DBCT MANAGEMENT

23 April 2020

Professor Flavio Menezes
Chair
Queensland Competition Authority

**2019 Draft Access Undertaking Interim Draft Decision**

Dear Professor Menezes

DBCTM welcomes the QCA's Interim Draft Decision on the DBCT 2019 DAU, and the conclusion that with appropriate amendments the 2019 DAU, including the proposed pricing model which does not include a reference tariff, is capable of approval. In particular, DBCTM appreciates the clear guidance provided by the QCA as to the characteristics required to be incorporated into the 2019 DAU for the QCA to approve such a pricing model.

DBCTM agrees that the 2019 DAU should include information provisions that facilitate effective negotiations and arbitration criteria that constrain any market power held by DBCTM, and that the 2019 DAU should include clear and efficient processes for negotiation and arbitration.

**Proposed amendments to the 2019 DAU**

DBCTM has comprehensively addressed the concerns highlighted in the Interim Draft Decision and proposes a number of amendments to the 2019 DAU which will ensure that the 2019 DAU is appropriate for approval by the QCA.

In particular DBCTM has adopted the QCA's suggestions to:

- introduce new, prescriptive information requirements which will require DBCTM to disclose key information in a pre-determined format in order to facilitate effective negotiations;
- amend the arbitration criteria to align with the legislative arbitration factors set out in section 120(1) of the QCA Act, in order to put beyond doubt that any market power held by DBCTM will be effectively constrained; and
- better align the standard access agreement with the existing user agreements and to disclose the outcomes of commercial arbitrations to access seekers.

In respect of the QCA's stated intent on publishing an arbitration guidance document, DBCTM considers that this should remain consistent with the approach of other regulators that administer negotiate/arbitrate regimes. That is, any arbitration guidance document should focus on the QCA's anticipated processes and timelines for the arbitration, and for the reasons explained in our submission should not set out the QCA's likely pricing methodology.

**The approval of a negotiate/arbitrate model will ensure that access seekers are protected**

In the Interim Decision the QCA emphasises the importance of certainty to access seekers, to ensure that they can have confidence to make long term investment decisions. The reality of the matter is that a pricing model with a reference tariff would provide no additional certainty for access seekers.

DBCTM's existing terminal will be fully contracted for the entire period that the 2019 DAU will apply. This means that all access seekers will be seeking access to expanded capacity, and will not be able to gain access to DBCT unless DBCTM undertakes an expansion. It follows that any reference tariff set by the QCA in the access undertaking will provide no additional certainty to access seekers, as it will not reflect the actual prices paid by access seekers for access to expanded capacity (which is determined following a Price Ruling by the QCA and the actual expansion of the terminal).

Given that there can be ***no*** access to DBCT during the regulatory period for access seekers without an expansion, it becomes imperative that the access undertaking provides appropriate incentives to ensure that DBCTM can undertake an expansion.

DBCTM is confident that the negotiate/arbitrate model laid out in the 2019 DAU, with the further amendments proposed by DBCTM to address the QCA's concerns, will enable DBCTM to negotiate appropriate, mutually beneficial terms with access seekers to ensure that an expansion can transpire, while effectively constraining any market power held by DBCTM.

**DBCTM welcomes further feedback from the QCA on the 2019 DAU**

While DBCTM is confident that the proposed amendments to the 2019 DAU address the concerns raised by the QCA, we are committed to working constructively with the QCA and other stakeholders to ensure that the 2019 DAU is fit-for-purpose.

DBCTM looks forward to your consideration of its proposed amendments to the 2019 DAU, and is available to answer any queries that arise.

Yours sincerely

Anthony Timbrell
Chief Executive Officer
**DBCT Management**

Attachment 1: DBCTM response to the QCA Interim Draft Decision on the DBCT 2019 DAU

DBCT MANAGEMENT

# DBCT 2021 Access Undertaking

## DBCT Management response to QCA Interim Draft Decision

## 24 April 2020

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# 1 Introduction

1 On 24 February 2020 the QCA published an interim draft decision on DBCT Management's (**DBCTM's**) 2019 draft access undertaking (**Interim Decision**). The Interim Decision explained that while the QCA does not consider it appropriate to approve DBCTM's 2019 draft access undertaking (**2019 DAU**) as proposed, it does consider that with appropriate amendments the 2019 DAU – including the proposed pricing model which does not include a reference tariff – is capable of approval.[1]

2 The QCA explained that it would be appropriate to approve a pricing model without a reference tariff where it features the following characteristics (**Approval Criteria**):[2]

2.1 information provisions that facilitate negotiations, reducing the dependence on arbitrations;

2.2 arbitration criteria that constrain DBCTM's market power;

2.3 arbitration criteria that do not impede competition for access to capacity; and

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

3 The QCA have also suggested a number of potential amendments that could be implemented to satisfy the Approval Criteria.

4 DBCTM agrees with the QCA that the starting point for the QCA's statutory task is to assess the 2019 DAU as submitted,[3] and welcomes the QCA's Interim Decision that the pricing model proposed in the 2019 DAU is capable of approval with appropriate amendments.[4]

5 DBCTM remains committed to working constructively with the QCA and users to ensure the 2019 DAU and its negotiate/arbitrate pricing model is implemented in a way that is balanced, effective and fit-for-purpose. As such, this submission comprehensively addresses the concerns highlighted in the Interim Decision and proposes amendments to the 2019 DAU which will ensure that the QCA's Approval Criteria are satisfied. DBCTM's proposed amendments are summarised in the table below.

| QCA criteria for approval | DBCTM proposed amendments to 2019 DAU |
|---|---|
| **Information provisions that facilitate negotiations** | Adopt the QCA's suggestion to introduce new, prescriptive information requirements which will require DBCTM to disclose key information in a pre-determined format. The information is tailored to facilitate effective negotiations. DBCTM will provide (amongst other things):<br>• information about the utilisation of the terminal, including the current and future contracted position of the terminal and the availability of spare capacity;<br>• historical pricing at the terminal;<br>• information on the historical regulated asset base, as well as the current and forecast capital base, updated to account for indexation, depreciation and capital expenditure;<br>• an independent assessment of efficient corporate costs for DBCTM; and<br>• historical and current estimates of DBCTM's weighted average cost of capital.<br>The 2019 DAU will also refer explicitly to compliance and enforcement provisions of the QCA Act as suggested by the QCA. |
| **Arbitration criteria that constrain asymmetrical market power** | Adopt the QCA's suggestion to amend the arbitration criteria in the 2019 DAU to align with s120 of the QCA Act. |

[1] QCA Interim Decision, section 1.6
[2] QCA Interim Decision, p. iv
[3] QCA Interim Decision, p. 21
[4] QCA Interim Decision, section 1.6

| QCA criteria for approval | DBCTM proposed amendments to 2019 DAU |
|---|---|
| **Certainty that the arbitration criteria do not impede competition for access to capacity** | Adopt the QCA's suggestion to amend the arbitration criteria in the 2019 DAU to align with s120 of the QCA Act.<br>Adopt the QCA's suggestion to include provisions in the 2019 SAA which align the arbitration criteria applicable when arbitrated by a commercial arbitrator, with the criteria applicable under the existing user agreements. |
| **Clear and efficient process in negotiation and arbitration and transparency around arbitrated outcomes** | Reconsider the timeframes set out in the 2019 DAU, to ensure that a timely outcome is possible for access seekers and that they do not face undue time pressures.<br>Clarify timelines for arbitrations in the QCA's arbitration guidance document.<br>Adopt the QCA's suggestion to allow the outcomes of arbitration determinations to be released to (non-participating) access seekers, whether arbitration is conducted by the QCA or another party. |

6 The proposed drafting for these amendments, shown as tracked changes against the initially proposed 2019 DAU, is included in Appendix 4 to this submission.

7 This submission is broken down into four main sections:

7.1 Section 2 provides important context to the QCA's access undertaking decision, framing the task before the QCA and the practical impacts of the decision.

7.2 Section 3 sets out DBCTM's proposed amendments to the 2019 DAU, that will ensure that the Approval Criteria are satisfied and that the amended 2019 DAU is capable of approval.

7.3 Section 4 explains why the criteria in section 120 of the QCA Act do not require prices to be set solely based on the efficient costs of the service, and why it would be problematic to predetermine the methodology to be used in applying the arbitration criteria.

7.4 Section 5 provides DBCTM's views on the QCA's proposed arbitration guidance document, and its appropriate scope and content, having regard to other negotiate/arbitrate regulatory regimes in Australia.

# 2 Context for the QCA's assessment of the 2019 DAU

8 This section provides some important context to the QCA's assessment of the 2019 DAU. Specifically it:

8.1 discusses the period over which the access undertaking will apply and the implications this has for the QCA's analysis;

8.2 shows that capacity at DBCT will be fully contracted for the duration of the access undertaking, and explains why this is relevant to the QCA's assessment of the 2019 DAU;

8.3 discusses the importance of a terminal expansion for new access seekers over the duration of the access undertaking; and

8.4 examines the DBCT User Group's (**User Group's**) contention that new access seekers will be disadvantaged in negotiating access to DBCT and are incapable of negotiating access to DBCT on reasonable terms and conditions, by examining the actual access seekers in the queue.

## 2.1 Period of the 2019 DAU

### The Regulatory Period

9 Consistent with DBCTM's previous AUs, the 2019 DAU will apply for a five year period, from the Approval Date (expected to be 1 July 2021)[5] to the terminating date of 1 July 2026 (**Regulatory Period**), unless DBCT becomes undeclared.[6]

10 In essence, the QCA's role is to assess whether the proposed 2019 DAU is an appropriate access undertaking *for this Regulatory Period*. The QCA is not required to make a decision regarding the form of regulation for DBCT in perpetuity. Rather, it is required to make a decision on whether the 2019 DAU is an appropriate access undertaking to apply for the next five years, having regard to the matters set out in section 138(2) of the QCA Act.

11 This is consistent with the QCA's final decision on the 2017 AU, where the QCA made its decision having regard to the prevailing conditions during that regulatory period. For example, in the 2017 AU the QCA revised DBCTM's equity beta downward on the basis that an expansion was unlikely during the relevant regulatory period:[7]

> While we acknowledge DBCTM did expand the Terminal after it was provided the uplifted equity beta in the 2006 AU, we consider the uplift has served its purpose, which was to stimulate investment, and is no longer justified. DBCTM by its own admission is not expecting to expand the Terminal *during the regulatory period*. We took this factor into account when setting the asset beta in our draft decision on the 2015 DAU. (emphasis added)

12 The QCA will have the opportunity to revisit the effectiveness of the pricing model at the end of the Regulatory Period. This is important for two reasons:

12.1 First, it means that to the extent any issues arise with the approved 2021 Access Undertaking (**2021 AU**), these will not endure long term and can be rectified prior to the start of the next Regulatory Period (or earlier through a Draft Amended Access Undertaking (**DAAU**) process).

12.2 Second, it provides a strong incentive for DBCTM to act reasonably in negotiations with users and access seekers in order to ensure that the negotiate/arbitrate pricing model operates efficiently and effectively, such that a similar model will be approved for future regulatory periods. This is a substantial *additional* constraint on DBCTM's market power.

[5] QCA, Statement of Regulatory Intent - DBCT Management's 2019 Draft Access Undertaking (11 June 2019), p. 1
[6] See: 2019 DAU, section 1.3 Duration of Undertaking
[7] QCA Final Decision on 2015 DAU, 21 November 2016, p. 94. See other examples at pp. 10-11, 58, 99, 129, 132, 135

## Access over the Regulatory Period

13 As the 2021 AU will apply for a five year Regulatory Period, the status of the contractual position at DBCT over the Regulatory Period is important context for the QCA's assessment.

14 Over the five year Regulatory Period, the existing capacity of the terminal will be fully contracted to existing users under their Existing User Agreements. This fact is not based simply on DBCTM's forecast, but on the existing contracts for capacity at DBCT including those which have recently been extended. Appendix 1 provides a summary of the capacity held by current Access Holders, including the extensions made to their existing contracts,[8] to show DBCTM's actual and forecast contract profile.

15 Given that existing capacity is fully contracted, ***all*** access seekers during the Regulatory Period will be seeking access to expansion capacity. The expansion process has already commenced – DBCTM has received signed Conditional Access Agreements for 27.0Mtpa of expansion capacity and the negotiation of Study Underwriting Agreements is well progressed.[9]

16 This is pertinent to the Interim Decision's conclusion that the proposed pricing model does not appropriately balance the interests of access seekers and DBCTM, and could increase uncertainty of access to DBCT.[10] The QCA can conclude definitively that access seekers will not be able to gain access to DBCT during the Regulatory Period without an expansion to the terminal.[11] This conclusion in turn means that:

- 16.1 the DAU should provide, as a priority, appropriate investment incentives;
- 16.2 the implementation of a reference tariff will not increase certainty for access seekers in the Regulatory Period as it will not apply to access seekers who will access expanded capacity;
- 16.3 it would be inappropriate for the QCA to reject the 2019 DAU on the basis that a reference tariff may increase certainty for existing users;
- 16.4 any arbitrations for access seekers will likely be concurrent; and
- 16.5 access seekers will have a degree of countervailing power because DBCTM will face competition from other terminals in relation to expansion tonnage;

17 These points are expanded on below.

### *Ensuring DBCTM has appropriate incentives to expand is a priority*

18 Given that an expansion is needed to provide new access, the first priority for the 2021 AU must be to ensure that access agreements can include appropriate incentives to invest in the terminal, to ensure that access seekers are able to gain access to capacity and are not disadvantaged in comparison to access holders. The terms of access, while still important, are a second order priority, as without an expansion there can be no access to DBCT for access seekers.

19 As previously submitted, the QCA has recognised the importance of incentives to invest when an expansion is required.[12] For example, the QCA explained in its final decision on the 2017 AU:[13]

> We also note that any assessment of the public interest will be shaped by its context, and will vary over time. For example, when the coal market is experiencing a period of growth, it may be that the public interest requires particular attention be paid to facilitating efficient investment in new or expanded capacity.

[8] As part of the current expansion of DBCTM, the early extension of contracts was required under Clause 20(b) of the user agreements
[9] 27.0Mtpa of Conditional Access Agreements were received by 20 March 2020. The full potential of 8X is to deliver 13.3Mtpa
[10] QCA Interim Decision, p. 6
[11] DBCTM notes that secondary capacity could be traded or assigned during the period. This point relates to direct negotiations between DBCTM and access seekers for existing capacity
[12] DBCTM July 2019 Submission, paras 97-102
[13] QCA *DBCT Management's 2015 draft access undertaking – Final Decision* (November 2016), p. 26

20 DBCTM and access seekers are aligned in the need to agree a TIC which incentivises an expansion. DBCTM submits that a pricing model without a reference tariff will allow DBCTM to negotiate mutually acceptable outcomes with access seekers that enable DBCTM to expand the terminal and provide access to access seekers.

*Reference tariffs will not provide any certainty for access seekers*

21 Even if the QCA were to require that the 2019 DAU must include a reference tariff, access seekers would not have certainty as to pricing for expansion capacity. The certainty faced by access seekers under the 2019 DAU is the same as under the 2017 AU – that is, the certainty that access charges will/can ultimately be determined by the QCA. The implementation of an ex-ante reference tariff ***would not*** increase certainty for access seekers during the Regulatory Period as the reference tariff determined by the QCA at the beginning of the period would not apply to access seekers. In the 20 years that DBCT has been regulated, access seekers have never had certainty over the pricing of expansions.

22 As part of the expansion process DBCTM must make an application to the QCA for a Price Ruling.[14] The Price Ruling will determine whether the cost of the expansion is to be recovered through socialised pricing or differential pricing. The outcome of this Price Ruling is likely to have a significant impact on the prices paid by access seekers. The QCA's ongoing involvement in the price setting process for expanding access seekers means that it is not necessary or desirable for the 2019 DAU to provide absolute certainty by setting prices prior to the commencement of the access undertaking.

*It is inappropriate for QCA to reject pricing method based on existing users*

23 DBCTM submits that it would be inappropriate for the QCA to reject the 2019 DAU on the basis that a reference tariff would provide increased certainty for access holders. This is because:

23.1 An access undertaking is intended to regulate ***access*** to essential infrastructure – not regulate ongoing prices under contractual arrangements where access is already being provided.

23.2 The considerations in section 138(2) of the QCA Act focus on the interests of access seekers, not access holders.

23.3 Certainty of price for *access holders* does not impact on competition in upstream or downstream markets as access holders have already invested in those markets. It is not clear how additional or absolute price certainty for access holders would promote the economically efficient operation of, use of, or investment in DBCT.

23.4 While the QCA considers that it is relevant to have regard to the interests of access holders on the basis that their interests are typically aligned with access seekers,[15] as noted by the QCA, this is not the case with expansions.[16] For example, access holders have much to gain at the expense of access seekers in the case of a differentiated expansion (and the reverse is the case for a socialised expansion). In this sense, over the relevant Regulatory Period it is clear that the interests of access holders and access seekers interests do not coincide.

23.5 As acknowledged by the QCA in the Interim Decision,[17] and consistent with the QCA's findings in the Declaration Review,[18] existing users are already protected under their existing user agreements in the absence of a reference tariff.

[14] See section 5.12 of the 2019 DAU
[15] QCA Interim Decision, pp. 18-19
[16] QCA Interim Decision, p. 19
[17] QCA Interim Decision, p. 8
[18] See for example, QCA Draft recommendation - Part C: DBCT declaration review, December 2018, p. 37

*Access seeker arbitrations will be concurrent*

24 The fact that all access seekers will be seeking access to expansion capacity also means that any access seeker arbitrations would likely be concurrent, meaning that the QCA would only need to review the majority of the relevant information once. The QCA's concern regarding the time and cost efficiencies of reviewing information multiple times is not borne out in reality.[19]

25 DBCTM also notes that the review events for Access Holders are aligned, meaning that there is no risk that the QCA will be faced with 'rolling arbitrations' as posited by the QCA.[20] Rather, the QCA will be faced with two narrow periods in which arbitrations could occur, at which time it could simultaneously review the related information in reaching its determination(s).

*DBCTM will compete with other terminals to provide expansion capacity*

26 The QCA's Interim Decision concluded that access seekers' countervailing power is limited on the basis that there was a lack of close substitutes:[21]

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

27 DBCTM considers that the QCA has not given sufficient consideration to the fact that any competition between terminals for new access seekers (i.e. competition for the market) will occur for *expansion capacity* at *expansion pricing*.

28 While the QCA has recognised that DBCT is currently fully contracted and that new users will likely be negotiating for expansion capacity, it has not acknowledged its own views from other decisions that DBCTM will likely be in competition with other terminals for such expansion capacity based on expansion pricing. For example, in reviewing DBCTM's Differential Pricing DAAU and 2015 DAU, the QCA made the following comments:[22]

> "… having considered DBCT Management's position, we acknowledge that depending on the location of new mines, other coal terminals such as those at Abbot Point and Gladstone (the Wiggins Island Coal Export Terminal (WICET) and RG Tanna) for example, may be in a position to compete with DBCT for some new expansion tonnage."
>
> "DBCTM may face a degree of competition from other terminals such as APCT for a future expansion".[23]
>
> "…there may be circumstances where it is more cost effective for other terminals to expand before DBCT" [24]

29 The fact that the QCA has previously acknowledged that DBCTM may face competition in relation to expansion tonnage, and that it may be more cost effective for other terminals to expand before DBCTM, contradicts its current view that there are limited substitution possibilities for coal handling services at DBCT. Access seekers considering shipping at DBCT have to weigh up the cost of accessing expansion capacity at DBCT or spare/expansion capacity other terminals; this is unambiguously substitution.

30 The QCA acknowledges DBCTM's point in its Interim Decision,[25] however it fails to address or take this relevant consideration into account, simply asserting that there are no close substitutes for the DBCT

[19] QCA Interim Decision, p. 28
[20] QCA Interim Decision, p. 5
[21] QCA Interim Decision, p. 9
[22] QCA Final Decision on Differential Pricing DAAU, 25 August 2015, p. 20
[23] QCA Final Decision on 2015 DAU, 21 November 2016, p. 10
[24] QCA Final Decision on 2015 DAU, 21 November 2016, p. 132
[25] QCA Interim Decision, p. 53

Service without assessing what competition for expansion capacity would look like.[26] DBCTM submits that the QCA has therefore not reached a conclusion underpinned by the required assessment. The QCA must give consideration to the substitutability of *expanded capacity* before reaching a conclusion on whether access seekers have countervailing power.

31 DBCTM's April 2019 submission for the DBCT declaration process included a report by GHD Advisory which set out the average supply-chain cost that Goonyella mines incurred in accessing an expanded DBCT relative to accessing spare capacity at RG Tanna Coal Terminal (**RGTCT**).[27] The analysis showed that the average supply chain cost to Goonyella mines for accessing expansion capacity at DBCT was $18.74 per tonne (assuming differential pricing of port and below-rail assets occurs, which is the default under the 2017 AU), compared with the QCA's assessment of $16.94 per tonne.[28]

32 The assessment demonstrated that new access seekers, particularly those along the Southern Goonyella branchline, would prefer, for cost reasons, to use spare capacity at RGTCT than differentially priced expansion capacity at DBCT. Accordingly, the evidence shows that substitution for price-related reasons could very likely occur for DBCT expansion capacity.

33 This is supported by numerous public statements from Whitehaven Coal (**Whitehaven**) which indicate that it intends for coal from the Winchester South mine to be exported through a number of different terminals in Queensland. For example:

33.1 In its 2018 annual report, Whitehaven said 'Winchester South is well positioned from an infrastructure perspective, with one of the main rail lines in the Goonyella System transgressing the tenement and the Queensland electricity power grid nearby. Coal can be delivered by rail to either Dalrymple Bay, Gladstone or Abbot Point for export'.[29]

33.2 In its 14 February 2019 Environmental Impact Statement for the Winchester South mine, Whitehaven stated that 'the Norwich Park Branch Railway will be used as the connection into the broader Queensland rail network to transport the product coal by rail and export via Abbott [sic] Point, Dalrymple Bay or Gladstone coal ports through the Newlands, Goonyella and Blackwater rail networks, respectively (subject to the availability of rail and port allocation)'.[30]

33.3 In its 2019 annual report, Whitehaven indicated its plan for port capacity was to secure excess port capacity from other producers (via trading), noting 'Early talks have commenced with a number of coal producers who may have excess port capacity with the aim of securing port capacity for the Winchester South Project.'[31]

34 The first two points make it clear that Whitehaven was considering accessing capacity at three terminals. The second point also makes it clear that Whitehaven was concerned about rail and port capacity availability across the supply chains, indicating it clearly considered that various coal terminals were plausible options for export.

35 The third point indicates that Whitehaven's preference is to negotiate with producers who have excess capacity, which DBCTM understand amounts to capacity trading. Given that DBCT is fully contracted, and the large proportion of high-value metallurgical coal it handles, it is highly unlikely that any producers using DBCT would be willing to offload any capacity to Whitehaven, especially in light of the QCA's view that a 'unique service offering' is provided at DBCT. Hence, Whitehaven must be seeking capacity-trading opportunities at terminal others than DBCT, re-enforcing the point that other terminals are credible

[26] QCA Interim Decision, p. 53
[27] DBCTM April 2019 Declaration Review Submission, appendices 3 and 4
[28] DBCTM April 2019 Declaration Review Submission, appendix 4, p. 2
[29] See: http://www.whitehavencoal.com.au/wp-content/uploads/2018/09/WVN_224754_Annual-Report-2018_LR_FA-3.pdf, p. 39
[30] See: https://www.statedevelopment.qld.gov.au/coordinator-general/assessments-and-approvals/coordinated-projects/current-projects/winchester-south-project.html, p. ES-1
[31] See: https://whitehavencoal.com.au/wp-content/uploads/2019/09/Whitehaven-Coal-Annual-Financial-Report-2019.pdf, p. 19

substitutes to (an expanding) DBCT. Whitehaven [redacted] addressed the uncertainty of capacity constraints for both the rail and coal terminal options by making use of bi-directional spur lines.

36 New Hope Group made a submission on DBCTM's 2019 DAU, noting that it is anticipating being an access seeker during the DAU period (despite the EIS process for its New Lenton mine being suspended under section 67 of the *Environmental Protection Act 1994* (Qld)).[32] In an archived project description information section on a Queensland Government website, it was stated that:[33]

> Depending on future port capacity, stockpiled coal products would either be loaded directly onto trains at an on-site rail load-out facility, or trucked to an off-lease train load-out facility and then railed to Port of Abbot Point near Bowen, or Dalrymple Bay coal terminal near Mackay, for export.

37 As both DBCT and Adani Abbot Point Terminal (**AAPT**) are understood to be fully contracted, the relative costs of terminal (and below-rail) expansions are relevant to the New Hope Group's consideration of which terminal its New Lenton mine should use.

38 Further, as explained by DBCTM throughout the declaration review process, Lake Vermont and Middlemount have previously sought access to capacity at DBCT (as accepted by the QCA in its draft recommendation), but instead substituted to AAPT because it could expand to accommodate those mines in a shorter timeframe than DBCT.[34]

39 These examples clearly demonstrate that access seekers consider nearby coal terminals to be substitutes for expansion capacity at DBCT, with the resulting impact being that these terminals will provide an additional constraint on DBCTM.

## 2.2 Current Access Seekers

40 New Hope Group's submissions stress that 'smaller scale users' are disadvantaged as they would not have adequate resources or expertise to negotiate with DBCTM or participate in arbitrations.[35]

41 The QCA's Interim Decision acknowledged this concern, referencing New Hope's comments that new access seekers may be incapable of adequately understanding the impact of different factors on prices, such that they would be unable to negotiate an appropriate price with DBCTM:[36]

> New Hope Group suggested new access seekers in particular would encounter difficulties in understanding how different factors provided by DBCTM could have an impact on individually negotiated prices, thereby undermining positions in negotiation with DBCTM. Whitehaven Coal added:
>
> > In any case, even if an access seeker could be assured of access to all potentially relevant information, it would be extremely difficult (and costly) to assess that information against the claims of DBCT Management, let alone challenge those claims in a manner capable of altering DBCT's negotiating position.

42 DBCTM considers that these comments by New Hope Group and Whitehaven are disingenuous.

43 DBCTM notes that it is highly unlikely that New Hope Group will gain access to capacity at DBCT during the Regulatory Period, given its recent decision not to execute a Conditional Access Agreement (**CAA**), therefore forfeiting its position in the access queue. New Hope Group now sits behind access seekers who have signed CAAs and have preferential rights to at least 27.0Mtpa of capacity ahead of New Hope Group.

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[32] See: https://www.qld.gov.au/environment/pollution/management/eis-process/projects/withdrawn-lapsed/new-lenton-coal-project
[33] See: https://www.qld.gov.au/environment/pollution/management/eis-process/projects/withdrawn-lapsed/new-lenton-coal-project
[34] See for example the discussion in DBCTM's March 2019 Declaration Review submission pp. 55-61
[35] See for example New Hope Group September 2019 submission, p. 2
[36] QCA Interim Decision, p. 28

Rather, New Hope Group has an incentive to encourage the QCA to determine a publicly available reference tariff, in order to provide competitive pressure on other coal terminals in competition with DBCT to provide expanded capacity, as discussed in the section above.

44 The vast majority of access seekers currently in the DBCT access queue are large, sophisticated, mining companies, with extensive experience in conducting mining operations throughout the world, including the negotiation of access to critical infrastructure. Assessment of appropriate pricing is part of these firms' core businesses.

45 These firms are required to evaluate large, complex mining projects, and manage numerous technical assumptions and risks to justify the significant investments required to undertake a mining project. The prospect that these same firms are unable to assess an appropriate charge at DBCT is not tenable and is inconsistent with the commercial reality. This is especially the case where DBCTM's historical charges are publicly available, along with detailed and extensive reasoning behind the charges. The same regulator that has set the charges over the past two decades is to perform the role of arbitrator. Further, the QCA has noted it intends to publish an arbitration guide, to provide even greater clarity around how arbitrations may proceed. As a result, any remaining uncertainty of pricing (not access) sits within a range that remains immaterial in relation to the other risks and uncertainties facing the access seekers.

46 To provide some context as to the actual scope and sophistication of the 'smaller scale' access seekers in the DBCT access queue, Appendix 2 sets out publicly available information which clearly demonstrates that the access seekers who have recently signed and returned Conditional Access Agreements are more than capable of assessing information in order to effectively negotiate with DBCTM.

47 Even in the unlikely event that an access seeker was unable to adequately assess the available information such that it could form a view on the reasonableness of DBCTM's offer and enter effective negotiations, that access seeker is able to seek advice or direction from the QCA, and ultimately refer the matter to the QCA for determination through arbitration.

## 2.3 The 2019 DAU is near-identical in most respects to the 2017 AU

48 The QCA's Interim Decision appears to suggest that the status quo should be the default regulatory arrangement to ensure stability and predictability: [37]

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

49 DBCTM submits that it is not appropriate give greater weight to previous versions of the AU on the basis that it arguably provides greater stability and predictability. The QCA's statutory task is to assess the appropriateness of the submitted DAU on its merits, having regard to the factors set out in section 138 of the QCA Act. The QCA Act is clear that an AU must be for a defined period,[38] and a new AU process must be undertaken to implement a subsequent AU. In this sense it is Parliament's clear intent that AU's must be revisited on a regular basis at the end of a regulatory period. This statutory task inherently creates some uncertainty. However, the AU once approved, then provides stability and predictability over the course of the Regulatory Period. Absolute predictability beyond the Regulatory Period is not envisaged by the legislation. The circumstances facing stakeholders for this Regulatory Period are in stark contrast to those that existed in the 2017 AU, creating a clear case for change.

50 Notwithstanding this, DBCTM notes that the 2019 DAU is based on the 2017 AU and replicates the vast majority of the drafting and protections set out in the 2017 AU. This means that all predictability and

[37] QCA Interim Decision, p. 19
[38] QCA Act, s137(1)

stability afforded to the following processes remains unchanged. For example, the 2019 DAU maintains the following non-price features (amongst others):

50.1 well-established queuing provisions which maintain the first-in first-served principle;

50.2 the ability for an access seeker to insist on a standard access agreement on substantively the same terms and conditions as the existing user agreements;

50.3 a substantively similar expansion process; and

50.4 annual reporting requirements.

51 The only material change is to the method of determining access charges – and even this is similar, in that it can still ultimately be determined by the QCA. In this sense any concerns regarding stability and predictability of the 2019 DAU are unfounded.

# 3 Proposed amendments to the 2019 DAU

## 3.1 Summary

52 This section sets out DBCTM's proposed amendments to comprehensively address the issues with the 2019 DAU raised in the Interim Decision, and to satisfy the Approval Criteria identified by the QCA.

53 In most cases DBCTM has adopted the amendments to the 2019 DAU suggested by the QCA. In some limited cases DBCTM has proposed slight alternatives to the QCA's suggested amendments which seek to more effectively satisfy the Approval Criteria, or address the underlying problem identified by the QCA. DBCTM is committed to ensuring a pricing model without reference tariffs is implemented effectively. As such, variations proposed by DBCTM are an effort to improve the implementation of the 2019 DAU, and DBCTM is open to further amendments should the QCA identify the need for further clarity during its assessment of the 2019 DAU.

54 A summary of DBCTM's proposed amendments to the 2019 DAU to satisfy the QCA's Approval Criteria are set out in Figure 1 below.

**Figure 1: Overview of proposed amendments to 2019 DAU**

| QCA criteria for approval | DBCTM proposed amendments to 2019 DAU |
|---|---|
| **Information provisions that facilitate negotiations** | Adopt the QCA's suggestion to introduce new, prescriptive information requirements which will require DBCTM to disclose key information in a pre-determined format. The information is tailored to facilitate effective negotiations at DBCT. DBCTM will provide (amongst other things):<br>• information about the utilisation of the terminal, including the current and future contracted position of the terminal and the availability of spare capacity;<br>• historical pricing at the terminal;<br>• information on the historical regulated asset base, as well as the current and forecast capital base, updated to account for indexation, depreciation and capital expenditure;<br>• an independent assessment of efficient corporate costs for DBCTM; and<br>• historical and current estimates of DBCTM's weighted average cost of capital.<br>The 2019 DAU will also refer explicitly to compliance and enforcement provisions of the QCA Act as suggested by the QCA. |
| **Arbitration criteria that constrain asymmetrical market power** | Adopt the QCA's suggestion to amend the arbitration criteria in the 2019 DAU to align with s120 of the QCA Act, recognising that the other factors initially proposed by DBCTM are materially captured by the mandatory considerations set out in s120 in any event. |
| **Certainty that the arbitration criteria do not impede competition for access to capacity** | Adopt the QCA's suggestion to amend the arbitration criteria in the 2019 DAU to align with s120 of the QCA Act.<br>Adopt the QCA's suggestion to include provisions in the 2019 SAA which align the arbitration criteria applicable when arbitrated by a commercial arbitrator, with the criteria applicable under the existing user agreements. |
| **Clear and efficient process in negotiation and arbitration and transparency around arbitrated outcomes** | Reconsider the timeframes set out in the 2019 DAU, to ensure that a timely outcome is possible for access seekers and that they do not face undue time pressures.<br>Provide clarifications of timelines for arbitrations in the QCA's arbitration guidance document.<br>Adopt the QCA's suggestion to allow the outcomes of arbitration determinations to be released to (non-participating) access seekers, whether arbitration is conducted by the QCA or another party. |

55 DBCTM provides in Appendix 4 its proposed amendments to the 2019 DAU, set out as tracked changes against the 2019 DAU as initially submitted.

## 3.2 The QCA's Approval Criteria

56 The Interim Decision set out the characteristics the QCA considers necessary for an appropriate pricing model without a reference tariff:[39]

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

57 DBCTM has used these Approval Criteria, along with the QCA's suggested amendments to the 2019 DAU, as the basis for developing DBCTM's proposed amendments to the 2019 DAU. The proposed package of amendments comprehensively addresses the issues raised by the QCA in its Interim Decision and satisfies the Approval Criteria. The remainder of this section sets out the amendments that DBCTM has made to address each of these criteria.

## 3.3 Information provisions that facilitate effective negotiations

### Summary

58 The Interim Decision identified that information asymmetry could act as an impediment to effective negotiations under the 2019 DAU. The QCA considers that this information asymmetry arises because the drafting of the 2019 DAU does not provide sufficient clarity on the minimum information access seekers would receive.[40]

59 The QCA considers that in order to approve a pricing model without a reference tariff, the AU must include information provisions that facilitate negotiations. The QCA suggests that DBCTM could introduce

[39] QCA Interim Decision, p. 36
[40] QCA Interim Decision, p. 29

prescriptive requirements similar to the information disclosure requirements for gas pipelines subject to 'light regulation' under the National Gas Law.

60 DBCTM agrees with the QCA that the National Gas Regime may offer some insights as to how a negotiate/arbitrate regime for DBCTM could operate, but submits that the information disclosure requirements applicable to 'non-scheme' pipelines under Part 23 of the National Gas Rules (**NGR**) are a more useful comparison.

61 Ultimately, any information requirements must reflect DBCTM's individual circumstances and be fit for purpose – that is, they must facilitate effective negotiations. DBCTM's proposed changes ensure this and provide absolute clarity as to information that access seekers will be entitled to, as set out below in Figure 2.

**Figure 2: Proposed amendments to information requirements**

| QCA criteria for approval | DBCTM proposed amendments to 2019 DAU |
|---|---|
| **Information provisions that facilitate negotiations**<br>Provision of the necessary information would allow access seekers to enter negotiations from an appropriately informed position. A model that provides such information will contribute to effective negotiations with prices that are likely to be at least reflective of the efficient costs of supply, reducing the dependence on costly and time-consuming arbitrations | Adopt the QCA's suggestion to introduce new, prescriptive information requirements which will require DBCTM to disclose key information in a pre-determined format. The information is tailored to facilitate effective negotiations at DBCT. DBCTM will provide (amongst other things):<br>• information about the utilisation of the terminal, including the current and future contracted position of the terminal and the availability of spare capacity;<br>• historical pricing at the terminal;<br>• information on the historical regulated asset base, as well as the current and forecast capital base, updated to account for indexation, depreciation and capital expenditure;<br>• an independent assessment of efficient corporate costs for DBCTM; and<br>• historical and current estimates of DBCTM's weighted average cost of capital.<br>DBCTM proposes to provide this information confidentially to access seekers in accordance with new Schedules proposed for the AU, before and after the receipt of a valid access application, rather than publish it on its website.<br>The information will be certified by two senior managers of DBCTM.<br>The 2019 DAU will also refer explicitly to compliance and enforcement provisions of the QCA Act as suggested by the QCA. |

## QCA Interim Decision

62 In its interim draft decision, the QCA raises concerns that DBCTM's 2019 DAU would not result in access seekers receiving sufficient information to promote effective negotiations.[41] In particular, the QCA cites submissions from the User Group that, under the 2019 DAU, DBCTM would not be required to justify its proposed prices by reference to cost, or to explain the basis for any estimates of costs that it provides.[42]

63 The QCA suggests that, to alleviate the concerns regarding information asymmetry, DBCTM could amend the 2019 DAU to incorporate information disclosure requirements, similar to those that apply to light regulation pipelines under the National Gas Law (NGL). It explains the focus on the requirements of light regulation on the following basis:

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

[41] QCA Interim Decision, pp. 29-30
[42] QCA Interim Decision, p. 38

**DBCTM's response**

64 As explained in DBCTM's November 2019 Submission, the intention of the information disclosure provisions in the 2019 DAU was to ensure that access seekers were provided with an appropriate level of information, by 'casting the net wide' and allowing adequate flexibility to ensure that access seekers were able to request information relevant to the specific negotiation at hand.[43]

65 The information disclosure provisions set out in the 2019 DAU are based on the requirements set out in section 101 of the QCA Act. These provisions were introduced by the *Queensland Competition Act Amendment Bill 2000*. The Explanatory Notes to that Bill explain:[44]

> The objective of the amendments regarding the disclosure of information by access providers to access seekers is to enhance the effectiveness of the negotiation component of the negotiate/arbitrate model for third party access. While there is a broad statutory obligation to satisfy the reasonable requirements (including information requirements) of an access seeker during the course of access negotiations, there is considerable scope for the negotiations to be unduly lengthened by extended disputes about the scope and level of disaggregation of information to be provided.
>
> *Specifically, the objective of the amendment is to ensure that an access seeker has sufficient information with which to form an informed view about the reasonableness of the price and terms of access being offered.* There is a growing acceptance, reflected in legislative provisions in other access regimes around the country, about the essential items of information that are necessary to achieve this objective. The amendment lists these items as the minimum level of disclosure, thus reducing the possibility of unnecessary delays in the negotiation process. (emphasis added)

66 This clearly shows that Parliament considered the legislated information requirements (reflected in the 2019 DAU) were sufficient to facilitate effective negotiations.

67 While DBCTM maintains its view that these provisions would effectively facilitate negotiations, we have proposed amendments to ensure that the QCA's concerns regarding the level of information that was required under those provisions are adequately addressed, by providing for more prescriptive information requirements.

68 In determining the appropriate information requirements for the 2019 DAU, DBCTM considers that the QCA's focus should be on the purpose of information disclosure in the context of negotiations between DBCTM and access seekers and, where relevant, should be informed by how similar problems have been addressed in other contexts, such as for gas pipelines.

69 However, for the reasons explained in this section, DBCTM does not agree with the QCA's characterisation of how the gas pipeline sector is regulated, and its description of light regulation as being the closest case study to the 2019 DAU. DBCTM considers that it may be useful to consider the information disclosure requirements mandated under Part 23 of the NGR, which apply to non-scheme pipelines (those that are not determined to be 'covered' pipelines). Many of the information disclosure requirements that apply to light regulation pipelines were adopted from those that apply to non-scheme pipelines.

70 Consideration of the development of the Part 23 information disclosure requirements shows that these were tailored to the particular requirements of shippers using non-scheme pipelines, which had little access to information to be able to assess the reasonableness of price offers. This context should be considered by the QCA in framing what information disclosure is necessary in the context of the 2019 DAU.

71 Further, a key lesson to be drawn from the review that gave rise to the Part 23 regime is that information disclosure serves a different purpose to arbitration. The value of information disclosure in the context of a

[43] DBCTM November 2019 Submission, section 7.2

[44] *Queensland Competition Act Amendment Bill 2000* Explanatory Notes, pages 2-3

negotiate-arbitrate regulatory regime is not to require DBCTM to justify its proposed prices by reference to cost, but to allow users to establish whether these prices are reasonable by reference to various benchmarks (including cost).

72 DBCTM explains these points further in the following paragraphs.

*Regulatory regimes applying to gas pipelines*

73 Three different regulatory regimes are applied to natural gas pipelines, depending upon their classification:

73.1 pipelines that have satisfied the coverage test are called 'covered' or 'scheme' pipelines, and are subject to either 'full regulation' or 'light regulation', with the choice between these determined by the National Competition Council (**NCC**) by reference to the 'form of regulation factors' set out at clause 16 of the NGL; and

73.2 pipelines that have not satisfied the coverage test are called 'uncovered' or 'non-scheme' pipelines, and are subject to a form of regulation under Part 23 of the NGR, unless exempted from some or all of these requirements by the Australian Energy Regulator (**AER**).

74 Unlike the QCA's description,[45] non-scheme pipelines are not generally 'unregulated' – although DBCTM notes above that some pipelines might be provided an exemption from some or all of the obligations under Part 23 of the NGR.

75 Relatively few gas transmission pipelines are covered, and subject to full regulation or light regulation. The large majority of gas transmission pipelines are not covered, and therefore subject to regulation under Part 23 of the NGR. However, all of these regulatory regimes apply (either in part, or wholly) a negotiate-arbitrate framework that has some degree of similarity to the access regime set out in Part 5 of the QCA Act. Relevantly, under Part 23 non-covered service providers and shippers negotiate terms for services with the backstop of commercial arbitration, subject to the scheme objective and pricing principles (though there are some exemptions available from some of the requirements).

*Information disclosure under light regulation and Part 23 gas pipelines*

76 The QCA cites the information disclosure requirements applying to light regulation gas pipelines as being most pertinent to the regulation of the coal handling services at DBCT. [46]

77 Although DBCTM agrees that the information disclosure requirements for light regulation gas pipelines are relevant as an example of regulatory practice in an industry with similar characteristics, it is important to see through to why those requirements were introduced to that industry, and whether the same or similar requirements would be fit for purpose at DBCT.

78 In particular, it is useful to note that the information disclosure requirements for light regulation pipelines cited by the QCA reflect recent changes, recommended by the AEMC, to bring these requirements substantially into line with those used by pipelines regulated under the Part 23 arrangements – whereas previously the information disclosure requirements were less onerous for light regulation pipelines.[47] Given this broader context, it is relevant to review the considerations that drove the adoption of these requirements for pipelines subject to the Part 23 arrangements.

[45] QCA Interim Decision, p. 39
[46] QCA Interim Decision, p. 39
[47] AEMC, *Review into the scope of economic regulation applied to covered pipelines: final report*, 3 July 2018, pp. 20-21

*Development of the Part 23 information disclosure requirements*

79 The Vertigan review, in making a recommendation to introduce the Part 23 regime for information disclosure and binding arbitration for non-scheme gas pipelines, described the information asymmetry problem as follows:[48]

> When shippers, either foundation or new entrants, seek to access a service on a particular pipeline they often have no reference to historic or current pricing information to be able to negotiate a reasonable commercial outcome. Pipeline operators have no compulsion to divulge the pricing information and thus the level of information publicly available varies between pipeline operators and in relation to different pipelines. Shippers, or potential shippers, currently have no benchmarks to assess if the tariffs and terms offered are reasonable. Numerous stakeholders consulted, particularly large gas users frequently indicated that they have no way of knowing if they are being offered a reasonable deal. Additional information needs to be provided on not only the prices associated with different services but also an indication of the methodology used to determine the prices and the underlying costs of providing the services.

80 In the context of the design of the gas regulatory arrangements, the purpose of information disclosure is described by the GMRG as being to:[49]

> …provide a prospective user with adequate information to consider whether it should seek access to services on a non-scheme pipeline and to *carry out a high-level assessment* of the reasonableness of the service provider's standing price, as well as terms and conditions associated with the services available. (emphasis added)

81 In assessing the scope of economic regulation applied to covered pipelines, the AEMC has stated that:[50]

> More broadly, requiring financial and offer information disclosure for light regulation pipelines should enable users and prospective users to negotiate prices, terms and conditions on an informed basis, mitigating potential monopoly power and leading to better prices flowing through to consumers, consistent with achieving the NGO.

82 The problems described in the Vertigan review are specifically those experienced by gas shippers on non-scheme pipelines. Similarly, the information disclosure solutions proposed by the Vertigan review (and later developed by the GMRG) have been developed to solve these specific problems.

83 As described in the quote from the Vertigan review, before the introduction of the Part 23 arrangements shippers seeking access to non-scheme pipelines had little or no basis upon which to make an assessment of whether the offer they were provided was reasonable. The degree to which pricing information was public varied between pipeline operator, and there was no standardised reporting of costs or assets against which prices could be benchmarked. Given this context, Dr Vertigan's vision of information disclosure was one that placed some of this information in the hands of shippers.

*Distinction between the role of information disclosure and arbitration*

84 Dr Vertigan drew a distinction between the purpose of information disclosure and arbitration. Whereas the purpose of information disclosure is to correct information asymmetry that hinders effective negotiation, Dr Vertigan considered that recourse to binding arbitration would:[51]

[48] Vertigan, M, *Examination of the current test for the regulation of gas pipelines*, 14 December 2016, p. 79
[49] GMRG, *Gas pipeline information and arbitration framework: initial National Gas Rules explanatory note*, 2 August 2017, p. 20
[50] AEMC, *Review into the scope of economic regulation applied to covered pipelines: final report*, 3 July 2018, p. 185
[51] Vertigan, M, *Examination of the current test for the regulation of gas pipelines*, 14 December 2016, p. 93

> … reduce the imbalance in negotiating power, constrain the exercise of market power and encourage downward pressure on gas transportation prices.

85 This distinction is important. Information disclosure is not intended, by itself, to entirely overcome an imbalance in negotiating power. For example, while information disclosure allows shippers to make an assessment of whether they are being offered a reasonable price, there is an additional mechanism which *assures* shippers that the price *is* reasonable – arbitration and the threat of arbitration.

86 This distinction is relevant because the concerns raised by the User Group regarding the information disclosure requirements proposed in the 2019 DAU reflect a misplaced focus on a role for information disclosure to bind DBCTM to propose prices that are calculated using the building block method or to adopt a particular approach to estimating the rate of return.[52] This is not the role that information disclosure conventionally plays in other Australian negotiate-arbitrate regulatory regimes. The price for access, and how it is calculated, are matters for the arbitrator to decide, if terms of access cannot be negotiated.

*Relevance of these factors for information disclosure by DBCTM*

87 The factors that gave rise to the information disclosure requirements developed for non-scheme gas pipelines are not present in respect of the services provided by DBCTM.

88 The regulatory regime that has been applied to the present time for the coal handling service at DBCT has given rise to a significant degree of transparency as to prices and the methodology by which these have been calculated from costs. This context diverges significantly from the problems faced by shippers of non-scheme gas pipelines.

89 In particular, the history of regulation of the services provided by DBCTM means that the current and previous prices charged for the service, and the efficient costs associated with its delivery, are in the public domain. The availability of this historical pricing information allows even the least sophisticated access seekers to easily undertake a high-level assessment of the reasonableness of any prices offered by DBCTM and make a decision whether to refer the matter to the QCA for arbitration. As set out in the Interim Decision, the QCA does not consider the possible range of access charges between users, if similar to historical ranges reported by DBCTM, would have a material impact on investment incentives.[53] This provides access seekers with a useful yardstick for the range of prices which the QCA is likely to consider reasonable.

*DBCTM's proposed information disclosure requirements*

90 DBCTM has developed its proposed information requirements in a bottom up manner, identifying the information that is likely to facilitate effective negotiations for access to DBCT, having regard to the unique historical information available for DBCT as well as how prices have been set, and may be set going forward.

91 DBCTM proposes to provide access seekers with the following information which it considers will enable access seekers to assess the reasonableness of its prices:

- 91.1 information about the utilisation of the terminal, including the current and future contracted position of the terminal and the availability of spare capacity;
- 91.2 information on the previous Terminal Infrastructure Charges determined by the QCA;
- 91.3 information regarding DBCTM's historical regulatory asset base as well as its current and forecast capital base, taking into account annual indexation, depreciation and capital expenditure;

[52] User Group, *Submission in response to 2019 DBCT draft access undertaking*, 23 September 2019, pp. 45-46
[53] QCA Interim Decision, p. 35

91.4 regular updates to its assessment of efficient corporate costs, based on independent expert estimates using benchmarking against other comparable entities;

91.5 the weighted average cost of capital(s) previously determined by the QCA and their component parameters;

91.6 DBCTM's estimate of an appropriate current weighted average cost of capital and its component parameters;

91.7 any other relevant forecast cost estimates and their bases;

91.8 information regarding the outcomes of any commercial arbitrations with access holders; and

91.9 any other relevant information that would assist an access seeker to determine the reasonableness of estimated access charges provided by DBCTM.

92 DBCTM has proposed specific drafting for these new information requirements in Appendix 4, and further includes an illustrative template of the information provisions in Appendix 3.

93 This information will be provided in two tranches. Historical information can be requested prior to the submission of an access application, enabling potential access seekers to assess the likely prices at DBCT by reference to this previous information. Current and forecast information is then provided as part of an Indicative Access Proposal (after DBCTM has received a valid access application). This will enable DBCTM to provide the most up to date current and forecast information to inform access negotiations.

94 DBCTM's extensive existing reporting requirements set out in section 10 of the 2019 DAU will also remain.

95 This proposed scope of DBCTM's disclosure reflects information that parties can use to make an assessment of the reasonableness of price during negotiations, which would not otherwise be available without the disclosure.

### *Confidentiality of information provided*

96 DBCTM proposes to provide information to access seekers (and potential access seekers) on a confidential basis consistent with the approach adopted at other ports throughout Australia. The information provided will be the same for all access seekers, at a given point in time.

97 The purpose of providing the information is to facilitate effective bilateral confidential negotiations with access seekers. The QCA has proposed no justification for why it is necessary for the information to be published externally to achieve this purpose and this approach is inconsistent with industry practice.

98 DBCTM's proposed approach is also consistent with the information requirements under the QCA Act which require that an access seeker must not, without consent of DBCTM, disclose to another person information provided under those information disclosure provisions.[54] As explained in the Explanatory Note which introduced this provision:[55]

> This provision is designed to protect any confidential information disclosed to an access seeker or an access provider by either party during the course of access negotiations.

### *Compliance and enforcement*

99 The User Group's submissions claimed there were no avenues to challenge whether the information provided is actually sufficient to provide for an informed negotiation.

[54] QCA Act, s101(6)
[55] *Queensland Competition Authority Amendment Bill 2000* Explanatory Notes, p. 15

100 While the QCA agreed with DBCTM's view that clause 17 of the 2019 DAU provides access seekers with the ability to raise a dispute as to DBCTM's compliance with its information provision obligation,[56] it suggested amendments to the 2019 DAU to:

100.1 Include an ability, consistent with section 101(5) of the QCA Act, for access seekers and DBCTM to seek advice or directions from the QCA - with the intention that this would provide a clear signal that access seekers may seek the QCA's advice and directions if they believe DBCTM has breached compliance with its information provision obligations; and

100.2 explicitly refer to section 150A of the QCA Act - with the intention that this would provide a clear signal to DBCTM that it must comply with an approved access undertaking, and to act otherwise would potentially lead to enforcement action.

101 While DBCTM is already cognisant of its obligation to act in accordance with an approved AU, and does not strictly-speaking consider the amendments necessary, DBCTM nonetheless proposes to make the amendments suggested by the QCA, in order to ensure that there is no doubt as to DBCTM's obligations and access seekers' ability to seek advice and direction from the QCA.

102 DBCTM proposes that the information provided is certified by senior representatives of DBCTM.

## 3.4 Arbitration criteria that constrain asymmetrical market power

### Summary

103 The Interim Decision identified issues with the proposed arbitration criteria in the 2019 DAU. DBCTM has adopted the QCA's proposed changes to the 2019 DAU to put beyond doubt that the arbitration criteria effectively constrain any market power held by DBCTM.

104 While DBCTM does not agree with the QCA's analysis of the arbitration factors included in the initially proposed 2019 DAU, it does agree that the arbitration criteria in section 120 of the QCA Act are appropriate for the purposes of the 2019 DAU. DBCTM's view is that the initially proposed arbitration criteria are matters that should be appropriately taken into account in the application of the section 120 criteria.

105 DBCTM is concerned, however, that the QCA Interim Draft's proposed approach to arbitrations appears to focus excessively, if not exclusively, on calculating an access charge on the basis of efficient cost, without having regard to the other section 120 factors. In accordance with the Act, the QCA must have regard to all of the section 120 factors in determining any future arbitrations, and should not predetermine the approach to setting access charges through any arbitration process. This is discussed further in section 4.

106 Figure 3 sets out DBCTM's proposed amendments to the arbitration criteria in the 2019 DAU.

**Figure 3: Proposed amendments to arbitration criteria**

| QCA criteria for approval | DBCTM proposed changes to 2019 DAU |
|---|---|
| **Arbitration criteria that constrain asymmetrical market power**<br>The criteria that we must have regard to in arbitrations should act to credibly constrain DBCTM's market power and lead to pricing that reflects at least the efficient costs of supply, consistent with the pricing principles of the QCA Act (s. 168A). Effective criteria should provide certainty to our approach, reducing the monetary and time costs for parties and potentially incentivising agreement through negotiation | Adopt the QCA's suggested amendments to the arbitration criteria in the 2019 DAU to align with section 120 of the QCA Act. |

[56] QCA Interim Decision, p. 40

### QCA Interim Decision

107 The QCA's Interim Decision explained that the arbitration criteria in the 2021 AU must credibly constrain DBCTM's market power:[57]

> The criteria that we must have regard to in arbitrations should act to credibly constrain DBCTM's market power and lead to pricing that reflects at least the efficient costs of supply, consistent with the pricing principles of the QCA Act (s. 168A). Effective criteria should provide certainty to our approach, reducing the monetary and time costs for parties and potentially incentivising agreement through negotiation.

108 The QCA considers that amendments are necessary to ensure that an arbitration in accordance with the 2019 DAU is a credible threat to constrain DBCTM from exercising any market power in negotiations.

109 The QCA suggested that this could be achieved by removing the arbitration factors outlined in clause 11.4(d) of the 2019 DAU, and instead requiring the QCA to have regard only to the factors outlined in section 120 of the QCA Act.[58]

110 The QCA also proposed to issue a guidance document which DBCTM discusses separately in section 5.

### DBCTM's response

111 While DBCTM remains of the view that the original criteria set out in the 2019 DAU effectively constrained its market power, DBCTM agrees that the section 120 factors set out in the QCA Act are fit-for-purpose and are an appropriate arbitration criteria for the purposes for the 2019 DAU. As such, DBCTM proposes to amend the 2019 DAU such that the QCA is required to only have regard to the factors in section 120 of the QCA Act. Detailed drafting for this change is provided in Appendix 4.

112 In the Interim Decision the QCA acknowledged that a number of DBCTM's proposed criteria formed a subset of the considerations under section 120.[59] Consistent with this view, the arbitration criteria initially proposed by DBCTM in the 2019 DAU will still be relevant to the QCA's determination of any arbitration under the amended 2019 DAU.

## 3.5 Certainty that arbitration criteria do not impede competition for access to capacity

### Summary

113 The QCA raised concerns that the application of the arbitration criteria may result in access seekers being materially worse off than access holders. DBCTM's proposed changes to address this issue are set out in Figure 4.

[57] QCA Interim Decision, section 4.4
[58] QCA Interim Decision, section 5.3.2, p. 41
[59] QCA Interim Decision, p. 33

**Figure 4: Proposed amendments to arbitration criteria and SAA**

| QCA criteria for approval | DBCTM proposed changes to 2019 DAU |
|---|---|
| **Certainty that the arbitration criteria do not impede competition for access to capacity**<br>The arbitration criteria should not result in access seekers being materially worse off in negotiations compared to access holders, where the latter may benefit from arbitration criteria that more effectively constrain DBCTM's market power under existing access agreements. It is critical to provide certainty that access holders and seekers operate on 'equal footing' in this regard, whereby neither party is exposed to monopoly pricing or prices that are otherwise inconsistent with the pricing principles in section 168A of the QCA Act | Clarify that the QCA must apply the arbitration criteria in the determination of price reviews for existing users.<br>Align the arbitration criteria with section 120 of the QCA Act (which the QCA has stated it would very likely apply if 2019 DAU did not apply to existing users).<br>Include provisions in the 2019 DAU SAA which align the arbitration criteria applicable when arbitrated by a commercial arbitrator, with the criteria applicable under the existing user agreements. |

## QCA Interim Decision

114 The Interim Decision outlined the QCA's concern that there was uncertainty as to whether arbitrations under existing user agreements would need to apply the arbitration factors specified in the 2019 DAU, and that existing users may receive favourable terms in arbitrations compared to access seekers and new access holders with agreements under the 2019 DAU.[60]

115 While this issue was characterised in the Interim Decision as 'competition for access to capacity'[61] DBCTM notes that the previously approved queuing provisions effectively operate to prevent competition for capacity at DBCT in a traditional sense, as access seekers gain capacity on a first come-first served basis. While a queuing process that allowed more efficient access seekers to offer a higher TIC and compete for access to DBCT would likely increase allocative efficiency at the terminal, DBCTM understands the QCA's reference to 'certainty that the arbitration criteria to not impede competition for access to capacity' to mean that access seekers should not be materially worse off than access holders.

## DBCTM's response

*Alignment of arbitration criteria for access seekers and existing users*

116 Existing user agreements provide that where the QCA is willing and able to arbitrate a dispute relating to the review of access charges, it may conduct the arbitration in such a manner as it sees fit.[62]

117 The QCA indicated in its Interim Decision that in exercising this discretion it would apply the arbitration criteria set out in section 120:[63]

> We note that existing access agreements do not specify the arbitration process or factors we must have regard to in an arbitration. However, in practice, we would very likely have regard to matters similar to those set out in section 120 of the QCA Act…

118 DBCTM considers that this is an appropriate approach.

119 As discussed above, DBCTM proposes to adopt the QCA's suggested amendments to the arbitration criteria in 11.4(d) of the 2019 DAU to align with section 120 of the QCA Act. This will align the arbitration criteria for existing users and access seekers.

[60] QCA Interim Decision, section 5.3.3, p. 43,45
[61] QCA Interim Decision, p. 36
[62] Clause 7.2
[63] QCA Interim Decision, p. 43

*Alignment of existing user agreements and 2019 DAU SAA*

120 DBCTM's 2019 DAU proposed that the arbitration factors outlined in clause 11.4(d) will apply to future access holders who sign access agreements according to the 2019 DAU and cannot satisfactorily negotiate a new price with DBCTM at the end of the five-year review of charges (clause 7.2(c)(ii) of the 2019 DAU SAA).[64]

121 The QCA considers that there may be merit in amending clause 7.2 of the 2019 DAU SAA to reflect provisions in the existing user agreements (clauses 7.2 (d) and (e) of the 2017 AU SAA).[65] These provisions require that:[66]

> (d) If the matter is referred under clause 7.2(c)(ii) to arbitration, then arbitration must be effected as follows:
>
> (i) by the QCA in such manner as it sees fit, after consultation with the parties; or
>
> (ii) if the QCA is unwilling or unable to act, by a single arbitrator agreed upon between the parties; or
>
> (iii) in default of agreement under clause 7.2(c)(ii) within 10 days after the matter is referred to arbitration, by a single arbitrator selected by the Chair of the Queensland Chapter of the Institute of Arbitrators and Mediators, Australia.
>
> (e) If a matter is referred to arbitration under clause 7.2(d)(ii) or clause 7.2(d)(iii), then the arbitrator must have regard to the following matters:
>
> (i) an appropriate asset valuation of the Terminal and the relevant Terminal Component;
>
> (ii) an appropriate rate of return for DBCT Management;
>
> (iii) the terms of this Agreement;
>
> (iv) the expected future tonnages of Coal anticipated to be Handled through the Terminal and the relevant Terminal Component;
>
> (v) any other matter agreed to by the User and DBCT Management and notified by them in writing to the arbitrator;
>
> (vi) any other matter which is submitted by either the User or DBCT Management and accepted by the arbitrator as being relevant; and
>
> (vii) 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).

122 DBCTM proposes to implement this amendment as suggested by the QCA.

## 3.6 Clear and efficient process in negotiation and arbitration – timing

### Summary

123 The QCA's Interim Decision raised concerns that the timeframes in the 2019 DAU may result in access seekers facing 'asymmetric time pressures' resulting in access seekers agreeing to inefficient prices.

124 DBCTM does not consider that this accords with commercial reality faced by access seekers and this section sets out why DBCTM considers the QCA's concerns to be unwarranted. Notwithstanding this, DBCTM is

[64] QCA Interim Decision, p. 43
[65] QCA Interim Decision, p. 43
[66] DBCT Management 2017 Access Undertaking Standard Access Agreement, cl. 7.2(d)(i) and cl. 7.2(e)

open to changing the timeframes under the 2019 DAU to address the QCA's concerns, and ensure that the process is clear and efficient.

**Figure 5: Proposed amendments to timing of access process**

| QCA criteria for approval | DBCTM proposed changes to 2019 DAU |
|---|---|
| **Clear and efficient process in negotiation and arbitration and transparency around arbitrated outcomes**<br>Clear and certain processes ensure access seekers and holders are not impacted by asymmetrical time pressure. Transparency of arbitration outcomes leads to efficient price determinations and decreases the likelihood of rolling arbitrations. | While it is not clear to DBCTM that access seekers face 'asymmetric' time pressures, DBCTM is happy to reconsider the timeframes set out in the 2019 DAU, to ensure that a timely outcome is possible for access seekers and that they do not face undue time pressures.<br>DBCTM also considers that the guidance document should include discussion and clarification of the timelines for any arbitration. |

## QCA Interim Decision

125 The QCA's Interim Decision acknowledged concerns raised by the User Group and Whitehaven relating to time pressures faced by access seekers. The concerns raised by the User Group and Whitehaven, while connected, related to two separate issues:

125.1 the User Group contended that access seekers would be pressured to reach agreements with DBCTM in order to increase their prospects of obtaining limited available access;[67]

125.2 Whitehaven argued that the timeframes in the 2019 DAU were lengthy and that DBCTM did not have an incentive to expedite the process, implying that this had the potential to cause delays to the mining projects which are sensitive to delays.[68]

126 In its Interim Decision, the QCA explained that it does not consider that the protections in the 2019 DAU are sufficient, in the absence of a reference tariff, to ensure timely commercial agreements.[69] The QCA's preliminary view was that the proposed 2019 DAU may result in access seekers not gaining access to capacity in a timely manner and/or having to accept a TIC that is reflective of asymmetric time pressure.[70]

127 The QCA considered that this asymmetric time pressure was a result of the non-competitive environment for services at DBCT:[71]

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

128 However, the QCA did not explain why a 'non-competitive' environment for services at DBCT would lead to greater time pressures on access seekers than DBCTM in negotiations under the 2019 DAU.

129 In line with Whitehaven's point, the QCA also pointed to the time-cost involved in referring the matter to arbitration as a potential reason why an access seeker may accept an inefficient price.[72]

[67] User Group September 2019 Submission, p. 14
[68] Whitehaven September 2019 Submission, p. 4 (c)
[69] QCA Interim Decision, p. 30
[70] QCA Interim Decision, p. 31
[71] QCA Interim Decision, p. 31
[72] QCA Interim Decision, p. 31

**DBCTM response**

*The access queue*

130 The access queuing provisions ensure that access seekers are not pressured to reach inappropriate agreements with DBCTM in order to secure access to limited terminal capacity.

131 As explained in DBCTM's previous submissions,[73] the access queuing provisions have been drafted such that the process to secure access to the terminal is separate from the process to determine the TIC that will apply. Once an access seeker establishes its place in the queue it is ***guaranteed access*** (provided it is prepared to enter into an access agreement for the capacity and subject to any required expansions). The willingness of the access seeker to agree terms with DBCTM does not affect this guarantee, and the queuing provisions provide a process whereby the access seeker can enter into an access agreement, notwithstanding that a TIC has not been agreed with DBCTM.

132 This ensures that there is no risk to the access seeker of losing this capacity because it cannot agree access charges with DBCTM. DBCTM ***is not*** permitted to offer capacity to another access seeker in order to leverage an access seeker into accepting a higher inefficient TIC, as suggested by the User Group.[74]

133 Therefore, it follows that access seekers do not face any time pressure from a desire to 'reach agreement to increase their prospects of obtaining limited available access', as suggested by the User Group.[75] Rather access to limited capacity is determined solely based on the queueing provisions in the 2019 DAU.

134 The queuing provisions give access seekers certainty that they will be able to gain access to capacity at the terminal, prior to the settlement of the access agreement.

135 In the context of the current situation at DBCT, as discussed in section 2, DBCT will be fully contracted for the Regulatory Period, meaning access seekers will be seeking access to expansion capacity.

136 Access seekers at DBCT have already entered into Conditional Access Agreements with DBCTM for 27.0Mtpa of capacity, giving those access seekers certainty of access to expansion capacity (to the extent it becomes available). It is not viable for DBCTM to expand the terminal to accommodate all of this demanded capacity during the Regulatory Period, and as such this group of access seekers represents all access seekers that DBCTM will negotiate with during the Regulatory Period.

137 These access seekers have essentially secured capacity (to the extent it becomes available) prior to the QCA's determination of a pricing methodology or the negotiation or arbitration of a pricing approach, meaning that there was no undue pressure for access seekers to agree to a high, inefficient TIC.

*The timeframes in the 2019 DAU and QCA Act provide certainty for access seekers*

138 The standard timeframes set out in the 2019 DAU will almost certainly not be used during the Regulatory Period, given that all access granted will be for expansion capacity or through secondary trading.

139 Nonetheless, the timeframes set out in the 2019 DAU were designed to provide certainty to access seekers by specifying definitive timeframes under which negotiations must be concluded, and when outcomes can be referred for arbitration. This ensures that access seekers have a clear path to a timely outcome. In determining the timeframes under the 2019 DAU, DBCTM has sought to balance the need for a timely outcome and the desire to allow sufficient time for meaningful negotiations. DBCTM's 2019 DAU reduced a number of the timeframes in the QCA approved 2017 DAU with the purpose of ensuring that the access seeking process can be conducted efficiently and expediently. DBCTM considers that these timeframes

[73] DBCTM July 2019 Submission, section 6
[74] DBCT User Group September 2019 Submission, p. 14
[75] User Group November 2019 submission, p. 14

provide for the access seeking process to be concluded in a timely way which will not cause delays to mining projects.

140 As previously submitted, mines require ***many years*** of development before they reach the operating stage (around which time access is negotiated at DBCT).

140.1 The access queue provisions at DBCT require an access seeker to provide a significant amount of information to DBCTM to form part of the queue (through the Access Form, Schedule A of the AU). This information includes a project timeline for construction / commissioning / production phases and how the project is tracking against that timeline, a description of the access seeker's progress in obtaining the necessary approvals for the project, a report prepared by a competent person in accordance with the JORC Code and Coal Guidelines detailing an estimate of the Coal Resources and Marketable Coal Reserves allocated for shipment, and an explanation of how these reserves are consistent with having sufficient reserves for the capacity request.

140.2 A JORC report is typically commissioned by a mining company early in the planning phase, as the information contained is critical to making the decision to proceed with a Mining Lease. There are at least two years of pre-execution engineering, and approximately 6-12 months of concept engineering required prior to the EIS process.

140.3 Therefore, access seekers are not making significant investment decisions at the time they are seeking access to DBCT; they are doing it considerably before-hand.

141 This creates considerable lead time and allows for access to DBCT to be negotiated well in advance of the commencement of access agreements. DBCTM has always welcomed early engagement with access seekers and is happy to commence in-principle negotiations in advance of the formal process set out in the 2019 DAU where appropriate, and this process will now be supplemented by the substantial amount of information which DBCTM is required to provide prior to the submission of an access application. This enables access seekers to gauge whether a negotiated outcome is likely well in advance of the timeframes set out in the 2019 DAU, and to plan accordingly such that there is no risk that an agreement will not be in place by the time the access seeker is ready to ship coal (available capacity permitting).

### *Where agreement is not possible arbitration will be completed within 6 months*

142 In circumstances where agreement between DBCTM and an access seeker is not possible, an access seeker may refer the dispute to arbitration. The QCA Act then requires that the arbitration must make best endeavours to make an access determination within 6 months from the day which an access dispute notice was provided to the authority.[76] In the scheme of mining projects, the development of which typically takes many years before moving to the operating stage, a 6 month period is inconsequential, and if adequately planned for would not affect the timing of the mining project.

143 For example, New Hope's New Acland mine expansion in Queensland's West Moreton system has been held up by a dispute for about three and a half years relating to whether the mine should be permitted to expand.[77] By comparison 6 months is inconsequential.

144 An access seeker's right to access and its position in the queue is unaffected if the matter is referred to arbitration. In this sense, the time cost involved in engaging in arbitration does not 'exacerbate the time pressures faced by an access seeker relative to DBCTM' as suggested by the QCA.[78]

[76] QCA Interim Decision, p. 31
[77] See *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd & Ors* [2019] QCA 184
[78] QCA Interim Decision, p. 31

*Certainty of cash-flows*

145 Both DBCTM and the access seeker have an incentive to negotiate an efficient, mutually acceptable TIC to gain certainty as to their cash-flows. In circumstances where this is not possible, each party has certainty that it may refer the matter to be arbitrated by the QCA in the timeframes set out in the 2019 DAU. The access seeker may refer an access dispute to the QCA for determination. The QCA Act then requires the QCA to make best endeavours to make an access determination within 6 months of receiving an access dispute notice.[79]

*Potential changes to the 2019 DAU*

146 While it is not clear to DBCTM that access seekers face 'asymmetric' time pressures, DBCTM is happy to further consider the timeframes set out in the 2019 DAU, to ensure that a timely outcome is possible for access seekers and that they do not face undue time pressures.

147 To assist in this task, DBCTM requests that the QCA clearly identify the source of the time pressure for access seekers, the reason why that may lead to access seekers accepting an inefficient TIC rather than referring the matter to arbitration, and the specific timeframes that it considers will lead to untimely outcomes. DBCTM is committed to amending the 2019 DAU to adopt any timeframe changes suggested by the QCA, in order to address any concerns it may have.

## 3.7 Transparency of arbitrated outcomes

148 The QCA's Interim decision raised concerns regarding the lack of transparency of commercial arbitration outcomes which it considered could lead to rolling arbitrations.[80]

**Figure 6: Proposed amendments to information requirements**

| QCA criteria for approval | DBCTM proposed changes to 2019 DAU |
|---|---|
| **Clear and efficient process in negotiation and arbitration and transparency around arbitrated outcomes**<br>Transparency of arbitration outcomes leads to efficient price determinations and decreases the likelihood of rolling arbitrations. | Adopt the QCA's suggestion to allow the outcomes of arbitration determinations to be released to (non-participating) access seekers, whether an arbitration is conducted by the QCA or another party. |

### QCA Interim Decision

149 The QCA's Interim Decision explained that it considered that because an access seeker is unable to request information regarding the outcome of an arbitration where the arbitrator is not the QCA, there is a lack of transparency which could contribute to rolling arbitrations.[81]

150 The QCA noted that the 2019 DAU could be amended to allow all arbitrated outcomes to be available to access seekers to improve transparency and place access seekers and DBCTM on a more 'level playing field'.[82]

[79] QCA Act, s117A
[80] QCA Interim Decision, p. 48
[81] QCA Interim Decision, p. 48
[82] QCA Interim Decision, p. 48

### DBCTM response

151 DBCTM has adopted the change as suggested by the QCA and has included a requirement to provide information on any arbitrated outcomes as part of its indicative access proposal.

## 3.8 Conclusion on proposed amendments

152 DBCTM is confident that the proposed amendments set out in this section comprehensively address the issues with the 2019 DAU raised in the Interim Decision, and therefore satisfy the Approval Criteria identified by the QCA.

153 To the extent that these proposed amendments require further refinement, as previously indicated, DBCTM is committed to working with the QCA, users and access seekers, to ensure that the amendments are fit-for-purpose.

# 4 Application of the arbitration criteria

## 4.1 Summary

154 DBCTM considers that the QCA's Interim Decision focuses too heavily on calculating an access charge on the basis of the efficient cost of providing the service (applying a building block model) and this anticipated approach may not have proper regard to the other section 120 factors. DBCTM considers that the appropriate time to determine the specific pricing methodology to apply is at the time of the arbitration – having regard to the criteria in section 120 and the specific circumstances of the given arbitration. If the QCA seeks to predetermine this outcome through the DAU process, and without having regard to the matters in section 120, it risks creating inefficient outcomes.

155 While the pricing principles in the QCA Act require prices that allow DBCTM to recover *at least* its efficient costs of providing the service, this should form the *minimum price* that the QCA can set. The wording of the QCA Act is clear that the price set by the QCA can still be set higher, having regard to the factors set out in section 120 of the QCA Act as they apply in the specific circumstances of a given arbitration.

156 The QCA's intended approach risks conflating *efficient cost* with *efficient price*. An efficient price would lie between efficient cost and value to users. The QCA's interpretation results in any available rent being allocated exclusively to the user, which is an extreme outcome in light of the section 120 factors. The QCA has not provided a consideration of the other section 120 factors, nor any justification for why it considers this approach appropriate.

157 DBCTM submits that the QCA must apply the arbitration criteria to the specific circumstances of a given arbitration and should not predetermine how these factors should apply. This point is discussed further below.

## 4.2 A range of prices would satisfy the section 120 factors

158 DBCTM considers that section 120 of the Act requires the QCA to determine a price that is *at least* enough to recover DBCTM's efficient cost of providing access,[83] but *no more than* the value of the service to access seekers or users.[84] This is because:

158.1 Section 120(1)(l) requires the QCA to have regard to the pricing principles in section 168A(a). Section 168A(a) requires that the price for access to a service should generate expected revenue for the service that is *at least* enough to meet the efficient costs of providing access to the service and include a return on investment commensurate with the regulatory and commercial risks involved. This clearly indicates that Parliament envisaged that it could be appropriate for prices to exceed the efficient costs of providing the service, but that prices should not be below that point.

158.2 Section 120(1)(e) requires the QCA to have regard to the value of the service to the access seeker. Prices above this level would likely result in the access seeker either substituting to another terminal, or altering its investment decisions such that access at DBCT was no longer required. DBCTM considers that having proper regard to section 120(1)(e), the price determined in any arbitration should not be higher than the value of the service to the access seeker.

[83] QCA Act, s120(1)(l) and s168A(a)
[84] QCA Act, s120(1)(e)

159 The QCA has wide discretion to determine a price within this range, having regard to other factors such as economic efficiency (section 120(1)(j)), the interests of the access provider and access seeker (section 120(1)(b) and (c)), and the public interest (section 120(1)(d)).

160 The Interim Decision appears to foreshadow that, faced with the task of weighing the factors in section 120, the QCA would apply its discretion to set a price at the lower bound of this range:[85]

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

161 The QCA's reference to 'available rent' appears to recognise that there may be a range of prices that would allow DBCTM to recover at least its efficient costs but would not exceed the value to access seekers or users of the terminal. The QCA explicitly states that all such rent would be allocated to users, rather than to DBCTM. However, it does not explain how it has reached this position or reconciled its view to the various factors that section 120 requires it to consider. Although the Interim Decision contains extensive commentary on how the QCA interprets the requirements of section 138(2) of the Act, it does not contain similar commentary in relation to the section 120 factors. For example, it is not possible to discern from the Interim Draft decision how the QCA has had regard to the value of the service to access seekers or users.

162 DBCTM agrees with the QCA's inference that there is likely to be economic space between 'efficient cost' and 'value to access seekers or users', noting that:

162.1 the QCA appears to have interpreted 'efficient costs' as representing the continued application of its building blocks approach, which is likely to give rise to even lower prices given trends in the risk free rate; and

162.2 DBCT is fully contracted, predominantly by users who have paid as much as $3.20 per tonne in the recent past, at coal prices that are much lower than those that currently prevail.

163 This conclusion is consistent with analysis undertaken by HoustonKemp, which showed that all users valued the service at more than the current TIC.[86]

## 4.3 Prices above building block costs may be efficient

164 The first section 120 factor that the QCA must consider in making an access determination is the object of Part 5 of the Act, which references economic concepts of efficiency, as well as effective competition in upstream and downstream markets.[87] It follows that, in considering whether it could determine a price that is above 'efficient costs', the QCA must have regard to the impact of a higher price on all three forms of efficiency – allocative, productive and dynamic efficiency.

165 DBCTM considers that it is highly unlikely that a single price, determined by reference to the QCA's implementation of the building block approach, would uniquely promote efficient outcomes and effective competition in upstream and downstream markets. Rather, it is more likely that there are a range of prices within which materially similar outcomes for efficiency and competition could be achieved. DBCTM discusses the economic rationale for this view below.

[85] QCA Interim Decision, pp. 43-44
[86] HoustonKemp, *Assessment of the QCA's draft recommendation to declare the DBCT service – criterion (a)*, March 2019, p. 17
[87] QCA Act, sections 120(1)(a) and 69E

166 In relation to a price that the QCA might determine above 'efficient costs' but below the lowest value placed on the service by an existing user:

166.1 there are no implications for allocative efficiency, since the DBCT service is produced in the same quantities and consumed by the same parties; and

166.2 the implications for productive efficiency are likely to be minor, since even under a cost-based allowance much of DBCTM's revenue is determined based on benchmark costs.

167 Changing the allocation of rent between the service provider and the users could be expected to affect incentives to invest. In particular, increasing the price of the service might be expected to increase incentives to invest in providing the service and may reduce incentives to undertake investments in coal mining.

168 By concluding that any available rent should be allocated to the user, the QCA implicitly assumes that its cost-based assessment provides uniquely appropriate incentives for efficient investment in the service, and that higher prices:

168.1 would not provide similar incentives that would give rise to materially similar investment outcomes; or

168.2 would provide greater incentives that would give rise to materially different investment outcomes, which would not be efficient.

169 DBCTM considers that there is good reason to expect that each of these assumptions are incorrect.

170 While the QCA acknowledges that:[88]

> …the Productivity Commission has said that deterring investment in infrastructure (because access prices are set too low by a regulator) is likely to be more costly than allowing service providers to retain some monopoly rent (from too high access prices),…

it has not explicitly explained how allocating all available rent to users during an arbitration process will allay the risk that infrastructure investment will be compromised. This is particularly critical because DBCT is in an expansion environment over the Regulatory Period.

### Modest increases in price are not likely to have a material impact on investment or competition

171 Modestly higher prices for the coal handling service are unlikely to give rise to materially different incentives for investment by users or prospective access seekers.

172 For example, as noted above, as recently as 2015 users at DBCT paid more than $3 per tonne for coal handling services. The QCA also cites this history in concluding that investment incentives are unlikely to be affected by prices within this range: [89]

> In the context of impacts on investment incentives, we do not consider the possible range of access charges between users, if similar to historical ranges reported by DBCTM, would have a material impact on investment incentives relative to other matters, particularly the market price of coal.

173 Similarly, in its draft recommendation in relation to the declaration of the DBCT service, the QCA concluded that a TIC of up to $6 per tonne applying to access seekers would not be materially different from existing charges, such it would not be expected to materially affect competition in related markets.[90] The QCA's

[88] QCA Interim Decision, p. 50
[89] QCA Interim Decision, p. 35
[90] QCA Draft recommendation - Part C: DBCT declaration review, December 2018, p. 86

conclusion was validated by HoustonKemp's previous analysis of mines that would prefer to use DBCT over the period, which indicated that their incentives to use DBCT (and therefore to develop their project) would not be affected by a TIC of less than $4.64 per tonne.[91]

## Efficiency rationales may apply for prices that are above cost

174 Regulators around the world have recognised that there may be circumstances in which it is appropriate (and efficient) to allow a service provider to recover revenues that exceed its best estimate of costs. This submission explores examples of these, and how their circumstances relate to those at DBCT, in more detail below, specifically:

174.1 asymmetric risk; and

174.2 asymmetric welfare consequences of regulatory error.

175 These examples generally stem from regulatory regimes in which various forms of direct price or revenue control apply. In the context of a negotiate-arbitrate regulatory regime, in which negotiation is promoted as the initial means by which terms and conditions of access are to be agreed, the possibility of providing for revenues that exceed costs may be operationalised through the interpretation of the arbitration principles and how this interpretation is communicated to stakeholders. This is further discussed below.

### *Compensation for asymmetric risk*

176 Asymmetric risk may occur where regulatory action truncates the distribution of possible returns at the upper end (but not the lower end) with the result that expected returns are lower than cost. This concern often arises in contexts where regulatory action is applied to new investments and where the risks specific to these investments either cannot (or are not permitted to be) spread across a broader base of assets.

177 In a regulatory environment, compensation for asymmetric risk may be provided with a cashflow allowance in excess of the usual building block components, or with a premium applied to the allowed rate of return to reflect the higher risk associated with undertaking investment.

178 This was acknowledged by the QCA in the 2004 DAU process, in relation to previous expansions:[92]

> In the particular case of DBCT, the Authority accepts ACG's advice that the proposed expansion beyond 60 mtpa involves an increase in overall risk, notwithstanding the measures put in place by the Authority to mitigate the risk. *The Authority also accepts that there is a need to ensure that there is no regulatory impediment to expansion of the port. Therefore, taking all factors to account, the Authority has determined to accept the equity beta of 1.0 proposed by DBCT Management in its response to the Authority's draft decision.* (emphasis added)

179 Another significant example of this is the approach adopted by European telecommunications regulators to provide incentives for investment in regulated next generation access (**NGA**) networks, in an environment characterised by uncertain demand and the potential development of competing technologies.

[91] HoustonKemp, *Assessment of the QCA's draft recommendation to declare the DBCT service – criterion (a)*, March 2019, p. 17.

[92] QCA DBCT 2004 DAU Final Decision, p. 150, see: https://www.qca.org.au/wp-content/uploads/2019/05/12203_DBCT_DAU_FINAL_plus_Part_B-1.pdf

180 For instance:

180.1 Spain's Commission of the Telecommunications Market (CMT) allows a risk premium of 4.81 per cent for fibre services based on a discounted cash flow assessment of the elevated risk associated with uncertain demand and competing services;[93]

180.2 Italy's Authority for Communications Guarantee (AGCOM) allows a risk premium of 3.2 per cent for fibre services based on a real options assessment of the lost flexibility associated with investment;[94] and

180.3 the Netherlands' Authority for Consumers and Markets (ACM) commissioned advice from the Brattle Group that a risk premium of 2 per cent is required for fibre-to-the-home services, due to additional systematic risks that are estimated using a discounted cash flow analysis.[95]

181 At DBCT, the expansion process that provides for expansions of the terminal with differentiated prices raises the possibility of asymmetric risk.

182 Currently there is excess demand for the service provided at DBCT, evidenced by the commencement of the expansion process, the long queue for the service and high current prices for coal in international commodity markets. Estimates of the cost of proceeding with an expansion of DBCT indicate that the average incremental cost of an expansion would materially exceed the charge for accessing existing terminal capacity. For example, the QCA estimated in its Draft Declaration Review Recommendation that a differentiated TIC at DBCTM could result in access charges of $8.50/t,[96] much higher than the current access charges.

183 This suggests that, if an expansion were to proceed, there is a material prospect that it might proceed on a differentiated basis, rather than the socialised basis on which all previous expansions of the terminal have proceeded. Notwithstanding this, it would likely be efficient for the expansion to proceed on the basis of current (and expected) market conditions, in which the current price (and outlook for prices) for metallurgical coal is elevated.[97]

184 Despite these conditions, there is currently no certainty that the expansion process will result in an increase in capacity at the terminal on a differentiated basis. If demand for the DBCT service softens in the future, users would prefer to access the existing terminal capacity in preference to using the (higher priced) differentiated terminal expansion, potentially leaving DBCTM unable to recover the cost of the differentiated expansion. In other words, volume risk is magnified considerably in relation to any differentiated terminal component as compared to socialised capacity, since there is a materially greater chance of a 'WICET-like' price spiral on a small wedge of capacity at the margin than is the case for the whole capacity of the terminal. It follows that a strictly cost-based building block allowance is unlikely to provide DBCTM any incentive to undertake efficient expansions of the terminal on a differentiated basis.

185 To provide the correct incentives for DBCTM to undertake an efficient expansion of the terminal, prices would need to provide for recovery of more than the costs of developing the expansion (assuming full utilisation of the expansion). This approach is consistent with the requirements of the pricing principles at section 168A of the Act, and would reflect an approach that gives weight to factors (a), (b), (c), (d), (e) and (g) of section 120 of the Act.

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[93] CMT, *Resolución sobre el procedimiento de cálculo de la prima de risgo en la tasa de retorno nominal para servicios mayoristas de redes de acceso de nueva generación (MTZ 2012/2155),* February 2013, p. 26

[94] AGCOM, *Integrazione della consultazione pubblica di cui alla delibera N.238/13/cons concernente l'identificazione ed analisi dei mercati dei servizi di accesso alla rete fissa | Allegato B all delivera n.42/15/Cons,* January 2015, pp. 129-130, paras 424 and 430

[95] Brattle Group, *The WACC for KPN and FttH,* July 2015, p. 26

[96] QCA *Draft Recommendation – Part C: DBCT Declaration Review* (December 2018)

[97] See for example, KPMG, *Coal price and FX market forecasts*, 20 February 2020

*Asymmetric welfare consequences of regulatory error*

186 Recognition is often given to the welfare consequences of under and over investment by regulated service providers. For example, the revenue and pricing principles in the National Electricity Law require, amongst other things, that:[98]

> Regard should be had to the economic costs and risks of the potential for under and over investment by a regulated network service provider in, as the case requires, a distribution system or transmission system with which the operator provides direct control network services.

187 In New Zealand, the Commerce Commission explicitly assesses the economic consequences of under and over investment due to the potential for regulatory error, and for electricity and gas network businesses adjusts its allowed rate of return decision accordingly.

188 The purpose of the regulatory regime that applies to New Zealand electricity and gas network businesses is to promote the long term benefit of consumers, including:

188.1 ensuring suppliers of regulated services have incentives to invest and innovate, which will benefit consumers over time; and

188.2 ensuring suppliers of regulated services are limited in their ability to extract excessive profits.

189 The Commission's current approach is to apply a cost of capital that corresponds with its estimate of the 67th percentile in the distribution of estimates of the true cost of capital.[99] This value is calculated as:

189.1 the mid-point estimate of the cost of capital; plus

189.2 0.440 multiplied by the standard error of the cost of capital.[100]

190 The Commission's revised approach is based on advice it received from Oxera.[101] The framework that it applies to estimate the appropriate cost of capital percentile is to consider the trade-off between:[102]

190.1 the costs of setting the allowed rate of return *too high* resulting in consumers being charged too much for regulated services; and

190.2 the costs of setting the allowed rate of return *too low* resulting in reduced incentives to innovate and invest, potentially leading to lower service quality and the deferred introduction of new services or technologies.

191 As a matter of principle, if the costs of setting the allowed rate of return too high and the cost of setting it too low are similar, it is likely there will not be much benefit to consumers from departing from a mid-point estimate of the cost of capital. However, where there are asymmetric consequences, it may benefit consumers to select a cost of capital that is either higher or lower than the mid-point estimate.

192 The figure below, taken from Oxera's advice to the Commerce Commission, illustrates the circumstance in which the costs of underinvestment from setting the cost of capital too low exceed the costs of overinvestment from setting the cost of capital too high.

[98] NEL, s 7A(6).

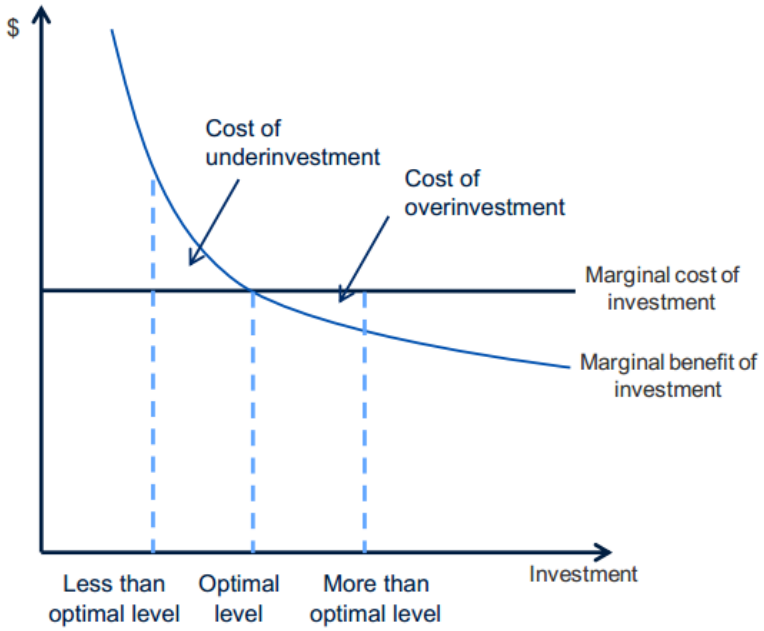
[99] Commerce Commission, *Amendment to the WACC percentile for price-quality regulation for electricity lines services and gas pipeline services: Reasons paper*, 30 October 2014.

[100] Commerce Commission, *Electricity distribution services input methodologies determination 2012*, 3 April 2018, 2.4.5(5)(b)

[101] Oxera, *Input methodologies: review of the '75th percentile' approach*, 23 June 2014.

[102] Commerce Commission, *Amendment to the WACC percentile for price-quality regulation for electricity lines services and gas pipeline services: Reasons paper*, 30 October 2014, pp 37-38.

**Figure 7: Asymmetric costs of over- and under-investment**




*Source: Oxera*

193 Oxera recommended that the Commission adopt a point estimate of the cost of capital at around the 60th to 70th percentile of the distribution of estimates of the true cost of capital, and that an estimate in this range would appropriately balance the costs and benefits described above.[103]

194 As previously submitted by DBCTM, the terminal will require significant non-expansion capital expenditure over the Regulatory Period. If the QCA were to determine prices that were too low this could result in inefficient outcomes where there is an economic incentive for DBCTM to maintain old equipment (in which case these costs would be passed through directly to the operator) rather than invest in more efficient asset replacements or upgrades. Further, it would stifle any incentive to invest in projects other than compliance based projects, including initiatives to innovate in areas such as automation and operational improvement at DBCT in an effort to optimise terminal throughput or reduce O&M Costs.

## 4.4 Conclusion on the application of the arbitration criteria

195 Under both the 2019 DAU and the legislative negotiate arbitrate regime, the QCA must determine charges having regard to all of the criteria set out in section 120. Following a proper assessment of the arbitration criteria set out in section 120, prices that are above the efficient costs of providing the service may be appropriate.

196 DBCTM submits that it is inappropriate for the QCA to predetermine how it will apply the arbitration criteria in section 120 of the QCA Act, especially without a proper consideration of those criteria. The following section further explains why predetermining arbitration processes is not appropriate in relation to the QCA's proposed guidance document.

[103] Oxera, *Input methodologies: review of the '75th percentile' approach*, 23 June 2014, p 73.

# 5 Guidance document

## 5.1 Summary

197 In its Interim Decision, the QCA proposed that it intends to publish a QCA guidance document to address uncertainty as to the arbitration process and the methodology to be applied in an arbitration.[104] The document would indicate the process the QCA would likely follow and the methodologies the QCA intends to adopt in an arbitration under an approved access undertaking.

198 DBCTM considers that a guidance document which sets out the QCA's likely methodology could have the effect of the QCA predetermining issues not currently before it and preclude the ability of the QCA to decide an arbitration having regard to the relevant facts of the dispute. DBCTM observes in this regard that the QCA Act does not prescribe a particular methodology for the determination of access disputes.

199 Furthermore, a prescriptive guidance document which provides a significant degree of certainty of the likely outcome prejudices the negotiation phase of the negotiate/arbitrate model.

200 It is important that any mechanism designed to reduce uncertainty does not impede the ability to achieve negotiated outcomes or mean that the QCA fetters its own discretion by binding itself to an approach that is not appropriate to the particular dispute.

201 If the QCA is minded to publish an arbitration guideline for disputes involving access to the DBCT service, it would be more appropriate if such a guideline were to follow the example set out in the ACCC and AER guidelines for access disputes. This would involve a focus on the arbitration process and procedures with reference to high level principles and matters set out in the QCA Act, rather than binding the QCA to a particular pricing methodology. This approach allows the QCA to retain considerably greater discretion to apply its expert analysis and judgement on a case by case basis.

## 5.2 QCA Interim Decision

202 As described above, the QCA proposed in its Interim Decision that the arbitration criteria should be amended to require the QCA to have regard to the factors outlined in section 120 of the QCA Act. DBCTM accepts that proposed amendment. The QCA further considered that while those amendments would mean an arbitration is a credible threat to constrain DBCTM from exercising its market power, there remains some uncertainty as to the arbitration process and methodology to be applied in an arbitration.

203 To address this uncertainty, the QCA proposed that it could publish a QCA guidance document.[105] The QCA proposed that the guidance document would indicate the *process* the QCA would likely follow and the *methodologies* the QCA would intend to adopt in an arbitration under an approved access undertaking.

204 The QCA's view on what should be included is guided by its interpretation of section 120 of the QCA Act. The QCA states:[106]

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

[104] QCA Interim Decision, p 42.
[105] QCA Interim Decision, p 42.
[106] QCA Interim Decision, p 42.

205 This view leads the QCA to suggest a guidance document that would cover several areas specific to the building blocks methodology. The QCA suggested the document could cover the following topics:[107]

205.1 the overall methodology the QCA intends to use, which is likely to be a building blocks approach;

205.2 the method the QCA would intend to use to establish the RAB;

205.3 the way in which depreciation would be calculated;

205.4 the method or methods for calculating the WACC;

205.5 consideration of how an appropriate remediation allowance would be determined;

205.6 the proposed treatment of other costs – such as capital and maintenance expenditure and corporate overhead costs.

206 The QCA considered that:[108]

> … these amendments would provide greater assurance that arbitrated prices would likely be reflective of the efficient costs of supply, including a return on investment commensurate with the regulatory and commercial risks involved, and as a result, provide a credible threat to constrain DBCTM from exercising its market power in a negotiation.

## 5.3 DBCTM's response

207 The QCA should be wary of fettering its discretion in access arbitrations by publishing a guidance document setting out the methodology it proposes to adopt (as opposed to processes). This is not the practice of other regulators that arbitrate access disputes, including the ACCC and AER. Rather, the arbitration guides of other regulators are limited to setting out the process for arbitrations and the legislative factors the regulator is required to take into account.

208 As the QCA observes, the fact the QCA is required to have regard to the section 120 factors gives access seekers some certainty as to the manner in which price will be set in an arbitration. It is not possible for all uncertainty to be removed from an arbitration process. Any mechanism designed to reduce uncertainty should not hamper the ability to achieve negotiated outcomes or mean that the QCA is tied to an approach that is not appropriate to the particular dispute.

209 Dispute processes by their nature are uncertain for parties involved in a dispute. The parties must face not only the risk of adverse outcomes from the dispute but also risks inherent in the dispute resolution process itself. In an arbitration process, where parties agree to submit their dispute to an arbitrator to arrive at a resolution, the uncertainties associated with the process can be mitigated by the issuance of guidelines that provides disputing parties with guidance of how the arbitration process is to be conducted. This transparency reduces process risk and increases the likelihood that arbitration outcomes will be accepted if the process is perceived to be fair and balanced by disputing parties.

210 The specific guidance proposed by the QCA may have the effect of constraining the QCA's methodology in all disputes, regardless of whether that methodology is fit for purpose or not. This may have the effect of restricting the QCA's freedom in applying its expert analysis and judgement to the individual circumstances of the dispute, giving rise to suboptimal dispute resolution outcomes.

211 The QCA Act does not mandate a particular pricing model to be applied to calculate charges that a service provider can charge to users accessing a declared service. The Australian Competition Tribunal made this

[107] QCA Interim Decision, p 42.
[108] QCA Interim Decision, p 42.

point in the context of Part IIIA in its recent arbitration decision in respect of the access dispute between Glencore Coal and Port of Newcastle Operations for access to the Port of Newcastle. The Tribunal stated:[109]

> Part IIIA does not mandate a particular pricing model to be applied when calculating charges that a service provider can charge users for accessing a declared service.

212 The QCA should not predetermine its approach for future arbitrations (i.e. a building blocks approach) that is not mandated by the QCA Act.

### Absolute certainty harms incentives to negotiate

213 The desire for high levels of certainty of arbitrated outcomes should not be an objective of any arbitration process. A guideline that is prescriptive as to the *methodology* to be applied by the QCA would impede commercial negotiations with the result that the negotiate-arbitrate model is ineffective. The QCA recognises the benefits of such a model in its Interim Decision by reference to findings of the Productivity Commission (**PC**).[110]

214 If the outcome of arbitration were certain, then there would be no scope for negotiation – essentially the situation that exists under the status quo. The guideline document should not perform the same role that the AU currently does in fully specifying and implementing an approach to determining the terms of access that substitutes regulatory decision making where commercial negotiations are feasible.

215 If DBCTM and users can accurately (and relatively precisely) anticipate the outcome of any arbitration decision, then the incentives on each party to engage in a commercial negotiation in good faith dissolves. The present situation, in which there are no meaningful negotiations (and never have been), would continue.

216 The PC has described this as negotiation 'in the shadow of arbitration', whereby the outcomes of negotiations are based on assumptions about the arbitrator's potential decisions rather than the negotiating parties' commercial incentives.[111]

217 Similarly, Harry Bush, previously of the United Kingdom Civil Aviation Authority, has described this problem as: [112]

> ...it's difficult to get the regulator out of the room… because the parties will be looking towards what the arbitrator will do, that becomes almost more important.

218 In the context of gas pipeline regulation, the problem of avoiding the shadow of regulation is acknowledged and addressed by ensuring that the arbitration framework has sufficient uncertainty built in to incentivise commercial negotiations. COAG Energy Council states that the Part 23 pricing principles were:[113]

> …designed to provide some stakes in the ground if an arbitration occurred, while also providing for some uncertainty in the outcome to try and incentivise the parties to negotiate and reach a commercial agreement, rather than relying on arbitration as a matter of course.

219 Put simply, if arbitration outcomes are transparently and precisely communicated before negotiations commence, no negotiation will occur. This prescriptive approach fundamentally undermines the negotiate-arbitrate framework, which seeks to achieve workably competitive outcomes with low intervention,

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[109] *Application by Port of Newcastle Operations Pty Ltd* [2019] ACompT 1 at [160]
[110] QCA Interim Decision, p. 59.
[111] Productivity Commission*, Economic regulation of airports: inquiry report*, 21 June 2019, pp. 27 and 302-303.
[112] Productivity Commission transcript of proceedings, 28 November 2018, p. 166.
[113] COAG Energy Council, *Options to improve gas pipeline regulation: COAG Regulation Impact Statement for consultation*, October 2019, p 117.

reducing the risk of regulatory error. Further, as a result of defeating the prospect of negotiation, a prescriptive arbitration guide will achieve exactly the opposite to that which it was designed to address – that is, it will reduce the prospect of successful negotiated outcomes and increase the likelihood that all access agreements will have their access charges determined by arbitration.

220 It is also important to note that the existence of arbitration as a backstop in the Part 23 regime was perceived by its designers as providing a 'credible threat' that would address the existence of market power, in comparable circumstances to those that apply at DBCT.[114]

### Consistency with the arbitration guidelines of other regulators

221 The suggested content of the QCA's arbitration guideline is at odds with guidelines from other regulators that arbitrate access disputes under negotiate-arbitrate regimes. Those regulators adopt an approach to drafting arbitration guidelines that are focused on principles and process. Examples of these include:

221.1 *A guide to resolution of access disputes under Part IIIA of the Trade Practices Act 1974*, prepared by the ACCC;

221.2 *Resolution of telecommunications access disputes – a guide*, prepared by the ACCC;

221.3 *Guideline for the resolution of distribution and transmission pipeline access disputes under the National Gas Law and National Gas Rules*, prepared by the AER;

221.4 *Non-scheme pipeline arbitration guide*, prepared by the AER.

222 These guidelines, which are discussed in more detail below, focus on the *arbitration process* rather than the methodology that the arbitrator may decide to apply in its determination. The material that is typically covered in these guidelines includes the phases (or stages) of an arbitration process, the roles, responsibilities and powers of parties to the arbitration, the standards of evidence and timing of procedures.

223 The guidelines do not predetermine any specific methodology or provide any specific details of how an arbitrator is to consider the dispute. This way, the ACCC and AER guidelines preserve discretion for the arbitrator to make the determination that is most suitable on a case by case basis.

224 The QCA Act provides high level matters and principles that could allow the QCA to adopt a similar approach to the ACCC and the AER in drafting its arbitration guidelines. The factors in section 120 of the QCA Act and pricing principles in section 168A will also be the factors the QCA is required to take into account in access disputes under the new DAU.

225 Those matters and principles do not require or prescribe a particular methodology that the QCA or arbitrator would need to apply in an arbitration dispute.

226 If the QCA is minded to publish an arbitration guideline for disputes involving access to the DBCT service, it would be more appropriate if such a guideline were to follow the example set out in the ACCC and AER guidelines. This would involve a focus on the arbitration process and procedures with reference to high level principles and matters set out in the QCA Act rather than binding the QCA to a particular pricing methodology.

227 This would allow the QCA to retain considerably greater discretion to apply its expert analysis and judgement on a case by case basis.

[114] Vertigan, M, *Examination of the current test for the regulation of gas pipelines*, 14 December 2016, p. 13.

## 5.4 Examples of arbitration guidelines from other regulators

228 This subsection describes the content of the following guidelines for access disputes published by the ACCC and the AER in respect of negotiate-arbitrate regimes:

228.1 *A guide to resolution of access disputes under Part IIIA of the Trade Practices Act 1974*, prepared by the ACCC;

228.2 *Resolution of telecommunications access disputes – a guide*, prepared by the ACCC;

228.3 *Guideline for the resolution of distribution and transmission pipeline access disputes under the National Gas Law and National Gas Rules*, prepared by the AER;

228.4 *Non-scheme pipeline arbitration guide*, prepared by the AER.

### Arbitration of disputes under the national access regime

229 'A guide to resolution of access disputes under Part IIIA of the Trade Practices Act 1974' is the ACCC's guide to arbitrations under the national access regime set out in Part IIIA of the (now) Competition and Consumer Act 2010 (**CCA**).

230 The guide does not prescribe or preclude any particular pricing models or methodologies. Instead, it sets out the process for an arbitration and how arbitration hearings are conducted. It contains the following content:

230.1 an introduction and overview of Part IIIA;

230.2 the structure and process which the ACCC will generally follow when arbitrating an access dispute;

230.3 how the ACCC conducts arbitration hearings, its powers to seek information, including the use of experts, and more general procedural matters such as improper conduct;

230.4 how the ACCC may address issues relating to privacy, confidentiality and disclosure of information and matters of procedural fairness;

230.5 an outline of the circumstances in which arbitrations can be terminated by either the ACCC or by the parties that notified the dispute; and

230.6 a brief overview of post-determination matters (e.g. review, enforcement and variation of a determination).

231 Importantly, what will guide the ACCC's decisions on an appropriate approach or model for setting prices will be those matters that the ACCC is required to take into account when making a determination – a list of matters that have considerable overlap with section 120 of the QCA Act: [115]

- the legitimate business interests of the provider and its investment in the facility
- the public interest, including the public interest in having competition in markets (whether or not in Australia)
- the interests of all persons who have rights to use the service
- the direct costs of providing access to the service
- the value to the provider of extensions whose cost is borne by someone else
- the operational and technical requirements necessary for the safe and reliable operation of the facility

[115] Competition and Consumer Act 2010, s.44X(1),(2).

- the economically efficient operation of the facility
- any other matters the Commission considers to be relevant.

### Arbitration of telecommunications access disputes

232 The ACCC's 'Resolution of telecommunications access disputes' [116] is a guide to dispute resolution provisions under Part XIC of the Competition and Consumer Act 2010 and the Telecommunications Act 1997. In the guide, the ACCC sets out how an arbitration under Part XIC of the Competition and Consumer Act 2010 and the Telecommunications Act 1997 will be conducted.

233 Again, the specific method, pricing model (e.g. building blocks), or approach the ACCC proposes to adopt in an arbitration is not set out in the guidelines. [117] This is left to the ACCC's discretion in an arbitration.

234 The guide covers process focussed aspects of an arbitration by reference to the CCA being:

234.1 how to commence an arbitration;

234.2 the structure of an arbitration;

234.3 the procedure for the arbitration;

234.4 joining parties, joint hearings and separate processes;

234.5 procedural fairness and confidentiality;

234.6 determinations and termination of an arbitration;

234.7 reviews by the Australian Competition Tribunal and Federal Court.

### Arbitration under the National Gas Law and National Gas Rules

235 Under the NGL and NGR, the AER can conduct access dispute hearings to resolve disputes between a user or potential user and a service provider about access to covered pipelines. The AER has published the 'Guideline for the resolution of distribution and transmission pipeline access disputes under the National Gas Law and National Gas Rules' in 2008 to provide certainty in relation to an arbitration process.

236 The guideline:

236.1 describes the stages of the access dispute process, including the process for the notification of the dispute, the AER's interim determination and the AER's final determination; and

236.2 procedural and other matters for determining an access dispute, including:

236.2.1 the handling of confidential information;

236.2.2 the use of experts;

236.2.3 procedural fairness; and

236.2.4 hearing costs and fees.

237 The guideline refers to the revenue and pricing principles which the AER must take into consideration in making a determination for revenue and price terms. [118] The revenue and pricing principles do not prescribe a particular methodology for the determination of price and nor does the guideline. As a result, the AER

[116] ACCC, *Resolution of telecommunications access dispute – a guide*, March 2004.
[117] ACCC, *Resolution of telecommunications access dispute – a guide*, March 2004, p 84.
[118] AER, *Guideline for the resolution of distribution and transmission pipeline access disputes under the National Gas Law and National Gas Rules, 2008*.

has significant discretion in arriving at an outcome that is most appropriate for the disputing parties in question.

### Arbitration for non-scheme gas pipelines

238 Chapter 6A of the National Gas Laws 2008 (NGL) and Part 23 of the NGR provide for negotiation and determination of disputes for access to non-scheme pipelines that can involve commercial arbitration. The AER is the scheme administrator and to that end, has published guidance to arbitrators, prospective users and services providers about the process for the determination of access disputes under the NGL and the NGR.[119]

239 The guide covers several areas including seeking access, negotiation under Part 23 and most relevantly, arbitration when negotiations fail. With respect to arbitration, the guide is focused on the roles, powers and obligations of parties to the arbitration, and the process of the arbitration by reference to the NGL and NGR:[120]

239.1 which disputes can be referred to arbitration;

239.2 the form of the access dispute notice;

239.3 the parties to the access dispute;

239.4 reference to arbitration and selection of the arbitrator;

239.5 the independence of the arbitrator;

239.6 information for the arbitrator;

239.7 access negotiation information;

239.8 conduct of the parties in arbitration;

239.9 termination of an arbitration; and

239.10 procedural requirements for the arbitration.

240 The guide sets out the principles in the NGR to which the arbitrator must have regard in making its determination.[121] The guide does not prescribe any approach or methodology for the AER to follow in access arbitrations.

## 5.5 Conclusion on guidance document

241 In conclusion, DBCTM submits that:

241.1 any guidance document the QCA publishes should be limited to providing information as to the process that the QCA proposes to follow and the factors that it must have regard to in any arbitration by reference to the QCA Act and DAU;

241.2 such a document should not unnecessarily constrain the QCA's ability to give effect to the requirements of the QCA Act (which do not mandate the building blocks approach), or serve to fetter the QCA's discretion to determine the arbitration having regard to the issues before it;

241.3 overly prescriptive guidelines would constrain the ability for parties to reach agreement in negotiations and result in a *de*-facto continuation of the present situation thus hindering the

[119] AER, *Non-scheme pipeline arbitration guide*, September 2017, p 1.
[120] AER, Non *Non-scheme pipeline arbitration guide*, September 2017, chapter 6.
[121] AER, *Non-scheme pipeline arbitration guide*, September 2017, pp 27-28

effective workings of the negotiate-arbitrate model, contrary to the premise of the access regime.

242 DBCTM acknowledges the QCA's intent to provide increased certainty to access seekers, however absolute certainty is not necessary or appropriate. DBCTM considers that the proposed amendments to the 2019 DAU as set out above, provide a significant degree of certainty, that is not enjoyed by access seekers at any other coal terminal in Australia.

243 DBCTM notes that the QCA has requested views on whether the proposed methodologies should be included in the AU. As explained in this section, DBCTM submits that it would be inappropriate for the QCA to set out any methodologies that could operate to defeat the effective operation of the negotiate/arbitrate model.

## 5.6 Assessment of rehabilitation costs

244 The QCA has also proposed to assess the rehabilitation plan and forecast costs proposed by DBCTM and included in its 2019 DAU submission, and present its preliminary views on this in the (full) draft decision.[122]

245 DBCTM welcomes the QCA's assessment of the rehabilitation plan and rehabilitation costs prepared for DBCTM by GHD. However, DBCTM does not consider the QCA's assessment of any potential associated allowance as necessary or appropriate in the circumstances. The current statutory task before the QCA is the assessment of an *access undertaking*. It is not a price setting exercise. DBCTM considers that the appropriate time for the QCA to assess any associated allowance would be in the event of arbitration.

[122] QCA Interim Decision, p 33.

# Appendix 1 Contract Profile & Access Seekers

## Current contract profile & capacity

1 This Appendix contains a summary of DBCT's current contracted profile, which is limited to System Capacity in accordance with the 2017 AU. The table below illustrates the contract extensions that were exercised as part of the 'clause 20(b) process'[123] in the 8X expansion.

| # | Access Holder | Mine(s) | Current Contracted (Mtpa) | Pre-cl.20(b) Expiry | Contracted Jun-28 (Mtpa) | Cl20(b) New Expiry |
|---|---|---|---|---|---|---|
| 1 | [redacted] | | | Jun-23 | | Jun-28 |
| 2 | | | | Jun-23 | | Jun-28 |
| 3 | | | | Dec-23 | | Dec-28 |
| 4 | | | | Jun-24 | | Jun-29 |
| 5 | | | | Jun-23 | | Jun-28 |
| 6 | | | | Jun-23 | | Jun-28 |
| 7 | | | | Jun-23 | | Jun-28 |
| 8 | | | | Jun-26 | | Jun-31 |
| 9 | | | | Jun-28 | | Jun-33 |
| 10 | | | | Jun-23 | | Jun-28 |
| 11 | | | | Jun-23 | | Jun-28 |
| 12 | | | | Jun-24 | | Jun-29 |
| 13 | | | | Jun-24 | | Jun-29 |
| 14 | | | | Jun-24 | | Jun-29 |
| 15 | | | | Jun-24 | | Jun-29 |
| 16 | | | | Jun-23 | | Jun-28 |
| 17 | | | | Jun-24 | | Jun-29 |
| 18 | | | | Jun-28 | | Jun-33 |
| 19 | | | | Jun-28 | | Jun-33 |
| 20 | | | | Dec-23 | | Dec-28 |
| 21 | | | | Jun-24 | | Jun-29 |
| 22 | | | | Dec-29 | | Dec-34 |
| 23 | | | | Jun-30 | | Jun-30 |
| 24 | | | | Jun-30 | | Jun-30 |
| 25 | | | | Jun-24 | | Jun-29 |
| 26 | | | | Jun-29 | | Jun-34 |
| 27 | | | | Jun-24 | | Jun-29 |
| 28 | | | | Jun-28 | | Jun-33 |
| 29 | | | | Jun-24 | | Jun-29 |
| 30 | | | | Jun-24 | | Jun-29 |
| 31 | | | | Jun-30 | | Jun-30 |
| | **Total** | | **84.20** | | **84.20** | |

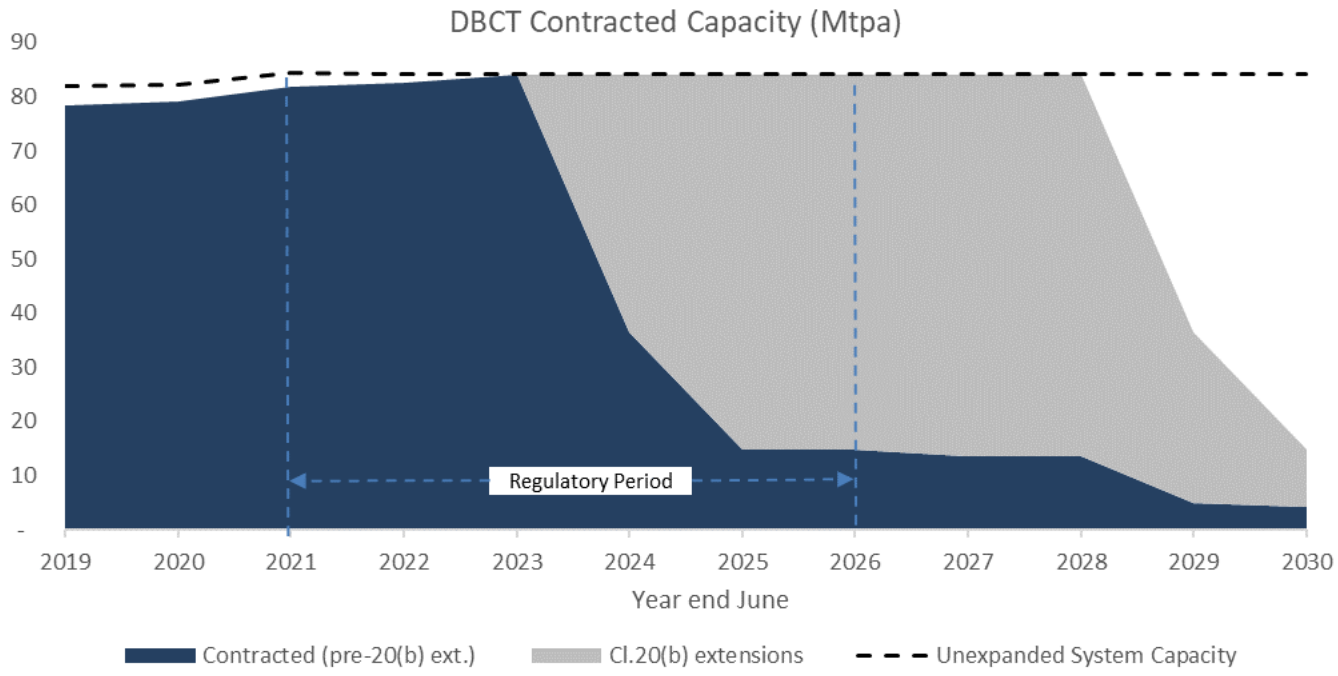
2 DBCT is currently contracted up to its System Capacity of 84.2Mtpa (ramping up to Jul-22).

3 As part of the clause 20(b) process, Access Holders extended their contracts by 5 years or otherwise indicated that no existing capacity would be released in the relevant period of the 8X Expansion. This means that DBCT's contract profile of 84.20Mtpa is effective to at least June 2028 (being the earliest expiry date). This is after the Regulatory Period under consideration and after commissioning of the 8X expansion project.

[123] Clause 20(b) per the 2017 Standard Access Agreement

[124] [redacted]

4 DBCTM will therefore be fully contracted during the Regulatory Period and Access Seekers will have to contract 8X expansion capacity. This is further evidenced by the fact that DBCTM received numerous signed Conditional Access Agreements (CAAs) from Access Seekers. The graph below illustrates DBCT's current contracted position.



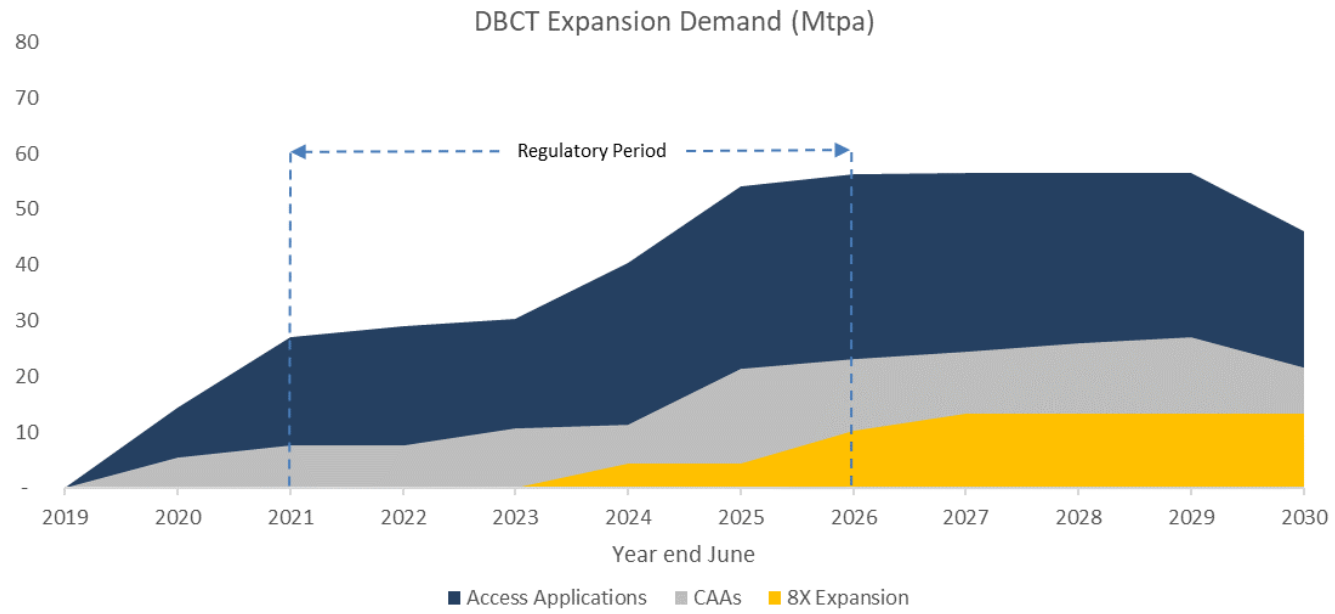

## Conditional Access Agreements

5 As part of the 8X expansion project, access seekers had until 20 March 2020 to submit signed CAAs to participate in the expansion process. Prior to this, the DBCT access queue peaked at 56.6Mtpa in July 2026. In accordance with the AU, DBCTM will form a new queue now that the CAA deadline has passed.

6 DBCTM received signed CAAs totalling 27.0Mtpa (at peak capacities). The 8X expansion is however only able to provide a maximum of 13.3Mtpa in new system capacity, leaving 13.7Mtpa in oversubscribed capacity. This is shown in the table and graph below.

| CAA Position* | Access Seeker | Mine | Access Type | Access Start | Access Expiry | Max Mtpa | Term years |
|---|---|---|---|---|---|---|---|
| 1 | [redacted] | | CAA | [redacted] | | | 10.0 |
| 2 | | | CAA | | | | 10.0 |
| 3 | | | CAA | | | | 10.0 |
| 4 | | | CAA | | | | 10.0 |
| 5 | | | CAA | | | | 10.0 |
| 6 | | | CAA | | | | 10.0 |
| 7 | | | CAA | | | | 10.0 |
| 8 | | | CAA | | | | 10.0 |
| 9 | | | CAA | | | | 10.0 |
| 10 | | | CAA | | | | 10.0 |
| Total peak capacity supported by signed Conditional Access Agreements | | | | | | **27.00** | |
| Capacity available from all 4 phases of 8X expansion | | | | | | 13.30 | |
| Capacity oversubscribed | | | | | | 13.70 | |

* CAA Queue positions are determined based on the Access Application date and whether a signed CAA was submitted to DBCTM




7 The first three phases of the 8X expansion are forecast to commission before December 2025, during the Regulatory Period, introducing 10.3Mtpa additional capacity. The remainder of 8X commissions after the Regulatory Period (fully ramped-up to 13.3Mtpa by June 2027).

# Appendix 2 Information on the scale of access seekers' operations

Redacted

# Appendix 3 Information Templates

DBCT MANAGEMENT

# DBCT Access Undertaking

## Schedule H

## Pre-Application Information Disclosure Report

## Financial Year 2021-22

**Table of Contents**

## Purpose of this document

This document contains a range of information for Access Seekers to assist in the preparation of an Access Application and the effective facilitation of any subsequent negotiations, pursuant to s.5.2(c)(2) of the DBCT Access Undertaking (**AU**) and in accordance with the requirements specified in Schedule H of the AU.

DBCT Management notes that under section 101(5) of the QCA Act, an Access Seeker may seek advice or directions from the QCA with regard to matters relating to this information provision.

In this Report:

**Preceding Period** means the period commencing on the Commencement Date and ending on the last day of the Financial Year prior to the Financial Year in which the information provided in accordance with this Report was requested;

**Historical Period** means the period commencing at the start of the 2006 Financial Year and ending on the last day of the 2021 Financial Year

**Table 1 – Capital Base components**

| Item | RAB Component | Units | 2021 | 2020 | 2019 | 2018 | 2017 | 2016 | 2015 | 2014 | 2013 | 2012 | 2011 | 2010 | 2009 | 2008 | 2007 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 1 | Capital Base Opening Value | A$m | 2,344 | 2,367 | 2,394 | 2,423 | 2,389 | 2,418 | 2,429 | 2,371 | 2,367 | 2,380 | 2,372 | 2,361 | 1,883 | 1,502 | 882 |
| 2 | March-March Outturn Inflation | % | 2.00% | 1.67% | 1.33% | 1.90% | 2.11% | 1.36% | 1.32% | 2.94% | 2.45% | 1.58% | 1.35% | 2.89% | 2.47% | 4.24% | 2.44% |
| | Indexation | A$m | 47 | 39 | 32 | 46 | 50 | 33 | 32 | 70 | 58 | 38 | 78 | 68 | 42 | 44 | 21 |
| 3 | Depreciation | A$m | (91) | (88) | (87) | (87) | (83) | (79) | (77) | (74) | (71) | (70) | (68) | (66) | (47) | (30) | (25) |
| 4 | Commissioned Assets | A$m | 88 | 26 | 29 | 11 | 68 | 18 | 34 | 63 | 17 | 20 | 7 | 11 | 483 | 367 | 625 |

## 1 Capital Base

The Capital Base is the value of assets comprising the Terminal. The Capital Base information provided is shown in Item 1 of Table 1.

The Capital Base for each Financial Year of the Historical Period (2006 to 2021), reflects the opening value of the Regulated Asset Base (**RAB**) as approved by the QCA. The QCA has historically calculated these values by rolling forward the previous Financial Year's RAB Opening Value to account for indexation, depreciation and RAB additions.

The Capital Base for each Financial Year of the Preceding Period and the Financial Year in which the information is requested, is based on DBCT Management's evaluation of its Capital Base as determined by rolling forward the previous year's Capital Base by:

- indexing the previous Financial Year's Capital Base value using inflation as determined in section 2;
- subtracting the depreciation value for the previous Financial Year as determined in section 3; and
- adding the value of commissioned assets from the previous Financial Year as determined in section 4.

## 2 Inflation

Indexation compensates for the impact of inflation on the value of the terminal. The Indexation information provided is shown in Item 2 of Table 1, based on the indexation value added to the Capital Base annually, which is calculated by applying the **March-March outturn inflation** to the Capital Base.

The March-March outturn inflation for each Financial Year of the Historical Period and the Preceding Period is the annual percentage change in the Australian Bureau of Statistics (**ABS**) consumer price index (**CPI**) for All Groups, Weighted Average of Eight Capital Cities from the March quarter in Financial Year t-2 to the March quarter in Financial Year t-1.

## 3 Depreciation

Depreciation reflects the reduction in value of assets in the Capital Base over their economic life. The Depreciation information provided is shown in Item 3 of Table 1[1], based on:

[1] Depreciation is shown as a negative figure in the table as this reflects the impact it has on the Capital Base

(a) for each year of the Historical Period, the depreciation value as applied by the QCA in its derivation of the relevant periods' revenue requirement under DBCT Management's previous access undertakings;

(b) for each Financial Year of the Preceding Period, the depreciation value reasonably determined by DBCT Management in such a way that:

(1) each asset or group of assets is depreciated over the economic life of that asset or group of assets; and

(2) allows, as far as reasonably practicable, for adjustments reflecting changes in the expected economic life of a particular asset or group of assets (including adjustments to align the asset life with the duration of DBCT Management's terminal lease); and

(3) so that an asset is depreciated only once – that is, the amount by which the asset is depreciated over its economic life does not exceed the value of the asset at the time of its inclusion in the Capital Base (adjusted for inflation); and

(4) the residual value of the asset is zero.

## 4 Commissioned Assets

Detailed information relating to new commissioned assets has historically been published by the QCA as part of its review process in accordance with the Access Undertaking. Item 4 of Table 1 sets out the value of assets commissioned for each Financial Year of the Historical Period, as approved by the QCA for addition to the RAB. Commissioned assets represent the capital expenditure that is incurred by DBCT Management to continue to perform in accordance with the requirements of relevant environmental and safety regulations, the Access Undertaking, Terminal Regulations, Operations and Maintenance Contract (**OMC**), Access Agreements, and various other applicable standards and agreements. Commissioned assets are comprised of two primary types of Capital Expenditure undertaken by DBCT Management:

- **NECAP**. The assets comprising the Terminal are subject to deterioration over time as part of delivering the coal handling service, and require refurbishment or replacement outside the scope of the OMC obligations. Other requirements include improvement of safety or environmental performance, terminal throughput and efficiency. In these cases, and where the new assets do not increase the System Capacity, the Operator will recommend the appropriate level of non-expansion capital expenditure (NECAP) required to comply with its requirements, and if this is approved by Access Holders, then DBCT Management will provide the funding and project management expertise to deliver the new assets. Examples of such new assets are replacements of major equipment such as stackers and shiploaders, structural repairs to berths, offshore pile wrapping, machine automation and collision prevention systems. Typical expenditure is in the order of $10m-$50m annually, and following commissioning and handover into operation, such expenditure is included in the Capital Base.
- **Expansion**. In the event that an increase in System Capacity is required to provide new capacity for Access Seekers, then DBCT Management will undertake a terminal expansion in accordance with the AU and consistent with the DBCT Master Plan. The new assets may include refurbishments or replacements of existing assets, but typically involve additional major plant and facilities, and significant reconfiguration of the terminal operations. Expenditure may be $5m-$20m for related feasibility studies, and in the order of $100m-$1000m for construction works over the duration of the expansion, and following commissioning and handover into operation, such expenditure is included in the Capital Base if approved by the QCA in accordance with various requirements of the AU, particularly s.12.5.

The Value of Commissioned Assets information provided in Item 4 of Table 1 is based on:

(a) for each Financial Year of the Historical Period, Capital Expenditure approved by the QCA for addition to the RAB;

(b) for each Financial Year of the Preceding Period, the value of commissioned assets in that year as reasonably determined by DBCT Management in accordance with the AU.

**Table 2 – WACC parameters**

| Item | WACC parameter | 2016-21 | 2011-16 | 2006-11 |
|---|---|---|---|---|
| 5(a) | Nominal Risk Free Rate | 1.82% | 5.08% | 5.84% |
| 5(b) | Debt Risk Premium | 2.89% | 3.96% | 1.30% |
| 5(c) | Market Risk Premium | 6.50% | 6.00% | 6.00% |
| 5(d) | Gamma | 0.47 | 0.50 | 0.50 |
| 5(e) | Equity | 40% | 40% | 40% |
| 5(f) | Gearing | 60% | 60% | 60% |
| 5(g) | Equity Beta | 0.87 | 1.00 | 1.00 |
| 5(h) | Return on equity | 7.48% | 11.08% | 11.84% |
| 5(i) | Nominal Vanilla WACC | 5.82% | 9.86% | 9.02% |
| 5(j) | Inflation Rate | 2.00% | 2.69% | 2.50% |
| 5(k) | Corporate Tax Rate | 30% | 30% | 30% |

## 5 Weighted average cost of capital (WACC)

DBCT Management's weighted average cost of capital is shown in Table 2 for each regulatory period of the Historical Period, based on the following values as approved by the QCA:

(a) Nominal Risk-Free Rate
(b) Debt Risk Premium
(c) Market Risk Premium
(d) Gamma
(e) Equity component
(f) Gearing component
(g) Equity Beta
(h) Return on equity
(i) Nominal Vanilla WACC
(j) Inflation Rate
(k) Corporate Tax Rate

**Table 3 – Allowances and TIC**

| Item | Revenue Component | Units | 2021 | 2020 | 2019 | 2018 | 2017 | 2016 | 2015 | 2014 | 2013 | 2012 | 2011 | 2010 | 2009 | 2008 | 2007 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 6(a) | Working Capital Allowance | A$m | 1.1 | 1.1 | 1.1 | 1.1 | 1.1 | 2.4 | 2.4 | 2.3 | 2.2 | 2.2 | 2.2 | 1.9 | 1.5 | 1.1 | 0.8 |
| 6(b) | Corporate Overheads | A$m | 7.8 | 7.6 | 7.6 | 7.5 | 7.3 | 6.0 | 6.1 | 5.9 | 5.7 | 5.7 | 5.4 | 5.3 | 5.2 | 5.1 | 4.8 |
| 6(c) | Regulatory Levy | A$m | 0.8 | 1.6 | 1.8 | 0.5 | 0.1 | 0.5 | - | 0.6 | 0.6 | 1.4 | 1.3 | 0.3 | 0.3 | 0.3 | 0.3 |
| 6(d) | Remediation Allowance | A$m | 7.0 | 7.0 | 7.0 | 7.0 | 7.0 | 1.0 | 1.0 | 1.0 | 1.0 | 1.0 | 1.0 | 1.0 | 1.0 | 1.0 | 1.0 |
| 6(e) | Net Tax Allowance | A$m | 8.7 | 8.4 | 8.4 | 8.1 | 7.8 | 9.5 | 9.4 | 8.4 | 7.6 | 7.5 | 7.0 | 9.6 | 8.0 | 6.8 | 4.4 |
| 6(f) | QCA Approved ARR | A$m | 200.5 | 199.1 | 199.6 | 198.1 | 193.0 | 260.0 | 258.5 | 250.3 | 246.7 | 247.3 | 243.4 | 228.3 | 178.8 | 136.3 | 90.3 |
| 6(g) | TIC | $/t | 2.43 | 2.51 | 2.48 | 2.52 | 2.39 | 3.13 | 3.08 | 2.99 | 2.90 | 2.92 | 2.87 | 2.71 | 2.56 | 2.17 | 1.49 |

## 6 QCA allowances and TIC

Table 3 sets out information on the QCA's historical revenue allowances and terminal infrastructure charge for each year of the Historical Period (as at the end of the relevant Financial Year) including the following revenue components:

(a) Working Capital
(b) Corporate Overheads
(c) Regulatory Levy
(d) Remediation Allowance
(e) Net Tax Allowance
(f) The approved Annual Revenue Requirement
(g) The Terminal Infrastructure Charge.

**Table 4 – Terminal Utilisation**

| Item | Items | Units | 2021 | 2020 | 2019 | 2018 | 2017 | 2016 | 2015 | 2014 | 2013 | 2012 | 2011 | 2010 | 2009 | 2008 | 2007 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 7(a) | Contracted capacity | Mtpa | 82.4 | 79.2 | 80.6 | 78.7 | 80.7 | 83.1 | 83.8 | 83.8 | 85.0 | 84.8 | 84.8 | 84.3 | 70.0 | 63.0 | 60.4 |
| 7(b) | Actual Throughput | Mtpa | - | - | 69.5 | 70.6 | 63.2 | 67.4 | 71.6 | 67.5 | 62.2 | 50.8 | 54.7 | 63.1 | 47.1 | 43.0 | 49.9 |
| 7(c) | Terminal Utilisation | % | - | - | 82% | 83% | 74% | 79% | 84% | 79% | 73% | 60% | 64% | 74% | 55% | 63% | 83% |

## 7 Terminal Utilisation

Table 4 sets out information on the historical utilisation of the terminal (as at the end of the relevant Financial Year). Specifically it sets out:

(a) Contracted capacity;

(b) Actual Throughput (being volumes of coal handled); and

(c) Terminal Utilisation (being Actual Throughput as a percentage of System Capacity).

## 8 Other Information

Any other information that may assist an Access Seeker to determine the reasonableness of historical pricing information (if applicable) will form part of this Report as an attachment.

## 9 Interpretation

Where applicable, capitalised terms adopt the meaning as set out in Schedule G of the AU.

## Certification

The undersigned Senior Managers of DBCT Management hereby certify their belief that the information provided in this Report is in accordance with s.5.2(c)(2) of the DBCT Access Undertaking, specifically:

(1) the information was derived and is provided in accordance with the relevant requirements of Schedule H; and

(2) it properly represents the information required under Schedule H.

| | | |
|---|---|---|
| Name | | |
| Title | | |
| Signature | | |
| Date | | |

## Attachments

A. Other Information

DBCT MANAGEMENT

# DBCT Access Undertaking

## Schedule I

## Indicative Access Proposal Information Disclosure Report

## Financial Year 2021-22

**Table of Contents**

## Purpose of this document

This document contains a range of information to facilitate effective negotiations between the Access Seeker and DBCT Management following the Indicative Access Proposal process, pursuant to s.5.5(d)(7) and Schedule I of the DBCT Access Undertaking (**AU**). Access Seekers should also reference the historical context of access charges which is provided in the Pre-Application Information Disclosure Report consistent with Schedule H of the AU.

DBCT Management notes that under section 101(5) of the QCA Act, an Access Seeker may seek advice or directions from the QCA with regard to the information provided in this report.

In this report **Forecast Period** means the period commencing at the start of the Financial Year in which the Indicative Access Proposal is to be provided and ending on 30 June 2026.

**Table 1 – Capital Base components**

| Item | Capital Base Component | Units | 2022 | 2023 | 2024 | 2025 | 2026 |
|---|---|---|---|---|---|---|---|
| 1 | Forecast Capital Base | A$m | 2,388 | | | | |
| 2a | Forecast Indexation | A$m | 48 | | | | |
| 2b | Forecast Inflation | % | 2.00% | | | | |
| 3 | Forecast Depreciation | A$m | (97) | | | | |
| 4 | Forecast Capital Expenditure | A$m | 60 | | | | |

## 1 Forecast Capital Base

The Capital Base is the value of assets comprising the Terminal. DBCT Management's forecast of the Capital Base for each Financial Year of the Forecast Period is shown in Item 1 of Table 1.

DBCT Management has determined the Capital Base by rolling forward the previous Financial Year's Capital Base by:

- adjusting the value of the previous Financial Year's Capital Base to account for inflation by applying the forecast inflation provided in Item 2b of Table 1;
- subtracting the forecast depreciation value for the previous Financial Year as provided in Item 3 of Table 1; and
- adding the value of forecast capital expenditure from the previous Financial Year as provided in Item 4 of Table 1.

For the purposes of determining the 2022 Capital Base, the Capital Base for the Financial Year 2021 was taken to be the RAB value approved by the QCA for that year.

## 2 Forecast Indexation

Indexation compensates for the impact of inflation on the value of the Terminal. The Forecast Indexation adjustment is shown in Item 2a of Table 1, based on DBCT Management's estimate of inflation for each Financial Year of the Forecast Period.

DBCT Management's forecast of inflation over for the Forecast Period is set out in Item 2b of Table 1.

## 3 Forecast Depreciation

Depreciation reflects the reduction in value of assets in the Capital Base over their economic life. The Forecast Depreciation information is shown in Item 3 of Table 1[1], for each Financial Year of the Forecast Period, as reasonably determined by DBCT Management in such a way that:

- each asset or group of assets is depreciated over the economic life of that asset or group of assets; and
- so as to allow, as far as reasonably practicable, for adjustments reflecting changes in the expected economic life of a particular asset or group of assets (including adjustments to align the asset life with the duration of the terminal lease); and
- so that an asset is depreciated only once – that is, the amount by which the asset is depreciated over its economic life does not exceed the value of the asset at the time of its inclusion in the Capital Base (adjusted for inflation); and
- the residual value of the asset is zero.

## 4 Forecast Capital Expenditure

DBCT Management's forecast of Capital Expenditure for each Financial Year of the Forecast Period is set out in Item 4 of Table 1, including a description of the related assets expected to be commissioned in the Forecast Period.

The Terminal must continue to perform in accordance with the requirements of relevant environmental and safety regulations, the Access Undertaking, Terminal Regulations, Operations and Maintenance Contract (**OMC**), Access Agreements, and various other applicable standards and agreements. The AU contemplates two types of Capital Expenditure to be undertaken by DBCT Management:

- **NECAP**. The assets comprising the existing Terminal are subject to deterioration over time as part of delivering the coal handling service, and require refurbishment or replacement outside the scope of the OMC obligations. Other requirements include improvement of safety or environmental performance, terminal throughput and efficiency. In these cases, and where the new assets do not increase the System Capacity, the Operator will recommend the appropriate level of non-expansion capital expenditure (NECAP) required to comply with its requirements, and if this is approved by Access Holders, then DBCT Management will provide the funding and project management expertise to deliver the new assets. Examples of such new assets are replacements of major equipment such as stackers and shiploaders, structural repairs to berths, offshore pile wrapping, machine automation and collision prevention systems. Expenditure is in the order of $10m-$50m annually. The Operator and DBCT Management regularly review the condition of existing facilities, the expected remaining service life, and any other factors impacting Terminal performance, in consultation with relevant experts. Annually, the outlook for such expenditure is summarised in the Operator's 5 Year Plan, and included in the Forecast Capital Expenditure for the relevant Terminal Component.
- **Expansion**. In the event that an increase in System Capacity is required to provide new capacity for Access Seekers, then DBCT Management will undertake a terminal expansion in accordance with the AU and consistent with the DBCT Master Plan. The new assets usually include refurbishments or replacements of existing assets, additional major plant and facilities, and significant reconfiguration of the terminal operations. Expenditure may be $5m-$20m for related feasibility studies, and in the order of $100m-$1000m for construction works over the duration of the expansion. Such expenditure is typically longer term, but if it is expected to be commissioned and included in the Capital Base during the Forecast Period, it will also be included in the Forecast Capital Expenditure for the relevant Terminal Component.

[1]Depreciation is shown as a negative figure in the table as this reflects the impact it has on the Capital Base

**Table 2 – WACC parameters**

| Item | WACC Parameter | 2021-26 |
|---|---|---|
| 5(a) | Nominal Risk Free Rate | |
| 5(b) | Debt Risk Premium | |
| 5(c) | Market Risk Premium | |
| 5(d) | Gamma | |
| 5(e) | Equity | |
| 5(f) | Gearing | |
| 5(g) | Equity Beta | |
| 5(h) | Return on equity | |
| 5(i) | Nominal Vanilla WACC | |
| 5(j) | Inflation Rate | |
| 5(k) | Corporate Tax Rate | |

## 5 Weighted average cost of capital (WACC)

Table 2 sets out DBCT Management's estimate of an appropriate weighted average cost of capital over the Forecast Period, comprising the following parameters:

(a) Nominal Risk-Free Rate

(b) Debt Risk Premium

(c) Market Risk Premium

(d) Gamma

(e) Equity component

(f) Gearing component

(g) Equity Beta

(h) Return on equity

(i) Nominal Vanilla WACC

(j) Inflation Rate

(k) Corporate Tax Rate

**Table 3 – Forecast terminal metrics**

| Item | Terminal Metrics | Units | 2022 | 2023 | 2024 | 2025 | 2026 |
|---|---|---|---|---|---|---|---|
| 6(a) | Forecast contracted capacity | Mtpa | | | | | |
| 6(b) | Forecast throughput | Mtpa | | | | | |
| 6(c) | Forecast spare capacity | Mtpa | | | | | |

## 6 Forecast terminal metrics

The forecast terminal metric information in Table 3, provides DBCT Management's estimate of utilisation of the terminal (at the end of each Financial Year of the Forecast Period). Specifically, it shows:

(a) Forecast contracted capacity;

(b) Forecast throughput; and

(c) Forecast spare capacity.

## 7 Forecast rehabilitation costs

DBCT Management's estimate of the cost of rehabilitating the Terminal at the end of the lease in accordance with the requirements of the PSA is $[ ].

**Table 4 – Forecast efficient costs**

| Item | Forecast efficient costs | Units | 2022 | 2023 | 2024 | 2025 | 2026 |
|---|---|---|---|---|---|---|---|
| 8 | Forecast QCA Fees | A$m | | | | | |
| 9 | Forecast efficient corporate costs | A$m | | | | | |
| 10 | Other forecast efficient costs | A$m | | | | | |

## 8 Forecast QCA Fees

DBCT Management's estimate of the costs charged to DBCT Management by the QCA for the provision of regulatory services related to the Terminal is shown in Item 8 of Table 4.

## 9 Forecast efficient corporate costs

The Forecast Corporate Costs information is an independent estimate of efficient corporate costs of DBCT Management for the Forecast Period, having regard to:

- High level benchmarking, based on other comparable regulatory judgements on total corporate costs for a range of infrastructure providers;
- Component benchmarking, based on benchmarks derived from a cross-section of listed companies to develop estimates of the major components of corporate costs; and
- Bottom-up benchmarking, based on an estimate of corporate costs from an assessment of individual cost items, with the starting point for this analysis being the breakdown of costs included in the QCA's determination of DBCT Management's corporate costs for the 2017 AU.

The Forecast Corporate Costs information is summarised at Item 9 in Table 4 and will form part of this Report as an attachment.

## 10 Other forecast efficient costs

DBCT Management's estimate of the costs relating to working capital management and tax obligations for a relevant efficient benchmarked firm is summarised at Item 10 of Table 4.

## 11 Outcome of commercial arbitrations

Information regarding the outcomes of any commercial arbitration relating to access to the DBCT service during the Pricing Period will form part of this Report as an attachment (if applicable).

## 12 Other Information

Any other information that DBCT Management provides in order to assist an Access Seeker to determine the reasonableness of the estimated Access Charges in accordance with section 5.5(d)(5)(B) of the AU will form part of this Report as an attachment (if applicable).

## 13 Interpretation

Where applicable, capitalised terms adopt the meaning as set out in Schedule G of the AU.

## Certification

The undersigned Senior Managers of DBCT Management hereby certify their belief that the information provided in this Report is in accordance with s.5.5(d)(8) of the AU, specifically:

(1) the information was derived and is provided in accordance with the relevant requirements of Schedule I; and

(2) the assumptions made are reasonable.

| | | |
|---|---|---|
| Name | | |
| Title | | |
| Signature | | |
| Date | | |

## Attachments

A. Forecast efficient corporate costs information

B. Outcome of commercial arbitrations

C. Other Information

# Appendix 4 Proposed amendments to the 2019 DAU and SAA

Attached Separately