

# Queensland Competition Authority

Decision

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## DBCTM's 2018 Modification DAAU

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June 2018

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## DECISION SUMMARY

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The Modification draft amending access undertaking (DAAU) process began on 15 September 2017 with the submission by DBCT Management Pty Ltd (DBCTM) of the 2017 Modification DAAU. The process concludes with this decision on the 2018 Modification DAAU.

DBCTM said the aim of the Modification DAAUs was to clarify inconsistencies, make changes arising from the DBCT Incremental Expansion Study DAAU, and fix typographical errors and formatting.

The QCA sought and considered stakeholders' comments in its assessment of the Modification DAAUs against the section 138(2) statutory criteria of the *Queensland Competition Authority Act 1997* (QCA Act).

In response to the QCA's draft decision on the 2017 Modification DAAU, DBCTM withdrew the 2017 Modification DAAU and submitted the 2018 Modification DAAU in May 2018, which it said fully complied with the QCA's draft decision on the 2017 Modification DAAU.

The QCA decided proceed directly to a final decision on the 2018 Modification DAAU (without a draft decision), considering that the amendments proposed were previously the subject of submissions by stakeholders and considered by the QCA within the 2017 Modification DAAU process.

### Decision

On 21 June 2018, the Queensland Competition Authority made a decision to approve the 2018 Modification DAAU submitted to it by DBCTM on 9 May 2018 under section 142 of the QCA Act.

### Way forward

The 2018 Modification DAAU comes into effect on the date of this decision, and forms the (newly amended) 2017 AU.

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# 1 REGULATORY PROCESS AND SUBMISSIONS

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## 1.1 2017 Modification DAAU

On 15 September 2017, DBCT Management Pty Ltd (DBCTM) submitted the 2017 Modification Draft Amending Access Undertaking (2017 Modification DAAU) to the Queensland Competition Authority (QCA), seeking to amend the wording of the 2017 access undertaking (2017 AU). The QCA sought stakeholders' comments and received one submission on the 2017 Modification DAAU, from the DBCT User Group. On 22 March 2018, the QCA issued its draft decision to refuse to approve DBCTM's 2017 Modification DAAU.

The QCA received two submissions on its draft decision, from DBCTM and the DBCT User Group.

The DBCT User Group supported the majority of the positions in the QCA's draft decision, with the exception of the QCA's proposed approval of three of the substantive changes to the 2017 AU sought by the 2017 Modification DAAU, namely:

- (1) clauses 3.2 and 3.3, regarding the role of Dalrymple Bay Coal Terminal Pty Ltd (DBCTPL, or the Operator) and the Operations and Maintenance Contract (OMC) in respect of the Dalrymple Bay Coal Terminal (DBCT, or the terminal)
- (2) the definition of 'supply chain business'
- (3) the streamlined non-expansion capital expenditure (NECAP) approval process.<sup>1</sup>

On 4 May 2018, DBCTM withdrew the 2017 Modification DAAU.

On the same day, the QCA received one confidential submission on the 2017 Modification DAAU.

## 1.2 2018 Modification DAAU

On 9 May 2018, having previously withdrawn the 2017 Modification DAAU, DBCTM submitted the 2018 Modification draft amending access undertaking (2018 Modification DAAU) in its place.<sup>2</sup>

When lodging the 2018 Modification DAAU, DBCTM submitted that it was intended to reflect and comply with the findings set out in the QCA's draft decision on the 2017 Modification DAAU.<sup>3</sup>

## 1.3 Stakeholders' comments

On 10 May 2018, the QCA published the 2018 Modification DAAU and sought stakeholders' comments.

The QCA received one submission on the 2018 Modification DAAU, from the DBCT User Group. The DBCT User Group did not support the 2018 Modification DAAU, and reiterated its concerns (raised earlier in relation to the 2017 Modification DAAU) regarding proposed changes in the 2017 AU to:

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<sup>1</sup> DBCT User Group 2018a, Submission to the QCA, *QCA's draft decision on DBCTM's 2017 Modification DAAU*, April, p. 1.

<sup>2</sup> The QCA notes that, following the QCA's draft decision, DBCTM lodged a further amended DAAU, which it considered complied with the draft decision. The QCA indicated in response to this further amended DAAU that proper consideration of any replacement DAAU could only occur once DBCTM formally withdrew the 2017 Modification DAAU.

<sup>3</sup> DBCTM 2018, *DBCTM's 2018 Modification DAAU*, explanatory submission, May, p. 1.

- (1) clauses 3.2 and 3.3, regarding the role of DBCTPL (the Operator) and OMC
- (2) the definition of supply chain business.

The DBCT User Group also raised a new concern with the changes proposed by DBCTM to the 'notifying access seeker' provisions in clause 5.4 of the 2017 AU that form part of the queuing mechanism.<sup>4</sup>

In making its decision, the QCA has considered all stakeholders' comments received to date on both the 2017 Modification DAAU and the 2018 Modification DAAU, including the confidential submission.

## 1.4 Summary of regulatory process

Table 1 summarises the Modification DAAUs regulatory process.

**Table 1 Summary of Modification DAAUs regulatory process.**

<i>Date</i>	<i>Action</i>
15 September 2017	DBCTM submitted the 2017 Modification DAAU
20 October 2017	Stakeholder submissions on DAAU due
22 March 2018	QCA draft decision on 2017 Modification DAAU
27 April 2018	Stakeholders submissions on draft decision due
4 May 2018	Receipt of one confidential submission on 2017 Modification DAAU
4 May 2018	DBCTM withdrew its 2017 Modification DAAU
9 May 2018	DBCTM submitted its 2018 Modification DAAU
6 June 2018	Receipt of DBCT User Group submission on 2018 Modification DAAU
21 June 2018	Decision to approve 2018 Modification DAAU

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<sup>4</sup> DBCT User Group 2018b, Submission to the QCA, *DBCTM's 2018 Modification DAAU*, June, pp. 2–4.

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## 2 ASSESSMENT OF THE 2018 MODIFICATION DAAU

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### 2.1 Assessment criteria

As set out in the QCA's draft decision on the 2017 Modification DAAU, section 143(2) of the QCA Act states that the QCA may approve a DAAU only if it considers it appropriate, having regard to the matters mentioned in section 138(2).<sup>5</sup> Therefore, the QCA has assessed the 2018 Modification DAAU in the context of the statutory access regime in the QCA Act and, in particular, the object of Part 5 (s. 69E) and the other criteria for review of undertakings in section 138(2) of the QCA Act.

### 2.2 Consistency with the QCA draft decision

The QCA's draft decision in respect of the 2017 Modification DAAU set out the QCA's view of the amendments proposed by DBCTM. The draft decision also responded to the various concerns and submissions raised by stakeholders in that process.

The QCA agrees with the submission of DBCTM that the 2018 Modification DAAU substantially adopts the changes set out in the draft decision on the 2017 Modification DAAU that the QCA had identified would be necessary in order for the QCA to be able to accept it.

As such, given that the issues raised by the 2018 Modification DAAU are not new and have been canvassed well in the earlier process, the QCA has decided to move directly to a final decision in relation to the 2018 Modification DAAU. In doing so, and unless inconsistent with any position taken in this decision document, the QCA has adopted the reasoning and position set out in its earlier draft decision.

Where stakeholders have put forward new information or raised new matters in submissions in relation to the 2018 Modification DAAU that were not raised in the earlier process, the QCA has had regard to such information and submissions and has responded in this decision.

### 2.3 Consideration of matters raised by the DBCT User Group

#### 2.3.1 Operator and the OMC (cls. 3.2 and 3.3)

##### Proposed amendments

DBCTM proposed to insert the phrase 'During the term of the Access Undertaking' at the start of clauses 3.2 and 3.3 of the 2017 AU, which have regard to the role of the Operator, and the OMC.<sup>6</sup>

##### Stakeholders' comments

The DBCT User Group opposed this amendment in all its submissions, saying:

- The proposed changes to clauses 3.2 and 3.3 were unnecessary, as they did not alter the substantive application of those clauses in any way since all provisions of the undertaking apply 'during the term of undertaking'.<sup>7</sup>

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<sup>5</sup> QCA 2018, *DBCT Management's 2017 Modification draft amending access undertaking*, draft decision, March, pp. 4–6.

<sup>6</sup> DBCTM 2017, *DBCTM's 2017 Modification DAAU*, explanatory submission, September, p. 2.

<sup>7</sup> DBCT User Group 2017, *Submission to the QCA, DBCTM's 2017 Modification DAAU*, October, p. 4 and DBCT User Group 2018b, *Submission to the QCA, DBCTM's 2018 Modification DAAU*, June, p. 2.

- DBCTM had not expressed any basis in its written submissions on which this proposed amendment was considered to be particularly 'important' to them, and that to the extent that DBCTM had expressed these views privately to the QCA, it was a failure to provide natural justice for the QCA to make a decision on that basis without DBCTM's views being made public.<sup>8</sup>
- Any apparent comfort afforded to DBCTM as a result of the proposed amendment was not, of itself, an appropriate basis on which to approve the proposed amendment and the QCA had not given any reasons for favouring DBCTM's comfort over the DBCT User Group's opposition.<sup>9</sup>
- Another relevant factor that the QCA should take into account, is the acknowledgement by DBCTM in its letter of 22 December 2016 that a 'user-owned operator is important to the DBCT User Group'.<sup>10</sup>
- The lack of evident issues with the existing wording, and the fact that the existing wording does not prevent DBCTM from submitting a DAAU to change the Operator, indicates the proposed amendments should be refused.<sup>11</sup>
- It considered that it was critical that any QCA decision on this issue explicitly expresses that it does not accept that it would cease to be appropriate for DBCTPL to remain the operator, or the operations and maintenance contractor beyond the term of the 2017 AU.<sup>12</sup>

DBCTM maintained its proposed amendment in the 2018 Modification DAAU and said:

- Its letter of 22 December 2016 provided background as to why it considered this amendment to be important, and is a relevant matter that should inform the QCA's consideration of this issue.
- DBCTM agreed with the users the amendments did not alter the substantive application of clause 3 in any way.
- DBCTM acknowledged a user-owned operator was important to the users and had not sought to change this position.<sup>13</sup>

#### QCA analysis

In its draft decision, the QCA previously addressed the submissions made by the DBCT User Group on the 2017 Modification DAAU.

Having considered further submissions from both the DBCT User Group and DBCTM on this matter, the QCA maintains its view to accept DBCTM's proposed amendments to clauses 3.2 and 3.3.

The QCA remains of the view that these amendments do not alter the substantive application of clause 3, while they provide DBCTM with a level of comfort.

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<sup>8</sup> DBCT User Group 2018a, Submission to the QCA, *DBCTM's 2017 Modification DAAU—QCA draft decision*, April, p. 5.

<sup>9</sup> DBCT User Group 2018a, Submission to the QCA, *DBCTM's 2017 Modification DAAU—QCA draft decision*, April, p. 5.

<sup>10</sup> DBCT User Group 2018a, Submission to the QCA, *DBCTM's 2017 Modification DAAU—QCA drat decision*, April, p. 5.

<sup>11</sup> DBCT User Group 2018b, Submission to the QCA, *DBCTM's 2018 Modification DAAU*, June, p. 3.

<sup>12</sup> DBCT User Group 2018b, Submission to the QCA, *DBCTM's 2018 Modification DAAU*, June, p. 3.

<sup>13</sup> DBCTM 2018, *DBCTM's 2018 Modification DAAU*, explanatory submission, May, p. 1.



The QCA agrees with the DBCT User Group that DBCTM could submit a DAAU to change the Operator. The QCA notes this will remain the case after the amendments to clause 3.

### 2.3.2 Definition of supply chain business (Sch. G)

#### Proposed amendments

DBCTM proposed to amend the wording of the definition of supply chain business, by inserting a connection to the terminal within subclauses (a), (b) and (c) of the definition.

#### Stakeholders' comments

The DBCT User Group opposed this amendment in all its submissions.

In its submission on the QCA's draft decision on the 2017 Modification DAAU, the DBCT User Group said:

- It was vital that the definition of supply chain business remained broad. The risks of the definition 'over-capturing' were easily resolved by the QCA, ensuring the relevant DAAU process was swiftly conducted, whereas the risk of the definition 'under-capturing' was that anti-competitive vertical integration could occur without any adjustment of the undertaking to ensure that it remained appropriate.<sup>14</sup>
- The definition should apply to not just rail services that accessed the terminal, coal mines that exported coal via the terminal, or purchases of coal from mines that exported via the terminal, but also those that were reasonably likely to access the terminal or export coal via the terminal.<sup>15</sup>

In its submission on the 2018 Modification DAAU, the DBCT User Group stated further:

- The fact that it was theoretically possible that the ACCC may subsequently take action to prevent anti-competitive conduct did not make it appropriate to remove protections against anti-competitive conduct from an access undertaking, which reiterated that prevention by not allowing anti-competitive market structures to develop in the first place was better than seeking a cure.
- If the definition became unduly narrow (and, for example, a supply chain business was acquired by DBCTM that did not initially operate in the coal supply chain but then commenced to do so post-acquisition in a substantial way) there would be no way to amend the 2017 AU to resolve the problems which arose from that vertical integration.
- Even in circumstances where the QCA or ACCC did become interested in such an acquisition from a regulatory perspective, it was possible such interest may arise only after the damage of vertical integration had been caused, with no recourse against, or ability to unwind, attributable losses.<sup>16</sup>

In its submission on the 2018 Modification DAAU, DBCTM said competition regulation in Australia provided 'robust mechanisms to protect all stakeholders in any market from anti-competitive practices' and gave some examples of such protections.<sup>17</sup>

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<sup>14</sup> DBCT User Group 2018a, Submission to the QCA, *QCA's draft decision on DBCTM's 2017 Modification DAAU*, April, p. 5.

<sup>15</sup> DBCT User Group 2018a, Submission to the QCA, *DBCTM's 2017 Modification DAAU—QCA draft decision*, April, p. 6.

<sup>16</sup> DBCT User Group 2018b, Submission to the QCA, *DBCTM's 2018 Modification DAAU*, June, pp. 3–4.

<sup>17</sup> DBCTM 2018, *DBCTM's 2018 Modification DAAU*, explanatory submission, May, p. 2.

### QCA analysis

The QCA does not consider that the additional submissions made in respect of this issue add significantly to the arguments and submissions already considered in its draft decision on the 2017 Modification DAAU.

Having considered the further submissions from both the DBCT User Group and DBCTM, the QCA considers it is appropriate to approve DBCTM's proposed amendments to the definition of supply chain business (Sch. G).

As set out in its draft decision on the 2017 Modification DAAU, the QCA considers the proposed amendment to the definition of supply chain business aligns with the policy objectives that sit behind the ring-fencing provisions in the 2017 AU. These objectives include addressing the incentive and ability of DBCTM to discriminate in favour of businesses in related markets through its ownership of the terminal.

The DBCT User Group raised concerns with the acquisition by DBCTM of a business that initially was not covered by the amended definition but later commences operations related to the terminal. The QCA understands the inclusion of the phrases 'provides, or proposes to provide' and 'owns or holds an interest in, or proposes to acquire such an interest in' in subclauses (a) and (b) of the definition of supply chain business. The QCA understands these words to mean, for example, that DBCTM will be required to lodge a DAAU as soon as it proposes to provide above-rail services in Queensland that access the terminal, whether via the acquisition of a new supply chain business or via an existing supply chain business altering its operations.

The QCA does not accept the DBCT User Group's suggestion to insert the phrase 'reasonably likely to access the terminal' into the definition of supply chain business is appropriate, having regard to the statutory criteria. The QCA considers that this concern is already addressed, to a more limited extent, by the language in subclauses (a) and (b), as discussed above. The amendment proposed by the DBCT User Group would potentially give rise to uncertainty about the way in which the definition is applied, making it difficult for DBCTM to determine, from time to time, whether a DAAU is necessary. In the circumstances, given the protections that already exist, the QCA considers that the additional uncertainty this would create outweighs any potential benefit.

### 2.3.3 Streamlined NECAP approvals (Sch. C, Part A, cl. 4(f)(1) and Sch. G)

#### Proposed amendments

DBCTM proposed to amend the definition of 'review event' at (e)(1) in Schedule G of the 2017 AU, to clarify the status of NECAP under clause 12.10(b) as a review event in Schedule C, Part A, clause 4(f)(1). In essence, DBCTM proposed that the procedure for amendment to the annual revenue requirement (ARR) following a review event in the form of a streamlined NECAP approval be effected by way of a request to the QCA, and not by way of a DAAU.

#### Stakeholders' comments

The DBCT User Group did not support this proposed amendment, as it considered the current process regarding NECAP approvals was not inappropriate or inefficient, nor had it caused any adverse outcomes.<sup>18</sup>

In its submission on the QCA's draft decision on the 2017 Modification DAAU, the DBCT User Group reiterated that it considered the current process (as provided for in the approved access undertaking) regarding NECAP approvals was satisfactory. The DBCT User Group said its silence

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<sup>18</sup> DBCT User Group 2017, Submission to the QCA, *DBCTM's 2017 Modification DAAU*, October, p. 5.

in not specifically objecting to the streamlined NECAP process during previous reviews should not be taken as tacit acceptance of amending the process.<sup>19</sup>

The DBCT User Group did not specifically mention this matter in its submission on the 2018 Modification DAAU.

#### QCA analysis

The QCA considers that no new argument on this issue has been raised in the DBCT User Group's submissions since the QCA's draft decision on the 2017 Modification DAAU.

The QCA considers the analysis set out in section 4.6 of its draft decision<sup>20</sup> still stands. That is, the streamlined NECAP approval process as proposed in the 2018 Modification DAAU achieves adequate consultation in the context of the 2017 AU.

### 2.3.4 Interaction between notifying access seeker process and any negotiations underway (cl. 5.7)

#### Proposed amendments

DBCTM proposed to insert a new clause 5.7(a)(6) to the 2017 AU, to clarify that where there is a queue and negotiations are underway with the access seeker first in the queue as a result of capacity becoming available, these negotiations should be suspended in circumstances where another access seeker (who is positioned further down the queue) uses the 'notifying access seeker' process set out in clause 5.4(e).

DBCTM considered this was the intention of clauses 5.4(f)–(h), and therefore it did not view the proposed amendment as changing the substantive provisions of the 2017 AU, but simply as clarifying the interrelationship between clauses 5.4 and 5.7.<sup>21</sup>

In its draft decision on the 2017 Modification DAAU, the QCA suggested further amending the reference in clause 5.7(b) to the negotiation process 'ceasing' (which implies that negotiations terminate), to the negotiation process 'being suspended', as this change would better reflect the meaning of this clause and was consequential to the amendment proposed by DBCTM in relation to clause 5.7(a)(6).<sup>22</sup>

DBCTM's 2018 Modification DAAU incorporates the QCA's suggested amendment to clause 5.7(b).

#### Stakeholders' comments

The DBCT User Group supported DBCTM's proposal to amend clause 5.7 in two of its submissions:

- submission on DBCTM's 2017 DAAU, October 2017<sup>23</sup>
- submission on the QCA's draft decision on DBCTM's 2017 DAAU, April 2018.<sup>24</sup>

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<sup>19</sup> DBCT User Group 2018a, Submission to the QCA, *DBCTM's 2017 Modification DAAU—QCA draft decision*, April, p. 6.

<sup>20</sup> QCA 2018, *DBCT Management's 2018 Modification draft amending access undertaking*, draft decision, March, pp. 25–27.

<sup>21</sup> DBCTM 2017b, *DBCTM's 2017 Modification DAAU, explanatory submission*, September, p. 3.

<sup>22</sup> QCA 2018, *DBCT Management's 2018 Modification draft amending access undertaking*, draft decision, March, p. 9.

<sup>23</sup> DBCT User Group 2017, Submission to the QCA, *Modification DAAU*, October, p. 3.

<sup>24</sup> DBCT User Group 2018a, Submission to the QCA, *DBCTM's 2017 Modification DAAU—QCA draft decision*, April, p. 3.

On the day DBCTM withdrew the 2017 Modification DAAU, the QCA received a confidential submission that focused only on this issue. The submission requested the QCA expedite its final decision on the 2017 Modification DAAU; it considered that some of the proposed amendments with respect to the queuing provisions were supportive of new access seekers and would allow bona fide projects to access the capacity in a timely manner, and this result would be consistent with the object of Part 5 of the QCA Act (s. 69E).

In its submission on the 2018 Modification DAAU, the DBCT User Group also suggested the QCA considers particular contemporary circumstances appertaining to the proposed amendments, which the QCA understands to be the following:

- There is a queue under clause 5.4(a) and the access seekers have been notified of the queue under clause 5.4(c).
- The one or more access seekers in the queue have given an indication to progress negotiations under clause 5.7(a) (which gives them six months to negotiate, per cl. 5.7(a)(4)).
- A notifying access seeker has given notice they are seeking access with a commencement date earlier than the date of access of the first access application in the queue under clause 5.4(e).
- DBCTM notified all other access seekers (who are ahead in the queue) on 24 May 2018, per clause 5.4(e)(4).
- the proposed amendment to clause 5.7(a)(6) (and consequential amendments to clause 5.7(b)) would suspend the negotiation period for a notified access seeker (the first in the queue) who had begun negotiating under clause 5.7(a), unless the notified access seeker delivers a signed access agreement and security with a commencement date the same as, or the earlier of, the date proposed by the notifying access seeker within three months, under clause 5.4(e)(5).

The DBCT User Group noted this was a transitional issue, and more broadly the User Group remained aligned with clarifying the operation of the queue (consistent with all of the other clarifications to the queuing provisions the DBCT User Group has supported).<sup>25</sup>

#### QCA analysis

The QCA reviewed and took into account all materials submitted on this matter, including the confidential submission.

As noted in the draft decision on the 2017 Modification DAAU, the QCA agrees with DBCTM that the amendments proposed to clause 5.7 in the 2018 Modification DAAU do not give rise to any substantive change in the operation of the 2017 AU. The QCA understands that DBCTM, access seekers and users had generally understood that negotiations with a person in the queue would be suspended during the period of any negotiations with a later 'notifying access seeker'. This appears to be the most obvious and sensible way to proceed.

Further, the QCA notes the DBCT User Group has not indicated a contrary view, nor submitted that these amendments would materially change the operation of the existing provisions or the rights of existing parties. The QCA also notes that the DBCT User Group in its submission noted that it remained broadly aligned with clarifying the operation of the queue, which is what the QCA considers these proposed amendments achieve.

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<sup>25</sup> DBCT User Group 2018b, Submission to the QCA, *DBCTM's 2018 Modification DAAU*, October, p. 4.

For these reasons, the QCA considers it remains appropriate to approve the amendments to clause 5.7.

## 2.4 Decision

For the reasons discussed above, and having regard to the matters mentioned in section 138(2), the QCA's decision is to approve DBCTM's 2018 Modification DAAU.

### Decision

**The QCA's decision, having had regard to all of the statutory elements contained in section 138(2) of the QCA Act, is to approve DBCTM's 2018 Modification DAAU.**

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## REFERENCES

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DBCT Management (DBCTM) 2017, *DBCTM's 2017 Modification DAAU*, explanatory submission, September.

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