

STAKEHOLDER NOTICE

23 August 2019

DBCT Management's 2019 DAU—QCA staff questions for stakeholders

Disclaimer: This material has been prepared by QCA staff and does not bind, nor represent the views of, the QCA. The material is to assist stakeholders in preparing submissions and it follows that this stakeholder notice should not be read, nor should it otherwise be implied, that any view has been reached by the QCA on the matters raised.

Background

On 1 July 2019, the QCA received a draft access undertaking from DBCT Management Pty Ltd (DBCT Management) concerning Dalrymple Bay Coal Terminal (DBCT) for the regulatory period beginning 1 July 2021 (the 2019 DAU).

On 5 July 2019, in accordance with section 146 of the *Queensland Competition Authority Act 1997* (the QCA Act), the QCA:

- informed stakeholders, including DBCT Management, of the QCA's intention to conduct an investigation to decide whether to approve, or refuse to approve, DBCT Management's 2019 DAU
- invited stakeholders to make written submissions to the QCA on DBCT Management's 2019 DAU. Submissions are due by **Monday, 23 September 2019**.

Questions for comment

QCA staff have developed a set of questions to assist stakeholders in preparing submissions on DBCT Management's 2019 DAU. While these questions highlight some specific matters related to the 2019 DAU, they do not seek to comprehensively cover all the aspects of the DAU. Hence, interested parties should rely on their own analysis to determine whether there are additional matters on which they wish to comment.

The due date for stakeholder submissions on DBCT Management's 2019 DAU is not affected by the publication of these questions. Submissions are still due on **23 September 2019**.

- (1) DBCT Management submits that its 2019 DAU provides an undertaking that is 'fit-for-purpose and proportionate' to the competition problem that declaration of the DBCT service would address, as identified in the QCA's draft recommendation concerning review of the declared DBCT service (pursuant to section 87A of the QCA Act).¹

Do stakeholders consider the scope of the competition problem identified in the declaration review as a relevant factor in assessing the 2019 DAU?

¹ DBCT Management describes the competition issue as 'the potential for asymmetric terms of access between existing users and new users in the absence of declaration, and the impact those asymmetric terms may have on competition in the tenements market(s).' [DBCT Management's letter to the QCA, dated 1 July 2019]

- (2) DBCT Management's 2019 DAU replaces the prescribed terminal infrastructure charge (TIC) that is in the 2017 access undertaking with a negotiate/arbitrate framework for determining access charges.
- (a) Do stakeholders consider this framework will allow access seekers to obtain access in an effective and timely manner?
 - (b) Would any additional features be needed to ensure that the negotiate/arbitrate framework could work effectively?
- (3) DBCT Management submits that the 2019 DAU would ensure that access seekers are provided with an appropriate level of information to enable them to negotiate from an informed position—the 2019 DAU (section 5.2(c)(2)) provides that an access seeker may request from DBCT Management the information set out in section 101(2) of the QCA Act. DBCT Management must provide the information within 10 business days of receiving a request.
- (a) Do stakeholders consider that provision of this information by DBCT Management will allow access seekers to negotiate for access from a sufficiently informed position?
 - (b) If not, what additional information requirements may be needed to support effective negotiation?
- (4) DBCT Management's 2019 DAU provides for disputes regarding access charges to be determined by arbitration by the QCA. In any such arbitration, DBCT Management submits that the QCA must have regard to '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 within a geographic boundary drawn so as to include all mines that have acquired, currently acquire or may acquire coal handling services supplied at the Port of Hay Point.'¹²
- Do stakeholders consider that having regard to this 'willing but not anxious buyer and seller' concept is appropriate in an arbitration?
- (5) The 2019 DAU provides that, in an arbitration, the QCA must have regard to the types of services provided to the access seeker as a factor in determining the TIC. DBCT Management submits that the Integrated Logistics Company (ILC) has indicated its willingness to assist in modelling the impacts on terminal efficiency resulting from specific user service requests.
- Do stakeholders consider that the modelling resulting from specific user service requests and the engagement of ILC would be appropriate?
- (6) The 2019 DAU also provides that, in an arbitration, the QCA must have regard to 'any other TIC agreed between [DBCT Management] and a different Access Holder for a similar service level.'¹³
- (a) Would an access seeker have sufficient information about the level and build-up of such 'other TIC' to be able to effectively negotiate access and/or participate in an arbitration process? If not, what other information would be required to enable them to do so?
 - (b) Would there need to be specific processes for access seekers to gain access to this information?
 - (c) Do stakeholders have any concerns regarding the provision of such information to access seekers, and if so, how might such concerns be addressed?
- (7) The negotiate/arbitrate framework contained in DBCT Management's 2019 DAU may have the potential to lead to an increase in the number of access disputes that the QCA needs to arbitrate. If such disputes are

² DBCT Management, *DBCT 2019 draft access undertaking*, explanatory submission, July 2019, p. 42.

³ DBCT Management, *DBCT 2019 draft access undertaking*, explanatory submission, July 2019, p. 54.

referred to the QCA for arbitration, the QCA will not be able to reach any determinations that are contrary to the provisions of an approved access undertaking.

Do stakeholders consider that any provisions in the 2019 DAU would inhibit the QCA in making appropriate arbitration determinations?

- (8) DBCT Management observed that the negotiate/arbitrate model for determining access prices is an accepted approach in access undertakings in Australia. In this context, DBCT Management referred to acceptance by the Australian Competition and Consumer Commission (ACCC) of access undertakings for wheat export terminals and to the form of 'light-handed' regulation applied to some covered pipelines under the National Gas Law.

DBCT Management also referred to the Productivity Commission's draft report on the review of the economic regulation of Australian airports, and noted that the Commission has proposed to reject submissions from airlines and the ACCC that recommend the existing regime be replaced by a more interventionist approach.

- (a) Do stakeholders agree that the negotiate/arbitrate model for determining access prices is an accepted approach in access undertakings in Australia?
- (b) Do stakeholders consider that the acceptance and operation of these regulatory frameworks for wheat export terminals and some covered gas pipelines are relevant to the assessment of DBCT Management's 2019 DAU?
- (c) Do stakeholders consider that the regulatory regime for Australian airports (and the Productivity Commission's review) are relevant to the assessment of DBCT Management's 2019 DAU?
- (9) DBCT Management submits that when commencing negotiation with access seekers, it will offer a base tariff, plus tariffs for additional services. It clarified that it provides additional services to users above the standard service of handling coal, and that users require distinct combinations of services and value those combinations differently to each other.
- (a) Do stakeholders consider DBCT Management's concept of a base tariff (that is, one that 'maximises throughput efficiency of the terminal'⁴) appropriate?
- (b) Do stakeholders consider DBCT Management's description of the base tariff (as described in paragraph 203 of its explanatory submission) appropriate?
- (c) Do stakeholders consider it commercially reasonable to identify additional services at DBCT, and value those services separately to the standard service of handling coal?
- (d) Should any of the additional services identified by DBCT Management (e.g. coal blending opportunities) be considered as part of the core coal handling service at DBCT?
- (10) DBCT Management submits that existing users are fully protected by existing user agreements, including in the absence of an access undertaking.⁵
- Do stakeholders agree that existing users would be fully protected under the terms of existing user agreements alone?
- (11) DBCT Management said that to facilitate negotiations during the 2019 DAU process and inform related discussions, its consultant GHD has developed a rehabilitation plan consistent with the requirements of the

⁴ DBCT Management, *DBCT 2019 draft access undertaking*, explanatory submission, July 2019, p. 44.

⁵ DBCT Management, *DBCT 2019 draft access undertaking*, explanatory submission, July 2019, p. 19.

Port Services Agreement. DBCT Management said it does not propose a process or specific value for the remediation allowance, but considers the detailed rehabilitation plan should inform price negotiations and any arbitration of a dispute regarding price.

- (a) Should the QCA formally review the rehabilitation plan as part of its assessment of the 2019 DAU?
- (b) Do stakeholders consider DBCT Management's proposal for the rehabilitation plan to inform price negotiations and any arbitrations of disputes to be reasonable?

(12) DBCT Management indicated that the non-price terms in the 2019 DAU are similar to those in the 2017 access undertaking, but with some amendments.

Do stakeholders consider that the non-price terms proposed by DBCT Management in the 2019 DAU are appropriate?

Submissions

Closing date for submissions: 23 September 2019

Public involvement is an important element of the decision-making processes of the QCA. Therefore, submissions are invited from interested parties concerning the assessment of DBCT Management's 2019 DAU. The QCA will take account of all submissions received within the stated timeframes.

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

Queensland Competition Authority

GPO Box 2257

Brisbane Q 4001

Tel (07) 3222 0555

Fax (07) 3222 0599

www.qca.org.au/submissions

Confidentiality

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

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

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

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

Public access to submissions

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