Dalrymple Bay Coal Terminal User Group
Submission on QCA Draft Decision
DBCT 2019 Draft Access Undertaking

23 October 2020

Contents

1 Introduction

This submission in respect of DBCT Management Pty Ltd's (***DBCTM***) 2019 draft access undertaking (the ***2019 DAU***) is made on behalf of the Dalrymple Bay Coal Terminal User Group (the ***DBCT User Group***).

The DBCT User Group comprises of both access holder and access seekers, including both users of the existing terminal and proposed customers of the 8X DBCT expansion.

The submission principally responds to the Queensland Competition Authority's (***QCA***) Draft Decision of August 2020 (the ***Draft Decision***), which:

(a) refused to approve the 2019 DAU; but

(b) provided the QCA's preliminary view that a negotiate/arbitrate pricing model could be made appropriate with amendments required by the QCA.

While the DBCT User Group supports the QCA's recognition that the 2019 DAU remains inappropriate to approve, they equally strongly consider that the amendments proposed by the QCA continue to fall short of making the 2019 DAU appropriate.

The 2019 DAU with only such amendments will *not* constrain DBCTM from engaging in monopoly pricing.

This submission seeks to explain why that is the case, and where the contrary conclusions reached in the Draft Decision rely on an error of law, unsubstantiated factual findings and a failure to take into account circumstances of the DBCT service that are inconsistent with the QCA's analysis that negotiated outcomes are both likely and will provide benefits.

For the purposes of clarity the submission is divided into 5 parts as follows:

Part A of this submission considers the error of law made in the Draft Decision regarding how the QCA has determined the amendments that are appropriate.

Part B of this submission considers the inappropriate nature of a negotiate/arbitrate regime in the circumstances of the DBCT service.

Part C of this submission considers the shortcoming in the QCA's proposed amendments to the 2019 DAU and why they do not resolve the issues arising from a negotiate/arbitrate regime.

Part D of this submission considers an alternative negotiate/reference tariff model, which provides the potential for negotiations the QCA appears to value, while providing an appropriate methodology for resolving access terms where the parties fail to negotiate a resolution.

Part E of this submission addresses other specific queries raised by the QCA in the Draft Decision, including the remediation allowance, depreciation methodology, price review mechanisms, roll-forward of pricing during the regulatory term and various non-pricing issues.

This submission is in addition to those previously provided by the DBCT User Group on:

(c) 23 September 2019 (***1st User Group Submission***);

(d) 22 November 2019 (***2nd User Group Submission***);

(e) 24 April 2020 (***3rd User Group Submission***); and

(f) 5 June 2020 (***4th User Group Submission***),

and should be read in conjunction with each of them.

2 Executive Summary

2.1 The 2019 DAU is Inappropriate

The DBCT User Group strongly agrees with the QCA's draft conclusions that the 2019 DAU:

(a) is inappropriate;

(b) does not appropriately balance the interests of DBCTM and access seekers;

(c) does not provide a sufficient constraint on DBCTM's ability to exercise market power;

(d) does not provide sufficient information to inform access negotiations;

(e) does not provide arbitration criteria that sufficiently protects the interests of access seekers;

(f) materially increases uncertainty with the potential to damage investment; and

(g) is contrary to the public interest.[1]

Accordingly, the DBCT User Group supports the QCA's decision to refuse to approve the 2019 DAU.

2.2 A Negotiate-Arbitrate Model is not Appropriate for DBCT

However, the DBCT User Group is concerned that, despite those serious issues identified by the QCA as problematic in the 2019 DAU, the Draft Decision only proposes fairly minor refinements.

In the DBCT User Group's view, these amendments evidently do not impose sufficient constraints on DBCTM's ability to engage in monopoly pricing, as a monopoly infrastructure owner which faces no competitive constraints.

(a) Founded on an Error of law

The foundation for the QCA's approach to determining amendments in 'the way the authority considers appropriate' under section 134(2) QCA Act is that it must 'start with' the 2019 DAU as submitted and is not required to consider whether other alternatives are preferable or more appropriate

The DBCT User Group strongly considers that narrowly confining the QCA's consideration process in that way, particularly to the exclusion of a reference tariff model, is an error of law and a failure to properly carry out the QCA's statutory function under section 134(2) QCA Act.

(b) Reliance on 'Primacy of commercial negotiations' where informed and effective negotiations cannot occur

The Draft Decision also relies heavily on the proposition that primacy should be given to commercial negotiations.

The DBCT User Group strongly considers that seeking to apply that principle in the circumstances of the DBCT service on the basis that there 'may' be benefits is a flawed approach that fails to take account of:

(i) the circumstances of the DBCT service (including DBCTM's market power, users' lack of countervailing power and the costs and risk of inefficient pricing and arbitration) and the implications they have for the potential for efficient and appropriate negotiated outcomes;

[1] Draft Decision, iv.

(ii) the existing contractual settings which actually leave only price to be negotiated (and the Users absolutely reject any suggestion that DBCTM's ability to negotiate a higher than efficient price is a 'benefit'); and

(iii) the practical experiences of, and ease of gaming, negotiate-arbitrate regimes.

As a result of those factors, the DBCT User Group consider it is clear that the speculated benefits will not arise.

Rather, when those factors are properly considered, it becomes clear that the only likely outcome of the negotiate-arbitrate regime is pricing in excess of efficient costs of supply – that is, permitting DBCTM to engage in monopoly pricing.

Taken together with the known disadvantages and risks of a negotiate-arbitrate regime, the DBCT User Group submits that it is not reasonably open to conclude a negotiate-arbitrate regime is appropriate in those circumstances.

(c) Negotiated Outcomes are Unlikely

The DBCT User Group also sees little prospect of appropriate negotiated outcomes.

The QCA has previously recognised that DBCTM is incentivised to raise prices to maximise profit (and given the long term nature of its contracts and lack of competition can do so without losing volume).[2]

DBCTM would be anticipated to continue to act rationally as a profit maximising monopolist under the proposed negotiate/arbitrate form of regulation, and raise prices until the point at which regulation imposes a constraint.

However, under such a negotiate/arbitrate form of regulation:

(i) DBCTM has no commercial imperative to agree a tariff, unless it believes that it is higher than the tariff that would be set under an arbitrated outcome;

(ii) Where the QCA has expressly indicated in the Draft Decision that efficient cost is only one factor, and 'value to the user' must also be taken into account,[3] DBCTM will envisage the potential for a much higher price than the efficient price; and

(iii) DBCTM does not have any realistic ability to offer differentiated services to users or access seekers which would justify them accepting such a tariff.

In addition, users (as price takers in coal markets, such that increases in DBCT's price are direct reductions in their profitability) have strong incentives to keep the price as close as possible to the efficient price, and will regard arbitration as their only real constraint on DBCTM's monopoly pricing.

Given the wide range of possible arbitration outcomes, and starkly divergent views of what constitutes an appropriate outcome, each party to an access pricing negotiation is likely to consider arbitration will provide a better outcome than a negotiated agreement.

Given that this position undermines any perceived benefit of the proposed model (which relies on the QCA's view that negotiated outcomes are likely and may provide benefits), and is clearly less efficient than determining a reference tariff upfront, the DBCT User Group strongly submits that there is no basis for considering a negotiate/arbitrate model to be appropriate.

The only circumstances in which negotiated outcomes might be likely are where a user suffers from lesser financial resources or a need to obtain immediately greater pricing certainty for their project – such that arbitration does not provide a credible constraint or backstop. In those specific

[2] Declaration Review, Final Decision: Part C, at 81.
[3] Draft Decision, 72.

circumstances the user is particularly vulnerable to DBCTM's abuse of its monopoly position and agreeing an inefficient pricing outcome. However, that is not a negotiated outcome which it is appropriate for the QCA to facilitate.

(d) A Reference Tariff provides a More Appropriate 'Backstop' Than Arbitration

If despite all of the analysis above, the QCA is minded to approve a form of regulation that provides an opportunity to negotiate, the DBCT User Group submits that the appropriate model would then be one where the 'backstop' is a reference tariff applied to all users where agreement is not reached.

That would provide:

(i) more certainty of appropriate pricing (with resulting positive impacts on the public interest, efficient investment and competition);

(ii) more certainty of the likely range of outcomes, which would enhance the prospects of a negotiated outcome;

(iii) result in a lower cost resolution process where the backstop applies; and

(iv) provide a more incremental change consistent with the predictability and stability the Draft Decision acknowledges a regulatory framework should provide,

while still providing the potential for negotiated outcomes to create the benefits the Draft Decision speculates might be achieved.

3 Steps the QCA Should Take to Inform Itself Appropriately

3.1 Need for Substantiation to Justify Such Upheaval

The Draft Decision acknowledges that DBCTM's proposed negotiate/arbitrate model is *'a significant shift from the longstanding regulatory framework at DBCT'*[4].

To place this in context, DBCTM is proposing upending an approach the QCA has considered appropriate across 14 years and three undertakings (the 2006, 2010 and 2017 access undertakings).

DBCTM proposes doing so without there being any change in the circumstances of the DBCT services that would evidently justify a different approach being appropriate.

If the QCA were to approve that approach, it will be imposing a form of regulation that has never applied to DBCTM since privatisation, on the basis that there *'may'* be benefits of negotiated outcomes,[5] despite that view being contradicted by the DBCT User Group and every single user and access seeker that has made submissions in the 2019 DAU process.

Where the QCA recognises that *'providing stability and predictability in the regulatory framework is likely to promote investment confidence and reduce administration and compliance costs'*[6] the DBCT User Group submits that it is critical that the QCA does not approve a negotiate-arbitrate model without a high level of confidence that it will operate appropriately in the future.

The submission process to date cannot reasonably have provided that high level of confidence.

DBCTM's submissions are silent on the most important issue in contention in this process – how they will seek to set the price for the period post 1 July 2021. DBCTM have not provided any indication in submissions of likely pricing which would apply under a negotiate-arbitrate regime (beyond concerning high level submissions that it should be entitled to price above the efficient

[4] Draft Decision, 3.
[5] Draft Decision, 7.
[6] Draft Decision, 24.

costs of supply up to the 'value to the user'[7]). Further, DBCTM have expressly refused to provide such an indication where requested to do so in correspondence by the DBCT User Group, and made it clear to individual users they will not do so while the regulatory consideration is on foot.

By contrast, the DBCT User Group has presented ample evidence about DBCTM's economic incentives and likely outcomes which is inconsistent with the Draft Decision's preliminary conclusions that a negotiate/arbitrate regime will constrain DBCTM from engaging in monopoly pricing.

Accordingly, the DBCT User Group submits that in order for the QCA to reasonably consider it appropriate to adopt a form of regulation that is completely unproven and uncertain in respect of DBCT, the QCA needs significantly more information about the likely future outcomes of doing so.

3.2 Information Production that should be required from DBCTM

The QCA has given notice of an investigation to consider the 2019 DAU, such that it has all the statutory powers provided to it for such investigations under Part 6 of the QCA Act.[8]

As a result, the QCA *'may inform itself on any matter relevant to the investigation in any way it considers appropriate*'[9].

One way in which the QCA can do this, to ensure it has all the appropriate evidence before it, is exercising its compulsory information production powers.[10]

As discussed in section 3.1, given the proposed major and unprecedented shift in regulatory settings, it is surely essential for the QCA to understand as much as possible about what the likely outcomes of that shift are. This is too important a matter to be left to mere speculation about potential benefits that 'may' arise.

Accordingly, the DBCT User Group submits that the QCA's compulsory information production powers should be exercised such that the QCA can obtain a more accurate picture of DBCTM's future pricing intentions under its proposed regulatory model.

The DBCT User Group considers that mandatory information production notices should be issued to DBCTM in respect of at least the following information:

(a)	*any modelling, documents or other information provided to any access seeker or access holder about pricing to apply after 1 July 2021 (noting that DBCTM has met with a number of users on this issue prior to the date of this submission and DBCTM is seeking to insist on users signing confidentiality arrangements as part of those discussions to prevent disclosure to the QCA);*
(b)	*any other modelling, documents or other information held by DBCTM or its affiliates regarding pricing to be sought by DBCTM to apply after 1 July 2021 (including DBCTM's internal preparation for negotiations or discussions with access seekers or access holders);*
(c)	*any modelling, documents or other information held by DBCTM or its affiliates regarding the price that may be determined to apply after 1 July 2021 by the QCA in an arbitration; and*
(d)	*any modelling, documents or other information provided by DBCTM, its advisers and consultants or its investors to bidders in the trade sale process or in connection with the*

[7] DBCTM Submission, 23 April, 31.
[8] s 147 QCA Act
[9] s 173(1)(c) QCA Act.
[10] s 185 QCA Act

proposed initial public offering in respect of DBCTM (both of which have been publicly reported on in the financial press) in relation to pricing that would apply after 1 July 2021.

DBCTM's existing analysis in that regard, in circumstances outside of the QCA process where DBCTM's views are likely to be described more honestly than in their submissions to the QCA where they have clearly vested interests, is highly relevant.

In the absence of requesting and understanding this information it is difficult to see how the QCA can be comfortable that DBCTM will be constrained from engaging in monopoly pricing.

Once that information has been obtained, the QCA should then consider how DBCTM's pricing outcomes anticipated under the negotiate/arbitrate model compares to what the QCA assesses as an efficient price (including utilising its existing building blocks methodology taking into account current timing and market based parameters) to help to inform its views on the likely future pricing a negotiate/arbitrate regime will permit.

Where DBCTM seeks to obstruct the QCA from obtaining this information, the only conclusion reasonably open is that DBCTM intend to engage in monopoly pricing, believe that the proposed negotiate/arbitrate regime will facilitate them doing so, and are seeking to prevent the full extent of that becoming known to the QCA.

3.3 Need for a Stakeholder Forum

The DBCT User Group proposes that a stakeholder forum should be held before the QCA's board in advance of any final decision in respect of the 2019 DAU.

Such a forum would give the board a chance to directly hear from stakeholders before a final decision is made on key matters which remain in contention, and properly challenge and investigate claims that are being made about the negotiate/arbitrate model.

In particular, the DBCT User Group seeks the opportunity to address the board on:

(a) matters regarding the circumstances of the DBCT service and existing contractual settings which effectively foreclose the negotiated outcomes the Draft Decision assumes will occur;

(b) the likelihood of negotiated outcomes occurring, and the prospects of them being anything other than higher prices; and

(c) matters on which the Draft Decision appears to have misinterpreted the submissions of the DBCT User Group.

3.4 Understanding the Parties' Incentives – Why Appropriate Negotiated Outcomes are Unlikely

The DBCT User Group submits that a reliance on negotiated outcomes as the principal form of price setting based on an assumption DBCTM will be incentivised to seek reasonable prices, is not appropriate when the economic incentives of the parties are so misaligned as to make efficient and appropriate negotiated outcomes highly unlikely to occur.

As Adam Smith famously said *'It is not from the benevolence of the butcher, the brewer or the baker that we expect our dinner, but from their regard to their own self-interest*.'.

Understanding the parties' economic incentives is critical to understanding the likely outcomes of different regulatory approaches.

The DBCT User Group submits that where the QCA truly understands the economic incentives stakeholders will face in a negotiate/arbitrate model it will alter the preliminary conclusions in the Draft Decision about the likely outcomes of such a form of regulation.

DBCTM's Economic Incentives

DBCTM has been found by the QCA to have incentives (as a monopolist which does not risk losing business to competitors) to raise prices to maximise profits.

Consistent with that finding, at no point has the negotiate/arbitrate mechanism been envisaged by DBCTM as anything other than an avenue for a price increase – a matter that is privately acknowledged by DBCTM in discussions with users.

Under the form of regulation envisaged by the Draft Decision, DBCTM will enter its negotiations with existing users understanding that:

(a) DBCT is a natural monopoly that faces no competitors such that DBCTM faces no risk of existing users switching to other providers;

(b) Existing Users have long life coal mining sunk investments which depend on continuing access to DBCT into the future (and existing users have recently renewed their access agreements for long terms in any case due to the early trigger of such renewal options in connection with the proposed 8X expansion), such that there is also no risk of existing users ceasing to use the service;

(c) DBCTM is not compelled to reach agreement on non-price terms with existing users - as those are already contractually fixed – and there is limited scope to vary the common service provided to all users using the common DBCT infrastructure and subject to the same terminal regulations in any case – such that the negotiation is practically limit to being about price;

(d) The least favourable outcome DBCTM could expect from an arbitration is an efficient price – i.e. that reflects the efficient cost of supply (including a return on capital reflecting the commercial and regulatory risks in providing the service), reflecting the approach the QCA would have adopted in setting a reference tariff;

(e) However, there is a high likelihood of significant pricing upside being achievable in an arbitration, particularly given statements from the QCA in the Draft Decision indicating that that cost is only one factor and value and other factors will also be taken into account;

(f) A higher monopoly price achieved in a negotiation or through arbitration will have a 'halo' effect due to being published and putting upwards pressure on future price negotiations with other users; and

(g) Where DBCTM faces an arbitration with any users, the incremental costs of an arbitration against an additional user are minimal (as such arbitrations will concern the same issues) making arbitration attractive provided DBCTM considers there is any prospect of increase price from that which can be reached through negotiation.

As a result, DBCTM's economic incentives are to push for the greatest extent of monopoly pricing that can be achieved in negotiations, and DBCTM has no incentive to reach agreement on an appropriate or efficient price below the highest level they consider is achievable in an arbitration.

Existing Users' Economic Incentives

Existing users will enter negotiations with DBCTM understanding that:

(a) For the reasons noted above, they cannot switch suppliers or otherwise cease using the DBCT service (and DBCTM knows that such that the user has no countervailing power in the negotiations);

(b) For the reasons noted above, they have no scope to improve the non-pricing contract terms;

(c) They are a price taker in global coal markets – such that any increase in the price for the DBCT service is a direct reduction in their profitability – which makes it critical to obtain a price as close as possible to the efficient price; and

(d) Given there is no competition for DBCT and no countervailing power held by users, arbitration is the only constraint on the extent of monopoly DBCTM seeks.

As a result, the economic incentives of DBCT's existing users are to arbitrate to seek to keep the cost as close to the efficient cost as possible and minimise the likelihood of DBCTM engaging in monopoly pricing.

Implications of Stakeholders' Economic Incentives

As a result of the clear economic incentives of users and DBCTM, the DBCT User Group currently sees little prospect of a negotiated outcome, other than potentially for users or access seekers which are willing to accept an inefficiently high price because arbitration does not provide a credible constraint or backstop in their particular circumstances.

That might occur for an individual user which suffers from lesser financial resources or has a need to obtain immediately greater pricing certainty for their project. While those users or access seekers might reach a negotiated outcome, negotiate/arbitrate regulation makes them particularly vulnerable to DBCTM's abuse of its monopoly position and agreeing an inefficient pricing outcome.

Where this backdrop is understood, the DBCT User Group submits that the QCA must revisit its assumptions that DBCTM will propose reasonable prices and the parties are therefore likely to be able to reach a commercially negotiated outcome.

Rather, one can only conclude that there are strong prospects of the QCA being required to determine numerous arbitrations – with DBCTM being highly incentivised to make that a protracted, costly and uncertain process for users to seek to have further users simply concede to DBCTM's monopoly pricing and disincentive future arbitrations.

Given that this position undermines any perceived benefit of the proposed model (which relies on the QCA's view that negotiated outcomes are likely and will provide benefits), and is clearly less efficient than determining a reference tariff upfront, the DBCT User Group strongly submits that a negotiate/arbitrate model is not appropriate for the DBCT service.

Part A – Statutory Framework

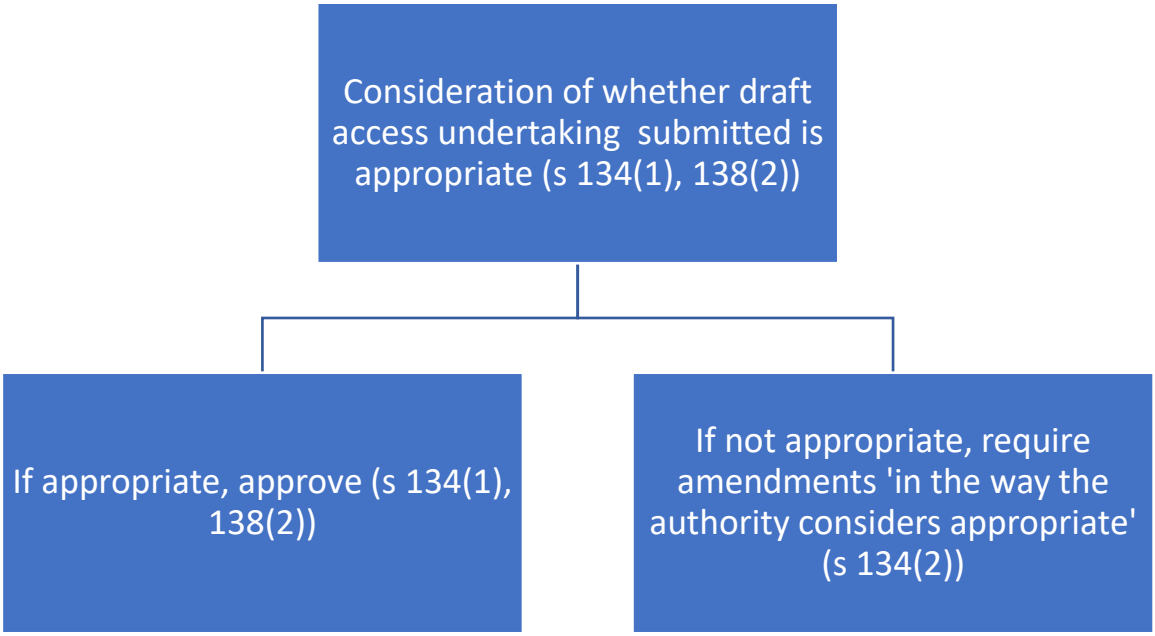
4 Failure to Perform the QCA's Statutory Role

4.1 Process for considering a draft access undertaking

The DBCT User Group is concerned that the QCA's Draft Decision contains a material error of law in respect of how the QCA carried out its statutory function under the *Queensland Competition Authority Act 1997* (Qld) (the ***QCA Act***) in considering a proposed access undertaking.

This error will impact on the validity of the Final Decision if it continues to be relied on.

Under section 134 of the QCA Act, consideration of a draft access undertaking is a two-step process as shown below:



The DBCT User Group agrees with the Draft Decision that the QCA is required to, as a starting point, consider the appropriateness of the actual draft access undertaking that is submitted to it.[11] That is not in contention.

To the extent that the Draft Decision appears to assume that the DBCT User Group considers that the QCA must, at that initial stage, refuse to approve the draft access undertaking submitted if there is a hypothetically more appropriate undertaking,[12] that is a misunderstanding of our earlier submissions.

In any case, reflecting on the 2019 DAU consideration process to date, the QCA has clearly considered the appropriateness of the 2019 DAU, and has concluded in both the Interim Draft Decision and the Draft Decision that the 2019 DAU is not appropriate to approve.

The DBCT User Group strongly agrees with the QCA's draft conclusions that the 2019 DAU:

(a) is inappropriate;

(b) does not appropriately balance the interests of DBCTM and access seekers;

(c) does not provide a sufficient constraint on DBCTM's ability to exercise market power;

[11] Draft Decision, 16.
[12] Draft Decision, 16-17.

(d) does not provide sufficient information to inform access negotiations;

(e) does not provide arbitration criteria that sufficiently protects the interests of access seekers;

(f) materially increases uncertainty with the potential to damage investment; and

(g) is contrary to the public interest.[13]

Where the QCA continues to hold this view (as the DBCT User Group submits it clearly should) then the first stage of its statutory function under section 134 QCA Act is complete.

For completeness, the DBCT User Group notes that while DBCTM has indicated ways in which it is willing to further amend its proposal and the QCA can take those into account in the second stage of consideration discussed below – the first stage is concerned with the 2019 DAU as originally submitted.

4.2 The Error of Law: Determining Appropriate Amendments

Where the QCA has determined that a draft access undertaking is not appropriate to approve, the second stage of the process is that the QCA must refuse to approve the 2019 DAU and give DBCTM a secondary undertaking notice stating the reasons for the refusal and requiring DBCTM to amend the 2019 DAU *'in the way the QCA considers appropriate'* (s 134(1)-(2) QCA Act).

It is at this stage that the DBCT User Group considers that the QCA is committing a serious error of law by determining that:

'In undertaking this exercise … we are not required to consider whether the amendments proposed by DBCTM are the 'most' appropriate … Similarly, it is not necessary for us to consider what hypothetical alternative might otherwise have been adopted or might be preferable'[14]

In stating that 'this exercise' under the QCA Act merely requires a consideration of what has been proposed[15] – the QCA is conflating the two statutory steps in the consideration process – which the QCA Act clearly defines as distinct. As a result, the QCA has failed to truly conduct the second step required by the QCA Act.

In this second step, determining the way the authority considers it appropriate for the draft access undertaking to be amended necessarily involves choices between possible outcomes.

The QCA has expressly acknowledged that appropriateness involves *'the striking of a balance between relevant considerations so as to provide the outcome which is fit and proper'.*[16]

It is simply not possible to make a decision that an outcome is 'the outcome which is fit and proper' in isolation of considering alternatives and considering whether they would have worse or better outcomes.

Again, the Draft Decision appears to misunderstand the DBCT User Group submissions on this point. It is not being suggested that the QCA must select from all of the infinite theoretical and hypothetical choices a single 'most' appropriate form of undertaking in order to be valid.

Rather, where there are distinctly different ways of the undertaking operating (here reference tariff based pricing or negotiate-arbitrate based pricing), in determining how it is appropriate to amend the 2019 DAU it is an error of law to adopt one as the 'appropriate' starting point because it formed part of the draft access undertaking that was initially submitted.

Reference tariff pricing is *not* merely one of many 'hypothetical alternatives'. It is:

[13] Draft Decision, iv.
[14] Draft Decision, 17.
[15] Draft Decision, 17.
[16] Draft Decision, 17.

(a) the well understood status quo;

(b) the form of regulation that has *previously been determined to be appropriate on multiple occasions* over 14 years and 3 undertakings (where the circumstances of the DBCT service were the same at the time of those previous findings of appropriateness as they are now);

(c) a form of regulation expressly recognised in existing users agreements;

(d) as the Draft Decision recognises,[17] a key choice the QCA Act expressly recognises needs to be made - by expressly recognising that an access undertaking can include a reference tariff,[18] without mandating that to be the case; and

(e) a common form of regulation that has been applied by the QCA and other regulators to monopoly infrastructure assets related to the coal industry and by numerous economic regulators in relation to other infrastructure assets that the QCA has previously considered to have similar characteristics to DBCT (such as electricity and water utilities).

There is nothing that limits the QCA, at the second stage of determining appropriate amendments, to the structure adopted in the draft access undertaking submitted. Doing so produces perverse outcomes where an undertaking is submitted that simply cannot be incrementally adjusted to make it appropriate.

Yet, that is evidently the basis upon which the Draft Decision proceeds.

The consideration of whether the clear reference tariff alternative to the approach proposed in the 2019 DAU provides a materially better (and therefore appropriate) outcome is something the QCA is legally required to consider.

A failure to do so will impact on the validity of the Final Decision.

4.3 A proper consideration of the alternatives will result in the QCA requiring different amendments

In the Interim Draft Decision of February 2020 (the ***Interim Draft Decision***) the QCA expressly recognised that reference tariffs were preferable:[19]

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

and[20]

> *Overall, we consider that there are likely to be benefits to requiring DBCTM to amend its 2019 DAU to incorporate a reference tariff. Key reasons for this are summarised as follows:*
>
> - *DBCT possesses characteristics of infrastructure facilities for which regulation commonly includes reference tariffs – for example, the existence of market power; limited substitution possibilities; and limited countervailing power of users;*
> - *Part 5 of the QCA Act explicitly contemplates the potential for a reference tariff to be included in an access undertaking for a declared service.*
> - *A reference tariff is an appropriate way to deal with information asymmetry problems associated with commercial negotiations for access – because it is a simple way of providing*

[17] Draft Decision, 17.
[18] Section 101(4) and 101(7) QCA Act.
[19] Interim Draft Decision, 59.
[20] Interim Draft Decision, 61-62

necessary information to access seekers, and is determined on an ex ante basis via a transparent QCA process.

- *Inclusion of a reference tariff in the DAU will avoid the potential for 'rolling' arbitrations – that would likely be costly, time-consuming and resource-intensive for all parties concerned, including us.*
- *Existing users are likely to have a greater degree of protection from the exercise of market power by DBCTM (even in the absence of a reference tariff). New users (access seekers, including expanding existing users) may be disadvantaged in comparison – due to different arbitration criteria, and time pressure for making investment decisions.*
- *To the extent stakeholders consider there is additional value in varied services that may be offered by DBCTM from time to time, an amended DAU including a reference tariff would not stop individual users negotiating access agreements reflective of this additional value.*
- *Each previously approved access undertaking for the service at DBCT has included a reference tariff, and this model has worked effectively over time to facilitate efficient access at the Terminal.*

…

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

There is no analysis in the Draft Decision which suggests that has ceased to be the QCA's view.

To carry out its functions in accordance with the QCA Act, the DBCT User Group submits that the QCA is legally bound to consider whether it is appropriate to:

(a) require DBCTM to amend the 2019 DAU to include a reference tariff which addresses the concerns identified (consistent with the previous findings of the QCA); or

(b) require DBCTM to amend the 2019 DAU to amend the negotiate-arbitrate regime proposed to address the concerns identified.

It is an error of law to simply conclude at this second stage of the statutory consideration process that the QCA is *'required to assess the 2019 DAU as proposed by DBCTM'* without such consideration.

The DBCT User Group submits that where the QCA duly conducts its statutory function in the manner provided for in the QCA Act, it follows from the reasoning in the Interim Draft Decision that the QCA should require amendments to the 2019 DAU which produce a reference tariff model.

4.4 Application of the Section 138(2) Statutory criteria

QCA findings on relevant factors for s 138(2) QCA Act criteria

While this issue has been extensively covered in submissions to date, the DBCT User Group emphasises that on the QCA's own interpretation of the section 138(2) QCA Act criteria, each of the following are relevant considerations:

s 138(2)	Criteria	Key considerations
(a)	Object of Part 5	• Constraining the potential exercise of market power by the owner of a facility with monopoly characteristics[21] • Constraining inefficient or unfair differentiation between access holders and access seekers[22] • Providing appropriate protections of the interests of access seekers and access holders[23] • Providing a stable, transparent and predictable regulatory framework[24]
(c)	Legitimate business interests of the operator	• Recovering efficient costs, including a commercial return on investment commensurate with the regulatory and commercial risks in supplying the declared service[25] • Not allowing the service provider to earn monopoly profits[26] • Complying with firm and binding contractual obligations – such as the Port Services Agreement[27]
(d)	Public interest	• The incidence of costs, including administrative and compliance costs[28] • Investment effects, including investment in facilities and markets that depend on access to the DBCT service[29] • The sustainable and efficient development of the Queensland coal industry (and related economic, regional development, employment and investment growth issues)[30]
(e)	Interests of access seekers	• The provision of access on reasonable commercial terms[31] • Tariffs that do not exceed the efficient costs of access[32]
(g)	Pricing Principles	• Price of access should provide incentives to reduce costs or otherwise improve productivity[33]

[21] Draft Decision, 19.
[22] Draft Decision, 19
[23] Draft Decision, 19.
[24] Draft Decision, 19
[25] Draft Decision, 20.
[26] Draft Decision, 20.
[27] Draft Decision, 20
[28] Draft Decision, 21.
[29] Draft Decision, 21
[30] Draft Decision, 21.
[31] Draft Decision, 22.
[32] Draft Decision, 22.
[33] Draft Decision, 23; s 168A(c) QCA Act

(h)	Other relevant issues	• The interests of access holders and inter-generational issues between access holders and access seekers[34] • Providing stability and predictability in the regulatory framework[35]

As a monopolist DBCT has incentives to maximise profit

It is a trite principle of economics that monopolists have strong economic incentives to raise price to maximise profits (even where that results in some reduction in volume), even though doing so reduces consumer and social welfare.

In this case because the existing capacity is locked in under long term evergreen contracts, it is likely DBCTM is in an even stronger position to raise price without risking any change in existing volumes.

As much is recognised by the QCA in the declaration review:

> *As a commercial entity, DBCT Management has an incentive to maximise profits.*
>
> *The QCA's view is that the coal handing service at DBCT is an essential service for moving coal from rail to ships for mines located in the Goonyella system, and that DBCT is the least-cost provider to meet the total foreseeable demand. The QCA also considers that DBCT Management would not be constrained from exercising its market power by the availability of substitute facilities, by the countervailing power of users (particularly potential DBCT users) in the absence of the access framework, and by the threat of a new facility being built. Furthermore, unlike the Port of Newcastle in the PNO declaration matter, DBCT is capacity constrained, as foreseeable demand is likely to exceed existing DBCT capacity. This means the issue of whether DBCT Management would have an incentive to contract spare capacity does not arise.*
>
> *Also, although DBCT Management is not vertically integrated, it is a monopolist service provider and would have an incentive to maximise profits by charging more, even if this reduces volumes.*[36]

and

> *even under declaration, DBCT Management may have an incentive to propose values that produce a higher TIC*[37]

Accordingly, to be effective as a constraint and thereby appropriate for the QCA to approve, a negotiate/arbitrate regime would need to be robust enough to prevent active attempts by DBCTM to increase prices above efficient levels and act in other ways that are inconsistent with the considerations relating to the section 138(2) QCA factors as noted above.

Inconsistency of the negotiate-arbitrate regime with the section 138(2) factors

The Draft Decision suggests that negotiated outcomes *'may'* have a number of benefits.[38] The Draft Decision does not conclude that is *likely*, rather merely *possible*. It does not identify what those benefits might be.

The DBCT User Group submits that the speculated potential for such benefits, and the likelihood of such benefits arising, needs to be balanced against other matters relevant to the section 138(2) QCA Act factors, and considerations relevant to them, as noted above.

[34] Draft Decision, 23-24
[35] Draft Decision, 24.
[36] Final Recommendation, Part C: DBCT Declaration Review, March 2020, 170.
[37] Final Recommendation, Part C: DBCT Declaration Review, March 2020, 190.
[38] Draft Decision, 53.

In particular, the DBCT User Group strongly urges the QCA to reconsider each of the following as considerations that weigh heavily against a negotiate/arbitrate model being able to be considered appropriate under section 138(2) QCA Act:

s 138(2)	Consideration	Analysis
(a), (h)	Negotiate/arbitrate does not provide a stable, transparent and predictable regulatory framework	The negotiate-arbitrate model is acknowledged by the QCA as being a 'significant shift'. Given it has never been applied to DBCT before, and involves arbitration criteria like 'value' which the QCA acknowledges will vary considerably between access seekers,[39] and will seeming vary considerably over time, that obviously detracts from the stability and predictability of the regulatory framework
(a)	Risk of unfair or inefficient differentiation between access holders and access seekers	By its very nature the negotiate-arbitrate regime will result in differentiation between access holders and access seekers – and there is no mechanism in place to ensure that such differentiation is not inefficient or unfair (because once a user has agreed to such an inefficient or unfair price it cannot subsequently be reopened even if other users are successful in arbitrating a better price).
(c), (e)	Risk of tariffs exceeding efficient costs (i.e. providing monopoly profits), being unreasonable and providing monopoly profits	DBCTM has been found to have clear incentives to increase prices to maximise profit. DBCTM has made express submissions to the QCA that it should be entitled to charge about efficient costs (i.e. seek monopoly profits), and that it considers the exact arbitration criteria being proposed by the QCA permit that.[40] Irrespective of the QCA's view about how the proposed arbitration criteria will operate, it follows that DBCTM will be anticipated to seek prices above efficient levels in negotiation because they have no economic incentive to agree a lower price than they believe they can obtain in arbitration. Unless the QCA believes that absolutely all access seekers and holders will utilise arbitration (in which point negotiation based regulation is pointless), the result will be at least some users being charged above efficient costs.
(b), (c)	Compliance with Port Services Agreement	The negotiate/arbitrate regime's differentiation of prices between users is inconsistent with DBCTM's contractual obligations under the Port Services Agreement (as discussed below) to have a common charge for a common service
(d)	Costs	Given the number of users of DBCT, bilateral negotiations followed by bilateral arbitrations will clearly be more costly and expensive than the current reference tariff model involving one ex-ante consideration in relation to all users at the time of regulatory reset.

[39] Draft Decision, 72 (footnote 255)
[40] DBCTM Submission, 23 April, 3137.

(e)	Investment outcomes	The negotiate-arbitrate model both creates uncertainty and (as discussed above) create a material risk of tariffs exceeding efficient costs. As a result it will have an adverse impact on investment in coal development in the Hay Point catchment (with a resulting negative impact on employment, investment, State royalties and indirect economic benefits). This is a particularly unfortunate outcome given the current recessionary economic environment. It is not a public benefit that monopoly pricing may create incentives for DBCTM to engage in inefficient over-investment.
(g)	Incentives to reduce costs or improve productivity	By delinking prices from an efficient costs based build-up, the negotiate-arbitrate model blunts some of DBCTM's incentives to reduce costs or improve productivity – as inefficiently high costs are not just excluded from the building blocks as they would have been under a reference tariff model.

The DBCT User Group submits that the QCA should not accept as appropriate a position that is inconsistent with those key considerations and criteria.

Confining the QCA's role to damage limitation of DBCTM's starting point through mitigation measures is not considering the amendments that are appropriate having regard to the criteria in section 138(2) QCA Act.

Port Services Agreement

In relation to the Port Services Agreement, the DBCT User Group notes that the legitimate interests of the owner and operator of DBCTM's compliance with it do not specifically appear to have been considered.

Relevantly, the Port Services Agreement requires that DBCTM use its best endeavours to have in place an approved undertaking at all times that is wholly consistent with each of the specified Access Principles.[41] The Access Principles relevant include giving effect to the following principles:[42]

(a)	*Charges and pricing will be structured on the basis of a **common user charge**, based on an asset base determined by the QCA, and calculated according to then current regulatory pricing principles. **Charges are to be levied at a common rate** for comparable services.*
(b)	***A principle of not discriminating between the interests of individual Users of DBCT**, or between the interests of existing and prospective users of DBCT.*

The negotiate/arbitrate regime DBCTM proposes is clearly inconsistent with the principle of a common charge that does not discriminate between users – given the whole purpose of the negotiate-arbitrate regime is to introduce differentiated pricing (because as noted in section 5.6 below – non-pricing terms are not practically up for negotiation). It is difficult to see how the implementation of the 2019 DAU results in any position other than DBCTM breaching the Port Services Agreement.

[41] Clause 9.2 and 9.12 Port Services Agreement
[42] Port Services Agreement, clause 3 of Schedule 3

The State included this protection at the time of privatising DBCT for the public good, to prevent the damage to competition and investment that is now threatened by DBCTM's future pricing activities.

It is not appropriate for the QCA to approve an undertaking that removes such intended protections without clear State government support for that occurring.

Part B – An Inappropriate Pricing Model for the DBCT Service

5 'Primacy of negotiated outcomes' is Inappropriate Where There is No Scope to Negotiate

5.1 Reliance on potential benefits of negotiated outcomes unwarranted

The QCA's decision appears to rest heavily on a belief that negotiated outcomes are preferable.[43]

For example, the Draft Decision suggests:[44]:

> *We are of the view that where possible, DBCTM and access seekers should be encouraged to reach agreement on the terms and conditions of access. Negotiated outcomes resolving terms and conditions of access may have a number of benefits for the parties.*
>
> *Negotiated outcomes may be tailored to reflect the individual preferences of access seekers, including differences to non-price access terms or risk-sharing arrangements and may better reflect the value of access to a user, given access seekers have better knowledge than the QCA of how much they each value access*

The QCA seems to have reached that conclusion:

(a) without a single access seeker or user making submissions suggesting they saw any benefits in negotiated outcomes or considered that a reference tariff was preventing them reaching a tailored outcome;

(b) despite the DBCT User Group, which represents existing users and access seekers, and multiple access seekers individually, making it clear that they see no benefit in this regime and that it will have adverse outcomes such as facilitating monopoly pricing and incurred higher costs;

(c) despite recognising that negotiated outcomes (including in respect of price) can occur where a reference tariff exists[45] and during the normal QCA investigation and consultation regime[46] - such that negotiate/arbitrate pricing is not required to produce negotiated outcomes;

(d) assuming that a reference tariff disincentivised negotiation without any evidence that DBCTM has previously sought to negotiate materially different terms (other than a higher price);

(e) without any examples being provided by DBCTM of the type of negotiated outcomes they consider would be beneficial (other than higher prices benefiting only themselves);

(f) despite the QCA's recognition that DBCTM's market power and information asymmetry are impediments to realising efficient and appropriate negotiated outcomes;

(g) despite the uncertainties and costs of arbitration making it unlikely users or access seekers could obtain any theoretically available benefits from negotiation;

(h) despite the practical and contractual restrictions on what can actually be changed in a negotiated outcome, including:

  (i) that existing user agreements having pre-established non-pricing terms;

  (ii) the 2019 DAU standard access agreements containing standard non-price terms; and

[43] Draft Decision, 7 and 53.
[44] Draft Decision, 53.
[45] Draft Decision, 53.
[46] Draft Decision, 53 (and footnote 214)

(iii) the way in which the services are provided, utilising the same infrastructure and subject to the same Terminal Regulations,

resulting in there being no real scope for negotiated outcomes (other than a higher price); and

(i) despite the divergent economic incentives of DBCTM and its customers being unlikely to lead to negotiated outcomes (as discussed in section 3.4 above).

In light of those issues and the lack of any evidence to indicate the likely benefits that will arise from a negotiate/arbitrate model, the DBCT User Group do not agree that the QCA's speculation about potential benefits (without any evident basis in the circumstances of the DBCT service) is a sound basis on which to determine that a negotiate/arbitrate pricing regime is appropriate.

5.2 Circumstances in which negotiated outcomes are preferable

Of course, the DBCT User Group does not dispute that negotiated outcomes can be preferable *in the circumstances of some services*.

However, that general principle cannot simply be applied to all circumstances, without critical analysis. That necessarily follows because appropriateness involves fitness for the actual circumstances of the service.

As much was recognised by the Productivity Commission in its review of the national access regime where it stated:[47]

> *That is not to suggest that negotiation and arbitration will be appropriate in every context. The particular experiences of service providers, access seekers and regulators in some sectors – for example, telecommunications – have given rise to alternative approaches to access dispute resolution.* ***Measures such as upfront regulatory arrangements can be more effective than the generic access regime at resolving access disputes in the specific circumstances of individual industries****.*

Accordingly, it is critical that the QCA carefully considers the appropriateness of the alternative regulatory approaches.

Where the QCA still considers there are potential benefits of commercial negotiations those benefits and the prospects of them eventuating need to be weighed against the cost and disadvantages of such a model, and evaluated relative to the benefits which would arise under other major forms of regulation (including whether those same benefits could also be obtained under alternative forms of regulation).

In order for negotiated outcomes to be preferable, the DBCT User Group submits that three key criteria would need to be established:

(a) real scope to negotiate different or tailored arrangements, such that more efficient results can actually be provided by individual negotiations than through common terms;

(b) an environment in which an informed, effective and balanced negotiation can occur; and

(c) an appropriate way of reaching resolution where agreement is not reached, with relatively certain outcomes, in order to incentivise reaching a negotiated agreement.

The QCA's approach, both in the Draft Decision and the Interim Draft Decision before it, have been focused on trying to resolve the second and third of those issues, through seeking to address information asymmetry and the arbitration process and criteria.

[47] Productivity Commission, *National Access Regime Productivity Commission Inquiry Report No. 66*, 25 October 2013, at 128

However, the DBCT User Group is concerned that irrespective of how much refining is done to the negotiate-arbitrate pricing model to resolve those issues, it does not resolve the first issue, namely that there is either limited or no scope for users to reach different or tailored arrangements in relation to the DBCT service.

Where there is no scope for negotiation – resolving the second and third points (i.e. creating an environment conducive to an informed and effective negotiation and providing an effective 'backstop') will not be sufficient to result in negotiated outcomes being preferable.

The real limits on the scope for different or tailored arrangements (not just higher prices) in the circumstances of the DBCT service are analysed in detail below.

The DBCT User Group submits that once these limits are properly considered, it is clear that any theoretical benefits that might typically arise from negotiated outcomes are highly unlikely to arise in the circumstances of the DBCT service.

5.3 The DBCT service is a single common user service which needs to be provided on common terms

DBCT was established as a *common-user* coal handling facility, to provide a *common coal handling service* to each user on the basis of *common terms and price*.

As recognised by the QCA in the Draft Decision:[48]

(a) DBCTM's alleged 'varied or different services' provided at DBCT are simply part of its core coal handling service; and

(b) use (and therefore pricing) of DBCTM's alleged 'varied or different services' across the pricing period cannot be forecast for the purposes of conducting informed negotiation/arbitration processes.

That is, the service provided to all users of the terminal is fundamentally the same service. Indeed, the provision of the service is:

(c) not handled by DBCTM – but by the industry owned operator of the Port under an Operations and Maintenance Contract that does not envisage tailored and customised services for particular users;

(d) substantially provided in the manner provided by the Terminal Regulations, which apply to the provision of the service to all users.

That common coal handling service is delivered using the same infrastructure (which is implicitly recognised in the socialisation of capital and operating costs). In that regard, the DBCT service is very different to other types of infrastructure where negotiate-arbitrate regimes are often applied (such as gas pipelines, multi-purpose railways or multi-purpose ports) where the service provided, and the components of the infrastructure used, can vary materially between customers.

In addition, there are numerous processes that effectively need to operate identically or in substantially the same manner across all users of DBCT to ensure that the terminal operates efficiently and can provide the capacity that has been contracted. For example:

(a) DBCT is a cargo assembly port, such that differentiated arrangements cannot be made for varied treatment in relation to dedicated stockpile without a significant loss of terminal capacity;

(b) the standard of service realistically has to be the same given it is provided by the same operator, provided utilising the same infrastructure and subject to the same Terminal Regulations; and

[48] Draft Decision, 43.

(c) scheduling arrangements need to be common to reflect the common coal supply chain which DBCT forms part of.

The DBCT User Group submits that those practical requirements for common terms substantially limit the prospects that 'negotiated outcomes may be tailored to reflect the individual preferences of access seekers' as the Draft Decision assumes.[49]

The reality is that the only opportunity provided by the negotiation process is the potential for DBCTM to charge a higher price – despite the fact there will be no material difference in the efficient costs of providing the service, the non-price terms or the manner in which the service is provided between users.

The DBCT User Group strongly considers that it is not appropriate or efficient 'tailoring' for a customer with less bargaining power to be charged a higher price.

5.4 Efficient negotiated outcomes are unlikely

Negotiated outcomes are generally unlikely in respect of access to the Terminal.

As explained above, there is little if any real scope for negotiation in the non-price terms on which the services are provided, given that:

(a) non-price terms are already set out in existing access agreements and the standard access agreements; and

(b) the way in which services are provided is determined by the Terminal Regulations which apply to all users of the terminal.

Therefore, any negotiation which occurs will be a discussion of the pricing terms only, in which both parties understand that their alternative to a negotiated price is an arbitration process.

Where DBCTM acts as a rational profit maximising monopolist, it will not accept any negotiated price unless it is higher than its expectation of the charges which would be determined by an arbitrator. In the context of the charges for the services, the costs for DBCTM in proceeding to an arbitration process are trivial, especially as these costs can effectively be spread across the multiple arbitrations that DBCTM is likely to conduct as the same information and materials is likely to be relevant in each case.

If the access holder or seeker acts rationally, it will not accept any price unless it is lower than its expectation of the charges which would be determined by an arbitrator. Although the costs of an arbitration will be a larger consideration for an access holder or seeker than for DBCTM given that it is not able to amortise its costs over multiple arbitrations, it is still likely to proceed to arbitration, as arbitration is the only constraint that would be available on DBCTM's pricing under this form of regulation.

The exception to this is where due to timing or other pressures, an access seeker is less able (or effectively unable) to rely on arbitration as a backstop, in which case it will be forced to accept the charges demanded by DBCTM in the absence of a constraint (which as stated above will be higher than those which would otherwise be determined by an arbitrator).

5.5 Existing users already have contract terms and no opportunity to negotiate

As the QCA acknowledges, existing users have 'evergreen' agreements, which provide a 5 yearly price review under clause 7.2.[50]

This places existing users in a position where there is no actual negotiation of non-price access terms that occurs at the time of the periodic pricing reviews. There is no real potential to negotiate

[49] Draft Decision, 53.
[50] Current Standard Access Agreement is on the same terms as all existing user agreements in this respect.

tailored individual outcomes, *because all of the non-pricing terms of the user agreement are already agreed*.

The key benefit that the Draft Decision attributes to the proposed negotiate-arbitrate model is therefore completely inaccessible to existing users.

This issue does not appear to have been considered or recognised in the Draft Decision.

Even the theory that allocative efficiency can be achieved by allocating capacity to the customer that places the highest value on the capacity is not applicable in these circumstances - because the capacity is already allocated to existing users, irrespective of the prices resolved. The differential pricing that the proposed form of regulation facilitates is therefore arbitrary pricing discrimination, without any efficiency benefits.

Existing users have already made significant investment decisions in the coal mines which use the capacity and contracting decisions in rail haulage and rail access, such that even not renewing the capacity is not a credible choice.

Accordingly, the scope for negotiation between DBCTM and existing access holders is limited to the extent to which the negotiated or arbitrated Terminal Infrastructure Charge is set above efficient levels (i.e. the extent of the value transfer from users to DBCTM achieved through DBCTM's monopoly pricing).

Even that value transfer is intended to be common, noting that the standard access agreement expressly provides that the review:[51]

is intended to be undertaken at the same time, in conjunction with, and on the same basis as reviews under other User Agreements which are in terms similar to this Agreement where a similar review is due at the same time.

To the extent that it is said that the parties can of course always agree to change the non-pricing terms – that is no less true of a reference tariff pricing model (as recognised by the QCA[52]) and therefore not a benefit of the proposed model. If, despite this, the QCA is minded to accept DBCTM's claim that reference tariffs are disincentivising negotiations – DBCTM should be required to provide evidence of the extent to which it has ever tried to negotiate tailored terms.

The existing users within the DBCT User Group strongly reject that there can be a benefit of negotiated outcomes for existing users given the nature of the locked-in terms under their existing access agreements.

5.6 8X Conditional Access Agreement holders do not have an opportunity to negotiate

The same position described in respect of existing users in section 5.5 above also holds true for those entities that have executed a conditional access agreement in respect of the 8X expansion (***8X CAAs***).

The 8X CAAs provide, subject to satisfaction of the conditions, an access agreement on the then current standard access terms.

Again, it places the parties to the 8X CAAs in a position where the non-price terms are locked in and they cannot negotiate anything other than price.

Again, that means the key benefit that the Draft Decision attributes to the proposed negotiate-arbitrate model is therefore completely inaccessible to the conditional access agreement holders.

The parties to the 8X CAAs within the DBCT User Group strongly reject that there can be a benefit of negotiated outcomes for parties to the 8X CAAs in that scenario.

[51] Clause 7.2(b) Current Standard Access Agreement.
[52] Draft Decision, 53.

5.7 Other access seekers and the limitations of a true common user service

It is of course possible that existing terminal capacity becomes available or that further expansions are developed such that there may be future access seekers who had not already agreed non-price access terms.

DBCTM has alleged in submissions in the declaration review, and the 2019 DAU, and in its pleading in the judicial review proceedings it has brought against the Treasurer's declaration decision, that there cannot be any such access seekers during the term of the next undertaking. On DBCTM's apparent view – it follows that there is no possibility of any access seeker being able to negotiate access terms during the term of the 2019 DAU. It would be impossible for there to be any benefit derived from a negotiate-arbitrate regime in that scenario.

While the DBCT User Group considers that there clearly can be access seekers, it acknowledges that a material proportion of capacity will be contracted on the existing common terms as discussed above.

In theory it is open to any remaining future access seekers to reach tailored non-price access terms, and negotiate trade-offs between pricing and such non-price terms.

However, even for such access seekers there is actually very little real potential to reach a truly tailored and bespoke solution. As acknowledged by the QCA (and discussed in section 5.3 above), the terminal provides a single coal handling service that cannot be reasonably differentiated, and the common service terms will practically make much of the contract terms off limits in a negotiation.

In addition, given the increasingly capacity constrained nature of DBCT, access seekers have very strong incentives to not negotiate bespoke terms due to the desire to swiftly contract the capacity.

DBCTM's position that there is no time pressure on access seekers in the queue because they have priority in the queue completely ignores both:

(a) the 'notifying access seeker' regime, which is likely to apply again and result in any existing terminal capacity that becomes available being quickly contracted; and

(b) DBCTM's proposed short term capacity regime – where there will be real time pressure to contract the capacity for the short period in which it is available (and for which DBCTM has reduced the periods access seekers have to respond).

Accordingly, the DBCT User Group strongly submit that there is extremely limited scope for such future access seekers to derive benefits from negotiated outcomes.

5.8 Conclusion

The DBCT User Group submits that because there is no actual scope for negotiation for any existing access holder (including parties to a 8X CAA), and limited scope for negotiation for future access seekers, there is no evidence that negotiation will produce more efficient or tailored outcomes or any benefit whatsoever (other than for DBCTM alone through an inefficient higher price).

In those circumstances, a desire to provide 'primacy of negotiated outcomes' does not make a negotiate/arbitrate form of regulation appropriate.

6 Full Regulation is Appropriate in the Circumstances of the DBCT service

6.1 Accepted Regulatory Approach to Form of Regulation

The DBCT User Group continues to have serious concerns about the Draft Decision's insistence that it is possible to constrain difficulties arising from DBCTM's market power in a negotiate-arbitrate model.

As discussed at great length in earlier submissions, it is well established in regulatory and economic practice and thinking, that the appropriate form of regulation will vary based on the circumstances of the infrastructure service in question.

The Draft Decision appears to acknowledge this, noting:[53]

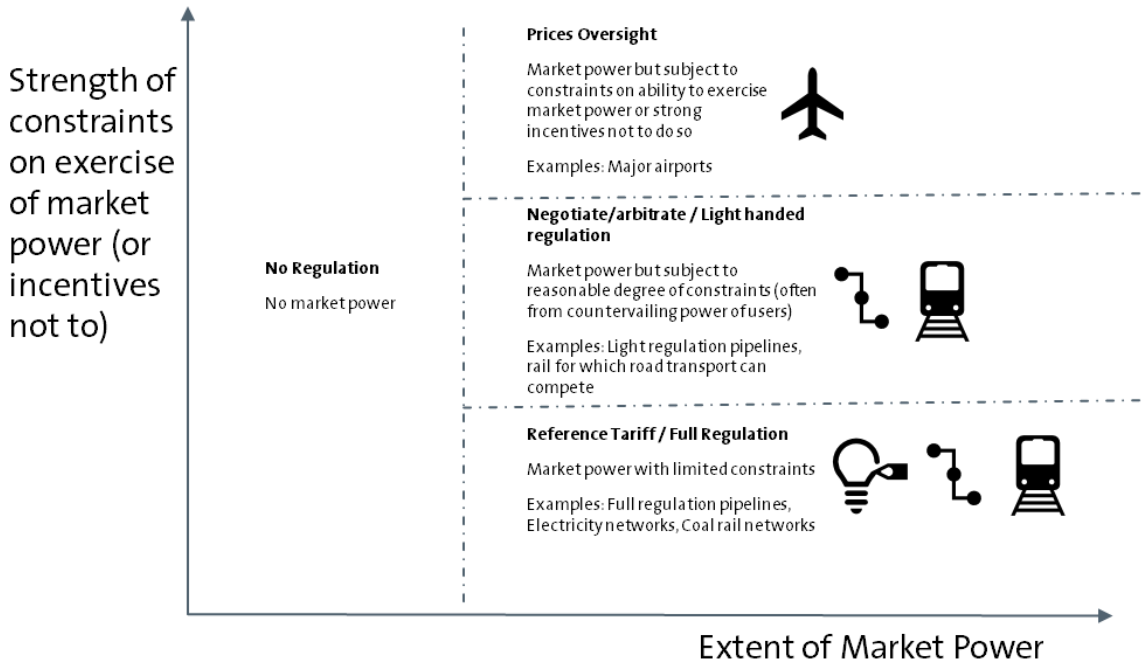
> *The characteristics of DBCT and the market within which its services are provided are relevant in our consideration of DBCTM's proposed pricing model, in that they provide an indication of DBCTM's ability to exert market power*

The DBCT User Group encourages the QCA to reconsider the extensive evidence and analysis provided in Part B of the DBCT User Group submission of 23 September 2019 and the PwC Report scheduled to that submission – which the Draft Decision does not consider in any detail.

The fact that the appropriate form of regulation will vary based on the circumstances of the infrastructure service to be regulated is evident both in the different regulatory models adapted by economic regulators for different types of infrastructure and even more expressly in the 'form of regulation' factors in the National Gas Laws[54].

What is evident is that there is accordingly a spectrum of regulatory responses, with the regulatory response that is appropriate depending on the circumstances of the relevant infrastructure service.

A high level overview of the various approaches and when they have been applied is set out in the diagram below:



[53] Draft Decision, 8.
[54] s 122 National Gas Laws

It necessarily follows from the above that there is a point at which the 'primacy of commercial negotiations' gives way to a recognition that the access provider's market power is subject to such limited constraints (absent regulation) that the efficient and appropriate form of regulation is for a reference tariff model.

It has been acknowledged through the 2019 DAU process and declaration review, that DBCTM has clear and significant market power, and the lack of competition results in users and access seekers having no countervailing power.[55]

Yet, outside the undertaking and access agreements, there is no evident constraint that the QCA has found to exist in any of those processes on DBCTM's ability and incentive to engage in monopoly pricing. In particular, the QCA acknowledges that DBCTM has no competitors, users have no countervailing power and DBCTM has no businesses in dependent markets that provide incentives not to engage in monopoly pricing.

What is evident from other regulatory experiences is that a negotiate/arbitrate regime is not considered appropriate where the form of regulation is being relied on as the only constraint, which the QCA's recognises is the exact situation here:[56]

> *the characteristics of DBCT and the relevant market suggest there is limited constraint on the exercise of market power (in the absence of appropriate regulation)*

In those circumstances, regulators apply full regulation with reference tariffs.

As noted in previous submissions, in addition to the strength of DBCTM's market power, other factors weigh very strongly in favour of a reference tariff model including:

(a) the common nature of the service provided and the common terms on which it is contracted (largely removing the benefits of a negotiated outcome); and

(b) the relatively large number of users (making negotiated and arbitrated outcomes costly and protracted).

DBCTM's market power and those other factors make DBCT far more akin to an electricity network or full regulation gas pipeline than the other examples which have been referred to by DBCTM in submissions.

Accordingly, the DBCT User Group submits that the QCA's decision is out of step with regulatory precedent and approaches, which brings into question the correctness of the Draft Decision conclusion about appropriateness of a 'light handed' regime.

6.2 Recent Analysis of the Form of Regulation by the Essential Services Commission

As a recent example of the disconnect between the analysis in the Draft Decision and other regulatory practice in relation to the form of regulation the DBCT User Group draws to the attention of the QCA the recent analysis of the Victorian Essential Services Commission (***ESC***) in the Port of Melbourne – Market Rent Inquiry.[57]

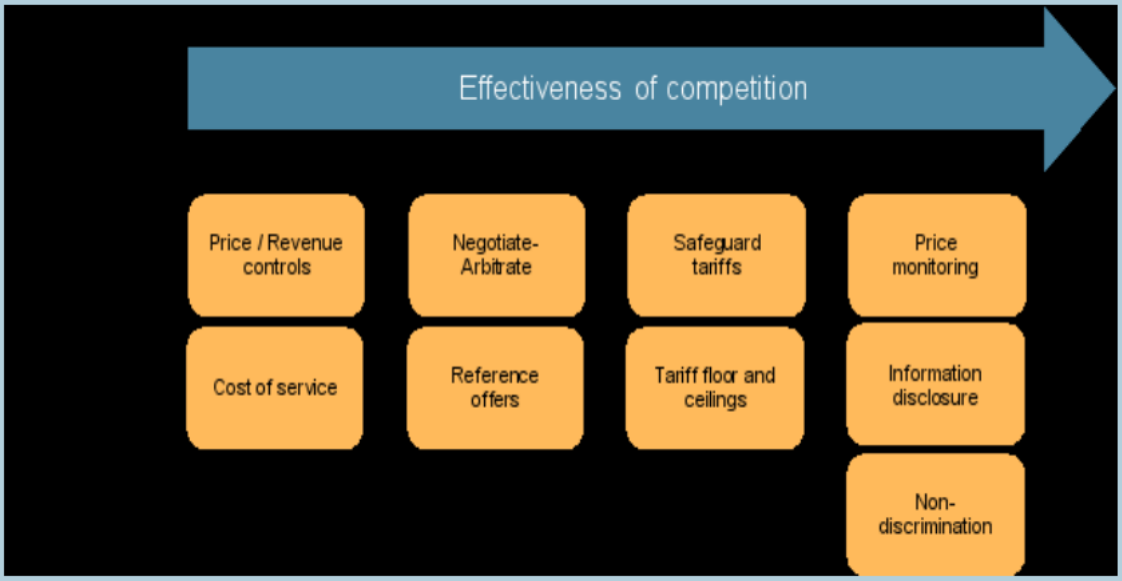
In particular the DBCT User Group notes the ESC's analysis in passages extract below (our emphasis added):[58]

> *Economic regulation can be thought of as a spectrum of options. As a general proposition, solutions that are most cost effective given the likely size of any detriment should be preferred. An illustrative summary of possible regulatory options is provided in Box 7.1.*

[55] Draft Decision, 8.
[56] Draft Decision, 8.
[57] Essential Services Commission, *Port of Melbourne – Market Rent Inquiry* 2020, 14 August 2020
[58] Essential Services Commission, *Port of Melbourne – Market Rent Inquiry* 2020, 14 August 2020, 53-54.

***The figure below shows the spectrum of possible regulatory approaches, defined here by differing responses to degree of competition and market power that is evident**.*

Figure 1: Economic regulation options



***The options on the left-hand side of the diagram are more appropriate for natural monopolies**. Price controls or cost-of-service regulation are common applications of such controls used in Australia for energy and water networks.*

***The options towards the middle of the spectrum reflect firms that may have power are also subject to some competitive constraints that mean negotiated solutions can be pursued**, usually with some oversight or recourse to independent decision-making. Negotiated access regimes are a common form of this kind of regulation. For example, the Victorian rail access regime and the National Access Regime (Part IIIA of the Competition and Consumer Act) facilitate commercial negotiations with an independent regulator as an arbitrator. These regimes are usually accompanied by a requirement to offer reference tariffs and other forms of information to promote commercial negotiations.*

…

For markets that are closer to being competitive, regulation is commonly more light-handed. This can include safeguard tariffs or price floors and ceilings which provide for the regulated firm to have a degree of pricing flexibility within certain bounds. Other possibilities include price monitoring, requirements to disclose information on prices and performance, or obligations to not discriminate between users.

This analysis by the ESC reflects the key point the DBCT User Group has made throughout the 2019 DAU process, namely that:

(a) where DBCT has been consistently recognised as being a natural monopoly which faces no competitive constraint from other coal terminals the appropriate form of regulation is a cost of service price control (i.e. a reference tariff); and

(b) in the absence of such competitive constraint, a negotiate/arbitrate form of regulation is not appropriate.

In the case of the Port of Melbourne a different form of regulation was recommended due to the complexity and cost which would have been involved in setting rents (for the various unique

parcels of port land being leased) and the significant disruption of introducing price regulation to an environment where existing contracts did not anticipate such regulation. Neither of those issues apply in relation to DBCT where the service provided is common to all users (as discussed in section 5.3) and the existing user agreements specifically refer to reference tariffs and QCA decisions.

The ESC's analysis also raises another issues that the DBCT User Group is concerned about in a negotiate/arbitrate regime – being the 'recycling of monopoly outcomes'. Because negotiated and arbitrated outcomes will be likely to influence future negotiation and arbitration outcomes – DBCTM is highly incentivised to increase the prices as much as possible in the first negotiations with existing users, so as to create an upward spiral in prices.

7 The Proposed Regime Remains Wide Open to Gaming

The Draft Decision assumes that DBCTM will act reasonably in the prices it requests.[59]

That is despite the economic incentives DBCTM has to increase prices (discussed in section 3.4 of this submission) and DBCTM declining to provide any indication of the proposed TIC that it will seek in regulatory submissions or in response to direct requests to do so in correspondence from the DBCT User Group.

Despite those 'red flags', the Draft Decision concludes that DBCTM's monopoly pricing will be constrained by a combination of:

(a) Information provision by DBCTM on the building blocks which would make up a building blocks based price;

(b) QCA ex ante determination of two key building blocks elements – the remediation estimate and the depreciation methodology; and

(c) Arbitration as a backstop (without any substantive guidance on the likely outcomes of such arbitration).

However, the recent decision of *Adani Abbot Point Terminal Pty Ltd v Lake Vermont Resources Pty Ltd*,[60] in the Queensland Supreme Court demonstrates the potential for a building blocks based negotiate/arbitrate regime of this nature to be easily gamed.

In that decision, the coal terminal provider was shown to have gamed a key building blocks element (relating to the contracted tonnage across which the calculated revenue requirement was allocated) by accepting a significant early termination payment from a contracted user, and then using the socialisation arrangements in the building blocks methodology to recover revenue again through allocating the revenue requirements across a lower remaining contracted tonnage. That occurred despite the building blocks methodology being specified in more detail that the QCA is now proposing, with similar price review and information disclosure obligations as the Draft Decision proposes, and with arbitration as the backstop.

As discussed in section 12 below, the exact same arrangements could be forced onto DBCT users based on the model the Draft Decision seems inclined to accept, where the same conduct would also result in automatic socialisation via increases in charges of other users and the same level of 'double-dipping'.

In the case of Abbot Point, the access provider was found to have levied $106 million in excessive charges derived from this conduct. Yet, the extent of the monopoly pricing that was engaged in was well in excess of that. The DBCT User Group confirm that because of the costs and uncertainties of arbitration, a number of users commercially agreed to the pricing which has

[59] Draft Decision, 83.
[60] [2020] QSC 260

now been held to have been achieved through unconscionable conduct. They remain bound to the agreed inefficient monopoly price for the duration of the five year pricing period despite the subsequently finding of unconscionability. In practical terms, the access provider has succeeded in obtaining material monopoly profits from those users for the next 5 years

There is no evidence to support the conclusion that the outcomes in respect of DBCT will be any different.

The adverse situation that a negotiate-arbitrate environment has produced, at a coal terminal which, if anything, has less market power than DBCT presents a strong warning of the adverse consequences that will occur without a reference tariff – and cannot reasonably continue to be ignored.

8 Conclusions – A negotiate/arbitrate model is inappropriate

For the reasons set out above, it remains clear that a negotiate/arbitrate model is not appropriate to the circumstances of the DBCT service, and the 2019 DAU cannot be considered appropriate for as long as it relies on such a form of regulation.

In the next section of this submission, the DBCT User Group goes on to consider the defects in the amendments the QCA has proposed to the negotiate/arbitrate model (even where the QCA is insistent on imposing a negotiate/arbitrate model).

However, so there can be no doubt on this issue – the DBCT User Group fundamentally rejects that such a model can ever be made appropriate to the circumstances of the DBCT service.

Part C – Defects in the 2019 DAU Negotiate-Arbitrate Model

9 Unresolved Information Asymmetry

9.1 The Recognised Information Asymmetry problem

The Draft Decision openly acknowledges that information asymmetry is a problem that needs to be resolved in order for a negotiate-arbitrate model to be appropriate.

The QCA's view is expressed in the Draft Decision as being that:[61]

> *to adequately address information asymmetry, DBCTM needs to provide access seekers with information that is sufficient for them to form a view of a reasonable TIC that would not be available to them, unless it is provided by DBCTM. There may also be instances where significant information asymmetry means verification of certain information requires the involvement, or potential involvement, of an independent party, such as the QCA.*

However:

(a) the information provision proposed by DBCTM was broadly written creating the potential for high level information to be provided that would not meet that objective; and

(b) the absence of an ex-ante assessment of the relevant information means the accuracy and adequacy of the information provided by DBCTM would need to be assessed by individual access seeker during negotiations – where they may not be able to form views on those matters due to information asymmetry.[62]

Accordingly, the DBCT User Group agrees with the QCA's assessment that:[63]

> *The information asymmetry inherent in DBCTM's proposed pricing model is not in the interests of access seekers (s. 138(2)(e)). The resulting inefficiencies in negotiations could lead to the inefficient use of DBCT's coal handling service, particularly when genuine access seekers require timely access to available capacity but are delayed by the negotiation and arbitration processes. In turn, this could have a detrimental impact on competition in related markets (s. 138(2)(a)).*

9.2 The Draft Decision does not resolve that information asymmetry

The DBCT User Group also considers that the QCA is correct in its conclusion that:[64]

> *an ex ante assessment by an independent third party (like the QCA) is a relatively efficient process that avoids multiple, concurrent assessments of information provided by DBCTM with greater potential for failed negotiations and the potential for rolling arbitrations*.

However, the logical conclusion that follows from that analysis is that it would be appropriate for *all* important components of the price of access to be subject to an ex-ante assessment in that way.

In other words, where the DBCT User Group differ from the QCA's analysis is in challenging why it is that that reasoning about the efficiency of ex-ante assessments, is only being selectively applied to matters like the depreciation methodology and remediation estimate, and other matters are only being sought to be dealt with by information provision.

That facilitates situations where DBCTM is required to provide information about aspects of pricing in the way the QCA prescribes – but then is free to propose pricing calculated in a

[61] Draft Decision, 58.
[62] Draft Decision 59-60.
[63] Draft Decision, 38.
[64] Draft Decision, 37.

completely differ manner. Clearly in that scenario the information disclosed would have limited benefit and will not result in a more informed negotiation as the QCA intended.

In reality those same issues apply to *all* information which underpins the pricing DBCTM proposes. The Draft Decision contains no explanation of why, for example, the weighted average cost of capital (***WACC***), approval of DBCTM's regulatory asset base, taxation allowances and corporate overhead allowances should not also be subject to a more efficient ex-ante assessment.

The WACC in particular has a very material impact on prices. An appropriate WACC is also necessary for numerous other aspects of the current approach to pricing including calculating the remediation allowance and in determining how a roll-forward of non-expansion capital expenditure incurred during the regulatory term should occur. The Draft Decision does not analyse how those matters will operate in the absence of a QCA approved WACC.

To the extent the QCA's thinking in relation to those issues is that users can 'form a view on this matter from information in the public domain'[65], such as through having an economic advisers prepare expert economic evidence about WACC and other issues, the DBCT User Group strongly reiterates the concerns it has raised in earlier submissions about:

(a) the wide range of WACC outcomes that are likely to be contested in the absence of an independent QCA ex-ante assessment; and

(b) the resulting difficulties that would cause for access seekers having to assess the information themselves.

As discussed in section 10 below, the proposed arbitration criteria exacerbate this issue – not resolve it.

Based on even the conservative assumption that DBCTM's price expectation would only be reflective of previous regulatory submissions to the QCA (made in an environment of greater regulatory constraints than DBCTM will face under a negotiate-arbitrate model) there is:

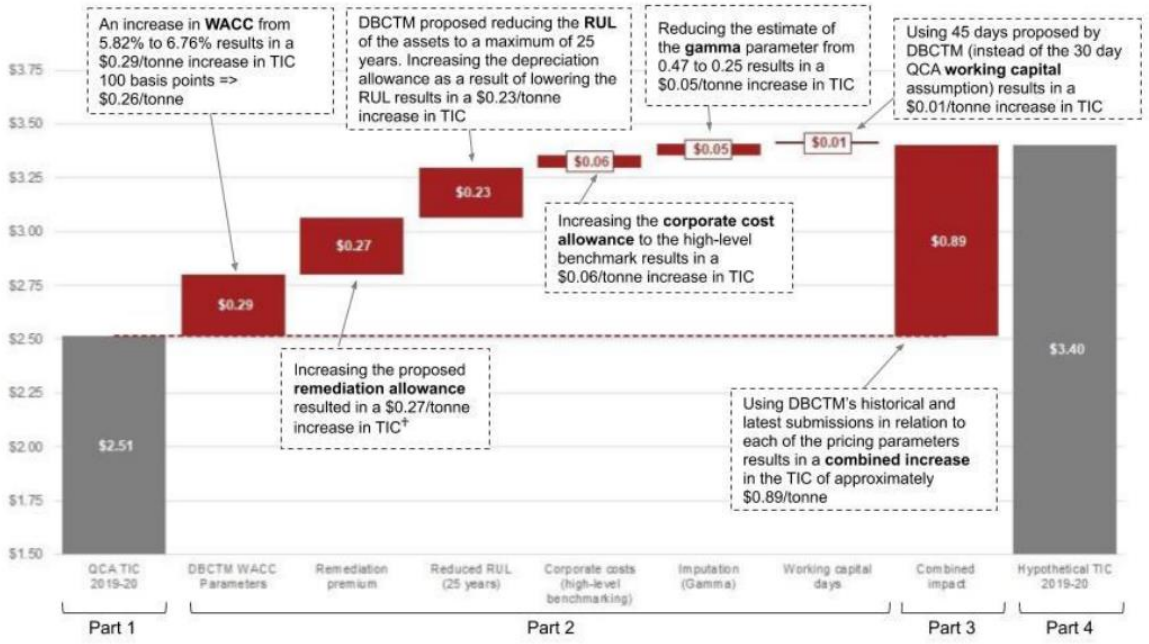
(c) a very wide range of prices that DBCTM may seek to justify; and

(d) great uncertainty as to what the QCA may determine in an arbitration given the nature of the Draft Decision (which appears to suggest pricing above efficient costs) and lack of any useful guidance in the proposed arbitration guidelines.

As simply demonstrated in the below chart from the PwC Report attached to the DBCT User Group submission of 23 September 2019, even with those extremely conservative assumptions of adopting DBCTM's past regulatory approaches, there are significant variances in DBCTM's previous approach relating to WACC and corporate cost related issues – not just those issues on which the QCA is proposing an ex-ante assessment (remediation and depreciation).

[65] Draft Decision, 63.

Figure 7: QCA FY20 TIC compared to proxy DBCT Management pricing based on current and historical documented claims



†Note: the estimated TIC impact reflects the latest Rehabilitation Cost Estimate prepared by GHD. However, the increase DBCT Management would seek for the remediation allowance is likely to be understated as it does not reflect the tax treatment claimed by DBCT Management in the 2017 Modelling DAAU.

The DBCT User Group strongly submits that if the QCA is to appropriately resolve information asymmetry without adopting the most efficient manner of doing so (i.e. an ex-ante assessment of all building blocks through a reference tariff):

(a) the requirement of a QCA conducted ex-ante assessment needs to apply to the WACC and other material building blocks beyond those proposed in the Draft Decision; and

(b) the undertaking needs to rectify the shortcomings discussed in section 9.3 of this submission below.

9.3 Examples of shortcomings

The Draft Decision concludes that, in addition to the information provision that DBCTM has proposed, it is appropriate for DBCTM to:[66]

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

However, that appears to still leave very significant scope for information asymmetry preventing a negotiation reaching an efficient and appropriate pricing outcome.

In particular, the DBCT User Group note each the following significant shortcomings in the QCA's proposed information disclosure that needs to be rectified in order for the information asymmetry inherent in DBCTM's model to be potentially resolved:

[66] Draft Decision, 66.

Shortcoming	Required remedy
There is no requirement for DBCTM to adopt a building blocks based pricing approach. The information proposed to be disclosed will have limited utility in terms of access seekers or holding assessing an appropriate access price where a building blocks methodology is not what DBCTM proposed.	The undertaking should prescribe that the Terminal Infrastructure Charge is required to be calculated by adopting a building blocks based pricing approach (using a formula prescribed by the QCA identifying each of the parameters to be used in that calculation) such that the negotiation reflects consideration and discussion of the appropriate parameters. That is necessary because: • there is no 'market' price – given that (as found by the QCA on multiple occasions) DBCTM faces no competition – such that there is no yardstick to measure a non-building blocks price against • a building blocks methodology will narrow the issues for negotiation and arbitration and be more predictable in terms of outcomes in an arbitration (which in turn with make agreement without arbitration more likely)
Merely requiring an 'explanation of its methodology' will permit DBCTM to simply describe its methodology in high level terms that will be insufficient for DBCT Users to seek to model the outcomes of DBCTM's methodology	DBCTM should be required to provide DBCT Users with the financial model on which DBCTM's pricing is based which enables DBCT Users to: • accurately model the charges based on the methodology DBCTM describes; and • calculate and model how the charges would be altered if the parameters were changed from those proposed by DBCTM
DBCTM has never provided transparency regarding its actual taxation costs. Merely requiring a disclosure of its methodology for estimating tax obligations will permit DBCTM to propose an estimating model that provides an estimate well in excess of its actual tax costs	DBCTM should be required to provide transparency of the actual taxation paid such that it is possible to estimate DBCTM's efficient costs
The remediation allowance component of the terminal infrastructure charge is materially impacted by factors beyond the remediation cost estimate – such as the timing at which it is assumed remediation occurs and the discount	The QCA should also determine the appropriate time period for remediation (i.e. at least the previously determined economic useful life of 2054) and the discount rate to be applied

rate applied in calculating the annuity stream	
There are numerous costs which the DBCT User Group has never had true visibility of – as discussed in submissions on the Modelling Draft Amending Access Undertaking	DBCTM should be required to provide DBCT Users with a complete financial model which enables DBCT Users to: • accurately model the charges based on the methodology DBCTM describes; and • calculate and model how the charges would be altered if the parameters were changed from those proposed by DBCTM.

9.4 Arbitration Guidelines

Outcomes not Process is the Key Concern

The DBCT User Group is disappointed with the QCA's proposed arbitration guidelines which, in their current form, are limited to providing guidance on largely uncontentious process points (while not even binding the QCA on those matters) in respect of which the QCA Act already contains some level of protections.[67]

However, the key concern stakeholders have expressed in relation to arbitration is uncertainty of outcome (i.e. how access pricing will be determined), not uncertainty of process. Uncertainty of outcome is stakeholders' key concern because where there is significant uncertainty of the outcome of arbitration, the guidelines:

(a) will not assist in overcoming information asymmetry concerning what constitutes an appropriate pricing outcome;

(b) will not assist in providing a reasonable range of potential outcomes within which negotiated outcomes would potentially be more likely to be reached; and

(c) will lead to more inefficient outcomes through either:

  (i) users or access seekers agreeing to an inefficiently high price reflecting monopoly pricing due to concerns about arbitration producing an even higher price; or

  (ii) costly arbitrations occurring due to the parties having materially divergent views on the likely outcomes of arbitration such that agreement is not reached.

To actually make arbitration an effective backstop that incentivised reaching a negotiated outcome (as the Draft Decision indicates the QCA intends), the QCA's arbitration guidelines need to mitigate the uncertainty generated by the proposed negotiate-arbitrate model's wide range of possible outcomes.

For example, statements from the Draft Decision like the following[68] need to be expressly included in any guideline document:

> *The costs and risk incurred by DBCTM should be reflected in a TIC, nothing that the pricing principles in the QCA Act (s. 168A) stipulate that the price of access to a service should 'generate expected revenue for the service that is at least enough to meet the efficient costs of providing access to the service and include a return on investment commensurate with the regulatory and commercial risks involved'.*

[67] s 196 QCA Act
[68] Draft Decision, 77.

Interim Draft Decision Acknowledged the Need to Provide Certainty on Pricing Methodology

The DBCT User Group is also disappointed with how the QCA's concept for the arbitration guidelines appears to have changed materially from that proposed in the Interim Draft Decision, which proposed that to address the uncertainty of arbitration outcomes the guidelines could cover:[69]

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

The DBCT User Group consider that, if the QCA is minded to approve a negotiate/arbitrate model, the above description is the appropriate use of the guidelines, rather than confining it to mere process points. It is really these substantive issues which give rise to the uncertainty about pricing outcomes.

In the Interim Draft Decision the QCA concluded that:[70]

> *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, and as a result, provide a credible threat to constrain DBCTM from exercise its market power in a negotiation*

The DBCT User Group strongly agree that arbitration guidelines which provided greater certainty that arbitrated prices would be reflective of the efficient costs of supply would make arbitration as much of a credible threat and constraint as it could ever be in the circumstance of the DBCT service (noting the DBCT User Group's broader reservations on this point as set out in Part B of this submission).

Even with such arbitration guidelines, it would not achieve the extent of certainty of a reference tariff, as there would still be expected to be a range of outcomes which DBCTM and users would see as meeting that criteria (as there have been in setting reference tariffs in previous undertaking processes).

However, the QCA's indications of its likely approach would more reasonably anchor all parties' expectations, and therefore:

(d) narrow the range of potential outcomes to a point where it was more likely to be bridged by commercial negotiations; and

(e) lessen the prospect of a party seeking arbitration of ambit claims outside of the range of outcomes which can reasonably be regarded as reflective of the efficient costs of supply.

[69] Interim Draft Decision, 42.
[70] Interim Draft Decision, 42.

In contrast to what was previously proposed, the proposed guidelines state that efficient costs is *'just one matter for consideration'*.[71]

This makes it extremely difficult for stakeholders to ascertain how influential efficient costs are intended to be, widening the range of possible outcomes and increasing the prospects of the parties being so far apart that only arbitration will provide a resolution.

Accordingly, the DBCT User Group submits that if the QCA is minded to impose a negotiate-arbitrate model and intends to make arbitration a real constraint on DBCTM exercising its market power it is necessary for:

(f) the guidelines to provide substantive guidance on all material pricing matters which the undertaking itself does not require to reflect the ex-ante determination of the QCA made during the 2019 DAU process; and

(g) the guidelines to expressly provide assurance that arbitration prices would be reflective of the efficient costs of supply including a return on investment commensurate with the regulatory and commercial risks (which is, after all, entirely consistent with the QCA's interpretation of each of the section 138(2) QCA Act factors).

Uncertainty is not a positive – but something that leads to inefficient outcomes and more arbitrations.

The Draft Decision marked a significant move away from the analysis of the Interim Draft Decision discussed above.

The DBCT User Group is highly concerned that some of the QCA's commentary in the Draft Decision seems to suggest that that change in approach reflected a belief that:

(a) uncertainty was considered a positive as it may incentivise parties to reach agreement;[72] or

(b) that more prescriptive guidelines would reduce the prospect of successful negotiated outcomes and increase the likelihood of arbitration.[73]

The DBCT User Group considers both lines of analysis are incorrect.

Instead, as discussed in section 5.4, neither a user or DBCTM have incentives to reach agreement unless they consider doing so will be a more favourable outcome than the anticipated result from an arbitration. The wide range of uncertainty as to arbitration outcomes will simply result in the gap between the differing views of the parties as to what constitutes an appropriate price being so wide that it cannot be resolved other than by such an arbitration.

Accordingly, the DBCT User Group strongly submits that the analysis in the Interim Draft Decision needs to be revisited and the guidelines should be revised to reflect the approach proposed in the Interim Draft Decision.

The analysis in the Draft Decision regarding the positive outcomes of uncertainty run counter to the DBCT User Group members' practical experience with commercial negotiate-arbitrate settings in relation to infrastructure contracts.

As the QCA expressly recognised in the Draft Decision, one of the ways in which it may be appropriate to provide a more balanced negotiation process on pricing matters is:[74]

Providing additional certainty as to how we are to conduct arbitrations under these binding agreements

[71] Arbitration Guidelines, 28.
[72] Draft Decision, 85.
[73] Draft Decision, 10.
[74] Draft Decision, 82.

That passage of the Draft Decision contains much greater logic and is far more aligned with the sounder analysis in the Interim Draft Decision. More prescriptive guidelines would assist in narrowing the wide range of outcomes to a range in which commercial negotiations would be *more* likely to bridge the remaining gap. The greater the range of outcomes that parties may perceive arbitration could deliver, the greater potential there is for a party to arbitrate in the belief that arbitration will provide a more favourable outcome.

The User Group continue to consider that a reference tariff model would be more appropriate.

However, if the QCA is committed to imposing a negotiate-arbitrate model, the DBCT User Group strongly encourages the QCA to ensure that the arbitration guidelines provide much clearer guidance on its intended approach to all of the building blocks parameters and its intention to ensure that arbitrated pricing reflects the efficient cost of supply as proposed in the Interim Draft Decision. This absolutely needs to occur if a negotiate/arbitrate model is to have the potential to operate as the QCA intends – as a real constraint on DBCTM's monopoly pricing.

10 Inappropriate Arbitration Criteria

10.1 Inappropriate criteria

DBCTM Criteria are Inappropriate

The DBCT User Group strongly agree with the QCA's confirmation that many of the original arbitration criteria proposed by DBCTM would not be in the interests of access seekers, undermine arbitration as a 'backstop' and are not appropriate.[75]

In particular, the DBCT User Group remains opposed to the 'willing but not anxious test' – which is:

(a) impractical to apply where there is no evidence of market prices;

(b) wrongly suggestive that because a user with significant sunk capital investment may be willing to pay a monopoly price that makes that monopoly price appropriate; and

(c) calculated by reference to mines outside of the relevant geographic market.

The DBCT User Group also supports the other findings made in the Draft Decision relating to DBCTM's originally proposed criteria for arbitration decisions, as (to the extent to which they may be valid) being sufficiently covered by other criteria.

Section 120 QCA Act Criteria

The Draft Decision proposed that the arbitration criteria should reflect those specified in section 120 QCA Act.

The Draft Decision also appears to suggest that the DBCT User Group was supportive of that approach.[76]

However, that is a misinterpretation of the DBCT User Group's submissions on this matter.

The fact that the section 120 QCA Act criteria are acknowledged by DBCT Users as an improvement on DBCTM's proposed 'willingness to pay' criteria, which by definition for a monopoly service would reflect monopoly pricing, does not mean they are appropriate.

When the 4th User Group Submission is read it is very clear that the DBCT User Group *do not* support the adoption of the section 120 QCA Act criteria and consider they (or at least the QCA's apparent interpretation of them) will facilitate monopoly pricing.

[75] Draft Decision, 40 and 71.
[76] Draft Decision, 71

In particular, the DBCT User Group emphasises the following passages from the 4th User Group Submission that demonstrated serious concerns with the section 120 QCA Act criteria:

> *If section 120 QCA Act operates in the manner that DBCTM considers it does, where it permits a determining of pricing at a level that extracts monopoly rent, then it is absolutely clear that it does not provide a sufficient constraint on the exercise of market power, and any negotiate-arbitrate model that relies on it as the constraint is not appropriate under section 138 QCA Act.* [77]
>
> *…*
>
> *The DBCT User Group acknowledges that the Latest DBCTM Submission does take up the QCA's proposal that the arbitration criteria should reflect the requirements of section 120 of the QCA Act. However, it noticeably does so while stridently asserting that the QCA is incorrect about section 120 operates.*
>
> *The Interim Draft Decision explains that QCA proposed the section 120 arbitration criteria because:*
>
> *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.*
>
> *Whereas, DBCTM has accepted those criteria because they believe they will have a starkly different outcome as noted in these passages of their submission:*
>
> *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.*

The Draft Decision concludes that the section 120 QCA Act criteria provide 'sufficient certainty'.[78]

The DBCT User Group strongly disagree with that conclusion. The section 120 criteria are high level, uncertain and ambiguous and involve factors that can clearly conflict with each other.

In the absence of a clear and unequivocal requirement in the access undertaking or the arbitration guidelines that in conducting an arbitration the QCA will seek to determine a price reflecting the efficient cost of provision of the service, including a return on investment commensurate with the regulatory and commercial risks involved, the section 120 QCA Act criteria create a very wide range of potential outcomes.

The DBCT User Group is particularly concerned about two aspects of the QCA's proposed reliance on the section 120 QCA Act criteria:

(a) the reference to 'value to the access seeker' (and the QCA's commentary in the Draft Decision on that issue discussed in section 10.2 of this submission below); and

(b) the fact that the section 120 QCA Act criteria do not incorporate the reference in clause 7.2(e) of the Standard Access Agreements to the QCA's approach to pricing of comparable services – leaving them without a useful benchmark or yardstick, and

[77] 4th User Group Submission, 10
[78] Draft Decision, 72.

creating an inefficient and unwarranted disconnect between access holders and access seekers.

These issues are considered below.

10.2 Value to the access seeker

The DBCT User Group has significant concerns regarding:

(a) the proposed arbitration criteria's reference to value;

(b) the QCA's commentary in relation to how value is to be taken into account; and

(c) the high levels of uncertainty that creates regarding the price that the QCA might determine in arbitration, and the resulting difficulties that creates for any negotiation of access pricing.

Uncertainty of value as a criterion

The section 120 QCA Act arbitration criteria simply refer to *'the value of the service to – (i) the access seeker; or (ii) a class of access seekers or users'*[79]. No definition is provided for what 'value' represents or how it is measured.

The QCA's own commentary in the Draft Decision demonstrates the serious amount of uncertainty this criterion creates, noting:

> *The value of access to an access seeker may be considered as part of an arbitration, regardless of the pricing model approach adopted. However, in having regard to such matters as part of an arbitration, we consider it is appropriate to take into consideration the individual circumstances of the parties involved, as well as the way in which risk is allocated to parties within the regulatory framework.*[80]

and

> *In this regard, the value of access to each access seeker may differ considerably and will need to be considered on a case-by-case basis. For instance, the operational and supply chain costs for each mine will differ depending on the site and location characteristics of that particular mine. Additional, the price obtained for the product may different considerably depending on the characteristics of the coal produced.*[81]

and

> *Given that high levels of volatility in trades coal prices have been a feature of global coal markets, the value of access to an access seeker may vary significantly throughout the coal price cycle to reflect market conditions.*[82]

The QCA's commentary therefore appears to suggest that the 'value' to each access seeker is something akin to the profit margin it obtains from the sale of coal utilising the terminal, seemingly suggesting that DBCTM will be entitled to extract high prices at times of higher coal prices without DBCTM taking any coal price or volume risk (as discussed further below).

This also seems to ascribe all 'value' over costs incurred by producers to DBCT's contribution rather than any other element of the supply chain.

Shifting the profit margin from the access seeker (which is exposed to substantial and uncontrolled risks such as fluctuations in coal price, currency exchange rates and pricing of key

[79] s 120(1)(e) QCA Act.
[80] Draft Decision, 72.
[81] Draft Decision, 72 (footnote 255).
[82] Draft Decision, 77-78.

inputs, regulatory changes and so on) to DBCTM, a monopoly infrastructure provider which is exposed to a much lower degree of volatility, will result in an economically inefficient level of investment in DBCT and Hay Point catchment coal development. In particular, the diversion of monopoly profits to DBCTM will result in a lower level of return for (higher risk) mining investment and therefore deter efficient investment in Hay Point catchment coal production.

Such an approach would amount to a fundamental change from the current pricing regime, which pursues economic efficiency by seeking to replicate a pricing structure which would be adopted by a competitor in a hypothetical competitive market (with a return reflective of the risks involved).

That change is both inappropriate and damaging to the prospects of commercial negotiations producing an efficient and reasonable price.

Inefficient differential pricing and blunting of producers efficiency incentives

Based on the approach in the Draft Decision the 'value' to each access seeker (or holder) will be different, and the greatest 'value' will actually be derived by the most efficient users (with the highest profitability).

Yet (as discussed in section 5.3) the service provided by DBCTM to all access seekers and access holders is the same. As recognised by the QCA, any minor differences are all part of the common core coal handling service.

No explanation has been provided as to why it is an appropriate outcome that the most efficient user would be charged a higher amount for the same service, which seems to be what the Draft Decision is suggesting will occur under the new arbitration criteria.

There is certainly no justification based on allocative efficiency – because the capacity is not allocated to the users based on those which ascribe it the most value.

In fact, this form of differential pricing will significantly harm efficiency, as incentives for existing producers to pursue greater efficiencies will be materially blunted – because the benefit will be anticipated to be materially reduced by higher DBCT charges.

Asymmetry between DBCTM sharing in 'value' upside without 'value downside'

The DBCT User Group strongly considers that it is inappropriate that:

(a) in periods of higher coal prices where the 'value' presumably increases – using 'value' as a criteria suggests that DBCTM will benefit from that higher 'value' through an increased access charges;

(b) yet in periods of lower coal prices where the 'value' presumably decreases – it seems that the QCA intends to still permit DBCTM to recover at least its efficient costs of providing access.

In other words, the inclusion of 'value' as a criteria creates a significant upward bias to pricing outcomes, reduces coal producer's exposure to high points of the coal price cycle while completely immunising DBCTM from low points of the coal price cycle.

The DBCT User Group is concerned that there has been no consideration of why it is appropriate to:

(a) increase DBCTM's prices significantly while maintaining their near-zero risk profile; and/or

(b) divert returns from coal mining to a monopoly infrastructure provider, which directly reduces the profitability of coal producers, who are price takers in global coal markets, and will not be able to pass on to customers any increased DBCT charges – such that an inefficiently high price will lead to inefficient underinvestment in coal developments in the Hay Point catchment.

Value for existing users where sunk investments have been made

As recognised in the Draft Decision:[83]

> *At the time of reviewing charges within an existing access agreement, access holders have already committed to entering the market and have incurred considerable sunk costs. Once these significant sunk investments have been made by an access seeker, the willingness to pay of a captured access seeker is likely to increase considerably. As a result, an access holder may be in a less favourable position to negotiate pricing matters with DBCTM …*
>
> *However, an ability for DBCTM to change the price of access to reflect matters other than changes in the cost or risk of providing access may have implications for an access seeker undertaking sunk investment in the first.*
>
> *Parties should consider any allocation of economic rents at the time of initially negotiating an access agreement.*

The DBCT User Group cannot emphasise enough that existing users have made significant capital investments on the basis of the existing arrangements, where they effectively completely underwrite DBCTM's volume risk in return for a guaranteed efficient price reflecting the efficient cost of supply the service.

The arbitration criteria, as well as the Draft Decision, need to make clear that the arbitration criteria will not be applied by the QCA in a way that permits DBCTM to extract that monopoly rent post-investment.

10.3 QCA approach to pricing of comparable services

The key feature of the existing access agreements that led to the QCA and Treasurer concluding that existing users have some protections against DBCTM's monopoly pricing in the absence of declaration was the criteria in clause 7.2(e), requiring the arbitration to have regard to the QCA's approach to pricing of comparable services.

Yet the arbitration criteria being proposed by DBCTM (and the Draft Decision) to apply to negotiations with access seekers are based solely on section 120 QCA Act – they have no equivalent of this clause 7.2(e) criteria.

While DBCTM is proposing to include clause 7.2(e) in the 2019 DAU Standard Access Agreement, that will only apply in a subsequent price reviews and not at the point of an access seeker's greatest vulnerability – when they are negotiating the initial TIC prior to signing an agreement.

The importance of including this criteria to constraining some of the adverse outcomes of a negotiate/arbitrate pricing model is very clear. In particular:

(a) it creates greater certainty by providing a clear yardstick against which proposals can be compared and which assists in predicting the outcomes of arbitration with greater certainty – thereby increasing the prospects of a negotiated outcome and negotiating parties adopting unreasonable positions;

(b) it assists in further reducing information asymmetry because it means there is greater utility in the information required to be published about the QCA's previous approaches in relation to DBCT services (and regulatory decisions in relation to Aurizon Network reference tariffs and other services the QCA regulates will remain public); and

(c) it reinforces that the price adopted in arbitration must be appropriate.

[83] Draft Decision, 78.

If a negotiate-arbitrate pricing model is to be adopted this criteria being included is absolutely essential to making that model as close as it can ever be to appropriate.

10.4 Disclosure of arbitrated outcomes

If the QCA remains minded to impose a negotiate/arbitrate model, the DBCT User Group:

(a) supports the Draft Decision requirements that DBCT provide all information on arbitrated outcomes (not just the TIC)[84] – as where it is alleged by DBCTM that it will negotiate tailored arrangements, it stands to reason that it is possible the arbitrated TIC was reflective of a position taken on non-pricing terms;

(b) consider the same disclosure should apply to arbitration outcomes not related to the TIC – because again, where DBCTM asserts that it will negotiate tailored outcomes it is important for access seekers to understand the QCA's view on non-pricing terms that have been unable to be agreed with DBCTM by other access seekers; and

(c) supports the requirement to publish such determinations on the DBCTM or QCA website – such that they are available as guidance to all stakeholders including parties who are considering becoming access seekers but have not yet formally applied to do so, and existing users preparing for the contractual price review process before the time period for that review has formally commenced.

11 Need for collective arbitration

The QCA's Draft Decision is heavily dependent on its view that arbitration will provide a restraint on DBCTM engaging in monopoly pricing.

However, what the Draft Decision seems to give insufficient attention to is the fact that arbitration is simply not an equal 'backstop' for all users.

In particular:

(a) for single project access seekers – the uncertainty of the price outcome and the cost of an arbitration may well be too great for them to commence an arbitration;

(b) for any smaller access seeker or access holder – the cost of an arbitration will be too great for them to commence an arbitration; and

(c) where an access seeker needs immediate certainty (say in order to make investment decisions or obtain financing) – the cost profile uncertainty caused by arbitration may well be too great for them to commence an arbitration.

In addition, an arbitration regime heavily advantages DBCTM relative to the existing regulatory regime, as DBCTM would be a party to all of the individual arbitrations, and be able to spread its costs across each of the arbitrations, and benefit from the learnings and experience gained in each separate arbitral process. It is not clear that DBCT Users would be able to collaborate in this way (and in the way they do in relation to the current regulatory settings).

The DBCT User Group submits that if a negotiate/arbitrate regime is going to be imposed by the QCA that it is critically important that the undertaking expressly provide a right for:

(d) existing users under substantially the same access terms (i.e. the past and current standard agreement access terms) being able to collectively arbitrate; and

(e) users in the same expansion being able to collectively arbitrate.

[84] Draft Decision, 72

This will assist in enhancing the extent of constraint that arbitration can cause by mitigating the costs imposed on individual access seekers and holders.

12 Socialisation is Inappropriate in a Negotiate/Arbitrate Regime

The DBCT User Group is also disappointed with the limited analysis in the Draft Decision of the consequences of continuing the socialisation approach in the absence of a reference tariff, which appears to overlook the adverse outcomes that can evidently be produced.

Not a concern under Existing User Agreements

Contrary to what seems to be assumed in the Draft Decision,[85] this was *not* an issue that arose under the existing access undertaking and existing user agreement.

The existing arrangements achieve socialisation by dividing the revenue cap among 'Reference Tonnage'. In that regard, the DBCT User Group strongly encourages the QCA to review Schedule C of the 2017 AU and Schedule 2 of the 2017 AU Standard Access Agreement. Access Agreements executed under previous access undertakings use the same formulation.

As a result, where DBCTM entered into a non-standard pricing arrangement currently they *do not* get the benefit of socialisation, and other users *do not* assume the volume risks relating to such an arrangement.

This aspect of the Draft Decision must be revisited as the unfortunate misconceptions about the existing regulatory settings have led to an unfounded assumption that the removal of a reference tariff would not fundamentally alter the risk allocation balance between and users.

Draft Decision does not acknowledge the adverse outcomes of socialisation combined with a negotiate/arbitrate regime

The QCA acknowledges that *'it may not be appropriate for DBCT to negotiate terms of access with an access seeker where such terms act to transfer additional risk to other users that are not a party to the negotiation'*[86].

However, the Draft Decision then simply states that the QCA has not identified circumstances in which DBCTM is provided with further scope to allocate risk to other users that are not a party to the negotiation.[87]

With respect, the DBCT User Group encourages the QCA to reconsider this matter – as there are plenty of circumstances where that will be true.

The DBCT User Group notes the following as each being clear and obvious examples of where socialisation is no longer appropriate in the absence of a reference tariff:

Examples
DBCTM negotiates a user agreement under which an access holder pays a higher price, but has non-standard rights to early termination or reduction in tonnage with lesser notice. Such an agreement is attractive to DBCTM as it gets all the upside of the higher price while the agreement remains on foot, but can socialise much of the downside by raising prices of other users in the event of earlier termination (because the drop in contracted volume automatically raises the TIC for all other users).
DBCT develops an expansion (for which pricing is socialised) where there is greater risks associated with the access holder's financial substance than DBCTM would usually accept.

[85] Draft Decision, 56.
[86] Draft Decision, 55.
[87] Draft Decision, 56.

After the expansion is developed, the access holder becomes insolvent and their user agreement is terminated. Such an agreement is attractive to DBCTM as it gets to recover returns on the expansion once it is developed from existing users (because the drop in contracted volume automatically raises the TIC for all other users).
DBCT negotiates a user agreement under which an access holder pays a higher price, but has the ability to nominate contracted tonnages up to a cap or within a band each year, rather than having a fixed annual tonnage. Such an agreement is attractive to DBCTM as it gets all the upside of the higher price while the higher annual tonnages are nominated, but can socialise much of the downside by raising prices of existing users (because where low tonnages are nominated, the drop in contracted volume automatically raises the TIC for all other users). This would also be anticipated to create adverse outcomes for other users in relation to their ability to access capacity (due to the flexibility required to service that customer).
DBCTM negotiates an early termination right into a User Agreement where the User can make a significant payment to terminate the User Agreement on short notice (but lower than the total take or pay commitment for the remainder of the term that would otherwise apply). Such an agreement is attractive to DBCTM as it gets both the termination payment, and a rise in prices from existing users (because the drop in contracted volume automatically raises the TIC for all other users) -thereby 'double dipping'. The DBCT User Group note the close similarities of this situation to the key conduct which was the subject of the litigation in respect of Adani Abbot Point Coal Terminal and found to be unconscionable, as discussed earlier in this submission. It is not a theoretical or fanciful example, and not an outcome the QCA should be facilitating.
DBCTM has negotiated two different TICs with two excising access holders. The access holder paying the lower TIC wishes to negotiate a lower tonnage to minimise their take or pay exposure, and is willing to pay DBCTM some proportion of the take or pay revenue it would otherwise have to pay in order to have such a reduction agreed. DBCTM is incentivised to accept this arrangement because it receives the amount the lower priced access holder pays for the reduction and through the socialisation mechanism gains a rise in prices from existing users (with the higher priced TIC actually of other users actually making the socialisation revenue accretive for DBCTM).

DBCTM's regulatory submissions justifying charging above efficient costs, and the normal commercial incentives of a monopolist, suggest it is unrealistically optimistic to suggest that socialisation will not be potentially gamed by DBCTM to the greater detriment of access holders and access seekers.

The absurd results of the type noted above are of course why the existing arrangements exclude non-reference tonnage from the revenue cap.

Socialisation is not appropriate where a negotiate/arbitrate regime is imposed

The DBCT User Group urges the QCA in the strongest terms to reconsider this issue – as the position in the Draft Decision is based on an incorrect interpretation of the existing regulatory arrangements for its untenable conclusion that removal of reference tariffs would not *'fundamentally alter the risk allocation balance*'[88].

[88] Draft Decision, 56.

For completeness, the DBCT User Group confirms that the 'other protections' that the QCA optimistically refers to as reducing the risks[89] do not assist in resolving the problems noted above.

The DBCT User Group reiterates that it considers the appropriate outcome is a reference tariff with the existing socialisation mechanism. It also appears that socialisation (and a building blocks model) being maintained is a fundamental part of how the QCA considered that a negotiate-arbitrate model could become workable and seems to be implicitly assumed in the QCA's disclosure related measures which seek to resolve information asymmetry by disclosing information which assumes a common building blocks treatment of pricing.

However, DBCTM should not be immunised from volume risk, while being incentivised to take action that chase higher prices in circumstances that involve heightened volume risk safe (which is ultimately borne by users).

[89] Draft Decision, 56.

Part D – Reference Tariff as an Appropriate Backstop

12.1 Reference tariff as the backstop to negotiation

If, despite all of the submissions above, the QCA remains convinced that there are benefits from providing parties with the opportunity to reach negotiated outcomes, the DBCT User Group submits that it doesn't automatically follow that arbitration provides a sufficient constraint on DBCTM's market power and is the appropriate 'backstop' to be combined with such a negotiation based model.

That is, if the QCA is minded to conclude that a model which provides an opportunity for a negotiated outcome is appropriate, then the QCA would need to give consideration to the appropriate method for resolving access terms where there is a failure to reach commercial agreement.

That is particularly true where the QCA has acknowledged that the current reference tariff model is actually established in a way that can accommodate negotiated outcomes.

The DBCT User Group strongly rejects the QCA's analysis that:

(a) the existence of arbitration makes it beneficial for DBCTM to propose a reasonable TIC in negotiations with access seekers,[90] rather it strongly incentivises DBCTM to push as hard as possible for a negotiated price that is higher than is reasonable knowing that there is only upside in doing so (because arbitration will not result in a below reasonable price – and as discussed in section 10 seems to provide grounds for DBCTM to argue for an inappropriately high price); and

(b) DBCT is incentivised to act reasonably in negotiations should it want the negotiate/arbitrate framework to remain in future regulatory periods – as:

  (i) DBCTM's economic incentives (as discussed in section 3.4 are aligned with engaging in monopoly pricing and the Draft Decision strongly suggests that the QCA is minded to accept a degree of monopoly pricing above the efficient cost of supply would be accepted in an arbitration);

  (ii) There is a significant extent of short term profit that can be gained across 85 mtpa of contracted capacity incentivises monopoly profit taking – which will be highly material to the share price of an entity that is likely to be a listed terminal owner post Brookfield's initial public offering; and

  (iii) DBCTM remains convinced that it will not be regulated in future (through its judicial review application or future challenges to declaration).

Particularly given DBCTM submissions that arbitration would already be likely be concurrent, the DBCT User Group notes that it would, for example, be possible to combine a negotiate based model with a reference tariff as a more efficient 'backstop' which applies where two or more users are unable to reach a negotiated outcome.

12.2 Benefits of a reference tariff as the backstop

The DBCT User Group submits that where consideration is given to alternative forms of 'backstop' it will become evident that arbitration is not the appropriate backstop in the circumstances of the DBCT service.

The DBCT User Group submits that only a reference tariff provides an appropriate resolution mechanism where initial access negotiations fail because utilising a reference tariff 'backstop' will:

[90] Draft Decision, 83.

(a) deliver the potential for negotiated outcomes the QCA sees some potential benefit in;

(b) provides for that potential without risking the inappropriate outcomes that can arise from arbitration between DBCTM and entities with less access to financial, legal and other resources;

(c) provides a 'backstop' to resolve the access terms where the parties were unable to reach agreement, and thereby:

  (i) provide a constraint on DBCTM exercising market power; and

  (ii) incentivise the parties to reach a negotiated outcome – providing greater incentives than an arbitration, due to the reducing the uncertainty of outcomes to a range which might be able to be bridged through commercial negotiation;

(d) be much less costly than arbitration – in particular because a reference tariff would be determined once for all existing users which had not reached agreement and would significantly reduce the cost relative to multiple arbitrations regarding the same circumstances;

(e) involve a less dramatic upheaval of regulatory arrangements in respect of DBCT, and thereby provide greater predictability, transparency and stability of the regulatory framework;

(f) be more consistent with:

  (i) the standard access agreements which provide for reference to be had to reference tariffs which exist for the service;

  (ii) the common nature of the service provided by DBCT by common infrastructure; and

  (iii) DBCT's obligations to have a common user charges under the Port Services Agreement.

Such an approach would allow the QCA to test whether the benefits that it considered 'may' arise from an opportunity for a negotiated outcome actually would arise – while ensuring an appropriate result applies to all users where such benefits do not arise.

The DBCT User Group considers that is a more appropriate outcome that locking in a regulatory setting that has the potential to mandate the retention of inappropriate results for the 5 year pricing period.

Accordingly, the DBCT User Group strongly submit that if the QCA is minded to consider a negotiation based model appropriate, the only way it should be considered appropriate is if the backstop was to be a QCA determined reference tariff.

Part E – Specific QCA Queries

13 Depreciation methodology

13.1 Support for ex-ante definition of depreciation methodology

The Draft Decision proposed to require DBCTM to calculate depreciation based on a QCA approved methodology.[91]

As correctly recognised in the Draft Decision, requiring depreciation to be calculated based on a QCA approved methodology:

(a) addresses information asymmetry issues associated with the value of depreciation and capital based presented by DBCTM;

(b) removes the need for DBCTM to provide significantly underlying information to access seekers; and

(c) removes the need for access seekers to assess the underlying information within the negotiation timeframes.[92]

While the DBCT User Group considers that does not go far enough, as all building blocks of the TIC should be based on a QCA approved methodology, logically the DBCT User Group supports each individual building block (including depreciation) having its methodology set by an efficient and appropriate ex-ante assessment.

13.2 Support for QCA's Existing Methodology

As the Draft Decision recognises, DBCTM is proposing to calculate depreciation utilising a different methodology to calculating depreciation than that applied in previous access undertakings for the DBCT service.

The DBCT User Group is not supportive of DBCTM's depreciation methodology.

The DBCT User Group remains supportive of the depreciation methodology applied by the QCA in previous access undertaking periods.

In particular, the DBCT User Group understand that the QCA's depreciation methodology involves:

(a) assets with an estimated useful life exceeding 2054, being depreciated over the period until 2054; and

(b) assets with a lesser estimated useful life, being depreciated over their remaining estimated useful life.

This methodology is appropriate as it:

(a) is understood by users and where the intention is to resolve information asymmetry that is best done through utilising a model that users are familiar with from previous regulatory periods; and

(b) based on a more appropriate estimate useful life of the terminal than that assumed by DBCTM in its calculations (as discussed in 13.4 of the terminal).

Accordingly, the DBCT User Group considers that the QCA should require charges in the next regulatory period to be calculated on a building blocks basis, with depreciation being required to be calculated on the basis of the QCA's existing methodology (consistent with this aspect of the Draft Decision).

[91] Draft Decision, 67.
[92] Draft Decision, 67.

13.3 Further changes to DBCTM depreciation proposal

Correspondence from DBCTM received late in the period for submissions appears to suggest that DBCTM is now intending to vary its proposed methodology again by allocating assets into separate 'simplified' bands of useful lives, and depreciating all assets by 2051 (corresponding to the initial lease term).

The DBCT User Group sees no merit in that approach where it is conditioned upon accepting an artificially early useful life of the terminal as:

(a) the QCA can simply prescribe the use of the existing more accurate useful lives for each asset – such that any such 'simplification' serves no purpose;

(b) rather than using a more inaccurate and obscured estimation technique, DBCTM should be required to provide modelling to support its calculation of the applicable depreciation using the QCA's prescribed methodology to the extent it has genuine concerns about information asymmetry; and

(c) DBCTM's methodology relies on an inappropriate useful life for the terminal which is prejudicial to an appropriate outcome in relation to the remediation allowance (which the useful life of the terminal is relevant to calculating).

13.4 Useful Life of the Terminal

Initial Lease Term is Not the Useful Life of the Terminal

The DBCT User Group remain strongly opposed to calculating depreciation by reference to the initial lease term which expires in 2051.

That lease terms falls short of the useful economic life of the terminal and therefore is an arbitrary end date that materially overstates the efficient level of depreciation. Some existing assets have useful lives beyond that artificial limit and where DBCTM is considering a major 8X expansion and significant investments will be made at the end of this regulatory period (out to 30 June 2026), and new greenfield mines are to be developed to utilise that capacity, it is likely further investments will have useful lives beyond that limit.

Artificially assuming a shorter estimated useful life, has the effect of imposing higher charges on existing users thereby subsidising future users at the cost of existing users. As recognised by the QCA, this type of 'intergenerational' inequity is something relevant to consideration of the section 138(2) QCA Act factors.

DBCTM does not face a risk of asset stranding

DBCTM has previously argued that the depreciation period should be shortened to reflect its risk of asset stranding. However, those arguments were clearly rejected by the QCA in its final decision in respect of the current access undertaking.[93]

During that process, the QCA also had a consultant consider the weighted average mine life of the DBCT catchment to conclude that the useful economic life of the terminal would continue until at least 2055.

If anything, it has become increasingly clear in the years since that the arguments DBCTM has continued to make for a shorter depreciation remain completely unjustified. In particular, recent events and findings have confirmed the accuracy of the QCA's previous analysis of this issue as noted below:

[93] Final Decision – DBCT Management's 2015 draft access undertaking, November 2016, at 129-135 https://www.qca.org.au/wp-content/uploads/2019/05/31145_DBCT2015DAUFINALDECISION-1.pdf

DBCTM argument for a shorter depreciation profile	Analysis
Risk of access holders not renewing capacity in the next regulatory period	Risk has recently been eliminated, given all existing users have exercised extension options in connection with DBCTM's expansion process which extend well beyond the regulatory period.
Asset stranding through softening in metallurgical coal market	No evidence has been provided of long term decline in the metallurgical coal market. In fact all available evidence is completely inconsistent with DBCTM's assertions of asset stranding risk. The transition to renewable or lower-emissions energy sources does not lead to the conclusion that DBCT's useful life is being reduced, as approximately 80% of DBCT's throughput is metallurgical coal and much of the remaining 20% is a secondary thermal coal product from a predominantly metallurgical mines (which will continue being produced as a by-product of metallurgical coal production). In addition, as Fitch noted in its assessment of DBCT Finance[94] *'DBCT is the most competitive coal terminal servicing the central Bowen Basin, in Queensland, in terms of location and port fees. Mines in the DBCT catchment area are mainly in the lower half of the global seaborne export metallurgical coal cash-cost curve.*' Accordingly, any reduction in seaborne global demand for metallurgical coal is unlikely to impact on DBCT contracted or throughput volumes. DBCTM's actions of progressing the 8X expansion, and users willingness to sign up to 8X conditional access agreements and underwriting agreements, strongly suggest stakeholders confidence in likely future coal demand. DBCTM's 2019 Master Plan notes that:[95] *'DBCT has observed an increase in demand for terminal capacity from developers of new and existing coal mines. This increased demand indicates that confidence has returned and miners are more willing to invest in coal mine developments in the Bowen Basin. Following years of cost cutting initiatives, combined with the advantages of well-development infrastructure and proximity to Asian import destinations, Queensland miners are expected to maintain a substantial advantage over their global competitors*.'
Threat of competition from Abbot Point Coal Terminal	The QCA has clearly found, in both the declaration review and the 2019 draft access undertaking process that Abbot Point (and other coal terminals) provide no competition for DBCT. That finding has been confirmed on multiple occasions for numerous reasons including cost differences, greater above and below rail costs to access other coal terminals, capacity constraints and differences in blending and co-shipping opportunities.

[94] Fitch Ratings, Fitch affirms DBCT Finance Pty Ltd at 'BBB-'; Outlook Stable, https://www.fitchratings.com/research/infrastructure-project-finance/fitch-affirms-dbct-finance-pty-limited-at-bbb-outlook-stable-31-03-2020
[95] DBCTM, DBCT Master Plan 2019, at 29.

	It is also clearly evidenced by the limited cross-system usage of other coal terminals by Hay Point catchment users.
It is not certain that the lease will be extended	DBCTM has still provided no evidence to suggest that it would not extend the lease. The mere theoretical ability to not renew the lease should not result in an artificial assumption of an unduly short estimated useful life for the terminal. Rather the QCA should consider how DBCTM is likely to act given the commercial incentives it has. DBCTM does not have to pay any additional consideration for extension of the lease, or meet onerous conditions. The extension also pushes back the timing of the obligation to remediate. Accordingly, it will be highly economically incentivised to renew the lease provided there is any remaining useful life in the terminal. Consequently, the QCA should reject any DBCTM assertion that the useful life should be artificially treated as expiring at the initial lease term. If the QCA wants further evidence that the useful life of the terminal is not bound to the initial lease term – the QCA should exercise its information production powers (as discussed in section 3.1) to obtain information DBCTM has provided to bidders and potential investors in relation to trade sale and initial public offering proposals regarding the future operations of the terminal.

DBCTM has presented no evidence to suggest that it is appropriate to assume a useful life of less than the previous estimate of 2054.

Long Term Demand for Hay Point Catchment Metallurgical Coal

In addition, recent economic reports continue to confirm the long term demand for metallurgical coal.

For example Wood Mackenzie's *July 2020 Global metallurgical coal long term outlook H1 2020* indicates:

(a) Australia's metallurgical coal export will grow to 250 Mt by 2040 (gaining 66% of the projected export growth across that period);

(b) Displacing metallurgical coal as a key input steel making (using blast furnace / basic oxygen furnace operations) is much more difficult than displacing thermal coal for power generation – and requires cheap and abundant renewable energy, affordable, transportable and storable hydrogen, commercial-scale validation of hydrogen-based direct reduce iron, increased scrap availability, widespread electric arc furnace penetration, government support and adequate carbon emission taxing – resulting in replacement technologies not being globally available until 2040 at the earliest;

(c) India, which is the principal source of long term growth and demand is embracing blast furnace / basic oxygen furnace operations, such that even if metallurgical demand starts to decline near the end of DBCT's estimated useful life in Europe, there will continued to be a strong source of demand for which coals in the Hay Point catchment will be the most cost effective producers.

Consistency in Approach Assists with Information Asymmetry

Adopting the same depreciation methodology would also make the information about the previously tariffs which the QCA is requiring to be disclosed more meaningful, and of greater assistance in resolving information asymmetry.

Accordingly, the DBCT User Group supports the depreciation methodology remaining the same as applied for the existing undertaking.

14 Calculating the TIC During the Regulatory Period

14.1 Current approach to roll-forward

Currently the QCA approves annually the 'roll-forward' of the TIC (based on capital expenditure, inflation and changes in contracted volumes).

That roll-forward typically includes a decision by the QCA on:

(a) the extent to which non-expansion capital expenditure (***NECAP***) should be included in the regulatory asset base;

(b) the Annual Revenue Requirement for the financial year – which then derives the TIC by being allocated across the reference tonnage.

That roll-forward decision is made after a submission by DBCTM, and an opportunity for stakeholders to make submissions and provide comments.

The QCA also approves TIC adjustments arising from 'Review Events' – most typically being a change in contracted reference tonnage.

14.2 Interaction with the negotiate/arbitrate regime in the existing User Agreements

As discussed in previous DBCT User Group submissions, the proposed negotiate/arbitrate regime is not aligned with or consistent with this roll-forward process – both as it operated under the undertaking and as it operates under the existing User Agreements – the latter of which *are not (and cannot be) amended* by the QCA's decision on the 2019 DAU*.*

The Draft Decision appears to consider that this is not an issue because the clause 7 arbitration process can resolve non-pricing terms.

The DBCT User Group considers that it is far from clear that conclusion is accurate. While it is true that 'consequential changes in drafting provisions' constitute part of the review,[96] it is expressly provided that neither party has any obligation to reach agreement on any revised terms.[97] The arbitration provisions go on to reference the arbitrator determining charges without reference to determining consequential drafting changes as well.

Consequently, it is far from clear to the DBCT User Group that the arbitrator has the power to determine matters other than the agreed charges. No basis in the provisions of the Standard Access Agreement is noted in the Draft Decision as supporting that conclusion.

In addition, it is not clear how DBCTM or the QCA considers this works where one user reaches agreement, and another receives an arbitrated determination, with different outcomes in relation to the roll-forward, one of which assumes socialisation and the other of which does not. Either this means DBCTM is going to need to dictate the same outcome on roll-forward for all users (i.e. no tailored outcomes) or there will be extreme complexity in pricing due to users having their prices rolled forward on a different basis (and one that could be changed again at the next arbitration).

The DBCT User Group remains seriously concerned that the QCA's proposed decision is:

[96] Current Standard Access Agreement, clause 7.2(a)
[97] Current Standard Access Agreement, clause 7.2(g)

(a) attempting to remove pre-existing contractual rights for users, which have made significant sunk capital investments on the basis of the existing contract terms;

(b) creating substantial uncertainty as to the operation of the roll-forward mechanism in respect of existing User Agreements whatever decision the QCA makes; and

(c) facilitating DBCTM strong-arming existing users into agreeing disadvantageous amendments to try to create some certainty.

That is not an appropriate set of outcomes to be approving.

14.3 DBCTM's Proposal in 2019 DAU Access Agreements

DBCTM's proposal in the 2019 DAU Standard Access Agreement is for the roll-forward to occur in accordance with the Access Undertaking.

The relevant Access Undertaking schedule has been revised to try to support the negotiate/arbitrate regime – which envisages users paying completely different prices for the same service despite having contracted the common service on common terms.

Schedule C of the proposed 2019 DAU provides for:

(a) inflation of the TIC applicable to the individual user on the basis of actual CPI (weighted average 8 capital cities);

(b) increasing the TIC applicable to the individual user proportionately where there is a decrease in annual contracted tonnage (i.e. socialisation of all volume risk);

(c) increasing the TIC applicable to the individual user for a return on and of NECAP incurred during the regulatory term at a deemed WACC rate of 5% plus the 10 year Commonwealth government bond rate.

In other words despite envisaging that it will charge completely different prices to users for the same service, DBCTM is suggesting that it would apply these 'roll forward' mechanics universally.

This can result in unexpected and commercially perverse outcomes. For example, if a lower priced user has its contracted terminated, this may actually increase DBCTM's revenue because of the ability to trigger a review event and increase every other user's price proportionately to the change in tonnage not the loss in revenue.

14.4 Difficulties of roll-forward in a negotiate/arbitrate model

DBCTM's proposal is to effectively adopt, the 'best of both worlds' (from its perspective) where it:

(a) is allowed to engage in monopoly pricing above the efficient cost of supply in setting the initial TIC for the pricing period; but

(b) is immunised from all inflation, volume or capital expenditure variance risk across the term of the pricing period through an automatic roll forward.

That is not an appropriate combination of regulatory settings, and is inconsistent with the principle reflected in the s 168A QCA Act pricing principles that return should correspondence to the commercial and regulatory risks involved in providing the service.

It also demonstrates the difficulties and uncertainties created by overlaying a negotiate-arbitrate model on existing contractual and regulatory arrangements, where DBCMT is seeking to pick and choose which of those existing elements continued to be prescribed (to remove its downside risk) and which elements are left for negotiation (to facilitate DBCMT capturing upside above the efficient price).

It also creates significant uncertainty as to how the roll-forward operates in relation to existing User Agreements which contain an existing contract schedule providing for roll-forward based on

QCA determinations (which will no longer occur). This issue is not resolved by changing the Standard Access Agreement or the undertaking and is therefore an issue that would seemingly be required to be the subject of negotiation or arbitration. It follows that, DBCTM's approach can seemingly result in a different approach to roll-forward applying to different users.

As the QCA recognises, providing a prescribed methodology for a roll-forward of the TIC limits the scope for negotiation.[98] It is also inconsistent with DBCTM's assertion that there are benefits from pursuing tailored negotiations.

The DBCT User Group also disagrees with DBCTM's assertion that its proposal reflects the current arrangements. The treatment of inflation, socialisation, and the return of and on NECAP have all been altered.

If despite all of the above the QCA is minded to impose a negotiate/arbitrate regime coupled with a prescribed roll-forward methodology then:

(a) return on and of NECAP should only be included where considered prudent by the QCA and at a weighted average cost of capital determine approved by the QCA at the time of the roll forward;

(b) NECAP should be required to be included into the asset base and depreciated in accordance with the prescribed QCA depreciation methodology;

(c) the treatment of inflation should remain the same as it currently is under the existing roll-forward arrangements; and

(d) there should cease to be any socialisation of changes in annual contract tonnage for the reasons discussed in section 12 above.

If DBCTM wants to pursue a significantly higher price, then it is an unreasonable negotiating environment to not have a significantly higher increase in their risk profile being part of the issues that can be negotiated and arbitrated upon. If the QCA is minded to impose a negotiate/arbitrate model, that users consider will permit engagement monopoly pricing, surely it should not be able to do that on a risk free basis.

15 Price Review Processes

15.1 Interaction of Price Review Provisions and 2019 DAU Process

As the QCA has identified existing User Agreements and the 2019 DAU standard access agreement envisage a 'price review' process in the lead up to the next 5 year regulatory period.

The significant change in regulatory settings being contemplated by the QCA have made application of those provisions a matter of great uncertainty – as they envisage the review discussions starting no later than 18 months before the next 'Agreement Revision Date' (so 18 months before 1 July 2021, i.e. 1 January 2020). That has obviously not been possible here.

While DBCTM is now seeking to engage individual users it is doing so without disclosing the price it is seeking (because it is not willing for the QCA to have knowledge of those prior to the final decision).

However, it should be noted that provisions are absolutely clear that where the arbitrator is the QCA:[99]

[98] Draft Decision, 68.
[99] Current Standard Access Agreement, clause 7.2(c)

The parties must request the arbitrator to progress the arbitration in conjunction with the process at that time for development of a new Access Undertaking (with the intention that reviewed charges will be determined no later than the commencement of the new Access Undertaking)

Given that the QCA's indicative timeline is a final approval in February 2021[100] it seems unlikely that timeframe is achievable before pricing is supposed to commencement for the next review period on 1 July 2020.

As noted in previous submissions, this issue will continue to be repeated in future regulatory and contractual price review periods, as the next undertaking will not be in place when the price review is contractually required to commence, and so on.

While the existing tariff is continued if pricing is not agreed by the commencement of the new price review period, there is interest payment consequences and a clear detriment to investment decisions where the pricing remains uncertain.

15.2 Information provision to existing users

The QCA rightly has raised queries about whether the information provision the undertaking terms will mandate also needs to be extended to existing users.

The DBCT User Group absolutely agrees that it does. Existing users will also suffer from information asymmetry in similar ways to new access seekers.

In fact, the DBCT User Group emphasises that in these contractual price reviews, existing DBCT users will be negotiating in an environment where they have evergreen contracts, which all parties know they have to renew given long term sunk capital investment in mining operations which depend on that access. Existing users will have even less countervailing power than access seekers, as they will not even realistically have the option to cease contracting.

Consequently, the DBCT User Group considers that, at an absolute minimum, if the QCA is minded to approve a negotiate/arbitrate model:

(a) the access undertaking must provide for existing users in the five yearly contractual price review processes to be provided all of the same information that an access seeker under the access undertaking is provided – which logically follows as:

  (i) existing users have no way of negotiating an appropriate price in such a contractual review process without such information;

  (ii) there is no justification for the regulatory settings to provide inequitable treatment between access seekers and access holder in terms of information provision;

(b) the access undertaking must provide that in the contractual price review process and any resulting arbitration, DBCTM must apply the QCA's prescribed methodology on issues like depreciation and remediation allowance and all other matters the QCA considers should be determined ex-ante (because that protection is equally necessary for existing holders for the same reasons); and

(c) the access undertaking should expressly require DBCTM to engage in a collective arbitration (as discussed in section 15.3 of this submission below).

15.3 Collective Arbitration

The DBCT User Group submits that if the QCA is minded to approve a negotiate/arbitrate regime the access undertaking should be expressly required to provide users with a right to participate in

[100] Draft Decision, vii.

a collective arbitration for all existing users that have not reached agreement on pricing by the time of approval of the new access undertaking.

This will enable a more efficient and less costly arbitration process than would arise where the QCA is to insist on numerous bilateral arbitrations, where users would need separate legal and economic advisers, but DBCTM would presumably have a single set of advisers and significantly lower costs per arbitration, and would benefit from the efficiencies of conducting multiple arbitrations on largely common issues.

Such a joint arbitration is also:

(a) clearly permitted by the provisions of the User Agreements which provides for the arbitration to be conducted in accordance with the rules and procedures required by the QCA;[101] and

(b) consistent with the provisions of the User Agreement which provided that the review is 'intended to be undertaken at the same time, in conjunction with, and on the same basis as reviews under other User Agreements which are in terms similar to this Agreement where a similar review is due at the same time'[102].

For the reasons set out in section 5 of this submission above, the DBCT User Group reject that any such joint arbitration would reduce the prospect of a tailored outcome – because all of the existing users:

(c) are not seeking a tailored outcome;

(d) see no benefit in one – particularly where those users who have had discussions with DBCTM have discovered that DBCTM is only interested in an increased price; and

(e) realistically can't have a tailored outcome in any case given the way the service practically operates and the near identical existing contractual terms they have all agreed to.

Consistent with the QCA's proposed requirement that arbitration outcomes be published (which the DBCT User Group supports where the negotiate/arbitrate model is imposed), this arbitration outcome would then be published and provide a reference point for future access seekers during the regulatory term.

The DBCT User Group submit that a joint arbitration should also then be permitted for the 8X expansion capacity access seekers which have signed conditional access agreements (assuming the 8X expansion is developed by DBCTM in a timeframe which involves the pricing for that capacity being determined during the this regulatory term).

15.4 Interaction of Price Review Processes and Contracting Late in the Regulatory Period

The Draft Decision raises valid concerns that:

(a) access seekers who enter into access agreement within the 18 months prior to 30 June 2026 may not be able to formally 'trigger' a review of access charges – such that the initial TIC negotiated between the parties will apply across two pricing periods; and

(b) access seekers will not be adequately informed in negotiating the initial TIC that will apply across two pricing periods as they will only have forecast information until 30 June 2026.[103]

[101] Current Standard Access Agreement, clause 7.2(f).
[102] Current Standard Access Agreement, clause 7.2(b)
[103] Draft Decision, 69.

The DBCT User Group submits that if the QCA is minded to approve a negotiate/arbitrate regime then to protect such 'late contracting' access seekers:

(c) the 2019 DAU standard access agreement should make it absolutely clear that the price agreed only applies for the balance of first regulatory period, and the price review process should start at the *later of* 18 months from the next review date or the date of execution of the agreement – so the new access seeker can participate in the next price review (even if that price review process has already started in respect of other access seekers);

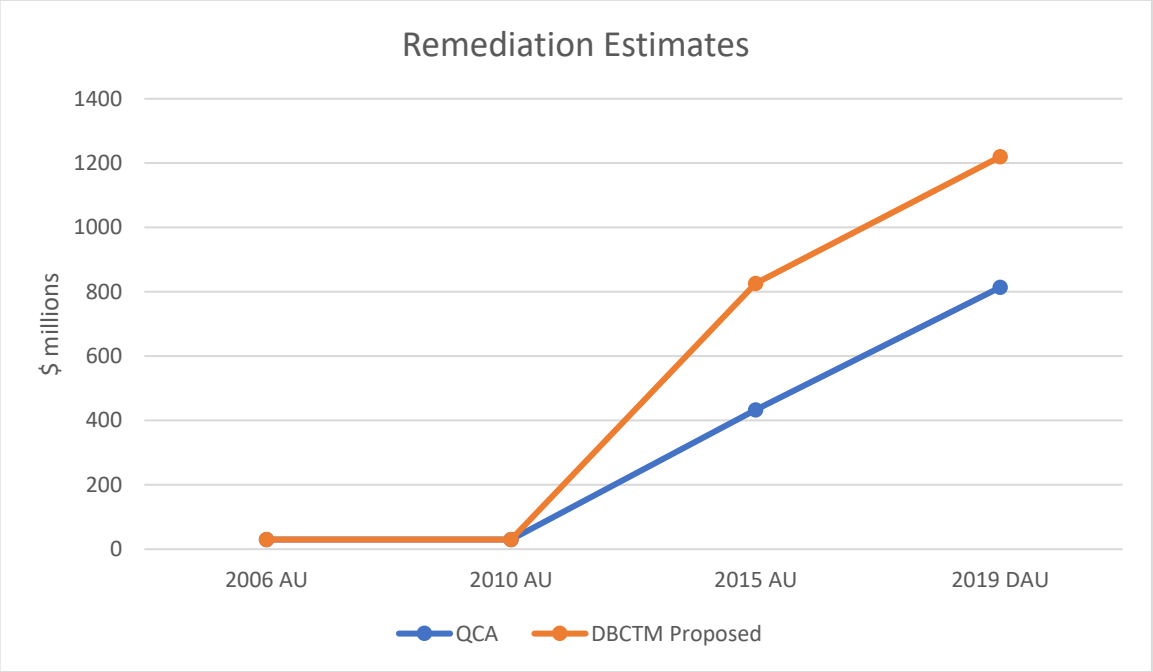
(d) the access undertaking should provide the same protections for such users as proposed for other existing users in section 15.2 of this submission (including the ability to join any collective arbitration that is underway at the time).

16 Remediation Allowance and Broader Issues

16.1 Information asymmetry and importance of the QCA determining an appropriate estimate

As highlighted in previous submissions of the DBCT User Group, the scale of the remediation costs and the wide range of uncertainty in relation to the appropriate estimate, is a key issue that creates substantial uncertainty in relation to pricing.

That is clearly demonstrated by the range of remediation estimates determined by the QCA and proposed by DBCTM across recently regulatory periods as shown below:



The Draft Decision concluded that GHD's estimate may be overestimated due to certain aspects not being prudent and/or efficient[104] and the use of GHD's estimate as a basis for negotiation of the remediation charges could result in charges that are inefficiently high.[105] The DBCT User Group strongly agrees – and considers the inflated nature of GHD's estimate is in fact a near certainty.

[104] Draft Decision, 94.
[105] Draft Decision, 91.

Accordingly, the Draft Decision proposed that it was appropriate for the QCA to determine a rehabilitation cost estimate that is required to be used by DBCTM to calculate pricing.[106]

While the DBCT User Group considers that does not go far enough – as all building blocks of the TIC should be based on a QCA approved methodology, logically the DBCT User Group supports each individual building block (including depreciation) having its methodology set appropriate in an ex-ante manner.

What has become evident through the consideration of remediation estimates in this and the previous access undertaking processes is that:

(a) DBCTM has strong incentives to overstate the likely remediation cost to completely insulate itself from risk and provide it with a higher return which it can invest elsewhere;

(b) DBCTM's proposed numbers are based on the absolute 'highest cost' scenario – involving an assumed standard well above what industry participants anticipate, at a higher cost to complete than technical experts anticipate, with additional contingency added;

(c) differences in assumptions about how the State will apply the obligation to remediate to 'its natural state and condition' make hundreds of millions of dollars of difference; and

(d) differences in assumptions about very specific issues in how remediation would practically be carried out, like how much depth of topsoil would need to be removed, makes hundreds of millions of dollars of difference.

The report prepared by Advisian demonstrates the extreme difficulty that users would experience in trying to negotiate the remediation estimate or arbitrate this point (and frankly the difficulty that the DBCT User Group faces in providing submissions on this issue at this point). Consequently, it is absolutely clear that the QCA needs to determine the remediation estimate on an ex-ante basis.

16.2 QCA determination should consider other elements of the remediation allowance

While, the DBCT User Group is supportive of the QCA determining an appropriate remediation estimate, that is only part of the remediation allowance that comprises part of the TIC payable by users.

Because the remediation allowance is calculated as an annuity stream payable over the remaining useful life of the terminal, with a view of ensuring that DBCTM has adequate funds to conduct the remediation it is a function of each of:

(a) the remediation estimate;

(b) the useful life of the terminal; and

(c) the discount rate applied.

It is important to the structural integrity and purpose of the remediation allowance, and ensuring that DBCTM does not engage in monopoly pricing by setting the remediation allowance at inefficient levels that the QCA:

(d) requires the remediation allowance to continue to be calculated in this manner; and

(e) also determines the useful life of the terminal and the approach to calculating the discount rate (as discussed below).

[106] Draft Decision, 91.

The Draft Decision's conclusion that access seekers would be able to negotiate a remediation charge from a sufficiently informed position with only the remediation estimate,[107] is not consistent with the influence the other factors outlined above have on the annuity payment calculation and undermines the very purpose of determining the remediation estimate (given the significant variance the 2 other elements creates).

It is not clear how the QCA envisages this would occur where there is no requirement for DBCTM to continue calculating the remediation allowance in the same way, and the DBCT User Group and DBCTM have clearly divided opinions on the useful life of the terminal and discount rate which should be applied.

16.3 Useful life of the terminal

The QCA has determined in all previous regulatory assessments that the useful life of the terminal extends until at least 2054.

However, DBCTM continues to argue that the useful life should be considered to expire in 2051.

There is no basis for that position. The useful life of the terminal is not aligned with or connected to the initial lease term, because DBCTM has a right of renewal for a further 49 years without having to pay any additional consideration or assume new or further obligations. As such, DBCTM will clearly be incentivised to renew the lease where useful economic life remains.

It needs to be remembered that DBCTM's throughput is over 80% metallurgical coal, which much of the remaining thermal coal throughput actually produced as a by-product or secondary product from mines that predominantly produce metallurgical coal. As such, the terminal's useful life is unlikely to be impacted by any future transition from thermal coal in the energy mix. Rather, the terminal's useful life is a function of:

(a) the demand for metallurgical coal – which is driven by:

  (i) the demand for steel; and

  (ii) the extent of, and cost effectiveness of, alternatives to metallurgical coal (particularly the high quality hard coking coal produced in the Hay Point catchment) for production of steel;

(b) the beneficial position on the cost curve of Hay Point catchment mines which results in them continuing to be viable even in future environments where global demand is reducing.

In that regard (as discussed in section 13.4 above) it is clear that demand for metallurgical coal will be continuing strongly for well past the end of the initial lease term, and that the Hay Point catchment's coal mines position low on the cost curve will result in them continuing to be economic even where there is a declared in global metallurgical coal demand.

16.4 Discount Rate

In relation to the discount rate applied, the QCA has traditionally set this at the WACC that underlies the QCA approved TIC.

The DBCT User Group's understanding is that QCA determined this to be an appropriate approach because DBCTM can reinvest such funds. The DBCT User Group remains willing to support that approach.

[107] Draft Decision, 99

However, under DBCTM's model, there will of course not be a QCA approved WACC, such that a major function of the remediation allowance calculation has been removed without any evident replacement.

The DBCT User considers that the QCA should either:

(a) expressly determine the WACC that should apply for these purposes; or

(b) require that DBCTM calculate the remediation allowance utilising a discount rate reflecting the WACC DBCTM has used to calculate the TIC for that user (together with requirements to use a building blocks based pricing methodology).

17 Remediation Estimate

17.1 Remediation Estimate should not be overly conservative

No stakeholder is arguing that DBCTM should not have sufficient funding to ensure remediation.

The DBCT User Group also acknowledges the uncertainty about issues like the scope and cost of works referred to in the Draft Decision.[108]

However, that does not mean that the remediation estimate that should be selected must be extremely conservative (as DBCTM/GHD are seeking), because the remediation estimate is evidently not set once without any opportunity to rectify any under or over estimate.

The DBCT User Group anticipates that the remediation estimate and useful life of the terminal will continue to be reviewed each regulatory term, and the annuity stream required would then be anticipated to be altered to ensure that DBCTM's remediation is funded.

Accordingly taking an extremely conservative view on rehabilitation estimates now is not required to ensure that DBCTM's remediation works are funded. Taking an extremely conservative view now (i.e. adopting DBCTM/GHD's excessive estimate) is simply front loading the payment of the remediation, such that current users are subsidising future users of the terminal.

Consequently, the appropriate regulatory response is to develop an accurate as possible point estimate and then adjust upwards or downwards at subsequent regulatory reviews as required (with it being anticipated that estimated costs would become more accurate, and adjustments would become smaller, as the end of the terminal's useful life becomes closer).

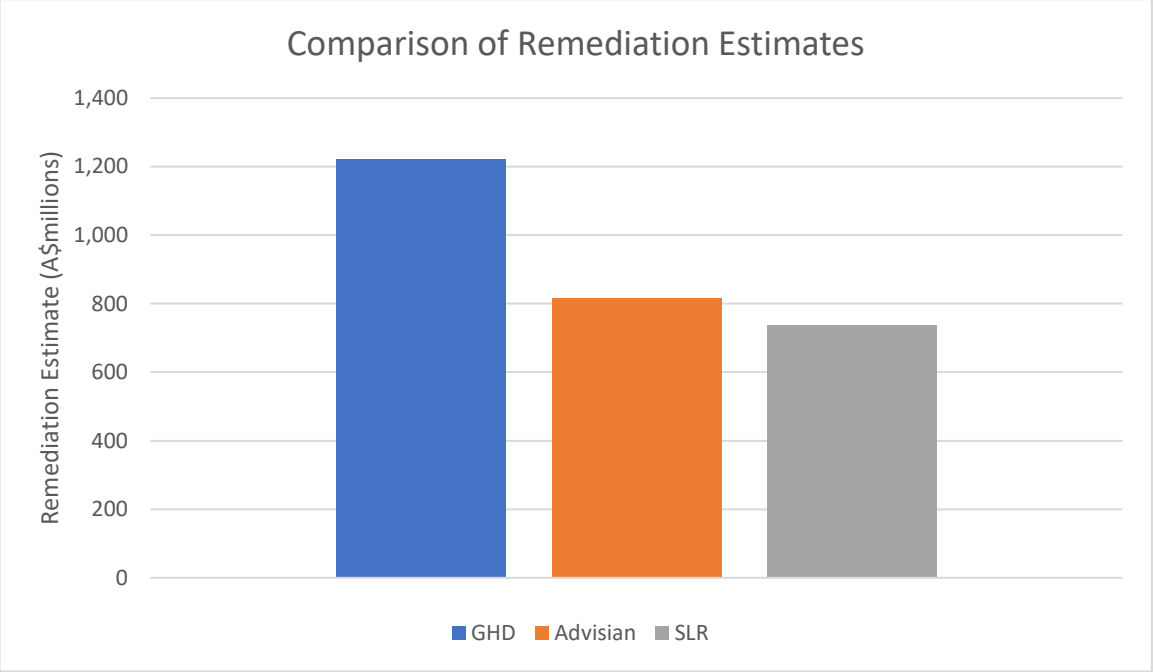
17.2 A More Appropriate Estimate – the SLR Report

The DBCT User Group has engaged SLR Consulting Australia (***SLR***) to provide an independent review of the various rehabilitation estimates that have been provided in the 2019 DAU process to date.

A copy of SLR's Report is contained in Schedule 1 to this submission, and the DBCT User Group encourages the QCA to carefully consider the detailed analysis in that report

SLR estimates a $736 million rehabilitation cost. That constitutes a $78.1 million reduction from the Advisian estimate, and a $484 million reduction from the GHD estimate, as shown below.

[108] Draft Decision, 92.



The DBCT User Group considers the SLR Report provides strong evidence that even the estimate provided by Advisian remains inappropriately high, and prescribing that DBCTM utilise a higher estimate than the SLR figures for the purposes of calculating pricing is requiring inappropriate and inefficiently high pricing.

The key differences between the cost estimates are summarised in the table below extracted from the SLR report:

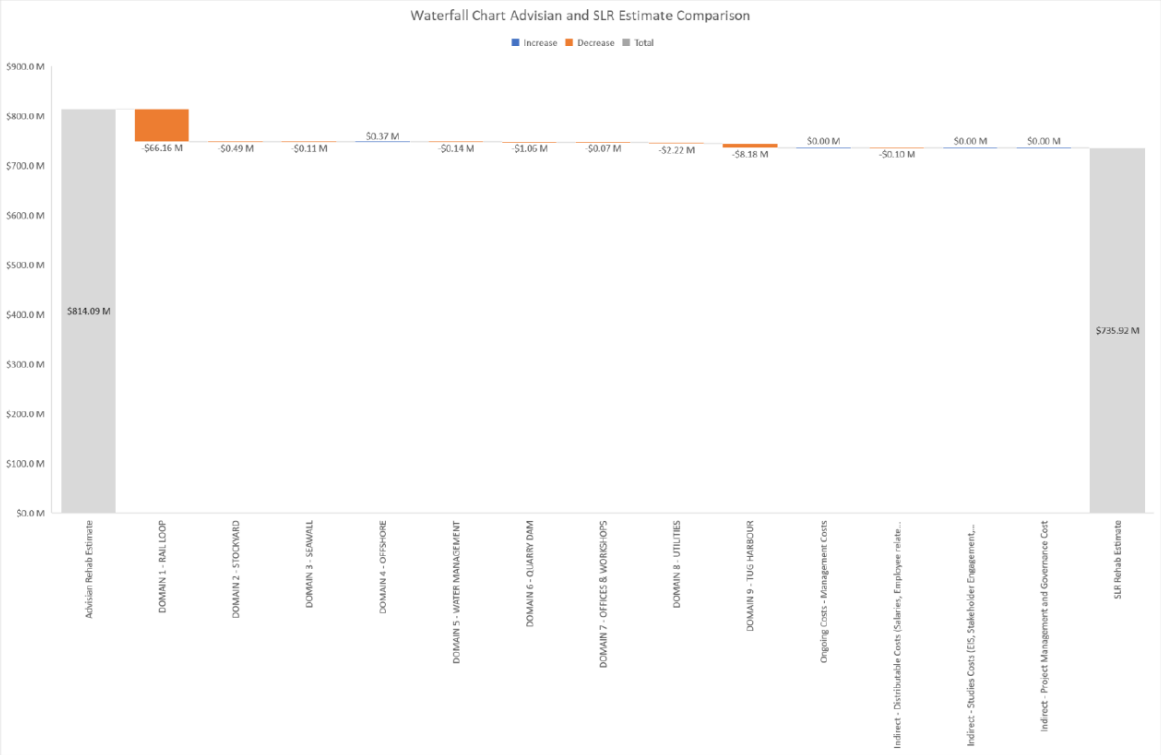
Domain	GHD ($'M)	Advisian ($'M)	SLR ($'M)	Variance Advisian-SLR ($'M)
DOMAIN 1 - RAIL LOOP	$217.37	$113.09	$46.93	$66.16
DOMAIN 2 - STOCKYARD	$457.26	$214.91	$214.41	$0.49
DOMAIN 3 - SEAWALL	$57.50	$49.24	$49.13	$0.11
DOMAIN 4 - OFFSHORE	$269.22	$169.31	$169.76	-$0.44
DOMAIN 5 - WATER MANAGEMENT	$58.84	$60.89	$60.75	$0.14
DOMAIN 6 - QUARRY DAM	$12.10	$77.29	$76.23	$1.06
DOMAIN 7 - OFFICES & WORKSHOPS	$48.97	$32.17	$32.10	$0.07
DOMAIN 8 - UTILITIES	$34.34	$7.75	$5.53	$2.22
DOMAIN 9 - TUG HARBOUR	$37.23	$37.23	$29.05	$8.18
Ongoing Costs - Management Costs	$9.25	$9.25	$9.25	$0.00
Indirect - Distributable Costs (Salaries, Employee related costs, IT)	$24.52	$50.20	$50.10	$0.10
Indirect - Studies Costs (EIS, Stakeholder Engagement, Tug Harbour)	$2.00	$2.00	$2.00	$0.00
Indirect - Project Management and Governance Cost	$1.00	$0.00	$0.00	$0.00
Total Cost	**$1,220.35**	**$814.09**	**$735.99**	**$78.10**

As is evident from that table, the SLR Report and estimate identifies many of the same issues that the Advisian report identifies, where GHD's estimated remediation cost is excessive. In that regard, the SLR Report is entirely consistent with the QCA's findings that GHD's plan and estimate showed a lack of transparency and insufficient justification across several aspects of the plant, which could suggest that the estimate is based on imprudent and/or inefficient works.[109]

Accordingly, SLR's Report confirms the QCA and Advisian's findings that the GHD estimate is inappropriate – and will result in inefficiently high pricing.

As is highlighted further, in the waterfall chart extracted below, the SLR report is highly aligned with the conclusions of the Advisian report regarding the appropriate estimates for the remediation estimate build-up, subject to identifying a further material reduction to the component of the remediation estimated related to the rail loop.

Figure 1 Waterfall Chart Showing Advisian Rehabilitation Cost Estimate to SLR's Cost Estimate



Accordingly, the DBCT User Group submits that the SLR Report also stands as evidence that:

(a) the Advisian estimate is generally likely to be provide a reasonable and appropriate remediation estimate; however

(b) Advisian's assumptions around the rail loop and tug harbour components of the remediation should be reconsidered and reduced taking into account the analysis and commentary in the SLR Report.

The DBCT User Group submits the SLR remediation estimate is the estimate that should be adopted by the QCA for the purposes of the 2019 DAU pricing arrangements.

[109] Draft Decision, 101.

17.3 Lack of natural justice in relation to remediation estimate

The DBCT User Group considers the SLR Report provides the best evidence that can be provided of the likely remediation cost in the time and with the information that has been available.

However, the DBCT User Group remains seriously concerned that it has not had the level of access that Advisian (the QCA's adviser) has had to GHD (or obviously the level of access that GHD itself has had to DBCTM).

For example, the DBCT User Group's consultant has not been able to have site visits.

DBCTM has not provided access to all information that was provided to Advisian despite a specific request for that information in correspondence from the DBCT User Group.

To the extent that a remediation estimate higher than that estimated by SLR is accepted on the basis of material not provided to the DBCT User Group (including in any DBCTM or GHD response to the Draft Decision and the Advisian report), there will have been a clear failure to provide natural justice to the DBCT User Group.

18 Non-pricing provisions

18.1 Forcing access seekers to contract access without pricing

A major concern raised by the DBCT User Group remains that under DBCTM's proposal there is a strong likelihood of access seekers being required to commit to capacity with little to no way of assessing the likely price they are committing to (or even some of the methodology for calculating it), without any ability to terminate an access agreement if the price applicable ceases to be commercially viable.

In particular, as recognised by the Draft Decision,[110] that can happen where an access seeker is entering a conditional access agreement for expansion capacity or as part of the notifying access seeker process. Even though, the 2019 DAU retain the concept of pricing rulings for expansion – because there is still a negotiation or arbitration to occur in respect of an individual user's price after such a ruling – the ruling does not provide the certainty of approach that it would have in previous undertakings.

Importantly the two circumstances noted above, are the most likely ways for a new users to gain capacity taking into account the extent of capacity already contracted at DBCTM, and the recent longer term renewals of such existing contracted capacity, such that this is not a minor issue – but one that will confront most access seekers during the regulatory term.

The DBCT User Group considers that requiring such access seekers to commit to a long term take or pay commitment without understanding the price is highly inappropriate because:

(a) it will result in inefficient contracting decisions (including decisions not to contract for fears of the price being higher, and inefficient decisions to contract assuming a lower price); and

(b) where capacity is contracted inefficiently – particularly expansion capacity – that creates a risk for inefficient expansions being developed and all other users incurring higher prices through the socialisation mechanics.

The Draft Decision acknowledges that the 2019 DAU exposes an access seeker to greater pricing uncertainty at the time of contracting, and concluded that it may be appropriate to provide for a more balanced negotiation process on pricing matters.[111]

[110] Draft Decision, 80.
[111] Draft Decision, 81.

The DBCT User Group continue to consider this is a clear detriment from the negotiate/arbitrate model that demonstrates how inappropriate it is.

If a negotiate/arbitrate model is going to be adopted despite having such inappropriate results, the only ways that the DBCT User Group considers this issue can be resolved is:

(c) providing significantly greater certainty in relation to the pricing methodology to be adopted in arbitrations to narrow the range of possible outcomes that an access seeker may face (as discussed in section 9.4 above); and

(d) allowing all access seekers to have an ability to elect to terminate without penalty at the point in time where they are delivered a firm price that has either been agreed or determined by an arbitrator. This should be built into the standard access agreement and the undertaking (to protect those 8X expansion conditional access holders who do not have such protections). If such an access seeker chooses to terminate and their capacity is not recontracted, that should not result in increased charges to other users through socialisation – as where DBCTM is insisting on such a regime through its negotiate-arbitrate model is should assume the volume risk that its proposed regime gives rise to.

18.2 Other issues

Except as set out in the table below, the DBCT User Group is willing to support the QCA's proposed approach in relation to non-pricing provisions as noted in section 8 of the Draft Decision.

The one exception to that position is the treatment of terminal regulation amendments, where members of the DBCT User Group do not have an aligned view on the appropriate approach, such that no further submissions on that issue are included below, but the DBCT User Group should not be regarded as supporting or opposing the Draft Decision position on that issue.

The DBCT User Group's views on the balance of the non-pricing issues are set out below:

Section	Issue and DBCT User Group Response
5.3(g)	**Notification of access agreement expiry** The DBCT User Group continues to consider the 30 day timeframe is too little due to the need to obtain internal approvals for such a renewal. If 60 days is not considered appropriate by the QCA this should be increased to at least 45 days
Sch A	**Additional information on environmental approvals access applications and renewal applications** The DBCT User Group continues to consider that the wording in the 2017 access undertaking is appropriate. There is no need to clarify what 'necessary approvals' are. This is intended to be an access application form – not a replacement for discussion of issues of this nature in negotiations.
5.4(d)-(i)	**Short Term Available Capacity** The DBCT User Group remains supportive of there being a mechanism for short term available capacity to be contracted. However, it remains concerned that there is insufficient protection to ensure that access seekers are able to obtain long term capacity with corresponding renewal rights where that is available. Accordingly, the undertaking should expressly require that DBCTM offer long term capacity (with renewal rights) whenever that is available because:

	• mine investments are long term investments with high sunk costs which require long term capacity; and • socialisation means that users – not DBCTM – have the volume risk of short term capacity ceasing to be utilised. If (as DBCTM asserts) there is truly no risk of DBCTM offering short term capacity where long term capacity is available, then this amendment should be acceptable to all parties.
5.4(e)(5), 5.4(h), 13.1	**DBCTM requiring non-standard terms** The entire purpose of the standard access agreement is to provide certain minimum terms. It is highly inappropriate for DBCTM to have rights to require different terms (but aptly demonstrates how DBCTM considers 'negotiation' will operate). In that regard we agree with the QCA's conclusion that such a requirement is unlikely to be appropriate.[112] All such drafting should be removed from the 2019 DAU.
5.4(l)	**Conditions precedent for access** The DBCT User Group strongly believes that DBCTM should be compelled by the undertaking to offer the conditions precedent which are specified in the undertaking – not have a discretion as to whether to do so. DBCTM's 8X conditional access agreements do not have conditions specified in these terms in favour of access seekers, and do not give the access seeker the ability to terminate where these types of events occur.
5.4(n)	**90 day period for existing users to exercise renewal option where DBCTM proposed an expansion** The DBCT User Group continues to consider that the 90 period is manifestly inadequate to be making decisions about whether a long term access agreement should be extended for another five years. The process as it related to the 8X expansion resulted in multiple users having to make decisions about their potential port needs in years more than 10 years away. This problem was caused because despite the wording of the clause, DBCTM insisted that it was able to give notice to all existing holders of capacity *at the same time* irrespective of the expiry dates of their user agreements. The process should be fixed so that (as was clearly intended by the clause in the existing user agreements) that notice is given to access holders in order of when their user agreements expire (subject to the specific right to give notice at the same time to users which have agreements expiring within 6 months of each other).
5.8(a)(4)	**Negotiation Cessation Notice for failure to provide security** The User Group's concern is that DBCTM's proposal involves it requiring provision of security at the time of execution of the User Agreement when the actual take or pay obligations secured may not start for a number of years.

[112] Draft Decision, 107.

	Having such security on foot comes at a cost to users and DBCTM should not be able to insist on security being provided on signing unless the access rights being contracted start immediately or in the near future.
5.10(q)(9)	**Underwriting Agreement – expansion and funding envelope** The DBCT User Group acknowledges that the QCA approved standard underwriting agreement envisaged expansion scope and funding envelope being included in an annexure, and information of that nature was annexed by DBCTM in the 8X underwriting agreement (albeit in an extremely short-form manner given the amount of funding being requested). However, that disclosure is practically useless given the estimated study costs do not bind DBCTM and that DBCTM has the right to vary the scope of the studies at any time and for any reason.
8.4(c)	**Disclosure of contracted tonnage to Aurizon Network** The DBCT User Group reiterates that this information is confidential, and there are numerous existing ways in which the regulatory arrangements for Aurizon Network and DBCT provides for alignment (including DBCT only being able to contract up to system capacity, and rail capacity only being able to be contracted with port exit rights).
12.1(h)	**Stakeholder consultations** The DBCT User Group continues to consider that consultation with individual ILC members is required (and can't simply be deemed to have occurred) where ILC acts as the independent expert in respect of a capacity estimation. Deeming such user consultation to have occurred is inappropriate because: • There is no improvement in expediency or efficiency of the consultation – as DBCTM will have to consult with users which are not members of ILC; • DBCTM and ILC's discussions in relation to ILC acting as independent expert are not disclosed to ILC members – such that effectively deeming them as consultation is just denying access to information to ILC members. DBCTM should not be allowed to avoid transparency in this way.

19 Conclusions

For the reasons set out above, the DBCT User Group continues to consider the 2019 DAU remains clearly inappropriate and should not be approved.

It also considers that these submissions demonstrate that the approach proposed in the Draft Decision QCA is inappropriate as:

(a) it relies on an error or law in relation to how the QCA is required to conduct its function in determining amendments that are appropriate;

(b) it relies on the 'primacy to commercial negotiations' which:

(i) fails to take account of the circumstances of the DBCT service (including DBCTM's market power, users lack of countervailing power and the costs and risk of inefficient pricing and arbitration) and the implications they have for the potential for efficient and appropriate negotiated outcomes;

(ii) fails to take account of the existing contractual settings which actually leave only price to be negotiated (and the Users absolutely reject any suggestion that DBCTM's ability to negotiate a higher than efficient price is a 'benefit');

(iii) fails to take account of the practical experiences of negotiate-arbitrate regimes in similar circumstances; and

(iv) is based on speculation that negotiated outcomes will derive benefits without any evidence that will occur, or any evidence of what these negotiated outcomes (other than a higher price) or benefits might be (or consideration of whether those same benefits could be obtained through a different form of regulation); and

(c) it relies on arbitration as a constraint on DBCTM monopoly pricing without rectifying the uncertainty of arbitration outcomes or the costs of arbitration.

The amendments proposed by the QCA fall well short of resolving these problems.

If the QCA is minded to approve negotiation based regulation, it would be far more appropriate to pair that with a reference tariff as the 'backstop'.

The DBCT User Group strongly submits that the Draft Decision must be revisited before the proposed approach causes damage which will be difficult to reverse in future regulatory periods.

Please let the DBCT User Group know if we can of any further assistance to the QCA in its consideration of these matters.

Schedule 1

SLR Report on Remediation Estimate

Prepared for:

SLR Ref: 620.30205-R01
Version No: -v1.1
October 2020

PREPARED BY

BASIS OF REPORT

This report has been prepared by SLR Consulting Australia Pty Ltd (SLR) with all reasonable skill, care and diligence, and taking account of the timescale and resources allocated to it by agreement with (the Client). Information reported herein is based on the interpretation of data collected, which has been accepted in good faith as being accurate and valid.

This report is for the exclusive use of the Client. No warranties or guarantees are expressed or should be inferred by any third parties. This report may not be relied upon by other parties without written consent from SLR.

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DOCUMENT CONTROL

Reference	Date	Prepared	Checked	Authorised
620.30205-R01-v1.1	23 October 2020	Abrelle Neubauer	Brad Radloff	Abrelle Neubauer
620.30205-R01-v1.0	21 October 2020	Abrelle Neubauer	Nathan Archer / Brad Radloff	Abrelle Neubauer

EXECUTIVE SUMMARY

Introduction

Dalrymple Bay Coal Terminal (DBCT) is a coal-handling facility at the Port of Hay Point in Queensland, located approximately 38 km from Mackay. The facility includes:

- Rail loop and associated structures;
- Stockyards;
- Seawall;
- Offshore wharf, marine structures and shiploaders;
- Dams, associated roads and drainage, and associated water infrastructure;
- Quarry dam, associated roads and drainage, and associated water infrastructure;
- Buildings, carparks and paved roads, diesel fuel storage and distribution, and associated support services;
- Utilities and potable water and raw water connections mains; and
- Tug harbour including marine offshore facilities and boat ramps.

The terminal is owned by the Queensland Government and leased to DBCT via a series of long-term lease agreements (together, the long-term lease). DBCT Holdings (DBCTH) is the agency that represents the Queensland Government. The Terminal is leased to DBCT Management (DBCTM, owned by Brookfield Asset Management).

The long-term lease is subject to the Port Services Agreement (PSA) between DBCTM and DBCTH which establishes DBCTM's obligations for the long-term lease at its expiry including rehabilitation requirements. The PSA also requires DBCTM to provide DBCTH with a Rehabilitation Plan scoping proposed works to be undertaken to complete rehabilitation at the site.

Access to the coal-handling services provided at DBCT is regulated by the Queensland Competition Authority (QCA) who regulates access and pricing affairs at DBCT through various activities including the review of Draft Access Undertakings (DAUs) and approval of Access Undertakings (AUs).

As part of the 2019 DAU submitted to the QCA, DBCTM proposed a Rehabilitation Plan and associated estimated rehabilitation cost of $1.22 billion (in October 2018 Australian dollars (AUD)) for rehabilitation of the DBCT site.

QCA refused to approve the DBCTM proposed estimated rehabilitation cost of $1.22 billion as it was considered to be overestimated. QCA engaged Advisian to review the prudency and efficiency of the rehabilitation plan and costs developed by GHD Advisory (GHD), and to develop an independent estimate of the rehabilitation costs to a level of detail comparable to that undertaken by GHD.

Advisian generally concurred with the methodology and scope of works proposed by GHD, but developed its own independent estimate of approximately $814 million (in March 2020 AUD).

The significant difference in the GHD and Advisian overall rehabilitation cost estimates was due to:

EXECUTIVE SUMMARY

- Cost rates used for bulk earthworks, handling and imported clean fill;
- Quantities estimated for cut and fill earthworks to return the topography of the site to its natural state;
- Assumptions about the location for disposal of contaminated waste;
- Depths for removal of contaminated soil and road substrate; and
- Approaches to the removal of offshore and onshore piles.

Context

QCA determined the way forward was to seek further views from stakeholders on the appropriateness of the estimates provided by GHD and Advisian. In particular, the QCA is seeking informed comments on the material aspects of GHD's rehabilitation plan outlined in a table *Summary of material differences between GHD and Advisian* (QCA, 2020), particularly from stakeholders with relevant technical expertise and experience, or informed by relevant expert advice.

SLR Consulting Australia Pty Ltd (SLR) was engaged on behalf of the DBCT User Group to provide a review of the GHD rehabilitation estimates and the independent estimate proposed by Advisian and to provide informed comments to the QCA on a rehabilitation cost estimate for the 2019 DAU.

A high-level rehabilitation cost estimate was developed by SLR with modifications made by exception (i.e. where SLR's opinion is different from the Advisian estimate, the costs are modified for that relevant aspect) assuming rehabilitation of the current DBCT site based on the terminal as it exists in 2020 (at the time of the Advisian report) without any expansions or modifications since then.

Methodology

SLR undertook a data review and assessment of a range of documents to determine how appropriate and representative the GHD and Advisian rehabilitation estimates are. The main documents reviewed included:

- GHD Advisory *DBCT Rehabilitation Plan and Rehabilitation Cost Estimate DBCT Management* (2019) (the GHD report); and
- Advisian Worley Group *Dalrymple Bay Coal Terminal Rehabilitation Cost Review Queensland Competition Authority* 311001-00034 (2020) (the Advisian report).

SLR considerations for reviewing decommissioning, demolition, rehabilitation and closure methodologies proposed in the rehabilitation cost estimates included prudency (required to comply with rehabilitation obligations under the PSA) and efficiency (best means to achieve outcomes from available options, meet technical standards and costs consistent with market conditions). SLR has also considered the principal objective of rehabilitating the DBCT site to a pre-construction, natural condition that is self-sustaining, compatible with surrounding land, and minimises potential for future environmental harm.

Based on SLR's proposed changes to methodologies, rates, etc. the Advisian rehabilitation cost estimate was updated by exception i.e. changes made to reflect review outcomes only.

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Review Outcomes

SLR identified various points of agreement and disagreement with the GHD and/or Advisian estimates and supporting assumptions, considerations, proposed rehabilitation strategies, rates, etc. including:

- The decommissioning and rehabilitation process objective of returning the DBCT site *"to its pre-construction landform, unless doing so would result in adverse environmental impacts, not comply with relevant legislation or create an unstable, unsafe or polluting post-operational landform"* under the PSA is reasonable for areas of the site under the long-term lease; however, areas under short term leases may have less stringent requirements (to be confirmed) and less conservative rehabilitation strategies may be used on these areas to compliment the PSA areas.
- Battery limits proposed by GHD of onshore and offshore land within the PSA long-term lease and short-term leases or land with associated assets utilised outside of these leases is considered appropriate with the exception of including all third party assets. It is likely that responsibility for rehabilitation for these assets themselves is held by the third party and responsibility for rehabilitation of underlying disturbance is likely required by DBCTM.
- SLR agrees that due to the public use benefit derived from the tug harbour and associated breakwater structure, it would be inappropriate for DBCTM to rehabilitate this structure. It is also considered reasonable that, in lieu of rehabilitation, a one-off payment would be made for maintenance of the facility to North Queensland Bulk Ports (NQBP) or Queensland Government. SLR agrees with the inclusions within the Tug Harbour cost estimate and the use of a 30 year time frame. However, the 20% contractor's margin applied is considered high and was replaced by 10%.
- Domains, as presented by GHD and maintained in the Advisian report are considered reasonable and have been adopted.
- SLR generally agrees with the closure planning strategies presented in the GHD report with the exception of:
  - Delaying stakeholder and issues identification on rehabilitation and post mining land uses until just before the terminal rehabilitation obligation would fall due; and
  - Exclusion of risk assessment for the post closure phase and lease relinquishment.
- The secondary domains based on post-operations land management units characterised by a defined final land use are: Grassland, Eucalypt Woodland to Open Forest, Beach foreshore, Beach ridge, Marine and Tug Harbour. SLR considers these proposed land uses to be comparable with natural and pre-existing conditions and satisfy the rehabilitation objective for the PSA relevant long-term lease areas; however, other post operations land uses may be considered on short-term lease areas based on lease conditions.
- SLR agrees with the Advisian volumes for re-generating the pre-construction landform based on Advisian independently modelling of digital terrain model utilising an alternative, pre-construction surface and an independently generated Prepared-Final Surface to derive earthworks quantities. However, surface water control and management considerations for the Quarry Dam is considered likely to result in the reduction of at least 5% of the predicted material volume.

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- SLR agrees with transporting general, steel and contaminated waste for handling at local Hogan's Pocket Transfer Station within the Mackay Regional Area instead of transport 750 km to Roma, Queensland. It is likely that waste disposal arrangements could be planned in advance of closure given timing.
- SLR agrees with 250 mm under the running pavement as road substrate removal depths assumed by Advisian.
- SLR agrees with Advisian's proposed 250 mm of contamination to be removed from relevant areas.
- SLR considers rehabilitation to pre-construction state for the seawall to be challenging and unlikely to be the preferred rehabilitation option for this domain due to potential for future environmental harm. SLR agrees with GHD that further engineering considerations would be required prior to rehabilitation to address potential erosion and stability and mitigate potential risks on closure objectives and/or criteria not being achieved.
- SLR agrees with partial instead of full removal of onshore and offshore piles considering environmental risks and available technology i.e. full extraction of the piles will be difficult given the size of the piles and the geotechnical conditions and the alternative proposed method does not guarantee full extraction.
- SLR agrees with rates for waste disposal including the Queensland Government Waste levy. Rates for importing clean fill and bulk earthworks utilised by Advisian appear reasonable.
- SLR agrees with Advisian and GHD assumptions that 10 years site maintenance and monitoring post rehabilitation with 2 full time staff would be required.
- SLR agrees with Advisian that based on their approach and delivery method the Owner's project management costs could be significantly reduced from the nominal 10% of Direct costs and is closer to 6%; this cost has been reduced to 8% based on considerations.
- SLR agrees that a reduction in contingency is warranted to reflect risk at the owner's level from a combined 20% of direct costs to about 15%.
- SLR agrees with allocations for risk based on certainty factors used to form the quantity/definition risk (quantity) in Advisian's indirect costs.
- SLR disagrees with removal of Temporary Controls for Marine Protection allowance for deployment of floating booms, netting or vessels during the decommissioning phase for offshore conveyors cleaning.
- Where relevant totals required adjustment based on the direct totals of the recalculated rehabilitation cost estimate.

Other relevant observations included:

- The economic life of the Bowen Basin will likely extend beyond 2051 with mine expansions and new projects coming online e.g. Olive Downs;
- The escalation rate for the GHD Rehabilitation Cost Estimate (in Oct 2018 AUD) to be expressed in April 2053 AUD had some high increases considering technological improvements (non-labour costs) and COVID-19 events of 2020 (forward labour costs); the net per annum rate should be reduced to no greater than 2%; and

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- Short term leases considerations over the rail loop, should pre-construction landform requirements also not be required could result in a reduction of $15 million of cut and fill earthworks in this domain.

SLR's rehabilitation cost estimate is $**736 M**, a reduction of **$78.1 M** from the Advisian estimate**.** Key assumptions included:

- Decommissioning and demolition of third party infrastructure not required by DBCTM;
- Modifications to the post closure land natural state for pile removal and Quarry Dam rehabilitation due to considerations for environmental harm (the seawall has been retained but is flagged for further investigation);
- All general and demolition waste will be able to be removed to Paget Transfer Station;
- All contaminated waste will be able to be removed to Hogan's Pocket Transfer Station; and
- All infrastructure associated with the Tug Harbour will be able to be transferred with no residual liability.

Summary of Opinions

Based on review of the rehabilitation estimates generated by GHD and Advisian, SLR considers both estimates to be an overestimation of rehabilitation costs for the site including the long-term lease areas under the PSA to be returned to the pre-construction natural state.

On points of agreement and disagreement, SLR finds that the Advisian approach to be the more representative of the rehabilitation cost for the DBCT site considering the principal rehabilitation objective and what would be considered prudent and efficient.

Based on high-level considerations of the assumptions and supporting information provided by both GHD and Advisian, SLR considers there to be a need for further investigation of a number of factors prior to updating or developing a rehabilitation cost estimate including:

- A review of all closure obligations for DBCT to confirm which infrastructure and aspects require inclusion and provisions in the rehabilitation cost estimate; these obligations should then drive the inclusion of any relevant aspects of third-party assets e.g. decommissioning, demolition, etc.;
- Consult with DBCTH on what methodologies would be considered reasonable for a more informed selection or confirmation of more cost efficient methodologies to rehabilitate the Terminal site prior to updating the DBCT Rehabilitation Plan and undertaking a new rehabilitation estimate; and
- Consult with DBCTM on the Rehabilitation Plan and general strategies to understand and incorporate existing information and knowledge base and planned works into the closure planning process and document.

Without undertaking any of the recommended works above, SLR's review of the GHD and Advisian rehabilitation estimates generally agreed with the premise of the DBCT Rehabilitation Plan e.g. rehabilitation objectives, battery limits, domains, closure planning, post closure land uses and retention of the Tug Harbour with a discounted payment to cover maintenance for a 30 year period.

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Points of disagreement with the GHD and/or Advisian reports that were material to the SLR rehabilitation cost estimate developed based on the Advisian estimate were:

- Reduction in the Owner's project management costs from 10% to 8%;
- Reduction in contingency from 18.7% contingency + 1.3% risk (20%) to ~15% total (risk and other contingencies total $80.5 million – approximately 16.5% of base) ;
- Exclusion of demolition costs for third party assets (Aurizon balloon loop and Queensland Rail (QR) substation and Ergon 33/11 kV substation);
- Reduction in Tug Harbour contractor margins from 20% to 10% and percentage paid by DBCTM to 80%;
- Reduction in Quarry Dam rehabilitation volumes by 5%; and
- Inclusion of Temporary Controls for Marine Protection (Booms, netting, small boat w/operator) during Offshore Conveyor Cleaning ($575,000).

The differences in total rehabilitation costs between GHD, Advisian and SLR estimates is tabulated here:

Domain	GHD ($'M)	Advisian ($'M)	SLR ($'M)	Variance Advisian-SLR ($'M)
DOMAIN 1 - RAIL LOOP	$217.37	$113.09	$46.93	$66.16
DOMAIN 2 - STOCKYARD	$457.26	$214.91	$214.41	$0.49
DOMAIN 3 - SEAWALL	$57.50	$49.24	$49.13	$0.11
DOMAIN 4 - OFFSHORE	$269.22	$169.31	$169.76	-$0.44
DOMAIN 5 - WATER MANAGEMENT	$58.84	$60.89	$60.75	$0.14
DOMAIN 6 - QUARRY DAM	$12.10	$77.29	$76.23	$1.06
DOMAIN 7 - OFFICES & WORKSHOPS	$48.97	$32.17	$32.10	$0.07
DOMAIN 8 - UTILITIES	$34.34	$7.75	$5.53	$2.22
DOMAIN 9 - TUG HARBOUR	$37.23	$37.23	$29.05	$8.18
Ongoing Costs - Management Costs	$9.25	$9.25	$9.25	$0.00
Indirect - Distributable Costs (Salaries, Employee related costs, IT)	$24.52	$50.20	$50.10	$0.10
Indirect - Studies Costs (EIS, Stakeholder Engagement, Tug Harbour)	$2.00	$2.00	$2.00	$0.00
Indirect - Project Management and Governance Cost	$1.00	$0.00	$0.00	$0.00
Total Cost	**$1,220.35**	**$814.09**	**$735.99**	**$78.10**

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1 Introduction

Dalrymple Bay Coal Terminal (DBCT) is a coal-handling facility at the Port of Hay Point in Queensland, located approximately 38 km from Mackay. The facility comprises:

- Rail loop and associated structures;
- Stockyards;
- Seawall;
- Offshore wharf and marine structures, shiploaders, materials handling systems and associated support structures and services;
- Dams, associated roads and drainage, and associated water infrastructure (process, potable, fire water e.g. piping, tanks, etc.);
- Quarry dam, associated roads and drainage, and associated water infrastructure;
- Buildings, carparks and paved roads, sewage mains connections, diesel fuel storage and distribution, and associated support services;
- Utilities and potable water and raw water connections mains; and
- Tug Harbour (groyne and seawall, marine offshore facilities and boat ramps, berths and other marine structures, and associated facilities).

The terminal is owned by the Queensland Government and leased to DBCT via a series of long-term lease agreements (together, the long-term lease). DBCT Holdings (DBCTH) is the agency that represents the Queensland Government. The Terminal is leased to DBCT Management (DBCTM, owned by Brookfield Asset Management). Terminal operations are subcontracted to DBCT Pty Ltd (DBCT P/L) which is owned by a majority of mining companies within the DBCT User Group.

The initial lease term is 49 years expiring in September 2051 (with a 50-year extension option). The long-term lease is subject to the Port Services Agreement (PSA) between DBCTM and DBCTH. The PSA establishes DBCTM's obligations for the long-term lease at its expiry including rehabilitation requirements. The PSA also requires DBCTM to provide DBCTH with a Rehabilitation Plan scoping proposed works to be undertaken at the site to complete rehabilitation.

Access to the coal-handling services provided at DBCT is regulated by the Queensland Competition Authority (QCA) under the *Queensland Competition Act 1997* (Qld). The QCA regulates access and pricing affairs at DBCT through various activities including the review of Draft Access Undertakings (DAUs) and approval of Access Undertakings (AUs).

As part of the 2019 DAU to QCA, DBCTM proposed a Rehabilitation Plan and associated estimated rehabilitation cost of $1.22 billion (in October 2018 AU dollars) for rehabilitation of the DBCT site. The 2019 DAU is intended to replace the current approved 2017 AU (2017 AU), due to expire on 1 July 2021. Under the 2017 AU, the approved rehabilitation cost estimate was $432.69 million (2015 Australian dollars (AUD)).

The QCA refused to approve the DBCTM proposed estimated rehabilitation cost of $1.22 billion as it was considered to be overestimated. QCA engaged Advisian to review the prudency and efficiency of the rehabilitation plan and costs developed by GHD Advisory (GHD), and to develop an independent estimate of the rehabilitation costs to a level of detail comparable to that undertaken by GHD.

Advisian generally concurred with the methodology and scope of works proposed by GHD, but developed its own independent estimate based on the delineation of works outlined in the GHD report. The independent estimate of rehabilitation costs by Advisian was approximately $814 million (in March 2020 AU dollars).

The significant difference in the GHD and Advisian overall rehabilitation cost estimates was due to:

- Cost rates used for bulk earthworks, handling and imported clean fill;
- Quantities estimated for cut and fill earthworks to return the topography of the site to its natural state;
- Assumptions about the location for disposal of contaminated waste;
- Depths for removal of contaminated soil and road substrate; and
- Approaches to the removal of offshore and onshore piles.

QCA's draft decision on the 2019 DAU included refusing to approve DBCTM's proposed rehabilitation cost estimate stating that *"…we are not convinced at this time that the rehabilitation costs estimated by GHD and Advisian reflect an efficient forecast of the likely cost"*. QCA determined the way forward was to seek further views from stakeholders on the appropriateness of the estimates provided by GHD and Advisian.

2 Context

The QCA's draft decision review of remediation costs selected a way forward to form a definitive view on an appropriate rehabilitation cost estimate for the 2019 DAU by inviting stakeholders to make submissions in response to the draft decision on DBCTM's rehabilitation cost estimate. In particular QCA is seeking informed comments on the material aspects of GHD's rehabilitation plan outlined in a table *Summary of material differences between GHD and Advisian* (QCA, 2020), particularly from stakeholders with relevant technical expertise and experience, or informed by relevant expert advice.

SLR Consulting Australia Pty Ltd (SLR) was engaged on behalf of the DBCT User Group to provide a review of the rehabilitation estimates developed by GHD and the independent estimate proposed by Advisian and provide informed comments to the QCA on a rehabilitation cost estimate for the 2019 DAU.

The review was undertaken as per the methodology outlined in **Section 3** of this report. The rehabilitation cost estimate undertaken by SLR is high-level and modifications were made by exception (i.e. where SLR's opinion is different from the Advisian estimate, the costs are modified for that relevant aspect). This work assumes rehabilitation of the current DBCT site based on the terminal as it exists at 2020 at the time of the Advisian report and does not consider any expansions or modifications since that time.

These works did not comprise auditing or verification of information provided by the QCA to facilitate review of the costs or used by GHD and/or Advisian for development of their rehabilitation costs estimates for the DBCT site.

This report is not intended to present a full and comprehensive assessment of rehabilitation requirements for DBCT site. Where adequate data was not available for the review, SLR has commented on relevance of this information to the rehabilitation strategies and, where possible, potential impacts on the rehabilitation cost estimate. This report should be read in its entirety. Excerpts from this report on their own cannot be taken as representative of the general review findings.

3 Methodology

SLR Consulting Australia Pty Ltd (SLR) was engaged to review the rehabilitation estimates on behalf of the DBCT User Group. SLR undertook a data review and assessment of a range of documents to determine how appropriate and representative the GHD and Advisian rehabilitation estimates are. The main documents reviewed were:

- Queensland Competition Authority *Draft Decision DBCT Management's 2019 Draft Access Undertaking* (2020) (the QCA draft decision 2019)
- GHD Advisory *DBCT Rehabilitation Plan and Rehabilitation Cost Estimate DBCT Management* (2019) (the GHD report)
- GHD Advisory *2019 DAU A1.03 Rehabilitation - Attachment 2 - Cost Estimate (for QCA)* <2 October 2020> (the GHD costs)
- Advisian Worley Group *Dalrymple Bay Coal Terminal Rehabilitation Cost Review Queensland Competition Authority* 311001-00034 (2020) (the Advisian report)
- Advisian Worley Group *01052020 - DBCT EstimateV1_Third Party Issue (1413737.1)* <17 October 2020> (Advisian costs)

SLR considerations for reviewing decommissioning, demolition, rehabilitation and closure methodologies proposed in the rehabilitation cost estimates included prudency (required to comply with rehabilitation obligations under the PSA) and efficiency (best means to achieve outcome from available options, meet technical standards and costs consistent with market conditions). SLR has also considered the principal objective of rehabilitating the DBCT site to a pre-construction, natural condition that is self-sustaining, compatible with surrounding land, and minimises potential for future environmental harm.

Based on SLR's proposed changes to methodologies, rates, etc. the Advisian rehabilitation cost estimate was updated by exception i.e. changes made to reflect review outcomes only.

4 Review Outcomes

4.1 Points of Agreement

Based on review, SLR has identified the following points of agreement with the GHD and/or Advisian estimates and supporting assumptions, considerations, proposed rehabilitation strategies, rates, etc. in **Table 1**.

Table 1 Points of Agreement with DBCT Rehabilitation Cost Estimates 2019 (GHD) and/or 2020 (Advisian)

No.	Aspect	Report and Reference	Review Findings	Basis of Opinion including Data / Facts and/or Information Considered
1	Rehabilitation objectives	GHD, 2019 Sect. 4.2 p. 22	SLR considers the decommissioning and rehabilitation process objective of returning the DBCT site *"to its pre-construction landform, unless doing so would result in adverse environmental impacts, not comply with relevant legislation or create an unstable, unsafe or polluting post-operational landform"* to be reasonable for areas of the site under the long-term lease. This supports the principal objective identified to achieve pre-construction condition with self-sustaining landform, hydrology, flora and fauna; compatibility with the surroundings; and minimising potential for future environmental harm.	The PSA *"…defines that DBCTM must remediate the Onshore and Offshore Land to its natural state and condition as existed prior to any development or construction activity occurring"* (GHD, 2019 Sect. 3.1 p. 16). The QCA draft decision 2016 found that the rehabilitation requirement to return the DBCT site to its natural state and condition as existed prior to development was the identified standard for determining a remediation allowance even if exceeding standard industry practice.
2	Battery limits	GHD, 2019 Sect. 4.4 p. 23	The battery limits proposed by GHD of onshore and offshore land within the PSA long-term lease and short-term leases or land with associated assets utilised outside of these leases is considered appropriate with the exception of including all third party assets. It is likely that responsibility for rehabilitation these assets themselves is held by the third party and responsibility for rehabilitation of underlying disturbance is likely required by DBCTM.	The Australian Accounting Standards Board *(AASB) 137 Provisions, Contingent Liabilities and Contingent Asset* notes: *"For a liability to qualify for recognition there must be not only a present obligation but also the probability of an outflow of resources embodying economic benefits to settle that obligation… Where it is not probable that a present obligation exists, an entity discloses a contingent liability, unless the possibility of an outflow of resources embodying economic benefits is remote."*
3	Tug Harbour	GHD, 2019 Sect. 4.4.4 p. 25	SLR agrees that due to the public use benefit derived from the tug harbour and associated breakwater structure, it would not be appropriate for DBCTM to rehabilitate this structure. It is also considered reasonable that in lieu of rehabilitation a one-off payment would be made for maintenance of the facility to North Queensland Bulk Ports (NQBP) or Queensland Government.	*AASB 137 Provisions, Contingent Liabilities and Contingent Asset* (AASB, 2020 Sect. 37) notes: *"The best estimates of expenditure are based on what a company would rationally pay to settle the obligation or transfer to a third party at the time."* The transfer process should include asset valuation for fair value and consultation to confirm asset transfer fate, followed by negotiations and planning. This would assist in determining an amount to pay for maintenance at a discounted rate to reflect present value.

No.	Aspect	Report and Reference	Review Findings	Basis of Opinion including Data / Facts and/or Information Considered
4	Domains	GHD, 2019 Sect. 4.5 p. 27 Advisian, 2020a Sect. 4.5 p. 34	Domains, as presented by GHD and maintained in the Advisian report are considered reasonable and have been adopted.	Leading Practice Sustainable Development Program for the Mining Industry – Mine Closure (LPSD Mine Closure) (Commonwealth of Australia, 2016 Sect. 6.1.3 p. 79) notes: *"The key aspects that should be considered for the development of the estimates for provisioning… the establishment of discrete land management units with similar geophysical and management characteristics, designated as domains…"* The Work Breakdown Structure (WBS) approach based on domains that was utilised by GHD as well as Advisian is straightforward and functional.

No.	Aspect	Report and Reference	Review Findings	Basis of Opinion including Data / Facts and/or Information Considered
5	Closure Planning	GHD, 2019 Sect. 5 p. 33	SLR generally agrees with the closure planning strategies presented in the GHD report with the exception of delaying stakeholder and issues identification on rehabilitation and post mining land uses until just before the terminal rehabilitation obligation would fall due and exclusion of risk assessment for the post closure phase and lease relinquishment.	SLR considers that identified stakeholders should include Mackay Regional Council, especially in consideration of plans to retain the Tug Harbour. Additionally, good industry practice for stakeholder identification and assessment is to establish this prior to when rehabilitation obligations would fall due and commence consultation that would influence the rehabilitation planning process especially the final post operations land uses. These key aspects could have a material impact on rehabilitation plans and cost estimates especially for long-term lease areas within the PSA. Significant decreases to the rehabilitation estimate could eventuate if different rehabilitation methodologies were determined to be reasonable for key features such as the Quarry Dam, offshore infrastructure and the seawall. Stakeholder engagement should be undertaken with DBCTH prior to updating the DBCT Rehabilitation Plan and undertaking a new rehabilitation estimate to confirm what reasonable requests and requirements for rehabilitation should be considered and to understand the impact on other rehabilitation options and associated costs. Good industry practice including development of the stakeholder list and stakeholder engagement prior to the rehabilitation obligation falling due is identified in multiple industry guidance and leading practice documents (including some referenced in the GHD report) for example: *"The process of engagement with internal and external stakeholders should be undertaken throughout the life cycle of the operation… at an appropriate level of frequency throughout…" (ICMM, 2008 Sect. 1 p. 17)"* and *"It is imperative that the stakeholders and proponent arrive at an agreed set of closure objectives and completion criteria for the site that will allow the company to relinquish the site in a manner that meets regulatory requirements and satisfies community expectations. Commencing open discussion using the legacy framework early in the process… can facilitate a successful outcome." (Commonwealth of Australia, 2016 Sect. 2.8 p. 23)."*

No.	Aspect	Report and Reference	Review Findings	Basis of Opinion including Data / Facts and/or Information Considered
6	Post Closure Land Use	GHD, 2019 Sect. 6.2.2 p. 38	The secondary domains based on post-operations land management units characterised by a defined final land use are: Grassland, Eucalypt Woodland to Open Forest, Beach foreshore, Beach ridge, Marine and Tug Harbour. SLR considers these proposed land uses to be comparable with natural and pre-existing conditions and satisfy the rehabilitation objective for the PSA relevant long-term lease areas.	Prior to development of DBCT site, land use was modified grassland associated with grazing and a number of remnant vegetation communities including mixed Eucalypt Woodland and open forest, dune/beach ridge, riparian and gully vegetation.
7	Final Landform	GHD, 2019 Sect. 6.3 p. 38 Advisian, 2020a Sect. 4.1 p. 29	The topography and landform of the DBCT site prior to any development or construction has been established via LIDAR and topographical mapping information from 1981 and used by GHD as a conceptual landform to calculate cut-and-fill volumes required to meet the pre-development natural state. The section notes that a detailed landform design and cut-and-fill balance has not been undertaken for these works. SLR agrees with adopting volumes from the Advisian report based on Advisian independently modelling of digital terrain model utilising an alternative, Pre-Construction Surface and an independently generated Prepared-Final Surface to derive earthworks quantities. Advisian used orthorectified high resolution aerial images of Hay Point, flown in 1977 supplied by the Queensland Department of Natural Resources, Mines and Energy (DNRME). The images were horizontally and vertically correlated to both the 2013 LIDAR supplied by GHD, and 2015 digital terrain supplied by DNRME.	The Advisian approach for calculation is a demonstrably more robust and auditable method of re-generating the Pre-Construction landform allowing digital calculations of earthworks volumes.
8	Rehabilitation Strategies / Methodology	Advisian, 2020a Sect. 12.3.3.1 p. 69	SLR agrees with transporting general, steel and contaminated waste for handling at local Hogan's Pocket Transfer Station within the Mackay Regional Area (as adopted by Advisian) instead of transport 750 km to Roma, Queensland (as adopted by GHD). . It is likely that waste disposal arrangements could be planned in advance of closure given timing.	It is highly unlikely that waste disposal would be undertaken to this distance to Roma. Through the closure planning process, several options could be considered including disposal in closer landforms already approved e.g. quarries (this should be a consideration for reducing rehabilitation costs).

No.	Aspect	Report and Reference	Review Findings	Basis of Opinion including Data / Facts and/or Information Considered
9	Rehabilitation Strategies / Methodology	Advisian, 2020a Sect. 12.3.3.1 p. 69	Road section drawings for the Domain were not able to be supplied, therefore Advisian has assumed 250 mm under the running pavement as road substrate removal depths based on a known facility like the Terminal asset. This compares to GHD allowance for removal of 500 mm of material under the roads.	SLR experience with rehabilitation cost estimation considers a similar depth to that adopted by Advisian for removal of road substrate for other facilities.
10	Rehabilitation Strategies / Methodology	Advisian, 2020a Sect. 13.2.1 p. 73	SLR agrees with Advisian's note that low grade bedding coal would be an operational cost for DBCTM to recover and sell prior to decommissioning.	This is typical practice and given proximity to export markets for sale SLR supports this assumption.

No.	Aspect	Report and Reference	Review Findings	Basis of Opinion including Data / Facts and/or Information Considered
11	Rehabilitation Strategies / Methodology	GHD, 2019 Sect. 7.5 p. 44-45	The GHD report notes *"Complete removal of the seawall area in Domain 3 poses a potential constraint to rehabilitation and requires assessment on a risk based approach to ensure that any impacts are adequately understood… Any detail design of the profile of the beach area following removal of the seawall would be subject to further investigation with a view to further optimising the design at the time of closure".* (GHD, 2019 Sect. 7.5 p. 44-45). SLR considers rehabilitation to pre-construction state for the seawall to be challenging and unlikely to be the preferred rehabilitation option for this domain due to potential for future environmental harm. SLR agrees with GHD that further engineering considerations would be required prior to rehabilitation to address potential erosion and stability and mitigate potential risks on closure objectives and/or criteria not being achieved e.g. installation of earthen bunds, retention of rip rap, etc. At a minimum, based on the time in place firstly the seawall would require investigation as to any habitat value to confirm removal would be an acceptable environmental result and would not result in unacceptable environmental harm to ecosystems or threatened or protected species utilising this feature.	The Queensland Department of Environment and Science (DES) (DES, 2020) notes: "*Queensland is particularly vulnerable to coastal erosion because of its extensive beaches and sandy landforms and exposure to extreme cyclones and storms.* *Coastal ecosystems are well adapted to these dynamic changes on the coast: while extensive erosion can occur, dune rebuilding and plant recolonisation usually follow in time.* *Human settlements close to the coast are at risk from sea erosion. This either sees erosion protection measures such as seawalls built or loss of the development…* *The impact of climate change on the coast, especially from rising sea levels, has been recognised. A sea level rise of 0.8m has been incorporated into the mapping of erosion prone areas.*" Re-establishment of the seawall area to its pre-construction natural state and condition may not facilitate achievement of environment and safety objectives due to coastal erosion and instability typical to the natural established ecosystems. More importantly, rehabilitation would be required to transition the shoreline to a more natural setting after asset removal. Erosion during storms, forecast sea level rise and potential for imported material to erode into the Great Barrier Reef World Heritage Area or other sensitive marine environments proximal to Dalrymple Bay requires consideration. Considerations of impacts of removal of the seawall on the nearby rehabilitation to be established is also relevant. SLR considers there is inadequate information to confirm seawall removal to be environmentally prudent without the considerations noted. However, additional technical considerations and DBCTH consultation on reasonable requirements would also be required to propose and cost alternative rehabilitation strategies for the seawall; therefore, SLR has retained the current cost and strategy at this time based on available options.

No.	Aspect	Report and Reference	Review Findings	Basis of Opinion including Data / Facts and/or Information Considered
12	Rehabilitation Strategies / Methodology	Advisian, 2020a Sect. Executive Summary p. 20	Domain 4 Offshore – full extraction of piles from seabed and rock (potential for significant environmental harm). As per the Advisian report based on discussions with DBCTM personnel *"…all marine piles are driven to refusal within the seabed and bedrock below… piles from previous temporary works were cut at the seafloor level and remain in situ today"*. GHD's method of fully removing the piles including relief drilling around piles and vibratory removal was assessed by Advisian as "more destructive" than the adopted approach of partial removal cutting off below the existing disturbed seabed floor. While the GHD method would be closer to achieving the natural state pre-construction, Advisian considered the partial removal "more environmentally prudent". SLR agrees with partial instead of full removal of onshore and offshore piles considering environmental risks and available technology.	The GHD report (GHD, 2019 Sect. 14.4.2 p. 79) states: *"Full extraction of the piles will be difficult given the size of the piles and the geotechnical conditions. A potential method of extraction is to:* • *Use a barge-mounted drill rig to drill around the piles and loosen the foundation material. The pile may then be extracted using vibration techniques. Note that this method does not guarantee full extraction…* *While complete removal poses short-term environmental risks and considerations, including impacts on species endemic to the Domain, complete removal will enable the natural coastal processes and sand flows to provide a great long-term environmental benefit."* Given the risks and potential impacts associated with undertaking complete removal, as well as difficulty and potential environmental and economic consequences of unsuccessful attempts at complete piling removal, SLR considers partial removal as the preferred option given previous success and no identification of associated significant environmental harm based on the information reviewed i.e. *"no material disadvantages regarding navigation, sediment movements, water quality or marine flora and fauna, when compared to full extraction of piles"* (Advisian, 2020a Sect. 15.2.4 p. 92).
13	Rehabilitation Strategies / Methodology	GHD, 2019 Sect. 7.3 p. 40 Advisian, 2020a Sect.	The Quarry Dam pre-construction profile in 1977 is the target post mining land use. The Quarry Dam is cut into the eastern side of the low ridge that forms part of the foot slopes and foothill ridges of Mt Griffiths. It is SLR's opinion that a modified landform is required for stability, management of surface water within the lease, etc. This agrees with GHD notes on landform drainage and other aspects that would require design to meet objectives for stability, etc.	Given considerations such as catchment available within the site to manage runoff, long-term stability, and efficiency, SLR notes that a landform similar to pre-construction in elevation with increased surface water management controls and reduced slope angles (steepness) would likely be required.

No.	Aspect	Report and Reference	Review Findings	Basis of Opinion including Data / Facts and/or Information Considered
14	Tug Harbour Maintenance Costs	GHD, 2020 Sect. 19.3 p. 101-102	Prior to the asset transfer of the Tug Harbour, the Domain will need to undergo an engineering inspection (estimated at $500,000) to determine any maintenance or repair works required on the facility and the appropriate annualised maintenance cost. Quantities from measuring satellite images of the site, the Port Designers Handbook, maintenance dredging requirements from NQBP reports, an allowance of 2 per cent for breakwater and causeway rockwork on armour layers and an assumption that fenders will need to be replaced every 10 years were used to develop an annual maintenance cost estimate. SLR agrees with the inclusions within the Tug Harbour cost estimate and the use of a 30 year time frame.	The discount rate for the Tug Harbour of 2.28% considering a Reserve Bank of Australia mid-point inflation assumption of 2.5% is considered reasonable given that the 10-yr risk free rate and inflation rate are likely to move in opposite directions. A 30 year timeframe reflects typical investment consideration for water infrastructure.
15	Rates	Advisian, 2020b Sect. Rates List	SLR agrees with costs for waste disposal including the Queensland Government Waste levy. Rates for importing clean fill and bulk earthworks utilised by Advisian appear reasonable.	Waste levy applicable since 2019. Costs appear representative for disposal. Comparable rates based on project experience, location and other considerations.
16	Mark ups	Advisian, 2020a Sect. 21.5 p. 125	SLR agrees with Advisian's position that lead-in design and planning cost for EIS, Stakeholder Engagement and Tug Harbour of $2 M is reasonable but expected to be higher and the Owner's Project management costs and rehabilitation study were adjusted to account for this.	SLR's experience in developing conceptual designs and modelling for landforms, surface water assessment and design for construction, etc. for closure and considerations of the sensitive environment support the likelihood of a higher cost associated with these items.
17	Mark ups	GHD, 2019 Sect. 21 Advisian, 2020a Sect. 21.5 p. 125	SLR agrees with Advisian and GHD that 10 years site maintenance and monitoring post rehabilitation with 2 full time staff is considered reasonable.	Based on experience with other closure planning and costing works a 10 year maintenance and monitoring period is reasonable without any known significant contamination or ongoing treatments required for long-term issues. Note that the closure criteria selected will impact the period of monitoring required to demonstrate rehabilitation success.

No.	Aspect	Report and Reference	Review Findings	Basis of Opinion including Data / Facts and/or Information Considered
18	Mark ups	Advisian, 2020a Sect. 21.5 p. 125 GHD, 2019 Attachment A Sect. 3	SLR agrees with Advisian that based on their approach and delivery method (including costs for Tenders, staff salaries and recruitment, engineering and design verifications) *"the Owner's project management costs could be significantly reduced from the nominal 10% of Direct costs as suggested in the GHD Report… more like 3% of the directs costs plus an allowance for approvals, pre-planning, procurement (tender process) and contract administration, such as reporting etc which in our view is a further 2-3% of the direct costs."* (Advisian, 2020a).	Based on the consideration of the GHD $53.5 M Owner's project management cost corresponding and an applicable range for the Owners' project management costs; SLR has considered to conservatively assume an 8% Owner's project management cost. Additionally, these numbers will be adjusted to reflect consideration of the direct and indirect totals of the recalculated rehabilitation cost estimate.
19	Mark ups	Advisian, 2020a Sect. 21.5 p. 125	SLR agrees with Advisian in adopting the GHD rehabilitation study works detailed assessment which in combination with the other costs *"…sum to a reasonable provision for these element of the works"*. Advisian did note some duplication of costs and as a consideration, SLR has adopted the same percentage of 2.5% of directs for rehabilitation studies (noting there is still some duplication with Engineering, marine studies, etc.).	Based on the detailed assessment of the rehabilitation study effort undertaken by GHD, duplication in studies (engineering, marine bathymetry, etc.) and experience with detailed closure planning and complexity of the site including marine works the 2.5% is considered appropriate. This total is adjusted to reflect consideration of the direct totals of the recalculated rehabilitation cost estimate.
20	Mark ups	Advisian, 2020a Sect. 21.5 p. 126	SLR agrees with Advisian's proposed Client schedule risk and ground conditions (extension of time claims) to allowance of 1.3% of the head contract sum for the client's schedule risk. This amount is a resultant of Advisian estimate reflecting the GHD allowance believed to be a prudent provision.	This sum covers the client's direct costs incurred when an extension of time is granted to the Tier 1 Contractor. This total is adjusted to reflect consideration of the direct totals of the recalculated rehabilitation cost estimate.
21	Mark ups	Advisian, 2020a Sect. 21.5 p. 125	Advisian were unable to establish what constituted the 18.7% contingency contained within the GHD Report. Whilst recognising risk is to be held at the Owners level, 18.7% far exceeded their expectation. The provision for client contingency, includes contract risk total. Given Advisian undertook a risk assessment in the Tier 1 SLR agrees this risk has largely been transferred and provided for.	Considering contract risk coverage including the General unallocated contingency ($15 M of which $5 M is for asbestos) and $30 M client contingency and contract risk, schedule risk analysis time ($12.8 M and more). SLR proposes a reduction of the contingency amount to 10-15% of the direct/base estimate (calculates to approximately 11% of the new total based on range of contingencies).

No.	Aspect	Report and Reference	Review Findings	Basis of Opinion including Data / Facts and/or Information Considered
22	Risk	Advisian 2020a, Sect. 21.6 p. 126 and Sect. 21.6.2 p. 128	The Advisian approach to risk was to undertake an assessment based on quality of information to determine estimates for additional risk… based on certainty factors. Additionally, $5M of the 'general unallocated contingency' from the Tier 1 Contractor provision was assigned to cover asbestos risk and there is additional buffer within the Owner's contingency is assigned it too would provision for 'unknown unknowns'. At this cost bracket and with such significant and complex project risks, SLR agrees that an assessment of the risk profile of the project and consideration of a probabilistic method of estimating an appropriate contingency or a range analysis based on the associated costs would be warranted.	An assessment of the risk profile of the project and consideration of a probabilistic method of estimating an appropriate contingency or a range analysis based on the associated costs would be warranted. (Transport and Main Roads Project Cost Estimating Manual – Seventh Edition (2017)) Sect. 3.4 p. 43. Advisian undertook such an assessment and reflected this in costs. The quantity/definition risk (quantity) in Advisian's indirect costs C reflect a risk factor based on analysis. As a result, SLR proposes to remove the 1.3% Contingency GHD had related to project and schedule risks.
23	Contamination	Advisian, 2020a Sect. 9.3 p. 53	Depth of contamination for removal proposed by GHD was 400 mm; however, Advisian proposed 250 mm on relevant areas considering spill management (ISO14001 environmental management system, etc.), experience with Tier 1 hydrocarbon client contamination, and assuming material for constructing earthen pads was free of contaminates. SLR considers the Advisian proposal to be a reasonable assumption.	No immediate neighbouring slag or contaminated waste areas to indicate likely use of contaminated materials historically supports Advisian experience and points.

4.2 Points of Disagreement

Based on review, SLR has identified the points of disagreement in **Table 2** with the GHD and/or Advisian estimates and supporting assumptions, considerations, proposed rehabilitation strategies, etc.

Table 2 Points of Disagreement with DBCT Rehabilitation Cost Estimates 2019 (GHD) and/or 2020 (Advisian)

No.	Aspect	Report and Reference	Review Findings	Basis of Opinion including Data / Facts and/or Information Considered
1	Rehabilitation objectives	GHD, 2019 Sect. 4.2 p. 22	While the general approach to rehabilitation considering the PSA requirements for a return to natural state is applicable to the long-term lease areas, areas of the site under short-term lease would likely not require rehabilitation to this standard. Based on lease conditions it may be appropriate for less conservative and more efficient and/or economic rehabilitation strategies to be implemented that would provide for safe, stable, non-polluting and beneficial post operations land use.	Clear relation of the PSA to the long-term lease in the GHD report (GHD, 2019 Sect. 3.1.1 p. 17) and exclusion of short-term leases from the listed information reviewed and references in the GHD report (GHD, 2019 Sect. 4.1 p. 20 and Sect. References p. 111).
2	Battery limits	GHD, 2019 Sect. 4.4 p. 23	The battery limits for the rehabilitation cost estimate should not necessarily include all rehabilitation activities associate with third party assets. The contractual obligations with relevant third parties should drive the inclusion or exclusion of asset decommissioning, demolition and/or rehabilitation. Outside of any contractual obligations (not yet determined) there is no obligation that arises for addressing third party assets or related environmental or rehabilitation issues from third party assets in relation to DBCTM's published policy PO0005 Health, Safety, Environment and Quality Policy dated 11/03/2020. As a result, rehabilitation of third party assets should not be included as part of the liability unless confirmed to be required for address by DBCTM. Further investigation or review would be required to determine which, if any, assets and associated scopes should be included in the cost estimate.	*AASB 137 Provisions, Contingent Liabilities and Contingent Assets* (2020) (AASB 137) notes: *"For a liability to qualify for recognition there must be not only a present obligation but also the probability of an outflow of resources embodying economic benefits to settle that obligation… Where it is not probable that a present obligation exists, an entity discloses a contingent liability, unless the possibility of an outflow of resources embodying economic benefits is remote."* Outside of any contractual obligations (not yet determined) there is no obligation that arises for addressing third party assets or related environmental or rehabilitation issues from third party assets in relation to DBCTM's published policy PO0005 Health, Safety, Environment and Quality Policy dated 11/03/2020. As a result, rehabilitation of third party assets should not be included as part of the liability unless confirmed to be required for address by DBCTM and not another party to meet the rehabilitation objectives. Further investigation or review would be required to determine which if any assets and associated scopes should be included in the cost estimate.

3	Tug Harbour	GHD, 2019 Sect. 4.4.4 p. 25	SLR agrees that due to the public use benefit derived from the tug harbour and associated breakwater structure, it would be inappropriate for DBCTM to rehabilitate this structure. In lieu of rehabilitation a one-off payment would be made for maintenance of the facility to NQBP or Queensland Government. The Tug Harbour was built to service DBCT and HPCT coal export facilities, the breakwater facility built from rock quarried at DBCT, and is used for recreation vessels (public boat ramp). It is currently owned and maintained by NQBP, and related costs are funded by harbour dues levied by NQBP on DBCT and HPCT. In Section 4.4. of the GHD report the principles of *"An appropriate share of third-party assets that are shared between DBCT and HPCT and provide essential services to DBCT, or were constructed to support the provision of coal-handling services at DBCT (or the broader Port of Hay Point) should be included"* and "*An appropriate proportion of assets owned by government agencies and are shared between DBCT and HPCT should be included"* are noted. However, the *Central Queensland Coal Associates Agreement Act 1918* (Qld) provides that where the Tug Harbour/harbour works need to be extended to meet the needs of the community, but not those of BMA then BMA (as the owner of HPCT) should not be charged for the operating, management and maintenance costs of that extension. GHD has proposed that *"it would be reasonable for DBCTM to consider having to bear the full costs of the Tug Harbour disposition…"* and *"…have assumed that DBCTM will incur all costs associated with the Tug Harbour disposition".* Given that the Tug Harbour is used for recreation etc. and is an already constructed asset maintained by NQBP via DBCT and HPCT levies; it is not reasonable to have DBCTM cover the full maintenance costs for 30 years. Additionally the 40 percent allowance over and above direct costs comprising 20% indirects and overheads and 20% contractor margins is excessive.	Section 4.1.5 Financial Assurance (Provisioning) of LPSD Mine Closure (Commonwealth of Australia, 2006 Sect. 4.1.5 p. 30) notes: *"The best estimates of expenditure are based on what a company would rationally pay to settle the obligation or transfer to a third party at the time."* The transfer process should include valuation of the asset and consultation to confirm asset transfer fate, followed by considerations of negotiations and planning. This would assist in determining an amount to pay for maintenance at a discounted rate to reflect present value. At the end of this process the asset transfer should ensure no further liabilities are attributable to DBCTM. LPSD Mine Closure (Commonwealth of Australia, 2016 Sect. 7.4 p 90) identifies that for legacy infrastructure it is important *"to determine who will manage the infrastructure into the future: will the site be managed by a third-party service provider and are they competent to provide the care and maintenance required"*. It also notes that *"financial provisions may need to be established to accommodate monitoring and maintenance costs for legacy infrastructure"*. According to the North Queensland Bulk Ports Hay Point Half Tide Tug Harbour Marine Operating Facility (MOF) (NQBP, 2017) *"from the 1st December 2015, NQBP acquired the asset, at the time known as the Hay Point Barge Loadout Facility…"* However, based on publicly available information SLR has been unable to confirm whether acquisition of the asset would be considered a third party asset for removal from the cost estimate. At a minimum SLR believes that the public use of the Tug Harbour and HPCT should be considered in reduction of the maintenance amount to be paid. Additionally, the contractor margins of 20% for the Tug Harbour are proposed to be reduced to be closer to industry considerations and alignment of other allowances and percentages with industry norms. To this end, SLR proposes a reduction in the Tug Harbour estimate by DBCT provisioning for 80% of maintenance for 30 years and a reduced 10% for contractor margins.

No.	Aspect	Report and Reference	Review Findings	Basis of Opinion including Data / Facts and/or Information Considered
4	Post Closure Land Use	GHD, 2019 Sect. 6.2.2 p. 38	The secondary domains based on post-operations land management units characterised by a defined final land use are: Grassland, Eucalypt Woodland to Open Forest, Beach foreshore, Beach ridge, Marine and Tug Harbour. SLR considers these proposed land uses to be comparable with natural and pre-existing conditions and satisfy the rehabilitation objective for the PSA relevant long-term lease areas. However, while these post closure land uses may also be achievable for rehabilitation of short-term leases, other options may be permissible based on short-term lease conditions e.g. industrial use.	Conditions under the PSA are conservative considering typical lease conditions which include removal or infrastructure, non-polluting areas, and rehabilitation to conserve soils, etc. On this basis, it is likely that short-term leases have less conservative requirements and the pre-construction landform can be engineered to combine with other areas without such a conservative approach e.g. gentle slope requiring less material merging into pre-existing landform vs. backfilling entire area to pre-construction levels.
5	Rehabilitation Strategies / Methodology	Advisian, 2020a Sect. 15.3.2.1 p. 93	Based on confirmation with DBCTM personnel at the site visit that there is no current plan in place to prevent water containing coal dust from entering the sea due to high pressure cleaning activities, Advisian did not allow for deployment of floating booms, netting or vessels during the decommissioning phase.	Based on other experience and considering the sensitive environment and typical Environmental Authority requirements around pollution prevention including erosion and sediments, SLR assumes some environmental controls will be required to facilitate rehabilitation. Based on this, the inclusion of the previously removed "Temporary Controls for Marine Protection (Booms, netting, small boat w/operator) during Offshore Conveyor Cleaning" cost of $575,000 has been undertaken for the rehabilitation cost estimate for this domain.
6	Rehabilitation Strategies / Methodology	GHD, 2019 Sect. 7.3 p. 40 Advisian, 2020a Sect.	The Quarry Dam pre-construction profile in 1977 is the target post mining land use. The Quarry Dam is cut into the eastern side of the low ridge that forms part of the foot slopes and foothill ridges of Mt Griffiths. SLR considers a modified landform is required for stability, management of surface water within the lease, etc.	Restoration of similar topography to pre-construction will result in a water shedding landform. Given considerations such as catchment available within the site to manage runoff, long-term stability, and efficiency, SLR notes that a landform similar to pre-construction in elevation with increased surface water management controls and reduced slope angles (steepness) would likely be required. While SLR has not developed a proposed landform for this feature, an estimated reduction of at least 5-10% of material is considered to represent a more likely fill volume required to facilitate erosion controls and controlled surface water movements (related to slope angles, etc.) and allow for fill materials to replace the previous rocky quarried materials. A 5% reduction assumption relates to a reduction of $2.8 M directs for rehabilitation.

No.	Aspect	Report and Reference	Review Findings	Basis of Opinion including Data / Facts and/or Information Considered
7	Mark ups – Owner's Project Management Costs	Advisian, 2020a Sect. 21.5 p. 124	SLR agrees with Advisian that based on their approach and delivery method (including costs for Tenders, staff salaries and recruitment, engineering and design verifications) should result in *significantly reduced Owner's project management costs from the nominal 10% of Direct costs as suggested in the GHD Report* (Advisian, 2020a). For cost comparison, Advisian recommended a total percentage of 5-6% but adopted the nominal 10%; however, SLR considers a conservative 8% based on the Tier 1 Contractor approach and associated indirects totalling $31.9 M is more appropriate (Advisian, 2020a Sect 21.3 p. 123-124) – see **Table 1 #18**.	Based on the consideration of the GHD $53.5 M Owner's project management cost corresponding and an applicable range for the Owners' project management costs; SLR will conservatively assume an 8% Owner's project management cost. Additionally, these numbers will be adjusted to reflect the direct and indirect totals of the recalculated rehabilitation cost estimate.
8	Mark ups – Client Contingency, Includes Contract Risk Total	GHD, 2019 Sect. 4.5.7 p. 23 of Attachment 1 Advisian, 2020a Sect. 21.5 p. 124	SLR, like Advisian, was unable to confirm what constituted the 18.7% Contingency based on description *"Contingency has been assessed at 18.7% of all base costs based on the underlying quality of current project definition and pricing sources."* (GHD, 2019). 1.3% was also added to address project discrete risks such as schedule delays and unexpected site conditions. This was in addition to other contingencies and related assumptions e.g. *"…critical path is the offshore infrastructure which is anticipated to take 7.5 years to complete. This allows for two barges to be operational for the pile removal and approximately 30 per cent down time… due to unsuitable marine conditions."* (GHD, 2019 Sect. 21 p. 107)	Based on the level of detail undertaken for the costing and planning, a lower contingency is likely to be more reflective of the costs. The following forms part of the overall contingency: • Quantity/definition risk (quantity) • Schedule risk analysis (time); • General unallocated contingency; • Client Contingency Includes Contract Risk Total; and • Client schedule risk and ground conditions (EOT's claims). This totals $80.5 million in contingencies and risk (approximately 16.5% of base).The decommissioning, demolition and disposal cost estimate developed by Axiom for the GHD report was developed in accordance with a Class 4 AACE International Recommended Practice No. 47R-11 - Cost Estimate Classification System – As Applied in The Mining and Mineral Processing Industries and intends to reflect the most likely cost expenditure outcome to -20% to +35% accuracy.

4.3 Other Relevant Observations

SLR considers the following additional observations as relevant to the QCA decision for remediation:

1. The QCA draft decision 2019 notes:

   "DBCTM also added that despite our previous determination that the economic life of the Bowen Basin and consequently, the Terminal, is expected to end in 2054, it considers '2051 should reasonably be considered the relevant date with regard to remediation of DBCT' as it is the end of the initial lease."

   SLR notes that the economic life of the Bowen Basin will likely extend beyond 2051 with mine expansions and new projects coming online e.g. " *…announced the State Government had signed off on a mining lease for the Olive Downs Coking Coal Project, run by Pembroke Resources.*

   The central Queensland mine will have a production life of 80 years…" (Zillman, 2020).

2. DBCTM requested that GHD propose an appropriate escalation rate for the Rehabilitation Cost Estimate (in Oct 2018 AUD) to be expressed in April 2053 AUD (mid-point of October 2051 and October 2054).

   Considering mining-industry norms for long-term cost-escalation assessments for rehabilitation activities, a rate of 2.6% per annum was considered appropriate derived from an escalation rate of 3.11% for labour costs (mid-point of the 15-year historical wage price index (WPI) for private-sector workers in Queensland and Queensland Treasury's forecast of Queensland WPI) and 2.50% for non-labour costs. The 3.11% applies to about a fifth of total rehabilitation costs, reflecting the share of labour costs, and 2.50% applies to the balance of costs.

   SLR's assessment of these considerations notes that non-labour cost increase of 2.5% can be considered high given likelihood of technological improvements, etc. Given the COVID-19 events of 2020, forward labour cost increases of 3.1% will likely also be considered high for at least the next 10 years. The net rate of 2.6% per annum considering these aspects would be reduced to no greater than 2%.

3. Using high-level GIS analysis, SLR calculated an area for the short-term lease over the rail loop of approximately 38.7 ha. Rehabilitation costs have been retained within the budget estimate for the rail area on short-term lease as closure obligations experience typically supports removal of infrastructure but not rehabilitation of the area below; however SLR note that a reduction of rehabilitation by this area could result in a significant decrease to rehabilitation costs in this domain (cut and fill earthworks across Domain 1 total $15 M).

5 Rehabilitation Cost Estimate for DBCT

5.1 Rehabilitation Cost Estimate

Based on the review outcomes in **Section 4**, SLR has updated the Advisian cost estimate by exception only. A summary of the changes to the cost estimates are shown in **Table 3**. Reduced Owner's project management costs and contingency impacted all areas.

Table 3 Summary of Rehabilitation Cost Estimate for DBCT Based on Modifications to Advisian Estimate

Domain	GHD ($'M)	Advisian ($'M)	SLR ($'M)	Variance Advisian-SLR ($'M)	Comments
DOMAIN 1 - RAIL LOOP	$217.37	$113.09	$46.93	$66.16	Removal of Demolition, Rehabilitation, Remediation and Disposal costs for the Rail Loop and QR Substation excluding fencing removal.
DOMAIN 2 - STOCKYARD	$457.26	$214.91	$214.41	$0.49	
DOMAIN 3 - SEAWALL	$57.50	$49.24	$49.13	$0.11	
DOMAIN 4 - OFFSHORE	$269.22	$169.31	$169.76	-$0.44	Inclusion of Temporary Controls for Marine Protection (Booms, netting, small boat w/operator) during Offshore Conveyor Cleaning.
DOMAIN 5 - WATER MANAGEMENT	$58.84	$60.89	$60.75	$0.14	
DOMAIN 6 - QUARRY DAM	$12.10	$77.29	$76.23	$1.06	Reduced proposed fill volume by 5%.
DOMAIN 7 - OFFICES & WORKSHOPS	$48.97	$32.17	$32.10	$0.07	
DOMAIN 8 - UTILITIES	$34.34	$7.75	$5.53	$2.22	Removal of Deconstruction of Utilities: utilities and demolition and Rehabilitation, Remediation and Disposal – Power costs for Ergon 33/11 kV Substation.
DOMAIN 9 - TUG HARBOUR	$37.23	$37.23	$29.05	$8.18	Reduction of 30 year maintenance to 80% DBCTM.
Ongoing Costs - Management Costs	$9.25	$9.25	$9.25	$0.00	
Indirect - Distributable Costs (Salaries, Employee related costs, IT)	$24.52	$50.20	$50.10	$0.10	
Indirect - Studies Costs (EIS, Stakeholder Engagement, Tug Harbour)	$2.00	$2.00	$2.00	$0.00	
Indirect - Project Management and Governance Cost	$1.00	$0.00	$0.00	$0.00	
Total Cost	**$1,220.35**	**$814.09**	**$735.99**	**$78.10**	

[1] *Decommissioning of third party assets retained in costs; note however, where assets are managed on site by third party contractors, typically decommissioning and clean-up costs are borne by the contractor supported by contractual responsibilities.*

2 Ballast and capping demolition and disposal costs are assumed to belong to Aurizon based on listing of track assets – ballast under Civil Assets (Aurizon, 2020) Sect. APPENDIX 9 p. 65 and reference to contaminated ballast removal, replacement, etc. throughout the 2020 report.

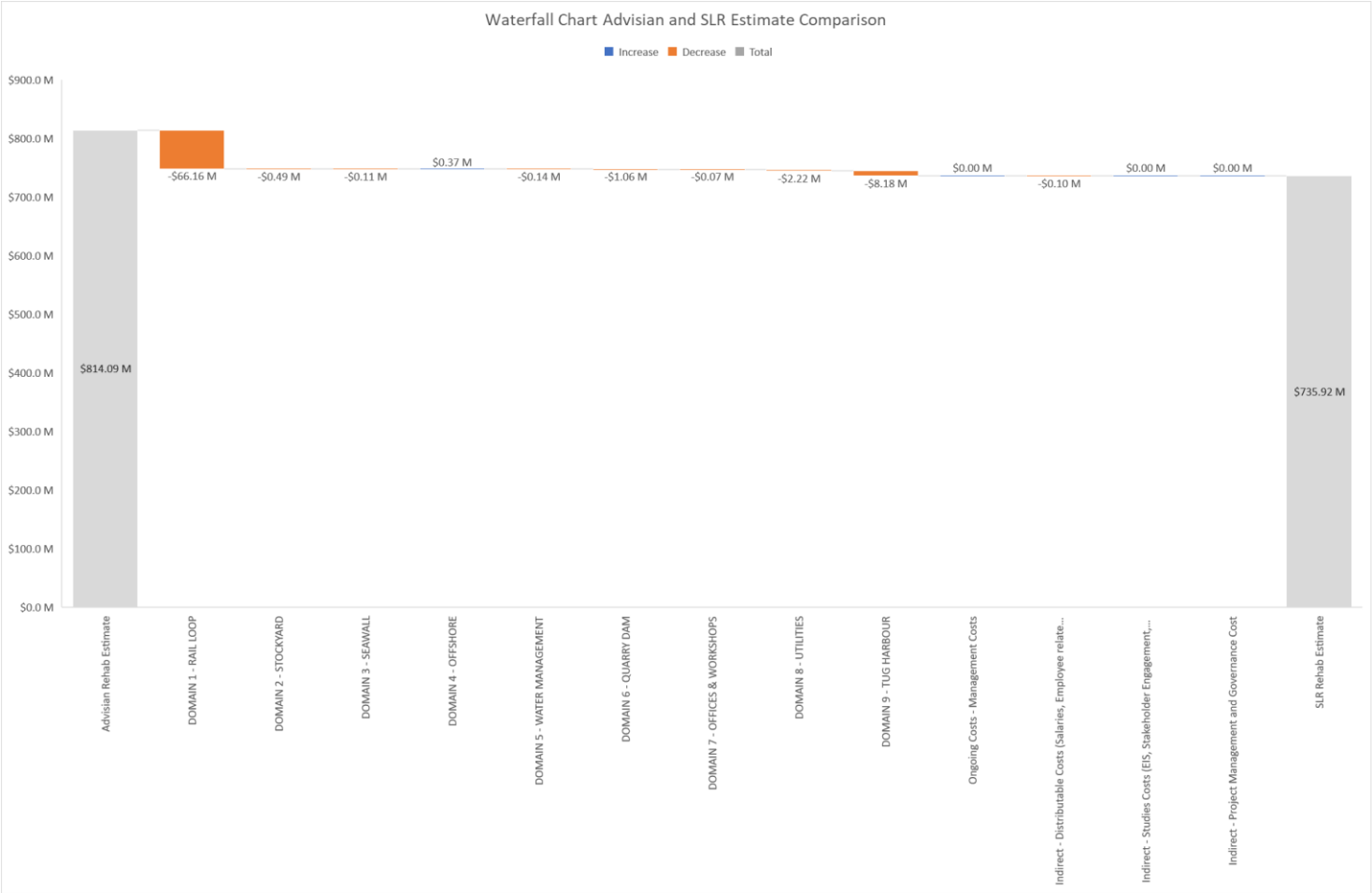
A summary comparison of direct cost variances by domain between Advisian and SLR is shown in **Table 4**.

Table 4 Summary of Domain Cost Variances (Direct Costs) Between Advisian and SLR

Domain	GHD	Advisian	SLR	Variance Advisian-SLR
DOMAIN 1 - RAIL LOOP	$ 144,653,427	$ 83,512,379	$ 34,526,430	$48,985,948
DOMAIN 2 - STOCKYARD	$ 304,133,326	$ 157,075,903	$ 157,075,903	$ -
DOMAIN 3 - SEAWALL	$ 36,986,133	$ 35,440,541	$ 35,440,541	$ -
DOMAIN 4 - OFFSHORE	$ 169,130,694	$ 117,960,243	$ 118,535,243	-$575,000
DOMAIN 5 - WATER MANAGEMENT	$ 39,291,773	$ 44,898,223	$ 44,898,223	$ -
DOMAIN 6 - QUARRY DAM	$ 8,084,266	$ 56,894,076	$ 54,127,045	$2,767,031
DOMAIN 7 - OFFICES & WORKSHOPS	$ 32,575,455	$ 23,608,771	$ 23,608,771	$ -
DOMAIN 8 - UTILITIES	$ 22,865,380	$ 5,741,923	$ 4,107,768	$1,634,155
DOMAIN 9 - TUG HARBOUR	$ 37,230,000	$ 37,230,000	$ 29,048,658	$8,181,342

The change in costs from the Advisian rehabilitation cost estimate to SLR's cost estimate are shown in the waterfall chart shown in **Figure 1**.

Figure 1 Waterfall Chart Showing Advisian Rehabilitation Cost Estimate to SLR's Cost Estimate



5.2 Key Assumptions for Rehabilitation Cost Estimate

The assumptions made for completion of the updated DBCT rehabilitation cost estimate all relate to points of disagreement (see **Section 4.2** of this report).

1. Based on information provided in the GHD report on composition of Domain 8 Utilities, SLR estimated one 33/11 kV substation to be demolished belongs to Ergon (third party). Considering quantities and information provided in the GHD costs tab *Capex Details*, SLR calculated that relevant to decommissioning costs, Ergon substation was approximately 5% of overall costs whereas relative to concrete footings area and volumes the Ergon substation was approximately 37% of overall costs.

   Based on this, to remove Ergon third party costs from the Advisian estimate, under Deconstruction of Utilities: the utilities and demolition costs for substations was reduced by 5%, crushing of concrete costs by 37%; under Rehabilitation, Remediation and Disposal - Power: decommissioning costs for oil disposal and substation substrate removal and disposal were reduced by 5% while general waste, steelworks, contamination and concrete handling costs were reduced by 37%.

2. The balloon loop servicing DBCT is an asset of Aurizon and costs for removal of infrastructure including decommissioning, demolition and disposal will be covered by Aurizon. Similar assumptions are made about the third party assets – QR substation (Domain 1) and Ergon Substation 33/11 kV (Domain 8).

3. Generally, lands will be restored to the natural state with the exception of the Tug Harbour (public recreational use) and the following due to considerations for environmental harm (the seawall has been retained but is flagged for further investigation):

   a. Partial instead of full removal of onshore and offshore piles (same approach as the Advisian report); and

   b. Quarry Dam modification of landform/profile for surface water management with runoff to be contained on leases area.

4. For Temporary Controls for Marine Protection (Booms, netting, small boat w/operator) during Offshore Conveyor Cleaning, costs are split between Labour, Plant and Materials (same time as cleaning of offshore conveyors) - costs for a small boat (assumed $1500/day with skipper lower end of reduced rate - assume $800/day boat and $700/day skipper) and Labour E; assume booms etc. part of consumables. Assume required for 100% of conveyor demolition time.

5. Assume 80% of Tug Harbour 30 year maintenance costs paid by DBCTM as calculated subject to discount rate and inflation with reduced contractor's margin (10%).

6. Current landform was determined by LIDAR data in 2013 and pre-construction landform is based on 1977 information.

7. All general and demolition waste will be able to be removed to Paget Transfer Station.

8. All contaminated waste will be able to be removed to Hogan's Pocket Transfer Station.

9. All infrastructure associated with the Tug Harbour will be able to be transferred with no residual liability.

10. The *Quantity/Definition Risk* in *C. Indirect Costs – Threats and Opportunities* within the Advisian costs are considered in the total on which the revised rehabilitation cost estimate in this report is based.

    The risk allowances in the Advisian costs tab Definition Risk Analysis were not reduced in line with adjustments made to the rehabilitation cost estimate because comments included *"We are still using GHD volumes at this stage…"* (Advisian, 2020b Tab Definition Risk Analysis) while the Advisian report (Advisian, 2020a) refers to volumes calculated by Advisian. On this basis, while reported within *C. Indirect* costs from the Executive Summary tab as the correct total from the Definition Risk Analysis tab, SLR could not confirm that a reduction in the risk amounts would correctly reflect the certainty factor (which possibly requires adjusting based on the Advisian report).

    In summary, a further reduction in costs should likely be reflected based on risk including a potential 59% reduction to Rail Loop – Catenary & Rail System and Rehab & Disposal costs (a further reduction of $2.2 M to indirects).

6 Summary of Opinions

Based on SLR's review of the rehabilitation estimates generated by GHD and Advisian, SLR considers both estimates are likely to be an overestimation of rehabilitation costs for the site including rehabilitation of the long-term lease areas under the PSA to be returned to the pre-construction natural state.

On points of agreement and disagreement, SLR finds that the Advisian approach to be the more representative of the rehabilitation cost for DBCT site considering the principal rehabilitation objective and what would be considered prudent and efficient.

Based on high-level considerations of the assumptions and supporting information provided by both GHD and Advisian, SLR considers there to be a need for further investigation of a number of factors prior to updating or developing a rehabilitation estimate. The following is recommended:

1. Undertake a review of all closure obligations for DBCT to confirm what infrastructure and aspects require inclusion and provisions in the rehabilitation cost estimate. Typical review of closure obligations includes contract terms (including termination and completion clauses), lease conditions (e.g. short-term leases) and supply agreements (including termination and completion clauses). These obligations should then drive the inclusion of any relevant aspects of third-party assets e.g. decommissioning, demolition, etc.

2. Based on the QCA's previous decisions, good industry practice, and the PSA obligation to "Rehabilitate the site in accordance with DBCTH's reasonable requests and requirements", consult with DBCTH on what methodologies would be considered reasonable for a more informed selection or confirmation of methodologies considering efficient costs to rehabilitate the Terminal site.

   Stakeholder engagement should be undertaken with DBCTH prior to updating the DBCT Rehabilitation Plan and undertaking a new rehabilitation estimate to allow updates to reflect rehabilitation methodologies in accordance with DBCTH and to understand the impact on remediation costs.

3. The relevant party to consult closely with DBCTM on the Rehabilitation Plan and general strategies to understand and incorporate existing information and knowledge base and planned works into the closure planning process and document. A review of the DBCT Management DBCT Master Plan 2019 Expansion Opportunities at the Dalrymple Bay Coal Terminal (2019) (Sect. 7.3 p. 66) noted there is an existing Community Engagement Strategy and Key Stakeholder Relations Program (Sect. 7.4 p. 66) which should likely be considered in the stakeholder identification and planning sections.

Without undertaking any of the recommended works above, SLR's review of the GHD and Advisian rehabilitation estimates generally agreed with the premise of the DBCT Rehabilitation Plan e.g. rehabilitation objectives, battery limits, domains, closure planning, post closure land uses and retention of the Tug Harbour with a discounted payment to cover maintenance for a 30 year period.

Points of disagreement with the GHD and/or Advisian reports that were material to the SLR rehabilitation cost estimate developed based on the Advisian estimate were:

- Reduction in the Owner's project management costs from 10% to 8%;
- Reduction in contingency from 18.7% contingency + 1.3% risk (20%) to ~15% total (risk and other contingencies total $80.5 million – approximately 16.5% of base)

- Exclusion of demolition costs for third party assets (Aurizon balloon loop and QR substation and Ergon 33/11 kV substation);
- Reduction in Tug Harbour contractor margins from 20% to 10% and percentage paid by DBCTM to 80%;
- Reduction in Quarry Dam rehabilitation volumes by 5%; and
- Inclusion of Temporary Controls for Marine Protection (Booms, netting, small boat w/operator) during Offshore Conveyor Cleaning ($575,000).

SLR developed a rehabilitation cost estimate by updating the Advisian rehabilitation cost estimate by exception. Based on calculations and the current knowledge base and expectations, SLR estimates rehabilitation of the DBCT site at **$736 M**; a decrease of **$78.1 M** from the Advisian estimate. **Table 3** and **Table 4** (**Section 5.1**) summarise the differences in total rehabilitation costs between GHD, Advisian and SLR estimates.

7 References

Advisian Worley Group *Dalrymple Bay Coal Terminal Rehabilitation Cost Review Queensland Competition Authority 311001-00034* (2020)

Aurizon *Aurizon Network Maintenance and Renewal Strategy and Budget* (2020) https://www.qca.org.au/wp-content/uploads/2020/03/aurizon-network-annual-review-of-reference-tariffs-fy2021-appc-maintenance-and-renewel-strategy-and-budget.pdf

Australian Accounting Standards Board (AASB) *137 Provisions, Contingent Liabilities and Contingent Assets* (2020)

Commonwealth of Australia *Leading Practice Sustainable Development Program for the Mining Industry – Mine Closure* (2016)

DBCT Management *DBCT Master Plan 2019 Expansion Opportunities at the Dalrymple Bay Coal Terminal (2019)*

DBCT Management *PO0005 Health, Safety, Environment and Quality Policy* (2020)

Department of Environment and Science *Erosion Prone Area* (2020) https://www.stateoftheenvironment.des.qld.gov.au/climate/coasts-and-oceans/erosion-prone-area

GHD Advisory *DBCT Rehabilitation Plan and Rehabilitation Cost Estimate DBCT Management* (2019)

GHD Advisory *2019 DAU A1.03 Rehabilitation - Attachment 2 - Cost Estimate (for QCA)* <2 October 2020>

International Council on Mining and Metals (ICMM) *Planning for Integrated Mine Closure: Toolkit* (2008)

Queensland Competition Authority *Draft Decision DBCT Management's 2019 Draft Access Undertaking* (2020)

Safe Work Australia *Draft Code of Practice – Mine Closure* (2011)

Transport and Main Roads *Project Cost Estimating Manual – Seventh Edition* (2017)

Zillman, S. *Queensland Government grants approval for state's third-largest coal mine with 1,000 jobs promised* (2020, September 29) *ABC News.* Retrieved from https://www.abc.net.au/news/2020-09-29/palaszczuk-government-approves-olive-downs-coal-mine-bowen-basin/12713298

APPENDIX A

SLR Rehabilitation Cost Calculations Summary

Directs

Domain	GHD	Advisian	Variance	SLR	Variance
[redacted]					

Total Cost Difference (Direct + Indirect Costs)

Domain	GHD ($'M)	Advisian ($'M)	SLR ($'M)	Variance Advisian-SLR ($'M)
DOMAIN 1 - RAIL LOOP	$ 217.37	$ 113.09	$ 46.93	$ 66.16
DOMAIN 2 - STOCKYARD	$ 457.26	$ 214.91	$ 214.41	$ 0.49
DOMAIN 3 - SEAWALL	$ 57.50	$ 49.24	$ 49.13	$ 0.11
DOMAIN 4 - OFFSHORE	$ 269.22	$ 169.31	$ 169.76	-$ 0.44
DOMAIN 5 - WATER MANAGEMENT	$ 58.84	$ 60.89	$ 60.75	$ 0.14
DOMAIN 6 - QUARRY DAM	$ 12.10	$ 77.29	$ 76.23	$ 1.06
DOMAIN 7 - OFFICES & WORKSHOPS	$ 48.97	$ 32.17	$ 32.10	$ 0.07
DOMAIN 8 - UTILITIES	$ 34.34	$ 7.75	$ 5.53	$ 2.22
DOMAIN 9 - TUG HARBOUR	$ 37.23	$ 37.23	$ 29.05	$ 8.18
Ongoing Costs - Management Costs	$ 9.25	$ 9.25	$ 9.25	$ -
Indirect - Distributable Costs (Salaries, Employee related costs, IT)	$ 24.52	$ 50.20	$ 50.10	$ 0.10
Indirect - Studies Costs (EIS, Stakeholder Engagement, Tug Harbour)	$ 2.00	$ 2.00	$ 2.00	$ -
Indirect - Project Management and Governance Cost	$ 1.00	$ -	$ -	$ -
Total Cost	**$ 1,220.35**	**$ 814.09**	**$ 735.99**	**$ 78.10**

Summary of Domain Cost Variances (Direct Costs)

Domain	GHD	Advisian	SLR	Variance Advisian-SLR
DOMAIN 1 - RAIL LOOP	$ 144,653,427	$ 83,512,379	$ 34,526,430	$ 48,985,948
DOMAIN 2 - STOCKYARD	$ 304,133,326	$ 157,075,903	$ 157,075,903	$ -
DOMAIN 3 - SEAWALL	$ 36,986,133	$ 35,440,541	$ 35,440,541	$ -
DOMAIN 4 - OFFSHORE	$ 169,130,694	$ 117,960,243	$ 118,535,243	-$ 575,000
DOMAIN 5 - WATER MANAGEMENT	$ 39,291,773	$ 44,898,223	$ 44,898,223	$ -
DOMAIN 6 - QUARRY DAM	$ 8,084,266	$ 56,894,076	$ 54,127,045	$ 2,767,031
DOMAIN 7 - OFFICES & WORKSHOPS	$ 32,575,455	$ 23,608,771	$ 23,608,771	$ -
DOMAIN 8 - UTILITIES	$ 22,865,380	$ 5,741,923	$ 4,107,768	$ 1,634,155
DOMAIN 9 - TUG HARBOUR	$ 37,230,000	$ 37,230,000	$ 29,048,658	$ 8,181,342

Aspect	Quantity		1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30
Estimate	1,200,000		1,684,575	1,714,575	1,744,575	1,714,575	1,744,575	1,714,575	1,744,575	1,714,575	1,744,575	1,714,575	1,744,575	1,714,575	1,744,575	1,714,575	1,744,575	1,714,575	1,744,575	1,714,575	1,744,575	1,714,575	1,744,575	1,714,575	1,744,575	1,714,575	1,744,575	1,714,575	1,744,575	1,714,575	1,744,575	1,714,575
Years	30		1,324,575	1,348,575	1,348,575	1,348,575	1,348,575	1,348,575	1,348,575	1,348,575	1,348,575	1,348,575	1,348,575	1,348,575	1,348,575	1,348,575	1,348,575	1,348,575	1,348,575	1,348,575	1,348,575	1,348,575	1,348,575	1,348,575	1,348,575	1,348,575	1,348,575	1,348,575	1,348,575	1,348,575	1,348,575	1,348,575
Subtotal	36,000,000	36,000,000																														
Indirects and Overheads	20%	7,200,000																														
Contractor Margins	20%	7,200,000																														
Insurance premium	4.575	1,647,000																														
Discount rate	2.28%	820,800																														
Inflation	2.50%	900,000																														
			$37,230,574.53																													
SLR			$29,048,658.23	$8,181,916.31																												
Contractor Margins	10%																															
Assume 80% of costs paid by DBCT																																

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