

STAKEHOLDER NOTICE

25 October 2019

DBCT Management's 2019 DAU—seeking further stakeholder feedback to inform an interim draft decision

The QCA is seeking further stakeholder feedback to inform an interim draft decision.

Background

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

To date, we have:

- 12 October 2017—issued an initial undertaking notice requiring DBCT Management to submit a DAU by 1 July 2019.
- 11 June 2019—issued a Statement of Regulatory Intent that informed stakeholders how we intended to manage the DAU review process.
- 1 July 2019—received DBCT Management's 2019 DAU and supporting material.
- 5 July 2019—published the 2019 DAU and DBCT Management's supporting material on our website, and issued a notice of investigation and time periods.
- 23 August 2019—issued a Stakeholder Notice, with staff questions, to assist stakeholders in preparing submissions on the 2019 DAU.
- 23 September 2019—received three stakeholder submissions (the initial submissions) on the 2019 DAU.

One important difference between the 2019 DAU and past access undertakings for DBCT is the proposed negotiate/arbitrate model for determining access charges. In previous access undertakings (including the 2017 undertaking), the terminal infrastructure charge (TIC) has been determined by the QCA on an ex-ante basis, as part of the undertaking review. Under the 2019 DAU negotiate/arbitrate model, the TIC would be determined by commercial negotiation, with recourse to arbitration by the QCA if an agreement cannot be reached.

Initial stakeholder submissions

From the initial submissions received, it appears that access seekers and access holders have divergent views from DBCT Management with regard to the appropriateness of the 2019 DAU negotiate/arbitrate model.

DBCT Management submitted that the negotiate/arbitrate model is appropriate in the circumstances and is a proportionate regulatory response to address the limited and narrow competition problem identified in the declaration review process.

DBCT User Group said it is strongly of the view that the 2019 DAU is not appropriate for the QCA to approve, having regard to the criteria in section 138(2) of the QCA Act. The DBCT User Group said its opposition principally arises from the abolition of reference tariffs in favour of a negotiate/arbitrate model, where there is no indication of how a TIC might be calculated.

New Hope Group and Whitehaven Coal also expressed similar views to the DBCT User Group in their submissions.

Interim draft decision

The negotiate/arbitrate model proposed in the 2019 DAU is a significant shift from the existing framework, and it is clear that stakeholders hold different views in relation to the proposal.

We consider that assessment of whether this structural change in approach is likely to be appropriate represents a 'threshold' matter for the assessment of the DAU as a whole.

As a consequence, we intend to proceed to an interim draft decision on the negotiate/arbitrate model, so as to provide an early indication to DBCT Management and other stakeholders of the QCA's views on this matter. We believe this will best enable an informed, efficient and effective assessment process on the DAU.

Our interim draft decision will address the question of whether a negotiate/arbitrate model is capable of approval by the QCA, having regard to the relevant statutory factors. The interim draft decision will also address some related matters. For example, if the interim draft decision is that we consider a negotiate/arbitrate model is capable of approval by the QCA, the interim draft decision may also indicate whether the model proposed by DBCT Management would need to be amended in order to be approved. On the other hand, if the interim draft decision indicates that a negotiate/arbitrate model is unlikely to be capable of approval, the interim draft decision may indicate alternatives that might be considered or explored.

Below are some questions to guide further stakeholder feedback.

While these questions highlight some specific matters related to the DAU and the initial submissions received, they do not seek to comprehensively cover all the aspects that may be relevant to the proposed interim draft decision. Hence, interested parties should rely on their own analysis to determine whether there are additional matters on which they wish to comment.

Some guidance questions:

- Does the negotiate/arbitrate model appropriately balance the interests of DBCT Management, access seekers and access holders? If not, can it be modified to be balanced and effective?
- How will the proposed negotiate/arbitrate model interact with existing user agreements? Where the QCA is not setting a TIC as part of a DAU review process, how would a price reset process under an existing user agreement work? To what extent would existing users be protected from a potential exercise of market power by DBCT Management under their existing user agreements?
- Do stakeholders have any further evidence to support or oppose DBCT Management's claim that existing users are fully protected by existing user agreements, including in the absence of a TIC?
- Do stakeholders have any further evidence to support or oppose DBCT User Group's claim that existing users are not fully protected from DBCT Management's exercise of market power?
- Will new users have the same protection as existing users from a potential exercise of market power by DBCT Management? If not, how will the level of protection differ between existing users and new users?
- Under a proposed negotiate/arbitrate model, how would the QCA apply the 'willing but not anxious' standard in an arbitration? What facts would the QCA require to effectively apply this standard?

We note that some of these matters have been addressed in initial stakeholder submissions. Stakeholders are invited to provide any further submissions and evidence on these matters, including responses to other stakeholder submissions.

We seek further submissions from stakeholders on matters relevant to the proposed interim draft decision by **Friday 22 November 2019**.

Updated assessment process and timeframes

The table below shows our updated indicative timeframes for key milestones for the assessment of DBCT Management's 2019 DAU.

Table 1 Updated indicative timeframes for the 2019 DAU assessment

<i>Milestone</i>	<i>Indicative timing</i>
Second round of stakeholder submissions due	22 November 2019
QCA interim draft decision	Q1 2020
QCA full draft decision	Q3 2020
QCA final decision	February 2021

The updated timing above replaces the timeframes outlined in our Statement of Regulatory Intent. The key changes from the Statement of Regulatory Intent are:

- We have introduced a second round of stakeholder submissions to allow stakeholders to respond to initial submissions, and provide targeted responses on the proposed negotiate/arbitrate model.
- We have introduced an interim draft decision and later full draft decision, in place of a single draft decision.
- We have removed the collaborative and consensus submissions that were originally intended to be called for by early November 2019. We anticipate that collaborative submissions will now be called for at an appropriate time between the initial and full draft decisions.

In accordance with section 147A of the QCA Act, the period for the QCA to decide whether to approve, or refuse to approve, the 2019 DAU will not include the period for making submissions in response to this notice.

Our updated process and timing are consistent with our Statement of Regulatory Intent where we said that the QCA may incorporate additional steps into the assessment process where we consider they will provide for a more transparent and effective 2019 DAU assessment process.

While we have updated the assessment timeframes, the rest of the Statement of Regulatory Intent document remains relevant. In particular, it remains relevant that we may elect to host a public stakeholder forum (or fora) at appropriate times during the 2019 DAU assessment process. The QCA will provide stakeholders with further details of such stakeholder engagement as necessary.

Submissions

Closing date for submissions: 22 November 2019

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

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

Queensland Competition Authority

GPO Box 2257

Brisbane Q 4001

Tel (07) 3222 0555

Fax (07) 3222 0599

www.qca.org.au/submissions

Confidentiality

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

The assessment of confidentiality claims will be made by the QCA in accordance with the *Queensland Competition Authority Act 1997*, including an assessment of whether disclosure of the information would damage the person's commercial activities and considerations of the public interest.

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

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

Public access to submissions

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