

# Queensland Competition Authority

Draft decision

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## DBCT Management's 2019 draft access undertaking

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August 2020

We wish to acknowledge the contribution of the following staff to this report:

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## SUBMISSIONS

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Closing date for submissions: 23 October 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, submissions are invited from interested parties concerning our preliminary 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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### 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.

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### 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](http://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

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On 1 July 2019, Dalrymple Bay Coal Terminal Management Pty Limited (DBCTM) submitted its 2019 draft access undertaking (2019 DAU) to the Queensland Competition Authority (QCA) for assessment. The 2019 DAU is intended to replace the current approved 2017 access undertaking (2017 AU), which is due to expire on 1 July 2021.<sup>1</sup>

Unlike previous approved access undertakings, DBCTM's 2019 DAU proposes a pricing model that does not include reference tariffs—but instead requires access prices to be agreed by commercial negotiation, with recourse to arbitration where agreement cannot be reached.

Our draft decision is to refuse to approve DBCTM's 2019 DAU, for the reasons detailed in this document. While we consider the adoption of a pricing model without reference tariffs may be appropriate for the service at DBCT, our view is that DBCTM's 2019 DAU requires amendment in order for it to be appropriate to be approved.

We have assessed the appropriateness of all aspects of DBCTM's 2019 DAU in accordance with the relevant statutory requirements. We have considered the appropriateness of DBCTM's 2019 DAU proposal overall, and its individual aspects, having regard to section 138(2) of the *Queensland Competition Authority Act 1997* (the QCA Act).

This draft decision is intended to provide stakeholders with the reasoning behind our preliminary assessment and to encourage further contributions by way of submissions. We seek stakeholder views on the appropriateness of DBCTM's 2019 DAU and our proposed amendments.

### Draft decision

Our draft decision is to refuse to approve DBCTM's 2019 DAU.

We consider that DBCTM's 2019 DAU does not promote the economically efficient operation of, use of and investment in, the infrastructure by which the declared service is provided.<sup>2</sup> Further, it does not appropriately balance the legitimate business interests of DBCTM with the interests of access seekers, access holders and the public interest.<sup>3</sup> In particular, we consider that the 2019 DAU does not provide sufficient constraint on DBCTM's ability to exercise market power in negotiations. The 2019 DAU also does not provide sufficient information to inform access seekers for the purposes of negotiating with DBCTM, or provide arbitration criteria that sufficiently protect the interests of access seekers, thereby undermining the purpose of arbitration as a 'backstop' for dispute resolution. Consequently, we find the 2019 DAU materially increases uncertainty, which could adversely affect investment incentives and not be in the public interest.

On this basis, we consider that amendments are required to DBCTM's 2019 DAU, in order for it to be appropriate to be approved.

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<sup>1</sup> Or the date that the handling of coal at the Terminal ceases to be a 'declared service' for the purposes of the QCA Act.

<sup>2</sup> QCA Act, s. 138(2)(a).

<sup>3</sup> QCA Act, ss. 138(2)(b), (c), (d), (e) and (h).

DBCTM proposed amendments to its 2019 DAU, following the publication of our interim draft decision in February 2020.<sup>4</sup> While maintaining that a pricing model without reference tariffs was appropriate to approve, DBCTM proposed to:

- introduce new information requirements that will require DBCTM to disclose key information in a predetermined format
- change the arbitration criteria to align with the legislative arbitration factors set out in section 120(1) of the QCA Act
- better align the standard access agreement with the existing user agreements and disclose the outcomes of commercial arbitrations to access seekers.<sup>5</sup>

Overall, we consider that DBCTM's proposed amendments make a significant attempt to address the issues identified with the 2019 DAU.

We are of the view that a pricing model without reference tariffs may be appropriate to approve for the service at DBCT. We consider it appropriate for the 2019 DAU to adopt DBCTM's proposed amendments. However, we consider that further amendments are required in order for the 2019 DAU to be appropriate to be approved. Broadly, these additional amendments centre around:

- the provision of information—in particular, information on depreciation and remediation cost estimates, along with information for parties who enter negotiations towards the end of the regulatory period
- addressing issues with specific non-pricing provisions, including the requirement for parties to enter into binding access agreements.

We also consider it appropriate that we produce a guideline, which is largely procedural in nature, that outlines how we intend to manage an access dispute process in accordance with our requirements in the QCA Act. A draft of this guideline is provided in Part B of this draft decision.

Our preliminary assessment of DBCTM's 2019 DAU and our proposed amendments are explained in detail throughout this draft decision. This summary should not be relied on as a substitute for the detailed analysis in the main body of this document.

### Next steps

We invite written submissions from interested parties. Stakeholders are encouraged to provide focused, detailed responses on our preliminary assessment and the proposed amendments we consider necessary for approval. Where possible, information and evidence should be provided in support of arguments advanced in submissions.

### **Submissions are due by 23 October 2020.**

All submissions made by this time will be taken into account.

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<sup>4</sup> The interim draft decision provided stakeholders with an early indication of our preliminary views on DBCTM's proposed pricing model. Our preliminary view was that the proposed pricing model was not appropriate to approve.

<sup>5</sup> DBCT Management, sub. 8, p. 1.

## THE ROLE OF THE QCA – TASK, TIMING AND CONTACTS

The Queensland Competition Authority (QCA) is an independent statutory body which promotes competition as the basis for enhancing efficiency and growth in the Queensland economy.

The QCA’s primary role is to ensure that 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.

### Task, timing and contacts

On 12 October 2017, we issued an initial undertaking notice (s. 133 of the QCA Act) requiring 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.

We have commenced an investigation to decide whether to approve, or refuse to approve, DBCTM's 2019 DAU. 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.

This draft decision is intended to provide stakeholders with the reasoning behind our preliminary views and to encourage them to further contribute by way of submissions. Our assessment may change when we make our final decision, which will be informed by submissions made in response to this draft decision.

### Key dates

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. We note that the six-month statutory timeframe ended on 1 August 2020, and we have published the written notice explaining reasons for the delay—as required by section 147A(5)(a) of the QCA Act.

In releasing a 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.

Table 1 provides the 2019 DAU investigation timeframes to date, along with 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 draft decision.

**Table 1 Timeframes**

<i>Date</i>	<i>Step</i>
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.

<i>Date</i>	<i>Step</i>
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 the interim draft decision on the 'threshold' issue of the pricing model proposed in DBCTM's 2019 DAU and invited stakeholder submissions. Our interim draft decision was to refuse to approve the 2019 DAU.
24 April 2020	We received two stakeholder submissions, from DBCTM and the DBCT User Group.
29 April 2020	We invited stakeholders to provide collaborative submissions. In particular, we encouraged joint consideration of non-pricing provisions.
5 June 2020	We received two collaborative submissions, from DBCTM and the DBCT User Group.
1 August 2020	End of six-month statutory timeframe.
26 August 2020	We published this draft decision outlining our preliminary views on DBCTM's 2019 DAU and invited stakeholder submissions. Our draft decision is to refuse to approve the 2019 DAU.
23 October 2020	Submissions in response to our draft decision due.
<i>Indicative Date</i>	<i>Step</i>
February 2021	We intend to release our final decision on DBCTM's 2019 DAU.

### Submissions sought

We invite written submissions from interested parties by 23 October 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 on our preliminary assessment 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 draft decision.

### Contacts

Enquiries regarding this project should be directed to:

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# 1 INTRODUCTION

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*Dalrymple Bay Coal Terminal Management (DBCTM) submitted its 2019 draft access undertaking (2019 DAU) on 1 July 2019. DBCTM's 2019 DAU does not include reference tariffs and instead contemplates access prices being agreed by commercial negotiation—with recourse to arbitration where agreement cannot be reached.*

*This draft decision sets out our preliminary assessment of DBCTM's 2019 DAU, having regard to the statutory criteria.*

*This chapter provides context for our assessment of DBCTM's 2019 DAU and outlines our preliminary view on whether to approve, or refuse to approve, DBCTM's 2019 DAU.*

## 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<sup>6</sup> 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 draft decision).

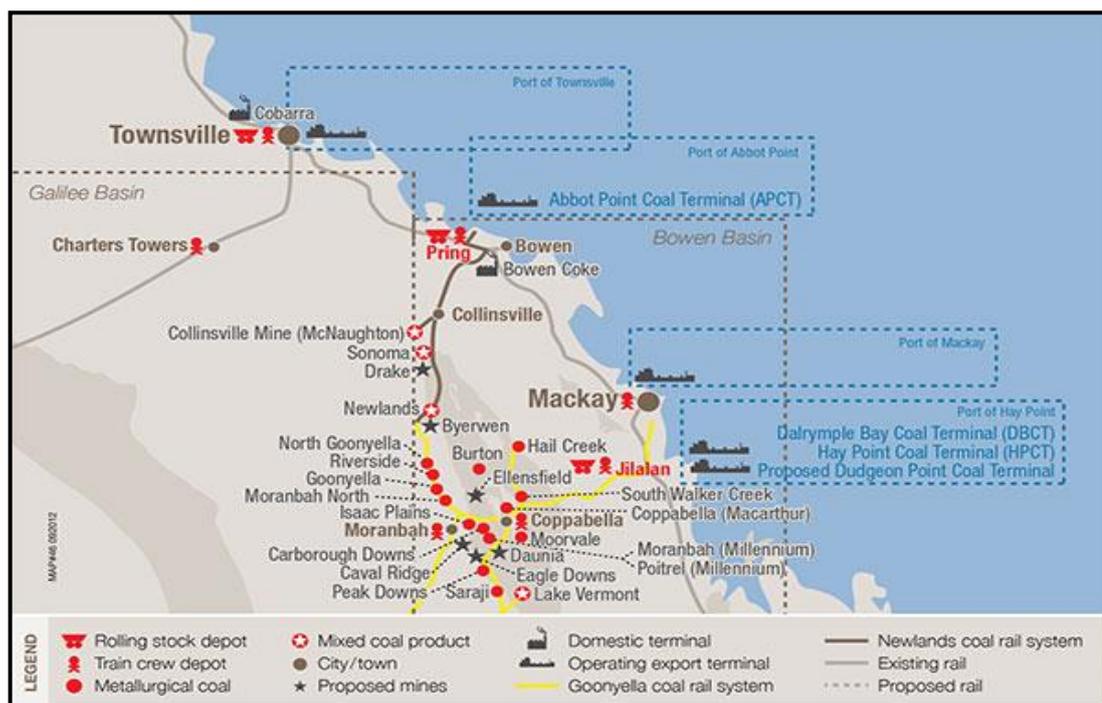
The Terminal is an integral part of the Dalrymple Bay Coal Chain<sup>7</sup>, helping to ensure the deliveries of coal by rail meet the demands of users in terms of the shipping movements and scheduled arrivals. Coal is transported to the Terminal from 26 coal producing mines at 23 load points on the Goonyella system rail network<sup>8</sup> that extends over 300 kilometres (see Figure 1).

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<sup>6</sup> 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 s. 250(5) of the QCA Act.

<sup>7</sup> See also DBCTM's website (<http://www.dbctm.com.au>) and the Integrated Logistics Company's website (<https://ilco.com.au>).

<sup>8</sup> 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**

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.<sup>9</sup> The regulatory access framework for DBCT is currently governed by the 2017 Access Undertaking (2017 AU), which was approved by the QCA on 16 February 2017.<sup>10</sup>

## 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, which included the submission of two DAUs by DBCTM, the release of our 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.

<sup>9</sup> Pursuant to s. 250(1)(c) of the QCA Act.

<sup>10</sup> Since the commencement of DBCTM's 2017 AU, DBCTM has submitted draft amending access undertakings to amend the 2017 AU. The latest 2017 AU can be accessed at [https://www.qca.org.au/wp-content/uploads/2019/05/33818\\_06-Trading-SCB-DAAU-clean-1300187\\_1-1.pdf](https://www.qca.org.au/wp-content/uploads/2019/05/33818_06-Trading-SCB-DAAU-clean-1300187_1-1.pdf).

On 12 October 2015, DBCTM submitted its 2015 DAU to us for approval. We made a final decision to refuse to approve the 2015 DAU on 21 November 2016, and issued DBCTM a notice to amend and resubmit its DAU, in accordance with section 134(2) of the QCA Act. The third access undertaking for DBCT was approved in February 2017, becoming the 2017 AU. The 2017 AU terminates on 1 July 2021.<sup>11</sup>

### 1.3 DBCTM's 2019 draft access undertaking

DBCTM submitted its 2019 DAU on 1 July 2019. DBCTM's 2019 DAU proposal represents a significant shift from the longstanding regulatory framework at DBCT, as it does not include a reference tariff and requires access prices to be agreed by commercial negotiation, with recourse to arbitration where agreement cannot be reached.

While all previous undertakings have allowed for commercial negotiation 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, parties have adopted the TIC set by the QCA as the access price at DBCT.

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.<sup>12</sup>

DBCTM considered its proposal to remove the reference tariff was a 'proportionate regulatory response' to the narrow competition problem we identified in our recommendation on the declaration of the coal handling service at DBCT—that is, the potential for asymmetric terms of access between existing users and new users, in the absence of declaration, which impacts competition in coal tenement markets.<sup>13</sup> 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).<sup>14</sup>

DBCTM considered the non-pricing provisions in the 2019 DAU to be similar to those in the 2017 AU.<sup>15</sup>

### 1.4 The QCA's investigation

We have assessed the appropriateness of all aspects of DBCTM's 2019 DAU in accordance with our statutory requirements. In doing so, we have had regard to the statutory criteria set out in section 138(2) of the QCA Act.

Section 138(2) provides a number of mandatory criteria governing any decision we make to approve or reject a DAU. The weight and importance of each of the factors is a matter to be

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<sup>11</sup> Or the date that the coal handling service at DBCT ceases to be declared, should that occur.

<sup>12</sup> DBCTM, sub. 1, pp. 5, 11–12.

<sup>13</sup> DBCTM, sub. 1, p. 5. While DBCTM initially referenced our draft recommendation on the declaration of the coal handling service at DBCT, it has since noted that our final declaration recommendation confirmed that the only competition issue to be addressed is the need to ensure new access seekers have the ability to compete with existing users for development stage tenements (DBCTM, sub. 10, cover letter, p. 1).

<sup>14</sup> DBCTM, sub. 1, p. 5.

<sup>15</sup> DBCTM, sub. 1, p. 58.

determined by us on a case-by-case basis, having regard to the circumstances.<sup>16</sup> 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.

The approach we have adopted in the application of the legislative framework when considering the DAU is set out in Chapter 2.

### Regulatory process to date

On 12 October 2017, we issued an initial undertaking notice to DBCTM under section 133 of the QCA Act, requiring DBCTM to submit a draft access undertaking to us for the period commencing 1 July 2021.

DBCTM's 2019 DAU was lodged on 1 July 2019 and we commenced an investigation to decide whether to approve or refuse to approve the 2019 DAU, inviting written submissions from stakeholders. Submissions were received from three parties: the DBCT User Group<sup>17</sup>; New Hope Group; and Whitehaven Coal.<sup>18</sup> These submissions expressed opposition to DBCTM's 2019 DAU, particularly the proposed pricing model.

We considered it prudent to provide stakeholders with an early indication of our preliminary views on the pricing model proposed under DBCTM's 2019 DAU, given its importance and the likely implications it could have for stakeholder views on other aspects of the 2019 DAU. As such, we informed stakeholders of our intention to publish an interim draft decision focused on the pricing model and sought stakeholder comments specific to the proposed pricing model. Three submissions were received, from the DBCT User Group, New Hope Group and DBCTM.

Broadly, the user stakeholders (subsequently referred to as 'stakeholders') considered that DBCTM's proposed pricing model would lead to inefficient negotiation outcomes, costly arbitration processes and material uncertainty. They also considered that the characteristics of DBCT meant 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.<sup>19</sup>

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.<sup>20</sup> DBCTM reiterated that the QCA's regulation of DBCT should only address the competition harm identified in the draft recommendation on the declaration review.<sup>21</sup>

Our interim draft decision, published on 24 February 2020, outlined our preliminary view that the pricing model as proposed was not appropriate to approve.<sup>22</sup> We considered that DBCTM could

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<sup>16</sup> *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 41 (Mason J).

<sup>17</sup> The glossary lists the stakeholders that the DBCT User Group's submission was made on behalf of.

<sup>18</sup> Whitehaven Coal is also a member of the DBCT User Group and is among the stakeholders that the latter's submission was made under.

<sup>19</sup> DBCT User Group, sub. 2, pp. 15–33.

<sup>20</sup> DBCTM, sub. 5, pp. 12–13.

<sup>21</sup> DBCTM, sub. 5, p. 8.

<sup>22</sup> The interim draft decision is available on our website, at <https://www.qca.org.au/wp-content/uploads/2020/02/interim-draft-decision.pdf>.

amend its pricing model in one of two ways. Firstly, DBCTM could amend its proposed pricing model without reference tariffs to address our concerns highlighted in the interim draft decision, including those related to information provision requirements and arbitration criteria. Alternatively, we considered that DBCTM could adopt a pricing model that included reference tariffs, consistent with previous DBCTM access undertakings.

We sought stakeholder comments across two consultation periods:

- submissions in response to the interim draft decision, due April 2020—we received two submissions, from DBCTM and the DBCT User Group
- collaborative submissions, due June 2020—we received two submissions, from DBCTM and the DBCT User Group.

DBCTM proposed a number of amendments to its 2019 DAU in response to our interim draft decision, and stated its commitment to ensuring the 2019 DAU and its pricing model without a reference tariff is implemented in a way that is balanced, effective and fit for purpose.<sup>23</sup> DBCTM's proposed amendments are outlined in appendix 4 of its April 2020 submission.<sup>24</sup>

The DBCT User Group remained of the view that the 2019 DAU would only be appropriate if it includes QCA-determined reference tariffs.<sup>25</sup> Even if it was assumed that a pricing model without a reference tariff could theoretically constrain DBCTM's market power to the same extent as a reference tariff, the DBCT User Group considered the additional costs and prescription involved in doing so would mean that the only appropriate approach would be to require a reference tariff model instead.<sup>26</sup>

Collaborative submissions reflected some agreement on non-pricing provisions in the 2019 DAU. However, the DBCT User Group stated that the polar opposite views held in relation to DBCTM's pricing model by the parties, and the extent to which non-pricing provisions like queuing and the expansion framework are intertwined with that pricing model, provided limited scope for collaboration.<sup>27</sup>

We have now progressed to a draft decision that assesses all aspects of DBCTM's 2019 DAU and has been informed by stakeholder submissions, including those in response to our interim draft decision.

## 1.5 Draft decision

Our draft decision is to refuse to approve DBCTM's 2019 DAU.

This document sets out our preliminary assessment of DBCTM's 2019 DAU against the statutory criteria, and outlines the reasons why we do not consider it is appropriate to approve the 2019 DAU.

We consider that the 2019 DAU will not promote the economically efficient operation of, use of and investment in the infrastructure by which the declared service is provided, nor will it appropriately balance the legitimate business interests of DBCTM with the interests of access seekers, access holders and the public interest.<sup>28</sup> In particular, we consider the 2019 DAU does

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<sup>23</sup> DBCTM, sub. 8, p. 4.

<sup>24</sup> DBCTM, sub. 8, appendix 4.

<sup>25</sup> DBCT User Group, sub. 9, p. 4.

<sup>26</sup> DBCT User Group, sub. 9, p. 28.

<sup>27</sup> DBCT User Group, sub. 11, p. 5.

<sup>28</sup> Sections 138(2)(a), (b), (d), (e) and (h) of the QCA Act.

not provide sufficient constraint on DBCTM's ability to exercise market power in negotiations. The 2019 DAU does not provide sufficient information to inform access seekers for the purposes of negotiating with DBCTM, or provide arbitration criteria that sufficiently protect the interests of access seekers, thereby undermining the purpose of arbitration as a 'backstop' for dispute resolution. Consequently, we find the 2019 DAU materially increases uncertainty, which could adversely affect investment incentives and not be in the public interest.

Nonetheless, we are of the view that a pricing model without reference tariffs may be appropriate to approve for DBCTM. We have identified a number of amendments to the 2019 DAU that we consider necessary in order for us to approve a replacement access undertaking for DBCTM's declared service. These amendments are discussed throughout this draft decision.

This draft decision is intended to provide stakeholders with the reasoning behind our preliminary views and to encourage them to further contribute by way of submissions. Our assessment may change when we make our final decision, which will be informed by submissions made in response to this draft decision.

### Draft decision

- (1) After considering DBCTM's 2019 DAU, our draft decision is to refuse to approve the 2019 DAU.
- (2) We consider it appropriate for DBCTM to amend its 2019 DAU in accordance with the amendments described in this draft decision.

### Overarching issues

DBCTM and/or other stakeholders raised a number of overarching issues in the context of DBCTM's 2019 DAU. The following sections provide an overview of these issues, which are discussed in more detail throughout this draft decision.

#### Primacy of negotiated outcomes

DBCTM considered that primacy should be given to commercial negotiations. It noted:

- Heavily prescribed access charges, along with the other terms and conditions of access that DBCTM must offer access seekers, mean that under the previous access undertakings DBCTM and access seekers have not had a real or meaningful opportunity to negotiate to reach a commercial access arrangement.<sup>29</sup>
- There is no requirement in the QCA Act for an access undertaking to include a price.<sup>30</sup>
- Ex ante price setting has the potential for regulatory error.<sup>31</sup>
- DBCTM is in an expansionary environment, meaning it is particularly important that the access undertaking does not introduce unnecessary regulatory burdens, which would put at risk efficient investment in the Terminal.<sup>32</sup>

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<sup>29</sup> DBCTM, sub. 1, p. 11.

<sup>30</sup> DBCTM, sub. 1, p. 29.

<sup>31</sup> DBCTM, sub. 1, p. 28.

<sup>32</sup> DBCTM, sub. 1, p. 17.

- The form of regulation to apply at DBCT should be tailored so that it addresses the 'competition problem' identified by the declaration review, and a pricing model without a reference tariff is a proportionate response to the identified problem.<sup>33</sup>

Stakeholders expressed the following views:

- The existing model is a negotiate-arbitrate model, where reference tariffs assist in facilitating efficient negotiation. DBCTM and access seekers could agree to a different price if non-reference terms were offered that made doing so attractive.<sup>34</sup>
- Any potential for regulatory error would be expected to 'balance out' over a number of regulatory periods. Should the QCA have concerns about regulatory error, it can address this through a reference tariff.<sup>35</sup>
- The QCA can have regard to investment incentives with a reference tariff, through its estimation of the weighted average cost of capital (WACC). Further, a reference tariff provides certainty, which promotes investment.<sup>36</sup>
- There is no suggestion in the QCA Act, in part 5 or elsewhere, that appropriateness must be considered solely by having reference to the conclusions the QCA has reached in a declaration review. The QCA Act outlines a broader set of criteria that the QCA must have regard to in assessing a DAU.<sup>37</sup>

We are of the view that, where possible, DBCTM and access seekers should be encouraged to reach agreement on the terms and conditions of access—noting that negotiated outcomes may have a number of benefits for the parties.

We consider that a regulatory framework that incorporates a reference tariff can provide scope for parties to reach an agreement on the terms and conditions of access. However, in assessing DBCTM's proposed 2019 DAU, we acknowledge DBCTM's concerns regarding the potential limitations of a reference tariff model. To the extent that the perceived certainty provided by a reference tariff within a negotiate-arbitrate framework stifles the incentives of parties to negotiate on pricing matters, the removal of a reference tariff could encourage further scope for negotiation between parties.

We recognise that there may be impediments to realising efficient and appropriate negotiated outcomes where the negotiations involve one party with market power, and which has the benefit of asymmetric information. An appropriate access undertaking must therefore constrain DBCTM from exercising market power and taking advantage of information asymmetry in negotiations with users.

Our full analysis on these issues is provided in Chapter 5.

With regard to the competition problem identified in the declaration review, we note that the assessment of the 2019 DAU involves the application of different parts of the QCA Act. While the declaration review considered the access criteria in section 76 of the QCA Act, our assessment of the 2019 DAU must have regard to the factors contained in section 138(2) of the QCA Act. This matter is discussed in Chapter 2.

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<sup>33</sup> DBCTM, sub. 1, p. 5.

<sup>34</sup> DBCT User Group, sub. 9, pp. 18–19.

<sup>35</sup> DBCT User Group, sub. 9, p. 12.

<sup>36</sup> DBCT User Group, sub. 9, p. 19–20.

<sup>37</sup> DBCT User Group, sub. 2, pp. 8–9.

### Market power and countervailing power

Stakeholders considered the characteristics of DBCT important in determining whether the form of regulation proposed by DBCTM is appropriate. These characteristics include the existence of market power and the lack of 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.<sup>38</sup>

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.<sup>39</sup>

DBCTM also suggested that access seekers do have a level of countervailing power.<sup>40</sup>

As discussed in Chapter 5, 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, we consider there is limited threat of competition entering the market, noting 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.

We are of the view 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 DBCTM's ability to exert market power. Nonetheless, we recognise that there may be alternative means to constrain market power other than the approval of a reference tariff. While the characteristics of DBCT and the relevant market suggest there is limited constraint on the exercise of market power (in the absence of appropriate regulation), 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 DBCTM's 2019 DAU. We require amendments to the 2019 DAU to address this matter.

### Addressing information asymmetry

Throughout the submission process, stakeholders raised concerns that information asymmetry was present between DBCTM and access seekers under DBCTM's 2019 DAU.<sup>41</sup> These stakeholders considered this particularly to be the case for new access seekers (i.e. those who are not currently access holders at DBCT).<sup>42</sup>

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<sup>38</sup> DBCT User Group, sub. 2, pp. 15–32; New Hope Group, sub. 3, p. 9.

<sup>39</sup> DBCTM, sub. 5, pp. 12–13.

<sup>40</sup> DBCTM, sub. 5, p. 13.

<sup>41</sup> DBCT User Group, sub. 2, pp. 44–46; New Hope Group, sub. 3, p. 2; Whitehaven Coal, sub. 4, pp. 3–4.

<sup>42</sup> DBCT User Group, sub. 2, pp. 44–45; New Hope Group, sub. 3, p. 7; Whitehaven Coal, sub. 4, p. 3.

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 the 2019 DAU to be sufficiently prescriptive for the type, format and availability of pricing-related information, with the intent of promoting effective negotiations.

In response to our interim draft decision, DBCTM proposed amendments to its 2019 DAU, to provide more prescriptive information requirements. These proposed amendments require DBCTM to provide access seekers with two schedules of information, which will include specific historical and forecast information on cost and pricing matters, along with Terminal metrics.<sup>43</sup>

The DBCT User Group considered that any attempt to resolve information asymmetry will result in needing such prescriptive requirements that it will give rise to many of the perceived costs of having a reference tariff.<sup>44</sup>

We consider that access seekers should be provided with sufficient information to enable them to form a view on a reasonable TIC for the purposes of negotiating with DBCTM. At the same time, we note that an overly prescriptive approach to information provision risks limiting the incentives of parties to negotiate on pricing terms of access.

Overall, we consider that DBCTM's proposed amendments to the 2019 DAU reflect a significant attempt to deal with the issues related to information asymmetry. The information contained in the new proposed schedules typically reflects the type of information previously captured within the reference tariff.

We consider it appropriate for the 2019 DAU to reflect DBCTM's proposed amendments. However, we are of the view that further amendments are required, particularly to the provision of information on depreciation and the remediation cost estimate, to address issues of information asymmetry and uncertainty of underlying information. We consider that amendments may also be required in relation to information provision for parties who enter negotiations towards the end of the regulatory period.

We have also considered whether the 2019 standard access agreement (SAA) includes appropriate processes for information provision when reviewing access charges.

Our concerns in relation to information asymmetry are detailed further in Chapter 4, with our views on the appropriate amendments to information provision requirements in the 2019 DAU outlined in Chapter 6.

#### Facilitating effective arbitration

We hold several concerns in relation to the arbitration criteria in the 2019 DAU. Overall, we are of the view that these arbitration criteria will not sufficiently protect the interests of access seekers, undermining the purpose of arbitration as a 'backstop' for dispute resolution.

Following the interim draft decision, DBCTM proposed amendments to its 2019 DAU to align the arbitration criteria to section 120 of the QCA Act.<sup>45</sup> The DBCT User Group submitted that the factors in section 120 of the QCA Act present an improved and more balanced set of criteria than DBCTM's 2019 DAU.<sup>46</sup>

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<sup>43</sup> DBCTM, sub. 8, appendix 4, schedules H and I.

<sup>44</sup> DBCT User Group, sub. 9, pp. 18, 21.

<sup>45</sup> DBCTM, sub. 8, p. 24.

<sup>46</sup> DBCT User Group, sub. 9, p. 23.

We consider arbitration criteria consistent with section 120 of the QCA Act are appropriate for us to apply when conducting arbitrations under the 2019 DAU. In general, we consider application of these criteria will provide an adequate constraint on the ability of DBCTM to exercise market power in negotiating a TIC with access seekers. At the same time, they are sufficiently flexible to provide scope for parties to reach negotiated outcomes on pricing matters.

Our interim draft decision sought stakeholder views on the QCA publishing guidelines that set out the process we would likely follow, and the methodologies we would intend to adopt, in a price arbitration under an approved access undertaking.

The DBCT User Group considered that QCA guidelines prescriptively determining the methodology for pricing that would apply during an arbitration are necessary to combat information asymmetry and create a higher certainty of outcome.<sup>47</sup> In contrast, DBCTM considered that prescriptive guidelines could preclude the ability of the QCA to decide an arbitration having regard to the relevant facts of the dispute, limit the prospect of successful negotiated outcomes and increase the likelihood of arbitration.<sup>48</sup> DBCTM was of the view that any guidance document published should be limited to providing information as to the process the QCA proposes to follow, and the factors it must have regard to, in any arbitration—by reference to the QCA Act and the approved access undertaking.<sup>49</sup>

We do not consider that prescribing the methodology for pricing that would apply during an arbitration is necessary to address information asymmetry. We require amendments to the information provision requirements under the 2019 DAU to address this matter.

We acknowledge that publishing guideline documents that are overly prescriptive may reduce the prospect of successful negotiated outcomes and increase the likelihood of arbitration. We propose to provide a guideline that is procedural in nature, with limited substantive guidance on key matters. In forming this view, we have had regard to guidelines provided for other sectors and under other jurisdictions.

Our views on the appropriate amendments to the 2019 DAU to facilitate effective arbitration are provided in Chapter 6. Part B of this draft decision includes a draft of our proposed arbitration guidelines.

#### [Differentiation between access holders and access seekers](#)

DBCTM considered that existing users of DBCT were protected under their existing 'evergreen' user agreements, which adequately constrain DBCTM's market power.<sup>50</sup> These user agreements provide for the review of access charges every five years through negotiation, with recourse to arbitration where agreement is not reached.

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 would be a significantly more costly process for individual users.<sup>51</sup>

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<sup>47</sup> DBCT User Group, sub. 11, p. 32.

<sup>48</sup> DBCTM, sub. 8, pp. 38, 40.

<sup>49</sup> DBCTM, sub. 8, p. 38.

<sup>50</sup> DBCTM, sub. 1, p. 19.

<sup>51</sup> DBCT User Group, sub. 6, pp. 22–25.

Our preliminary view in the interim draft decision was that existing users were likely to have a greater level of protection in the absence of a reference tariff than access seekers, on the basis that arbitrated outcomes would provide a credible threat to constrain DBCTM from exercising its market power in negotiations.

In response to our interim draft decision, DBCTM proposed amendments to the arbitration criteria in the 2019 DAU to align with section 120 of the QCA Act. DBCTM also proposed amendments to the arbitration criteria to apply to price reviews under the 2019 SAA, to align with existing user agreements.<sup>52</sup>

We are of the view that our proposed amendments to the 2019 DAU (which include DBCTM's proposed amendments) will adequately constrain DBCTM's ability to exercise market power in negotiations with access seekers, future access holders and existing users.

The DBCT User Group considered that a negotiate-arbitrate model will result in unfair differentiation between access holders and access seekers, based on different levels of information asymmetry and resources to pursue arbitrations.<sup>53</sup>

DBCTM submitted that the vast majority of access seekers currently in the DBCT access queue are large, sophisticated mining companies with extensive experience in conducting mining operations. DBCTM considered that the prospect that these same firms are unable to assess an appropriate charge at DBCT is not tenable and is inconsistent with the commercial reality.<sup>54</sup>

The amendments we require to the 2019 DAU should facilitate negotiation, providing access seekers with sufficient information to form a view on a reasonable TIC for the purposes of negotiating with DBCTM, placing them in an equitable position with existing users.

Further detail on these matters is provided in Chapter 6.

#### [Operation of a pricing model without reference tariffs under existing user agreements](#)

The DBCT User Group stated that a negotiate-arbitrate regime cannot be appropriate where it includes features of a reference tariff system, such as socialisation to protect DBCTM against risks.<sup>55</sup> The DBCT User Group considered socialisation is appropriate with the current regulatory settings, because all affected stakeholders have transparency of proposals and the opportunity to make submissions in relation to capital expenditure, revenue and pricing issues.<sup>56</sup>

DBCTM considered that under its proposed pricing model, socialisation will ultimately be a matter for negotiation between the parties, taking into account the individual circumstances of the access seekers.<sup>57</sup>

Our view is that socialisation is not necessarily inappropriate for a pricing model without a reference tariff. It is unclear to us how the removal of a reference tariff would act to fundamentally alter the risk allocation balance between DBCTM, access seekers and access holders. We note that the 2017 AU allows for access seekers and DBCTM to negotiate different terms to the reference tariff and 2017 SAA. The basis for such negotiated outcomes would likely be differences in risk profile or costs to one or other party, as contemplated by clause 13.1 of the 2017 AU.

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<sup>52</sup> DBCTM, sub. 8, p. 24.

<sup>53</sup> DBCT User Group, sub. 9, p. 11.

<sup>54</sup> DBCTM, sub. 8, p. 12.

<sup>55</sup> DBCT User Group, sub. 9, p. 30.

<sup>56</sup> DBCT User Group, sub. 9, p. 30.

<sup>57</sup> DBCTM, sub. 10, p. 23.

Our views regarding socialisation are discussed in detail in Chapter 5.

The DBCT User Group considered that access agreements clearly anticipate the existing regulatory arrangements and continuation of reference tariffs—contemplating a continuing role for us in approving tariffs and making decisions in relation to annual roll-forwards and review events.<sup>58</sup>

DBCTM stated that existing user agreements clearly envisage that the method of determining access charges may vary over time, and clause 7.2 of existing user agreements allows for drafting changes to be made to address this.<sup>59</sup>

We are unclear as to why existing access agreements would not be able to incorporate a negotiated tariff, as opposed to a predetermined reference tariff.

Clause 7.2 of existing user agreements provides for the TIC and the processes applied to update the TIC and other charges (including annual roll-forwards and review events) to be reviewed at the date on which the 2019 DAU comes into effect.<sup>60</sup> Our view is that this process will allow access holders and DBCTM to negotiate amendments to the pricing arrangements to reflect the removal of the reference tariff. If agreement cannot be reached, these issues can be resolved as part of an arbitration.

These matters are discussed in Chapter 6.

### Non-pricing provisions

While stakeholders opposed DBCTM's proposed pricing model (and related consequential wording changes to the 2019 DAU), the DBCT User Group recognised the reasonable nature of some of the non-pricing related changes to the drafting of the 2019 DAU.<sup>61</sup>

After we published the interim draft decision, we sought collaborative submissions from stakeholders, encouraging their joint consideration of non-pricing provisions. While this process led to agreement on some specific non-price terms in the 2019 DAU, the DBCT User Group stated that the polar opposite views held in relation to DBCTM's pricing model meant there was limited scope for collaboration.<sup>62</sup>

Our assessment of non-pricing provisions is provided in Chapter 8.

We recognise that pricing and non-pricing provisions in the 2019 DAU are closely connected and should be considered as a package. For example, we note that stakeholders raised concerns over the 2019 DAU requiring access seekers to agree to a legally binding access agreement without any certainty of the pricing that will apply in specific circumstances.<sup>63,64</sup>

DBCTM stated that access seekers had recently executed conditional access agreements and underwriting agreements without pricing certainty, showing that pricing certainty does not inhibit an access seeker's ability or incentive to access DBCT.<sup>65</sup> DBCTM was of the view that access

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<sup>58</sup> DBCT User Group, sub. 9, p. 31.

<sup>59</sup> DBCTM, sub. 10, p. 26.

<sup>60</sup> Where consistent with the 2017 SAA.

<sup>61</sup> DBCT User Group, sub. 2, p. 7.

<sup>62</sup> DBCT User Group, sub. 11, p. 5.

<sup>63</sup> These circumstances relate to the notifying access seeker process (see cls. 5.4(j)–(k)) and conditional access agreement process (see cl. 5.4(l)(15)).

<sup>64</sup> DBCT User Group, sub. 6, p. 20; Whitehaven Coal, sub. 4, pp. 5–6.

<sup>65</sup> DBCTM, sub. 10, pp. 14–15.

seekers obtain certainty through other arrangements in the 2019 DAU, including recourse to arbitration by the QCA if agreement cannot be reached.<sup>66</sup>

In considering the proposed negotiation arrangements in the context of DBCTM's proposed pricing model, we are of the view that the 2019 DAU exposes an access seeker to greater pricing uncertainty at the time at which it must decide whether to enter into a binding access agreement with DBCTM, than the 2017 AU which includes a reference tariff. We are concerned that when the proposed negotiation arrangements are coupled with the 2019 DAU, they may require an access seeker to enter into a binding access agreement without knowing the likely TIC, or whether it would be able to obtain a TIC (through negotiation or arbitration) that did not exceed the value it placed on that access.

We consider it may be appropriate for the 2019 DAU to provide for a more balanced negotiation process on pricing matters. This matter is considered in Chapter 6.

## 1.6 Submissions invited on areas of particular interest to the QCA

While we are seeking submissions on all aspects of DBCTM's 2019 DAU, there are a number of matters that we consider would particularly benefit from stakeholder views, and these are identified throughout this document. For example, these include:

- the appropriate methodology to estimate depreciation costs—our draft decision is to require DBCTM to provide information on depreciation based on an approved methodology to be assessed transparently as part of this 2019 DAU assessment process. We seek stakeholder views on the appropriate methodology for DBCTM to apply when calculating depreciation
- Schedule C of the 2019 DAU—we seek stakeholder views on DBCTM's proposed approach for updating the TIC during the regulatory period, including the merits or otherwise of removing schedule C (or elements of schedule C) from the 2019 DAU
- price review processes—the 2019 SAA and existing user agreements provide for the periodic review of access charges. We seek stakeholder views on the way in which the various price review processes will operate and interact in the absence of a reference tariff
- the appropriate value of the remediation cost estimate—our draft decision considers it appropriate for the QCA to assess the remediation cost estimate to apply for the 2019 DAU period. We seek stakeholder views on the appropriate remediation cost estimate—in particular, on the specific matters outlined in Chapter 7
- non-pricing provisions—noting the DBCT User Group's view that pricing and non-pricing provisions in the 2019 DAU are closely connected and should be considered as a package, we seek stakeholder views about the appropriateness of the non-pricing provisions, in light of our draft decision to approve a pricing model without a reference tariff.

Views on these matters will assist us in making our final decision on DBCTM's 2019 DAU, including any amendments necessary to make the DAU appropriate to approve.

## 1.7 Structure

This draft decision is structured as follows:

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<sup>66</sup> DBCTM, sub. 10, p. 28.

**Part A: Assessment of DBCTM's pricing model and non-price terms**

Part A provides detail on our preliminary assessment of DBCTM's 2019 DAU.

- Chapter 1: Introduction—provides background and context to our investigation.
- Chapter 2: Legislative framework—sets out how we have applied our legislative obligations in making this draft decision.
- Chapter 3: Overview of DBCTM's pricing model—provides detail on the pricing model proposed by DBCTM, and revisions it subsequently proposed in response to our interim draft decision.
- Chapter 4: Assessment of DBCTM's pricing model—sets out our assessment and consideration of the pricing model proposed in the 2019 DAU.
- Chapter 5: Appropriateness of the pricing model—outlines our views on whether a pricing model without a reference tariff can be appropriate to approve.
- Chapter 6: Amendments to DBCTM's pricing model—outlines the amendments to the pricing model we consider necessary in order to approve the 2019 DAU.
- Chapter 7: Remediation charges—provides our assessment of DBCTM's proposed remediation cost estimate for the 2019 DAU.
- Chapter 8: Non-pricing provisions—provides our assessment of DBCTM's proposed non-pricing provisions, and the amendments we consider necessary in order to approve the 2019 DAU.

**Part B: Arbitration guideline for disputes under the DBCT 2021 access undertaking**

Part B provides detail on the various processes that will occur should a dispute be referred to the QCA for arbitration, and outlines specific matters for consideration in pricing disputes.

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## 2 LEGISLATIVE FRAMEWORK

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*Our assessment of DBCTM's 2019 DAU has been conducted in accordance with the statutory framework of the QCA Act, as outlined in this chapter.*

### 2.1 The 2019 DBCT draft access undertaking

On 12 October 2017, we issued an initial undertaking notice requiring DBCTM to submit a draft access undertaking (DAU) for the declared service described in section 250(1)(c) of the QCA Act.<sup>67</sup> In response to our initial undertaking notice, DBCTM lodged its DAU on 1 July 2019 (the 2019 DAU).

### 2.2 Consideration and approval of the 2019 DAU by the QCA

The QCA must consider a DAU given in response to an initial undertaking notice and either approve, or refuse to approve, the DAU. We may approve the 2019 DAU only if we consider it appropriate to do so, having regard to the factors outlined in section 138(2) of the QCA Act (Box 1).

**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.

If we consider that it is not appropriate to approve the 2019 DAU, having regard to section 138 of the QCA Act, then we must refuse to approve the DAU. If we refuse to approve the 2019 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.<sup>68</sup>

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<sup>67</sup> Pursuant to s. 133 of the QCA Act.

<sup>68</sup> Section 134 of the QCA Act.

### 2.2.1 Stakeholder submissions

The DBCT User Group submitted that the test for the approval of a DAU under section 138(2) of the QCA Act requires the QCA to only approve the most appropriate undertaking:

The DBCT User Group acknowledges the QCA's view that the starting point for the QCA's statutory task is assessing whether the draft access undertaking as submitted is appropriate.

However, it necessarily follows from the meaning of appropriate that the QCA is not required, and it would actually be an invalid exercise of its power, to settle for a less suitable alternative.

...

First, whether the proposed terms of an undertaking are appropriate must be assessed relative to the alternative terms which could be adopted in the draft access undertaking.

It necessarily follows that, if there are considerable advantages of one potential approach over another, that the less advantageous approach is not appropriate. That will remain the case irrespective of whether it was the approach initially submitted.<sup>69</sup>

The DBCT User Group therefore contended that the QCA cannot approve a draft access undertaking model without reference tariffs, as it would be less appropriate than one with reference tariffs:

In order for the QCA to ultimately conclude that a non-reference tariff model is appropriate, it would need to determine that the non-reference tariff model put forward is so close in terms of merits to the reference tariff model that they could both be considered appropriate.<sup>70</sup>

Similarly, the DBCT User Group submitted that if the QCA refused to approve the 2019 DAU, it must then require amendments that achieve the most appropriate outcomes under section 134 of the QCA Act:

Accordingly, if the QCA was to maintain the preliminary views that a reference tariff model has advantages over a pricing model without reference tariffs, then the DBCT User Group submits that the secondary undertaking notice must require reinstatement of a reference tariff model.<sup>71</sup>

In response, DBCTM submitted that the DBCT User Group had misinterpreted the statutory test and erroneously imported words into section 138(2) and section 134 of the QCA Act:

In assessing the submitted undertaking against the section 138(2) factors, the QCA is not required to opine as to whether another form of undertaking would be more appropriate.

...

The User Group also suggests that there is a requirement in section 134(2) for the QCA to formulate amendments that are the "most" appropriate amendments. Rather, the requirement is for the QCA to ask the owner or operator to amend the DAU in "the way the Authority considers appropriate" - again, there is no "most" before "appropriate" in section 134(2) and "appropriate" does not of itself mean "most appropriate".<sup>72</sup>

### 2.2.2 QCA analysis

The QCA Act requires us to consider the DAU given to us by DBCTM as a starting point, and either approve or refuse to approve the DAU.<sup>73</sup> In deciding whether to approve the 2019 DAU, the QCA Act requires us to approve a DAU only if the QCA 'considers it appropriate to do so' having regard

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<sup>69</sup> DBCT User Group, sub. 9, pp. 6–7.

<sup>70</sup> DBCT User Group, sub. 9, p. 9.

<sup>71</sup> DBCT User Group, sub. 9, pp. 8–9.

<sup>72</sup> DBCTM, sub. 10, pp. 7–8.

<sup>73</sup> Section 134(1) of the QCA Act.

to each of the factors listed in section 138(2) of the QCA Act. 'Appropriate' is not defined in the QCA Act, and therefore it takes its ordinary meaning. As the High Court has previously stated:

The phrase "considers appropriate" indicates the striking of a balance between relevant considerations so as to provide the outcome which is fit and proper.<sup>74</sup>

Therefore, we must consider the 2019 DAU as submitted, and evaluate it against the factors in section 138(2) of the QCA Act. If, having regard to and balancing the various section 138(2) criteria, we consider it appropriate to approve the DAU as submitted, we may approve that undertaking.

If, having regard to the section 138(2) criteria, we consider that it is not appropriate to approve the 2019 DAU, then we must refuse to approve the 2019 DAU and give DBCTM a secondary undertaking notice stating the reasons for the refusal, and asking DBCTM to amend the DAU in 'the way the QCA considers appropriate'.<sup>75</sup>

In undertaking this exercise and determining whether the 2019 DAU appropriately balances the various considerations set out in section 138(2), we are not required to consider whether the amendments proposed by DBCTM are the 'most' appropriate, if that was indeed possible. Similarly, it is not necessary for us to consider what hypothetical alternatives might otherwise have been adopted or might be preferable. Rather, the QCA Act requires us to undertake a practical and straightforward task of considering whether what has been proposed relevantly and appropriately balances the statutory factors in section 138(2).

## 2.3 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—that indeed, 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.<sup>76</sup>

At the same time, the QCA Act does not preclude a reference tariff being included in an access undertaking. We note that the QCA Act:

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

However, we note that while section 137(2) of the QCA Act provides a list of matters that an access undertaking may contain, which includes how charges for access to the service are to be calculated, the inclusion of any particular item is not required.

We will assess the 2019 DAU as submitted, having regard to the factors in section 138(2) of the QCA Act. We consider that the QCA Act does not mandate that an access undertaking must include a reference tariff in order to be appropriate.

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<sup>74</sup> *Mitchell v R* (1996) 134 ALR 449 at 458.

<sup>75</sup> Sections 134(1) and 134(2) of the QCA Act.

<sup>76</sup> DBCTM, sub. 1, pp. 11–12.

## 2.4 Factors affecting our approval of the 2019 DAU

We may approve the 2019 DAU only 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 the 2019 DAU. 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.<sup>77</sup> We discuss our approach to each of the section 138(2) factors below.

### 2.4.1 The object of part 5 of the QCA Act

We are required to have regard to the object of part 5 of the QCA Act.<sup>78</sup> Part 5 of the QCA Act establishes an access regime to provide 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.

#### Legislative background

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 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.<sup>79</sup>

#### Economically efficient outcomes

The object of part 5 of the QCA Act is principally directed at promoting economic efficiency—in particular, the economically efficient operation of, use of, and investment in significant infrastructure by which services are provided.

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<sup>77</sup> *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 41. Also see *Telstra Corporation Ltd v ACCC* [2008] FCA 1758.

<sup>78</sup> Section 138(2)(a) of the QCA Act.

<sup>79</sup> Productivity Commission, *Review of the National Access Regime*, Inquiry report no. 17, September 2001, p. xxii.

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 the following:

- Constraining inefficient or unfair differentiation between access holders, access seekers and, where appropriate, other market participants (such as rail operators).
- Supporting efficient entry and 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.
- 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 through innovation.
- Providing a stable, transparent and predictable regulatory framework, with appropriate oversight and enforcement.

By promoting the efficient use of, and investment in the infrastructure by which declared services are provided, competition in related markets is also promoted.

#### 2.4.2 Legitimate business interests of the owner or operator

We are required to have regard to the legitimate business interests of the owner (DBCT Holdings) or operator (DBCTM) of the service.<sup>80</sup> 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.<sup>81</sup>

##### Relationship between DBCT Holdings and DBCTM

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

The term 'owner' is defined as the owner of a facility used, or to be used, to provide the service.<sup>82</sup> Under long-term lease arrangements, the Queensland Government retains ownership of DBCT 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.<sup>83</sup>

We consider that DBCTM is the operator of the service. We previously determined that various features of DBCT's contractual arrangements support the view that DBCTM is the appropriate

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<sup>80</sup> Section 138(2)(b) of the QCA Act.

<sup>81</sup> Section 138(2)(c) of the QCA Act.

<sup>82</sup> Schedule 2 of the QCA Act.

<sup>83</sup> As in the 2015 DAU; QCA, *DBCT Management's 2015 draft access undertaking*, final decision, November 2016, p. 24.

operator because, among other things, it is DBCTM that gives access to DBCT by negotiating and entering into the access agreements which specify the commercial terms that apply to access.<sup>84,85</sup>

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. In balancing the interests of both parties, we have considered DBCTM's role as the operator of the service, and the significant capital investments DBCTM has made in DBCT.

Additionally, broader economic considerations that touch upon state ownership of DBCT—such as the importance of the operation of the Terminal to the state or regional economy, may be relevant to our consideration of the public interest criterion (s. 138(2)(d) of the QCA Act). These public interest considerations are discussed below.

### Legitimate business interests

The term 'legitimate business interests' is not a defined term under the QCA Act; however, we note that the explanatory memorandum to the QCA Act states the following:

The requirement that the authority consider the access provider's legitimate business interests and investment in the facility will require the authority to recognise the access provider's past investment in the facility and to ensure its decisions do not discourage the access provider from undertaking socially desirable investment in the future. If the authority fails to take adequate account of an owner's legitimate business interest, future investment in this State may be jeopardised. However, the phrase is not intended to justify owners continuing to earn monopoly profits under the regime. The firm and binding contractual obligations of the owner, as well as its reasonably anticipated requirements, should also be recognised in the context of its legitimate business interests.<sup>86</sup>

The concept of 'legitimate business interests' is frequently used and referred to in other access regimes, including the national access regime and the telecommunications access regime (part IIIA and part XIC of the *Competition and Consumer Act 2010* (Cth)). In the context of determining access prices, the 'legitimate business interests' of the access provider include recovering its efficient costs and obtaining a normal return on capital. The expression is not one that allows the service provider to earn monopoly profits, pursue any anti-competitive interests, or inflate its profits to compensate for any losses it might have incurred in a dependent market as a result of the provision of access.<sup>87</sup>

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, including 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:

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<sup>84</sup> See QCA, *DBCTM 2015 (ring-fencing) draft amending access undertaking*, draft decision, February 2016, attachment 2, pp. 73–77.

<sup>85</sup> We note that in the 2019 DAU, DBCT PL is defined as the 'Operator'. This refers to the fact that the day-to-day operational management of the Terminal is sub-contracted to DBCT PL by way of the operations and maintenance contract (OMC). DBCT PL is an independent service provider owned by a majority of the existing users of the Terminal. This definition of the 'Operator' in the 2019 DAU is separate from the definition of the 'operator of the service' in the QCA Act—for the purposes of the QCA Act, we consider the operator of the service is DBCTM.

<sup>86</sup> *Queensland Competition Authority Bill 1997* (Qld), explanatory memorandum, p. 30.

<sup>87</sup> See for example, *Re Fortescue Metals Group* [2010] ACompT 2 at [604], [1170]; *Re Telstra Corporation Ltd* [2006] ACompT 4 at [89].

- promote incentives to maintain, improve and invest in the Terminal and the efficient provision of the declared services
- 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 and compliance with all relevant environmental obligations
- comply with other contractual or regulatory requirements such as the Port Services Agreement (PSA)—recognising that contractual arrangements do not bind or constrain the QCA in our assessment of the proposed pricing model.

### 2.4.3 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).<sup>88</sup>

Public interest is not a defined term in the QCA Act; however, current jurisprudence notes that the range of matters that can potentially be considered within the scope of 'public interest' is very broad. For example, the majority judgement of the High Court of Australia in *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* noted:

It is well established that, when used in a statute, the expression "public interest" imports a discretionary value judgment to be made by reference to undefined factual matters. As Dixon J pointed out in *Water Conservation and Irrigation Commission (NSW) v Browning*, when a discretionary power of this kind is given, the power is "neither arbitrary nor completely unlimited" but is "unconfined except in so far as the subject matter and the scope and purpose of the statutory enactments may enable the Court to pronounce given reasons to be definitely extraneous to any objects the legislature could have had in view". [footnotes omitted]<sup>89</sup>

Some issues we may consider in our assessment of the public interest under section 138(2)(d) of the QCA Act include:

- competition in markets (whether or not in Australia)
- investment effects, including investment in facilities and markets that depend on access to the DBCT service
- the incidence of costs, including administrative and compliance costs, and costs associated with having multiple users of the service
- the sustainable and efficient development of the Queensland coal industry, and related industries
- economic and regional development issues, including employment and investment growth
- environmental considerations, including legislation and government policies relating to ecologically sustainable development.

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<sup>88</sup> Section 138(2)(d) of the QCA Act.

<sup>89</sup> (2012) 246 CLR 379 at [42].

The DBCT User Group submitted that regulatory certainty and stability of regulation is an important public interest factor:

In addition to the factors specifically recognised in the [QCA's] Interim Draft Decision, the DBCT User Group submits that regulatory certainty and stability of regulation is an important public interest factor, that falls well within the scope of the wide breadth of matters that are encompassed in consideration of the public interest.<sup>90</sup>

DBCTM did not disagree that regulatory certainty and stability may be a factor relevant to considering the public interest, but noted that 'the benefits of regulatory certainty and stability do not mean that the regulatory settings should remain static or should not evolve over time'.<sup>91</sup> We further note that regulation itself may create incentives and other distortions that are not welfare enhancing, and that regulators may make decisions which contain errors.

The matters that can potentially be considered within the scope of 'public interest' is very broad, and a range of issues may be relevant in our consideration of this factor.

#### 2.4.4 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.<sup>92</sup>

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, equitable and non-discriminatory manner
- tariffs that do not exceed the efficient costs of access, 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.

As discussed in section 2.4.7, we have also considered the interests of access holders to be relevant<sup>93</sup>, because access seekers, upon signing an access agreement, become access holders. Our assessment of the 2019 DAU seeks to achieve an appropriate balance between different users, including over time.

#### 2.4.5 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.<sup>94</sup>

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<sup>90</sup> DBCT User Group, sub. 9, p. 13.

<sup>91</sup> DBCTM, sub. 10, p. 20.

<sup>92</sup> Section 138(2)(e) of the QCA Act.

<sup>93</sup> Under s. 138(2)(h) of the QCA Act.

<sup>94</sup> Section 138(2)(f) of the QCA Act.

Both DBCTM and the DBCT User Group considered that this factor had little impact on the issue of the appropriate pricing model.<sup>95</sup> DBCTM submitted that 'there are no relevant assets which could be excluded for pricing purposes and this factor is not relevant to the QCA's consideration of whether to approve the 2019 DAU.'<sup>96</sup>

#### 2.4.6 Pricing principles

We are required to have regard to the pricing principles in section 168A of the QCA Act.<sup>97</sup> These principles state that the price of access should:

- (a) 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
- (b) allow for multi-part pricing and price discrimination when it aids efficiency
- (c) 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
- (d) provide incentives to reduce costs or otherwise improve productivity.

The pricing principles 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 cost-reflective 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.

#### 2.4.7 Other issues the QCA considers relevant

We may have regard to any other issues we consider relevant in assessing a DAU.<sup>98</sup> We consider the following matters relevant in our assessment of the 2019 DAU.

##### The interests of 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.<sup>99</sup>

We consider that the interests of access holders are a relevant issue under section 138(2)(h) of the QCA Act. 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 future access seekers has an inter-generational dimension, where the interests of access holders and future access seekers may

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<sup>95</sup> DBCT User Group, sub. 9, p. 15; DBCTM, sub. 10, p. 21.

<sup>96</sup> DBCTM, sub. 10, p. 21.

<sup>97</sup> Section 138(2)(g) of the QCA Act.

<sup>98</sup> Section 138(2)(h) of the QCA Act.

<sup>99</sup> DBCTM, sub. 1, p. 10.

differ. For example, the approach to pricing capacity expansions can give rise to tension when a pricing outcome favours one group over another.

### The relevance 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, which stakeholders are familiar with and are comfortable with their operation.

While we are considering the 2019 DAU afresh, we consider the 2017 AU (as varied through approved DAAUs over the regulatory period) provides instructive and appropriate guidance to help assess the 2019 DAU. 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, and others that require improvement.

We also consider that providing stability and predictability in the regulatory framework is likely to promote investment confidence and reduce administrative and compliance costs. We note that stability and predictability can come from having a clear and transparent framework for decision-making, which promotes a clear understanding and confidence in how changes will be made over time. As such, providing stability and predictability does not necessarily mean the maintenance of the status quo, or a replication of the terms of the 2017 AU.

### 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. We consider there is a strong relationship between an efficient and effective Dalrymple Bay coal supply chain 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 opportunity for users to trade access rights (on both a short- and long-term basis), promoting efficient investment in the relevant DBCT capacity expansions, through differential pricing where appropriate, as well as having an efficient queue for users to obtain new or additional access rights.

## 2.5 The 2020 declaration review and the 2019 DAU assessment

Stakeholders have referred to the 2020 declaration review<sup>100</sup> in their submissions, each highlighting various parts of the materials from that review<sup>101</sup> to support their submissions to this 2019 DAU assessment process.<sup>102</sup>

The 2020 declaration review and the 2019 DAU assessment involve the application of different parts of the QCA Act—in particular, the declaration review considered the access criteria in

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<sup>100</sup> The review of whether the DBCT service (among others) should be declared under part 5 of the QCA Act from September 2020; see <https://www.qca.org.au/project/declared-infrastructure/declaration-review/>.

<sup>101</sup> Including the submissions made to the declaration review, the QCA's recommendation and the Minister's decision.

<sup>102</sup> See for example, DBCTM, sub. 10, p. 10; DBCT User Group, sub. 11, pp. 4, 19.

section 76 of the QCA Act, whereas the assessment of the 2019 DAU will consider the factors affecting the approval of a DAU in section 138 of the QCA Act.

We consider the statutory task under section 138 of the QCA Act is an independent and different exercise than the task undertaken under section 76 of the QCA Act. However, notwithstanding the judicial review proceedings initiated by DBCTM against the Treasurer in relation to the decision to declare the service provided by DBCT<sup>103</sup>, there may be matters raised in the declaration review that are relevant to our assessment of the 2019 DAU. Where we consider such matters to be relevant to the 2019 DAU assessment, these are noted in our decision. The 2019 DAU assessment is conducted according to the legislative framework, as outlined in this chapter, including having regard to section 138(2) of the QCA Act.

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<sup>103</sup> These proceedings are ongoing at the time of writing.

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## 3 OVERVIEW OF DBCTM'S PRICING MODEL

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*DBCTM's 2019 DAU does not include a reference tariff or a prescriptive approach for determining the terminal infrastructure charge (TIC). Rather, the 2019 DAU provides for the TIC to be determined via commercial negotiation, with recourse to QCA (or other) arbitration if agreement cannot be reached. To facilitate this pricing model, DBCTM's 2019 DAU details the processes to occur under negotiation and arbitration.*

*The processes outlined in the 2019 DAU will apply to access seekers requesting new or additional capacity. Any periodic review of pricing or other terms by an existing access holder will be governed by the terms of the relevant access agreement.*

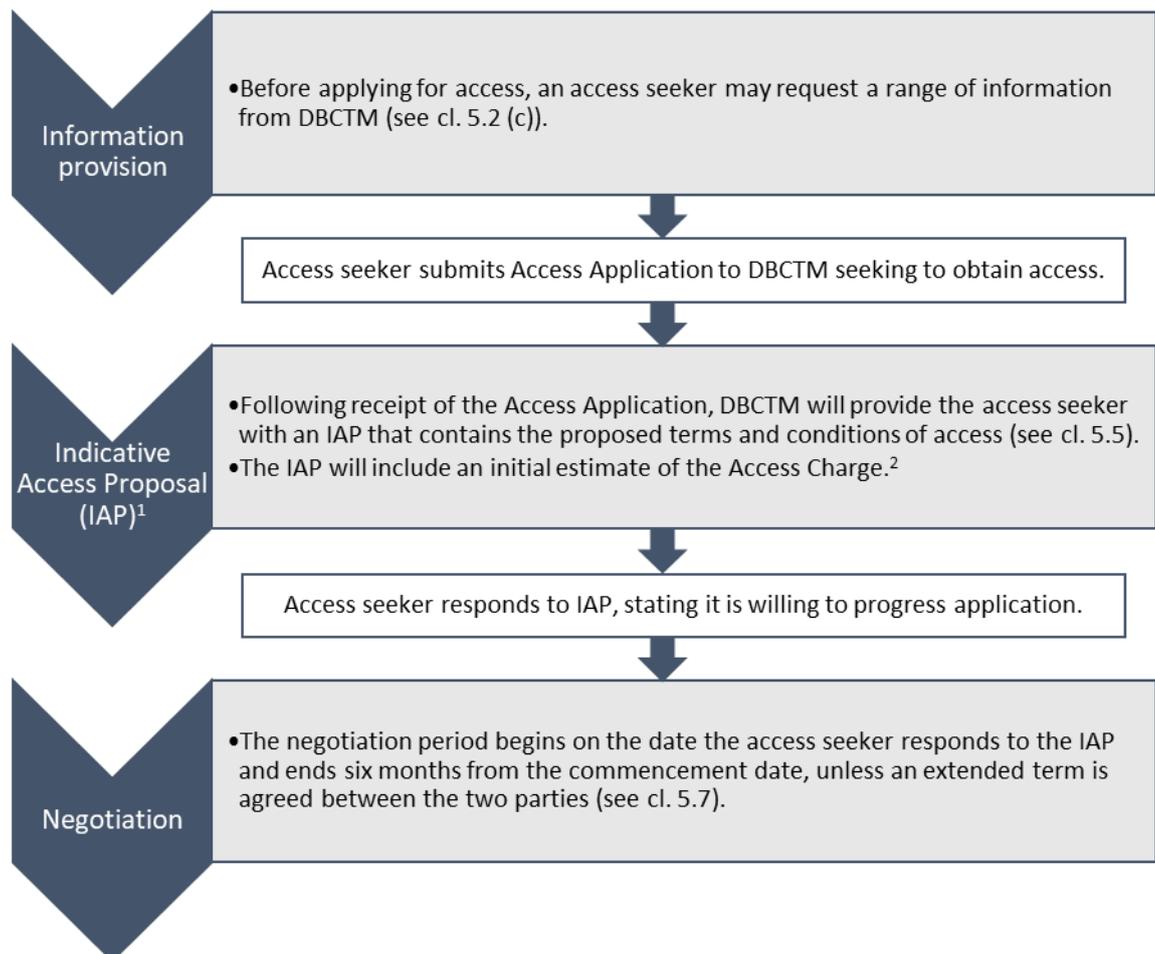
### 3.1 Framework for negotiations regarding new or additional access

DBCTM's proposal requires access seekers and DBCTM to engage in negotiation to determine the TIC; and these negotiations must 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).

The 2019 DAU includes provisions that DBCTM considers facilitate negotiation. The following figure outlines the general process to apply in negotiating access charges.<sup>104</sup>

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<sup>104</sup> In specific situations, other processes may be required (see section 3.1.1 for examples).

**Figure 2 General process for negotiation of new or additional access under the 2019 DAU**

*Notes: (1) The indicative access proposal (IAP) is provided to access seekers following the receipt of an access application. If the access seeker intends to progress its access application on the basis of the arrangements set out in the IAP, it must notify DBCTM of its intention to do so within 30 business days. The IAP provides an access seeker with indicative information, including whether there is available system capacity to accommodate the access application, an initial assessment of the pricing method applicable to the access sought and an initial estimate of the access charge. The IAP does not oblige DBCTM to provide access, unless it contains specific conditions to the contrary. (2) The access charge comprises the TIC and an operation and maintenance charge.*

### Information provision

DBCTM's 2019 DAU includes information provision clauses that DBCTM considers will facilitate negotiation.<sup>105</sup> In particular, the 2019 DAU provides for access seekers to request information set out in sections 101(2)(a)–(h) of the QCA Act before submitting an access application, which DBCTM must provide within 10 business days of receiving the request (cl. 5.2(c)).<sup>106</sup> This information 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;

<sup>105</sup> DBCTM, sub. 1, p. 40.

<sup>106</sup> Access seekers can also request preliminary information relating to the access application (such as copies of the standard access agreement), and request initial meetings to discuss the proposed access application.

- (c) information about the value of the access provider's [DBCTM] 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) of the QCA Act, 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.

### 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<sup>107</sup> for requested services specified in the access application (cl. 5.5(d)(5)(B)). The IAP is indicative only and does not oblige DBCTM to provide access.<sup>108</sup>

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.<sup>109</sup>

### Negotiation period

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)). This period for negotiation will expire after six months or an extended period of time agreed by the parties to the negotiation.<sup>110</sup>

#### 3.1.1 Alternative negotiation processes

We note that the negotiation process may vary from that described above in certain circumstances. For example, 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<sup>111</sup> is entering into an access agreement (binding standard access agreement).

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<sup>107</sup> Access charges comprise of the TIC and an operation and maintenance charge.

<sup>108</sup> Unless the IAP contains specific conditions to the contrary.

<sup>109</sup> DBCTM, sub. 1, p. 42.

<sup>110</sup> Negotiation may cease at an earlier time for a number of other reasons outlined in clause 5.7(a) of DBCTM's 2019 DAU.

<sup>111</sup> 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.

When a binding standard access agreement is signed, DBCTM and the relevant access seeker have 30 days to negotiate and reach agreement on the access price to be specified in the access agreement.<sup>112</sup> Where agreement is not reached, either party may refer the matter for arbitration. When a binding conditional agreement is signed, DBCTM and the relevant access seeker have 30 days to negotiate and seek to agree an expansion pricing approach.<sup>113</sup>

Another example is where there is sufficient available capacity to enter into an access agreement with a notifying access seeker.<sup>114</sup> In this case, the parties have 30 business days to negotiate and agree an initial TIC.

### 3.2 Framework for arbitrations regarding new or additional access

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 we are making the determination, we are required to do so in accordance with clause 11 of DBCTM's 2019 DAU, except to the extent necessary to give effect to any matter agreed by the parties to the arbitration (cl. 17.4).

In making a determination, DBCTM's 2019 DAU (cl. 11.4(d)(1)) requires us 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;
- (G) the factors in section 120(1) of the QCA Act;

We may also take into account any other matters relating to the matters mentioned above (cl. 11.4(d)(2)).

While the 2019 DAU does not specify timeframes for the arbitration process, it should be noted that the QCA Act requires us to use our best endeavours to make an access determination within six months.<sup>115</sup>

DBCTM has pointed to Part 7 of the QCA Act<sup>116</sup>, which it considers includes provisions that emphasise the need for expedient and efficient conduct of the arbitration process.<sup>117</sup> For example, during an arbitration, we are required to act as speedily as proper consideration of the dispute allows (s. 196(1)(e)). In doing so, we must have regard to the need to carefully and quickly inquire into and investigate the dispute and all matters affecting the merits and fair settlement

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<sup>112</sup> Or such longer period as the parties agree.

<sup>113</sup> Or such longer period as the parties agree.

<sup>114</sup> 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.

<sup>115</sup> Various exclusions to this time period apply. See section 117A(2) of the QCA Act.

<sup>116</sup> Section 121 of the QCA Act states that Part 7 applies to arbitrations occurring under part 5, subdivision 3.

<sup>117</sup> DBCTM, sub. 5, pp. 29–30.

of the dispute (s. 196(2)). Also, we may generally give directions, and do things, that are necessary or expedient for the speedy hearing and determination of the dispute (s. 197(1)(f)).

### 3.3 DBCTM's proposed amendments to its pricing model

DBCTM stated it is committed to working to ensure its proposed pricing model without a reference tariff is balanced, effective and fit for purpose.<sup>118</sup> In response to the interim draft decision, which identified several concerns with the proposed information provision requirements and arbitration criteria, DBCTM proposed amendments to its 2019 DAU.

#### 3.3.1 Information provision

Under DBCTM's proposed amendments to information provision under the 2019 DAU, access seekers will still be able to request information from DBCTM prior to submitting an access application; however, a specific information set will be provided, instead of access seekers requesting information specified in sections 101(2)(a)–(h) of the QCA Act.<sup>119</sup> The information set will provide historical information from the start of the 2006 financial year on:

- the capital base
- inflation
- depreciation
- the value of commissioned assets
- the weighted average cost of capital
- the QCA's approved revenue allowances (i.e. remediation allowance, net tax allowance), approved annual revenue requirements and approved TIC
- Terminal utilisation
- any other information DBCTM elects to provide to assist access seekers.

Detail on what is included in the information set, and explanation on how this information will be determined, is outlined in a new schedule to the 2019 DAU (schedule H). The information set must be provided within 10 business days of DBCTM receiving a request for the information.

DBCTM's proposed amendments to its 2019 DAU provide for further information provision with the IAP. DBCTM must provide, at the request of an access seeker, information consistent with sections 101(2)(a)–(h) of the QCA Act.<sup>120</sup> Another information set must also be given to access seekers.<sup>121</sup> This information set will provide forecast information for the remainder of the pricing period and will include:

- the forecast capital base
- forecast inflation
- forecast depreciation
- forecast capital expenditure

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<sup>118</sup> DBCTM, sub. 8, p. 4.

<sup>119</sup> DBCTM, sub. 8, appendix 4, cl. 5.2(c)(2).

<sup>120</sup> DBCTM, sub. 8, appendix 4, cl. 5.5(d)(8).

<sup>121</sup> DBCTM, sub. 8, appendix 4, cl. 5.5 (d)(7).

- the weighted average cost of capital
- forecast Terminal metrics
- forecast rehabilitation costs
- forecast QCA fees
- forecast efficient corporate costs
- other forecast efficient costs, relating to working capital management and tax obligations
- outcomes of commercial arbitrations
- any other information DBCTM elects to provide to assist access seekers.

Specifics on the information set are provided in a new schedule to the 2019 DAU (schedule I), including some detail on the methods DBCTM intends to apply to forecast the information.

Consistent with the QCA Act, DBCTM's proposed amendments provide for access seekers or DBCTM to ask the QCA for advice or directions in relation to the information to be provided in accordance with clause 5.5(d).<sup>122</sup> The requirement for DBCTM to provide information sought prior to an access application or an IAP is subject to an access seeker's compliance with the confidentiality requirements set out in clause 8 of the 2019 DAU.<sup>123</sup> All information provided by DBCTM (whether historical or forecast) will be certified by no fewer than two senior managers of DBCTM.<sup>124</sup>

### 3.3.2 Arbitration criteria

DBCTM has proposed amendments to the arbitration criteria.<sup>125</sup> Where DBCTM and an access seeker are unable to reach agreement on the TIC and the matter is referred to us for arbitration, DBCTM's proposed amendments require us to have regard to the following matters, consistent with the QCA Act (s. 120(1)):

- (a) the object of this part [being 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];
- (b) the access provider's legitimate business interests and investment in the facility;
- (c) the legitimate business interests of persons who have, or may acquire, rights to use the service;
- (d) the public interest, including the benefit to the public in having competitive markets;
- (e) the value of the service to—
  - (i) the access seeker; or
  - (ii) a class of access seekers or users;
- (f) the direct costs to the access provider of providing access to the service, including any costs of extending the facility, but not costs associated with losses arising from increased competition;

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<sup>122</sup> DBCTM, sub. 8, appendix 4, cl. 5.5 (j) and s. 101(5) of the QCA Act.

<sup>123</sup> DBCTM, sub. 8, appendix 4, cls. 5.2 (c), 5.5 (k).

<sup>124</sup> DBCTM, sub. 8, appendix 4, cls. 5.2(d), 5.5(i).

<sup>125</sup> DBCTM, sub. 8, appendix 4, cl. 11.4(d)(1).

- (g) the economic value to the access provider of any extensions to, or other additional investment in, the facility that the access provider or access seeker has undertaken or agreed to undertake;
- (h) the quality of the service;
- (i) the operational and technical requirements necessary for the safe and reliable operation of the facility;
- (j) the economically efficient operation of the facility;
- (k) the effect of excluding existing assets for pricing purposes;
- (l) the pricing principles mentioned in section 168A [of the QCA Act].

### 3.4 Periodic review of access charges under the 2019 SAA

The 2019 SAA provides for the periodic review of all charges, the method of calculating, paying and reconciling them and any consequential changes in drafting of provisions at the request of either the access holder or DBCTM (cl. 7.2(a) of the 2019 SAA).

Should either party wish to review charges, negotiations must commence no later than 18 months prior to the start of the next pricing period (meaning the period ending on 30 June 2026 and each subsequent five-year period during the term of the agreement).

Where the parties do not reach agreement six months before the next pricing period, either party may refer the matter to arbitration. DBCTM's 2019 SAA requires the arbitrations to be conducted in accordance with the access undertaking, having regard to the matters outlined in clause 11.4(d)(1) of the 2019 DAU.

Following publication of our interim draft decision, DBCTM proposed amendments to the arbitration process that will apply to access charge reviews conducted under clause 7.2(c) of the 2019 SAA. These amendments align the price review provisions under the 2019 SAA with those under the 2017 SAA. They require that we conduct the arbitration in such manner as we see fit, after consultation with the parties. Where we are unwilling or unable to act, then the arbitrator must have regard to specific factors, including our then current approach.<sup>126</sup>

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<sup>126</sup> Clauses 7.2 (d) and (e) of the 2019 SAA in DBCTM, sub. 8, appendix 4.

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## 4 ASSESSMENT OF DBCTM'S PRICING MODEL

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*Our view is that DBCTM's pricing model, as proposed in its 2019 DAU that was submitted in July 2019, is not appropriate 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 focused on its interpretation of our draft recommendation for the declaration review of the coal handling service at DBCT as the basis for its proposed pricing model. DBCTM stated that we must be informed by the 'competition problem' that declaration of the Terminal would be trying to address, which it said 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 DBCTM's market power, with respect to existing users, 'was adequately constrained by the existence of the evergreen existing user agreements'.<sup>127</sup>

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.<sup>128</sup>

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'.<sup>129</sup> 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.<sup>130</sup>

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.<sup>131</sup> It noted that 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, 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. DBCTM considered that the negotiation of multi-part pricing, and price discrimination based on the additional services, would promote economically efficient use of DBCT.<sup>132</sup>

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<sup>127</sup> DBCTM, sub. 1, p. 18.

<sup>128</sup> DBCTM, *2019 Draft Access Undertaking for DBCT coal handling service*, letter to the QCA, 1 July 2019, p. 1.

<sup>129</sup> DBCTM, sub. 1, p. 11.

<sup>130</sup> DBCTM, sub. 1, p. 29.

<sup>131</sup> DBCTM, sub. 1, pp. 29–31, 55, sub. 5, pp. 7–8.

<sup>132</sup> DBCTM, sub. 1, pp. 43–45.

## 4.2 Initial stakeholder views

Overall, other stakeholders did not consider that a pricing model without a reference tariff would be appropriate for us to approve.

Stakeholders 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.<sup>133</sup>

These stakeholders also disputed DBCTM's view that an access undertaking should give primacy to negotiation.<sup>134</sup> 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.<sup>135</sup> 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.<sup>136</sup>

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'<sup>137</sup>, compared to DBCTM's suggested errors resulting from reference tariffs. It also said DBCTM overstated the potential for, and outcomes of, regulatory error 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.<sup>138</sup>

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, and is therefore difficult to forecast in advance of a pricing period.<sup>139</sup>

## 4.3 Interim draft decision

In our interim draft decision, we formed a preliminary view that DBCTM's proposed pricing model was not appropriate to approve, having regard to the factors in section 138(2) of the QCA Act. At a high level, we considered the following fundamental characteristics must be demonstrated before the 2019 DAU, without a reference tariff, could be considered appropriate to approve:

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<sup>133</sup> Our views on this matter are outlined in Chapter 2 of this draft decision.

<sup>134</sup> DBCT User Group, sub.2, p. 6, sub. 6, p. 10, sub. 9, pp. 9–10; New Hope Group, sub. 7, p. 6.

<sup>135</sup> DBCT User Group, sub.2, p. 6, 60.

<sup>136</sup> DBCTM, sub. 2, p. 6; New Hope Group, sub. 3, pp. 9–10.

<sup>137</sup> DBCT User Group, sub. 2, p. 37.

<sup>138</sup> DBCT User Group, sub. 2, p. 37, sub. 9, p. 12.

<sup>139</sup> DBCT User Group, sub. 2, pp. 35–36, New Hope Group, sub. 3, pp. 6, 8.

- information provisions that allow access seekers to enter negotiations from an appropriately informed position
- arbitration criteria that credibly constrain market power
- arbitration criteria that do not result in access seekers being materially worse off in negotiations compared to access holders
- clear and efficient processes in negotiation and arbitration, with transparency around arbitrated outcomes.

#### Further stakeholder submissions

We received submissions from DBCTM and the DBCT User Group in response to the interim draft decision. We also sought collaborative submissions in a subsequent round of consultation.

The DBCT User Group agreed with the QCA's preliminary view that the proposed model without reference tariffs is not appropriate to approve, because it:

- does not provide a sufficient constraint on the ability of DBCTM to exercise market power in negotiations, which are likely [to] result in prices above the efficient costs of service delivery;
- creates uncertainty, which could materially and adversely impact investment investments [sic];
- does not promote the economically efficient operation of, use of and investment in, the infrastructure by which the declared service is provided; and
- does not appropriate [sic] balance the legislative business interests of DBCTM with the interests of access seekers and access holders, and the public interest.<sup>140</sup>

DBCTM proposed a number of amendments to the 2019 DAU, which it considered would address our concerns. These revisions include:

- more prescriptive information requirements
- revised arbitration criteria to align with the legislative arbitration factors in section 120(1) of the QCA Act
- alignment of the standard access agreement with existing user access agreements, and disclosure of commercial arbitration outcomes to access seekers.<sup>141</sup>

#### 4.4 QCA analysis

Our draft position is to not approve DBCTM's 2019 DAU as proposed—given that 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 proposed in the 2019 DAU do not sufficiently protect the interests of access seekers, thereby undermining the purpose of arbitration as a 'backstop'<sup>142</sup> for dispute resolution. Consequently, we find the proposed pricing model materially increases uncertainty, which could adversely affect investment incentives and not be in the public interest.

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<sup>140</sup> DBCT User Group, sub. 9, p. 4.

<sup>141</sup> DBCTM, sub. 8, pp. 4–5.

<sup>142</sup> DBCTM, sub. 5, p. 4.

We have had regard to submissions and consider these do not introduce any new issues that lead us to change our position on these threshold matters at this stage. We maintain our views expressed in the interim draft decision on these matters.

DBCTM has indicated it will revise its DAU in a number of areas, in ways which it considers address the concerns raised by the QCA and stakeholders. These proposed amendments are discussed in Chapters 5 and 6 of this draft decision.

The subsequent sections outline our draft views on DBCTM's proposed pricing model for both the negotiation and arbitration stages. Chapter 6 of this draft decision sets out the ways in which we consider it appropriate for DBCTM to amend its 2019 DAU, to resolve the concerns we have raised with the pricing model as proposed.

#### 4.4.1 Information asymmetry

A key concern with the negotiation process that we consider needs to be resolved 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'.<sup>143</sup> This was echoed by New Hope Group, who referred to the information to be provided under the clause as 'limited, and non-specific'.<sup>144</sup> 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'.<sup>145</sup> 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).<sup>146</sup>

The DBCT User Group expressed the concern that information made available to access seekers '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)'.<sup>147</sup> New Hope Group suggested new access seekers in particular would encounter difficulties in understanding how different factors provided by DBCTM could impact individually negotiated prices, thereby undermining positions in negotiation with DBCTM.<sup>148</sup> 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.<sup>149</sup>

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<sup>143</sup> DBCT User Group, sub. 2, p. 45.

<sup>144</sup> New Hope Group, sub. 3, p. 6.

<sup>145</sup> DBCTM, sub. 5, p. 32.

<sup>146</sup> DBCTM, sub. 5, p. 32.

<sup>147</sup> DBCT User Group, sub. 2, p. 45.

<sup>148</sup> New Hope Group, sub. 3, p. 7.

<sup>149</sup> Whitehaven Coal, sub. 4, p. 3.

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 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 form a view of an appropriate and efficient terminal infrastructure charge (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 broadly written, and indicative of the general categories and types of information to be made available in the context of DBCTM's proposed pricing model, rather than an exhaustive or prescriptive list.

When we approved the 2017 AU, we accepted similar drafting for clauses 5.2(d)–(e), after also assessing 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 in this context. However, in the absence of a reference tariff, we consider it appropriate to further detail the type, format and availability of pricing related information outlined in section 101(2), 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)<sup>150</sup>, 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) were intended to reduce some information asymmetry, we are not certain that these provisions would provide sufficient transparency, because:

- The section (s. 101(2)(h)) does not specify the exact nature of the information to be provided.

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<sup>150</sup> DBCTM, sub. 5, p. 29.

- 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 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 could lead to the inefficient use of DBCT's coal handling service, particularly when genuine access seekers require timely access to available capacity but are delayed by the negotiation and arbitration processes. In turn, this could have a detrimental impact on competition in related markets (s. 138(2)(a)).

In response to the interim draft decision, DBCTM maintained that the information provisions in the 2019 DAU would effectively facilitate negotiations. Nonetheless, it proposed further amendments and more prescriptive information requirements to address the QCA's concerns.<sup>151</sup>

The DBCT User Group acknowledged DBCTM's proposed revisions, but maintained that no amount of information disclosure can make a non-reference-tariff model appropriate in the context of the DBCT service.<sup>152</sup> It submitted that the proposed information does not satisfy the criteria expressed in the interim draft decision that the information would allow negotiations from an appropriately informed position.<sup>153</sup>

The DBCT User Group considered that a negotiate-arbitrate model cannot appropriately resolve information asymmetry, and:

any attempt to do so, will result in needing such prescriptive requirements that it will give rise to many of the QCA's perceived costs of utilising a reference tariff while still not removing all of the costs and disadvantages of a negotiate/arbitrate model.<sup>154</sup>

We have had regard to submissions and consider these do not introduce any new issues that lead us to change our views on the matter of information asymmetry. As such, we maintain the positions expressed in our interim draft decision.

#### 4.4.2 Time pressures in negotiations

Further to the information asymmetry, we also had regard to the asymmetrical time pressure faced by access seekers 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:

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<sup>151</sup> DBCTM, sub. 8, p. 17.

<sup>152</sup> DBCT User Group, sub. 11, p. 25.

<sup>153</sup> DBCT User Group, sub. 11, p. 25.

<sup>154</sup> DBCT User Group, sub. 9, p. 18.

- ... the access seeker will be pressured to reach agreement to increase their prospects of obtaining limited available access<sup>155</sup>
- 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.<sup>156</sup>

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.<sup>157</sup>

Additionally, it specifies 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.<sup>158</sup> 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.<sup>159</sup>

We acknowledge the protections for access seekers mentioned by DBCTM were also included in previous undertakings, including in the 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 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).

In response to the interim draft decision, DBCTM said the QCA's concerns are unwarranted and do not accord with commercial reality faced by access seekers.<sup>160</sup> DBCTM submitted that any such time pressure does not create pressure to agree to an inappropriate access charge, as the process for determining charges is dealt with separately.<sup>161</sup> Notwithstanding this, DBCTM said it is open to considering revised timelines should the queuing process create time pressures to sign up for capacity.<sup>162</sup>

While DBCTM has highlighted the provision of arbitration for access seekers as a constraint on its market power<sup>163</sup>, we consider the additional time costs in engaging in negotiation and, potentially arbitration, in the absence of a reference tariff exacerbates the time pressure faced by an access seeker relative to DBCTM. Under the pricing model as proposed, there is potential for this

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<sup>155</sup> DBCT User Group, sub. 2, p. 14.

<sup>156</sup> Whitehaven Coal, sub. 4, p. 5.

<sup>157</sup> DBCTM, sub. 5, p. 33.

<sup>158</sup> DBCTM, sub. 5, p. 34.

<sup>159</sup> DBCTM, sub. 5, pp. 34–35.

<sup>160</sup> DBCTM, sub. 8, p. 25.

<sup>161</sup> DBCTM, sub. 10, p. 13.

<sup>162</sup> DBCTM, sub. 10, p. 13.

<sup>163</sup> DBCTM, sub. 1, p. 54, sub. 5, p. 26.

imbalance to result in access seekers accepting a price higher than might have been accepted in the absence of time constraints, or experiencing unnecessary delays in their investment. We are concerned that DBCTM's proposed pricing model does not sufficiently protect access seekers from being resigned to this outcome.

Our 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.

#### 4.4.3 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 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 this is not addressed, it could adversely affect competition between access holders and seekers.

In response to the interim draft decision, DBCTM disagreed with the QCA's analysis of the arbitration factors included in the 2019 DAU and maintained that its original criteria effectively constrained its market power. Notwithstanding this, DBCTM agreed that the factors set out in section 120 of the QCA Act are appropriate for the purposes of the 2019 DAU. DBCTM proposed to amend the 2019 DAU such that the QCA is required to only have regard to the factors in section 120 of the QCA Act.<sup>164</sup>

DBCTM also proposed to amend clause 7.2 of the 2019 DAU SAA to reflect provisions in the existing user agreements.<sup>165</sup>

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 Chapters 5 and 6 of this draft decision.

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<sup>164</sup> DBCTM, sub. 8, pp. 22–23.

<sup>165</sup> DBCTM, sub. 8, p. 25.

### Application of the 'willing but not anxious' test

We do not consider criterion (1)(A), the 'willing but not anxious' test, 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'.<sup>166</sup> All user stakeholders disagreed with the application of this standard to arbitration of a TIC. Reasons for this disagreement include:

- ... [I]t is not commonly applied to valuing a service (noting the cases that DBCTM refers to concern valuation of assets and/or liabilities);<sup>167</sup>
- ... [W]here 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).<sup>168</sup>
- 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.<sup>169</sup>

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'.<sup>170</sup> It expected us to determine the application of the test at the time of individual arbitrations, including seeking submissions from the disputing parties on 'the method to be used to apply the test'.<sup>171</sup> DBCTM asserted the test 'provides greater guidance than the arbitration provisions of the QCA Act'.<sup>172</sup>

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, 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'<sup>173</sup>, which is materially unlike the market for access to DBCT, where DBCTM is an access provider with market power. To apply

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<sup>166</sup> DBCTM, sub. 1, p. 42.

<sup>167</sup> DBCT User Group, sub. 2, p. 46.

<sup>168</sup> New Hope Group, sub. 3, p. 8.

<sup>169</sup> Whitehaven Coal, sub. 4, p. 6.

<sup>170</sup> DBCTM, sub. 5, p. 36.

<sup>171</sup> DBCTM, sub. 5, pp. 36–37.

<sup>172</sup> DBCTM, sub. 5, p. 37.

<sup>173</sup> DBCTM, sub. 1, p. 43.

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.

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. Wiggins Island Coal Export Terminal or Abbott Point Coal Terminal), only choosing to export at DBCT on rare occasions.<sup>174</sup> 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. In addition, we consider an agreed TIC that is reflective of at least the efficient costs of providing access to the service, 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 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 it is relevant to have regard to DBCTM's rehabilitation obligations under the PSA (under arbitration criterion (1)(E))—given DBCTM 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 have presented our preliminary views on this aspect in Chapter 7 of this draft decision.

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<sup>174</sup> 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. We are not convinced of the proposed differentiated pricing approach:

- 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 forecast for the purposes of conducting informed negotiation/arbitration processes.

Therefore, we do not regard criterion (1)(D) 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 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.

#### 4.4.4 Impact on certainty at DBCT

We acknowledge the potential negative impacts of DBCTM's proposed pricing model on certainty regarding terms and conditions of access, and pricing for services at DBCT and, consequentially, 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<sup>175</sup> and DBCTM has not sufficiently justified the deviation from reference tariffs.<sup>176</sup> 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.<sup>177</sup> The DBCT User Group submitted that a reference tariff is the only method by which upfront certainty can be provided.<sup>178</sup>

DBCTM argued that certainty is afforded through 'agreement or arbitration of access charges'<sup>179</sup>, 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

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<sup>175</sup> DBCT User Group, sub. 2, p. 12; New Hope Group, sub. 4, pp. 11–12.

<sup>176</sup> DBCT User Group, sub. 6, p. 6; New Hope Group, sub. 7, pp. 3–4.

<sup>177</sup> DBCT User Group, sub. 6, p. 15, sub. 11, pp. 14–15; New Hope Group, sub. 7, p. 4.

<sup>178</sup> DBCT User Group, sub. 9, p. 24.

<sup>179</sup> DBCTM, sub. 5, p. 29.

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.<sup>180</sup>

We are conscious that access seekers may have less certainty regarding price outcomes under the pricing model proposed in DBCTM's DAU—given the proposed change in objectivity and transparency in the negotiation and determination of access charges.<sup>181</sup> However, 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 and regulatory environments, and acknowledge DBCTM's point that 'absolute certainty' of a reference tariff is not a prerequisite to full protection.<sup>182</sup> Nevertheless, we consider DBCTM's proposed pricing model contains several issues that create a high level of uncertainty for access seekers.

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 potential for delay and costly determination of access to available capacity to genuine access seekers could adversely impact 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.<sup>183</sup> We consider the asymmetrical time pressure faced by access seekers would reduce the effectiveness 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 DBCT User Group's previous statements (as quoted by DBCTM<sup>184</sup>) 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 consider 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)). Neither is it necessarily in the interests of DBCTM as the operator of DBCT (s. 138(2)(c)).

## 4.5 Conclusion

We do not consider DBCTM's pricing model, as proposed in DBCTM's 2019 DAU, is appropriate to approve, having regard to the criteria in section 138(2). However, a pricing model without reference tariffs could be appropriate to approve, provided it meets these criteria.

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<sup>180</sup> DBCTM, sub. 5, p. 29.

<sup>181</sup> DBCT User Group, sub. 6, pp. 13–15; New Hope Group, sub. 7, pp. 3–4.

<sup>182</sup> DBCTM, sub. 1, p. 28.

<sup>183</sup> DBCTM, sub. 5, p. 20.

<sup>184</sup> DBCTM, sub. 5, p. 20.

We consider the pricing model must constrain DBCTM's ability to exert market power, lead to prices that reflect at least the efficient costs of providing access to the service, and thereby promote economically efficient operation and use of the Terminal. Further, it should promote competition and, as such, the 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 providing access to the service, 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 providing access to the service, consistent with the pricing principles of the QCA Act (s. 168A). Effective criteria should provide certainty regarding 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
- *clear and efficient processes in negotiation and arbitration and transparency around arbitrated outcomes*—clear and certain processes ensure access seekers and access 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 demonstrate these characteristics and be appropriate to approve under section 138(2) of the QCA Act.

### Draft decision

- (1) Our 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 appropriateness of arbitration factors and processes proposed—which could result in inefficient pricing outcomes for access seekers.

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## 5 APPROPRIATENESS OF THE PRICING MODEL

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*We are required to assess whether it would be appropriate to approve the 2019 DAU as submitted by DBCTM. We consider that a pricing model without a reference tariff may be appropriate to approve, and that a pricing model with a reference tariff model is not a prerequisite to an access undertaking for the DBCT service.*

### 5.1 Stakeholder submissions

DBCTM's 2019 DAU includes a pricing model without a reference tariff. Throughout the 2019 DAU assessment process to date, it is apparent that stakeholders hold divergent views regarding whether it would be appropriate for the QCA to approve, among other things, the type of pricing model that is proposed in the DAU.

#### 5.1.1 DBCTM submissions

DBCTM has proposed a DAU with a pricing model that does not include a reference tariff and has indicated that it is opposed to the 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 expressed the following views:

- There is no requirement in the QCA Act for an access undertaking to contain a reference tariff, and the DBCT User Group is incorrect in suggesting that the QCA Act contemplates that an access undertaking will normally include a reference tariff. DBCTM said that the QCA Act does not require an access undertaking to include a reference tariff; however, it does not preclude a reference tariff being included in an access undertaking.<sup>185</sup>
- 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. Negotiated outcomes resolving the terms and conditions of access are preferable to regulated outcomes, and negotiation can limit the potential for regulatory error, as access seekers and users are in a better position than the QCA to know their own business circumstances and the costs and benefits to them of access to DBCT.<sup>186</sup>
- 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.<sup>187</sup>

In response to our interim draft decision, DBCTM proposed a number of amendments to the DAU—the terms of the DAU, including these amendments, are assessed in detail in the following chapters. In proposing these amendments, DBCTM noted:

- The DAU should provide, as a priority, appropriate investment incentives.

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<sup>185</sup> DBCT Management, sub. 1, pp. 28–29, sub. 10, p. 8.

<sup>186</sup> DBCT Management, sub. 1, pp. 28–29, sub. 10, p. 8.

<sup>187</sup> DBCT Management, sub. 1, p. 11.

- The implementation of a reference tariff will not increase certainty for access seekers due to issues relating to expansion capacity.
- It would be inappropriate for the QCA to reject the 2019 DAU on the basis that a reference tariff may increase certainty for existing users.
- Any arbitrations for access seekers will likely be concurrent.
- Access seekers will have a degree of countervailing power because DBCTM will face competition from other terminals in relation to expansion tonnage.<sup>188</sup>

### 5.1.2 DBCT User Group and other stakeholder submissions

The DBCT User Group and other stakeholders, including New Hope Group and Whitehaven Coal, were strongly of the view that DBCTM's 2019 DAU should be amended to incorporate a reference tariff, and that a non-reference tariff model is fundamentally flawed and cannot be amended in any way to be appropriate for the QCA to approve.<sup>189</sup>

The DBCT User Group said:

[I]t 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.<sup>190</sup>

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.<sup>191</sup>

Additionally, the DBCT User Group made the following arguments against the DAU as submitted by DBCTM:

- 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 proposed DAU would damage regulatory certainty, including the certainty of future pricing and the stability and predictability of the existing regulatory framework, with resulting damage to investment decisions in dependent markets.
- The characteristics of the DBCT service and infrastructure (including a lack of close substitute services, a lack of countervailing power of users and significant information asymmetry) indicate that DBCTM has significant market power. Accordingly, regulation is the only potential constraint on DBCTM's market power, and a stronger form of regulation is required than a 'light handed' negotiate-arbitrate model to ensure that DBCTM does not engage in monopoly pricing.
- 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 costly and uncertain, and involve significant delays to obtaining access.

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<sup>188</sup> DBCTM, sub. 8, p. 7.

<sup>189</sup> DBCT User Group, sub. 6, pp. 3–5, sub. 9, p. 20.

<sup>190</sup> DBCT User Group, sub. 6, p. 16.

<sup>191</sup> New Hope Group, sub. 7, p. 3.

- The absence of a reference tariff will disadvantage future access seekers more than existing users, with a resulting adverse impact on competition and investment in dependent markets.<sup>192</sup>

The DBCT User Group considered that despite the amendments to the DAU proposed by DBCTM in response to the interim draft decision, a non-reference tariff model cannot be made appropriate for approval:

The DBCT User Group considers that the preliminary conclusion that a negotiate-arbitrate model can be amended to constrain DBCTM's market power:

- fundamentally overstates the extent such changes would make a negotiate-arbitrate model effective in constraining DBCTM's market power; and
- even if it is assumed that both a reference tariff and revised negotiate-arbitrate model could theoretically constrain DBCTM's market power to a similar extent, fails to undertake any cost benefit analysis as to whether it is actually preferable to make those changes rather than adopting a reference tariff that will definitely be effective in constraining DBCTM's market power.<sup>193</sup>

## 5.2 Reference tariff model

### 5.2.1 Stakeholder submissions

In the interim draft decision, we noted that a reference tariff was not a prerequisite to an access undertaking for the DBCT service. However, given that a reference tariff had been a key feature of each of the previously approved undertakings for the DBCT service, we discussed the potential benefits and shortcomings of a reference tariff in the context of the DBCT service, and invited stakeholder comment.

In response to the interim draft decision, DBCTM and the DBCT User Group each reasserted their views on the appropriateness of approving the DAU without a reference tariff (see section 5.1). Additionally, the DBCT User Group asserted that the QCA's task under section 138(2) of the QCA Act requires us to only approve the most appropriate undertaking.<sup>194</sup> The DBCT User Group therefore contended that the QCA cannot approve a DAU model without reference tariffs, as it would be less appropriate than one with reference tariffs.<sup>195</sup> Similarly, the DBCT User Group submitted that if the QCA refused to approve the 2019 DAU, we must then require amendments that achieve the most appropriate outcomes under section 134 of the QCA Act—which in the DBCT User Group's view would involve the reinstatement of a reference tariff model.<sup>196</sup> For the reasons set out in Chapter 2, we consider that our statutory task does not require us to identify and approve only the 'most' appropriate undertaking. Our task is to consider whether a DAU as submitted is appropriate to approve, having regard to and appropriately balancing the statutory factors in section 138(2).

### 5.2.2 Assessment of DBCTM's 2019 DAU

The starting point of our analysis is the 2019 DAU as submitted by DBCTM. Unlike each of the previously approved access undertakings for the DBCT service, the 2019 DAU includes a pricing model without a reference tariff.

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<sup>192</sup> DBCT User Group, sub. 6, pp. 3–5, sub. 9, pp. 16–20, sub. 11, p. 15.

<sup>193</sup> DBCTM, sub. 9, p. 20.

<sup>194</sup> DBCT User Group, sub. 9, pp. 6–7.

<sup>195</sup> DBCT User Group, sub. 9, p. 9.

<sup>196</sup> DBCT User Group, sub. 9, pp. 8–9.

## Characteristics of DBCT

In the interim draft decision, we noted several characteristics of the DBCT service that we considered were relevant in our consideration of DBCTM's proposed pricing model. While these characteristics alone were not determinative of whether DBCTM's proposed pricing model would be appropriate to approve, we considered that they indicated the presence of market power.<sup>197</sup> These characteristics included:

- **limited contestability for the DBCT service**—we considered that other coal export terminals did not provide a close substitute for the DBCT service, and that high barriers to entry limited the threat of entry by competitors entering the market for the DBCT service
- **limited countervailing power**—we considered that due to the lack of close substitutes available for the DBCT service, and in many cases sunk investments associated with use of DBCT, a user could not make a credible threat to switch to another facility, and as such, access seekers (whether potential new users or existing users seeking additional capacity) had limited countervailing power in any negotiations with DBCTM concerning access.

These characteristics remain relevant for our draft decision. In order for the 2019 DAU non-reference tariff model to be appropriate to approve, we consider that, among other things, it must effectively constrain DBCTM's ability and incentive to exercise market power.

## Productivity Commission inquiry into the economic regulation of airports

In considering matters relating to the existence and exercise of market power, we 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.<sup>198</sup>

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

- Airlines (i.e. users) had 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.<sup>199</sup>

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<sup>197</sup> QCA, *DBCT Management's 2019 draft access undertaking, interim draft decision*, February 2020, section 6.3.1.

<sup>198</sup> DBCT Management, sub. 1, p. 36.

<sup>199</sup> DBCT User Group, sub. 2, pp. 16–17.

These comments from DBCTM and the DBCT User Group are from submissions provided to the Productivity Commission before the public release of the Productivity Commission's final report (in October 2019). In its final report, the Productivity Commission found:<sup>200</sup>

- Major Australian airports (Sydney (Kingsford Smith), Melbourne, Brisbane and Perth) 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.
- 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.
- 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.
- 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.
- Imposing additional regulation on airports could only be justified if airport operators 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 Australian Competition and Consumer Commission (ACCC)), with five-yearly reviews of the arrangements by the Productivity Commission).

We consider the characteristics of the major Australian airports, as described by the Productivity Commission, differ from the characteristics of DBCT. In particular, while the major Australian airport operators and DBCTM 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 airport operators to exercise their market power—particularly due to the countervailing power possessed by the major airlines, a finding the Productivity Commission has made in three previous inquiries into airport regulation.<sup>201,202</sup> However, we are of the view that the characteristics of markets related to the DBCT service are different to those of the relatively wider range of services provided by Australian airports.

Further, we note that the purpose of the Productivity Commission's review of airport regulation was to advise the Australian Government what, if any, was the appropriate form of regulation for airports—it recommended, and the Australian Government accepted, that price monitoring should continue at Australia's largest four airports and specifically rejected proposals for a negotiate-arbitrate framework to be applied outside of the application of Part IIIA of the *Competition and Consumer Act 2010* (Cth).<sup>203</sup> Our task is very different. The decision of the Treasurer of Queensland to declare the DBCT service for a further 10 years under part 5 of the

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<sup>200</sup> Productivity Commission, *Economic Regulation of Airports*, inquiry report no. 92, June 2019, pp. 89, 119, 191.

<sup>201</sup> 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.

<sup>202</sup> See: Productivity Commission, *Economic Regulation of Airport Services*, inquiry report no. 57, December 2011, *Review of Price Regulation of Airport Services*, inquiry report no. 40, December 2006, *Price Regulation of Airport Services*, inquiry report no. 19, May 2002.

<sup>203</sup> Productivity Commission, *Economic Regulation of Airports*, inquiry report no. 92, June 2019, pp. 23–28.

QCA Act means the form of regulation is not the issue here as it was in the Productivity Commission's inquiry—a negotiate-arbitrate framework is clearly in place with respect to the DBCT service. Rather, our task is to assess the DAU provided to us under the QCA Act—in accordance with the provisions of that Act—and while the Productivity Commission's work is of some interest, it has relatively little application to the task at hand.

### Conclusion—effective constraints on market power

It is important that the pricing model contained in any approved access undertaking for the service at DBCT can provide effective constraints on DBCTM's market power. However, that does not require that the pricing model in the access undertaking must include a reference tariff. We consider that an access undertaking model without a reference tariff can be constructed to effectively constrain DBCTM's market power, without requiring amendments to extend to the inclusion of a reference tariff.

In the interim draft decision, we considered that an access undertaking model with a reference tariff could also effectively constrain DBCTM's market power, for example by providing transparent and independently verified prices around which negotiations can occur.<sup>204</sup> However, we noted that a pricing model with a reference tariff is not the only form of regulation that could effectively constrain DBCTM's market power.

The starting point of the QCA's analysis is the 2019 DAU as submitted by DBCTM, including the pricing model without a reference tariff. As discussed in Chapter 4, while we do not consider the current 2019 DAU appropriate to approve, we consider that amendments could be made to the DAU so that the DAU can provide an effective constraint on DBCTM's market power, and be appropriate to approve, having regard to section 138(2) of the QCA Act. These amendments are discussed in detail in Chapter 6.

## 5.3 Non-reference-tariff model

### 5.3.1 A pricing model without a reference tariff

DBCTM's 2019 DAU does not include a reference tariff for access to the DBCT service, but rather provides for access prices to be negotiated between access seekers and DBCTM with recourse to arbitration where an agreement cannot be reached.

DBCTM considered that the reference tariff pricing model implemented in previous regulatory periods has negated the opportunity for negotiations to take place:

While the previously approved access undertakings have purported to retain the negotiate/arbitrate framework set out in the Act, they have all mandated a highly prescriptive methodology for determining the charges that DBCTM may receive for its coal handling services. This has occurred by way of a QCA determined revenue cap, from which a terminal infrastructure charge (TIC) is derived. The TIC is then published as a reference tariff, and has (inadvertently) negated the opportunity for negotiations to take place in accordance with the Act.<sup>205</sup>

DBCTM noted 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

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<sup>204</sup> QCA, *DBCT Management's 2019 draft access undertaking*, interim draft decision, February 2020, section 6.3.3.

<sup>205</sup> DBCT Management, sub. 1, p. 11, para. 36.

for DBCT).<sup>206</sup> Importantly, DBCTM stated it is committed to ensuring the 2019 DAU is implemented in a way that is balanced, effective and fit for purpose.<sup>207</sup>

DBCTM considered that it is appropriate that regulation of the DBCT service moves to lighter-handed regulation where primacy is given to commercial negotiations—consistent with the primacy given to commercial negotiations in the Competition Principles Agreement and the Competition and Infrastructure Reform Agreement, and accompanying statements.<sup>208</sup> DBCTM asserted that specifying a reference tariff increases the risk of regulatory error—thereby interfering with investment incentives during the current expansionary phase of the Terminal.<sup>209</sup>

The DBCT User Group disagreed with DBCTM's submissions and argued that 'the drawbacks of a reference tariff in relation to DBCT have been substantially overstated'.<sup>210</sup> In particular, the DBCT User Group noted:

- The existing model is a negotiate-arbitrate model where reference tariffs assist in facilitating efficient negotiation. It is clearly open to DBCTM and access seekers to agree a different price other than the reference tariff if DBCTM offered non-reference terms that made that attractive. The fact that DBCTM has not done so is not a failing of the regulatory regime.
- The price that will apply in a non-reference tariff model will also not be set at the precise level that would maximise overall economic efficiency. The submission, draft reporting, and judicial review elements of the QCA process provide further protections against any potential for regulatory error.
- Reference tariffs provide certainty which promotes investment. There is no evidence of any adverse impacts at DBCT, with the Terminal having expanded significantly under a reference tariff regime.<sup>211</sup>

The DBCT User Group contended that the potential for asymmetric risk and asymmetric consequences of regulatory error could nevertheless occur in a non-reference tariff model, and that these factors actually favour a reference tariff:

If pricing is going to be set potentially above efficient levels, then it is surely important that is done knowingly, having carefully weighed the costs and benefits of doing so, and having actually determined that there is in fact asymmetric consequence of any regulatory error and any over-estimate/uplift is sufficiently modest to not adversely impact on investment and competition outcomes in dependent markets.

By contrast, in a negotiate-arbitrate model, uplifts above the estimated efficient cost of supply will occur in an ad-hoc way that will instead be reflective of differences in information, negotiating position, asymmetric time pressures and limits on resources of individual access seekers, without any science or rigour in relation to how that will impact on investment and competition generally.<sup>212</sup>

We consider that a regulatory framework that incorporates a reference tariff can provide scope for parties to reach an agreement on the terms and conditions of access. Previous access undertakings for DBCT have provided for parties to agree to alternative terms and conditions of

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<sup>206</sup> DBCT Management, sub. 1, p. 11.

<sup>207</sup> DBCT Management, sub. 8, para. 5.

<sup>208</sup> DBCT Management, sub. 1, p. 28, para. 114.

<sup>209</sup> DBCT Management, sub. 1, pp. 5, 11–12.

<sup>210</sup> DBCT User Group, sub. 9, p. 18.

<sup>211</sup> DBCT User Group, sub. 9, pp. 18–20.

<sup>212</sup> DBCT User Group, sub. 11, pp. 10–11.

access and negotiate around the reference tariff.<sup>213</sup> Furthermore, we consider our investigation process is able to facilitate genuine negotiation, providing for collaboration between the parties. During such investigations, we may have regard to consensus positions and are not required to apply a strict rules-based approach in estimating a reference tariff as part of a DAU assessment.<sup>214</sup> This may ultimately facilitate more efficient and equitable outcomes across different users, particularly where smaller users may not otherwise have the scale or resources to effectively negotiate with DBCTM individually.

However, in assessing DBCTM's proposed 2019 DAU, we acknowledge DBCTM's concerns regarding the potential limitations of a reference tariff model. To the extent that the perceived certainty provided by a reference tariff within a negotiate-arbitrate framework stifles the incentives of parties to negotiate on pricing matters, the removal of a reference tariff could encourage further scope for negotiation between parties. In addition, removal of the reference tariff may act to better incentivise investments in expansions of the Terminal, and better encourage potential innovation in delivery of the declared service.

On this basis, as discussed in this chapter, we accept that it may be appropriate for DBCTM to adopt a pricing model without a reference tariff, provided the relevant model and associated negotiation and arbitration processes are sufficiently robust and well-designed.

### 5.3.2 Primacy of negotiated outcomes

We are of the view that where possible, DBCTM and access seekers should be encouraged to reach agreement on the terms and conditions of access. Negotiated outcomes resolving terms and conditions of access may have a number of benefits for the parties.

Negotiated outcomes may be tailored to reflect the individual preferences of access seekers, including differences to non-price access terms or risk-sharing arrangements and may better reflect the value of access to a user, given individual access seekers have better knowledge than the QCA of how much they each value access—indeed this is not an issue incorporated in the setting of reference tariffs. That is not to say that the parties cannot negotiate those non-price terms or risk-sharing arrangements while a reference tariff exists, but we accept that the parties may be less inclined to engage in commercial negotiation of non-price terms when there is a reference tariff.

While we consider that regulatory arrangements should give primacy to negotiated outcomes where these can be achieved, we recognise that there will be impediments to realising efficient and appropriate negotiated outcomes where the negotiations involve one party with market power and which has the benefit of asymmetric information.

One of the important roles of an appropriate access undertaking in this context is therefore to constrain DBCTM from exercising market power and taking advantage of information asymmetry in negotiations with users. Therefore, while we generally consider that a non-reference-tariff model can be appropriate to approve, we consider issues remain with the 2019 DAU as submitted

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<sup>213</sup> The parties will have greater scope to agree to alternative terms of access to those outlined by the reference tariff where the prescription governing the associated terms of access is limited. While DBCTM has proposed to omit the reference tariff from the pricing model, the 2019 DAU provides for a similar level of prescription on non-price terms and risk-sharing arrangements as the 2017 AU.

<sup>214</sup> For instance, DBCTM's calculation of prices for its 2010 DAU was undertaken in the context where DBCTM and existing users had agreed to rolling forward the existing cost parameters and the resultant revenues and tariffs. Additionally, as part of the collaborative consultation process informing this draft decision, stakeholders were able to reach consensus in relation to various non-pricing terms in the 2019 DAU (see Chapter 8).

that need to be addressed before the 2019 DAU is appropriate to approve. These issues are considered in detail in Chapter 6.

### 5.3.3 Information asymmetry

In the interim draft decision, we outlined our position on the information asymmetry that exists between DBCTM and access seekers in negotiations under the proposed non-reference tariff model.<sup>215</sup> In particular, we considered that dealing with information asymmetry between DBCTM and access seekers was a key concern in the facilitation of effective and balanced commercial negotiation and arbitration processes. We proposed a number of amendments to the 2019 DAU that we considered were necessary to make the DAU appropriate to approve, in the absence of a reference tariff.<sup>216</sup>

In response, DBCTM has proposed amendments to its 2019 DAU, in order to seek to address the concerns we identified (see Chapter 6).

In general, we consider that while a pricing model with a reference tariff may have advantages in addressing the issue of information asymmetry, we are required to assess the 2019 DAU as proposed by DBCTM. We consider that the pricing model without a reference tariff proposed in the 2019 DAU could be amended to adequately address our concerns regarding information asymmetry, without requiring the inclusion of a reference tariff (discussed in Chapter 6).

### 5.3.4 Arbitration

In the interim draft decision, we outlined our position regarding the proposed arbitration model in the 2019 DAU. In particular, we identified concerns regarding DBCTM's proposed arbitration criteria, the uncertainties around the application of those criteria to access seekers and existing access holders, and ultimately, the effectiveness of arbitration as a constraint on DBCTM's market power. We proposed amendments that could be made to address our concerns, and further proposed that we could publish an arbitration guideline document that would indicate the processes we would likely follow, and the methodologies we intend to adopt, in an arbitration under an approved access undertaking.<sup>217</sup>

In response, DBCTM has proposed amendments to its 2019 DAU in order to seek to address the concerns that we and other stakeholders identified in relation to the arbitration model. The objective of these amendments (see Chapter 6) is to provide for arbitration to be an effective 'fall-back' to commercial negotiations in a negotiate-arbitrate model without a reference tariff.

We note the DBCT User Group's submissions that a pricing model with a reference tariff can provide a higher degree of ex ante certainty to access seekers and existing users.<sup>218</sup> However, in assessing the 2019 DAU proposed by DBCTM, we consider that the pricing model without a reference tariff as set out in the 2019 DAU could be amended to adequately address our concerns regarding the operation and effectiveness of arbitration as part of the proposed model (see Chapter 6).

We consider it is important that arbitration processes do operate as an effective and efficient 'fall-back' to commercial negotiations. However, as noted above, we also consider that primacy should be given to negotiated outcomes where these can be achieved. Our view is that a well-designed negotiate-arbitrate model that constrains DBCTM from exercising market power,

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<sup>215</sup> QCA, *DBCT Management's 2019 draft access undertaking*, interim draft decision, February 2020, section 4.3.1.

<sup>216</sup> QCA, *DBCT Management's 2019 draft access undertaking*, interim draft decision, February 2020, section 5.3.1.

<sup>217</sup> QCA, *DBCT Management's 2019 draft access undertaking*, interim draft decision, February 2020, section 5.3.2.

<sup>218</sup> DBCT User Group, sub. 9, pp. 23–24.

through effective information provision and 'fall-back' arbitration processes, should act to incentivise DBCTM and access seekers to reach negotiated outcomes.

### 5.3.5 Socialisation

In the interim draft decision, we outlined our concerns regarding issues arising in the context of the expansion process at DBCT.<sup>219</sup>

In response, the DBCT User Group asserted that a non-reference tariff model is inappropriate when coupled with socialisation:

Yet, DBCTM's model seeks to preserve all the regulatory protections that have been introduced as an appropriate part of a reference tariff regime, with the principal example being automatic socialisation of matters including changes in volume and new capital expenditure.

...

To put it plainly, socialisation means that users that are not party to commercial negotiations and arbitrations can be affected by the pricing arrangements agreed or determined without affected users having any opportunity to even raise their reviews. That is the very antithesis of the circumstances in which socialisation should apply.<sup>220</sup>

The DBCT User Group considered socialisation was appropriate in the current regulatory settings, because all affected stakeholders have transparency of proposals and the opportunity to make submissions in relation to capital expenditure, revenue and pricing issues. However, the DBCT User Group questioned whether the socialisation of expansions is able to be a feature of a pricing model that does not contain reference tariffs.

DBCTM rejected the assertions made in the DBCT User Group's submission, and said in response:

Under the negotiate arbitrate model, socialisation will ultimately be a matter for negotiation between the parties taking into account the individual circumstances of the access seekers (or for the arbitration in circumstances where agreement cannot be reached).

A benefit of the negotiate arbitrate model is that it allows for more tailored outcomes accounting for the individual circumstances of the access seeker. DBCTM will be able to offer different approaches to socialisation to access seekers based on their individual risk appetite and cost sensitivity...<sup>221</sup>

As discussed below, we consider that socialisation is not necessarily inappropriate for a pricing model that does not contain a reference tariff.

Much like for the determination of a reference tariff, the cost and risk incurred in providing access will be a key consideration that is likely to form the basis for negotiating access. We are of the view that negotiation of a TIC should be informed by, among other things, the way in which risk is allocated between the negotiating parties. As such, it may not be appropriate for DBCTM to negotiate terms of access with an access seeker where such terms act to transfer additional risk to other users that are not a party to the negotiation.

In this regard, the 2019 DAU prescribes similar non-price terms and risk-sharing arrangements as the 2017 AU. As an example, the 2019 DAU contains minimum terms of access agreements (see

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<sup>219</sup> QCA, *DBCT Management's 2019 draft access undertaking*, interim draft decision, February 2020, section 5.3.4.

<sup>220</sup> DBCT User Group, sub. 9, pp. 29–30.

<sup>221</sup> DBCTM, sub. 10, pp. 23–25.

cl. 13.2). We also note that market characteristics for DBCT will also influence the extent to which the users are exposed to counterparty risk of other users.<sup>222</sup>

More importantly, we note that there is an ability under the 2017 AU for DBCTM and access seekers to negotiate different terms (both price and non-price) to the reference tariff and standard terms and conditions in the 2017 SAA. Relevantly, clause 13.1 of the 2017 AU provides that DBCTM or an access seeker may seek access on terms which are different from the SAA (cl. 13.1(d)). In such circumstances, either party may require that charges other than the reference tariff apply if the different terms result in a risk profile or costs (direct or indirect) to the party that are different to those that would have applied under the SAA (cls. 13.1(d)(1)(B) and 13.1(d)(2)(B).

While our understanding is that, in practice, no access seeker has to date negotiated away from the reference tariff (since regulation of the service at DBCT commenced), the existing regulatory arrangements do not preclude this from occurring. Moreover, as described in clause 13.1 of the 2017 AU, the basis for such negotiation would be likely to be differences in risk profile or costs to one or other party. In essence then, the type of scenario described by the DBCT User Group in its submissions on this matter appears to be able to occur under the regulatory arrangements established by the 2017 AU, albeit we also recognise that those provisions would apply in the context of a reference tariff being in place to more directly guide negotiations (and that may have influenced whether negotiations for alternative pricing occurred).

Should an access seeker negotiate and agree 'different terms' (including an access charge that differed from the reference tariff) under the 2017 AU, it is not clear that the types of matters identified by the DBCT User Group as being of concern in a model without a reference tariff would be impacted by such an arrangement. For example, socialisation of contracted volumes would continue to occur, and approval processes for non-expansion capital expenditure (NECAP) would operate as previously. Further, while a negotiated access charge that was higher than the reference tariff may lead to DBCTM earning more revenue than its Annual Revenue Requirement (ARR), the 2017 AU does not incorporate any true up process that would provide for this extra revenue to be 'clawed back' or otherwise subject to an 'unders and overs' mechanism.

Given these elements of the regulatory arrangements in the 2017 AU, it is not clear that the arrangements proposed in DBCTM's 2019 DAU, and in particular the removal of a reference tariff as a basis for guiding negotiations around the access charge, would act to fundamentally alter the risk allocation balance between DBCTM, access seekers and access holders. In comparison to a pricing model with a reference tariff, we have not identified circumstances in which DBCTM is provided with further scope to allocate risk to other users that are not a party to the negotiation. However, we welcome additional stakeholder views on this matter.

We also note that there are some other protections in the 2019 DAU that we consider would operate to reduce the likelihood of DBCTM being able to inappropriately pass risk from itself to particular access seekers. These include the formal mechanistic operation of the queuing mechanism and notifying access seeker processes, the detailed requirements of expansion processes, and the maintenance of NECAP approval processes. However, we encourage stakeholders to provide further information on where they consider these provisions may need to be amended or strengthened.

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<sup>222</sup> For instance, the position that DBCTM's users occupy in the global seaborne coal cost curve and the high fixed shut-down and start-up costs at mines provide for a stable and resilient customer base for coal handling services at DBCT.

We have also considered the related matter of socialised or differential pricing for future expansions. Importantly, the 2019 DAU requires DBCTM to make an application to the QCA for a price ruling as part of the expansion process, in order to determine whether the cost of an expansion is to be recovered through socialised pricing or differential pricing.<sup>223</sup> When implementing differential pricing, clause 1.7 of both the 2017 AU and the 2019 DAU also provide for DBCTM to seek to negotiate any associated amendments to access agreements (including existing user agreements) in a manner that is both equitable and non-discriminatory as between relevant executed access agreements.

Where an expansion has been found to justify socialised pricing (e.g. because doing so will have the effect of lowering charges for all users, including existing access holders), it is not clear why such socialisation gives rise to inappropriate outcomes due only to the relevant pricing model not containing a reference tariff. As part of a price ruling, we are required to determine how the cost of an expansion is to be recovered (either through socialised pricing or differential pricing). This does not preclude negotiation on pricing matters, but rather identifies the Terminal component that negotiation should be based on, and therefore the capacity and relevant group of access holders or access seekers over which the costs of that Terminal component are required to be recovered, through either negotiated or arbitrated prices.

Moreover, a pricing model without a reference tariff does not provide DBCTM with any additional discretion to determine whether negotiation for the provision of access is to be based on a socialised or differentiated Terminal component. Similar to the 2017 AU, should a dispute on pricing matters be referred to arbitration under the 2019 DAU, the arbitration process may be informed by any relevant price ruling and the characteristics of the relevant Terminal component, including any risk that price discrimination or differentiation between users gives rise to inefficient or otherwise inappropriate transfer of risk (or cross subsidies) as between users.

A more detailed consideration of issues regarding expansions, including the terms and conditions governing the expansion process, is contained in Chapter 6 and Chapter 8.

### 5.3.6 Conclusion

In assessing the 2019 DAU, including the amendments submitted to us by DBCTM, we consider that the pricing model without a reference tariff may be appropriate to approve, subject to particular issues being addressed in the way we consider appropriate.

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<sup>223</sup> DBCTM, sub. 8, p. 8.

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## 6 AMENDMENTS TO DBCTM'S PRICING MODEL

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*We consider that a pricing model without a reference tariff may be appropriate to approve for DBCTM's 2019 DAU. This chapter outlines the amendments we consider necessary for such a model to be appropriate to approve, particularly amendments relating to provision of information to access seekers and the processes for conduct of arbitrations.*

### 6.1 Overview

We consider that there is merit in adopting a pricing model without a reference tariff, and that a non-reference tariff model can be appropriate to approve (discussed in Chapter 5)—subject to particular issues being addressed in the way we consider appropriate.

We have identified amendments to the 2019 DAU that we consider necessary in order to approve a pricing model without a reference tariff. In particular, we consider that it is appropriate to amend the 2019 DAU to:

- enable access seekers to make an informed assessment about an access price proposal for the purposes of negotiating with DBCTM
- facilitate the role of arbitration as an effective incentive for parties to act reasonably during negotiations
- provide for a more balanced negotiation process on pricing matters.

### 6.2 Information provision to address information asymmetry

#### Appropriate level of information provision

Adequately informed access seekers are more likely to engage in successful and efficient negotiations. Appropriate information provision requirements also discourage DBCTM from offering unreasonable access proposals during the negotiation process.

We are of the view that access seekers need to be provided with sufficient information to be able to form their own views of a reasonable TIC for the purposes of negotiating with DBCTM.

DBCTM's submission noted that the purpose of information disclosure is to correct information asymmetry that hinders effective negotiation.<sup>224</sup> We consider that to adequately address information asymmetry, DBCTM needs to provide access seekers with information that is sufficient for them to form a view of a reasonable TIC that would not be available to them, unless it is provided by DBCTM. There may also be instances where significant information asymmetry means verification of certain information requires the involvement, or potential involvement, of an independent party, such as the QCA.

The DBCT User Group considered that it cannot be sufficient for information provisions to simply refer to how the price is calculated, costs, asset values, reasonable rates of return, or even individual building blocks parameters. The DBCT User Group submitted that past processes have demonstrated that these can be areas of contention, and DBCTM has been proven to have different views on those matters than what the QCA would consider appropriate. The DBCT User Group considered that any attempt to resolve information asymmetry will result in needing such

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<sup>224</sup> DBCTM, sub. 8, p. 19.

prescriptive requirements that it will give rise to many of the perceived costs of having a reference tariff, while still having the costs and disadvantages of a negotiate-arbitrate model.<sup>225</sup>

As outlined above, we are of the view that appropriate information provision will enable access seekers to form a view on an appropriate TIC for the purpose of negotiating access with DBCTM. An overly prescriptive approach to information provision risks limiting the incentives of parties to negotiate on pricing terms of access. Where elements of a TIC proposal rely on judgment, they may provide an opportunity for the parties to negotiate without regulatory intervention.

Previously, reference tariffs have been used as a means to provide information to access seekers for negotiations. Given DBCTM is proposing the removal of reference tariffs to encourage further scope for parties to negotiate on pricing matters, we consider that information provision requirements must reduce information asymmetry to the extent possible to encourage negotiation.

As such, we have given consideration to the information provision requirements proposed by DBCTM in the 2019 DAU, and DBCTM's proposed amendments in appendix 4 of its April 2020 submission.<sup>226</sup>

### DBCTM's 2019 DAU proposal

DBCTM's 2019 DAU (cl. 5.2(c)(2)) included provisions for access seekers to request information from DBCTM in accordance with the QCA Act (ss. 101(2)(a)–(h)). This allows access seekers to request information, including the price at which DBCTM provides the service and the costs of providing the service, prior to submitting an access application.<sup>227</sup>

Stakeholders were of the view that the information provision requirements in the 2019 DAU did not address information asymmetry concerns, particularly for new access seekers (i.e. those who are not currently an access holder at DBCTM).<sup>228</sup> The DBCT User Group said the information requirements are 'extremely high level and clearly inadequate for enabling an informed negotiation'. This was echoed by New Hope Group, who referred to the information to be provided under the clause as 'limited, and non-specific'.<sup>229</sup>

We do not consider it is appropriate to approve the information provision requirements outlined in DBCTM's 2019 DAU.

We are of the view that the information provision requirements could lead to access seekers being unable to form a view on an appropriate TIC for the purposes of negotiating with DBCTM. In particular, we note:

- The drafting of the information provision clause in the 2019 DAU (cl. 5.2(c)(2)) does not provide sufficient clarity on the minimum information access seekers will receive. We consider that the information obligations in the QCA Act (s. 101(2)) are broadly written and indicative of the general categories and types of information to be made available in the context of DBCTM's proposed pricing model, rather than being an exhaustive or prescriptive list.
- The absence of an ex ante assessment (either by us or another independent auditor) of the relevant information to be provided to access seekers means the accuracy and adequacy of

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<sup>225</sup> DBCT User Group, sub. 9, pp. 18, 21.

<sup>226</sup> DBCTM, sub. 8, appendix 4.

<sup>227</sup> DBCTM, sub. 1, p. 40.

<sup>228</sup> DBCT User Group, sub. 2, pp. 44–45; New Hope Group, sub. 3, p. 7; Whitehaven Coal, sub. 4, p. 3.

<sup>229</sup> New Hope Group, sub. 3, p. 6.

the information provided by DBCTM would need to be assessed by individual access seekers during negotiations. Access seekers may not be able to form views on these matters, where information asymmetry is present.

### DBCTM's proposed amendments to the 2019 DAU

In response to our interim draft decision, DBCTM proposed amendments to the 2019 DAU to provide for more prescriptive information requirements.<sup>230</sup>

DBCTM proposed to significantly expand the information requirements that would apply to it in the negotiation phases. Specifically, DBCTM proposed to require the provision of two new information sets, as governed by schedules in appendix 4 of its April 2020 submission (schedule H and schedule I).<sup>231</sup>

Schedule H enables access seekers to request historical information (from the start of the 2006 financial year) prior to submitting an access application. This includes price, capacity and cost information, which will be consistent with the information applied to calculate revenue allowances and the TIC in previous QCA decisions.<sup>232</sup> Schedule H also provides this information for the 'preceding period' where necessary. This period starts when the 2019 DAU commences and includes information for the period up until the financial year prior to the one in which the access seeker requests the information from DBCTM.

The information set provided in schedule I will be given to access seekers as part of an indicative access proposal (IAP).<sup>233</sup> Schedule I provides forecast information for the period commencing at the start of the financial year in which the IAP is to be provided and ending on 30 June 2026. The proposed amendments require DBCTM to provide access seekers with information, including:<sup>234</sup>

- the forecast capital base
- forecast inflation
- forecast depreciation
- forecast capital expenditure
- the weighted average cost of capital
- forecast terminal metrics
- forecast rehabilitation costs
- forecast QCA fees
- forecast efficient corporate costs
- other forecast efficient costs, relating to working capital management and tax obligations.

The proposed information sets provide varying levels of prescription, outlining the way in which DBCTM would estimate the information provided to access seekers.

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<sup>230</sup> DBCTM, sub. 8, p. 17.

<sup>231</sup> DBCTM, sub. 8, appendix 4, schedule H and I.

<sup>232</sup> See DBCTM, sub.8, appendix 4, schedule H.

<sup>233</sup> See DBCTM, sub.8, appendix 4, cl. 5.5 (d)(7).

<sup>234</sup> DBCTM's proposed amendments also require DBCTM to provide access seekers with information regarding the outcomes of any commercial arbitration relating to access to the DBCT service during the pricing period. This matter is discussed in section 6.3 of this draft decision.

Noting that historical information provided for previous regulatory periods is based on QCA decisions, which are already publicly available to access seekers, we have focused on the provision of information associated with the 2019 DAU regulatory period—that is, the 'preceding period' and the 'forecast period' (2021–26).

Overall, we consider that DBCTM has made a significant attempt to deal with the issues related to information asymmetry between DBCTM and potential access seekers that we identified in our interim draft decision. The information contained in the schedules typically reflects the type of information previously used to determine the reference tariff. However, DBCTM has provided varying degrees of prescription around how cost information will be determined.

We have assessed the information provision requirements for each of the cost information categories and considered the extent that these arrangements address information asymmetry issues and promote opportunities for negotiation (see Table 2).

To provide access seekers with confidence that the information provided in these schedules is correct, the information would be collated by DBCTM and certified internally by two senior DBCTM managers.

In addition, we note that DBCTM's proposed amendments to the 2019 DAU provide for an access seeker or DBCTM to ask the QCA for advice or directions in relation to the information DBCTM must provide in accordance with clause 5.5(d) (information provided with the IAP).<sup>235</sup> This is consistent with the QCA Act (s. 101(5)), and we consider that it further assists access seekers in verifying information provided by DBCTM.

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<sup>235</sup> See DBCTM, sub. 8, appendix 4, cl. 5.5(j).

**Table 2 Assessment of information provision requirements for each cost category**

<i>Information category</i>	<i>Sufficiently inform access seekers</i>	<i>Scope for negotiation</i>	<i>QCA views</i>
Capital base	<p>DBCTM specifies the methodology used to estimate the capital base. DBCTM will estimate the capital base using a continuation of the regulatory asset base (RAB) roll-forward methodology, which has been in place since the RAB was set in DBCTM's first access undertaking (2006 AU).</p> <p>The mechanistic nature of rolling-forward the RAB will enable access seekers to form a view on the appropriate capital base. Additionally, verification of this information is relatively straight-forward for access seekers, as long as access seekers are able to verify the components used to annually update the RAB—namely, inflation, depreciation and the value of commissioned assets (see below).</p>	The mechanistic nature of rolling-forward the RAB provides limited scope for parties to negotiate on alternative methodologies for estimating the capital base.	<p>We consider a prescriptive approach for providing information on the capital base to be appropriate.</p> <p>Estimating the capital base in the absence of a roll-forward model requires significant knowledge of underlying information and technical expertise.</p> <p>DBCTM's approach reflects a continuation of the previous methodology for valuing the asset base.</p>
Inflation	<p>DBCTM specifies the methodology it will apply to determine outturn inflation for the preceding period. Access seekers are able to verify this information as it is publicly available. Regardless, access seekers should be able to form a view on this matter.</p> <p>DBCTM does not specify a methodology for forecasting expected inflation. Access seekers should be able to form a view on this matter with information in the public domain on expected inflation and different forecasting methods.</p>	Information provision does not limit scope for negotiation on this matter. Access seekers should be able to form a view on this matter from assessment of information in the public domain.	<p>We consider that access seekers are able to form a view on these matters from information in the public domain. As such, we have not sought to form a view as to the appropriate methodology for forecasting inflation.</p> <p>However, to provide further scope for negotiation, DBCTM should be required to disclose and explain its methodology for estimating inflation.</p>
Depreciation	<p>DBCTM specifies a methodology for calculating depreciation of the RAB it will apply in the preceding period and the forecast period.</p> <p>Without the underlying information, we consider that access seekers will be unable to</p>	<p>The level of information provision limits scope for negotiation on this matter.</p> <p>Calculating depreciation involves assumptions (particularly regarding the economic life of the asset). However, there is</p>	We do not consider the approach for providing information on depreciation to be appropriate (see discussion below).

<b>Information category</b>	<b>Sufficiently inform access seekers</b>	<b>Scope for negotiation</b>	<b>QCA views</b>
	estimate depreciation based on an alternative methodology (e.g. calculating depreciation based on an economic life of the asset that differs to the term of the lease).	limited scope for access seekers to reach an informed alternative view on this matter, should they form differing views on these assumptions, given the asymmetric information not provided.	We do not consider that these information provision arrangements are sufficient for access seekers to make an informed view of depreciation costs.
Capital expenditure	DBCTM is to provide the value of commissioned assets for each financial year of the preceding period, as reasonably determined in accordance with the access undertaking. DBCTM also intends to provide forecast information on capital expenditure, including a forecast of the related commissioned assets.  The 2019 DAU outlines an approval process for capital expenditure, which addresses the issue of information asymmetry.	The prescriptive approach to capital expenditure (i.e. in accordance with the approval process in the access undertaking) provides limited scope for parties to negotiate on these matters.	We consider the approach for providing information on capital expenditure to be appropriate.  The prescriptive approval process for capital expenditure in the 2019 DAU should give access seekers confidence in the information provided.
WACC	DBCTM is to provide its estimate of the WACC and the individual WACC parameters used to calculate it. It does not specify the methodology for estimating the WACC.  Access seekers are able to form a view on WACC, without having to rely on information provided by DBCTM. Information in the public domain should allow access seekers to consider/verify WACC information provided by DBCTM. <sup>236</sup>	Information provision does not limit scope for negotiation on this matter. Access seekers should be able to form a view on this matter from information in the public domain.	Estimating a reasonable WACC typically relies on matters of judgment. Access seekers are able to form a view on this matter from information in the public domain.  However, to provide further scope for negotiation, DBCTM should be required to disclose and explain its methodology for estimating WACC and the relevant parameters.
Terminal metrics	DBCTM is to provide factual information on the utilisation of the Terminal (at the end of the relevant financial year) for each financial year	The factual nature of this information does not provide scope for negotiation.	We consider the approach for providing information on Terminal metrics to be appropriate.  The information sufficiently informs access seekers on these matters.

<sup>236</sup> The DBCT User Group has demonstrated that there is sufficient information in the public domain for access seekers to verify information on WACC, by submitting a report on WACC as part of this investigation.

<b>Information category</b>	<b>Sufficiently inform access seekers</b>	<b>Scope for negotiation</b>	<b>QCA views</b>
	of the preceding period, as well as forecasts of this information for future years.		
Rehabilitation cost estimate	<p>DBCTM is to provide an estimate of the costs of rehabilitating the Terminal at the end of the lease, in accordance with the requirements of the PSA. DBCTM's 2019 DAU proposal included a consultant's report outlining a rehabilitation plan and cost estimate, which DBCTM considered will inform negotiations under the 2019 DAU.<sup>237</sup></p> <p>Estimation of these costs requires underlying information, which is problematic, as discussed in Chapter 7. Forming a view on remediation costs requires technical knowledge and involves matters of judgment, as can be seen from the estimates provided by our and DBCTM's consultants. Any attempt by access seekers and DBCTM to resolve such differences would be time consuming and costly.<sup>238</sup></p>	The uncertain nature of the information underlying the estimate limits the scope for meaningful negotiation on this matter.	<p>We do not consider the proposed information to be an appropriate basis for negotiation.</p> <p>We consider it appropriate that we determine the appropriate rehabilitation cost estimate to apply for the 2019 DAU period. Our assessment of this issue is outlined in Chapter 7.</p>
QCA fees	DBCTM does not specify the methodology for estimating the costs the QCA charges for the provision of regulatory services related to the Terminal. The QCA provides DBCTM information on these fees which should inform forecasts. These costs are immaterial and likely to be uncontroversial.	The factual nature of this information does not provide scope for negotiation.	<p>We consider the approach for providing information on QCA fees to be appropriate.</p> <p>The information sufficiently informs access seekers on this matter.</p>
Efficient corporate costs	DBCTM specify a methodology to estimate efficient corporate costs, whereby an independent party is to determine forecast	Information provision does not limit scope for negotiation on this matter. Access seekers	In addition to the approach for providing information on corporate costs, we consider it appropriate for DBCTM to provide access seekers with detail on the benchmarking methods considered, and the resulting

<sup>237</sup> DBCTM, sub. 1, p. 52.

<sup>238</sup> An expectation that individual access seekers are to form their own view of these costs during negotiations would place an additional time (and cost) burden on access seekers in the timeframes provided in the 2019 DAU for negotiating access.

<b><i>Information category</i></b>	<b><i>Sufficiently inform access seekers</i></b>	<b><i>Scope for negotiation</i></b>	<b><i>QCA views</i></b>
	<p>efficient corporate costs having regard to several benchmarking methods.</p> <p>Given this forecast is based on a benchmarking approach, access seekers should be able to form their own view on efficient corporate costs. Access to the benchmarking methods will be required for access seekers to verify DBCTM's estimate.</p>	<p>should be able to form a view on this matter with information in the public domain.</p>	<p>estimates, to enable them to verify the independent estimate and form a view on efficient corporate costs.</p>
<p>Other forecast efficient costs</p>	<p>DBCTM does not specify a methodology to forecast costs relating to working capital management and tax obligations for a relevant efficient benchmarked firm.</p> <p>Given this estimation is based on a benchmarking approach, access seekers do not rely on information provided by DBCTM to form their views on these costs. Access seekers should be reasonably well placed to form a view on these costs with information in the public domain.</p>	<p>Information provision does not limit scope for negotiation on this matter. Access seekers should be able to form a view on this matter from information in the public domain.</p>	<p>Estimating the relevant benchmark costs typically relies on matters of judgment. Access seekers are able to form a view on these matters from information in the public domain.</p> <p>However, to provide further scope for negotiation, DBCTM should be required to disclose and explain its methodology for estimating the relevant costs.</p>

We consider it appropriate for the 2019 DAU to adopt DBCTM's proposed amendments to the information provision arrangements, as provided for in appendix 4 of its April 2020 submission.<sup>239</sup> In addition to DBCTM's proposed amendments, we consider it appropriate for DBCTM to:

- disclose and explain its methodology for estimating inflation, WACC, working capital management and tax obligations
- provide detail on the benchmarking methods that were considered and the resulting estimates that were used to determine efficient corporate costs
- specify the appropriate remediation cost estimate to apply for the 2019 DAU period, as determined by us (see Chapter 7).

We consider that further amendments are required to the information provision arrangements to ensure that the arrangements are fit for purpose in allowing access seekers to be properly informed at the start of an access negotiation. These are outlined below.

#### Assessing the methodology for calculating depreciation

DBCTM calculates depreciation of the regulatory asset base (RAB) based on the various individual assets that form DBCT's RAB. For instance, in the 2017 AU, the depreciation allowance was derived from the remaining asset lives of hundreds of different assets, each with different asset lives and installation dates. The assets that form the basis for the RAB are also continually updated to reflect new capital expenditure for DBCT.

As part of the information provision requirements, DBCTM is to provide depreciation values to access seekers, determined by applying its specified methodology for calculating depreciation of the RAB. The methodology it is proposing to calculate depreciation relies on assumptions that differ from those applied in previous access undertakings for the service at DBCT (for instance, aligning the asset life with the length of DBCTM's Terminal lease).

Where access seekers form a different view on these assumptions, there is limited scope for access seekers to make an informed assessment of an alternative depreciation value based on the information DBCTM is proposing to provide (DBCTM's proposed amendments do not provide access seekers with the underlying information that supports DBCTM's calculation, which is asymmetric in nature).

Moreover, DBCTM has proposed to update the RAB based on its proposed methodology for calculating depreciation. The ability of access seekers to form a view on the capital base of the relevant Terminal component relies on them being able to estimate the components used to annually update the RAB—namely, inflation, depreciation and the value of commissioned assets.

Requiring DBCTM to provide the underlying asset information to access seekers would overcome this issue, enabling access seekers to apply an alternative approach for calculating depreciation if they wish to do so. However, an expectation that individual access seekers are to form their own view of these costs during negotiations would place an additional time (and cost) burden on access seekers in the timeframes provided in the 2019 DAU for negotiating access. In this regard, we note that to form a view on an appropriate opening asset value of the capital base upon which negotiations will occur, access seekers need to also form a view on depreciation in previous periods (in particular from FY2021 onwards).

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<sup>239</sup> DBCTM, sub. 8, appendix 4.

Alternatively, we consider an appropriate approach for providing information on depreciation is to require DBCTM to calculate depreciation based on an approved methodology.

This approach:

- addresses information asymmetry issues associated with the value of depreciation and the capital base presented by DBCTM, leaving access seekers appropriately informed to engage in negotiations
- removes the need for DBCTM to provide significant underlying information to access seekers<sup>240</sup>
- removes the need for access seekers to assess the underlying information within the negotiation timeframes.

Given that determining an appropriate approach to calculate depreciation relies on a series of assumptions, we consider that the methodology used to calculate depreciation should be transparently assessed as part of this 2019 DAU assessment process.

We have not formed a view on the appropriateness of the methodology proposed by DBCTM to calculate depreciation.<sup>241</sup> Rather, we seek stakeholder views on the appropriate methodology for DBCTM to apply in calculating depreciation to inform negotiations.<sup>242</sup>

We recognise that assessing the methodology used to calculate depreciation may limit scope for negotiation on depreciation during the negotiation period. However, we consider it reasonable, having regard to the need to address the inefficiency and delay that would otherwise be likely to result if DBCTM provides substantial and detailed cost and asset data—in order to overcome information asymmetry in this circumstance, and enable access seekers to form a view on whether the TIC proposed by DBCTM is reasonable. In seeking stakeholder views on the appropriate methodology to apply, we encourage the parties to collaborate to resolve matters related to the methodology.

#### Information provision for the relevant Terminal component

Should there be an expansion that is differentially priced during the regulatory period, there may be more than one Terminal component for negotiations to be based on.

We consider that DBCTM should be required to provide all information specified in schedules H and I for the Terminal component in respect of which an access seeker is negotiating access.

#### Updating a negotiated TIC within the regulatory period

Schedule C of DBCTM's 2019 DAU provides for the TIC, once negotiated, to be updated throughout the regulatory period. In particular, schedule C provides for the TIC to be annually updated for:

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<sup>240</sup> Without a specified methodology, DBCTM, in our view, would need to provide access seekers with significant information on the assets included in the asset base, the asset lives applied to each asset, the reasons for adopting such asset lives and any additional detail on how it has derived depreciation.

<sup>241</sup> DBCTM is proposing to estimate depreciation with respect to aligning the asset life to the expiry of the initial lease term. We note that aligning the asset life to the expiry of the initial lease term has been a matter of contention in the past. In the 2015 DAU assessment process, DBCTM proposed to adjust the economic life of the Terminal based on its view that there had been an increase in the asset stranding risk of the Terminal and DBCTM's lease would expire in 2051 (adopting an economic life to 2054 implied that DBCTM would need to exercise its 49-year extension option to recover its return of capital in full). Stakeholders did not support this position.

<sup>242</sup> The appropriate methodology for estimating depreciation will also need to be reflected in schedule C of the 2019 DAU to update the TIC.

- changes in the Consumer Price Index (schedule C, cl. 3(b))
- different utilisation rates (schedule C, cl. 3(f))
- capital expenditure (schedule C, cl. 3(g), (h))

While we are of the view that updating the TIC in a clear and transparent manner throughout the pricing period may be reasonable, we seek stakeholder views on the proposed approach for updating the TIC and the specific processes outlined in schedule C.

In this regard, a prescriptive approach as to how a TIC will be updated in the undertaking may limit the scope for negotiation on these matters. Acknowledging that negotiated outcomes on the TIC may take on many forms, we also seek stakeholder views on the merits or otherwise of removing the approach for updating the TIC (or elements of schedule C) from the 2019 DAU.

#### Reviewing access charges for the following pricing period

Under the 2019 standard access agreement (SAA) (cl. 7.2 (a)), either party may request a review of access charges, including the method of calculating, paying and reconciling them, which will be effective from the start of the following pricing period (coinciding with the date of commencement of each access undertaking for the Terminal). However, the 2019 SAA (cl. 7.2 (c)) states that:

- any request must happen no later than 18 months prior to the start of a pricing period (meaning the period ending 30 June 2026 and each subsequent five-year period during the term)
- if the parties do not reach agreement by the date six months prior to the start of the relevant pricing period, either party may refer the determination of the issues to arbitration.

These provisions are similar to those in the current 2017 SAA. However, the 2017 SAA (cl. 7.2(c)) provides that DBCTM and the user must commence a review no later than 18 months prior to the relevant end date—making a periodic review under the SAA a mandatory feature of the agreement.

To date, we understand that this review and the associated TIC update has simply formed part of the periodic DAU and reference tariff process. In this regard, the 2017 SAA outlines that the review may have regard to, among other things, the terms of the access undertaking and relevant reference tariffs effective from the agreement revision date (the subsequent pricing period). Should there be no agreement or determination by the agreement revision date, then the existing access charges will continue to apply until otherwise agreed or determined.

We welcome stakeholder feedback on the way in which the various price review processes operate and interact in the absence of a reference tariff. In particular:

- We consider it important for access holders to be able to form a view on whether they have been offered a reasonable TIC during negotiations under access charge reviews, whether that be under existing user agreements or the 2019 SAA. We seek stakeholder views on whether additional information provision requirements in the undertaking are necessary, so that access holders can request information that is consistent with information provided to an access seeker for negotiation of the TIC.
- The DBCT User Group considered that the SAA may result in the contractual pricing review occurring before there is an opportunity under the next undertaking to determine a

reference tariff.<sup>243</sup> In this regard, we note that both the 2017 SAA and 2019 SAA provide for existing charges to continue to apply until an agreement or determination has been made, at which point any determination or agreement will operate retrospectively from the start of the relevant pricing period. Noting that there may be amendments to information provision and regulatory arrangements in future access undertakings, we consider that any review of access charges should have regard to the terms of the access undertaking effective for the relevant pricing period. We seek stakeholder views on the extent to which existing user agreements and the 2019 SAA provide scope for parties to review access charges, based on the terms of the access undertaking effective for the relevant pricing period.

#### Timing of initial TIC negotiations and implications for information provision

DBCTM's proposed amendments to information provision requirements only provide forecast information to access seekers for the five-year pricing period (1 July 2021 to 30 June 2026).<sup>244</sup> The 2019 SAA then provides for the review of access charges to commence at the start of the following pricing period.

However, the 2019 SAA (cl. 7.2(c)) requires the parties to commence each review no later than 18 months prior to the start of the pricing period. It therefore appears that access seekers who enter into access agreements within the 18 months prior to 30 June 2026 may not be able to formally 'trigger' a review of access charges. This means the initial TIC negotiated between the parties will apply across two pricing periods (the period up until 30 June 2026 and the following pricing period).

We are of the view that these access seekers will not be adequately informed in negotiating the initial TIC that will apply across two pricing periods, as they will only have forecast information until the 30 June 2026.

We consider these arrangements should be amended to provide for better information provision for relevant access seekers, or an ability for those access seekers to review access charges based on updated information for the following pricing period.

We are seeking submissions from stakeholders on these matters.

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<sup>243</sup> DBCT User Group, sub. 11, p. 12.

<sup>244</sup> DBCTM, sub. 8, appendix 4, schedule I.

### Draft decision

Our draft decision is that it is appropriate for DBCTM to amend the 2019 DAU to:

- (1) reflect its proposed amendments to information provision arrangements, as provided for in appendix 4 of its April 2020 submission.<sup>245</sup> This includes the provision of two new information sets (schedules H and I). In providing these information sets, DBCTM is to:
  - (a) disclose and explain the methodology used for estimating inflation, WACC, working capital management and tax obligations
  - (b) detail the benchmarking methods considered, and the resulting estimates, used to determine efficient corporate costs
  - (c) specify the appropriate remediation cost estimate to apply for the 2019 DAU period, as determined by the QCA
  - (d) amend the methodology to calculate depreciation costs during the 2019 DAU period, to reflect our determination on this matter
- (2) require all information specified in the information sets to be provided for the Terminal component upon which an access seeker is negotiating access
- (3) provide additional information to access seekers who enter into an access agreement within the 18 months prior to 30 June 2026, or enable those access seekers to review access charges based on updated information for the following pricing period.

We seek stakeholder views on the following matters:

- the appropriate methodology for DBCTM to apply in calculating depreciation to inform negotiations
- the merits or otherwise of removing the approach for updating the TIC (or elements of schedule C) from the 2019 DAU
- the way in which the various price review processes operate and interact in the absence of a reference tariff.

## 6.3 Amendments to the pricing model to facilitate effective 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. DBCTM submitted that the provision of arbitration for access seekers is a constraint on its market power.<sup>246</sup>

We are of the view that amendments to the 2019 DAU for referring a dispute on the TIC to us for arbitration are required for the proposed pricing model to be appropriate.

### Arbitration criteria

Where we are required to make a determination on a dispute, we must do so in accordance with the 2019 DAU (cl. 11), except to the extent necessary to give effect to any matter agreed by the parties to the arbitration (cl. 17.4).

<sup>245</sup> DBCTM, sub. 8, appendix 4.

<sup>246</sup> DBCTM, sub. 1, p. 54, sub. 5, p. 26.

We hold a number of concerns in relation to the arbitration criteria contained in the 2019 DAU. In particular:

- The arbitration criteria (cl. 11.4(d)) do not sufficiently protect the interests of access seekers, thereby undermining the purpose of arbitration as a 'backstop' for dispute resolution.
- There is a degree of uncertainty as to whether the arbitration criteria in the 2019 DAU would apply to arbitrations under existing user agreements.<sup>247</sup>

DBCTM proposed amendments to the arbitration criteria in the 2019 DAU (cl. 11.4(d)) to align with section 120 of the QCA Act, and to align the arbitration criteria for existing users and access seekers.<sup>248</sup>

The DBCT User Group submitted that the factors in section 120 of the QCA Act present an improved and more balanced set of criteria than DBCTM's 2019 DAU.<sup>249</sup>

DBCTM also proposed amendments to the arbitration criteria to apply to price reviews that will occur under the 2019 SAA (see cl. 7.2 of the 2019 SAA). The proposed amendments align the arbitration criteria with those in the 2017 SAA. These provisions state that when we are the arbitrator, we may conduct the arbitration in such a manner as we see fit, after consultation with the parties. In considering a dispute on access prices conducted in accordance with the SAA, 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). DBCTM supported this approach.

We are of the view that DBCTM's proposed amendments to the arbitration criteria provide access seekers, future access holders and existing users with sufficient certainty as to the criteria which will apply for a dispute on the TIC under the 2019 DAU and various user agreements. We consider that the arbitration factors outlined in section 120 of the QCA Act are appropriate criteria for us to apply as part of the arbitration process. Such an approach is aligned with the intention of the QCA Act and provides us with sufficient flexibility to make appropriate access determinations on pricing matters. In general, we consider the application of these criteria as part of the arbitration process provides an adequate constraint on the ability of DBCTM to exercise market power in negotiating a TIC with access seekers.

Additionally, the arbitration criteria are sufficiently flexible to provide scope for parties to reach negotiated outcomes on pricing matters, including to reflect, among other things, the value of access to an access seeker.

In this regard, DBCTM submitted that the pricing principles in the QCA Act require prices that allow DBCTM to recover at least its efficient costs of providing the service. DBCTM considered that the access price can still be set higher as part of an arbitration, having regard to the factors set out in section 120 of the QCA Act.<sup>250</sup>

DBCTM considered that it is highly unlikely that a single price, determined by reference to our assessment of efficient costs of access, would uniquely promote efficient outcomes and effective competition in upstream and downstream markets.<sup>251</sup> Furthermore, DBCTM contended that modestly higher prices for the coal handling service are unlikely to give rise to materially different

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<sup>247</sup> QCA, *DBCT Management's 2019 draft access undertaking*, interim draft decision, February 2020, p. 8.

<sup>248</sup> DBCTM, sub. 8, p. 24.

<sup>249</sup> DBCT User Group, sub. 9, p. 23.

<sup>250</sup> DBCTM, sub. 8, p. 31.

<sup>251</sup> DBCTM, sub. 8, p. 32.

incentives for investment by users or prospective access seekers.<sup>252</sup> DBCTM submitted 'an efficient price would lie between efficient cost and value to users'.<sup>253</sup>

In contrast, the DBCT User Group considered that as there are no close substitutes for the service, there will in fact be a very significant gap between the efficient price for the DBCT service and the 'value to the user'. Furthermore, given the coal users are price takers in the coal markets into which they sell their products, prices above the efficient costs of supply will necessarily translate into inefficient investment decisions by coal access seekers and users in other dependent markets.<sup>254</sup>

Consistent with the matters outlined in section 120 of the QCA Act, we are to have regard to matters other than the efficient costs incurred in providing access—including the value of access to access seekers.<sup>255</sup>

The value of access to an access seeker may be considered as part of an arbitration, regardless of the pricing model approach adopted. However, in having regard to such matters as part of an arbitration, we consider it is appropriate to take into consideration the individual circumstances of the parties involved, as well as the way in which risk is allocated to parties within the regulatory framework.

### Providing arbitration outcomes to non-participating access seekers

DBCTM's 2019 DAU (cl. 5.2(c)(2)) provides for access seekers to request information consistent with section 101(2) of the QCA Act. This includes information about previous arbitrations where the QCA makes a determination under the QCA Act (specifically div. 5, subdiv. 3).

Our interim draft decision noted that DBCTM's 2019 DAU provided no transparency on arbitrations not conducted by the QCA. In response, DBCTM proposed amendments to its 2019 DAU to allow the outcomes of arbitration determinations to be released to (non-participating) access seekers, whether the arbitration is conducted by the QCA or another party. DBCTM proposed to provide this information with the IAP.

DBCTM will necessarily be a party to each arbitration relating to the Terminal and will have knowledge of the determinations made and the reasoning behind these determinations. The DBCT User Group was of the view that this would benefit DBCTM in terms of cost efficiencies and being able to refine its arguments across all arbitrating access seekers. The DBCT User Group considered that DBCTM's proposal to publish the outcomes of arbitrations would not resolve this issue—as during these arbitrations, the proceedings will presumably be confidential.<sup>256</sup>

DBCTM's 2019 DAU appears to limit transparency on arbitrations determined by the QCA in accordance with clause 17.4 of the 2019 DAU, by only providing for the disclosure of the initial TIC (cls. 17.4(d), (e)).

In the interests of transparency, we consider there is merit in requiring DBCTM to provide information on arbitrated outcomes, beyond the initial TIC. We consider that information should include the determination itself and the reasons for the determination. Access seekers and

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<sup>252</sup> DBCTM, sub. 8, p. 33.

<sup>253</sup> DBCTM, sub. 8, p. 31.

<sup>254</sup> DBCT User Group, sub. 11, pp. 8–9.

<sup>255</sup> In this regard, the value of access to each access seeker may differ considerably and will need to be considered on a case-by-case basis. For instance, the operational and supply chain costs for each mine will differ depending on the site and location characteristics of that particular mine. Additionally, the price obtained for the product may differ considerably depending on the characteristics of the coal produced.

<sup>256</sup> DBCT User Group, sub. 11, p. 18.

DBCTM will then be similarly informed on arbitrated outcomes when entering into negotiations and arbitrations.

In this regard, we recognise the importance of confidentiality and the need to balance the legitimate interest of the parties to arbitrations in maintaining confidentiality, with the public interest associated with providing sufficient transparency. This is consistent with those considerations applicable to our consideration of confidentiality under the QCA Act (s. 207).

We therefore consider it appropriate for the 2019 DAU to provide for:

- the QCA to consult with the parties to any arbitration regarding a form of the final QCA or arbitrator determination (and associated reasons) that is appropriate for publication
- a process for parties to request, and for DBCTM to provide, a copy of any public version of determinations and reasons to third parties.

We have proposed amendments to the 2019 DAU to reflect our preliminary views (Box 2 below).

We note our proposed amendments relate only to providing arbitration determinations relating to the TIC (see cl. 17.5(a) in Box 2). We seek stakeholder views on whether this clause should be broadened to include all arbitration determinations (i.e. including determinations not relating to the TIC).

DBCTM's 2019 DAU only provides for information on arbitrated outcomes to be given to access seekers. As periodic reviews of access charges will occur under access agreements, we consider that access holders should also be able to request information on arbitrated outcomes from DBCTM, so that they are similarly informed on arbitrated outcomes when entering into negotiations and arbitrations under their access agreements. Our proposed amendments will require DBCTM to either publish on its website, or make available upon request by any person, a copy of the determination and reasons for the determination (e.g. cl. 17.5(b) in Box 2). We seek stakeholder views as to their preferred approach to the method of publication.

We consider the provision of arbitrated outcomes in this manner will not limit the scope for negotiations, noting that DBCTM is not obligated to use information determined in prior arbitrations for the calculation of prices for subsequent access seekers.

We note this approach is broadly similar to that adopted in other jurisdictions, such as access disputes conducted by the ACCC under the national access regime.<sup>257</sup>

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<sup>257</sup> See, for example: ACCC, *Final determination: Statement of reasons, Access dispute between Glencore Coal Assets Australia Pty Ltd and Port of Newcastle Operations Pty Ltd*, 18 September 2018.

**Box 2 Our proposed drafting amendments to the 2019 DAU****17.4 Determination by the QCA**

- (a) **(Division 5 Part 5 process)** If a Dispute is referred to the QCA in accordance with this Undertaking, then Division 5 of Part 5 of the QCA Act will apply. In any Dispute relating to Access Charges or the Expansion Pricing Approach, the QCA must determine on terms and conditions relating to Access Charges that are in accordance with Section 11 of this Undertaking, except to the extent necessary to give effect to any matter agreed by the parties to the Arbitration. The QCA must not make an access determination that is inconsistent with this Undertaking (unless all parties agree and no other relevant stakeholder is adversely affected).
- (b) **(Process in other cases)** If an issue is referred to the QCA for determination as specified in accordance with this Undertaking but does not constitute a Dispute for the purposes of Division 5 of Part 5 of the QCA Act, then the QCA will make a determination through any process that it considers appropriate, provided that:
- (1) prior to considering the issue, the QCA advises both parties of the process that it will use to make the determination and both parties are given the opportunity to advise the QCA of any concerns they may have with that process and receive a response from the QCA as to how it will deal with such concerns, if at all; and
  - (2) the QCA must not make an access determination that is inconsistent with this Undertaking (unless all parties agree and no other relevant stakeholder is adversely affected).
- (c) **(Costs awarded as QCA determines)** The costs of the QCA and the reasonable costs of the parties are to be borne by the parties in such proportions as determined by the QCA. If two or more Access Holders are parties to a Dispute involving substantially the same issues and there are no special circumstances making it necessary or desirable for them to be separately represented, it will only be reasonable for those Access Holders in aggregate to recover the costs of being collectively represented in any Dispute.
- ~~(d) **(Confidentiality)** Subject to Section 17.4(e), the proceedings referred to in this Section 17.4(a) and (b), including any determination by the QCA, will be kept confidential by the parties and the QCA.~~
- ~~(e) DBCT Management may disclose an initial TIC for a Terminal Component and a Pricing Period determined by the QCA in any arbitration under this Section 17.4 to an Access Seeker in subsequent negotiations with the Access Seeker concerning an Initial TIC, subject to the Access Seeker in subsequent negotiations first undertaking to maintain the confidentiality of the outcome of the Arbitration.~~

**17.5 Publication of arbitration determinations relating to the Terminal Infrastructure Charge**

- (a) **(Application)** This section applies to:
- (1) any determination made by the QCA under clause 17.4 which relates to the Terminal Infrastructure Charge; and
  - (2) any determination issued by the QCA or another arbitrator to resolve an arbitration arising from a review of Access Charges under an Access Agreement.
- (b) **(Making determination and reasons available)** Subject to Sections 17.5(c) to 17.5(f), DBCT Management must [publish on its website / make available upon request by any person] a copy of:
- (1) any determinations referred to in section 17.5(a); and
  - (2) the reasons for each determination.
- (c) Where the QCA has approved or issued to DBCT Management a form of determination and/or reasons (**Public Determination**) that addresses confidentiality issues, in accordance with Sections 17.5(d) or 17.5(e), DBCT Management must [publish / make available] under sub-clause 17.5(b) the relevant Public Determination.
- (d) **(Confidentiality claims for QCA Arbitrations)** Where the QCA is the arbitrator of a dispute referred to under clause 17.5(a), the QCA will:
- (1) consult with the parties to the Arbitration prior to making any final determination as to whether any of the information the QCA intends to include in its determination and/or reasons is regarded by the parties to be Confidential Information; and
  - (2) having regard to the submissions of the parties, and subject to sub-clause 17.5(f), at the time the QCA issues its final determination and/or reasons, the QCA will also issue to the parties a form of Public Determination.
- (e) **(Confidentiality claims for other Arbitrations)** Where the QCA is not the arbitrator of a dispute referred to under clause 17.5(a):
- (1) DBCT Management must provide the QCA with a full unredacted copy of the determination and/or reasons as soon as reasonably practicable after it has been issued by the arbitrator;
  - (2) the QCA will consult with the parties to the Arbitration as to whether any information in the determination and/or reasons is Confidential Information; and
  - (3) having regard to the submissions of the parties, and subject to sub-clause 17.5(f), the QCA will issue to the parties a form of Public Determination.
- (f) **(Assessment of confidentiality claims)** When assessing any confidentiality claim raised by parties in accordance with Sections 17.5(d) or 17.5(e), the QCA must have regard to:
- (1) whether the information identified is Confidential Information;
  - (2) whether disclosure of any Confidential Information would, or would be likely, to damage the commercial activities of a party;
  - (3) whether disclosure of any Confidential Information would be in the public interest, including the public interest associated with a form of Public Determination being made available to other Access Seekers or Access Holders that is sufficiently detailed to facilitate the efficient and timely resolution of any subsequent disputes; and
  - (4) any other matter the QCA considers relevant to its assessment.

### Providing arbitration guidelines

The interim draft decision sought stakeholder views on the QCA publishing a guidance document that would set out the process it would likely follow, and the methodologies it would intend to adopt, in a price arbitration under an approved access undertaking.

The DBCT User Group considered that QCA guidelines prescriptively determining the methodology for pricing that would apply during an arbitration are absolutely necessary to respond to information asymmetry and create a higher certainty of outcome.<sup>258</sup>

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<sup>258</sup> DBCT User Group, sub. 11, p. 32.

DBCTM submitted that any guidance document published should be limited to providing information as to the process the QCA proposes to follow, and the factors it must have regard to in any arbitration—by reference to the QCA Act and the approved access undertaking. In this regard, DBCTM considered:

- A guideline document that sets out the QCA's likely methodology could have the effect of the QCA predetermining issues not currently before it, and preclude the ability of the QCA to decide an arbitration having regard to the relevant facts of the dispute.<sup>259</sup>
- A prescriptive arbitration guideline will reduce the prospect of successful negotiated outcomes and increase the likelihood that all access agreements will have their access charges determined by arbitration.<sup>260</sup>
- A prescriptive arbitration guideline is at odds with guidelines from other regulators that arbitrate access disputes under negotiate-arbitrate regimes. Those regulators adopt approaches to drafting arbitration guidelines that are focused on principles and process.<sup>261</sup>

We do not consider that prescribing the methodology for pricing that would apply during an arbitration is necessary to adequately address the concerns we have identified with market power and information asymmetry. We also acknowledge that publishing guideline documents that are overly prescriptive may reduce the prospect of successful negotiated outcomes, or may increase the likelihood that all access agreements will have their access charges determined by arbitration.

However, we also consider that there are likely to be benefits to us publishing a guideline that is procedural in nature, providing guidance for parties involved in a dispute as to how we intend to manage such disputes.

In providing this guideline document, we have not sought to provide prescriptive methods or approaches that we consider appropriate to apply in an arbitration. However, we consider there is merit in providing limited substantive guidance on key matters. These matters are outlined below.

We may, from time to time, revise this guideline at our absolute discretion. This may include, for example, the correction of typographical errors or updating terminology and cross-references as required. If substantive changes are proposed, we will conduct an appropriate consultation process with stakeholders, which may include the issuing of draft revised guidelines and inviting submissions from stakeholders.

Part B of this draft decision presents our draft guideline: *Arbitration guideline for disputes under the DBCT 2021 access undertaking*.

#### Arbitration will take into consideration the characteristics of the relevant Terminal component

The 2019 DAU requires DBCTM to make an application to the QCA for a price ruling as part of the expansion process, in order to determine whether the cost of an expansion is to be recovered through socialised pricing or differential pricing.<sup>262</sup>

As part of a price ruling, we are required to determine how the cost of an expansion is to be recovered (either through socialised pricing or differential pricing). This does not preclude

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<sup>259</sup> DBCTM, sub. 8, p. 38.

<sup>260</sup> DBCTM, sub. 8, p. 40.

<sup>261</sup> DBCTM, sub. 8, p. 41.

<sup>262</sup> DBCTM, sub. 8, p. 8.

negotiation on pricing matters, but rather identifies the Terminal component that negotiation should be based on. For example, should we determine that an expansion is to be socialised, DBCTM will provide access to the existing Terminal component, and negotiations should occur on that basis. If the price ruling determines that an expansion should be differentially priced, negotiations should be based on the differentiated Terminal component.

The costs DBCTM incurs, and risks it is exposed to, may differ across Terminal components. Where an expansion of the Terminal is differentiated from the existing component, DBCTM may be exposed to additional costs and risks in providing access to that expansion in comparison to that of providing access to the existing Terminal component. For instance, each expansion will have different underlying characteristics that potentially affect DBCTM's exposure to its counterparties.<sup>263</sup>

We consider these cost and risk characteristics will be a key consideration, which is likely to form the basis for negotiating access.

We consider that DBCTM should be required to provide the cost and Terminal information outlined in schedule I for the relevant Terminal component (discussed in section 6.2).

Importantly, we will approach an arbitration informed by the characteristics of the relevant Terminal component, and in accordance with our price ruling. Thus, it is appropriate for DBCTM to identify which Terminal component it is negotiating access on.

To support the effectiveness of arbitration in addressing this matter, we consider it is appropriate to outline that we intend to take into consideration the relevant Terminal component as part of the arbitration of an access dispute on pricing matters.

#### [Arbitration will take into consideration the features of the regulatory framework](#)

In arbitrating a dispute on pricing matters, we will have regard to how cost and risk are allocated to parties within the regulatory framework. In particular, the 2019 DAU and relevant access agreements specify the terms by which access is to be provided and the risk-sharing arrangements between the parties. These will be directly relevant in having regard to the matters outlined in section 120 of the QCA Act.

For instance, the costs and risk incurred by DBCTM should be reflected in a TIC, noting that the pricing principles in the QCA Act (s. 168A) stipulate that the price of access to a service should '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'.

It is also appropriate to account for the risk-sharing arrangements provided for in the access arrangements in having regard to other factors, including the value of access to an access seeker. The regulatory framework prescribes how volume and cost risk are to be allocated between the parties.

For instance, the regulatory arrangements outlined in the 2019 DAU allocate much of DBCTM's volume risk to access holders/seekers. Access seekers enter into long-term take-or-pay contracts for access to DBCT, with the TIC to be updated to reflect the utilisation of the relevant Terminal component. Given that high levels of volatility in traded coal prices have been a feature of global

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<sup>263</sup> For instance, DBCTM's exposure to individual counterparties of a differentiated expansion will be affected by the following factors: the utilisation of the expansion's capacity; the number and creditworthiness of counterparties using the expansion; and the underlying competitiveness of the expansion's customer base, including the production costs and quality of the coal produced.

coal markets, the value of access to an access seeker may vary significantly throughout the coal price cycle to reflect market conditions.

#### Arbitration will take into consideration existing contractual arrangements

At the time of reviewing charges within an existing access agreement, access holders have already committed to entering the market and have incurred considerable sunk costs. Once these significant sunk investments have been made by an access seeker, the willingness to pay of a captured access seeker is likely to increase considerably. As a result, an access holder may be in a less favourable position to negotiate pricing matters with DBCTM.

Increasing the access charge to reflect an increase in the users' willingness to pay may arguably be regarded as a transfer of rents between the parties, with little effect on the efficient utilisation of DBCT. However, an ability for DBCTM to change the price of access to reflect matters other than changes in the cost or risk of providing access may have implications for an access seeker undertaking sunk investment in the first place.

Parties should consider any allocation of economic rents at the time of initially negotiating an access agreement. That said, there is nothing to prevent the parties from entering into arrangements that might vary the distribution of rents in a known way over the life of an access agreement.

To support the effectiveness of arbitration in addressing this matter, we consider it is appropriate to outline that in arbitrating a dispute on pricing matters, we will have regard to an access holder's existing contractual arrangements.

#### Guidance provided in other jurisdictions

In considering the appropriate form of guidance material to provide, we have considered guidelines provided in other jurisdictions.

DBCTM stated that other regulators adopt an approach to drafting arbitration guidelines that are focused on principles and process.<sup>264</sup> DBCTM provided a number of examples including *A guide to resolution of access disputes under Part IIIA of the Trade Practices Act 1974*, prepared by the ACCC, and *Guideline for the resolution of distribution and transmission pipeline access disputes under the National Gas Law and National Gas Rules*, prepared by the AER.

The DBCT User Group noted that the approach of regulators on this issue is, unsurprisingly, related to the scope of the relevant regime.<sup>265</sup> The DBCT User Group stated there is clear precedent for prescribing detailed pricing methodologies and provided examples including the AER's *Light Regulation – Financial Reporting Guideline*, and the ACCC's *Pricing principles for price approvals and determinations under the Water Charge (Infrastructure) Rules 2010*.<sup>266</sup>

It is apparent from our review of various guideline documents that content can vary greatly—from guidelines which provide only general commentary on likely processes to be followed in an arbitration, to guidelines which provide detailed guidance on specific issues. We consider that the amount of detail contained in each guideline is related to the scope of the relevant regulatory regime, including the regime's underlying legal framework. Further, it appears that certain guidelines have been provided for different purposes. This is demonstrated by the following guidelines:

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<sup>264</sup> DBCTM, sub. 8, p. 41.

<sup>265</sup> DBCT User Group, sub. 11, p. 33.

<sup>266</sup> DBCT User Group, sub. 11, p. 33.

- The ACCC has stated its guideline entitled *A guide to resolution of access disputes under Part IIIA of the Trade Practices Act 1974*, explains how the ACCC will exercise its dispute resolution powers under Part IIIA of the Act. We consider this guideline to be general in nature, which may be due to the breadth of the underlying access regime. Part IIIA is not limited to any particular industries—services that may be covered under Part IIIA include those provided by facilities such as railway tracks, airports, port terminals or sewage pipes. In this case, it may be impractical to provide guidelines on any specific issues—the only issue that various access disputes under Part IIIA may have in common is likely to be the procedure that the ACCC will follow in conducting an arbitration, which is specified in the *Competition and Consumer Act 2010* (CCA). In contrast, we consider that an access dispute in relation to access to the DBCT service has greater levels of certainty in the range of possible issues that may arise. This may provide scope for more specific guidance on certain matters.
- While the AER's *Light Regulation – Financial Reporting Guideline* is highly prescriptive, this guideline is focused on information provision. Under the National Gas Rules, providers of light regulation pipeline services are required to prepare and publish on their website financial information about each of its light regulation pipelines. This financial information must be in the form, and contain the information specified, in the AER's financial reporting guidelines, and be certified in the manner provided for in the financial reporting guidelines.<sup>267</sup> DBCTM's information provision requirements are to be outlined as part of an approved access undertaking (see section 6.2).
- The ACCC's *Pricing principles for price approvals and determinations under the Water Charge (Infrastructure) Rules 2010* set out the detailed pricing methodology to achieve consistency where decisions were being made by different regulators in different Murray-Darling Basin states. The Water Charge (Infrastructure) Rules require the approval or determination of regulated charges for certain infrastructure operators. In the case of DBCT, we do not consider it necessary to provide a guideline that prescribes all of the methodologies to apply when determining access prices at DBCT. Doing so may limit negotiation and increase the likelihood of arbitration.

Overall, we consider our proposed approach for providing guidance that is procedural in nature, but provides limited substantive guidance on specific matters, is appropriate.

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<sup>267</sup> We consider that the AER is able to provide the detailed level of information in its financial reporting guidelines due to the comprehensive requirements of its underlying legal framework (Part 7 of the National Gas Rules).

### Draft decision

Our draft decision is that it is appropriate for DBCTM to amend the 2019 DAU to:

- (1) align the arbitration criteria in clause 11.4(d) of the 2019 DAU with section 120 of the QCA Act
- (2) align the arbitration criteria to apply to price reviews that will occur under the 2019 SAA (see cl. 7.2 of the 2019 SAA) with those in the 2017 SAA
- (3) require DBCTM to provide information on arbitrated outcomes, including the determination itself and the reasons for the determination.

We also intend to produce a guideline that is procedural in nature, that sets out for parties involved in a dispute how we intend to manage access disputes in accordance with the requirements of the QCA Act. Part B of this draft decision presents our draft arbitration guideline for disputes under the DBCT 2021 access undertaking.

## 6.4 Implementation of the pricing model within the 2019 DAU

DBCTM noted that the 2019 DAU is based on the 2017 AU and replicates the vast majority of the drafting and protections set out in the 2017 AU.<sup>268</sup> DBCTM submitted that provisions have been included to ensure that the pricing model without a reference tariff is practically workable.<sup>269</sup>

In certain circumstances, binding access agreements under the 2019 DAU require access seekers to enter into an access agreement without knowledge of the TIC they will be required to pay, in order to obtain access. More specifically:

- Access agreements for existing capacity under the notifying access seeker process. An access agreement between the access seeker and DBCTM is binding, notwithstanding that it does not include an initial TIC. The parties must execute a deed to amend the agreement once the initial TIC is agreed or a dispute about the initial TIC is resolved.<sup>270</sup>
- Conditional access agreements for expansion capacity. A conditional access agreement between an access seeker and DBCTM is legally binding, notwithstanding that it does not contain an initial TIC or expansion pricing approach, and will not come into operation until its conditions precedent are fulfilled.<sup>271</sup>

These arrangements reflect the fact that a TIC may not yet be negotiated at the time at which an access seeker and DBCTM are to enter into an access agreement or conditional access agreement.

As outlined by the DBCT User Group, the 2019 DAU appears to intend to require access seekers to contract for capacity without knowing the price at the time of contracting and without providing any express mechanism to terminate an access agreement (or conditional access agreement) if they do not like the price offered.<sup>272</sup> The DBCT User Group<sup>273</sup> and Whitehaven Coal<sup>274</sup> were concerned about the requirement for access seekers to enter into binding conditional access agreements or binding access agreements, before the TIC was agreed.

<sup>268</sup> DBCTM, sub. 8, p.12.

<sup>269</sup> DBCTM, sub. 10, p. 39.

<sup>270</sup> See cl. 5.4(j)–(k) of the 2019 DAU.

<sup>271</sup> See cl. 5.4(l)(15) of the 2019 DAU.

<sup>272</sup> DBCT User Group, sub. 11, p. 14.

<sup>273</sup> DBCT User Group, sub. 2, p. 54, sub. 6, pp. 16, 20, sub. 9, p. 39, sub. 11, pp. 14, 21–22, 35.

<sup>274</sup> Whitehaven Coal, sub. 4, pp. 5–6.

There may be significant implications for access seekers, should they not wish to enter into these binding agreements. For instance, an access seeker may be removed from the queue if it does not sign a conditional access agreement within three months of receiving an invitation or as part of the notifying access seeker process.<sup>275</sup> DBCTM considered that the ability to remove access seekers from the queue who do not intend to take capacity, or who are not prepared to fund an expansion, is a crucial part of the efficient operation of the access queue.<sup>276</sup>

DBCTM argued that access seekers obtain certainty through other arrangements in the 2019 DAU, including recourse to the QCA if agreement cannot be reached.<sup>277</sup> DBCTM also said that access seekers had recently executed conditional access agreements and underwriting agreements for the 8X expansion without pricing certainty, which it considered was evidence that pricing certainty does not inhibit access seekers' ability or incentive to access DBCT.<sup>278</sup>

The DBCT User Group submitted that it is not just that pricing is uncertain, but there would not even be any certainty as to the approach to be applied to determining such pricing. The DBCT User Group considered that pricing uncertainty could deter efficient access seekers from contracting capacity.<sup>279</sup>

We acknowledge that some level of uncertainty exists in all commercial environments.

DBCTM's 2017 AU provided a reference tariff that could be used as a basis for negotiations between the parties on pricing matters. The 2019 DAU does not include a reference tariff, providing scope for the parties to negotiate on pricing matters on an individual user basis, including potentially to reflect the value of access to an access seeker. We are of the view that the 2019 DAU exposes an access seeker to greater pricing uncertainty at the time at which it must decide whether to enter into a binding access agreement with DBCTM.

The negotiation arrangements in the 2017 AU provide for DBCTM and access seekers to enter into agreements giving them the certainty of obtaining access based on the reference tariff.<sup>280</sup>

In making this draft decision, we have sought not to unnecessarily restrict the scope for parties to negotiate the TIC. However, we are concerned that the proposed negotiation arrangements when coupled with the 2019 DAU pricing model, may require an access seeker to enter into a binding access agreement without knowing the likely TIC or whether the access seeker would be able to obtain a TIC (through negotiation or arbitration) that did not exceed the value it placed on that access.

We consider it may be appropriate for the 2019 DAU to provide for a more balanced negotiation process on pricing matters. We acknowledge that there may be various ways to provide for this within the 2019 DAU negotiation arrangements, including the following:

- Providing for access seekers to be better informed on pricing matters before access agreements are to be signed, either through delaying the signing of agreements until negotiations on price have occurred or providing sufficient information to access seekers upfront so they can form a view on the reasonable TIC. In the case of conditional access agreements, while the ability of access seekers and DBCTM to negotiate a TIC prior to a QCA

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<sup>275</sup> See cl. 5.4(l)(5) and cl. 5.4(i)(1) of the 2019 DAU.

<sup>276</sup> DBCTM, sub. 10, p. 27.

<sup>277</sup> DBCTM, sub. 10, p. 28.

<sup>278</sup> DBCTM, sub. 10, pp. 14–15.

<sup>279</sup> DBCT User Group, sub. 11, p. 31.

<sup>280</sup> Even if future reference tariffs are unknown, access seekers still have knowledge of the general approach that would be applied to determine the TIC.

price ruling may be limited<sup>281</sup>, a proposed pricing approach could be outlined by DBCTM enabling access seekers to form at least a preliminary view on pricing matters.

- Enabling access seekers to have more scope to terminate an access agreement if the negotiation-arbitration process does not deliver a TIC that is acceptable to the access seeker.
- Providing additional certainty as to how we are to conduct arbitrations under these binding agreements. We note that such an approach may limit scope for negotiation on pricing matters.

### Draft decision

Our draft decision is that it is appropriate for DBCTM to amend the 2019 DAU to provide for a more balanced negotiation process on pricing matters.

There may be various ways to provide for this within the 2019 DAU negotiation arrangements (see above). Therefore, we seek stakeholder views on the appropriate form of amendments, including the scope for making amendments to the 2019 DAU to address this matter.

## 6.5 Other concerns raised by stakeholders

Stakeholders have raised a number of other concerns in relation to the adoption of a pricing model without reference tariffs.

### 6.5.1 Costs associated with engaging in arbitration

The DBCT User Group submitted that the costs of arbitration will be very significant for individual access seekers.<sup>282</sup> It considered that, even if determinations led to outcomes consistent with a QCA-approved reference tariff, arbitration may be a significantly more costly process for individual users.<sup>283</sup>

Moreover, the DBCT User Group submitted that the time, cost and resources needed to determine a reference tariff are incurred once per regulatory period, instead of the greater cost that will be caused by a price needing to be determined each time an access seeker seeks access. In this regard, rolling arbitrations could be costly, inefficient and time-intensive for access seekers and DBCTM, and resource intensive for the QCA.<sup>284</sup>

DBCTM submitted that itself and the access seeker both have an incentive to negotiate an efficient, mutually acceptable TIC.<sup>285</sup> DBCTM noted that the effectiveness of the pricing model may be revisited at the end of the regulatory period and that this provides a strong incentive for DBCTM to act reasonably in negotiations with users and access seekers. It also means any issues that do arise will not endure long term.<sup>286</sup>

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<sup>281</sup> We note that even in the absence of DBCTM's proposed changes to the pricing model, the DBCT User Group has raised concerns relating to the timing of price rulings resulting in uncertainty under the recently executed conditional access agreements. DBCT User Group, sub. 11, p. 36.

<sup>282</sup> DBCT User Group, sub. 11, p. 30.

<sup>283</sup> DBCT User Group, sub. 6, pp. 22–25.

<sup>284</sup> DBCT User Group, sub. 9, p. 5.

<sup>285</sup> DBCTM, sub. 8, p. 29.

<sup>286</sup> DBCTM, sub. 8, p. 6.

We are of the view that the regulatory arrangements provide incentives for both parties to act reasonably in negotiations. Notably:

- As outlined by DBCTM, dispute processes by their nature are uncertain for parties involved in a dispute.<sup>287</sup> Where a dispute on the TIC is referred to us for arbitration and we deem an access proposal by DBCTM not reasonable to approve, we are to determine the TIC to apply as part of that access agreement.<sup>288</sup> It is therefore beneficial for DBCTM to propose a reasonable TIC when negotiating with access seekers.
- Given the negotiate-arbitrate framework is to apply for the proposed regulatory period, DBCTM is incentivised to act reasonably in negotiations with access seekers should it want this framework to remain. In this regard, the reporting requirements outlined in the 2019 DAU (cl. 10) require DBCTM to disclose, among other things, negotiation periods, disputes and complaints incurred during the regulatory period. Such reporting requirements will assist in identifying whether any issues have been encountered in applying a negotiate-arbitrate pricing model.
- The time and costs associated with arbitration, as identified by the DBCT User Group, are likely to incentivise access seekers to reach an agreement on a reasonable TIC with DBCTM.

We consider that the incentives to both parties to reach a negotiated outcome will reduce the risk of arbitrations having significant cost and timing implications for access seekers, as well as the likelihood of rolling arbitrations for multiple disputes across the regulatory period.

Moreover, DBCTM considered that, given all access seekers will be seeking access to expansion capacity, arbitrations would likely be concurrent—we would therefore only need to review the majority of the relevant information once.<sup>289</sup> In relation to an access charges review, the 2017 SAA (cl. 7.2(b)) explicitly states that such reviews are intended to be undertaken at the same time, in conjunction with, and on the same basis as reviews under other user agreements which are in terms similar to the agreement where a similar review is due at the same time.

As outlined by the DBCT User Group, the pricing model that exists in the 2017 AU is a negotiate-arbitrate model, where reference tariffs assist in facilitating efficient negotiation.<sup>290</sup> Should the information provision arrangements be sufficient to adequately inform negotiations, it is not clear as to why a negotiate-arbitrate pricing model in itself necessarily results in a significant increase in time or costs to access seekers.

However, this matter is something that we would continue to monitor throughout the regulatory period. We are of the view that should the arrangements contained in the 2019 DAU result in a significant increase in costs for the parties involved, it may be appropriate to revise the pricing model for future pricing periods.

In relation to the potential timing implications associated with negotiating access under the 2019 DAU, the DBCT User Group considered that the timeframes will mean that access seekers will

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<sup>287</sup> DBCTM, sub. 8, p. 39.

<sup>288</sup> Cl. 11.4(d) of the 2019 DAU.

<sup>289</sup> DBCTM, sub. 8, p. 9. The DBCT User Group submitted that it is not clear that the 8X expansion (the next proposed expansion at DBCT) will be developed as a whole, rather than advanced in progressive tranches (creating the potential for multiple separate arbitrations for each tranche of expansion capacity). DBCT User Group, sub. 11, p. 18.

<sup>290</sup> DBCT User Group, sub. 9, pp. 18–19.

face extreme pressure to try to obtain certainty of pricing and access to both DBCT and below-rail at the same time, and in a timeframe that aligns with project approval pathways.<sup>291</sup>

The DBCT User Group also considered that access seekers face asymmetric time pressures in negotiations with DBCTM—access seekers will always be more reliant than DBCTM on both reaching an outcome, and doing so in a confined period.<sup>292</sup> In contrast, DBCTM considered that the idea of asymmetric time pressures does not accord with commercial reality faced by access seekers.<sup>293</sup>

We note the timeframes for negotiating access are generally similar to those outlined in the 2017 AU. As noted by DBCTM, where agreement between DBCTM and an access seeker is not possible, an access seeker may refer the dispute to arbitration.<sup>294</sup> We acknowledge that should a dispute on the TIC be referred to arbitration, the QCA Act requires us to use our best endeavours to make an access determination within six months from the day the access dispute notice is provided.<sup>295</sup>

We do not consider it appropriate for DBCTM to capitalise on timing pressures faced by access seekers in order to exercise market power in negotiating access. We consider that our draft decision should allow access seekers to be able to form a view on a reasonable TIC in a reasonable time period. Incentives for DBCTM to provide a reasonable TIC in negotiation should lead to negotiated outcomes in a reasonable timeframe.

In any case, DBCTM said it is open to changing the timeframes under the 2019 DAU to address any concerns identified and ensure that the process is clear and efficient.<sup>296</sup> We welcome further views from stakeholders on this matter, including whether any specific implications are associated with the timeframes outlined in the negotiation framework or expansion process (as discussed in section 6.4).

### 6.5.2 Uncertainty of arbitration outcomes

The DBCT User Group considered the negotiate-arbitrate model can give rise to uncertainty.<sup>297</sup> The DBCT User Group considered that investment incentives in dependent markets will be distorted to a much greater extent by uncertainty and the potential for monopoly pricing. The DBCT User Group submitted that the promotion of the sustainable and efficient development of the Queensland coal industry requires prices set at efficient levels, and certainty of the pricing approach—which can only be achieved with a reference tariff.<sup>298</sup>

DBCTM considered that the certainty faced by access seekers under the 2019 DAU is the same as that provided under the 2017 AU—the certainty that access charges can ultimately be determined by the QCA.<sup>299</sup> DBCTM noted that dispute processes by their nature are uncertain for parties involved in a dispute, and the parties must face not only the risk of adverse outcomes from the dispute but also risks inherent in the dispute resolution process itself.<sup>300</sup>

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<sup>291</sup> DBCT User Group, sub. 11, pp. 30–31.

<sup>292</sup> DBCT User Group, sub. 9, p. 22, sub. 11, p. 30.

<sup>293</sup> DBCTM, sub. 8, p. 25.

<sup>294</sup> DBCTM, sub. 8, p. 28.

<sup>295</sup> Section 117A (1) of the QCA Act.

<sup>296</sup> DBCTM, sub. 8, pp. 25–26.

<sup>297</sup> DBCT User Group, sub. 9, p. 24.

<sup>298</sup> DBCT User Group, sub. 9, pp. 5, 13, 20.

<sup>299</sup> DBCTM, sub. 8, p. 8.

<sup>300</sup> DBCTM, sub. 8, p. 39.

In relation to the extent that certainty can be provided as to the level at which a TIC is set, DBCTM considered that the implementation of a reference tariff will not increase certainty for access seekers, given all access seekers during the regulatory period will be seeking access to expansion capacity.<sup>301</sup>

Some level of uncertainty exists in all commercial environments, even those involving regulatory price setting. While a pricing model that does not incorporate a reference tariff gives rise to some uncertainty as to the likely negotiated outcome, this may serve to facilitate the negotiation process in finding a TIC that is acceptable to both access seekers and DBCTM. Importantly, with the amendments outlined in the draft decision, the negotiate-arbitrate pricing model should provide access seekers with confidence that QCA arbitration is a constraint on parties from acting unreasonably during the negotiation process.

#### Existing access arrangements

The DBCT User Group considered there is a great level of uncertainty around arbitration processes and outcomes under existing user agreements.<sup>302</sup> It considered that access agreements clearly anticipate the existing regulatory arrangements and continuation of reference tariffs—contemplating a continuing role for the QCA in approving tariffs and making decisions in relation to annual roll-forwards and review events.<sup>303</sup>

In response, DBCTM noted that existing user agreements clearly provide for these provisions to be periodically revised.<sup>304</sup>

We are unclear as to why existing access agreements would not be able to incorporate a negotiated tariff, as opposed to a predetermined reference tariff. The review of access charges under existing user agreements clearly contemplate that there may not always be a reference tariff in place.<sup>305</sup> We note that under existing user agreements (where consistent with the SAA), the TIC and processes applied to update the TIC and other charges, including annual roll-forwards and review events, are up for review at the date on which the 2019 DAU comes into effect (agreement revision date).

We would likely continue to have a role in approving tariffs—should a dispute be referred to us—and we will continue to make decisions in relation to certain review events, as required throughout the regulatory period.

### 6.5.3 Unfair differentiation between access seekers

The DBCT User Group considered that a negotiate-arbitrate model will result in unfair differentiation between access holders and access seekers, based on different levels of information asymmetry and resources to pursue arbitrations.<sup>306</sup> The DBCT User Group submitted that access seekers are more likely than existing users to suffer from information asymmetry, face greater time pressures, have less financial resources and lack the benefit of protections provided in existing user agreements—leaving them more exposed to monopoly prices.<sup>307</sup>

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<sup>301</sup> DBCTM, sub. 8, p. 7.

<sup>302</sup> DBCT User Group, sub. 6, pp. 22–25.

<sup>303</sup> DBCT User Group, sub. 9, p. 5.

<sup>304</sup> DBCTM, sub. 10, p. 26.

<sup>305</sup> Clause 7.2(b)(ii) of the 2017 SAA states that each review may have regard to (among other things) the relevant reference tariff (if any) effective from the relevant agreement revision date.

<sup>306</sup> DBCT User Group, sub. 9, p. 11.

<sup>307</sup> DBCT User Group, sub. 9, p. 14.

DBCTM submitted that the vast majority of access seekers currently in the DBCT access queue are large, sophisticated mining companies, with extensive experience in conducting mining operations throughout the world, including the negotiation of access to critical infrastructure. DBCTM considered that the prospect that these same firms are unable to assess an appropriate charge at DBCT is not tenable and is inconsistent with the commercial reality.<sup>308</sup>

DBCTM also considered that its proposed amendments to the 2019 DAU mirror the protections in the existing user agreements.<sup>309</sup> DBCTM considered that the most likely source of differentiation between access holders and access seekers would arise if the QCA determined that an expansion should be differentially priced.<sup>310</sup>

We consider that our draft decision will ensure that access seekers are provided with sufficient information to enable them to form their own view of a reasonable TIC for the purposes of negotiating with DBCTM. The level of information available to access seeker should therefore place them in an equitable position with existing users.

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<sup>308</sup> DBCTM, sub. 8, p. 12.

<sup>309</sup> DBCTM, sub. 10, p. 13.

<sup>310</sup> DBCTM, sub. 10, p. 14.

## 7 REMEDIATION CHARGES

*Our draft decision is to refuse to approve DBCTM's proposed estimate of the rehabilitation cost. We consider DBCTM's estimated cost of \$1.22 billion to rehabilitate the DBCT site may be overestimated. Consequently, we consider using this proposed rehabilitation cost to determine the remediation component of access charges would not be in the interest of access seekers and access holders. We invite stakeholders, particularly those with an understanding of the technical aspects of the scope of rehabilitation work at DBCT, to make submissions on the matters raised and specific questions outlined in this chapter.*

### 7.1 DBCTM's remediation obligations

The Port Services Agreement (PSA) specifies terms and conditions for DBCTM's lease of DBCT from DBCT Holdings, including obligations to rehabilitate the DBCT site at expiry of the lease. According to DBCTM, as the leaseholder, it would be required to rehabilitate the site such that:

- (1) The **scope** of rehabilitation must be in accordance with a Rehabilitation Plan;
- (2) The **standard** of rehabilitation must be to remediate onshore and offshore land "to its natural state and condition as existed prior to any development or construction activity having occurred";
- (3) In terms of **timing**, the rehabilitation may be started "before the end of the [lease] to the extent that doing so does not adversely affect its performance of any Project Document, User Agreement or the OMC" and must be completed "within 3 years after the end of the [lease]";
- (4) The **cost** of the rehabilitation must be borne by DBCTM "at its cost".<sup>311</sup>

#### Remediation allowance and component of access charges

DBCTM collects a remediation allowance<sup>312</sup>, which is an annuity to accumulate the expected future rehabilitation cost. Calculation of the allowance is based on:

- (a) an estimate of the Terminal's useful life to determine when remediation is expected to commence
- (b) a forecast rehabilitation plan and current cost of implementing that plan, where the cost is escalated by an appropriate inflation rate to the end of the Terminal's useful life
- (c) a discount rate to determine the remediation allowance—typically the approved WACC of the respective pricing period
- (d) the prevailing value of a notional sinking fund comprising all user payments for remediation accumulated to date, including interest at the WACC.

We previously determined the appropriate remediation allowance for each regulatory period by assessing DBCTM's proposals on the matters listed above, as submitted in its respective DAUs.

The remediation component of access charges (or remediation charge) was determined by allocating the annuity across users according to the contracted access tonnage via the TIC.

<sup>311</sup> DBCTM, sub 1, p. 52.

<sup>312</sup> The remediation allowance is a part of the cost build-up to determine the annual revenue requirement (ARR) in previous and current pricing models for the declared service at DBCT.

Under the 2017 AU, the approved rehabilitation cost estimate was \$432.69 million (2015 dollars), escalated by an annual inflation rate of 2.5 per cent, with an approved WACC of 5.82 per cent, and expected commencement of rehabilitation in 2054. We approved an annual remediation allowance of \$7.02 million, based on the reasons outlined in our final decision on the 2015 DAU.<sup>313</sup>

Critically, the final decision on the 2015 DAU remediation allowance was based on an updated rehabilitation plan and cost estimate submitted by DBCTM, which indicated that the original rehabilitation cost estimate of \$30 million (approved for the 2006 AU) would not reflect the true cost of rehabilitating the DBCT site. While we concluded that \$30 million 'is unlikely to reflect the costs of remediating the Terminal site'<sup>314</sup>, we did not approve the plan and cost proposed by DBCTM in its 2015 DAU (of \$826 million) as it was above 'the efficient costs of rehabilitating the Terminal site' and inconsistent with the pricing principles of the QCA Act (s. 138(2)(g)).<sup>315</sup> Instead, we required DBCTM to amend the remediation cost estimate to reflect what we considered appropriate, which was \$432.69 million.<sup>316</sup>

## 7.2 DBCTM's 2019 DAU proposal for remediation

DBCTM proposed a new rehabilitation plan in its 2019 DAU submission, developed by its consultant GHD Advisory (referred to as GHD for the rest of this chapter) who estimated the total costs of implementing that plan at \$1.22 billion (October 2018 dollars). Although it did not propose a calculation or specific value for the remediation allowance, DBCTM asserted that 'the detailed Rehabilitation Plan and resultant cost estimate of \$1.22 billion should inform price negotiation and any arbitration of a dispute regarding price.'<sup>317</sup> DBCTM provided a report produced by GHD (the GHD report) with its 2019 DAU submission, outlining the scope of works GHD designed to base its estimate upon.<sup>318</sup>

According to DBCTM, the proposed rehabilitation plan presents a level of detail and quality of estimate that 'is a significant improvement over all previous estimates, for example those developed during the 2017 AU process'. DBCTM also commented on the flexibility of the plan stating:

The Rehabilitation Plan and Estimate are structured so they may be refreshed from time to time as required, for example if the applicable laws change, or if additional plant is installed at the terminal, new technology is developed, or more detailed quantities become available.<sup>319</sup>

DBCTM also added that despite our previous determination that the economic life of the Bowen Basin and consequently, the Terminal, is expected to end in 2054,<sup>320</sup> it considers '2051 should reasonably be considered the relevant date with regard to remediation of DBCT'<sup>321</sup> as it is the end of the initial lease.

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<sup>313</sup> QCA, *DBCT Management's 2015 draft access undertaking*, final decision, November 2016, pp. 143–150.

<sup>314</sup> QCA, *DBCT Management's 2015 draft access undertaking*, final decision, November 2016, p. 143.

<sup>315</sup> QCA, *DBCT Management's 2015 draft access undertaking*, final decision, November 2016, p. 145.

<sup>316</sup> QCA, *DBCT Management's 2015 draft access undertaking*, final decision, November 2016, p. 149.

<sup>317</sup> DBCTM, sub. 1, p. 53.

<sup>318</sup> GHD Advisory (GHD), *DBCT Rehabilitation Plan and Rehabilitation Cost Estimate*, prepared for DBCT Management, June 2019 (GHD report). This report is available for download on our [website](#).

<sup>319</sup> DBCTM, sub. 1, p. 52.

<sup>320</sup> QCA, *DBCT Management's 2015 draft access undertaking*, final decision, November 2016, p. 147.

<sup>321</sup> DBCTM, sub. 1, p. 53.

### 7.3 Stakeholder views

Both New Hope Group and the DBCT User Group expressed disagreement with DBCTM's proposed rehabilitation cost estimate and its approach to determining the remediation charges through negotiation.

The DBCT User Group questioned the validity of a material increase to the rehabilitation cost estimate so soon after our review of the costs under the 2015 DAU without 'suggestion that DBCTM's legal remediation obligations have increased since that time'.<sup>322</sup> It further detailed concerns with the specifics of the rehabilitation plan developed by GHD including that:

- The plan has not been independently verified.
- The cost estimates are stated to be only preliminary, within a band of accuracy.
- The report includes a disclaimer that the costs only provide an understanding of the order of magnitude of the costs, based on numerous assumptions and without scrutiny of prudence and efficiency.
- No allowance has been provided for improvements in efficiency and technology that may reduce costs.
- The plan does not allow for the possibility for the State to require rehabilitation to a lower standard.<sup>323</sup>

Both New Hope Group and the DBCT User Group stated they considered it would be appropriate for the QCA to determine:

- an estimate for the rehabilitation costs
- an estimate for the period when rehabilitation works should commence
- an appropriate annuity stream to fund the rehabilitation costs through a remediation component of the TIC (i.e. the remediation charge).<sup>324</sup>

More broadly, New Hope Group noted that the rehabilitation plan is representative of information asymmetry between access seekers and DBCTM and said that it is 'very difficult to envisage how an individual user could meaningfully challenge DBCT Management's assertions regarding the cost of rehabilitation given the asymmetrical information available to those parties in negotiation'.<sup>325</sup> This was echoed by the DBCT User Group who stated this matter is an example of how 'DBCTM's self-serving claims in relation to the cost of remediation provide a further example of why negotiate/arbitrate pricing is so unworkable in the context of DBCTM's coal handling services'<sup>326</sup> and is 'another reason why such a change is clearly not appropriate'.<sup>327</sup>

Finally, the DBCT User Group noted its 'concerns about DBCTM continuing to seek greater remediation allowances without any evident protection of those funds so that they are actually available for remediation'.<sup>328</sup> It explained that unlike mining operations, there seems to be no regulatory mechanism to ensure the accrued remediation allowance for rehabilitation of DBCT is secured or bonded to the State. The DBCT User Group suggested that if DBCTM asserts that

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<sup>322</sup> DBCT User Group, sub. 2, p. 50.

<sup>323</sup> DBCT User Group, sub. 2, p. 50, sub. 9, p. 37.

<sup>324</sup> DBCT User Group, sub. 2, p. 50; New Hope Group, sub. 3, p. 13.

<sup>325</sup> New Hope Group, sub. 3, p. 12.

<sup>326</sup> DBCT User Group, sub. 2, p. 51.

<sup>327</sup> DBCT User Group, sub. 9, p. 37.

<sup>328</sup> DBCT User Group, sub. 2, p. 52.

remediation is currently underfunded and warrants an increase in the allowance, 'surely it must be appropriate for there to be scrutiny of how it can be ensured that all of this money is actually preserved for use in remediation rather than the State or coal industry being required to resolve this problem.'<sup>329</sup>

## 7.4 QCA consultant's advice

We engaged Advisian to review the prudence and efficiency of the rehabilitation plan and costs developed by GHD, and to develop an independent estimate of the rehabilitation costs to a level of detail comparable to that estimated by GHD. Advisian completed the following tasks:

- a desktop review of GHD's rehabilitation plan and cost
- an independent build-up of the estimated costs for rehabilitation of the DBCT site
- a site visit to review the assumptions made by GHD and to verify its own assumptions for its independent estimate.

We facilitated Advisian's requests for information from GHD and meetings between the consultants to review the latter's plan and cost estimate, which involved requests for specific technical data and clarification of GHD's approach.

Advisian generally concurred with the methodology and scope of works proposed by GHD, and developed its own independent estimate based on the delineation of works outlined in the GHD report.<sup>330</sup> However, Advisian's independent estimate of the rehabilitation costs was approximately \$814 million (in March 2020 dollars<sup>331</sup>), about a third lower than the GHD estimate. It stated in its report (the Advisian report) that this significant difference in overall rehabilitation cost estimates is attributable to differences in:

- cost rates used for bulk earthworks handling and imported clean fill—Advisian was unable to confirm the commercial sources that GHD used for these matters and built up its own rates based on its own commercial sources
- quantities estimated for cut and fill earthworks to return the topography of the site to its natural state—Advisian developed its own model for earthworks volumes based on data different to GHD's earthworks model, which resulted in materially different volumes for cut and fill
- assumptions about the location for disposal of contaminated waste—Advisian's assumed disposal site was a local disposal site 60 km from DBCT as compared to GHD, who assumed disposal at a commercial facility in Roma, 750 km away from the Terminal
- depths for removal of contaminated soil and road substrate—Advisian assumed materially lower depths of substrate and soil removal based on its own recent industry experience with a site of similar hydrocarbon contamination; it was unable to ascertain GHD's reasoning for its assumption for depths for substrate removal

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<sup>329</sup> DBCT User Group, sub. 2, p. 52.

<sup>330</sup> Advisian, *Dalrymple Bay Coal Terminal Rehabilitation Cost Review*, prepared for the QCA, August 2020 (Advisian report), pp. 34–35; GHD report, pp. 27–28.

<sup>331</sup> Advisian stated its estimate contained contingencies that would negate any impact of escalation over the relatively short period between October 2018 to March 2020 (Advisian report, p. 16).

- approaches to removal of offshore and onshore piles—Advisian did not agree with GHD on an approach for offshore pile removal that returns the site to its natural state, consistent with DBCTM's rehabilitation obligations.<sup>332</sup>

## 7.5 QCA analysis

We acknowledge that the approved rehabilitation cost estimate of \$432.69 million under the 2017 AU does not appear to be an appropriate forecast of DBCTM's efficient costs of rehabilitating the Terminal site. We considered that estimate to be appropriate for the level of detail of the associated rehabilitation plan DBCTM provided to us at the time. However, we accept that GHD's rehabilitation plan, and Advisian's subsequent review and independent estimate, are significantly more detailed with regard to the likely scope of rehabilitation works, compared to DBCTM's rehabilitation plan that was assessed as part of the 2015 DAU. We find the detailed build-up of the respective rehabilitation plans and cost estimates provides greater understanding and accuracy of the likely rehabilitation costs than the previously approved cost estimate.

However, we are not convinced at this time that the rehabilitation costs estimated by GHD and Advisian reflect an efficient forecast of the likely cost. On the one hand, we consider the use of GHD's estimate as a basis for negotiation of the remediation charges could result in charges that are inefficiently high, which is not in the interests of access seekers (s. 138(2)(e) of the QCA Act) and may not promote the efficient use of the Terminal (s. 138(2)(a) of the QCA Act). Similarly, reliance on Advisian's estimates could deny DBCTM the ability to recover its efficient costs (s. 168A(a) of the QCA Act) and not be in the legitimate interests of the state and DBCTM (ss. 138(2)(b) and 138(2)(c) of the QCA Act).

That said, our draft decision is to refuse to approve DBCTM's proposed rehabilitation cost estimate and seek further views from stakeholders on the appropriateness of the estimates provided by GHD and Advisian.

### 7.5.1 Determination of a rehabilitation cost estimate

We recognise that determining the remediation allowance or corresponding charge for individual users may hinder the potential for negotiation of access charges in a pricing model that does not include reference tariffs, given the need to determine elements to calculate the remediation allowance as outlined in section 7.1. However, we are of the view that determining the rehabilitation cost estimate is appropriate in our assessment of the 2019 DAU. While a pricing model without a reference tariff would provide DBCTM and access seekers discretion for negotiation of an appropriate remediation charge, we consider negotiations would be ineffective if based on an inefficient estimate of rehabilitation costs. This would run the risk of multiple concurrent arbitrations, unnecessary delays in access to services at DBCT, or access seekers being resigned to accepting inefficiently high remediation charges in order to avoid the former two costly outcomes. Thus, we consider it appropriate for us to determine a rehabilitation cost estimate to apply under the 2019 DAU:

- It would be in the interests of the State (as owner), DBCTM (as operator), and the public for DBCTM to be able to recover sufficient costs to rehabilitate DBCT in the future (ss. 138(2)(b)–(d) of the QCA Act).
- It is consistent with the pricing principles under part 5 of the QCA Act, which states that the price of access should generate expected revenue that is at least enough to meet the

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<sup>332</sup> Advisian report, pp. 18–21.

efficient costs of providing access to the service (at DBCT) (ss. 138(2)(g) and 168(A)(a) of the QCA Act). We consider that the efficient costs include the rehabilitation cost estimate based on DBCTM's obligations under the PSA.

- It would not be in the interest of access seekers and access holders for the remediation charge to be based on rehabilitations costs that are higher than the expected efficient rehabilitation costs (ss. 138(2)(e), (h) of the QCA Act).

#### Rehabilitation standard

We acknowledge that DBCTM is obligated to rehabilitate the DBCT site according to the standard outlined in the PSA but the final scope of works to satisfy this standard is a matter to be determined between DBCTM and DBCT Holdings (the State), as parties to the PSA. In absence of further clarity as to the application of DBCTM's rehabilitation obligations beyond the relevant clauses of the PSA, we consider it appropriate for us to interpret the rehabilitation standard based on prevailing information, to ensure the remediation cost estimate reflects the efficient costs of rehabilitation and any corresponding remediation charges appropriately balance the interests of DBCTM, the State, the public, and access holders and seekers (ss. 138(2)(a)–(e), (g), (h) of the QCA Act).

We previously investigated the standard to which DBCTM would be required to rehabilitate the DBCT site in accordance with the PSA during our assessment of the 2015 DAU. Our final decision on this matter at that time was that DBCTM's obligation was to rehabilitate the site 'to its natural state and condition as existed prior to development' even if this standard may exceed standard industry practice. We considered it in the legitimate business interests of DBCTM to assume this standard for rehabilitation and determining a remediation allowance based on this standard would provide DBCTM 'with expected revenue which is at least enough to meet the expected efficient cost of rehabilitating the Terminal site (ss. 138(2)(c) and (g) of the QCA Act).'

Based on DBCTM's submission and the consultants' reports, there is a general consensus among us, DBCTM and the consultants that DBCTM's obligation under the PSA would be to return the site to its natural state. However, we recognise that the obligation does not prescribe a specific set of works or outline standards to achieve a site rehabilitated to its natural state, which creates uncertainty as to the final scope of works. In addition, DBCTM's rehabilitation obligations are due in over 30 years, which adds to the uncertainty of the final scope and cost of works. The uncertainty is evident in the different scopes for rehabilitation works that have been considered as part of DAU assessments for DBCT thus far, and the different applications of the 'natural state' standard to the design of corresponding rehabilitation plans by consultants.

We are not presently aware of any change to DBCTM's rehabilitation obligations under the PSA and as such, are minded to apply the 'natural state' standard to our assessment of the rehabilitation plan and cost. We are conscious of the uncertainty in the application of this standard as discussed above and as such, consider it appropriate to assess the proposed rehabilitation plan afresh and on its own merits, rather than in comparison to previous plans that were used to determine approved rehabilitation cost estimates.

#### Criteria for assessing DBCTM's proposed rehabilitation cost estimate

Our analysis of DBCTM's proposed rehabilitation cost estimate is based on an assessment of the associated rehabilitation plan developed by GHD. We recognise this assessment is not to determine a rehabilitation plan for implementation, which is not our remit in the assessment of the 2019 DAU. However, given DBCTM intends to utilise the rehabilitation plan and cost developed by GHD in negotiations under the 2019 DAU, we consider it appropriate to assess the plan to ensure it would be an appropriate basis for determining remediation charges.

We are also cognisant that the final rehabilitation plan implemented may be different to what is being assessed or will be approved in this process, given the uncertainty discussed above. However, we consider it appropriate for the rehabilitation plan to only represent prevailing information, including reasonable forecasts where appropriate, and not speculate on possible changes, particularly where there is no evidence for the likelihood of circumstances changing. We believe attempting to account for future changes without clear guidance or evidence could result in a greater inaccuracy in the total rehabilitation cost estimate than forming a view based on current information.

In determining if the rehabilitation plan (and its associated cost) is appropriate for the purposes of informing negotiations, we assessed GHD's plan to answer these questions:

- Are the rehabilitation costs proposed in DBCTM's 2019 DAU (estimated by GHD) prudent and efficient?
- If the costs proposed for the plan or part(s) of the plan are not prudent and/or efficient, what are the prudent and efficient costs for undertaking the associated rehabilitation works?

For this assessment, we consider the rehabilitation works:

- (a) **prudent**—if the works are required for the rehabilitation plan to comply with DBCTM's rehabilitation obligations under the PSA
- (b) **efficient**—
  - (i) if the scope of works represents the best means of achieving an outcome determined prudent, having regard to the options available
  - (ii) if the standard of works conforms to technical, design and construction requirements in the legislation and/or other standards, codes and manuals
  - (iii) if the cost of works is consistent with conditions prevailing in the relevant markets.

#### Assessment of GHD's rehabilitation plan

We are currently not convinced that the rehabilitation cost estimate of \$1.22 billion, estimated by GHD, is an appropriate basis for determining remediation charges in negotiations. Although we do not presently consider GHD's rehabilitation plan and estimate to be fundamentally imprudent or inefficient in its entirety, we are of the view that some aspects may not be prudent and/or efficient in line with the criteria discussed above, having regard to Advisian's report. Therefore, we consider GHD's rehabilitation cost estimate may be overestimated and consequently, not in the interests of access seekers and holders if used as a basis for negotiation of remediation charges (s. 138(2)(e), (h) of the QCA Act). In addition, potential delays due to ineffective negotiations and/or need for arbitration to determine remediation charges would be inconsistent with the promotion of economically efficient investment, operation and use of DBCT (s. 138(2)(a) of the QCA Act).

In forming our view, we recognise that the materiality of the overall difference in estimates between GHD and Advisian was not reason in itself to conclude the relevant aspects of GHD's estimate were inappropriate. We are also aware that these differences could be attributed to either:

- GHD and Advisian differing in their views on the most prudent and/or efficient approach to return the DBCT site to its natural state, or

- Advisian being unable to verify GHD's justification or source of information, instead developing its own approach and sourcing its own data in the development of its independent estimate.

A difference in views, lack of justification or differences in commercial sources do not necessarily mean relevant aspects of GHD's rehabilitation plan are imprudent and/or inefficient. However, our assessment of the consultants' reports, particularly of Advisian's discussion of each material difference<sup>333</sup>, has informed our current view that GHD's rehabilitation estimate may be overestimated, due to certain aspects not being prudent and/or efficient. This is particularly evident in view of the material matters discussed in Table 3.

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<sup>333</sup> As summarised in the executive summary (pp. 17–21) and detailed in the rest of the Advisian report.

**Table 3 Summary of material differences between GHD and Advisian**

<i>Individual aspect</i>	<i>Advisian's approx. decrease in estimate from GHD's costs</i>	<i>GHD's position (reference to GHD report)</i>	<i>Advisian's position (reference to Advisian report)</i>
Waste disposal	\$31.71 million of direct costs	GHD assumed non-contaminated waste would be disposed at Hogan's Pocket Waste Facility (65 km from site) (p. 139) and contaminated waste transported to a commercial facility in Roma (750 km from site) (p. 133). The resulting disposal rate is \$383 per tonne (p. 141).	Advisian assumed general waste disposal at Paget Transfer Station (30 km from site) and contaminated waste at Hogan's Pocket (65 km from site) (p. 31). The resulting disposal rate is \$350 per tonne (pp. 19, 49).  Advisian noted that neither contaminated waste site (Hogan's Pocket or Roma) currently has capacity to accommodate the demands, but it expects notice periods would allow these facilities to expand (pp. 18, 50).
Bulk earthworks volumes	\$103.33 million of direct costs for all materials handling (earthworks) related costs	GHD modelled pre-construction landform based on digitisation of pre-construction earthworks layout drawings from 1981, and final landform based on Light Detection and Ranging (LIDAR) data flown in 2013, 'as-built' drawings of dams in 2015 and 'as-built drawings' from the 7X expansion project (pp. 47–49).	Advisian independently modelled earthworks volumes using digitised aerial images flown in 1977 as the pre-construction landform (from Department of Natural Resources, Mines and Energy or DNRME) and orthorectified (geometrically corrected) using 2013 LIDAR data (used by GHD) and 2015 digital terrain data (from DNRME). Final landform data was generated from the 2013 LIDAR data, modified for structures anticipated to be removed prior to earthworks. Advisian estimated dam storage volumes from images provided by GHD to calculate water surface levels removed, and verified its estimate during its site visit (pp. 56–62).  In reviewing GHD's approach (without provision of earthworks modelling from GHD), Advisian could only determine the methods used by GHD for Domain 2 (stockyards) and noted GHD's volumes did not match the volumes reported in Axiom's <sup>334</sup> estimate (p. 56).
Bulk earthworks rate		GHD priced plant and labour (with contractor margin) at \$372 per hour with productivity of 27.64 cubic metres per hour,	Advisian estimated plant and labour at \$915 per hour with a productivity of 115 cubic metres per hour, resulting in a 'sell price' of \$7.96 per cubic metre (pp. 18, 77). Advisian explained these figures are based on its industry and commercial sources

<sup>334</sup> GHD subcontracted the estimation of the rehabilitation costs to Axiom.

<i>Individual aspect</i>	<i>Advisian's approx. decrease in estimate from GHD's costs</i>	<i>GHD's position (reference to GHD report)</i>	<i>Advisian's position (reference to Advisian report)</i>
		resulting in a 'sell price' of \$13.46 per cubic metre. <sup>335</sup> GHD did not elaborate on these figures.	specific to Queensland, verified by recent bulk earthworks projects in the state (p. 18).
Imported clean fill		GHD applied a clean fill rate of \$35 per cubic metre (but did not clarify its source) <sup>336</sup> , and Axiom applied a rate of \$50 per cubic metre (based on recent project experience in the locality) (p. 139). This resulted in two different rates for imported clean fill being used in GHD's estimate.	Advisian sourced screened topsoil rates delivered to site by local landscaping suppliers. It applied a higher rate of \$48.50 per cubic metre (including contractor mark-up). Advisian stated this rate is a conservative position given the large quantities would likely be supplied by a producer that would be able to pass on savings from economies of scale (p. 18).
Contaminated soil removal	\$51.78 million of direct costs for all contaminated soil and substrate removal related costs	GHD assumed removal of 400 millimetres of bedding coal and contaminated soil. It did not provide an explanation for this assumption. <sup>337</sup>	Advisian assumed removal of 250 millimetres of contaminated soil based on recent commercial experience with a producer with similar expected hydrocarbon contamination in the soil (p. 19). It also assumed bedding coal is removed prior and sold by DBCTM to cover costs under normal operating conditions (p. 53).
Contaminated road substrate removal		GHD assumed removal of 500 millimetres of material under roads removed. It did not provide an explanation for this assumption. <sup>337</sup>	Advisian assumed removal of 250 millimetres of road substrate based on recent commercial experience with a producer with similar expected hydrocarbon contamination of road substrate (pp. 19–20). It made the assumption that any large contamination spills would be cleaned up and earthen pads were contaminate-free at time of construction.
Contaminated substrate removal under substation		GHD assumed removal of 1 metre of material under substation areas, classified as low contamination substrate. It did not provide an explanation for this assumption. <sup>337</sup>	Advisian assumed removal of 250 millimetres of material under substation areas (pp. 19–20). It made the assumption that any large contamination spills would be cleaned up and earthen pads were contaminate-free at time of construction. This position was based on recent commercial experience with a producer with similar expected hydrocarbon contamination.

<sup>335</sup> These assumptions were not reported by GHD but were determined in Advisian's review of GHD's cost estimation and modelling (Advisian report, p. 18). Advisian noted that it could not verify how GHD determined its bulk earthworks rates or if it was peer-reviewed to a similar rigour.

<sup>336</sup> This assumption was not reported by GHD but determined in Advisian's review of GHD's cost estimation and modelling (Advisian report, p. 50).

<sup>337</sup> This assumption was not reported by GHD but determined in Advisian's review of GHD's cost estimation and modelling (Advisian report, pp. 19–20).

<i>Individual aspect</i>	<i>Advisian's approx. decrease in estimate from GHD's costs</i>	<i>GHD's position (reference to GHD report)</i>	<i>Advisian's position (reference to Advisian report)</i>
Offshore pile removal	\$45.86 million of direct costs	GHD considered two options (full or partial removal) (p. 52) and estimated for full removal of piles. Its justification for this choice was that completely removing piles maximises long-term rehabilitation of the offshore domain (p. 86).  GHD identified that there is no leading practice method or preferable environmental option accepted by government agencies and there has also not been a similar project with matched scale or varying locations with similar marine environment to benchmark an approach (p. 52).	In reviewing GHD's approach, Advisian came to the position that complete removal of piles could have a detrimental impact on marine life. Given the agreed positions of letting the sea floor fill in naturally over time, its position was for the piles to be cut to just below the existing seafloor level. It explained that this would allow embedded parts to be covered over time as the seafloor is naturally restored to its natural state (p. 52).
Indirect labour and project management costs	Between \$5.79 million and \$30.79 million of the total estimate—depending on the allowance for DBCTM's project management role	GHD utilised two approaches for indirect labour rates. It used a first principles build-up for one portion of its estimate <sup>338</sup> , and its subcontractor (Axiom) applied a 10 per cent allowance to the direct costs estimated for rehabilitation works. The latter approach outlined that the project management team was assumed to be supplied by DBCTM (p. 142).	Advisian assumed project management would be outsourced to a relevant Tier 1 contractor and built up the relevant costs based on an organisational structure it developed (pp. 48–49). It also added a 10 per cent allowance (\$50 million) for costs it assumed DBCTM would bear as part of its project management role but implied this was highly conservative and included for comparison purposes with GHD. It suggested this cost could be approximately five per cent of direct cost (p. 125).
Risk and contingency allowance	\$100 million of the total estimate	GHD applied an additional 25 per cent to direct costs as risk and contingency allowance. <sup>339</sup> It did not provide an explanation for this assumption nor a reference for this benchmark.	Advisian built-up a risk profile for each type of work by domain, based on prevailing documentation and verified its risk profiles during its site visit (pp. 126–128). It also included client risks and other contingencies based on an assumption of project management by a Tier 1 contractor (pp. 123–124).

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<sup>338</sup> This assumption was not reported by GHD but determined in Advisian's review of GHD's cost estimation and modelling (Advisian report, pp. 47–48).

<sup>339</sup> This assumption was not reported by GHD but determined in Advisian's review of GHD's cost estimation and modelling (Advisian report, p. 126).

### Way forward

Although we currently consider GHD's estimated rehabilitation cost may be overestimated and therefore not representative of DBCTM's efficient costs of rehabilitating the DBCT site, we do not have sufficient information to form a definitive view on an appropriate rehabilitation cost estimate for the 2019 DAU.

We note that several aspects of GHD's rehabilitation plan did not have sufficient justification in comparison to Advisian's report, such as the assumptions for soil and substrate removal, benchmarks for risk and contingency allowances, and decision to apply different rates for imported clean fill and the sources for these rates. We consider that GHD may be able to better explain the particular reasons for its approach to these matters, where the explanations of those reasons were not included in its reporting or adequately ventilated during Advisian's review. Additional information from DBCTM and GHD in response to our concerns on these matters would enable us to make a decision from a more informed position.

We are also cognisant that where the consultants have taken fundamentally different positions in the absence of prevailing standards (e.g. for the removal of offshore piles, choice of waste disposal locations), further public consultation may bring forward more conclusive information in favour of one approach over the other, or consideration of alternative positions that are more prudent and/or efficient.

Therefore, we invite stakeholders, including DBCTM (with advice from GHD), to make submissions in response to our draft decision on DBCTM's rehabilitation cost estimate. In particular, we seek informed comments on the material aspects of GHD's rehabilitation plan outlined in Table 3, particularly from stakeholders with relevant technical expertise and experience, or informed by relevant expert advice. We have published the Advisian report with this draft decision and note that we published the GHD report with DBCTM's 2019 DAU in July 2019. Thus, we are of the view that all stakeholders would be able to make informed submissions on the rehabilitation plan and cost estimate, having regard to the material published, and where appropriate, seek expert technical advice in developing these submissions.

We intend to review any further submissions received in relation to the rehabilitation cost estimate (as with other matters in this draft decision) to determine an appropriate rehabilitation cost estimate for the 2021 AU. To that end, following receipt of submissions on the draft decision, we may elect to then facilitate additional direct discussions between DBCTM/GHD, Advisian, and other stakeholders (and their corresponding technical advisors), to determine appropriate positions for the rehabilitation plan and total cost. If we elect to facilitate such discussions, we will:

- publish any submissions received on this draft decision, and the rehabilitation plans and cost estimates
- notify stakeholders of our intended process for the discussion
- provide interested parties sufficient opportunity to participate and engage expert advisors.

### 7.5.2 Determination of the remediation component of access charges

DBCTM has not proposed a specific method to calculate the individual remediation charges, but instead proposed that this would be determined through the negotiation and/or arbitration process. Although stakeholders have submitted that we should determine the remediation

charges<sup>340</sup>, we are presently minded that this would not be appropriate under a pricing model that does not include a reference tariff.

Critically, we are not convinced that access seekers would be unable to effectively negotiate a remediation charge with DBCTM from an informed position or will have their interests be materially impacted (s. 138(2)(e) of the QCA Act), if sufficient information has been provided by DBCTM and is publicly available elsewhere. As discussed above, we intend to determine an appropriate rehabilitation cost estimate under the 2021 AU, which would provide DBCTM and access seekers a consistent basis for the determination of the corresponding remediation charges in negotiations. We will publish all relevant consultants' reports and our analysis outlining our determination of this estimate with our final decision on the 2019 DAU. In addition, we consider DBCTM's provision of historical and prevailing information regarding the remediation allowance (as outlined in our recommended amendments to schedules H and I in the 2019 DAU) should provide sufficient additional information for an access seeker to negotiate its remediation charge from an informed position. For clarity, this additional information includes:

- under our proposed amendments to DBCTM's information provision obligations prior to lodgement of an access application—historical information on the remediation allowance approved by us since 2006
- under our proposed information provision obligations as part of an indicative access proposal (IAP)
  - forecast rehabilitation costs under DBCTM's information provision obligations, which we would have assessed prior to approval of the 2019 DAU, and
  - information regarding the outcomes of any commercial arbitration relating to access to the DBCT service, which may include determinations on the remediation charge.

We also consider that access to arbitration by us on this matter provides sufficient protection to access seekers that DBCTM would not be able to exercise its market power and force an access seeker to accept a remediation charge that is inappropriate.

At this stage, we are satisfied that access seekers would be able to negotiate a remediation charge with DBCTM from a sufficiently informed position, under a pricing model that does not specify a reference tariff or a remediation charge. As outlined above, we consider our determination of a rehabilitation cost estimate, DBCTM's information provision obligations under an amended 2019 DAU, and availability of QCA arbitration sufficiently balances out the interests of DBCTM and access seekers in negotiations (ss. 138(2)(c), (e) of the QCA Act).

### 7.5.3 Future updating of rehabilitation costs

We acknowledge the DBCT User Group's concerns around DBCTM proposing to significantly increase the rehabilitation cost estimate after our consideration and approval of an increase during the 2015 DAU process, despite no change to DBCTM's legal obligations.<sup>341</sup> However, we are presently of the view that an increase is warranted based on review of the rehabilitation plans and costs developed by GHD and Advisian. We consider that the increased detail and scrutiny to the likely scope of works of both plans have clearly identified that a rehabilitation cost estimate of \$432.69 million, approved in 2016, would leave DBCTM with insufficient funds to meet its rehabilitation obligations, and thus would not be an appropriate basis to determine the

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<sup>340</sup> DBCT User Group, sub. 2, p. 50, sub. 9, p. 37; New Hope Group, sub. 3, p. 13.

<sup>341</sup> DBCT User Group, sub. 2, p. 50.

remediation allowance, given the requirements to ensure DBCTM has the ability to recover its efficient costs (s. 168A(a) of the QCA Act).

As mentioned previously, we recognise the significant uncertainty in forecasting rehabilitation costs for DBCTM's obligations that will not be due for at least 30 years. Therefore, we do not consider a change to the rehabilitation cost estimate is only warranted for a change in DBCTM's legal obligations. We acknowledge that in the period leading up to DBCTM's rehabilitation obligations falling due, there may be other matters that impact the final cost of rehabilitation including:

- changes to the list of assets being decommissioned (e.g. due to expansions)
- an increased understanding of the final scope of works (e.g. as evident with increased detail of DBCTM's proposal assessed in this DAU)
- possible changes to environmental standards and legislation governing rehabilitation projects
- changes in relevant markets that may materially impact rehabilitation costs or alter the projected term to rehabilitation.

In addition, the DBCT User Group has also identified other sources of uncertainty to the rehabilitation costs, namely improvements to efficiency and technology that may reduce costs, and the State potentially requiring a different standard to rehabilitation.<sup>342</sup>

As noted above, our assessment of DBCTM's rehabilitation plan is based only on prevailing information and does not speculate on matters that may affect the rehabilitation plan and cost in the future. Instead, we expect DBCTM to seek to update the rehabilitation cost estimate in the future, based on changing circumstances, to ensure the remediation charges reflect the efficient costs of rehabilitation. We intend to assess the merits of any updates to an approved rehabilitation cost estimate based on the criteria of prudence and efficiency (section 7.5.1). We also note that access holders and seekers have opportunities to raise matters that may impact the rehabilitation cost estimate including through submissions to an investigation conducted by us, such as our assessment of a DAU or DAAU (ss. 138(3)(c)–(d)). As with other matters, these submissions may include reports prepared by stakeholders' expert consultants to justify positions, which we will consider in accordance with the QCA Act (s. 174).

We do not consider it appropriate for DBCTM to seek to determine a remediation charge based on a rehabilitation plan (or an update to an approved rehabilitation plan and cost) that we have not assessed. We consider such an approach could result in multiple arbitrations over the same matter, which we believe would impact access seekers asymmetrically. We believe that any changes or updates to the rehabilitation plan and cost should be assessed either as part of a DAU or DAAU process, to allow us to effectively consider the matter and make a decision that balances the criteria in section 138(2) of the QCA Act. While we do not presume DBCTM will take the former approach with an approved 2021 AU, we consider outlining our views accordingly is critical to avoid its occurrence.

#### 7.5.4 Protection of rehabilitation funds

We acknowledge the DBCT User Group's concerns about the status of the users' (past and future) payments for remediation in order to guarantee security of the funds for rehabilitation in the

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<sup>342</sup> DBCT User Group, sub. 2, p. 50.

future.<sup>343</sup> In past DAU assessments, we calculated the annual remediation allowance having regard to a notional sinking fund, which is an estimate of the accumulated remediation allowances, escalated by the approved WACC as a proxy for an expected interest rate. While this notional sinking fund gives some idea of the status of users' remediation payments (and could be ascertained using prevailing information on remediation allowance approvals), it does not guarantee the actual status of the funds collected by DBCTM to date.

It should be noted that DBCTM's rehabilitation obligations are based on the PSA, to which only DBCTM and DBCT Holdings (the State) are parties to. We are not a party to the PSA and have no role in its enforcement. We consider our current role with regard to rehabilitation of DBCT is limited to ensuring that DBCTM is entitled to earn sufficient funds for future rehabilitation works based on an expected revenue that is at least enough to meet the expected efficient cost of rehabilitating the site (ss. 138(2)(c), (g) and 168A(a) of the QCA Act), while also ensuring access seekers and holders are not overcharged for remediation to the point of inefficiently reducing access to DBCT (ss. 138(2)(a), (e), (h) of the QCA Act).

We note the QCA Act does not contemplate us having a direct role in monitoring or enforcing environmental obligations at DBCT, either under the PSA or wider environmental regulations. We also acknowledge the absence of other legislation governing rehabilitation of assets like DBCT, or Ministerial direction outlining additional tasks for us regarding the rehabilitation of the Terminal, that would require consideration as part of our assessment of the 2019 DAU. As such, we do not presently consider it appropriate to require further reporting of the status of the rehabilitation sinking fund for DBCT, or for DBCTM to demonstrate such protection of funds as part of the 2019 DAU.

## 7.6 Conclusion

We do not presently consider it appropriate to approve DBCTM's proposed rehabilitation cost estimate of \$1.22 billion. We believe this cost may be overestimated and if it is accepted as a basis to determine remediation charges, we consider this could provide DBCTM with remediation payments that are higher than the expected efficient cost of rehabilitation of the DBCT site, which is at odds with the interests of access seekers and holders (ss. 138(2)(e), (h) of the QCA Act). Conversely, we regard commencing negotiation of a remediation charge based on an overestimated rehabilitation cost could result in potential delays due to ineffective negotiations and/or need for arbitration to determine remediation charges, which would be inconsistent with the promotion of economically efficient investment, operation and use of DBCT (s. 138(2)(a) of the QCA Act).

We are particularly concerned with specific aspects of the rehabilitation plan developed by DBCTM's consultant, GHD, which has been used to estimate the expected rehabilitation cost (as outlined in Table 3). We observed a lack of transparency and insufficient justification across several aspects of the plan, which could suggest that the estimate is based on imprudent and/or inefficient works.

We do not have sufficient information to form a view on the appropriate rehabilitation cost estimate at this stage. As such, we encourage stakeholders to provide informed submissions on the matters discussed in this chapter, particularly in relation to critical aspects of the rehabilitation plan developed by DBCTM's consultant (detailed in section 7.5.1).

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<sup>343</sup> DBCT User Group, sub. 2, p. 52.

We will have regard to any matters raised and discussed in subsequent consultation on the rehabilitation of DBCT in our determination of a rehabilitation cost estimate that would be appropriate to approve under section 138(2) of the QCA Act.

#### Draft decision

- (1) Our draft decision is to refuse to approve DBCTM's proposal for the total rehabilitation cost estimate of \$1.22 billion.
- (2) Without reflecting on parties or consultants, given the broad range of estimates provided by reputable technical advisors, we are not in a position to confidently form a view on an estimate of the efficient rehabilitation costs.
- (3) Reliance on either estimate currently available could lead to negotiations of the remediation charge not appropriately balancing the interests of stakeholders.
- (4) We invite stakeholders to comment on the matters discussed in this chapter, particularly the positions taken on material aspects of DBCTM's rehabilitation plan, which we will take into consideration in our determination of an appropriate rehabilitation cost estimate.

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## 8 NON-PRICING PROVISIONS

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In this chapter, we explain our preliminary views and draft decisions on the non-pricing provisions in DBCTM's 2019 DAU (Table 4). In some cases, we have identified issues that would benefit from further collaboration or discussion between stakeholders.

DBCTM said the 2019 DAU is largely unchanged from the 2017 AU, apart from the approach to determine access charges.<sup>344</sup> To date, stakeholders have extensively commented on pricing matters, but provided limited comments on non-pricing matters. While this chapter focuses on specific provisions in the 2019 DAU that have attracted comments from stakeholders, we acknowledge the DBCT User Group's view that pricing and non-pricing provisions in the 2019 DAU are closely connected and should be considered as a package.<sup>345</sup> Therefore, we are particularly interested in stakeholders' views about the appropriateness of the non-pricing provisions in light of our draft decision that it may be appropriate for us to approve a pricing model without a reference tariff (see Chapters 5 and 6).

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<sup>344</sup> DBCTM, sub. 1, pp. 58, 67, sub. 8, pp. 12–13.

<sup>345</sup> DBCT User Group, sub. 11, pp. 5–6, 34.

**Table 4 Non-pricing provisions—draft decision**<sup>346, 347</sup>

<i>DBCTM 2019 DAU</i>	<i>Section</i>	<i>QCA analysis and draft decision</i>
<b>Amendments to the undertaking</b>		
To the extent that the 2017 AU is amended in accordance with the QCA Act before the 2019 DAU is approved, DBCTM intends to apply to amend the approved undertaking to reflect those changes.	s. 1.6(b)	The DBCT User Group did not support the proposal, because it did not know what amendments DBCTM is proposing. <sup>348</sup> Acknowledging the DBCT User Group's concern, DBCTM said it was content to remove the provision, as it had no practical effect. <sup>349</sup> While DBCTM's proposal only records an intention and is unlikely to have any adverse effects on stakeholders, we consider that DBCTM should amend the 2019 DAU to remove the provision, given stakeholder agreement (ss. 138(2)(b), (c), (e), (h) of the QCA Act).
<b>Operation and maintenance contract</b>		
Unlike in the 2017 AU, there is no explicit requirement for DBCTM to maintain the operation and maintenance contract <sup>350</sup> or to ensure the contract terms remain substantially consistent with the terms specified in the undertaking.	s. 3.3 (and sch. I) of the 2017 AU	DBCTM considered that access holders were adequately protected, because DBCT PL is, and will remain, the operator (s. 3.2), and any amendments to the contract would need to be negotiated and agreed with DBCT PL. <sup>351</sup> The DBCT User Group did not support DBCTM's proposal, on the basis that the independent operator was critically important to users, and underpins fundamental parts of the undertaking and access agreements. It also said section 3.3 provided users with certainty about the operation and maintenance of the Terminal and the terms of the Operator's appointment. <sup>352</sup> While DBCTM maintained its view that section 3.3 was unnecessary, it was prepared to reinstate the provision, given the DBCT User Group's concerns. <sup>353</sup> Given DBCTM's agreement, we consider the 2019 DAU should be amended to reinstate the relevant provisions from the 2017 AU (ss. 138(2)(b), (c), (e), (h) of the QCA Act).

<sup>346</sup> Unless otherwise specified, references to sections, clauses and schedules in this table are to the 2019 DAU or 2019 DAU SAA, as applicable.

<sup>347</sup> DBCTM's revised proposal (sub. 8) included minor clarifying amendments to sections 3.1(d) and 5.5(k). These proposed amendments are not discussed in this table, but we consider they are appropriate to be approved.

<sup>348</sup> DBCT User Group, sub. 2, p. 66.

<sup>349</sup> DBCTM, sub. 10, p. 30.

<sup>350</sup> Under the OMC, DBCTM has engaged DBCT PL (which is owned by access holders) to operate and maintain the Terminal on a day-to-day basis.

<sup>351</sup> DBCTM, sub. 1, pp. 58, 67.

<sup>352</sup> DBCT User Group, sub. 2, pp. 66–67.

<sup>353</sup> DBCTM, sub. 10, p. 31.

<i>DBCTM 2019 DAU</i>	<i>Section</i>	<i>QCA analysis and draft decision</i>
<b>Renewal/expiry of access applications</b>		
Access applications will expire on 31 August each year (unless renewed under s. 5.3A).	s. 5.3(f)	<p>DBCTM said its proposal would provide for the efficient administration of the application process.<sup>354</sup> The DBCT User Group generally supported the proposal, observing that a uniform date would reduce the administrative burden and improve certainty for all supply chain participants. However, it suggested the following amendments:<sup>355</sup></p> <ul style="list-style-type: none"> <li>• Paragraph (b) of the definition of 'access application' (sch. G) should extend to section 5.3, to clarify that applications submitted before the commencement of the 2019 DAU are access applications for the purposes of section 5.3.</li> <li>• Section 5.3(f) should be simplified so that it reads:  <p style="margin-left: 40px;">'Subject to an Access Application or Renewal Application (as applicable) lapsing or otherwise being rejected by DBCT Management in accordance with this Undertaking, any Access Application will expire on the next occurring 31 August, unless renewed under section 5.3A.'</p> </li> </ul> <p>DBCTM supported the amendments suggested by the DBCT User Group.<sup>356</sup> We consider those amendments are appropriate to clarify and simplify the provisions, which is in the interests of all parties (ss. 138(2)(b), (c), (e), (h) of the QCA Act).</p>
Unlike in the 2017 AU, DBCTM is not required to advise an access seeker that its access application is about to expire.	s. 5.3(g) of the 2017 AU	<p>The DBCT User Group and New Hope Group did not support the proposed change, because they considered the current notification requirements were not an unreasonable burden on DBCTM, given DBCTM's proposal to standardise application expiry dates.<sup>357</sup> The DBCT User Group also suggested that notifications be sent at least 60 days before the expiry date to ensure access seekers did not inadvertently fail to renew their applications.</p> <p>DBCTM considered that access seekers should be able to manage renewal timeframes, particularly with standardised expiry dates.<sup>358</sup> In our view, access seekers should be responsible for tracking and managing expiry dates. Nevertheless, reflecting DBCTM's agreement to reinstate the notification requirement because of stakeholder concerns<sup>359</sup>, we consider it is appropriate for DBCTM to amend the 2019 DAU to include the notification requirement from the 2017 AU. We do not, however, consider there is justification to extend the timeframe to 60 days, as suggested by the DBCT User Group.</p>

<sup>354</sup> DBCTM, sub. 1, pp. 58, 67.

<sup>355</sup> DBCT User Group, sub. 2, p. 67.

<sup>356</sup> DBCTM, sub. 10, p. 31.

<sup>357</sup> DBCT User Group, sub. 2, p. 68; New Hope Group, sub. 3, p. 13.

<sup>358</sup> DBCTM, sub. 1, pp. 58, 67, sub. 10, p. 32.

<sup>359</sup> DBCTM, sub. 10, p. 32.

<i>DBCTM 2019 DAU</i>	<i>Section</i>	<i>QCA analysis and draft decision</i>
<b>Content of access applications and renewal applications</b>		
<p>The renewal application must include a revised commencement date for access, where the previously nominated date has now passed.</p>	s. 5.3A(a)(1)	<p>DBCTM said its proposal would ensure applications stay up-to-date, and enable the notifying access seeker process to operate as intended.<sup>360</sup> The DBCT User Group and New Hope Group generally supported the proposal.<sup>361</sup> However, to prevent the revised commencement date from also being in the past, the DBCT User Group suggested replacing the proposed drafting of section 5.3A(a)(1) with the following:</p> <p style="padding-left: 40px;">'a revised date for commencement of Access which must be no earlier than 1 September following the date of the Renewal Application.'</p> <p>The DBCT User Group also suggested clarifying the definition of 'renewal application' (sch. G), as follows:</p> <p style="padding-left: 40px;">'Renewal Application means an application to renew an Access Application made under section 5.3A.'</p> <p>DBCTM agreed with the drafting amendments suggested by the DBCT User Group<sup>362</sup>, and we consider those amendments are appropriate to improve the clarity and workability of the drafting, which is in the interests of all parties (ss. 138(2)(b), (c), (e), (h) of the QCA Act).</p>
<p>Compared to the 2017 AU, DBCTM proposed the following changes to the templates for access applications and renewal applications:</p> <ul style="list-style-type: none"> <li>• clarifying that the commencement date for the delivery of coal to the Terminal must be no later than five years from the application date (consistent with s. 5.3(d)(2)(A))</li> <li>• only permitting ramp-up volumes to the start of the fourth financial year</li> <li>• requiring information about the status of the mine's environmental approval.</li> </ul>	sch. A	<p>DBCTM said that these additional requirements would add clarity and encourage only those access seekers with viable projects to submit access applications, which would promote the efficient management of the queue and utilisation of capacity.<sup>363</sup> New Hope Group supported the proposal and, along with the DBCT User Group, acknowledged the requirement to demonstrate project readiness would maintain the integrity of the queue.<sup>364</sup></p> <p>However, the DBCT User Group queried the requirement for information about the status of a mine's environmental approval, noting there was already a requirement for information on progress to obtain 'necessary approvals'.<sup>365</sup> DBCTM's argument was that the additional information would help to assess whether the mine would be operational by the requested commencement date.<sup>366</sup></p>

<sup>360</sup> DBCTM, sub. 1, p. 59.

<sup>361</sup> DBCT User Group, sub. 2, p. 68; New Hope Group, sub. 3, p. 13.

<sup>362</sup> DBCTM, sub. 10, p. 32.

<sup>363</sup> DBCTM, sub. 1, pp. 64–65.

<sup>364</sup> New Hope Group, sub. 3, p. 13; DBCT User Group, sub. 2, pp. 68–69, 77.

<sup>365</sup> DBCT User Group, sub. 2, pp. 68–69.

<sup>366</sup> DBCTM, sub. 1, p. 65, sub. 10, p. 32.

<i>DBCTM 2019 DAU</i>	<i>Section</i>	<i>QCA analysis and draft decision</i>
		<p>Like the DBCT User Group, we query why the requirement for information on progress to obtaining necessary approvals for the mine (see item 13 of sch. A) is not sufficient to enable DBCTM to assess project readiness.<sup>367</sup> However, we acknowledge and support DBCTM's intention to discuss this matter further with stakeholders.<sup>368</sup></p> <p>Noting stakeholder support, we consider the other changes proposed by DBCTM are appropriate to be approved, because they are consistent with the efficient use of the Terminal and provide an appropriate balance between the interests of DBCTM and access seekers (ss. 138(2)(a), (b), (c), (e) of the QCA Act).</p>
<b>Terms and conditions of access</b>		
<p>DBCTM may seek—or in some cases require, acting reasonably—terms and conditions for providing access that differ from the terms and conditions in the standard access agreement.</p>	<p>ss. 5.4(e)(5), 5.4(h), 13.1 (and others)</p>	<p>The DBCT User Group said by allowing DBCTM to require agreement on different terms, the purpose of the standard access agreement may be undermined. The DBCT User Group considered the purpose of the standard access agreement was to provide certainty as to the terms DBCTM could require, while allowing access seekers to agree to variations.<sup>369</sup></p> <p>Section 13.1(c) appears to contemplate that access seekers can require DBCTM to contract for access on terms that are substantially the same as the terms in the standard access agreement. To the extent that different terms are sought by either party, section 13.1(c) has been amended to clarify that the matter be referred for arbitration if the parties cannot agree. However, an amendment to section 5.4(e)(5)(A) now refers to an access seeker contracting on the terms of the standard access agreement or, if required by DBCTM, acting reasonably, on other terms agreed between DBCTM and the access seeker. A similar amendment has been made to section 5.4(h).</p> <p>It is unclear precisely what DBCTM intends by these references to it 'requiring' terms that are different to the standard access agreement, which are then agreed. However, as a general observation, we do not consider it likely to be appropriate for DBCTM to have the ability to require (without the agreement of an access seeker) terms that are substantially different to those in the standard access agreement, as this would not provide an appropriate balance between the legitimate interests of DBCTM and those of access seekers (ss. 138(2)(c), (d), (e) of the QCA Act).</p> <p>Consistent with our draft decision that it is appropriate for access charges to be negotiated between the parties, we consider that the 2019 DAU should be amended to provide for DBCTM and the access seeker to negotiate different terms. In that context, it is unlikely to be appropriate to refer to either party 'requiring' the other to adopt terms that depart from the standard access agreement. We consider that the standard access agreement has a role to provide guidance for those negotiations as the agreed 'starting point' (as provided by s. 13.1(d)), and if any departure cannot be agreed then the parties should have access to arbitration.</p>

<sup>367</sup> The definition of 'approvals' in the 2019 DAU includes environmental approvals and licences (sch. G).

<sup>368</sup> DBCTM, sub. 10, p. 32.

<sup>369</sup> DBCT User Group, sub. 11, pp. 36–37.

<i>DBCTM 2019 DAU</i>	<i>Section</i>	<i>QCA analysis and draft decision</i>
<b>Standard access agreement—terms and conditions</b>		
The parties must continue to perform their obligations under the agreement, despite the existence of a dispute.	sch. B, cl. 15.7	DBCTM said the proposal ensures continuity and is a market standard clause for dispute frameworks. <sup>370</sup> The DBCT User Group supported the proposal. <sup>371</sup> We consider the proposal is appropriate to be approved, as it provides certainty to the contracting parties (ss. 138(2)(b), (c), (e), (h) of the QCA Act).
Where there is excess demand for capacity, DBCTM may bring forward the date by which access holders are required to exercise or waive their options to renew their agreements. <sup>372</sup> DBCTM must notify access holders in the order of their agreement expiry dates, starting with the earliest expiring agreement. Notices may be given to access holders at the same time if their agreements expire within six months of each other. Each access holder (or tranche of access holders) has 90 days to exercise/waive their option before the next notice can be issued.	cl. 5.4(n) and sch. B, cl. 20	We seek stakeholders' views about the workability of these provisions, as we understand they have recently been applied in the context of the 8X expansion project. We would particularly like to know whether the requirement to provide each tranche of access holders with 90 days to exercise their options would delay the expansion process. To the extent problems have been identified, we encourage stakeholders to suggest potential solutions.
<b>Allocating short-term available capacity</b>		
A process has been included for allocating 'short-term available capacity', which is defined as 'Available System Capacity, which is commencing within the next 12 months and that is not able to be renewed.'	s. 5.4 and sch. G	DBCTM said its proposal would promote the efficient and equitable allocation of short-term parcels of capacity that may become available from time to time but would otherwise not be used. <sup>373</sup> The DBCT User Group supported the intention of the proposal but was concerned it would enable DBCTM to offer capacity on a short-term basis, even if that capacity should be available for long-term contracting (with associated renewal rights and other protections). It also said the process lacked clarity. For example, it was not clear whether capacity would be offered as a single block or split into smaller blocks. <sup>374</sup> DBCTM responded that greater prescription and clarity was unnecessary and said there was no risk it would offer long-term capacity as short-term capacity, noting that limited capacity was expected to become available. <sup>375</sup>

<sup>370</sup> DBCTM, sub. 1, p. 65.

<sup>371</sup> DBCT User Group, sub. 2, p. 55.

<sup>372</sup> Otherwise, access holders can exercise their options at any time up to 12 months before the agreement expires (cl. 20(a) of the 2017 SAA and 2019 DAU SAA).

<sup>373</sup> DBCTM, sub. 1, pp. 59, 67.

<sup>374</sup> DBCT User Group, sub. 2, pp. 69–70, sub. 11, p. 34.

<sup>375</sup> DBCTM, sub. 10, p. 33.

<i>DBCTM 2019 DAU</i>	<i>Section</i>	<i>QCA analysis and draft decision</i>
		<p>While we consider the definition of 'short-term available capacity' does not sufficiently distinguish it from capacity that would be available for long-term contracting, it is unclear whether DBCTM would have an incentive to offer long-term capacity as short-term capacity. We also note DBCTM's view that it would be inappropriate for new access seekers to obtain evergreen renewal rights through short-term agreements, on the basis that it may create unintended incentives for capacity hoarding.<sup>376</sup> However, the DBCT User Group did not appear to argue for the provision of renewal rights in short-term agreements, and did not suggest amending the provisions in the 2019 DAU that limit renewal rights to agreements that are at least 10 years long (s. 13.2 of the 2019 DAU and cl. 20 of the 2019 DAU SAA).</p> <p>We support DBCTM's intention to consult with the DBCT User Group about the concerns raised<sup>377</sup> and welcome further submissions from stakeholders about the appropriateness of DBCTM's proposal.</p>
<p>After receiving notification that short-term capacity is available, access seekers have 30 days to deliver a signed access agreement, and any required security.</p>	<p>s. 5.4(e)(5)</p>	<p>The DBCT User Group suggested extending the timeframe to enable access seekers to organise the relevant documents and security. For contracts up to five years long, it suggested 60 days, and for contracts longer than five years, it suggested 90 days.<sup>378</sup> DBCTM said it was comfortable adopting the timeframes suggested by the DBCT User Group<sup>379</sup>, and we consider the 2019 DAU should be amended to include those suggested timeframes (ss. 138(2)(b), (c), (e), (h) of the QCA Act).</p>
<p>Access seekers will not be removed from the queue if they do not take up short-term available capacity.</p>	<p>s. 5.4(i)(2)</p>	<p>DBCTM said its proposal would protect those access seekers that are only seeking long-term capacity.<sup>380</sup> The DBCT User Group agreed with the proposal, for the reasons given by DBCTM.<sup>381</sup> We consider DBCTM's proposal is appropriate to be approved because it is in the interests of access seekers (s. 138(2)(e) of the QCA Act).</p>
<p>An access seeker intending to progress its application for short-term available capacity is required to notify DBCTM of its intention within 14 days of receiving an indicative access proposal.</p>	<p>s. 5.6(a)</p>	<p>The DBCT User Group suggested 10 business days would be appropriate to account for periods with several public holidays.<sup>382</sup> DBCTM said it was comfortable adopting the timeframe proposed by the DBCT User Group.<sup>383</sup> Taking into account stakeholder agreement, we consider that 10 business days is an appropriate timeframe (ss. 138(2)(b), (c), (e), (h) of the QCA Act).</p>

<sup>376</sup> DBCTM, sub. 10, p. 33.

<sup>377</sup> DBCTM, sub. 10, p. 33.

<sup>378</sup> DBCT User Group, sub. 2, p. 70.

<sup>379</sup> DBCTM, sub. 10, p. 34.

<sup>380</sup> DBCTM, sub. 1, p. 59.

<sup>381</sup> DBCT User Group, sub. 2, p. 70.

<sup>382</sup> DBCT User Group, sub. 2, p. 75.

<sup>383</sup> DBCTM, sub. 10, p. 40.

<i>DBCTM 2019 DAU</i>	<i>Section</i>	<i>QCA analysis and draft decision</i>
<b>Notifying access seeker process</b>		
<p>The notifying access seeker process provides an opportunity for access seekers to take priority in the queue. An access seeker that is not the first in the queue (a 'notifying access seeker') may notify DBCTM that it is seeking access to available capacity at an earlier date<sup>384</sup> than the first access seeker in the queue.</p> <p>DBCTM must then notify all access seekers in the queue (each a 'notified access seeker') of their opportunity to submit a signed access agreement with an access commencement date that is the same as, or earlier than, the date proposed by the notifying access seeker.</p> <p>DBCTM will assign capacity to the notified access seeker(s) with the earliest commencement date(s). If two or more access seekers have the earliest date(s), they will be prioritised based on their respective positions in the queue.</p>	<p>ss. 5.4(e)–(h)</p>	<p>DBCTM said the purpose of its proposal was to promote the efficient allocation of capacity, by ensuring capacity was contracted from the earliest possible date.<sup>385</sup> The DBCT User Group generally supported DBCTM's proposal, but suggested amendments to:<sup>386</sup></p> <ul style="list-style-type: none"> <li>• address a drafting issue that may unintentionally result in all access seekers in the queue receiving priority over the notifying access seeker, even if the notifying access seeker had an earlier commencement date</li> <li>• clarify that the notifying access seeker cannot nominate a commencement date in the past (because other access seekers must match the commencement date to obtain access)</li> <li>• clarify that, if the first access seeker in the queue has a nominated commencement date that is already in the past, a notifying access seeker will be deemed to have sought access from an earlier date than that first access seeker, if it seeks access starting within three months of providing the notice that triggers the notifying access seeker process.</li> </ul> <p>DBCTM supported the amendments suggested by the DBCT User Group, but on the last point said that six months made more sense than three months, from a commercial perspective. DBCTM planned to consult further with stakeholders on this issue.<sup>387</sup></p> <p>New Hope Group argued that the ability for notified access seekers to amend their commencement date should be removed and that access seekers should only be permitted to submit an application ahead of the notifying access seeker if they are ahead of the notifying access seeker in the queue.<sup>388</sup> We do not support New Hope Group's proposal. Under DBCTM's proposal, all access seekers in the queue have an opportunity to change their access commencement date, including the notifying access seeker. With the drafting amendments proposed by the DBCT User Group, another access seeker would not receive priority over the notifying access seeker, unless they sought an earlier commencement date.<sup>389</sup></p> <p>Subject to receiving further information from stakeholders about an appropriate time period (discussed above), and taking into account DBCTM's support, we consider that the amendments suggested by the DBCT User Group clarify and improve the workability of the provisions, which is in the interests of all parties (ss. 138(2)(b), (c), (e), (h) of the QCA Act). With these amendments, we consider that DBCTM's proposal would be appropriate to be approved, because it would be consistent with:</p> <ul style="list-style-type: none"> <li>• the efficient use of the Terminal and DBCTM's legitimate business interests to allocate capacity to the access seeker with the earliest commencement date (ss. 138(2)(a), (b), (c) of the QCA Act)</li> <li>• the rights of access seekers to take up capacity based on their position in the queue, while also being able to jump the queue if they are willing to take up capacity at an earlier date (s. 138(2)(e) of the QCA Act).</li> </ul>

<sup>385</sup> DBCTM, sub. 1, pp. 59–60.

<i>DBCTM 2019 DAU</i>	<i>Section</i>	<i>QCA analysis and draft decision</i>
After receiving notification, notified access seekers must return a signed access agreement and any required security within three months. <sup>390</sup>	s. 5.4(e)(5)	The DBCT User Group said proposed security requirements should be included in the notice, because this would help access seekers to decide whether to take up the capacity, and to meet the security requirements within the specified timeframe. <sup>391</sup> However, DBCTM said this would not be possible, because it does not have sufficient information at the time of issuing the notice. <sup>392</sup>  Provisions exist for access seekers to dispute the security requirements and to provide security after the agreement is signed, if they are unable to provide it earlier (see s. 5.4(g)). Access seekers could also approach DBCTM for advice on likely security requirements, noting that DBCTM expressed a willingness to discuss likely requirements with access seekers. <sup>393</sup> In our view, these provisions sufficiently protect access seekers, and DBCTM's proposal is appropriate to be approved (ss. 138(2)(b), (c), (e) of the QCA Act).
If the notice period under section 5.4(e)(5) spans two financial years, the earliest possible commencement date for access will be the first day of the new financial year.	s. 5.4(f)(3)	DBCTM said the requirement was necessary to work with the annual true-up mechanism for access charges in standard access agreements. <sup>394</sup> The DBCT User Group supported the proposal, noting the issues raised by DBCTM. <sup>395</sup> We consider DBCTM's proposal is appropriate to be approved, as it should improve the workability of the 2019 DAU, which is in the interests of all parties (ss. 138(2)(b), (c), (e), (h) of the QCA Act).
DBCTM is not obliged to enter into an access agreement with an access seeker if DBCTM would be entitled to cease negotiations under section 5.8, had the usual negotiation process been followed.	s. 5.4(f)	The DBCT User Group supported the proposal, because it considered the ability to cease negotiations should be the same, regardless of the process followed. <sup>396</sup> In our view, DBCTM's proposal is appropriate to be approved, because the reasons for ceasing negotiations under the usual negotiation process are also relevant if the notifying access seeker process is instead followed (s. 138(2)(h) of the QCA Act).

<sup>385</sup> DBCTM, sub. 1, pp. 59–60.

<sup>386</sup> DBCT User Group, sub. 2, pp. 70–71.

<sup>387</sup> DBCTM, sub. 10, p. 35.

<sup>388</sup> New Hope Group, sub. 3, pp. 14–15.

<sup>389</sup> If those access seekers sought the same commencement date, priority would be given based on their respective position in the queue.

<sup>390</sup> Although a shorter timeframe applies in respect of short-term available capacity (see discussion above).

<sup>391</sup> DBCT User Group, sub. 2, p. 71.

<sup>392</sup> DBCTM, sub. 10, pp. 35, 37.

<sup>393</sup> DBCTM, sub. 10, pp. 35.

<sup>394</sup> DBCTM, sub. 1, pp. 67–68, sub. 10, p. 36.

<sup>395</sup> DBCT User Group, sub. 2, p. 71–72.

<sup>396</sup> DBCT User Group, sub. 2, p. 72.

<i>DBCTM 2019 DAU</i>	<i>Section</i>	<i>QCA analysis and draft decision</i>
If an access seeker wants to dispute the security requested by DBCTM, it must do so within 14 days of receiving the request.	s. 5.4(g)(2)	DBCTM said that imposing a time limit would avoid delays in negotiating and signing agreements. <sup>397</sup> The DBCT User Group supported the proposal, but suggested 10 business days to account for periods with several public holidays. <sup>398</sup> DBCTM said it was comfortable adopting the timeframe proposed by the DBCT User Group. <sup>399</sup> Taking into account stakeholder agreement, we consider that 10 business days is an appropriate timeframe (ss. 138(2)(b), (c), (e), (h) of the QCA Act).
After receiving an offer from DBCTM to enter into an access agreement, an access seeker has 30 business days to sign an agreement.	ss. 5.4(h), 5.4(i)(5)	DBCTM said it proposed to include a timeframe to provide certainty to access seekers in the queue. <sup>400</sup> It considered 30 business days was appropriate, because it was consistent with the timeframe for responding to an indicative access proposal. <sup>401</sup> The DBCT User Group supported the proposal, subject to the notifying access seeker receiving the same rights as notified access seekers to dispute security and obtain additional time to obtain security (under s. 5.4(g)). <sup>402</sup> DBCTM was comfortable with the amendments suggested by the DBCT User Group. <sup>403</sup> We consider those amendments are appropriate to provide for the consistent treatment of access seekers participating in the process (s. 138(2)(e) of the QCA Act).
Notified access seekers may be removed from the queue if: <ul style="list-style-type: none"> <li>the nominated commencement date in their access application is within two years of the notifying access seeker's nominated commencement date</li> <li>they do not respond with a signed access agreement within the three-month period specified in section 5.4(e)(5).</li> </ul>	s. 5.4(i)(1)	DBCTM said that including objective criteria would improve certainty and promote the efficient operation of the queue and the efficient allocation of capacity. <sup>404</sup> The DBCT User Group supported including objective criteria to provide greater certainty to all participants, but suggested the following amendments: <sup>405</sup> <ul style="list-style-type: none"> <li>reducing the two-year timeframe to one year, because of the significant cost impacts of an extra year of access charges<sup>406</sup></li> <li>removing the requirement for a dispute to be 'bona fide', because any dispute (including those that DBCTM does not consider to be bona fide) should be resolved before removal</li> <li>clarifying that the reference to the execution of an access agreement is confined to an agreement with a start date sufficient to give the notified access seeker priority under section 5.4(f)</li> </ul>

<sup>397</sup> DBCTM, sub. 1, p. 62.

<sup>398</sup> DBCT User Group, sub. 2, p. 72.

<sup>399</sup> DBCTM, sub. 10, p. 37.

<sup>400</sup> No timeframe was specified in the 2017 AU.

<sup>401</sup> DBCTM, sub. 1, pp. 62, 68.

<sup>402</sup> DBCT User Group, sub. 2, p. 73.

<sup>403</sup> DBCTM, sub. 10, p. 37.

<sup>404</sup> DBCTM, sub. 1, pp. 60, 68.

<sup>405</sup> DBCT User Group, sub. 2, pp. 73–74.

<sup>406</sup> New Hope also disagreed with the two-year timeframe, arguing it would punish access seekers for committing to the timelines in their access application and result in an unreasonable financial burden (New Hope Group, sub. 3, p. 15).

<i>DBCTM 2019 DAU</i>	<i>Section</i>	<i>QCA analysis and draft decision</i>
If there is a 'bona fide' dispute in relation to the access seeker's removal from the queue, the access seeker maintains its position in the queue until the dispute is resolved.		<ul style="list-style-type: none"> <li>clarifying that a notified access seeker that responds with a signed agreement for a lower tonnage or shorter term will maintain its place in the queue for the remaining tonnage/term.</li> </ul> <p>DBCTM said it was comfortable with all but the last of the DBCT User Group's proposed amendments.<sup>407</sup> DBCTM said it was concerned about the potential incentive for access seekers to apply for more tonnage than required to reserve a place in the queue. We support DBCTM's proposal to discuss this issue and potential solutions with stakeholders.</p> <p>We otherwise consider that DBCTM's proposal would be appropriate to be approved, with the amendments suggested by the DBCT User Group (and supported by DBCTM), because it is consistent with the efficient operation of the queue and provides an appropriate balance between the interests of DBCTM and access seekers (ss. 138(2)(a), (b), (c), (e) of the QCA Act).</p>
If, due to insufficient capacity being available, an access seeker does not accept an offer for lower tonnage than sought in its access application, DBCTM may remove the access seeker from the queue.	s. 5.4(i)(6)	The DBCT User Group did not support the proposal, on the basis that a lower tonnage may not be sufficient to meet the access seeker's needs. <sup>408</sup> For example, a certain amount of access may be required to support a greenfield mine development or a mine expansion. DBCTM said it was comfortable removing its ability to remove an access seeker from the queue who did not accept a lower tonnage. <sup>409</sup> Taking into account the DBCT User Group's concerns, and noting DBCTM's support, we consider that DBCTM should amend the 2019 DAU to remove this requirement (ss. 138(2)(b), (c), (e) of the QCA Act).
<b>Negotiations following provision of indicative access proposal</b>		
An access seeker must start negotiations within 14 days of advising it intends to progress its access application based on the indicative access proposal.	s. 5.7(a)	DBCTM said that including a hard timeframe (rather than 'as soon as reasonably practicable') would ensure that negotiations progress in a timely manner. <sup>410</sup> The DBCT User Group supported the proposal but suggested 10 business days to account for periods with several public holidays. <sup>411</sup> DBCTM agreed with the timeframe proposed by the DBCT User Group. <sup>412</sup> Taking into account stakeholder agreement, we consider that 10 business days is an appropriate timeframe (ss. 138(2)(b), (c), (e), (h) of the QCA Act).
DBCTM may, at any time during the process for negotiating an access agreement, advise the access seeker that it has decided not to enter	ss. 5.8(a)(3)–(4)	DBCTM said its proposal would promote efficient negotiations with access seekers. <sup>413</sup> The DBCT User Group said that many factors can impact the commencement date and the access seeker's financing position over the negotiation period, and suggested drafting amendments. <sup>414</sup>

<sup>407</sup> DBCTM, sub. 10, p. 38.

<sup>408</sup> DBCT User Group, sub. 2, p. 74.

<sup>409</sup> DBCTM, sub. 10, p. 39.

<sup>410</sup> DBCTM, sub. 1, pp. 63, 68.

<sup>411</sup> DBCT User Group, sub. 2, p. 75.

<sup>412</sup> DBCTM, sub. 10, p. 40.

<sup>413</sup> DBCTM, sub. 1, pp. 63, 68, sub. 10, p. 41.

<sup>414</sup> DBCT User Group, sub. 2, p. 75.

<i>DBCTM 2019 DAU</i>	<i>Section</i>	<i>QCA analysis and draft decision</i>
<p>into an access agreement, but only if at least one of the criteria in section 5.8 is met. The following criteria were proposed (in addition to the criteria in the 2017 AU):</p> <ul style="list-style-type: none"> <li>• The access seeker has no reasonable likelihood of gaining or utilising access from the nominated commencement date (s. 5.8(a)(3)).</li> <li>• The access seeker is not willing or able to provide the security reasonably requested by DBCTM, in accordance with section 5.9 (s. 5.8(a)(4)).</li> </ul>		<p>DBCTM said the purpose of the first additional criterion (s. 5.8(a)(3)) was to prevent access seekers from engaging in negotiations to reserve capacity for future operations that are unlikely to eventuate in the timeframe proposed, and which may cause inefficient contracting of capacity. DBCTM also said the provision was consistent with the criteria for rejecting an access application (under s. 5.3(d)).<sup>415</sup> The DBCT User Group suggested amending section 5.8(a)(3) in the following way:<sup>416</sup></p> <p style="padding-left: 40px;">'DBCT Management is reasonably of the opinion that the Access Seeker has no genuine intention of gaining Access, or has no reasonable likelihood of utilising Access, at the level of capacity sought or <del>from</del> <u>within a reasonable period after</u> the nominated commencement date for Access;'</p> <p>DBCTM said it was comfortable with the suggested amendment<sup>417</sup>, and we consider the amendment is appropriate to provide for a reasonable degree of flexibility (ss. 138(2)(b), (c), (e) of the QCA Act).</p> <p>DBCTM said the second additional criterion (s. 5.8(a)(4)) was a practical outcome of concerns that an access seeker (or its guarantor) is not of good financial standing.<sup>418</sup> The DBCT User Group suggested amending the drafting in the following way:<sup>419</sup></p> <p style="padding-left: 40px;">'DBCT Management is reasonably of the opinion that the Access Seeker or its guarantor is not or is likely not to be reputable or of good financial standing or that the Access Seeker is not willing or able to provide security reasonably requested by DBCT Management in accordance with Section 5.9 <u>by the time that Security is required to be provided in accordance with an Access Agreement</u>.'</p> <p>DBCTM said it did not understand the purpose of the suggested amendment and noted it may not be workable, because negotiations occur before an access agreement is signed. We support DBCTM's intention to discuss the matter with the DBCT User Group<sup>420</sup> and welcome further submissions from stakeholders.</p>
<p>When forming a view on whether the access seeker is reputable or of good financial standing (see s. 5.8(a)(4)), and on the likelihood of the access seeker complying with an access agreement (see s. 5.8(a)(2)), DBCTM can</p>	<p>s. 5.8(c)</p>	<p>Compared to the 2017 AU, the broader definition of 'related entity' applies, instead of 'related body corporate'<sup>421</sup>, and the assessment of performance under other agreements is no longer restricted to the previous two years. DBCTM said its proposal would allow it to take into account all prior dealings in considering whether the access seeker is reputable</p>

<sup>415</sup> DBCTM, sub. 1, pp. 63.

<sup>416</sup> DBCT User Group, sub. 2, p. 75.

<sup>417</sup> DBCTM, sub. 10, p. 41.

<sup>418</sup> DBCTM, sub. 1, pp. 63.

<sup>419</sup> DBCT User Group, sub. 2, p. 75.

<sup>420</sup> DBCTM, sub. 10, p. 41.

<sup>421</sup> 'Related entity' and 'related body corporate' each have the meaning given to the relevant term in the *Corporations Act 2001* (Cth) (see sch. G of the 2017 AU and 2019 DAU).

<i>DBCTM 2019 DAU</i>	<i>Section</i>	<i>QCA analysis and draft decision</i>
consider the performance of an access seeker, or a related entity of the access seeker, under other relevant agreements.		and of good financial standing. <sup>422</sup> We consider the proposal is reasonable and appropriate to be approved, as it is consistent with DBCTM's legitimate business interests (ss. 138(2)(c), (d) of the QCA Act).
<b>Expansion process</b>		
<p>When there is insufficient capacity within the next five years to satisfy the requirements of access seekers in the queue, such that an expansion may be justified, DBCTM will invite each access seeker to enter into a conditional access agreement.</p> <p>A conditional access agreement is an access agreement that is conditional on capacity being delivered by an expansion.</p>	s. 5.4(l)	<p>The DBCT User Group said that access seekers should not be invited to enter into a conditional access agreement until the relevant expansion is sufficiently defined through feasibility studies.<sup>423</sup> DBCTM said it did not support the DBCT User Group's suggestion, because it could result in unnecessary expenditure on feasibility studies, given the way the expansion process interacts with the accelerated process for access holders to exercise their options to renew access agreements.<sup>424</sup></p> <p>Under the standard access agreement, if DBCTM receives an access application that cannot be met by the existing Terminal, unless access holders waived their options to extend their agreements, DBCTM may bring forward the date by which access holders are required to exercise or waive those options (as discussed above). If sufficient capacity becomes available through this process, the expansion may no longer be required. DBCTM said that the DBCT User Group's suggested amendment would mean that feasibility studies would need to be completed before the accelerated options process was complete. This is because an access application must be converted into an access agreement within three months of the completion of the accelerated options process, for the exercise/waiving of options to have any effect (see cl. 20(e) of the 2017 SAA and 2019 DAU SAA).</p> <p>Our preliminary view is that DBCTM's proposal is appropriate to be approved. If an extension does not need to proceed because sufficient capacity is made available by access holders waiving their options, inefficient expenditure on feasibility studies may be avoided (ss. 138(2)(a), (g) of the QCA Act). As DBCTM may be able to recover the costs of feasibility studies from access seekers through underwriting agreements, the proposal may also be in the interests of access seekers (s. 138(2)(e) of the QCA Act).</p>
An access seeker may make an offer to enter into a conditional access agreement that is subject to conditions precedent specified by DBCTM (which must relate to the matters in s. 5.4(l)(3)). The agreement will terminate if a relevant condition	s. 5.4(l)	The DBCT User Group said it was unreasonable that DBCTM could decide whether access seekers could include conditions precedent, and was concerned that access seekers would be required to contract for capacity that does not meet their needs (in terms of cost or timing), or for which they are unable to obtain matching rail rights. <sup>425</sup> DBCTM said that, in the context of the current 8X expansion, the issues raised by the DBCT User Group are addressed through the termination provisions of the conditional access agreement (including the attached standard access agreement), and the access application to which the conditional access agreement relates. <sup>426</sup>

<sup>422</sup> DBCTM, sub. 1, pp. 63, 68.

<sup>423</sup> DBCT User Group, sub. 9, p. 39, sub. 11, p. 36.

<sup>424</sup> DBCTM, sub. 10, pp. 28–29.

<sup>425</sup> DBCT User Group, sub. 11, pp. 35–36.

<sup>426</sup> DBCTM, sub. 10, p. 27.

<i>DBCTM 2019 DAU</i>	<i>Section</i>	<i>QCA analysis and draft decision</i>
precedent is not fulfilled within a reasonable period.		As we are not aware of provisions in the 2019 DAU that would provide for access seekers to terminate their agreements, we seek further information from DBCTM about the nature and source of the termination provisions it has referred to. In section 6.4, we discuss the concerns raised by stakeholders about the requirement for an access seeker to enter into a conditional access agreement without a price or expansion pricing approach, and without any express mechanism to terminate the agreement if they cannot negotiate an appropriate price. Given these concerns, we are seeking further comments from stakeholders about providing for a more balanced negotiation process on pricing matters, including the scope to make amendments to the 2019 DAU. Stakeholders may wish to consider commenting in the context of the broader issues raised about contracting uncertainty.
Unless otherwise agreed between the parties, an underwriting agreement <sup>427</sup> must be on the terms of the standard underwriting agreement approved by the QCA.	s. 5.10(q)(9)	The DBCT User Group said that underwriting agreements should define the expansion to be studied and the funding envelope for the study. <sup>428</sup> The standard underwriting agreement that was approved by the QCA in February 2020 <sup>429</sup> provides for details of the studies, including the scope and estimated costs, to be included as an annexure to the agreement. DBCTM said that the standard underwriting agreement issued to access seekers in February 2020 for the 8X expansion sets out the specific expansion, scope of the study and funding envelope. <sup>430</sup> Our draft decision is that DBCTM's proposal sufficiently protects the interest of access seekers and is appropriate to be approved (s. 138(2)(e) of the QCA Act). Should the DBCT User Group maintain that amendments to DBCTM's proposal are required, further information and justification for its position should be provided.
<b>Disputes on re-ordering the queue</b>		
An access seeker must raise a dispute in relation to DBCTM's intended re-ordering of the queue within 15 business days of being notified of DBCTM's intention.	s. 5.4(w)	DBCTM said the proposed timeframe provides for disputes to be raised and resolved in a timely manner, giving certainty to access seekers. <sup>431</sup> The DBCT User Group supported the proposal. <sup>432</sup> We consider DBCTM's proposal is in the interests of access seekers and is appropriate to be approved (s. 138(2)(e) of the QCA Act).

<sup>427</sup> An underwriting agreement enables DBCTM to recover the costs of feasibility studies if an expansion does not proceed (sch. G).

<sup>428</sup> DBCT User Group, sub. 9, p. 39.

<sup>429</sup> The approved standard underwriting agreement is available on our [website](#).

<sup>430</sup> DBCTM, sub. 10, pp. 28, 45.

<sup>431</sup> DBCTM, sub. 1, pp. 62–63, 68.

<sup>432</sup> DBCT User Group, sub. 2, pp. 74–75.

<i>DBCTM 2019 DAU</i>	<i>Section</i>	<i>QCA analysis and draft decision</i>
<b>Access transfers</b>		
The criteria DBCTM must apply when deciding whether to consent to access transfers are alternative, not cumulative, criteria.	s. 5.13(a)	DBCTM said its proposal amends the 2017 AU to clarify the intended operation of the section. <sup>433</sup> The DBCT User Group supported DBCTM's proposal and agreed that the criteria were meant to be alternatives. <sup>434</sup> We consider that DBCTM's proposal is appropriate to be approved, as it clarifies the operation of this section, which is in the interest of all parties (ss. 138(2)(b), (c), (e), (h) of the QCA Act).
<b>Terminal regulations</b>		
The terminal regulations govern procedures for operating the Terminal and providing services under access agreements. If the Operator of the Terminal would like to amend the terminal regulations, it must obtain DBCTM's consent. Before deciding whether to provide consent, DBCTM must conduct reasonable consultation with stakeholders and consider the request against specified criteria. Stakeholders have 30 days to lodge an objection to DBCTM's decision with the QCA, and the QCA must then make a determination in accordance with the dispute resolution procedures (s. 17).	s. 6	The DBCT User Group said it was difficult for users to understand the impacts of proposed changes to the terminal regulations. To address this concern and to improve the assessment of the proposed changes by DBCTM (and, in the event of any objections, the QCA), the DBCT User Group suggested the following amendments to the 2019 DAU:  'where changes [to the terminal regulations] are proposed that would be reasonably anticipated to impact on ordering, scheduling, plann[ing] or capacity, ... those changes should only be able to be proposed where the operator has first obtained and provides to access holders and access seekers in the queue robust and independent modelling about how the changes would impact on users, terminal capacity and terminal efficiency.' <sup>435</sup>  While we acknowledge the concerns of the DBCT User Group, we query whether an undertaking could impose such an obligation on the Operator of the Terminal when it is not the access provider. The DBCT User Group and other stakeholders may wish to discuss their concerns with DBCTM and provide further comments in submissions.
<b>Reporting tonnage information to Aurizon Network</b>		
DBCTM can share information on changes in contracted tonnage with the below-rail provider (currently Aurizon Network). This includes information on individual access holders that do not exercise an option to renew their contract tonnage.	s. 8.4(c)	DBCTM said the provision would promote supply chain efficiency. <sup>436</sup> The DBCT User Group supported the provision of aggregated information but not information on individual access holders. It considered that measures were already in place to address rail and port alignment issues, including rail capability forming part of the access application process, and requirements in the Aurizon Network undertaking for port capacity to be demonstrated before rail capacity could be contracted. <sup>437</sup> In response, DBCTM reiterated that supply chain efficiency would improve if it were able to identify relevant access holders. It proposed to consult with stakeholders about possible ways to address their concerns,

<sup>433</sup> DBCTM, sub. 1, p. 69, sub. 10, p. 41.

<sup>434</sup> DBCT User Group, sub. 2, p. 76.

<sup>435</sup> DBCT User Group, sub. 2, pp. 54–55.

<sup>436</sup> DBCTM, sub. 1, pp. 64, 69.

<sup>437</sup> DBCT User Group, sub. 2, p. 76.

<i>DBCTM 2019 DAU</i>	<i>Section</i>	<i>QCA analysis and draft decision</i>
		without adversely affecting supply chain efficiency. <sup>438</sup> We welcome further submissions from stakeholders following these discussions.
<b>Ring-fencing</b>		
All references to the 'Trading SCB' and related provisions have been removed, and relevant consequential amendments made. <sup>439</sup>	s. 9 (and others)	<p>DBCTM said the proposed changes reflect its decision to cease the activities of the Trading SCB from September 2018. DBCTM advised that the Trading SCB would be deregistered before the commencement date of the 2019 DAU.<sup>440</sup></p> <p>The DBCT User Group supported the proposal, subject to the inclusion of a requirement that DBCTM (and its related bodies corporate) would not own any supply chain businesses.<sup>441</sup> DBCTM agreed with the DBCT User Group's proposed amendment.<sup>442</sup> We consider the amendment is appropriate, taking into account the interests of DBCTM, access seekers and access holders (ss. 138(2)(b), (c), (e), (h) of the QCA Act). We note that DBCTM could submit a DAAU for our consideration if circumstances change.</p> <p>The DBCT User Group also said that DBCTM should be required to provide evidence it had deregistered the Trading SCB.<sup>443</sup> DBCTM said it was willing to provide evidence to the QCA when the deregistration process was complete, which would be soon.<sup>444</sup></p>
<b>Capacity determinations</b>		
If the Integrated Logistics Company is the independent expert in relation to a capacity estimation, it will be assumed to have consulted with its members.	s. 12.1(h)	DBCTM said the intention of its proposal was to improve the efficiency of the consultation process. <sup>445</sup> However, the DBCT User Group said it did not support the proposal, because the Integrated Logistics Company is an independent supply chain body and it could not be assumed that members would have been consulted. It also noted that some users had withdrawn their membership in recent years, and queried why DBCTM's proposal would improve the efficiency of the consultation process, given that forums could be held to consult with users as a group. <sup>446</sup> In its most recent submission, DBCTM reiterated its view that a requirement to consult with all access holders would be

<sup>438</sup> DBCTM, sub. 10, p. 42.

<sup>439</sup> In the 2017 AU, the Trading SCB is defined as 'a Supply Chain Business in the Brookfield Group that solely engages in the trading of secondary capacity at the Terminal and which includes, as at the Commencement Date, Brookfield Port Capacity Pty Ltd ACN 134 741 567' (see sch. G of the 2017 AU).

<sup>440</sup> DBCTM, sub. 1, pp. 64, 69.

<sup>441</sup> DBCT User Group, sub. 2, pp. 66, 76.

<sup>442</sup> DBCTM, sub. 10, pp. 30, 43.

<sup>443</sup> DBCT User Group, sub. 2, pp. 66, 76.

<sup>444</sup> DBCTM, sub. 10, p. 43.

<sup>445</sup> DBCTM, sub. 1, pp. 64, 69, sub. 10, p. 43.

<sup>446</sup> DBCT User Group, sub. 2, pp. 76–77.

<i>DBCTM 2019 DAU</i>	<i>Section</i>	<i>QCA analysis and draft decision</i>
		<p>inefficient, noting the potential to extend timeframes and delay contracting. However, DBCTM proposed to discuss the issue further with the DBCT User Group.<sup>447</sup></p> <p>We encourage stakeholders to discuss their concerns and attempt to reach consensus about a possible way forward. We look forward to receiving further submissions from stakeholders.</p>
<p>The only grounds for disputing or challenging DBCTM's capacity estimates are a breach of the undertaking, a breach of an access agreement, or manifest error.</p>	<p>s. 12.1(i)</p>	<p>DBCTM said its proposal would promote certainty and avoid unnecessary challenges to the expert's decision.<sup>448</sup> The DBCT User Group opposed the proposal for the following reasons:</p> <ul style="list-style-type: none"> <li>• The 'manifest error' standard was too high and unclear.</li> <li>• No justification had been provided as to why determinations made in bad faith should no longer be covered.</li> <li>• It was appropriate to retain the ability for users to dispute the estimate, where a material volume of users (by tonnage) objected on similar grounds.<sup>449</sup></li> </ul> <p>Given the concerns raised by the DBCT User Group, DBCTM said it was prepared to reinstate the drafting from the 2017 AU.<sup>450</sup> Taking into account stakeholder support, we consider the 2019 DAU should be amended to reinstate the drafting from the 2017 AU. In making our draft decision, we have considered the interests of DBCTM, access seekers and access holders (ss. 138(2)(b), (c), (d), (e), (h) of the QCA Act).</p>

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<sup>447</sup> DBCTM, sub. 10, p. 43.

<sup>448</sup> DBCTM, sub. 1, pp. 64, 69.

<sup>449</sup> DBCT User Group, sub. 2, p. 77.

<sup>450</sup> DBCTM, sub. 10, p. 44.

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## GLOSSARY

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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
ARR	Annual Revenue Requirement
COAG	Council of Australian Governments
DAAU	draft amending access undertaking
DAU	draft access undertaking
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
DNRME	Department of Natural Resources, Mines and Energy
HPCT	Hay Point Coal Terminal
IAP	indicative access proposal
LIDAR	Light Detection and Ranging
NECAP	non-expansion capital expenditure
NGL	National Gas Law
NGR	National Gas Rules
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
WCIR	Water Charge (Infrastructure) Rules

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## APPENDIX A: LIST OF SUBMISSIONS

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

<i>Stakeholder</i>	<i>Sub. no.</i>	<i>Submission</i>	<i>Date</i>
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 pricing model	November 2019
DBCT User Group	6	Further submission on pricing model	November 2019
New Hope Group	7	Further submission on pricing model	November 2019
DBCT Management	8	Response to QCA interim draft decision	April 2020
DBCT User Group	9	Response to QCA interim draft decision	April 2020
DBCT Management	10	Collaborative submission	June 2020
DBCT User Group	11	Collaborative submission	June 2020

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## REFERENCES

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- Australian Competition and Consumer Commission (ACCC), *A guide to resolution of access disputes under Part IIIA of the Trade Practices Act 1974*, April 2006.
- Pricing principles for price approvals and determinations under the Water Charge (Infrastructure) Rules 2010*, July 2011.
- Australian Energy Regulator (AER), *Financial reporting guideline for light regulation pipeline services*, October 2019.
- DBCT Management (DBCTM), *2019 Draft Access Undertaking for DBCT coal handling service*, letter to the QCA, 1 July 2019.
- GHD Advisory (GHD), *DBCT Rehabilitation Plan and Rehabilitation Cost Estimate*, prepared for DBCT Management, June 2019.
- Productivity Commission, *Review of the National Access Regime*, inquiry report no. 17, September 2001.
- Price Regulation of Airport Services*, inquiry report no. 19, May 2002.
- Review of Price Regulation of Airport Services*, inquiry report no. 40, December 2006.
- Economic Regulation of Airport Services*, inquiry report no. 57, December 2011.
- 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.
- DBCT Management's 2019 draft access undertaking*, interim draft decision, February 2020.