



Final Decision

**Dalrymple Bay Coal Terminal
Draft Access Undertaking**

April 2005

Queensland Competition Authority

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PREAMBLE

The purpose of the Preamble is to outline the Authority's decision on this matter and to provide a body of factual material to answer a number of criticisms levelled at the Authority.

This Preamble should not to be taken as a substitute for the detailed deliberations of the Authority as reflected in the final decision of the Authority.

The Authority's decision in relation to the Dalrymple Bay Coal Terminal (DBCT) provides for:-

Weighted Average Cost of Capital - 9.02%;

Return on Equity - 11.84% - 600 basis points above the risk free rate;

Price - \$1.72/ tonne until further expansion occurs; and

Expansion - mechanisms approved to enable expansions to occur easily and for the efficient costs of such expansions to be automatically added to the regulated asset base provided certain criteria are met.

The above matters remove any potential regulatory road blocks to the expansion of DBCT.

The Authority rejects the assertion that its investigation has either delayed the expansion of the terminal or caused the current and very public queue of ships off the Hay Point coastline waiting to load coal from DBCT.

It is to be hoped the facts detailed here and in the decision will allow for informed debate on this matter.

The Authority would have preferred this matter to have been finalised earlier. However, contrary to assertions from some quarters, the task before the Authority was not simply a price arbitration. It was a full access undertaking for the provision of services at the DBCT. The task of investigating the undertaking raised a number of complexities.

The reasons for the perceived delay are identified below. They were not within the control of the Authority. Indeed, the Authority moved as quickly as information from the parties and the matter itself would allow.

Decision

The Authority has adopted a price of \$1.72/tonne in respect of current capacity. This price is based on an asset value of \$850 million and a weighted average cost of capital of 9.02%. In adopting this WACC, the Authority accepted the advice of the Allen Consulting Group that, while a WACC of 8.54% was sufficient for the existing terminal, the proposed major expansion added to the level of risk, particularly in the light of the uncertainty about the long term outlook for demand.

The Authority also noted that DBCT Management, the wholly owned entity of Prime Infrastructure and referred to as Prime in this preamble, effectively indicated that a WACC of 9.02% was the minimum it considered to be reasonable.

The WACC is equivalent to a return on equity of 11.84%, which is 600 basis points above the risk free rate.

This is in excess of the return that could have been expected at the time the terminal was leased by the consortium led by Babcock & Brown and subsequently transferred to Prime given the Authority's decisions that were available at that time.

In the absence of a clear capital expenditure program in the access undertaking lodged with the Authority in 2003, or subsequently proposed in response to the draft decision, the decision includes a framework that facilitates terminal expansions.

Specifically, the Authority is prepared to automatically approve expansion proposals where:

- the expansion path is consistent with a Master Plan approved by DBCT Holdings Pty Ltd; and
- 60% of the proposed expansion is subject to firm contractual commitments; and
- 60% of other users do not oppose the expansion.

Expansion proposals that do not meet these criteria will be considered by the Authority on their merits. However, the Authority indicates in its decision that it will approve any prudent expansion proposal.

To streamline the assessment of whether expansion costs are efficient, the Authority has included the option of a tender approval process along the lines of that included in the Gas Code. This option provides for the Authority to approve the process for conducting the tender and selecting tenderers for the capital works. Provided the approved tender processes are followed, the resulting actual capital expenditure will be automatically included into the regulated asset base.

Given the general concern about the current rail in-loading capacity, the Authority has determined to include in the regulated asset base the efficient cost of the works needed to increase rail in-loading capacity, if such works are submitted to the Authority.

Once a capital expansion is approved by the Authority, the proposed revenue cap will protect Prime from income fluctuations over the short to medium term.

At the same time, provision has been made for Prime to retain a portion of any increased revenue it has been responsible for, in order to encourage it to consider coal chain improvement.

In the longer term, the Authority undertakes that it will not write-down the value of the terminal in the future, except in exceptional and specified circumstances eg where the Authority has approved a terminal expansion based on false or misleading information provided by Prime.

The Authority has formally decided not to approve the DBCT draft access undertaking in its current form. However, the decision identifies all of the changes that need to be made to it so that a complying undertaking may be lodged and approved.

The Authority anticipates that a revised access undertaking will be resubmitted to the Authority for approval in the very near future encompassing the matters raised in the decision.

Public comment by the Authority

Until the publication of the decision, it was neither appropriate nor proper for the Authority to make any public comment on the matters that were the subject of investigation by it.

The Authority is obliged to conduct its investigations in an unbiased manner and in doing so to provide a fair hearing to all interested parties. This is done in the knowledge the Authority's determination will have a significant impact on the legitimate business interests of Prime and terminal users.

It is not consistent with that obligation for the Authority to enter into public debate on matters it is considering as part of its investigation. This is not to suggest a lack of accountability, as some have suggested, but rather a need to ensure the Authority does not in any way pre-empt or taint the decision it is required to make in relation to the undertaking lodged with it.

The Queue of Ships

The Authority rejects the assertions that its investigation has either delayed the expansion of the terminal or caused the current and very public queue of ships off the Hay Point coastline.

The Current Queue

Over the past two decades, DBCT has experienced rapid growth. When the last expansion was commissioned in 2003, capacity was increased from 45.5 mtpa to 55.5 mtpa.

At that time, it was widely believed that the rate of growth had plateaued, at least in the short to medium term. As a result, previously contemplated major capital works were deferred and the terminal's expansion plans were based on incremental expansions and working the terminal smarter and harder, rather than through major, capital intensive jumps in capacity.

Growth rates in Asia, in particular China and India, led to an unforeseen boom in the global demand for coal.

It is simplistic to say that there would be no queue if the port at DBCT had greater capacity than it does today. While this is probably true, it is highly unlikely that any reasonable or responsible owner would have expanded the terminal prior to now given all the circumstances.

While terminal capacity has failed to accommodate the unforeseen boom in coal demand, this is not the major reason for the queuing of ships.

In a recent submission to the Australian Competition and Consumer Commission (ACCC) seeking approval for a queue management system, the terminal operator, DBCT Pty Ltd, identifies the factors responsible for the queue as including:

- *system capacity limitations* - the coal chain delivery system is unable to supply coal into and through the terminal in a way that meets demand in a timely manner;
- *collapse of a terminal coal reclaimer* - the loss of the coal reclaimer has reduced terminal capacity;
- *high vessel arrival rates* - high demand, plus a decline in vessel sizes, has resulted in an increase in the number of vessels to be handled; and
- *absence of capacity management system* - capacity is allocated on a vessel arrival basis ie first in first served which is not aligned to current system capacity.

DBCT Pty Ltd has told the ACCC it believes that, if approved by the ACCC, the proposed queue management system would eliminate the queue over 2 to 3 months.

Has the Expansion of the Terminal been Delayed?

So far as the long term expansion of the port is concerned, the simple fact is that the boom in demand in early 2004 was not foreseen by either the users or Prime.

The draft access undertaking submitted to the Authority in mid 2003 did not propose a capital expenditure programme to underpin future capacity expansions at the terminal. Rather, it indicated there was no clear timetable for implementing the next increment of capacity and that terminal expansions would occur as and when required to meet the needs of user demand.

As a result, only a framework for capacity expansion was included. The expansion path included in the Master Plan sought to match a modest demand growth with incremental increases in capacity.

The first quarter of 2004 saw a boom in demand for coal. As a result, the existing incremental expansion path was no longer relevant and alternative expansion options had to be developed. These alternative expansion paths delivered different increments of capacity at different times and at different costs.

Three different expansion options were canvassed in its 2004 Master Plan and these were used as the basis for discussions with users. Prime was also concerned about the regulatory arrangements that would surround any future expansion, particularly any optimisation of the facility in future years and return on its investment. Notwithstanding, a small 5mtpa “short term gain” expansion was commenced that was possible without a major capital expenditure outlay.

As of April 2005, a preferred major expansion plan has almost been finalised by Prime. It is required to be submitted to and approved by DBCT Holdings Pty Ltd as part of the lease agreement over the terminal.

Major port expansions are complex, particularly when likely long term demand is uncertain and the expansion involves works akin to developing a new port. As such, the time taken by Prime to settle on a planned expansion path is not surprising although no doubt frustrating to all parties concerned.

The development and finalisation of the preferred expansion path has occurred along side the Authority’s assessment of the access undertaking.

The finalisation of the preferred expansion path has not been delayed by the Authority’s assessment of the access undertaking. The Authority understands the expansion will proceed on schedule as long as the financial issues are settled by the end of June.

Given the Authority now provides its final decision, there are now no regulatory impediments to this occurring.

Time Taken

Contrary to assertions from some quarters, the task before the Authority was not simply a price arbitration. It was a full access undertaking for the provision of all services at the DBCT. The detail of the decision is reflected in the decision itself which is in excess of 180 pages.

The undertaking establishes the framework for users to negotiate access to the terminal’s services. It also includes key access principles and terms and conditions that will govern access to the terminal until December 2009.

As with all access undertakings, careful consideration of the issues was required as the undertaking will affect the legal rights and obligations of all relevant parties. This particular undertaking gave rise to a number of complexities.

Complexities

This is the first undertaking to be submitted to the Authority in respect of the terminal and the first to be assessed in respect of a major privately owned export commodity terminal.

The undertaking is complicated by the fact it is submitted by the lessee DBCT Management Pty Ltd on behalf of the owner DBCT Holdings Pty Ltd, a company owned by the state of Queensland. This type of arrangement is not contemplated by the QCA Act and is one which creates potential enforceability problems.

Prime's corporate structure is complex and, as a result, certain necessary aspects of the structure were difficult to unravel.

After the undertaking was lodged in 2003, it took in excess of 5 months for the Authority to be provided with the documentation necessary to confirm the roles and responsibilities of various parties regarding ownership of the terminal and, by extension, to confirm the draft access undertaking as lodged had been properly submitted and could, if approved, operate effectively including being capable of enforcement.

As part of its investigation, the Authority identified a need for the QCA Act to be amended to ensure the terms of the undertaking and, in the event of a dispute, the Authority's determinations, are enforceable against the access provider.

Divergence of Views

In its reviews, the Authority does not aim to impose its own views on the parties. Its preference is to allow the various parties the opportunity to convince the Authority of the merits of their arguments. Where the parties are not in agreement, the Authority then weighs those arguments against one another, and the public interest.

This approach depends on the parties adopting reasoned and reasonable positions. It is not assisted when parties adopt extreme positions. It is not assisted if positions are not easily verifiable but are simply postulated without adequate support. When circumstances such as that arise, it is necessary for the Authority to more carefully investigate matters for itself as it is unable to rely on what is provided to it. This inevitably leads to a review taking longer than might otherwise be the case.

The two primary stakeholders concerned with the undertaking, namely the terminal lessee and the DBCT Users Group, advanced diametrically opposed views on most aspects of the terms of the undertaking.

Price

Prime provided a detailed submission in support of its proposed price of \$2.77/tonne while the DBCT User Group provided a detailed submission suggesting that a price of less than \$1.00/tonne was appropriate.

This wide divergence on price was in spite of the fact the parties had tried unsuccessfully to agree a price prior to and after lodgement of the undertaking with the Authority. It became necessary for the Authority to independently assess the claims and counterclaims of the parties. The Authority does not possess the luxury of simply dismissing, trivialising or ignoring inconvenient arguments. In undertaking this part of its investigation, the Authority identified material errors in submitted documents.

Asset Valuation

Prime submitted a valuation of \$1.1 billion for the terminal which was acquired from the Queensland Government for \$630 million. After acquisition, the expansion of the terminal that was then underway was finalised at a cost of some \$100 million and past capital contributions made by some of the users were repaid.

The DBCT User Group submitted an independent valuation of under \$500 million.

Having regard to the range between the values put forward, it was necessary for the Authority to require its asset valuation advisor to not only provide a detailed engineering valuation of the terminal but to also explain the divergence in valuations bearing in mind they had been performed by reputable firms.

In undertaking this work the Authority did not have the benefit of a detailed asset register for the terminal. The Authority's consultant therefore had to conduct its valuation on the basis of detailed site diagrams and tender documents.

Rate of Return

The Authority encountered similar difficulties when assessing the various rate of return claims. Prime sought a WACC of 11.04%, which would have provided a 14.74% return on equity. In response, the DBCT User Group proposed a WACC of 7.64% on the basis that the risks faced by DBCT were significantly below other regulated assets.

Prime has not been listed long enough to allow reliable estimates to be made of its required return on equity from market data. Also, there are no equivalent, listed coal export terminals in Australia or overseas that would allow the return on equity to be unequivocally and accurately benchmarked. This necessitated a first principles analysis of the terminal's underlying risks.

All such work is subject to statistical uncertainty and judgement. While submissions to the Authority were critical of its rate of return assessments as proposed in the draft decision released in October 2004, similar criticisms can be made of the analyses that were submitted to the Authority.

In its draft decision in October 2004, the Authority set a WACC of 8.2% based on an independent report provided to it. That figure was a more realistic rate of return than either of the returns postulated at that time by the two primary stakeholders. Material received in response to the draft decision was of far greater assistance to the Authority in reaching its decision than was the earlier material.

In Summary

The assessment of the DBCT access undertaking has been a complex task, not helped by the wide divergence of views held by the parties.

Notwithstanding this, the regulatory arrangements outlined in the decision ensure there are no regulatory impediments to the future expansion of the terminal.

The Authority's investigation of this matter has neither delayed the expansion of the terminal nor caused the very public queue of coal ships off Hay Point.

The Authority appreciates the participation of those individuals and organisations which have provided submissions during the review process.

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GLOSSARY

the Authority	Queensland Competition Authority
AMSA	Australian Maritime Safety Authority
ARR	Annual Revenue Requirement
APIA	Australian Pipeline Industry Association Ltd
BMA	BHP Billiton Mitsubishi Alliance
Connell Hatch	Connell Hatch Pty Ltd
CPI	Consumer Price Index
DAC	Depreciated Actual Cost
DAU	Draft Access Undertaking
DBCT Management	Prime Infrastructure (DBCT) Management Pty Ltd
DBCT Trust	Prime Infrastructure (DBCT Trust)
DBCT Trustee	Prime Infrastructure (DBCT) Investor Services Ltd
DHC	Depreciated Historical Cost
DIHC	Depreciated Inflated Historical Cost
DNRME	Department of Natural Resources, Mines and Energy
DORC	Depreciated Optimised Replacement Cost
EPA	Environmental Protection Agency
GHD	GHD Pty Ltd
GPA	Gladstone Port Authority
Holdings	DBCT Holdings Pty Ltd
IAP	Indicative Access Proposal
IDC	Interest During Construction
MAR	Maximum Allowable Revenue

Maunsell	Maunsell Australia, Sedgman and DTZ Property Valuers
MEA	Modern Equivalent Asset
Mtpa	Million Tonnes Per Annum
NCN	Negotiation Cessation Notice
O&M	Operation and Maintenance
OMC	Operation and Maintenance Contract
ORC	Optimised Replacement Cost
PCI	Pulverised Coal Injection
PCQ	Ports Corporation of Queensland
PSA	Ports Services Agreement
PWC	Port Waratah Coal Services
QRC	Queensland Resources Council (formerly known as Queensland Mining Council)
QR	Queensland Rail
QTC	Queensland Treasury Corporation
RAB	Regulated Asset Base
Rushton	Rushton (Qld) Pty Ltd
SAA	Standard Access Agreement
SRP	Statement of Regulatory Principles
TCC	Terminal Capacity Committee
the EPA Act	Environmental Protection Act (QLD) 1994
the Operator	DBCT Pty Ltd
the QCA Act	Queensland Competition Authority Act 1997
the Terminal	Dalrymple Bay Coal Terminal
the WH&S Act	Workplace Health and Safety Act 1995

TIC	Terminal Infrastructure Charge
TR	Throughput Rebate
TRTT	Throughput Rebate Threshold Tonnage
WACC	Weighted Average Cost of Capital

1. INTRODUCTION

Summary

The Dalrymple Bay Coal Terminal is declared for third party access under the Queensland Competition Authority Act 1997. The terminal is owned by DBCT Holdings P/L and is leased to DBCT Management P/L on a long term basis. Declaration for third party access requires that DBCT Management must not hinder or prevent access to the declared service and must negotiate in good faith with access seekers.

The role of an access undertaking is to assist access negotiations by reducing the scope for disputes and, in the event of a dispute, to provide guidance on how it may be resolved.

The Authority is required to either accept or reject a draft access undertaking in accordance with statutory assessment criteria. The Authority has decided to reject the draft access undertaking. This decision constitutes the written notice stating the reasons for the refusal and the way in which the Authority considers it is appropriate to amend the undertaking.

1.1 Background

The Queensland Competition Authority (the Authority) received a draft access undertaking for the Dalrymple Bay Coal Terminal (DBCT) from Prime Infrastructure DBCT Management P/L (DBCT Management) on 20 June 2003. The draft was submitted under s.136 of the *Queensland Competition Authority Act 1997* (the QCA Act) on behalf of DBCT Holdings P/L (Holdings), the owner of DBCT.

On 11 July 2003, in accordance with s.146 of the QCA Act, the Authority advised Holdings that it would conduct an investigation to assist it in deciding whether to approve, or refuse to approve, the draft access undertaking. The Authority invited written submissions from interested parties on 21 July 2003, with submissions due by 29 August 2003.

Following a full consultation process, on 15 October 2004, the Authority released a draft decision which outlined the Authority's preliminary views on the draft access undertaking and the Authority's recommended amendments to it. On 20 April 2005, the Authority made this final decision to reject the draft access undertaking.

DBCT (the terminal) is a coal export terminal located in central Queensland. The Queensland Government, through Holdings, owns the terminal.

In September 2001, a group led by international investment bank Babcock and Brown acquired a long-term lease of the terminal from Holdings for approximately \$630 million.¹ Following an initial public offering, Prime Infrastructure was listed on Australian Stock Exchange in June 2002 with DBCT as its foundation asset.² Upon listing, the leasehold interest in the terminal was transferred to Prime Infrastructure.³

As part of the restructuring process leading up to the lease of the terminal, the Queensland Government declared the coal handling services of the terminal for third party access under Part 5 of the QCA Act. That declaration gave rise to a range of rights and obligations in relation to

¹ Prime Infrastructure, Media Release, 14 January 2002. The lease has a 50 year term, with an option to extend this by an additional 49 years.

² The Prime Infrastructure Group has since acquired other assets, including a 50% stake in the Ecogen electricity generation assets in Victoria, a 50% stake in Redbank Power Station in New South Wales and a 50% stake in Global Wind Partners. It has also been selected as preferred bidder to acquire an approximately 50% share of Powerco Limited, a New Zealand electricity and gas distribution utility.

³ Prime Infrastructure — Prospectus and Product Disclosure Statement: 21.

the negotiation of the terms and conditions of access to the declared service. Those rights and obligations vest in the facility owner, the access provider, access seekers and access holders.

Under the leasing arrangements for the terminal, entities within the Prime Infrastructure Group entered into a number of agreements with Holdings and Ports Corporation of Queensland (PCQ). The lease arrangement involves a primary lessee, DBCT Trustee⁴, and a secondary lessee, DBCT Management. The ownership and management arrangements, which are complex in nature, are illustrated in Figure 4.

One of the key agreements under the lease is the Ports Services Agreement (PSA) which establishes the rights and responsibilities of the lessee with respect to the terminal's operation, management and expansion. Moreover, the PSA obliged the lessee to prepare and submit a draft access undertaking to Holdings by September 2002. Following approval of the draft access undertaking by Holdings, the lessee was then required to submit the draft access undertaking to the Authority as a voluntary undertaking, for approval.

1.2 Declaration for Third Party Access

The service of the *handling of coal at DBCT by the terminal operator* has been declared under Part 5 of the QCA Act for the purposes of third party access. Given the ownership and leasing arrangements, the access obligations are separated between the facility owner Holdings and the access provider DBCT Management.

More specifically, the effect of declaration under Part 5 of the QCA Act is that:

- statutory duties arise for an access provider, including an obligation to negotiate with and provide information to access seekers and prohibits the access provider from hindering or preventing access;
- an access seeker gains recourse to compulsory dispute resolution procedures;
- the owner of a facility may submit an access undertaking to the Authority for approval, if the owner considers it is appropriate to do so; and
- the Authority may request an undertaking be prepared by the owner 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 facility owner and 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.

⁴ Prime Infrastructure (DBCT) Investor Services Ltd as trustee (known as “DBCT Trustee”) of Prime Infrastructure (DBCT) Trust.

Role of an Approved Undertaking

Part 5 of the QCA Act imposes broad obligations on a facility owner and an access provider. An undertaking for a service sets out in more detail the terms and conditions on which an owner 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 a 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 ie. 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 not be inconsistent 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. Further, an approved undertaking 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.

The QCA Act provides that, where the Authority has approved an access undertaking which includes reference tariffs, certain obligations to provide information may be waived. For example, information about prices, costs and the value of the access provider's assets need not be provided to an access seeker.

Access Undertaking and Existing User Agreements

An approved access undertaking does not of itself affect the terms and conditions of any pre-existing access agreement. Rather, the access undertaking will only apply to access negotiations occurring after the approval date of the undertaking. User agreements entered into before an access undertaking is approved are governed by the terms and conditions contained in those agreements.

Each of the existing user agreements in relation to DBCT provides for certain charges to be reviewed effective from 1 July 2004. If the relevant user and DBCT Management are unable to agree on the charges that are to apply from 1 July 2004, the existing user agreements provide that the dispute may be referred to arbitration.

On 1 April 2004, each user referred a price review dispute to the Authority for arbitration. The Authority accepted appointment as arbitrator in respect of each of those disputes subject to the terms of a protocol that applies to that arbitration.

The Authority's role as arbitrator under the existing user agreements is separate from its role in relation to the draft access undertaking lodged pursuant to the QCA Act.

Accordingly, the Authority's decision on the draft access undertaking is separate from the arbitration process and its role as arbitrator in respect of the price paid under the existing user agreements.

1.3 The Terminal

The terminal is located at the Port of Hay Point, adjacent to the Hay Point Coal Services Terminal⁵, 40 kilometres south of Mackay in Queensland. PCQ is the port authority for the Port of Hay Point. The terminal opened in 1983 as a common user coal export facility, servicing mines in the Goonyella system of the Bowen Basin coal fields (see Figure 1). The terminal has been expanded from time to time to service the growth in demand for coal. The terminal operates constantly and now has a nameplate capacity of 56⁶ Mtpa. Figure 2 displays export tonnage figures for the terminal since 1985.

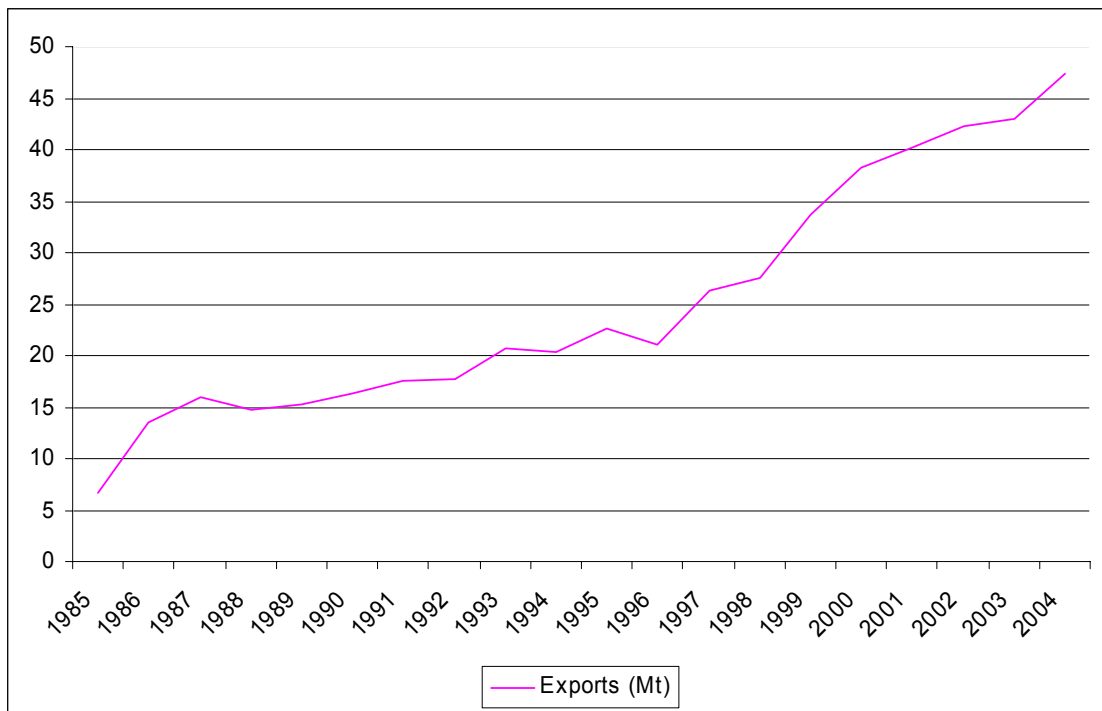
⁵ Hay Point Coal Services Terminal is owned by BHP Billiton Mitsubishi Alliance (BMA).

⁶ DBCT's operating capacity was recently revised upwards to 56 mtpa following a recalibration of the terminal capacity model, as a consequence of utilising Stage 6 data. Stage 6 at DBCT was completed in June 2003 (Prime Infrastructure Media Release, 20 June 2003).

Figure 1: Queensland Coal Infrastructure Map



Source: Queensland Department of Natural Resources and Mines, Queensland Coal industry Review 2001 – 2002.

Figure 2: Dalrymple Bay Coal Terminal Coal Export Tonnages (1985 - 2004)

Source: Queensland Department of Natural Resources, Mines and Energy

Currently, coal is contracted to be shipped from 13 mines in the Bowen Basin.⁷ The terminal is one of the world's largest coal-exporting terminals. It is linked to the Bowen Basin by a rail network owned by Queensland Rail (QR). Currently, QR business groups rail all coal from the mines to the terminal. An approved third party rail access regime allows for non-QR operators to rail coal.

The terminal itself consists of purpose-built rail in-loading facilities, on-shore stockpile yards and off-shore wharves. Jetty supported conveyor systems service the off-shore wharves, which extend 3.8km out to sea allowing for deep water loading.

As an integral part of the coal supply chain, the terminal provides unloading, stockpiling, coal blending, cargo assembly and out-loading services to mines using the terminal. It also has a co-ordination role, helping to ensure that the delivery of coal by rail meets the demands of customers in terms of scheduled ship arrivals.

Coal is railed to the terminal using bottom dump wagons and is unloaded at one of two rail receival transfer stations. Typically, the coal is then conveyed to the stockpile area. Each mine has an allocated stockpile area, where stackers are used to stockpile the coal. There is also a common user cargo assembly area which provides greater flexibility in handling coal prior to out-loading. In certain circumstances, it is possible for coal to be conveyed directly to an awaiting ship.

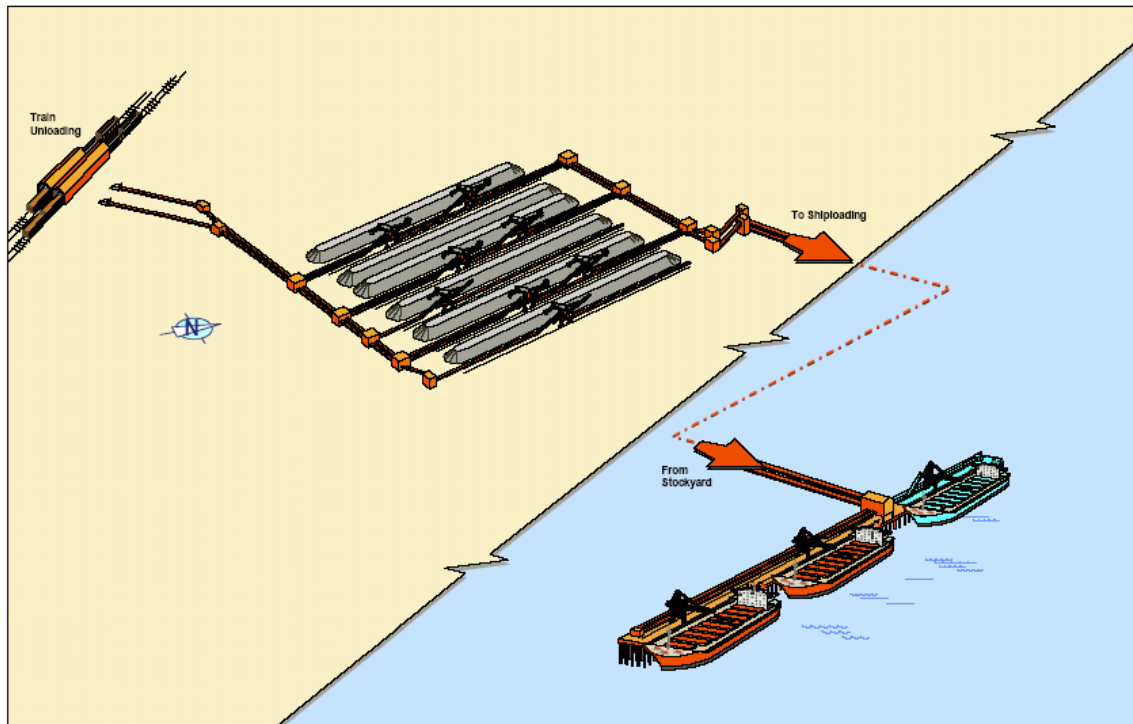
A blending service for the different types of coal is also undertaken at the terminal. While blending can be done at the mine site, blending at the terminal allows coal from different mines to be combined into a single product. The Operator undertakes blending for up to 33 different

⁷ Blair Athol, Hail Creek, German Creek, Moranbah North, Oaky Creek, Burton, North Goonyella, Foxleigh, Coppabella, Moorvale, Riverside, South Walker Creek and Millennium Moranbah. Nine companies own the 13 mines.

types of coal products in three distinct product types, namely, hard coking coal, pulverised coal injection (PCI) coal and thermal coal.

Reclaimers transfer coal from the stockpiles and cargo assembly areas onto the conveyor system. Thereafter, shiploaders transfer the coal onto ships. The shiploaders are rail mounted and travel along the wharf servicing three berths. Figure 3 provides a schematic of the port/terminal.

Figure 3: The Terminal



Source: Master Plan 2002, DBCT Management Draft Access Undertaking Volume 2

Maritime Safety Queensland (a government agency attached to Queensland Transport) provides pilotage services for the two terminals at the Port of Hay Point, with most transfers to and from ships via helicopter. PCQ provides the pilot transfer service. Halftide Marine P/L provides towage services, operating two tug boats.

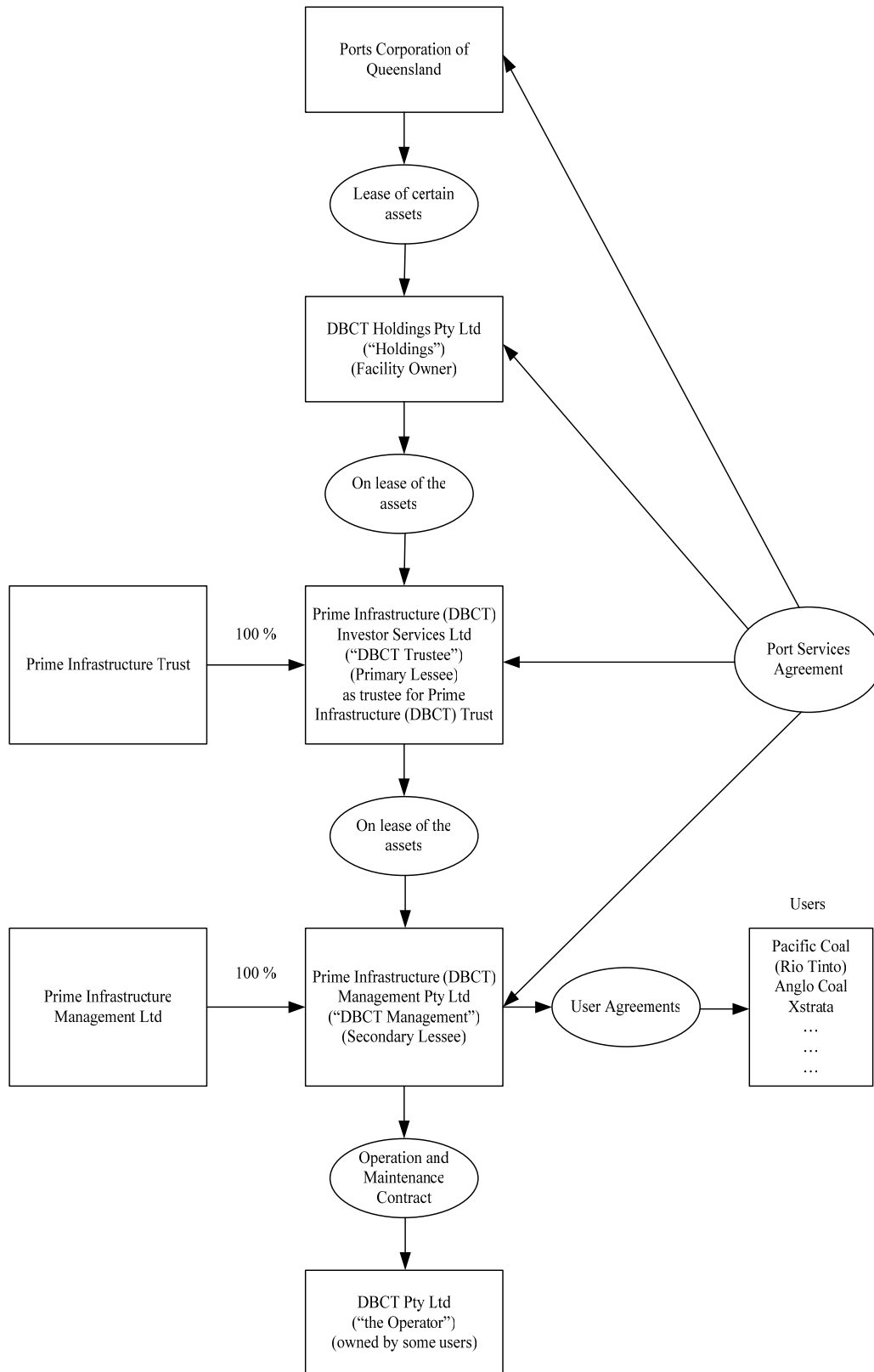
Ownership and Management Structure

The terminal is owned by Holdings. It is leased to DBCT Trustee which sub-leases it to DBCT Management. DBCT Management sub-contracts the day-to-day operations of the terminal under an operations and maintenance contract (OMC) with an independent company DBCT P/L (the Operator). The Operator is owned by six of the nine⁸ existing mine users of the terminal and is responsible for the daily operation and maintenance of the terminal. The Operator Shareholders' Agreement provides for any user to become a shareholder of the Operator, with an upper limit of share ownership proportional to the user's annual entitlement for throughput tonnage, as per its user agreement with DBCT Management. The OMC commenced in 1999 and was recently extended until March 2009 with the capacity for a second extension, taking it to 2014. The Operator may request a third successive extension, but DBCT Management is under no obligation to grant this.

⁸ Nine owners operate 13 mines.

User agreements (ie. access agreements) are between DBCT Management and the users (ie the mines). Figure 4 illustrates the contracts and relationships that surround the terminal.

Figure 4: Contract Summary Diagram



1.4 Authority's Assessment Process

Under the provisions of s.136 of the QCA Act, the Authority must either approve, or refuse to approve, an undertaking submitted to it. If the Authority refuses to approve a draft access undertaking, as is the case with this current 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 appropriate to amend the undertaking.

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 following⁹:

- the legitimate business interests of the owner of the service;
- 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 effected; and
- any other issues the Authority considers relevant.

In response to the draft decision, the Authority received 21 submissions from a range of interested parties including: DBCT Management, a joint submission from the coal companies currently using the facility (the DBCT User Group); Queensland Government; and other infrastructure service providers. These submissions included consultants' reports on a range of matters such as the weighted average cost of capital, asset value, corporate overheads, delineation between operating and capital expenses and revenue versus price cap. Table 1 lists the submissions received in response to the Authority's draft decision.

On 20 April 2005, the Authority made this final decision to refuse to approve the draft access undertaking. The reasons for this final decision are relevantly set out in both the draft decision and this final decision. However, this final decision sets out in complete terms the way in which the Authority considers it is appropriate to amend the draft access undertaking.

This final decision consists of two parts, Part A and Part B. Part A outlines DBCT Management's position as set out in the draft access undertaking, a summary of stakeholder comments on the draft decision and the Authority's analysis and recommendations. Part B provides a detailed mark-up of the draft access undertaking showing the Authority's suggested amendments as outlined in Part A.

⁹ s.138(2) QCA Act.

Table 1: List of Submissions received in response to the Authority's Draft Decision

<i>Organisation/Individual</i>	<i>Date Submission Received</i>
Clift, C.	2 November 2004
Aitken, J.	9 November 2004
Fodora	9 November 2004
Queensland Treasury Corporation	18 November 2004
Stanfield, W.	22 November 2004
Australian Council for Infrastructure Development Ltd	26 November 2004
ANZ Investment Bank	26 November 2004
DBCT Holdings	26 November 2004
DBCT User Group	26 November 2004
Energex	26 November 2004
Ergon Energy	26 November 2004
In Tempore Advisory Pty Ltd	26 November 2004
Queensland Resources Council	26 November 2004
Australian Pipeline Industry Association Ltd	29 November 2004
GasNet	29 November 2004
Queensland Rail	29 November 2004
Queensland Government	30 November 2004
DBCT Management	17 December 2004
DBCT Management	11 March 2005
DBCT User Group	11 March 2005
DBCT User Group	14 March 2005

2. ENFORCEMENT AND SCOPE OF THE UNDERTAKING

Summary

As a result of the lease arrangements at the terminal, the facility owner and the access provider are separate entities — Holdings is the facility owner and DBCT Management is the access provider.

As the access obligations of the facility owner and the access provider differ, the Authority sought to establish the undertaking was submitted correctly and that it is enforceable. While the Authority is satisfied the undertaking was submitted correctly, it has concerns about its enforceability.

An amendment to the QCA Act is required to resolve this issue. However, pending changes to the QCA Act, the Authority recommends ‘work around’ provisions be included in the undertaking to clarify DBCT Management’s accountability for compliance.

For clarity and certainty for both DBCT Management and access seekers, the Authority proposes amendments to the undertaking to establish the scope of the services covered.

The term of the undertaking is another key element of the regulatory regime. Taking into account the need to strike a balance between the certainty provided by a longer term and the flexibility of a shorter term, the Authority has recommended that the term of the undertaking expire on 31 December 2009.

However, given the importance of the Operator to the arrangements underpinning the undertaking, the Authority has proposed that a change in Operator will be a terminating event.

The undertaking also establishes when reviews may occur.

2.1 Roles of Various Parties and Enforcement of the Undertaking

The QCA Act provides that the owner of a declared service, which in the case of the terminal is DBCT Holdings, may voluntarily submit a draft access undertaking to the Authority (s.136(1)). In accordance with this, DBCT Management submitted a draft access undertaking to the Authority on behalf of DBCT Holdings.

Access obligations may apply to different entities under the QCA Act, for example, obligations to negotiate for access, and to not prevent or hinder access, apply to the ‘access provider’. However, obligations in relation to submitting and complying with an undertaking rest with the owner as the ‘responsible person’.

Due to the leasing arrangements in relation to the terminal, the access provider and responsible person are different entities — that is, DBCT Management is the access provider and DBCT Holdings is the responsible person.

In the draft access undertaking DBCT Management committed to comply with, and give effect to, the undertaking and any applicable laws relating to the provision of third party access to the coal handling service, as if it was the owner of the terminal and had itself given the undertaking. The draft access undertaking states that DBCT Management, subject to DBCT Holdings acting reasonably, will take all action reasonably available to ensure that DBCT Holdings is able to comply with the undertaking and any applicable laws relating to the coal handling service including, but not limited to, Part 5 of the QCA Act (DAU, Vol.1: clause 3).

In its draft decision, the Authority raised concerns about its ability to enforce compliance with the undertaking.

In summary, at present, the Authority may only seek to enforce the undertaking against DBCT Holdings, who is the ‘responsible person’ for an approved undertaking. To overcome this, the Authority has proposed that the QCA Act be amended so that it may effectively ensure compliance with an approved undertaking in the case where the owner and access provider are different entities.

To address this issue, the Authority wrote to Queensland Treasury at the time of releasing its draft decision requesting that the QCA Act be amended. However, in the absence of an amendment, the Authority also argued that the access undertaking should clarify that it is DBCT Holdings that is responsible for compliance. To this end, the Authority proposed that DBCT Holdings acknowledge in the access undertaking that a breach by DBCT Management of the undertaking will constitute a breach by DBCT Holdings, and that DBCT Holdings will be liable to enforcement action under s.158A of the QCA Act for such a breach.

Stakeholder Comments on Draft Decision

In responding to the draft decision, DBCT Management argued that legislative amendment is unnecessary as the undertaking is enforceable against Holdings. It considered that it is sufficient that the undertaking is legally binding on the party to whom parliament intended the undertaking apply, namely the ‘responsible person’. Further, DBCT Management stated that it is not aware of circumstances in which the ‘back to back’ obligations of DBCT Management in the Port Services Agreement (PSA) to comply with the undertaking may not be effective, as suggested by the Authority. It submitted that, at the time of entry into the PSA, stakeholders made their commercial decisions in good faith on the assumption that the access regime’s application to DBCT Management would be as it was intended under the PSA and the long term lease.

DBCT Management argued that every effort should be made to work within the existing regulatory framework, with the undertaking taking account of existing contractual arrangements, most notably the PSA. It further noted that the Government consulted with users on the content of the PSA before it was finalised and that the Authority was aware of the lease structure, as evidenced by the Statement of Regulatory Principles provided to original bidders for the lease (February 2001). DBCT Management submitted that it is essential that its rights and protections in the PSA are not compromised. Accordingly, DBCT Management argues for a comprehensive review of the QCA Act (DBCT Management, sub. no.64: 8, 9).

DBCT Holdings supported the legislative amendments proposed by the Authority, believing that the proposals to permit enforcement directly against DBCT Management and to allow the Authority to require expansion of capacity in an access dispute determination would assist in achieving the essential outcomes of the long term lease.

DBCT Holdings proposed specific amendments to the QCA Act, namely, to: allow an access provider to give an access undertaking; allow the QCA to compel an access provider to give a draft access undertaking (s.133); allow the QCA (or another person) to apply to the court for orders concerning enforcement (s.158A); and to provide that, where the owner of a facility has given an access undertaking, the QCA will first seek enforcement against any other access provider who has control of the facility before seeking to enforce the undertaking against the owner.

However, DBCT Holdings does not support the wording of the acknowledgement proposed by the Authority, and asks that the Authority consider an alternative form of acknowledgement linking DBCT Holdings’ obligations to compel DBCT Management to comply with the

undertaking to the extent of its rights under the PSA and as permitted by law and, further, that DBCT Holdings will be liable to enforcement action by the Authority only if it fails to exercise such rights (DBCT Holdings, sub. no. 50: 8, 9).

The DBCT User Group also supported the Authority's proposed amendments to the QCA Act, stating that DBCT Holdings and DBCT Management should both be 'responsible persons'. It also requested the Authority reconsider its decision to not bind DBCT Trustee in terms of enforcement of the undertaking (DBCT User Group, sub. no. 52: 6).

In its submission, the Queensland Government acknowledged that it was considering the issue of amending the QCA Act (Queensland Government, sub. no. 62: 2).

Authority's Analysis

Although, as currently drafted, the QCA Act provides for the Authority to take enforcement action for a breach of the undertaking against the owner and, hence, responsible person for the access undertaking (DBCT Holdings), it does not provide for enforcement action against the access provider (DBCT Management).

The Authority remains of the view that to be effective, it is essential that the access regime in the access undertaking be enforceable.

To achieve this with certainty, the Authority believes that legislative amendment is required to the QCA Act to ensure that enforcement action for a breach of the undertaking is able to be directly taken against DBCT Management, given that DBCT Management is the access provider.

In the absence of amendments to the QCA Act, the Authority must rely on the compliance mechanism in the PSA for DBCT Holdings to ensure DBCT Management complies with an approved access undertaking. Such reliance on the PSA is undesirable from a regulatory perspective and may not be effective in all cases.

The QCA Act does not provide for a situation where the owner is also not an access provider. Amendments to the QCA Act will ensure that the enforcement of the regulatory regime depends directly on the QCA Act, rather than the PSA.

The Authority notes stakeholder comments on proposed legislative amendments to the QCA Act. However, the nature of any amendments to the QCA Act, or indeed whether the QCA Act is amended at all, is not a matter for the Authority, rather it is a matter for the Queensland Government to consider.

While the Authority accepts that the Queensland Government is currently considering amendments to the QCA Act, any such amendments have yet to be enacted. In the absence of an amendment to the QCA Act, the Authority believes the undertaking should be clear that DBCT Holdings is responsible for compliance.

The Authority notes DBCT Holding's concerns about its suggested amendments designed to achieve this — that is, a provision stating that a breach of the undertaking by DBCT Management will constitute a breach by DBCT Holdings, and that DBCT Holdings will be liable for enforcement action under s.158A of the QCA Act. In particular, the Authority notes DBCT Holding's proposal to qualify this acknowledgment of responsibility as being limited to the extent of its rights under the PSA and as permitted by law.

However, these concerns reflect the current framework in the QCA Act and, if anything, further highlight the need for the legislative amendments discussed above. The changes proposed by

the Authority to the draft access undertaking clarify the obligations for the terminal owner under the QCA Act as currently drafted.

The QCA Act clearly establishes that the responsible person for an approved access undertaking is responsible for compliance and will be liable for enforcement action. The Authority believes that this obligation should not be undermined by existing contracts, in particular, the PSA. Further, access obligations which are not enforceable under the QCA Act are clearly not in the legitimate business interests of access seekers or the public interest. Therefore, having had regard to the legitimate business interests of the owner, the public interest and interests of persons who may seek access to the coal handling service, the Authority remains of the view that the undertaking should include its proposed acknowledgement by DBCT Holdings as set out in the draft decision.

Another matter the Authority believes the undertaking should address is to ensure that the undertaking continues to apply in the event that ownership of the terminal changes, for example, if DBCT Holdings is no longer the owner or DBCT Management assigns its lease to another party. To achieve this, the Authority is proposing to amend the definitions of ‘DBCT Management’ and ‘DBCT Holdings’ to cover any successors and permitted assigns of those entities (clause 2.1).

The Authority notes the DBCT User Group’s concerns about the role of DBCT Trustee, in particular, that it should be a party to the access undertaking and guarantor of all of DBCT Management’s commitments, for example in the case of access agreements.

The Authority remains of the view that it is reasonable that the obligations in the undertaking be expressed in terms of obligations on DBCT Management, given its role as access provider, rather than DBCT Trustee. The QCA Act defines the roles of responsible person, owner and access provider, none of which relate to DBCT Trustee. That is, the QCA Act does not provide a role for DBCT Trustee. It should be noted that including DBCT Trustee as a party to the access undertaking would require significant amendments to the QCA Act, well beyond those suggested by the Authority or stakeholders to date.

In relation to concerns about DBCT Trustee acting as guarantor for DBCT Management under access agreements, the Authority considers that these concerns are best addressed by requiring amendments to the Schedule B principles allowing for reciprocal guarantees. These amendments are discussed further in Chapter 6.

In order for the undertaking to be approved, it must be amended to state that:

- **Section 158A of the QCA Act provides that enforcement action in respect of a breach of this undertaking either by the QCA or another person may only be sought against the “responsible person” under the QCA Act. The term “responsible person” under the QCA Act means the person to whom the undertaking applies as the owner of the relevant service. Therefore, in this context, the “responsible person” is DBCT Holdings.**

DBCT Holdings accepts and acknowledges that a breach by DBCT Management of a term or condition of the undertaking will constitute a breach by Holdings, and Holdings will be liable to enforcement action under s.158A of the QCA Act for such a breach;

- **The definitions of ‘DBCT Management’ and ‘DBCT Holdings’ are amended to insert the following words at the end of both definitions: “...and its successors and permitted assigns, including persons taking by way of novation”.**

2.2 Coverage of Declared Services

The declaration defines the scope of the services subject to third party access under Part 5 of the QCA Act. The declaration of DBCT, as set out in s.5 of the *QCA Regulation 1997*, defines the declared service as the ‘handling of coal at the Dalrymple Bay Coal Terminal by the terminal operator’. The terms of the declaration are set out in the box below:

Declaration of the Coal Handling Service at DBCT	
The declared service is the handling of coal at Dalrymple Bay Coal Terminal (DBCT) by the terminal operator.	
<i>DBCT:</i>	means the port infrastructure located at the port of Hay Point owned by Ports Corporation of Queensland or the State, or a successor or assign of Ports Corporation of Queensland or the state and known as Dalrymple Bay Coal Terminal and includes the following which form part of the terminal - <ul style="list-style-type: none"> (a) loading and unloading equipment; (b) stacking, reclaiming, conveying and other handling equipment; (c) wharfs and piers; (d) deepwater berths; (e) ship loaders.
<i>Handling of coal:</i>	includes unloading, storing, reclaiming and loading.
<i>Terminal operator:</i>	means - <ul style="list-style-type: none"> (a) the owner or lessee of Dalrymple Bay Coal Terminal; or (b) a person operating Dalrymple Bay Coal Terminal for the owner or lessee.

DBCT Management proposed that access to the coal handling service at the terminal be subject to the undertaking. The coal handling service is defined by DBCT Management as the unloading, storing, reclaiming and loading of coal as set out in Schedule G of the draft access undertaking (DAU, Vol. 1: clause 4). Schedule G describes the coal handling service DBCT Management undertakes to provide — train scheduling, train unloading, storing, reclaiming and ship loading, prevention of contamination, compliance with laws and co-ordination.

In its draft decision, the Authority proposed that DBCT Management be required to amend Schedule G so that, in summary, it: is non-exhaustive; specifies that ‘storage’ includes both stockpiling and cargo assembly; specifies that other services in relation to coal handling may be requested by an access holder, including services incidental to the handling of coal; provides stronger obligations on DBCT Management regarding the provision of train scheduling and train unloading; removes references to DBCT Management’s contractual obligations to other access holders in ‘train unloading’, ‘storing’ and ‘reclaiming and shiploading’; constrains

DBCT Management's discretions where appropriate; and places access obligations directly on DBCT Management, as access provider.

The Authority also recommended some amendments to the definition of 'coal handling service' and 'handle' for greater clarity.

Stakeholder Comments on Draft Decision

In regard to the Authority's proposals to place coal handling service obligations directly on DBCT Management (rather than the Operator) and to place stronger obligations on DBCT Management regarding the provision of train scheduling and unloading, DBCT Management noted that it is happy to provide services at DBCT that are clearly covered by the declaration; that were contemplated at the time of the original lease of the facility and catered for in the various agreements in place, including the Operation and Maintenance contract (OMC); and where the full efficient costs of fulfilling its obligations are able to be recovered.

DBCT Management also indicates that, given that there is an existing OMC in place, DBCT Management's ability to control and manage any new obligation, and any risk associated with it, should be taken into account (DBCT Management, sub. no. 64: 10).

The DBCT User Group supports the Authority's proposed amendments regarding the scope of services covered by the undertaking. However, it believed that there should be safeguards to ensure that the total amounts charged to access holders for the provision of all services do not exceed the aggregate cost to DBCT Management for providing those services. For example, there should not be cost recovery through handling charges for 'core' services, with the opportunity for DBCT Management to make an additional profit on 'non core' services (DBCT User Group, sub. no. 57: 6). The DBCT User Group also suggested that the part of the undertaking which establishes the services to be provided (clause 4) should be drafted more clearly as an obligation on DBCT Management and refer to both reference and non-reference tonnage.

Authority's Analysis

The Authority remains of the view that obligations to provide the coal handling service under an access agreement should apply directly to DBCT Management. Although DBCT P/L is providing the coal handling service on a day to day basis, this is effectively as a sub-contractor of DBCT Management. As access agreements are between a user and DBCT Management, the Authority believes it is appropriate that access obligations should be directly placed on DBCT Management.

DBCT Management has also noted that there may be some additional or stronger access obligations which the Authority has proposed to place on it that may not be catered for under its current agreement with the Operator. DBCT Management cites the stronger obligations on it to provide train scheduling and train unloading as examples of this. However, to the extent that there are additional obligations that are not provided for under the OMC, the Authority recognises that DBCT Management may be placed in a position where, in order for it to comply with the undertaking, it may have to renegotiate the terms of the OMC. Clearly, this would take the agreement of the Operator to achieve. The Authority has formally raised this issue with the terminal operator to gauge its willingness to renegotiate the OMC to enable DBCT Management to comply with its access obligations.

The Authority recognises that placing direct obligations on DBCT Management that are not covered under the OMC may place it in a difficult position. Nevertheless, the Authority believes that these principles are an important element of the access regime in that they provide greater clarity and certainty as to the services to be provided. The Authority's approach on this

issue is to qualify DBCT Management's obligations to provide the coal handling service as being to the extent permitted by the OMC (clause 4). This is in conjunction with an obligation on DBCT Management to take all reasonable steps to renegotiate the OMC to enable DBCT Management to comply with its undertaking obligations.

The Authority notes the DBCT User Group's suggestion that clause 4 (Services to be Provided) clarify that DBCT Management must provide the coal handling service as set out in Schedule G for all reference and non-reference tonnage. While accepting that a clearer obligation on DBCT Management to provide the coal handling service is desirable, the Authority does not believe the amendment relating to reference and non-reference tonnage is necessary. As discussed in Chapter 6, the Authority believes that DBCT Management must negotiate, if requested by an access seeker, for access to the coal handling service, including whether on reference or non-reference terms. The coal handling service is defined in a non-exhaustive way in Schedule G, which sets out the scope of services to be provided under an access agreement.

The Authority remains of the view that the definition in Schedule G of the coal handling service should be as comprehensive as possible (having regard to the declaration) and expressed in a non-exhaustive way. Consistent with this, the Authority proposed that a category of 'other services' be included in Schedule G for greater clarity. The Authority understands that services in this category are currently provided at the terminal. By including them in Schedule G, the Authority has sought to clarify that these services form part of, or are incidental to, the coal handling service.

In terms of the funding of services provided at the terminal, the reference tariff is effectively a 'capacity charge' which is paid to DBCT Management. As the physical delivery of the services is provided by the Operator, the handling costs incurred in doing this are recovered from users and passed through to the Operator.

Under the undertaking, operating costs are recovered through the operation and maintenance charge. This, by definition, is the component of access charges by which DBCT Management will recover terminal operating costs. This recovery mechanism is currently reflected in the Schedule B principles of the draft access undertaking which set out what the operation and maintenance charge will comprise, namely: a fixed handling charge (allocated across all access holders according to annual contract tonnage); a variable handling charge per tonne (taking into account each access holder's proportion of throughput); reasonable charges for miscellaneous services; and additional reasonable handling charges if the nature of coal causes material extra costs and delays.

As discussed in Chapter 6 of this decision, the Authority is proposing to address the DBCT User Group's concerns about handling charges for additional miscellaneous services by including extra protections for users in the Schedule B principles. These will ensure that handling charges for 'additional miscellaneous services' will not be included in the general fixed and variable handling charge component of the operation and maintenance charge. Also, to ensure DBCT Management is unable to make additional profit on these miscellaneous services via the handling charge, the Authority is proposing to clarify that these charges are subject to the total of the operation and maintenance charge not exceeding terminal operating costs and the Operator's margin.

The Authority believes that these amendments to Schedule B should address stakeholder concerns on the issue of charging for 'additional' services. These proposed changes are discussed further in Chapter 6.

In order for the undertaking to be approved, it must be amended so that:

- **the first paragraph of Part 4 states that, to the extent permitted by the OMC, DBCT Management must provide at the terminal the coal handling service as set out in Schedule G;**
- **the second paragraph of Part 4, flagging a possible future draft amending undertaking to excise certain services from the scope of the undertaking, is deleted;**
- **Schedule G is amended in accordance with Part B of this decision, so that in summary it will:**
 - **be non-exhaustive;**
 - **specify that ‘storage’ includes both stockpiling and cargo assembly;**
 - **specify that other services in relation to coal handling may be requested by an access holder, including services incidental to the handling of coal;**
 - **provide stronger obligations on DBCT Management regarding the provision of train scheduling and train unloading;**
 - **remove references to DBCT Management’s contractual obligations to other access holders in ‘train unloading’, ‘storing’ and ‘reclaiming and shiploading’;**
 - **constrain DBCT Management’s discretions where appropriate; and**
 - **place access obligations directly on DBCT Management, as access provider;**
- **the definition of ‘Coal Handling Service’ in clause 2.1 states that the coal handling service is the service set out in Schedule G; and**
- **the definition of ‘Handle’ in clause 2.1 states that it includes the unloading, storing, reclaiming and loading of coal and any other services provided in accordance with Schedule G, using any of the infrastructure at the terminal.**

2.3 Term and Review of the Undertaking

DBCT Management had proposed a seven year term for the undertaking, with reviews conducted one, three and five years after the commencement date of the undertaking. The Authority rejected this in its draft decision on the basis that this period of time may be too long, at least for the initial regulatory period. Instead, the Authority recommended an initial regulatory period of five years, or when DBCT P/L ceases to be the operator, whichever is sooner, with reviews to be conducted one and three years after the commencement date of the undertaking.

This link to the identity of the operator is in recognition of the importance the Authority places on the incentives created by the current ownership and operational arrangement whereby the terminal operator, DBCT P/L, is owned by users of the terminal. If this arrangement were to alter, the Authority considers that the implications of this would potentially be significant enough to warrant a reassessment of the undertaking.

Stakeholder Comments on Draft Decision

Stakeholders generally did not comment on this aspect of the draft decision. However, the DBCT User Group expressed concern that the commencement date of the undertaking is still some time away. Accordingly, it believes it would be appropriate for the term of the initial

undertaking to end on a specified date (ie., 31 December 2009), so that it does not continue to run on (DBCT User Group, sub. no. 52: 7). The DBCT User Group also requested that access holders be able to provide input during the review process (DBCT User Group, sub. no. 54: 2).

Authority's Analysis

The Authority accepts the concerns of the DBCT User Group that the end of the first regulatory period may continue to 'run on', depending on when the approved undertaking commences. Accordingly, the Authority believes it may be preferable for the initial undertaking to end on a specified date, rather than exactly five years from the commencement date. The Authority accepts the suggestion of the DBCT User Group on this and, therefore, proposes that the terminating date of the undertaking should be 31 December 2009 or when the Operator changes, whichever is sooner.

In terms of the proposed reviews of one and three years, and the DBCT User Group's requests that access holders be able to provide input during the regulatory process, the Authority notes that it has little scope under the QCA Act to amend an approved access undertaking. While conducting informal reviews as specified will be of benefit, ultimately, it is up to DBCT Holdings and DBCT Management to determine whether to submit a draft amending access undertaking to the Authority as a result of a review. If a draft amending access undertaking is submitted, the Authority must undertake a public consultation process.

Despite this, the Authority notes that access holders may at any time, including during times of review, submit any concerns they have about the operation of the access undertaking to the Authority. The Authority anticipates that any such concerns raised by access holders would be taken into account by the Authority at the time of the scheduled reviews.

In order for the undertaking to be approved, it must be amended so that:

- **'Terminating Date' is defined to mean 31 December 2009 or when the Operator changes, whichever is earlier (clause 2.1);**
- **the definition of 'Operator' in clause 2.1 be amended to define the Operator to be DBCT P/L (clause 2.1); and**
- **reviews are to be conducted one and three years after the undertaking's commencement date (clause 1.4).**

2.4 Information Provision

DBCT Management proposed that the Authority have the right to request from DBCT Management any information or documents that the Authority reasonably requires for the purpose of performing its obligations and functions in accordance with the undertaking or subsequent access agreements. DBCT Management committed to comply with any such request, unless there was a reasonable reason for non-compliance. This includes where DBCT Management has a legal or contractual obligation to comply with confidentiality requirements or otherwise wishes to maintain confidentiality in respect of the information provided, but the Authority has not undertaken to treat the information as confidential (DAU, Vol. 1: clause 6).

The Authority had proposed an amendment to clause 6 of the undertaking on the basis that it was potentially inconsistent with the provisions of the QCA Act which govern handling confidential information by limiting the circumstances in which the Authority could require DBCT Management to provide information. To address this, the Authority proposed an

amendment to clarify that clause 6 of the undertaking does not limit the rights of the Authority under the terms of the QCA Act with respect to obtaining and handling information.

The DBCT User Group supported the Authority's proposed amendment. Otherwise, there were no stakeholder comments on this issue.

Accordingly, there is no change to the Authority's position in the draft decision on this issue.

In order for the undertaking to be approved, clause 7 (Information Provision) must be amended to delete that part which sets out the circumstances when it would be reasonable for DBCT Management not to comply with a notice from the Authority to provide information.

3. NEGOTIATION FRAMEWORK

Summary

Key elements of the negotiation framework include providing adequate information in a timely manner, specifying the steps in the access negotiation process, including processes for resolving disputes. The Authority has proposed amendments in these areas to provide greater certainty for both DBCT Management and access seekers about their rights and obligations and to ensure an acceptable balance in the interests of each party to the negotiations.

Other issues addressed include the ring-fencing and confidentiality provisions proposed by DBCT Management. Ring-fencing is typically an important issue when the access provider has interests in upstream or downstream markets. However, this is currently not the case with respect to DBCT Management. In terms of obligations relating to the handling of confidential information, the Authority has proposed a number of amendments to DBCT Management's proposed confidentiality deed in order to ensure that it is a commercially balanced document.

3.1 Access Negotiation Process

The QCA Act requires the access provider and access seeker to negotiate in good faith for reaching an access agreement. The access provider must make all reasonable efforts to try to satisfy the reasonable requirements of the access seeker, including providing certain information (ss. 100-101 of the QCA Act).

Information Provision and Access Application

In its draft access undertaking, DBCT Management proposed that an access application be provided in writing and contain the information set out in Schedule A of that undertaking. DBCT Management proposed that, prior to submitting this, an access seeker may request from it reasonably available preliminary information, including copies of the current standard access agreement and Terminal Regulations and, where practicable, the information set out in ss.101(2)(d)-(h) of the QCA Act. DBCT Management also proposed that the access seeker may request initial meetings to discuss the application and the requirements of Schedule A (DAU, Vol. 1: clause 5.2).

DBCT Management committed that, upon receiving an access application, it would use reasonable endeavours to provide written acknowledgement as soon as practicable, and in any event within 10 business days of the access application's receipt. DBCT Management also proposed that it may request from the access seeker additional information or clarification of information provided. DBCT Management must also provide written acknowledgement of receipt of such information as soon as practicable, and in any event within 10 business days (DAU, Vol. 1: clause 5.3).

In its draft decision, the Authority proposed a number of amendments to ensure that the obligations in the draft access undertaking with respect to providing information are consistent with the QCA Act, and to provide a reasonable balance in the legitimate business interests of the access provider and access seekers. For example, the Authority recommended that additional information relating to price, cost and asset value be provided where there is no applicable reference tariff, consistent with the QCA Act. The Authority also proposed that a time limit of 10 days apply for DBCT Management to provide preliminary information. The Authority also recommended changes to Schedule A to ensure that DBCT Management must act reasonably in determining whether information provided by an access seeker as part of an access application is satisfactory. The Authority further proposed that information on contracted annual rai

capacity must only be provided ‘where known’ and that information to be provided by an access seeker should be reasonably practicable to provide and may be a forecast.

To address the DBCT User Group’s concerns about timeliness, the Authority recommended an overarching obligation on DBCT Management to make all reasonable efforts to progress the access application in a timely way.

Stakeholder Comments on Draft Decision

With regard to the Authority’s proposed amendment to Schedule A (Information required as part of an access application, clause (j)) which required that an access seeker must provide information on contracted annual raiiling capacity only ‘where known’, DBCT Management submitted that this qualification should be amended to include a ‘best estimate’ provision or be based on a request made to QR. DBCT Management noted that the purpose of seeking this information is to determine appropriate capacity expansions and plan future operations, so that it is important that the information is based on the best estimates available at the time (DBCT Management, sub. no. 64: 11).

The DBCT User Group supported the amendments proposed by the Authority. It also suggested that the information requirements listed in Schedule A be categorised into two classes: first, essential information; and second, information that is desirable, but not urgent. The latter would include information which will not be firmed up in the early stages of negotiation or is not critical to DBCT Management’s early planning, and which can be progressively provided as it becomes available (DBCT User Group, sub. no. 54: A-1).

Authority’s Analysis

The Authority supports DBCT Management’s proposal to amend clause (j) of Schedule A to qualify that an access seeker must provide information on contracted annual raiiling capacity where known, or otherwise a best estimate of such information. The Authority considers that this qualification will better facilitate DBCT Management’s planning requirements.

In relation to the DBCT User Group’s proposal to categorise the information requirements listed in Schedule A into two classes, the Authority considers that such an approach may prove to be unnecessarily complicated. Moreover, determining what information is essential or otherwise may be a subjective matter. The Authority, therefore, considers that the information requirements of Schedule A are reasonable and necessary in order for DBCT Management to properly assess an access application in order to provide the access seeker with an Indicative Access Proposal (IAP).

While recognising the DBCT User Group’s concerns that certain information may need to be firmed up over time, the Authority believes that the information to be included in Schedule A is reasonable. In addition, the Authority believes that there is sufficient flexibility built into the access negotiation process to address the DBCT User Group’s concerns. This includes the caveats recommended by the Authority that DBCT Management acknowledge that, at the time of provision, information may be a forecast only. Also, the recommendation that access seekers will provide the information requirements of Schedule A is subject to a ‘where reasonably practicable’ requirement.

The Authority notes that the draft access undertaking provides scope for DBCT Management to request additional information and clarification during the access application process. However, to ensure this flexibility also applies to users, the Authority believes another provision should be added to clarify that a user may revisit its application provided that this does not substantially alter the nature of the access rights sought. If DBCT Management is reasonably of the view that

the revision does do this, it will treat the revised information as a new access application (clause 5.6). This is similar to an approach taken in QR’s access undertaking.

In order for the undertaking to be approved, it must be amended to:

- **clarify that information to be provided by an access seeker should be reasonably practicable to provide and may be a forecast (clause 5.2);**
- **provide a clear statement of DBCT Management’s obligations to provide certain information consistent with s.101 of the QCA Act (clause 5.2);**
- **provide that, if requested by an access seeker, where there is a reference tariff, DBCT Management will provide information set out in ss.101(2)(d)-(h) of the QCA Act. Where there is no reference tariff, DBCT Management will provide information set out in with ss.101(2)(a)-(h) of the QCA Act (clause 5.2);**
- **provide that DBCT Management must provide preliminary information within 10 business days of request (clause 5.2);**
- **provide that additional information requested by DBCT Management must be reasonably able to be demonstrated to be necessary to prepare an IAP (clause 5.3); and**
- **ensure that, in Schedule A, the provision requiring information to be provided ‘to the satisfaction of DBCT Management is made subject to DBCT Management ‘acting reasonably’. Also, the requirement in Schedule A, clause (j), must state that an access seeker must provide information on contracted annual raiiling capacity ‘where known’ and, if not known, a ‘best estimate’ (Schedule A); and**
- **allow an access seeker to review and revise its access application provided it does not substantially alter the nature of the access rights sought by the access seeker. If DBCT Management is reasonably of the view it does, it will treat the revised information as a new access application (clause 5.7).**

Provision of an IAP by DBCT Management

The draft access undertaking establishes DBCT Management’s obligations in preparing an IAP and circumstances in which an access seeker may refer a matter regarding the IAP to dispute resolution. Among other things, the IAP sets out non-binding indicative arrangements in relation to an initial estimate of the access charge for the requested service and the expiry date of the IAP. Access seekers have recourse to dispute resolution if they consider that, among other things, DBCT Management is not making reasonable progress in preparing an IAP. Access seekers must notify DBCT Management of their intention to proceed to the access negotiation phase.

In its draft decision, the Authority proposed a number of amendments relating to DBCT Management’s obligations in progressing an access application, in particular, that DBCT Management be obliged to make all reasonable efforts in progressing an access application in a timely manner (clause 5.2). Other proposed amendments relate to the content of an IAP. In particular, the Authority proposed that the content of the IAP be expanded to include the current master plan and information on the current and prospective handling charges and, where a standard access agreement is not available, a copy of a draft access agreement. The Authority also proposed that that a stronger obligation be placed on DBCT Management to continue to negotiate on the basis of a capacity expansion, if so requested by an access seeker.

Stakeholder Comments on Draft Decision

In relation to the Authority's proposal that an IAP include an estimate of current and prospective handling charges (clause 5.4(c)(1)), DBCT Management noted that this would require it to establish a view on the Authority's likely response to either a request to increase the asset base following an expansion or a draft access undertaking submitted upon the expiry of the term. DBCT Management submitted that, given the Authority's autonomy in arriving at a decision, the estimate requirements of clause 5.4(c)(1) exposes DBCT Management to liability should such an estimate be wrong or misleading. DBCT Management suggested amendments to address these concerns, namely, that the IAP set out an estimate of prospective handling charges where reasonable to provide such an estimate (DBCT Management, sub. no. 64: 11).

The DBCT User Group generally agreed with the Authority's recommendations. Nevertheless, it had residual concerns that the negotiation process should not be delayed in a way which might force access seekers to make unreasonable concessions due to time pressures. It suggested that there should be an overriding requirement on DBCT Management to respond as quickly as practicable. It further suggested that an access seeker should be able to refer a dispute where DBCT Management's response could obviously have been made in a shorter timeframe (for example, where it is a non-specific, standard response).

Another issue raised by the DBCT User Group is that it believes more regard should be given to the fact that access seekers will need to be undertaking simultaneous negotiations with DBCT Management, a railway manager, a railway operator, customers, construction companies, infrastructure providers, local authorities, government departments and various other third parties. Given this, negotiations and agreements would need to be conditional in the initial stages, but with sufficient certainty to allow access seekers to commit to DBCT Management and other parties and be assured that handling services will be provided (DBCT User Group, sub. no. 52: 8, 9).

The DBCT User Group provided a mark up of the undertaking as part of its submission which included a number of proposed amendments to Part 5 of the undertaking. These amendments typically place stronger obligations on DBCT Management to provide certain information or are designed to improve the timeliness of the process. For example, it proposed that DBCT Management must provide the access seeker with an IAP within 20 days following receipt of an access application, and not just be obligated to use 'reasonable endeavours' to achieve this. It also proposed a similar amendment for when DBCT Management has advised that it needs extra time to prepare an IAP. Another proposed amendment is that the IAP should not include an expiry date of thirty days if notification has been received pursuant to clause 5.5 (Response to IAP) (DBCT User Group, sub. no. 54: 10-12).

Authority's Analysis

The Authority considers that the IAP should provide an access seeker with the most accurate up to date information available on the terms and conditions upon which DBCT Management is willing to provide access to the coal handling service. The Authority, however, recognises that there are particular circumstances, for example in the case of a proposed capacity expansion, where it may prove difficult for DBCT Management to provide an accurate estimate of, among other things, prospective handling charges. The Authority acknowledges DBCT Management's concerns in this regard, particularly its concerns that its best estimate of prospective handling charges may expose them to liability should such an estimate be wrong or misleading. Therefore, the Authority supports DBCT Management's proposed qualification that estimates of prospective handling charges will be provided in an IAP 'where it is reasonable to provide such an estimate'.

In relation to the DBCT User Group's concerns about the timeliness of the negotiation process and its suggestion that there be an overriding requirement on DBCT Management to respond as quickly as practicable, the Authority notes its proposed amendment in the draft decision to clause 5.2 is intended to address timeliness concerns. This amendment requires DBCT Management to make all reasonable efforts to progress an access application in a timely way. The Authority considers that this amendment addresses the DBCT User Group's concerns about the timeliness of the access application process. However, for clarity, this requirement should apply not only to the access application but to the entire access negotiation process. The Authority therefore proposes that its proposed amendment to clause 5.2 be moved to clause 5.1 and augmented to state that DBCT Management will complete each relevant step as soon as practicable.

With regard to the DBCT User Group's proposal that an access seeker should be able to refer a dispute where DBCT Management's response could obviously have been made in a shorter timeframe, the Authority notes that clause 5.8 provides that any party may notify any dispute or question arising under the undertaking or in relation to the negotiation of access. Given this, the Authority understands that a belief by an access seeker that DBCT Management is not making reasonable efforts to progress an access application in a timely manner would give rise to a dispute or question under the undertaking or in relation to the negotiation of access. Accordingly, the Authority understands that a party could notify such a dispute. As such, it is unnecessary to specifically state that a dispute may be notified in these circumstances.

The Authority acknowledges the DBCT User Group's concerns that access seekers will be engaged in negotiations with other parties while also negotiating for access to the terminal. The Authority believes that the draft access undertaking, as proposed to be amended by the Authority, already acknowledges this. In particular, as recommended in the draft decision, the undertaking will include an acknowledgement by DBCT Management that the information provided as part of an access application may be a forecast only. Moreover, the Authority's proposal in this decision to allow an access seeker to review its access application during the negotiation process provides greater flexibility for users, without compromising DBCT Management's legitimate business interests in this regard.

However, the Authority also recognises there may be times when DBCT Management is required to consider a number of potentially competing access applications. In this situation, access seekers will have an incentive to finalise an access agreement as expeditiously as possible. At present, the draft access undertaking provides that, if a finalised access agreement affects the ability of DBCT Management to provide access to another access seeker, DBCT Management will provide a revised IAP to that access seeker and the negotiation process will recommence from the date this is provided to the access seeker.

In view of stakeholder concerns on this issue and in order to provide access seekers with guidance regarding the status of their respective access applications, the Authority considers it appropriate that there should be a more transparent and equitable mechanism in place to deal with a situation where there is not sufficient capacity to meet all current access applications. The Authority does not consider that this needs to be as formal a mechanism as a conditional access agreement, as suggested by the DBCT User Group. Rather, it may be sufficient to effectively have a queuing mechanism. The Authority has proposed a set of minimal amendments designed to achieve this, while recognising it may not be exhaustive of all possible issues.

The mechanism proposed by the Authority would effectively place access seekers in a queue according to the date an access application is made. Should an access seeker notify DBCT Management of its willingness to execute an access agreement, DBCT Management should be obliged to notify all access seekers which are ahead of that access seeker in the queue. Notified access seekers should then be given 20 business days to finalise their respective access

negotiations. If any notified access seeker wishes to conclude an agreement, priority must be given to the access seeker that is higher in the ‘queue’. If the notified access seekers either do not indicate a willingness to execute an access agreement within that period, or do not in fact execute an agreement within that 20 day period, DBCT Management is free to finalise an access agreement with the access seeker who, at the outset, was willing to execute an access agreement. Once an access seeker has finalised an access agreement with DBCT Management, it will be removed from the queue.

The Authority anticipates that this mechanism will provide an environment in which all access seekers are treated fairly, in terms of ensuring that those access seekers which have submitted access applications are given the opportunity to execute an access agreement ahead of access seekers who submitted access applications at a later date. Essentially, this mechanism ensures ‘first in first served’ for access seekers while safeguarding DBCT Management’s interests by ensuring a tightly defined period for response.

The Authority does not accept the DBCT User Group’s proposed amendments to the negotiation framework to provide stronger obligations on DBCT Management to provide particular information (ie. requiring that DBCT Management ‘must provide’ instead of using ‘reasonable endeavours’). The Authority considers that it may not be reasonable for DBCT Management to meet deadlines during the access negotiation process in all circumstances as the complexity of the negotiations will differ depending on the particular circumstances (eg whether or not the terminal needs to be expanded to meet an access seeker’s requirements). The Authority considers there are adequate protections in the access undertaking for users, namely, the overarching obligation for DBCT Management to progress an access application and negotiation in a timely way, and the provisions allowing recourse to dispute resolution.

Nevertheless, the Authority believes it would be reasonable for DBCT Management to acknowledge receipt of an access application within 10 days of receipt, rather than making ‘reasonable endeavours’ to do so. This seems a fairly straightforward requirement that should not be difficult for DBCT Management to comply with, and will provide access seekers with further assurance that DBCT Management will not be unduly slow in progressing the negotiation process.

The Authority accepts the DBCT User Group’s proposal that the expiry of an IAP of thirty days should not apply where an access seeker has notified DBCT Management pursuant to clause 5.5 that it believes the IAP has not been prepared in accordance with the access undertaking.

In order for the undertaking to be approved, it must be amended to:

- **correct the inconsistency in the times for DBCT Management to provide an IAP in the first paragraph of clause 5.4;**
- **provide that DBCT Management must notify an access seeker ‘as soon as practicable but in any event within 20 business days’ of the extra time required to provide an IAP (clause 5.4);**
- **expand the IAP to include the current master plan and information on current and, where reasonable to provide such an estimate, prospective handling charges. Moreover, where there is no approved standard access agreement, a draft access agreement should also be included in the IAP (clause 5.4(c)(1));**
- **change the timeframe in which an access seeker must notify of its intent to progress an access application to 30 days, consistent with the life of an IAP (in clause 5.6);**
- **place a stronger obligation on DBCT Management to continue negotiations on the basis of a capacity expansion, if requested by the access seeker, where DBCT Management has notified of insufficient capacity in accordance with clause 5.4. In this case, if DBCT Management is unable to comply with the timeframes in clause 5, it must advise of the estimated timeframes. The access seeker will have recourse to dispute resolution if it does not believe that the proposed timetable is reasonable or that DBCT Management is making reasonable progress (clause 5.5);**
- **provide a mechanism for dealing with potentially competing access applications. In particular, access seekers will be placed in a queue according to the date an access application is made. Where an access seeker who is not first in the queue notifies DBCT Management of its willingness to execute an access agreement, DBCT Management must notify all access seekers ahead of that access seeker in the queue, and allow 20 business days for the notified access seekers to execute an access agreement. If any notified access seeker wishes to conclude an access agreement, priority must be given to that access seeker that is higher in the queue. If the notified access seekers either do not indicate a willingness to conclude an access agreement in that period or do not in fact execute an access agreement in that period, DBCT Management is free to finalise an access agreement with the access seeker who, at the outset, was willing to execute an access agreement (clause 5.4);**
- **include a provision requiring DBCT Management to make all reasonable efforts to progress the access application and any negotiations to develop an access agreement with an access seeker in a timely manner and will complete each relevant step as soon as practicable (clause 5.1);**
- **provide that DBCT Management must acknowledge receipt of an access application in writing to the access seeker within 10 business days of its receipt (clause 5.3); and**
- **provide that the IAP should not expire where an access seeker has notified DBCT Management pursuant to clause 5.6 that it believes the IAP has not been prepared in accordance with the access undertaking (clause 5.5(c)(5)).**

Negotiations to Develop an Access Agreement

The draft access undertaking proposes that, if an access seeker indicates it is willing to progress with an access application, negotiations will commence as soon as reasonably possible to progress towards an access agreement. It also sets out the circumstances in which negotiations will cease, for example, where: an access agreement is executed; the access application is withdrawn; a Negotiation Cessation Notice (NCN) is issued; or there is insufficient capacity due to another access seeker finalising an access agreement. In this last case, DBCT Management will provide the access seeker with a revised IAP, and the negotiation process will recommence from the date of its receipt (DAU, Vol. 1: clause 5.6).

DBCT Management proposed that if the parties are unable to resolve a dispute during the negotiation period after reasonable negotiations, either party may refer the matter to dispute resolution.

The draft access undertaking sets out grounds on which DBCT Management may issue a NCN, as well as recourse to dispute resolution if the access seeker believes it has been improperly given.

In its draft decision, the Authority proposed a number of amendments to the clauses dealing with access negotiations, including the extension of the negotiation period from three to six months (clause 5.6). Other amendments relate to the circumstances in which DBCT Management may issue a NCN and recover its costs incurred as a result of issuing a NCN. For example, the Authority proposed that DBCT Management be permitted recover such costs only where negotiations have ceased because an access seeker has no genuine interest in gaining or utilising access at the level sought. It was also proposed that disputes about the recovery of costs when a NCN is issued be dealt with in accordance with the dispute resolution provisions of the undertaking.

Stakeholder Comments on Draft Decision

The DBCT User Group agreed with the Authority's recommendations, although it was concerned that the Authority's suggestion to extend the negotiation period to six months may inevitably lead to negotiations taking up that full period. It suggested that timing issues may be more focussed if it is open to access seekers to have a conditional agreement, but with a time limit by which time an access seeker is to commit to an access agreement. To balance this, DBCT Management should have a right to require the access seeker to commit by an earlier date if another access seeker offers to sign an unconditional agreement (DBCT User Group, sub. no. 52: 9).

The DBCT User Group proposed that the period for negotiation should not end while a dispute is in progress (DBCT User Group, sub. no. 54: 13).

The DBCT User Group also proposed an amendment to clause 5.7 to clarify that DBCT Management may recover its reasonable costs where a NCN is validly issued under clause 5.7(c) unless a dispute on the matter has been determined otherwise (DBCT User Group, sub. no. 54: 14).

The DBCT User Group submitted that there is a need for transitional arrangements to progress any applications by access seekers which are outstanding at the commencement of the access undertaking (DBCT User Group, sub. no. 54: 17).

Authority's Analysis

In regard to the DBCT User Group's concerns that negotiations may extend to the full six months, the Authority notes that this is a maximum. It remains up to the negotiating parties how quickly negotiations are resolved in this time. Further, the Authority believes it is preferable to err on the side of setting a longer maximum negotiation period in order to prevent unduly truncating access negotiations. Further, as discussed in the previous section, the Authority has decided to incorporate the concept of a 'queue' in the undertaking for competing access applications, with priority given to access seekers higher in the queue for a defined period of time. As noted by the DBCT User Group, this may serve to focus and expedite access negotiations in certain circumstances.

The Authority supports the DBCT User Group's proposal to not cease negotiations if there is a dispute in progress. The Authority considers that this proposal is justified as it is not fair or reasonable that the time spent in dispute resolution should subtract from the time available to negotiate an access agreement. Therefore, the Authority proposes to include an additional provision clarifying that the negotiation process and obligations of the parties in that regard will continue notwithstanding the commencement of a dispute resolution process.

The Authority also supports the DBCT User Group's proposal to amend clause 5.7 to clarify that DBCT Management may recover reasonable costs incurred as a result of improperly issuing a NCN, unless the dispute resolution determines otherwise.

The Authority supports the DBCT User Group's proposal to include transitional arrangements in the undertaking. The Authority considers that including transitional arrangements provides certainty for access seekers and DBCT Management as there may be an access application in progress at the time the undertaking commences. To remove any uncertainty about the status of such an access application, the Authority proposes that, at the time the undertaking is approved, any access seeker who is in possession of a current IAP should have the option to elect whether it wishes to complete negotiations for an access agreement in accordance with the approved access undertaking.

In order for the undertaking to be approved, it must be amended to:

- **extend the negotiation period to six months (clause 5.7);**
- **remove the duplication of the negotiation cessation right between clauses 5.8(b) and (d);**
- **provide consistent materiality thresholds applicable to issuing a NCN in clause 5.8;**
- **provide that DBCT Management must not issue a NCN for non-compliance with the expert’s decision if the expert is found to be in manifest error (clause 5.8);**
- **provide that the insolvency or default of an access seeker under an access agreement or related agreement is only relevant to the circumstances outlined in clauses 5.8(b) and (d) (clause 5.8);**
- **allow DBCT Management to recover its costs where a NCN is issued only where negotiations have ceased because an access seeker has no genuine interest in gaining or utilising access at the level sought (clause 5.8);**
- **provide for a dispute about recovery of costs when a NCN is issued to be notified and resolved in accordance with the dispute resolution provisions of clause 5.9 (clause 5.8);**
- **provide that the negotiation process and the obligations in that regard will continue notwithstanding the commencement of a dispute resolution process (clause 5.7);**
- **make clear that DBCT Management may recover costs incurred as a result of issuing a NCN unless a dispute resolution on the matter determines otherwise (clause 5.8); and**
- **include a provision for transitional arrangements, allowing an access seeker in possession of a current IAP to elect whether it wishes to finalise negotiations in accordance with the access undertaking (a new clause 15).**

3.2 Dispute Resolution Process

In its draft access undertaking, DBCT Management proposed that disputes which arise under the undertaking, or in the negotiation for access, be dealt with in accordance with the dispute resolution process in the undertaking. Once an agreement is signed, any disputes arising under an agreement will be dealt with in accordance with any dispute resolution procedures in that access agreement (DAU, Vol. 1: clause 5.8(a)).

The draft access undertaking sets out the processes that will apply in the event that negotiations break down and a dispute is notified. DBCT Management proposed a three tiered approach to disputes arising under the undertaking, with disputes initially to be referred to the chief executives of the respective parties, or their nominees. Failing resolution, the parties may agree to refer the dispute to an expert. If the parties disagree, either party may refer the dispute to the Authority.

DBCT Management proposed that, where a dispute is referred to the Authority under clause 5.8(d) (Determination by QCA), or as otherwise specified in accordance with the undertaking, then Division 5 of Part 5 of the QCA Act will apply, subject to the consistency of any determination by the Authority with the provisions of the undertaking.

In its draft decision, the Authority proposed a number of relatively minor amendments to this part of the undertaking to ensure consistency with the QCA Act and to provide greater balance in the interests of the disputing parties. For example, requiring that the Authority not make an access determination that is inconsistent with an approved access undertaking.

Stakeholder Comments on Draft Decision

The DBCT User Group suggested that a recent, rather than immediate, past employee of the access seeker or DBCT Management be precluded from providing expert determination (DBCT User Group, sub. no. 52: 9).

The DBCT User Group also suggested a truncation of timeframes in the case of a standard access agreement with little to negotiate (DBCT User Group, sub. no. 52: 9).

In terms of the dispute resolution provisions of the undertaking, the DBCT User Group proposes a reduction in the time allowed for chief executive resolution from 20 to 10 days.

The DBCT User Group also proposed that expert determination in the case of non-financial matters be by the president of the Queensland Law Society rather than the President of the Institution of Engineers (DBCT User Group, sub. no. 54: 9-16).

Authority's Analysis

The Authority does not support the DBCT User Group's proposal to preclude a recent, rather than an immediate past employee of either the access seeker or DBCT Management from providing expert determination. There is some subjectivity as to what exactly constitutes a 'recent' employee, and the Authority believes this term may be too prescriptive in the circumstances. In any case, the Authority notes that clause 5.8 (c)(ii) requires the expert to have no interest or duty which conflicts or may conflict with their function as expert. The Authority believes that preventing a conflict of interest is the key issue and that this requirement should adequately address the concerns of the DBCT User Group. Moreover, the appointment of an expert is subject to agreement of both parties and, if one party has any concern about a nominated expert, it is up to that party to reject the nominated expert and/or nominate an alternative expert.

The Authority does not support the DBCT User Group's proposal to truncate timeframes in the case of a standard access agreement with little to negotiate. The Authority notes that the purpose of an access undertaking, including a standard access agreement, is to minimise the scope for dispute. That is, the detailed terms and conditions included in the standard access agreement may mean that an access dispute is less likely to occur in the first place.

However, if a dispute is notified, the Authority must resolve it properly, taking into account all relevant matters. That is, in the event of a dispute, the Authority would not be obliged to resolve the dispute by simply reiterating the terms of the standard access agreement or Schedule B. Rather, the Authority's determination would be guided by the terms of the standard access agreement, Schedule B and the circumstances of the particular matter.

The Authority supports the DBCT User Group's proposal to reduce the amount of time for the chief executive resolution from 20 to 10 days. The Authority notes that QR's 2001 access undertaking and draft 2005 access undertaking provide for similar timeframes for this stage of the dispute resolution process.

The Authority does not support the DBCT User Group's proposal to have the president of the Queensland Law Society, rather than the president of the Institution of Engineers, preside over disputes relating to non-financial matters. The DBCT User Group did not provide any

justification for the amendment. The Authority notes that QR’s 2001 access undertaking and draft 2005 access undertaking provide for the President of the Institution of Engineers to preside over non-financial matters.

In order for the undertaking to be approved, it must be amended so that:

- **it does not place a time limit on when either DBCT Management or an access seeker may refer a dispute to the Authority (clause 5.9(b));**
- **the parties to a dispute must, if requested by an expert to provide confidential information, be reasonable in determining if confidentiality arrangements are acceptable (clause 5.9(c)(iv));**
- **provide in clause 5.9(d) that the Authority must not make an access determination that is inconsistent with the undertaking; and**
- **the time permitted for chief executive resolution is reduced from 20 to 10 business days (clause 5.9(b)(i)).**

3.3 Confidentiality Requirements

In its draft access undertaking, DBCT Management proposed that it and an access seeker will, at all times, keep confidential and not disclose any confidential information exchanged during negotiations or under any part of the undertaking. DBCT Management also proposed that the exceptions to this are where disclosure is required by law and/or where disclosure is to the recipients’ advisors who are under a duty of confidentiality. It was also proposed that both parties must also ensure that all confidential information is used only for the purposes for which it was provided.

DBCT Management proposed that both it and an access seeker enter into a confidentiality deed in the form of Schedule D, if required by either party (DAU, Vol. 1: clause 7).

In its draft decision, the Authority required that the draft access undertaking be amended in a manner such that the confidentiality deed (Schedule D) and the definition of ‘confidential information’ (clause 2.1) be consistent with the mark-up in Part B of the draft decision.

Stakeholder Comments on Draft Decision

There was generally agreement with the Authority’s proposed amendments to the confidentiality deed. DBCT Management noted that the proposed amendments appear to be of a minor nature and do not appear to unreasonably impact on the rights of any party to the deed (DBCT Management, sub. no. 64: 11). The DBCT User Group suggested some further minor amendments, namely that disclosing confidential information to advisers, to financiers, to advisers of financiers and the Operator may be relevant and permissible (DBCT User Group, sub. no. 54: D-5).

Authority’s Analysis

The Authority notes the DBCT User Group’s concerns and it has reviewed the confidentiality deed in light of these concerns. The Authority considers that the DBCT User Group’s concerns are warranted and has accordingly amended the confidentiality deed to allow advisers etc. to be ‘specified persons’ for the purpose of receiving confidential information.

In order for the undertaking to be approved, the confidentiality deed (Schedule D) and the definition of ‘confidential information’ (clause 2.1) must be amended in accordance with the mark-up in Part B.

3.4 Ring-fencing Issues

In its draft access undertaking, DBCT Management proposed that it presently has no interest in upstream or downstream markets. Consequently, ring-fencing provisions were not provided for in the draft access undertaking. However, DBCT Management proposed that, if its interests change, it will prepare and submit to the Authority a draft amending access undertaking setting out its obligations in relation to ring-fencing (DAU, Vol. 1: clause 8).

In its draft decision, the Authority accepted that DBCT Management currently has no conflict of interest in upstream or downstream markets. The Authority accepted DBCT Management’s commitment to submit a draft amending access undertaking should potential ring-fencing issues arise in the future.

No stakeholder comments were received on this issue. Consequently, the Authority accepts Part 8 of the draft access undertaking.

4. CAPACITY

Summary

The draft access undertaking did not propose a specific capital expenditure program to meet future demand increases, primarily because the facility had only recently been expanded and was considered to have sufficient capacity. Rather, DBCT Management proposed that terminal expansions occur as and when required to meet the needs of users and, in any event, when certain ship and train delay triggers were activated.

In response to user concerns that the proposed delay cost triggers were too uncertain, in its draft decision the Authority sought to include more definitive triggers into the undertaking. However, stakeholders remained concerned that the undertaking's arrangements surrounding terminal expansions were unclear and could, therefore, delay needed expansions.

As a result, in this decision the Authority has sought to include a framework that encourages and facilitates expansion of the terminal. This framework involves the Authority automatically approving the scope of DBCT Management's expansions if:

- the expansion path is consistent with the approved DBCT Master Plan;*
- 60% of the proposed expansion is subject to firm contractual commitments from access seekers; and*
- 60% of existing users (as determined by contracted tonnages), other than those users who have formally committed to the expansion tonnes, do not oppose the expansion.*

In the event that these tests are met, the Authority would need to be satisfied that the expansion costs were efficient before it included them into the asset base.

In the event that the above tests are not met, DBCT Management may apply for the inclusion of capital expenditure in the asset base for the purposes of a capacity expansion but it would not be automatically included. In such a case, the Authority would assess the prudence and efficiency of the proposed expansion as it would under standard regulatory practice.

The Authority also has provided a mechanism to speed up the process for regulatory approval of expansion costs. This involves the Authority approving upfront a tender process for the capital expansion and accepting the resulting expansion costs for inclusion into the asset base provided the tender process was followed.

Given DBCT Management's concerns about the future sustainability of forecast tonnages, the Authority is prepared to undertake that, effectively, once it agrees that new capital expenditure will enter the asset base, it will not seek to optimise that investment in the future or, for that matter, the original DORC valuation by the Authority.

4.1 Determining Terminal Capacity and Expansion Paths

In its draft access undertaking, DBCT Management set out a process for determining terminal capacity. The process first involved DBCT Management taking advice from an independent expert and consulting with access holders, the operator and access seekers and then determining terminal capacity with regard to a number of criteria. The process also allowed access holders to dispute DBCT Management's determination of terminal capacity. The capacity of the terminal, as determined by DBCT Management, will constitute terminal capacity until reassessed. Reassessment of terminal capacity was proposed to occur upon completion of each capacity expansion or, in the absence of a capacity expansion, at DBCT Management's discretion and, in any event, within 5 years of the last assessment.

In its draft decision, the Authority acknowledged that assessing terminal capacity is a complex issue. As a result, rather than prescribing all factors that should be considered in any such assessment, the Authority sought to establish a transparent capacity assessment process. To this extent, the Authority placed obligations on DBCT Management to provide access holders, access seekers and the operator with any independent expert report or advice it receives in relation to determining terminal capacity and to publish its decision making process regarding its determination of capacity.

In terms of expansion paths, the terminal Master Plan guides the development and expansion of the terminal to ensure capacity is sufficient to meet demand. The Master Plan is a requirement of the PSA which requires DBCT Management to develop and submit a Master Plan to Holdings for approval each year in the light of changing circumstances. DBCT Management sought to ensure that the draft access undertaking was consistent with the PSA to the extent that both documents sought to limit DBCT Management's terminal expansion discretions by requiring it to only expand the terminal in accordance with a Master Plan approved by Holdings.

In the draft decision, while the Authority believed that expansions should, in general, be undertaken in accordance with the terminal's Master Plan, the Authority proposed that there should be sufficient flexibility to provide an option in terms of expansion paths and, where appropriate, re-sequencing of expansion stages if this improves the ability of the terminal to meet future, changing demand requirements. To this extent, the Authority proposed that, in the event of a capacity expansion, strict adherence to the Master Plan is not required, should it be deemed more appropriate to undertake a future stage before the next planned stage.

In addition, the Authority also considered it was appropriate that the draft access undertaking include a consultation process whereby DBCT Management would hold meetings not less than twice yearly to consult access holders in good faith regarding: the current capacity and throughput; constraints on current capacity including impact on demurrage costs and access holder transport costs; future contracts/forecasts that may impact on terminal capacity; significant issues relevant to terminal capacity; timing and nature of the next capacity expansion; the impact on current capacity requirements, pricing and the Master Plan; and proposed changes to Terminal Regulations. It was also proposed that a copy of meeting minutes be distributed to all access holders, Holdings and the Authority.

Stakeholder Comments

DBCT Management was supportive of the Authority's draft decision regarding the determination of capacity. In particular, DBCT Management considered that this framework should provide sufficient comfort that sustained impacts on capacity and any resultant requirement for expansion will be identified. Moreover, DBCT Management noted that users also have the ability to dispute terminal capacity so determined (DBCT Management, sub. no. 64: 14).

The DBCT User Group also supported the Authority's requirements for transparency and disclosure of any expert reports. However, the DBCT User Group believed that the Authority had not addressed the frequency of terminal capacity reassessment. Specifically, the DBCT User Group believe the Authority should provide that the terminal be reassessed following the completion of each capacity expansion, upon the occurrence of any event which materially and for sustained periods reduces terminal capacity and, in any event, at least once a year given the various factors that can affect terminal capacity (DBCT User Group, sub. no. 52:10) (DBCT User Group, sub. no. 54: 23, 24).

In regard to the expansion path, DBCT Management agreed that the Authority's approach is sensible but also believed that the Authority's amendment may be in conflict with the PSA. For

instance, DBCT Management noted that the PSA required terminal expansions to be undertaken in accordance with the Master Plan. DBCT Management also noted that, in the event of a dispute, the Authority must make a determination that is consistent with the undertaking. However, if the Authority determined that an expansion stage is appropriate that is not in line with the Master Plan, then DBCT Management suggested that such circumstances could potentially oblige it to breach the PSA (DBCT Management, sub. no. 64: 20).

DBCT Management noted that, if it deems it more appropriate to undertake a future stage of an expansion before the next planned stage, it can submit an amending Master Plan to Holdings (DBCT Management, sub. no. 64: 20).

The DBCT User Group, on the other hand was supportive of the Authority's amendment regarding expansion paths (DBCT User Group, sub. no. 52: 12).

In regard to the Authority's proposed capacity expansion consultation, the DBCT User Group also supported the transparency of the Authority's capacity expansion consultation but also submitted that consultation by DBCT Management to date had been less than comprehensive and not timely. As a result, the DBCT User Group suggested that a KPI be included in the consultation process to ensure that transparency is indeed achieved (DBCT User Group, sub. no. 52: 10).

In contrast, DBCT Management did not make any specific comment in relation to the Authority's capacity expansion consultation process.

Authority's Analysis

The Authority believes that a transparent process for determining terminal capacity is important as it ensures all stakeholders are informed as to how terminal capacity is determined. In this regard, the Authority notes that stakeholders are generally supportive of the Authority's draft decision with respect to determining terminal capacity. To this extent, the Authority will retain its draft decision requirements. However, the Authority agrees with the DBCT User Group that capacity should be reassessed at least once a year to take account of the various factors that may impact on terminal capacity, and after each expansion, or if a capacity expansion has not occurred, at DBCT Management's discretion.

In regard to the Authority's draft decision regarding the terminal's expansion paths, the Authority's intent was to provide flexibility in terms of undertaking future capacity expansions. In particular, the Authority sought to provide for the re-sequencing of expansion stages if this improves the ability of the terminal to meet future demand requirements.

However, the Authority acknowledges DBCT Management's comment that such an arrangement may cause DBCT Management to be in breach of the PSA. The Authority notes that should DBCT Management deem it more appropriate to undertake a future stage of an expansion before the next planned stage, it can submit an amending Master Plan to Holdings for approval. As a result, the Authority will remove its draft decision amendment regarding the terminal's expansion paths.

In terms of the capacity consultation process, the Authority believes that, as customers of the terminal, all access holders should be entitled to be consulted and given the opportunity to provide input on capacity issues. To this extent, the Authority maintains its draft decision requirement that DBCT Management is to consult access holders not less than twice yearly regarding capacity expansion issues. Given that DBCT Management is required to consult in good faith, the Authority believes it unnecessary to include any KPI associated with the consultation process. In addition, in the interests of transparency and clarity, the Authority has maintained its draft decision to require DBCT Management to remove the word "solely" from

clause 10.3(a) of its draft access undertaking and disclose to access seekers, access holders and the Authority its process for so calculating demurrage costs and average net costs to access holders as stated in clause 10.3(a).

In order for the undertaking to be approved, it must be amended to place an obligation on DBCT Management to:

- **disclose its decision making process in relation to its determination of terminal capacity and provide a copy of any independent expert report that DBCT Management receives in relation to determining terminal capacity to access seekers, access holders and the operator;**

and ensure that terminal capacity is reassessed in the following circumstances:

- **upon the completion of each capacity expansion; or**
- **if a capacity expansion has not occurred, at DBCT Management’s discretion, but in any event at least once a year.**
- **include a consultation process whereby DBCT Management will consult not less than twice yearly with access holders in good faith on the following issues:**
 - **current capacity and throughput;**
 - **constraints on current capacity including impact on demurrage costs and access holder transport costs;**
 - **future contracts/forecasts that may impact on terminal capacity;**
 - **significant issues relevant to terminal capacity;**
 - **timing and nature of the next capacity expansion and impact on current capacity requirements, pricing and the Master Plan;**
 - **proposed changes to Terminal Regulations; and**

with a copy of meeting minutes to be distributed to all access holders, Holdings and the Authority.

- **remove the word “solely” from cl.12.4(a);**
- **require DBCT Management to disclose to access seekers, access holders and the Authority the process for determining the cost calculation regarding demurrage and average net costs to access holders as stated in clause 12.4(a) of the draft access undertaking.**

4.2 Capacity Expansion Approval Process

In its draft access undertaking, DBCT Management did not include a capital expenditure program to expand the terminal. Rather, DBCT Management proposed to expand the terminal as per its obligations under the PSA. That is, DBCT Management proposed to expand the terminal as and when required, subject to the expansion not being unreasonable and uneconomic, to accommodate the actual and reasonably anticipated future growth of demand

(DAU, Vol 1: clauses 10.2, 10.4 and 10.5). Moreover, DBCT Management would expand the terminal upon the receipt of a bona fide offer from an access seeker where the proposed new tonnages would otherwise result in a material and sustained increase in demurrage or rail transport costs (DAU, Vol 1: Clause 10.3).

In considering this matter, the Authority shared a number of the concerns of the DBCT User Group relating to whether such a regime would ensure that capacity expansions would occur. First, unlike most other regulatory arrangements, the proposed reference tariffs did not include provision for a capital expenditure program. Second, given that the proposed reference tariffs were based on a price cap, the Authority was concerned that DBCT Management had an incentive to over contract and earn above benchmark returns at the expense of users who would receive a poorer level of service as a result of increased delay costs. Third, in the event that delay costs did increase, the Authority was not convinced that the proposed expansion triggers (based on increased demurrage or rail transport costs) could be effectively activated to ensure that expansions occurred and delay costs were reduced.

Given these concerns, in the draft determination, the Authority sought to amend the access undertaking: first, to include a process to revise the reference tariff, based on expansion costs; and second, to include triggers to signal when a capacity expansion was required. In doing so, the Authority sought to ensure that any amendments to the reference tariffs, within the life of the undertaking, relied upon the Authority exercising its statutory powers, such as approving a draft amending access undertaking (DAAU).

Process to Revise a Reference Tariff

In terms of these process matters, the Authority's draft decision proposed that, in the event that DBCT Management sought to expand the terminal as per its obligations under the PSA or under a capacity trigger in the draft access undertaking, DBCT Management would be required to submit to the Authority a (DAAU) outlining the costs associated with the impending capacity expansion.

The Authority proposed that the DAAU application would relate solely to a request for a revision of the revenue cap and a recalculation of reference tariffs (i.e. the TIC) based on submitted capital expenditure and forecast tonnages associated with the impending capacity expansion. Where the DAAU and expansion costs were approved, the Authority proposed to roll these costs into DBCT Management's asset base with the WACC approved for the relevant regulatory period to apply in calculating the revised TIC.

Triggers for Capacity Expansion

The capacity expansion triggers proposed by DBCT Management in its draft access undertaking were essentially the same as the capacity expansion triggers in the PSA. Specifically, an expansion would be triggered upon receipt of a bona fide offer from a creditworthy access seeker to enter into an access agreement to handle coal for a period in excess of five years. DBCT Management would use its best endeavours to expand the terminal to ensure that the terminal is able to handle the coal without a material and sustained increase in demurrage costs or the average net costs to users of transporting coal to the terminal over any period of three consecutive months (DAU, Vol 1: clause 10.3 (a)).

In its draft decision, the Authority expressed concerns regarding the effectiveness of these proposed triggers. Consequently, the Authority believed it was appropriate to include additional capacity expansion triggers to signal when a capital expansion was required.

As a result, the Authority's draft decision specified that DBCT Management would be required to expand the terminal when either of the following was triggered:

- (a) access seekers have contractually committed to (40% to 60%) of the next capacity expansion; or
- (b) when existing access holders with more than (40% to 60%) of the existing contracted tonnage request a capacity expansion.

The Authority also sought comments on the appropriate percentages for use in the triggers.

Stakeholder Comments

Process to Revise a Reference Tariff

DBCT Management argued that any capacity expansion process should provide for special circumstances, for example, where an expansion may be warranted without additional tonnage commitment if current capacity levels are proving inadequate. Also, there may be occasions where DBCT Management and a minority of users believe an expansion is necessary but such an expansion is not supported by the majority of users. To this extent, DBCT Management argued that the undertaking should allow DBCT Management to submit an amending undertaking at its own discretion (DBCT Management, sub. no. 64: 16).

Moreover, DBCT Management submitted that regardless of what the Authority proposes in terms of capacity expansions, it is essential that DBCT Management's rights and protections under the PSA are not compromised (DBCT Management, sub. no. 64: 8, 9 and 13).

Similarly, the DBCT User Group and Holdings also submitted that the Authority needs to ensure that the PSA process is not impeded by any determination and that DBCT Management's obligations to the Queensland Government under the PSA are not diluted by any provisions of the access undertaking (DBCT User Group, sub. no. 52: 12) (DBCT Holdings, sub. no. 50: 5).

A number of stakeholders, including the DBCT User Group, the Queensland Government and Holdings expressed concerns that the DAAU process might prove lengthy and not result in timely expansions of the terminal.

While supportive of the DAAU process, the DBCT User Group argued that the Authority's approval should generally be sought in advance of the need to expand to ensure that optimal expansion timeframes are met (DBCT User Group, sub. no. 54: 12). Moreover, the DBCT User Group argued DBCT Management should also be required to undertake preliminary planning/approvals to ensure that capacity can be expanded in a timely manner (DBCT User Group, sub. no. 52: 11).

Both Holdings and the Queensland Government submitted that the draft decision provided little guidance as to how the Authority will assess expansion costs proposed by DBCT Management. It was argued that this might not result in timely expansions in the event that the Authority sought changes to DBCT Management's amending access undertaking. Holdings was concerned that this might require DBCT Management to undertake redesign works and resubmit its expansion plans for approval to Holdings and then the Authority. Holdings and the Queensland Government were concerned that it would also require DBCT Management to renegotiate any previous commitments made between itself and the users (DBCT Holdings, sub. no. 50: 6) (Queensland Government, sub. no. 63: 2).

As a result, the Queensland Government suggested that a more appropriate approach may be for the Authority to authorise capital works which it thought supported capacity expansions and

revise the revenue cap and reference tariffs to reflect the approved capital expenditure program over the term of the undertaking (Queensland Government, sub. no. 62: 2).

DBCT Management also commented that the Authority's capacity expansion approval process lacked detail and was unclear as to how the process would work. For example, DBCT Management stated that it was unclear as to whether the approved WACC would be applied to expansions or whether the WACC would be reset to account for the prevailing risk free rate at the time expansion capital was raised (DBCT Management, sub. no. 64: 12, 19).

On the other hand, the DBCT User Group were unclear about when the recalculation of the reference tariff following a capacity expansion would apply, suggesting it be effective only from the completion and commissioning of the expansion works and handover to the operator (DBCT User Group, sub. no.54: 24).

DBCT Management also submitted that, whatever the expansion triggers, DBCT Management should not be obliged by the access undertaking to fund future capacity expansions. DBCT Management argues that, while it has certain obligations to fund expansions under the PSA, those obligations cannot be mirrored in the undertaking if the undertaking is to remain consistent with the QCA Act (DBCT Management, sub. no. 64: 19).

Specifically, DBCT Management argued that the amendments the Authority proposed to the draft access undertaking could be interpreted to require DBCT Management, as access provider, to extend the terminal and pay the costs of extending the facility. Moreover, given that the s119(2)(c) of the QCA Act states that the Authority must not make an access determination that would have the effect of requiring an access provider to pay some or all of the costs of extending the facility, DBCT Management argue the Authority's provisions could create an inconsistency between the access undertaking and s119 (5)(c) of the QCA Act.

Other stakeholders, such as Ergon Energy (Ergon), submitted that the Authority appeared to be applying a rate of return form of regulation to DBCT Management in relation to approving capital expenditure. Ergon further argued that the Authority has taken the discretion away from DBCT Management for investment decisions allowing only prospective access seekers who commit to a set percentage of a capacity expansion or large existing access holders to instigate a capacity expansion expenditure (Ergon Energy sub. no. 56: 7).

Moreover, Ergon submitted that that the process set out by the Authority for approving capital projects may be unworkable in practice for DBCT Management. This is because, under the Authority's proposal, DBCT Management would be required to commit to undertake a capacity expansion (initiated by a prospective access seeker or an existing access holder) when it submits a revised access undertaking to the Authority. Ergon Energy submitted that under the Authority's proposed process, because the Authority will approve the allowed reference tariff, DBCT Management will not know the revenue it will be able to recover from users until after the Authority has approved the revised access undertaking. Ergon argued that means DBCT Management will need to commit to a project without knowing whether it will adequately recover its costs (Ergon Energy sub. no. 56: 8, 9).

Triggers for Capacity Expansion

In response to the Authority's draft decision, DBCT Management submitted that they were prepared to commit to clear capacity expansion triggers to provide all stakeholders with a high degree of certainty regarding the availability of future access. However, at the same time, DBCT Management noted the difficulty associated with specifying capacity triggers and noting that no capacity trigger will be perfect (DBCT Management, sub. no. 64: 12).

While not putting forward any specific proposals, DBCT Management made the following comments in relation to the Authority's proposed capacity expansion triggers:

- capacity expansion trigger thresholds are difficult to set and there is no one correct answer to setting the expansion trigger threshold;
- only contractual commitments from users should be recognised in triggering a capacity expansion, therefore the second capacity trigger proposed by the Authority is inappropriate in its current form; and
- if the second trigger is retained, it should be set at a high level, such as 80%. The logic being that, should a capacity expansion be required to relieve congestion at DBCT, DBCT Management believe this would be to the benefit of all users and, as such, it is likely that a high percentage of users would be in agreement to the expansion; and
- it is unclear whether the Authority's proposed expansion triggers are aimed at starting a process to determine whether an expansion is needed or whether the triggers are absolute so that once triggered an expansion goes ahead without any further discussion of the merits (DBCT Management, sub. no. 64: 12, 13).

Moreover, to the extent more specific capacity expansion triggers can be developed for the undertaking, DBCT Management suggests that the triggers set out in clause 10.3 of the draft access undertaking would be redundant. DBCT Management argues these triggers would still apply to DBCT Management under the PSA, hence DBCT Management argue it may not be necessary to also include them in the access undertaking (DBCT Management, sub. no. 64: 17).

In terms of specific comments on the Authority's capacity expansion triggers, the DBCT User Group submitted that the expansion trigger thresholds be both be set at 50%, but that these triggers should not preclude capacity expansions being committed at lesser figures in other appropriate circumstances (the DBCT User Group did not define these circumstances) (DBCT User Group, sub. no 52:11).

Authority's Analysis

Unlike most other regulatory arrangements, DBCT Management did not submit a capital expenditure program to underpin future capacity expansions at the terminal. The draft access undertaking did, however, indicate that DBCT Management would expand the terminal as and when required and on the basis of two expansions triggers (based on increased demurrage or rail transport costs) that were copied from the PSA.

In examining this framework, the Authority was not convinced that the proposed expansion triggers could be effectively activated to ensure that expansions occurred and delay costs were reduced. As a result, in its draft decision, the Authority sought to include a process to revise and approve reference tariffs based on expansion costs. In doing so, the Authority was seeking to introduce effective triggers within a framework that relied upon the Authority exercising its statutory functions, such as approving a DAAU.

Despite this, stakeholders criticised the Authority for a range of reasons, including that:

- (a) it was seeking to limit the circumstances in which an expansion would take place;
- (b) it was seeking to dilute the provisions of the PSA;
- (c) its proposals lacked detail and would further delay necessary expansions;

- (d) it was seeking to introduce rate of return regulation; and
- (e) access seekers would not know with any certainty the access charge at the time that they were being required to finalise an access agreement.

The Authority considers that much of this criticism is unjustified and not particularly helpful as, in general, stakeholders themselves did not suggest remedies for the problems they identified. For purposes of clarity, though, the Authority has decided to deal with each of these matters in turn.

First, in introducing two expansion triggers within a reference tariff framework, the Authority did not seek to constrain Holdings' or DBCT Management's ability to approach the Authority in any other circumstances to seek approval of capital expenditure to undertake an expansion. Rather, the Authority sought to introduce binding and definitive triggers into the undertaking as a fall back position in the event that DBCT Management had proven unwilling to expand the terminal. Moreover, the QCA Act provides Holdings with the discretion to seek an amendment to the undertaking at any time and there is nothing in the draft access undertaking, or in the Authority's proposed amendments, that seeks to constrain this right.

Second, the Authority does not believe that it has diluted the provisions of the PSA by seeking to introduce binding or definitive triggers into the undertaking or in requiring clauses that also appear in the PSA to be deleted from the draft access undertaking. The PSA is a binding contract between Holdings and the lessee and an approved access undertaking cannot over-ride existing contracts.

Third, the Authority accepts that its proposals lacked detail. However, the arrangements in the submitted draft access undertaking, and in the PSA, did not contain superior detail and this was not an issue that stakeholders were particularly concerned about in the initial round of submissions in September 2003. Furthermore, the Authority's proposals were introduced as a fall back position, as a remedy for a set of circumstances where DBCT Management prove unwilling to expand the terminal.

In response, the Authority is proposing more detailed processes to facilitate the approval of capital expenditure, including a mechanism to approve capital expenditure along the lines of the tender approval request provisions in the Gas Code in order to streamline the expansion and regulatory approval processes. Details on each of these matters are set out below.

Fourth, the Authority rejects the notion that it is seeking to introduce rate of return regulation. Rather, it is reacting to a situation where the access provider did not submit and was not supportive of an upfront capital expenditure program. In the absence of such a program, it is reasonable for the Authority to indicate its willingness to assess capital expenditure proposals as and when they are required. This approach provides access seekers with some assurance on the future access charge. This approach also gives the access provider some assurance that it will earn a reasonable return on its investment.

Fifth, the Authority accepts that access seekers might not know the future access charge at the time they enter and/or conclude their access negotiations with DBCT Management. However, the Authority has not been provided with a proposed capital expenditure program. As a result, it is inevitable that there is some uncertainty surrounding future reference tariffs. All stakeholders, including the Authority, would welcome DBCT Management's and Holdings' finalised Master Plan 2005 and for them to bring a capital expenditure program to the Authority at the earliest opportunity. The Authority understands that this work is well advanced. In any event, the Authority has sought to include within the undertaking provision for DBCT Management to seek the Authority's approval of an indicative reference tariff based on an assessment of forecast capital expenditure (see below for further detail).

Regulatory Capacity Expansion Approval Process

As mentioned above, the Authority accepts that its proposed trigger events and capacity expansion approval process lacked detail. However, it was expected that stakeholder responses to the draft decision would have helped to flesh out the detail of the process. The Authority also accepts DBCT Management's concerns that the draft capacity expansion triggers could be interpreted as requiring DBCT Management, as access provider, to extend the terminal and pay the costs of extending the facility. DBCT Management argues that such an outcome would be inconsistent with the QCA Act which does not provide for the access provider to fund extensions to the terminal.

While the Authority notes that the PSA contains an obligation for DBCT Management to fund and pay for the costs of terminal expansions, the Authority accepts that the QCA Act does not provide it with the same powers. Consequently, rather than seeking to include definitive triggers into the undertaking compelling DBCT Management to expand the terminal under defined circumstances, the Authority believes it is more appropriate for it to seek to include in the undertaking a framework that encourages and facilitates the expansion of the terminal as and when required.

However, this does not mean that DBCT Management is free to sit on the existing capacity and not expand the facility. In the event of a dispute with an access seeker, the QCA Act still provides for the Authority to make a determination requiring the terminal to be extended, provided it is not at the cost of DBCT Management. Moreover, Holdings could seek to exercise its rights under the PSA to also require DBCT Management to expand the terminal.

In this regard, the Authority proposes to provide an approval framework that sets out the conditions under which the Authority will approve a capacity expansion and the associated capital expenditures.

A key issue of concern to DBCT Management when considering expansions is the rate of return it will earn on the proposed capital expansion and any associated risk of optimisation that such capital investment faces in future years. While the Authority's positions on these issues are detailed elsewhere in this decision, it is important to note that, by approving a 9.02% WACC (to be adjusted only for the risk free rate at the date of the effective completion of the expansion) the Authority is of the view that it has provided sufficient incentive for DBCT Management to expand the terminal to meet user demand. Moreover, the Authority considers such a rate of return should remove any regulatory impediment to expanding the terminal.

In the event DBCT Management decides to expand the terminal, the Authority believes there are three key aspects of any expansion program, namely:

- (a) the scope of a capacity expansion;
- (b) future optimisation; and
- (c) the costs associated with a capacity expansion.

The Authority will deal with each of these three matters and its approach to addressing the regulatory uncertainties in turn.

Approval of Capacity Expansion Scope

The scope of the works to be undertaken as part of any terminal expansion is largely comprised of two elements; first, the expansion path or the nature of the stages of the works to be undertaken, and second, the timing of the various stages of the expansion path.

In terms of the expansion path, from a regulatory approval perspective, the question is whether all reasonable options have been considered and whether the right works have been selected from these options.

In this respect, DBCT Management has a legal obligation under the PSA to only expand the terminal in accordance with its approved Master Plan which deals with, amongst other things, the terminal expansion path. The PSA requires DBCT Management to prepare a Master Plan annually and to submit it to Holdings for its approval.

While the Authority must be satisfied that expansion costs are efficient, it also accepts that the expansions must be timely and that delays may occur if assessments and approvals of the expansion paths were duplicated.

Consequently, the Authority is prepared to accept the terminal expansion path proposed provided that the then current Master Plan contains a single detailed expansion path and that DBCT Management's proposed expansion works are consistent with that Master Plan.

The second main element of the Authority's approval of the scope of the work contained in a capacity expansion proposal relates to the extent of the expansion works. That is, how far down the expansion path is prudent given the likely future demands for the terminal's services. For example, in the current context, the terminal has a capacity of 56 mtpa and has contracts signed necessitating it to expand to 60 mtpa. However, beyond that, the question remains whether the terminal should be expanded to 65 mtpa, 75 mtpa, or 85 mtpa or indeed at some other level between these marks.

For DBCT Management, the market uncertainties relate to the likely future demand for the terminal's services and the optimisation risks if forecast demand are not realised. These demand uncertainties include both the likely growth in new demand as well as demand from existing users on contracts expiring in the medium term.

In terms of the demand uncertainties, terminal users and future access seekers are in the best place to assist DBCT Management and the regulatory process to assess the need for future capacity requirements. Guidance on these matters will also assist arrangements to limit future optimisations which represent a significant disincentive to commit to future terminal expansions.

To facilitate a resolution of these demand and regulatory uncertainties, the Authority has revised its two draft expansion triggers. Rather than setting out the circumstances in which expansions must occur, the Authority believes that similar triggers can be used to manage the demand and regulatory uncertainties faced by DBCT Management. More specifically, the Authority will automatically approve the scope of DBCT Management's expansion if:

- (i) 60% of the proposed expansion is subject to firm contractual commitments from access seekers; and
- (ii) 60% of existing users (as determined by contracted tonnages), excluding those users who have provided the firm commitments that necessitated the proposed expansion, do not oppose the expansion.

The Authority believes that these triggers will assist the regulatory process as they bring users and access seekers into the regulatory decision making framework in such a way that, if they demonstrably are in favour of the proposed expansion, then the regulatory process should simply and quickly confirm the commercial requirements of the parties.

The Authority has also provided a mechanism to speed up the regulatory process for the approval of capital expenditure costs through the Authority approving, upfront, a tender process for the capital expansion. The Authority will automatically accept the resulting expansion costs for inclusion into the asset base if DBCT Management can demonstrate it has complied with the approved tender process (see section on regulatory approval of capital expenditure).

The Authority believes that the 60% trigger under contract for proposed expansions is reasonable as it provides for an efficient approval process where the majority of the required capacity expansion has already been sold. On its own, this trigger is unlikely to result in any significant excess capacity at the terminal as the terminal is already mature and it is likely that any future expansions stages will be in the order of 5 mtpa to 10 mtpa.

If the uncontracted portion of the expansion remains uncontracted, the likely future excess capacity at the terminal will then be in the order of 2 mtpa to 4 mtpa. Any excess capacity of this magnitude would be very low for a terminal with a capacity in the range of 60 mtpa to 80 mtpa. Possessing some low degree of excess capacity would also be consistent with the reported comments of the users which have argued that facilities such as DBCT should possess surge capacity in order to allow the industry to take advantage of unforeseen demand spikes or to allow the terminal to recover in circumstances where stoppages, somewhere in the coal supply chain, have temporarily impaired in-loading or out-loading activities.

While the Authority believes that these processes will assist the assessment of the scope of future expansions, the Authority believes there is already significant concerns about the current in-loading capacity. Given these concerns, the Authority has determined to include in the regulated asset base the efficient cost of the works needed to increase rail in-loading capacity, if such works are submitted to the Authority.

To the extent that a proposed expansion was in excess of necessary capacity, including reasonable excess capacity, the Authority would set it aside. In other words, should DBCT Management choose to expand the terminal beyond a level the Authority believes was prudent given its view of future demand, the associated assets would be excluded from the regulated asset base. The assets would only be included into the asset base (at a value rolled forward at WACC) once demand had reached a level that meant the previously unutilised capacity was now utilised.

Where expansions do not automatically qualify for inclusion into the asset base, the Authority would assess the proposed expansion in the same manner as it would assess an upfront capital expenditure program at the start of a regulatory period. That is, the Authority will consider the prudence and efficiency of the proposed expansion.

The Authority also believes that it would provide stakeholders with greater certainty if a form of ‘pre-approval’ of a reference tariff is done in the case of a capacity expansion. This could be done by DBCT Management submitting, following a decision to expand, but well in advance of commissioning of new capacity, its estimated costs for the expansion. The Authority could assess these forecast costs and provide advice on giving an ‘indicative reference tariff’. DBCT Management also has the ability to seek the Authority’s approval of reference tariffs as set out above.

Future Optimisations

The Authority recognises that the level of excess capacity may change if the terminal is expanded to meet a forecast increase in demand that proves unsustainable as existing users decline to agree to new contracts when the existing contracts expire.

The Authority believes that the second trigger will assist in such circumstances as it will provide existing users with a formal mechanism to be involved in the decision making process. This will be important as capacity expansions have the potential to impact on all users both through the service levels the terminal delivers and also through the prices users pay. Irrespective of whether a user agrees to the average cost pricing mechanism as set out in Chapter 7 of this decision, existing contracts will expire and all new contracts will have to fund any expanded capacity. The level of those future prices will, in part, depend on the level of excess capacity that may eventuate in the medium term.

However, as argued by DBCT Management, up-front agreements by users to capacity expansions are unlikely, on their own, to provide sufficient long term security to DBCT Management that it will be able to recover its investments in future capacity expansions. While the revenue cap provides some security that DBCT Management will earn a reasonable return on its investments, this assurance is only for the term of an undertaking. DBCT Management argued that it was seeking further, long term assurances that its investments would not be optimised. One suggestion being that access seekers commit to long term take or pay contracts (ie 20 years).

While the Authority recognises that such long term take or pay contracts are usual for other infrastructure industries (eg gas transmission), the Authority also understands that this would be unusual for the coal industry where this has not been the historical practice and where individual mine lives are likely to be less than this. In this context, the Authority is prepared to undertake that, once it agrees that new capital expenditure will enter the asset base, it will not seek to optimise that investment in the future.

There are three provisos to this. First, if the Authority made its initial decision to include the investment into the asset base on the basis of information provided by DBCT Management that DBCT Management knew to be false or misleading at the time it provided the information. Second, if circumstances arise in the future where demand has deteriorated to such an extent that regulated prices on an unoptimised asset would only further serve to exacerbate the decline in demand and the associated revenue impacts for DBCT Management. Third, there may also be a need for reconsideration if it subsequently became clear that there was a possibility of actual (not hypothetical) by-pass. In the latter two circumstances, DBCT Management would probably choose to reduce prices in order to maintain revenues and, therefore, any such optimisation would be unlikely to alter the returns earned, but it would formalise the situation.

Regulatory Approval of Capital Expenditure

As outlined above, the Authority has set out a process whereby a significant number of elements of a capacity expansion can be resolved before any application to amend the reference tariff is lodged with the Authority. These matters include the WACC post expansion, the scale and scope of the planned expansion works and the Authority's undertaking on optimisation risks. The only major matter that is therefore left unresolved is the approval process for the cost of the capacity expansion.

The traditional approach adopted by the Authority and other Australian regulators to the approval of capital expenditure has been a two stage process. First, the Authority conducts an upfront assessment of the proposed capital expenditure program with the forecast, prudent capital expenditures being included in the initial determination of the reference tariffs. Second, at the end of that term of the undertaking, or regulatory period, the Authority assesses the efficiency of the past capital expenditure program and includes into the asset base all efficiently incurred actual capital expenditure.

This approach has largely been adopted when access providers include a capital expenditure program in their initial reference tariff proposal and when the assessment of the prudence of the

capital expenditure program occurs at the same time as the Authority assesses the other aspects of the reference tariff and undertaking. As a result, the capital expenditure assessment process does not result in any delays to the timely expansion of the facility. However, the regulated entity is only compensated for prudent investments actually undertaken.

While the Authority accepts that this is not the current situation with DBCT, the Authority believes that an approval process for future capacity expansions at the terminal need not be elongated, as the aforementioned framework seeks to resolve a number of important matters upfront. Consequently, the scope for future disputes between stakeholders is constrained and any capital expansion works need not wait to be commenced until regulatory approval has been finalised.

Nevertheless, the Authority believes there is scope to further streamline the regulatory approval processes with the expansion design and construction processes. In other circumstances, such as the capital costs for the rail spur to the Hail Creek coal mine, the Authority accepted the final tendered costs subject to a demonstration that the tender process was competitive and that the proposed costs were related solely to providing the regulated service. The outcome of that process was not unlike those provisions in the Gas Code that provide for a regulator to approve, upfront, the tender process and to simply accept the actual expansion costs if it can be subsequently demonstrated that the approved tender process was complied with.

In the current context, this option would allow DBCT Management to continue its expansion design work and to simultaneously develop its tender documents for capital works without first having to wait for the Authority to approve the forecast expenditure. It would also allow the reference tariff to be adjusted based on the actual outcome of the tender, thereby minimising any end of period adjustments due to discrepancies between forecast and actual capital expenditure.

This process would involve DBCT Management first obtaining the approval of the Authority for its proposed tender process. That is, DBCT Management would submit a tender approval request to the Authority specifying how the tender will be conducted (i.e. rules, selection criteria to be used in choosing tenderers, etc). The Authority would then publish the tender process documents and seek stakeholder comments. The Authority would decide whether or not to approve DBCT Management's tender approval request.

Once approved, DBCT Management would then conduct the tender process and choose a tenderer. DBCT Management would be required to submit the outcome of the tender process to the Authority for final approval. Before granting final approval, the Authority must be satisfied that the tender process proposed was followed, that the successful tenderer was selected in accordance with the criteria set out in the tender approval request and that any cost variation from tendered amounts (eg contract variations) are reasonable. Once final approval is granted, the Authority will accept the proposed capacity expansion costs as reasonable and economic and roll them into the asset base and recalculate the TIC once the expansion works are completed and capacity is commissioned.

In order for the undertaking to be approved, it should be amended to:

- **include a regulatory capacity expansion approval process. This process should provide that:**
 - (a) **If DBCT Management decides to expand the terminal, it must submit an application to the Authority for approval of the scope of the capacity expansion and the expansion costs. DBCT Management’s application must detail:**
 - (i) **the scope of the expansion to be undertaken and its relationship to the current Master Plan; and**
 - (ii) **the forecasted costs associated with the capacity expansion. DBCT Management may submit its own forecasted capacity expansion costs or capacity expansion costs that result from a tender process.**
 - (b) **The Authority will automatically approve the scope of a capacity expansion provided that:**
 - (i) **the scope of the capacity expansion is consistent with the Master Plan, provided it contains a single detailed expansion path;**
 - (ii) **DBCT Management secures contracts for at least 60% of the proposed capacity increment; and**
 - (iii) **if 60% of existing Access Holders (as determined by annual contracted tonnages), excluding those Access Holders who have provided the firm commitments that necessitated the proposed expansion, do not oppose the expansion.**
 - (c) **In the event that the conditions in (b) above are not met, the Authority will undertake its own assessment of the scope of the Capacity Expansion, in consultation with DBCT Management, access holders and other stakeholders.**
 - (d) **In applying for the approval of forecasted capacity expansion costs in accordance with (a) ii above, DBCT Management may either:**
 - (i) **apply to the Authority for a pre-approval of capacity expansion costs; or**
 - (ii) **lodge with the Authority, a Tender Approval Request (TAR).**
 - (e) **The Authority will approve the costs associated with a proposed capacity expansion if it is satisfied that:**
 - (i) **the capacity expansion costs are prudent and efficient; or**
 - (ii) **if DBCT Management has demonstrated that the capacity expansion costs are the result of a tender process as set out under the Tender Approval Request provisions of the undertaking.**
 - (f) **If the Authority approves the expansion costs, the Authority will give**

- DBCT Management a notice in writing containing:**
- (i) the Authority’s pre-approval;**
 - (ii) the resultant indicative reference tariff;**
 - (iii) a requirement for DBCT Management to submit a draft amending access undertaking in accordance with Part 11 of this undertaking upon the completion and commissioning of the capacity expansion indicating the actual costs of the capacity expansion;**
 - (iv) a requirement to publish the indicative reference tariff and advise relevant access holders of the indicative reference tariff.**
- (g) If the Authority refuses to pre-approve DBCT Management’s capacity expansion costs, the Authority will give DBCT Management a notice in writing stating:**
- (i) the reasons for its refusal; and**
 - (ii) the quantum of costs the Authority considers economic and reasonable.**
- **include a Tender Approval Request (TAR) process. This process must include:**
 - (a) a Tender Approval Request application which details:**
 - (i) the proposed expansion;**
 - (ii) the process to be followed in conducting the tender including the minimum requirements a tenderer must meet (eg no conflict of interest); and**
 - (iii) the selection criteria to be applied in selecting the tenderer.**
 - (b) the Authority’s process for approving a TAR. This will require the Authority to:**
 - (i) publish a request for submissions after receiving a TAR;**
 - (ii) make a decision to approve or not to approve the TAR;**
 - (iii) if the Authority approves the TAR, DBCT Management must conduct the tender and DBCT Management may then make a final approval request (FAR);**
 - (iv) on receipt of a FAR, the Authority must approve the FAR if the successful tenderer was selected in accordance with the rules/procedures specified in the TAR;**
 - (v) upon approval of the FAR, the Authority will give DBCT Management a notice in writing containing:**
 - (i) a statement that the Authority will accept the costs of the**

- tender as prudent and efficient;**
- (ii) the resultant indicative reference tariff.**
 - (iii) a requirement for DBCT Management to submit a draft amending access undertaking in accordance with Part 11 of this undertaking upon the completion and commissioning of the capacity expansion indicating the actual costs of the capacity expansion; and**
 - (iv) a requirement to publish the indicative Reference tariff and advise relevant access holders of the indicative reference tariff.**
 - (vi) if the Authority refuses to approve the TAR, the Authority will give DBCT Management a notice in writing stating:**
 - (i) the reasons for its refusal;**
 - (ii) the way in which the Authority considers it appropriate to amend the TAR.**

4.3 Funding Expansions and Unreasonable and Uneconomic Expansions

In its draft access undertaking, DBCT Management stated that it would not expand the terminal if a capacity expansion is deemed to be unreasonable and uneconomic (DAU, Vol 1: clause 10.4).

Specifically, DBCT Management defined unreasonable and uneconomic to be a situation where the Authority declines to include the expansion costs as part of DBCT Management’s cost base for the purposes of determining access charges or where the Authority declines to make any decision, and DBCT Management has not agreed an alternative arrangement for funding the capacity expansion with an access seeker such that the capacity expansion has become reasonable and commercially justifiable without increasing access charges paid by access holders (DAU, Vol. 1: clause 10. 4 and 10.5 (a)).

In its draft decision, the Authority noted that the unreasonable capacity expansion clause (DAU, Vol. 1: clause 10.4) of the draft access undertaking is largely consistent with the clause in the PSA. However, clause 10.5(a) of the draft access undertaking, which seeks to define the terms ‘unreasonable’ and ‘uneconomic’, does not appear within the PSA and is in addition to DBCT Management’s obligations within the PSA. The Authority understands that DBCT Management inserted clause 10.5(a) into the DAU to define situations in which DBCT Management considers an expansion to be unreasonable and uneconomic.

To this extent, in its draft decision, the Authority considered that clause 10.5 (a) was an addition to the primary lessee’s obligations in the PSA. Moreover, the Authority indicated that both clause 10.4 and 10.5(a) largely deal with the primary lessee’s obligations in the PSA and, to some extent, a clarification of those obligations and neither clause 10.4 or 10.5 (a) seem to be particularly drafted to the context in which a matter is raised between DBCT Management and the Authority. Moreover, those clauses do not seek to involve the Authority exercising a relevant statutory power, whether it is approving a draft amending access undertaking or making an access determination in the event of a dispute. As a result, the Authority decided that clauses 10.4 and 10.5(a) should be deleted.

The Authority also stated in the draft decision that, given the nature of the terminal as a multi-user terminal, it would be inappropriate to recover the incremental costs of capacity expansions only from the incremental users/tonnes. As a result, the Authority agreed with stakeholders, that expansion costs should be shared on an average cost basis, with the TIC applying to each access holder. This would involve recalculating the TIC upon a terminal expansion to take into account the cost of existing and expanded capacity.

The Authority acknowledged this proposal would require renegotiating the existing user agreements.

Stakeholder Comments

DBCT Management believed the draft decision should be amended to explicitly allow DBCT Management not to submit an amending undertaking if DBCT Management considered an expansion to be unreasonable and uneconomic or otherwise not in DBCT Management's commercial interests after advising the Authority of its reasons (DBCT Management, sub. no. 64: 19).

In terms of average cost pricing, DBCT Management agreed with the Authority that a common charge applying between current and future users would require the agreement of all current users to amend the existing user agreements (DBCT Management, sub. no. 72: 8). DBCT Management stated that it senses the majority of existing users believe an appropriate amendment to the current user agreements to incorporate the average cost approach is in all parties' best interest (DBCT Management, sub. no. 72: 8).

The DBCT User Group expressly supported the principle that the costs of expansion should be recovered from all users on an average cost basis. The DBCT User Group noted that this will require an amendment to the existing user agreements to ensure that this principle operates universally, that is, whether the incremental costs of expansion cause an increase or decrease in average costs. The DBCT User Group also submitted that changes to the existing user contracts should logically occur when the outcome of the current price review under the existing agreements is finalised (DBCT User Group, sub. no. 52: 11).

The DBCT User Group further stated they are not aware of the terms of the new users agreements recently concluded between DBCT Management and the two new users who are not presently users of the terminal. However, they would see considerable difficulties if those new agreements could not also be amended to similar effect as this could mean that two levels of tariffs would apply (DBCT User Group, sub. no. 52: 11).

Further, the DBCT User Group argued that any agreement to average pricing heightens the need for meaningful user participation in expansion decisions. Any average price passed on to access holders must be one that is approved by the Authority (DBCT User Group, sub. no. 52: 11).

Holdings also considered that the cost of expansions should be shared on an average cost basis. Holdings notes that, while the Authority stated in its draft decision that an average cost pricing arrangement would require renegotiating existing user agreements, Holdings is concerned that the Authority has not considered the situation where all existing users do not agree on the application of an average cost approach. Holdings pointed out that, if just one user refuses to renegotiate the existing user agreements, future expansions could be potentially held up and the incremental user could be forced to underwrite the full cost of the proposed expansion (DBCT Holdings, sub. no. 50: 5).

Holdings also believed that an incremental pricing approach will impact on the ability for new entrants to the coal industry to obtain throughput capacity at DBCT and thus current users could potentially make new entrants to the industry bear the full cost of expansion should they elect to

support an expansion plan which provides for their needs alone (DBCT Holdings, sub. no. 50: 7).

Authority's Analysis

In its draft decision, the Authority considered that clause 10.4 of DBCT Management's draft access undertaking dealt with issues that were not drafted to the context in which a matter is raised between DBCT Management and the Authority. Moreover, the Authority believes that clause 10.5(a) of DBCT Management's draft access undertaking was an addition to the primary lessee's obligations in the PSA. In addition, neither clause 10.4 or 10.5 (a) relates to the Authority exercising a relevant statutory power, whether it is approving a draft amending access undertaking or making an access determination in the event of a dispute. To this extent, the Authority maintains its draft decision that clauses 10.4 and 10.5(a) should be deleted.

However, the Authority maintained clause 10.5(b) of draft access undertaking in its draft decision because it was largely consistent with the clause in the PSA. The clause provided DBCT Management with an option to write to Holdings to obtain a delay or modification to an expansion if DBCT Management considered a capacity expansion unreasonable or uneconomic. In the draft decision, the Authority sought to impose forced expansion triggers seeking DBCT Management to expand the terminal. However, as mentioned earlier, the Authority has sought to include in the undertaking a framework to encourage and facilitate needed efficient expansions. The Authority therefore considers that, in this context, clause 10.5(b) and 10.5(c) no longer involves the Authority exercising a relevant statutory power, whether it is approving a draft amending access undertaking or making an access determination in the event of a dispute. As a result, the Authority believes clause 10.5 of DBCT Management's draft access undertaking should also be deleted.

In terms of average cost pricing, the Authority continues to support this approach (see Chapter 7 of this decision for more details).

In order for the undertaking to be approved, it should be amended to ensure that:

- **clauses 10.4 and 10.5 of the draft access undertaking are deleted.**

5. OPERATIONAL ISSUES

Summary

At DBCT, the Terminal Regulations are the key operational rules that govern the procedures for receiving, handling and loading coal. The Authority has assessed these arrangements with a view to ensuring they do not serve to hinder access or discriminate between users. On the basis of this assessment, the Authority is not requiring amendments to the Terminal Regulations but it is requiring amendments to the undertaking in relation to the processes associated with amending the Terminal Regulations. The Authority has sought to ensure that the framework governing changes to the Terminal Regulations is sufficiently flexible to allow reasonably necessary changes in the event of an emergency at the terminal.

Another key element of an access regime is reporting of the access provider's performance in terms of service quality and compliance with the undertaking. The Authority has proposed a range of indicators on which DBCT Management must publicly report in order to provide a more transparent access regime. The Authority requires that DBCT Management also report certain information to the Authority in the form of regulatory accounts to allow the Authority to monitor elements of the regulatory regime.

5.1 Operational Arrangements

The operational arrangements which govern the day-to-day operation of the terminal are established in the Operation and Maintenance Contract (OMC), existing access (user) agreements and the Terminal Regulations. The draft access undertaking proposes the continuation of these arrangements. As these operational matters pertain to the terms and conditions of access to the declared service, they are relevant factors in assessing the access regime.

The declaration under Part 5 of the QCA Act for third party access is of the coal handling service at the terminal by the terminal operator. While Holdings is the terminal owner, the provision of the coal handling service is by DBCT Management and the Operator, DBCT P/L. DBCT Management is responsible for providing capacity and is the access provider under an access agreement. However, the coal handling service is provided on a day-to-day basis by the Operator under the terms of the OMC.

These operational arrangements, as established in the following documents, are explained in greater detail in the Authority's Draft decision. A brief summary is provided below.

Operation and Maintenance Contract

The OMC is the contract between DBCT Management and the Operator which establishes the Operator's responsibility for the day-to-day operation and maintenance of the terminal. In particular, it specifies, among other things, that the Operator must undertake the performance of services in accordance with an agreed specification and good operating and maintenance practice. It must also ensure that the terminal is operated in a reliable and efficient manner.

Further, the OMC provides that, with the consent of DBCT Management, the Operator may establish Terminal Regulations for the convenient operation and maintenance of the terminal. It may also require that a user observe the Terminal Regulations as a condition of access to the terminal. DBCT Management commits to include in user agreements an acknowledgement by users that the provision of services by the Operator will be subject to any applicable Terminal Regulations.

Access (User) Agreements

Access rights and obligations of both the access provider and access holder are set out in access, or user, agreements. In terms of operational arrangements, the current user agreements provide, among other things, that the user agrees that the Operator may, with the consent of DBCT Management, establish and amend Terminal Regulations for the convenient operation and maintenance of the terminal and that the customer must observe them as a condition of access. They also provide that DBCT Management must undertake reasonable consultation with customers before consenting to establishing or amending Terminal Regulations. Also, DBCT Management must only consent to Terminal Regulations if it reasonably considers that, as a whole, they operate equitably among customers, having had regard to (among other things) their respective annual contract tonnages. The agreements set out the range of matters that may be covered in the Terminal Regulations.

In terms of future access agreements, once the undertaking is approved, the negotiation of access agreements will be subject to the terms of the undertaking. The draft access undertaking currently does not include a standard access agreement, but rather includes principles to guide the development of a standard access agreement (Schedule B). DBCT Management commits to submit a standard access agreement for approval within three months of the approval of the undertaking.

Terminal Regulations

Terminal Regulations have been developed by the Operator and, in accordance with the terms of existing access agreements, all users of the terminal must comply with them. They comprise a comprehensive set of arrangements that cover the full range of operational matters applying to the handling of coal at the terminal, from receipt of coal by rail to shiploading.

5.2 Terminal Regulations

The current Terminal Regulations are included as a schedule to the draft access undertaking (Schedule E). However, the Terminal Regulations are defined as those ‘in force from time to time’. This suggests, although it is not entirely clear, that the Terminal Regulations could be amended during the term without the submission of a draft amending undertaking.

The Authority considered that the status of the Terminal Regulations under the undertaking should be clarified. Accordingly, it recommended in the draft decision that the Terminal Regulations be deleted from the undertaking to clarify that they are not part of the undertaking and, therefore, the Authority is not approving the terms of the current Terminal Regulations. Further, this would clarify that they may be amended without submitting a draft amending undertaking – an approach that allows greater flexibility, in line with stakeholder preferences.

However, the Authority considered that the 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.

Accordingly, the Authority has sought to protect the interests of current and potential users by including an obligation to consult on proposed changes to the Terminal Regulations and providing a right to dispute any proposed changes. The Authority has also sought to impose more balanced obligations to comply with the Terminal Regulations on DBCT Management and users.

The elements of the framework governing the Terminal Regulations proposed by the Authority are:

- an obligation on DBCT Management to comply with, or ensure the Operator complies with, the Terminal Regulations in force from time to time;
- an obligation on DBCT Management to undertake reasonable consultation with access seekers and access holders prior to implementing or consenting to any proposed changes to the Terminal Regulations;
- the ability for access seekers and access holders to notify a dispute about any proposed changes to the Terminal Regulations under clause 5.8 of the undertaking or under the dispute resolution provisions of an access agreement, respectively. DBCT Management must not implement a proposed amendment until the outcome of any dispute has been determined;
- an obligation on DBCT Management to notify the Authority and current access seekers and access holders of amended Terminal Regulations and to provide a copy of the amended Terminal Regulations to them;
- an obligation on DBCT Management to use its best endeavours to ensure the Operator applies the Terminal Regulations in a manner that does not prevent or hinder a user's access to the terminal; and
- an acknowledgement by DBCT Management that a failure to comply with the above obligation will amount to conduct which itself constitutes prevention or hindering of a user's access to the terminal for the purpose of ss.104 and 125 of the QCA Act.

Stakeholder Comments on Draft Decision

DBCT Management's ability to comply with access obligations

DBCT Management noted that the draft decision places additional obligations on it that may not be catered for under current contracts, in particular, the OMC. It submitted that, before additional obligations are placed on it by the undertaking, DBCT Management's ability to control and manage the obligation, and the risk associated with it, should be taken into account (DBCT Management, sub. no. 64: 21).

DBCT Management identified the Authority's proposed obligation on it to comply with, or ensure the Operator complies with, the Terminal Regulations in force from time to time as an example of an obligation it is unable to comply with due to the terms of existing contracts. In particular, it submits that the OMC is the relevant contract which establishes the Terminal Regulations and that this contains no provision obliging the Operator to comply with the Terminal Regulations. Accordingly, DBCT Management argues that it would need the Operator's consent to amend the OMC to enable it to comply with the undertaking. DBCT Management sought confirmation from the Authority that, if the Operator refuses its consent, the Authority will then remove these undertaking obligations.

DBCT Management further noted that, even if the Operator does consent to amend the OMC, any obligation on DBCT Management must recognise its ability to enforce contractual compliance by the Operator and the Operator's acceptance of its liability in the event of a breach – that is, the Operator must indemnify DBCT Management for any losses due to the Operator's failure to comply with the Terminal Regulations.

Disputes about amendments to Terminal Regulations

While acknowledging that a workable dispute resolution process is desirable, DBCT Management noted that, historically, individual users have expressed ‘parochial’ views on the Terminal Regulations and that consensus has been difficult to achieve. It therefore submitted that the dispute resolution process should recognise the potential for conflicting views among users and be able to quickly resolve disputes in the overall interest. DBCT Management has subsequently provided the Authority with suggested drafting amendments to the undertaking to address its concerns on this issue (DBCT Management, sub. no. 64: 22).

DBCT Management has also raised concerns about the operation of the Authority’s proposed clauses 6(e) and (f) which provide that a minority could use them to block sensible amendments to the Terminal Regulations that have been agreed by the majority. Also, it stated that any amendment will almost certainly restrict access to the terminal in some way for at least one user. Therefore, it may be difficult to amend regulations in response to temporary capacity shortages, such as in the case of equipment failure.

The DBCT User Group has reviewed its position on the operation of the Terminal Regulations in light of recent experience with the prompt and collaborative introduction of emergency amendments to the Terminal Regulations in response to the collapse of RL1 in February 2004 and also the current initiatives of all stakeholders through the Goonyella Coal Chain Improvement Program to improve coal chain efficiency. It noted the Terminal Regulations are critical to daily functioning of the terminal and that existing processes have worked in a satisfactory manner in the interests of all stakeholders. Accordingly, the DBCT User Group considered that only minor changes are necessary to ensure the future effectiveness of the arrangements in the interests of all stakeholders, including future users (DBCT User Group, sub. no. 52: 12, 13).

The DBCT User Group submitted that it would be concerned if processes were introduced which reduced flexibility. It suggested that it may be acceptable to have an appeals process provided the introduction of new measures to improve efficiency is not delayed. The DBCT User Group requested that any such appeals be dealt with expeditiously and that stakeholders will be prohibited from pursuing frivolous appeals. It suggested that the Authority consider pursuing an alternative approach — providing interim authorisation of Terminal Regulations where a genuine case for change exists, but where a minority of access holders are in dispute, until the Authority has considered all parties’ positions before making a final authorisation (DBCT User Group, sub. no. 52: 13).

The DBCT User Group also suggested a number of relatively minor amendments to the new undertaking provisions proposed by the Authority in the draft decision. This included qualifying that DBCT Management will use its best endeavours to ensure the Operator applies the Terminal Regulations in a manner that does not ‘substantially’ prevent or hinder access to the terminal (DBCT User group, sub. no. 54: 17).

*Authority’s Analysis**DBCT Management’s ability to comply with access obligations*

The Authority acknowledges DBCT Management’s concerns that it may not be in a position to comply with access obligations imposed by the Authority due to the terms of existing contracts and has taken this into account in reaching its final decision on this matter.

At the same time, while DBCT Management has pre-existing contracts in place which establish the current operational rules applying to the terminal, the Authority does not believe that this is a sufficient reason for there not to be embodied in the undertaking obligations on the access

provider to ensure the terminal is operated in a way that does not prevent or hinder access to any user.

The Authority remains of the view that the framework it has proposed regarding the Terminal Regulations is important in protecting the legitimate business interests of access seekers and access holders. This is because the Terminal Regulations encompass important conditions of access to the coal handling service and may potentially operate as a barrier to access to the service if applied inequitably amongst users or if varied unilaterally by the Operator/DBCT Management. The Authority, therefore, believes the obligations included in its proposed framework, including the obligation on DBCT Management to comply with, and ensure the Operator complies with, the Terminal Regulations, serve to ensure an effective access regime is in place, a matter which is clearly in the public interest.

Accordingly, the Authority's approach on this issue has two elements. Firstly, the Authority has decided to substantially retain the obligations proposed by it in the draft decision. This includes the obligation on DBCT Management to comply with, and ensure the Operator complies with, the Terminal Regulations. However, this latter obligation will be qualified as being subject to the OMC allowing DBCT Management to enforce this obligation against the Operator. The Authority is also proposing to change the obligation on DBCT Management to ensure the Operator complies with the Terminal Regulations from an absolute to a 'best endeavours' obligation.

Secondly, the Authority proposes to place an obligation on DBCT Management in the undertaking that it will, in good faith, take all reasonable steps to renegotiate the OMC to accommodate the Authority's proposed access obligations in the undertaking. In support of this approach, the Authority has written to the Operator to elicit its views on amending the OMC. While this is a matter for the parties to the OMC, the Authority notes that it is in the users' interests to consider amendments that would allow DBCT Management to comply with its access undertaking. In regard to DBCT Management's suggestion that an amended OMC would need to include an indemnity for the Operator's failure to comply with the Terminal Regulations, this is a commercial issue to be determined between the Operator and DBCT Management.

The Authority notes there may be other areas, beyond the Terminal Regulations framework, where the OMC would need to be amended to allow DBCT Management to comply with the undertaking. The obligation to try to renegotiate the OMC in good faith applies to all such undertaking obligations (see new clause 1.7).

Disputes about amendments to Terminal Regulations

In light of stakeholder comments, the Authority accepts the need to modify the dispute resolution framework governing changes to the Terminal Regulations to allow adequate flexibility in the event of an emergency. Further, the Authority accepts that the elements of the framework relating to preventing and hindering access need to recognise that a change to the Terminal Regulations may have the effect of restricting a particular user's access, but was not implemented with that purpose in mind.

The DBCT User Group suggested an approach whereby the Authority could provide an interim authorisation of the Terminal Regulations where there appeared to be a bona fide case for a change and where there was a dispute by a minority of access holders. The Authority is generally not in favour of an 'authorisations' mechanism as it is not consistent with its overall approach to the Terminal Regulations – that is, of the Authority having no role in approving Terminal Regulations as such, merely a potential role in resolving disputes about changes to the Terminal Regulations. Nevertheless, the Authority accepts that it may be desirable for the framework governing the amendment of the Terminal Regulations to deal specifically with

urgently needed changes to the Terminal Regulations due to an emergency or in response to a force majeure event.

In this case, the Authority believes it would be appropriate to allow a change to the Terminal Regulations that is reasonably necessary to proceed on an interim basis, subject to the resolution of any dispute. That is, if there is an event of force majeure or an emergency at the terminal, the Operator/DBCT Management would be able to amend the Terminal Regulations as required to respond to this event. However, the Authority believes that access seekers and access holders should still have the right to dispute such a change but, in the situation where an emergency or force majeure event occurs, the altered arrangements could continue to operate until the dispute is resolved or the emergency/force majeure event ceases, whichever is earlier.

The Authority notes that this approach will most likely require that ‘emergency’ and ‘force majeure’ are defined in the undertaking. The Authority has not attempted to define these terms in this decision on the basis that this is best addressed by DBCT Management in consultation with access holders. However, the Authority anticipates that ‘force majeure’ will likely have a standard commercial definition. An ‘emergency’ should typically relate to circumstances where a response is required to deal with a safety issue or a failure of terminal equipment that materially affects the operating capacity of the terminal.

The Authority believes this ‘carve out’ for emergency circumstances to the process governing a change in the Terminal Regulations should address concerns that the dispute process may be used to frustrate a change that is in the interests of overall terminal efficiency. However, the Authority acknowledges that the access seeker and access holder will retain the right to dispute a change to the Terminal Regulations (even in the case of an emergency or force majeure event). The Authority considers that this right is important to protect the legitimate business interests of access seekers and access holders.

The Authority notes, however, that a right to dispute a change does not amount to a veto on a change. The role of the Terminal Regulations is to facilitate the efficient operation of the terminal, allowing contractual commitments to be met in a least-cost efficient manner. Any change to the Terminal Regulations should be consistent with this objective.

The Authority also accepts DBCT Management’s suggested drafting amendment which provides that DBCT Management will only give its consent to an amendment of the Terminal Regulations if it reasonably consider, as a whole, they will operate equitably amongst access holders and access seekers, having regard to (amongst other things), the annual contract tonnages of access holders.

The Authority notes the concerns of both the DBCT User Group and DBCT Management with regard to its proposed clauses 6(e) and (f) which provides that DBCT Management will use its best endeavours to ensure that the Operator applies the Terminal Regulations in a manner that does not prevent or hinder an access holder’s access to the terminal. Stakeholders’ concerns relate to the fact that almost any change to the Terminal Regulations will restrict access to the terminal in some way for at least one user. The Authority understands and accepts that the Operator should have some discretion to be flexible in its operation of the terminal in the interests of overall efficiency. It is not the Authority’s intention to unduly constrain this flexibility, merely to help ensure the Terminal Regulations are not applied in an anti-competitive manner. To address stakeholders’ concerns, the Authority is proposing an amendment to clause 6(e) to reflect a ‘purpose’ test. That is, this obligation will relate to whether the Operator’s conduct in applying the Terminal Regulations is for the purpose of preventing or hindering access, not whether this is the effect of the change. This approach is consistent with the preventing and hindering access provisions of the QCA Act.

In order for the undertaking to be approved, it should be amended as follows:

- **Schedule E should be deleted from the undertaking;**
- **the undertaking should include a framework applying to the Terminal Regulations as follows:**
 - **DBCT Management will comply with, and will use its best endeavours to ensure that the Operator complies with, the Terminal Regulations in force from time to time. The obligation imposed on DBCT Management to ensure that the Operator complies with the Terminal Regulations is subject to the Operation & Maintenance Contract allowing DBCT Management to enforce this obligation against the Operator;**
 - **an obligation on DBCT Management to undertake reasonable consultation with access seekers and access holders prior to implementing or consenting to any proposed changes to the Terminal Regulations. DBCT Management will only give its consent to an amendment of the Terminal Regulations if it reasonably considers that the Terminal Regulations, as a whole, will operate equitably amongst Access Holders and Access Seekers, having regard to (amongst other things) the annual contract tonnages of the Access Holders;**
 - **ability for access seekers and access holders to notify a dispute about any proposed changes to Terminal Regulations under clause 5.9 of the undertaking or under the dispute resolution provisions of an access agreement, respectively. DBCT Management must not implement a proposed amendment to the Terminal Regulations until the outcome of any dispute has been determined. However, DBCT Management may proceed to implement, on an interim basis, pending the resolution of the Dispute, an amendment to the Terminal Regulations which is reasonably necessary to deal with an emergency or force majeure event. The interim change to the Terminal Regulations will only continue until the resolution of any dispute or the cessation of the emergency or force majeure event, whichever is earlier;**
 - **an obligation on DBCT Management to notify the Authority and current access seekers and access holders of amended Terminal Regulations and to provide a copy of the amended Terminal Regulations to these parties;**
 - **an obligation on DBCT Management to use its best endeavours to ensure the Operator does not apply the Terminal Regulations in a manner that constitutes conduct for the purpose of preventing or hindering an access holder's access to the terminal; and**
 - **and acknowledgement by DBCT Management 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 purposes of ss.104 and 125 of the QCA Act.**

5.3 Environmental, Safety Regulation and Operational Standards

In terms of health, safety and environmental laws, DBCT Management and the Operator have obligations under the PSA and OMC to comply with any relevant laws and Authority approvals applicable to the terminal.

The Authority noted in the draft decision that access issues in the application of environmental and safety laws are most likely to arise where the access provider has a related business potentially competing with an access seeker/holder. This is not the case at DBCT and, consequently, DBCT Management does not have any incentive to prevent or hinder access on these grounds.

In terms of operational standards, the draft access undertaking commits DBCT Management to undertake capacity expansions as is necessary to, among other things, ensure that the terminal complies with worlds' best practice in respect of quality standards for such facilities, environmental best practice and applicable environmental standards (DAU, Vol. 1: clause 10.2(b)).

The DBCT User Group had expressed concerns that the commitment to comply with worlds' best practice in environmental and safety matters may be unnecessarily expensive. However, the Authority proposed to retain the obligation in the undertaking as this reflects a PSA commitment and will therefore not oblige DBCT Management to meet a higher standard than is already required by the PSA. The Authority has sought to ensure that the terms of the undertaking are not inconsistent with the PSA.

Stakeholder Comments on Draft Decision

DBCT Management agreed with the DBCT User Group that worlds' best practice should be changed to Australian Standard practice, despite the fact that the PSA imposes a different (higher) threshold test. It considered that the undertaking should be as unambiguous as possible and whether DBCT Management meets the higher standard is then a matter for DBCT Management and DBCT Holdings, and not the Authority (DBCT Management, sub. no. 64: 22).

Authority's Analysis

While the Authority notes the views of both the DBCT User Group and DBCT Management that the commitment to worlds' best practice in environmental and safety matters may not be the appropriate standard, the Authority is reluctant to require an amendment to the undertaking that mandates that a potentially lower or different standard should apply. The Authority's approach has been to ensure, as far as reasonably possible and having regard to the effectiveness of the access regime, that the undertaking is consistent with the PSA. Given this, the Authority does not recommend amending this point. However, should DBCT Management successfully negotiate an amendment to the similar provision in the PSA with Holdings, a draft amending access undertaking may be submitted at that time.

5.4 Reporting by DBCT Management

A key element of a regulatory regime is reporting on aspects of the access provider's performance. This includes the provision of financial information to allow the regulator to monitor matters such as revenue and capital expenditure. It also includes reporting in relation to the quality of service provided by the access provider and its performance in complying with its undertaking. These requirements assist the transparency and therefore stakeholders' ability to comment on the arrangements.

In the draft decision, the Authority required DBCT Management to provide financial information to the Authority regarding revenue and capital expenditure on an annual basis. In addition, the Authority required DBCT Management to publicly report on its performance, both in terms of its compliance with its undertaking and the operational and service quality performance, that is, key performance indicators (KPIs) of the terminal.

The Authority also noted in its draft decision, that clauses 10.3(a) (3) and (4) of the draft access undertaking required DBCT Management to add capacity where necessary to meet the *bona fide* needs of new users, or increased volumes for existing users, in such a way that there be no increase in demurrage costs or the average net costs across all access holders of transporting coal from mine to port over any three consecutive months. Given the uncertainty about the effectiveness of this clause, yet its importance in facilitating and signalling the need for capacity expansions, the Authority required DBCT Management to report on the following performance areas:

- demurrage costs; and
- average net transports costs of access holders

Financial Reporting

In the draft decision, the Authority argued that in order for it to assess the level of annual capital charges and operating costs and to roll forward DBCT Management's regulated asset base, the Authority believed it is necessary to require DBCT Management to report on a range of financial indicators, namely:

- the opening RAB value for the relevant year — by asset class/type consistent with the asset class/types used to determine the initial capital base;
- the amount of indexation of the RAB calculated for the relevant year — by asset class/type;
- the amount of depreciation calculated for the relevant year — by asset class/type;
- DBCT Management's corporate overheads for the relevant year;
- the value of any new assets (capital expenditure) acquired during the relevant year — by asset class/type. Capital expenditure is to be identified as either replacement or expansionary capital expenditure, and is to include information relating to the estimated life of each new asset;
- asset disposals for the relevant year — by asset class/type;
- the actual operating and maintenance costs incurred for the relevant year — in a format to be determined by the Authority. This should separately identify any minor capital; and
- an explanation for any significant variance in actual capital expenditure and/or operating and maintenance costs, and forecast capital expenditure and/or operating and maintenance costs for the relevant year.

Given that the majority of this information is of a commercial nature, the Authority proposed that DBCT Management report this information on a confidential basis. This financial report must be provided annually to the Authority and at least within four months of the end of the relevant year.

There were no specific stakeholder comments in relation to the draft decision regarding financial reporting.

Consequently, the Authority maintains the view that the draft access undertaking be amended to reflect the Authority’s proposed financial reporting requirements.

Performance Reporting

In the draft decision, the Authority proposed that DBCT Management publicly report on a quarterly basis 11 KPIs on various aspects of the terminal’s performance, including rail in-loading, stockyard utilisation, ship out-loading and capacity utilisation.

Stakeholder Comments on Draft Decision

In regard to service quality indicators, the DBCT User Group suggested that this issue be discussed with DBCT Management and the Operator. The DBCT User Group noted a couple of sources that may prove to be a useful point of reference when drafting a set of KPIs for the access undertaking such as, the operational KPIs contained in the OMC and the KPIs currently being developed by the Goonyella Coal Chain Improvement Program (DBCT User Group, sub. no. 52: 13).

Holdings did not support the Authority’s proposed public reporting of KPIs as it believed such requirements would impose significant administrative costs and that some of the information proposed to be disclosed may be confidential to third parties or may be commercially sensitive. Moreover, Holdings considers that some of the KPIs to be reported are highly variable and dependant on a number of factors. In addition, Holdings considered that the Authority’s statement to report on “any other performance measure requested by the Authority” was unacceptable (DBCT Holdings, sub. no. 50: 9, 10).

Similarly, DBCT Management did not support full public reporting of KPIs but only limited public reporting to help define system bottlenecks (DBCT Management, sub. no. 73: 5).

DBCT Management submits that any KPI regime must acknowledge the position of the terminal as only one link in an integrated Goonyella coal chain. Accordingly, DBCT Management believes that performance reporting should include all elements of the coal chain, in particular, the critical interaction points within the system that influence performance, namely: mine performance; train performance; terminal performance; shipping performance; and environment. DBCT Management proposed a number of KPIs across all elements of the coal chain. These KPIs incorporate the KPIs in the Authority’s draft decision, with suggested minor amendments. DBCT Management added that all the data necessary to produce the proposed KPIs is already captured (DBCT Management, sub. no. 73: 5). However, DBCT Management state, in order for it to be able to report on demurrage and net transport costs, it would require the DBCT User Group to provide DBCT Management with such information (DBCT Management, sub. no, 64: 18).

DBCT Management’s proposed KPIs are outlined below, note that the Authority’s draft decision KPIs are shaded:

Table 5.1: DBCT Management Proposed KPIs

<i>Performance dimension</i>	<i>DBCT Management KPI</i>	<i>Definition</i>
Mine performance		
Train arrival at load point	No. of on-time arrivals.	Measures the on-time performance of the rail at the out-loading point which can affect cycle time and so contribute to system loss.
Mine load-out performance	Tonnes/hour (measured from train arrival to train load).	Measures the out-loading performance of the mine which can affect cycle time and so contribute to system loss.
Cargo availability	No. of cancelled train services (cancelled by mine).	Measures the availability of the cargo after DBCT has scheduled the outgoing train service. Train cancellations contribute greatly to loss of system capacity.
Train departure from load point	No. of on-time departures.	Measures the on-time performance of the outgoing train at the out-loading point which can affect cycle time and so contribute to system loss.
Mine load-out Capability	Time required to rebuild stocks for the next train.	Measures delays impacting the system by the mines inability to recharge the on-site stockpile in readiness for the next train.
Rail ratio performance between DBCT and HPS	No. of deviations and result of deviation (trains cancelled from DBCT and diverted to HPS – Dysart leg mines can benefit HPS at DBCT detriment).	This measurement tracks the impact on DBCT of train services diverting to accommodate HPS operations.
Train performance		
Train handling	The Authority proposed tonnes/hour of train handling expressed in tonnes per gross train-hour. Gross hour means the total time in terminal (departure time minus arrival time).	DBCT Management proposed the same KPI as Authority but exclude less train set up and departure. DBCT Management argue this will give the true time it takes to unload the train
Rail pit in-loading performance	The time rail pits are in use/available, measured by job in/job close.	This KPI gives an indication of in-loading capacity as opposed to rail capacity.
Train scheduling	The Authority proposed % of on-time train arrivals (arriving within 1 hour of scheduled arrival time).	DBCT Management proposed same but include % of time trains arrive in sequence. Trains arriving out of sequence major system losses.
Average train cycle time	Average time to complete a full cycle of the system measured from departure Jilalan (outbound empty to mine) to arrival Jilalan (empty from DBCT).	Train cycle time can impact on terminal capacity due to the realignment of terminal equipment to match out of sequence train arrival.
Average train payload	Average coal per train.	High terminal throughput is not only reliant on high train payload but consistent train payload (in order to effectively build stockpiles).
Train cancellations/deviations	Number of cancellations and deviations/mine.	This KPI will assist in root cause analysis of the reasons why system delivery to DBCT is below terminal capacity.
Maintenance alignment	Delays due to non-alignment of individual node maintenance.	This measurement is designed to capture any misalignment between maintenance programs in each individual link of the chain.
Terminal performance		
In-loading performance	Actual in-loading throughput measured against in-loading GOC.	Seeks to track the performance of cargo through the system relative to the erosion of terminal capacity (i.e. the effect of sticky coal).
Average blending per customer	Amount of blending from stockpiles per customer.	Currently modelled on an individual user basis to track impact on terminal

Performance dimension**DBCT Management KPI****Definition****Mine performance**

Average parcel/parcel size by customer	No of parcels and parcel size per ship.	capacity. Currently modelled on an individual user basis to track impact on terminal capacity.
Average parcel residence time in stockyard	Time from first coal stacked to last coal reclaimed (per parcel).	Tracks the residence time of coal parcels through the stockyard. This will be a vital statistic in assessing cargo velocity through the terminal.
Shipping Mix	Shipping mix per customer.	Currently modelled on an individual user basis to track impact on terminal capacity.

Installed Capacity	The Authority proposed gross operating capacity (GOC) which is the engineering capacity of the terminal assuming 85% equipment utilisation.	DBCT proposed the same KPI but add weather allowance.
Capacity Utilisation	The Authority proposed a capacity utilisation ratio measured as the ratio of tonnes of coal throughput to GOC.	DBCT Management proposes the same KPI but suggest the KPI needs to be supported by subordinates to identify the root cause of loss.
Terminal Operational Effectiveness	The Authority proposed the ratio of net operating capacity (NOC) to gross operating capacity (GOC). Measures the extent to which the terminal in practice can deliver the GOC.	DBCT Management argues this KPI is identical to the “capacity utilisation KPI.
Stockyard Management	The Authority proposed terminal area available for storage (m ²).	DBCT Management suggests “stockyard utilisation” as an alternative.
Stockyard Utilisation	The Authority proposed a stockyard utilisation ratio measures as the ratio of tonnes kept in stockpile to stockpile capacity.	DBCT Management suggested the same KPI but for each user as a percentage of total capacity measured daily.
Stockyard Machine Utilisation	Actual use/time that each machine was available (based on Machine GOC).	Assesses the capacity of the terminal in terms of unused available time.
Stockyard Machine Conflict	No of instances of yard machine conflict.	Stockyard machine conflict occurs with dual purpose stacker/reclaimer machines. This delays trains as they queue awaiting an in-loading slot.
Ship-loading performance	The Authority proposed tonnes loaded per gross ship-hour at berth segregated by category of vessel. Measures rate at which ships are loaded.	DBCT proposed the same KPI but add a measure of % time coal actually run on outloading strings.
Ship Waiting Time	The Authority proposed average ship delay in port (measured as the difference between arrival and berthing).	DBCT Management made no comment.

Shipping performance

Berth utilisation	Ship hours/available berth time (available time is the time which a ship could have passed through the berths less actual time for other factors).	Essential for measuring the effect of different types of ships. De-ballasting has been shown to have a major impact on outloading efficiency
Arriving vessels	Daily arrival of vessels (measured by cargo tonnes)/daily sailing of vessels (measured by cargo tonnes).	Measures the amount of coal sold versus the capacity of the system/terminal (depending on where the bottleneck is) to deliver.

Environment

Suspended airborne deposition	Daily measure of suspended airborne dust particles and dust deposition less daily background allowance.	Dust emissions cause a nuisance to residential areas bordering DBCT. Control of emissions to predetermine levels is a requirement of DBCT’s development approval.
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Note: Authority’s proposed KPIs are shaded

Authority's Analysis

The Authority considers that performance reporting forms an important part of the regulatory environment, benefiting a diverse range of stakeholders by engendering confidence in an access regime. In particular, it serves to assure stakeholders that a regulated entity is complying with its access obligations of the quality of service provided and provides information about, and incentives to improve service quality.

In this respect, the Authority notes that DBCT Management has proposed an extensive list of KPIs covering the whole of coal supply chain. These KPIs incorporate the KPIs in the Authority's draft decision, with suggested minor amendments.

The Authority understands these KPIs were developed in consultation with stakeholders as part of the Goonyella Coal Chain Improvement Program. To this extent, the Authority is satisfied that these KPIs focus on the critical aspects of the coal supply chain. In terms of DBCT Management's minor amendments to the Authority's KPIs, the Authority also accepts these with the exception that the Authority's proposed ship waiting time KPI be retained and reported.

Even though it forms an expansion provision within the PSA, the Authority notes DBCT Management's comments that it does not, by itself, have sufficient information to report on and/or calculate the demurrage and net transport costs to users at the terminal. The Authority believes it would be inappropriate for the undertaking to seek to impose an obligation on users requiring them to report this information to DBCT Management. Consequently, the Authority is not requiring DBCT Management to report on demurrage and net transport costs.

While stakeholders generally did not consider that service quality KPIs needed to be made public, the Authority believes that, to be of benefit to future access seekers and the coal industry in general, a number of base KPIs should be publicly reported. Given that the proposed KPIs are to be reported on an aggregated and in some cases on an average basis, the Authority does not consider any of its proposed KPIs would be of a confidential or commercially sensitive nature. Given this, the Authority believes the undertaking should include an obligation on DBCT Management to publicly report, on a quarterly basis, against the KPIs proposed in the draft decision. The Authority accepts DBCT Management's proposal that it report to the Authority its performance against the additional KPIs included in DBCT Management's submission, but leaves it at DBCT Management's discretion whether or not it chooses to report publicly on those additional KPIs.

Access Undertaking Compliance Reporting

In its draft decision, the Authority argued that there are certain key stages in access negotiations that warrant being reported on. For example, reporting on the timeliness of providing an Indicative Access Proposal, the length of the negotiation process and the frequency of access disputes. The Authority considers that public reporting of these measures is necessary to provide access holders and access seekers with valuable information with which to make informed decisions about access negotiations.

The Authority envisaged that any compliance reporting on the undertaking would be undertaken at an aggregate level. That is, no one stakeholder will be identified. As a result, the Authority did not believe there would be any confidentiality issues associated with publicly reporting on compliance with the undertaking. The Authority also noted that Queensland Rail, as part of its undertaking, is also required to publicly report on its compliance with its undertaking.

There were no specific stakeholder comments in relation to the draft decision regarding compliance reporting.

Consequently, the Authority maintains the view that the draft access undertaking be amended to reflect the Authority's proposed access undertaking reporting requirements. Moreover, to ensure that the Authority has the ability to ensure the effective and efficient operation of the access undertaking, the Authority does not consider it unreasonable to request DBCT Management to provide 'any other additional performance measures necessary' in relation to compliance with the undertaking.

In order for the undertaking to be approved, it must be amended so that DBCT Management publicly reports on:

- **the following service quality key performance indicators for the terminal, on a quarterly basis:**
 - **tonnes/hour of train handling expressed in tonnes per gross-train hour;**
 - **the percentage of trains arriving within an hour of scheduled arrival time;**
 - **gross operating capacity (Mtpa);**
 - **capacity utilisation ratio;**
 - **the ratio of net operating capacity to gross operating capacity;**
 - **terminal area available for storage (average area (m²) available for coal storage);**
 - **stockyard utilisation ratio (ratio of tonnes kept in stockpile to stockpile capacity);**
 - **tonnes loaded per ship-hour at berth segregated by category of vessel; and**
 - **average ship delay in port (average time between first arrival in port and time coming to berth).**
- **the following undertaking compliance indicators, on an annual basis:**
 - **the number and percentage of total Indicative Access Proposals provided within the applicable timeframe;**
 - **the number and percentage of access applications received for which an extension of time for provision of an indicative access proposal is sought by DBCT Management;**
 - **the average delay (in days) taken to provide an indicative access proposal not provided within the applicable timeframe;**
 - **the number of instances where an issue has been referred to dispute resolution;**
 - **the average length of the negotiation period (in days), where the negotiation period has commenced and has ceased as the result of the execution of an access agreement in respect of the access sought by the access seeker;**
 - **the average length of the negotiation period (in days), where the negotiation period has commenced and has ceased as the result of any reason other than the execution of an access agreement in respect of the access sought by the access seeker;**
 - **the number of instances where a negotiation period commenced has ceased as the result of the execution of an access agreement in respect of the access sought by the access seeker; and**
 - **any other performance measure requested by the Authority.**

In order for the undertaking to be approved, it must be amended so that DBCT Management reports to the Authority, on a confidential basis:

- **the following financial information, annually and, within four months of the close of the relevant financial year:**
 - **the opening RAB value for the relevant year — by asset class/type consistent with the asset class/types used to determine the initial capital base;**
 - **the amount of indexation of the RAB calculated for the relevant year — by asset class/type;**
 - **the amount of depreciation calculated for the relevant year — by asset class/type;**
 - **DBCT Management’s corporate overheads for the relevant year;**
 - **the value of any new assets (capital expenditure) acquired during the relevant year — by asset class/type. Capital expenditure is to be identified as either replacement or expansionary capital expenditure, and is to include information relating to the estimated life of each new asset;**
 - **asset disposals for the relevant year — by asset class/type;**
 - **the actual operating and maintenance costs incurred for the relevant year at a level to be determined by the Authority. This should separately identify any minor capital; and**
 - **an explanation for any significant variance in actual capital expenditure and/or operating and maintenance costs, and forecast capital expenditure and/or operating and maintenance costs for the relevant year.**

- **the following service quality performance indicators for the terminal, on a quarterly basis:**
 - **number of on-time arrivals;**
 - **tonnes/hour (measured from train arrival to train load);**
 - **number of cancelled train services (cancelled by mine);**
 - **number of on-time departures;**
 - **time required to rebuild stocks for the next train;**
 - **number of deviations and result of deviation (trains cancelled from DBCT and diverted to HPS);**
 - **time rail pits are in use/available measure by job in/job close;**
 - **average time to complete a full cycle of the system measured from departure Jilalan (outbound empty to mine) to arrival Jilalan (empty from DBCT);**
 - **average coal payload per train;**
 - **number of cancellations and deviations/mine;**
 - **delays due to non-alignment of individual node maintenance;**
 - **actual inloading throughput measured against inloading GOC;**
 - **amount of blending from stockpiles per customer;**

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- **number of parcels and parcel size per ship;**
 - **time from first coal stacked to last coal reclaimed (per parcel);**
 - **shipping mix per customer and impact on terminal capacity;**
 - **number of instances of yard machine conflict;**
 - **tonnes loaded per ship-hour at berth segregated by category of vessel;**
 - **average ship delay in port (measured as difference between arrival and berthing);**
 - **berth utilisation in terms of ship hours/available berth time (available time being the time which a ship could have passed through the berths less actual time for scheduled and unscheduled maintenance and downtime unrelated to terminal);**
 - **daily arrival of vessels (measured by cargo tonnes)/daily sailing of vessels (measured by cargo tonnes); and**
 - **daily measure of suspended airborne dust particles and dust deposition less daily background allowance.**

6. ACCESS AGREEMENTS

Summary

The Authority supports the commitment in the undertaking for DBCT Management to develop and submit a draft standard access agreement for the Authority's approval within three months of the undertaking's approval.

The draft access undertaking includes a set of principles to guide the development of a standard access agreement.

The Authority proposes a range of amendments to these principles in order to ensure that access agreements are fair and reflect a reasonable balance of risks between the parties, thereby protecting the legitimate business interests of both access seekers and DBCT Management.

Key amendments proposed by the Authority relate to the principles relevant to shipping of coal, changes to contract tonnage, remedies and guarantees.

6.1 Access Agreements

The undertaking establishes that access will be underpinned by an access agreement. It also provides that DBCT Management will submit a standard access agreement (SAA) to the Authority for approval within three months of approval of the undertaking. In the draft decision, the Authority required the definition of the SAA be amended such that it incorporates detailed terms and conditions that are consistent with the principles set out in Schedule B.

Stakeholder Comments on Draft Decision

The DBCT User Group proposed an amendment to the provisions of the draft access undertaking setting out the process to develop a SAA. In particular, it suggested that where DBCT Management fails to resubmit an amended draft SAA in accordance with the Authority's decision, the Authority should have the right to impose a SAA (DBCT User Group, sub. no. 54: 28).

Authority's Analysis

The Authority recognises that the draft access undertaking is silent on what happens in the event DBCT Management does not resubmit a SAA in accordance with the Authority's decision.

As noted in the draft decision, the Authority's scope under the QCA Act to require DBCT Management to submit a draft amending access undertaking is limited. Moreover, the Authority may not insist on it being resubmitted in a stated form. Given this, the Authority believes that it is not appropriate to include a provision in the undertaking seeking to give the Authority the right to impose a SAA.

If this situation eventuates, it is open to the Authority to issue an arbitration guideline. While clearly a second best option, it will provide some certainty as to the Authority's approach in access disputes.

In order for the undertaking to be approved, Schedule B must be amended to:

- **define ‘Standard Access Agreement’ in clause 2.1 to reflect that it will incorporate detailed terms and conditions consistent with the principles in Schedule B.**

6.2 Principles for Inclusion in the Standard Access Agreement

The draft access undertaking includes a commitment from DBCT Management to develop a SAA based on a summary of principles that will form the basis of a SAA (Schedule B). DBCT Management proposed that an access agreement must, unless otherwise agreed, be consistent with the approved SAA or, where one has yet to be approved, with the principles outlined in Schedule B (DAU, Vol. 1: clause 11.1(c)).

The Schedule B principles, and the SAA once developed, form part of the undertaking and therefore will serve to provide certainty to both access seekers and DBCT Management as to the terms and conditions of access. This certainty is provided by the fact that, in the event of an access dispute, the Authority must not make a determination that is inconsistent with the approved undertaking.

The Authority sought to clarify in the draft decision that, in the event of an access dispute, the Authority would not be obliged to resolve the dispute by simply reiterating the terms of the SAA or Schedule B. Rather, the Authority’s determination would be guided by the terms of the SAA, Schedule B and the circumstances of the particular matter. The Authority proposed an amendment to clause 11.1 of the undertaking to clarify this.

Stakeholder Comments on Draft Decision

DBCT Management questioned the Authority’s statement that access seekers wishing to negotiate on terms other than the SAA may do so, with DBCT Management obliged to negotiate on these issues. It argued that it is not clear what it would be negotiating or what incentive/penalty might apply to DBCT Management with respect to non-standard terms and their impact on the revenue cap. It submitted that there is ultimately a risk the Authority may ‘punish’ DBCT Management where it believes it has exercised poor commercial judgement and, therefore, under the revenue cap, DBCT Management will effectively be obliged to adopt the least risk approach in respect of negotiated outcomes (DBCT Management, sub. no. 64: 38).

Authority’s Analysis

The Authority believes that the terms of the undertaking, including the SAA and Schedule B principles, provide a significant degree of certainty to the parties to an access negotiation by providing guidance as to the Authority’s approach in the event of a dispute. This is because the Authority is bound under the QCA Act to not make an access determination in the event of a dispute that is inconsistent with an approved undertaking. In practice, the detail in the undertaking is likely to minimise the scope for disputes.

This role of an undertaking should be seen in the context of the negotiate/arbitrate model on which Part 5 of the QCA Act is based. That is, the primary focus of the access regime is for the access seeker and access provider to negotiate in good faith for the conclusion of an access agreement.

Given this, the Authority believes it is reasonable that the access provider, DBCT Management, be obliged to negotiate for access to the declared service if requested by an access seeker. To the extent that the Schedule B principles (or SAA) specify a set of ‘reference terms’, this will

serve to provide further guidance to negotiating parties. However, as noted in the draft decision, the Authority does not believe this binds it to make a determination in the event of an access dispute that simply reiterates these terms. In hearing such a dispute, the Authority would be guided by the SAA, Schedule B and the circumstances of the particular matter. The Authority's proposed amendment to clause 11.1 of the draft access undertaking sought to put this matter beyond doubt.

For example, the Schedule B principles establish contractual terms for access agreements of no less than 10 years and pricing consistent with the terms of the undertaking (including take or pay arrangements). However, the Authority stated in the draft decision that including these principles in Schedule B does not preclude the development of other 'non-reference' services. Indeed, this approach is not novel as short term contracts and/or contracts without take or pay terms are already provided for under the existing user agreements. Access seekers wishing to negotiate for access on other terms may still seek to do so, with DBCT Management obliged to negotiate on this basis. As noted above, a dispute in this situation would need to take into account the SAA, Schedule B and the particular circumstances of the case (for example, that the access being sought was not on long term take or pay terms).

In response to DBCT Management's concern that it is not clear what 'non-reference' terms it would be negotiating or what incentive/penalty might apply to DBCT Management with respect to non-standard terms and their impact on the revenue cap, the Authority is of the view that divergences from the reference tariff are a matter for commercial negotiation between the parties. That is, if an access seeker is seeking to negotiate for access on non-reference terms (for example, a non-take or pay contract), it may negotiate this with DBCT Management. However, as contemplated in the draft access undertaking (clause 9.3), it is reasonable that DBCT Management is compensated for any additional cost and risk associated with contracting on 'non-reference' terms, subject to the limits on price differentiation applying. The amount of this divergence from the reference tariff is a matter for negotiation between the parties, with recourse to dispute resolution available.

DBCT Management has claimed that the Authority's statement in the draft decision that "access seekers wishing access on other terms can still seek to do so, with DBCT Management obliged to negotiate on these issue" is unclear and, further, that it would have little incentive to negotiate on non-reference terms. In response, the Authority notes that it is clear that DBCT Management contemplates the possibility of contracting on non-reference terms as the submitted undertaking clearly provides for this – by specifying that the capital charge for coal handled on non-reference terms will be negotiated between the parties, subject to the limits on price differentiation applying (clause 9.3(a), 9.6). Accordingly, DBCT Management would be appropriately compensated for contracting on non-reference terms as the capital charge in this case will diverge from the approved reference tariff to reflect differences in cost and risk. Also, revenue earned from non-reference tonnage will fall outside the revenue cap.

The DBCT User Group's concerns that DBCT Management will have an incentive to contract for non-reference tonnage should be addressed by the requirement that reference tonnage be no less than 80% of annual contract tonnage (Schedule B, principle 2.1).

In order for the undertaking to be approved, the undertaking must be amended as follows:

- **a new clause 13.1(d) (Access Agreements) be inserted to clarify that, for services of a type for which a Standard Access Agreement has not been developed and approved by the QCA (for example, for a contract term of less than 10 years or without a take or pay charge), then the principles set out in Schedule B of this Undertaking and the terms of any Standard Access Agreement will provide guidance as to the terms and conditions that are to be included in the relevant Access Agreement, it being acknowledged that, in these circumstances, varied terms and conditions may then be required.**

1. Term and Termination

These principles establish, among other things, that access agreements must include: commencement and termination dates, with the termination date being no less than 10 years after commencement; the grounds for termination; and the timeframes that apply.

The Authority recommended a number of amendments in the draft decision designed to provide greater balance in these principles and to ensure they reflect standard commercial practice. In particular, the Authority recommended that DBCT Management should not be able to terminate an agreement without exercising its suspension rights first and that it must give reasonable notice prior to suspension or termination. The Authority also sought feedback from stakeholders as to whether the time periods applying to suspension and termination rights are appropriate. The Authority also proposed a materiality threshold for termination for non-financial default.

Stakeholder Comments on Draft Decision

DBCT Management did not agree with the Authority's concerns that the termination rights lacked balance, however, DBCT Management did accept the Authority's view that termination for non-financial default should be limited to material defaults. It considered that the proposed termination rights applied equally to access holders and DBCT Management, reflecting current user agreements (DBCT Management, sub. no. 64: 24).

DBCT Management considered that, by most commercial standards, a cure period of 60 days for non-financial defaults is a relatively long period for the defaulting party to cure the breach. Such a period was also considered to be consistent with most SAAs relating to access to public facilities, notably the QR SAAs (DBCT Management, sub. no. 64: 24).

DBCT Management considered that a cure period of 30 days for financial default is fair and reasonable, noting that such a period is in addition to the contractual payment terms for an invoice payment. DBCT Management submitted that its right to terminate for financial default occurs if the access holder does not pay an invoice within 30 days of its receipt and also does not make a payment within a further 30 days of a second notice. DBCT Management also considered that a 30 day cure period for financial default is consistent with current commercial standards — a period in excess of this may affect the terminal's actual cost of debt (DBCT Management, sub. no. 64: 24).

DBCT Management submitted that the effect of the Authority's suggestion that DBCT Management should not terminate unless it has first exercised its rights of suspension are to further add to the default cure periods. DBCT Management considered it uncommercial and inequitable for one default regime to be applicable to DBCT Management, with a less onerous

regime applicable to access holders. DBCT Management noted that this is also inconsistent with current user agreements (DBCT Management, sub. no. 64: 24).

DBCT Management considered that access holders were sufficiently protected by the termination regime prescribed in current user agreements — a regime reflected in the Schedule B principles of the draft access undertaking (DBCT Management, sub. no. 64: 24).

The DBCT User Group suggested some alternative drafting to that proposed by the Authority to clarify that DBCT Management is not entitled to suspend or terminate for financial default if a dispute resolution process is underway and the access holder had paid the undisputed amount (DBCT User Group, sub. no. 54: B-1).

Authority's Analysis

Term of access agreements

In its submission, DBCT Management stated that it “understands that the Authority is proposing 10 year take or pay contracts...” and suggested that a 25 year term might be more appropriate (DBCT Management, sub. no. 64: 14). The Authority notes that this 10 year ‘reference term’ was proposed by DBCT Management in its submitted undertaking, and not by the Authority. That is, principle 1.2 of Schedule B states that the termination date of access agreements will be no less than 10 years after the commencement date.

The Authority endorses this as part of the ‘reference terms’. However, as noted above, the Authority does not believe this precludes the negotiation of access agreements for a different term.

Suspension/termination rights

In the draft decision, the Authority questioned the commerciality of the ‘cure periods’ of 30 and 60 days (for financial and non-financial default respectively) and sought stakeholder comments. On the basis of those comments, the Authority accepts retaining these timeframes as set out in the draft access undertaking.

However, the Authority does not accept DBCT Management’s arguments that the requirement to suspend prior to terminating extends default cure periods in a way that is uncommercial and inequitable.

The Authority’s view on this matter is guided by the following principles and considerations:

- losing an access contract will, in most cases, be a very severe loss for any access holder, particularly where there is no alternative export facility;
- termination should always be the very last resort in circumstances where terminal access is critical to an access holder’s ability to export;
- an obligation to suspend an access holder’s rights for a specified minimum period before being entitled to terminate for a continuing material breach acts as a severe second and final warning to the access holder to rectify the continuing breach or lose its critical access; and
- in some respects, suspension as a prerequisite to termination is no different to DBCT Management being obliged to give a second and final warning notice (which the Authority understands is not uncommon in major contracts where termination has severe

consequences for the customer). The main difference is that the suspension-prerequisite approach appears to be more in favour of DBCT Management as it acts as a more severe ‘last warning’ as the access holder is immediately deprived of access.

Further, it is difficult to see what prejudice DBCT Management would actually suffer if it is obliged to suspend access for a specified period rather than terminate at the end of the designated 30 or 60 day initial default periods. It would not appear that DBCT Management would be exposed to any extra costs or substantive inconvenience simply because an access holder’s right are suspended for an additional period (14 days) rather than being terminated immediately on expiry of the initial default periods. Schedule B appears to establish this by stating that the access holder’s right to have its coal handled will be suspended.

Nor does the Authority consider that the fact that this approach is different to current user agreements is a compelling argument for rejecting the concept. After all, the terms of contracts in any long-established multi-user facility are bound to vary over time. Further, current contracts were negotiated in a pre-regulation environment and, therefore, may not necessarily represent a fair balance of both parties’ interests nor be typical of commercial contract terms in a competitive market. Also, it is reasonable to expect that good practice requires all standard contract terms be reviewed from time to time.

In summary, the Authority is proposing to retain the requirement that DBCT Management must suspend before it terminates an agreement. The Authority proposes to limit the suspension obligation to a minimum of 14 days at the end of the initial 30 and 60 day default periods. DBCT Management may have a discretion to decide whether or not it wants to make the suspension term longer than 14 days on a case by case basis (this may be done by DBCT Management having the discretion to issue either a ‘suspension and automatic termination notice’ or a ‘suspension and elective termination notice’, the latter giving DBCT Management more flexibility). The Authority also maintains that termination should only be a response to material non-financial default. In this regard, it should be recognised that the 60 day default period cannot start unless the relevant breach is capable of being rectified.

The Authority is also proposing to accept an amendment proposed by the DBCT User Group clarifying that DBCT Management cannot suspend or terminate for a financial default while dispute resolution is underway. This is consistent with the Authority’s proposed amendment in the draft decision, but serves to provide greater clarity. Accordingly, the Authority accepts this amendment.

In order for the undertaking to be approved, Schedule B must be amended as follows:

- **an access agreement should provide suspension and (mutual) termination rights, which are subject to certain thresholds: namely, a breach for non-financial default must be material and DBCT Management must exercise its right to suspend prior to termination. DBCT Management may suspend the agreement for a period of 14 days if a financial default is not remedied within 30 days and a material non-financial default is not remedied within 60 days. If the default has not been remedied at the end of the suspension period, then DBCT Management may immediately terminate the agreement;**
- **DBCT Management will not be entitled to suspend or terminate for financial default if the alleged default arises out of a dispute as to the amount owing, the access holder has paid all amounts that are not being disputed and the dispute resolution process is being undertaken in respect of the matter; and**
- **principle 1.7 regarding disputes for non-financial default should be made consistent with principle 10 dealing with dispute resolution.**

2. Shipping of Coal

This principle requires, among other things, that each agreement prescribe: for each contract year, the access holder's annual contract and reference tonnage, with reference tonnage being no less than 80% of annual contract tonnage; DBCT Management's and access holder's obligations regarding the provision of terminal services. It also establishes that access is provided subject to the Terminal Regulations, the requirements of other users and the absolute discretion of the Operator. Further, the principles prescribe that access holders have no right of possession to any part of the terminal, including a dedicated stockpile.

The Authority proposed a number of amendments to these principles to provide greater certainty and balance regarding users' and DBCT Management's access obligations. In particular, the Authority recommended an absolute obligation on DBCT Management to make the terminal available rather than a 'reasonable endeavours' obligation. The Authority also proposed the deletion of some of the caveats to DBCT Management's commitment to provide terminal services, namely, that this commitment be subject to the requirements of other access holders and the absolute discretion of the Operator (principles 2.4(b)-(d)). Further, the Authority's recommendations in regard to the Terminal Regulations must be reflected in the Schedule B principles.

Stakeholder Comments on Draft Decision

In response to the Authority's suggestion that principles 2.4(b)-(d) be deleted from Schedule B, DBCT Management submitted that these principles were included for practical and valid reasons. DBCT Management submitted that principles 2.4(b) and (c) clarified that no access holder's rights under the SAA were superior to any other access holder (DBCT Management, sub. no. 64: 24).

DBCT Management submitted that principle 2.4(d) was included because, under the current operating paradigm, access holders do not have the right to nominate which part of the stockpile area their coal is to be stockpiled. This is left at the Operator's discretion and is dependant upon operational requirements at the time (DBCT Management, sub. no. 64: 25).

In response to the Authority's suggestion that DBCT Management ensure that the Operator complies with the Terminal Regulations, DBCT Management advised that in a practical sense, it could not comply with such a requirement as there is no mechanism under the OMC empowering DBCT Management to require the Operator comply with the Terminal Regulations. As such, DBCT Management considered that the Authority's proposal seeks to force DBCT Management to comply with an obligation with which it does not have the power to comply (DBCT Management, sub. no. 64: 25).

With regard to DBCT Management's proposal to require a minimum of 80% reference tonnage in an access holder's annual contract tonnage, the DBCT User Group requested that the Authority refer to the DBCT User Group's earlier comments on reference tonnage (see Chapter 7 of this decision). The DBCT User Group has subsequently advised the Authority that it believes 80% is too large a proportion of annual contract tonnage, and that 95% is a more appropriate threshold (DBCT User Group, sub. no. 78: 3).

The DBCT User Group also believed that requesting that access holders ship their coal at an 'even rate' needs further consideration as it may be too inflexible, particularly in light of the fact that 'rail to ship' is considered the most efficient (DBCT User Group, sub. no. 54: B-1).

The DBCT User Group did not consider that the principle establishing that the access holder should have no rights to a dedicated stockpile should be included in the SAA. The DBCT User Group considered that an access holder who negotiates stockpile rights would be outside

“Reference Terms” and, therefore, not eligible to participate in the revenue cap (DBCT User Group, sub. no. 54: B-2).

The DBCT User Group generally supported the dispute process dealing with DBCT Management’s proposed amendments to the Terminal Regulations. However, they did note that a single user should not have the ability to frustrate (by disputing an amendment to the Terminal Regulations) urgently required amendments to the Terminal Regulations as a result of, for example, an emergency. The DBCT User Group suggested that the Authority be empowered to authorise DBCT Management to temporarily approve an amendment, despite a dispute (DBCT User Group, sub. no. 54: B-2).

Authority’s Analysis

Both DBCT Management and the DBCT User Group have raised concerns with the Authority’s approach to principle 2.4, for different reasons. DBCT Management rejects the Authority’s deletion of principles 2.4 (b)-(d) on the basis that these are necessary to clarify that no access holder’s rights are superior to any other access holder and to reflect the current operating paradigm that the Operator has discretion as to allocating stockpiles. The DBCT User Group does not believe the SAA should include a principle establishing users have no right to dedicated stockpile.

The Authority’s approach on this issue is to ensure that stockpiling and cargo assembly services are part of the coal handling service that DBCT Management is obliged to provide under an access agreement. This is achieved through the inclusion of these services in Schedule G, which sets out the scope of services that would be provided under an access agreement. However, the Authority also accepts that the Operator currently has some discretion on how stockpiles are allocated, in a day-to-day operational sense and, further, that this discretion works in the overall best interests of terminal efficiency.

The Authority believes it is reasonable that this right to have coal transferred to stockpile, if requested, should be subject to the Terminal Regulations. Although this appears to be the intent of this principle, the Authority remains concerned that the ‘carve outs’ in principles 2.4 (b)-(d) are too open-ended and do not provide an access holder with adequate certainty regarding its rights in relation to this service.

Moreover, with regard to the DBCT User Group’s concerns that establishing no right to a dedicated stockpile in the SAA will make a variation of this type fall outside reference terms and, hence, the revenue cap, the Authority believes that this may be reasonable depending on whether such a variation has a material impact on DBCT Management’s costs (see discussion in Chapter 7). If a user wishes to negotiate a dedicated stockpile right, it is open to it to do so. However, it may be reasonable that DBCT Management would be compensated for this additional service, which may reduce the overall operating efficiency of the terminal, through a capital charge that diverges from the reference tariff to reflect the difference in cost and risk. In general terms, the standard or ‘reference’ service should reflect efficient operation of the terminal.

The Authority is proposing alternative drafting of this principle, as set out below, to meet the intended objective.

With regard to the principle relating to the Terminal Regulations, this must be modified to reflect the Authority’s proposed changes on this issue, as discussed in Chapter 5 of this decision.

The Authority notes the DBCT User Group’s latest submission that 95% of annual contract tonnage would be a more appropriate minimum threshold for the reference tonnage. However,

the Authority believes that the 80%, submitted by DBCT Management, and accepted by the Authority in its draft decision, reflects an appropriate threshold.

With regard to the DBCT User Group's comment that requiring an access holder to use reasonable endeavours to ship at an even rate throughout the year may be too inflexible, the Authority believes that this is a fair and reasonable obligation for an access holder given the potential operational difficulties that may result from shipping at an uneven rate. The Authority believes that this requirement should not preclude 'rail to ship' loading. Moreover, the Authority is not aware that this requirement in current user agreements has affected such arrangements.

In order for the undertaking to be approved, Schedule B must be amended to:

- **clearly state that, in return for payment of access charges, DBCT Management will provide the coal handling service within the terminal;**
- **replace principle 2.4 with the following: “Subject to all relevant rules and procedures set out in the Terminal Regulations, the agreement will provide the Access Holder with the right to have its coal transferred from the train unloading facility at the Terminal to a stockpile area that is assigned to the Access Holder by DBCT Management or the Operator. In assigning stockpiles, DBCT Management will ensure that it and the Operator act fairly and reasonably and use all reasonable endeavours to ensure that the Access Holder and all other stockpile users are treated equally”;**
- **provide an absolute obligation on DBCT Management to make the terminal available to handle contracted tonnage;**
- **provide for the following framework applying to the Terminal Regulations:**
 - **DBCT Management will comply with, and will use its best endeavours to ensure that the Operator complies with, the Terminal Regulations in force from time to time. The obligation on DBCT Management to ensure that the Operator complies with the Terminal Regulations is subject to the OMC allowing DBCT Management to enforce this obligation against the Operator;**
 - **an obligation on DBCT Management to undertake reasonable consultation with access holders prior to implementing or consenting to any proposed changes to the Terminal Regulations. DBCT Management will only give its consent to an amendment of the Terminal Regulations if it reasonably considers that the Terminal Regulations, as a whole, will operate equitably among access holders and access seekers, having regard to (among other things) the annual contract tonnages of the access holders;**
 - **ability for access holders to notify a dispute about any proposed changes to the Terminal Regulations under the dispute resolution provisions of an access agreement. DBCT Management must not implement a proposed amendment to the Terminal Regulations until the outcome of any dispute has been determined. However, DBCT Management may proceed to implement, on an interim basis, pending the resolution of the dispute, an amendment to the Terminal Regulations which is reasonably necessary to deal with an emergency or force majeure event. The interim change to the Terminal Regulations will only continue until the resolution of any dispute or the cessation of the emergency or force majeure event, whichever is earlier; and**
 - **an obligation on DBCT Management to current access holders of amended Terminal Regulations and to provide access holders with a copy of the amended Terminal Regulations to these parties.**

3. *Payment of Charges and Rebates*

This principle requires that each agreement prescribe the applicable Terminal Infrastructure Charge (which includes a fixed component and a Throughput Rebate) and the Operation & Maintenance Charge to be payable by access holders. These charges are calculated in Schedule C and Part 4 of the draft access undertaking respectively. The principle also requires each agreement to prescribe the terms of payment for access charges and the interest to be applied to any outstanding balances.

In its draft decision, the Authority proposed a number of amendments to this principle in order to reflect the Authority's proposed form of regulation and pricing structure. In particular, the Authority proposed that Schedule C guide the calculation of access charges, including take or pay liabilities, additional charges for excess tonnage and adjustments for under/over recovery of DBCT Management's revenue cap. Moreover, the Authority proposed that the WACC be applied to determine the interest to be paid/charged on the balance of the unders/overs account.

Stakeholder Comments on Draft Decision

The DBCT User Group suggested a number of fairly minor editorial amendments to these principles for greater clarity (DBCT User Group, sub. no. 54: B-3).

Authority's Analysis

This principle should reflect the Authority's recommendations in regard to the form of regulation and pricing structure. Accordingly, it is essentially unchanged from the draft decision, although the Authority has accepted the minor editorial changes proposed by the DBCT User Group.

In order for the undertaking to be approved, Schedule B must be amended to provide for:

- **access charges, including take or pay liabilities, additional charges for excess tonnage (as defined in clause 2.1) and adjustments for under/over recovery of DBCT Management's revenue cap, to be calculated in accordance with Schedule C; and**
- **provide for interest to be accrued/payable at DBCT Management's WACC on any outstanding 'unders and overs' balances.**

4. *Operation and Maintenance Charges*

This principle, among other things, outlines the components (and their calculation) which form the Operation & Maintenance Charge. The Operation & Maintenance Charge comprises a fixed and variable component, reasonable charges for miscellaneous services provided at the terminal and additional reasonable handling charges (these charges arise if an access holder's coal or requirements result in material additional costs and delays).

In its draft decision, the Authority proposed that this principle be amended to clarify that charges for miscellaneous services provided at the terminal are subject to an agreement between the access holder and DBCT Management. The Authority rejected the principle specifying that the operation and maintenance charge will comprise additional reasonable handling charges if the nature of coal or the access holder's handling requirements results in material additional costs or delays.

Stakeholder Comments on Draft Decision

DBCT Management submitted that the reference in Schedule B to additional handling charges for additional delays results from the costs referred to in principles 6.4(c) and (d) of the current user agreements, which provide additional handling charges if the nature of the user's coal results in materially additional costs or delays. DBCT Management believed that the ability to charge additional reasonable handling charges where particular coal characteristics incur material additional costs is efficient and beneficial for all access holders (DBCT Management, sub. no. 64: 25).

The DBCT User Group considered it unwise for principle 4 to refer to minor capital expenditure. It also proposed rewording principle 4.1(i) so that operation and maintenance charges exclude 'other expenditure incurred by the Operator'. The DBCT User Group also sought clarity regarding what are "core" services and "additional miscellaneous services", and to ensure that reasonable charges for additional miscellaneous services are subject to agreement between the access holder and DBCT Management and subject to the total of operation and maintenance charges not exceeding the terminal operating costs and the Operator's margin (DBCT User Group, sub. no. 54: B-3).

The DBCT User Group also noted that current user agreements refer to the Operator's margin being recouped in handling charges and, generally, the concept of 'operating costs' needs to be further defined (DBCT User Group, sub. no. 54: B-4).

Authority's Analysis

The Authority retains its position in the draft decision that the operation and maintenance charge may include reasonable charges for miscellaneous services, subject to agreement between the access holder and DBCT Management. These charges should be for services for which handling costs are not already recovered under the fixed and variable handling charges calculated in accordance with principles 4.1(i) and (ii). The Authority has proposed to include this caveat to clarify the handling cost recovery mechanism for terminal services. The provision in principle 4.1(iii) should merely provide a mechanism to recover handling charges associated with any additional miscellaneous services not currently included in fixed and variable handling charge component of the operation and maintenance charge.

The Authority also accepts the DBCT User Group's suggestion that these handling charges for additional miscellaneous services also be subject to the requirement that the total of the operation and maintenance charge should not exceed terminal operating costs and the operator's margin. This should ensure that any such charges merely reflect a reallocation of total operational costs among users and is not a chance for DBCT Management to make an additional profit from handling charges.

With regard to the Authority's proposed deletion of principle 4.1(iv), the Authority noted in the draft decision that it does not have any concerns about introducing charges to provide incentives to efficiently use the terminal, however, the basis and level of those charges should be clearly defined and agreed between the access holder and DBCT Management. The Authority considered that this principle in the draft access undertaking is too imprecise and lacks transparency and believes that any such additional charges should be clearly agreed and established between DBCT Management and the access holder.

On balance, the Authority accepts the argument submitted by DBCT Management that it may be reasonable and in the interests of overall terminal efficiency to allow for additional reasonable handling charges if the nature of the access holder's coal or handling requirements result in materially additional costs or delays relative to other coal. However, to protect the interests of all terminal users and to ensure transparency, the Authority believes this should be qualified so

that such additional handling costs shall be subject to agreement and shall not be included in the calculation of the fixed and variable handling costs (as set out in principles 4.1(i) and (ii)). The Authority notes that the Terminal Regulations currently provide for the Operator to impose additional charges on a user to unload, stockpile and load for material additional costs incurred or simply to reject such coal.

The DBCT User Group made some suggestions with regard to the inclusions in the operation and maintenance charge, namely that it exclude ‘minor capital’ and ‘other expenditure incurred by the Operator’. The Authority has accepted the concept of ‘minor capital’, subject to certain protections for users in terms of transparency. This issue is discussed in Chapter 10 of this decision.

Regarding the DBCT User Group’s proposed deletion of ‘other expenditure incurred by the Operator’ from the operation and maintenance charge, the Authority considers that its proposed change to the definition of ‘terminal operating costs’, which clearly excludes capital costs (other than minor capital expenditure) should provide assurance that capital costs will not be recovered through the operation and maintenance charge. This is because the undertaking provides that the operation and maintenance charge is the mechanism by which DBCT Management will recover ‘terminal operating costs’. The Authority also believes that its acceptance of the amendment that the operation and maintenance charge may include reasonable charges for additional miscellaneous services, subject to the total of the operation and maintenance charges not exceeding terminal operating costs and the Operator’s margin should help ensure that this charge only reflects operating costs. Also, although these definitions do not specifically mention it, the Authority understands that the fixed and variable component of the operation and maintenance charge will reflect the Operator’s margin. The current user agreements note that this margin is calculated on an ‘arms length’ basis and represents a reasonable charge in all the circumstances, as agreed between DBCT Management and the Operator.

In order for the undertaking to be approved, Schedule B must be amended to:

- **make clear that charges for miscellaneous services provided at the terminal, for which handling costs are not already recovered under the fixed and variable handling charges calculated in accordance with principles 4.1(i) and (ii), are subject to an agreement between the access holder and DBCT Management and subject to the total of the operation and maintenance charges not exceeding terminal operating costs and the Operator’s margin (principle 4.1(iii)); and**
- **amend principle 4.1(iv) to allow for reasonable additional handling charges if the nature of the access holder’s coal or requirements in respect of Handling result in materially additional costs or delays (compared with other coal shipped through the terminal). Such additional handling costs shall not be included in the calculation of the costs referred to in principles 4.1(i) and (ii).**

5. Review of Charges

This principle requires that each agreement provide for amendments to access charges, where such amendments are made in accordance with changes in approved reference tariffs. Amendments may also be retrospective and apply from the date the revised reference tariff takes effect.

The draft decision did not propose any amendments and there were no stakeholder comments on this issue.

The Authority accepts these principles.

6. Recording of Tonnage

These principles require that each agreement prescribe an access holder's obligations with respect to the recording of coal tonnage handled, and sets out the process for establishing cargo weight. It also provides the ability to amend an incorrect account.

In its draft decision, the Authority required changes to principle 6.3 to provide more balance. It also required that access holders have access to relevant information in the event of a dispute.

Stakeholder Comments on Draft Decision

The DBCT User Group suggested an amendment to principle 6.2 providing both an access holder and DBCT Management the opportunity to agree on an alternative method to determine the weight of shipments (DBCT User Group, sub. no. 54: B-4).

Authority's Analysis

The Authority accepts the DBCT User Group's suggestion that the SAA allow the opportunity to agree on an alternative method of determining the weight of shipments. This would seem to provide some flexibility, with the 'fall back' option in place if agreement cannot be reached on an alternative.

In order for the undertaking to be approved, Schedule B must be amended to provide:

- **the possibility of the access holder and DBCT Management agreeing to an alternative method of determining the weight of a shipment;**
- **that, where there is a bona fide disputed account, access holders are able to have access to the information used in the calculation of access charges, including cost and throughput details; and**
- **for a fair and reasonable dispute resolution process for bona fide disputed accounts.**

7. Changes to Annual Contract Tonnage and Reference Tonnage

This principle stipulates that if an access holder wishes reduce its reference tonnage it must give DBCT Management five years' notice of the extent and period of the required reduction. In the event of any transfer of reference tonnage from an access holder to another access holder or access seeker, the transferee must be acceptable to DBCT Management and be willing to enter into a binding agreement with DBCT Management in relation to the transferred reference tonnage on terms and conditions acceptable to DBCT Management.

An access holder wishing to reduce its non-reference tonnage must give DBCT Management at least one year's notice. A request to increase its non-reference tonnage or annual contract tonnage requires no advance notice.

An access holder may ship coal in excess of annual contract tonnage, provided that this does not adversely affect another access holder or create additional expenses. The access holder must pay the relevant Terminal Infrastructure Charge and Operation and Maintenance Charges in respect of the additional tonnage.

The draft access undertaking also proposed that DBCT Management may reduce an access holder's annual contract tonnage if, in its reasonable opinion, an access holder is not using or likely to use its annual contract tonnage over a sustained period.

In its draft decision, the Authority proposed amendments to qualify that DBCT Management must act reasonably in determining if a proposed recipient of transferred access rights is acceptable and if the terms and conditions of the transfer are acceptable. Other proposed amendments sought to clarify that a request from an access holder for a sustained increase to its reference tonnage or annual contract tonnage will be treated as a new access application. The Authority also rejected DBCT Management's proposed capacity resumption rights.

Stakeholder Comments on Draft Decision

DBCT Management submitted that its proposed principle 7 of Schedule B of its draft access undertaking was similar to clause 9.3 of the current user agreements, allowing DBCT Management to resume capacity where an access holder fails to use reasonable efforts to make available its annual contract tonnage for shipping. DBCT Management submitted that the Authority's analysis fails to recognise that a user may have an economic interest to pay for access it will not use to prevent or delay a competitor's access to capacity. DBCT Management considered that the purpose of its proposed resumption rights was to reduce this risk for all users' benefit. DBCT Management submitted that if its proposal is deemed unacceptable, an alternative mechanism should be established to protect the interests of both new and smaller users from users with greater market power (DBCT Management, sub. no. 64: 26).

DBCT Management submitted that the ability for existing users to contract and hoard capacity and sell such capacity at a premium on the secondary market effectively results in "virtual ownership" of the terminal by users, a principle that was unacceptable to the State at the time of the lease because of the potential for gaming and anti-competitive behaviour by access holders. DBCT Management submitted that the Authority should also be of the same view.

DBCT Management highlighted that its proposed resumption right was applicable only if there was a "sustained" under-use and if the access holder is not able to "demonstrate a case for retention". DBCT Management submitted that the resumption right is not triggered by normal variations in the coal market.

DBCT Management submitted that incorporating a resumption right provides a mechanism which prevents continual terminal under-use by an access holder in situations where there is no likelihood of the access holder completely using its rights (DBCT Management, sub. no. 64: 26).

The DBCT User Group suggested extending principle 7.1(i) to allow both the transfer and substitution of reference tonnage (DBCT User Group, sub. no. 54: B-4, B-5).

In response to the Authority's recommendation that a request for a sustained increase be regarded as a request by a new access seeker, the DBCT User Group proposed changing the threshold from a 'sustained' increase to an increase exceeding 18 months.

Authority's Analysis

In its draft decision, the Authority rejected the notion of DBCT Management having a right to resume capacity on the basis that it was not reasonable in light of its proposed revenue cap and the existence of substantial take or pay obligations. Further, the Authority argued that capacity trading among users would mitigate against the risk that there may be sustained underutilisation of the terminal by a user.

However, the Authority acknowledges DBCT Management’s argument that some users may have an incentive to ‘hoard’ capacity, despite paying take or pay charges (which would be quite onerous under the Authority’s take or pay proposals), to prevent or delay a competitor’s access to the terminal.

On balance, the Authority accepts that a right to resume capacity is in fact reasonable and appropriate to help ensure the optimal management of terminal capacity and to preclude the possibility of hoarding. However, the Authority proposes that such a right be significantly constrained, and should not be triggered by normal variations in coal production. The Authority considers that the resumption process should operate along the following lines:

- there must be a sustained underutilisation by the access holder, for any reason other than a force majeure event or the failure of DBCT Management to make the access rights available;
- DBCT Management must be able to demonstrate it has a reasonable expectation of a sustained alternative demand for the unutilised access rights;
- the access holder must have the right to demonstrate a sustained requirement for the access rights that have not been utilised and are subject to resumption; and
- there must be provision for dispute resolution if the access holder does not agree that the triggers have been met or does not agree with DBCT Management’s assessment.

In terms of what might constitute ‘sustained’ underutilisation, the Authority believes that this may be considered at the time of considering the SAA, with the benefit of stakeholder input.

The Authority believes that this significantly constrained resumption right is reasonable, taking into account the legitimate business interests of both DBCT Management and access holders, as well as the public interest.

The DBCT User Group has suggested modifying principle 7.1(i) to allow both the transfer and substitution of reference tonnage. The Authority’s understanding is that this amendment is merely to reflect that an access holder may transfer access rights as well as purchase them. While the Authority believes that ‘transfer’ is probably adequate to convey this concept, it has accepted the DBCT User Group’s proposal for the purposes of clarity.

The DBCT User Group also proposed to state that a request for an increase in tonnage exceeding 18 months should be regarded as a new access seeker. This is in place of the Authority’s proposal which referred to a ‘sustained’ increase. The Authority does not accept this amendment on the basis that it may unfairly advantage access holders at the expense of new access seekers in terms of obtaining additional access rights.

In order for the undertaking to be approved, Schedule B must be amended to:

- **qualify principle 7.1(i) to require DBCT Management to act reasonably in determining if a proposed recipient of transferred access rights is acceptable and if the terms and conditions of the transfer are acceptable;**
- **include “...transfer or substitution..” of reference tonnage in principle 7.1(i);**
- **clarify that principle 7.3 relates to requests for sustained increases in tonnage and that principle 7.4 relates to temporary increases in tonnage; and**
- **modify principle 7.5 giving DBCT Management resumption rights subject to the following constraints:**
 - **must be sustained underutilisation by the access holder for any reason other than a force majeure event or failure of DBCT Management to make access rights available;**
 - **DBCT Management must be able to demonstrate that it has a reasonable expectation of sustained alternative demand for the unutilised access rights;**
 - **access holder has right to demonstrate sustained requirement for the access rights subject to resumption; and**
 - **recourse to dispute resolution if the access holder does not agree that the triggers have been met or if it does not agree with DBCT Management’s assessment.**

8. Set-off

This principle requires, among other things, that each agreement prescribe that each party have the power to set-off any amount under the agreement which is due and payable to the other party.

The draft decision did not propose any amendments and there were no stakeholder comments on this issue.

The Authority accepts these principles.

9. Remedies

This principle outlines what amounts an access holder can recover from DBCT Management in the event of a delay on the part of DBCT Management. In particular, the draft access undertaking proposes that an access holder may recover amounts which DBCT Management recovers from its insurers, the Operator and third persons (or their insurers).

It also outlines the amounts which DBCT Management has a right to charge for in the event of a delay on the part of an access holder. In particular, DBCT Management may charge any relevant fixed component of the Terminal Infrastructure Charge, and any fixed Operation and Maintenance Charges.

Principle 9 also provides a definition of ‘delay’ and for a system of delay notices which may be issued by either DBCT Management or an access holder in the event of a delay.

In its draft decision, the Authority expressed strong reservations as to whether the principles submitted by DBCT Management were commercially balanced and appropriate. The Authority, therefore, proposed that principle 9 be deleted and replaced with high-level principles — namely, that the agreement will: prescribe the liabilities of parties in the event of delay, failure to provide access and force majeure; provide for insurances to be effected by the parties to appropriately provide for the relevant insurance risks; 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 wrong act or omission; and liability arising from inaccurate scheduling information (provisions currently in the Terminal Regulations).

Stakeholder Comments on Draft Decision

The DBCT User Group suggested a number of amendments, including an addition to principle 9.4 proposed by the Authority, requiring that the agreement will prescribe the liability arising from reasonably foreseeable over-commitment of the terminal or reasonably avoidable inaccuracies in scheduling information (DBCT User Group, sub. no. 54: B-5).

In response to the Authority's concerns that the liability and remedial provisions of Schedule B of the draft access undertaking were unbalanced and uncommercial, DBCT Management highlighted that these provisions reflected the provisions in current user agreements. DBCT Management noted that this regime had been agreed to by the DBCT User Group. DBCT Management further noted that, in June and July 2004, it was agreed to by two additional users and that these provisions had been agreed upon by all current stakeholders on an arm's length basis (DBCT Management, sub. no. 64: 23).

DBCT Management submitted that, under the liability and remedy provisions there are appropriate sanctions on DBCT Management for default. To the extent that DBCT Management is not at fault, there are remedies consistent with an efficient allocation of risk and appropriate management practices. Further, express limits on DBCT Management's liability have a narrow application (DBCT Management, sub. no. 64: 23).

DBCT Management submitted that Schedule B principles of the draft access undertaking relating to remedies are based upon the intent of the liability and remedy provisions in the current user agreements, and noted that all of its risk assessments and commercial decisions regarding DBCT have been based on these provisions. DBCT Management recognised that many of these issues are complex and interdependent with other provisions in the draft access undertaking (DBCT Management, sub. no. 64: 27).

In summary, DBCT Management believed many of the proposals adopted by the Authority: reflect a misunderstanding of commercial reality or DBCT Management's intent; are not feasible to implement due to the prevalence of existing user agreements; and have DBCT Management exposed to risks it cannot effectively mitigate and is not rewarded for assuming. Further, DBCT Management believed the risk profile under the SAA should not be considered in isolation, as adopting a materially different risk matrix between existing arrangements and the SAA will lead to difficulties for DBCT Management in mitigating these additional risks (DBCT Management, sub. no. 64: 37-38).

DBCT Management's General Risk Profile

DBCT Management submitted that under a regulated price framework, the risk/liability profile of Schedule B, if considered in its entirety, is completely appropriate (DBCT Management, sub. no. 64: 27).

DBCT Management submitted that the liability profile of its proposed Schedule B principles:

- excluded an access holder’s liability to DBCT Management for differences between actual and forecast terminal use;
- limits an access holder’s liability for not offering its annual contract tonnage for shipping to take or pay charges and the fixed component of handling charges; and
- entitles an access holder, where DBCT Management is primarily responsible for a delay, to recoup the take or pay charges that would have been payable had the delay not occurred. Consequently, DBCT Management is not compensated for the fixed capital costs it incurs, and loses potential income. DBCT Management thus considered that this, in itself, would encourage it to minimise delays which are within its control (DBCT Management, sub. no. 64: 27, 28).

DBCT Management submitted that, other than for delays for which it is primarily responsible, its liability for shipping delays is limited to amounts recouped from insurers, the Operator and third parties. DBCT Management considered that this limitation is appropriate as the declared service is primarily undertaken by the Operator and because there is a carve-out for losses primarily caused by DBCT Management (DBCT Management, sub. no. 64: 28).

DBCT Management submitted that the Authority’s analysis of Schedule B’s risk profile failed to acknowledge that the provisions limiting DBCT Management’s liability are very limited in their application. That is, its liability is limited only in the case of delays, failures or inability to ship coal (DBCT Management, sub. no. 64: 28).

Conversely its liability to access holders (other than for delays, failures or inability to ship) is unlimited. This position is based on clause 7.1 of the current Terminal Regulations which provides that access holder’s bear the risk of coal being shipped through the terminal, except in cases where coal loss or damage “is caused by the negligence, or intentionally wrongful act or omission of [DBCT Management] or the Operator (as the case may be)” (DBCT Management, sub. no. 64: 29).

DBCT Management considered that the provisions (in current user agreements and the Terminal Regulations) pertaining to DBCT Management’s liability to access holders is commercially very favourable to access holders, as most service providers will, at least, cap their total liability and exclude their liability for particular losses — for example, lost profits and consequential loss (DBCT Management, sub. no. 64: 29).

DBCT Management further noted that there is nothing in the access agreements or OMC which prevents access holders pursuing claims of negligence directly against the Operator. DBCT Management noted that, given that the Operator is not a party to an access agreement, the Operator would be unable to rely on the relevant access agreement provisions limiting DBCT Management’s liability (DBCT Management, sub. no. 64: 29).

DBCT Management noted that the risk profile reflected in Schedule B of the draft access undertaking and the current access agreements were expressly negotiated and agreed in recognition that:

- multiple users use the terminal;
- access holders’ throughput is extremely variable and access holders have no liability for differences between actual and forecast tonnage (other than take or pay charges and a portion of fixed operating costs);
- access holders have no liability for differences between actual and scheduled ship arrivals; and

- DBCT Management operates within a regulated price framework (DBCT Management, sub. no. 64: 29).

DBCT Management noted that, in line with sound commercial risk management practice, the draft access undertaking recognises DBCT Management’s liability for material terminal events should be restricted to insurable events, and the agreements provide for access holders to have significant input into the types and level of insurance DBCT Management has purchased. DBCT Management considered that the proposed risk profile is reasonable, commercial and efficient when considered in its entirety. DBCT Management noted that there are sanctions against it if it primarily causes a delay. DBCT Management further noted that in all other cases of delay there is an obligation to pursue the Operator, third parties and insurance claims. Except for its liability for delays, failure or inability to ship coal, DBCT Management’s liability for default is unrestricted (DBCT Management, sub. no. 64: 30).

Force Majeure

DBCT Management noted that the SAA principles did not include any reference to the notion of “force majeure”. DBCT Management submitted that this reflects its view that such circumstances should be treated in the SAA in the same way as they are treated in the current user agreements. It also submitted that this approach is far simpler and clearer than the usual force majeure terminology adopted (DBCT Management, sub. no. 64: 30).

DBCT Management noted that, if an access holder fails to offer its tonnage due to ‘force majeure’ circumstances, the current user agreements provide for the access holder to be liable to pay the fixed component of both the terminal infrastructure charges and operation and maintenance charges (DBCT Management, sub. no. 64: 30).

DBCT Management believes this approach is appropriate given that the service forms a discreet part of the distribution chain, and it is consistent with other infrastructure service contracts. DBCT Management submitted that this risk allocation is efficient because the parties at either end of the supply chain are best placed to reduce the risk either via contract or insurance, both of which may be priced into agreements (DBCT Management, sub. no. 64: 31).

DBCT Management submitted that the effect of the relevant provisions in the current user agreements (clause 11.9(b)) is that access holders are only liable for take or pay charges if: the access holder suffers the force majeure event; and if the terminal force majeure events are not insurable (DBCT Management, sub. no. 64: 30, 31).

In response to the Authority’s view that DBCT Management should not be entitled to take or pay charges for force majeure unless it has acted prudently, DBCT Management noted that the current user agreements provide access holders with a remedy if a terminal force majeure event could have been avoided by reasonable measures. This is because it recognises that the actions of the Operator affect whether a force majeure event at the terminal occurs (DBCT Management, sub. no. 64: 31).

Under the user agreements, DBCT Management is obliged to pursue claims against the Operator where the Operator is in default. Under the OMC, if the Operator delays, fails or is not able to ship coal because of a force majeure event, it is not liable for default. DBCT Management submitted that the Operator is liable to DBCT Management if it does not act reasonably to avoid the force majeure (DBCT Management, sub. no. 64: 32).

Therefore, while access holders must pay take or pay charges for any shortfall in annual contract tonnage resulting from terminal force majeure events, access holders are provided with a remedy where force majeure events affect DBCT Management, the terminal or the Operator

and such events could have been prevented by the Operator by exercising a reasonable standard of care (DBCT Management, sub. no. 64: 32).

DBCT Management submitted that, to the extent the Authority envisages DBCT Management retaining some liability for force majeure, then 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 (DBCT Management, sub. no. 64: 32).

Limiting DBCT Management’s liability to amount recovered under insurance

DBCT Management noted that the relevant provision in the current user agreements (clause 11.7) merely affects the amount of DBCT Management’s liability, not whether DBCT Management is liable or not. DBCT Management submitted that the indemnity insurance policy will react to liability which is covered by the policy up to a specified limit (DBCT Management, sub. no. 64: 33).

DBCT Management noted that if it were to be in breach of its obligation to effect appropriate insurance, despite there being no recovered monies under an insurance policy, DBCT Management would be liable for breach of contract. In this case, damages represented by such amounts as would have been recovered had DBCT Management effected insurance as required (DBCT Management, sub. no. 64: 33).

DBCT Management considered that it not unusual or uncommercial to have provisions which limit liability to insurance sums. It considered that provisions limiting liability to amounts recovered through insurance are regularly used as a risk management tool where both parties can allocate risk and provide certainty with respect to their ability to recover losses (DBCT Management, sub. no. 64: 33).

DBCT Management also submitted that it is wrong to say that there is no express obligation on DBCT Management to pursue an insurance claim. DBCT Management noted that the current user agreements (clause 11.9(a)) included this obligation, and that this principle is intended to apply to any SAA (DBCT Management, sub. no. 64: 33).

Limiting DBCT Management’s liability to amounts which may be recovered from third parties

DBCT Management disagreed with the Authority’s construction of the principle limiting DBCT Management’s liability to the amount recovered from a third party. Again, this principle is based on the current user agreements.

DBCT Management submitted that the majority of delays or failures to ship coal which constitute a breach of DBCT Management’s part of an access agreement will be the result of breach or default caused by the Operator under the OMC. DBCT Management noted that this occurs because the scope of the Operator’s obligations under the OMC is to undertake DBCT Management’s obligations to access holders under the access agreements (DBCT Management, sub. no. 64: 34).

DBCT Management submitted that the relevant clause in the current user agreement (clause 11.7) seeks to limit the “maximum amount which the Access Holder is entitled to recover from” DBCT Management. It noted that this clause works in the same manner as clauses which limit liability to a specified amount of money. That is, DBCT Management is liable to an access holder up to a cap, and that cap is the amount for which the Operator is liable to DBCT Management for the same event. It should be noted that, under the OMC, the Operator’s liability to DBCT Management is not limited. Moreover, it noted that, under the OMC, the Operator is required to indemnify DBCT Management for any damages or losses resulting from

the Operator being in breach of the OMC or the Operator being negligent (DBCT Management, sub. no. 64: 34, 35).

DBCT Management submitted that clause 24 of the OMC would be construed as an indemnity. Accordingly, the clause will operate so that the Operator is obliged to compensate DBCT Management for amounts for which DBCT Management is liable to an access holder, without DBCT Management having actually paid monies to an access holder (DBCT Management, sub. no. 64: 35).

DBCT Management submitted that, should the Operator act in a manner which is a default under an access agreement, then such an act would most probably constitute negligence. In this event, the access holder would benefit from having a direct right in negligence against the Operator (DBCT Management, sub. no. 64: 35).

Finally, DBCT Management noted that it is its intention to include in the SAA the provision under the current user agreements which place an express obligation on it to pursue a claim against the operator or third party.

The Definition of Delay

DBCT Management submitted that the exception of delays under 24 hours for an access holder's entitlement to remedies recognises the fact that, notwithstanding best practice operation and maintenance standards, there will unavoidably be delays on occasions. DBCT Management noted that this reflects the fact that the terminal is a multi-user facility where users are under no obligation to ship forecasted tonnages, users are not liable for differences in scheduled and actual shipping and access holder's throughput is highly variable (DBCT Management, sub. no. 64: 36).

DBCT Management submitted that a 24 hour delay benchmark distinguishes those delays from delays that are of an unusual duration. DBCT Management considered it important to recognise that, despite the exception of delays under 24 hours, DBCT Management has the incentive, under the current pricing regime, to avoid and minimise delays so that throughput and revenue are maximised (DBCT Management, sub. no. 64: 36).

DBCT Management submitted that the exception of delays resulting from good operating and maintenance practice is a necessary caveat which benefits both access holders and DBCT Management. DBCT Management noted that by definition good operating and maintenance practice does not allow DBCT Management to unduly disturb either coal unloading or loading. DBCT Management considered that it should not be punished for delays if due to good operating and maintenance practice (DBCT Management, sub. no. 64: 36).

Transfer of liability provisions from the Terminal Regulations to the Access Agreements

In response to the Authority's recommendation to transfer elements of the Terminal Regulations (which establish liabilities for product risk, inaccurate scheduling information and for negligence etc) to access agreements, DBCT Management is concerned it may not be possible to transfer such provisions to the current user agreements (DBCT Management, sub. no. 64: 37).

Authority's Analysis

DBCT Management has submitted that the SAA principles in regard to remedies in the draft access undertaking are based on the provisions of the current user agreements and that, if the entirety of these provisions in current user agreements are taken into account, the Authority should not form the view that the remedies are commercially imbalanced. In support of this,

DBCT Management cites a number of relevant provisions in the current user agreements and indicates that it is its intention that these be carried forward into future access agreements.

In response, the Authority notes that it can only make a decision on the matters which have been submitted in the draft access undertaking. While acknowledging DBCT Management's comments that other provisions of current user agreements, which have not been submitted in the draft access undertaking, are relevant to the Authority's assessment, the Authority must make its decision only on the matters which are before it — namely, the principles in Schedule B. The complete SAA will be assessed by the Authority when it is submitted three months after the approval of the undertaking. In assessing the Schedule B principles at this point in time, the Authority cannot assume that the matters submitted by DBCT Management detailing the remedies provisions of current user agreements will be included in the submitted SAA.

In any event, the Authority has considered but does not accept DBCT Management's argument that future access agreements should not adopt a materially different risk matrix to current access agreements. Existing user agreements were established with a government owned monopoly business in a pre-regulation environment. Therefore, it cannot be assumed that the fact that current users (including two new users in June and July 2004) have signed up to these terms is conclusive evidence that they reflect standard, commercially balanced terms. Indeed, as part of the undertaking assessment process, the DBCT User Group has submitted that it believes these provisions in current user agreements are imbalanced and need to be renegotiated on a commercially fair basis.

Accordingly, the Authority proposes to retain the principles it recommended in the draft decision on this issue. This is on the basis that these principles are both appropriate as they stand and are expressed in fairly general terms. This means that they will not preclude further detailed consideration of these issues when the SAA is submitted. The Authority believes it is important to have the benefit of the complete draft SAA before it when considering the detail of an appropriate remedies regime. Moreover, the Authority believes the liabilities and remedies regime is a very important part of an access regime and that commercially fair remedies must be available to both access holders and the access provider. An access regime may ultimately be ineffective if there is no meaningful remedy for a failure to provide access once an access agreement has been signed.

In response to the DBCT User Group's suggested amendments to the Authority's recommended principles, the Authority does not accept that agreements should include provisions setting out the indemnities and liabilities of the parties with respect to reasonably foreseeable over-commitment of the terminal. The issue of DBCT Management over-committing terminal capacity is addressed under the access regime in a range of ways, including through the proposed form of regulation and the triggers for capacity expansion. Moreover, the Authority believes that the consequences of an over-commitment of capacity will be reflected in the other indemnities/liabilities provisions relating to delays and failure to provide access.

In regard to the modification proposed by the DBCT User Group regarding 'reasonably avoidable' inaccuracies in scheduling information, the Authority considers that this should be considered in more detail at the time of assessing the SAA.

In response to the Authority's proposal to transfer liability provisions from the Terminal Regulations to access agreements, DBCT Management submitted that it may not be possible to transfer such provisions to the current user agreements. The Authority's recommendations were in regard to the Schedule B principles and, hence, should be reflected in future access agreements. With regard to current user agreements, these liability provisions are incorporated by reference to the Terminal Regulations. The Authority notes it is open to the parties to these agreements to amend them at any time, a process which the Authority understands is being considered to accommodate other undertaking obligations. Even if this does not occur, the

Authority considers it would be possible to retain these provisions in the Terminal Regulations for the benefit of current user agreements, while including them in access agreements going forward.

In accordance with the Authority's approach, the principles do not include the definition of 'delay' as proposed by the DBCT Management. However, it is likely to be necessary for the SAA to include such a definition. In the draft decision, the Authority raised the question of whether an accumulation of 24 hour delays beyond some specified threshold should trigger a liability on the part of DBCT Management. No other stakeholder comments were received on this issue. However, it was not the Authority's intention, as suggested by DBCT Management, to imply that delays for the purpose of good operating and maintenance practice should be excluded from the definition of 'delay' or that DBCT Management should be 'punished' for delays for this reason.

Although the Authority is not proposing to amend the remedies principles in Schedule B proposed in the draft decision, in the interests of facilitating discussion and the future development of the SAA, the Authority believes it may be beneficial to respond to some of the matters raised by DBCT Management in its submission on this issue. This response is set out below.

Authority's response to issues raised in DBCT Management's submission

Extent of liability

DBCT Management has submitted that its general risk profile, if considered in its entirety (as reflected in current user agreements) is appropriate. This regime provides that, other than for delays for which it is primarily responsible, an access holder's remedies are limited to amounts recouped from insurers, the Operator and third parties.

As outlined in the draft decision, the Authority has serious reservations about the effectiveness of linking the remedies regime to amounts recovered from insurers, the Operator or third parties. The Authority understands, based on legal advice, that there is considerable doubt that such a regime will work and, in consequence, may effectively render DBCT Management not liable at all. The Authority understands that DBCT Management rejects this interpretation of the effects of these provisions. DBCT Management has submitted that the relevant provision of the current agreements does not affect the question of DBCT Management's liability to an access holder, but merely the quantum of its liability. Despite this, the Authority remains concerned about DBCT Management's approach to remedies.

The Authority's concerns are due to the fact that, in order for insurance policies to be triggered, or for DBCT Management to be able to make a claim against the Operator or a third party, a liability to an access holder under an access agreement will need to exist in the first place. The Authority's understanding is that, due to the circular nature of the current provisions, insurance policies and claims against other parties may not be triggered until a liability exists. For instance, in the case of recovering from insurers, the Authority has been advised that, in order for there to be any liability, there must be a quantum. Under the proposed circular provision, the level of the liability will simply be whatever the insurer chooses to pay out.

Limitation of liability to amounts recovered from third parties runs into the same problem, namely, that until there is a recovery from a third party there is no liability from DBCT Management to the access holders. In the absence of a liability to the access holder, DBCT Management has suffered no 'damage' which could form the basis of the action against the third party.

The Authority remains of the view that a strong possibility exists that the proposed regime renders DBCT Management not liable at all. While serious uncertainty exists as to the viability of the regime, the Authority believes a persuasive argument exists to contemplate a change in the remedies regime.

Distinction between DBCT Management and Operator

In its response, DBCT Management appears to make some distinction between the Operator and DBCT Management in the context of the remedies available to an access holder. The Authority considers that DBCT Management will be the party contracting with the access holders. If DBCT Management chooses to provide these services by a sub-contractor (Operator), that is not a matter that should impact on the liability between the access holder and DBCT Management for failure to provide the services.

DBCT Management submits that there is nothing in the access arrangements or the OMC which would prevent access holders from pursuing a claim in negligence directly against the Operator. DBCT Management notes that, as the Operator is not a party to the access agreement, it would not be able to rely on any provisions limiting liability. In this regard, the Authority understands that the Operator is still a sub-contractor to DBCT Management. Accordingly, in accordance with normal commercial practice, there should be no distinction between the actions of the Operator or DBCT Management. In any event, the claim that an access holder may pursue a claim against the Operator overlooks the fact that there will be no contractual relationship between the access holder and the Operator. Further, the Authority understands that causes of action against the Operator in tort may be very difficult to establish given there is no contractual or direct obligations owed by the Operator to the access holder.

DBCT Management notes there must be recognition of the fact that the services will be provided by a third party, the Operator, and that DBCT Management cannot be liable for the Operator's default. DBCT Management is the party to an access agreement and the party to whom the access holder will be paying the fees and charges. Under the contract, it is DBCT Management that must provide the services. Whether it chooses to do that by an independent Operator, sub-contractor or provide the service itself should not affect its liability for failure to provide the services it has committed to provide to each access holder. It is of course open to DBCT Management to have contractual recourse to the Operator for its failure to provide services.

Force Majeure

The Authority has concerns that the matters raised by DBCT Management in regard to force majeure do not reflect the normal operation of this principle. The Authority has received independent legal advice to the effect that DBCT Management's approach misunderstands the normal operation of force majeure and, further, may not be compatible with the insurance market in Australia. The Authority's legal advice on this issue is that an access holder has a right, not an obligation, under its access agreement to ship contracted tonnage. However, if it chooses not to, or is unable to, for whatever reason particular to it (including force majeure), that is a matter within the normal operational risks or choice of the access holder. In those circumstances, it is appropriate that the access holder still be held to its take or pay obligations.

However, if an event of force majeure affects the terminal or facilities provided by DBCT Management, that is not an event of force majeure affecting the access holder. It is 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.

The Authority understands that the principle of force majeure is that, where a party is, by matters outside its control, prevented from fulfilling its contractual obligations, it has relief from

those obligations under the contract. However, the Authority understands that this does not mean that it is still entitled to receive payment for the services that it is not providing.

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

In order for the undertaking to be approved, Schedule B must be amended to state that the agreement will:

- **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 wrong act or omission; and liability arising from inaccurate scheduling information.**

10. Dispute Resolution

This principle requires, among other things, that each agreement include a dispute resolution process which involves compulsory negotiation and conciliation, followed with optional arbitration. Moreover, court proceedings and arbitration are not to commence until the negotiation and conciliation procedures have been followed.

In its draft decision, the Authority supported the staged dispute resolution process on the basis that the parties have recourse to expert resolution or arbitration and that the process be fully developed as part of the SAA.

Stakeholder Comments on Draft Decision

The DBCT User Group suggested an amendment to this principle to allow urgent injunctive relief, if relevant, while negotiation and conciliation procedures are underway (DBCT User Group, sub. no. 54: B-6).

Authority's Analysis

The Authority does not accept the DBCT User Group's proposal that the dispute resolution principles should allow for urgent injunctive relief while negotiation and conciliation procedures are progressing. The Authority understands that an injunction of the type referred to by the DBCT User Group is an interim order in a proceeding which is obtained pending the trial and the making of a final order. Therefore, for a court to grant such an injunction, an action must have commenced. This does not appear consistent with the remainder of the principle that establishes that court proceedings must not commence until the negotiation and conciliation procedure has been complied with.

The Authority accepts this principle.

11. Assignment

This principle requires, among other things, that each agreement provide for an access holder to assign part or all of its rights and entitlements under the agreement temporarily or permanently. This principle also provides for DBCT Management to assign all or part of its benefits under an agreement to anyone who is responsible and qualified to operate and maintain the terminal in a manner which complies with DBCT Management's obligations.

In its draft decision, the Authority proposed that principle 11 be amended to clarify that agreements will provide for the secondary trading of capacity. Further, it proposed amendments to clarify that an access holder is released of its obligations on assignment, but not any liabilities which may have been incurred before assignment. Also, an amendment was proposed to the effect that DBCT Management will not unreasonably withhold its consent in allowing third parties to offer coal for shipping through the terminal.

Stakeholder Comments on Draft Decision

DBCT Management submitted that the Authority's requirement that Schedule B be amended to incorporate provisions for mandatory secondary trading of capacity are dangerous as such provisions give current users the incentive to hoard capacity to prevent or delay a competitor's entry. It considered that the ability of users to sell capacity in the secondary market amounts to 'virtual ownership' and may encourage gaming and anti-competitive behaviours by access holders. It noted that, in any event, principle 11 already allows an access holder to assign its rights on a temporary or permanent basis. Therefore, DBCT Management submitted that the Authority's proposal is unnecessary duplication (DBCT Management, sub. no. 64: 37).

The DBCT User Group suggested a number of editorial amendments, including an amendment to prohibit DBCT Management from charging in respect of the secondary trading of capacity (other than for the recovery of reasonable costs). It also proposed clarifying that the agreement will allow for an access holder to assign or allow another access holder to substitute in its agreement all or part of its entitlements (DBCT User Group, sub. no. 54: B-6).

Authority's Analysis

The Authority proposed to include an additional principle stating that agreements will provide for the secondary trading of capacity entitlements. The Authority recommended this on the understanding that current agreements already provide for this, and stakeholders support this regime. In doing so, the Authority sought to place beyond doubt that future access agreements will also allow for trading of capacity rights among access holders.

DBCT Management's arguments on this appear contradictory. On the one hand, DBCT Management objects to the inclusion of this principle on the basis that it confers extra 'ownership' rights on users. On the other hand, it notes that, in any event, principle 11 already allows an access holder to assign its rights on a temporary or permanent basis.

The Authority's objective in including this principle was to clarify this latter objective, not to extend it. However, to the extent the Schedule B principles already provide for secondary trading and, if that is DBCT Management's intention, then this is consistent with the Authority's intention. On this basis, the Authority proposes deleting its new principle on secondary trading.

In order for the undertaking to be approved, Schedule B must be amended to:

- **state that the agreement should establish that the access holder is released from obligations under the access agreement on assignment (but not from liabilities that may have arisen before assignment); and**
- **require DBCT Management to not unreasonably withhold its consent to users permitting a third party to offer coal for handling through the terminal.**

12. Guarantees

This principle stipulates the conditions upon which DBCT Management may request guarantees from an access holder. Such guarantees will secure the obligations of an access holder to DBCT Management and be made from entities DBCT Management considers, acting reasonably, to be of reputable and good financial standing.

In its draft decision, the Authority proposed that the DBCT Management consider the creditworthiness of a potential guarantor in deciding whether or not to accept a guarantee. Further, it was proposed that such guarantees be open to review, with the outcome of any such review subject to the undertaking's dispute resolution provisions.

Stakeholder Comments on Draft Decision

The DBCT User Group generally approved of the Authority's proposed guarantee principle. DBCT Management noted that DBCT Trustee had guaranteed DBCT Management's obligations to current users under current user agreements and to the Operator under the OMC. DBCT Management considered that DBCT Trustee should guarantee these obligations for future access agreements (DBCT User Group, sub. no. 52: 18).

Authority's Analysis

In view of the DBCT User Group's submissions on this matter, the Authority has revised its position on the question of the role of DBCT Trustee in guaranteeing DBCT Management's obligations under access agreements. On balance, the Authority believes that the DBCT User Group's concerns on this matter have merit and, consequently, it may be reasonable for an access holder to require that DBCT Trustee guarantee DBCT Management's obligations under an access agreement in some circumstances. This could be dealt with by making the obligation to obtain a guarantor where there is an issue of creditworthiness a mutual obligation.

In order for the undertaking to be approved, Schedule B must be amended to:

- **allow for DBCT Management or an access holder to require guarantees or any other security reasonably acceptable to the other party, based on its reasonable assessment of the creditworthiness of the other party; and**
- **provide for a review for any such guarantees if requested, with the outcome of such a review to be subject to dispute resolution.**

13. Warranties

The principle stipulates that, under the agreement and subject to normal repairs and maintenance, DBCT Management will maintain, at a minimum, terminal components to their rated design capacity.

In its draft decision, the Authority proposed that each terminal component be maintained to at least its rated design capacity, provided that capacity is consistent with the least cost operation of the facility over the long term.

Stakeholder Comments on Draft Decision

The DBCT User Group concurred with the proposed principle, but suggested alternative wording providing that DBCT Management must warrant that terminal components are maintained to at least its rated design capacity except to the extent it is cost-efficient not to and overall terminal capacity is not materially adversely affected (DBCT User Group, sub. no. 52: 18).

Authority's Analysis

The Authority accepts the DBCT User Group's proposed modification of this principle on the basis that it provides greater clarity as to what may be regarded as the 'least cost operation of the facility over the long term'.

In order for the undertaking to be approved, Schedule B must be amended to state that:

- **each terminal component will be maintained to at least its rated design capacity, except to the extent it is cost-efficient not to and overall terminal capacity is not materially adversely affected.**

14. Expansion of Terminal

This principle provides that DBCT Management will undertake to consult with access holders prior to expanding the terminal, and to expand the terminal with minimal interference to the handling of an access holder's coal. The draft decision did not propose any amendments.

There were no stakeholder comments on this issue. Accordingly, the Authority accepts this principle.

15. Access Holder Committee

This principle provides that DBCT Management and the access holder will agree to participate in the Access Holder Committee. The committee will consist of one representative from each of DBCT Management, the Operator and each access holder. The committee will provide a forum to discuss matters relating to the operation and maintenance of the terminal.

In its draft decision, the Authority proposed amendments to clause 15 to take account of capacity expansion consultations, and to include the requirement to distribute the minutes of the meeting of the Access Holder Committee to access holders.

Stakeholder Comments on Draft Decision

The DBCT User Group suggested minor amendments clarifying that detailed briefings, agendas for and minutes of meetings are to be provided to members of the access holder committee (DBCT User Group, sub. no. 54: B-6).

Authority's Analysis

The Authority accepts the amendments suggested by the DBCT User Group.

In order for the undertaking to be approved, Schedule B must be amended so that:

- **principle 15.2 cross-refers to the matters to be set out in the new clause 12.4 of the undertaking (capacity expansion consultations); and**
- **principle 15.3 includes a requirement to provide for the distribution of detailed briefings, agendas for and minutes of the meetings to access holders.**

7. FORM OF REGULATION AND PRICING ARRANGEMENTS

Summary

The form of regulation, pricing structure and associated incentive mechanism should ideally promote economic efficiency, revenue adequacy and the public interest. Those matters should also ensure that risks are allocated to those best able to handle them. The main risks faced in DBCT's case are volume risk, and capacity expansion risk associated with increasing demand.

In its draft decision, the Authority considered that the form of regulation that best managed the risks associated with DBCT was a revenue cap with an unders and overs mechanism. The Authority remains of the view that a revenue cap is the best form of regulation for the terminal as it provides DBCT Management with revenue certainty over all possible volume outcomes and provides both DBCT Management and users with increased certainty in regard to capacity expansions. However, stakeholders commented that a pure revenue cap does not give DBCT Management adequate incentive to work to improve terminal and coal supply chain efficiency. Consequently, the Authority has proposed a modification to its proposed revenue cap which would allow DBCT Management to retain up to 2% of any over recovery of revenue that is due to productivity improvements it has achieved.

The Authority proposes to continue with a single \$/tonne access charge with a take or pay mechanism. The Authority has accepted most aspects of the take or pay mechanism proposed by the DBCT User Group on the basis that it places the volume risk on users, who are in the best position to handle this risk.

The need for a dual pricing structure at the terminal will depend on whether existing users are willing to modify their current contracts to align with the pricing regime in the undertaking. This is a matter for the parties to these agreements. This decision outlines the situation in the event that some or all current agreements are not modified.

7.1 Form of Regulation

DBCT Management proposed in the draft access undertaking a hybrid price-revenue cap approach to apply at the terminal. The draft access undertaking provided a terminal infrastructure charge (TIC) based on DBCT Management's annual revenue requirement (ARR) and its contracted reference tonnage. DBCT Management also proposed a rebate mechanism whereby access holders receive a share of any additional revenue earned from throughput at the terminal being, in aggregate, in excess of contracted tonnage. Over time, it was proposed that this throughput rebate received by access holders would be linked to the efficiency with which individual access holders use the terminal.

Specifically, under DBCT Management's proposal, it bore the risk of under-recovering its revenue if throughput fell below a specified threshold (the throughput rebate threshold tonnage, TRTT). If volumes exceed this threshold, there is a sharing of revenues, with users receiving a declining share as actual throughput increases beyond the TRTT. That is, users receive: 100% of additional revenues for tonnages between the TRTT and reference (ie. contract) tonnage; 75% of additional revenues earned for tonnage between reference tonnage and terminal capacity; and 50% of revenues for tonnages shipped in excess of terminal capacity. Where actual throughput is below the TRTT, DBCT Management's downside risk is mitigated by the take or pay basis of access agreements. That is, users must pay 50% of the TIC for contracted tonnages that are not shipped.

The DBCT User Group argued in favour of a revenue cap as the most appropriate form of regulation to apply at the terminal. It was concerned that the hybrid price-revenue cap proposed by DBCT Management could create an environment where it may be unwilling to expand as

necessary, with an incentive to ship as much throughput as possible from existing capacity. It believed a revenue cap was more appropriate as it allocated volume risk to users, which it believed are the parties best able to manage it. The DBCT User Group believed a revenue cap would also address the issue of the timing of capacity expansions by providing DBCT Management with a defined revenue stream for new capacity. An additional concern of the DBCT User Group regarding DBCT Management's approach is that it may create incentives for it to contract for non-reference tonnage so that it could recover revenues which would not be subject to the rebate arrangements. The DBCT User Group also strongly supported terminal throughput being underpinned by take or pay contracts.

In the draft decision, the Authority proposed a revenue cap apply at the terminal on the basis that it is likely to create the best incentives for the access provider in terms of contracting for throughput and managing terminal capacity in an optimal way. The Authority believed that a revenue cap would alleviate concerns about future capacity expansions by giving DBCT Management revenue certainty in regard to such expansions.

The Authority was also concerned about the incentives for DBCT Management to over-contract for capacity under its proposed hybrid price-revenue cap, particularly given that the costs of over-contracting would be borne by users, and not DBCT Management, through demurrage charges. Delays at the terminal may also lead to other delays throughout the coal chain – costs for which DBCT Management has limited liability. The Authority argued in its draft decision that these delay costs and consequential losses would be minimised under a revenue cap.

In terms of the risk of a user defaulting and not making its contractually required payments, the DBCT User Group believed that DBCT Management should bear this risk as it is the party best placed to assess creditworthiness of an access seeker. The DBCT User Group did not believe it to be appropriate that the credit risk for a particular access seeker be passed on to other users. Therefore, it believed that the ARR should be adjusted to account for the lost contribution from the defaulting user.

In the draft decision, the Authority recommended that DBCT Management bear this default risk, ensuring that it has the incentive through the access negotiation process to manage this risk. As such, the Authority recommended that access revenue which DBCT Management has been unable to collect as a result of contract default should not be taken into consideration in determining any end of period under or overs adjustment, until such time as replacement tonnes are found or the contract expires.

Stakeholder Comments on Draft Decision

Implications of a Revenue Cap

The DBCT User Group agreed with the Authority's draft decision regarding the form of regulation. However, the DBCT User Group submitted that the Authority's final decision should address the interest rate that should be applied to debit and credit funds while in the unders and overs account, noting that the WACC rate seemed appropriate. (DBCT User Group, sub. no. 52: 18).

DBCT Holdings believed that the issue of a revenue cap versus price cap is inextricably linked to the process for capacity expansion as this determines the extent of revenue certainty and volume risk borne by the parties. DBCT Holdings requested the Authority to consider whether a revenue cap would facilitate achieving the essential outcomes of the lease, in particular promoting an efficient coal transport chain and the long term competitiveness of the Central Queensland coal industry. It believed this should be considered in the context of an

environment in which other parties would be determining the timing and quantum of expenditure for capacity expansions (DBCT Holdings, sub. no. 50: 8).

DBCT Management submitted that a revenue cap fails to provide appropriate incentives to improve both terminal and coal chain productivity. In particular, it removes any economic incentive for DBCT Management to: proactively support users; optimise the use of existing capacity; or work to better coal supply chain efficiency (DBCT Management, sub. no. 64: 40).

DBCT Management submitted that a revenue cap approach essentially re-positions the terminal as a passive investment, providing it with no incentive to assign management attention to its stewardship other than what is required to minimise the downside risk of the terminal. It believed that this is reinforced by the proposed significant reduction in allowable overhead costs (DBCT Management, sub. no. 64: 40).

DBCT Management further noted that it did not believe that a revenue cap was in the best interest of both the public and the coal industry due to its adverse impact on the incentives of stakeholders to improve efficiency and work together to optimise the coal supply chain (DBCT Management, sub. no. 64: 40).

DBCT Management noted that the incentives it would face under a revenue cap would not be consistent with appropriately managing some of the additional responsibilities imposed on it in the proposed regulatory regime, such as actively managing the operator, the service levels being provided and potentially participating in supply chain improvement forums. Going forward, it believed it would have no economic incentive to invest in developing better pricing arrangements and, consequently, it would fall on the Authority to drive any such structural changes – a form of active regulation it believes goes well beyond appropriate light-handed regulation. It considered that creating a setting where the threat of sanction is the only motivating force was not good regulatory practice or likely to result in good industry outcomes (DBCT Management, sub. no. 64: 40-41).

DBCT Management submitted that the form of regulation had played an integral part in the Allen Consulting Group's analysis of an appropriate equity beta, and hence allowable WACC for the terminal. DBCT Management noted that the WACC is a key factor which influences DBCT Management's ability to expand the terminal. However, it was unclear what risk/reward adjustment has been made for the form of regulation, and whether a different form of regulation could produce a better result for prospective investors (DBCT Management, sub. no. 64: 46).

In a similar vein, AusCID argued that the Authority's proposed revenue cap approach eliminates all incentive for DBCT Management to actively work with both existing and new customers in expanding the terminal. AusCID further submitted that the approach potentially enabled existing users to hamper expansions, ultimately restricting competition in related markets. AusCID noted that this outcome is directly contrary to the policy purpose of access regulation (AusCID, sub. no. 47: 2).

AusCID added that the revenue cap approach proposed by the Authority: removed any incentive for DBCT Management to expand its business; provided little incentive for DBCT Management to innovate, essentially neutralising one of the key objectives of the privatisation; created a bottleneck in the supply chain, thus restricting competition in related markets; and impaired overall industry competitiveness when there is a slackening in demand and thus, an increase in supply chain costs (AusCID, sub. no. 47: 2).

Existing Contracts

In regard to the Authority's proposal that the cost of expansion be shared on an average cost basis across all users, DBCT Holdings is concerned that the Authority may not have fully

considered the implications of a situation where all existing users do not agree on the application of an average cost approach. It believed an incremental pricing approach requiring case by case agreement of each user will adversely impact on the ability for new entrants to the coal industry to obtain throughput capacity at DBCT. It believed current users could potentially make new entrants bear the full cost of expansion should they elect to only support an expansion plan which provides for their needs alone (DBCT Holdings, sub. no. 50: 7).

Existing user contracts posed a number of practical issues concerning implementing a revenue cap according to DBCT Management. For example, existing contracts do not contain a mechanism by which collecting or allocating additional revenue due to under/over recovery could be enforced. DBCT Management submitted that it may be possible to manufacture the same outcomes by changing the existing contract pricing terms, for example the levels of both the take and pay and throughput rebate (DBCT Management, sub. no. 64: 41).

In summary, DBCT Management submitted that a revenue cap is enforceable only by contract, and existing contracts do not include the required provisions and are unable to be amended without agreement with all the relevant users. In cases where there was under recovery, it believed it may be possible to recover the shortfall in revenue from new users, should the access undertaking provide for such a mechanism where new users bear all the risk of under-recovery. However, it is highly likely that new users would not accept such a mechanism. DBCT Management noted that, alternatively, it could bear the risk of under-recovery. DBCT Management submitted that this, however, defeated the purpose of having a revenue cap. In a period where there were no new users, DBCT Management would ultimately bear all the risk of under-recovery. DBCT Management noted that such risks would need to be reflected by higher prices being decided upon for existing contracts compared to those prices contemplated by the terms and conditions specified in the draft decision (DBCT Management, sub. no. 64: 41).

DBCT Management submitted that the existing user agreements do not contain a mechanism to facilitate or accommodate recalculating the revenue cap and terminal infrastructure charge following either: the signing of a new agreement; termination of an existing agreement; or where volume commitments change (DBCT Management, sub. no. 64: 41).

Encouraging Future Capacity Expansion

DBCT Holdings highlighted that, in the Authority's consideration of an expansion plan, the potential exists for DBCT Management to constantly face the downside risk of the Authority approving a lower price than that proposed in the amended access undertaking. It considered this a difficulty associated with the Authority having a role in approving capital projects undertaken by DBCT Management, as it is effectively also approving the prices which DBCT Management may charge its customers for those projects. DBCT Holdings considered that, if the users intend to use the Authority-determined price as the basis for negotiated contracts, then DBCT Management will be exposed to the Authority approving a lower price than what DBCT Management and its customers have earlier negotiated. Alternatively, users may refuse to negotiate a price, preferring to await the Authority's determination. Either way, DBCT Management would not have any price/revenue certainty at the time it seeks funding commitments, which is not conducive to DBCT Management participating positively in the Queensland coal industry (DBCT Holdings, sub. no. 50: 7).

DBCT Management argued that the passive management implied by a revenue cap approach is likely to be sub-optimal given that future investments are large and likely to involve some degree of excess capacity. It believed that a revenue cap provides relatively little, if any, additional certainty for DBCT Management beyond that of the hybrid approach that was proposed in the draft access undertaking. Moreover, once additional capacity is installed, it provides no incentive for capacity to be optimised (DBCT Management, sub. no. 64: 42, 43).

Further, DBCT Management submitted that, while a revenue cap approach provided certainty in relation to short-term revenues, such an approach fails to address the medium to long-term stranding risks inherent in terminal investment. DBCT Management considered that, ultimately, over the medium to long-term, under a revenue cap, it would still bear the risk of Bowen Basin coal remaining globally competitive against other suppliers of coal, alternative fuel sources and alternative steel making technologies. Should such risks materialise, it may be required to significantly increase prices in a declining market during a time when it is more than likely that users will be under financial strain. DBCT Management believed that these risks should be recognised and funded now when there is a positive outlook for coal and there is a clear capacity to pay (DBCT Management, sub. no. 64: 42).

To effectively mitigate asset stranding risk, DBCT Management believed it was not sufficient to just protect the expansion from future optimisation. Existing capacity must also be protected. Their concern was based on the possibility that, in the event of a down-turn, there could simply be a transfer of coal exports from existing contracts to contracts entered into in respect of the expansion. While the revenue from the expansion would be protected, the revenue from the existing facility would be compromised. DBCT Management considered that, unless this additional protection was provided, a revenue cap provided little real protection from volume risk (DBCT Management, sub. no. 64: 42).

DBCT Management highlighted that a benefit of their proposed price-revenue approach is that it may eliminate the need for a dual pricing structure should the parties fail to agree to amend existing user agreements to facilitate the average cost approach (DBCT Management, sub. no. 64: 44).

DBCT Management noted the DBCT User Group's concern regarding potential costs incurred by users in other components of the coal chain (ie. demurrage) is adequately addressed by clarity about capacity expansion triggers, and proposed measures ensuring that appropriate protections are in place for contracting beyond capacity (DBCT Management, sub. no. 64: 44).

In terms of the user's concerns about disproportionate sharing of upside gains, DBCT Management submitted that it is appropriate that it shares in the upside to provide the appropriate incentives. DBCT Management expressed a willingness to discuss the appropriate levels of upside sharing with the Authority (DBCT Management, sub. no. 64: 44).

In response to the Authority's comment that DBCT Management's hybrid approach was more appropriate in circumstances where there exists both a more effective capacity expansion trigger and excess capacity such that any new tonnages are less likely to raise delay costs, DBCT Management submitted that, if the issue of concern relates to adequate capacity expansion triggers, then DBCT Management is agreeable to the undertaking being amended address this (DBCT Management, sub. no. 64: 45).

To address the DBCT User Group's concerns about DBCT Management over-contracting capacity and delaying expansions, DBCT Management proposed a framework that limits the quantum of extra capacity that could be contracted as contracted capacity approached nameplate capacity. DBCT submitted that, for example, a cap could be placed on the tonnage that DBCT Management could contract (eg. 5%-10% above nameplate capacity with the percentage affected by the product type contracted and whether capacity expansions had been triggered). DBCT Management suggested that it would be prohibited from contracting beyond the cap without approval of the majority of users, and that approval would not be unreasonably withheld. DBCT Management submitted that the QCA Act dispute resolution process would apply should a dispute arise. DBCT Management considered that it would be reasonable to assume that users would withhold their approval if expansion was a better economic option due to, for instance, whole of coal supply chain costs (DBCT Management, sub. no. 64: 45).

Default Risk

The DBCT User Group submitted that Schedule C of the draft access undertaking required further clarification to confirm that insolvency and other non-payment risks are to be borne by DBCT Management. The DBCT User Group acknowledged that, under a revenue cap, access holders should share the volume risk. However, the DBCT User Group considered that DBCT Management should bear the risk of an access holder not paying what it is required to pay, for example, because of insolvency. The DBCT User Group further considered it inappropriate that access holders, who have no role in determining arrangements made with other access holders, to guarantee other access holders' obligations (DBCT User Group, sub. no. 52: 20).

DBCT Management submitted that it is willing to accept user default risk provided it is able to manage such risk. DBCT Management considered that it has insufficient in-house credit risk assessment skills. Further, it believed that the proposed allowable corporate overheads were insufficient in allowing it to internally or otherwise conduct such risk assessments. As such, DBCT Management proposed that take or pay contracts incorporate requirements on users to acquire and retain credit ratings from acceptable third party rating agencies and to incorporate appropriate financial covenants (DBCT Management, sub. no. 64: 45).

In addition, DBCT Management would be willing to accept user default risk provided that, in the case of a user defaulting, any replacement tonnes should include any additional contracted tonnes (whether an extension of an existing contract or a new contract) or any additional tonnes shipped under a spot arrangement. DBCT Management believed that it should not be required to establish any causal link between the replacement tonnage and a defaulting user's tonnage (DBCT Management, sub. no. 64: 45-46).

Authority's Analysis

Revenue Cap, Expansions and Existing Contracts

Stakeholders' main arguments against the Authority's proposed revenue cap are that it would reduce the terminal to a passive investment for DBCT Management by removing any incentive for DBCT Management to actively manage the terminal or be involved in any consideration of measures designed to improve the associated coal chain, besides minimising its downside risk. For instance, DBCT Management argued that it would have no incentive to pursue terminal efficiencies by managing the Operator, the service levels, and any aspect of improving the whole of supply chain.

The motivation behind the Authority's proposed revenue cap in the draft decision was not to reduce the terminal to a passive investment for DBCT Management. Rather, the Authority made its draft decision at a time when there was no real indication that capacity expansion at the terminal would occur. The draft access undertaking and associated financial model which were provided to the Authority by DBCT Management did not have a capital expenditure program incorporated. In addition, it appeared that the capital expenditure trigger mechanism included in the PSA and the draft access undertaking were unlikely to provide users with sufficient certainty regarding expansion of the terminal to meet their throughput needs in a timely manner.

With these factors in mind, and the high degree of uncertainty about future coal demand, a revenue cap appeared to be the most appropriate mechanism for balancing the business interests of all stakeholders.

The Authority understands DBCT Management's view that the proposed revenue cap mechanism might limit incentives for DBCT Management to promote whole of chain efficiency improvements and its incentives to manage the terminal operator and the terminal service levels. That said, at the time of the draft decision, the Authority was of the view that the costs

associated with not expanding (or at least not having a structure in place to ensure expansion would occur when required) outweighed any benefits from efficiency gains from pricing and whole of coal chain improvements.

In response to DBCT Management's comments that, under a revenue cap, it would always face the downside risk associated with the Authority having a role in approving capital projects and in effect, prices for new capacity, the Authority notes that it is always open to DBCT Management to put forward a capital expenditure program and to do so well in advance of user requirements. In the absence of DBCT Management adopting this approach, it is unclear what alternative the Authority could adopt.

The Authority has considered the concerns raised by stakeholders in regard to incentives. The Authority remains of the view that the revenue cap offers significant protections to both DBCT Management and to users, but accepts that, in a context where operating costs are "passed through", there are limited incentives to pursue productivity improvements. The Authority considers that stakeholders' concerns would be ameliorated by increasing the flexibility of the revenue cap proposed in the draft decision by allowing DBCT Management to earn above the revenue cap where it can be demonstrated that it had participated in projects which resulted in improved capital productivity. The Authority proposes to include an incentive threshold into the regulatory regime at 2% above the revenue cap. The 2% incentive threshold will operate as follows:

- Provided DBCT Management can show that it was the result of their involvement in the process, DBCT Management may retain an over recovery in any year up to a maximum of 2% of the revenue cap for that year. That is, for additional revenue earned up to and including the 2% threshold, the overs account will not be automatically actioned. To the extent that any such over recovery is accepted by the Authority, it will also result in a permanent increase in the revenue caps for the following years of the same amount, and the 2% threshold will apply to those increased revenue caps. That is, DBCT Management will have an ongoing incentive to achieve efficiencies, and any efficiency gain will be passed through to the following year. Any such increase in the revenue cap will not be reviewed in light of subsequent developments. If some or all of the 2% increase in revenue is not accepted by the Authority as being the result of the involvement of DBCT Management in the process, that amount will be returned to users.
- If revenues collected are above the revenue cap by in excess of 2%, the overs account will be actioned automatically at the end of the year. In such instances, the over recovery to be allocated to users will only be the revenue above the 2% threshold, subject to the Authority's acceptance that the first 2% was the result of DBCT Management's involvement in the process. For example, if revenues collected exceed the revenue cap by 3% in a year, the first 2% will be subject to the conditions outlined above, while the next 1% will be automatically redistributed amongst users at year end.

In regard to the treatment of the first 2% of an over recovery, DBCT Management will be required to make an application to the Authority within 60 days of year end regarding the treatment of this retained amount. If DBCT Management can satisfy the Authority that the over recovery is directly due to initiatives which it has undertaken or been actively involved in which have increased the efficiency of the terminal or whole of supply chain, DBCT Management will not be required to distribute this retained amount amongst users and the revenue cap for the following year will be increased by that amount. In making its assessment, the Authority would consider what proportion of that over recovery is due to productivity-enhancing measures involving DBCT Management.

In the case where the Authority is not satisfied that DBCT Management has directly influenced efficiency of the terminal or supply chain, the proportion of the over recovery that was retained

by DBCT Management will then be distributed amongst users, with appropriate consideration of interest at the rate of the DBCT Management's WACC.

Conversely, if revenues recovered by DBCT Management in a year are below the revenue cap, the unders account will be automatically actioned at year end. That is, any under recovery will be fully collected from users in proportion to contracted throughput in that year. This is in line with the DBCT User Group's proposal and will transfer downside volume risk to the users and provide DBCT Management with revenue certainty.

This proposed flexibility to the revenue cap mechanism should increase incentives to obtain efficiency improvements while retaining the characteristics of moving the majority of the volume risk to the users, and providing DBCT Management with a level of revenue security with regard to any capital expenditure undertaken.

Stakeholders also commented on the potential problems to amending the pricing structure if one or more existing contracts are not modified to reflect the proposed regime. As addressed in the Authority's draft decision, implementing a pricing mechanism at the terminal, as part of the access undertaking, will be strongly influenced by the breadth of its application. If the existing product 4 tonnage is not subject to the new pricing structure, while new reference tonnage is, it may be necessary to operate several different pricing structures concurrently. That is, separate pricing structures may exist for product 4 tonnages, new reference tonnages and all non-reference tonnages, or some combination of these categories.

The prospect of such an outcome is neither new nor a result of the Authority's proposed pricing approach within a revenue cap framework. The undertaking operates on a prospective basis and, on its own, cannot alter existing contractual arrangements. The prospect of dual pricing arrangements for existing and new tonnes of capacity is an issue that applies equally to all pricing proposals, irrespective of whether they have been put forward by DBCT Management, the DBCT Users Group or the Authority.

Nevertheless, for a simple and transparent pricing structure to be implemented at the terminal, the Authority sees merit in a pricing structure that applies to both existing product 4 tonnage and any new reference tonnage. This effectively would mean that DBCT Management and the existing users would need to agree to alter the terms and conditions of existing product 4 tonnage contracts to encompass the new pricing structure. Both DBCT Management and the DBCT Users Group have indicated to the Authority that it would be desirable for the new pricing structure to apply to all reference tonnage including existing product 4 tonnage.

That noted, the situation has not become any clearer since the publication of the draft decision. That is, although there is broad acknowledgement of the desirability of an average cost pricing approach, the Authority understands that DBCT Management and the DBCT Users Group have not reached a firm agreement. The Authority strongly urges DBCT Management and the DBCT Users Group to reach and document such an agreement (or otherwise) prior to DBCT Management submitting its revised draft access undertaking.

In the event that one or more users chooses not to vary their product 4 contracts to reflect the Authority's decision, parallel pricing structures will be required and the prices for the different categories would be determined as follows:

- *product 4 tonnages with modified contracts and new tonnages (including product 4 tonnages that are re-contracted on the expiration of existing contracts)* — the revenue cap will be determined by dividing forecast throughput for this category (ie reference tonnage) by total contracted tonnage and multiplying the ARR by the result. The TIC will then be calculated by dividing the revenue cap by the reference tonnage;

- *product 4 with unmodified contracts* — the price will be determined as part of the pending arbitration into the TIC for existing contracts; while
- *non-reference tonnage* — the price will vary from the reference tariff based on the costs and risks associated with the non-reference tonnes.

As such, the revenue cap arrangements outlined by the Authority will apply to new contracts, modified existing contracts and tonnages that are re-contracted on the expiry of existing contracts. Any under or over recovery applicable to this category would only be calculated on its relevant proportion of the ARR. That is, all three parallel pricing structures would be independent of one another, and new users would not be liable for any under recovery that eventuated in the product 4 with unmodified contracts or non-reference tonnage categories.

The complexity of the pricing structure would depend on the circumstances, in particular, the extent to which DBCT Management and the users can agree to modify existing contracts. In the event that no existing contracts are modified, the TIC resulting from the Authority's approved revenue cap would not apply immediately to any throughput at the terminal. That said, the resulting TIC from the Authority's decision would apply as new tonnes come on line and contracts for existing tonnes are renewed. However, that is not to say that new and renewed tonnes alone will necessarily have to fund the expansion of capacity. For instance, an option that is available to the Authority is to consider expansion costs as part of its arbitration on existing contracts, such that expansion costs are paid for by all users.

In addition, the Authority considers DBCT Management's comment that its hybrid price-revenue cap may eliminate the need for a parallel pricing structure is incorrect. DBCT Management's pricing structure included the incorporation of an efficiency mechanism for the rebate pool over the term of the regulatory period. In the event that one or more of the existing users refused to modify their contracts to incorporate such a mechanism (which seems likely given the users did not support DBCT Management's approach), there may also be a need for a parallel pricing structure under DBCT Management's approach.

Finally, the definition of reference tonnes in the draft access undertaking needs to be modified given the prospect of one or more existing users not agreeing to modify their contracts to reflect the Authority's proposed regulatory regime. Any modification to existing contracts is likely to require a change to the way the TIC, throughput rebate and take or pay charge are calculated. The new definition of reference tonnes needs to include only existing product 4 contracts which are modified to reflect the Authority's proposed regulatory regime and new contracts which meet the reference tonne criteria (including product 4 tonnages that are re-contracted on the expiration of existing contracts). That is, existing product 4 contracts which are not modified would no longer be considered as reference tonnes for the purposes of the undertaking.

Default Risk

The Authority remains of the view expressed in the draft decision that DBCT Management should bear the risk of a defaulting user. That is, DBCT Management should not take into account revenue which it has been unable to collect from a defaulting user in determining any end of period under/overs adjustment, until such time as replacement tonnes are found or the contract expires.

The Authority believes that, for the purposes of any adjustments to the revenue cap, 'replacement' tonnes should only be reference tonnes. Therefore, in the event current user agreements are modified to align with the undertaking arrangements (and therefore the revenue cap will apply to existing and future tonnages) any 'replacement' tonnes should include any additional contracted tonnes, whether an extension of an existing contract or a new contract.

However, if current user agreements are not modified, tonnages under those unmodified contracts will not be reference tonnage and, therefore, will not be taken into account in the revenue cap. Any adjustment to the revenue cap reflecting lost revenue from a defaulting user should not take into account replacement tonnes that are not reference tonnes.

DBCT Management has suggested that, to appropriately manage this risk, it should be able to incorporate contractual requirements on users to acquire and retain credit ratings from acceptable ratings agencies and to incorporate appropriate financial covenants. In response, the Authority notes that there are safeguards in the undertaking which allow DBCT Management to cease negotiations if an access seeker or its guarantor is not of good financial standing. Further, if an access agreement is concluded, the SAA principles allow for DBCT Management to require, in appropriate cases and based on its reasonable assessment of the creditworthiness of the access holder, guarantees or any other reasonably acceptable security to secure the access holder's obligations to DBCT Management (Schedule B, principle 12). The Authority believes that these mechanisms provide adequate protection for DBCT Management to manage this risk. Further, it is reasonable that it has an incentive to do so as it is the party best placed to manage this risk. Given this, Authority rejects DBCT Management's suggestion that it should also be able to require an access holder to acquire and maintain a credit rating as this appears to be unduly onerous on access holders in the circumstances.

In order for the undertaking to be approved, it must be amended so that a modified revenue cap approach is adopted, whereby:

- **there is an unders and overs account which accrues interest during the period in which funds are held in it at the rate of DBCT Management’s WACC and incorporates a 2% upper bound on the revenue cap which operates as follows:**
 - (a) **DBCT Management will initially retain any over recovery of up to and including 2% of the revenue cap and will be obliged to submit an application to the Authority for the treatment of this over recovery. If it can be demonstrated that the some or all of over recovery is the direct result of DBCT Management engaging in activities which have improved capital productivity, the overs account will not be actioned on the retained amount attributable to the actions of DBCT Management and the revenue caps will be increased, on a permanent basis, by the same amount in the following years. If DBCT Management can not satisfactorily demonstrate that some or all of the over recovery is the result of its direct actions improving capital productivity, that amount of the retained revenues will be distributed to each reference tonnage access holder in proportion to their contracted throughput for that year;**
 - (b) **if revenues recovered are greater than 2% of the revenue cap, the first 2% of over recovery will be subject to the conditions outlined above, and the overs account will be automatically actioned for the over recovery greater than 2% of the revenue cap, with the aggregate amount allocated to reference tonnage access holders being the revenue above the 2% bound;**
 - (c) **if revenues are below the revenue cap, the unders account will be automatically actioned at the end of the year.**
- **DBCT Management assumes full responsibility for, and non-defaulting users are not penalised for, outstanding access revenue of a defaulting user. Revenue which DBCT Management has been unable to collect as a result of contract default should not be taken into consideration in determining any end of period under or overs adjustment until such time as replacement tonnes are found or the contract expires. For the purposes of any adjustments to the revenue cap, only replacement tonnes that are reference tonnes will be taken to account.**

7.2 Pricing Objectives

The draft access undertaking sets out a number of pricing objectives for DBCT Management. Namely, in setting access charges, DBCT Management’s objectives are to:

- achieve its annual revenue requirement (ARR) in order to provide a commercial return to its shareholders;
- provide incentives for efficient utilisation of terminal capacity;
- ensure equitable treatment of access holders and access seekers;
- encourage efficient future investment in the terminal; and
- ensure full recovery from access holders of terminal operating costs.

In its draft decision, the Authority accepted the pricing objectives proposed by DBCT Management. However, the Authority recommended an additional objective for DBCT Management of ensuring efficient terminal operating costs. This is on the basis that the pricing objectives relate to access charges, and that terminal operating costs are reflected in access charges through the operation and maintenance charge component (DAU, clause 9.1, 9.2). Accordingly, the Authority believed ensuring efficient operating costs is a legitimate objective for DBCT Management.

The Authority also rejected in the draft decision the suggestions made by some stakeholders that the undertaking should include certain objectives which are included in the PSA, in particular, relating to whole of coal chain efficiency and the long term competitiveness of the Bowen Basin coal industry. The Authority rejected these proposals on the basis that it is not necessarily appropriate for the undertaking to mirror the objectives of the PSA. Further, the additional proposed objectives are quite broad and beyond the direct control of DBCT Management. The Authority believed the pricing objectives in the undertaking should be as succinct as possible to avoid the potential for conflicting objectives.

Stakeholder Comments on Draft Decision

The DBCT User Group did not agree with some aspects of the Authority's analysis regarding pricing objectives. The DBCT User Group considered that the principles contained in the PSA should be reflected in the access undertaking given that those principles affect outcomes relevant to the access undertaking. It believed the access undertaking should be clearly aligned with the PSA obligations. The DBCT User Group remains of the view that coal chain efficiency should form part of the pricing objectives. The Authority's observation that DBCT Management has limited control over the outcome is not the main issue given that DBCT Management has the ability to obstruct or delay efficient coal chain efficiency outcomes should it so desire (DBCT User Group, sub. no. 52: 18, 19).

The DBCT User Group also proposed a number of amendments to particular pricing objectives, namely to clarify that DBCT Management cannot recover more than its annual revenue requirement or over-recover on terminal operating costs (DBCT User Group, sub. no.54: 20).

DBCT Management raised two concerns with the Authority's additional pricing objective (DBCT Management, sub. no. 64: 46). First, DBCT Management believed it is unclear as to the extent to which this new pricing objective obliges DBCT Management to facilitate a 'user pays' efficient pricing regime for terminal operating costs, noting the Authority's decision to continue with a uniform average \$/tonne charge. DBCT Management noted that a more complicated pricing structure developed to improve efficiency essentially adds complexity, cost and risk to terminal management. Second, DBCT Management submitted that the allowable corporate overheads do not provide it with the resources to comply with this obligation (DBCT Management, sub. no. 64: 47).

Authority's Analysis

The Authority notes the DBCT User Group's comments that the pricing objectives in the undertaking should align with those in the PSA and, therefore, should include coal chain efficiency as an objective. However, the Authority remains of the view that, even though this may be an objective of the PSA, it should not necessarily be an explicit objective in the undertaking. This is because the role of the undertaking is not necessarily analogous to the role of the PSA. The Authority believes that the undertaking should be as specific as possible in its obligations and that it would be undesirable to include obligations over which DBCT Management has partial control.

This does not mean, however, that the Authority does not believe that it is unimportant for DBCT Management to work to improve supply chain efficiency. In this regard, the Authority notes the existing undertaking obligations proposed by DBCT Management to require it to engage with stakeholders to develop and implement mechanisms to improve the overall efficiency of the Goonyella export coal supply chain and to establish a co-ordination body for this purpose. Further, the Authority’s proposed modifications to the revenue cap are designed to address concerns that DBCT Management needs more incentive to actively manage the terminal to enhance its efficiency.

In regard to the specific amendments to the pricing objectives proposed by the DBCT User Group, the Authority proposes that the objective in clause 9.1(a) be amended to state that DBCT Management’s objective is to ‘achieve its annual revenue requirement, in accordance with this Undertaking’ This objective should take into account the possibility of DBCT Management earning revenue in excess of the revenue cap through non-reference tonnage and through the 2% efficiency incentive threshold proposed by the Authority, while ensuring that this must be done in accordance with the undertaking. The Authority also accepts the DBCT User Group’s proposal to amend clause 11.1(e) to establish as an objective the full recovery (but not over-recovery) from access holders of terminal operating costs. This should provide greater clarity that the pass through of operating costs is limited to total terminal operating costs, and that there is no opportunity for DBCT Management to recover additional revenue through this mechanism.

The Authority notes that, in seeking to have as an objective ‘ensuring efficient terminal operating costs’, it was not its intention, as suggested by DBCT Management, to oblige DBCT Management to facilitate a user pays pricing regime. Rather, the Authority recommended this on the basis that it is reasonable that DBCT Management, as the party with the contract with the Operator, has a particular objective to manage this contract with a view to ensuring optimum terminal efficiency, including having regard to capital/operating cost tradeoffs.

In order for the undertaking to be approved it should be amended as follows:

- **amend 11.1(a) (pricing objectives) to state ‘achieve its Annual Revenue Requirement, in accordance with this Undertaking’;**
- **amend 11.1(e) to state ‘ensure full recovery (but not over-recovery) from access holders of terminal operating costs; and**
- **add an additional clause 11.1(f): ensure efficient Terminal Operating Costs.**

7.3 Pricing Structure

DBCT Management proposed in the draft access undertaking an access charge which will have two components: a capital charge (or reference tariff) and an operating and maintenance charge. This section addresses the reference tariff component of access charges.

The pricing structure proposed by DBCT Management in the draft access undertaking is integral to the hybrid price-revenue cap approach advocated. That is, the reference tariff (TIC) is an average \$/tonne charge which applies to all tonnages shipped through the terminal on ‘reference terms’ (ie, the terms and conditions of a standard access agreement). Such coal is referred to as reference tonnage. The reference tariff is proposed to be set so that DBCT Management recovers its ARR over the aggregate reference tonnage.

As outlined in section 7.2, the draft access undertaking proposes that DBCT Management and users share the revenue generated from tonnes shipped in excess of the TRTT. The user’s share of such revenue accumulates in a throughput rebate pool, to be distributed amongst users at the

end of the year via the throughput rebate (TR). DBCT Management proposed to progressively introduce an efficiency component to the distribution of the TR by linking the TR received by each access holder to the relative efficiency with which it uses key terminal resource. DBCT Management also proposed to develop further amendments to the pricing structure during the term to provide for enhanced pricing signals aimed at promoting efficient terminal use.

The DBCT User Group put forward a very different pricing structure for the terminal which it considered to be more cost reflective and, therefore, would provide better incentives to use the terminal efficiently. This proposal entailed a three part tariff based on inloading usage, outloading usage and a balancing item. The DBCT User Group proposed that the inloading and outloading tariffs be charged on a \$/hour basis.

Take or pay contracts were supported by both DBCT Management and users. DBCT Management proposed in the draft access undertaking that access agreements be on take or pay terms, with access holders being liable for 50% of the TIC on contracted tonnages that are not shipped. DBCT Management proposed to recover its ARR over tonnages contracted on long term take or pay terms (ie. 'reference terms').

While the DBCT User Group was also strongly in favour of take or pay contracts, it proposed an alternative model. Consistent with its revenue cap approach, whereby users bear a large share of volume risk, the DBCT User Group proposed a new set of take or pay arrangements which provide for greater penalties for under or over shipment of contracted tonnages than is envisaged under DBCT Management's proposal. Namely, it proposed take or pay liabilities be assessed on the following basis:

- where the user operates within a 90%-110% band of contracted volume (subject to the shortfall payments below) – nil;
- for users whose throughput is below contracted capacity – 90% of charges for the difference between actual throughput and the 90% minimum threshold (subject to shortfall payments and secondary trading below);
- for users whose throughput exceeds contracted capacity – additional charges to apply on that portion of throughput that exceeds contracted capacity as follows:
 - a 25% additional TIC charge to apply to incremental throughput levels between 110% and 125% of contracted capacity; and
 - a 50% additional TIC charge to apply to incremental throughput levels greater than 125% of contracted capacity.

As outlined in section 7.1 above, the Authority recommended that a revenue cap apply at terminal. Although recognising the merit in the more cost reflective pricing proposed by the users, given some issues with the implementation of time of use charging, the Authority decided to continue with a \$/tonne charge. However, the Authority considered that the take or pay arrangements proposed by the users were preferable, being more likely to result in users adopting contractual commitments that more accurately reflect their anticipated usage pattern.

Stakeholder Comments on Draft Decision

The DBCT User Group noted that one of its objectives was to ensure that a pricing structure promoting the efficient use of existing capacity be introduced. It believed that such a pricing structure has become even more important given the emergence of coal chain capacity constraints (DBCT User Group, sub. no. 52: 19).

The DBCT User Group continues to believe that its proposed pricing structure which includes an element of “user-pays” pricing for in-loading and out-loading has merit, even though it may require additional refinement to address the different machine capacities. The DBCT User Group emphasised that its objective was to send pricing signals which promote efficient behaviour, rather than achieving a perfect match of terminal capacity use and charges (DBCT User Group, sub. no. 52: 20).

DBCT Management agreed with the Authority’s analysis regarding the user’s approach to take or pay. However, it believed that it can be applied to DBCT Management’s proposed hybrid price revenue approach, with penalties imposed on tonnages not shipped beyond a contracted tonnage continuing to apply. Such penalties would be allocated to reduce the reference tariff payable by users (DBCT Management, sub. no. 64: 47).

Similarly, DBCT Management submitted that a hybrid price-revenue cap approach can cater for both 100% take or pay commitments or, alternatively, a take or pay commitment/throughput rebate pricing structure as was originally proposed in the draft access undertaking. Under the latter, the pricing (including the throughput rebate) would be calculated based on reference tonnage (linked to contracted tonnage). DBCT Management considered that such an approach accommodates expansion triggers of the type suggested by the Authority with users still bearing the risk of capacity being under-utilised in the short term (DBCT Management, sub. no. 64: 47).

Authority’s Analysis

As discussed in Section 7.1 above, the Authority continues to favour a revenue cap. Also, as outlined in the draft decision, the Authority has proposed to incorporate the DBCT Users Group’s take or pay proposal into the revenue cap regime.

The Authority rejected the users proposal of a more ‘user-pays’ reflective mechanism in the draft decision on the basis that there are practical limitations with implementing such an approach. Namely, individual items of terminal equipment in the in-loading and out-loading streams have different rated capacities and the choice of equipment is at the discretion of the Operator. Therefore, the prices paid by users may be determined by factors beyond their control. This may diminish the incentive properties of time-of-use charges.

In light of the considerable work that would be required to develop this approach to the point where it could be implemented, the Authority considers that, on balance, it is preferable to retain the average price approach proposed in the draft decision. Nevertheless, the Authority will look favourably on detailed pricing proposals that encourage improved performance at the terminal and the DBCT Users Group and DBCT Management could continue to work on such an approach and put an amending undertaking to the Authority for approval at a future date. Reflecting this position, the Authority has deleted the provisions in the draft access undertaking that are inconsistent with its pricing proposal (ie. Part 11 (pricing arrangements), Part 14 (whole of supply chain efficiency) and Schedule C).

The Authority’s Proposed Pricing Structure

As outlined in the draft decision, the Authority’s proposed pricing structure continues to be a single \$/tonne TIC with the DBCT Users Group’s proposed take or pay model. As discussed in 7.1 above, the users proposed unders and overs mechanisms will be modified with a 2% upper bound to provide DBCT Management with operational incentives. Implementing this alternative will result in the volume risks associated with throughput at the terminal falling substantially on the users. The details of the Authority’s proposed pricing structure are provided in Part B of this decision in Section 11 and Schedule C.

As the ARR will be assessed on all relevant terminal costs and the revenue cap will only apply to reference tonnages, only a proportion of these costs are attributable to reference tonnages. Consequently, the Authority proposes that the revenue cap for reference tonnages be determined as:

$$\text{Revenue Cap} = \text{ARR} \times \frac{\text{Reference Tonnage}}{\text{Total Contracted Tonnage}}$$

and the TIC should be defined as:

$$\text{TIC} = \frac{\text{Revenue Cap}}{\text{Reference Tonnage}}$$

The treatment of non-reference tonnage is considered in the following section, 7.4.

Compared to DBCT Management’s method for calculating TIC, the Authority’s approach will result in a lower TIC value as it is not grossed up to take account of the TR mechanism.

The take or pay and unders and overs mechanisms will be applied at the end of the period once all outcomes in relation to throughput are known. The take or pay mechanism will be considered first, with users settling any amounts owing under this mechanism. Following this, total revenues for the period will be determined and compared to the revenue cap, whereby:

- Any *under recovery* of the revenue cap will be collected from each reference tonnage access holder in proportion to their contracted throughput. This adjustment will be retrospective in nature, that is, through an uplift payment rather than an adjustment to the TIC for the next period.
- Any *over recovery* of up to and including 2% of the revenue cap will not be distributed to users and the revenue caps in the following years will be increased by the same amount to the extent that DBCT Management can demonstrate to the Authority that the over recovery of revenue is due to DBCT Management engaging in activities which result in improved capital productivity. This will have a continuing impact on the TIC in the following year.
- Any *over recovery* of in excess of 2% of the revenue cap will be returned to each reference tonnage access holder in proportion to their contracted throughput. This adjustment will be retrospective in nature, that is, through a rebate payment rather than an adjustment to the TIC for the next period.

The full set of recommendations in regard to the revenue cap and unders and overs mechanism is in section 7.1 of this decision.

In order for the undertaking to be approved, it should be amended such that:

- **it adopts a modified revenue cap as set out in Schedule C. A definition of ‘revenue cap’ must be included in clause 2.1;**
- **the TIC should be on a \$/tonne basis; and**
- **it reflects the DBCT User Group’s approach to take or pay, including additional charges for over-shipment.**

7.4 Reference Tonnage

The concept of reference tonnage is integral to DBCT Management’s proposed hybrid price-revenue cap. Reference tonnage is defined in the draft access undertaking as: that portion of an access holder’s annual contract tonnage that is contracted to be handled as Product 4 (ie. tonnages contracted for a term of 10 years or more with a take or pay component); and, for an access holder under an access agreement, that portion of the access holder’s annual contract tonnage which is contracted to be handled in accordance with the reference terms. Reference terms are defined as the terms and conditions of a SAA (DAU, vol. 1: clause 2.1).

The TIC rate is calculated based on the aggregate reference tonnage in the contract year. This reference tariff is set such that DBCT Management’s ARR is recovered over the aggregate reference tonnage under DBCT Management’s proposal. The capital charge for coal handled on terms and conditions other than the reference terms is to be negotiated between DBCT Management and the access seeker, subject to section 9.6 of the undertaking (limits on price differentiation).

The Authority recommended in the draft decision some modifications to the treatment of reference tonnage to reflect the Authority’s recommended revenue cap approach. In particular, the Authority proposed that the reference tariff be set taking into account all tonnages shipped through the terminal (not just reference tonnages). That is, a proportion of the ARR is to be recovered via non reference tonnes as well as reference tonnes. The reference tariff for reference tonnes will be calculated only on the proportion of the ARR (ie, the revenue cap) allocated to reference tonnes.

However, the Authority also recommended that revenues earned from non-reference tariff tonnes not be allocated into the calculation of the unders and/or over payments mechanism given that, by definition, these do not reflect standard costs and risks. Including such revenues within the revenue cap would therefore not recognise the additional costs and risks borne by DBCT Management in contracting on non-standard terms.

Stakeholder Comments on Draft Decision

The DBCT User Group agreed with the Authority’s suggestion that reference tariffs be set taking into account all tonnages shipped through the terminal (not just reference tonnages). The DBCT User Group, however, disagreed with the Authority’s suggestion that the revenues earned from non-reference tariff tonnes not be allocated into the calculation of the unders and/or over payments mechanism given that there may be in fact little reference tonnage being shipped through the terminal. The DBCT User Group submitted that this suggestion would incite DBCT Management to encourage users accept non-reference tonnages (DBCT User Group, sub. no. 52: 20).

The DBCT User Group further noted that, given the narrow definition of ‘reference terms’, it is possible that the reference tariff and the revenue cap will not apply to a single tonne of coal shipped through the terminal during the duration of the undertaking. It submitted that, by definition, no existing user agreement will be on ‘reference terms’. It thought the drafting seems circular, and that there should be enough flexibility to allow tonnages/charges under existing and future user agreements to be taken into account in the revenue cap, if that is agreed to in those user agreements, even though they are not strictly on ‘reference terms’ (DBCT User Group, sub. no. 54: 21).

In addition, the DBCT User Group submitted that, if the reference tariff only applies to tonnages on reference terms, access holders not on such terms would potentially subsidise those on reference terms (or vice versa) under a revenue cap. It also proposed that the definition of ‘reference terms’ be qualified such that ‘reference terms’ means the terms and condition which

are *substantially those applicable* under a standard access agreement. The DBCT User Group also submitted that confining reference tonnage for new access agreements to the tonnages contracted under the ‘reference terms’ is too restrictive, as a small departure from the standard access agreement, not relevant to pricing or term, would remove that tonnage from the revenue cap (DBCT User Group, sub. no. 54: 6,7).

DBCT Management considered that the user’s objections to the reference tonnage concept incorporated in its hybrid approach basically relate to concerns about creating an incentive for DBCT Management to over-contract capacity and to contract for non-reference tonnage. It submitted that appropriate protections for contracting beyond capacity could be introduced (as outlined earlier), while still providing appropriate efficiency incentives. In regard to the second concern, DBCT Management considered that non-reference tonnage reflects a user’s desire to negotiate on non-standard terms and conditions. DBCT Management noted that users retain the protection of the undertaking, including the limits on price differentiation (DBCT Management, sub. no. 64: 47, 48).

Authority’s Analysis

The Authority notes the concerns expressed by the DBCT User Group that, for tonnages contracted on a basis involving even slight variation from reference terms (ie. the terms of the SAA), such tonnes would fall outside the revenue cap.

It is the Authority’s intention that the reference tariff will be based on a 10 year take or pay contract (equivalent to product 4 under current agreements). However, as discussed in Chapter 6, this should not preclude negotiating access contracts for a different term or on a non-take or pay basis. Moreover, access seekers may seek to negotiate variations from reference (SAA) terms. The Authority has proposed an amendment to the undertaking to put this flexibility beyond doubt (terms and conditions of access, part 13).

In terms of whether tonnages contracted on terms that vary from the reference terms would be included in the revenue cap, the Authority considers that, for minor variations that do not have a material impact on DBCT Management in terms of additional costs, such tonnages should be included in the revenue cap. However, if variations from reference terms are more significant and have a material impact on DBCT Management’s costs, then it is reasonable that such tonnages fall outside the revenue cap. This is because DBCT Management should be compensated for providing a service that consumes substantially more capacity (and therefore imposes substantially greater costs) than the standard service – for example, if an access seeker requested that a significant proportion of its contract tonnages be handled in a concentrated period rather than evenly, this would require significant capacity to be provided for that period which may remain idle for the remainder of the year. It would be reasonable that the access seeker to pay a premium for that service rather than have all users contribute to the costs.

Therefore, the Authority proposes to accept the recommendation by the DBCT User Group that ‘reference terms’ be defined as the terms and conditions which are substantially those applicable under a SAA (clause 2.1). In this regard, the Authority notes that a contract other than on a 10 year take or pay basis would clearly be a ‘substantial’ variation from the reference terms. In terms of other types of variations, a materiality test should be applied in determining whether such tonnages would be considered reference tonnages and, therefore, be included in the revenue cap.

In summary, reference tonnage will include: product 4 tonnages under existing user agreements which have been modified to align with the undertaking; and new and renewed tonnages contracted to be handled in accordance with reference terms (essentially a 10 year take or pay basis).

In addition, it would be inappropriate to include non-reference tonnes in the unders and overs calculation as the revenue cap is calculated on the proportion of forecast reference tonnes to forecast total throughput at the terminal. That is, for example, if 80% of forecast total throughput is reference tonnes, then the revenue cap applicable to reference tonnes will be 80% of the terminal's ARR. The under or over recovery of revenue will equal the revenue earned from reference tonnes minus the 80% of the ARR.

Non-reference tonnes fall outside of the scope of the undertaking and the revenue recovered from non-reference tonnes is not protected by the risk mitigating mechanisms contained in the undertaking. Consequently, using the example above, the 20% of the ARR which is not collected from reference tonnage throughput will not be subject to the unders and overs mechanism contained in the undertaking. Revenue collected from non-reference tonnes will only be subject to the relevant contracts entered into between DBCT Management and users.

In order for the undertaking to be approved, it must be amended so that:

- **reference tariffs are set taking into account all tonnages shipped through the terminal (not just reference tonnages) as specified in Schedule C; and**
- **the revenues earned from non-reference tonnes are not allocated into the calculation of the unders and/or over payments mechanism;**
- **'reference terms' be defined as the terms and conditions which are substantially those applicable under a SAA (clause 2.1).**

7.5 Limits on Price Differentiation

DBCT Management commits in the draft access undertaking to not differentiate access charges between access seekers or between access seekers and access holders other than to reflect differences in costs (direct or indirect) or risks to DBCT Management of providing access (DAU, Vol. 1: clause 9.6).

The Authority decided in the draft decision to accept this clause of the undertaking. The Authority did not believe additional detail was warranted at this time.

Stakeholder Comments on Draft Decision

The DBCT User Group submitted that the Authority's decision to not accept its suggestions for a more transparent test of price discrimination would be of less concern if DBCT Management's ability to benefit from selling non-reference tonnage is addressed (DBCT User Group, sub. no. 52: 20).

Authority's Analysis

The Authority remains of the view, expressed in the draft decision, that any further detail in the undertaking as to what does or does not contravene the limits on price differentiation may be unduly limiting. Moreover, access seekers have the ability to notify a dispute if unable to agree on an access charge with DBCT Management.

However, in view of stakeholder concerns on this matter, the Authority believes that the legitimate interests of users may be better protected if DBCT Management is obliged to disclose the reasons for any price differentiation on the basis of cost or risk. Such disclosure would improve transparency and would potentially allow access seekers to better manage issues that have a direct impact on their access charges.

Accordingly, the Authority proposes that, in any circumstance where DBCT Management proposes to differentiate access charges on the basis of cost or risk, DBCT Management must demonstrate to the access seeker that the price differentiation is justified. In demonstrating this, DBCT Management needs to provide sufficient information to adequately explain why it believes the charge should vary from the approved reference tariff. The Authority believes that this obligation should not be unduly onerous for DBCT Management as, in a practical sense, it will have made such an assessment as part of its consideration to seek an access charge other than at the approved reference tariff. It should also provide greater certainty to access seekers/holders as to the practical application of this principle and may, in fact, serve to minimise the scope for disputes on this matter due to the greater transparency required.

In order for the undertaking to be approved, it must be amended so that:

- **where DBCT Management is proposing an access charge that varies from the reference tariff, it must demonstrate to the access seeker that the divergence from the reference tariff is justified. In doing so, DBCT Management must provide sufficient information to adequately explain the reasons for the divergence (clause 11.6. Limits on Price Differentiation).**

7.6 Review of Reference Tariffs

Review trigger events are typically included in regulatory regimes to provide flexibility to deal with aspects of the regime that are subject to change. However, to provide adequate certainty for all stakeholders, such reviews should be limited to significant unscheduled events.

DBCT Management committed in the draft access undertaking to amend the reference tariff from time to time in accordance with any changes in the parameters used to calculate the reference tariff as set out in Schedule C of the undertaking. The relevant parameters noted by DBCT Management as triggering a reassessment of the TIC charge are changes in aggregate reference tonnage, terminal capacity or the regulated asset base (DAU, Accompanying Submission: 47). DBCT Management will submit a draft amending undertaking for the Authority's approval in these circumstances.

Consistent with the Authority's recommended pricing approach in the draft decision, the Authority proposed the following review trigger events: a change in reference tonnage; a change in non-reference tonnage; and capital expenditure at the terminal. The Authority noted that capital expenditure may occur under different scenarios, such as increasing terminal capacity or replacing worn out equipment. In the case of capital expenditure associated with an expansion, the Authority recommended that the review should occur once the expansion is complete, with interest during construction accruing at the WACC rate. For other classes of capital expenditure, an annual change to reference tariffs is appropriate, with interest during construction at the WACC rate until the change is made.

Stakeholder Comments on Draft Decision

With some minor drafting amendments, the DBCT User Group supported the Authority's suggestions regarding reviews of reference tariffs (DBCT User Group, sub. no. 52: 20). These proposed amendments aim to ensure timeliness in DBCT Management submitting a revised reference tariff for the Authority's approval. In addition, the DBCT User Group proposed changing the review trigger from 'capital expenditure' at the terminal to the 'commissioning of an expansion'. It also included an annual review of the reference tariff in respect of capital during the proceeding 12 months, which is not expansion capital. The DBCT User Group also noted that it would support pre-approval of a new reference tariff/access undertaking prior to

each expansion, which would take effect from commissioning of the expansion, to give all stakeholders certainty (DBCT User Group, sub. no. 54: 21,22).

Authority's Analysis

The Authority accepts the amendments suggested by the DBCT User Group to clause 11.4(a) which seek to clarify DBCT Management's obligation to submit, in a timely way, an application to amend the reference tariff.

With regard to the DBCT User Group's proposed amendments to the trigger events, the Authority notes that these are consistent with its proposal in the draft decision, and serve to provide greater clarity. Accordingly, the Authority proposes that the review trigger events be: a change in reference tonnage; a change in non-reference tonnage; commissioning of an expansion; and, an annual review in respect of capital expenditure during the proceeding 12 months, which is not expansion capital.

In the case of a capital expenditure associated with an expansion, the above review will occur once the expansion is complete, with interest during construction accrued at the normal WACC rate. For other capital expenditure, an annual change to reference tariffs is appropriate, with interest during construction at the WACC rate until the change is made.

The Authority believes that it would provide stakeholders with greater certainty if a form of 'pre-approval' of a reference tariff is done in the case of a capacity expansion. This could be achieved by providing scope for DBCT Management to submit to the Authority for approval its estimated costs of expansion well in advance of the completion of the expansion (see Chapter 4 of this decision). Once the expansion is complete and actual costs are known, the review trigger outlined above would come into effect, with the Authority endorsing a reference tariff based on actual costs.

In order for the undertaking to be approved, it must be amended so that:

- **reference tariff reviews are limited to the occurrence of significant unscheduled events. Specifically, DBCT Management will promptly submit to the QCA for approval a draft application to amend the reference tariff on each occurrence of any of the following events:**
 - **a change in reference tonnage;**
 - **a change in non-reference tonnage;**
 - **commissioning of an expansion at the terminal; and**
 - **annually in respect of capital expenditure during the proceeding 12 months which is not expansion capital.**
- **in the case of capital expenditure at the terminal (either for a capacity expansion or for non-expansion capital expenditure), interest during construction will accrue at the WACC rate; and**
- **clauses 11.4(b) and (d) state that the QCA may approve a draft amending access undertaking seeking to amend the reference tariff only if it considers it appropriate having regard to the pricing principles in the undertaking and Schedule C.**

7.7 Whole of Supply Chain Efficiency

The draft access undertaking includes obligations on DBCT Management to use its best endeavours, and in consultation with stakeholders, to implement mechanisms to improve the efficiency of the overall coal chain. These initiatives include introducing efficient pricing signals in three stages over the term of the undertaking.

DBCT Management also propose establishing a coordination body, the Goonyella Supply Chain Committee, with representatives from DBCT Management, the Operator, access holders, rail operators and the rail network manager. The purpose of the committee is to facilitate efficiency initiatives for the whole of the Goonyella supply chain, with any cost savings shared equitably with DBCT Management. DBCT Management also commits to meet with the Authority on an annual basis to report progress on the initiatives agreed by the committee.

Taking account of the views of stakeholders in favour of a process for improving coal chain efficiencies, the Authority recommended in the draft decision that DBCT Management have an obligation to consult with stakeholders on whole of supply chain issues

Stakeholder comments

Generally, few stakeholder comments were received on this part of the draft decision. However, the DBCT User Group proposed drafting amendments to strengthen the obligations on DBCT Management to engage with any co-ordination body formed to consider initiatives to improve the overall efficiency of the Goonyella supply chain. The DBCT User Group also proposed deleting the specific reference to the foreshadowed Goonyella Supply Chain Committee, indicating that its drafting amendments reflect a current initiative.

Authority's Analysis

The Authority accepts the suggestion of the DBCT User Group to clause 14(b) to delete specific reference to the Goonyella Supply Chain Committee, in recognition of a current initiative. The Authority recognises that an existing forum may potentially meet its objective. However, the Authority does not accept the stronger statement obliging DBCT Management to actively and co-operatively engage with and assist any such co-ordination body on the basis that the Authority's proposed modified revenue cap will provide DBCT Management with an incentive to actively participate in such a forum. Under this proposal, DBCT Management may retain any additional revenue up to 2% over the revenue cap if it is demonstrably linked to productivity improvements in which DBCT Management has been involved. The Authority believes this incentive should be sufficient.

In order for the undertaking to be approved, it must be amended so that:

- **clause 14 (b) (Whole of Supply Chain) be amended to delete references to the Goonyella Supply Chain Committee.**

8. THE ASSET BASE

Summary

The value of the regulated asset base is a key determinant of the annual revenue requirement and, as a consequence, the proposed reference tariff. The Authority has valued the terminal on the basis of a single stage DORC methodology adopting fundamentally the same terminal configuration as presently used.

A number of DORC valuations were submitted to the Authority for consideration. DBCT Management proposed a single stage DORC value of \$1084 million while the DBCT User Group proposed a DORC value of \$462 million. In its Draft Decision, the Authority adopted a DORC value of \$824 million.

In this final decision, the Authority has adopted a DORC value of \$850 million.

The increase in asset value from the draft decision is a result of adding back the optimised stockyard assets to DBCT Management's asset base (\$27.7million), a revaluation of the terminal's rail receipt (\$4.7million), a net increase in interest during construction and up front financing (\$2.7 million) and a reduction in the DORC of \$9.1 million due to the truncation of the remaining lives of the terminal's assets to a maximum of 50 years, as recommended by DBCT Management.

The Authority also maintained its draft position regarding on-cost allowances and continued to exclude claims for staging costs, a growth allowance and the recognition of minor capital contributions made by users.

8.1 Background

A number of widely variant asset valuations of the terminal were submitted to the Authority. DBCT Management proposed a single staged Depreciated Optimised Replacement Cost (DORC) valuation of \$1084.3m. DBCT Management's valuation was based on an average of two separate valuations provided by its advisers Connell Hatch (\$1111.8m) and Rushton (\$1056.9m). In contrast, the DBCT User Group proposed a DORC value of \$462m.

To assist in its consideration of these matters, the Authority commissioned Maunsell to undertake a DORC valuation of the terminal. Based on that advice, in its draft decision, the Authority proposed a DORC valuation, as at 1 July 2004, of \$823.7m (see Table 8.1). This value was based on a single stage DORC methodology applying an incremental optimisation.

While there are differences in the methodological approaches adopted in the Authority's and DBCT Management's assessments, the Authority was able to identify the reasons for approximately \$230m of the \$260m difference between its draft asset value and that proposed by DBCT Management.

Two factors explain \$169m of this difference. In preparing its DORC value, DBCT Management proposed an \$89m provision for a growth allowance and \$177m for interest during construction and up-front financing costs. The Authority has rejected the claim for a growth allowance to be built into the current asset value on the basis that it is inconsistent with DORC principles to provide for a non-existent asset in determining an asset value.¹⁰ In addition, the Authority provided for \$97.5m in interest during construction and up-front financing costs. The main difference between the two assessments of interest during construction and upfront

¹⁰ In the absence of DBCT Management submitting a forward capital expenditure programme, it was proposed that capital expenditure be added into the asset value as it is expended, with the reference tariff correspondingly adjusted.

financing costs is that DBCT Management double counted inflation in their estimate of interest during construction and both their WACC and asset values were higher.

Table 8.1: The Authority’s draft DORC Valuation of DBCT (\$m)

Valuation	QCA	DBCT Management	
		Connell Hatch	Rushton
Single Stage Base DORC	723.7	840.0	794.5 ¹
Interest During Construction	78.8 ²	166.1	156.7
Up-front Financing Costs	18.8	15.7	15.7
Land Value	2.3	1.0	1.0
Growth Allowance	0.0	89.0	89.0
Sub total		1111.8	1056.9
DORC	823.7	1084.3	

¹ The Rushton base valuation was \$686m. This excluded stage 6. Prime subsequently added the costs of stage 6 on and inflated and depreciated the Rushton DORC to arrive at a 1 July 2004 Rushton DORC value.

² DBCT Management assumed a nominal post- tax WACC of 10.52% and a 4 year construction period.

Of the difference that remained, roughly \$61m, just under half was due to DBCT Management either valuing assets at a higher standard than actually exists or inadvertently double counting some assets. The balance of this difference is due to the Authority’s proposed optimisations, largely in the stockyard and in computer equipment.

A matter of some contention in the Authority’s draft asset valuation was the valuation of the terminal’s shiploaders. DBCT Management effectively proposed a replacement cost valuation of all three shiploaders. The Authority’s independent asset valuation consultant considered that the three shiploaders could have been procured at a substantial discount had an alternative acquisition process been undertaken.

The Authority was not convinced that this was the case or that the alternative shiploaders would be fit for purpose. The current shiploaders have been installed to meet the particular demands of the DBCT site (eg environmental and geographic requirements) and they have been designed with in-built flexibility to meet the range of possible future requirements (eg ability to handle large vessels and up-graded handling rates). Given these uncertainties, and the vital role the shiploaders play in the coal supply chain, the Authority decided to give the benefit of the doubt to DBCT Management and not optimise the shiploaders.

On the basis of the above factors, the Authority arrived at a draft DORC value of \$795m. As a result, there remained an unexplained difference of \$56m between this valuation and that proposed by DBCT Management. The Authority accepted that such a difference was understandable given the differences in valuation approach adopted by DBCT Management and the Authority’s independent consultant and the judgement, and therefore uncertainties, that DORC valuations inevitably entail. The Authority therefore adopted a conservative approach to its draft asset valuation and added one-half of the unexplained difference to its DORC valuation. In adopting that approach, the Authority noted that this is the same approach adopted by DBCT Management to reconciling the \$55m difference between its two DORC valuations. It is on this basis that the Authority adopted \$823.7m as the terminal’s opening asset value as at 1 July 2004.

In its draft decision, the Authority also optimised the terminal's stockyard on the basis of Maunsell's advice. However, the Authority noted that Maunsell's optimised terminal configuration had not been subjected to simulation modelling to determine its ability to deliver an equivalent service at the terminal. As a result, the Authority stated in its draft decision that, if it could be demonstrated by DBCT Management that the Maunsell stockyard optimisations would adversely impact terminal capacity, the Authority would review its position on the stockyard optimisation.

In response to the Authority's draft decision, a number of submissions made comment in regard to the Authority's draft asset valuation determination. These submissions focussed on the following issues:

- the replacement cost valuation of certain assets, namely the rail in-loaders and application of contract variation and project risk on-costs;
- the Authority's optimisation of the stockyard and dust extraction system and non-optimisation of the terminal's shiploaders; and
- the Authority's position on depreciation, staging costs and growth allowance.

This chapter discusses these submissions and outlines the Authority's final decision with respect to the DBCT asset valuation.

8.2 Replacement Cost Valuation

Rail In-loaders

Stakeholder Comments on Draft Decision

DBCT Management's asset valuation consultant, Connell Hatch, submitted that Maunsell undervalued the terminal's rail loop and receipt (RL&R); that is, the terminal's rail in-loaders in rail receipt pits 1 & 2 (RRP1 and RRP2). Specifically, DBCT Management submitted that the Connell Hatch and the DBCT User Group's (GHD) ORC valuations of the rail in-loaders are reasonably close at \$39.0m and \$34.1m respectively, whereas the Maunsell ORC valuation of \$21.6m is \$17.4m less than the Connell Hatch value.

DBCT Management submitted that the values used by Connell Hatch and GHD are more accurate and representative of the true value of the rail in-loaders than the Maunsell value which appeared to have been heavily discounted for no apparent reason or has been used in error (DBCT Management, sub. no. 64: 52, 53) (DBCT Management, sub. no. 65: 5).

In an effort to resolve the difference, DBCT Management reviewed the latest cost estimates for a proposed new rail in-loader system, RRP3. The estimates of RRP3 indicated that the base cost of one rail in-loader was approximately \$25m. DBCT Management suggested that the cost of two rail in-loaders could therefore be argued to be worth approximately \$50m. In any event, DBCT Management believed it would be impossible to procure two rail in-loaders for \$21.6m. Consequently, DBCT Management argued that the Authority should add back \$17.4m to the Authority's base ORC (DBCT Management, sub. no. 64: 52, 53) (DBCT Management, sub. no. 65: 5).

No other stakeholders commented in relation to the valuation of the terminal's rail in-loaders.

Consultant's Response

The Authority's consultant, Maunsell, and Connell Hatch jointly investigated the differences between the two RL&R valuations. The result was that Maunsell increased its valuation and Connell Hatch reduced its valuation.

Under Maunsell's original valuation, Maunsell valued the civil assets associated with each rail in-loader separately. Specifically, Maunsell valued RRP1 in 1980 dollars and RRP2 in 1993 dollars, before indexing both to obtain a 1 July 2004 figure.

Based on its investigations with Connell Hatch, Maunsell revised its civil valuation of the rail in-loaders on the basis of the more recent in-loader (RRP2). This resulted in an increase in the ORC for the RL&R civil assets of \$4.7m. Maunsell believed that this revised method would provide a more accurate estimate than applying an index to update RRP1. As a consequence, Maunsell reviewed its valuation of the mechanical and electrical components of the RL&R. This revision resulted in an increase of \$0.7m to the Maunsell RL&R ORC.

Overall, the revised valuation method resulted in the Maunsell ORC value of the RL&R increased by \$5.3m from \$21.6m to \$26.9m.

Connell Hatch similarly revised its valuation of the RL&R downwards from \$39.0m to \$35.4m due to a number of errors such as including additional preliminaries in their cost of both RRP1 and RRP2, and double counting conveyors S2, S4, substation 2A and the amenities building. Consequently, the original ORC difference of \$17.4m between the Maunsell and Connell Hatch RL&R valuations decreased to \$8.5m.

Authority's Analysis

The Authority accepts that the joint investigation by Maunsell and Connell Hatch on the RL&R has resulted in Connell Hatch reducing its valuation of the RL&R due to a number of identified errors and omissions as well Maunsell revising its value for the RL&R. After allowing for the Authority's decision to add back 50% of the unexplained difference between the two valuations, the effective difference in respect of the rail in-loaders is less than \$4m. On this basis, the Authority accepts Maunsell's revised valuation of the RL&R.

The Authority accepts Maunsell's revised rail in-loader valuation.

On-costs

In its draft decision, the Authority was satisfied with the approach of using current market prices to value the terminal's mechanical and electrical assets. The Authority also accepted Maunsell's allowance of 2.5% for contract variation and 3% for project risk on-costs for the mechanical and electrical assets on the basis that these assets were valued using final market contract prices as opposed to tender prices.

In relation to the terminal's civil works and off-shore assets, the Authority accepted that these assets were more dependent on the geographic/local site conditions than the mechanical and electrical assets and, as such, accepted Maunsell's view that the historical tendered rates for these assets represented a better basis for determining replacement costs for these assets. However, given Maunsell valued these assets on the basis of tender quantities and prices and not final market contract prices, Maunsell indicated that it would revise its on-cost allowance for these assets if DBCT Management could demonstrate that the allowance for contract variation and project risk was higher than 2.5% and 3%.

In response to the Authority's August 2004 asset valuation request for comments paper, DBCT Management presented data that indicated on-costs at the terminal had averaged around 15.2%. Consequently, the Authority accepted Maunsell's use of this figure as an on-cost allowance for the offshore and civil assets.

Stakeholder Comments on Draft Decision

DBCT Management submitted that all items, including mechanical and electrical works should attract a contract variation and project risk on-cost percentage of 10% each. DBCT Management argued that the data provided to the Authority in its previous submissions indicated that a conservative average for actual contract variations experienced at DBCT for stages 2 to 6 was in the order of 15.2%. DBCT Management claimed this average covered all categories of work, that is, both offshore and civil works as well as mechanical and electrical assets. DBCT Management also pointed out that the 15.2% figure does not include project risk but rather, is only an allowance for contract variation. DBCT Management argued that, at the very least, all items including mechanical and electrical works should attract the average rate of 15.2%. DBCT Management also submitted it is unclear whether the on-costs as determined by Maunsell will apply to future capital expansions (DBCT Management, sub. no. 64: 53, 55) (DBCT Management, sub. no. 65: 7, 8).

While noting the difference in on-costs applied, DBCT Management also acknowledged that Maunsell and Connell Hatch adopted different valuation approaches and, as a result, agree that in any DORC valuation, differences are understandable and indeed very likely. DBCT Management submitted therefore, that, it may not be possible to fully understand and reconcile the different application of on-costs. To this extent, DBCT Management supported the Authority's approach of adding one-half of the valuation difference to the Authority's ORC valuation. DBCT Management argued that such an approach is fair and pragmatic and alleviates to a considerable extent their concerns raised in relation to issue of on-costs (DBCT Management, sub. no. 64: 55).

On the other hand, the DBCT User Group believed that the Authority's adding of one-half the valuation difference risks creating incentives for infrastructure owners to manufacture such differences in the future and make it difficult for asset valuation reconciliations to be completed by the Authority. Moreover, the DBCT User Group considered the 15.2% on-cost allowance too high. In any event, the DBCT User Group argued that the issue of on-costs has already been subjected to a detailed examination as part of the Authority's analysis (DBCT User Group, sub. no. 52: 21, 22).

Consultant's Report

Maunsell valued the mechanical and electrical assets on the basis on final complete prices. This involved obtaining material take-off quantities from the actual as constructed drawings of the terminal's assets as they currently exist on site and obtaining current market prices for design and construction of such assets. Maunsell maintains its earlier arguments that an allowance of 2.5% for contract variation and 3% for project risk is reasonable given its experience in valuing the mechanical and electrical assets and that the site specifics and quantities of these assets were known to a high degree.

In relation to the civil and offshore assets, given Maunsell valued these assets on the basis of tender prices, Maunsell was willing to provide a higher allowance for project risk and contract variation in order to obtain a complete final price. Based on the data provided by DBCT Management which indicated that 15.2% was the average percentage figure representing the movement from tender prices to final complete prices, Maunsell adopted this figure as an on-cost allowance for the offshore and civil assets. Maunsell argues that, because there were no more costs incurred after this amount (i.e. a final complete price was arrived at), Maunsell does

not consider there is any reason to apply any further on-cost amounts on top of this final amount.

Authority's Analysis

The Authority accepts Maunsell's approach to calculating replacement costs of the terminal. In particular, the Authority accepts that Maunsell valued the mechanical and electrical assets on the basis of final complete prices and therefore the allowance of 2.5% for contract variation and 3% for project risk accords with Maunsell's experience for such assets.

In contrast, Maunsell used a tender approach to value the civil and offshore assets and the Authority therefore accepts the allowance of 15.2% for project risk and contract variation based on information provided by DBCT Management to the Authority that indicated the 15.2% was the average percentage figure representing the movement from tender prices to final complete prices. In response to the draft decision, no compelling evidence was presented to dissuade Maunsell or the Authority of this view. As a result, the Authority rejects DBCT Management's claim that an allowance of 10% should be made for both contract variation and project risk on-costs.

In this decision, the Authority maintains its approach to adding to its asset value one half of the difference between the Authority's and the Connell Hatch's asset value. The Authority believes this is reasonable given the different valuation approaches and uncertainties that DORC valuations inevitably entail. While the DBCT User Group believes this position risks creating incentives for infrastructure owners to manufacture such differences in the future, the Authority believes such an approach is fair and reasonable on this occasion given the differences in valuation approaches adopted. The Authority does not accept that this establishes a precedent for future asset valuations.

However, for the avoidance of doubt in regard to future expansions, the on-costs as determined by Maunsell for establishing the initial capital asset base will not apply, rather, the Authority will allow all reasonable on-costs associated with future capital expansions provided an efficient procurement process is followed.

8.3 Optimisation

In its draft decision, the Authority optimised the terminal on the basis of an incremental (brownfields) approach. Such an approach is based on the premise that the existing asset would be replaced using fundamentally the same configuration as presently used, with adjustments introduced to ensure that only assets relevant to providing the desired level of service provision are incorporated as well as optimising out any over capacity, over designed or redundant assets.

In response to the Authority's draft decision, stakeholder comments focussed on the following optimisation issues:

- stockyard optimisation;
- the non-optimisation of the terminal's shiploaders; and
- the dust extraction system.

Stockyard Optimisation

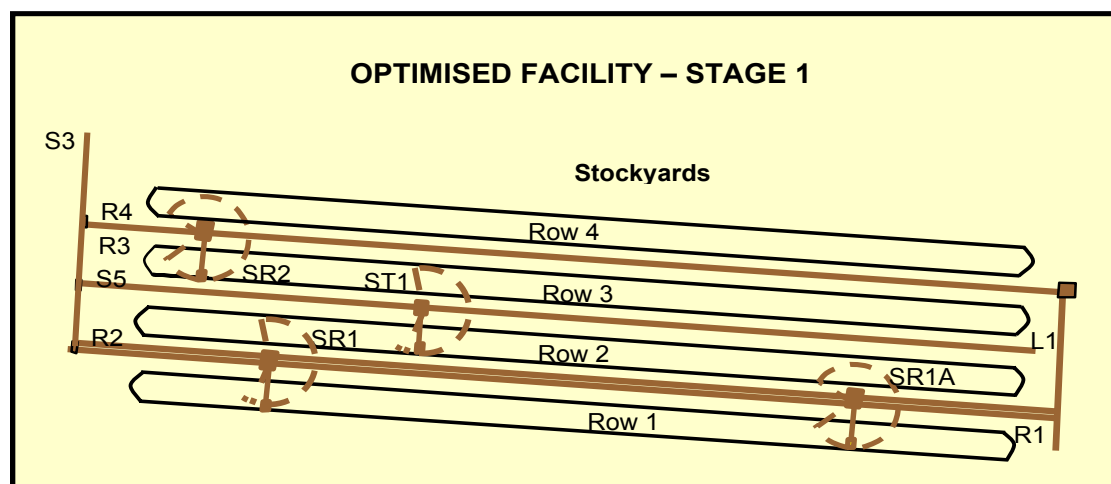
In its draft decision, the Authority accepted Maunsell's optimisation of the terminal's stockyard on the basis of a sub-optimal design decision. Maunsell argued that the selection of yard machine Reclaimer RL1 unnecessarily restricted the operation of the plant and complicated the

stockpile management of the facility. Moreover, Maunsell argued that, while it should have been recognised from the outset, the impact of this sub-optimal decision was made even more obvious in later stages when Stacker ST2 and associated feed systems were installed in stage 5 to alleviate stockpile management issues created by the initial selection of RL1.

Maunsell's optimisation of the stockyard involved optimising out RL1 and replacing it with a Stacker/Reclaimer identified as SR1A. The inclusion of SR1A in the optimised facility led to other equipment becoming redundant and also being optimised out. This equipment included: conveyors S6A, transfer station S6A to S6, conveyor S6, stacker ST2, associated stockyard electrical items and earthworks for stages 3 and 5 and drainage associated with stage 5 (see figure 8.1).

At the ORC level, Maunsell's optimisation of the stockyard totalled approximately \$27m. However, while the Authority accepted Maunsell's optimisation of the stockyard, the Authority also acknowledged Maunsell's caveat that it had not undertaken simulation modelling to confirm its proposed optimised configuration would deliver an equivalent service at the terminal. Accordingly, in the draft decision, the Authority indicated it would review its position if it could be demonstrated by DBCT Management that the Maunsell stockyard optimisation would impact terminal capacity in a meaningful way.

Figure 8.1: Optimised Terminal Stockyard



Source: Maunsell DBCT Asset Valuation, 2004.

Stakeholder Comments on Draft Decision

DBCT Management commissioned Dr Harry King of Sandwell Engineering to run simulation modelling exercises comparing the Authority's optimised terminal configuration with the existing terminal layout. DBCT Management submitted that Sandwell's modelling showed the optimised configuration would in fact increase the loading time of ships by as much as 1.5 hours and reduce terminal capacity by 1 mtpa. As a result, DBCT Management argued that the \$27m in optimisations of the stockyard should be added back into the Authority's ORC valuation of the terminal (DBCT Management, sub. no. 64: 52 & sub. no. 65: 3, 4).

In contrast, the DBCT User Group submits that the Authority's optimisation of the terminal is generally considered to be appropriate.

Holdings supported the Authority adopting an incremental approach to optimisation. However, Holdings also submitted that it is surprising that a significant yard machine had been optimised

out especially given that the terminal was constructed on the basis of demand at the time and independent professional design advice (DBCT Holdings, sub. no. 50: 10).

Consultant's Response

Maunsell undertook a review of DBCT Management's (Sandwell's) modelling of the terminal and concluded that Sandwell's model was a reasonable representation of the terminal and that Sandwell had fairly incorporated the optimised configuration of the terminal into the model. On the basis of its analysis, Maunsell confirmed that it is reasonable to conclude that the "optimised" configuration of the terminal (as opposed to the current configuration) will incur additional delays to out-loading thus reducing capacity of up to 1 mtpa. Consequently, Maunsell removed the stockyard optimisation from its final asset valuation.

Maunsell suggested that the principal reason for the reduction in capacity was due to the flexibility of eight yard machines versus seven. That is, the optimised configured stacker reclaimer SR1A can only stack or reclaim, it cannot do both functions at the same time. In the event of train inloading, if SR1A is reclaiming for the purposes of outloading, it needs to divert from loading a ship and start stacking from the train to row 1. This inevitably leads to a delay in outloading and a reduction in terminal capacity. In the event that there a number of ships in the queue, Maunsell suggest this delay could be compounded.

Authority's Analysis

In its draft decision, the Authority indicated that it would review its position in relation to the stockyard optimisation if it could be demonstrated that the proposed optimised terminal configuration would impact on terminal capability in a meaningful way.

Based on DBCT Management's modelling results and Maunsell's audit of that model and a review of the results, the Authority believes that a reduction in terminal capacity of 1 mtpa and an increase in shipping delays of 1.5 hours is material and therefore will add back the optimised stockyard assets (\$27m) to DBCT Management's asset base.

While the Authority acknowledges that the optimised capacity is "expensive" relative to the remainder of the terminal, it is nevertheless capacity that is currently used and is likely to be continued to be used for the foreseeable future. The Authority therefore believes that including that capacity in its asset value is consistent with DORC principles. In other circumstances, where for instance such capacity is unused and likely to continue to be unused, the Authority may have accepted Maunsell's proposed stockyard optimisation.

The Authority will add back the \$27.7m in optimised stockyard assets to DBCT Management's asset base.

Non-Optimisation of Shiploaders

In the draft decision, while the Authority considered Maunsell undertook an appropriate brownfields valuation of the terminal, it did not accept all of Maunsell's proposed optimisations. For example, the Authority did not accept Maunsell's proposed \$57.2m optimisation of the terminals shiploaders. Maunsell argued that the terminal's existing shiploaders are over-designed and that cost effective alternative shiploaders could have been procured.

However, after extensive investigation, the Authority was not convinced that the Maunsell proposed shiploaders would meet the conditions and required demands of the DBCT location. The Authority did however accept Maunsell's advice not to optimise out one of terminal's three shiploaders on the basis that it agreed that all three shiploaders are justified given the terminal's

existing layout, the design and location of the third berth, and the risks associated with the options for relocating the original shiploader.

Stakeholder Comments on Draft Decision

The DBCT User Group submitted that, while they believe the Authority's optimisation of the terminal is generally considered to be appropriate, they believe that at least one of the shiploaders should be optimised out and a fresh assessment made of the extent to which the design of the other shiploaders are excessive (DBCT User Group sub. no. 52: 21).

In contrast, DBCT Management believed the Authority had acted appropriately in not applying any optimisation to the terminal's shiploaders. DBCT Management also believed that the Authority's comments with regard to the shiploaders' importance within the coal supply chain were both appropriate and pragmatic as they give the infrastructure provider confidence that the regulator will take a holistic view of the port's role in the coal supply chain and levels of service and reliability (DBCT Management, sub. no. 64: 57).

DBCT Management further noted that it is not feasible to take a low cost, off-the-shelf shiploader and then start adding features to it in order to make it meet site specific requirements. Such an approach would compromise the structural stability, strength and serviceability of the machine and overlooks the importance of valuing an asset that is truly and unambiguously "fit for purpose". It is Connell Hatch's view that the operational, maintenance and functionality of these machines has to be designed in and cannot be retrofitted to a standard base machine (DBCT Management, sub. no. 65: 10) (DBCT Management, sub. no. 64: 56, 57).

Authority's Analysis

The Authority believes that, in its draft decision, it undertook a thorough and fair assessment in relation to the issue of shiploader optimisation and, in the absence of new information, remains unconvinced of the need to optimise any of the terminal's shiploaders.

Dust Extraction System

In its draft decision, the Authority accepted Maunsell's optimisation of the terminal's dust extraction system in RRP1 on the basis that it is currently inoperable and thus subsequently considered redundant.

Stakeholder Comments on Draft Decision

DBCT Management submitted that, although currently unused, the dust extraction system in RRP1 is not in fact redundant. DBCT Management argued that there was a clear obligation on the owner (now the lessee) of the terminal to install the dust extraction equipment and this has occurred.

DBCT Management argued that, regardless of whether the system actually operated, it made the investment for a dust extraction and the system was installed as per the statutory requirements for the operability of a coal facility. Moreover, DBCT Management submitted that, if the facility was to be replaced today, EPA requirements dictate that a dust extraction system be fitted. As a result, DBCT Management argued that any replacement cost valuation of the terminal should value all equipment actually purchased and required for the operation of the facility. Accordingly, DBCT Management believes it is appropriate that the Authority add back \$1.9m to its ORC valuation for the dust extraction system (DBCT Management, sub. no. 64: 49-51) (DBCT Management, sub. no. 65: 2).

Other stakeholders did not comment on the optimisation of the dust extraction system.

Consultant's Response

In regard to the dust extraction system, Maunsell argued that DORC principles for regulatory valuations seek to remove redundant, over capacity or unused assets to achieve an optimised value for the assets currently required to deliver the prescribed service. While the dust extraction system exists, Maunsell advised that it is not currently operable.

Under DORC principles, the valuer cannot place a value on assets that is greater than that applying to the current operating asset. Hence, given the dust extraction system is not operating, it must be optimised out. Maunsell submitted that, if the dust extraction system was operating, it could be included within the asset base. However, under the current operation of DBCT, services are delivered without it. Maunsell has therefore valued the rail receipt system excluding the dust extraction system and believes this results in an appropriate optimised current value of those assets.

Authority's Analysis

The Authority accepts Maunsell's advice that under DORC principles it is not reasonable to place a value on an asset that is greater than that applying to the current operating asset. Hence, given the dust extraction system is not operating, it must be optimised out. Therefore, the Authority accepts Maunsell's advice and has not included the dust extraction system on the basis that it is not used to deliver the required service at the terminal. However, the Authority would reconsider this decision in the future if the existing unused dust extraction system is either replaced or repaired and is made operable.

8.4 Summary of Authority's Optimisations and Valuation Differences

The Authority noted in its draft decision that its consultant Maunsell sought to compare its optimisations with other valuations. However, Maunsell's attempt to do so was hampered by a number of factors, including the different methods of valuing assets, differences in asset registers and the limited detailed information on some of the valuations. As a result, Maunsell concentrated on comparing its ORC with the Connell Hatch ORC.

Table 8.2 highlights the optimisations and valuation differences between the Authority's ORC and Connell Hatch's ORC valuation, comparing the draft decision to the final decision. In summary, the Authority's optimisations at the terminal can be categorised as follows:

- over-designed assets — assets currently on site that have been designed beyond what is needed to satisfy the capacity requirements of the terminal;
- redundant assets — assets that are no longer used in operating the terminal;
- sub-optimal design decisions — decisions that, at the time they were made, were inappropriate;
- items valued in excess of their current capability — items valued by Connell Hatch that do not reflect the asset currently existing on the site; and
- other adjustments — items in the Connell Hatch valuation that appear to have been incorrectly included.

In contrast to the advice of Maunsell, the Authority has not optimised the terminal's shiploaders and surge bins and has added back the value of the optimised stockyard on the basis that Maunsell's proposed stockyard optimisation adversely affects the terminal's capability (see Table 8.2).

In terms of the items valued in excess of their current capability (\$19.4m), the Authority accepts Maunsell's advice that Connell Hatch valued surge bin 1, conveyors S1 to S4, various parts of the stockyard bund fitout and conveyors R1 to R4 in excess of their current capability. As a result, the Authority maintains its optimisation of these items.

Similarly, the Authority maintains its draft decision position to optimise out the dust extraction system (\$1.9m) on the basis that it is not operable and not currently contributing to the prescribed service and therefore redundant.

With regard to the "other adjustments", in its draft decision, the Authority, based on Maunsell's advice, made an allowance of \$5.8m for the terminal's computer systems. This compares Connell Hatch's allowance of \$21.9m.

The DBCT User Group submitted that most computers and software were the subject of operating leases to the operator and requested the Authority to clarify this situation. The Authority sought clarification on the ownership of the terminal's computer systems. The Authority confirmed that the PC based hardware and software is leased by the operator and recovered from users in operating costs and, as a result, the Authority maintains its draft decision not to include these assets within its asset valuation. While the Authority requested clarification from stakeholders on the ERP coal tracking software, it was unable to establish title of ownership. However, the Authority believes such a system is essential for the operation and control of the terminal and has included the ERP within the Authority's valuation.

Maunsell also identified a number of assets that had been counted twice in the Connell Hatch valuation which the Authority subsequently confirmed at the draft decision stage. These assets include:

- Rail Reveal Pits 1 and 2 (RRP1 & RRP2) — DBCT Management acknowledged that Connell Hatch had erroneously duplicated water services (\$0.8m) and preliminaries, conveyor footings and amenities buildings in RRP1 and RRP2 (originally valued by Connell Hatch at \$3.2m). In the draft decision, the Authority noted, as confirmed by Connell Hatch, these errors totalled \$4.0m. However, as a result of the revised valuation of the terminal's rail in-loaders by Connell Hatch and Maunsell, these errors have also been revised and now total \$7.4m.
- Sample Plant, Surge Bins 1 & 2 — DBCT Management acknowledged that the cost of the sample plant was erroneously counted twice in the Connell Hatch valuation of Surge Bins 1 & 2. Connell Hatch valued this error at \$3.6m.
- Berth 3 Dredging — DBCT Management acknowledged that preliminaries were erroneously included twice in the Connell Hatch valuation, at a cost of \$8.4m.

Included in Table 8.2 is an adjustment for the value of spares due to the Authority's revised ORC valuation.

As a result of the Authority's changes to its asset value, the Authority's base ORC is \$976.2. Of the \$113.8m difference between Connell Hatch's ORC and the Authority's ORC, \$58.3m can be directly explained due to optimisations and other identified variations leaving a remaining unexplained difference of \$55.5m.

Table 8.2: Authority Optimisations and Valuation Differences between Connell Hatch and the Authority's ORC Valuations (\$m)

	<i>Draft decision ORC Value Differences</i>	<i>Final Decision ORC Value Differences</i>	<i>Connell Hatch ORC Valuation</i>
			1,090.0
Optimisation of Over-Designed Items			
Outloading – Surge Bin 2	0.0 ^a	0.0 ^a	
Outloading – Shiploaders	0.0 ^a	0.0 ^a	
Total Over-Designed Items	0.0	0.0	
Optimisation of Redundant Items			
Rail Loop & Receival – Dust extraction system in RRP1	1.9	1.9	
Total Redundant Items	1.9	1.9	
Optimisation of Sub-Optimal Design Decisions			
Stockyard – Conveyor S6A	1.3	0.0 ^a	
Stockyard – S6/S6A Transfer Station	0.9	0.0 ^a	
Stockyard – Conveyor S6	5.3	0.0 ^a	
Stockyard – Stacker/Reclaimer SR1A replacing Stacker ST2 and Reclaimer RL1	15.0	0.0 ^a	
Stockyard – Electrical	1.1	0.0 ^a	
Stockyard – Bulk Earthworks – Stage 5	1.4	0.0 ^a	
Stockyard – Stage 5 Drainage	2.4	0.0 ^a	
Total Design Decision	27.5	0.0	
Items Valued in Excess of Their Current Capability			
Outloading – Surge Bin 1	5.5	5.5	
Inloading – S1 Conveyor	0.9	0.9	
Inloading – S2 Conveyor	0.9	0.9	
Inloading – S3 Conveyor	0.9	0.9	
Inloading – S4 Conveyor	0.9	0.9	
Stockyard – Bund Fitout	8.4	8.4	
Stockyard – Conveyor R1	0.5	0.5	
Stockyard – Conveyor R2	0.5	0.5	
Stockyard – Conveyor R3	0.5	0.5	
Stockyard – Conveyor R4	0.5	0.5	
Total Items Valued in Excess of Their Current Capability	19.4	19.4	
Other Adjustments			
Computer Systems	16.1	16.1	
RL&R – duplicated water services in RRP1 and RRP2	0.8 ^b	0.8 ^b	
RL&R – duplicated preliminaries, conveyor footings and substation buildings in RRP1 and RRP2	3.2 ^b	7.4 ^c	
Sample plant – CH have included supply and installation of sample plant in Surge Bins 1 and 2	3.6 ^b	3.6 ^b	
Berth 3 dredging – CH have included berth 3 dredging preliminary expenses	8.4 ^b	8.4 ^b	
Total Other Adjustments	32.1	36.3	
Adjustment for Spares	1.6	0.7	
Total Explained Differences	82.5	58.3	
Total Unexplained Differences	64.7	55.5	
Authority's Base ORC Valuation	942.8	976.2	
Authority's ORC Valuation plus half the Unexplained Difference	975.2	1003.9	

^a These values differ to the values reported in the Maunsell asset valuation report as the Authority rejected Maunsell's optimisation of these items.

^b These numbers differ to the values in the Maunsell asset valuation report because the Authority has included DBCT Management's values for these items in this table.

^c This value has been revised from the draft decision due to Maunsell's & Connell Hatch's revised valuation of the RL&R.

The Authority maintains its view that such a difference is understandable given the differences in valuation approaches adopted by DBCT Management and the Authority's independent consultant, and judgement and the uncertainties that DORC valuations inevitably entail.

The Authority has therefore adopted a conservative approach to its asset valuation and added one-half the unexplained difference of \$55.5m to its ORC valuation. It is on this basis that the Authority has assessed the ORC of the terminal at \$1003.9m.

8.5 Depreciation

While the optimised replacement cost provides a value for an efficient set of modern equivalent assets needed to provide equivalent service and capacity to the asset being valued, depreciation measures the decline in the service potential of an asset as a result of usage, ageing and/or obsolescence. In the draft decision, the Authority applied straight-line depreciation to the terminal assets without regard to an economic constraint on the assets' technical lives.

Stakeholder Comments on Draft Decision

The majority of stakeholders offered no comments on asset depreciation. The DBCT User Group made no specific comments in relation to depreciation except that it noted the Authority's approach in the draft decision (DBCT User Group, sub. no. 52: 22).

DBCT Management, however, reiterated its position that an economic constraint on the DBCT asset life is appropriate. In this regard, DBCT Management engaged Barlow Jonker to undertake an independent assessment of the economic life of the coal reserves in the Bowen Basin. The Barlow Jonker report indicated that there are reserves of about 49.8 years at current extraction rates, excluding mines owned by BHP Billiton Mitsubishi Alliance (BMA) who is the operator of the neighbouring Hay Point terminal.

Barlow Jonker identified a number of factors, such as steel substitutes, alternative steel making technology, alternative energy sources, punitive government imposts, eg carbon taxes, and new supply sources, as potential challenges to the coal industry. For these reasons, Barlow Jonker submitted that forecasting the market position for a period greater than 50 years is extremely difficult. To this extent, Barlow Jonker submits that there is no basis for assuming, with any level of certainty, that the remaining economic life of DBCT will be longer than the current identified resource base. Similarly, QR argued that long term coal forecasts are highly uncertain and, as a result, QR supported a limit on the economic lives of the terminal's assets (QR sub. no. 60: 4).

Based on Barlow Jonker's analysis, DBCT Management submitted that, for DBCT assets with physical lives that exceed 50 years, it would be prudent to adopt a remaining economic life of 50 years for future return of capital calculation purposes. Further, DBCT Management argued that, to the extent the Authority adopts an economic constraint, ie such that recovery of capital is over a period less than the remaining physical life of the assets, this approach should not affect the initial DORC value of the assets for regulatory purposes.

Consultant's Report

In light of DBCT Management's concern and more detailed submission, the Authority engaged Energy Economics to independently review Barlow Jonker's report on the Bowen Basin coal reserves and, therefore, the likely remaining economic life of the terminal. Energy Economics' report generally supported the Barlow Jonker analysis and conclusions.

In particular, Energy Economics indicated that, at current extraction rates, non-BMA proven reserves would last 46 years. At proposed extraction rates post-expansion of DBCT at 75 mtpa, proven reserves would last only 32 years. When combined with BMA reserves, at a combined extraction rate of 126 mtpa, proven reserves would last 38 years. At the same time, Energy Economics indicated that ongoing exploration would define additional reserves in the catchment area. As a consequence, Energy Economics considers that the risk of structural decline in coal exports via DBCT occurring within a 50 year timeframe is small. Beyond this period, the potential risks, both in terms of sources of coal supply to the port and demand for coal in international markets, increase considerably. Energy Economics, therefore, recommends the Authority adopt a 50 year economic life for depreciation purposes.

Authority's Analysis

In its draft decision, the Authority did not impose an economic constraint on the Bowen Basin coal reserves. The Authority, however, indicated that it would consider further arguments and/or evidence on this matter. In assessing the evidence presented, the Authority notes that both consultants concur that a 50 year constraint is justifiable even at current extraction rates, ie before any expansion, as the degree of uncertainty associated with both the demand for, and supply of, coal increases substantially beyond 50 years. Although it is arguable that ongoing exploration will generate additional reserves in the catchment area, the potential effect on total reserves is currently unknown and counterbalanced by the consideration that the potential impact of mitigating factors, eg technology-related changes, is also unknown.

Further, with any increase in current extraction rates associated with a future expansion of the terminal, the economic life of the assets is reduced below 50 years unless exploration generates additional reserves, which is likely to be the case. However, even with a 50 year constraint in place, DBCT Management would still bear some risk, but without such a constraint, DBCT Management would certainly be exposed to even more. As a consequence, a 50 year economic constraint on asset lives more evenly balances the potential risks of asset stranding between DBCT Management and terminal users.

In its draft decision, the Authority considered that, in order for an economic constraint to be placed on the life of the terminal site, it must be demonstrated that such limitation is reasonably likely to arise during the period in question (ie 50 years). In light of the evidence presented, the Authority considers that, on balance, there is sufficient justification for a 50 year economic constraint and this period is reasonable for the recovery of capital. The Authority, therefore, will apply a remaining life of 50 years to those assets with remaining lives exceeding 50 years. The Authority notes that applying the constraint results in a modest reduction in the DORC. This occurs because the 50 year remaining life assumption effectively reduces the asset's total life for depreciation purposes. As such, with a reduced remaining life and the assumption of straight line depreciation, annual depreciation increases. As a result, a greater amount of depreciation is assessed prior to the commencement of the regulatory regime, resulting in a reduced DORC.

8.6 Financing Costs

In the draft access undertaking, DBCT Management proposed that the regulatory asset base include allowances for both interest during construction (IDC) and up-front financing costs, as these costs are associated with constructing such a facility. DBCT Management submitted an estimate of \$161.4m for IDC, which included an up-front debt financing cost, and an allowance of \$15.7m for equity-raising costs, in DORC terms.

In its draft decision, the Authority agreed with DBCT Management that allowances for IDC and up-front financing costs are legitimate costs incurred by the developer of an equivalent asset.

Based on the Authority's draft values for the asset base and WACC, the Authority determined that appropriate allowances for these costs are \$78.8m and \$18.8m respectively, in DORC terms.

The Authority received no further comments from stakeholders on the issue of financing costs.

Authority's Analysis

The Authority considers that its approach to assessing these costs in the draft decision is reasonable and, therefore, the only change from the draft decision is to update the financing cost allowances to reflect the Authority's final ORC and WACC values. For the purpose of assessing financing costs associated with the DORC of the existing assets, the Authority has used a WACC of 8.54% (see chapter 9). Based on the Authority's final ORC of \$1003.9m (excluding interest during construction and upfront financing costs), the depreciation profile adopted and a WACC of 8.54%, the allowance for interest during construction is \$86.0m, and the allowance for up-front financing costs is \$19.3m, in DORC terms.

8.7 Land Value

In its draft decision, the Authority valued the terminal land and non-infrastructure buildings and site improvements according to market value.

Stakeholder Comments on Draft Decision

DBCT Management made no comment in relation to the Authority's draft decision on the value of the terminal's land. The DBCT User Group on the other hand agrees with the Authority's draft determination in relation to valuing the terminal's land (DBCT User Group, sub. no. 52: 22).

Holdings suggested however that an alternative treatment for land may be to allow the actual lease payments made by DBCT Management in its allowable operational costs (DBCT Holdings, sub. no. 50: 10).

Authority's Analysis

The Authority notes that, in response to the draft decision, neither DBCT Management nor the DBCT User Group disagree with Authority's draft decision on valuing the terminal's land. In fact, the Authority notes the DBCT User Group's support the Authority's approach to valuing the land.

In the absence of disagreement, for the purpose of the final decision, the Authority will maintain its draft decision to value the terminal's land according to market value.

8.8 Staging Costs and Growth Allowance

In its draft decision, the Authority valued the terminal on a single stage basis and made no allowance for staging costs or a growth allowance.

Stakeholder Comments on Draft Decision

The DBCT User Group agreed with the Authority that there should be no provision for a growth allowance or staging costs in valuing the terminal (DBCT User Group, sub. no.52: 22).

On the other hand, DBCT Management argued that a growth allowance and staging costs are interchangeable and it is appropriate to include one or the other, but not both.

DBCT Management submitted that staging costs will always be incurred when building a terminal of DBCT's size. Thus, any competitive facility would include costs associated with staging.

DBCT Management stated that the Authority has denied it staging costs on the basis of past Government pricing practices and the fact that the terminal was purchased in a fully developed state. However, DBCT Management submitted that the Authority has provided no analysis of these pricing practices.

In any event, DBCT Management argued that past pricing practices are an irrelevant consideration particularly in the context of a "line in the sand" DORC valuation suggesting that there should be no nexus between efficient forward looking prices and past pricing practices. Moreover, DBCT Management argued that the fact the terminal was acquired in a fully developed state is also an irrelevant consideration and suggests that, if staging costs are not allowed simply because a new owner has purchased a facility in a fully developed state, then logically, if the original owner had not sold the facility, then staging costs would be allowed (DBCT Management, sub. no 64: 57-59).

Authority's Analysis

The Authority notes that the existing DBCT assets were developed in a staged approach to accommodate progressive increases in capacity. The Authority considers that building the assets in stages was a decision made at the time by the owner. Such a decision is a business decision as opposed to a DORC valuation approach.

The Authority is not aware of any precedent to applying DORC principles other than to value the terminal as a single stage development. This equates with the process and costs required by a new competitor in the market wishing to establish the same service, at the same location, on the date of valuation. Therefore, the Authority believes staging costs should not be included. If the Authority were to consider including staging costs, it would need to revisit its adoption of a conventional brownfields optimisation and consider the appropriateness of a greenfields approach. The Authority decided against doing so.

The Authority also believes there should be no provision in a DORC valuation to assign values to assets (i.e. a growth allowance) that do not exist in order to accommodate expected capacity requirements in the future.

The Authority notes that the issue of staging costs did not arise until after the Authority indicated that it was unlikely to include a growth allowance. The Authority does not consider these to be interchangeable items and has considered each separately on its merits.

8.9 Contributed Assets

Contributed assets are those assets that are funded or otherwise provided by a terminal user or a group of terminal users for their own benefit or the collective benefit of users associated with the provision of terminal services.

In its draft decision, the Authority's consultant Maunsell argued that the asset value will be unaffected if the capital works do not extend the life of the assets. Information presented to Maunsell indicates that works undertaken and funded under the minor capital expenditure arrangements have not extended asset lives. The Authority accepted Maunsell's advice and made no allowance for contributed capital.

Stakeholder Comments on Draft Decision

DBCT Management made no comment in relation to the issue of contributed capital.

The DBCT User Group, on the other hand, argued that they are contractually required to pay DBCT Management for minor capital that, once installed, forms part of the terminal's assets and potentially part of the asset base.

The DBCT User Group claimed they have contributed \$11.5m in minor capital payments over the period 1999/00 to 2003-04. As a result, the DBCT User Group considers that these minor capital payments should be recognised as contributed assets for the purposes of calculating the regulated asset base (DBCT User Group, sub. no. 52: 22).

Authority's Analysis

In its draft decision, the Authority stated that, in the absence of documentary evidence, the Authority does not believe there is sufficient justification to adjust the terminal valuation to recognise capital contributed by the users.

Moreover, in previous decisions, the Authority has stated that where a contribution is made towards an asset by a user and the contribution is made with the express intent of obtaining future price benefits (which will usually be reflected in a formal agreement between the contributor and the access provider recognising these arrangements) there is a strong case for recognition of those capital contributions.

The Authority acknowledges that the DBCT User Group is required to pay for minor capital contributions as part of its user agreement for the shipment of coal at the terminal. However, the Authority has not been able to establish that the minor capital contributions have been made with the express intent of obtaining future price benefits.

Moreover, on the basis of the information provided, the Authority has not been able to establish whether or not the contributions referred to by the DBCT User Group have been included in the Authority's asset value. In this context, the Authority notes that Maunsell only included those refurbishments in its asset value where they extended the assets lives, while other refurbishments of a capital nature were excluded.

As a result, the Authority does not believe there is sufficient justification to adjust the terminal valuation to recognise capital contributed by the users. This issue should not arise in the future as the Authority has specifically addressed the definition and treatment of capital in Chapter 10 of this decision.

8.10 Authority's Final DORC Valuation of the DBCT

The Authority's final DORC valuation of the terminal as at 1 July 2004 is \$850m. Table 8.3 highlights the breakdown of the value into its component parts.

Table 8.3: Authority’s Final DORC Valuation of DBCT

Valuation	QCA	DBCT Management	
		<i>Connell Hatch</i>	<i>Rushton</i>
Single Stage Base DORC	742.4	840.0	794.5
Interest During Construction	86.0	166.1	156.7
Up-front Financing Costs	19.3	15.7	15.7
Land Value	2.3	1.0	1.0
Growth Allowance	0	89.0	89.0
Sub total		1111.8	1056.9
DORC	850.0		1084.3

The Authority’s final DORC value of the terminal as at 1 July 2004 is \$850 million.

9. COST OF CAPITAL

Summary

DBCT Management and the DBCT User Group proposed nominal, post-tax WACCs of 10.52% and 7.29% respectively. In its draft decision, the Authority determined a WACC of 8.20%.

For the final decision, the Authority has taken into account technical advice regarding a reasonable WACC for the existing terminal assets and the risks associated with future investment.

The Authority believes that a post-tax, nominal WACC of 8.54% is a reasonable rate of return for DBCT at its existing capacity. This is consistent with a 10.64% return on equity; that is, 480 basis points above the risk-free rate. The Authority believes this return is commensurate with the business and regulatory risks of the existing terminal. Also, it is in excess of what may have been reasonably anticipated at the time the terminal was leased given the decisions the Authority had already published at that time.

The Authority, however, accepts that the proposed expansion to DBCT beyond 60 mtpa involves an increase in overall risk, notwithstanding the measures put in place by the Authority to mitigate the risk. Therefore, the Authority proposes to accept the equity beta of 1.0 proposed by DBCT Management in its response to the Authority's draft decision.

In reaching this decision, the Authority considered adopting a 'two-tier' approach to DBCT's rate of return, under which the 8.54% would apply until DBCT is substantively expanded, at which point the WACC would increase to 9.02% (equity beta of 1.0) for the entire terminal. While the Authority believes that this approach may delineate the different risk profiles of the existing and expansion assets, such an approach introduces uncertainty and unnecessary complexity.

As a consequence, the Authority has made a definitive determination on this matter now. For the purpose of assessing financing costs for the opening asset value and the expansion costs to 60 mtpa, the Authority has used a WACC of 8.54%. For the purpose of assessing reference tariffs into the future, the Authority has used a WACC of 9.02%. This WACC reflects an equity beta of 1.0 and a risk-free rate of 5.84%, giving DBCT Management a return on equity of 11.84%, which is 600 basis points above the risk-free rate.

9.1 Introduction

The Authority originally received two significantly divergent views on an appropriate cost of capital for DBCT. Specifically, in its draft access undertaking, DBCT Management proposed a nominal post-tax WACC of 10.52%, based on a risk-free rate of 5.35%, market risk premium of 7%, asset beta of 0.60 (equity beta of 0.99), debt margin of 1.50%, capital structure of 50% debt / 50% equity and an asymmetric risk premium of 10%. Using the risk-free rate that applied at the time of the Authority's draft decision, this equates to a WACC of 11.04%.

In contrast, the DBCT User Group proposed a nominal post-tax WACC of 7.29%, based on a risk-free rate of 5.49%, market risk premium of 6%, asset beta of 0.30 (equity beta of 0.42), debt margin of 1.30%, and a capital structure of 60% debt / 40% equity. Using the risk-free rate that applied at the time of the Authority's draft decision, this equates to a WACC of 7.64%.

In its draft decision, the Authority gave a nominal, post-tax WACC of 8.20%, which applying a capital structure of 60% debt and 40% equity, gave a:

- return on debt of 7.14%, based on a risk-free rate of 5.84% and a debt margin of 1.30%; and
- return on equity of 9.79%, based on a risk-free rate of 5.84%, market risk premium of 6% and an equity beta 0.66 (asset beta of 0.35).

At the time of the draft decision, the Authority's view was that a cost of capital of 8.20% for DBCT was, on balance, reasonable, given the well established cash flows of the existing terminal assets and the entirety of the regulatory arrangements put in place in the draft decision.

In particular, the very low correlation between returns to DBCT and the Australian economy, in combination with the Authority's proposed revenue cap, largely removed revenue risk from DBCT. In addition, the pass-through of the terminal's operating costs to users largely insulates DBCT from operating cost risk. These two factors jointly ensure that the terminal reflects very stable earnings relative to the market and, therefore, relatively low systematic risk. Given the totality of these economic and regulatory circumstances, the Authority concluded that a return on equity of 9.79%, which was around four hundred basis points above the risk-free rate, was likely to err on the high side of compensation to equity holders.

The Authority received comments from a number of stakeholders on WACC-related matters. At the most general level, the Australian Pipeline Industry Association (APIA) submitted that the regulator's role is to assess only whether the regulated firm's cost of capital proposal falls within a reasonable range (APIA, sub. no. 49: 1-2).

More specifically, however, DBCT Management and most stakeholders submitted that they believe the draft rate of return provided by the Authority was too low for the level of risk involved and sufficiently low to deter investment (DBCT Management, sub. no. 64: 61; AusCID, sub. no. 47: 2-3):

"In DBCT Management's view, and in the view of numerous industry commentators, the WACC set out in the Draft Decision is manifestly inadequate having regard to the nature of the asset and the business risks involved" (DBCT Management, sub. no. 64: 61).

This view was supported by the Queensland Government, which argued:

"Regulated assets or firms must be able to earn a return that not only adequately compensates owners but also attracts investors to regulated infrastructure in Queensland" (Queensland Government, sub. no. 62: 2).

In contrast, the DBCT User Group submitted that the draft WACC was generous:

"It is argued that the QCA draft decision represents a relatively high rate of return given the very low systematic risk associated with the Terminal, especially under a revenue cap form of regulation" (DBCT User Group, sub. no. 53: 6).

The DBCT User Group's position was supported by the QRC, who submitted that considering the cost of capital in the context of the entire undertaking, eg revenue cap, the rate of return should be low and not far removed from the risk-free rate (QRC, sub. no. 61: 1).

Given the breadth of comments on the draft decision, the Authority commissioned additional cost of capital studies on the risk-free rate, market risk premium, credit rating and debt margin, gamma and the asset/equity beta, to address the arguments and concerns raised by stakeholders. The findings of these studies are discussed throughout the chapter as appropriate. A summary of the more detailed commentary on the asset and equity betas is contained in Appendix A.

9.2 Risk-free Rate

In the draft decision, the Authority estimated a risk-free rate of 5.84% by averaging the yield of the 10-year Commonwealth government bond over the 20 trading days preceding 1 July 2004. This is the traditional approach to estimating the risk-free rate adopted by the Authority and other regulators in Australia. In doing so, the Authority reconfirmed its use of this approach as part of its recent technical review of the cost of capital.

As part of that technical review and the Authority's investigation into the DBCT draft access undertaking, most stakeholders supported the Authority's continued use of this approach. However, in contrast to those views, the Queensland Treasury Corporation (QTC) submitted that the short (ie 20-day) averaging period results in debt management practices that are imprudent and impose additional risks on regulated businesses, for which the regulatory regime does not provide compensation (Queensland Treasury Corporation, sub. no. 46: 1-2).

In its draft decision, the Authority responded to these criticisms by noting that the estimates of the risk-free rate, based on a 20-day averaging period, reflect the most recent market data, balanced by a mechanism that removes short term rate spikes. The Authority rejected QTC's proposal, as it appeared to be designed to overcome difficulties arising from QTC's high level of regulated industry debt and the manner in which regulated industries choose to manage risk. The Authority also noted that the other suggested approaches (eg reviewing the risk-free rate and adjusting the cash flows for adverse effects on the rate) represent cost-plus regulatory approaches and, therefore, are inconsistent with incentive-based regulation.

Stakeholder Comments on Draft Decision

The majority of stakeholders supported the Authority's draft estimate of the risk-free rate. However, QTC reiterated, and Ergon Energy supported, its previous concerns that the requirement to refinance within a very short timeframe imposes refinancing risks on regulated firms. QTC and Ergon Energy submitted that the risk-free rate should be set on the basis of a rolling average of four or five years (QTC, sub. no. 46: 1-2; Ergon Energy, sub. no. 56: 5-6).

Authority's Analysis

Stakeholders generally supported the Authority's approach for determining the risk-free rate. In particular, as neither DBCT Management nor the DBCT User Group supported QTC's proposal, it has not been addressed in this decision. It will however be addressed in the Authority's forthcoming 2005 Electricity Distribution Determination.

Accordingly, the Authority maintains its view in the draft decision that a risk-free rate of 5.84% is appropriate.

9.3 Market Risk Premium

In its draft decision, the Authority decided to retain its past estimate of 6% for the market risk premium, based largely on a technical review of this issue by its advisor, Dr Martin Lally. Dr Lally examined estimates of the market risk premium produced by a range of different methodologies. Given that all approaches suffer from one or more weaknesses, and that the level of statistical uncertainty in estimating the market risk premium is considerable, Dr Lally concluded that the Authority's current estimate of 6% was reasonable. In the draft decision, the Authority accepted this view and proposed a 6% market risk premium for DBCT.

Stakeholder Comments on Draft Decision

Since the Authority's draft decision, stakeholders have raised two principal issues with regard to the estimate of the market risk premium.

First, both DBCT Management and Ergon Energy submitted a technical paper by SFG Consulting (SFG) that argued that the Authority's current values of the market risk premium and gamma are inconsistent with each other. Specifically, SFG submitted that, for an average risk firm in the market with a gamma of 0.50, the expected return from dividends and capital gains is only 3.9% above the draft decision risk-free rate, which is inconsistent with empirical evidence. As a consequence, SFG recommended either setting gamma to zero or increasing the market risk premium to somewhere in the range of 7.1% to 10% (DBCT Management, sub. no. 64: 73-74; Ergon Energy, sub. no. 57: 3-4).

Second, QR reiterated its view that a market risk premium of 7% is reasonable, based on long term (historical) averages. In particular, QR cited several studies that the market risk premium is at least 7% and reported that its own analysis suggests the market risk premium from 1903 to 2003 is 7.88%. QR requested the Authority to not only consider regulatory precedent, but to also consider more recent empirical evidence when setting the estimate of the market risk premium (QR, sub. no. 60: 5).

Consultant's Response

In light of these concerns, the Authority engaged Dr Lally to undertake further analysis of the market risk premium.

First, the Authority asked Dr Lally to examine the supposed inconsistency between the Authority's value of the market risk premium and gamma. Dr Lally concluded that, while there is likely to be an inconsistency in the Authority's values, SFG's analysis contains a fundamental error. Dr Lally found that correcting this error leads him to make the opposite conclusion to the one proposed by SFG; that is, Dr Lally concluded that the estimate of the market risk premium should fall. In any event, Dr Lally concluded that any change is likely to be less than one basis point and is, therefore, immaterial (see Lally (2005) for details).

Second, examining estimates for the Australian market risk premium in the context of the Officer model from historical and other, available methodologies, Dr Lally concluded that the evidence points to an estimate of 6% at most. Dr Lally's findings in this context do not support QR's claim.

In addition, the Authority is aware of claims by some other regulators that the market risk premium may have declined in recent years.¹¹ Other observers, however, including Professor Stephen Gray (see Gray (2001)), support the view that there is no empirical evidence of a decline in the market risk premium.

In light of the divergent views on this issue, the Authority asked Dr Lally to consider recent empirical evidence of change in the market risk premium and the implications for the Authority's current estimate. Dr Lally concluded that, given the high standard errors of estimates of the market risk premium, statistical tests, in general, will not be able to conclude that the market risk premium has changed. Therefore, applying a test to support a claim that there has, or has not, been a decline in the market risk premium is completely uninformative. As a consequence, while anecdotal evidence may support a change in the market risk premium, statistical testing is indeterminate.

¹¹ For example, see ACCC (2001), *Access Arrangement Proposed by Epic Energy South Australia Pty Ltd for the Moomba to Adelaide Pipeline System: Final Decision*.

Authority's Analysis

It is widely accepted that estimates of the market risk premium are subject to large standard errors and are, therefore, inherently uncertain. Given this fact, the Authority accepts that, while individual studies (eg such as that presented by QR) may generate estimates of 7%, the weight of empirical evidence indicates that estimates of 6% are likely to be more reasonable. In maintaining its estimate of 6%, the Authority believes that, based on examining a range of estimation approaches, it is likely to be a generous estimate. While it cannot be statistically proven, there is anecdotal evidence to suggest that the market risk premium has declined in recent years. For example, the proliferation of risk management products (ie derivatives) has allowed risk to be isolated, traded, syndicated and more actively managed, and advances in technology mean that information disclosure is now more immediate and comprehensive, thus reducing uncertainty.

In summary, the Authority finds no justification for changing the market risk premium and maintains its current estimate of 6% from the draft decision.

9.4 Capital Structure

In its draft decision, the Authority determined that an appropriate capital structure for DBCT Management is 60% debt and 40% equity, with an associated credit rating of BBB+.

Stakeholder Comments on Draft Decision

Without providing details, DBCT Management submitted that there is reasonable evidence to support a lower level of gearing than determined in the draft decision (DBCT Management, sub. no. 64: 75).

In contrast, the DBCT User Group expressed concern that ACG's credit rating assessment has not paid sufficient attention to the likelihood that DBCT, as a stand-alone entity under a revenue cap, would attract a more favourable credit rating as a consequence of the earnings certainty associated with the cash flows under the revenue cap. The DBCT User Group further submitted that potential expansions of the terminal are unlikely to affect this assessment, given the revenue cap model (DBCT User Group, sub. no. 53: 21).

Consultant's Response

In light of these comments, ACG reassessed DBCT Management's (benchmarked) credit rating for regulatory purposes. ACG concluded that a BBB+ credit rating remains appropriate, taking into account the stability of cash flows provided by the proposed revenue cap arrangements. In this context, ACG noted that the ACCC has awarded regulated electricity transmission networks A credit ratings in its previous decisions but ACG believed DBCT has greater operational risk due to its exposure to technical failures. Compared with the transmission networks, DBCT's exposure is greater in both potential magnitude and concentration, as DBCT is a single site and any substantial outages can inhibit operations over a prolonged period. Accordingly, ACG confirmed its original view favouring a BBB+ rating at 60% gearing, and concluded that this assessment is robust to the effect of the proposed revenue cap.

Authority's Analysis

The Authority accepts ACG's analysis and will benchmark the cost of debt on the basis of a BBB+ credit rating and apply a capital structure of 60% debt / 40% equity.

9.5 Cost of Debt

In its draft decision, the Authority determined that an appropriate cost of debt for DBCT Management is 7.14%, based on a risk-free rate of 5.84% and a debt margin of 130 basis points, including debt issuance costs.

Stakeholder Comments on Draft Decision

As part of its submission on the draft decision, DBCT Management provided, on a confidential basis, information on actual debt costs in support of its original claim of 150 basis points for the debt margin.

Consultant's Response

ACG examined DBCT Management's submission on actual debt costs but was not convinced that the material demonstrated that its earlier benchmark estimates of debt costs were in error.

Authority's Analysis

The Authority maintains its view that it is reasonable to set debt costs based on efficient benchmarks.

Consequently, the Authority finds no reason to vary the cost of debt allowance in the draft decision. Furthermore, the range of evidence surveyed in arriving at the draft allowance of 1.30% suggests that this debt margin is reasonable and, if anything, errs on the high side.

9.6 Gamma

Gamma is the product of the utilisation rate of dividend imputation credits and the ratio of imputation credits to company tax paid. In the context of its current model, the Authority adjusts the firm's cash flows for the effect of dividend imputation. In its draft decision, the Authority retained its traditional value of 0.50 for gamma.

Stakeholder Comments on Draft Decision

QR submitted that a reasonable estimate of gamma is 0.04 on the basis that the recent introduction of regulations limiting the trading of imputation credits has lowered the estimate relative to the Authority's current estimate. QR engaged a consultant to estimate gamma using the same methodology from which the Authority's current value originated. In applying this approach, the consultant compared the results from the period 1990 to 2000 with those from 2000 to 2004, with the break in time periods corresponding to the introduction of the regulations. The consultant reported that the estimate for gamma is 0.04 for the second period (QR, sub. no. 60: 6-7).

Consultant's Response

In view of QR's submission on gamma, the Authority engaged Dr Lally to undertake a technical review of QR's study. Dr Lally concluded that QR's study suffers from a number of technical problems.

First, Dr Lally noted that, in estimating gamma for the period 2000 to 2004, QR's study excluded outlying data observations. While doing so is not unusual in this type of study, Dr Lally noted the rule used in the study has a large bearing on the resulting gamma estimate. It is, therefore, unclear whether QR's proposed gamma estimate of 0.04 demonstrated that there had

been a structural shift in the value of gamma or whether it simply reflected the rule applied to remove outliers from the sample.

Second, and perhaps more importantly, Dr Lally observed that the confidence intervals for the estimates corresponding to the two time periods are very wide and that the difference in estimates between the periods is not statistically significant.

Third, Dr Lally noted that QR's study actually estimated the utilisation rate and not gamma and that, in any event, the estimate contains a modest error.

For these reasons, Dr Lally recommended that the Authority view these results with 'considerable scepticism.'

Authority's Analysis

Given Dr Lally's findings, the Authority does not consider that any change to its current estimate of 0.50 for gamma is justified. Further, although the Authority has no objection to applying empirical approaches to estimating gamma, when considering this matter as part of its technical review of WACC, the Authority concluded that, in order to accept a gamma estimate that includes foreign investors, it should be done within the context of an international CAPM for consistency. However, a move to an international CAPM would be to the detriment of facility owners. Accordingly, the Authority has maintained its past regulatory practice of using a gamma estimate of 0.50.

9.7 Asset/Equity Beta

In its draft access undertaking, DBCT Management proposed an equity beta of 0.99, based on an asset beta of 0.60, gearing of 50% and a debt beta of 0.21. In proposing an asset beta for the terminal, DBCT Management benchmarked itself against a number of companies engaged in port-related activities in Australia and New Zealand, drawn from a decision by Victoria's Office of the Regulator General. DBCT Management adopted an asset beta of 0.60, which was the midpoint of the ORG range of 0.50 to 0.70, and corresponded to the value selected by the ORG for the Melbourne Ports Corporation. DBCT Management noted that the resulting equity beta is comparable to the equity betas for other regulated businesses in the electricity, gas and rail sectors (DAU, Accompanying Submission: 25-26).

In contrast, the DBCT User Group proposed an equity beta of 0.42, based on an asset beta of 0.30, gearing of 60% and a debt beta of 0.22. The DBCT User Group argued that the systematic risk associated with the terminal is extremely low, and significantly less than other regulated infrastructure businesses in Australia and New Zealand, which it largely attributes to: immaterial demand risk; low credit risk; low exposure to movements in the domestic economy; and no exposure to operating cost risk. The DBCT User Group argued that a reasonable range for an asset beta, therefore, is 0.20 to 0.30, and that its proposed value of 0.30 is the highest reasonable value.

In its draft decision, the Authority determined that the equity beta for DBCT should be 0.66 (asset beta of 0.35). At that time, the Authority's view was that this estimate was reasonable given the underlying systematic risk of the existing terminal assets and the regulatory environment in which they operate. Although this beta estimate was on the low side relative to other regulatory decisions in Australia, the Authority believed that it reasonably reflected the nature of the existing terminal assets, namely that:

- DBCT is the only regulated, 100% coal export port in Australia;

- the demand for its services is derived from the demand for coal by predominantly Asian countries whose economic cycles are being driven by factors that have little or no correlation with the Australian economy and market;
- it has very low operating leverage relative to other regulated utilities (5% in comparison to 35% to 60% for electricity distribution); and
- it will operate under a revenue cap, with volumes subject to overlapping take-or-pay contracts.

Stakeholder Comments on Draft Decision

The Authority received a number of submissions on the value for the equity/asset beta, including detailed submissions from DBCT Management (including two from its independent consultants, Capital Research and NERA) and the DBCT User Group.

While the DBCT User Group agreed that DBCT's systematic risk was low, it nevertheless believed that the Authority's draft beta overstated that risk.

In contrast, most other stakeholders criticised the Authority's draft beta estimate on the basis that it is too low and, therefore, did not adequately reflect the terminal's exposure to systematic risk. While the nature of these criticisms varied, three primary themes emerged:

- Capital Research argued that, in the absence of any clear evidence to the contrary, the Authority should adopt the 'null hypothesis' of an equity beta of one;
- Capital Research and NERA argued that ACG's analysis for the Authority, in particular its first principles analysis of the underlying risk profile of the terminal, contained a number of significant technical problems, resulting in flawed conclusions. In particular, they focussed on two elements of ACG's analysis, namely the correlation of DBCT's demand with the market and its operating leverage. It was argued that ACG's analysis was either incorrect or over-emphasised these factors (which are suggestive of a low beta) to the exclusion of other factors (which would be suggestive of a higher beta); and
- a number of stakeholders, including DBCT Management and the Queensland Government, submitted that ACG's choice of comparator firms was also flawed, as two of the businesses were not even ports and that the third comparator, although a port, was a foreign company.

Given these perceived problems with ACG's analysis, some stakeholders proposed alternative estimates for DBCT's equity beta. DBCT Management argued that an equity beta of one is appropriate, as it is consistent with the average equity beta of its real world peers and, further, that it is not in the public interest, or the interest of the Queensland coal industry, to give DBCT a cost of capital less than its real world peers (DBCT Management, sub. no. 64: 65-66). Its consultants, Capital Research and NERA, also argued for an equity beta of one, on the basis that this value is consistent with regulatory precedent and within the equity beta range for ports (NERA) and that this value is appropriate for a 'null hypothesis', given there is no 'hard' evidence to suggest otherwise (Capital Research) (DBCT Management, sub. no 66: 6; DBCT Management, sub. no 67: 5).

The Queensland Government proposed an asset beta range of 0.50 to 0.80, based on estimated betas of related firms in the coal, mining services and ports industries. At 60% gearing, this range becomes 1.0 to 1.68 for an equity beta (Queensland Government, sub. no. 63: 5-6).

Consultant's Response

ACG rejected Capital Research's arguments for the 'null hypothesis' of an equity beta of one. First, ACG noted that Capital Research's arguments are inconsistent with regulatory precedent. ACG noted that regulators have consistently sought to discriminate between the systematic risks of different industries, so that an equity beta of one is not applied universally. Second, beta estimates are subject to high standard errors. As a result, almost any value could be proposed for the equity beta (eg 0.80 or 1.20), and it would be statistically impossible to reject the null hypothesis that the equity beta was something other than the chosen number. ACG, therefore, concluded that Capital Research's 'null hypothesis' proposal was arbitrary in nature and rejected it as a basis for establishing the beta for DBCT.

ACG also reviewed Capital Research's and NERA's technical criticisms of its study, and concluded that the criticisms levelled are largely without merit. While many of the criticisms are detailed and technical (see Appendix A for a summary of the criticisms and ACG's responses), ACG made several relevant conclusions.

First, while ACG examined all other explanatory factors in the context of DBCT, it concluded that any potential effects on systematic risk were either immaterial or significantly outweighed by the uncorrelated demand or operating leverage effects.

Second, ACG demonstrated that steel production in DBCT's major importing countries has a negative correlation with Australian GDP, which is indicative of a low beta for DBCT.

Third, ACG undertook further work that established that DBCT's low operating leverage is an important explanatory factor of its relatively low systematic risk and beta. While ACG rejected NERA's technical criticisms of its analysis, ACG did nevertheless conclude that its original analysis overstated the impact of operating leverage on the asset beta. As a result, ACG concluded that its original analysis underestimated DBCT's beta.

In response to the criticisms of its original comparator analysis, ACG restated its broad conclusions, namely:

- (i) there are no direct comparators for DBCT (ie listed coal export terminals) either in Australia or overseas; and
- (ii) there are good reasons to conclude that DBCT has a lower equity beta than the average equity beta of: New Zealand ports (1.47) and United Kingdom ports (1.24); Australian and New Zealand transport companies (1.15); regulated Australian electricity networks (1.0); and Australian property trusts (0.83). This is suggestive that DBCT's equity beta is below 0.83.

ACG had originally concluded that three particular businesses (ie Port of Tauranga, Macquarie Office Trust and Macquarie Infrastructure Group) shared key fundamental drivers of systematic risk with DBCT and, therefore, served as sound comparators for DBCT's beta. After making an upward adjustment to allow for the impact of the dot com bubble, ACG concluded that these three comparators indicate that DBCT's equity beta lies in the range of 0.56 to 0.78.

Of the three selected comparators, ACG considered Port of Tauranga to be the closest available comparator to DBCT as, during the early to mid-1990s, it functioned almost exclusively as a raw materials export port, with an operating leverage among the lowest of the New Zealand ports. ACG, therefore, viewed its pre-bubble average equity beta of 0.65 as an important

benchmark. Given that this estimate reflects Port of Tauranga's initial expansion into containers, and therefore greater exposure to systematic risk, ACG concluded that DBCT may be expected to have a lower equity beta than this benchmark; that is, around 0.55 to 0.60.

In concluding its analysis, ACG believed that a reasonable range for DBCT's equity beta was 0.56 to 0.78, where the middle of this range was the Port of Tauranga equity beta (0.65).

In re-evaluating its original analysis in the light of stakeholder comments, ACG accepted that it:

- (i) placed too much weight on the Port of Tauranga, given statistical uncertainties; and
- (ii) should have excluded Macquarie Office Trust from the comparator sample.

In light of these considerations, ACG believed that a revised equity beta of 0.80 (asset beta of 0.40) is a reasonable estimate in the case of DBCT.

ACG believed this estimate would be sufficient to attract continued investment in DBCT's existing capacity, or in small incremental expansions, given long term contracts over that capacity.

However, ACG noted that the future outlook for DBCT has now changed with major expansions currently being contemplated by DBCT Management and users. In this context, ACG advised the Authority that the demand underpinning any significant increment to DBCT's existing capacity may not be as secure as the demand for current capacity. For example, ACG argued that new capacity for DBCT would have limited long run contract protection, as its asset life would significantly exceed the length of long term contract protection.

As a result, ACG indicated to the Authority that it considered a higher equity beta should apply in this context. However, ACG did not offer a point estimate.

Authority's Analysis

In general, stakeholder submissions criticised the Authority's asset beta, and in particular, the ACG analysis upon which the Authority relied in determining its beta estimate. In response to these criticisms, the Authority is satisfied that ACG has adequately addressed stakeholders' major criticisms and, further, the Authority accepts ACG's responses to these criticisms.

As a result, the Authority believes that ACG's upward revision to its equity beta estimate from 0.66 to 0.80 reasonably reflects ACG's revised assessment of its first principles and comparators analysis for DBCT.

Accordingly, the Authority accepts ACG's revised advice that 0.80 is a reasonable beta estimate for the existing terminal capacity.

While the Authority is confident that the equity beta of 0.80 reasonably reflects the underlying systematic risk associated with the existing terminal capacity, the Authority, at the same time, concurs with ACG that any major expansion of terminal capacity over the short term is likely to require a higher rate of return. Even though the economics of expansion appear fundamentally sound given the currently buoyant coal market, the Authority notes that coal prices have been volatile in the past, and therefore, the volume risk for significant new capacity is real. As a consequence, the Authority's view is that investors in a major expansion of the terminal would likely require relatively higher compensation for it.

In this context, the Authority notes that DBCT Management argued that an equity beta of one would place it on a par with its real world peers. Moreover, the Queensland Government

suggested that a reasonable range for the equity beta would be 1.0 to 1.68 (asset beta range of 0.50 to 0.80). As the Authority has concerns over the choice of some firms included in the industry portfolios used in the Government's submission, it does not consider that a beta estimate at the top of this range is justifiable.

9.8 Conclusion

In finalising its consideration of the WACC for DBCT, the Authority took into account the technical analysis of a reasonable WACC for the existing terminal and arguments that, in making its decision, the Authority should err on the high side when considering future investment.

Based on ACG's revised recommendation for an equity beta of 0.80, and given the other cost of capital inputs, the resulting nominal, post-tax WACC estimate for DBCT is 8.54%. This is equivalent to a 10.64% return on equity. The Authority believes this is a reasonable rate of return for DBCT at its current capacity.

The Authority's determined return on equity of 10.64% is 480 basis points above the risk-free rate. At the time the Queensland Government leased the terminal, the Authority had released its draft decision of QR's draft access undertaking. That decision, which included a return on equity that was 456 basis points above the risk free rate, would have provided the purchaser of the terminal lease with a clear indication of the Authority's likely approach to setting a regulated return for DBCT. The Authority's decision in this matter is, therefore, in excess of what may have been reasonably anticipated at the time the terminal was leased.

The Authority also considered whether, in the public interest, it should increase the recommended beta estimate for DBCT. In this regard, the Authority is aware of recent comments by the Productivity Commission and others that regulatory bodies should err on the high side, on the basis that the impact on the economy of under-investment exceeds the impact on the economy of higher than warranted prices being paid by customers:

- the Productivity Commission stated that there is a potential asymmetry in the effects arising from over-compensating versus under-compensating service providers, with the latter being the worse outcome;
- the Queensland Government submitted that the allowed cost of capital should not only provide investors with an adequate return but provide a return sufficient to attract investors to invest in regulated infrastructure in Queensland; and
- Professor Stephen Gray proposed a simulation approach to account for estimation uncertainty (see Appendix A for further details).

In principle, the Authority sees merit in the proposition that it is preferable to err on the high side of compensation. The Authority, however, rejects Professor Gray's proposed approach, as it involves additional complexity and subjectivity, relative to the current approach, for an uncertain benefit. Further, the Authority believes that its domestic CAPM framework provides DBCT Management with the benefit of the doubt across a range of cost of capital parameters, for example:

- *market risk premium* – indirect evidence suggests that the true premium is more likely to be in the order to 5% to 5.5%; and
- *cost of debt* – available evidence indicates that world debt markets, especially in the US, enable infrastructure firms in Australia to source debt funding at very competitive rates.

The Authority notes that, where regulated firms have changed hands, it is usually at a multiple to the regulated asset base. Further, the Authority is aware that the primary explanation for these multiples is the spread between the allowed rate of return and the actual WACC. Such transactions are not consistent with regulated firms receiving an inappropriate return when all aspects of the regulatory arrangements are taken to account.

In the particular case of DBCT, the Authority accepts ACG's advice that the proposed expansion beyond 60 mtpa involves an increase in overall risk, notwithstanding the measures put in place by the Authority to mitigate the risk. The Authority also accepts that there is a need to ensure that there is no regulatory impediment to expansion of the port.

Therefore, taking all factors to account, the Authority has determined to accept the equity beta of 1.0 proposed by DBCT Management in its response to the Authority's draft decision.

In reaching this decision, the Authority contemplated adopting a 'two-tier' approach to DBCT's rate of return under which the 8.54% WACC would apply until DBCT is substantively expanded, at which point the WACC would increase to 9.02% (equity beta of 1.0) for the entire terminal. While the Authority believes that this approach may demarcate the different risk profiles of the existing and expansion assets, such an approach introduces uncertainties and unnecessary complexity.

As a consequence, the Authority has sought to make a clear and definitive determination on this matter now. For the purpose of assessing financing costs for the opening asset value and the expansion costs to 60 mtpa, the Authority has used a WACC of 8.54%. For the purpose of assessing reference tariffs into the future, the Authority has used a WACC of 9.02%. In doing so, the Authority believes that this WACC provides DBCT Management with an adequate incentive to expand the terminal, particularly as it gives DBCT Management the return it sought for taking on the greater risks associated with any major expansion of DBCT. However, in the event that the terminal is not substantively expanded, the Authority will reassess the equity beta at the next regulatory review.

In summary, the Authority's analysis gives DBCT Management a nominal, post-tax cost of capital of **9.02%**, which applying a capital structure of 60% debt and 40% equity, gives a:

- return on debt of **7.14%**, based on a risk-free rate of 5.84% and a debt margin of 1.30%; and
- return on equity of **11.84%**, based on a risk-free rate of 5.84%, market risk premium of 6% and an equity beta 1.0 (asset beta of 0.50).

This return on equity gives DBCT Management a return that is 600 basis points above the risk-free rate.

Table 9.1 summarises the Authority's draft and final positions on the cost of capital for DBCT.

Table 9.1: DBCT Final Decision - Cost of Capital Parameter Values

<i>Parameter</i>	<i>DBCT Management Proposal</i>	<i>DBCT User Group Proposal</i>	<i>Authority Draft Position</i>	<i>Authority Final Position</i>
Risk-free rate	5.84% ¹	5.84% ²	5.84%	5.84% ³
Market risk premium	7.00%	6.00%	6.00%	6.00%
Debt margin	1.50%	1.30%	1.30%	1.30%
Debt beta	0.21	0.22	0.11	0.11
Gearing (debt/value)	50%	60%	60%	60%
Asset beta	0.60	0.30	0.35	0.50
Equity beta	0.99	0.42	0.66	1.0
Gamma	0.50	0.50	0.50	0.50
Asymmetric Risk Premium	10%	---	---	---
Return on Equity	14.74%	8.39%	9.79%	11.84%
Equity Margin (basis pts)	890	255	395	600
Officer WACC3	11.04%	7.64%	8.20%	9.02%

¹ DBCT Management's proposed risk-free rate of 5.35% is updated to 5.84% for comparative purposes.

² The DBCT User Group's proposed risk-free rate of 5.49% is updated to 5.84% for comparative purposes.

³ For comparative purposes only. The actual rate for expansions will be determined at the date of effective completion of the expansion.

10. TOTAL REVENUE

Summary

This chapter sets out the elements of the Authority's building block model used to assess the annual revenue requirement for DBCT.

The opening asset value, as assessed in Chapter 8, is rolled forward over the term of the undertaking and is used to assess the return of capital (depreciation). Return on capital is assessed with reference to the asset value and the WACC. In this final decision, the Authority has included the forecast capital expenditure associated with expanding the terminal to 60 million tonnes per annum. These capital related items represent around 90 per cent of DBCT's annual revenue requirement, as operating and maintenance costs are treated as a pass-through item.

The remainder of the annual revenue requirement is comprised of corporate overhead costs and tax. As Prime Infrastructure engages in a number of activities other than managing the terminal, the Authority has assessed corporate overheads on the basis of benchmarked costs of comparable ports. In general, the Authority assesses tax on the basis of actual tax liabilities. However, in the course of the DBCT lease process, the Authority indicated it would consider sharing the tax benefits arising from the leasing arrangements between the terminal lessee and the terminal users. Contrary to its normal approach, the Authority has decided to smooth the tax benefits over the initial lease term, because the benefits are particularly skewed and to do otherwise would result in a significant imbalance between existing and future users in the sharing of the benefits.

10.1 The Building Blocks Approach

For an access provider to have the incentive to maintain existing assets and to invest in new assets, the access provider requires sufficient revenue to cover its costs and provide an adequate return on capital. The Authority employs the 'building blocks approach' for calculating an annual revenue requirement (ARR) for the regulated business, based on the following elements:

- return on capital – a fair and reasonable rate of return on assets taking into account the risks involved;
- return of capital – an allowance for depreciation of the assets over time; and
- operating and maintenance costs – an allowance for efficient administrative and operating costs required for providing the regulated service.

The Authority uses a nominal post-tax framework to assess a regulated firm's annual revenue requirement for pricing purposes. The primary inputs are: the regulatory asset base, the weighted average cost of capital (WACC), operating and maintenance expenditure forecasts (Opex) and capital expenditure forecasts (Capex). These inputs flow into the calculation of the ARR:

$$\begin{aligned} \text{ARR} &= \text{Return on capital} - \text{InfG} + \text{Return of capital} + \text{Opex} + \text{Tax} \\ &= (\text{WACC} * \text{WDV}) - \text{InfG} + \text{Dep} + \text{Opex} + \text{Tax} \end{aligned}$$

where:

WACC	=	post-tax nominal weighted average cost of capital ¹²
WDV	=	written-down (depreciated) value of the asset base
InfG	=	inflationary gain on assets
Dep	=	depreciation
Opex	=	operating and maintenance expenditure
Tax	=	expected tax liability

The remainder of this chapter assesses DBCT Management's proposal for each of the building block elements. The chapter concludes by discussing the raw and smoothed revenue streams obtained from applying the Authority's building blocks approach and comparing these with the Authority's draft decision and those based on DBCT Management's proposal.

10.2 Summary of DBCT Management's Proposal

In its initial submission, DBCT Management proposed an annual revenue requirement for each of the seven years commencing 1 July 2004 of its proposed draft access undertaking. This revenue requirement sought to cover DBCT Management's costs including capital, corporate overheads and taxation but did not include any allowance for terminal operating and maintenance costs, as these costs are effectively a 'pass-through' to current access holders (this issue is discussed in more detail later).

DBCT Management's proposed inputs for calculating its annual revenue requirement were:

- an initial regulatory asset base of \$1,084.3m, as at 1 July 2004;
- an asset base roll-forward that adjusts the asset base for depreciation and inflation (not capital expenditure) resulting in a closing asset value for 2008-09 of \$1,041.5m;
- a return on capital (including working capital) based on a nominal post-tax WACC of 10.52%¹³;
- a return of capital, based on straight-line depreciation of the asset base and a weighted average remaining life of the terminal of 33 years (as at 1 July 2004);
- an allowance for corporate overhead costs, initially estimated at about \$4.0m and subsequently revised to \$6.5m, based on actual corporate costs incurred in the year ending 30 June 2004 and the budgeted costs for the financial year ending 30 June 2005; and¹⁴

¹² The Authority uses the 'vanilla' version of the nominal WACC, consistent with the Officer WACC3 model.

¹³ Using the risk-free rate as at 1 July 2004, this increases to 11.04%.

¹⁴ This figure excludes DBCT Management's allowance for the QCA levy and DBCT site remediation.

- an allowance for tax, calculated on a generic, corporate basis (using a ‘gamma’ of 0.50), which was adjusted for the sharing of tax benefits arising from the lease, rather than the sale, of the terminal assets.

In response to the Authority’s draft decision, DBCT Management did not seek to revise its proposed revenue requirement. It did, however, offer a critique of the various elements of the Authority’s draft revenue requirement. DBCT Management’s comments on the asset base and WACC are dealt with separately in Chapters 8 and 9 above. In addition, DBCT Management made specific cases for changes to corporate overheads and its tax allowance and a summary of its arguments and proposals are addressed in section 10.3 below.

10.3 Assessment of Building Blocks

Asset Base Roll Forward

To enable the return on capital to be determined for each year of the regulatory period, the asset base needs to be rolled forward to account for capital expenditure, inflationary gain and depreciation. The basic methodology underpinning the asset base roll-forward is that the closing value of each year is calculated by taking the opening value as the starting point, adding any relevant capital expenditure, adding the impact of inflation on the asset base and then subtracting depreciation. As all asset values and costs are increased annually by inflation, depreciation must also be increased annually by inflation to maintain relativity.

Inflationary gain and depreciation are calculated on the opening asset value and on half the value of capital expenditure. Unless the specific timing of a project’s completion is known, half the value for capital expenditure is used to reflect an average rate of expenditure across a year. This method provides the best estimate of inflationary gain and depreciation applicable to capital expenditure under these circumstances.

In response to the draft decision, DBCT Management did not propose any changes to its previously advised approach to rolling forward the asset base over the term of the undertaking.

Authority’s Position

As discussed in Chapter 8, the Authority’s opening asset value in the draft decision was \$823.7m. With consideration of the issues discussed in Chapter 8, the Authority’s final position on the opening asset value is \$850.0m. In addition, for the purpose of setting the annual revenue allowance, the Authority has taken into consideration the expansion to 60 mtpa currently underway. The provision for capital expenditure includes forecast construction costs (including on-costs), up-front finance costs and interest during construction in the same manner as was done with the base asset. The asset base roll forward for 2004-05 is based on inflationary gain of \$21.2m and depreciation of \$23.2m, giving a closing value of \$848.0m. The asset base roll forward over the remaining years of the undertaking results in a closing asset value as at 31 December 2009 of \$861.5m, as shown in Table 10.1.

Table 10.1: Authority’s Asset Base Roll Forward

	2004-05 (\$'000)	2005-06 (\$'000)	2006-07 (\$'000)	2007-08 (\$'000)	2008-09 (\$'000)	to 31 Dec 09 (\$'000)
Opening Asset Value	849,961	847,982	870,516	872,947	868,929	864,164
plus Capital Expenditure	-	25,151	5,736	-	-	-
plus Inflationary Gain	21,249	21,514	21,882	21,824	21,723	10,735
less Depreciation	23,228	24,131	25,187	25,842	26,488	13,409
Closing Asset Value	847,982	870,516	872,947	868,929	864,164	861,491

Return on Capital

The return on capital compensates investors for the opportunity cost of their investment. In the context of the building blocks approach, this component provides the regulated firm with a return on its investment in the existing infrastructure and any relevant capital expenditure.

The method used by the Authority to determine a regulated entity’s return on capital in a particular year involves applying the WACC to the entity’s opening asset value and to half of the capital expenditure which occurred during that year where the timing of that expenditure is unknown.

Capital gain as a result of inflation is reflected in the closing value of the asset each year under the asset roll forward method. As the nominal WACC applied on the opening value of assets includes the market estimate of inflationary gain, and the asset base is adjusted at the end of the year to reflect inflation, it is necessary to reduce the return on capital included in the ARR by the value of inflationary gain applied to assets to avoid double-counting. That is, the total return on capital to be earned by the business over a full year is equivalent to WACC (a cash return included in ARR plus inflationary gain on assets).

In its response to the draft decision, DBCT Management did not propose any changes to its previously advised approach in relation to return on capital, but noted that it should include an allowance for working capital, as it is a legitimate business expense (DBCT Management, sub. no. 64: 85).

Authority’s Position

In its draft decision, and based on a WACC of 8.20%, the Authority proposed a return on capital for 2004-05 (and the following years) of: \$68.0m, \$68.0m, \$67.9m, \$67.7m and \$67.5m, which already included an allowance for working capital.

With consideration of the Authority’s revised asset value and WACC of 9.02%, the Authority’s final return on capital (including working capital) for each year of the regulatory period commencing with 2004-05 is: \$77.3m, \$78.2m, \$79.6m, \$79.4m, \$79.0m and \$38.5m for the half year to 31 December 2009.

Return of Capital

Assets must be depreciated to recognise the consumption of service potential. As the value of a firm’s assets decrease over time, the firm should be compensated for the loss in value. Depreciation represents the return of capital invested by shareholders in the firm’s assets. Within the building blocks approach, an allowance for depreciation is included in the ARR.

Apart from reiterating its view that the terminal should be depreciated over its remaining economic life (see section 8.8 for details), DBCT Management did not propose any changes to its previously advised approach to depreciation.

Authority's Position

Based on the revisions to the asset base discussion in Chapter 8, the Authority has provided for a nominal depreciation value of \$23.2m in 2004-05, which is then inflated by 2.5% on an annual basis for the remainder of the regulatory cycle (see Table 10.1 for details).

Corporate Overhead Costs

The costs of operating and maintaining the terminal are treated as a 'pass-through' to users and, therefore, do not need to be incorporated into DBCT Management's allowable revenues. The operating expenditures facing DBCT Management comprise three elements: corporate overhead costs; the QCA levy; and the DBCT site remediation charge.

DBCT Management initially claimed an allowance of approximately \$4m per year for corporate overhead costs, covering DBCT Management's administration, ownership, governance, and finance expenses (DAU, Accompanying Submission: 40). This amount was subsequently revised twice, first to \$9.7m and then to \$6.5m per annum. These estimates excluded allowances for the QCA levy and the DBCT site remediation charge as well as a claim for a 'one-off' allowance of \$1.4m to cover its costs associated with the draft access undertaking and regulatory process to date.

The DBCT User Group argued that these corporate costs needed to be verified to ensure they did not include the costs associated with Prime Infrastructure seeking to add other assets to its investment portfolio. The DBCT User Group believed the more appropriate level of corporate overhead costs to be in the order of \$2m per annum (DBCT User Group, sub. no. 5: 183).

The Authority engaged Meyrick and Associates (Meyrick) to provide an independent view as to whether DBCT Management's claimed corporate overheads were reasonable, given its responsibilities for DBCT. Meyrick concluded that an appropriate allowance would be in the order of \$2.9m per annum on the basis that some of DBCT Management's claimed costs were not of a "type" that would be incurred, or were in excess of the level expected to be incurred, by a stand-alone coal terminal.

Based on this information, in its draft decision the Authority proposed a corporate overhead allowance of \$3.1m, costs comprised of the Meyrick recommended allowance of \$2.9m per annum, plus an additional \$200,000 per annum for on-going regulatory compliance costs. The Authority noted that the \$3.1m allowance did not include the separate allowances for the QCA levy and the DBCT site remediation charge, which the Authority accepted as reasonable.

Stakeholder Comments on Draft Decision

Following the release of the Authority's draft decision, DBCT Management submitted that Meyrick's corporate overhead allowance was inappropriately low and submitted a review by Ernst & Young in support of its claims.

DBCT Management and Ernst & Young argued that the Meyrick analysis was flawed, primarily on the basis that it utilised the wrong comparator for benchmarking corporate overhead costs. Specifically, they argued that the appropriate business model for comparison purposes was one in which the owner's function was high level and strategic, eg port master planning, capital management and customer relationships, while actual operations were outsourced to another company. DBCT Management noted that this model was consistent with the accepted

management model for stand-alone infrastructure assets in Australia (DBCT Management, sub. no. 64: 80-82; DBCT Management, sub. no. 70: 1-2).

On the basis of its own independent assessment of DBCT Management's overhead costs, and with reference to a strategic asset management model, Ernst & Young concluded that an annual allowance of at least \$5.0m was appropriate for DBCT (DBCT Management, sub. no. 70: 4).

Consultant's Report

Following the release of the draft decision, the Authority re-engaged Meyrick to revisit its corporate overheads estimate in light of any new information contained in DBCT Management's submission and in Ernst & Young's review on the draft decision.

On the basis of this review, Meyrick maintained its view that the appropriate comparator for the purpose of benchmarking competitive costs is a stand-alone coal terminal operator. Meyrick argued that DBCT Management's strategic asset management model is inappropriate in this context, as it does not reflect the efficient delivery of coal terminal services. Meyrick argued that the appropriate comparison is between DBCT Management's costs and the costs of an efficient and well-managed coal terminal. The specific form of the company, financing or dividend structure that the owners may wish to wrap around the facility is ultimately irrelevant to the decision regarding the charges users should pay.

Despite this view, Meyrick revised its estimate of corporate overhead costs upward to \$3.9m, based on new information provided in the Ernst & Young report. This adjustment included an additional allowance for salaries to reflect more current information and several other costs previously contested due to their value. Meyrick also provided an allowance for both the DBCT credit rating and distribution expenses, as the Ernst & Young report provided additional detail on the reasons why these charges are incurred. Meyrick accepted that similar charges could be incurred by a listed entity whose sole business was the operation of DBCT.

Authority's Analysis

The Authority accepts Meyrick's argument that the relevant comparator for DBCT is a stand-alone coal terminal operator. The Authority believes that DBCT's regulatory cost base should not automatically reflect Prime Infrastructure's existing cost structure as it is clearly designed to also accommodate asset acquisition and growth. Nevertheless, the Authority did not accept some of Meyrick's proposed adjustments, either in full or in part. In this regard, the Authority considered that it was reasonable to base the costs on those that would be incurred by a Brisbane based listed entity. This impacted on the allowances for a variety of costs, including salaries, board expenses, corporate communications, share registry costs, office rental and distribution costs.

In consideration of DBCT Management's response to the Authority's draft decision and Meyrick's additional analysis, the Authority has revised its draft recommendation from \$3.1m to \$4.6m. This allowance includes the \$200,000 per annum for ongoing regulatory compliance costs but excludes the allowances for the QCA levy and DBCT site remediation, which the Authority accepts as reasonable.

The Authority considers that an allowance of \$4.6m for corporate overhead costs, including on-going regulatory compliance costs, is reasonable. The Authority accepts the annual allowances for the QCA levy and the DBCT site remediation charge.

Operating and Maintenance Costs

The operation and maintenance of the terminal is currently undertaken by DBCT P/L under an Operations and Maintenance Contract (OMC) with DBCT Management. DBCT P/L is owned by a subset of the current users of the terminal, with each user's ownership interest (ie shareholding) capped in proportion to its contracted tonnage. All current users are entitled to be shareholders but some choose not to be. This arrangement is an extension of the arrangements in place since the terminal commenced operations.

The OMC sets out the roles, responsibilities and contractual obligations of the Operator (DBCT P/L) to DBCT Management with respect to operating the terminal. These responsibilities include, *inter alia*, operating and maintaining the terminal to achieve optimum efficiency and reliability. In meeting these obligations, the Operator incurs the operating costs and recovers them, along with a margin, from DBCT Management. In turn, DBCT Management recovers from users these costs, along with other amounts (eg 'minor capital'). As a consequence, the operating and maintenance costs of the terminal are effectively a 'pass-through' to users.

In its draft access undertaking, DBCT Management proposed a similar arrangement to the existing pass-through model for operating and maintenance costs, noting that the users' control of terminal operations helps to ensure incentives for optimal utilisation and efficiency. While the DBCT User Group favours retaining this basic framework as long as DBCT P/L remains the Operator, it raised several concerns, the principal one being that responsibilities for capital and operating costs are not clearly defined and allocated in the context of the existing arrangements and that further clarity is necessary to:

- prevent the 'cost-shifting' of capital expenditure to operating expenditure;
- ensure the correct economic trade-off with respect to asset maintenance versus replacement; and
- ensure inter-generational equity between existing and future users.

In its draft decision, the Authority accepted the pass-through arrangement subject to DBCT Management adequately addressing these concerns. The Authority considered that satisfactory resolution of these issues was particularly important, given DBCT Management proposed an operating cost pass-through subject to no regulatory benchmarking of the associated costs.

In its draft decision, therefore, the Authority sought to clarify the relevant capital and operating expenditure definitions and provide greater transparency in two ways:

- first, the Authority proposed amending the definitions of 'capital charge' and 'terminal operating costs' and that 'capital costs' be defined in accordance with the principles advanced by the Authority; and
- second, the Authority required DBCT Management to identify expenditures consistent with the aforementioned definitions, as part of its reporting requirements as set out in section 5.4 of this decision.

The Authority considered that the DBCT User Group's concerns regarding minor capital expenditures would be largely addressed by these proposed changes.

The Authority also determined that the current budgetary approvals process was a material concern, as it is relatively 'open-ended' at present. The Authority, therefore, required DBCT Management to include an approval process for the OMC budget, including a process for dispute resolution, in consultation with DBCT P/L. While the Authority accepted that the

effective implementation of this budgetary approval process was subject to acceptance by DBCT P/L, it nevertheless believed that an effective approval process was a necessary element to ensure the appropriate checks and balances are in place in order to implement the efficient operation of the cost pass-through model.

Finally, in the draft decision, the Authority indicated that:

- DBCT P/L ceasing to be the Operator would trigger reconsideration of various elements of the undertaking, including the cost pass-through model;
- it is satisfied with the quantum of the Operator's margin, as the margin is ultimately returned, if not to all users, to those users who voluntarily choose to be shareholders of DBCT P/L; and
- clause 9 of the Shareholders' Agreement does not pose any limitations on a future user's right to hold shares in DBCT P/L.

Stakeholder Comments on Draft Decision

In response to the draft decision, DBCT Management submitted that, as the existing OMC includes a definition of terminal operating and maintenance costs based on accounting standards and tax definitions, this definition should be considered reasonable and likely to be consistent with the Authority's proposed definition. DBCT Management noted again that the undertaking should not impose different conditions on DBCT Management than its existing, binding arrangements. Further, DBCT Management submitted that, in principle, it has no issue with the proposed definition for capital costs but argued that, for the sake of clarity, capital expenditure must extend the life of the actual item of plant or equipment beyond its original useful life and not simply extend the life of a component part of the item (DBCT Management, sub. no. 64: 80).

In regard to the DBCT User Group's concerns about minor capital expenditure, DBCT Management noted that it will only be allowed to include in its asset base expenditures it incurs in renewing or upgrading the terminal. As DBCT Management will only be permitted to capitalise costs that it has actually incurred into its asset base, DBCT Management is unclear how the DBCT User Group's concern about 'double-dipping' is justified (DBCT Management, sub. no. 64: 79).

The DBCT User Group submitted that the capital and operating expense issue is complex and that conventional accounting definitions have proved problematic and unsatisfactory in practice. While not offering any additional suggestions on this issue, the DBCT User Group requested that the Authority gives further consideration to this issue (DBCT User Group, sub. no. 52: 23).

With respect to the Authority's suggestion that 'lumpy' expenditures be apportioned over a period of several years, the DBCT User Group submitted that this approach is not consistent with the current OMC requirement that the Operator be reimbursed for all expenditure when it is incurred or with the provisions of the user agreements, which provide for an immediate pass-through of operating costs (DBCT User Group, sub. no. 52: 23).

The DBCT User Group supported, in principle, the Authority's suggested amendments to the OMC budgetary approval process (DBCT User Group, sub. no. 52: 23).

Authority's Analysis

Capital versus Operating Costs

The Authority agrees that the issues in this area are complex. Nevertheless, after considering this issue further, the Authority maintains its view that the definitions set out in its draft decision are appropriate, subject to a minor changes to the definition of 'terminal operating costs' to recognise that minor capital expenditures are recoverable through terminal operating costs and that there may be a legitimate need for an operating lease of certain equipment.

With regard to the distinction between 'capital costs' and 'terminal operating costs', the definitions proposed by the Authority are consistent with accounting and taxation requirements and are similar in nature to those definitions currently utilised in the coal industry in Queensland. Although there will always be some residual subjectivity required to assess whether an expenditure is of a capital or operating nature, the Authority considers that its definitions represent a material improvement on the current arrangements. The Authority believes the proposed definitions better delineate standard maintenance practices (including cyclical maintenance activities), which do not extend original, useful asset lives, from more significant (capital) improvements to assets that do extend original, useful asset lives. Further, the Authority agrees with DBCT Management that capital expenditure must extend the life of the actual item of plant or equipment beyond its original useful life and not simply extend the life of a component part of the item.

Further, the Authority notes that any residual uncertainty is unlikely to be eliminated by tightening the definitions because there will always be a level of subjectivity in terms of whether certain expenditure is providing future economic benefits and, accordingly, should be capitalised. The Authority's view is that the mechanism to best address these concerns is the budgeting process, including the annual and five yearly operations and maintenance plans and the capital plans.

The Authority accepts that its suggestion to smooth 'lumpy' expenditures over several years may not be provided for under existing contractual arrangements. Nevertheless, the Authority believes it is a reasonable suggestion given the DBCT User Group's concerns about inter-temporal equity and that any other remedy is also likely to face implementation difficulties, given the existing contractual arrangements.

In addition, the Authority reiterates its view that the current definition of 'capital charge' in clause 2.1 should be amended to recover any components of the access charges that are not an operation and maintenance charge. Consequently, it is the Authority's intention that the capital charge be the mechanism to recover DBCT Management's allowable revenues, including the approved allowance for corporate overhead costs.

The Authority would be prepared to accept the draft access undertaking provided the definitions of 'capital charge' and 'terminal operating costs' are amended, and 'capital costs' defined, in accordance with the above principles. As this requirement may involve an amendment to the OMC, this is subject to the agreement of DBCT P/L. While an amendment to the OMC is a matter for the Operator and DBCT Management, the Authority has proposed that the undertaking including an overarching obligation on DBCT Management to, in good faith, take all reasonable steps to renegotiate the terms of the OMC with the Operator to allow it to comply with its undertaking obligations. In the meantime, such undertaking obligations should be made subject to the OMC allowing DBCT Management to enforce compliance against the Operator.

The Authority requires DBCT Management to amend Schedule B as necessary to be consistent with the definitions developed and approved by the Authority. The Authority notes that DBCT

Management’s reporting for capital and operating expenditures, as set out in Chapter 5 (section 5.4) of this decision, should be fully consistent with the definitions developed.

Treatment of ‘Minor Capital’ Expenditures

The Authority maintains its view that the DBCT User Group’s concerns in this regard will be largely addressed by the proposed changes to the definitions of capital costs and terminal operating costs set out above. For clarity, minor capital included in terminal operating costs must not also be included in new assets as part of the regulatory asset base. Further, the reporting requirements in section 5.4 of this decision will make the expenditure under the minor capital element more transparent, thereby enabling the Authority to monitor this aspect of expenditure and ensure that there is no double-counting at the time the Authority approves a revenue cap revision.

Budget Approval Process

The Authority confirms its view in the draft decision that the budgetary approval process should be amended as described.

In order for the undertaking to be approved, it must be amended so that:

- **clause 2.1 includes an appropriate definition of ‘capital costs’, which clarifies that such costs are: (i) capital expenditures relating to replacement or expansion of the terminal plant and/or infrastructure; and (ii) expenditures relating to refurbishment or upgrades that are expected to extend the life of the plant and/or infrastructure beyond its original, useful life;**
- **clause 2.1 includes a modified definition of ‘capital charge’, where it is defined to mean the components of access charges that are not an operation and maintenance charge;**
- **clause 2.1 includes a modified definition of ‘terminal operating costs’, where it is defined to mean any amounts reasonably incurred in the operation and maintenance of the terminal under the Operation & Maintenance Contract, but excluding capital costs, other than budgeted minor capital expenditure, and any financial lease and/or rental payments, made by the Prime Infrastructure Group, associated with the terminal infrastructure, plant and/or land; and**
- **the undertaking includes a budgetary approvals process consistent with the principles set out in this chapter.**

Tax

The tax component of the building blocks model seeks to compensate the regulated firm for the tax payable in respect of its annual revenue requirement. The Authority addresses tax directly in the cash flows. There are no tax or dividend imputation credit adjustments made in the WACC itself. By treating tax like any other expense, it ensures that the allowance for tax in the annual revenue requirement is consistent with the amount of tax actually payable, both in terms of amount and timing.

On this occasion, however, the treatment of tax is also impacted by the Authority’s *Statement of Regulatory Principles: Dalrymple Bay Coal Terminal (Feb 2001)*, which was prepared by the Authority as part of the Dalrymple Bay Coal Terminal leasing process to inform prospective bidders of, *inter alia*, the methodologies the Authority may apply when assessing an access undertaking. Although not formally binding on the Authority, it recognised that there were

different ways in which the transaction could be structured, with different taxation consequences. It also recognised that the current arrangement of passing through all tax savings to users could adversely impact on the incentive to adopt the most efficient structure. While the Authority noted at the time there was no correct way to share any such benefits, it did propose to share the benefits on a 50/50 basis between the lessee and users.¹⁵

Draft Decision

In seeking to give effect to this benefit-sharing principle, the Authority considered that there were three principal aspects of the tax arrangements, namely:

- the actual tax position of the DBCT entities;
- the tax benefits arising from the leasing arrangements particular to the DBCT entities; and
- the trust structure.

Actual Tax Position and Tax Sharing

In seeking to share the tax benefit 50/50 between DBCT Management and users, the Authority accepted that, to do otherwise and to follow the Authority's normal practice, DBCT Management would receive none of the benefits of its lease arrangements. This would be inappropriate and inconsistent with the position outlined in the Authority's *Statement of Regulatory Principles: Dalrymple Bay Coal Terminal (Feb 2001)*.

In addition, the Authority agreed with DBCT Management that, because the benefits are particularly skewed, the Authority's normal approach would result in a significant imbalance between existing and future users in the sharing of the benefits. Therefore, on this occasion, the Authority smoothed the benefits over the life of the lease on an NPV neutral basis (using the DBCT WACC).

In making its assessment of tax, the Authority included those tax losses occurring after 1 July 2004 on the basis that the draft decision was for a reference tariff effective from that date. The Authority believed that there are a range of benefits and costs which occurred prior to that date, which the Authority did not seek to value or include. The Authority believed that, to have done so, would have involved a degree of retrospectivity which would have been inappropriate. On the same basis, the Authority did not seek to assess the tax losses that accrued prior to 1 July 2004.

As a result of applying the approach outlined, the Authority provided DBCT Management with an estimated average allowance of \$2.0m per annum for tax over the regulatory cycle.

The Authority was aware that, in the medium to longer term, DBCT Management's actual tax liabilities may be greater than that provided for in the regulated revenues. This is the likely consequence of the approach adopted and the Authority would not be amenable to any change in the calculation of the tax allowance on this account.

The Authority also recognised that the tax arrangements as they currently apply to DBCT Management may change over time. As would be the case under the Authority's normal approach to tax, the Authority would consider reassessing DBCT Management's tax allowance at that time, on a prospective basis.

¹⁵ QCA. *Statement of Regulatory Principles: Dalrymple Bay Coal Terminal (Feb 2001)*, pp. 16-17.

Trust Structure

Prime Infrastructure's tax profile differs from the tax profile of a typical corporate entity. Specifically, each investor in Prime Infrastructure owns a share in a company, Prime Infrastructure Management Limited (PIML) and a unit in a trust, Prime Infrastructure Trust (PIT).¹⁶ PIML and PIT are taxed on a different basis, with PIML taxed as a company and PIT taxed as a unit trust.¹⁷ The Authority noted that distributions to investors will principally be in the form of 'tax-deferred' income and capital distributions by PIT, with any income distributions by PIML expected to be fully franked.¹⁸ A tax-deferred distribution reduces the investor's capital cost base resulting in a commensurate increased capital gains tax obligation at the point at which the investor sells the security.¹⁹

DBCT Management submitted that, as the distributions are, for tax purposes, a return of invested capital to investors, no benefits from deferral accrue to DBCT Management. The Authority did not entirely agree with DBCT Management that it receives no benefit from this arrangement. However, the Prime Prospectus indicates that, "over the forecast period, it is expected that both income and capital distributions by Prime Trust to investors will be made on a 'tax-deferred' basis...".²⁰ As a consequence, seeking to link the income component of distributions directly to operations at DBCT is highly problematic. Even if the Authority was able to establish such a definitive link, a number of important and contentious assumptions would be required to quantify any resulting benefits, should they exist. As a consequence, in the draft decision, the Authority adopted the view that the DBCT User Group's proposed approach to modelling the trust structure was inappropriate. Further, the Authority considered that it would add an uncertainty and complexity that was not warranted and that, taking all factors into account, the approach proposed by the Authority was fair and reasonable to both DBCT Management and users.

Stakeholder Comments on Draft decision

Following the release of the Authority's draft decision, DBCT Management submitted to the Authority that its review of the Authority's tax calculation had revealed a relatively minor error that reduced DBCT Management's annual revenue requirement. DBCT Management subsequently provided a detailed explanation to the Authority on a confidential basis (DBCT Management, sub. no. 64: 79).

The DBCT User Group largely accepted the Authority's draft decision with respect to tax treatment. The DBCT User Group, however, objected to the Authority's commencement date, eg 1 July 2004, for assessing tax benefits. Specifically, the DBCT User Group believed that this decision is unfair and encourages tax benefits to be brought forward to the pre-regulatory period. The DBCT User Group, therefore, submitted that the Authority should assess the tax benefits over the entire lease period (DBCT User Group, sub. no. 52: 24).

Authority's Analysis

The Authority has reviewed its tax calculation and concurs with DBCT Management's submission on the error. Adjusting the Authority's model to take this factor into account increases DBCT Management's tax allowance by about \$0.3m per annum on average over the regulatory period.

¹⁶ PIML holds all the shares in Prime Infrastructure (DBCT) Management Pty Ltd (DBCT Management) and Prime Infrastructure (DBCT) Finance Pty Ltd (DBCT Finance). PIT holds all the units in Prime Infrastructure (DBCT) Trust (DBCT Trust).

¹⁷ Further, the investor is taxed differently on the share holding in PIML and the unit holding in PIT.

¹⁸ Prime Prospectus (p. 7).

¹⁹ This applies to Australian tax resident investors who invest in Prime Infrastructure on capital account.

²⁰ Prime Prospectus (p. 7).

The DBCT User Group submitted that the Authority's decision to not assess retrospective tax benefits was unfair and provided an incentive to DBCT Management to bring forward tax benefits into the pre-regulatory period. In reaching its draft decision in relation to tax, the Authority considers that it adopted an approach that is both fair and reasonable to both parties. While the Authority understands the DBCT User Group's concern, it nevertheless must 'draw a line' in determining an appropriate demarcation point for assessing tax-related issues. As almost all relevant aspects of the Authority's modelling calculations use 1 July 2004 as the appropriate reference point, the Authority finds no reason to deviate from this benchmark in assessing tax benefits. Further, even if the Authority were to assess benefits accruing prior to this time, it would necessarily have to consider related costs incurred by DBCT Management over the earlier period for consistency. Undertaking such an assessment would introduce an element of retrospectivity into the analysis that the Authority does not consider is appropriate in the current regulatory context. As a consequence, the Authority maintains its draft position of assessing the tax benefits as at 1 July 2004.

10.4 Annual Revenue Requirement and Revenue Smoothing

On the basis of its initial estimates of asset value, WACC, depreciation, corporate overheads and tax, DBCT Management proposed in its draft access undertaking a smoothed revenue over the period of the undertaking of about \$138m on average per annum. Using its approach to calculating the TIC, DBCT Management's proposed TIC was \$2.77/tonne for each year of the regulatory cycle.²¹ While DBCT Management offered a critique of the various elements comprising the Authority's proposed TIC, it did not formally revise its proposed TIC of \$2.77/tonne.

On the basis of the Authority's analysis of asset value, asset life, cost of capital, operating costs and tax, the Authority's draft decision determined an average annual revenue allowance of \$72.8m in 2004-05 and averaging around \$76m over the term of the undertaking.

Authority's Final Position

The final estimates for asset value, asset life issues, cost of capital, operating costs and tax have increased the average annual revenue allowance by around \$15m per annum to \$87.3m in 2004-05 and averaging around \$92m over the term of the undertaking, as illustrated in Table 10.2.²² The revenue cap will be indexed by actual CPI over the term of the undertaking.

²¹ DBCT Management's proposed TIC is constant in nominal terms over the length of the regulatory period and calculated as a 'grossed-up' value, ie it is higher than a simple average \$/tonne rate, to ensure that revenues are constant between specific levels of throughput. In addition, the calculation reflects recovery of the entire revenue requirement via reference tonnages.

²² Smoothing of the raw revenue series is undertaken on the principle that the net present value of the raw and smoothed series will be zero.

Table 10.2: Authority's Annual Revenue Requirement^a

	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

^a The values in this table are derived using the Authority's method for calculating the TIC.

For comparative purposes only, if DBCT Management's approach to calculating the TIC is employed in conjunction with the Authority's estimated annual revenue requirement, then the TIC is \$1.72/tonne for each year of the regulatory period. This compares with a TIC of \$1.53 included in the draft decision.

However, the Authority has proposed a revenue cap arrangement which transfers volume risk to the users. This results in a lower nominal TIC as there is no need to adopt coal tonnage estimates that are below forecast tonnages, as any shortfalls [and surpluses] will be automatically adjusted. Using the Authority's proposed approach, the same annual revenue requirement of \$92m results in a TIC which averages \$1.58/tonne over the regulatory period.²³

²³ The charge varies from \$1.51 to \$1.67 over the period as the TIC reflects the impact of changing demand forecasts over the period.

APPENDIX A: TECHNICAL REVIEW OF THE DBCT WACC

In preparing its draft decision, the Authority engaged the Allen Consulting Group (ACG) to prepare a comprehensive assessment of the DBCT WACC. In response, stakeholders made a number of detailed criticisms of the Authority's draft decision and, in particular, of ACG's advice. As a result, the Authority engaged ACG and Dr Martin Lally to review these criticisms. This appendix summarises the main issues in the stakeholder critiques and consultants' responses. Section A1.1 addresses the detailed issues associated with estimating DBCT's asset/equity betas and section A1.2 addresses a proposal to determine a WACC from a range of possible parameter estimates. Copies of the various documents are available from the Authority's web site.

A1.1 Asset/Equity Beta

Background

In assessing DBCT's asset beta, ACG undertook a comprehensive analysis, employing three different approaches.

First, ACG directly estimated Prime's equity beta from available market data. Although this estimate suggested there was little correlation between Australian equity returns and returns on Prime, ACG ultimately did not rely on this approach as an input to determining its recommendation, as the available data did not yield reliable estimates.

Second, ACG undertook a 'first principles' assessment to identify the underlying explanatory factors for the asset beta of DBCT and then used these criteria to identify similar, listed firms to serve as comparators. ACG determined that the most relevant explanatory factors for DBCT to be the nature of demand for its services, operating leverage, and duration of contracts. These factors all pointed to the conclusion that the terminal has low underlying systematic risk. Further, these factors suggest that the only satisfactory beta comparators for DBCT would likely be either other listed ports that solely export raw materials and do not bear the majority of fixed operating costs, or infrastructure companies with relatively uncorrelated demand and relatively low fixed operating costs.

Third, ACG compared the characteristics of DBCT with that of thirty-eight listed businesses from the coal, ports, transport, energy, and property trust sectors. ACG narrowed this list of thirty-eight possible comparators down to three businesses, namely Port of Tauranga (POT), Macquarie Infrastructure Group (MIG) and Macquarie Office Trust (MOF), who were the exceptions in each of their respective industries, as they satisfied ACG's first principles criteria, ie these companies all possess a revenue stream that is relatively uncorrelated with the domestic economy and low fixed operating costs, which make earnings relatively invariant to changes in output.

ACG concluded that DBCT's asset beta was likely to lie in the range of 0.30 to 0.40, given the equity betas of these comparators, in particular Port of Tauranga, and given the average beta benchmarks of the industries surveyed. ACG recommended an asset beta of 0.35 (equity beta of 0.66) on the basis that this estimate reflected a reasonable outcome given all available evidence at the time.

In support of their critiques of the Authority's draft decision, stakeholders' comments were diverse. Nevertheless, these critiques focused on three principal aspects of ACG's analysis:

- 'first principles' assessment of systematic risk;

- choice of comparator firms; and
- statistical reliability of beta estimates.

Stakeholders' comments along with ACG's responses on these issues are set out below.

First Principles Assessment

Stakeholder Comments on Draft Decision

On the one hand, the DBCT User Group agreed with ACG's first principles analysis that DBCT's systematic risk is very low (DBCT User Group, sub. no. 53: 10, 20). On the other hand, DBCT Management, its consultants and other stakeholders criticised ACG's first principles assessment.

First, DBCT Management submitted that the ACG analysis was highly subjective, as it placed substantial weight on two select characteristics (ie uncorrelated demand and low operating leverage) which implied a low asset beta. Conversely, they argued that ACG did not place similar weight on other explanatory factors that would have implied relatively higher systematic risk than other essential services, such as electricity and water. For example, DBCT Management submitted that the coal industry supplies the steel manufacturing and energy industries, which have a relatively higher sensitivity to real GNP than essential services (DBCT Management, sub. no. 64: 64).

Second, Capital Research added that ACG's analysis incorrectly assumes that DBCT's attributes are unique while, in fact, many of its attributes are common to infrastructure assets. For example, Capital Research suggested that Australian electricity, rail and ports businesses are likely to provide services that are inputs to producing final goods with demands that are relatively uncorrelated with Australian GDP. For this reason, Capital Research argued that it is incorrect to distinguish DBCT's systematic risk from that of other Australian infrastructure assets on this basis (DBCT Management, sub. no. 67: 16-18).

Third, DBCT Management and NERA submitted that, as the domestic CAPM is a convenient simplification of a complex international model, ACG's narrow interpretation of the domestic CAPM fails to recognise that in a broader, international context, DBCT faces greater systematic risk due to its export orientation (DBCT Management, sub. no. 66: 12-14; DBCT Management, sub. no. 64: 63).

Fourth, NERA argued that, by concluding that DBCT's diversified customer base reduces systematic risk, ACG commits the principal error of confusing non-systematic with systematic risk. Specifically, NERA submitted that, from an investor's perspective, there is no benefit arising from a single port exporting coal to many countries, or many ports exporting coal to a single country each, as the investor can obtain the diversification benefits by holding equities in a range of different businesses (DBCT Management, sub. no. 66: 10-12).

Fifth, ACG's assessment of the effect of operating leverage on systematic risk was variously criticised as being arcane, inconsistent with standard regulatory practice and flawed. For its part, NERA argued that ACG's analysis is flawed on the basis that decreasing operating leverage (ie passing responsibility for operating costs to DBCT P/L) unambiguously increases DBCT's asset beta, assuming that these costs move pro-cyclically. NERA's reasoning is that, if revenues are invariant to output, pro-cyclical movements in costs cause profits to move counter-cyclically. For example, if the economy booms then costs increase and, since revenues are fixed, profits decrease. This effect implies a negative beta. Alternatively, if the firm in the same situation, but with full cost pass-through, experiences a boom then it bears more

systematic risk than without any cost pass-through, as its profits no longer move countercyclically. As a result, DBCT's cost pass-through implies that it bears relatively more systematic risk as long as costs move procyclically (DBCT Management, sub. no. 66: 14-17).

Sixth, Capital Research submitted that the CAPM ignores the risk attributes of small capitalisation assets and, as a consequence, the CAPM would typically not be used to value small capitalisation assets, such as Prime Infrastructure. Capital Research further submitted that Australian market data suggest a premium above the CAPM return for small capitalisation stocks because such stocks generally have higher returns than large capitalisation stocks, even though the former have lower betas. On this basis, Capital Research argued that Prime Infrastructure requires a premium above the CAPM-based return (Capital Research, sub. no. 67: 18-22).

Seventh, DBCT Holdings submitted that potential competition from unregulated ports must ultimately affect DBCT's asset beta, as the prospect of competition would make users reluctant to enter into long term contracts with DBCT Management. Specifically, given the masterplan [unpublished] for expansion of Abbot Point and the current pressure by DBCT users to develop the Northern Missing Link (rail line), the availability of additional capacity suggests that users would be reluctant to enter into long term contracts with DBCT Management. DBCT Holdings, therefore, submitted that, in such circumstances, potential competition for new and out-of-contract tonnages must reasonably influence DBCT's asset beta (DBCT Holdings, sub. no. 50: 2-3).

Consultant's Response

In response to these criticisms, ACG denied it had ignored relevant systematic risk characteristics of DBCT. ACG noted that it had considered how each of nine different explanatory factors (see Lally (2004)) potentially affects DBCT's systematic risk and concluded that the two most important factors were the demand for DBCT's coal export services and operating leverage.

In relation to the effect of product demand on systematic risk, ACG argued that a primary consideration is the sensitivity of the firm's demand, and therefore revenues, to economic fluctuations. If demand is sensitive to the economic cycle then, all else equal, one would expect a relatively high asset beta because economic booms (recessions) would result in large positive (negative) demand changes. In the case of DBCT, all of its coal throughput is exported overseas, with demand primarily driven by the steel and electricity industries located predominantly in Asia. As these importing countries experience cyclical economic growth patterns, the causes of which are fundamentally uncorrelated with the Australian economy and market (ASX), ACG estimated that the demand for DBCT's coal export services to be relatively uncorrelated with the Australian economy or, to the extent that it exists, the correlation is slightly negative (-0.21).

In response to specific claims that, as Queensland coal exports are primarily used in steel manufacturing, they will be subject to greater GDP sensitivity, ACG found that the correlation between quarterly steel production in DBCT's major customer countries and Australian GDP over the period 1995 to 2004 was -0.109. This relationship is contrary to the claims and supports ACG's *a priori* hypothesis.

The second explanatory factor is the level of DBCT's operating leverage. In a similar way to which its commitment to fixed debt obligations increases beta, the higher a firm's *fixed* production charges (ie operating leverage), the greater is the sensitivity of its earnings to changes in output, given the underlying obligation. In the context of DBCT, ACG assessed DBCT's operating leverage as very low. As the operating costs of the terminal are a pass-through to users, the residual costs incurred by DBCT Management are largely fixed operating

costs. Furthermore, they are a relatively small proportion of the total asset value. These two aspects of DBCT's current cost situation suggest that a change in terminal throughput would have only a minimal impact on the underlying systematic risk.

In undertaking this analysis, ACG disputed NERA's claim that it committed an error in assessing the impact of operating leverage on DBCT's asset beta. ACG submitted that, in order to reach NERA's conclusion (ie that passing responsibility for operating costs to DBCT P/L unambiguously increases DBCT's systematic risk), NERA's argument must implicitly assume that the systematic risk of DBCT's revenues are either less than the systematic risk of its costs or zero. ACG argued, however, that it is more likely the case that DBCT's costs have a lower systematic component than its revenues, as its costs are almost entirely fixed and the systematic risk of fixed costs is likely to be low. Further, revenues have some residual systematic risk under a revenue cap. In any event, independent of the assumption NERA invoked, ACG demonstrated that NERA's argument necessarily implies a very low, or zero, asset beta *regardless*. Further, entities with a higher operating leverage than DBCT (eg electricity distribution) would have a negative asset beta. ACG did not consider it plausible to suggest that the asset beta for DBCT is zero or that the asset beta for revenue-capped electricity distributors is negative.

Notwithstanding its view that DBCT's operating leverage indicates a lower level of systematic risk relative to other utilities, ACG acknowledged that its original analysis overstated the impact. As a consequence, ACG revised its conclusion on DBCT's asset beta.

A third factor is the nature of DBCT's contracts with customers. Longer contract periods tend to reduce the asset beta, as such contracts span the peaks and troughs in the economic cycle, making revenues less responsive to demand shocks. In the context of DBCT, current contracts with users, which cover almost all throughput volume, are staggered, overlapping and possess a longer duration than a domestic boom or recession would likely persist. The existing contracting situation, therefore, suggests a lower asset beta. ACG noted, however, that this effect is largely dominated by the uncorrelated demand effect and, as a result, is less important.

While ACG examined the other explanatory factors in the context of DBCT, it concluded that any potential effects on systematic risk were either immaterial (eg market weight) or significantly outweighed by the uncorrelated demand or operating leverage effects (eg pricing structure).

ACG argued that the assumption of a domestic CAPM framework is not unusual and is consistent with regulatory precedent in Australia. However, as a result of this assumption, a 'domestic' beta is assessed relative to the Australian market, which is then applied in conjunction with a domestic market risk premium to obtain a domestic equity risk premium. However, if one is to argue that relativities to world markets are important, for the sake of consistency, DBCT's beta should then be assessed with reference to an international version of the CAPM. Moreover, as Dr Lally has previously observed, if an international CAPM were adopted, the result would certainly lower, not raise, the cost of capital for DBCT, as the market risk premium would be substantially less.

In any case, ACG rejected the claim that it has misapplied the 'domestic' CAPM. ACG argued that it is not DBCT's exporting operations per se that indicate lower systematic risk but rather, it is the fact that the derived demand for DBCT's coal exports is not correlated with Australia's economic cycle.

ACG also rejected NERA's claim that it confused non-systematic risk with systematic risk. Rather, ACG argued that this issue has arisen from its use of imprecise terminology, as ACG should have more appropriately referred to 'diversified demand' as 'uncorrelated demand'.

ACG also rejected the suggestion that DBCT is no different than the average regulated business. While ACG acknowledged that individual businesses may share *some* of DBCT's identifying characteristics, they generally do not possess all of them: i) regulated, 100% coal export port in Australia; ii) ultimate demand based in a number of foreign countries, with growth in demand arising from Asian countries with economic cycles that are driven by factors that are relatively uncorrelated to the Australian economy; iii) very low operating leverage for regulated utilities (eg about 5% in comparison to 35% to 60% for electricity distribution); and iv) operation under a revenue cap with volumes subject to overlapping take-or-pay contracts.

Although Prime Infrastructure is listed in the 'small caps' index of the Australian Stock Exchange (ASX), ACG argued that this fact alone is insufficient to justify a small cap premium. Although there is some academic debate about reasons for the 'small cap' effect, ACG noted that the typical justification for a small cap premium is stock illiquidity and/or poor coverage by stock analysts. ACG observed, however, that Prime has a relatively strong investment profile and market liquidity, with investment analysts viewing DBCT's earnings component of Prime as very predictable. ACG, therefore, concluded that, while Prime may be ranked in the small caps index, there is no justification for a small cap premium.

In response to DBCT Holdings' claim that the prospect of competition from unregulated ports should affect DBCT's asset beta, ACG noted that inter-port competition generally reflects non-systematic risk. ACG argued that the risk of another port attracting DBCT's customers is primarily dependent on cost competitiveness, and this factor is unlikely to be correlated with the state of the domestic economy.

Authority's Comments

While ACG rejected the criticisms that its operating leverage analysis is flawed, it did not respond directly to the other criticisms of the Authority's use of operating leverage as an explanatory factor for systematic risk. For instance, it was argued that operating leverage is an 'arcane' aspect of finance and, further, that it is inconsistent with standard regulatory practice in Australia, which has not relied on this characteristic to distinguish among the systematic risks of firms (DBCT Management, sub. no. 67: 8, 23-24; DBCT Management, sub. no. 66: 16-18).

The Authority rejects both of these assertions.

First, the Authority notes that a leading finance text identifies two primary determinants of the asset beta:

- *cyclicality* – firms with revenues that are strongly dependent on the state of the business cycle tend to have higher asset betas than those firms whose revenues are not; and
- *operating leverage* – the commitment to fixed production charges adds to the asset beta of the firm.²⁴

Second, the Authority notes that, while previous regulatory practice may not have focused on operating leverage in assessing asset betas of regulated infrastructure firms, this may well be the case because typical infrastructure businesses possess similar operating leverages; that is, in the order of 35% to 60% (eg electricity distribution). Therefore, this similarity means that operating leverage is not particularly helpful in making distinctions among the systematic risks of typical regulated firms. However, DBCT is not the typical regulated asset, as the cost pass-through of operating and maintenance costs to DBCT P/L leaves an operating cost component that is almost entirely fixed and a small in proportion of the total asset value. As a result,

²⁴ See Brealey, et al. (2000), pp. 257-58.

operating leverage is a distinguishing factor in establishing the systematic risk relativities between DBCT and other regulated assets in Australia.

Choice of Comparators

Stakeholder Comments on Draft Decision

While the DBCT User Group, however, submitted that ACG's approach for selecting the comparators is reasonable and, if anything, the identified comparators reflect greater systematic risk than DBCT (DBCT User Group, sub. no. 53: 12, 15-16), most other stakeholders argued that ACG's comparators are questionable at best and irrelevant at worst. In particular, stakeholders noted that only one comparator is from the same industry as DBCT (ports) while the other two are in different lines of business. DBCT Management and the Queensland Government further observed that selecting comparators from outside the regulated industry is inconsistent with regulatory precedent. Stakeholders' basic concern, therefore, was that the comparators ultimately do not bear the same systematic risks as DBCT (DBCT Management, sub. no. 66: 4; QR, sub. no. 60: 7-8; AusCID, sub. no. 47: 3; DBCT Holdings, sub. no. 50: 2; Queensland Government, sub. no. 63: 5-6).

More particularly, QR and the Queensland Government argued that the ACG analysis appears to ignore industry averages that would reflect the systematic risk of DBCT (QR, sub. no. 60: 7-8). They suggested that betas benchmarked to averages for related industries in the relevant supply chain (ie coal, mining services and ports) provide a relevant proxy for DBCT's asset beta. (QR, sub. no. 60: 8; Queensland Government, sub. no. 63: 5-6). The Queensland Government constructed proxy groups based on Australian and global industries and submitted that the asset beta for DBCT likely falls into the range of 0.50 to 0.80 (Queensland Government, sub. no. 63: 5-6).

With regard to specific comments about the three ACG comparators, DBCT Management submitted that the only characteristic setting the Port of Tauranga apart from other New Zealand ports is its relatively low beta and that basing its selection on the highest proportion of revenues from raw materials trade is grossly inadequate (DBCT Management, sub. no. 64: 65). In addition, Capital Research submitted that Port of Tauranga's stock is thinly traded, thus its estimated beta is likely to be unreliable (DBCT Management, sub. no. 67: 11).

NERA argued that ACG's logic in selecting Macquarie Infrastructure Group is flawed, as selecting it on the basis that a large proportion of its revenues is sourced internationally leads to the erroneous conclusion that other firms that source most of their revenue from overseas (eg News Corporation) are also suitable comparators. As a consequence, NERA concluded that ACG selected Macquarie Infrastructure Group on the basis of its low beta, not as a result of its foreign earnings (DBCT Management, sub. no. 66: 36).

NERA submitted that, as it would be highly unlikely for investors to be roughly neutral between DBCT and Macquarie Infrastructure Group when considering the purchase of shares, Macquarie Infrastructure Group is not a relevant 'comparable' (DBCT Management, sub. no. 66: 37-38).

Noting that ACG selected Macquarie Office Trust on the basis of possessing an uncorrelated revenue stream and a similar operating leverage to DBCT, NERA submitted that it is inappropriate to select a comparator on the basis that it has low systematic risk, and therefore a beta that is similar to what one presupposes for the business of interest. NERA concluded that the point of comparables analysis is to yield information regarding systematic risk and that it yields no information to select comparators on the basis of their systematic risk (DBCT Management, sub. no. 66: 38).

Consultant's Response

ACG argued that much of the criticism of its comparator analysis is unfounded and that its original study already addressed many of the stakeholders' concerns. In order to respond to those criticisms, ACG re-emphasised its original methodological approach and then addressed the criticisms in turn. ACG noted that the principal consideration in choosing appropriate comparators in the context of the CAPM is that they possess underlying explanatory factors for systematic risk that match those of the firm of interest as closely as possible.

ACG noted that, in the first instance, it sought to identify those businesses that shared the same explanatory factors as DBCT. As a result, ACG examined Australian coal producers, as DBCT is a coal exporting port. ACG argued that, while DBCT and the coal companies shared similar demand conditions, the coal producers' revenues are exposed to potential fluctuations in world coal prices and have significantly higher operating leverages than DBCT. Due to these differences, ACG did not consider coal producers to be appropriate comparators. Of the remaining companies in the list, ACG concluded that DBCT's equity beta was lower than the average equity betas of:

- 1.24 and 1.47 for United Kingdom and New Zealand ports, as they are both import and export-oriented (eg containers) and have higher fixed operating costs;
- 1.15 for Australian and New Zealand transport companies, which tend to have more cyclical demand and higher fixed operating costs;
- 1.0 for the regulated Australian electricity networks, as their activities are more cyclical with respect to the Australian economy, and they have significantly higher fixed operating costs; and
- 0.83 for Australian property trusts, as they generally have greater exposure to domestic economic factors and higher fixed operating costs than DBCT.

ACG pared this list of thirty-eight possible comparators down to three businesses, namely Port of Tauranga (POT), Macquarie Infrastructure Group (MIG) and Macquarie Office Trust (MOF), which are the exceptions in each of their respective industries, as they satisfied ACG's first principles criteria; that is, these companies all possess a revenue stream that is relatively uncorrelated with the domestic economy and have low fixed operating costs, which make earnings relatively invariant to changes in output.

While the equity beta range for these comparators was from 0.28 to 0.51, ACG believed that, for the 2001-03 period, equity betas for these comparators were temporarily low, due to the dampening effect of the 'dot-com' bubble on the beta estimates of utility-like stocks. ACG, therefore, concluded that the long term average for these comparators would likely settle at higher levels than DBCT's beta, and for this reason, ACG adjusted its equity beta range upward to 0.56 to 0.78 to reflect this expectation.

Of the three selected comparators, ACG considered Port of Tauranga to be relatively more important, as during the early to mid-1990s, it functioned almost exclusively as a raw materials export port, with an operating leverage among the lowest of the New Zealand ports. Given these characteristics, ACG considered Port of Tauranga as the closest available comparator to DBCT and, therefore, viewed its pre-bubble average equity beta of 0.65 as an important benchmark. Given that this estimate reflects Port of Tauranga's initial expansion into containers, and therefore greater exposure to systematic risk, ACG concluded that DBCT may be expected to have a lower equity beta than this benchmark; that is, around 0.55 to 0.60. This range also coincided with ACG's view that, as DBCT is a 100% raw materials export port, its equity beta would more likely be in the range of 0.55 to 0.80, rather than in the range of 0.80 to

1.0, the latter of which would only be appropriate if DBCT exhibited characteristics similar to the average energy transmission company.

With this as background, ACG believed that most stakeholders' criticisms of the comparators selected are not justified and, therefore, ACG rejected them.

ACG believed that there are technical problems with the advice provided to the Queensland Government, on which it based its proposed asset beta range of 0.50 (global ports) to 0.80 (global mining services) for DBCT. In particular, ACG noted that estimates: use two years of weekly data when four to five years of monthly data is the accepted standard; include companies with extremely small market capitalisations; include companies with returns measured against markets (eg Jordan and Thailand) whose structures and risks are unlikely to be comparable to Australia; and importantly, include a number of companies with betas measured twice against different markets. ACG concluded that these factors raise concerns over the choice of some firms included in the industry portfolios used in the Government's submission.

In response to DBCT Management's criticism of selecting the Port of Tauranga as a comparator, ACG observed that it was chosen on the basis of a significant raw materials export trade to Asia and a low operating leverage relative to other ports. In regard to the thin trading point, ACG noted that this can be a problem with any beta study, for example DBCT Management's original submission accepted a proxy equity beta of 1.20 (eg Northland Port Corporation), based on the then Office of the Regulator General's (Victoria) analysis that used the betas of New Zealand ports, which are more thinly traded than Port of Tauranga.

In response to the criticisms of selecting Macquarie Infrastructure Group, ACG maintained its view that it is a reasonable comparator and noted that:

- as News Corporation is in a different asset class, is subject to highly cyclical demand and has a high level of operating leverage, the divergences in business characteristics suggest that it is not a suitable comparator for DBCT; and
- analysts actively compare Prime Infrastructure directly with Macquarie Infrastructure (see eg Booth, A. (18 October 2004), *Prime Infrastructure Group*).

In response to NERA's claim that the analysis selects comparators on the basis that their systematic risk is similar to what one presupposes for the business of interest, ACG responded that it did not limit its analysis to the three firms identified but reviewed a large number of potential comparators in energy distribution, coal production, ports and transport companies. The choice of the three comparators from among firms in these groups was based on identifying *a priori* similar operating characteristics to DBCT, ie revenue insensitivity to the Australian market and low operating leverage.

However, in response to the widespread criticism of selecting Macquarie Office Trust, ACG noted that its relative contribution to the analysis was to provide supporting evidence that a company in a high-yielding industry (ie property trusts), possessing the same primary drivers of systematic risk (ie uncorrelated demand and low operating leverage relative to other firms in its industry), is likely to have low systematic risk relative to its industry. ACG, however, accepted the stakeholder comments that listed property trusts are unlikely to provide substantial insights into the betas for regulated infrastructure firms and conceded that, as a consequence, ACG should have excluded Macquarie Office Trust from the sample.

Authority's Comments

The Authority notes that, although most stakeholders were critical of ACG's comparators, they did not offer superior alternative comparators. The most commonly suggested comparator was

a port, given that DBCT is a coal-exporting port. However, DBCT's systematic risk drivers are fundamentally unrelated to those of the average port that handles a wide variety of traffic, including containers, which makes its revenues more correlated with the domestic economic cycle than DBCT.

The Authority notes that the ORG, in its decision on the Melbourne Ports Corporation (MPC) and Victorian Channels Authority (VCA), recognised this distinction. Specifically, the ORG set a relatively lower asset beta for the Victorian Channels Authority (0.50) to recognise that its systematic risk is only dependent on the number and size of ships, while the beta for the Melbourne Ports Corporation (0.60) also depended on the extent and type of cargo. Re-gearing these asset betas to 60% debt for comparability with DBCT gives equity betas of 0.95 and 1.20 respectively. It would be expected that DBCT should attract a substantially lower equity beta than the Victorian Channels Authority (ie less than 0.95) given DBCT's correlation with the domestic economy and its operating leverage are substantially less.

Finally, the Authority notes that some stakeholders also criticised ACG's selection of the Port of Tauranga, as it is a comparator from a foreign market and, therefore, not directly comparable. The Authority accepts that there can be problems when using foreign comparators, due to cross-country differences in markets. For this reason, as part of its original study, ACG was requested to undertake additional analysis to ensure the appropriateness of Port of Tauranga as a comparator. In addition, ACG made an upward adjustment to its final estimate to allow for any residual uncertainty in this comparator. On this basis, the Authority believes that the Port of Tauranga remains a reasonable comparator for DBCT. The Authority notes that both DBCT Management's original submission on asset beta and NERA's proxy beta analysis both relied on a number of foreign ports, including the Port of Tauranga, as comparators for DBCT.

Statistical Reliability

Stakeholder Comments on Draft Decision

A number of stakeholders expressed the concern that there is a considerable degree of uncertainty inherent in beta estimates and that ACG has not attempted to qualify its results with appropriate statistical testing (DBCT Management, sub. no. 64: 66; APIA, sub. no. 49: 2; AusCID, sub. no. 47: 3; DBCT Holdings, sub. no. 50: 2; QR, sub. no. 60: 7-8).

For example, DBCT Management, Capital Research and NERA submitted that, given the extent of statistical uncertainty, the alternative 'null hypothesis' of unity could be applied by a prudent regulator to obtain an appropriate value for the equity beta (DBCT Management, sub. no. 64: 67; DBCT Management, sub. no. 67: 5; DBCT Management, sub. no. 66: 43).

DBCT Management submitted that ACG applied too high frequency data (ie weekly) to estimate betas, suggesting that this practice would lower the beta estimates below what they would be otherwise (DBCT Management, sub. no. 64: 66).

In contrast, the DBCT User Group's principal concern with ACG's beta estimates was that it does not believe the upward adjustment to them for the effects of the dot-com bubble is justified, as there was no dot-com bubble in Australia (DBCT User Group, sub. no. 53: 16-19).

Consultant's Response

ACG agreed with stakeholders that standard errors associated with beta estimates are high but noted that this is an area in which it is difficult to achieve statistical precision, as the depth and quality of empirical data is often lacking. As a consequence, in its other advice to regulators on cost of capital matters, ACG has emphasised adopting a presumption in favour of previous

regulatory decisions, unless there is persuasive evidence to the contrary. In the case of DBCT, ACG believed that the combination of first principles and empirical evidence supports the proposition that the systematic risk of DBCT is lower than other utilities (eg energy) and, therefore, justifies a beta that is less than the 'regulatory norm' of one that ACG has advised previously in relation to energy.

Further, ACG accepted the comment that its conclusion was based on analysis of the evidence, rather than on tests of statistical significance. ACG, however, submitted that the implication of an approach that recognises only statistically significant results is that regulators would never reach a conclusion, or they would arrive at an arbitrary 'default' number. ACG noted that regulators in Australia have adopted equity betas that differ across industries, and differ from unity, which are likely to be unsupportable with statistically significant results.

ACG rejected DBCT Management's, and its consultants', proposal to adopt a 'null hypothesis' of unity for DBCT's equity beta, as such an approach is only justifiable in the absence of any corroborating data on DBCT's systematic risk. Again, ACG believed that, in the case of DBCT, evidence exists to support an equity beta of less than one and that applying a value of unity in this situation would likely introduce a degree of error. In any event, ACG submitted that it is unclear why unity is an appropriate value for the null hypothesis.

In response to the criticisms of its use of higher frequency (ie weekly) data, ACG noted that its estimates of comparators' betas used at least sixty months of monthly observations, which is standard practice in this area. ACG used weekly estimates only for the purpose of indicating likely future movements of monthly beta estimates.

Finally, ACG disputed the DBCT User Group's claim that there was no dot-com bubble in Australia, observing that, although the Australian market did not move in the significant manner of the US market, an analysis of the relevant indices demonstrates that utilities in Australia nevertheless behaved in a similar manner to those in the US. For this reason, ACG concluded that its upward revision to beta estimates to reflect this fact is justified.

Authority's Comments

The Authority notes that a primary criticism of ACG's analysis in this respect was that ACG did not qualify its beta estimates with statistical testing. The Authority acknowledges the tendency for standard errors of beta estimates to be high but agrees with ACG that precision in this area is not possible. The Authority considers, however, that in the face of this limitation, the best course of action is to examine all other available evidence as well. The Authority notes that ACG undertook a comprehensive analysis that relied on all available approaches and that its first principles assessment and benchmarking of other industries are consistent with its empirical findings. Finally, in using the information from these approaches to identify an appropriate value for DBCT's asset beta, the Authority notes that, if anything, ACG has erred on the high side by choosing an equity beta of 0.80, when the available evidence suggests that the true value is likely to be less.

A1.2 Estimation Uncertainty

Stakeholder Comments on Draft Decision

Several stakeholders, namely DBCT Management, Energex and GasNet, argued that applying the CAPM in the context of an individual firm is subject to significant uncertainty, given the difficulties in accurately defining the relevant inputs, and that the Authority's analysis has not made allowances for these uncertainties (DBCT Management, sub. no. 64: 71-74; Energex, sub. no. 55: 1-4; GasNet, sub. no. 58: 1-2).

In particular, DBCT Management and Energex supported a submission by SFG Consulting, which proposed an alternative method of estimating the regulatory cost of capital, given the inherent uncertainties of the parameter values. SFG's recommended approach involves determining a probability distribution for each individual input rather than a point estimate of the input. The process then applies a Monte Carlo simulation to generate an implied distribution for the cost of capital. The final step involves selecting a value from the resulting probability distribution for the cost of capital, and SFG recommended an estimate from the upper end (75th percentile) of the distribution on the basis that it is preferable to err on the side of over-compensating, rather than under-compensating, the regulated business (DBCT Management, sub. no. 68).

Consultant's Response

ACG believed that, while a simulation approach may have some theoretical attractions for modelling uncertainty, it is inappropriate for estimating the cost of capital for regulated firms for a number of reasons. First, the approach requires the regulator to not only form a view of the parameter ranges but also of an appropriate probability distribution for the relevant parameters. This additional information requirement, therefore, expands the number of assumptions, while decreasing transparency of the estimation process. Second, while the proposal allows the regulator to determine the extent to which it should err on the side of the regulated business when selecting a final WACC estimate, regulators already adopt parameter estimates that err on the conservative side (eg the market risk premium). As a consequence, if the simulation approach were to be applied, regulators would need to ensure that the expected values for the inputs reflect unbiased estimates, ie did not already embody an element of conservatism.

Authority's Comments

The Authority generally agrees with ACG's assessment of this proposal. First, even if it could be demonstrated that this approach leads to selecting input estimates that are statistically unbiased, the Authority considers that its current approach already errs on the high side of compensation, as several of the inputs (eg the market risk premium) are benchmarked with reference to the domestic economy and, therefore, are higher than they would be in an international CAPM framework.

Second, the proposed approach introduces additional subjectivity, primarily with respect to choosing a WACC estimate. SFG recommended choosing an estimate from the 75th percentile, based on the view that it is preferable to err on the side of over-compensating, rather than under-compensating the regulated business. Regardless of the merits of this argument, the choice of an appropriate estimate from the 'WACC distribution' is clearly arbitrary.

Third, the proposed approach introduces additional information requirements, which would add another layer of complexity and, therefore, reduce the transparency of the current process. The Authority notes that stakeholders have consistently expressed reservations about modifying the Authority's current approach in such a way.

LIST OF SUBMISSIONS

<i>Organisation/Individual</i>	<i>Submission Number</i>
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- 2 February 2004. *Comments on the Asset Valuation Component of the DBCT User Group's Submission to QCA including the GHD Report (submission no. 17)*.

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- 7 April 2004. *Technical Review of the Authority's Cost of Capital Method* (submission no. 30).
- 7 April 2004. *Issues in Cost of Capital for QCA* (Capital Research) (submission no. 31).
- 23 August 2004. *DBCT Asset Valuation — Request for Comments Paper. Prime Infrastructure's Response* (submission no. 40).
- 26 November 2004. *QCA Draft Decision on the Access Undertaking for the Dalrymple Bay Coal Terminal Submission prepared by Prime Infrastructure (DBCT) Management Pty Limited* (submission no. 51).
- 17 December 2004. *QCA Draft Decision on the Access Undertaking for the Dalrymple Bay Coal Terminal Submission prepared by: Prime Infrastructure (DBCT) Management Pty Limited* (submission no. 64).
- *Appendix A — Connell Hatch's Response to the Queensland Competition Authority's Draft Decision — October 2004* (Connell Hatch) (submission no. 65).
- *Appendix B — Critique of the Proxy Betas for Dalrymple Bay Coal Terminal — A Report for Prime Infrastructure* (NERA) (submission no. 66).
- *Appendix C — Dalrymple Bay Coal Terminal — Response to QCA Draft Determination* (Capital Research) (submission no. 67).
- *Appendix D — A Framework for Quantifying Estimation Error in Regulatory WACC — A Report for Prime Infrastructure in relation to Dalrymple Bay Coal Terminal (SFG)* (submission no. 68)
- *Appendix E — Useful Life of DBCT Assets — Prepared for Prime Infrastructure Pty Ltd* (Barlow Jonker) (submission no. 69).
- *Appendix F — RE: Review of Corporate Overheads* (Ernst & Young) (submission no. 70).
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PART B

DRAFT 1
19 June 2003

**Dalrymple Bay Coal Terminal
Access Undertaking**

**Submitted by Prime Infrastructure
(DBCT) Management Pty Limited on
behalf of DBCT Holdings Pty Limited**

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1 Introduction

1.1 Purpose of this document

In March 2001 the Queensland Government passed a regulation under which the handling of coal at the Dalrymple Bay Coal Terminal (“**the Terminal**”) was made a “declared service” for the purposes of the *Queensland Competition Authority Act 1997* (“**QCA Act**”). Access providers of declared services have an obligation under the QCA Act to negotiate with and in certain circumstances provide access to third parties seeking access to that service (“**Access Seekers**”). The regulator under the QCA Act is the Queensland Competition Authority (“**QCA**”).

The QCA Act has provisions that allow the owner of a declared service to voluntarily submit a draft access undertaking to the QCA which sets out the terms and conditions upon which access will be granted to Access Seekers. If the draft access undertaking meets certain criteria set out under the QCA Act and is approved by the QCA, it will regulate third party access to the service.

On 14 September 2001 Prime Infrastructure (DBCT) Investor Services Limited as trustee of the Prime Infrastructure (DBCT) Trust (“**DBCT Trustee**”), as primary lessee, and Prime Infrastructure (DBCT) Management Pty Limited (“**DBCT Management**”), as secondary lessee, entered into a number of agreements with DBCT Holdings Pty Limited (“**DBCT Holdings**”) and Ports Corporation of Queensland (“**PCQ**”) (both owned by the Queensland Government (the “**State**”)) as part of a long-term lease of the State-owned DBCT.

One of the agreements, the Port Services Agreement, requires DBCT Trustee to prepare a draft access undertaking on behalf of DBCT Holdings (which as the owner of the Terminal is formally responsible for submitting the draft access undertaking) for submission to the QCA for approval under the QCA Act. The Port Services Agreement also specifies a number of issues the draft access undertaking must address above and beyond the requirements of the QCA Act.

This access undertaking (“**Undertaking**”) has been prepared by DBCT Management on behalf of DBCT Trustee and DBCT Holdings for the purposes of the Port Services Agreement.

This Undertaking sets out details of the terms and conditions on which DBCT Management undertakes to provide access to the declared services provided by the Terminal as set out in Part 4 of this Undertaking. This Undertaking has been prepared to assist Access Seekers in reaching negotiated outcomes on the terms and conditions of access to those services.

DBCT Management submitted this Undertaking to the QCA on behalf of DBCT Holdings on 20 June 2003.

1.2 Scope of Undertaking

This Undertaking provides for the negotiation of Access to the Coal Handling Service at the Terminal.

1.3 Duration of Undertaking

This Undertaking will come into operation on the Commencement Date. It will apply until the Terminating Date unless withdrawn as provided for in the QCA Act.

1.4 Review of Undertaking

DBCT Management and the QCA will meet approximately one; and three-~~and five~~ years after the Commencement Date to review the operation of this Undertaking. These reviews will identify any provisions of the Undertaking that are not operating to the satisfaction of either DBCT Management or the QCA. If as a result of this review, DBCT Management and the QCA agree that amendments are required to the Undertaking, DBCT Management will submit a draft amending undertaking to the QCA for approval under the QCA Act.

1.5 Access Agreements

This Undertaking applies only to the negotiation of new Access Agreements or the negotiation of additional Access rights in addition to those already the subject of an Access Agreement or Existing User Agreement. Nothing in this Undertaking requires a party to a concluded Access Agreement to vary a term or provision of that Access Agreement.

1.6 Existing User Agreements

Nothing in this Undertaking requires a party to an Existing User Agreement to vary a term or provision of that Existing User Agreement.

1.7 Obligation to Renegotiate Operation & Maintenance Contract

DBCT Management will, in good faith, take all reasonable steps to negotiate relevant amendments to the Operation & Maintenance Contract to allow DBCT Management to comply with all its obligations under this Undertaking. In particular, DBCT Management will seek to negotiate relevant amendments to the Operation & Maintenance Contract to:

- (a) specifically provide in that contract that DBCT Management and the Operator will both comply, in all respects, with the Terminal Regulations as in force from time to time; and
- (b) require the provision at the Terminal of the Coal Handling Service as set out in Schedule G of this Undertaking.

1.7.1.8 Amendment to Undertaking

Any amendment to this Undertaking will be prepared and submitted to the QCA by DBCT Management on behalf and with the consent of DBCT Holdings in accordance with the Port Services Agreement and the QCA Act.

2 Interpretation

2.1 Dictionary

In this Undertaking:

Access means access to the Coal Handling Service as provided by DBCT Management at the Terminal under an Access Agreement or Existing User Agreement.

Access Agreement means an access agreement between DBCT Management and an Access Holder negotiated under Part 5 of this Undertaking.

Access Application means an application for Access made under Section 5.2 of this Undertaking.

Access Application Date has the meaning given to that term in Section 5.4.

Access Charges means amounts payable by an Access Holder under an Access Agreement or Existing User Agreement for the Coal Handling Service.

Access Holder means a party who has an entitlement to Access under an Access Agreement or an Existing User Agreement.

Access Seeker means a party seeking Access, or increased Access, to the Coal Handling Service.

Aggregate Reference Tonnage means the sum of the Reference Tonnages for all Access Holders.

Aggregate Non-Reference Tonnage means the sum of the Non-Reference Tonnages for all Access Holders.

Annual Contract Tonnage means, for an Access Holder, the number of tonnes of coal in a Contract Year that the Access Holder is entitled to have Handled under its Access Agreement or Existing User Agreement.

Annual Revenue Requirement means the amount of revenue ~~required by~~ DBCT Management is entitled to earn to fully recover the costs incurred (other than Terminal Operating Costs), in providing Access to the Coal Handling Service (including an adequate rate of return on the value of assets employed).

Approvals means any and all licences, approvals, consents and permits required from any Government Agency or third party for the construction, occupation, development or operation of the Terminal for the provision of the Coal Handling Service, performance of the ~~Primary Leases, Secondary~~ Leases, or the Port Services Agreement including but not limited to:

- (a) environmental approvals and licences;
- (b) planning and development approvals and licences; and
- (c) Local Government approvals and licences.

Available Capacity means the amount of Terminal Capacity that is not subject to Contracted Tonnage, and is derived by subtracting Contracted Tonnage from Terminal Capacity.

Business Day means a day on which banks (as defined in the *Banking Act* 1959 (Cth)) are open for general banking business in Queensland excluding Saturdays and Sundays.

Capacity Expansion means any construction work at the Terminal that is reasonably expected to have the effect of increasing the Terminal Capacity.

Capital Charge means the components of Access Charges ~~under which DBCT Management recovers its capital and other costs, and comprises all components of the Access Charge~~ that are not an Operation & Maintenance Charge.

Capital Cost means: (i) capital expenditure relating to replacement or expansion of the Terminal plant and/or infrastructure; and (ii) expenditure relating to refurbishment or upgrades that are expected to extend the life of the plant and/or infrastructure beyond its original useful life;

Coal Handling Service means the services set out in ~~Part 4~~ Schedule G of this Undertaking.

Commencement Date means ~~the later of~~ the date this Undertaking is approved by the QCA ~~or 1 July 2004~~.

Confidential Information means any information, data or other matter disclosed to a party by, or on behalf of, another party where:

- (i) the disclosure of the information, data or other matter by the recipient might reasonably be expected to affect the commercial affairs of the owner of the ~~Confidential I~~ information; or
- (ii) the information, data or other matter is marked or otherwise clearly identified as confidential by a party when disclosed; provided that such information, data or other matter:
 - is not already in the public domain;
 - does not become available to the public through means other than a breach of the confidentiality provisions in this undertaking or under any confidentiality deed contemplated in Section 8 of this Undertaking;
 - was not in the other party's lawful possession prior to such disclosure; ~~and/or~~
 - is not received by the other party independently from a third party free to disclose such information, data or other matter;

and provided further that the information, data or other matter will cease to be Confidential Information if the information, data or other matter has ceased to retain its confidential nature, for example:

~~1.~~ the disclosure of the information, data or other matter by the recipient would no longer reasonably be expected to affect the commercial affairs of the owner of the information, data or other matter;

~~2.~~ the information, data or other matter is now in the public domain through means other than a breach of the confidentiality provisions in this Undertaking or under any confidentiality deed contemplated in Part 8 of this Undertaking; or

3. the information, data or other matter has been received by the recipient independently from a third party free to disclose the information, data or other matter.

Contracted Tonnage means the aggregate number of tonnes of coal in a Contract Year that all Access Holders are entitled to have Handled under Access Agreements or Existing User Agreements, and is the sum of each Access Holder's Annual Contract Tonnage.

Contract Year means 1 July in a calendar year to 30 June in the next following calendar year.

DBCT Holdings means DBCT Holdings Pty Limited ACN 096 395 783 and its successors and permitted assigns, including persons taking by way of novation.

DBCT Management means Prime Infrastructure (DBCT) Management Pty Limited ACN 097 698 916 and its successors and permitted assigns, including persons taking by way of novation.

DBCT Trustee means Prime Infrastructure (DBCT) Investor Services Limited ACN 052 156 082 as trustee of the Prime Infrastructure (DBCT) Trust.

Demurrage Costs means the average cost across all Access Holders of demurrage in respect of the loading of coal on vessels at the Terminal over any period of 3 consecutive months.

Dispute has the meaning given to that term in Section 5.9(a).

Dispute Notice has the meaning given to that term in Section 5.9(a).

Excess Tonnage means tonnes of an Access Holder's coal Handled in excess of 110% of that Access Holder's Reference Tonnage, ~~and includes excluding~~ the Access Holder's Non-Reference Tonnage.

Existing User Agreement means an agreement for Access in force as at the Commencement Date.

Framework Agreement means the framework agreement between DBCT Holdings, the State, PCQ, DBCT Trustee, DBCT Management and others dated 31 August 2001.

Government Agency means a minister, government, government department or another government body, a governmental, semi-governmental or judicial person or a person (whether autonomous or not) charged with the administration of any applicable law.

Good Operating and Maintenance Practice means adherence to a standard of practice which includes the exercise of that degree of skill, diligence, prudence and foresight which would reasonably be expected from a competent, experienced and qualified operator of a facility comparable to the Terminal.

Gross Operating Capacity means the engineering capacity of the Terminal, taking into account equipment maintainability and 85% equipment utilisation.

Handle ~~means~~ includes the unloading, storing, reclaiming and loading of coal and any other services provided in accordance with Schedule G, using any of the infrastructure at the Terminal.

Hay Point Services Terminal means the coal loading terminal neighbouring DBCT and owned by a consortium of BHP Billiton and Mitsubishi.

Indicative Access Proposal has the meaning given to that term in Section 5.5.

Insolvent~~ey~~ means for an Access Seeker, where one of the following events has happened in relation to ~~an~~the Access Seeker:

- (1) it is unable to pay all its debts as and when they become due and payable or it has failed to comply with a statutory demand as provided in Section 459F(1) of the *Corporations Act 2001 (Cth)*;
- (2) a meeting is convened to place it in voluntary liquidation or to appoint an administrator, unless the resolution is withdrawn within 14 days or the resolution fails to pass;
- (3) an application is made to a court for it to be wound up and the application is not dismissed within one month;
- (4) the appointment of a controller (as defined in the *Corporations Act 2001 (Cth)*) of any of its assets, if that appointment is not revoked within 14 days after it is made; or
- (5) it resolves to enter into or enters into any form of arrangement (formal or informal) with its creditors or any of them, including a deed of company arrangement.

Leases means the Primary Leases and the Secondary Leases.

Lease Term has the meaning ascribed to that term in the Framework Agreement.

Master Plan (a current copy of which is attached at Schedule F) means the Master Plan approved by DBCT Holdings under the Port Services Agreement ~~(a current copy of which is attached at Schedule F)~~, and related engineering and other reports, as amended from time to time with the approval of DBCT Holdings under the Port Services Agreement.

Negotiation Cessation Notice means a notice given in accordance with the provisions of Section ~~5.75.8~~.

Non-Reference Tonnage means, for an Access Holder, that portion of the Access Holder's Annual Contract Tonnage that is not Reference Tonnage.

Notified Access Seeker has the meaning given to that term in Section 5.4.

Notifying Access Seeker has the meaning given to that term in Section 5.4.

Operation & Maintenance Charge means the component of Access Charges under which DBCT Management recovers the Terminal Operating Costs from Access Holders and is calculated in accordance with Section 11.5.

Operation & Maintenance Contract means any contract in force between DBCT Management and the Operator under which the Operator is appointed by DBCT Management to operate and maintain the Terminal on a day to day basis.

Operator means Dalrymple Bay Coal Terminal Pty Limited ACN 010 268 167 ~~or any other person appointed by DBCT Management from time to time to operate and maintain the Terminal on a day to day basis.~~

PCQ means Ports Corporation of Queensland.

Port Services Agreement has the meaning ascribed to that term in the Framework Agreement.

Primary Leases has the meaning ascribed to that term in the Framework Agreement.

Prime Infrastructure Group means Prime Infrastructure Management Limited (ACN 100 364 234) (“PIML”), Prime Infrastructure Trust (ARSN 100 375 479) (“PIT”), DBCT Management, DBCT Trustee and any other wholly owned entity of each of PIML and PIT.

QCA means the Queensland Competition Authority, a statutory authority established under the QCA Act.

QCA Act means the *Queensland Competition Authority Act 1997* (Qld).

Reference Tariff means that tariff approved by the QCA as a reasonable Capital Charge (details of which are set out in Schedule C) to apply in respect of the Reference Terms.

Reference Terms means ~~the~~ terms and conditions ~~of which are substantially the same as the terms and conditions applicable under~~ a Standard Access Agreement.

Reference Tonnage means, for an Access Holder under an Existing User Agreement, that portion of the Access Holder’s Annual Contract Tonnage that is contracted to be Handled as Product 4 (as that term is defined in the Existing User Agreement) and has been modified to align with the Undertaking and, for an Access Holder under an Access Agreement, that portion of the Access Holder’s Annual Contract Tonnage which is contracted to be Handled in accordance with the Reference Terms.

Related Party has the meaning given to that term in the *Corporations Act 2001* (Cth).

Revenue Cap is the amount DBCT Management is entitled to earn from Reference Tonnage. For clarity, it is calculated as follows:

$$\text{Revenue Cap} = \frac{\text{Annual Revenue Requirement} \times \text{Reference Tonnage}}{\text{total Contracted Tonnage}}$$

Secondary Leases has the meaning ascribed to that term in the Framework Agreement.

Standard Access Agreement means a pro-forma Access Agreement to be developed under Part 13~~1~~ of ~~this~~ Undertaking, which must ~~include~~incorporate detailed terms and conditions that are consistent with the principles set out in Schedule B of this Undertaking.

State means the State of Queensland.

Term means the period between the Commencement Date and the Terminating Date.

Terminal means the port infrastructure located at the Port of Hay Point which is owned by DBCT Holdings or the State and leased to DBCT Trustee and DBCT Management, and known as the Dalrymple Bay Coal Terminal, and includes the following which form part of the Terminal:

- loading and unloading equipment;
- stacking, reclaiming, conveying and other handling equipment;
- wharves and piers;

- deepwater berths; and
- shiploaders.

Terminal Capacity means the throughput capacity of the Terminal (measured in tonnes per Contract Year) as determined pursuant to Section 120.1 of this Undertaking.

Terminal Operating Costs means any amounts reasonably incurred in the operation and maintenance of the Terminal, ~~including but not limited to any amounts paid to the Operator~~ under the Operation & Maintenance Contract, but excluding Capital Costs, other than budgeted minor capital expenditure, and any financial lease and/or rental payments, made by the Prime Infrastructure Group, associated with the Terminal infrastructure, plant and/or land.

Terminal Regulations means regulations in force from time to time governing procedures for the operation of the Terminal and provision of the Coal Handling Service. ~~A copy of the Terminal Regulations in force as at the Commencement Date is attached at Schedule E.~~

Terminating Date means 31 December 2009~~the seventh anniversary of the Commencement Date~~ or when the Operator changes, whichever is earlier.

Undertaking means this Access Undertaking (as amended from time to time) which is an access undertaking for the purposes of the QCA Act.

WACC means the weighted average cost of capital approved by the QCA.

2.2 Interpretation

In this Undertaking unless the context otherwise requires:

- (a) reference to a person includes any other entity recognised by law and vice versa;
- (b) reference to “dollars” or “\$” means a reference to Australian dollars;
- (c) words importing the singular number include the plural number and vice versa;
- (d) words importing any gender include the other gender;
- (e) where a word or phrase is defined, its other grammatical forms have a corresponding meaning;
- (f) ~~clause~~ headings are for reference purposes only;
- (g) any reference to the words “include” or “including” must be read as if they are followed by the words “without limitation”;
- (h) reference to a Section, Part, Clause, Subclause, Paragraph, Subparagraph or Schedule is a reference to the corresponding Section, Part, Clause, Subclause, Paragraph, Subparagraph or Schedule to this Undertaking as amended or replaced from time to time;
- (i) this or any other document or agreement includes the document or agreement as varied, amended or replaced from time to time;
- (j) reference to any legislation includes all legislation under and amendments to that legislation and any legislation passed in substitution for that

legislation or incorporating any of its provisions to the extent that they are incorporated;

- (k) if there is any inconsistency between matters contained in a Schedule and the body of this Undertaking, the provision in the body of the Undertaking prevails.

3 Role of DBCT Trustee and DBCT Management

Under Section 136(1) of the QCA Act, the owner of a declared service may voluntarily submit a draft ~~a~~Access ~~u~~Undertaking to the QCA. The owner of the Terminal (and consequently the declared service) is DBCT Holdings.

DBCT Trustee and DBCT Management, under the ~~Primary Leases and Secondary Leases~~, are the lessee and sublessee of the Terminal. DBCT Management is solely responsible for providing Access to Access Holders and Access Seekers during the Lease Term.

DBCT Management will comply with and give effect to this Undertaking and any applicable laws relating to the provision of ~~third party access to the Coal Handling Service~~Access as if it was the owner of the Terminal and had itself given this Undertaking.

DBCT Management, subject to DBCT Holdings acting reasonably, will take all action reasonably available to ensure that DBCT Holdings is able to comply with this Undertaking and any applicable laws relating to the provision of ~~third party access to the Coal Handling Service~~Access including, but not limited to, Part 5 of the QCA Act.

Section 158A of the QCA Act provides that enforcement action in respect of a breach of this Undertaking either by the QCA or another person may only be sought against the “responsible person” under the QCA Act. The term “responsible person” under the QCA Act means the person to whom the Undertaking applies as the owner of the relevant service. Therefore, in this context, the “responsible person” is DBCT Holdings.

DBCT Holdings accepts and acknowledges that a breach by DBCT Management of a term or condition of this Undertaking will constitute a breach by DBCT Holdings, and DBCT Holdings will be liable to enforcement action under Section 158A of the QCA Act for such a breach.

4 Services to be provided

To the extent permitted by the Operation and Maintenance Contract, DBCT Management must provide at the Terminal t~~The Coal Handling Service provided at the Terminal is the unloading, storing, reclaiming and loading of coal~~ as set out in Schedule G¹.

~~DBCT Management believes that a number of the services provided at the Terminal do not fall within the scope of the declared service under the~~

¹ see also the obligation imposed in Section 1.7 of this Undertaking.

~~Queensland Competition Authority Regulation 1997 (as amended). However, DBCT Management also believes that at present such services are not material and do not negatively impact on the efficiency of the Terminal. If in the future such services do become material or do negatively impact on the efficiency of the terminal, then DBCT Management will inform the QCA and prepare a draft amending Undertaking setting out its proposed treatment of such services.~~

5 Negotiation arrangements

5.1 Framework for negotiation

This Part of the Undertaking outlines the process which will be followed to enable Access Seekers to obtain Access. It provides for:

- (a) submission of an Access Application by the Access Seeker;
- (b) provision of an Indicative Access Proposal by DBCT Management;
- (c) negotiations to develop an Access Agreement; and
- (d) dispute resolution procedures.

DBCT Management will take all reasonable steps to progress the Access Application and any negotiations to develop an Access Agreement with an Access Seeker in a timely manner and will complete each relevant step as soon as practicable.

5.2 Application for Access and information to be provided

Any application for ~~Access to the Coal Handling Service~~ must be in writing and, where reasonably practicable, contain the information set out in Schedule A).

DBCT Management acknowledges that, at the time of provision, the information provided in the Access Application may be a forecast only.

Prior to submitting ~~this an~~ Access Application, an Access Seeker may request from DBCT Management and DBCT Management must provide:

- (a) reasonably available preliminary information relating to the Access Application (including copies of the then current Standard Access Agreement and Terminal Regulations) within 10 Business Days of DBCT Management receiving an Access Application; and where practicable, the information set out in Section 101(2)(d) to (h) of the QCA Act); and
- (b) where there is a Reference Tariff, the information set out in Sections 101(2)(d) to (h) of the QCA Act;
- (c) where there is no Reference Tariff, the information set out in Sections 101(2)(a) to (h) of the QCA Act; and
- (b)(d) initial meetings to discuss the Access Application and the requirements set out in Schedule A.

5.3 Acknowledgment

Upon receiving an Access Application under Section 5.2, DBCT Management must ~~use its reasonable endeavours to~~ acknowledge receipt of the Access

Application in writing to the Access Seeker as soon as practicable and in any event within 10 Business Days of its receipt.

DBCT Management may request from the Access Seeker additional information where DBCT Management can reasonably demonstrate the need for such information for the purpose of preparing an Indicative Access Proposal, or clarification of information provided. Upon receiving the required information or clarification from the Access Seeker, DBCT Management must provide written acknowledgment of the receipt of this further information as soon as practicable and in any event within 10 Business Days of receipt of the further information.

5.4 Priority of Access Applications

If at any time DBCT Management has before it more than one Access Application and there is insufficient Available Capacity to accommodate all of the Access Applications that are before DBCT Management, a queue will be formed.

The priority of an Access Seeker in the queue will be determined by the date when their completed Access Application was received by DBCT Management or was deemed to be made if the Access Application was substantially altered in accordance with Section 5.7 of this Undertaking ("Access Application Date"). The priority system will operate so that an Access Seeker with the earliest Access Application Date will be first in the queue. An Access Seeker will lose their position in the queue once their Access Application is no longer current in accordance with the terms of Part 5 of this Undertaking.

If an Access Seeker who is not first in the queue ("the Notifying Access Seeker") gives notice to DBCT Management, in writing, that it is prepared to enter into an Access Agreement, then on receiving such notice, DBCT Management must notify, in writing, all other Access Seekers that are ahead of the Notifying Access Seeker in the queue ("the Notified Access Seekers") of this development (but not the identity of the Notifying Access Seeker) and allow 20 Business Days from the date when such notice is given by DBCT Management for the Notified Access Seekers to deliver to DBCT Management a signed Access Agreement.

If during the above 20 Business Day period, one or more of the Notified Access Seekers deliver to DBCT Management a signed Access Agreement, DBCT Management will then give priority to the Notified Access Seeker that has the highest ranking in the queue and will execute their Access Agreement.

If, at the end of the above 20 Business Day period none of the Notified Access Seekers deliver to DBCT Management a signed Access Agreement, DBCT Management may then conclude an Access Agreement with the Notifying Access Seeker.

For clarity, any Notified Access Seeker that does not within the above 20 Business Day period deliver to DBCT Management a signed Access Agreement, does not then lose its place in the queue and the Access Application negotiation process for that Access Seeker will otherwise continue in accordance with Part 5 of this Undertaking.

5.45.5 Indicative Access Proposal

As soon as practicable and in any event within 20 Business Days following receipt of ~~the~~ an Access Application, DBCT Management must use its reasonable

endeavours to provide the relevant Access Seeker with a response containing proposed terms and conditions of Access (“Indicative Access Proposal”). If it is not reasonable to provide an Indicative Access Proposal within 20 Business Days of ~~acknowledgment of~~ receipt of ~~the an~~ Access Application, DBCT Management must, as soon as practicable, but in any event, within 20 Business Days, advise the relevant Access Seeker of its estimate of the extra time required to deliver the Indicative Access Proposal.

If the Access Seeker is of the opinion that the estimate of extra time for preparation of the Indicative Access Proposal is excessive, then the Access Seeker may refer the matter for dispute resolution in accordance with Section ~~5.85.9~~ of this Undertaking. DBCT Management must use reasonable efforts to provide the Indicative Access Proposal within the estimated time period provided by DBCT Management or as otherwise determined by the QCA.

The Indicative Access Proposal must set out:

- (a) an indicative assessment as to whether there is sufficient Available Capacity to accommodate the Access Application and, if not, an estimate of what the Available Capacity is and whether a queue has been formed in accordance with Section 5.4 of this Undertaking;
- (b) advice in respect of the existence of (but not the identity of) other Access Seekers who have submitted an Access Application;
- (c) If there is sufficient Available Capacity to accommodate the Access Application, the Indicative Access Proposal must also set out:
 - (1) an initial estimate of the Access Charge, including an estimate of current and, where reasonable to provide such estimate, prospective Handling charges, for the requested services in the Access Application based on the pricing principles set out in Part 11 of this Undertaking;
 - (2) a draft access agreement where there is no approved Standard Access Agreement;
 - (3) the current Master Plan;
 - ~~(2)~~(4) details of any additional information required by DBCT Management to progress the ~~proposal~~ Access Application and develop the terms and conditions for acceptance; and
 - ~~(3)~~(5) the expiry date of the Indicative Access Proposal (should there be no notification by the Access Seeker pursuant to Section 5.6 that the Indicative Access Proposal has not been prepared in accordance with the Undertaking) which will be 30 Business Days following the date the Access Seeker receives the Indicative Access Proposal.

The Indicative Access Proposal will, unless it contains specific conditions to the contrary, contain indicative arrangements only and does not oblige DBCT Management to provide Access ~~to the Coal Handling Service~~.

~~5.5~~If, after 20 Business Days following DBCT Management’s acknowledgment of the Access Application, the Access Seeker believes that DBCT Management is not making reasonable progress in the preparation of the Indicative Access

Proposal, the Access Seeker may refer the matter for dispute resolution in accordance with Section 5-85.9 of this Undertaking.

If there is not sufficient Available Capacity to accommodate the Access Application, DBCT Management must notify the Access Seeker of this fact and provide reasonable particulars as to why this circumstance prevails. DBCT Management will also notify the Access Seeker of how much Available Capacity there is, and will provide to the Access Seeker ~~with~~ an indicative timetable for any Capacity Expansion which may be necessary. DBCT Management will comply with the provisions of Part 12 of this Undertaking.

If the Access Seeker wishes to continue the negotiation process provided for in this Part 5, such negotiations can continue on the basis that the Capacity Expansion which may be necessary is to be undertaken in accordance with Part 12 of this Undertaking. In this case, if DBCT Management is unable to comply with the timeframes specified in Part 5 of this Undertaking, it will advise the Access Seeker of the estimated timeframes. If the Access Seeker does not believe the proposed timetable is reasonable or that DBCT Management is not making reasonable progress, it may refer the matter to dispute resolution in accordance with Section 5.9 of this Undertaking.

5.55.6 Response to Indicative Access Proposal

If the Access Seeker intends to progress its Access Application on the basis of the arrangements set out in the Indicative Access Proposal, it must notify DBCT Management of its intention to do so within 20-30 Business Days of the date it receives the Indicative Access Proposal. If the Access Seeker does not notify DBCT Management of its intention before the expiry date of the Indicative Access Proposal, it may apply again for Aaccess in accordance with Section 5.2 unless agreed otherwise between the parties.

If the Access Seeker considers that the Indicative Access Proposal has not been prepared in accordance with Section 5.5 of this Undertaking, it must notify DBCT Management in writing within 20 Business Days of receipt of the Indicative Access Proposal, such notice setting out the reasons why the Access Seeker believes that the Indicative Access Proposal is inconsistent with Section 5.5 of this Undertaking.

DBCT Management must use all reasonable efforts to respond to this notice, including, where appropriate, the making of revisions to the Indicative Access Proposal within 20 Business Days of the notification under this Section 5.6. If DBCT Management is unable to respond within this time period, it must notify the Access Seeker of the date on which it expects to be able to respond.

If the Access Seeker is not satisfied with:

- (a) the response to the notice given under this Section; or
- (b) DBCT Management's estimated date to respond to the notice,

the Access Seeker may seek to resolve the dispute in accordance with the dispute resolution procedure in Section 5-85.9.

5.65.7 Negotiation process

If the Access Seeker indicates its willingness to progress its Access Application under Section ~~5.55.6~~, then both parties must commence negotiations as soon as reasonably possible to progress towards an Access Agreement. The period for negotiation will commence on the date notified by the Access Seeker under Section ~~5.55.6~~ and end upon any of the following events:

- (a) execution of an Access Agreement in respect of Access sought by the Access Seeker;
- (b) written notification by the Access Seeker that it no longer wishes to proceed with its Access Application;
- (c) DBCT Management issuing a Negotiation Cessation Notice to the Access Seeker in accordance with Section ~~5.75.8~~;
- (d) the expiration of ~~3-6~~ months from the commencement of the negotiation period or, if both parties agree to an extension of the negotiation period, the expiration of the agreed extended term, provided that agreement to extend the negotiation period is not unreasonably withheld by either party; or
- (e) a reduction in Available Capacity due to another Access Seeker finalising an Access Agreement, where that reduction in Available Capacity adversely affects DBCT Management's ability to offer Access to the Access Seeker under the terms of the Indicative Access Proposal.

In the event that the negotiation period ceases for the reason set out in Section ~~5.65.7~~(e) above, DBCT Management must review the Indicative Access Proposal and prepare a revised Indicative Access Proposal in accordance with Section 5.5 and the negotiation process will recommence from the date this is provided to the Access Seeker.

During the negotiation period, the Access Seeker may review and revise the information provided to DBCT Management in the Access Application, provided that such revision does not substantially alter the nature of the Access rights sought by the Access Seeker. If DBCT Management is reasonably of the view that an Access Seeker's revision of information provided to DBCT Management in the Access Application has substantially altered the nature of the Access rights sought by the Access Seeker, DBCT Management will treat the revised information as a new Access Application, and the process set out in this Part 5 will recommence from that point.

If at any time during the negotiation period a dispute arises between the parties that, after reasonable negotiations, the parties are unable to resolve to their mutual satisfaction, then either party may seek to resolve the dispute in accordance with the dispute resolution process set out in Section ~~5.85.9~~.

To remove any doubt, the negotiation process and the obligations of the parties in that regard are to continue notwithstanding the commencement of a dispute resolution process pursuant to Section ~~5.85.9~~ of this Undertaking.

5.75.8 Negotiation Cessation Notice

At any time during the negotiation process under Section ~~5.76~~, DBCT Management may give notice to an Access Seeker that it does not intend to enter

into an Access Agreement with the Access Seeker (such notice being a “Negotiation Cessation Notice”), if:

- (a) an Access Seeker does not comply with all of its material obligations contained in this Undertaking;
- (b) DBCT Management is reasonably of the opinion that there is no reasonable likelihood that the Access Seeker will comply with the material terms and conditions of an Access Agreement;
- (c) DBCT Management is reasonably of the opinion that the Access Seeker has no genuine intention of gaining Access, or has no reasonable likelihood of utilising Access at the level of capacity sought;
- (d) DBCT Management is reasonably of the opinion that the Access Seeker or its guarantor is not reputable and of good financial standing ~~or would not have the capability to fulfil all of its obligations under an Access Agreement, should one be concluded;~~
- (e) except where the expert is in manifest error, the Access Seeker does not materially comply with a decision of an expert pursuant to Section 5.85.9; or
- (f) an Access Seeker does not materially comply with a decision of the QCA pursuant to Section 5.85.9.

A Negotiation Cessation Notice must identify the reasons for DBCT Management’s decision not to enter into an Access Agreement with the Access Seeker.

Without limitation, it will be reasonable for DBCT Management to form the view that circumstances in Section 5.7(a), 5.8(b), (e) or (d) apply if:

- (a) the Access Seeker is Insolvent; or
- (b) the Access Seeker, or a Related Party of the Access Seeker, is currently or has in the previous two years been in material default of any Access Agreement, Existing User Agreement or any other agreement and where its performance under that agreement is relevant to its likely performance under an Access Agreement.

If the Access Seeker reasonably considers that DBCT Management has improperly given it a Negotiation Cessation Notice, then the Access Seeker may refer the matter to dispute resolution in accordance with Section 5.85.9. If the resolution of the dispute is in favour of the Access Seeker, DBCT Management must re-commence negotiations with that Access Seeker.

Subject to any dispute on the matter being otherwise determined, DBCT Management may recover its reasonable costs incurred in negotiations with the Access Seeker where it ceases negotiations in accordance with a Negotiation Cessation Notice validly issued under ~~this~~ Section 5.75.8(c). The Access Seeker may refer a Dispute about the recovery of these costs to dispute resolution in accordance with Section 5.9 of this Undertaking.

5.85.9 Dispute resolution

(a) *Disputes*

If any dispute or question arises under this Undertaking or in relation to the negotiation of Access between an Access Seeker and DBCT Management (“Dispute”) then, unless otherwise expressly agreed by both parties, such Dispute shall be resolved in accordance with this Section 5.85.9 and either party may give to the other party to the Dispute notice in writing (“Dispute Notice”) specifying the Dispute and requiring that it be dealt with in the manner set out in this Section 5.85.9.

Unless otherwise agreed by the parties, Disputes in relation to an executed Access Agreement must be dealt with in accordance with the provisions of that Access Agreement and are not dealt with under this Undertaking.

(b) *Chief Executive ~~R~~resolution*

Unless otherwise agreed by both parties or provided for in this Undertaking, any Dispute must be referred in the first instance and in any event within 10 Business Days of the giving of the Dispute Notice to the Chief Executive of DBCT Management (or his or her nominee) and the Chief Executive of the Access Seeker (or his or her nominee) for resolution.

In the event that:

- (i) resolution is not reached within 20-10 Business Days of referral; or
- (ii) either Chief Executive appoints a nominee in accordance with this Section 5.85.9(b) that is unacceptable to the other party;

the relevant Dispute may, by agreement between DBCT Management and the Access Seeker, be referred for resolution by an expert in accordance with Section 5.89(c). Failing such agreement, either party may, ~~within a further 30 Business Days,~~ refer the Dispute to the QCA in accordance with Section 5.85.9(d).

(c) *Expert determination*

Where a matter is referred to an expert in accordance with Section 5.85.9(b) or as otherwise specified in accordance with this Undertaking, then the following will apply:

- (i) An expert may be appointed by the parties, or where agreement cannot be reached by the parties within 20 Business Days, in the case of financial matters, by the President for the time being of the Australian Society of Certified Practising Accountants and, in the case of non-financial matters, the President for the time being of the Institution of Engineers, Australia;
- (ii) In any event the expert must:
 - have appropriate qualifications and practical experience having regard to the nature of the Dispute;
 - have no interest or duty which conflicts or may conflict with his or her function as expert, he or she being required

to fully disclose any such interest or duty before his or her appointment; and

~~5.2~~ not be a current or immediate past employee of the Access Seeker or DBCT Management or of a Related Party of either of them;

(iii) The expert appointed pursuant to this Section 5.89(c) must not act until the expert has given written notice of the acceptance of his or her appointment to both parties;

(iv) The parties must upon request by the expert, provide or make available to the expert:

~~5.3~~ all information in their possession or control (other than Confidential Information);

~~6.0~~ all Confidential Information, subject to entry into arrangements to preserve confidentiality which are acceptable to all relevant parties, acting reasonably; and

~~7.0~~ all other assistance,

that the expert may reasonably require. Any such information or assistance must be provided as soon as reasonably practicable. Any determination made by an expert in relation to a Dispute must be consistent with the provisions of this Undertaking;

(v) The expert will provide both parties with a copy of the determination in relation to the Dispute within a reasonable time after his or her appointment;

(vi) The expert appointed pursuant to this Section 5.89(c) is required to undertake to keep confidential all matters coming to his or her knowledge by reason of this appointment and performance of his or her duties;

(vii) Any person nominated as an expert pursuant to this Section 5.89(c) is deemed to be and must act as an expert and not as an arbitrator. The law relating to arbitration including, without limitation, the *Commercial Arbitration Act 1990 (Qld)*; as amended, does not apply to the expert or to the determination or to the procedures by which the expert may reach that determination;

(viii) In the absence of manifest error, the decision of the expert is final and binding upon the parties. If a party believes that there was a manifest error it may refer the matter to the QCA for a determination. If the QCA determines that there was a manifest error, then the parties may agree to refer the Dispute to another expert in accordance with this Section 5.89(c), or failing such agreement, either party may refer the Dispute to the QCA for resolution in accordance with Section ~~5.85.9~~(d);

(ix) The costs of the expert and any advisers are to be borne by the parties in such proportions as determined by the expert.

(d) *Determination by the QCA*

If a Dispute is referred to the QCA in accordance with this Section ~~5.85.9~~(d) or as otherwise specified in accordance with this Undertaking, then Division 5 of Part 5 of the QCA Act will apply. ~~subject to consistency of any determination by the QCA with the provisions of this Undertaking~~The QCA Authority must not make an access determination that is inconsistent with this Undertaking.

If an issue is referred to the QCA for determination as specified in accordance with this Undertaking but does not constitute a Dispute for the purposes of Division 5 of Part 5 of the QCA Act, then the QCA will make a determination through any process that it considers appropriate, provided that:

~~8.~~• prior to considering the issue, the QCA advises both parties of the process that it will use to make the determination and both parties are given the opportunity to advise the QCA of any concerns they may have with that process and receive a response from the QCA as to how it will deal with such concerns, if at all; and

• the QCA must not make an access determination that is inconsistent with this Undertaking.

~~9.any determination by the QCA is consistent with the provisions of this Undertaking.~~

The costs of the QCA are to be borne by the parties in such proportions as determined by the QCA.

6 Terminal Regulations

(a) DBCT Management will comply with, and will use its best endeavours to ensure that the Operator complies with, the Terminal Regulations in force from time to time. The obligation imposed on DBCT Management to ensure that the Operator complies with the Terminal Regulations is subject to the Operation & Maintenance Contract allowing DBCT Management to enforce this obligation against the Operator².

(b) DBCT Management must not implement or consent to a proposed amendment to the Terminal Regulations without reasonable consultation with Access Holders and Access Seekers. DBCT Management will only give its consent to an amendment of the Terminal Regulations if it reasonably considers that the Terminal Regulations, as a whole, will operate equitably amongst Access Holders and Access Seekers, having regard to (amongst other things) the Annual Contract Tonnages of the Access Holders.

(c) If, following consultation about a proposed amendment to the Terminal Regulations, an Access Seeker or Access Holder wishes to notify a Dispute about the proposed amendment, the Access Seeker or Access Holder may refer the matter for dispute resolution, in the case of an Access Seeker in

² See also the obligation imposed in Section 1.7 of this Undertaking.

accordance with Section 5.9 of this Undertaking and, in the case of an Access Holder, in accordance with the dispute resolution provisions of its Access Agreement. DBCT Management must not implement the proposed amendment to the Terminal Regulations until the outcome of the Dispute has been determined. However, DBCT Management may proceed to implement, on an interim basis, pending the resolution of the Dispute, an amendment to the Terminal Regulations as is reasonably necessary to deal with an emergency or force majeure event. The interim change to the Terminal Regulations will only continue until the resolution of any Dispute or the cessation of the emergency or force majeure event, whichever is earlier.

- (d) DBCT Management must notify Access Holders, Access Seekers and the QCA of any amendments to the Terminal Regulations and will provide a copy of the amended Terminal Regulations to these parties;
- (e) DBCT Management will use its best endeavours to ensure that the Operator does not apply the Terminal Regulations in a manner that –constitutes conduct for the purpose of preventing or hindering an Access Holder’s Access to the Terminal; and
- (f) DBCT Management acknowledges that a failure to comply with Section 6(e) above will amount to conduct by DBCT Management which itself constitutes prevention or hindering of an Access Holder’s access to the Terminal for the purposes of Sections.-104 and 125 of the QCA Act.

67 Information provision

The QCA has the right, by written notice, to request that DBCT Management provide to the QCA any information or documents that the QCA reasonably requires for the purpose of performing its obligations and functions in accordance with either this Undertaking or an Access Agreement developed pursuant to this Undertaking. The notice must include a description of the information or document required, the purpose for which it is required, and the date it is required; (with such date to allow DBCT Management reasonable time to comply with the notice).

DBCT Management will comply with any such request; by the date stated in the notice, unless there is a reasonable reason for non-compliance. ~~Reasonable reasons for non-compliance will include circumstances in which DBCT Management:~~

- ~~(a) has a legal or contractual obligation to comply with confidentiality requirements; or~~
- ~~(b) otherwise wishes to maintain confidentiality in respect of the information provided;~~

~~but the QCA has not undertaken to keep the information confidential.~~

78 Confidentiality requirements

The Access Seeker and DBCT Management will, at all times, keep confidential and not disclose to any other person, any Confidential Information exchanged under the negotiation arrangements in Part 5 of this Undertaking or any other part of this Undertaking, except:

- (a) where any disclosure is required by law; and/or
- (b) where disclosure is to the recipient's advisors who are under a duty of confidentiality.

If required by either party, the parties must enter into a confidentiality deed substantially in the form ~~of~~ set out in schedule D of this Undertaking.

Both the Access Seeker and DBCT Management must only use Confidential Information provided by the other party for the purposes for which it was provided.

89 Ring-fencing arrangements

DBCT Management does not presently have any interests in upstream or downstream markets. However, if such interests arise in future then DBCT Management will inform the QCA and prepare a draft amending access undertaking in accordance with the QCA Act setting out its obligations in relation to ring fencing.

10 Reporting by DBCT Management

10.1 Regulatory accounts

DBCT Management will report to the QCA on an annual and confidential basis, within four (4) months of the close of the relevant Contract Year, information relating to:

- (a) the opening regulated asset base value for the relevant Contract Year — by asset class/type consistent with the asset class/types used to determine the initial capital base;
- (b) the amount of indexation of the regulated asset base calculated for the relevant Contract Year — by asset class/type;
- (c) the amount of depreciation calculated for the relevant Contract Year — by asset class/type;
- (d) DBCT Management's corporate overheads for the relevant Contract Year;
- (e) the value of any new assets (capital expenditure) acquired during the relevant Contract Year — by asset class/type. Capital expenditure is to be identified as either replacement or expansionary capital expenditure, and is to include information relating to the estimated life of each new asset;
- (f) asset disposals for the relevant Contract Year — by asset class/type;

- (g) the actual operating and maintenance costs incurred for the relevant Contract Year – at a level to be determined by the QCA. This should separately identify any minor capital; and
- (h) an explanation for any significant variance in actual capital expenditure and/or operating and maintenance costs, and forecast capital expenditure and/or operating and maintenance costs for the relevant Contract Year.

10.2 Indicators relating to compliance with this Undertaking

DBCT Management will publicly report on an annual basis the following information:

- (a) the number and percentage of total Indicative Access Proposals provided within the applicable timeframe;
- (b) the number and percentage of Access Applications received for which an extension of time for provision of an Indicative Access Proposal is sought by DBCT Management;
- (c) the average delay (in days) taken to provide an Indicative Access Proposal not provided within the applicable timeframe;
- (d) the number of instances where a Dispute has been referred to dispute resolution in accordance with Section 5.9;
- (e) the average length of the negotiation period (in days), where the negotiation period has commenced and has ceased as the result of the execution of an Access Agreement in respect of the Access sought by the Access Seeker;
- (f) the average length of the negotiation period (in days), where the negotiation period has commenced and has ceased as the result of any reason other than the execution of an Access Agreement in respect of the Access sought by the Access Seeker;
- (g) the number of instances where a negotiation period that had commenced, ceased as the result of the execution of an Access Agreement in respect of the Access sought by the Access Seeker; and
- (h) any other performance measure requested by the QCA.

10.3 Indicators relating to service quality

DBCT Management is required to publicly report on the following service quality key performance indicators for the Terminal, on a quarterly basis:

- (a) tonnes per hour of train handling expressed in tonnes per gross-train hour;
- (b) the percentage of trains arriving within an hour of the scheduled arrival time;
- (c) gross operating capacity (Mtpa);
- (d) capacity utilisation ratio;
- (e) the ratio of net operating capacity to gross operating capacity;
- (f) Terminal area available for storage (m²);
- (g) stockyard utilisation ratio;

- (h) tonnes loaded per ship-hour at berth segregated by category of vessel; and
- (i) average ship delay in port.

DBCT Management is required to report to the QCA on a confidential basis the following service quality key performance indicators for the Terminal, on a quarterly basis:

- (a) number of on-time arrivals;
- (b) tonnes per hour (measured from train arrival to train load);
- (c) number of cancelled train services (cancelled by mine);
- (d) number of on-time departures;
- (e) time required to rebuild stocks for the next train;
- (f) number of deviations and the result of those deviations (trains cancelled from DBCT and diverted to Hay Point Services Terminal);
- (g) time rail pits are in use/available measured by job in/job close;
- (h) average time to complete a full cycle of the system measured from departure Jilalan (outbound empty to mine) to arrival Jilalan (empty from DBCT);
- (i) average coal payload per train;
- (j) number of cancellations and deviations per mine;
- (k) delays due to non-alignment of individual node maintenance;
- (l) actual inloading throughput measured against inloading Gross Operating Capacity;
- (m) amount of blending from stockpiles per customer;
- (n) number of parcels and parcel size per ship;
- (o) time from first coal stacked to last coal reclaimed (per parcel);
- (p) shipping mix per customer and impact on terminal capacity;
- (q) number of instances of yard machine conflict;
- (r) tonnes loaded per ship-hour at berth segregated by category of vessel;
- (s) average ship delay in port (measured as difference between arrival and berthing);
- (t) berth utilisation in terms of ship hours/available berth time (available time being the time which a ship could have passed through the berths less actual time for scheduled and unscheduled maintenance and downtime unrelated to the Terminal);
- (u) daily arrival of vessels (measured by cargo tonnes)/daily sailing of vessels (measured by cargo tonnes); and
- (v) daily measure of suspended airborne dust particles and dust deposition less daily background allowance.

911 Pricing arrangements

9.111.1 Pricing objectives

In developing Access Charges, DBCT Management's objectives are to:

- (a) achieve its Annual Revenue Requirement ~~in order to provide a commercial return to its shareholders~~ in accordance with this Undertaking;
- (b) provide incentives for efficient utilisation of Terminal Capacity;
- (c) ensure equitable treatment of Access Holders and Access Seekers;
- (d) encourage efficient future investment in the Terminal; ~~and~~
- (e) ensure full recovery (but not over-recovery) from Access Holders of Terminal Operating Costs; ~~and-~~
- (f) ensure efficient Terminal Operating Costs.

9.211.2 Access Charges

Access Charges will comprise two components:

- (a) a Capital Charge, being the Reference Tariff or any other tariff agreed between DBCT Management and an Access Holder (subject to Section 119.6); and
- (b) an Operation & Maintenance Charge.

9.311.3 Reference Tariff

- (a) The Reference Tariff will apply to coal Handled under the Reference Terms. The Capital Charge for coal Handled on terms and conditions other than the Reference Terms will be negotiated between DBCT Management and the Access Seeker (subject to Section 119.6).
- (b) The Reference Tariff will be set such that only the proportion of DBCT Management's Annual Revenue Requirement associated with Reference Tonnage throughput would be recovered over Aggregate Reference Tonnage; ~~assuming the Reference Tariff applies to all Reference Tonnage. The proportion of DBCT Management's Annual Revenue Requirement associated with Reference Tonnage will be established in accordance with the formula set out in Schedule C.~~
- (c) The Reference Tariff will comprise a single~~two~~ components being the Terminal Infrastructure Charge (TIC) ~~and the Throughput Rebate~~.
- (d) The TIC will comprise:
 - (1) a variable component, based on the tonnes of the Access Holder's coal Handled; and
 - (2) a fixed component payable irrespective of the portion of Reference Tonnage which is actually Handled (ie. the take or pay charge).
- (e) The TIC will be established in accordance with the formula set out in Schedule C.

- (f) The TIC will be applied to the Reference Tonnage of each Access Holder who enters into an Access Agreement on Reference Terms. ~~The TIC rate of the Reference Tariff applying as at the Commencement Date is set out in Schedule C.~~
- (g) An adjusted TIC rate calculated as set out in Schedule C will be applied to Excess Tonnage.
- (h) The allocation (collection) of additional revenue from an over (under) recovery of the Revenue Cap amongst Reference Tonnage Access Holders will be established in accordance with the formula set out in Schedule C. Interest is to be paid (charged) at DBCT Management's WACC on the balance of the unders and overs account. The operation of the unders and overs account ~~The Throughput Rebate Pool, being the amount available to be distributed proportionately to Access Holders who enter into an Access Agreement on Reference Terms through the Throughput Rebate component of the Reference Tariff, will be calculated as set out in Schedule C.~~ will be as follows:
- (1) If DBCT Management earns revenue in excess of the Revenue Cap ("over recovery"), DBCT Management will initially hold a portion of the over recovery of up to and including 2% of the Revenue Cap. DBCT Management may submit an application seeking to permanently retain the over recovery to the QCA within 60 days of year end. If the QCA is reasonably satisfied that some or all of the over recovery is a direct result of DBCT Management engaging in activities which have improved capital productivity of the Terminal then the QCA may approve the application.
 - (A) If the QCA approves DBCT Management's application, DBCT Management will permanently retain the over recovery of up to and including 2% of the Revenue Cap that was approved by the Authority, and DBCT Management's Revenue Cap will be increased in the following year by the same amount;
 - (B) If the QCA does not approve DBCT Management's application or DBCT Management does not submit an application to the QCA as outlined above, DBCT Management will distribute the retained portion of the over recovery to Reference Tonnage Access Holders within 14 days of the QCA's decision in proportion to their contracted throughput for that year.
 - (2) If DBCT Management earns greater than 2% of the Revenue Cap, the mechanisms outlined in Section 11.3(h)(1) above will apply to that portion of the over recovery equivalent to 2% of the Revenue Cap, while the remainder of the over recovery will be distributed to Reference Tonnage Access Holders at year end in proportion to their contracted throughput for that year.
 - (3) In the event that DBCT Management earns less than the Revenue Cap, DBCT Management will action the unders account and issue Reference Tonnage Access Holders with

notices of revenue due. Revenue due will be in proportion to a Reference Tonnage Access Holder's throughput for that year and will be determined in accordance with Schedule C.

~~(i) The portion of the Throughput Rebate paid to each Access Holder who enters into an Access Agreement on Reference Terms will be calculated as set out in Schedule C.~~

~~(j) The Throughput Rebate will be paid annually in arrears.~~

~~(k)(i)~~ Where ~~the QCA has approved~~ a Reference Tariff has been calculated from the QCA's approved revenue cap, that Reference Tariff will be an acceptable means by which DBCT Management provides Access Seekers with information about the matters listed in ~~sSections~~ Sections 101(2)(a) to (c) of the QCA Act as provided for in accordance with ~~sSection~~ Section 101(4) of the Act.

~~(j)~~ The Standard Access Agreement to be developed under Section ~~131.2~~ will provide that Access Charges will be reviewed to be consistent with changes over time in the applicable Reference Tariff, including changes calculated from the QCA's approved Revenue Cap.

9.411.4 Amendment of the Reference Tariff

(a) DBCT Management will promptly submit to the QCA for approval in accordance with the QCA Act a draft amending access undertaking to amend the Reference Tariff on the occurrence of any of the following events:

(1) a change in Reference Tonnage;

(2) a change in Non-Reference Tonnage;

(3) commissioning of a Capacity Expansion at the Terminal; or

(4) annually in respect of capital expenditure during the proceeding 12 months which is not expansion capital.

In the case of capital expenditure at the Terminal (either for a Capacity Expansion or for non-expansion capital expenditure), interest during construction will accrue at the WACC rate.

(b) The QCA ~~will may~~ approve ~~an amended~~ a draft amending access undertaking seeking to amend the Reference Tariff in accordance with Section 11.4(a) only if it considers it appropriate having regard to the pricing principles in Part 11 and Schedule C of this Undertaking, and Schedule C.

(c) If DBCT Management, acting reasonably, believes that the Reference Tariff framework set out in Schedule C of this Undertaking no longer satisfies the pricing principles and objectives set out in this Part ~~11.9~~, or could be structured to more effectively achieve them, it will submit a draft amending access undertaking incorporating an amended Reference Tariff framework to the QCA for approval in accordance with the QCA Act.

(d) The QCA ~~will may~~ approve a draft amending access undertaking seeking to amend the Reference Tariff framework in accordance with section 11.4(c) only if it considers it appropriate having regard to the pricing

~~principles in Part 11 and Schedule C of this Undertaking, an amended Reference Tariff framework if the QCA is satisfied that the Reference Tariff is consistent with the pricing principles and objectives established in this Part 119.~~

9.511.5 Operation & Maintenance Charge

- (a) Terminal Operating Costs will be recovered from each Access Holder through the Operation & Maintenance Charge. The Operation & Maintenance Charge for each Access Holder will be calculated as a proportion of Terminal Operating Costs, in accordance with that Access Holder's usage of the Coal Handling Service (measured on a per tonne basis as outlined in Schedule B).
- (b) DBCT Management will notify Access Holders of estimated Terminal Operating Costs annually in advance, recover such costs monthly or on such other regular basis advised by DBCT Management to Access Holders, and advise Access Holders of any applicable adjustment at the end of each Contract Year to recover any shortfall or to reimburse Access Holders in the event of over-recovery by DBCT Management.

9.611.6 Limits on price differentiation

~~10~~DBCT Management will not differentiate Access Charges between Access Seekers or between Access Seekers and Access Holders other than to reflect differences in costs (direct or indirect) or risks to DBCT Management of providing Access. Where DBCT Management is proposing an Access Charge to apply to an Access Seeker that varies from the Reference Tariff, it must demonstrate to the Access Seeker that the divergence from the Reference Tariff is justified. In doing so, DBCT Management must provide sufficient information to adequately explain the reasons for the divergence.

1012 Capacity Expansion

10.112.1 Procedure for determining Terminal Capacity

- (a) DBCT Management will, from time to time, acting reasonably and after taking advice from an independent expert appointed by DBCT Management, determine (in consultation with Access Holders, the Operator and any Access Seekers) the optimal throughput capacity (measured in tonnes of coal per Contract Year) of the Terminal, having regard to:
- (1) DBCT Management's obligations and Access Holders' entitlements under Existing User Agreements and Access Agreements;
 - (2) DBCT Management's requirement to comply with Good Operating and Maintenance Practice;
 - (3) the Terminal Regulations;
 - (4) Demurrage Costs; and
 - (5) any other matter DBCT Management reasonably considers appropriate.

DBCT Management must disclose its decision making process in relation to its determination of Terminal Capacity and provide a copy of any independent expert report that DBCT Management receives in relation to determining Terminal Capacity to Access Seekers, Access Holders and the Operator.

- (b) Where a group of Access Holders whose combined Annual Contract Tonnage for the then current Contract Year is greater than 40% of the Aggregate Reference Tonnage for that Contract Year, dispute the determination of optimal throughput capacity under ~~Section 10.1(a)~~ 12.1 (a) above, those Access Holders may refer the matter for expert determination under the provisions of Section 5.89(c). If a dispute is so referred, the provisions of Section 5.89(c) shall apply to the dispute, except that if the amount determined by the expert as optimal throughput capacity is equal to or within 5% of DBCT Management's determination of the optimal throughput capacity under ~~10.1(a)~~, Section 12.1(a) then the Access Holders initiating the dispute must pay the expert's costs, and all DBCT Management's reasonable costs of participating in the expert determination process.
- (c) The capacity of the Terminal determined under ~~Section 10.1(a)~~ 12.1 (a) (or, if applicable ~~10.1(b)~~ Section 12.1 (b)) above will constitute Terminal Capacity until it is next reassessed.
- (d) Terminal Capacity will be reassessed:
- (1) upon completion of each Capacity Expansion; or

- (2) if a Capacity Expansion has not occurred, at DBCT Management's discretion, but in any event at least once a year, and in any event within 5 years of the last assessment.

12.2 Capacity Expansion ~~c~~Consultation

DBCT Management will hold meetings with Access Holders not less than twice yearly to consult with Access Holders in good faith upon the following issues:

- (a) current Terminal Capacity;
- (b) constraints on current Terminal Capacity including the impact on Demurrage Costs and Access Holder transport costs;
- (c) future contracts/forecasts that may impact on Terminal Capacity;
- (d) significant issues relevant to Terminal Capacity;
- (e) the timing and nature of the next Capacity Expansion and the impact on current capacity requirements, pricing and the Master Plan; and
- (f) proposed changes to the Terminal Regulations.

A copy of the minutes of each of these meetings is to be distributed to all Access Holders, DBCT Holdings and the QCA.

10.212.3 Expansion of Terminal Capacity

~~Subject to Sections 10.4 and 10.5 of this Undertaking,~~ DBCT Management will from time to time during the Term undertake Capacity Expansions at the Terminal as is necessary to:

- (a) accommodate the actual and reasonably anticipated future growth of demand for the use of the Terminal by Access Holders and Access Seekers;
- (b) ensure that the Terminal complies with world's best practice in respect of quality standards for such facilities, environmental best practice and applicable environmental standards;
- (c) comply with Approvals and applicable laws; and
- (d) be consistent with Good Operating and Maintenance Practice.

10.312.4 Accommodation of Capacity

- (a) ~~Subject to Sections 10.4 and 10.5 of this Undertaking but without limiting Section 10.2 of this Undertaking,~~ DBCT Management will use its best endeavours to ensure that:

- (1) as soon as practical after; and
- (2) in any event within 12 months after,

DBCT Management receives from a reasonably creditworthy Access Seeker a bona fide offer to enter into an Access Agreement that, on acceptance, will be unconditional and legally binding to obtain Handling of coal at the Terminal for a period in excess of 5 years, the Terminal is able to Handle that coal without a material and sustained increase in:

- (3) Demurrage Costs; or
- (4) the average net costs (after taking into account any discounts or rebates available to Access Holders) across all Access Holders of transporting coal from the rail loading points at mine sites to the Terminal for Handling, over any period of three consecutive months,

attributable to delays caused ~~solely~~ by the provision of Coal Handling Services in respect of the additional volume. DBCT Management will disclose to all Access Holders, Access Seekers and the QCA its process for so calculating Demurrage Costs and average net costs to Access Holders. This Section ~~10.3~~12.4 does not require DBCT Management to undertake a Capacity Expansion at the Terminal if the outcome required by this Section ~~10.3~~12.4 can be achieved without undertaking a Capacity Expansion.

- (b) Without limiting the circumstances in which DBCT Management may be taken to have received from a reasonably creditworthy Access Seeker a bona fide offer to enter into an Access Agreement, if DBCT Management receives an offer from an Access Seeker to enter into an Access Agreement on the terms of a Standard Access Agreement, or receives an offer from an Access Seeker to enter into an Access Agreement where any departure of the terms of that offer from the terms of a Standard Access Agreement is not likely to materially prejudice DBCT Management, and:
 - (1) the offer, if accepted by DBCT Management, will be legally binding on the Access Seeker; and
 - (2) the Access Seeker has satisfied DBCT Management (acting reasonably) that the Access Seeker has the financial and other relevant resources to enable it to discharge its obligations under the relevant Access Agreement,

then for the purpose of Section ~~10.3(a)~~12.4(a), DBCT Management will be taken to have received from a reasonably creditworthy Access Seeker a bona fide offer to enter into an Access Agreement.

12.5 Capacity Expansion approval process

- (a) If DBCT Management decides to expand the Terminal, it must submit an application to the QCA for approval of the scope of the Capacity Expansion and the Capacity Expansion costs.

DBCT Management's application must detail:

- (1) the scope of the Capacity Expansion to be undertaken and its relationship to the current Master Plan; and
 - (2) the forecasted costs associated with the Capacity Expansion. DBCT Management may submit its own forecasted Capacity Expansion costs or Capacity Expansion costs that result from a tender process as set out in Sections 12(d)(ii) and 12.5(h);
- (b) The QCA will automatically approve the scope of a Capacity Expansion provided that:

- (1) the scope of the Capacity Expansion is consistent with the Master Plan, provided it contains a single detailed expansion path;
 - (2) DBCT Management has secured from Access Seekers contracts for at least 60% of the proposed Terminal Capacity increment; and
 - (3) 60% of existing Access Holders (as determined by Annual Contracted Tonnages), excluding those Access Holders who have provided the firm commitments that necessitated the proposed Capacity Expansion, do not oppose the Capacity Expansion.
- (c) In the event that the conditions in Section 12.5(b) above are not met, the QCA will undertake its own assessment of the scope of the Capacity Expansion, in consultation with DBCT Management, the Access Holders and other stakeholders.
- (d) In applying for approval of forecasted Capacity Expansion costs in accordance with Section 12.5(a)(2), DBCT Management may either:
- (i) apply to the QCA for a pre-approval of Capacity Expansion costs; or
 - (ii) lodge with the QCA, a Tender Approval Request (“TAR”) as set out in Section 12.5(h).
- (e) If DBCT Management applies for a pre-approval of Capacity Expansion costs in accordance with Section 12.5d(i), the QCA may grant pre-approval if it is satisfied the Capacity Expansion costs are prudent and efficient.
- (f) If the QCA pre-approves the Capacity Expansion costs in accordance with Section 12.5d(i), the QCA will give DBCT Management a notice in writing containing:
- (1) the QCA’s pre-approval;
 - (2) the resultant indicative Reference Tariff;
 - (3) a requirement for DBCT Management to submit a draft amending access undertaking in accordance with the QCA Act upon the completion and commissioning of the Capacity Expansion indicating the actual costs of the Capacity Expansion; and
 - (4) a requirement to publish the indicative Reference Tariff and advise relevant Access Holders of the indicative Reference Tariff.
- (g) If the QCA refuses to pre-approve DBCT Management’s Capital Expenditure costs in accordance with Section 12.5d(i), the QCA will give DBCT Management a notice in writing stating:
- (1) the reasons for its refusal; and
 - (2) the quantum of costs the QCA considers to be economic and reasonable.

(h) A TAR must detail the following:

- (1) the proposed Capacity Expansion;
- (2) the process to be followed in conducting the tender process for the Capacity Expansion, including minimum requirements a tenderer must meet (eg no conflict of interest); and
- (3) the selection criteria to be applied in selecting the tenderer.

Upon receipt of a TAR the QCA will:

- (4) publish a request for submissions; and
- (5) make a decision to approve or not to approve the TAR.

(i) If the QCA approves the TAR, DBCT Management may conduct the tender process. Following completion of the tender process, DBCT Management may then submit a Final Approval Request (“FAR”). On receipt of a FAR, the QCA must approve the FAR if the successful tenderer was selected in accordance with the rules/procedures specified in the TAR. Upon approval of the FAR, the QCA will give DBCT Management a notice in writing containing:

- (1) a statement that the QCA will accept the costs submitted by the successful tenderer as prudent and efficient;
- (2) the resultant indicative Reference Tariff;
- (3) a requirement for DBCT Management to submit a draft amending access Undertaking in accordance the QCA Act upon the completion and commissioning of the Capacity Expansion indicating the actual costs of the Capacity Expansion; and
- (4) a requirement to publish the indicative Reference Tariff and advise relevant Access Holders of the indicative Reference Tariff.

(j) If the QCA refuses to approve the TAR, the QCA will give DBCT Management a notice in writing stating:

- (1) the reasons for its refusal;
- (2) the way in which the QCA considers it appropriate to amend the TAR.

10.4 Unreasonable Capacity Expansion

If, having regard to:

- ~~(a) the actual or anticipated long term demand for the services of the Terminal;~~
- ~~(b) the extent to which expansion or development work under the relevant stage of the Master Plan would produce a capacity in excess of that demand;~~
- ~~(c) the cost of such expansion and development;~~
- ~~(d) the extent to which DBCT Management is able to demonstrate on reasonable evidence that those costs in their entirety would be unlikely to be accepted by the QCA as forming part of DBCT~~

~~Management's cost base for the purpose of determining the charges that DBCT Management may charge to Access Holders; and~~

- ~~(e) the long term nature of DBCT Management's investment in the Terminal;~~

~~DBCT Management's compliance with Section 10.2 or 10.3 of this Undertaking would be unreasonable and uneconomic, DBCT Management may submit a written proposal to DBCT Holdings in accordance with Section 10.5(b).~~

~~10.5 Unreasonable and Uneconomic~~

- ~~(a) Without limiting the circumstances in which compliance by DBCT Management with Sections 10.2 or 10.3 of this Undertaking would be unreasonable and uneconomic, DBCT Management will consider compliance with Section 10.2 or 10.3 of this Undertaking to be unreasonable and uneconomic, if:~~

- ~~(1) DBCT Management has in good faith, sought a formal decision by the QCA that the costs of the Capacity Expansion will be accepted by the QCA as forming part of DBCT Management's cost base in current and future regulatory periods for the purpose of determining the charges that DBCT Management may charge to Access Holders; and~~
- ~~(2) despite the reasonable endeavours of DBCT Management, the QCA has declined to approve the addition of those costs to the cost base in accordance with (1) above, or has declined to make any decision; and~~
- ~~(3) DBCT Management has not agreed an alternative arrangement for funding the Capacity Expansion with an Access Seeker such that the Capacity Expansion has become reasonable and commercially justifiable without increasing Access Charges paid by Access Holders.~~

- ~~(b) If DBCT Management's compliance with Sections 10.2 or 10.3 of this Undertaking would be unreasonable and uneconomic, DBCT Management may submit to DBCT Holdings a written proposal that:~~

- ~~(1) provides details of the above matters; and~~
- ~~(2) proposes a modification to or a temporary delay in the expansion and development that would otherwise be required to be undertaken under this Part 10, on terms and conditions that are not inconsistent with the objectives in clause 2.2 of the Port Services Agreement.~~

- ~~(c) DBCT Management will consult with DBCT Holdings, the State and Access Holders in good faith in respect of the proposal. DBCT Holdings will not unreasonably withhold or delay its agreement to such modification or delay.~~

10.612.6 Land for **Capacity Expansion**

If DBCT Management, despite its best endeavours is unable to procure a relevant tenure to or interest in land, or an approval in respect of the occupation or operation of the Terminal, that is required for DBCT Management to lawfully undertake any construction or development otherwise required by a Capacity Expansion under this Part ~~1012~~, the obligations of DBCT Management under this Part ~~1012~~ will be suspended to the extent affected by that inability while that inability continues. ~~Subject to Sections 10.4 and 10.5~~, DBCT Management will continue to use its best endeavours to procure that approval (including amending, resubmitting or substituting the application and amending the relevant design or work program for the construction or development to procure the approval), interest or tenure.

10.712.7 Master Plan

~~Subject to Sections 10.4 to 10.6 inclusive, i~~If DBCT Management is required to undertake a Capacity Expansion of the Terminal under this Part ~~1012~~, it will do so by undertaking the next applicable stage or stages of development contemplated by the Master Plan that are necessary to at least provide the necessary relevant additional Handling capacity.

1113 Terms and conditions of Access

11.113.1 Access Agreements

- (a) The granting of Access will be underpinned by an Access Agreement that will be developed and finalised during the negotiation process under Part 5 of this Undertaking.
- (b) The parties to the Access Agreement will be DBCT Management and the Access Holder.
- (c) The Access Agreement must, unless otherwise agreed between DBCT Management and the Access Seeker, be consistent with:
 - (1) where a Standard Access Agreement has been developed and approved by the QCA under this **PartSection 13.2**, the terms of that Standard Access Agreement; and
 - (2) where a Standard Access Agreement has not been developed and approved by the QCA under this **PartSection 13.2**, the principles outlined in the Standard Access Agreement summary that is contained in Schedule B of this Undertaking, recognising that Schedule B does not provide an exhaustive list of the issues that may be included in an Access Agreement.
- (d) For services of a type for which a Standard Access Agreement has not been developed and approved by the QCA (for example, for a contract term of less than 10 years or without a take or pay charge), then the principles set out in Schedule B of this Undertaking and the terms of any Standard Access Agreement will provide guidance as to the terms and conditions that are to be included in the relevant Access Agreement, it

being acknowledged that, in these circumstances, varied terms and conditions may then be required.

- ~~(d)~~(e) Once an Access Seeker has notified DBCT Management that it is satisfied with the terms and conditions of the Access Agreement as drafted, DBCT Management will, as soon as reasonably practicable, provide a final Access Agreement to the Access Seeker for execution.
- ~~(e)~~(f) The parties will use reasonable efforts to duly execute the final Access Agreement as soon as practicable after negotiations are finalised.

11.213.2 Development of Standard Access Agreement

- (a) DBCT Management will prepare and submit to the QCA for its approval a draft Standard Access Agreement within the first 3 months following the date of approval of this Undertaking.
- (b) The QCA must consider the draft Standard Access Agreement given to it under ~~s~~Section ~~11~~13.2(a) and either approve, or refuse to approve the draft Standard Access Agreement within 45 Business Days, or such longer period as advised in writing to DBCT Management by the QCA.
- (c) If the QCA refuses to approve the draft Standard Access Agreement in accordance with Section ~~11~~13.2(b), it must give DBCT Management a written notice stating the reasons for the refusal and asking DBCT Management to, within 45 Business Days, amend the draft Standard Access Agreement in the way the QCA considers appropriate and to submit this to the QCA.
- (d) If DBCT Management amends the draft Standard Access Agreement and submits it to the QCA in accordance with the notice provided to it pursuant to Section ~~11~~13.2(c), the QCA will approve the draft Standard Access Agreement.
- (e) Once a Standard Access Agreement has been developed and approved by the QCA in accordance with this Section ~~11~~13.2, it will be taken to form part of this Undertaking.

1214 Whole of supply chain efficiency

- (a) DBCT Management will, on a best endeavours basis, engage with other stakeholders to develop and implement mechanisms to improve the overall efficiency of the Goonyella export coal supply chain.
- ~~(b)DBCT Management believes that a staged approach is the most appropriate way to develop a sensible, pragmatic and non-disruptive evolution of the efficient pricing signals inherent in the Reference Tariff set out in Schedule C towards a whole of supply chain efficiency program.~~
- ~~(c)DBCT Management contemplates 3 stages over the Term, as illustrated in Schedule H:
 - ~~(1)the pricing signals aimed at promoting efficient terminal utilisation which operate at the Throughput Rebate level (“Stage 1”);~~~~

~~(2)the pricing signals aimed at promoting efficient terminal utilisation which operate at the TIC and the Operation & Maintenance Charge level (“Stage 2”); and~~

~~(3)the pricing signals reflective of amended business, mining and transport practices which drive changed behaviour across the whole of the Goonyella export coal supply chain (“Stage 3”).~~

~~(d)(b)~~ DBCT Management foreshadows the establishment of a co-ordination body (i.e. the Goonyella Supply Chain Committee) to facilitate the organisation, data and information collection and collation, funding and reporting of the more broadly based initiatives in relation to improving the overall efficiency of the Goonyella Supply Chain, contemplated in Stages 2 and 3. ~~The Goonyella Supply Chain Committee~~ This co-ordination body will invite representation from DBCT Management, the Operator, Access Holders, relevant rail operators and the rail network manager.

~~(e)In respect of Stage 3, if DBCT Management and Access Holders are able to negotiate changes to existing arrangements that offer material savings in whole of coal chain costs, including an equitable sharing with DBCT Management of the benefits of those savings, DBCT Management will submit a draft amending access undertaking which encapsulates the proposed changes in arrangements to the QCA for approval.~~

~~(f)(c)~~ DBCT Management will meet with the QCA on an annual basis to report progress on the various initiatives agreed by the Goonyella Supply Chain Committee ~~co-ordination committee established in accordance with Section 14(b).~~

~~(g)~~ Nothing in this Part 142 will oblige DBCT Management to enter into any new arrangements with Access Holders not already provided for in this Undertaking.

15 Transitional arrangements

If, prior to the Commencement Date, an Access Seeker has been provided with an Indicative Access Proposal, the Access Seeker may elect, by notice in writing to DBCT Management, to proceed with its negotiations for Access in accordance with this Undertaking.

To remove any doubt, an Access Seeker that has been provided with an Indicative Access Proposal prior to the Commencement Date does not have to proceed with its negotiations for Access in accordance with this Undertaking, and may continue/commence negotiations outside the framework of this Undertaking.

Schedule A – Information required as part of an Access Application

Information to the satisfaction of DBCT Management, acting reasonably, including:

- (a) Access Seeker's name and contact details
- (b) Stockpiling requirements
- (c) Blending requirements
- (d) Number of products
- (e) Required term of Access Agreement
- (f) Date of commencement of delivery of coal to the Terminal
- (g) Description of each type of coal (including coal qualities such as moisture content, dust extinction moisture level, "stickiness", and contamination levels and any special requirements the Access Seeker has in relation to its coal, including any special equipment or particular Hhandling processes)
- (h) Net tonnes of coal per annum for each Contract Year
- (i) Origin of coal (e.g. mine origin)
- (j) The Access Seeker's contracted annual raiiling capacity, (where known, and if not known, a best estimate) subject to the consent of the contractor providing rail haulage services to the Access Seeker (which the Access Seeker will endeavour to obtain)
- (k) Proposed number of trains and wagons per train for each week from the proposed date of commencement of the delivery of coal to the Terminal to the end of the first full Contract Year
- (l) Proposed gross tonnes per wagon
- (m) To the extent possible, the number, type and respective gross and deadweight tonnages of vessels, on a month by month basis, expected to ship the Access Seeker's coal from the proposed date of commencement of the delivery of coal to the Terminal to the end of the first full Contract Year, including details of the numbers of single and part vessel consignments
- (n) Evidence of the solvency and creditworthiness of the Access Seeker and its guarantor
- (o) Requirements for trial shipments (if any)
- (p) any other information reasonably required by DBCT Management or the Operator

Schedule B – Principles for inclusion in Standard Access Agreement

1 Term & termination

- Each agreement will set out its commencement and termination dates.
- The termination date will be no less than 10 years after the commencement date.
- The agreement will provide the grounds on which DBCT Management may suspend, and on which DBCT Management and/or an Access Holder may terminate the agreement.
- An Access Holder may terminate the agreement if a financial default is not remedied within 30 days, or a material non-financial default is not remedied within 60 days.
- DBCT Management must not terminate the agreement unless it has first exercised its right to suspend the agreement.
- DBCT Management may suspend the agreement for a minimum period of 14 days if a financial default is not remedied within 30 days, or a material non-financial default is not remedied within 60 days. During the suspension period, the Access Holder's obligations based on its Annual Contract Tonnage will be unchanged, but DBCT Management's obligation to Handle the amounts will be reduced proportionately. If the default has not been remedied at the end of the suspension period then DBCT Management may immediately terminate the agreement.
- Disputes regarding defaults which are not based on a failure to pay money must be ~~settled~~ referred for resolution through the dispute resolution process to be provided ~~by~~ for in the agreement.
- ~~□ The agreement will allow for the Access Holder's right to have its coal Handled to be suspended if the Access Holder is in default of a financial obligation which has not been remedied for 14 days. In this event, the Access Holder's obligations based on its Annual Contract Tonnage will be unchanged, but DBCT Management's obligations to Handle the amounts will be reduced proportionately.~~
- DBCT Management will not be entitled to suspend or terminate for financial default if the alleged default arises out of a dispute as to an amount owing, and the Access Holder has paid all amounts that are not being disputed, and the dispute resolution process under the agreement is being followed in respect of the disputed matter.

2 Shipping of coal

- The agreement will specify the Access Holder's Annual Contract Tonnage and Reference Tonnage in each Contract Year whereby the Reference

Tonnage must be no less than 80% of Annual Contract Tonnage in any one Contract Year.

- The agreement will entitle Access Holders to have their Annual Contract Tonnage Handled in the relevant Contract Year. The Access Holder must use all reasonable endeavours to offer their Annual Contract Tonnage for Handling in the relevant Contract Year and to ship their Annual Contract Tonnage at an even rate throughout the Contract Year.
- In return for payment of the required fees and charges to DBCT Management, ~~Access Holders will be entitled to receive~~ DBCT Management will provide the Coal Handling Service within the Terminal. Access Holders will have no right of possession to any part of the Terminal nor will they have rights to dedicated stockpile. Coal is to be delivered to the Terminal by rail.
- Subject to all relevant rules and procedures set out in the Terminal Regulations, the agreement will provide the Access Holder with the right to have its coal transferred from the train unloading facility at the Terminal to a stockpile area that is assigned to the Access Holder by DBCT Management or the Operator. In assigning stockpiles, DBCT Management will ensure that it and the Operator act fairly and reasonably and use all reasonable endeavours to ensure that the Access Holder and all other stockpile users are treated equally.

~~Subject to:~~

~~(e) the Terminal Regulations;~~

~~(f) contractual obligations to Access Holders under Existing User Agreements or Access Agreements;~~

~~(g) the requirements of other Access Holders; and~~

~~(h) the absolute discretion of the Operator;~~

~~the agreement will allow, at the request of the Access Holder, the transfer of the Access Holder's coal from the train unloading facility at the Terminal to the stockpile area requested by the Access Holder and the stockpile of the Access Holder's coal in that area~~

~~:~~

- The agreement will set out the obligations of DBCT Management in the provision and operation of the Terminal. Primarily, DBCT Management must ~~make every reasonable effort to~~ ensure the Terminal is available and operating so as to enable the Contracted Tonnage to be Handled.
- The agreement will state that Access is provided subject to the Terminal Regulations, and that Access Holders must comply with the Terminal Regulations as in force from time to time. The Access Holder must advise both DBCT Management and the Operator of any issues relating to the Handling of its coal at the Terminal.
- DBCT Management will comply with, and will use its best endeavours to ensure the Operator complies with, the Terminal Regulations in force from time to time. The obligation imposed on DBCT Management to ensure that the Operator complies with the Terminal Regulations is subject to the

Operations & Maintenance Contract allowing DBCT Management to enforce this obligation against the Operator.³

- DBCT Management must not implement or consent to a proposed amendment to the Terminal Regulations without reasonable consultation with Access Holders. DBCT Management will only give its consent to an amendment to the Terminal Regulations if it reasonably considers that the Terminal Regulations, as a whole, will operate equitably among Access Holders and Access Seekers, having regard to (amongst other things) the Annual Contract Tonnages of the Access Holders.
- If, following consultation about a proposed amendment to the Terminal Regulations, an Access Holder wishes to notify a dispute about the proposed amendment, it may do so in accordance with the dispute resolution provisions of the agreement. DBCT Management must not implement the proposed change to the Terminal Regulations until the outcome of any dispute has been determined. However, DBCT Management may proceed to implement, on an interim basis, pending the resolution of the dispute, an amendment to the Terminal Regulations which is reasonably necessary to deal with an emergency or force majeure event. The interim change to the Terminal Regulations will only continue until the resolution of any dispute or the cessation of the emergency or force majeure event, whichever is earlier.
- DBCT Management must notify Access Holders of any amendments to the Terminal Regulations and provide Access Holders with a copy of the revised Terminal Regulations.

3 Payment of charges and rebates

3.1 Access Holders

- The agreement will set out: the Capital Charge to apply, ~~comprising a~~(the Terminal Infrastructure Charge (TIC)); ~~take or pay liabilities; additional charges for shipping Excess Tonnage; and obligations with respect to paying/receiving amounts to adjust for any under(over) recovery of~~ DBCT Management's Revenue Cap. These charges will be, ~~which will include a fixed component, and a Throughput Rebate.~~ Access Holders ~~must pay the TIC~~ calculated in a manner consistent with Schedule C.
- The agreement will also set out the Operation & Maintenance Charge payable by the Access Holder and calculated in accordance with Part 4 below.
- The agreement will set out the terms for payment of Access Charges, including a provision for the accrual or payment of interest on any outstanding "unders or overs" balances. Interest is to be paid/charged at DBCT Management's WACC.

³ See also the obligation imposed in Section 1.7 of this Undertaking.

3.2 DBCT Management

- ~~3.1• DBCT Management will pay a Throughput Rebate to all Access Holders, calculated in a manner consistent with Schedule C.~~

4 Operation & Maintenance Charges

- Operation & Maintenance Charges will comprise:
 - (i) a fixed handling charge to be paid by monthly instalments in advance. It will be calculated on the Operator's total fixed operating costs, other expenditure incurred by the Operator for the operation and maintenance of the Terminal, and minor capital expenditure for the Terminal allocated across Access Holders according to Annual Contract Tonnage;
 - (ii) a variable handling charge per tonne Handled. The formula for calculating the variable charges is based on the total number of tonnes Handled at the Terminal, each Access Holder's proportion of the tonnes thereof and the Operator's total operating costs less the total fixed operating costs referred to in Section 4(i) hereof; and
 - (iii) reasonable charges for additional miscellaneous services (if any) provided at the Terminal for which handling costs are not already recovered under the fixed and variable handling charges calculated in accordance with sections 4.1(i) and (ii) above and subject to:
 - agreement between the Access Holder and DBCT Management; and
 - the total of the Operation and Maintenance Charges not exceeding Terminal Operating Costs and the Operator's margin.
 - (iv) reasonable additional handling charges, subject to agreement between the Access Holder and DBCT Management, if the nature of the Access Holder's coal (or any contaminants in it) or if the Access Holder's requirements for in respect of its Handling results in material additional costs or delays (compared with other coal shipped through the Terminal). Such additional handling costs shall not be included in the calculation of the costs referred to in Sections 4.1 (i) and (ii) above.
- Fixed and variable Operation & Maintenance Charges will initially be based on estimates of the relevant costs and tonnage Handled, with regular reconciliation to actuals and adjustments paid by or to the Access Holder as appropriate.

5 Review of charges

- The agreement will provide for amendment of Access Charges in line with changes in approved Reference Tariffs.
- An amendment to Access Charges may be retrospective to apply from the date of commencement of the revised Reference Tariff.

6 Recording of tonnage

- The agreement will set out the obligations of the Access Holder in relation to the recording of coal tonnage Handled.
- Unless an Access Holder and DBCT Management otherwise agree to an alternative method of determining the weight of shipments, each Access Holder must commission an independent surveyor to issue a certificate of weight in respect of each shipment of the Access Holder's cCoal loaded on a vessel at the Terminal. They must also promptly send the cargo manifest, including a statement of the certified weight of the shipment to DBCT Management (or as directed by DBCT Management) on completion of loading, and ensure a notice is attached to the cargo manifest stating the quantity of each product making up the shipment. The information will be used by DBCT Management to calculate the TIC and other relevant charges.
- ~~• If it can be demonstrated that an account previously sent to or paid by an Access Holder was incorrectly calculated, or based on incorrect information, so that a party was disadvantaged, the agreement will provide for an adjustment.~~
- The agreement will provide that, where there is a bona fide disputed account, Access Holders are able to have access to the information used in the calculation of Access Charges, including cost and throughput details; and
- If an Access Holder has a bona-fide dispute regarding an account, it may notify DBCT Management of this. The agreement will provide a fair and reasonable process for resolution of bona-fide disputes.

7 Changes to Annual Contract Tonnage and Reference Tonnage

- An Access Holder's Reference Tonnage may only be reduced under the agreement in the following ways:
 - (i) If the Access Holder has arranged for the transfer or substitution of Reference Tonnage to or from another Access Holder or to an Access Seeker and the Access Holder or Access Seeker is acceptable to DBCT Management, acting reasonably, and is prepared to enter into a binding agreement in relation to the transferred Reference Tonnage on terms and conditions acceptable to DBCT Management, acting reasonably; or

- (ii) On giving DBCT Management five years' notice of the extent and period of the reduction required or as otherwise agreed with DBCT Management.
- An Access Holder's Non-Reference Tonnage may only be reduced under the agreement by giving DBCT Management one years' notice of the extent and period of the change required or as otherwise agreed with DBCT Management.
- ~~An Access Holder may seek a sustained-to~~ increase in its Reference Tonnage or Annual Contract Tonnage at any time but will be treated as an Access Seeker and the provisions of the ~~Access~~ Undertaking will apply.
- The agreement will provide for the Handling of coal in excess of the Annual Contract Tonnage from time to time. An Access Holder may do this if it does not cause additional expense or unreasonable interference to another Access Holder, and it pays the additional TIC and Operation & Maintenance Charges in respect of each tonne so Handled.
- If in the reasonable opinion of DBCT Management, an Access Holder is not using, or is unlikely to use, its Annual Contract Tonnage over a sustained period, the agreement will allow DBCT Management to reduce the Access Holder's Annual Contract Tonnage, ~~subject to the Access Holder being able to satisfactorily demonstrate a case for retention of its Access Contract Tonnage.~~ This right to reduce the Access Holder's Annual Contract Tonnage is subject to:
 - (i) a requirement that there must be a sustained underutilisation by an Access Holder for any reason other than a force majeure event or failure of DBCT Management to make Access rights available before this resumption right may be triggered;
 - (ii) DBCT Management must be able to demonstrate that it has a reasonable expectation of a sustained alternative demand for the unutilised Access rights;
 - (iii) the Access Holder has a right to demonstrate a sustained requirement for the Access rights subject to resumption; and
 - (iv) the Access Holder is able to notify a dispute in accordance with the dispute resolution provisions of the agreement if it does not agree that the above triggers have been met or if it does not agree with DBCT Management's assessment.

8 Set-off

- Each party will have a power under the agreement to set-off any amount under the agreement which is due and payable to the other party. The amount set-off will be deemed to have been paid.

9 Remedies

- The agreement will establish the liabilities of the parties with respect to delays/failure to provide Access;
- The agreement will set out the obligations and liabilities of the parties in the case of a force majeure event;
- The agreement will provide for insurances to be effected by the parties to appropriately provide for the relevant insurable risks; and
- The agreement will 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 wrong act or omission; and liability arising from inaccurate scheduling information.

9.1 Access Holders

~~9.1 The Access Holders' remedies for a delay on the part of DBCT Management will be provided under the agreement. An Access Holder can recover costs, losses and damages to the extent of, but only to the extent of:~~

- ~~(i) any amounts DBCT Management receives from its insurers; plus~~
- ~~(ii) any amounts DBCT Management recovers from the Operator or any third persons (or their insurers) for negligence or breach; less~~
- ~~(iii) any costs incurred by DBCT Management in pursuing the above recoveries.~~

~~In the event that DBCT Management is solely or primarily (i.e. at least 95%) responsible for a delay, then an Access Holder can also recover (and is limited to recovering) that part of any claim against DBCT Management which is for a recovery of an amount equivalent to the fixed component of the TIC which would not have been payable had the delay not occurred.~~

9.2 DBCT Management

~~9.3 The agreement will provide that any delay on the part of the Access Holder to offer coal for Handling in accordance with the agreement, irrespective of cause, gives DBCT Management a right to charge for the duration of the delay:~~

- ~~(i) any relevant fixed component of the TIC; and~~
- ~~(ii) any fixed Operation & Maintenance Charges.~~

9.4 General

~~9.5 'Delay' will be interpreted under the agreement as unscheduled or abnormal stoppage or delay in loading or unloading an Access Holder's coal at the Terminal resulting in a delay of more than 24 hours but will not include any delays required to ensure Good Operating and Maintenance Practice at the Terminal.~~

~~9.6 The agreement will also provide for a system of delay notices, which may be issued by either party in the event of a delay. Notices for each quarter will be reviewed by DBCT Management, the Access Holder and the Operator at the conclusion of the quarter. The review will address the extent to which delays occurred, and any need for redress.~~

10 Dispute resolution

- A dispute resolution procedure will be provided for in the agreement, involving compulsory negotiation and conciliation, followed by optional arbitration. A dispute arising out of, or in connection with an Access Holder ~~a~~ agreement should be dealt with either party giving notice of the dispute to the other providing details. Court proceedings or arbitration are not to be commenced until the negotiation and conciliation procedure has been complied with.

11 Assignment

11.1 Access Holders

- The agreement will provide for an Access Holder to assign all or part of rights and entitlements under the agreement (including all or part of its Annual Contract Tonnage) permanently or temporarily with the prior written consent of DBCT Management, which must not be unreasonably withheld. The Access Holder may also, with DBCT Management's prior written consent, which must not be unreasonably withheld, permit a third party to offer coal for Handling through the Terminal using an Access Holder's Annual Contract Tonnage entitlement. Access Holders are released from obligations under the agreement on assignment (but not liabilities that may have arisen before assignment).

11.2 DBCT Management

- The agreement will provide that, in consultation with the Access Holders, DBCT Management may assign all or any part of its benefits under the agreement to any person who is responsible, and has the expertise and financial capacity to operate and maintain the Terminal and comply with DBCT Management's obligations.

12 Guarantees

- The agreement will provide that, in appropriate circumstances and from time to time, either party (being "the Requesting Party") may, based on its reasonable assessment of the creditworthiness of the other party, require the other party, if required by DBCT Management, then, within a time frame specified by in the agreement, the Access Holder must to provide guarantees in a form that is acceptable to the Requesting Party a guarantee or other form of security of its obligations owed under the

agreement to the Requesting Party. The Requesting Party must act reasonably and in good faith in this regard. ~~which secure the obligations of the Access Holder to DBCT Management.~~ Any guarantee is to be from ~~an entity~~ies ~~which are~~that is reputable and of good financial standing as ~~may reasonably be determined by the Requesting Party.~~ ~~determined by DBCT Management,~~ acting reasonably.

- If the party that has provided a security reasonably considers that its financial circumstances have changed, so that a guarantee or other security should no longer be required, then, that party may request that there be a review of the need for the security, and the Requesting Party must then undertake such a review, having regard to the creditworthiness of the other party. In conducting the review, the Requesting Party must act reasonably and in good faith. The agreement will provide that the outcome of such a review is to be subject to the dispute resolution procedures set out in the agreement.

13 Warranties

- DBCT Management will warrant, under the agreement, that subject to normal repairs and maintenance, each Terminal component will be maintained to ~~be available to operate to at least its rated design capacity (as set out in the agreement);~~ at least its rated design capacity, except to the extent it is cost-efficient not to and overall Terminal Capacity is not materially adversely affected.

14 Expansion of Terminal

- The agreement will provide that any decision of DBCT Management to expand the Terminal must be preceded by consultation with the Access Holders as to the reasons, extent, timing and estimated cost of any proposed Capacity eExpansion.
- The agreement will provide that DBCT Management must use all reasonable endeavours to carry out expansion with minimal interference to the Handling of the Access Holder's coal.

15 Access Holder Committee

- DBCT Management and the Access Holder will agree, pursuant to the ~~Aeeess-a~~Agreement, to participate in a committee consisting of one representative of each of DBCT Management, the Operator, and each Access Holder – to be known as the Access Holder Committee.
- The purpose of the Committee will be to provide a forum for consultation between all participants on matters relating to the operation and performance of the Terminal (as per Part 12 (Capacity Expansion) of the Undertaking), any proposed enhancements for the Terminal (including any ~~expansions of Terminal~~Capacity Expansions), and any proposed changes to the Terminal Regulations.

- The agreement will set out the formal arrangements for the running of the Committee including meetings (which shall be held no less frequently than semi-annually) and appointment of a Chairman, and will provide for the distribution of detailed briefings, agendas for and minutes of the meetings to Access Holders.

Schedule C – Revenue Cap and Pricing Structure ~~Reference Tariff~~

C.1 Revenue Cap

The Revenue Cap will apply to Reference Tonnages only. As the Annual Revenue Requirement (ARR) will be assessed on all relevant terminal costs, only a proportion of these total costs are attributable to Reference Tonnages. Consequently, the Revenue Cap for reference tonnage will be determined as:

$$\text{Revenue Cap} = \text{ARR} \times \frac{T^R}{T^T}$$

Where:

ARR = Annual Revenue Requirement.

T^R = Aggregate Reference Tonnage in the Contract Year.

T^T = Total Contracted Tonnage in the Contract Year (ie, Reference Tonnage plus Non-Reference Tonnage).

C.2 Terminal Infrastructure Charge

The Terminal Infrastructure Charge (TIC) rate to be applied to tonnes Handled under the Reference Terms will be calculated in accordance with the following formula:

$$\text{TIC} = \frac{\text{Revenue Cap}}{T^R}$$

C.3 Take or Pay/Excess Tonnage

The Terminal Infrastructure Charge in a Contract Year for an Access Holder's Reference Tonnages will be calculated at year end in accordance with the following formula which, if applicable, accounts for any take or pay charges or, conversely, additional charges for Excess Tonnage:

$$TIC_{User,i} = \frac{\left[\begin{array}{l} TIC \times T_{User,i} + \\ TIC \times 0.9 \times \text{MAX} \left[\left((T_{User,i}^R \times 0.9) - T_{User,i} \right), 0 \right] + \\ TIC \times 0.25 \times \text{MAX} \left[\left(T_{User,i} - (T_{User,i}^R \times 1.1) \right), 0 \right] + \\ TIC \times 0.25 \times \text{MAX} \left[\left(T_{User,i} - (T_{User,i}^R \times 1.25) \right), 0 \right] \end{array} \right]}{T_{User,i}}$$

Where:

TIC_{User,i} = An Access Holder's –actual TIC rate after all take or pay or additional charges for Excess Tonnage are considered.

T_{User,i} = The actual Reference Tonnage throughput of an Access Holder in the Contract Year.

T_{User,i}^R = The contracted level of Reference Tonnage of an Access Holder in the Contract Year.

For each Reference Tonnage Access Holder, if:

$$TIC_{User,i} > TIC$$

the Reference Tonnage Access Holder will be required to make up the difference between their TIC_{User,i} and the TIC for each Reference Tonnage of actual throughput. Differences between Reference Tonnage Access Holders TIC_{User,i} and the TIC will arise when Reference Tonnage Access Holders throughput is at a level which triggers the take or pay mechanism or additional charges for Excess Tonnage. The additional revenues required to be paid by each Reference Tonnage Access Holder to balance their account will be calculated using the following formula:

$$\text{Take or Pay/Excess Throughput Balancing Adjustment} = (TIC_{User,i} - TIC) \times T_{User,i}$$

Only after all take or pay payments/Excess Tonnage charges have been settled can DBCT Management's position in relation to the Revenue Cap be determined.

C.43 Unders/Overs Adjustment

An under/over recovery of revenue at the end of the Contract Year is to be collected/distributed from/to Reference Tonnage Access Holders and will be calculated in accordance with the following formula:

Under Recovery =

$$\text{Max} \left[\left(\text{Rev Cap} - \text{Potential revenue from defaulting Reference Tonnages} \right) - \left(\sum_{i=1}^n \text{TIC}_{\text{User},i} \times T_{\text{User},i} \right), 0 \right]$$

To the extent that the application of individual users' TICs generate a shortfall in the recovery of the Revenue Cap, ie,

$$\sum_{i=1}^n \text{TIC}_{\text{User},i} \times T_{\text{User},i} < \left(\text{Rev Cap} - \text{Potential revenue from defaulting Reference Tonnages} \right)$$

the shortfall is to be recovered from all Reference Tonnage Access Holders in proportion to their contracted throughput. The amount to be recovered from each Access Holder will be calculated in accordance with the following formula:

$$\text{Recoverable Amount}_i = \frac{T_{\text{User},i}^R}{\sum_{i=1}^n T_{\text{User},i}^R} \times \text{Under Recovery}$$

Where:

Recoverable Amount_i = The amount to be recovered from a user in order to increase total revenue to align with the Revenue Cap.

Over Recovery =

$$\text{Max} \left[\left(\sum_{i=1}^n \text{TIC}_{\text{User},i} \times T_{\text{User},i} \right) - \left(\text{Rev Cap} - \text{Potential revenue from defaulting Reference Tonnages} \right), 0 \right]$$

To the extent that the application of individual Access Holders' TICs generate an over recovery of the Revenue Cap, ie,

$$\sum_{i=1}^n \text{TIC}_{\text{User},i} \times T_{\text{User},i} > \left(\text{Rev Cap} - \text{Potential revenue from defaulting Reference Tonnages} \right)$$

DBCT Management will initially retain a portion of the over recovered revenue up to a maximum of 2% of the Revenue Cap. DBCT Management is required to lodge an application with the QCA, in accordance with Part 11 of this

Undertaking, regarding the treatment of the retained portion of the over-. If the QCA approves DBCT Management’s application, the retained portion of the over recovery will not be distributed amongst Reference Tonnage Access Holders.

For the unretained portion of the over recovery,-, this is to be returned to Reference Tonnage Access Holders in proportion to their contracted throughput. If the QCA rejects DBCT Management’s application regarding the retained portion, this retained portion is to be returned to Reference Tonnage Access Holders in proportion to their contracted throughput.

The amount to be distributed to each Access Holder will be calculated in accordance with the following formula:

$$\text{Allocation Amount}_i = \frac{T_{\text{User},i}^R}{\sum_{i=1}^n T_{\text{User},i}^R} \times \text{Portion of Over Recovery to be distributed}$$

Where:

Recoverable Amount_t = The amount to be recovered from a user in order to increase total revenue to align with the Revenue Cap.

Allocation Amount_t = The amount to be distributed to an Access Holder in order to decrease revenue to align with the Revenue Cap.

Interest is to be applied on any end of year unders/overs balance calculated on half of the end of year balance at DBCT Management’s WACC of 9.02%.

C.5 Roll Forward of ARR and Revenue Cap Determination

From year 2 of the regulatory period, the ARR will be rolled forward by adjusting the revenue cap from year 1 of the regulatory period by the change in the CPI since year 1 of the regulatory period using CPI outcomes. That is:

$$\text{ARR}_t = \text{ARR}_1 \times C$$

Where ‘C’ is the adjustment for actual inflation, given by:

$$C = \frac{B}{A}$$

Where:

A = 144.1 (being the CPI figure for the quarter ending 31 March 2004 for the category of ‘weighted average of eight capital cities’ from the ABS publication 6401.0 Consumer Price Index, Australia)

B = the CPI (weighted average of eight capital cities) for the quarter ending 31 March in the relevant year

As noted in C.1 above, the base Revenue Cap will be calculated using the following formula:

$$\text{Revenue Cap}_t = \text{ARR}_t \times \frac{T_t^R}{T_t^T}$$

In addition to this base Revenue Cap calculation, adjustments for all previous QCA endorsed permanent increases in the Revenue Cap will need to be made. In the event that the QCA endorses an over recovery of the Revenue Cap in the previous year being retained by DBCT Management, the following adjustment will be required to the Revenue Cap for the current year:

Over Recovery Adjustment* =

$$\text{Min} \left(\left(\sum_{i=1}^n \text{TIC}_{\text{User},i} \times T_{\text{User},i} \right) - (\text{Rev Cap} - \text{Potential revenue from defaulting Reference Tonnages}), \right. \\ \left. (\text{Rev Cap} \times 0.02) \right)$$

* All values are from the previous year, ie, year_{t-1}.

Once the ARR has been rolled forward for CPI, the base Revenue Cap has been calculated, and the revenue cap has been adjusted for any retained over recovery in previous years, the TIC value can be calculated. As outlined in C.2 above, the TIC will be determined by dividing the fully adjusted Revenue Cap by the contracted Reference Tonnage for that year.

C.1 — Reference Tariff

~~The Reference Tariff in a Contract Year for an Access Holder who enters into an Access Agreement on Reference Terms (in this Schedule C, a “New Access Holder”) will comprise two components, a Terminal Infrastructure Charge and a Throughput Rebate, i.e.~~

$$\text{RT}_{\text{User}} = \text{TIC}_{\text{User}} - \text{TR}_{\text{User}} \dots \dots \dots (1)$$

Where:

RT_{User} = Reference Tariff for the New Access Holder in a Contract Year (in \$ per annum)

TIC_{User} = Terminal Infrastructure Charge for the New Access Holder in a Contract Year (in \$ per annum)

TR_{User} = Throughput Rebate for the New Access Holder in a Contract Year (in \$ per annum)

C.2 Terminal Infrastructure Charge

The Terminal Infrastructure Charge in a Contract Year for a New Access Holder will be calculated in accordance with the following formula:

$$TIC_{User} = \frac{TIC \times T_{User} + TIC \times 0.3 \times \text{MAX}[(T_{User} - T_{User}^R), 0] + TIC \times 0.5 \times \text{MAX}[(T_{User}^R - T_{User}), 0]}{1} \dots\dots\dots (2)$$

The TIC rate to be applied to tonnes Handled under the Reference Terms will be calculated in accordance with the following formula:

$$TIC = \frac{ARR}{(T^{\theta} + 0.5 \times (T^R - T^{\theta}))} \dots\dots\dots (3)$$

Where:

TIC = The Terminal Infrastructure Charge rate applied to tonnes Handled under the Reference Terms in the Contract Year (in \$/tonne)

T_{User} = Actual tonnage of the New Access Holder Handled at the Terminal in the Contract Year

T_{User}^R = Reference Tonnage of the New Access Holder in the Contract Year

ARR = DBCT Management’s Annual Revenue Requirement in the Contract Year

T^{θ} = Throughput Rebate Threshold Tonnage in the Contract Year

T^R = Aggregate Reference Tonnage in the Contract Year

C.3 Throughput Rebate Pool

The Throughput Rebate Pool is the amount to be distributed proportionately to New Access Holders through the Throughput Rebate component of the Reference Tariff.

The Throughput Rebate Pool (TR_{Pool}) has three components:

15 Rebate for the Reference Tonnage Handled at the Terminal in the Contract Year exceeding the Throughput Rebate Tonnage Threshold (TR_A);

16 Rebate for Actual Tonnage Handled at the Terminal in the Contract Year exceeding the Reference Tonnage (TR_B); and

17 Additional revenue above the TIC earned from Excess Tonnage (TR_C).

That is,

$$TR_{Pool} = \text{MAX}[TR_A + TR_B + TR_C, 0] \dots\dots\dots (4)$$

$$TR_A = 0.5 \times TIC \times (\text{MIN}[T^R, T^A] - T^{\theta}) \dots\dots\dots (5)$$

$$TR_B = \frac{0.75 \times TIC \times \text{MAX}[\text{MIN}[T_{Cap}, T^A] - T^R, 0] + 0.5 \times TIC \times (\text{MAX}[T^A - T_{Cap}, 0])}{\dots} \quad (6)$$

$$TR_C = \frac{\sum (\text{for all New Access Holders}) - 0.3 \times TIC \times \text{MAX}[(T_{User} - T^R_{User}), 0]}{\dots} \quad (7)$$

Where:

T_{Cap} = the Terminal Capacity as determined from time to time

T^A = Aggregate Tonnes Handled at the Terminal in the Contract Year

C.4 Throughput Rebate paid to each Access Holder

The Throughput Rebate payable to a New Access Holder will be calculated according to the following formula:

$$TR_{User} = (TR_{Pool} / T^X \times (1 - E_{Wt}) + TR_{Pool} / T^X \times E_{User} \times E_{Wt}) \times T^X_{User} \quad (8)$$

Where:

TR_{Pool} = Pool of revenue that would be distributed to New Access Holders as Throughput Rebate, assuming that all Access Holders were New Access Holders

E_{User} = Efficiency factor applied to the New Access Holder (User)

T^X = Rebatable Tonnes, calculated as T^A less the sum of tonnes not delivered to the Terminal as a consequence of trains cancelled by Access Holders (to be calculated as the product of the number of cancelled trains and the net tonnes of coal per cancelled train).

E_{Wt} = Efficiency Weighting (ranging from 0 – 100% over the Term)

T^X_{User} = Rebatable Tonnage of the Access Holder, calculated as the Actual tonnage of the New Access Holder Handled at the Terminal in the Contract Year less the sum of tonnes not delivered to the Terminal as a consequence of trains cancelled by the New Access Holder (to be calculated as the product of the number of cancelled trains and the net tonnes of coal per cancelled train).

C.5 Efficiency Factor

The resource consumption cost of each New Access Holder in the Contract Year is calculated by the following formula:

$$R_{User} = (I_{hrs} * I_{Bench} + O_{hrs} * O_{Bench} + C_{m/day} * C_{Bench}) / T_{User} \quad (9)$$

The relative efficiency of the New Access Holder (P_{User}) is calculated according to the following formula:

$$P_{User} = R_{Min} / R_{User} \quad (10)$$

And the Efficiency Factor of each New Access Holder in the Contract Year is calculated by the following formula:

$$E_{User} = P_{User} * T^X / (\sum (P_i * T^X_i)) \quad (11)$$

Where:

~~P_{User} = is the resource consumption cost of the New Access Holder (in \$/tonne)~~

~~t_{hrs} = is the utilisation of the inloading system, measured in hours, attributed to the inloading of the New Access Holder's coal in the Contract Year~~

~~t_{Bench} = is the resource price attributed to inloading, measured in \$/hour~~

~~O_{hrs} = is the utilisation of the outloading system, measured in hours, attributed to the outloading of the New Access Holder's coal in the Contract Year~~

~~O_{Bench} = is the resource price attributed to outloading, measured in \$/hour~~

~~$C_{m/day}$ = is the number of metres of cargo assembly area used to store a New Access Holder's coal, in circumstances where the New Access Holder has cancelled or delayed loading onto a ship, multiplied by the number of hours the coal remains in storage.~~

~~C_{Bench} = is the resource price attributed to storage in the cargo assembly area (\$/metre/hour)~~

~~R_{Min} = The resource consumption cost of the New Access Holder with the lowest resource consumption cost in the Contract Year~~

~~$\Sigma (P_i \times T_{i}^X)$ = the sum of the product of P_{User} and T_{User}^X for New Access Holders in the Contract Year~~

C.56 Pricing Parameters

The relevant reference pricing parameters approved by the QCA are provided in the Table below.

Parameter	Aeronym Abrev.	FY2005 2004-05	FY2006 2005-06	FY2007 2006-07	FY2008 2007-08	FY2009 2008-09	FY2010 To 31 Dec 09
Annual Revenue Requirement (\$m)	ARR	<u>137.5</u> <u>87.3</u>	<u>138.9</u> <u>89.5</u>	<u>138.9</u> <u>91.7</u>	<u>138.1</u> <u>94.0</u>	<u>138.1</u> <u>96.4</u>	<u>138.1</u> <u>48.8</u>
Terminal Capacity (million tonnes)	T_{Cap}	<u>54.5</u>	<u>54.5</u>	<u>54.5</u>	<u>54.5</u>	<u>54.5</u>	<u>54.5</u>
Aggregate Reference Tonnage (million tonnes)	T^R	<u>53.0</u> <u>55.8</u>	<u>54.0</u> <u>58.4</u>	<u>54.0</u> <u>59.4</u>	<u>53.5</u> <u>59.0</u>	<u>53.5*</u> <u>56.8*</u>	<u>53.5*</u> <u>28.7*</u>
Throughput Rebate Threshold Tonnage (million tonnes)	T^{Θ}	<u>46.1</u>	<u>46.1</u>	<u>46.1</u>	<u>46.1</u>	<u>46.1</u>	<u>46.1</u>
Aggregate Non-Reference Tonnage (million tonnes)	$T^T - T^R$	<u>TBA</u>	<u>TBA</u>	<u>TBA</u>	<u>TBA</u>	<u>TBA</u>	<u>TBA</u>
TIC rate (\$/tonne)	TIC	<u>2.77</u> <u>1.54</u>	<u>2.77</u> <u>1.51</u>	<u>2.77</u> <u>1.52</u>	<u>2.77</u> <u>1.57</u>	<u>2.77</u> <u>1.67</u>	<u>2.77</u> <u>1.67</u>
Efficiency Weighting Capacity Expansion (\$m)	E_{Wt} Capex	<u>0</u>	<u>20</u> <u>24.5</u>	<u>50</u> <u>5.5</u>	<u>75</u> <u>0</u>	<u>75</u> <u>0</u>	<u>100</u> <u>0</u>

* Projected Aggregate Reference Tonnage.

~~The resource prices (I_{Bench} , O_{Bench} and C_{Bench}) applied in formula (9) above, will be agreed with the Access Holder Committee informed by the advice of the Operator. In the absence of agreement within 60 days prior to the Commencement Date, the resource consumption prices will be as determined by DBCT Management acting reasonably.~~

Schedule D – Confidentiality Deed

This confidentiality deed

is made on _____ between the following parties:

1. **Prime Infrastructure (DBCT) Management Pty Limited**
ACN 097 098 916
of Level 26, Waterfront Place, 1 Eagle Street, Brisbane QLD 4000
(DBCT Management)
2. [insert name of receiving party]
[insert ABN/ACN/ARBN]
of [insert address]
(Access Seeker)

Recitals

- A. DBCT Management and the Access Seeker wish to negotiate the terms of an Access Agreement under which DBCT Management will provide Access to the Coal Handling Service.
- B. The parties have agreed to the disclosure of certain Confidential Information to each other in order to assist them to reach a negotiated outcome on the terms and conditions of Access to the Coal Handling Service.
- C. The parties have agreed that any Confidential Information is provided on the terms of this deed and that they will not use or disclose the Confidential Information except as provided in this deed.

This deed witnesses

that in consideration of, among other things, the mutual promises contained in this deed, the parties agree:

1 Definitions and interpretation

1.1 Definitions

In this deed:

Access Undertaking means the Dalrymple Bay Coal Terminal Access Undertaking prepared in accordance with the requirements of the *Queensland Competition Authority Act 1997 (Qld)* and approved on [_____] as varied or replaced from time to time;

Confidential Information means any information, data or other matter disclosed to a party by or on behalf of another party where:

- (a) the disclosure of the information, data or other matter by the Recipient might reasonably be expected to affect the commercial affairs of the owner of the Confidential Information; or

- (b) the information, data or other matter is marked or otherwise clearly identified as confidential by a party when disclosed, provided that such information, data or other matter:
- (1) is not already in the public domain;
 - (2) does not become available to the public through means other than a breach of this confidentiality deed or of the confidentiality provisions of the Access Undertaking;
 - (3) was not in the other party's lawful possession prior to such disclosure; and/or
 - (4) is not received by the other party independently from a third party free to disclose such information, data or other matter;

and provided further that the information, data or other matter will cease to be Confidential Information if the information has ceased to retain its confidential nature, for example:

- (A) the disclosure of the information, data or other matter by the Recipient would no longer reasonably be expected to affect the commercial affairs of the owner of the information, data or other matter;
- (B) the information, data or other matter is now in the public domain through means other than a breach of this confidentiality deed or of the confidentiality provisions of the Access Undertaking; or
- (C) the information, data or other matter has been received by the Recipient independently from a third party free to disclose the information, data or other matter.

Corporations Act means the *Corporations Act 2001* (Cth);

Discloser means a person who discloses Confidential Information to a Recipient pursuant to negotiations for Access to the Coal Handling Service under Part 5 of the Access Undertaking;

Document includes any note, memorandum, record, report, financial information, summary, analysis, calculation, strategic assessment, market survey, business plan, computer program, computer record, circuit, circuit layout, drawing, specification, material or any other means by which information may be stored or reproduced;

Express Purpose means to assist the Recipient to reach a negotiated outcome with the Discloser as to the terms and conditions of Access;

Recipient means a person who receives Confidential Information pursuant to negotiations for Access to the Coal Handling Service under Part 5 of the Access Undertaking; and

Specified Person means ~~an officer, employee or adviser of a Recipient or of a related body corporate who has a specific need to have access to the Confidential Information for the Express Purpose;~~

- (a) an officer or employee of a Recipient;
- (b) a professional adviser to a Recipient;

- (c) a financier of a Recipient;
 - (d) a professional adviser to a financier of a Recipient;
 - (e) an officer, employee, or a professional adviser to a related body corporate of a Recipient;
 - (f) an officer or employee of the Operator;
- who has a specific need to have access to the Confidential Information for the Express Purpose.

1.2 Interpretation

- (a) Terms defined in the Access Undertaking have the same meaning in this deed unless otherwise defined.
- (b) Headings are for convenience only and do not affect interpretation.
- (c) In this deed, unless the context otherwise requires:
 - (1) words importing the singular include the plural and vice versa;
 - (2) a reference to any thing (including, but not limited to, any right) includes a part of that thing but nothing in this clause 1.2(1) implies that performance of part of an obligation constitutes performance of the obligation;
 - (3) the term “related body corporate” has the meaning given to that term under the Corporations Act;
 - (4) the term “associate” has the meaning given to that term in Section 15 of the Corporations Act;
 - (5) an expression importing a natural person includes any company, partnership, joint venture, association, corporation or other body corporate and any government agency; and
 - (6) a reference to a person includes that person’s successors and legal personal representatives.

2 Confidentiality

The Recipient must:

- (e)(a) hold the Confidential Information in strict confidence and not disclose, or cause or permit the disclosure of, the Confidential Information, except as permitted under this deed or with the prior written consent of the Discloser;
- (f)(b) not disclose, or cause or permit the disclosure to any person of, any opinion in respect of the Confidential Information or a Document created in accordance with clause 3(c), except as permitted under this deed;
- (g)(c) keep the Confidential Information and any Documents created in accordance with clause 3(c) ~~secure and~~ in a way such that it is reasonably protected from any use, disclosure or access which is inconsistent with this deed;

- ~~(h)~~(d) promptly notify the Discloser if it suspects, or becomes aware of, any unauthorised use, storage, copying or disclosure of the Confidential Information
- ~~(i)~~(e) do anything reasonably required by the Discloser to prevent or stop a breach or threatened breach of this deed or an infringement or threatened infringement of the Discloser's rights arising out of this deed by any person, whether by court proceedings or otherwise; and
- ~~(j)~~(f) maintain such procedures as are reasonably necessary to ensure compliance with this deed by the Recipient and each Specified Person and, upon request, provide the Discloser details of the procedures adopted.

3 Permitted use and disclosure

The Recipient may:

- ~~(e)~~(a) only use the Confidential Information for the Express Purpose;
- (b) not make use of the Confidential Information to the commercial, financial or competitive disadvantage of the Discloser (but this does not preclude the Recipient from using the Confidential Information in negotiations with the Discloser or in any dispute proceedings, submissions to the Queensland Competition Authority or other proceeding contemplated in the Access Undertaking or the Queensland Competition Authority Act 1997 (Qld));
- (c) create, or cause or permit to be created, a Document which reproduces, is based on, utilises or relates to Confidential Information only if that creation is solely for the Express Purpose; and
- (d) only disclose Confidential Information (including as contained in a Document created in accordance with clause 3(c) to a Specified Person, and may only make such disclosure solely for the Express Purpose.

4 Return and destruction of information

- ~~(e)~~(a) If requested by the Discloser, the Recipient must immediately promptly return to the Discloser, or destroy or delete as the Discloser directs, all original Documents and copies which:
 - ~~(a)~~(1) are or contain Confidential Information; and
 - ~~(b)~~(2) reproduce, are based on, utilise or relate to Confidential Information.
- (b) If a Document or a copy referred to in clause 4(a) contains information which is Confidential Information of the Recipient, then the Recipient is not required to return that Document but must destroy or delete the portion of the Document containing the Confidential Information of the Discloser.

5 Operation of this deed

~~(e)~~(a) This deed continues without limitation in time but, subject to clause 5(b), does not apply to any Confidential Information that:

- (1) the Recipient or a Specified Person is required to disclose by any applicable law or legally binding order of any court, government, semi-government authority, administrative or judicial body, or a requirement of a stock exchange or regulator;
- (2) is in the public domain other than as a result of a breach of this deed;
- (3) was at the time of disclosure already in the lawful possession of the Recipient; or
- (4) is received by the Recipient from a person (other than a Discloser or any employee, officer, agent or adviser of a Discloser) legally entitled to possess that information and provide it to the Recipient.

~~(f)~~(b) If the Recipient or a Specified Person must make a disclosure referred to in ~~Section~~ clause 5(a)(1):

- (1) the Recipient must only disclose, and must ensure that the Specified Person only discloses ~~only~~ the minimum Confidential Information required to comply with the applicable law, order or requirement; and
- (2) before making such disclosure, the Recipient must:
 - (A) give the Discloser reasonable written notice of:
 - (i) the full circumstances of the required disclosure; and
 - (ii) the Confidential Information which it, or the Specified Person, proposes to disclose; and
 - (B) consult with the Discloser as to the form of the disclosure.

6 Acknowledgment

The Recipient acknowledges that:

~~(e)~~(a) the Confidential Information is secret and highly confidential to the Discloser;

~~(f)~~(b) this deed does not convey any proprietary or other interest in the Confidential Information to the Recipient or any Specified Person;

~~(g)~~(c) disclosure of Confidential Information in breach of this deed could cause considerable commercial and financial detriment to the Discloser;

~~(h)~~(d) damages may be inadequate compensation for breach of this deed and, subject to the court's discretion, the Discloser may restrain by an injunction or similar remedy, any conduct or threatened conduct which is or would be a breach of this deed; and

~~(i)~~(e) some or all of the Confidential Information may be relevant to the price or value of securities of the Discloser. The Recipient undertakes that it will

not deal in those securities in breach of the insider trading provisions of the Corporations Act.

7 Recipient to ensure others comply

The Recipient must:

- (a) inform each Specified Person of the Recipient's obligations under this deed;
- (b) procure that each Specified Person strictly observes all of the Recipient's obligations under this deed as if those obligations were imposed on that person; and
- (c) generally ensure that no officer, employee, adviser or agent of the Recipient does anything which, if done by the Recipient, would be inconsistent with this deed.

8 Indemnity

The Recipient indemnifies the Discloser in respect of any claim, action, damage, loss, cost, charge, expense, outgoing or payment which the Discloser suffers, incurs or is liable for in respect of:

- (a) any breach of this deed by the Recipient;
- (b) any failure by the Recipient to ensure compliance by any Specified Person with the terms of this deed; or
- (c) any infringement of the Discloser's rights in respect of the Confidential Information by the Recipient or a Specified Person.

9 Disclaimer

- (a) Neither the Discloser, nor any of its related bodies corporate nor any of their respective officers, employees or advisers:
 - (1) makes any representation or warranty:
 - (A) as to the accuracy or completeness of the Confidential Information;
 - (B) that the Confidential Information has been audited, verified or prepared with reasonable care; or
 - (C) that the Confidential Information is the totality of the information that a prospective Access Seeker may require in order to negotiate an Access Agreement;
 - (2) accepts any responsibility for any interpretation, opinion or conclusion that the Recipient or a Specified Person may form as a result of examining the Confidential Information;
 - (3) accepts any responsibility to inform the Recipient of any matter arising or coming to the Discloser's notice which may affect or

- qualify any Confidential Information which the Discloser provides to the Recipient; and
- (4) is liable, and the Recipient covenants not to make any claim or commence or pursue any proceedings against any of them, for any loss of any kind (including, without limitation, damages, costs, interest, loss of profits, or special loss or damage) arising from:
- (A) an error, inaccuracy, incompleteness or similar defect in the Confidential Information; or
- (B) any default, negligence or lack of care in relation to the preparation or provision of the Confidential Information.
- (b) The Recipient acknowledges that it is making an independent assessment of the Confidential Information and that it will carry out, and rely solely on, its own investigation and analyses in relation to the Confidential Information.
- ~~(1) carry out, and rely solely on, its own investigation and analyses in relation to the Confidential Information; and~~
- ~~(2) verify all information on which it intends to rely to its own satisfaction.~~
- (c) Any reliance by the Recipient, or any Specified Person, on any Confidential Information, or any use of any Confidential Information, is solely at its own risk.

10 Governing law and jurisdiction

- (a) This deed is governed by the laws of Queensland.
- (b) The parties irrevocably submit to the exclusive jurisdiction of the courts of Queensland.

11 Waivers

- (a) Waiver of any right, power, authority, discretion or remedy arising on default under this deed must be in writing and signed by the party granting the waiver.
- (b) A failure or delay in exercise, or partial exercise, of a right, power, authority, discretion or remedy created or arising on default under this deed does not result in a waiver of that right, power, authority, discretion or remedy.

12 Variation

Any variation of this deed must be in writing and signed by the parties.

13 Entire agreement

This deed is the entire agreement between the parties in respect of its subject matter.

Executed as a deed:

**Signed sealed and delivered by
DBCT Management**

by:

Director/Secretary

Director

Name (please print)

Name (please print)

**Signed sealed and delivered by
*[insert Access Seeker]***

by:

Director/Secretary

Director

Name (please print) Name (please print)

Schedule E – Terminal Regulations

Schedule F – Master Plan

Contained separately as Volume 2

Schedule G – Coal Handling Service

~~Subject to the Access Holder complying with the Access Agreement and DBCT Management's obligation to comply with applicable laws and Approvals: The Coal Handling Service to be provided under an Access Agreement will, subject to the terms of the Access Agreement, include:~~

1. Train Scheduling

DBCT Management will co-ordinate, ~~or procure the Operator to co-ordinate,~~ the scheduling of trains at the Terminal to ensure that ~~to the extent practical (and subject to availability of trains~~ or other factors beyond the control of DBCT Management), trains are scheduled and sufficient unloading capacity is made available at the Terminal to allow the Access Holder to ship the Annual Contract Tonnage of coal in each Contract Year.

2. Train Unloading

If a train carrying the Access Holder's coal arrives at the Terminal ~~as scheduled~~, DBCT Management will subject to:

- (i) ~~t~~ The Terminal Regulations;
- (ii) ~~c~~ Contractual obligations to the Access Holders ~~under Existing User Agreements or Access Agreements; and~~
- ~~(iii) The requirements of other Access Holders; and~~
- ~~(iv)(iii)~~ n No force-majeure event prevailing

ensure that the train is unloaded at a rate (consistent with the type and condition of the coal) consistent with achieving shipment of the Annual Contract Tonnage of coal for the Access Holder.

3. Storing

DBCT Management will provide stockpiling and cargo assembly areas ~~from time to time after consultation with the Operator, and~~ in accordance with the Terminal Regulations.

Subject to:

- (i) the Terminal Regulations;
- (ii) c contractual obligations to the Access Holders ~~under Existing User Agreements or Access Agreements; and~~
- ~~(vi) the requirements of other Access Holders; and~~
- ~~(iv)(iii)~~ n no force majeure event prevailing,

DBCT Management will transfer the Access Holder's coal from the train unloading facility at the Terminal to the nominated stockpile area or a cargo assembly area and stockpile the Access Holder's coal in that area (except to the extent that a quality plan under the Terminal Regulations has been agreed to which provides for direct loading from train to ship).

4. Reclaiming and Ship Loading

DBCT Management will, subject to

- (i) the Terminal Regulations;
 - (ii) contractual obligations to the Access Holders ~~under Existing User Agreements or Access Agreements;~~ and ~~(ix) the requirements of other Access Holders;~~ and ~~(iv)(iii)~~ no force-majeure event prevailing.
- (a) make the Terminal available for berthing by vessels nominated by the Access Holder, such that not less than the Annual Contract Tonnage can be shipped by the Access Holder in each Contract Year (as long as the vessel mix required by the Access Holder does not in DBCT Management's reasonable opinion unreasonably impact on the efficiency of the Terminal); and
 - (b) load the Access Holder's coal into a vessel which is nominated by the Access Holder and is available for loading so as to achieve the objective in Section 4(a) hereof.

5. Prevention of Contamination

DBCT Management will take all practicable measures to maintain the integrity of the Access Holder's coal at the Terminal, including by:

- (a) avoiding contamination of the Access Holder's coal, including contamination with other coal or waste material; and
- (b) minimising handling and associated degradation of the Access Holder's coal. However, DBCT Management is not obliged to undertake any measure which in its reasonable opinion will unreasonably impact on the efficiency of the Terminal.

6. Compliance with Laws

In unloading, stockpiling, reclaiming and loading the Access Holder's coal and in discharging any of its other obligations in the performance of the Coal Handling Service, DBCT Management will comply with all applicable laws and Approvals.

7. Co-ordination

Subject to the Access Holder providing relevant information to DBCT Management and where relevant the Operator within a reasonable time, DBCT Management will ensure (subject to factors beyond the control of DBCT Management), as far as practicable, that it discharges its obligations to provide the Coal Handling Service in accordance with the requirements of the Access Holder's reasonable quality plans and shipping programs as notified to DBCT Management and the Operator from time to time consistent with Terminal Regulations, and (having regard to equity amongst Access Holders) use its best endeavours to minimise the aggregate cost to Access Holders arising out of shipment through the Terminal (including demurrage and rail freight).

8. Other Services

DBCT Management will provide all other services from time to time requested by an Access Holder in relation to coal Handling at the Terminal, (including transportation within the Terminal, blending, assembly of shipments, dozing, surfactant treatment, moisture adding, compacting, sampling and survey services) and other services incidental to coal Handling (eg. vessel monitoring, ship agents, co-ordination with masters, crew disembarkation, co-ordination with customs, wharfage), provided that, in DBCT Management's reasonable opinion, the provision of such services will not unreasonably impact on the efficiency of the Terminal.

Schedule H – Efficiency Incentives: Development Stages