Queensland Competition Authority

Final decision

DBCT 2019 draft access undertaking

March 2021

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

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DECISION AND SECONDARY UNDERTAKING NOTICE

On 1 July 2019, the Queensland Competition Authority (QCA) received a draft access undertaking (2019 DAU) from Dalrymple Bay Infrastructure Management Pty Limited (DBIM)[1] following the initial undertaking notice issued by us on 12 October 2017 under section 133 of the *Queensland Competition Authority Act 1997* (QCA Act).

The 2019 DAU relates to the declared service provided by Dalrymple Bay Coal Terminal (DBCT). The service was previously declared under section 250 of the QCA Act and was re-declared under section 84 of the QCA Act by order of the Queensland Treasurer on 1 June 2020.[2]

Decision

In accordance with section 134(1) of the QCA Act, the QCA has considered DBIM's 2019 DAU and has decided to refuse to approve it.

The QCA has assessed the appropriateness of all aspects of DBIM's 2019 DAU in accordance with the relevant statutory requirements. The QCA's assessment has considered the appropriateness of DBIM's 2019 DAU proposal overall, and its individual aspects, having regard to section 138(2) of the QCA Act.

Secondary undertaking notice

This decision and its appendices constitute a secondary undertaking notice for the purposes of section 134(2) of the QCA Act. It sets out the reasons for the QCA's decision to refuse to approve DBIM's 2019 DAU and the way in which the QCA considers it appropriate for DBIM's 2019 DAU to be amended.

In accordance with section 134(2), the QCA asks DBIM to:

- amend its 2019 DAU in the way described in this decision and as specified in Appendix A and B, being the way the QCA considers appropriate; and
- give the QCA a copy of the amended draft access undertaking within 60 days of receiving this notice.

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Professor Flavio Menezes

Chair

Queensland Competition Authority

[1] Dalrymple Bay Infrastructure Management Pty Limited (DBIM) was previously named DBCT Management Pty Limited (DBCTM). Effective 8 December 2020, DBCTM changed its name to DBIM. The name DBIM is used in this decision—however, documents that were submitted by DBCTM are referenced under that previous name.

[2] Queensland Government, *Gazette: Extraordinary*, no. 31, vol. 384, 1 June 2020, p. 267. We note that at the time of us making this decision, the Treasurer's decision to declare the service is subject to judicial review by the Supreme Court of Queensland.

Way forward

The QCA is not seeking submissions on this decision.

If DBIM complies with the QCA's secondary undertaking notice, the QCA may approve the amended draft access undertaking pursuant to section 134(3) of the QCA Act.

If DBIM does not comply with the QCA's secondary undertaking notice, in accordance with section 135 of the QCA Act, the QCA may prepare and approve a draft access undertaking for the declared service. The QCA will provide advice to stakeholders on that process, should it become necessary.

EXECUTIVE SUMMARY

On 1 July 2019, DBIM[3] submitted the 2019 DBCT DAU to us for assessment. The 2019 DAU is intended to replace the current approved 2017 access undertaking (2017 AU), which is due to expire on 1 July 2021.[4]

Unlike the previously approved access undertakings, the 2019 DAU proposes a pricing model that does not include reference tariffs. The 2019 DAU provides for access prices to be agreed by commercial negotiation, with recourse to arbitration where agreement cannot be reached.

Decision

Our decision is to refuse to approve the 2019 DBCT DAU.

We consider that the 2019 DAU does not promote the economically efficient operation of, use of and investment in, the infrastructure by which the declared service is provided.[5] Further, it does not appropriately balance the legitimate business interests of DBIM with the interests of access seekers and access holders, and the public interest.[6] We consider that the 2019 DAU does not sufficiently constrain DBIM's ability to exercise market power including because, in our view, it does not provide:

- sufficient information to inform access seekers for the purposes of negotiating access with DBIM
- arbitration criteria that sufficiently protect the interests of access seekers, thereby undermining the purpose of arbitration as a 'backstop'.

The 2019 DAU is likely to materially increase uncertainty regarding access to DBCT, which could adversely affect investment incentives and would not be in the public interest.

Nonetheless, we consider the adoption of a pricing model without reference tariffs, if properly designed, is appropriate for the declared service at DBCT. Such a pricing model represents a reframing of the negotiate-arbitrate process under part 5 of the QCA Act in order to place greater emphasis on negotiations.

While the price-setting process will be different to a reference tariff model, critically, the exercise of market power will be constrained by the ability of the parties to refer a dispute to arbitration and by our amendments required in this decision. Moreover, key elements of our consultation and decision-making processes in the event of arbitration are likely to be broadly aligned with our processes to date—we will still invite submissions from the parties to the dispute and consider them in accordance with criteria in the QCA Act, and we will provide reasons for our final determination.

We have identified a number of amendments to the 2019 DAU that we consider necessary in order for us to approve a replacement access undertaking for the declared service, operating with a negotiate-arbitrate model. Key amendments are summarised below:

- *Amending the information provision arrangements, to require DBIM to disclose key cost and price information to access seekers and holders in a predetermined format, with an explanation of the methodology applied to calculate various costs*. We require information provided on the site

[3] Dalrymple Bay Infrastructure Management Pty Limited (DBIM) was previously named DBCT Management Pty Limited (DBCTM). Effective 8 December 2020, DBCTM changed its name to DBIM. The name DBIM will be used in this decision.

[4] Or the date that the coal handling service at DBCT ceases to be declared, should that occur. For clarity, the 2017 AU will expire on the earlier of 1 July 2021, or the date that the handling of coal at the Terminal ceases to be a 'declared service' for the purposes of the QCA Act.

[5] QCA Act, s. 138(2)(a).

[6] QCA Act, ss. 138(2)(b)–(e), (h).

rehabilitation cost estimate and depreciation to reflect our views on these matters, as explained in this decision. We consider these amendments will enable access seekers and holders to form a view on a reasonable terminal infrastructure charge (TIC) for the purpose of negotiating access with DBIM.

- *Requiring DBIM to disclose information on prior arbitrated outcomes to access seekers and holders entering negotiations, subject to confidentiality and relevance considerations*. We consider this will address information asymmetry concerns, as DBIM will necessarily be a party to each arbitration relating to the DBCT service, whereas access seekers and holders will not otherwise have knowledge of the determinations and the reasons for the determinations in previous arbitrations.
- *Requiring DBIM, when requested, to collectively negotiate with access seekers and/or holders, where lawful*. We consider there is scope for collective arbitration of disputes arising during the operation of the 2019 DAU.[7] Given this, where and to the extent that collective negotiation is legally permitted we consider that requiring DBIM to collectively negotiate will promote genuine negotiated outcomes and disincentivise parties to proceed to collective arbitration as a first resort. Additionally, collective negotiations can avoid the unnecessary duplication of costs involved in negotiations. There will be no requirement for parties to a collective negotiation to enter agreements based on the same terms of access.
- *Amending the arbitration criteria in the 2019 DAU to align with the legislative arbitration factors in section 120 of the QCA Act*. We also require amendments to be made to the arbitration criteria in the 2019 DAU Standard Access Agreement (SAA), to align with those in the 2017 SAA. We consider that our required amendments will provide access seekers and holders with sufficient certainty that arbitration will lead to reasonable outcomes.
- *Removing schedule C from the 2019 DAU*. We do not consider it appropriate for the 2019 DAU to specify how the TIC is to be updated during the regulatory period (including socialisation arrangements). We consider these matters are best resolved between the parties during negotiations. We also consider that including such arrangements in the 2019 DAU could limit the scope for negotiations.
- *Requiring DBIM to provide information on the expansion pricing approach, and amending the 2019 DAU to allow for the termination of conditional access agreements, after the determination of an expansion pricing approach by us*.[8] We consider these amendments will facilitate efficient contracting decisions where access seekers must enter into binding conditional access agreements without certainty on pricing outcomes.
- *Amending the arbitration criteria in the 2019 DAU to reflect that we would determine the remediation charge based on our approved rehabilitation cost estimate*. We recognise that an individual access seeker or holder would face inefficient costs to forecast and resolve differences in this estimate with DBIM.
- *Amending the 2019 DAU to address specific non-pricing issues*. We largely consider that the amendments which have been proposed and agreed between DBIM and the DBCT User Group are appropriate to be approved.

[7] Whether such a dispute arises under the 2019 DAU, the QCA Act, or an access agreement.

[8] Conditional access agreements can be terminated within a specified period after the determination of an expansion pricing approach by us, provided the expansion has not already been committed to by DBIM by submitting a Terminal capacity expansion application.

We have also published an arbitration guideline at the same time as this decision.[9] The guideline is largely procedural in nature, explaining how we intend to manage a dispute in relation to the DBCT service. However, it does include limited substantive guidance on key matters.

This summary should not be relied on as a substitute for the detailed analysis in the main body of this document.

[9] The guideline is a publication of the QCA and is non-binding. It is intended to be read in conjunction with (without being part of) any access undertaking that we might subsequently approve.

THE ROLE OF THE QCA – TASK, TIMING AND CONTACTS

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

The QCA's primary role is to ensure that monopoly businesses operating in Queensland, particularly in the provision of key infrastructure, do not abuse their market power through unfair pricing or restrictive access arrangements.

The access regime under the QCA Act

DBIM provides access to a declared service for the purposes of Queensland's third party access regime established under part 5 of the QCA Act.

As the access provider of the declared service, DBIM is subject to various obligations under the QCA Act, including an obligation to negotiate access to the service in good faith (s. 100) with access seekers who have various rights, including to information about the service and to dispute resolution.

The access regime also provides for the implementation of a QCA-approved access undertaking. An access undertaking is defined under the QCA Act as 'a written undertaking that sets out details of the terms on which an owner or operator of the service undertakes to provide access to the service whether or not it sets out other information about the provision of access to the service'.[10]

An undertaking approved by us is intended to establish binding provisions to guide negotiation. It has the legal effect of constraining us from making an access determination that is inconsistent with the approved access undertaking (s. 119) and, to the extent permitted by an approved undertaking, provides the access provider with exemptions in certain circumstances from provisions of the QCA Act that otherwise prohibit preventing or hindering access (ss. 104 and 125).

On 12 October 2017, we issued an initial undertaking notice (s. 133) to DBIM, requiring it to submit a draft access undertaking (DAU) for the declared service. In response to the initial undertaking notice, DBIM lodged the 2019 DBCT DAU on 1 July 2019.

We commenced an investigation to decide whether to approve, or refuse to approve, the 2019 DAU. Our assessment has considered the 2019 DAU in accordance with the statutory assessment criteria in section 138(2) and other applicable requirements of the QCA Act.

Key dates

In accordance with section 147A(2) of the QCA Act, we must use our best endeavours to decide whether to approve, or refuse to approve, the 2019 DBCT DAU proposal within the specified time periods. We gave notice of the specified time periods on 5 July 2019 and subsequently updated the time periods on several occasions—most recently in April 2020. We published a notice in August 2020 stating that our statutory timeframe for assessing the 2019 DAU had expired, providing reasons for our failure to make a decision within this timeframe and explaining what we would do to make a decision as soon as reasonably practicable.

Table 1 provides the 2019 DAU investigation timeframes.

[10] Schedule 2 of the QCA Act.

Table 1 Timeframes

Date	*Step*
12 October 2017	We issued an initial undertaking notice requiring DBIM to submit a DAU by 1 July 2019.
11 June 2019	We issued the Statement of Regulatory Intent that informed stakeholders how we intend to manage the regulatory process.
1 July 2019	We received the 2019 DAU.
5 July 2019	We published the 2019 DAU on our website and issued a notice of investigation and indicative time periods. We also asked stakeholders to make submissions by 23 September 2019.
23 August 2019	We issued a stakeholder notice, with staff questions, to assist stakeholders to prepare submissions on the 2019 DAU.
23 September 2019	We received three stakeholder submissions (initial submissions), from the DBCT User Group, New Hope Group and Whitehaven Coal.
25 October 2019	We issued a stakeholder notice notifying stakeholders of our intent to proceed to an interim draft decision. We asked stakeholders to make further submissions by 22 November 2019.
22 November 2019	We received three further stakeholder submissions, from DBIM, the DBCT User Group and New Hope Group.
24 February 2020	We published the interim draft decision on the 'threshold' issue of the pricing model proposed in the 2019 DAU and invited stakeholder submissions. Our interim draft decision was to refuse to approve the 2019 DAU.
24 April 2020	We received two stakeholder submissions, from DBIM and the DBCT User Group.
29 April 2020	We invited stakeholders to provide collaborative submissions. In particular, we encouraged joint consideration of non-pricing provisions.
5 June 2020	We received two collaborative submissions, from DBIM and the DBCT User Group.
1 August 2020	End of six-month statutory timeframe.
26 August 2020	We published our draft decision, outlining our preliminary views on the 2019 DAU, and invited stakeholder submissions. Our draft decision was to refuse to approve the 2019 DAU.
23 October 2020	We received three submissions, from DBIM, the DBCT User Group and Aurizon Network in response to our draft decision.
29 October 2020	We invited stakeholders to provide further submissions (in the form of collaborative and cross-submissions) on the matters relevant to the 2019 DAU and our draft decision.
18 November 2020	We held two stakeholder forums on the 2019 DAU.
4 December 2020	We received two further stakeholder submissions, from DBIM and the DBCT User Group.
30 March 2021	We published this decision to refuse to approve the 2019 DAU and issued a secondary undertaking notice requiring DBIM to submit an amended 2019 DAU.

Way forward

In releasing a decision at this time, we are aware of the importance of a timely and seamless transition between undertakings.

This secondary undertaking notice asks DBIM to submit an amended DAU within 60 days of receiving this notice.[11] Should DBIM not comply with this secondary undertaking notice, we may prepare and approve a DAU for the declared service (s. 135). In that case, we will provide advice on the process for preparing and approving the DAU.

Contacts

Enquiries regarding this project should be directed to:

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www.qca.org.au/contact

[11] This date may be extended if requested by DBIM, to within 90 days of receiving this notice.

1 INTRODUCTION

DBIM submitted the 2019 DBCT DAU on 1 July 2019. The 2019 DAU does not include a reference tariff and instead contemplates access prices being set through commercial negotiation—with recourse to arbitration where agreement cannot be reached.

This decision sets out our reasons for refusing to approve the 2019 DAU, having regard to the statutory criteria. It also explains the way in which we consider it appropriate for DBIM to amend the 2019 DAU.

This chapter provides context for our assessment of the 2019 DAU and an overview of our decision.

1.1 Background

The Dalrymple Bay Coal Terminal (DBCT or the Terminal) is a common-user coal export terminal servicing mines in the Goonyella system of the Bowen Basin coal fields. DBCT, located 38 kilometres south of Mackay, is Queensland's largest common-user coal export terminal. Since its commissioning in 1983, the Terminal has provided coal handling services[12] to the coal industry in central Queensland. The Terminal is owned by the Queensland Government through a wholly government-controlled entity, DBCT Holdings Pty Ltd (DBCT Holdings). DBCT Holdings leases the Terminal to Dalrymple Bay Terminal Trust (DBT Trust). DBT Trust in turn sub-leases the Terminal to Dalrymple Bay Infrastructure Management Pty Limited (DBIM).[13]

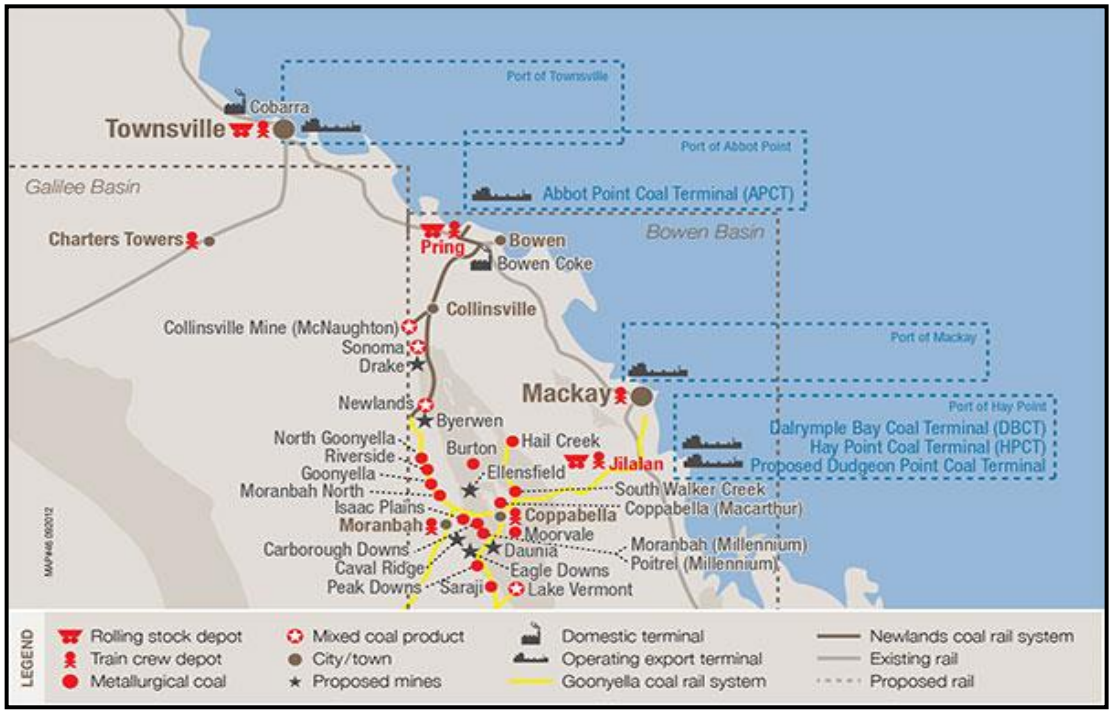
The Terminal is an integral part of the Dalrymple Bay coal supply chain, helping to ensure the deliveries of coal by rail meet the demands of users in terms of the shipping movements and scheduled arrivals. Coal is transported to the Terminal from 26 coal producing mines at 23 load points on the Goonyella system rail network[14] that extends over 300 kilometres (see Figure 1).

[12] Coal-handling services include unloading, stockpiling, coal blending, cargo assembly and out-loading handling services to the mines using the Terminal. The term is defined in s. 250(5) of the QCA Act.

[13] Dalrymple Bay Infrastructure Limited, *Prospectus—Dalrymple Bay Infrastructure Limited*, November 2020, p. 13. Dalrymple Bay Infrastructure Management Pty Limited (DBIM) was previously named DBCT Management Pty Limited (DBCTM). Effective 8 December 2020, DBCTM changed its name to DBIM. The name DBIM will be used in this decision. However, its former name, DBCTM, may still appear in extracts of submissions received prior to its name change.

[14] The Goonyella system is a regulated multi-user and multi-directional rail network that can be used by mines to transport coal to any of the five coal terminals operating in the Bowen Basin. The vast majority of train services on the Goonyella system deliver coal to the Terminal and Hay Point Coal Terminal (HPCT), but some mines do use the Goonyella system to transport coal north to Abbot Point Coal Terminal (APCT), and south to RG Tanna Coal Terminal and the Wiggins Island Coal Export Terminal (WICET) at the Port of Gladstone.

Figure 1 Central Queensland coal rail network



The day-to-day operational management of the Terminal is sub-contracted to DBCT Pty Ltd (DBCT PL) as the 'Operator' under an operations and maintenance contract (OMC). The Operator is an independent service provider owned by most of the existing users of the Terminal. The Operator oversees the day-to-day operations and maintenance of the Terminal and is responsible for some long-term asset management and maintenance planning.

The services provided by DBCT are declared for third party access under part 5 of the QCA Act.[15] The regulatory access framework for DBCT is currently governed by the 2017 access undertaking (2017 AU), which was approved by us on 16 February 2017, and the QCA Act.[16]

1.2 History of access undertakings for DBCT

In June 2006, we approved the first access undertaking (the 2006 AU) for the declared service at DBCT. This followed an extensive consultation and assessment process, which included the submission of two DAUs by DBIM (then DBCTM), the release of our draft and final decisions, and lengthy discussions between DBIM and the users of the Terminal (as represented by the DBCT User Group).

In September 2010, we approved the second access undertaking (the 2010 AU) for the declared service at DBCT. That undertaking replaced the 2006 AU and took effect from 1 January 2011. The 2010 AU reflected a package of arrangements that had been agreed between DBIM (then DBCTM) and the DBCT User Group. Our assessment of this undertaking thus focused on the public interest and the interests of access seekers that were not members of the DBCT User Group and therefore not parties to the agreed package of arrangements.

[15] The service was previously declared pursuant to s. 250 of the QCA Act. On 1 June 2020, the Queensland Treasurer declared the DBCT service from 9 September 2020 to 8 September 2030: Queensland Government, *Gazette: Extraordinary*, no. 31, vol. 384, 1 June 2020, p. 267.

[16] Since the commencement of DBIM's 2017 AU, DBIM has submitted draft amending access undertakings to amend the 2017 AU. The latest 2017 AU was approved on 20 September 2018 and can be accessed on our website.

On 12 October 2015, DBIM (then DBCTM) submitted its 2015 DAU to us for approval. We made a final decision to refuse to approve the 2015 DAU on 21 November 2016 and issued DBIM a notice to amend and resubmit its DAU, in accordance with section 134(2) of the QCA Act. The third access undertaking for DBCT was approved in February 2017, becoming the 2017 AU. The 2017 AU terminates on 1 July 2021.[17]

1.3 The 2019 DBCT draft access undertaking

DBIM submitted the 2019 DBCT DAU on 1 July 2019. The 2019 DAU does not include a reference tariff in the form of a terminal infrastructure charge (TIC), nor does it set out the method for calculating the TIC. This is the main source of difference between the 2019 DAU and previous access undertakings that have applied at DBCT.

The 2019 DAU provides for the terms and conditions of access, including the TIC, to be agreed by commercial negotiation, with recourse to arbitration where agreement cannot be reached.

Stakeholders have engaged in negotiation and collaboration to varying extents under previous draft access undertaking processes. These processes have ultimately culminated in a reference tariff that we approved, and which we understand was used by the parties in access agreements.

1.4 Our investigation

Our task is to assess the 2019 DBCT DAU and either approve, or refuse to approve, the DAU.

If we refuse to approve the 2019 DAU, we must provide a written notice stating the reasons for the refusal and the way in which we consider it is appropriate to amend the DAU (s. 134(2) of the QCA Act).

We have assessed all aspects of the 2019 DAU in accordance with our statutory requirements, having regard to the statutory criteria in section 138(2) of the QCA Act. Section 138(2) provides a number of mandatory criteria governing any decision we make to approve or reject a DAU. The weight and importance of each of the factors is a matter to be determined by us on a case-by-case basis, having regard to the circumstances.[18] Moreover, the matters listed in section 138(2) give rise to different, and at times competing, considerations that need to be assessed and balanced in deciding whether it is appropriate to approve a DAU. The approach we have adopted in applying the legislative framework is set out in Chapter 2.

We have considered all of the submissions received from stakeholders throughout the investigation.[19]

Regulatory process

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

The 2019 DBCT DAU was lodged on 1 July 2019, and we commenced an investigation to decide whether to approve or refuse to approve the 2019 DAU, inviting written submissions from

[17] Or the date that the coal handling service at DBCT ceases to be declared, should that occur. For clarity, the 2017 AU will expire on the earlier of 1 July 2021, or the date that the handling of coal at the Terminal ceases to be a 'declared service' for the purposes of the QCA Act. See Terminating Date, Schedule G of the 2017 AU.

[18] *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 41 (Mason J).

[19] A list of submissions is provided at Attachment 1.

stakeholders. Submissions were received from three parties: the DBCT User Group[20], New Hope Group and Whitehaven Coal.[21] These submissions opposed the 2019 DAU, particularly the proposed pricing model.

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

Our interim draft decision was published on 24 February 2020. We sought stakeholder comments across two consultation periods:

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

We progressed to a draft decision that assessed all aspects of the 2019 DAU, which we published on 26 August 2020. Our draft decision provided stakeholders with our preliminary views and encouraged further contributions by way of submissions. Three submissions were received on the draft decision, from DBIM, the DBCT User Group and Aurizon Network.

We also held two stakeholder forums on 18 November 2020—a general forum and a technical forum on site remediation matters. These forums provided stakeholders with the opportunity to discuss issues related to the 2019 DAU with us and other stakeholders.

A further round of consultation was undertaken so that stakeholders could provide collaborative and cross-submissions on our draft decision and formally express views on matters raised during the stakeholder forums. We received two further submissions during this consultation period, from DBIM and the DBCT User Group.

DBIM and the DBCT User Group also provided letters after the latest consultation period, which we accepted as late information to this process.

Consultation and consideration of consensus positions

Effective consultation with interested parties is integral to achieving a balanced and transparent regulatory process, as well as supporting accountability and confidence in our decision-making.

We consulted extensively on the 2019 DAU and provided interested parties a number of opportunities to put forward their views on DBIM's proposal and our preliminary positions on the 2019 DAU.

We sought collaborative submissions throughout our assessment of the 2019 DAU, which resulted in consensus positions on specific non-pricing matters. While the existence of stakeholder consensus positions is persuasive, it is not decisive. We must consider the effect of proposed amendments on all stakeholders, including future access seekers, and the public

[20] The glossary lists the stakeholders that the DBCT User Group's submission was made on behalf of.
[21] Whitehaven Coal is also a member of the DBCT User Group and is among the stakeholders that the latter's submission was made under.

interest. We have assessed all proposed positions—including those where consensus positions were reached—in accordance with the statutory criteria in the QCA Act.

1.5 Decision

Our decision is to refuse to approve the 2019 DBCT DAU, as submitted on 1 July 2019.

This document sets out our assessment of the 2019 DAU against the statutory criteria and explains the reasons why we consider the 2019 DAU is not appropriate to be approved.

We consider the 2019 DAU does not promote the economically efficient operation of, use of and investment in the infrastructure by which the declared service is provided, nor does it appropriately balance the legitimate business interests of DBIM with the interests of access seekers and access holders, and the public interest.[22]

We consider that the 2019 DAU does not sufficiently constrain DBIM's ability to exercise market power including because, in our view, it does not provide:

- sufficient information to inform access seekers for the purposes of negotiating access with DBIM
- arbitration criteria that sufficiently protect the interests of access seekers; it thereby undermines the purpose of arbitration as a 'backstop'.

We find the 2019 DAU is likely to materially increase uncertainty regarding access to DBCT, which could adversely affect investment incentives and would not be in the public interest.

Nonetheless, we are of the view that a pricing model without reference tariffs could be appropriate to be approved for the declared service at DBCT. We have identified a number of amendments to the 2019 DAU that we consider necessary in order for us to approve a replacement access undertaking for the declared service applying a negotiate-arbitrate model. These amendments are discussed throughout this decision and are specified in Appendices A and B.

Decision

(1) Our decision is to refuse to approve the 2019 DBCT DAU.

(2) We consider it appropriate for DBIM to amend the 2019 DBCT DAU in accordance with the amendments described in this decision and specified in Appendices A and B.

Overarching issues

DBIM and other stakeholders raised several overarching issues in the context of the 2019 DBCT DAU. The following sections provide an overview of these issues, which are discussed in more detail throughout this decision.

Primacy of negotiated outcomes

DBIM considered that primacy should be given to commercial negotiations and that the parties have not had a real or meaningful opportunity to negotiate under previous access undertakings.[23] DBIM noted there is no requirement in the QCA Act for an access undertaking to include a price.[24]

[22] Sections 138(2)(a), (b), (d), (e) and (h) of the QCA Act.
[23] DBCTM, sub. 1, p. 11.
[24] DBCTM, sub. 1, p. 30.

In the case of DBIM, it considered that the only matter the 2019 DAU must state is its expiry date.[25] Given DBIM is in an expansionary environment, DBIM considered it particularly important that the access undertaking does not introduce unnecessary regulatory burdens, which would put at risk efficient investment in the Terminal.[26]

The DBCT User Group noted that the existing model is a negotiate-arbitrate model, where reference tariffs assist in facilitating efficient negotiation. The DBCT User Group considered that DBIM and access seekers could agree to a different price if non-reference terms were offered that made doing so attractive.[27] However, it considered there is limited scope or no scope for users to reach different or tailored arrangements in relation to the DBCT service, noting:

- existing users and access seekers that are parties to '8X' conditional access agreements have already agreed all terms other than price
- all users seek a single coal handling service provided by common infrastructure.[28]

The DBCT User Group and New Hope Group also noted that DBIM has a high degree of market power and access seekers have limited countervailing power—meaning a pricing model of the kind proposed by DBIM is inappropriate.[29]

We are of the view that, where possible, DBIM and access seekers should be encouraged to reach agreement on the terms and conditions of access—noting that negotiated outcomes may be tailored to reflect the preferences and priorities of DBIM and access seekers/holders (either individually or collectively).

To date, we have approved reference tariffs in access undertakings for the coal handling service provided by DBCT. The adoption of reference tariffs can provide useful information on DBIM's costs and reduce negotiation costs. It can also provide certainty about the access price that we consider appropriate. Relevantly, section 101(4) of the QCA Act expressly permits information about DBIM's costs and pricing to be given in the form of a reference tariff that is approved by us.

However, the inclusion of a reference tariff in an undertaking may reduce scope or incentives to negotiate. Where there is no reference tariff, the parties may have greater incentive to negotiate as there will be less up-front certainty in the outcome under arbitration. The absence of an up-front reference tariff may also permit greater room for flexibility in commercial negotiations, allowing parties to explore different and efficient commercial alternatives or options.

While we have set the price for access through reference tariffs to date, the determination of the reference tariff has followed the outcome of detailed consultative processes, including through collaborative submissions on the terms and conditions of access. In this context, we consider that the move to a negotiate-arbitrate framework without a reference tariff for setting the price for access to the DBCT service, with the changes we require in this decision, will continue to constrain the exercise of market power by DBIM. We consider that it represents a reframing of the negotiation and decision-making process that to date has resulted in us approving a reference tariff.

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

[25] DBCTM, sub. 1, p. 30.
[26] DBCTM, sub. 1, p. 17.
[27] DBCT User Group, sub. 9, pp. 18–19.
[28] DBCT User Group, sub. 13, p. 23.
[29] DBCT User Group, sub. 2, pp. 15–32; New Hope Group, sub. 3, p. 9.

Addressing information asymmetry

Throughout the submission process, the DBCT User Group, New Hope Group and Whitehaven Coal raised concerns that information asymmetry was present between DBIM and access seekers under the 2019 DAU.[30] These stakeholders considered this particularly to be the case for new access seekers (i.e. those who are not currently access holders at DBCT).[31]

The DBCT User Group considered the appropriate way to resolve information asymmetry was to provide a reference tariff. The DBCT User Group considered that any attempt to resolve information asymmetry in the absence of a reference tariff will result in needing such prescriptive requirements that it will give rise to many of the perceived costs of having a reference tariff.[32]

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

We are of the view that the 2019 DAU does not provide sufficient clarity on the minimum information that access seekers will receive. In the absence of a reference tariff, we do not regard the information provision requirements in the 2019 DAU to be adequate in terms of the type, format and availability of pricing-related information, to ensure effective negotiations.

Throughout this investigation, DBIM has proposed a number of amendments to the information provision arrangements in the 2019 DAU. These include the provision of two schedules of information, which will include specific historical and forecast information on cost and pricing matters, along with Terminal metrics.

Overall, we consider that DBIM's proposed amendments to the 2019 DAU reflect a significant attempt to address the issues related to information asymmetry.

We require amendments to the 2019 DAU that will require DBIM to disclose key information to access seekers in a predetermined format. This includes information on costs and pricing, along with an explanation of the methodology applied to calculate various costs. In this decision, we have assessed the appropriate site rehabilitation cost estimate and the appropriate methodology to apply when calculating depreciation for the 2019 DAU period. We require information provided on these costs to reflect our positions in this decision (see Chapters 9 and 10 respectively). We also consider it appropriate for DBIM to provide information on arbitration outcomes to access seekers and access holders (see Chapter 6).

As part of our assessment, we have also considered whether access holders will be provided with sufficient information when they undertake periodic price reviews under access agreements. We consider that amendments are required to provide access holders with sufficient information to enable them to form a view on a reasonable TIC for the purposes of negotiating with DBIM.

Our concerns in relation to information asymmetry are detailed in Chapter 4, while our views on the appropriate amendments to information provision arrangements in the 2019 DAU are explained in Chapter 6.

Collectively, these measures will further reduce information asymmetry between the parties and facilitate more balanced negotiations, and in this way help achieve efficient outcomes.

[30] DBCT User Group, sub. 2, pp. 44–46; New Hope Group, sub. 3, p. 2; Whitehaven Coal, sub. 4, pp. 3–4.
[31] DBCT User Group, sub. 2, pp. 44–45; New Hope Group, sub. 3, p. 7; Whitehaven Coal, sub. 4, p. 3.
[32] DBCT User Group, sub. 9, pp. 18, 21.

Incentives to negotiate

DBIM submitted that it and the access seeker both have an incentive to negotiate an efficient, mutually acceptable TIC.[33] DBIM noted that the effectiveness of the pricing model may be revisited at the end of the regulatory period and that this provides a strong incentive for DBIM to act reasonably in negotiations with users and access seekers.[34]

Nonetheless, DBIM suggested amendments to further incentivise parties to put forward reasonable proposals in negotiations. These included evidentiary limits, termination of vexatious matters, and awarding of arbitration costs.[35]

The DBCT User Group considered that DBIM's economic incentives are to push for the greatest extent of monopoly pricing that can be achieved in negotiations. On the other hand, the economic incentives of existing users are to arbitrate to seek to keep the cost as close to the efficient cost as possible and minimise the likelihood of DBIM engaging in monopoly pricing.[36] The DBCT User Group also proposed tools to incentivise DBIM to propose reasonable and appropriate pricing. These included 'final offer' arbitration, providing 'floor and ceiling' limits for arbitration, and awarding arbitration costs.[37]

We consider that the 2019 DAU, once amended as we require, will provide appropriate incentives for parties to act reasonably during negotiations. For example, we consider that requiring DBIM to engage in collective negotiation with access seekers/holders where lawful, and where requested by access seekers/holders, will promote incentives for effective negotiation.

We consider this decision provides an appropriate balance so that the fact that there is less up-front certainty in relation to the outcomes of an arbitration will create the conditions under which the parties have incentives to negotiate outcomes. As the arbitrator we may also consider the conduct of parties in cost orders. Providing information provision arrangements that are sufficient to adequately inform access seekers and holders in negotiations should also act to incentivise reasonable proposals being put forward.

These matters are further discussed in Chapter 7.

Facilitating effective arbitration

The DBCT User Group raised concerns that arbitration would not provide an appropriate backstop and would not constrain DBIM's ability to exert market power.

The 2019 DAU included arbitration criteria, which we would be required to have regard to, should we receive a dispute under the 2019 DAU on the TIC. We are of the view that these arbitration criteria would not sufficiently protect the interests of access seekers, and will thereby undermine the purpose of arbitration as a 'backstop'.

Following the interim draft decision, DBIM proposed amendments to the 2019 DAU to align the arbitration criteria to section 120 of the QCA Act.[38]

The DBCT User Group considered the section 120 QCA Act criteria did not provide 'sufficient certainty'—it submitted that they are high-level, uncertain and ambiguous, and involve factors

[33] DBCTM, sub. 8, p. 29.
[34] DBCTM, sub. 8, p. 6.
[35] DBCTM, sub. 15, pp. 16–19.
[36] DBCT User Group, sub. 13, pp. 10–11.
[37] DBCT User Group, sub. 16, pp. 31, 38–40.
[38] DBCTM, sub. 8, p. 24.

that can clearly conflict with each other. In particular, the DBCT User Group raised concerns around the arbitration criteria's reference to the value of the service to an access seeker.[39]

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

The value of the service to an access seeker is only one of many factors that we are to have regard to in determining an appropriate TIC. We will assess the appropriateness of a TIC in an arbitration, having regard to the matters in section 120 of the QCA Act, the information before us, and the relevant circumstances of the dispute, including the individual circumstances of the parties involved.

We consider that having regard to the matters in section 120 of the QCA Act in an arbitration, including the value of the service to an access seeker or class of access seekers or users, provides access seekers with sufficient certainty that they will be able to obtain access to DBCT on reasonable terms. We do not consider it appropriate for the TIC to be set at a level that impairs economic efficiency, either in the use of the Terminal or in a related market.

This decision is accompanied by an arbitration guideline, which is largely procedural in nature. It outlines how we intend to manage disputes in relation to the DBCT service.[40]

While the DBCT User Group considered that QCA guidelines that prescriptively determine the methodology for pricing that would apply during an arbitration are necessary to combat information asymmetry and create a higher certainty of outcome[41], we do not consider that guidelines are necessary to address information asymmetry. Instead, we require amendments to the information provision arrangements themselves to address this matter. Further, we acknowledge that publishing guideline documents that are overly prescriptive may reduce the prospect of successful negotiated outcomes. Nonetheless, our arbitration guideline includes limited substantive guidance on key matters. We consider that this balance between use of the arbitration guideline and requiring substantial amendment to the 2019 DAU itself to provide for information provision, strikes the right balance in relation to this issue.

We have considered the arbitration criteria that would apply in relation to potential disputes on the TIC that may occur under the price review process in clause 7.2 of the 2019 DAU Standard Access Agreement (SAA). We are of the view that DBIM's proposed amendments to align the arbitration criteria in the 2019 SAA with the criteria in the 2017 SAA are appropriate.

In considering whether an arbitration framework is effective, we acknowledge there is a balance to be reached on the level of certainty provided around arbitration outcomes and the costs associated with arbitration. We consider that the 2019 DAU, once amended as we require, will provide arbitration that is an appropriate backstop and acts as a threat to constrain DBIM's market power in negotiations. We do not consider that costs and uncertainty associated with arbitration are so material that they will prevent access seekers from pursuing arbitration if not offered a reasonable access proposal during negotiations.

[39] DBCT User Group, sub. 13, pp. 40–41.

[40] The guideline is a publication of the QCA and is non-binding. It is intended to be read in conjunction with (without being part of) any access undertaking that we might subsequently approve.

[41] DBCT User Group, sub. 11, p. 32.

Our views on the appropriate amendments to the 2019 DAU to facilitate effective arbitration are provided in Chapter 7.

Differentiation between access holders and access seekers

The DBCT User Group considered that a negotiate-arbitrate model will result in unfair differentiation between access holders and access seekers, based on different levels of information asymmetry and resources to pursue arbitrations.[42]

DBIM submitted that the vast majority of access seekers currently in the DBCT access queue are large, sophisticated mining companies with extensive experience in conducting mining operations. DBIM considered that the prospect that these same firms are unable to assess an appropriate charge at DBCT is not tenable and is inconsistent with the commercial reality.[43]

We are of the view that our required amendments to the 2019 DAU will adequately constrain DBIM's ability to exercise market power in negotiations with access seekers and access holders.

The amendments we require to the 2019 DAU should facilitate negotiation, providing both access seekers and access holders with sufficient information to form a view on a reasonable TIC for the purposes of negotiating with DBIM.

Further detail on these matters is provided in Chapter 8.

Operation of a pricing model without reference tariffs, where both the 2019 DAU and existing user agreements include features of a reference tariff model

The DBCT User Group submitted that the 2019 DAU seeks to preserve all the regulatory protections that have been introduced as an appropriate part of a reference tariff model, with the principal example being automatic socialisation of matters—including changes in volume and new capital expenditure. The DBCT User Group did not consider these protections to be appropriate under a negotiate-arbitrate regime.[44]

DBIM considered that under its proposed pricing model, socialisation will ultimately be a matter for negotiation between the parties, taking into account the individual circumstances of the access seekers.[45]

We do not consider it appropriate to specify how the TIC is to be updated during the regulatory period (including socialisation arrangements) in the 2019 DAU. We consider that the negotiating parties are best placed to determine these matters, consistent with the underlying premise of a negotiate-arbitrate framework. We also consider that including such arrangements in the 2019 DAU could unduly limit the scope for negotiations.

These matters are discussed across Chapters 5 and 8.

With regards to existing user agreements, the DBCT User Group noted the proposed negotiate-arbitrate regime is not aligned with, or consistent with, the roll-forward process as it operates under existing user agreements.[46]

[42] DBCT User Group, sub. 9, p. 11.
[43] DBCTM, sub. 8, p. 12.
[44] DBCT User Group, sub. 9, p. 30.
[45] DBCTM, sub. 10, p. 23.
[46] DBCT User Group, sub. 13, p. 54.

DBIM stated that existing user agreements clearly envisage that the method of determining access charges may vary over time, and clause 7.2 of existing user agreements allows for drafting changes to be made to address this.[47]

We have not been provided with information that satisfies us that existing user agreements would not be able to incorporate a negotiated tariff, as opposed to a predetermined reference tariff.

Periodic price reviews under clause 7.2 of existing user agreements provide for the review of pricing matters with the commencement of each access undertaking for the Terminal. Where the parties do not reach agreement under this review, we consider the arbitrator's powers are broad in relation to determining all charges and the method of calculating, paying and reconciling them. We consider that any such arbitrated outcome will be able to provide certainty about the operation of existing user agreements going forward.

Our views on this matter are discussed in Chapter 8.

Non-pricing terms

While stakeholders opposed DBIM's proposed pricing model (and related consequential wording changes to the 2019 DAU), the DBCT User Group recognised the reasonable nature of some of the non-pricing terms in the 2019 DAU.[48] Following consultation, the DBCT User Group and DBIM agreed that amendments should be made to other terms. Overwhelmingly, we consider that the consensus positions submitted are appropriate to be approved.

Our assessment of non-pricing terms is provided in Chapter 11.

1.6 Structure

This decision is structured as follows:

Assessment of the pricing model and non-price terms

- Chapter 1: Introduction—provides background and context to our investigation.
- Chapter 2: Legislative framework—sets out how we have applied our legislative obligations in making this decision.
- Chapter 3: Overview of the 2019 DAU pricing model—provides detail on the pricing model proposed by DBIM and the revisions it subsequently proposed.
- Chapter 4: Assessment of the pricing model—sets out our assessment and consideration of the pricing model proposed in the 2019 DAU.
- Chapter 5: Appropriateness of the pricing model—explains our views on whether a pricing model without a reference tariff can be appropriate to approve.
- Chapter 6: Amendments to the pricing model—information provision—explains the amendments to the information provision arrangements we consider necessary.
- Chapter 7: Amendments to the pricing model—negotiation and arbitration—explains the amendments we consider necessary to incentivise reasonable behaviour in negotiations and facilitate effective arbitration.

[47] DBCTM, sub. 10, p. 26.
[48] DBCT User Group, sub. 2, p. 7.

- Chapter 8: Amendments to the pricing model—other matters—considers whether further amendments are required to address various matters raised by stakeholders.
- Chapter 9: Remediation charges—provides our assessment of DBIM's proposed rehabilitation cost estimate for the 2019 DAU.
- Chapter 10: Depreciation—provides our assessment of the appropriate depreciation methodology to apply for information provision purposes under the 2019 DAU.
- Chapter 11: Non-pricing terms—provides our assessment of DBIM's proposed non-pricing provisions, and the amendments we consider necessary.

Appendix A: Amended 2019 DAU

Appendix B: Amended 2019 DAU SAA

Arbitration guideline—Arbitration of disputes in relation to the DBCT service

Our arbitration guideline has been published at the same time as our decision on the 2019 DBCT DAU. It explains how we intend to manage disputes relating to the DBCT service and includes limited guidance on key matters.[49]

[49] The guideline is a publication of the QCA and is non-binding. It is intended to be read in conjunction with (without being part of) any access undertaking that we might subsequently approve.

2 LEGISLATIVE FRAMEWORK

We have assessed DBIM's 2019 DAU in accordance with the statutory framework of the QCA Act, as outlined in this chapter.

2.1 The 2019 DBCT draft access undertaking

On 12 October 2017, we issued an initial undertaking notice[50] requiring DBIM[51] to submit a draft access undertaking (DAU) for the declared DBCT service described in section 250(1)(c) of the QCA Act.[52] In response to our initial undertaking notice, DBIM lodged its DAU on 1 July 2019 (the 2019 DBCT DAU).

2.2 Consideration and approval of the 2019 DAU by the QCA

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

Box 1 Section 138(2) of the QCA Act

The authority may approve a draft access undertaking only if it considers it appropriate to do so having regard to each of the following—

(a) the object of this part;

(b) the legitimate business interests of the owner or operator of the service;

(c) if the owner and operator of the service are different entities – the legitimate business interests of the operator of the service are protected;

(d) the public interest, including the public interest in having competition in markets (whether or not in Australia);

(e) the interests of persons who may seek access to the service, including whether adequate provision has been made for compensation if the rights of users of the service are adversely affected;

(f) the effect of excluding existing assets for pricing purposes;

(g) the pricing principles mentioned in section 168A;

(h) any other issues the authority considers relevant.

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

[50] Pursuant to section 133 of the QCA Act.

[51] Effective 8 December 2020, DBCT Management Pty Limited (DBCTM) changed its name to Dalrymple Bay Infrastructure Management Pty Limited (DBIM). The name DBIM is used in this chapter; however, the name DBCTM may still appear in extracts of submissions received prior to the name change.

[52] On 1 June 2020, the Queensland Treasurer declared the DBCT service from 9 September 2020 to 8 September 2030: Queensland Government, *Gazette: Extraordinary*, no. 31, vol. 384, 1 June 2020, p. 267.

we must give DBIM a written notice (a secondary undertaking notice) in which we must provide the reasons for the refusal and ask DBIM to amend the DAU in the way we consider appropriate.[53]

2.2.1 Stakeholder submissions

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

> The DBCT User Group acknowledges the QCA's view that the starting point for the QCA's statutory task is assessing whether the draft access undertaking as submitted is appropriate.
>
> However, it necessarily follows from the meaning of appropriate that the QCA is not required, and it would actually be an invalid exercise of its power, to settle for a less suitable alternative.
>
> …
>
> First, whether the proposed terms of an undertaking are appropriate must be assessed relative to the alternative terms which could be adopted in the draft access undertaking.
>
> It necessarily follows that, if there are considerable advantages of one potential approach over another, that the less advantageous approach is not appropriate. That will remain the case irrespective of whether it was the approach initially submitted.[54]

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

> In order for the QCA to ultimately conclude that a non-reference tariff model is appropriate, it would need to determine that the non-reference tariff model put forward is so close in terms of merits to the reference tariff model that they could both be considered appropriate.[55]

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

> Accordingly, if the QCA was to maintain the preliminary views that a reference tariff model has advantages over a pricing model without reference tariffs, then the DBCT User Group submits that the secondary undertaking notice must require reinstatement of a reference tariff model.[56]

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

> In assessing the submitted undertaking against the section 138(2) factors, the QCA is not required to opine as to whether another form of undertaking would be more appropriate.
>
> …
>
> The User Group also suggests that there is a requirement in section 134(2) for the QCA to formulate amendments that are the "most" appropriate amendments. Rather, the requirement is for the QCA to ask the owner or operator to amend the DAU in "the way the Authority considers appropriate" - again, there is no "most" before "appropriate" in section 134(2) and "appropriate" does not of itself mean "most appropriate".[57]

In response to the draft decision, the DBCT User Group submitted that we had misunderstood its submissions on this point, and that 'the QCA's Draft Decision contains a material error of law in

[53] Section 134 of the QCA Act.
[54] DBCT User Group, sub. 9, pp. 6–7.
[55] DBCT User Group, sub. 9, p. 9.
[56] DBCT User Group, sub. 9, pp. 8–9.
[57] DBCTM, sub. 10, pp. 7–8.

respect of how the QCA carried out its statutory function under the [QCA Act] in considering a proposed access undertaking.'[58] The DBCT User Group stated:

> 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'*
>
> In stating that 'this exercise' under the QCA Act merely requires a consideration of what has been proposed – 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. [Footnotes omitted][59]

The DBCT User Group submitted that for us to carry out our functions in accordance with the QCA Act, we are 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.[60]

2.2.2 Analysis

Section 134(1) of the QCA Act requires the QCA to 'consider a draft access undertaking given to it in response to an initial undertaking notice and either approve, or refuse to approve, the draft access undertaking'. Section 138(2) of the QCA Act states that the QCA 'may approve a draft access undertaking only if it considers it appropriate to do so having regard to each of the following [factors]'.

For the reasons outlined in this final decision, we consider that the 2019 DBCT DAU is not appropriate to approve. Section 134(2) of the QCA Act provides that:

> If the authority refuses to approve the draft access undertaking, it must give the owner or operator a written notice (a "secondary undertaking notice") stating the reasons for the refusal and asking the owner or operator to—

[58] DBCT User Group, sub. 13, p. 12, sub. 16, p. 12.
[59] DBCT User Group, sub. 13, pp. 13–14.
[60] DBCT User Group, sub. 13, p. 15.

(c) amend the draft access undertaking in the way the authority considers appropriate; and

(d) give the authority a copy of the amended draft access undertaking within—

(i) 60 days of receiving the notice; or

(ii) if the period is extended under subsection (2A) —the extended period.

The language of both section 134 and 138(2) of the QCA Act calls for a determination of what is 'appropriate' rather than what is 'most appropriate'. We are not required to identify the 'most appropriate' form of access undertaking. Our power to approve a DAU is subject to the condition that we consider it is 'appropriate to do so', having regard to the various matters in section 138(2) of the QCA Act. Such appropriateness is to be assessed against broad objectives, including economic concepts and the public interest. Broad objectives can be achieved in a variety of ways, and as such, there are likely to be a range of 'appropriate' outcomes.

Accordingly, we are not required to be satisfied that a particular form of undertaking or component of it is 'most appropriate'. Rather, if a DAU is not approved, the QCA Act requires us to identify those amendments which we consider are appropriate. We have undertaken this analysis and have identified in this final decision the set of amendments that we consider are appropriate. In particular, we consider that a negotiate-arbitrate model, containing the amendments described in this final decision, is appropriate to approve. As discussed in this final decision, we consider the 2019 DBCT DAU does not need to be amended to include a reference tariff in order for it to be appropriate to approve.

In summary, we consider that:

(a) the 2019 DBCT DAU is not appropriate to approve

(b) it is appropriate that the 2019 DBCT DAU be amended in the way described in this final decision.

2.3 Contents of access undertakings

DBIM said that the only mandatory requirement for an access undertaking, for present purposes, is an expiry date for the undertaking (s. 137(1) of the QCA Act)—that indeed, there is no requirement under the QCA Act for an access undertaking for a declared service to be in place at all. Further, DBIM said:

> This means both the requirement to give an access undertaking, and the requirement for the access undertaking to specify the method for calculating prices or indeed to publish a reference tariff, are at the discretion of the QCA. It is of note that DBCTM's previous access undertakings have provided for all the possible discretionary contents of an access undertaking.[61]

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

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

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

[61] DBCTM, sub. 1, pp. 11–12.

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

2.4 Factors affecting our approval of the 2019 DAU

We may approve the 2019 DBCT DAU only if we consider it appropriate to do so having regard to the factors outlined in section 138(2) of the QCA Act (Box 1). These factors give rise to different and at times competing considerations, which we need to weigh in deciding whether it is appropriate to approve the 2019 DAU. In the absence of any statutory or contextual indication of the relative weights to be given to factors to which a decision-maker must have regard—as in the QCA Act—the decision-maker is able to determine the appropriate weights.[62] We discuss our approach to each of the section 138(2) factors below.

2.4.1 The object of part 5 of the QCA Act

In making a decision as to whether to approve a draft access undertaking, we are required to have regard to the object of part 5 of the QCA Act.[63] Part 5 of the QCA Act establishes an access regime to provide for third parties to acquire access to services that use significant infrastructure that has natural monopoly characteristics. Its object is set out in section 69E:

> The object of this part is to promote the economically efficient operation of, use of and investment in, significant infrastructure by which services are provided, with the effect of promoting effective competition in upstream and downstream markets.

Legislative background

The Queensland Government inserted this object clause as part of its commitment under the Council of Australian Governments (COAG) 2006 Competition and Infrastructure Reform Agreement, under which all states and territories would introduce a nationally consistent objects clause to support consistency in access regulation across Australia. The clause is similar to section 44AA(a) of the *Competition and Consumer Act 2010* (Cth), which relates to the national access regime.

Inclusion of an objects clause in the national access regime was recommended by the Productivity Commission in its 2001 review of the regime, where it noted that clear specification of objectives is fundamental to all regulation. The Productivity Commission said that inclusion of an objects clause would be highly desirable, to:

- provide greater certainty to service providers and access seekers about the circumstances in which intervention may be warranted
- emphasise, as a threshold issue, the need for application of the regime to give proper regard to investment issues
- promote consistency in the application of the regime by the various decision-makers
- help to ensure that decision makers are accountable for their actions.[64]

[62] *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 41. Also see *Telstra Corporation Ltd v ACCC* [2008] FCA 1758.
[63] Section 138(2)(a) of the QCA Act.
[64] Productivity Commission, *Review of the National Access Regime*, inquiry report no. 17, September 2001, p. xxii.

Economically efficient outcomes

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

We consider economically efficient outcomes are facilitated, among other things, by a robust access framework that constrains the potential exercise of market power by the owner of a facility with monopoly characteristics.

In the context of DBCT, the access framework should be directed at the following:

- Constraining inefficient or unfair differentiation between access holders, access seekers and, where appropriate, other market participants (such as rail operators).
- Supporting efficient entry and competition in upstream and downstream markets, including by providing appropriate incentives for efficient investment in new capacity.
- Providing an opportunity for DBIM to recover at least its efficient costs, including a return on investment that appropriately reflects the commercial and regulatory risks commensurate with providing access.
- Providing appropriate protections of the interests of access seekers and access holders, including in respect of confidentiality, disputes and access rights.
- Providing incentives to reduce costs or otherwise improve productivity, including through innovation.
- Providing a stable, transparent and predictable regulatory framework, with appropriate oversight and enforcement.

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

2.4.2 Legitimate business interests of the owner or operator

We are required to have regard to the legitimate business interests of the owner (DBCT Holdings) or operator (DBIM) of the service.[65] Where the owner and operator are different entities, we are required to have regard to whether the legitimate business interests of the operator are protected.[66]

Relationship between DBCT Holdings and DBIM

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

The term 'owner' is defined as the owner of a facility used, or to be used, to provide the service.[67] Under long-term lease arrangements, the Queensland Government retains ownership of DBCT through DBCT Holdings as state-owned lessor of the Terminal. DBCT is leased to DBCT Investor Services (as trustee for the DBCT Trust), who has subleased it to DBCT Management Pty Ltd. On 19 October 2020, DBCT Management Pty Limited changed its name to Dalrymple Bay Infrastructure Management Pty Limited (DBIM).

[65] Section 138(2)(b) of the QCA Act.
[66] Section 138(2)(c) of the QCA Act.
[67] Schedule 2 of the QCA Act.

The term 'operator' is not defined in the QCA Act. Therefore, it is appropriate to give effect to the plain meaning of the term, taking into account the purpose and object of the QCA Act and the manner in which the term is used in the access provisions.[68]

We consider that DBIM is the operator of the service. We previously determined that various features of DBCT's contractual arrangements support the view that DBIM is the operator because, among other things, it is DBIM that gives access to DBCT by negotiating and entering into the access agreements that specify the commercial terms that apply to access.[69, 70]

We note there may be some occasions where the respective interests of DBCT Holdings (as the owner of the Terminal) and DBIM (as the operator) are in conflict or tension. In balancing the interests of both parties, we have considered DBIM's role as the operator of the service, and the significant capital investments DBIM has made in DBCT.

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

Legitimate business interests

The term 'legitimate business interests' is not a defined term under the QCA Act; however, the explanatory notes to the QCA Act state the following:

> The requirement that the authority consider the access provider's legitimate business interests and investment in the facility will require the authority to recognise the access provider's past investment in the facility and to ensure its decisions do not discourage the access provider from undertaking socially desirable investment in the future. If the authority fails to take adequate account of an owner's legitimate business interest, future investment in this State may be jeopardised. However, the phrase is not intended to justify owners continuing to earn monopoly profits under the regime. The firm and binding contractual obligations of the owner, as well as its reasonably anticipated requirements, should also be recognised in the context of its legitimate business interests.[71]

The concept of 'legitimate business interests' is frequently used and referred to in other access regimes, including the national access regime and the telecommunications access regime (set out respectively in part IIIA and part XIC of the *Competition and Consumer Act 2010* (Cth)). In the context of determining access prices, the 'legitimate business interests' of the access provider include recovering its efficient costs and obtaining a normal return on capital.

In particular, the pricing principles in section 168A of the QCA Act state (in part) that the price of access to a service should generate expected revenue that is at least enough to meet the efficient costs of providing access to the service and include a return on investment commensurate with

[68] As in the 2015 DAU—QCA, *DBCT Management's 2015 draft access undertaking*, final decision, November 2016, p. 24.

[69] See QCA, *DBCTM 2015 (ring-fencing) draft amending access undertaking*, draft decision, February 2016, attachment 2, pp. 73–77.

[70] In the 2019 DAU, DBCT PL is defined as the 'Operator'. This refers to the fact that the day-to-day operational management of the Terminal is subcontracted to DBCT PL by way of the operations and maintenance contract (OMC). DBCT PL is an independent service provider owned by a majority of the existing users of the Terminal. This definition of the 'Operator' in the 2019 DAU is separate from the definition of the 'operator of the service' in the QCA Act—for the purposes of the QCA Act, we consider the operator of the service is DBIM.

[71] Explanatory notes, Queensland Competition Authority Bill 1997 (Qld), p. 30.

the regulatory and commercial risks involved. This suggests that consideration of the legitimate business interests of the owner or operator may allow for a level of pricing above efficient costs.

However, we consider the legitimate business interests of the owner or operator may be informed by, and must be balanced against, the other considerations in section 138(2) of the QCA Act, including the object of part 5 of the QCA Act and the public interest, which includes the public interest in having competition in markets.[72] As such, although the pricing principles and reference to the legitimate business interests of the owner or operator may allow for a level of pricing above efficient costs, we consider that the extent to which prices are set above efficient costs may be constrained by the considerations of promoting economic efficiency[73], the public interest and the other factors in section 138(2) of the QCA Act.

In addition, we recognise that DBIM may have a range of other legitimate business interests, including to:

- promote incentives to maintain, improve and invest in the Terminal and the efficient provision of the declared services
- meet its contractual obligations to existing users
- seek to attract additional tonnages from new and existing coal producers within the relevant region, and contract for these tonnages
- improve commercial returns, where these returns are generated from, for example, innovative investments or improved efficiencies
- ensure the Terminal is maintained and operated in a way that meets legal requirements, including providing for its safe operation and compliance with all relevant environmental obligations
- comply with other contractual or regulatory requirements, such as the Port Services Agreement (PSA)—while also recognising that contractual arrangements do not bind or constrain us in our assessment of the proposed pricing model.

2.4.3 The public interest

We are required to have regard to the public interest, including the public interest in having competition in markets (whether or not in Australia).[74]

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

> It is well established that, when used in a statute, the expression "public interest" imports a discretionary value judgment to be made by reference to undefined factual matters. As Dixon J pointed out in Water Conservation and Irrigation Commission (NSW) v Browning, when a discretionary power of this kind is given, the power is "neither arbitrary nor completely unlimited" but is "unconfined except in so far as the subject matter and the scope and purpose of the

[72] *Glencore Coal Assets Australia Pty Ltd (ACN 163821298) v Australian Competition Tribunal* (2020) 382 ALR 331 at [272].
[73] Specifically, to promote the economically efficient operation of, use of and investment in, significant infrastructure by which services are provided, with the effect of promoting effective competition in upstream and downstream markets (s. 69E of the QCA Act).
[74] Section 138(2)(d) of the QCA Act.

> statutory enactments may enable the Court to pronounce given reasons to be definitely extraneous to any objects the legislature could have had in view". [footnotes omitted][75]

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

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

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

> In addition to the factors specifically recognised in the [QCA's] Interim Draft Decision, the DBCT User Group submits that regulatory certainty and stability of regulation is an important public interest factor, that falls well within the scope of the wide breadth of matters that are encompassed in consideration of the public interest.[76]

DBIM did not disagree that regulatory certainty and stability may be a factor relevant to considering the public interest, but noted that 'the benefits of regulatory certainty and stability do not mean that the regulatory settings should remain static or should not evolve over time'.[77] We note that regulation itself may create incentives and other distortions that are not welfare-enhancing and that regulators may make decisions that contain errors.

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

2.4.4 Interests of persons who may seek access

We are required to have regard to the interests of persons who may seek access to the service, including whether adequate provision has been made for compensation if the rights of users of the service are adversely affected.[78]

In the context of our assessment, we consider the interests of access seekers may include:

- the provision of access on reasonable commercial terms, including through the availability of standard access agreements that represent an appropriate risk allocation (including appropriately protecting existing contractual entitlements)
- being treated in a fair, equitable and non-discriminatory manner

[75] *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379 at [42].
[76] DBCT User Group, sub. 9, p. 13.
[77] DBCTM, sub. 10, p. 20.
[78] Section 138(2)(e) of the QCA Act.

- tariffs that reflect the efficient costs of access, provided that tariffs (and the tariff structure) also provide an appropriate incentive to DBIM to increase efficiency over time
- clear and transparent information about access to, and use of, the declared service, which supports a principled negotiation framework and an effective dispute resolution process
- a clear and effective framework for capacity expansion decision-making
- reasonable protection of an access seeker's confidential information
- effective transitional arrangements as one undertaking replaces another.

As discussed in section 2.4.7, we have also considered the interests of access holders to be relevant[79], because access seekers, upon signing an access agreement, become access holders. Our assessment of the 2019 DBCT DAU seeks to achieve an appropriate balance between different users, including over time.

2.4.5 The effect of excluding existing assets for pricing purposes

We are required to have regard to the effect of excluding existing assets for pricing purposes.[80]

Both DBIM and the DBCT User Group considered that this factor had little impact on the issue of the appropriate pricing model.[81] DBIM submitted that 'there are no relevant assets which could be excluded for pricing purposes and this factor is not relevant to the QCA's consideration of whether to approve the 2019 DAU'.[82]

2.4.6 Pricing principles

We are required to have regard to the pricing principles in section 168A of the QCA Act.[83] These principles state that the price of access should:

(a) generate expected revenue for the service that is at least enough to meet the efficient costs of providing access to the service and include a return on investment commensurate with the regulatory and commercial risks involved

(b) allow for multi-part pricing and price discrimination when it aids efficiency

(c) not allow a related access provider to set terms and conditions that discriminate in favour of the downstream operations of the access provider or a related body corporate of the access provider, except to the extent the cost of providing access to other operators is higher

(d) provide incentives to reduce costs or otherwise improve productivity.

The pricing principles provide guidance in determining the revenue requirements and regulatory tariffs, including the structure of access charges and associated pricing matters.

The pricing principles also recognise that pricing can be used to aid efficiency. For example, differential pricing in appropriate circumstances may provide a direct and cost-reflective signal to users of the costs of expansion, and in doing so, incentivise owners and users to explore alternative productivity measures.

[79] Under section 138(2)(h) of the QCA Act.
[80] Section 138(2)(f) of the QCA Act.
[81] DBCT User Group, sub. 9, p. 15; DBCTM, sub. 10, p. 21.
[82] DBCTM, sub. 10, p. 21.
[83] Section 138(2)(g) of the QCA Act.

The nature of the pricing principles and the context in which they are relevant means that, in respect of some matters, there may be other considerations that are in tension and which require us to undertake a balancing or weighing exercise.

2.4.7 Other issues the QCA considers relevant

We may have regard to any other issues we consider relevant in assessing a DAU.[84] We consider the following matters relevant in our assessment of the 2019 DBCT DAU.

The interests of existing users/access holders

DBIM stated that the statutory factors are not concerned with advancing the rights of existing users who have access under existing contracts or setting charges for those users.[85]

We consider that the interests of access holders are a relevant issue under section 138(2)(h) of the QCA Act. The interests of access holders will generally coincide with the interests of access seekers, as all access seekers who sign contracts will become access holders. However, there may be circumstances where the interests of access holders and future access seekers may differ. For example, the approach to pricing capacity expansions can give rise to tension when a pricing outcome favours one group over another.

The relevance of the 2017 access undertaking

We consider the 2017 AU relevant to our assessment of the 2019 DAU. The 2017 AU represents a package of arrangements that stakeholders are familiar with, and stakeholders are comfortable with the operation of these arrangements.

Whereas we are considering the 2019 DAU afresh, we consider that the 2017 AU (as varied through approved DAAUs over the regulatory period) provides instructive and appropriate guidance to help assess the 2019 DAU. We also recognise that users and other stakeholders, through their experience with the 2017 AU, may have identified aspects of the 2017 AU that have functioned well, as well as aspects that require improvement.

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

Supply chain improvements and coordination

We consider supply chain coordination is an important factor for achieving the object of part 5 of the QCA Act. We consider there is a strong relationship between an efficient and effective Dalrymple Bay coal supply chain and the competitiveness of the Queensland coal industry.

Therefore, the regulatory framework should not unnecessarily restrict or prevent supply chain improvements or innovations that could help facilitate the more efficient development and coordinated operation of the supply chain.

To the extent possible, the framework should have the flexibility to facilitate the alignment of contractual requirements at different parts of the supply chain. This may include participants

[84] Section 138(2)(h) of the QCA Act.
[85] DBCTM, sub. 1, p. 10, sub. 12, p. 16.

having access to information necessary to make informed coordination and contracting decisions; providing an opportunity for users to trade access rights (on both a short- and long-term basis); promoting efficient investment in the relevant DBCT capacity expansions, through differential pricing where appropriate; and having an efficient queue for users to obtain new or additional access rights.

2.5 The 2020 declaration review and the 2019 DBCT DAU assessment

Stakeholders have referred to the 2020 declaration review[86] in their submissions. They highlighted various parts of the materials from that review[87] to support their submissions to this 2019 DAU assessment process.[88]

The 2020 declaration review and the 2019 DAU assessment involve the application of different parts of the QCA Act—in particular, the declaration review considered the access criteria in section 76 of the QCA Act, whereas the assessment of the 2019 DAU has considered the factors affecting the approval of a DAU in section 138 of the QCA Act.

We consider the statutory task under section 138 of the QCA Act is an independent exercise and is different from the task undertaken under section 76 of the QCA Act. However, notwithstanding the judicial review proceedings initiated by DBIM against the Queensland Treasurer in relation to the decision to declare the service provided by DBCT[89], there may be matters raised in the declaration review that are relevant to our assessment of the 2019 DAU. Where we consider such matters to be relevant to the 2019 DAU assessment, these are noted in our decision.

The 2019 DAU assessment is conducted according to the legislative framework, as outlined in this chapter, including having regard to section 138(2) of the QCA Act.

[86] The declaration review refers to the review of whether the DBCT service (among others) should be declared under part 5 of the QCA Act from September 2020.
[87] Including the submissions made to the declaration review, our recommendation and the Minister's decision.
[88] See for example, DBCTM, sub. 10, p. 10; DBCT User Group, sub. 11, pp. 4, 19.
[89] These proceedings are ongoing at the time of writing.

3 OVERVIEW OF THE 2019 DAU PRICING MODEL

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

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

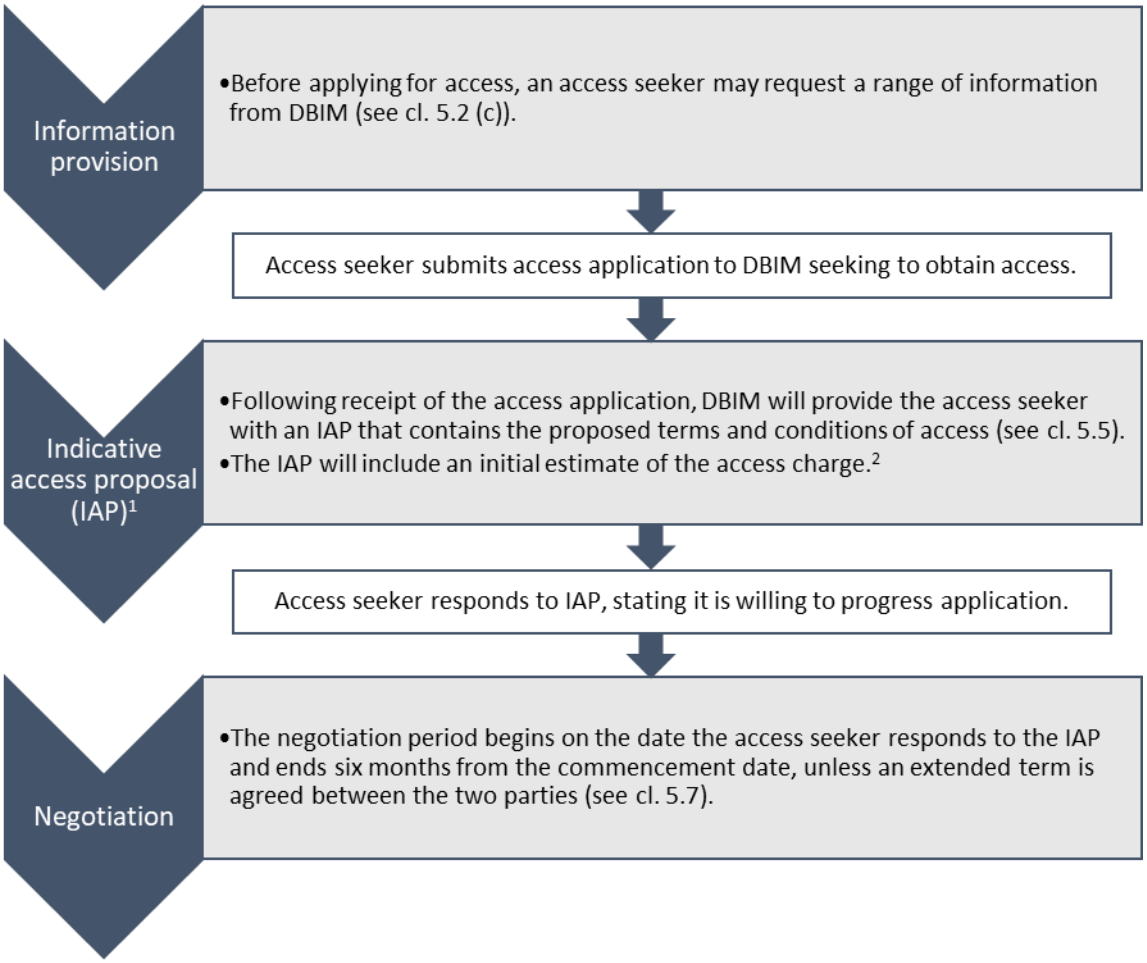
3.1 Framework for negotiations regarding new or additional access under the 2019 DAU

DBIM's proposal provides for access seekers and DBIM to engage in negotiations to determine the TIC; and these negotiations must occur in good faith. DBIM must not unfairly differentiate between access seekers and must make all reasonable efforts to try to satisfy the reasonable requirements of the access seeker (cl. 5.1).

The 2019 DAU includes provisions that DBIM considered would facilitate negotiation. The following figure outlines the general process to apply in negotiating access charges where there is capacity available to contract.[90]

[90] Alternative processes may apply in different situations, such as the current situation at the Terminal where capacity appears to be constrained (see section 3.1.1 for examples).

Figure 2 General process for negotiating new or additional access under the 2019 DAU



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

Information provision

The 2019 DAU includes information provision clauses that DBIM considered would facilitate negotiation.[91] In particular, the 2019 DAU provides for access seekers to request information set out in sections 101(2)(a)–(h) of the QCA Act before submitting an access application, which DBIM must provide within 10 business days of receiving the request (cl. 5.2(c)).[92] This information includes:

(a) information about the price at which the access provider provides the service, including the way in which the price is calculated;

(b) information about the costs of providing the service, including capital, operational and maintenance costs;

[91] DBCTM, sub. 1, p. 40.

[92] In addition to adopting section 101(2) of the QCA Act, the 2019 DAU allows access seekers to request preliminary information relating to the access application (such as copies of the standard access agreement) and request initial meetings to discuss the proposed access application.

(c) information about the value of the access provider's [DBIM] assets, including the way in which the value is calculated;

(d) an estimate of spare capacity of the service, including the way in which the spare capacity is calculated;

(e) a diagram or map of the facility used to provide the service [DBCT];

(f) information on the operation of the facility

(g) information about the safety system for the facility;

(h) if the authority [the QCA] makes a determination in an arbitration about access to the service under division 5, subdivision 3—information about the determination.

In the 2019 DAU (cl. 5.2(c)(2)) providing information is subject to sections 101(3)(a) and (b) of the QCA Act, under which we may determine that the provision of such information is commercially sensitive and authorise DBIM to either not provide such information, or allow it to be provided in a manner that is not unduly damaging.

Indicative access proposal

If DBIM receives an access application, it must respond to the relevant access seeker with proposed terms and conditions of access—referred to as an indicative access proposal (IAP). The IAP will include an initial estimate of the access charge[93] for requested services specified in the access application (cl. 5.5(d)(5)(B)). The IAP is indicative only and does not oblige DBIM to provide access.[94]

DBIM stated that at the commencement of commercial negotiations it would provide access seekers with an offer of a base tariff (founded on a base service, applicable to all users) plus tariffs pertaining to additional services required by the access seeker.[95]

Negotiation period

The 2019 DAU includes a general negotiation period (not specific to the negotiation of the TIC), which will commence on the date the access seeker indicates a willingness to progress its access application after receiving the IAP from DBIM (cl. 5.7(a)(4)). This period for negotiation will expire after six months or an extended period of time agreed by the parties to the negotiation.[96]

3.1.1 Alternative negotiation processes

The negotiation process may vary from the general process (Figure 2) in certain circumstances, such as where capacity of the Terminal is constrained. For example, there are cases where the 2019 DAU provides for access seekers to enter into binding access agreements that do not contain a TIC. This may occur when an access seeker enters into an access agreement that is conditional on an expansion, or when a notified access seeker[97] enters into an access agreement.

When a binding standard access agreement is signed, DBIM and the relevant notified access seeker have 30 days to negotiate and reach agreement on an initial TIC to be specified in the access agreement (cl. 5.4(k)).[98] If agreement is not reached, either party may refer the matter for

[93] Access charges comprise the TIC and an operation and maintenance charge.
[94] Unless the IAP contains specific conditions to the contrary.
[95] DBCTM, sub. 1, p. 42.
[96] Negotiation may cease at an earlier time for a number of other reasons, outlined in clause 5.7(a) of the 2019 DAU.
[97] An access seeker who has been notified that another access seeker (who is not first in the queue) is seeking access to existing available system capacity at a date that is earlier than the first in the queue.
[98] Or such longer period as the parties agree to.

arbitration (cl. 5.4(k)(3)). If there remains sufficient available system capacity for DBIM to enter into an access agreement with a notifying access seeker[99], the parties have 30 business days to negotiate and agree an initial TIC (cl. 5.4(h)).

When a binding conditional agreement is signed, DBIM and the relevant access seeker have 30 days to negotiate and seek to agree an expansion pricing approach.[100]

3.2 Framework for arbitrations regarding new or additional access under the 2019 DAU

Where DBIM and an access seeker are unable to reach agreement on the TIC, the matter may be referred to arbitration.

The dispute resolution provisions in the 2019 DAU will apply if both parties to the dispute agree.[101] Under these provisions, the parties may seek CEO resolution or expert resolution of the matter before referring the dispute to us for arbitration (see cls. 17.2 and 17.3). If the dispute is referred to us, then division 5 of part 5 of the QCA Act will apply (see cl. 17.4(a)).[102] Where we are making a determination on the TIC, we are required to do so in accordance with clause 11 of the 2019 DAU, except to the extent necessary to give effect to any matter agreed by the parties to the arbitration (cl. 17.4(a)).

In making a determination, the 2019 DAU (cl. 11.4(d)(1)) requires us to have regard to:

> (A) the TIC that would be agreed by a willing but not anxious buyer and seller of coal handling services for mines within a geographic boundary drawn so as to include all mines that have acquired, currently acquire or may acquire coal handling services supplied at the Port of Hay Point;
>
> (B) the expected future tonnages of Coal anticipated to be Handled through the relevant Terminal Component during the relevant Pricing Period;
>
> (C) the expected capital expenditure requirements for the relevant Terminal Component during the relevant Pricing Period;
>
> (D) the types of service to be provided to the Access Seeker;
>
> (E) the obligation in the Port Services Agreement to rehabilitate the site on which the Services are provided;
>
> (F) any other TIC agreed between DBCTM [DBIM] and a different Access Holder for a similar service level;
>
> (G) the factors in section 120(1) of the QCA Act;

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

While the 2019 DAU does not specify timeframes for the arbitration process, an arbitration under the QCA Act requires us to use our best endeavours to make an access determination within six months (s. 117A(1)).[103]

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[99] An access seeker who is not first in the queue but seeks access to available system capacity at an earlier date than the first in the queue.

[100] Or such longer period as the parties agree to.

[101] Such disputes will be dealt with under the QCA Act where section 112 is satisfied, unless the parties agree otherwise.

[102] This assumes the dispute satisfies section 112 of the QCA Act. Where the matter referred to us for arbitration does not constitute a dispute for the purposes of division 5 of part 5 of the QCA Act, clause 17.4(b) of the 2019 DAU outlines the process that will apply.

[103] Various exclusions to this time period apply. See section 117A(2) of the QCA Act.

DBIM pointed to part 7 of the QCA Act[104], which it considered includes provisions that emphasise the need for expedient and efficient conduct of the arbitration process.[105] For example, during an arbitration, we are required to act as speedily as proper consideration of the dispute allows (s. 196(1)(e)). In doing so, we must have regard to the need to carefully and quickly inquire into and investigate the dispute and all matters affecting the merits and fair settlement of the dispute (s. 196(2)). Also, we may generally give directions, and do things, that are necessary or expedient for the speedy hearing and determination of the dispute (s. 197(1)(f)).

3.3 Periodic review of access charges under the 2019 DAU SAA

An access holder's access to the Terminal will be governed by the terms and conditions of the relevant access agreement.

The 2019 DAU SAA provides for the periodic review of pricing matters, at the request of either the access holder or DBIM (cl. 7.2(a) of the 2019 SAA).

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

Where the parties do not reach agreement six months before the next pricing period, either party may refer the matter to arbitration. The 2019 SAA requires the arbitrations to be conducted in accordance with the access undertaking.

3.4 DBIM's proposed amendments to the 2019 DAU pricing model

DBIM stated it is committed to working to ensure its proposed pricing model without a reference tariff is balanced, effective and fit for purpose.[106] Since submitting the 2019 DAU proposal, DBIM has proposed a range of amendments, including the adoption of certain amendments outlined in our draft decision. Key amendments include a requirement to provide specific information in a predetermined format and changing the arbitration criteria to align with the factors set out in section 120(1) of the QCA Act. DBIM's proposed amendments are discussed in further detail throughout this decision.

[104] Section 121 of the QCA Act states that part 7 applies to arbitrations occurring under part 5, subdivision 3.
[105] DBCTM, sub. 5, pp. 29–30.
[106] DBCTM, sub. 8, p. 4.

4 ASSESSMENT OF THE PRICING MODEL

Our view is that DBIM's pricing model, as proposed in the 2019 DBCT DAU that it submitted in July 2019, is not appropriate to approve. We consider that key aspects of both the negotiation and arbitration processes, as proposed by DBIM, do not appropriately balance the access undertaking assessment criteria in the QCA Act.

4.1 DBIM's rationale for its model

DBIM provided several justifications for its proposed pricing model.

Firstly, DBIM focused on its interpretation of our draft recommendation for the declaration review of the coal handling service at DBCT as the basis for its proposed pricing model. DBIM stated that we must be informed by the 'competition problem' that declaration of the Terminal would be trying to address, which it said is the asymmetric terms for new access seekers relative to incumbent access holders that impact competition in the coal tenements market. It said the competition problem is narrow for a number of reasons—including that DBIM's market power, with respect to access holders, 'was adequately constrained by the existence of the evergreen existing user agreements'.[107]

DBIM added that the QCA Act does not require 'an access undertaking to specify access charges', and consequently:

> [a] heavy-handed price-setting approach, whereby prices in the access undertaking are set by the QCA on an ex-ante basis, is not appropriate to address the narrow competition problem identified by the QCA and the DBCT User Group in the declaration review.[108]

Secondly, DBIM suggested the prescription of a reference tariff in previous undertakings negated DBIM and access seekers having 'a real or meaningful opportunity to negotiate to reach a commercial access agreement'.[109] It further stated that the level of prescription of a reference tariff was not envisaged under the QCA Act, which gives primacy to commercial negotiations.[110]

DBIM also asserted that commercial negotiation under its proposed model would limit the risk of regulatory error that exists under a prescriptive reference tariff model. It noted that the risk of regulatory error interferes with investment incentives, which is detrimental during an expansionary phase.[111]

Finally, DBIM questioned the application of a uniform reference tariff to its coal handling service, claiming it offers multiple services that warrant differentiated pricing. It said DBCT provides users with a variety of additional services above the standard coal handling service, which impacts the throughput efficiency of the Terminal. DBIM considered that the negotiation of multi-part pricing, and price discrimination based on the additional services, would promote economically efficient use of DBCT.[112]

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[107] DBCTM, sub. 1, p. 19.
[108] DBCTM, *2019 Draft Access Undertaking for DBCT coal handling service*, covering letter to the 2019 DAU submission, 1 July 2019, p. 1.
[109] DBCTM, sub. 1, p. 11.
[110] DBCTM, sub. 1, pp. 28–29.
[111] DBCTM, sub. 1, pp. 29–31, 55, sub. 5, pp. 7–8.
[112] DBCTM, sub. 1, pp. 43–45.

4.2 Stakeholder views

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

Stakeholders opposed DBIM's use of our draft recommendation for the declaration review of DBCT to determine the scope of regulation, including the pricing model, for the 2019 DAU. Their reasons relate to our roles under the QCA Act in assessing a DAU and separately conducting a declaration review.[113]

These stakeholders also disputed DBIM's view that an access undertaking should give primacy to negotiation.[114] Stakeholders argued that the examples DBIM gave of pricing models in other sectors that do not have a reference tariff are different to the coal handling service at DBCT, where DBIM has clear market power.[115]

Additionally, the DBCT User Group argued that DBIM's proposed model will result in greater errors, due to 'some access seekers and users agreeing to the higher monopoly pricing'[116], compared to DBIM's suggested errors resulting from reference tariffs. It also said DBIM overstated the potential for, and outcomes of, regulatory error by providing 'no credible evidence' of such error; not accounting for any errors to be balanced out or addressed over time; and ignoring the transparent and objective development of a reference tariff that would reduce the risks of these errors.[117]

Stakeholders also questioned DBIM's assertion that it offers multiple services additional to the core coal handling service. The DBCT User Group and New Hope Group considered the quoted 'additional services' to be minor and part of the core coal handling service offered at DBCT. They did not consider differentiated pricing of these services to be appropriate, because:

- no other coal terminal in Australia that offers such services does so
- it would be difficult to determine the minor costs and capacity differences involved
- use of these services is a dynamic response to market forces and is therefore difficult to forecast in advance of a pricing period.[118]

4.3 Interim and draft decisions

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

- information provisions that allow access seekers to enter negotiations from an appropriately informed position
- arbitration criteria that credibly constrain market power

[113] Our views on this matter are outlined in Chapter 2 of this decision.
[114] DBCT User Group, sub. 2, p. 6, sub. 6, p. 10, sub. 9, pp. 9–10, sub. 13, pp. 5–6, sub. 16, pp. 13–14; New Hope Group, sub. 7, p. 6.
[115] DBCT User Group, sub. 2, p. 6; New Hope Group, sub. 3, pp. 9–10.
[116] DBCT User Group, sub. 2, p. 37.
[117] DBCT User Group, sub. 2, pp. 37–38, sub. 9, p. 12.
[118] DBCT User Group, sub. 2, pp. 34–35, New Hope Group, sub. 3, pp. 6, 8.

- arbitration criteria that do not result in access seekers being materially worse off in negotiations compared to access holders
- clear and efficient processes in negotiation and arbitration, with transparency around arbitrated outcomes.

Our draft decision maintained the positions expressed in the interim draft decision.

Further stakeholder submissions

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

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

> (a) does not provide a sufficient constraint on the ability of DBCTM to exercise market power in negotiations, which are likely [to] result in prices above the efficient costs of service delivery;
>
> (b) creates uncertainty, which could materially and adversely impact investment investments [sic];
>
> (c) does not promote the economically efficient operation of, use of and investment in, the infrastructure by which the declared service is provided; and
>
> (d) does not appropriate [sic] balance the legislative business interests of DBCTM with the interests of access seekers and access holders, and the public interest.[119]

DBIM proposed a number of amendments to the 2019 DAU following the interim draft decision, which it considered would address our concerns. These revisions include:

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

We also received submissions from DBIM, the DBCT User Group and Aurizon Network in response to the draft decision. We also held stakeholder forums on the draft decision, including a technical forum that provided for experts to confer on an appropriate rehabilitation cost estimate. We sought further submissions in a subsequent round of consultation.

In response to the draft decision, the DBCT User Group maintained that it is not appropriate to rely on the primacy of negotiation as a basis for considering the model appropriate. It said there would be increased costs and limited benefits arising from the proposed model, and little prospect of appropriate negotiated outcomes.[121] The DBCT User Group said that an appropriate model would provide for a 'backstop' reference tariff applying to all users where agreement cannot be reached.[122] It reiterated that the Terminal provides a single common-user service that should be provided on common terms.[123]

[119] DBCT User Group, sub. 9, p. 4.
[120] DBCTM, sub. 8, pp. 4–5.
[121] DBCT User Group, sub. 13, pp. 21–31, sub. 16, pp. 13–29.
[122] DBCT User Group, sub. 13, p. 7, sub. 16, pp. 25, 35.
[123] DBCT User Group, sub. 13, p. 23.

DBIM proposed further amendments to the 2019 DAU that it considered would address the matters raised by the QCA in the draft decision. These revisions primarily extended the scope and detail of information provision to address information asymmetry.[124]

4.4 Analysis

Our decision is to not approve DBIM's 2019 DAU as proposed, given that we do not find DBIM's proposed pricing model is appropriate, having regard to the factors in section 138(2). In particular, we consider the proposed model does not sufficiently constrain DBIM's ability to exercise market power in negotiations with access seekers. Additionally, we consider the arbitration criteria proposed in the 2019 DAU do not sufficiently protect the interests of access seekers, thereby undermining the purpose of arbitration as a 'backstop' for dispute resolution. We find the proposed pricing model is likely to materially increase uncertainty, which could adversely affect investment incentives. That said, we do not consider that a model without a reference tariff is inappropriate in all circumstances. We consider that an alternative 'negotiate-arbitrate' model could be appropriate, subject to the amendments set out in this decision.

Throughout the consultation process, DBIM has indicated it will revise its DAU in a number of areas, in ways which it considers address the concerns raised by the QCA and stakeholders. These proposed amendments are discussed in Chapters 6 and 7 of this decision.

The subsequent sections outline our views on DBIM's proposed pricing model for both the negotiation and arbitration stages. Chapters 6 to 10 of this decision set out the ways in which we consider it appropriate for DBIM to amend its 2019 DAU, to resolve the concerns raised with the proposed pricing model.

4.4.1 Information asymmetry

A key concern with the negotiation process that we consider needs to be resolved is the information asymmetry between DBIM and access seekers. In the absence of a reference tariff, DBIM's 2019 DAU relies on the categories of information DBIM would be obliged to provide to access seekers prior to negotiation (cl. 5.2(c)(2) of the 2019 DAU), consistent with the QCA Act (s. 101(2)).

DBIM and other stakeholders disagreed on the adequacy of the information covered under the provision in the 2019 DAU. The DBCT User Group said the information requirements are inadequate for enabling an informed negotiation.[125] This was echoed by New Hope Group, who referred to the information to be provided under the clause as 'limited, and non-specific'.[126] DBIM responded to this concern stating that 'the high level nature of the information which access seekers can request operates to cast the net wide in terms of the information which can be requested from DBCTM'.[127] It also highlighted that access seekers have access to an 'abundance' of public information relevant to price determinations and an ability to dispute DBIM's compliance with this provision under the dispute resolution provisions in the 2019 DAU (cl. 17).[128]

The DBCT User Group expressed the concern that information made available to access seekers 'is bound to be DBCTM's view about each of those items, without any scrutiny of the type applied where there is a review by the QCA (and often the engagement by the QCA of expert

[124] DBCTM, sub. 12, pp. 7–8.
[125] DBCT User Group, sub. 2, p. 45, sub. 13, pp. 32–36, sub. 16, pp. 35–37.
[126] New Hope Group, sub. 3, p. 6.
[127] DBCTM, sub. 5, p. 32.
[128] DBCTM, sub. 5, p. 32.

consultants)'.[129] New Hope Group suggested new access seekers in particular would encounter difficulties in understanding how different factors provided by DBIM could impact individually negotiated prices, thereby undermining positions in negotiation with DBIM.[130] Whitehaven Coal added:

> In any case, even if an access seeker could be assured of access to all potentially relevant information, it would be extremely difficult (and costly) to assess that information against the claims of DBCT Management, let alone challenge those claims in a manner capable of altering DBCT's negotiating position.[131]

We recognise that some of the information requirements outlined in the QCA Act (s. 101(2))—such as matters related to the determination of price, costs and asset valuation—could be (and have historically been) provided in the form of a reference tariff (s. 101(4)). In that instance, we are able to assess the information concerning DBIM's charges in an open and collaborative manner during a DAU review process. In such a process, access seekers have access not only to a reference tariff but also to a range of information used to derive that reference tariff. We consider that undertaking such a review only at a regulatory reset, rather than at each negotiation (or arbitration) with an access seeker, is more time- and cost-efficient. However, set against this is the fact that the relevant information is not static and is likely to change more frequently than the occurrence of periodic (typically five-yearly) reviews. Nevertheless, in assessing the proposed model, we considered whether the proposed information provision clause would be adequate to ensure a timely negotiated outcome that appropriately balances the interests of access seekers and DBIM.

Firstly, we do not consider that the drafting of the information provision clause in the 2019 DAU (cl. 5.2(c)(2)) provides sufficient clarity on the minimum information access seekers will receive, which could lead to access seekers being unable to reasonably form a view of an appropriate and efficient terminal infrastructure charge (TIC) for the purposes of negotiating with DBIM. We recognise that this clause refers to DBIM's information provision obligations to access seekers in negotiations under the QCA Act (s. 101(2)). We consider that the information obligations under section 101(2) are broadly written and are indicative of the general categories and types of information to be made available in the context of DBIM's proposed pricing model, rather than being an exhaustive or prescriptive list.

When we approved the 2017 AU, we accepted similar drafting for clauses 5.2(d)–(e), after also assessing the information related to sections 101(2)(a)–(c) given in the form of a reference tariff (consistent with s. 101(4) of the QCA Act). We considered the prescriptive nature of the information given in this form appropriate in that context. However, in the absence of a reference tariff, we consider it appropriate to further detail the type, format and availability of pricing related information outlined in section 101(2), with the intent of promoting effective negotiations. We discuss the specific amendments in further detail in Chapter 6.

While DBIM's obligations to disclose determinations in QCA arbitrations (under s. 101(2)(h) of the QCA Act and cl. 5.2(c)(2) of the 2019 DAU) were intended to reduce information asymmetry, we do not consider that these provisions provide sufficient transparency, because:

- the section (s. 101(2)(h)) does not specify the nature of the information to be provided with sufficient precision

[129] DBCT User Group, sub. 2, p. 45.
[130] New Hope Group, sub. 3, p. 7.
[131] Whitehaven Coal, sub. 4, p. 3.

- some of the information may need to be redacted or aggregated to protect the confidential and commercially sensitive information of the parties to the arbitration (s. 101(3))
- the assessment of related information would be conducted in a closed hearing, which may not be accessible to parties outside of the arbitration.

For the same reasons, we do not consider that DBIM's obligation to disclose TICs determined by the QCA in arbitration (cl. 17.4(e) of the 2019 DAU) will provide sufficient transparency.

Additionally, DBIM is not obligated to use information that has been determined by the QCA in prior arbitrations for the calculation of prices for subsequent access seekers under the proposed model. This could result in multiple (concurrent) disputes and arbitrations requiring review of similar information. Again, we do not consider this an efficient approach, particularly where certain information should remain consistent across access seekers and would not materially change within a regulatory period.

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

In response to the interim and draft decisions, DBIM maintained that the information provisions in the 2019 DAU would effectively facilitate negotiations. Nonetheless, it proposed further amendments and more prescriptive information requirements to address the QCA's concerns.[132]

The DBCT User Group acknowledged DBIM's proposed revisions but maintained that no amount of information disclosure can make a non-reference-tariff model appropriate in the context of the DBCT service.[133] It submitted that the proposed information does not satisfy the required criteria expressed by the QCA that the information would allow negotiations from an appropriately informed position.[134]

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

> any attempt to do so, will result in needing such prescriptive requirements that it will give rise to many of the QCA's perceived costs of utilising a reference tariff while still not removing all of the costs and disadvantages of a negotiate/arbitrate model.[135]

We have had regard to submissions. While DBIM's proposed revisions to an extent mitigate the information asymmetry inherent in DBIM's proposed pricing model, the resulting residual information asymmetry is not in the interests of access seekers (s. 138(2)(e)) and further amendments would be required by DBIM before the QCA could accept the 2019 DAU. We discuss the specific amendments in further detail in Chapter 6.

[132] DBCTM, sub. 8, pp. 16–17, sub. 12, pp. 7–8.
[133] DBCT User Group, sub. 11, p. 25.
[134] DBCT User Group, sub. 11, p. 25, sub. 13, pp. 32–36.
[135] DBCT User Group, sub. 9, p. 18.

4.4.2 Time pressures in negotiations

Further to the information asymmetry, we also had regard to the time pressure faced by access seekers during negotiations and its potential impact on the ability of access seekers to negotiate effectively under the proposed model.

Both the DBCT User Group and Whitehaven Coal said there is an asymmetry in the time pressure that access seekers face in negotiations, compared with DBIM, for reasons including:

- ... the access seeker will be pressured to reach agreement to increase their prospects of obtaining limited available access[136]
- DBCT Management's incentive to avoid these [timing] delays would be far weaker than a new access seeker, where DBCT Management is negotiating access for long-term use of a monopoly asset that is at or near capacity.[137]

DBIM responded to these concerns, stating that access seekers are afforded several protections under the proposed model, including requirements for DBIM:

> to take all reasonable steps to progress each access application and any negotiations to develop an access agreement with an access seeker in a timely manner.[138]

Additionally, it specified that the access queue alleviates any pressure on genuine access seekers and that access seekers will have 'ample time' to negotiate with DBIM and, if required, seek an arbitrated outcome from the QCA.[139] Finally, DBIM asserted that the complexities and time sensitivities an access seeker faces in potential negotiations are common, and:

> [t]his is not a good reason to treat one aspect of a mining project's delivery differently from the numerous other aspects which must all be negotiated in a commercial environment.[140]

In the interim draft and draft decisions, we acknowledged the protections for access seekers mentioned by DBIM were also included in previous undertakings, including in the 2017 AU (cl. 5.1). However, in the absence of a reference tariff, we considered these protections may not be sufficient to ensure commercial agreements are reached in a reasonable timeframe.

Under the proposed model, access seekers would be potentially responsible for assessing a significant amount of information before and during negotiations. In the interim and draft decisions we noted our expectation that DBIM would commit to negotiations in good faith under this proposed model (cl. 5.1(c) of the 2019 DAU) and consistent with the QCA Act (s. 101(1)). Nonetheless, we considered the difference in time pressure on DBIM and on access seekers may result in an imbalance in negotiations, which would not be in the interests of access seekers. We acknowledged that some level of uncertainty and time pressure exists in all commercial environments; however, we considered the non-competitive environment for services at DBCT could result in the time pressure being asymmetrically greater on access seekers in negotiations with DBIM, which could result in inefficient outcomes (particularly in the absence of a reference tariff).

In response to the interim draft and draft decisions, DBIM said our concerns are unwarranted and do not accord with commercial reality faced by access seekers.[141] DBIM submitted that, to the extent users face time pressure to secure access at a certain stage of the mine development

[136] DBCT User Group, sub. 2, p. 14.
[137] Whitehaven Coal, sub. 4, p. 5.
[138] DBCTM, sub. 5, p. 33.
[139] DBCTM, sub. 5, p. 34.
[140] DBCTM, sub. 5, pp. 34–35.
[141] DBCTM, sub. 8, p. 25, sub. 12, p. 20.

process, the negotiate-arbitrate model does not affect this.[142] DBIM submitted that any such time pressure does not create pressure to agree to an inappropriate access charge, as the process for determining charges is dealt with separately. It said the process for gaining access is the same with and without a reference tariff and is completely independent of the price that is agreed.[143] Notwithstanding this, DBIM said it is open to considering revised timelines should the queuing process create time pressures to sign up for capacity.[144] The DBCT User Group disagreed that there is no time pressure on access seekers, submitting that:

- the 'notifying access seeker' regime will likely result in any existing Terminal capacity that becomes available being quickly contracted
- the proposed short-term capacity regime will present real time pressure to contract the capacity for the short period in which it is available[145]
- access seekers face pressure to obtain the capacity in parallel to contracting rail capacity and developing and financing the related new coal mining project for which the capacity is sought.[146]

We acknowledge DBIM's willingness to accommodate revised timelines to reduce time pressures that may arise due to the queuing process. We consider that time pressures are relevant to the ability of access seekers to be fully informed in negotiations under the proposed model.

DBIM has highlighted the provision of arbitration for access seekers as a constraint on its market power.[147] Nonetheless, we consider the possibility of arbitration by itself does not sufficiently address concerns that arise due to time pressure. In our view, the time required for an access seeker to assess information and effectively engage in negotiation may be greater under the proposed model, while the time pressures faced by access seekers would appear to be the same as those faced under a reference tariff. However, we note there is scope for users to lawfully co-operate in the assessment of the relevant information and that if they are authorised to collectively bargain with DBIM, that scope is likely to be enhanced. However, these factors taken together may still hinder an access seeker's ability to ensure it is sufficiently informed to effectively negotiate, placing it in a materially weaker bargaining position than DBIM. We consider this would not be in the interests of access seekers (s. 138(2)(e)).

We consider the proposed pricing model, as originally submitted, requires amendments to ensure that it does not compromise the ability of access seekers to negotiate from an appropriately informed position, given the time pressures they may face to secure capacity. We discuss the specific amendments in further detail in Chapter 6.

4.4.3 Criteria for arbitration

If appointed as the arbitrator of a dispute under the 2019 DAU, we must have regard to the matters outlined in section 120 of the QCA Act in making an access determination—such as in the arbitration of a TIC—and could have regard to any other matters identified in an access undertaking. DBIM's drafting of the arbitration factors in clause 11.4(d) of the 2019 DAU alludes to this, with mention of section 120 in clause 11.4(d)(1)(G).

[142] DBCTM, sub. 10, p. 13.
[143] DBCTM, sub. 10, p. 13.
[144] DBCTM, sub. 10, pp. 9, 13.
[145] DBCT User Group, sub. 13, p. 26.
[146] DBCT User Group, sub. 16, p. 19
[147] DBCTM, sub. 1, p. 54, sub. 5, p. 26.

Consistent with the draft decision, we consider that the proposed arbitration factors in clauses 11.4(d)(1)(A)–(F) of the 2019 DAU are not appropriate to approve as they appear to place an emphasis on matters that may not, in all cases, appropriately balance the interests of DBIM and access seekers or access holders (s. 138(2)(e)). We also do not consider they are matters that need to be separately identified, given that parties already have scope to raise them, and the QCA can have regard to them, within the factors in section 120 (or the wider related matters referred to in clause 11.4(d)(2)).

In addition, we recognise that reference to these factors in the 2019 DAU SAA (cl. 7.2(d)) creates uncertainty as to whether existing access holders—with access agreements under the current or previous undertakings—would receive asymmetrically favourable terms in arbitrations compared to access seekers and new access holders with agreements under the proposed 2019 DAU. We foresee that if this is not addressed, it could adversely affect competition between access holders and access seekers. We consider it preferable, and appropriate, for the arbitration factors to be aligned between current access holders (under legacy access agreements) and access seekers.

DBIM disagreed with our analysis of the arbitration factors included in the 2019 DAU in the interim draft and draft decisions and maintained that its original criteria effectively constrained its market power. Notwithstanding this, DBIM agreed that the factors set out in section 120 of the QCA Act are appropriate for the purposes of the 2019 DAU. DBIM proposed to amend the 2019 DAU such that the QCA is required to only have regard to the factors in section 120 of the QCA Act.[148] This is consistent with the view we have reached in this decision.

DBIM also proposed to amend clause 7.2 of the 2019 DAU SAA to reflect provisions in the existing user agreements.[149] DBIM proposed further amendments in response to the draft decision.[150]

We consider amendments to the arbitration factors are necessary in order for the 2019 DAU to be considered appropriate to approve. These amendments are discussed in Chapters 6 and 7 of this decision.

4.4.4 Impact on certainty at DBCT

The DBCT User Group and New Hope Group stated that DBIM's proposed model introduces material uncertainty for price (and non-price) terms of access [151] and DBIM has not sufficiently justified the deviation from reference tariffs.[152] Both expressed concerns about the impact of this uncertainty on the willingness of access seekers to make longer-term investment decisions, including in dependent markets.[153] The DBCT User Group submitted that a reference tariff is the only method by which upfront certainty can be provided.[154]

DBIM argued that certainty is afforded through 'agreement or arbitration of access charges'[155], which would be contracted for five years or longer if parties agree. It also disagreed with stakeholders on the impacts of excluding a reference tariff on investment incentives, stating

[148] DBCTM, sub. 8, pp. 22–23.
[149] DBCTM, sub. 8, p. 25.
[150] DBCTM, sub. 12, p. 11.
[151] DBCT User Group, sub. 2, p. 40; New Hope Group, sub. 4, pp. 11–12.
[152] DBCT User Group, sub. 6, p. 15; New Hope Group, sub. 7, pp. 3–4.
[153] DBCT User Group, sub. 6, p. 41, sub. 11, p. 9; New Hope Group, sub. 7, p. 4.
[154] DBCT User Group, sub. 9, p. 24.
[155] DBCTM, sub. 5, p. 29.

access charges at DBCT are immaterial to investment in the industry relative to other factors (such as labour or coal prices), based on historical fluctuations.[156]

We considered whether access seekers may have less certainty regarding price outcomes under the pricing model proposed in DBIM's DAU—given the proposed change in the negotiation and determination of access charges. However, we recognise that our assessment of the impact on certainty does not hinge on a comparison with the previous pricing model that included a reference tariff and may have afforded a higher level of certainty. We accept that some level of uncertainty exists in all commercial and regulatory environments, and acknowledge DBIM's point that 'absolute certainty' of a reference tariff is not a prerequisite to full protection.[157] Nevertheless, we consider DBIM's proposed pricing model contains several issues that are likely to create a higher level of uncertainty for access seekers.

We do not consider the possible range of access charges between access seekers, if similar to historical ranges reported by DBIM, would have a material impact on investment incentives relative to other matters, particularly the market price of coal. However, a pricing model that does not sufficiently inform access seekers who are entering negotiations, or adequately protect them from asymmetrical time pressures, could increase the likelihood of negotiated prices gradually increasing where there is insufficient justification for doing so. In addition, we recognise uncertainty may also come from the negotiation-arbitration process—where access seekers may face delays and increased costs to determine access charges. We are concerned that the potential for delay and costly determination of access to available capacity to genuine access seekers could adversely impact investment in DBCT.

DBIM has stressed that the option of arbitration by the QCA is a constraint on its market power and would provide a 'certain backstop' to disputes, reiterating the DBCT User Group's points from a previous submission made to the QCA during the declaration reviews.[158] We note the DBCT User Group's previous statements (as quoted by DBIM[159]) reflect its views regarding the level of certainty provided by QCA arbitration when compared with private arbitration. In our view, these statements alone do not justify a conclusion that the process for determining access charges in the 2019 DAU provides an appropriate level of certainty.

We find the lack of transparency in determining access charges under DBIM's proposed pricing model is likely to introduce material uncertainty to the determination of access charges at DBCT. We consider this uncertainty could impact investment incentives beyond the short term (ss. 138(2)(a) and (h)), and consequently we find the pricing model is not in the public interest (s. 138(2)(d)). Neither is it necessarily in the interests of DBIM as the operator of DBCT (s. 138(2)(c)).

4.5 Conclusion

We consider DBIM's pricing model, as proposed in the 2019 DAU, is not appropriate to approve, having regard to the criteria in section 138(2) of the QCA Act. However, we accept that a pricing model without a reference tariff could be appropriate to approve, if appropriately framed.

We consider the following characteristics are necessary for an appropriate pricing model that does not include reference tariffs:

[156] DBCTM, sub. 5, p. 29.
[157] DBCTM, sub. 5, p. 28.
[158] DBCTM, sub. 5, pp. 19–20, 26.
[159] DBCTM, sub. 5, p. 20.

- *information provision that facilitates negotiations*—provision of the necessary information would allow access seekers to enter negotiations from an appropriately informed position. A model that provides such information will contribute to effective negotiations with prices that are likely to be at least reflective of the efficient costs of providing access to the service, reducing the dependence on arbitrations
- *arbitration criteria that constrain asymmetrical market power*—the criteria that we must have regard to in arbitrations should act to credibly constrain DBIM's market power and lead to pricing that reflects at least the efficient costs of providing access to the service, consistent with the pricing principles of the QCA Act (s. 168A)
- *certainty that the arbitration criteria do not impede competition for access to capacity*—the arbitration criteria should not result in access seekers being materially worse off in negotiations compared to access holders, where the latter may benefit from arbitration criteria that more effectively constrain DBIM's market power under existing access agreements
- *clear and efficient negotiation and arbitration processes and transparency around arbitrated outcomes*.

We consider DBIM's pricing model, as proposed, requires amendments to demonstrate these characteristics and be appropriate to approve under section 138(2) of the QCA Act.

Summary of decision 4.1

Our decision is to refuse to approve the pricing model as proposed by DBIM in the 2019 DBCT DAU. We consider the proposed pricing model is likely to materially increase uncertainty regarding access to DBCT and does not appropriately balance the interests of access seekers and DBIM.

5 APPROPRIATENESS OF THE PRICING MODEL

Part 5 of the QCA Act provides a negotiate-arbitrate framework for the setting of terms and conditions of access. Stakeholders have been able to make submissions about the appropriate terms of access as part of the draft access undertaking approval process. Relevantly, the access undertakings approved to date have included a reference tariff. DBIM and access seekers have not negotiated terms following the approval by us of an access undertaking, but rather have chosen to adopt the reference tariff and related reference terms, even though it has been open for them to agree different outcomes.

We consider that an access undertaking with no reference tariff is a reframing of the existing negotiate-arbitrate approach. While the price-setting process will be different to a reference tariff model, critically, the exercise of market power will be constrained by the ability to refer a dispute to arbitration and our required amendments. Moreover, key elements of our consultation and decision-making processes in the event of arbitration are also likely to be broadly aligned with our processes to date—we will still invite submissions and consider them in accordance with criteria in the QCA Act and will provide reasons for our final determination.

5.1 Stakeholder submissions

The 2019 DBCT DAU includes a pricing model without a reference tariff. Throughout the 2019 DBCT DAU assessment process, it has been apparent that stakeholders hold divergent views about whether it would be appropriate for us to approve the pricing model proposed in the DAU.

5.1.1 DBIM submissions

DBIM has indicated that it is opposed to the inclusion of a reference tariff in the 2019 DBCT DAU. Instead, DBIM considers the DAU should place primacy on commercial negotiation of access charges, with arbitration by us as a 'fall-back'. DBIM said:

- There is no requirement in the QCA Act for an access undertaking to contain a reference tariff.[160]
- The regulatory framework in part 5 of the QCA Act is based on encouraging commercial negotiation as the primary means of negotiating terms and conditions of access to a declared service. Negotiated outcomes resolving the terms and conditions of access are preferable to regulated outcomes, and negotiation can limit the potential for regulatory error, as access seekers and users are in a better position than the QCA to know their own business circumstances and the costs and benefits to them of access to DBCT.[161]
- The QCA determining and publishing a reference tariff removes all incentive for access seekers and existing users to seek to negotiate on price or attempt to reach commercial agreement with DBIM.[162]
- Uncertainty regarding the absence of a reference tariff affects both DBIM and access seekers, but there is no evidence that uncertainty deters access seekers.[163]

[160] DBCTM, sub. 1, pp. 28–29, sub. 10, p. 8.
[161] DBCTM, sub. 1, pp. 28–29, sub. 10, p. 8.
[162] DBCTM, sub. 1, p. 11.
[163] DBCTM, sub. 8, p. 7, sub. 12, p. 19.

5.1.2 DBCT User Group and other stakeholder submissions

The DBCT User Group and other stakeholders, including New Hope Group and Whitehaven Coal, were strongly of the view that the 2019 DBCT DAU should be amended to incorporate a reference tariff and that a non-reference tariff model is fundamentally flawed and cannot be amended in any way to be appropriate for us to approve.[164]

The DBCT User Group said the only clear outcome of a negotiate-arbitrate model is pricing in excess of efficient costs of supply.[165] It said that under 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, 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. (footnote omitted)[166]

The DBCT User Group also said:

> [I]t is the negotiate/arbitrate model itself that gives rise to the inappropriateness. While there are amendments that could be made to remove some egregious provisions, the flaws of the negotiate/arbitrate structure mean that the 2019 DAU cannot be modified to be appropriate while it relies on that form of regulation.[167]

Additionally, the DBCT User Group made the following arguments against the 2019 DBCT DAU as submitted by DBIM:

- The proposal in the DAU to not have a reference tariff represents a significant shift from the existing regulatory framework—and one that is not justified by any change in circumstances.
- The proposed DAU would damage regulatory certainty, including the certainty of future pricing and the stability and predictability of the existing regulatory framework, with resulting damage to investment decisions in dependent markets.
- The theoretical 'fall-back' of arbitration by the QCA will not be an effective or a credible threat that will sufficiently constrain DBIM's behaviour, as arbitrations will be costly and uncertain, and involve significant delays to obtaining access.
- The absence of a reference tariff will disadvantage future access seekers more than existing users, with a resulting adverse impact on competition and investment in dependent markets.[168]
- The model is less efficient than determining a reference tariff.
- At no point has the negotiate-arbitrate model proposed been envisaged by DBIM as anything other than an avenue for a price increase.[169]

[164] DBCT User Group, sub. 6, pp. 3–5, sub. 9, p. 20; New Hope Group, sub. 3, sub. 7; Whitehaven Coal, sub. 4.
[165] DBCT User Group, sub. 13, p. 6.
[166] DBCT User Group, sub. 13, p. 6.
[167] DBCT User Group, sub. 6, p. 16.
[168] DBCT User Group, sub. 6, pp. 3–5, sub. 9, pp. 16–20, sub. 11, p. 15.
[169] DBCT User Group, sub. 13, pp. 10–11.

- DBIM has market power and, in equivalent circumstances, it is clear from other regulatory decisions that regulators have imposed reference tariffs or full regulation.[170]
- The total costs of a negotiate-arbitrate model will be substantially higher than a single process for assessment of a reference tariff.[171]
- DBIM does not have an incentive to negotiate on non-price terms or on pricing below the highest level it considers achievable in an arbitration.
- DBIM will enter negotiations with the knowledge that users have made sunk investments and that there is no risk of users ceasing to use the service.[172]

New Hope Group said:

> There is no way to modify a negotiate/arbitrate model of regulation to balance the interests of the parties at DBCT—and the best way to balance the interests of DBCT Management, access seekers and access holders is to adopt an undertaking based model of regulation, under which the QCA determines an efficient price for access.[173]

Whitehaven Coal noted that, among other things, information asymmetry exists between DBIM and access seekers in the negotiating process—in particular as the latter may not have experience in negotiating access at DBCT.[174]

5.2 Primacy of negotiated outcomes

We are of the view that, where possible, DBIM and access seekers should be encouraged to reach agreement on the terms and conditions of access.

Negotiated outcomes may be tailored to reflect the preferences and priorities of DBIM and users/access seekers (either individually or collectively). We consider such outcomes are preferable to terms and conditions of access being set by us. If the parties cannot reach an agreement between themselves, the matter will be referred to arbitration—which will allow the respective parties to make submissions to an impartial and independent arbitrator (which may be us), on what they consider reasonable terms and conditions of access are.

DBIM had previously submitted draft access undertakings for approval that proposed the price for access be set through reference tariffs. We subsequently accepted a reference tariff methodology and its level following detailed consultative processes, including through the receipt of collaborative submissions on the terms and conditions of access.

In this context, we consider that the move to a negotiate-arbitrate framework without a reference tariff for setting the price for access to the DBCT service will continue to constrain the exercise of market power by DBIM. As such, it represents a reframing of the negotiation and collaboration process that to date has resulted in us approving a reference tariff.

The adoption of a negotiate-arbitrate framework without a reference tariff for setting the price for access to DBCT also remains consistent with the intent of part 5 of the QCA Act and the national access regime more broadly.

[170] DBCT User Group, sub. 16, p. 14.
[171] DBCT User Group, sub. 16, pp. 21–22.
[172] DBCT User Group, sub. 13, p. 10.
[173] New Hope Group, sub. 7, p. 3.
[174] Whitehaven Coal, sub. 4, pp. 2–3.

5.2.1 Background to access regulation and terms and conditions of access

The purpose of access regulation is to address the market failure associated with an enduring lack of effective competition, due to natural monopoly, in markets for infrastructure services where access is required for third parties to compete effectively in dependent markets.[175]

In recommending the creation of a national access regime, the Hilmer Report emphasised the importance of a framework through which negotiated access could be provided:

> [An] … approach would be to require the relevant Minister to stipulate more specific pricing principles in the context of declaring a right of access to particular facilities. Once those principles were established, the parties would be free to negotiate access agreements … If the parties could not agree on an access price, either party could insist on binding arbitration in accordance with the declared principles.
>
> … Once principles are in place the parties have a greater degree of certainty over their respective rights and obligations. This approach is also less interventionist than regulated outcomes and should facilitate the evolution of more market-oriented solutions over time.[176]

The Council of Australian Governments (COAG) accepted the recommendations of the Hilmer Report, with the Commonwealth and state and territory governments signing the Competition Principles Agreement (CPA). This agreement provides for:

- the primacy of negotiations[177]
- an avenue for resolving disputes through arbitration, should parties fail to reach agreement.[178]

5.2.2 Part 5 of the Queensland Competition Authority Act

The QCA Act was subsequently passed in 1997 and provides for an access regime in part 5 that is based on a negotiate-arbitrate model, in which the primary responsibility is on the access provider and access seeker to negotiate on price and non-price terms.[179]

The importance of negotiations as a means of resolving disputes was discussed in the explanatory notes at the time of passage of the Bill:

> [Following declaration, the] second step of the process is the compulsory dispute resolution process which can only be invoked once negotiations in good faith fail to produce an agreement between the parties. The regime provides for dispute resolution through recourse to the QCA as arbitrator (although parties are free to arrange for private arbitration of a dispute).[180]

Application of Part 5 to DBCT

To date we have approved three access undertakings for the coal handling service provided by DBCT under the QCA Act framework—in 2006, 2010 and 2017. Each of these access undertakings contained detailed terms and conditions for access as well as a reference tariff (although there is no requirement for an approved undertaking to contain a reference tariff and related reference terms).

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[175] Productivity Commission, *National Access Regime*, inquiry report 66, 2013, p. 72.
[176] Independent Committee of Inquiry on National Competition Policy (the Hilmer Committee), *National Competition Policy*, 1993, p. 255.
[177] COAG, *Competition Principles Agreement*, 11 April 1995, as amended to 13 April 2007, cl. 6(4).
[178] COAG, *Competition Principles Agreement*, 11 April 1995, as amended to 13 April 2007, cl. 6(4).
[179] For instance, division 4, subdivision 1—Negotiations for access agreements: relating to obligations on an access provider in negotiations with access seekers.
[180] Explanatory Notes, Queensland Competition Authority Bill 1997, p. 6.

These undertakings reflected the outcome of DAU approval processes, including consultation, and at times collaborations and negotiations between the parties, to determine both non-price and price matters.

2006 access undertaking

The 2006 access undertaking process followed on from our detailed regulatory review of a DAU submitted by DBIM in June 2003. The process culminated in our final decision in April 2005 to refuse to approve the DAU. DBIM and the DBCT User Group subsequently negotiated and broadly agreed a revised DAU that included both price and non-price terms (including a proposed reference tariff) that DBIM submitted in January 2006. We approved that DAU without amendment and noted at the time that:

> [o]n other than a small number of issues, the DAU submitted by DBCT Management was supported by the DBCT User Group representing all current users of the terminal. This had a significant impact on the extent and focus of the Authority's investigations into the DAU and SAA. To the extent that both documents reflect a negotiated agreement between DBCT Management and all users, the Authority is prepared to accept that the DAU and SAA are in the interests of those parties.[181]

2010 access undertaking

Likewise, we approved without amendment the 2010 access undertaking that was negotiated between DBIM and the DBCT User Group. In doing so, we noted that:

> [i]ndeed, both DBCT Management and the terminal's users have emphasised that the DAU reflected a negotiated package of arrangements that was satisfactory to both parties–but that those parties did not necessarily agree on every individual aspect of the DAU.
>
> The Authority has considered the DAU in this context. In particular, the Authority notes that DBCT Management has used a methodology for determining the weighted average cost of capital (WACC) that is not consistent with the Authority's current WACC methodology. That the Authority has approved the revenues and tariffs based on this alternative methodology should not be seen as the Authority endorsing that methodology. Rather, the Authority accepts that the WACC methodology proposed was part of the negotiated package of arrangements agreed with users.[182]

2017 access undertaking

While DBIM and the DBCT User Group were unable to successfully negotiate proposed terms and conditions as part of the 2015 draft access undertaking process, both parties acknowledged that efforts were made in this respect.

DBIM said:

> The parties began discussions in late 2014 and managed to work through a number of amendments to the undertaking but were unable to agree on a package of changes as a whole. In some areas within the supporting submission we have sought to identify where we believe there to be broad User support for a proposed position …[183]

Likewise, the DBCT User Group said:

> [it] acknowledges the efforts made by DBCTM prior to submission of the 2015 DAU to investigate with the DBCT User Group the extent to which it was possible to present an outcome to the QCA that was supported by both DBCTM and DBCT Users. That has resulted in a number of provisions

[181] QCA, *Dalrymple Bay Coal Terminal, 2006 Draft Access Undertaking*, decision, 2006, p. 3.
[182] QCA, *Dalrymple Bay Coal Terminal, 2010 Draft Access Undertaking*, final decision, 2010, p. iii.
[183] DBCT Management, *DBCT Draft Access Undertaking*, covering letter to the 2016 DAU submission, 9 October 2015, p. 1.

> being included in the 2015 DAU which are supported by the DBCT User Group, at least in principle or with some drafting changes …[184]

We subsequently approved the 2017 access undertaking that contained terms and conditions of access, including a reference tariff.

2019 draft access undertaking

For the 2019 draft access undertaking assessment process, we have continued to encourage DBIM and users/access seekers to negotiate on terms and conditions of access. We have also encouraged collaborative submissions through our Statement of Regulatory Intent:

> The QCA encourages open communication between stakeholders, including early signalling of perceived issues, and will provide opportunities for collaboration to resolve these issues, as it will improve the regulatory process.[185]

Following a subsequent stakeholder notice inviting collaborative submissions[186], we received two collaborative submissions (from DBIM and the DBCT User Group), although these submissions did not reflect agreement between the two groups on a number of important terms of access, in particular the pricing approach.

5.2.3 Nature of negotiations under an approved access undertaking

Under the negotiate-arbitrate framework of part 5 of the QCA Act, stakeholders have engaged in collaborations and negotiations on a wide range of matters prior to, or as part of, DBIM submitting a draft access undertaking to us for approval.

Relevantly, the collaborations and negotiations have sought to reach agreement on a broad range of matters, including the reference tariff and related reference terms, as contained in a standard access agreement that we approved.

We understand that once an undertaking has been approved, DBIM and users/access seekers have generally not sought to negotiate terms and conditions of access that differ from the reference tariff and related non-price terms contained in the standard access agreement. This is despite the standard access agreement explicitly providing for the negotiation of non-reference tonnage.[187]

In any event, it is open for parties to negotiate terms and conditions other than those in the standard access agreement if they so choose.

5.3 Moving away from a reference tariff

As a general principle, we consider that it is preferable for parties to negotiate price and non-price terms and conditions of access as opposed to us imposing them. This is because there will be differences in business operations between individual users and access seekers, and ultimately, parties know what is of most value to them and what they are willing to trade away.[188]

To date, we have approved reference tariffs in access undertakings for the coal handling service provided by DBCT. The adoption of reference tariffs can provide useful information on DBIM's costs of providing access and reduce negotiation costs. It can also provide certainty about the

[184] Dalrymple Bay Coal Terminal User Group, submission to the QCA, *DBCT Management's 2015 DAU*, 24 November 2015, p. 3.
[185] QCA, *Statement of Regulatory Intent: DBCT Management's 2019 Draft Access Undertaking*, June 2019, p. 5.
[186] QCA, *DBCT Management's 2019 DAU*, stakeholder notice, 29 April 2020.
[187] DBCT User Group, sub. 16, p. 24.
[188] See also Productivity Commission, *National Access Regime*, inquiry report no. 66, 2013, p. 115.

access price we consider appropriate for reference tonnage on reference terms. Relevantly, the provision of a reference tariff by us is explicitly permitted by section 101(4) of the QCA Act.

That said, the inclusion of a reference tariff may reduce incentives for the parties to reach agreement on terms and conditions of access themselves. For instance, we understand the parties have not engaged in any meaningful price negotiations following the approval of previous access undertakings, and all parties have accepted the reference tariff and related reference terms to date. If there was no reference tariff, parties would have greater incentive to negotiate, as there would be a degree of uncertainty in relation to the outcomes of any arbitration we conduct.

Further, the existence of a reference tariff or tariffs for a regulated service may act to stifle incentives for innovation in the delivery of the service. A reference tariff may also stifle innovations on pricing. For example, users and access seekers may be willing to pay more for access terms that increase flexibility or result in a transfer of risk from them to DBIM but may instead opt for the more certain reference tariff where that is available. However, the scope for bespoke arrangements in the absence of a reference tariff will be subject to negotiations between the parties and to the less-certain outcomes of arbitration if negotiations fail.

5.3.1 An approved undertaking without a reference tariff

To the extent that the perceived certainty provided by a reference tariff within a negotiate-arbitrate framework stifles the incentives of parties to negotiate on pricing matters, its absence could encourage further negotiation between parties. The absence of the reference tariff may also act to better incentivise investments in expansions of the Terminal, and better encourage potential innovation in delivery of the declared service.

We do not consider that the absence of a reference tariff represents a wholesale change in the process for settling the price of access at DBCT. Rather, facilitating negotiations without a reference tariff can be regarded as a reframing of the negotiate-arbitrate process as DBIM and users/access seekers are still likely to participate in many of the same processes as has occurred to date when we determined a reference tariff.

Relevantly, the non-reference tariff model will continue to constrain the exercise of market power by providing for QCA arbitration that will have regard to established statutory criteria. This process will involve us inviting submissions and we will in most cases provide our reasons for our determination to the parties in writing through draft determinations, followed by final determinations. Draft determinations are required for arbitrations that arise under the QCA Act[189], and it will be our preferred approach to also issue them for arbitrations under the undertaking or user agreements, subject to the views of the parties.

Moreover, it is not evident that our determination on pricing under a negotiate-arbitrate framework (without a reference tariff) will be higher or lower than under a reference tariff approach. Under a negotiate-arbitrate model (without a reference tariff), we need to take into account the criteria under section 120 when making a final determination with respect to price, whereas under the current reference tariff model we need to take into account the criteria in section 138(2) of the QCA Act when determining the appropriate price. The criteria under these provisions are both very broad and require us to balance a range of different (and potentially competing) considerations.

[189] Section 117(5) of the QCA Act requires us to make a draft determination in an arbitration for access by an access seeker before making a final determination.

That said, we consider that any removal of the reference tariff must be accompanied by measures that will facilitate meaningful negotiations on terms and conditions of access, with stakeholders only resorting to arbitration in the event agreement cannot be reached.

5.4 Amendments proposed in the draft decision

In our interim draft decision, we acknowledged that there were some advantages to a reference tariff as opposed to a negotiate-arbitrate model that did not contain appropriate controls to constrain DBIM's market power. In the interim draft decision and the draft decision, we proposed amendments to DBIM's model to address our concerns.

Specifically, in the draft decision, our proposed amendments to the pricing model submitted by DBIM included:

- providing additional information to users to enable them to form a view on whether the TIC proposed by DBIM is appropriate. We proposed additional information be provided, including in respect of depreciation and remediation costs, and on Terminal components (if an expansion is to be differentially priced)
- removing prescriptiveness in updating the TIC within the regulatory period
- providing arbitration outcomes to non-participating access seekers
- providing arbitration guidelines that provide further information to parties on substantive matters we will have regard to in any arbitration.[190]

5.4.1 Stakeholder views

The DBCT User Group did not support the model we proposed in the draft decision, whereas DBIM supported it.

DBCT User Group

The DBCT User Group's concerns are summarised below.

DBIM has market power

The DBCT User Group reaffirmed its view that DBIM has market power, arguing that DBIM:

- faces no constraints from competing coal terminals
- has no constraints from countervailing power of users
- has the ability and incentive to engage in monopoly pricing.[191]

The DBCT User Group said it is clear from other regulatory decisions that in equivalent circumstances regulators have imposed reference tariffs or full regulation.[192]

We are not persuaded that a reference tariff is always necessary to constrain DBIM's market power. If measures can be implemented to encourage negotiation but also provide sufficient protections to users in the event that negotiations fail, then we consider that a pricing approach without a reference tariff can be appropriate to approve.[193]

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[190] QCA, *DBCT Management's 2019 draft access undertaking*, draft decision, August 2020, chapter 6.
[191] DBCT User Group, sub. 16, pp. 14–15. The DBCT User Group referred to our findings in the declaration review of the DBCT service in this respect.
[192] DBCT User Group, sub. 16, p. 14.
[193] Whether a reference tariff or non-reference tariff model is appropriate for us to approve for a regulated entity will depend on the assessment of a DAU against the approval criteria in section 138(2). In approving an appropriate

Information asymmetry

The DBCT User Group considered that our proposed approach in the draft decision does not adequately address the information asymmetry between DBIM and users. The DBCT User Group (while supporting a reference tariff) said if a reference tariff framework was removed, it was necessary that:

- DBIM's cost and related modelling of the price it proposes be provided (otherwise it impedes the ability of users/access seekers to form a view on the appropriateness of pricing options)
- publication of arbitration outcomes occur if arbitration is not done collectively. To do otherwise, would place users at a strategic disadvantage in negotiations.[194]

We consider that the DBCT User Group's concerns have merit and that appropriate measures to reduce information asymmetry between the parties are likely to facilitate more balanced negotiations and thereby help achieve efficient outcomes. Additional information on our specific recommendations regarding information asymmetry and information provision are provided in Chapter 6.

Costs of negotiation and arbitration

The DBCT User Group said that the total costs of a negotiate-arbitrate model will be substantially higher than for a single process for assessment of a reference tariff, given:

- the need for numerous bilateral negotiations
- the inability to be able to engage a common legal and economic adviser
- additional economic and legal costs if the matter goes to arbitration.[195]

The DBCT User Group said that costs would be particularly prohibitive on small users and access seekers who require cash at the early stages of a project.[196]

We consider that measures to reduce the costs of negotiation and arbitration are appropriate to the extent they can facilitate resolution between the parties of appropriate terms and conditions of access. For example, those costs will be reduced where sufficient information has been provided to users and access seekers ahead of a negotiation process. Further, avenues exist for access holders and seekers to lawfully collaborate in ways that can reduce negotiation costs. Additional information and our specific recommendations regarding reducing costs of negotiation and arbitration are provided in Chapters 6 and 7.

Absence of incentives for DBIM to negotiate

The DBCT User Group said that DBIM does not have an incentive to negotiate, as users are 'captive', given their sunk investments. Moreover, while DBIM faces a threat that users may seek arbitration, DBIM will realise that the costs of arbitration may be prohibitive for some users.

The DBCT User Group disagreed that a reference tariff discourages negotiation:

> A reference tariff does not disincentivise negotiations about terms that vary from the standard access agreement or reference terms–it only disincentivises accepting a higher inefficient price

pricing model as part of this process, we will consider a range of factors, including the market environment within which the regulated service is provided, stakeholder submissions, as well as the design of any proposed model. These considerations may vary across regulated entities and across DAU approval periods.

[194] DBCT User Group, sub. 16, pp. 35–37.
[195] DBCT User Group, sub. 16, pp. 21–22.
[196] DBCT User Group, sub. 16, p. 22.

> for the standard terms. Where DBCTM was willing to [negotiate] over variations that were considered sufficiently valuable to a user that could occur.[197]

We consider DBIM does have an incentive to negotiate, as DAU approval processes to date have demonstrated willingness of the parties to negotiate outcomes (particularly the 2006 and 2010 access undertaking processes). DBIM and users/access seekers are also likely to have further incentives to continue negotiating the price for access in the absence of a reference tariff, as the parties will not have certainty on whether a determination by an arbitrator will produce a more favourable or a less favourable outcome.

Moreover, it would also be open for us to adopt a reference tariff in subsequent DAU processes if we considered it appropriate to do so, having regard to the criteria in section 138(2) and following a consultative process with the parties. One factor that would be relevant in any future determination would be whether DBIM had demonstrated that it was willing to engage in genuine negotiations over the period in which the 2019 DBCT DAU is in effect.

We consider incentives for both parties to engage in meaningful negotiations, rather than seeking arbitration by us as a first resort, are appropriate and consistent with the intent of part 5 of the QCA Act.

Common infrastructure limits scope to negotiate

The DBCT User Group said that, as all users seek a single coal handling service provided by common infrastructure that is operated in accordance with universally applied Terminal regulations, there is limited scope to negotiate. In particular, the DBCT User Group said:

- DBCT is a cargo assembly port, such that differentiated arrangements cannot be made for varied treatment in relation to dedicated stockpiles, without a significant loss of Terminal capacity.
- The standard of service realistically has to be the same given it is provided by the same operator, using the same infrastructure and subject to the same Terminal regulations.
- Scheduling arrangements need to be common to reflect the common coal supply chain which DBCT forms part of.[198]

In this respect, the DBCT User Group noted the views of the Australian Energy Regulator on gas pipelines:

> The negotiate-arbitrate framework is an appropriate model for a sector that provides customised services …
>
> …
>
> when investigating the best framework for regulating distribution pipelines, it will be important for the AEMC to decide whether tailoring terms and conditions has value for distribution pipelines and their customers. If it does not, we question the value of having the negotiate arbitrate framework for distribution, and whether more specific price determinations, such as those in electricity may be more appropriate.[199]

We consider the scope for negotiation may be more limited where access seekers and users require access to common infrastructure. However, this does not preclude scope for negotiation on a range of matters, including service quality, payment terms and duration of access required and does not impact on our decision to approve a model without a reference tariff. Individual (or

[197] DBCT User Group, sub. 16, p. 25.
[198] DBCT User Group, sub. 13, pp. 23–24.
[199] DBCT User Group, sub. 16, p. 18.

groups of) access seekers and users will have different priorities and requirements, a fact acknowledged by the DBCT User Group when it said that users may have different priorities to access seekers (with the latter prioritising cash flow in the early stages of a project).[200] That said, as mentioned previously, the scope for bespoke arrangements may vary depending on the outcome of negotiations and, failing that, arbitrations.

Contracts are already in place

The DBCT User Group said there is very limited scope for negotiation, as:

- for existing users, all terms other than price have already been agreed as part of the access agreement they have signed
- access seekers that are parties to 8X expansion conditional access agreements are in the same position. This is because, as part of the underwriting conditions for the expansion, they were required to enter into conditional access agreements on the same terms as the SAA—such that, again, only price remains to be negotiated.[201]

We are unconvinced by the DBCT User Group's arguments in this respect, as the terms of access agreements may vary across DBCT users and 8X conditional access seekers. In any event, the access agreements provide for non-reference tonnage to be negotiated.

Terms relating to price are also able to be renegotiated during access charge review periods (cl. 7.2 of the 2017 SAA and 2019 DAU SAA), notwithstanding the executing of access agreements and conditional access agreements. If the parties cannot agree on such amendments, the operation of the existing contracts can be a matter that is resolved as part of any arbitration process conducted in accordance with the terms of the agreement.

Additional information on the operation of the existing contracts is provided in Chapter 8.

DBIM

DBIM was broadly supportive of our draft decision and proposed some further drafting to address matters raised by us.[202]

DBIM reaffirmed its view that a reference tariff was unnecessary and argued that there are a range of matters on which there is scope for negotiation. These include:

> 130.1 Variations to the frequency of the standard five year access charge review under the existing user agreements (i.e. the term of the pricing arrangements, not the term of the contract as argued by the User Group and discussed further below). For example, the parties could decide to take advantage of the prevailing low interest rates to lock in access charges for a period of ten years, rather than the standard five.
>
> 130.2 Payment of access charges in foreign currency.
>
> 130.3 Linking charges to prevailing coal prices, such that DBCTM could share some exposure to market volatility.
>
> 130.4 Incentives for efficient operational behaviours, which could lead to more efficient operation of the terminal.
>
> 130.5 Simple matters of convenience, such as the form of notice requirements.[203]

[200] DBCT User Group, sub. 16, p. 22.
[201] DBCT User Group, sub. 16, pp. 18–19.
[202] DBCTM, sub. 12, p. 3.
[203] DBCTM, sub. 15, p. 28, para 130.

The DBCT User Group reiterated its reservations that there is scope for negotiation. In particular, it argued:

- Pricing with a coal price linkage is unlikely to be ever agreed, as such negotiations have not been successful in the past with other access providers—given the complexities in setting a coal price linkage that both parties consider fair and appropriate. Moreover, DBIM's prospectus highlights that it is not exposed to coal price risk.
- Pricing fixed for a longer term is never likely to be agreed, as:
  - users are becoming more risk averse in relation to long-term contracting than was previously the case, given the volatility of coal prices
  - where we impose a negotiate-arbitrate regime, users and access seekers consider the adverse consequences of doing so will have become starkly evident in the first five years. Given this, users and access seekers will not want to lock in inefficiently high prices for a longer period as that would foreclose the potential for us seeking to prevent such an outcome continuing in the future.[204]

We consider there may be potential for DBIM and users/access seekers to negotiate on matters such as the above, given the risk profiles and preferences of users/access seekers will vary. We understand that generally such negotiations have not occurred to date once we have approved a reference tariff. But that may reflect the desire of the parties not to negotiate once we have approved pricing arrangements. Ultimately, whether the parties seek to negotiate alternative arrangements is a matter for them.

5.5 Further amendments are appropriate

As discussed above, part 5 of the QCA Act is premised on a negotiate-arbitrate framework for access to declared services and does not prescribe that any access undertaking approved by us must include a reference tariff. Rather, our role if we refuse to approve a draft access undertaking is to include arrangements within it that we consider provide appropriate terms and conditions of access to the DBCT service. Each draft access undertaking is assessed on its merits and in accordance with the approval criteria in the QCA Act. There is no presumption that prior arrangements in previous undertakings will necessarily continue in subsequent undertakings.

While it is our final decision to refuse to approve the 2019 DBCT DAU as originally submitted, in this context, we consider it is appropriate to approve an access undertaking for DBCT without a reference tariff. We consider that the parties have an incentive to negotiate, and the potential for exercise of market power by DBIM is constrained by the ability to refer an access dispute to arbitration. DBIM will also be constrained by the various changes to the DAU we require that aim to reduce the asymmetry of information and any imbalances in negotiating power between the parties (that result from the existence of market power).

The amended model should therefore promote incentives to negotiate terms of access and allow the potential for more flexible arrangements that have regard to differences in the risk profiles and priorities of different users/access seekers. There are other alternatives to an ex ante reference tariff approved by us.

[204] DBCT User Group, sub. 16, pp. 20–21.

However, consistent with our draft decision, we also acknowledge that there can be certain downsides in a negotiate-arbitrate model without a reference tariff, if the model does not also include measures to reduce uncertainty and costs for users.

To this end, we consider that further amendments are necessary to DBIM's proposal to:

- address information asymmetry (Chapter 6)
- improve incentives to negotiate (Chapter 7)
- reduce uncertainty in arbitration (Chapter 7)
- reduce the costs of negotiation and arbitration (Chapters 6 and 7).

Addressing information asymmetry

We consider that information asymmetry exists between DBIM and users/access seekers in negotiations under the proposed non-reference tariff model. We consider that addressing information asymmetry, including through additional measures outlined in this decision, is fundamental in facilitating effective and balanced commercial negotiation and arbitration processes.

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

We proposed a range of measures to address information asymmetry between DBIM and users/access seekers in our draft decision, and further measures are described in Chapter 6. These measures include providing users/access seekers with further information on key parameters that impact on the access price. We consider these measures can adequately address the concerns of users/access seekers regarding information asymmetry, without requiring the inclusion of a reference tariff.

Improving incentives to negotiate

While DBIM has market power, we consider it has incentives to negotiate price (and non-price) terms and conditions as demonstrated by the negotiations of parties in previous access undertaking approval processes (especially for the 2006 and 2010 access undertakings).

We note users' concerns that DBIM may seek to extend the negotiation process or make ambit offers in the knowledge that users/access seekers have limited or no alternatives to the DBCT service.[205]

However, we consider that DBIM does not have an incentive to engage in such behaviour, given that it will be open for users to seek arbitration if they are not satisfied with the negotiation process.

Moreover, in the absence of a reference tariff, DBIM will not have certainty on whether the outcome of an arbitration by us on pricing will be better or worse than one DBIM could have negotiated with the user(s) in question. Given this, we consider DBIM's incentive to negotiate will be increased in the absence of a reference tariff.

Nevertheless, we require further amendments to DBIM's DAU in this decision to provide incentives to both DBIM and users/access seekers to engage in genuine negotiation in the first instance, before seeking arbitration (see Chapter 7).

[205] DBCT User Group, sub. 2, pp. 14, 24, sub. 13, pp. 17, 26.

In any event, we will continue to monitor the actions of both DBIM and users/access seekers in negotiating access, following this decision.

Reducing uncertainty in arbitrations

We consider it is important that arbitration processes operate as an effective and efficient 'fall-back' to commercial negotiations. However, as noted above, we also consider that primacy should be given to negotiated outcomes where these can be achieved.

As part of the draft decision, we published a draft arbitration guideline document that indicates the processes we would likely follow, and the methodologies we intend to adopt, in an arbitration under an approved access undertaking (see section 5.4). While an arbitration guideline cannot provide as much pricing certainty as a reference tariff, we have made further amendments (outlined in Chapter 7) to provide greater clarity about how we will:

- arbitrate in a pricing dispute
- have regard to the matters in section 120 of the QCA Act.

Reducing the costs of negotiation and arbitration

We consider the move to a negotiate-arbitrate framework without a reference tariff should be accompanied by measures to reduce the costs of negotiation and arbitration. We acknowledge that these costs may be relatively greater for smaller access seekers/holders, notwithstanding the ability of access seekers/access holders to lawfully collaborate in a way to reduce costs.

Greater information disclosure of financial information that is relevant to the access price, as well as initiatives to allow users/access seekers to share costs related to negotiating an access price, will help to ameliorate any additional costs of a model that does not incorporate a reference tariff (see Chapter 6). Further, collective arbitration will reduce the time and costs of disputes that can be determined at once together (see Chapter 7).

5.5.1 Socialisation

The reference tariffs in the current and previous undertakings have included measures to protect DBIM from volume fluctuations and to share the costs of expansions among all users of the Terminal. These price adjustment mechanisms are known as 'socialisation', as the cost of underwriting DBIM's volume and investment risks is borne by access holders as a group.

The DBCT User Group considered socialisation was appropriate under the current regulatory settings, because all affected stakeholders have transparency of proposals and the opportunity to make submissions in relation to risk, revenue and pricing issues. However, the DBCT User Group said socialisation is not appropriate with a pricing model that does not contain reference tariffs:

> DBCTM's model seeks to preserve all the regulatory protections that have been introduced as an appropriate part of a reference tariff regime, with the principal example being automatic socialisation of matters including changes in volume and new capital expenditure.
>
> …
>
> To put it plainly, socialisation means that users that are not party to commercial negotiations and arbitrations can be affected by the pricing arrangements agreed or determined without affected users having any opportunity to even raise their reviews. That is the very antithesis of the circumstances in which socialisation should apply.[206]

[206] DBCT User Group, sub. 9, pp. 29–30.

The DBCT User Group provided several examples of potential problems with socialisation without a reference tariff:

(a) DBIM negotiates a higher price or other payment, but 'can socialise much of the downside' because a drop in contracted volume automatically raises the TIC for other users. Potential examples include:

  (i) non-standard termination rights

  (ii) an early termination payment, that is less than the take-or-pay that would otherwise apply

  (iii) a variable tonnage contract

  (iv) a payment for a reduction in contracted tonnage.

(b) DBIM develops an expansion for a user with lower 'financial substance', which then becomes insolvent. DBIM can recover returns on the expansion, because a drop in contracted volume automatically raises the TIC for other users.[207]

DBIM rejected these arguments in the DBCT User Group's submissions, and responded:

> Under the negotiate arbitrate model, socialisation will ultimately be a matter for negotiation between the parties taking into account the individual circumstances of the access seekers (or for the arbitration in circumstances where agreement cannot be reached).
>
> A benefit of the negotiate arbitrate model is that it allows for more tailored outcomes accounting for the individual circumstances of the access seeker. DBCTM will be able to offer different approaches to socialisation to access seekers based on their individual risk appetite and cost sensitivity …[208]

DBIM said suggestions that socialisation had the potential to require other users to pay for shortfalls from short-term contracts mischaracterised the 2019 DAU, which did not give DBIM the ability to 'pick and choose the length of supply contracts'.[209] And for commercial reasons, neither an expanding user nor DBIM would want a short-term contract.

DBIM said the examples cited by the DBCT User Group included a range of outcomes that were not permitted under the 2019 DBCT DAU. It said the examples ignored that any socialisation adjustment could be disputed. The examples also ignored that the Terminal was fully contracted for the regulatory period, so it was most likely that in the event of a user default, a new user would contract the capacity.[210]

We consider that it is not appropriate for socialisation terms to be specified in an undertaking that does not contain a reference tariff.

A reference tariff seeks to balance the risks and rewards for the various parties. These risks and rewards are reflected in, among other things, the regulated rate of return. While the socialisation mechanisms create some price risk for customers, with a reference tariff these are mitigated by measures including the minimum term of contracts, and the transparent tariff mechanisms prescribed in the undertaking. Where these circumstances change, it is appropriate for the risk–reward balance to be reconsidered. While negotiation where the undertaking does not include a reference tariff would take place under the overall regulatory protections afforded by the

[207] DBCT User Group, sub. 13, pp. 45–46.
[208] DBCTM, sub. 10, pp. 23–25.
[209] DBCTM, sub. 15, p. 43.
[210] DBCTM, sub. 15, pp. 43–44.

undertaking and the QCA Act, the access seeker or holder will not have the same visibility of any shared risks that is provided by the reference tariff approach.

In other regulatory decisions, we have required measures to prevent negotiated outcomes that favour one access seeker being subsidised by other access seekers and holders. The treatment of revenue and take-or-pay for Aurizon Network is a good example. Revenue cap adjustments under Aurizon Network's reference tariff are calculated on the basis of the amounts it is entitled to earn 'regardless of what it actually earned or collected'.[211] This means that, should Aurizon Network agree preferential take-or-pay terms with an access seeker or holder, other access holders will not be required to pay for those favourable terms through the revenue cap mechanism.[212]

In another regulatory decision, we have also sought to remove measures that unnecessarily restrict terms of access where reference tariffs do not apply. Over the course of the 2016 and 2020 Queensland Rail undertaking assessment processes, we ended prescription of take-or-pay and relinquishment fees on Queensland Rail's non-reference-tariff lines, which account for most of its access revenue.[213] We said this should be left to be negotiated between the parties:

> We are not suggesting that relinquishment fees should not apply. Rather we reiterate that in the absence of a reference tariff, the commercial negotiation of an agreement between Queensland Rail and the access seeker is the appropriate way to consider the best package of risks, costs and entitlements, which may include relinquishment fees and take-or-pay requirements.[214]

We hold a similar view about DBCT—negotiation of a TIC should be informed by, among other things, the way in which risk is allocated between the negotiating parties. As such, it would not be appropriate for DBIM to negotiate a package of 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.

That said, we are in no way precluding specific socialisation measures that might emerge from a negotiation process. Our view is that DBIM and its customers (acting separately or, more likely, collectively) may negotiate bespoke socialisation measures, but an undertaking without a reference tariff should not prescribe any such measures in advance.

For access holders, clause 1.7 of the 2019 DBCT DAU requires DBIM to negotiate any amendments to access agreements in a manner that is equitable and does not discriminate between relevant executed access agreements.

Where access involves expansions, the 2019 DBCT DAU requires DBIM to make an application to us for a ruling as part of the expansion process, in order to determine whether the cost of an expansion is to be recovered through socialised pricing or differential pricing.[215]

In assessing any tariff proposal involving socialisation that is brought to us for arbitration, we will necessarily have regard to all the matters listed in section 120 of the QCA Act, including the effects on competition in upstream and downstream markets.

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[211] Aurizon Network, *2017 Access Undertaking (UT5)*, Schedule F, cls. 4.3 (d)(i) and (ii), and 4.2(j)(i) and (ii). For an explanation of the rationale for the 'entitled' provision for take-or-pay, see QCA, *QR's Proposed Schedule F Amendment*, decision, May 2007, pp. 14–15.

[212] QCA, *QR's Proposed Schedule F Amendment*, decision, May 2007, pp. 14–15. The decision was made when the business that now forms Aurizon Network was the network business of the then QR Ltd.

[213] QCA, *Queensland Rail Draft Access Undertaking*, decision, June 2016, p. 52; QCA, *Queensland Rail 2020 draft access undertaking*, decision, February 2020, pp. 152–154.

[214] QCA, *Queensland Rail 2020 draft access undertaking*, decision, February 2020, p. 153.

[215] DBCTM, sub. 8, p. 8.

As in the 2017 AU, should a dispute on pricing matters be referred to arbitration under the 2019 DBCT DAU, the arbitration process may be informed by any relevant ruling[216] and the characteristics of the relevant Terminal component, including any risk that price discrimination or differentiation between users gives rise to inefficient or otherwise inappropriate transfer of risk (or cross-subsidies) between users.

5.6 Conclusion

While we have said in the past that a reference tariff is an appropriate way to determine the price for access, it is not the only way for prices to be determined under the negotiate-arbitrate framework in part 5 of the QCA Act.

We accept that a negotiate-arbitrate model, by its nature, does not provide the same level of up-front price certainty to access holders and access seekers, nor indeed to DBIM, as a reference tariff model.[217] However, we accept the view of DBIM that some level of uncertainty exists in all commercial and regulatory environments, and acknowledge DBIM's point that 'absolute certainty' of a reference tariff is not a prerequisite to full protection.[218]

In our interim draft decision, we acknowledged that 'there are likely to be advantages to providing for the relevant price and cost information to continue to be provided by way of a reference tariff'.[219] Our interim draft decision set out a number of the benefits of a reference tariff, in this regard, over the form of negotiate-arbitrate model that DBIM had proposed in its 2019 DBCT DAU—and added that 'there are likely to be benefits to requiring DBCTM to amend its 2019 DAU to incorporate a reference tariff'.[220]

We maintain the view that the form of negotiate-arbitrate model proposed by DBIM in the 2019 DBCT DAU is inappropriate, having regard to the statutory factors. For the reasons set out in this final decision, we consider that DBIM's proposed approach to implementing a negotiate-arbitrate model in its 2019 DAU does not adequately address our concerns regarding information asymmetry and market power, and contains several aspects that create a level of uncertainty for access seekers that we view as unacceptable.

However, over the course of our consideration of the 2019 DBCT DAU, we have formed the view that the issues identified in our interim draft decision can be appropriately addressed through amendments to the negotiate-arbitrate model and therefore do not necessitate the reintroduction of a reference tariff into the 2019 DBCT DAU.

For example:

- The price and cost transparency offered by a reference tariff can also be achieved through appropriate information provision prior to the negotiation process (including disclosure to access holders and access seekers of relevant cost and roll forward information and relevant prior arbitrated price outcomes).

[216] As part of this final decision, we are requiring that DBIM amend the 2019 DAU to change references to 'price ruling' to 'expansion ruling'.
[217] DBCT User Group, sub. 6, pp. 13–15; New Hope Group, sub. 7, pp. 3–4.
[218] DBCTM, sub. 1, p. 28.
[219] QCA, *DBCT Management's 2019 draft access undertaking*, interim draft decision, 2020, p. 57.
[220] QCA, *DBCT Management's 2019 draft access undertaking*, interim draft decision, 2020, p. 61.

- While in the past we have had an established and open process for determination of a reference tariff, greater certainty around the negotiation and arbitration process can be established through publishing our arbitration guideline.
- The reference tariff involves a single and open regulatory process. There is a risk that a negotiate-arbitrate model can result in a constant or 'rolling' series of arbitrations, resulting in inefficient, costly and time-consuming outcomes that undermine efficient and timely investment. For the reasons set out in this decision, we consider this risk can be appropriately mitigated through allowing for collective engagement by access holders and access seekers in joint arbitration processes.

In this way, we consider that a well-framed negotiate arbitrate model can deliver an appropriate balance between up front regulatory certainty and commercial flexibility. In particular, an appropriate model would provide certainty around the principles that will be applied in determining any arbitration and information regarding DBIM's costs and other relevant Terminal information, as well as prior arbitrated outcomes.

Relevantly, the proposed model retains many aspects of processes that to date, stakeholders have participated in, and that we have undertaken, as part of implementing appropriate terms and conditions for access at DBCT.

5.7 The way forward

To date, DBIM and users/access seekers have participated in DAU approval processes which have, at times, included reaching a negotiated agreement on certain terms and conditions of access, including price, in an environment where we have subsequently approved an access undertaking with a reference tariff. We understand that parties have not departed from the approved reference tariff and reference terms in access negotiations.

In this context, the absence of a reference tariff simply reframes the existing negotiate-arbitrate approach to one in which a reference price is not established upfront. The parties will continue to negotiate terms and conditions of access, including price and, failing agreement, we will make our arbitration determination on the appropriate price for access (that is, our determination on pricing will occur as part of an arbitration, and not before).

The process we will follow in making an access determination on pricing will also have close parallels to the process we have undertaken in approving a reference tariff. That is, we will continue to:

- provide the parties with natural justice by seeking submissions from relevant stakeholders
- encourage the parties to collaborate, where possible, before making submissions to us
- provide reasons for our position on pricing (in the form of draft and final access determinations, rather than draft and final decisions on an access undertaking)
- have regard to broad statutory criteria in making our decision on the price (s. 120, rather than s. 138(2)).

The remainder of this decision explains the amendments to the 2019 DBCT DAU we consider necessary for the 2019 DBCT DAU to be appropriate to approve. These amendments provide for, among other things, the following:

- Appropriate information provision to enable access seekers to make an informed assessment about a TIC proposal for the purposes of negotiating with DBIM. Negotiations are more likely to be successful and provide for efficient outcomes if access seekers are

adequately informed. However, an overly prescriptive approach to information provision risks limiting the incentives of parties to negotiate on pricing terms of access. Our required amendments to provide for appropriate information provision are outlined in Chapter 6.

- Appropriate incentives to facilitate negotiations, including incentives for DBIM to provide reasonable access proposals in negotiations and an arbitration framework that acts as a credible backstop and threat to constrain DBIM's conduct in negotiations. In this regard, we consider that the opportunities for collective negotiation, where lawful, and collective arbitration, where appropriate, are necessary to promote the effective operation of the negotiate-arbitrate regime. Our required amendments are outlined in Chapter 7.

We have also considered whether additional amendments to the pricing model in the 2019 DAU are required to address other matters raised by stakeholders in submissions (we consider these other matters in Chapter 8).

We have had regard to each of the approval criteria in section 138(2) of the QCA Act in forming our views on whether the DAU is appropriate to approve and the required amendments to the 2019 DBCT DAU (for it to be appropriate to be approved).

Our final decision is to reject the 2019 DBCT DAU as submitted by DBIM. Overall, we consider our required amendments to the 2019 DBCT DAU provide for a negotiate-arbitrate framework that appropriately balances the object of part 5 of the QCA Act (s. 138(2)(a)), the legitimate business interests of DBIM (s. 138(2)(b)), the interests of access seekers (s. 138(2)(e)) and access holders (s. 138(2)(h)), the pricing principles (s. 138(2)(g)), and the public interest (s. 138(2)(d)).

We consider that DBIM's pricing model, with the amendments outlined in Chapters 6, 7 and 8, is appropriate to approve. The amended model has the benefits ordinarily associated with a reference tariff model (such as reduced costs and resolving information asymmetry), but at the same time, it encourages negotiations and innovation in pricing—which is appropriate, as DBIM and users/access seekers know more about their respective priorities, preferences and risk profiles than we do.

The amendments should therefore go some way to addressing the concerns of the users/access seekers over an access undertaking without a reference tariff. Moreover, any concerns are likely to diminish over time as all parties become accustomed to the resolution of access pricing issues under the new pricing model.

In any event, if negotiations fail, QCA arbitration is available as a 'fall-back', and parties can have confidence that we will determine an appropriate and reasonable price for access, having regard to established criteria.

6 AMENDMENTS TO THE PRICING MODEL—INFORMATION PROVISION

This chapter considers the appropriate information provision arrangements for the 2019 DBCT DAU.

Having regard to the assessment criteria in section 138(2) of the QCA Act, we consider that appropriate information provision arrangements will enable access seekers and access holders to make an informed assessment about a TIC proposal for the purposes of negotiating with DBIM. However, an overly prescriptive approach to information provision risks limiting the incentives of parties to negotiate on pricing terms of access.

We consider our decision on the information provision arrangements appropriately balances the assessment criteria in the QCA Act, by addressing information asymmetry where it may exist.

6.1 Appropriate level of information provision

Negotiations are more likely to be successful and efficient if access seekers are adequately informed. Appropriate information provision requirements also discourage DBIM from offering unreasonable access proposals during the negotiation process and encourage more balanced negotiations that are more likely to achieve efficient outcomes.

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

DBIM's submission noted that the purpose of information disclosure is to correct information asymmetry that hinders effective negotiation.[221] We consider that to adequately address information asymmetry, DBIM needs to provide access seekers with information that is sufficient for them to form a view of a reasonable TIC, but which would otherwise not have been available to them unless it is provided by DBIM. There may also be instances where significant information asymmetry means verification of certain information may require the involvement of an independent party, such as the QCA.

The DBCT User Group considered that it cannot be sufficient for information provision to simply refer to how the price is calculated, costs, asset values, reasonable rates of return, or even individual building blocks parameters. The DBCT User Group submitted that past processes have demonstrated that these can be areas of contention, and DBIM has had different views on those matters than what the QCA would consider appropriate. The DBCT User Group considered that any attempt to resolve information asymmetry will result in needing such prescriptive requirements that it will give rise to many of the perceived costs of having a reference tariff, while still having the costs and disadvantages of a negotiate-arbitrate model.[222]

An overly prescriptive approach to information provision risks limiting scope for parties to negotiate on pricing terms of access. Where there is scope for commercial judgement and flexibility around elements of a TIC proposal, they may provide an opportunity for the parties to negotiate without regulatory intervention.

[221] DBCTM, sub. 8, p. 19.
[222] DBCT User Group, sub. 9, pp. 18, 21.

Reference tariffs have been used as a means to provide information to access seekers for negotiations. Given DBIM is proposing the removal of the reference tariff to encourage further scope for parties to negotiate on pricing matters, we consider that information provision requirements must reduce information asymmetry so as to encourage and facilitate effective negotiation.

As such, we have considered the information provision requirements proposed by DBIM in the 2019 DBCT DAU, as well as DBIM's proposed amendments in appendix 4 of its April 2020 submission and appendix 6 of its October 2020 submission.[223]

6.1.1 The 2019 DBCT DAU

The 2019 DBCT DAU (cl. 5.2(c)(2)) includes provisions for access seekers to request information from DBIM in accordance with the QCA Act (ss. 101(2)(a)–(h)). This allows access seekers to request information, including the price at which DBIM provides the service and the costs of providing the service, prior to submitting an access application.[224]

The DBCT User Group, New Hope Group and Whitehaven Coal were of the view that the information provision requirements in the 2019 DBCT DAU did not address information asymmetry concerns, particularly for new access seekers.[225] The DBCT User Group said the information requirements are 'extremely high level and clearly inadequate for enabling an informed negotiation'.[226] This was echoed by New Hope Group, who referred to the information to be provided under the clause as 'limited, and non-specific'.[227]

We consider it is not appropriate to approve the information provision requirements outlined in the 2019 DBCT DAU.

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

- The drafting of the information provision clause in the 2019 DAU (cl. 5.2(c)(2)) does not provide sufficient clarity on the minimum information access seekers will receive. We consider the information obligations in the QCA Act (s. 101(2)) are broadly written and indicative of the general categories and types of information to be made available in the context of DBIM's proposed pricing model, rather than being an exhaustive or prescriptive list.
- The absence of an ex ante assessment (either by us or another independent auditor) of the relevant information to be provided to access seekers means the accuracy and adequacy of the information provided by DBIM would need to be assessed by individual access seekers during negotiations. Access seekers may not be able to form views on these matters, where information asymmetry is present.

[223] DBCTM, sub. 8, appendix 4, sub. 12, appendix 6.
[224] DBCTM, sub. 1, p. 40.
[225] DBCT User Group, sub. 2, pp. 44–45; New Hope Group, sub. 3, p. 7; Whitehaven Coal, sub. 4, p. 3.
[226] DBCT User Group, sub. 2, p. 45.
[227] New Hope Group, sub. 3, p. 6.

6.1.2 DBIM's proposed amendments

Response to the interim draft decision

In response to our interim draft decision, DBIM proposed amendments to the 2019 DBCT DAU to provide for more prescriptive information requirements.[228]

DBIM's proposed amendments continued to include provisions for access seekers to request information from DBIM in accordance with the QCA Act (ss. 101(2)(a)–(h)). However, this option would be provided as part of an indicative access proposal (IAP).

DBIM also proposed to provide two new information sets, as governed by schedules in appendix 4 of its April 2020 submission (schedule H and schedule I).[229]

Schedule H enables access seekers to request historical information (from the start of the 2006 financial year) prior to submitting an access application.[230] This includes price, capacity and cost information, which must be consistent with the information applied to calculate revenue allowances and the TIC in previous QCA decisions.[231] Schedule H also provides this information for the 'preceding period' where necessary. This period starts when the 2019 DAU commences and includes information for the period up until the financial year prior to the one in which the access seeker requests the information from DBIM.

The information set provided in schedule I will be given to access seekers as part of an IAP.[232] Schedule I provides forecast information for the period commencing at the start of the financial year in which the IAP is to be provided and ending on 30 June 2026. The proposed amendments require DBIM to provide access seekers with information that includes:[233]

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

[228] DBCTM, sub. 8, p. 17.
[229] DBCTM, sub. 8, appendix 4, schedule H and I.
[230] Subject to compliance with the confidentiality requirements set out in cl. 8. See DBCTM, sub. 8, appendix 4, cl. 5.2(c).
[231] See DBCTM, sub. 8, appendix 4, schedule H.
[232] See DBCTM, sub. 8, appendix 4, cl. 5.5 (d)(7). Provision of the IAP will be subject to compliance with the confidentiality requirements set out in cl. 8. See DBCTM, sub. 8, appendix 4, cl. 5.5(k).
[233] DBIM's proposed amendments also require DBIM to provide access seekers with information regarding the outcomes of any commercial arbitration relating to access to the DBCT service during the pricing period. This matter is discussed in section 6.2 of this decision.

The proposed information sets, which provide varying levels of prescription, outline the way DBIM is to provide information to access seekers.

Our draft decision considered the information provision arrangements as proposed by DBIM in appendix 4 of its April 2020 submission.

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

Our views on these matters are outlined in Table 2. In forming these views, we considered the extent to which DBIM's proposed amendments address information asymmetry issues and promote opportunities for negotiation, for each category of cost information to be provided.

Table 2 Our consideration of DBIM's information provision arrangements (appendix 4 of its April 2020 submission) for each cost category

Information category	*Arrangements to inform access seekers*	*Scope for negotiation*	*Appropriateness of proposed arrangements*
Capital base	DBIM specified the methodology used to estimate the capital base. DBIM will estimate the capital base using a continuation of the regulatory asset base (RAB) roll-forward methodology, which has been in place since the RAB was set in DBIM's first access undertaking (2006 AU). The mechanistic nature of rolling forward the RAB will enable access seekers to form a view on the appropriate capital base. Additionally, verification of this information is relatively straightforward for access seekers, as long as access seekers can verify the components used to annually update the RAB—namely, inflation, depreciation and the value of commissioned assets (see below).	The mechanistic nature of rolling forward the RAB provides limited scope for parties to negotiate alternative methodologies for estimating the capital base.	We consider a prescriptive approach for providing information on the capital base to be appropriate. Estimating the capital base in the absence of a roll-forward model requires significant knowledge of underlying information and technical expertise. DBIM's approach reflects a continuation of the previous methodology for valuing the asset base.
Inflation	DBIM specified the methodology it will apply to determine outturn inflation for the preceding period. Access seekers can verify this information, as it is publicly available. Regardless, access seekers should be able to form a view on this matter. DBIM does not specify a methodology for forecasting expected inflation. Access seekers should be able to form a view on this matter with information in the public domain on expected inflation and different forecasting methods.	Information provision does not limit scope for informed negotiation on this matter. Access seekers should be able to form a view on this matter through assessing information in the public domain.	We consider that access seekers are able to form a view on these matters from information in the public domain. As such, we have not formed a view as to the appropriate methodology for forecasting inflation. However, to provide further scope for negotiation, DBIM should be required to disclose and explain its methodology for estimating inflation.
Depreciation	DBIM specified a methodology for calculating depreciation of the RAB it will apply in the preceding period and the forecast period. We consider that without the underlying information, access seekers will be unable to	The level of information provision limits scope for informed negotiation on this matter. Calculating depreciation involves assumptions (particularly regarding the	We consider that the approach for providing information on depreciation is not appropriate. A depreciation methodology should be specified for the purposes of the 2019 DAU.

Information category	*Arrangements to inform access seekers*	*Scope for negotiation*	*Appropriateness of proposed arrangements*
	estimate depreciation based on an alternative methodology (e.g. calculating depreciation based on an economic life of the asset that differs to the term of the lease).	economic life of the asset). However, there is limited scope for access seekers to reach an informed alternative view on this matter, should they form differing views on these assumptions, given the asymmetric information not provided.	
Capital expenditure	DBIM is to provide the value of commissioned assets for each financial year of the preceding period, as reasonably determined in accordance with the access undertaking. DBIM also intends to provide forecast information on capital expenditure, including a forecast of the related commissioned assets. The 2019 DAU outlines approval processes for capital expenditure, which addresses the issue of information asymmetry.	The prescriptive approach to capital expenditure (i.e. in accordance with the approval processes in the access undertaking) provides limited scope for parties to negotiate on these matters.	We consider the approach for providing information on capital expenditure is appropriate. The approval processes for capital expenditure in the 2019 DAU should give access seekers confidence in the information provided.
WACC	DBIM is to provide its estimate of the WACC and the individual WACC parameters used to calculate it. It is not required to specify the methodology for estimating the WACC. Access seekers can form a view on WACC, without having to rely on information provided by DBIM. Information in the public domain should allow access seekers to consider/verify WACC information provided by DBIM.[234]	Information provision does not limit scope for informed negotiation on this matter. Access seekers should be able to form a view on this matter from information in the public domain.	Estimating a reasonable WACC typically relies on matters of judgment. Access seekers can form a view on this matter from information in the public domain. However, to further support negotiations, DBIM should be required to disclose and explain its methodology for estimating WACC and the relevant parameters.
Terminal metrics	DBIM is to provide factual information on the utilisation of the Terminal (at the end of the relevant financial year) for each financial year of the preceding period, as well as forecasts of this information for future years.	The factual nature of this information does not provide scope for negotiation.	We consider the approach for providing information on Terminal metrics to be appropriate. The information sufficiently informs access seekers on these matters.

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

Information category	*Arrangements to inform access seekers*	*Scope for negotiation*	*Appropriateness of proposed arrangements*
Rehabilitation cost estimate	DBIM is to provide an estimate of the costs of rehabilitating the Terminal at the end of the lease, in accordance with the requirements of the PSA. DBIM's 2019 DAU proposal includes a consultant's report outlining a rehabilitation plan and cost estimate, which DBIM considered will inform negotiations under the 2019 DAU.[235] Estimation of these costs requires access to underlying information (discussed in Chapter 9). Forming a view on rehabilitation costs requires technical knowledge and involves matters of judgment, as can be seen from the estimates provided by our and DBIM's consultants. Any attempt by access seekers and DBIM to resolve such differences would be time-consuming and costly.[236]	The uncertain nature of the information underlying the estimate limits the scope for informed negotiation on this matter.	We consider the proposed information is not an appropriate basis for negotiation. It is appropriate that we determine the appropriate rehabilitation cost estimate to apply for the 2019 DAU period.
QCA fees	DBIM did not specify the methodology for estimating the costs the QCA charges for the provision of regulatory services related to the Terminal. The QCA provides DBIM information on these fees that should inform forecasts. These costs are immaterial and likely to be uncontroversial.	The factual nature of this information does not provide scope for negotiation.	We consider the approach for providing information on QCA fees to be appropriate. The information sufficiently informs access seekers on this matter.
Efficient corporate costs	DBIM specified a methodology to estimate efficient corporate costs, whereby an independent party is to determine those costs having regard to several benchmarking methods.	The information provision does not limit the scope for informed negotiation on this matter. Where access seekers have access to information on benchmarking methods, they should be able to form a view on this matter with information in the public domain.	In addition to the approach for providing information on corporate costs, we consider it appropriate for DBIM to provide access seekers with detail on the benchmarking methods considered, and the resulting estimates, to enable them to verify the independent estimate and form a view on efficient corporate costs.

[235] DBCTM, sub. 1, p. 52.

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

Information category	*Arrangements to inform access seekers*	*Scope for negotiation*	*Appropriateness of proposed arrangements*
	Given this forecast is based on a benchmarking approach, access seekers should be able to form their own view on efficient corporate costs. Information about the benchmarking methods employed by DBIM will be required for access seekers to verify DBIM's estimate.		
Other forecast efficient costs	DBIM did not specify a methodology to forecast costs relating to working capital management and tax obligations for a relevant efficient benchmarked firm. Given this estimation is based on a benchmarking approach, access seekers do not rely on information provided by DBIM to form their views on these costs. Access seekers should be reasonably well placed to form a view on these costs based on information in the public domain.	The information provision does not limit the scope for informed negotiation on this matter. Access seekers should be able to form a view on this matter from information in the public domain.	Estimating the relevant benchmark costs typically relies on matters of judgment. Access seekers are able to form a view on these matters based on information in the public domain. However, to provide further support for negotiations, DBIM should be required to disclose and explain its methodology for estimating the relevant costs.

On the basis of the views provided in Table 2, our draft decision considered it appropriate for the 2019 DBCT DAU to adopt DBIM's proposed amendments to the information provision arrangements, as provided for in appendix 4 of its April 2020 submission.[237] However, we also considered it appropriate for DBIM to:

- disclose and explain its methodology for estimating inflation, WACC, working capital management and tax obligations
- provide detail on the benchmarking methods that were considered and the resulting estimates that were used to determine efficient corporate costs
- specify the depreciation methodology to apply for the 2019 DAU period (see Chapter 10)
- specify the appropriate rehabilitation cost estimate to apply for the 2019 DAU period, as determined by us (see Chapter 9).

In our draft decision we noted that DBIM's proposed amendments require the information provided in schedules H and I to be certified internally by two senior DBIM managers, to provide access seekers with confidence that the information provided is correct. DBIM's proposed amendments to the 2019 DBCT DAU also provide for an access seeker or DBIM to ask us for advice or directions in relation to the information DBIM provides in accordance with clause 5.5(d) (information provided with the IAP).[238] This is consistent with the QCA Act (s. 101(5)). We considered that these proposed amendments would further assist access seekers in verifying information provided by DBIM and are appropriate to adopt.

Response to our draft decision

In response to the draft decision, DBIM proposed further amendments to the 2019 DAU, as outlined in appendix 6 of its October 2020 submission, to provide for the outcomes listed above.[239]

Overall, we consider that DBIM has made a significant attempt to address our concerns about the information asymmetry between DBIM and potential access seekers, which we identified in our interim draft decision and draft decision.

The DBCT User Group submitted that, while our draft decision facilitates situations where DBIM is required to provide prescribed information about aspects of pricing, DBIM is free to propose pricing calculated in a completely different manner. In that scenario, the information disclosed would have limited benefit and will not result in a more informed negotiation.[240]

In particular, the DBCT User Group noted there is no requirement for DBIM to adopt a building-blocks-based pricing approach. The information to be disclosed will have limited utility for assessing an appropriate TIC where a building blocks methodology is not proposed by DBIM. The DBCT User Group submitted that, to meaningfully reduce information asymmetry, it is necessary for the 2019 DAU to compel DBIM to disclose how the TIC it is offering is calculated on a building blocks basis.[241]

The DBCT User Group also submitted that the draft decision contains no explanation of why the WACC, approval of DBIM's RAB, taxation allowances and corporate overhead allowances should

[237] DBCTM, sub. 8, appendix 4.
[238] See DBCTM, sub. 8, appendix 4, cl. 5.5(j).
[239] DBCTM, sub. 12, p. 3, appendix 6.
[240] DBCT User Group, sub. 13, pp. 32–33.
[241] DBCT User Group, sub. 13, pp. 24–6, sub. 16, pp. 35–36.

not also be subject to an ex ante assessment, which would be more efficient.[242] If we were not willing to determine a building blocks price, the DBCT User Group considered that a less optimal alternative would be for us to:

- determine the WACC
- procure an independent economist to determine the building blocks price, which we would then take into account if called on to arbitrate, and which would be anticipated to inform negotiations between the users/access seekers and DBIM.[243]

The DBCT User Group reiterated concerns about:

- the wide range of WACC outcomes that are likely to be contested in the absence of an independent ex ante assessment
- access seekers having to assess the information themselves.[244]

In general, we are of the view that the amendments proposed by DBIM in appendix 6 of its October 2020 submission enable access seekers to form a view on an appropriate TIC for the purpose of negotiating access with DBIM. We consider that DBIM has largely addressed issues related to information asymmetry between DBIM and potential access seekers that we identified in our draft decision. Our consideration of the appropriate rehabilitation cost estimate is provided in Chapter 9 and the appropriate methodology to apply for providing information on depreciation is outlined in Chapter 10.

We acknowledge there is no requirement for DBIM to propose a TIC that is directly based on the information outlined in the information provision schedules provided in the 2019 DBCT DAU. However, the primary purpose of the information provision requirements is to provide sufficient information to an access seeker, to enable it to form its own view of a reasonable TIC. We consider our decision on the appropriate information provision arrangements achieves this objective, by addressing information asymmetry where it exists.

As outlined above, where there is scope for commercial judgement and flexibility around elements of a TIC proposal, it may provide an opportunity for the parties to negotiate without regulatory intervention. A negotiated outcome, where possible, is preferable, as parties know more about their individual operations and commercial parameters than we do.

Therefore, we do not consider it necessary to require a particular pricing approach, nor to undertake an ex ante assessment of any cost components other than rehabilitation costs and depreciation (see Chapter 9 and 10 respectively). We are of the view that this would also risk an overly prescriptive approach to information provision, potentially limiting scope for parties to negotiate on pricing terms of access.

With regard to undertaking an ex ante assessment of an appropriate WACC, we note that estimating the WACC requires consideration of the relevant circumstances, including the terms of access being negotiated. For instance, the negotiated arrangements for reviewing the TIC through the regulatory period will affect the way in which risk is allocated among the negotiating parties.

[242] DBCT User Group, sub. 13, pp. 32–33.
[243] DBCT User Group, sub. 13, pp. 34–35, sub. 16, p. 32.
[244] DBCT User Group, sub. 13, p. 33.

Our previous approaches and past considerations for determining certain cost components, including the WACC, were comprehensively articulated in public documents and decisions that are available to stakeholders, including access seekers and access holders.

The DBCT User Group submitted that there are numerous costs into which it has never had true visibility. The DBCT User Group noted that DBIM has never provided transparency regarding its actual taxation costs. It considered that merely requiring a disclosure of its methodology for estimating tax obligations will permit DBIM to propose a model that provides an estimate well in excess of its actual tax costs.[245]

In forming a view on an appropriate TIC for the purpose of negotiating access with DBIM, we consider it important that users and access seekers be able to form a view on the costs that an efficient benchmark entity would incur in providing access—and not necessarily the actual costs incurred by DBIM. We consider that the information provision arrangements enable users and access seekers to form a view on the relevant costs incurred by an efficient benchmark entity in providing access to DBCT.[246]

The DBCT User Group also considered that merely requiring an 'explanation of its methodology' will permit DBIM to simply describe its methodology in high-level terms. It considered that requiring DBIM to provide a transparent model to users/access seekers (with the functionality to allow users/access seekers to change individual inputs) is appropriate, to enable them to properly assess DBIM's pricing proposals and engage in informed negotiations.[247]

DBIM submitted that the information schedules in the 2019 DAU show that DBIM will not be required to provide broad information. Rather it will be required to provide specific and detailed information on a wide range of relevant points.[248]

In its December 2020 submission, DBIM proposed to provide a cost-of-service model that can be populated using the information provided by DBIM, or the access seeker's own information, to estimate the efficient costs of providing the service. This is to assist access seekers to assess the reasonableness of DBIM's access proposal, enabling access seekers to easily calculate the effects of various inputs on the estimated cost of providing the service.[249]

We consider it appropriate for the 2019 DBCT DAU to require DBIM to provide a cost-of-service model that can be populated using the information provided by DBIM. This will assist in enabling access seekers to form a view of a reasonable TIC, in a timely manner, using the information provided.

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

6.1.3 Information provision for the relevant Terminal component

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

[245] DBCT User Group, sub. 13, pp. 35–36.
[246] In the interests of transparency and to address potential information asymmetry, we also consider it appropriate for DBIM to provide access seekers with any information which may be relevant to the approval of NECAP.
[247] DBCT User Group, sub. 16, p. 36.
[248] DBCTM, sub. 15, p. 30.
[249] DBCTM, sub. 15, pp. 17, 19.

We consider that DBIM should be required to provide all information specified in the information schedules for the Terminal component in respect of which an access seeker is seeking access.

The 2019 DBCT DAU requires DBIM to make an application to us for a 'price ruling' as part of the expansion process. Where relevant, this ruling is to identify the Terminal component that negotiation should be based on. For example, should we determine that an expansion is to be treated as part of the existing Terminal, DBIM will provide access to that existing Terminal component, and negotiations should occur on this basis. If the ruling determines that an expansion should be treated as a separate Terminal component, negotiations should be based on information relating to that separate Terminal component.

We have also proposed drafting amendments in Appendix A that further clarify our role in determining whether an expansion is to be treated as a separate Terminal component, for a pricing model that does not contain a reference tariff.

In this regard, we have amended all references to a 'price ruling' to an 'expansion ruling' to reflect that in making this ruling we will not be considering, or making a determination on, the access price of an expansion. In the interests of transparency, we consider it appropriate for DBIM to provide access seekers with any expansion ruling made relating to the Terminal component.

We also consider it appropriate to amend the expansion pricing principles that are to apply in assessing whether differentiation should apply in respect of a proposed Terminal capacity expansion. The principles applied in the 2019 DBCT DAU, among other things, consider whether an expansion is expected to increase (or decrease) the TIC for users of the existing Terminal.

Given the TIC, and the arrangements for updating the TIC through the regulatory period, is to be negotiated between the relevant parties, it is not clear how this principle, as drafted, is to be applied in practice. As such, we consider that amending the expansion pricing principles to consider whether an expansion is expected to increase (or decrease) the unit costs for users of the existing Terminal clarifies how this principle is intended to operate.

6.1.4 Updating information provision schedules through the regulatory period

DBIM must provide access seekers with the information specified in the schedules that relates to the relevant Terminal component. The information provided in these schedules may change over time to reflect, among other things, changes in market circumstances and capital expenditure on the Terminal.

Noting that the access agreements and conditional access agreements have already been signed for all Terminal capacity, there may be a significant period between the time at which an access seeker receives the information contained in the schedules and the time at which the access seeker is to commence negotiating the pricing terms of access.

To ensure that access seekers are well-informed at the time of negotiating access terms, we consider it appropriate for access seekers to be able to request revised information specified in the schedules as it becomes superseded during the regulatory period. This will avoid any potential delays to the negotiation process associated with access seekers obtaining the relevant information.

Summary of decision 6.1

It is appropriate for DBIM to amend the 2019 DBCT DAU to:

(1) include the provision of two new information schedules (see schedules G and H of Appendix A), to be provided before an access seeker submits an access application, and along with the IAP, respectively (see cls. 5.2(c)(2) and 5.5(d)(7) of Appendix A)

(2) require all information specified in the information sets to be provided for the Terminal component in relation to which an access seeker is negotiating access (see cls. 5.2(c)(2) and 5.5(d)(7) of Appendix A)

(3) require the information sets to be certified internally by two senior DBIM managers (see cls. 5.2(d) and 5.5(i) of Appendix A)

(4) provide for access seekers and DBIM to ask the QCA for advice or directions in relation to the information provided in accordance with clause 5.5(d) of the 2019 DBCT DAU (see cl. 5.5(j) of Appendix A)

(5) require DBIM to provide, on request, revised information specified in schedules G and H as they become superseded during the regulatory period (see cls. 5.2(d)(1) and 5.5(i)(1) of Appendix A)

(6) replace references to the TIC with unit costs in the expansion pricing principles (see cl. 11.8(a) of Appendix A).

6.2 Disclosure of arbitration outcomes

6.2.1 Introduction

The 2019 DBCT DAU (cl. 5.2(c)) provides for access seekers to request information consistent with section 101(2) of the QCA Act. This includes information about previous arbitrations where the QCA makes a determination under the QCA Act.

Our interim draft decision noted that the 2019 DBCT DAU provided no transparency on arbitrations conducted by a party other than the QCA. In response, DBIM proposed amendments to the 2019 DAU to allow the outcomes of arbitration determinations to be released to (non-participating) access seekers, whether the arbitration is conducted by the QCA or another party. DBIM proposed to provide this information with the IAP.

In the draft decision, we considered that there was merit in requiring DBIM to disclose information on arbitrated outcomes to access seekers and users, including the determination and reasons for the determination. We considered that this disclosure should apply only to providing arbitration determinations relating to the TIC. We provided draft amendments and invited submissions on whether arbitration outcomes should be disclosed, and how disclosure could be implemented.

6.2.2 Stakeholder submissions

In response to the draft decision, DBIM submitted that it was opposed to the requirement for it to disclose arbitration outcomes, contending that the 'provision of detailed information regarding arbitration to access seekers could undermine the negotiate/arbitrate process, with the TIC determined at risk of being interpreted as a de facto reference tariff':

> Requiring DBCTM to disclose details about the outcomes of arbitrations would create a real disincentive for access seekers and access holders to negotiate with DBCTM, even prior to arbitrations having occurred. Disclosure of arbitrated TICs would likely be interpreted as a de facto reference tariff, prejudicing the likelihood of meaningful commercial negotiations. The provisions

> of the QCA Act expressly restrict the disclosure of information in circumstances such as this – where the disclosure is likely to damage the commercial activities of the access provider.[250]

DBIM also considered that arbitrations and their outcomes should remain private and cited various legal authorities to support its submission.[251]

DBIM, however, stated it understood 'the QCA's concerns regarding the information asymmetry that may occur where DBCTM has been party to an arbitration and the other party has not'[252], and proposed to provide additional information regarding the outcomes of arbitrations, including the principles and methodologies the QCA applied in making a determination, and how the QCA took into account the matters in section 120 of the QCA Act.[253]

DBIM noted that it did not consider it appropriate to provide information regarding the initial TIC determined by the arbitrator, as '[p]roviding information regarding the initial TIC or any information that discloses a charge or component of a charge will provide a strong disincentive on parties to negotiate and will risk becoming interpreted as a de facto reference tariff'.[254]

Additionally, DBIM proposed to disclose the above information only to access seekers—it did not agree with our draft decision that arbitration outcomes should be provided to existing users. DBIM submitted that 'the risk that providing arbitration outcomes will act as a disincentive to negotiate is more pronounced for existing users', and that '[i]t is fundamental to the very nature of an access undertaking, that any obligations relate to the provision of access to access seekers'.[255] Additionally, DBIM considered that it should not be required to disclose the outcomes of arbitration determinations unrelated to the TIC, stating that:

> DBCTM does not consider that it should be required to share the outcomes of arbitration determinations unrelated to the TIC. Such arbitrations are likely to be rare, and relate to issues specific to a particular user or access seeker. DBCTM does not consider that sharing the outcomes of such arbitrations is necessary to facilitate effective negotiations more generally.[256]

The DBCT User Group considered that arbitration outcomes for disputes relating to price and non-price terms should be published on the website of DBIM or the QCA:

> 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) – 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

[250] DBCTM, sub. 12, p. 13.
[251] DBCTM, sub. 12, pp. 13–14.
[252] DBCTM, sub. 12, p. 14.
[253] DBCTM, sub. 12, p. 14.
[254] DBCTM, sub. 12, p. 16.
[255] DBCTM, sub. 12, p. 16.
[256] DBCTM, sub. 12, p. 17.

for the contractual price review process before the time period for that review has formally commenced.[257]

The DBCT User Group disagreed with the claims DBIM made, including: 'that arbitrations are required to be kept strictly private'; that the undertaking should not 'deal with matters that impact on existing access holders and how existing access agreements operate'; and that the 'publication of arbitration outcomes will result in the arbitrated price becoming a de-facto reference tariff prejudicing the likelihood of meaningful negotiations'.[258]

6.2.3 Amendments to the 2019 DBCT DAU—disclosure of arbitration outcomes

We consider that the 2019 DBCT DAU as submitted is not appropriate to approve. We consider that it is appropriate that the 2019 DAU be amended in the following ways:

(1) DBIM must keep a register of arbitration determinations. The register must include, for each arbitration determination, details of the following:

  (a) the date of each determination

  (b) the identity of the decision maker (being either the QCA or another arbitrator)

  (c) whether the arbitration involved one or more Access Seekers or Access Holders (or both), but not the identity of any individual party or parties to the arbitration

  (d) the number of parties to the arbitration (other than DBIM), and

  (e) a summary of substantive issues addressed in each determination.

(2) At the same time as we assess the scope of any confidential information to be withheld from disclosure (see bullet point 8 below), we will confer with DBIM and all other parties to the arbitration in relation to determining the list of substantive issues, following which we will notify DBIM of the description of substantive issues to be included by DBIM in the register in respect of each determination.

(3) During a negotiation or dispute under the 2019 DBCT DAU or an access agreement, DBIM must provide the register to the relevant access seekers and/or access holders. The access seekers and/or access holders can request the disclosure of arbitration determinations from the arbitration register at any time during the negotiation or dispute process.

(4) DBIM is required to disclose the determination and reasons for determination for each arbitration requested by an access seeker/holder relating to access in the period to which the negotiation or dispute relates or the immediately prior period, subject to the confidentiality and relevance considerations described below.

(5) DBIM is required to disclose only those determinations and reasons for the determination that are relevant to the negotiation or dispute with that access seeker/holder. DBIM may object to providing a determination on the basis that the determination is not relevant. Disputes regarding disclosure (including disputes as to relevance) may be referred to us.

(6) The requirement to disclose the determination and reasons for the determination applies to all arbitrations, whether the dispute is regarding pricing and/or non-pricing terms.

[257] DBCT User Group, sub. 13, p. 44.
[258] DBCT User Group, sub. 16, p. 37.

(7) DBIM is precluded from entering into access agreements, or agreeing to modifications to access agreements, that contain terms that are inconsistent with DBIM's obligation to disclose arbitration determinations and reasons under the 2019 DBCT DAU.

(8) In order to protect the confidential information of the arbitration parties, the amendments include the following procedure:

(a) Where the QCA is the arbitrator of a dispute, the QCA will consult with the parties to the arbitration before making any final determination as to whether any of the information the QCA intends to include in its determination and/or reasons is confidential information. The QCA will have regard to the submissions of the parties in issuing the disclosable form of the determination, which is required to be disclosed by DBIM where applicable.

(b) Where the QCA is not the arbitrator of a dispute, DBIM must provide the QCA with a full unredacted copy of the determination and reasons for the determination as soon as reasonably practicable after it has been issued by the arbitrator. The QCA will then adopt the approach described in (a) above in issuing a disclosable form of the determination, which is required to be disclosed by DBIM where applicable.

(9) DBIM may require access seekers and access holders who will receive details of determinations and reasons for determinations pursuant to this amendment to enter into a confidentiality deed substantially in the form set out in schedule C of the 2019 DBCT DAU.

Our proposed drafting implements the aforementioned measures—see clause 17.5 in Appendix A.

We acknowledge that the implementation of the disclosure processes for arbitration outcomes under the 2019 DBCT DAU is new, and as such we will continue to monitor the operation of this arrangement throughout the operation of the 2019 DBCT DAU, with a view to implementing refinements as required.

6.2.4 Analysis

We consider that the amendments discussed in section 6.2.3 are appropriate, having regard to the factors in section 138(2) of the QCA Act. For the reasons discussed below, we consider that DBIM's proposal to provide additional information regarding arbitration outcomes—including information about the principles and methodologies adopted by the QCA in an arbitration and how the QCA took into account the matters in section 120 of the QCA Act[259]—is not sufficient to address our concerns with the disclosure regime.

Information asymmetry

We consider the 2019 DBCT DAU as submitted, including amendments subsequently proposed by DBIM in submissions, would lead to issues of information asymmetry arising between DBIM and access seekers and access holders. DBIM will necessarily be a party to each arbitration relating to the DBCT service and will have full knowledge of the determinations made in arbitrations and the reasons for the determinations. We consider that without the required amendments discussed in section 6.2.3 above, access seekers and access holders of the DBCT service will have limited knowledge of the outcomes of previous arbitrations. The presence of this information asymmetry would not promote the interests of access seekers and access holders, as

[259] See DBCTM, sub. 12, p. 14.

it may limit the ability of access seekers/holders to effectively negotiate with DBIM under the negotiate-arbitrate regime.

Provision of relevant information on previous arbitration outcomes to access seekers and access holders as part of their negotiations with DBIM will provide access seekers and access holders with information regarding pricing and cost issues and the methodologies that can/have been used to determine this information, as well as the consideration of non-pricing terms and their effect on pricing terms. This would, in turn, assist access seekers and access holders to make efficient decisions regarding their operations and investment, and promote the economically efficient operation of, use of and investment in DBCT.

Disclosure of relevant arbitration outcomes can also promote the public interest in having competition in markets, where such disclosure will assist in establishing conditions or an environment for improving competition. For example, under the negotiate-arbitrate model proposed in the 2019 DBCT DAU, there could potentially be a change in methodology for estimating costs and price away from the building blocks model adopted by the QCA under previous undertakings. Where there is a lack of information regarding costs and price, or the current methodologies for estimating such costs, disclosure of arbitration determinations can provide more information and guidance for market participants in dependent markets. Improved information, for example regarding the costs of the supply chain, can promote an improved environment for competition in dependent markets, particularly during the period of transition from the reference tariff model of the previous undertaking to the negotiate-arbitrate model under the 2019 DBCT DAU.

We consider that the required amendments would address our concerns regarding the presence of information asymmetry. At the same time, the amendments will appropriately balance the legitimate business interests of DBIM by ensuring appropriate protections around relevant and confidential information—see 'Confidentiality' discussion below.

Promoting effective negotiation

DBIM expressed its concerns that disclosing details about arbitration outcomes would create a 'real disincentive' for access seekers and access holders to negotiate with DBIM, and that disclosure of arbitrated TICs 'would likely be interpreted as a de facto reference tariff, prejudicing the likelihood of meaningful commercial negotiations'.[260]

We consider that disclosing relevant arbitration outcomes would more likely promote effective negotiation, rather than hinder it, for the reasons discussed below.

No 'de facto reference tariff'

We consider that under the proposed negotiate-arbitrate regime, it is unlikely that disclosure of arbitrated outcomes (including terms such as prices for access) would be interpreted as a 'de facto reference tariff'. As DBIM submitted, the 2019 DBCT DAU is intended to give primacy to commercial negotiations:

> DBCT [sic] provides additional services to users which go beyond the standard coal handling service. A negotiate/arbitrate regime for agreeing terms and conditions of access (including price) is appropriate where different services are offered to different users. This is because it enables different prices to be agreed having regard to the quality of the service, the types of service on offer and the value of the service to the access seeker.[261]

[260] DBCTM, sub. 12, p. 13.
[261] DBCTM, sub. 1, p. 31.

Under the negotiate-arbitrate model proposed in the 2019 DBCT DAU, the parties are likely to have a greater incentive and scope to negotiate. The range of terms which may be negotiated between DBIM and an access seeker or access holder under the negotiate-arbitrate model proposed in the 2019 DBCT DAU, taking into account the specific circumstances of the parties, is broader than under the previous reference tariff model in the 2017 AU. Indeed, the intention of adopting the negotiate-arbitrate model without a reference tariff is to enable commercial negotiations to occur and allow for more bespoke agreements to be reached between the parties.

As such, we consider that a dispute raised during the term of the 2019 DBCT DAU is likely to reflect the negotiated terms specific to that negotiation or user agreement. The arbitration outcome for that dispute will have considered the specific facts of that negotiation or agreement. As such, the outcome of any particular arbitration, including a determination on pricing terms, cannot necessarily be said to be a 'de facto reference tariff', as that determination will be specific to the facts of that dispute. A 'de facto reference tariff' presumes the existence of a reference service that is provided subject to a set of reference terms—concepts which will no longer be relevant under the proposed negotiate-arbitrate regime without a reference tariff.

Rather, the information on arbitration outcomes will provide a guide as to the approach of the arbitrator in applying the arbitration criteria to the particular facts of the dispute and may include the methodology that the arbitrator used in determining pricing issues. It is this information that will assist future access seekers and users in their negotiations, rather than any specific terms determined on the specific facts of the dispute.

Information disclosure would promote effective negotiation

We consider that disclosing information about arbitration outcomes would create an incentive for access seekers and users to reach agreement with DBIM, rather than create a disincentive to negotiate. Disclosure of a determination and the accompanying reasons is likely to provide other access seekers and users with greater insight into the approach of the arbitrator to the issues raised in an arbitration. We consider that negotiations are more likely to succeed when the outcome of an arbitration can be predicted within relatively narrow boundaries. This is because the parties will be more readily able to predict the range of reasonable terms and conditions which may be upheld in an arbitration, and thus they will be more likely to agree to such terms during negotiations. Each party will be better able to determine the credibility of a threat to arbitrate, given the arbitrator's previous methodology.

Moreover, the disclosure of arbitration outcomes will likely reduce the number of disputes proceeding to arbitration which concern similar terms to those that have already been the subject of a dispute. This will reduce the costs involved in arbitrations for all parties, thereby promoting both the interests of DBIM and its access seekers and access holders. Thus, disclosure of arbitration outcomes might be expected to result in access arrangements being settled in a more timely manner, through negotiation rather than arbitration.

Confidentiality

In response to the draft decision, DBIM submitted that 'arbitrations and their outcomes should remain private':

> The QCA Act confirms the common law position that privacy is a fundamental element of arbitrations by the QCA. That is, arbitrations are private to the parties to the arbitration. This position is consistent with arbitrations under The Commercial Arbitration Act 2013 (Qld) [sic], Part

> IIIA of the Competition and Consumer Act 2010 (Cth), and the common law position as affirmed by the High Court.[262]

We consider it is important that the confidential information of the parties to an arbitration is protected. However, appropriate protections for confidential information can be implemented while still requiring the disclosure of arbitration outcomes.

The QCA Act permits an access undertaking to include details about 'information to be given to access seekers', and ' information to be given to the authority or another person'[263]—we consider that 'another person' includes existing users. Additionally, the QCA Act requires DBIM to give access seekers information about arbitration determinations for access disputes under the QCA Act.[264] The QCA is also required to keep a public register of access determinations[265], which must include the reasons for the determination as well as other details.[266] We consider these provisions of the QCA Act permit the disclosure of arbitration outcomes as required by this final decision.

However, the QCA Act also provides for the protection of confidential information—for example, section 127(3) of the QCA Act provides that:

> The details in the register of the authority's reasons for an access determination must not include details that are likely to damage the commercial activities of the parties to the determination.

We consider these sections must be read in the context of the object of part 5 of the QCA Act, which includes promoting the economically efficient operation of, use of and investment in significant infrastructure, with the effect of promoting effective competition in upstream and downstream markets. In this context, the various provisions of part 5 seek to balance the need for transparency with a need to protect information that is genuinely confidential.

We consider that our decision similarly needs to balance the interests of access seekers and access holders in having transparency around arbitration outcomes, with the need to protect the confidentiality of arbitration parties. It is for this reason that we consider that arbitration outcomes are only required to be disclosed to access seekers and access holders at the time of their negotiations or disputes with DBIM. They are not required to be published or made available to the public, as initially proposed in the draft decision.

Further, our decision implements a relevance threshold for the disclosure of determinations, to ensure that only determinations that are relevant to the negotiation or dispute are provided to an access seeker/holder. Our decision also provides for disclosure of arbitration outcomes only after the determination and reasons have been reviewed for confidential information, parties have been consulted, and we have made a ruling on which parts of the determination and reasons ought to be disclosed. We consider this method of implementation appropriately balances the legitimate business interests of DBIM and the other parties to the arbitration in having their confidential information protected, while addressing our concerns regarding information asymmetry. We consider that the disclosure of arbitration outcomes in this way will promote the object of part 5 of the QCA Act, the public interest and the interests of access seekers and access holders.

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[262] DBCTM, sub. 12, pp. 13–14.
[263] Sections 137(2)(b) and 137(2)(ba) of the QCA Act.
[264] See section 101(2)(h) of the QCA Act. For a discussion of the different types of disputes that may arise for the DBCT service, see the DBCT Arbitration Guideline published to accompany this decision.
[265] 'Access determination' is defined in section 117(1) of the QCA Act.
[266] Sections 127, 227B and 227C of the QCA Act.

We have also considered below a number of other grounds on which information associated with an arbitration might be the subject of some kind of legally enforceable confidentiality restriction; however, we consider none of these are applicable to the current circumstances.

As DBIM submitted, section 27E of the *Commercial Arbitration Act 2013* (Qld) (CAA) imposes a general confidentiality restriction for 'confidential information' (which is broadly defined in s. 2 of the CAA). However, the restriction is subject to exceptions, including where disclosure is 'authorised or required by a relevant law or required by a competent regulatory body', subject to a procedural requirement.[267] Compliance with an undertaking, as required by section 150A of the QCA Act, would thus satisfy one of the exceptions. Accordingly, we consider that the CAA does not prohibit the disclosure of arbitration outcomes as required in the final decision.

As DBIM submitted, section 194 of the QCA Act and various common law authorities provide that an arbitration is to be conducted in private. However, the fact that an arbitration is to be conducted in private (that is, without members of the public attending) is not determinative of information associated with the arbitration being confidential.[268]

Finally, it may be the case that DBIM has entered into user agreements that compel it to keep arbitration information confidential. We have received no submissions indicating that this is the case, and the 2017 SAA does not contain any such provision. In order to ensure the consistent application of the requirement to disclose arbitrated outcomes, we require an amendment to the 2019 DBCT DAU to the effect that DBIM is precluded from entering into, or agreeing to amendments to, access agreements that contain terms that are inconsistent with its obligations to disclose arbitration outcomes.

Access holders and access seekers

DBIM submitted that while it considered that 'it may be appropriate for access seekers to be provided with key information regarding arbitration outcomes as outlined above, DBCTM does not agree with the QCA's draft decision that arbitration outcomes should be provided to existing users', saying:

> More generally, DBCTM considers that the pricing reviews under the existing user agreements should be governed by the existing contractual terms entered into between the parties. DBCTM does not consider it appropriate for the QCA to introduce additional obligations on DBCTM that do not relate to the provision of access to access seekers, but rather concern the ongoing terms of access applicable under an existing contractual agreement.
>
> It is fundamental to the very nature of an access undertaking, that any obligations relate to the provision of access to access seekers.[269]

We consider that it is not the case that an access undertaking should only, or even predominantly, deal with the terms for negotiation of access by access seekers. The contents of a DAU may deal with a wide range of elements of access applicable to existing access holders as well as access seekers. In relation to the disclosure of arbitration outcomes, section 137(2)(ba) of the QCA Act permits an undertaking to include details of 'information to be given to the authority or another person', and we consider that 'another person' includes existing users.

More generally, section 138(2)(e) requires us to consider the interests of access seekers in the approval of an access undertaking. However, we consider the interests of access holders is also a relevant consideration under section 138(2)(h) (see Chapter 2). As a further example, section

[267] Section 27F(9) of the CAA.
[268] *Esso Australia Resources Limited v Plowman* (1995) 183 CLR 10.
[269] DBCTM, sub. 12, p. 16.

138A(b) of the QCA Act provides that an approved access undertaking may require or permit the access provider to 'treat users differently in providing access to the service', suggesting that the QCA Act explicitly contemplates access undertakings to contain obligations in relation to the provision of access to existing users.

We consider these various provisions indicate that an undertaking may deal with, and impose obligations on DBIM in relation to, the terms of access by access seekers as well as existing users. This would include providing a process for the determination of disputes with users under access agreements, particularly in circumstances where such disputes have been referred to us under the terms of those access agreements.

Price and non-price terms

In the draft decision, we noted that our proposed amendments to require DBIM to disclose arbitration outcomes related only to arbitrations relating to pricing terms. We sought stakeholder views on whether the disclosure should be broadened to include all arbitration determinations, including price and non-price terms.

DBIM considered that the determination and reasons for a determination for an arbitration should not be disclosed to access seekers and users, whether in relation to price or non-price terms.[270] Instead, DBIM proposed limited disclosure in the form of a 'summary of key information'. Including:

> 55.1 the principles the QCA [as the arbitrator] applied in making the determination;
>
> 55.2 the methodologies the QCA applied in making the determination;
>
> 55.3 how the QCA took into account the matters mentioned in subsection 120(1) of the QCA Act in making the determination; and
>
> 55.4 any matter the QCA took into account under subsection 120(2) in making the determination and the reasons for doing so.[271]

The DBCT User Group submitted that disclosure of arbitrated outcomes should not be limited to arbitrations regarding pricing terms, 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'.[272]

We consider that DBIM's obligation to disclose arbitration outcomes should apply to arbitrations regarding both price terms as well as non-price terms. This is because, practically, it is likely that a dispute will involve the entire factual matrix—taking into account both price and non-price terms—surrounding the negotiation or user agreement that is the subject of the dispute.

Moreover, if the obligation to disclose is restricted to only disputes about price terms, this may lead to unnecessary increases in time and compliance costs for DBIM to comply with the obligation, as:

- those parties who do not wish for disclosure may seek to characterise a dispute as regarding non-price terms, while those parties who wish for disclosure will argue that same dispute as to be regarding price terms, thus leading to a dispute about the characterisation of the dispute

[270] DBCTM, sub. 12, p. 14.
[271] DBCTM, sub. 12, p. 14.
[272] DBCT User Group, sub. 13, p. 44.

- determinations and reasons for the determination, which combine discussion of price and non-price terms, will need to be reviewed and redacted to exclude discussion of non-price terms.

We consider the legitimate business interests of DBIM include its interest in minimising the time and costs of compliance, as much as is possible, while still ensuring compliance with the obligation. We consider the confidentiality of non-price terms will be protected in the same way as price terms under the proposed implementation. As such, we consider it appropriate that DBIM's obligation to disclose arbitration outcomes should apply to arbitrations regarding both price terms and non-price terms.

Summary of decision 6.2

It is appropriate for DBIM to amend the 2019 DBCT DAU, such that:

(1) DBIM must keep a register of arbitration determinations, that includes, among other things, a summary of substantive issues addressed in each determination.

(2) At the same time as we assess the scope of any confidential information to be withheld from disclosure, we will confer with DBIM and all other parties to the arbitration in relation to determining the list of substantive issues, following which we will notify DBIM of the description of substantive issues to be included by DBIM in the register in respect of each determination.

(3) During any negotiation or dispute under the 2019 DBCT DAU or an access agreement, DBIM must provide the register to the relevant access seekers and/or access holders. The access seekers and/or access holders can request the disclosure of arbitration determinations from the arbitration register at any time during the negotiation or dispute process.

(4) DBIM is required to disclose the determination and reasons for determination for each arbitration requested by an access seeker/holder relating to access in the period to which the negotiation or dispute relates or the immediately prior period, subject to the confidentiality and relevance considerations described below.

(5) DBIM is required to disclose only those determinations and reasons for the determination that are relevant to the negotiation or dispute with that access seeker/holder. DBIM may object to providing a determination on the basis that the determination is not relevant. Disputes regarding disclosure (including disputes as to relevance) may be referred to us.

(6) The requirement to disclose the determination and reasons for the determination applies to all arbitrations, whether the dispute is regarding pricing and/or non-pricing terms.

(7) DBIM is precluded from entering into, or agreeing to amendments to, access agreements that contain terms that are inconsistent with DBIM's obligations to disclose the determination and reasons for determination for each arbitration conducted during the period that the 2019 DBCT DAU is in effect.

(8) In order to protect the confidentiality of information of the arbitration parties, the amendments include the following procedure:

  (a) Where the QCA is the arbitrator of a dispute, the QCA will consult with the parties to the arbitration before making any final determination as to whether any of the information the QCA intends to include in its determination and/or reasons is confidential information. The QCA will have regard to the submissions of the parties in issuing the disclosable form of the determination, which is required to be disclosed by DBIM.

  (b) Where the QCA is not the arbitrator of a dispute, DBIM must provide the QCA with a full unredacted copy of the determination and reasons for the determination as soon as reasonably practicable after it has been issued by the arbitrator. The QCA will then adopt the approach described in (a) above in issuing a disclosable form of the determination, which is required to be disclosed by DBIM.

(9) DBIM may require access seekers and access holders who will receive details of determinations and reasons for determinations pursuant to this amendment to enter into a confidentiality deed substantially in the form set out in schedule C of the 2019 DBCT DAU.

6.3 Information provision under the price review processes

Clause 7.2(a) of the 2017 SAA requires:[273]

> All charges under this Agreement will be reviewed in their entirety, effective from each Agreement Revision Date, in accordance with the following provisions of this clause 7.2.

The agreement revision date is defined to include the date of commencement of each access undertaking after the first access undertaking.

Among other things, each review may have regard to the terms of the access undertaking and the relevant reference tariff, effective from the relevant agreement revision date.

Clause 7.2(c) of the 2017 SAA requires that these reviews start no later than 18 months before the relevant scheduled agreement revision date. The parties must endeavour to agree as early as is practicable to do so (if possible, by no later than the agreement revision date) on the basis and amount of new charges to apply from the relevant agreement revision date. If the parties do not reach agreement by the date six months before the scheduled agreement revision date, either party may refer the determination of the issues to arbitration.

Under clause 7.2(c)(ii) of the 2017 SAA, where the QCA is the arbitrator, the parties must ask 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).

The 2019 DAU SAA also provides for prices to be reviewed. However, there are some notable differences, including:

- Under the 2019 SAA, price reviews appear to be optional, only triggered where either party requests a review at least 18 months before the start of a pricing period, where the pricing period is the period ending on 30 June 2026, and each subsequent five-year period.
- Clause 7.2(b) of the 2019 SAA states that each review may have regard to the terms of the access undertaking that are effective at the time of the review, rather than from the relevant pricing period as per existing user agreements.

6.3.1 Information provided to access holders

Our draft decision considered it important for access holders to be able to form a view on whether they have been offered a reasonable TIC during negotiations, that will occur under the price review provisions contained in both existing user agreements and the 2019 SAA.[274]

The DBCT User Group considered that the access undertaking should provide for existing users to be given the same information available to access seekers, as:

- existing users have no way of negotiating an appropriate price in a price review process without such information[275]
- there is no justification to provide for inequitable treatment between access seekers and holders in terms of information provision[276]

[273] The DBCT User Group (sub. 13, p. 24) noted that the terms in existing user agreements reflect cl. 7.2 of the 2017 SAA.
[274] QCA, *DBCT Management's 2019 draft access undertaking, draft decision*, August 2020, p. 68.
[275] DBCT User Group, sub. 13, p. 57.
[276] DBCT User Group, sub. 13, p. 57.

- subjecting existing users to information asymmetry would result in users pushing for arbitration where the statutory information gathering powers of the QCA would become available to resolve the information asymmetry.[277]

DBIM stated its intention was to provide existing users with substantially the same information that it is required to provide to access seekers under the 2019 DBCT DAU, with the exception of arbitrated outcomes. However, DBIM did not consider it appropriate for the access undertaking to impose an obligation on it that does not relate to the provision of access to access seekers, but rather concerns the ongoing terms of access applicable under an existing contractual agreement. It considered that price review processes should be governed by the terms in existing user agreements.[278]

The DBCT User Group strongly rejected the view that the undertaking should not seek to deal with or supplement the contractual price review regime. It noted that the price review process expressly provides for regard to be given to the terms of the access undertaking[279], demonstrating a clear intention that the regulatory arrangements were supposed to interact and support the operation of the contractual provisions.[280]

In the absence of a reference tariff, parties entering negotiations with DBIM should be provided with sufficient information to be able to form their own views on a reasonable TIC. This will encourage successful and efficient negotiations, discourage DBIM from offering unreasonable access proposals during the negotiation process and limit the likelihood of arbitration.

On this basis, we consider DBIM should be required to make available to all parties entering negotiations on the TIC the same certified information available to access seekers.

Consistent with access seekers, we also consider it appropriate to provide access holders with the ability to request initial meetings to discuss the review of Access Charges with DBIM and the ability for access holders and DBIM to ask us for advice or directions in relation to the information provided. This will facilitate appropriate information provision.

We do not consider that the access undertaking can only impose obligations on DBIM that concern the provision of access to access seekers. Section 137 of the QCA Act provides for an access undertaking to deal with a wide range of elements of access, applicable to access holders and access seekers. Further, section 138A(b) of the QCA Act provides that the access undertaking may treat users differently in providing access to the service.

While we accept that access agreements will generally take precedence over the terms of the 2019 DBCT DAU (to the extent of any inconsistency), we do not consider our proposed information provision requirements inconsistent with previous iterations of the SAA or the 2019 SAA. As noted by the DBCT User Group, clause 7.2(b) of the 2017 SAA and 2019 SAA provides for the parties to have regard to the terms of the relevant access undertaking when assessing the pricing methodology to be applied for the next pricing period.

[277] DBCT User Group, sub. 16, p. 43.
[278] DBCTM, sub. 12, pp. 33–34.
[279] Clause 7.2(b)(i) of the 2017 SAA.
[280] DBCT User Group, sub. 16, pp. 42–43.

6.3.2 Having regard to the relevant access undertaking

Price reviews under existing user agreements

Prior to our draft decision, the DBCT User Group raised concerns that the contractual pricing review would reset the price before there is an opportunity under the next undertaking to determine a reference tariff.[281] Our draft decision considered that any review of access charges should have regard to the terms of the access undertaking effective for the relevant agreement revision date, noting that there may be amendments to information provision and regulatory arrangements in future access undertakings. We sought stakeholder views on the extent to which existing user agreements provided scope for parties to review access charges, based on the terms of the access undertaking effective for the relevant agreement revision date.[282]

DBIM agreed that it may be appropriate for price reviews under existing user agreements to have regard to the terms of the access undertaking that is in effect for the relevant pricing period. It considered there is scope for this to occur under the dispute process in existing user agreements. DBIM pointed to clause 7.2(c)(ii) of existing user agreements, which states that, where the QCA is the arbitrator, the parties must request that the arbitrator progress the arbitration in conjunction with the process at that time for developing a new access undertaking (with the intention that reviewed charges will be determined no later than the commencement of the new access undertaking). While the QCA would have to determine the arbitration in accordance with the relevant criteria, DBIM was of the view these provided the QCA with considerable scope to consider the relevant access undertaking.[283]

DBIM did not consider it appropriate for an access undertaking to reopen the contractual terms between existing users and DBIM and impose additional obligations on the parties.[284]

The DBCT User Group, on the other hand, noted that the indicative timing of the final decision on the 2019 DBCT DAU meant it was unlikely that pricing outcomes would be achieved before pricing is supposed to commence for the next review period on 1 July 2021. It noted that because contractual price reviews commence 18 months before the agreement revision date, existing users were placed in the invidious position of a contractual price review without an undertaking in place that regulates pricing during the relevant period to which the price review relates.[285]

It considered this issue would continue in future periods, as the next undertaking will not be in place when the price review is contractually required to commence. While noting that the existing tariff is continued if pricing is not agreed by the commencement of the new price review period, the DBCT User Group considered there to be interest payment consequences and a clear detriment to investment decisions where the pricing remains uncertain.[286]

We consider the proposed package of arrangements provides sufficient scope for parties to have regard to the relevant access undertaking. While the adoption of a non-reference tariff model may have implications for the timing of pricing outcomes under the review process, existing user agreements provide for the continuation of existing prices, should there be no agreement or determination by the agreement revision date. It is unclear that any such timing implications will

[281] DBCT User Group, sub. 11, p. 12.
[282] QCA, *DBCT Management's 2019 draft access undertaking*, draft decision, August 2020, pp. 68–69.
[283] DBCTM, sub. 12, p. 34.
[284] DBCTM, sub. 12, p. 34.
[285] DBCT User Group, sub. 16, p. 43.
[286] DBCT User Group, sub. 13, pp. 56–57.

be significant enough to affect investment decisions or lead to considerable interest payment consequences.

Price reviews under the 2019 DAU SAA

Future access holders may enter into agreements that reflect the 2019 DAU SAA.

In response to our draft decision, DBIM proposed amendments to clause 7.2(b) of the 2019 SAA to expressly permit a pricing review to have regard to an approved access undertaking that will have effect in the upcoming pricing period in which the reviewed charges will apply.[287]

While DBIM's proposed amendments would provide for regard to be given to the relevant approved access undertaking, the DBCT User Group considered that traditionally no such access undertaking would be approved at this point.[288]

We consider it appropriate to adopt the amendments proposed by DBIM to the 2019 SAA, which explicitly state that regard may be given to the approved access undertaking that is effective at the date of the review or will have effect in the relevant pricing period.

The adoption of a non-reference tariff model may have implications for the timing of pricing outcomes under the review process. However, existing user agreements provide for the continuation of existing prices, should there be no agreement or determination by the agreement revision date.

6.3.3 Negotiations occurring within 18 months of the next pricing period

Our draft decision stated that it appears that access seekers who enter into access agreements within the 18 months prior to 30 June 2026 (i.e. the commencement of the next regulatory period) may not be able to formally 'trigger' a review of access charges. If this were the case, our view was that these access seekers will not be adequately informed in negotiating the initial TIC that will apply across two pricing periods, as they would only have forecast information until 30 June 2026. We considered the arrangements should be amended to provide for better information provision for relevant access seekers, or an ability for those access seekers to review access charges based on updated information for the following pricing period.[289]

While DBIM did not comment on whether future access holders who have negotiated terms within the 18-month period would be able to renegotiate prices for the next pricing period, it proposed to extend the forecast information it provides to access seekers when those access seekers commence access within 18 months of the new pricing period.[290]

We consider that DBIM's proposed amendments do not sufficiently address our concerns, as access seekers negotiating agreements within the 18-month period will not be able to have regard to the terms of the access undertaking effective in the second pricing period. This could put these access seekers at a disadvantage, should amendments be made to information provision requirements and/or regulatory arrangements in future regulatory periods, which is not in the interests of access seekers.

The DBCT User Group provided alternative amendments to the 2019 DAU SAA, which would require the price review process to start at the later of 18 months from the next review date or

[287] Pricing period in the 2019 DAU SAA is defined to mean the period ending on 30 June 2026 and each subsequent five-year period during the term.
[288] DBCT User Group, sub. 16, p. 43.
[289] QCA, *DBCT Management's 2019 draft access undertaking*, draft decision, August 2020, p. 69.
[290] DBCTM, sub. 12, p. 9, figure 3.

the date of execution of the agreement—so the new access seeker could participate in the next price review (even if that price review process has already started in respect of other access holders).[291]

The DBCT User Group's proposed amendments mean the initial price agreed by the parties would only apply for a single pricing period (less than 18 months). This approach would then provide for the parties to begin a second round of negotiations immediately after the agreement is executed. This would allow for regard to be given to the access undertaking in place for the second pricing period.

We acknowledge that recommencement of negotiations as soon as an agreement is executed may not be considered an efficient approach by the parties. However, price reviews under the 2019 SAA are optional. The parties will not be required to enter into a second round of negotiations if they do not wish to do so.

On this basis, we consider it appropriate for the 2019 DBCT DAU to provide for access seekers entering negotiations within 18 months of the next pricing period to be able to renegotiate prices once the user agreement is executed.

Summary of decision 6.3

It is appropriate for DBIM to amend the 2019 DBCT DAU to:

(1) require DBIM to provide access holders with the certified information specified in schedules G and H of Appendix A at the time of negotiating a TIC as part of any price review process contained in an access agreement (see cl. 11.5 of Appendix A)

(2) provide access holders with the ability to request initial meetings to discuss the review of Access Charges with DBIM and the ability for access holders and DBIM to ask the QCA for advice or directions in relation to the information provided (see cl. 11.5 of Appendix A)

(3) provide that price reviews under the standard access agreements may have regard to the terms of the approved access undertaking that is effective at the date of the review or will have effect in the relevant pricing period (see cl. 7.2(b) of Appendix B)

(4) provide for access seekers entering negotiations within 18 months of the next pricing period to be able to renegotiate prices once the access agreement is executed (see cl. 7.2(a) of Appendix B).

[291] DBCT User Group, sub. 13, p. 59.

7 AMENDMENTS TO THE PRICING MODEL–NEGOTIATION AND ARBITRATION

This chapter considers the appropriateness of the proposed negotiation and arbitration arrangements for the 2019 DBCT DAU.

Having regard to the assessment criteria in section 138(2) of the QCA Act, we consider that amendments are required to the 2019 DBCT DAU in order to make it appropriate to be approved. Such amendments are necessary to promote genuine and well-informed negotiations as a first step, and to strengthen the arbitration framework so that it can act as a credible and effective backstop.

We consider the proposed amendments address the concerns, identified in this final decision, with the proposed implementation of a negotiate arbitrate model as part of the 2019 DBCT DAU.

7.1 Incentives to negotiate

7.1.1 Overview of our final decision on incentives to negotiate

In response to our draft decision, stakeholders generally considered that we should seek to further strengthen the incentives to negotiate that are associated with a negotiate-arbitrate pricing model without a reference tariff. On balance, we consider there is merit in strengthening the incentives for parties to act reasonably during negotiations.

We consider this can appropriately be done by:

- providing guidance to the parties as to how we propose to conduct arbitrations, including how we intend to assess the arbitration criteria in section 120 of the QCA Act when making a determination. This, together with improvements required by us in relation to information that is made available to negotiating parties by DBIM (including prior relevant arbitral determinations), will allow parties to be better informed for negotiation purposes and better understand how the QCA will approach arbitration processes
- where appropriate and legally permissible, using legal and process costs orders as a means of incentivising reasonable behaviour in the course of negotiations.

Stakeholders have also suggested other mechanisms that could be used to further incentivise reasonable behaviour in negotiation processes—for example, the use in arbitrations of evidentiary limits (proposed by DBIM[292]); or 'final offer' arbitration (sometimes referred to as 'baseball style' arbitration) and 'floor and ceiling' approaches (both proposed by the DBCT User Group[293]). While we acknowledge that these options are used in other contexts and have various benefits, overall we consider that use of these additional measures to influence the approach adopted by the parties and constrain the arbitrator in arbitrations are unlikely to deliver an effective process and could, in some cases, limit flexibility in the process in ways inconsistent with the QCA Act.

The detailed reasons for these positions are discussed below.

[292] DBCTM, sub. 15, pp. 16–18.
[293] DBCT User Group, sub. 16, pp. 38–40.

7.1.2 Draft decision

In our draft decision[294], we considered that the regulatory arrangements proposed in the 2019 DBCT DAU provided incentives for both parties to act reasonably in negotiations. We indicated that:

- Dispute processes by their nature are uncertain for parties involved in a dispute. Where a dispute on the TIC is referred to us for arbitration, we will give consideration to the appropriateness of the access proposal (having regard to the factors outlined in s. 120 of the QCA Act) and determine the TIC to apply as part of that access agreement. We said it would therefore be beneficial for DBIM to propose a reasonable TIC when negotiating with access seekers (and access holders).
- Given a negotiate-arbitrate framework without a reference tariff is to apply for the proposed regulatory period, DBIM is incentivised to act reasonably in negotiations with access seekers (and access holders), should it want this style of regulatory framework to remain in place for future regulatory periods. In this regard, the reporting requirements outlined in the 2019 DBCT DAU (cl. 10) require DBIM to disclose to us, among other things, the average length of negotiation periods and the number of disputes and complaints incurred during the regulatory period. Such reporting requirements will assist in identifying whether any issues have been encountered in applying a negotiate-arbitrate pricing model without a reference tariff.
- The time and costs associated with arbitration, as identified by the DBCT User Group, are likely to incentivise access seekers and users to reach an agreement on a reasonable TIC with DBIM.
- The pricing model that exists in the 2017 AU is a negotiate-arbitrate model, where reference tariffs assist in facilitating efficient negotiation. If the information provision arrangements in a negotiate-arbitrate model without a reference tariff are sufficient to inform negotiations, then such arrangements should serve to incentivise parties to put forward reasonable proposals in negotiations.

We also suggested that our process for making an access determination (e.g. taking into account the s. 120 criteria and issuing draft and final determinations) regarding the TIC may incentivise the parties to act reasonably during the negotiation processes. The draft arbitration guidelines, provided as part of our draft decision, outlined that:

> if the QCA were to become the arbitrator pursuant to clause 7.2(d)(i) of the 2017 or 2019 SAAs, which must be conducted in accordance with the relevant access undertaking, then the QCA intends to have regard to the arbitration procedures set out in the QCA Act in terms of process, and to the matters set out in section 120 of the QCA Act in terms of factors to be considered in an arbitration.[295]

7.1.3 Stakeholder views

In response to the draft decision, stakeholders proposed further measures they considered could act to provide additional incentives for parties to put forward reasonable proposals in negotiations.

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[294] QCA, *DBCT Management's 2019 draft access undertaking,* draft decision, 2020*,* p. 83.
[295] QCA, *DBCT Management's 2019 draft access undertaking*, draft decision, Part B—Arbitration Guideline for disputes under the DBCT 2021 access undertaking, 2020, p. 9.

DBIM suggested that the 2019 DBCT DAU could be amended to incorporate the following further measures in this regard:

- Evidentiary limits—an evidentiary limit could be introduced into the DAU, which would ensure parties to a negotiation produce all material they propose to rely on in an arbitration, during negotiations. DBIM said this would ensure access seekers are fully informed and can make an assessment of the reasonableness of DBIM's offer prior to a matter being referred to arbitration. This would improve the effectiveness of negotiations, as well as the efficiency of arbitrations.[296]
- Termination of vexatious matters—DBIM said the QCA should be able to terminate arbitrations where:
  - the QCA considers the party that referred the matter to arbitration did so vexatiously
  - the subject matter of the dispute is trivial
  - the party referring the matter to arbitration has not engaged in negotiations in good faith.[297]
- Awarding costs—DBIM said the QCA should consider the publication of guidance around how we would exercise our ability in the QCA Act to award costs. DBIM stated that we could also introduce express provisions to the 2019 DBCT DAU dealing with the award of costs.[298]

The DBCT User Group also submitted that the QCA should adopt additional measures to streamline the dispute process, such as the following:

- 'Final offer' (or baseball style) arbitration—the DBCT User Group said this would result in the QCA's task as arbitrator being to determine which of the negotiating parties' negotiating positions should be accepted, by deciding between two final offers. This would discourage ambit claims and incentivise parties to submit reasonable offers in negotiations.[299]
- Providing 'floor and ceiling' limits for arbitration—the DBCT User Group said this would involve the QCA specifying reasonable floor and ceiling limits, which would apply as 'bookends' for any arbitration where an access seeker or access holder accepted standardised access terms. The DBCT User Group said this would further incentivise negotiating parties to make appropriate offers during negotiations.[300]
- Awarding costs—the DBCT User Group also suggested that the QCA should consider how we would exercise our power under the QCA Act to make costs awards. However, the DBCT User Group said that because of the potential for the costs of negotiation and arbitration to be asymmetrical, the costs exposure for access seekers and access holders should be eliminated or largely removed by the undertaking or arbitration guidelines.[301]

These stakeholder proposals, and our responses, are discussed in more detail below.

[296] DBCTM, sub. 15, pp. 16–18.
[297] DBCTM, sub. 15, p. 18.
[298] DBCTM, sub. 15, pp. 18–19.
[299] DBCT User Group, sub. 16, pp. 38–39.
[300] DBCT User Group, sub. 16, pp. 39–40.
[301] DBCT User Group, sub. 16, p. 31.

7.1.4 Analysis

Strengthened incentives

Where a dispute on the TIC is referred to us for arbitration, we are to determine the TIC to apply under that access agreement. We are of the view that, where DBIM acts as a rational profit-maximising firm, it will not accept a negotiated TIC unless it is at least as high as its expectation of a TIC determined by us in an arbitration. Likewise, access seekers/holders are not likely to accept a TIC that is above their expectation of a TIC determined in arbitration.

However, we also consider that strictly adopting the arbitration procedures set out in the QCA Act may not (in itself) necessarily incentivise parties to any dispute to act reasonably during negotiations. For example, there may be a risk that parties do not provide reasonable offers or counter-offers in negotiation, but hold these back and offer them only in the course of subsequent arbitration processes.

Our draft decision was based in part on us being satisfied that parties would be likely to act reasonably during negotiations. As such, we consider there is merit in setting out the tools available to us, as arbitrator, to help incentivise parties to act reasonably during negotiations—so that, by the time any dispute reaches arbitration, each party is reasonably aware of the position of the other and both have engaged reasonably in trying to resolve those differences. These tools include:

- Clarifying in our arbitration guideline that, while not a binding evidentiary constraint or limit, we may have regard to the proposals made by parties during the negotiation stage.
- We may potentially use arbitration costs orders to respond to any failure by a party to engage fully and reasonably in negotiations or dispute resolution proceedings.
- A number of the amendments required by this final decision, particularly in relation to information provision, should enable access seekers/holders to be more fully informed at the negotiation stage—thereby improving the quality of negotiations and reducing the need to rely on arbitration processes (or the powers of the arbitrator) to obtain information from DBIM.

Having regard to negotiation proposals

In the draft arbitration guideline, we said that, in establishing an appropriate TIC, we will give consideration to the appropriateness of the access proposal, having regard to the factors outlined in section 120 of the QCA Act.

We added that this approach for considering a dispute on the TIC recognises that:

- forming a view as to what may constitute an appropriate TIC for the provision of access to coal handling services at DBCT will require us to apply our judgement, due to the uncertainty inherent in estimating, among other things, costs associated with providing access
- consideration of the reasonableness of the access proposal as part of an arbitration, rather than applying a strict rules-based approach to estimating a TIC, will facilitate genuine negotiation between the parties and incentivise DBIM to propose a reasonable TIC when negotiating with access seekers.

However, having regard to the comments made by stakeholders in response to the draft decision, we consider it may be appropriate to provide more direct guidance to stakeholders in the arbitration guideline as to how we would likely view the proposals made by parties in negotiations, as part of an arbitration.

We consider that it may be appropriate for us to have regard to the proposals made by each party during the negotiation phase. These proposals may inform our assessment of the factors in section 120 of the QCA Act, particularly where the proposals reflect some consideration of those factors.

We consider this remains consistent with an appropriate balancing of the factors in section 120 of the QCA Act—noting it would likely involve, for example, some consideration of the extent to which the parties' proposals took into account both:

- DBIM's legitimate business interests and investment in the facility (s. 120(1)(b)), and
- the legitimate business interests of persons who have, or may acquire, rights to use the service (s. 120(1)(c)).

This will not operate as an evidentiary constraint, but we do acknowledge that in assessing the reasonableness of a TIC sought in an arbitration, it may be relevant for us to have regard to the extent to which any claim is inconsistent with a TIC sought by the same party during the negotiation phase—on the presumption that all parties would have acted reasonably in making such claims in the negotiation phase.

Awarding of costs / termination of arbitrations

Another option to incentivise the making of reasonable proposals in negotiations that we consider has merit is the use of legal and process costs awards in arbitration determinations. This would mean that if any party is seen to have not acted reasonably or in good faith during negotiations, we may consider requiring that party to pay all, or a larger proportion, of the costs of the other party and of us.

As noted above, in their responses to the draft decision, both DBIM and the DBCT User Group commented on the potential for the awarding of costs for arbitrations to be used to incentivise behaviour in negotiation processes. DBIM said that awarding of costs in an appropriate manner could deter parties from bringing unreasonable cases before the QCA, but not deter parties from bringing reasonable cases.[302] The DBCT User Group said the QCA should not award costs against an arbitrating user or access seeker unless an arbitration is vexatious (but this should not apply to DBIM, because of the potential for the costs of arbitration to be asymmetrical if DBIM can use expert reports/advice in multiple arbitrations with individual users/access seekers).[303]

We consider that an approach of using costs awards to incentivise behaviour could provide an additional mechanism to encourage parties, including DBIM, to act reasonably in negotiation processes. As a consequence, we have flagged in the version of the arbitration guideline published to accompany this final decision an intention to give consideration to costs awards in this regard, where appropriate and legally permissible.

We note, in this regard, that we have broad discretion to determine the awarding of costs associated with the conduct of arbitrations of access disputes under part 5 of the QCA Act. Relevantly, section 208 of the Act provides that:

> (1) In an arbitration, the authority may make any order it considers appropriate about—
>
> (a) the payment by a party (the designated party) of the costs, or part of the costs, incurred by another party in the conduct of the arbitration; or

[302] DBCTM, sub. 15, pp. 18–19.
[303] DBCT User Group, sub. 16, p. 31.

> (b) the payment by a party (also the designated party) of the costs, or part of the costs, incurred by the authority in conducting the arbitration.

Further, clause 17.4(c) of the 2019 DBCT DAU provides that for determinations by the QCA:

> (**Costs awarded as QCA determines**) The cost of the QCA and the reasonable costs of the parties are to be borne by the parties in such proportions as determined by the QCA.

With regard to DBIM's further proposal that we be able to terminate vexatious matters, we note that the reasons DBIM proposed for termination already apply to arbitration of access disputes under part 5 of the QCA Act. Section 122 of the QCA Act states:

> The authority may decide not to start an arbitration, or at any time end an arbitration (without making an access determination) if it considers that—
>
> (a) the giving of the access dispute notice was vexatious; or
>
> (b) the subject matter of the dispute is trivial, misconceived or lacking in substance; or
>
> (c) the party who gave the access dispute notice has not engaged in negotiations for an access agreement in good faith.

For disputes under the 2017 SAA and 2019 DAU SAA and the approved access undertaking, we said in the draft arbitration guideline that we intend to have regard to the arbitration procedures set out in the QCA Act in terms of process.[304] This includes the matters in section 122 of the Act, relating to resolution of disputes without proceeding to arbitration or the making of a determination. We maintain that position in this final decision.

Evidentiary limits

DBIM considered that the introduction of an evidentiary limit could assist to ensure that parties engage in meaningful negotiations prior to referring a dispute to arbitration.[305] This would mean that an arbitration could only consider evidence submitted by the parties during the negotiation process.

However, we have identified a number of concerns with this approach:

- In an arbitration, we must make an access determination, having regard to the section 120 factors. We consider that it may be problematic if we were to be bound by only the evidence provided by the parties during a negotiation, as this may be inconsistent with the principles in section 196(1)(b) and (c) of the QCA Act, which state that in an arbitration, the authority:

  > (b) is not bound by technicalities, legal forms or rules of evidence; and
  >
  > (c) may inform itself on any matter relevant to the dispute the subject of the arbitration in any way it considers appropriate;

- More generally, it is not clear that we should act to constrain ourselves in this way, in terms of material we may consider to be relevant to assess as part of arbitrating a dispute. The arbitration processes in the QCA Act provide us with a broad discretion to make a determination—having regard to the arbitration criteria, including any other matters relating to the matters listed in section 120(1)[306], and a broad discretion to weigh and balance the matters we do have regard to. In addition, in arbitrating a dispute on a price review under an

[304] QCA, *DBCT Management's 2019 draft access undertaking*, draft decision, Part B—Arbitration Guideline for disputes under the DBCT 2021 access undertaking, 2020, pp. 9, 13.
[305] DBCTM, sub. 15, p. 17.
[306] Section 120(2) of the QCA Act.

existing user agreement (for example, the 2017 SAA), the arbitration is effected 'by the QCA in such a manner as it sees fit, after consultation with the parties' (cl. 7.2(d)(i)).

- This approach may encourage parties to submit excess information as part of negotiations, so as not to limit it being used in an arbitration, rather than providing relevant information to support effective negotiation between the parties. Assessing the validity of excessive amounts of evidence as part of a negotiation, as well as submitting counter-evidence, may prove challenging for access seekers and users, particularly prospective access seekers.
- Users have suggested that imposition of an evidentiary limits approach would place access seekers at a disadvantage in comparison to DBIM. This is because, even with amendments proposed to the DAU pricing model in the draft decision, access seekers may still face some information asymmetry (in comparison to DBIM) at the start of negotiation processes. More specifically, DBIM may be better able to provide detailed evidence and analysis (e.g. expert reports) to support its positions than access seekers, who may be in the process of trying to get a new project developed.

For these reasons, we consider that an evidentiary limit is not likely to be necessary in order for the arbitration process to operate appropriately.

Final offer arbitration / floor and ceiling limits

In its responses to the draft decision, the DBCT User Group suggested two alternative approaches to arbitration that it considered could potentially improve incentives for parties to negotiate reasonably:

- 'Final offer' arbitration—this would mean our arbitration task becomes one of choosing which of the negotiating parties' positions should be accepted—after each party submits a final offer—with a view to discouraging ambit claims and incentivising parties to submit reasonable offers. The DBCT User Group noted that the ACCC has recently proposed an arbitration model of this nature as part of its proposed news media bargaining code.[307]
- Providing floor and ceiling limits for arbitration—this would involve us specifying a 'bookend' price range for any arbitration where the user/access seeker accepted standardised access terms. The DBCT User Group suggested that the 'floor' would be set at a level of a pure mechanistic application of the building blocks approach to price determination (applying the QCA's then current approach), while the 'ceiling' would be a small specified percentage above that (say 10%).[308]

We note that while the DBCT User Group put forward both these options as suggestions, it nonetheless only expressed qualified support for them. For example, the DBCT User Group said that final offer arbitration would only be effective if:

- the parties were put on an equal footing in terms of information—which it said would require using a building blocks approach and publication by DBIM of a transparent model showing actual costs
- the QCA provided substantive guidance on methodologies it would apply in considering parties' offers in an arbitration (including for WACC and its parameters)—so parties would better understand what the QCA was likely to consider reasonable

[307] DBCT User Group, sub. 16, pp. 38–39.
[308] DBCT User Group, sub. 16, pp. 39–40.

- we still retained a discretion to not select either parties' proposal—where we considered both proposals inappropriate, having regard to the object of part 5 of the QCA Act.[309]

Subject to us being minded to consider adopting a floor and ceiling limits model, the DBCT User Group would want to be further consulted on this proposal, as 'its support of it as a methodology is highly dependent on the extent of the proposed 'negotiating range' between the floor and ceiling limits.'[310]

We consider the two suggestions made by the DBCT User Group are subject to some of the same criticisms as DBIM's evidentiary limits proposal, such as:

- constraining us in our discretion to consider relevant material in an arbitration—by binding us to select only one of two options, or from a discrete range of options, when those may not be the only reasonable options in the circumstances of each case—or, as is often the case in complex pricing disputes, it may be that elements of each party's position have merit, and a determination should reflect elements of both cases (rather than entirely adopting one or the other)
- limiting parties from bringing forward important new or additional information in the course of an arbitration, including information which may indicate that an option outside of those proposed would be reasonable for us to accept/determine.

More generally, we are concerned that either a 'final offer' arbitration process or the imposition of floor and ceiling limits would be unduly restrictive. It may restrict us from determining the terms and conditions of access (including access charges) in a way that best gives effect to the factors in section 120 of the QCA Act.

Moreover, by amending the process to provide for access holders or access seekers to be more fully informed in relation to relevant information (and any past relevant arbitral determinations), the parties should have sufficient information to reach informed views about the reasonable range of pricing outcomes likely to be determined in an arbitration—without this needing to be directed or imposed on them by us or by the access undertaking.

For these reasons, we also consider that arbitration of disputes in accordance with these suggestions from the DBCT User Group is not appropriate to include or approve in the 2019 DBCT DAU.

7.1.5 Conclusion on incentives to negotiate

In our draft decision, we considered that the proposed negotiate-arbitrate pricing model without a reference tariff provided some incentives for parties, including DBIM, to act reasonably in negotiations. These incentives included the following:

- Our intention to take into account the nature of proposals made by parties during negotiations in determining a TIC in a dispute would incentivise DBIM to propose a reasonable TIC when negotiating with access seekers and access holders.
- DBIM is incentivised to act reasonably in negotiations if it wishes to avoid the reintroduction of a reference tariff approach in future regulatory periods (should it become apparent that DBIM was not engaging reasonably in negotiations).

[309] DBCT User Group, sub. 16, pp. 38–39.
[310] DBCT User Group, sub. 16, p. 40.

- The time and costs associated with arbitration are likely to incentivise access seekers and access holders to seek to reach an agreement on a reasonable TIC with DBIM.
- Provided the information provision arrangements are strengthened from those in the 2019 DBCT DAU, as set out in this final decision, such arrangements should also help parties to narrow the scope of any disputes—and thereby act to incentivise reasonable proposals being put forward by the parties to such negotiations.

We remain of the view that these matters provide incentives for the parties to a negotiation, including DBIM, to put forward reasonable proposals in negotiation processes. However, we consider there is merit in further strengthening the incentives for parties to act reasonably during negotiations. Given this, in this final decision we are providing for the following further measures to better incentivise reasonable behaviour by parties in negotiations:

- We have made clear in the arbitration guideline that, when making an access determination in an arbitration, we will assess whether TIC proposals and counter-proposals made by parties during negotiations are appropriate to approve (in accordance with the relevant factors in s. 120 of the QCA Act).
- Where appropriate and legally permissible, we intend to use legal and process costs orders as a means of incentivising reasonable behaviour in negotiations (including by amending cl. 17.4(d) of the 2019 DBCT DAU—see Appendix A).

In addition, we consider the other amendments we are proposing to the 2019 DBCT DAU to better balance the negotiate-arbitrate pricing model without a reference tariff will also likely help to incentivise parties to put forward reasonable proposals in negotiations. This includes amendments that:

- require DBIM to provide substantial additional information to access seekers and access holders at the commencement of negotiations, to inform and assist them with negotiations (see schedules G and H in Appendix A)
- improve arbitration processes
- provide more guidance to stakeholders by way of the arbitration guideline
- allow for collective negotiation and arbitration, where appropriate (see cls. 5.14 and 17 in Appendix A)
- provide for disclosure of relevant arbitration outcomes to access seekers and access holders during negotiations and disputes (see cl. 17.5 in Appendix A).

With regard to the latter, we note the ACCC has previously commented on what it sees as one of the benefits of disclosing arbitration outcomes to relevant stakeholders:

> Publication of a determination and the accompanying reasons is usually likely to enable other access seekers to estimate, with greater certainty, the likely outcome of an arbitration. In the Commission's experience with Part XIC, negotiations are more likely to succeed when the outcome of an arbitration can be predicted within relatively narrow boundaries. Thus publication of a determination might be expected to result in access arrangements being settled in a more timely manner, through negotiation rather than arbitration.[311]

We note that both the 2006 and 2010 DBCT access undertaking approval processes resulted in commercially agreed packages of arrangements between DBIM and access seekers/holders,

[311] Australian Competition and Consumer Commission, *Resolution of telecommunications access disputes—a guide*, October 2002, p. 45.

which we subsequently approved (discussed in Chapter 5). This suggests that sufficient incentives for the parties to negotiate outcomes existed in those processes. While commercially agreed outcomes between the parties were not achieved in the 2017 access undertaking approval process (or in this 2019 DBCT DAU process), efforts to reach agreement were nevertheless made (see Chapter 5). We consider that once the amendments we require are implemented, the negotiate-arbitrate pricing model without a reference tariff in the 2019 DBCT DAU is likely to provide appropriate incentives for parties to negotiate and will improve the prospects of commercially agreed outcomes being reached in negotiations in future.

Summary of decision 7.1

(1) In making an access determination, the QCA will take into account the nature of the proposals made by parties during negotiations (in accordance with the factors in s. 120 of the QCA Act). This is further discussed in the arbitration guideline published to accompany this final decision.

(2) The QCA will have regard to the reasonableness of parties' conduct during negotiations, when making costs orders in any arbitration.

(3) In this decision, the QCA has required various other amendments to be made to the 2019 DBCT DAU—which we consider will, among other things, help to equip access seekers and access holders to put forward reasonable proposals in negotiations.

7.2 Collective negotiation

7.2.1 Stakeholder submissions

The DBCT User Group expressed its concerns that a negotiate-arbitrate model without a reference tariff would cause a 'significant increase in costs' and a 'disproportionate cost burden that will be borne by users and access seekers'.[312] The DBCT User Group contended that 'part of the reason for the increased costs is the requirement for multiple bilateral negotiations, and ultimately multiple bilateral arbitrations instead of a single ex-ante regulatory process.'[313]

The DBCT User Group submitted that in order to 'mitigate the costs involved in a negotiate-arbitrate form of regulation it is critical that the process is streamlined and simplified as much as possible through collective negotiations, and rights to a collective arbitration.'[314] The DBCT User Group noted that 'collective negotiation would improve the availability of information and resources for the negotiating users/access seekers' and improve the bargaining positions of access seekers and users.[315] The DBCT User Group also noted that DBIM 'has refused to engage in collective negotiation', and accordingly:

> [T]he QCA would need to resolve this issue by the undertaking:
>
> (a) compelling DBCTM to engage in collective negotiations with access holders and access seekers which choose to collectively negotiate price or access terms; and
>
> (b) providing a right for collective arbitrations (as discussed below).[316]

[312] DBCT User Group, sub. 13, p. 44, sub. 16, pp. 29–30.
[313] DBCT User Group, sub. 16, p. 29.
[314] DBCT User Group, sub. 16, p. 29.
[315] DBCT User Group, sub. 16, pp. 29–30.
[316] DBCT User Group, sub. 16, pp. 29–30.

The DBCT User Group subsequently submitted an application to the ACCC seeking authorisation to engage in collective negotiations with DBIM.[317]

DBIM has indicated that it is strongly opposed to, and does not intend to engage in, collective negotiation with access seekers and existing users:

> First, the coal handling service at DBCT is regulated by the Queensland Competition Authority (QCA) under an access regime certified under the Competition and Consumer Act 2010 (CCA). The QCA has wide powers to constrain any market power possessed by DBIM, meaning the Applicants' primary rationale for the authorisation, and the associated public benefits, are invalid.
>
> Secondly, DBIM does not intend to collectively negotiate with users as to do so is inconsistent with the existing contract framework… DBIM also has no incentive to engage in collective negotiations, as they would likely lead to unreasonable negotiating positions being taken by users and unnecessary arbitrations. For these reasons DBIM will not engage in collective negotiations with users. Therefore, as there will be no collective negotiations, there cannot be any public benefits flowing from collective negotiations.[318]

Given the positions expressed by stakeholders, we have considered whether provision should be made for collective negotiations (if otherwise permitted by law) and, in circumstances where this is sought by access seekers or access holders, whether DBIM should be required to participate in collective negotiations.

7.2.2 Amendments to the 2019 DBCT DAU—collective negotiation

We consider that the 2019 DBCT DAU as submitted, including amendments subsequently proposed by DBIM in submissions, is not appropriate to approve. We consider that it is appropriate that the 2019 DBCT DAU be amended such that DBIM is required to collectively negotiate with access seekers and/or access holders, where lawful, and where requested to do so by those access seekers and/or access holders.

The amendments we require have the following elements:

(1) Access seekers or access holders will not be forced to negotiate collectively, if they wish to engage or agree separate terms with DBIM.

(2) However, if a group of access seekers or access holders wish to negotiate collectively with DBIM, DBIM is not permitted to refuse to do so other than for the following reasons:

  (a) the group has failed to provide relevant written notice to DBIM

  (b) the group has not been able to demonstrate that it is legally permitted to collectively negotiate, or

  (c) there is insufficient commonality of interest in relation to the matters that are the subject of negotiation.

We have proposed drafting that implements the positions discussed above—see clause 5.14 in Appendix A.

As the implementation of collective negotiation under the 2019 DBCT DAU is new, we will continue to monitor the operation of this arrangement throughout the operation of the 2019 DBCT DAU, with a view to implementing refinements as required.

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[317] Dalrymple Bay Coal Terminal Access Holders and Access Seekers, submission to the ACCC, *Application for Authorisation to the Australian Competition and Consumer Commission*, 21 December 2020.

[318] DBCTM, submission to the ACCC, *Application for authorisation no. 1000541: Dalrymple Bay Coal Producers collective negotiation with DBCT Management*, 29 January 2021, p. 3.

7.2.3 Analysis

Sharing of costs

In its submissions, DBIM emphasised that the negotiate-arbitrate without a reference tariff model proposed in the 2019 DBCT DAU would give primacy to commercial negotiations between DBIM and its access seekers and holders.[319] DBIM stated that it offered 'a range of services above and beyond simply the handling of coal at DBCT', that 'these additional services are valued by producers', and that 'producers have unique service demands'.[320] As a result, DBIM contended that there was a range of terms that could be negotiated with access seekers and existing users, and that variation would be reflected in price and non-price terms.[321]

We consider that the range of terms that may be negotiated between DBIM and an access seeker or an existing user under the negotiate-arbitrate model proposed in the 2019 DBCT DAU, taking into account the specific circumstances of the parties, is broad. As such, the presence of collective negotiation does not mean that the same terms will necessarily be agreed with all parties—parties to a collective negotiation are free to conclude their own individual agreements with DBIM. Rather, collective negotiation can act as a 'starting point' for negotiations, by permitting access seekers and users to share the costs involved in assessing standard information about the DBCT service. The starting point for all negotiations is the same declared service at DBCT, so there is likely to be significant overlap in the standard information to be obtained about the DBCT service at any particular time.

We consider that the sharing of costs would promote the interests of access seekers and users who are engaged in negotiation with DBIM, by reducing unnecessary duplication of costs. We consider collective negotiation would have a neutral impact on the legitimate business interests of DBIM in terms of costs, as the information disclosed during a collective negotiation is likely to be information that would need to be disclosed individually by DBIM to each access seeker/user as part of the negotiation. Indeed, negotiating with a group of access seekers and/or users may reduce the costs of negotiation for DBIM compared to engaging in individual bilateral negotiations. We note that the 2019 DBCT DAU contained words that appeared to have recognised the likely cost efficiencies of collective engagement with access holders. Clause 17.4(c) of the 2019 DBCT DAU had relevantly stated:

> If two or more Access Holders are parties to a Dispute involving substantially the same issues and there are no special circumstances making it necessary or desirable for them to be separately represented, it will only be reasonable for those Access Holders in aggregate to recover the costs of being collectively represented in the Dispute.

In this final decision, given that collective negotiation and arbitration are separately dealt with, we consider it is appropriate that these words be removed so that the question of costs in relation to the matter is for our discretion. However, this clause had the effect that where costs from separate representation were incurred by access holders or access seekers, these were not permitted to be recovered. This indicates a previous recognition of the efficiency associated with collective processes and appears to have sought to incentivise such collective processes to occur.

Finally, in circumstances where DBIM considers there is insufficient commonality of issues between participants in a collective negotiating group, it can refuse to participate (subject to a right by the members of the group to refer that refusal to us as a dispute). This means that DBIM

[319] DBCTM, sub. 1, p. 28.
[320] DBCTM, sub. 1, pp. 41–42.
[321] For example, see DBCTM, sub. 1, pp. 43–48.

is not forced to participate in collective negotiations unless the nature of the joint engagement involves common issues and, therefore, that the benefits identified above are likely to arise.

Scope for negotiation

We consider that collective arbitration is permitted under the existing legislative regime in Queensland, without requiring amendments to the 2019 DBCT DAU (discussed in section 7.4). In circumstances where collective arbitration is permitted, we consider that collective negotiation will promote the incentive for access seekers and users to negotiate with DBIM prior to seeking arbitration. Agreeing access terms at the negotiation stage is less costly than having access terms determined at arbitration. Where collective negotiation can incentivise parties to agree to access terms without resorting to collective arbitration as a 'first resort', we consider that the requirement to collectively negotiate can promote the interests of both DBIM and access seekers and users in avoiding potentially costly and protracted arbitrations.

We consider that permitting collective negotiations does not undermine incentives for legitimate negotiations between individual access seekers or access holders and DBIM, where this is seen to be in the interests of the parties. There is no compulsion on access seekers or access holders to participate in a collective process if their commercial interests are better achieved by independently negotiating a deal with DBIM. As such, DBIM has an incentive to identify and propose different and targeted benefits to individual access seekers or access holders in order to achieve negotiated outcomes with individuals.

Collective negotiation can limit the ability of DBIM to exercise its market power in a way that would appropriate the value of investment undertaken by a user of the Terminal, such that this would have efficiency implications for the use of DBCT. We consider that such an exercise of its market power would be contrary to the object of part 5 of the QCA Act and the public interest in having competition in related markets, and would not be a legitimate business interest of DBIM. Collective negotiation may limit the legitimate business interests of DBIM in engaging in bilateral negotiations with access seekers/users; however, we consider this potential cost is outweighed by the benefits of requiring collective negotiation, as discussed above.

Summary of decision 7.2

It is appropriate for DBIM to amend the 2019 DBCT DAU such that:

DBIM is required to collectively negotiate with access seekers and/or existing users, where lawful, and where requested to do so by access seekers and/or existing users, subject to certain minimum requirements (including that the group can establish sufficient commonality in the issues to be negotiated).

7.3 Amendments to facilitate effective arbitration

Where DBIM and an access seeker are unable to reach agreement on the terms and conditions of access, including an appropriate TIC, or DBIM and a user are unable to reach agreement on new access charges the matter may be referred to arbitration. While we consider that an appropriate non-reference tariff model should facilitate negotiations, reducing the likelihood of arbitration occurring, the arbitration framework is important, in that it:

- provides an appropriate backstop—access seekers and users should have confidence that where negotiations do fail, they will be able to access arbitration, which will produce reasonable outcomes

- provides a credible threat to constrain DBIM's market power in negotiations—the threat of arbitration may incentivise DBIM to provide reasonable access proposals in negotiations, given access seekers and users can resort to arbitration if it does not do so.

There is a balance to be achieved on the level of certainty provided around any likely future arbitration outcome. Significant certainty about the outcomes of arbitration may constrain the way in which parties approach negotiation and therefore reduce the scope available for efficient and flexible outcomes. However, where the likely outcome of any future arbitration is unduly uncertain, this may limit the effectiveness of arbitration as a backstop to constrain DBIM's market power in negotiations.

Further, consideration must be given to the costs associated with arbitration. While such costs may incentivise parties to reach negotiated outcomes, if these costs prohibit access seekers or users from accessing arbitration, the objectives may not be achieved. The cost and time associated with an arbitration may be reduced if parties have a clear understanding of the likely approach which we, or any other arbitrator, will take to considering the matters in dispute as they can focus their negotiations, evidence and preparation accordingly.

We have had regard to these matters when considering the appropriate amendments to the arbitration framework outlined in the 2019 DBCT DAU. This includes the arbitration processes proposed to apply to future access holders under the 2019 DAU SAA.

7.3.1 Arbitration criteria

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

We hold several concerns in relation to the arbitration criteria originally proposed by DBIM in clause 11.4(d) of the 2019 DBCT DAU. In particular:

- the arbitration criteria do not sufficiently protect the interests of access seekers, thereby undermining the purpose of arbitration as a backstop for dispute resolution
- there is a degree of uncertainty as to whether the arbitration criteria in the 2019 DBCT DAU would apply to arbitrations under existing user agreements.[322]

DBIM proposed amendments to the arbitration criteria in the 2019 DBCT DAU (cl. 11.4(d)) to align with section 120 of the QCA Act, and to align the arbitration criteria for users and access seekers.[323]

DBIM submitted that the statutory arbitration criteria would not permit us to set prices at inappropriately high levels.[324] In this regard, DBIM considered it is highly unlikely that in having regard to the arbitration criteria it would be permissible for us to set pricing at inefficient or inappropriately high levels. Even if it were permissible, DBIM considered the suggestion that we would exercise our discretion in undertaking its statutory role under part 5 of the QCA Act to set inappropriately high prices is completely unreasonable.[325]

The DBCT User Group submitted that the factors in section 120 of the QCA Act present an improved and more balanced set of criteria than the 2019 DBCT DAU. While the DBCT User Group

[322] QCA, *DBCT Management's 2019 draft access undertaking,* interim draft decision, February 2020, p. 8.
[323] DBCTM, sub. 8, p. 24.
[324] DBCTM, sub. 15, p. 21.
[325] DBCTM, sub. 15, pp. 31–32.

acknowledged the section 120 QCA Act criteria as an improvement on DBIM's proposed 'willingness to pay' criteria, it did not support the adoption of the section 120 QCA Act criteria. It considered that the criteria, or at least our apparent interpretation of the criteria, will facilitate monopoly pricing.[326]

The DBCT User Group strongly disagreed that the criteria provide 'sufficient certainty'—as they are high-level, uncertain and ambiguous, and involve factors that can clearly conflict with each other. It said that the section 120 QCA Act criteria create a very wide range of potential outcomes.[327]

The DBCT User Group outlined the following concerns about relying on the section 120 QCA Act criteria to arbitrate a dispute on the TIC:

- the arbitration criteria's reference to 'value'
- the arbitration criteria do not reference pricing of comparable services.[328]

These matters are further discussed below.

DBIM also proposed amendments to the arbitration criteria to apply to price reviews that will occur under the 2019 DAU SAA.[329] The proposed amendments align the arbitration criteria with those in the 2017 SAA (see cl. 7.2(d) and (e) of the 2017 SAA). These provisions state that when we are the arbitrator, we may conduct the arbitration in such a manner as we see fit, after consultation with the parties. In considering a dispute on access prices conducted in accordance with the SAA, we would have regard to the matters in clause 11.4 of the 2019 DBCT DAU, consistent with clause 11.3(c) of the 2019 DBCT DAU.[330]

We are of the view that the required amendments to the arbitration criteria provide access seekers and users with sufficient certainty as to the criteria that will apply for a dispute on the TIC under the 2019 DBCT DAU and access agreements. We consider the arbitration criteria in section 120 of the QCA Act are appropriate criteria for us to apply as part of the arbitration process. Such an approach provides us with sufficient flexibility to make appropriate access determinations on pricing matters. We consider the application of these criteria as part of the arbitration process provides an adequate constraint on the ability of DBIM to exercise market power in negotiating a TIC with access seekers and access holders.

We also consider it necessary to include the rehabilitation cost estimate as part of the arbitration criteria to give the parties sufficient certainty of our intention to apply our approved cost estimate as part of any arbitration during the term of the 2019 DBCT DAU. This is further discussed in Chapter 9.

Additionally, the arbitration criteria are sufficiently flexible to provide scope for parties to reach negotiated outcomes on pricing matters.

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[326] DBCT User Group, sub. 9, p. 23, sub. 13, p. 39.
[327] DBCT User Group, sub. 13, p. 40.
[328] DBCT User Group, sub. 13, pp. 40–41.
[329] DBCTM, sub. 8, appendix 4 (Amended SAA mark-up), cl. 7.2.
[330] We require amendments to clause 11.3(c)(2) of the 2019 DBCT DAU to clarify that subject to cl. 11.4 of the 2019 DBCT DAU, for any dispute in terms of a TIC under an access agreement, we must give effect to and make a determination that is consistent with the terms of that access agreement. We do not consider it appropriate for the terms of the standard access agreement in place under the undertaking at the time of the determination to override the access agreement between the parties.

The arbitration criteria's reference to 'value'

The DBCT User Group had significant concerns regarding the proposed arbitration criteria's reference to value and the commentary in the draft decision as to how value is to be taken into account. It considered this aspect of the criteria creates high levels of uncertainty regarding the price that we might determine in arbitration.[331]

The DBCT User Group noted that the QCA Act provides no definition for what 'value' represents or how it is to be measured. It submitted that our draft decision 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.[332]

The DBCT User Group considered 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 that would be adopted by a competitor in a hypothetical competitive market. It said that the change is both inappropriate and damaging to the prospects of commercial negotiations producing an efficient and reasonable price.[333]

The DBCT User Group further considered that given the coal users are price takers in the coal markets into which they sell their products, prices above the efficient costs of supply will necessarily translate into inefficient investment decisions by coal access seekers and users in other dependent markets.[334] The DBCT User Group considered there is no justification based on allocative efficiency, as capacity is not allocated to the users based on those which ascribe it the most value. The DBCT User Group also considered that this form of differential pricing will significantly harm efficiency, as incentives for existing producers to pursue greater efficiencies will be materially blunted.[335]

The DBCT User Group considered that this is not how this arbitration criterion was intended to be interpreted. This criterion is to be applied in determining appropriate pricing for a monopoly service that meets the access criteria in section 76(2) of the QCA Act. Value in this context is intended to capture the true economic value of the service—that which would apply in a hypothetical competitive market for the service.[336]

The DBCT User Group was of the view that either these criteria should be removed from the arbitration criteria that we will apply, or we should confirm a more appropriate interpretation (for example by way of substantive arbitration guidelines).[337] The arbitration criteria need to make clear that it will not be applied in a way that permits DBIM to extract monopoly rent post-investment.[338]

DBIM submitted that the value of service to the access seeker is simply a relevant consideration that the arbitrator must have regard to. It is not to say that the value of the service to the access seeker would be determinative of the price for access to the service. [339]

[331] DBCT User Group, sub. 13, p. 41.
[332] DBCT User Group, sub. 13, p. 41.
[333] DBCT User Group, sub. 13, p. 42.
[334] DBCT User Group, sub. 11, pp. 8–9.
[335] DBCT User Group, sub. 13, p. 42.
[336] DBCT User Group, sub. 16, p. 34.
[337] DBCT User Group, sub. 16, p. 35.
[338] DBCT User Group, sub. 13, p. 42.
[339] DBCTM, sub. 15, pp. 33–34.

DBIM considered that the pricing principles in the QCA Act require prices that allow DBIM to recover at least its efficient costs of providing the service. DBIM considered that the access price can still be set higher as part of an arbitration, having regard to the factors in section 120 of the QCA Act.[340] DBIM submitted that it is highly unlikely that a single price, determined by reference to our assessment of efficient costs of access, would uniquely promote efficient outcomes and effective competition in upstream and downstream markets.[341]

DBIM considered that prices below the value of the service will not restrict output. It noted that the users in the CQCN are price takers in the global coal market, and prices above the efficient costs of the service but below the value of the service to the user will simply result in a transfer of rents between the service provider and the user.[342]

Consistent with the matters in section 120 of the QCA Act, we consider it is appropriate that the undertaking requires the arbitrator to have regard to matters other than the efficient costs incurred in providing access—including the value of the service to an access seeker, or group of access seekers/users.

However, the value of the service to an access seeker or group of access seekers/users is only one of many factors that we are to have regard to in determining an appropriate TIC. We acknowledge that matters in section 120 of the QCA Act may give rise to competing considerations that need to be weighed in deciding whether it is appropriate to determine the TIC. Some of the matters to which we must have regard may lend themselves to different conclusions on whether a TIC is appropriate. In the absence of any statutory or contextual indication of the weight to be given to the various factors, it is generally for the decision-maker to determine the appropriate weight. Relevantly, our approach is broadly aligned with the process adopted in previous undertakings in that we will continue to have regard to broad statutory criteria in making our decision on the pricing terms of access.

We will assess the appropriateness of a TIC in an arbitration having regard to the matters in section 120 of the QCA Act, relevant information before us, and the relevant circumstances of the dispute, including the individual circumstances of the parties involved. In this regard, the value of the service to each access seeker/user will be considered on a case-by-case basis.[343] As such, the way in which we will have regard to the value of the service to an access seeker will be determined as part of an arbitration and having regard to the facts and evidence that are before us as the arbitrator.

While consideration of the value of the service may allow for access prices to be set higher than the efficient costs of providing access, such a price would not necessarily have efficiency implications for the use of the Terminal.

However, in this regard, we do not consider it appropriate for the TIC to be set at a level that impairs economic efficiency, either in the use of the Terminal or in a related market. We have provided further guidance, as part of our arbitration guideline, to reflect this consideration in having regard to the value of the service to an access seeker, should there be a dispute regarding the TIC.

[340] DBCTM, sub. 8, p. 31.
[341] DBCTM, sub. 8, p. 32.
[342] DBCTM, sub. 15, pp. 33–34.
[343] For instance, the operational and supply chain costs for each mine will differ depending on the site and location characteristics of that mine. Additionally, the price obtained for the product may differ considerably depending on the characteristics of the coal produced.

In assessing an appropriate TIC as part of an arbitration, we will have regard to the reasonableness of the access proposal offered by DBIM and any counteroffer provided by an access seeker/user.

The DBCT User Group was also concerned that there has been no consideration of the appropriateness of access prices increasing to reflect value, while DBIM maintains the same risk profile. Noting that coal producers are price takers in global coal markets, the DBCT User Group considered that an inefficiently high price will lead to inefficient underinvestment in coal developments in the Hay Point catchment.[344] The DBCT User Group also considered it inappropriate that the inclusion of 'value' as a criterion creates a significant upward bias to pricing outcomes, reducing coal producers' exposure to high points of the coal price cycle while completely immunising DBIM from low points of the coal price cycle.[345]

We recognise that the value of the service to access seekers may vary over the life of the asset and is affected by market circumstances and the contractual arrangements being negotiated. Similarly, the value of the service to an access seeker may vary through the regulatory period. To ensure that any consideration of 'value' does not deter efficient investment in dependent markets, any consideration of the value of the service to an access seeker should take into account the commercial and regulatory risks faced by access seekers that affect the value of the service over the life of the asset. This is reflected in our arbitration guideline, which explains that we will have regard to the risk-sharing arrangements provided for in the access arrangements—and the extent to which the value of the service to an access seeker may vary significantly throughout the coal price cycle to reflect market conditions.

Overall, we consider that having regard to the matters in section 120 of the QCA Act in an arbitration provides access seekers with sufficient certainty that they will be able to obtain access to DBCT on reasonable terms. This will be further supported by guidance in the arbitration guideline, addressing the matters discussed above.

The arbitration criteria do not reference pricing of comparable services

The DBCT User Group was also concerned that the section 120 QCA Act criteria do not incorporate the reference in clause 7.2(e) of the SAAs to pricing of comparable services. It considered including this criterion is important to constraining some of the adverse outcomes of a negotiate-arbitrate model without a reference tariff. In particular, 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
- assists in further reducing information asymmetry because it means there is greater utility in the information required to be published about our previous approaches in relation to DBCT services
- reinforces that the price adopted in arbitration must be appropriate.[346]

DBIM submitted that it is unnecessary to include the relevant clause 7.2(e) as part of the arbitration criteria, in the context where we are the arbitrator. DBIM considered that the purpose of the clause is that the commercial arbitration should produce outcomes similar to what might have been expected had we determined it—this is redundant in circumstances where we are the arbitrator. That is not to say that we cannot take into account the same considerations we did in

[344] DBCT User Group, sub. 13, p. 42.
[345] DBCT User Group, sub. 13, p. 42.
[346] DBCT User Group, sub. 13, p. 43.

determining the prices of comparable services, to the extent that they are relevant to the arbitration criteria.[347]

We consider that the criterion in clause 7.2(e) of the SAA, as drafted, does not apply directly to QCA arbitration on the TIC. As outlined above, we consider that having regard to the matters in section 120 of the QCA Act provides users with sufficient certainty that they will be able to obtain access to DBCT on reasonable terms. Providing additional criteria in relation to comparable services may in some circumstances limit the scope for commercial negotiations on pricing matters.

Summary of decision 7.3

It is appropriate for DBIM to amend the 2019 DBCT DAU to:

(1) align the arbitration criteria in the 2019 DBCT DAU with section 120 of the QCA Act (see cl. 11.4(d) of Appendix A)

(2) align the arbitration criteria to apply to price reviews that will occur under the 2019 DAU SAA with those in the 2017 SAA (see cl. 7.2 of Appendix B).

7.3.2 Providing arbitration guidelines

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

The DBCT User Group considered that QCA guidelines prescriptively determining the methodology for pricing that would apply during an arbitration are absolutely necessary to respond to information asymmetry and create a higher certainty of outcome.[348]

DBIM submitted that any guidance document should be limited to providing information about the process we propose to follow, and the factors we must have regard to in any arbitration—by reference to the QCA Act and the approved access undertaking. DBIM considered:

- a guideline document that sets out our likely methodology could have the effect of us predetermining issues not currently before us and preclude our ability to decide an arbitration having regard to the relevant facts of the dispute[349]
- a prescriptive arbitration guideline will reduce the prospect of successful negotiated outcomes and increase the likelihood that all access agreements will have their access charges determined by arbitration[350]
- a prescriptive arbitration guideline is at odds with guidelines from other regulators that arbitrate access disputes under negotiate-arbitrate regimes. Those regulators adopt approaches to drafting arbitration guidelines that are focused on principles and process.[351]

Our draft decision considered that there are likely to be benefits to us publishing a guideline that is procedural in nature, providing guidance for parties involved in a dispute as to how we intend

[347] DBCTM, sub. 15, p. 34.
[348] DBCT User Group, sub. 11, p. 32.
[349] DBCTM, sub. 8, p. 38.
[350] DBCTM, sub. 8, p. 40.
[351] DBCTM, sub. 8, p. 41.

to manage such disputes. As part of our draft decision, we presented a draft guideline, *Arbitration guideline for disputes under the DBCT 2021 access undertaking.*

In providing this guideline document, we did not seek to provide prescriptive methods or approaches that we consider appropriate to apply in an arbitration. However, we considered there was merit in providing limited substantive guidance on key matters.

DBIM supported the publication of an arbitration guideline and considered it will help facilitate an effective and efficient arbitration process. DBIM considered the draft arbitration guideline strikes the right balance by clearly laying out the process for arbitration, without providing a prescriptive methodology for setting prices which would risk ultimately defeating any attempt at negotiation. DBIM considered the non-prescriptive nature of the draft guideline consistent with the approach taken by other regulators. It also considered that it is appropriate that the guideline is not binding on us, as retaining the flexibility to depart from the guideline will ensure we are not forced to adopt a process that is not fit-for-purpose.[352]

In contrast, the DBCT User Group was disappointed with our draft arbitration guideline. The DBCT User Group considered the arbitration guideline needs to mitigate the uncertainty generated by the proposed negotiate-arbitrate model's wide range of possible outcomes, to make arbitration effective. It also considered that guidelines that achieve significantly greater certainty of outcomes are critical to improving both the prospects for, and appropriateness of, negotiated outcomes.[353]

The DBCT User Group considered that to be appropriate, the guideline needs to create something approaching the level of certainty that exists for users and access seekers about how a future reference tariff will be determined but does not require absolute certainty that will disincentivise negotiation.[354]

The DBCT User Group submitted that providing greater certainty that arbitrated prices would be reflective of the efficient costs of supply, would make arbitration more of a credible threat and constraint. The DBCT User Group submitted our indications of its likely approach would more reasonably anchor all parties' expectations, and therefore:

- narrow the range of potential outcomes to a point where it was more likely to be bridged by commercial negotiations
- 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.[355]

The DBCT User Group submitted that it is also necessary for the guideline to provide substantive guidance on all material pricing matters that the undertaking itself does not require to reflect the ex ante determination we made during the 2019 DBCT DAU process.[356]

We remain of the view that there are likely to be benefits of publishing a guideline that is primarily procedural in nature.

We do not consider that prescribing the pricing methodology for an arbitration is necessary to adequately address the concerns we have identified with market power and information

[352] DBCTM, sub. 12, pp. 4, 11, 17, sub. 15, p. 21.
[353] DBCT User Group, sub. 13, p. 36, sub. 16, pp. 33–34.
[354] DBCT User Group, sub. 16, p. 34.
[355] DBCT User Group, sub. 13, pp. 37–38.
[356] DBCT User Group, sub. 13, pp. 38–39.

asymmetry. Furthermore, we consider that no further guidance of this sort is required to facilitate effective negotiation between the parties. As explained in this decision, we consider:

- information provision arrangements are sufficient for access seekers and users to form a view on a reasonable TIC
- access seekers and users have recourse to arbitration should they consider a TIC proposal unreasonable
- the arbitration criteria provide sufficient certainty that access seekers and users will be able to obtain access to DBCT on reasonable terms
- negotiating parties are incentivised to act reasonably in negotiating access.

We acknowledge that publishing guideline documents that are overly prescriptive may reduce the prospect of successful negotiated outcomes. Furthermore, we note that determining particular aspects of a pricing proposal may rely on the terms of access being negotiated between the parties. Nonetheless, we remain of the view that there is merit in providing limited substantive guidance on key matters.

We have published an updated guideline titled *Arbitration of disputes in relation to the DBCT service,* to accompany this final decision.[357] We may, from time to time, revise this guideline at our discretion. This may include, for example, the correction of typographical errors or updating terminology and cross-references as required. If substantive changes are proposed, we will conduct an appropriate consultation process with stakeholders, which may include the issuing of a draft revised guideline and inviting submissions from stakeholders.

Guidance provided in other jurisdictions

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

DBIM stated that other regulators adopt an approach to drafting arbitration guidelines that are focused on principles and process.[358] DBIM provided several examples including *A guide to resolution of access disputes under Part IIIA of the Trade Practices Act 1974* by the ACCC and *Guideline for the resolution of distribution and transmission pipeline access disputes under the National Gas Law and National Gas Rules* by the AER.

The DBCT User Group noted that the approach of regulators on this issue is, unsurprisingly, related to the scope of the relevant regime.[359] The DBCT User Group stated there is clear precedent for prescribing detailed pricing methodologies and provided examples including the AER's *Light Regulation – Financial Reporting Guideline,* and the ACCC's *Pricing principles for price approvals and determinations under the Water Charge (Infrastructure) Rules 2010*.[360]

It is apparent from our review of various guideline documents that content can vary greatly—from guidelines that provide only general commentary on likely processes to be followed in an arbitration, to guidelines which provide detailed guidance on specific issues. We consider that the amount of detail contained in each guideline is related to the scope of the relevant regulatory regime, including the regime's underlying legal framework.

[357] The guideline is a publication of the QCA and is non-binding; it is intended to be read in conjunction with (without being part of) any access undertaking that might subsequently be approved by the QCA.
[358] DBCTM, sub. 8, p. 41.
[359] DBCT User Group, sub. 11, p. 33.
[360] DBCT User Group, sub. 11, p. 33.

Overall, we consider it is appropriate to provide guidance that is procedural in nature but that also provides limited substantive guidance on specific matters. We do not consider it appropriate to provide guidance which is overly prescriptive.

7.4 Collective arbitration

7.4.1 Stakeholder submissions

The DBCT User Group expressed its concerns that 'the adverse cost impacts of the negotiate-arbitrate form of regulation are not just caused by the negotiation phase, but the cost prohibitive nature of the proposed arbitration backstop'.[361] The DBCT User Group contended that as a result of the additional costs, arbitration would not be an equal backstop for all users, and that small or single project access seekers, or access seekers requiring immediate certainty, would be particularly negatively affected.[362]

The DBCT User Group also submitted that in the absence of collective arbitration, there would be issues of information asymmetry between DBIM and access seekers and users:

> 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).[363]

The DBCT User Group submitted that this information asymmetry, along with the increased costs and uncertainty of arbitration, may lead to access seekers and users being 'forced into agreeing inefficiently high pricing due to not having access to a credible backstop'.[364] As a result, the DBCT User Group submitted 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
>
> This will assist in enhancing the extent of constraint that arbitration can cause by mitigating the costs imposed on individual access seekers and holders.[365]

DBIM strongly disagreed with the DBCT User Group's submissions, and submitted that '[c]ollective arbitrations are inappropriate and could potentially harm incentives for access seekers to engage in meaningful negotiations with DBCTM'.[366] It stated:

> Collective arbitrations could materially reduce the likelihood of negotiated outcomes, and increase the likelihood that access seekers would proceed directly to arbitration, a risk that the User Group has repeatedly raised as an issue. DBCTM has very real concerns that existing users would seek to engage in collective arbitrations, without meaningfully engaging in commercial negotiations, with a view to producing an arbitration outcome that would, in effect, become a de

[361] DBCT User Group, sub. 16, p. 30.
[362] DBCT User Group, sub. 13, p. 44.
[363] DBCT User Group, sub. 13, p. 44.
[364] DBCT User Group, sub. 16, p. 29.
[365] DBCT User Group, sub. 13, pp. 44–45.
[366] DBCTM, sub. 15, p. 21.

> facto reference tariff. The mere prospect of collective arbitration will significantly dampen any incentive for otherwise willing individual users to engage in meaningful negotiations.[367]

DBIM disputed the DBCT User Group's submissions regarding increased information asymmetry and the increased costs of arbitration, particularly for smaller or single project access seekers, stating:

> DBCTM disputes that single project access seekers could not make a reasonable assessment of the likely pricing outcomes. Even DBCTM's smallest customers are far from being 'mum and dad' consumers. As shown in DBCTM's April 2020 submission, they are relatively large, sophisticated, mining companies who deal with significant uncertainty on a day-to-day basis. Any additional costs involved in assessing the reasonableness of the TIC is a completely standard cost of doing business and would be in keeping with other (unregulated) negotiations that miners face on a day-to-day basis. With regard to existing users, many have negotiated charges at other unregulated terminals, and most have a very long history at DBCT and are familiar with the regime.[368]

DBIM submitted that the measures it has previously proposed, such as information provision, evidentiary limits and our processes, would be sufficient to address the DBCT User Group's concerns, while at the same time preserving the incentives for negotiation.[369]

7.4.2 No amendments required to implement collective arbitration

We consider that amendments are not required to the 2019 DBCT DAU to implement an express right for collective arbitration. This is because the existing legislative regime in Queensland already provides for collective arbitration of disputes in certain circumstances, and we consider this existing legislative regime to be appropriate for the circumstances of the 2019 DBCT DAU and for undertaking arbitrations under existing access agreements. We note that parties are able to negotiate an express right for collective arbitration if they value such a right, in addition to the existing legislative regime.

We consider that it is beneficial to conduct arbitrations collectively where the legislative requirements for collective arbitration are satisfied—for example, where there is a common question of law or fact that arises in all the proceedings, or if for some other reason it is desirable that arbitrations proceed collectively.[370] In these circumstances, collective arbitration will reduce the time and costs incurred by the arbitrator, DBIM, and the access seeker/user who are parties to the dispute in resolving multiple disputes that can otherwise be determined at once together. We consider that reducing the time and costs spent on arbitrations would promote the interests of DBIM (as the operator of the service) and the interests of access seekers and existing users, and would promote the objects of part 5 of the QCA Act in ensuring the efficient provision of the DBCT service.

Collective arbitration for disputes under the QCA Act

We consider that for access disputes under the QCA Act, we (as the arbitrator) are empowered by the QCA Act to:

- notify any other person the QCA considers is appropriate to become a party to the arbitration of the access dispute—section 114(c)

[367] DBCTM, sub. 15, p. 36.
[368] DBCTM, sub. 15, p. 37.
[369] DBCTM, sub. 15, p. 37.
[370] Section 27C of the *Commercial Arbitration Act 2013* (Qld). See below for a discussion of the application of this Act to disputes arising within the term of the 2019 DBCT DAU.

- join any other person who applies to the QCA in writing to be made a party and is accepted by the QCA as having a sufficient interest—section 116(1)(d).

We consider the above provisions to be sufficient to allow us as arbitrator to hear and determine collective arbitrations for access disputes under the QCA Act.

Collective arbitration for disputes under the Commercial Arbitration Act

More broadly, we consider that collective arbitration is provided for in the circumstances described in the *Commercial Arbitration Act 2013* (Qld) (CAA). We consider that it is appropriate that the arbitrator make a decision regarding collective arbitration based on the facts of the dispute and the application of the CAA at the relevant time.

Arbitrations conducted in Queensland by the QCA or a private arbitrator, including those conducted pursuant to existing access agreements, will be commercial arbitrations within the scope of the CAA—section 1 of the CAA. Section 27C(1) of the CAA permits consolidation of arbitral proceedings by the arbitral tribunal on application of a party to the arbitration, on the grounds that:

> (a) a common question of law or fact arises in all those proceedings; or
>
> (b) the rights to relief claimed in all those proceedings are in respect of, or arise out of, the same transaction or series of transactions; or
>
> (c) for some other reason specified in the application, it is desirable that an order be made under this section.

These issues would need to be considered on the facts of any given dispute.

Additionally, section 27C(4) of the CAA permits the arbitral tribunal to consolidate arbitral proceedings by its own motion if all the related proceedings are being conducted by that same tribunal.

For some disputes arising under the 2019 DBCT DAU or existing user agreements, it would seem likely that there would be questions of law or fact that could be said to be common—for example, on the methodology for determining an efficient price for the service. This is particularly the case for price reviews conducted under existing user agreements—for example, clause 7.2(b) of the 2017 SAA provides that reviews of charges on revision dates are 'intended to be undertaken at the same time, in conjunction with, and on the same basis as reviews under other User Agreements which are in terms similar to this Agreement where a similar review is due at the same time'. Such a clause may provide a basis to conclude, in a case to which the clause applied, there is 'some other reason' why a consolidation order is desirable.

We note there are some practical limitations on the use of section 27C of the CAA. Firstly, it requires that the various arbitrations be on foot in order for them to be consolidated. Secondly, where one of the arbitrations is on foot before a different tribunal (for example, a private arbitrator rather than the QCA), a consolidation order would only be made if the two tribunals agreed on the appropriate consolidation order.[371]

7.4.3 Amendments to the 2019 DBCT DAU—consistency of procedure for disputes

We note that under the arbitration processes proposed in the 2019 DBCT DAU and the existing regulatory regime, there may be some gaps or areas of inconsistency that require clarification. We require the following amendments to the 2019 DBCT DAU to address these issues.

[371] Section 27C(5)–(7) of the CAA.

We consider that it is appropriate to require such amendments to ensure, where possible, consistency in the procedures that apply to disputes—whether such disputes arise under the QCA Act, the undertaking or existing user agreements.[372] We consider that ensuring consistent procedures will reduce the administrative and compliance burden and costs to DBIM, access seekers and users and the arbitrator in engaging in disputes. Additionally, ensuring consistent procedures will reduce the scope for 'forum shopping'—where a dispute may be brought under different processes (e.g. under the QCA Act or under the access undertaking) with a view to achieving a more beneficial outcome under a particular process—by ensuring that similar procedures will be followed in the resolution of each dispute to the extent possible.

Allowing collective negotiation groups to enter into collective arbitrations

As discussed in section 7.2 above, we consider it appropriate to require the addition of a new clause (cl. 5.14) in the 2019 DBCT DAU to require DBIM to engage in collective negotiations on request, where lawful.

For those collective negotiation groups to obtain the full benefit of the negotiate-arbitrate model, further consequential amendments are required to clause 17 (dispute resolution) of the 2019 DBCT DAU to ensure those collective negotiation groups can deal with any subsequent dispute failing negotiation under the same processes as individual access seekers/users.

Given collective negotiation groups can equally refer their disputes to the dispute resolution process in clause 17.4 which ultimately ends with arbitration by the QCA, DBIM will be incentivised, for the same reasons set out above, to engage meaningfully and in good faith with the collective negotiation group.

We have proposed drafting that implements this position—see clause 17 in Appendix A.

Consistency of procedure to notify other parties of arbitrations

For access disputes under the QCA Act, section 114(c) of the QCA Act empowers the QCA (as the arbitrator) to notify any other person the QCA considers is appropriate to become a party to the arbitration of the access dispute (see section 7.4.2).

No similar power exists for the arbitrator if a dispute is commenced under the 2019 DBCT DAU or an existing access agreement. As such, we require an amendment to the 2019 DBCT DAU to require DBIM to notify any other person we consider may be appropriate of the arbitration on foot. These persons may then initiate their own arbitrations with a view to possible consolidation.

We have proposed drafting that implements this position—see clause 17.4(c) in Appendix A.

Summary of decision 7.4

It is appropriate for DBIM to amend the 2019 DBCT DAU such that:

If a dispute or issue is referred to us for determination in accordance with the undertaking, DBIM must give written notice of the dispute or issue to (inter alia) any other person we consider may be appropriate to become a party to the arbitration.

[372] For a detailed discussion of these types of disputes and the various procedures that apply to each, see the Arbitration Guideline that accompanies this decision.

8 AMENDMENTS TO THE PRICING MODEL—OTHER MATTERS

In this chapter we consider a range of other matters related to the appropriateness of the 2019 DBCT DAU, which stakeholders have raised throughout our investigation. We outline our views on these matters, including whether we consider further amendments are required to the 2019 DAU, having regard to the assessment criteria in section 138(2) of the QCA Act.

8.1 Implications of costs and uncertainty associated with the 2019 DBCT DAU

The DBCT User Group considered that the 2019 DBCT DAU created significant costs and uncertainty for individual access seekers, relative to the upfront regulatory process for setting tariffs. The DBCT User Group considered that this will result in some access seekers effectively being pressured to settle for inefficient prices.[373] The DBCT User Group stated that costs and uncertainty mean the 'threat of arbitration' will not provide a credible or sufficient constraint on DBIM's market power in negotiations.[374]

The DBCT User Group considered there is little prospect of negotiated outcomes being reached, other than for those users or access seekers that are willing to accept an inefficiently high price—because arbitration does not provide a credible constraint or backstop in their particular circumstances. It considered this might occur for an individual user with lesser financial resources or a need to obtain immediately greater pricing certainty for a project. While those users or access seekers might reach a negotiated outcome, the DBCT User Group considered that negotiate-arbitrate regulation makes it particularly vulnerable to DBIM's abuse of its monopoly position and agreeing an inefficient pricing outcome.[375]

In our view, once our required amendments to the 2019 DAU are incorporated, we do not expect that access seekers/holders would be pressured to settle for inefficient prices due to costs and uncertainty associated with arbitration. Following these amendments, we do not consider that the costs and uncertainty associated with arbitration will be so material as to limit arbitration providing a credible backstop and threat to constrain DBIM's market power in negotiations. Our reasoning is outlined below.

8.1.1 Costs associated with negotiation and arbitration

The DBCT User Group and New Hope Group considered that the 2019 DAU relies on numerous costly and protracted bilateral contractual negotiations and costly arbitration mechanisms.[376] Overall, the DBCT User Group considered that the administrative and compliance costs of negotiation and arbitration will clearly outweigh the costs of a single ex ante determination of the appropriate reference tariff followed by efficient negotiations.[377] Whitehaven Coal considered that complex factual and economic matters could be resolved more efficiently and fairly by way of an approved reference tariff.[378]

[373] DBCT User Group, sub. 2, p. 43.
[374] DBCT User Group, sub. 11, p. 30.
[375] DBCT User Group, sub. 13, p. 13.
[376] DBCT User Group, sub. 2, p. 12; New Hope Group, sub. 3, p. 9.
[377] DBCT User Group, sub. 9, p. 14.
[378] Whitehaven Coal, sub. 4, pp. 3–4.

The DBCT User Group submitted that transaction costs associated with negotiations are likely to be high. Even if an access seeker/holder could be assured of access to all potentially relevant information, it would be extremely difficult (and costly) to assess that information against the claims of DBIM. While it is possible that access seekers may be able to commission expert reports to assist their negotiations, the DBCT User Group considered that such reports are likely to make entering into negotiations prohibitively expensive, noting that access seekers/holders will cease to be able to engage a common legal and economic adviser, and will be required to appoint individual advisers at great individual expense (also noting that DBIM has already sent confidentiality agreements to existing users in the context of the current contractual price review that would restrict them from sharing advisers).[379]

Further, the DBCT User Group considered that where arbitration is required, this would also involve significant additional costs, including further legal and economic adviser costs. For access seekers, such costs can be very significant in terms of cash flow at the early stages of a project.[380] Rolling arbitrations were considered to be costly, inefficient and time-intensive for access seekers and DBIM, and resource-intensive for us.[381]

The DBCT User Group were of the view that the costs associated with negotiation and arbitration will be particularly significant for new and smaller access seekers with lesser resources or experience with DBCT than existing access holders.[382] While an access seeker may be sophisticated in relation to investment in and operation of mining projects, it does not mean the access seeker is able to easily assess information in relation to coal terminal costs and returns or to effectively negotiate terminal prices.[383]

On the other hand, the commonality of issues subject to access negotiations and arbitration means DBIM will face relatively limited additional costs for each arbitration, and because DBIM is party to all arbitrations it will have benefit in terms of cost efficiencies and be able to refine its arguments across all arbitrating access seekers.[384]

We accept that individual access seekers/holders may incur costs in negotiations, particularly if economic advisers are engaged to assist them in forming a view on the efficient costs of providing access to the Terminal. If a dispute occurs, additional costs will be incurred. These may include costs associated with economic and legal advice. We note these costs may be relatively greater for smaller access seekers/holders.

However, beyond the scope for access seekers/holders to reduce costs through lawful collaboration, we are of the view that our required amendments to the 2019 DAU will limit the costs associated with the 2019 DAU, particularly because:

- The required amendments to information provision (including the disclosure of relevant arbitrated outcomes) will narrow the scope of the task for access seekers/holders to establish a view on the efficient costs of providing access to the Terminal, should they wish to form a view on this matter in negotiating a reasonable TIC with DBIM.
- A range of amendments are designed to incentivise DBIM to provide reasonable access proposals in negotiations, which we expect will limit the costs associated with negotiations.

[379] New Hope Group, sub. 7, pp. 5–6; Whitehaven Coal, sub. 4, p. 3; DBCT User Group, sub. 16, p. 21.
[380] DBCT User Group, sub. 11, p. 30, sub. 16, pp. 21, 22.
[381] DBCT User Group, sub. 9, p. 5.
[382] DBCT User Group, sub. 2, p. 14.
[383] DBCT User Group, sub. 11, p. 20.
[384] DBCT User Group, sub. 11, p. 18, sub. 16, p. 22.

- Our amendment that provides for the option of collective negotiation where this is lawful will allow access seekers/holders to share the costs of negotiation, where applicable.
- The scope for collective arbitration to occur under the 2019 DAU is expected to reduce the costs associated with arbitration, by allowing the relevant parties to share these costs.
- We expect that our required amendments to facilitate effective negotiation, including those that provide incentives for DBIM to act reasonably in negotiations, will decrease the likelihood of arbitrations and the associated costs occurring.

We consider that when the 2019 DAU is amended in the way we require, the costs associated with the DAU will not lead to inefficient outcomes.

Access seekers/holders may still incur some costs under the 2019 DAU, even with the amendments outlined in this decision in place—ultimately, the extent to which costs are incurred will depend on the conduct of the parties. However, there are costs associated with all commercial environments, including under the reference tariff model. Further, where there are costs associated with arbitration, this could facilitate negotiations, by further incentivising the parties to reach negotiated outcomes.

Nonetheless, we do not consider these costs will be sufficiently great to pressure access seekers/holders into settling for inefficient prices. We do not consider that access to arbitration will be hindered by these costs.

8.1.2 Uncertainty around access prices

The DBCT User Group were of the view that the 2019 DAU removes the certainty provided by up-front TICs being determined by us.

The DBCT User Group considered that uncertainty will have a detrimental impact on investment incentives for users of the Terminal.[385] It was of the view that the promotion of the sustainable and efficient development of the Queensland coal industry requires prices set at efficient levels, and certainty of the pricing approach—which can only be achieved with a reference tariff.[386]

The DBCT User Group considered there is more uncertainty in an arbitration process, relative to the well understood QCA process.[387] While acknowledging there is not absolute pricing certainty where we set the reference tariff, New Hope Group were of the view that a process whereby an independent regulator sets reference tariffs by applying a transparent building block methodology, and provides access seekers with the opportunity to comment on the proposed terms of access, creates far greater certainty for investors in mining projects than the proposed negotiate/arbitrate model.[388]

While the DBCT User Group accepted there will not be certainty on the fixed dollar price that will be charged for expansion capacity, it considered that the approach we will take to determine price will be clear.[389]

The DBCT User Group considered that uncertainty around arbitrated outcomes could lead to costly arbitrations occurring due to the parties having materially divergent views on the likely

[385] DBCT User Group, sub. 2, p. 12.
[386] DBCT User Group, sub. 9, pp. 5, 13, 20.
[387] DBCT User Group, sub. 6, pp. 22–23.
[388] New Hope Group, sub. 3, pp. 11–12.
[389] DBCT User Group, sub. 11, p. 15.

outcomes of arbitration such that agreement is not reached.[390] In order for DBIM and access seekers/holders to be incentivised to reach negotiated outcomes without resorting to arbitration, the DBCT User Group considered the parties need to have a clear understanding of the likely range of outcomes from an arbitration.[391]

We acknowledge that the 2019 DAU will not provide access seekers/holders with the same level of certainty as when we conduct an ex ante assessment of what we consider to be the appropriate reference tariff.

DBIM submitted that implementation of a reference tariff will not increase certainty for access seekers in the 2019 DAU regulatory period, given they will be seeking access to expansion capacity.[392] While we accept this is likely to be the case, we note the DBCT User Group's comments that under the current reference tariff model, there is still certainty on the approach we would take, including the pricing methodology that would apply.[393]

Regardless, we consider that access seekers/holders will be provided with sufficient certainty that they will be able to obtain access to the Terminal on reasonable terms, including a reasonable price. We are of the view that our required amendments to the 2019 DAU, as outlined in this decision, will facilitate such an outcome.

As noted by DBIM, access seekers/holders will continue to have certainty that access charges can ultimately be determined by us through arbitration.[394]

We consider this level of certainty will be sufficient to ensure arbitration is an appropriate backstop and acts as a threat to constrain DBIM's behaviour in negotiations. As such, we do not consider that uncertainty will lead to inefficient investment decisions by access seekers/holders.

We do not consider it necessary to provide further certainty at this stage. Where significant certainty is provided on the outcomes of arbitration, this may limit the scope for commercial negotiation on pricing matters. We note that all commercial environments involve some degree of uncertainty. DBIM has stated that dispute processes, by their nature, are uncertain for the parties involved, and the parties must face not only the risk of adverse outcomes from the dispute but also risks inherent in the dispute resolution process itself.[395] We consider that some uncertainty around arbitration outcomes may serve to facilitate commercial negotiations.

We note the DBCT User Group's concern that uncertainty around arbitration outcomes may lead to views so divergent in negotiations that arbitration is likely to occur. We consider that our required amendments to information provision, allowing access seekers to form a view on a reasonable TIC, in combination with incentives for DBIM to act reasonably in negotiations, should assist in facilitating negotiations. Further, where there are divergent views or elements of a TIC proposal that rely on judgment, this may provide an opportunity for the parties to negotiate without regulatory intervention, as has occurred under access undertakings approved to date.

With regards to the expansion process, we note that DBIM has proposed amendments that will require DBIM to provide information on its expansion pricing approach during the early stages of negotiation, which we consider appropriate for the 2019 DAU to adopt. This is discussed in further detail in section 8.5.

[390] DBCT User Group, sub. 13, p. 36.
[391] DBCT User Group, sub. 16, p. 31.
[392] DBCTM, sub. 8, p. 7.
[393] DBCT User Group, sub. 11, p. 15.
[394] DBCTM, sub. 8, p. 8.
[395] DBCTM, sub. 8, p. 39.

8.2 Time pressure

The DBCT User Group considered that the timeframes associated with the negotiate/arbitrate model will mean that access seekers will face extreme pressure to try to obtain certainty of pricing and access to both DBCT and below-rail at the same time, and in a timeframe that aligns with project approval pathways.[396]

The DBCT User Group also considered that access seekers face asymmetric time pressures in negotiations with DBIM—access seekers will always be more reliant than DBIM on both reaching an outcome and doing so in a confined period.[397] In contrast, DBIM considered that the idea of asymmetric time pressures does not accord with the commercial reality faced by access seekers.[398]

As outlined by the DBCT User Group, the pricing model that exists in the 2017 AU is a negotiate-arbitrate model, where reference tariffs assist in facilitating efficient negotiation.[399] Should the information provision arrangements be sufficient to adequately inform negotiations, it is not clear why a negotiate-arbitrate model without a reference tariff would result in a significant increase in time pressures. We are of the view that our required amendments to information provision requirements and amendments to incentivise DBIM to provide reasonable access proposals in negotiations should allow access seekers to be able to form a view on a reasonable TIC in a reasonable timeframe.

Where agreement between DBIM and an access seeker is not achieved, either party may refer the dispute to arbitration.[400] Under the QCA Act, we are required to use our best endeavours to make an access determination within six months from the day the access dispute notice is provided.[401] We also consider that our required amendments to facilitate effective negotiation, including incentives for DBIM to act reasonably in negotiations, will reduce the risk of arbitrations having significant timing implications for access seekers.

8.3 Updating the TIC during the regulatory period

Schedule C of the 2019 DBCT DAU provides for the TIC, once negotiated, to be updated through the regulatory period. In particular, schedule C provides for the TIC to be annually updated for:

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

DBIM considered that updating the TIC in a clear and transparent manner, as proposed by the processes in schedule C of the 2019 DAU, is appropriate—ensuring that the TIC does not decrease over the course of the pricing period in real terms. This enables parties to focus negotiations on the initial TIC in real terms.[402]

DBIM submitted:

[396] DBCT User Group, sub. 11, pp. 30–31.
[397] DBCT User Group, sub. 9, p. 22, sub. 11, p. 30.
[398] DBCTM, sub. 8, p. 25.
[399] DBCT User Group, sub. 9, pp. 18–19.
[400] DBCTM, sub. 8, p. 28.
[401] Section 117A (1) of the QCA Act.
[402] DBCTM, sub. 12, p. 32.

> the 'universal' mechanisms are simply mechanisms applying to individual prices. The prices agreed relate to individual circumstances. It is important not to conflate price adjustment mechanisms with pricing itself.[403]

Having regard to the fact that the review event provisions are designed to operate equitably across all users and are well understood, DBIM considered that their inclusion forms a useful guide for negotiations. It considered that, while there is merit in using these mechanisms to update the TIC, the TIC adjustment provisions in schedule C will still be subject to negotiation. DBIM considered this will promote efficient and effective negotiations, without limiting the opportunity for negotiation of a TIC or those provisions in schedule C.[404]

The DBCT User Group submitted that the proposed negotiate/arbitrate regime is not aligned with or consistent with the current roll-forward process—both as it operated under the undertaking and as it operates under the existing user agreements. In this regard, the DBCT User Group considered the arrangements in the existing user agreements are not (and cannot be) amended by our decision on the 2019 DAU.[405]

The DBCT User Group considered that it is far from clear that the arbitrator has the power to determine matters other than the agreed charges. Existing user agreements will not automatically incorporate any changes to the roll-forward mechanism incorporated into the access undertaking. As a result, the contractual process will effectively continue to apply, unless determined otherwise in an arbitration.[406]

The DBCT User Group raised concerns that our draft decision:

- attempts to remove pre-existing contractual rights for users, which have made significant sunk capital investments on the basis of the existing contract terms
- creates substantial uncertainty as to the operation of the roll-forward mechanism in respect of existing user agreements, whatever decision we make
- facilitates DBIM strong-arming existing users into agreeing disadvantageous amendments to try to create some certainty.[407]

The DBCT User Group submitted that providing a prescribed methodology for a roll-forward of the TIC limits the scope for negotiation and is inconsistent with DBIM's assertion that there are benefits from pursuing tailored negotiations. The DBCT User Group considered that it also demonstrates the difficulties and uncertainties created by overlaying a negotiate-arbitrate model on existing contractual and regulatory arrangements, where DBIM is seeking to pick and choose which of those existing elements continue to be prescribed and which elements are left for negotiation.[408]

> 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.[409]

The DBCT User Group also submitted that it is not clear how DBIM or the QCA considers this works where one user reaches agreement, and another receives an arbitrated determination, with

[403] DBCTM, sub. 15, p. 44.
[404] DBCTM, sub. 12, p. 33, sub. 15, p. 44.
[405] DBCT User Group, sub. 13, p. 54.
[406] DBCT User Group, sub. 13, p. 5, sub. 16, p. 42.
[407] DBCT User Group, sub. 13, pp. 54–55.
[408] DBCT User Group, sub. 13, pp. 55–56.
[409] DBCT User Group, sub. 13, p. 56.

different outcomes in relation to the roll-forward—one of which assumes socialisation and the other does not.[410]

We consider that applying a default arrangement in an access undertaking for updating the TIC through the regulatory period has the potential to limit the scope for negotiating pricing arrangements. Furthermore, it is not clear why this aspect of pricing needs to be specified in the access undertaking while other aspects of pricing, which are also subject to negotiation, are not.

Assessing the arrangements for updating the TIC through the regulatory period requires consideration of the relevant circumstances, including the TIC being negotiated (and vice versa). As such, we do not consider it appropriate to include arrangements in an approved access undertaking for updating the TIC during the regulatory period. These matters are best left to negotiation.[411]

We note this will require the removal of schedule C from the 2019 DAU. We require consequential amendments to the 2019 DAU to address any workability concerns resulting from the removal of schedule C.

In this regard, we consider it appropriate to require amendments to the NECAP expenditure approval process and expansion framework to reflect the fact that any capital expenditure approved through these processes does not necessarily result in a review of the TIC in accordance with schedule C of the 2019 DAU (as this will be subject to negotiation).

In relation to existing user agreements, schedule 2 in previous iterations of the SAA[412] includes a process for updating the TIC each year (Rules for Calculating Terminal Infrastructure Charge), whereby the TIC is to be calculated with reference to the revenue cap and annual revenue requirement approved by us.

We are of the view that schedule 2 is to be reviewed in its entirety as part of the periodic price review contemplated by clause 7.2 of existing user agreements.[413] Clause 7.2(a) states:

> All charges under this Agreement and the method of calculating, paying and reconciling them (including the terms of Schedule 2) and any consequential changes in drafting of provisions will be reviewed in their entirety, effective from each Agreement Revision Date, in accordance with the following provisions of this clause 7.2.

Where the parties do not reach agreement under this review, the matter may be referred to arbitration under clause 7.2(c)(ii) of existing user agreements. In any dispute brought before an arbitrator under existing user agreements, we consider that the arbitrator would have broad powers to determine all charges under the relevant agreement and the method of calculating, paying and reconciling them, including in a manner that is not consistent with the existing schedule 2 (or equivalent). Should the matter be referred to us for arbitration, we will consider the appropriate methodology for updating the TIC.

[410] DBCT User Group, sub. 13, p. 54.
[411] As outlined in Chapter 5, we also consider it is not appropriate for socialisation terms to be specified in an undertaking that does not contain a reference tariff.
[412] That is, the 2006 SAA, 2010 SAA and 2017 SAA.
[413] The DBCT User Group (sub. 13, p. 24) noted that the terms in existing user agreements reflect the price review process in the 2017 SAA.

Summary of decision 8.1

It is appropriate for DBIM to amend the 2019 DBCT DAU to:

(1) remove schedule C

(2) make other changes consequential on the removal of schedule C, including:

- (a) amendments to certain provisions which referred to schedule C (see cl. 11.4 of Appendix A and sch. 2 of Appendix B)
- (b) removal of clause 11.5 of the 2019 DBCT DAU, which (as proposed by DBIM) provided for TIC reviews within a pricing period in accordance with schedule C
- (c) amendments to certain provisions which referred to section 11.5 (see cls. 11.3, 12.5(j), 12.6, 12.10(b) and 12.10(c) of Appendix A)
- (d) removal of certain provisions which contemplate an adjustment to the TIC on the occurrence of a review event (such as cls. 5.10(o)(1) and (2) of the 2019 DBCT DAU)
- (e) removal of certain provisions relating to calculation of the NECAP asset base (such as cl. 11.7(a)(2) of the 2019 DBCT DAU)
- (f) removal of certain definitions which were linked to, or used in, schedule C, including the definitions of 'Review Event', 'NECAP Asset Base', 'NECAP Risk Free Rate' and 'WACC(1) Rate' (see schedule F of Appendix A).

8.4 Operation of existing user agreements

The DBCT User Group considered there is a great level of uncertainty around arbitration processes and outcomes under existing user agreements.[414] It considered that access agreements clearly anticipate the existing regulatory arrangements and continuation of reference tariffs—contemplating a continuing role for us in approving tariffs and making decisions in relation to annual roll-forwards and review events.[415] In particular, it noted that each of the following depends on decisions by us, that would no longer form part of DBIM's pricing model:

(1) excess charges and year-end adjustments

(2) provisional increments and provisional increment repayments

(3) the distinction between 'reference tonnage' and 'non-reference tonnage'

(4) annual roll-forward arrangements and review events.[416]

In response, DBIM noted that existing user agreements clearly provide for these provisions to be periodically revised.[417]

The DBCT User Group also submitted that it was not clear that the periodic review could resolve non-pricing terms and noted that the arbitration provisions in existing user agreements reference

[414] DBCT User Group, sub. 6, pp. 22–25.
[415] DBCT User Group, sub. 9, p. 5.
[416] DBCT User Group, sub. 11, p. 17.
[417] DBCTM, sub. 10, p. 26.

the arbitrator determining charges without an explicit reference to determining consequential drafting changes as well.[418]

We have not been provided with information that satisfies us that existing user agreements would not be able to incorporate a negotiated tariff, as opposed to a predetermined reference tariff.

As discussed above, existing users have signed agreements that require periodic price reviews under clause 7.2 of existing user agreements.[419] These reviews provide for the determination of all charges under the agreement, including the method of calculating, paying and reconciling them (including the terms of schedule 2) and any consequential changes in drafting of provisions to be reviewed in their entirety, effective from each agreement revision date. The agreement revision date includes the date of commencement of each access undertaking for the Terminal. Drafting relating to these pricing reviews expressly contemplates that there might not be an applicable reference tariff at the point at which they apply.[420]

Where the parties do not reach agreement under this review, we consider the arbitrator's powers are broad in relation to determining all charges and the method of calculating, paying and reconciling them. We consider any such arbitrated outcome will be able to provide certainty about the operation of existing user agreements going forward.

We are not satisfied that the concerns raised by the DBCT User Group about whether the pricing review could resolve non-pricing terms creates any material uncertainty about the continued operation of existing user agreements. We recognise that removal of a reference tariff is likely to interact with a range of clauses in existing user agreements relating to price, potentially including those identified by the DBCT User Group.[421] However as noted above, price reviews under clause 7.2 involve the determination of all charges under the agreement, including the method of calculating, paying and reconciling them. We are not satisfied that removal of a reference tariff will have a similar interaction with non-pricing terms in existing user agreements such that there is likely to be material uncertainty about their continued operation in the absence of a reference tariff.

8.5 Binding access agreements

In certain circumstances under the 2019 DBCT DAU, access seekers may enter into binding access agreements without knowledge of the TIC they will be required to pay, in order to secure capacity. More specifically:

- *Access agreements for existing capacity under the notifying access seeker process*—an access agreement between the access seeker and DBIM is binding, notwithstanding that it does not include an initial TIC. The parties must execute a deed to amend the agreement once the initial TIC is agreed or a dispute about the initial TIC is resolved.[422]
- *Conditional access agreements for expansion capacity*—a conditional access agreement between an access seeker and DBIM is legally binding, notwithstanding that it does not

[418] DBCT User Group, sub. 13, p. 54.
[419] The DBCT User Group (sub. 13, p. 24) noted that the terms in existing user agreements reflect the price review process outlined in the 2017 SAA.
[420] DBCTM, sub. 5, p. 26.
[421] DBCT User Group, sub. 9, p. 31.
[422] See cl. 5.4(j)–(k) of the 2019 DAU.

contain an initial TIC or expansion pricing approach, and will not come into operation until its conditions precedent are fulfilled.[423]

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

As outlined by the DBCT User Group, the 2019 DAU appears to intend to require access seekers to contract for capacity without knowing the price at the time of contracting and without providing any express mechanism to terminate an access agreement (or conditional access agreement) if they do not like the price offered.[424] The DBCT User Group[425] and Whitehaven Coal[426] were concerned about the requirement for access seekers to enter into binding conditional access agreements or binding access agreements before the TIC was agreed.

DBIM noted that the 2019 DAU is based on the 2017 AU and replicates the vast majority of the drafting and protections set out in the 2017 AU.[427] DBIM submitted that provisions have been included to ensure that the pricing model without a reference tariff is practically workable.[428]

There may be implications for access seekers, should they not wish to enter into these binding agreements. For instance, an access seeker may be removed from the queue if it does not sign a conditional access agreement within three months of receiving an invitation or as part of the notifying access seeker process.[429] DBIM considered that the ability to remove access seekers from the queue who do not intend to take capacity, or who are not prepared to fund an expansion, is a crucial part of the efficient operation of the access queue.[430]

DBIM argued that access seekers obtain certainty through other arrangements in the 2019 DAU, including recourse to us if agreement cannot be reached.[431] DBIM noted that all previous expansions have been undertaken without pricing certainty and access seekers had executed conditional access agreements for the 8X expansion in June 2020 without pricing certainty, which it considered was evidence that pricing uncertainty does not inhibit access seekers' ability or incentive to access DBCT.[432] It also noted that all existing users have entered access agreements without pricing certainty, given access charges are subject to a pricing review under clause 7.2 of existing user agreements.[433] DBIM also stated that access agreements and conditional access agreements have already been signed for all capacity that will possibly be available in the upcoming regulatory period, meaning it was highly unlikely that additional agreements would be executed during the regulatory period.[434]

With regard to the conditional access seeker process, DBIM was of the view that a degree of uncertainty would always exist, recognising that the final costs of the expansion will not be confirmed when commitment is needed from expanding access seekers to progress the expansion. It considered it necessary to ensure that expanding access seekers are committed to an expansion, so that an expansion can be funded and undertaken, and so that DBIM can execute

[423] See cl. 5.4(l)(15) of the 2019 DAU.
[424] DBCT User Group, sub. 11, p. 14.
[425] DBCT User Group, sub. 2, p. 54, sub. 6, pp. 16, 20, sub. 9, p. 39, sub. 11, pp. 14, 21–22, 35.
[426] Whitehaven Coal, sub. 4, pp. 5–6.
[427] DBCTM, sub. 8, p. 12.
[428] DBCTM, sub. 10, p. 39.
[429] See cls. 5.4(l)(5) and 5.4(i)(1) of the 2019 DAU.
[430] DBCTM, sub. 10, p. 27.
[431] DBCTM, sub. 10, p. 28.
[432] DBCTM, sub. 10, pp. 14–15, sub. 12, p. 19, sub. 15, p. 35.
[433] DBCTM, sub. 12, pp. 19–20.
[434] DBCTM, sub. 12, p. 20.

the process set out in clause 20(b) of the existing user agreements and avoid wasted investment in feasibility studies in cases where capacity could become available without an expansion.[435]

In terms of the notifying access seeker process, DBIM submitted that it is necessary for access seekers to indicate whether they are prepared to enter into an access agreement in a timely manner once capacity becomes available, to ensure efficient operation of the queuing mechanism. DBIM stated that the 2019 DAU was drafted to allow access seekers to enter into agreements before a TIC was determined, with the purpose of protecting access seekers by ensuring that DBIM has no perceived ability to discriminate between access seekers based on price.[436]

The DBCT User Group submitted that it is not just that pricing is uncertain, but there would not even be any certainty as to the approach to be applied to determine such pricing. The DBCT User Group considered that pricing uncertainty could lead to inefficient contracting decisions and potentially inefficient expansions being developed.[437] It noted that the conditional and notifying access seeker processes were the most likely way new users would gain capacity during the regulatory period, taking into account the extent of capacity already contracted at DBIM, and the recent longer term renewals of such existing contracted capacity.[438]

We acknowledge that some level of uncertainty exists in all commercial environments. However, we are of the view that the 2019 DAU exposes an access seeker to greater pricing uncertainty at the time at which it must decide whether to enter into a binding access agreement with DBIM than under the current reference tariff framework.

DBIM's 2017 AU provided a reference tariff that could be used as a basis for negotiations between the parties on pricing matters. DBIM and access seekers are able to enter into agreements which give them the certainty of obtaining access based on the reference tariff.[439] As the 2019 DAU does not include an ex ante assessment of the TIC, such certainty is not obtained.

Our draft decision raised concerns that, under the 2019 DAU, the proposed negotiation arrangements, when coupled with the non-reference tariff pricing model, may require an access seeker to enter into a binding access agreement without knowing the likely TIC or approach for calculating the TIC, and whether they would be able to obtain a TIC (through negotiation or arbitration) that did not exceed the value it placed on that access. We sought stakeholder views on the scope for making amendments to the 2019 DAU to address this matter.

8.5.1 Proposed amendments to the 2019 DBCT DAU

The DBCT User Group considered that resolving this issue required:

- 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, and

[435] DBCTM, sub. 12, p. 20.
[436] DBCTM, sub. 12, p. 20.
[437] DBCT User Group, sub. 11, p. 31, sub. 13, p. 65.
[438] DBCT User Group, sub. 13, p. 65.
[439] Even if future reference tariffs are unknown, access seekers still have knowledge of the general approach that would be applied to determine the TIC.

- 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.[440]

DBIM proposed amendments to the negotiation process under conditional access agreements in the 2019 DAU, which included:

- an obligation to provide information on the expansion pricing approach[441] to access seekers when commencing the conditional access agreement process,[442] and
- allowing parties to terminate the agreement after determination of the expansion pricing approach by us, provided the expansion has not already been committed to by DBIM, by submitting a Terminal capacity expansion application.[443]

With regard to the notifying access seeker process, DBIM considered that its proposed amendments to information provision in the 2019 DAU will ensure that notified access seekers will have sufficient information to be able to form a view on what would be a reasonable TIC. DBIM considered that no amendments should be made to allow notified access seekers to terminate their agreements.[444]

In response to DBIM's proposed amendments, the DBCT User Group noted:

(a) the proposed amendments only apply to contracting of expansion capacity, not short-term capacity or the notifying access seeker process

(b) the 'expansion pricing approach' may provide little in the way of certainty—the termination right needs to arise at the time there is certainty of the price and pricing methodology for the next pricing period

(c) there is nothing to prevent DBIM from subsequently changing its expansion pricing approach from that which it notifies

(d) the right of termination to be included in the conditional access agreements is to be specified by DBIM—suggesting DBIM intends for the content of the termination right to remain at DBIM's discretion

(e) the termination right will be illusory for many access seekers who must contract rail access and rail haulage in parallel, contract long lead time procurement items and obtain financing or equity funding for development at the same time.[445]

We recognise that inclusion of binding access agreements can facilitate efficient operation of the access queue and provide for an efficient expansion process.

We consider that the information provision requirements and negotiation and arbitration processes outlined in this decision will provide access seekers with sufficient certainty that they will be able to access the Terminal at a reasonable price—including under a conditional access agreement and notifying access seeker process.[446] We are of the view that providing further

[440] DBCT User Group, sub. 13, p. 66.
[441] Defined broadly to mean the dollar amount, formula, mechanism or process for setting an initial TIC.
[442] DBCTM, sub. 12, pp. 20, 21.
[443] DBCTM, sub. 12, p. 22.
[444] DBCTM, sub. 12, p. 22.
[445] DBCT User Group, sub. 16, p. 45.
[446] We have also published a guideline on arbitration of disputes in relation to the DBCT service to accompany this decision.

information in relation to pricing and/or the pricing methodology to be adopted in an arbitration may limit the scope for commercial negotiations on pricing matters.

With regard to the conditional access agreement process, we consider DBIM's proposed amendments to deliver information on the expansion pricing approach at the commencement of the process will give access seekers sufficient pricing certainty to continue to provide for efficient contracting decisions and Terminal expansions, as required.[447]

We are also of the view that allowing the parties to terminate a conditional access agreement following a determination on the expansion pricing approach by us, will further facilitate efficient contracting decisions.[448] As such, we consider that the right for conditional access seekers to terminate should be provided for in the undertaking, and not be specified by, or at the discretion of, DBIM.

We do not consider it appropriate for the termination right to expire at the date that this access undertaking expires. We consider any access seekers entering into conditional access agreements during the 2019 DAU period should continue to have access to the termination rights going forward. For the reasons outlined above, we consider this will further facilitate efficient contracting decisions.

We accept that providing access seekers with a right to terminate a conditional access agreement once an expansion has been committed is not reasonable, as this may result in DBIM incurring significant additional risk in undertaking an expansion and may act as a disincentive for DBIM to undertake efficient expansions. Such disincentive may also have adverse implications for access seekers.

We require DBIM to amend the 2019 DAU as outlined in Appendix A of this decision, to reflect these views.

With regard to the notifying access seeker process, we consider that providing for termination of an access agreement, where the access seeker is not satisfied with a TIC determined through arbitration, may have adverse implications for the operation of the access queue.

We acknowledge that there will remain a degree of uncertainty on pricing outcomes under these arrangements. However, we do not consider the level of uncertainty sufficiently great to lead to inefficient contracting decisions. Nonetheless, we intend to monitor these processes during the regulatory period.

[447] We consider this amendment will result in consequential amendments being required to the 2019 DAU (see cl. 5.4(l)(4) of Appendix A for our required amendments).

[448] We consider this amendment will result in consequential amendments being required to the 2019 DAU (see cl. 5.4(l)(15) of Appendix A for our required amendments).

Summary of decision 8.2

It is appropriate for DBIM to amend the 2019 DBCT DAU to:

(1) require DBIM to provide information on the expansion pricing approach to access seekers when commencing the conditional access agreement process (see cl. 5.4(l)(1) of Appendix A)

(2) enable parties to terminate a conditional access agreement up until 30 days after determination of an expansion pricing approach by us, provided the expansion has not already been committed to by DBIM (by way of submitting a Terminal capacity expansion application) (see cl. 5.4(l)(3)(A) of Appendix A).

8.6 Unfair differentiation between access seekers and access holders

The DBCT User Group considered that a negotiate-arbitrate model will result in unfair differentiation between access holders and access seekers, based on different levels of information asymmetry and resources to pursue arbitrations.[449] The DBCT User Group submitted that access seekers are more likely than existing users to suffer from information asymmetry, face greater time pressures, have less financial resources and lack the benefit of protections provided in existing user agreements—leaving them more exposed to monopoly prices.[450]

DBIM submitted that the vast majority of access seekers currently in the DBCT access queue are large, sophisticated mining companies, with extensive experience in conducting mining operations throughout the world, including the negotiation of access to critical infrastructure. DBIM considered that the prospect that these same firms are unable to assess an appropriate charge at DBCT is not tenable and is inconsistent with the commercial reality.[451]

DBIM also considered that its proposed amendments to the 2019 DBCT DAU mirror the protections in the existing user agreements.[452] DBIM considered that the most likely source of differentiation between access holders and access seekers would arise if we determined that an expansion should be differentially priced.[453]

We consider that our decision will ensure that access seekers are provided with sufficient information to enable them to form their own view of a reasonable TIC for the purposes of negotiating with DBIM. The level of information available to an access seeker should therefore place it in an equitable position with access holders. As discussed throughout this decision, when the 2019 DAU is amended as we require, we do not consider that the costs associated with negotiation and arbitration, or uncertainty around pricing outcomes, will hinder access to arbitration.

[449] DBCT User Group, sub. 9, p. 11.
[450] DBCT User Group, sub. 9, p. 14.
[451] DBCTM, sub. 8, p. 12.
[452] DBCTM, sub. 10, p. 13.
[453] DBCTM, sub. 10, p. 14.

9 REMEDIATION CHARGES

We consider DBIM's proposed estimate for the rehabilitation cost of $1.22 billion likely exceeds the efficient cost of remediating the DBCT site and thus, would not be in the interest of access seekers and access holders if used as a basis for negotiation of remediation charges. Our final decision is that it is appropriate for the 2019 DBCT DAU to be amended such that negotiations and arbitrations for the remediation charge be based on our approved rehabilitation cost estimate of $849.98 million. In making this decision, we note there is significant uncertainty relating to these costs to be incurred in more than three decades. We expect DBIM will update them over time, in light of regulatory, technical and market developments.

9.1 DBIM's remediation obligations

The Port Services Agreement (PSA) specifies terms and conditions for DBIM's lease of the Terminal from DBCT Holdings, including obligations to rehabilitate the DBCT site upon expiry of the lease. According to DBIM, as the leaseholder, it would be required to rehabilitate the site such that:

(1) The **scope** of rehabilitation must be in accordance with a Rehabilitation Plan;

(2) The **standard** of rehabilitation must be to remediate onshore and offshore land "to its natural state and condition as existed prior to any development or construction activity having occurred";

(3) In terms of **timing**, the rehabilitation may be started "before the end of the [lease] to the extent that doing so does not adversely affect its performance of any Project Document, User Agreement or the OMC" and must be completed "within 3 years after the end of the [lease]";

(4) The **cost** of the rehabilitation must be borne by DBCTM "at its cost".[454]

Remediation allowance and component of access charges

For clarity, the following terms are referenced in this chapter:

- rehabilitation cost estimate—forecast of the expected costs of rehabilitating the DBCT site to the standard DBIM is obligated to achieve under the PSA, in current dollars
- remediation allowance—the annuity for DBIM to accumulate the future costs of rehabilitating the DBCT site
- remediation charge—the component of access charges for an individual access holder that contributes to DBIM's remediation allowance.

DBIM has historically recovered the remediation allowance[455] based on:

(a) the rehabilitation cost estimate, which is escalated by an appropriate inflation rate to the end of the Terminal's useful life

(b) an estimate of the Terminal's useful life to determine when remediation is expected to commence

[454] DBCTM, sub. 1, p. 52.

[455] The remediation allowance has been a part of the cost build-up to determine the annual revenue requirement (ARR) in previous pricing models for the declared service at DBCT.

(c) a discount rate to determine the remediation allowance—typically the approved WACC for the relevant pricing period

(d) the prevailing value of a notional sinking fund comprising all user payments for remediation accumulated to date, including interest at the WACC.

We previously determined the appropriate remediation allowance for each pricing period by assessing DBIM's proposals on the matters listed above, as submitted in its respective DAUs. The remediation charge was then calculated by allocating the annuity across access holders according to the contracted access tonnage via the TIC using the building blocks methodology.

Under the 2017 AU, the approved rehabilitation cost estimate was $432.69 million (in 2015 Q4 dollars), escalated by an annual inflation rate of 2.5 per cent, with an approved WACC of 5.82 per cent and expected commencement of rehabilitation in 2054. We approved an annual remediation allowance of $7.02 million, based on the reasons outlined in our final decision on the 2015 DAU.[456]

Critically, the final decision on the 2015 DAU remediation allowance was based on an updated rehabilitation cost estimate submitted by DBIM, which indicated that the original rehabilitation cost estimate of $30 million (in 2004–05 dollars, approved for the 2006 and 2010 AUs) would not reflect the true cost of rehabilitating the DBCT site. While we concluded that $30 million 'is unlikely to reflect the costs of remediating the Terminal site'[457], we did not approve the plan and cost proposed by DBIM in its 2015 DAU (of $826 million in 2014–15 dollars) as it was above 'the efficient costs of rehabilitating the Terminal site' and was inconsistent with the pricing principles of the QCA Act (s. 138(2)(g)).[458] Instead, we required DBIM to amend the rehabilitation cost estimate to reflect what we considered appropriate, which was $432.69 million.[459]

9.2 DBIM's proposal for remediation under the 2019 DBCT DAU

DBIM proposed a new rehabilitation plan in its 2019 DBCT DAU submission, developed by its consultant GHD Advisory (referred to as GHD), who estimated the total costs of implementing that plan at $1.22 billion (October 2018 dollars). Although it did not propose a calculation or specific value for the remediation allowance, DBIM stated that 'the detailed Rehabilitation Plan and resultant cost estimate of $1.22 billion should inform price negotiation and any arbitration of a dispute regarding price.'[460] DBIM appended a report that GHD produced (the GHD report) to its 2019 DBCT DAU submission. The report outlines the scope of works GHD designed to base its estimate upon.[461]

According to DBIM, the proposed rehabilitation plan presents a level of detail and quality of estimate that 'is a significant improvement over all previous estimates, for example those developed during the 2017 AU process'. DBIM also commented on the flexibility of the plan, stating:

[456] QCA, *DBCT Management's 2015 draft access undertaking*, final decision, November 2016, pp. 143–150.
[457] QCA, *DBCT Management's 2015 draft access undertaking*, final decision, November 2016, p. 143.
[458] QCA, *DBCT Management's 2015 draft access undertaking*, final decision, November 2016, p. 145.
[459] QCA, *DBCT Management's 2015 draft access undertaking*, final decision, November 2016, p. 149.
[460] DBCTM, sub. 1, p. 53.
[461] GHD Advisory (GHD), *DBCT Rehabilitation Plan and Rehabilitation Cost Estimate*, prepared for DBCT Management, June 2019 (GHD report).

> The Rehabilitation Plan and Estimate are structured so they may be refreshed from time to time as required, for example if the applicable laws change, or if additional plant is installed at the terminal, new technology is developed, or more detailed quantities become available.[462]

DBIM 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,[463] it considers '2051 should reasonably be considered the relevant date with regard to remediation of DBCT'[464], as that is the end of the initial lease.

9.3 Initial stakeholder views

Both New Hope Group and the DBCT User Group expressed disagreement with DBIM's proposed rehabilitation cost estimate and its approach to determining the remediation charges through negotiation.

The DBCT User Group questioned the validity of a material increase to the rehabilitation cost estimate so soon after our review of the costs under the 2015 DAU without 'suggestion that DBCTM's legal remediation obligations have increased since that time'.[465] It detailed concerns about the specifics of the rehabilitation plan developed by GHD, including that:

- the plan has not been independently verified
- the cost estimates are stated to be only preliminary, within a band of accuracy
- the report includes a disclaimer that the costs only provide an understanding of the order of magnitude of the costs, based on numerous assumptions and without scrutiny of prudency and efficiency
- no allowance has been provided for improvements in efficiency and technology that may reduce costs
- the plan does not allow for the possibility for the state to require rehabilitation to a lower standard.[466]

Both New Hope Group and the DBCT User Group considered it would be appropriate for us to determine:

- an estimate for the rehabilitation costs
- an estimate for the period when rehabilitation works should commence
- an appropriate annuity stream (i.e. the remediation allowance) to fund the rehabilitation costs through a remediation component of the TIC (i.e. the remediation charge).[467]

More broadly, New Hope Group noted that the rehabilitation plan is representative of information asymmetry between access seekers and DBIM and said that it is 'very difficult to envisage how an individual user could meaningfully challenge DBCT Management's assertions regarding the cost of rehabilitation given the asymmetrical information available to those parties in negotiation.'[468]

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[462] DBCTM, sub. 1, p. 52.
[463] QCA, *DBCT Management's 2015 draft access undertaking*, final decision, November 2016, p. 147.
[464] DBCTM, sub. 1, p. 53.
[465] DBCT User Group, sub. 2, p. 50.
[466] DBCT User Group, sub. 2, p. 50, sub. 9, p. 37.
[467] DBCT User Group, sub. 2, p. 50; New Hope Group, sub. 3, p. 13.
[468] New Hope Group, sub. 3, p. 12.

Finally, the DBCT User Group noted its 'concerns about DBCTM continuing to seek greater remediation allowances without any evident protection of those funds so that they are actually available for remediation.'[469] It explained that unlike for mining operations, there seems to be no regulatory mechanism to ensure the accrued remediation allowance for rehabilitation of DBCT is secured or bonded to the state. The DBCT User Group suggested that if DBIM asserts that remediation is currently underfunded and warrants an increase in the allowance, 'surely it must be appropriate for there to be scrutiny of how it can be ensured that all of this money is actually preserved for use in remediation rather than the State or coal industry being required to resolve this problem.'[470]

Consultant's advice

We engaged Advisian to review the prudency and efficiency of the rehabilitation plan and cost estimates developed by GHD, and to develop an independent estimate of the rehabilitation costs to a level of detail comparable to that estimated by GHD. Advisian completed the following tasks:

- a desktop review of GHD's rehabilitation plan and cost
- an independent build-up of the estimated costs for rehabilitation of the DBCT site
- a site visit to review the assumptions made by GHD and to verify its own assumptions for its independent estimate.

We facilitated Advisian's requests for information from GHD and meetings between the consultants to review the latter's plan and cost estimate, which involved requests for specific technical data and clarification of GHD's approach.

Advisian generally concurred with the methodology and scope of works proposed by GHD, and developed its own independent cost estimate based on the delineation of works outlined in the GHD report.[471] However, Advisian's independent estimate of the rehabilitation costs was approximately $814.09 million (in March 2020 dollars[472]), about a third lower than the GHD estimate. It stated in its report (the Advisian 2020 report) that this significant difference in overall rehabilitation cost estimates is attributable to differences in:

- cost rates used for bulk earthworks handling and imported clean fill—Advisian was unable to confirm the commercial sources that GHD used for these matters and built up its own rates based on its own commercial sources
- quantities estimated for cut and fill earthworks to return the topography of the site to its natural state—Advisian developed its own model for earthworks volumes based on data different to GHD's earthworks model, which resulted in materially different volumes for cut and fill
- assumptions about the location for disposal of contaminated waste—Advisian's assumed disposal site was a local disposal site 60 km from DBCT as compared to GHD, who assumed disposal at a commercial facility in Roma, 750 km away from the Terminal

[469] DBCT User Group, sub. 2, p. 52.
[470] DBCT User Group, sub. 2, p. 52.
[471] Advisian, *Dalrymple Bay Coal Terminal Rehabilitation Cost Review*, prepared for the QCA, May 2020, as revised 5 August 2020 (Advisian 2020 report), pp. 34–35; GHD report, pp. 27–28.
[472] Advisian stated its estimate contained contingencies that would negate any impact of inflation over the relatively short period between October 2018 and March 2020 (Advisian 2020 report, p. 16).

- depths for removal of contaminated soil and road substrate—Advisian assumed materially lower depths of substrate and soil removal based on its own recent industry experience with a site of similar hydrocarbon contamination; it was unable to ascertain GHD's reasoning for its assumption for depths for substrate removal
- approaches to removal of offshore piles—Advisian did not agree with GHD on an approach for offshore pile removal that returns the site to its 'natural state' that DBIM is obligated to achieve under the PSA.[473]

9.4 Draft decision

Our draft decision outlined our preliminary views on DBIM's proposal for remediation matters under the 2019 DBCT DAU. We also addressed additional concerns raised by other stakeholders. These preliminary views are summarised below.

Rehabilitation cost estimate

Our draft decision was to not approve DBIM's proposed rehabilitation cost estimate, developed by GHD. However, we were not convinced at the time that the cost estimates developed by either GHD or Advisian reflected an efficient forecast of the expected rehabilitation costs. On the one hand, we considered the use of GHD's estimate as a basis for negotiation of the remediation charges could result in charges that are inefficiently high, which is not in the interests of access seekers and holders (ss. 138(2)(e), (h) of the QCA Act), and may result in delays from failed negotiations and/or unnecessary arbitrations that do not promote the efficient use of the Terminal (s. 138(2)(a) of the QCA Act). However, reliance on Advisian's estimate, if inefficiently low, could deny DBIM the ability to recover its efficient costs (s. 168A(a) of the QCA Act) and not be in the legitimate interests of the state and DBIM (ss. 138(2)(b) and 138(2)(c) of the QCA Act).

We identified that several components of the rehabilitation plan accounted for a material proportion of the difference in the initial estimates from GHD and Advisian.[474] We recognised that the differences between the approaches and estimates could be attributed to:

- GHD and Advisian differing in their views on the most prudent and/or efficient approach to return the DBCT site to its natural state, or
- Advisian being unable to verify GHD's justification or source of information, instead developing its own approach and sourcing its own data in the development of its independent estimate.[475]

We considered there was insufficient evidence at the time for us to form a definitive view on an appropriate rehabilitation cost estimate. In order for us to make an informed decision, we sought further information from DBIM, GHD and other stakeholders (and their relevant technical experts) through written submissions and direct discussions.[476]

Future updating of rehabilitation costs

Recognising the significant uncertainty in forecasting DBIM's rehabilitation costs that will not be incurred for at least 30 years, we outlined our expectation that DBIM, and access seekers and holders will have the opportunity to raise matters that would update the rehabilitation cost estimate through the DAU and DAAU processes, and corresponding submissions periods afforded

[473] Advisian 2020 report, pp. 18–21.
[474] QCA, *DBCT Management's 2019 draft access undertaking*, draft decision, August 2020, pp. 95–97.
[475] QCA, *DBCT Management's 2019 draft access undertaking*, draft decision, August 2020, pp. 93–94.
[476] QCA, *DBCT Management's 2019 draft access undertaking*, draft decision, August 2020, p. 98.

through the QCA Act. We also stated that we would not consider it appropriate for DBIM to seek to negotiate a remediation charge based on a rehabilitation plan and cost estimate that we have not previously assessed.[477]

Determination of the remediation charges

Although stakeholders submitted that we should determine the remediation charges under the 2019 DBCT DAU[478], our preliminary view was that this would not be appropriate under a pricing model that does not include a reference tariff. At that time, we were satisfied that access seekers would be able to negotiate a remediation charge with DBIM from a sufficiently informed position, provided DBIM fulfilled its information provision obligations under an amended 2019 DBCT DAU, and with the availability of QCA arbitration. At that time. we considered these arrangements sufficiently balanced the interests of DBIM and access seekers in negotiations (ss. 138(2)(c), (e) of the QCA Act).[479]

Protection of rehabilitation funds

We acknowledged stakeholders' concerns for the protection of past and future remediation payments.[480] However, in absence of direction under the QCA Act or other legislative instruments, we outlined that our role in regards to rehabilitation of DBCT is limited to ensuring that DBIM is entitled to earn sufficient funds for future rehabilitation works based on expected revenue that is at least enough to meet the expected efficient cost of rehabilitating the site (ss. 138(2)(c), (g) and 168A(a) of the QCA Act), while also ensuring access seekers and holders are not overcharged for remediation to the point of inefficiently reducing access to DBCT (ss. 138(2)(a), (e), (h) of the QCA Act). As such, we did not consider it appropriate to require further reporting of the status of the rehabilitation sinking fund for DBCT, or for DBIM to demonstrate such protection of funds as part of the 2019 DBCT DAU.[481]

Further stakeholder consultation

DBIM and the DBCT User Group addressed the aspects of remediation discussed in our draft decision, in their submissions during the two latest consultation periods. These submissions appended technical advices from their respective consultants, GHD[482] and SLR Consulting (the DBCT User Group's consultant, referred to as SLR)[483] respectively.

In its subsequent submissions, DBIM:

- reiterated that we should accept a new term to remediation of 2051 (instead of the current 2054)[484]

[477] QCA, *DBCT Management's 2019 draft access undertaking*, draft decision, August 2020, pp. 99–100.
[478] DBCT User Group, sub. 2, p. 50, sub. 9, p. 37; New Hope Group, sub. 3, p. 13.
[479] QCA, *DBCT Management's 2019 draft access undertaking*, draft decision, August 2020, pp. 98–99.
[480] DBCT User Group, sub. 2, p. 52.
[481] QCA, *DBCT Management's 2019 draft access undertaking*, draft decision, August 2020, pp. 100–101.
[482] GHD, *GHD's response to QCA's draft decision on 2019 DAU (DBCT Rehabilitation Plan and Cost Estimate)*, prepared for DBCT Management, October 2020 (GHD response 1), *GHD's response to SLR Report on DBCT rehabilitation plan and further queries from the QCA*, prepared for DBCT Management, December 2020 (GHD response 2).
[483] SLR Consulting (SLR), *SLR Report on Remediation Estimate*, prepared for the DBCT User Group, October 2020 (SLR report), *SLR Memorandum on Remediation Estimate*, prepared for the DBCT User Group, November 2020 (SLR memorandum).
[484] DBCTM, sub. 12, pp. 36–37, sub. 15, pp. 42–43.

- provided further justifications for the positions taken in its proposed rehabilitation plan (supported by explanations from GHD)[485]
- addressed additional issues identified by SLR that the latter suggested should further reduce the rehabilitation cost estimate.[486]

The DBCT User Group, in its submissions:

- submitted that we should determine other aspects of remediation including the term to remediation, escalation and discount rates, and method for calculating the remediation component of access charges[487]
- proposed an alternative cost estimate of $736 million, developed through SLR's review of both rehabilitation plans, including additional matters that would result in a further decrease from Advisian's cost estimate[488]
- stated that the estimate proposed by DBIM/GHD is based on 'unrealistic and unsupported worst cast assumptions and numerous contingencies'.[489]

These stakeholders and their technical advisors also participated in a technical forum, together with Advisian, where we sought expert views on some of the specific material matters identified in our draft decision.[490] We note the matters discussed at the technical forum were canvassed in stakeholders' submissions and respective technical advice.

We requested Advisian to provide us with further advice on the technical matters raised in these latest submissions. It outlined in its rebuttal report (the Advisian rebuttal) that it maintains its position and GHD's response reports have 'no further compelling evidence'.[491] On forming our views on the material components of the rehabilitation plan (as discussed below), we also sought for Advisian to revise its original report (the Advisian 2021 report) to consolidate the technical discussions and analysis, so that it could represent a single source of information for the approved rehabilitation cost estimate.[492]

9.5 Analysis and final decision

Our final decision is that DBIM's proposed rehabilitation cost estimate of $1.22 billion does not reflect the likely efficient cost of remediating the Terminal. We require that the cost estimate used in negotiations and arbitrations be $849.98 million, as at 1 July 2021.

We acknowledge that the approved rehabilitation cost estimate of $432.69 million under the 2017 AU does not appear to be an appropriate forecast of DBIM's efficient costs of rehabilitating the Terminal site. We considered that estimate was appropriate for the level of detail of the associated rehabilitation plan DBIM provided to us at the time. However, we accept that GHD's rehabilitation plan and Advisian's subsequent review and independent estimate are significantly more detailed with regard to the likely scope of rehabilitation works, compared to DBIM's

[485] DBCTM, sub. 12, pp. 37–40, sub. 15, pp. 38–41.
[486] DBCTM, sub. 15, pp. 41–42.
[487] DBCT User Group, sub. 13, pp. 60–62
[488] DBCT User Group, sub. 13, p. 62; SLR report, pp. 24, 29, 32.
[489] DBCT User Group, sub. 16, p. 44.
[490] QCA, *DBCT Management's 2019 draft access undertaking*, draft decision, August 2020, pp. 95–97.
[491] Advisian, *DBCTM Rehabilitation Cost Review—Positioning Statement Rebuttal*, prepared for the QCA, December 2020 (Advisian rebuttal), p. 3.
[492] Advisian, *Dalrymple Bay Coal Terminal Rehabilitation Cost Review (Revision 1)*, prepared for the QCA, February 2021 (Advisian 2021 report).

rehabilitation plan that was assessed as part of the 2015 DAU. We find the detailed build-up of the respective rehabilitation plans and cost estimates provides greater understanding and accuracy of the likely rehabilitation costs than the previously approved cost estimate.

However, we are of the view that the rehabilitation costs estimated by GHD do not reflect an efficient forecast of the likely cost. We consider the use of GHD's estimate as a basis for negotiation of the remediation charges could result in charges that are inefficiently high, which is not in the interests of access seekers and holders (ss. 138(2)(e), (h) of the QCA Act) and may not promote the efficient use of the Terminal if its use results in delays due to failed negotiations and/or preventable arbitrations (s. 138(2)(a) of the QCA Act).

We acknowledge that this cost estimate is not finalised for the entirety of the Terminal's useful life. We expect the rehabilitation cost estimate to be updated in the future to account for new information, as discussed in section 9.5.1.

Our views on other components for the calculation of the remediation charge are outlined in section 9.5.3. Our current views on these matters should provide all parties with guidance as to how we may approach the determination of a remediation charge in an arbitration on this matter. We consider this guidance would sufficiently inform negotiations and encourage reasonable proposals from negotiating parties.

9.5.1 Determination of a rehabilitation cost estimate under the 2019 DBCT DAU

Our assessment of remediation matters under the 2019 DBCT DAU, as with other matters, is based on balancing the criteria in section 138(2) of the QCA Act.

While a pricing model without a reference tariff would provide DBIM and access seekers discretion to negotiate an appropriate remediation charge, we consider negotiations would be ineffective if based on an inefficient estimate of the rehabilitation costs. This is because the estimation of this cost involves highly technical knowledge—particularly in making projections and judgements on the expected scope of works in the future—and requires access to underlying information on the Terminal. Access seekers and access holders face a high degree of information asymmetry and may individually bear inefficient costs to assess the proposed estimate, which should be the same across all stakeholders. We consider that not determining the rehabilitation cost estimate to apply under the 2019 DBCT DAU would run the risk of multiple concurrent arbitrations, unnecessary delays in access to services at DBCT, or access seekers being resigned to accepting inefficiently high remediation charges in order to avoid the former two costly outcomes.

We consider it appropriate for us to determine a rehabilitation cost estimate to apply under the 2019 DBCT DAU because:

- it would be in the interests of the State of Queensland (as owner), DBIM (as operator), and the public for DBIM to be able to recover sufficient costs to rehabilitate DBCT in the future (ss. 138(2)(b)–(d) of the QCA Act)
- it is consistent with the pricing principles under part 5 of the QCA Act, which state that the price of access should generate expected revenue that is at least enough to meet the efficient costs of providing access to the service (at DBCT) (ss. 138(2)(g) and 168(A)(a) of the QCA Act). We consider the efficient costs include the rehabilitation cost estimate based on DBIM's obligations under the PSA
- it would not be in the interests of access seekers and access holders for the remediation charge to be based on rehabilitation costs that are higher than the expected efficient

rehabilitation costs, or face inefficient costs and information asymmetry to assess the appropriateness of the proposed cost estimate (ss. 138(2)(e), (h) of the QCA Act).

DBIM's latest proposed amended DAU outlines that an Indicative Access Proposal (IAP) should disclose:

> (**Forecast rehabilitation costs**) the QCA's estimate of the remediation costs for the purpose of rehabilitating the Terminal at the end of the lease in accordance with the requirements of the PSA, as set out in the QCA's Final Decision on this Undertaking.[493]

We consider this amendment to the 2019 DBCT DAU alone does not reflect the requirement that our approved rehabilitation cost estimate be used in the negotiation and arbitration processes to determine remediation charges under the 2019 DAU. Our proposed redrafting of this item in DBIM's information disclosure requirements (now sch. H) and clause 11.4(d)(3) of the 2019 DAU, as shown in Appendix A, implements this requirement.

Rehabilitation standard

DBIM is obligated to rehabilitate the DBCT site according to the standard outlined in the PSA. However, the final scope of works to satisfy this standard is a matter to be determined between parties to the PSA, namely DBIM and DBCT Holdings (the State). In the absence of further clarity as to the application of DBIM's rehabilitation obligations beyond the relevant clauses of the PSA, we consider it appropriate for us to interpret the rehabilitation standard based on prevailing information, to ensure that the rehabilitation cost estimate reflects the efficient costs of rehabilitation and that any corresponding remediation charges appropriately balance the interests of DBIM, the State, the public, and access holders and seekers (ss. 138(2)(a)–(e), (g), (h) of the QCA Act).

We previously investigated the rehabilitation standard under the PSA during our assessment of the 2015 DAU. Our final decision at that time was that DBIM's obligation was to rehabilitate the site 'to its natural state and condition as existed prior to development', even if this standard may exceed standard industry practice.[494] We considered it in the legitimate business interests of DBIM to assume this standard for rehabilitation. Consequently, determining a remediation allowance based on this standard would provide DBIM 'with expected revenue which is at least enough to meet the expected efficient cost of rehabilitating the Terminal site (ss. 138(2)(c) and (g) of the QCA Act)'.[495]

There is a general consensus among DBIM and the technical experts that DBIM's obligation under the PSA would be to return the site to its natural state, consistent with our past decision. However, we recognise that the obligation does not prescribe a specific set of works or specify standards for work to achieve a site rehabilitated to its natural state. In addition, DBIM's rehabilitation obligations are due in over 30 years. This results in significant uncertainty as to the final scope, standard and cost of works. The uncertainty is evident in the different scopes for rehabilitation works that have been considered as part of DAU assessments for DBCT thus far, and the different applications of the 'natural state' standard to the design of corresponding rehabilitation plans by consultants in this process.

We are not presently aware of any change to DBIM's rehabilitation obligations under the PSA, and as such, we applied the same interpretation of the 'natural state' standard to our assessment of the rehabilitation plan and cost. We are conscious of the uncertainty in the application of this

[493] DBCTM, sub. 12, appendix 6, p. 120.
[494] QCA, *DBCT Management's 2015 draft access undertaking*, final decision, November 2016, p. 144.
[495] QCA, *DBCT Management's 2015 draft access undertaking*, final decision, November 2016, p. 144.

standard, as discussed above, and as such, we consider it appropriate to assess the proposed rehabilitation plan afresh and on its own merits, rather than in comparison to previous plans that were used to determine approved rehabilitation cost estimates in the past.

Criteria for assessing DBIM's proposed rehabilitation cost estimate

Our analysis of DBIM's proposed rehabilitation cost estimate is based on an assessment of the associated rehabilitation plan developed by GHD. We recognise this assessment is not intended to determine a rehabilitation plan for implementation, which is not our remit in the assessment of the 2019 DBCT DAU. However, given DBIM intends to use the rehabilitation plan and cost developed by GHD in negotiations under the 2019 DBCT DAU, we consider it appropriate to assess the plan as a forecast for future work to ensure it would be an appropriate basis for determining remediation charges.

We are also cognisant that the final rehabilitation plan implemented may be different to what is approved in this process, given the uncertainty to the final rehabilitation standard and scope of works. However, we consider it appropriate for the rehabilitation plan to only represent prevailing information, including reasonable forecasts, where appropriate. We did not speculate on possible changes where there was no evidence for such. We believe attempting to speculate without clear guidance or evidence could result in greater inaccuracy in the total rehabilitation cost estimate than when forming a view based on current information.

In determining if the rehabilitation plan (and its associated cost) is appropriate for the purposes of informing negotiations, we assessed GHD's plan to answer these questions:

- Are the rehabilitation costs proposed for the 2019 DBCT DAU (estimated by GHD) prudent and efficient?
- If the costs proposed for the plan or part(s) of the plan are not prudent and/or efficient, what are the prudent and efficient costs for undertaking the associated rehabilitation works?

For this assessment, we consider the rehabilitation works are:

- **prudent**—if the works are required for the rehabilitation plan to comply with DBIM's rehabilitation obligations under the PSA
- **efficient**
  - if the scope of works represents the best means of achieving an outcome determined prudent, having regard to the options available
  - if the standard of works conforms to technical, design and construction requirements in the legislation and/or other standards, codes and manuals
  - if the cost of works is consistent with conditions prevailing in the relevant markets.

Classification of the rehabilitation cost estimate

DBIM recommended that we nominate a classification of the rehabilitation cost estimate to 'ensure that expectations of the estimate are aligned'.[496] It stated that its proposed estimate (developed by GHD) 'was a Class 4 estimate on the industry standard [Association for the Advancement of Cost Engineering International or] AACEI matrix, which is in the range of accuracy of a [front end loading or] FEL 1 feasibility study as contemplated by the access undertaking'.[497]

[496] DBCTM, sub. 12, p. 37.
[497] DBCTM, sub. 12, p. 37.

DBIM suggested limiting the classification of the estimate, given the expectation that accuracy will only improve closer to commencement of the rehabilitation. This was reflected in GHD's response in relation to Advisian's approach to contingency estimation[498] and estimation of bulk earthworks rates.[499]

SLR contended that the material difference between GHD and Advisian was not attributable to the classification of the estimate but rather to different approaches to several material components of the rehabilitation plan.[500]

We recognise that uncertainty exists for the final scope of works and cost of the rehabilitation plan. However, we believe the definition and detail in each rehabilitation plan and cost build-up suggest a level of accuracy above what would be expected for a FEL 1 Feasibility Study. Under the 2017 AU, a FEL 1 Feasibility Study denotes when expansion components are identified and preliminary assessments are made with an accuracy of about 50 per cent.[501] Based on this, we consider a FEL 1 study to be a largely conceptual consideration of options to achieve a project outcome, such that cost estimates are broad and high-level. While some components of the rehabilitation plan fit into that classification (e.g. consideration of offshore pile removal approaches), we consider other components to be more defined, such as the deconstruction of existing assets and volume of earthworks. This is unlike expansion or large non-expansionary capital expenditure projects where the entirety of a project scope and associated components would be conceptual at the FEL 1 stage.

Thus, we consider nominating a classification for the entire cost estimate, as recommended by DBIM, would not reflect the level of definition that can be achieved through the rehabilitation plans. We believe that doing so would result in components of the estimate being inefficient (such as the estimation of contingency allowance), and consequently the negotiation of corresponding remediation charges on this basis being inappropriately balanced against access seekers and holders (ss. 138(2)(e), (h) of the QCA Act). Accordingly, we do not consider it necessary for us to nominate a classification to be applied across the entire rehabilitation cost estimate. Instead, we assessed the material components of the cost estimate based on the criteria outlined above and had regard to the expected level of accuracy of each component in determining its costs and related contingency allowance requirements.

Relevance of past QCA decisions

GHD referenced the past QCA decisions on expansion and non-expansion capital expenditure projects at DBCT as benchmarks for individual material components of the proposed rehabilitation plan. Those decisions are:

- the Water Quality Improvement Project (WQIP), which was approved in 2016 and included an upper bound bulk earthworks rate of $13.76 per cubic metre, similar to the rate used by GHD of $13.46[502]
- the four most recent non-expansionary capital expenditure (NECAP) proposals approved by us, which included project management costs of approximately 10 per cent (or more). Those

[498] GHD response 1, pp. 30, 32.
[499] GHD response 1, p. 15.
[500] SLR report, pp. 10–11.
[501] 2017 AU, p. 103.
[502] GHD response 1, pp. 4, 16.

mark-ups align with GHD's assumption, compared to Advisian's advice that these costs for the rehabilitation plan are between 3 and 7 per cent.[503]

We accept that rates from previously approved capital expenditure projects at the Terminal could represent benchmarks for some proposed rehabilitation works. However, the appropriateness of these benchmarks is not solely based on their approvals. Instead, we have regard for the associated scope and scale of works, and other contextual aspects in considering these approved rates as benchmarks. We consider that it would be inappropriate to indiscriminately apply previous approvals as benchmarks for the rehabilitation plan without consideration of the associated context for approvals, particularly if application to the rehabilitation plan would result in imprudence or inefficiency. For example, unit rates (such as bulk earthworks) are highly dependent on the volume of material, such that there would be an expectation of economies of scale for larger volumes. We have been advised the previously approved bulk earthworks rate referenced by GHD was for a materially smaller volume[504], and thus, we consider it would be inefficiently high if applied in the rehabilitation context. Also, we are obliged to approve any NECAP submissions under a streamlined approval process, provided it has been approved by access holders (cl. 12.10(b) of the 2017 AU). This involves a different level of consideration compared to the approval for the rehabilitation cost estimate under the QCA Act.

In assessing the relevance of previous capital expenditure approvals to the rehabilitation plan and cost estimate, we have given consideration to the context of the associated works. We placed a greater emphasis on the merit of each proposal and where benchmarks were used (including rates from previous decisions), we had regard to the appropriateness of these benchmarks in line with the assessment criteria for prudency and efficiency outlined above.

Assessment of GHD's rehabilitation plan

Our decision is that DBIM's proposed rehabilitation cost estimate of $1.22 billion, estimated by GHD, is not appropriate. GHD's rehabilitation plan and estimate is not fundamentally inappropriate in its entirety, but several aspects may not be prudent and/or efficient, in line with the criteria discussed above. Therefore, our view is that GHD's rehabilitation cost estimate is not likely to reflect the efficient costs of remediating the DBCT site and consequently, not in the interests of access seekers or access holders if used as a basis for negotiation of remediation charges (ss. 138(2)(e), (h) of the QCA Act). In addition, potential delays due to ineffective negotiations and/or the need for avoidable arbitrations to determine remediation charges would be inconsistent with the promotion of economically efficient investment, operation and use of DBCT (s. 138(2)(a) of the QCA Act). We consider the appropriate rehabilitation cost estimate, based on prevailing information, is approximately $849.98 million.[505]

Our decision-making on the rehabilitation cost estimate involved assessment of technical matters related to deconstruction and remediation works. While we sought technical advice from Advisian, our decisions on each component of the rehabilitation plan—where there were material differences between the consultants—are based on a consideration of the merits of the respective approaches from each consultant, in line with the assessment criteria of prudency and efficiency discussed above. Our analysis and decisions on these material components are canvassed in Table 3, together with our views on the additional matters raised by SLR in its review of the rehabilitation plans and cost estimates. Based on the additional information received since

[503] GHD response 1, p. 29.
[504] Advisian rebuttal, pp. 7–8.
[505] The exact rehabilitation cost estimate is $849,978,612.

our draft decision, we consider the revised cost estimate of $849.98 million—determined by Advisian—is an appropriate forecast of DBIM's costs of remediating the DBCT site.

We note that our cost estimate has been estimated by Advisian (using its modelling), and therefore is based on its commercial sources for prices and other data. We did not assess the validity of each consultant's commercial sources as part of this process, and as such, we do not suggest that the sources used by GHD or SLR are inappropriate. Rather, we concluded that the majority of Advisian's positions on the abovementioned material differences were appropriate on merit, in accordance with the assessment criteria for prudency and efficiency, as compared to GHD. We considered that attempting to amalgamate Advisian's positions on these material components with the other components or prices used in GHD's plan would be convoluted and impact transparency for negotiating the remediation charge, without an obvious benefit to accuracy.

Further to this, we intend to provide DBIM the model—developed by Advisian—used to estimate our approved rehabilitation cost estimate. We consider that this model is a component of this final decision on the approved rehabilitation cost estimate. As such, we expect DBIM to provide this model to any access seeker and holder prior to negotiations as part of its information provision obligations under schedule H of our amended 2019 DBCT DAU (see Appendix A). We have also published the Advisian 2021 report, which represents a consolidated position on the approved rehabilitation plan and cost estimate, and thus an explanatory complement to the modelling of our approved estimate.

Table 3 Summary of material differences between consultants' estimates

Individual aspect	*Approx. decrease from GHD's cost estimate to our final decision*[506]	*GHD's position (with reference to the relevant report)*	*Advisian's position (with reference to the relevant report)*	*SLR's position (with reference to the relevant report)*	*QCA analysis and final decision*
Waste disposal location	$31.71 million of direct costs	From GHD report GHD assumed non-contaminated waste would be disposed at Hogan's Pocket Waste Facility (65 km from site) (p. 139) and contaminated waste transported to a commercial facility in Roma (750 km from site) (p. 133). The resulting disposal rate is $383 per tonne (p. 141). From GHD response 1 GHD stated that assuming disposal of contaminated waste at the Hogan's Pocket facility would require factoring in the cost of expansion of the facility and related infrastructure, which GHD contended would be more costly overall (pp. 2, 14). From GHD response 2 GHD stated that the WestRex facility at Roma is able to accommodate the expected heavily contaminated waste volumes (22 per cent of total waste). It added that DBIM must account for the risks of the	From Advisian 2020 report Advisian assumed general waste disposal at Paget Transfer Station (30 km from site) and contaminated waste at Hogan's Pocket (65 km from site) (p. 31). The resulting disposal rate is $350 per tonne (pp. 19, 49). Advisian noted that neither contaminated waste site (Hogan's Pocket or Roma) currently has capacity to accommodate the demands, but it expected notice periods would allow these facilities to expand (pp. 18, 50). From Advisian rebuttal Advisian stated that transportation of waste 750 km from site is not practical or reasonable. It suggested that the increase in demand for waste disposal services from DBCT (and mines in the region seeking to remediate at the same time) could be easily filled by the market through expansion of local facilities, or new service providers	From SLR report SLR concurred with Advisian that it is highly unlikely that waste disposal would be undertaken to Roma, and several options could be considered during the closure planning process, including disposal in closer landforms (p. 17). From SLR memorandum SLR provided examples of disposal at nearby quarries and mines such as Collinsville (<350 km from DBCT). It also suggested that a business case could be made to the council to support a waste facility expansion, such that DBIM does not have to bear the costs entirely (p. 4).	Although the facility at Roma may be the most appropriate option for contaminated waste disposal at this time, we consider it reasonable to expect DBIM to access several waste disposal options locally during the time to remediate, including increase in supplier capacity in the region. We also consider that the cost of expanding existing facilities would not be borne by DBIM, as suppliers are likely to compete for disposal contracts from DBIM and mines decommissioning at the same time. Thus, it would be highly unlikely to assume the waste would be transported 750 km for disposal. In the absence of full certainty to the waste disposal locations available at the time to remediate, we consider the assumption of disposal at the Hogan's Pocket facility an appropriate proxy for this 'reasonable forecast'. **We consider GHD's assumption for waste disposal inefficient in**

[506] The values in this column are approximations of the variance between DBIM's proposal and our final decision for these specific cost components only. They are intended for illustrative purposes and are not representative of all the cost differences between DBIM's proposal and our final decision.

Individual aspect	*Approx. decrease from GHD's cost estimate to our final decision*[506]	*GHD's position (with reference to the relevant report)*	*Advisian's position (with reference to the relevant report)*	*SLR's position (with reference to the relevant report)*	*QCA analysis and final decision*
		rehabilitation project, and as such, DBIM would bear the entire cost of expansion, estimated at $50 million (p. 6).	entering the market, which has a low barrier to entry. Advisian also suggested alternatives like disused open-cut mines being repurposed for waste handling, such as Ebenezer coal mine in Ipswich being transferred to waste disposal provider Collex (now Veolia) (pp. 5–6).		**scope and accept Advisian's position on the waste disposal location.**
Bulk earthworks volumes	$103.33 million of direct costs for all materials handling, including imported clean fill	From GHD report GHD modelled pre-construction landform based on digitisation of pre-construction earthworks layout drawings from 1981, and final landform based on Light Detection and Ranging (LIDAR) data flown in 2013, 'as-built' drawings of dams in 2015 and 'as-built drawings' from the 7X expansion project (pp. 47–49). From GHD response 1 GHD stated that its approach to calculating bulk earthworks volumes was different to Advisian but yielded comparable results. It added Advisian's approach may result in a higher level of accuracy for pre-construction landform data (pp. 16–18).	From Advisian 2020 report Advisian independently modelled earthworks volumes using digitised aerial images flown in 1977 as the pre-construction landform (from Department of Natural Resources, Mines and Energy or DNRME) and orthorectified (geometrically corrected) using 2013 LIDAR data (used by GHD) and 2015 digital terrain data (from DNRME). Final landform data was generated from the 2013 LIDAR data, modified for structures anticipated to be removed prior to earthworks. Advisian estimated dam storage volumes from images provided by GHD to calculate water surface levels removed and verified its estimate during its site visit (pp. 56–62). In reviewing GHD's approach (without provision of earthworks modelling from GHD), Advisian	From SLR report SLR stated Advisian's approach is more robust and auditable (p. 17).	Both GHD and SLR stated that Advisian's approach to modelling earthworks would be more accurate. Although the difference in volumes calculated by GHD and Advisian could be immaterial, the overall impact to cost from a marginal inaccuracy in volumes would be significant. **We consider the volumes determined by GHD could be inefficient in scope and cost, and we accept Advisian's bulk earthworks volumes for calculation of the related costs.**

Individual aspect	*Approx. decrease from GHD's cost estimate to our final decision*[506]	*GHD's position (with reference to the relevant report)*	*Advisian's position (with reference to the relevant report)*	*SLR's position (with reference to the relevant report)*	*QCA analysis and final decision*
		DBIM proposed that Advisian's volumes be accepted for the calculation of related costs.[507]	could only determine the methods used by GHD for Domain 2 (stockyards) and noted GHD's volumes did not match the volumes reported in Axiom's[508] estimate (p. 56).		
Bulk earthworks rate		From GHD report GHD priced plant and labour (with contractor margin) at $372 per hour with productivity of 27.64 cubic metres per hour, resulting in a 'sell price' of $13.46 per cubic metre.[509] GHD did not elaborate on these figures. From GHD response 1 GHD clarified its unit rate was a total unit price method used in a Class 4 estimation rather than a first principles estimation. It considered its rate appropriate in light of the QCA's past approval of the Water Quality Improvement Project (WQIP) NECAP, which had an upper bound of $13.37 per cubic metre for related earthworks (pp. 15–16).	From Advisian 2020 report Advisian estimated plant and labour at $915 per hour with a productivity of 115 cubic metres per hour, resulting in a 'sell price' of $7.96 per cubic metre (pp. 18, 77). Advisian explained these figures are based on its industry and commercial sources specific to Queensland, verified by recent bulk earthworks projects in the state (p. 18). From Advisian rebuttal Advisian stated in its written response that the bulk earthworks volumes for the WQIP NECAP are significantly less than what is expected for the rehabilitation project. It also stated that these reported rates are not broken down to ascertain if mobilisation	From SLR report SLR stated Advisian's estimated unit rates appear reasonable (p. 21). From SLR memorandum SLR provided its own estimates from industry experience that align with Advisian (p. 12).	We did not assess the validity of any consultant's commercial sources for prices and do not suggest that the rates are inappropriate for this reason. We do not consider the unit rates for the WQIP NECAP an appropriate benchmark for earthworks unit rates for the rehabilitation plan. Instead, the low associated volumes for this NECAP and certainty for economies of scale for the rehabilitation works suggests GHD's proposed rates for the rehabilitation earthworks being inefficient in cost. We also had regard to SLR reporting its recent industry experience yielding similar rates to Advisian for comparable labour and plant.

[507] DBCTM, sub. 12, pp. 36, 38.
[508] GHD subcontracted the estimation of the rehabilitation costs to Axiom.
[509] These assumptions were not reported by GHD but were determined in Advisian's review of GHD's cost estimation and modelling (Advisian 2020 report, p. 18). Advisian noted that it could not verify how GHD determined its bulk earthworks rates or if it was peer-reviewed to a similar rigour.

Individual aspect	*Approx. decrease from GHD's cost estimate to our final decision[506]*	*GHD's position (with reference to the relevant report)*	*Advisian's position (with reference to the relevant report)*	*SLR's position (with reference to the relevant report)*	*QCA analysis and final decision*
			and demobilisation has been factored in (pp. 7–8). It stated its rates were easily verifiable from commercial earthmovers.		**We consider GHD's approach to be inefficient in cost and accept Advisian's unit rates for bulk earthworks.**
Imported clean fill		From GHD report GHD applied a clean fill rate of $35 per cubic metre (but did not clarify its source)[510], and Axiom applied a rate of $50 per cubic metre (based on recent project experience in the locality) (p. 139). This resulted in two different rates for imported clean fill being used in GHD's estimate. From GHD response 1 GHD clarified that the lower rate it used was meant for smaller volumes sourced from nearby facilities, but Axiom's rate was for larger volumes sourced from further stockpile facilities (p. 19).	From Advisian 2020 report Advisian sourced screened topsoil rates delivered to site by local landscaping suppliers. It applied a higher rate of $48.50 per cubic metre (including contractor mark-up). Advisian stated this rate is a conservative position, given the large quantities would likely be supplied by a producer that would be able to pass on savings from economies of scale (p. 18). From Advisian rebuttal Advisian advised that its rates are highly conservative, as they are for (higher-grade) topsoil and do not factor in buying gains. It suggested that it would be feasible to assume clean fill delivered at $25 per cubic metre (p. 8).	From SLR report SLR considered Advisian's rate of $48.50 reasonable (p. 21). From SLR memorandum SLR disagreed with GHD's reasoning for its two rates, stating that in reality, clean fill would be sourced from few sources and as such, one rate should be used (p. 12).	We did not assess the validity of any consultant's commercial sources for prices and do not suggest that the rates are inappropriate for this reason. We note that Advisian's conservative rate of $48.50 is similar to Axiom's rate of $50 but materially higher than GHD's rate of $35. However, the overall impact from these rates may be immaterial to the estimate for direct costs (which we estimate at around $4.7 million). We consider that clean fill would be sourced from a number of sources, as suggested by SLR, and an earthworks contractor would not quote multiple rates in developing an overall estimate. Critically, we consider that using two different rates introduces unnecessary complexity to the modelling and an element of spurious precision, given the

[510] This assumption was not reported by GHD but determined in Advisian's review of GHD's cost estimation and modelling (Advisian 2020 report, p. 50).

Individual aspect	*Approx. decrease from GHD's cost estimate to our final decision[506]*	*GHD's position (with reference to the relevant report)*	*Advisian's position (with reference to the relevant report)*	*SLR's position (with reference to the relevant report)*	*QCA analysis and final decision*
					lower GHD rate only applies to 1 per cent of the import fill volumes. Although lower rates have been suggested, we consider using Advisian's conservative rate of $48.50 represents an appropriate position that sufficiently captures any notion of multiple sources for clean fill, without introducing the complexity of multiple unit rates in estimation. **We consider GHD's position may be inefficient in scope and accept Advisian's import clean fill rate.**
Contaminated soil and substrate removal	$51.78 million of direct costs	From GHD report GHD assumed removal of: • 400 millimetres of bedding coal and contaminated soil • 500 millimetres of material under roads • 1 metre of material under substation areas, classified as low contamination substrate. It did not provide an explanation for these assumptions.[511]	From Advisian 2020 report Based on recent commercial experience with a producer with similar hydrocarbon contamination, Advisian assumed removal of: • 250 millimetres of contaminated soil (p. 19). It also assumed bedding coal is removed prior and sold by DBIM to cover costs under normal operating conditions (p. 53)	From SLR report SLR considered Advisian's approach reasonable (p. 18). From SLR memorandum SLR suggested that GHD's sources of information to justify greater depths of removal were inadequate to be applied sitewide (p. 5). It also stated that the midpoint proposal would grossly overestimate disposal and other requirements (p. 6).	We consider GHD has assumed an overly conservative position for contamination depths across the entire site, rather than attempting to account for lower levels of contamination offsetting areas of greater contamination. This is in addition to the advice on DBIM's mandated environmental management plan, which would negate the likelihood of contamination to the depths suggested by GHD across the entire site. In the same vein, it is also inefficient in scope to accept a

[511] This assumption was not reported by GHD but determined in Advisian's review of GHD's cost estimation and modelling (Advisian 2020 report, pp. 19–20).

Individual aspect	*Approx. decrease from GHD's cost estimate to our final decision[506]*	*GHD's position (with reference to the relevant report)*	*Advisian's position (with reference to the relevant report)*	*SLR's position (with reference to the relevant report)*	*QCA analysis and final decision*
		From GHD response 1 GHD clarified that its assumptions were based on its own commercial experience, informed expectation for contamination at DBCT, and estimation based on drawings from the Department of Transport and Main Roads (TMR) (pp. 21–24). DBIM proposed that the midpoint between the two depths should be used to calculate removal and disposal costs.[512]	• 250 millimetres of road substrate (pp. 19–20) • 250 millimetres of road (pp. 19–20). It made the assumption that any large contamination spills would be cleaned up and earthen pads were contaminate-free at the time of construction. From Advisian rebuttal Advisian added that if DBIM complied with its mandated environmental management plan legislated for a Tier 1 operator, contamination would only breach the top 100 millimetres of material, on average, with a further 150 millimetres assumed across the entire site providing sufficient contingency (p. 9).		midpoint position, if one of the reference points is considered to be inefficient. We expect this matter to be revisited in future updates when soil and substrate sampling can be conducted closer to the rehabilitation date, to verify depths for removal (see section 9.5.2). **We consider GHD's position for removal of contaminated material inefficient in scope and accept Advisian's position on the depths for removal of contaminated material.**
Offshore pile removal	$23.97 million of direct costs	From GHD report GHD considered two options (full or partial removal) (p. 52) and estimated for full removal of piles. Its justification for this choice was that completely removing piles maximises long-term rehabilitation of the offshore domain (p. 86).	From Advisian 2020 report In reviewing GHD's approach, Advisian came to the position that complete removal of piles could have a detrimental impact on marine life. Given the agreed positions of letting the sea floor fill in naturally over time, its position was for the piles to be cut to just below the existing seafloor	From SLR report SLR supported Advisian's assumption, pointing out that the method proposed by GHD may yield economic and environmental consequences from unsuccessful extraction attempts. It suggested that consultation with DBCTH and	We consider that full extraction of offshore piles is consistent with DBIM's obligations to rehabilitate the site to its natural state and is therefore prudent. However, we consider the full extraction approach proposed by GHD may be inefficient in scope and cost. This is based on Advisian's advice on the feasibility

[512] DBCTM, sub. 12, pp. 36, 38.

Individual aspect	*Approx. decrease from GHD's cost estimate to our final decision[506]*	*GHD's position (with reference to the relevant report)*	*Advisian's position (with reference to the relevant report)*	*SLR's position (with reference to the relevant report)*	*QCA analysis and final decision*
		GHD identified that there is no leading practice method or preferable environmental option accepted by government agencies and there has also not been a similar project with matched scale or varying locations with a similar marine environment to benchmark an approach (p. 52). From GHD response 1 GHD added to its reasoning that full extraction is consistent with DBIM's rehabilitation obligations under the PSA to return the site to its natural state and aligns with the Great Barrier Reef Marine Park Authority (GBRMPA)'s obligations for long-term protection and conservation. It further clarified that it expects DBIM's legislative requirements for environmental protections to increase leading up to the rehabilitation obligations falling due, thereby supporting the likelihood of full extraction of piles being required (pp. 26–27). From GHD response 2 GHD added that the North Queensland Bulk Ports Corporation (NQBP), a party to the PSA, specified full removal of piles for a recent development	level. It explained that this would allow embedded parts to be covered over time as the seafloor is naturally restored to its natural state (p. 52). From Advisian rebuttal Advisian outlined that it viewed the cost of either method appropriate, and the decision on this matter would be based on what is in line with DBIM's obligations, which it contended is partial removal (p. 10). From Advisian 2021 report We requested Advisian to reassess GHD's methodology and estimate for full removal of piles. It stated that some works proposed by GHD were not advisable (i.e. relief drilling, not factoring 'collaring' of piles). It also proposed a more cost-effective approach to remove the piles and factored relevant contingencies. Advisian's further consideration and estimation for full extraction was approximately $22 million less than GHD's (including indirect costs) (pp. 88, 95–96).	other relevant agencies is necessary (p. 20). From SLR memorandum SLR recommended consultation with DBCTH and other relevant agencies on an acceptable approach (p. 7).	of the works proposed by GHD, and the estimation for indirect costs and contingency. We expect this matter to be revisited in the future, in consultation with relevant stakeholders and agencies (see section 9.5.2). **We consider GHD's position on this matter is prudent. However, we assessed that the approach may be inefficient in scope and costs, and we accept Advisian's estimate for full extraction of offshore piles.**

Individual aspect	*Approx. decrease from GHD's cost estimate to our final decision[506]*	*GHD's position (with reference to the relevant report)*	*Advisian's position (with reference to the relevant report)*	*SLR's position (with reference to the relevant report)*	*QCA analysis and final decision*
		approval package at the Port of Mackay (p. 9).			
Indirect labour and project management costs	$11.72 million increase compared to GHD's estimate for this component	From GHD report GHD utilised two approaches for indirect labour rates. It used a first principles build-up for one portion of its estimate[513], and its subcontractor (Axiom) applied a 10 per cent allowance to the direct costs estimated for rehabilitation works. The latter approach outlined that the project management team was assumed to be supplied by DBIM (p. 142). From GHD response 1 GHD referenced past QCA approvals for recent NECAPs and the Outstanding Costs DAAU that included indirect project management costs exceeding 10 per cent as evidence that the Axiom assumption is not on the higher end of industry norms, as contended by Advisian, and is indeed prudent (pp. 28–29). From GHD response 2 GHD stated that the operator (DBCT PL) charges a higher percentage for actual PM costs for NECAP works, as does NQBP (a	From Advisian 2020 report Advisian assumed project management would be outsourced to a relevant Tier 1 contractor under the direction of a DBIM-established Project Management Office (PMO). It estimated the relevant costs based on an organisational structure it developed (pp. 48–49). It also added a 10 per cent allowance ($50 million) for costs it assumed DBIM would bear as part of its project management role but implied this was highly conservative and was included for comparison purposes with GHD. It suggested this cost could be approximately 3–7 per cent of direct costs (p. 125). From Advisian rebuttal Based on its estimation, Advisian advised that its proposed project delivery approach would deliver the same outcome as GHD's without the contractor's margin, suggesting GHD's approach is inefficient in cost. It added the project would attract sufficient	From SLR report SLR agreed with Advisian but suggested a conservative assumption of 8 per cent for DBIM's PMO costs. It added that management of closure projects requires a different skillset and experience compared to expansions, which DBIM personnel do not appear to possess (pp. 21–22, 27). From SLR memorandum SLR stated that DBIM's experience with expansions would not be applicable to closure and rehabilitation works, and the PMO established by DBIM would be sufficient to provide site knowledge and context. It added that a Tier 1 contractor is more risk-balanced (pp. 7–8).	We do not consider past approvals in our decision-making for these indirect costs, given the different contexts of these approvals, as discussed previously. We do not consider the position held by GHD/DBIM as reflective of the expected approach to indirect costs for the rehabilitation project when the obligations fall due. While DBIM has managed numerous capital expenditure and expansion projects, the positions presented by the expert consultants would indicate that the delivery of a deconstruction and rehabilitation project, particularly of this scale, would likely be managed by an external contractor, with DBIM being able to provide its asset knowledge via a PMO. As alluded to by Advisian, GHD's project delivery approach could deliver similar outcomes but would be inefficient in cost. While GHD contend that a Tier 1 contractor would yield costs from

[513] This assumption was not reported by GHD but determined in Advisian's review of GHD's cost estimation and modelling (Advisian 2020 report, pp. 47–48).

Individual aspect	*Approx. decrease from GHD's cost estimate to our final decision[506]*	*GHD's position (with reference to the relevant report)*	*Advisian's position (with reference to the relevant report)*	*SLR's position (with reference to the relevant report)*	*QCA analysis and final decision*
		party to the PSA). It added an external contractor would incur familiarisation costs, on top of its profit margin (p. 10).	participants to the market to create competitive project delivery pricing (pp. 11–12).		familiarisation of DBCT, the difference in skillsets for project management suggests that an external contractor would deliver a more risk-balanced and more cost-efficient outcome overall. **We consider GHD's position inefficient in scope and cost, and we accept Advisian's approach to indirect labour and project management costs**, maintaining the nominal 10 per cent for project management allowance that Advisian originally determined.
Risk and contingency allowance	$95.18 million of the total estimate	From GHD report GHD applied an additional 25 per cent to direct costs as risk and contingency allowance.[514] It did not provide an explanation for this assumption or a reference for this benchmark. From GHD response 1 GHD clarified that Axiom's allowance was based on its development of a Class 4 estimate and this is lower than TMR guidance of 40–70 per cent. Regarding its own contingency allowance assumption, GHD	From Advisian 2020 report Advisian built up a risk profile for each type of work by domain, based on prevailing documentation and verified its risk profiles during its site visit (pp. 126–128). It also included client risks and other industry-accepted contingencies by class of work, based on an assumption of project delivery by a Tier 1 contractor, accounting for the expected level of risk (pp. 123–124). From Advisian rebuttal	From SLR report SLR agreed with Advisian's approach, noting that TMR recommends a similar probabilistic method for risk assessment (p. 23). From SLR memorandum SLR noted that the 25 per cent contingency used by GHD is added on other contingencies. It suggests the estimation of risk and contingency profiles is most efficient, whereby the profiles would reflect the existing knowledge base and other	We consider the different approaches to the risk and contingency allowances are dependent on the perception of accuracy of the rehabilitation cost estimate. While significant uncertainty exists about DBIM's obligations and components for rehabilitation (e.g. quantity of contaminated material), we expect that several material aspects of the project can be estimated to a greater degree of precision than what GHD/DBIM alluded to when it compared rehabilitation with

[514] This assumption was not reported by GHD but determined in Advisian's review of GHD's cost estimation and modelling (Advisian 2020 report, p. 126).

Individual aspect	*Approx. decrease from GHD's cost estimate to our final decision*[506]	*GHD's position (with reference to the relevant report)*	*Advisian's position (with reference to the relevant report)*	*SLR's position (with reference to the relevant report)*	*QCA analysis and final decision*
		pointed to its own commercial experience for asset-closure projects and noted a DAAU for a phase of the 7x expansion project had a contingency of 25 per cent, which the QCA approved (pp. 30–32). GHD added that Advisian's approach would require comprehensive input from all stakeholders closer to rehabilitation (p. 32). GHD commented that Advisian did not define its class of estimate to determine the risk allowance and noted that rail construction project estimates, including those which Advisian previously developed, have employed much higher percentages for risk contingencies (pp. 32–33). <u>From GHD response 2</u> GHD highlighted that SLR and other consultants on the Inland Rail project outline contingencies between 26 and 36 per cent. It also addressed a discussion at the technical forum on the tangibility of assets providing greater certainty compared to construction projects (such as those it cited) by pointing to the uncertainty in quantities for the rehabilitation works. GHD	Advisian stated that the level of definition obtained through its analysis and supported by its site visit would be in excess of 85 per cent, given the tangibility and quantifiable nature of the existing assets. If an approach similar to GHD's was adopted, Advisian would advocate for a maximum of 15 per cent in contingency (p. 13).	relevant considerations. It suggested GHD's deterministic approach is more suited to small and/or non-complex projects (pp. 8–9).	construction projects (e.g. quantity of earthworks, volume of disposal from physical asset deconstruction). Where uncertainty exists, we consider Advisian's probabilistic approach to quantifying risk and contingency provides a more thoughtful and accurate reflection of the allowance required in the cost estimate. We expect the risk and contingency profiles to be revisited in future updates and recommend that DBIM should consult with all relevant stakeholders in determining these profiles (see section 9.5.2). **We consider GHD's approach to be inefficient in scope and cost, and we accept Advisian's approach to estimating the risk and contingency allowances**.

Individual aspect	*Approx. decrease from GHD's cost estimate to our final decision[506]*	*GHD's position (with reference to the relevant report)*	*Advisian's position (with reference to the relevant report)*	*SLR's position (with reference to the relevant report)*	*QCA analysis and final decision*
		suggested that its approach based on benchmarks would be less subjective than Advisian's, considering that DBIM were not involved in the development of the risk and contingency profiles (pp. 11–13).			
Battery limits and ownership of assets	SLR proposed a decrease of $66.16, but our final decision is not to include this decrease	From GHD report GHD included third-party owned assets (i.e. an Ergon-owned substation and an Aurizon-owned balloon loop electrified by a QR-owned substation) within the battery limits for the remediation of DBCT (p. 25). From GHD response 2 GHD stated it sought confirmation from DBIM on agreements with third parties. DBIM advised that there were none (p. 15).	From Advisian 2020 report Advisian adopted the list of assets for demolishing from GHD, including third-party owned assets (p. 114).	From SLR report SLR submitted that DBIM would not bear the cost of demolishing these third-party owned assets (p. 32).	We consider there is insufficient evidence to suggest that DBIM would not bear the entire cost of demolishing third-party owned assets that are in exclusive use at DBCT. This matter could be revisited in the future, in consultation with relevant stakeholders and third-party asset owners (see section 9.5.2). **We consider GHD's approach to the rehabilitation of third-party assets (which was adopted by Advisian) to be prudent and efficient.**
Contractor's margin for tug harbour works	SLR proposed a decrease of $8.18 million, but our final decision is not to include this decrease	From GHD report GHD applied a 20 per cent contractor's margin to the rehabilitation of the tug harbour. From GHD response 2 GHD responded in its latest report stating that the Central Qld Coal Associates Agreement Act 1968	From Advisian 2020 report Advisian adopted GHD's entire estimate for the tug harbour domain, having accepted the approach on merit (p. 119).	From SLR report SLR agreed with GHD's approach to rehabilitate the tug harbour but stated the contractor's margin should be reduced to 10 per cent and the maintenance should be reduced to 80 per cent to reflect public and HPCT use (p. 25).	We consider GHD's response and evidence definitive in stating that DBIM must bear the cost of rehabilitating the tug harbour in its entirety. In relation to the contractor's margin, we consider the impact (which would be less than the proposed $8.18 million) is immaterial to the overall estimate

Individual aspect	*Approx. decrease from GHD's cost estimate to our final decision*[506]	*GHD's position (with reference to the relevant report)*	*Advisian's position (with reference to the relevant report)*	*SLR's position (with reference to the relevant report)*	*QCA analysis and final decision*
		(Qld), No. 55[515] outlines that BMA (owner of HPCT) should not be charged for operating, management and maintenance costs for extending use of the harbour to meet the community's needs (pp. 16–17).			We consider it an appropriate position to cover for the marginal risk of higher contractor's costs. We also note Advisian did not consider that GHD's estimation for the tug harbour is inefficient. **We consider that GHD's approach to the rehabilitation of the tug harbour (which was adopted by Advisian) is prudent and efficient.**

[515] This legislative reference has been corrected from what GHD originally quoted in its report and response.

The variances between DBIM's proposal for the rehabilitation cost estimate, developed by GHD, and our final decision are outlined in Table 4. The material components discussed in Table 3 are spread across the domains[516], except for the offshore pile removal which only applies to the offshore domain. Further detail on the works forecasted for each domain and other differences between the two cost estimates—not canvassed in Table 3—are described in the respective consultants' reports available on our website.

Table 4 Summary of DBIM's proposed rehabilitation cost estimate and our final decision, by domain (July 2021 dollars)

Domain		*DBIM/GHD ($ millions)*	*QCA ($ millions)*	*Variance from DBIM/GHD (%)*
Rail loop		232.77	111.38	-52
Stockyards		489.65	211.65	-57
Seawall		61.57	48.50	-21
Offshore		288.30	207.34	-28
Water management		63.01	59.96	-5
Quarry dam		12.96	76.12	487
Offices and workshops		52.44	31.69	-40
Utilities		36.77	7.63	-79
Tug harbour		39.87	37.23	-7
Ongoing costs	Monitoring and management	9.91	9.25	-7
Once-off costs	Distributable costs	26.26	56.48	115
	Studies costs	2.14	2.00	-7
	Project management and governance	1.07	0	-100
Total rehabilitation cost estimate		**1,306.81**	**849.98**	**-35**

Note: Our approved cost estimate was determined by Advisian. Details of the associated forecast scope of works are in the Advisian 2021 report. Ongoing costs have been distributed across the domains and are shown in the table for information purposes. The figures under the DBIM/GHD proposal have been escalated to 1 July 2021 using the method proposed by DBIM (DBCTM, sub. 12, p. 40). Advisian stated that the values of our final decision have been estimated to apply from 1 July 2021 (Advisian 2021 report, p. 23).

9.5.2 Future updating of rehabilitation cost estimate

We acknowledge the DBCT User Group's initial concerns around DBIM proposing to significantly increase the rehabilitation cost estimate after our consideration and approval of an increase during the 2015 DAU process, despite no change to DBIM's legal obligations.[517] However, we are of the view that an increase is warranted based on review of the rehabilitation plans and cost estimates developed by GHD, Advisian and SLR. We consider that the increased detail and

[516] Advisian and SLR adopted GHD's delineation of the rehabilitation plan by domain, as described in the GHD report (pp. 27–28).
[517] DBCT User Group, sub. 2, p. 50.

scrutiny of the likely scope of works of both plans have clearly identified that the rehabilitation cost estimate of $432.69 million, approved in 2016, would leave DBIM with insufficient funds to meet its rehabilitation obligations. Consequently, we are of the view that the previously approved cost estimate would not be an appropriate basis to determine the remediation allowance going forward, given our role to ensure DBIM has the ability to recover its efficient costs (s. 168A(a) of the QCA Act). This has since been supported by the DBCT User Group, suggesting the cost estimate should be $736 million (based on the review by SLR)[518], which is materially higher than the previously approved estimate of $432.69 million.

Reasons and matters for future amendments

We recognise the significant uncertainty in forecasting rehabilitation costs for DBIM's obligations that will not be due for at least 30 years. This is particularly evident from the range of cost estimates approved under previous undertakings and those proposed in this process. Therefore, we do not consider an increase to the approved rehabilitation cost estimate is only warranted for a change in DBIM's legal obligations. In the term leading up to DBIM's rehabilitation obligations falling due, there may be other factors that impact the final cost of rehabilitation, including:

- changes to the list of assets to be decommissioned (e.g. due to expansions or asset disposals)
- an increased understanding of the final scope of works (e.g. as evident with increased detail of DBIM's proposal assessed in this DAU)
- possible changes to environmental standards and legislation governing rehabilitation projects
- changes in relevant markets that may materially impact rehabilitation costs or alter the projected term to rehabilitation.

In addition, the DBCT User Group identified other sources of uncertainty affecting the rehabilitation costs—that is, improvements to efficiency and technology may reduce costs, and the state may potentially require a different standard of rehabilitation.[519]

As noted above, our assessment of DBIM's rehabilitation plan is based only on prevailing information and does not speculate on matters that may affect the rehabilitation plan and cost in the future without sufficient evidence. Thus, we acknowledge the appropriate rehabilitation cost estimate outlined above is representative of the information available at a point in time. It may not be an appropriate estimate in the future, when alternative positions are justified with new information. Instead, we expect DBIM to seek to update the rehabilitation cost estimate regularly in the future, to account for the matters discussed above, and to ensure the remediation charges reflect the expected costs of rehabilitation.

Our proposed drafting to clause 11.4(d)(3) and item 7 in schedule H of the 2019 DBCT DAU (Appendix A) sets the remediation cost estimate for the duration of the pricing period under the 2019 DAU. We do not consider it appropriate for DBIM to seek to negotiate a remediation charge based on a rehabilitation cost estimate (or an amended cost estimate) that we have not assessed or approved as part of an amendment to this clause. We also do not regard the negotiation or arbitration processes to be the appropriate junctures to propose changes to the rehabilitation plan or cost estimate—as these processes are meant to determine terms specific for a contract with an individual access seeker or holder. We believe that any changes or updates to the

[518] DBCT User Group, sub. 13, p. 62.
[519] DBCT User Group, sub. 2, p. 50.

rehabilitation plan and cost would apply to all access seekers and access holders, in addition to broader stakeholder groups. Thus, any amendments should be assessed as part of a DAAU process to amend the approved undertaking, to allow us to effectively consider the matter and make a decision that balances the criteria in section 138(2) of the QCA Act. DBIM may also elect to update the rehabilitation cost estimate as part of future DAU submissions.

Access holders and seekers have opportunities to raise matters that may impact the rehabilitation cost estimate, including through submissions to an investigation conducted by us, such as our assessment of a DAU or DAAU (ss. 138(3)(c)–(d)). We intend to assess the merits of any updates to the approved rehabilitation cost estimate based on the criteria of prudency and efficiency (section 9.5.1). As with other matters, submissions on updates to the rehabilitation cost estimate may include reports prepared by stakeholders' expert consultants to justify positions, which we will consider in accordance with the QCA Act (ss. 138(3)(d) and 174).

Consultation for the development of amendments

Our decision on the rehabilitation cost estimate outlined above noted several matters that are still uncertain at this time. These include specific positions on offshore pile removal, depths of contaminated substrate and soil for removal, waste disposal locations, and liability for remediating assets owned by third parties. In addition to conducting further assessments over time, we believe some of the uncertainty associated with these and other matters could be addressed through consultations with relevant stakeholders.

For example, we noted that the final scope and standard for rehabilitation works would be determined by the parties to the PSA. We are not aware if there have been any preliminary discussions at this stage. Also, several of these matters would require clear views from relevant agencies like the Great Barrier Reef Marine Park Authority (GBRMPA), the Queensland Department of Environment and Science, and/or local councils in the Mackay and surrounding regions. We note DBIM and GHD have cited recent project approvals from the North Queensland Bulk Ports Corporation (a party to the PSA) and GBRMPA's obligations under the Great Barrier Reef Marine Park Act 1975 in its submissions.[520] However, we encourage DBIM to seek further specific views from these and other relevant authorities on the appropriate scope and standard of works for its rehabilitation plan at DBCT, where possible.

In the same vein, we believe the DBCT User Group and other access holders have a critical role in the rehabilitation of DBCT, given all access holders contribute towards funding the rehabilitation works through the corresponding access charge component. We also note that day-to-day operational management of the Terminal is performed by DBCT PL, which is owned by a majority of existing access holders, and it may be able to inform the scope of work for rehabilitation. In addition, we understand that access holders are faced with their own rehabilitation obligations for mine-site closures and rehabilitation[521], the timing of which may coincide with the end of economic life of DBCT, as would some of the types of rehabilitation work (e.g. earthworks). We encourage DBIM to seek to collaborate with the DBCT User Group, DBCT PL and other access holders, in determining if the rehabilitation cost estimate should be amended. Equally, we encourage access holders to engage productively with DBIM in these matters in a timely manner, if given the opportunity. We would expect these consultations should afford access holders the opportunity to seek information to undertake their own assessments and request site visits for their own advisors, where appropriate and necessary.

[520] DBCTM, sub. 15, p. 40; GHD response 1, pp. 25–26; GHD response 2, p. 9.
[521] These obligations are based on the Queensland Government Mine Land Rehabilitation Policy.

DBIM and GHD expressed concern that the risk and contingency profiles developed by Advisian did not involve consultation with DBIM's project managers or managers of the rehabilitation project.[522] At the time, we had not come to a view on an appropriate approach to estimating these allowances. Thus, it was not prudent to require this consultation at an earlier stage. Given that we have now expressed our views that the estimation of the risk and contingency allowances should involve a considered build-up like the approach undertaken by Advisian, we encourage DBIM to consult its project managers and collaborate with relevant stakeholders (and their expert advisors) to determine if any of the profiles should be amended and to what degree. The QCA Act does not outline any restriction for us (and our expert advisors whom we may choose to engage) to participate in any collaborative process on this or any other remediation matters. Thus, we would be inclined to participate in such consultations, if DBIM is collaborating with other stakeholders and it considers our involvement beneficial.

We would still publicly consult on any amendments to the rehabilitation cost estimate under a DAU or DAAU process in accordance with the QCA Act (ss. 138(3)(c), (d)) and assess any amendments to the cost estimate according to the criteria outlined above. However, we consider consultation on these matters prior to submission would be beneficial to the process, where discussions are productive. This would also afford all parties increased transparency, and sufficient opportunity to request and assess information related to proposed amendments, particularly where information sharing could lead to an overall beneficial outcome for DBIM, access holders and other parties, in terms of the future rehabilitation of DBCT.

Renegotiation of remediation charges for changes to the cost estimate

We would not assess the impacts of an amendment to the approved rehabilitation cost estimate to an individual TIC under this pricing model, when submitted through a DAU or DAAU. Instead, we envisage any revision of the remediation charge, including due to an amendment to the cost estimate, being negotiated between DBIM and the individual access holder. This could either occur at the five-year review of charges (cl. 7.2 of the 2019 SAA) or at any time during a pricing period—contingent on respective provisions in a user's agreement. Parties could negotiate for a revised TIC to reconcile any differences from when the cost estimate is amended to when the TIC is renegotiated, particularly if the TIC is only revised at the five-year review. Where negotiations do not result in agreement, either party could refer the recalculation of remediation charges to arbitration in accordance with the respective user agreement (cl. 7.2(d) of the 2019 SAA or equivalent).

9.5.3 Determination of the remediation component of access charges

Remediation charges under the 2019 DBCT DAU

DBIM did not propose a specific method to calculate the individual remediation charges but instead proposed that this would be determined through negotiation and/or arbitration.[523] Stakeholders have submitted that we should determine the remediation charges[524] or outline our positions on the method and components used to calculate the remediation charges.[525]

We consider that if relevant information is available to all parties, an appropriate remediation charge can be determined through negotiation or arbitration. Furthermore, we are conscious that over-prescription on matters relevant to the determination of the remediation charge in a pricing

[522] DBCTM, sub. 12, pp. 39–40; GHD response 2, p. 13.
[523] DBCTM, sub. 1, p. 53.
[524] DBCT User Group, sub. 2, p. 50, sub. 9, p. 37; New Hope Group, sub. 3, p. 13.
[525] DBCT User Group, sub. 13, pp. 60–61, sub. 16, pp. 44–45.

model without a reference tariff may impede negotiations (as discussed below). Thus, we are of the view that the remediation charge should be determined through negotiation and/or arbitration, provided that negotiating parties have access to relevant information. We believe this range of information may include:

(1) the approved rehabilitation cost estimate—as outlined above and including any amendments to the estimate approved in the future

(2) the method to determine the remediation charge—how the rehabilitation cost estimate is converted to a remediation charge for a specific user

(3) the expected date for remediation—this is an estimate for when remediation is expected to commence, and thus it determines the term to remediation for the cost estimate to be accrued

(4) rates used to calculate the remediation charge—in the context of the annuity and building blocks methodologies, these are the escalation and discount rates

(5) the value of past accrued remediation payments—commonly referred to as the notional sinking fund

(6) any other relevant information used to calculate the remediation charge.

We recognise our direct role in ensuring transparency of the rehabilitation cost estimate and any approved amendments (item 1 above), which would include publication of this and future decisions (and complementary consultants' reports) on our website. Also, DBIM is required to provide information on our rehabilitation cost estimate, which includes the corresponding model, as part of its information provision obligations under schedule H of our amended 2019 DBCT DAU (see Appendix A).

We were previously of the view that the provision of historical and prevailing information regarding the remediation allowance and cost estimate (outlined in schedules G and H of our amended 2019 DBCT DAU) and publicly available information would provide for parties to negotiate the remediation charge from a sufficiently informed position, with protection afforded through arbitration.[526] However, we note that both DBIM and the DBCT User Group made submissions on the other components used to determine a remediation charge. In particular, the DBCT User Group commented on the 'influence of the other factors'[527] and that it had significantly different views to DBIM on items 3 and 4 above.

In the interest of providing further guidance to stakeholders, we have outlined our views and positions on other components for calculating the remediation charge (listed as items 2–6), which should be used to inform negotiations and will form part of our consideration in arbitrations by us. In doing so, we are of the view that sufficient guidance has been provided to ensure an appropriate remediation charge can be determined under this pricing model without requiring our ex ante calculation of the remediation allowance or charge. We consider sufficient information is available for any negotiations and arbitrations on the remediation charge to be conducted in a manner that appropriately balances the interests of DBIM, and access seekers and holders (ss. 138(2)(c), (e) and (h) of the QCA Act).

[526] QCA, *DBCT Management's 2019 draft access undertaking*, draft decision, August 2020, p. 99.
[527] DBCT User Group, sub. 13, p. 60, sub. 16, p. 44.

Method to determine the remediation charge

The DBCT User Group contended that we should require that the remediation allowance be calculated using the annuity methodology employed in undertakings at DBCT thus far—to ensure 'that DBCTM does not engage in monopoly pricing by setting the remediation allowance at inefficient levels'.[528] We note that DBIM did not elaborate on the method it intends to use to determine the remediation allowance or charge in any subsequent submission after its original proposal in July 2019. DBIM only commented on some components that may be used in the process (i.e. the term to remediation and escalation rate), which are canvassed below.

We consider it appropriate that DBIM provide information on its forecast remediation charge as part of its disclosure requirements prior to negotiations; this includes detail on its methodology to calculate this forecast charge based on our approved rehabilitation cost estimate (see sch. H of Appendix A). We consider this would provide access seekers and holders entering negotiations sufficient information to determine if DBIM's remediation charge proposal is reasonable.

We acknowledge the DBCT User Group's comments that the annuity methodology (as described in section 9.1) has been applied since the 2006 AU and deviation from this could impact certainty. However, we consider the annuity methodology could represent just one method to convert the rehabilitation cost estimate to an annual allowance and, subsequently, to a remediation charge (by allocating the allowance by annual contracted tonnage in the building blocks methodology). We envisage the possibility that DBIM and other parties may be willing to negotiate and agree on remediation charges that are unlike that determined through the annuity and building blocks methodologies. The parties may elect to negotiate for the rehabilitation charge to account for other factors, such as DBIM offering the (potential) user to frontload or backload remediation payments during a pricing period. At this point in time, we cannot conclude that any other method used to determine a remediation allowance or charge is inappropriate, particularly if the charge is based on the approved rehabilitation cost estimate and has consideration for any other factors that we have expressed our position on. Thus, we do not consider it necessary for us to require use of the annuity and building blocks methodologies to determine the remediation charges, where negotiations and/or arbitrations would allow use of an alternative model that may also be appropriate.

If the parties are unable to negotiate a remediation charge, including where an access seeker or holder considers DBIM to be exercising its market power, parties can seek for the matter to be arbitrated by us. In an arbitration, we would have consideration for any alternative methodology proposed by either party to determine the remediation charge, provided again, the methodology is based on the approved rehabilitation cost estimate and has regard for our positions on relevant matters outlined in this decision, where appropriate. We may elect to use the annuity and building blocks methodologies to determine the remediation charge in arbitrations if we consider other proposed methods to be inappropriate. If we assess an alternative methodology as inappropriate in all circumstances during an arbitration, we will not reconsider its use in subsequent arbitrations, barring compelling evidence to do so.

Expected date for remediation

DBIM and the DBCT User Group consistently expressed opposing views on the term to remediation. DBIM's position—which it intended to apply in negotiations—was that the date for remediation should reflect the end of its initial lease in 2051, as this is when its obligations would be triggered under the PSA. It stated:

[528] DBCT User Group, sub. 13, p. 60.

> DBCTM's rehabilitation obligation under the PSA is triggered by the end of the term of the initial lease in 2051, or if DBCTM chooses to extend the lease, in 2100. The QCA has determined that the economic life of the Bowen Basin ends in 2054. Under those circumstances it would represent a considerable risk for DBCTM to extend the lease for another 50 years to recover only 3 years of trailing revenues, and therefore 2051 should reasonably be considered the relevant date with regard to remediation of DBCT.[529]

DBIM provided two scenarios—for rehabilitation to commence before or after 2051—to justify its position, stating:

> Further, DBCTM could not rehabilitate the terminal if the relevant date was 2054 as this would require a renewal of the lease, in which case the rehabilitation obligation would only fall due in 2100. Similarly, if the economic life of the Bowen Basin was reduced for any reason, then DBCTM's rehabilitation obligation still falls due in 2051.[530]

The DBCT User Group held the position that 'it is clear that the terminal's useful life will extend well beyond the initial term of 2051'[531] and 'DBCTM will clearly be incentivised to renew the lease where useful economic life remains'.[532]

Our position is that a term of remediation should equal the economic life of the Terminal, as this represents the period over which the expected remediation charges can be recovered from Terminal users. We reviewed the expected economic life of the Terminal (as detailed in section 10.2.3) and concluded that the available evidence supports maintaining the economic life of the Terminal until June 2054. In view of this forecast, we consider it reasonable to expect DBCTH (as owner of DBCT) to incentivise continued operation of DBCT, potentially for a much shorter period than DBIM's 49-year extension option contemplates, to extract the remaining value. We envisage that DBCTH could:

- offer DBIM alternative lease renewal options with a shorter lease period
- lease the Terminal to a different entity, or
- operate the Terminal itself.

In the event of DBIM choosing not to extend its lease past 2051 in any circumstance, despite the existence of residual useful life of the Terminal, we expect DBIM will be asked to pay to DBCTH the amount of amortised remediation payments from access holders collected to date (i.e. the notional sinking fund). We then foresee DBCTH (or another lessee) collecting the balance of the rehabilitation cost estimate over the remaining life of the asset before undertaking remediation. This was also contemplated by DBIM in its Modelling DAAU, where it stated:

> Regardless of any access agreements in place at the time, DBCTM could not operate the terminal between 2051 and 2054 and therefore could not recover any related revenue. The operation of the terminal would return to DBCT Holdings in accordance with the terms of the lease, and all access agreements would need to be assigned to DBCT Holdings in order that the Users at the time could continue to ship without interruption. Since DBCTM could not undertake the rehabilitation of the terminal due to ongoing operation, the rehabilitation requirement would also return to DBCT Holdings. It seems likely under those circumstances that DBCTM would be required to pay DBCT Holdings the cost of rehabilitation in lieu of carrying out the rehabilitation. The balance of the notional sinking fund should be sufficient for DBCT Holdings to rehabilitate the terminal to its required standard in its preferred timeframe, assuming that DBCT Holdings

[529] DBCTM, sub. 1, p. 53.
[530] DBCTM, sub. 12, p. 37.
[531] DBCT User Group, sub. 2, p. 51.
[532] DBCT User Group, sub. 13, p. 61

> recovers an appropriate remediation contribution from Users as part of access charges for as long as the terminal remains operational.[533]

Thus, we do not expect that DBIM would need to recover the full cost of rehabilitation during its existing lease term, if the Terminal is expected to retain productive potential after the current lease expiry. We consider any residual rehabilitation costs would still be recovered past 2051 by DBIM, a different lessee or DBCTH—over an operating period that reflects the remaining economic life of the Terminal. We maintain that a term of remediation that is shorter than the expected economic life would inappropriately transfer costs from future access holders and seekers to current access holders and seekers[534], which would not be in the latter's interests (ss. 138(2)(e), (h) of the QCA Act).

As mentioned in section 10.2.3, we are cognisant of the uncertainty in forecasting the economic life of DBCT and intend to reconsider this matter in future DAU assessments.

Rates to calculate the remediation charge

We are conscious that the escalation and discount rates may not be relevant in the application of an alternative method to calculate the remediation charge. However, we considered it appropriate to express our current views and intended approach to these rates, given we would not expect either rate to change materially during the pricing period, and to account for the possibility that:

- the annuity and building blocks methodologies may be employed at negotiations and/or arbitrations, or
- these rates could be relevant to other methods to calculate the remediation charge.

Escalation rate

DBIM requested GHD to determine an escalation rate in order to express the rehabilitation cost estimate in April 2053 dollars.[535] GHD suggested a rate of 2.6 per cent, based on its research of relevant escalation rates for labour and non-labour costs.[536] Advisian agreed with GHD's position on this rate but stated it did not apply this rate to any part of its rehabilitation cost estimate.[537] DBIM subsequently suggested that the estimates should be escalated, using the 2.6 per cent escalation rate agreed by the consultants, to the time when the 2019 DBCT DAU would come into effect if approved—which is 1 July 2021.[538]

We understand that the original estimates by GHD and Advisian were not aligned in terms of the month and year of estimate[539], but the initial disagreements in positions were based on merit. Our approved rehabilitation cost estimate discussed above reconciles our positions of matters on merit and is reflective of a lump sum, not requiring further indexation, to be applied from 1 July 2021.[540]

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[533] DBCTM, *DBCT 2017 AU—Modelling DAAU*, September 2017, p. 8.
[534] QCA, *DBCT Management's 2015 draft access undertaking*, final decision, November 2016, p. 147.
[535] This was the midpoint between when DBIM expected remediation would commence and when it would end, the latter being within three years of the lease expiry, in accordance with the PSA.
[536] GHD report, p. 5.
[537] Advisian 2020 report, p. 22.
[538] DBCTM, sub. 12, p. 40.
[539] GHD's estimate was in October 2018 dollars and Advisian's was in March 2020 dollars. Advisian stated its estimate contained contingencies that would negate any impact of escalation over the relatively short period between October 2018 and March 2020 (Advisian 2020 report, p. 16).
[540] Advisian 2021 report, p. 23.

SLR noted that GHD's non-labour cost escalation rate did not factor in the 'likelihood of technological improvements, etc.'.[541] We do not consider it appropriate to factor in the impact of technological innovations to the non-labour component of the long-term escalation rate at this stage, because we expect any improvements to be accounted for in amendments to the rehabilitation cost estimate over time, as discussed in section 9.5.2.

SLR also suggested that the labour cost escalation rate did not account for the medium-term impact of the coronavirus pandemic, proposing that the net rate should be reduced to no greater than 2.0 per cent.[542] We are conscious that the coronavirus pandemic may have impacts on the escalation rate. However, we note that the magnitude of this impact is still being assessed as parts of the world continue to actively deal with the pandemic. We are of the view that no amendment to the escalation rate of 2.6 per cent is required, but we expect this matter, like the rehabilitation cost estimate, to be revisited as new data and analysis become available.

If DBIM or the negotiating access seeker/holder proposes an alternative escalation rate based on additional evidence during an arbitration, we would assess the matter and outline our views in the corresponding arbitration.

Discount rate

Under the current and previous undertakings, the escalated rehabilitation cost estimate has been discounted to calculate the annual remediation allowance in the building blocks methodology using the approved WACC. This was on the assumption that DBIM would be able to reinvest any remediation payments from access holders, and 'the WACC represents the opportunity cost of funds accrued through the annual remediation allowance.'[543]

The DBCT User Group stated that outlining a WACC for the purposes of remediation would reduce uncertainty of arbitrated outcomes.[544] It also outlined two alternative approaches to this matter, namely that we 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).[545]

As noted above, we do not consider it appropriate to require use of the annuity and building blocks methodologies to calculate the remediation allowance under the 2019 DBCT DAU. In the same vein, we consider determining a WACC or equivalent to discount the escalated rehabilitation cost estimate at this stage would be unnecessary and could be inappropriate. We maintain that an ex ante determination of the discount rate would undermine negotiations for the WACC under this pricing model and may not reap any material benefits in certainty if an alternative model is proposed whereby a discount rate is not required. Similarly, DBIM may be able to demonstrate how it has invested remediation payments that accrue a higher interest, thereby requiring a discount rate higher than the WACC determined during negotiations or arbitrations.

As discussed earlier, we may implement use of the annuity and building blocks methodologies in arbitrations. In those circumstances, we would make a decision on an appropriate discount rate.

[541] SLR report, p. 28; SLR memorandum, p. 11.
[542] SLR report, p. 28; SLR memorandum, pp. 11–12.
[543] QCA, *DBCT Management's 2015 draft access undertaking*, final decision, November 2016, p. 147.
[544] DBCT User Group, sub. 16, p. 45.
[545] DBCT User Group, sub. 13, p. 62.

We are presently uncertain if this rate would be equivalent to a WACC applied to other components of the price, but access seekers and holders would be informed of our views at the time through the published arbitration outcome.

Value and status of the notional sinking fund

In past DAU assessments, we calculated the annual remediation allowance having regard to a notional sinking fund, which is an estimate of the accumulated remediation allowances, escalated by the approved WACC. While this notional sinking fund gives some idea of the status of access holders' remediation payments (and could be ascertained using prevailing information on remediation allowance approvals), it does not guarantee the actual status of the funds collected by DBIM to date.

As stated in section 9.4 (and detailed further in our draft decision[546]), our role in the funding for rehabilitation at DBCT is limited to ensuring the remediation charges appropriately balance the interests of all stakeholders. Consequently, we do not require DBIM to demonstrate protection of past and future remediation payments under the 2019 DBCT DAU.

However, parties should note that we estimated the value of the notional sinking fund during each previous DAU assessment process. Related information is available in our published decisions on the corresponding DAUs. Also, DBIM may elect to provide information on the prevailing value of the notional sinking fund used to determine the balance of the rehabilitation cost estimate as part of the 'Other Information' provided for in an IAP.[547] Thus, we consider that there would be sufficient information available, both publicly and provided through DBIM's information provision obligations under the amended 2019 DBCT DAU for any access seeker or holder to estimate the value of the notional sinking fund at the time of negotiation, or at least determine to a high degree of certainty if DBIM has understated this value. We do not consider this matter should limit the capacity for negotiation of a remediation charge.

If parties disagree with the expected valuation of the notional sinking fund, we would assess this matter in arbitration. Our assessment would be based on past decisions and any new information presented by the parties. In such circumstances, we may request DBIM to provide information on its determination of the value of the sinking fund used in calculating the remediation charge. If we consider DBIM's determination materially inappropriate, we would estimate the value of the notional sinking fund. Our approach and decision would be outlined in the corresponding published arbitration outcome.

Other relevant information

Depending on the method proposed by either negotiating party, there may be other relevant information required for each party to sufficiently assess if the proposals are appropriate during negotiations or for us to assess the proposals in an arbitration. We would expect DBIM and the negotiating access seeker/holder to provide any other relevant information in a timely manner for both processes.

9.6 Conclusion

We consider that DBIM's proposed rehabilitation cost estimate of $1.22 billion is not an appropriate estimate of the efficient costs of remediating the Terminal. We consider this cost is overestimated and using it as a basis to determine remediation charges would result in DBIM

[546] QCA, *DBCT Management's 2019 draft access undertaking*, draft decision, August 2020, pp. 100–101.
[547] DBCTM, sub. 12, appendix 6, p. 120.

receiving remediation payments that are higher than the expected efficient cost of rehabilitation of the DBCT site, which is at odds with the interests of access seekers and holders (ss. 138(2)(e), (h) of the QCA Act). In addition, we envisage that negotiation of a remediation charge, based on an overestimated rehabilitation cost, could result in potential delays due to ineffective negotiations and/or the need for arbitrations to determine remediation charges, which would be inconsistent with the promotion of economically efficient investment, operation and use of DBCT (s. 138(2)(a) of the QCA Act).

Our final decision is that the appropriate rehabilitation cost estimate is $849.98 million as at 1 July 2021. We require DBIM to amend clause 11.4(d)(3) and schedule H of the 2019 DBCT DAU (see Appendix A) to reflect that this approved cost estimate should be used in the determination of remediation charges.

We acknowledge that this cost estimate is not finalised for the entirety of the Terminal's useful life. We expect the rehabilitation cost estimate may be updated in the future to account for new information. We have outlined specific aspects of the rehabilitation plan that could be revisited in the future. We encourage DBIM to consult with stakeholders and relevant agencies on these matters in proposing amendments to the rehabilitation cost estimate.

We have also expressed our views on other matters that may be relevant to determining remediation charges for access seekers and holders under the 2019 DBCT DAU pricing model. We consider this provides further guidance on how we may approach an arbitration of a dispute on remediation charges; therefore, these views should encourage reasonable proposals for remediation charges during negotiations.

Summary of decision 9.1

It is appropriate for DBIM to amend the 2019 DBCT DAU such that the determination of remediation charges is based on our approved rehabilitation cost estimate of $849.98 million, as at 1 July 2021 (see cl. 11.4(d)(3) and schedule H of Appendix A).

10 DEPRECIATION

Regulatory depreciation (or the return of capital) is included in building blocks models so that asset owners can recover their initial investment. It typically requires establishing an economic or useful life of the asset and returning the investment in that asset to the owner over the estimated life of the asset through depreciation charges.

In our view, it is appropriate to specify a depreciation methodology for the purposes of the 2019 DBCT DAU. Doing so will address information asymmetry issues associated with the value of depreciation and the capital base proposed by DBIM, leaving access seekers more appropriately informed during negotiations. We consider the existing depreciation methodology applying during the 2017 AU period should be retained as a default method for the next undertaking period.

DBIM has not argued a compelling case to justify reducing the economic life of the Terminal to 2051, particularly given the lack of evidence of increased asset stranding risk. There is also evidence of substantial remaining coal reserves in the DBCT catchment area and a generally strong coal market outlook for the medium term, particularly for metallurgical coal producers in the Bowen Basin. That said, we do accept there is significant uncertainty relating to the demand for all forms of coal arising from current trade conditions and future environmental regulation including but not limited to carbon emissions. However, if these uncertainties manifest in material demand reductions in the future, DBIM can put a case to us in the future to address these.

We consider DBIM should amend the 2019 DAU to specify that the method for estimating depreciation charges will be the current depreciation methodology applied during the 2017 AU period, maintaining the remaining economic life of the Terminal at 34 years to June 2054 rather than reduce it to 31 years. DBIM should also be required to provide additional depreciation modelling, if requested by users.

Importantly, establishing this methodology is intended to provide information and guidance for negotiations. It does not preclude parties reaching agreement on a TIC developed using an alternative approach to depreciation, including potentially different assumed asset lives.

10.1 Depreciation methodology

In previous access undertakings, regulatory depreciation allowances were determined during the process of setting the reference tariff using a building block model. The 2019 DBCT DAU does not specify a building block approach or a reference tariff, and DBIM did not initially specify its proposed methodology for calculating depreciation.

During subsequent consultation, DBIM provided further detail on its proposed methodology and proposed amendments to make further information on depreciation available to access seekers.[548]

In the interim draft decision, we said the DAU could be amended to require improved information disclosure to access seekers to facilitate negotiations.[549] In response, DBIM proposed to expand on the information it would make available to access seekers to include, among other things, depreciation forecasts determined by DBIM such that:

[548] See, DBCTM, sub. 8, appendix 4, schedules H and I, sub. 12, pp. 24–32.
[549] QCA, *DBCT Management's 2019 draft access undertaking*, interim draft decision, February 2020, pp. 37, 48.

- assets are depreciated over their economic life
- changes in the expected economic life of a particular asset or group of assets are reflected (including adjustments to align the asset life with the duration of the Terminal lease)
- assets are depreciated only once
- the residual value of the asset is zero.[550]

DBIM proposed to assume a maximum economic life of the Terminal assets of 30 years to 2051, rather than 34 years to 2054, which is the economic life under the 2017 AU (section 10.2).

10.1.1 Draft decision

We considered that DBIM's revised information disclosure regarding depreciation was not sufficient. We concluded that the proposed level of information provision would limit the scope for negotiation and the ability for access seekers to make an informed assessment of an alternative methodology, due to information asymmetry.[551]

We considered that requiring DBIM to provide the underlying asset information to access seekers would overcome this issue, enabling access seekers to apply an alternative approach for calculating depreciation if they wished to do so. We noted that requiring this level of disclosure could, however, impose additional time and cost burdens on access seekers during negotiations.[552]

We considered it appropriate for DBIM to calculate, and provide information on, depreciation using an approved methodology to be transparently assessed as part of the 2019 DAU assessment process.[553]

The draft decision also required DBIM to amend the 2019 DAU to specify that depreciation costs would be calculated using a methodology determined by us. We sought stakeholder views on an appropriate depreciation methodology.[554]

10.1.2 Submissions on the draft decision

DBIM and the DBCT User Group broadly agreed that the depreciation methodology should be specified and assessed as part of our review of the 2019 DAU; however, stakeholders did not agree on an appropriate methodology.

DBIM

DBIM said that specifying an approved depreciation methodology is preferable to providing asset specific information to access seekers.[555] It accepted our proposed amendment requiring depreciation to be calculated in accordance with the methodology specified by the QCA.[556]

DBIM also proposed an alternative depreciation methodology, which differs from the approach adopted during the 2017 AU period.

Rather than calculating depreciation based on information for individual assets, DBIM proposed a simplified method that groups assets into six categories based on their remaining life as at July

[550] DBCTM, sub. 8, appendix 4, schedules H and I, pp. 113–114, 116.
[551] QCA, *DBCT Management's 2019 draft access undertaking*, draft decision, August 2020, pp. 62–63.
[552] QCA, *DBCT Management's 2019 draft access undertaking,* draft decision, August 2020, p. 66.
[553] QCA, *DBCT Management's 2019 draft access undertaking*, draft decision, August 2020, p. 67
[554] QCA, *DBCT Management's 2019 draft access undertaking,* draft decision, August 2020, p. 70.
[555] DBCTM, sub. 12, p. 10.
[556] DBCTM, sub. 12, p. 32.

2021. A proxy remaining life would then be assigned to each group to depreciate all assets within each group. Future assets would also be assigned to one of the six asset groups based on their expected economic lives.[557] Assets with a remaining life of more than 25 years would be depreciated over 30 years to 2051, consistent with the remaining term of the Terminal lease.[558] Table 5 sets out DBIM's proposed asset categories for depreciation.

Table 5 DBIM proposed asset groups for depreciation

Asset group	*Remaining life of assets* [a]
Asset group 1	Up to 2 years
Asset group 2	Between 2 and 10 years
Asset group 3	Between 10 and 15 years
Asset group 4	Between 15 and 20 years
Asset group 5	Between 20 and 25 years
Asset group 6	Greater than 25 years

a *DBIM did not identify the assumed proxy asset life to be used when depreciating each asset group, with the exception of 'asset group 6', which is depreciated over 30 years to 2051, consistent with the remaining term of the lease.*

Source: DBCTM, sub. 12, p. 25.

DBIM said its simplified approach would enable access seekers to calculate depreciation costs and remove the complexity associated with providing full depreciation schedules. DBIM said this would facilitate negotiation with access seekers and provide greater transparency.[559]

DBIM added that the proposed approach would deliver a depreciation profile, for at least the next two undertaking periods, that is similar to applying the 2017 AU depreciation method.[560]

Information provision

To accompany its alternative methodology, DBIM proposed to disclose a simplified set of asset information based on the six proposed categories. DBIM said this will enable access seekers to assess DBIM's approach to calculating depreciation and the roll-forward without the complexity of doing so at an individual asset level.[561] DBIM said it would provide this information to access seekers as part of information included in an indicative access proposal. DBIM also committed to provide this information to existing users during negotiations under existing user agreements.[562]

DBIM noted that, under section 10 of the 2017 AU, DBIM provides users and the QCA with a breakdown of additions to the asset base, including their effective lives, values, inflation and depreciation. DBIM said these reporting requirements are materially preserved in the 2019 DAU.[563] DBIM said it will also provide access seekers with modelling of new assets that calculates inflation and depreciation.[564]

[557] Under the current depreciation methodology, future capital expenditure is depreciated over a maximum of 20 years.
[558] DBCTM, sub. 12, p. 25.
[559] DBCTM, sub. 12, p. 10.
[560] DBCTM, sub. 12, pp. 25, 27.
[561] DBCTM, sub. 12, p. 24.
[562] DBCTM, sub. 12, p. 25.
[563] DBCTM, sub. 15, p. 44.
[564] DBCTM, sub. 15, p. 44.

DBIM submitted revisions to the 2019 DAU that provide for the following depreciation information to be provided to access seekers:

> for each year Financial Year of the Historical Period, the depreciation value as applied by the QCA in its derivation of the relevant period's' revenue requirement under the DBCT Management's 2017 Access Undertaking;
>
> for each Financial Year of the Preceding Period, the depreciation value reasonably determined by DBCT Management in such a way that is consistent with the methodology specified in the reasons of the QCA's final decision on this Access Undertaking.

With regard to forecast depreciation, DBIM proposed the following information provision:

> forecast depreciation for the relevant Terminal Component each Financial Year of the Forecast Period as determined by DBCT Management in such a way that is consistent with the methodology specified in the reasons of the QCA's final decision on this Access Undertaking.[565]

DBCT User Group

The DBCT User Group did not support DBIM's simplified depreciation method, describing the proposed method as an inaccurate and obscured estimation technique. The DBCT User Group also said DBIM's methodology uses an inappropriate Terminal asset life, which it considered prejudicial to an appropriate outcome for the remediation allowance (see Chapter 9).[566]

The DBCT User Group supported retaining the existing depreciation methodology applied in previous undertakings.[567] It considered the existing method appropriate, because it:

- is understood by users, which assists in resolving information asymmetry
- is based on a more appropriate estimated life of the Terminal
- would make information about previous tariffs more meaningful and useful in resolving information asymmetry.[568]

The DBCT User Group said we should require DBIM to:

- calculate charges in the next regulatory period using a building blocks approach, with depreciation calculated using the QCA's existing methodology
- provide modelling to support its depreciation calculations using the QCA's methodology.[569]

The DBCT User Group said it was willing to consider DBIM's alternative method, subject to long-life assets being depreciated to 2054 rather than 2051, and greater transparency allowing users to determine whether individual assets are being depreciated properly.[570]

10.1.3 Analysis

We maintain that it is appropriate for the 2019 DAU to specify the methodology for calculating depreciation for the purposes of negotiating a TIC. Doing so will address information asymmetry issues associated with the value of depreciation and the capital base proposed by DBIM, leaving access seekers more appropriately informed during negotiations.

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[565] DBCTM, sub. 12, pp. 115–116, 118.
[566] DBCT User Group, sub. 13, pp. 50–51.
[567] DBCT User Group, sub. 13, p. 50, sub. 16, p. 41.
[568] DBCT User Group, sub. 13, pp. 50, 54.
[569] DBCT User Group, sub. 13, pp. 50–51.
[570] DBCT User Group, sub. 16, p. 41.

As DBIM did not propose a depreciation methodology in the 2019 DAU, our assessment relates to the alternative method that DBIM put forward in its October 2020 submission.

DBIM's alternative depreciation proposal

DBIM's alternative methodology relies on a simple straight-line depreciation profile. The basic mechanics of this approach appear consistent with the existing method applying under the 2017 AU. Where it differs is in the proposed grouping of assets, use of proxy remaining asset lives and the shorter assumed economic life of the Terminal. DBIM did not specify the proxy remaining asset lives that would be assumed for each of the six asset groups, or how those proxy lives would be determined.

We acknowledge that DBIM's simplified methodology was proposed in an effort to address concerns raised in the draft decision. Calculating and presenting depreciation using aggregated asset information as proposed would appear to simplify the methodology and dataset. Nonetheless, we consider the approach is not transparent and does not support the broader goal of reducing information asymmetry.

Moreover, given DBIM's assertions that the results of its proposed method are similar to current depreciation arrangements (under the 2017 AU), we are not convinced there is a compelling case for change. We do not see that it will materially reduce DBIM's costs and users expressed support for maintaining the existing method and are comfortable with assessing more detailed asset information. As such, we see no justification for adopting DBIM's alternative depreciation method, particularly when it is likely to result in less accurate and transparent outcomes.

The existing depreciation approach, applying during the 2017 AU period, is well understood by users and is relatively transparent. We consider that maintaining it would be in the interests of access seekers, access holders and DBIM.

Information provision

We consider an appropriate depreciation method should be transparent and verifiable. While DBIM's proposed alternative methodology provides more information disclosure than originally proposed in the 2019 DAU, we are not convinced it provides sufficient transparency. DBIM's proposed information disclosure requires annual depreciation values only, calculated using a QCA-approved methodology, to be disclosed.[571] The provisions do not contemplate any further information to be made available explaining the derivation of these annual values.

We consider it appropriate to include further provisions in the 2019 DAU requiring DBIM to make underlying depreciation modelling information available to access seekers, if requested. This information should be sufficiently detailed for parties to accurately verify DBIM's proposed depreciation values, including underlying assumptions. The same information should be made available to access holders during renegotiation of a TIC under existing access agreements, if requested.[572]

As we acknowledged in the draft decision, evaluating detailed depreciation information could introduce further costs for access seekers and access holders. We do not consider it serves access seekers, access holders or DBIM to mandate the provision of this information as a default disclosure requirement; however, it is appropriate that users be afforded the opportunity to consider this information, should they wish to do so. We provided suggested amendments to the 2019 DAU (schedules H and I, now schedules G and H in Appendix A) to give effect to this position.

[571] DBCTM, sub. 12, pp. 115–116, 118.
[572] We note DBIM appears to have committed to do so (DBCTM, sub. 12, p. 25).

While the preparation and disclosure of this information may place some additional burden on DBIM, we consider it will not be significant. This underlying information should already exist in a suitable form and providing it is unlikely to be onerous. In our view, any additional compliance cost will be minimal and outweighed by the benefits to access seekers from improved transparency and more complete information in negotiations.

10.1.4 Decision

We consider it is not appropriate to approve the approach to depreciation contemplated in the 2019 DAU as originally submitted, having regard to the criteria in section 138(2) of the QCA Act. The 2019 DAU does not specify a depreciation method that will be applied during negotiation of a TIC. We maintain our draft decision view that the 2019 DAU does not offer sufficient prescription or transparency regarding the method to be used.

We also consider that the alternative depreciation methodology put forward in DBIM's submissions is not appropriate. We acknowledge that DBIM's alternative depreciation methodology was an attempt to address concerns raised in the draft decision. Nonetheless, we consider the alternative methodology is materially less transparent than the existing approach and does not address information asymmetry concerns. Adopting this less transparent method would not be in the interests of access seekers or access holders under sections 138(2)(e) and (h) of the QCA Act.

In our view, it would be appropriate for the 2019 DAU to specify that the existing depreciation method applying during the 2017 AU period will be used to calculate depreciation for the purposes of negotiating a TIC. This method is well understood by stakeholders, and maintaining it would support certainty and transparency. DBIM should be required to make further detailed depreciation information available to access seekers and access holders for verification purposes, if requested. We consider this effectively balances the legitimate business interests of DBIM with the interests of access seekers and access holders in accordance with sections 138(2)(b), (e) and (h) of the QCA Act. It also allows DBIM to recover at least the efficient depreciation costs of providing access to the service, consistent with section 168A(a) of the QCA Act.

In forming a view on an appropriate depreciation method, our intent is to provide stakeholders with transparency and guidance. Importantly, this does not preclude the use of depreciation values based on another methodology, if that is agreed through negotiation. Further, the basis for negotiating a TIC need not be a building blocks cost approach (noted in Chapter 6). It may be the case that parties are willing to negotiate a TIC determined by other means, in which case detailed depreciation information—or a specified depreciation methodology—may not be required to reach a mutually acceptable negotiated outcome.

10.2 Economic life of the Terminal

10.2.1 Background

Determining a regulatory depreciation profile requires an estimate of the period over which an asset is expected to remain economically productive. The initial investment in the asset is then returned to the asset owner over this period through a regulatory depreciation allowance.

An assumed economic life is also relevant to estimating DBIM's site remediation costs to ensure DBIM can recover sufficient revenue, over an appropriate period, to meet the cost of site rehabilitation obligations that will arise when the Terminal is decommissioned. Chapter 9 sets out our considerations of an appropriate remediation cost allowance.

The economic life of the Terminal has been a matter of contention in previous undertaking investigations.

Since the 2006 AU was approved, we have assumed an economic constraint on the depreciation profile of the Terminal assets' lives of 50 years, implying an end date of 30 June 2054. This constraint was estimated based on the economic life of the coal reserves in the DBCT catchment area, informed by two consultant reviews. In applying this constraint, individual assets are depreciated over the shorter of their useful lives, and the term implied by the economic constraint.

The 2010 AU maintained the 50-year economic constraint on the Terminal's asset life.[573] However, the depreciation allowance in the 2010 AU was not considered in isolation, given the 2010 AU reflected a commercially negotiated arrangement between DBIM and the DBCT User Group.

In the 2015 DAU investigation, DBIM initially proposed an economic constraint based on an estimate of weighted average mine life (WAML) which, at the time and using the specific method, reduced the prevailing remaining life to 25 years. During this process, DBIM argued it faced increased asset stranding risk and submitted that the economic life should be linked to the underlying risk profile of the asset.

We did not accept DBIM's arguments regarding asset stranding risk. We engaged a consultant to review the proposed WAML methodology and independently estimate the economic life based on coal reserves. The consultant's findings supported a remaining economic life until at least 2055.

In response to the draft decision, DBIM argued that the remaining life should instead be aligned with the Terminal lease period (to 2051). It argued that our estimated life assumes that DBIM will renew its lease, which is not certain.[574]

We maintained that an economic constraint to 2054 was appropriate but said we would consider a shorter life in future if presented with evidence of increased asset stranding risk.

In the 2019 DAU investigation process, DBIM again proposed to apply an economic constraint to the depreciation profile of the Terminal aligned with the remaining term of its Terminal lease.

10.2.2 Stakeholder submissions

DBIM

DBIM's 2019 DAU, as originally submitted, did not comment on the assumed economic life of the Terminal for depreciation purposes. In subsequent submissions, DBIM proposed to depreciate assets with remaining lives greater than 25 years over a 30-year period, to coincide with the end of its initial lease term (2051). During previous undertaking periods, the lives of these assets were truncated to the shorter of the asset's useful life and 2054 (50 years from 2004). DBIM submitted that 2051 is the more appropriate end of life, arguing:

- An economic life to 2054 assumes that DBIM will extend the lease, which is uncertain. The economic life should not 'infer a regulatory requirement for DBIM to renew its lease in order to recover revenue due in the initial lease period'.

[573] QCA, *Dalrymple Bay Coal Terminal 2010 Draft Access Undertaking*, final decision, September 2010, p. 7.
[574] DBIM has a 50-year lease on the Terminal, which expires in 2051, with an option to extend to 2100.

- If DBCT's economic life is the reference point for calculating depreciation, DBIM may not recover its return of capital on assets over the September 2051 to 30 June 2054 period. This would be inconsistent with the pricing principles and DBIM's legitimate business interests (ss. 138(2)(g), (c) of the QCA Act).
- It is standard industry practice and an AASB requirement to depreciate over the shorter of the useful life of the asset and the lease period.
- It aligns with the rehabilitation obligations in the Port Services agreement (PSA).[575]

DBIM did not advance arguments of increased asset stranding risk to support its position in this instance.

Similarly, DBIM proposed to adopt the remaining lease period as the constraint on recovering remediation costs. It submitted this is appropriate, as the rehabilitation obligation under the PSA is triggered at the end of the term of the initial lease in 2051, or otherwise in 2100 if DBIM chooses to extend its lease.[576] It submitted that assuming a life to 2054 implies it would have to renew its lease for another 50 years to recover the remaining three years of rehabilitation allowance between 2051 and 2054.[577]

DBCT User Group

The DBCT User Group strongly opposed DBIM's proposed reduction in the economic life. It submitted that adopting the lease term as an economic constraint is not appropriate, as it:

- reflects an arbitrary date that materially overstates the efficient level of depreciation and remediation costs
- is an artificial assumption and has the effect of imposing higher charges on existing users, thereby subsidising future users at the cost of existing users.[578]

The DBCT User Group said that the theoretical ability to not renew the lease should not infer an artificial assumption of an unduly short estimated useful life for the Terminal. It said we should consider how DBIM is likely to act given the commercial incentives it faces. It argued that DBIM would be highly incentivised to renew its lease if there is remaining useful life in the Terminal at the end of the current lease.[579]

The DBCT User Group also argued that DBIM does not face increased risk of asset stranding, saying:

- No evidence has been provided of long-term decline in the metallurgical coal market.
- Abbot Point and other coal terminals provide no competition for DBCT.
- There are indications of long-term demand for Hay Point catchment metallurgical coal.[580]

The DBCT User Group considered there will be further opportunities to revisit the economic life of the Terminal in future, noting:

[575] DBCTM, sub. 12, pp. 26–27.
[576] DBCTM, sub. 1, p. 53.
[577] DBCTM, sub. 1, p. 53.
[578] DBCT User Group, sub. 13, p. 51, sub. 9, p. 37.
[579] DBCT User Group, sub. 13, p. 53.
[580] DBCT User Group, sub. 13, pp. 51–53, 61, sub. 16, p. 44.

> there will continue to be avenues, at a minimum at each regulatory term, for the appropriate remediation allowance to be reconsidered taking into account all new information including in relation to the likely useful life of the terminal and the likely cost of rehabilitation.[581]

The DBCT User Group added that our assumed economic life of 2054 underestimates the likely useful economic life of the Terminal.[582]

10.2.3 Analysis

Depreciation allowances are typically determined such that the value of the initial capital investment is returned to the asset owner over the useful or physical life of the asset. However, we consider it appropriate to apply an economic constraint to the depreciation profile where it can be demonstrated that an asset's economic potential is likely to be depleted prior to the end of its useful or physical life. When applying a constraint, individual assets are depreciated over the shorter of their useful life, and the life implied by the economic constraint.

As we concluded in previous investigations, the coal resources that ship through DBCT, while significant, are finite and will likely constrain the economic life of the Terminal to a term somewhat shorter than the potential physical life of the assets.

Assessment of the lease term as an economic constraint

We consider that DBIM has not argued a compelling case for the further truncation of the Terminal asset life to match the remaining term of its Terminal lease. Importantly, DBIM has not provided any evidence of an increase in asset stranding risk to justify its proposal. Our reasons and consideration of DBIM's arguments are set out below.

Renewal of the Terminal lease

While we acknowledge that DBIM is not obligated to renew its lease in 2051, the economic life of the asset is a concept distinct from the lease term. The economic life represents an estimate of the period over which the asset remains productive and can generate a return. We have previously held the view that the economic life of the Terminal is best estimated with reference to the expected life of the underlying coal resource. We note that DBIM has previously shared this view.[583]

The Terminal lease, on the other hand, is a legal framework that gives the lessee the rights to use, and derive economic benefits from, the Terminal assets for a given time. The end of the current lease represents the potential end of the useful life of the asset to DBIM only, not necessarily an end to the productive potential of the asset.

The Australian Rail Track Corporation (ARTC) advanced a similar argument in the context of mining licenses as a constraint on the economic life of individual mines feeding the Hunter Valley Coal Network (HVCN).[584] ARTC argued that the ongoing extension of mining licences is uncertain and therefore the economic life of mines for depreciation purposes should be constrained by the term of each coal producer's current license.[585] IPART rejected this argument:

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[581] DBCT User Group, sub. 9, p. 37.
[582] DBCT User Group, sub. 9, p. 37.
[583] See, DBCTM, *DBCT Management 2016 DAU Submission*, October 2015, p. 21–22; *DBCT Management 2010 access undertaking submission,* March 2010, pp. 36–37.
[584] ARTC, submission to IPART, *NSW Rail Access Undertaking—Review of rate of return and remaining mine life*, 28 May 2019.
[585] ARTC, submission to IPART, *NSW Rail Access Undertaking—Review of rate of return and remaining mine life,* 28 May 2019, p. 2.

> While there are some risks associated with licence renewal, we do not consider licence term to be a suitable proxy for remaining mine life. Licences are a technical construct that would underestimate the remaining economic life of the mine, based on its proven and probable reserves.[586]

To the extent the Terminal has remaining productive potential at the end of DBIM's lease in 2051, it is likely the owner would continue to operate or re-lease the facility, potentially for a much shorter period than the agreement currently contemplates, to extract that remaining value.

Any residual return of capital between 2051 and the end of the Terminal's economic life should accrue to the party with the rights to the economic benefits of the asset at that time. We do not accept that this residual return of capital represents 'revenue due' to DBIM in the current lease period, as it has suggested. As such, the likelihood of DBIM renewing its lease in 2051 is not a relevant consideration when determining an appropriate economic life of the Terminal assets for depreciation.[587]

Consistency with timing of rehabilitation obligations

DBIM argued that aligning the economic life with the term of its lease is appropriate, as it is consistent with the timing of rehabilitation obligations in the PSA. In our view, this is not a relevant justification for DBIM's proposal.

As discussed in Chapter 9 (section 9.5.3), we consider it unlikely that DBIM's remediation obligations would trigger at the end of its lease if there is residual economic life in the Terminal assets at that time. Rather, we consider it likely that the Terminal would continue to be operated by DBCTH as the owner, or leased to another party, for as long it remained economically viable to do so.

If DBIM chooses not to extend its lease past 2051, we consider it likely that the balance of the notional sinking fund would be transferred from DBIM to the Terminal owner, along with the future obligation to rehabilitate the site. Any residual rehabilitation costs would then be recovered by DBCTH, or a subsequent lessee, over the remaining economic life of the asset. In our view, the assumed term to remediation should reflect the economic life of the Terminal, as this represents the period over which the expected remediation charges can be recovered from Terminal users.

Consistency with the pricing principles

We do not accept DBIM's suggestion that it is inconsistent with the section 168A pricing principles and DBIM's legitimate business interests (s. 138(2)(c)) to assume an economic life that exceeds the term of its current Terminal lease.

In our view, depreciating the Terminal assets over an appropriate economic life provides DBIM with the opportunity to recover at least the efficient costs of depreciation associated with providing access to the declared service (s. 168A(a)).

We consider it would not be in the legitimate business interests of DBIM to accelerate the recovery of depreciation simply because DBIM may choose to discontinue leasing the Terminal before the full economic value of the asset has been extracted.

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[586] IPART, *Rate of return and remaining mine life 2019–2024*, final report, July 2019, p. 21.

[587] Notwithstanding this, we note DBIM has indicated its current intention is to exercise the renewal option until 2100. It acknowledged 'independent studies indicating extensive coal reserves in the Bowen Basin, implying continued economic life at the end of the full lease term' (Dalrymple Bay Infrastructure Limited, *Prospectus—Dalrymple Bay Infrastructure Limited*, November 2020, p. 247).

Relevantly, to assume the Terminal's productive potential is fully depleted prior to the end of its economic life would inappropriately transfer costs from future users to current users through higher than necessary depreciation and remediation allowances. We consider this does not appropriately balance the interests of current access seekers and access holders with the interests of future users (ss. 138(2)(c), (e), (h)).

Relevance of accounting standards

DBIM argued that the lease term is an appropriate asset life for depreciation, as it is consistent with accounting standards that require leased assets to be depreciated over the shorter of the term of the lease and the useful life of the asset.[588]

In our view, DBIM's argument appears to conflate the concepts of accounting depreciation and regulatory depreciation. The former allows an asset owner to spread the total cost of an asset over the period it will be used. Accounting depreciation is reflected as a non-cash expense on the income statement and a reduction in the asset's carrying value on the balance sheet. Regulatory depreciation is a regulatory construct that provides a revenue allowance to the regulated asset owner, sufficient to recover the initial capital cost of an asset over its useful life.

From a financial accounting perspective, we would expect the relevant depreciable amount of the Terminal would be the cost of DBIM's actual investment. This would primarily be the cost of the lease.[589] It would likely be appropriate for DBIM to depreciate this amount in accordance with the AASB standard for the purposes of its statutory accounts. From a regulatory perspective however, depreciation is based on the rolled-forward value of the RAB (comprising the written-down value of the initial depreciated optimised replacement cost (DORC) valuation of the Terminal, and incremental capital expenditure incurred). DBIM's proposal contemplates the continued use of a regulatory depreciation framework, whereby depreciation is based on the residual value of the RAB.

There are no statutory or regulatory requirements to adopt financial accounting standards when determining regulatory depreciation. As discussed above, we have significant concerns with DBIM's proposed economic life when assessed against the criteria of the QCA Act. In our view, maintaining consistency with financial accounting conventions is not sufficient justification for accelerated depreciation in light of these broader concerns.

Conclusion

We consider that reducing the economic life of the Terminal assets to 2051 would not appropriately balance the interests of DBIM, the asset owner, current access holders and seekers, or future access holders and seekers (ss. 138(2)(c), (e), (h) of the QCA Act).

We consider that the economic life of the Terminal is appropriately proxied by a measure of the lesser of the estimated life of the supply of coal from the DBCT catchment area and the physical life of the Terminal assets, not the term of DBIM's current lease. Importantly, we have not been presented with evidence of increased asset stranding risk to support a reduction in the economic life at this time.

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[588] See Australian Accounting Standards Board (AASB), *Compiled AASB Standard, AASB 16—Leases*, 15 June 2020, p. 10, para 32. AASB 16 requires that if a lease does not transfer ownership of the underlying asset to the lessee by the end of the lease term, then the lessee shall depreciate the right of use asset from the commencement date to the earlier of the end of the useful life of the asset or the end of the lease term.

[589] Noting that the total depreciable cost of the lease may also include costs incurred to bring the leased asset into service. Any incremental capital investment made by the lessee during the term of the lease would also be depreciable.

As stated in previous decisions, we are willing to consider potential accelerated recovery of depreciation and remediation annuities in future, given compelling evidence of an increased risk of asset stranding. The current lease has 30 years to run and it will be appropriate to revisit the assumed life of the Terminal from time to time. This will ensure that the owner or lessee has the opportunity to recover at least its efficient depreciation and remediation costs, over an appropriate timeframe.

Determining an appropriate economic life

We have decided to review the assumed economic life of the Terminal, given the last review was undertaken during our assessment of DBIM's 2015 DAU.

In the 2015 review, we engaged Resource Management International (RMI) to undertake an assessment of the economic life of the Terminal, based on the estimated life of coal reserves in the DBCT catchment area. Similar approaches have been accepted by the ACCC and IPART in estimating the economic life of ARTC's HVCN and Railcorp's HVCN, respectively.[590] We consider this remains an appropriate approach.

For this review, we again engaged RMI to independently assess the economic life of the Terminal. The methods and general approach adopted by RMI are consistent with those used during its 2015 review.

In summary, RMI considered that, despite short-term impacts of Covid-19, trade restrictions, and net zero carbon emissions targets, demand for Bowen Basin coals will continue to grow until at least 2035 and flattening until around 2060. RMI considered this would be driven by continued demand from China, along with growth in demand from India and South-East Asia, which will work to offset declining demand from other markets that are expected to be earlier adopters of new technologies. RMI projects that demand would start to decline from 2060, when remaining coal-based infrastructure is expected to reach end of life and is likely replaced by more carbon neutral technologies.[591]

Supply

RMI's analysis indicates that the Terminal will remain economically viable until at least 2053. This is based on RMI's estimate of coal reserves in the DBCT catchment area from existing and advanced mining projects.

RMI's findings are based on an analysis of resource data from each mine and project, compiled from a range of data sources. A similar methodology as in previous reviews was used, where the economic life is calculated by dividing the indicative coal reserves by DBCT capacity.[592] RMI also considered the scheduling of mine production over time, using assumptions of production rates from each project. This provides a more appropriate estimate of the point at which Terminal throughput may be insufficient to sustain the economically viable operation of DBCT.[593]

[590] See, IPART, *Rate of return and remaining mine life 2019–2024*, final report, July 2019, p. 21; ARTC, *Hunter Valley Coal Network Access Undertaking* (as varied on 29 November 2018) pp. 37–38.
[591] RMI, *DBCT 2019 DAU Review of the economic life of DBCT assets*, prepared for the QCA, February 2021, p. 3.
[592] RMI's analysis assumed the 8X expansion will proceed according to the general timeline identified by DBIM in its submissions on the interim draft decision (DBCTM, sub. 8, p. 48). RMI's analysis did not assume 9X expansion capacity as this is not yet certain to proceed.
[593] RMI, pp. 4, 34.

We note RMI's analysis excludes significant potential mining projects that presently have a lower probability of proceeding, and 'inferred' resources of currently operating mines.[594] We consider it appropriate to exclude these potential resources from the analysis at this stage, given the associated uncertainty. We note that RMI's estimated supply life will be conservative if these resources are proven in future.

DBIM's November 2020 investor prospectus also expresses a positive outlook for coal supply, acknowledging the significant expected lives of its existing customers' reserves and resources, as well as potential new development projects.[595] DBIM noted the:

> [l]ong life basin with high quality coal DBT services mines in the Bowen Basin, the world's largest metallurgical coal export region, which includes superior quality metallurgical coal deposits. The Bowen Basin is estimated to contain 6,656Mt of coal reserves and 34,386Mt of coal resources, which are expected to support the long life of operations in the region.[596]

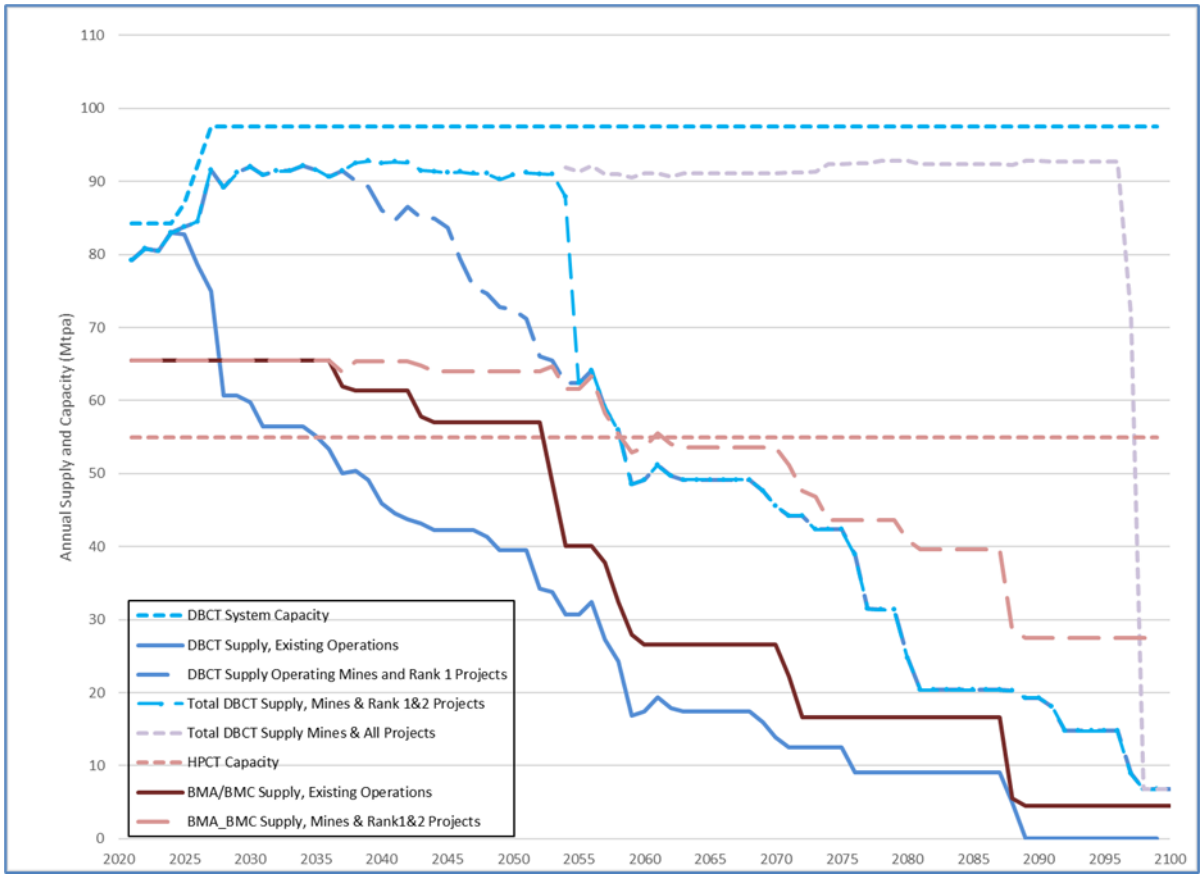
Importantly, as RMI has pointed out, the level of coal supply available to DBCT will depend on the timing of mine closures and expansions, availability of new projects, port capacity and market demand for coal. A strong demand outlook will help support the supply side, encouraging continued exploration and development of new resources as existing ones are depleted. This could potentially extend the life of the resource in the DBCT catchment area well beyond RMI's current estimate. Assuming the future extraction of these lower probability reserves, supply could potentially be maintained at near DBCT capacity until beyond 2090, based on RMI's analysis (see Figure 3).

[594] Inferred resources are identified based on a more limited level of geological evidence than measured or indicated resources but may with a sufficient level of confidence be upgraded to an 'indicated' resource with further exploration. RMI's report offers further explanation of the relevant terminology used to define mineral resource reserves.

[595] Dalrymple Bay Infrastructure Limited, *Prospectus—Dalrymple Bay Infrastructure Limited*, November 2020, pp. 47, 75–76.

[596] Dalrymple Bay Infrastructure Limited, *Prospectus—Dalrymple Bay Infrastructure Limited*, November 2020, p. 20.

Figure 3 Estimated saleable coal reserves in the DBCT catchment area



Source: RMI, p. 40.

Demand

Queensland is the world's largest exporter of metallurgical coal. Metallurgical coal represents around 70 per cent of coal produced in Queensland. In 2019–20, 86 per cent of this metallurgical coal was exported to China, India, Japan, Korea, the Netherlands and Taiwan combined. In the same year, 95 per cent of Queensland thermal coal was exported to China, Japan, Korea, Vietnam, Taiwan and India.[597] Around 80 per cent of the coal shipped through DBCT is metallurgical coal.

Both the thermal and metallurgical coal markets weakened in 2020, with significant reductions in demand from key markets due to the widespread economic impacts of Covid-19. The Department of Industry, Science, Energy and Resources (DISER) projected that Australia's metallurgical coal exports will fall by around 8 million tonnes to 169 million tonnes in 2020–21, due to lower global demand—before increasing in 2021–22, as steel production and prices start to recover.[598] RMI also forecast a recovery in seaborne metallurgical coal demand in 2021 after the low levels seen during 2020, driven by a strong recovery in China.[599] Similarly, under current policy settings, the IEA forecast demand for coal in the power and industry sectors to grow in India, Indonesia and South-East Asia, but more slowly than previously projected.[600]

[597] Queensland Treasury, *A study of long-term global coal demand*, September 2020, p. 4.
[598] Department of Industry, Science, Energy and Resources (DISER), *Resources and Energy Quarterly*, December 2020, p. 43.
[599] RMI, p. 23.
[600] International Energy Agency (IEA), *World Energy Outlook 2020*, IEA website, October 2020, accessed 19 February 2021.

There appears to be a general consensus among international authorities that the global economy will rebound during the next 12–24 months, noting that the path for individual nations will differ.[601]

Key markets

India is the world's second largest steel producer and metallurgical coal importer and was the largest importer of Australian metallurgical coal during 2019.[602] India is a relatively small importer of Australian thermal coal.

India has announced plans to significantly expand its steel-making industry from per capita consumption of 61 kg in 2017 to 160 kg by 2031.[603] This is predicted to drive an increase in demand for imported metallurgical coal. This is notwithstanding India's accompanying policies aimed at reducing coal consumption through encouraging more efficient steelmaking technologies, and reducing reliance on imported metallurgical coal from the current 85 per cent, to 65 per cent.[604] However, DISER noted that India has limited domestic reserves of metallurgical coal and will need to increase imports to support rapid growth of its steel sector.[605] This is a view shared by DBIM, which expected India to remain a key driver of metallurgical coal demand due to its lack of high-quality coking coal essential to steelmaking.[606]

China was the second largest importer of Australian metallurgical and thermal coal during 2019.[607] While the Australia-China trade relationship has experienced challenges in recent times, the analysis we considered indicates this is likely to have only a temporary impact on Australian coal exports, particularly metallurgical coal.

DISER noted that if China's informal trade restrictions on Australian coal persist, exporters would need to find alternative markets for up to 3 to 4 million tonnes a month of metallurgical coal. DISER highlighted recent indications of such trade realignment, with additional Australian coal being delivered into India and other Asian ports in response to uncertainty regarding Chinese trade policy. It noted that other exporting countries, such as Canada, have redirected tonnages to China to fill the gap left by Australian exports.[608]

DISER noted that in the long term China's steel industry would likely face challenges in obtaining the higher-grade hard coking coals it requires in sufficient quantities.[609] RMI expressed a similar view, noting that China's reserves of high-quality metallurgical coal are being depleted quickly compared with Australia's. It considered that, with a population of more than 1.4 billion, demand from China is expected to remain stable, but it may increase as China more rapidly depletes its higher-quality, lowest-cost coal.[610] DBIM expected continued Chinese demand to remain strong, due to the high-quality metallurgical coals exported through DBCT.[611]

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[601] Organisation for Economic Co-operation and Development (OECD), *OECD Economic Outlook*, vol. 2020, issue 2, OECD iLibrary website, n.d., accessed 19 February 2021; International Monetary Fund (IMF), *World Economic Outlook Update,* January 2021, p. 5; World Bank Group, *Global Economic Prospects*, January 2021, pp. 25–26.
[602] DISER, p. 42.
[603] Government of India, *Gazette of India: Extraordinary, no. 358*, part ll, s. 3(i), 8 May 2017, pp. 20, 22.
[604] Government of India, *Gazette of India: Extraordinary, no. 358*, part ll, s. 3(i), 8 May 2017, pp. 22, 25.
[605] DISER, p. 45.
[606] Dalrymple Bay Infrastructure Limited, *Prospectus—Dalrymple Bay Infrastructure Limited*, November 2020, p. 35; DBCTM, *DBCT master plan 2019,* p. 29.
[607] DISER, pp. 42, 53.
[608] DISER, pp. 43–44.
[609] DISER, p. 44.
[610] RMI, pp. 3, 22.
[611] DBCTM, *DBCT master plan 2019*, p. 30.

Japan and South Korea are other major markets for Bowen Basin coals. RMI forecast these countries to maintain steady or growing demand for seaborne thermal coal until at least 2030, before starting to decline with the introduction of new lower carbon emissions technologies. RMI noted that Japan still has a major program of coal-fired power station construction, and there is an expectation that Japan will require high-quality thermal coal imports for the next 10 years to service these plants. Japanese demand is expected to peak about 2030 and then steadily decline.[612] Demand for metallurgical coal in Japan and South Korea is expected to remain strong. DBIM considered Japan and South Korea will remain stable importers of coal from DBCT, due to a lack of domestic metallurgical coal reserves.[613] It noted that many of the mines that ship through the Terminal have Japanese joint venture ownership, which is likely to support the long-term sourcing of coal by Japanese buyers from these mines.[614]

RMI also projected growth in demand for seaborne coal from Vietnam, Pakistan and Bangladesh, which have growing populations and ongoing programs of investment in new coal-fired power generation capacity. Vietnam and Indonesia are also expected to increase imports of seaborne metallurgical coal to supply their growing domestic steelmaking industries.[615]

DBIM expected demand for Queensland thermal coal to increase with continuing economic development in India and South-East Asian regions, where imported coal is expected to supplement domestic production.[616]

Environmental initiatives

A significant challenge in projecting medium- to long-term demand for coal is the pursuit of 'net zero carbon' emissions by 2050 among many developed nations, including the key coal export markets of South Korea and Japan. China has announced a target of net zero carbon emissions by 2060.

The IEA has estimated that total carbon dioxide emissions would need to fall by around 45 per cent from 2010 levels by 2030 to achieve net zero carbon emissions by 2050.[617] Achieving this will likely require a range of approaches; however, fundamental changes to carbon intensive industries such as electricity generation and steel making, will likely play a significant role in achieving these targets. This may include retirement of coal-fired power plants, expansion of renewable generation capacity and alternative fuels, carbon capture and storage, and alternative steel making technologies that do not rely on coal in the reduction process.

In RMI's view, it will take time for these new technologies to have a significant impact on demand for Bowen Basin coal. RMI said the impact is likely be tempered by:

- forecast strong demand from South-East Asia, China and India for coal-fired electricity with an ongoing program of coal-fired power station construction in China, India, Vietnam, Pakistan, Indonesia and Bangladesh
- use of carbon capture and storage technologies
- challenges in achieving scale in renewable generation, and overcoming issues with intermittency and storage

[612] RMI, pp. 22–23.
[613] Dalrymple Bay Infrastructure Limited, *Prospectus—Dalrymple Bay Infrastructure Limited*, November 2020, p. 35.
[614] DBCTM, *DBCT master plan 2019,* pp. 33–34.
[615] RMI, pp. 22–25.
[616] DBCTM, *DBCT master plan 2019*, p. 35.
[617] IEA, *World Energy Outlook 2020*.

- continued construction of coal dependent blast furnaces in South-East Asia and India, and the early stage and commercially unproven nature of alternative steel production technologies, including hydrogen reduction.[618]

RMI considered that population growth will also be a challenge for decarbonising economies, noting growing middle-income sectors in highly populated nations such as China, India and South-East Asian countries, and growing per capita energy demand.[619] This point was also noted by DBIM, which said thermal coal-fired generation continues to represent one of the lowest-cost, most efficient and reliable sources of electricity for developing countries. It expected a long timeline for thermal coal generation to be phased out in markets such as Japan, Korea, Taiwan and China given their ongoing investment in new coal-fired power, and the relatively young age of their thermal coal generation fleet.[620]

The development of alternative steel making technologies will be important in reaching net zero emissions, particularly for China as the world's largest steel producer. As RMI has noted, this alternative technology is yet to be commercially proven, and traditional oxygen blast furnaces are expected to remain the staple technology for some time, supporting continued demand for metallurgical coal.

RMI expected the adoption of new technologies to be modest initially, and largely limited to the developed economies of Europe, the USA, Japan and eventually China.[621] RMI said new technologies are likely to have an increasing influence on new demand from about 2035, as existing infrastructure gradually begins to be retired—with demand starting to decline by 2060 as more existing and new plant comes up for replacement.[622]

The IEA considered that, in addition to investment in technologies such as carbon capture and storage, low-carbon gases and buildings retrofits, behaviour changes would form an integral part of the emissions reduction strategy.[623] The IEA said the scale and pace of emissions reductions required to meet the 2050 target would require a far-reaching set of actions and unparalleled changes across all parts of the energy sector, which would need to be realised simultaneously.[624]

The IEA's modelling sets out its view on a potential path to net zero emissions by 2050. This is predicated on a number of key outcomes being achieved by 2030, which are relevant to demand for thermal and metallurgical coal. These outcomes include, but are not limited to:

- a 17 per cent reduction in energy demand, and a 60 per cent reduction in carbon dioxide emissions from the power sector
- a 60 per cent reduction in coal demand
- an increase in annual solar photovoltaic additions from 110 gigawatts in 2019 to nearly 500 gigawatts, with few coal power plants (without associated carbon capture and storage technology) still operating by 2030

[618] RMI, pp. 17, 19–20.
[619] RMI, p. 17.
[620] Dalrymple Bay Infrastructure Limited, *Prospectus—Dalrymple Bay Infrastructure Limited*, November 2020, p. 41.
[621] RMI, p. 20.
[622] RMI, pp. 20, 25.
[623] IEA, *World Energy Outlook 2020*.
[624] IEA, *World Energy Outlook 2020*.

- an increase in renewable sources as a proportion of global energy demand from 27 per cent to 60 per cent, and a reduction in the share of power supplied by coal plants from 37 per cent to 6 per cent.[625]

Competitive position

Bowen Basin metallurgical coal producers have a very strong competitive position in the global seaborne market for metallurgical coal. As RMI notes, with the possible exception of Russia, there is limited metallurgical coal supply elsewhere that can compete with the Bowen Basin coal in terms of quality and cost.[626] RMI considered there is some potential for increased supply from Mozambique, Canada and the USA over the next 10 years; however, resource depletion will then impact supply potential.[627] RMI also identified opportunities for potential supply growth from Indonesia, but noted that the lower quality of the coals, and logistical challenges are impediments to expanding its exports.[628] Overall, RMI concluded that mines in the DBCT catchment are in a very strong competitive position to maintain a dominant share of the growing metallurgical coal market in the long term.[629]

DBIM said that Bowen Basin metallurgical coal producers maintain a distinct comparative advantage over other producers. It highlighted the Bowen Basin producers' significant reserves of high-quality product, relatively low costs of production, strong client base and favourable logistics to serve high-growth metallurgical coal demand centres.[630] DBIM noted no significant metallurgical coal projects are being developed outside of the Bowen Basin. It said significant reserves and ongoing expansion activity in the Bowen Basin suggest that its producers will be the main source of new metallurgical coal supply in the future, supporting a long life of operations.[631]

Conclusion—economic life of the Terminal

In our view, RMI's analysis on the potential supply of coal reserves in the DBCT catchment area is robust and applies appropriate assumptions. We consider RMI's estimate of 2053 is a reasonable, albeit likely conservative, estimate of the life of the coal resource in the DBCT catchment area, at this time.

Estimating demand for coal is a complex exercise. It cannot be done with accuracy over the significant period of time inferred by the estimated life of the coal resource. There are clearly uncertainties arising from environmental initiatives, new technologies and international trade policies. However, the underlying fundamentals of the seaborne coal market suggest that Bowen Basin coal producers are well placed to remain competitive for some time, particularly in key growth markets in India and South-East Asia. It is likely that exposure to these growth markets will temper the impact of reduced demand in the medium term as developed nations pursue low-carbon technologies.

Based on the information available at this time, we consider the overall demand outlook for Bowen Basin coals is positive over the long term. This suggests demand is likely to be sufficient

[625] IEA, *World Energy Outlook 2020*.
[626] RMI, p. 31. RMI noted that Russia can supply additional high quality, low-cost coal into China and upgrading of rail infrastructure could support an additional 20 million tonnes of metallurgical coal exports over the next 10 years, for at least another 15 years (RMI, p. 32).
[627] RMI, p. 31.
[628] RMI, p. 32.
[629] RMI, p. 32.
[630] Dalrymple Bay Infrastructure Limited, *Prospectus—Dalrymple Bay Infrastructure Limited*, November 2020, pp. 37, 45.
[631] Dalrymple Bay Infrastructure Limited, *Prospectus—Dalrymple Bay Infrastructure Limited*, November 2020, p. 45.

to sustain the operation of the Terminal for at least the period implied by RMI's estimate of the life of the coal resource.

RMI's conclusion on the estimated life of coal reserves is not materially different from the current assumed life of the Terminal of 2054. As a general principle, we consider asset lives and depreciation methods should only be revised where there is a compelling case to do so. Therefore, we consider there is not strong justification to depart from the current assumed constraint of 30 June 2054, at this time.

After considering the significant extent of coal supply in the DBCT catchment—and balancing this against the strong, albeit less certain, demand environment over the medium- to long-term—we consider the available evidence supports maintaining the economic life of the Terminal at its current 50-year constraint, until June 2054. Importantly, we intend to consider the economic life of the Terminal again in future undertaking investigations. Depending on the demand and supply outlook at the time, it may be appropriate to adopt a shorter, or longer, economic life at some point in the future.

10.2.4 Decision

We consider that DBIM's proposal to align the asset life of the Terminal with the remaining term of its lease is not appropriate, having regard to the criteria in section 138(2) of the QCA Act. We consider the proposal does not achieve an appropriate balance between the interests of DBIM, the asset owner, current access holders and future access holders and seekers (ss. 138(2)(b), (c), (e), (h)). Specifically, we consider the proposal:

- inappropriately accelerates the return of capital to DBIM which is not in the legitimate business interests of DBIM—given DBIM has not demonstrated any increase in asset stranding risk at this time (ss. 138(2)(c), (h))
- inappropriately transfers costs from future access seekers to current access holders and seekers, through higher depreciation charges over the forthcoming regulatory period (s. 138(2)(e)).

On balance, we consider there is sufficient evidence at this time to indicate the Terminal is likely to remain viable until at least 2054.

RMI's conclusion on the extent of coal reserves is not materially different from the current assumed life of the Terminal. As a general principle, we consider asset lives and depreciation methods should only be revised where there is a compelling case to do so. Section 138(2) of the QCA Act requires us to have regard to a number of factors when deciding whether to approve the DAU. In this context, we have used our judgement to maintain the current assumed constraint of 30 June 2054, at this time. We also consider it is appropriate to do so in the interests of access seekers and access holders, as it provides some degree of certainty and stability in the depreciation profile (ss. 138(2)(e), (h)).

We consider applying an economic constraint for depreciation to 2054 adequately deals with the risk of asset stranding due to coal resource depletion. We consider this satisfies the legitimate business interests of DBIM as the operator and DBCTH as the asset owner (ss. 138(2) (b), (c)). It also provides DBIM with the opportunity to recover depreciation amounts that are at least enough to meet its efficient costs of providing access to the declared service (ss. 138(2)(g)).

In our view, this decision appropriately balances the interests of DBIM, the asset owner, current access holders and future access holders and seekers (ss. 138(2)(b), (c), (e), (h)).

While we consider this is an appropriate assumption at this time, we acknowledge the uncertainties in estimating the economic life of the Terminal over such a significant time horizon. As a general principle, we consider it appropriate to revisit the economic life assumption at each undertaking investigation to ensure DBIM is afforded the opportunity to recover at least its efficient depreciation and remediation costs, consistent with section 168A(a) of the QCA Act. We are open to reconsidering the economic life of the Terminal asset in future investigations, and potential accelerated depreciation, should we be presented with compelling evidence of a material change in asset stranding risk. Likewise, if circumstances in the future indicate the life of the Terminal is likely to exceed 2054, we would consider whether relaxing the economic constraint would be appropriate at that time.

Summary of decision 10.1

(1) After having regard to the criteria in section 138(2) of the QCA Act, we consider it is not appropriate to approve the approach to depreciation contemplated in the 2019 DBCT DAU, as originally submitted.

(2) We consider it is appropriate for DBIM to amend the 2019 DAU to:

- (a) require depreciation amounts to be calculated using the existing depreciation methodology applying during the 2017 AU period, maintaining the remaining economic life of the Terminal at 34 years to June 2054
- (b) include further provisions requiring it to make underlying depreciation modelling information available to access seekers and access holders, if requested. This information should be sufficiently detailed for parties to accurately verify DBIM's proposed depreciation values, including underlying assumptions.

11 NON-PRICING TERMS

In this chapter, we explain our decisions on non-pricing terms in the 2019 DAU. The chapter does not address our decisions on those non-pricing terms that we consider are closely tied to our decisions on the pricing approach, as we discuss these decisions in earlier chapters.

While we have considered all aspects of the 2019 DAU, we have identified specific non-pricing provisions for further consideration. These include terms that attracted comments from stakeholders and terms that differ from those in the 2017 AU.[632]

The sections, clauses and schedules we refer to in this chapter are from the 2019 DAU, unless otherwise specified.

[632] DBIM explained that the 2019 DAU is largely unchanged from the 2017 AU, apart from the approach to determining access charges (DBCTM, sub. 1, pp. 58, 67, sub. 8, pp. 12–13).

11.1 Negotiations after an indicative access proposal (ss. 5.7–5.8)

The 2019 DAU provides a process for access seekers and DBIM to negotiate access agreements. The negotiation process begins after DBIM provides an access seeker with an indicative access proposal in response to an access seeker's application. We explain our decisions on provisions that are relevant to the negotiation process in Table 6.

Table 6 Negotiation process—decision

Provision in the 2019 DAU	*Analysis and decision*
Timeframe for starting negotiations—An access seeker must start negotiations within 14 days of advising it intends to progress its access application based on the indicative access proposal (s. 5.7(a)).	DBIM said including a hard timeframe (rather than 'as soon as reasonably practicable') would ensure that negotiations progress in a timely manner.[633] The DBCT User Group supported the proposal but suggested 10 business days to account for periods with several public holidays.[634] DBIM agreed with the timeframe proposed by the DBCT User Group.[635] Taking into account stakeholder support (ss. 138(2)(b), (c), (e), (h) of the QCA Act), we consider that 10 business days is an appropriate timeframe.
Ending negotiations early—DBIM may, at any time during the process for negotiating an access agreement, advise an access seeker that it has decided against entering into an agreement, but only if at least one of the criteria in section 5.8 is met. In addition to the criteria in the 2017 AU, the following criteria were proposed: • The access seeker has no reasonable likelihood of gaining or utilising access from the nominated commencement date (s. 5.8(a)(3)).	DBIM said its proposal would promote efficient negotiations with access seekers.[636] The DBCT User Group noted that many factors impact the commencement date and the access seeker's financing position over the negotiation period, and suggested drafting amendments.[637] **No reasonable likelihood of utilising access (s. 5.8(a)(3))** DBIM said the purpose of the first additional criterion was to prevent access seekers from engaging in negotiations to reserve capacity for future operations that are unlikely to eventuate in the timeframe proposed and that may cause inefficient contracting of capacity. DBIM also said the provision was consistent with the criteria for rejecting an access application (under s. 5.3(d)).[638] The DBCT User Group suggested amending section 5.8(a)(3) in the following way: DBCT Management is reasonably of the opinion that the Access Seeker has no genuine intention of gaining Access, or has no reasonable likelihood of utilising Access, at the level of capacity sought or ~~from~~ within a reasonable period after the nominated commencement date for Access;[639]

[633] DBCTM, sub. 1, pp. 63, 68.
[634] DBCT User Group, sub. 2, p. 75.
[635] DBCTM, sub. 10, p. 40, sub. 12, appendix 1, pp. 5, 13.
[636] DBCTM, sub. 1, pp. 63, 68, sub. 10, p. 41.
[637] DBCT User Group, sub. 2, p. 75.
[638] DBCTM, sub. 1, p. 63.
[639] DBCT User Group, sub. 2, p. 75.

Provision in the 2019 DAU	*Analysis and decision*
• The access seeker is not willing or able to provide the security reasonably requested by DBIM, in accordance with section 5.9 (s. 5.8(a)(4)).	DBIM was comfortable with the suggested amendment.[640] Taking into account stakeholder support (ss. 138(2)(b), (c), (e), (h) of the QCA Act), we consider the amendment is appropriate to provide for a reasonable degree of flexibility. **Access seeker not willing or able to provide security (s. 5.8(a)(4))** DBIM said the second additional criterion was a practical outcome of concerns that an access seeker (or its guarantor) is not of good financial standing.[641] However, the DBCT User Group suggested amending the drafting in the following way: > DBCT Management is reasonably of the opinion that the Access Seeker or its guarantor is not or is likely not to be reputable or of good financial standing or that the Access Seeker is not willing or able to provide security reasonably requested by DBCT Management in accordance with Section 5.9 by the time that Security is required to be provided in accordance with an Access Agreement;[642] DBIM said the purpose of the DBCT User Group's proposed amendment was unclear and the amendment also appeared to be unworkable, because negotiations occur before an access agreement is signed, with any security required under an agreement to be delivered after negotiations end.[643] Following the draft decision, DBIM advised it had sought further explanation from the DBCT User Group about the intention and workability of the proposed amendment but did not receive a response. As a result, DBIM did not support the proposed amendment.[644] The DBCT User Group clarified—in submissions to the draft decision—that the purpose of its proposed amendment was to defer the provision of security until it was required under an access agreement, because providing security at the negotiation stage was a significant cost to access seekers.[645] Our decision is that DBIM's proposal is appropriate to be approved without the amendment proposed by the DBCT User Group. The amendment would likely make the provision unworkable, because any security requirements in an access agreement[646] are separate to the section 5.8(a)(4) security requirement, which is related to establishing creditworthiness and financial standing at the negotiation stage. While providing security at this stage may impose costs on access seekers, it may also avoid the cost and delay associated with DBIM continuing to negotiate with access seekers that will not be able enter into an access agreement given their financial situation. Other access seekers could also be disadvantaged by these delays, particularly given capacity constraints at the Terminal. In our view, the ability of DBIM to 'reasonably request' security to establish an access seeker's creditworthiness during access negotiations promotes the efficient negotiation and

[640] DBCTM, sub. 10, p. 41, sub. 12, appendix 1, pp. 5, 13.
[641] DBCTM, sub. 1, p. 63.
[642] DBCT User Group, sub. 2, p. 75.
[643] DBCTM, sub. 10, p. 41, sub. 12, p. 49.
[644] DBCTM, sub. 12, p. 49 and appendix 3, pp. 1–2, 6.
[645] DBCT User Group, sub. 13, pp. 67–68, sub. 16, p. 46.
[646] Security requirements in an access agreement are negotiated between DBIM and access seekers. There are provisions in the 2019 DAU SAA to incorporate security requirements that are negotiated (see sch. B, cls. 29.1–29.2).

Provision in the 2019 DAU	*Analysis and decision*
	allocation of scarce capacity, and appropriately balances the interests of DBIM with the interests of access seekers (ss. 138(2)(a), (b), (c), (e) of the QCA Act).
Assessing financial standing—When forming a view on whether the access seeker is reputable or of good financial standing (see s. 5.8(a)(4)), and on the likelihood of the access seeker complying with an access agreement (see s. 5.8(a)(2)), DBIM can consider the performance of an access seeker, or a related entity of the access seeker, under other relevant agreements (s. 5.8(c)).	Compared to the 2017 AU, the broader definition of 'related entity' applies, instead of 'related body corporate'[647], and the assessment of performance under other agreements is no longer restricted to the previous two years. DBIM said this would allow it to consider all prior dealings in considering whether the access seeker is reputable and of good financial standing.[648] We consider the proposal is reasonable and appropriate to be approved, as it is consistent with DBIM's legitimate business interests (ss. 138(2)(c), (d) of the QCA Act).

11.2 Obtaining priority in the queue—'notifying access seeker' process (s. 5.4)

DBIM advised that capacity at the Terminal is fully contracted and there is a substantial access queue.[649] The 'notifying access seeker' process in the 2019 DAU provides access seekers with an opportunity to gain priority in the queue. If capacity becomes available, an access seeker that is not the first in the queue (a 'notifying access seeker') may notify DBIM that it is seeking access to that capacity at an earlier date[650] than the first access seeker in the queue. DBIM must then notify all access seekers in the queue (each a 'notified access seeker') of their opportunity to obtain that capacity by submitting a signed access agreement with an access commencement date that is at least as early as the date proposed by the notifying access seeker. We explain our decisions on those provisions that are relevant to the 'notifying access seeker' process in Table 7.

Table 7 'Notifying access seeker' process—decision

Provision in the 2019 DAU	*Analysis and decision*
Assigning capacity—DBIM will assign capacity to the access seeker(s) with the earliest commencement date(s). If two or more access seekers have the earliest date(s), they will be	DBIM said the purpose of its proposal was to promote the efficient allocation of capacity, by ensuring capacity was contracted from the earliest possible date.[651] The DBCT User Group generally supported DBIM's proposal, but suggested amendments to:

[647] 'Related entity' and 'related body corporate' each have the meaning given to the relevant term in the *Corporations Act 2001* (Cth) (see sch. G of the 2017 AU and 2019 DAU).
[648] DBCTM, sub. 1, pp. 63, 68.
[649] DBCTM, sub. 1, pp. 17, 22.
[650] Instead of at least six months earlier, as required in the 2017 AU.
[651] DBCTM, sub. 1, pp. 59–60.

Provision in the 2019 DAU	*Analysis and decision*
prioritised based on their respective positions in the queue (ss. 5.4(e)–(h)).	• address a drafting issue that may unintentionally result in all access seekers in the queue receiving priority over the notifying access seeker, even if the notifying access seeker has an earlier commencement date • clarify that the notifying access seeker cannot nominate a commencement date in the past (because other access seekers must match the commencement date to obtain access).[652] DBIM supported the proposed amendments.[653] We consider the amendments are appropriate, as they clarify and improve the workability of the provisions, which is in the interests of all parties (ss. 138(2)(b), (c), (e), (h) of the QCA Act). The DBCT User Group proposed an additional amendment[654] to clarify that a notifying access seeker would be deemed to have sought access from an earlier date than the first access seeker in the queue if: • the first access seeker had a nominated commencement date that was already in the past • the notifying access seeker sought access starting within three months of providing the notice that triggered the notifying access seeker process. DBIM generally supported making this amendment, but said the timeframe should instead be six months, because this made more sense from a commercial perspective.[655] DBIM said it sought confirmation from the DBCT User Group that a six-month timeframe was workable, but did not receive a response.[656] We consider six months to be an appropriate timeframe, as it would not appear to adversely affect the interests of access seekers or access holders, or otherwise be inappropriate, having regard to the matters in section 138(2) of the QCA Act. New Hope Group argued that the ability for notified access seekers to amend their commencement date should be removed and that an access seeker should only be permitted to apply if it is ahead of the notifying access seeker in the queue.[657] We do not support New Hope Group's proposal. DBIM's proposal provides all access seekers in the queue with an opportunity to change their access commencement date, including the notifying access seeker. Under the DBCT User Group's proposed amendments, another access seeker would not receive priority over the notifying access seeker, unless they sought an earlier commencement date.[658] DBIM's proposal, with the amendments in its revised drafting[659], is appropriate to be approved, because it is consistent with promoting:

[652] DBCT User Group, sub. 2, pp. 70–71.
[653] DBCTM, sub. 10, p. 35, sub. 12, appendix 1, pp. 5, 8–9.
[654] DBCT User Group, sub. 2, pp. 70–71.
[655] DBCTM, sub. 10, p. 35, sub. 12, appendix 1, pp. 5, 9.
[656] DBCTM, sub. 12, appendix 1, pp. 5, 9 and appendix 3, pp. 1–2, 5.
[657] New Hope Group, sub. 3, pp. 14–15.
[658] If those access seekers sought the same commencement date, they would be prioritised based on their respective position in the queue.
[659] DBCTM, sub. 12, appendix 1, pp. 5, 8–9 and appendix 6, ss. 5.4(e)(1), 5.4(e)(2), 5.4(f)(3), 5.4(f)(4), 5.4(h).

Provision in the 2019 DAU	*Analysis and decision*
	• the efficient use of the Terminal and DBIM's legitimate business interests to allocate capacity to the access seeker with the earliest commencement date (ss. 138(2)(a), (b), (c) of the QCA Act) • the rights of access seekers to take up capacity based on their position in the queue, while also being able to move to the head of the queue if they are willing to take up capacity at an earlier date (s. 138(2)(e) of the QCA Act).
Timeframe for notified access seekers to return signed agreements—After they receive notification, notified access seekers must return a signed access agreement and any required security within three months (s. 5.4(e)(5)).[660]	The DBCT User Group said proposed security requirements should be included in the notice, because this would help access seekers to decide whether to take up the capacity, and to meet the security requirements within the specified timeframe.[661] However, DBIM said this was not possible because it did not have sufficient information at the time of issuing the notice.[662] Provisions exist for access seekers to dispute the security requirements and to provide security after signing the agreement (see s. 5.4(g)). Access seekers could also approach DBIM for advice on likely security requirements—DBIM expressed a willingness to discuss likely requirements with access seekers.[663] In our view, these provisions sufficiently protect the interests of access seekers (s. 138(2)(e) of the QCA Act), and DBIM's proposal is appropriate to be approved.
Access commencement date—If the notice period under section 5.4(e)(5) spans two financial years, the earliest possible commencement date for access will be the first day of the new financial year (s. 5.4(f)(3)).	DBIM said the requirement was necessary to work with the annual true-up mechanism for access charges in user agreements.[664] The DBCT User Group supported the proposal, given the issues raised by DBIM.[665] Noting that stakeholders consider the proposal will address workability concerns (ss. 138(2)(b), (c), (e), (h) of the QCA Act), our decision is that DBIM's proposal is appropriate to be approved.
Ending negotiations early—DBIM is not obliged to enter into an access agreement with an access seeker if DBIM would be entitled to cease negotiations under section 5.8, if the usual negotiation process had been followed (s. 5.4(f)).	The DBCT User Group supported the proposal, noting the ability to cease negotiations should be the same, regardless of the process followed.[666] In our view, DBIM's proposal is appropriate to be approved, because the reasons for ceasing negotiations under the usual negotiation process are also likely to be relevant if the notifying access seeker process is instead followed (ss. 138(2)(b), (c), (h) of the QCA Act).

[660] Although a shorter timeframe applies in respect of short-term available capacity (see discussion in Table 8 below).
[661] DBCT User Group, sub. 2, p. 71.
[662] DBCTM, sub. 10, pp. 35, 37.
[663] DBCTM, sub. 10, p. 35.
[664] DBCTM, sub. 1, pp. 67–68, sub. 10, p. 36.
[665] DBCT User Group, sub. 2, pp. 71–72.
[666] DBCT User Group, sub. 2, p. 72.

Provision in the 2019 DAU	*Analysis and decision*
Timeframe to dispute security—If an access seeker wants to dispute the security requested by DBIM, it must do so within 14 days of receiving the request (s. 5.4(g)(2)).	DBIM said that imposing a time limit would avoid delays in negotiating and signing agreements.[667] The DBCT User Group supported the proposal but suggested 10 business days to account for periods with several public holidays.[668] DBIM said it was comfortable adopting the timeframe proposed by the DBCT User Group.[669] Taking into account stakeholder support (ss. 138(2)(b), (c), (e), (h) of the QCA Act), we consider that 10 business days is an appropriate timeframe.
Timeframe for notifying access seeker to sign agreement—After receiving an offer from DBIM to enter into an access agreement, the notifying access seeker has 30 business days to sign an agreement (ss. 5.4(h), 5.4(i)(5)).	DBIM said it proposed to specify a timeframe to provide certainty to access seekers in the queue.[670] It considered 30 business days was appropriate, because that was consistent with the timeframe for responding to an indicative access proposal.[671] The DBCT User Group supported the proposal, subject to the notifying access seeker receiving the same rights as notified access seekers to dispute security and obtain additional time to obtain security (under s. 5.4(g)).[672] DBIM was comfortable with the amendments suggested by the DBCT User Group.[673] We consider those amendments, which are consistent with DBIM's revised drafting[674], are appropriate to provide for the consistent treatment of access seekers participating in the process (ss. 138(2)(b), (c), (e) of the QCA Act).[675]
When an access seeker can be removed from the queue—Under section 5.4(i), notified access seekers may be removed from the queue if: • the nominated commencement date in their access application is within two years of the notifying access seeker's nominated commencement date	DBIM said that including objective criteria would improve certainty and promote the efficient operation of the queue and the efficient allocation of capacity.[676] The DBCT User Group generally supported DBIM's proposal, but suggested the following amendments:[677] • reducing the two-year timeframe to one year, because of the significant cost impacts of an extra year of access charges[678] • removing the requirement for a dispute to be 'bona fide', because any dispute (including those that DBIM does not consider to be bona fide) should be resolved before an access seeker is removed

[667] DBCTM, sub. 1, p. 62.
[668] DBCT User Group, sub. 2, p. 72.
[669] DBCTM, sub. 10, p. 37, sub. 12, appendix 1, pp. 5, 10.
[670] No timeframe was specified in the 2017 AU.
[671] DBCTM, sub. 1, pp. 62, 68.
[672] DBCT User Group, sub. 2, p. 73.
[673] DBCTM, sub. 10, p. 37, sub. 12, appendix 1, pp. 5, 10.
[674] DBCTM, sub. 10, p. 37, sub. 12, appendix 6, s. 5.4(h)(3).
[675] However, the reference in section 5.4(h)(3)(B) to section 5.4(e)(5)(B) is incorrect and should be changed to section 5.4(h)(2).
[676] DBCTM, sub. 1, pp. 60, 68.
[677] DBCT User Group, sub. 2, pp. 73–74.
[678] New Hope Group (sub. 3, p. 15) also disagreed with the two-year timeframe, arguing it would punish access seekers for committing to the timelines in their access applications and result in an unreasonable financial burden.

Provision in the 2019 DAU	*Analysis and decision*
• they do not respond with a signed access agreement within the three-month period specified in section 5.4(e)(5). If there is a 'bona fide' dispute in relation to the access seeker's removal from the queue, the access seeker maintains its position in the queue until the dispute is resolved (s. 5.4(i)(1)).	• clarifying that the reference to the execution of an access agreement is confined to an agreement with a start date sufficient to give the notified access seeker priority under section 5.4(f)[679] • clarifying that a notified access seeker that responds with a signed agreement for a lower tonnage or shorter term than its access application will maintain its place in the queue for the remaining tonnage/term. DBIM agreed to adopt the first three amendments and proposed revised drafting to incorporate those amendments.[680] On the last amendment, DBIM was concerned that access seekers could reserve their place in the queue by applying for more tonnage than required. DBIM also said the DBCT User Group did not respond to its request for suggestions to mitigate that risk. Nevertheless, DBIM proposed clarifying amendments to section 5.4(i)(5).[681] While DBIM's revised drafting does not seem to go as far as implementing the DBCT User Group's proposal, we consider it would be inappropriate to require further amendments as the proposal may lead to the problems identified by DBIM. We also note that the DBCT User Group has not provided specific or sufficient justification for its proposal or responded to DBIM's concerns. Our decision is that DBIM's revised drafting is appropriate to be approved.[682] In making our decision, we balanced promoting the efficient usage of the Terminal and the interests of DBIM with the interests of access seekers (ss. 138(2)(a), (b), (c), (e) of the QCA Act).
Removing an access seeker from the queue when there is insufficient capacity—If, due to insufficient capacity being available, an access seeker does not accept an offer for lower tonnage than sought in its access application, DBIM may remove the access seeker from the queue (s. 5.4(i)(6)).	The DBCT User Group did not support the proposal, on the basis that a lower tonnage may not be sufficient to meet the access seeker's needs.[683] For example, a certain amount of access may be required to support a greenfield mine development or a mine expansion. DBIM said it was comfortable not having the ability to remove an access seeker from the queue who did not accept a lower tonnage.[684] Considering the DBCT User Group's concerns, and noting DBIM's support (ss. 138(2)(b), (c), (e) of the QCA Act), DBIM should amend the 2019 DAU to remove this requirement.[685]

[679] To gain priority, the start date needs to be earlier than the notifying access seeker's start date (or the same date if the notified access seeker is higher in the queue).
[680] DBCTM, sub. 10, p. 38, sub. 12, appendix 1, pp. 5, 10–11 and appendix 6, s. 5.4(i).
[681] DBCTM, sub. 10, p. 38, sub. 12, appendix 1, pp. 5, 12, appendix 3, pp. 1–2, 5 and appendix 6, s. 5.4(i)(5).
[682] DBCTM, sub. 12, appendix 6, s. 5.4(i).
[683] DBCT User Group, sub. 2, p. 74.
[684] DBCTM, sub. 10, p. 39, sub. 12, appendix 1, pp. 5, 12.
[685] The removal of this requirement is consistent with DBIM's revised drafting (DBCTM, sub. 12, appendix 6, s. 5.4(i)(6)).

11.3 Allocating short-term available capacity (various sections in the 2019 DAU)

DBIM introduced a new process in the 2019 DAU to allocate capacity that may become available to contract on a short-term basis. DBIM said the process—which is not in the 2017 AU—would promote the efficient and equitable allocation of short-term parcels of capacity that may become available from time to time but would otherwise not be used.[686] The DBCT User Group supported the intention of the proposal, but raised concerns about how it would work and whether it would enable DBIM to provide capacity on a short-term basis, even if that capacity should be available for long-term contracting.[687] We explain our decisions on DBIM's proposed short-term capacity allocation process in Table 8.

Table 8 Allocating short-term available capacity—decision

Provision in the 2019 DAU	*Analysis and decision*
New process for allocating short-term capacity—A process has been included for allocating 'short-term available capacity', which is defined as 'Available System Capacity, which is commencing within the next 12 months and that is not able to be renewed' (s. 5.4 and sch. G).	The DBCT User Group said DBIM should be required to offer long-term capacity (with associated renewal rights) whenever it is available, because this would be consistent with the efficient operation of the Terminal, the long-term nature of mining investments, and the interests of all users where socialisation continues.[688] DBIM said that greater prescription and clarity was unnecessary, noting that limited capacity was expected to become available, and that it was not able to offer long-term capacity as short-term capacity.[689] DBIM said it wrote to the DBCT User Group to better understand its concerns but did not receive a response.[690] In the draft decision, we said the definition of 'short-term available capacity' did not appear to clearly distinguish it from capacity that would be available for long-term contracting, but we also noted it was not clear that DBIM would be incentivised to offer long-term capacity as short-term capacity.[691] In response to the draft decision, the DBCT User Group said that DBIM was incentivised to contract on a short-term basis, as some users would likely be willing to pay a higher price for that capacity, while access holders would accept volume risk if the capacity was not used (due to socialisation).[692] DBIM disagreed, arguing it could not choose the contract length, because it is required to offer access to the first access seeker in the queue for the length of time requested.[693] In our view, there is insufficient justification to require DBIM to offer capacity that becomes available on a long-term basis. While DBIM may be able to obtain higher access charges through short-term contracts, long-term contracts mitigate the risk

[686] DBCTM, sub. 1, pp. 59, 67.
[687] DBCT User Group, sub. 2, pp. 69–70, sub. 11, p. 34, sub. 13, pp. 66–67.
[688] DBCT User Group, sub. 13, pp. 66–67, sub. 16, p. 46.
[689] DBCTM, sub. 10, p. 33. DBIM also said it would be inappropriate for access seekers to obtain evergreen renewal rights by signing short-term agreements, because this may create unintended incentives for capacity hoarding. However, stakeholders did not appear to request such a provision.
[690] DBCTM, sub. 12, pp. 41–43, appendix 3, pp. 1–2, 4.
[691] QCA, *DBCT Management's 2019 draft access undertaking*, draft decision, August 2020, pp. 108–109.
[692] DBCT User Group, sub. 13, pp. 66–67, sub. 16, p. 46.
[693] DBCTM, sub. 15, pp. 43–44.

Provision in the 2019 DAU	*Analysis and decision*
	of DBIM not recovering the costs associated with its long-lived sunk investments. Long-term contracts may become even more important to DBIM as a risk management tool, given our decision that socialisation measures—where volume risk is borne by access holders as a group—should be removed from the 2019 DAU (see Chapter 5). In any event, to the extent that capacity is available to contract on a long-term basis, DBIM may breach its obligations in the QCA Act and the 2019 DAU if it fails to meet the requirements of access seekers that seek to contract on a long-term basis. The obligations include: • overarching principles to satisfy the reasonable requirements of access seekers (s. 5.1(e)) and negotiate agreements in good faith (s. 5.1(c); s. 100(1) of QCA Act) • processes requiring DBIM to accommodate access seekers' requirements when capacity becomes available (for example, ss. 5.1(e), 5.4(d)–(e), 5.5, 12.4). We consider that further protections for access seekers are unnecessary, because their interests are sufficiently protected and appropriately balanced against the interests of DBIM (ss. 138(2)(b), (c), (e) of the QCA Act). Our decision is that DBIM's proposed mechanism is appropriate to be approved, subject to DBIM improving the operation of the mechanism by amending certain timeframes (as discussed below).
Offering capacity to the queue—Under section 5.4(d), when short-term capacity becomes available, DBIM will: • notify each access seeker in the queue of the commencement date, relevant tonnage, and period available • issue an indicative access proposal to the first access seeker in the queue.	The DBCT User Group said the process for offering short-term capacity lacked clarity. For example, it was not clear whether capacity would be offered as a single block or split into smaller blocks.[694] DBIM said that prescriptive rules may not account for every scenario and could be inefficient or unworkable.[695] In our view, maintaining flexibility is appropriate at this time, particularly when the mechanism has not been tested. We consider that DBIM's proposal appropriately balances the interests of DBIM and access seekers (ss. 138(2)(b), (c), (e) of the QCA Act) and so our decision is that DBIM's proposal is appropriate to be approved.
Timeframe to deliver signed agreement—After receiving notification that short-term capacity is available, access seekers have 30 days to deliver a signed access agreement, and any required security (s. 5.4(e)(5)).	The DBCT User Group suggested extending the timeframe to enable access seekers to organise the relevant documents and security. For contracts shorter than five years, it suggested 60 days, and for contracts longer than five years, it suggested 90 days.[696] DBIM said it was comfortable adopting the timeframes suggested by the DBCT User Group (ss. 138(2)(b), (c), (e), (h) of the QCA Act).[697] We consider the 2019 DAU should be amended to include those timeframes, consistent with DBIM's revised drafting.[698]

[694] DBCT User Group, sub. 2, pp. 69–70, sub. 11, p. 34.
[695] DBCTM, sub. 12, p. 43.
[696] DBCT User Group, sub. 2, p. 70.
[697] DBCTM, sub. 10, p. 34, sub. 12, appendix 1, pp. 5, 8.
[698] See the proposed amendment to section 5.4(e)(5) and consequential amendments to sections 5.4(f) and 5.4(g)(1) (DBCTM, sub. 12, appendix 6).

Provision in the 2019 DAU	*Analysis and decision*
Removal from the queue—Access seekers will not be removed from the queue if they do not take up short-term available capacity (s. 5.4(i)(2)).	DBIM said its proposal would protect those access seekers that only seek long-term capacity.[699] The DBCT User Group agreed with the proposal, for the reasons given by DBIM.[700] We consider DBIM's proposal is appropriate to be approved, noting it is in the interests of access seekers (ss. 138(2)(b), (c), (e) of the QCA Act).
Timeframe to start negotiations after indicative access proposal—An access seeker intending to progress its application for short-term available capacity is required to notify DBIM of its intention within 14 days of receiving an indicative access proposal (s. 5.6(a)).	The DBCT User Group suggested 10 business days would be appropriate to account for periods with several public holidays.[701] DBIM said it was comfortable adopting the timeframe proposed by the DBCT User Group.[702] Noting stakeholder support (ss. 138(2)(b), (c), (e), (h) of the QCA Act), we consider that 10 business days is an appropriate timeframe.

11.4 Expansion process (various sections in the 2019 DAU)

DBIM may expand the Terminal if there is insufficient capacity to meet the requirements of access seekers in the queue. In early 2018, DBIM started the process of expanding capacity to satisfy current demand (in the queue) and future demand.[703] The 2019 DAU provides a framework and processes for undertaking expansions. Among other matters, there are processes dealing with the funding of feasibility studies, negotiating and signing conditional access agreements, and the QCA's involvement in making price rulings and assessing the prudency of capital expenditure. We explain our decisions on provisions relevant to the expansion process in Table 9.

Table 9 Expansion process—decision

Provision in the 2019 DAU	*Analysis and decision*
Invitation to enter into a conditional access agreement—When there is insufficient capacity within the next five years to satisfy the requirements of access seekers in the queue,	The DBCT User Group said that access seekers should not be invited to enter into a conditional access agreement until the relevant expansion is sufficiently defined through feasibility studies.[704] DBIM did not support the DBCT User Group's

[699] DBCTM, sub. 1, p. 59.
[700] DBCT User Group, sub. 2, p. 70.
[701] DBCT User Group, sub. 2, p. 75.
[702] DBCTM, sub. 10, p. 40, sub. 12, appendix 1, pp. 5, 13.
[703] DBCTM, sub. 1, p. 24; Dalrymple Bay Infrastructure Limited, *Prospectus—Dalrymple Bay Infrastructure Limited*, November 2020, pp. 80–84.
[704] DBCT User Group, sub. 9, p. 39, sub. 11, p. 36.

Provision in the 2019 DAU	*Analysis and decision*
such that an expansion may be justified, DBIM will invite each access seeker to enter into a conditional access agreement. A conditional access agreement is an access agreement that is conditional on capacity being delivered by an expansion (s. 5.4(l)).	suggestion, saying it could result in unnecessary expenditure on feasibility studies, given the way the expansion process interacts with the accelerated process for access holders to exercise options to renew their agreements.[705] If DBIM receives an access application that cannot be met by the existing Terminal unless access holders waive their options to extend their agreements, DBIM may bring forward the date by which access holders are required to exercise or waive those options[706] (as discussed further in Table 10 below). If sufficient capacity becomes available through this process, the expansion may no longer be required. DBIM said that the DBCT User Group's suggested amendment would mean feasibility studies need to be completed before the accelerated options process was complete. This is because an access application must be converted into an access agreement within three months of the completion of the accelerated options process, for the exercise/waiving of options to take effect.[707] Our view is that DBIM's proposal is appropriate to be approved. An expansion may not need to proceed if sufficient capacity becomes available because access holders waive their options, meaning inefficient expenditure on feasibility studies may be avoided (ss. 138(2)(a), (d), (g) of the QCA Act). As DBIM may be able to recover the costs of feasibility studies from access seekers through underwriting agreements, avoiding those costs is also likely to be in the interests of access seekers (s. 138(2)(e) of the QCA Act).
Conditions precedent in conditional access agreements—An access seeker may make an offer to enter into a conditional access agreement that is subject to any condition precedent specified by DBIM, which relates to the matters in s. 5.4(l)(3). The agreement will terminate if a relevant condition precedent is not fulfilled within a reasonable period (s. 5.4(l)).	The DBCT User Group said DBIM should be compelled (rather than have discretion) to offer the conditions precedent.[708] It was concerned about the requirement for access seekers to contract for capacity that may not meet their needs (in terms of cost or timing), or for which they are unable to obtain matching rail rights.[709] For the current expansion, DBIM said that the issues raised by the DBCT User Group were addressed by the termination provisions in the conditional access agreement and the access application to which the conditional access agreement relates.[710] However, it is not clear whether DBIM was referring to provisions in recently signed conditional access agreements or provisions in the 2019 DAU. Stakeholders did not elaborate on their positions in response to the draft decision. We are concerned that introducing additional requirements without understanding the relevant circumstances of an expansion may distort investment incentives and lead to inefficient risk-sharing (ss. 138(2)(a), (b), (c), (d), (e) of the QCA Act). Therefore, our decision is that it is appropriate to approve DBIM's proposal.

[705] DBCTM, sub. 10, pp. 28–29.
[706] Under clause 20(b) of existing user agreements (where those agreements are consistent with the 2006, 2010 or 2017 SAA).
[707] See cl. 20(e) of the 2006, 2010 or 2017 SAA.
[708] DBCT User Group, sub. 11, pp. 35–36, sub. 13, p. 67.
[709] DBCT User Group, sub. 11, pp. 35–36.
[710] DBCTM, sub. 10, p. 27.

Provision in the 2019 DAU	*Analysis and decision*
Terms of an underwriting agreement—Unless otherwise agreed between the parties, an underwriting agreement[711] must be on the terms of the standard underwriting agreement approved by the QCA (s. 5.10(q)(9)).	The DBCT User Group initially said underwriting agreements should define the expansion to be studied and the funding envelope for the study[712], but later acknowledged the disclosure was provided for in the standard underwriting agreement approved by the QCA in February 2020. [713, 714] In its submission to the draft decision, the DBCT User Group appeared to raise a new concern that the disclosure was not useful because the estimated study costs did not bind DBIM, and DBIM had the right to vary the scope at any time and for any reason.[715] The DBCT User Group did not, however, suggest amendments to the 2019 DAU to address these concerns. No objections to DBIM's proposed standard underwriting agreement were raised during the consultation period before it was approved. The approved agreement also includes some protections for access seekers in the event of scope and cost variations.[716] After considering submissions and the interests of access seekers and DBIM (ss. 138(2)(b), (c), (e) of the QCA Act), our decision is that DBIM's proposal is appropriate to be approved.

11.5 Terms and conditions of access (various sections in the 2019 DAU)

DBIM may provide access under the terms of the standard access agreement, which forms part of the 2019 DAU. The issues we have identified for consideration are the role, and some of the specific terms, of the standard access agreement (see Table 10).

Table 10 Standard access agreement—decision

Provision in the 2019 DAU	*Analysis and decision*
Role of the standard access agreement (ss. 5.4(e)(5), 5.4(h), 13.1)	
DBIM may seek—or in some cases require, acting reasonably—terms and conditions for providing access that differ from the terms and	The DBCT User Group said that allowing DBIM to require agreement on different terms meant the purpose of the standard access agreement may be undermined. The DBCT User Group considered the purpose of the standard access agreement was to provide certainty as to the terms DBIM could require, while allowing access seekers to agree to variations.[717]

[711] An underwriting agreement enables DBIM to recover the costs of feasibility studies if an expansion does not proceed (sch. G).
[712] DBCT User Group, sub. 9, p. 39.
[713] DBCT User Group, sub. 13, p. 68.
[714] DBIM said the standard underwriting agreement for the 8X expansion was issued to access seekers in February 2020 (DBCTM, sub. 10, pp. 28, 45).
[715] DBCT User Group, sub. 13, p. 68.
[716] See, for instance, clauses 4.2 and 4.3 of the agreement.
[717] DBCT User Group, sub. 11, pp. 36–37, sub. 13, p. 67.

Provision in the 2019 DAU	*Analysis and decision*
conditions in the standard access agreement (ss. 5.4(e)(5), 5.4(h), 13.1).	Section 13.1(c) provides for access seekers to contract on terms that are substantially the same as the terms in the standard access agreement. To the extent that different terms are sought by either party, section 13.1(c) clarifies that the matter be referred for arbitration if the parties cannot agree. However, section 5.4(e)(5)(A) refers to an access seeker contracting on the terms of the standard access agreement or, if required by DBIM, acting reasonably, on other terms agreed between DBIM and the access seeker.[718] In the draft decision, we said it was unclear what DBIM intended by references to it 'requiring' terms that are different to the standard access agreement, which are then agreed.[719] While DBIM acknowledged the drafting may suggest it has the power to unilaterally require different terms, it did not consider this interpretation was correct. It argued the provisions do not require access seekers to accept different terms, but rather provide flexibility for the parties to depart from the standard access agreement if it is not fit for purpose. DBIM also said the standard access agreement retained its primary purpose of providing certainty to access seekers, as the terms of that agreement would be fit for purpose in most circumstances, and DBIM would rarely (if ever) seek to negotiate different terms. Nevertheless, DBIM said it would be prepared to change the relevant wording from 'if required by DBIM' to 'if proposed by DBIM'.[720] The DBCT User Group said that DBIM's proposed amendments were insufficient, arguing that access seekers should be entitled to the terms of the standard access agreement or other terms that are 'agreed' between the parties, not 'proposed' by DBIM.[721] We do not consider it appropriate for DBIM to have the ability to require terms that are substantially different to those in the standard access agreement, as this would not provide an appropriate balance between the legitimate interests of DBIM and the interests of access seekers (ss. 138(2)(b), (c), (e) of the QCA Act). It is unlikely that the 2019 DAU provides for DBIM to require material departures from the standard access agreement, given that section 13.1(c) provides an overarching ability for access seekers to require terms that are substantially consistent with the standard access agreement. Nevertheless, to remove doubt, DBIM should amend the 2019 DAU to remove the phrase 'if required by DBCT Management, acting reasonably' from the relevant sections.[722] Clarifying the drafting is likely to be in the interests of all parties (ss. 138(2)(b), (c), (d), (e) of the QCA Act).
Terms of standard access agreement (sch. B)	
Contract obligations during disputes—The parties must continue to perform their	DBIM said the proposal ensures continuity and is a market standard clause for dispute frameworks.[723] The DBCT User Group supported the proposal.[724] DBIM's proposal provides certainty to the contracting parties (ss. 138(2)(b), (c), (e), (h) of the QCA Act) and is appropriate to be approved.

[718] Section 5.4(h) is drafted in a similar way.
[719] QCA, *DBCT Management's 2019 draft access undertaking*, draft decision, August 2020, p. 107.
[720] DBCTM, sub. 12, pp. 47–48.
[721] DBCT User Group, sub. 13, p. 67, sub. 16, p. 46.
[722] Sections 5.4(e)(5)(A)(ii) and 5.4(h).
[723] DBCTM, sub. 1, p. 65.
[724] DBCT User Group, sub. 2, p. 55.

Provision in the 2019 DAU	*Analysis and decision*
obligations under the agreement, despite the existence of a dispute (sch. B, cl. 15.7).	
Requirement to exercise contract renewal option early—Where there is excess demand for capacity, DBIM may bring forward the date by which access holders are required to exercise or waive their options to renew their agreements.[725] DBIM must notify access holders in the order of their agreement expiry dates, starting with the earliest expiring agreement. Notices may be given to access holders at the same time if their agreements expire within six months of each other. Each access holder (or tranche of access holders) has 90 days to exercise/waive their option before the next notice can be issued (s. 5.4(n) and sch. B, cl. 20).	We sought stakeholders' views about the workability of these provisions, given they had recently been applied in the context of the 8X expansion project. We particularly sought feedback about whether the requirement to provide each tranche of access holders with 90 days to exercise their options may delay the expansion process.[726] DBIM generally considered the process had worked efficiently but said there may be benefit in removing the requirement to enter into an access agreement for the outcome of the renewal process to take effect (sch. B, cl. 20(e)). DBIM said this would help with early planning for expansions, while allowing conditional access agreements to be executed later. However, DBIM acknowledged the removal of the requirement would only apply to future access holders, given the requirement will continue to apply in existing agreements.[727] Stakeholders held different views about the 90-day timeframe. The DBCT User Group said the timeframe was too short, particularly when making decisions about likely port needs several years ahead[728], while DBIM said the timeframe could possibly be shortened.[729] Taking into account stakeholders' comments (ss. 138(2)(b), (c), (e), (h) of the QCA Act), we do not consider it appropriate to require amendments to the process at this time. The benefits of amending a process that will only apply to new access seekers appear to be limited, while applying different processes to existing access holders and new access seekers may increase complexity. Nevertheless, it may be appropriate to consider this matter as part of a future review.

[725] Otherwise, access holders can exercise their options at any time up to 12 months before the agreement expires (cl. 20(a) of the 2017 SAA and 2019 DAU SAA).
[726] QCA, *DBCT Management's 2019 draft access undertaking*, draft decision, August 2020, p. 108.
[727] DBCTM, sub. 12, p. 44.
[728] DBCT User Group, sub. 13, p. 67. We also acknowledge the DBCT User Group's concerns that DBIM may not have properly followed the process set out in the existing user agreements when that process was recently applied. However, this is a contractual matter that would need to be resolved in accordance with the terms of the agreement.
[729] DBCTM, sub. 12, p. 44.

11.6 Other provisions

Table 11 provides our analysis and decisions on other non-pricing provisions in the 2019 DAU.

Table 11 Other provisions—decision

Provision in the 2019 DAU	*Analysis and decision*
Amendments to the undertaking (s. 1.6)	
If the 2017 AU is amended in accordance with the QCA Act before the 2019 DAU is approved, DBIM intends to apply to amend the undertaking to reflect those changes (s. 1.6(b)).	The DBCT User Group did not support including this provision, because it did not know what amendments DBIM would be proposing.[730] Acknowledging the DBCT User Group's concern, DBIM agreed to remove the provision, as it had no practical effect.[731] While DBIM's proposal only records an intention and is unlikely to have any adverse effects on access seekers or access holders, the 2019 DAU should be amended to remove the provision, reflecting DBIM's agreement (ss. 138(2)(b), (c), (e), (h) of the QCA Act).
Operation and maintenance contract (s. 3.3 and sch. I of the 2017 AU)	
Unlike in the 2017 AU, there is no explicit requirement for DBIM to maintain the operation and maintenance contract (OMC)[732] or to ensure the contract terms remain substantially consistent with the terms specified in the undertaking (s. 3.3 and sch. I of the 2017 AU).	DBIM considered that access holders were adequately protected, because DBCT PL will remain as the Operator (s. 3.2), and any amendments to the contract would need to be negotiated and agreed with DBCT PL.[733] The DBCT User Group did not support DBIM's proposal, on the basis that the independent Operator is important to users and underpins fundamental parts of the undertaking and access agreements. It also said section 3.3 provided users with certainty about the operation and maintenance of the Terminal and the terms of the Operator's appointment.[734] While DBIM maintained its view that section 3.3 was unnecessary, it was prepared to reinstate the provision, given the DBCT User Group's concerns.[735] Noting DBIM's agreement, and taking into account the interests of access seekers and access holders (ss. 138(2)(b), (c), (e), (h) of the QCA Act), the 2019 DAU should be amended to reinstate the relevant provisions from the 2017 AU.[736]

[730] DBCT User Group, sub. 2, p. 66.
[731] DBCTM, sub. 10, p. 30, sub. 12, appendix 1, p. 5 and appendix 6, s. 1.6.
[732] Under the OMC, DBIM has engaged DBCT PL (which is owned by access holders) to operate and maintain the Terminal on a day-to-day basis.
[733] DBCTM, sub. 1, pp. 58, 67.
[734] DBCT User Group, sub. 2, pp. 66–67.
[735] DBCTM, sub. 10, p. 31, sub. 12, appendix 1, p. 5.
[736] Some amendments to DBIM's revised drafting (DBCTM, sub. 12, appendix 6, s. 3.3 and sch. J) are necessary to align with the drafting in the 2017 AU.

Provision in the 2019 DAU	*Analysis and decision*
Content of access applications and renewal applications (ss. 5.2, 5.3(A), sch. A)	
Access commencement date in renewal application—The renewal application must include a revised commencement date for access, where the previously nominated date has now passed (s. 5.3A(a)(1), sch. G).	DBIM said its proposal would ensure applications remain up to date and enable the notifying access seeker process to operate as intended.[737] The DBCT User Group and New Hope Group generally supported the proposal.[738] However, to prevent the revised commencement date from also being in the past, the DBCT User Group suggested replacing the proposed drafting of section 5.3A(a)(1) with the following: a revised date for commencement of Access which must be no earlier than 1 September following the date of the Renewal Application. The DBCT User Group also suggested clarifying the definition of 'renewal application' (sch. G), as follows: Renewal Application means an application to renew an Access Application made under section 5.3A. DBIM agreed with these suggested drafting amendments.[739] We consider the amendments will improve the clarity and workability of the drafting, which is in the interests of all parties (ss. 138(2)(b), (c), (e), (h) of the QCA Act).
Information required in application—DBIM proposed the following changes to the templates in the 2017 AU for access applications and renewal applications (s. 5.2, sch. A): • clarifying that the commencement date for the delivery of coal to the Terminal must be no later than five years from the application date (consistent with s. 5.3(d)(2)(A))	DBIM said that the additional requirements would add clarity and encourage only those access seekers with viable projects to submit access applications, which would promote the efficient management of the queue and utilisation of capacity.[740] New Hope Group supported the proposal and, along with the DBCT User Group, acknowledged the requirement to demonstrate project readiness would maintain the integrity of the queue.[741] Nevertheless, the DBCT User Group queried the requirement for information about the status of a mine's environmental approval, noting there was already a requirement to provide information on progress to obtain 'necessary approvals'.[742] In earlier submissions, DBIM argued the additional information would help to assess whether the mine would be operational by the requested commencement date.[743] Following the draft decision, DBIM proposed to remove the separate requirement to provide information regarding environmental approvals on the basis that 'necessary approvals' would capture that information.[744, 745] We consider it appropriate that this separate requirement be removed, in line with DBIM's revised drafting.[746]

[737] DBCTM, sub. 1, p. 59.
[738] DBCT User Group, sub. 2, p. 68; New Hope Group, sub. 3, p. 13.
[739] DBCTM, sub. 10, p. 32, sub. 12, appendix 1, pp. 5–6 and appendix 6, s. 5.3A(a)(1), sch. G.
[740] DBCTM, sub. 1, pp. 64–65.
[741] New Hope Group, sub. 3, p. 13; DBCT User Group, sub. 2, pp. 68–69, 77.
[742] DBCT User Group, sub. 2, pp. 68–69, sub. 13, p. 66.
[743] DBCTM, sub. 1, p. 65, sub. 10, p. 32.
[744] The definition of 'approvals' in the 2019 DAU includes environmental approvals and licences (sch. G).
[745] DBCTM, sub. 12, appendix 1, pp. 5, 7 and appendix 3, pp. 1–3.
[746] DBCTM, sub. 12, appendix 6, sch. A.

Provision in the 2019 DAU	*Analysis and decision*
• only permitting ramp-up volumes to the start of the fourth financial year • requiring information about the status of the mine's environmental approval.	Noting stakeholder support, DBIM's proposal is otherwise appropriate to be approved, because it promotes the efficient use of the Terminal and provides an appropriate balance between the interests of DBIM and access seekers (ss. 138(2)(a), (b), (c), (e) of the QCA Act).
Renewal/expiry of access applications (s. 5.3)	
Application expiry date—Access applications will expire on 31 August each year, unless they are renewed under s. 5.3A (s. 5.3(f), sch. G).	DBIM said its proposal would provide for the efficient administration of the application process.[747] The DBCT User Group generally supported the proposal, observing that a uniform date would reduce the administrative burden and improve certainty for all supply chain participants. However, it suggested the following amendments:[748] • Paragraph (b) of the definition of 'access application' (sch. G) should extend to section 5.3 to clarify that applications submitted before the 2019 DAU commences are access applications for the purposes of section 5.3. • Section 5.3(f) should be simplified so that it reads: Subject to an Access Application or Renewal Application (as applicable) lapsing or otherwise being rejected by DBCT Management in accordance with this Undertaking, any Access Application will expire on the next occurring 31 August, unless renewed under section 5.3A. DBIM supported these proposed amendments.[749] We consider these amendments will clarify and simplify the provisions, which is in the interests of all parties (ss. 138(2)(b), (c), (e), (h) of the QCA Act).
Advising access seeker of expiry date—Unlike in the 2017 AU, DBIM is not required to advise an access seeker that its access application is about to expire (s. 5.3(g) of the 2017 AU).	The DBCT User Group and New Hope Group did not support the proposed change, because they did not consider the current notification requirements were an unreasonable burden on DBIM, given DBIM's proposal to standardise application expiry dates.[750] The DBCT User Group also suggested that notifications be sent at least 60 days before the expiry date to ensure access seekers did not inadvertently fail to renew their applications. DBIM considered that access seekers should be able to manage renewal timeframes, particularly with standardised expiry dates.[751] In our view, it is reasonable for access seekers to be responsible for tracking and managing expiry dates. Nevertheless, reflecting DBIM's agreement to reinstate the notification requirement given stakeholder concerns[752], DBIM

[747] DBCTM, sub. 1, pp. 58, 67.
[748] DBCT User Group, sub. 2, p. 67.
[749] DBCTM, sub. 10, p. 31, sub. 12, appendix 1, p. 5 and appendix 6, ss. 5.3(f), sch. G.
[750] DBCT User Group, sub. 2, p. 68; New Hope Group, sub. 3, p. 13.
[751] DBCTM, sub. 1, pp. 58, 67, sub. 10, p. 32.
[752] DBCTM, sub. 10, p. 32, sub. 12, appendix 1, pp. 5–6.

Provision in the 2019 DAU	*Analysis and decision*
	should amend the 2019 DAU to include the notification requirement in a manner consistent with its revised drafting, which is in the interests of access seekers (s. 138(2)(e) of the QCA Act).[753]
Dispute on re-ordering the queue (s. 5.4(w))	
An access seeker must raise a dispute in relation to DBIM's intended re-ordering of the queue within 15 business days of being notified of DBIM's intention.	DBIM said the proposed timeframe provides for disputes to be raised and resolved in a timely manner, giving certainty to access seekers.[754] The DBCT User Group supported the proposal.[755] We consider DBIM's proposal is in the interests of access seekers (s. 138(2)(e) of the QCA Act) and is appropriate to be approved.
Access transfers (s. 5.13(a))	
The criteria DBIM must apply when deciding whether to consent to access transfers are alternative, not cumulative, criteria.	DBIM said its proposal amends the 2017 AU to clarify the intended operation of the section.[756] The DBCT User Group supported DBIM's proposal and agreed that the criteria were meant to be alternatives.[757] We consider that DBIM's proposal is appropriate to be approved, as it clarifies the operation of this section, which is in the interest of all parties (ss. 138(2)(b), (c), (e), (h) of the QCA Act).
Terminal regulations (s. 6)	
The terminal regulations govern procedures for operating the Terminal and providing services under access agreements. If the Operator would like to amend the terminal regulations, it must obtain DBIM's consent. Before deciding whether to provide consent, DBIM must conduct reasonable consultation with stakeholders and consider the request against specified criteria.	In its initial submission, the DBCT User Group said it was difficult for users to understand the impacts of proposed changes to the terminal regulations. To address this concern and to improve the assessment of the proposed changes by DBIM (and, in the event of any objections, the QCA), the DBCT User Group suggested the following amendments to the 2019 DAU: > where changes [to the terminal regulations] are proposed that would be reasonably anticipated to impact on ordering, scheduling, plann[ing] or capacity, … those changes should only be able to be proposed where the operator has first obtained and provides to access holders and access seekers in the queue robust and independent modelling about how the changes would impact on users, terminal capacity and terminal efficiency.[758] We encouraged the DBCT User Group and other stakeholders to discuss their concerns with DBIM and provide further comments.[759] In response to the draft decision, the DBCT User Group said that its members did not have an aligned view on

[753] DBIM's revised drafting included a notification timeframe of two months prior to the relevant 31 August (DBCTM, sub. 12, appendix 6, s. 5.3(g)), which aligns with the DBCT User Group's preferred timeframe (DBCT User Group, sub. 2, p. 68, sub. 13, p. 66).
[754] DBCTM, sub. 1, pp. 62–63, 68.
[755] DBCT User Group, sub. 2, pp. 74–75.
[756] DBCTM, sub. 1, p. 69, sub. 10, p. 41.
[757] DBCT User Group, sub. 2, p. 76.
[758] DBCT User Group, sub. 2, pp. 54–55.
[759] QCA, *DBCT Management's 2019 draft access undertaking*, draft decision, August 2020, p. 117.

Provision in the 2019 DAU	*Analysis and decision*
Stakeholders have 30 days to lodge an objection to DBIM's decision with the QCA, and the QCA must make a determination in accordance with the dispute resolution procedures (in s. 17).	an appropriate approach, and it declined to comment further.[760] DBIM noted the comprehensive process and extensive time to make the recent amendments to the terminal regulations and said introducing further requirements could be costly and delay amendments that would improve the efficient operation of the Terminal.[761] Our decision is that DBIM's proposal is appropriate to be approved. It has not been established that the amendments that the DBCT User Group initially proposed would improve the efficient operation of the Terminal and we acknowledge that access seekers and access holders may hold different views about the appropriateness of those amendments (ss. 138(2)(a), (b), (c), (e), (h) of the QCA Act). However, stakeholders may wish to reflect on lessons from the recent terminal regulation amendment process and discuss potential improvements, which could be considered as part of a future DAU or DAAU process.
Reporting tonnage information to Aurizon Network (s. 8.4(c))	
DBIM can share information on changes in contracted tonnage with the below-rail provider (currently Aurizon Network). This includes information on individual access holders that do not exercise an option to renew their contract tonnage.	DBIM said the ability to identify access holders would assist with coordination and promote supply chain efficiency.[762] The DBCT User Group supported providing aggregated information but not information on individual access holders, which it considered to be confidential. It said measures were already in place to address rail and port alignment issues, including rail capability forming part of the access application process, and requirements in the Aurizon Network access undertaking for port capacity to be demonstrated before rail capacity could be contracted.[763] DBIM said it was unable to identify any legitimate reason why disaggregated information should not be shared with Aurizon Network.[764] Aurizon Network supported provisions to promote supply chain efficiency, including the objectives of section 8.4(c). It said the provisions in Aurizon Network's undertaking were not sufficient to achieve supply chain alignment, given differences in rail and port contract terms, and the ability of users to transfer port capacity after contracting rail capacity.[765] In a submission to the draft decision, the DBCT User Group reiterated its view that DBIM's proposal was inappropriate, adding that it would be more appropriate for Aurizon Network and DBIM to consider such measures as part of a wider package to improve supply chain alignment.[766] Measures to improve supply chain efficiency are also likely to promote the efficient operation of the Terminal. However, it is unclear how the provision would lead to improvements in supply chain efficiency. We also acknowledge the concerns raised by the DBCT User Group about the confidentiality of the information that may be shared. We consider that DBIM should amend section 8.4(c) so that DBIM cannot provide information relating to individual access holders that is not publicly

[760] DBCT User Group, sub. 13, p. 66.
[761] DBCTM, sub. 12, pp. 45–46.
[762] DBCTM, sub. 1, pp. 64, 69, sub. 10, p. 42.
[763] DBCT User Group, sub. 2, p. 76, sub. 13, p. 68.
[764] DBIM said it wrote to the DBCT User Group after the draft decision, seeking to understand its concerns and identify potential solutions, but it did not receive a response (DBCTM, sub. 12, pp. 48–49 and appendix 3, pp. 1–2, 7).
[765] Aurizon Network, sub. 14, pp. 1–2.
[766] DBCT User Group, sub. 16, p. 46.

Provision in the 2019 DAU	*Analysis and decision*
	available, without obtaining consent. DBIM and access holders are well placed to address these issues, as improvements to supply chain efficiency are likely to be in the interests of all parties (ss. 138(2)(a), (b), (c), (d), (e), (h) of the QCA Act).[767]
Ring-fencing (s. 9 and others)	
All references to the 'Trading SCB' and related provisions have been removed, and relevant consequential amendments have been made.[768]	DBIM said the proposed changes reflect its decision to cease the activities of the Trading SCB from September 2018.[769] The DBCT User Group supported the proposal, subject to the inclusion of a requirement that DBIM (and its related bodies corporate) would not own any supply chain businesses.[770] DBIM initially agreed with the DBCT User Group's proposed amendment[771] but subsequently advised that an amendment was not necessary, because the requirement already exists.[772] Noting that we consider section 9.1 of the 2019 DAU to be sufficient to address the DBCT User Group's concerns (ss. 138(2)(e), (h) of the QCA Act), we consider that DBIM's proposal is appropriate to be approved.[773]
Capacity determinations (s. 12.1)	
Consultation requirements—If the Integrated Logistics Company (ILC) is the independent expert in relation to a capacity estimation, it will be assumed to have consulted with its members (s. 12.1(h)).	DBIM said the intention of its proposal was to improve the efficiency of the consultation process, noting that a requirement to consult with all access holders could extend timeframes and delay contracting.[774] The DBCT User Group disagreed with DBIM's proposal, arguing there would be no improvement in efficiency, because DBIM would have to consult with users that were not members of the ILC. It also said that DBIM could avoid transparency because some discussions between DBIM and the ILC were not disclosed to ILC members.[775] In the draft decision, we encouraged stakeholders to discuss their concerns and attempt to reach consensus about a possible way forward.[776] While DBIM said it did not receive a response to its attempt to engage with the DBCT User Group, it

[767] We also note the requirement for DBIM to engage with stakeholders to develop and implement mechanisms to improve supply chain efficiency and to submit a DAAU to implement agreed mechanisms (s. 14).
[768] In the 2017 AU, the Trading SCB is defined as 'a Supply Chain Business in the Brookfield Group that solely engages in the trading of secondary capacity at the Terminal and which includes, as at the Commencement Date, Brookfield Port Capacity Pty Ltd ACN 134 741 567' (see sch. G of the 2017 AU).
[769] DBCTM, sub. 1, pp. 64, 69.
[770] DBCT User Group, sub. 2, pp. 66, 76. In response to the DBCT User Group's request, DBIM also provided evidence that the Trading SCB was deregistered in August 2020 (DBCTM, sub. 12, p. 46, appendix 4).
[771] DBCTM, sub. 10, pp. 30, 43.
[772] DBCTM, sub. 12, p. 46.
[773] However, consistent with DBIM's revised drafting (DBCTM, sub. 12, appendix 6), a minor consequential amendment is required to remove section 1.2(b).
[774] DBCTM, sub. 1, pp. 64, 69, sub. 10, p. 43.
[775] DBCT User Group, sub. 2, pp. 76–77, sub. 13, p. 68.
[776] QCA, *DBCT Management's 2019 draft access undertaking*, draft decision, August 2020, pp. 118–119.

Provision in the 2019 DAU	*Analysis and decision*
	nevertheless proposed to remove the consultation assumption (ss. 138(2)(b), (c), (e), (h) of the QCA Act).[777] We consider the 2019 DAU should be amended to reflect DBIM's revised drafting, which removes the relevant provision.[778]
Disputing capacity estimates—The only grounds for disputing or challenging DBIM's capacity estimates are a breach of the undertaking, a breach of an access agreement, or manifest error (s. 12.1(i)).	DBIM said its proposal would promote certainty and avoid unnecessary challenges to the expert's decision.[779] The DBCT User Group opposed the proposal for the following reasons: • The 'manifest error' standard is too high and unclear. • No justification has been provided as to why determinations made in bad faith should no longer be covered. • It is appropriate to retain the ability for users to dispute the estimate, where a material volume of users (by tonnage) object on similar grounds.[780] Given the concerns raised by the DBCT User Group, DBIM said it was prepared to reinstate the 2017 AU drafting.[781] DBIM also proposed a requirement for disputes about the estimate to be made within 30 business days to improve the efficiency of the process and provide certainty to stakeholders.[782] DBIM submitted revised drafting consistent with these positions.[783] Considering the interests of DBIM, access seekers and access holders (ss. 138(2)(b), (c), (e), (h) of the QCA Act), our decision is that the 2019 DAU should be amended to reflect DBIM's revised drafting.
Definition of 'insolvent' (sch. G)	
The definition has been expanded from that contained in the 2017 AU, including to capture additional events. The definition is relevant to the circumstances in which DBIM can issue a negotiation cessation notice (s. 5.8) and remove an access seeker from the queue (s. 5.9).	The definition includes circumstances where an access seeker states that it will substantially decrease the size or scope of its business. We consider that this is not a circumstance that is appropriately covered by the definition and should not, on its own, permit DBIM to cease negotiating with an access seeker or remove an access seeker from the queue. Access seekers may undertake a range of changes to their business and operating model and such changes do not, on their own, provide sufficient indication about the access seeker's creditworthiness or financial position. Our decision is to approve the proposed definition of 'insolvent' but with the phrase 'or will substantially decrease the size or scope of its business' removed. We consider our decision appropriately balances the interests of DBIM, access seekers and access holders (ss. 138(2)(b), (c), (e), (h) of the QCA Act).

[777] DBCTM, sub. 12, appendix 1, pp. 5, 14 and appendix 3, pp. 1–2, 7.
[778] DBCTM, sub. 12, appendix 6, s. 12.1(h)(1).
[779] DBCTM, sub. 1, pp. 64, 69.
[780] DBCT User Group, sub. 2, p. 77.
[781] DBCTM, sub. 10, p. 44, sub. 12, appendix 1, pp. 5, 14.
[782] DBCTM, sub. 12, appendix 1, pp. 5, 14.
[783] DBCTM, sub. 12, s. 12.1(i).

Provision in the 2019 DAU	*Analysis and decision*
Clarifying amendments (various)	
	We require DBIM to make the following amendments to the 2019 DAU: • Clarify the operation of sections 3.1(d) and 5.5(a), consistent with DBIM's revised drafting.[784] • Clarify the drafting in section 5.5(d)(5)(A) to require an initial assessment of access charges, to capture circumstances where no expansion is anticipated.

[784] DBCTM, sub. 12, appendix 6, ss. 3.1(d), 5.5(a).

GLOSSARY

2006 AU	2006 access undertaking
2010 AU	2010 access undertaking
2017 AU	2017 access undertaking
2019 DAU/2019 DBCT DAU	2019 draft access undertaking
2019 SAA/2019 DAU SAA	2019 standard access agreement
AASB	Australian Accounting Standards Board
ACCC	Australian Competition and Consumer Commission
AER	Australian Energy Regulator
APCT	Abbot Point Coal Terminal
ARR	Annual revenue requirement
ARTC	Australian Rail Track Corporation
COAG	Council of Australian Governments
DAAU	draft amending access undertaking
DAU	draft access undertaking
DBCT	Dalrymple Bay Coal Terminal
DBCT Holdings	DBCT Holdings Pty Ltd
DBCT Management/DBCTM	DBCT Management Pty Ltd and DBCT Trustee (now DBIM)
DBCT PL	DBCT Pty Ltd (Operator of the Terminal)
DBT Trust	Dalrymple Bay Terminal Trust
DBCT User Group	Anglo American, BHP Mitsui, BMA, Fitzroy Australia Resources, Glencore, Peabody Energy, Pembroke Resources, QMetco Limited, Stanmore Coal and Whitehaven Coal
DBI Management/DBIM	Dalrymple Bay Infrastructure Management Pty Limited (operator of the Terminal, previously DBCTM)
DISER	Department of Industry, Science, Energy and Resources (Commonwealth)
DNRME	Department of Natural Resources, Mines and Energy
DORC	depreciated optimised replacement cost
FEL	front-end loading
GBRMPA	Great Barrier Reef Marine Park Authority
HPCT	Hay Point Coal Terminal
HVCN	Hunter Valley Coal Network
IAP	indicative access proposal
IEA	International Energy Agency
IMF	International Monetary Fund
IPART	Independent Pricing and Regulatory Tribunal (NSW)

JORC	Joint Ore Reserves Committee
LIDAR	Light Detection and Ranging
mtpa	million tonnes per annum
NECAP	non-expansion capital expenditure
NGL	National Gas Law
NGR	National Gas Rules
OECD	Organisation for Economic Co-operation and Development
OMC	operations and maintenance contract
Operator	DBCT PL
operator	DBIM
PSA	Port Services Agreement
QCA	Queensland Competition Authority
QCA Act	Queensland Competition Authority Act 1997
RAB	regulated asset base
RMI	Resource Management International
SAA	standard access agreement
Terminal	DBCT
TIC	terminal infrastructure charge
WACC	weighted average cost of capital
WAML	weighted average mine life
WCIR	Water Charge (Infrastructure) Rules
WICET	Wiggins Island Coal Export Terminal

ATTACHMENT 1: LIST OF SUBMISSIONS

We received the following submissions during our investigation of DBIM's 2019 DAU. The submission numbers below are used in this final decision for referencing purposes. The submissions are available on the QCA website unless otherwise indicated.

Stakeholder	***Sub. no.***	***Submission***	***Date***
DBCT Management	1	2019 DAU explanatory submission	July 2019
DBCT User Group	2	Submission on the 2019 DAU	September 2019
New Hope Group	3	Submission on the 2019 DAU	September 2019
Whitehaven Coal	4	Submission on the 2019 DAU	September 2019
DBCT Management	5	Further submission on the pricing model	November 2019
DBCT User Group	6	Further submission on the pricing model	November 2019
New Hope Group	7	Further submission on the pricing model	November 2019
DBCT Management	8	Response to the QCA interim draft decision	April 2020
DBCT User Group	9	Response to the QCA interim draft decision	April 2020
DBCT Management	10	Collaborative submission	June 2020
DBCT User Group	11	Collaborative submission	June 2020
DBCT Management	12	Response to the QCA draft decision	October 2020
DBCT User Group	13	Response to the QCA draft decision	October 2020
Aurizon Network	14	Response to the QCA draft decision	October 2020
DBCT Management	15	Cross-submission on the QCA draft decision	December 2020
DBCT User Group	16	Cross-submission on the QCA draft decision	December 2020
DBI Management	17	Letter to the QCA	December 2020
DBCT User Group	18	Letter to the QCA	January 2021

APPENDIX A: AMENDED 2019 DAU

Appendix A sets out the way in which we consider it appropriate for the 2019 DBCT DAU to be amended, subject to the incorporation of any further amendments necessary to correct any demonstrated typographical or cross-referencing errors.

Appendix A to this decision incorporates the attached mark-up to the 2019 DBCT DAU.

APPENDIX B: AMENDED 2019 DAU SAA

Appendix B sets out the way in which we consider it appropriate for the 2019 DBCT DAU SAA to be amended, subject to the incorporation of any further amendments necessary to correct any demonstrated typographical or cross-referencing errors.

Appendix B to this decision incorporates the attached mark-up to the 2019 DBCT DAU SAA.

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