

23 September 2019

Mr Charles Millsted  
Chief Executive Officer  
Queensland Competition Authority  
Level 27, 145 Ann St  
BRISBANE QLD 4001

Online submission: [www.qca.org.au/submissions](http://www.qca.org.au/submissions)

Dear Mr Millsted

## **DBCT DRAFT ACCESS UNDERTAKING – SUBMISSION TO QCA**

### **1. INTRODUCTION**

Whitehaven Coal Limited (**Whitehaven**) expects to seek access to coal handling services provided at the Dalrymple Bay Coal Terminal (**DBCT**) in order to export coal produced at its proposed Winchester South coal mine project in the Bowen Basin, Queensland (the **Project**).

This submission is made to the Queensland Competition Authority (**QCA**) in relation to the 2019 draft access undertaking submitted by DBCT Management Pty Ltd (**DBCT Management**) to the QCA on 1 July 2019 (the **2019 DAU**). Whitehaven welcomes the opportunity to comment on the 2019 DAU.

As a member of the Dalrymple Bay Coal Terminal User Group (**DBCT User Group**), Whitehaven has read and fully supports the submission by the DBCT User Group to the QCA. For the reasons given by the DBCT User Group, the QCA should refuse to approve the 2019 DAU under the *Queensland Competition Authority Act 1997* (Old) (the **QCA Act**).

This submission adds, or emphasises, particular matters concerning the 2019 DAU which are relevant to Whitehaven as a prospective new user of the DBCT. In particular:

- (a) Section 2 describes Whitehaven's position as a likely future access seeker, by reason of the Project; and
- (b) Section 3 sets out Whitehaven's key concerns about the proposal that access seekers each be required to negotiate, in the shadow of arbitration, infrastructure charges at the DBCT.

### **2. THE WINCHESTER SOUTH PROJECT**

Whitehaven is an independent coal producer and currently operates four mines in the Gunnedah Basin in New South Wales.

The Winchester South Project is Whitehaven's first investment in Queensland, with the company having purchased the tenements in 2018. The Project is currently subject to the Queensland Government's major project development assessment process. If the Project is approved, it will involve the development of a new open-cut coal mine 30 km south-east of Moranbah in the Bowen Basin. The Project will also involve the construction of a coal

processing plant and a new rail loop to connect to the Goonyella rail corridor in the Central Queensland Coal Network.

At full capacity, Whitehaven anticipates that the Project will produce 8 to 10 million tonnes of predominantly high quality metallurgical coal for sale to customers per annum. Production is expected to commence by financial year 2024, based on current approval and construction timelines. Accordingly, Whitehaven expects to seek access to the DBCT within the term of the proposed 2019 DAU (ie, prior to 1 July 2026).

The Project has been declared a 'co-ordinated project' under the *State Development and Public Works Organisation Act 1971* (Qld) on the basis of, among other matters, its strategic significance to an area of Queensland.<sup>1</sup>

### 3. **IMPACT OF NEGOTIATE/ARBITRATE MODEL ON NEW ACCESS SEEKERS**

DBCT Management asserts in its submission to the QCA that the negotiate/arbitrate model is appropriate because it places new and existing users on the same footing, in the sense that they will each have access to QCA arbitration if price negotiations fail.<sup>2</sup>

Firstly, for the reasons outlined in the DBCT User Group submission, the QCA should not be satisfied that the negotiate/arbitrate mechanism is "appropriate", for the purposes of the test in section 138(2) of the QCA Act, merely because new and existing users are in the same position in some (or all) respects. The interests of prospective access seekers, such as Whitehaven, are not limited to ensuring that their position is no worse than existing users. That is a necessary - but by no means adequate - feature of an appropriate access undertaking.

Secondly, the negotiate/arbitrate model does not place new and existing users on the same footing. That is so in at least two respects:

- (a) the disadvantages of having to negotiate, and potentially arbitrate, to determine access pricing will disproportionately impact new access seekers. In negotiations with new users, DBCT Management will have far greater access to relevant information, superior means to assess that information and – to use the terminology proposed by DBCT Management – will be less "anxious" than users to quickly reach an agreement that avoids the need for arbitration. This imbalance will result in inefficient negotiating outcomes, costly arbitration, or both, and is precisely the kind of market failure which a regulated tariff can efficiently address; and
- (b) new access seekers would not be on the same footing as existing users, in the sense that existing users were able to initially secure long-term access to the DBCT from a fairer and more favourable position than that proposed in the 2019 DAU. By making this observation, Whitehaven does not mean to suggest that the QCA should not approve any amendment which makes seeking access less attractive or favourable than under a prior undertaking. However, the appropriateness of such amendments must be justified in light of the interest in a stable and predictable regulatory framework.<sup>3</sup> That is particularly important to access seekers such as Whitehaven, who have made substantial investments in Queensland resource projects which are dependent on access to the DBCT and which preceded a major proposed change to the current access regime.

Whitehaven considers that the disadvantages for new access seekers referred to above - and the concomitant advantages for DBCT Management – would principally result from two

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<sup>1</sup> Gazette notice: <http://eisdocs.dsdip.qld.gov.au/Winchester%20South/Initial%20Advice%20Statement/winchester-south-gazette-notice.pdf>

<sup>2</sup> DBCT Management submission, 114 (page 28).

<sup>3</sup> See DBCT User Group submission, 14.7(b) (page 42).

key bargaining imbalances in price negotiations under the 2019 DAU. Those imbalances are described below, from the perspective of a new access seeker.

### 3.1 Information imbalance

Whitehaven supports the submissions made by the DBCT User Group regarding the very significant extent and impact of information asymmetry on commercial negotiations under the proposed 2019 DAU.<sup>4</sup>

The information asymmetry between DBCT Management and new access seekers, such as Whitehaven, will be especially pronounced, given new users:

- (a) will not be shareholders of Dalrymple Bay Coal Terminal Pty Ltd at the time they are seeking access; and
- (b) otherwise do not have any experience in using the services at the DBCT for which they will be negotiating prices. The uncertainty and imbalance created by a lack of familiarity with terminal operations will be particularly significant where DBCT Management negotiates, as it has foreshadowed in its submissions, a premium for any activities which do not conform to the 'efficiency-maximising' base service at the DBCT.<sup>5</sup> It is unclear how DBCT Management would seek to quantify, on an individual-user basis, the value (and projected frequency) of the services identified at paragraph 207 of its submissions, or how it would structure any "*discounts or incentives for operational and logistical improvements*".<sup>6</sup> To say the least, a new access seeker would be at a significant disadvantage in attempting to understand – let alone meaningfully challenge – any modelling proposed by DBCT Management in relation to differentiated aspects of its coal handling activities.

Further, the problem of information asymmetry – including difficulties of the kind identified in (b) above – cannot be overcome by an entitlement for users to request and obtain particular categories of information. The proposed entitlement, in section 5.2(c) of the 2019 DAU, illustrates that fact. That clause allows, for example, access seekers to obtain "*information about*" the costs of providing the relevant service. This entitlement is clearly insufficient to ensure that access seekers are adequately informed in negotiations, including for the reasons outlined at paragraph 15.2 of the DBCT User Group submission. There is significant scope for DBCT Management to adopt its own interpretation of what information it should disclose "about" particular matters. Further, it will be very difficult for new access seekers to identify information that is arguably missing or incomplete.

It will not be sufficient to attempt to modify or expand the categories of information which an access seeker is entitled to obtain from DBCT Management. 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 to challenge those claims in a manner capable of altering DBCT's negotiating position.

The 2019 DAU would defer - for repeated negotiation (and likely arbitration) by different access seekers – complex factual and economic matters which could be resolved more efficiently and fairly by way of an approved reference tariff. The asymmetry in the level of, and means to assess, information during negotiations means that access seekers are likely to either:

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<sup>4</sup> See especially DBCT User Group submission, 15 (page 43-45).

<sup>5</sup> DBCT Management submission, paragraphs 202, 210 (page 45-46).

<sup>6</sup> DBCT Management submission, paragraph 208 (page 45).

- agree to terms that are less favourable than would be reached in a workably competitive market or with a reference tariff; or
- proceed through a lengthy and costly dispute resolution and arbitration process.

The particular outcome of the negotiating process will depend, to some extent, on the balance of incentives discussed below.

### 3.2 Incentives to resolve negotiation and avoid arbitration

The submission by DBCT Management states that a negotiate/arbitrate regime is appropriate where, among other factors:

- (a) DBCT Management lacks the ability or incentive to deny access to the DBCT service;<sup>7</sup> and
- (b) Each party will be "*constrained by the threat of a QCA arbitrated price*" such that "*it is likely that commercial agreement will be able to be reached without resort to arbitration*".<sup>8</sup>

In relation to the first point, that merely excludes the prospect that DBCT would refuse (or threaten to refuse) access altogether – that certainly does not mean negotiation is likely to result in an efficient outcome (or any outcome at all). An assurance against actual or threatened refusals of access is merely the starting point for any regime governing access to a monopoly asset, where prospective users also cannot credibly threaten to take their demand elsewhere.

The observation in (b), however, is directly relevant to the likely outcomes of negotiation – but it incorrectly assumes that the "threat" of arbitration will be felt equally by each party. That is highly unlikely to be the case in any negotiation that occurs under the 2019 DAU. The imbalance in the gravity of that threat, and the corresponding incentive to avoid arbitration, will be very significant for new users who are seeking access in connection with a mine development. That is so for a number of reasons, including:

- (c) **Impact of delays.** A party seeking access for a mine in development will be uniquely sensitive to delays that could impact the progress of a project, including the timing for final investment decisions. DBCT Management will be well aware of the type of, if not the exact, timing pressures on a party that is seeking to lock in access arrangements for a new mine (particularly where that access seeker has already had to commit to taking rail capacity in order to provide the necessary warranty as to rail infrastructure access required by the DBCT Access Application). If an access seeker and DBCT Management were unable to agree on a Terminal Infrastructure Charge during negotiations, the negotiate/arbitrate process under the 2019 DAU could involve:
  - (i) An initial negotiation period of up to 6 months (if none of the other events in section 5.7(a) occur and the negotiation period is not extended by agreement);
  - (ii) A period of up to 10 Business Days in which the matter must be referred to the respective CEOs of each party;
  - (iii) A further period of up to 10 Business Days in which the CEOs must attempt to reach a resolution;

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<sup>7</sup> DBCT Management submission, 154-158 (pages 33-34).

<sup>8</sup> DBCT Management submission, 267, 285 (pages 54, 57).

- (iv) A further period of up to 20 Business Days in which the parties must agree to refer the matter for resolution by an expert or, failing that, refer the dispute to the QCA;
- (v) A possible further period, if the matter is reviewed to an expert, of expert determination; and
- (vi) A further period of up to 6 months for arbitration by the QCA under Division 5, Part 5 of the QCA Act (but potentially more, given the exclusion of certain periods from the time limitation and the possibility of an extension).<sup>9</sup>

DBCT Management's incentive to avoid these 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.

- (d) **Uncertainty of arbitration.** The concerns that new users will have about imbalances in the negotiate/arbitrate process will not necessarily be resolved by proceeding to arbitration. Whitehaven has no confidence that, under the terms of the 2019 DAU, a prospective user and DBCT Management would have equal means to advocate their case before the QCA. As explained in the DBCT User Group submissions, the requirement for the QCA to have regard to any Terminal Infrastructure Charge agreed between DBCT Management and a different access holder is capable of producing both procedural and substantive unfairness in the arbitration process. Procedurally, it is unclear how an access seeker would obtain sufficient information about prior agreements, given the most relevant information will be highly commercially sensitive. Substantively, the outcome of prior negotiations are themselves likely to be favourable to DBCT Management for the reasons discussed in this section.
- (e) **Negotiations after binding agreement is entered.** As DBCT Management observed in its submissions: *"DBCTM is currently fully contracted long term to the System Capacity of 84.2Mtpa41, which is the maximum tonnage that can be contracted under the 2017 AU"*. Accordingly, there is a strong prospect that the process for offers of "Conditional Access Agreements" (section 5.4(l)) or "Notifying Access Seekers" (section 5.4(e)-(k)) will be triggered. In brief, these processes:
  - (i) require access seekers to deliver signed access agreements in a 3 month period or risk removal from the queue (sections 5.4(i)(1), 5.4(l)(5));
  - (ii) provide for the parties to enter a binding access agreement before agreement on the TIC has been reached (5.4(k); 5.4(l)(15)). These processes are a consequence of the proposed negotiate/arbitrate regime and would result in access seekers entering binding, long-term access agreement before the most essential terms have been agreed. In the case of new access seekers, there is a strong prospect that this process would mean they are bound to uncertain access agreements while making other critical project decisions (eg final investment decisions, securing below rail access).

Whitehaven also supports the submissions by the DBCT User Group in relation to the proposal that, in arbitration, the QCA have regard to the Terminal Infrastructure Charge that would be agreed between a buyer and seller of defined services who are each "willing but not anxious".<sup>10</sup> That standard is inappropriate for the DBCT service. Further, for the reasons outlined above, it is highly unlikely that the parties to any actual negotiations under the 2019 DAU would be equally "anxious" (or "knowledgeable", which is conspicuously

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<sup>9</sup> 2019 DAU, sections 5.7(f), 11.3(b), 17.

<sup>10</sup> DBCT User Group submission, 16.1 (page 45).

absent from the test proposed by DBCT Management).<sup>11</sup> A new access seeker will be far more 'anxious' to secure access, as quickly and efficiently as possible, to a facility for which there are no economic substitutes. Negotiations under the 2019 DAU would not meet the standard which DBCT Management itself regards as likely to result in an efficient bargain.

Yours sincerely

*Submitted Electronically*

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**Company Secretary**  
**Whitehaven Coal Limited**

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<sup>11</sup> DBCT Management submission, 193 to 200 (page 42-43). A number of the authorities cited by DBCT Management also use the term "knowledgeable".