DBCT MANAGEMENT

24 April 2019

Professor Flavio Menezes
Chair
Queensland Competition Authority

Dear Professor Menezes

DBCT Declaration Review - Response to Initial Submissions

1 I am pleased to attach DBCTM's cross-submission on the QCA's Draft Recommendation in relation to its review of the declaration of coal handling services at Dalrymple Bay Coal Terminal.

2 The QCA's April staff questions paper asked stakeholders to submit 'evidence and data' to support their submissions on the factors that influence miners' decisions to invest in the coal tenements markets. DBCTM is pleased to attach to its submission an in-depth analysis of transactions in the coal tenements market by HoustonKemp economists. The evidence unequivocally shows that uncertainty regarding the terms and conditions of access beyond 2020 has had no effect on the purchase of Goonyella coal tenements by miners without incumbent capacity at DBCT, let alone a material effect. In fact, the data shows that the period leading up to the expiry of declaration at DBCT has had the highest ever number of tenement acquisitions by miners without contracted capacity at DBCT.

3 This real-world evidence clearly contradicts the User Group's purely academic theory, that asymmetry in the terms and conditions of access at DBCT will have a material adverse impact on competition in the coal tenements market. This means that criterion (a) cannot be satisfied for the DBCT Service.

4 In accordance with the QCA Act, the declaration of coal handling services at DBCT expires in September 2020. For the coal handling services at DBCT to be regulated beyond September 2020, requires the case to be made that all of the access criteria are satisfied. Without probative material to establish this, the QCA cannot be affirmatively satisfied of the declaration criteria.

Summary of assumptions that must hold for the QCA to declare the DBCT Service

5 As the QCA reaches the final stages of its review of the declaration status of DBCT beyond 2020, it is helpful to set out the key factual premises that would have to be established, in order for the QCA to be affirmatively satisfied that the declaration criteria are met.

6 For the QCA to conclude that the DBCT service satisfies criterion (a), it would have to establish that access on reasonable terms and conditions, as a result of declaration would promote a *material* increase in competition in the coal tenements markets.

Criterion (a) key premises that must be established
• The QCA must be affirmatively satisfied that the geographic dimension of the coal tenements market is limited to the Hay Point catchment. For this, the QCA must establish that purchasers of coal tenements in the Goonyella system would be unable to deploy their capital and expertise to acquire tenements in other regions of Queensland (or elsewhere) in response to a reduction in their returns. This would contradict substantial evidence, from the miners themselves, that they can and do shop around for coal tenements that will provide the greatest returns, across the Queensland region, Australia, and the Asia Pacific region.
• This would also contradict the position (discussed in the submission) of the National Competition Council's independent economic advisors, NERA, who have concluded "If an owner of a coal tenement in the Newcastle catchment raised price above the competitive level (or otherwise made the tenement less attractive), potential investors could in general look elsewhere… Accordingly we consider the geographic scope of the tenements market to be at least as wide as Australia, and potentially as broad as the Asia Pacific"
• The QCA must establish that DBCTM has an ability and incentive not only to increase its charges, but to increase charges to levels that would foreclose efficient new entrants from the coal tenements market.

- The QCA must establish that pricing would not be differentiated with declaration (despite the presumption that it will under the Access Undertaking) – because if pricing for an expansion component were differentiated under regulation, access charges at DBCT for new users would likely be the same with and without declaration.
- The QCA must alter the position that it took in its draft recommendation that a $3.50 per tonne price differential would not be material. DBCTM notes that there have been no submissions from stakeholders that challenge this position and to change it would require the QCA to determine that differential pricing under the QCA approved Access Undertaking could lead to material adverse impact on competition in the tenements market.
- The QCA must be affirmatively satisfied that with declaration:
    - there are new entrants,
    - that are more efficient than incumbents,
    - who would enter the coal tenements market,
    - and gain access to DBCT, overcoming significant barriers to entry in both of these markets, including highly volatile global coal prices, and a fully queued terminal (including for all viable expansion capacity).
- The QCA must be affirmatively satisfied that without declaration access charges, which could be a maximum of $3 per tonne (and likely less) higher than those of incumbent users' – as determined under a QCA administered pricing regime for the existing terminal – will create a material asymmetry such that that those efficient new entrants that would enter the coal tenements market with declaration would be deterred from entering as a result of this minor potential price increase without declaration.
- The QCA must be affirmatively satisfied that incumbents with production coming off in the declaration period do not already have tenements ready to replace mines reaching their end of lives. This needs to be established because, otherwise, the QCA cannot be satisfied that incumbents with better terms under their existing user agreements will even need to go to the tenements market to replace existing reserves. The QCA cannot simply assume that there are no existing coal resources available to incumbents.
- The QCA must be affirmatively satisfied that any deterrence of efficient new entrants would be sufficiently significant that it would constitute a material adverse impact on competition in the coal tenements market, despite the clear evidence provided by DBCTM that leading up to the expiry of declaration in 2020, investment in tenements by non-incumbents is at all-time highs.

7 For criterion (b) to be satisfied, the QCA must be satisfied that DBCT could meet the total foreseeable demand in the market over the period for which the service would be declared; and at the least cost compared to any 2 or more facilities (which could include DBCT).

Criterion (b) key premises that must be established

- The QCA must be satisfied that it is appropriate to employ an approach to market definition that has the result that it measures the use of the DBCT service, rather than demand in the market.
- The QCA must be satisfied that it is appropriate to conflate the distinct concepts of 'demand in the market' and 'use of the DBCT service' contrary to basic economic principles, and to assume that demand in the market cannot include volumes served by other terminals, such that demand does not exceed the use of DBCT.
- The QCA must be satisfied that it is appropriate to employ an approach to market definition that assumes a price in the market that is lower than the competitive price, contrary to established economic principles and case law.
- The QCA must be satisfied that it is not appropriate to consider substitutability by reference to what miners have revealed in their choice of coal handling services at the present time or in the recent past.
- The QCA must be satisfied that 22% of DBCT's capacity (being the tonnages that mines within the Goonyella rail system export through AAPT and the Port of Gladstone) is marginal.
- The QCA must be satisfied that forecast production from BMA mines does not form part of total foreseeable demand in the market, despite the fact that BMA openly states that it treats DBCT as a substitute to HPCT, and the fact that BMA mines currently use DBCT, seek additional access to DBCT, and will continue to use DBCT in the declaration period.
- The QCA must be satisfied that the access queue does not represent demand in the market in which the DBCT service is provided, notwithstanding that in the 2017 AU process the queuing arrangements were reformed with a view to ensuring the queue was representative of the actual demand for additional access to DBCT.
- The QCA must be satisfied that peak total foreseeable demand in the market in the declaration period does not exceed the maximum reasonably possible expanded capacity of DBCT in that period of 102Mtpa.
- The QCA must be satisfied that timing is not relevant to determining whether it is reasonably possible to expand a facility to meet total foreseeable demand under section 76(3) of the QCA Act.
- The QCA must be satisfied that it is economically sound for a least cost analysis undertaken on the basis of a total cost standard to ignore sunk costs associated with alternative terminals when considering scenarios under which DBCT meets all foreseeable demand, even though the sunk costs of those terminals will continue to be incurred in those scenarios, (even though such a conclusion would be contrary to commonly understood microeconomic principles and the Tribunal's approach to the least cost assessment in the Pilbara rail matter).

9 For criterion (d) to be satisfied, the QCA must be satisfied that declaration would promote the public interest.

Criterion (d) key premises that must be established

• The QCA must establish that there are real benefits that would result from declaration, despite the fact that the alleged harm that declaration prevents is vague, theoretical and unquantified. The User Group has not identified the efficient new entrants that would be deterred from entering the coal tenements market without declaration, which means it is difficult to identify any clear benefit from declaration.
• The QCA must also establish that any benefits are not outweighed by the costs that arise from declaration, or other factors which mean that declaration does not promote the public interest. These include (inter alia):
  ○ compliance and regulatory costs, which can be accurately estimated based on empirical evidence;
  ○ a material deterrent to future investment in the terminal; and
  ○ significant policy reasons for not declaring, for example:
  ▪ The only basis for alleged harm is the existence of QCA mandated evergreen existing user agreements. It is contrary to public policy that the contracts resulting from previous declaration are the sole reason for DBCT's continued declaration. Such reasoning would result in DBCT being regulated in perpetuity.
  ▪ The User Group's theory of harm is irreconcilably inconsistent with the National Competition Council's statement of preliminary views in the Port of Newcastle declaration matter. If the QCA adopts the User Group's theory of harm, then the two regimes will be misaligned, which would undermine the integrity of the Queensland access regime. This would clearly be contrary to the public interest.

10 If any one of these key factual premises are not established, the QCA cannot be affirmatively satisfied that the declaration criteria are met, and the QCA must recommend that the coal handling service at DBCT is not declared.

11 We look forward to your further consideration of DBCTM's positions herein.

Yours sincerely

Anthony Timbrell
Chief Executive Officer
DBCT Management

DBCT MANAGEMENT

DBCT declaration review

DBCT Management response to submissions on QCA's draft recommendation and staff questions paper

24 April 2019

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1 Executive Summary

1 DBCT Management Pty Ltd (**DBCTM**) makes the following submission in response to the March 2019 submissions of the User Group, BHP, Peabody Energy and Glencore in respect of the Queensland Competition Authority's (**QCA's**) review of the declared service at Dalrymple Bay Coal Terminal (**DBCT**) under the *Queensland Competition Authority Act 1997* (**QCA Act**).

2 In order to recommend that the coal handling service at DBCT be declared by the Minister, the QCA must be satisfied about all of the access criteria for the service.[1] DBCTM has established throughout this declaration review process that there is no logical or evidentiary basis on which the QCA could be satisfied of access criteria (a), (b) and (d). The users' submissions do not affect the conclusions in DBCTM's previous submissions that those access criteria are not met. Nor do those submissions, or the users' previous submissions, present the QCA with probative evidence upon which the QCA can be satisfied that the DBCT service satisfies the access criteria. Further, DBCTM has explained in its March 2019 submission the errors in the QCA's approach in its draft recommendation and the new information that supports a conclusion that access criteria (a), (b) and (d) are not satisfied.

3 Accordingly, the QCA must recommend to the Minister that, with effect from the expiry date, the DBCT service should not be declared.

Criterion (a)

4 In order to find that criterion (a) is met, the QCA must be affirmatively satisfied that access (or increased access), on reasonable terms and conditions, as a result of a declaration of the service would promote a material increase in competition in at least 1 market, other than the market for the service.

5 The users' submissions do not affect the conclusions in DBCTM's previous submissions that criterion (a) cannot be satisfied for the DBCT Service. This is because:

5.1 The User Group has provided no probative evidence to support its theory of harm – that an asymmetry in terms and conditions of access will deter efficient new entrants from entering the coal tenements markets.

5.2 The User Group's concern is narrow and theoretical, with many essential premises that are unsubstantiated or illogical.

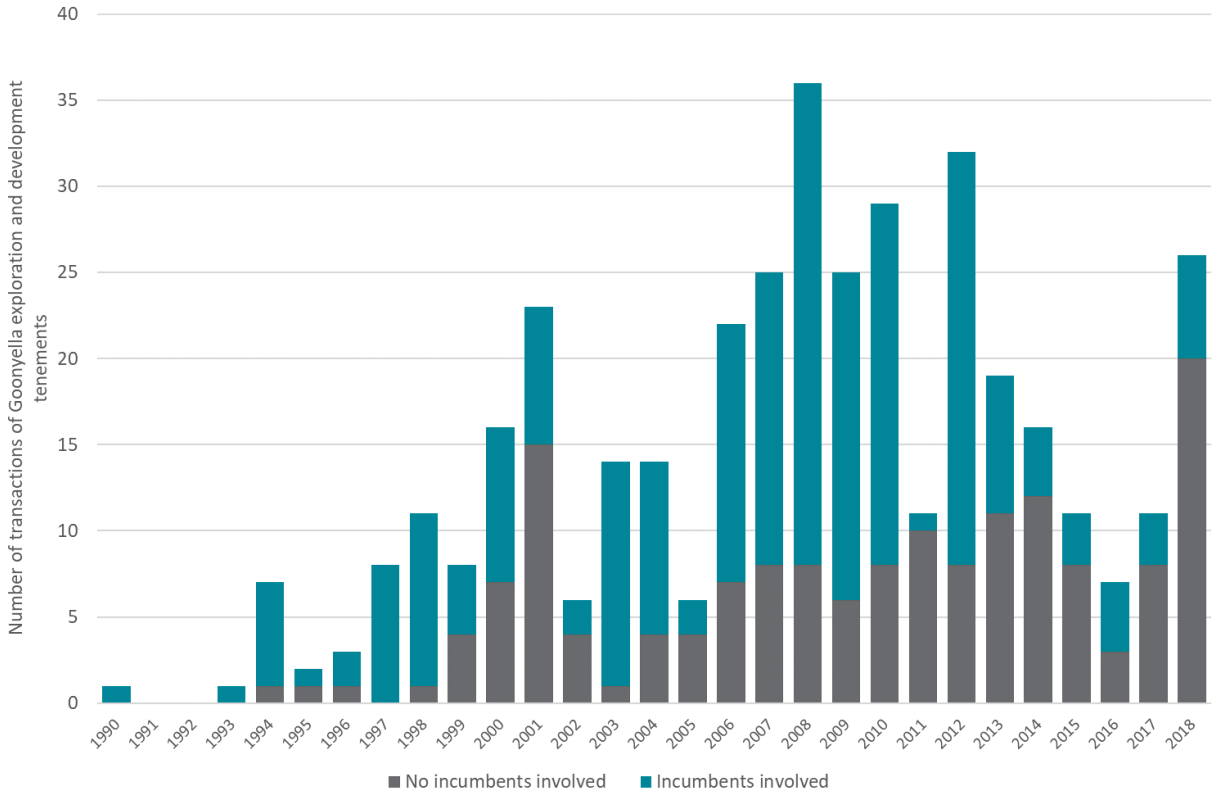
5.3 The User Group appears to now be pivoting its argument to focus on the purported uncertainty that exists from access being required after the *possible* expiry of the Access Framework in 2030.

5.4 However, this uncertainty exists today and has existed for some time due to the expiration of the declaration of the coal handling services at DBCT in 2020. This submission attaches robust empirical evidence which clearly demonstrates that uncertainty regarding the terms and conditions of access at DBCT post-2020 *has not* deterred investment in coal tenements, by miners without existing access to DCBT.

5.5 In fact, as shown in the figure below, in 2018 (the year in which the declaration review process began and DBCT's impending declaration expiry was made clear to stakeholders), tenement acquisitions by miners without existing capacity at DBCT were at a historic high. This is clear evidence that the User Group's theory of harm is nothing more than assertion.

[1] Section 76(1) and 87C(1) of the QCA Act.

Transactions of exploration and development coal tenements in the Goonyella system



5.6 As explained by HoustonKemp:[2]

> The available empirical evidence does not support the DBCT User Group's contention that the prospect of differentially priced access in the period beyond 2030 has material implications for economic activity that is taking place now, but which is dependent on access to infrastructure at the end point of the lengthy exploration and mine development phase. If this were the case, we would expect to see indications of a similar effect in the decade leading up to the expiry of declaration at DBCT in September 2020, giving rise to a 'freezing' effect on the involvement of non-incumbent users in the tenements market. We observe no such effect.
>
> Rather, the results of our review of the available evidence indicate that non-incumbent users have not been dissuaded from entering into tenement transactions in recent years. This is despite the expiry of declaration at DBCT in September 2020 and the prospect that the terminal would no longer be declared, with the potential implications for access charges at the terminal. Indeed, during 2018, in which the declaration review commenced, the involvement of non-incumbent users in tenement transactions has been very high by historical standards. These facts are not consistent with, and do not support, the DBCT User Group's theory of harm.

6 DBCTM has established throughout the declaration process that there will be constraints on DBCTM's market power, such that access as a result of declaration will not promote a material increase in competition in the coal tenements markets. In contrast to the User Group's *assertions*, DBCTM has *evidenced* this by way of the executed Deed Poll and Framework, which has legal effect and allows the QCA to assess, with certainty, the terms and conditions of access that will apply without declaration. Therefore, the QCA cannot be affirmatively satisfied that criterion (a) is met for the coal handling service at DBCT.

[2] HoustonKemp Report on Goonyella System Tenement Transactions, section 4

Criterion (b)

7 In order to find that criterion (b) is met, the QCA must be affirmatively satisfied that the facility for the service could meet the total foreseeable demand in the market— (i) over the period for which the service would be declared; and (ii) at the least cost compared to any 2 or more facilities (which could include the facility for the service).

8 The only available conclusion to the QCA is that criterion (b) is not satisfied. Using an approach that conforms to the requirements in section 76(2)(b) of the QCA Act, relevant facts and case law, and commonly understood economic principles, DBCTM has demonstrated throughout this declaration review process that the DBCT service does not satisfy criterion (b).

9 DBCTM has demonstrated, both on a theoretical basis and in reality, that DBCT alone does not currently, and could not in the future, service total foreseeable demand in the market and at least cost. Rather, it is least cost for that demand to be met using DBCT's coal handling services, together with coal handling services at HPCT, AAPT and RGTCT. DBCTM's position is supported by the facts as they occur in the market.

10 The User Group's conclusion that the DBCT service satisfies criterion (b) is made with disregard to reality and is contrary to the requirements of section 76(2)(b) of the QCA Act.

11 In the case of criterion (b), market definition is directed to assessing whether DBCT can meet total foreseeable demand in the market over the declaration period, and at least cost. Given this purpose, the market definition requires a demand side focus in order to facilitate the identification of customers in the market - that is, the mines that should be included as contributing to total foreseeable demand in the market in which DBCT operates.

12 Like the QCA, the User Group conflates the distinct concepts of 'demand for' and 'use of' a service. The effect of this approach is that demand in the market does not include volumes that are served by other terminals, such that demand does not exceed the use of DBCT. The User Group erroneously dismisses evidence of substitution between terminals actually occurring in the market and the fact that other terminals in addition to DBCT are currently serving demand in the market.

13 As a result of its approach to market definition, the User Group fails to correctly identify total foreseeable demand in the market as required by section 76(2)(b) of the QCA Act. The User Group estimates the use of DBCT, rather than total foreseeable demand in the market.

14 The least cost analysis by PwC relied on by the User Group is erroneous. Significantly, it commits the same error as the QCA in that it purports to be undertaken on the basis of a total cost standard, however, it ignores the sunk costs associated with other terminals when considering scenarios under which DBCT meets all foreseeable demand, even though those costs will continue to be incurred in those scenarios. When this error in PwC's (and the QCA's) assessment of least cost is corrected, even without any changes to the market defined by the QCA or the QCA's estimate of foreseeable demand in the market, the DBCT service fails criterion (b).

Criterion (d)

15 In order to find that criterion (d) is met, the QCA must be affirmatively satisfied that access (or increased access) to the service, on reasonable terms and conditions, as a result of a declaration of the service would promote the public interest.

16 This necessitates a balancing of the benefits and detriments that would arise with declaration, as compared to without declaration.

17 Even if the QCA concludes that criterion (a) is satisfied, the competition benefits that will arise through declaration are vague, theoretical and de minimus such that criterion (d) cannot be met for the DBCT service. This is because the User Group's theory of harm is purely theoretical, and has not been

substantiated by any empirical evidence. The User Group has not identified any efficient new entrant that would only enter the coal tenements markets if DBCT was declared, so cannot evidence any pro-competitive benefit of declaration.

18 Even if the benefit did exist and could be identified, it would be minimal. Under the User Group's theory of harm, any harm would be limited to the Hay Point Catchment area. The Framework includes substantial protections for access seekers and permits only extremely minor increases in the TIC representing a maximum of 1% of current coking coal prices. Any minor increase would affect less than 10% of users (based on the QCA's demand forecasts), and the remaining users would be protected by evergreen existing user agreements. This means that, if the QCA finds that competition is protected through declaration, the competition that is protected will be minimal.

19 Further, in the exceedingly unlikely circumstances where DBCTM was evidently harming competition in the coal tenements market, DBCT could be redeclared, limiting any harm that would actually occur to a negligible amount.

20 On the other hand, the costs of declaration are significant and clearly evidenced. These include:

20.1 Tangible regulatory compliance costs amounting to over $45m over the declaration period, which must be taken into account under the QCA Act.

20.2 The risk of regulatory error, which will deter investment in the terminal and delay investment in expansions.

21 There are also significant policy reasons why the declaration of the DBCT service would not be in the public interest:

21.1 Declaring DBCT on the basis of the User Group' theory of harm, would be to declare DBCT in perpetuity. This is because the only reason for the harm alleged by the User Group is the existence of the QCA mandated evergreen existing user agreements. In essence, DBCT would be declared only as a result of previous regulation by the QCA. This is clearly not the intent of the Part 5 access regime, and to declare DBCT for those reasons would undermine the regime, which is clearly not in the public interest.

21.2 The Part 5 access regime was intended to prevent vertically integrated monopolies from leveraging their power into dependent markets in which they participate, in order to harm competition. This is not the case here. Rather, large DBCT incumbents have concocted a highly theoretical harm which arises out of the past regulation of the terminal, in order to artificially satisfy the declaration criteria and protect their economic rents. To declare DBCT on this basis would be to twist the regime far beyond its intended purpose and would cast doubt on the integrity of the regime. Such a departure from the policy intent of the regime would be contrary to the public interest.

21.3 The arguments of the User Group are irreconcilably inconsistent with the NCC's statement of preliminary views regarding the declaration of the shipping channel service at the Port of Newcastle, and the recent report by the NCC's independent economic consultants NERA. If the QCA were to adopt a position in stark contrast with the NCC on a highly analogous matter, this would undermine confidence in the access regime, which would clearly be contrary to the public interest

22 Without any evidence of the magnitude of the benefits that would be promoted by declaration, and in light of the clear costs that will arise, the QCA cannot be affirmatively satisfied that declaration will promote the public interest, and criterion (d) cannot be satisfied.

2 Criterion (a)

2.1 Summary

23 DBCTM makes the following submission in response to the March 2019 submissions of the User Group, BHP, Peabody Energy and Glencore.

24 Those submissions do not affect the conclusions in DBCTM's previous submissions that criterion (a) is not satisfied. This is because:

24.1 The User Group has provided no probative evidence to support its theory of harm – that an asymmetry in terms and conditions of access will deter efficient new entrants from entering the coal tenements market.

24.2 The User Group's concern is narrow and theoretical, with many essential premises that are unsubstantiated or illogical.

24.3 The User Group appears to now be pivoting its argument to focus on the purported uncertainty that exists from access being required after the possible expiry of the Access Framework (**Framework**) in 2030.

24.4 However, this uncertainty exists today and would have existed for some time due to the expiration of declaration for the DBCT service in 2020. DBCTM's current submission attaches robust empirical evidence which clearly demonstrates that uncertainty regarding the terms and conditions of access at DBCT post-2020 has not deterred investment in coal tenements by miners without existing access to DCBT.

25 DBCTM has established throughout this process that there will be constraints on DBCTM's market power, such that access as a result of declaration will not promote a material increase in competition in the coal tenements markets. In contrast to the User Group's assertions, DBCTM has established this by providing an executed Deed Poll and Framework, which has legal effect and allows the QCA to assess, with certainty, the terms and conditions of access that will apply without declaration.

26 Section 2.2 of this submission lays out the User Group's theory of harm in relation to criterion (a) and the key requirements for the QCA to conclude that criterion (a) is satisfied on the basis of that theory.

27 Section 2.3 sets out DBCTM's responses to the staff questions published by the QCA on 5 April 2019 relating to its assessment of criterion (a), including evidence and data (as requested by the QCA) which demonstrates that the theory posited by the User Group is not borne out in reality.

28 Section 2.4 identifies fundamental flaws in user submissions and explains how, under the final, executed version of DBCTM's Framework, DBCTM has comprehensively addressed the concerns that the User Group has raised regarding the operation of the (draft) Framework.

2.2 Key factual premises that must be established for the QCA to conclude that criterion (a) is satisfied

30 Consistent with the QCA's draft recommendation, the User Group's theory of harm in relation to criterion (a) is that without declaration:[3]

30.1 there will be a significant difference in the terms and conditions of access for new users seeking access to DBCT as compared with incumbents (which will be protected under evergreen existing user agreements that have price protection in the form of arbitration rights);

30.2 this asymmetry will result in new users placing a lower value on tenements, compared to incumbents, which will result in efficient potential entrants being deterred from entering the Hay Point coal tenements market; and

30.3 this deterrent effect will constitute a material adverse effect on competition in the Hay Point coal tenements market (as compared to with declaration), such that access as a result of declaration would promote a material increase in competition in the coal tenements market.

31 For the QCA to conclude that the DBCT service satisfies criterion (a) on the basis of this theory of harm:

31.1 The QCA must be affirmatively satisfied that the geographic dimension of the coal tenements market is limited to the Hay Point catchment. For this, the QCA must establish that purchasers of coal tenements in the Goonyella system would be unable to deploy their capital and expertise to acquire tenements in other regions of Queensland (or elsewhere) in response to a reduction in their returns. This would contradict substantial evidence, from the miners themselves, that they can and do shop around for coal tenements that will provide the greatest returns, across the Queensland region, Australia, and globally .

31.2 The QCA must establish that DBCTM has an ability and incentive not only to increase its charges, but to increase charges to levels which would foreclose efficient new entrants from the coal tenements market.

31.3 On the basis that the irrevocable Deed Poll and Framework are binding and enforceable, the QCA must:

31.3.1 establish that pricing would not be differentiated with declaration (despite the presumption that it will under the existing Access Undertaking) – because if pricing for an expansion component is to be differentiated under regulation, access charges at DBCT for new users would likely be the same with and without declaration;

31.3.2 alter the position that it took it its draft recommendation that a $3.50 per tonne price differential would not be material. DBCTM notes that there have been no submissions from stakeholders that challenge this position and to change it would require the QCA to determine that differential pricing under the QCA approved Access Undertaking could lead to a material adverse impact on competition in the tenements market;

31.3.3 be affirmatively satisfied that **with declaration**, there are new entrants, that are more efficient than incumbents, who would enter the coal tenements market, and gain access to DBCT, overcoming significant barriers to entry in both of these markets, including highly volatile global coal prices and a fully queued terminal (including for all viable expansion capacity);

31.3.4 be satisfied that **without declaration** the access charges, which could be *a maximum* of $3 per tonne (and likely less) higher than those of incumbent users' –

[3] See: QCA Draft Recommendation, page C94; User Group March 2019 Submission at 5.7

as determined under a QCA administered pricing regime for the existing terminal – will create a material asymmetry such that that those efficient new entrants that would enter the coal tenements market with declaration would be deterred from entering as a result of this minor potential price increase without declaration;

31.3.5 be affirmatively satisfied that incumbents with production coming off in the declaration period do not already have tenements ready to replace mines reaching their end of lives. This needs to be established because, otherwise, the QCA cannot be satisfied that incumbents with better terms under their existing user agreements will even need to go to the tenements market to replace existing reserves. The QCA cannot simply assume that there are no existing coal resources available to incumbents;

31.3.6 (finally), be satisfied that any deterrence of efficient new entrants would be sufficiently significant that it would constitute a *material* adverse impact on competition in the coal tenements market, despite evidence provided by DBCTM that leading up to the expiry of declaration in 2020, investment in tenements by non-incumbents is at all-time highs.

31.4 Alternatively, the QCA must be affirmatively satisfied that DBCTM's executed Deed Poll and Framework would not provide a constraint on DBCTM without declaration, despite clear evidence of a executed, irrevocable, legally enforceable Deed Poll, based substantively on the QCA approved Access Undertaking. Even if this were the case, the QCA would still have to establish that DBCT is not constrained by other factors.

32 If the QCA does not establish the core factual premises set out in points 31.1, 31.2 and either 31.3 or 31.4 based on probative evidence, it cannot rely on the stated theory of harm to conclude that criterion (a) is satisfied for the DBCT service. DBCTM notes the decision in *Australian Broadcasting Tribunal v Bond* where Mason CJ commented:[4]

> …a finding of fact will then be reviewable on the ground that there is no probative evidence to support it and an inference will be reviewable on the ground that it was not reasonably open on the facts, which amounts to the same thing.

33 To date the User Group has relied exclusively on assertion to substantiate its theory of harm. In contrast, DBCTM has provided robust evidence to support its submissions that the DBCT service does not meet criterion (a). Most pertinently:

33.1 The executed Deed Poll and Framework, which now have legal effect, allows the QCA to assess, with certainty, the terms and conditions of access that will apply without declaration; and

33.2 HoustonKemp's analysis of real tenements transactions, which shows that uncertainty regarding the terms and conditions of access at DBCT has not affected the acquisition of tenements by miners without access to DBCT.

34 To the extent that the QCA or User Group proposes an alternative theory of harm, natural justice would require that DBCTM must be afforded an opportunity to provide its views on it, as a matter of procedural fairness.

[4] *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 3211 at 359-60; (1990) 94 ALR 11 at 40

2.3 QCA staff questions

35 On 5 April 2019 the QCA released a short document which included a number of staff questions to stakeholders for the purposes of developing their cross-submissions.

36 This section sets out DBCTM's response to those questions.

The Framework

37 The QCA's first question invites stakeholders' views on the likely impact of the Framework on competition in dependent markets. DBCTM notes that the Framework is no longer "proposed" but has now been executed and is legally binding, as evidenced in DBCTM's March 2019 submission.[5]

QCA Question	Summary of DBCTM response
Question 1 The Access Framework which DBCT Management says would apply in a future 'without declaration' appears to mirror in some respects the Access Undertaking, with the key exception of the pricing approach. QCA staff invite stakeholders' views on the likely impact of this proposed Access Framework on the incentives to invest and the environment for competition in related markets, in particular, the coal tenements market (exploration/ development tenements market and production tenements market), compared to a future with declaration.	• The Framework has been carefully designed to ensure there is no difference between the environment for competition in dependent markets, with and without declaration. • The Framework mirrors the provisions of the QCA approved Access Undertaking and prevents any price differential exceeding $3 per tonne. • It is not necessary that the Framework be identical to the Access Undertaking for criterion (a) not to be satisfied. Rather the Framework simply needs to provide a sufficient constraint that there is no material impact on competition as a result of declaration.

38 As previously submitted, the Framework has been carefully designed to ensure there is no difference between the environment for competition in dependent markets, with and without declaration.

39 It is not necessary that the Framework be an optimal possible arrangement, or identical to the Access Undertaking, to achieve this. Nor is it necessary that the Framework covers off every trivial or theoretical possibility of competitive harm. Rather the Framework needs to provide a sufficient constraint to ensure that declaration would not promote a *material* increase in competition.[6]

40 DBCTM submits that the NCC's approach to certification of State and Territory access regimes under Part IIIA of the *Competition and Consumer Act 2010* (Cth) is relevant to the QCA's assessment of the Framework, as the considerations are closely analogous. The NCC has stated that it 'does not consider the process of certification to involve an assessment of whether an access regime is "optimal"' and that 'certification does not necessarily require that the particular regime provides the most effective means of achieving efficient access outcomes'.[7] Rather, what is required is an assessment only that the particular regime satisfactorily addresses the clause 6 principles and accords with the objects of Part IIIA.[8] The NCC has stated that the

[5] DBCTM March 2019 Submission, Appendix 15 – Executed Deed Poll and Framework

[6] Rather, Parliament was concerned with vertically integrated monopolies leveraging their market power to harm competition in dependent markets

[7] NCC, Queensland Rail Access Regime, Application for certification under s44M of the Trade Practices Act 1974, Final Recommendation, 22 November 2010 at [4.18]. See also the NCC's most recent certification decision: NCC, South Australian Water Access Regime, Application for certification under section 44M of the Competition and Consumer Act 2010 (Cth), Final Recommendation, 22 March 2017 at [4.14]

[8] NCC, Queensland Rail Access Regime, Application for certification under s44M of the Trade Practices Act 1974, Final Recommendation, 22 November 2010 at [4.18]. See also NCC, South Australian Water Access Regime, Application for certification under section 44M of the Competition and Consumer Act 2010 (Cth), Final Recommendation, 22 March 2017 at [4.15]

NCC and the Minister have considerable flexibility in applying the CPA principles and recognises that a range of regulatory arrangements are capable of delivering efficient outcomes.[9]

41 This being said, as the QCA notes, the Framework does mirror in all material respects the QCA approved Access Undertaking, with the exception of the pricing provisions. Figure 7 in section 2.4 clearly demonstrates this by showing the key constraints (identified by the User Group) that exist with declaration and how they have been replicated under the Deed Poll and Framework. As previously demonstrated, the Framework has also been designed to comply with the requirements for an effective access regime under the Competition and Consumer Act 2010.

42 The TIC ceiling in the originally proposed version of the Framework was designed to ensure that any increase in access charges could not discourage usage of the terminal. This meant that any price increase would only ever affect the distribution of coal-export rents between miners and DBCTM.

43 In its draft recommendation, the QCA expressed concern that an increase in charges at DBCTM might put efficient new users at a competitive disadvantage in the coal tenements markets relative to existing users with evergreen rights to lower charges. In response to this DBCTM introduced the $3 Cap to ensure that any such effect could not be material and put beyond doubt that there could be no impact on competition in the coal tenements markets, in a future without declaration.[10]

The $3 Cap

QCA Question	Summary of DBCTM response
Question 1(a) You are invited to consider the…: • inclusion of a $3 per tonne cap (i.e. the requirement that the TIC cannot be more than $3 per tonne higher than the TIC that would apply under a QCA administered pricing regime) in the Deed Poll and Access Framework	• The $3 Cap addresses concerns raised by the QCA and User Group that an asymmetry in pricing between new and existing users would result in efficient new entrants being deterred from entering the coal tenements market. • It is untenable that a $3 per tonne *maximum* price differential would materially impact an efficient new entrant's decision to enter the coal tenements markets. • In any event, a new entrant is likely to value tenements based on an assumption that expansion capacity will be differentially priced. This would deliver the same access charges, and valuation of tenements by new entrants, with and without declaration.

44 As previously explained the $3 Cap prevents DBCTM from charging new users a TIC that is more than $3.00 per tonne higher than the TIC that would be determined under a QCA administered pricing regime for the existing terminal component. The only circumstances where DBCTM could charge more than this is where the QCA administered TIC for the new terminal component would exceed the existing terminal Floor TIC + $3.00 (i.e. in the case of an expensive and differentially priced expansion). In those circumstances, DBCTM could only charge up to the TIC determined under a QCA administered pricing regime for that terminal component.

45 To put the materiality of the $3 Cap in context, it is useful to note that the current spot price for seaborne metallurgical coal is currently around A$300 per tonne. This means that the *maximum* price differential

[9] NCC, Certification of State and Territory Access Regimes, A guide to Certification under Part IIIA of the Competition and Consumer Act 2010 (Cth), December 2017 at [3.3]

[10] Later in this submission DBCTM provides evidence that uncertainty regarding terms and conditions of access at DBCT post 2020 has had no impact on incentives to invest – with 2018 showing the highest levels of investment by non-incumbents in the Goonyella exploration and development tenements market ever, despite the uncertainty of declaration potentially expiring in 2020, and with non-incumbents fully aware that declaration was about to expire. This was also in circumstance before DBCTM had committed to the $3 cap.

between new and existing users at DBCT represents around 1% of export revenues – clearly a trivial difference.[11]

46 It is also important that the QCA appreciates that the TIC that will be determined by an arbitrator without declaration **will likely not** be at the $3 Cap. Rather, the $3 Cap is simply the limit. The actual TIC will be determined under the 'willing but not anxious' test and may be much lower than a TIC set at the full cap. The QCA must take this into account in its analysis. This submission uses the $3 Cap to demonstrate that even at the *maximum possible* charges under the Framework there will be no adverse impact on competition.

47 The prospect that a price differential of less than $3 per tonne could result in a *material* adverse impact on competition in the coal tenements is not tenable. This was acknowledged in the QCA's draft recommendation where it concluded that a $3.50 per tonne price differential (which would apply if expansion costs were not socialised) would not appear to be material.[12]

Impact of $3 per tonne increase in access charges on valuations will be trivial

48 The User Group's theory of harm is based on an assumption that valuations of tenements will be different with and without declaration. However this is unlikely to be the case under the Framework.

48.1 The QCA's draft recommendation estimates that access charges with declaration will include a $3.50 per tonne price differential if expansion capacity is differentially priced.

48.2 In valuing tenements, it is likely that new entrants would take a prudent approach and adopt the differentiated charges, given that this is the default position under the Access Undertaking.[13]

48.3 If expansion capacity is differentially priced, access charges will almost certainly be the same with and without declaration.[14] Hence, the incentives for efficient new entrants to invest in coal tenements will be the same both with and without declaration.

49 Even if the QCA were satisfied that a potential new entrant would, despite the default of the current Access Undertaking, imprudently value a tenement based on the assumption that expansion costs would be socialised, HoustonKemp estimates that even at the maximum $3 per tonne additional cost of access to DBCT for a new entrant without declaration – it would only result in a possible 1.5% reduction in today's valuation of an exploration and development tenement not coming into production until 2030.[15]

50 The only circumstance in which a change in valuation so small would affect a new entrant's decision whether or not to enter the coal tenements market would be if the investment was already on an economic 'knife's edge'.

51 The 'knife's edge' concept – and the remoteness of this possibility – was referred to by the National Competition Council in its recent preliminary view in relation to the Port of Newcastle revocation application, where it stated that:[16]

[11] Unless expansion costs were differentiated, in which case the price differential would almost certainly be the same with and without declaration.

[12] QCA Draft Recommendation, pages C86 and C87

[13] This is discussed further, below in section 2.4

[14] This is because, based on the QCA's estimate of the charges for differentially priced expansion capacity with declaration in its draft recommendation, the floor TIC for the expansion component will exceed the $3 Cap, meaning that pricing under the Framework will be at the Floor TIC for the expansion component

[15] Appendix 1 - HoustonKemp, Economic Concepts underpinning the assessment of access criteria, April 2019 (**Houston Kemp April 2019 Report**), section 2.2

[16] National Competition Council "Revocation of the declaration of the shipping channel service at the Port of Newcastle – Statement of Preliminary Views" 19 December 2018, page 54

> …..As noted in submissions, a decision to invest in the Newcastle Catchment may be motivated by the possibility of drawing on factors of production and contracts for other mines in that area (where present) or may be made with regard given to pre-existing infrastructure in the area. The Council considers that in order for uncertainty linked to the absence of declaration of the Service to have a material impact on participation in Newcastle catchment tenements, the investment decision between participating in the Newcastle catchment versus other areas would have to be a 'knife's edge' decision. The Council does not have any evidence that this is currently the case.
>
> The Council notes that submissions have been received from large mining companies advising of the vulnerability of small mining participants in the tenements market but it has not received any submissions from the small mining companies which are likely to be most affected

52 As previously submitted, in circumstances where a new entrant to the coal tenements market was on such a "knife edge", it is unlikely that that new entrant would be more efficient than existing users. In which case, the impact on competition would be trivial and immaterial, in a wider coal tenements market which is already workably competitive with a number of efficient, existing competitors with economies of scope and scale.

53 DBCTM also notes, consistent with the NCC's observations, that there have been no submissions from current or prospective tenement market participants demonstrating that their decision to participate in the tenements market is so finely balanced that increased access charges, in the order of what would be allowed under the Framework, would lead to a decision not to enter the coal tenements market.[17]

The Floor TIC

QCA Question	Summary of DBCTM response
Question 1(b) You are invited to consider the…: • reliance in the Access Framework on estimating a floor TIC 'that would apply under a QCA administered pricing regime'. Does this provide clarity on the likely TIC that would apply? Is the process for establishing the floor TIC similar to the setting of access charges under existing user agreements? How will this process apply, including at both the negotiation and arbitration stages, if Part 5 of the QCA Act no longer applies in the absence of declaration?	• The floor TIC provides clarity on the approach and principles that will be used to determine access charges under the Framework. It provides the same level of clarity that is provided with declaration. • To determine the Floor TIC under the Framework the arbitrator is required to determine the TIC that *would* apply under a QCA administered pricing regime. This requires the arbitrator to put itself "in the shoes" of the QCA. Part 5 does not need to apply to the DBCT Service for the arbitrator to undertake this exercise. • This is a similar process to that which would be undertaken by the arbitrator under the existing user agreements. This means that any uncertainty will not create an asymmetry between new and existing users.

54 It is unclear why the clarity of the Floor TIC is now the subject of debate. The fundamental basis of the User Group and QCA's theory of harm is that protections in the existing user agreements protect incumbents, and therefore give rise to an asymmetry in the terms and conditions of access, between new users and incumbents. This was the basis for the conclusion in the QCA's draft recommendation that criterion (a) was satisfied.

55 The protections in the existing user agreements which give rise to the alleged asymmetry rely on the use of an arbitrator to redetermine capital charges every 5 years, having regard to (*inter alia*) the then current approach of the QCA for comparable to the services with the intent that "the arbitrator should produce an outcome similar to that which might have been expected had the QCA determined it".[18]

[17] See also, National Competition Council "Revocation of the declaration of the shipping channel service at the Port of Newcastle – Statement of Preliminary Views" 19 December 2018 at [6.161]

[18] Clause 7.2(e)(vii) of the existing user agreements

56 If the Floor TIC – which requires an arbitrator to set charges having regard to the Floor TIC (which is the TIC that would apply under a QCA administered pricing regime) – was not a workable proposition then:

56.1 this must also be so for the protections under the existing user agreements, which require a similar process and considerations;

56.2 this would mean that the purported harm caused by asymmetry of terms and conditions of access cannot occur, as incumbents would not be protected by the provisions in the existing user agreements post-declaration, and new and existing users would be on a level playing field; and

56.3 if this were the case, the reasoning underlying the QCA's conclusion on criterion (a) in its draft recommendation would not hold, and the QCA must find that criterion (a) is not satisfied for the DBCT service.

Does the floor TIC provide clarity on the likely TIC that will apply?

57 The Floor TIC under the Framework is expressed as "the TIC for that Terminal Component that would apply under a QCA administered pricing regime". This requires the arbitrator to determine the TIC that would apply, by putting itself in the shoes of the QCA.

58 This provides clarity as to the approach to setting the Floor TIC that will be taken by the arbitrator under the Framework, as the arbitrator is required to apply the same principles and rules as the QCA would be required to under the QCA Act, such as the pricing principles under section 168A. The arbitrator may also look to the QCA's approach to comparable services.

59 Clarity will also be further enhanced by a clear and well documented regulatory precedent between 2005 and 2020, under which the QCA has developed the building blocks approach it has used to determine DBCTM's access charges.[19] This means that determination of the floor TIC should be a relatively straightforward assessment.

60 This is the same level of certainty regarding access charges that potential access seekers would have if DBCT was declared. With and without declaration, the precise charges that would be determined by the QCA for a new entrant will not be perfectly clear at the time the new entrant enters the coal tenements market. This is because:

60.1 given that DBCT is now fully contracted, new users will need to contract for expansion capacity, the cost of which has not yet been determined by the QCA; and

60.2 as identified by the User Group, a new entrant to the exploration and development tenements market will typically make a decision to invest a number of years before access to DCBT is required. This means that the exact charges that will be applicable will not be apparent, even with declaration.

61 However, the QCA's estimated the likely access charges that would apply in a future with declaration, as part of its draft recommendation. This shows that it is relatively straight-forward to estimate future floor TIC. These estimates provide a reasonable indication to potential access seekers of the likely TIC that would apply under QCA administered scheme for the short to mid-term.

62 Both with and without declaration, potential access seekers will be able to reasonably estimate the TIC that would be determined under a QCA administered pricing regime, providing clarity required for investment decisions.

[19] DBCTM notes that in over 15 years of regulated pricing at DBCT, terminal charges have always been within a range of less than $1, between high rate periods that included an expansion incentive equity beta, and low rate periods where that incentive was discontinued. Over this time charges have only ranged from $2.50 to $3.30.

63 In fact, Access Seekers may have greater clarity of the TIC that would apply under the Framework, than they would with declaration. At the recent stakeholder forum, Dr Mundy raised the prospect that the QCA may not determine a TIC at all for DBCTM as part of the 2021 regulatory reset, and may use a completely different form of regulation altogether. On the other hand, the Framework has now been executed, and is available for future access seekers to gain clarity on the exact terms of access that will be available in the future. This includes a methodology where an arbitrator is required to determine a TIC, based on that which would be determined under a QCA administered pricing regime (regardless of whether the QCA would, in fact, determine a TIC with declaration).

Is the process for establishing the floor TIC similar to the setting of access charges under existing user agreements?

64 In determining the access charges that would apply under the existing user agreements an arbitrator is required to determine the capital charges having regard to (*inter alia*):[20]

> the then current approach of the QCA in respect of appropriate charges for services comparable to the Services (with the intent that the arbitrator should produce an outcome similar to that which might have been expected had the QCA determined it).

65 This is substantially the same exercise to that under the Framework, as under both the Framework and the existing user agreements the arbitrator must consider the likely approach of the QCA to determining capital charges.

66 The *process* to determine the floor TIC under the Framework is similar to the process for reviewing capital charges under clause 7 of the existing user agreements, currently in place.

66.1 Both processes require the parties to negotiate the charges that will apply in the first instance. This will likely involve each party making their own estimate of the likely capital charges that would apply if the matter were referred to arbitration. The Framework includes detailed provisions for this process in section 5, including requirements for DBCTM to provide information to access seekers in order to inform these negotiations.[21] Based on this information, new access seekers will be able to estimate the floor TIC.

66.2 In circumstances where a negotiated outcome is not possible, the parties have the option of referring the matter for determination by an independent arbitrator. Under both the Framework and existing user agreements, the arbitrator will be required to determine the capital charges that will apply for the relevant pricing period. Under the Framework this would require consideration of the TIC that would apply under a QCA administered regime. Under the existing user agreements this would require a consideration of the expected outcomes had the QCA determined the matter.

How will this process apply, including at both the negotiation and arbitration stages, if Part 5 of the QCA Act no longer applies in the absence of declaration?

67 As explained above, the floor TIC does not require that Part 5 applies, or that the arbitrator knows what the QCA definitively would have done in the relevant period, in order to operate. Rather, the arbitrator is required to put itself in the shoes of the QCA to determine the TIC that *would* apply under a QCA administered price regime. In doing so, the arbitrator will have regard to the same factors that would bind the QCA if it were administering the pricing regime.

68 This is in the same way that the User Group and the QCA have agreed that existing user agreements are capable of operation without declaration, to protect and provide certainty to incumbents. In fact, the

[20] Clause 7.2(e)(vii) of the existing user agreements
[21] Section 5.2(d) of the executed Framework

protection and certainty offered under those user agreements are the basis for the purported asymmetry which allegedly results in competitive detriment to the coal tenements market. A similar process is now provided for to new entrants under the Framework, and as such the QCA must find that future access seekers will be protected in a similar manner.

The Duration of the Access Framework

QCA Question	Summary of DBCTM response
Question 1(c) You are invited to consider the…: • The duration of the Access Framework (up to 10 years, to 2030), relative to mine life. How would terms and conditions of access be set after this time? How would prices in the 5 yearly reviews under the standard user agreement (under the proposed Access Framework) be determined after this time? To the extent that there is uncertainty over pricing terms after expiry of the Deed Poll, would this affect the environment for competition in coal tenements market during the proposed declaration period? If so, how? Please provide supporting data and evidence	• Criterion (a) requires a comparison of the with and without declaration.[22] In both scenarios, the declaration/Framework will expire in 2030. To presume that the 10 year declaration period was ongoing would be erroneous. • DBCTM will likely renew the operation of the Framework for a further term prior to expiration. The Deed Poll sets out this process and requires DBCTM to notify its intention to renew or not renew the Framework 12 months before it expires. • If DBCTM does not renew the Framework, the Service may be declared unless there are appropriate other constraints on its ability and incentive to exercise market power. • The User Group has raised the theory that uncertainty of access terms beyond the expiry of the Framework would deter new entrants to the exploration and development market within the declaration period. • If this was a legitimate effect, then it would be observable now, as there has been uncertainty as to the terms of access to DBCT post-2020 when declaration expires. • HoustonKemp has provided robust, quantitative evidence to evidence that no such effect has occurred • To date the User Group has put forward **no** evidence to support its theory. • In any event, access seekers cannot have precise certainty of access terms far into the future. As DCBT can be declared or undeclared at any time depending on whether the access criteria are met.

How would terms and conditions of access be set after the expiration of the Framework?

69 Prior to the expiration of the Framework, DBCTM has the option of renewing the Framework for a further term, or allowing it to lapse. This process is expressly contemplated in the Deed Poll, and obligates DBCTM to publish a notice of its intention to renew or not renew the Framework for a further term, 12 months before it is due to expire.[23]

70 The notification provisions were included to provide transparency of DBCTM's intentions prior to the expiration of the Framework, allowing potential access seekers to request that the QCA recommend that the DBCT Service be declared, under section 77 of the QCA Act, if DBCTM were not to renew the Framework.

71 This is similar to the process that would occur if DBCT were declared until 2030 as proposed in the QCA's draft recommendation. In that scenario, the QCA would have to recommend whether the Service be redeclared under section 87A of the QCA Act, between 6 and 12 months before the expiration of the

[22] QCA Draft Recommendation, section C3.4
[23] Executed Deed Poll, Clause 5

declaration. This means that there is no material difference between the process leading into 2030 with and without declaration.

72 Naturally, if DBCTM chose not to renew the Framework before its expiration it would be at risk of being declared. As such, DBCTM considers it highly likely that it will renew the term of the Framework, beyond 2030.

73 The only circumstances where DBCTM would not renew the Framework would be if it was clear to the QCA that there were sufficient constraints without the Framework such that declaration would not promote a material increase in competition in a dependent market, even without the Framework.

74 If DBCTM did not renew the Framework and the QCA found that DBCTM was not constrained by other factors, access seekers would be able to successfully apply for declaration, and access charges post-2030 would be determined by the QCA.[24]

How would prices in the 5 yearly reviews under the standard user agreement (under the proposed Access Framework) be determined after this time?

75 When the Framework is renewed then the 5 yearly reviews will proceed as they did in the initial term of the Framework:

75.1 The parties will endeavour to negotiate and agree, as early as practicable, the basis and amount of new charges to apply for the next pricing period;[25] and

75.2 if the parties have not reached an agreement 6 months prior to the start of the relevant pricing period, either party can refer the matter for determination by an arbitrator in accordance with the renewed Framework.

76 In the unlikely circumstances that DBCTM did not renew the Framework, a similar process would be followed:

76.1 The parties would endeavour to negotiate and agree as early as practicable the basis and amount of new charges to apply for the next pricing period;[26] and

76.2 To the extent that the parties could not agree on these matters, the matter would be resolved under clause 15 of the SAA, and ultimately be submitted to arbitration in accordance with, and subject to, the Resolution Institute Arbitration Rules, under clause 15.4.

77 Following the cessation of the Framework, the arbitration would operate as a normal commercial arbitration. However, as discussed above, in practice, DBCTM would only not renew the Framework if it was confident that there was no risk of re-declaration.

To the extent that there is uncertainty over pricing terms after expiry of the Deed Poll, would this affect the environment for competition in coal tenements market during the proposed declaration period? If so, how? Please provide supporting data and evidence.

The User Group's new theory of harm

78 At the recent stakeholder forum, the User Group argued that uncertainty over pricing terms after expiry of the Framework term in 2030, would harm the environment for competition in the exploration and development coal tenements market during the proposed declaration period.[27]

[24] Assuming the other declaration criteria were also satisfied
[25] Standard Access Agreement, clause 7.2(c)(ii)
[26] Standard Access Agreement, clause 7.2(c)(ii)
[27] User Group March 2019 stakeholder forum slides, slide 19

79 The User Group's theory is that:

79.1 New users will have no certainty as to the terms of access beyond the expiration of the Framework in 2030.

79.2 This means there will be an asymmetry in the valuations of tenements by new and existing users leading up to the expiry of the Framework.

79.3 As a result, efficient new entrants will be deterred from entering the exploration and development coal tenements market a number of years before those users would seek access to DCBT.

79.4 Therefore, this will result in a material impact on competition during the declaration period.[28]

HoustonKemp has provided supporting data and evidence, as requested by the QCA, to show that the User Group theory is **not** borne out in reality

80 If the effect referred to by the User Group were valid, then it would be observable now. This is because DBCT's declaration status (and the terms and conditions of access for new users) post-2020 is uncertain, as DBCTM's declaration expires in 2020. This means that (until DBCTM executed the binding Deed Poll in March 2019) the only certainty of access terms that users have had post-2020 is that, if the declaration criteria are met, DBCT will be declared and the terms of access will be regulated under the QCA Act.[29] This is analogous to the situation that will occur in the period leading up to either the potential expiry of the Framework, or the expiration of the declaration period proposed by the QCA, in 2030.

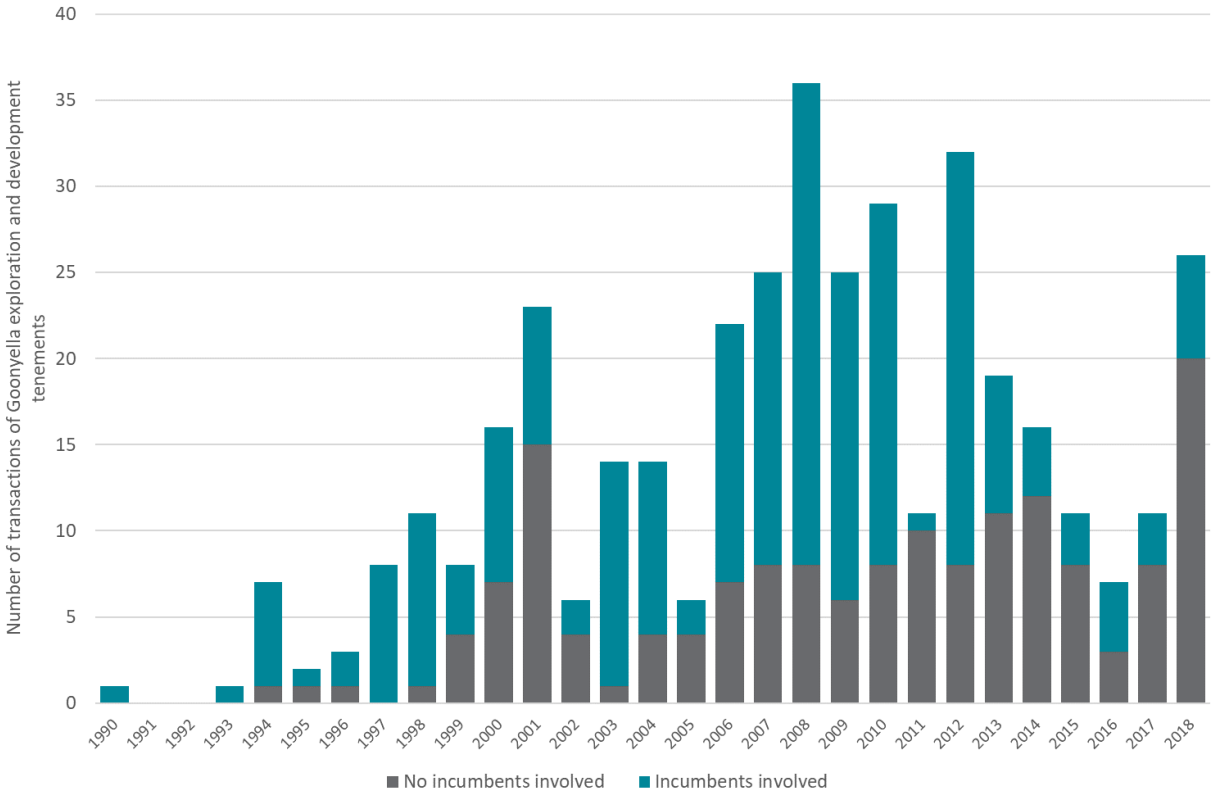
81 However, as analysis undertaken by HoustonKemp and set out in its attached report on Goonyella System Tenement Transactions,[30] clearly shows – there is simply **no evidence** of new entrants to the coal tenements market being deterred as argued by the User Group.

[28] User Group March 2019 stakeholder forum slides, slide 19

[29] The declaration of DBCT has been set to expire in 2020 since the QCA Act was amended in 2010. Through the QCA's public consultation processes, the impending expiry of declaration has been visible to stakeholders since early 2018. Therefore any evidence of the User Group's theory of harm is necessarily contained in the period 2010 until the present, with 2018 providing the strongest empirical evidence of tenement market impacts from any uncertainty regarding the terms and conditions of access post declaration.

[30] Appendix 2 – HoustonKemp report on Goonyella System Tenement Transactions

Figure 1: Transactions of exploration and development coal tenements in the Goonyella system[31]



82 If the User Group's theory were valid, one would expect to see a material increase in the proportion of acquisitions involving incumbents (who would value tenements more highly given their evergreen rights to access post-2020), and a decrease in the proportion of tenements acquired by non-incumbents (given the purported reduction in valuation and deterrent effect cited by the User Group), leading up to the expiry of declaration at DBCT.

83 Instead what is shown is a thriving tenements market, with significant acquisitions by miners who are not incumbents with capacity at DBCT. Notably, the 2018 year showed the highest number of tenement acquisitions by non-incumbents since 1990, by a large margin. This was a period overlapping with the current declaration review, where it was clear to future access seekers that DBCTM may not be regulated beyond 2020, and where DBCTM was publicly arguing against declaration. The User Group's theory that future uncertainty regarding access at DBCT will have a deterrent effect on miners without existing access to DBCT is simply not reconcilable with the evidence provided by HoustonKemp. As outlined by HoustonKemp:[32]

> The available empirical evidence does not support the DBCT User Group's contention that the prospect of differentially priced access in the period beyond 2030 has material implications for economic activity that is taking place now, but which is dependent on access to infrastructure at the end point of the lengthy exploration and mine development phase. If this were the case, we would expect to see indications of a similar effect in the decade leading up to the expiry of declaration at DBCT in September 2020, giving rise to a 'freezing' effect on the involvement of non-incumbent users in the tenements market. We observe no such effect.
>
> Rather, the results of our review of the available evidence indicate that non-incumbent users have not been dissuaded from entering into tenement transactions in recent years. This is despite the expiry of declaration at DBCT in September 2020 and the prospect that the terminal would no longer be declared, with the potential implications for access charges at the terminal. Indeed,

[31] HoustonKemp report on Goonyella System Tenement Transactions, figure 3-2
[32] HoustonKemp report on Goonyella System Tenement Transactions, section 4

> during 2018, in which the declaration review commenced, the involvement of non-incumbent users in tenement transactions has been very high by historical standards. These facts are not consistent with, and do not support, the DBCT User Group's theory of harm.

84 In light of the clear evidence that the User Group's theory of harm does not conform with empirical observations, the QCA cannot be affirmatively satisfied that efficient new entrants would be deterred from entering the coal tenements market in a future without declaration compared to a future with declaration. This means that criterion (a) cannot be satisfied and the QCA must recommend that the DBCT is not declared.

85 DBCTM notes that, to date, the User Group has not put on **any** probative evidence to demonstrate that the purported effect on competition would occur, or has occurred elsewhere. It has relied on assertion alone to substantiate its theories of harm. This is despite the fact that no other terminal that provides coal handling services in Australia is declared.

86 Even if the User Group's theory were valid, this effect would occur both with declaration (at the end of the declaration period), and without declaration (at the end of the Framework term (assuming that the Framework is not renewed)).

87 In line with the QCA's draft recommendation, the User Group has previously accepted that if criterion (a) is satisfied, a 10 year declaration period would be appropriate, taking into account the importance of providing long term certainty to access seekers:[33]

> Accordingly, on balance, if the QCA ultimately finds that the access criteria are satisfied over a 10 year declaration period, the DBCT User Group would be willing to support the QCA's proposed 10 year declaration period.

88 The User Group is backtracking now only because DBCTM has executed a final Framework that put beyond doubt that the Framework will prevent any prospect of harm to competition without declaration.

89 In any event, even if DBCT were declared for a longer period, this would not create any additional certainty as to the terms of access for potential entrants to the exploration and development coal tenements markets, who would not seek to access DBCT for a number of years.

90 The only certainty that a new entrant to the tenements market/potential access seeker would have at the exploration or development stage, is that there is a certified effective third party access regime in place and that DBCT will be declared, or able to be declared, if the declaration criteria are satisfied. This is because:

90.1 Even if the DBCT Service was declared for a longer period, declaration could be revoked at any time if the declaration criteria were no longer met, under the Part 5, subdivision 5 of the QCA Act.

90.2 Likewise, if the DBCT Service was not declared, it could become declared at any time if the declaration criteria were met, under Part 5, Subdivisions 2 and 4, of the QCA Act.

91 Because these two processes could occur at any time, the only certainty that a new entrant to the exploration and development coal tenements market has regarding the terms of access when it comes to accessing DBCT, is that *if* the declaration criteria are met, then the DBCT Service will be declared. This being said, access seekers also have certainty of the terms of access that will apply if DBCT is not declared, for the duration of the Framework.

[33] User Group March 2019 Submission, page 5

92 This means that uncertainty beyond 2030 is no different with or without declartion. The QCA cannot be affirmatively satisfied that the terms and conditions of access to DBCT will be materially different with and without declartion that far into the future.

Compliance and Enforcement

QCA Question	Summary of DBCTM response
Question 1(d) You are invited to consider the…: • compliance and enforcement - access seekers' visibility over DBCT Management's compliance with the Access Framework and ability to address breaches, as well as consequences of a breach. To what extent is DBCT Management's process similar or different to that which applies under Part 5 of the QCA Act? Are there any circumstances where the Access Framework could be unenforceable - for example, assignment by DBCT Management?	• It would typically be apparent to access seekers if DBCTM was not honouring the access rights they are afforded under the Framework. • Despite this, the Framework also contains express reporting requirements that DBCTM must comply with – it will be clear when DBCTM does not comply with these requirements. • The dispute resolution mechanisms in the Framework allow for the Framework to be effectively enforced and provide for the determination of any disputes by appointing independent and qualified individuals (either an expert or arbitrator). In this context, those individuals carry out the role that the QCA has performed under the Act and Access Undertakings. • In the extremely unlikely event that the Framework was unenforceable for any reason, the QCA would be able to declare the DBCT Service (if the access criteria were met)

Access Seeker's visibility over DBCT Management compliance

93 Access Seekers are provided with visibility in relation to DBCTM's broader compliance with the Access Framework through the public reporting requirements in sections 9.1 and 9.2 of the Framework, which are based on the QCA approved Access Undertaking.

93.1 Under section 9.1, DBCTM is required to annually publicly report information regarding a number of things, such as the number of instances where a dispute has been referred to dispute resolution under the Framework, and any written complaints received by DBCTM in relation to its compliance with the Framework.

93.2 Under section 9.2, DBCTM is also required to publicly report on a quarterly basis on a variety of service quality key performance indicators for the Terminal.

94 These reporting requirements are in addition to the significant visibility arising from access seekers' general dealings and negotiations with DBCTM under the Framework. For example access seekers and holders are acutely aware of DBCTM's pricing obligations, and would detect any non-compliance immediately.

95 The independent operator, which is user owned, is also intimately aware of DBCTM's obligations regarding its operations, which provides an additional check on DBCTM's compliance.

Ability for Access Seeker to address breach / consequences of a breach

96 The Framework enables an access seeker to refer 'any dispute' or, more broadly, any 'question that arises under or in relation to' the Framework (Dispute) to the specified dispute resolution mechanisms contained in section 16.1. Such a Dispute would include, for example, where an Access Seeker considers that DBCTM has breached the Framework or where the access seeker and DBCTM agree that DBCTM has breached the Framework, but do not agree on the consequences of that breach.

97 As is the process under the QCA approved Access Undertaking, the dispute resolution mechanisms under the Framework refer the Dispute to: first, the respective CEO's of the access seeker and DBCTM;[34] then, expert determination,[35] determination by arbitration,[36] or both.

98 Additionally, if an access seeker requires more urgent relief resulting from a breach by DBCTM, the Framework expressly provides that nothing in the Framework prohibits an access seeker from seeking urgent injunctive relief from a court.[37]

Resolution by CEO's

99 Unless otherwise specified in the Framework, disputes under the Framework will generally be referred, in the first instance, to the Chief Executive of DBCT Management and the Chief Executive of the Access Seeker for resolution (section 16.2(a)).

100 If the Dispute is not resolved within 10 Business Days of being referred to the respective Chief Executives, the Dispute will be referred to an Independent Expert by default (under section 16.3) or, if the parties agree, to Arbitration (under section 16.4).

Expert Determination

101 The Independent Expert has the power to request from the parties provide information and all other assistance that the Independent Expert reasonably requires (section 16.3(d)). The parties must provide that information as soon as soon as reasonably practicable.

102 The Independent Expert's determination in relation to the Dispute is final and binding (section 16.3(h)) and must be consistent with the provisions of the Access Framework (section 16.3(d)).

Determination by Arbitration

103 Disputes referred to Arbitration under section 16.4 of the Framework are to be conducted in accordance with the Resolution Institute Arbitration Rules (clause 16.4(b)). The Resolution Institute Arbitration Rules requires that parties are to communicate their respective positions in a statement of claim and statement of defence, and also provides for the exchange of further written statements (should the arbitral tribunal require them), as well as statements by witnesses (including expert witnesses). Under the Resolution Institute Arbitration Rules interim measures may be ordered, such as the provision of the discovery of documents and the inspection of property.

104 In making a determination, the Arbitrator must have regard to the terms of the Framework and other matters, including matters set out at section 120 of the Act (which are to be considered by the QCA in making an access determination). These matters include (among other things) the Framework Objective (which mirrors section 69E of the Act (the Object of Part 5)), the public interest (including the benefit to the public in having competitive markets), and the direct costs to DBCTM of providing access to the Terminal.

105 An access seeker is able to enforce an arbitral award against DBCTM through the courts, under section 35 of the *Commercial Arbitration Act 2013* (Qld).

[34] Section 16.2 of the Framework
[35] Section 16.3 of the Framework
[36] Section 16.4 of the Framework
[37] Section 16.5 of the Framework

Enforcement of Access Framework / consequences of breach

106 An Independent Expert or Arbitrator may make a determination including an order that DBCTM must 'specifically perform' the Framework in a way that is not in breach or that addresses the breach. Such a determination is enforceable through the courts.

To what extent is DBCT Management's process similar or different to that which applies under Part 5 of the QCA Act?

107 As explained above, the dispute resolution mechanisms in the Framework allow for framework to be effectively enforced and provide for the determination of any Disputes by appointing independent and qualified individuals (either an expert or arbitrator). In this context, those individuals will, in essence, carry out the dispute resolution role that the QCA has performed under the Act and Access Undertakings.

Are there any circumstances where the Framework could be unenforceable - for example, assignment by DBCT Management?

108 DBCTM's Framework has been designed to give certainty to access seekers by including safeguards to ensure that it will be enforceable for the term of the Framework.

109 Following the QCA's draft recommendation, DBCTM amended clause 4.1 of the Deed Poll to include a new covenant that the Framework will continue to apply to the use of the terminal (including access to the DBCT Service) throughout the term of the Framework.

110 This covenant was included to address any perceived risk that DBCTM could assign its interest in the terminal to a third party without conditioning that assignment on the assumption by the third party of DBCTM's obligations under the Deed Poll and the Framework. If DBCTM were to assign its interest without ensuring that the Framework would continue in force, it would breach clause 4.1. The executed Deed Poll also provides that specific performance is available as a remedy for a breach of this covenant.

111 In any event, in the highly unlikely circumstances that the Framework was found to be unenforceable, access seekers would be able to immediately apply for redeclaration, and (to the extent that access criteria were met without the Framework) the DBCT Service would be redeclared by the QCA.

Would different pricing terms or other terms have a material effect on the environment for competition?

112 The QCA's second question asked for information on the factors influencing decisions to invest in the coal tenements markets.

QCA Question	Summary of DBCTM response
Question 2 What factors influence a decision to invest in the market for exploration/development coal tenements and for production tenements? What impact, if any, would uncertainty about terms and conditions of access over the life of a mine have on investment decisions? Please provide evidence where possible.	• Miners make investment decisions based on the return offered on an investment. The return on a given investment will be influenced by a wide range of factors – primarily, revenues, costs and risks. • The materiality of access charges - less than 3% of total mining costs and less than 1% of current spot prices – is too insignificant to have a material impact on investment decisions of miners. • Analysis by HoustonKemp supports this by showing that uncertainty regarding terms of access post-2020 has had no impact on investment in the tenements markets.

Factors influencing decisions to invest in tenements

113 Miners make investment decisions based on the return offered on an investment. The return on a given investment will be influenced by a wide range of factors. These can be categorised, broadly into three categories:

113.1 Revenues - The primary driver for investment will be coal prices, which dictate the incomes that a miner will receive from an investment.

113.2 Costs - The likely costs of production will also influence a decision to invest, as costs will impact the return that the miner receives on its investment.

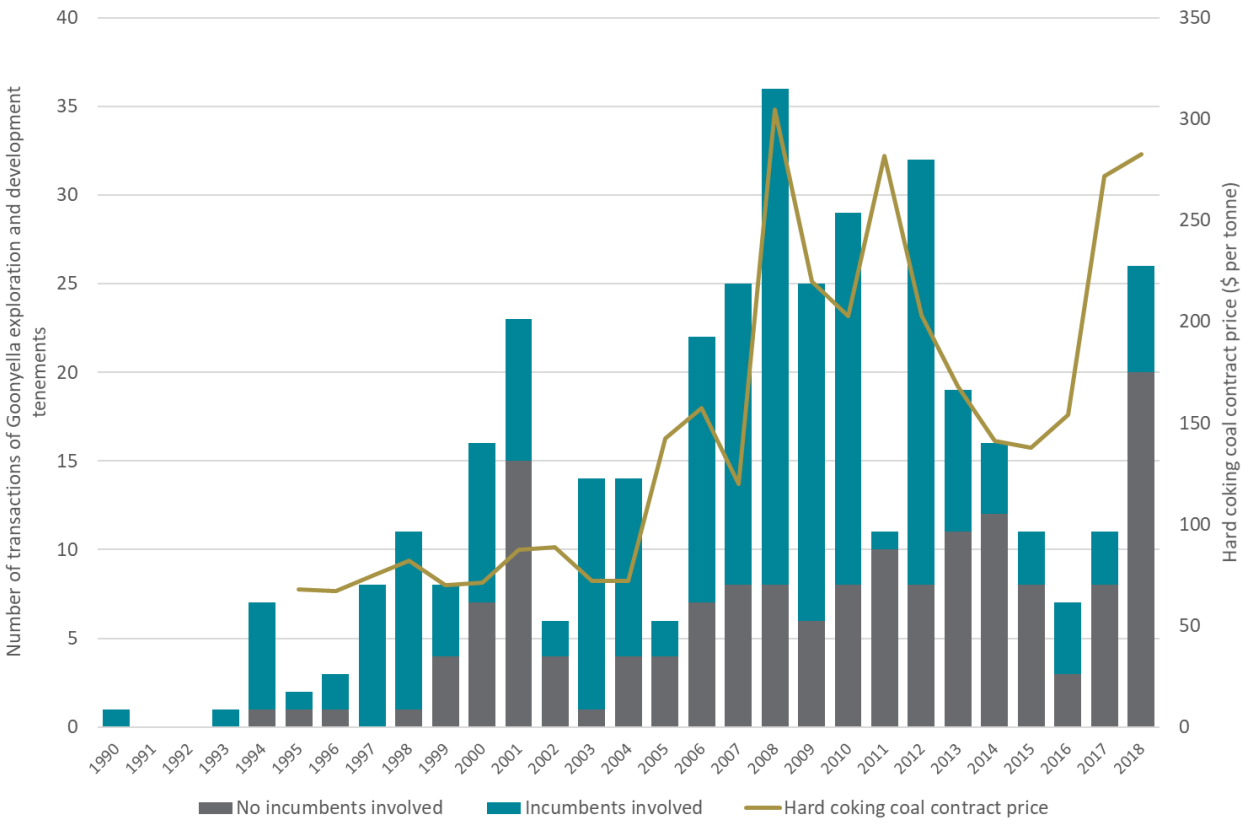
113.3 Risks - The mining industry is inherently risky. The level of risk for a given investment will influence a decision to invest.

Revenues

114 Global coal prices are the key driver for investment in coal tenements at all stages of production. This is because miners are price takers on the global market, and global coal prices are source of all revenue that trickles back through the various stages of production.

115 HoustonKemp's analysis of coal tenement transactions in the Goonyella System clearly shows that the main driver for investment in the exploration and development tenement markets, is coal prices.

Figure 2: Transactions in Goonyella exploration and developments and coal prices[38]



116 The figure above shows a clear correlation between exploration and development tenement transactions in the Goonyella system and global coking coal prices. Notably, as discussed above, the figure does not

[38] HoustonKemp report on Goonyella System Tenement Transactions, figure 4-1

show any drop off in coal tenement transactions due to uncertainty as to the terms and conditions of access to DBCT beyond 2020 (when declaration expires).

117 Coal price fluctuations also present a significant risk for investors in tenements. As DBCTM explained in its March 2019 submission, the highest traded coal price between 2011 and 2018 was US$278 per tonne and the lowest was US$76 per tonne. This is more than a US$200 swing in an 8 year period.

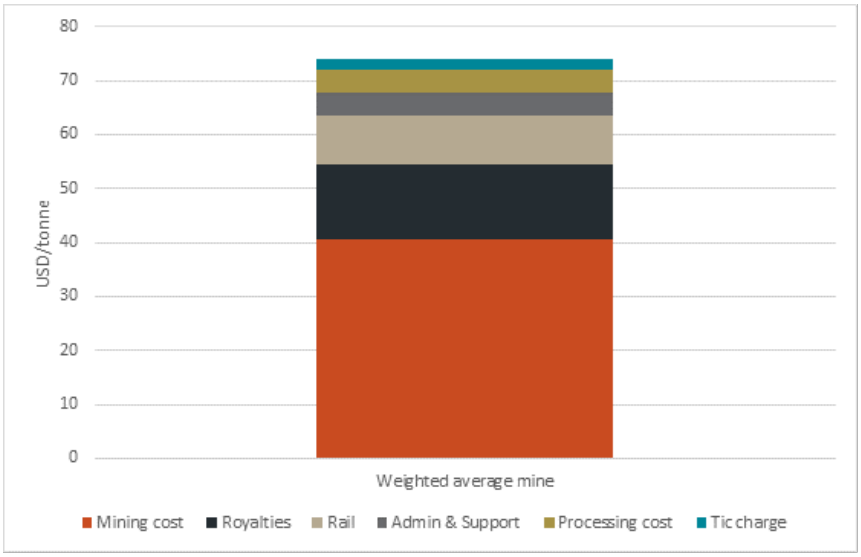
118 Compared to this extreme uncertainty, any uncertainty relating to the access charges at DBCTM is clearly unlikely to affect a potential entrant's decision to enter the coal tenements markets.

Costs

119 The likely costs of production will also influence a decision to invest, as costs will impact the return that the miner receives on investment.

120 The following chart, which DBCTM included in its July 2018 submission, shows the producer cost stack for an average mine for FY18.[39]

Figure 3: TIC as proportion of coal producer costs



121 As shown above, the most significant cost for a miner throughout the exploration, development and operation stages is mining costs. This is followed by royalties and rail charges. The terminal charges are currently the lowest cost, with the TIC at DBCT representing less than 3% of total costs.

122 This clearly shows that access charges are a tiny fraction of the total costs faced by miners. This means that uncertainty regarding access charges at DBCT will not have a significant impact on an efficient new entrant's decision to enter the coal tenements markets.

Risks

123 The mining industry is inherently risky, with significant revenue volatility, high regulatory burdens, and enormous political risks. The risk profile for a given investment will influence a miner's decision to invest.

[39] Figure 3 is based on the TIC charged up to 31 March 2018 at DBCT of AUD 2.5175; AME data on costs for all active mines at DBCT in 2018, with costs weighted by 2018 tonnage to represent a benchmark indicative mine producer cost stack; and DBCT charges converted to USD using an average exchange rate over the period 3 April 2017 to 29 March 2018

124 Investing in exploration and development tenements is particularly high risk and speculative activity, as many tenements never turn into revenue generating production mines.

124.1 At the exploration stage, risk arises from the possibility that there will be no coal in the area covered by the tenement.

124.2 At the development stage, the miner still faces feasibility risks, where the mine may be unsuitable for production due to geological challenge, such as a low mining ate, the amount of dilation or some other factor which means that the deposit is unfeasible, given market conditions.

125 Mining is also heavily regulated with a large number of hurdles that must be cleared to begin the operation of a new mine. There are a number of recent examples of difficulties faced in commissioning new mines. One need only to look at the case example of the proposed Adani Carmichael mine, and the many years and millions of dollars spent in the approvals stage, to understand the types of risks associated with greenfield mine development.

126 DBCTM explained in its March 2019 submission that, given DBCT is fully contracted, there is a real risk that an future entrants to the coal tenements market will not secure any capacity. The result of this is that there will be significant uncertainty for miners as to the availability of access at DBCT both with and without declaration. As explained by HoustonKemp in its March 2019 Report on (a):[40]

> It follows that, with or without declaration, new entrants in the market for tenements can have no certainty about the availability of access to the DBCT service, or potentially other infrastructure services over the period for which the DBCT service would be declared. In other words, an investment in a tenement is required before a new entrant can enter the access queue and begin to form expectations about when, and on what terms, they may be able to obtain access to the DBCT service. This is a significant barrier to entry that will persist whether the DBCT is declared or otherwise.

127 On the other hand, the risk of uncertainty regarding terms and conditions of access at DBCTM does not register as a material risk to miners.

What impact, if any, would uncertainty about terms and conditions of access over the life of a mine have on investment decisions?

128 To assess the impact that uncertainty about terms and conditions of access at DBCT has on investment decisions, it is important to consider the materiality of this uncertainty compared with the other factors that influence investment decisions.

129 As mentioned in DBCTM's March 2019 submission, the National Competition Council's comments regarding the impact that uncertainty about port charges at Port of Newcastle are clearly relevant:[41]

> …the Council considers that any uncertainty about port charges is likely to be relatively small compared to uncertainty about other factors such as coal prices, labour costs and taxes. Accordingly, the Council considers that the reduction in uncertainty associated with port charges in a future with the Service declared, as compared to a future where there is no declaration of the Service, is so small that it is not likely to promote a material increase in competition in the tenements market.

130 This is equally true at DBCT:

[40] HoustonKemp March 2019 Report on (a), section 6.1

[41] National Competition Council "Revocation of the declaration of the shipping channel service at the Port of Newcastle – Statement of Preliminary Views" 19 December 2018

130.1 DBCT's current capital charges represent less than 1% of the current spot price for metallurgical coal which is currently ~$300 per tonne. It is not tenable that potential moderate increases in access charges of (at a maximum) this magnitude would deter investment by miners who would otherwise invest in an industry where coal prices over the last 8 years have fluctuated by more than US$200 per tonne.

130.2 Terminal charges are a tiny fraction of the total costs faced by miners to take their coal to market, with the TIC currently represents 3% of total costs for miners in the Goonyella system. Uncertainty regarding a small increase in these charges would not materially influence investment decisions of miners.

130.3 Miners face very high risks in undertaking mining activity, with many tenements never producing coal due to geological, political and regulatory issues. Again, any alleged uncertainty regarding access charges would not have a determinative effect on miners decisions to invest.

131 Given the materiality of access charges for DBCT both with and without declaration, it is extremely unlikely that uncertainty about the terms and conditions of access to DBCT over the life of a mine, would have any impact on investment decisions, much less a material or determinative effect.

132 This is evidenced above, where HoustonKemp clearly shows that uncertainty regarding the terms and conditions of access post-2020 has not deterred acquisitions of coal tenements by miners without existing access to DBCT.

133 To date the User Group has not provided any probative evidence to suggest that uncertainty about terms and conditions of access at DBCT would deter investment in the coal tenements market.

134 This means that the QCA cannot be satisfied that uncertainty relating to access charges will have a material impact on competition in tenements markets, and the QCA must conclude that criterion (a) cannot be satisfied.

Terminal capacity and impact of alleged asymmetry on competition

135 The QCA's third question related to the impact of DBCT being fully contracted and the queue for capacity exceeding 102Mtpa.

QCA Question	Summary of DBCTM response
Question 3 DBCT Management has indicated that the terminal is currently fully contracted and there is an access queue for expansion capacity beyond 102 mtpa. What are the implications of this? Can users (existing and potential) acquire coal tenements by purchasing tenement rights from access seekers in the queue? Would the pricing terms between existing users and potential users over the expected life of a mine affect their relative ability to acquire coal tenements and would that affect the environment for competition in the coal tenements market?	• The implications of DBCT being fully queued for all viable expansion capacity is that, with or without declaration, efficient new entrants will not have certainty of being able to contract for capacity at DBCT. Therefore, efficient new entrants will likely be deterred with and without declaration under the User Group's theory of harm. • Tenement owners are able to sell tenements while they are in the access queue, though the position in the queue will not transfer with the tenement. • A maximum $3/t pricing differential will not materially affect the ability of a potential user of DBCT to acquire coal tenements, and would not affect the environment for competition in the coal tenements markets.

DBCT Management has indicated that the terminal is currently fully contracted and there is an access queue for expansion capacity beyond 102 mtpa. What are the implications of this?

136 As explained in DBCTM's March 2019 submission, the key implication of this is that both with and without declaration, new entrants to the coal tenements markets will not have any certainty of access to DBCT.

137 The QCA's draft recommendation concluded that criterion (a) was satisfied because uncertainty/ asymmetry regarding the terms and conditions of access at DBCT would deter efficient new entrants from entering the coal tenements market.[42] If new entrants would be deterred from entering the coal tenements market due to uncertainty/asymmetry regarding the *terms and conditions* of access then it follows that those same new entrants would be deterred due the fact that they may not be able to access capacity at DBCT *at all* given any expansion capacity is also likely to be fully allocated.

138 Given that the queue for DBCT currently exceeds all available expansion capacity, and the queuing mechanisms under the Framework and Access Undertaking are substantively identical, under the User Group's theory of harm, those new entrants must be deterred from entering the coal tenements market both with and without declaration. Therefore, access on reasonable terms and conditions as a result of declaration cannot promote a material increase in competition, as efficient new entrants will be deterred in both scenarios.[43]

139 Of course, DBCTM disputes that efficient new entrants would be deterred from entering the coal tenements market due to uncertainty/asymmetry regarding the terms and conditions of access at DBCTM. HoustonKemp has now provided evidence to show that this deterrent effect does not, in fact, play out in practice.[44] This may mean that uncertainty regarding available capacity may not deter efficient new entrants to the coal tenement markets as well.

Can users (existing and potential) acquire coal tenements by purchasing tenement rights from access seekers in the queue?

140 Tenements (comprising of exploration permits, development licences and mining leases) can be bought and sold at any time, subject to certain restrictions (such as the payment of a transfer duty).

141 There is no reason that a queued access seeker would be unable to sell a tenement in its possession, to an existing or potential user of DBCT, or someone else.

142 However, if an access seeker were to sell a tenement, the access seeker's place in the queue would not be transferred along with the tenement. This is because queue position is allocated to an access applicant, not the tenement which that access applicant is seeking to exploit in order to ship at DBCT.

143 If an access applicant were to sell its tenements, then it may lose its position in the queue, unless it could demonstrate that has other reserves needed to maintain its position.

Would the pricing terms between existing users and potential users over the expected life of a mine affect their relative ability to acquire coal tenements and would that affect the environment for competition in the coal tenements market?

144 As previously explained, and accepted by the QCA, a small pricing differential will not materially affect the relative ability of potential users to acquire coal tenements, and much less efficient potential users.

[42] QCA Draft Recommendation, section C3.4
[43] DBCTM explains the reasoning for this in detail in paragraphs 383 to 390 of its March 2019 Submission.
[44] Appendix 2 - HoustonKemp Report on Goonyella System Tenement Transactions

Therefore the pricing terms between existing users and potential users over the expected life of a mine would not materially affect the environment for competition in the coal tenements market.

145 The QCA has previously considered and dismissed competition-related concerns relating to differential pricing.[45] In its Final Decision on the DBCTM Differential Pricing Draft Amending Access Undertaking in 2015, the QCA accepted that expansion pricing could give rise to different tariffs applying to existing and expanding users but concluded that:[46]

> We do not consider differential pricing creates an inappropriate competitive advantage for non-expanding users… However, we acknowledge that differences in the timing of investment may lead to existing users obtaining cost advantages over later entrants, which we note is appropriate and consistent with how competitive markets develop over time.

146 Further, it is unclear that there will be a difference in pricing terms beyond 2030, as both the Framework and declaration period are set to expire in 2030. There has been no evidence presented to suggest that there would be a differential beyond 2030.

2.4 Key flaws in the User Group's March 2019 submission

147 This section identifies key flaws in the User Group's March 2019 submission relating to criterion (a) and is broadly structured based on the User Group's submission. This section:

147.1 identifies the fundamental flaws in the User Group's definition of the relevant markets for coal tenements;

147.2 explains why the User Group's concerns regarding the effectiveness of the Frameworks as a constraint on DBCTM's market power are not justified, and have, in any event, been addressed by changes in the final executed version of the Framework;

147.3 identifies flaws in the User Group's arguments relating to the other constraints on DBCTM's market power without declaration;

147.4 demonstrates how the Framework provides the same constraints that the User Group identifies would be provided with declaration under the QCA Act; and

147.5 identifies flaws in the User Group's reasoning with regard to the impact that declaration will have on competition in the coal tenements market.

148 The following table sets out the key errors in the User Group's submission relating to criterion (a) and DBCTM's high level response to those errors.

[45] QCA, Final Decision - DBCT Management Differential Pricing Draft Amending Access Undertaking, August 2015
[46] QCA, Final Decision - DBCT Management Differential Pricing Draft Amending Access Undertaking, August 2015 at page iv

Figure 4: DBCTM responses to User Group key points

Issue	User Group March 2019 submission	DBCTM comment
Definition of dependent markets		
Defining the relevant market – the Tenement Market	• Geographic dimension of the tenements market is limited to the Hay Point catchment	• The User Group makes the same error as the QCA by conflating the value or price of a tenement with its return. As a result the User Group's analysis is based on the erroneous premise that a differently valued tenement cannot be substitutable.
Ability and incentive to exercise market power		
Constraints on DBCTM's market power without declaration	• DBCTM will not be constrained by other coal terminals • DBCTM will not be constrained by the Access Framework - It is not an appropriate counterfactual - The current terms of DBCTM's Access Framework does not provide a constraint in any case - DBCTM's power to make amendments means the Framework could change • DBCTM's lack of vertical integration does not mean it will not foreclose new entrants • There is no constraint provided by the threat of declaration	• The User Group ignores evidence that there is spare capacity at RGTCT and that the cost of accessing RGTCT would be similar to accessing DBCT if expansion costs were differentiated. • DBCTM's Framework provides a complete constraint on DBCTM's ability to exercise market power - The Framework is clearly an appropriate counterfactual, it has now been executed, is irrevocable and enforceable - The terms of the Framework provide a strong constraint and have now been strengthened, including through the introduction of a $3 cap - DBCTM's power to make amendments is subject to substantial protections under the final executed version of the Deed • In the absence of any vertical integration the QCA must establish that DBCTM has an incentive to exercise its market power in a way that would damage competition in a dependent market. The User Group has not identified such an incentive. • The threat of declaration is real and credible, and will constrain DBCTM's market power without declaration
Constraints on DBCTM's market power with declaration	• The User Group explain the constraints that exist under the QCA Act and are likely to exist under future access undertakings, with declaration.	• DBCTM has demonstrated that substantively the same constraints exist without declaration under DBCTM's binding Framework.
Competition in dependent markets		
Impact of declaration on competition in the coal tenements market	• Asymmetric terms of access will result in new users placing a lower value on tenements, compared to incumbents, which will result in efficient potential entrants being deterred from entering the Hay Point coal tenements market • This deterrent effect will constitute a material adverse effect on competition in the Hay Point coal tenements market (as compared to with declaration)	• The final Framework ensures that there is no material asymmetry in the terms of access for new and existing users. • Any pricing asymmetry between new and existing users will be a maximum of $3 per tonne. • This asymmetry is too immaterial, compared to the other costs and risks faced by miners, to deter an efficient new entrant from entering the coal tenements market.
Impact of declaration on competition in other markets	• The User Group attempts to reserve its ability to make further submissions in respect of the impact on competition in other dependent markets.	• The User Group has had its opportunity to submit on this point, and was encouraged to do so by the QCA. Any further opportunity for the User Group to submit on the impact of competition on these markets would be inappropriate in the circumstances.

Definition of the coal tenements market

149 The arguments put forward by the User Group that the geographic scope of the coal tenements market is limited to the Hay Point catchment are flawed.

150 The User Group's arguments can perhaps be best summarised by the slide presented at the recent stakeholder forum:[47]

> Geographic scope of the tenements market …
>
> > Valuations (and return) for equivalent tenements in other coal regions would be substantially different due to differences in supply chain costs (resulting in lower profits)
>
> > There are numerous other differences which makes it clear other tenements are not close substitutes – discussed particularly by Palaris:
>
> - Stable geological setting and favourable geotechnical conditions
> - Distribution of world class coal bearing formations
> - Coal quality attributes
> - Mines in the lower end of the cost curve
> - Favourable project development and approval conditions

151 The User Group has consistently argued that tenements are not substitutable between Goonyella and other regions because the differences in the quality of coal, and differences in the costs of infrastructure, result in tenements in different regions having different values.[48] In arguing this, the User Group makes the same error as the QCA in its draft recommendation. That is, it conflates the value of a tenement with its return, and simply asserts that differences in value between tenements in different regions implies a lack of substitutability. DBCTM has responded to this error in in detail in its March 2019 submission, along with HoustonKemp's March 2019 report on (a).

152 As set out in DBCTM's March 2019 submission, the price or value of a tenement in isolation says nothing about its substitutability with tenements in other areas.[49] Rather, all other things being equal, a buyer of coal tenements will prefer to buy a tenement that provides the greatest return. This is not the same as the tenement with the lowest price.

153 The critical factor when considering the degree of substitutability between tenements from different regions is, whether buyers of tenements are able to re-deploy capital and relevant expertise from one region to another, so as to bring about an equalisation of expected returns.[50]

There is clear evidence that miners are not constrained to the Hay Point catchment

154 The prospect that a miner seeking to invest in a coal tenement would only consider tenements in the Hay Point catchment does not align with commercial practice. In reality a miner will consider tenements in different regions (in Queensland, Australia or even globally), and will seek to acquire the tenements that it considers provide the best overall return, taking into account expected revenues, costs and risks.

155 There is a multitude of evidence to support that this is the approach employed by miners and that they can and do deploy their capital into tenements across a wide range of different regions in Queensland, Australia and internationally.

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[47] User Group March 2019 stakeholder forum slides, slide 23
[48] User Group March 2019 Submission, pages 59-63
[49] HoustonKemp March 2019 Report on (a), section 5.2
[50] HoustonKemp March 2019 Report on (a), section 5.2

156 For example, AngloAmerican describes its strategy as focusing on securing the best opportunities globally for mineral assets which will create long-term value as measured by cash flow and returns:[51]

> The quality and long life of our mineral assets are the foundation of our global business. We focus on securing and operating assets that offer – either in isolation or in combination with other assets in the portfolio – **the most attractive long-term value creation potential, as measured by sustainable cash flow and returns**.
>
> …The diverse composition of the portfolio creates a measured risk profile and supports strong returns by balancing and optimising the concentration of our investments across:
>
> - Products (supply)
> - End markets (demand); and
> - **Geographies (political, regulatory and other country-specific considerations).** [Emphasis added]

157 Likewise on Terracom's website it comments:[52]

> TerraCom has established a **portfolio of coal exploration tenement areas in Queensland, Australia**. TerraCom's tenements cover an estimated area in excess of 11, 100 square kilometres … [Emphasis added].

158 In assessing the likely return on an investment, a miner will not just consider infrastructure costs. They will also consider geology, coal quality, mining methods required, distance to rail and ports, forecast global coal prices and many other factors.

159 To the extent that the Goonyella system offers more cost effective infrastructure, or superior coal qualities, this will factor into a miner's assessment of the value of a tenement. This will drive competition for tenements in the Goonyella region, increasing the price paid for tenements by miners, and bringing about a equalisation in returns (as you would expect any cost efficiencies will be balanced out by increased tenement prices).

160 This supports a much wider geographic definition of the coal tenements market. As pointed out in HoustonKemp's previous reports, this would be at least the Queensland region and likely wider. Given that, even without the Framework, an increase in access charges would not result in efficient new entrants being deterred from entering the coal tenements markets as those new entrants could seek tenements in other regions within Queensland (or likely broader).

NERA Report

161 This approach is consistent with the recent independent report by NERA Economic Consulting which was prepared for the National Competition Council to assist in its assessment of whether shipping channel services at the Port of Newcastle should be declared under Part IIIA of the CCA.[53]

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[51] https://www.angloamerican.com/about-us/our-strategy (accessed 29/3/19)

[52] http://terracomresources.com/australian-projects/

[53] NERA Economic Consulting *Declaration of the shipping channel service at the Port of Newcastle – Prepared for the National Competition Council,* 8 April 2019, accessible on the NCC website at: http://ncc.gov.au/application/consideration-of-possible-recommendation-to-revoke-declaration-of-service-a/4

162 In that report NERA concludes that the coal tenements markets are at least Australia wide, and probably wider:[54]

> So although each tenement is specific to one location, potential investors are not limited to that location – if a tenement in the Newcastle catchment is not attractive, an investor could consider exploring or mining for coal elsewhere (or not coal mining at all). There is scope for some potential investors to prefer the Newcastle catchment all else being equal, because of economies of scope and potentially also scale, if those buyers have established operations close to there. However, in general, prior to investing capital into a mine, potential owners of tenements have geographic options.
>
> In fact, because the coal export market is global (or at least as broad as the Asia-Pacific region), it does not make sense to consider the "tenement market" to be limited to the Newcastle catchment. If an owner of a coal tenement in the Newcastle catchment raised price above the competitive level (or otherwise made the tenement less attractive), potential investors could in general look elsewhere (although as noted those with existing mines might have economies of scope and scale). Accordingly we consider the geographic scope of the tenements market to be at least as wide as Australia, and potentially as broad as the Asia Pacific.

163 The report also helpfully explained why a wider market definition means that an increase in charges resulting in a change in the value of a mine, would not impact on competition, under a wider market definition:

> Because the PNO charge is a cost to a coal miner, an increase in that charge would lower the expected net present value of a mining project to which a tenement relates. However, this per se would not be a reduction in competition in the tenements market – the lower value of the tenement would reflect the lower value of the mining project, not a loss of competition in the tenement market. In other words, the lower value of the tenement would reflect less attractive entry to or expansion in the coal export market, via the Newcastle catchment only. It would not affect the value of tenements in other parts of the Asia Pacific.
>
> There are likely to be substantial numbers of alternative coal tenements elsewhere in the Asia Pacific that are suitable for supplying the coal export market. These alternatives reduce the scope for impacts on the value of tenements in the Newcastle catchment to have a material impact on competition in a market for tenements.

164 Applying this reasoning to DBCT it is clear that if the market is correctly defined more broadly, even if a difference in valuations between existing users and new users would deter efficient new entrants from purchasing coal tenements in the Hay Point catchment, those efficient new entrants users could acquire tenements in other parts of the Asia Pacific, meaning that there would be no impact on the competition in the correctly defined coal tenements markets.

165 This means, that declaration would have no material impact on competition in the coal tenements markets, and criterion (a) cannot be satisfied for the DBCT Service.

Ability to exercise market power without declaration - The Access Framework

166 The User Group's March 2019 submission repeated a number of the arguments it raised in its July 2018 submission, which attempted to cast doubt on the Framework as a an effective constraint on DBCT without declaration. The User Group's concerns fall broadly into four key arguments:

166.1 The Framework is not an appropriate counterfactual;

[54] NERA Economic Consulting *Declaration of the shipping channel service at the Port of Newcastle – Prepared for the National Competition Council,* 8 April 2019, at [23]-[24]

166.2 The Framework does not provide a constraint even if it is an appropriate counterfactual;

166.3 The ability for DBCTM to amend the Framework undermines its effectiveness as a constraint; and

166.4 The Framework allows DBCTM to auction off capacity at DBCT.

167 While DBCTM did not necessarily agree with the concerns raised by the User Group in its July 2018 submission (many of which were based on a mischaracterisation of the draft Framework), DBCTM made a number of changes to the final, executed, Framework in order to address all of the concerns that were raised.

168 The comments in the User Group's March 2019 submission were based on the draft Framework, not the final executed version provided alongside DBCTM's March 2019 submission. DBCTM has now comprehensively addressed the User Group's concerns regarding the effectiveness of the Access Framework in constraining DBCTM's ability to exercise market power.

169 The rest of this section explains how the various concerns raised by the User Group in its March 2019 submission are either unjustified, or have been addressed in the final, executed version of the Framework. It also addresses the User Group's comments at the recent stakeholder forum regarding its opportunity to be heard in respect of the Framework.

170 The table below sets out the key concerns expressed by the User Group with the Framework and the changes that have been made to the Framework to address those concerns.

Figure 5: Summary of key changes that have been made to address User Group concerns

QCA/ User Group concern	How DBCTM has addressed the concern
DBCTM has not executed the deed poll	On 11 March 2019 DBCTM duly executed the binding and irrevocable Deed Poll, requiring DBCTM to comply with the Access Framework.
Significant differences in access charges between new and existing users without declaration will cause potential efficient new users to be deterred from entering the coal tenements market	The final, executed, version of the Deed Poll includes provisions which will prevent DBCTM from charging new users more than $3 per tonne more than the charges that would be determined by the QCA for the existing terminal (maximum spread). In circumstances where a costly expansion would result in differentiated expansion costs for a terminal component which would exceed the maximum spread, DBCTM will be limited to charging the charges that would be determined by the QCA for that terminal component.
The Framework objective itself can be changed which would undermine the amendment process protections	DBCTM's final Deed Poll 'hard-codes' the Framework Objective, as well as the $3 maximum spread provisions. These provisions cannot be amended in any circumstances.
The Framework can effectively be changed however DBCTM chooses	DBCTM has introduced further protections into the executed Deed Poll to ensure that any amendments to the Framework are appropriate. These include amendments to: • Increase the transparency of the amendment process; • lengthen timeframes for appeals; • reduce barriers to challenging amendments, and • require DBCTM to have proper regard to mandatory considerations. DBCTM has also 'hard-coded' key provisions in the Deed Poll as referred to above.
DBCTM would be able to unfairly differentiate between users	DBCTM has replicated the same restrictions on unfairly differentiating between users as those that are in place under the QCA approved Access Undertaking.

QCA/ User Group concern	How DBCTM has addressed the concern
Access to terminal capacity would be subject to an access seeker's willingness to pay relative to other access seekers	DBCTM has made changes to the Framework to ensure that the process for determining access charges operates completely independently from the process for allocating capacity, by allowing for access charges to be determined through the negotiate/arbitrate process, *after* capacity has been allocated through the queuing mechanism.

The Framework is clearly the only appropriate counterfactual

171 In its March 2019 submission the User Group argues that DBCTM should not be allowed to "simply assert that in a future without declaration it would provide access in a certain way" and that the Framework is not an appropriate counterfactual:[55]

> It is not appropriate to simply assume that DBCTM will provide access in the long term on a set of terms they volunteer (without any actual commitment) in the context of the current regulatory scrutiny. That is entirely speculative and hypothetical and not consistent with:
>
> (i) the QCA's view that it is not required to determine the detailed terms that would apply in the absence of declaration; or
>
> (ii) the principle that criterion (a) involves a comparison of the likely (not speculative) state of markets with and without declaration.

172 Of course, the QCA does not need to make a 'speculative' assumption in order to accept that the Framework will provide a valid constraint on DBCTM in a future without declaration. As previously evidenced, DBCTM has made an 'actual commitment' in the form of the binding and irrevocable Deed Poll, which was executed on 11 March 2019.[56]

173 The Deed Poll comes into force on the day that DBCTM's current declaration expires and continues for a period of ten years. It is a legitimate constraint, which is legally enforceable and certain. This means that the terms of access under the Deed Poll and Framework are the only appropriate counterfactual. If the QCA were to disregard the constraint provided by the Framework, that would be a significant error of law.

174 In (i) the User Group seems to suggest that the QCA should disregard the Framework because to take it into account would require engagement with the detailed terms of the Framework put before it. The absurdity of this argument is clear on the face of it, but for the avoidance of doubt if the QCA were to disregard the Framework on this basis, it would clearly deny DBCTM procedural fairness and would constitute a breach of natural justice.

The Framework provides an effective constraint on DBCTM's ability to exercise market power

175 The User Group argues that the Framework will not constrain DBCTM's ability to exercise market power because it will allow DBCTM to charge new users materially higher access charges reflecting the cost of access to WICET:[57]

> Even if, contrary to the DBCT User Group's views, the QCA considers it is required to consider whether the DBCTM proposed Access Framework would provide a constraint on DBCTM's behaviour in the absence of declaration, the answer is clearly that it would not.
>
> In particular, the DBCT User Group strongly supports the QCA's views that the proposed access framework:

[55] User Group March 2019 Submission, pages 65 and 66
[56] See Appendix 15 of DBCTM's March 2019 Submission
[57] User Group March 2019 Submission, page 66

(i) will enable DBCTM to exercise discretion in setting access terms and conditions, including engaging in monopoly pricing by providing access to terminal capacity based on users' willingness to pay; and

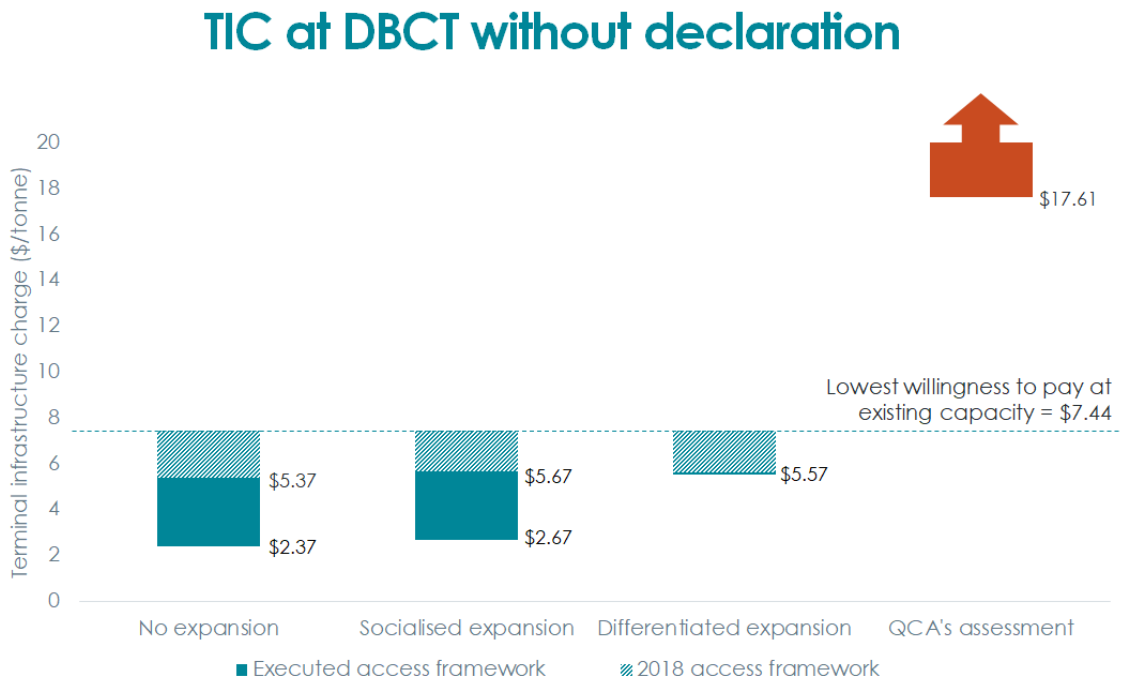
(ii) that discretion would have the effect that, in the absence of declaration, potential future DBCT Users would face the risk of paying a materially higher access charge reflecting the cost of accessing the next least costly alternative (currently assessed by the QCA and DBCT User Group as accessing WICET via the Blackwater system) as well as uncertainty as to whether and when they would obtain access to the terminal.

176 As explained in detail in DBCTM's March 2019 submission, under the draft Framework DBCTM would not have had the ability to 'set' access terms based on users' 'willingness to pay'. Rather, the Framework required DBCTM to negotiate and to agree to terms with users. Where agreement could not be reached, the terms of access would be determined by an independent arbitrator, with access charges based on what would be agreed between a willing but not anxious buyer and seller.[58] The charges which could be determined by an arbitrator were also restricted to being below the ceiling, which is based on the highest charge at which there would be no change in volumes contracted at DBCT. HoustonKemp estimated the ceiling as a maximum $7.44 per tonne over the declaration period.

177 In any event, while these constraints remain in place, DBCTM has also introduced the $3 Cap in order to remove ambiguity from the operation of the Framework. Actual charges faced by access seekers will likely be lower as they will be determined under the 'willing but not anxious' test.

178 The diagram below, prepared by HoustonKemp, shows the range of outcomes that could be determined by an arbitrator under the executed Framework (teal), the outcomes the arbitrator could have determined under the previous version of the Framework (teal and shaded teal), and the erroneous charges that the User Group and QCA purported would apply under the previous version of the Framework (dark orange).

Figure 6: TIC ranges under different scenarios without declaration



[58] DBCTM March 2019 Submission, pages 53-55

179 The protection of the $3 Cap has been 'hard-coded' into the executed Deed Poll. This means that it cannot be amended under any circumstances, and access seekers will have certainty over the declaration period of the maximum charge at which they will be able to gain access to DBCT.

180 As such, there is no ambiguity as to the maximum access charges that could apply without declaration and the Framework will clearly provide an effective constraint on DBCTM without declaration, such that there can be no material impact on competition in dependent markets.

181 The prospect that a $3 per tonne price differential could result in a material adverse impact on competition in the coal tenements is not tenable and as such the only reasonable conclusion available to the QCA is that criterion (a) is not satisfied.

182 This is clear in the User Group's March 2019 submission, which attempted to distinguish DBCTM from PNO by noting the magnitude of the price rises which the NCC assessed for PNO were fairly limited (in the order of a few dollars) as compared to the $15 that the QCA assessed in the case of the DBCT Service.[59] Under the final Deed Poll and Framework it is now clear that *maximum* price increase at DBCT is similarly "in the order of a few dollars".

DBCTM can only make amendments where it will promote the object of part 5 and DBCTM has added additional protections to ensure amendments are only made where appropriate

183 The User Group's March 2019 submission also reiterated the QCA's concerns with DBCTM's ability to amend the proposed Framework:[60]

> As the QCA correctly notes, on any dispute, the court would not be able to determine the appropriate outcome in a quasi-regulatory 'QCA like' manner, but would be constrained to determining whether the amendments proposed would be within the range of outcomes that would be said to satisfy or promote the object of Part 5.
>
> In addition, disputes take time and cost (and it should not be assumed new access seekers would be in a position to bring such disputes or even be incentivised to do so). In particular, rather than taking exposure to the risks of such future amendments and then spend time challenging that through subsequent disputes, a potential new user (and potential participant in the coal tenements market) is far more likely to simply not invest.
>
> The DBCT User Group also agree with the QCA that the amendment powers create uncertainty as to the scope of the framework and the access terms which would apply. That is clearly counterproductive to conducting negotiations in a timely and cost effective manner (and as the QCA notes, completely removes the credible backstop provided by the standard access terms that exist with declaration).

184 These comments were also echoed at the stakeholder forum.[61]

185 As explained in detail in DBCTM's March 2019 submission, DBCTM has introduced a number of additional protections to the final Framework's amendment process to explicitly address these concerns.

186 DBCTM also notes that the Framework provides greater certainty to users than many other access frameworks for similar services such as the WITAP which applies to WICET and the arrangements for AAPT. The User Group's argument suggests that **all** infrastructure access arrangements are unworkable, which it clearly absurd, as this would suggest that access to all infrastructure should be governed by heavy-handed regulation.

[59] User Group March 2019 Submission, page 10
[60] User Group March 2019 Submission pages 66 and 69
[61] User Group March 2019 stakeholder forum slides, slide 19

The court will be able to determine the appropriateness of the amendment

187 The Deed Poll now includes provisions requiring that any amendments be appropriate having regard to the mandatory considerations set out in clause 7.3 (which are derived from sections 138[62] and 168A[63] of the QCA Act).

188 The new wording more closely aligns the requirements for amendments to the Framework to the requirements for the QCA approval of amendments to an Access Undertaking, and addresses the concern raised by the QCA and User Group.

189 These new provisions will operate to confer power on the Court to consider and determine the appropriateness of the amendments, i.e. to review DBCTM's discretion as to the choice of amendments from the range of options that promote the Framework Objective.

DBCTM has made changes to reduce barriers to challenging amendments

190 It is implausible that a potential new user would decide not to undertake a multimillion (or even billion) dollar investment in purchasing and developing a new tenement on the basis that of the (relatively low) cost of challenging a potential erroneous amendment to the Framework.

191 Nonetheless, in the executed Deed Poll the relief that the court can provide for successfully challenging amendments has been changed from specific performance, to declaratory relief. This change was made to simplify the process for stakeholder's to challenge amendments. The provisions of the Deed Poll ensure where an amendment is successfully challenged, that declaratory relief will prevent that amendment from being implemented.

Users will have the benefit of the Standard Access Agreement

192 The basis for the User Group's comments that the backstop of the Standard Access Agreement would be removed is unclear. The Framework clearly includes a standard access agreement which new users are able to require that their access agreement is substantively identical to.[64] In order to change the standard access agreement DBCTM would have to undertake the same amendment process (which includes all of the new safeguards identified in the paragraphs above) as it would for any other amendment to the Framework.

The User Group's concerns about the opportunity to be heard are unfounded

193 At the QCA's stakeholder forum on 20 March 2019 the User Group raised concerns regarding its opportunity to be heard in relation to the Framework that would govern access without declaration. In its slides presented at the Forum the User Group noted:[65]

> > The QCA has been transparent on the proposed process
>
> > However, the DBCT User Group is disappointed with the way DBCTM has sought to 'game' the declaration review process
>
> > DBCTM has made material changes in position that have only been raised nearly 12 months into the process

194 These comments by the User Group are completely disingenuous for the following reasons :

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[62] Section 138 of the QCA Act provides that the QCA may approve a draft Access Undertaking given to it only if it considers it appropriate to do so having regard to the factors listed in that section

[63] Section 168A sets out principles applicable to the price for access to services. The QCA must have regard to these pricing principles when deciding whether to approve an access undertaking

[64] Executed Framework, section 12.1(c)

[65] User Group March 2019 stakeholder forum slides, slide 2

194.1 DBCTM has not materially changed its position from that set out in its May and June 2018 submissions where it set out the Framework.

194.2 All changes to the Framework and Deed Poll since June 2018 have been exclusively to either:

194.2.1 respond, in good faith, to concerns raised by the User Group relating to the operation of the Framework;

194.2.2 provide greater clarity as to the likely pricing impact of the Framework, given the User Group and QCA's erroneous conclusion that the charges under the Framework would be similar to the cost of accessing WICET; or

194.2.3 make minor refinements to the ensure effective operation of the Framework and Deed Poll.

194.3 To assist the User Group and the QCA in their assessments of the changes to the draft Framework DBCTM has provided tracked versions of the Framework and Deed Poll. These documents show that the changes made to the draft version of the Framework were limited. DBCTM also provided a table outlining the changes made and the rationale for these changes.[66]

194.4 DBCTM first introduced its position that it intended to execute a binding access Framework on substantially the same terms as the current Access Undertaking in May 2018.[67]

194.5 DBCTM has offered on numerous occasions to meet with the User Group to better explain, refine and develop the Framework. These offers have been repeatedly rejected.

195 In any event, the User Group now has the opportunity to provide its views on the executed Framework as part of the cross-submission process (which has now been extended), and submit to the QCA Board at the subsequent stakeholder forum.

The Framework does not allow DBCTM to auction off capacity

196 The User Group argues that the Framework allows DBCTM to allocate capacity in a way that would "auction off" capacity.[68]

197 As explained in detail in DBCTM's March 2019 submission, while DBCTM disagrees that the draft Framework allowed it to "auction off capacity", the final version of the Framework includes provisions that make it clear that the queuing process operates independently of the determination of access charges. Therefore, the User Group's concerns have been addressed.

General obligations are enforceable

198 As a more minor point the User Group attempts to distinguish some of the general obligations that apply under the Framework from those under the QCA Act:[69]

> DBCTM also noted in its submission of 29 June 2018 that it had amended its proposed access framework to include 'similar general obligations to those that apply under the QCA Act'.
>
> That obviously does not have the same effect as declaration as those general obligations do not, by themselves provide an effective constraint on DBCTM's monopoly pricing – particularly because of:
>
> (i) the difficulties, costs and delays involved in enforcing the access framework for individual users (particularly where an arbitrator or court would be being called on to

[66] DBCTM March 2019 Submission, Appendix 8
[67] In DBCTM's May 2018 Submission
[68] User Group March 2019 Submission, pages 67 and 69
[69] User Group March 2019 Submission, page 72

determine concepts like 'good faith', 'unfair differentiation' and 'reasonable requirements');

(ii) the lack of role for an independent regulator to monitor and enforce compliance; and

(iii) the lack of remedies (particularly the lack of damages or compensation which can be provided for a breach, by contrast to the remedies available for breach of the QCA Act and approved undertakings).

199 This distinction is not valid as:

199.1 an arbitrator or court would similarly be required to determine concepts such as "good faith" in order to enforce the provisions under the QCA Act;

199.2 the Framework provides provisions for an independent arbitrator, or expert, to require compliance with the Framework; and

199.3 remedies are available through the courts:

199.3.1 relating to the enforcement of arbitral determinations under the *Commercial Arbitration Act 2013* (Qld); and

199.3.2 relating to the enforcement of the $3 Cap and other provisions of the Deed Poll, directly as per clause 9 of the Deed Poll.

200 In any event, DBCTM agrees with the User Group's comment that "the general obligations assist in supplementing the constraints imposed by regulated pricing – but they do not provide an effective constraint on their own."[70] This is the case both with and without declaration, and without declaration, these general obligations are supplemented by a clear, enforceable, pricing framework, which ensures access at DBCT is provided on reasonable terms and conditions.

Entrants to the coal tenements market may have greater certainty as to access charges than with declaration

201 At the stakeholder forum the User Group argued that:[71]

> The alleged '$3 price cap' is a cap above a hypothetical figure

- DBCTM has an inflated view of what the QCA tariffs should be
- Still provides great uncertainty as to the price which will be payable (even if was possible to enforce)

202 As covered in section 3.2, these points are not pertinent to the QCA's assessment for the following reasons.

202.1 Any uncertainty as to the floor TIC is equally applicable to the existing user agreements, which the User Group maintains provide such certainty that it creates a asymmetry between new and existing users which forms the basis of the User Group's theory of harm. This is because the floor TIC is similar to the provisions of the existing user agreements which the User Group asserts is the basis of the purported asymmetry. If the QCA accepts the User Group's assertions that the floor TIC is merely 'hypothetical' and provides for 'great uncertainty', then it would also have to accept that the protections in the existing user agreements are hypothetical and uncertain, in which case the alleged asymmetry at the heart of the User Group's theory of harm cannot exist, and criterion (a) cannot be satisfied.

202.2 The QCA determined access charges for DBCT that will apply to potential new entrants to the coal tenements market will always be 'hypothetical' at the time of entry into the tenements

[70] User Group March 2019 Submission, page 72
[71] User Group March 2019 stakeholder forum slides, slide 19

market, both with and without declaration. This is because a miner will typically enter the coal tenement markets a number of years before seeking access to DBCT. This means a potential new entrant will have as much certainty of the floor TIC without declaration as it would with declaration.

202.3 In fact, a potential new entrant to the coal tenements market arguably has greater certainty as to access charges than they would with declaration. At the stakeholder forum Dr Mundy raised the prospect that the QCA may not determine a regulated TIC for DBCT post-2020. On the other hand, with declaration, users know that access charges will be based on the TIC that would be determined under a QCA administered pricing regime .

202.4 Finally, DBCTM's 'views' on what the QCA tariffs should be is not a determinative factor in calculating the TIC floor under the Framework. Rather the floor TIC, and access charges, will be determined by an *independent* arbitrator.

203 Any uncertainty as to pricing is consistent with the uncertainty experienced by new entrants to the tenements market with declaration and is normal in the context of conducting business (and is a far less material uncertainty than is presented by other aspects of a mining operation).

Conclusion on the constraints without declaration as a result of the binding Access Framework

204 As demonstrated above and in DBCTM's March 2019 submission DBCTM has comprehensively addressed the QCA and User Group's concerns regarding the operation of the Framework to effectively constrain DBCTM's market power without declaration. As such, declaration will not result in the promotion of a material increase in competition in the coal tenements market and the only reasonable conclusion available to the QCA is that criterion (a) is not satisfied for the DBCT service.

Ability to exercise market power without declaration - Other constraints

205 The User Group's March 2019 submission maintains that other factors would not act as constraints on DBCTM's ability and incentive to exercise market power without declaration. Specifically that:

205.1 Other terminals will not provide a constraint on DBCTM;

205.2 That DBCTM has an incentive to charge for access to DBCT at levels which would foreclose new entrants to the coal tenements market, despite not being vertically integrated; and

205.3 DBCTM is not constrained by the threat of declaration.

Constraints provided by other terminals

206 The User Group argues that other coal terminals do not provide a competitive constraint on DBCTM because they are not close substitutes for the DBCT service, due to significant differences in cost as well as non-cost factors.

207 To support this argument the User Group points to the QCA's conclusion's regarding the costs of accessing DBCTM as opposed to other terminals:

> …the cost difference for a Goonyella mine of utilising a non-Goonyella terminal (based on the QCA's estimates, 47 to 130% more expensive on average than utilising DBCT) is significant, such that DBCTM would be able to increase its price to the next lower cost alternative terminal which actually has existing and available capacity – which appears to be WICET, effectively permitting a price rise (by the QCA's calculation) of nearly $15 per tonne;

208 However, in calculating the estimated 47% higher access charges for RGTCT, both the QCA and the User Group disregard the very real prospect that differentiated pricing could apply to any expansion capacity.

209 As shown by GHD in its note at Appendix 4, if differentiated pricing were to apply to an expansion at DBCT the cost of accessing DBCT would be similar, and possibly greater, than the cost of accessing RGTCT.

210 This means, given that DBCT is now fully contracted and an expansion would be required to provide access to new users, there is a very real prospect that DBCTM will be constrained by RGTCT, even if the Framework did not apply.

New entrants to the coal tenements market will take differentiated expansion costs into account when valuing tenements

211 With and without declaration a new entrant to the coal tenements market would likely assume that expansion capacity would be subject to differentiated pricing.

212 Under the current access undertaking (and Framework) the decision on whether expansion costs will be socialised is based on the socialisation pricing principles set out at section 11.13 (and 10.8 of the Framework). In essence they provide:

212.1 Where the socialisation of the expansion costs would decrease access charges, the expansion will be treated as forming part of the existing terminal.

212.2 Where socialisation of the expansion costs would increase access charges, the expansion will be deemed a "cost sensitive expansion" and a presumption will apply that it should be treated as a separate terminal component (a differentiated expansion component).

212.3 However, a cost sensitive expansion may be treated as forming part of the existing terminal where circumstances exist that justify Socialisation. Section 11.13(c)(1)-(5) sets out considerations for the QCA in determining circumstances that warrant socialisation, which includes any factor that the QCA considers relevant.

213 In order to accommodate new demand for capacity at DBCT (and on the QCA's forecast demand used in its draft recommendation), DBCTM would be required to undergo its Zone 4 and 8X Phase I expansion projects. The QCA's analysis shows that if the expansion costs of these projects were socialised, the coal handling charge at DBCT would **increase** by 9 cents.[72]

214 Therefore, unless specific circumstances exist that justify socialisation, it would be fair to assume that the expansions would be treated separately and pricing would be differentiated for new users who seek access to expanded terminal capacity.

215 Without knowing the specific circumstances under which expansion will occur, it is impossible to determine if there are factors that would justify moving away from the presumption that pricing would be differentiated. However, as identified by GHD, a prudent new entrant to the coal tenements market would likely assess the value of a tenement by reference to differentiated costs at DBCT, given this is the default presumption in the access undertaking. As shown by GHD, the costs of accessing differentially price capacity at DBCT are similar to accessing RGTCT. Therefore, provided there is capacity available at RGTCT, without declaration a potential new entrant's valuation of tenements will be materially the same as with declaration, as its valuation will be based on the costs of accessing RGTCT or differentially priced DBCT expansion capacity. Even if DBCTM could increase charges above this level, the valuation would remain the same because the new entrant would be able to gain access to RGTCT at that cost. Therefore the User Group's theory of harm must fail.

The User Group have not established that there is no capacity available at RGTCT.

[72] QCA Draft Recommendation, page C85

216 The User Group supports the QCA's assumption that RGTCT is fully contracted, despite there being no evidence to suggest that this is the case:[73]

> The DBCT User Group agrees with the QCA's assessment that that is likely to be WICET given the AAPT / GAPE capacity constraints, RGT being fully contracted and HPCT not being open access

217 The QCA's draft recommendation noted that RGTCT's contract status is unknown and that stakeholders had not provided evidence of spare capacity at this terminal; on this basis (or lack thereof), it concluded RGTCT has no spare capacity.

218 As explained by GHD in its report included as part of DBCTM's March 2019 submission, there is likely to be spare capacity available at RGTCT in sufficient quantities to meet expected additional demand for capacity at DBCT as forecast by the QCA.[74]

219 This means that potential new entrants will not be deterred from entering the coal tenements market without declaration. Both with and without declaration new entrants will factor into their valuation of tenements the cost of accessing either RGTCT or DBCT (at differentiated QCA determined prices). As such the User Group's theory of harm cannot hold as any difference in the valuation of tenements between new entrants and incumbents will exist both with and without declaration.

220 The attached note from GHD at Appendix 4 explains this point in more detail.

The User Group does not identify an incentive for DBCT to price at levels that would foreclose entry to the coal tenements market

221 The User Group accepts that a non-vertically integrated monopolist may not have an incentive to foreclose competitors in a dependent market.[75] Further, it does not identify any valid incentive for why DBCTM would charge for access at levels which would lead to that result.

222 Rather the User Group simply asserts that DBCTM has an incentive to maximise profits and that it will engage in monopoly pricing.

223 However, as explained in more detail in DBCTM's March 2019 submission, increasing charges for access to DBCT such that efficient new entrants are deterred from entering the coal tenements market, would not be profit-maximising for DBCTM. This is because:

223.1 If DBCTM were to increase access charges to a point where efficient new entrants were excluded from the coal tenements market as proposed by the QCA – then this would result in lost revenue for DBCTM, as those efficient new entrants would no longer be able to purchase terminal capacity from DBCTM. Rather, without the Framework, DBCTM would have an incentive to offer the efficient new entrant the highest charges that it could, without deterring the efficient new entrant from entering the coal tenements market.

223.2 In circumstances where tenements which would have been purchased by efficient new entrants are still purchased, but by a less efficient incumbent with spare capacity at DBCT, DBCTM would only be able to charge the lower rates secured under the existing user agreement. This would clearly not be profit maximising or in DBCTM's commercial interests.

223.3 Further, even if DBCTM were not constrained by the existing user agreements and the Framework, then it would still be able to charge less to the inefficient incumbents than it could to an efficient new entrant (as an efficient new entrant would have a higher capacity to pay, due to its efficiencies).

[73] User Group March 2019 Submission, page 74
[74] GHD March 2019 report (Appendix 7 to DBCTM March 2019 Submission), section 5
[75] User Group March 2019 Submission, page 70

224 Therefore DBCTM has an incentive to take into account the effects that its pricing will have on investors (in particular efficient new entrants) in the coal tenements markets, and not price in a way that would deter investors.

225 This is consistent with NERA's independent analysis for the NCC of the incentives facing PNO in relation to its shipping channel service. NERA surmised noted that:[76]

> …PNO has an incentive to account for effects that its shipping channel pricing could have on coal mine investors, if that effect would lead to a reduction of future shipping channel revenues. In other words PNO does not have an incentive to materially reduce the attraction of mining in the Newcastle catchment and accordingly would not behave in a way that would reduce competition in the tenements market.

226 In the absence of any evidence of a competing incentive for DBCTM to charge at a level that would foreclose efficient new entrants, there can be no reasonable basis for the QCA's assertion that DBCTM would have an incentive to act in this way without declaration, and criterion (a) cannot be satisfied.

The threat of declaration is credible and real

227 The User Group maintains its position that the threat of declaration after a period of no declaration is not a sufficient deterrent to constrain DBCTM's market power because the redeclaration process is lengthy and declaration does not apply retrospectively.[77]

228 However, as explained in DBCTM's previous submissions, that position is not consistent with DBCTM's commercial incentives.

Threat of declaration provides a constraint *before* DBCTM would exercise market power

229 As identified in DBCTM's March 2019 submission, the threat of declaration provides a constraint before DBCTM is in the position to be redeclared, hence it is the threat of declaration which provides a constraint.[78] The threat of declaration provides a strong disincentive for DBCTM to act in a way that would harm competition in a dependent market, because any short-term gains that could be achieved by increasing charges in a way that would harm competition (notwithstanding the inability and disincentive to do so), would be outweighed by the cost of being declared in the future.

230 Further, even if the declaration process took two years, DBCTM's ability to extort excessive access charges over this period would be extremely limited (even without the Framework and with no incentive to do so). Miners typically begin access discussions for with DBCTM a number of years before they actually start shipping at DBCT. This means that if DBCTM attempted to charge unreasonably, miners would have plenty of time to proceed through the declaration process before access to DBCT is actually needed.[79] Certainly new entrants to the exploration and development tenements market would have ample time to seek to have the DBCT service declared.

231 The User Group also argues that it is flawed to maintain that the threat of declaration could apply when it must first have been held that the declaration criteria were not satisfied:[80]

> …even more critically, the DBCT User Group considers that it is fundamentally flawed to assert that there is a remaining threat of declaration which applies to DBCTM in the future without declaration, given that in those circumstances the DBCT service must have first been held *not* to satisfy the

[76] NERA Economic Consulting *Declaration of the shipping channel service at the Port of Newcastle – Prepared for the National Competition Council,* 8 April 2019, at [28]
[77] User Group March 2019 Submission, page 70
[78] DBCTM March 2019 Submission, page 60
[79] Typically, at least 3 years in advance (though there are some exceptions to this, such as the provision of short term capacity).
[80] User Group March 2019 Submission, page 70

> access criteria in the current environment when it is clear that it has both the ability and incentive to increase prices to the point of the next alternative terminal. In that context, the DBCT User Group cannot comprehend how it could be said that DBCTM's behaviour would be constrained by the risk of future declaration. It is paradoxical to find that the *threat* of declaration forms a basis for deciding *not* to declare a service, as such a finding undermines the very effectiveness of the alleged *threat*.

232 This myopic reasoning takes a unrealistically static view of the Part 5 access regime. Clearly, if the DBCT service were not declared post 2020 and, despite the existence of the binding Framework, DBCTM managed to charge prices consistent with WICET, this would be used as damning evidence for redeclaration and DBCTM would not be able to, again, argue that the Framework and threat of declaration would provide a valid constraint.

Conclusion on threat of declaration

233 In order for the QCA to conclude that the threat of declaration does not provide a constraint on DBCTM and it must be satisfied that if DBCTM was not declared that it would act in a way that would almost certainly result in its declaration following a process from the QCA. This is clearly not plausible and as such the QCA must find that criterion (a) is not satisfied for the DBCT Service.

The constraints that exist with declaration are the same as without

234 In its March 2019 submission the User Group set out the key constraints that exist with declaration concluding that "it is clear that in those settings, DBCTM is unable to unilaterally set the price or other terms of access in a way that will impact on competition in dependent markets."[81]

235 However, as shown in the table below, it is clear that the same (or substantively identical) constraints, also exist under DBCTM's binding, executed and irrevocable Deed Poll and Framework. The table sets constrains identified by the User Group that exist with declaration in the left column, and the analogous constraints that exist without declaration in the right column.

Figure 7: Constraints identified by User Group with declaration and equivalent constraints without declaration

Constraint identified by User Group with declaration[82]	Equivalent provision applicable under Framework without declaration
(i) a statutory obligation on DBCTM to negotiate in good faith (s 99-100 QCA Act)	Obligation under the Framework to negotiate in good faith (s 5.1(c) of the final Framework)
(ii) a statutory prohibition on unfairly differentiating between access seekers in a way that has a material adverse effect on the ability of 1 or more of the access seekers to compete with other access seekers (s 100 QCA Act)	Prohibition the Framework against unfairly differentiating between access seekers in a way that has a material adverse effect on the ability of 1 or more of the access seekers to compete with other access seekers (s 5.1 (d) of the final Framework)
(iii) a statutory obligation on DBCTM to provide information to an access seeker to inform access negotiations (s 101 QCA Act)	Obligation under the Framework on DBCTM to provide information to an access seeker to inform access negotiations (s 5.2(d) of the final Framework)
(iv) a right to seek QCA arbitration where access negotiations fail	A right under the Framework to seek arbitration by an independent expert where access negotiations fail

[81] User Group March 2019 Submission, page 71
[82] User Group March 2019 Submission, page 71

Constraint identified by User Group with declaration[82]	Equivalent provision applicable under Framework without declaration
(v) standard access terms which provide reasonable terms and conditions	Standard access terms which provide reasonable terms and conditions (in the form of a standard access agreement which access seekers have the right to use under the Framework)
(vi) QCA approved reference tariffs which provide reasonable charges	Access charges approved by an independent expert (where negotiation is unsuccessful), on reasonable terms that would be agreed by a willing but not anxious buyer and seller, and in no event greater than $3 per tonne more than the price that would be determined under a QCA administered pricing regime.
(vii) a queuing process by which to obtain access to existing capacity	A queuing process by which to obtain access to existing capacity (see s 5.4 of the final Framework)
(viii) statutory prohibitions on preventing or hindering access under an access agreement or access determination (section 104 and 125 QCA Act)	Requirements under the Framework to negotiate in good faith and to take all reasonable steps to progress each access application and any negotiations to develop an access agreements with an access seeker in a timely manner (Section 5.1).
(ix) a statutory obligation on DBCTM to comply with the applicable approved access undertaking (s 150A QCA Act)	An enforceable obligation on DBCTM to comply with the Access Framework (see cl 4 of the executed Deed Poll).
(x) information gathering powers for the QCA to monitor compliance with the applicable approved access undertaking (s 150AA QCA Act)	Reporting requirements under section 9 of the Framework and information gathering powers for independent expert, and arbitrator (through discovery orders on the part of the arbitrator).
(xi) rights for a party to an access determination to obtain court orders to enforce access determinations (s 152 QCA Act)	Rights for a party to enforce an arbitral award in relation to an access dispute are available through the courts pursuant to s 35 of the *Commercial Arbitration Act 2013* (Qld).
(xii) rights for the QCA and other persons to obtain court orders to enforce access undertakings (s 158A QCA Act)	(xii) rights for the persons to obtain court orders to enforce the Deed Poll (cl 9). Terms of the Framework can also be enforced through the dispute resolution provisions of the Framework, with arbitral decisions enforceable as per the box above.

236 The tables clearly shows that the terms of access are, in all material respects, the same with and without declaration. As the User Group puts it "DBCTM is unable to unilaterally set the price or other terms of access in a way that will impact on competition in dependent markets" both with and without declaration.

237 It is important to note that the QCA does not need to find that every access term would be exactly the same with and without declaration (though as shown in the table it likely will in all material respects). The question for the QCA is whether access to DBCT on reasonable terms is available without declaration, such that access as a result of declaration would not promote a material increase in competition in the coal tenements market.

Impact on competition in the coal tenements market

238 The User Group's argument regarding the impact on competition in the coal tenements market is that:

238.1 there will be a significant difference in the terms and conditions of access for new users seeking access to DBCT as compared with incumbents (which will be protected under evergreen existing user agreements);

238.2 this asymmetry will result in new users placing a lower value on tenements, compared to incumbents, which will result in efficient potential entrants being deterred from entering the Hay Point coal tenements market; and

238.3 this deterrent effect will constitute a material adverse effect on competition in the Hay Point coal tenements market (as compared to with declaration), such that access as a result of declaration promote a material increase in competition in the coal tenements market.

239 While DBCTM strongly submits that the geographic dimension of the coal tenements markets is wider than the Hay Point catchment region, for the purposes of this section the analysis pertains to the Hay Point Catchment coal tenements markets, in order to demonstrate that there cannot be any material impact on competition regardless of the geographic dimension of the markets.

The User Group's underlying assumption that there will be a material asymmetry in the terms of access is flawed

240 The key assumption underpinning the User Group's theory of harm is that, without declaration, there will be a material asymmetry in the terms of access between new and existing users, which would not exist with declaration. This is based on the fundamental premise that existing users of DBCT will have protection against unreasonable price rises under their existing user agreements. As demonstrated in the sections above and in DBCTM's March 2019 submission, this asymmetry will not exist without declaration due to the existence of the binding Access Framework (which similarly protects against unreasonable price rises) and other constraints on DBCTM's ability and incentive to exercise market power.

241 This means that the material adverse impact on competition argued by the User Group falls away. It is clear that a maximum $3 per tonne price differential will not have a material impact on competition in the coal tenements markets. As discussed above, this is evidenced by:

241.1 The QCA's analysis in its draft recommendation that a price differential in the order of $3.50 would not appear to be material.[83] The User Group has also indicated that a price increase "in the order of a few dollars" would not be problematic.[84]

241.2 The fact that in practice, terminal charges make up only a fraction of the costs (and risks) considered by a miner deciding whether to invest in a coal tenement.

241.3 The fact that miners face far greater risks than uncertainty regarding access terms at DBCT, such as highly volatile coal prices, the risk that DBCT will reach full expanded capacity with or without declaration, political risks and others.

241.4 The analysis provided by HoustonKemp which clearly shows that acquisitions of new exploration and development tenements by miners without existing capacity at DBCT has not been deterred by the fact that the declaration of DBCT is nearing expiry. [85]

242 Therefore, it is simply not plausible that a $3 per tonne price differential could result a material impact on competition in the coal tenements market.

243 In order to find that criterion (a) is satisfied the QCA must be affirmatively satisfied that access on reasonable terms and conditions, as a result of declaration would promote a material *increase* in competition in a coal tenements markets. There is simply no evidence that this would occur, so the QCA must find that criterion (a) is not satisfied for the DBCT Service.

[83] QCA Draft Recommendation, pages C86 and C87
[84] User Group March 2019 Submission, page 10
[85] Appendix 2 – HoustonKemp Report on Goonyella System Tenement Transactions

Impact on competition in other dependent markets

244 The User Group has neglected to make any substantive submission in regard to the QCA's conclusions that there is not impact on competition in other markets, despite being given the opportunity to do so, and in fact being invited to do so, by the QCA.

245 In its draft recommendation the QCA expressly requested that stakeholders submit additional material regarding its conclusions that it was not apparent that the environment for competition would be better with declaration in dependent markets, other than the coal tenements market.[86] As such, the User Group has been afforded every opportunity to provide further evidence or arguments in respect of those markets, and has not done so. No additional evidence has been produced in response to the QCA's draft recommendation in respect of those markets, so the QCA's draft conclusions on those other markets must stand.

246 For the avoidance of doubt, DBCTM repeats its previous submissions in respect of other dependent markets and agrees with the QCA's draft recommendation that declaration would not promote a material increase in competition in the secondary capacity, coal haulage, or coal export markets. Hence, criterion (a) is not satisfied for the DBCT Service.

2.5 Conclusion on criterion (a)

247 For the reasons laid out and evidenced in this submission, along DBCTM's May 2018, July 2018, November 2018 and March 2019 submissions, access to DBCT on reasonable terms and conditions will not promote a material increase in competition in any dependent market. This means that criterion (a) cannot be satisfied and the QCA must recommend that DBCT is not declared.

[86] QCA Draft Recommendation, pages C53 and C54

3 Criterion (b)

3.1 Summary

248 DBCTM makes the following submission in response to the March 2019 submissions of the User Group, BHP, Peabody Energy and Glencore.

249 Those submissions do not affect the conclusions in DBCTM's previous submissions that criterion (b) is not satisfied. Nor do they constitute probative evidence upon which the QCA can be satisfied that the DBCT service satisfies criterion (b).

250 DBCTM has established throughout this process that the DBCT service does not satisfy criterion (b).[87] There is no basis for a conclusion that criterion (b) is satisfied.

251 Significantly, DBCTM has demonstrated that DBCT alone does not currently, and cannot in the future, service total foreseeable demand in the market and at least cost. Rather, it is least cost for that demand to be met using DBCT's coal handling service, together the coal handling services at HPCT, AAPT and RGTCT.

252 The following table summarises the User Group's submissions on key elements of criterion (b) and DBCTM's response to those submissions.

Figure 8: Summary of key positions and DBCTM response to User Group's submissions - criterion (b)

Issue	User Group	DBCTM	DBCTM response
The service	As per section 250(1)(c)	As per section 250(1)(c)	Agreed
The facility	As per section 250(5)	As per section 250(5)	Agreed
The market	The market for DBCT's coal handling services in the Goonyella coal system[88]	The market for coal handling services for mines that are proximate to the Port of Hay Point[89]	• The User Group confines the market to the market for utilisation of available capacity at DBCT. This is contrary to section 76(2)(b) of the QCA Act, which requires an identification of the market in which the DBCT service is supplied, in order to identify total foreseeable demand in that market (as opposed to identifying demand for the service). • The User Group's approach to market definition assumes that demand in the market cannot include volumes that are served by other terminals, with the effect that demand cannot exceed the use of DBCT. • The User Group incorrectly dismisses evidence of close substitution between terminals actually occurring in the market in which the DBCT service is supplied and the fact that other terminals in addition to DBCT are currently serving demand in that market, and will continue to do so over the declaration period. • The User Group focuses on the degree of substitutability between the *existing* capacity of

[87] DBCTM May 2018 Submission at [58] to [272] and associated Appendices; DBCTM July 2018 Submission at [13] to [289] and associated Appendices; DBCTM March 2019 Submission at [19] to [181] and associated Appendices

[88] User Group March 2019 Submission, page 33

[89] DBCTM May 2018 Submission at [119]; HoustonKemp May 2018 Report, page 26

Issue	User Group	DBCTM	DBCTM response
			DBCT and coal handling services provided by other facilities. Importantly, the User Group fails to consider the degree of substitutability between the *expanded* capacity of DBCT and coal handling services provided by other facilities.
Declaration period	User Group is willing to accept QCA's proposed 10 year declaration period. However, if all criteria are not satisfied at 10 years, the QCA should reconsider a shorter period.[90]	The DBCT service should not be declared for any period.[91]	• DBCTM maintains that the DBCT service should not be declared for any period given the QCA cannot reasonably be satisfied of criteria (a), (b) or (d).[92] Nothing in the users' submissions causes DBCTM to alter this conclusion.
Total foreseeable demand	Total foreseeable demand is represented by projected utilisation of DBCT having regard to DBCT's current capacity. Peak total foreseeable demand in the market is 83.8Mtpa on a throughput basis. The throughput basis seems to be the User Group's position. To provide an estimate of total foreseeable demand analogous to the QCA's approach, the User Group estimated contract capacity of 93.1Mtpa would apply.[93]	Total foreseeable demand in the market is the total demand arising from customers in the market. Peak total foreseeable demand in the market in the declaration period is at least 188Mt on a demand for coal handling contract capacity basis.[94]	• The User Group fails to identify total foreseeable demand in the market in which the DBCT service is supplied, contrary to section 76(2)(b) of the QCA Act. • The User Group conflates the distinct concepts of supply and demand, with the result that it estimates coal handling volumes that are expected to be supplied at DBCT having regard to DBCT's capacity. This means that for customers that the User Group treats as being in the market, it estimates those customers' use of the DBCT service, instead of their total demand for coal-handling services, contrary to section 76(2)(b) of the QCA Act. In addition, the User Group excludes mines that should properly be in the market, such as mines operated by BMA. • The Wood Mackenzie forecast of "utilisation at DBCT" does not represent demand in the market in which the DBCT service is supplied. Rather, it is a forecast of the projected use of the DBCT service which is further limited by the current capacity of DBCT. • While DBCTM continues to rely on HoustonKemp's estimate of total foreseeable demand in the market, regard to DBCT's contracted capacity and the access queue further demonstrates that DBCT cannot service total foreseeable demand in the market over the declaration period alone. • The User Group's forecast does not accord with the actual utilisation advice provided to the terminal Operator by current users. This advice from January 2019 shows throughput demand

[90] User Group March 2019 Submission, pages 33 to 34
[91] DBCTM March 2019 Submission at [95] to [102]
[92] DBCTM March 2019 Submission at [95] to [102]
[93] User Group March 2019 Submission, page 40
[94] DBCTM March 2019 Submission, pages 28 and 32

Issue	User Group	DBCTM	DBCTM response
			from current users exceeding the capacity of DBCT from 2023.[95]
DBCT cannot meet total foreseeable demand	The User Group did not comment on DBCTM's position that the maximum reasonably possible capacity of DBCT over the declaration period is 102Mtpa.	Criterion (b) is not satisfied where the facility for the service cannot meet the total foreseeable demand in the market over the period for which the service would be declared. The maximum reasonably possible capacity of DBCT over the declaration period is 102Mtpa, which is far lower than DBCTM's estimate of total foreseeable demand in the market of 188Mt.	• On any reasonable assessment, peak total foreseeable demand in the market over the declaration period exceeds 102Mtpa. Accordingly, DBCT cannot meet total foreseeable demand in the market over the declaration period.
At the least cost	DBCT can satisfy total foreseeable demand at least cost compared to any 2 or more facilities. It is least cost for an expanded DBCT to meet total foreseeable demand in the market under various scenarios of total foreseeable demand in the market.	DBCT cannot satisfy total foreseeable demand at least cost compared to any 2 or more facilities	• PwC's least cost analysis suffers from the same error as that made by the QCA in its least cost analysis in its draft recommendation. • Where the least cost assessment is undertaken on the basis of total (instead of incremental) costs, it must recognise the costs that cannot be avoided are counted in all scenarios. The price of alternative terminals and rail transport includes sunk costs that PwC assesses as part of total cost in assessing the costs of meeting demand at alternative terminals but not when assessing the cost of expanding DBCT. • PwC's least cost analysis does not account for the below-rail expansion costs in the Goonyella system that the QCA considered necessary for DBCT alone (expanded) to meet total foreseeable demand in the market. When these costs are accounted for under PwC's own approach for the least cost analysis, the combination of DBCT (unexpanded) and RGTCT, not the expanded DBCT supply chain, is the least-cost solution.

[95] To inform the terminal Operator's business plan, existing users must provide a forecast of their throughput for the next 5 years. Refer to Appendices 5 and 6 to this submission. This is sourced directly from existing terminal users as advised in January 2019

3.2 Market in which the service is provided

253 In the case of criterion (b), market definition is directed to assessing whether DBCT can meet total foreseeable demand in the market over the declaration period, and at least cost.[96] As explained in DBCTM's previous submissions, given this purpose the market definition requires a demand side focus in order to facilitate the identification of customers in the market - that is, the mines that should be included as contributing to total foreseeable demand in the market in which DBCT operates.[97]

254 The User Group makes the same error in their approach to market definition as the QCA. This error is described in detail in the DBCTM March 2019 Submission[98] and HoustonKemp March 2019 Report on (b).[99]

255 Supporting the position adopted by the QCA, the User Group focuses on the degree of substitutability between the existing capacity of DBCT and coal handling services provided by other facilities, and fails to consider the degree of substitutability between the expanded capacity of DBCT and coal handling services provided by other facilities. This leads to the incorrect conclusion that DBCT is the only supplier in the relevant market, contrary to evidence that there has been, and continues to be, close competition between the supply of *expanded capacity* at DBCT and existing capacity at other coal terminals for Goonyella system users.

256 Underpinning the User Group's (and QCA's) approach is a conflation of the distinct concepts of 'demand in the market' and 'use of the DBCT service'.[100]

257 The effect of this approach is that demand in the market does not include volumes that are served by other terminals, such that demand does not exceed the *use* of DBCT.[101] This approach has the result that, like the QCA, the User Group estimates total foreseeable use of DBCT, rather than total foreseeable demand in the market.[102] This is revealed by the Wood Mackenzie forecast of DBCT utilisation it relies upon which, as explained in this submission, is constrained by the capacity of DBCT and does not include tonnages from mines proximate to DBCT that use alternative terminals.

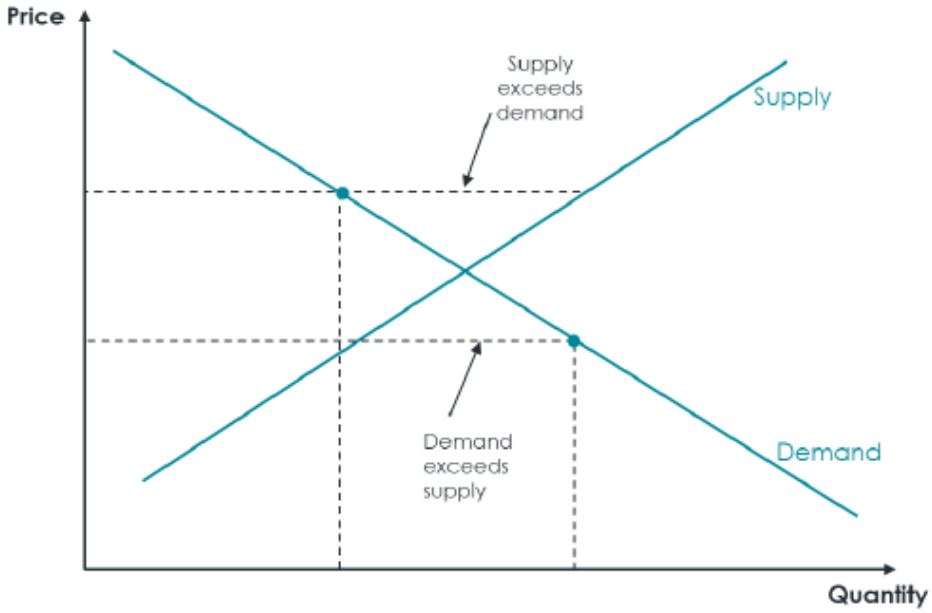
258 However, demand in the market may exceed the use of the DBCT service if other suppliers are meeting demand of consumers in the market.

259 As explained in the DBCTM March 2019 Submission and the HoustonKemp March 2019 Report on (b), demand by an individual for a product reflects the maximum quantity that the individual is willing to consume at any given price of that product.[103] Market demand is the sum of the demand of individuals in the market. These concepts are independent of willingness to supply.

260 The concepts of demand and supply are illustrated in the following diagram from HoustonKemp's April 2019 Report.[104] The diagram shows that when prices are high, supply may exceed demand; and when prices are low, demand may exceed supply.

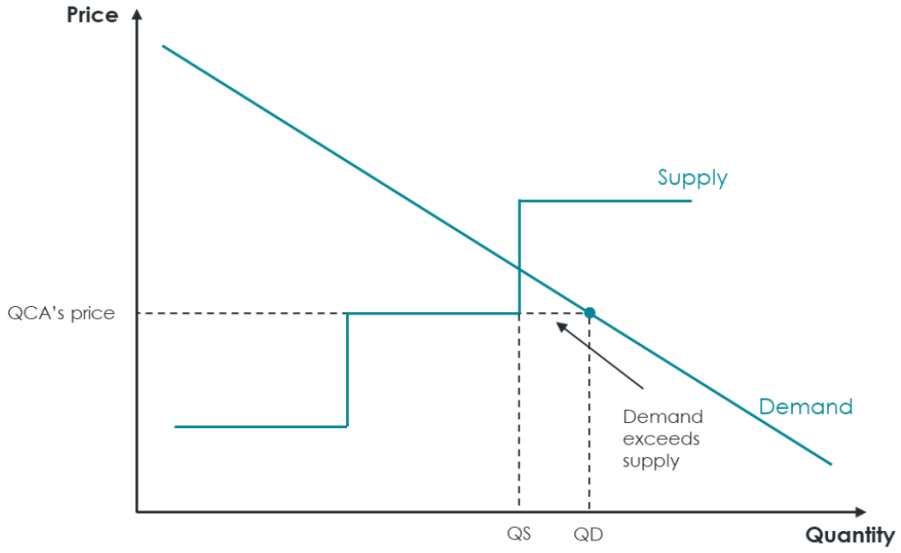
[96] DBCTM March 2019 Submission at [30]; DBCTM July 2018 Submission at [60].
[97] DBCTM March 2019 Submission at [30] to [32]; DBCTM July 2018 Submission at [116] to [123]
[98] DBCTM March 2019 Submission at [26] to [94]
[99] HoustonKemp March 2019 Report on (b), section 2
[100] DBCTM March 2019 Submission at [36]; HoustonKemp March 2019 Report on (b), section 2
[101] HoustonKemp March 2019 Report on (b), section 2
[102] HoustonKemp March 2019 Report on (b), section 2.2
[103] DBCTM March 2019 Submission at [37]; HoustonKemp March 2019 Report on (b), page 21. See also Appendix 1 - HoustonKemp April 2019 Report, section 3.2
[104] Appendix 1 - HoustonKemp April 2019 Report, section 3.2

Figure 9: Surplus supply and surplus demand



261 It is agreed that the coal handling services up to the existing capacity of DBCT are the cheapest option available to coal mines in the Goonyella system. It is not surprising that, at the administered price determined by the QCA, demand for the service exceeds the capacity of DBCT. The below figure from HoustonKemp's April 2019 Report illustrates this situation.[105] It has a 'lumpy' supply curve which represents the prospective capital costs of providing increased terminal capacity at DBCT. 'QD' represents the quantity demanded at the QCA's price. 'QS' represents the quantity supplied at the QCA's price, a value that is constrained by the existing capacity of DBCT.

Figure 10: At the QCA price there is surplus demand for the DBCT service



262 It is agreed that Lake Vermont and Middlemount would have preferred to use the DBCT service at the QCA's administered price, rather than the coal handling service at AAPT. It follows that tonnages contracted with AAPT are included in 'QD' above, not in 'QS'.

[105] Appendix 1 - HoustonKemp April 2019 Report, section 3.2

263 The above diagram shows that excluding volumes served at other terminals will underestimate total foreseeable demand in the market. This approach will give rise instead to an estimate of the 'quantity supplied of the DBCT service', not 'total foreseeable demand in the market'. This is contrary to the requirement in section 76(2)(b) of the QCA Act.

User Group misinterprets evidence of substitution

264 Supporting the QCA's position, the User Group incorrectly dismisses evidence of substitution between terminals actually occurring in the market in which the DBCT service is supplied and the fact that other terminals in addition to DBCT are currently serving demand in that market.

265 The User Group's assessment of substitutability with other terminals,[106] focuses on the degree of substitutability between the *existing* capacity of DBCT and coal handling services provided by other facilities and fails to consider the degree of substitutability between the *expanded* capacity of DBCT and coal handling services provided by other facilities. Like the QCA, in undertaking its SSNIP-type analysis of substitutability between DBCT and other terminals, the User Group fails to recognise that the regulated TIC is below the market clearing price - i.e. that at the regulated TIC there is excess demand for DBCT's existing capacity.[107]

266 In respect of the User Group's analysis of supposed "non-cost barriers to switching":

266.1 DBCTM responded to the items listed by the User Group in the DBCTM March 2019 Submission;[108]

266.2 The User Group fails to recognise that there are already a number of mines within the geographic dimension of the market which use terminals other than DBCT. Those mines and the terminals they use must be within the market for the DBCT service and their forecast production must be included in total foreseeable demand in that market. Having regard to the supposed non-cost barriers to switching advanced by the User Group:

266.2.1 where below and above rail network differences apply, those mines have overcome those differences;

266.2.2 those mines already have access to terminals (including AAPT);

266.2.3 those mines already have capacity on the Goonyella and other rail systems. Further, in the case of BMA mines, the same rail system services HPCT as DBCT;

266.2.4 those mines already have contracts for use of alternative terminals and railways servicing those terminals;

266.2.5 those mines already have either incurred or found a way around any mine infrastructure costs of transporting coal to alternative terminals.

267 Once again the User Group seeks to dismiss Goonyella mines' use of terminals other than DBCT on the basis that it is "marginal use".[109] In doing so, the User Group pays no regard to statements in the Wood Mackenzie report in Schedule 1 of the User Group's March 2019 Submission that mines within the Goonyella rail system export tonnage totalling 22% of DBCT's capacity through AAPT and the Port of Gladstone. Wood Mackenzie states that:

> DBCT and the mines and projects in its catchment, serviced by the Goonyella rail system, are shown in Figure 2.
>
> …

[106] User Group March 2019 Submission, pages 17 to 33
[107] DBCTM March 2019 Submission at [41]
[108] DBCTM March 2019 Submission at [91] to [94] and Figure 4; DBCTM July 2018 Submission at [62] to [89]; HoustonKemp July 2018 Report, pages 5 to 11
[109] User Group March 2019 Submission, page 31

> Coal from mines in the region pictured in Figure 2 is predominately exported through DBCT, which is the closest export port, however coal from this area is also exported from other ports. Tonnage originating from the DBCT catchment area includes 13-14 Mtpa exported through Abbot Point Coal Terminal (APCT) and approximately 5 Mtpa through the Port of Gladstone.

268 That is not marginal use of alternative terminals, it is significant. For context, if DBCT had been required to service this demand alone, it would have needed to expand beyond its reasonably possible expanded capacity of 102Mtpa.

269 Further, as explained in the DBCTM March 2019 Submission, miners' use of alternative terminals is not a case of a consumer on some occasions selecting to serve corn crisps with savoury dip rather than dry biscuits.[110] A household may well keep both corn crisps and dry biscuits on hand and serve them as required on different occasions, while not regarding them as substitutes more generally. Acquiring take or pay capacity from a coal terminal is not analogous to this. Miners' use of alternative terminals generally means engaging in long term take or pay contracts with those terminals, in addition to rail contracts. The product must be paid for even when it is not being used. It follows that a mine requiring a unit of coal handling capacity needs only a unit of DBCT capacity or AAPT capacity, not a unit of each.[111]

270 The User Group seeks to set out its understanding of the reasons certain Goonyella mines have utilised capacity at substitute terminals.[112] These reasons are, in summary:

270.1 because capacity was not available at DBCT within the time required;

270.2 to provide for risk mitigation and flexibility to deal with supply chain outages;

270.3 to take advantage of coal blending and co-shipping opportunities at substitute terminals.

271 DBCTM maintains HoustonKemp's position that, consistent with Australian case law, [113] substitution must be defined by reference to users' historical choice of coal handling services. That is, price and non-price factors are relevant; nothing in section 76 of the QCA Act limits the consideration of substitution to be price-based only.

272 The User Group dismisses these examples of substitution as not "economic substitution". As explained in the DBCTM March 2019 Submission and the HoustonKemp March 2019 Report on (b), contrary to the User Group's assertions:

272.1 Lake Vermont and Middlemount chose AAPT over DBCT after comparing the cost to them of using the two terminals. The cost of using DBCT was substantially greater than the regulated TIC. Given that there was not sufficient existing capacity at DBCT to serve these customers, the choices made by Lake Vermont and Middlemount discloses that, for them, the use of capacity at other facilities was preferable to the use of expanded capacity at DBCT.[114] That is, the AAPT service was more attractive and better value than the DBCT service because contracted capacity at AAPT could be made available more rapidly than at DBCT.[115]

272.2 The acquisition of surplus capacity at terminals other than DBCT is not "uneconomic" but is justified by the expected benefits of contracting elsewhere.[116] HoustonKemp observes that to the extent that miners operate a geographically dispersed portfolio of mines and a corresponding portfolio of terminal contracts, this supports their ability to substitute the DBCT service for other coal handling services at the margin within their portfolio. Such miners have the ability to switch away from DBCT both:

[110] DBCTM March 2019 Submission at [74]
[111] Appendix 1 - HoustonKemp April 2019 Report, section 3.1
[112] User Group March 2019 Submission, pages 31 to 32
[113] DBCTM March 2019 Submission at [45]; HoustonKemp March 2019 Report on (b), section 2
[114] DBCTM March 2019 Submission at [55] to [61]; HoustonKemp March 2019 Report on (b), page 5
[115] Appendix 1 - HoustonKemp April 2019 Report, section 3.1
[116] DBCTM March 2019 Submission at [62] to [70]; HoustonKemp March 2019 Report on (b), page 9

272.2.1 in the short term, by sending more coal to other terminals in their portfolio; and

272.2.2 in the medium term, based on their ability to renegotiate the contracts that underpin this portfolio.

273 Further, the User Group's treatment of mines using terminals other than DBCT where DBCT is capacity constrained serves to further demonstrate that the User Group has deployed an erroneous approach to market definition, which:

273.1 ignores the fact that demand in the market exceeds the use of DBCT where DBCT is capacity constrained such that other suppliers are meeting the demand of consumers in the market;

273.2 fails to consider the degree of substitutability between the expanded capacity of DBCT and coal handling services provided by other facilities; and

273.3 proceeds on the incorrect basis that the price that clears the market is the regulated TIC, whereas that is in fact lower than the competitive price in the market.

274 This evidence of mines utilising terminals other than DBCT where DBCT is capacity constrained demonstrates that DBCT does not service total foreseeable demand in the market alone.

275 In respect of the use by non-Goonyella customers of the DBCT service, DBCTM notes that [redacted]. This is evidence that non-Goonyella users are seeking access to the DBCT service.[117]

HoustonKemp's approach to substitutability

276 In contrast to the User Group, HoustonKemp considers substitutability by reference to what miners have revealed in their choice of coal handling services, either at the present time or in the recent past.[118] This is consistent with the standard approach to market definition as described in economic literature and Australian case law. Under this framework, any factor that drives value to users is relevant to substitutability.

277 This approach allows for the prospect that demand arising from customers in the market may exceed the capacity of DBCT to meet that demand either now or in the future. If demand in the market meets or exceeds the capacity of DBCT, then it is relevant to consider the degree of substitutability between the expanded capacity of DBCT and coal handling services provided by other facilities.

278 HoustonKemp concludes that the DBCT service is provided in the market for coal handling services for mines which are proximate to the Port of Hay Point, that mines which currently use other terminals are included in this market, and that DBCT, HPCT, AAPT and RGTCT all provide coal handling services in this market.[119]

279 HoustonKemp's conclusion is supported by what is currently happening and will continue to happen in the market in which DBCT operates.[120] That is, DBCT does not currently, and will not in the future, service total foreseeable demand in the market alone - rather DBCT services that demand together with HPCT, AAPT and RGTCT.

HPCT

280 In its previous submissions, DBCTM has provided evidence that there are a number of BMA and BMC mines who use HPCT and also use the DBCT service.[121] Further, BHP has acknowledged that "for BMA and BMC,

[117] Cf User Group March 2019 Submission, page 33
[118] DBCTM March 2019 Submission at [45]; HoustonKemp March 2019 Report on (b), section 2
[119] HoustonKemp May 2018 Report on (b), pages 23 to 35
[120] DBCTM May 2018 Submission at [128] to [143]; DBCTM March 2019 Submission at [55] to [90]
[121] DBCTM March 2019 Submission at [86]; DBCTM May 2018 Submission at [156]; DBCTM July 2018 Submission at [127]; HoustonKemp May 2018 Report on (b), pages 28 and 37

the services at DBCT may be 'able to be substituted for' services provided at HPCT".[122] Accordingly, total foreseeable demand in the market must include all foreseeable production from BMA and BMC mines.

281 In its consideration of HPCT, the User Group has focussed on the supply side of the market and whether DBCT is a substitute for non-BMA/BMC mines. It does not give sufficient regard to the demand side of the market and the indisputable fact that DBCT is a substitute for BMA and BMC mines that are permitted to use HPCT.

282 In this case, the vertically integrated producer is also a consumer of the coal handling services of the vertically separated supplier, which operates adjacent to the coal handling services of the vertically integrated supplier. The vertically integrated producer's demand for coal handling services (from itself and from the vertically separated supplier) must be included in total foreseeable market demand.

283 The key question is not whether BMA is likely to operate HPCT as a common user facility in the future.[123] Rather, the key question is whether BHP mines perceive DBCT as a substitute for HPCT. The answer to this question is unequivocally yes.[124]

284 The fact that BMA/BMC mines may be using DBCT because there is insufficient capacity at HPCT,[125] or to optimise BHP's business operations, does not mean that DBCT is not a substitute for BMA/BMC mines.[126] Rather, it demonstrates plainly that BMA/BMC mines treat coal handling services at DBCT as a substitute for coal handling services at HPCT.

285 The QCA is not required to assess whether the HPCT service would satisfy the access criteria.[127] Rather, the QCA is required to recognise that BMA/BMC mines use both DBCT and HPCT and should therefore take into account foreseeable production from BMA/BMC mines in estimating total foreseeable demand in the market. This conclusion should be made keeping in mind that the purpose of defining the market in the criterion (b) analysis is not to determine whether other terminals provide a competitive constraint to DBCT, but rather to facilitate the identification of total foreseeable demand in the market in which DBCT operates.[128]

3.3 Total foreseeable demand in the market

286 The User Group's approach to market definition fails to identify total foreseeable demand in the market in which the DBCT service is supplied. This is contrary to section 76(2)(b) of the QCA Act which requires a determination of 'total foreseeable demand in the market'.

287 By contrast, HoustonKemp's approach to market definition allows for the prospect that demand in the market may exceed demand for the DBCT service and encompass volumes that are served by other terminals.[129] This approach facilitates the identification of total foreseeable demand in the market and accordingly is consistent with section 76(2)(b) of the QCA Act.

288 Total foreseeable demand must be estimated as the total requirement for coal handling services arising from production (or expected production) of coal at locations that are within the geographic dimension of the market.[130] The fact that some of these volumes may currently, or in the future, be served by a facility other than DBCT is not a basis for excluding that demand from total foreseeable demand for coal handling services in the market.

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[122] BHP Submission March 2019 at [4.7]. DBCTM observes that BHP's reference to "able to be substituted" in this quote comes from section 71(2)(b) of the QCA Act

[123] Cf User Group March 2019 Submission, page 28

[124] DBCTM March 2019 Submission at [77] to [99]; BHP Submission at [4.7] and page 5.

[125] User Group March 2019 Submission, page 30

[126] DBCTM March 2019 Submission at [62] to [70]; HoustonKemp March 2019 Report on (b), pages 9, 18 and 19

[127] Cf User Group March 2019 Submission, page 31

[128] DBCTM March 2019 Submission at [30] and [31]; HoustonKemp March 2019 Report on (b), pages 12 to 15

[129] DBCTM March 2019 Submission at [46]; HoustonKemp March 2019 Report on (b), section 2

[130] DBCTM March 2019 Submission at [113] and [114]; HoustonKemp May 2018 Report on (b), page 19; HoustonKemp March 2019 Report on (b), section 3

289 Like the QCA, the User Group understates the number of customers in the market because:

289.1 it underestimates the scope of the market for the service;

289.2 for customers that it treats as being in the market, the User Group estimates use of the DBCT service, instead of total demand for coal handling services.[131] That is, the User Group does not include these customers' total demand in the market in its forecast of total foreseeable demand, contrary to section 76(2)(b) of the QCA Act;

289.3 the User Group's approach to market definition excludes mines that should properly be included in the market - notably, mines operated by BMA that currently use DBCT and the functionally identical service at HPCT.

290 As explained below, the Wood Mackenzie forecast of "utilisation at DBCT" relied on by the User Group is not fit for purpose. This is because the forecasting methodology employed by Wood Mackenzie does not seek to forecast demand in the market in which a coal handling service at a terminal is provided. Rather, Wood Mackenzie forecasts utilisation of terminals in Central Queensland having regard to factors such as terminal capacity, forecast production from mines, known contracts that mines have with terminals, rail system capability and assumed demand levels.[132]

291 Further, as explained below, while DBCTM continues to rely on HoustonKemp's estimate of total foreseeable demand in the market, regard to DBCT's contracted capacity and the access queue further demonstrates that DBCT alone cannot service total foreseeable demand in the market over the declaration period.

Capacity and access queue projections

292 DBCTM has demonstrated throughout this process that where the market is correctly defined and foreseeable demand is correctly estimated, total foreseeable demand in the market over the declaration period materially exceeds the reasonably possible maximum coal handling capacity of DBCT in the declaration period of 102Mtpa.[133]

293 DBCTM observes that the sum of DBCTM's contracted capacity and the access queue does not represent total foreseeable demand in the market. This is because total foreseeable demand in the market must be estimated as the total requirement for coal handling services arising from production (or expected production) of coal at locations that are within the geographic dimension of the market.[134] Accordingly, it includes:

293.1 demand for coal handling services from mines within the geographic dimension of the market that use DBCT or propose to use DBCT;

293.2 demand for coal handling services from mines within the geographic dimension of the market that use other terminals or propose to use other terminals.

294 Not all of this demand is captured in the current access queue or quantities contracted at DBCT.

295 Nonetheless, as discussed in the DBCTM March 2019 Submission, DBCTM's contracted capacity and the access queue provide verifiable and probative evidence of actual demand for the DBCT service as requested by access seekers in accordance with a formal process. Regard to the current contracted capacity and access

[131] DBCTM March 2019 Submission at [104] to [121]; HoustonKemp March 2019 Report on (b)
[132] Wood Mackenzie, DBCT throughput forecast, 11 March 2019, page 6
[133] DBCTM May 2018 Submission at [220] to [224]; DBCTM March 2019 Submission at [161] to [163]
[134] DBCTM March 2019 Submission at [113] and [114]; HoustonKemp May 2018 Report on (b), page 19; HoustonKemp March 2019 Report on (b), section 3

queue demonstrates that demand materially exceeds DBCT's capacity over the declaration period, such that DBCT cannot service that demand alone.[135]

Contracted capacity

296 Contrary to the User Group's contention, the statement in the capacity outlook DBCTM provided to users at the Throughput and Capacity Forum in December 2018 that '*DBCT likely to be contracted at 84.2 mtpa*',[136] does not represent DBCTM's projection of demand. DBCTM was simply informing users that DBCT was likely to be fully contracted at its current system capacity of 84.2Mtpa. The amount contracted at DBCT does not represent total foreseeable demand in the market in which the DBCT service is provided. DBCTM's view of total foreseeable demand in that market is that presented in DBCTM's submissions in this process, being the demand estimate prepared by HoustonKemp based on AME data.[137]

297 DBCTM's submissions throughout this declaration review process plainly demonstrate that: [138]

297.1 it is incorrect to equate contracted capacity at DBCT to demand in the market in which the DBCT service is supplied; and

297.2 demand in that market exceeds DBCT's contracted capacity throughout the period of declaration.

298 The User Group's contention that the amount contracted at DBCT on the basis of DBCT's current system capacity equates to maximum total foreseeable demand further demonstrates the User Group's error with respect to market definition described above in constraining demand to the capacity of DBCT.

Access queue

299 The QCA Staff Questions Paper[139] published on 5th April 2019 asked

> To what extent should an access queue at DBCT Management be viewed as a reliable forecast of demand for terminal services at DBCT? If it is not, why not?
>
> In asking this question, staff are not focussing on whether DBCT Management's queue correctly reflects the relevant access seekers and their requests for capacity in different years. Rather, the focus of staff's question is on the rights and obligations of DBCT Management and access seekers in respect of the queue and the nature of the incentives of access seekers to participate in such a queue and to provide an accurate estimate of their demand.

300 This section seeks to address the QCA staff questions above, and the mischaracterisations contained within the User Group submissions in respect of the access queue. It demonstrates that the DBCT access queue gives rise to rights and obligations to both DBCTM and access seekers and must be treated as a component of total foreseeable demand in the market. The current queue is the basis upon which DBCTM has begun the next expansion of the terminal,[140] just as the previous feasibility studies (and prior expansions) now added to the DBCTM RAB, were completed on the basis of the queue as it existed at the time.

301 As explained in the DBCTM March 2019 Submission, the User Group's submission that the access queue does not provide a genuine reflection of demand must be rejected.[141] Each of the mines currently in the access queue have current applications for capacity.

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[135] DBCTM March 2019 Submission at [136] to [141]
[136] User Group March 2019 Submission, page 36
[137] DBCTM May 2018 Submission at [201] to [219]; DBCTM March 2019 Submission at [122]
[138] DBCTM May 2018 Submission at [144] to [167] and [203] to [214]; DBCTM July 2018 Submission at [154] to [170]; DBCTM March 2019 Submission at [107] to [121]
[139] QCA Staff Questions: Submissions post Draft Recommendations, page 2
[140] Refer to Appendix 7 - DBCT Expansion Activity
[141] DBCTM March 2019 Submission at [139]; User Group March 2019 Submission, pages 38 to 39

Access applications (or renewal applications) under the 2017 AU

302 DBCTM observes that in the 2017 AU process, the queuing arrangements were reformed to ensure that the queue is more representative of the actual demand for additional access to DBCT. DBCTM submitted to the QCA that the proposed tightening of the access queue provisions, including the information requirements listed below, were in order to provide "reasonable evidence of an applicant's bona fides"[142] with a view to providing DBCTM with an accurate demand profile for use in its planning of expansions. DBCTM further noted its clear intent for the additional queue provisions, explaining that they were "to ensure that the access queue is a bona fide reflection of the demand for access at DBCTM."[143]

303 Significantly, the User Group supported DBCTM's proposals to update the access queue provisions and to ensure that the access queue is representative of actual demand. The User Group submitted to the QCA that it "…agrees with the principle proposed by DBCTM of reforming the negotiation framework and queuing arrangements with a view to **seeking to ensure that the queue is more representative of the actual demand** for additional access to the Terminal."[144] (emphasis added)

304 At the QCA public forum on 20 March 2019, the User Group referred to the access queue as it existed in 2009 and again in 2015 in seeking to argue that it is not representative of actual demand.[145] This is exactly the issue that was dealt with in the 2017 AU process by DBCTM, the User Group and ultimately the QCA. The QCA approved the access queue tightening provisions, per the table below. Finally, as noted below, DBCTM has subsequently tested the queue rigorously (in late 2018) and it is now comprised of: those Access Seekers who submitted a signed Access Agreement in late 2018 but who weren't able to be fully satisfied, disputing Access Seekers, and new Access Applications submitted since late 2018.

QCA Draft Decision on 2015 DAU (which became 2017 AU)[146]

Summary of 2015 DAU proposal	*Comparison to the 2010 access undertaking*	*Stakeholders' comments*	*QCA 2016 draft decision*
Access processes			
Access application			
Access seekers and renewing access holders to provide evidence of coal reserves and mine plans (both greenfield and brownfield mine plans).	The 2015 DAU strengthens the information provisions in Schedule A of the AU.	Support.[779]	Approve.
Objective criteria[783] allows DBCTM to reject an access application (including an access renewal) if the: • access application is not accompanied with all information in the form specified (e.g. evidence of coal reserves, mine plans and warranty) • access seeker does not demonstrate that access rights will be used within five years from the date of lodgement.	DBCTM could exercise reasonable discretion in rejecting an application. Access applications tended to lapse by default.	Support.[784] Recommended drafting to clarify that for bona fide disputes regarding a rejection, parties should hold their position in the queue until the dispute is determined.[785]	Approve, in principle, and recommend a clarifying amendment to ensure bona fide disputing parties continue to hold their position in the queue until a dispute is determined.

305 Under section 12.3 of the 2017 AU, DBCTM has a 'general obligation' to undertake a Terminal Capacity Expansion to:

> accommodate the actual and reasonably anticipated future growth of demand (having regard to Access Applications received by DBCT Management and other relevant factors) for the use of the Terminal by Access Holders and Access Seekers

306 Under the 2017 AU, an access seeker must notify DBCTM of its desired capacity and other relevant details relating to that capacity requirement. This formal Access Application or Renewal Application (**access application**) is made in accordance with Schedule A of the 2017 AU. The access seeker must demonstrate that it has rights to below-rail infrastructure, or will request those rights from the relevant rail provider

[142] See for example, DBCTM Submission to the QCA, 2015 DAU, 12 October 2015, "Compare – 2015 DAU against 2010 DAU", page 6
[143] See for example, DBCTM Submission to the QCA, 2015 DAU, 12 October 2015, "Compare – 2015 DAU against 2010 DAU", page 10
[144] See for example, User Group Submission to the QCA, 2015 DAU, 03 December 2015, page 32
[145] User Group March 2019 stakeholder forum slides, pages 11-12
[146] See for example, QCA Draft Decision on 2015 DAU, 19 April 2016, pages 264-265. Note – QCA position did not change in its final decision

(which are reasonably expected to be granted if the access application is granted), or will make arrangements to ensure that there is sufficient rail access to deliver to the required tonnes to DBCT.

307 The access seeker must also provide the following information to DBCTM (inter alia):[147]

307.1 Description of the coal mine, including the project timeline for construction/ commissioning/ production phases, how the mining activity is tracking against that timeline, and how the timeline is consistent with the date of commencement for delivery of coal;

307.2 Description of the access seeker's progress in obtaining the necessary approvals for the project;

307.3 An assessment of the creditworthiness of the access seeker, including the prospects of obtaining any required finance for the mine to achieve the project timeline;

307.4 Stockpiling and blending requirements;

307.5 Number of products and descriptions of each type of coal (including qualities such as moisture content, stickiness, contamination levels and any special requirement, including special equipment);

307.6 The commencement date of delivery of coal to DBCT;

307.7 The proposed number of trains and wagons per train, as well as the proposed gross tonnes per wagon, each week from the commencement of delivery to the end of the first full financial year;

307.8 The indicative deadweight tonnage of vessels (on a monthly basis) for the first full financial year, including details of the numbers of single and part vessel consignments;

307.9 Any requirements for trial shipments;

307.10 A report prepared by a competent person in accordance with the JORC Code and Coal Guidelines which detail an estimate of the Coal Resources and Marketable Coal Reserves which are allocated for shipment under the Access Agreement; and

307.11 An explanation of how the Marketable Coal Reserves and Coal Resources are consistent with having sufficient reserves for the capacity request for the first five financial years.

308 DBCTM is then obligated to acknowledge receipt of the access application and confirm whether it conforms with the 2017 AU Schedule A requirements. DBCTM may also request further information from the access seeker in respect of the capacity request. This could include further detail in respect of that information provided in Schedule A. DBCTM may, acting reasonably, reject the access application where it determines that the access seeker is not reasonably likely to deliver coal by the estimated date, or there is a discrepancy between the capacity request and the coal reserves. The access seeker can dispute DBCTM's rejection of this request.

309 If the access application is accepted, it forms part of the access queue.

310 Where the requested capacity cannot be met unless DBCT is expanded, DBCTM begins the expansion process, which includes undertaking a 'Clause 20 process'. Clause 20 of the Standard Access Agreement (**SAA**) allows DBCTM to assess whether an expansion is required, by requiring access holders to either exercise their options to extend their agreements, or to advise if the option is waived. If there is a waiver of sufficient options to accommodate the sought capacity, no expansion will be required (and vice versa).

<u>The access queue and total foreseeable demand</u>

311 In its response to the draft recommendation, the User Group acknowledged that it is appropriate for the determination of total foreseeable demand to be updated with the most recent information available to the QCA and stakeholders.[148] It acknowledged that this should include the outcomes of the "notifying access seeker process completed in late 2017 (sic), which is addressed to some degree in DBCTM's

[147] See also Timbrell Declaration at [7] (Appendix 3 - DBCTM March 2019 Submission)
[148] User Group March 2019 Submission, page 34

7 November 2018 late submission".[149] The User Group's assertions as to why the access queue does not constitute a reliable component of total foreseeable demand and DBCTM's response are outlined in the table below.[150]

Figure 11: User Group's position on the Access Queue and DBCTM's response

User Group	Response
While the access queue has historically contained a significant amount of capacity, those capacity requests have rarely been converted into contracted capacity	To the extent that the terminal requires significant expansion to accommodate future demand, it is reasonable that users would contract to expand the terminal. This has been evidenced when the 7X expansions led to the access queue being converted to contracted capacity. The section below describes DBCTM's responses to demand as indicated by the access queue.
Since the queue is costless to enter, there is an incentive for users to enter the queue as it is a free option that does not carry any disadvantage or penalty when those capacity requests are not converted to Take-or-Pay (**ToP**) agreements	The access queue is not costless to enter. While DBCTM does not levy a fee, and there are no consequences if users do not convert those requests to ToP agreements, there is a significant degree of information required by DBCTM to join the queue under clause 5.4 and Schedule A of the 2017 AU. This information includes JORC studies, forecast rail and vessel scheduling requirements for the first financial year of shipments. Users are also required to demonstrate the strong likelihood of sufficient below-rail access. DBCTM's conversations with industry indicate that users engage external consultants with providing such advice for below-rail, above-rail and port services. Where a dispute is lodged about being removed from the queue, access seekers are protecting the value of the sunk investments they have made in undertaking studies and procuring information to prove the bona fides of their access requests
If capacity requests within the queue genuinely represent total foreseeable demand, users would have contracted for that capacity.	See comment 1. Further, access seekers have now contracted to the full extent of existing capacity.
Users were aware that the recent queue process was the last opportunity to contract capacity without an expansion at DBCT in the short- to medium-term. Since users did not convert their access applications to ToP agreements during that process, the queue is an unreliable indicator of foreseeable demand.	This is factually incorrect. Access seekers converted their access applications to ToP agreements to the full extent available at the existing terminal. In fact, available capacity was oversubscribed. Having regard to system capacity and capacity that was already subject to contract, DBCTM could only countersign access agreements totalling 6.85Mtpa of the total 8.72Mtpa sought by applicants in the queue. Therefore, demand of 1.87Mtpa could not be met.[151] All access seekers who did not submit signed Access Agreements in the three month period have been removed from the DBCT access queue. The access queue is now comprised of those Access Seekers who submitted a signed Access Agreement in the three month period under the Notifying Access Seeker (**NAS**) process in late 2018 but who weren't able to be fully satisfied, disputing Access Seekers, and new Access Applications submitted during or after the three month NAS process.

[149] Ibid
[150] User Group March 2019 Submission, page 38
[151] Timbrell Declaration at [20] (Appendix 3 - DBCTM March 2019 Submission)

User Group	Response
To the User Group's knowledge, no expansion of DBCT is currently the subject of a feasibility study (suggesting that DBCTM knows the access will not convert to short-term demand).	This is factually incorrect. The Zone 4 expansion studies are now at a FEL2 level[152] The cost of expansion studies were included in the 2017/18 RAB roll forward, as cited in the User Group's initial submission to the QCA on declaration matters, 30 May 2018 (see page 28 of PwC report – schedule 3 of the User Group submission). As noted above, the 2017 AU imposes an obligation on DBCTM to have regard to the access applications in the access queue to determine demand for the use of the terminal, with a view to expanding the terminal to accommodate the demand. As such, upon completion of the NAS process, in 2018 DBCTM immediately commenced work on the next expansion of the terminal. DBCTM's current expansion activity is further described in the DBCT Expansion Activity Appendix.[153]
Users have reported that they have not been approached by DBCTM under clause 20 of their access agreements	The User Group has failed to account for the work that occurs prior to undertaking the clause 20 process. This includes independent modelling of expansion options, the updating of the Master Plan (in accordance with the 2017 AU), and the contracting of all capacity at the existing terminal. DBCT notes that one access seeker has until 6 May 2019 to advise whether it will contract the final 0.13Mtpa of long term capacity available at the existing terminal. This access seeker did not receive its full allotment of requested capacity, and has advised it may therefore seek to satisfy its requirements at another terminal (and in that case, DBCTM will immediately offer the 0.13Mtpa back to the access queue). As illustrated in the timeline in Appendix 7, DBCT will shortly approach Access Holders under clause 20 of their respective agreements as part of the current expansion process.
DBCTM's process to test the validity of the access applications is insufficient and it has also not required any access seeker to demonstrate *bona fides* in the annual review process	Users are required to provide a significant amount of detailed information regarding their capacity request. The 2017 AU provides for DBCTM to obtain further information regarding a project where the initial information provided by the access seeker was not sufficient. DBCTM's most recent process to test the validity of access applications is demonstrated by its removal from the queue of all access seekers who do not submit signed Access Agreements in late 2018. This is further evidenced by the disputes that have arisen as a result of the recent queue clean-up process undertaken by DBCTM.[154]

[152] DBCTM May 2018 Submission at [39]
[153] Refer to Appendix 7 - DBCT Expansion Activity
[154] Timbrell Declaration at [27] (Appendix 3 - DBCTM March 2019 Submission)

User Group	Response
Since access seekers in the queue can replace existing users (through trading or the waiving of renewal rights by existing users), the queue does not strictly reflect the additional aggregate demand. That is, the queue cannot be added to projections of contracted capacity as access seekers can replace some of that contracted capacity forfeited by existing users.	Investment decisions in respect of the terminal are made with reference to the queue, not third party forecasts. Obligations upon DBCTM regarding the expansion of the terminal arise solely as a result of the access queue. DBCTM must, as a prudent and efficient terminal operator, investigate the expansion of DBCT where it considers future demand cannot reasonably be met without an expansion. Whether this materialises is dependent on the queue and views/commitment from its users.

312 As noted above, the genuineness of the applications for capacity of mines in the access queue was recently tested in the capacity allocation process referred to in the Timbrell Declaration.[155]

313 Following the capacity allocation process there was 1.87Mtpa of immediate demand for DBCT capacity in the form of signed access agreements that could not be met.[156]

314 In late 2018, DBCTM removed access seekers from the queue who had not signed access agreements during that process in accordance with the Access Undertaking.[157] In total, DBCTM removed 12 access seekers from the queue and a total of 59.4Mtpta. As set out in the following table.

Figure 12: Access seekers removed from access queue

DBCT 2018 queue removals				
	Entity	Mine(s)	Maximum capacity (Mtpa)	Disputed?
1	[redacted]			
2				
3				
4				
5				
6				
7				
8				
9				
10				
11				
12				

315 Four access seekers disputed their removal from the access queue and referred the dispute to dispute resolution under section 17 of the Access Undertaking. The capacity demanded from those access seekers and subject to the dispute totals 22Mtpa in 2024.[158]

316 The fact that four access seekers are disputing their removal from the queue demonstrates that the access queue is valued by users and they will take up dispute resolution with the QCA to preserve their position in the queue. Three of those access seekers are existing users and four out of the five mines they are seeking capacity for are current operating mines that are subject to existing contracts with DBCTM.

[155] Timbrell Declaration at [27] (Appendix 3 - DBCTM March 2019 Submission)
[156] Timbrell Declaration at [20] (Appendix 3 - DBCTM March 2019 Submission)
[157] Timbrell Declaration at [27] (Appendix 3 - DBCTM March 2019 Submission)
[158] Timbrell Declaration at [27] (Appendix 3 - DBCTM March 2019 Submission)

317 The Timbrell Declaration explains that if the access seekers are ultimately removed from the queue it is likely that they will subsequently make new applications to join the queue for the same quantities as currently sought.[159] Mr Timbrell notes that two of the access seekers who disputed their removal from the access queue have already made new applications to join the queue for the quantities in dispute.

318 Accordingly, consistent with the views expressed by DBCTM at the stakeholder forum in March 2019, it is clear that the QCA must treat the quantities in the access queue as genuine demand for coal handling services in the market in which the DBCT service is supplied.

319 Given these observations, DBCTM considers that the User Group is incorrect in contending that the revised Wood Mackenzie forecast provides a more appropriate estimate of total foreseeable demand in the market than what the access queue would suggest the estimate should be. Hence, of the two information sources, DBCTM submits that the QCA should place significantly more weight on the access queue than Wood Mackenzie's forecast in forming a view on total foreseeable demand. DBCTM responds further to the Wood Mackenzie forecast below.

Revised Wood Mackenzie forecast

320 In its March 2019 Submission, the User Group presents a revised Wood Mackenzie forecast of "utilisation for DBCT".[160]

321 The Wood Mackenzie forecast does not represent a forecast of demand in the market in which the DBCT service is supplied. Rather, it is an estimate of projected use of the existing DBCT facility over the declaration period. It does not take into account demand from mines proximate to DBCT which use other terminals.

322 Further, the manner in which Wood Mackenzie prepares its utilisation forecast constrains demand to be no more than the capacity of DBCT. In particular, in preparing its utilisation forecast Wood Mackenzie has regard to "[a]vailable DBCT capacity during the forecast window".[161] Given this, it is unsurprising that Wood Mackenzie concludes that "[e]xpected DBCT throughput suggests that expansions of DBCT capacity are unlikely to be required."[162]

323 In DBCTM's experience, and as suggested in Wood Mackenzie's report, Wood Mackenzie takes a Central Queensland wide approach to its throughput forecasts. It forecasts production at mines serviced by the Central Queensland Coal Network and predicts which terminals those mines are likely to use to export their coal. Wood Mackenzie's forecast of throughput at DBCT is one component of its total Central Queensland throughput forecasts. Its forecasting methodology seeks to best fill its understanding of available existing terminal capacity first before requiring an expansion of capacity at a terminal. Wood Mackenzie notes in its report that:[163]

> Throughput at other ports, while not the focus of this report, has the ability to impact DBCT throughput.

324 Wood Mackenzie acknowledges in its report that several mines that export through DBCT also allocate a smaller tonnages to other ports, stating that:[164]

> Wood Mackenzie's base view assumes certain tonnage allocations to DBCT and to various other ports. Several mines with (sic) that export through DBCT, also currently allocate a smaller tonnage to other ports, specifically APCT and RG Tanna Coal Terminal at Gladstone port. Changes to these assumptions have the potential to impact on DBCT throughput and hence demand for DBCT capacity.

325 Earlier in its report Wood Mackenzie states:[165]

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[159] Timbrell Declaration at [27.2] (Appendix 3 - DBCTM March 2019 Submission)
[160] User Group March 2019 Submission, page 39
[161] Wood Mackenzie, DBCT throughput forecast, 11 March 2019, page 6
[162] Wood Mackenzie, DBCT throughput forecast, 11 March 2019, page 6
[163] Wood Mackenzie, DBCT throughput forecast, 11 March 2019, page 7
[164] Wood Mackenzie, DBCT throughput forecast, 11 March 2019, page 6
[165] Wood Mackenzie, DBCT throughput forecast, 11 March 2019, page 3

> Tonnage originating from the DBCT catchment area includes 13-14 Mtpa exported through Abbot Point Coal terminal (APCT) and approximately 5 Mtpa through the Port of Gladstone.

326 Wood Mackenzie also recognises that an upside risk to its forecast is the reallocation of Lake Vermont supply to DBCT. Wood Mackenzie states:[166]

> Production from Lake Vermont is currently exported through APCT and Gladstone, however, these contracts expire in 2028 and 2022, respectively. After 2022 Lake Vermont could elect to move part of its allocation to DBCT, which is significantly closer to the mine than APCT, however this is not assumed in the base case. An upside risk to the forecast is the reallocation of Lake Vermont supply to DBCT. Wood Mackenzie has no indication from Jellinbah regarding future throughput plans.

327 Further, Wood Mackenzie's forecast of DBCT throughput assumes no tonnage from BMA mines. Wood Mackenzie states:[167]

> Mines owned by BMA predominantly export through HPCT. However these mines also exported through DBCT and APCT in 2016 and 2017. Depending on the future performance of HPCT, there remains the potential for additional tonnage to be redirected to DBCT. Wood Mackenzie's forecast of DBCT throughput assumes no tonnage from BMA mines; any tonnage from BMA mines would represent additional throughput upside for DBCT. However HPCT mines, specifically Goonyella Riverside, have also demonstrated the ability to export through APCT, utilising the 4 Mtpa contract allocation there. After expiry in 2026 this tonnage may revert to HBCT (sic) or DBCT.

328 A proper analysis of demand in the market consistent with section 76(2)(b) of the QCA Act would take into account tonnages from mines in the market in which the DBCT service is supplied which utilise other terminals, including tonnages from BMA mines.

328.1 BMA mines utilised approximately [redacted] This demand from BMA must be included in the total foreseeable demand. [redacted].

328.2 The illogicality of an approach to measuring foreseeable demand in the market which fails to take into account tonnages from mines in the market in which the DBCT service is supplied that utilise other terminals can be demonstrated by way of an example of market transactions following the recent capacity allocation process at DBCT described in the Timbrell Declaration.[168] During that process, in August 2018 DBCTM received a signed access agreement from an access seeker seeking 1.5Mtpa of long term capacity. That same access seeker sought 0.5Mtpa in a second access application (i.e. indicating it was ready to execute an agreement for a further 0.5Mtpa). DBCTM was unable (due to system capacity constraints) to meet the total demand of 2.0Mtpa requested by that access seeker and was only able to offer 0.13Mtpa long term. As a result, DBCTM understands that that access seeker now seeks capacity at another terminal. Applying the User Group's approach to estimating total demand for coal handling services, the total demand from that access seeker in this example would only be 0.13Mtpa. That approach would erroneously ignore the 1.87Mtpa remaining unsatisfied demand from that access seeker for coal handling services in the market in which the DBCT service is supplied.

329 As noted above, Wood Mackenzie states that approximately 18-19Mtpa of DBCT catchment coal is exported from other terminals. Wood Mackenzie's base case has assumed that 3Mtpa, from

[166] Wood Mackenzie, DBCT throughput forecast, 11 March 2019, page 7
[167] Wood Mackenzie, DBCT throughput forecast, 11 March 2019, page 7
[168] Timbrell Declaration (Appendix 3 - DBCTM March 2019 Submission)

Middlemount's expiring contract with AAPT in 2027, will go to DBCT in 2028.[169] This means that Wood Mackenzie's base case assumes that 15-16Mtpa of DBCT catchment coal will not go through DBCT. If Wood Mackenzie had added this demand to its base-case peak estimated throughput figure of 83.8 Mtpa in 2028, forecast demand for the DBCT service would have been 98.8Mtpa to 99.8Mtpa on a throughput basis. Using the QCA's assumption that throughput reflects 90 per cent of contracted capacity, results in total foreseeable demand figures of 110Mtpa to 111Mtpa. This exceeds DBCTM's reasonably possible expanded capacity of 102Mtpa.

330 Further, the market demand figure is even higher where demand from BMA mines is included (as should be the case on a proper approach to market demand).[170] On an assumption that Wood Mackenzie excludes 55Mtpa of demand from BMA mines (being the capacity of HPCT), demand in the market in which the DBCT service is supplied would be approximately 165Mtpa to 166Mtpa.

331 In addition, Wood Mackenzie concludes that the Moranbah South project is "possible" and will commence production of 0.5Mtpa from 2034.[171] [redacted] Where that [redacted] is added to Wood Mackenzie's peak estimated throughput figure of 83.8Mtpa in 2028, this results in [redacted] of estimated throughput. Converting that figure to demand for contracted capacity results in a figure of [redacted]. This is not an estimate of demand in the market, but rather of utilisation of DBCT, and accordingly demand in the market would be higher than this figure. However, even on the basis of this figure, DBCT does not satisfy criterion (b) because it is not reasonably possible for DBCT to expand beyond 102Mtpa in the declaration period.[173]

User Group's demand projection contrary to advice from existing users

[redacted]

333 This is recent evidence, directly from existing terminal users, that their throughput requirements already exceed the existing capacity of DBCT from 2023 onwards. When combined with the access queue, this provides the most accurate projection of actual foreseeable demand for the DBCT service. For the reasons explained above, this does not represent total foreseeable demand in the market - including because it does not include demand for coal handling services from mines within the geographic dimension of the market that use other terminals, or propose to use other terminals. This evidence is clearly of far greater

[169] Wood Mackenzie, DBCT throughput forecast, 11 March 2019, page 7
[170] DBCTM March 2019 Submission at [108] to [111]; HoustonKemp May 2018 Report on (b), pages 28 and 37; HoustonKemp July 2018 Report on (b), pages 8 and 21; HoustonKemp March 2019 Report on (b), pages 18 to 19
[171] Wood Mackenzie, DBCT throughput forecast, 11 March 2019, page 5, Table 1
[172] DBCTM March 2019 Submission at [127]; Appendix 5 - Moranbah South Project
[173] DBCTM May 2018 Submission at [191] to [200]
[redacted]

relevance, reliability and significance than third party forecasts citing anonymous consultations with industry. The current advice of existing users' throughput requirements is greater in 2023 than the forecast provided by the User Group as the maximum total foreseeable demand in the market from 2020-2030.

Winchester South Project

334 MMI Advisory (**MMI**) excluded the Winchester South Project from its base case forecast of demand on the basis that at the time of its December 2018 report, "Whitehaven's plans for this project have not been announced" and the development path for the mine was "highly uncertain".[176] In its May 2018 Submission, the User Group listed Winchester South as an example of a transaction in the tenements market for which "future export using DBCT is highly likely", which list was referred to by the QCA in its draft recommendation.[177] In its recent analysis, Wood Mackenzie included Winchester South as a "probable project" in its base case DBCT forecast, with production to commence at 1.5Mtpa in 2024 and ramping up to 6.5Mtpa from 2028 onwards.[178] PwC included Winchester South in its adjusted MMI high case forecast, with production to commence at 1.8Mtpa in 2026 and ramping up to 4Mtpa from 2028 onwards.[179]

335 A recent ASX announcement by Whitehaven reveals that Winchester South should be included in total foreseeable demand from 2023 in an amount of at least 8.9Mtpa (based on a conservative estimate and including a contracted capacity allowance of 10 per cent).

336 Whitehaven's Winchester South Project has recently been declared a 'Coordinated Project' under the State Development and *Public Works Organisation Act 1971*.[180] Whitehaven states in its ASX announcement of 18 April 2019 regarding the project that:[181]

> In Queensland, Coordinated Projects are large developments that, among other things, have strategic significance to an area of the State because of the potentially significant economic and employment benefits they bring. Today's declaration paves the way for whole-of-government assessment of the project by way of an environmental impact statement.

337 While the project has not yet received government approval, the project being declared a 'Coordinated Project', reduces uncertainty from an approvals prospective and means the project can advance to the next stage of the development process, including the environmental impact statement.

338 The project proposes a mine that could produce up to 8Mtpa of coal for 30 years with a proposed production start date of 2023.[182] The proposed production of 8Mtpa appears to be a conservative estimate, as Whitehaven states in its ASX announcement that it is targeting run-of-mine production of approximately 15Mtpa.[183] A JORC Coal Resource Estimate Report is referenced which indicates total resources of 530Mt.[184]

339 DBCTM maintains its position that the QCA erred in its approach to market definition and determining total foreseeable demand.[185] However, to illustrate the impact of including 8.9Mtpa from Winchester South in the QCA's estimate of total foreseeable demand of 91.71Mtpa in 2026,[186] that estimate increases to 98.6Mtpa (note the QCA's estimate of total foreseeable demand included 2Mtpa on a capacity entitlement basis from Winchester South from 2026 onwards). That estimate of foreseeable demand further increases to 111.6Mtpa when demand from [redacted] is included in total foreseeable demand[187]

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[176] MMI Advisory, Reconciliation of DBCT Demand Forecasts Submitted by Stakeholders, December 2018, page 15
[177] User Group May 2018 Submission, page 42; QCA Draft Recommendation, page C90
[178] Wood Mackenzie, DBCT throughput forecast, 11 March 2019, page 5
[179] PwC, Response to QCA's Draft Report, 11 March 2019 (**PwC March 2019 Report**), page 33
[180] http://www.whitehavencoal.com.au/winchester-south-project-declaration/ (accessed on 18 April 2019)
[181] http://www.whitehavencoal.com.au/winchester-south-project-declaration/ (accessed on 18 April 2019)
[182] https://www.townsvillebulletin.com.au/news/townsville/950-mining-jobs-a-step-closer-after-government-announcement/news-story/56d7c52825e7a95ca03b35844003ed82 (accessed on 18 April 2019); https://www.australianmining.com.au/news/whitehavens-1bn-winchester-south-coal-mine-moves-forward/ (accessed on 23 April 2019)
[183] http://www.whitehavencoal.com.au/winchester-south-project-declaration/ (accessed on 18 April 2019)
[184] http://clients3.weblink.com.au/clients/whitehavencoal/headline.aspx?headlineid=21112869 (accessed on 18 April 2019)
[185] DBCTM March 2019 Submission at [103] to [128]
[186] QCA Draft Recommendation, page C45
[187] DBCTM March 2019 Submission at [127]; Appendix 5 - Moranbah South Project

(note that while [redacted] .

It is inappropriate to confine demand by the capacity of the rail system

340 The User Group seeks to confine demand by the capacity of the rail system.[188] DBCTM has previously explained that the forecast of demand in the market must be made without reference to the capacity of the rail system.[189]

341 Further, given it is a forecast of 'demand in the market' it is not necessary for DBCT to serve that demand alone. In fact, DBCT does not currently serve 'demand in the market' alone, but rather it is served in part by AAPT, HPCT and RGTCT. Mines within the market that use those terminals also have rail capacity to transport coal to those terminals. It is highly likely that over the declaration period it will continue to be the case that DBCT will not serve that demand alone and that mines that use other terminals will have rail capacity to transport coal to those terminals. Accordingly, the rail system leading to DBCT does not have to handle all of the demand in the market.

342 In any event, even if demand in the market were (incorrectly) to be confined to the current capacity of the Goonyella system, which the QCA suggests in its draft recommendation is 140Mtpa, that demand would exceed the reasonably possible maximum coal handling capacity of DBCT in the declaration period of 102Mtpa, with the result that criterion (b) is not satisfied.

HoustonKemp demand forecast

343 The User Group appears to be under the misapprehension that HoustonKemp's forecast of demand was on the basis of HoustonKemp's own assumptions about whether new projects would be developed and the timing of their development.[190] However, HoustonKemp's demand forecasts were derived as follows:

343.1 HoustonKemp determined a mine to be within the geographic scope of the market when the total supply chain costs of accessing capacity at the Port of Hay Point were expected to be lower than those associated with any other available option.[191] To calculate the port charges, HoustonKemp used data provided by AME.[192] To calculate the above and below rail charges, HoustonKemp used data provided by Wood Mackenzie.[193]

343.2 After determining each mine that fell within the geographic scope of the market, total foreseeable demand in the market was estimated as the sum of forecast production from mines determined to be in the market.[194] In this step HoustonKemp used production forecasts supplied by AME.[195] This resulted in estimates of total foreseeable demand on a throughput basis. Given that in practice demand for coal terminal capacity is realised as demand for take-or-pay contracts, rather than for volumes of coal handled, HoustonKemp then derived estimates of total foreseeable demand for contract capacity on the assumption that, on average, 10 per cent of contracted capacity is not used.[196]

344 Accordingly, HoustonKemp's forecast of demand was derived using independent data as to port and rail charges, provided by AME and Wood Mackenzie respectively, and independent data as to forecast production provided by AME. As explained in DBCTM's May 2018 Submission, AME is a highly regarded

[188] User Group March 2019 Submission, page 43
[189] DBCTM May 2018 Submission at [86] to [89] and [274] to [276]
[190] User Group March 2019 Submission, pages 46 to 47
[191] HoustonKemp May 2018 Report on (b), page 27
[192] HoustonKemp May 2018 Report on (b), page 27 and Appendix A3.1; DBCTM Addendum and disclosure of data, 18 June 2018, page 1; DBCTM May 2018 Submission, Appendix 13 - Reference Paper
[193] HoustonKemp May 2018 Report on (b), page 27 and Appendices A3.2 and A.3.3; DBCTM Addendum and disclosure of data, 18 June 2018, page 1; DBCTM May 2018 Submission, Appendix 13 - Reference Paper
[194] HoustonKemp May 2018 Report, page 36 and table A1.1
[195] HoustonKemp May 2018 Report, page 36, table A1.1 and table A3.6; DBCTM Addendum and disclosure of data, 18 June 2018, page 1; DBCTM May 2018 Submission, Appendix 13 - Reference Paper
[196] HoustonKemp May 2018 Report, page 37

resource and industry analyst with expertise in central Queensland coal.[197] DBCTM explained in its July 2018 Submission why AME's forecast should be preferred to that of Wood Mackenzie.[198]

Need to account for market demand

345 In any event, while mine production forecasts may vary as between AME and Wood Mackenzie, the key issue with estimating total foreseeable demand is the need to account for demand in the market. The DBCTM March 2019 Submission and HoustonKemp March 2019 Report on (b) demonstrate that where appropriate adjustments are made to the QCA's/MMI's estimates of demand to account for demand 'in the market', total foreseeable demand in the market substantially exceeds the existing capacity of DBCT and the reasonably possible maximum coal handling capacity of DBCT in the declaration period of 102Mtpa.[199] This is also demonstrated above with respect to the User Group/Wood Mackenzie estimate of demand.[200] Accordingly, the DBCT service does not satisfy criterion (b).

Contracted capacity is the appropriate metric for demand

346 Contrary to the User Group's submission[201], demand for coal handling contract capacity is the appropriate measure of demand. This is because in practice demand for coal terminal capacity is realised as take-or-pay contracts rather than volume of coal handled.

347 As explained in the DBCTM May 2018 Submission and HoustonKemp May 2018 Report on (b),[202] it is normal for contracted capacity to exceed the volumes of coal handled by a significant margin. Accordingly, it is appropriate to assume that demand for throughput is 90% of the demand for contract capacity. HoustonKemp observes in its May 2018 Report on (b) that this assumption reflects a cautious approach to estimating this parameter, since it is likely to underestimate the total foreseeable demand for capacity in the market, relative to the recent rates of capacity utilisation referred to in its Report.[203]

348 For clarity, the fact that demand for coal handling contract capacity is the appropriate measure of demand in this case does not mean that demand must be confined to that contracted to DBCT, or that demand contracted to alternative terminals is excluded from the estimate of demand in the market. It is a demand measure. A mine proximate to DBCT may contract for coal handling services with another terminal. This is nonetheless demand for coal handling capacity in the market in which the DBCT service is supplied and must be included in the estimate of total foreseeable demand in that market.

349 As explained in DBCTM's previous submissions, contractual or other arrangements mines have to export coal through other terminals are not grounds for excluding them from total foreseeable demand for coal handling services in the *market*.[204] In short, this is because the determination of total foreseeable demand in the market should not be constrained by whether mines actually use (or will use) the DBCT service - it is a determination of demand in the market and must not be confined to demand served by the facility.[205]

[197] DBCTM May 2018 Submission, Appendix 13 - Reference Paper; DBCTM July 2018 Submission at [212]
[198] DBCTM July 2018 Submission at [209] to [217]
[199] DBCTM March 2019 Submission at [123] to [128] and [162]; HoustonKemp March 2019 Report on (b), section 3, Table 3.2
[200] See also DBCTM July 2018 Submission at [220]; HoustonKemp July 2018 Report on (b), pages 19 to 21 - taking a market demand approach to Wood Mackenzie's June 2018 production forecasts HoustonKemp found total foreseeable demand in the market peaked at 167.7Mtpa
[201] User Group March 2019 Submission on QCA Draft Determination, pages 8 to 9
[202] DBCTM May 2018 Submission at [207] to [209]; HoustonKemp May 2018 Report on (b), pages 36 to 37
[203] HoustonKemp May 2018 Report on (b), page 37
[204] DBCTM March 2019 Submission at [112] to [120]
[205] HoustonKemp July 2018 Report on (b), pages 17 to 19

3.4 DBCT cannot meet total foreseeable demand in the market

350 As explained in DBCTM's previous submissions on criterion (b), on any reasonable estimate of total foreseeable demand in the market, the DBCT service cannot meet total foreseeable demand in the market over the declaration period. [206]

351 Criterion (b) is not satisfied where the facility for the service cannot meet the total foreseeable demand in the market over the period for which the service would be declared (section 76(2)(b)(i) of the QCA Act).[207] For a facility to satisfy criterion (b) it must be able to meet total foreseeable demand at all times over the declaration period.

352 The User Group's incorrect approach to the market means that it underestimates total foreseeable demand in the market. In circumstances where section 76(2)(b) is correctly applied, the DBCT service fails criterion (b) because it cannot satisfy total foreseeable demand over the period for which the DBCT service would be declared.

353 As explained in the DBCTM May 2018 Submission, it is not reasonably possible to expand DBCT's capacity beyond 102Mtpa during the declaration period and there is considerable uncertainty as to whether expanding beyond 102Mtpa will ever be viable.[208] As explained in the DBCTM March 2019 Submission, peak total foreseeable demand in the market over the declaration period is at least 188 Mtpa.[209] This is greater than 102Mtpa. Accordingly, DBCT cannot meet the total foreseeable demand in the market over the declaration period. It follows that the DBCT service does not satisfy criterion (b).

354 Since DBCT cannot service total foreseeable demand in the market over the declaration period, the DBCT service does not satisfy criterion (b). It is therefore not necessary for the QCA to consider whether DBCT could meet that demand at least cost compared to any two or more facilities. Despite this, DBCTM also responds to the User Group's least cost analysis below.

3.5 DBCT cannot meet total foreseeable demand at least cost

355 In its first submission in this process and in each of its subsequent submissions, DBCTM has presented evidence and analysis that demonstrates that the DBCT service cannot meet total foreseeable demand in the market over the declaration period at least cost compared to any two or more facilities. That material has been both primary - in the form of HoustonKemp's comprehensive quantitative assessment[210] and the illustrative example provided in DBCTM's May 2018 Submission,[211] and responsive - in the form of DBCTM's submissions and HoustonKemp's and GHD's reports in response to the User Group's submissions of May 2018 and the QCA's draft recommendation of December 2018.[212]

356 There is no basis for a different conclusion. The User Group relies on the least cost analysis in the PwC Report. As explained below, PwC's analysis:

[206] DBCTM May 2018 Submission at [220] to [224]; DBCTM March 2019 Submission at [161] to [163]
[207] DBCTM March 2019 Submission at [144] and [146] to [155]; DBCTM May 2018 Submission at [71] and [72]
[208] DBCTM May 2018 Submission at [191] to [199] and Appendix 18
[209] DBCTM March 2019 Submission at [128]
[210] HoustonKemp May 2018 Report on (b) (refer to Appendix 10 to DBCTM May 2018 Submission and the discussion at [229] to [253] of the DBCTM May 2018 Submission)
[211] Least Cost Analysis (refer to Appendix 11 to DBCTM May 2018 Submission and the discussion at [254] to [259] of the DBCTM May 2018 Submission)
[212] DBCTM July 2018 Submission at [228] to [250]; HoustonKemp July 2018 Report on (b) (Appendix 2 to DBCTM July 2018 Submission); DBCTM March 2019 Submission at [164] to [179]; HoustonKemp March 2019 Report (Appendix 1 to DBCTM March 2019 Submission); GHD Report (Appendix 7 to DBCTM March 2019 Submission)

356.1 falls into the same error as the QCA which results in an understatement of the total costs of meeting total foreseeable demand at DBCT; and

356.2 does not account for the below-rail expansion costs in the Goonyella system that the QCA considered necessary for DBCT (expanded) to meet total foreseeable demand alone.

Errors in the least cost analysis

PwC understates the total cost of DBCT meeting total foreseeable demand

357 PwC, advising the User Group, previously accepted that the assessment of least cost should be made using incremental resource costs.[213] However, in its most recent report, PwC simply adopts the approach proposed by the QCA in its draft recommendation without commentary, being the use of total charges to miners as a proxy for cost.[214] By adopting the QCA's approach PwC falls into the same error that HoustonKemp identified with the QCA's approach in its March 2019 Report on (b).[215]

358 As a result of that error, PwC's least cost analysis must be disregarded.

359 In its March 2019 Submission DBCTM explained the error made by the QCA in its least cost assessment.[216] The QCA assumes that an 'average cost' standard is the same as a 'total cost' standard. As a result of this mistake, the QCA understates the total costs of meeting all foreseeable demand at DBCT and overstates the incremental costs of meeting some of this demand at the alternative terminal. By adopting the QCA's approach, PwC makes the same error.

360 It is critical that the least cost analysis be undertaken on a correct basis. Significantly, where a total-cost approach is used, including sunk costs, the least cost assessment must ensure that costs that cannot be avoided are included in all scenarios. Following the QCA, PwC's approach (in its March 2019 report), which uses charges as the basis for determining the average costs for mines to use terminals other than DBCT, is erroneous because it:[217]

360.1 ignores the sunk costs associated with other terminals when considering scenarios under which DBCT meets all foreseeable demand, even though the sunk costs of those other terminals will continue to be incurred in these scenarios; but

360.2 takes into account these same sunk costs when considering scenarios under which some foreseeable demand is met at those terminals.

361 HoustonKemp explains in its April 2019 Report on (b) that, put another way, PwC's use of 'charges paid' as a proxy for costs causes it to omit the unavoidable costs of the alternative other terminal, whenever no charges are paid at that terminal (even though the other terminal's costs are still not avoided by it not being used).[218] This approach violates the requirement for the same unavoidable costs to be included on both sides of the comparison.

362 The nature of this omission is illustrated in figure 3.3 from the HoustonKemp April 2019 Report.[219]

[213] PwC, 2018 Access Declaration Review – Supplementary Report, 17 July 2018, pages 10-13. PwC also argues that the use of resource costs is problematic when used for the purpose of market definition. DBCTM agrees – DBCTM has never proposed the use of resource costs to assess market definition. The use of charges to miners is the appropriate basis for this assessment. See Appendix 1 - HoustonKemp April 2019 Report, page 11

[214] PwC March 2019 Report, page 17

[215] HoustonKemp March 2019 Report on (b), section 4

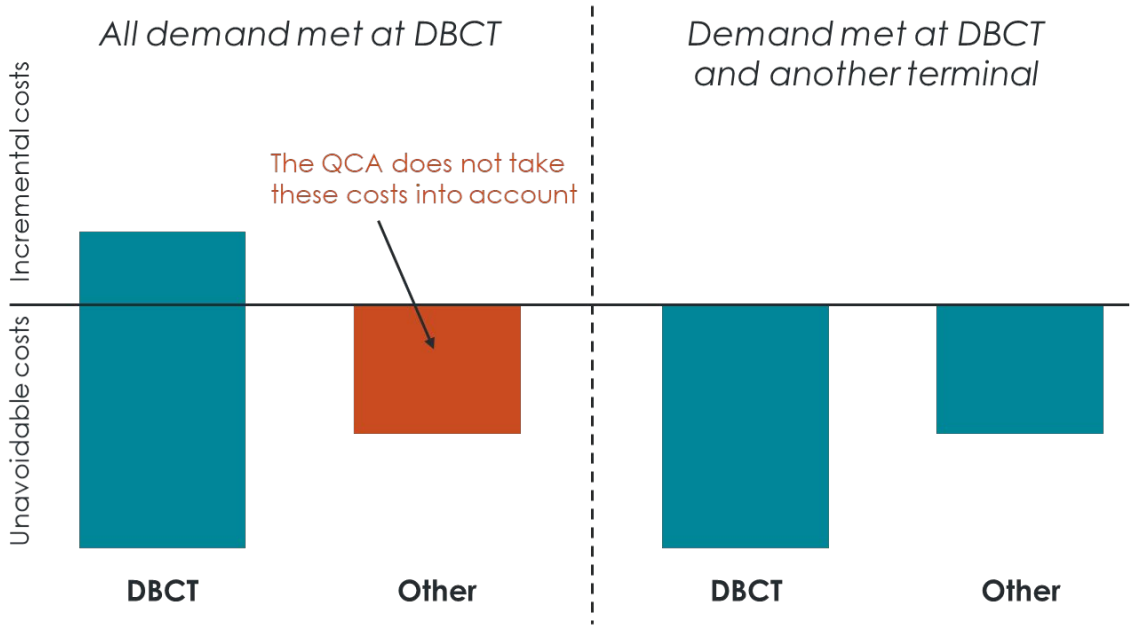
[216] DBCTM March 2019 Submission at [167] to [179]; HoustonKemp March 2019 Report on (b), section 4

[217] DBCTM March 2019 Submission at [167] to [179]; HoustonKemp March 2019 Report on (b), section 4

[218] Appendix 1 - HoustonKemp April 2019 Report, section 3.3

[219] Appendix 1 - HoustonKemp April 2019 Report, page 12

Figure 13: QCA's and PwC's error in calculating least cost



363 Where this error is corrected, the DBCT service fails criterion (b), even on the basis of the QCA's and User Group's flawed approach to market definition and estimating foreseeable demand.[220]

PwC does not account for below-rail expansion costs in Goonyella system

364 In addition, GHD's April 2019 Report concludes that PwC's least cost analysis (utilising the QCA's approach) does not account for the below-rail expansion costs in the Goonyella system that the QCA considered necessary for DBCT alone (expanded) to meet total foreseeable demand in the market.[221] DBCTM notes that Aurizon has recently begun a Network Demand Assessment to assess expansion options to provide additional capacity to the Goonyella coal system.[222]

365 When below-rail expansion costs are accounted for, PwC's own approach for the least cost analysis shows that it is least cost for total foreseeable demand in the market to be met utilising the combination of DBCT (unexpanded) and RGTCT.

QCA's estimate of average supply chain costs for accessing RGTCT is considerably overstated

366 Following the DBCT stakeholder forum, DBCTM requested that GHD update its March 2019 Criterion (b) Report[223] to reflect any findings from its review of stakeholder submissions on the draft recommendation. As part of this update, GHD has found that the QCA has incorrectly calculated the average below-rail cost to a Goonyella mine of accessing RGTCT.[224]

367 The QCA's cost derivation does not correctly apply Aurizon Network's pricing of 'cross system train services' in the approved 2019 access undertaking. A mine that is located in the Goonyella system (origin system) is considered to run 'cross system train services' when accessing RGTCT in the Blackwater system (destination

[220] Appendix 1 - HoustonKemp April 2019 Report, section 3.3; DBCTM March 2019 Submission at [172]; HoustonKemp March 2019 Report on (b), page 30
[221] Appendix 3 - GHD, Report on DBCT User Group's least-cost analysis for criterion (b), April 2019
[222] Aurizon letter to DBCTM, 12 April 2019, "Aurizon Network Demand Assessment: Potential Rail Infrastrcuture (sic) Expansion to the Goonyella Infrastructure"
[223] GHD March 2019 Report (Appendix 7 - DBCTM March 2019 Submission)
[224] Appendix 8 - GHD, Update to March 2019 criterion (b) report, April 2019

system).[225] The QCA's approach for calculating upper-bound below-rail average costs to Goonyella mines of accessing RGTCT is inappropriate because its calculation incorrectly includes the:

367.1 AT2 tariff component in the Goonyella system. Under the Aurizon Network 2019 Access Undertaking, Goonyella mines using the Blackwater system do not use the capacity constrained corridor (i.e. Coppabella to Hay Point Junction) in the Goonyella system[226]

367.2 AT4 tariff component in the Blackwater system. Under the Aurizon Network 2019 Access Undertaking, the AT4 tariff applies only in the origin system (i.e. Goonyella system). [227]

368 In its March 2019 report, GHD provided analysis and evidence to demonstrate that the QCA should have used Aurizon Network's contracted tonnes and gross tonne kilometres (gtks), not actual tonnes and gtks, in deriving average below-rail costs.[228] By addressing the AT2/AT4 issues described above and using contracted tonnes/gtks, the QCA would have found that the upper-bound average supply chain cost to Goonyella mines of accessing RGTCT is $15.79 per tonne, compared with the $20.09 per tonne it estimated in the draft recommendations.[229]

369 GHD finds that the QCA would have estimated that, to meet total foreseeable demand in the market of 93 mtpa, the average supply chain cost to Goonyella mines of using a combination of DBCT (unexpanded) and RGTCT is $11.80 per tonne. This is lower than the QCA's estimate of the average supply chain cost to Goonyella mines of using the expanded DBCT ($12.05 per tonne). Accordingly, the QCA would have found that criterion (b) is not satisfied.

Facilities relevant to the assessment of least cost

370 At the stakeholder forum, the User Group's representative stated that it cannot be least cost for two or more facilities to serve total foreseeable demand in the market because DBCT is the only terminal in the market. The User Group made a similar statement in its May 2018 Submission.[230]

371 However, HoustonKemp explains in its April 2019 Report on (b) that there is no basis for this contention.[231] HoustonKemp states: [232]

> An assessment of the least cost means by which to serve foreseeable demand can objectively be made by reference to the option of using any facility, whether inside or outside the market. This step is conceptually different from market definition. The market definition and least cost steps are not equivalent because market definition can be influenced by how the costs of facilities are reflected in prices, whereas the assessment of least cost looks beyond prices to the underlying costs to society of providing coal handling services.

372 HoustonKemp observes further that even if one assumed that there must be a close consistency between market definition and the assessment of least cost, it would also be necessary to consider this consistency in the assessment of demand. For example, it would be inconsistent to define the relevant market by reference to the existing charges at DBCT, yet use this market to conclude that total foreseeable demand in the market could only be met at least cost by expanded capacity at DBCT without also considering the costs of meeting this demand at other facilities.[233]

[225] Aurizon Network's 2019 Access Undertaking, Schedule F, clause 2.3(a)
[226] Aurizon Network 2019 Access Undertaking, clause 2.3(a)(ii), page 360
[227] Aurizon Network 2019 Access Undertaking, clause 2.3(a)(iv), page 360
[228] GHD March 2019 Report (Appendix 7 - DBCTM March 2019 Submission), section 6
[229] Appendix 8 - GHD, Update to March 2019 criterion (b) report, April 2019, section 2
[230] User Group, Declaration review regarding Dalrymple Bay Coal Terminal: submission to the Queensland Competition Authority , 30 May 2018, page 71
[231] Appendix 1 - HoustonKemp April 2019 Report, section 3.3.2
[232] Appendix 1 - HoustonKemp April 2019 Report, page 13
[233] Appendix 1 - HoustonKemp April 2019 Report, page 13; See HoustonKemp's discussion in the HoustonKemp March 2019 Report on (b), pages 5 to 12

373 In any event, as explained in DBCTM's previous submissions it is not correct to say that DBCT is the only supplier of coal handling services in the market. A facility does not need to be located within the Hay Point catchment in order to provide coal handling services to miners in that region:[234] For example:

373.1 AAPT provides coal handling services to Lake Vermont and Middlemount, which are both customers in the market; and

373.2 RGTCT provides coal handling services to Oaky Creek and Capcoal, which are both customers in the market.

374 Accordingly, even on the narrow view of the least cost test suggested by the User Group, AAPT and RGTCT are both alternative facilities that should be considered in the assessment of whether total foreseeable demand in the market can be met at least cost by DBCT.[235]

Terminal capacity figure in ILC report is not a real measure of terminal capacity

375 Contrary to the contentions in the User Group's March 2019 Submission and PwC March 2019 Report,[236] the terminal capacity figures reported by Integrated Logistics Company (**ILC Report**) do not represent a realistic estimate of terminal capacity and should not be used in the least cost analysis.

376 The distinction between 'system capacity' and 'terminal capacity' relates to how the operating/capacity constraints of the mining load-outs, above-rail infrastructure and below-rail network affect the interfaces with DBCT. Terminal capacity is an estimation of the throughput DBCT could theoretically handle if there were no constraints in the supporting supply chain components that affect the efficiency of DBCT's operations. By contrast, system capacity accounts for the operating/capacity constraints of these infrastructure components, and hence recognises that these considerations limit what capacity DBCTM can actually offer to access seekers.

377 The terminal capacity figures in the ILC report are derived by assuming the upstream rail and train load-out performance is unconstrained, and a demand of 120Mtpa is applied to the supply chain at all times.[237] The ILC has used the model to estimate the maximum throughput that the terminal infrastructure could theoretically achieve if inloading and outloading were flooded with supply and demand respectively. There is no real application of this capacity figure because it is system capacity that dictates what capacity is contracted at DBCT.[238]

378 The terminal capacity figures in section 4.1 of the ILC Report are grossly unrealistic for three key reasons:

378.1 the model assumes the rail network has infinite capacity by assuming that the speed of the trains is such that when a train is needed at the inloader there is always one there with the required product on it;

378.2 the model also assumes that the mine load outs have infinite capacity to load the required trains at an unrealistic rate and also that consecutive trains can be loaded without regard to the recharge capacity of the individual mine load outs; and

378.3 the model assumes that the system demand is 120Mtpa when the measured "capacity" is only 94Mtpa. A consistent demand exceeding capacity would have the effect of demurrage growing exponentially because there is never an opportunity to reduce the shipping queue.

379 Accordingly, the QCA would fall into error if it were to use the terminal capacity figures in the ILC Report as its basis for the least cost analysis (or indeed if it is used for any purpose). Rather, the system capacity figure of 84.2Mtpa should be used instead. Finally, DBCTM notes that the executed, binding Access Framework has retained the definitions of "System Capacity" and "Available System Capacity" from the 2017 AU; hence, without declaration, there is no difference in the volume of capacity that DBCTM can actually offer to access seekers.

[234] Appendix 1 - HoustonKemp April 2019 Report, page 13
[235] Appendix 1 - HoustonKemp April 2019 Report, page 13
[236] User Group March 2019 Submission, page 52; PwC March 2019 Report, page 18
[237] ILC Report, page 11
[238] Timbrell Declaration at [10] to [17] (Appendix 3 - DBCTM March 2019 Submission)

3.6 Conclusion on criterion (b)

380 The User Group's conclusion that the DBCT service satisfies criterion (b) is made without probative evidence and with disregard to reality.

381 The User Group presents the QCA with:

381.1 a market definition that excludes demand serviced by other terminals, despite the fact that relevant mines are proximate to DBCT and should be included in the demand side of the market in which the DBCT service is offered;

381.2 a demand forecast that conflates supply with demand and projects coal handling volumes to be supplied at DBCT, rather than total foreseeable *demand in the market* in which the DBCT service is provided, contrary to section 76(2)(b) of the QCA Act; and

381.3 a least cost analysis that understates the total costs of DBCT meeting total foreseeable demand alone, contrary to commonly understood microeconomic principles.

382 Using an approach that conforms to the requirements in section 76(2)(b) of the QCA Act, relevant facts and case law and commonly understood economic principles, DBCTM has established throughout this declaration review process that the DBCT service does not satisfy criterion (b). DBCTM has demonstrated, both on a theoretical basis and in reality, that DBCT alone does not currently, and could not in the future, service total foreseeable demand in the market and at least cost. Rather, the least-cost means of servicing total foreseeable demand in the market would be to use existing capacity at DBCT, together with available capacity at HPCT, AAPT and RGTCT. DBCTM's position is supported by the facts as they occur in the market. The only available conclusion is that criterion (b) is not satisfied.

4 Criterion (d)

4.1 Summary

383 The User Group argues that declaration produces overall gains in the public interest, such that criterion (d) is satisfied.[239]

384 As set out by the QCA, criterion (d) requires that the QCA is affirmatively satisfied that declaration promotes the public interest.[240]

> Based on the text of the statutory provision, criterion (d) requires satisfaction of a positive test (i.e. the requisite access 'would promote the public interest').

385 This requires the QCA to weigh up the costs and benefits of declaration, applying a 'with and without test', to assess if declaration generates sufficient net benefits to facilitate 'overall gains to the community'.[241]

386 In supporting the QCA's conclusion that the DBCT service satisfies criterion (d), the User Group relies primarily on the benefits of the promotion of competition in the tenements market in the Hay Point Catchment region, which it asks the QCA to assume are significant on the basis that (a) and (c) are satisfied.[242] But, as the User Group recognises, to be satisfied that DBCT meets criterion (d) the QCA must be convinced that these benefits (and any others identified) outweigh the costs of declaration.

387 Even if, contrary to the evidence before it, the QCA concludes that criterion (a) is satisfied, the competition benefits from declaration are vague, theoretical and de minimus. This is because:

387.1 The User Group's theory of harm is purely theoretical, and is not substantiated by any empirical evidence.

387.2 The User Group has not identified the efficient new entrants that would purportedly be deterred from entering the coal tenements markets without declaration.

387.3 Under the User Group's theory of harm, the alleged harm would be limited to the Hay Point Catchment area.

387.4 The Framework only includes substantial protections for access seekers and permits only extremely minor increases in the TIC representing a maximum of 1% of current coking coal prices.

387.5 Any alleged TIC increase would only affect less than 10% of users (based on the QCA's demand forecasts), and the remaining users would be protected by evergreen existing user agreements.

387.6 In the exceedingly unlikely circumstances where DBCTM was evidently harming competition in the coal tenements market, DBCTM could be redeclared, limiting any harm that would actually occur to a negligible amount.

388 The other purported benefits identified by the User Group (such as increased royalties and investment in infrastructure such as above and below rail), assume that there is a change in quantities served at DBCT, which cannot occur under the Framework.

389 On the other hand, the costs of declaration are significant and clearly evidenced. These include:

[239] User Group March 2019 Submission, page 79
[240] QCA Draft Recommendation – Introduction Paper, page 28
[241] QCA Approach to the Access Criteria Paper, December 2018, page 28; DBCTM March 2019 Submission [412]
[242] User Group March 2019 Submission, page 79

389.1 Tangible regulatory compliance costs amounting to over $45m over the declaration period, which must be taken into account under the mandatory consideration in section 76(5)(c) of the QCA Act.[243]

389.2 The risk of regulatory error, which will deter investment in the terminal and delay investment expansions.[244]

389.3 There are also significant policy reasons why the declaration of the coal handling services at DBCT would not be in the public interest:

389.3.1 Declaring DBCT on the basis of the User Group' theory of harm, would be to declare DBCT in perpetuity. This is because the only reason for the harm alleged by the User Group is the existence of the QCA mandated evergreen existing user agreements. In essence, DBCT would be declared only as a result of previous regulation by the QCA. Such circularity in the exercise of statutory discretion would be to justify declaration in perpetuity, is inconsistent with the intent of the Part 5 access regime and would undermine the public interest.

389.3.2 The Part 5 access regime was intended to prevent vertically integrated monopolies from leveraging their power into dependent markets in which they participate, with the result of harm to competition. This is not the case here. Rather, large DBCT incumbents have concocted a highly theoretical harm which arises out of the past regulation of the terminal, in order to artificially satisfy the declaration criteria and protect their economic rents. To declare DBCT on this basis would be to twist the regime far beyond its intended purpose. Such a departure from the policy purposes of the regime undermines the public interest.

389.3.3 The arguments of the User Group are entirely inconsistent with the NCC's statement of preliminary views regarding the declaration of the shipping channel service at the Port of Newcastle, and the recent report by the NCC's independent economic consultants NERA. If the QCA were to adopt a position in stark contrast with the NCC on a highly analogous matter, this would undermine confidence in the access regime, which would clearly be contrary to the public interest.

389.4 DBCTM also reiterates its previous submissions on the detriments to the public interest which arise from declaration and does not repeat these arguments here.[245]

390 In order to conclude that criterion (d) is satisfied the QCA must identify the *extent* of the harm that would be caused to competition in the 'Hay Point catchment coal tenements markets'.[246] This is necessary to assess the benefits that will occur as a result of declaration. It is not sufficient that the QCA simply identifies a theoretical harm that could arise without declaration. It must form a view on its extent, and be affirmatively satisfied that these benefits outweigh the costs of declaration.

391 There simply is not any evidence to support the contention by the User Group that the promotion of competition in a narrowly defined market in specified circumstances would produce economic benefits that are significant to the public interest.

392 The User Group has avoided the obligation of actually specifying the significance of the benefits of declaration by stating that 'if there is a material promotion of competition and a positive impact on investment… that would be anticipated to be influential in the weighing of costs and benefits'.[247] This is inconsistent with criterion (d) being framed as a positively framed 'rigorous test',[248] to operate as an

[243] DBCTM May 2018 Submission [487]
[244] DBCTM May 2018 Submission, [466]-[468], [480]-[481]
[245] DBCTM March 2019 Submission, [400]-[465]; DBCTM July 2018 Submission [443]-[487]; DBCTM May 2018 Submission [387]-[499]
[246] QCA Draft Recommendation, C93 and C94
[247] User Group March 2019 Submission at page 13
[248] Productivity Commission, *National Access Regime,* Report No. 66 (25 October 2013), page 181

'additional positive criterion'.[249] To the extent that the User Group proposes that criterion (d) should be presumed to be satisfied if criterion (a) is satisfied, this must be rejected by the QCA.

393 In contrast, there is hard evidence of direct costs including quantified regulatory costs, and indirect costs including dampening incentives to invest in DBCT and policy considerations demonstrating that declaration is contrary to the public interest.

394 In these circumstances, it is apparent a reasonable decision-maker exercising statutory discretion within its legal bounds, could not conclude that declaration of the DBCT coal-handling service positively promotes the public interest.

4.2 Costs - declaration harms the public interest

395 DBCTM repeats its previous submissions, on why the public interest will be harmed as a result of declaration.[250]

396 DBCTM has previously identified and evidenced firm, tangible detriments which will arise as a result of declaration. This section responds to the User Group's submissions in respect of compliance and regulatory costs and incentives to invest in the terminal.

397 In addition, as a matter of public policy, DBCTM makes three key points as to why declaration, resulting from the User Group's contended theory of harm, is contrary to the public interest:

397.1 The User Group's theory of harm relies on evergreen user agreements to justify declaration and such circular reasoning justifies declaration in perpetuity and must be rejected.

397.2 The User Group's theory of harm is so remote from the intended operation of the access regime that it is inconsistent with the public policy rationale.

397.3 The User Group's rejection of the NCC's Port of Newcastle decision will result in inconsistent decision-making by two regulatory bodies tasked with applying the same statutory test.

Declaration of DBCTM in perpetuity would harm the public interest

398 The User Group's only argument as to why criterion (a) is satisfied is that asymmetric terms and conditions of access faced by a new entrant (who does not have an evergreen contract) and incumbents (who have evergreen contracts) will cause efficient new entrants to be deterred from entering the coal tenements markets.[251]

399 Under the User Group's theory of harm, the only reason for the alleged harm to competition, is the existence of evergreen existing user agreements which were entered into under the QCA approved access undertaking, which provide for QCA determined pricing.

400 If the evergreen existing user agreements were not in place, there would be a completely level playing field between new and existing users, who would both be protected by the Framework, which would ensure that there is no change in volumes served at DBCTM, and that access charges cannot increase by more than $3 above what the QCA would have determined with declaration.

401 In other words, the only argument for the continued declaration of DBCT Service, is the existence of an asymmetry created by the previous regulation of the terminal itself. This is clearly perverse as a matter of public policy and inconsistent with good regulatory practice. This means that declaration of the DBCT Service on the basis suggested by the User Group, is clearly contrary to the public interest.

[249] Explanatory Memoranda to Competition and Consumer Act amendments to access criteria, at [12.39]
[250] DBCTM March 2019 Submission, [400]-[465]; DBCTM July 2018 Submission [443]-[487]; DBCTM May 2018 Submission [387]-[499]
[251] QCA Draft Recommendation, C93-C94

Declaration should not be in perpetuity

402 Parliament did not intend for declaration to continue in perpetuity. Hence, when the QCA Act was amended in 2010, an expiry date was set for the declaration of the DBCT service, of 2020, with a process to reassess whether the service meets the declaration criteria leading up to that expiry.

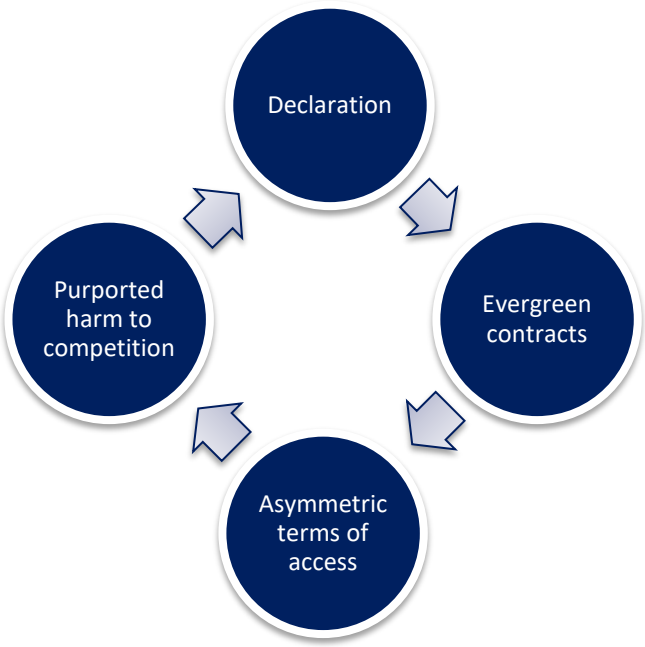
403 As the QCA aptly notes in its draft recommendation:[252]

> The QCA considers that neither the access regime under Part 5 of the QCA Act, nor the regime under Part IIIA of the *Competition and Consumer Act 2010*, intends for the declaration of services to continue in perpetuity.

404 However, as explained above, if the User Group's theory of harm is accepted, this is the only logical result.

405 As depicted in the figure below, if DBCTM continues to be declared, it will be forced to continue to enter into evergreen agreements at QCA determined prices,[253] which would continue to perpetuate the alleged asymmetry with new users in any future without declaration, which would in turn result in the DBCT Service being redeclared. The result is that the DBCT Service would be declared in perpetuity.

Figure 14: Diagram illustrating circularity of declaring DBCTM based on the alleged asymmetry caused by evergreen contracts



Harm to the public interest

406 To continue to declare DBCTM on the basis only of the QCA mandated existing user agreements would cause significant harm to the public interest, as it would result in the unnecessary declaration of the DBCT Service in perpetuity which directly contradicts the policy intention of the access regime.

407 As a matter of public policy, declaring DBCT solely on the basis of an ongoing obligation arising out of past regulation would be contrary to public interest, and should be factored into the QCA's assessment of criterion (d).

[252] QCA Draft Recommendation, page C126
[253] This is indicated by the QCA in its draft recommendation where it concludes that a 10 year declaration period is appropriate, at page 37

Declaration of DBCT is inconsistent with the policy intent of access regulation

408 The User Group state that declaration is required to promote competition in dependent markets, meaning that the imposition of QCA regulated terms and conditions of access is required to promote the object of Part 5 of the regime.

409 The primary purpose of declaration is to prevent vertically integrated monopolies from harming competition in dependent markets in which they compete.

410 As, previously demonstrated, DBCTM is not vertically integrated and has no prospect of becoming vertically integrated.[254] Further, it has put in place extensive protections, through the binding Framework, to ensure that competition in dependent markets is protected.

The primary purpose of declaration is to prevent vertically integrated monopolies from harming competition in dependent markets in which they compete

411 As previously submitted it is well recognised that the economic problem that access regulation is designed to address is more pronounced where service providers are vertically integrated. In its 2013 report on its inquiry into the National Access Regime, the Productivity Commission stated that:[255]

> **The only economic problem that access regulation should address is an enduring lack of effective competition, due to natural monopoly**, in markets for infrastructure services where **access is required for third parties to compete effectively in dependent markets**…..

412 The Productivity Commission further stated that:[256]

> incentives to deny access to some or all access **seekers will be heightened where infrastructure service providers are vertically integrated** - that is, where service providers also operate in markets upstream or downstream of the facility. Under these circumstances, denial of access can be used to protect a monopoly position in an upstream or downstream market, in particular where that allows the service provider to increase total profits across its operations…. Due to its inability to affect prices in commodity markets in the medium to long term, **the operator of a commodity export facility will have little or no incentive to withhold supply from global commodity markets**…Intervention to require access where the infrastructure service provider has no ability to affect prices in downstream markets **risks lowering efficiency and, in the long term, adversely affecting incentives to invest in markets for infrastructure services**. (Emphasis added)

DBCT is not vertically integrated and cannot be in the future

413 As evidenced by DBCTM, DBCT is no longer vertically integrated, and cannot be vertically integrated in the future. This results in the perverse outcome that DBCTM is both the least vertically integrated and most regulated coal terminal in Queensland.

[254] DBCTM May 2018 Submission [45]-[47], [382]-[384]; DBCTM March 2019 Submission [261]-[267]
[255] Productivity Commission Inquiry Report, National Access Regime, No. 66, 25 October 2013, page 7.
[256] Productivity Commission Inquiry Report, National Access Regime, No. 66, 25 October 2013, pages 84, 89 and 93

Figure 15: Extent of vertical integration by terminal owner

Terminal			HPCT	AAPT	WICET	RGTCT	DBCT
Owner			BMA	Adani	WICET	GPC	DBCTM
Coal chain components	Mine	Owner	Yes	Yes	Yes	No	No
		Operator	Yes	Yes	Yes	No	No
	Below rail	Owner	No	Yes	No	No	No
		Operator	No	Yes	No	No	No
	Above rail	Owner	Yes	Yes	No	No	No
		Operator	Yes	Yes	No	No	No
	Terminal	Operator	Yes	Yes	Yes	Yes	No
		Contracted capacity	Yes	Yes	Yes	No	No
	Tug	Owner	Yes	No	No	No	No
		Operator	Yes	No	No	Yes	No
	Port	Owner	No	No	No	Yes	No
		Operator	No	No	No	Yes	No
	Shipping	Operator	No	No	No	No	No
		Scheduler	Yes	No	Yes	No	No
	End user		Yes	Yes	No	No	No
Heavy handed economic regulation			No	No	No	No	Yes

Declaration of DBCT is inconsistent with the purpose of the access regime

414 The prospect that DBCT, as a facility with no vertical integration, is declared and subject to heavy handed regulation is unprincipled, and in circumstances in which significant protections exist for users with or without declaration, is inconsistent with the intended operation of the access regime and Parliament's March 2018 amendments to the access criteria.

415 The harm to competition envisaged by the Productivity Commission is directed at bottleneck facilities which exhibit natural monopoly characteristics, particularly vertically integrated enterprises, hindering access to distort the competitive environment in markets that depend on access to the service resulting in 'an enduring lack of effective competition'.

416 The harm identified by the QCA, and sought to be substantiated by the User Group departs from this concept of policy mischief in several important respects, as discussed at length previously in DBCTM's submissions:

416.1 DBCTM is not vertically integrated with no incentive to foreclose or deny access.[257]

416.2 DBCTM, as the operator of a commodity export facility with long term sunk investments, has no incentive to act in a way that results in a restriction in market output.[258]

416.3 DBCTM has no ability to significantly raise prices under the Framework which would result in an 'enduring lack of effective competition' in any dependent market.[259]

416.4 DBCTM faces a degree of competitive constraints from nearby coal terminals,[260] intuitively, it is unlikely that policy bodies envisaged that 'natural monopoly' encompassed a situation where

[257] DBCTM May 2018 Submission [45]-[47], [382]-[384]; DBCTM March 2019 Submission [261]-[267]
[258] DBCTM May 2018 Submission [428]; HoustonKemp May 2018 Report on (a), at page iii, 5, 19-21
[259] DBCTM March 2019 Submission [226]-[254] and [343]-[347]
[260] DBCTM May 2018 Submission [126]-[143];

a rival facility supplied identical services at the same location, as is the case with Hay Point Coal Terminal.

417 The identified harm, alien to the policy intention of regulated access, is confined to circumstances in which a hypothetical efficient new entrant is unable to effectively compete for the acquisition of a coal tenement for the Hay Point catchment region due to advantages accruing to incumbents. As set out in DBCTM's previous submissions, not only is this harm de minimus from the perspective of the public interest,[261] this harm is inconsistent with the fundamental economic problem access regulation is designed to address as set out by the Productivity Commission.

418 Further, DBCTM submits that a decision to declare, which is a serious imposition on the legitimate business interests of DBCTM is disproportionate to the identified harm. To use the language of the High Court in circumscribing the legal limits on the exercise of statutory discretion, decision-makers must not make decisions akin to 'taking a sledgehammer to crack a nut'.[262] In this case, a decision to declare, based on the narrowly defined theory of harm to competition, which has not been substantiated or quantified, is disproportionate and 'exceeds what, on any view, is necessary for the purpose'[263] with regard to the object of and public policy rationale for access regulation.

Inconsistency with the NCC decision in Port of Newcastle is contrary to the public interest

419 Despite quoting the NCC's preliminary views on the declaration of the Port of Newcastle at a number of points to support its points,[264] the User Group argues that it would be "highly dangerous and inappropriate to attempt to draw any analogies between the Newcastle shipping service and the DBCT service or how the access criteria should be applied to the DBCT service."[265]

420 DBCTM disagrees. Rather, the Newcastle shipping service is closely analogous to the service at DBCT and if the QCA is to find that criterion (a) is satisfied for DBCT it risks creating inconsistencies in the applications of the two regimes. This would clearly not be an appropriate outcome and the QCA should give careful thought before adopting a conclusion that is inconsistent with that of the NCC on a very similar service.

421 The User Group argues that there are significant differences between the Newcastle shipping channel service and the DBCT service that are highly material to how the access criteria should be applied.[266] This is clearly not the case.

422 For example, the User Group argues that the magnitude of price rises at PNO, which are only "in the order of a few dollars", distinguish it from DBCT where price increases without declaration have been assessed as $15.[267]

423 As previously explained in detail, it is clear that under the final executed version of the Deed and Framework that the maximum price increase will be "in the order of a few dollars" without declaration. This is clear as the "$3 Cap" prevents DBCTM from charging more than $3 more than what it would be able to with declaration, under a QCA administered pricing regime.

424 Likewise, the User Group tries to argue that PNO would maximise profits by increasing volume rather than increasing price.[268] This is clearly a misrepresentation of the NCC's position as the NCC found that PNO would increase prices (in the order of a few dollars as the User Group points out). Further, the QCA has

[261] DBCTM March 2019 Submission [412]-[434].
[262] *Minister for Immigration and Citizenship v Li* [2013] HCA 18 at [30].
[263] *Minister for Immigration and Citizenship v Li* [2013] HCA 18 at [30].
[264] The User Group cherry picks from the NCC decision throughout its March 2019 submission, see for example pages 65, 70, and 69 where the User Group refers to the "closely analogous circumstances" in the NCC statement
[265] User Group March 2019 Submission, page 10
[266] User Group March 2019 Submission, page 10
[267] User Group March 2019 Submission, page 10
[268] User Group March 2019 Submission, page 10

accepted that without declaration DBCTM would, like PNO, expand capacity and increase volumes served at DBCT.

425 Contrary to the User Group's arguments, the two services are clearly closely analogous as without declaration they may both seek to increase prices from those that apply under regulation, as well as increasing volumes through the ports. The NCC statement of preliminary views is clearly relevant precedent, and includes a number of important statements regarding the impact that small price increases will have on decisions of miners in respect of whether to invest in the coal tenements markets.

426 However, the draft conclusions of the QCA and the NCC are evidently not aligned, as discussed in DBCTM's submissions on criterion (a) in both this submission and DBCTM's March 2019 submission.

427 There are minimal substantive differences between the two cases. In substance, the NCC is applying the same statutory criteria, for a largely comparable coal export terminal and it is in the interests of consistency of public policy that the QCA afford significant weight to the reasoning in that decision.[269] The QCA should also take into account that the NCC's statement of preliminary views was in the context of the Port of Newcastle which will not be subject to a binding access framework, and the NCC still was of the view that criterion (a) was not met for that Service.

428 It is clearly not in the public interest that two public competition bodies arrive at wholly inconsistent and irreconcilable conclusions in applying the same statutory criteria. To do so would undermine the public's confidence in the decision-making process. Such inconsistency, actual or perceived, is a clear public detriment serving to undermine confidence in the regime.

Administrative and compliance costs

429 DBCTM reiterates that the regulatory costs of declaration are significant and relies on its unchallenged estimates of regulatory costs amounting to $46.7m in real terms over an illustrative period of declaration from 2015-2022.[270]

430 Contrary to the assertions of the User Group,[271] there is no evidence to suggest that these costs are insignificant compared to the benefits of the increased competition in the Hay Point tenements market implied by the User Group's theory of harm.

431 The User Group supports the QCA's assertion that:[272]

> Practically, many administrative and compliance costs may be recoverable by the service provider, for example, through access charges or other terms and conditions.

432 As previously submitted, it is not appropriate to disregard a cost based on the incidence of the cost.[273] Criterion (d) is not an assessment of the costs to the service provider, rather it requires an assessment of the costs to society, such that declaration, on the whole, promotes the public interest. The fact that the service provider can recover a cost is irrelevant, the cost is still a cost to society that would not exist without declaration. Further, Parliament explicitly amended the criterion to refer specifically to compliance costs demonstrating the clear centrality of these costs in applying criterion (d).[274]

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[269] NCC, *Revocation of the declaration of the shipping channel service at the Port of Newcastle - Statement of Preliminary Views,* 19 December 2018

[270] DBCTM May 2018 Submission, [487]; DBCTM July 2018 Submission, [481]-[482]; DBCTM March 2019 Submission, [454]

[271] User Group March 2019 Submission, page 83 provides that the costs are 'not sufficiently material to have an impact on the public interest'.

[272] Intro p 31.

[273] DBCTM March 2019 Submission, [457]

[274] Section 76(5)(c) of the QCA Act; DBCTM March 2019 Submission, [452]-[459]

433 DBCTM notes the User Group's comments that its users are prepared to bear the cost of regulation:[275]

> The User Group are willing to bear those costs through access charges (and their own costs of participating in the regulatory process) as they consider they are outweighed by the clear benefits of declaration).

434 These comments do not align with the User Group's assertions regarding criterion (a). The User Group's theory of harm is that without declaration existing users will be protected while efficient new entrants would be deterred from entering the coal tenements markets. It is not plausible that existing users would fund the regulation of a terminal solely to protect efficient future competitors, and so, these comments demonstrate that the User Group's theory of harm has been manufactured solely to protect the rents of large incumbents.

Declaration will harm incentives to invest

435 The User Group denies that any regulatory error must reduce DBCTM's incentives to invest in the terminal and that the regulatory error could equally be favourable to DBCTM:[276]

> to the extent there is any regulatory error, there is as much potential for any such error to favour the regulated entity as there is for it to disadvantage the regulated entity – there is no systematic basis such that for an entity providing services utilising long life infrastructure that remains regulated over a long period of time it would be expected that this would 'even out'

436 DBCTM strongly refutes this argument. In fact, as previously submitted, the RBA, Federal Treasury, and the current Chairman of the ACCC, have expressly stated that the WACC for DBCT has been inappropriately low, and has directly contributed to delayed, or otherwise insufficient investment in DBCT.[277]

437 In any event, regulatory error reduces economic efficiency, regardless of incidence, such costs are central to the assessment of the public interest.

438 This point is uncontroversial. Regulatory, policy and judicial bodies, including the QCA,[278] NCC,[279] Productivity Commission,[280] Harper Review,[281] Hilmer Review,[282] and Federal Court[283] have maintained that a known detriment of access regulation is the 'chilling effect' of declaration on incentives to invest in the regulated facility as declaration inherently introduces the risk of regulatory error.[284] Contrary to the assertions of the User Group,[285] declaration clearly gives rise to the risk of regulatory error, and this risk, once materialised, has asymmetric effects on social welfare relevant to the public interest.[286] DBCTM reiterates that declaration under Part 5 of the QCA Act, without any avenue for the regulated entity to seek

[275] User Group March 2019 Submission, page 83
[276] User Group March 2019 Submission, pages 80-82
[277] DBCTM May 2018 Submission at [478]
[278] QCA Draft Recommendation, page C112
[279] NCC, *Declaration of Services - A guide to declaration under Part IIIA of the Competition and Consumer Act 2010 (Cth),* April 2018, at [6.11]; DBCTM May 2018 Submission [462]
[280] Productivity Commission, *National Access Regime, Report No. 66,* October 2013, page 28, 104, 179-181; DBCTM May 2018 Submission [461]-[463]
[281] Harper et al. Competition Policy Review (Final Report), March 2015, page 439.
[282] *National Compeition Policy Review Report* (Hilmer Report) (25 August 1993), page 251.
[283] *Telstra Corporation Limited v Australian Competition and Consumer Commission* [2009] FCA 757 at [202]-[204]; DBCTM May 2018 Submission [467]
[284] DBCTM May 2018 Submission, [466]-[468], [480]-[481]; see also Aurizon Network May 2018 Submission, pages 10-12 and 16-23
[285] User Group March Submission, page 80
[286] DBCTM July 2018 Submission [467]-[468]; DBCTM May 2018 Submission [466]-[468], which provides that regulatory pricing determinations setting inefficiently low prices result in large social welfare losses arising from under-investment in critical infrastructure compared with marginal social welfare distortions associated with regulatory error resulting in over-recovery of costs.

merits review of any decision handed down by the QCA,[287] dampens incentives to invest and erects unnecessary hurdles to investment at DBCT which are not faced by nearby coal export terminals.

439 Despite DBCTM's previous submissions, the User Group seeks to argue that declaration has facilitated expansions:[288]

> (iii) there is no available evidence to support the argument that declaration will reduce DBCTM's incentives to invest in the future (rather it has facilitated multiple expansions since regulation of the terminal.
>
> As discussed in detailed [sic] in the DBCT User Group's previous submissions, since the declaration of the terminal there has been numerous expansions of DBCT.
>
> DBCTM has presented no evidence of how the terminal would likely have been developed in the absence of declaration and no recognition of how declaration has actually been an important part of driving the demand that makes expansions possible.

440 This is simply not the case. In fact DBCTM has provided evidence that *all* expansions at DBCT since privatisation were committed to prior to commencement of the first Access Undertaking, and there have been *no* expansions committed to since the commencement of the first Access Undertaking.[289]

> The User Group attempts to substantiate its assertion that declaration promotes incentives to invest in the terminal by pointing out that substantial expansions of the terminal have occurred since the terminal was declared. This conflates temporal correlation with causation, and is fallacious in the absence of any evidence that establishes that the expansions would not have occurred without declaration.
>
> The User Group has failed to note that all expansions at DBCT were committed to prior to the first Access Undertaking coming into effect in 2006. This establishes that the expansions would have occurred even in the absence of arrangements approved by a Regulator.

441 On the other hand the User Group's statement that declaration of DBCT has been an important part of driving demand for expansions, is not supported by any evidence and is another baseless assertion. If the declaration of DBCTM was such a significant factor in the development of a mining tenement, then it would be reasonable to expect that documents would be available to evidence this assertion. DBCTM agrees that access to DBCT is an important factor for mines, but no evidence has been presented that declaration is a significant factor in the development of a mine (and likewise there is no evidence that access could be denied, where capacity is available).

[287] DBCTM May 2018 Submission [480]-[481]
[288] User Group March 2019 Submission, page 79
[289] DBCTM July 2018 Submission, page 101

4.3 Public benefits - the benefits to the public interest are vague and immaterial

442 The QCA's articulation of harm to competition, must be scrutinised to meaningfully assess the extent to which declaration results in economic efficiency benefits which advance the public interest.

443 The benefits of declaration are confined to the resolution of the alleged harm to competition asserted by the User Group. Such benefits must be substantiated by reasonably probative evidence and application of a with and without test (such that exaggerated assertions regarding the effect of declaration on coal industry investment per se, State royalties, and environmental benefits are appropriately tested). Without such evidence the alleged benefits must be given no weight.[290]

The User Group hasn't established the benefits of declaration

444 The User Group's theory of harm has not been substantiated by any empirical evidence. In the section in this submission on criterion (a), DBCTM puts forward empirical evidence that miners without capacity at DBCT have not been deterred from purchasing tenements as a result of uncertainty of the terms and conditions of access at DBCT beyond 2020. The User Group has provided no probative evidence of the extent of the harm that would be caused without declaration, which means it is impossible to determine the benefit of declaration. In the unlikely circumstances that the QCA finds there is competitive harm without declaration then that harm is likely to be minimal (consistent with the analysis of HoustonKemp).

445 The User Group has not identified any evidence of potential efficient new entrants that are looking to enter the coal tenements markets, but would be deterred from entering the coal tenements markets without declaration. Indeed, notably, the only submissions received by the QCA have been by large, well established incumbents. This makes it impossible to quantify the actual harm under the User Group's theory of harm, that would be avoided through declaration. Without identifying the entrants which would purportedly be deterred, and which declaration would protect, the QCA cannot be affirmatively satisfied that declaration will be in the public interest, as there is no clear benefit that would occur as a result of declaration.

Benefits of declaration are likely minimal because declaration only affects a few users

446 Under the User Group's theory of harm, the alleged harm would be limited to the Hay Point Catchment area, which limits any benefits that may result from declaration.

447 Further the Framework includes substantial protections for access seekers and permits only extremely minor increases in the TIC representing a maximum of 1% of current coking coal prices.

448 Any increase would only affect *less than* 10% of future users (based on the QCA's demand forecasts), and the remaining users (comprising the entire capacity of the existing terminal) would be protected by evergreen existing user agreements.

If competitive harm eventuates, it would be stopped and reversed

449 In the exceedingly unlikely circumstances where DBCTM was evidently harming competition in the coal tenements market, DBCTM could be redeclared, limiting any harm that would actually occur to a negligible amount.

[290] User Group March 2019 Submission, page 82-83 and page 85, which list broad economic benefits of declaration and endorses the QCA's Draft Recommendation that '**to the extent** efficient mine investment is promoted by declaration, which then drives demand for increased terminal capacity, it follows that there will be corresponding investment in above- and below-rail haulage infrastructure', without providing evidence to determine this **extent**. Without evidence establishing the causal nexus between declaration and investment in upstream or downstream facilities, applying a with and without test in which the future without incorporates evergreen contracts and the Access Framework, this argument cannot be afforded any weight.

The QCA must identify the actual public benefits that arise as a result of declaration

450 The User Group erroneously attempts to argue that if criteria (a) and (c) are satisfied there will automatically be a significant public benefits in declaring the service:[291]

> As discussed in section 3.5 of this submission, criterion (d) takes the outcome of criterion (a) to (c) into account in assessing whether declaration will provider [sic] overall gains in the public interest. Consequently, in the context of it having been concluded that criterion (a) has been satisfied (i.e. that there is a promotion of competition in a dependent market), with the facility being significant and a natural monopoly (criterion (b) and (c)) there would need to be very significant public detriments arising from declaration before it could reasonably be concluded that criterion (d) was not also satisfied.

451 This interpretation clearly has no basis, contradicts Parliament's clear intent for criterion (d) to be an 'additional positive criterion', and such an interpretation renders criterion (d) obsolete.

452 The state significance of the facility says nothing about the significance of the dependent market in which competition is promoted, nor the degree of competition that is promoted. In this case, the User Group proposes a narrow coal tenements market, and a specific theoretical harm. Further, declaration would only affect less than 10% of future users of DBCT (based on the QCA's demand forecasts).

453 The QCA should not automatically accept that there is significant public interest in the declaration of the Service. The QCA has a duty to be affirmatively satisfied that declaration positively promotes the public interest, which necessarily requires the QCA to quantify the benefits that will occur as result of declaration, in order to balance against the costs.

4.4 Conclusion

454 This submission on criterion (d) is in addition to DBCTM's previous submissions on criterion (d). It sets out compelling arguments as to why declaration of the DBCT service does not promote the public interest, namely; that the benefits of declaration are minimal, and that declaration results in quantified direct costs, indirect costs, and as a matter of public policy, afflicts harm to the integrity of the regime.

455 Accordingly, the QCA must recommend that the DBCT service not be declared.

[291] User Group March 2019 Submission, page 79

Appendix 1 HoustonKemp report on Economic concepts underpinning the assessment of access criteria

HOUSTONKEMP
Economists

Economic concepts underpinning the assessment of access criteria

A report for DLA Piper

April 2019

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1. Introduction

The Queensland Competition Authority (QCA) is reviewing whether the coal handling service supplied at Dalrymple Bay Coal Terminal (DBCT) specified in section 250 of the *Queensland Competition Authority Act 1997* (QCA Act) should be declared following the expiry of its existing declaration on 8 September 2020. For the QCA to recommend that DBCT service be declared, it must reach the view that each of criteria (a), (b), (c) and (d) of section 76(2) of the QCA Act is satisfied.

On 18 December 2018, the QCA published its draft recommendation. It concluded that each of the relevant criteria is satisfied in respect of the DBCT service.

1.1 Scope of this report

We[1] have been asked by DLA Piper (DLA), on behalf of DBCT Management Pty Limited (DBCTM), to review whether the coal handling service supplied at Dalrymple Bay Coal Terminal (DBCT) satisfies criterion (a) and criterion (b) of section 76(2) of the QCA Act.

During the QCA's review process to date, we have prepared six reports for DLA, three each in relation to criterion (a) and criterion (b). Our most recent reports responded to the QCA's draft recommendation and these were attached to DBCTM's submission.

The QCA published initial submissions on its draft recommendation on 11 March 2019, including submissions made by the DBCT User Group, Peabody Energy and BHP, largely in support of the QCA's draft recommendation. Glencore Coal added its support to the recommendation in a late submission published on 13 March 2019. A public forum was held in Brisbane on 20 March 2019, at which presentations were made by DBCTM and the DBCT Users Group, followed by an open discussion.

DLA has asked us to revisit our earlier conclusions in relation to whether the DBCT service satisfies criterion (a) and criterion (b), or otherwise, in light of the submissions made by the DBCT User Group, Peabody Energy, BHP and Glencore Coal, the expert advice upon which they rely, and issues raised in the public forum.

1.2 Structure of this report

In order to give appropriate structure to and context for our comments, we have organised this report so as to revisit and identify the key economic elements that underpin the assessment of criterion (a) and criterion (b). The structure of the remainder of this report is set out as follows:

- section 2 reviews the assumptions underpinning the assessment of criterion (a), and responds to issues raised in relation to:
  - the TIC that would apply at DBCT without declaration; and
  - the effect of declaration on competition in the tenements market;
- section 3 reviews the elements involved in the assessment of criterion (b), and responds to issues raised in relation to:
  - substitution between the DBCT service and other coal handling services;
  - estimation of total foreseeable demand in the market; and
  - assessment of the least cost means of serving total foreseeable demand in the market.

[1] The authors of this report are Greg Houston and Daniel Young.

2. Economic elements of criterion (a)

Criterion (a) reads:[2]

> …that access (or increased access) to the service, on reasonable terms and conditions, as a result of a declaration of the service would promote a material increase in competition in at least 1 market (whether or not in Australia), other than the market for the service.

In its draft recommendation, the QCA concluded that:[3]

> Criterion (a) is satisfied
>
> DBCT Management has an ability and incentive to exercise market power, such that in the absence of declaration, efficient entry to the coal tenements market would be discouraged and there will be a material impact on competition in that market
>
> Access (or increased access) to the DBCT service on reasonable terms and conditions as a result of declaration would promote a material increase in competition in the coal tenements market

The rationale advanced by the QCA as to why criterion (a) is satisfied in the market for coal tenements is that, given the prospect that DBCTM may seek to apply an increase in TIC without declaration:

- incumbent users of DBCT access the service using 'evergreen' contracts, which protect them from this increase;
- non-incumbent users of DBCT are not protected from this increase and may therefore be exposed to a higher TIC than incumbent users; and
- the difference in TIC between incumbent users and non-incumbent users is such that more efficient entrants would be kept out of the tenements market by less efficient incumbents who would have a higher willingness to pay for tenements because of their preferential terms of access.

In this section, we review two aspects of the QCA's rationale that have been addressed in submissions on the draft recommendation and in the public forum:

- the TIC that would apply at DBCT without declaration; and
- the effect of declaration on competition in the tenements market.,

2.1 DBCT's TIC without declaration

At the public forum in Brisbane, representatives of the DBCT User Group raised concerns that DBCTM had made material changes to its access framework and that this represented an attempt to 'game' the declaration process with a 'contrived and artificial' counterfactual.[4] We address these concerns by explaining the essential difference between the pricing elements of the access framework proposed by DBCTM in May 2018 and the executed access framework that was attached to its submission in response to the draft recommendation.

In its submissions to the QCA prior to the draft recommendation, DBCTM proposed that, if agreement cannot be reached with an access seeker, an arbitrator would determine a TIC that:[5]

[2] QCA Act, section 76(2)(a).

[3] QCA, *Draft recommendation | Part C: DBCT declaration review*, December 2018, p 5 ('QCA draft recommendation').

[4] DBCT User Group, *DBCT declaration review,* 20 March 2019, pp 2 and 18.

[5] DBCTM 2018 access framework, 29 July 2018, schedule C(2).

- would be agreed between a willing but not anxious buyer and a willing but not anxious seller of coal handling services for mines that are proximate to the Port of Hay Point; but
- notwithstanding this direction:
  - is not less than the floor TIC, being that which would have prevailed had a QCA-administered regime continued to be applied; and
  - is not greater than the ceiling TIC, being the highest price at which coal volumes served at DBCT would be the same as if the floor TIC applied – with this assessment being made without reference to any contractual limitations on volumes that are able to be delivered to either DBCT or any other coal terminal.

In its draft recommendation the QCA assumed that, under the 2018 access framework, the TIC would be set 'based on willingness to pay'. It concluded that, in a future without declaration, the coal handing charge at DBCT would be capped only by the cost of accessing WICET.[6] This would be equivalent to a TIC of about $17.66 per tonne at DBCT.[7]

This approach to assessing the effect of the 2018 access framework is not realistic. In our criterion (a) report responding to the QCA's draft recommendation, we estimated the ceiling TIC under DBCTM's 2018 access framework. Using demand estimates from MMI and other parameters from AME, we estimated that this value is likely to be at most $7.44 per tonne.[8] Further, any TIC set under the access framework would have been set by reference to the 'willing but not anxious' principle and would likely be lower than the ceiling TIC.

In light of the QCA's draft recommendation, DBCTM made a change to the pricing terms of the access framework that it executed. In the executed framework, it amended the specification of the ceiling TIC so that it can be no higher than $3.00 per tonne above the floor TIC, expressed in real terms of 2020-21.[9] The intent behind this amendment was to provide a higher degree of certainty for the QCA and access seekers as to the 'worst case' scenario arising from the implementation of the access framework.[10]

Figure 2.1 below sets out a comparison of the potential TICs that could apply at DBCT without declaration, as compared to the QCA's assessment. It shows that:

- if the terminal is not expanded, and is at full utilisation, then the TIC will be between $2.37 per tonne and $5.37 per tonne;[11]
- if the terminal is expanded, and this expansion is socialised, then the TIC will be between $2.67 per tonne and $5.67 per tonne;[12] and
- if the terminal is expanded, and this expansion is differentiated, then the TIC will be approximately $5.57 per tonne.[13]

Figure 2.1 also indicates the effect of the change made in the executed access framework. The shaded teal area represents the range of pricing outcomes that were possible under the 2018 access framework but are not possible under the executed access framework.

[6] QCA draft recommendation, p C84.

[7] This value is derived from Table 3 of the appendix to the QCA's draft recommendation. It is calculated as the supply chain cost for WICET ($26.51 per tonne) less the charges for accessing DBCT other than the TIC (ie, below rail charges of $3.07 per tonne, above rail charges of $3.25 per tonne and fixed and variable handling charges of $2.53 per tonne).

[8] HoustonKemp, *Assessment of the QCA's recommendation to declare the DBCT service – criterion (a)*, March 2019, pp 15-19.

[9] DBCTM executed access framework, 11 March 2019, schedule C(2).

[10] DBCTM submission, 11 March 2019, para 186.

[11] We calculate the lower bound of this range using Table 7 from the appendix to the QCA's draft recommendation as the ARR without expansion ($199.6 million) divided by the system capacity of DBCT without expansion (84.2 mtpa).

[12] We calculate the lower bound of this range using Table 7 from the appendix to the QCA's draft recommendation as the ARR with expansion ($248.6 million) divided by the system capacity of DBCT after expansion (93.0 mtpa).

[13] We calculate the lower bound of this range using Table 7 from the appendix to the QCA's draft recommendation as the increase in ARR with expansion ($49.0 million) divided by the increase in system capacity of DBCT as a result of the expansion (8.8 mtpa).

The QCA's assessment of the TIC without declaration gives rise to an estimated TIC that is far in excess of the outcomes that would be expected to occur under either the 2018 access framework or the executed access framework.

Figure 2.1 Terminal infrastructure charge at DBCT without declaration

Figure 2.1 demonstrates that, contrary to the statements made by the DBCT User Group, there has not been a fundamental change to the proposed pricing under the executed access framework.

2.2 Effect of declaration on competition in the tenements market

The tenements market comprises two distinct tenement types (or functions), being:

- exploration and development[14] tenements, which involve intrinsically high risk, speculative activity (many such tenements never turn into producing mines); and
- production tenements, where the risks arise principally in relation to the price of coal (rather than whether there are sufficient reserves to allow mining).

The tenements market identified by the QCA in its draft recommendation did not distinguish these activities, and its theory of harm is unclear as to from precisely which of them more efficient new entrants will be deterred.

In contrast, at the public forum in Brisbane, the DBCT User Group's representative emphasised that the criterion (a) competitive harm arises for exploration and development tenement holders. In advancing this theory of harm, reference was made to:[15]

- the negative effect of differentially priced access to DBCT that will only be required (by, at that time, production tenement holders) ten years and beyond from now;

[14] Exploration and development rights are legally and functionally distinct. The former is focused on determining the extent of any mineral resource, while the latter is focused on the development potential of a defined resource. However, for the purpose of any criterion (a) analysis, there is no apparent need to distinguish these two forms of right.

[15] DBCT User Group, *DBCT declaration review,* 20 March 2019, p 19.

- the near term manifestation of this effect as being on economic activity that is taking place now, but which is dependent on access to infrastructure at the end point of the lengthy exploration and mine development phase; and
- the nature of this effect being on the valuation (today) of exploration and development tenements, based on the present value effect of a future, long term differential as to the price of access.

Underpinning these propositions are a substantial number of assumptions.

First, they contain an implied assumption as to the terms of access to DBCT in 2030 and beyond. Declaration is proposed to apply for a period of 10 years from 2021. This has no particular implications for access prices beyond 10 years. However, the theory of harm put forward by the DBCT User Group assumes a difference between the terms of access with and without declaration applying in the period beyond 2030.

Second, the User Group's analysis assumes that the geographic boundaries of the tenements market is confined to the Hay Point catchment. Differential terms at DBCT could not materially affect competition in a broader market for tenements.

We explained in our criterion (a) report responding to the QCA's draft decision that the market for tenements is likely to extend beyond the Hay Point catchment, at least to Central Queensland. We observed that the critical element determining the substitutability of tenements within the Hay Point catchment as compared to other areas was not the coal handling charge at DBCT, but the ability of buyers to re-deploy capital and expertise from one region to another so as to bring about an equalisation in expected returns.[16]

These observations are echoed in a recent assessment by NERA Economic Consulting, which was asked by the National Competition Council to address issues relating to the coal tenements market:[17]

> The Council finds that the coal export market is most likely global, and that a narrower coal export market might be relevant, which is likely to be as broad as the Asia-Pacific region ([6.91]). In either case, a firm wishing to supply the market could do so from similar coal fields located elsewhere in Australia and overseas.
>
> So although each tenement is specific to one location, potential investors are not limited to that location – if a tenement in the Newcastle catchment is not attractive, an investor could consider exploring or mining for coal elsewhere (or not coal mining at all). There is scope for some potential investors to prefer the Newcastle catchment all else being equal, because of economies of scope and potentially also scale, if those buyers have established operations close to there. However, in general, prior to investing capital into a mine, potential owners of tenements have geographic options.
>
> In fact, because the coal export market is global (or at least as broad as the Asia-Pacific region), it does not make sense to consider the "tenement market" to be limited to the Newcastle catchment. If an owner of a coal tenement in the Newcastle catchment raised price above the competitive level (or otherwise made the tenement less attractive), potential investors could in general look elsewhere (although as noted those with existing mines might have economies of scope and scale). Accordingly we consider the geographic scope of the tenements market to be at least as wide as Australia, and potentially as broad as the Asia Pacific.

If the market for tenements extends beyond the Hay Point catchment, then it follows that the TIC at DBCT is not material to competition in this market. Any increase in TIC at DBCT would not affect the environment for competition in the market since buyers can substitute between tenements in the Hay Point catchment and tenements in other regions.

[16] HoustonKemp, *Assessment of the QCA's draft recommendation to declare the DBCT service – criterion (a)*, March 2019, p 28.

[17] NERA Economic Consulting, *Declaration of the shipping channel service at the Port of Newcastle*, 8 April 2019, p 4.

Finally, we note that no evidence has been presented that establishes that the potential for a higher TIC applying to new entrant miners under the access framework would materially affect competition in the market for tenements.

The materiality threshold in criterion (a) is intended to avoid declaration due to effects on competition that are trivial.[18] The QCA must make a positive determination as to the potential harm to competition in the tenements market as compared to the situation with declaration.

It is difficult to see how the QCA can be satisfied of an effect on competition without declaration in circumstances where its access undertaking already provides for the prospect of a discriminatory price to be charged to new entrants under a differentiated expansion. We explain at section 2.1 above that this process could give rise to a TIC of $2.37 per tonne for incumbent users of the existing terminal component, and $5.57 per tonne for new entrant users of the terminal expansion. The difference between these potential charges exceeds the $3.00 per tonne 'maximum spread' to which DBCTM's executed access framework commits.

At the public forum, the DBCT User Group's representative contended that the present day valuation consequences for exploration and development tenements of differentially priced access *beyond* the declaration period give rise to competitive detriment *within* the declaration period.

Even if we accept the User Group's assumption that a ten-year declaration has implications for access prices beyond ten years, it is straightforward to show that its implications for competition in the tenements market would not pass the materiality threshold. The value of an exploration and development tenement is given by the present value of the difference between:[19]

- the expected potential revenues from mine production (if this is ever realised); and
- the expected costs of exploration, development and production activity, including the use of a port coal handling facility.

The likely magnitude of this valuation effect can be estimated, adopting ball park assumptions that are in line with current market average parameters. Adopting ball park assumptions for metallurgical coal prices ($300/tonne), cost of production ($100/tonne), and the additional cost of access to DBCT for a new entrant ($3/tonne); then the expected effect on the valuation today of an exploration and development tenement that was not anticipated to be coming into production until 2030 would be a reduction in tenement valuation of 1.5 per cent.[20]

It follows that, if the effect of differentiated access prices contended by the DBCT User Group that would cause exploration and development tenements to fall into the hands of less efficient incumbent miners, the potential size of this effect on tenement valuation is negligible.

[18] HoustonKemp, *Assessment of the QCA's recommendation to declare the DBCT service – criterion (a)*, March 2019, pp 26-27.

[19] These details are already explained in our recent criterion (a) report, at page 26.

[20] These valuations assume that production costs (being $100 per tonne) include an amount sufficient to finance pre-production exploration and development costs.

3. Economic elements of criterion (b)

Criterion (b) reads:[21]

> …that the facility for the service could meet the total foreseeable demand in the market–
>
> (i) over the period for which the service would be declared; and
>
> (ii) at the least cost compared to any 2 or more facilities (which could include the facility for the service);

In its draft recommendation, the QCA concluded that:[22]

> Criterion (b) is satisfied
>
> The relevant market for criterion (b) is the market for DBCT's coal handling services in the Goonyella system
>
> In this market, there are no viable substitutes to DBCT
>
> DBCT is able to meet total foreseeable demand in the market at the least cost compared to any two or more facilities

The QCA reaches this conclusion because it finds that:

- no other coal handling services are substitutable with the DBCT service, so DBCT is the only supplier in the relevant market; and
- total demand in this market does not include coal volumes that are produced within the market but are served at other coal terminals; and
- the coal handling supplier that can meet this demand at least cost is also the supplier for which the lowest charges apply, which is DBCT.

3.1 Substitutability of coal handling services

We have previously put forward evidence of Goonyella system mines that utilise coal handling services both at DBCT and other terminals (apart from HPCT), including:[23]

- South Walker Creek and Poitrel, which have contracts with DBCT and AAPT;
- Lake Vermont, which has contracts with DBCT and AAPT;
- Middlemount, which has contracts with DBCT and AAPT;
- Capcoal, which has contracts with DBCT and RGTCT;
- Oaky Creek, which has contracts with DBCT and RGTCT; and
- Blair Athol and Clermont, which until recently had contracts with DBCT and AAPT.

[21] QCA Act, section 76(2)(b).

[22] QCA draft recommendation, p 5.

[23] HoustonKemp, *Does DBCT's coal handling service satisfy criterion (b)?*, 28 May 2018, pp 14-15.

We have presented this as evidence that miners within the Goonyella system are able to substitute between the DBCT service and other coal handling services. Contracts of Goonyella system miners that are served by other coal terminals represent demand in the relevant market that were not met by DBCT.[24]

The DBCT User Group disagrees with this framework for interpreting the evidence. At the public forum, the DBCT User Group's representative stated that our reliance on this information is a fallacy, because the fact that a customer buys two products does not demonstrate that those products are substitutes. By way of example, he observed that one person might consume both tea and coffee, but this does not establish that these products are substitutes.

This claim has its origin in the Federal Court's decision in *Arnotts Limited & Ors v Trade Practices Commission*, upheld on appeal to the Full Federal court. This judgment is cited by the DBCT User Group in support of its position.

In *Arnotts*, Justice Beaumont addressed the question of whether biscuits might be in the same market as other similar products:[25]

> In the present case, emphasis is placed upon the fact that, upon some occasions, a consumer might select a non-biscuit product instead of a biscuit; for example, corn crisps might be served with a savoury dip rather than dry biscuits; chocolate mints might be offered as an after- dinner sweet, rather than chocolate biscuits.

Justice Beaumont found that it was not correct to treat corn crisps and dry biscuits as being in the same market simply because, on some occasions, some consumers select one product rather than another.

The facts that are addressed in *Arnotts* are very different from the facts of the matter in hand. A choice between coal handling services at DBCT and another terminal is not similar to a choice between corn crisps and dry biscuits. In our opinion, there are few meaningful insights for the assessment of the substitutability of coal handling services that can be taken from this judgment.

A household may well keep both corn crisps and dry biscuits in storage and serve them as required on different occasions, while not regarding them as substitutes more generally. Acquiring take or pay capacity from a coal terminal is not analogous to this thought experiment. Coal terminal services must be paid for even when not being used, and cannot be 'stored'. A mine requiring a unit of coal handling capacity needs only a unit of DBCT capacity or unit of AAPT capacity – not a unit of each. It would be entirely uneconomic for a miner to acquire both a unit of DBCT capacity and a unit of AAPT capacity, and use these alternately to address its needs, in the way that a household might draw from stored corn crisps one day and dry biscuits another.

Anglo American observes that there may be risk management reasons why a customer would find it desirable to establish contracts with more than one terminal for capacity that is greater than they expect to export. Accepting this statement at face value suggests that demand for coal handling services will be higher than total coal production. It does not establish that a coal miner with contracts at more than one terminal would not be able to substitute demand between them.

In any case, the factual material put before the QCA demonstrates that, at least for Lake Vermont and Middlemount, the choice of AAPT's coal handling services was not made, in substance, for risk management reasons. Rather, for these mines, the AAPT service was more attractive and better value than the DBCT service because contracted capacity at AAPT could be made available more rapidly than at DBCT.[26]

[24] HoustonKemp, *Assessment of the QCA's draft recommendation to declare the DBCT service – criterion (b)*, March 2019, pp 4-9.

[25] Re Arnotts Limited; Arnotts Biscuits Limited; Fledspac Limited and the Dickens Corporation Pty Limited v Trade Practices Commission [1990] FCA 473; 97 ALR 555/2 (29 November 1990), para 64.

[26] DBCTM, *DBCT Management submission to the QCA*, 30 May 2018, paras 140-142.

3.2 Supply and demand

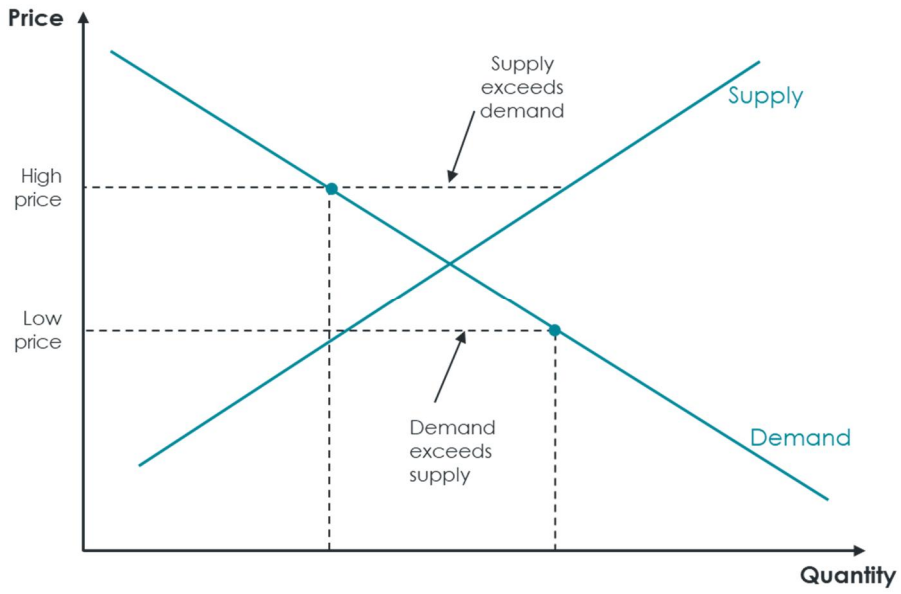
At the public forum in Brisbane, Glencore's representative spoke about the 'commercial reality' that demand is constrained by supply, and that to estimate demand that exceeds the capacity of the terminal is 'hypothetical'.

This observation echoes in its substance, although not its words, the QCA's approach to estimating total foreseeable demand in the market. The QCA excludes from its estimate of demand, contracts for coal handling services entered into by customers in the market with coal terminals other than DBCT.[27]

The fundamental problem with the notion that demand is limited by supply can best be illustrated by a simple diagram of these concepts. Demand by an individual for a product reflects the maximum quantity that he or she is willing to consume at any given price of that product.[28] Market demand is the sum of the demand of individuals in the market. These concepts are independent of willingness to supply. The diagram below shows that:

- when prices are high, supply may exceed demand; and
- when prices are low, demand may exceed supply.

Figure 3.1: Surplus supply and surplus demand



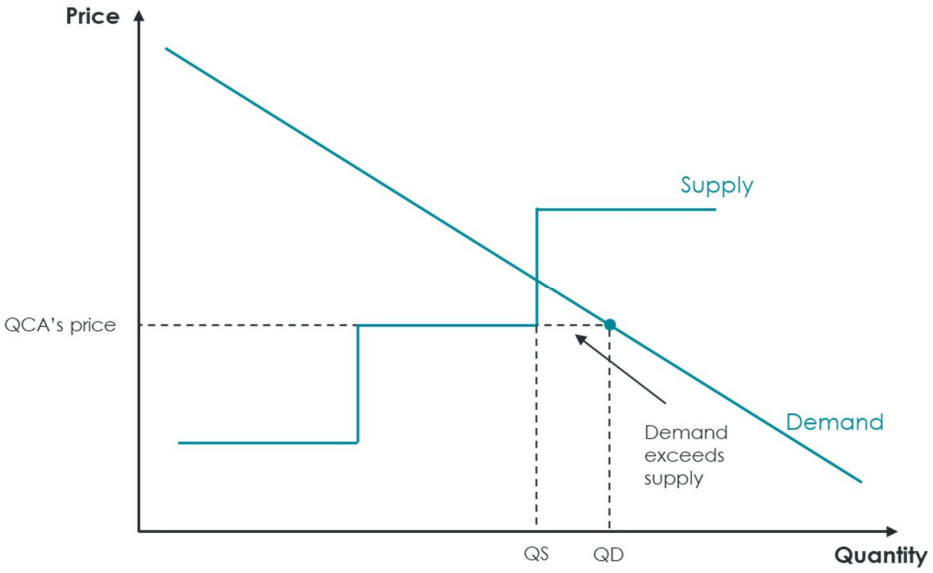
All parties agree that coal handling services using the existing capacity of DBCT are the cheapest option available to coal mines in the Goonyella system. It is not surprising that, at the administered price determined by the QCA, demand for the service exceeds the capacity of DBCT.

The figure below shows this situation, with a 'lumpy' supply curve representing the prospective costs of providing increased terminal capacity. 'QD' represents the quantity demanded at the QCA's price. 'QS' represents the quantity supplied at the QCA's price, a value that is constrained by the capacity of the terminal.

[27] QCA draft recommendation, p C43.

[28] Morgan, W, Katz, M and Rosen H, *Microeconomics*, McGraw-Hill: Maidenhead, 2006, p 62.

Figure 3.2: At the QCA price there is surplus demand for the DBCT service



There appears to be agreement that Lake Vermont and Middlemount would have preferred to use the DBCT service at the QCA's administered price, rather than the AAPT service. It follows that the tonnages contracted with AAPT are included in 'QD' above, not in 'QS', and that the QCA's approach to demand is estimated by reference to willingness (or ability) to supply the service at the QCA's price, not by reference to willingness to use the service at the QCA's price.

The diagram above shows that excluding volumes served at other terminals will underestimate total foreseeable demand in the market. This approach will instead give rise to an estimate of the quantity supplied of the DBCT service. This is not what criterion (b) in the *QCA Act* requires.

The incoherency of this approach to assessing total foreseeable demand in the market is further revealed by reference to the paradox to which it gives rise, being that:

- up until the day that Lake Vermont and Middlemount decided to contract with AAPT, the QCA's approach assesses these tonnages as being part of total foreseeable demand in the market; and
- from the day that Lake Vermont and Middlemount decided to contract with AAPT, the QCA's approach assesses these tonnages as not being part of total foreseeable demand in the market.

In other words, tonnages can be in the market, out of the market, and possibly in the market again later. This leaves open the possibility that the determination of whether DBCT is a natural monopoly could change with this assessment, even without changes to the underlying economics associated with the terminals or the mines. This is an unsatisfactory basis on which to assess whether criterion (b) is satisfied.

3.3 Determination of least cost

The third element of criterion (b) is the assessment of whether it is least cost for foreseeable demand to be met at the facility, as compared with at two or more facilities.

3.3.1 Treatment of sunk costs

In our criterion (b) report responding to the QCA's draft recommendation, we identified that a fundamental problem in the QCA's assessment of criterion (b) was its approach to assessing costs.[29] The QCA's assessment of least cost – which uses charges rather than incremental or total costs – is distorted because it:

- ignores the sunk costs associated with other terminals when considering scenarios under which DBCT meets all foreseeable demand – even though the sunk costs of those other terminals will continue to be incurred in these scenarios; but
- takes into account these same sunk costs when considering scenarios under which some foreseeable demand is met at those other terminals.

We advised that the use of resource costs (or incremental costs to society) is the appropriate basis on which to assess the least cost means of serving total foreseeable demand in the market.[30] PwC, advising the DBCT User Group, previously accepted the relevance of resource costs to an assessment of least cost.[31] However, in its most recent advice, PwC adopts without commentary the approach proposed by the QCA in its draft recommendation, being the use of total charges to miners as a proxy for cost.[32]

In assessing least cost, the relevant comparison is the cost of serving all foreseeable demand in the market at DBCT as against serving some of that foreseeable demand at DBCT and some at another terminal. If it is lower cost for any amount of foreseeable demand to be served at a terminal other than DBCT, then it is least cost to meet total foreseeable demand using two or more facilities.

Since DBCT is fully contracted for most years of the declaration period, the least cost assessment amounts to a comparison of the cost of meeting foreseeable demand that exceeds DBCT capacity by using capacity already available at another terminal (including any additional transport or costs associated with that terminal) or by expanding DBCT. Such comparison of the costs of meeting total foreseeable demand:

- *may include* unavoidable costs that have already been incurred, such as the capital costs required to build and maintain the existing capacity of DBCT and other terminals; but
- *must include* the incremental costs that will be incurred prospectively to meet the demand, such as the costs of expanding DBCT or the variable costs associated with use of an existing, other terminal.

The least cost comparison will be determined only by differences in *incremental* costs. Unavoidable costs are not affected by whether all demand is served at DBCT or some demand is served at another terminal – by definition, unavoidable costs will be the same on both sides of the comparison. It is on this basis that we say an incremental cost basis is an appropriate approach to the assessment of least cost.

The DBCT User Group's submission assumes that determining the least cost means of meeting total foreseeable demand is the same as identifying the facility with the lowest average costs or the average charges paid, which include a return on and of unavoidable costs.[33] This is the same fundamental error made by the QCA in its draft recommendation, which:

- *includes* the unavoidable cost of using other terminals when serving foreseeable demand at *another terminal*; but

[29] HoustonKemp, *Assessment of the QCA's draft recommendation to declare the DBCT service – criterion (b),* March 2019, p 24.

[30] HoustonKemp, *Does DBCT's coal handling service satisfy criterion (b)?*, 28 May 2018, pp 20-22.

[31] PwC, *2018 access declaration review – supplementary report*, 17 July 2018, pp 10-13. PwC also argues that the use of resource costs is problematic when used for the purpose of market definition. We agree – we have never proposed the use of resource costs to assess market definition. The use of charges to miners is the appropriate basis for this assessment.

[32] PwC, *2020 access declaration review*, 11 March 2019, p 17.

[33] DBCT User Group, *Submission in response to the Queensland Competition Authority draft decision*, 11 March 2019, p 51.

- *does not include* the unavoidable cost of using other terminals when serving *all foreseeable demand at DBCT*.

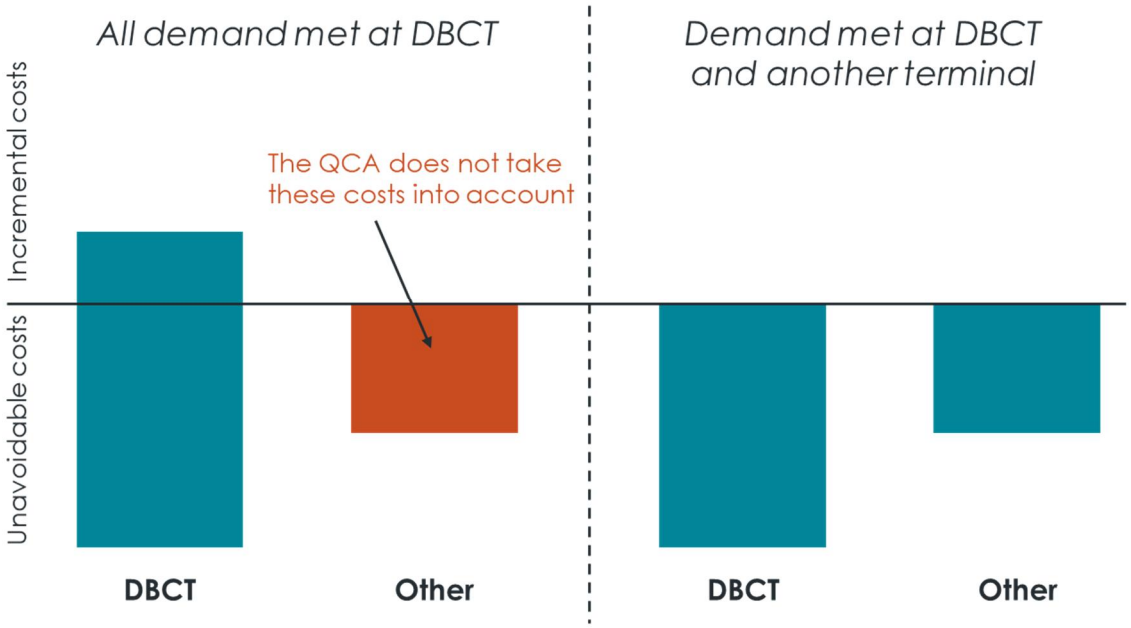
Put another way, use of 'charges paid' as a proxy for costs omits the unavoidable costs of the alternative other terminal, whenever no charges are paid at that terminal (even though the other terminal's costs are still not avoided by it not being used). This approach violates the requirement for the *same unavoidable costs* to be *included on both sides* of the comparison.

This approach understates the cost of serving all foreseeable demand at DBCT, because:

- it omits *unavoidable* costs at other terminals when all demand is served at DBCT; yet
- *unavoidable* costs are unavoidable in all circumstances and must be taken into account in all circumstances.

The nature of this omission from the QCA's least cost analysis is illustrated in figure 3.3 below:

Figure 3.3: QCA's error in calculating least cost



Once this correction is made, but without any changes to either the market as defined by the QCA, or foreseeable demand in the market, as forecast by the QCA, then the QCA's conclusion in relation to its least cost assessment reverses and so criterion (b) is no longer satisfied.[34]

3.3.2 Facilities relevant to the assessment of least cost

At the public forum in Brisbane, the DBCT User Group's representative stated that it cannot be least cost for two or more facilities to serve total foreseeable demand in the market because DBCT is the only terminal in the market. This contention is consistent with an earlier statement by the DBCT User Group.[35]

[34] HoustonKemp, *Assessment of the QCA's draft recommendation to declare the DBCT service – criterion (b)*, March 2019, pp 30-34.

[35] DBCT User Group, *Declaration review regarding Dalrymple Bay Coal Terminal: submission to the Queensland Competition Authority*, 30 May 2018, p 71.

However, there is no basis for this contention. An assessment of the least cost means by which to serve foreseeable demand can objectively be made by reference to the option of using any facility, whether inside or outside the market. This step is conceptually different from market definition. The market definition and least cost steps are not equivalent because market definition can be influenced by how the costs of facilities are reflected in prices, whereas the assessment of least cost looks beyond prices to the underlying costs to society of providing coal handling services.

By way of example, it is entirely feasible that there may be a single facility in the market, but that total foreseeable demand in the market is met at least cost by more than one facility. For example, this could occur if another facility has a very high price such that it is not identified as being in the relevant market, yet the incremental costs it incurs to meet demand are lower than those of DBCT. The potential for divergence between marginal price and cost is relevant to the assessment of the market, but has no bearing on an assessment of whether the DBCT service is the least cost means of meeting total foreseeable demand in the market (and so is a natural monopoly).

It follows that the assessment of least cost cannot be satisfactorily concluded either in the positive, by observing that there is more than one facility serving the market, or in the negative, by observing that there is only one facility serving the market. Rather, the least cost step must be conducted separately from the assessment of the market and total foreseeable demand in the market.

Further, even if one assumed that there must be a close consistency between market definition and the assessment of least cost, it would also be necessary to consider this consistency in the assessment of demand. For example, it would be inconsistent to define the relevant market by reference to the existing charges at DBCT, yet use this market to conclude that total foreseeable demand in the market could only be met at least cost by expanded capacity at DBCT without also considering the costs of meeting this demand at other facilities.[36]

In any case, it is not correct to say that DBCT is the only supplier of coal handling services in the market. A facility does not need to be located within the Hay Point catchment in order to provide coal handling services to miners in that region. Specifically:

- AAPT provides coal handling services to Lake Vermont and Middlemount, which are both customers in the market; and
- RGTCT provides coal handling services to Oaky Creek and Capcoal, which are both customers in the market.

Even on the narrow view of the least cost test proposed by the DBCT User Group, AAPT and RGTCT are both alternative facilities that should be considered in the assessment of whether total foreseeable demand in the market can be met at least cost by DBCT.

[36] See for example our discussion in HoustonKemp, *Assessment of the QCA's draft recommendation to declare the DBCT service – criterion (b)*, March 2019, pp 5-12.

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Appendix 2 HoustonKemp report on Goonyella System Tenement Transactions

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Transactions of coal tenements in the Goonyella system

A report for DLA Piper

April 2019

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Disclaimer

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1. Introduction

The Queensland Competition Authority (QCA) is reviewing whether the coal handling service supplied at Dalrymple Bay Coal Terminal (DBCT) specified in section 250 of the *Queensland Competition Authority Act 1997* (QCA Act) should be declared following the expiry of its existing declaration on 8 September 2020. For the QCA to recommend that the DBCT service be declared, it must reach the view that each of the criteria set out at section 76(2) of the QCA Act is satisfied.

1.1 Market for tenements

On 18 December 2018, the QCA published its draft recommendation. It concluded that each of the relevant criteria is satisfied in respect of the DBCT service. In particular, the QCA it concluded that:

- there is a market for coal exploration and development tenements, and production tenements, in the Hay Point catchment region, which is understood to be tenements located on the Goonyella system;[1] and
- declaration would promote a material increase in competition in this market, since without declaration there would be differential terms and conditions of access to DBCT, with non-incumbent users facing higher prices and increased uncertainty about their ability to access the terminal such that efficient new entrants would be discouraged from entering the market for tenements.[2]

The tenements market comprises two distinct tenement types (or functions), being:

- exploration and development[3] tenements, which involve intrinsically high risk, speculative activity (many such tenements never turn into producing mines); and
- production tenements, where the risks arise principally in relation to the price of coal (rather than whether there are sufficient reserves to allow mining).

The tenements market identified by the QCA in its draft recommendation did not distinguish these activities, and its theory of harm is unclear as to from precisely which of them more efficient new entrants will be deterred.

In contrast, at the public forum in Brisbane, the DBCT User Group's representative emphasised that the criterion (a) competitive harm arises for exploration and development tenement holders. In advancing this theory of harm, reference was made to:[4]

- the negative effect of differentially priced access to DBCT that will only be required (by, at that time, production tenement holders) ten years and beyond from now;
- the near term manifestation of this effect as being on economic activity that is taking place now, but which is dependent on access to infrastructure at the end point of the lengthy exploration and mine development phase; and
- the nature of this effect being on the valuation (today) of exploration and development tenements, based on the present value consequences of a future, long term differential as to the price of access.

[1] QCA, *Draft recommendation | Part C: DBCT declaration review*, December 2018, pp 57-58.

[2] QCA, *Draft recommendation | Part C: DBCT declaration review*, December 2018, pp 93.

[3] Exploration and development rights are legally and functionally distinct. The former is focused on determining the extent of any mineral resource, while the latter is focused on the development potential of a defined resource. However, for the purpose of any criterion (a) analysis, there is no apparent need to distinguish these two forms of right.

[4] DBCT User Group, *DBCT declaration review*, 20 March 2019, p 19.

1.2 Scope of this report

A notable consequence of the DBCT User Group's theory is that, since the declared status of the DBCT service beyond 2020 is unclear, and has been so for many years, competitive harm to exploration and development tenement holders must already be occurring.

The prospect that DBCT may not be declared from September 2020 has been 'in place' for some time, and so already carries potential implications for the future price of access for non-incumbent users. If the DBCT User Group's theory of harm were valid, its consequences would be reflected in actual market outcomes. That is, we would expect to see that the involvement of non-incumbent users in acquisitions of tenements in the Goonyella system had been affected in recent years by this prospect. However, the DBCT User Group did not present any empirical evidence from the tenements market in support of its contentions.

We[5] have been asked by DLA Piper (DLA), on behalf of DBCT Management Pty Limited (DBCTM), to examine the DBCT User Group's theory of harm, and to collect and present evidence from the tenements market that is capable of assessing the extent to which observed market outcomes are consistent with such a theory of harm.

1.3 Structure of this report

The remainder of this report is structured as follows:

- section 2 explains how we have sourced information on tenements and tenement holders and identified those tenements that are located in the Goonyella system;
- section 3 describes our construction of a dataset of tenement transactions that are relevant to assessing the DBCT User Group's theory of harm and summarises the information imparted by that dataset; and
- section 4 assesses whether the information presented in sections 2 and 3 is consistent with the DBCT User Group's theory of harm.

[5] The authors of this report are Greg Houston and Daniel Young. We have been assisted in the preparation of this report by Nick Twort, an Analyst in HoustonKemp's Sydney office.

2. Identification of coal tenements and holders

In this section, we describe how we have collected information about coal tenements and their holders so as to assess the validity of the DBCT User Group's theory of harm. We explain:

- the types of coal tenements in Queensland;
- the basis for our identification of a relevant subset of these tenements, being those in the Goonyella system; and
- the identity of the holders of each of these relevant tenements.

2.1 Types of coal tenements in Queensland

Tenements in the *Mineral Resources Act 1989* (Qld) (the Act) refer to any of the relevant rights to explore, develop or mine resources. The types of tenements (authorities) under the Act are:[6]

- prospecting permits;
- mining claims;
- exploration permits;
- mineral development licences; and
- mining leases.

In this report, we consider three types of tenements:

1. Exploration permits for coal (EPCs) – these allow holders to carry out activities for the purpose of determining the existence, quality and quantity of coal in the tenement area. A holder of an EPC may, in priority to all other persons, apply for a mineral development licence (MDL) or mining lease (ML) in respect of the tenement area.[7]
2. MDLs for coal – these allow holders to carry out activities leading to the evaluation and economic development of an ore body, which may include, for example, geological programs, mining feasibility studies, and metallurgical testing.[8] A holder of an MDL for coal may, in priority to all other persons, apply for any number of MDLs and MLs for coal in respect of the tenement area.[9]
3. MLs for coal – these allow holders to undertake mining operations and are granted to extract the mineral resources (in this case, coal) specified in previous permits. To apply for a coal ML, the proposed area must be in the area of an existing prospecting permit, EPC or MDL, and the applicant must either hold that tenement or have the permission of the holder to apply for an ML.[10]

We have considered these three tenement types because these are the tenements relevant for large scale mining operations in Queensland.[11]

[6] Mineral Resources Act 1989 (Qld), s 6D.

[7] Mineral Resources Act 1989 (Qld), s 129(1)(b).

[8] Mineral Resources Act 1989 (Qld), s 181(3).

[9] Mineral Resources Act 1989 (Qld), s 181(4)(c).

[10] Mineral Resources Act 1989 (Qld), s 232(2).

[11] See, for example: Business Queensland, *Mineral and coal authorities*, https://www.business.qld.gov.au/industries/mining-energy-water/resources/minerals-coal/authorities-permits/applying/authorities, accessed 15 April 2019.

2.2 Coal tenements in the Goonyella system

The Queensland Department of Natural Resources, Mines and Energy (DNRME) provides a database that describes the boundaries of exploration and production permits in Queensland.[12] This database sets out the approval status, lodgement, approval and expiry dates, land area and authorised holder of each tenement. For MLs and MDLs, the database also provides information on the minerals for which the tenement applies. This enables the differentiation of coal permits from permits for other minerals.[13]

Table 2-1 below summarises the DRNME information as it applies to coal tenements in Queensland. The data indicate that there are 1,073 coal permits in Queensland, of which 993 have been granted and a further 80 are under application.

Table 2-1: Applied and granted coal tenements in Queensland

Tenement type	Applied permits	Granted permits	Total permits
EPC	5	477	482
MDL (for coal)	7	131	138
ML (for coal)	68	385	453

Source: Department of Natural Resources, Mines and Energy, Exploration and production permits - Queensland, *http://qldspatial.information.qld.gov.au/catalogue/custom/detail.page?fid={B0D192C5-4076-43E8-9A2C-94A0FA928AF9}, accessed 27 March 2019.*

To assess the DBCT User Group's theory of harm, as applied to the QCA's tenements market, we have identified those tenements that are in the Hay Point catchment. We explain above that the DRNME data identify the location of each tenement. However, the database does not identify the rail system that a mine developed in each tenement would be likely to use.

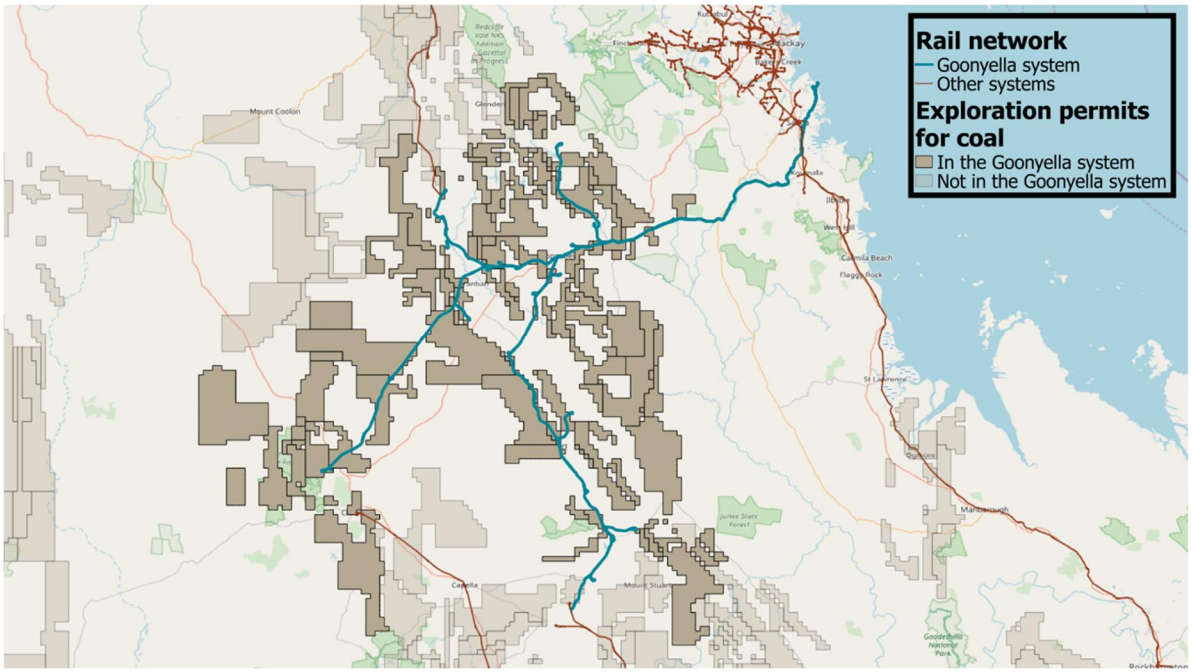
We have identified relevant tenements as being in the Hay Point catchment by reference to their proximity to the Goonyella rail system as compared to their proximity to other rail systems. In other words, we identify those tenements for which the most likely feasible rail line is the Goonyella system.

Figure 2-1, figure 2-2 and figure 2-3 below show the EPC, MDL and ML tenements that we identify as being in the Goonyella system, respectively. Figure 2-4 is an amalgamation of the three previous figures and shows all tenement types that we identify as being in the Goonyella system. A full list of tenements that we identify as being in the Goonyella system is set out in appendix A1 below.

[12] Department of Natural Resources, Mines and Energy, *Exploration and production permits - Queensland*, http://qldspatial.information.qld.gov.au/catalogue/custom/detail.page?fid={B0D192C5-4076-43E8-9A2C-94A0FA928AF9}, accessed 27 March 2019.

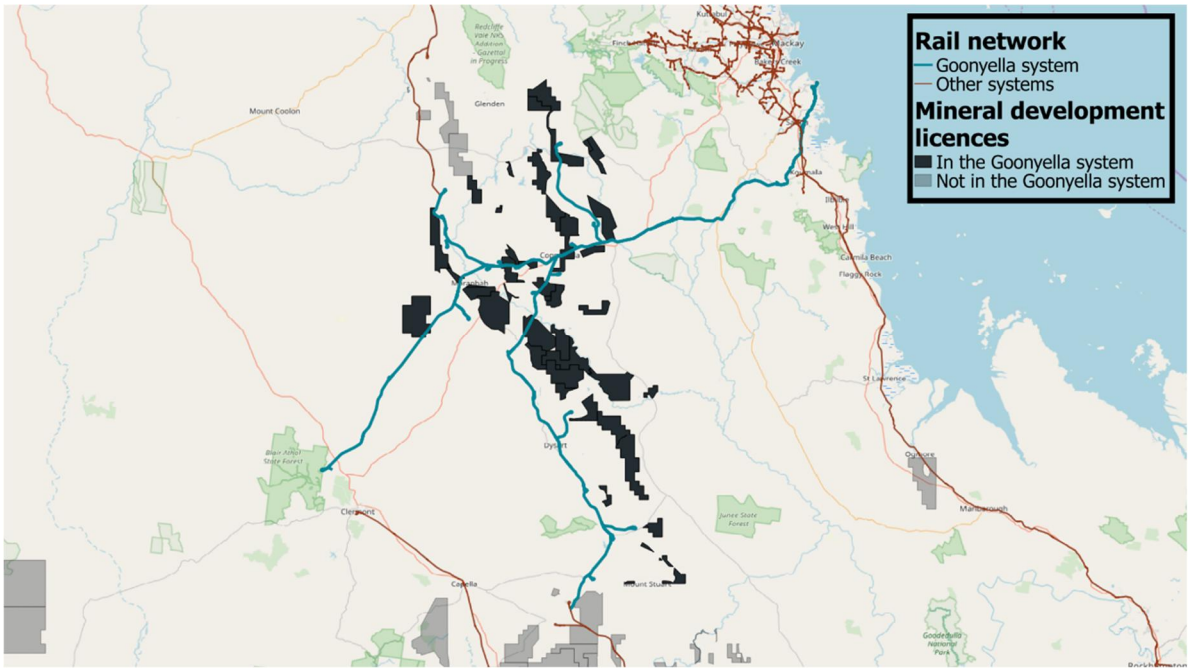
[13] Specifically, MDL and ML permits for coal are those for which the 'DIVISION' field is 'C' (ie, for coal, as compared to 'M' for minerals).

Figure 2-1: Exploration permits for coal in the Goonyella system



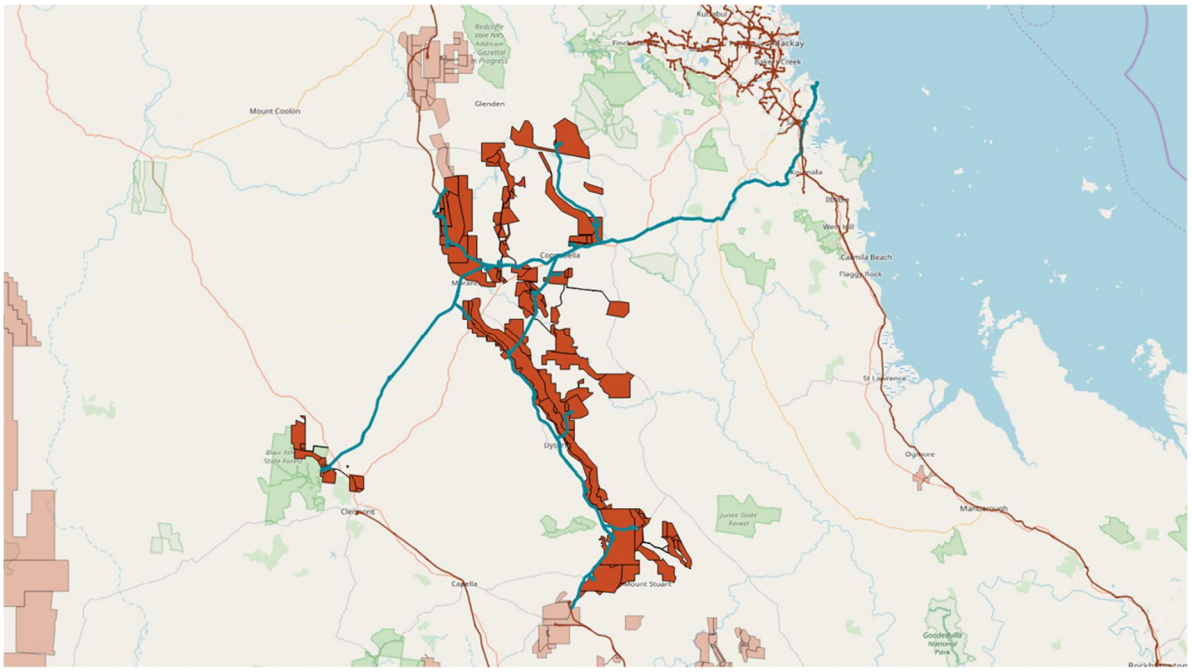
Source: HoustonKemp analysis; Department of Natural Resources, Mines and Energy, Exploration and production permits - Queensland, http://qldspatial.information.qld.gov.au/catalogue/custom/detail.page?fid={B0D192C5-4076-43E8-9A2C-94A0FA928AF9}, accessed 27 March 2019; Department of Natural Resources and Mines, Rail network - Queensland, http://qldspatial.information.qld.gov.au/catalogue/custom/detail.page?fid={8C0F5D96-96C0-4510-8D67-445A0E92893A}, accessed 27 March 2019. See appendix A1 for a list of the included tenements.

Figure 2-2: Mineral development licences for coal in the Goonyella system



Source: HoustonKemp analysis; Department of Natural Resources, Mines and Energy, Exploration and production permits - Queensland, http://qldspatial.information.qld.gov.au/catalogue/custom/detail.page?fid={B0D192C5-4076-43E8-9A2C-94A0FA928AF9}, accessed 27 March 2019; Department of Natural Resources and Mines, Rail network - Queensland, http://qldspatial.information.qld.gov.au/catalogue/custom/detail.page?fid={8C0F5D96-96C0-4510-8D67-445A0E92893A}, accessed 27 March 2019. See appendix A1 for a list of the included tenements.

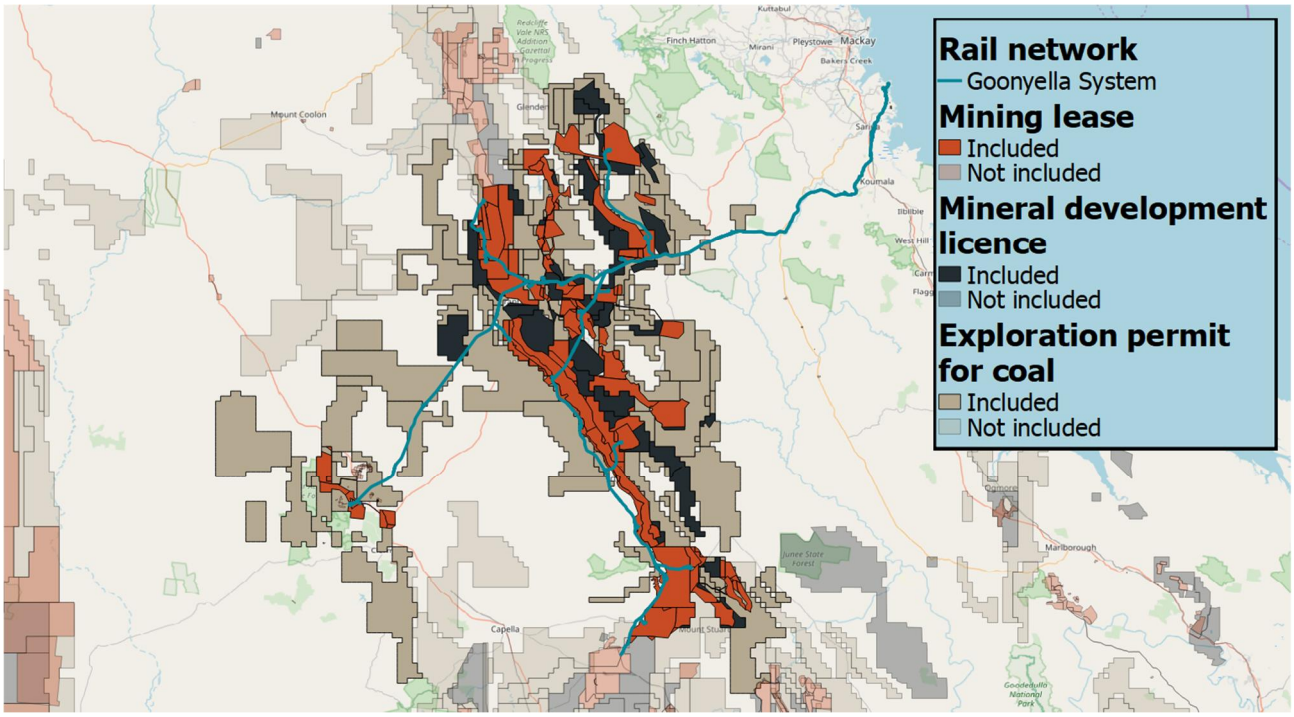
Figure 2-3: Mining leases for coal in the Goonyella system



Source: HoustonKemp analysis; Department of Natural Resources, Mines and Energy, Exploration and production permits - Queensland, http://qldspatial.information.qld.gov.au/catalogue/custom/detail.page?fid={B0D192C5-4076-43E8-9A2C-94A0FA928AF9}, accessed 27 March 2019; Department of Natural Resources and Mines, Rail network - Queensland, http://qldspatial.information.qld.gov.au/catalogue/custom/detail.page?fid={8C0F5D96-96C0-4510-8D67-445A0E92893A}, accessed 27 March 2019. See appendix A1 for a list of the included tenements.

Figure 2-4 shows all the coal tenements in the Goonyella system.

Figure 2-4: Tenements in the Goonyella System



Source: HoustonKemp analysis; Department of Natural Resources, Mines and Energy, Exploration and production permits - Queensland, http://qldspatial.information.qld.gov.au/catalogue/custom/detail.page?fid={B0D192C5-4076-43E8-9A2C-94A0FA928AF9}, accessed 27 March 2019; Department of Natural Resources and Mines, Rail network - Queensland, http://qldspatial.information.qld.gov.au/catalogue/custom/detail.page?fid={8C0F5D96-96C0-4510-8D67-445A0E92893A}, accessed 27 March 2019. See appendix A1 for a list of the included tenements.

Table 2-2 summarises the number of coal tenements that we identify, on the basis described above, as being in the Goonyella system. In total, we identify 312 coal permits as being associated with tenements in the Goonyella system. This is approximately 29 per cent of the coal permits that have been applied for or granted in Queensland.

Table 2-2: Coal tenements in the Goonyella system

Tenement type	Permits in the Goonyella system	Queensland permits total	Goonyella system percentage
EPC	109	482	22.6%
MDL (for coal)	46	138	33.3%
ML (for coal)	154	453	34.0%

Source: HoustonKemp analysis; Department of Natural Resources, Mines and Energy, Exploration and production permits - Queensland, *http://qldspatial.information.qld.gov.au/catalogue/custom/detail.page?fid={B0D192C5-4076-43E8-9A2C-94A0FA928AF9}, accessed 27 March 2019.*

2.3 Holders of tenements in the Goonyella system

Incumbent and non-incumbent miners at DBCT hold tenements in the Goonyella system (as well as the wider coal tenement markets of Queensland and Australia). Table 2-3 below sets out the tenements for which an interest is held by one or more incumbent miners at DBCT, either directly or through subsidiary companies.

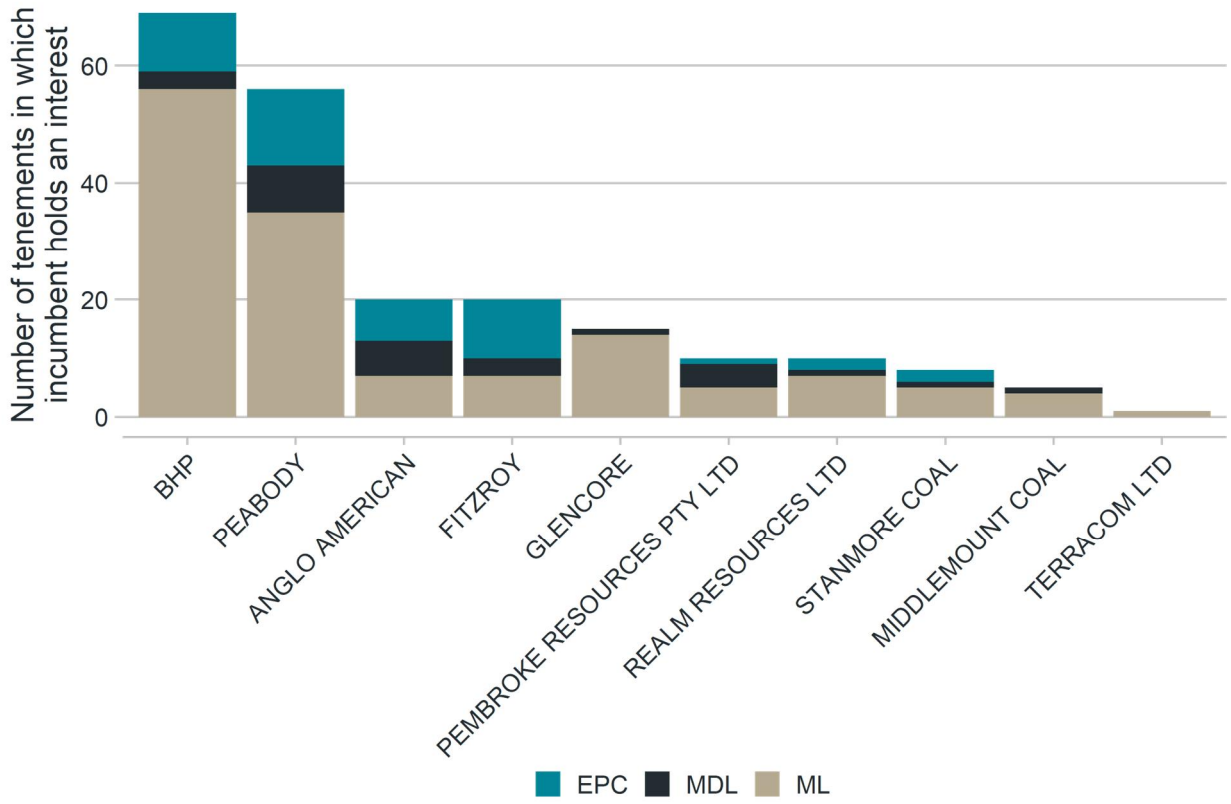
Table 2-3: Tenements in the Goonyella system in which incumbent miners at DBCT hold an interest

Holder	Tenements in the Goonyella system in which the holder has an interest
BHP	EPC 554, EPC 837, EPC 928, EPC 1444, EPC 1646, EPC 1647, EPC 1951, EPC 2071, EPC 2103, EPC 2109, MDL 235, MDL 454, ML 1763, ML 1764, ML 1775, ML 1781, ML 1782, ML 1783, ML 1784, ML 1791, ML 1802, ML 1885, ML 1900, ML 2360, ML 2410, ML 4749, ML 4750, ML 4751, ML 70115, ML 70116, ML 70121, ML 70126, ML 70127, ML 70131, ML 70142, ML 70193, ML 70194, ML 70287, ML 70288, ML 70289, ML 70294, ML 70298, ML 70312, ML 70325, ML 70328, ML 70350, ML 70369, ML 70370, ML 70371, ML 70372, ML 70377, ML 70383, ML 70403, ML 70410, ML 70411, ML 70412, ML 70421, ML 70459, ML 70462, ML 70463, ML 70468, ML 70469, ML 70478, ML 70479, ML 70493, ML 70494, ML 700003, ML 700021, MDL 3027
PEABODY	EPC 649, EPC 657, EPC 676, EPC 682, EPC 688, EPC 708, EPC 712, EPC 721, EPC 749, EPC 835, EPC 850, EPC 1199, EPC 1607, MDL 282, MDL 308, ML 6949, ML 70161, ML 70163, ML 70164, ML 70236, ML 70237, ML 70252, ML 70256, ML 70257, ML 70258, ML 70259, ML 70260, ML 70290, ML 70291, ML 70313, ML 70319, ML 70344, ML 70354, ML 70355, ML 70379, ML 70384, ML 70385, ML 70386, ML 70387, ML 70401, ML 70417, ML 70450, ML 70455, ML 70457, ML 70482, ML 70483, ML 70484, ML 70485, MDL 494, MDL 495, ML 700014, MDL 3020, MDL 3023, ML 700027, MDL 3033, MDL 3034
ANGLO AMERICAN	EPC 548, EPC 552, EPC 726, EPC 747, EPC 1454, EPC 1455, EPC 2033, MDL 170, MDL 273, MDL 274, MDL 277, MDL 331, MDL 377, ML 1831, ML 1894, ML 1998, ML 70047, ML 70311, ML 70336, ML 70378
FITZROY	EPC 667, EPC 675, EPC 719, EPC 722, EPC 858, EPC 951, EPC 952, EPC 1036, EPC 1052, EPC 1146, MDL 354, MDL 359, MDL 384, ML 70338, ML 70339, ML 70340, ML 70345, ML 70374, ML 70375, ML 700024
GLENCORE	MDL 163, ML 1787, ML 1788, ML 1832, ML 1881, ML 1884, ML 1995, ML 2004, ML 2355, ML 70241, ML 70327, ML 70334, ML 70343, ML 70424, ML 700020
PEMBROKE RESOURCES PTY LTD	EPC 1949, MDL 3012, MDL 3013, MDL 3014, MDL 3025, ML 700032, ML 700034, ML 700033, ML 700035, ML 700036
REALM RESOURCES LTD	EPC 855, EPC 1139, ML 70171, ML 70309, ML 70310, ML 70429, ML 70430, ML 70431, ML 70470, MDL 3028
STANMORE COAL	EPC 728, EPC 755, MDL 137, ML 70342, ML 700018, ML 700017, ML 700016, ML 700019
MIDDLEMOUNT COAL	MDL 282, ML 70379, ML 70417, ML 700014, ML 700027
TERRACOM LTD	ML 1804

Source: HoustonKemp analysis; Department of Natural Resources, Mines and Energy, Exploration and production permits - Queensland, http://qldspatial.information.qld.gov.au/catalogue/custom/detail.page?fid={B0D192C5-4076-43E8-9A2C-94A0FA928AF9}, accessed 27 March 2019; Business Queensland, Resource authority public reports, https://myminesonline.business.qld.gov.au/suite/apps, accessed 2 April 2019

The number of Goonyella tenements in which incumbent miners at DBCT hold an interest are shown at figure 2-5 below. This figure indicates that BHP and Peabody are by far the largest incumbent holders of tenements in the Goonyella system, with most of these tenements being MLs.

Figure 2-5: Tenements in the Goonyella system in which incumbent miners at DBCT hold an interest



Source: HoustonKemp analysis; Department of Natural Resources, Mines and Energy, Exploration and production permits - Queensland, http://qldspatial.information.qld.gov.au/catalogue/custom/detail.page?fid={B0D192C5-4076-43E8-9A2C-94A0FA928AF9}, accessed 27 March 2019; Business Queensland, Resource authority public reports, https://myminesonline.business.qld.gov.au/suite/apps, accessed 2 April 2019

3. Transactions of coal tenements

In order to assess the extent to which observed market outcomes are consistent with the DBCT User Group's theory of harm, we require information on the extent to which coal tenements have transacted over time, and the involvement of non-incumbent DBCT capacity holders in these transactions. This section sets out:

- details of a dataset that we have created, based on Queensland government reports, for coal tenement transactions over time; and
- insights that we draw to inform whether the DBCT User Group's theory of harm is consistent with the available data as to observed market outcomes.

3.1 Published information about tenement transactions

Most tenements identified as being in the Goonyella system have changed ownership over time.

The Queensland government publishes a resource authority public report for each tenement in Queensland, which is made available on the MyMinesOnline website.[14] The information provided includes a list of current and former holders of the tenement, their share in the tenement and between which dates the interest was held.

This information allows for the basic details of transactions to be derived. Transactions can be identified based on the date and time that holders changed and the percentage amount of interest transferred. For example, EPC 837 is an exploration permit for coal which, according to the MyMinesOnline data:[15]

- was initially held in full since grant by New Hope Exploration Pty Ltd; and
- transferred ownership on 16 October 2008 to:
  - BHP Coal Pty Ltd (a subsidiary of BHP Group) – 40.75 per cent share;
  - QCT Mining Pty Ltd (a subsidiary of Mitsubishi Corporation) – 15.78 per cent share;
  - Mitsubishi Development Pty Ltd (a subsidiary of Mitsubishi Corporation) – 15.53 per cent share;
  - QCT Investment Pty Ltd (a subsidiary of Mitsubishi Corporation) – 12.00 per cent share;
  - BHP Queensland Coal Investments Pty Ltd (a subsidiary of BHP Group) – 8.50 per cent share;
  - QCT Resources Pty Limited (a subsidiary of Mitsubishi Corporation) – 6.69 per cent share; and
  - UMAL Consolidated Pty Ltd (a subsidiary of BHP Group) – 0.75 per cent share.

We note that this information is consistent in every respect with that disclosed by BHP.[16]

We have extracted information about tenement transactions from the MyMinesOnline website to create a dataset of tenement transactions, which we attach as annexure A2 to this report.[17] This dataset contains

[14] See, for example: Business Queensland, *EPC 554 resource authority public report*, https://myminesonlineservices.business.qld.gov.au/Web/PublicEnquiryReport.htm?permitType=EPC&permitNumber=554, accessed 17 April 2019.

[15] Business Queensland, *EPC 837 resource authority public report*, https://myminesonlineservices.business.qld.gov.au/Web/PublicEnquiryReport.htm?permitType=EPC&permitNumber=837, accessed 17 April 2019.

[16] See attachment A to the mining lease application for Red Hill, available online at https://www.bhp.com/-/media/bhp/regulatory-information-media/coal/bhp-billiton-mitsubishi-alliance/red-hill/red-hill-mining-lease-application-mla-70421-and-related-environmental-authority-application/150820_coal_bma_redhill_mla70421applicationfinalpart1of3december2009.pdf, accessed 17 April 2019.

[17] The dataset is attached in an Excel file 'Tenement transaction dataset.xlsx'.

information in relation to 1,147 transactions of Goonyella system tenements since 1969. Our focus is on the period since 1990, in which the large majority of these transactions occurred.

3.2 Identification of relevant transactions

We describe in section 1 that the DBCT User Group's theory of harm implies that the involvement of non-incumbent users of the DBCT service in tenement acquisitions in the Goonyella system will have been affected in recent years by the prospect that DBCT may not be declared from September 2020.

In this section, we assess the validity of this proposition by identifying transactions for Goonyella system tenements in which the acquiring parties are non-incumbent miners. We identify relevant transactions as being those that result in the tenement being held *entirely* by entities that are not currently incumbent miners at DBCT. For these transactions, there is no incumbent on the buy side of the transaction and also no incumbent owner of the tenement which is not involved in the transaction. This approach avoids identifying as relevant transactions those in which there is only a change in the joint venture partner of an incumbent miner.

The classification of transactions in this way is likely to err on the side of denoting transactions as being not relevant. We have not identified firms as non-incumbent users if they were subsequently acquired by an incumbent, even if they were a new entrant at the time of holding the relevant tenement. Moreover, the current incumbent users of DBCT have not always been incumbent users of DBCT.

Of the 1,147 tenement transactions that were identified since 1969, 282 (or 25 per cent) are relevant as a tenement that results in the tenement being held entirely by entities which are not currently incumbent miners at DBCT. These transactions involve 162 tenements in total, which amount to 52 per cent of the tenements in the Goonyella basin identified in section 2.2 above, comprising:

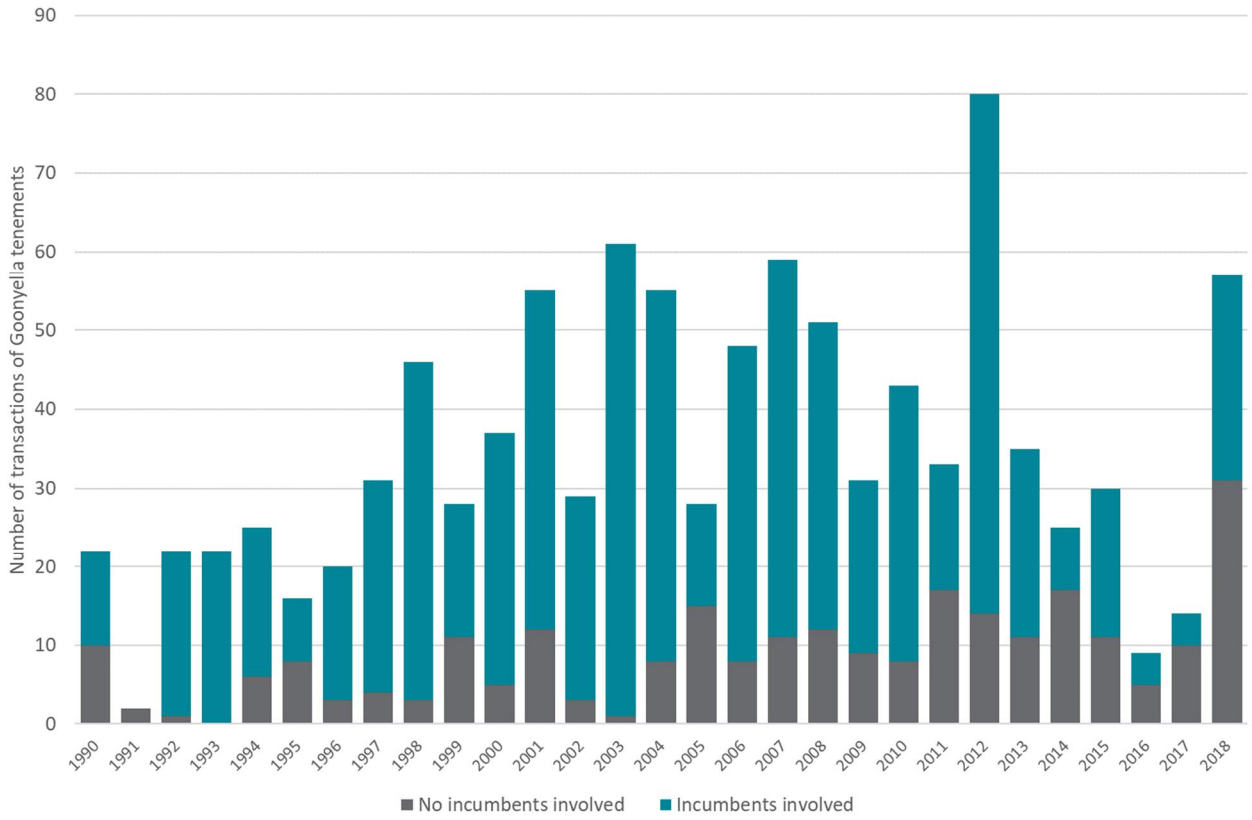
- 70 EPCs – 64 per cent of the total;
- 29 MDLs – 63 per cent of the total; and
- 63 MLs – 41 per cent of the total.

In order to assess the DBCT User Group's theory of harm, we consider both:

- all coal tenements in the Goonyella system without distinguishing between tenements for the purposes of exploration and development of coal resources, as opposed to production; and
- only coal tenements in the Goonyella system that are permits for the purposes of exploration and development of coal resources – EPCs and MDLs.

Figure 3-2 below indicates the number of Goonyella tenement transactions in each year, identifying separately those that have not involved incumbents and those that have (as defined above). Generally, the data show an increase in non-incumbents' share of transactions over time. In 2014, 2016, 2017 and 2018, the number of transactions that do not involve incumbents has exceeded those that do involve incumbents.

Figure 3-1: Transactions of coal tenements in the Goonyella system

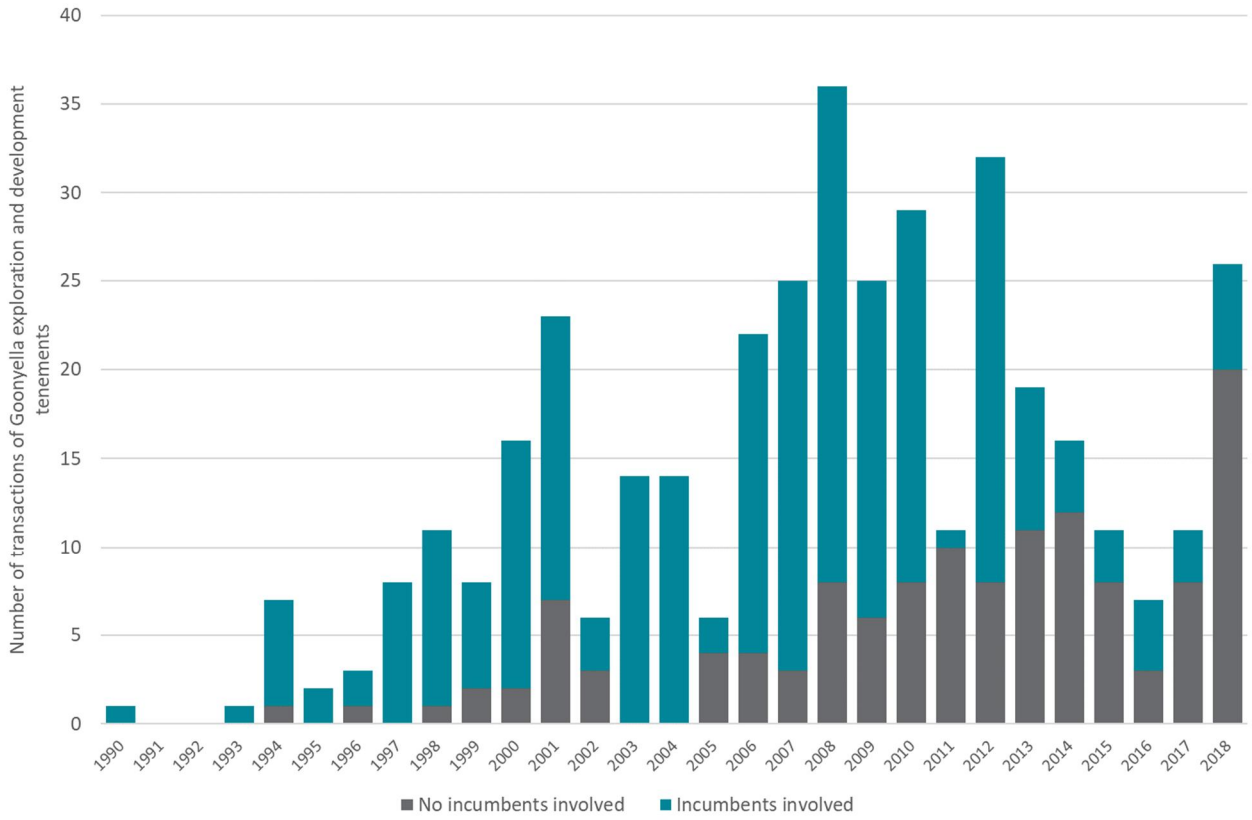


Source: HoustonKemp analysis; https://myminesonline.business.qld.gov.au/suite/apps, accessed 2 April 2019.

Figure 3-2 below indicates the number of exploration and development (ie, EPC and MDL) transactions in each year, identifying separately those that have not involved incumbents and those that have (as defined above).

As compared with figure 3-1 above, figure 3-2 shows that non-incumbent users have had an increasing level of involvement in transactions for exploration and development tenements over time. The involvement of non-incumbent users in these transactions has also been high in recent years. For example, in 2018 there were 26 transactions of Goonyella exploration and development tenements, of which 20 resulted in the tenement being held only by non-incumbent users of DBCT.

Figure 3-2: Transactions of exploration and development coal tenements in the Goonyella system



Source: HoustonKemp analysis; https://myminesonline.business.qld.gov.au/suite/apps, accessed 2 April 2019.

4. Implications for the theory of harm

The information that we have collated on coal tenements in the Goonyella system and their holders, and transactions of these tenements, indicates that non-incumbent users are often involved in the acquisition of such tenements and that this involvement has not reduced over time. This is shown most clearly in figure 3-1 and figure 3-2 above, which show that the relative share of non-incumbents in tenement transactions has increased over time, regardless of whether tenement transactions are examined collectively or whether a distinction is drawn between exploration and development tenements, as compared to production tenements,

The available empirical evidence does not support the DBCT User Group's contention that the prospect of differentially priced access in the period beyond 2030 has material implications for economic activity that is taking place now, but which is dependent on access to infrastructure at the end point of the lengthy exploration and mine development phase. If this were the case, we would expect to see indications of a similar effect in the decade leading up to the expiry of declaration at DBCT in September 2020, giving rise to a 'freezing' effect on the involvement of non-incumbent users in the tenements market. No such effect can be observed.

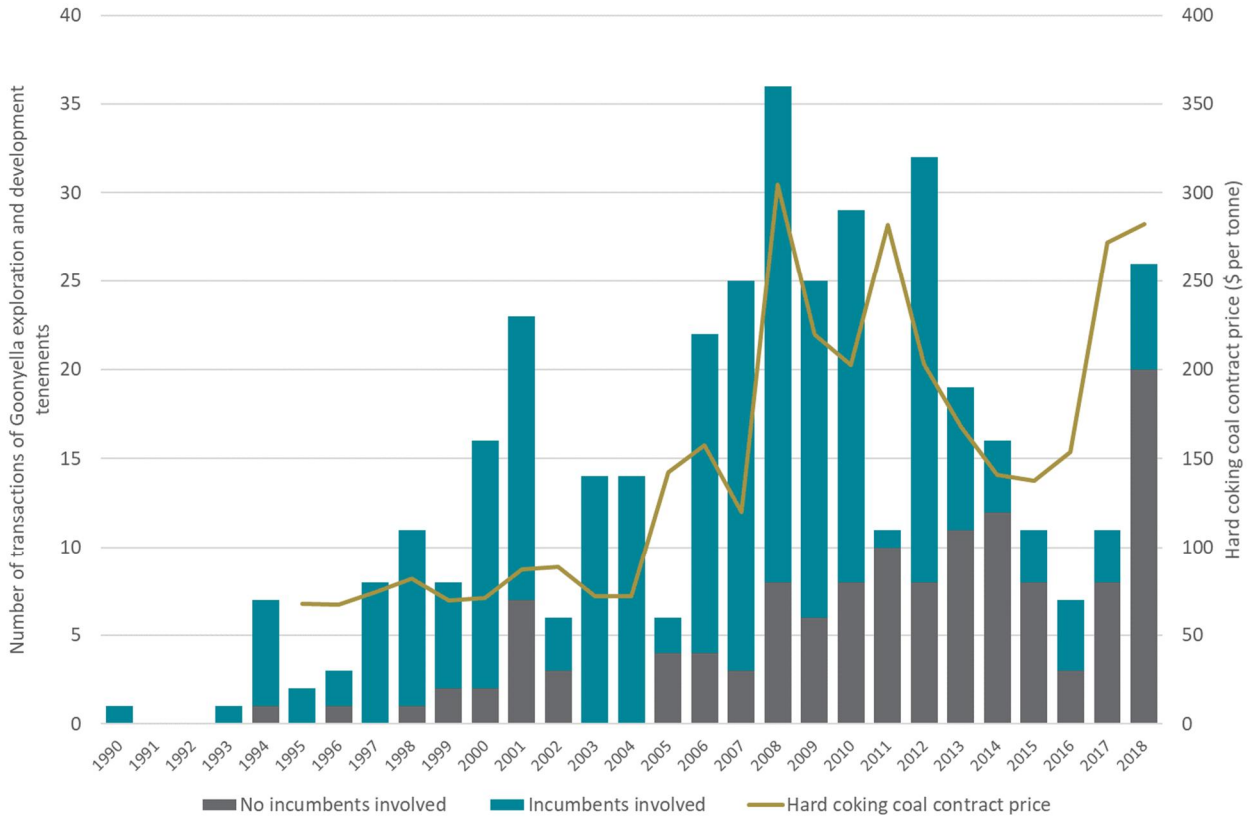
Rather, the results of our review of the available evidence indicate that non-incumbent users have not been dissuaded from entering into tenement transactions in recent years. This is despite the expiry of declaration at DBCT in September 2020 and the prospect that the terminal would no longer be declared, with the potential implications for access charges at the terminal. Indeed, during 2018, in which the declaration review commenced, the involvement of non-incumbent users in tenement transactions was very high by historical standards. These facts are not consistent with, and do not support, the DBCT User Group's theory of harm.

We acknowledge that there is variability in the number of transactions of tenements each year. Further, figure 4-1 below indicates that the number of transactions of tenements in the Goonyella system appears to be explained in part by the average hard coking coal contract price.

Generally, during periods in which hard coking coal contract prices have been higher, so too has been the number of tenement transactions. Coal prices appear to be an important factor in explaining the relatively low number of total tenement transactions between 2015 and 2017 and the most recent upswing in 2018.

The observations in section 3 above, and the data disclosed in figure 4-1 below, indicate that it is the price of coal, and not the status of declaration at DBCT or the prospective level of access charges, that is the most relevant factor determining the level of economic activity in tenement transactions, including by non-incumbent users.

Figure 4-1: Transactions in Goonyella exploration and developments and coal prices



Source: HoustonKemp analysis; https://myminesonline.business.qld.gov.au/suite/apps, accessed 2 April 2019, Bloomberg.

A1. Tenement holders and incumbents

This appendix tabulates the key assumptions that underpin our identification of tenement in the Goonyella system and those that are held by incumbent operators of DBCT.

Table A-1 lists the coal tenements that we have identified as being in the Goonyella. These tenements are also identified graphically in figure 2-1, figure 2-2 and figure 2-3 above.

Table A-1: Tenements in the Goonyella system

Tenement type	Tenement numbers
EPC	548, 552, 554, 649, 657, 658, 667, 675, 676, 682, 688, 689, 706, 708, 712, 719, 721, 722, 726, 728, 747, 749, 752, 755, 766, 775, 776, 777, 818, 830, 835, 837, 850, 855, 857, 858, 900, 928, 930, 951, 952, 1033, 1036, 1044, 1052, 1056, 1067, 1069, 1139, 1146, 1176, 1188, 1199, 1212, 1213, 1228, 1233, 1234, 1238, 1239, 1241, 1244, 1444, 1454, 1455, 1513, 1514, 1607, 1634, 1645, 1646, 1647, 1675, 1729, 1732, 1738, 1744, 1746, 1773, 1806, 1824, 1860, 1867, 1891, 1949, 1951, 2008, 2011, 2013, 2022, 2033, 2060, 2071, 2089, 2103, 2109, 2135, 2141, 2216, 2220, 2343, 2360, 2822, 2825, 25622, 25626, 25627, 26844, 27205
MDL	8, 137, 163, 166, 170, 183, 235, 273, 274, 277, 282, 303, 308, 315, 324, 331, 349, 353, 354, 359, 377, 384, 391, 429, 435, 442, 444, 454, 494, 495, 518, 519, 3001, 3012, 3013, 3014, 3020, 3022, 3023, 3024, 3025, 3027, 3028, 3030, 3033, 3034
ML	1763, 1764, 1775, 1781, 1782, 1783, 1784, 1787, 1788, 1791, 1802, 1804, 1831, 1832, 1881, 1884, 1885, 1894, 1900, 1995, 1998, 2004, 2355, 2360, 2410, 4738, 4749, 4750, 4751, 6949, 70047, 70108, 70109, 70115, 70116, 70121, 70126, 70127, 70131, 70142, 70161, 70163, 70164, 70171, 70193, 70194, 70236, 70237, 70241, 70252, 70256, 70257, 70258, 70259, 70260, 70287, 70288, 70289, 70290, 70291, 70294, 70298, 70309, 70310, 70311, 70312, 70313, 70319, 70325, 70327, 70328, 70331, 70334, 70336, 70337, 70338, 70339, 70340, 70342, 70343, 70344, 70345, 70350, 70354, 70355, 70369, 70370, 70371, 70372, 70374, 70375, 70377, 70378, 70379, 70383, 70384, 70385, 70386, 70387, 70389, 70401, 70403, 70410, 70411, 70412, 70417, 70421, 70424, 70429, 70430, 70431, 70450, 70455, 70456, 70457, 70459, 70462, 70463, 70468, 70469, 70470, 70477, 70478, 70479, 70482, 70483, 70484, 70485, 70493, 70494, 70507, 70524, 70525, 70526, 70528, 700003, 700014, 700016, 700017, 700018, 700019, 700020, 700021, 700024, 700026, 700027, 700032, 700033, 700034, 700035, 700036, 700040, 700041, 700042

Source: HoustonKemp analysis; Department of Natural Resources, Mines and Energy, Exploration and production permits - Queensland, http://qldspatial.information.qld.gov.au/catalogue/custom/detail.page?fid={B0D192C5-4076-43E8-9A2C-94A0FA928AF9}, accessed 27 March 2019

Table A-2 lists the tenement holders that we identify as being part of the corporate structure of an incumbent user of DBCT, and the identity of that incumbent. In section 3 above, we identify relevant transactions as those which result in none of these parties holding a share in the tenement.

Table A-2: Tenement holders and parent companies

Holder	Parent incumbent
AMCI (BROADLEA) PTY LTD	FITZROY
AMCI (CQ) PTY LTD	FITZROY
AMCI (IP) PTY LTD	FITZROY
AMCI (MOORVALE) PTY LTD	FITZROY
AMCI (MV) PTY LTD	FITZROY
ANGLO AMERICAN METALLURGICAL COAL PTY LTD	ANGLO AMERICAN
ANGLO COAL (CAPCOAL MANAGEMENT) PTY LIMITED	ANGLO AMERICAN
ANGLO COAL (GERMAN CREEK) PTY LTD	ANGLO AMERICAN
ANGLO COAL (GROSVENOR) PTY LTD	ANGLO AMERICAN
ANGLO COAL (ROPER CREEK) PTY LTD	ANGLO AMERICAN

Holder	Parent incumbent
ANGLO COAL INVESTMENT HOLDINGS PTY LTD	REALM RESOURCES LTD
BB INTERESTS PTY LTD	PEABODY
BHP AUSTRALIA COAL LIMITED	BHP
BHP AUSTRALIA COAL PTY LTD	BHP
BHP BILLITON MITSUI COAL PTY LTD	BHP
BHP COAL PTY LTD	BHP
BHP MITSUI COAL PTY LTD	BHP
BHP QUEENSLAND COAL INVESTMENTS PTY LTD	BHP
BHP QUEENSLAND COAL LIMITED	BHP
BHP-UTAH COAL LIMITED	BHP
BLAIR ATHOL COAL PTY LTD	TERRACOM LTD
BOWEN CENTRAL COAL PTY LTD	FITZROY
CAML RESOURCES PTY LTD	REALM RESOURCES LTD
CAPRICORN COAL DEVELOPMENTS PTY LTD	ANGLO AMERICAN
CAPRICORN COAL MANAGEMENT PTY LTD	ANGLO AMERICAN
COPPABELLA COAL (JPN) PTY LTD	PEABODY
COPPABELLA COAL PTY LTD	PEABODY
CUSTOM MINING (MIDDLEMOUNT) PTY LTD	MIDDLEMOUNT COAL
CVRD AUSTRALIA (CQ) PTY LTD	FITZROY
CVRD AUSTRALIA IP PTY LTD	FITZROY
DRAYTON MINING DEVELOPMENT PROPRIETARY LIMITED	ANGLO AMERICAN
FITZROY (CQ) PTY LTD	FITZROY
FITZROY COAL EXPLORATION PTY LTD	FITZROY
FOXLEIGH COAL PTY LTD	REALM RESOURCES LTD
GENERAL ELECTRIC MINERALS INC	BHP
GLENCORE COAL QUEENSLAND PTY LIMITED	GLENCORE
GS COAL PTY LTD	GLENCORE
MACARTHUR 2 PTY LTD	PEABODY
MACARTHUR 5 PTY LTD	PEABODY
MACARTHUR COAL (EQUIPMENT) PTY LTD	PEABODY
MACARTHUR COAL LTD	PEABODY
MACARTHUR COAL PTY LTD	PEABODY
MACARTHUR EXPLORATION PTY LTD	PEABODY
MACARTHUR MINING PTY LTD	PEABODY
MACARTHUR PREMIUM COALS PTY LTD	PEABODY
MACARTHUR RESOURCES PTY LTD	PEABODY
MACARTHUR RUSH PTY LTD	PEABODY
MIDDLEMOUNT COAL PTY LTD	MIDDLEMOUNT COAL
MILLENNIUM COAL PTY LTD	PEABODY
MIM COAL PTY LTD	GLENCORE
MIM HOLDINGS LIMITED	GLENCORE
MITTERB PTY LIMITED	PEABODY
MODERN MINING TECHNOLOGIES PTY LTD	PEABODY

Holder	Parent incumbent
MOORVALE COAL PTY LTD	PEABODY
MOORVALE INTEREST PTY LTD	PEABODY
MOUNT ISA MINES LIMITED	GLENCORE
NEBO CENTRAL COAL PTY LTD	FITZROY
NORTH GOONYELLA COAL PROPERTIES PTY LTD	PEABODY
OAKY CREEK HOLDINGS PTY LIMITED	GLENCORE
OLIVE DOWNS COAL PTY LTD	PEABODY
ORION MINING PTY LTD	TERRACOM LTD
PEABODY (BOWEN) PTY LTD	PEABODY
PEABODY (BURTON COAL) PTY LTD	PEABODY
PEABODY BB INTERESTS PTY LTD	PEABODY
PEABODY COPPABELLA PTY LTD	PEABODY
PEABODY ENERGY AUSTRALIA COAL PTY LIMITED	PEABODY
PEABODY ENERGY AUSTRALIA PCI RUSH PTY LTD	PEABODY
PEABODY MOORVALE WEST PTY LTD	PEABODY
PEABODY WEST BURTON PTY LTD	PEABODY
PEABODY WEST WALKER PTY LTD	PEABODY
PEMBROKE OLIVE DOWNS PTY LTD	PEMBROKE RESOURCES PTY LTD
QUEENSLAND COAL RESOURCES PTY LTD	FITZROY
RAG AUSTRALIA COAL PTY LIMITED	PEABODY
RIBFIELD PTY LTD	PEABODY
RUHRKOHLE AUSTRALIA PTY LIMITED	PEABODY
SHELL COAL (GERMAN CREEK) PTY LTD	ANGLO AMERICAN
SHELL COAL (GROSVENOR) PTY LTD	ANGLO AMERICAN
SHELL COAL (ROPER CREEK) PTY LTD	ANGLO AMERICAN
STANMORE IP COAL PTY LTD	STANMORE COAL
STANMORE IP SOUTH PTY LTD	STANMORE COAL
SUNRISE MINING (QLD) PTY LTD	PEABODY
SWANBANK RESOURCES PTY LTD	FITZROY
THIESS DAMPIER MITSUI COAL PTY LTD	BHP
THIESS NG PTY LIMITED	PEABODY
THIESS PEABODY MITSUI COAL PTY LTD	BHP
UMAL CONSOLIDATED LIMITED	BHP
UMAL CONSOLIDATED PTY LTD	BHP
UTAH DEVELOPMENT COMPANY LIMITED	BHP
UTAH MINING AUSTRALIA LIMITED	BHP
UTAH QUEENSLAND COAL LIMITED	BHP
WEST BURTON COAL PTY LTD	PEABODY
WEST WALKER COAL PTY LTD	PEABODY

A2. Tenement transaction dataset

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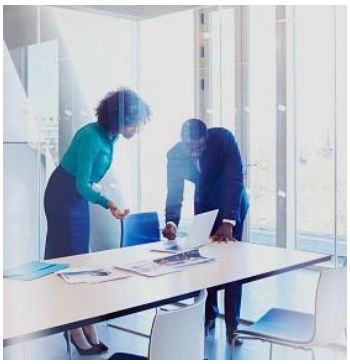
Appendix 3 GHD report on DBCT User Group's least-cost analysis for criterion (b)

GHD Advisory



Report on DBCT User Group's least-cost analysis for criterion (b)

DBCT Management

17 April 2019

Contents

Figures

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Tables

Appendices

1. Executive summary

Dalrymple Bay Coal Terminal (**DBCT**) is currently declared for third-party access under the *Queensland Competition Authority Act 1997 (Qld)* (**QCA Act**). Its declared status is due to expire on 8 September 2020. The QCA is currently assessing whether the coal handling service at DBCT satisfies the access criteria in section 76 of the QCA Act. On 18 December 2018, the QCA made a draft recommendation concluding that the coal handling service provided at DBCT satisfied the access criteria.

Several affected parties responded to the QCA's Draft Recommendation, including DBCT Management (**DBCTM**), Peabody Energy, Glencore, BHP and the DBCT User Group. The DBCT User Group engaged PricewaterhouseCoopers Consulting (Australia) Pty Limited (**PwC**) to support with the least-cost assessment for criterion (b). DBCTM engaged GHD Advisory (us) to review PwC's analysis.

PwC's assessment compared the cost of alternative export pathways (e.g. using RG Tanna Coal Terminal (**RGTCT**)) to that of accessing DBCT. Its modelling considered a demand exceedance above the current nameplate capacity of DBCT, and therefore considered an expanded and unexpanded DBCT.

PwC's base-case scenario adopted the QCA's average-cost approach for the least-cost assessment, and accepted also the QCA's estimate of total foreseeable demand in the market of 93 mtpa.[1] However, PwC did not include the cost of the below-rail expansions ($845m, FY2017) that the QCA considered necessary for Goonyella mines to be able to access the expanded DBCT.[2] If PwC had included these costs, it would have found that it is least cost for a combination of DBCT (unexpanded) and RGTCT to meet total foreseeable in the market, rather than for an expanded DBCT to do so.

[1] DBCT User Group submission on QCA Draft Recommendation, Schedule 2, 3rd PwC Report, p. 17

[2] QCA Draft Recommendation, Part C, Appendix A, p. 137

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This report has been prepared by GHD for DBCTM and may only be used and relied on by DBCTM for the purpose agreed between GHD and the DBCTM as set out in section 2 of this report.

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2. Introduction

DBCT is currently declared for third-party access under the QCA Act. Its declared status is due to expire on 8 September 2020. The QCA is currently assessing whether the coal handling service at DBCT satisfies the access criteria in section 76 of the QCA Act. On 18 December 2018, the QCA made a draft recommendation concluding that the coal handling service provided at DBCT satisfied the access criteria.

Several affected parties responded to the QCA's Draft Recommendation, including DBCTM, Peabody Energy, Glencore, BHP and the DBCT User Group. The DBCT User Group engaged PwC to support with the least-cost assessment for criterion (b). DBCTM engaged GHD Advisory (us) to review PwC's analysis.

2.1 Context for this report

In its response to the QCA's Draft Recommendation on criterion (b), the DBCT User Group agreed with the QCA's view that "costs should be construed widely, **so as to capture all costs of meeting total foreseeable demand in the market** using the facility in question, or using two or more facilities" (emphasis added).[3] The DBCT User Group also stated that the relevant costs 'clearly include costs of meeting foreseeable demand irrespective of whether they are incurred by the facility operator or by participants in dependent markets'.

For the DBCT case, the DBCT User Group considered that the QCA is "**absolutely correct in considering that the additional costs of rail infrastructure**, rail haulage and mine site infrastructure are clearly all relevant costs' (emphasis added) to meet total foreseeable demand in the market. It also claimed that any other interpretation of costs 'is not consistent with the 'natural monopoly' nature of the revised criterion (b)".[4] The DBCT User Group engaged PwC to support with the least-cost assessment for criterion (b).

Although the DBCT User Group considers that it is important to include the additional costs of rail infrastructure in the criterion (b) assessment, we observe that PwC did not account for the Goonyella below-rail expansions that the QCA considered necessary for DBCT to meet total foreseeable demand in the market of 93 mtpa.

We note PwC's statement that "the QCA's estimation of the cost of an expansion to the Goonyella rail network also was conservative, in that it overestimated the impact of accessing an expanded DBCT, which had the effect of biasing the comparison of supply chain costs towards Abbot Point or RG Tanna pathways".[5] This suggests that PwC would have sought to model the below-rail expansion cost using assumptions that it would consider more appropriate, not exclude these costs from its modelling altogether.[6]

If PwC had accounted for the below-rail expansions that the QCA's least-cost analysis deemed necessary, it would have found that it is least cost for the combination of DBCT (unexpanded) and RGTCT to meet total foreseeable demand in the market. This report sets out our logic chain and findings to support this conclusion.

[3] DBCT User Group submission on QCA Draft Recommendation, p. 7-8

[4] DBCT User Group submission on QCA Draft Recommendation, p. 8

[5] DBCT User Group submission on QCA Draft Recommendation, Schedule 2, 3rd PwC Report, p. 13

[6] Our report for DBCTM that responded to the QCA's Draft Recommendation considered that the QCA's estimate of the impact of Goonyella-system below-rail expansions on the average cost of accessing the expanded DBCT supply chain were reasonable. We do not consider that the QCA's estimation approach was conservative in that respect. See DBCTM submission on QCA's Draft Recommendation, Appendix 7, pp. 19-21

2.2 This report

This report is structured as follows:

- Section 3 sets out PwC's approach for modelling the supply chain costs of accessing DBCT (existing and as expanded) and alternative export pathways for Central Queensland coal miners.
- Section 4 provides our view on what PwC's finding on average supply chain costs would have been if it had incorporated the costs of the below-rail expansions that the QCA considered necessary for DBCT (expanded) to meet total foreseeable demand in the market.

3. PwC's approach

PwC has prepared three reports for the DBCT User Group as part of the current declaration review process. These are:

- *2018 Access Declaration Review,* submitted as part of the DBCT User Group's initial submission to the QCA of 30 May 2018(the **first PwC report**)
- *2018 2018 Access Declaration Review – Supplementary Report,* which accompanied the DBCT User Group's cross-submission to the QCA on 16 June 2018 (the **second PwC report**)
- *2020 Access Declaration Review,* which formed part of the DBCT User Group's response to the QCA's Draft Recommendation on 11 March 2019 (the **third PwC report**).

PwC's least-cost approach assesses whether the cost of using alternative export pathways to meet a nominated demand exceedance (e.g. 8 or 10 mtpa) over DBCT's nameplate capacity is higher than the cost of accessing an expanded DBCT to meet the demand exceedance. If the cost of the alternative export pathway is higher than that of accessing the expanded DBCT, then criterion (b) is satisfied

In each of its reports, PwC's least-cost assessment supports the view that criterion (b) is satisfied. We describe PwC's modelling assumptions in the first and second reports, and then explain how it reached its findings in its third report were reached in section 3.1 and 3.2.

3.1 PwC's modelling assumptions (first and second reports)

In its first and second reports, PwC's approach to the least-cost assessment considers the cost per tonne of DBCT expansions relative to the cost of accessing existing capacity at other terminals (e.g. RGTCT, Adani Abbot Point Terminal (**AAPT**), and Wiggins Island Coal Export Terminal (**WICET**)). Hence, PwC's approach in these two reports was based on an incremental-cost comparison. The approach was as follows[7]:

- **For each DBCT port expansion option**, the cost per tonne was calculated by developing a proxy regulated asset base (RAB). The relevant capital cost per tonne was determined based on an indexed annuity payment set to recover the proxy RAB over the economic life of DBCT. [8] PwC's key assumptions for developing the capital costs were:
  - Identifying expansion costs in 30 June 2017 terms
  - Using a nominal pre-tax WACC of 7.10 per cent across the modelling term[9]
  - Applying an economic life of 37 years from 1 July 2017[10]
  - Applying an annual inflation of 2.5 per cent over the modelling term
  - Applying interest during construction (IDC) costs of 9.6 per cent of expansion costs[11]
  - Applying upfront financing costs of 2.3 per cent of expansion costs[12].

[7] DBCT User Group submission on declaration review regarding DBCT, Schedule 3, 1st PwC Report, p. 27

[8] DBCT User Group cross submission, Schedule 3, PwC, p. 26 (also known as 2nd PwC Report)

[9] Reflecting the nominal post-tax vanilla WACC of 5.82 per cent that the QCA approved for DBCTM's 2015 DAU

[10] Based on the terminal life adopted in the QCA's final decision on DBCTM's 2015 DAU

[11] Based on the IDC percentage of terminal RAB developed in the QCA's 2005 Draft Access Undertaking Draft Decision

[12] Based on the up-front financing costs as a percentage of terminal RAB developed in the QCA's 2005 Draft Access Undertaking Draft Decision

- **Incremental operating costs** associated with each DBCT expansion would be $2.53 per tonne, which was based on the then current fixed and variable handling charges, as published by DBCTM.[13]
- **For each alternative terminal**, the reported cost per tonne was an average based off individual users' reported costs (which where were provided to PwC) of accessing both rail and port capacity.

In its third report, to be consistent with the QCA's analytical framework for the modelling of supply chain costs and expansion costs, PwC modified its incremental-cost comparison approach to assess instead the average supply chain cost of accessing capacity at all relevant terminals.[14] That is, PwC included the total cost of using the Goonyella system and any other relevant rail system to haul coal from mine to terminal. PwC also updated its cost assumptions, based on information reported by DBCT users or the QCA's costs.

Appendix A provides an example of how PwC presented its cost-related findings for AAPT in the first, second and third reports.

3.2 PwC's derivation of average supply chain costs (third report)

PwC's least-cost analysis from the third report estimates the average supply chain costs of a Goonyella mine accessing DBCT, DBCT (as expanded) and alternative coal terminals.[15] The analysis is presented in Table 1.

Table 1: PwC's derivation of average supply chain costs ($ per tonne), third report

Coal tonnages	DBCT + RGTCT (unit cost)	DBCT + AAPT (unit cost)	DBCT + WICET (unit cost)	DBCT (expanded)
85 mtpa (DBCT)	$14.60	$14.60	$14.60	$14.60
8 mtpa[16] [17]	$21.43	$22.82	$39.43	$16.54[18] (inferred by GHD)
93 mtpa[19] (average cost)[20]	**$15.18**	**$15.30**	**$16.71**	**$14.76**

As an example, PwC determined the average supply chain cost of the combination of DBCT (unexpanded) and RGTCT to be $15.18 per tonne (refer to first column of Table 1). This is based on the total costs of the unexpanded DBCT serving 85 mtpa ($14.60 per tonne x 85 mt) and RGTCT serving 8 mtpa ($21.43 per tonne x 8 mt), divided by 93 mt.[21]

[13] DBCT User Group cross submission, Schedule 3, PwC, p. 27 (2nd PwC Report). (http://www.dbctm.com.au/coalchain/charges.aspx)

[14] DBCT User Group submission on QCA Draft Recommendation, Schedule 2, 3rd PwC Report, pp. 17, 15 and 6

[15] We note that PwC has not considered the relevance of sunk costs in its derivation of average supply chain costs. Our report does not seek to provide a view on the appropriateness of PwC's approach in this respect.

[16] PwC used 7.9 mtpa instead of 8 mtpa. The calculations in Table 1 use 7.9 mtpa to be consistent with PwC's own numbers.

[17] DBCT User Group submission on QCA Draft Recommendation, Schedule 2, 3rd PwC Report, p. 11

[18] Solution for y in [(14.60 x 85) + (y x 7.9)] / 92.9 = 14.76 is $16.48 per tonne. However, due to rounding issues in PwC's analysis, we found the appropriate number to be $16.54 per tonne. This number still leads to the average cost being $14.76 per tonne.

[19] PwC used 92.9 mtpa instead of 93 mtpa. The calculations in this table use 92.9 mtpa to be consistent with PwC's own numbers.

[20] DBCT User Group submission on QCA Draft Recommendation, Schedule 2, 3rd PwC Report, p. 17

[21] See footnotes 16 and 19 about the use of 7.9 mtpa and 92.9 mtpa, instead of 8 mtpa and 93 mtpa, respectively

Since its estimate of the average supply chain cost of DBCT (expanded) meeting total foreseeable demand in the market of 92.9 mtpa[22] ($14.76 per tonne) is lower than the average supply chain cost of all other terminals doing so (shown in Table 1), PwC concluded that "an expanded DBCT facility remains the least-cost means of meeting foreseeable demand".[23]

Importantly, we note that PwC's modelling approach in the third report is consistent with the approach set out in the worked example of Appendix B of the QCA Staff Issues Paper.[24] Its approach is consistent also with section 4 of GHD's criterion (b) report for DBCTM's submission on the QCA's Draft Recommendation.[25]

In its third report, PwC did not explain how it derived the $14.76 per tonne figure for the average supply chain cost for the expanded DBCT facility (see last column of Table 1). We have inferred from PwC's own numbers that the cost of the expanded DBCT serving 8 mtpa of demand is $16.54 per tonne.[26] Verifying how PwC determined this $16.54 per tonne figure requires an understanding of the incremental-cost analysis that its second report presented. In that report, PwC stated that the terminal cost of using DBCT (existing) was $4.86 per tonne and that the port-terminal cost of using an expanded DBCT facility (i.e. with the Zone 4 and 8 Phase 1 expansions) is $6.80 per tonne.[27]

Hence, PwC's calculation of the incremental cost of the expanded DBCT supply chain relative to the existing one is $1.94 per tonne (i.e. $6.80 per tonne minus $4.86 per tonne). The incremental average supply chain cost for the expanded DBCT facility is thus $16.54 per tonne (i.e. $14.60 + $1.94). Therefore, the average supply chain cost to use the expanded DBCT facility is $14.76 per tonne. [28]

PwC's calculation of $16.54 per tonne for the average supply chain cost of accessing the expanded DBCT facility does not account for the Goonyella below-rail expansions of $845m (FY2017)[29] that the QCA considers are needed for the expanded DBCT supply chain to support 93 mtpa of demand. This includes the construction of a fourth balloon loop at DBCT and track duplication in part of the Goonyella system's Connors Range. Accounting for these costs would support the DBCT User Group's statement that:

> *…it is clear from a range of sources that there are currently capacity constraints in the Goonyella system. In particular, the 2018 Aurizon Network Development Plan suggest the Goonyella system 'has only limited latent capacity on the mainline trunk', with the Connors Range described as the 'constraining section in the Goonyella system'.* [30]

Aurizon Network has also provided evidence, in its 12 April 2019 letter to DBCTM, indicating that it is in the process of assessing customer demand for rail infrastructure options to provide additional capacity in the Goonyella system.[31]

Our analysis to capture the impact of the below-rail expansion costs on average supply chain costs to access the expanded DBCT facility is set out in section 4 below.

[22] The QCA's estimate is 92.99 mtpa. It is unclear why PwC used 92.9 mtpa in its analysis.

[23] DBCT User Group submission on QCA draft recommendation, Schedule 2, 3rd PwC Report, p. 17

[24] QCA Staff Issues Paper, Appendix B, pp. 31-32

[25] DBCTM submission on QCA's Draft Recommendation, Appendix 7, pp. 6-9

[26] See footnote 18.

[27] DBCT User Group cross submission, Schedule 1, 2nd PwC Report, pp. 19-20

[28] ($14.60/t x 85 mt + $16.54 x 7.9 mt) / 92.9 mt = $14.76 per tonne

[29] QCA Draft Recommendation, Part C, Appendix A, p. 137

[30] DBCT User Group submission on QCA draft recommendation, p. 43

[31] Letter from Aurizon Network to DBCTM, *Aurizon Network Demand Assessment: Potential Rail Infrastrcuture (sic) Expansion to the Goonyella Infrastructure*, 12 April 2019. DBCTM provided GHD this letter in an e-mail dated 15 April 2019.

4. GHD analysis

4.1 GHD's assumptions

While PwC's modelling approach in section 3.1 applied to the various DBCT expansion options, we note that it can be readily applied to Aurizon Network's below-rail expansion costs of $845 million (FY17). Under the circumstances that the QCA would adopt for Aurizon Network, the following revised assumptions are:

- Use of post-tax nominal WACC of 7.17 per cent (the WACC the QCA used in its Draft Recommendation for determining below-rail expansion costs) instead of the post-tax nominal WACC 5.82 per cent to determine a nominal pre-tax WACC for the annuity calculation. This yields a pre-tax nominal WACC of 8.79 per cent instead of 7.10 per cent
- Use of 20-year modelling period (as per QCA's Aurizon-Network depreciation approach) instead of 37 years (the DBCT depreciation approach).

We have estimated incremental per-tonne operating costs associated with the below-rail expansions in the Goonyella system to be Aurizon Network's AT1 Goonyella-system revenue in FY2017, which reflects incremental maintenance costs, divided by FY2017 Goonyella-system actual tonnes. We have estimated this figure to be $0.20 per tonne.[32]

4.2 GHD's findings

When the revised assumptions in section 4.1 are adopted under PwC's modelling approach, we determine the incremental per-tonne below-rail cost to be approximately $10.88 per tonne. This comprises $10.68 per tonne for the incremental capital cost and $0.20 per tonne for the incremental operating cost.

PwC estimates total current below- and above-rail costs to be $9.56 per tonne in the Goonyella system, but does not present the below- and above-rail rail costs separately.[33] Hence, we have assumed that the QCA's split of below- and above-rail costs, which PwC presented in its third report, is maintained (i.e. $2.62 per tonne for below rail and $3.70 per tonne for above rail, for total rail costs of $6.32 per tonne). Thus, the PwC estimate of below-rail costs would have been $3.96 per tonne.

If an existing DBCT user in the Goonyella system (who pays $3.96 per tonne for below-rail charges) were to be a DBCT expansion user (i.e. a user of the upgraded below-rail capacity to access DBCT with the Zone 4 and 8X Phase 1 expansions), it would incur an additional $6.92 per tonne (i.e. $10.88 per tonne minus $3.96 per tonne), approximately, relative to current charges. Thus, when the cost of the necessary below-rail expansions are accounted for in the average supply chain costs for Goonyella users, the average supply chain cost is $15.36 per tonne[34] instead of $14.76 per tonne to access an expanded DBCT (see Table 2).

Table 2 shows that when PwC's modelling approach is updated to accommodate the costs of the necessary below-rail expansions, the average supply chain cost of the expanded DBCT supply chain meeting total foreseeable demand ($15.36 per tonne) is higher than the supply chain combination of DBCT (unexpanded) and RGTCT doing so ($15.18 per tonne). It is also higher than the combination of DBCT (unexpanded) and AAPT to do so ($15.30 per tonne).

[32] [$0.63 /'000 gtk x 36.1 billion gtk] / 111.1 mt

[33] DBCT User Group submission on QCA draft recommendation, Schedule 2, 3rd PwC Report, p. 10

[34] When including the impact of below-rail expansions, the incremental average supply chain cost for using the expanded DBCT increases from $16.54 per tonne to $23.46 per tonne. See footnote 36 for the relevant calculations.

Table 2: PwC's average supply chain costs ($ per tonne), adjusted by GHD

Coal tonnages	DBCT (expanded) (PwC) (unit cost)	DBCT (expanded) (GHD-corrected) (unit cost)	DBCT + RGTCT (PwC) (unit cost)	DBCT + AAPT (PwC) (unit cost)
85 mtpa (DBCT existing)	$14.60	$14.60	$14.60	$14.60
8 mtpa	$16.54[35]	$23.46[36]	$21.43[37]	$22.82
93 mtpa (average cost)	**$14.76**	**$15.36**	**$15.18**	**$15.30**

In summary, if PwC had accounted for the Goonyella below-rail expansions that the QCA considered necessary for total foreseeable demand of 93 mtpa to be met, criterion (b) would not have been satisfied.

[35] Calculated by GHD as $14.60 + ($6.80 - $4.86) [incremental port cost to use expanded DBCT]

[36] $14.60 [existing DBCT supply chain cost] + ($6.80 - $4.86) [incremental port cost to use expanded DBCT] + $6.92 [incremental rail cost to use expanded DBCT].

[37] DBCT User Group submission on QCA draft recommendation, Schedule 2, 3rd PwC Report, p. 11

GHD Advisory

Appendices

Appendix A

To illustrate PwC's approach, we present, in Table 3, PwC's cost estimates in its first, second and third reports for a Goonyella mine to access AAPT. Note that the separation of costs between port and rail is unpublished in PwC's second report; however, given the total supply chain cost did not change between the first and second reports, we have assumed that the individual costs were unchanged.

Table 3: PwC's cost estimates for a Goonyella mine to access AAPT ($ per tonne), first to third report

Item	First report (incremental-cost approach)	Second report (incremental-cost approach)	Third report (average-cost approach)
Port cost	$7.00*	$7.00**	$6.77
Rail cost	$11.00*	$11.00**	$16.05
Supply chain cost	**$18.00**	**$18.00****	**$22.82**

*Note: the port cost presented from the first and second report reflects the total port cost, while the rail cost presented reflects the incremental cost of using the Goonyella Abbot Point / Newlands system relative to using the Goonyella system for above- and below-rail services.
**Note: assumed to be unchanged from the first report.

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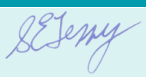
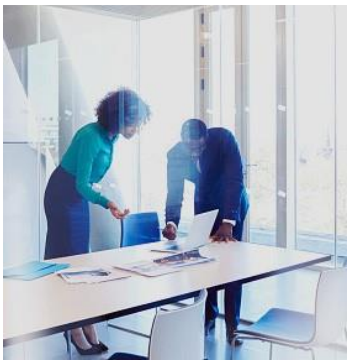
Final	Hiresh Devaser	Simon Terry		Hiresh Devaser		17 April 2019

GHD Advisory

Appendix 4 GHD report on criterion (a)

GHD Advisory



Response to criterion (a)

DBCT Management

17 April 2019

GHD

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Figures

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Tables

1. Executive summary

The coal handling service at Dalrymple Bay Coal Terminal (**DBCT**) is currently declared for third-party access under the *Queensland Competition Authority Act 1997 (Qld)* (**QCA Act**). The declaration is due to expire on 8 September 2020.

The QCA is currently assessing whether the coal handling service at DBCT satisfies the access criteria in section 76 of the QCA Act. On 18 December 2018, the QCA made a draft recommendation concluding that the service satisfied the access criteria (**Draft Recommendation**).

On 20 March 2019, the QCA hosted a stakeholder forum to hear the views of DBCT Management (**DBCTM**), the DBCT User Group and other stakeholders on the Draft Recommendation. One of the major issues raised during the forum was whether declaration will promote a material increase in competition in the Hay Point catchment coal tenements market (the **coal tenements market)**. Specifically, stakeholders queried how DBCTM and users would negotiate terms and conditions of access if DBCTM's executed, binding Access Framework[1] did not apply, in a future without declaration.

In its Draft Recommendation, the QCA concluded that the "[e]nvironment for competition in [the] coal tenements market would be materially better with declaration than it would be without declaration".[2] In forming this position, the QCA stated that the key question to address is whether access to the service in a future without declaration would result in a material asymmetry between existing DBCT users (**incumbents**) and potential DBCT users (**potential entrants**) involved in the Hay Point catchment coal tenements market, such that market entry by efficient firms would be discouraged.[3]

The QCA determined that because incumbents enjoy evergreen rights under the access agreements signed with DBCTM, these parties would not be materially affected in a future without declaration. For potential entrants, however, the QCA considered that:

> *access to DBCT capacity in a future without declaration would depend on their willingness to pay relative to other access seekers, with the coal handling charge likely being subject to a cap to reflect the cost they would likely incur for accessing the next alternative terminal.*[4]

DBCTM engaged GHD Advisory (us) to review the QCA's approach to criterion (a) in respect of the coal tenements market. We have done this by reviewing the QCA's approach and assumptions for selecting the alternative terminal and for estimating the supply chain costs that a potential entrant would incur in using that terminal.

The QCA found that only Wiggins Island Coal Export Terminal (**WICET**) had spare capacity (11 million tonnes per annum (mtpa)) available, and that the supporting Blackwater below-rail network has 18 mtpa of spare capacity. We consider that WICET is not the appropriate alternative terminal for the QCA to have selected, as publicly available information demonstrates that RG Tanna Coal Terminal (**RGTCT**) has spare capacity of approximately 8.4 mtpa.[5]

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[1] DBCTM submission on QCA Draft Recommendation, Appendix 11

[2] QCA Draft Recommendation, Part C, p. 53

[3] QCA Draft Recommendation, Part C, pp. 54, 83

[4] QCA Draft Recommendation, Part C, p. 84

[5] DBCTM submission on QCA Draft Recommendation, Appendix 7, p. 11

Since existing DBCT capacity of 85 mtpa is fully contracted under the QCA's estimates of total foreseeable demand in the market over the declaration period (i.e. 84.68 mtpa to 92.99 mtpa)[6], the QCA's analysis should have focused on average supply chain costs that potential entrants would bear in accessing *expanded* capacity at DBCT relative to existing capacity at RGTCT. Servicing total foreseeable demand of 92.99 mtpa would require an expansion at DBCT and on the Goonyella below-rail network. Both the DBCT 2017 Access Undertaking (**DBCT 2017 AU)** [7] and Aurizon Networks 2019 Access Undertaking **(AN 2019 AU)** [8] allow for differentiated or socialised charges to apply to expansion users.

The default position under the DBCT 2017 AU is to apply an incremental-up / average-down approach for expansion pricing. The AN 2019 AU provides that expanding users should generally pay an access charge that reflects at least the full incremental costs of the additional capacity provided. Given these, a potential entrant would be acting reasonably and prudently if it considers it will be subject to incremental-cost pricing for using the DBCT and Aurizon Network expansions. Consistent with the QCA's analysis in the Draft Recommendation, potential entrants would incur a differentiated price[9] of 18.74 per tonne to access the expanded DBCT [10]. When this figure is compared with the average supply chain costs incurred for using RGTCT of $20.09 per tonne, the difference in supply chain costs is only $1.35 per tonne.

The $1.35 per tonne difference is substantially less than the $3.50 per tonne figure that the QCA considered would not be materially different when comparing the coal handling charge a potential entrant would incur under differential pricing relative to socialised pricing for accessing an expanded DBCT.[11] Hence, criterion (a) is not satisfied.

We also note that the QCA has incorrectly applied Aurizon Network's pricing framework in deriving the upper-bound average below-rail costs incurred by Goonyella mines accessing RGTCT. The QCA's approach for calculating these costs is inappropriate because Goonyella-to-Blackwater cross-system train services do not incur the:

- AT2 tariff component in the Goonyella system.[12] Goonyella mines that use RGTCT are exempt from paying this component because they do not use the constrained corridor of Coppabella to Hay Point Junction in the Goonyella system.
- AT4 tariff component in the Blackwater system.[13] The AT4 tariff applies only in the origin system.

When these corrections are made, the QCA's estimate of FY17 upper-bound average supply chain cost for accessing RGTCT decreases from $20.09 per tonne to $16.94 per tonne. This is *lower* than the $18.74 per tonne that the QCA has estimated that Goonyella mines would incur to use the expanded DBCT, if subject to differential pricing. Hence, potential entrants do not face a materially different supply chain cost in accessing RGTCT relative to the expanded DBCT. Accordingly, criterion (a) is not satisfied. The misapplication of Aurizon Networks pricing framework also has implications for the QCA's criterion (b) assessment (refer to GHD Advisory's Update to March 2019 criterion (b) report, submitted with DBCTM's overarching response).

[6] QCA Draft Recommendation, Part C, p. 45

[7] DBCT 2017 AU, clause 11.13 (a) – (c)

[8] AN 2019 AU, clause 6.4.1(d), Expansion pricing principles

[9] Assuming that the differential price applies to the 8 mtpa over DBCTM's nameplate capacity of 85 mtpa. The cost of $18.74 per tonne was noted in page 8 of GHD's report in Appendix 7 of DBCTM's submission on the QCA's Draft Recommendation.

[10] Assuming that the differential price applies to the 8 mtpa over DBCTM's nameplate capacity of 85 mtpa. The cost of $18.74 per tonne was noted in page 8 of GHD's report in Appendix 7 of DBCTM's submission on the QCA's Draft Recommendation.

[11] QCA Draft Recommendation. Part C, pp. 85-86

[12] Aurizon Network's 2019 AU, cl. 2.3(a)(ii), p. 360

[13] Aurizon Network's 2019 AU, cl. 2.3(a)(iv), p. 360

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This report is intended to be provided as part of a wider submission to the QCA by DBCTM. While components of this report may be relevant to access declaration considerations for other infrastructure facilities, our conclusions are based on DBCT-specific information and the market within which DBCT operates. It should not be used to draw conclusions on the arrangements at other facilities.

2. Background

The coal handling service at DBCT is currently declared for third-party access under QCA Act. The declaration is due to expire on 8 September 2020. The QCA is currently assessing whether the coal handling service at DBCT satisfies the access criteria in section 76 of the QCA Act. On 18 December 2018, the QCA made a draft recommendation concluding that the service satisfied the access criteria.

Following the Draft Recommendation, DBCTM, the DBCT User Group, Peabody Energy Australia, BHP and Glencore lodged submissions with the QCA responding to key issues raised in the Draft Recommendation. On 20 March 2019, the QCA hosted a stakeholder forum to hear the views of DBCTM, the DBCT User Group and other stakeholders on the Draft Recommendation.

2.1 The importance of criterion (a) for stakeholders of DBCT

Criterion (a) is set out under section 76(2)(a) of the QCA Act as:

> *that access (or increased access) to the service, on reasonable terms and conditions, as a result of a declaration of the service would promote a material increase in competition in at least 1 market (whether or not in Australia), other than the market for the service…*[14]

To date, the most contentious dependent market under criterion (a) for stakeholders has been the coal tenements market. The coal tenements market is the market for resource authorities issued by the Queensland government which allow mining companies to develop, explore and operate coal mines in Queensland.[15] The competition issue that emerges from criterion (a) in respect of tenements is the potential impact that declaration may have on efficient investment in this market.

DBCTM included an Access Framework in its submission, which largely reflects the terms of access contained within the current 2017 AU, which was approved by the QCA. One of the key differences between the Access Framework and the 2017 AU that is relevant for the assessment of criterion (a) is the pricing arrangements that would apply without declaration.

One of the key issues raised during the stakeholder forum was the conditions under which DBCTM and users would negotiate terms and conditions of access if DBCTM's executed, binding Access Framework[16] did not apply in a future without declaration.

2.2 This report

DBCTM engaged GHD Advisory (us) to review the QCA's approach to criterion (a) in respect of the coal tenements market. Our report is structured as follows:

- Section 3 provides a summary of the QCA's approach to assessing criterion (a) in respect of the coal tenements market.
- Section 4 provides our analysis on the shortcomings of the QCA's assessment framework and methodology.

[14] QCA Act, Section 76(2)(a)

[15] QCA Draft Recommendation, Part C, pg.55

[16] DBCTM submission on QCA Draft Recommendation, Appendix 11

3. The QCA's approach

3.1 The QCA's approach to assessing criterion (a)

The QCA focused its assessment of criterion (a) on whether DBCTM would be able to exert market power, such that competition in at least one dependent market would be impacted, in a future without declaration. It then considered whether economic regulation of DBCT would constrain DBCTM's market power such that competition in that dependent market would be "materially better with declaration than…without…".[17]

The QCA undertook the following steps in assessing criterion (a):[18]

1 Identifying the dependent markets and also confirming that each market is distinct from the market for the DBCT service.

2 Assessing the extent of the constraint on DBCTM's ability to exercise market power, by comparing the case in which DBCT remains declared with the case in which the service becomes undeclared.

3 Comparing the competitive environment of dependent markets in a future with and without declaration, if the QCA found that DBCTM had an ability to exercise market power in the absence of declaration

4 Determining whether declaration would lead to a material increase in competition in at least one of the identified dependent markets.

The QCA considered the relevant dependent markets to be the coal tenements market, the market for above-rail services, the secondary capacity trading market at DBCT and coal export markets. This report focuses on the impact on competition in the coal tenements market, as the QCA considered this was the only market that is materially impacted by declaration.

Criterion (a) is concerned with whether declaration would lead to a *material increase* in competition. That is, the focus is not on whether declaration would mitigate or eliminate any potential detrimental impacts to competition associated with DBCTM exercising market power. Hence, the QCA considered matters such as the condition of entry into the coal tenements by efficient firms – such as the impact DBCTM's conduct in the market would have on the incentives to enter this market – as important for its assessment of whether declaration would result in a material increase in competition in this market.[19]

The QCA considered whether there would be a material asymmetry between existing and future users of DBCT, and how this asymmetry may impact the competitive environment of the coal tenements market. Specifically, the QCA stated that the key question to address is whether access to the service in a future without declaration would result in a material asymmetry between existing DBCT users (**incumbents**) and potential DBCT users (**potential entrants**) involved in the Hay Point catchment coal tenements market.[20]

The QCA determined that because incumbents enjoy evergreen rights under the access agreements signed with DBCTM, these parties would not be materially affected in a future without declaration. For potential entrants, however, the QCA considered that:

> *access to DBCT capacity in a future without declaration would depend on their willingness to pay relative to other access seekers, with the coal handling charge likely being subject to a cap to reflect the cost they would likely incur for accessing the next alternative terminal.*[21]

[17] QCA Draft Recommendation, Part C, p.52

[18] QCA Draft Recommendation, Part C, p.52

[19] QCA Draft Recommendation, Part C, p.80

[20] QCA Draft Recommendation, Part C, pp. 54, 83

[21] QCA Draft Recommendation, Part C, p. 84

The QCA assessed the potential competition impacts in the coal tenements market by considering the extent of available capacity at WICET, RGTCT and Adani Abbot Point Terminal (AAPT). It then considered the relevant costs that would be incurred by a potential entrant in accessing the DBCT supply chain relative to those of accessing other terminals.

We set out the QCA's capacity and cost assumptions in section 3.1.1 and section 03.1.2, respectively.

3.1.1 The QCA's view on spare capacity at alternative terminals

The QCA considered the extent of spare capacity at alternative terminals to be relevant for its assessment of criterion (a) and the impact on competition in the coal tenements market. Table 1 outlines the QCA's findings on spare capacity at other Queensland coal terminals.

The QCA found that only WICET had spare capacity (11 mtpa) available, and that the supporting Blackwater below-rail network has 18 mtpa of spare capacity.

Table 1: The QCA's view on the contracted capacity status at Central Queensland coal terminals[22]

Terminal	Nominal capacity (mtpa)	Contracted capacity status (mtpa)
DBCT	85	76.9 mtpa
AAPT	50	Fully contracted
WICET	27	16 mtpa
RGTCT	75	Unknown. QCA assumes it is fully contracted.

3.1.2 The QCA's supply chain cost estimates used in the assessment of criterion (a)

As the QCA determined that WICET was the only alternative terminal that had spare capacity available, it only considered the average supply chain cost at WICET of at least $26 per tonne.[23] It compared this cost against the average supply chain cost of DBCT of $11 per tonne, and observed that the per-tonne cost difference was at least $15.[24] In doing so, the QCA said that:

> *… the coal handling charge at DBCT for potential entrants in a future without declaration would likely go up from the current $5 per tonne (that incumbents would pay) by an additional at least $15 per tonne to at least $20 per tonne, such that the cost of accessing DBCT for entrants would be about the same as accessing WICET, all other things being equal…*
>
> *A coal handling charge at this level for potential entrants would represent at least 8 to 12 per cent of the forecast metallurgical coal prices in a future without declaration. This would be at least four times the 2 to 3 per cent of metallurgical coal price that existing users would pay as a coal handling charge.*[25]

[22] QCA Draft Recommendation, p. 10

[23] QCA Draft Recommendation, Part C, p. 84

[24] QCA Draft Recommendation, Part C, p. 84

[25] QCA Draft Recommendation, Part C, p. 85

The QCA relied on the 8 to 12 per cent figure in reaching its conclusion on criterion (a). It considered that the potental increase in the coal handling charge at DBCT in a world without declaration would put potential entrants at a material disadvantage relative to incumbents and, on that basis, concluded that criterion (a) was satisfied. [26]

[26] QCA Draft Recommendation, Part C, p. 4

4. GHD's analysis

The QCA's finding that declaration would result in a material increase in competition in the coal tenements market is inappropriate. The QCA has undertaken its analysis with reference to WICET, based on its finding that WICET is the only other terminal within the Central Queensland Coal Network with spare capacity.

In our March 2019 criterion (b) report for DBCTM[27], we found that there was sufficient evidence to demonstrate that there is spare capacity of 8.4 mtpa at RGTCT. This section outlines our analysis on the average supply chain costs that would be incurred by a potential entrant in the coal tenements market in accessing an expanded DBCT supply chain, relative to those of accessing RGTCT.

4.1 Using the QCA's estimate of average supply chain costs

The QCA found that WICET is the only alternative terminal with spare capacity (11 mtpa) and that the supporting Blackwater below-rail network has 18 mtpa of spare capacity. Since the QCA-derived average supply chain cost for Goonyella mines to access WICET is at least $26 per tonne while that for accessing DBCT is $11 per tonne currently; there is at least a $15 per tonne cost difference incurred by potential entrants.

Without declaration, the QCA considered that the coal handling charge at DBCT could likely increase by at least $15 per tonne. This $15 per tonne difference was considered by the QCA to be material for potential entrants' ability to compete in the coal tenements market.[28] The QCA noted this led to the coal handling charge being approximately 8 to 12 per cent of the forecast metallurgical coal price, which the QCA considered to be materially different to the current 2 to 3 per cent.[29]

In our March 2019 criterion (b) report for DBCTM, we pointed to publicly available information that demonstrates RGTCT has spare capacity of approximately 8.4 mtpa.[30] Therefore, instead of selecting WICET as the alternative terminal for its criterion (a) analysis, the QCA should have considered RGTCT. Since existing DBCT capacity is fully contracted under the QCA's estimates of total foreseeable demand over the declaration period (i.e. 84.68 mtpa to 92.99 mtpa)[31], the QCA's analysis should have focused on average supply chain costs that potential entrants would bear in accessing *expanded* capacity at DBCT relative to existing capacity at RGTCT.

Servicing total foreseeable demand of 92.99 mtpa would require an expansion at DBCT and on the Goonyella rail network. Both the DBCT 2017 Access Undertaking (**DBCT 2017 AU)** [32] and Aurizon Networks 2019 Access Undertaking **(AN 2019 AU)** [33] allow for socialised or differentiated charges to apply to expansion users. Hence, differential pricing becomes a relevant consideration in the assessment of criterion (a). We note that the QCA acknowledged that either socialised or differentiated coal handling charges would be borne by potential entrants using the expanded DBCT.[34]

[27] DBCTM submission on QCA Draft Recommendation, Appendix 7, p. 11

[28] QCA Draft Recommendation, Part C, pp. 70-71, 84

[29] QCA Draft Recommendation, Part C, p. 85

[30] DBCTM submission on QCA Draft Recommendation, Appendix 7, p. 11

[31] QCA Draft Recommendation, Part C, p. 45

[32] DBCT 2017 AU, clause. 11.13 (a) – (c)

[33] AN 2019 AU, clause 6.4.1(d), Expansion pricing principles

[34] QCA Draft Recommendation, Part C, p. 85

Consistent with the QCA's analysis in the Draft Recommendation, potential entrants would incur either of the following costs for the expanded DBCT supply chain:

- $12.05 per tonne, if the DBCT and Aurizon Network expansions are socialised
- $18.74 per tonne, if the DBCT and Aurizon Network expansions are differentially priced.[35]

The default position under the DBCT 2017 Access Undertaking (**DBCT 2017 AU**) is to apply an incremental-up / average-down approach for expansion pricing.[36] The AN 2019 AU provides that expanding users should generally pay an access charge that reflects at least the full incremental costs of the additional capacity provided.[37] These positions have been formed over five years of extensive stakeholder consultation and regulatory decisions led by the QCA.

Given these observations, a potential entrant would be acting reasonably and prudently if it considers it will be subject to incremental-cost pricing for using the DBCT and Aurizon Network expansions. Hence, the average supply chain cost that the potential entrant would reasonably expect to incur in accessing the expanded DBCT is $18.74 per tonne.

For a potential entrant that would access RGTCT, the QCA estimates that the:

- lower-bound average supply chain cost is $17.02 per tonne
- upper-bound average supply chain cost is $20.09 per tonne.[38]

We consider that a potential entrant would be acting prudently if it expects, reasonably, that the upper bound of $20.09 per tonne for it to access RGTCT applies.

Table 2 summarises the average supply chain cost difference outcomes when expansions are either socially or differentially priced, based on the QCA-derived lower- and upper-bound costs.

Scenario 1 captures the costs that a potential entrant would incur to access:

- the expanded DBCT, if the potential entrant were subject to differential pricing when using DBCT's and Aurizon Network's infrastructure.
- RGTCT, if the potential entrant were to be levied the QCA's upper-bound estimate of supply chain costs.

By comparison, Scenario 2 assumes that the lower-bound RGTCT access cost of $17.02 per tonne would eventuate. While there is a possibility that a potential entrant would be subject to average-cost pricing (see Scenarios 3 and 4), we anticipate that such entrants would not consider this to be a credible possibility in light of the differential-pricing debate that has transpired in the last several years.

[35] Assuming that the differential price applies to the 8 mtpa over DBCTM's nameplate capacity of 85 mtpa. The cost of $18.74 per tonne was noted in page 8 of GHD's report in Appendix 7 of DBCTM's submission on the QCA's Draft Recommendation.

[36] DBCT 2017 AU, clauses 11.13 (a) – (c)

[37] AN 2019 AU, clause 6.4.1(d), Expansion pricing principles

[38] DBCTM submission on QCA Draft Recommendation, Appendix 7, p. 17

Table 2: Average supply chain costs for potential entrants to access expanded DBCT vs RGTCT

Scenario	Cost to access expanded DBCT ($ per tonne)	Cost to access RGTCT ($ per tonne)	Difference ($ per tonne)	Would the QCA consider this difference material?[39]
Scenario 1	18.74	20.09	1.35	No
Scenario 2	18.74	17.02	(1.72)	No
Scenario 3	12.05	20.09	8.04	Yes
Scenario 4	12.05	17.02	4.97	Yes

Based on the analysis above, we consider that Scenario 1 reflects what prudent potential entrants would reasonably expect to occur without declaration. Under this scenario, the average supply chain cost difference between accessing the expanded DBCT and RGTCT is only $1.35 per tonne. This is not material.

This cost difference is also substantially less than the $3.50 per tonne difference that the QCA considered would not be materially different when comparing the coal handling charge a potential entrant would incur under differential pricing relative to socialised pricing for accessing an expanded DBCT.[40] Under the QCA's own approach for assessing criterion (a) and the analysis that we have provided in this report, we consider that the $1.35 per tonne difference in average supply chain costs for a potential entrant to access an expanded DBCT compared with RGTCT is not material. Hence, criterion (a) is not satisfied.

4.2 Using the QCA's estimate of average supply chain costs, with GHD adjustments

In estimating average supply-chain costs to Goonyella mines of using WICET (and RGTCT), the QCA said that the relevant mine would incur below-rail costs in using both the Goonyella and Blackwater systems.[41]

In deriving the average below-rail costs incurred by Goonyella mines accessing RGTCT, the QCA has incorrectly applied Aurizon Network's pricing framework under the 2019 AU, which was approved by the QCA. A potential entrant, whose mine is located in the Goonyella system, is considered to run 'cross system train services' when accessing RGTCT (Blackwater system). That is, a mine that is located in the Goonyella system but accesses RGTCT is required to use both the Goonyella and Blackwater systems to haul coal from mine site to terminal. For such cross system train services, the 'origin system' is the Goonyella system and the 'destination system' is the Blackwater system.

The QCA's approach for determining FY17 below-rail average costs in each coal system is as follows:

$$\frac{AT2 \text{ to } AT4 \text{ Adjusted } Allowable\ Revenues + AT1\ revenue\ (actual\ gtks)}{Actual\ tonnes}$$

[39] We note that the QCA's benchmark for materiality in its draft recommendation is approximately $3.50 per tonne, and has applied this threshold herein.

[40] QCA Draft Recommendation. Part C, pp. 85-86

[41] QCA Draft Recommendation. Part C, p. 84

The QCA calculated the upper-bound cost to be $20.09 per tonne.[42]

The QCA's approach for calculating the upper-bound below-rail average costs to Goonyella mines of accessing RGTCT is inappropriate because it incorrectly includes the:

- AT2 tariff component in the Goonyella system. Goonyella mines using the Blackwater system do not use the capacity constrained corridor (i.e. Coppabella to Hay Point Junction) in the Goonyella system [43]
- AT4 tariff component in the Blackwater system. The AT4 tariff applies only in the origin system (i.e. Goonyella system) for cross system train services. [44]

We have recalculated the relevant below-rail charges for the QCA's FY17 upper-bound estimate of the average supply chain costs for the Blackwater system that would be incurred by a Goonyella user accessing capacity at RGTCT. We have removed the AT2 tariff component for the average Goonyella below-rail charge and removed the AT4 tariff component for the average Blackwater below-rail charge.

These adjustments lead to a reduction in the average:

- Goonyella below-rail cost component from $3.07 per tonne [45] to $2.80 per tonne [46]
- Blackwater below-rail cost component from $7.25 per tonne [47] to $4.37 per tonne[48].

Our estimate of the FY17 upper-bound average supply chain cost for accessing RGTCT is $16.94 per tonne. This is approximately 15.6 per cent lower than the QCA's estimate of $20.09 per tonne. In fact, it is lower than the $18.74 per tonne that the QCA has estimated that Goonyella mines would incur to use the expanded DBCT, if subject to differential pricing. Hence, potential entrants do not face a materially different supply chain cost in accessing RGTCT relative to the expanded DBCT. Accordingly, criterion (a) is not satisfied.

[42] QCA Draft Recommendation, Part C, Appendix A, pp. 130,135

[43] Aurizon Network's 2019 AU, cl. 2.3(a)(ii), p. 360

[44] Aurizon Network's 2019 AU, cl. 2.3(a)(iv), p. 360

[45] QCA Draft Recommendation. Part C, Appendix A, p. 130

[46] Reduction of $0.27 per tonne was determined by (FY17 AT2 Goonyella tariff of:
$1,369 per train path x (111.1 mt / 10,055 t) x 2 paths) / 111.1 mt

[47] QCA Draft Recommendation, Part C, Appendix A, p. 130

[48] Reduction of $2.88 is based on the FY17 AT4 tariff in the Blackwater system of $2.88 per net tonne. Aurizon Network 2016 AU, p. 387

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Rev.No.	Author	Reviewer Name	Signature	Approved for Issue Name	Signature	Date
Final	Jacqui Marshall	Hiresh Devaser		Hiresh Devaser		17 April 2019

GHD Advisory

Appendix 5 Dalrymple Bay Coal Terminal – Five Year Operation, Maintenance & Capital Plan – FYEJ 2020 – FYEJ 2024

REDACTED

Appendix 6 Excerpt from Draft Operator Board Briefing Presentation 5 Year Operation, Maintenance & Capital Plan

REDACTED

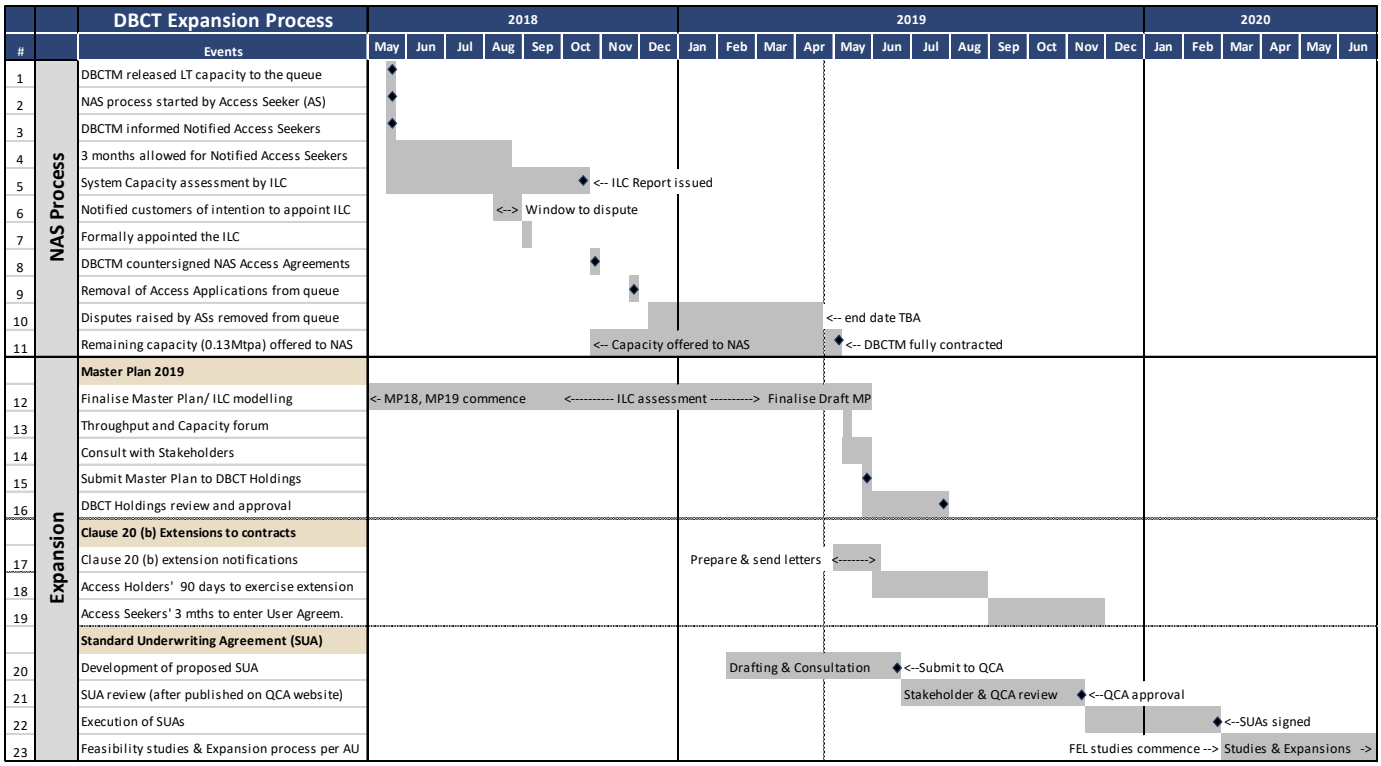
Appendix 7 DBCT Expansion Activity

Appendix 7 DBCT Expansion Activity

1 This Appendix describes the steps undertaken by DBCTM with respect to the next expansion of DBCT from the date of the initial Notifying Access Seeker request (22 May 2018).

Timeline

2 The timeline below illustrates DBCTM's expansion-related events occurring from the date of the initial Notifying Access Seeker request (22 May 2018), to mid-2020.



3 The following paragraphs provide a description of each of the main processes in the table above.

Notifying Access Seeker Process

4 On 22 May 2018 the following events occurred:

4.1 DBCTM released available long-term capacity to the first Access Seeker in the queue (in the form of an Indicative Access Proposal) and informed the rest of the queue of the availability of capacity;

4.2 Initial discussions were held with the Independent Logistics Company (**ILC**) to conduct a System Capacity assessment, as required under the 2017 AU; and

4.3 An Access Seeker triggered the Notifying Access Seeker (NAS) process in accordance with Section 5.4 of the 2017 AU.

5 DBCTM informed all Notified Access Seekers (Access Seekers ahead of the Notifying Access Seeker in the queue) on 24 May 2018 and allowed 3 months for these Notified Access Seekers to deliver two signed Access Agreements and any security required by DBCTM. At the end of the 3 month process (24 August 2018), DBCTM received signed contracts from Notified Access Seekers totalling 8.22Mtpa, plus 0.5Mtpa requested by the Notifying Access Seeker (total 8.72Mtpa).

6 On 12 August 2018, DBCTM informed customers of its intention to formally appoint the ILC as the independent expert under the 2017 AU to conduct the System Capacity assessment. Parties had until 31 August 2018 to dispute the proposed appointment of the ILC and no disputes were received. The ILC was formally appointed on 3 September 2018 as the independent expert. The ILC used the total contract demand from the NAS process as an input into its system capacity assessment, and issued the final report on 19 October 2018. The ILC report concluded that DBCT's long-term system capacity is 84.2Mtpa.

7 DBCTM can only contract up to a maximum of the system capacity in accordance with the 2017 AU, and on 26 October 2018 DBCTM countersigned Access Agreements totalling 6.72Mtpa. These executed agreements took DBCT's total long-term contracted capacity to 84.07Mtpa (0.13Mtpa below system capacity).

8 DBCTM offered the remaining 0.13Mtpa to a Notified Access Seeker on 25 October 2018, which expires on 6 May 2019 (unless extended). DBCTM expects to be fully contracted in May 2019. 1.87Mtpa of contract demand from the NAS process was not satisfied.

9 As part of the NAS process under the 2017 AU, DBCTM can remove Access Seekers from the queue who did not deliver signed Access Agreements within 3 months of being requested. On 30 November 2018, DBCTM removed 12 Access Applications from the queue. Subsequently, during December 2018, 4 Access Seekers (with a total of 5 Access Applications in the queue) disputed their removal from the queue. These disputes are at different stages at the time of this submission.

Master Plan 2019

10 In early 2018, when it became evident that all available system capacity at DBCT was likely to be contracted, DBCTM began a review of its Master Plan. The update of the Master Plan (**MP2019**) includes three key elements:

10.1 A review of the current market conditions, including commentary on price, supply, and demand for coal from the Bowen Basin;

10.2 An update of terminal and system operational issues, environmental requirements and the regulatory environment that impacts on the operation and development of DBCT; and

10.3 A critical review of the proposed expansion pathway from the last Master Plan and any necessary updates that may be driven from issues identified in item 2 above.

11 DBCTM has been working with the ILC to undertake comprehensive expansion options since immediately after the system capacity assessment was concluded in October 2018. According to ILC modelling completed in early 2019, there may be an incremental expansion option in form of a fourth shiploader, at a similar cost and capacity increase to Zone 4.[1]

Throughput Forum

12 DBCTM has an obligation under the PSA to consult with stakeholders before it issues MP2019. MP2019 is expected to be completed by the end of May 2019 and submitted to DBCT Holdings for review and approval. DBCTM will consult with stakeholders prior to finalising MP2019. In addition, DBCTM will share the content of MP2019 with stakeholders at a Throughput and Capacity Forum to be held in May 2019.

13 Also at this forum, DBCTM will discuss the proposed Draft Standard Underwriting Agreement (**SUA**) for feasibility studies and the key principles that it will contain. DBCTM will invite meetings with Access Seekers

[1] DBCTM notes that the maximum reasonably possible expanded capacity of DBCT within the declaration period remains unchanged at 102Mtpa, regardless of any ordering of the next incremental expansions. This is because the 102Mtpa constraint is imposed by the terminal's stockyard size, which cannot be increased.

and Access Holders on an individual basis to discuss details of the proposed SUA prior to its submission to the QCA in June 2019.

Clause 20(b) of the Standard Access Agreement

14 In parallel to the preparation of a Draft SUA, DBCTM will request existing Users to exercise or waive their rights to contract extensions pursuant to clause 20 of their Access Agreements to ensure that the current demand from Access Seekers cannot be serviced without expansion. For efficiency, it is assumed the request will be issued to all Users simultaneously in May 2019 and will allow 3 months for Users to exercise or waive their extension options. Based on the outcome of this process, and once a SUA has been approved by the QCA, DBCTM will then require Access Seekers to enter into a SUA so that feasibility studies can commence.

15 An Access Seeker has 3 months to execute an Access Agreement (if sufficient capacity is waived). For efficiency, DBCTM has assumed the 3 month period will be offered to all Access Seekers simultaneously.

Standard Underwriting Agreement (SUA)

16 In February 2019 DBCTM commenced drafting a proposed SUA that meets the requirements of Section 5.10 of the 2017 AU. Once the key principles have been drafted, DBCTM will share the draft with Access Seekers and Access Holders at the proposed Throughput and Capacity Forum to be held in May 2019. At the forum, DBCTM will invite interested parties to meet and discuss the proposed terms of the SUA and seek input from Access Seekers and Access Holders prior to DBCTM finalising the SUA and submitting it to the QCA in June 2019. The QCA will publish the proposed SUA on its website and DBCTM will inform all Access Seekers and Access Holders that it is available for review. Access Seekers and Access Holders are allowed 3 months to dispute the proposed SUA, and assuming no disputes, the QCA could potentially approve the SUA by November 2019.

Market Environment

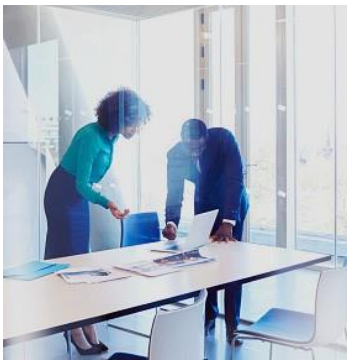
17 Since early 2016, coal prices have increased significantly and have sustained high levels to date, with a Hard Coking Coal (HCC) price in early April 2019 of ~A$290/t. As a result of the high coal price, demand for terminal capacity at DBCT is very high, with the access queue peaking at 56.1Mtpa[2] between 2021 and 2030 (noting this excludes all tonnages removed from the queue in late 2018). These factors, coupled with the fact that DBCTM currently has no available capacity to offer to Access Seekers, led to the commencement of the expansion processes in late 2018, upon completion of the NAS process.

18 Wood Mackenzie, AME, and other publicly available consensus forecasts continue to forecast coal prices to remain above incentive levels during the declaration period.

[2] Timbrell Declaration at [24] (Appendix 3 - DBCTM March 2019 Submission)

Appendix 8 GHD Update to March 2019 criterion (b) report

GHD Advisory



Update to March 2019 criterion (b) report

DBCT Management

18 April 2019

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Tables

1. Introduction

This supplementary report has been prepared by GHD Advisory (GHD) in our capacity as advisors to DBCT Management Pty Ltd (**DBCTM**) for the declaration review regarding the coal handling service provided at Dalrymple Bay Coal Terminal (**DBCT**). DBCTM commissioned this report following the issues raised by participants at the DBCT stakeholder forum held by the Queensland Competition Authority (**QCA**) on 20 March 2019, and following our review of stakeholder submissions on the QCA's Draft Recommendation (**Draft Recommendation**) to declare the DBCT service.

This supplementary report updates our March 2019 report titled 'Review of the QCA's least cost calculations and approach for criterion (b)', Appendix 7 of DBCTM's response to the QCA Draft Recommendation, (**GHD March 2019 Report**). The GHD March 2019 Report was provided as part of DBCTM's submission response to the Draft Recommendation.

This supplementary report also considers key material and information from the Declaration Review - Staff Issues Paper (**Staff Issues Paper**), and our report on criterion (a), Response to criterion (a), Appendix 7 of DBCTM's response to submissions on Draft Recommendation.

This report has been prepared by GHD for DBCTM and may only be used and relied on by DBCTM for the purpose agreed between GHD and the DBCTM as set out in chapter 1 of this report.

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

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

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

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

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

The GHD authors of this report, Jacqui Marshall and Hiresh Devaser, acknowledge the contributions of Brian Parmenter of ACIL Allen Pty Ltd in the preparation of this report.

2. Updates to the GHD March 2019 Report

2.1 Our approach in the GHD March 2019 report

In the GHD March 2019 Report, we found that the QCA had undertaken its least cost assessment in a way that was inconsistent with its stated method in the worked example of Appendix B of the Staff Issues Paper.[1] Instead of comparing:

- the average supply chain cost of DBCT (expanded) meeting total foreseeable demand in the market of 93 million tonnes per annum (**mtpa**) of demand with the average supply chain cost of meeting demand with a combination of DBCT (unexpanded) meeting 85 mtpa and RG Tanna Coal Terminal (**RGTCT**) meeting 8 mtpa,

the QCA compared:

- the average supply chain cost of DBCT (expanded) meeting 93 mtpa of demand with the average supply chain cost of a Goonyella mine using RGTCT.[2]

We found that when the QCA's own methodology is correctly applied, a combination of DBCT (unexpanded) and RGTCT meeting total foreseeable demand in the market is least-cost compared with an expanded DBCT doing so.[3]

The GHD March 2019 Report also considered that the QCA had inappropriately calculated the lower- and upper-bound supply chain costs for a Goonyella mine accessing RGTCT. The QCA applied actual tonnes and gross tonne kilometres (**gtks**), instead of contracted tonnes and gtks, to determine the below-rail average costs. The use of actual tonnes and gtks is inappropriate, since the QCA considers capacity entitlements are the relevant measure of total foreseeable demand.[4]

The GHD March 2019 Report also found that the QCA over-estimated the below-rail costs for a Goonyella mine accessing RGTCT because it had incorrectly incorporated the Goonyella AT2 tariff component in the calculation.[5]

[1] Draft Recommendation, Part C, p. 50

[2] Refer Chapter 4 of the GHD March 2019 Report

[3] Refer Chapter 4 of the GHD March 2019 Report

[4] Refer Chapter 6 of the GHD March 2019 Report

[5] Refer Chapter 6 of the GHD March 2019 Report

2.2 Our approach in this supplementary report

This supplementary report updates our analysis of deriving the upper-bound below-rail cost for a Goonyella mine accessing RGTCT. We consider that the QCA has further over-estimated the upper-bound below-rail cost for a Goonyella mine accessing RGTCT because its cost derivation incorrectly incorporated the Blackwater AT4 tariff component, in addition to the Goonyella AT2 tariff component. The QCA's approach to deriving below-rail costs is inconsistent with the pricing framework that the QCA approved under Aurizon Network's 2019 Access Undertaking (**AN 2019 AU**).[6]

Our approach to recalculating the appropriate upper-bound below-rail cost for a Goonyella mine accessing RGTCT is to first remove the relevant AT2 and AT4 tariff components from the QCA's calculated below-rail cost estimate. We then consider the impact of applying contracted tonnes and gtks on the upper-bound below-rail cost for a Goonyella mine accessing RGTCT.

Finally, we compare the average supply chain cost of DBCT (expanded) meeting 93 mtpa with the average supply chain cost of meeting demand with a combination of DBCT (unexpanded) meeting 85 mtpa and RGTCT meeting 8 mtpa. The calculation methodology we apply in our least cost analysis is consistent with the QCA's own methodology in its Staff Issues Paper.

2.3 GHD's analysis of the QCA's approach to deriving upper-bound below-rail costs

In estimating upper-bound average below-rail costs for Goonyella mines using the Blackwater system to access RGTCT, the QCA summed its 'within system' average below-rail cost estimates for the Goonyella and Blackwater systems.[7] The QCA estimated the upper-bound below-rail average cost to be $10.32 per tonne, which is the sum of:

- $3.07 per tonne in the Goonyella system
- $7.25 per tonne in the Blackwater system.[8]

2.3.1 Adjusting for the relevant AT2 and AT4 tariff components

A mine that is located in the Goonyella system is considered to run 'cross system train services' when accessing RGTCT (Blackwater system). Hence, the QCA's approach for calculating upper-bound below-rail average costs to Goonyella mines of accessing RGTCT is inappropriate because it incorrectly includes the:

- AT2 tariff component in the Goonyella system. Per the AN 2019 AU, Goonyella mines using the Blackwater system do not use the capacity constrained corridor (i.e. Coppabella to Hay Point Junction) in the Goonyella system[9]
- AT4 tariff component in the Blackwater system. Per the AN 2019 AU, the AT4 tariff applies only in the origin system (i.e. Goonyella system). [10]

[6] AN 2019 AU, Schedule F, clause 2.3, pp. 359 to 361

[7] Draft Recommendation, Part C, Appendix A, p. 129

[8] Draft Recommendation, Part C, Appendix A, p. 130

[9] AN 2019 AU, cl. 2.3(a)(ii), p. 360

[10] AN 2019 AU, cl. 2.3(a)(iv), p. 360

When the Goonyella system AT2 and Blackwater system AT4 tariff components (of $0.27 per tonne and $2.88 per tonne, respectively[11]) are subtracted from the relevant systems' below-rail costs, the FY17 upper-bound average below-rail cost for accessing RGTCT is $7.17 per tonne. This is significantly lower than the QCA's estimate of $10.32 per tonne.

2.3.2 Adjusting for the use of contracted tonnes and gtks, instead of actual tonnes and gtks

The FY17 upper-bound average below-rail cost for a Goonyella mine accessing RGTCT of $7.17 per tonne remains overstated because it is based on actual tonnes and gtks, instead of contracted tonnes and gtks (refer Chapter 6 of the GHD March 2019 Report).

When contracted tonnes and gtks are applied to derive the average below-rail cost,[12] the FY17 upper-bound is $5.21 per tonne. Our findings are provided in Table 1. Our approach conforms to the QCA's own methodology within its Draft Recommendation and is in accordance with the QCA-approved AN 2019 AU.

Table 1: FY17 upper-bound average below-rail costs for Goonyella mines accessing RGTCT

Average cost build up	QCA estimate	QCA estimate less the relevant AT2 and AT4 tariff component	QCA estimate adjusted for the relevant AT2 and AT4 tariff component, using contracted tonnes and gtks
Goonyella component ($ per tonne)	$3.07	$2.80	$2.23
Blackwater component ($ per tonne)	$7.25	$4.37	$2.98
Upper bound ($ per tonne)	**$10.32**	**$7.17**	**$5.21**

[11] Reduction of $0.27 per tonne was determined by (FY17 AT2 Goonyella tariff of $1,369 per train path x (111.1 mt / 10,055 t) x 2 paths) / 111.1 mt, per the Aurizon Network 2016 Access Undertaking, p. 391. Reduction of $2.88 per tonne is based on the FY17 AT4 tariff in the Blackwater system is per the Aurizon Network 2016 Access Undertaking, p. 387.

[12] Refer Table 12 of the GHD March 2019 Report for the comparison of actual/contracted tonnes and gtks. We have used the contracted tonnes/gtks in Table 12 of the GHD March 2019 Report to inform the results presented in Table 1: FY17 upper-bound average below-rail costs for Goonyella mines accessing RGTCT, in this report.

2.4 Key findings

Table 2 details the relevant supply chain components which comprise the average supply chain cost for DBCT and RGTCT. It compares the QCA's estimate of the average supply chain cost to Goonyella mines accessing an expanded DBCT ($12.05 per tonne) to our estimate[13] of accessing RGTCT ($15.79 per tonne). The QCA's upper-bound estimate of the average supply chain cost to Goonyella mines of accessing RGTCT is $20.09 per tonne, which is considerably higher than the $15.79 per tonne that we estimated.[14]

Table 2: Average supply chain per-tonne costs, DBCT (expanded) and RGTCT (upper bound)

Supply chain cost component	DBCT (expanded)[15]	RGTCT
Below-rail cost	$3.61	$5.21
Above-rail cost	$3.25	$5.35[16]
Coal-handling cost	$5.14	$5.18
Other port costs	$0.05	$0.05
Average supply chain cost	**$12.05**	**$15.79**

Table 3 compares our updated estimate of the average supply chain cost for Goonyella mines using a combination of DBCT (unexpanded) and RGTCT with that of DBCT (expanded). The average supply chain cost to Goonyella mines of using a combination of DBCT (unexpanded) and RGTCT is $11.80 per tonne, while that of using an expanded DBCT is $12.05 per tonne.

Table 3: Average supply chain per-tonne costs, DBCT (expanded) vs DBCT (unexpanded) and RGTCT

Coal tonnages	QCA estimate DBCT (expanded)	GHD estimate DBCT + RGTCT
85 mtpa	$11.42	$11.42 (DBCT)
8 mtpa	$18.74	$15.79 (RGTCT)
93 mtpa (average cost)	**$12.05**	**$11.80**

It is least cost for the combination of DBCT (unexpanded) and RGTCT to meet total foreseeable demand in the market of 93 mtpa. Criterion (b) is not satisfied.

[13] We have not adjusted the QCA's estimates of coal-handling costs and other port costs at RGTCT.

[14] Draft Recommendation, Part C Appendix A, pp. 130, 135

[15] Draft Recommendation, Part C Appendix A, pp. 135, 138

[16] Refer Table 12 of the GHD March 2019 Report

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