Queensland Competition Authority

Interim draft decision

DBCT Management's 2019 draft access undertaking

February 2020

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SUBMISSIONS

Closing date for submissions: 24 April 2020

This document represents the Queensland Competition Authority's (QCA's) preliminary views and is intended to give stakeholders an insight into these views to encourage further contributions. The QCA's application of the statutory assessment criteria and its thinking may change towards its final decision, which will be informed by submissions, including those made in response to this document. This document is not a draft version of a final decision, and it has no force of itself. There should be no expectation that it presents views and recommendations which will prevail to the end of the decision making process.

Public involvement is an important element of the decision-making processes of the QCA. Therefore written submissions are invited from interested parties concerning our interim assessment of Dalrymple Bay Coal Terminal Management's (DBCTM's) 2019 draft access undertaking. We will take account of all submissions received within the stated timeframes.

Submissions, comments or inquiries regarding this paper should be directed to:

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Tel (07) 3222 0555
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Confidentiality

In the interests of transparency and to promote informed discussion and consultation, the QCA intends to make all submissions publicly available. However, if a person making a submission believes that information in the submission is confidential, that person should claim confidentiality in respect of the document (or the relevant part of the document) at the time the submission is given to the QCA and state the basis for the confidentiality claim.

The assessment of confidentiality claims will be made by the QCA in accordance with the *Queensland Competition Authority Act 1997*, including an assessment of whether disclosure of the information would damage the person's commercial activities and considerations of the public interest.

Claims for confidentiality should be clearly noted on the front page of the submission. The relevant sections of the submission should also be marked as confidential, so that the remainder of the document can be made publicly available. It would also be appreciated if two versions of the submission (i.e. a complete version and another excising confidential information) could be provided.

A confidentiality claim template is available on request. We encourage stakeholders to use this template when making confidentiality claims. The confidentiality claim template provides guidance on the type of information that would assist our assessment of claims for confidentiality.

Public access to submissions

Subject to any confidentiality constraints, submissions will be available for public inspection at our Brisbane office, or on our website at www.qca.org.au. If you experience any difficulty gaining access to documents please contact us on (07) 3222 0555.

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EXECUTIVE SUMMARY

On 1 July 2019, Dalrymple Bay Coal Terminal Management (DBCTM) submitted its 2019 draft access undertaking (2019 DAU) to us for assessment. The 2019 DAU is intended to replace the current approved access undertaking (the 2017 AU), which is due to expire on 1 July 2021.[1]

DBCTM's 2019 DAU reflects a significant shift from the 2017 AU in that the proposed pricing model does not include reference tariffs.

This interim draft decision focuses on the pricing model proposed by DBCTM. We consider it important to provide stakeholders with an early indication of our preliminary views on this matter, given its importance, and the likely implications it may have for stakeholder views on other aspects of the 2019 DAU.

While we have considered the appropriateness of DBCTM's proposed pricing model in the context of the 2019 DAU as a whole, and made a number of observations about the interaction of other parts of the 2019 DAU in this regard, this interim draft decision does not address the appropriateness of all aspects of the 2019 DAU. We intend to assess the appropriateness of the 2019 DAU as a whole in our subsequent full draft decision.

Preliminary views

Our preliminary view is that it is not appropriate to approve DBCTM's pricing model, as proposed, having regard to the statutory assessment criteria in the *Queensland Competition Authority Act 1997* (the QCA Act). In particular, we consider that the pricing model:

- does not provide a sufficient constraint on the ability of DBCTM to exercise market power in negotiations, which could result in prices above the efficient costs of service delivery
- creates uncertainty, which could materially and adversely impact investment incentives.

We therefore consider that the proposed pricing model does not promote the economically efficient operation of, use of and investment in, the infrastructure by which the declared service is provided.[2] Further, it does not appropriately balance the legitimate business interests of DBCTM with the interests of access seekers and access holders, and the public interest.[3]

On this basis, we consider that amendments are required to DBCTM's 2019 DAU, in order for it to be appropriate to approve. Our preliminary view is that DBCTM's 2019 DAU could be amended in one of two ways.

Firstly, DBCTM could amend its proposed pricing model that does not include reference tariffs. We consider that it could be appropriate to approve a pricing model without reference tariffs where it features the following characteristics:

- information provisions that facilitate negotiations, reducing the dependence on costly and time-consuming arbitrations
- arbitration criteria that constrain asymmetrical market power
- arbitration criteria that do not impede competition for access to capacity

[1] Or the date that the handling of coal at DBCT ceases to be a 'declared service' for the purposes of the QCA Act.
[2] QCA Act, s. 138(2)(a).
[3] QCA Act, ss. 138(2)(b), (c), (d), (e) and (h).

- clear and efficient processes for negotiation and arbitration, and transparency around arbitrated outcomes.

We have provided suggested amendments within this interim draft decision that seek to achieve these characteristics.

Alternatively, DBCTM's 2019 DAU could adopt a pricing model with reference tariffs. Noting its previous and existing application in access undertakings for DBCT, we consider that a reference tariff model could be appropriate to approve. While recognising that reference tariffs are not without drawbacks, in the context of the 2019 DAU, we consider these drawbacks would be likely outweighed by the benefits of providing for a transparent and easy to understand reference tariff in the DAU.

Next steps

We intend to progress to a full draft decision, which will consider the appropriateness of DBCTM's 2019 DAU as a whole. We will provide any further views in relation to the proposed pricing model in that full draft decision.

We invite written submissions on this interim draft decision. Stakeholders are encouraged to provide focused, detailed responses to our preliminary views. Where possible, information and evidence should be provided in support of arguments advanced in submissions.

Submissions are due by 24 April 2020. All submissions made by this time will be taken into account.

THE ROLE OF THE QCA—TASK, TIMING AND CONTACTS

The Queensland Competition Authority (QCA) is an independent statutory authority whose functions include promoting competition as the basis for enhancing efficiency and growth in the Queensland economy.

Our primary role is to ensure that certain monopoly businesses operating in Queensland, particularly in the provision of key infrastructure, do not abuse their market power through unfair pricing or restrictive access arrangements.

The QCA's investigation and role of the interim draft decision

On 12 October 2017, we issued an initial undertaking notice (s. 133 of the QCA Act)[4] requiring Dalrymple Bay Coal Terminal Management (DBCTM) to submit a draft access undertaking (DAU) for the service declared under section 250(1)(c) of the QCA Act. In response to our initial undertaking notice, DBCTM lodged its 2019 DAU on 1 July 2019.

Our statutory obligations require us to consider a DAU given in response to an initial undertaking notice and either approve, or refuse to approve, the DAU (s. 134). In doing so, we must consider DBCTM's 2019 DAU in accordance with the statutory assessment criteria in section 138(2) and other applicable requirements of the QCA Act.

DBCTM's 2019 DAU proposal is based on a pricing model that does not include reference tariffs. Under DBCTM's proposal, access prices are to be agreed through commercial negotiation, with recourse to QCA arbitration where agreement cannot be reached.

While a pricing model of the type proposed by DBCTM is not precluded by the QCA Act, it represents a significant shift from the longstanding regulatory framework at DBCT, and we consider it important to provide stakeholders with an early indication of our views on this 'threshold' issue, given the likely implications it has for stakeholder views on other aspects of the 2019 DAU. For these reasons, we are publishing this interim draft decision that focusses on the pricing model proposed by DBCTM.

This interim draft decision is not a draft of a final decision and thus, has no force of itself. The preliminary views outlined in this interim draft decision are subject to change, and we seek further contributions from stakeholders by way of submissions.

Way forward

It is our intention to now progress to a full draft decision where we will assess the appropriateness of the 2019 DAU as a whole. Any further submissions from stakeholders related to the proposed pricing model will be discussed in the full draft decision.

Declaration review

The existing declaration for the coal handling service at DBCT expires on 8 September 2020. Pursuant to section 87A, we are now reviewing whether, with effect from the expiry date, the relevant service (or parts of the service) should be declared. We published a draft recommendation in December 2018.

While there is an overlap in timeframes between the investigation of the 2019 DAU and the declaration review, the reviews are separate processes and are subject to separate requirements (both under Part 5 of

[4] References to specific sections of legislation throughout this interim draft decision are to the QCA Act, unless otherwise stipulated.

the QCA Act, but under Division 2 and Division 7 respectively). Stakeholders should therefore be aware of the following:

- Each review process has been (and will continue to be) undertaken separately, on its merits and in accordance with the relevant assessment criteria.
- Any draft or final position in respect of one matter does not pre-suppose a conclusion in the other matter.
- Submissions should be made on each review separately.
- We may, nevertheless, inform ourselves on any matter relevant to the investigation of the 2019 DAU in any way we consider appropriate (s. 173(1)(c)).

Key dates

In releasing an interim draft decision at this time, we are aware of the importance of a timely and seamless transition from DBCTM's 2017 AU to an approved replacement access undertaking.

In accordance with section 147A(2) of the QCA Act, we must use our best endeavours to decide whether to approve, or refuse to approve, DBCTM's 2019 DAU proposal within the specified time periods.

Table 1 provides the 2019 DAU investigation timeframes to date, along with an outline of the proposed timetable for progressing to a final decision on DBCTM's 2019 DAU. Meeting this timetable will depend on the scope and complexity of issues raised by stakeholders in response to this interim draft decision, as part of the consultation and submission phases.

Table 1 Timeframes

Date	***Step***
12 October 2017	We issued an initial undertaking notice requiring DBCTM to submit a DAU by 1 July 2019.
11 June 2019	We issued a statement of regulatory intent that informed stakeholders how we intend to manage the regulatory process.
1 July 2019	We received DBCTM's 2019 DAU.
5 July 2019	We published the 2019 DAU on our website, and issued a notice of investigation and indicative time periods. We also asked stakeholders to make submissions by 23 September 2019.
23 August 2019	We issued a stakeholder notice, with staff questions, to assist stakeholders to prepare submissions on DBCTM's 2019 DAU.
23 September 2019	We received three stakeholder submissions (initial submissions), from the DBCT User Group, New Hope Group and Whitehaven Coal.
25 October 2019	We issued a stakeholder notice notifying stakeholders of our intent to proceed to an interim draft decision. We asked stakeholders to make further submissions by 22 November 2019.
22 November 2019	We received three further stakeholder submissions, from DBCTM, the DBCT User Group and New Hope Group.
24 February 2020	We published this interim draft decision on the 'threshold' issue of the pricing model proposed in DBCTM's 2019 DAU.

Date	*Step*
24 April 2020	Submissions are due on this interim draft decision.
Indicative date	***Step***
Q3 2020	We intend to publish a full draft decision, which will consider the 2019 DAU as a whole, including the pricing model proposed in the DAU.
February 2021	We intend to publish our final decision.

Submissions

We invite written submissions from interested parties by 24 April 2020. All submissions made by this date will be taken into consideration before we make our decision on DBCTM's 2019 DAU. Stakeholders are encouraged to provide focused, detailed responses to our preliminary views and proposed amendments to DBCTM's 2019 DAU. Where possible, information and evidence should be provided in support of arguments advanced in submissions.

In coming to a final decision on whether to approve or refuse to approve DBCTM's 2019 DAU, our views may change, having regard to issues raised by stakeholders, including issues raised in response to this interim draft decision.

Contact

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1 INTRODUCTION

Dalrymple Bay Coal Terminal Management (DBCTM) submitted its 2019 DAU on 1 July 2019. A key element of DBCTM's 2019 DAU is the proposed pricing model, which does not include reference tariffs, and instead contemplates access prices being agreed by commercial negotiation—with recourse to QCA arbitration where agreement cannot be reached.

This interim draft decision focuses on the pricing model proposed by DBCTM, so we can give stakeholders an early indication of our preliminary views on this matter.

This chapter provides context for our assessment of the pricing model proposed by DBCTM and a summary of our views on this issue.

1.1 Background

The Dalrymple Bay Coal Terminal (DBCT or the Terminal) is a common-user coal export terminal servicing mines in the Goonyella system of the Bowen Basin coal fields. DBCT, located 38 kilometres south of Mackay, is Queensland's largest common-user coal export terminal. Since its commissioning in 1983, the Terminal has provided coal handling services[5] to the coal industry in central Queensland. The Terminal is owned by the Queensland Government through a wholly government-controlled entity, DBCT Holdings Pty Ltd (DBCT Holdings). In 2001, DBCT Holdings leased the Terminal to DBCT Management Pty Ltd and the DBCT Trustee (collectively referred to as DBCT Management or DBCTM in this interim draft decision).

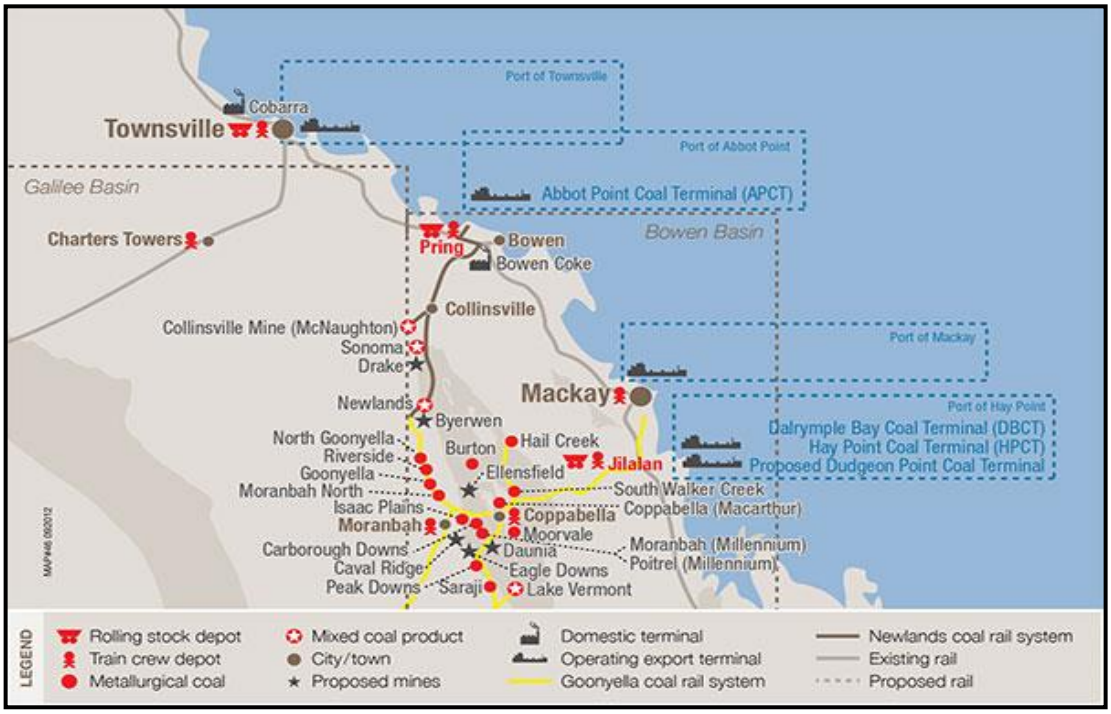
The Terminal is an integral part of the Dalrymple Bay coal chain (DBCC)[6], helping to ensure the deliveries of coal by rail meet the demands of users in terms of the shipping movements and scheduled arrivals. Coal is transported to the Terminal from 26 coal producing mines at 23 load points on the Goonyella system rail network[7] that extends over 300 kilometres (see Figure 1).

[5] Coal-handling services include unloading, stockpiling, coal blending, cargo assembly and out-loading handling services to the mines using the Terminal. The term is defined in section 250(5) of the QCA Act.

[6] See also DBCTM's website (http://www.dbctm.com.au) and the Integrated Logistics Company's website (https://ilco.com.au).

[7] The Goonyella system is a regulated multi-user and multi-directional rail network that can be used by mines to transport coal to any of the five coal terminals operating in the Bowen Basin. The vast majority of train services on the Goonyella system deliver coal to the Terminal and Hay Point Coal Terminal (HPCT), but some mines do use the Goonyella system to transport coal north to Abbot Point Coal Terminal (APCT), and south to RG Tanna Coal Terminal and the Wiggins Island Coal Export Terminal (WICET) at the Port of Gladstone.

Figure 1 Central Queensland coal rail network map



The day-to-day operational management of the Terminal is sub-contracted to DBCT Pty Ltd (DBCT PL) as the 'Operator' under the Operations and Maintenance Contract (OMC). The Operator is an independent service provider owned by a majority of the existing users of the Terminal. The Operator oversees the day-to-day operations and maintenance of the Terminal and is responsible for some long-term asset management and maintenance planning.

The services provided at DBCT are declared for third-party access under Part 5 of the QCA Act.[8] The regulatory access framework for DBCT is currently governed by the 2017 AU, which was approved by the QCA on 16 February 2017.[9]

1.2 History of access undertakings for DBCT

In June 2006, we approved the first access undertaking (the 2006 AU) for the declared service at DBCT. This followed an extensive consultation and assessment process that included the submission of two DAUs by DBCTM, our release of draft and final decisions, and lengthy discussions between DBCTM and the users of the Terminal (as represented by the DBCT User Group).

In September 2010, we approved the second access undertaking (the 2010 AU) for the declared service at DBCT. This undertaking replaced the 2006 AU and took effect from 1 January 2011. The 2010 AU reflected a package of arrangements that had been agreed between DBCTM and the DBCT User Group. Our assessment of this undertaking thus focused on the public interest and the interests of access seekers that were not members of the DBCT User Group and, therefore, not a party to the agreed package of arrangements.

[8] Pursuant to section 250(1)(c) of the QCA Act.

[9] Since the commencement of DBCTM's 2017 AU, DBCTM have submitted draft amending access undertakings to amend the 2017 AU. The latest 2017 AU can be accessed via https://www.qca.org.au/wp-content/uploads/2019/05/33818_06-Trading-SCB-DAAU-clean-1300187_1-1.pdf.

In February 2017, we approved the third access undertaking for DBCT (2017 AU). The 2017 AU terminates on the earlier of 1 July 2021 or the date that the coal handling service at DBCT ceases to be declared, should that occur.

While all these undertakings have allowed for commercial negotiations to occur, they have also included reference tariffs in the form of a Terminal Infrastructure Charge (TIC) and set out the method for calculating the TIC. Based on submissions from stakeholders, we understand that as a practical and commercial matter, access pricing at DBCT has adopted the TIC set by the QCA.

The inclusion of a TIC was first proposed by DBCTM in the DAU submitted to us in 2003. DBCTM's proposal to remove reference tariffs from the pricing model in its 2019 DAU represents a significant shift from the longstanding regulatory framework at DBCT.

1.3 DBCTM's 2019 draft access undertaking and pricing model

DBCTM has proposed a pricing model that does not include a reference tariff and requires access prices to be agreed by commercial negotiation, with recourse to QCA arbitration where agreement cannot be reached.

DBCTM considered its proposal a 'proportionate regulatory response' to the narrow competition problem identified in the QCA's draft recommendation on the declaration review for the coal handling service at DBCT[10]—that is, the potential for asymmetric terms of access between existing users and new users, in the absence of declaration, which impacts competition in the coal tenement markets.[11] DBCTM considered its proposed model addressed this issue, stating that the proposed model:

> will allow existing users' Access Agreements to operate as intended, and place new users on the same footing as existing users (having regard to the negotiate/arbitrate price review mechanism in existing users' Access Agreements).[12]

DBCTM noted that the QCA Act does not require an access undertaking to specify the method for calculating prices or publish a reference tariff and that doing so increases the risk of regulatory error—interfering with investment incentives during the current expansionary phase of the Terminal.[13]

1.4 Stakeholder consultation

We sought comments on DBCTM's 2019 DAU across two consultation periods prior to this interim draft decision:

- September 2019: we received three submissions—from the DBCT User Group[14], New Hope Group and Whitehaven Coal.[15]
- November 2019: we received three further submissions—from DBCTM, the DBCT User Group and New Hope Group.

User stakeholders (subsequently referred to as 'stakeholders') expressed opposition to DBCTM's 2019 DAU, particularly its proposed pricing model. Broadly, these stakeholders considered that

[10] QCA, *Part C: DBCT declaration review*, draft recommendation, December 2018.
[11] DBCT Management, sub. 1, p. 5.
[12] DBCT Management, sub. 1, p. 5.
[13] DBCT Management, sub. 1, pp. 5, 11–12.
[14] The glossary (p. 63) shows a list of stakeholders that the DBCT User Group's submission was made under.
[15] Whitehaven Coal is also a member of the DBCT User Group and is among the stakeholders that the User Group's submission was made under.

DBCTM's proposed pricing model would lead to inefficient negotiation outcomes, costly arbitration processes and material uncertainty. They also considered that because of certain characteristics of DBCT, the pricing model should include reference tariffs. These characteristics include DBCTM's market power, access seekers' lack of countervailing power and the existence of information asymmetry.[16]

In response to stakeholders' concerns, DBCTM noted that the DBCT User Group's initial analysis of DBCT's characteristics did not take into account constraints on DBCTM's ability to exercise market power—through existing user agreements, the recourse to arbitration, and information provision requirements in the 2019 DAU.[17] DBCTM reiterated that the QCA's regulation of DBCT should only address the competition harm identified in the draft recommendation on the declaration review.[18]

DBCTM also stated that it looks forward to working constructively with the QCA and users to ensure the model is implemented in a way that is balanced, effective and fit-for-purpose.[19]

1.5 The QCA's assessment of DBCTM's proposed pricing model

In our assessment of the pricing model proposed by DBCTM, we have had regard to the statutory factors set out in section 138(2) of the QCA Act.

Section 138(2) sets out a number of mandatory criteria governing any decision by the QCA to approve or refuse to approve a DAU. The weight and importance of each of the factors is a matter to be determined by the QCA on a case-by-case basis, having regard to the circumstances.[20] No individual factor is regarded as having fundamental weight or is required to be determinative in every case. Moreover, the matters listed in section 138(2) give rise to different, and, at times competing considerations which need to be assessed and balanced in deciding whether it is appropriate to approve a DAU.

More detail on the approach we have adopted in the application of the legislative framework when considering the proposed pricing model is set out in Chapter 2.

1.6 QCA's interim draft decision

As discussed in detail in this interim draft decision, we do not consider the pricing model, as proposed by DBCTM in its 2019 DAU, appropriate to approve.

We do not consider the pricing model proposed in the 2019 DAU promotes the economically efficient operation of, use of and investment in the infrastructure by which the declared service is provided, nor does it appropriately balance the legitimate business interests of DBCTM with the interests of access seekers and access holders, and the public interest.[21] In particular, we do not consider the pricing model as proposed provides appropriate protections to access seekers. It does not sufficiently constrain DBCTM's ability to exert market power—which may lead to ineffective negotiations and costly rolling arbitrations, with the criteria proposed to apply in arbitrations being inappropriate. Further, we consider that, as proposed, DBCTM's pricing model creates a degree of uncertainty that could materially and adversely impact investment incentives.

[16] DBCT User Group, sub. 2, pp. 15–33.
[17] DBCT Management, sub. 5, pp. 12–13.
[18] DBCT Management, sub. 5, pp. 8–9.
[19] DBCT Management, sub. 5, p. 3.
[20] *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 41 (Mason J).
[21] Sections 138(2)(a),(b),(d),(e) and (h) of the QCA Act.

On this basis, amendments are required to DBCTM's 2019 DAU, in order for it to be appropriate for us to approve. In considering the form of amendments required, our preliminary view is that there are two alternative approaches that could be adopted.

Firstly, DBCTM could amend its proposed pricing model that does not include reference tariffs. Such amendments would need to ensure that the pricing model without reference tariffs features the following characteristics:

- information provisions that facilitate negotiations, reducing the dependence on costly and time-consuming arbitrations
- arbitration criteria that constrain asymmetrical market power
- arbitration criteria that do not impede competition for access to capacity
- clear and efficient processes for negotiation and arbitration, and transparency around arbitrated outcomes.

Our suggested amendments to achieve these characteristics (provided in Chapter 5) include:

- requiring DBCTM to provide a number of key pieces of information to be disclosed in a predetermined format to facilitate commercial negotiations
- replacing the criteria that will apply in arbitrations, to reflect section 120 of the QCA Act
- allowing arbitration determinations to be released to (non-participating) access seekers, whether arbitration is conducted by the QCA or another party.

Along with these amendments, our view is that if a model without reference tariffs was adopted, it would be appropriate for us to provide guidance to stakeholders on the approach we would intend to take in determining any price arbitrations. If we are minded to approve an amended pricing model without reference tariffs, we presently consider it suitable to publish a preliminary version of the guidance document as part of the full draft decision. We invite stakeholders to comment on matters related to the guidance document in submissions to this interim draft decision.

Alternatively, DBCTM could amend its 2019 DAU to include a pricing model with reference tariffs. A pricing model with reference tariffs could be appropriate to approve, noting its previous and existing application in access undertakings for DBCT. While acknowledging that reference tariffs are not without drawbacks, such a model provides a well-understood and effective way to address key considerations like information asymmetry and DBCTM's market power. Further, it may provide some advantages over a pricing model without reference tariffs, in that it avoids the likelihood of rolling arbitrations and provides greater transparency and certainty.

Our interim draft decision is set out in the decision box below.

Interim draft decision

(1) Our interim draft decision is to refuse to approve the pricing model as proposed in DBCTM's 2019 DAU.

(2) We consider the proposed pricing model does not appropriately balance the interests of access seekers and DBCTM, and could increase uncertainty of access to DBCT. We note particular issues with:

  (a) the information provision clause—which would impact the effectiveness and efficiency of negotiation of access prices

  (b) the proposed arbitration factors and processes—that could result in inefficient pricing outcomes for access seekers.

(3) We consider it appropriate for DBCTM to amend the pricing model proposed in its 2019 DAU to address the concerns identified in this interim draft decision.

  (a) We have proposed some possible amendments that may address these concerns.

  (b) We seek submissions from stakeholders, including DBCTM, as to specific amendments that could be made to the pricing model to address the identified concerns—without requiring inclusion of a reference tariff or tariffs.

(4) In the absence of proposed amendments that would satisfactorily address the concerns with the pricing model identified in this interim draft decision, we would be inclined to require DBCTM to amend its 2019 DAU to include a reference tariff or tariffs.

  (a) We seek proposals from stakeholders, including DBCTM, as to how a reference tariff or tariffs to be included in DBCTM's 2019 DAU might be developed.

1.7 Overarching issues

DBCTM and/or other stakeholders raised a number of overarching issues in the context of the pricing model proposed by DBCTM. The following provides an overview of these issues, which are discussed in more detail throughout this interim draft decision.

The competition problem

DBCTM stated that the form of regulation to apply at DBCT should be tailored to address the 'competition problem' identified by the QCA in the draft recommendation on the declaration review; it considered its pricing model a proportionate response to the identified problem.[22]

In its subsequent submission, DBCTM emphasised its view on this matter, stating that the QCA's power to regulate does not extend to where there is no competition problem as expressly found by the declaration process, and to do otherwise would be contrary to the objective of Part 5 of the QCA Act and beyond power.[23]

Stakeholders disagreed with DBCTM, noting the QCA Act outlines a broader set of criteria that the QCA must have regard to in assessing a DAU.[24] New Hope Group stated that it would not be

[22] DBCT Management, sub. 1, p. 5.
[23] DBCT Management, sub. 5, p. 8.
[24] DBCT User Group, sub. 2, pp. 8–9.

appropriate to determine the scope of regulation based on a process that is not yet finalised. Further, it considered the findings from the declaration review not an exhaustive list of competitive harm but rather a thorough consideration of the application of very specific declaration criteria to the service.[25]

We do not accept that our application of the factors in section 138(2) of the QCA Act is necessarily limited or constrained by the market or competition analysis undertaken for the purpose of section 76(2)(a). The section 138(2) factors include, but are not limited to, the object of Part 5 of the QCA Act—which is to promote the economically efficient operation of, use of and investment in, significant infrastructure by which services are provided, with the effect of promoting effective competition in upstream and downstream markets. Other relevant factors include the pricing principles in section 168A, the legitimate business interests of DBCTM and access seekers and the broader public interest. While the proportionality of any regulatory outcome to any likely promotion of competition in related markets may be a matter we have regard to, in the context of the factors in section 138(2), it is not a consideration we consider we should give fundamental or overriding weight to.

This matter is discussed further in Chapter 2.

Information asymmetry

Throughout the submission process, stakeholders raised concerns that information asymmetry was present between DBCTM and access seekers under DBCTM's 2019 DAU.[26] These stakeholders considered that this is particularly the case for new access seekers (i.e. those who are not currently an access holder at DBCT).[27] A potential future access seeker, Whitehaven Coal, stated that the level of information asymmetry in DBCTM's 2019 DAU would result in access seekers agreeing to terms that are less favourable than terms that would be reached in a workably competitive market or with reference tariffs; or it could lead to costly rolling arbitrations.[28]

DBCTM, on the other hand, considered that the provisions within the 2019 DAU allow access seekers to request a wide range of information. DBCTM also said there is a wide range of information currently available in the public domain.[29]

In the absence of a reference tariff, we consider that the level and quality of information provided to access seekers is particularly important—because access seekers must be placed in a position where they are able to identify their own view of an appropriate and efficient TIC, for the purpose of negotiating with DBCTM.

Our preliminary view is that DBCTM's 2019 DAU does not provide sufficient clarity on the minimum information that access seekers will receive. In the absence of a reference tariff, we do not regard the information provision requirements in DBCTM's 2019 DAU to be sufficiently prescriptive in relation to the type, format and availability of pricing-related information, with the intent of promoting effective negotiations.

Further, we consider the information provision requirements within DBCTM's 2019 DAU will result in time and cost inefficiencies, as a lack of transparency of the information provided in

[25] New Hope Group, sub. 3, p. 3.
[26] DBCT User Group, sub. 2, pp. 44–46; New Hope Group, sub. 3, p. 2; Whitehaven Coal, sub. 4, pp. 3–4.
[27] DBCT User Group, sub. 2, pp. 44–45; New Hope Group, sub. 3, p. 7; Whitehaven Coal, sub. 4, p. 3.
[28] Whitehaven Coal, sub. 4, pp. 3–4.
[29] DBCT Management, sub. 5, p. 32.

various negotiations could result in similar information being reviewed multiple times, both by different access seekers in negotiations, and the arbitrator (in the event of a dispute referral).

It is our preliminary view that these information asymmetry concerns could be addressed by amending the 2019 DAU (while retaining a pricing model without a reference tariff). We consider the implementation of information provision requirements similar to those applied to light regulation pipelines under the National Gas Law (NGL), which require reporting of specific financial information in a predetermined format, could be appropriate to approve.[30]

However, we also consider that providing relevant cost and pricing information by way of a reference tariff can have advantages. A reference tariff provides cost and pricing information in a more meaningful and useful form for access seekers than is likely to be the case through the provision of information as set out in DBCTM's 2019 DAU. It is determined through a well-understood and transparent process, which occurs once at every regulatory reset, limiting the time taken and costs spent in assessing the information.

Our concerns in relation to information asymmetry are detailed further in Chapter 4, with our views on amendments that could be made to a pricing model without reference tariffs discussed in Chapter 5. The advantages of a reference tariff in addressing information asymmetry are discussed in Chapter 6.

Existing user protections

DBCTM considered that existing users of DBCT were 'fully protected' under their existing 'evergreen' user agreements.[31] These user agreements provide for the review of access charges every five years through negotiation, with recourse to arbitration where agreement is not reached. DBCTM subsequently clarified that the term 'fully protected' meant users were protected from DBCTM exercising market power and could gain access to DBCT on reasonable terms and conditions.[32]

The DBCT User Group was of the view that existing users were not fully protected and noted existing provisions only applied to volumes already contracted. The DBCT User Group considered there is a great level of uncertainty around arbitration processes and outcomes under existing user agreements. Even if arbitration determinations led to outcomes consistent with a QCA-approved reference tariff, the DBCT User Group considered it be would be a significantly more costly process for individual users.[33]

Our preliminary view is that under their existing user agreements, existing users are likely to have a greater level of protection in the absence of a reference tariff than new users. We expect that arbitrated outcomes under existing user agreements will likely reflect the efficient costs of supply including a return on investment that is commensurate with the regulatory and commercial risks involved and, as a result, provide a credible threat to constrain DBCTM from exercising its market power in a negotiation.

We do note there is a degree of uncertainty as to whether the arbitration criteria outlined in clause 11.4(d) of the 2019 DAU would apply to arbitrations under existing user agreements. This could alter and possibly diminish the protections provided under existing user agreements. However, we consider that if this was the case, implementation of our proposed amendments to

[30] Australian Energy Regulator (AER), *Financial reporting guideline for light regulation pipeline services*, October 2019.
[31] DBCT Management, sub. 1, p. 19.
[32] DBCT Management, sub. 5, p. 28.
[33] DBCT User Group, sub. 6, pp. 22–25.

clause 11.4(d), as discussed in Chapter 5, would mean existing users' protections under their contracts would not be diminished.

Further detail on these matters is provided in Chapters 5 and 6.

Market power and countervailing power

Stakeholders considered that the characteristics of DBCT are important in determining whether the form of regulation proposed by DBCTM is appropriate. These characteristics include the prevalence of market power and countervailing power.

Stakeholders considered that DBCTM exhibits a high degree of market power and access seekers have limited countervailing power—meaning a pricing model, of the kind proposed by DBCTM, is inappropriate.[34]

DBCTM on the other hand, considered that such analysis of characteristics does not sufficiently take into account the constraints on DBCTM's ability to exert market power. According to DBCTM, these constraints include:

- protections available through existing user agreements
- the recourse to arbitration for access seekers
- the right for access seekers to request information in negotiations.[35]

DBCTM also suggested that access seekers do have a level of countervailing power.[36]

As discussed in Chapter 6, we consider that DBCTM exhibits a high degree of market power as there is limited contestability due to a lack of close substitutes for the DBCT service. Further, there is limited threat of competition entering the market, given the stringent legislative requirements around port development.

Given a lack of close substitutes for the DBCT service, we also consider that access seekers will have limited countervailing power, as they cannot credibly threaten to take their business elsewhere.

Our preliminary view is that the characteristics of DBCT and the market within which its services are provided are relevant in our consideration of DBCTM's proposed pricing model in that they provide an indication of constraints on DBCTM's ability to exert market power. Nonetheless, we agree with DBCTM's contention that there may be alternative means to constrain market power. While the characteristics of DBCT and the relevant market suggest there is limited constraint on the exercise of market power, this does not necessarily mean a pricing model without reference tariffs is not appropriate to approve.

However, as discussed throughout this document, we do not consider DBCTM's ability to exert market power is appropriately constrained by the arbitration criteria and the information provision requirements as proposed in DBCTM's 2019 DAU pricing model.

Our assessment of the constraints on DBCTM's market power is discussed throughout Chapters 4, 5 and 6.

[34] DBCT User Group, sub. 2, pp. 15–32; New Hope Group, sub. 3, p. 9.
[35] DBCT Management, sub. 5, p. 12.
[36] DBCT Management, sub. 5, p. 13.

Varied services

DBCTM considered that its 2019 DAU proposal would allow the varied or different services provided at DBCT, such as blending and co-shipping, to be appropriately valued and priced accordingly. DBCTM considered this would result in efficient use of and investment in DBCT, consistent with the pricing principles in the QCA Act (s. 168A(b)).[37]

Stakeholders however, considered that the different services provided at DBCT were minor and should be captured as part of the core coal handling service. It was noted that no other coal terminals apply different pricing for those services—and questions were raised as to how such differentiated prices would be determined, given it is not possible to know what type of services will be required at the time of arbitration when requirements vary over time.[38]

DBCTM responded to these points by noting that throughout the declaration review the DBCT User Group pointed out that DBCTM 'offers a number of premium services, above that of the standard coal handling service', making reference to blending and co-shipping opportunities.[39] It also considered differentiated pricing to be common practice at ports more generally. DBCTM considered that if only some users are benefiting from a premium service, then applying a reference tariff to all users would impact the Terminal's overall efficiency.[40]

Our preliminary view is that DBCTM's ability to apply varied or differentiated pricing for services, such as blending and co-shipping, does not determine that a pricing model without reference tariffs should apply. Importantly, we note that, to the extent stakeholders consider there is additional value in varied or additional services that may be offered by DBCTM from time to time, an amended DAU, which includes a reference tariff would not stop individual users negotiating access agreements reflective of this additional value. This view is discussed in detail in Chapter 6.

We are not convinced that services such as blending and co-shipping are separate to the core coal handling service provided by DBCTM, and note they have not been charged for separately in the past. Further, we consider that demand for such services could vary significantly over time, making it difficult to negotiate such prices or determine these through arbitration—as forecasting future demand/usage and cost would be complex and problematic.

1.8 Structure

The rest of this interim draft decision is structured as follows:

Chapter 2: Legislative framework—sets out how we have applied our legislative obligations in making this interim draft decision.

Chapter 3: DBCTM's 2019 DAU pricing model—provides detail on the pricing model proposed by DBCTM.

Chapter 4: Preliminary assessment of DBCTM's pricing model—sets out our assessment and consideration of the elements of DBCTM's 2019 DAU pricing model, including information provision and the criteria to be applied in an arbitration.

[37] DBCT Management, sub. 1, pp. 43–48.
[38] DBCT User Group, sub. 2, pp. 34–36; New Hope Group, sub. 3, pp. 10–11; Whitehaven Coal, sub. 4, p. 3.
[39] DBCT Management, sub. 5, p. 21.
[40] DBCT Management, sub. 5, p. 22.

Chapter 5: Amendments to DBCTM's 2019 DAU—outlines our assessment and preliminary views on whether, with amendment, a pricing model without reference tariffs could be appropriate to approve and what form of amendments would be required.

Chapter 6: Reference tariff model—sets out our assessment and preliminary views on whether a pricing model with reference tariffs would be appropriate to approve, and how it compares to a pricing model without reference tariffs.

2 LEGISLATIVE FRAMEWORK

We conducted our assessment of DBCTM's proposed pricing model in accordance with the statutory framework of the QCA Act, as outlined in this chapter.

2.1 Interim draft decision

The pricing model (without reference tariffs) proposed in the 2019 DAU is a significant shift from the existing pricing model (with reference tariffs), and it is clear from the initial submissions we received that access seekers and access holders are strongly opposed to this element of DBCTM's proposal. Consequently, we consider this element of DBCTM's 2019 DAU constitutes a key 'threshold' matter for the assessment of the DAU as a whole. As such, we issued a stakeholder notice, notifying stakeholders of our intent to proceed to an interim draft decision, following consultation.

We have now proceeded to this interim draft decision to provide an early indication to DBCTM and stakeholders on whether a pricing model without reference tariffs could be appropriate to approve. By publishing the interim draft decision, we seek to encourage further contributions by way of submissions. As stated, the interim draft decision does not cover all matters associated with DBCTM's 2019 DAU. These will be the subject of the subsequent full draft decision that we intend to release later in the year.

The QCA Act requires that we comply with natural justice when undertaking investigations (s. 173(1)(b)). Consistent with this, our interim draft decision and subsequent full draft decision will provide stakeholders with opportunities to comment on preliminary QCA positions, prior to publication of our final decision.

Our views in the interim draft decision are preliminary and subject to change, having regard to submissions and further analysis, as well as to other issues as the wider context of the 2019 DAU is considered.

2.2 Assessment approach

On 12 October 2017, we issued an initial undertaking notice (s. 133) requiring DBCTM to submit a DAU for the service declared under section 250(1)(c) of the QCA Act. In response to our initial undertaking notice, DBCTM lodged the 2019 DAU on 1 July 2019.

Statutory obligations require us to consider a DAU given in response to an initial undertaking notice and either approve, or refuse to approve, the DAU (s. 134). If we refuse to approve the DAU, we must give DBCTM a written notice—a secondary undertaking notice—that states the reasons for the refusal and asks DBCTM to amend the DAU in the way we consider appropriate (s. 134(2)).

2.3 Factors affecting our approval of the pricing model in the 2019 DAU

We may approve the pricing model (without reference tariffs) in the 2019 DAU if we consider it appropriate to do so having regard to the factors outlined in section 138(2) of the QCA Act (Box 1). These factors give rise to different, and at times, competing considerations which need to be weighed by us in deciding whether it is appropriate to approve a pricing model without reference tariffs.

In the absence of any statutory or contextual indication of the weights to be given to factors to which a decision-maker must have regard—as in the QCA Act—the decision-maker is able to determine the appropriate weights.

As discussed earlier, if we refuse to approve the pricing model without reference tariffs, we must state the reasons for the refusal and ask DBCTM to amend the pricing model in the way we consider appropriate (s. 134(2)). We acknowledge that in doing so, we have not refused to approve the pricing model (without reference tariffs) simply because we consider a minor and inconsequential amendment should be made to a particular part of the model (ss. 138(5) and (6)).

Box 1 Section 138(2) of the QCA Act

The Authority may approve a draft access undertaking only if it considers it appropriate to do so having regard to each of the following—

(a) the object of this part

(b) the legitimate business interests of the owner or operator of the service

(c) if the owner and operator of the service are different entities – the legitimate business interests of the operator of the service are protected

(d) the public interest, including the public interest in having competition in markets (whether or not in Australia)

(e) the interests of persons who may seek access to the service, including whether adequate provision has been made for compensation if the rights of users of the service are adversely affected

(f) the effect of excluding existing assets for pricing purposes

(g) the pricing principles mentioned in section 168A

(h) any other issues the authority considers relevant.

2.3.1 The object of this part

We are required to have regard to the object of Part 5 of the QCA Act (s. 138(2)(a)). Part 5 of the QCA Act establishes an access regime to provide a legislated right for third parties to acquire access to services that use significant infrastructure with natural monopoly characteristics. Its object is set out in section 69E:

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

The Queensland Government inserted this object clause as part of its commitment under the Council of Australian Governments (COAG) 2006 Competition and Infrastructure Reform Agreement, under which all states and territories would introduce a nationally consistent object clause to support consistency in access regulation across Australia. The clause is similar to section 44AA(a) of the *Competition and Consumer Act 2010* (Cth) as it relates to the national access regime.

Inclusion of an objects clause in the national access regime was recommended by the Productivity Commission in its 2001 review of the regime, where it noted that clear specification of objectives is fundamental to all regulation. The Productivity Commission further said that inclusion of an objects clause would be highly desirable to:

- provide greater certainty to service providers and access seekers about the circumstances in which intervention may be warranted
- emphasise, as a threshold issue, the need for application of the regime to give proper regard to investment issues
- promote consistency in the application of the regime by the various decision makers
- help to ensure that decision makers are accountable for their actions.[41]

Economically efficient outcomes for the operation of, use of and investment in, the declared service

The object of Part 5 of the QCA Act (s. 69E) is principally directed at promoting economic efficiency and, in particular, the economically efficient operation of, use of, and investment in facilities.

We consider economically efficient outcomes are facilitated, among other things, by a robust access framework that constrains the potential exercise of market power by the owner of a facility with monopoly characteristics.

In the context of DBCT, the access framework should be directed at:

- constraining unfair differentiation between access holders, access seekers and, where appropriate, other market participants (such as rail operators)
- preventing the Terminal from being used to restrict or delay efficient entry or competition in upstream and downstream markets, including by providing appropriate incentives for efficient investment in new capacity
- providing an opportunity for DBCTM to recover at least its efficient costs, including a return on investment that appropriately reflects the commercial and regulatory risks commensurate with providing access
- allowing for multi-part pricing and price discrimination when it aids efficiency
- providing appropriate protections of the interests of access seekers and access holders, including in respect of confidentiality, disputes and access rights
- providing incentives to reduce costs or otherwise improve productivity, including by way of innovation
- preventing cost-shifting or cross-subsidisation between regulated and unregulated activities
- providing a stable, transparent and predictable regulatory framework, with appropriate oversight and enforcement.

Promoting effective competition in upstream and downstream markets

By promoting the efficient use of, and investment in the infrastructure by which declared services are provided, competition in related markets is also promoted. This is the second element of the object in Part 5 of the QCA Act (s. 69(E)).

The service at the Terminal is declared under the QCA Act (under the transitional provisions in s. 250) and relates to the handling of coal through the provision of Terminal services to access

[41] Productivity Commission, *Review of the National Access Regime*, Inquiry report no. 17, September 2001, p. xxii.

holders at the Terminal (s. 250). The coal handling service may promote competition in a range of dependent markets, such as:

- coal tenements market
- coal haulage services market (above-rail services)
- DBCT secondary capacity trading market
- coal export markets
- rail access market (below-rail services)
- a number of other markets such as port services (e.g. pilotage and towage services), coal shipping services, and various mining inputs and services markets.

2.3.2 Legitimate business interests of the owner or operator

We are required to have regard to the legitimate business interest of the owner (DBCT Holdings) or operator (DBCTM) of the service (s. 138(2)(b)). Where the owner and operator are different entities, we are required to have regard to whether the legitimate business interests of the operator are protected (s. 138(2)(c)).

Relationship between DBCT Holdings and DBCTM

As a result of corporate history and associated lease arrangements at DBCT, the Terminal owner and the operator are separate entities.

The term 'owner' is defined as the owner of a facility used, or to be used, to provide the service (sch. 2 of the QCA Act). Under long-term lease arrangements, the Queensland Government retains ownership of the Terminal through DBCT Holdings as state-owned lessor of the Terminal. DBCT is leased to DBCT Investor Services (as trustee for the DBCT Trust) who has sub-leased it to DBCT Management Pty Ltd.

The term 'operator' is not defined in the QCA Act. Therefore, it is appropriate to give effect to the plain meaning of the term, taking into account the purpose and object of the QCA Act and the manner in which the term is used in the access provisions.[42] We previously determined[43] that various features of the Terminal's contractual arrangements support the view that DBCTM is the appropriate 'operator' because, among other things, it is DBCTM that gives access to the Terminal by negotiating and entering into the access agreements that specify the commercial terms that apply to access.

By contrast, the day-to-day operational management of the Terminal is sub-contracted to DBCT PL by way of the OMC. DBCT PL is the 'Operator' as defined in the 2019 DAU, and not the QCA Act. DBCT PL is an independent service provider owned by a majority of the existing users of the Terminal.

We note there may be some occasions where the interests of DBCT Holdings as the owner of the Terminal, and DBCTM as the operator, are in conflict or tension.

[42] As in the 2015 DAU—QCA, *DBCT Management's 2015 draft access undertaking*, final decision, November 2016, p. 24.

[43] QCA, *DBCTM 2015 (ring-fencing) draft amending access undertaking*, draft decision, February 2016, Attachment 2, pp. 73–77.

In balancing the interests of both parties, we have given particular consideration to DBCTM's role as the operator, and the significant capital investments DBCTM has made in the Terminal.

In spite of this, in our assessment of the public interest criterion (s. 138(2)(d)), we accept that broader economic considerations that touch upon state ownership of the Terminal may be relevant—such as the importance of the operation of the Terminal to the state or regional economy. These public interest considerations are discussed later.

Legitimate business interests

The term 'legitimate business interests' is not a defined term under the QCA Act.

We consider the legitimate business interests of DBCTM include the commercial interest in having an opportunity to recover at least the efficient costs of providing the relevant service and in earning a commercial return on investment commensurate with the regulatory and commercial risks in supplying the declared service.

In addition, we recognise that DBCTM may have a range of other legitimate business interests, including to:

- promote incentives to maintain, improve and invest in the Terminal and the efficient provision of the declared service
- meet its contractual obligations to existing users
- seek to attract and contract for additional tonnages from new and existing coal producers within the relevant region
- improve commercial returns, where these returns are generated from, for example, innovative investments or improved efficiencies
- ensure the Terminal is maintained and operated to meet legal requirements, including providing for its safe operation
- comply with other contractual or regulatory requirements such as the Port Services Agreement (PSA)—recognising that contractual arrangements cannot bind or constrain us in our assessment of the proposed pricing model.

2.3.3 The public interest

We are required to have regard to the public interest, including the public interest in having competition in markets (whether or not in Australia) (s. 138(2)(d)).

Public interest is not a defined term in the QCA Act. We note that public interest may be shaped by its context such that it may vary over time.

For this assessment, we consider there is public interest in the promotion of sustainable and efficient development of the Queensland coal industry, which in turn, provides a stimulus to the Queensland economy, local employment and regional development.

We consider that assessment of the public interest may be informed by a number of other related sources, including:

- The matters previously listed in the (repealed) section 76(3) of the QCA Act, which included:
  - the object of Part 5 of the Act
  - legislation and government policies relating to ecologically sustainable development

- social welfare and equity considerations including community service obligations and the availability of goods and services to consumers
- legislation and government policies relating to occupational health and safety and industrial relations
- economic and regional development issues, including employment and investment growth
- the interests of consumers or any class of consumers
- the need to promote competition
- the efficient allocation of resources.[44]

- The majority judgement of the High Court of Australia in *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal and Ors* in relation to public interest matters.[45]
- The Explanatory Memorandum to the *Competition and Consumer Amendment (Competition Policy Review) Bill 2017* (Cth), which provides examples of costs and benefits that may be relevant to the assessment of public interest matters.[46]

2.3.4 Interests of persons who may seek access

We are required to have regard to the interests of persons who may seek access to the service, including whether adequate provision has been made for compensation if the rights of users of the service are adversely affected (s. 138(2)(e)).

In the context of our assessment, we consider the interests of access seekers may include:

- the provision of access on reasonable commercial terms, including through the availability of standard access agreements that represent an appropriate risk allocation (including appropriately protecting existing contractual entitlements)
- being treated in a fair and equitable manner, including constraining DBCTM from unfairly differentiating between access seekers in a way that has a material adverse effect on the ability of one or more access seekers to compete with other access seekers
- tariffs that generate expected revenue for the service that is at least enough to meet the efficient costs of providing access to the service, provided that tariffs (and the tariff structure) also provide an appropriate incentive to DBCTM to increase efficiency over time
- clear and transparent information about access to, and use of, the declared service, which supports a principled negotiation framework and an effective dispute resolution process
- a clear and effective framework for capacity expansion decision-making
- reasonable protection of an access seeker's confidential information
- effective transitional arrangements as one undertaking replaces another.

[44] We note that the Explanatory Notes to the Queensland *Competition Authority Amendment Bill 2018* (Qld) (at p. 6) stated that (in considering a declaration matter) 'the Authority or the Minister can still have regard to any of the matters that were previously listed in the existing section 76(3), if considered relevant.'
[45] (2012) 246 CLR 379 at [42].
[46] Explanatory Memorandum, *Competition and Consumer Amendment (Competition Policy Review) Bill 2017* (Cth), [12.41], examples 12.1 and 12.2.

We have also considered the interests of access holders to be relevant (s. 138(2)(h)) because access seekers, upon signing an access agreement, become access holders. Our assessment of the proposed pricing model (without reference tariffs) includes seeking to achieve an appropriate balance between different users, including over time.

2.3.5 The effect of excluding existing assets for pricing purposes

We are required to have regard to the effect of excluding existing assets for pricing purposes (s. 138(2)(f)). We have briefly addressed this criterion in Chapter 5, which discusses the QCA guidance document.

2.3.6 Pricing principles

We are required to have regard to the pricing principles (s. 138(2)(g)). These principles state that the price of access should (s. 168A):

- generate expected revenue for the service that is at least enough to meet the efficient costs of providing access to the service and include a return on investment commensurate with the regulatory and commercial risks involved
- allow for multi-part pricing and price discrimination when it aids efficiency
- not allow a related access provider to set terms and conditions that discriminate in favour of the downstream operations of the access provider or a related body corporate of the access provider, except to the extent the cost of providing access to other operators is higher
- provide incentives to reduce costs or otherwise improve productivity.

The intent of the pricing principles is to provide guidance in determining the revenue requirements and regulatory tariffs, including the structure of access charges and associated pricing matters.

The pricing principles also recognise that pricing can be used to aid efficiency. For example, differential pricing in appropriate circumstances may provide a direct and efficient signal to users of the costs of expansion, and in doing so, incentivise owners and users to explore alternative productivity measures.

The nature of the pricing principles and the context in which they are relevant means that, in respect of some matters, there may be other considerations which are in tension, and which require us to undertake a balancing or weighing exercise.

2.3.7 Other issues the QCA considers relevant

We are required to have regard to any other issues we consider relevant (s. 138(2)(h)). We consider the following matters relevant in our assessment of the 2019 DAU.

Existing users/access holders

DBCTM stated that the statutory factors are not concerned with advancing the rights of existing users who have access under existing contracts, or setting charges for those users.[47]

We acknowledge that the statutory factors do not explicitly refer to access holders. However, we consider the interests of access holders to be relevant. The interests of access holders will generally coincide with the interests of access seekers, as all access seekers who sign contracts will become access holders. However, we consider the interaction between access holders and

[47] DBCT Management, sub. 1, p. 10.

future access seekers has an inter-generational dimension, where the interests of access holders and future access seekers may differ. For example, the approach to pricing capacity expansions can give rise to tension when a pricing outcome favours one group over another.

The role of the 2017 access undertaking

We consider the 2017 AU relevant to our assessment of the 2019 DAU. The 2017 AU represents a package of arrangements that stakeholders are familiar with. Stakeholders are also comfortable with the operation of those arrangements.

While we are considering the 2019 DAU afresh, we consider the 2017 AU (as varied through DAAUs that were approved over the regulatory period) provides instructive and appropriate guidance to help us assess the proposed pricing model (without reference tariffs). We also recognise that users and other stakeholders, through their experience with the 2017 AU, may have identified aspects of the 2017 AU that have functioned well, as well as aspects that require improvement.

We also regard it relevant to consider that, unless there is an appropriate case for change, providing stability and predictability in the regulatory framework, is likely to promote investment confidence, and reduce administrative and compliance costs.

Supply chain improvements and coordination

We consider supply chain coordination is an important factor for achieving the object of Part 5 of the QCA Act—there is a strong relationship between an efficient and effective DBCC and the competitiveness of the Queensland coal industry.

Therefore, we consider the regulatory framework should not unnecessarily restrict or prevent supply chain improvements or innovations that could help facilitate the more efficient development and coordinated operation of the supply chain.

To the extent possible, the framework should have the flexibility to facilitate the alignment of contractual requirements at different parts of the supply chain. This may include participants having access to information necessary to make informed coordination and contracting decisions; providing an opportunity for users to trade access rights (on both a short- and long-term basis); promoting efficient investment in the relevant Terminal capacity expansions—where appropriate, through differential pricing; as well as having an efficient queue for users to obtain new or additional access rights.

Declaration review

As discussed previously, pursuant to section 87A, we are currently reviewing whether, with effect from the expiry date,[48] the handling of coal at DBCT by the Terminal operator should be declared.

The investigation of the 2019 DAU and the review of the declaration are separate processes and are subject to separate requirements (both under Part 5 of the QCA Act, but under Division 2 and Division 7 respectively).

In its initial submission, DBCTM said that while it acknowledges that the declaration review is a separate process, there are nonetheless a number of issues from the declaration review process that are relevant to the 2019 DAU process. In particular, DBCTM said the declaration review process identified that declaration is only intended to ensure that potential efficient new entrants to the coal tenements markets do not face a material asymmetry in the terms of access to the

[48] 8 September 2020.

extent they would be deterred from entering the coal tenements market. As a consequence, DBCTM said the limited and narrow competition problem must inform the QCA's assessment of the 2019 DAU and ensure that the final 2021 access undertaking is a proportionate and fit-for-purpose regulatory response.[49]

In response to DBCTM's initial submission, the DBCT User Group said there is no suggestion in the QCA Act that the QCA's assessment must be considered solely by having reference to the conclusions in the declaration review, let alone solely by reference to conclusions on criterion (a).[50] Further, it is evident from the wording of the assessment criteria that the matters the QCA must have regard to (s. 138(2)) are substantially wider.[51]

In its subsequent submission, DBCTM made a further argument for its case and said:

> The declaration recommendation determines the scope of the QCA's authority to regulate the relevant service. That is, the QCA's power to regulate does not extend to where there is no competition problem as expressly found by the declaration process. Accordingly, any regulation of the relevant service in relation to a dependent market in which the QCA has expressly found declaration will not promote a material increase in competition, is beyond power.
>
> The QCA's regulation under Part 5 of the QCA Act is to address the competition harm identified by the declaration process and no further, or at least it must not seek to regulate the service as applied in dependent markets in which has had (sic) expressly determined do not satisfy criterion (a). While the coverage criteria under the NGL are similar to the access criteria under Part 5 of the QCA Act, the factors for approving an access undertaking and for determining the appropriate form of regulation under the NGL are completely different. This means that while under the NGL there may be a significant difference between coverage criteria and the form of regulation factors, and they may address different purposes, this is simply not the case under the QCA Act.
>
> Rather, there is significant overlap in the considerations under the two Part 5 processes, such that the conclusions drawn in the declaration review are inextricably relevant to the QCA's consideration of the appropriate form of any access undertaking … the ultimate purpose of the two processes is identical, and that there is significant overlap in the key factors which the QCA must have regard to in making a decision.
>
> Therefore, DBCTM submits that the competition problem identified in the declaration review, and whether the proposed 2019 DAU addresses this problem, should be front of mind for the QCA in determining whether it is appropriate to approve the 2019 DAU.[52]

We do not agree with DBCTM's view on this matter. The scope of our authority to approve a DAU is defined by Division 7 of Part 5 of the QCA Act, particularly section 138. We may only approve a DAU if we consider it appropriate to do so, having regard to each of the matters set out in section 138(2). The mandatory assessment criteria for a DAU (s. 138(2)) are broad, and incorporate a number of factors. We do not consider that, when applying the mandatory factors under section 138(2), we are confined by, or required to give fundamental weight to, any approach adopted for the assessment of related markets under section 76(2)(a) during a declaration review. That said, we accept that the analysis of related markets and the findings in relation to market power in those markets, as expressed in a final recommendation of a declaration review, may well be relevant in the context of our assessment of the appropriateness of the 2019 DAU—particularly when we consider the object of Part 5 (as required by s. 138(2)(a)).

[49] DBCT Management, sub. 1, pp. 5–6.
[50] Criterion (a) states '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.'
[51] DBCT User Group, sub. 2, p. 8.
[52] DBCT Management, sub. 5, pp. 8–9.

DBCTM and other stakeholders, in their submissions to us, have referred to the declaration review process and materials extensively. As a result, we have also referred to the declaration review process and materials where it is appropriate. This is consistent with section 173(1)(c) of the QCA Act that states the QCA may inform itself on any matter relevant to the investigation in any way it considers appropriate.

2.4 Contents of access undertakings

DBCTM said that the only mandatory requirement for an access undertaking, for present purposes, is an expiry date for the undertaking; there is no requirement under the QCA Act for an access undertaking for a declared service to be in place at all. Further, DBCTM said:

> This means both the requirement to give an access undertaking, and the requirement for the access undertaking to specify the method for calculating prices or indeed to publish a reference tariff, are at the discretion of the QCA. It is of note that DBCTM's previous access undertakings have provided for all the possible discretionary contents of an access undertaking.

We agree that the QCA Act does not require an access undertaking to include a reference tariff, but at the same time, the Act does not preclude a reference tariff being included in an access undertaking. We note that section 137(2) provides a list of details that an access undertaking may contain, which includes how charges for access to the service are to be calculated (s. 137(2)(a)).

In addition, we also note that:

- section 101(4) explicitly contemplates that price and cost information may be provided by way of a reference tariff
- section 101(7) specifically defines the concept of a reference tariff.

Section 6.3.3 of this interim draft decision provides a more detailed discussion on how the QCA Act at least contemplates a reference tariff being a normal inclusion in an access undertaking.

2.5 Amendments to a draft access undertaking

Section 134 of the QCA Act provides that we must consider a DAU and either approve, or refuse to approve, the DAU. If we refuse to approve the DAU, we must ask the owner or operator of the service to amend the DAU in the way we consider appropriate.

We consider that the starting point for our statutory task in assessing a DAU must be the DAU as submitted. This is consistent with the structure of section 134—which provides for us, only if we have decided to refuse to approve a DAU, to ask for *amendments* to the DAU.

In determining amendments that are appropriate, we consider that we are required to have regard to the factors affecting approval of a DAU in section 138, and to therefore develop appropriate amendments that balance the various section 138 factors.

Having regard to the requirements of section 134 and the object of Part 5 of the QCA Act, we consider our task is to determine an appropriate set of amendments to a DAU—in light of the section 138 factors. Although any amendments should be developed while having regard to any concerns identified with the DAU, we do not accept that this limits us to proposing only a 'minimum' set of amendments.

3 DBCTM'S 2019 DAU PRICING MODEL

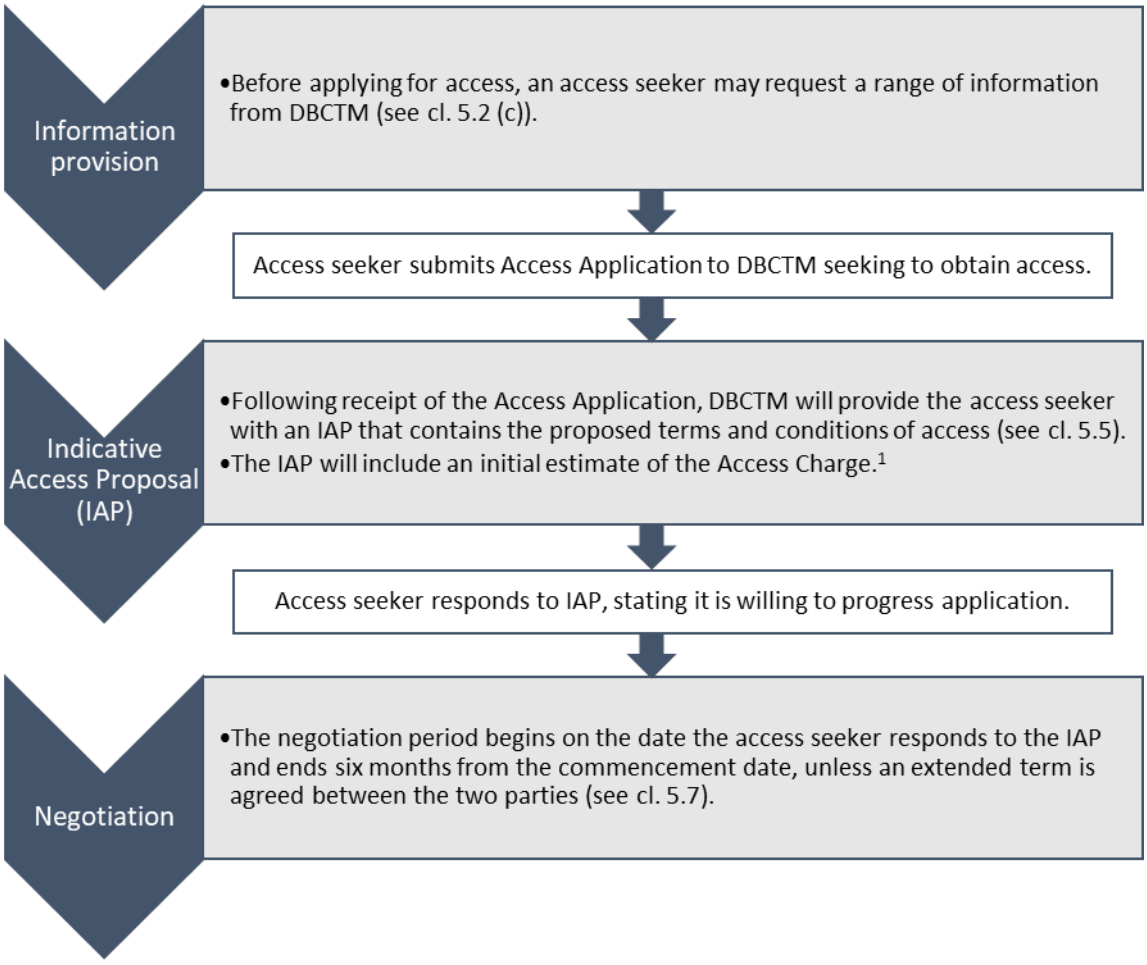
DBCTM's proposal does not include a reference tariff nor a prescriptive approach for determining a reference tariff. Rather, the 2019 DAU provides for access prices, in the form of a TIC, to be determined via commercial negotiation, with QCA arbitration as recourse if agreement cannot be reached. To facilitate this pricing model, DBCTM's 2019 DAU details the processes to occur under negotiation and arbitration.

3.1 Framework for negotiation

DBTCM's proposal requires access seekers and DBCTM to engage in negotiation to determine the Terminal Infrastructure Charge (TIC). The 2019 DAU requires these negotiations to occur in good faith. DBCTM must not unfairly differentiate between access seekers and must make all reasonable efforts to satisfy the reasonable requirements of the access seeker (cl. 5.1 of the 2019 DAU).

DBCTM's 2019 DAU includes a number of provisions to facilitate negotiation. The following outlines the general process to apply in negotiating the TIC.[53]

Figure 2 General process for negotiation in the 2019 DAU



[53] In specific situations, other processes may be required. Examples of these are touched on in section 3.1.1.

(1) Access Charge comprises the TIC and an Operation and Maintenance Charge.

Information provision

DBCTM has included information provision clauses within the 2019 DAU that it considers will facilitate negotiation.[54] In particular, the 2019 DAU provides for access seekers to request information set out in section 101(2)(a)–(h) of the QCA Act, which DBCTM must provide within 10 business days of receiving the request (cl. 5.2(c)(2) of the 2019 DAU).[55] This information may be requested prior to the access seeker submitting an access application, and includes:

(a) information about the price at which the access provider provides the service, including the way in which the price is calculated;

(b) information about the costs of providing the service, including capital, operational and maintenance costs;

(c) information about the value of the access provider's [DBCTM's] assets, including the way in which the value is calculated;

(d) an estimate of spare capacity of the service, including the way in which the spare capacity is calculated;

(e) a diagram or map of the facility used to provide the service [DBCT];

(f) information on the operation of the facility

(g) information about the safety system for the facility;

(h) if the authority [the QCA] makes a determination in an arbitration about access to the service under division 5, subdivision 3—information about the determination.

The provision of this information is subject to sections 101(3)(a) and (b), where the QCA may determine that the provision of such information is commercially sensitive and authorise DBCTM to either not provide such information, or allow it to be provided in a manner that is not unduly damaging.

We note that under the QCA Act we may also issue advice or directions to either DBCTM or an access seeker in relation to information disclosure, if asked to do so (s. 101(5)).

Indicative access proposal

If DBCTM receives an access application, it must respond to the relevant access seeker with its proposed terms and conditions of access. This is referred to as an indicative access proposal (IAP) and will include an initial estimate of the access charge[56] for requested services specified in the access application (cl. 5.5(d)(5)(B) of the 2019 DAU). The IAP is indicative only and does not oblige DBCTM to provide access.[57]

DBCTM stated that at the commencement of commercial negotiations it would provide access seekers with an offer of a base tariff (founded on a base service, applicable to all users) plus tariffs pertaining to additional services required by the access seeker.[58]

[54] DBCT Management, sub. 1, p. 40.
[55] Access seekers can also request preliminary information relating to the access application (such as copies of the SAA), and request initial meetings to discuss the proposed access application (cls. 5.2(c)(1), (3)).
[56] Access charges comprise the TIC and an operation and maintenance charge.
[57] Unless the IAP contains specific conditions to the contrary.
[58] DBCT Management, sub. 1, p. 42.

Negotiation

While not specific to the negotiation of the TIC, the 2019 DAU includes a general negotiation period, which will commence on the date the access seeker indicates a willingness to progress its access application after receiving the IAP from DBCTM (cl. 5.7(a)(4) of the 2019 DAU). This period for negotiation will expire after six months, or after an extended period of time agreed by the parties to the negotiation.[59]

3.1.1 Alternative negotiation processes

In certain circumstances, DBCTM's 2019 DAU provides for access seekers to enter into binding access agreements that do not contain a TIC. This may occur when entering into an access agreement conditional on an expansion (binding conditional access agreement) or where a notified access seeker[60] is entering into an access agreement (binding standard access agreement).

When a binding access agreement is signed, DBCTM and the relevant access seeker only have 30 business days to negotiate and reach agreement on the access price to be specified in the access agreement.[61] Where agreement is not reached, either party may refer the matter for arbitration.

The 30-business-day timeframe also applies when there is sufficient available capacity to enter into an access agreement with a notifying access seeker.[62]

3.2 Framework for arbitration

Where DBCTM and an access seeker are unable to reach agreement on the TIC, either party may refer the matter for arbitration, consistent with the dispute resolution provisions in the 2019 DAU. Where the QCA is making the determination, it is required to do so in accordance with clause 11 of the 2019 DAU, except to the extent necessary to give effect to any matter agreed by the parties to the arbitration (cl. 17.4 of the DAU).

In making a determination, clause 11.4(d)(1) of the 2019 DAU requires the QCA to have regard to:

> (A) the TIC that would be agreed by a willing but not anxious buyer and seller of coal handling services for mines within a geographic boundary drawn so as to include all mines that have acquired, currently acquire or may acquire coal handling services supplied at the Port of Hay Point;
>
> (B) the expected future tonnages of Coal anticipated to be Handled through the relevant Terminal Component during the relevant Pricing Period;
>
> (C) the expected capital expenditure requirements for the relevant Terminal Component during the relevant Pricing Period;
>
> (D) the types of service to be provided to the Access Seeker;
>
> (E) the obligation in the Port Services Agreement to rehabilitate the site on which the Services are provided;
>
> (F) any other TIC agreed between DBCTM and a different Access Holder for a similar service level;

[59] Negotiation may cease at an earlier time for a number of other reasons outlined in clause 5.7(a) of the 2019 DAU.
[60] An access seeker who has been notified that another access seeker (who is not first in the queue) is seeking access from existing available system capacity at a date that is earlier than the first in the queue.
[61] Or such longer period as the parties agree.
[62] An access seeker who is not first in the queue but seeks access to available system capacity at an earlier date than the first in the queue.

(G) the factors in section 120(1) of the QCA Act;

The QCA may also take into account any other matters relating to the matters mentioned above (cl. 11.4(d)(2) of the 2019 DAU).

While the 2019 DAU does not specify timeframes for the arbitration process, the QCA Act requires the QCA to use its best endeavours to make an access determination within six months.[63]

DBCTM has pointed to Part 7 of the QCA Act[64], which it considers includes provisions that emphasise the need for expedient and efficient conduct of the arbitration process.[65] For example, section 196(1)(e) of the QCA Act requires that in an arbitration, the QCA act as speedily as proper consideration of the dispute allows. Section 196(2) requires that in doing so, the QCA has regard to the need to carefully and quickly inquire into and investigate the dispute and all matters affecting the merits and fair settlement of the dispute. DBCTM also pointed to section 197(1)(f) of the QCA Act, which states that the QCA may generally give directions, and do things, that are necessary or expedient for the speedy hearing and determination of the dispute.

[63] Various exclusions to this time period apply. See section 117A(2).
[64] Section 121 states that Part 7 applies to arbitrations occurring under Part 5, subdivision 3.
[65] DBCT Management, sub. 5, pp. 29–30.

4 PRELIMINARY ASSESSMENT OF DBCTM'S PRICING MODEL

Our preliminary view is DBCTM's pricing model, as proposed in its 2019 DAU, is not appropriate for us to approve. We consider key aspects of both negotiation and arbitration processes do not appropriately balance the access undertaking assessment criteria in the QCA Act.

4.1 DBCTM's rationale for its model

DBCTM provided several justifications for its proposed pricing model.

Firstly, DBCTM focussed on its interpretation of our draft recommendation for the declaration review of the coal handling service at DBCT as the basis for this approach. DBCTM stated that we must be informed by the 'competition problem' that declaration of the Terminal would be trying to address, which is the asymmetric terms for new access seekers relative to incumbent access holders that impacts competition in the coal tenements market. It said the competition problem is narrow for a number of reasons—including that its 'market power, with respect to existing users, was adequately constrained by the existence of the evergreen existing user agreements.'[66]

DBCTM added that the QCA Act does not require 'an access undertaking to specify access charges' and consequently:

> [a] heavy-handed price-setting approach, whereby prices in the access undertaking are set by the QCA on an ex-ante basis, is not appropriate to address the narrow competition problem identified by the QCA and the DBCT User Group in the declaration review.[67]

Secondly, DBCTM suggested the prescription of a reference tariff in previous undertakings negated DBCTM and access seekers having 'a real or meaningful opportunity to negotiate to reach a commercial access agreement.'[68] It further stated that the level of prescription of a reference tariff was not envisaged under the QCA Act, which gives primacy to commercial negotiations.[69]

In the same vein, DBCTM asserted that commercial negotiation under its proposed model would limit the risk of regulatory error that exists under a prescriptive reference tariff model.[70] The risk of regulatory error interferes with investment incentives, which is detrimental during an expansionary phase.

Finally, DBCTM disputed the application of a uniform reference tariff to its coal handling service, by claiming it offers multiple services that warrant differentiated pricing. It said DBCT provides users with a variety of additional services above the standard coal-handling service, which impacts the throughput efficiency of the Terminal. The negotiation of multi-part pricing and price discrimination based on the additional services would promote economically efficient use of DBCT.[71]

[66] DBCT Management, sub. 1, p. 18.
[67] DBCT Management, *2019 Draft Access Undertaking for DBCT coal handling service*, letter to the QCA, 1 July 2019, p.1.
[68] DBCT Management, sub. 1, p. 11.
[69] DBCT Management, sub. 1, p. 29.
[70] DBCT Management, sub. 1, pp. 29–31, 55, sub. 5, pp. 7–8.
[71] DBCT Management, sub. 1, pp. 43–45.

4.2 Stakeholder views

Overall, other stakeholders disagreed with DBCTM that a pricing model without a reference tariff would be appropriate for us to approve.

They opposed DBCTM's use of our draft recommendation for the declaration review of DBCT to determine the scope of regulation, including the pricing model, for the 2019 DAU. Their reasons relate to our roles under the QCA Act in assessing a DAU and separately conducting a declaration review.[72]

These stakeholders also disputed DBCTM's view that an access undertaking should give primacy to negotiation.[73] Instead, they asserted that regulation should be intended to facilitate access in a manner that would be commensurate with a competitive market between access providers and seekers.[74] Where DBCTM has given examples of pricing models that do not have a reference tariff in other sectors, stakeholders argued such cases are circumstantially different to the coal handling service at DBCT, where DBCTM has clear market power.[75]

Additionally, the DBCT User Group argued that DBCTM's proposed model will result in greater errors, due to 'some access seekers and users agreeing to the higher monopoly pricing'[76], compared to DBCTM's suggested errors resulting from reference tariffs. It also said DBCTM overstated the potential for, and outcomes of, regulatory errors by providing 'no credible evidence' of their existence; not accounting for any errors to be balanced out or addressed over time; and ignoring the transparent and objective development of a reference tariff that would reduce the risks of these errors.[77]

Stakeholders also questioned DBCTM's assertion that it offers multiple services additional to the core coal handling service. The DBCT User Group and New Hope Group considered the quoted 'additional services' to be minor and part of the core coal handling service offered at DBCT. They did not consider differentiated pricing of these services to be appropriate because:

- no other coal terminal in Australia that offers such services does so
- it would be difficult to determine the minor costs and capacity differences involved
- use of these services is a dynamic response to market forces, thereby being difficult to forecast in advance of a pricing period.[78]

4.3 QCA analysis

We are presently minded not to approve DBCTM's 2019 DAU—given we do not find its proposed pricing model appropriate, having regard to the factors in section 138(2). In particular, we consider the proposed model does not sufficiently constrain DBCTM's ability to exercise market power in negotiations with access seekers. Additionally, we consider the arbitration criteria do not sufficiently protect the interests of access seekers, thereby undermining the purpose of arbitration as a 'backstop'[79] for dispute resolution. Consequently, we find the proposed pricing

[72] Our views on this matter are outlined in Chapter 2 of this interim draft decision.
[73] DBCT User Group, sub.2, p. 6, sub. 6, p. 10; New Hope Group, sub. 7, p. 6.
[74] DBCT User Group, sub.2, pp. 6, 60.
[75] DBCT Management, sub. 2, p. 6; New Hope Group, sub. 3, pp. 9–10.
[76] DBCT User Group, sub. 2, p. 37.
[77] DBCT User Group, sub. 2, p. 37.
[78] DBCT User Group, sub. 2, pp. 35–36; New Hope Group, sub. 3, pp. 6, 8.
[79] DBCT Management, sub. 5, p. 4.

model materially increases uncertainty, and thereby could adversely affect investment incentives and not be in the interests of the public.

The subsequent sections outline our concerns with the mechanics of DBCTM's proposed pricing model for both the negotiation and arbitration stages.

4.3.1 Information asymmetry in negotiations

A key aspect of the negotiation process that raises concerns is the information asymmetry between DBCTM and access seekers. In the absence of a reference tariff, DBCTM's 2019 DAU relies on the categories of information DBCTM would be obliged to provide to access seekers prior to negotiation (cl. 5.2(c)(2) of the 2019 DAU), consistent with the QCA Act (s. 101(2)).

DBCTM and other stakeholders disagreed on the adequacy of the information covered under the provision in the 2019 DAU. The DBCT User Group said the information requirements are 'extremely high level and clearly inadequate for enabling an informed negotiation'[80], which was echoed by New Hope Group, who referred to the information to be provided under the clause as 'limited, and non-specific'.[81] DBCTM responded to this concern stating that 'the high level nature of the information which access seekers can request operates to cast the net wide in terms of the information which can be requested from DBCTM.'[82] It also highlighted that access seekers have access to an 'abundance' of public information relevant to price determinations and an ability to dispute DBCTM's compliance with this provision under the dispute resolution provisions in the 2019 DAU (cl. 17).[83]

Further to the comments on the drafting of the information provision clause, the DBCT User Group expressed concern that 'such information is bound to be DBCTM's view about each of those items, without any scrutiny of the type applied where there is a review by the QCA (and often the engagement by the QCA of expert consultants).'[84] New Hope Group suggested new access seekers in particular would encounter difficulties in understanding how different factors provided by DBCTM could have an impact on individually negotiated prices, thereby undermining positions in negotiation with DBCTM.[85] Whitehaven Coal added:

> In any case, even if an access seeker could be assured of access to all potentially relevant information, it would be extremely difficult (and costly) to assess that information against the claims of DBCT Management, let alone challenge those claims in a manner capable of altering DBCT's negotiating position.[86]

We recognise that some of the information requirements outlined in the QCA Act (s. 101(2))—such as matters related to the determination of price, costs and asset valuation—could be (and have historically been) provided in the form of a reference tariff (s. 101(4)). In that instance, we are able to assess the information concerning DBCTM's charges in a transparent and collaborative manner during a DAU review process. In such a process, access seekers have access not only to a reference tariff but also to a range of information used to derive that reference tariff. We consider undertaking such a review only at a regulatory reset, rather than at each negotiation (or arbitration) with an access seeker, to be more time- and cost-efficient. Nevertheless, in assessing the proposed model, we considered whether the proposed information provision clause would

[80] DBCT User Group, sub. 2, p. 45.
[81] New Hope Group, sub. 3, p. 6.
[82] DBCT Management, sub. 5, p. 32.
[83] DBCT Management, sub. 5, p. 32.
[84] DBCT User Group, sub. 2, p. 45.
[85] New Hope Group, sub. 3, p. 7.
[86] Whitehaven Coal, sub. 4, p. 3.

be adequate to ensure a timely negotiated outcome that appropriately balances the interests of access seekers and DBCTM.

Firstly, we do not consider that the drafting of the information provision clause in the 2019 DAU (cl. 5.2(c)(2)) provides sufficient clarity on the minimum information access seekers will receive, which could lead to access seekers being unable to identify their own view of an appropriate and efficient TIC for the purposes of negotiating with DBCTM. We recognise that this clause refers to DBCTM's information provision obligations to access seekers in negotiations under the QCA Act (s. 101(2)). We consider the information obligations under section 101(2) to be a broadly-written, minimum standard for information provision that is not sufficiently detailed in itself in the context of DBCTM's proposed pricing model, particularly the pricing-related information outlined in sections 101(2)(a)–(c).

In comparison, our previous acceptance of similar drafting for clauses 5.2(d)–(e) of the 2017 AU also included assessment of the information related to sections 101(2)(a)–(c) given in the form of a reference tariff (consistent with s. 101(4) of the QCA Act). We considered the prescriptive nature of the information given in this form appropriate for access seekers to be certain in the determination of the TIC in those instances. However, in the absence of a reference tariff, we do not regard the clause to be sufficiently prescriptive in itself to describe the type, format and availability of pricing-related information, with the intent of promoting effective negotiations.

In addition, the absence of an ex ante assessment of the relevant information (either by us or another independent auditor) means the information's accuracy and adequacy would need to be assessed by individual access seekers during negotiations or by us through separate arbitrations for each referred dispute. It is likely that if individual access seekers have to assess the information themselves, similar information may end up being reviewed multiple times by different access seekers, impacting transparency and efficiency. Unlike DBCTM's assertions about the inefficiency of ex ante assessment (through a reference tariff-setting process)[87], we consider ex ante assessment by an independent third party (like the QCA) to be a relatively efficient process—in that it avoids multiple, concurrent assessments of information provided by DBCTM, the potential for failed negotiations, and the potential for rolling arbitrations.

While DBCTM's obligations to disclose determinations in QCA arbitrations (under s. 101(2)(h) of the QCA Act and cl. 5.2(c)(2) of the 2019 DAU) was intended to reduce some information asymmetry, we are not presently certain that these provisions would provide sufficient transparency because:

- the section itself (s. 101(2)(h)) does not specify the exact nature of the information to be provided
- some of the information may need to be redacted or aggregated to protect the confidential and commercially sensitive information of the parties to the arbitration (s. 101(3))
- the assessment of related information would be conducted in a closed hearing, which may not be privy to parties outside of the arbitration.

Likewise, we are unclear as to whether DBCTM's obligation to disclose TICs determined by the QCA in arbitration (cl. 17.4(e) of the 2019 DAU) will provide sufficient transparency.

Additionally, DBCTM is not obligated to use information that has been determined by the QCA in prior arbitrations for the calculation of prices for subsequent access seekers under the proposed model. This could result in multiple (concurrent) disputes and arbitrations requiring review of

[87] DBCT Management, sub. 5, p. 29.

similar information. Again, we do not consider this an efficient approach, particularly where certain information should remain consistent across access seekers and would not materially change within a regulatory period.

Consequently, we are of the opinion that the information asymmetry inherent in DBCTM's proposed pricing model is not in the interests of access seekers (s. 138(2)(e)). The resulting inefficiencies in negotiations would likely result in an inefficient use of DBCT's coal handling service, particularly when genuine access seekers require timely access to available capacity but are unnecessarily delayed by the negotiation and arbitration processes, impacting competition in related markets (s. 138(2)(a)). We note DBCTM has stated its willingness to revisit the provisions[88], and we suggest consideration of amendments to address this concern, as outlined in Chapter 5.

4.3.2 Time pressures in negotiations

Further to the information asymmetry, we also had regard to the asymmetrical time pressure access seekers would face during negotiations under the proposed model.

Both the DBCT User Group and Whitehaven Coal mentioned the asymmetrical time sensitivity faced by an access seeker in negotiations compared to DBCTM for reasons including:

- ... the access seeker will be pressured to reach agreement to increase their prospects of obtaining limited available access[89]
- DBCT Management's incentive to avoid these [timing] delays would be far weaker than a new access seeker, where DBCT Management is negotiating access for long-term use of a monopoly asset that is at or near capacity.[90]

DBCTM responded to these concerns, stating that access seekers are afforded several protections under the proposed model, including requirements for DBCTM:

> to take all reasonable steps to progress each access application and any negotiations to develop an access agreement with an access seeker in a timely manner.[91]

Additionally, DBCTM specified that the access queue alleviates any pressure on genuine access seekers and that access seekers will have 'ample time' to negotiate with DBCTM and, if required, seek an arbitrated outcome from the QCA.[92] Finally, DBCTM asserted that the complexities and time sensitivities an access seeker faces in potential negotiations are common, and:

> [t]his is not a good reason to treat one aspect of a mining project's delivery differently from the numerous other aspects which must all be negotiated in a commercial environment.[93]

We acknowledge the protections for access seekers mentioned by DBCTM were also included in previous undertakings, including in the current 2017 AU (cl. 5.1). However, in the absence of a reference tariff, we do not consider these protections would be sufficient to ensure timely commercial agreements. As mentioned in the previous section, access seekers would be responsible for the assessment of information before and during negotiations under the proposed pricing model. While we expect DBCTM to commit to negotiations in good faith under this proposed model (cl. 5.1(c) of the 2019 DAU) and consistent with the QCA Act (s. 101(1)), we recognise the difference in time pressure on DBCTM and on access seekers may result in an

[88] DBCT Management, sub. 5, p. 32.
[89] DBCT User Group, sub. 2, p. 14.
[90] Whitehaven Coal, sub. 4, p. 5.
[91] DBCT Management, sub. 5, p. 33.
[92] DBCT Management, sub. 5, p. 34.
[93] DBCT Management, sub. 5, pp. 34–35.

imbalance in negotiations, which negatively impacts the interests of access seekers. We acknowledge that some level of uncertainty that impacts timeliness of outcomes exists in all commercial environments; however, we consider the non-competitive environment for services at DBCT results in the time pressure being asymmetrically greater on access seekers in negotiations with DBCTM, which could result in inefficient outcomes (particularly in the absence of a reference tariff).

While DBCTM has highlighted the provision of arbitration for access seekers as a constraint on its market power[94], we consider the additional time costs in engaging in arbitration exacerbates the time pressure faced by an access seeker relative to DBCTM. There is potential for this imbalance to result in access seekers accepting an inefficient price or experiencing unnecessary delays in their investment. We are presently concerned that DBCTM's proposed pricing model does not sufficiently protect access seekers from being resigned to this outcome.

Therefore, our preliminary view is that the imbalance in negotiations under the proposed model may result in access seekers not gaining access to available capacity in a timely manner and/or having to accept a TIC that is reflective of asymmetric time pressures. This is not in the interests of access seekers (s. 138(2)(e)) and may result in an inefficient use of DBCT's coal handling service (s. 138(2)(a)). We believe the proposed pricing model requires amendments, at the very least, to ensure access seekers are not materially impacted by the asymmetrical time pressure—and access charges can be agreed upon in a timely manner.

4.3.3 Criteria for arbitration

We must have regard to the matters outlined in section 120 of the QCA Act in making an access determination—such as in the arbitration of a TIC—and could have regard to any other matters identified in an access undertaking in addition to our statutory obligations. DBCTM's drafting of the arbitration factors in clause 11.4(d) of the 2019 DAU alludes to this, with mention of section 120 in clause 11.4(d)(1)(G).

However, we presently do not consider the proposed arbitration factors in clauses 11.4(d)(1)(A)–(F) of the 2019 DAU appropriate to approve. We are not convinced of the relevance of a number of the factors to an arbitration, and consider requiring us to have regard to them in arbitrating any disputes in relation to access charges (under cl. 17.4 of the 2019 DAU) would not be in the interests of access seekers (s. 138(2)(e)). Consequently, we consider these factors would not act to constrain DBCTM's market power or incentivise agreement through negotiation, as intended.

In addition, we recognise reference to these factors in the 2019 DAU SAA (cl. 7.2(d)) creates uncertainty as to whether existing access holders—with access agreements under the current or previous undertakings—would receive asymmetrically favourable terms in arbitrations compared to access seekers and new access holders with agreements under the proposed 2019 DAU. We foresee that if not addressed, this could adversely affect competition between access holders and seekers.

We consider amendments to the arbitration factors are necessary in order for the 2019 DAU to be considered appropriate to approve. These amendments are discussed in Chapter 5 of this interim draft decision.

[94] DBCT Management, sub. 1, p. 54, sub. 5, p. 26.

Application of the 'willing but not anxious' test

We do not consider criterion (1)(A), the 'willing but not anxious' criterion, is appropriate as a matter we would need to have regard to in the arbitration of a TIC.

DBCTM stated (and gave examples of how) this criterion is commonly used 'in Australia as a valuation concept in circumstances where an independent means of arriving at a market value is required'.[95] All user stakeholders disagreed with the application of this standard to arbitration of a TIC. Reasons for this disagreement include:

- ... it is not commonly applied to valuing a service (noting the cases that DBCTM refers to concern valuation of assets and/or liabilities);[96]
- ... where this standard has been used by other regulators (such as the [Australian Competition and Consumer Commission] ACCC in relation to the Copyright Guidelines), it has not been used in the context of a market that is clearly not workably competitive and where one firm holds clear and unequivocal market power (as in the case with DBCT Management).[97]
- A new access seeker will be far more 'anxious' to secure access, as quickly and efficiently as possible, to a facility for which there are not economic substitutes.[98]

DBCTM explained that the criterion is intended to frame the arbitration task and 'is designed to reduce the effect of any market power that may be held by one party over the other'.[99] It expected us to determine the application of the criterion at the time of individual arbitrations, including seeking submissions from the disputing parties on 'the method to be used to apply the test'.[100] DBCTM asserted that the criterion 'provides greater guidance than the arbitration provisions of the QCA Act'.[101]

Our understanding of the 'willing but not anxious' concept is that:

- it is a form of economic bargaining test commonly applied in price review clauses in markets with workable, but oligopolistic, competition—such as when undertaking periodic rent reviews under long-term commercial leases, or price reviews under long-term gas supply agreements
- the test is applied by an expert through identifying a sample of similar contracts involving comparably recent transactions, in order to undertake a loose form of benchmarking exercise
- the benchmarking exercise is most effective when it is possible to find sufficient and relevant samples of negotiated outcomes.

Based on DBCTM's explanation discussed above, we understand its intention with the application of this criterion was to create a standard whereby the two negotiating parties are assumed to have symmetrical (or approximately symmetrical) bargaining power. The Australian Taxation Office's use of the term, as cited by DBCTM, specifies 'an open and unrestricted market'[102], which is materially unlike the market for access to DBCT, where DBCTM is an access provider with

[95] DBCT Management, sub. 1, p. 42.
[96] DBCT User Group, sub. 2, p. 46.
[97] New Hope Group, sub. 3, p. 8.
[98] Whitehaven Coal, sub. 4, p. 6.
[99] DBCT Management, sub. 5, p. 36.
[100] DBCT Management, sub. 5, pp. 36–37.
[101] DBCT Management, sub. 5, p. 37.
[102] DBCT Management, sub. 1, p. 43.

market power. To apply this criterion in such circumstances, we would have regard to relevant proxies or benchmarks for the TIC at DBCT, negotiated between symmetrically 'willing but not anxious' parties.

The criterion (1)(A) outlines the range of negotiated outcomes we would need to have consideration for as potential benchmarks, which includes 'all mines that have acquired, currently acquire or may acquire coal handling services supplied at the Port of Hay Point'. We find the geographic boundary defined under this criterion may capture prices paid by users outside of what we consider representative of an access seeker for services at DBCT. As identified by the DBCT User Group, some mines that are included in this proposed boundary typically export coal through other ports (e.g. WICET or APCT), only choosing to export at DBCT on rare occasions.[103] Application of this geographic boundary would imply other terminals are relevant alternatives to DBCT. We do not consider this an accurate representation of the coal handling service at DBCT or relevant in determining a TIC for this service, given the unique service offering at DBCT for metallurgical coal at materially lower cost. Critically, we do not consider any negotiated access charge in these other ports within DBCTM's identified geographic boundary appropriate to benchmark the 'willing but not anxious' criterion.

Alternative benchmarks for the 'willing but not anxious' criterion would be access charges agreed with existing users at DBCT (at the time of arbitration). However, we do not consider applying other agreed TICs as benchmarks for this hypothetical bargain test would be appropriate given the likelihood of a negotiated TIC not being reflective of a symmetrical bargain due to the information asymmetry and time pressure matters discussed earlier. In addition, we consider an agreed TIC that is reflective of the efficient costs of supply, such as those based on a reference tariff under existing agreements, would already form part of our consideration under the section 120 factors.

Consequently, we do not envisage how this hypothetical bargain test could be practically applied in an arbitration between DBCTM and an access seeker, and therefore, we are minded not to approve inclusion of the clause 11.4(d)(1)(A).

Consideration of forecast tonnage, costs and rehabilitation obligations

We find that the matters we would have regard to in section 120 of the QCA Act sufficiently encompass relevant information to our determination of a TIC in an arbitration. We recognise that arbitration criteria (1)(B) and (C) in the 2019 DAU—the expected future tonnages and capital expenditure requirements—may be a subset of the criterion in section 120(1)(f) and as such, would be relevant in a determination. However, we are not convinced of the need to identify these limited criteria as requiring particular attention over other matters listed in section 120 for our arbitration of a TIC under the proposed 2019 DAU.

In the same vein, we find that having regard to DBCTM's rehabilitation obligations under the PSA (under arbitration criterion (1)(E)) relevant—given it has historically aimed to fund this through an allowance charged to users—and recognise the intent to identify this component of the access charge for arbitrations. However, we consider this is sufficiently captured in the criteria of sections 120(1)(d) and (f), and as such, we would be obligated to have regard to it in an arbitration without requiring specific reference in the undertaking. Further to this, we intend to assess the rehabilitation plan and forecast costs proposed by DBCTM, and included in its 2019 DAU submission, and will present our preliminary views on this aspect in the future (full) draft decision.

[103] DBCT User Group, sub. 6, p. 20.

Defining the type of service provided to the access seeker

We consider DBCTM's inclusion of criterion (1)(D), the types of service to be provided, was intended to reflect its assertion that it provides 'varied or different services' to its core coal handling service. As discussed in Chapter 6 of this interim draft decision, we are not presently convinced of the merits of the proposed differentiated pricing approach, given:

- We consider the 'varied or different services' provided at DBCT to be part of its core coal handling service.
- There is a lack of evidence to suggest that similar 'varied or different services' have been charged for separately in the past or at any other coal terminal in Australia.
- We are not convinced that use—and therefore pricing—of these 'varied or different services' across the entire pricing period could be forecasted in advance for the purposes of conducting informed negotiation/arbitration processes.

Therefore, our preliminary view is that we do not regard the stated criteria as relevant in an arbitration under the proposed 2019 DAU.

Relevance of any other agreed TIC

We do not find it necessary to specify that we must have regard to 'any other TIC' in determining the TIC in an arbitration (criterion (1)(F)). We are of the view that the matters outlined in section 120 sufficiently cover the relevant matters for an arbitration, including section 120(2)—which allows us to take into account any other matters (relating to the matters mentioned in s. 120(1)) that we consider appropriate. Critically, we consider the price of access should promote efficiency, reflect at least the efficient costs of supply and be non-discriminatory (where it does not aid efficiency), under the QCA Act (ss. 69E, 168A). We are not presently convinced that 'any other TIC' that was agreed during negotiation would assist in the determination of a price that promotes efficient use of the Terminal.

4.3.4 Impact on certainty at DBCT

Finally, we acknowledge the potential impacts of DBCTM's proposed pricing model on certainty about services at DBCT and consequentially, on investment incentives.

The DBCT User Group and New Hope Group stated that DBCTM's proposed model introduces material uncertainty for price (and non-price terms) of access[104] and DBCTM has not sufficiently justified the deviation from reference tariffs.[105] Both expressed concerns on the impact of this uncertainty on the willingness of access seekers to make longer-term investment decisions, including in dependent markets.[106]

DBCTM argued that certainty is afforded through 'agreement or arbitration of access charges'[107], which would be contracted for five years or longer if parties agree. It also disagreed with stakeholders on the impacts of excluding a reference tariff on investment incentives, stating access charges at DBCT are immaterial to investment in the industry relative to other factors (such as labour or coal prices), based on historical fluctuations.[108]

[104] DBCT User Group, sub. 2, p. 12; New Hope Group, sub. 4, pp. 11–12.
[105] DBCT User Group, sub. 6, p. 6; New Hope Group, sub. 7, pp. 3–4.
[106] DBCT User Group, sub. 6, p. 15; New Hope Group, sub. 7, p. 4.
[107] DBCT Management, sub. 5, p. 29.
[108] DBCT Management, sub. 5, p. 29.

We recognise that our assessment of the impact on certainty does not hinge on a comparison with the previous pricing model that included a reference tariff and may have afforded a higher level of certainty. We accept that some level of uncertainty exists in all commercial environments and we had regard to DBCTM's point that 'absolute certainty' of a reference tariff is not a prerequisite to full protection.[109] However, we consider DBCTM's proposed pricing model contains several issues, as discussed above, which would materially increase uncertainty such that it could adversely impact demand for the coal handling service at DBCT. We are conscious that access seekers may be less confident in the regulation of DBCT—given the proposed change in objectivity and transparency in the determination of access charges.[110]

In the context of impacts on investment incentives, we do not consider the possible range of access charges between users, if similar to historical ranges reported by DBCTM, would have a material impact on investment incentives relative to other matters, particularly the market price of coal. However, a pricing model that does not sufficiently inform access seekers entering negotiations or adequately protect them from asymmetrical time pressures could increase the likelihood of negotiated prices gradually increasing to the point of breaching historical ranges, where there is insufficient justification for doing so. In addition, we recognise uncertainty may also come from the negotiation-arbitration process—where access seekers may face uncertain delays and increased costs to determine access charges. We are concerned that the delay and costly determination of access to available capacity to genuine access seekers, particularly through rolling arbitrations, could escalate to the point of adversely impacting investment in DBCT.

DBCTM has stressed that the option of arbitration by the QCA is a constraint on its market power and would provide a 'certain backstop' to disputes, reiterating the DBCT User Group's points from a previous submission.[111] As discussed earlier, we consider the asymmetrical time pressure faced by access seekers and the possibility of rolling arbitrations would negate the characterisation of access to QCA arbitrations as a 'certain backstop' to disputes, particularly with the information asymmetry that exists under the proposed model. We consider the previous discussion on our ability to deliver certainty in arbitration was made in comparison to private arbitration, and is not sufficient justification in itself that this process affords an appropriate level of certainty.

We find the lack of transparency and objectivity in determining access charges under DBCTM's proposed pricing model introduces material uncertainty to the determination of access charges at DBCT. We are minded to believe this uncertainty could impact investment incentives beyond the short-term (ss. 138(2)(a) and (h)), and consequently we find the pricing model to not be in the public interest (s. 138(2)(d)), and neither is it necessarily in the interests of DBCTM as the operator of DBCT (s. 138(2)(c)).

4.4 Conclusion

As outlined above, we do not consider DBCTM's pricing model, as proposed, appropriate to approve, having regard to the criteria in section 138(2). However, we envisage that a pricing model without reference tariffs could be appropriate to approve, provided it meets these criteria. We consider the pricing model must constrain DBCTM's ability to exert market power, lead to prices reflecting the efficient costs of supply, and thereby promote economically efficient operation and use of the Terminal. Further, it should promote competition and as such, the

[109] DBCT Management, sub. 1, p. 28.
[110] DBCT User Group, sub. 6, pp. 13–15; New Hope Group, sub. 7, pp. 3–4.
[111] DBCT Management, sub. 5, p. 20.

pricing model should not create material asymmetry in the determination of access pricing between access holders and access seekers that would adversely impact competition. Finally, we consider the pricing model must provide an appropriate level of certainty to promote an efficient level of investment in DBCT.

We consider the following characteristics are necessary for an appropriate pricing model that does not include reference tariffs:

- *information provisions that facilitate negotiations*—provision of the necessary information would allow access seekers to enter negotiations from an appropriately informed position. A model that provides such information will contribute to effective negotiations with prices that are likely to be at least reflective of the efficient costs of supply, reducing the dependence on costly and time-consuming arbitrations
- *arbitration criteria that constrain asymmetrical market power*—the criteria that we must have regard to in arbitrations should act to credibly constrain DBCTM's market power and lead to pricing that reflects at least the efficient costs of supply, consistent with the pricing principles of the QCA Act (s. 168A). Effective criteria should provide certainty to our approach, reducing the monetary and time costs for parties and potentially incentivising agreement through negotiation
- *certainty that the arbitration criteria do not impede competition for access to capacity*—the arbitration criteria should not result in access seekers being materially worse off in negotiations compared to access holders, where the latter may benefit from arbitration criteria that more effectively constrain DBCTM's market power under existing access agreements. It is critical to provide certainty that access holders and seekers operate on 'equal footing' in this regard, whereby neither party is exposed to monopoly pricing or prices that are otherwise inconsistent with the pricing principles in section 168A of the QCA Act
- *clear and efficient processes in negotiation and arbitration and transparency around arbitrated outcomes*—clear and certain processes ensure access seekers and holders are not impacted by asymmetrical time pressure. Transparency of arbitration outcomes leads to efficient price determinations and decreases the likelihood of rolling arbitrations.

We consider DBCTM's pricing model, as proposed, requires amendments in order to feature these characteristics and be appropriate to approve under section 138(2) of the QCA Act.

Interim draft decision

(1) Our interim draft decision is to refuse to approve the pricing model as proposed in DBCTM's 2019 DAU.

(2) We consider the proposed pricing model does not appropriately balance the interests of access seekers and DBCTM, and could increase uncertainty of access to DBCT. We note particular issues with:

  (a) the information provision clause—which would impact the effectiveness and efficiency of negotiation of access prices

  (b) the proposed arbitration factors and processes—that could result in inefficient pricing outcomes for access seekers.

5 AMENDMENTS TO DBCTM'S 2019 DAU

We consider a pricing model without a reference tariff or tariffs could be appropriate to approve—but we would require DBCTM to amend its proposed pricing model to incorporate stronger information disclosure provisions and more balanced arbitration factors.

5.1 DBCTM's views

In response to our stakeholder notice asking for submissions to inform the 'threshold' matter of the 2019 DAU pricing model, DBCTM said that while it considers the proposed 2019 DAU, as drafted, is already balanced and effective, it is committed to ensuring a pricing model without reference tariffs is implemented effectively. As such, DBCTM said it looks forward to working constructively with the QCA and users to implement the model in a way that is balanced, effective and fit-for-purpose.[112]

5.2 Stakeholder views

Other stakeholders expressed the view that a pricing model without reference tariffs is fundamentally flawed, and that it cannot be amended in any way to be appropriate:

- The DBCT User Group said:

  > [The DBCT User Group] considers that it is the negotiate/arbitrate model itself that gives rise to the inappropriateness. While there are amendments that could be made to remove some egregious provisions, the flaws of the negotiate/arbitrate structure mean that the 2019 DAU cannot be modified to be appropriate while it relies on that form of regulation.[113]

- New Hope Group said:

  > There is no way to modify a negotiate/arbitrate model of regulation to balance the interests of the parties at DBCT— and the best way to balance the interests of DBCT Management, access seekers and access holders is to adopt an undertaking based model of regulation, under which the QCA determines an efficient price for access.[114]

5.3 QCA analysis

5.3.1 Information provision

Problem definition

Section 4.3.1 of this interim draft decision describes our position on the information asymmetry that exists between DBCTM and access seekers in a negotiation under the proposed pricing model. This section examines the problems in more detail.

The information provision clause (cl. 5.2(c)(2) of the 2019 DAU) references section 101(2) of the QCA Act. We consider that this provision (s. 101(2)) is broadly written and is the minimum standard for information provision—but is not sufficiently detailed in itself in the context of DBCTM's proposed pricing model. As a result, it may lead to some issues (described below).

[112] DBCT Management, sub. 5, p. 3.
[113] DBCT User Group, sub. 6, p. 16.
[114] New Hope Group, sub. 7, p. 3.

Our preliminary view is that access seekers and existing access holders seeking additional access may face the following information asymmetry issues:

- There is significant uncertainty—the 2019 DAU provides DBCTM with a wide range of discretion and flexibility as to the information it actually provides, the quality and format of the information it provides, and the way prices are calculated. The DBCT User Group said under the proposed model, there is no requirement:
    - for the way in which the price is calculated to be in any way transparent or verifiable (so for example, there is no requirement for the price even to be calculated using a building blocks type revenue model).
    - to justify any rate of return.
    - for DBCTM to verify or substantiate the prudency or efficiency of any cost or asset valuations.[115]
- The information may be too difficult to understand within a limited timeframe and with limited resources. For example, an access seeker may request a copy of GHD's rehabilitation plan that has estimated the rehabilitation cost at $1.22 billion; however, from a practical point of view, the DBCT User Group said an access seeker would not be able to critique the report and then use the information to negotiate.[116]

In addition, new access seekers, who have little or no experience of dealing with DBCTM, could, in our view, face further barriers—for example, information asymmetry, delays and uncertainty are heightened for new access seekers. The DBCT User Group said:

- many new access seekers are smaller companies with less resources or experience with DBCT than existing access holders (and unlikely to have any insight through being shareholders of the independent operator, DBCT PL, in the way many existing access holders are)
- access seekers are more likely to be making contracting decisions at the same time as they are making other project investment and contracting decisions as part of a greenfield project—such that uncertain costs of access, and uncertain timing for resolving whether access is able to be obtained are more challenging for them than existing access holders.[117]

However, we consider some of the issues and barriers described above are limited. For example, DBCTM said these issues should not raise concerns, as it is not clear that DBCT PL holds any information that is relevant to negotiations with DBCTM that is not readily available to access seekers.[118] Additionally, making contracting decisions for other aspects of a project at the same time as contracting with DBCTM is the commercial reality of a mining project—it is part of doing business.[119]

An alternative information provision model (amended 2019 DAU)

In order to understand how the 2019 DAU could be amended to address the information asymmetry issue, we have reviewed the information provision requirements in the gas sector. We have chosen the gas sector because submissions from DBCTM and other stakeholders have referred to it extensively.

[115] DBCT User Group, sub. 2, pp. 45–46.
[116] DBCT User Group, sub. 2, p. 52.
[117] DBCT User Group, sub. 2, p. 14.
[118] DBCT Management, sub. 5, p. 32.
[119] DBCT Management, sub. 5, p. 34.

While the application of some information provision requirements from the gas sector may be appropriate for inclusion in the amended 2019 DAU, we are not expressing a view; neither have we applied any other principles (including pricing principles) from the gas sector to the DBCT context.

We understand that the form of regulation of gas pipelines falls under one of three types: full regulation, light regulation and no regulation (uncovered or non-scheme pipelines). Of these, we consider light regulation pipelines to be the closest case study to the 2019 DAU—because service providers and potential users must negotiate the price and terms and conditions for access to the service. When an agreement cannot be reached, either party may refer the dispute for arbitration.

Our analysis of the light regulation pipelines shows that service providers must use the predetermined financial reporting template to provide extensive financial information, including:

- the statement of pipeline revenue and expenses, by the categories set out in the template
- the statement of pipeline assets, where it is disaggregated by:
  - the asset's useful life schedule, which provides the basis for calculating depreciation for different classes of assets and the reason for choosing this basis
  - the shared supporting asset schedule, which provides the basis for allocating shared assets to the pipeline
- the pipeline and financial performance information, including the return on capital and return of capital
- the regulatory asset base (RAB) of the pipeline
- the basis upon which the weighted average cost of capital (WACC) is determined
- weighted average price information.[120]

Service providers are also required to adopt the methods, principles and inputs set out in the AER's guideline, which are highly prescriptive. For example, the guideline states that the opening RAB value should be based on the value established at the commencement of the most recent full access arrangement[121], and the WACC must be an estimate of the WACC that would have been set by the ACCC/AER.[122]

Additionally, the financial statements must be assured by an independent auditor[123], and the information mentioned above must be published on the service provider's website, in a place that is easy to find.[124]

Based on this review, our view is that many of the information provision clauses governing light regulation pipelines, when applied to the 2019 DAU, would overcome a large proportion of the information asymmetry issues described earlier.

For example, an amended 2019 DAU could require DBCTM to:

[120] AER, *Financial reporting guideline for light regulation pipeline services*, October 2019, p. 8; s. 2; s. 3.1.3; s. 3.3.
[121] Assuming a RAB value was previously established as a result of the pipeline being covered and subject to a full access arrangement in accordance with the NGR; AER, *Financial reporting guideline for light regulation pipeline services*, October 2019, p. 19, table 4.1.
[122] AER, *Financial reporting guideline for light regulation pipeline services*, October 2019, section 6.
[123] AER, *Financial reporting guideline for light regulation pipeline services*, October 2019, section 3.4.
[124] AER, *Financial reporting guideline for light regulation pipeline services*, October 2019, section 1.6.

- disclose its revenue and expenses, financial performance information (including the return on capital, and return of capital), RAB, the basis upon which the WACC is determined, and weighted average price information in a predetermined format
- ensure its financial statements are certified and assured by an independent auditor
- publish the information on its website in a place that is easy to find.

We note the provisions described above could be 'hardcoded' into the 2019 DAU, or alternatively the 2019 DAU could refer to an 'information pack' that must be published on DBCTM's website, where the contents of the 'information pack' is determined by the QCA in consultation with stakeholders. We welcome stakeholder feedback on this matter.

We acknowledge the DBCT User Group's claim that there are no avenues to challenge whether the information provided is actually sufficient to provide for an informed negotiation.[125] However, DBCTM argued that any dispute as to DBCTM's compliance with its information provision obligations could be raised through clause 17 of the 2019 DAU.[126] It is our view that clause 17 of the 2019 DAU provides access seekers with the ability to raise a dispute as to DBCTM's compliance with its information provision obligation (even if negotiations have not commenced). However, we note that the QCA Act already provides a method for resolving compliance issues with an approved access undertaking, which could be invoked through amendments to the 2019 DAU to:

- explicitly refer to section 101(5) of the QCA Act—where this would provide a clear signal that access seekers may seek the QCA's advice and directions if they believe DBCTM has breached compliance with its information provision obligations
- explicitly refer to section 150A of the QCA Act—where this would provide a clear signal to DBCTM that it must comply with an approved access undertaking, and to act otherwise would potentially lead to enforcement action.

However, we note that the QCA's advice and direction as to what constitutes a compliance or non-compliance with DBCTM's information provision obligations would be guided by the specific information and standard stated in the information provision clause of the eventual 2021 access undertaking. As a result, we encourage stakeholders to provide written submissions as to what information DBCTM should be obliged to provide, and the quality and standard of such information.

The amendments described above provide for a number of key pieces of information to be disclosed in a predetermined format, which must be certified and assured by an independent auditor, and published on DBCTM's website in a place that is easy to find. We consider the information already exists in a similar form—and should be readily accessible by DBCTM—because DBCTM has previously submitted similar information to us as a part of previous DAU processes. We also acknowledge that DBCTM would be required to format its data into a useable form to be certified and published. While the information disclosure requirements place some regulatory burden on DBCTM, it is our view that this may not be overly onerous because the information already exists in a similar form and any burden is outweighed by the benefits from improved transparency in information provision. As a consequence, we consider the information provision requirements in an amended 2019 DAU would not have a material impact on the legitimate business interests of the operator (s. 138(2)(c)).

[125] DBCT User Group, sub. 2, p. 46.
[126] DBCT Management, sub. 5, p. 32.

Additionally, we had regard to access seekers having unrestricted access to a wide range of certified information. The information may be used to:

- inform an access seeker's business operations in upstream and downstream markets prior to commencing negotiations with DBCTM for access to the Terminal
- inform an access seeker in its negotiation with DBCTM, where the information disclosure places the access seeker on a more level playing field compared to the 2019 DAU.

Benefits from this unrestricted access are in the interests of access seekers (s. 138(2)(e)), which in turn contributes to the promotion of sustainable and efficient development of the Queensland coal sector (s. 138(2)(d)).

5.3.2 Criteria for arbitration—2019 DAU

Problem definition

Under the 2019 DAU, the arbitration criteria set out in clause 11.4(d) of the 2019 DAU would apply to arbitrations between DBCTM and:

- access seekers—who are seeking available capacity at DBCT (cl. 11.3(b) of the 2019 DAU) and cannot satisfactorily negotiate an initial price with DBCTM
- existing access holders—who are seeking additional access to available capacity at DBCT (cl. 11.3(b) of the 2019 DAU) and cannot satisfactorily negotiate an initial price with DBCTM
- expansion parties—access seekers (existing access holders) seeking access (additional access) that can only be accommodated through a Terminal capacity expansion (cl. 5.4(l)(15)(D) of the 2019 DAU) where they cannot negotiate an expansion pricing approach or price with DBCTM
- future access holders—who have signed access agreements according to the 2019 DAU and cannot satisfactorily negotiate a new price with DBCTM (cl. 7.2(c)(ii) of the 2019 DAU SAA).

The arbitration criteria in clause 11.4(d) of the 2019 DAU include these factors:

- the TIC that would be agreed by a willing but not anxious buyer and seller of coal handling services for mines within a geographic boundary drawn so as to include all mines that have acquired, currently acquire or may acquire coal handling services supplied at the Port of Hay Point
- the type of service to be provided to the access seeker
- any other TIC agreed between DBCTM and a different access holder for a similar service level.

As discussed in section 4.3.3 of this interim draft decision, our view is that the arbitration factors in clause 11.4(d) of the 2019 DAU are inappropriate, particularly the three factors listed above.

An alternative arbitration model (amended 2019 DAU)

For the reasons outlined in the previous chapter (see section 4.3.3), we consider amendments are necessary to ensure that an arbitration in accordance with the 2019 DAU is a credible threat to constrain DBCTM from exercising its market power in a negotiation. We consider this could be achieved by removing the arbitration factors in clause 11.4(d) of the 2019 DAU, and instead requiring the QCA to have regard to the factors outlined in section 120 of the QCA Act. We note that the QCA Act already requires the QCA to have regard to section 120 of the QCA Act in an

arbitration of a dispute about access under Part 5 of the QCA Act[127] (s. 120(1)). As a result, the amendments would simply reinforce our obligations under the QCA Act.

We consider that the arbitration factors outlined in section 120 of the QCA Act provide the QCA with the flexibility to adopt, among other things, its current building blocks methodology and current approach to the rate of return. As a consequence, a QCA-arbitrated price would in all likelihood be reflective of the efficient costs of supply, including a return on investment commensurate with the regulatory and commercial risks involved, which we consider will appropriately constrain DBCTM from exercising market power.

While the amendments described above would mean an arbitration in accordance with the 2019 DAU is a credible threat to constrain DBCTM from exercising its market power, we acknowledge there is some uncertainty as to the arbitration process and methodology to be applied in an arbitration. To address this uncertainty, we could publish a QCA guidance document that indicates the process we would likely follow, and the methodologies we would intend to adopt in an arbitration under an approved access undertaking. The document could cover the following topics:

- the overall methodology we intend to use, which is likely to be the building blocks approach
- the method the QCA would intend to use to establish the RAB, including if the RAB would be based on the opening RAB from the 2017 AU
- the way in which depreciation would be calculated, including whether we would continue to adopt a straight line depreciation method and the asset lives used in the 2017 AU
- the method or methods for calculating the WACC, including whether we would continue to adopt previous positions on the gearing, risk-free rate, asset beta, market risk premium, debt risk premium, and gamma
- consideration of how an appropriate remediation allowance would be determined, including the status of the rehabilitation plan prepared for DBCTM by GHD
- the proposed treatment of other costs—such as capital and maintenance expenditure, and corporate overhead costs.

If we are minded to approve an amended pricing model without reference tariffs, we intend to provide a preliminary version of this guidance as part of the (full) draft decision on DBCTM's 2019 DAU. We seek stakeholder views on matters related to the guidance document, including consideration of whether the arbitration processes and/or proposed methodologies should be included in an approved access undertaking.

It is our view that these amendments would provide greater assurance that arbitrated prices would likely be reflective of the efficient costs of supply, including a return on investment commensurate with the regulatory and commercial risks involved, and as a result, provide a credible threat to constrain DBCTM from exercising its market power in a negotiation. This is consistent with the interests of access seekers (s. 138(2)(e)), the object of Part 5 (s. 138(2)(a)) and the promotion of sustainable and efficient development of the Queensland coal sector (s. 138(2)(d)). Lastly, as we are obliged to apply the access dispute determination factors in section

[127] See in particular ss. 111 and 112 of the QCA Act, regarding the application of arbitration procedures to access disputes.

120 of the QCA Act, an arbitration would in effect have regard to the effect of excluding existing assets for pricing purposes[128] (s. 138(2)(f)) and the pricing principles[129] (s. 138(2)(g)).

Amendments to price review provisions in DBCTM's proposed SAA

DBCTM's 2019 DAU proposed that the arbitration factors outlined in clause 11.4(d) will apply to future access holders who sign access agreements according to the 2019 DAU and cannot satisfactorily negotiate a new price with DBCTM at the five-year review of charges (cl. 7.2(c)(ii) of the 2019 DAU SAA).

We consider that in this case there may be merit in amending clause 7.2 of the 2019 DAU SAA to reflect provisions in the existing user agreements (cls. 7.2 (d) and (e) of the 2017 AU SAA). These provisions require that:

- the QCA conducts the arbitration in such a manner as it sees fit, after consultation with the parties (cl. 7.2(d)(i) of the 2017 AU SAA)
- where the QCA is unwilling or unable to act, then the arbitrator have regard to specific factors, including the then current approach of the QCA (cl. 7.2(e) of the 2017 AU SAA).

We seek stakeholder views on this matter.

5.3.3 Criteria for arbitration—existing users

Problem definition

This section discusses the arbitration factors existing users face when an arbitration is conducted in accordance with existing user agreements.[130]

An existing user, who cannot satisfactorily negotiate a pricing reset with DBCTM, may refer a dispute for arbitration under its access agreement:

- When the QCA is the arbitrator, the QCA may conduct the arbitration in such a manner as it sees fit, after consultation with the parties (cl. 7.2(d)(i) of the 2017 AU SAA).
- If the QCA is unwilling or unable to act, then another arbitrator must be agreed upon (cl. 7.2(d)(ii) of the 2017 AU SAA). The arbitrator is required to have regard to the current approach of the QCA, with the intent that the arbitration should produce an outcome similar to that which might have been expected had the QCA determined it (cl. 7.2(e)(vii) of the 2017 AU SAA).

We note that existing access agreements do not specify the arbitration process or factors we must have regard to in an arbitration. However, in practice, we would very likely have regard to matters similar to those set out in section 120 of the QCA Act (although we would not be obliged to do so).[131]

Our preliminary views are:

- When the QCA is the arbitrator, it is provided with the flexibility to adopt, among other things, its current building blocks methodology and current approach to the rate of return (if it should see fit to do so). As a consequence, a QCA-arbitrated outcome would likely reflect the efficient costs of supply, including a return on investment that is commensurate with the

[128] As set out in section 120(1)(k) of the QCA Act.
[129] As set out in section 120(1)(l) of the QCA Act.
[130] Assuming existing user agreements reflect the relevant terms of clause 7 of the 2017 AU SAA.
[131] As this would not be an access dispute for the purposes of Part 5 of the QCA Act, section 120 of the QCA Act would not automatically apply.

regulatory and commercial risks involved (with the effect of allocating any available rent to the user). We also note that the charge applying prior to the agreement revision date will continue to apply until otherwise agreed to or determined, with the new charge and interest rate to be applied retrospectively. It is our view that these two factors, in combination, provide a credible threat to constrain DBCTM from exercising its market power in a negotiation. We note that the DBCT User Group has expressed contrary views because it considers that, even if a QCA-determined arbitration produces the same outcome as a QCA-approved reference tariff, the cost to an individual user to obtain that outcome would be significant.[132] The DBCT User Group said some users will settle, rather than engage in protracted, expensive and uncertain arbitrations.[133]

- While an arbitrator other than the QCA is required to have regard to the current approach of the QCA—with the intent that the arbitration should produce an outcome similar to that which might have been expected had the QCA determined it—the arbitrator would be less experienced and familiar with DBCT and the market within which it operates, compared to the QCA. As a consequence, there is less certainty about the outcome of a non-QCA arbitration compared to a QCA arbitration. In spite of this, given the evergreen rights of users, we consider a non-QCA arbitration can still constrain DBCTM from exercising its market power in a negotiation.

An alternative arbitration model (amended 2019 DAU)

When the QCA is the arbitrator, we consider that the arbitrated outcome would likely reflect the efficient costs of supply, including a return on investment that is commensurate with the regulatory and commercial risks involved. In the context of the evergreen rights of users, our view is that this outcome would provide a credible threat to constrain DBCTM from exercising its market power in a negotiation. As a result, we consider this part of the 2019 DAU to be appropriate.

However, when the QCA is unwilling or unable to act, then another arbitrator must be agreed upon. Our view is that under this scenario, there is less certainty about the arbitrated outcome compared to a QCA arbitration. In spite of this, we consider a non-QCA arbitration is still likely to be a credible threat to constrain DBCTM from exercising its market power. While the issue is marginal, it could be further reduced through the provision of a QCA guidance document (as discussed in section 5.3.2).

We consider that the provisions in existing user agreements,[134] in combination with a QCA guidance document, mean that arbitrated outcomes would likely reflect the efficient costs of supply including a return on investment that is commensurate with the regulatory and commercial risks involved—and, as a result, provide a credible threat to constrain DBCTM from exercising its market power in a negotiation. This is consistent with the interests of access seekers (s. 138(2)(e)) and not inconsistent with the pricing principles (s. 138(2)(g)). Additionally, since arbitrated prices would likely reflect the efficient costs of supply, including a return on investment that is proportional to the risks involved, it would also be consistent with the object of Part 5 (s. 138(2)(a)) and the promotion of sustainable and efficient development of the Queensland coal sector (s. 138(2)(d)).

[132] DBCT User Group, sub. 6, p. 22.
[133] DBCT User Group, sub. 6, p. 18.
[134] Assuming existing user agreements reflect the relevant terms of clause 7 of the 2017 AU SAA.

Uncertainty regarding the application of the arbitration criteria in the 2019 DAU for existing users

We recognise there is a degree of uncertainty with respect to whether arbitrations conducted under existing user agreements would need to apply the arbitration factors specified in clause 11.4(d) of the 2019 DAU.[135] The relevant references with respect to this topic are:

(1) clause 7.2(b)(i) of the 2017 AU SAA—stipulates that a pricing reset may have regard to the terms of the access undertaking in place at the time of the relevant agreement revision date[136]

(2) clause 17.4(a) of the 2019 DAU—states that the QCA must determine disputes in accordance with clause 11 of the 2019 DAU, and the determination must not be inconsistent with the 2019 DAU.

DBCTM considered that clause 7.2(b)(i) (point (1) above) would have the effect of requiring the arbitrator to arbitrate in accordance with the factors in the 2019 DAU[137]—which include the 'willing but not anxious' concept.

If it was the case that the criteria in clause 11.4(d) applied to price reviews under existing user agreements, the protections to existing users described above may not hold. However, we consider an amended 2019 DAU that might be appropriate to approve, would remove the arbitration factors in clause 11.4(d) of the 2019 DAU and replace these with the factors in section 120 of the QCA Act (as outlined in section 5.3.2 of this interim draft decision). As a consequence, we consider that the references described in points (1) and (2) above would not require the arbitrator to have regard to the willing but not anxious concept (among other things).

In addition, and as indicated earlier, if we are the arbitrator for a price reset dispute we expect we would most likely default to the section 120 factors in the QCA Act. That is, subject to any consultation with the parties, we anticipate that in arbitrating a price reset dispute involving an existing user under its existing access agreement, we would have regard to matters the same as or similar to those set out in section 120.

5.3.4 Expansions—process for securing conditional access agreements in the context of expansion capacity

Problem definition

The 2019 DAU proposes that an IAP from DBCTM to an access seeker seeking access that can only be accommodated through a Terminal capacity expansion must contain:

- information on whether a queue has been formed (cl. 5.5(d)(6)(C) of the 2019 DAU)
- an initial assessment of the pricing method that will be applicable—having regard to any planned or reasonably expected Terminal capacity expansions, relevant QCA rulings and the expansion pricing principles (cl. 5.5(d)(6)(D) of the 2019 DAU)

[135] We note the uncertainty discussed here would not exist under the declaration review process whereby the assessment of protections for existing users is undertaken in a context where there is no access undertaking in place.

[136] Agreement revision date generally refers to the commencement date of each access undertaking, or if an access undertaking ceases to be relevant, then the date five years after the immediately previous agreement revision date.

[137] DBCT Management, sub. 5, p. 25.

- where reasonable, an estimate of the prospective access charges (cl. 5.5(d)(6)(E) of the 2019 DAU).

Once an access seeker receives the IAP, it may notify DBCTM that it wishes to commence negotiations to progress towards a conditional access agreement (cl. 5.7(a)). If the access seeker and DBCTM successfully negotiate and enter into a conditional access agreement, then the QCA's role is limited. If a dispute arises during the negotiation, then either party may refer the dispute, and the QCA must have regard to the arbitration factors (cl. 5.7(f) of the 2019 DAU), as discussed in Chapter 3. See section 5.3.2 of this interim draft decision for our views on how the arbitration factors should be amended.

However, an access seeker may sign a binding conditional access agreement that does not contain an expansion pricing approach or price (cl. 5.4(l)(15)(A) of the 2019 DAU) in order to receive priority and remain in the queue (cls. 5.4(l)(15)(A), 5.4(l)(5), (6) and (8) of the 2019 DAU). After signing, and after the re-positioning of each applicant in the queue, DBCTM and the access seeker must negotiate and seek to agree the expansion pricing approach to be included in the conditional access agreement (cl. 5.4(l)(15)(B) of the 2019 DAU). If an agreement cannot be reached, then DBCTM or the access seeker may refer the dispute to the QCA for arbitration (cl. 5.4(l)(15)(D) of the 2019 DAU). The 2019 DAU proposes that the QCA must have regard to arbitration factors in clause 11.4(d)(1) of the 2019 DAU (cl. 11.9(a)(1) of the 2019 DAU).

Additionally, the QCA's determination must:

- be consistent with the Terminal infrastructure charge provision (cls. 11.9(a)(1) and 11.4 of the 2019 DAU)
- be consistent with any price ruling in respect of that Terminal capacity expansion (cl. 11.9(a)(2) of the 2019 DAU)
- provide for any capital expenditure incurred in respect of that Terminal capacity expansion that is determined to be prudent by the QCA, and any associated construction related financing costs (cl. 11.9(a)(3) of the 2019 DAU).

As discussed in section 4.3.3 of this interim draft decision, the arbitration factors in clause 11.4(d) of the 2019 DAU are not appropriate to approve. However, we have not yet formed a view on how the other factors (listed above) may affect arbitrated outcomes (or other matters related to the expansion process such as whether there may be differences in the treatment under arbitration of socialised and differentially priced expansions), and whether it is appropriate or inappropriate for the QCA to have regard to these in the context of a Terminal capacity expansion.

We also note that the 2017 AU includes a process for DBCTM to submit an expansion DAAU prior to completing an expansion, with the expansion DAAU to include an interim Annual Revenue Requirement, revenue cap and reference tariff (cls. 12.5(o)–(q) of the 2017 AU). This process is not included in the 2019 DAU, which may mean that expanding users under the 2019 DAU would have less certainty around how access prices for expansion capacity may be determined. Given this, it becomes important that the arbitration processes in the DAU provide sufficient constraint on DBCTM's exercise of market power in setting prices—such that expanding users can enter into conditional access agreements with some confidence around this constraint.

DBCTM said the key challenge in designing an expansion process is balancing the need for price certainty prior to an expansion, and the need for prices to reflect actual construction costs. Additionally, another key challenge is giving effect to the intent of the queuing provisions in circumstances where prices are yet to be determined. DBCTM said these challenges exist equally under the existing 2017 AU and the 2019 DAU. DBCTM said that while its 2019 DAU strikes a

reasonable balance between the different factors, it accepts that the provisions are in some respects untested and may require amendments. DBCTM looks forward to working with the QCA and the DBCT User Group to ensure the expansion provisions are fit-for-purpose.[138]

An alternative process for expansion parties (amended 2019 DAU)

For the reasons discussed in section 4.3.3 of this interim draft decision, we consider the arbitration factors in clause 11.4(d) of the 2019 DAU are not appropriate to approve. As for the other factors we must have regard to in an arbitration, we have not yet formed a view in this interim draft decision. We would welcome DBCTM and other stakeholders to take up DBCTM's offer to revisit these factors and make a collaborative submission.

With respect to the process of securing access agreements, we note that the DBCT User Group said it is highly prejudicial that new access seekers, who are likely to be expansion parties, would have to agree to a legally binding access agreement without any certainty of the pricing that will apply under it.[139]

However, we note the process and risks under the 2019 DAU are generally similar to the 2017 AU. Under the 2017 AU, a signed conditional access agreement may exclude prices[140], whereby some price certainty is only achieved when DBCTM makes an application to the QCA for a price ruling that provides an estimate of the price (cl. 12.5(c) of the 2017 AU). We also note that under the 2017 AU, the QCA's role post-construction is to determine the prudency of costs.

This means under both the 2017 AU and 2019 DAU, access seekers may enter into conditional access agreements without knowing the price, where a price ruling and ultimately the prudent cost are determined by the QCA.

As a consequence, it is our view that this part of the 2019 DAU remains appropriate. However, we would welcome DBCTM and other stakeholders to take up DBCTM's offer to revisit this issue and work collaboratively to make improvements.

For the reasons discussed above, our preliminary view is that the process for expansion parties in the 2019 DAU is likely to be appropriate. However, we note that further submissions, including any collaborative submissions, will help to refine our views.

5.3.5 Lack of transparency—arbitration outcomes

Prior to submitting an access application, an access seeker may request information about previous arbitrations if the arbitrator was the QCA (s. 101(2)(h) of the QCA Act by way of cl. 5.2(c)(2) in the 2019 DAU). Our preliminary view is that while this provision captures a wide range of information, it invariably introduces some uncertainty, because it does not prescribe the exact nature of the information to be provided that would be useful to access seekers in the context of DBCT. However, we also consider this uncertainty may be addressed by the QCA Act that provides for us to issue advice or directions to DBCTM (s. 101(5)), which means we can direct DBCTM to disclose relevant parts of arbitration outcomes as we see fit, on a case-by-case basis.

We note that our suggested amendments in section 5.3.1 of this interim draft decision—that is, amend the 2019 DAU to explicitly refer to sections 101(5) and 150A of the QCA Act—also invokes

[138] DBCT Management, sub. 5, pp. 33–34.
[139] DBCT User Group, sub. 6, p. 20.
[140] Clause 5.5(d)(6) of the 2017 AU does not stipulate that an IAP must contain prices. In addition, clause 5.4(j) of the 2017 AU also does not stipulate prices.

the relevant parts of the QCA Act that would address the issue described in the previous paragraph.

However, an access seeker is unable to request the same information if the arbitrator was a party other than the QCA. As a result, there is a lack of transparency around arbitrated outcomes when the arbitrator is someone other than the QCA, which could contribute to rolling arbitrations. Our view is that the 2019 DAU could be amended to allow all arbitrated outcomes, whether arbitrated by the QCA or another party, to be available to access seekers.

As the amendments described above provide more transparency about arbitrated outcomes, they also place access seekers and DBCTM on a more level playing field, compared to the 2019 DAU. These proposed amendments are in the interests of access seekers (s. 138(2)(e)), which is in turn consistent with the object of Part 5 (s. 138(2)(a)) and the promotion of sustainable and efficient development of the Queensland coal sector (s. 138(2)(d)).

5.4 Conclusion

We consider the pricing model (without reference tariffs) in the 2019 DAU, as drafted, exhibits a number of shortcomings. Two important shortcomings are the following:

- There is significant uncertainty as to the type of information that would be provided to access seekers, the quality and format of the information, and whether the proposed information provision clause would be sufficient and complete enough to inform and empower access seekers in a negotiation.
- The arbitration factors that access seekers, existing access holders (seeking additional access), expansion parties and future access holders face, in an arbitration, are not a credible threat to constrain DBCTM from exercising its market power.

However, the majority of these shortcomings may be addressed through:

- amendments that provide for improved information disclosure in a predetermined format, which must be certified and assured by an independent auditor, and published on DBCTM's website in a place that is easy to find
- amendments to the arbitration factors in clause 11.4(d) of the 2019 DAU, to align them with section 120 of the QCA Act
- amendments to require DBCTM to disclose relevant arbitration outcomes that were not arbitrated by the QCA.

On the other hand, we also note that the current model whereby we determine a reference tariff, has some advantages over modifying the 2019 DAU:

- The time, cost and effort to determine a price that is consistent with the relevant statutory factors would only be expended once by the QCA, instead of each time an access seeker seeks access to the Terminal.
- The QCA has a well-established, well-understood, open and transparent access undertaking process. The QCA's process and timeframes provide for an appropriate length of time for stakeholder consultation, and the QCA to analyse relevant information. This is in contrast to a negotiation that would be likely to occur under time pressure.
- The current model avoids the potential risk of rolling arbitrations because the reference tariff would apply to all access holders and access seekers in the same way.

The potential benefits of a reference tariff model, and the reasons that a reference tariff may be the preferred option for DBCTM's 2019 DAU, are discussed in detail in Chapter 6 of this interim draft decision.

Interim draft decision

(3) We consider it appropriate for DBCTM to amend the pricing model proposed in its 2019 DAU to address the concerns identified in this interim draft decision.

(a) We have proposed some possible amendments that may address these concerns.

(b) We seek submissions from stakeholders, including DBCTM, as to specific amendments that could be made to the pricing model to address the identified concerns—without requiring inclusion of a reference tariff or tariffs.

6 REFERENCE TARIFF MODEL

Although we do not consider that a reference tariff is a prerequisite to an access undertaking for the declared service at DBCT, it has been a key feature of each of the previously approved access undertakings (i.e. the 2006, 2010 and 2017 undertakings). We have therefore given consideration to the benefits and shortcomings of a reference tariff in the context of the characteristics of DBCT, as outlined in this chapter.

6.1 DBCTM's views

DBCTM is strongly opposed to inclusion of a reference tariff in the 2019 DAU.

Instead, DBCTM considers the DAU should place primacy on commercial negotiation of access charges, with arbitration by the QCA as a 'fall-back'. DBCTM said:

- There is no requirement in the QCA Act for an access undertaking to contain a reference tariff—rather, the regulatory framework in Part 5 of the QCA Act is based on encouraging commercial negotiation as the primary means of negotiating terms and conditions of access to a declared service.[141]
- The QCA determining and publishing a reference tariff removes all incentive for access seekers and existing users to seek to negotiate on price or attempt to reach commercial agreement with DBCTM. This is shown by the fact that no commercial agreements between DBCTM and access seekers/users to vary the standard terms and conditions of access (including the price) have ever been struck.[142]
- A heavy-handed price-setting approach, with prices set on an ex ante basis in the form of a reference tariff, is not appropriate to address the competition problem that has been identified by the QCA in the declaration review process. The DAU thus replaces ex ante price regulation with ex post regulation—characterised by a negotiate-arbitrate framework, with no underpinning reference tariff.[143]

6.2 Stakeholder views

Other stakeholders (i.e. the DBCT User Group, New Hope Group and Whitehaven Coal) are all strongly of the view that DBCTM's 2019 DAU should be amended to incorporate a reference tariff. They expressed the following views:[144]

- The proposal in the DAU to not have a reference tariff represents a significant shift from the existing regulatory framework—and one that is not justified by any change in circumstances. The proposal is damaging to regulatory certainty, as it represents a fundamental break from what has been determined to be appropriate in each previous access undertaking for DBCT. The change would damage certainty of future pricing, with resulting damage to investment decisions in dependent markets.

[141] DBCT Management, sub. 1, pp. 28–29.
[142] DBCT Management, sub. 1, p. 11.
[143] DBCT Management, sub. 1, p. 5.
[144] DBCT User Group, sub. 6, pp. 3–5.

- The facility at DBCT possesses characteristics of infrastructure facilities that are commonly regulated via a reference tariff. These characteristics include:
  - existence of market power on the part of the service provider
  - lack of close substitute services to which potential users of DBCT can switch, or credibly threaten to switch
  - resultant lack of countervailing power of access seekers/users (due to the limited substitutes and existence of multiple users at DBCT)
  - incentives for DBCTM to engage in monopoly pricing as a profit-maximising strategy
  - significant information asymmetry—particularly for future users of DBCT.
- These characteristics mean the service provided by the facility at DBCT is not appropriate for regulation via a framework that places primacy on commercial negotiations—because any such negotiations are likely to be unbalanced in favour of DBCTM.
- The theoretical 'fall-back' of arbitration by the QCA will not be an effective or a credible threat that will sufficiently constrain DBCTM's behaviour, as:
  - arbitrations will be very costly
  - the outcomes of arbitrations will be uncertain
  - arbitrations will involve significant delays to obtaining access.
- The absence of a reference tariff will disadvantage future access seekers more than existing users:
  - Existing users have 'some degree' of continued protection against DBCTM's exercise of market power, through the existing price review provisions in their user agreements.
  - The factors that DBCTM seeks to require the QCA to have regard to in an arbitration for new access seekers are different to those that apply under existing user agreements.
  - Access seekers will suffer from greater information asymmetry than existing users (particularly because they will not be shareholders in the independent Operator).
  - The costs, delays and uncertainty of arbitrated outcomes are more problematic for new access seekers than existing users—because new access seekers are trying to make project investment and other contracting decisions in parallel, and are thus more likely to settle for an inefficiently high price than resort to arbitration.
- A continuation of the reference tariff model is appropriate—as it provides regulatory certainty, will produce efficient and appropriate pricing for both existing users and new access seekers, and involves lower aggregate regulatory and administrative costs than the alternative. At the same time, an access undertaking containing a reference tariff will still provide room for negotiation where DBCTM is willing to offer access terms that justify a different price.

6.3 QCA analysis

6.3.1 Characteristics of DBCT

As noted above, the DBCT User Group and other (potential) user stakeholders argued that DBCT possesses characteristics of infrastructure facilities that are commonly regulated via a reference tariff. In particular, these stakeholders identified that the service provided by DBCT has

characteristics similar to those that would suggest a gas pipeline, covered under the National Gas Law (NGL), should be subject to 'full regulation' rather than 'light regulation' (noting that the former requires reference tariffs).[145]

Our view is that the characteristics of DBCT identified by user stakeholders are relevant in our consideration of DBCTM's proposed pricing model. While these characteristics alone are not determinative of whether DBCTM's proposed pricing model is appropriate to approve, they provide an indication of constraints on DBCTM's ability to exert market power.

Where there are no appropriate constraints on DBCTM's ability to exert market power, DBCTM may be able to charge monopoly prices, or prices that are otherwise inconsistent with the pricing principles in section 168A of the QCA Act. We do not consider this would be consistent with the object of Part 5 of the QCA Act, nor would it be in the interests of access seekers and access holders (ss. 138(2)(e) and (h)).

The following provides an assessment of the key characteristics of DBCT, and a consideration of the implications of these characteristics for DBCTM's market power.

Specific characteristics of DBCT

Contestability and the threat of entry

The DBCT User Group considered a defining economic characteristic of DBCT to be the limited contestability evident in the market for DBCT's coal handling service. The DBCT User Group considered there are significant barriers to entry, and limited scope for existing ports to be redeveloped and new ports to be established.[146]

Our view is that there is limited contestability for the coal handling service provided at DBCT. We do not consider that other coal export terminals provide a close substitute for the DBCT service due to:[147]

- increased supply chain costs to export coal through an alternative terminal—including relatively high terminal charges at WICET, and the relatively high cost of railing to APCT via the Goonyella to Abbot Point system in comparison to the Goonyella system to DBCT
- capacity constraints at alternative coal export terminals—including APCT and the RG Tanna Coal Terminal
- capacity constraints on rail lines providing access to alternative coal export terminals—particularly on the Blackwater system delivering to the RG Tanna Coal Terminal and WICET
- inability for particular rail lines to accommodate electric rolling stock—particularly the Goonyella to Abbot Point system delivering to APCT
- alternative coal export terminals being unavailable for common user access—such as HPCT (which is adjacent to DBCT in the Goonyella system)
- product characteristics such as blending and co-shipping (particularly for metallurgical coal) that may differentiate the coal handling service at DBCT—where, in contrast to most other central and north Queensland terminals, the majority of coal handled is metallurgical coal.

[145] DBCT User Group, sub. 2, pp. 20–21.
[146] DBCT User Group, sub. 2, pp. 10–11.
[147] The reasons for this view were discussed in detail in a number of previous QCA decisions. See for example: QCA, *DBCT Management's differential pricing draft amending access undertaking*, final decision, August 2015, pp. 19–20; QCA, *DBCT Management's 2015 draft access undertaking*, draft decision, April 2016, pp. 229–30.

Further, we consider the threat of competitors entering the market is limited—noting there are significant barriers to entry, including stringent legislative requirements around port development and operations.

Countervailing power

With regard to countervailing power, the DBCT User Group noted that DBCT is a multi-user terminal with more than 10 users—where no user holds a dominant share of Terminal capacity. The DBCT User Group considered this implies there is limited countervailing power.[148]

Further, the DBCT User Group considered that the long-term nature of the take-or-pay agreements underpinning users' access further reduces countervailing power, as any recontracting must align with the term of take-or-pay commitments in the upstream rail haulage and rail access markets.[149]

DBCTM, on the other hand, considered that the users of DBCT are highly concentrated, with DBCT's top five existing users representing around 90 per cent of contracted capacity at DBCT. DBCTM also considered future access seekers who seek expansion capacity at DBCT will likely have the option of gaining capacity at alternative terminals on comparable terms to DBCT.[150]

As discussed above, our preliminary view is that there are no close substitutes available for the services provided at DBCT. Without the credible threat to switch to another facility, we consider access seekers (whether potential new users or existing users seeking additional capacity) will have limited countervailing power.

Implications for the constraint on DBCTM's market power

We consider that a pricing model with reference tariffs would address the issue of bargaining imbalance caused by DBCTM's market power by providing transparent and independently verified prices around which negotiations can occur.

However, there may be other forms of regulation that also address this issue. As discussed in Chapter 5, while we do not consider the pricing model as proposed by DBCTM addresses this issue, we consider that amendments could be made to the proposed pricing model to constrain DBCTM's ability to exert market power in negotiations—without the need for the QCA to determine an up-front reference tariff.

Productivity Commission inquiry into the economic regulation of airports

In considering matters relating to the existence and exercise of market power, we have also had regard to the Productivity Commission's recent inquiry into the economic regulation of airports—noting that the outcomes of this inquiry have been the subject of some discussion in the submissions from stakeholders on the DAU.

DBCTM said that major airports are an example of infrastructure services that exhibit characteristics of market power and are subject to a light-handed form of regulation. DBCTM added that the framework for the Productivity Commission's review, which includes enquiring as to whether the form of regulation is suited to the circumstances of the airport and whether the current regulatory regime is fit-for-purpose, is the kind of enquiry the QCA should make in assessing the 2019 DAU.[151]

[148] DBCT User Group, sub. 2, p. 31.
[149] DBCT User Group, sub. 2, p. 31.
[150] DBCT Management, sub. 5, p. 13.
[151] DBCT Management, sub. 1, p. 36.

The DBCT User Group said there are fundamental differences in the context and market circumstances that exist in relation to airport services compared to DBCTM's coal handling service. The DBCT User Group noted that the Productivity Commission found the following:

- Airlines (i.e. users) have significant countervailing power and there was a high degree of mutual dependence between airports and a very small number of airlines.
- Airports offer a large range of services, including retail and parking, where the exercise of market power in one part of the operation could negatively affect another.
- For these reasons, monopoly pricing may well not be the profit-maximising strategy for an airport monopolist.[152]

We note the comments described above from DBCTM and the DBCT User Group are from submissions provided prior to the public release of the Productivity Commission's final report on its inquiry into the economic regulation of airports (in October 2019). In its final report, the Productivity Commission found, consistent with three previous inquiry reports, that:

- Major Australian airports have significant market power in domestic and international aeronautical services, which creates a prima facie case for regulatory intervention. Contributory factors are high barriers to entry, including significant capital costs, and little competition from nearby airports.[153]
- However, an airport with market power is not always able, or incentivised, to use that market power. Constraints on the use of market power include: countervailing power (of airlines); airlines' bargaining power more broadly; and the level of demand for airport services.[154]
- Major airports with market power have not systematically exercised their market power in negotiations with airlines to the detriment of the community. Airports and airlines have incentives to reach agreement, especially given the need for new investments in aeronautical infrastructure to meet demand growth.[155]
- Airport operators often use a building block model to share information with airlines, where charges are 'built up' based on an airport's expected costs. This shows that airport operators consider it necessary to justify their prices during negotiations.[156]
- Imposing additional regulation on airports could only be justified if airports were exercising their market power. As there is no evidence of this, the Productivity Commission recommended maintaining the existing regulatory regime (service quality monitoring by the ACCC, with five-yearly reviews of the arrangements by the Productivity Commission).[157]

We consider the characteristics of the major Australian airports, as described by the Productivity Commission, differ somewhat from the characteristics of DBCT, as described earlier in this chapter. In particular, while the major Australian airports and DBCT both appear to possess significant market power in the respective markets in which they operate, the Productivity Commission considered there are clear constraints on the ability of the major airports to exercise their market power—particularly due to the countervailing power possessed by the major

[152] DBCT User Group, sub. 2, pp. 16–17.
[153] Productivity Commission, *Economic Regulation of Airports*, Inquiry report no. 92, June 2019, p. 89.
[154] Productivity Commission, *Economic Regulation of Airports*, Inquiry report no. 92, June 2019, p. 89.
[155] Productivity Commission, *Economic Regulation of Airports*, Inquiry report, no. 92, June 2019, p. 119.
[156] Productivity Commission, *Economic Regulation of Airports*, Inquiry report no. 92, June 2019, p. 119.
[157] Productivity Commission, *Economic Regulation of Airports*, Inquiry report no. 92, June 2019, p. 191.

airlines.[158] This contrasts with the situation at DBCT, where the countervailing power of users appears to be limited, due to the:

- limited substitution possibilities for the coal handling service at DBCT
- high barriers to entry for the development of new substitutable coal handling services at other facilities, particularly characterised by high capital costs and stringent legislative requirements
- presence of multiple users at DBCT, with no single user accounting for a dominant share of capacity at the Terminal.

6.3.2 Existing versus new users

In its submissions supporting the 2019 DAU, DBCTM asserted the following:[159]

- Existing users are fully protected from the exercise of market power by DBCTM, including in the absence of a reference tariff, by virtue of the price review provisions in their 'evergreen' user agreements. More specifically, these agreements provide for an ex ante price review process commencing 18 months prior to a price review taking effect, with recourse to arbitration by the QCA if agreement has not been reached six months prior to this.
- New users will have substantially the same protections as existing users because the DAU gives them the ability to negotiate access charges with DBCTM, with recourse to arbitration by the QCA if agreement cannot be reached. As existing user agreements provide for reviews of access charges to have regard to the access undertaking in place at the time, this means the QCA will be able to apply the same factors to arbitrations involving existing and new users.

The DBCT User Group said:[160]

- Existing users are protected to some extent (but not fully) by the price review provisions in their existing user agreements. This is because: 'fall-back' arbitration by the QCA is likely to be a less rigorous and less transparent process than ex ante determination of a reference tariff; and arbitration will involve higher costs than the regulatory process (which will have to be borne by individual users).
- New users will be further disadvantaged by the provisions in the DAU because: arbitrations by the QCA would have regard to different factors under the DAU compared to under existing user agreements; and new users will be in a fundamentally different negotiating position to existing users—as they are access seekers who cannot accommodate significant delays, need to make investment decisions and other commercial contractual decisions in a timely manner, and are less likely to be able to fund the significant costs potentially associated with arbitration processes.

Considering these respective views, our preliminary position is as follows:

- Existing users (who are not also expanding users) are likely to have a high degree of protection under existing user agreements where there is a regular process for reviewing the access undertaking, which includes ex ante determination of reference tariffs by us. In

[158] We note that airline representatives contested this position, considering that airlines do not possess significant countervailing power in respect of major capital city airports because of the need to use each major airport to maintain network reach.
[159] DBCT Management, sub. 5, pp. 25–30.
[160] DBCT User Group, sub. 6, pp. 23–25.

practice, the reference tariffs that we approve are simply passed through to existing users at the time of commencement of a new access undertaking.

- However, these existing users would not necessarily benefit from the same level of protection in a circumstance where we are not periodically reviewing reference tariffs (as with the pricing model proposed in the DAU). Existing users would need to go through a negotiation and potentially dispute process to arrive at new access charges—and there is considerable uncertainty as to how any amended criteria (in clause 11 of the 2019 DAU) might apply to existing users, or what constraints this may seek to place on our ability to apply criteria the same or similar to those set out in section 120 of the QCA Act (see clause 17.4(a) of the 2019 DAU). Depending on the conduct of negotiation and arbitration processes, this may not result in exactly the same outcome as ex ante setting of reference tariffs. It also not clear that outcomes would be determined in a timely manner—meaning material 'true-up' payments may become common.
- This means the framework for QCA determination of access charges is likely to be different under existing user agreements, compared to the 2019 DAU framework applicable to new users (including existing users looking to acquire additional capacity). Disputes for new users would be arbitrated in accordance with the criteria listed in clause 11.4(d) of the DAU (including, for example, the 'willing but not anxious' buyer and seller concept, or those criteria as they may be amended). For users that sign agreements in the form of the new SAA (in the 2019 DAU), subsequent access charges disputes would most likely be arbitrated in accordance with the clause 11.4(d) criteria.

In conclusion, we consider on balance that:

- Existing users are likely to have a greater level of protection (than new users) under their existing user agreements in the absence of a reference tariff, although the precise degree of that protection is uncertain. While there is a level of uncertainty as to exactly how arbitrations for existing users (in accordance with the existing SAA) would proceed, it is likely that existing users would be better protected than new users—particularly given the context of the 'evergreen' renewal rights attached to existing user agreements.
- New users (including existing users looking to acquire additional capacity) may be disadvantaged in comparison to existing users in the absence of a reference tariff—that is, the potentially different criteria that would apply to arbitrations, and timing issues associated with project and commercial completions, may lead to different outcomes. This may be exacerbated by the fact that, as DBCT is fully contracted, new users are likely to be negotiating for access to expansion capacity.

6.3.3 Information asymmetry

As discussed in earlier sections of this interim draft decision, dealing with information asymmetry between DBCTM and access seekers (particularly new access seekers who have little or no experience with DBCTM) is a key concern in the facilitation of effective and balanced commercial negotiation and arbitration processes.

DBCTM said the 2019 DAU ensures access seekers are provided with an appropriate level of information to enable them to engage in commercial negotiations from an informed position.

Specifically, the DAU requires DBCTM to provide access seekers with the information set out in sections 101(2)(a) to (h) of the QCA Act (within 10 business days of it being requested).[161]

The DBCT User Group said the information specified in section 101(2) is extremely high level and likely to be inadequate for enabling an informed negotiation regarding access to occur. In addition, the information provided is bound to be DBCTM's view about each of the relevant items, without any scrutiny of the type applied where there is a review by the QCA (often including engagement by the QCA of expert consultants).[162]

The information specified in section 101 of the QCA Act includes price and cost information as follows:

- information about the price at which the access provider provides the service, including the way in which the price is calculated (s. 101(2)(a))
- information about the costs of providing the service, including the capital, operation and maintenance costs (s. 101(2)(b))
- information about the value of the access provider's assets, including the way in which the value is calculated (s. 101(2)(c)).

Relevantly, we note that section 101(4) of the QCA Act also provides that '[d]espite subsection (2), the authority may allow the matters mentioned in subsection 2(a) to (c) to be given in the form of a reference tariff.' There is no similar provision (or indeed mention of the concept of a reference tariff) in Part IIIA of the *Competition and Consumer Act 2010* (Cth).

DBCTM argued that an access undertaking approved under Part 5 of the QCA Act does not need to include a reference tariff (or indeed any commitments relating to access charges).[163] This accords with our view of the strict requirements relating to the contents of access undertakings. However, it is the case that the relevant provisions of Part 5 of the QCA Act are framed in such a way as to suggest that the QCA Act at least contemplates a reference tariff being a normal inclusion in an access undertaking. In particular:

- section 137(2)(a) indicates that an access undertaking for a service may include details of 'how charges for access to the service are to be calculated'
- section 101(7) defines the concept of reference tariff as being 'for a service, means a price, or formula for calculating a price, that has been approved by the authority to set the basis for negotiation of the price for access to the service under an access agreement'
- as indicated above, section 101(4) explicitly contemplates that the price and cost information the service provider for a declared service must provide to access seekers may be provided in the form of a reference tariff.

Chapter 5 of this interim draft decision describes how the pricing model (without a reference tariff) proposed in DBCTM's 2019 DAU could be amended to deal with information asymmetry problems, without requiring inclusion of a reference tariff. However, while that discussion demonstrates this could be done, there are likely to be advantages to providing for the relevant price and cost information to continue to be provided by way of a reference tariff. These advantages include:

[161] DBCT Management, sub. 1, p. 40.
[162] DBCT User Group, sub. 2, pp. 45–46.
[163] DBCT Management, sub. 1, pp. 11–12.

- A reference tariff is a simple, transparent mechanism for providing the price and cost information likely to be required by an access seeker at the commencement of a process to seek access. A reference tariff provides this information in a more meaningful and useful form than is likely to be the case through provision of just the minimal information described in sections 101(2)(a) to (c) of the QCA Act, without a reference tariff.
- The QCA has a well-established, well-understood, open and transparent process for determining a reference tariff as part of its assessment of a DAU (and amending reference tariffs via DAAUs, where necessary). This process provides for sufficient timeframes to allow for significant stakeholder consultation; preparation and consideration of expert reports; release of one or more draft decisions by the QCA, with opportunity for stakeholders to comment further; and thorough analysis to be conducted before a final position is determined.
- The QCA's determination of a reference tariff results in development of an ex ante published price, which provides greater certainty and transparency than an ex post unknown price. This means the reference tariff is effectively a signalling device that allows for better investment planning and timing.
- Determination of a reference tariff by the QCA on an ex ante basis means that the time, cost and resources needed to determine an appropriate price for access to the service at DBCT only needs to be expended once per regulatory period (five years or otherwise) instead of potentially each time an access seeker seeks access to the Terminal.
- Existence of a reference tariff is likely to reduce the risk of a set of rolling arbitrations needing to be determined by the QCA. Rolling arbitrations could be costly, inefficient and lengthy for access seekers (and the access provider) and resource intensive for the QCA. Evidence suggests the experience at the (unregulated) APCT has been that rolling arbitrations appear to have become the norm in the periodic reviews of users' terminal charges that occur in accordance with the contractual arrangements between users and the owner of the terminal.[164]

We also note that in the draft recommendation on the declaration review of the DBCT service, we indicated an expectation that any access undertaking approved for a re-declared service at DBCT would:

- include an access charge
- provide for an access charge that would be cost-reflective
- have the access charge approved by the QCA
- have the same access charge for potential new users and existing users for accessing existing capacity at DBCT.

All of these expectations would be achieved if future access undertakings approved for the service at DBCT continue to contain a reference tariff or tariffs.

Given the above, our preliminary view is that inclusion of a reference tariff in the DAU may be a better and more effective way to deal with information asymmetry concerns regarding commercial negotiation and arbitration processes than amending DBCTM's proposed pricing model without reference tariffs.

[164] DBCT User Group, sub. 2, pp. 38–39.

6.3.4 Potential drawbacks of inclusion of a reference tariff in the DAU

At the same time, we also recognise that there are potential costs that may be associated with inclusion of a reference tariff in an access undertaking. For example:

- Inclusion of a reference tariff in an access undertaking may act to reduce or remove incentives for access seekers and access providers to negotiate on price or seek to reach commercial agreement because the reference tariff that has been determined by the regulator is simply accepted as the price of access. DBCTM has pointed out that no commercial agreements between itself and users to vary access charges from the reference tariff have ever been struck (since the approval of the first access undertaking for DBCT).[165]
- There are costs associated with regulatory error—the Productivity Commission has previously argued that regulators are unable to set optimal access prices (prices that would maximise overall economic efficiency) with precision, meaning there remains scope for regulatory error in the setting of access terms and conditions.[166] We accept this is the case.
- The Productivity Commission has also commented that negotiated outcomes resolving terms and conditions of access are preferable to regulated outcomes because the parties to a dispute will know more about their claims and the costs and benefits of access than a regulator could.[167]
- A reference tariff could potentially act to hamper investment in a regulated infrastructure facility—particularly if the reference tariff is set at a level too low to properly incentivise such investment. DBCTM has argued that maintaining a reference tariff in the access undertaking for DBCT may create a regulatory burden, which would put at risk efficient investment in the Terminal (at a time when expansions are considered to be required to create additional capacity for new potential users).
- The Productivity Commission has also found that access regulation more generally may result in economic distortions, including adverse effects on investment in markets for infrastructure services. In addition, the Productivity Commission has said that deterring investment in infrastructure (because access prices are set too low by a regulator) is likely to be more costly than allowing service providers to retain some monopoly rent (from too high access prices). Regulators should therefore err on the side of allowing higher returns to regulated businesses to allow for this asymmetry.[168]
- Existence of a reference tariff or tariffs for a regulated service may also act to stifle incentives for innovation in delivery of the service.

While we recognise these potential costs associated with a reference tariff model, we consider that, in the context of the 2019 DAU (as submitted by DBCTM), these costs would be likely to be outweighed by the benefits of including a reference tariff or tariffs in the DAU (as described above).

6.3.5 Value of varied or differentiated services

In its submissions supporting its DAU, DBCTM said an additional reason for preferring commercial negotiation of prices over a reference tariff is that DBCT offers different services to different users

[165] DBCT Management, sub. 1, p. 11.
[166] Productivity Commission, *National Access Regime*, Inquiry report no. 66, October 2013, p. 112.
[167] Productivity Commission, *National Access Regime*, Inquiry report no. 66, October 2013, p. 115.
[168] Productivity Commission, *National Access Regime*, Inquiry report no. 66, October 2013, pp. 11, 104.

over and above the base coal handling service. Different users require different combinations of services and value—so a one-size-fits-all approach to access charges will not be fit-for-purpose. In addition, provision of varied or differentiated services can introduce inefficiencies into the operation of the Terminal, which has implications for Terminal capacity. Commercial negotiation will allow for price differentiation that appropriately values the differentiated services.[169]

In response, user stakeholders made the following comments:[170]

- Other coal terminals do not apply differentiated pricing based on the extent of blending or coal handling.
- Differences in services are minor, and these differences should be captured in the core coal handling service. DBCTM has not demonstrated why these services warrant differentiated pricing, or how they create inefficiencies.
- There will be difficulty in working out minor cost or capacity differences actually involved—and the limited nature of the differences means it is not a worthwhile activity to try to undertake.
- It is not possible to determine what type of differentiated services a particular user will require at the time of negotiation or arbitration, as demands will vary over time.
- The differentiated pricing approach will result in smaller (primarily new) users paying higher tariffs than larger (primarily existing) users, as smaller users may be more likely to use blending and/or co-shipping opportunities.
- DBCTM has not provided any information as to how pricing for differentiated or varied services would be determined in practice.

As noted in Chapter 1, DBCTM responded to these points by stating that throughout the declaration review the DBCT User Group pointed out that DBCTM 'offers a number of premium services, above that of the standard coal handling service', making reference to blending and co-shipping opportunities. It also considered differentiated pricing to be common practice at ports more generally. DBCTM considered that if only some users are benefiting from a premium service, then applying a reference tariff to all users would impact the Terminal's overall efficiency.[171]

After considering all relevant information, we are not convinced that the ability to value (and charge for) varied or differentiated services separately to the core coal handling service at DBCT is a significant reason for preferring the proposed pricing model without a reference tariff to a model that incorporates a reference tariff. This is because:

- These services have not been charged for separately in the past. If particular stakeholders (including DBCTM and users) considered there was potential value to be attained by charging for these services separately, they could have already attempted to negotiate such outcomes under the existing regulatory framework—including users who do not use, or rarely use, the varied services potentially seeking discounts from the reference tariff.
- No evidence has been provided to suggest these types of varied or differentiated services are charged for separately at any other coal terminal in Australia. These services generally appear to be treated by users as part of the core coal handling service of a coal terminal.

[169] DBCT Management, sub. 1, p. 26.
[170] DBCT User Group, sub. 2, pp. 47–48.
[171] DBCT Management, sub. 5, p. 22.

- The nature of the additional services described by DBCTM in its submissions (e.g. co-shipping, blending, provision of remnant stockpiles, moisture adding, compacting, surfactant adding, and dozing) appear to be part of what would normally be expected to be a core coal handling service. DBCTM identified a number of examples of ports in Australia that do offer differentiated pricing of varied services, but none of these relate to variations to a coal handling service of the type described here—four of the ports (Port Headland, Darwin, Fremantle and Melbourne) are not coal terminals, while the Port of Newcastle differentiates between coal and non-coal vessels.[172]
- It is likely that the varied services would be used by most, if not all, users at one stage or another. However, demand for these services from individual users is likely to vary significantly over time and from coal shipment to shipment. This means separate negotiation and/or arbitration of prices for these services would be difficult because forecasting future demand/usage and cost of provision of the services would be particularly complex and problematic.
- Differentiated pricing of the varied services may have the potential to disadvantage new (smaller) users in comparison to existing (larger) users—as smaller users are more likely than larger users to make use of these services on a regular basis.

Importantly, we also note that, to the extent stakeholders consider there is additional value in varied services that may be offered by DBCTM from time to time, an amended DAU including a reference tariff would not stop individual users negotiating access agreements reflective of this additional value. Thus, potential differentiated pricing of varied services is not dependent on implementation of a pricing model without a reference tariff.

6.4 Conclusion

Overall, we consider that there are likely to be benefits to requiring DBCTM to amend its 2019 DAU to incorporate a reference tariff. Key reasons for this are summarised as follows:

- DBCT possesses characteristics of infrastructure facilities for which regulation commonly includes reference tariffs—for example, the existence of market power; limited substitution possibilities; and limited countervailing power of users.
- Part 5 of the QCA Act explicitly contemplates the potential for a reference tariff to be included in an access undertaking for a declared service.
- A reference tariff is an appropriate way to deal with information asymmetry problems associated with commercial negotiations for access—because it is a simple way of providing necessary information to access seekers, and is determined on an ex ante basis via a transparent QCA process.
- Inclusion of a reference tariff in the DAU will avoid the potential for 'rolling' arbitrations—that would likely be costly, time-consuming and resource-intensive for all parties concerned, including us.
- Existing users are likely to have a greater degree of protection from the exercise of market power by DBCTM (even in the absence of a reference tariff). New users (access seekers, including expanding existing users) may be disadvantaged in comparison—due to different arbitration criteria, and time pressure for making investment decisions.

[172] DBCT Management, sub. 5, pp. 22–23.

- To the extent stakeholders consider there is additional value in varied services that may be offered by DBCTM from time to time, an amended DAU including a reference tariff would not stop individual users negotiating access agreements reflective of this additional value.
- Each previously approved access undertaking for the service at DBCT has included a reference tariff, and this model has worked effectively over time to facilitate efficient access at the Terminal.

As noted above, we also consider that potential drawbacks may be associated with the inclusion of a reference tariff in an access undertaking, particularly related to:

- removal of incentives for parties to negotiate to reach commercial agreement
- the potential for regulatory error
- disincentives for service providers to invest in developing or expanding infrastructure facilities
- lack of incentives for innovation in delivery of the regulated service.

Overall, while acknowledging there are potential drawbacks that could be associated with inclusion of a reference tariff in DBCTM's 2019 DAU, we do consider that a reference tariff has certain specific advantages associated with it (as discussed above)—and we consider these advantages are likely to outweigh the drawbacks of including a reference tariff or tariffs in the 2019 DAU. This means that a reference tariff or tariffs may thereby be an appropriate, convenient, cost-effective and transparent method for addressing the concerns with the DAU's pricing model that have been identified in this interim draft decision.

Given this, in response to the interim draft decision we seek proposals from stakeholders, including DBCTM, as to how a reference tariff or tariffs that could potentially be incorporated into DBCTM's 2019 DAU might be developed.

Interim draft decision

(4) In the absence of proposed amendments that would satisfactorily address the concerns with the pricing model identified in this interim draft decision, we would be inclined to require DBCTM to amend its 2019 DAU to include a reference tariff or tariffs.

  (a) We seek proposals from stakeholders, including DBCTM, as to how a reference tariff or tariffs to be included in DBCTM's 2019 DAU might be developed.

GLOSSARY

2006 AU	2006 access undertaking
2010 AU	2010 access undertaking
2017 AU	2017 access undertaking
2019 DAU	2019 draft access undertaking
ACCC	Australian Competition and Consumer Commission
AER	Australian Energy Regulator
APCT	Abbot Point Coal Terminal
COAG	Council of Australian Governments
DAAU	draft amending access undertaking
DAU	draft access undertaking
DBCC	Dalrymple Bay Coal Chain
DBCT	Dalrymple Bay Coal Terminal
DBCT Management/DBCTM	DBCT Management Pty Ltd and DBCT Trustee (owner of the Terminal)
DBCT PL	DBCT Pty Ltd
DBCT User Group	Anglo American, BHP Mitsui, BMA, Fitzroy Australia Resources, Glencore, Peabody Energy, Pembroke Resources, QMetco Limited, Stanmore Coal and Whitehaven Coal
HPCT	Hay Point Coal Terminal
IAP	indicative access proposal
NGL	National Gas Law
OMC	Operations and Maintenance Contract
Operator	DBCT PL
operator	DBCTM
PSA	Port Services Agreement
QCA	Queensland Competition Authority
QCA Act	*Queensland Competition Authority Act 1997*
RAB	regulated asset base
SAA	standard access agreement
Terminal	DBCT
TIC	Terminal Infrastructure Charge
WACC	weighted average cost of capital
WICET	Wiggins Island Coal Export Terminal

APPENDIX A: LIST OF SUBMISSIONS

We received the following submissions during our investigation of DBCTM's 2019 DAU. The submission numbers below are used in this interim draft decision for referencing purposes. The submissions are available on the QCA website unless otherwise indicated.

Stakeholder	*Sub. no.*	*Submission*	*Date*
DBCT Management	1	2019 DAU explanatory submission	July 2019
DBCT User Group	2	Submission on the 2019 DAU	September 2019
New Hope Group	3	Submission on the 2019 DAU	September 2019
Whitehaven Coal	4	Submission on the 2019 DAU	September 2019
DBCT Management	5	Further submission on the pricing model	November 2019
DBCT User Group	6	Further submission on the pricing model	November 2019
New Hope Group	7	Further submission on the pricing model	November 2019

REFERENCES

Australian Energy Regulator (AER), *Financial reporting guideline for light regulation pipeline services*, October 2019.

DBCT Management, *2019 Draft Access Undertaking for DBCT coal handling service*, letter to the QCA, 1 July 2019.

Productivity Commission, *Review of the National Access Regime*, Inquiry report no. 17, September 2001.

—— *National Access Regime*, Inquiry report no. 66, October 2013.

—— *Economic Regulation of Airports*, Inquiry report no. 92, June 2019.

QCA, *DBCT Management's differential pricing draft amending access undertaking*, final decision, August 2015.

—— *DBCT Management's 2015 (ring-fencing) draft amending access undertaking*, draft decision, February 2016.

—— *DBCT Management's 2015 draft access undertaking*, draft decision, April 2016.

—— *DBCT Management's 2015 draft access undertaking*, final decision, November 2016.

—— *Part C: DBCT declaration review*, draft recommendation, December 2018.