Dalrymple Bay Coal Terminal User Group

Declaration review regarding Dalrymple Bay Coal Terminal

Submission in response to:

1) submission provided by DBCT Management dated 30 May 2018

2) addendum to that submission provided by DBCT Management dated 18 June 2018

3) QCA Staff Questions dated 6 June 2018

16 July 2018

1 Introduction

This submission is made on behalf of the DBCT User Group, in relation to the Queensland Competition Authority's (***QCA***) review of the declaration of the coal handling service provided at the Dalrymple Bay Coal Terminal (the ***Declared Service***).

It principally addresses:

(a) the submission opposing declaration provided to the QCA by DBCT Management (***DBCTM***) dated 30 May 2018 (the ***DBCTM Initial Submission***);

(b) the addendum to the DBCTM Initial Submission provided to the QCA by DBCTM dated 18 June 2018 (the ***DBCTM Information Addendum***); and

(c) the QCA staff questions dated 6 June 2018 (the ***QCA Questions***).

For completeness, the DBCT User Group notes that the submission does not seek to address the late submissions made by DBCTM on 29 June 2018, as the QCA has indicated that late submission will not be taken into account in the draft QCA decision, but all stakeholders will have the opportunity to address that material before the final decision by the QCA.

This submission is entirely consistent with the DBCT User Group's previous submission of 30 May 2018 (the ***DBCT User Group Initial Submission***), including the supporting:

(a) legal advice from Allens (the ***Allens Advice***);

(b) PricewaterhouseCoopers report (the ***PWC Report***); and

(c) The Castalia Strategic Advisers report (the ***Castalia Report***),

which were included with that submission and should be read together with each of those documents.

2 Executive Summary

The DBCT User Group continues to consider it is clear, having considered all submissions that touch on the review of the Declared Service, that each of the access criteria are satisfied in respect of the Declared Service.

In summary, that is the case for the reasons set out below:

2.1 Criterion (b) – Foreseeable demand is met by DBCT at least cost

The DBCTM/HoustonKemp approach is fundamentally flawed

The DBCT User Group continues to consider it is clear that foreseeable demand over the declaration period is met at least cost by the facility (i.e. the Dalrymple Bay Coal Terminal (***DBCT***)), rather than 2 or more facilities.

The DBCTM Initial Submission which reaches the contrary view does so in reliance on the HoustonKemp Economists Report – Does DBCT's coal handling service satisfy criterion (b)? dated 28 May 2018 (the ***HoustonKemp Criterion (b) Report***).

The analysis in respect of criterion (b) contained in both the DBCTM Initial Submission and the HoustonKemp Criterion (b) Report is fundamentally flawed as:

(a) rather than applying the well settled approach to market definition of starting with the relevant service and then seeking to determine which services are close substitutes, through tests like the hypothetical monopolist test, DBCTM and HoustonKemp simply blindly assume that if producers acquire coal handling services from two coal terminals each of those services must necessarily be close substitutes and therefore in the same market;

(b) the demand projections relied on substantially overstate 'foreseeable demand' by ignoring contractual and operational issues that will result in part or all of the production of a project not being part of the demand for the Declared Service;

(c) the approach taken to the determination of the declaration period for the purposes of assessing criterion (b) is clearly inconsistent with the legislature's intention; and

(d) in numerous places the data and information used in the HoustonKemp Criterion (b) Report, including the data drawn from the AME Advisory Coal Industry Report (the ***AME Report***), is either misleading, inconsistent with industry views about particular projects, or simply wrong.

In support of the DBCT User Group's analysis in relation to criterion (b) this submission encloses:

(a) in Schedule 1, a supplementary report from PricewaterhouseCoopers (the ***2nd PWC Report***) which principally responds to the HoustonKemp Criterion (b) Report; and

(b) in Schedule 2, a report from WoodMackenzie which provides a far more accurate forecast of foreseeable demand than that relied on by DBCTM (the ***WoodMackenzie Report***).

Market Definition

On the key issue of whether the services of other terminals are in the same market, the DBCT User Group notes that DBCTM/HoustonKemp's analysis is fundamentally flawed as they assert:

(a) that a market can be defined other than by reference to substitution (which is completely inconsistent with every judicial and regulatory decision in relation to the approach to market definition);

(b) services provided at the Hay Point Coal Terminal (***HPCT***) are in the same market as the Declared Service without having considered that what is presented as evidence of substitution is very clearly asymmetric substitution which is only available to BHP affiliated users (which form only a small proportion of DBCT's customer base) – such that services provided at HPCT are not substitutable for the Declared Service, being services provided by DBCT;

(c) services provided at coal terminals at other ports are in the same market as the Declared Service without addressing the clear evidence that the services of other terminals:

  (i) involve cost differences far greater than a small but significant non-transitory increase in price (a ***SSNIP***);

  (ii) are different services, which those DBCT User Group members which use more than one terminal have confirmed are acquired for their different properties (particularly from a risk-diversification, portfolio optimisation, blending and co-shipping perspective) not due to a price incentive or as a competitive substitute for the Declared Service;

  (iii) are clearly not choices for the vast majority of DBCT customers – in particular:

    (A) a significant proportion of producers exporting through DBCT are 'captive' and to and only use terminals at the Port of Hay Point because it will never be economically viable to switch to other terminals;

    (B) RG Tanna (***RGT***) is only really used by producers that are clearly on the southern margin of the Hay Point catchment and using some marginal RGT capacity for non-price reasons – such that their limited use of RGT is merely the usual 'fuzziness' that you would anticipate at the edge of the geographic dimension of a market; and

(C) Abbot Point Coal Terminal (***APCT***) is only really used by Hay Point catchment producers that are clearly a long distance from both DBCT and APCT, and any past substitutability is not continuing but instead reflective of the market at the time of the long term contracting of that APCT capacity, not now or over the declaration period.

When the evidence of coal producer behaviour and reasons for it are properly understood, it is clear that none of the other terminals' services are close substitutes which provide a price or other competitive constraint on the Declared Service.

Consequently the DBCT User Group remains strongly of the view that the only possible appropriate market definition for the purposes of assessing criterion (b) is the Hay Point catchment common user coal handling services market.

Foreseeable Demand

In addition, DBCTM/HoustonKemp demand forecasts have materially overstated 'foreseeable demand' as they:

(a) assert that foreseeable demand is determined by simply aggregating total forecast production from the relevant mines which ignores:

(b) the impact on demand of coal producers' existing contractual arrangements (and the very strong disincentive that rail access, rail haulage and coal terminal take or pay contracts create for demand being diverted during the term of those contracts); and

(c) the incentives that risk-diversification, portfolio, blending and co-shipping arrangements create for some coal producers to ship part of their production through a different terminal despite that second terminal not being a close substitute for the Declared Service;

(d) erroneously treat some projects as being in the Hay Point catchment which are not and rely on extremely bullish projections about coal projects that will be developed in order to provide an inflated demand forecast; and

(e) erroneously seek to interpret foreseeable demand as referable to contracted capacity not actual demand.

Other flaws – Approach to the Declaration Period and Treatment of 9X Expansion

While criterion (b) will clearly be satisfied once the market is defined and foreseeable demand is calculated appropriately, the DBCT/HoustonKemp approach to the 'declaration period' in criterion (b) and which expansions are taken into account is also flawed.

In respect of the declaration period, DBCTM/HoustonKemp simply ignore that the clear legislative intention was that multiple declaration periods would be considered and, where the access criteria were not met over one potential declaration period but were met over another, a declaration period would be adopted over which the access criteria were met.

It is also clear that if foreseeable demand warranted doing so (which is does not if properly calculated) the 9X expansion of DBCT would need to be taken into account as it is 'reasonably possible' (and therefore meets the threshold set out in section 76(3) QCA Act). For an expansion to be reasonably possible it does not have to be 'reasonably likely' or 'probable' and does not require the high level of certainty that DBCTM asserts.

2.2 Criterion (a) – Promotion of Competition

The DBCTM/HoustonKemp Approach is fundamentally flawed

The DBCT User Group continues to consider it is clear that declaration promotes a material increase in competition in at least one dependent market.

The DBCTM Initial Submission which reaches the contrary view does so in reliance on the HoustonKemp Economists report – Does DBCT's coal handling service satisfy criterion (a)? dated 29 May 2018 (the ***HoustonKemp Criterion (a) Report***).

The analysis in respect of criterion (a) contained in both the DBCTM Initial Submission and the HoustonKemp Criterion (a) Report is also fundamentally flawed as:

(a) it applies an interpretation of what is required for there to be a 'promotion of competition' that is inconsistent with the well settled meaning of that terminology;

(b) it is entirely reliant on the proposed Access Framework (and related deed poll) which do not provide a proper counterfactual; and

(c) it fails to appreciate that the Access Framework will, even if it was assumed to provide a proper counterfactual, result in a differential impact on various customers of the Declared Service and it is the resulting stark inequality of pricing and other treatment which, particularly in the Hay Point catchment coal tenements market, will mean that declaration promotes a material increase in competition.

In support of the DBCT User Group's analysis in relation to criterion (a) this submission encloses in Schedule 3, a response from Castalia Strategic Advisers on the HoustonKemp Criterion (a) Report (the ***2nd Castalia Report***).

Promotion of competition

All case law precedents and regulatory guidance in respect of the meaning of 'promotion of competition' in the context of criterion (a) support that it should be interpreted as follows:

The promotion of a material increase in competition involves an improvement in the opportunities and environment for competition such that competitive outcomes are materially more likely to occur

By failing to recognise that and asserting that the QCA needs to be satisfied that there would be an immediate promotion of competition, all of DBCTM's and HoustonKemp's conclusions in relation to criterion (b) are fundamentally flawed because they apply the incorrect threshold.

The Access Framework is not an appropriate counterfactual

The proposed terms of the Access Framework do not provide an appropriate counterfactual from which the QCA can seek to determine the likely state of competition in the dependent markets because:

(a) the Access Framework is blatantly contrived solely to try to defeat the declaration continuing – and is therefore a sham counterfactual which it is not appropriate for the QCA to consider for the purposes of criterion (a);

(b) as the Access Framework is not, and has never been, operational or implemented, DBCTM's assertions as to how it will operate are entirely speculative, such that the QCA cannot be satisfied that its impact on dependent markets will be as asserted by DBCTM;

(c) it is so easy for DBCTM to amend the Access Framework that the QCA cannot be satisfied that the likely future state of the dependent markets without declaration should be considered based on DBCTM's proposed initial terms for the Access Framework; and

(d) the ability to detect and enforce breaches of the Access Framework (without the involvement of the QCA and its regulatory powers and given DBCTM's complete exclusion of liability for such breaches under the deed poll) will be so diminished from the

current arrangements under the QCA Act, that the QCA cannot be satisfied that compliance with the Access Framework is the likely counterfactual.

The appropriate counterfactual in which to assess criterion (a) is therefore DBCTM having no contractual constraints beyond the existing user agreements – such that in relation to non-contracted potential future users, DBCTM can engage in monopoly pricing and other monopolistic behaviour without any meaningful constraints.

Even if the Access Framework provides a counterfactual, the 'Ceiling Price' will not have the outcome of volume remaining the same

Even if it was incorrectly assumed that the Access Framework provided the appropriate counterfactual, it is clear that the 'ceiling price' will not have the outcome which it is asserted it will – namely maintaining the same volume of throughput at DBCT.

In particular, that cannot be assumed because:

(a) the ceiling price is completely uncertain and unworkable in a practical sense. It effectively relies on DBCTM being omniscient about and able to determine:

  (i) the price at which the QCA would have hypothetically set the Terminal Infrastructure Charge (***TIC***) – which will become more uncertain as the term of the Access Framework continues; and

  (ii) the price at which throughput through DBCT will remain the same as if that hypothetical floor price applied (which will require DBCTM to accurately predict the production and investment decisions of every user and potential user of DBCT);

(b) that uncertainty is exacerbated further because there is serious information asymmetry which makes it impossible to assume that confidential commercial negotiations will result in a price that is below the ceiling price even if that was DBCTM's intention. It cannot simply be assumed that all users will be able to afford the significant costs of a lengthy negotiation or commercial arbitration against a well-funded sophisticated party like DBCTM who has shown a willingness in all QCA processes to vigorously pursue their position at significant cost and will have clear incentives as a monopolist to price at a level that maximises profit (which will not be equivalent to maintaining throughput); and

(c) even if it was assumed that access prices will be disputed and referred to arbitration, a commercial arbitrator will similarly have serious information asymmetry and be in no better position to ensure that the ceiling price is not breached. An arbitrator in particular will, in contrast to the QCA's role if declaration continued:

  (i) not have the resources or compulsory information production powers or the extensively trained staff with an ability to determine the price and volume that would be likely to apply in the event of declaration and then try to determine a ceiling price; and

  (ii) not have a continuing role such that the next price review is likely to occur with an entirely different arbitrator with none of the experience or knowledge of past issues that have arisen.

As a result it is likely that DBCTM would act as a conventional profit-maximising monopolist and maximise profit with a reduction in output, rather than as a perfectly discriminating monopolist with the omniscience to price in a way that maintains throughput at the same level as would hypothetically have existed based on the regulatory arrangements DBCTM is opposing.

Even if throughput at DBCT remained the same through the Access Framework, it is clear that declaration promotes competition

Finally, even if DBCTM was correct about how the Access Framework would operate it fundamentally overlooks the obvious point that the equality of access terms which exist as a consequence of declaration is a critically important part of ensuring vigorous competition in the Hay Point catchment coal tenements market.

Given that existing users will have the benefit of the pricing regime in their existing user agreements for as long as they exercise their ongoing renewals rights, and future users will be exposed to the uncertain, unworkable and higher pricing under the Access Framework, that equality of access terms will clearly be lost without declaration.

Even on DBCTM's view of how the Access Framework would operate, a comparison of the likely state of that tenements market with and without declaration is:

(a) with declaration – the current vigorous competition in the tenements market we see today, particularly characterised by numerous participants that are new entrants / not existing users of the terminal competing on an equal footing with the existing users due, in large part, to the certainty of access and efficient pricing of the Declared Service (at the same level as existing users) provided by declaration; and

(b) without declaration – the existing DBCT users (and particularly the major users with a portfolio of Hay Point catchment mines) would be so clearly advantaged over such new entrants by the difference in the applicable pricing regimes, that even if volume at DBCT remained the same, the number of acquirers in the tenements market would fall significantly as the existing DBCT users would always be able to obtain more value through future tenement acquisitions given their improved port price position relative to new entrants, and as a natural consequence the incentive of others to invest in dependent quality tenements would be substantially reduced.

In other words, by blindly assuming that equality of throughput at DBCTM with and without the declaration must necessarily result in competition being the same in each dependent market, DBCTM and the HoustonKemp Criterion (b) Report have missed the very clear promotion of competition that declaration produces in the Hay Point catchment coal tenements market.

The problems caused in the tenements market will also have flow on consequences for other dependents markets – such that declaration also produces a clear promotion of competition in the central Queensland rail haulage market as a result of the damage the absence of declaration does particularly to the prospects of new entry into the rail haulage market.

2.3 Criterion (c) – DBCT is significant

For all of the reasons noted in the DBCT User Group Initial Submission, the DBCT User Group continues to consider it is clear that DBCT is significant, having regard to its size and importance to the Queensland economy.

The DBCT User Group notes that DBCTM has put in no submissions in relation to criterion (c) to the contrary, and consequently consider it is beyond doubt that, on the evidence provided to the QCA, criterion (c) is satisfied.

2.4 Criterion (d) – Promotion of the public interest

The DBCT User Group continues to consider it is clear that declaration promotes the public interest.

Contrary to the assertions in the DBCTM Initial Submission, there is clearly no materiality threshold in criterion (d) (see by contrast the wording of criterion (a)). However, even if there was,

it is absolutely clear that the wide range of public benefits produced by declaration means that declaration will promote the public interest.

In particular:

(a) all of the evidence demonstrates that declaration has promoted efficient investment in:

(i) expansion of the terminal – given the numerous past expansions that have been facilitated, the reduction in the risk for DBCTM in achieving a return on expansions that the regulatory arrangements have produced and the protections it has provided against inefficient expansion (particularly when compared to the extent of surplus unutilised capacity now evident in the other coal terminal capacity developed in response to a spike in demand during the mining boom that has not been sustained); and

(ii) investment in dependent markets through the certainty of long term access on reasonable terms and efficient pricing that is provided by declaration; and

the arguments raised by DBCTM in relation to the alleged costs and detriments arising from declaration:

(iii) completely ignore and fail to take into account the costs and detriments that would arise in the absence of declaration (particularly in the case of DBCTM's proposed Access Framework – where the massive costs and inefficiencies caused by the uncertainty its creates, the inefficient economic outcomes that it will result in and excessive costs in private commercial negotiations and arbitration proceedings it will unleash, have all been glossed over by DBCTM);

(iv) fail to acknowledge that much of the alleged costs of regulation are caused by DBCTM's own conduct;

(v) fail to acknowledge that the Declared Service will always be a multi-user service such that some of the coordination costs and inefficiencies that might (in the context of single user infrastructure) be said to result from declaration are not a result of declaration here; and

(vi) are otherwise largely made up of completely unsubstantiated and highly debatable claims about the alleged impacts of regulation, which do not stand up to scrutiny or analysis.

3 Criterion (b) – the Key Issues

Criterion (b) requires:

> *that the facility for the service could meet the total foreseeable demand in the market –*
>
> *(i) over the period for which the service would be declared; and*
>
> *(ii) at the least cost compared to any 2 or more facilities (which could include the facility for the service).*

It is evident from the DBCT User Group Initial Submission and DBCTM Initial Submission that the key issues in contention in respect of criterion (b) are:

(a) the appropriate market definition in which demand is to be measured – principally in relation to whether the services of other coal terminals are substitutable;

(b) how foreseeable demand in the market should be measured – particularly where there are clear contractual constraints and evidence of part of certain mine's demand not being in the relevant market;

(c) whether criterion (b) should only be measured against a single declaration period or whether it should be measured against multiple possible declaration periods – particularly if there is any doubt over whether criterion (b) is satisfied over a particular time period;

(d) how the 'least cost' of meeting that demand should be determined; and

(e) The costs and potential for expanding the facility (i.e. DBCT).

The DBCT User Group considers that DBCTM's reasoning is flawed in each of those respects and, as a result, DBCTM does not properly apply criterion (b).

Criterion (b) will clearly be satisfied even if the DBCT User Group is only correct in relation to the first two issues – market definition and how demand is measured – such that that is the focus for the majority of the DBCT User Group's submissions in respect of criterion (b).

However, this submission goes on to consider the remaining issues for completeness.

4 Criterion (b) – Market definition

4.1 Market definitions contended for and the issues in dispute

The market definitions contended for in the DBCT User Group Initial Submission and DBCTM Initial Submission are:

(a) the Hay Point common user coal handling services market (as per the DBCT User Group Initial Submission); and

(b) the market for coal handling services for mines that are proximate to the Port of Hay Point (as per the DBCTM Initial Submission).

The DBCT User Group and DBCTM are therefore in agreement as to the product/functional dimension of the market, being the provision of coal handling services.

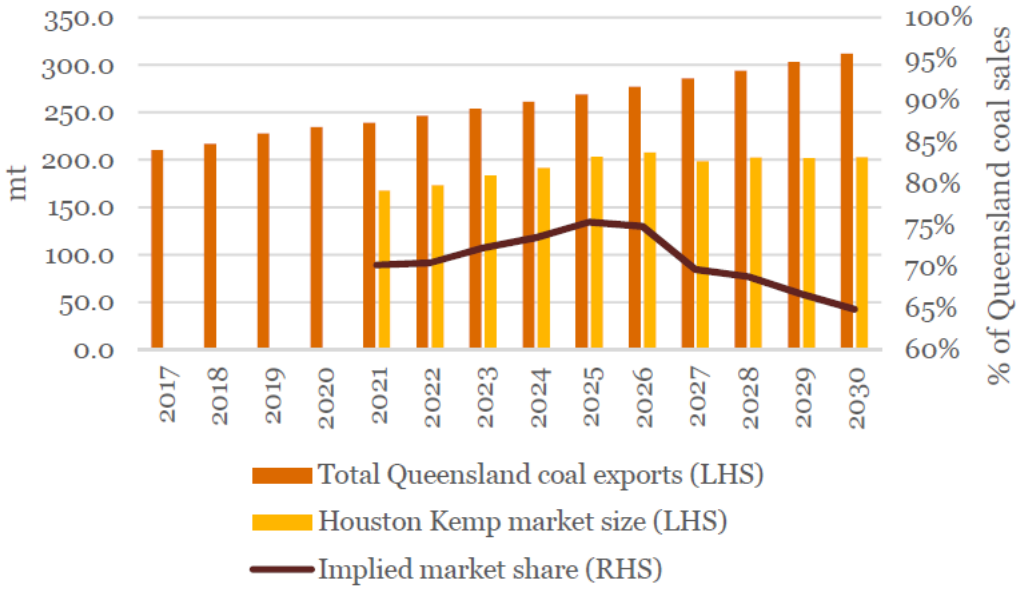
The key difference between the market definitions contended for is whether services provided by Hay Point Coal Terminal (***HPCT***) or by central Queensland coal terminals at other Ports namely Abbot Point Coal Terminal (***APCT***), RG Tanna (***RGT***) and Wiggins Island Coal Export Terminal (***WICET***), should be included in the market.

By assuming they are, despite all evidence to the contrary and by taking an approach to market definition which is completely at odds with the well settled approach applied by Australian courts and the Australian Competition Tribunal, the DBCTM Initial Submission and HoustonKemp

Criterion (b) Report produces an arbitrarily wide market definition and, consequently, a flawed attempt to apply criterion (b).

The artificiality of the DBCTM/HoustonKemp market definition is demonstrated in the 2nd PWC Report, which shows that they are effectively asserting that this market comprises approximately 70% of all Queensland coal production (and therefore coal handling services).

Figure 1: Implied market share relative to total Queensland coal production



The market definition also flies in the face of reality where no non-BHP users have ever used HPCT and there continue to be substantial unutilised capacity at each of RGT, WICET and APCT relative to the position at DBCT.

The principal issue produced by the arbitrarily wide market definition adopted by DBCTM/HoustonKemp is that by assuming coal terminals that are not in the market are suppliers of close substitute services – the DBCTM/HoustonKemp estimate of how demand can be met at least cost is flawed through its reliance on suppliers that are not actually in the market.

This submission first discusses the fundamental flaws in the DBCTM/HoustonKemp approach to market definition, before then considering the specific evidence and issues which demonstrate clearly that other coal terminals are not suppliers in the same market.

4.2 Why the HoustonKemp approach to market definition is deeply flawed

Acquiring a different service does not automatically indicate substitutability

The DBCTM Initial Submission relies on the approach to market definition outlined in the HoustonKemp Criterion (b) Report.

However, the approach in the HoustonKemp Criterion (b) Report is fundamentally flawed and inconsistent with the approaches to market definition adopted over a long period of time by Australian courts, the Australian Competition Tribunal and regulatory bodies such as the Australian Competition and Consumer Commission (***ACCC***) and National Competition Council (***NCC***).

In particular the HoustonKemp Criterion (b) Report is flawed because:

(a) it does not apply the well settled approach to market definition of starting with the narrowest reasonable possible definition of the service and then seeking to determine which services are close substitutes; and

(b) instead HoustonKemp starts with an existing set of customers and then simply asserts that all coal handling services they acquire are therefore necessarily included in the same market.

The error inherent in the HoustonKemp approach is that it simply blindly assumes that if a producer in the Hay Point catchment is acquiring coal handling services from two different terminals those terminals must be close substitutes and therefore in the same market.

Yet it has long been a settled that, as stated by the Federal Court in *Arnotts Limited and Others v TPC*[1]:

> *The fact that, upon some occasions, some consumers select one product rather than another does not establish that the two products are 'substitutable', so as to be within a single market.*

In that case it was explained that:

> *No doubt there are many people who sometimes drink tea and, at other times, coffee … The fact is that tea and coffee are distinct beverages for each of which there is a distinct demand*.

In other words, to be a close substitute requires *more* than simply evidence that a customer acquires two different services. One needs to go further and question why that is – is it because they are close substitutes (between which a customer might switch based on a SSNIP) or is it because they are different distinct services that are acquired for different reasons to meet different needs.

The reasoning quoted above is equally applicable here. For the reasons that are explained in this submission, the coal handling services provided by different coal terminals are in fact distinct services.

The error in the DBCTM/HoustonKemp analysis is obvious when one considers:

(a) the inability for all users other than BHP to access HPCT; and

(b) the additional costs for Hay Point catchment users of transportation to and utilisation of coal terminals at other ports, which clearly outweigh a SSNIP in the cost of coal handling services at DBCT,

as clearly explained in the DBCT User Group Initial Submission and the PWC Report.

DBCTM seeks to blithely wave away this issue by simply making assertions like the following (from paragraph 99 of the DBCTM Initial Submission):

> *while a market is often defined by reference to substitution, the definition does not preclude other means of defining the market*

Yet that is inconsistent with every judicial or regulatory decision in Australia concerning market definition since *Re Queensland Co-operative Milling Association*[2] ***(Re QCMA)*** – which have always adopted substitution as what defines market boundaries.

As the 2nd PWC Report succinctly puts it:

[1] (1990) 24 FCR 313 at 332

[2] (1976) 25 FLR 169

> *The relevant question in the context of criterion (b) is not whether customers using other facilities occasionally now or in the past did use DBCT, but whether DBCT genuinely faces rivalry from other ports/terminals in a way which influences its decisions and those of its users.*

As a result, the conclusions DBCTM/HoustonKemp reach on criterion (b) are largely worthless because they proceed from this inappropriate market definition to calculate foreseeable demand and the costs at which such demand can be met across multiple coal terminals when it should only be calculated for DBCT (or a future coal terminal at the Port of Hay Point providing common user coal handling services).

To avoid the sort of fallacy DBCTM/HoustonKemp have fallen into – the settled approach to market definition starts with the relevant service (as described in more detail below) rather than the customers of the service.

The settled and appropriate approach to market definition – start with the service and then consider substitutability

The settled approach to market definition (adopted by courts, the Australian Competition Tribunal, and regulators such as the ACCC and NCC) is:

(a) to start with the service (in this case the Declared Service); and

(b) then test the next closest service (in the various dimensions of the market – geographic, production, functional) until all close substitutes for the initial service are included.

The hypothetical monopolist or SSNIP test is effectively the main method by which courts and regulators have determined whether two products or services are close substitutes.

By way of examples of statements of that principle:

From the ACCC's Merger Guidelines:[3]

> *Market definition begins by selecting a product supplied … in a particular geographic area and incrementally broadening the market to include the next closest substitute until all close substitutes for the initial product are included.*

From the Trade Practices Tribunal in *Re QCMA*:[4]

> *Within the bounds of a market there is substitution – substitution between one product and another, and between one source of supply and another, in response to changing prices. So a market is the field of actual and potential transactions between buyers and sellers amongst whom there can be strong substitution, at least in the long run, if given a sufficient price incentive*
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> *…*
>
> *It is the possibilities of such substitution which set the limits upon a firm's ability to "give less and charge more". Accordingly, in determining the outer boundaries of the market we ask a quite simple but fundamental question: If the firm were to "give less and charge more" would there be, to put the matter colloquially, much of a reaction? And if so, from whom? In the language of economics the question is this: From which products and which activities could we expect a relatively high demand or supply response to*

[3] At [4.12]

[4] (1976) ATPR 40-012

price change, i.e. a relatively high cross-elasticity of demand or cross-elasticity of supply?

As discussed by the Federal Court in *ACCC v Metcash Trading Limited*[5] the hypothetical monopolist or SSNIP test is applied to determine close substitutes as follows:

> *This test involves determining whether a hypothetical monopolist supplier could profitably impose a small but significant non-transitory increase in price (most commonly, but not necessarily, between 5 and 10%) for the supply of a relevant product. Starting with the firm and product in issue, the market boundaries are expanded to include all sources of close substitutes that would defeat the increase. The smallest area, generally in terms of product identification and geographic space, over which the hypothetical monopolist can profitably impose the increase, shows the boundaries of the market.*

The DBCT User Group strongly agrees with the analysis in the Minter Ellison advice included with the QCA Issues Paper that that approach is entirely consistent with section 71(2) QCA Act.

Consequently, it is absolutely clear that the appropriate way to determine the market is to start with the Declared Service – the coal handling service at DBCT and then ask whether there are any services that users would switch to in the event of a SSNIP.

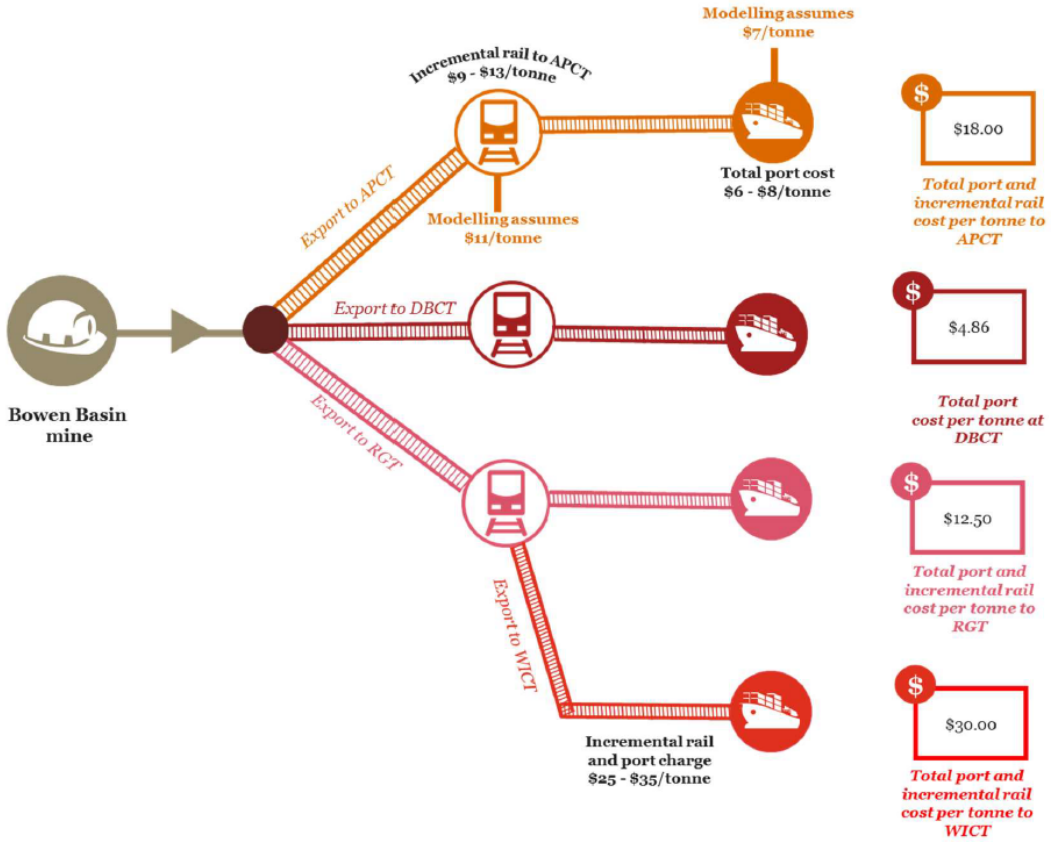
As conclusively demonstrated in both the PWC and Castalia Reports the answer is a resounding no due to the enduring inability to access HPCT and the economically prohibitive costs for Hay Point Catchment Users of switching to other terminals.

For example, the PWC Report contained the following indication of the range of costs for Hay Point catchment users of using other terminals, relative to the costs of using the Declared Service (sourced from actual User Group member costs). Even the least expensive of those involves well more than double the cost of using the Declared Service.

Figure 1: Incremental costs to utilise coal terminals at other ports

[5] [2011] FCAFC 151 at [247]

Figure 7: Calculation of cost of alternative export pathways for existing DBCT users



Source: PWC Report

Consequently, it is absolutely clear that the services of RGT, APCT and WICET are not in the same market as the Declared Service.

In addition, as discussed in detail in the DBCT User Group Initial Submission, the PWC Report and the 2nd PWC Report, there is a large range of non-price constraints which would dampen or eliminate the prospects of a switching response from producers to price rises at DBCT, including:

(a) below rail constraints (and the costs of creating below rail capacity);

(b) long term take or pay contracts (not just for coal handling services – but for rail haulage and rail access, with the terms of such contracts not always aligned) which create strong incentives to continue to ship through the contracted coal supply chain;

(c) co-shipping and blending opportunities – which are particularly strong at DBCT for metallurgical coal producers (and are often customer requirements rather than choices a producer truly has);

(d) other differing characteristics (such as portfolio effects where a producer has other mines which also user DBCT).

For completeness, the DBCT User Group acknowledges that there have been some suggestions (for example in *Re Fortescue Metals Group Ltd*,[6] as referred to in the Minter Ellison advice enclosed in the QCA Issues Paper) that it may also be relevant to consider other ways of testing substitutability such as 'interchangeability of use'.

[6] [2010] ACompT2

On the most generous possible reading that is what the HoustonKemp Criterion (b) Report was referring to when it quoted the Tribunal on the geographic area of a market, stating that:

> *The geographic area of the market (ie whether it is local, regional, national or international) takes into account, principally, the area in which buyers choose to purchase their goods (ie actual buying patterns) and the areas within which sellers traditionally supply (or could easily supply in response to changed market conditions) their goods*
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> and clarified their own view as:
>
> *In other words, the geographic dimension of the market is the area over which a product or service is supplied, or* ***could be supplied quickly without significant investment****.*

Similarly, the HoustonKemp Criterion (b) Report indicated that the geographic dimension of the market was an identification of the area in which consumers could 'source supply quickly without too much additional cost or inconvenience'.[7]

However it is notable that in *Re Fortescue Metals Group Ltd*[8] the Tribunal specifically noted

> *it is not sufficient to measure only historical and current market behaviour. It is also necessary to consider whether customers would readily turn to more remote suppliers in response to a price increase by local suppliers or whether remote suppliers would choose to enter the local market*

Consequently, on the basis of all precedents, past usage is clearly not determinative of the market boundaries. The test is one of substitutability and the key evidence of that is the likely future response of market participants to a SSNIP. That is unsurprising, given that it has long been recognised that the dimensions of markets can change with time.

The real issue is understanding those coal terminals (if any) to which there would be a relatively high demand response of producers in the Hay Point catchment of switching to utilising such coal terminals in the event of DBCTM 'giving less or charging more' (to use the language from *Re QCMA*)[9].

As noted above, and as demonstrated very clearly by the DBCT User Group Initial Submission, PWC and Castalia Report, there are no other coal terminals which meet that threshold.

An extremely theoretical analysis that ignores key constraints

The HoustonKemp analysis also suffers from being a very theoretical analysis that pays scant attention to the realities of the market.

As noted in the 2nd PWC Report:

> *The key limitations in HoustonKemp's approach to market definition are that it:*
>
> *(a) assumes away the impact of existing contracts, many of which have terms which extend for substantially all or even beyond the term of any prospective declaration of the relevant services and which materially impact the incentives and behaviours of market participants*

[7] [3.1.2] p 18.

[8] [2010] ACompT2

[9] (1976) 25 FLR 169 at 190

(b) *vastly simplifies the effect of capacity limitations, particularly in the rail network, with the effect of presenting a simplistic and misleading view of the ease with which miners can readily avail themselves of alternative export pathways;*

(c) *uses a 'resource cost' approach as a basis for seeking to determine an optimised configuration of mine/port export pathways, but which ignores that mines receive and respond to price signals which are fundamentally different, and*

(d) *includes in the market HPCT, notwithstanding HoustonKemp acknowledging that this facility is not accessible by any non-BHP miners.*

As the 2nd PWC Report correctly notes:

> *By ignoring or abstracting away from these realities, HoustonKemp's analysis has moved away from the fundamental purpose of market definition, in the context of access declaration criterion (b). Market definition is not an abstract consideration to be assessed in isolation, rather it must consider the context of the underlying matter being assessed*

Each of these issues are addressed in more detail below.

4.3 Geographic dimension of the market

General approach

To the extent that there may be evidence of very limited use of different coal terminals on the edge of the geographic boundaries of the market it needs to be kept in mind that, as stated in *Re Tooth & Co Ltd*,[10] determining substitution involves determining:

> *'the widest geographic area within which, if given a sufficient economic incentive,* ***buyers can switch to a substantial extent from one source of supply to another'***
>
> *…*
>
> *'all competition or substitution does not cease at the outer boundaries of the market; the economy as a whole is a network of substitution possibilities in consumption and production; competition is a matter of degree. Rather, at the extremities of the market, there is such a break in substitution possibilities that firms within its boundaries would collectively possess substantial market power: were they to join forces as a cartel, they would be able to raise prices or offer a poorer deal without their market being substantially undermined by the incursions of rivals'*

In other words, for other coal terminals to be in the same market there needs to be a likelihood of substantial switching from DBCT to the services of other terminals (to use the expression from *Re Tooth & Co Ltd*) or a relatively high demand or supply response.

As this submission demonstrates below, to the extent there is evidence of Hay Point catchment users utilising multiple coal terminals:

(a) it does not evidence switching in response to economic incentives of the type relevant to market definition (and rather is clearly explained by other factors which result in customers acquiring different services); and

[10] (1979) 39 FLR 1 at 18,196-18,197

(b) such usage only occurs at the very geographic margins of the market (rather than evidencing the 'substantial extent' of switching relevant to market definition).

Consequently, for the reasons in the DBCT User Group's Initial Submission and as discussed further below, it is clear that HPCT, RGT and WICET are not in the same geographic market as DBCT due to the inability to substitute services provided at those terminals without incurring significant costs (and in some cases, significant infrastructure investment for new rail turn-outs and capacity expansions), such that the market is most appropriately defined as the Hay Point common user coal handling services market (as noted in the DBCT User Group Initial Submission).

Market definition where there are captive customers

What DBCTM and HoustonKemp appear to lose sight of by myopically focusing on past exports and contracts is that the vast majority of mines in the Hay Point catchment are truly captive to DBCT (such that substantial switching of the nature relevant to market definition boundaries is not possible).

A review of the map from Figure 2.10 of the HoustonKemp Criterion (b) Report (a modified version of which is set out below) evidences clearly the fact that the vast majority of demand comes from this captive customer group. That is also true of each of the other coal ports (as shown in the circled clusters of captive mines on the map below in respect of each port).

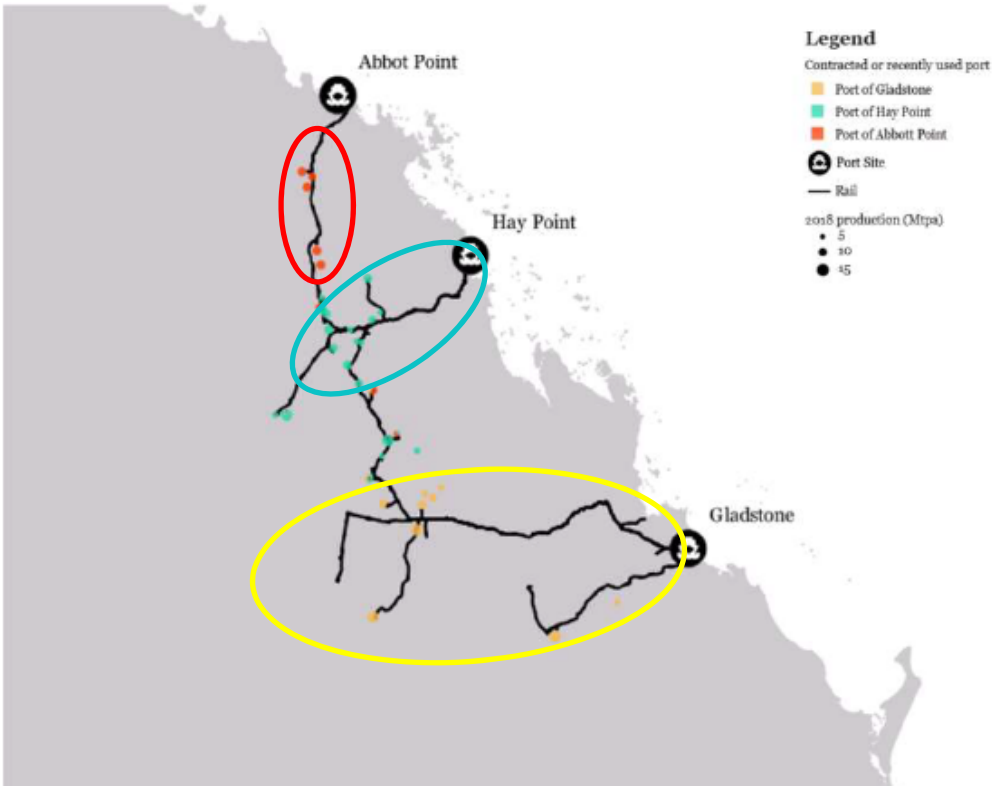
That becomes even clearer when the map is corrected for:

(a) the errors in the map - such as the fact that the South Walker Creek mine does not use APCT as incorrectly suggested in the original version of this map in the HoustonKemp Criterion (b) Report. As described in more detail later in this submission, BMC has confirmed that South Walker Creek has never exported tonnage through APCT for reasons including the need for an expensive 'western rail turnout' to be developed to facilitate that occurring. The DBCT User Group can only presume that DBCTM/HoustonKemp have erroneously assumed APCT usage because DBCTM has incorrectly assumed BMC's APCT contract is used for South Walker Creek); and

(b) the misleading presentation in respect of mines that principally export through a terminal and have marginal or infrequent exports through a second terminal – so that rather than being shown as equal users of both terminals it is clearer which port is principally used.

Figure 2: Hay Point catchment captive customers

Figure 3: Reproduction of Houston Kemp's Figure 2.10, with errors corrected



Source: 2nd PWC Report

With that clear group of captive customers in mind, it is worth particularly noting the discussion of captive customers of this nature and how they should be taken into account in defining markets in the ACCC Merger Guidelines.

Those Guidelines provide that:

> ***in certain cases where substitution possibilities are not uniform across consumer groups, it may be appropriate to define separate markets for different consumer groups.***
>
> *If suppliers can discriminate, a customer that has limited substitution possibilities receives different terms and conditions from suppliers to a customer that has strong substitution possibilities. In this situation it may be appropriate to consider two separate markets for different consumer groups. For example, some consumers may view two products to be highly substitutable while other consumers may consider the products to be, at best, weak substitutes. In such situations, the relevant number and importance of each customer class and the ability of suppliers … to discriminate between the customer classes will be important when determining the appropriate product and/or geographic dimension of the market.*
>
> *…*
>
> *a customer that has limited substitution possibilities received different terms and conditions from suppliers to a customer that has strong substitution possibilities. In this situation it may be appropriate to consider two separate markets for merger analysis, one market would include the relevant product and the alternative product, and would focus on those consumers who have*

the option of substitution. ***The second market would not include the alternative product and would focus on those consumers who are 'captive' or do not have the option of substitution****.*

The focus here is therefore necessarily on the captive customers – such that the market is clearly most appropriately defined as the Hay Point common user coal handling services market (as noted in the DBCT User Group Initial Submission).

With the appropriate approach to market definition in mind it is worth considering the specifics of each other terminal that DBCTM alleges is a supplier in the same market.

4.4 HPCT is not a supplier in the same market as DBCT

HPCT is not available to non-BHP Users

HPCT is operated by the BHP Mitsubishi Alliance (***BMA***).

As discussed in the DBCT User Group Initial Submission:

(a) since its initial commencement in 1971, HPCT has only ever provided services for coal produced from mines operated by BMA and BHP Mitsui Coal (***BMC***) (the ***BHP Users***);

(b) BMA has confirmed that it anticipates continuing to utilise all of HPCT's capacity for its own operations (and potentially for some lesser BMC production, at times);

(c) BMA has confirmed that it is therefore unlikely to offer coal handling services at HPCT to third parties;

(d) those confirmed positions are reflective of the perceptions and consistent past experience of non-BHP Users. A number of DBCT Users have investigated the potential to utilise capacity at HPCT at different points in the past without HPCT ever having provided services to such third party shippers; and

(e) HPCT will continue to not be available for use by non-BHP Users – as the efficiency reasons that have resulted in HPCT being operated as a dedicated single shipper facility to date will be enduring.

However, DBCTM asserts, despite all of that evidence to the contrary, that HPCT is a supplier in the relevant market solely based on a small quantity of usage of the Declared Service by BHP Users.

Clearly DBCTM have serious doubts themselves as to this conclusion – given that they have also requested HoustonKemp to provide foreseeable demand estimates without demand from such BHP Users included.

Asymmetric Substitution

What DBCTM and HoustonKemp completely and simplistically ignore is, that as discussed in the DBCT User Group Initial Submission:

(a) the BHP Users' use of HPCT and DBCT is a clear instance of asymmetric substitution in that only BHP Users (who constitute a small part of the demand for the Declared Service) may seek to substitute coal handling services between HPCT and DBCT; and

(b) this option for substitution is not open to non-BHP Users in the market such that it cannot be properly considered to be a competitive constraint on DBCTM's behaviour of the type a close substitute within the same market would provide.

The DBCT User Group Initial Submission referred to the ACCC's guidelines and previous consideration of asymmetric substitution.

This is, of course, an issue all competition regulators have had to grapple with over time, and the DBCT User Group also particularly notes the European Commission's Practical Guidelines on Market Definition (at [191]) which states:

> *The specific relevant market to be chosen will depend on the case at hand.* ***It should be noted that in an asymmetric substitution situation it is important to define the focal product of the market analysis, (i.e. the main product under investigation as defined in Section 4.2). The question is whether the price of the focal product is sufficiently constrained by the price of the other.***

The focal 'product' is the Declared Service, that is coal handling services provided by DBCT. That should, of course, be unsurprising, given that the exercise of market definition is to determine the extent of close substitutes which provide a competitive constraint on the provider of the service. If only a specific customer who provides marginal demand for the service is able to switch to the alternative service (i.e. coal handling services at HPCT), then the alternative service will clearly not provide a competitive constraint on the Declared Service.

To put it simply, the question is clearly not can a BHP User switch to using HPCT (which is what DBCTM and HoustonKemp appear to have asked). The relevant question is whether customers of DBCT can switch to HPCT to a substantial extent in the event of a SSNIP in relation to the Declared Service.

The answer to that is very clearly no.

It is absolutely clear that HPCT does not provide a constraint on the price at which the Declared Service is provided as:

(a) no non-BHP User has or can switch to HPCT in response to any price change at DBCT; and

(b) any theoretical switching away of the small quantity of BHP User usage of DBCT is at the margin (i.e. not the switching to a substantial extent which is required for such a service to be in the same market).

Consequently, it is clear that coal handling services provided by HPCT are not in the same market as the Declared Service.

Market evidence – no past evidence of switching or responding to a SSNIP

In addition to being inconsistent with the approach to asymmetric substitution applied by all regulators, coal handling services at HPCT being in the same market as the Declared Service does not pass the test DBCTM itself seeks to apply.

As the DBCTM Initial Submission notes:

> *The dimension of the market are real, not theoretical. To define those dimensions the best evidence will come from the people who work in the market'*[11]

It is therefore highly relevant that:

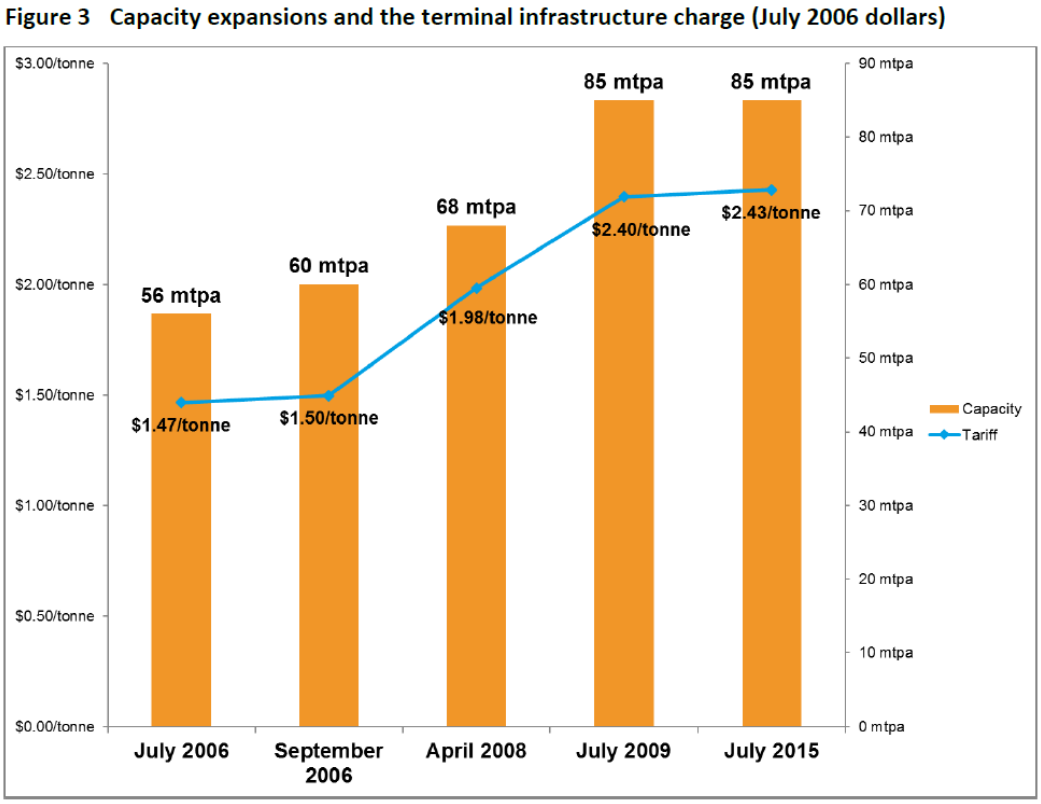
(a) coal producers (the users of coal handling services) do not regard HPCT as a substitute – given the clear history of it not being a substitute and the clear likelihood of that position continuing; and

(b) the operator of HPCT (BMA) has confirmed that it does not consider itself a competitor of DBCT – and rather is focused on maximising the throughput at HPCT from BHP Users.

[11] J D Heydon, Trade Practices Law, [3.245]

It is also notable that the changes in the TIC arising from changes in the QCA approved reference tariff, have actually resulted in a SSNIP in respect of the Declared Service at various times in the past. For example, the below graph from the QCA's Final Decision in respect of the current DBCT Access Undertaking[12] shows changes in the TIC over time (in 2006 dollars so that none of the changes are attributable to inflation).

Figure 3: QCA Approved TICs for DBCT over time



Source: QCA Final Decision 2016 Access Undertaking

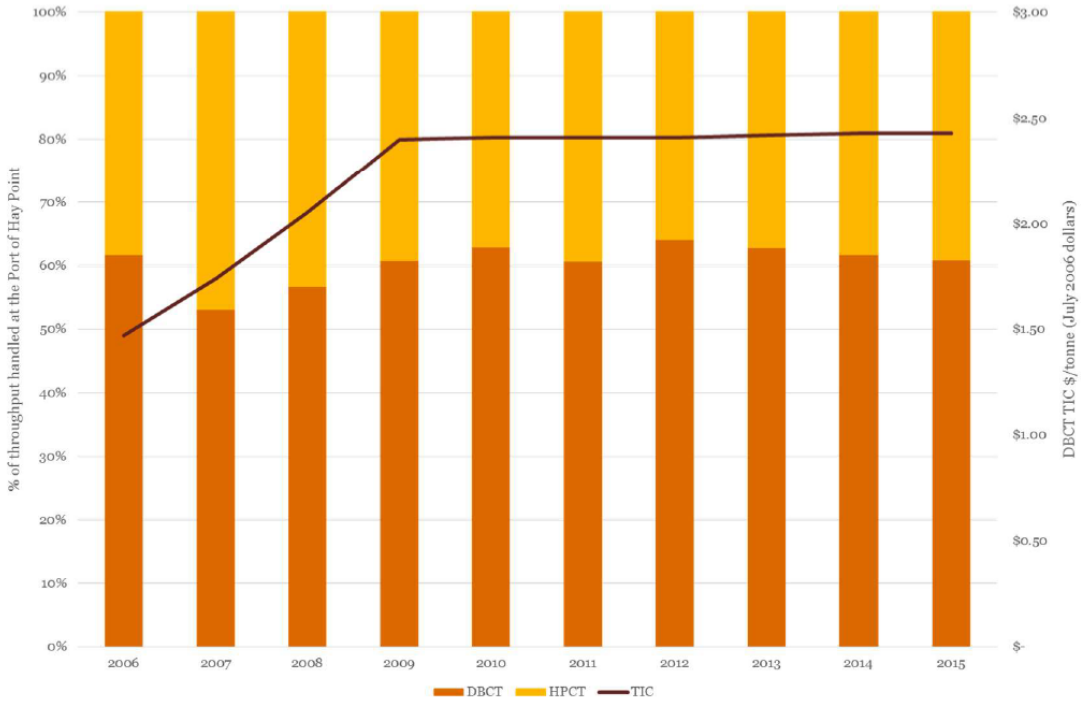
Yet, those price rises have not resulted in switching behaviour away from DBCT in the way that would have occurred if HPCT was actually a substitute.

As shown in the 2nd PWC Report, there is no observable correlation in user's switching from DBCT to HPCT in response to those prices as would be expected if the terminals were genuine substitutes.

Figure 4: Throughput at DBCT/HPCT and lack of response to DBCT TIC rises

[12] Final Decision at 11

Figure 4: Throughput at DBCT/HPCT compared to DBCT $/tonne TIC (July 2006 dollars)*



Source: 2nd PWC Report

Application of the SSNIP Test

As noted earlier in these submissions, the inclusion of HPCT in the market is also inconsistent with a proper application of the SSNIP or hypothetical monopolist test.

The narrowest possible geographic dimension of the market – is services provided by DBCT itself, so the question then becomes whether it would be profitable for DBCTM, as the supplier of services at DBCT, to impose a SSNIP.

As noted above, there is no ability for non-BHP Users to switch to HPCT in response to a SSNIP.

Even if it was assumed that all BHP User tonnage would be withdrawn from DBCT, a SSNIP will be highly profitable for DBCTM as demonstrated very clearly in the Castalia Report which shows that the profit maximising price does not involve maximum throughput – confirming that the appropriate market does not include HPCT.

4.5 APCT, RGT and WICET are not suppliers in the same market as DBCT

DBCTM's approach does not accord with the accepted regulatory approach

As noted earlier in this submission, the DBCTM Initial Submission seeks to define the market not by starting with where the services are provided (as would be consistent with the well settled approach to market definition), but by reference to the location of each of its customers and the services they acquire (without any critical analysis as to whether the other services they acquire are actually close substitutes).

The HoustonKemp Criterion (b) Report asserts that this reflects the ACCC's determinations in respect of exemptions for the Victorian wheat terminals from the Port Terminal Access (Bulk Wheat) Code of Conduct – without recognising the fundamental differences in the relevant markets.

In particular, HoustonKemp does not acknowledge:

(a) that because the grain terminals are located very closely to each other:

(i) there is few if any captive customers of the type which clearly characterises the coal terminals;

(ii) the connectivity of the relevant wheat terminals by road and rail is not capacity constrained in the same manner as is the case for the central Queensland coal port terminals (such that switching grain terminals does not require significant new investment in other supply chain infrastructure);

(iii) the terminals do not provide any further risk mitigation in relation to outages caused by natural disasters or supply chain outages (as distant coal terminals do)

(iv) there are not the substantial cost differences in transportation to different terminals of the type that exist between the central Queensland coal terminals; and

(b) because grain is not sold in a co-shipped or blended manner – the co-shipping or blending opportunities which exist for Hay Point catchment producers to contract capacity at a second terminal do not exist for grain producers.

Consequently, the markets operate entirely differently and it is misconceived at best (and frankly misleading) to suggest that that ACCC decision supports the market definition the DBCTM Initial Submission and HoustonKemp Criterion (b) Report assert.

In fact, in terms of the current regulatory approach to market definition, as indicated in the DBCT User Group Initial Submission, both the QCA (in its decision in respect of the 2016 Access Undertaking) and ACCC (in its Statement of Issues in connection with Brookfield's proposed acquisition of Asciano) have previously found that:

(a) other coal terminals (APCT, RGT and WICET) do not provide close substitutes for the Declared Service; and

(b) there are very substantial costs which would be involved in a producer using DBCT to switch to utilising a different port, and other barriers to switching.

Aurizon Network Below Rail Capacity

One of the clearest constraints to a Hay Point catchment user switching is the lack of below rail capacity to accommodate higher volumes of cross system access on the Aurizon below rail network.

The central Queensland coal region network has, unsurprisingly, been designed to provide access for mines to the terminals they are a captive user of or have long term contracts for.

As a result, for the vast majority of DBCT users, very significant investments would be required to expand the below rail network in order to use a different terminal other than on a very ad-hoc basis (or without adversely impacting on Goonyella system capacity in a way that would not be anticipated to be permitted by Aurizon Network).

It is not sufficient for the purposes of criterion (b) to suggest that this is hard to calculate and therefore simplistically ignore it, as the HoustonKemp Criterion (b) Report does.

For some mines this involves investment in a turning angle so that trains can enter the mainline in an opposite direction (which producers have been notified would cost between $A[redacted] million). However, for nearly all Hay Point catchment mines, to redirect a substantial volume of coal from DBCT to a terminal at a different coal port would also involve investment in additional passing loops (at a minimum) or duplication or sections of rail to add sufficient capacity.

It is difficult to quantify the costs of this as Aurizon Network's network development plans do not include planning for any further cross system capacity of this nature (which itself clearly speaks to the services of other terminals not being substitutes for the Declared Service).

However, what is absolutely clear is that the below rail constraints mean that coal handling services provided by other coal terminals clearly do not meet the threshold of being able to *'easily supply'* Hay Point catchment users (see the passage from *Re Fortescue Metals Corp Ltd*[13] quoted earlier) or meet HoustonKemp's test of the area over which a service could be *'supplied quickly without significant investment*'.

As discussed in the 2nd PWC Report, the HoustonKemp modelling fails to properly deal with or cost this in assessing the costs for Hay Point users in switching to other terminals.

In particular as the 2nd PWC Report notes:

> *By using a resource cost basis for its optimisation modelling (see below, also), HoustonKemp effectively reallocates demand and supply across the entire Central Queensland rail system, assuming 'perfect foresight on behalf of an overall system planner' and 'negligible switching costs to a mine in changing its port of export'. The effect of this is likely to be a materially different profile of network utilisation from that which actually occurs, and therefore potentially realising a more efficient but theoretical level of system utilisation – implying a lesser need for network expansion than would practically be the case. HoustonKemp's modelling outputs are redacted to the extent that it is impossible to ascertain the extent to which the spatial profile of demand/supply is modelled as changing from that which currently occurs.*
>
> *Finally, while HoustonKemp acknowledges that there are complexities in capturing rail expansion costs, its modelling then applies various 'simplified' options' ranging from ignoring expansion costs altogether, to assuming that future expansion costs can be proxied from existing rail access and haulage charges.*
>
> *Experience with recent rail network expansions in Central Queensland (including GAPE and WIRP) suggests that rail capacity expansions are substantially more costly than existing capacity. This is unsurprising, given that existing rail access charges reflect a depreciated and well-utilised network, whereas expansions tend to have higher unit costs, and by virtue of being 'lumpy' are often less-than-fully utilised in the period immediately following their development.*

In other words, DBCTM and HoustonKemp have failed to appreciate that there are very significant costs to any material volume of DBCT usage being switched to usage of APCT, RGT or WICET, and by failing to take them into account have reached a clearly inappropriate market definition.

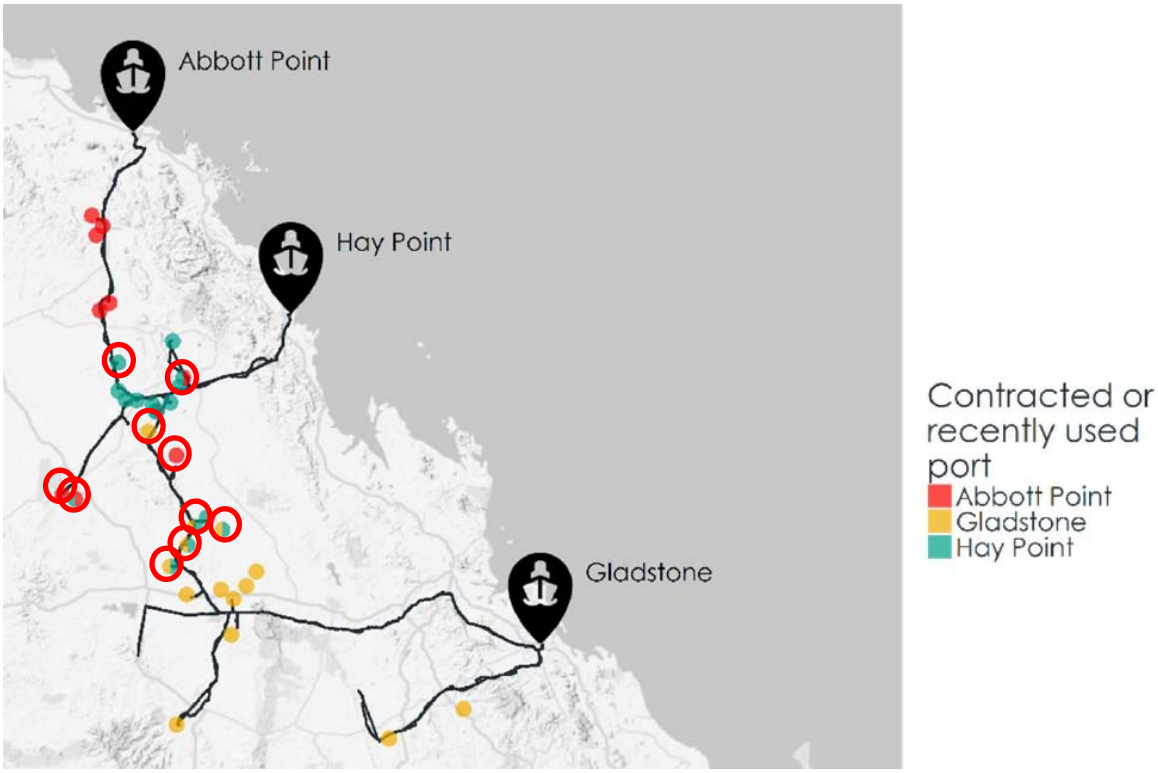
Market evidence – what is the relevance of the existing use of other terminals?

The DBCTM Initial Submission and HoustonKemp Criterion (b) Report appears to consider that it is definitive evidence of substitutability between coal terminals that there are a number of coal mines in the Hay Point catchment which currently export coal through APCT or RGT.

[13] [2010] ACompT2.

In particular, the arguments in the HoustonKemp report are largely based around the following diagram (Figure 2.10) which is asserted to show the projects which are utilising coal terminals at the three major ports.

Figure 5: HoustonKemp Criterion (b) Report Figure 2.10 – With Errors Highlighted



Source: HoustonKemp Criterion (b) Report (misleading or incorrect information circled in red by the DBCT User Group for emphasis)

The DBCT User Group acknowledge (as they did in the DBCT User Group Initial Submission) that there is a small number of mines which could potentially export coal through DBCT, which have historically executed contracts providing for export through RGT or APCT.

However, what DBCTM's and HoustonKemp's analysis suffers from is:

(a) numerous errors in relation to the information which appears to have been relied on in compiling the above diagram – such that there are mines said to be utilising a terminal they have never utilised it or only utilised it in rare or exceptional circumstances;

(b) producing a highly misleading representation of the usage it suggests is made of various coal terminals (where a true representation of the proportionate terminal use of such mines shows clearer geographic market boundaries); and

(c) a lack of any critical analysis of why such other services were being acquired by the relevant coal producers.

Errors and Misleading Information in DBCTM Analysis

Before conducting further analysis of the multitude of errors and misleading information in that diagram (and DBCTM / HoustonKemp's statements) about coal terminal usage by coal producers need to be corrected.

In particular:

(a) South Walker Creek: BMC confirms that the South Walker Creek mine (the mine shown as partly APCT / Hay Point that is closest to the Port of Hay Point in the map above) does

not use, and has never used, APCT. BMC has a contract for capacity at APCT but does not use it to export South Walker Creek coal. To do so would require incurring significant expenditure in either:

(A) installing a western 'turning angle' below rail infrastructure at a cost of approximately $[redacted] million; or

(B) operating push-pull haulage operations involving materially greater haulage costs and lesser scheduling certainty;

(b) Blair Athol: Rio Tinto (as the previous operator) and TerraCom (as the current owner) confirm that Blair Athol, that is currently shown as exporting solely to APCT has in fact never exported coal to APCT. Rio Tinto confirms that it previously had a contract for APCT capacity, but that was never used for Blair Athol coal, was not assigned to TerraCom as part of the sale of Blair Athol and has been subsequently terminated;

(c) Clermont: Rio Tinto (as the previous operator) notes that while Clermont has utilised APCT that was only on very rare occasions in the past under Rio Tinto ownership where there were major supply disruptions in the DBCT coal supply chain. Rio Tinto confirms that the rationale for contracting APCT tonnage was for future projects which formed part of the Rio Tinto coal portfolio at the time of contracting (principally Valeria). It was not intended for Clermont which always had contracted capacity at DBCT, but was notionally held for Clermont as the existing load point in Rio Tinto's portfolio which could theoretically use APCT. Only a small proportion of APCT capacity was assigned to Glencore in conjunction with the sale of Clermont and the DBCT User Group understand that Clermont principally exports its production via DBCT;

(d) Peak Downs: BHP confirms that in respect of Peak Downs/Caval Ridge (which is shown as only using RGT) only a small proportion of Caval Ridge / Peak Downs production has been exported through RG Tanna to meet customer requirements on an ad hoc basis – with RG Tanna capacity principally being contracted for the Blackwater mine;

(e) Capcoal: Anglo American confirms that in respect of Capcoal (which is shown as partly using DBCT and partly using Gladstone capacity) only a very small proportion of Capcoal production is exported through RGT – and that occurs in order to enable Anglo American to meet particular customer requirements, not as a result of switching to RGT in response to price rises of the Declared Service;

(f) Oaky Creek: The DBCT User Group understand that Oaky Creek (which is shown as partly using DBCT and partly using RGT capacity) principally exports its production via DBCT with only a small proportion of Oaky Creek production exported through RG Tanna; and

(g) Kestrel: Rio Tinto (as the current operator) confirms that, for the reasons discussed further below, only a very small proportion of Kestrel production is exported through DBCT, with the vast majority of Kestrel production exported via RGT. Exports via DBCT only occurred to enable Rio Tinto to sell a blended coal product (blended with Hail Creek coal when both were part of the Rio Tinto portfolio which will no longer be the case given that Rio Tinto has agreed to divest those mines to separate purchasers) or to continue exports where there were supply chain disruptions on the Blackwater system/at RGT. Only a small proportion of DBCT capacity is being assigned to the purchasers of the Kestrel mine as part of the recently announced sale (with more than [redacted]% of the terminal capacity assigned being for RGT not DBCT).

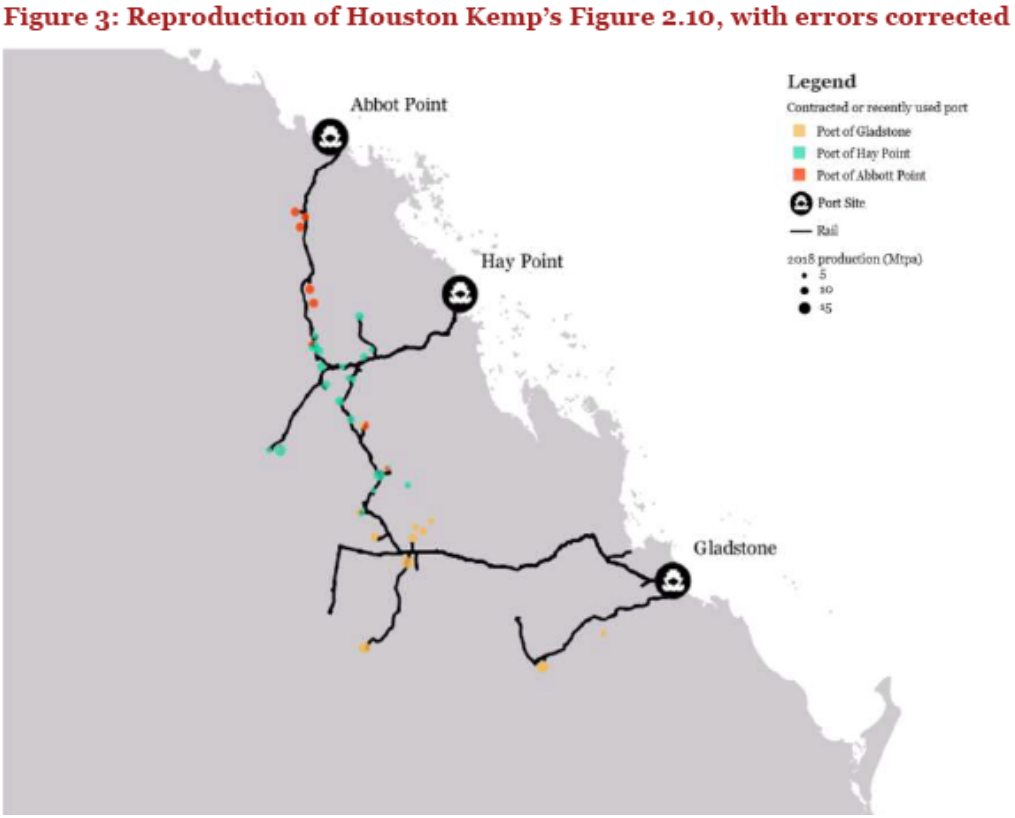
For completeness the DBCT User Group notes that while Lake Vermont is not a DBCT User, it is understood to be utilising both APCT and RGT, and has indicated to the DBCT User Group's

advisers that it has a preference for such a multiport strategy for marketing, operational and risk mitigation reasons.

The DBCT User Group understands that some individual producers will provide their own confidential submissions in which the rationale for the marginal use of alternative terminals may be explained further. The DBCT User Group recommends serious consideration of those submissions as evidence provided by the customers which are actually making the buying decisions.

Once those errors are fixed, that results in the following far more accurate representation:

Figure 5: Corrected map showing current terminal usage



Source: 2nd PWC Report

Analysis based on the corrected information

That corrected and more representative map very clearly demonstrates a number of points, namely:

(a) there is a very significant cluster of mines which only use terminals at Hay Point (the captive mines discussed earlier in this submission) – and that is true for terminals at the ports of Gladstone (RGT and WICET) and Abbot Point (APCT) as well. Accordingly there is strong evidence to suggest that it is completely uneconomic for those mines to utilise another terminal and any substitution is truly of the marginal type that typically occurs at the very edges of a market;

(b) a small number of mines on the far southern margin of the Hay Point catchment are located in a region where there is some marginal use of a secondary terminal with:

  (i) Capcoal and Oaky Creek being examples in the Hay Point catchment showing marginal use of RGT;

  (ii) Kestrel being an example out of the catchment showing marginal use of DBCT,

where the use of a secondary terminal is occurring for strategic reasons unrelated to price (such as risk diversification, blending/co-shipping opportunities or defraying take or pay exposure of another mine which is within the wider portfolio of mines operated by the same producer);

(c) while APCT users do not show such a clear cut geographic clustering it is evident that:

(i) the only users of APCT are mines that are a significant distance away from both APCT and DBCT;

(ii) the only users of APCT are those that contracted APCT capacity a substantial period of time ago with no evidence of more recent substitution,

suggesting, at most, that at some point in the past there may have been a period when APCT and DBCT may have been substitutable for a small number of mines on the margins of the market, but that that is no longer the case (and will not be the case for the foreseeable future or over the proposed declaration period);

(d) in all of the cases of Hay Point catchment mines that make use of other terminals (particularly when account is taken of the cost differences reported in the PWC Report) there is something else driving the decision to use the other terminal – it is not price based substitution.

The DBCT Users for which DBCT is the principal exporting terminal that have used more than one terminal for any of their mines confirm that the coal terminals that are not DBCT:

(a) were not contracted in response to price competitiveness with DBCT;

(b) but rather were contracted because they provided a distinctly different service to DBCT, namely by providing:

(i) exposure to a second coal supply chain (such that natural disasters, derailments, maintenance outages and the like specific to the DBCT supply chain do not prevent export through the alternative port – and vice versa);

(ii) a different range of blending and co-shipping options (where the customers and other producer preferences, and the location of the mine owner's other portfolio of mines, effectively influence the port which it is most desirable from a marketing perspective); and

(iii) for some producers, greater operational flexibility to manage capacity they hold principally for other projects at such a terminal (so that the infrastructure capacity contracted on a take or pay basis can be used by another mine in the producer's portfolio if the other mine is experiencing production problems or volatility.

As discussed above, DBCTM and HoustonKemp fail to critically assess why it is that a producer would have contracted capacity at two terminals and therefore completely overlook these issues.

Yet it is clear from the analysis above that:

(a) contracting a second terminal was not a case of substitution in response to price increases (as would be suggestive of being in the same market) noting that none of the contracting occurred in response to the DBCT TIC increases that have occurred in the past (as discussed earlier in this submission); and

(b) contracting of a different terminal is something that is only done by mines that are on the geographic margin of the Hay Point catchment; and

(c) contracting of a different terminal, even by those relatively distant mines, is through a conscious decision to acquire a different service in pursuit of risk mitigation through diversification of coal chains utilised and marketing or operational flexibility.

Further analysis of the specifics of that as it relates to the use of RGT and APCT and why the services of those terminals are not in the same market as services at DBCT is described below.

4.6 Southern-Hay Point Catchment Mines – Use of RGT

As discussed above, a number of mines at the very southern edge of the Hay Point catchment (Oaky Creek, Capcoal) and the far north of the Port of Gladstone catchment (Kestrel) currently export coal through both DBCT and RGT – although as noted below, Kestrel's use of DBCT capacity is marginal at best, and Oaky Creek and Capcoal's use of RGT capacity is marginal as well.

That is perhaps unsurprising as they exist in a region which is relatively even distances by rail to both the Port of Hay Point and the Port of Gladstone. It is also notable that the use of RGT as a secondary terminal is principally occurring for major mining companies with a portfolio of mines – for who the potential for defraying take or pay obligations from other mines, being able to make use of capacity contracted for other mines during Goonyella system outages and providing blending/co-shipping opportunities across their portfolio of mines – is likely to provide the greatest incentives.

It has long been recognised that this type of marginal substitution on the boundaries of the market due to special circumstances does not mean that the two suppliers (DBCT and RGT) are in the same market.

As the court noted in *Arnotts Ltd v TPC*[14]:

> *The question of substitutability is not to be disposed of merely by showing that, upon some occasions, some people consume one product rather than another… or that some products within a claimed market … do compete with some products outside that claimed market*

In addition there is a well-established series of precedents which confirm that there needs to be more than marginal examples of substitution for the market to be broadened.

As per the statement from Antitrust Laws and Trade Regulation Vol 3, p 18-96 quoted with approval in *Australia Meat Holdings Pty Ltd v TPC*[15](***AMH***):

> *Because a geographic market determination looks to actual trade patterns, it is not required that geographical boundaries be drawn with exactitude; some amount of 'fuzziness' is inevitable*

AMH is a particularly relevant case to the consideration in this review of the geographic dimension of the market in which the Declared Service is provided. It is analogous to the situation seen in the relevant coal supply chain here, as in AMH it was clear that transportation costs were a very significant factor in determining the geographic extent of the market – and the fact that there were a small proportion of sales and some special and specialist sales that reached beyond what transportation costs would indicate would be the likely geographic boundaries of the market, did not result in the market definition being expanded to account for all sales.

As noted in AMH:

[14] (1990) 24 FCR 313

[15] [1989] ATPR 40-932

the Act does not require the total or unrestricted domination of a market, but simply domination of a market

As demonstrated in the PWC Report, the costs of transport for mines in the Hay Point catchment mean that services at RGT are not substitutable for services at DBCT.

The use of an alternative terminal that is occurring is not open to the vast bulk of customers in the Hay Point catchment.

Consequently when the reasoning from AMH is applied to these circumstances, it leads to the clear conclusion that there is a Hay Point catchment common user coal handling services market – that does not include RGT (or other terminals at the Port of Gladstone).

In addition, as discussed at length above, the use of two different coal terminals by the few mines in question is not substitution of the type that occurs in response to a SSNIP indicating real competition. Rather it is largely attributable to portfolio effects – to diversify risk and provide operational flexibility – or for marketing or customer driven reasons:

In particular:

(a) Anglo American has confirmed that while it exports the vast majority of its coal production from Capcoal through DBCT, it utilises some capacity contracted at RGT in order to be meet particular customer's requirements or for specific sales;

(b) Glencore has capacity contracted at RGT for Oaky Creek and Anglo American has capacity contracted at RGT for Capcoal, with it being notable that both producers have portfolio benefits of having capacity at two major ports (to better deal with coal supply chain interruptions) and through having other mines that export from RGT; and

(c) for Kestrel it is absolutely clear that DBCT is not its principal export terminal. In particular:

  (i) it has been used very rarely to export Kestrel coal (only to sell a Hail Creek / Kestrel blend when both were under Rio Tinto ownership, which will no longer continue being the case given Rio Tinto's agreement to sell those mines to separate purchasers), and as part of the agreement to separately divest Hail Creek and Kestrel, and less than [redacted]% of the coal terminal capacity being assigned to the Kestrel purchaser as part of the divestment is DBCT capacity;

  (ii) railing to DBCT is more expensive than railing to RGT, including due to:

    (A) the requirement for a 'push-pull' haulage operation in the absence of investment in a 'northern angle' rail connection costing approximately $[redacted]million; and

    (B) Kestrel being on the Blackwater system, such that Kestrel pays a higher cross-system below rail access for railing to DBCT.

Consequently the DBCT User Group consider it is clear that RGT coal handling services are not provided in the same market as DBCT's coal handling services.

4.7 Distant Goonyella system mines – Use of APCT

As the DBCT User Group Initial Submission acknowledges, there are a number of mines in the Hay Point catchment which partly utilise APCT, being Middlemount, Lake Vermont (owned by Jellinbah) and Poitrel (owned by BMC).

It is notable that all of these mines are a long distance from DBCT – such that, similar to the position discussed above in relation to use of RGT, there is a zone of marginal distant users. While the uses of APCT are not closely clustered in location (as they are divided among the edges of the Goonyella system), they are clustered in the sense of being a long distance from

any terminal - being approximately 160-270 kilometres by rail from DBCT and 300-409 kilometres by rail from APCT.

As the DBCT User Group Initial Submission discussed, the usage of APCT is by a small number of mines, and a consequence of long term take or pay contracts that are a historic legacy of the state of the market at the relevant time.

That evidence of a past decision to contract a different terminal is not definitive evidence of anything. In particular, the fact that existing producers are locked in to the APCT coal supply chain is a feature of the take or pay and long term nature of the contracts signed rather than an indication that there is any continuing substitutability between services at APCT and DBCT.

A classic example of that is the APCT capacity that was contracted by Rio Tinto (and related below rail access) and very rarely used before its termination. Only a small proportion of that significant surplus capacity was assigned with the sale of Clermont and it was ultimately terminated with none of it assigned with the sale of Kestrel and Hail Creek. The below rail access arrangements are not utilised by Rio Tinto and are reported as onerous financial contracts in financial statements. That clearly indicates, that whatever the view may have been at the time of contracting that capacity, purchasers of Rio Tinto's coal mines did not regard APCT capacity as a substitute for DBCT.

It is not alone as a story of capacity that was contracted at the peak of the mining boom when there was a perceived inability to obtain capacity at DBCT, with at least Middlemount's APCT capacity also confirmed as being obtained for that reason.

It is well established that the dimensions of markets can change over time – markets are not to be determined by a view frozen in time (*AGL v ACCC (No. 3)*).[16] Accordingly, even if it was established that the past contacting of APCT capacity reflected substitution of the type relevant to market definition (which it is not for the reasons set out below) that would not include APCT in the market now and over the declaration period when it is absolutely clear that it is not in the market.

As very clearly demonstrated by the PWC Report, the costs of transportation to APCT are simply not low enough for a Hay Point catchment mine today or in the long run (based on current consensus long run future coal prices) to switch to utilising the APCT coal supply chain in response to a SSNIP of the cost of DBCT's coal handling service.

In addition – it is important to understand why APCT was contracted. Again, there is a significant element of capacity being contracted at APCT for diversification and operational flexibility reasons – not because APCT is a substitute in the sense of being competitive with DBCT. In particular, Middlemount has capacity at DBCT/APCT, Lake Vermont has capacity at APCT/RGT and Poitrel effectively has capacity at HPCT, DBCT and APCT and at least BMA has confirmed that the use of APCT is to provide risk diversification and operational flexibility.

4.8 The relative demand for the terminals over time reinforces that finding

If any proof is required that the terminals are not substitutes one only needs to consider the history of how capacity is being contracted or remaining surplus capacity at these terminals.

APCT and WICET have both been heavily underutilised for a significant period. The unfortunate reality is that the type of long term coal price outlook that was projected during when WICET and AP50 were developed, is no longer projected at any time during the proposed 10-15 year declaration period.

RGT also remains substantially under capacity.

[16] [2003] FCA 1525

By contrast DBCT has remained close to fully contracted, with additional access seekers still in the queue seeking further access. That is not a short term position, but one which has been persistent – driving a series of expansions while leaving further access seekers in the queue.

If the services provided by other coal terminals were really close substitutes, surely it should be anticipated that the DBCT queue would long ago have dissipated as those users looking to contract capacity would have switched to using capacity at the other terminals.

The fact that this has not occurred, is further evidence that services provided at APCT, RGT and WICET are not in the same market as the Declared Service.

4.9 Conclusion on market definition

It follows from the above analysis that:

(a) there is no likelihood of Hay Point catchment users switching from DBCT terminal in response to a SSNIP in respect of the Declared Service;

(b) while there is evidence of some mines utilising RGT or APCT that is:

  (i) clearly only an option that is pursued by those mines on the very margin of the Hay Point catchment area (with the bulk of mines effectively being captive to DBCT); and

  (ii) even for those mines is pursued as a clear secondary option for reasons which show it is a distinct service (such as risk diversification, operational flexibility or marketing reasons).

Accordingly, the DBCT User Group remains absolutely certain that the Hay Point catchment coal handling services market is the appropriate market definition, and the only market definition that is actually supported by the market evidence – and the only supplier in that market is DBCTM.

5 Criterion (b) - Foreseeable demand

5.1 Key issues

The key issues in contention in respect of what constitutes 'foreseeable demand' that are evident from the DBCT User Group Initial Submission and the DBCTM Initial Submission are:

(a) whether contractual constraints are relevant to an assessment of foreseeable demand;

(b) the extent of demand that should be considered for the purposes of criterion (b) for a customer whose demand is split between a service that is 'in the market' and a service that is 'not in the market'; and

(c) whether foreseeable demand should be measured by throughput or contracted capacity.

5.2 Foreseeable demand – issues with the DBCTM/HoustonKemp projections

What does foreseeable mean in this context?

While the principle of 'foreseeable demand' was only introduced in the recent changes to criterion (b) the concept has previously been referenced by the Tribunal under interpretations of previous declaration criterion. In particular in *Duke Eastern Gas Pipeline*[17] reasonable foreseeability was discussed in terms of a 'likely range of demand'.

As the producers who operate the relevant mines (including into the foreseeable future) make up the DBCT User Group, and those producers understand the real barriers to substitution which exist, the DBCT User Group is best placed to provide information on the 'likely range of demand'

[17] [2001] ACompT2

(as frankly is evident from the myriad of errors involved in DBCTM / HoustonKemp's analysis of current usage).

For a demand forecast to be 'foreseeable' it must clearly not just be speculative, artificial or contrived.

While future demand will never be absolutely certain, to be 'foreseeable' demand forecasts need to involve reasonable and appropriate assumptions that reflect the realities of the market.

The DBCT User Group considers, for example, that the process undertaken by the NCC to predict foreseeable demand for the purpose of the Pilbara proceedings – particularly the importance of categorising the stage of each iron ore project and the rail and port infrastructure that had been investigated for the project – clearly indicates a requirement for foreseeable demand to be based upon a real probability of demand for the specific service, rather than a mere possibility of demand. That is, there is a real need to show both:

(a) the proved/predicted throughput for each mine/project; and

(b) that the throughput is or will be (or will very likely be) contracted for the *specific service* being considered.

The 'demand' forecasts relied on by DBCTM are not foreseeable demand

DBCTM/HoustonKemp have also not properly projected foreseeable demand.

The main reason for that is that DBCTM/HoustonKemp have simply asserted that foreseeable demand is *'estimated as the total expected production of mines that are located within the market*' (or adjusting that further upwards to create a 'demand for coal handling contract capacity').[18]

No attempt has been made by DBCTM/HoustonKemp to rationalise how this could ever be a foreseeable demand projection when DBCTM has itself acknowledged that there are mines that use more than one terminal. Rather they just stunningly assert, without explanation, that that is how they have determined to express foreseeable demand.

There are other errors – such as including projects in the market that the DBCT User Group seriously doubt are a source of any demand for DBCT or including projects as a source of demand that are not likely to be developed in the time frame assumed.

Each of those errors are discussed below.

In markets involving long term take or pay contracts – foreseeable demand must take into account those contracts

The issue of contractual constraints has not really arisen in previous declaration proceedings or consideration as typically the entities seeking declaration have not been able to gain access at all (or have had access on relatively short term contractual arrangements).

However, the issue very clearly arises here where a number of companies have contracted long term capacity at other coal terminals (and related long term rail haulage and rail access capacity) – such that long term substitutability is impacted by these contractual arrangements.

For a coal producer which has such long term contracts to switch the terminal in which it exports coal during the term of such contracts it would need to:

(a) pay take or pay obligations on all of its existing rail access, rail haulage and port capacity; and in addition

(b) pay charges under the rail access, rail haulage and port user agreements for the coal supply chain switched to.

[18] HoustonKemp Criterion (b) Report at iii

That means coal producers have very significant economic incentives to utilise existing contracted capacity at least until the end of the contract term. Switching mid-way through a contract term is completely uneconomic for any producer, such that there is absolutely no likelihood of an entity which has such contracted capacity switching away from the coal supply chain in relation to which it is currently contracted in that manner.

However, HoustonKemp's analysis is conducted on the basis 'there were no constraints from existing supply contracts'[19].

As noted above, foreseeable demand is about measuring the likely demand for the service.

Consequently, given the economic incentives created by long term take or pay arrangements, it is completely irrational to consider that likely demand should be calculated without reference to existing contracts (as DBCTM and HoustonKemp assert) – because that completely ignores the actual realities of likely demand.

Consequently all of the capacity that is contracted to APCT or RGT needs to be removed from any projection of foreseeable demand for at a very minimum the period for which it is contracted.

That is material with, at a minimum, Lake Vermont (6 mtpa to APCT until 30 June 2028), Middlemount (3 mtpa to 30 June 2027) and Poitrel (4 mtpa to APCT until 31 December 2026), contracted capacity needing to removed.

Whether that contracted capacity should continue to be excluded beyond the existing contract term, requires an assessment of the most economically viable export terminal for the relevant mine and whether there are other reasons which might result in the mine continuing to export though their existing terminal – with reasons potentially including:

(a) a continued need to export through a particular non-DBCT terminal for co-shipping or blending potential;

(b) a producer with a portfolio of mines wanting to keep some production of a mine being exported through a secondary terminal to provide some risk diversification measures or assist in defraying take or pay liabilities that would be borne by another project of the same producer; or

(c) rail haulage or rail access contracts that have an expiry that does not align with the timing for a recontracting decision at the relevant coal terminal.

Assessing demand where there is past evidence of demand for a different terminal service that is out of the market

Even leaving aside contractual constraints, the DBCT User Group considers it is clear that 'foreseeable demand' does not include the entirety of a mine's production (as DBCTM / HoustonKemp assume in their forecasts of demand) where a mine has enduring reasons to export through a different terminal that is not in the market (as properly defined).

The DBCT User Group notes that in *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal*, the NCC prepared a report on foreseeable demand at the Tribunal's request. The NCC was asked to address, on a project by project basis, the following:

(a) the nature and extent of the resource for each project, specifying, in the case of a mineral resource, whether the JORC classification is inferred, indicated or measured, and in the case of an iron ore reserve, whether the JORC classification is probable or proved;

(b) the chemical characteristics of the resource or reserve (eg its iron content);

(c) any target production rate which is proposed or being investigated for the project;

[19] HoustonKemp Criterion (b) Report at ii

(d) any transport arrangements that are proposed or being investigated for the project; and

(e) any use of port facilities that is proposed or being considered for the project.

The last two of those suggest a very clear consideration of the practicalities of where the demand would occur (not just production).

Most obviously, it should be assumed that BHP Users will collectively export close to 55 mtpa through HPCT. Terminals have high fixed costs, and the BHP Users will have every economic incentive to maximise the utilisation of HPCT.

Similarly, given Kestrel's principal and most economic export path to RGT, the need for expensive options like a northern rail turn-out / push pull haulage operations and cross-system access tariffs to allow utilisation of DBCT, and no longer being part of the same portfolio of mines as captive DBCT User Hail Creek, it seems reasonable to assume that all of Kestrel's production will now be exported via RGT.

For the purposes of providing an estimate of foreseeable demand, it would also be reasonable to provide some allowance for the production from Hay Point catchment mines which utilise another terminal for non-price reasons.

Assessing demand from future projects where it is not clear that DBCT is the most likely port or development will not occur in the declaration period

The same issue exists in relation to future projects, which could utilise coal terminals other than DBCT.

In particular, the DBCT User Group consider it is not correct to assume, as DBCTM/HoustonKemp do, that:

(a) all coal from the Teresa project is exported through DBCT (given its location making railing to the Port of Gladstone feasible as well); or

(b) all coal from the Eagle Downs project is exported through DBCT, given that Aquila has 1.6 mtpa of long term take or pay capacity at WICET that it is likely to make more economic sense to defray (and Wood Mackenzie does not predict that development will occur before 2037 in any case).

Similarly, any coal from the following projects will either not be in production during the period of declaration such that any demand projected by HoustonKemp should be excluded even if those projects are notionally captive to DBCT if developed – see Wood Mackenzie report:

(a) Moranbah South, which is not forecast to begin production until 2034;

(b) Harrybrandt, which is not forecast to begin production until 2038; and

(c) Hillalong, which Wood Mackenzie does not consider likely to be developed in the relevant timeframe.

Throughput vs contracted capacity

The threshold for criterion (b) is 'total foreseeable demand' can be met 'at the least cost' by the facility.

The DBCT User Group acknowledges there is limited case law considerations which provide any guidance as to whether 'foreseeable demand' is measured by reference to throughput (i.e. the actual volume of demand) or contracted capacity).

However, the DBCT User Group considers that it appears implicit in the way demand projections have been undertaken and considered in past declaration and gas pipeline coverage proceedings

that throughput is how demand is measured. See for example *Duke East Gas Pipeline*[20] and the NCC Final Recommendation on Declaration – where it is clear that the NCC and Tribunal were seeking to estimate foreseeable demand using gas consumption/demand estimates, without seeking to add a buffer above those estimates to reflect demand for contracted capacity.

In addition, there is nothing in the wording of the QCA Act which suggests that demand should be interpreted to mean demand plus a buffer above demand which reflected contracted capacity.

In addition, the amount of buffer which is required between actual throughput and contracted capacity is a matter of the individual user's risk appetite and other production and contracting profile, and so it seems an unusual result that contracted capacity would be what is taken into account.

Consequently, the DBCT User Group consider that the appropriate way of measuring foreseeable demand is by reference to actual demand (i.e. throughput).

For completeness, to the extent that the QCA considers contracted capacity to be relevant, then the DBCT User Group considers that the DBCTM assumption of throughput being 90% of contracted capacity is likely to have been set too low, particularly in the context of:

(a) the DBCT User Agreements allowing users to provide permission for third party shippers to utilise the capacity (see clause 12.5 Standard Access Agreement);

(b) there being clear evidence of a secondary capacity trading market where producers which hold surplus capacity are able (at least currently) to dispose of that capacity to other producers;

(c) the renewal rights in the DBCT User Agreements which are exercisable every five years provide the ability to renew for less capacity than currently contracted, and there is examples of users doing that, so there is an option every five years to reduce contracted capacity (see clause 20 Standard Access Agreement); and

(d) the DBCT User Agreement provisions regarding DBCTM having power to resume annual contract tonnage that a user is not utilising over a sustained period (see clause 11.3 Standard Access Agreement),

each of which is likely to result in throughput and contracted capacity being very closely correlated over the long term.

Conclusions

The DBCTM/HoustonKemp 'demand' projections are deeply flawed for the reasons set out above and bear little resemblance to a true foreseeable demand forecast.

To try to inject some reality into them (to effectively 'back calculate' a foreseeable demand) one would need to start with the HoustonKemp (excluding HPCT) assessment and then make each of the adjustments described above.

That produces the following arguable foreseeable demand:

Figure 6: Back-calculation of foreseeable demand from HoustonKemp data

	2021	**2022**	**2023**	**2024**	**2025**	**2026**	**2027**	**2028**	**2029**	**2030**
HoustonKemp (excl BHP)	91.1	95.2	102.7	109.6	117.8	120.6	111.3	112.7	112.5	113
Reductions	- 26.91	- 33.15	- 37.96	- 44.46	-49.06	-49.06-	- 46.02	- 46.03	-39.96	-39.96

[20] [2001] ACompT2

by correcting errors										
Adjusted demand forecast	64.19	62.05	64.74	65.14	68.74	71.54	65.1	66.67	72.54	73.04

The detailed workings and reasons for that adjustment are shown in Schedule 4.

While the DBCT User Group considers this corrects the obvious errors, it considers the Wood Mackenzie forecasts discussed below provide a much better assessment of foreseeable demand, rather than seeking to back-calculate from such flawed base data.

However, for completeness the DBCT User Group notes that peak demand on this basis is well below the capacity of DBCT (such that it falls within the peak foreseeable demand using the Wood Mackenzie high demand case discussed below).

5.3 Foreseeable demand – WoodMackenzie production

Given the number of issues with the DBCTM/HoustonKemp demand projection – the DBCT User Group has also commissioned WoodMackenzie to prepare a report demonstrating foreseeable demand for the Declared Service.

That report is included in Schedule 2.

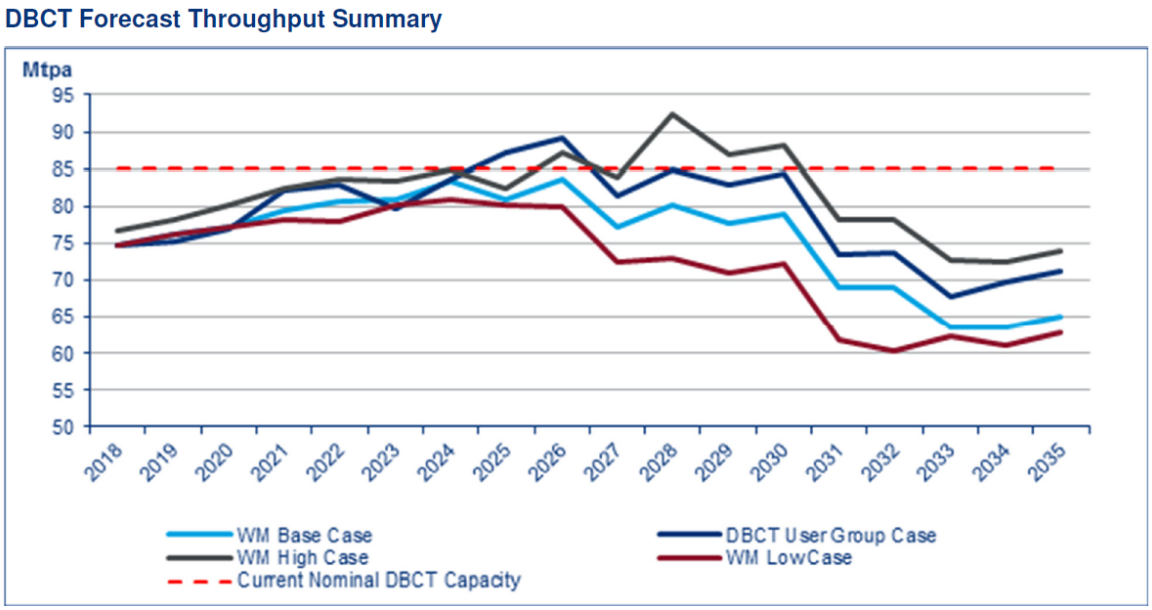
To ensure that this view is truly independent and cannot be argued to be biased, the DBCT User Group have requested WoodMackenzie to provide their own view of DBCT throughput, as well as a 'high case' and 'low case' with different assumptions being made around some of the points of uncertainty in forecasting demand.

In addition, individual members of the DBCT User Group, have provided WoodMackenzie with a view as to the likely DBCT demand for their own individual projects.

The demand projections are minor variances from those prepared by Wood Mackenzie that are referenced in the Initial DBCT User Group submission based on more up to date data, but are highly consistent with those previous projections.

A summary illustration of those various foreseeable demand projections, extracted from the Wood Mackenzie Report is shown below

Figure 7: Foreseeable Demand Projections from WoodMackenzie Report



Source: Wood Mackenzie

Source: Wood MacKenzie Report

Wood Mackenzie Base Forecast

Wood Mackenzie's base forecast for foreseeable demand is set out below:

Figure 8: Wood Mackenzie Base Forecast Demand

Table 1 Combined Wood Mackenzie DBCT Throughput Forecast

Case	2018 (Mt)	2019 (Mt)	2020 (Mt)	2021 (Mt)	2022 (Mt)	2023 (Mt)	2024 (Mt)	2025 (Mt)	2026 (Mt)	2027 (Mt)	2028 (Mt)	2029 (Mt)	2030 (Mt)	2031 (Mt)	2032 (Mt)	2033 (Mt)	2034 (Mt)	2035 (Mt)
Mine specific	74.8	76.2	77.3	79.5	80.7	80.9	83.5	80.9	83.6	77.3	80.2	77.7	79.0	69.1	68.9	63.5	63.5	65.0
Additional	-	-	-	-	-	-	-	-	-	-	-	-	-	6.1	4.1	12.9	18.2	20.0
Combined	74.8	76.2	77.3	79.5	80.7	80.9	83.5	80.9	83.6	77.3	80.2	77.7	79.0	75.2	73.0	76.4	81.7	85.0

Source: Wood Mackenzie

Source: Wood MacKenzie Report

As WoodMackenzie states in its report:

This outlook is Wood Mackenzie's base view of expected DBCT throughput based on a range of factors such as:

- *Forecast future production rates from existing mines;*
- *The cessation of production at operational mines;*
- *The development of other mines in terms of timing and scale;*
- *Available DBCT capacity during the forecast window;*
- *A view on individual mine export allocations between ports; and*
- *A view on rail system capability.*

As is evident from the table above, it also takes account of additional non-mine specific projected demand (given the uncertainty in the longer term about which individual projects will be developed).

The DBCT User Group considers that is evidently a much more credible method of projecting forecast demand in the market than the DBCTM / HoustonKemp approach of simply aggregating production from proximate mines and artificially ignoring the issues Wood Mackenzie has considered.

As shown above and in the WoodMackenzie Report, WoodMackenzie predicts a peak demand for the Declared Service of approximately 83.6 mtpa.

Wood Mackenzie High and Low Cases

The DBCT User Group has also requested Wood Mackenzie to provide a high case and low case demand forecast.

Each represent a series of assumptions being made which do not reflect Wood Mackenzie's base case.

For example, as described in the Wood MacKenzie report, the high demand case is based on APCT contracted capacity reverting to DBCT (Lake Vermont / Middlemount), Eagle Downs being developed and utilising DBCT despite Aquila's stake in WICET and some marginal tonnage reverting to DBCT from RGT.

Where it can be shown that even on an 'aggressive' high demand case forecast that demand can be met at least cost by the existing facility (i.e. DBCT) it will be clear that criterion (b) is satisfied.

The Wood Mackenzie Report provides the following high and low demand cases:

Figure 9 – Wood Mackenzie – High and Low Demand Cases

Table 2 Wood Mackenzie DBCT Throughput Forecast (Mine specific)

Case	2018 (Mt)	2019 (Mt)	2020 (Mt)	2021 (Mt)	2022 (Mt)	2023 (Mt)	2024 (Mt)	2025 (Mt)	2026 (Mt)	2027 (Mt)	2028 (Mt)	2029 (Mt)	2030 (Mt)	2031 (Mt)	2032 (Mt)	2033 (Mt)	2034 (Mt)	2035 (Mt)
Base	74.8	76.2	77.3	79.5	80.7	80.9	83.5	80.9	83.6	77.3	80.2	77.7	79.0	69.1	68.9	63.5	63.5	65.0
High	76.8	78.2	80.3	82.5	83.7	83.4	85.0	82.4	87.1	84.0	92.4	86.9	88.2	78.3	78.1	72.7	72.6	74.1
Low	74.8	76.2	77.3	78.3	78.0	80.2	80.9	80.2	79.9	72.5	72.9	70.9	72.2	61.8	60.3	62.2	61.1	62.9

Source: Wood Mackenzie

Source: Wood Mackenzie Report

Consequently, even on the high demand case, foreseeable demand peaks at 92.4 mtpa capacity.

While the DBCT User Group has its doubts about whether additional capacity above the 85 mtpa capacity would be developed for a peak demand period of only 4-5 years (particularly given the aggressively optimistic assumptions that are required to produce that peak), given how clearly criterion (b) is satisfied even on the basis of that demand, the 2nd PWC Report provides modelling of least cost on the basis of this high demand forecast.

User Adjustments

A number of individual DBCT Users have provided Wood Mackenzie DBCT demand forecasts for their own individual projects, creating the 'DBCT User Group Case' noted in the Wood Mackenzie

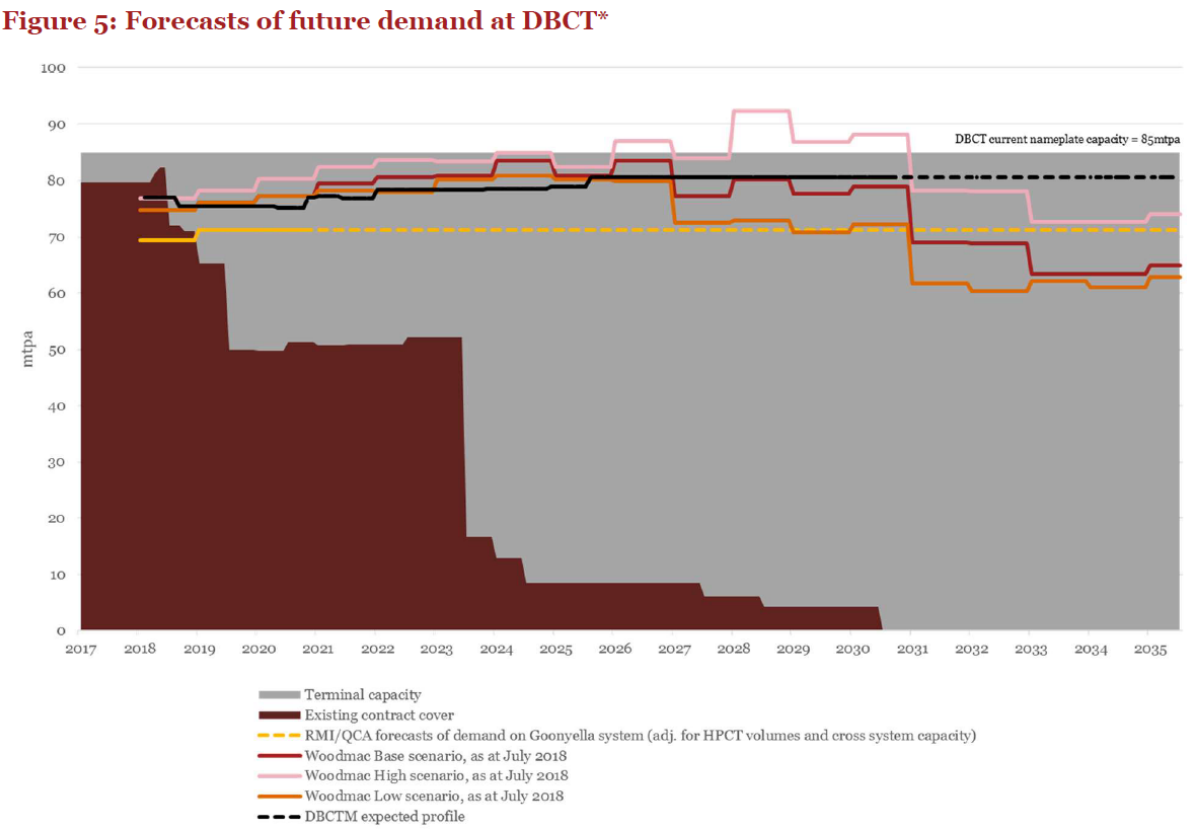
Report (with Wood Mackenzie's Base Case number being used for those producers who have not provided their own forecast).

As demonstrated above, the DBCT User Group projects are well correlated to the Wood Mackenzie forecast and produce a lower peak foreseeable demand than the Wood Mackenzie High Case.

Overview of foreseeable demand projections

As shown in the 2nd PWC Report, the Wood Mackenzie forecast demand scenarios, together with other scenarios discussed in the DBCT User Group Initial Submission (particularly the RMI forecast relied on by the QCA in connection with the 2016 access undertaking process and DBCTM's previously published view of contracted capacity), provides the following range of forecasts.

Figure 10 – Combined foreseeable demand projections



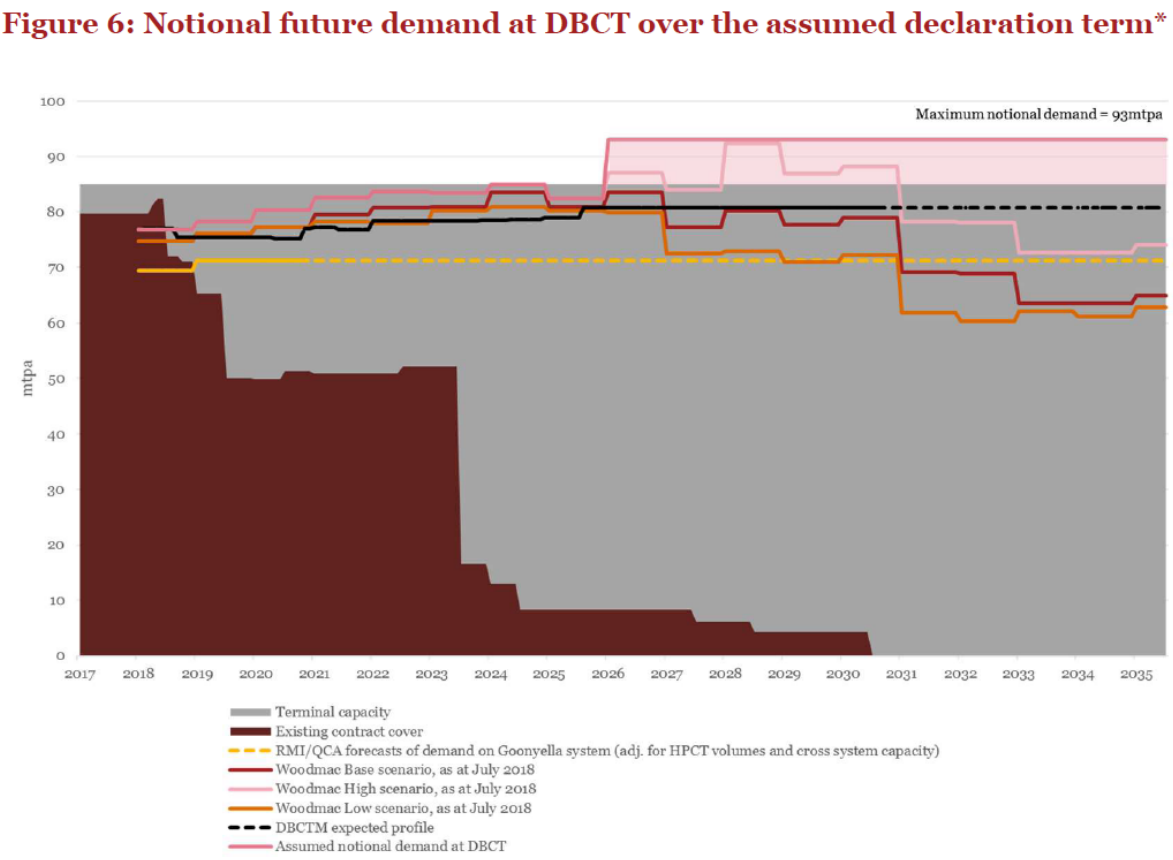
On any of those demand projections it is clearly not true that DBCT cannot meet total foreseeable demand (as DBCTM / HoustonKemp claim).

Only the Wood Mackenzie high case goes beyond the 85mtpa capacity of DBCT – and even then, only for a few years such that there would have to be real questions as to whether such an expansion would be built for such a short and unsustained period of peak demand (particularly taking into account that that is an optimistic/aggressive forecast demand – such that the actual demand peak is likely to be lower and for a lesser period). A far more likely foreseeable demand is something in the range of high 70's – low 80's mtpa.

In any case, as shown below, each of those demand forecasts is within a 93 mtpa forecast that the DBCT User Group has determined to use as an extreme high case demand forecast to definitively demonstrate that even on the highest possible foreseeable demand assumption, that

demand could be met by DBCT at least cost. If that level of demand can be met at least cost by DBCT alone, then it will be clear that criterion (b) is satisfied.

Figure 11 – Maximum foreseeable demand (utilising aggressively optimistic assumptions)



QRC Goonyella Forecasts

For completeness the DBCT User Group notes that it understands that QRC has provided a Goonyella system railings forecast as part of its submissions in respect of the review of the Aurizon Network declared service.

If the QCA was to seek to use that forecast as an alternative way of assessing foreseeable demand for the Declared Service it would need to deduct:

(a) throughput of HPCT (which is usage for close to its nameplate capacity of 55 mtpa) which will be usage of the Goonyella rail system without using DBCT; and

(b) cross-system traffic – which for the purposes of the Aurizon Network declared service is a use of the Goonyella system even though the ultimately unloading facility is not DBCT.

When those issues are taken into account, the DBCT User Group understands that the QRC aggregate forecast is not dissimilar to those projections provided by the DBCT User Group and economic consultants it has engaged (and in fact appears to support a position of lesser demand that the DBCT User Group is conservatively modelling).

6 Criterion (b) – the declaration period

6.1 Submissions on the declaration period

The declaration periods contended for as being appropriate in the initial submissions were 15 years (DBCT User Group Initial Submission) and 10 years (DBCTM Initial Submission).

However, there is a far more important difference between the submissions received, in relation to how the declaration period is set, which can be best summarised as:

(a) criterion (b) being tested over a range of possible declaration periods, and if there is a declaration period for which criterion (b) and each other access criterion are satisfied the service must be declared (as discussed in the DBCT User Group Initial Submission); or

(b) determining a declaration period (in complete isolation of any consideration of whether criterion (b) or any other access criteria would be satisfied over that time period), followed by determining whether criterion (b) and each other access criterion are satisfied in respect of that single specific time period (as proposed in the DBCTM Initial Submission – see particularly paragraph 81).

Where there are material potential changes in foreseeable demand over the declaration period, that difference becomes important.

6.2 Why criterion (b) should be measured against multiple potential declaration periods

There are some obvious and clear difficulties with what is proposed by DBCTM.

Most fundamentally, the approach DBCTM proposes is completely inconsistent with the principle in section 87C(1) QCA Act that the QCA must make a recommendation that the service be declared if all of the access criteria are met (and the principle that the access criteria are supposed to set the thresholds for when declaration is appropriate).

For example, under DBCTM's proposal, if:

(a) a hypothetical service met all of the access criteria if a declaration period of a shorter period (say 8 years) was utilised; but

(b) that hypothetical service failed to meet an access criterion if a declaration period over a longer period (say 20 years) was utilised,

DBCTM's approach is likely to result in declaration not occurring.

It is a completely absurd result that what would in that scenario be acknowledged to be a natural monopoly of the type that should be regulated would remain unregulated based on a long-dated (and potentially more uncertain) demand profile.

This is not a theoretical issue – but a real one depending on the projections of foreseeable demand. For instance, satisfying criterion (b) over a shorter period but not a longer period could occur where there was a very significant increase in foreseeable demand in the market that was relevant to the longer period (but not the shorter period).

If the service is a natural monopoly service for the shorter period (and all the other access criteria are satisfied) – it is clear that the intention and purpose of the third party access regime in the QCA Act is that it should be declared for that shorter period.

That intention and purposes is made even clearer when regard is had to the various mechanisms which exist in the QCA Act to cease declaration if it ceases to be appropriate, such as the service provider's ability to apply for revocation and the provisions requiring periodic reviews of declarations (such as the review currently being undertaken).

With those review mechanisms, it is clear that the QCA Act access regime was not designed to deny declaration where the criteria are met over a period in the manner asserted by DBCTM.

That is particularly important given the wide range of declaration periods that has been proposed (see for example the NCC recommendation of 50 years for Sydney Water's sewerage services and 5 years for cargo related infrastructure at Sydney Airport).

DBCTM's approach is also completely inconsistent with the explanation in the Competition Policy Review Bill EM (at [12.27]), which expressly envisages the consideration of multiple potential declaration periods in the way the DBCT User Group proposes:

> *The Council and the Minister may need to consider multiple potential declaration periods in determining whether there is an appropriate declaration period over which criterion (b) would be met.*

That passage of the Competition Policy Review Bill EM is also quoted in the NCC's updated Guide to Declaration, such that DBCTM's approach is also inconsistent with the views of the one regulator who has considered this issue since criterion (b) was altered.

For completeness the DBCT User Group notes that, if the QCA was to (completely contrary to all indications of how the legislative regime should work), determine that what was required was to test criterion (b) against a single time period, then the DBCT User Group consider that the appropriate time period is likely to be shorter than would be the case on the basis of how the criterion (b) should be interpreted. In particular, there is very clearly a period between when the current declaration expires (8 September 2020) and before the various coal companies contractual commitments at APCT begin to expire (at 31 December 2026 for BHP Mitsui, 30 June 2027 for Middlemount and 30 June 2028 for Lake Vermont), in which demand is lower and the DBCT User Group considers that criterion (b) would even more clearly be met.

6.3 Appropriate declaration period

It follows from the above analysis, that the DBCT User Group's views about the appropriate declaration period are dependent on the approach taken to applying criterion (b) where there are multiple possible declaration periods.

Assuming the QCA applies the approach indicated by the Competition Policy Review Bill EM and the NCC Guide to Declaration (such that criterion (b) should be tested against multiple possible declaration periods), then the DBCT User Group continue to consider the appropriate declaration period is a long one (with 15 years being suggested) given:

(a) the importance of long-term certainty to access seekers who may engage in significant investments as part of gaining access to a declared facility; and

(b) the duration of time for which users may seek access to the facility,

with shorter declaration periods being considered if for any reason any of the access criteria are not satisfied over that period.

However, if the QCA considers that, contrary to all regulatory and legislative guidance, criterion (b) should be tested against a single declaration period, then the DBCT User Group considers that to avoid the absurd outcomes that are referred to above, it would be reasonable to consider a shorter declaration period over which there is a high degree of certainty of the demand profile (in this case being likely to be the period prior to some or all of the APCT contracts expiring).

7 Criterion (b) – at least cost

7.1 What costs are to be taken into account?

As the Competition Policy Review Bill EM notes – the costs relevant to determining whether a facility can meet total foreseeable demand at least cost are not defined (see [12.31]).

While the QCA Act requires that regard is had to all costs associated with having multiple users of the facility – that is not particularly relevant here as that is already the prevailing position and will continue to be the position with or without declaration.

The DBCT User Group agree with DBCTM's assessment that all costs that may be incurred in the coal supply network to meet foreseeable demand are relevant – including rail access and rail haulage costs.

However, DBCTM and HoustonKemp assert that all that is relevant is 'incremental' or 'resource costs'.

The DBCT User Group strongly disagree with that analysis.

There is nothing in the wording of criterion (b) which suggests that previously incurred capital costs should be ignored in the way that DBCTM suggests – that is simply inconsistent with the ordinary meaning of the 'least cost' wording.

In addition, DBCTM's approach will also produce absurd results as it ignores the very high capital costs that actually create natural monopolies (which seems completely inconsistent with the clear intention as explained in the Competition Policy Review Bill EM to refocus criterion (b) as a natural monopoly test).

As discussed in detail in the 2nd PWC Report only considering resource costs ignores that mines receive and respond to price signals that are very different.

In determining whether to use an alternative terminal, the DBCT User Group members confirm that they consider the costs they will incur – including the relevant capital costs – because those capital costs are clearly taken into account in the calculation of the charges levied by the providers of coal handling services.

In any case:

(a) given the appropriate market definition of a Hay Point catchment common user coal handling services market – even on DBCTM's view of how cost should be measured, demand will be met at least cost given the high incremental cost of development of a Dudgeon Point coal terminal; and

(b) if DBCTM/HoustonKemp properly took into account the significant below rail investments that would be required in order for a material volume of Hay Point catchment mines to utilise terminals at ports other than Hay Point, it would still be clear on any view of how cost should be measured that demand will be met at least cost by DBCT.

7.2 PWC Modelling of costs to meet demand

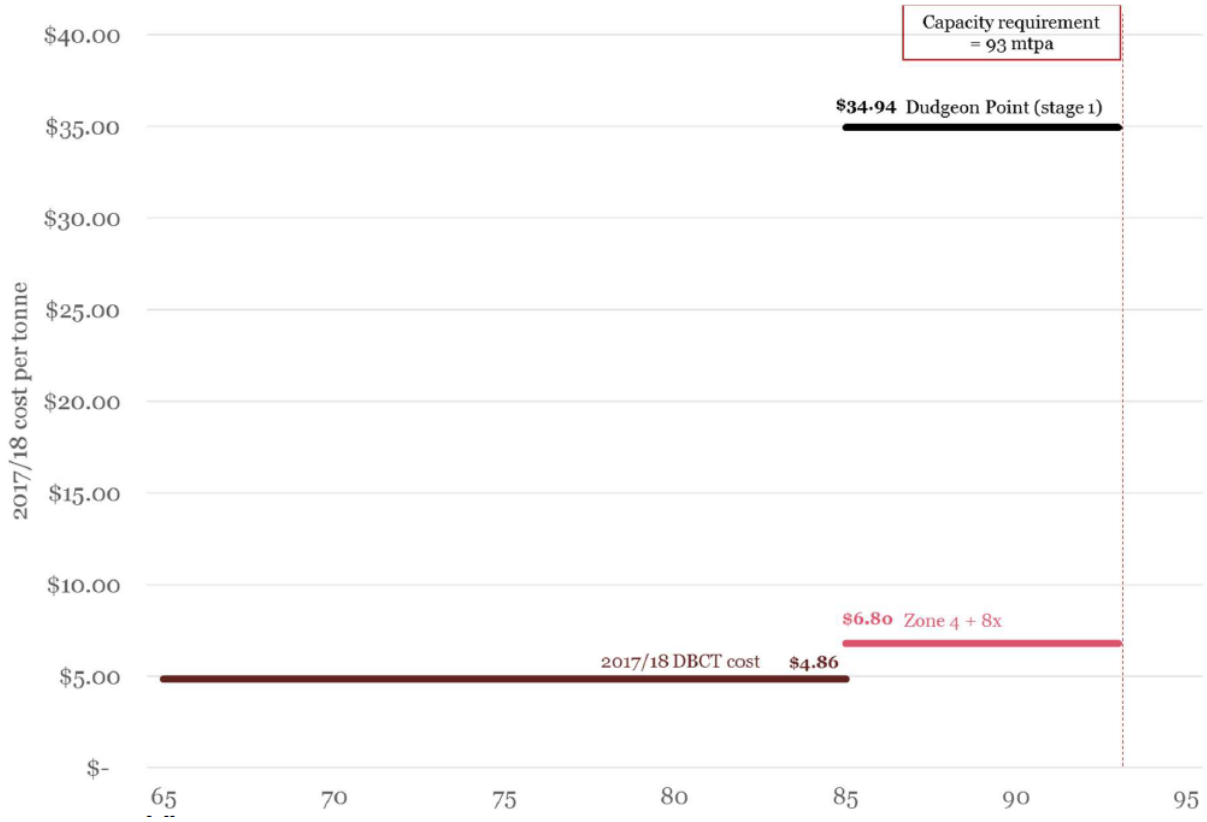
The 2nd PWC Report (in Schedule 1) models the costs of meeting the various demand profiles referred to in this submission, and clearly demonstrates that foreseeable demand is met at least cost by DBCT alone (evening assuming the revised costs of the Zone 4 and 8X expansions of DBCT.

That is the case even though PWC has taken the conservative approach of updating the costs of those expansions to reflect the revised figures provided by DBCTM (despite the DBCT User Group considering those figures have been manipulated to assist DBCTM's arguments in the declaration review, as there is very limited evidence or substantiation provided for how the costs increased dramatically on particularly the 8X expansion of DBCT – in the most recent Master Plan).

In particular, the modelling shows the following for the alternative methods of meeting the projected peak demand of 93 mtpa (using the peak demand from the Wood Mackenze high case as the maximum possible foreseeable demand) at least cost:

Figure 11 – Costs of meeting 93 mtpa of foreseeable demand

Figure 7: FY18 cost per tonne of incremental expansion options, scaled to capacity requirement (93 mtpa)

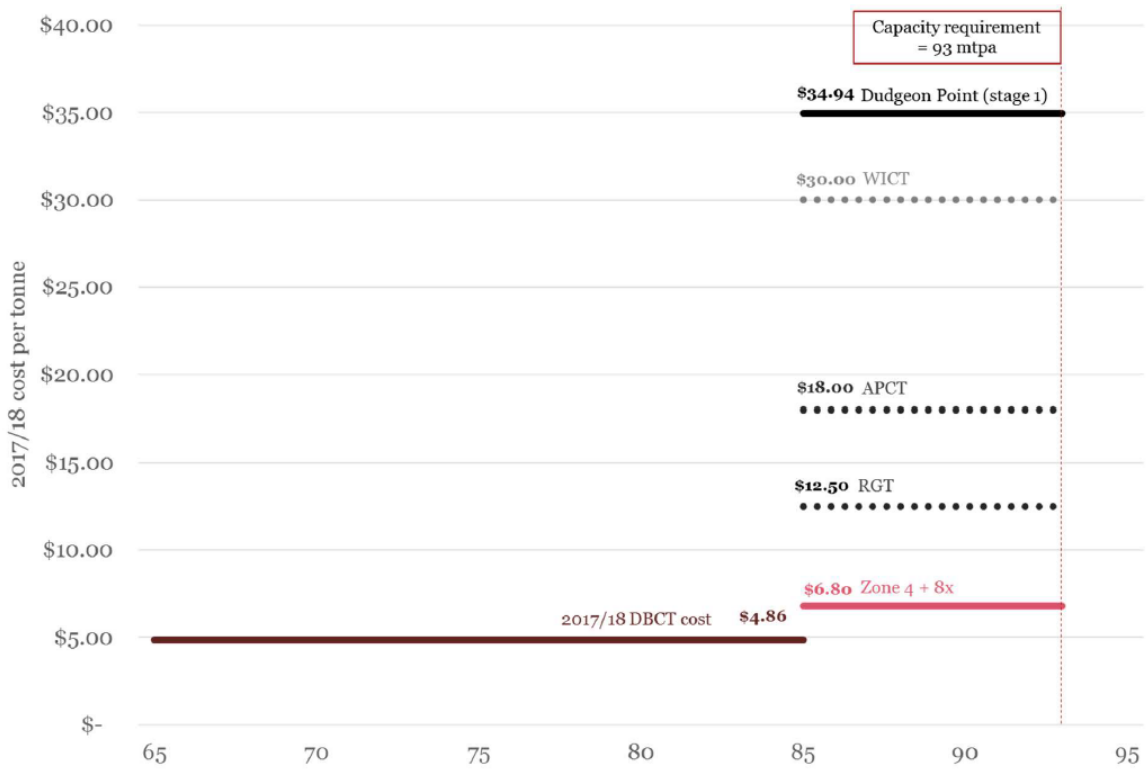


That is not even a close comparison – such that there is no doubt about the conclusion that criterion (b) is satisfied.

Even if it was assumed that other coal terminals were part of the market and it was artificially assumed that they could meet demand from Hay Point catchment users without below rail investments (which obviously understates costs of utilising other terminals significantly), it is still evident from the modelling that the price differential means that it would still be least cost for the demand to be met by DBCT (expanded as reasonably required to meet demand).

Figure 12 – Costs of meeting 93 mtpa of foreseeable demand (even if other terminals were suppliers)

Figure 8: FY18 cost per tonne of options to service total foreseeable demand, scaled to capacity requirement



8 Criterion (b) – 9X is Reasonably Possible

Under section 76(3) QCA Act if it is 'reasonably possible' to expand capacity of a facility for a service the QCA may have regard to the facility as if it had that expanded capacity.

On any reasonable projection of total foreseeable demand, DBCT would only be required to expand (if it was actually so required) via the Zone 4 and 8X expansions (which between them take DBCT up to 102 mtpa).

DBCTM acknowledges that it is reasonably possible to expand DBCT through those expansions – such that they are clearly relevant as to whether DBCT can meet demand at least cost relative to 2 or more facilities.

For completeness however, the DBCT User Group notes that it does not agree that the 9X expansion no longer meets that threshold of being 'reasonably possible' as DBCTM appears to now be alleging.

'Reasonably possible'

While it is not actually relevant when the market is defined appropriately and foreseeable demand is estimated appropriately (as foreseeable demand is easily met through the Zone 4 and 8X expansions), it is clear that the 9X expansion of DBCT would need to be taken into account if forecast demand warranted doing so.

That follows because it is 'reasonably possible' (and therefore meets the threshold set out in section 76(3) QCA Act) for 9X to be developed.

The use of the terminology 'reasonably possible' in section 76(3) QCA Act sets a low threshold – it clearly requires an analysis of whether an expansion is 'possible' – not whether it is planned, probable, likely, highly likely or certain.

It certainly does not require the level of certainty that DBCTM asserts.

Prospects of a 9X Expansion

When the facts surrounding 9X are considered, it is clear that 9X would meet such a threshold.

The DBCT User Group notes that 'coincidentally' DBCTM has revised the 2018 DBCT Master Plan from the 2016 Master Plan in a manner that suits its current position in respect of the declaration review – just days before the initial round of submissions were due.

DBCTM now claims (without any prior communication to the DBCT Users of this view) that the 9X expansion is not viable because of:

(a) the alleged difficulty of securing permits to complete the required dredging;

(b) the land required for the new stockyard;

(c) the introduction of differential pricing;

(d) delays which DBCTM alleges would occur; and

(e) depending on Aurizon below rail network development.

The change in master plan notably did not require approval of the QCA (and there is no evidence that it involved any other scrutiny about DBCTM's claims regarding it no longer being likely that a 9X expansion could be developed).

The *Sustainable Ports Development Act* was passed before the 2016 Master Plan, the land required and need for below rail development was always known, differential pricing was introduced in the undertaking to which the 2016 Master Plan became part, and there is no reason for the anticipated delays to have increased.

In other words, the DBCT User Group notes that none of this has actually changed since the 2016 Master Plan – such that there now must be real questions about why suddenly the 9x expansion is considered not feasible by DBCTM when it previously was.

If the QCA was minded to consider the difficulties of these natures, then the QCA needs to similarly consider the costs, delays and difficulties involved in developing new coal projects (which will very directly impact on the foreseeable demand projections for coal projects).

In that regard it is evident from the objections which have occurred to projects like Adani's Carmichael project and New Hope's New Acland project – that there is real potential for coal supply to be delayed well beyond the point which project proponents may be seeking to have it in production (or the point at which Wood Mackenzie or AME anticipate it will be in production).

The simple reality is that all expansions of significant infrastructure would face similar hurdles to what DBCTM suggests means 9X cannot even be considered (third party consents and regulatory approvals).

While the DBCT User Group considers it is irrelevant, as foreseeable demand calculated based on an appropriate forecast within an appropriate market definition does not require 9X, it does not consider that any real evidence has been provided to suggest that 9X would not be 'reasonably possible' if such demand existed.

9 Criterion (b) – Conclusion

It follows from the extensive analysis above, the more accurate demand forecast provided in the Wood Mackenzie report, and the modelling in the PWC Report and 2nd PWC Report, that DBCT can clearly meet foreseeable demand in the market properly defined (the Hay Point catchment common user coal handling services market) at least cost – and criterion (b) is therefore satisfied.

10 Criterion (a) – the Key Issues

Criterion (a) provides:

> *That access (or increased access) to the service, on reasonable terms and conditions, as a result of a declaration of the service would promote a material increase in competition in at least 1 market (whether or not in Australia), other than the market for the service*

The Initial DBCT User Group Submission did not address the Access Framework as it had not been published at the time those submissions were due. However, the DBCT User Group had foreshadowed that it would not be appropriate to consider such an artificial and contrived construct in determining the counterfactual for the purposes of criterion (a)).That remains the case.

Based on the Initial DBCT User Group Submission, Initial DBCT Submission and the now published Access Framework, it is apparent that the issues in contention in relation to the application of criterion (a) are:

(a) the interpretation of the promotion of competition threshold;

(b) the market definition for the relevant dependent markets;

(c) whether the Access Framework is an appropriate counterfactual;

(d) if so, what the differences are between the Access Framework and the likely terms of access with declaration; and

(e) whether those differences mean that declaration will promote competition in at least one of the dependent markets.

11 Criterion (a) – interpretation of a promotion of competition

What is required for a promotion of competition?

DBCTM has made submissions that to satisfy criterion (a) the QCA must be positively satisfied that declaration would promote a material increase in competition (see particularly paragraph 287).

However, as demonstrated very clearly in the Allens advice (see Schedule 1 of the DBCT User Group Initial Submissions) that interpretation is clearly inconsistent with the legal and regulatory precedent which exists in relation to the interpretation of this wording.

In particular, DBCTM's interpretation is:

(a) inconsistent with the decision in *Sydney Airport*[21] (noting that the promotion of competition part of the language in the section has not changed since that decision was handed down);

(b) inconsistent with the subsequent decisions where the interpretation from Sydney Airport was adopted, such as *Services Sydney* where the Tribunal stated:[22]

> *It is in this sense that the notion of promotion of competition involves a consideration that if the conditions or environment for improving competition are enhanced, then there is a likelihood of increased competition that is not trivial. We agree.*

and the Tribunal's decision in *Re Fortescue Minerals Group*;[23]

[21] [2005] ACompT 5 approved by the Federal Court on appeal at (S7)

[22] Re Services Sydney Pty Limited [2005] ACompT 7

(c) inconsistent with the Australian Competition Tribunal's latest consideration of the criteria *Application by Glencore Coal Pty Ltd*[24]:

> *In identifying dependent markets for the purposes of criterion (a), what must be determined is whether any dependent market is distinct from the market for the service, and the effect access will have on the conditions for competition in that dependent market.* ***This includes considering whether access will create or improve the environment in which competition may then flourish****: see Sydney Airport FC at [107].*

(d) inconsistent with the NCC's guide – which was updated following the change to the wording of criterion (a) and continues to state the following (at [3.23]):

> ***The promotion of a material increase in competition involved an improvement in the opportunities and environment for competition such that competitive outcomes are materially more likely to occur****.*

It is absolutely clear from the above that the interpretation of what constituted a 'promotion of competition' was well and truly settled at the time of the amendments to criterion (a) being made in 2017 (in the CCA) and 2018 (in the QCA Act).

While criterion (a) was amended in 2006, after the *Re: Sydney Airports* decision, those amendments did not alter the threshold for what constituted a promotion of competition. The explanatory memorandum relating to the 2006 amendment makes clear that it was not intended to alter the approach to assessing whether there had been a change in competition, but directed at more clearly expressing the magnitude of expected changes to the competitive environment that were required – that is, such changes should be more than trivial changes.

That some aspects of *Sydney Airport* may no longer provide precedent value is not relevant – when in respect of the meaning of promotion of competition it is very clear that Sydney Airport continues to provide the law.

There was also no discussion about seeking to change what promotion of competition meant under criterion (a) in:

(a) the Productivity Commission review of the national access regime report;

(b) the Harper Review report; or

(c) the explanatory memorandum or notes to the bills which made the changes to criterion (a) in the CCA and QCA Act or the parliamentary debates on them,

In that context, the legislature must be assumed to know and understand how that wording had been interpreted, such that where it has seen fit to change other aspects of criterion (a), but not the promotion of competition wording – it is clear that there was no intention to change how the reference to promotion of competition was interpreted. All that has changed is what it is that is required to produce that promotion of competition (previously access, now access on reasonable terms and conditions as a result of declaration).

It is therefore completely unsurprising that the NCC has formed the view in the NCC Guide to Declaration that the test for what constitutes a promotion of competition remains the same – requiring an improvement in the opportunities and environment for competition.

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[23] [2010] ACompT 2

[24] [2016] ACompT 6 at [107].

The QCA should follow the clear judicial and regulatory precedent, and legislative intention, in relation to this issue, and therefore the QCA staff issues paper is clearly correct to express the same view.

Yet it is clear from the HoustonKemp Criterion (a) Report that they have proceeded on the basis of a clearly erroneous and incorrect interpretation of requiring a positive finding of a material increase in competition (see page ii). As a result the conclusions HoustonKemp reaches on criterion (a) are flawed and largely worthless because they are clearly testing what they consider to be the likely outcomes in dependent markets against the wrong threshold.

If the QCA was to proceed on the basis of the interpretation of criterion (a) that DBCTM / HoustonKemp asserts it would be a clear error of law.

What is the relevance of the existing status the Declared Service being declared or the existing state of markets?

DBCTM's Initial Submission asserts (at paragraph 20) that:

> *If the QCA were to view its obligation under section 87A as an assessment of whether declaration should continue, the adoption of such an approach would involve error.*

If DBCTM's point is confined to suggesting that there is no presumption that declaration should continue or that the QCA is required to apply the access criteria rather than come to a general conclusion about appropriateness of declaration then there is no issue with that.

However, it appears from much of DBCTM's submissions that their view is that the QCA cannot have regard to the pro-competitive effects of declaration that are evident in the status quo – and in that regard DBCTM is clearly wrong.

DBCTM / HoustonKemp have not properly understood the context of this declaration review, in seeking to apply the access criteria where the services are currently declared.

In this context, the QCA is required to consider the likely state of dependent markets with declaration – and it is clear that the current status will typically be a very good proxy for that. It is actually the likely state of dependent markets without declaration for which there is less evidence and more judgement is required.

As a clear example of the errors this results in the DBCTM/HoustonKemp falling into – DBCTM/HoustonKemp suggest that where markets are workably competitive criterion (a) cannot be satisfied.

The DBCT User Group acknowledges that is likely to be the case where the access criteria are being considered in respect of a service that has not yet been declared.

However, again that line of reasoning simply demonstrates that DBCTM / HoustonKemp have not properly understood the context of this declaration review, in seeking to apply the access criteria where the services are currently declared.

To the extent that markets are identified as currently workably competitive – that clearly cannot be determinative of the fact that declaration will not promote competition, when the very reason they are workably competitive currently may be (and in the DBCT User Group's view is) the existing declaration.

Consequently DBCTM's attempts to simply rule out consideration of some dependent markets as relevant to criterion (a) by indicating they are workably competitive is clearly misconceived.

Accordingly, there is no escaping the need to consider the likely state of the dependent markets with and without declaration and then determine whether the existence of declaration will create

improvement in the opportunities and environment for competition such that competitive outcomes are materially more likely to occur (to use the words of the NCC Guide).

12 Criterion (a) - Market definition of the dependent markets

12.1 Tenements market – product/service dimension

The DBCT User Group notes the acknowledgement in the HoustonKemp Criterion (a) Report (at page 38) that:

> *There are a number of mining authorities for undertaking different activities and that relate to different minerals. Firms wanting to acquire these are not likely to be willing to substitute between them. Each of these may be in a separate market*

The DBCT User Group strongly believes that HoustonKemp is correct in that assessment, such that (consistent with the Initial DBCT User Group Submission and Castalia Report):

(a) there is a separate market for coal tenements (compared to other minerals); and

(b) there is a separate market for exploration tenements to mining tenements (see the Castalia Report and DBCT User Group Initial Submission).

Coal tenements

There is clearly a separate market for coal tenements as:

(a) the Queensland government grants tenements for coal (in clear distinction to tenements for other minerals – which are granted in respect of minerals more generally);

(b) the buyers of coal tenements are different to those of other mineral tenements. In that regard the DBCT User Group notes the existence of numerous pure coal plays (i.e. BMA, BMC, Fitzroy, New Hope, Peabody, Pembroke, Stanmore, Whitehaven) who are not buyers of other types of mineral tenements – such that there is clearly non-price constraints for many buyers on acquiring different types of tenements (most obviously most market participant's experience in exploration, development, operation and marketing – and as a result valuation of a tenement for potential acquisition - being specific to coal); and

(c) the value of coal tenements is impacted by fundamentally different factors to the value of tenements for other minerals – most obviously:

  (i) the price of coal and the prices of other minerals respectively; but also

  (ii) the different costs of transportation; and

  (iii) the different amounts and costs of downstream processing that are required,

  such that there would not be any correlation of the type that would suggest a willingness for producers to substitute a coal tenement for another mineral tenement (or vice versa).

Exploration tenements

There are also clearly separate markets for exploration/development and production tenements:

(a) as the Queensland government grants separate types of tenements for coal production and coal exploration (mining leases and exploration permits for coal / mineral development licences respectively), with substantially greater rights and obligations attached to mining leases than to exploration permits for coal or mineral development licences; and

(b) the reasons noted in the Pilbara tribunal decision and the Castalia Report are clearly applicable in respect of coal tenements, namely:

(i) the existence of entities that buy and sell tenements (without a view to ultimate development);

(ii) the differences in suppliers and acquirers in this market; and

(iii) the differences in price of such tenements.

12.2 Tenements market – geographic definition

The DBCT User Group also notes the acknowledgement in the HoustonKemp Criterion (a) Report (at page 38) that:

> *there are likely to be markets (or a market) for mining authorities*
>
> *Mining authorities are provided for a specific location, and* ***so the geographic dimension of the market may be quite small***

The HoustonKemp Criterion (a) Report (in clear contradiction to the statement about a small geographic dimension) then refers to the 'Queensland market for authorities' – without any apparent basis for that extremely wide geographic dimension.

It is absolutely clear for example, that a coal tenement in a coal basin in Queensland that is not well connected to infrastructure (such as the Galilee Basin) is a fundamentally different proposition to a tenement in the Hay Point catchment – such that they are clearly not close substitutes. The costs of infrastructure for such projects are so fundamentally different that they would not be regarded as close substitutes.

In addition the challenges to new coal projects outside of the established central Queensland coal region network (such as Adani's Galilee project and New Hope's New Acland project) are such that there is a distinctly different regulatory risk profile for development for such projects.

As demonstrated by:

(a) the analysis in the Initial DBCT User Group Submission (and the Castalia Report) about the importance of infrastructure costs to the cash flows which would be anticipated from a tenement; and

(b) the evidence of DBCT User Group members that they value tenements on a discounted cash flow basis, with the assumptions made in relation to the costs of infrastructure being one of the most material components of that valuation,

it is clear that the geographic dimension of the coal tenements market is actually bounded by proximity to particular coal infrastructure supply chains.

For example, if two tenements in different regions were thought to have coal reserves or resources which could be developed into a 5 mtpa mine for a 15 year mine life, and the infrastructure coal supply chain cost differences were $5 that would result in $375 million of extra costs across the mine life, which could clearly change the net present value of such a project (noting that there is known to be substantially higher differences in costs between some coal supply chains). On any sensible discount rate, this will clearly impact on the valuation applied to the underlying tenement. The same would be true for other hypothetical tenements/projects.

As is evident from that modelling, the value of tenements is significantly different based on such infrastructure costs.

Consistent with that analysis, DBCT User Group members which have made recent acquisitions in this tenements market have confirmed that they hold the view that tenements in the Hay Point

catchment are distinct from coal tenements in other parts of the central Queensland coal region as a result of factors including:

(a) infrastructure cost differences;

(b) portfolio effects for existing users – being able to use existing port (and to a lesser extent rail) capacity for new projects, more easily transfer employees between projects and achieving economies of scale through colocation; and

(c) greater co-shipping and blending opportunities – particularly for metallurgical coal producers.

The views of market participants are clearly the best evidence which exists.

Accordingly, the DBCT User Group continues to strongly believe that the 'Hay Point' catchment is the appropriate geographic dimension for the tenements market.

As a result, the DBCT User Group considers that the appropriate dependent market to consider for the purposes of criterion (a) is clearly a Hay Point catchment coal exploration / development tenements market.

12.3 Rail haulage

The DBCT User Group strongly rejects the suggestions by DBCTM / HoustonKemp that there is a 'Queensland bulk rail haulage market' (for which no credible evidence is presented).

That would tend to suggest that DBCTM / HoustonKemp consider that haulage on the Mount Isa Line (bulk minerals), North Coast Line (intermodal) and West Moreton network (coal) are in the same market as coal haulage in Central Queensland. However, that is patently untrue.

It is notable for example that:

(a) different wagons are used in central Queensland and different trains are able to operate in central Queensland compared to other parts of the broader Queensland rail network (with very different axle loads applicable in the central Queensland coal region to the regions mentioned above) – such that it is not easy to move rolling stock outside of the central Queensland coal region network;

(b) haulage providers have separate intermodal divisions;

(c) some haulage providers do not operate in some of those regions;

(d) because those regions are geographically distant a haulage provider could not enter a new region without significant investment in new maintenance and provisioning facilities; and

(e) the buyers in these different networks are very different.

Accordingly it is clear that, at the widest there is a central Queensland coal region rail haulage market (while noting that even within that region there are differences in substitutability – most particularly in respect of electric locomotives which can only operate on the Goonyella and Blackwater systems).

As discussed further below, the DBCT User Group remains of the view that this market is one in which there is a promotion of competition as competition in the rail haulage space is materially dependent on the threat of new entry – and the damage to competition done in the tenements market (as described below), and the uncertainty of pricing which will exist in the absence of declaration, will substantially reduce the prospects of new entry into the haulage market which could be underwritten by such new entrant.

12.4 Other relevant dependent markets

This submission has focused on the Hay Point catchment coal exploration / development tenements market and rail haulage market, given how clear it is that declaration promotes a material increase in competition in those markets.

However if, despite all evidence to the contrary, the QCA was to not find that was the case it would need to consider all other possible dependent markets, and the DBCT User Group would make further submission on other markets in which declaration would promote a material increase in competition.

In relation to markets that were mentioned in the Initial DBCT User Group Submission:

(a) DBCT secondary capacity trading market – the DBCT User Group notes the recently submitted draft amending access undertaking in relation to the potential cessation of business of the 'Trading SCB' now proposed by DBCTM. However the DBCT User Group still has concerns in relation to that market given that without the declaration the protections against the anti-competitive impacts of future vertical integration are effectively removed – given how easy the 'Access Framework' is to amend (discussed further below); and

(b) Coal markets – DBCT continues to be an extremely important metallurgical coal port, and the distortion of competition in the tenements market, described below and in the Castalia Report and 2nd Castalia Report, has the potential to increase concentration in metallurgical coal markets over time.

13 Criterion (a) - The 'Access Framework' is not a proper counterfactual

13.1 Overview

It is inappropriate for the QCA to determine the likely state of the dependents market without declaration, as being reflective of the Access Framework being in effect (at least in the terms provided to the QCA).

That is the case because:

(a) as discussed in the DBCT User Group's initial submission – this is a contrived and artificial counterfactual which has been cynically prepared to defeat the very purposes of Part 5 of the QCA Act. If this is permitted then taken to its logical conclusion there is very limited circumstances in which access regulation will continue in Australia;

(b) there is no certainty that DBCTM will execute the Access Framework (DBCTM for example has only very recently been able to provide its proposed drafting to reflect its position on pricing) and DBCTM's assertions as to how it will operate to constrain DBCTM's incentives to exercise its market power are speculation without any supporting evidence;

(c) even if DBCTM did execute the Access Framework, it can so easily be amended by DBCTM in the future (without the need for consent of existing or future users) that the QCA cannot be satisfied that it will remain in materially the same terms of the longer term declaration period(s) being considered; and

(d) even if DBCTM did execute the Access Framework that DBCTM is proposing, given the lack of any regulator or regulatory power to detect or report breaches and the lack of any real remedies for any breaches, the QCA cannot be satisfied that DBCTM will actually comply with the Access Framework.

Each of those issues are explored in more detail below.

13.2 Contrived and artificial counterfactuals

DBCTM's contentions in respect of criterion (a) are heavily reliant on the proposition that the proposed Access Framework will constrain DBCTM's market power such that competition would effectively be the same with and without declaration.

The DBCT User Group continues to consider that it cannot be the case that it is appropriate for criterion (a) to be assessed by reference to a counterfactual which:

(a) is not executed;

(b) has never been implemented or operational – such that DBCTM's views about how it will theoretically operate is entirely speculative and has no evidence to support it; and

(c) is clearly designed with the cynical and sole purpose in mind of trying to establish that criterion (a) is not satisfied.

This is a fundamentally different position to where access has historically been provided (or not been provided) in a particular way in the absence of declaration for a sustained period before the access criteria came to be considered – such that the QCA could potentially have a much higher degree of confidence that that position would continue and have clear evidence of the form of the appropriate counterfactual without declaration.

Rather here the QCA is being asked to determine that the likely state of the market should reflect DBCTM (which will be a monopolist, with market power and an incentive to maximise profit) giving effect to a completely new and untested arrangement which has never been implemented, can be changed largely on a whim, and compliance with which is extremely difficult to monitor, verify or enforce. That is not a credible counterfactual.

Accepting the Access Framework as providing a counterfactual is not something that should be done by the QCA lightly - as doing so effectively turns the access criteria into merely a safe harbour for this sort of cynical attempt at legitimising unregulated monopoly pricing.

The DBCT User Group cannot see how such an interpretation can be consistent with the object of Part 5 of the QCA Act.

As noted in the DBCT User Group's Initial Submission, the ACCC's merger guidelines expressly indicate that contrived and artificial counterfactuals will not be accepted. It is hard to understand why criterion (a) should be treated differently – as the issue is the same, in assessing the impact on competition of declaration or the merger (as applicable) it is important to measure the impact based on the *likely* state of the market – not merely what the monopoly infrastructure provider or merger parties allege will occur.

It is also particularly worth noting what was said in the *ACCC v Metcash*[25] proceedings about what is required to demonstrate a counterfactual as the likely state of the market (in a case like this where the status quo is not a useful proxy).

In that case it was said (at paragraph 35 and 145):

> *In my view, it was necessary to establish, on the balance of probabilities, what would happen if the acquisition proceeded and, importantly for the present case, if it did not proceed. Only then could the test in s 50 be applied. The application of a 'real chance' test, even at this (second point), also has the consequence, so far as s 50 is concerned, that the Court may be required to find the statutory prohibition operative when, in all likelihood,*

[25] [2011] FCA 967

the suggested possible effect on competition will not occur. That also seems a strange and unsatisfactory result.

…

I consider that the Commission must establish, on the balance of probabilities, what the future state of the market will be, both with and without the proposed acquisition. That is, the Commission must satisfy the Court that its counterfactual is more probable than any competing hypothesis advanced

In other words, applying that reasoning here, the QCA should not proceed on the basis of simply assuming that the correct counterfactual (for the likely state of the market without declaration) should reflect DBCTM complying with the Access Framework on the terms currently proposed, Rather it must be satisfied on the balance of probabilities that that will be the likely outcome without declaration.

The DBCT User Group cannot see how that view is even open to the QCA given the uncertainties inherent in the Access Framework, its application, future amendments to its terms and the significant difficulties in ensuring DBCTM's compliance in the absence of the QCA (and DBCTM's strong economic incentives as a monopolist).

13.3 Amendments to the Access Framework

DBCTM gives itself under the Deed Poll (see clause 7 and 8) a unilateral right to amend the Access Framework (including the Standard Access Agreement).

It is clear from clause 8.2 that DBCTM can make amendments at any time it sees fit.

DBCTM can make such amendments without meeting any criteria other than that the amendments:

(a) 'promote the Framework Objective' (clause 8.2); and

(b) have the prior written consent of the State (clause 5.1)).

'Having regard to' specified factors is not a protection against adverse amendments

While DBCTM is required to have regard to the matters in clause 8.5, that should be seen for what it is – an attempt to provide a thin veneer of credibility to the amendment process – that will actually provide no constraints on the type of amendments that DBCTM can make.

The amendments are not required to be appropriate having had regard to them (in the way the QCA's approval of a draft amending access undertaking process would work under the QCA Act), and, given DBCTM's incentives as a monopoly service provider, there will not be an independent balancing of factors as occurs when a regulator such as the QCA has regard to multiple factors in making its decisions.

Instead, DBCTM merely has to have given some consideration to the specified factors. DBCTM can and will have complied with that requirement where it considers these issues and then subjectively determines that those which don't suit its proposed amendments should be given less weight such that the amendment should still proceed.

State's consent

If the State consents to amendments, it seems that the User Group's only protections against future amendments are commencing court proceedings to allege that the amendments do not 'promote the Framework Objective'.

It is important to note in that regard that the State has previously been close to consenting to changes to the Port Services Agreement that would have substantially damaged the DBCT User Group and that it will not always be evident to the State the damage that could be done by any

particular amendments. Where the State is already the lessor of the terminal to DBCTM, and they engage in commercial discussions without the involvement of the DBCT Users it is hard to see how the DBCT Users (or the QCA) can be certain as to how the State will act in the future in respect of DBCTM proposed amendments.

One only needs to consider, for example, the State's (through DBCT Holdings) recent approval of the 2018 Master Plan with spurious changes that were designed to assist DBCTM in this declaration view process, and which the DBCT User Group never had an opportunity to test or scrutinise, to understand that:

(a) the State will not typically be in a position to assess whether proposed amendments are appropriate as it is not a direct participant in the industry; and

(b) it cannot be assumed that either DBCT Users will be consulted by the State or that the State will heed their views.

Ultimately of course, decisions of the State have a political dimension such that if the only gatekeeper is the State, control of which changes with political cycles, there is a clear likelihood of DBCTM testing amendments with each change of government.

Promoting the Framework Objective – the Framework Objective itself can be changed

In relation to the threshold of promoting the Framework Objective, the DBCT User Group note that the ineffectiveness of the amendment regime is easily demonstrated by the fact that, under the deed poll, the Framework Objective itself can be changed with the State's consent. Such an amendment has the potential, if not likelihood, to remove even the theoretical protections the requirement to promote the Framework Objective provides.

Promoting the Framework Objective – the extreme difficulty in testing or challenging amendments against that threshold

Secondly, the Deed Poll makes it exceedingly difficult and expensive to test whether any particular proposed amendment meets the threshold of promoting the Framework Objective – to the point that this notional protection is merely theoretical.

In particular:

(a) whether amendments 'promote the objective' will clearly be open to dispute – that is most evidently the case because:

  (i) it will be very difficult to measure whether a specific detailed amendment might promote such a high level objective ('to promote the economically efficient operation of, use of and investment in, the Terminal, with the effect of promoting effective competition in upstream and downstream markets); and

  (ii) the objective, by its very nature, involves a degree of tension between what is in the interests of access seekers/holders and the infrastructure provider;

(b) the only possible way of a user raising an objection is to commence court proceedings (see clause 11.2); and

(c) such court proceedings must be commenced within 90 days of the Access Framework amendments first being published, making it highly likely that:

  (i) amendments will be 'slipped through' without consideration by users; and

  (ii) amendments will be made that detriment future access seekers for the terminal who are not aware/considering the Access Framework at the time such that they are not in a position to raise an objection even if they would have had they been a user of the terminal at the time (which provides a stark contrast with the QCA

consideration of amendments that may detrimentally impact on future access seekers).

One only needs to look at the various DAAUs being proposed by DBCTM (which it asserts are consistent with the similarly worded objective of Part 5 of the QCA Act) and how strongly the DBCT User Group feel that those amendments are not consistent with that objective (and the number of times that the QCA itself has determined such amendments are inappropriate) – to appreciate:

(a) the vague, uncertain and contentious boundaries in relation to future amendments that DBCTM are proposing; and

(b) how vigorously DBCTM is likely to pursue amendments that are in its commercial interests.

The Access Framework terms can effectively be changed however DBCTM chooses

It should be clear from the above, that the Access Framework terms can basically be changed whenever and however DBCTM chooses.

That has two very clear consequences for the purposes of this declaration review, namely:

(a) the Declared Service being provided in accordance with the currently proposed terms of the Access Framework is not the likely outcome in the absence of declaration such that it is not a proper counterfactual under which the impact on competition should be considered for the purposes of criterion (a); and

(b) there is extreme uncertainty as to whether the Access Framework will continue on the same terms (even within its initial 10 year term), such that it will have a clear chilling impact on investment decisions which rely on long term access by anyone who does not have the benefit of relying on existing users agreements to provide that certainty, which in turn will have a substantial detrimental impact on the environment and opportunities for competition in some of the impacted dependent markets.

14 Criterion (a) - Overview of the material differences between the 'Access Framework' and the QCA regime

Overview of Material Differences

The QCA has specifically requested submissions in the QCA Staff Questions on the following topic:

> *Would there be any material differences between the operation of the proposed deed poll and DBCT Access Framework and the operation of the access regime under Part 5 of the Queensland Competition Authority Act?*

Potentially the most critical difference is that the Access Framework will result in a completely different, much more uncertain and less favourable pricing regime for future users than that which exists for existing users who will maintain the price review rights under their existing user agreements for as long as they are renewed (see the Allens Advice in the DBCT Initial Submission for details).

In addition there are other principal differences, such as the certainty of the terms of the Access Framework, which can be easily changed and how difficult it will be to enforce any alleged breach of the Access Framework given the absence of an independent regulator or the statutory rights to seek compensation for breaches of the access arrangements.

Consequently any comparison of material differences conducted now based solely on the current terms (assuming they won't be amended and will always be strictly complied with) is likely to material understate the differences between the current terms and the future realities of how the service is provided which will develop over the declaration period.

However, for the purposes of demonstrating how uncertain and damaging to competition in dependent markets the Access Framework is, an overview of the key material differences is set out below.

This is not purported to be an exhaustive list, but demonstrates very clearly the artificial, uncertain and completely unworkable nature of the proposed Access Framework.

Difference	QCA Access Regime	DBCT Access Framework	Summary of Implications of Difference
Pricing	QCA determines pricing in accordance with a certain, transparent and well understood building blocks methodology, developed through multiple access undertaking decisions and guided by regulatory precedent established by the QCA itself and other economic regulators. Stakeholders can have reference to past QCA decisions (and the criteria in the QCA Act itself) as a strong guide as to future pricing outcomes.	The pricing approach is completely uncertain and unworkable, such that it is extremely difficult to describe how it will operate. However, the DBCT User Group's understanding based on the assertions by DBCTM about how the Access Framework is proposed to operate is as follows. Pricing is to be commercially negotiated (with a monopolist) and if not agreed is resolved by private commercial arbitration, theoretically within bounds provided by floor and ceiling prices. The floor price is theoretically the terminal infrastructure charge (TIC) that would apply under a QCA administered pricing regime. The ceiling price is the highest TIC for which the forecast annual production from mines that prefer to handle their coal at DBCT where that TIC applies is no less than the forecast annual production from such mines where the floor price applies, with that assessment being made without reference to any contractual limitations on volumes that are able to be delivered to DBCT or any other coal terminal. All of the reporting requirements regarding cost matters have been deleted – so that such negotiations would occur in a position of clear	There is extreme uncertainty as to the likely price of future access. It is practically impossible for the floor and ceiling price to be determined. That is the case because: • the floor price (being the TIC that would apply under a QCA administered pricing regime):is hypothetical in the absence of declaration; • the ceiling price is then dependent on that hypothetical with a further leap of logic – as it is a price at which volumes will remain the same as at the hypothetical floor price; • the ceiling price is also reliant on completely artificial assumptions about ignoring contractual limitations, and ignoring the realities about how demand works in the market (as discussed in detail in relation to criterion (b)) – such that even past throughput will not reflect the relevant volume, making it even more difficult to calculate the ceiling price; • the hypothetical floor price (and the ceiling price that is inherently dependent on it) will become more and more uncertain over the longer term as it becomes harder to determine the prices and volumes that would have applied under a QCA regime; • DBCTM is demonstrated to be a poor judge of the likely price that the QCA will propose - the numerous submissions that DBCTM has made to the QCA in respect of pricing matters during the consideration of the most recently approved access undertaking demonstrates the

		information asymmetry (see previous cl 10.1). Pricing is then reviewed each 5 years.	substantial variance between how DBCTM thinks the QCA should determine pricing and how the QCA does appropriately determine pricing; • the calculation of the ceiling price is dependent on so many variables which form part of each individual producer's decision making as to whether to export coal through DBCT but which DBCTM will have limited knowledge of. For example, a determination by DBCTM as to whether volume will remain the same can only actually be done if DBCTM has perfect knowledge of likely future coal prices and for each individual mine, the likely coal products to be produced, differences from prevailing coal prices for those products, operating costs, strategy of the relevant producer or joint venture, coal resources and the like; and • that perfect knowledge needs to exist not just at a moment in time, but for each mine across a 5 year period, and it needs to be known both in terms of how each mine will respond to a particular current price, but how it would have responded to a hypothetical QCA set price. **The evident conclusion is that the only way that the floor and ceiling regime could ever theoretically operate as asserted by DBCTM is if they are a perfectly discriminating monopolist who was completely omniscient.** **Because DBCTM will not be omniscient and will have strong incentives to maximise profits – the ceiling price will be contravened even if DBCTM was aiming to price at or below the ceiling price.** The 5 years pricing review effectively means that: • each 5 years there is a prospect of DBCTM pricing above

			the theoretical ceiling price and adversely impacting volume; • users have no real way of predicting their long term access price – as it will change every 5 years due to factors that will not be within their knowledge – which places users in a terrible bargaining position given they will have significant sunk costs at that point and creates a real disincentive for potential users to make long term investments reliant on access to DBCT. The fact that the floor and ceiling price are completely unworkable has a domino effect that infects the entirety of the pricing regime in the Access Framework. In particular: • as discussed in the 2nd Castalia Report, because the floor price is a hypothetical and the ceiling price is dependent on that hypothetical and a completely unworkable judgement about whether volume would remain the same at a different price - it will not be possible for DBCTM (or DBCT Users) to verify or substantiate whether the ceiling price is being complied with; • the fact that the floor and ceiling prices cannot be verified or substantiated places a potential user of DBCT in an impossible situation. A potential future user will in fact suffer from material information asymmetry as (unlike DBCTM) it will not have access to even the cost data that DBCTM will (which would be important to calculating the floor price) or to the discussions which DBCTM will have with other users which may inform its view of the ceiling price. It is notable that DBCTM has made this even worse again by deleting reporting requirements (see clause 10 of the marked-up Access Framework);

			• the QCA Act will no longer assist to rectify information asymmetry, because potential users of the service would (in the absence of declaration) no longer have the right to seek important information under section 101 QCA Act which would otherwise assist in determining the floor price; and • because it will be impossible to verify or substantiate whether DBCTM is complying with the ceiling price, it will also be impossible to challenge that when it is being breached. Even if there was to be a decrease in volume, DBCTM will be able to allege the same decrease would have occurred under QCA pricing (i.e. the floor price) and there will be no way to prove otherwise. Of course, even if it is generously assumed that despite all of the above a user will somehow manage to negotiate or an arbitrator somehow manages to determine a price which is not higher than the ceiling price it will as a matter of course be a monopoly price (and materially higher than the efficient price determined by the QCA). The outcome in any commercial negotiation or arbitration is far less certain than in a QCA process. That is particularly the case given the hypothetical nature of the floor and ceiling and the information asymmetry which characterises the negotiation. Given the complexity and lack of certainty, negotiations and arbitration of pricing will be protracted and costly (to the point that smaller, less well resourced users will likely suffer in terms of pricing outcomes relative to larger better resources users). Arbitration proceedings (and commercial settlements) are confidential – so unlike the transparency provided by the QCA regime, access holders will cease to understand the approach

			to pricing accepted by other users. The arbitrator is also likely to be different in each arbitration, such that certainty of approach will be removed. The experience coal producers have had at APCT is that negotiate-arbitration pricing of this nature: • will result in differential pricing – not based on efficiency – but based on which entities have the resources / bargaining power to reach commercial settlement / successfully arbitrate; and • will result in ongoing and major disputes at each price review and create substantial uncertainty as to the pricing outcome, which (together with the monopoly price being charged even if DBCTM did comply) will provide a substantial disincentive to use the supply chain, (but this will be much worse at DBCT given that the APCT User Agreement provide more prescriptive pricing principles than what DBCTM is proposing). **Importantly, the whole pricing regime is deeply uncertain and unfavourable relative to that which will continue to apply to existing users which renew their existing user agreements. That difference will materially distort competition in a number of dependent markets.**
Information	DBCTM had obligations under the access undertaking to produce information to the QCA to allow it to determine compliance with the undertaking (see clause 8), comply	As the QCA has been removed, the ability for the QCA to seek to verify compliance with the access undertaking has been completely removed. There is no effective replacement for this. All of the reporting requirements regarding cost matters have been deleted – so that such	The various changes: • create very clear information asymmetry in access negotiations; and • make it extremely difficult for any user or potential user of the service to determine whether DBCTM is complying with the pricing regime or any other part of the Access Framework.

	with reporting obligations (clause 10) and under the QCA Act to provide information to access seekers in accordance with section 101 QCA Act	negotiations would occur in a position of clear information asymmetry (see clause 10.1 of the access undertaking being deleted in the Access Framework mark-up) As the service would no longer be a declared service, an access seeker would no longer have a statutory right to acquire information under section 101 QCA Act.	
Access Terms	Where DBCTM sought access on terms which are different to the standard terms, an access seeker could refer the varied terms to arbitration (see clause 12.1) In practice this has resulted in very close to identical terms for all users of the terminal	DBCTM may seek access on terms which are different to the standard terms (see clause 12.1). There is no provision for dispute where DBCTM seeks to require that.	There is substantial uncertainty as to the access terms which will be provided, and a much greater likelihood of differential treatment of access seekers.
Term	Indefinite, assuming the service continues to meet the access criteria	10 years (see proposed definition of Terminating Date) The term can theoretically be amended or extended but that is entirely at the discretion of DBCTM.	Future users have no certainty as to the terms of access to the terminal beyond the initial 10 year term. They will not be provided with even DBCTM's proposal as to the future until 9 years out. That will have a chilling effect on activity in some markets (like the tenements market, where investment in exploration occurs many years in advance of determining there is a project to develop), and where mine life is greater than 10 years in any case.

Monitoring, Enforcement and Liability	The QCA Act gives both the QCA and affected entities the ability to enforce an access undertaking, with remedies including compensation (see s 158A QCA Act) The undertaking gives the QCA the power to require DBCTM provide information regarding its compliance (see clause 7)	The deed poll is solely in favour of current access seekers, access applicants, access holders, DBCT Holdings and the State. There is no remedy other than specific performance – no matter how egregious the breach, how many times the same type of breach has been committed, or how much damage has been caused to users or other stakeholders (see clause 17 of the Access Framework) – with the only remedy being specific performance. No entity has the power to seek information regarding DBCTM's compliance – so even evidencing that there has been a breach will be much more difficult.	The Access Framework cannot be enforced by other potential impacted stakeholders (such as rail haulage providers). DBCTM can repeatedly breach the Access Framework (including in very serious and damaging ways) with little to no consequences. Seeking enforcement in the courts is costly and will take time (and DBCTM will never have to compensate for the losses caused by its breaches, such that it would actually be a profitable strategy for DBCTM to intentionally breach the document where it was unhappy with its terms). Even if a user could successfully enforce a breach, there is a real risk of 'payback' in the form of future breaches given the complete lack of any real harm accruing to DBCTM as a result of breaches. Breaches will be very hard to prove unless absolutely blatant. All of that makes it impossible to make investments in dependent markets on the basis of assuming that DBCTM will comply with the access framework
Amendment	DBCTM has a right to submit draft amending access undertakings. However, the QCA only approves those where it is appropriate to do so have regard to the factors in section 138(2) QCA Act.	DBCTM has a right to propose amendments (requiring only the consent of the State to do so and that the amendments promote the Framework Objective). The framework objective itself can be amended with the State's consent. DBCTM is to have regard to (i.e. consider) the factors in clause 8.5. See discussion of the amendment regime in section 13.3 above.	It is very easy for DBCTM to amend the Access Framework. See the detailed discussion of the amendment regime in section 13.3 above

		There is no provisions (even things like the clause regarding the irrevocable nature of the Access Framework) that are beyond the scope of such amendments	
Liability	The access undertaking does not contain limitations of liability	Damages are not a remedy for any breach – with the only remedy being specific performance Very broad indirect and consequential loss exclusion	The incentives to breach where that would be in DBCTM's commercial interests are very high given the lack of consequences for doing so.
Term of future funding agreements	The QCA was responsible for resolving disputes about the terms of standard funding / underwriting agreements	An arbitrator is responsible for resolving such disputes. The factors they are to consider (clause 5.10(q)(3) are not entirely reflective of section 138(2) QCA Act)	There is far less certainty as to the terms of any future funding agreements.
Issues arising from contractual nature	The undertaking is a statutory instrument that is clearly enforceable	The Deed Poll is reliant on contractual rights which creates the potential for those rights to be impacted by other laws, contractual doctrines like frustration and severance (the latter of which DBCTM even permits to change the Access Framework).	This issue just adds to the uncertainty created by the Access Framework.

It is very clear from the above that:

(a) the Access Framework will not provide reasonable terms and conditions in the absence of declaration;

(b) the pricing provisions are so uncertain as to be completely unworkable – relying on DBCTM being a perfectly discriminating monopolist and completely omniscient;

(c) at best, the pricing provisions will result in inefficient and monopoly pricing that will be materially less favourable and more uncertain that the pricing provided to existing users – such that it will materially damage competition in the coal tenements and other dependent markets;

(d) the limited term will create substantial uncertainty in any market which requires long term investment decisions to be made and therefore chill investment (and in time reduce supply);

(e) it will be extremely difficult to determine whether the Access Framework is being complied with and the compliance and enforcement regime is so weak that the practical reality is that the likely outcome is for DBCTM to breach the arrangements without redress (such that it will not be possible for participants in dependent markets to invest with any confidence that DBCTM will comply with the access framework); and

(f) the power for DBCTM to amend is so wide that there is no likelihood of the access arrangements remaining the same, such that it will not be possible for participants in dependent markets to invest with any confidence that access will continue on the terms initially provided for.

As the 2nd Castalia Report notes:

> *The Access Framework, as proposed, is unworkable, impractical and cannot be verified or enforced. Hence, it is likely that DBCTM would act as a conventional profit-maximising monopolist with an incentive to constrain output, rather than as a perfectly discriminating monopolist with an incentive to maintain output unchanged.*

15 Criterion (a) - The difference between pricing under the existing user agreements and pricing for new users under the access framework

15.1 The existing user agreements continue

As noted in the DBCT User Group's initial submissions (and the Allens advice in Schedule 1 of those submissions) the existing User Agreements will continue and not be frustrated if the declaration ceases.

Despite earlier threats of frustration by DBCTM, the continuation of these agreements was very clearly acknowledged by DBCTM in its own submissions (at [301]):

> *DBCTM's existing user agreements set out the terms of access for existing users and are often described as 'evergreen' as they are able to be extended at the option of the user. Accordingly, existing users will have the option to extend their agreements and continue to access the Terminal based on the terms of access and volumes set out in those agreements.*

Consequently, it is now a commonly agreed position that existing users would continue to enjoy the benefit of their user agreements (including how they deal with pricing in the absence of an access undertaking) while new users would theoretically be treated by DBCTM in accordance with the proposed 'Access Framework'.

That is a critical conclusion because it means that the likely state of competition in the dependent markets without declaration needs to be considered in the context of existing users retaining the pricing regime provided for in their user agreements and future users being exposed to the pricing regime in the Access Framework.

15.2 Different pricing outcomes

While the User Agreements involve charging at the TIC provided by the QCA while the declaration continues, as discussed in detail in the Allens Advice (see Schedule 1 of the Access Framework) they contain a pricing regime that will continue to apply in the absence of declaration or a QCA approved TIC.

Both the existing User Agreements and the terms proposed in the Access Framework have price reviews resolved by arbitration in the event of disagreement. However, they are likely to lead to materially different pricing outcomes.

In particular that follows because of the difference in criteria that the arbitrator in each scenario would apply in seeking to determine the price:

DBCT User Agreements (7.2(e)) **Pricing to be determined having regard to:**	**Access Framework (from Annexure 7)**
An appropriate asset valuation of the Terminal and the relevant Terminal Component	Reflect the TIC that would be agreed between a willing but not anxious buyer and a willing but not anxious seller of coal handling services for mines that are proximate to the Port of Hay Point
An appropriate rate of return for DBCTM	Is no less than the Floor TIC calculated in accordance with the Framework – being the TIC that would apply under a QCA administered pricing regime
The terms of this Agreement	Is no greater than the Ceiling TIC calculated in accordance with the Framework – being the highest price at which coal volumes served at DBCT would be the same as if the Floor TIC applied, with this assessment being made without references to any contractual limitations on volumes that are able to be delivered to DBCT or any other terminal
The expected future tonnages of coal anticipated to be handed through the Terminal and the relevant Terminal Component	
Any other matter agreed to by the User and DBCTM and notified by them in writing to the arbitrator	
Any other matter which is submitted by either the User or DBCTM and accepted by the arbitrator as being relevant	
The then current approach of the QCA	

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

It is notable that the existing User Agreement pricing review mechanism effectively provides for:

(a) having regard to the key elements of a building blocks methodology; and

(b) most relevantly, a very clear intent of producing an outcome similar to that which might have been expected had the QCA determined it.

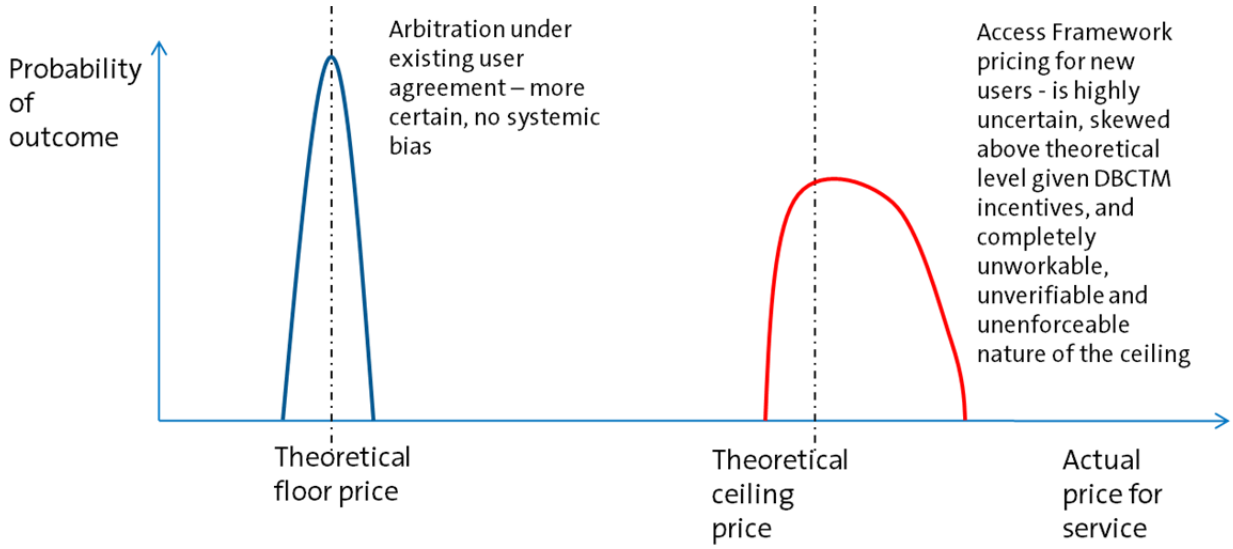
That is fundamentally different and clearly:

(a) more certain than the pricing outcome provided for in the Access Framework – as an arbitrator under the User Agreement will clearly with those criteria consider carefully QCA decisions – whereas an arbitrator under the Access Framework will have very limited guidance; and

(b) more efficient, reasonable and favourable to users than the position under the Access Framework where the lowest possible price is effectively the QCA price which is notionally what the arbitrator under the User Agreement is aiming for (such that it is beyond doubt that the Access Framework will produce a worse outcome for new entrants than existing users).

That will result in an anticipated distribution of pricing outcomes something like the following:

Figure 13 – Illustration of differential pricing outcomes for current and future DBCT Users



That distortion / difference in treatment is critically important to understanding how that will impact on competition in dependent markets.

16 Criterion (a) - Why DBCTM is wrong that the ceiling price means that criterion (a) cannot be satisfied

16.1 DBCTM/HoustonKemp analysis

DBCTM and its consultant, HoustonKemp, engage in a series of deeply flawed reasoning about how a change in the price of coal handling services cannot (due to the formulation of the ceiling

price which theoretically prevents a change in volume through the terminal) impact on competition in any dependent market.

Even if we ignore the reasons that ceiling price will not constrain pricing and ensure volume in the way DBCTM suggests, DBCTM's position is clearly incorrect.

The key premise DBCTM relies on is that (see para 270):

> *A change in price that alters the distribution of rents or gains in the supply chain, but that does not affect the volume or quality of output, does not satisfy criterion (a)*

That approach is largely based on reasoning in the Newcastle shipping channel proceedings, and phases of the Tribunal's judgement like the following from *Application by Glencore Coal Pty Ltd*[26]

> *Either a price rise would have an impact on coal export volumes .. or it would not, in which case the claim of any competitive impact is seen to be empty*

Similarly the DBCTM Initial Submission claims (at para 363):

> *The NCC and Tribunal decisions in the Port of Newcastle case also provide clear precedent that if the impact of access as a result of declaration on the coal export markets is not such as to promote a material increase in competition in those markets, declaration would also not promote a material increase in competition in other derivative markets.*

However, the key difference which DBCTM and HoustonKemp have failed to understand is that:

(a) all competitors in the dependent markets were to be affected equally by the price rises of the Port of Newcastle channel services – such that if there was no change in volume that necessarily meant that competition in dependent markets would occur in the same manner; and

(b) whereas the competitors in the dependent markets of relevance to the Declared Service, are to be affected quite differently (as discussed above) – such that the pricing change will cause a substantial distortion in the position of different competitors in some dependent markets.

The 'ceiling price' (the Ceiling TIC) is proposed as:

> *The highest TIC for which the forecast annual production from mines that prefer to handle their coal at DBCT where that TIC applies is no less than the forecast annual production from mines that prefer to handle their coal at DBCT where the Floor TIC applies.*

That is cast as an aggregate test.

It does not seek to understand how the TIC would impact on any particular user (despite the unsubstantiated assertions from DBCTM/HoustonKemp at points during their submission and report that there will be no change in volume from individual mines), rather it asks the question about whether aggregate throughput would remain the same.

That question might be sufficient to determine whether there is a material promotion of competition in markets for coal with declaration, but simply ignores the impact on other dependent markets.

In particular, it ignores the obvious issue that a substantial proportion of capacity is already contracted on terms that will involve better pricing and more certain terms of access – such that it

[26] [2016] A Comp T 6 at [137] and [155]

is clear that competition will be heavily damaged in dependent market by the lack of declaration without a drop in volume due to the continuing existing contracted position clearly placing existing users in a better position relative to new entrants.

In particular, in the tenements market, the potential competitors will be:

(a) BMA/BMC – which will continue to have access to HPCT on efficient pricing and reasonable terms (***HPCT Users***);

(b) the existing DBCT Users – which will continue to have access to DBCT's coal handling services on the basis of their existing user agreements (which, in the absence of declaration will revert to arbitration) (***Current DBCT Users***); and

(c) future potential DBCT Users – which are exposed to the uncertainty and monopoly pricing inherent in the Access Framework (***Potential DBCT Users***).

The impact on the tenements market is discussed in further detail below.

As discussed in the submissions above, a material price difference will exist between the pricing for Current DBCT Users and Potential DBCT Users.

As a result, when assessing the value of a tenement in the Hay Point catchment, the value to the HPCT Users, Current DBCT Users and Potential DBCT Users is fundamentally different.

By way of illustration, it is worth returning to the illustrative example of a tenement in the Hay Point catchment, thought to have coal reserves or resources which could be developed into a 5 mtpa mine for a 15 year mine life If one potential acquirer (as a Potential DBCT User) faces a price increase of $5, which the other potential acquirer (as a Current DBCT User) does not face - that would result in $375 million of extra costs across the mine life, which could clearly change the net present value of such a project (noting that the Castalia report suggested it would be possible for DBCTM to increase charges by as much as $12 while maximising profit). On any sensible discount rate, this will clearly impact on the valuation applied to the underlying tenement. The same type of analysis would hold true for other hypothetical tenements/projects of material size.

It is difficult to see how a Potential DBCT User could ever be an effective competitor again for a coal tenement in the Hay Point catchment compared to HPCT Users and Current DBCT Users who do not face such a likely differential price and have strong economic incentives to utilise HPCT or their more reasonably priced DBCT contracted capacity respectively.

16.2 Why DBCTM is wrong that it has clear incentives to maintain throughput such that declaration will not promote competition

As discussed above, maintaining volume through the terminal is not the same as not damaging the environment for competition in dependent markets where different access terms create a distortion in the relevant dependent markets.

As noted above, DBCTM has sought to argue that its incentives as an infrastructure owner to maintain throughput will mean that it will not set pricing in a way that adversely impacts on throughput at the terminal.

That argument is deeply flawed because it assumes that DBCTM cannot recover revenue if it sets the price too high for future users.

In effect, it suffers from the same deeply flawed assumption that pricing is the same for all users (as was the position for the Newcastle shipping channel services) when in fact there will be substantial differential pricing introduced in the absence of declaration.

What will in fact happen is:

(a) Current DBCT Users will pay access pricing based on the terms of their existing user agreements – which as noted above provide for a 'QCA-like' methodology, such that it should be assumed pricing would be socialised, and price would be set in a way that entitles DBCTM to recover a quasi-annual revenue requirement;

(b) DBCTM from that point has no incentive to contract additional capacity unless it can recover substantial monopoly profits. If anything this incentive is exacerbated by the way that an arbitration result can bind a subsequent user under the Access Framework as proposed, such that DBCTM is incentivised to wait for the highest possible value user – this is discussed in the 2nd Castalia Report as likely to result in discrimination in favour of more closely located users which should produce the highest possible ceiling price; and

(c) the HPCT Users which are a relevant competitor in a number of dependent markets are not impacted at all.

Consequently, even if volume is maintained it is clear that the make-up of that volume will become far more tilted towards existing users over time.

17 Criterion (a) - Impact on competition in the Hay Point catchments coal tenements market

17.1 DBCTM/HoustonKemp have not properly considered the tenements market

The HoustonKemp criterion (a) report makes some stunning leaps in logic in respect of the coal tenements market in particular that demonstrate the deep flaws in the way that DBCTM / HoustonKemp have considered criterion (a).

HoustonKemp's reasoning in respect of the tenements market is worth setting out in full (both as it is evident that it consists simply of assertions and because this submission analyses how each of those unsubstantiated assertions is simply incorrect).

> *As we explained in section 4, the volumes of coal that is mined and exported will not change as a result of declaration of the DBCT service. Therefore the number of mining authorities will not change.*
>
> *Declaration of the DBCT service does not have any direct effect on mining authorities. Therefore, a change in volumes supplied is the only way that declaration of the DBCT service could affect this market.*
>
> *Given that volume of mining authorities will not change, the structure and conduct of firms in the market are also not affected by declaration.*
>
> *The quality mining authorities cannot change as a result of the declaration of the DBCT service.*
>
> *We conclude that declaration of the DBCT service would not promote a material increase in competition in any mining authorities market, given that it would not affect:*
>
> - *The structure of the market or conduct of the firms in a way that enhances the competitive process; or*
> - *The volume or quality of output in the market.*

17.2 Volume of coal remaining the same does not reflect competition remaining the same

As the 2nd Castalia Report notes:

> *HoustonKemp equates unchanged total coal volumes as an indicator of the level of competition and assert that the proposed Access Framework*

> *ensures both. Even if the Access Framework was workable and practical and resulted in throughput being maintained regardless of declaration or non-declaration, total coal volumes provide little useful information on the state of competition in circumstances where different terms and conditions of access for different classes of users create different incentives and behaviours.*

As discussed in detail above, volume remaining the same does not mean the competition is not impacted when the Access Framework produces a substantial distortion in competition due to the differential treatment, particularly in respect of pricing (but also treatment in other respects), it creates.

This is akin to why declaration was held by the Australian Competition Tribunal to result in a promotion of competition in respect of Sydney Airport, where pricing changes were held to have a different impact on users of the service.[27] Similar to here, the promotion of competition was a result of declaration preventing pricing that had a discriminatory impact on new entrants compared to incumbents.

As the 2nd Castalia Report puts it:

> *The HoustonKemp analysis of the effects of the floor and ceiling price proposal conflates no change in competition with no change in coal volumes handled at DBCTM. This would be true if two conditions were satisfied:*
>
> - *The Access Framework prices applied to all users; and*
> - *The pricing framework allowed for reliable and consistent discrimination.*

Yet, clearly neither of those conditions is satisfied.

As the 2nd Castalia Report notes:

> *even if it [the Access Framework] was practical and effective, and DBCTM throughput was maintained at identical levels with and without declaration, there would still be a material impact on competition in the mining tenement [market]. This distortion of competition arises because of the interaction of the Access Framework with existing contracts held by current users.*

The more favourable and more certain pricing and terms of access that existing Users have under their existing User Agreements means that:

(a) Current DBCT Users will place a higher value on tenements than Potential DBCT Users – making them more effective competitors for acquisition of tenements in the tenements market – and being highly likely to result in them becoming the principal acquirers in the tenements market;

(b) Potential DBCT Users will have:

  (i) a much reduced incentive to invest in acquisition of tenements – due to:

    (A) the uncertainty of returns that it will be able to derive; and

    (B) the completely unbankable nature of the Access Framework;

  (ii) a much reduced incentive to invest in exploration / development of coal mining projects for the same reasons,

[27] [2005] A Comp T 5

resulting in an immediate reduction in the demand for tenements and in turn reducing the future volume and quality of supply in the market).

As noted in the 2nd Castalia Report:

> *The five-year price resets and the probability of DBCTM error in setting future ceiling prices creates a very high hurdle for new entrant miners. It would be difficult for such a miner to raise finance or for example, enter into a ten-year haulage contract, when key logistics prices can be arbitrarily increased by DBCTM at five yearly intervals, not based on underlying costs, but on their guess at the available consumer surplus.*
>
> *When contrasted with the scenario of access in the event of declaration, where new mines will have a legally enforceable right of access with reasonable prices set by an independent regulator it is obvious that new entrants will not be able to develop mines leading to increasing concentration among the current incumbents with their portfolios of mines.*

This is particularly problematic for the competitive environment because, as demonstrated by the list of transactions in the tenements market over the last 3 years noted below, the vast majority of transactions in respect of exploration or development tenements in recent times are attributable to Potential DBCT Users rather than Current DBCT Users:

Figure 14 – Hay Point catchment tenement transactions

Date (of announcement)	Project	Purchaser	Vendor	New Entrant (i.e. not an existing DBCT User) at time of acquisition
July 2015	Wotonga / Isaac Plains East	Stanmore	Peabody	Yes
July 2015	Isaac Plains	Stanmore	Vale / Sumitomo	Yes
May 2016	Olive Downs (exploration project)	Pembroke Resources	Peabody / CITIC	Yes
July 2016	Blair Athol (on care and maintenance)	TerraCom	Rio Tinto	Yes
December 2016	Broadlea (previously operating mine on care and maintenance at time of acquisition)	Fitzroy Australia Resources	Vale	Yes
September 2017	Lenton (exploration project)	Lenton Joint Venture (New Hope 90%)	Peabody	Yes
February 2018	Hillalong East	Bowen Coking Coal	Rio Tinto and Cape Coal	Yes

March 2018	Winchester South	Whitehaven	Rio Tinto	Yes
March 2018	Valeria	Glencore	Rio Tinto	No
March 2018	Exploration rights 60km SE of Middlemount	Metroof Minerals (named as preferred developer for coal release)	Queensland Government	Yes
March 2018	Exploration rights 25km SE of Middlemount	Sojitz Coal (named as preferred developer for coal release)	Queensland Government	Yes

In other words criterion (a) is satisfied because, where the declaration was not continued, the existing contracted users of DBCT who have the price review protections noted above will have a substantial advantage over new entrants facing the uncertainty and higher pricing.

That will result in existing users having strong incentives to continue to develop mines to utilise their capacity, including by acquisition in the tenements market. As demonstrated earlier in this submission, the favourable pricing they enjoy will result in them valuing tenements much higher than new entrants – such that new entrants will cease to be competitive in acquiring tenements.

That will in turn result in:

(a) a substantial increase in concentration in the tenements market (as the only likely buyers will be the existing DBCT Users); and

(b) a reduction in supply and a reduction in quality of supply in the tenements market (as non-existing DBCT Users will have very little incentive to develop tenements giving the pricing regime they will face).

As discussed in the 2nd Castalia Report, this distortion will not just be a transitory phenomenon. Because the existing user agreements can be renewed, and the existing users will have strong incentives to recharge their portfolio by acquiring tenements and development tenements to enable them to continue to make use of the more favourable pricing which will be available under the existing user agreements.

For completeness, the DBCT User Group notes that even among those existing DBCT users there is really two categories of Current DBCT User, being:

(c) those users who have contracts with capacity matched tightly to a particular project (Fitzroy, Stanmore, Pembroke) – who will really only be advantaged in acquiring tenements where they would be targeted for development at the point of ramp down/closure of their existing mine; and

(d) those users who have multiple mines with a clear portfolio effect (Anglo American, Peabody, Glencore, BHP) – such that it is possible for them to 'bring on' a new project to use capacity that was originally contracted for a different project.

That is largely because it is the major mining houses with a portfolio of mines who would be most advantaged through the advantageous pricing position (relative to Potential DBCT Users) resulting from the existing User Agreement price review positions compared to the Access Framework proposed, as they would be able to more easily utilise the advantageously priced

capacity for new projects than an existing user whose contracted capacity was tightly matched to a single mines' production.

That would in effect leave, BMA/BMC, Glencore, Peabody and Anglo American as the only active competitors in the tenements market in time, and such an increase in concentration would clearly demonstrate that declaration would promote a material increase in competition in a dependent market – such that criterion (a) would be satisfied.

18 Criterion (a) – Impact on the rail haulage market

18.1 DBCTM/HoustonKemp have not properly considered the rail haulage market

DBCTM and HoustonKemp simply conclude that given that (in theory) the Access Framework will result in coal volumes remaining the same, declaration would not promote a material increase in competition in the central Queensland coal haulage market.

However, that assertion ignores:

(a) how the Access Framework will actually impact on coal production and investment;

(b) the additional concentration on the demand side that will occur because of the substantial distortion of competition in the tenements market (discussed above); and

(c) most importantly, the resulting damage to the prospect of new entry into the above rail haulage market.

18.2 Competition in the rail haulage market is clearly promoted by declaration

The DBCT User Group continue to consider that declaration clearly promotes a material increase in competition in the central Queensland coal region rail haulage market.

It is notable that Pacific National has since grown its business from a position of being a new entrant to hauling over 50% of the throughput through DBCT in recent years, while having materially lower penetration in other parts of the central Queensland coal region.

Given that below rail regulation is common to all systems within the central Queensland coal region, that alone suggests that declaration of the Declared Service is an important part of facilitating vigorous competition in the above rail haulage market.

That market evidence of the impact of declaration is not particularly surprising, as providing a stable regulatory environment, a certain path to access to DBCT on reasonable terms and long term certainty of efficient pricing, declaration facilitates and incentivises investment in coal production – which in turn provides greater business opportunities for rail haulage operators to compete for and creates an environment in which new entry remains credible and possible.

Declaration (and the certainty of access, including pathways to expansions at efficient pricing) also avoids the issues which have occurred at the WICET and APCT supply chains where producers were forced to sign long term port take or pay agreements and were then held hostage to below rail expansion arrangements (GAPE and WIRP) that have resulted in rail haulage volumes not materialising in the way they would be likely to have done in the absence of those arrangements.

Given the significance of the Hay Point catchment / Goonyella system in terms of volumes – it is critical for a new entrant to the central Queensland rail haulage market to be able to supply haulage volumes in that region in order to provide meaningful competition to the existing incumbent providers (Aurizon and Pacific National).

18.3 Declaration facilitates new entry

The DBCT User Group consider it was clearly the certainty produced by declaration that:

(a) reduced the barriers to entry in the central Queensland coal region rail haulage market such that it was easier for Pacific National to enter; and

(b) enabled Rio Tinto and Glencore to commit to the significant long term and high volume contract which sponsored Pacific National's entry to the central Queensland coal region rail haulage market.

There is other rail haulage providers, which (with declaration) provide a credible threat of new entry – with the most obvious example being Genesee & Wyoming Australia following the establishment of its coal haulage business in the Hunter Valley region.

Even a credible threat of new entry, for as long as it remains, provides an important competitive constraint on the incumbent rail haulage providers – but clearly if there was new entry, the change from 2 suppliers to 3 would be expected to result in even more vigorous competition – such that where declaration promotes the environment for that occurring criterion (a) is clearly satisfied.

Declaration is critical because:

(a) as discussed earlier in this submission, the uncertainty and adverse impact on pricing that will arise due to the Access Framework will damage future investment in coal production such that the new volumes that create the potential for users to sponsor new entry by a haulage provider are less likely to occur;

(b) as discussed earlier in this submission, even if the Access Framework did maintain volume the distortion it causes due to inequality of pricing, will lead to an increase in concentration on the demand side of the rail haulage market (due to increasing consolidation in favour of the incumbent users which benefit from better pricing);

(c) the certainty of pricing allows users to enter long term haulage contracts – which are critical to facilitate new entry (as to invest in rolling stock with a 20+ year useful life, a haulage provider will need to underwrite much of that initial investment with long term contracts), as occurred when Genesee & Wyoming Australia entered the Hunter Valley market and when Pacific National entered the central Queensland market – whereas by contrast the Access Framework will result in a reset of pricing every 5 years (with DBCTM seeking to set the pricing at the point at which a producer only meets their cash costs) such that future users of DBCT will find it very difficult to actually commit for more than a 5 year term (both because the price may be set at a level where they cease to be profitable or their mine operation costs might change over time such that a price at which they are profitable might change).

Each of these issues makes it clear that declaration promotes a material increase in competition by creating the environment for new entry.

19 Criterion (a) – conclusion

Based on the above analysis, the DBCT User Group considers that it is clear that criterion (a) is satisfied based on the clearly likely outcomes in the Hay Point catchment coal tenements market.

While DBCTM seeks to rely on the proposed Access Framework:

(a) the Access Framework is clearly not an appropriate counterfactual – as it is contrived and artificial and has been cynically prepared to defeat the very purposes of Part 5 of the QCA Act, can be easily amended by DBCTM in the future and breached without loss by DBCTM; and

(b) even if it was accepted as providing a counterfactual, it is clear that it will effectively create a two-tiered pricing system that will adversely distort competition in the coal tenements market.

20 Criterion (c) – Significance of the facility

Criterion (c) requires that the facility is significant having regard to its size and impact on the State's economy.

DBCTM has put forward no submissions or evidence to the QCA in respect of this criterion – effectively conceding that it is satisfied.

That is frankly unsurprising given that a 85mtpa capacity DBCT is the largest coal terminal in Queensland, the export gateway to much of Queensland metallurgical coking coal and critical to the State's economy in numerous ways including royalties, facilitating investment and employment.

The DBCT User Group note all of the evidence provided in the DBCT User Group Initial Submission and the PWC Report and remain absolutely certain that criterion (c) is clearly satisfied on the basis of that evidence.

21 Criterion (d) – Public interest

21.1 Key issues in respect of criterion (d)

The new criterion (d) requires:

> *that access (access or increased access) to the service, on reasonable terms and conditions as a result of declaration of the service would promote the public interest.*

The criterion requires consideration of the matters set out under section 76(5) QCA Act, including:

(a) the effect declaring the service would have on investment in-

  (i) facilities; and

  (ii) markets that depend on access to the service;

(b) the administrative and compliance costs that would be incurred by the provider of the service if the service were declared; and

(c) any other matter the QCA or Minister considers relevant.

The DBCT User Group and DBCTM are in agreement that the threshold for the promotion of the public interest under criterion (d) has increased, now requiring a positive test (contrasted with the previous extremely low threshold of a 'not contrary to the public interest' test).

However, DBCTM's analysis has a number of fundamental flaws. In particular:

(a) DBCTM has asserted that criterion (d) now involves a 'substantially increased' materiality threshold – asserting that 'it is necessary for the QCA to find that significant net public benefits will result from declaration' – despite the fact there is no support for that position in the wording of the legislation or the related extrinsic material[28];

(b) DBCTM substantially overstates the impact of factors which it asserts will constrain its ability or incentive to exercise market power in the absence of declaration;

(c) similar to DBCTM's analysis in respect of criterion (a), DBCTM simply asserts in unjustified reliance on its proposed Access Framework that as throughput at DBCT will not be altered, there cannot be a change in the public benefit arising from declaration.

(d) DBCTM substantially overstates any costs or detriments which theoretically arise from declaration; and

(e) DBCTM makes unsubstantiated and false claims about the impact of declaration on investment – both in respect of DBCT and related markets – which are not borne out by the evidence of how declaration has in fact facilitated such investment. As has been discussed above in respect of criteria (a) and (b), a lack of declaration will cause substantial adverse effects on investments in these markets which will have significant flow-on economic and other effects that will impact the public interest.

The DBCT User Group continues to consider that it is absolutely clear that declaration promotes the public interest.

21.2 Interpretation of criterion (d)

DBCTM's Interpretation

[28] See DBCTM Submission, at 92

As set out in the DBCT User Group's initial submission, the new criterion (d) is now a positive test, requiring that access as a result of declaration promotes the public interest, rather than being not contrary to the public interest.

However, DBCTM have plainly misconstrued the new test as imposing a significant threshold for the promotion of the public interest as being a 'substantial' increase to the test and requiring a 'significant net benefit' to be produced.

For example, at [413] of DBCTM's Initial Submission, DBCTM expresses its view on how criterion (d) ought to be applied:

> *The QCA must be satisfied not only that increased access on reasonable terms and conditions as a result of declaration would promote the public interest, but also that it will do so in a way that is not merely trivial or ambiguous. Put another way,* ***it is necessary for the QCA to find that significant net public benefits will result from declaration****.*

DBCTM expresses the change in test as a 'substantial' increase to the threshold throughout its Initial Submission on criterion (d).

However, there is nothing in the wording of criterion (d) which suggests that it is correct to interpret it as requiring 'significant net public benefits'.

Materiality / Significance

First it is worth starting with DBCTM's assertion that the net public benefits must be 'significant' – effectively trying to import into criterion (d) a materiality threshold that does not exist.

The clearest evidence of this is the words of criterion (a) itself:

> *that access (access or increased access) to the service, on reasonable terms and conditions as a result of declaration of the service* ***would promote the public interest****.*

The lack of any words to the effect that a materiality threshold (or similar) should be imposed in any test under criterion (d) clearly indicates that the Commonwealth government did not intend to impose even a 'material' threshold, let alone one that is substantial or significant.

In particular, that wording of criterion (d) is in stark contrast to that of criterion (a) which expressly provides for a materiality threshold:

> *that access (or increased access) to the service, on reasonable terms and conditions, as a result of a declaration of the service* ***would promote a material increase in competition*** *in at least 1 market (whether or not in Australia), other than the market for the service.*

As discussed in respect of criterion (a), the reference to 'material' is understood to mean 'not trivial'. Given that is the materiality threshold for the criterion which applies where there is an express materiality threshold it is clear that there is no requirement in criterion (d) for there to be a significant or material net public benefit.

Promotion

Second, it is worth noting that while the reference to promotion is new to criterion (d), that (as discussed in detail earlier in this submission) what is required for there to be a promotion has already been considered in the context of criterion (a), as requiring

(a) an enhanced environment for competition; and

(b) a significant finite probability that competition would be promoted.[29]

Guidance in Extrinsic Material

The new form of criterion (d) was recommended in the Productivity Commission's Final Report on its inquiry into the national access regime where it stated:[30]

> *Given the costs associated with access regulation, it is appropriate that a service can only be declared where the decision maker is satisfied that declaration is likely to generate overall gains to the community. To support this, criterion (f) would be better drafted as an affirmative test that requires the public interest to be promoted (as opposed to access being 'not contrary to' the public interest).*

The Harper Review Final Report supported that recommendation.

In the Commonwealth Government's response to the Harper Review Panel's proposed amendment to criterion (d), the government supported that criterion (d) should be amended 'such that it is a positive test that declaration be in the public interest'.

In expressing its general support regarding the recommendations to amend the national access regime, the Commonwealth government referred to its response to recommendation 1 on the Competition Principles. That response relevantly supported that the principles should be subject to a public interest test, such that legislation or government policy should not restrict competition unless:

(a) the benefits of the restriction to the community as a whole outweigh the costs; and

(b) the objectives of the legislation or government policy can only be achieved by restricting competition.

Most relevantly, and consistent with the Productivity Commission recommendation and the government's ultimate response, the Competition and Consumer Policy Review Bill EM states at [12.37] that the drafting of the new criterion (d) means:

> *that a decision maker must be satisfied that declaration is likely to generate overall gains to the community.*

That guidance is notable for two key reasons:

(a) firstly, it clearly specifies the threshold as a test of likelihood of generating net gains; and

(b) secondly it does not suggest that there is any materiality threshold that those overall gains must surpass for criterion (d) to be satisfied.

Conclusion

It is very clear from the above that the test in criterion (d) is now one of declaration being likely (in the sense of their being a significant finite probability) to generate overall gains (without any materiality requirement being applied to those gains).

22 Criterion (d) – DBCTM assertions about why declaration does not promote significant benefits

DBCTM asserts that a number of factors constrain its ability of incentive to exert market power in the absence of declaration.

[29] [2005] ACompT 5 at [160].

[30] Productivity Commission 2013, National Access Regime, Inquiry Report No.66, Canberra, pages 20-21.

The asserted impact of those on DBCTM's behaviour is either not correct or substantially overstated for the reasons described below.

The DBCT User Group therefore does not accept that the public benefits of declaration are diminished by those constraints.

22.1 Seaborne coal market is effectively competitive

It is true that coal producers are price takers in markets which are set based on global demand and supply.

However, exports through DBCT are important, particularly in respect of metallurgical coal.

To say that the price for coal will not be altered or that coal markets will remain competitive in the absence of declaration misses the point that the assessment under criterion (d) considers a much wider range of issues that the impact on competition in dependent markets considered under criterion (a).

In particular, price increases at DBCTM of the type that will occur in the absence of declaration will:

(a) reduce incentives for coal producers to invest in the Hay Point catchment relative to coal projects elsewhere (with a resulting loss of employment and economic activity and growth in Queensland); and

(b) reduce royalties payable to government (though the higher port charges being deductions taken into account in the royalties calculation).

Those are clear public detriments relevant to criterion (d) irrespective of whether coal markets remain competitive.

22.2 Alleged incentives created by 'mutual dependence'

DBCTM's incentive as a monopoly supplier will be to maximise profit.

That is quite different to the alleged incentive to maximise throughput. As demonstrated very clearly in the Castalia Report, DBCTM's profit is actually maximised by increasing prices materially even if that is at the cost of some marginal volume.

While it is true that both DBCTM and users have sunk costs, the very concept of the ceiling price proposed by DBCTM demonstrates an understanding that there is some point to which DBCTM can price gouge users before which they go out of business or otherwise cease using DBCT.

In addition, as discussed further below, DBCTM has a significant volume locked up under existing contracts with renewal rights, such that maintaining volumes can occur in a number of ways – some at great detriment to incentives to invest for new entrants.

22.3 Assertion that transfer of economic rents is 'neutral in public interest terms'

The assertion that DBCTM will only engage in a transfer of economic rents that is neutral in public interest terms is clearly not true – particularly for material transfers of economic rents which do not apply equally to all coal supply chain participants (which is the outcome of declaration ceasing as described in detail in relation to criterion (a)).

It is a fundamental tenant of economics that monopoly behaviour is likely to lead to higher prices, and withheld supply, resulting in a deadweight economic loss to society.

A transfer of economic rents will not be value neutral from society's perspective if it causes any change in investment decisions.

However, as discussed in the submissions made above in respect of criterion (a), even if it was assumed that the Access Framework ceiling price would operate as proposed by DBCTM, investment decisions will be distorted in the tenements market (and as a consequence in related markets).

That is because, in stark contrast to the Newcastle shipping channel proceedings that DBCTM references and relies on so extensively, the increased prices will not apply equally to all producers.

In addition the DBCT User Group consider that it is beyond dispute that if coal producers are given greater incentives to invest that will be of greater public benefit than if DBCTM is given greater incentive to invest. In particular that is the case because it will drive much wider employment, royalty and economic growth outcomes, with the benefit spread across a wider region of the State and society.

22.4 The vast majority of capacity is contracted

It is acknowledge by the DBCT User Group that approximately 80 of the 85 mtpa capacity of DBCT is currently contracted.

However in seeking to argue that that constraints DBCTM behaviour, there is two critical issues that DBCTM ignores, namely:

(a) given the way the renewal rights operate under the existing User Agreements, a significant proportion of this contracted capacity ceases to be contracted in the next 5 years (for proof of that see the contract profile disclosed by DBCTM below) – such that existing contracts cannot be relied on as a long term protection; and

(b) that the differential treatment of new users and distortion of competition that the absence of declaration will cause (as discussed in detail in the DBCT User Group's submissions in respect of criterion (a)) is a very significant public detriment in its own right.

Figure 15: DBCT Contracted Capacity Profile

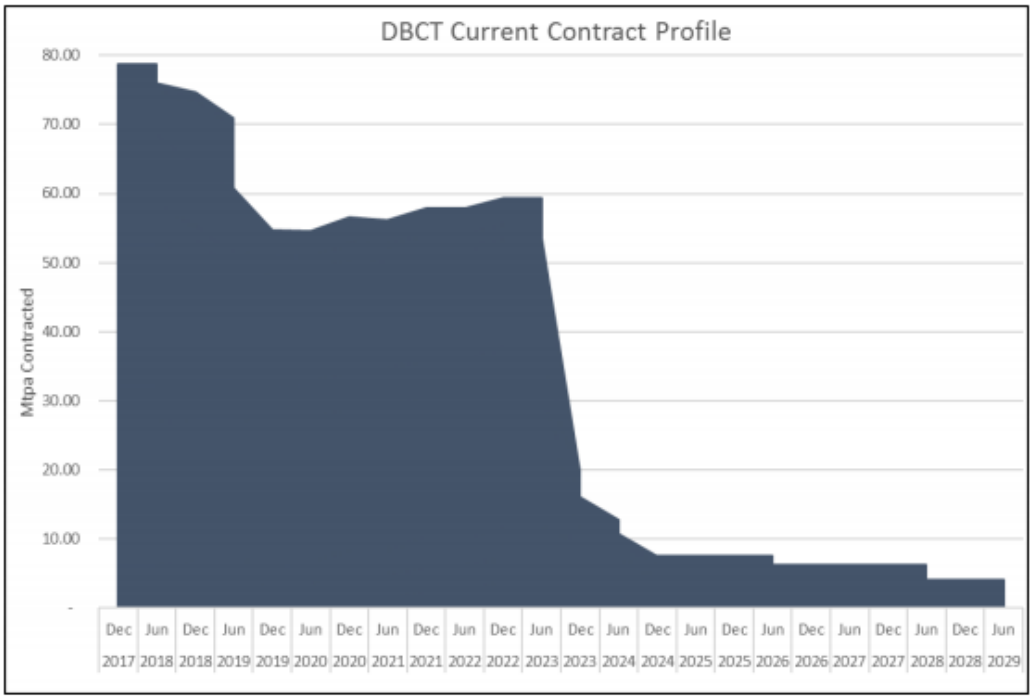


Figure 9: Contractual Position March 2018

Source: DBCTM 2018 Master Plan at 21

22.5 Alleged 'competitive constraint' imposed by other terminals

As discussed in detail in relation to criterion (b), the other terminals are not close substitutes for and do not provide material competitive constraints on DBCTM, given the physical distances, significantly higher rail haulage and rail access charges and other factors.

Consequently, other terminals will not prevent a SSNIP (or for the matter, much greater monopoly price rises) by DBCTM in the absence of declaration.

In addition, any theoretical constraint that other terminals provide, is highly limited because of the nature of long-term take or pay contracts which bind producers to the consequences of a single decision for long periods (noting that price reviews would occur under the proposed Access Framework more regularly than renewal rights – such that a user faced with a significant uplift in price part way through its term has no economic potential for switching given the take or pay costs that would be incurred even ignoring all of the other practical constraints on doing so).

22.6 Alleged countervailing power of terminal users

Smaller producers

It is simply not the case that the customer group is entirely made up of 'large, commercially sophisticated multinational corporations that exert significant countervailing power' as DBCTM alleges.

That statement aptly demonstrates the propensity by DBCTM to paint all users with the same brush without acknowledging their differences.

The DBCT User Group in fact contains a number of companies with Australian projects only and in many cases a single mine utilising DBCT (for example Fitzroy Resources, Realm Resources, Pembroke Resources Stanmore). For likely future users that is even more likely to be the case (with evident examples like TerraCom, New Hope, Whitehaven) being of a similar nature.

In addition, asserting countervailing power, ignores that the clear adverse outcomes of declaration ceasing that have been identified in the discussion of criterion (a) above, impact principally on new/potential future users of that nature.

The DBCT User Group considers that any countervailing power of users that currently exists is by virtue of the collective bargaining position and current protection provided by the QCA as regulator, such that the bargaining power of users is considered in aggregate. In the absence of declaration, where an Access Framework structure applied, users would each be forced to negotiate with DBCTM separately and any alleged countervailing power would crumble for smaller producers.

Countervailing power requires a credible threat of switching

In addition, countervailing power requires more than just size and financial substance – it would require the DBCT Users to have a viable alternative – i.e. a credible threat of switching material volumes away from DBCT.

As discussed in greater detail in respect of criterion (b) (in this submission, the DBCT User Group Initial Submission, the PWC Report and the Castalia Report):

(a) given the substantial price differences involved in using other terminals (well more than a SSNIP applied to the price of the Declared Service) the usage of other terminals by Hay Point catchment mines is only at the geographic boundaries of the market and for non-costs reasons; and

(b) substantial infrastructure investment would be required in relation to the below rail system to make a switching of substantial volume to another coal terminal a viable threat.

Consequently the potential to switch to other terminals do not provide a competitive constraint on DBCTM's behaviour and DBCT Users (irrespective of their size) do not have countervailing power against DBCTM.

22.7 Alleged constraints imposed by Access Framework

DBCTM is dismissive of the public benefits of declaration on the basis that it asserts that the same benefits arise from the Access Framework as from declaration and that the Access Framework is more robust than prevailing processes administered by other coal terminals.

The arrangements that are in place at other terminals – is clearly not the benchmark. The assessment is whether there are overall gains of any kind from declaration – such that what is relevant is the impact on how services at DBCT would be provided with and without declaration.

As discussed in detail in relation to criterion (a), it is inappropriate for the QCA to determine the likely state of the market without declaration as being reflective of the Access Framework being in effect (or at least being in effect in the terms provided to the QCA).

Without restating the submissions made earlier, that is the case because:

(a) the Access Framework is a contrived and artificial counterfactual, designed to reassure the QCA that DBCTM will conduct itself differently or deal differently with users – a counterfactual that has clearly been manipulated for the purposes of achieving a particular regulatory decision but is actually illusory in terms of the protections it provides;

(b) there can be no certainty that DBCTM will execute the Access Framework, which is particularly evident given that DBCTM has only recently provided the proposed drafting to reflect its position on pricing;

(c) even if DBCTM did execute the Access Framework, it would not be prevented from amending the document in the future and could do so without review or consent from the QCA or existing or prospective users such that the QCA could not be satisfied that the Access Framework would remain in materially the same terms;

(d) even if DBCTM did execute the Access Framework, given the lack of real remedies available to enforce a breach, the QCA cannot be satisfied that DBCTM will actually comply with the Access Framework; and

(e) key parts of the Access Framework are vague, uncertain and unworkable – with a key example being the operation of the ceiling price (which involves trying to determine without all of the relevant information a price at which the volume of throughput from more than 10 individual producers with different cost profiles, project portfolios and investment priorities and criteria would in aggregate remain the same as the price which the QCA would hypothetically have determined)

22.8 Alleged threat of regulation or declaration

If (despite all evidence to the contrary) the declaration is not continued at the end of the declaration review process (which is the hypothetical circumstance in which this alleged constraint is relevant), then it is hard to see how the threat of regulation in the future would constrain DBCTM's future behaviour.

Rather, DBCTM will have much greater confidence that its service would be unlikely to be declared than an infrastructure provider that had never been subject to a declaration application, given it would have a decision of the QCA and Minister in its favour – together with detailed reasons for that position.

In that situation, even though the QCA Act would theoretically allow an access seeker to seek declaration, it is difficult to see how there would be any material risk of the QCA's and Minister's position on declaration changing.

Even if declaration were to subsequently occur after a period of the service not being declared, that re-declaration would only occur in circumstances of irreparable damage having already been done – and the damage that would be done in the interim is highly material to the public benefit assessment.

Relying on the general prohibition against misuse of market power in section 46 of the CCA is clearly suboptimal – as there can be significant public detriment caused without that section being contravened and there can clearly be public detriment and lessening of competition caused without there technically being a contravention of that section.

The State has made it clear in correspondence with the DBCT User Group that it intends to follow the process in the QCA Act to determine the appropriateness of declaration continuing – such that there is no prospect of the State determining to regulate the Declared Service other than under the Part 5 QCA Act regime.

22.9 Terminal lease arrangements with the State

The DBCT User Group acknowledges that DBCT is subject to a long term lease from DBCT Holdings (a State government owned corporation) to DBCTM.

The State has provided no indication that it considers it has the powers in those arrangements to ensure that DBCTM engages in monopoly pricing, and to the best of the DBCT User Group's knowledge it does not have such power.

It is notable that DBCTM has not pointed to any particular contractual rights that it says the DBCT Holdings / the State has which would provide such a constraint.

In addition it should be noted that it is a very different outcome from the public interest perspective for:

(a) the State to have private contractual rights against DBCTM – enforceable only by the State and where only the State will know the extent of its rights and whether they have been breached; and

(b) stakeholders and an independent regulator to have clear and transparent statutory rights under the QCA Act to enforce breaches of an access undertaking.

Consequently any rights that the State may have do not provide a material constraint on DBCTM's behaviour.

23 Criterion (d) – Alleged public detriments

23.1 Overview of issues with DBCTM's detriment arguments

DBCTM alleges that declaration results in public detriments arising from:

(a) regulating one of five coal terminals may reflect inconsistent regulation; and

(b) declaration unduly increases the regulatory burden.

The DBCT User Group considers that it is clear that the first of these is not a public detriment and the second of these is not true, as declaration will involve significantly less burden in aggregate that the proposed Access Framework.

23.2 Inconsistency of regulation

DBCTM alleges that declaration of DBCT is a clear instance of inconsistent decision making which:

> *'breaches the principles of equality and predictability, which are fundamental to the rule of law and the concept of justice'* in circumstances where there is no justifiable basis for the inconsistency.

In illustrating this alleged inconsistency, DBCTM compares DBCT as one of five coal terminals on the Queensland coast (that is, DBCT, HPCT, APCT, RGTCT and WICET) and highlights DBCT as the only terminal subject to regulation, citing this as a clear public detriment in inconsistent regulation being applied to coal terminals that service the CQCN.

The DBCT User Group consider that there are a raft of fundamental issues with that argument:

History of ownership and unjustified windfall gains

DBCTM's predecessors sought the lease of DBCT from the State with full knowledge that the coal handling services would be declared and that it was a multi-user open access terminal. DBCTM subsequently acquired the lease on the same basis.

In each case, the purchase price paid presumably took that into account.

That is for instance, in contrast to APCT, which was privatised without a regulatory regime in place (potentially for a higher purchase price).

For the owner of DBCT to now express discontent with that position is farcical and should be seen for just what it is – an opportunistic grab for an unjustified windfall gain.

In that regard, the DBCT User Group draw the QCA's attention to the fact that the Harper Review panel's acknowledge that past history was relevant to the assessment of criterion (d):[31]

> *All factors that bear upon the overall public interest, including the history of the ownership of the asset, should be taken into account in the declaration decision*

That history strongly weighs in favour of criterion (d) being satisfied.

Other terminals do not provide a competitive constraint and are not relevant

As discussed in respect of criterion (b), the other terminals do not provide a competitive constraint on the coal handling service at DBCT (such that it is not particularly relevant to DBCT how other terminals are treated and it is simply not true for DBCTM to say that it impacts on how they can compete with other terminals).

It is clear from the QCA Act, that whether a service should be declared is a question of whether it satisfies the access criteria (in which case it must be declared under the QCA Act) – not a question of how other services that have some similarities are treated.

The fact that other coal handling services have not been declared is a product as much of no one applying to have such services declared as anything else.

There are of course a variety of possible reasons for that. For example:

(a) RGT remains government owned;

(b) WICET is user owned; and

[31] Harper Review Final Report at 437

(c) There may well be differences for some of those facilities in relation to issues such as the constraints they face from other facilities and whether they can meet foreseeable demand in the market at least cost on a stand-alone basis.

However, the point is that nothing can be read into the position of other terminals' coal handling services not being declared when no stakeholder has sought declaration - and it is entirely possible that if tested other terminal services may satisfy the access criteria.

State's view that DBCT requires different treatment

If anything, the fact that the State determined it appropriate to declare DBCT's coal handling services tends to indicate the State has previously held the view that there is something different about DBCT which justifies its regulatory treatment.

It is notable by way of contrast that APCT was privatised without any similar regulatory regime being implemented (or for that matter even being considered).

Conclusion

On that basis the DBCT User Group consider that the fact of other terminals not being regulated is not a public detriment – and has not been shown to be inconsistent (given that DBCTM, again, just blinding ignores the issues that make DBCT different to other coal terminals).

23.3 Increased regulatory burden

DBCTM alleges that in circumstances where declaration of the DBCT service would not promote the public interest, declaration in disregard of that would result in excessive and superfluous regulation.[32]

The most obvious problem with that proposition is that it starts from the assumption that declaration would not promote the public interest – when, as discussed in detail throughout this submission, all evidence points to declaration clearly being in the public interest (particularly through its facilitation of investment in dependent market – as discussed further below).

The other glaringly obvious problem is that if regulatory burden is to be considered as part of the public benefit assessment, the burden imposed in the absence of declaration should also be considered – so as to properly determine whether overall net gains are produced by declaration.

The DBCT User Group considers that the burden created by the 'Access Framework' is particularly onerous, due to the absence of an experienced, well-resourced and independent economic regulator to resolve some of the key contentious issues.

Instead, the Access Framework places extremely heavy reliance on:

(a) private commercial negotiation of issues like price in circumstances of asymmetric information (and even for non-pricing terms given that the provisions of the undertaking regarding non-differentiation have been removed) – which will lead to protracted and lengthy negotiations and result in significant administrative, legal and economic costs;

(b) private arbitration to resolve pricing review disputes – which again will be protracted and will involve significant administrative, legal and economic costs;

(c) court litigation to dispute amendments that do not promote the Framework Objective – which given the uncertain nature of the objective relative to specific amendments that would be being made – will again be protracted and will involve significant administrative and legal costs; and

[32] [456-457].

(d) court litigation to enforce all breaches of the deed poll – which again will be protracted and involve significant administrative and legal costs.

Those issues alone would involve aggregate costs well in excess of those that would be incurred in respect of the QCA regulatory arrangements.

In particular, it is notable how the Access Framework substantially exacerbates the total costs by removing the common independent umpire and ensuring that each individual user needs to incur significant costs (noting that collective negotiation by the users will effectively be prohibited by the competition prohibitions of the CCA).

In addition, the fact that the DBCT User Group pays the QCA levy (the QCA's costs), pays its own costs of participating in the regulatory process and also pays much of DBCTM's costs through the corporate overhead allowance in the TIC, and remains in favour of declaration is strong evidence of the gains of declaration outweighing those costs.

The concerns expressed above reflect the experience of those DBCT Users which have experienced previous APCT pricing reviews – noting that the experience under the Access Framework would be far more costly given how much more vague and uncertain the principles in the Access Framework are compared to the APCT User Agreements.

24 Criterion (d) - Effect declaration will have on investment in the mining industry

24.1 Declaration is preferable to the proposed Access Framework

As set out in the DBCT User Group's initial submission at [10.6], the existing access undertaking provides significant benefits which promote the public interest that would not be similarly provided by the proposed Access Framework, including:

(a) independent determination of reasonableness of terms and conditions as opposed to captive and unbalanced bargaining disputes which would likely result in non-transparent and differential pricing between access holders;

(b) greater transparency through required reporting, QCA information production powers and publication of QCA decisions so as to lead better informed access negotiations;

(c) the certainty provided by the access undertaking, standard access agreement (in conjunction with the protections regarding differentiated access terms) and determinations by the QCA which are swift, as opposed to the prospect of long and contentious arbitration; and

(d) maintaining the flexibility to review and/or amend the access undertaking to meet changes in the regulatory and/or market climate as opposed to being disincentivised to seek to amend the Access Framework via the arbitration process.

24.2 An increase in cost in the absence of declaration will force producers and investors out of the Hay Point catchment

In circumstances where declaration was allowed to expire such that the access undertaking no longer applied and the Access Framework was executed, the DBCT User Group consider it is extremely likely that DBCTM will increase the costs at DBCT to a point of monopoly rents. Even if the Access Framework was said to apply – that is in fact the outcome it provides.

Whilst DBCTM argues that it is price constrained by nearby terminals, for the reasons discussed in the DBCT User Group's Initial Submission, and above in respect of criterion (b), none of HPCT, APCT, RGTCT or WICET are capable of constraining the prices at DBCT for users that are captive to DBCT.

A significant increase in price will make the cost of access unreasonable to an extent of being economically unviable for (at least) existing junior producers in the Hay Point catchment and new or prospective producers (who would otherwise be) looking to invest in the Hay Point catchment.

DBCTM alleges that will not be the case – but only because:

(a) they have mistaken holding throughput constant with not impacting on individual producers (when, as discussed in respect of criterion (a) above); and

(b) as discussed in respect of criterion (a) above, the ceiling price is unworkable and uncertain, and given the high potential for error it is likely that even with the best will in the world, it will be contravened,

As the price increase would be wholly borne by coal suppliers who are price takers in coal markets, the unreasonableness of the costs would undoubtedly force some producers out of the region, or to place their mines into care and maintenance by worsening their position on the cost curve, and even the potential for adverse outcomes of that nature will detrimentally impact new exploration and development investment within the Hay Point catchment.

While the ceiling price is defined in a way that would theoretically prevent this – the reality is that given the information asymmetry facing an arbitrator and the uncertainty of exactly how one would calculating the ceiling price in practice, there will come a time when a decision will be made that has that outcome.

As discussed in the DBCT User Group's Initial Submission at [8.6] and the Castalia Report, the increased price sensitivity for the DBCT User Group is very different from that analysed by the NCC, the Minister, the Tribunal and courts in the Newcastle shipping channel declaration proceedings. In particular:

(c) the DBCT terminal infrastructure charge is already much higher/more material that the charge for channel services which was relevant to the shipping channel proceedings; and

(d) the mines which use the terminal services have far less uniform levels of profitability / ability to withstand pricing volatility / uncertainty / changes (given the more varied product – premium hard coking, PCI, thermal; and position on the cost curve – driven by open cut/underground mining methods and differences in scale).

The result of this is that monopoly rents would not end merely in the transfer of income from participants in the supply chain, as separate from economic welfare or the public interest – as was considered by the NCC in the Herbert River cane railway recommendation and quoted by DBCTM at [438.2]. Economic welfare and the public interest in this case would be affected due to:

(a) the detrimental impact on the commercial viability of mining operations in the Hay Point catchment which would force (particularly) existing junior miners either out of the region or to place their mines into care and maintenance; and

(b) increased barriers to entry for small or new producers which would reduce the level of investment in the region.

The Castalia Report annexed to the DBCT User Group's Initial Submission identifies DBCTM's revenue maximising point as approximately $12 per tonne, as shown below:

Figure 16 – Profit Maximising Price Projection

- **DBCT: Throughput and Revenue**

24.3 Promotion of the public interest with declaration – facilitation of investment in the coal industry

As set out in the DBCT User Group's Initial Submission, the protections provided by the access undertaking as a result of declaration facilitates investment in coal projects in the Goonyella by:

(a) reducing barriers to entry – particularly for smaller or new producers, as discussed, who would hold a comparatively small bargaining position which would otherwise inhibit their ability to negotiate or obtain access on reasonable terms in the absence of the protection of the undertaking;

(b) creating certainty and transparency which facilitates long-term investments required for coal exploration and production, given the necessary significant sunk costs in pursuing those ventures (which, despite DBCTM and HoustonKemp's disregard of sunk costs as costs that have been incurred and satisfied in the past in respect of rail and terminal infrastructure, are relevant for the future investment in the coal industry given the significant long-term sunk costs required for coal exploration and development); and

(c) as has recently occurred, allowing the contracting of access by new, expanding or reopened mines (such as Isaac Plains). It is likely to continue to assist those opening new or temporarily closed mines in the Goonyella system (such as Terracom reopening the Blair Athol mine, and Sojitz having recently acquired Gregory-Crinum).

In particular, it is difficult to see how any new entrant would be incentivised to make new investments or obtain financing for such investment where the pricing could become uneconomic due to ceiling price movements which will occur every 5 years.

Whilst declaration of the service would appear to most directly produce significant benefits for coal producers, the benefits enjoyed by coal producers result in substantial flow-on economic benefits for the public.

In particular this will have wide-ranging impacts upon investment in:

(a) facilities and markets that depend upon access to the service;

(b) the coal industry;

(c) the rail access and rail haulage industry;

(d) related markets for mining services and mining inputs;

(e) the DBCT facility itself; and

(f) will cause significant detrimental impacts on coal royalties payable to the state of Queensland.

The reduction of royalties is particularly significant as it will mean a reduced state budget, which would naturally flow-on to budget cuts for essential public services or public infrastructure.

25 Criterion (d) - Investment effects

25.1 Investment effects

The DBCT User Group acknowledges that investment effects are relevant (as expressly recognised in section 76(5)(b)(i) QCA Act).

However, all evidence points to the declaration facilitating prudent and efficient investment – not thwarting it as DBCTM tries to allege – and contains important protections for both DBCTM and users in ensuring that investment is prudent.

25.2 Investment in the DBCT facility itself

DBCTM cannot reasonably argue that declaration is a disincentive against investment in the DBCT facility.

As set out in the DBCT User Group's initial submission, capacity at DBCT has been expanded by around 52% since declaration, with investments of AU $1.4 billion being made.

Phase	Capacity (Mtpa)	Year	
Initial terminal	14.55	1983	In 18 years pre-declaration: 1) 5 expansions, 2) total of 23 Mtpa of capacity added
Stage 1	22.55	1990	
Stage 2	22.55	1995	
Stage 2A	28.55	1997	
Stage 3	33.55	1999	
Stage 4	37.55	1999	
Stage 5	45.50	2002	In 17 years since declaration: 1) 3 expansions; 2) total of 47.45 Mtpa of capacity added
Stage 6	54.50	2003	
7X	85.00	2009	

Moreover, given that:

(a) DBCTM's access undertaking requires DBCTM to expand the terminal in certain circumstances where that is justified by demand;

(b) the Port Services Agreement DBCTM is a party to with the State contractually requires DBCTM to expand the terminal in certain circumstances where it is justified by demand;

(c) the terminal has been expanded numerous times since regulation was introduced;

(d) DBCTM has undertaken feasibility studies in relation to potential future expansions of the terminal;

(e) DBCTM's master plan identifies a series of expansions that would be pursued if justified by future demand;

(f) the access undertaking has always provided DBCTM with an appropriate return on and of capital; and

(g) the pricing methodology used in the undertaking has effectively made DBCTM completely immune from the volatile coal price (which in the absence of declaration would provide a commercial disincentive to invest that is actually removed through regulation).

As shown in the table above, the clear majority of capacity expansion (by tonnage) has occurred during (and, the DBCT User Group considers, as a result of) declaration.

The DBCT User Group also note Brookfield's own submissions during the certification process, also set out in the user group's Initial Submission:

> *Brookfield [DBCTM's ultimate owner] submits that expansion of terminal infrastructure requires substantial and long term capital commitment and that facilities are typically built to last 50 years or longer. Brookfield argues that a certification period of 'at least ten years, preferably longer' is appropriate 'as* ***long term regulatory certainty is necessary to instil confidence that investments can be made within settings that remain predictable for the longer term'*** *(Brookfield submission, [17]).*

It is clear that both DBCTM's actions in investing in previous expansions and Brookfield's previous submissions make it obvious that the existing declaration provides strong incentives to invest in DBCT and produces substantial benefits for the purpose of such decisions.

25.3 Delays to investment

DBCTM alleges that declaration results in delayed or insufficient investment.

Critically:

(a) there is no example of a DBCT expansion given which it is alleged should have been developed but was not;

(b) not once has DBCTM sought to materially change the process in the access undertaking for studying and investing in expansions (which presumably should have occurred if DBCTM genuinely took issue with the way these issues were dealt with);

(c) DBCTM is completely silent on the fact that the main reason that DBCT has not been expanded further was DBCTM's related entities seeking to progress the unregulated Dudgeon Point Coal Terminal developments at the expense of DBCT's further expansion; and

(d) DBCTM completely ignores the fact that it is not just DBCT expansions that have been delayed – coal mining developments themselves are taking longer and longer to receive

approvals – with numerous developments having been subjected to land court and other disputes.

It is true that the requirements in the undertaking relating to feasibility studies do ensure that there is rigour in the scope of expansions and the costs of expansions of DBCT are prudent.

To the extent that is said to deter investment, it is worth noting the cautionary tales of developments which occurred during the mining boom – WICET and APSO (and the related WIRP and GAPE projects) – which of course DBCTM completely ignores:

(e) WICET currently has 11 mtpa of unallocated long term capacity (out of 27 mtpa of nameplate capacity) with even more contracted capacity that is not being utilised;

(f) APCT is similarly estimated following the X50 extension to be operating at well below its capacity following the termination of its contract with Rio Tinto.

In hindsight, it is absolutely clear that neither of those investments was efficient. A significant amount of capital was invested at the very height of the boom when construction costs were high, and the long term coal price outlook was well in excess of where it currently is.

Ensuring investment is prudent is a public benefit.

Finally the BHP slide included at Figure 15 of the DBCTM submission which DBCTM volunteers as evidence to the delay caused to expansions of DBCT in a regulated climate does not at all support that position. The slide was very clearly drafted to depict how a single-user terminal could produce commercial efficiencies that a multi-user terminal could not. It is misleading to seek to interpret it as DBCTM does.

25.4 Alleged regulatory risk in the absence of merits review

DBCTM alleges that the absence of a merits review regime in the Queensland access regime increases regulatory risk and dampens incentives to invest.

However, there is absolutely no evidence of any decision of the QCA which is said to demonstrate this problem.

It should be noted that the Queensland access regime allows DBCTM to lodge a draft amending access undertaking at any time during a declaration period. The effect of this provision, as shown by recent draft amending access undertakings (***DAAUs***), is that DBCTM has an avenue to seek from the QCA reconsideration of any aspect of the access undertaking such that each issue is effectively reassessed and a merits review would be unnecessary.

It is also possible for a judicial review application to be lodged (as has occurred on previous occasions in the context of Aurizon Network regulatory decisions by the QCA).

The above makes it clear that, contrary to the assertions made in the DBCTM Initial Submission there is both avenues to have issues reviewed on the merits (through DAAUs) and to review matters of law (through judicial review).

Finally – and perhaps just as critically – DBCTM appears to completely overlook the uncertainty caused by their proposed commercial arbitration regime, particularly where it involves determinations of vague, uncertain and unworkable concepts like the proposed ceiling price.

As discussed earlier in this submission, as a result of:

(a) the information asymmetry (and lack of information gathering powers / reporting obligations);

(b) having a different arbitrator for each price review;

(c) the vague and completely uncertain nature of the pricing principles (including the floor and ceiling prices),

means the risk of a decision making error is off the chart under the Access Framework compared to when the QCA is responsible for making decisions.

25.5 Declaration does promote certainty

DBCTM argues that declaration does not increase certainty for coal producers.

Surely the fact that coal producers have made such extensive submissions in relation to the certainty the QCA regulation provides and the uncertainty DBCTM's Access Framework would result in should indicate how strongly the DBCT Users disagree with that argument.

It is of course true that coal producers face uncertainties in the coal price and through issues like regulatory change.

However, certainty in relation to the ability to obtain access and that pricing will remain at an efficient level is extremely important given:

(a) in exploration and development of coal projects;

(b) in the high proportion of costs infrastructure consists of; and

(c) that without certainty of those matters development projects are not bankable given the long term and high sunk cost nature of investments in mines;

Finally, DBCTM can hardly claim that without declaration it could provide more certainty to assist producers with managing volatility – when their proposed Access Framework introduces far greater uncertainty – both as to price and other terms – compared to the QCA regulatory arrangements.

25.6 Promotion of investment in related markets

As set out in the DBCT User Group's Initial Submission, declaration and the certainty it provides would also promote investment in a number of related markets, including:

(a) the rail access and rail haulage industries, in consideration of the appeal for investment in coal projects near to or on the Goonyella system such that below rail expansions and above rail haulage services are positively impacted; and

(b) in other related markets such as those for mining inputs and mining services.

26 Criterion (d) - Administrative and compliance costs

26.1 Costs for DBCTM in complying with declaration

DBCTM could not reasonably be concerned with the administrative and compliance costs incurred as a result of declaration in circumstances where the costs are passed through to, and paid by, users.

In any case, the DBCT User Group considers that those administrative and compliance costs are immaterial in the context of infrastructure of this scale and services of the volume provided. This is particularly so given that:

(a) the provisions of the DBCT access undertaking have been relatively settled, with incremental rather than wholesale changes occurring with each new access undertaking;

(b) the nature of the asset provides a single common service to all users that utilise DBCT such that synergy and simplicity of regulation of operational matters is created; and

(c) the operations and maintenance costs are not regulated – as, while the operator is user owned, it is accepted by all stakeholders (including the QCA) that the operator's interests are aligned with users in terms of striving for the appropriate balance between costs and service levels.

As raised in the DBCT User Group's Initial Submission, to the extent that DBCTM have sought to depict the costs it considers have been incurred as a result of declaration (see Figure 15 of DBCTM's Initial Submission) it is highly relevant to consider the number of draft amending access undertakings (***DAAUs***) DBCTM have lodged, withdrawn and resubmitted to the QCA over that period. This information is summarised in the table below:

Date	Details	Outcome
27 June 2018	Trading SCB DAAU	Consultation currently occurring
9 May 2018	Modification DAAU	Approved
30 April 2018	Remediation Allowance DAAU	Ongoing
14 September 2017	Outturn inflation DAAU	Ongoing
14 September 2017	Modelling DAAU	QCA ceased considering this DAAU on 15 December 2017
15 September 2017	Modification DAAU	QCA indicated in March 2018 it was willing to accept amendments which removed ambiguity, but refused to approve the Modification DAAU as some amendments would significantly change the terms of the AU Withdrawn 4 May 2018
14 March 2017	Incremental Expansion Study DAAU	Withdrawn on 10 May 2017
20 April 2016	DAAU submitted to extend the terminating date by a year to 30 June 2017	Approved by QCA in June 2016
10 November 2015	2nd ring-fencing DAAU	Draft decision to refuse issued February 2016 Withdrawn on 24 March 2016
9 October 2015	Ring-fencing DAAU	Withdrawn on 10 November 2015
3 February 2015	DAAU – differential pricing	QCA refused on 25 August 2015

This information shows that of the 8 DAAUs lodged since 2015 (excluding the most recent 3, which are ongoing), 2 DAAUs have reached a successful outcome. The DBCT User Group consider that it is also worth noting that the frequency with which DBCTM lodged DAAUs with the QCA in the lead-up to (and during) the declaration review process clearly increased.

It is also relevant that the 2017 and 2018 Modification DAAUs and the Modelling and Remediation Allowance DAAUs did not concern new issues and instead involved DBCTM attempting to reargue issues that had/have been settled both at the time of consultation on the access undertaking and in previous DAAU processes that considered the same matters.

The DBCT User Group consider this is highly relevant in circumstances where DBCTM appears to have intentionally and strategically submitted multiple DAAU's and thereby increased its compliance costs.

In addition, while DBCTM might consider its compliance costs would decrease in the absence of declaration, the costs of users would significantly increase, and the DBCT User Group is very confident that aggregate costs would significantly increase.

Abbot Point provides an excellent case study for the costs involved in a commercial negotiate-arbitrate model in the absence of declaration, principally being:

(a) the costs involved in negotiating a bilateral agreement with more likelihood of differentiated terms and differentiated pricing outcomes; and

(b) the costs involved in arbitrating disputes; and

(c) the costs of court proceedings to seek to enforce the contractual deed poll.

The APCT experience is that each producer ends up having to get their own legal and economic advice (as would DBCTM), there would be costs of arbitrator, counsel and in all likelihood engineering and other technical experts.

Those costs are significant – and that is the case at APCT with a contract that specifies in far greater precision than the proposed Access Framework how charges will be calculated.

The DBCT User Group consider that the aggregate costs of administering DBCTM's contractual framework as an alternative to, and in the absence of, declaration would be significantly greater than the costs of administering and complying with the current declaration.

26.2 Costs for access seekers

The DBCT User Group consider there would be a material increase in compliance costs for each of them and new access seekers under a contractual alternative to declaration (including the proposed Access Framework) if the declaration was allowed to expire.

As discussed above, these costs would arise due to lengthy and costly negotiations (and likely arbitrations) and court proceedings in order to enforce the arrangements (given the lack of a regulator).

27 Criterion (d) - Other relevant matters

It is unclear how DBCTM has reached the conclusion that any benefits found to result from declaration would likely flow to users of the facility only.

This is particularly so in consideration of the benefits provided to DBCTM particularly, including the incentive to invest in DBCT as well as the broad circumstances that produce significant public benefits (listed in the DBCT User Group's Initial Submission and repeated below for convenience).

There is of course numerous wider public benefits arising from declaration as set out in the Initial DBCT User Group submissions / PWC Report, such as:

(a) Ecologically sustainable development - Open access delivered by declaration will result in a larger single terminal instead of multiple smaller terminals, which will be more ecologically sustainable (due to involving less need for dredging, and confining the areas of the coastline which have been developed and through which shipping occurs).

(b) Rehabilitation funding - Specific amounts have been identified in the QCA approved tariffs for contribution to environmental rehabilitation to ensure that future rehabilitation

and restoration work is fully funded. That would cease to be the case under the proposed 'Access Framework'.

(c) Wider economic benefits including:

(i) Lower costs and efficiencies (with it being a well known principle of economics that monopoly pricing of the type DBCTM wishes to propose creates a loss of consumer welfare) – which improved the viability of the Queensland coal industry and been important in allowing it to survive volatile coal prices (which only 12 months ago were significantly more depressed than the current price environment)

(ii) Higher government royalties – both through the certainty of efficient and reasonable pricing providing increased incentives to invest in production of coal and reducing the deductions which would apply from coal royalty calculations (where coal export terminal costs are permitted deductions) due to the lower costs provided by declaration and QCA regulation. Those higher royalties result in a stronger State budget which can be used to provide public and community services. In 2016-17, total general government sector revenue was $5.439 billion (or 10.7%) higher than the previous financial year – which was noted in the Queensland Government Budget Strategy and Outlook 2017-18 as resulting from increased coal prices towards the end of 2016.[33]

In addition it is worth noting that a number of terms of the APCT User Agreements refer to outcomes in respect of the DBCT Access Undertaking – such that the removal of declaration is likely to create significant uncertainty about future pricing outcomes at APCT as well.

28 Criterion (d) - Conclusion

It is clear from all of the above, that on any cost / benefit analysis or any other form of overall analysis, declaration produces overall gains, and the public benefits of declaration overwhelmingly outweigh any public detriment which would arise from declaration continuing.

Accordingly it is clear that access, on reasonable terms and conditions as a result of declaration, will result in a promotion of the public interest, and criterion (d) is satisfied.

29 Detailed responses to QCA Questions

While the QCA Questions on the initial submissions have been responded to in full in the course of the submissions above, a detailed response to each question is provided in Schedule 5.

[33] https://s3.budget.qld.gov.au/budget/papers/2/4-Revenue.pdf

Schedule 1 – 2nd PWC Report

DBCT User Group

2018 Access Declaration Review – Supplementary Report

Dalrymple Bay Coal Terminal User Group

2018 Access Declaration Review – Supplementary Report

17 July 2018

pwc

Executive summary

The DBCT User Group engaged PricewaterhouseCoopers Consulting (Australia) Pty Limited (PwC) to provide economic advice regarding the Queensland Competition Authority's (QCA) review of the ongoing declaration of the Dalrymple Bay Coal Terminal (DBCT).

We prepared a report which was provided with the DBCT User Group's initial submission to the QCA.[1] Our report found that DBCT satisfied the access declaration criteria (b), (c) and (d), as a single facility could meet foreseeable demand in the relevant market at least cost, the terminal was a significant facility, and that declaration would promote the public interest. The DBCT User Group's submission also included a report from advisors Castalia,[2] demonstrating that declaration of the facility would promote competition in a related market, and therefore satisfied access declaration criterion (a).

Other submissions were received by the QCA which purported to demonstrate a contrary view, at least on criteria (a) and (b). Specifically, DBCT Management (DBCTM) provided a submission with accompanying reports from Houston Kemp Economists[3] (Houston Kemp) which argued that declaration would not satisfy access declaration criteria (a) or (b).

Access declaration criterion (b) is a type of 'natural monopoly' test, used to assess whether a facility could service the total demand in the market at least cost over the proposed term of declaration. This criterion considers whether a facility exhibits sufficient economies of scale with respect to the market in which it operates, such that it is the least cost way in which market demand can be met.

Our initial report found that substitutability between DBCT and alternative terminals is constrained by a range of factors including limitations of the existing rail infrastructure and different haulage distances, resulting in increased rail access charges. Having considered these constraints, we found the relevant market for assessing the future declaration of the services provided by DBCT is the market for the provision of common user coal handling services at the Port of Hay Point.

Whilst starting from a broadly similar view of the service, being the coal handling services provided by the facility at DBCT which currently are declared and regulated by the QCA, Houston Kemp suggests a far broader market definition.

[1] PwC (2018), *Dalrymple Bay Coal Terminal User Group – 2018 Access Declaration Review*, 29 May

[2] Castalia (2018), *Dalrymple Bay Coal Terminal: Economic Analysis of Declaration Criteria,* Report to DBCT User Group, May

[3] Houston Kemp Economists (2018), *Does DBCT's coal handling service satisfy criterion (b)?* A report for DLA Piper, 28 May and *Does DBCT's coal handling service satisfy criterion (a)?* A report for DLA Piper, 28 May

Houston Kemp presents a view of market definition which overstates the practical extent of interconnectivity and substitutability between what properly should be assessed as separate markets. The key limitations in Houston Kemp's approach to market definition are that it:

- assumes away the impact of existing contracts, many of which have terms which extend for substantially all or even beyond the term of any prospective declaration of the relevant services and which materially impact the incentives and behaviours of market participants

- vastly simplifies the effect of capacity limitations, particularly in the rail network, with the effect of presenting a simplistic and misleading view of the ease with which miners can readily avail themselves of alternative export pathways

- uses a 'resource cost' approach as a basis for seeking to determine an optimised configuration of mine/port export pathways, but which ignores that mines receive and respond to price signals which are fundamentally different, and

- includes Hay Point Coal Terminal (HPCT) in the market, notwithstanding Houston Kemp acknowledging that that this facility is not accessible by any non-BHP miners.

The question asked of access declaration criterion (b) is whether or not it is likely that a single facility can meet foreseeable demand. The underlying context is that, if multiple facilities can meet that demand, then this would seem to suggest the existence of conditions for contestability between them, and which would negate the need for declaration, and for the intervention of a regulatory agent.

In our view, the basis of Houston Kemp's market definition is removed from this primary purpose such that it provides no useful guidance to the QCA in its consideration of access declaration criterion (b). It adopts assumptions that do not reflect the conditions of 'close competition' and 'rivalry' which should be at the core of any approach to market definition.

Adopting a more appropriate market definition, we find that foreseeable demand, as forecast by industry analysts Wood Mackenzie and others, is likely to remain below the capacity of the existing DBCT facility. Accordingly, a single facility remains the least cost way of meeting foreseeable demand, meeting the requirements of access declaration criterion (b). Even adopting a more aggressive 'high scenario' demand forecast, where an expansion of capacity is required, we find that this demand can be met at least cost by an incremental expansion to DBCT, in line with the expansion pathway set out in DBCTM's 2018 Master Plan.

Contents

1 Introduction

1.1 Background

The DBCT User Group engaged PricewaterhouseCoopers Consulting (Australia) Pty Limited (PwC) to provide economic advice regarding the Queensland Competition Authority's (QCA) review of the ongoing declaration of the Dalrymple Bay Coal Terminal (DBCT).

We prepared a report which was provided with the DBCT User Group's initial submission to the QCA.[4] Our report found that DBCT satisfied the access declaration criteria (b), (c) and (d), as a single facility could meet foreseeable demand in the relevant market at least cost, the terminal was a significant facility, and that declaration would promote the public interest. The DBCT User Group's submission also included a report from advisors Castalia,[5] demonstrating that declaration of the facility would promote competition in a related market, and therefore satisfied access declaration criterion (a).

Other submissions were received by the QCA which purported to demonstrate a contrary view, at least on criteria (a) and (b). Specifically, DBCT Management (DBCTM) provided a submission with accompanying reports from Houston Kemp Economists[6] (Houston Kemp) which argued that declaration would not satisfy access declaration criteria (a) or (b).

The DBCT User Group has requested that PwC prepare this supplementary report, responding to the market definition and other analysis presented in the Houston Kemp reports.

This supplementary report is in two parts.

- In the first part, we address the approach to market definition, for the purposes of assessing whether DBCT meets the requirements of access declaration criterion (b). In doing this, we respond to what we consider are key limitations in Houston Kemp's approach and conclusions.

- In the second, and having confirmed our previous view on market definition, we revisit the forecast of foreseeable demand and the least-cost expansion pathway required, in the event that demand is anticipated to exceed the capacity of the current terminal.

As a supplementary report, we have not restated in full the background and context to the QCA's current access declaration review – this detail is provided in our initial report and in the DBCT User Group submission.

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[4] PwC (2018), *Dalrymple Bay Coal Terminal User Group – 2018 Access Declaration Review*, 29 May

[5] Castalia (2018), *Dalrymple Bay Coal Terminal: Economic Analysis of Declaration Criteria,* Report to DBCT User Group, May

[6] Houston Kemp Economists (2018), *Does DBCT's coal handling service satisfy criterion (b)?* A report for DLA Piper, 28 May and *Does DBCT's coal handling service satisfy criterion (a)?* A report for DLA Piper, 28 May

2 Defining the market

2.1 PwC's initial report

Our initial report found that a single terminal is the least cost means of servicing total foreseeable demand for coal handling services at DBCT over an assumed 15 year declaration term, and therefore satisfied access declaration criterion (b).

Criterion (b) is a type of 'natural monopoly' test, used to assess whether a facility could service the total demand in the market at least cost over the proposed term of declaration. This criterion considers whether a facility exhibits sufficient economies of scale with respect to the market in which it operates – typically a result of it having a cost base that is predominantly comprised of fixed costs, and 'lumpy' capacity augmentation costs – such that it is the least cost way in which market demand can be met.

Whilst our approach to market definition drew on similar theoretical economic principles presented by DBCT Management and its advisors Houston Kemp,[7] we also considered the commercial and physical constraints faced by market participants, and the complex system of incentives that drives their decision making.

Guidelines from the Australian Competition and Consumer Commission (ACCC, the Commission)[8] hold that underpinning any market definition is the close substitutability of products within a given geography, and that both price and non-price factors determine the extent of that substitutability.

Consistent with this, and in addition to identifying the theoretical product, geographic, functional and temporal dimensions to the market for DBCT services, we identified those price and non-price issues that refine the market definition to one that is aligned with substitutability. These include:

- infrastructure capacity constraints, specifically considering existing limitations in the capacity of the Goonyella, Newlands and Blackwater systems, which are relevant to assessing the extent to which northern or southern ports might be in close competition to DBCT

- user's contractual arrangements for rail and port access, which influenced the economic incentives and behaviours of users and producers in the market, and again which are relevant to assessing whether there is genuine rivalry between alternative export coal terminals

- the cost of accessing alternative export pathways, which goes directly to the boundaries of the market given the material cost differences associated with longer rail haulage distances and also the higher cost of available spare capacity at other coal terminals, and

- the characteristics of the services offered by DBCT and how these are different to other export coal terminals and which therefore differentiate the services offered by DBCT.

We found that substitutability between DBCT and alternative terminals is constrained by a range of factors including limitations of the existing rail infrastructure and different haulage distances, resulting in increased rail access charges. Having considered these constraints, we

[7] Houston Kemp Economists (2018), *Does DBCT's coal handling service satisfy criterion (b)?* A report for DLA Piper, 28 May, p.17

[8] ACCC (2008, updated 2017) *Merger Guidelines*, p.14, p.17

found the relevant market for assessing the future declaration of the services provided by DBCT is the market for the provision of common user coal handling services at the Port of Hay Point.

Critically, this market excludes Hay Point Coal Terminal (HPCT), the single-user terminal adjacent to DBCT. Capacity at this terminal has never previously been made available to any non-BHP users,[9] and nor is it expected to be over the term of the declaration. The services of HPCT therefore are not in any way substitutes for the majority of users at DBCT, and cannot be considered to be in the same market.

Supporting this view, the ACCC explicitly lists 'discrimination and captive customers' as a key reason to segregate markets.[10] The Commission's guidelines state that 'in certain cases where substitution possibilities are not uniform across consumer groups, it may be appropriate to define separate markets for different consumer groups.' The guidelines go on to observe 'if suppliers can discriminate, a customer that has limited substitution possibilities receives different terms and conditions from suppliers to a customer that has strong substitution possibilities. In this situation it may be appropriate to consider two separate markets for merger analysis. One market would include the relevant product and the alternative product, and would focus on those consumers who have the option of substitution. The second market would not include the alternative product and would focus on those consumers who are 'captive' or do not have the option of substitution'.[11]

The relevant question in the context of criterion (b) is not whether customers using other facilities occasionally now, or in the past, use DBCT, but whether DBCT genuinely faces rivalry from other ports/terminals in a way which influences its decisions and those of its users. A substitutability condition for DBCT implies that there are practical and commercially feasible alternatives to DBCT for the majority of its customers. It is not sufficient to argue that the since some customers may or did use other terminals, in addition to DBCT, this choice can be reciprocated for DBCT's substantive customer base. DBCT is a *de facto* monopoly facility for the majority of its customers, who have no other practical choice for coal handling services, and indeed, have never used another facility throughout the current declaration period.

Having determined the appropriate approach to market definition, our initial report then considered various forecasts of demand prepared by market analysts and indeed the forecasts of DBCTM itself, to establish a number of potential scenarios for foreseeable demand. This modelling showed that foreseeable demand, including under various scenarios which contemplated the need for capacity augmentation, could be met at least cost by DBCT.

2.2 Houston Kemp's criterion (b) report

Whilst starting from a broadly similar view of the service, being the coal handling services provided by the facility at DBCT which currently are declared and regulated by the QCA, Houston Kemp suggests a far broader market definition.

[9] Where BHP users include affiliated BHP Billiton Mitsubishi Alliance (BMA) and BHP Mitsui Coal (BMC) entities.

[10] ibid. p.19 4.35

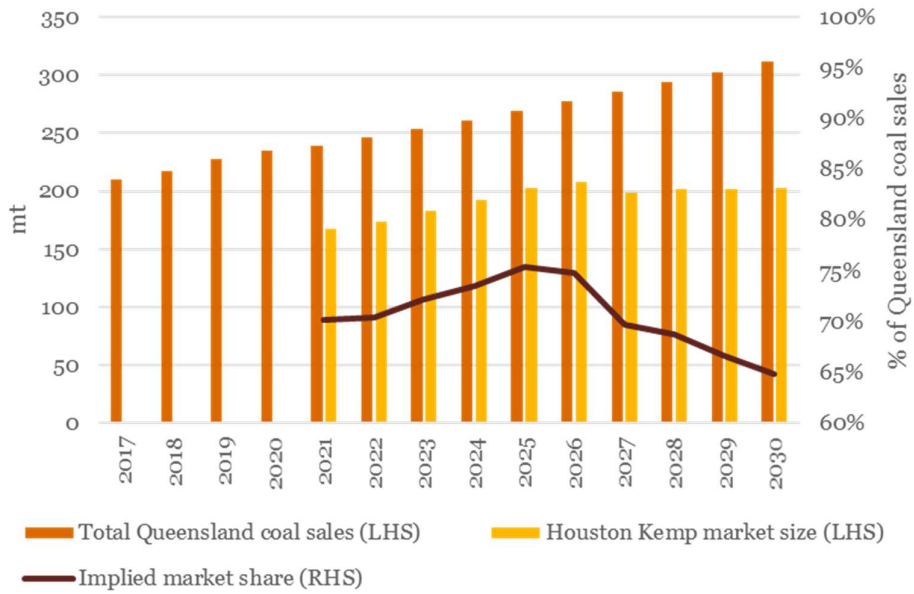
[11] ibid p.19 4.37

Houston Kemp reference the same ACCC's guidelines as informing its approach to market definition and application of SSNIP, but omits any meaningful consideration of the extent to which there is genuine substitutability between the DBCT's services and other terminals. Interpreted in full, the ACCC's guidance suggests the following factors[12] should properly overlay an assessment of market definition:

- any limitations on the ability of customers to access alternative sources of supply in alternative regions
- any regulatory or other practical constraints on suppliers selling to alternative regions
- records relating to trade flows and the actual movement of customers and/or suppliers between geographic regions, especially related to changes in relative prices across regions in the recent past
- views and business records of buyers and suppliers regarding the likelihood of switching between geographic sources of supply

As defined by Houston Kemp, the DBCT market extends to include substantially all of Queensland's seaborne export coal production. Houston Kemp's market definition suggests a market size of more than 200 million tonnes per annum during the forthcoming declaration period.[13] To put this figure in context, whilst the export coal market is expected to continue to grow between now and the period relevant to the access declaration, Houston Kemp assumes a market definition which would account for more than three-quarters of total Queensland coal sales.

Figure 1: Implied market share relative to total Queensland coal sales*



Source: 2017 coal sales data sourced from: https://data.qld.gov.au/dataset/annual-coal-statistics/resource/c522fcaa-89d7-4c76-bd6e-064d39617d38;
2018-2021 coal sales data sourced from: https://budget.qld.gov.au/files/BP2-2018-19.pdf;
Note: total Queensland coal sales assumed to grow at 3 per cent annually from 2022.

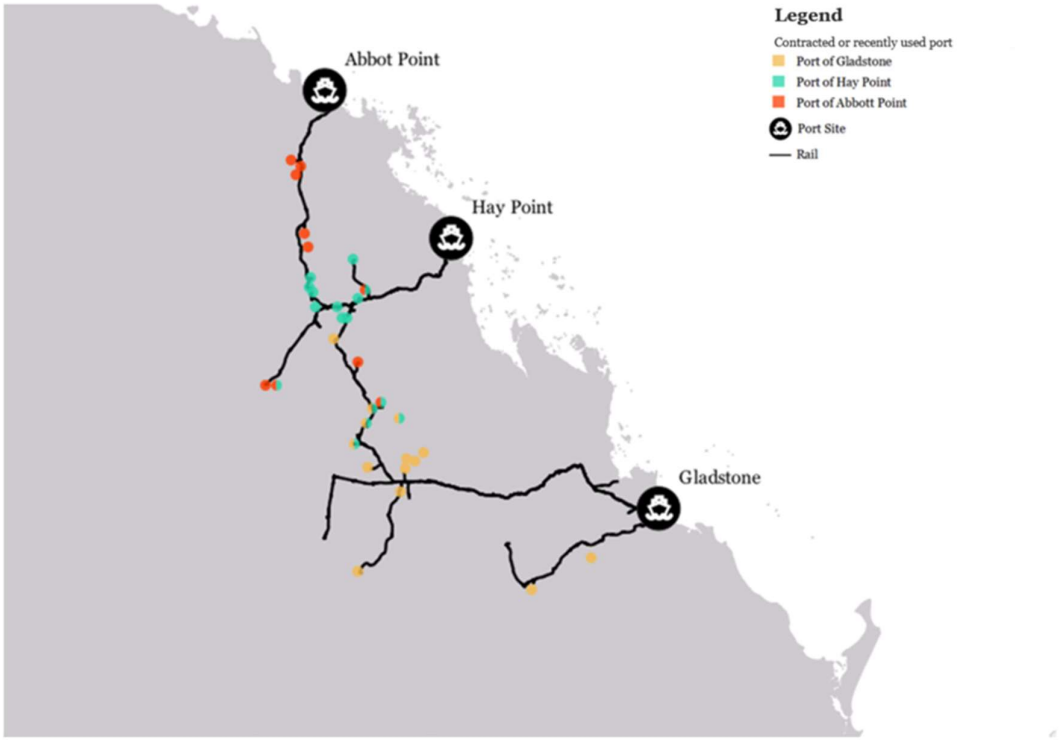
[12] ibid. pp.13-21

[13] Houston Kemp Economists (2018), op. cit. Table 5.1, p.36

Using this market definition, Houston Kemp purports to show that demand cannot feasibly be met by DBCT, as more than half of the suggested total foreseeable demand would need to be met by other terminals from 2021. This includes both physically distant terminals at Abbot Point and Gladstone, and also the single-user HPCT.

Supporting this conclusion, Houston Kemp includes in its report an illustration of the apparent extent to which the 'market' for coal handling services is defined by interconnectivity and substitutability between Hay Point and coal export ports to the north and south. In its Figure 2.10,[14] Houston Kemp show that there are mines which appear to ship through coal terminals contrary to an expected preference for the closest proximate port (and therefore shortest rail haulage distance). We reproduce Houston Kemp's Figure 2.10, below.

Figure 2: Reproduction of Houston Kemp's Figure 2.10



Source: PwC modelling

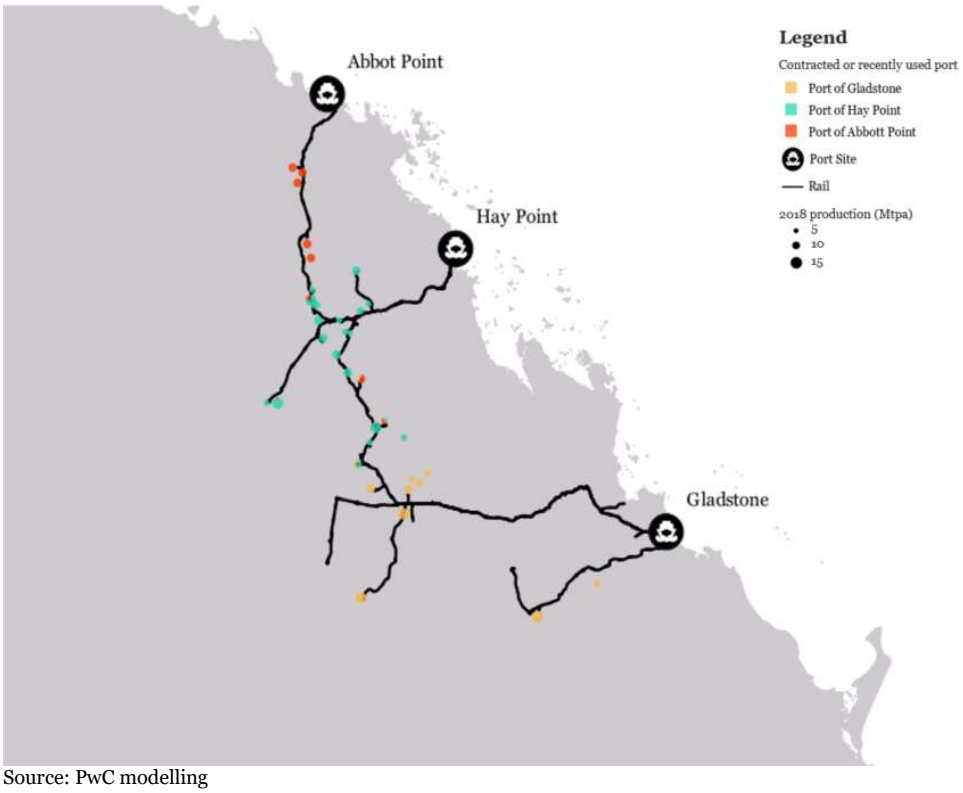
However, through engagement with various user companies, we understand there are a number of aspects of this illustration which are incorrect and misleading, including:

- mines which are shown as using either Abbot Point or Gladstone, but which have never used terminals at those ports
- where there may be occasional or incidental use, but where the scale of this is immaterial in the context of the broader market, or
- where terminal choice has been influenced by user-specific considerations, such as opportunities at other ports to blend coal from multiple mines owned by that user.

[14] Houston Kemp Economists (2018), op. cit. p.14

Correcting for these factors, the boundaries of the market become clearer. In Figure 3 we present the same illustration, but adjusting for actual utilisation by each of the respective mines. What is clear from this corrected presentation is that there is a clear catchment of mines which ship through Hay Point, logically which reflects the significant rail haulage penalty associated with using more distant terminals. Some inevitable 'grey' areas remain, at the outer edges of this catchment, but this is uncontroversial and competition regulators frequently have acknowledged and accept that market definition boundaries rarely will be absolute and distinct.

Figure 3: Reproduction of Houston Kemp's Figure 2.10, with errors corrected



Source: PwC modelling

2.3 Responding to the key limitations in Houston Kemp's analysis

Houston Kemp presents a view of market definition which overstates the practical extent of interconnectivity and substitutability between what properly should be assessed as separate markets. The market definition presented by Houston Kemp is disconnected from the realities of how market participants – both users and suppliers - actually behave.

The key limitations in Houston Kemp's approach to market definition are that it:

- assumes away the impact of existing contracts, many of which have terms which extend for substantially all, or even beyond, the term of any prospective declaration of the relevant services and which materially impact the incentives and behaviours of market participants

- vastly simplifies the effect of capacity limitations, particularly in the rail network, with the effect of presenting a simplistic and misleading view of the ease with which miners can readily avail themselves of alternative export pathways

- uses a 'resource cost' approach as a basis for seeking to determine an optimised configuration of mine/port export pathways, but which ignores that mines receive and respond to price signals which are fundamentally different, and

- includes HPCT in the market, notwithstanding Houston Kemp acknowledging that that this facility is not accessible by any non-BHP miners.

2.3.1 Infrastructure capacity limitations and existing contracts

Houston Kemp characterises the market as being shaped by a substantial degree of interconnectivity, and a ready ability for users to seamlessly substitute from DBCT to other terminals. The reality is far more constrained, and these constraints are directly relevant to understanding the boundaries of the market for the relevant services.

Houston Kemp appears to simplify the actual effect of constraints such as existing user agreements for both port and rail services, and infrastructure capacity limitations, particularly in relation to the Central Queensland rail network. This affects both the assessment of the relevant market and the optimisation modelling presented by Houston Kemp.

In its guide to the declaration of services under the parallel Commonwealth access regime, the National Competition Council referenced earlier work from the Trade Practices Tribunal as observing that markets are typically are defined as being 'the area of *close competition* between firms' or 'the field of *rivalry between them*' (emphasis added).[15] Houston Kemp's report cites various similar market definition precedents.

Competition fundamentally is about incentives and behaviour. Competition is preferred as an end-state not because of some implicit merit in a competitive market structure, but because of the desirable incentives it is held to provide to market participants - users and producers - insofar as how they interact with each other. Necessarily, it is the nature of those incentives and character of those interactions which define competition.

By ignoring or abstracting away from these realities, Houston Kemp's analysis has moved away from the fundamental purpose of market definition, in the context of access declaration criterion (b). Market definition is not an abstract consideration to be assessed in isolation, rather it must consider the context of the underlying matter being assessed.

In this case, the question asked of criterion (b) is whether or not it is likely that a single facility can meet foreseeable demand. The underlying context is that, if multiple facilities can meet that demand, then this would seem to suggest the existence of conditions for contestability between them, and which would negate the need for declaration, and for the intervention of a regulatory agent.

[15] National Competition Council (2018), *Declaration of services: a guide to declaration under Part IIIA of the Competition and Consumer Act 2010 (Cth)*, p. 29

As noted by Green, 'economic regulation can be defined as government-sponsored intervention in market decisions that empowers markets to work better by *promoting competitive, market-like outcomes*' and, further, that 'access regulation seeks to address the *lack of effective competition* in markets for infrastructure services where access is required for third parties to compete effectively in related markets' (emphasis added).[16] Restated another way, a finding that DBCT should not be declared, and therefore should not be subject to access regulation, would rest on a conclusion that there is *effective competition* in the market for the services the facility provides.

In our view, the basis of Houston Kemp's market definition is removed from this primary purpose such that it provides no useful guidance to the QCA in its consideration of access declaration criterion (b). It adopts assumptions that do not reflect the conditions of 'close competition' and 'rivalry' which should be at the core of any approach to market definition.

Existing contracts impact user behaviours and thus shape market definition

In respect to the existence and import of existing user port and rail agreements, Houston Kemp notes variously that its analysis was undertaken as 'if there were no constraints from existing supply contracts.'[17] Houston Kemp goes on to argue that it would be impractical to take account of existing contracts as there is insufficient information available in respect to these contract positions and difficultly in predicting the behaviour of miners, and in any event Houston Kemp argues that it is not necessary to take existing contracts into account as these do not impose or affect resource costs (see below for further consideration of Houston Kemp's 'resource cost' approach).[18]

What this approach ignores is that contracts do fundamentally influence economic incentives and thus the behaviour of market participants. It is those incentives and behaviours we are seeking to assess in understanding whether certain services are 'in the market', and the extent to which any competition that might be suggested is indeed 'close'.

In its 2015 Statement of Issues concerning proposed acquisition of Asciano Limited by a Brookfield consortium, for instance, the ACCC reported evidence that DBCT was not a close substitute for the services offered by Abbot Point Coal Terminal (APCT) or coal terminals at the Port of Gladstone. One of the key reasons was that the 'long-term 'take-or-pay' nature of both below rail and port access contracts limit switching between terminals'.[19]

This indicates that in a fundamentally similar regulatory assessment of market definition, covering almost identical services, the ACCC considered that market definition must take into account the incentives and constraints imposed by existing user agreements.

In the case of DBCT, existing contracts for rail and port access typically have a take-or-pay element, which increase the transactions costs of shifting export pathways. Even for the minority of users, at the boundaries of the DBCT catchment and whom may potentially been able to consider capacity at another terminal, these options present only infrequently when long-term contracts expire and recontracting opportunities can be considered.

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[16] Green, R. (2017), *Challenges of economic regulation in Queensland*, published in Network: a publication of the Australian Competition and Consumer Commission for the Utility Regulators Forum, Issue 65, December, pp.2,4

[17] Houston Kemp Economists (2018), *Does DBCT's coal handling service satisfy criterion (b)?*, A report for DLA Piper, 28 May, p.ii

[18] Houston Kemp Economists (2018), op. cit., p.70

[19] Australian Competition and Consumer Commission (2015) *Statement of Issues, Brookfield consortium – proposed acquisition of Asciano Limited*, 15 October, p.14

Accounting for capacity limitations in the below-rail network

Similarly, infrastructure capacity constraints were cited by the ACCC as another relevant consideration in assessing the market for DBCT's services and the extent – or more properly the absence – of competition from other terminals.[20]

We acknowledge that estimating the effect of rail capacity constraints is difficult. Capacity is a dynamic variable, impacted by the age, condition, and maintenance environment of the network, and also by the way in which a common-user network is utilised, capturing different origin/destination pairs, rolling stock configuration, and efficiencies in system coordination and operation.

Although Houston Kemp's report variously claims that its analysis and optimisation modelling does take into account rail network capacity limitations, we are not convinced the way that this is done is appropriate.

There is a lack of reliable network capacity and operational performance data for the Central Queensland network, at a level of granularity necessary to properly inform this type of optimisation modelling. Houston Kemp acknowledges these limitations,[21] but seems to infer that this impacts only the derivation of resource costs for rail expansion. In our view the absence of detailed network capacity and performance information potentially casts doubt on the optimisation modelling in aggregate, not just at the margin for network expansions.

By using a resource cost basis for its optimisation modelling (see below, also), Houston Kemp effectively reallocates demand and supply across the entire Central Queensland rail system, assuming 'perfect foresight on behalf of an overall system planner' and 'negligible switching costs to a mine in changing its port of export'.[22] The effect of this is likely to be a materially different profile of network utilisation from that which actually occurs, and therefore potentially realising a more efficient but *theoretical* level of system utilisation – implying a lesser need for network expansion than would practically be the case. Houston Kemp's modelling outputs are redacted to the extent that it is impossible to ascertain the extent to which the spatial profile of demand/supply is modelled as changing from that which currently occurs.

Finally, while Houston Kemp acknowledges that there are complexities in capturing rail expansion costs, its modelling then applies various 'simplified' options ranging from ignoring expansion costs altogether, to assuming that future expansion costs can be proxied from existing rail access and haulage charges.[23]

Experience with recent rail network expansions in Central Queensland (including GAPE and WIRP) suggests that rail capacity expansions are substantially more costly than existing capacity. This is unsurprising, given that existing rail access charges reflect a depreciated and well-utilised network, whereas expansions tend to have higher unit costs, and by virtue of being 'lumpy' are often less-than-fully utilised in the period immediately following their development.

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[20] ACCC (2015), op. cit., p.14

[21] Houston Kemp Economists (2018), op. cit., p.68

[22] Houston Kemp Economists (2018), op. cit., p.63

[23] Houston Kemp Economists (2018), op. cit., p.68

2.3.2 *Actual supply chain costs, not resource costs, should be used to define the market*

Houston Kemp applies a resource cost approach to test the least cost condition for meeting foreseeable demand in the market. This approach focuses on calculating the incremental cost of using the terminal and rail infrastructure without reference to 'sunk costs' – those costs of investment in capital that have been committed prior to the declaration period. Houston Kemp's rationale is twofold:

1 the sunk costs of existing rail and terminal infrastructure have already been incurred and will not be incurred again over the period for which the service would be declared; and

2 even if the sunk costs of existing rail and terminal infrastructure were to be taken into account, in an assessment of least cost, these costs would be captured under all scenarios in which total foreseeable demand in the market is met and are therefore not relevant to determining whether the facility for the service can meet this demand at least cost.

We acknowledge that a resource cost approach, applied in the correct context, is an accepted and appropriate methodology.[24] Indeed, we apply a similar framework in our comparative assessment of an expansion to DBCT (which does not incorporate any 'sunk costs' relating to the existing terminal) relative to alternative greenfield terminal development at the Port of Hay Point.

However, we have concerns with the way Houston Kemp has applied a resource cost approach to DBCT in the context of an assessment of access declaration criterion (b). Our key concern is that a resource cost approach abstracts away from the economic incentives that users perceive and respond to, and which ultimately are the determinants of market boundaries.

[24] Productivity Commission (2013), *National Access Regime*, Inquiry Report No. 66, October, p.163

Consider the following simplified illustration.

Assume that capacity is exhausted at the existing DBCT facility, yet there is unmet demand. All users face the same rail charge to DBCT ($5 per tonne) and that resource costs are 40 per cent of this (so, the underlying resource cost is $2 per tonne).

Expanding DBCT will cost $10 per tonne (levelised capital and operating costs, so an expansion charge of $10 per tonne is also a proxy for resource cost). Assume further that there is rail capacity available to cater for this expansion in throughput.

There is spare capacity at an (unregulated) alternative terminal which has a resource cost of $2 per tonne, but an actual user-charge of $15 per tonne. Similarly, there is assumed capacity on the rail line to that alternative terminal with a rail charge of $10 per tonne (and underlying resource cost of $4 per tonne).

The economic decision confronting the user is:

- *DBCT expansion, $15 per tonne, comprised of a rail charge of $5 per tonne plus a port expansion charge of $10 per tonne, or*
- *alternative terminal, $25 per tonne, comprised of a rail charge of $10 per tonne plus a port charge of $15 per tonne.*

A rational user would prefer the DBCT expansion, and the quantum of the differential in user-cost would suggest no contestability between the two terminals.

However, a focus on resource cost would imply a different view of market definition.

The resource costs of a DBCT expansion is $12 per tonne (comprised of a rail resource cost of $2 per tonne plus a port expansion cost of $10 per tonne), whereas the resource cost of the alternative terminal is $6 per tonne (comprised of a rail resource cost of $4 per tonne plus a port resource cost of $2 per tonne).

A resource cost approach would suggest the least-cost pathway is the alternative terminal, and as applied by Houston Kemp would imply that both terminal facilities are in the same market.

The problem with this interpretation is obvious. An 'efficient' resource cost outcome implies that users will make uncommercial decisions as to rail and port contracting. The QCA does not have any jurisdiction over the charge set by the (unregulated) alternative terminal, so cannot compel it to levy charges which reflect only resource cost. And in the case of rail, where the QCA does have jurisdiction, the regulator's established practice is to set charges inclusive of a return on past (sunk) investment.

What this illustration highlights is that capital costs for both existing port and rail infrastructure are still being recovered in the declaration period, and this period of cost recovery would have been factored in to the past capital investment decision. The fact that capacity is available in the declaration period is because of the potential for the return of capital during the period, thus the ongoing cost of the capital employed as it affects actual user charges should be included in any assessment of the relevant market, for a future declaration period.

Houston Kemp argues that in an assessment of least cost, inclusion of past capital investment costs is unnecessary because these costs would be included across all scenarios where total market demand is met. This assumes that existing capacity will be utilised before considering extensions to rail infrastructure or terminals, and the sequence of capacity

utilisation will always be 'least cost' from an overall societal welfare perspective.[25] This is only the case if we agree that access to capacity across terminals is inherently substitutable, that capacity switching can occur at relatively low cost, that users' economic incentives to shift capacity align perfectly with underlying resource costs, and that utilising existing capacity at any terminal is always at lower cost than expanded capacity at the current terminal. This only holds if we assume away the reality of capital recovery for other existing terminals, and ignore the premium in rail access and haulage costs implicit in accessing capacity that might be available at more distant terminals.

With regard to below rail infrastructure capacity and expansion costs, Houston Kemp's resource cost approach is modelled as creating a supposedly optimised profile of rail and terminal utilisation, but which cannot be calibrated to actual network capacity or performance (see discussion in Section 2.3.1, above).

Fundamentally, Houston Kemp's resource cost framework misses the objective of the least cost assessment in the context of access declaration criterion (b). It is not a theoretical judgement, agnostic of market conditions. Rather, it should be informed by an understanding of the least cost sequence of expansion initiatives under expected market conditions, with a view towards assessing whether there is a genuine field of competitive rivalry between alternative suppliers of coal terminal services. As the ACCC's guidelines make clear, it is the 'costs *to customers* of obtaining supply from alternative regions' that is the critical determinant of market definition, not a theoretical resource cost construct.[26]

A proper view of market definition necessarily should consider the short-term and long-term costs faced by users of those services in making their buying decisions. Perhaps one of the most material cost drivers for the decision as to which export pathway to choose is the existence of long term 'take or pay' contracts, committing a volume of output to a particular facility over the medium term. Houston Kemp explicitly exclude this consideration from its optimisation analysis, notwithstanding that this is the manner in which the industry participants will continue to transact throughout the declaration period. A proper analysis of a least cost pathway for the declaration period should incorporate the incentive effect of those contracts, at least until they expire.

It is for these reasons that our initial report employed a 'comparative cost' approach to measuring least cost supply chain route options. This approach is based on the premise that firms optimise their decisions to least cost, giving rise to the market outcomes observed. Importantly, this takes into account the constraints faced by firms when taking these decisions. We include the costs faced by terminals and rail operators, but overlay those faced by their customers, as these are the most relevant in determining the supply chain decision.

Houston Kemp's sensitivity analysis attempts to mitigate some of the concerns raised above (though notably not the constraints imposed by infrastructure contract arrangements).[27] Nonetheless, this analysis does not address our fundamental concerns - it is still grounded in a market definition that is too broad, and appears simply to reallocate at the margins the same foreseeable demand between different terminals.

The artificiality of Houston Kemp's modelling framework is perhaps best illustrated by its own analysis, shown at Figure 7.10.[28] In this 'compounding assumptions' scenario, Houston Kemp model a low coal price, low expansion cost for DBCT and allowed for the feasibility of the 9X expansion. Yet, when BMA and BMC mines are excluded, Houston Kemp's model implies that all demand above 85 million tonnes per annum would divert north to Abbot

[25] Houston Kemp Economists (2018), op. cit., p.21

[26] ACCC (2008, updated 2017) *Merger Guidelines*, p.17

[27] Houston Kemp Economists (2018), op. cit., pp.43-44

[28] Houston Kemp Economists (2018), op. cit., p.57

Point. This ignores both the significant uncertainty as to whether capacity at Abbot Point would even be made available, and also the significantly higher *actual* rail transport cost that would be incurred by users seeking to access GAPE.

HPCT is not in the same market as DBCT

Houston Kemp proposes a market definition which includes the terminal services provided by the BHP-owned and operated HPCT. HPCT is essentially a single-user terminal which has only ever been used by BHP (and its affiliated BMA/BMC) mines. For the period of the declaration there is no basis to suggest that these arrangements would change. As a wholly-owned and vertically-integrated terminal, the terminal operated by BHP in Hay Point is not a practical or commercially realistic substitute for DBCT. BHP does not have the commercial incentive to make capacity available to third parties at its Hay Point facility, even if prices at DBCT were to increase, given the commercial value in the downstream seaborne coal market it derives from full control of the terminal.[29] We note that in the interests of maintaining these efficiencies, BHP has advised the user group that it anticipates continuing to utilise all of HPCT's capacity for its own operations, and will not offer services to third parties.[30]

Houston Kemp argues that there is 'evidence that there is significant substitution by many of these mines between HPCT and DBCT'[31] and further notes that its analysis does 'not distinguish between customers that may prefer or may be constrained to use one or other of the services provided at either DBCT or HPCT [...] since the terminals are immediately adjacent in their location at the Port of Hay Point.'[32]

Geographic proximity is not a sufficient condition to imply that HPCT and DBCT are in the same market. The key requirement is that there is 'close competition' and observable 'rivalry' between these facilities. Additionally, as noted above, this rivalry cannot be asymmetric. Accepting that some customers regularly exporting out of HPCT occasionally use DBCT, the reverse is not the case.

Since 2001, DBCT has been expanded five times. Between the 2006 and 2015 Access Undertakings, real terminal charges increased by around 65 per cent – an implied annual growth of around 5.7 per cent. Despite this, Figure 4 shows that there is no observable correlation in users' switching from DBCT to the adjacent HPCT, as would be expected were the terminals genuine substitutes and absent a similar increase in the real cost of accessing capacity at HPCT.

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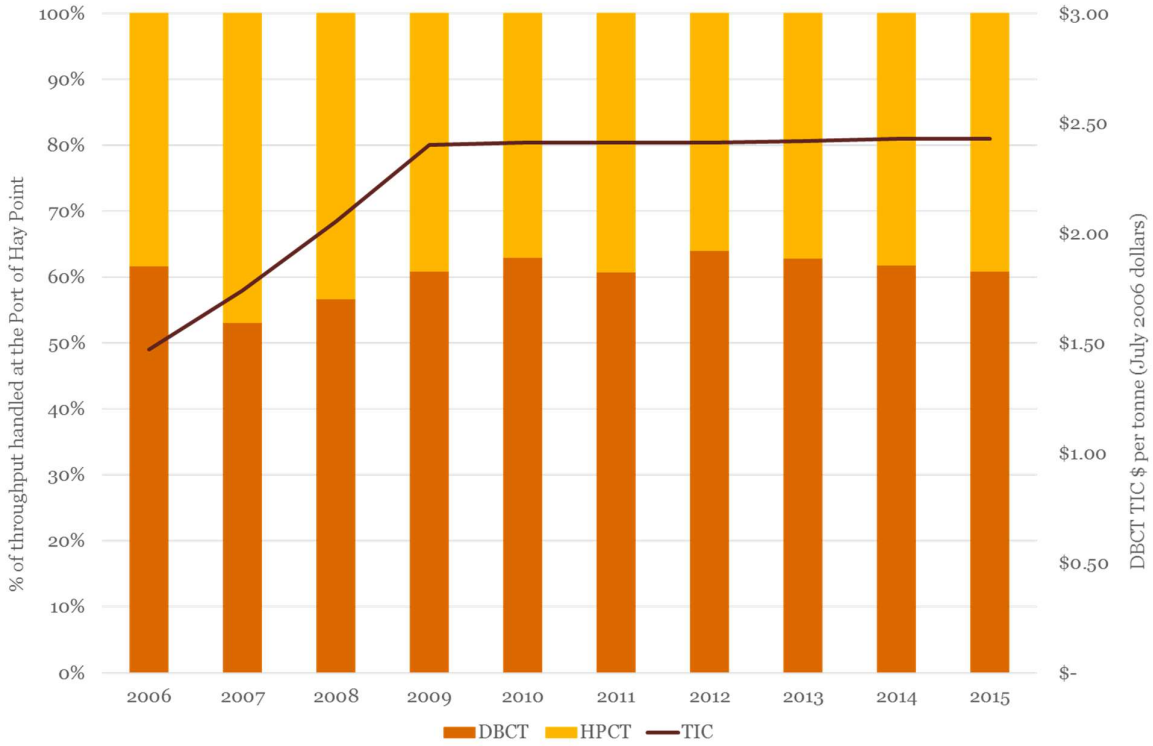
[29] Peabody Energy Australia, Response to QCA Staff Paper, p2

[30] DBCT User Group (2018) *Declaration review regarding Dalrymple Bay Coal Terminal: Submission in response to submission provided by DBCT Management dated 30 May 2018*

[31] Houston Kemp Economists (2018), op. cit., p.iii

[32] Houston Kemp Economists (2018), op. cit., p.28

Figure 4: Throughput at DBCT/HPCT compared to DBCT TIC $ per tonne (July 2006 dollars)*



Source: 2006 – 2014 throughput data from Dalrymple Bay Coal Terminal Pty Ltd (2018) *Milestones & History*, as provided by the DBCT User Group, 2015 throughput data sourced from: North Queensland Bulk Ports Corporation (2018) *Trade*, available at: https://nqbp.com.au/trade/throughputs, QCA (2016), *2016 - DBCT Management's 2015 draft access undertaking – Final Decision*, available at: http://www.qca.org.au/getattachment/081401b3-903e-4aea-b9fd-9da8e544cf94/Secondary-Undertaking-Notice%E2%80%94Attachment%E2%80%94QCA-decisi.aspx
*Note that the tonnage throughput for DBCT reflects declared tonnes, while the tonnage throughput for HPCT: reflects outloading for the period 2006-2014.

3 Meeting foreseeable demand

3.1 Total foreseeable demand at DBCT

We have updated our initial report estimate of total foreseeable demand at DBCT over the assumed declaration term of 15 years with reference to:

- the existing contract cover at DBCT based on unpublished information provided to PwC by the individual members of the DBCT User Group
- DBCTM's own forecast of future demand at DBCT[33]
- industry analyst, Wood Mackenzie (Woodmac), forecasts as at July 2018 of future throughput based on base, low and high scenarios regarding the timing and scope of various mining projects[34]
- RMI/QCA forecasts of demand on the Goonyella system, adjusted for both Hay Point capacity and an assumed cross-system capacity factor.[35]

Projections of future demand at DBCT

Figure 5 shows the volume of existing contracts at DBCT, Woodmac projections for the market which accesses coal handling services at that terminal, DBCTM's own view of future contract cover at the terminal, and the adjusted RMI/QCA view of demand on the Goonyella System.

With the exception of the Woodmac high scenario,[36] throughput is expected to remain below the current nameplate capacity of the existing terminal. Woodmac's assessment is that the high scenario reflects an unlikely and optimistic demand projection which would require current trends in the global coal market to continue.[37] In every other scenario, throughput is expected to remain below the nameplate capacity of the terminal through to 2035.

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33 Unpublished forecast of demand for contracted capacity at DBCT, provided to the User Group in February 2018

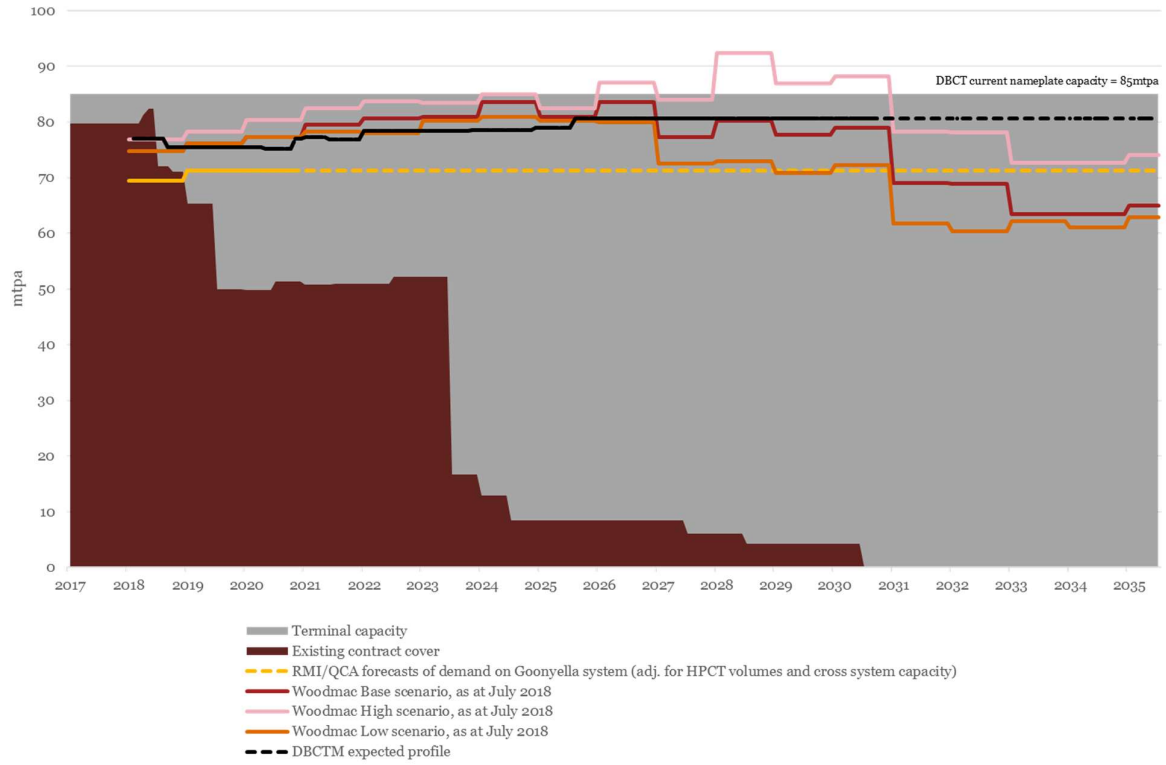
34 Wood Mackenzie (2018), *Independent Review – DBCT Throughput Forecast 16 July 2018,* unpublished

35 *Aurizon Network's 2017 draft access undertaking,* available at: http://www.qca.org.au/getattachment/7183cb8a-1be0-4de7-a451-a299e0f97896/QCA-Draft-decision.aspx

36 Under the Woodmac high scenario, throughput exceeds existing terminal capacity from 2026, peaking at 92.4 mtpa in 2028, then declines to 86.9 mtpa in 2029, before decreasing to 88.2 mtpa in 2030. Between 2031 and 2035, the Woodmac high scenario forecasts throughput below the current nameplate capacity of the Terminal.

37 Wood Mackenzie (2018) *Brisbane Coal forum,* unpublished.

Figure 5: Forecasts of future demand at DBCT*



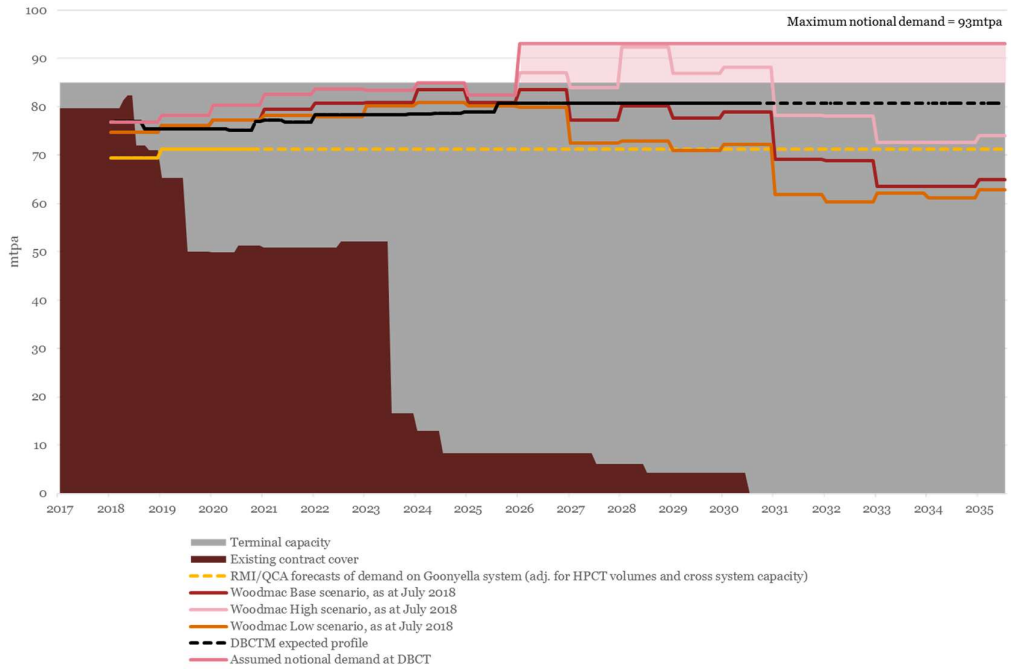
Sources: Unpublished data provided to PwC by the DBCT User Group, *Aurizon Network's 2017 draft access undertaking*, available at: http://www.qca.org.au/getattachment/7183cb8a-1be0-4de7-a451-a299e0f97896/QCA-Draft-decision.aspx, Woodmac projections – July 2018
*Note: we have adjusted the RMI/QCA forecast of demand on the Goonyella system for 49 mtpa of capacity for the Hay Point Coal Terminal and 10 mtpa of cross system capacity. Note also that we have assumed DBCTM's view of contract cover at 2029 continues to July 2035.

Total foreseeable demand at DBCT

Based on the various forecast of future demand presented, total foreseeable demand at DBCT can be accommodated within the terminal's current nameplate capacity of 85 mtpa. This suggests that the terminal remains the least cost means of meeting foreseeable demand, and as such satisfies access declaration criterion (b).

However, acknowledging that Woodmac has provided a scenario where an expansion would need to be contemplated, we have revisited the scenario analysis as presented in our initial report. Figure 6 illustrates a revised adopted maximum notional demand of 93 mtpa that reflects the Woodmac high scenario demand. To accommodate the Woodmac high scenario demand requires an expansion of at least 8 mtpa.

Figure 6: Notional future demand at DBCT over the assumed declaration term*



Sources: Unpublished data provided to PwC by the DBCT User Group, *Aurizon Network's 2017 draft access undertaking,* available at: http://www.qca.org.au/getattachment/7183cb8a-1be0-4de7-a451-a299e0f97896/QCA-Draft-decision.aspx, Woodmac projections – July 2018.
*Note all qualifications and adjustments as per Figure 2.

3.2 Options to service total foreseeable demand

Our initial report assessed whether the single terminal at DBCT is the least cost option to service total foreseeable demand at DBCT using an estimate of the levelised cost per tonne for various expansion options. The assumptions and references for these estimates are provided at Appendix A of our initial report.

In its submission to the QCA,[38] DBCTM provided updated capital cost estimates and incremental capacity delivered by each of the expansion projects. These costs are reproduced at Table 1, below, though have been escalated to 30 June 2017 dollar terms, consistent with the methodology in our initial report.

[38] DBCT (2018) *DBCT Declaration Assessment - Appendix 11 – Least cost analysis*, available at: http://www.qca.org.au/getattachment/468d7edc-4137-4ab1-bfee-f65d78126d2e/1-DBCT-Management-Submission.aspx,

Table 1: Terminal expansion capital cost estimates, as at 30 June 2017

Incremental expansion project	Cost ($million)	Incremental capacity (mtpa)	Total terminal capacity (mtpa)
Zone 4	$368.0	4	89
Project 8X (phase 1)	$165.4	5	94
Project 8X (phase 2)	$488.9	8	102
Project 9X (phase 1)	$1,035.6	12	114
Project 9X (phase 2)	$1,035.6	12	126
Project 9X (phase 3)	$836.0	10	136

Source: DBCTM (2018) *DBCT Declaration Assessment - Appendix 11 – Least cost analysis*, available at: http://www.qca.org.au/getattachment/468d7edc-4137-4ab1-bfee-f65d78126d2e/1-DBCT-Management-Submission.aspx

There are a number of significant discrepancies in the cost estimates for the expansion projects between DBCTM's May 2017 *Incremental Expansion Study DAAU* (which was the basis for the modelling in our initial report), DBCTM's 2018 Declaration Assessment submitted to the QCA, and the cost estimates reported by Houston Kemp. Table 2 presents the expansion cost estimates from each of these sources, adjusted to be in consistent nominal (June 2017) terms.

Table 2: Cost estimates for expansion projects, as published by DBCTM and Houston Kemp, as at 30 June 2017

Incremental expansion project	DBCTM 2017 Incremental Expansion DAAU cost ($million)	DBCTM 2018 Declaration Assessment cost ($million)	Houston Kemp reported cost ($million)*
Zone 4	$360.2	$368.0	$527.1
Project 8X – phase 1	$496.8	$165.4	$248.8
Project 8X – phase 2		$488.9	$770.7
Project 9X – phase 1	$2,887.7	$1,035.6	$1,713.8
Project 9X – phase 2		$1,035.6	$1,798.3
Project 9X – phase 3		$836.0	$1,572.6

Sources: *DBCT Declaration Assessment - Appendix 11 – Least cost analysis*, available at: http://www.qca.org.au/getattachment/468d7edc-4137-4ab1-bfee-f65d78126d2e/1-DBCT-Management-Submission.aspx, DBCTM (2017) *DBCTM Incremental Expansion Study DAAU*, available at: http://www.qca.org.au/getattachment/f1ab7119-6909-4260-b150-f181be4a87b3/DBCTM%E2%80%94Expansion-Study-DAAU-submission.aspx,
Houston Kemp (2018) *Does DBCT's coal handling service satisfy criterion (b)?*, available at: http://www.qca.org.au/getattachment/468d7edc-4137-4ab1-bfee-f65d78126d2e/1-DBCT-Management-Submission.aspx
*Note: the Houston Kemp reported figures are assumed to be as at May 2018. This cost has been de-escalated using ABS published CPI data in order to perform a direct comparison between the various cost estimates.

Generally, the cost estimates reported by Houston Kemp are an order of magnitude higher than both DBCTM's submission to the QCA, and the 2017 Incremental Expansion DAAU figures. Houston Kemp report cites DBCTM as its source for its capital cost estimates, however, does not articulate the basis of the difference between the cost estimates.

Given the significant discrepancies between the cost estimates, for the purposes of this supplementary report, we have adopted the cost estimates provided in DBCTM's submission to the QCA in Appendix 11.

Summary of cost estimates applied to DBCT expansion options

Table 3 summarises the DBCT expansion option and associated cost estimates that we have adopted for this supplementary report, to assess whether the single terminal at DBCT continues to be the least cost option to service total foreseeable demand.

Table 3: Summary of cost estimates applied for DBCT expansion options, as at 30 June 2017

Expansion option	Cost ($ million)	Incremental capacity (mtpa)	Source
Zone 4	$368.0	4	DBCT (2018) *DBCT Declaration Assessment - Appendix 11 – Least cost analysis*, available at: http://www.qca.org.au/getattachment/468d7edc-4137-4ab1-bfee-f65d78126d2e/1-DBCT-Management-Submission.aspx,
Project 8X (phase 1)	$165.4	5	DBCT (2018) *DBCT Declaration Assessment - Appendix 11 – Least cost analysis*, available at: http://www.qca.org.au/getattachment/468d7edc-4137-4ab1-bfee-f65d78126d2e/1-DBCT-Management-Submission.aspx,
DPCT (stage 1)	$4,044.4	30	Beca (2012), unpublished.
DPCT (full terminal)	$7,938.5	90	Beca (2012), unpublished.

3.3 Modelling results

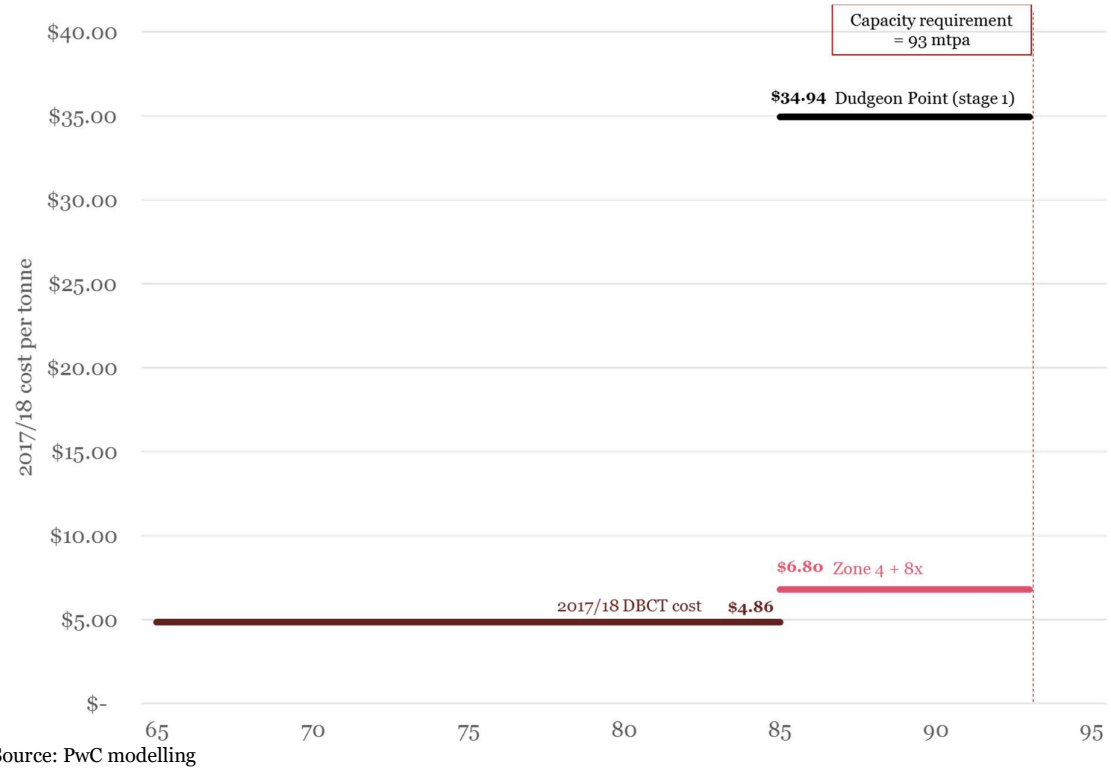
The following results are based on our analysis of the defined options to service notional future demand for coal handling services at DBCT using updated estimates of expansion cost and forecast demand, as described earlier in this chapter.

The methodology applied for this supplementary report is consistent with our initial report and focuses on a *comparative* cost assessment of each option.

Figure 7 reflects the FY18 cost of incremental expansion options, scaled to reflect the proportion of the capacity to be used under each option. That is, the FY18 cost per tonne has been scaled to reflect the extent to which total expansion costs would need to be recovered from incremental demand, where this is less than the capacity made available by the expansion. For the purpose of this analysis, we have adopted a maximum notional demand of 93 mtpa, consistent with the Woodmac high scenario demand.

The combined Zone 4 and 8X (phase one) project remains the least cost option to support demand of 93 mtpa, with a FY18 cost of $6.80 per tonne, which is significantly lower than the FY18 cost per tonne of the Dudgeon Point (stage one) project.

Figure 7: FY18 cost per tonne of incremental expansion options, scaled to capacity requirement (93 mtpa)



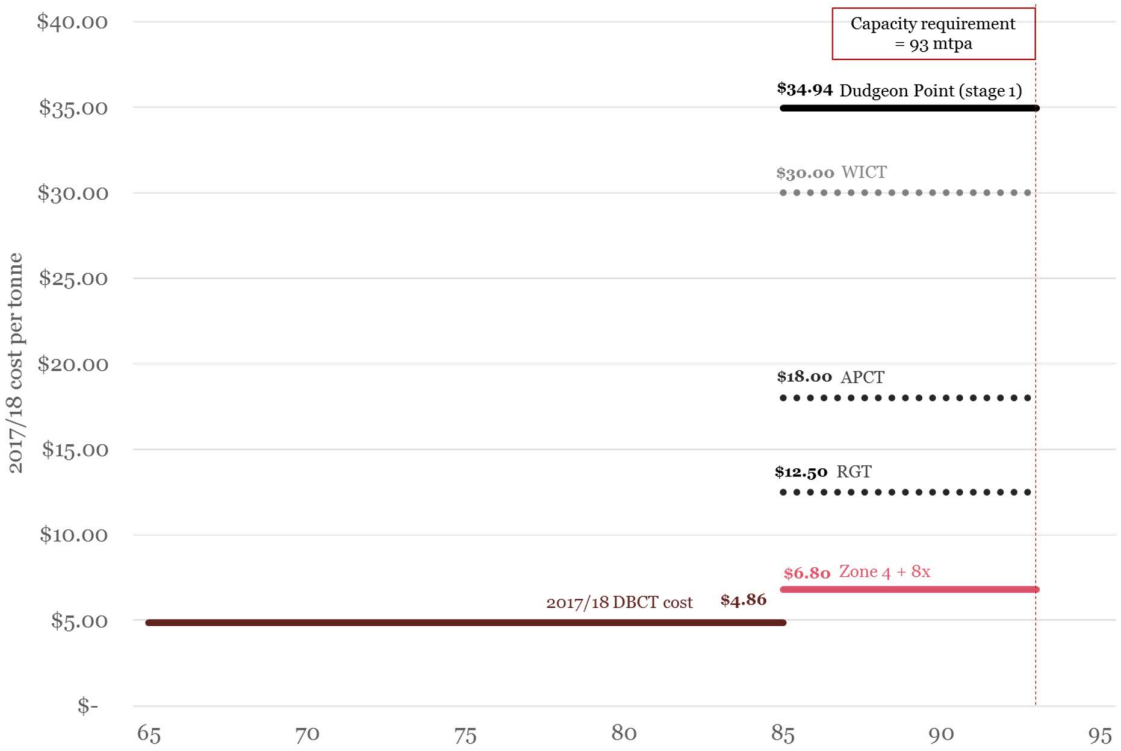
Source: PwC modelling

Cost of alternative export pathways

Our initial report found that the coal handling services provided by DBCT do not compete with services provided by terminals at the Ports of Gladstone or Abbot Point.

Notwithstanding, even if a more expansive market definition is adopted, and alternative export pathways are assumed to be feasible options to service foreseeable demand, a single facility at DBCT remains the least cost option, as demonstrated in Figure 8

Figure 8: FY18 cost per tonne of options to service total foreseeable demand, scaled to capacity requirement



Source: PwC modelling

As noted in our initial report, including these alternative export pathways as potential options to service total foreseeable demand ignores the material constraints faced by access seekers of coal handling services. For access to be secured at the existing RG Tanna or Abbot Point coal terminals, there must be sufficient capacity available to be contracted at those terminals, and access also to above- and below-rail capacity. To the extent that below rail capacity would need to be augmented, this would amplify the cost penalty associated with each of the Gladstone or Abbot Point pathways.

4 Disclaimer

We prepared this report solely for the DBCT User Group's use and benefit in accordance with and for the purpose set out in our engagement letter with the DBCT User Group dated 29 September 2017 and section 1.3 of the report. In doing so, we acted exclusively for the DBCT User Group and considered no-one else's interest.

We accept no responsibility, duty or liability:

- to anyone other than the DBCT User Group in connection with this report
- to the DBCT User Group for the consequences of using or relying on it for a purpose other than that referred to above.

We make no representation concerning the appropriateness of this report for anyone other than the DBCT User Group. If anyone other than the DBCT User Group chooses to use or rely on it they do so at their own risk.

The information, statements, statistics and commentary (together the 'Information') contained in this report have been prepared by PwC from publicly available material, discussions with industry experts, and from material provided by the DBCT User Group and its constituent User companies. PwC has relied upon the accuracy, currency and completeness of that Information. The Information contained in this report has not been subject to an audit. PwC may in its absolute discretion, but without being under any obligation to do so, update, amend or supplement this Report.

Our modelling is reliant on the assumptions and forecasts as described in this report. These assumptions and forecasts are uncertain and the results are intended to be indicative only, and future outcomes may be different.

While we consent to a copy of this report being provided to the QCA, we do not accept any responsibility or liability (whether in contract, tort (including negligence) or otherwise) to the QCA or any other person for the consequences of any reliance on this Report.

This disclaimer applies:

- to the maximum extent permitted by law and, without limitation, to liability arising in negligence or under statute;
- even if we consent to anyone other than the DBCT User Group receiving or using this report.

Liability limited by a scheme approved under Professional Standards legislation.

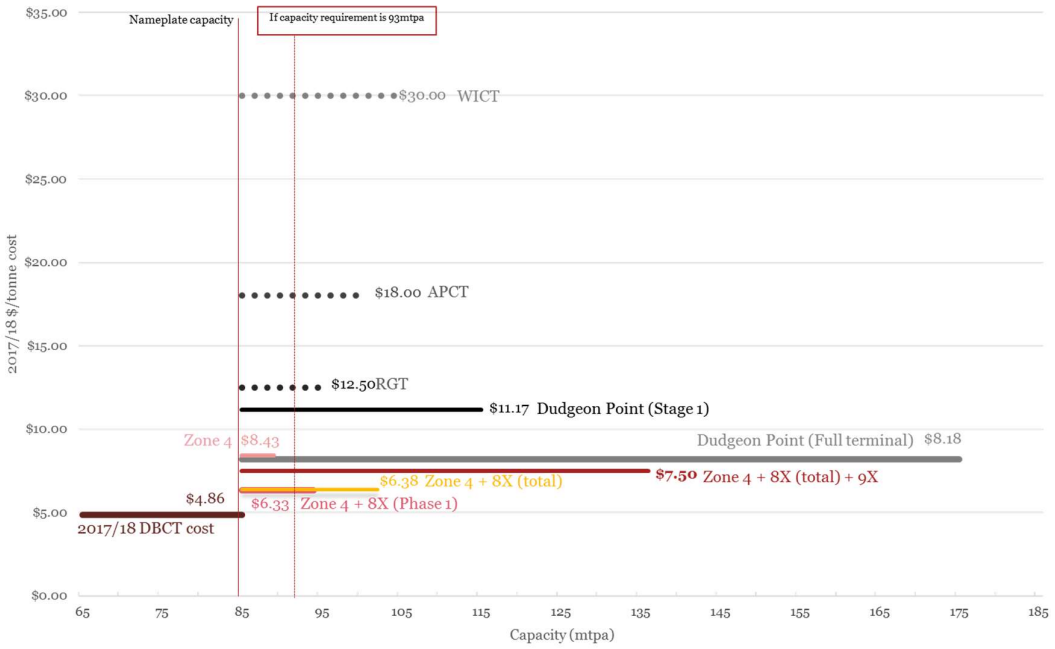
Appendices

Appendix A Detailed modelling results

Figure 9 shows the estimated cost per tonne of each incremental expansion option, calculated with reference to the incremental capacity provided by that option, i.e. – the cost per tonne of Dudgeon Point (stage one) is based on an additional 30 mtpa of capacity. In this scenario, we have assumed the maximum capacity requirement over the assumed declaration term is 93 mtpa, resulting in a need for expansion or an alternative export pathway to service demand.

All incremental expansion options to the Terminal, except for Zone 4 as a standalone project, could deliver 93 mtpa of capacity at a FY18 cost between $6.33 per tonne and $30.00 per tonne.

Figure 9: FY18 cost per tonne of incremental expansion options



Source: PwC analysis
Note: there are no reported available capacity figures for RGT. For the analysis above, we have assumed that ten mtpa of capacity is available at that terminal.

www.pwc.com.au

Schedule 2 – WoodMackenzie Report

Independent Review – DBCT Throughput Forecast

16 July 2018

Executive Summary

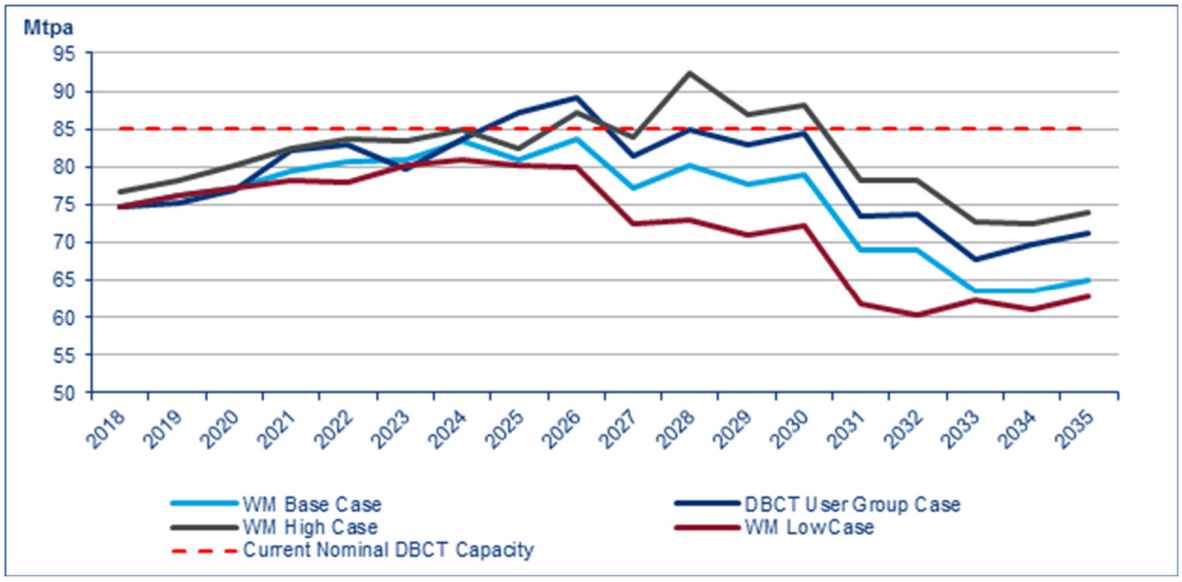
Wood Mackenzie has developed this report to review forecast throughput through DBCT from 2018 to 2035. It includes Wood Mackenzie's own forecast and forecast DBCT throughput based on the aggregated responses from the DBCT User Group, for the period between 2018 and 2035.

Wood Mackenzie forecast average DBCT throughput of 79.4Mtpa between 2018 and 2030, based on individual mine throughput estimates. After 2030, throughput derived from identified mines and projects falls, however Wood Mackenzie still expect DBCT throughput to average above 75Mtpa between 2030 and 2035.

Wood Mackenzie's base throughput forecast consider a range of factors, including likely allocation decisions during the forecast period, and expected capacity. Wood Mackenzie has reviewed some potential scenarios which represents alternative throughput forecast DBCT through the forecast period.

The DBCT throughput forecasts, including the aggregated throughout expectations of the DBCT User Group, are summarised in the figure below.

DBCT Forecast Throughput Summary



Source: Wood Mackenzie

Contents

List of figures

List of tables

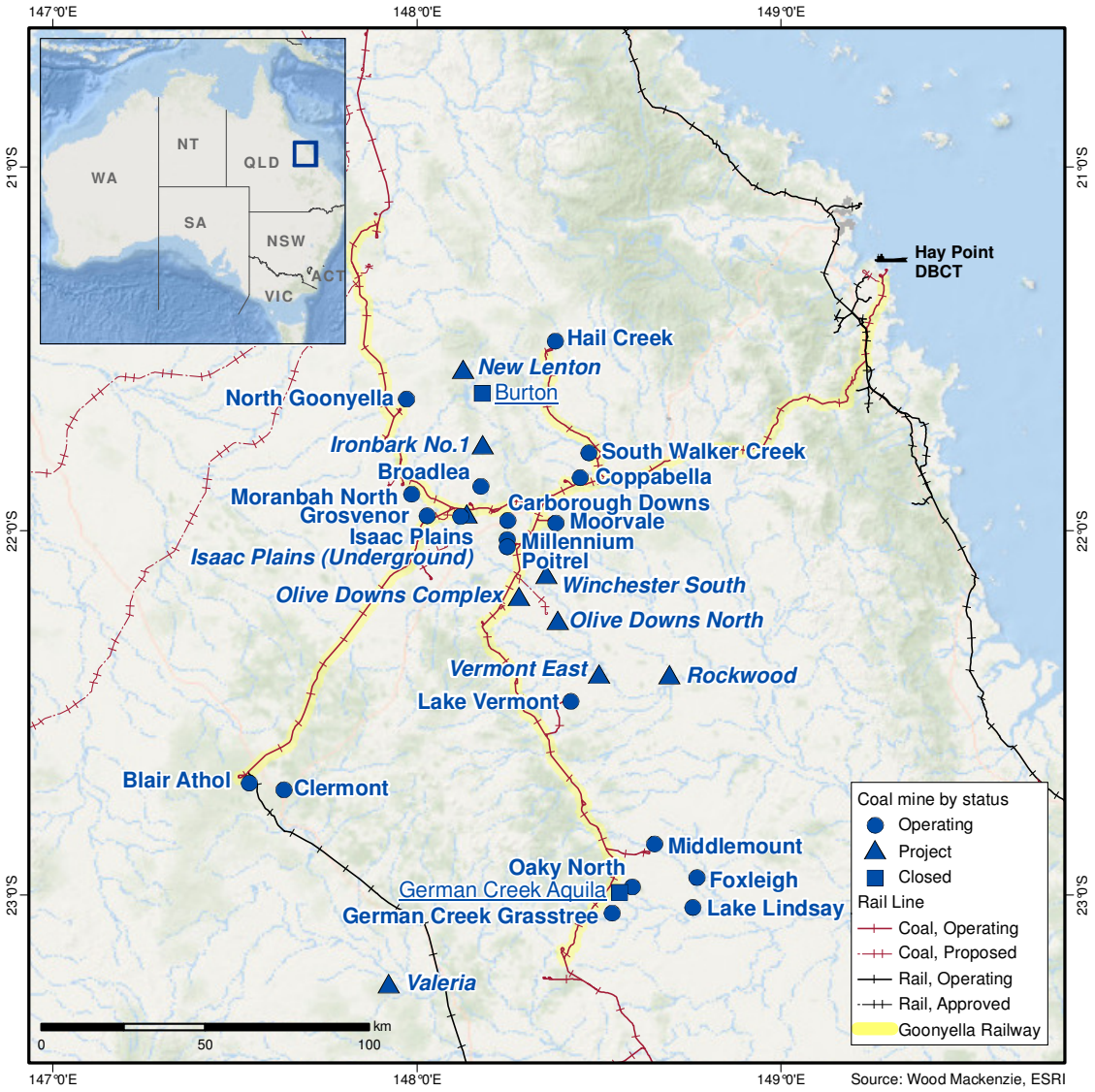
Context

Dalrymple Bay Coal Terminal (DBCT) is a multi-user coal port in Queensland. It services coal exporters in the catchment area serviced by the Goonyella rail system. An estimated 20 operational mines currently utilise DBCT to export coal to seaborne markets.

Assessing future throughput through DBCT and demand for DBCT capacity requires an assessment of current operations, future projects, and commitments to export through other ports

DBCT and the mines and projects in its catchment, serviced by the Goonyella rail system, are shown in Figure 1.

Figure 1 Map of DBCT & mines serviced by Goonyella Rail system



Source: Wood Mackenzie

Other mines in this catchment area (not shown) include the BHP Mitsubishi Alliance (BMA) mines which predominantly export through the Hay Point Coal Terminal (HPCT).

Coal from mines in the region in Figure 1 is predominantly exported via DBCT, which is the closest export port, however coal from this area is also exported from other ports. Tonnage originating from the DBCT catchment area includes 13 to 14Mtpa exported from Abbot Point Coal Terminal (APCT) and approximately 5Mtpa from Gladstone coal terminals.

The Kestrel mine which predominantly exports through Gladstone, also exports small tonnages through DBCT. Similarly mines that predominantly export via HPCT also export through DBCT, exporting approximately 11 Mt in 2016 and 6Mt in 2017.

Wood Mackenzie DBCT Forecast

Error! Reference source not found. shows Wood Mackenzie's assessment of mine-specific expected tonnage through DBCT between 2018 and 2035.

Table 1 Forecast Mine Shipments Through DBCT 2018-2035

Mine Name	Current Status	Port	2018 (Mt)	2020 (Mt)	2025 (Mt)	2030 (Mt)	2035 (Mt)
Blair Athol	Operating	DBCT	1.7	1.7	1.7		
Broadlea	Operating	DBCT	0.5				
Carborough Downs	Operating	DBCT	2.3	2.5	2.3		
Clermont	Operating	DBCT	11.6	11.6	11.6		
Coppabella	Operating	DBCT	3.8	3.8	0.9		
Foxleigh	Operating	DBCT	2.8	3.0	3.0	3.0	
German Creek Grasstree	Operating	DBCT	5.3	5.0			
Grosvenor	Operating	DBCT	4.5	5.0	5.0	5.0	5.0
Hail Creek	Operating	DBCT	10.0	11.0	11.0	11.0	
Isaac Plains	Operating	DBCT	1.7	1.4	1.0		
Lake Lindsay	Operating	DBCT	3.0	3.8	3.8	3.8	3.8
Middlemount	Operating	DBCT	2.0	2.0	2.0		
Millennium	Operating	DBCT	1.7				
Moorvale	Operating	DBCT	2.5	2.5	0.7		
Moranbah North	Operating	DBCT	6.2	6.2	6.2	6.2	5.5
North Goonyella	Operating	DBCT	2.5	3.0	3.0	3.0	3.0
Oaky North	Operating	DBCT	3.5	3.5	3.5	3.5	
Poitrel	Operating	DBCT	3.5	3.5	3.5	3.5	3.5
South Walker Creek	Operating	DBCT	5.8	6.0	6.0	6.0	6.0
Olive Downs North	Possible	DBCT		0.0	0.0	0.8	0.8
Rockwood	Possible	DBCT	0.0	0.0	0.0	3.0	3.0
Vermont East	Possible	DBCT		0.0	0.0	2.0	3.0
Ironbark No 1	Probable	DBCT	0.0	0.0	4.0	4.0	4.0
Isaac Plains (Underground)	Probable	DBCT	0.0	0.4	0.8		
New Lenton	Probable	DBCT	0.0	0.0	2.0	2.0	
Olive Downs Complex	Probable	DBCT	0.0	0.0	3.7	4.2	12.8
Valeria	Probable	DBCT	0.0	0.0	1.0	10.0	10.0
Winchester South	Probable	DBCT	0.0	0.0	1.0	4.5	4.5
Burton	Suspended	DBCT	0.0	1.5			
German Creek Aquila	Suspended	DBCT	0.0	0.0	3.5	3.5	
Total	**By Mine**	**DBCT**	**74.8**	**77.3**	**80.9**	**79.0**	**65.0**

Source: Wood Mackenzie

This outlook is Wood Mackenzie's base view of expected DBCT throughput based on a range of factors such as:

- Forecast future production rates from existing mines;

- The cessation of production at operational mines;
- The development of other mines in terms of timing and scale;
- Available DBCT capacity during the forecast window;
- A view on individual mine export allocations between ports; and
- A view on rail system capability.

It can be observed that DBCT throughput is expected to average 79.4Mtpa between 2018 and 2030. After 2030, identified mine specific throughput falls, as currently operating mine production falls, but is not replaced by identified mine project tonnage.

DBCT throughput peaks in 2024 and 2026 at approximately 83.5Mtpa

Both average DBCT throughput (79.4Mtpa) and peak DBCT throughput (83.5Mtpa) between 2018 and 2030 exceed maximum observed DBCT throughput, which was 69.6Mt achieved in 2015. However expected throughput remains below the nominal capacity of DBCT of 85Mtpa.

Key variables and assumptions

Wood Mackenzie has assumed that the nominal capacity of DBCT of 85Mtpa is achievable.

Expected DBCT throughput suggests that expansions of DBCT capacity will not be required, although DBCT will be required to operate at very high utilisation levels between 2023 and 2026.

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

It also can be observed that a significant proportion of future DBCT throughput is expect to come from coal mines that are not currently operational (projects). Projects have a greater degree of uncertainly in terms of production start, ramp-up rate, typical production rates, and export port allocation. Changes to Wood Mackenzie's view on projects will effect DBCT throughput and capacity demand profile over time.

In the longer term it is increasingly difficult to assess which mine projects will become operational, and which projects will utilise DBCT. Wood Mackenzie employs a different approach to assess DBCT throughput, which is not based on mine specific tonnage. This modelling approach suggests that DBCT throughput will not drop after 2030, as implied in Table 1. Table 2 shows expected throughput through DBCT, including additional tonnage which is not mine specific, at this time. It suggests that DBCT throughput will continue at high levels between 2030 and 2035.

Table 2 Combined Wood Mackenzie DBCT Throughput Forecast

Case	2018 (Mt)	2019 (Mt)	2020 (Mt)	2021 (Mt)	2022 (Mt)	2023 (Mt)	2024 (Mt)	2025 (Mt)	2026 (Mt)	2027 (Mt)	2028 (Mt)	2029 (Mt)	2030 (Mt)	2031 (Mt)	2032 (Mt)	2033 (Mt)	2034 (Mt)	2035 (Mt)
Mine specific	74.8	76.2	77.3	79.5	80.7	80.9	83.5	80.9	83.6	77.3	80.2	77.7	79.0	69.1	68.9	63.5	63.5	65.0
Additional	-	-	-	-	-	-	-	-	-	-	-	-	-	6.1	4.1	12.9	18.2	20.0
Combined	74.8	76.2	77.3	79.5	80.7	80.9	83.5	80.9	83.6	77.3	80.2	77.7	79.0	75.2	73.0	76.4	81.7	85.0

Source: Wood Mackenzie

Coal does move from DBCT/HPCT catchment mines to other ports. The ability to continue to rail and export a certain tonnage through APCT has been demonstrated up to 14Mtpa. The systems' ability to move tonnage from DBCT catchment mines to APCT above this level, without negative impacts on Goonyella/DBCT/HPCT throughput has not been demonstrated. The nominal capacity of this rail link is 31Mtpa.

Similarly only limited tonnages (~5Mtpa) move from DBCT/HPCT catchment mines to Gladstone coal terminals. The ability to move significantly larger amounts of coal have not been demonstrated. Given the longer transportation distances from mines in the catchment to Gladstone, relative to the distances to DBCT/HPCT, mines are not incentivised to direct coal to Gladstone port. This is considered to continue to be the situation for the base case.

Variants of the Wood Mackenzie DBCT Forecast

The base Wood Mackenzie DBCT throughput forecast is underpinned by a range of assumptions. Key potential developments that impact forecast DBCT throughput include:

- The expiry of existing contract allocation, potentially resulting in reallocation of tonnage to, or away from, DBCT;
- Unutilised capacity at other ports which might incentivize tonnage to be preferentially shipped through those ports;
- Limited available capacity at other ports which might result in reallocation of tonnage to DBCT, if excess capacity is available;
- Mining project delays which might alter throughput through DBCT.

Table 3 shows forecast DBCT throughput or capacity demand under several scenarios, including Wood Mackenzie's base case view. Only mine specific production is considered in the high and low cases.

Table 3 Wood Mackenzie DBCT Throughput Forecast (Mine specific)

Case	2018 (Mt)	2019 (Mt)	2020 (Mt)	2021 (Mt)	2022 (Mt)	2023 (Mt)	2024 (Mt)	2025 (Mt)	2026 (Mt)	2027 (Mt)	2028 (Mt)	2029 (Mt)	2030 (Mt)	2031 (Mt)	2032 (Mt)	2033 (Mt)	2034 (Mt)	2035 (Mt)
Base	74.8	76.2	77.3	79.5	80.7	80.9	83.5	80.9	83.6	77.3	80.2	77.7	79.0	69.1	68.9	63.5	63.5	65.0
High	76.8	78.2	80.3	82.5	83.7	83.4	85.0	82.4	87.1	84.0	92.4	86.9	88.2	78.3	78.1	72.7	72.6	74.1
Low	74.8	76.2	77.3	78.3	78.0	80.2	80.9	80.2	79.9	72.5	72.9	70.9	72.2	61.8	60.3	62.2	61.1	62.9

Source: Wood Mackenzie

The High Case

The high scenario assumes a number of change to the base case assumptions. The cumulative effect of these changes on DBCT throughput causes throughput to exceed 85Mtpa from 2026 to 2030. However after 2030, mine specific tonnage drops below 80Mtpa, albeit they remain at relatively higher levels. DBCT throughput exceeds 85Mtpa in 2026, peaking at over 92Mtpa in 2028. DBCT throughput then declines to 74.1Mtpa by 2035. This scenario assumes no capacity constraints exist at DBCT.

In the high case, the potential for the development of Eagle Downs is considered, albeit Aquila has some ownership of WICET and may see benefits in redirecting some tonnage to Gladstone, which may incur higher transport costs, but take advantage of existing (and paid-for) port capacity. The proposed partial acquisition of Eagle Downs by South32 is expected to result in this project becoming operational earlier than previously assumed in the base case.

The allocation of Lake Vermont production is an important variable impacting DBCT throughput & capacity demand. Lake Vermont currently exports through APCT and Gladstone, but these allocations expire in 2028 & 2022 respectively[1]. After 2022, Lake Vermont may change its allocation, as DBCT is significantly closer to its operations, compared to Gladstone and APCT. In the high case, Lake Vermont exports occur via DBCT after the expiry of its existing contractual allocations.

[1] Source: Wood Mackenzie

The allocation of Middlemount production is an important variable impacting DBCT throughput and capacity demand. Middlemount currently ships through APCT and DBCT, but the APCT allocation is understand to expire in December 2026. After 2026, Middlemount may change its allocation, as DBCT is significantly closer to its operations, relative to APCT. Allocation changes by Middlemount are reflected in the high case.

Other key APCT allocations expire between 2026 and 2027. In some cases this may prompt a readjustment of throughput, based on available capacity closer to that time.

If throughput through Gladstone coal terminals approaches capacity limitations, this could cause incremental tonnage to revert to DBCT. Approximately three (3) Mtpa of coal could re-directed from Gladstone back toward DBCT, if and when Gladstone capacity is fully utilised. Throughput at other ports, while not the focus of this report, has the ability to impact DBCT throughput.

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

There is also the potential for some projects to increase production, through productivity based improvements, rather than expansions. An example of this is the proposed Grosvenor project to increase production, based on productivity improvements demonstrated at other mines, which could add an additional DBCT throughput

The Low Case

The low case also assumes a range of different assumptions. In Table 3, it can be observed that DBCT throughput peaks at 80.9Mtpa is 2024, and declines from 2027.

The potential scale and port allocation of Valeria tonnage is an important variable impacting future DBCT throughput. In the low case. Valeria production is directed to APCT, on the assumption that it is equidistant to APCT and DBCT, and that APCT could make an attractive offer to Valeria to obtain its throughput. However if Valeria product is redirected to APCT, DBCT is likely to be filled by production from Lake Vermont, which is able to be redirected from APCT from 2028. Valeria and Clermont, are both majority-owned by Glencore; in some scenarios Valeria replaces Clermont in Glencore's production outlook. Clermont currently exports predominantly through DBCT; and consequently Wood Mackenzie assume that Valeria will also preferentially utilise DBCT in the base case.

The low case also envisages slower ramp up of several projects. As previously observed, a significant proportion of DBCT throughput comes from future projects from 2023. Delays to projects would reduce DBCT throughput, until those projects become fully operational. The tonnage derived from projects in the base case and the low case is shown in Table 4. Low case project tonnes are, on average, 35% lower than the base case view, between 2020 and 2030.

Table 4 Project Tonnage Comparison

Case	2018 (Mt)	2019 (Mt)	2020 (Mt)	2021 (Mt)	2022 (Mt)	2023 (Mt)	2024 (Mt)	2025 (Mt)	2026 (Mt)	2027 (Mt)	2028 (Mt)	2029 (Mt)	2030 (Mt)
WM Base Case	0.0	0.8	1.9	3.9	5.7	10.6	13.2	15.9	20.7	25.9	30.8	32.0	34.0
WM Low Case	0.0	0.8	1.9	2.8	3.1	4.9	8.2	12.7	15.4	17.0	19.2	21.0	23.0

Source: Wood Mackenzie

Due to incentives from other ports, or existing ownership/contractual obligations may also see tonnage continue to flow from some mines to other ports, specifically the Gladstone coal terminals. If mine and projects such as Lake Lindsay, German Creek Grasstree, Lake Vermont or Winchester South continue to export a proportion of their production through Gladstone, this will reduce throughput through DBCT.

It should be noted that in the low case DBCT throughput averages 76.5Mtpa which is significantly higher the higher throughput achieved at DBCT in 2015. So while the Low case is significantly lower than Wood Mackenzie's base case throughput, it is not below current annualised throughput levels.

Other Potential Considerations

Wood Mackenzie have included a list of projects that are expected to utilise DBCT in Table 1. This is not a comprehensive list of all potential projects. There are additional projects in the DBCT catchment area, that, if developed would potentially seek to export through DBCT. These additional projects are shown in Table 5.

Table 5 Indicative mine projects

Project	WM Start Year
Moranbah South	2034
Wilpeena	2038
Nebo West	2034
Wards Well	2031
Eagle Downs	2031
Harrybrandt	2038
Hillalong	-
Teresa	-
Grosvenor West	-

Source: Wood Mackenzie

If developed these projects represent further upside to the high case included in this report.

The timing of Moranbah South is uncertain but will be linked to market demand and potential extensions at Moranbah North.

Wilpeena is a relatively early stage exploration projects. Wood Mackenzie assume that it is unlikely to become operational before 2035.

Nebo West is an early stage project with little certainty of potential development timelines. Little new information is publically available regarding this project.

Wards Well has not been included, as Wood Mackenzie assume tonnage from this operation will be shipped via APCT.

Harrybrandt is a relatively early stage exploration project. Wood Mackenzie expect that, if developed, production would begin after 2035.

The Eagle Downs project is the subject of a new feasibility study, following South32's acquisition of 50% of the project. Wood Mackenzie will update its production outlook as more information becomes available, but there is potential for the development timeline to be accelerated.

Wood Mackenzie are in the process of developing an updated view on the Hillalong project, owned by Shandong Energy Australia. Previously this project was considered highly unlikely.

Wood Mackenzie currently doesn't consider the Teresa project to be actively progressing, with no viable timeline for its development. A similar situation exists in relation to the Grosvenor West project.

DBCT User Group Aggregated Throughput Forecast

DBCT throughput has been forecast based on information received from individual, current members of the DBCT User Group. This is shown in Table 6 and Figure 2.

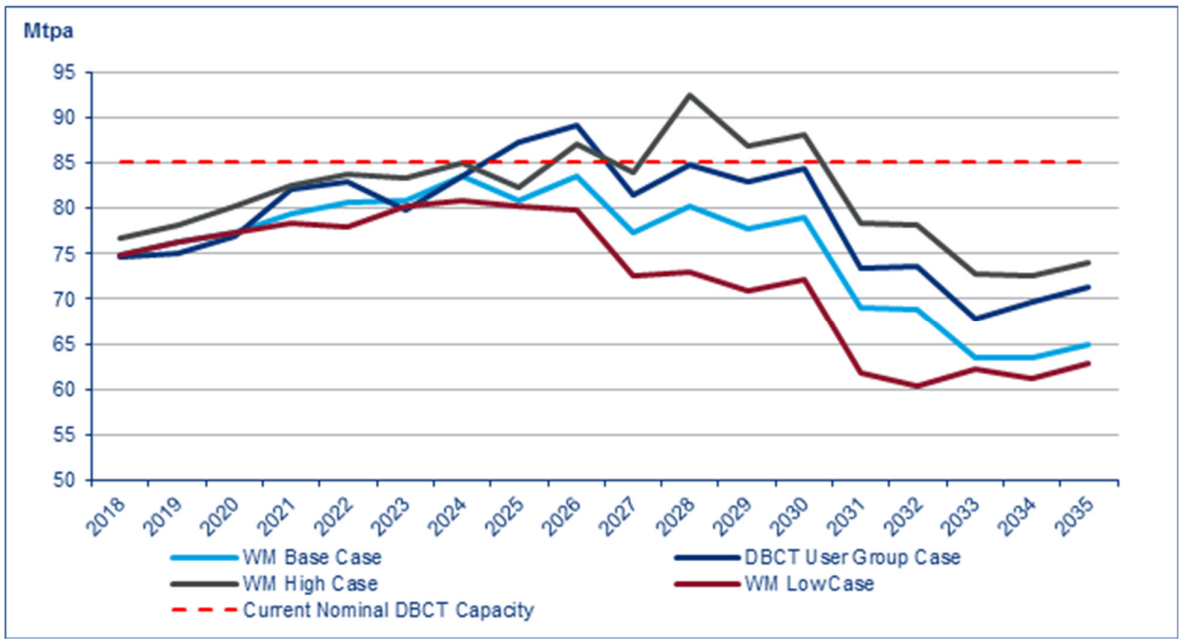
Table 6 DBCT User Group (UG) Aggregate Throughput Forecast

Case	2018 (Mt)	2019 (Mt)	2020 (Mt)	2021 (Mt)	2022 (Mt)	2023 (Mt)	2024 (Mt)	2025 (Mt)	2026 (Mt)	2027 (Mt)	2028 (Mt)	2029 (Mt)	2030 (Mt)	2031 (Mt)	2032 (Mt)	2033 (Mt)	2034 (Mt)	2035 (Mt)
WM Base	74.8	76.2	77.3	79.5	80.7	80.9	83.5	80.9	83.6	77.3	80.2	77.7	79	69.1	68.9	63.5	63.5	65
User Group	74.7	75.2	77.0	82.1	82.9	79.8	83.6	87.2	89.2	81.5	84.8	83.0	84.5	73.4	73.7	67.9	69.8	71.3
Difference	-0.1	-1.5	-1.5	-0.9	-0.6	-1.1	0.1	6.3	5.6	4.2	4.6	5.3	5.5	4.3	4.8	4.4	6.3	6.3

Source: Wood Mackenzie

Where information has not been provided by DBCT User Group members, Wood Mackenzie have applied its Base Case mine specific outlook.

Figure 2 Comparison of Wood Mackenzie Forecast & DBCT User Group (Forecast)



Source: Wood Mackenzie

It can be observed that the aggregate view of the DBCT User Group is higher than Wood Mackenzie's base view, after 2024. This higher outlook results from:

- Slightly more aggressive project timelines compared to Wood Mackenzie's base view;
- Changes to port allocation after the expiry of existing contract obligations at other ports; and
- Mine life extensions beyond Wood Mackenzie's forecast depletion date for particular mines.

The DBCT User Group aggregate view does not include unidentified mine projects that are not mentioned in Table 1 and Table 5.

The User Group view is lower than the high case described in this report. One reason for this difference is the inclusion of Lake Vermont tonnage in the high. Lake Vermont does not currently utilise DBCT, and consequently their future view is not considered in the User Group aggregate view. Similarly the high case includes an earlier start for the Eagle Downs project. The Eagle Downs projects ownership has recently changed; the new owners are not current members of the DBCT User Group, and consequently their views have not been incorporated in the User Group view.

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Schedule 3 – 2nd Castalia Report

Economic Analysis—Response to DBCTM Expert Report on Criteria (a)

July 16, 2018

1 Introduction

In their May 30th, 2018 submission to the QCA, DBCTM have proposed that, in the absence of declaration of the DBCT, access terms and conditions will be set through:

> *"a binding and effective negotiate/arbitrate access framework"*[1]

DBCTM have submitted an expert report from HoustonKemp suggesting that the effectiveness of the proposed DBCTM Access Framework will be such that criteria (a) is not satisfied—that is, declaration will have no material impact on competition in any dependent market.

The Access Framework establishes the terms and conditions of access through a negotiate/arbitrate model with the access price set between a floor and a ceiling in such a way as to ensure DBCTM's throughput is the same with and without declaration. In effect, the proposed Access Framework aims to enable DBCTM to act as a perfectly discriminating monopolist, which captures all consumer surplus but does not reduce output.

This submission responds to the HoustonKemp criteria (a) report and builds on the previous submissions by the DBCT User Group, Castalia and PwC.

In our previous submission, Castalia showed that in the absence of declaration, there would be different access terms, conditions, prices and rights between incumbents and new entrants, and this would distort competition in the dependent market for coal tenements which we define as the market for the supply and acquisition of rights to explore for or develop resources of coking coal, thermal coal or both in the "Hay Point catchment". The proposed Access Framework confirms that concern.

Proposed DBCTM Access Framework

DBCTM have proposed that, absent declaration, an access price would be set between a floor and a ceiling. The floor would approximate the price that would apply if DBCT was declared. The ceiling would be determined by the highest price that each user would be willing to pay—that is, the price just below the level that would prompt the user to switch

[1] *DBCT declaration review: DBCT Management submission to the QCA*, DBCTM, 30 May 2018

to an alternative logistics chain or make the user unviable. The price would be set by negotiation with binding arbitration in the event of a failure to agree.

While the Access Framework has a floor and a ceiling, it is essentially designed to enable prices to reach the ceiling, which would also be the ceiling in the absence of any formal access arrangement. The main difference between the proposed Access Framework and DBCTM acting as an unconstrained profit-maximising monopolist is that the Access Framework provides a basis for DBCTM to price discriminate among its customers.

DBCTM and HoustonKemp assert that—by enabling perfect discrimination—the Access Framework ensures that DBCTM's throughput will be the same with and without declaration, while allowing DBCTM to earn a monopoly profit.

Our analysis is that the Access Framework, as proposed, is unworkable, impractical and cannot be verified or enforced. Hence, it is likely that DBCTM would act as a conventional profit-maximising monopolist with an incentive to constrain output, rather than as a perfectly discriminating monopolist with an incentive to maintain output unchanged.

However, even if it was practical and effective, and DBCTM throughput was maintained at identical levels with and without declaration, there would still be a material impact on competition in the coal tenements market. This distortion of competition arises through the interaction of the Access Framework with existing contracts held by current users.

Access Framework and Existing Contracts

HoustonKemp conflate DBCTM's throughput being the same with or without declaration with levels of competition in dependent markets being the same and thus conclude that criteria (a) is not satisfied.

We agree that DBCTM throughput is likely to remain the same under the Access Framework but for an entirely different reason—the interaction of the Access Framework and existing contracts.

DBCTM and HoustonKemp acknowledge that existing DBCTM users have evergreen contracts for capacity that will remain valid post declaration. Those contracts have very different terms and conditions of access with prices being set by a methodology somewhat analogous to the Access Framework floor price. These contracts do not allow a higher ceiling price. This means that the higher Access Framework ceiling prices will never apply to existing users, at least up to their current contracted capacity, so they will have an enduring commercial advantage over new users. Given that the current contracted maximum capacity of about 76mtpa[2] is of the same magnitude as the Wood Mackenzie base case forecast to 2035 this shows that almost all activity in the coal tenements market will be undertaken by incumbents.

It is non-declaration that creates this segmented market between incumbents and new entrants and thus creates a material reduction in competition in the market for coal tenements. This means that under declaration criteria (a) will be satisfied.

[2] HoustonKemp report currently contracted capacity as 80mpta (*"Does DBCT's coal handling service satisfy criteria (b)"*, HoustonKemp, 28 May 2018, pp 37). We understand that as at 1 July 2018 the operator estimates contracted tonnage to be approximately 76mtpa.

2 Criteria (a) Economic Analysis

Criteria (a) states:

> *That access (or increased access) to the service, on reasonable terms and conditions,* ***as a result of a declaration of the service*** *would promote a material increase in competition in at least 1 market (whether or not in Australia), other than the market for the service*[3]

There are two aspects to the economic analysis underpinning the QCA being satisfied, or not, that continued declaration of DBCT will meet criteria (a):

- A comparison between access on reasonable terms as a result of continued declaration and access on the terms that will likely apply absent declaration; and
- An assessment of the extent of competition in a dependent market that will occur with and without declaration

This is uncontroversial and is broadly the economic analysis that HoustonKemp have undertaken. In this section we respond to their analysis of these two aspects of criteria (a).

2.1 The Proposed Access Framework

At the outset we note that as the QCA's task is to determine if declaration should be continued, the comparison is reversed in that as DBCTM is declared the current conditions of access are well known and it is the counterfactual of the likely conditions of access in the absence of declaration that must be assessed.

In their submission to the QCA, DBCTM proposes that absent declaration the terms and conditions of access will be set through the Access Framework that they claim will be binding and effective.

The key feature of the Access Framework is that the Terminal Infrastructure Charge (TIC) be agreed between DBCTM and each user. In the absence of agreement, an arbitrator is to determine a TIC that is:

- No lower than the price that would be set if the QCA had determined the price—the TIC floor; and
- No higher than the highest price at which the utilisation of DBCTM would be the same as it would be at the floor price—the TIC ceiling.

Though this mechanism HoustonKemp assert that criteria (a) is not satisfied as volumes at DBCT would be the same for any price between the TIC floor and ceiling.

The HoustonKemp analysis of the effects of the floor and ceiling price proposal conflates no change in competition with no change in coal volumes handled at DBCTM. This would be true if two conditions were satisfied:

- the Access Framework prices applied to all users, and
- The pricing framework allowed for reliable and consistent discrimination.

However, neither of these conditions is satisfied.

[3] QCA Act, section 76(2)(a)

Existing users have in place, medium to long term "evergreen" contracts, that will remain on foot post declaration. A key feature of these contracts is that prices, in the absence of declaration, are set either by negotiation or if there is a failure to agree, arbitration according to a methodology that attempts to mimic the QCA process—that is to set prices that would be equivalent to the floor defined in the Access Framework. There is no concept of a ceiling price.

This results in different terms and conditions of access for different classes of users at different tonnage levels as shown in Table 2.1. HoustonKemp report currently contracted capacity as 80mpta[4]. We understand that as at 1 July 2018 the operator estimates contracted tonnage to be approximately 76mtpa.

Table 2.1: Access Conditions and Capacities

	Up to current contract level (~76mtpa)	**Between current contract level & current physical capacity (85mtpa)**	**Greater than current physical capacity (> 85mtpa)**
Incumbents:	Existing contracts: "reasonable price"	Access Framework: "price between floor and ceiling"	Access Framework: "price between floor and ceiling"
New Entrants:	Access Framework: "price between floor and ceiling"	Access Framework: "price between floor and ceiling"	Access Framework: "price between floor and ceiling"
Result:	Material advantage to incumbents	Equal terms and conditions of access	Equal access terms and conditions

2.2 Interaction of the Access Framework and Existing Contracts

DMCTM acknowledge that existing users' contracts are evergreen and remain on foot. They suggest that existing users have "the option" to continue to have access under those terms and conditions, or presumably to accept the proposed terms and conditions under the Access Framework.

Importantly these existing contracts allow users to renew their contracted tonnage on a rolling annual basis for the same or lesser volume as originally contracted. HoustonKemp report that existing users had a "take or pay" commitment of 80 million tonnes in 2017[4]. We understand that the operator estimates contracted capacity at 1 July 2018 to be approximately 76mtpa.

This means, that at least for tonnages up to the current contracted level, no existing user would switch to the Access Framework as it would be commercially disadvantageous to move from a "reasonable price" to a ceiling price set at "what the market will bear".

The differences between new and existing users would clearly disadvantage new entrants and advantage incumbents—as incumbents would have guaranteed access at a lower price and likely better non-price conditions. Importantly incumbents would also have a legally

[4] *"Does DBCT's coal handling service satisfy criteria (b)"*, HoustonKemp, 28 May 2018, pp 37

enforceable right of access whereas new entrants would have to negotiate both conditions of access and the access ceiling price.

HoustonKemp equates unchanged total coal volumes as an indicator of the level of competition and assert that the proposed Access Framework ensures both. Even if the Access Framework was workable and practical and resulted in throughput being maintained regardless of declaration or non-declaration, total coal volumes provide little useful information on the state of competition in circumstances where different terms and conditions of access for different classes of users create different incentives and behaviours.

2.2.1 Competition impacts up to current contract level

Since, at least up to their current contract level, incumbents have a commercial advantage, this means that they will be more likely:

- to bid for new coal tenements as they have a legally enforceable right of access at reasonable prices whereas new entrants will have the cost, complexity and delay associated with negotiation of access terms and conditions and price; and
- to develop existing undeveloped coal tenements that they already own whereas new entrants will face greater cost, complexity and delay in developing a new mine.

The Access Framework confirms the analysis in Castalia's previous submission that in the absence of declaration there would be a material impact on competition in the market for coal tenements.

However, the differential pricing resulting from the Access Framework is also likely to distort the efficient development of mines and thus competition.

In an efficient market for coal tenements, for new mine developments in the DBCT catchment area, all else being equal, mines with the lowest total production costs would be developed before higher cost mines. Total costs include the capital and operating costs of the mines as well as the logistics costs—all the costs incurred to get coal FOB to a buyer. Effectively there is a "merit order" for mine development.

Efficient development of mines should also result in mines using the lowest cost logistics chain—that is mines for which DBCT rail and coal loader costs are the lowest cost should use DBCT.

However, under the Access Framework, at least up to their current contract levels, incumbents, through their existing contracts will have more favourable commercial conditions—legally enforceable access and at a lower price. This is likely to have the following effects:

- Incumbents may develop new mines that are only lower cost financially as a result of their existing contracts and not the lowest economic cost or the lowest on the cost curve of possible mines. This will occur as incumbents will seek to monetise the commercial advantage they have in the margin between the current throughput of around 65mtpa and their maximum contract level.

  Incumbents are thus incentivised to ensure that, in aggregate, they always export up to the maximum of their current contracts through DBCT, even if that volume comes from mines that are economically better served by other ports; and

- New entrants may develop mines that use other logistics chains where using DBCT is the lowest economic cost. This may occur when DBCTM "overplay their hand" is negotiating the ceiling price or simply because the cost, time and delay in negotiating access makes their projects unfinanceable.

This distortion of investment decisions in the coal tenement market leading to inefficient development of mines results directly from the material impact on competition that will occur without declaration.

This reduction in competition arises from the dual price and access conditions created by the interaction of existing contracts and the Access Framework which distorts incentives and behaviours.

This distortion will not just be a transitory phenomenon. The current contracts help by users are evergreen and the total volume contracted of approximately 76mtpa is material. The Wood Mackenzie base forecast shows that expected throughput will only be at a maximum about 10 percent greater than current contract levels in any year in the period to 2035.

This means that there are unlikely to be any new users developing mines in that time. The existing users, particularly those with a portfolio of mines will sequence mine development with new mines coming onstream to replace capacity within their portfolios from the depletion of their existing mines.

This follows the historic pattern of large miners replacing existing mines with new mines; for example, between 2007 Rio wound down the Blair Athol mine as the reserves depleted and ramped up production in the Clermont mine, essentially maintaining production and DBCT throughput at around 12mtpa.

2.3 Impact above currently contract level

Above the maximum existing contracted take or pay tonnage, while incumbents may lose the commercial advantage of existing contracts, the Access Framework will still distort investment decisions in the mining tenements.

The Access Framework creates strong financial incentives for DBCTM to discriminate by favouring new mines that will be likely to have a higher ceiling price and thus higher returns. This means that in negotiations they will be biased towards facilitating the development of mines closer to DBCT, where the costs of alternative ports are higher, or mines producing higher value metallurgical coal, or both.

By contrast under declaration, DBCTM must treat all prospective users equally on a first come, first served basis.

There is also likely to be an impact related to mine size and new entry. As smaller or independent mines or both will have less ability to endure the cost, complexity, uncertainty and delays inherent in the Access Framework, new mines will largely be developed by the large miners with portfolios of mines.

It is likely that any current holders of coal tenements in the DBCT catchment that do not have current contracts with DBCT will be unlikely to proceed with mine development and that these mines will not be developed regardless of their economic viability, or position on the cost curve, as they will not be bankable.

2.3.1 Workability of Access Framework

In Section 2.2.1 we show that even if the Access Framework was workable and practical it would not address the fundamental problem identified in the earlier Castalia submission of the competition impacts created by the interaction with existing contracts, at least up to

the current contracted capacity. However, above this level, the proposed Access Framework will apply equally to new entrants and incumbents and therefore we now detail why it isn't workable, practical, verifiable or enforceable. In addition, it can be altered unilaterally by DBCTM.

Assessing if criteria (a) is satisfied or not requires a realistic and appropriate counterfactual—in this case and assessment of the likely terms and conditions of access without declaration.

The proposed (highly theoretical) Access Framework cannot be an appropriate counterfactual as it is inherently circular—DBCTM asserts that criteria (a) is not satisfied because it says under the Access Framework it won't be.

It won't result in the outcomes claimed by DBCTM

This is because in the negotiations between each user and DBCTM, where throughput is greater than current maximum contract levels there will be substantial information asymmetries and conflicting incentives:

- Both parties may have an idea of the range of plausible floor prices floor price through previous QCA determinations; and
- DBCTM will have no information on the cost structures of the user and thus the likely ceiling price that the user can bear before reducing volumes.

In terms of incentives, the users while users may not be motivated to enter the complex and costly arbitration process, DBCTM is incentivised to always move to arbitration. This is because if DBCTM offers a "ceiling" price to a user and the user accepts, then logically the user is signalling that it has the capacity to pay and its volumes will not be reduced. To avoid "leaving monopoly rents on the table" DBCTM will favour arbitration and can engineer this situation by proposing an initial high price.

While the arbitrator will not have the expertise or access to information that a regulator such as QCA has, the very act of requiring a user to demonstrate that the price offered by DBCTM is higher than the ceiling will require that the user provides some insight into its financial position—more insight than it is likely to disclose to DBCTM in the pre-arbitration negotiations.

Essentially in bi-lateral negotiations, the monopolist is always incentivised to move to arbitration. This has been the experience of users of the Abbot Point Coal Terminal.

A further complication is that the Access Framework will result in price discrimination as individual users will have different "ceiling" prices. This isn't inefficient but means that DBCTM's incentives will be to maximise revenue by maximising volumes from users with the capacity to pay the highest ceiling prices.

In addition to the information asymmetry and conflicting incentives, there is also a temporal dimension. The Access Framework proposes that prices be fixed for five-year intervals—but mining costs, logistics costs and coal prices are dynamic. This means that while an arbitrated price may be between the floor and ceiling level when set, the ceiling price is likely to vary widely during the pricing period with a consequential impact on volumes.

The five-year price resets and the probability of DBCTM error in setting future ceiling prices creates a very high hurdle for new entrant miners. It would be difficult for such a miner to raise finance or for example, enter into a ten-year haulage contract, when key logistics prices can be arbitrarily increased by DBCTM at five yearly intervals, not based on underlying costs, but on their guess at the available consumer surplus.

When contrasted with the scenario of access in the event of declaration, where new mines will have a legally enforceable right of access with reasonable prices set by an independent regulator it is obvious that new entrants will not be able to develop mines. This will lead to increasing concentration among the current incumbents with their portfolios of mines.

For these reasons—the lack of information, the incentives of DBCTM, and the variability of the ceiling price, the actual TIC is highly unlikely to result in prices always being between the floor and ceiling over time and thus throughput volumes will not be maintained at the theoretical levels that would have applied under declaration.

It's not verifiable or enforceable

As well as not delivering the outcomes claimed, no party, either DBCTM, users, or even the QCA will ever be able to verify DBCTM's compliance with the proposed Access Framework.

There are two reasons for this:

- No party has the data. Verification would require a detailed analysis of the "actual" range between the floor and ceiling prices and assessing if the TIC that had been set was within this range. Clearly this is equally impossible ex ante as well as ex post; and
- Volumes at DBCT are impacted by such a wide range of factors that ascribing any future decrease to DBCTM charging a price higher than its proposed theoretical ceiling price is impossible. DBCTM would assert that any volume reduction was a result of other factors such as low coal prices, changes in corporate strategy, lower demand for coal, operational problems at the mines or the rail network and the like.

Further, no party will have the responsibility of monitoring the outcome and no party can take any action to ensure compliance.

The Access Framework does not bind DBCTM

The Access Framework is misaligned with DBCTM's incentives which, absent declaration, are to maximise revenue through a price/volume trade-off. In our earlier submission we show that, under a theoretical "no constraints" analysis the maximum revenue would occur at around double the current total DBCTM charge.

Essentially, under the Access Framework DBCTM proposes that it won't act as a rational profit maximising monopolist but will restrain itself through the proposed floor and ceiling price. We have been advised that the deed that underpins the Framework can be altered at any time by DBCTM so the actual restraints on monopoly behaviour are non-existent.

Schedule 4 – Calculations to adjust errors in DBCTM/HoustonKemp/AME projections

		2021	2022	2023	2024	2025	2026	2027	2028	2029	2030
	HoustonKemp total (excluding HPCT)	**91.1**	**95.2**	**102.7**	**109.6**	**117.8**	**120.6**	**111.3**	**112.7**	**112.5**	**113**
Excluding contracted to other terminals / enduring reason to stay at other terminals	Lake Vermont[1]	- 9.3	- 9.3	- 9.3	- 9.3	- 9.3	- 9.3	- 9.3	- 9.3	- 3.3	- 3.3
	Middlemount[2]	-3	-3	-3	-3	-3	-3				
	Kestrel[3]	-5.71	-5.71	-5.71	-5.71	-5.71	-5.71	-5.71	-5.71	-5.71	-5.71
Excluding projects that do not come into production before 2035	Eagle Downs[4]	-3.5	-4.5	-4.5	-4.5	-4.5	-4.5	-4.5	-4.5	-4.5	-4.5
	Teresa[5]		-2	-2.85	-3.33	-6.4	-6.4	-6.4	-6.4	-6.4	-6.4
	Moranbah South[6]	**- 1.8**	**- 5**	**- 9**	**- 14**	**- 14**	**- 14**	**- 14**	**- 14**	**- 14**	**- 14**
	Hillalong[7]	**- 3.6**	**- 3.64**	**- 3.6**	**- 3.62**	**- 3.64**	**- 3.64**	**- 3.6**	**- 3.61**	**- 3.54**	**- 3.54**
	Harrybrandt[8]				**- 1**	**- 2.51**	**- 2.51**	**- 2.51**	**- 2.51**	**- 2.51**	**- 2.51**
	Total adjustments	**- 26.91**	**- 33.15**	**- 37.96**	**- 44.46**	**-49.06**	**-49.06-**	**- 46.02**	**- 46.03**	**-39.96**	**-39.96**
	HoustonKemp total (excluding HPCT) less total adjustments	**64.19**	**62.05**	**64.74**	**65.14**	**68.74**	**71.54**	**65.1**	**66.67**	**72.54**	**73.04**

1 Exclusion of 6 mtpa to 30 June 2028.

2 Exclusion of 3 mtpa to 30 June 2027 (known to be contracted to APCT).

3 Exclusion of full HoustonKemp forecast demand as more likely to export exclusively from RGT

4Exclusion of full HoustonKemp forecast demand as Wood Mackenzie projects that it will not be developed in the relevant timeframe. The DBCT User Group notes that 1.6 mtpa of capacity is contracted for the project at WICET in any case, creating real questions as to whether it would export all or some of its production through DBCT in any case.

5 Exclusion of full HoustonKemp forecast demand as Wood Mackenzie projects that it will not be developed in the relevant time frame. The DBCT User Group also considers that it is more likely to export exclusively from RGT in any case.

6 Exclusion of full HoustonKemp forecast demand as Wood Mackenzie projects first production in 2034.

7 Exclusion of full HoustonKemp forecast demand as Wood Mackenzie projects that it will not be developed in the relevant timeframe.

8 Exclusion of full HoustonKemp forecast demand as Wood Mackenzie projects first production in 2038.

Schedule 5 – Responses to QCA Questions

	QCA Staff Question	DBCT User Group Responses
Criterion (a)		
Question 1	Would there be any material differences between the operation of the proposed deed poll and DBCT Access Framework, and the operation of the access regime under Part 5 of the Queensland Competition Authority Act?	As described in more detail in the DBCT User Group submission, there are very substantial differences between the Access Framework and the position which would apply under Part 5 of the QCA Access Framework. Firstly it should be noted that the initially proposed terms of the deed poll / DBCT Access Framework substantially understate the likely material differences given: • how easy it is for DBCTM to amend the terms of the Access Framework; • how difficult it would be for any producer to negotiate pricing (given asymmetric information) or dispute pricing outcomes (given the costs of disputes) • the uncertain, unworkable and vague nature of some of the principles relied on – including the ceiling price (which are effectively reliant on DBCTM being omniscient to have the effect DBCTM asserts). In addition, even if it was assumed that the deed poll / DBCT Access Framework initial terms would be given effect to, the Access Framework will produce: • substantial inequality of pricing as: o existing access holders will continue to have access under the pricing regime provided for in their existing user agreement o new users will only have access based on the pricing regime provided in the access framework – which is uncertain and

		unworkable, involves significant information asymmetry and will always involve monopoly pricing. • material risks of inequality of terms of access (given that the protections regarding differentiated access terms have been removed) • far less informed negotiations (given that some of the reporting obligations have been removed).
Question 2	How would the proposed deed poll and DBCT Access Framework affect competition in a market other than the market for the service, compared to the access regime under Part 5 of the Queensland Competition Authority Act? In responding to this question, stakeholders are invited to have regard to aspects of DBCTM's proposal, for example:	As described in more detail in the DBCT User Group submission, the clearest impact on competition in a dependent market occurs in relation to the Hay Point catchment coal tenements market. Firstly it should be noted that the impact on competition of the deed poll / DBCT Access Framework is actually completely uncertain given: • how easy it is for DBCTM to amend the terms of the Access Framework; • how difficult it would be for any producer to negotiate (given asymmetric information) However, even if (at best) the Access Framework was assumed to operate in accordance with its proposed initial terms it will produce a major adverse impact on competition because: • Current DBCT Uses will place a higher value on tenements than Potential DBCT Users – making them more effective competitors for acquisition of tenements in the tenements market – and being highly likely to result in them becoming the principal acquirers in the tenements market • Potential DBCT Users will have: • a much reduced incentive to invest in acquisition of tenements – due to the uncertainty of returns that it will be able to derive; • a much reduced incentive to fund acquisition of tenements given the completely unbankable nature of the Access Framework;

		• a much reduced incentive to invest in exploration / development of coal mining projects, resulting in an immediate reduction in the demand for tenements and in turn reducing the future volume and quality of supply in the market). This is particularly problematic for the competitive environment because, as demonstrated by the list of transactions in the tenements market referred to in the Initial DBCT User Group submission, the vast majority of such transactions in recent times are attributable to Potential DBCT Users. In other words criterion (a) is satisfied because, where the declaration was not continued, the existing contracted users of DBCT who have the price review protections noted above will have a substantial advantage over new entrants facing the uncertainty and higher pricing which will be imposed on them through the Access Framework and that will in turn result in: • a substantial increase in concentration in the tenements market • a reduction in supply and a reduction in quality of supply in the tenements market.
Criterion (b)	Staff invite submissions on the following matters:…	
Question 3	If mines in the market described by DBCTM would 'prefer to use' DBCT, why have some mines in the market described by DBCTM contracted for capacity at other terminals? Would this suggest that there are other factors that would affect their ability to use the coal handling service at DBCT?	As described in more detail in the DBCT User Group submission, there are a range of reasons why coal producers have used different coal terminals including: • the different blending and co-shipping opportunities that exist at different ports; • risk diversification - for example, where an Aurizon Network shut down caused by maintenance or a derailment, or a cyclone closes a coal terminal at a particular port, having capacity at an alternative port allows continuing exports (somewhat akin to insurance against coal supply chain issues);

		• for major producers with capacity contracted at other terminals for other mines, the use of surplus capacity defrays take or pay costs; • at the time of contracting capacity at another terminal, capacity at DBCT and Goonyella Aurizon Network system capacity was not available. In addition those factors are only important enough to producers to result in some marginal substitution (such as for limited use of RGT by mines on the southern edge of the Hay Point catchment or limited use of APCT by mines that are distant from both DBCT and APCT). In other words, the usage of other coal terminals is a result of coal producers determining to acquire a service with different distinct quantities – not because of substitution in response to price increases of the Declared Service.
Question 4	Staff note that for mines to use DBCT to meet their coal handling requirements, they must utilise the Goonyella system. To what extent, if any, is the capacity of Aurizon Network's Goonyella system, or other Aurizon Network systems, relevant to the QCA's considerations?	The DBCT User Group considers that the lack of capacity in the Aurizon Network system for: • Hay Point catchment mines to access other coal terminals; or • Mines in other parts of the Bowen Basin to access DBCT, is highly relevant. Capacity simply does not exist for a significant volume of Hay Point catchment production to be exported via other coal terminals. The DBCT User Group acknowledges that that of itself is not absolutely determinative of the appropriate market definition – as substitution is not measured only over the short term. However, the costs of having to invest in the additional capacity are highly relevant – because they are clearly so high as to result in it being completely uneconomic for a producer to underwrite such investments in response to a SSNIP of the declared service. It is also highly relevant fact that Aurizon Network has no evident plans to expand the limited existing capacity for Hay Point catchment users to access

		other terminals).
Criterion (d)		
Question 5	Stakeholders are invited to comment on the extent to which an assessment of the effectiveness of the current regulatory regime (including a cost versus benefits comparison) is relevant to the QCA's assessment of criterion (d)?	While this question was asked principally in relation to Aurizon Network, the DBCT User Group has also provided a response given that DBCTM has made submissions in relation to criterion (d). The DBCT User Group considers that it is clearly relevant in asserting whether criterion (d) is satisfied for a service to consider the likely impact of declaration and the likely impact without declaration. Assisting the likely impact of declaration necessary involves some consideration of the outcomes of the existing undertaking. However the question is therefore not really whether the current regulatory regime is effective or appropriate – those are questions that are relevant to certification of an access regime and approval of an access undertaking – not whether a service should be declared. But, the outcome in terms of public costs and detriments of the current regulatory regime is a relatively good proxy for the likely outcome with declaration. Consequently, that is relevant to whether that outcome would involve a promotion of the public benefit relative to the likely outcome without declaration.