DBCT MANAGEMENT

DBCT Management

Response to QCA October request for submissions regarding 2019 DAU

22 November 2019

DBCT Management
Level 15 Waterfront Place, Brisbane QLD 4001
PO Box 7823, Waterfront Place QLD 4001
(07) 3002 3100

Contents

1 Introduction

1 DBCTM welcomes the opportunity to reply to the Stakeholder Notice released by the QCA on 25 October 2019, which included questions regarding certain matters related to the Draft Access Undertaking submitted by DBCTM in July 2019 (**2019 DAU**) and the initial submissions received on it.

2 DBCTM supports the QCA's proposal to make an interim draft decision on the appropriateness of the negotiate/arbitrate model, to provide an early indication to stakeholders of the QCA's views on the matter.

3 However, the Stakeholder Notice suggests that the 2019 DAU provides for a significant shift from the existing framework. This is not entirely correct. The negotiate/arbitrate framework has always been a feature of DBCTM's access undertakings, though in practice it has been rendered inoperable by the QCA's ex-ante setting of a reference tariff. The publication of a reference tariff undermines any opportunity for meaningful commercial negotiations between DBCTM and users, and shifts the burden of determining appropriate access charges straight to the QCA.

4 The 2019 DAU seeks to enliven the existing negotiate/arbitrate model, in place under previous access undertaking and the existing user agreements, by removing the requirement for a reference tariff to be set, while retaining all of the other access protections which have been a feature of previous access undertakings.

5 This will allow for the benefits of commercially negotiated outcomes between the parties, while retaining QCA oversight and the ability for the QCA to determine the terms of access, in circumstances where an agreed outcome is not achieved.

6 This submission explains how a negotiate/arbitrate model will deliver a balance between the interests of DBCTM, access holders and access seekers, and effectively constrain DBCTM from exercising any market power – protecting access holders and access seekers alike.

7 The User Group's submission dated 23 September 2019 (**User Group submission**) attempts to discredit the negotiate/arbitrate model by relying on a fundamental misrepresentation of the QCA's full declaration review analysis, which concluded that existing user agreements were an effective constraint on DBCTM's market power. Even if this were not the case, the QCA's analysis in its draft declaration recommendation considered the constraints on DBCTM's market power if it were *no longer declared*. It is clear that this analysis is not relevant in this context, where the DBCT service clearly *will be declared*. Overlooking the constraints that will exist as a result of declaration is a consistent theme of the User Group submission.

8 The QCA's key task is to assess whether the 2019 DAU will provide an appropriate constraint on DBCTM's market power, and ensure that competition is protected in dependent markets. DBCTM submits that a recourse to arbitration by the QCA ensures that there is no opportunity for DBCTM to exercise market power under the 2019 DAU.

9 While DBCTM considers that the proposed 2019 DAU as currently drafted is already balanced and effective, DBCTM is committed to ensuring that the negotiate/arbitrate model is implemented effectively. As such, DBCTM looks forward to working constructively with the QCA and users to ensure that the negotiate/arbitrate model is implemented in a way that is balanced, effective and fit for purpose.

10 This submission is split into two sections:

- 10.1 The first section provides some context to DBCTM's response to the QCA's questions, by laying out some of the key reasons why a negotiate/arbitrate model is appropriate for DBCT.
- 10.2 The second section responds to the specific questions set out in the QCA's Stakeholder Notice.

2 Overview – why DBCTM considers a negotiate/arbitrate model is appropriate

11 This section provides an overview of the key reasons why the negotiate/arbitrate model is appropriate for application to DBCT.

2.1 The negotiate/arbitrate model is not a new concept for DBCT

12 The QCA's Stakeholder Notice suggests that the 2019 DAU provides for a significant shift from the existing framework. However, this is not necessarily correct:

12.1 The existing user agreements already expressly contemplate a negotiate/arbitrate process whereby charges would be agreed between the user and DBCTM, and where this is not possible, provide for the matter to be referred to arbitration.[1]

12.2 Likewise, DBCTM's previous access undertakings have all included the shell of a negotiate/arbitrate model.[2]

13 As such, the negotiate/arbitrate model, set out in the 2019 DAU, does not present a revolutionary change to the model of regulation previously put in place by the QCA.

14 Nevertheless, to date, the opportunity for meaningful negotiation under these instruments has been undermined by the setting of a reference tariff. This reference tariff has been set by the QCA at the minimum level which is permissible under the pricing principles – the perceived efficient costs of providing the service.[3] This means that there has previously been no scope for negotiation as access seekers and access holders have not had an incentive to negotiate. As a result, the parties have been unable to take into account other relevant factors that would be considered in an arbitration under the Part 5 negotiate/arbitrate regime, such as the quality of the service, the types of service on offer, and the value of the service to the access seeker.

15 Moving to an effective negotiate/arbitrate model without a predetermined reference tariff provides an opportunity to achieve mutually agreed commercial outcomes, without relying on the QCA to do the heavy lifting.

2.2 The insertion of a genuine negotiation step will not change ultimate protections for users

16 The implementation of a genuine negotiate/arbitrate model does not remove any protections that have been included in previous access undertakings. The 2019 DAU simply enlivens the existing negotiate/arbitrate model by adding a real negotiation step, with recourse to the QCA as a backstop to resolve any disputes.

17 The QCA must have regard to substantively similar factors in determining an arbitration as it would in determining a reference tariff as part of an access undertaking process. As shown in the table below, all the relevant considerations for the QCA in determining a reference tariff under the access undertaking process are also considerations for the QCA in undertaking an arbitration under the 2019 DAU.

[1] See clause 7.2 of the 2017 AU Standard Access Agreement

[2] See for example, section 5 of the 2017 AU which is titled 'Negotiations arrangements' and sets out, in great detail, the process to be followed for access negotiations; section 17.4 which sets out the process for determination of a dispute by the QCA

[3] The Act requires that access charges provide for ***at least*** the efficient costs of providing the service.

Figure 1: Comparison of considerations for access undertakings vs arbitrations

Consideration	Factor that the QCA must have regard to under the AU process	Factor that the QCA must have regard to in arbitration process[4]
The object of Part 5	s 138(2)(a) of the QCA Act	s 11.4(d)(1)(G) of the 2019 DAU via s 120(1)(a) of the QCA Act
The legitimate interests of DBCTM	s 138(2)(b) of the QCA Act	s 11.4(d)(1)(G) of the 2019 DAU via s 120(1)(b) of the QCA Act
The interests of the operator/operation of the terminal	s 138(2)(c) of the QCA Act	s 11.4(d)(1)(G) of the 2019 DAU via s 120(1)(i) and (j) of the QCA Act
The public interest	s 138(2)(d) of the QCA Act	s 11.4(d)(1)(G) of the 2019 DAU via s 120(1)(d) of the QCA Act
The interests of access seekers	s 138(2)(e) of the QCA Act	s 11.4(d)(1)(G) of the 2019 DAU via s 120(1)(c) of the QCA Act
The effect of excluding existing assets for pricing purposes	s 138(2)(f) of the QCA Act	s 11.4(d)(1)(G) of the 2019 DAU via s 120(1)(k) of the QCA Act
The pricing principles	s 138(2)(g) of the QCA Act	s 11.4(d)(1)(G) of the 2019 DAU via s 120(1)(l) of the QCA Act
Any other issues the QCA considers relevant	s 138(2)(h) of the QCA Act	s 11.4(d)(2) of the 2019 DAU

18 As a result, in circumstances where a negotiated outcome is not achieved, the regulator (the QCA), and the considerations that the regulator will have regard to, are substantially the same under both the access undertaking and arbitration processes. Both processes allow for the QCA to balance the interests of access holders, access seekers and DBCTM.

2.3 A genuine negotiation step will deliver the best outcomes

19 Commercially negotiated outcomes have the potential to deliver the most appropriate outcomes for all parties, allowing an opportunity for DBCTM and access seekers to find common ground and reach mutually agreed terms and conditions.

20 DBCTM's first submission set out a wide range of well-established regulatory precedent to support the proposition that, wherever possible, regulation should allow for the opportunity for negotiated outcomes, and that regulation should be as light touch as appropriate in the circumstances.[5] The User Group has not

[4] While these factors apply to the determination of an arbitration for a new access seeker, we expect that the QCA will have regard to the same factors in any arbitration of access charges for existing users under their existing user agreements. This follows from the reference in the existing user agreements at clause 7.2(b)(i) that a review of access charges may have regard to the access undertaking in place at the time of the agreement revision date

[5] DBCTM DAU submission, section 4

put forward any convincing reason why this well-established precedent is not entirely pertinent to the current access undertaking process.

21 DBCTM does not repeat the full analysis from its first submission but does reiterate two key fundamental matters which must frame the QCA's approach to its functions under Part 5 of the QCA Act.

The Competition Principles Agreement

22 A fundamental element of the Australian access regime as implemented by the Competition Principles Agreement (CPA) and Part IIIA of the Competition and Consumer Act (CCA) is the application of a negotiate/arbitrate regime to resolve access disputes. As previously submitted, the importance of the negotiation step is made clear under clause 6(4)(a) of the CPA which is unequivocal in its requirement that access regimes should allow for the possibility of negotiated outcomes wherever possible: [6]

> wherever possible third party access to a service provided by means of a facility should be on the basis of terms and conditions agreed between the owner of the facility and the person seeking access

23 Part 5 of the QCA Act gives effect to this fundamental requirement of the CPA, by setting out a negotiate/arbitrate access regime to apply to declared services under the QCA Act, including the services provided by DBCT.

24 The QCA must give effect to a negotiate/arbitrate model by approving the 2019 DAU and should not depart from giving effect to this fundamental element of Australia access regulation, without a clear unequivocal basis to do so.

The 2019 DAU ensures that the DBCT Access Regime is compliant with the CPA

25 The DBCT Access Regime, established under the QCA Act, is certified as an effective access regime under section 44M of the CCA.

26 The certification process under s 44M of the CCA, requires the National Competition Council (**NCC**) to advise the federal Treasurer whether or not, in its opinion the relevant State regime is an "effective regime". In determining whether or not a regime is an effective regime the NCC applies the principles set out in the CPA, including the principle that wherever possible access should be on agreed terms.

27 The Queensland Government's application for the certification of the DBCT Access Regime highlighted that the regime's intention was to give primacy to commercial negotiations through an negotiate/arbitrate model:[7]

> The DBCT Access Regime incorporates the principle of the primacy of contractual negotiations through the adoption of a "negotiate/arbitrate" model in the QCA Act.

28 The NCC provided its final recommendation to certify the DBCT Access Regime as effective on 10 May 2011.[8] In doing so the NCC acknowledged that the requirements of the CPA seek to ensure that negotiated outcomes are not precluded:[9]

> Clauses 6(4)(a)–(c) seek to ensure that an access regime provides an appropriate balance between commercial negotiation and regulatory intervention to facilitate access. **Regulatory arrangements**

[6] Competition Principles Agreement 11 April 1995 (as amended 13 April 2007) clause 6(4)(a)

[7] Queensland Government, Application to the National Competition Council for a Recommendation on the Effectiveness of an Access Regime -Queensland Third Party Access Regime for coal handling services at Dalrymple Bay Coal Terminal (December 2010), page 33

[8] See: http://ncc.gov.au/application/application_for_certification_of_the_dalrymple_bay_coal_terminal_access_reg, for a detailed timeline of the certification process

[9] NCC, Dalrymple Bay Coal Terminal Access Regime, Final Recommendation (10 May 2011), page 18 [emphasis added]

> **should not preclude negotiated outcomes**. Consideration of clauses 6(4)(a)-(c) must include an assessment of whether regulatory arrangements create an environment in which parties can enter into effective negotiations. This may require the inclusion of processes to address imbalances of bargaining power and information asymmetries.

29 On 11 July 2011 the Commonwealth Minister decided to certify the DBCT Access Regime as effective, for a period of ten years, consistent with the NCC's final recommendation.

30 The implementation of the negotiate/arbitrate model in the 2019 DAU is appropriate as it will ensure that the DBCT Access Regime includes a genuine opportunity for commercial negotiations in line with clause 6(4)(a) of the CPA. This will help ensure that the DBCT Access Regime can be certified as an effective regime by the NCC following the expiration of the current certification in July 2021.

The Productivity Commission

31 The Productivity Commission previously confirmed that negotiated terms and conditions of access are preferable to regulated outcomes and that negotiation can limit the potential for regulatory error:[10]

> The declaration of an infrastructure service establishes a right for an access seeker to negotiate with the provider of the service on the price and terms of access. This right extends to any access seeker, not just the declaration applicant. Negotiated outcomes resolving the terms and conditions of access are preferable to regulated outcomes because the parties to a dispute will know more about their claims and the costs and benefits of gaining or providing access than a regulator could. Negotiation can thus limit the potential for regulatory error.

32 This is consistent with the case at DBCT where access holders and access seekers are best placed to assess the types of service required, the costs of providing it and the benefits of the service to the users.

33 The Productivity Commission further recognised the scope for regulatory error where regulators set access prices, commenting that:[11]

> Given that regulators are unable to set optimal access prices (prices that would maximise overall economic efficiency) with precision, there is scope for regulatory error in the setting of access terms and conditions.

34 The risk of regulatory error is particularly significant for DBCT at a time where the terminal is at full capacity and will require an expansion in order to provide access to future access seekers. Regulatory error creates a risk that DBCTM is faced with access charges which impair efficient investment in the expansion of the terminal. It is appropriate that the QCA adopt a negotiate/arbitrate model to help mitigate this risk.

[10] Productivity Commission Inquiry Report, National Access Regime, 25 October 2013, page 115
[11] Productivity Commission Inquiry Report, National Access Regime, 25 October 2013, page 103

35 The User Group's submission argues that the risks of regulatory error are overstated. However, there is strong evidence that regulatory error can be material and have significant impacts on investment incentives. A recent example is the Port of Newcastle arbitration.

Case study: Port of Newcastle arbitration

The recent Port of Newcastle/Glencore arbitration highlights the significant risks of regulatory error that occur, even when the arbitration is undertaken by a sophisticated regulator such as the QCA or the ACCC.

Glencore commenced arbitration proceedings against the Port of Newcastle under Part IIIA of the Competition and Consumer Act 2010, prior to the revocation of the Port's declaration status. The ACCC initially determined that the charge for ships entering the port to carry Glencore's coal would be **$0.61** per gross tonne.

Both parties subsequently applied to the Australian Competition Tribunal, who ultimately found that the ACCC had significantly understated the appropriate charges for the port. The Australian Competition Tribunal ultimately found that the appropriate charge was **$1.01** per gross tonne, or approximately 166% of the charge initially determined by the regulator.

2.4 Scope of regulation

The competition problem is relevant to the QCA's approval of an Access Undertaking

36 The User Group Submission states:[12]

> Declaration is a pre-condition to the Authority's right to provide an initial undertaking notice. However, once such a notice has been given, particular conclusions about an access criterion which underpin the declaration, do not somehow constrain the Authority's discretion in determining appropriateness of the draft access undertaking that is actually submitted.

37 With respect this is wrong. The declaration recommendation determines the scope of the QCA's authority to regulate the relevant service. That is, the QCA's power to regulate does not extend to where there is no competition problem as expressly found by the declaration process. Accordingly, any regulation of the relevant service in relation to a dependent market in which the QCA has expressly found declaration will not promote a material increase in competition, is beyond power.

38 The QCA's regulation under Part 5 of the QCA Act is to address the competition harm identified by the declaration process and no further, or at least it must not seek to regulate the service as applied in dependent markets in which has had expressly determined do not satisfy criterion (a).

39 To do otherwise would be contrary to the objective of Part 5 of the QCA Act which is to promote efficient operation, use and investment in infrastructure to *promote effective competition in upstream and downstream markets*.

40 The User Group argues that the NCC's consideration of the National Gas Law (NGL) provides precedent to support the proposition that findings relating to the access (or in that case coverage) criteria should not be taken into account in determining the form of regulation.[13]

41 However, the NCC's reasoning in that matter is clearly not applicable to the Part 5 access regime. This is abundantly clear when the NCC's actual reasoning is examined. The NCC explains that:[14]

> Where an application for light regulation is made for an already covered pipeline, the Council considers there are three main reasons why it is inappropriate for it to rely on assessments made

[12] User Group September 2019 submission, page 9
[13] User Group September 2019 submission, page 9
[14] NCC, Light Regulation of Covered Pipeline Services July 2011, page 40

at the coverage stage in relation to issues that may arise for consideration under the form of regulation factors. Those reasons are that:

(a) there are differences between the coverage criteria and the form of regulation factors

(b) the coverage criteria and form of regulation factors address different purposes, and

(c) practical constraints arising, for example, from changes or developments occurring since coverage.

42 The User Group concedes that the third point is not applicable to DBCTM, but argues that the first two points apply equally to DBCTM. This is demonstrably incorrect. While the coverage criteria under the NGL are similar to the access criteria under Part 5 of the QCA Act, the factors for approving an access undertaking and for determining the appropriate form of regulation under the NGL are completely different.[15] This means that while under the NGL there may be a significant difference between the coverage criteria and the form of regulation factors, and they may address different purposes, this is simply not the case under the QCA Act.

43 Rather, there is significant overlap in the considerations under the two Part 5 processes, such that the conclusions drawn in the declaration review are inextricably relevant to the QCA's consideration of the appropriate form of any access undertaking. The table below shows that the ultimate purpose of the two processes is identical, and that there is significant overlap in the key factors which the QCA must have regard to in making a decision.

Figure 2: Comparison of purpose and considerations for declaration review and access undertaking processes

Declaration review process	Access Undertaking process
Purpose of the Part under which the process occurs	
Part 5 of the QCA Act 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.	**Part 5 of the QCA Act** 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.
Specific considerations	
Section 76(2)(a) - Criterion (a) (a) that access (or increased access) to the service, on reasonable terms and conditions, as a result of a declaration of the service would promote a material increase in competition in at least 1 market (whether or not in Australia, other than the market for service;	**Section 138(2)(a) - The object of Part 5** 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; **Section 138(2)(d) - public interest in competition** The public interest, including the public interest in having competition in markets (whether or not in Australia);

44 Therefore, DBCTM submits that the competition problem identified in the declaration review, and whether the proposed 2019 DAU addresses this problem, should be front of mind for the QCA in determining whether it is appropriate to approve the 2019 DAU.

[15] See section 16 of the NGL

2.5 The negotiate arbitrate model is fit for purpose and consistent with s 138

Existing users are protected under their existing user agreements

45 The User Group does rely on the findings of the declaration review – despite its objections to doing so – where it considers that it supports its arguments. DBCTM agrees with the User Group's submission that the declaration review findings have relevance in identifying the extent of market power that DBCTM possesses.[16]

46 DBCTM further agrees with the User Group submission that:[17]

> …it becomes clear that the overriding question on the appropriate form of regulation for the DBCT service *is the extent of market power that DBCTM has* …

That is the key issue for the QCA in determining if the 2019 DAU is 'appropriate' is the extent to which it addresses DBCTM's market power.

47 However, this is where the agreement ends.

48 As explored further below, in response to questions three and four, the User Group mischievously seeks to down-play the protections included in the existing user agreements, emphasising the QCA's comments that there are *some* limitations to the protections *without declaration*. However, it is clear that with declaration, and with the QCA in the position as the arbitrator, these minor limitations fall away.

49 Further, the User Group ignores the QCA's clear conclusion that the existing user agreements *were* an effective constraint on DBCTM's market power, up to the volumes of capacity contained in those agreements:[18]

> The existing user agreements provide for regular reviews of the method of calculating charges based on negotiation between DBCT Management and the user, and a dispute resolution mechanism for determination of charges, which is intended to produce an outcome similar to that which the QCA would have been expected to determine.
>
> Therefore, in the absence of declaration, *existing user agreements will provide an effective constraint on DBCT Management's exercise of market power up the volumes specified in those agreements*.
>
> …
>
> **Conclusion**
>
> In this section, the QCA considered whether DBCT Management's ability and incentive to exercise market power in the absence of declaration would be constrained by existing user agreements and DBCT Management's proposed access framework.
>
> On the one hand, existing user agreements will enable existing users to extend the term of their agreements and continue to access the DBCT service based on the terms and the volumes set out in those agreements. So, *existing user agreements will provide an effective constraint on DBCT Management's exercise of market power up to the volumes specified in those agreements*.

50 The protections in the existing user agreements are the sole basis put forward by the User Group to justify the continued declaration of the DBCT service – by establishing that existing users would be protected from DBCTM's market power, and that access seekers would not, resulting in an asymmetry in the terms of

[16] User Group September 2019 submission, page 10
[17] User Group September 2019 submission, page 19 [emphasis added]
[18] QCA Draft Recommendation, pages 66 and 73 [emphasis added]

access. It is disingenuous that the User Group now seeks to downplay the protections contained in these agreements. Furthermore, there must be consistent treatment of the existing user agreements by the QCA throughout the declaration and the 2019 DAU processes. If the users now, in this process, assert that the existing user agreements do not protect existing users from any exercise of market power then it must follow that criterion (a) is no longer satisfied for the purposes of the declaration process.

51 Stripping away the User Group's obfuscation shows that its primary concern is the outcomes under the negotiate/arbitrate regimes as compared with the status quo. The User Group argues that existing users are not "fully protected" because existing users:

51.1 are not "in the same position as [under the] existing regulatory environment involving the QCA determined reference tariffs";[19]

51.2 are potentially subject to a contractual negotiate/arbitrate regime which would be "clearly less favourable than regulatory reference tariffs";[20] and

51.3 are as "equally badly off" as access seekers.[21]

52 As set out in section 2.2 above, the 2019 DAU provides for substantively similar protections and considerations in the process of setting a reference tariff and setting an access undertaking, such that there is no basis for these arguments.

53 The relevant question, as acknowledged by the User Group, is whether any market power on the part of DBCTM will be effectively constrained under the 2019 DAU.

54 The User Group does not point to any evidence to justify the QCA reversing its position in the declaration process that the existing user agreements provide an effective constraint on DBCT Management's exercise of market power up to the volumes specified in those agreements.

55 Given that under the 2019 DAU existing users will be protected from the exercise of market power by DBCTM due to their existing user agreements and the ability of the QCA to arbitrate any access disputes, DBCTM submits that the 2019 DAU is clearly appropriate, having regard section 138(2) and the interests of existing users of the service (which DBCTM notes is not an express consideration of s 138(2), but rather a factor that the QCA may consider relevant in accordance with s 138(h)).

Access seekers are protected under the 2019 DAU

56 Access seekers will also be protected under the 2019 DAU. The User Group Submission concedes that the 2019 DAU addresses the potential asymmetry in access terms that access seekers could have as compared to existing users (notwithstanding its unsubstantiated assertion that users will be disadvantaged):[22]

> the 2019 DAU is not appropriate simply because access holders and access seekers are equally disadvantaged under it, and equally exposed to DBCTM's market power in such negotiations.

57 That is, the users concede that the 2019 DAU addresses the sole competition problem identified by the QCA in the declaration process – that being asymmetry in the terms of access between existing users and access seekers.

58 Rather, the User Group asserts that DBCTM has market power and has incentives to engage in monopoly pricing for future access seekers at DBCT, on the basis of the QCA draft declaration recommendation. This is not a valid basis to draw the same conclusion under the 2019 DAU because:

[19] User Group September 2019 submission, page 12
[20] User Group September 2019 submission, page 12
[21] User Group September 2019 submission, page 12
[22] User Group September 2019 submission, page 13

58.1 The QCA's findings in the declaration were in a completely different context.

58.2 In making those findings the QCA was considering DBCTM's ability and incentive to exercise market power *without declaration*, and accordingly, did not have regard to the additional constraints on DBCTM's market power that occur as a result of being declared.

58.3 Further, throughout the declaration process the QCA did not have regard to the effect of the 2019 DAU (including the recourse to a binding QCA arbitration) as a constraint on DBCTM's market power.

59 Therefore, the QCA's draft declaration determination is not a valid basis to substantiate the User Groups' assertion that under the 2019 DAU DBCT will have market power and an ability to monopoly price.

60 The User Group Submission states that "it is impossible to see those circumstances as being conducive to a negotiate/arbitrate model reaching appropriate and reasonable pricing."[23]

61 When the QCA is required to apply the same criteria under the 2019 DAU arbitration as it would under an arbitration under s 120 of the QCA Act, it would clearly be without merit to conclude that it is impossible for the 2019 DAU to provide for appropriate and reasonable pricing.

PwC's analysis is fundamentally flawed

62 The User Group asserts that PwC's September 2019 report is an expert report. However, the PwC report does not identify the author(s), the expertise nor experience relied upon to form the views set out in the report. Furthermore, as a large consulting and audit business, PwC likely has many extensive relationships with users which it has not disclosed and therefore material questions as to the independence of PwC arise. Accordingly, the PwC views cannot be accepted as any form of admissible expert opinion. For this reason, the PwC report is no more than a submission and cannot be given any more weight than a submission.

63 PwC's lack of expertise and experience is clearly demonstrated by the fundamentally flawed analysis set out in the report.

64 The analysis by PwC in section 4.2 and 4.3 of its September report, provides its skewed perspective using a number of cherry-picked examples, to argue that negotiate/arbitrate model is not appropriate for DBCTM. This analysis is fundamentally flawed in that it fails to have regard to a number of the most significant constraints on DBCTM, does not consider the extent to which the 2019 DAU appropriately addresses DBCTM's market power, and makes an incorrect assessment of DBCT in its application of the factors that it does identify.

PwC's analysis does not have regard to the key constraints on DBCTM's market power without the access undertaking

65 PwC identify five key factors that it considers should influence the choice of the form of regulation. However, PwC embarrassingly completely ignores two key constraints on the access provider's exercise of market power – existing and future contractual and regulatory constraints on the access provider.

66 As a result, PwC's analysis has no regard to the fact that existing users are protected from DBCTM's market power by virtue of their existing user agreements. Further it has no regard to the constraints on DBCTM's market power that occur as a result of declaration (even without an access undertaking in place), including the recourse for access seekers to the legislative arbitration process, and the rights of access seekers to negotiation information.

[23] User Group September 2019 submission, page 14

67 In neglecting to consider these fundamental constraints on DBCTM's market power, the conclusions of PwC are clearly without merit.

68 If regard is had to the full suite of existing and future constraints on DBCTM under the 2019 DAU, it is clear that DBCTM's market power would be effectively constrained under the 2019 DAU and a negotiate/arbitrate model is an appropriate form of regulation for the DBCT service.

PwC's analysis does not have regard to the constraints that the 2019 DAU provides

69 Further, the task for the QCA is to assess whether it is appropriate to approve the 2019 DAU having regard to the factors in section 138 of the QCA Act.

70 It should go without saying that a necessary part of this analysis is to consider the effect of the 2019 DAU on DBCTM's ability and incentive to exercise market power.

71 PwC's analysis is completely devoid of such analysis. By comparing the regulation of different facilities in a vacuum, the conclusions drawn by PwC are completely delinked from the assessment required by the QCA.

PwC's application of the factors affecting the form of regulation is skewed

72 PwC's application of the factors it considers affects the form of regulation, summarised in Figure 5 of the report, is severely skewed to support the case that the User Group attempts to make.

73 DBCTM does not provide a blow-by-blow rebuttal of PwC's subjective assessment of where DBCTM lies on each spectrum but points out a few blatant factors that were overlooked by PwC:

73.1 **Number of access seekers and their countervailing power** – the users of DBCT are highly concentrated, with DBCTM's top five existing users representing almost 90% of contracted capacity at DBCT. Further, future access seekers who will seek expansion capacity at DBCT (given the terminal is fully contracted) will likely have the option of gaining capacity at alternative terminals on comparable terms to DBCT.

73.2 **Likely demand for the 'reference services'** – to date regulation at DBCT has not recognised the varying different premium services provided to separate customers, which have an adverse impact on the efficiency of the terminal. PwC argues that a heavy-handed regime would provide the 'flexibility to address the bespoke needs of individual users', however history has shown that this is not case, with DBCT always applying a uniform reference tariff.

73.3 **Information asymmetry** – DBCTM highlights in detail below the significant information that is already available to access seekers, as well as the extensive rights under the QCA Act and the 2019 DAU for access seekers to gain access to information needed to inform negotiations or an arbitration. Further, the QCA's extensive powers to request information, engage experts and consult on its arbitral decisions. There is very little scope for information asymmetry on the part of access seekers and existing users.

73.4 **Administrative and compliance burden** – as discussed in the response to question three and four, a bilateral negotiate/arbitrate model will provide for a *more efficient* determination of access charges, compared with a multi-party process where the QCA is burdened with determining a one-size-fits-all solution, through an extensive consultation process.

74 In any event, the comparison of the regulation applying to other regulated facilities is no substitute for a thorough analysis by the QCA of whether the 2019 DAU, and a negotiate/arbitrate model, will appropriately constrain DBCTM's market power.

PwC's contention that the QCA should not give primacy to negotiations is unfounded

75 The finding of PwC that it is inappropriate to give primacy to commercial negotiations, has no regard to the important considerations identified in section 2.3 above.

76 PwC characterises the preference for negotiated outcomes as a 'one size fits all' approach.[24]

77 This is clearly not the case. Alternative approaches may well be appropriate in some circumstances. However, there must be good reason for moving away from an approach to regulation which allows for the opportunity of negotiated outcomes (for example, if a negotiate/arbitrate approach model would not provide a sufficient constraint to the access provider's market power). This is consistent with the CPA which specifies that negotiations should be provided for ***wherever possible***, not in all circumstances.

[24] PwC September 2019 report, page 4

3 Response to the QCA's specific questions

78 This section responds to the specific questions raised by the QCA in its October 2019 paper. A summary of DBCTM's response to these questions is set out in the table below.

Figure 3: Summary of DBCTM's response to QCA questions

QCA question	Summary of DBCTM response
Question One 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?	The negotiate/arbitrate model ensures that in all circumstances DBCTM, access seekers and access holders all have recourse to arbitration by the QCA to settle any access disputes. This protection applies equally to all parties – ensuring a level playing field for meaningful commercial negotiations to occur in the first instance. While DBCTM considers that the proposed 2019 DAU as currently drafted is already balanced and effective, DBCTM is committed to ensure that the negotiate/arbitrate model is implemented effectively. As such, DBCTM looks forward to working constructively with the QCA and users to ensure that the negotiate/arbitrate model is implemented in a way that is appropriate, balanced, effective and fit for purpose.
Question two 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?	The negotiate/arbitrate model will complement the provisions of the existing user agreements, which already provide for a negotiate/arbitrate process for determining access charges when a review event occurs. This already protects existing users from the exercise of any market power by DBCTM in the same way that the 2019 DAU protects new users – by providing recourse to the QCA to determine the terms and conditions of access, in circumstances where a mutually agreeable commercial outcome is not achieved.
Question 3 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? **Question 4** 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?	Existing users are fully protected from DBCTM's exercise of market power under their existing user agreements. • The majority of existing users' terms and conditions of access are already locked-in under their existing agreements, which were willingly entered into under previous versions of the access undertaking. The only aspect of access that is not contractually locked down is access charges. • With respect to the access charges, existing users are protected from DBCTM's exercising of market power to extract monopoly access charges, due to their ability to refer the matter to arbitration in circumstances where they cannot reach a mutually agreed outcome. • This has the flow on effect of ensuring that DBCTM does not have an incentive to exercise market power, due to the threat of arbitration – meaning DBCTM has an incentive to reach a mutually agreeable middle-ground with users. 'Fully protected' does not require users to have the absolute certainty, of a spoon-fed reference tariff. Rather, existing users have the full protection of QCA arbitration as a backstop to commercial negotiations, and the certainty of this fall back, if DBCTM attempts to exercise market power.

QCA question	Summary of DBCTM response
Question 5 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?	New users will have substantively the same protections as existing users. New users will have: • The ability to negotiate charges with DBCTM, with a recourse to arbitration by the QCA in circumstances where this is not achieved; • The right to request a significant amount of information to inform commercial negotiations and address any information asymmetries; • The ability to insist on a standard access agreement on substantively the same terms and conditions as the existing user agreements; and • The benefit of a wide raft of access provisions in the 2019 DAU which are substantively, if not identically, the same as those which were in place when the existing users entered into their agreements.
Question 6 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?	The exact process that will be followed by the QCA to determine the TIC in any arbitration is ultimately a question for the QCA. The negotiate/arbitrate model in the 2019 DAU is based on the legislative model under the QCA Act, with the addition of the 'willing but not anxious' test to help frame the task for the QCA. DBCTM expects that the QCA may seek submissions from the parties to an arbitration, on a case-by-case basis, to assist in determining the appropriate course of action in the given circumstances. In terms of the information required to apply the test, DBCTM expects that information relating to each of the mandatory considerations for the QCA would be an appropriate starting point, though the QCA would have the ability to request further information as necessary.

4 Question 1 – does the model appropriately balance interests of the parties?

79 Question one asks stakeholders whether the negotiate/arbitrate model appropriately balances the various stakeholders' interests:

> 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?

80 The negotiate/arbitrate model ensures that in all circumstances DBCTM, access seekers and access holders all have recourse to arbitration by the QCA to settle access disputes. This protection applies equally to all parties – ensuring a level playing field for meaningful commercial negotiations to occur in the first instance, with arbitration by the QCA as a backstop.

81 While DBCTM considers that the proposed 2019 DAU as currently drafted is already balanced and effective, DBCTM is committed to ensuring that the negotiate/arbitrate model is implemented effectively. As such, DBCTM looks forward to working constructively with the QCA and users to ensure that the negotiate/arbitrate model is implemented in a way that is appropriate, balanced, effective and fit for purpose.

4.1 The negotiate/arbitrate in the 2019 DAU balances interests of DBCTM, access seekers and access holders

82 The negotiate/arbitrate framework effectively balances the interests of DBCTM, access seekers and access holders by:

82.1 creating a real opportunity for a balanced, mutually agreed outcome through commercial negotiations;

82.2 providing all parties the option of referring a dispute to arbitration by the QCA, providing a meaningful backstop, and ensuring a level playing field for commercial negotiations;

82.3 empowering the QCA to facilitate resolutions to access disputes in a balanced and effective manner, having regard to the interests of all the parties;

82.4 allowing access charges to reflect the value of the individual user and whether they make use of premium services which come at a cost to other users and the terminal's efficiency; and

82.5 retaining the same non-price protections for new users that were included in the 2017 AU and previous access undertakings.

The negotiate/arbitrate model creates a real opportunity for commercial negotiations

83 Commercially negotiated outcomes have the potential to deliver the most balanced outcomes for all parties, allowing an opportunity for the parties to find common ground and reach mutually agreed terms and conditions.

84 As discussed above, DBCTM's pervious access undertakings have all included the shell of a negotiate/arbitrate model, however, the opportunity for meaningful negotiation has been undermined by the setting of a reference tariff.

85 The NCC in recommending the certification of the DBCT Access Regime as an effective access regime, highlighted that the ability for parties to enter into commercial negotiations ensured an appropriate balance between service providers and access seekers:[25]

[25] NCC, Dalrymple Bay Coal Terminal Access Regime, Final Recommendation (10 May 2011), page 20

The DBCT Access Regime encourages parties to enter into commercial negotiations to reach agreement on the terms and conditions of access and strikes an appropriate balance between the interests of service providers and access seekers.

86 DBCTM's 2019 DAU enlivens the negotiation provisions contained in previous access undertakings and provides an incentive for DBCTM and users/access seekers to negotiate a mutually acceptable, balanced, outcome, with the fall-back of having the QCA determine the matter if this is not achieved.

Commercially negotiated outcomes are likely under the 2019 DAU

87 It is understandable that the User Group favours the determination of a reference tariff, as it has historically been set at the lowest possible level allowed for under the QCA Act, without reflecting the value of the service, and in particular the additional services to the user.

88 Therefore, it is not surprising that the User Group's submission goes to great lengths to try and establish that commercial negotiations could not be successful with DBCTM. However, in making these arguments, the User Group overlooks a number of critical facts, which we discuss in the following sections. DBCTM considers that if the QCA approves a negotiate/arbitrate model for the next access undertaking, negotiated outcomes will be likely between DBCTM and access seekers/holders.

Different starting positions on price does not mean a negotiated outcome is not possible

89 The User Group contends that DBCTM and users will be unable to reach a commercially negotiated access agreement due to their substantially different views on the appropriate price.[26]

90 The User Group makes a point of identifying that DBCTM's proposed TIC for the last access undertaking process was 127% of the TIC ultimately determined by the QCA, characterising DBCTM as 'making ambit claims' and the User Group as 'seeking a price that is more aligned with QCA and other regulatory precedent'.[27]

91 However, the User Group does not identify that its own proposed TIC was also only 86% of the TIC that was ultimately determined by the QCA.

92 The reality is that this difference in starting position is completely consistent with commercial negotiations in workably competitive markets. It is common for commercial negotiations to begin with the parties adopting differing starting positions, before working towards a workable, mutually satisfactory, middle-ground which balances both party's interests.

93 A starting position of both parties within 30% of the QCA determined outcome is unlikely to be irreconcilable.

94 However, ultimately if a negotiated outcome is not feasible, then the matter can be referred to the QCA for determination.

DBCTM is not incentivised to pursue monopoly pricing

95 Relying on the QCA's views in its draft recommendation on declaration, the User Group's submission also asserts that DBCTM has *no incentive* to reach a commercial agreement, but rather has an incentive to engage in monopoly pricing as a profit maximising strategy.[28]

96 While DBCTM strongly disagrees with the QCA's conclusions in its draft recommendation regarding DBCTM's incentives to engage in monopoly pricing, it is obvious that those comments were made in the context of the declaration review, in which the QCA was contemplating circumstances where access seekers

[26] User Group September 2019 submission, page 23
[27] User Group September 2019 submission, page 23
[28] See, for example, the User Group's September 2019 submission at page 10

would not have recourse to the QCA to ultimately determine prices. These circumstances are clearly not applicable in this context.

97 The User Group's assertion ignores the fact that all parties will have recourse to arbitration under the 2019 DAU, meaning that DBCTM has no incentive to exercise market power. If it did, users would simply refer the matter to the QCA to be arbitrated.

98 A more realistic proposition is that DBCTM will be incentivised to offer concessions in order to reach a position with access seekers/holders that is mutually workable, rather than have the matter determined by the QCA.

99 The User Group also refers to analysis by PwC which it considers supports the proposition that DBCTM would not accept a TIC lower than $3.40.[29] It is unclear why DBCTM would refuse to accept a lower TIC than this in circumstances where it considered the QCA would determine a materially lower TIC. Again, DBCTM is incentivised to make compromises and accept a negotiated outcome, rather than have the matter determined by the QCA.

Successful negotiate/arbitrate regimes at other ports demonstrate it is a workable model

100 DBCT is the only Australian coal terminal that is subject to access regulation. Many other coal terminals in Australia operate successful, voluntary negotiate/arbitrate regimes, demonstrating that this method of access is workable, even without QCA oversight.

101 A prime example of this is the Adani Abbott Point Terminal (AAPT). The User Group points to the fact that some arbitrations have occurred regarding access to AAPT as a reason why a negotiate/arbitrate regime will not work.[30] However, the User Group neglects to mention the fact that the majority of users successfully negotiated a commercial outcome with the AAPT, demonstrating that a commercially negotiated outcome will be possible in most cases.

102 The User Group also blindly asserts there is a disparity in pricing between users which arbitrate and those which do not at AAPT, and that AAPT users are incentivised to accept a higher price than they would get at arbitration due to the costs and risks involved in arbitration.[31] There is no basis for this assertion. Any risks and costs of arbitration apply equally to the facility and the access seeker, resulting in a symmetrical incentive for the parties to reach a middle ground.

103 As previously discussed, the Port of Newcastle also provides an example of how a negotiate/arbitrate regime can effectively operate (notwithstanding that the NCC determined that access regulation was not needed at the terminal at all). The Port of Newcastle was only subject to a single arbitration during the period which it was declared, with the remaining users successfully agreeing to access charges with the Port of Newcastle, without recourse to arbitration.

Where negotiations are unsuccessful the QCA will balance the interests of stakeholders

104 In circumstances where a negotiated outcome is not possible, all parties will have recourse to arbitration by the QCA.

105 As such, DBCTM, access holders and access seekers can have confidence that the QCA will determine the matter in a way that appropriately balances the interests of the various stakeholders of DBCT. While DBCTM would expect the QCA to do this in any event, the 2019 DAU also expressly requires the QCA to have regard to (inter alia):[32]

[29] See PwC September 2019 report, section 5
[30] User Group September 2019 submission
[31] User Group September 2019 submission
[32] Section 11.4(d)(1)(G) of the 2019 DAU, by reference to section 120(1) of the QCA Act.

105.1 the access providers' legitimate business interests and investment in the facility; and

105.2 the legitimate business interests of persons who have, or may acquire, rights to use the service.

106 This means that balancing the various parties' interests is an inherent part of the QCA's role in determining arbitrated access disputes under the 2019 DAU. These considerations will apply equally to arbitrations under existing user agreements, with the pricing review provisions of those agreements expressly providing that the review may have regard to the access undertaking on foot as at the agreement revision date (discussed further below).

107 In its April 2019 submission on the declaration review, the User Group highlighted the certainty provided by having the QCA as a 'certain backstop' to arbitrate disputes:[33]

> Even if it was assumed that the Access Framework was theoretically effective (despite all of the evidence to the contrary noted above), there are material differences in the level of certainty provided by the Access Framework and its **reliance on private arbitration to resolve access disputes relative to access seekers having a right to refer disputes to the QCA for arbitration where the regulatory framework provides a much more certain backstop**.

108 The User Group has also previously commented on how well equipped the QCA is to adjudicate access disputes:[34]

> The DBCT User Group have material concerns about whether a private arbitrator could ever put itself in a position to address the matters that might arise in an access dispute in the manner in which the QCA could.
>
> In particular, that follows from:
>
> (a) the extensive knowledge the QCA has about the terminal from previous access undertaking and tariff setting processes, whereas a private arbitrator is likely to be involved in a one-off dispute with no prior experience of that type;
>
> (b) the extensive knowledge the QCA has in relation to setting access terms through regulation of other monopoly infrastructure, including the Aurizon Network and Queensland Rail rail networks and setting or investigating pricing in relation to various monopoly water infrastructure service providers such as Gladstone Area Water Board and SunWater;
>
> (c) the extensive experience the QCA has internally through its expert staff, and unparalleled access to external economic, engineering and other expertise which may be relevant to resolving such an access dispute;
>
> (d) the statutory powers that the QCA has in arbitrating access disputes under Part 7 of the QCA Act, including information production powers (see section 205 QCA Act) and [t]he power to compel witnesses (see section 200 QCA Act) – with penalties for noncompliance; and
>
> (e) the fact that the QCA would be making an [sic] decision under an enactment, such that it would be subject to judicial review scrutiny if there are flaws in its decision making.

109 The QCA's experience will enable efficient, fair and balanced determination of disputes, in circumstances where negotiations are not effective. This 'certain backstop' will also incentivise the parties to adopt more reasonable positions in without prejudice discussions, in order to reach agreed outcomes.

[33] User Group April 2019 submission, page 91

[34] User Group April 2019 declaration review submission, page 92

A balanced approach must recognise that different users make use of different services

DBCTM offers a range of premium services

110 Throughout the declaration process the User Group was at pains to point out that DBCTM offers a number of premium services, above that of the standard coal handling service. For example, with respect to blending, the User Group previously commented that:[35]

> A number of **DBCT Users have also confirmed that they have utilised the blending opportunities available at DBCT and, similar to co-shipping opportunities, consider them superior to that available at other terminals** due to:
>
> • the greater range of metallurgical coal products available (which cannot be replicated by other terminals irrespective of plant, equipment and stockpile space);
>
> • the existing facilities at DBCT which allow 2 stacker reclaimers to be used to create a homogenous blend in a surge bin of up to 3 different coal products to meet customer specifications (which is not possible based on the current coal handling operations at other terminals); and
>
> • the ability to generate a further variety of blends by way of multiple grades of coal being delivered into a stockpile that will then be homogenously blended by the dual reclaim method.
>
> …
>
> **Some users have indicated that they place a particularly high value on blending opportunities at DBCT due to concerns with product quality and saleability of some of their coal production in the absence of blending**. That is particularly the case for users which have multiple mines in the Goonyella system, where blending allows them to mine different quality coal at each operation while still meeting bespoke customer desired blends or grade specifications.
>
> The importance of blending is demonstrated by the high proportion of vessels shipping blended parcels from the terminal (ranging between 23.9 and 28.66% over the last 3 full financial years).

111 Likewise, Peabody previously commented:[36]

> …DBCT is able to offer blending options at the terminal. DBCT offers homogenous blending on a consistent basis that caters to a wide variety of end customer requirements, and allows users to increase the value and saleability of their product range.
>
> The **DBCT blending options are a distinct market offering**. Comparable blending options are not available at other terminals such as RGTanna, WICET or APCT.

112 These comments are at complete odds with the User Group's most recent submission which seek to wind back its previous comments regarding the importance of these separate services:[37]

> **The current services provided to all access seekers are principally the same coal handling service with minor variations**, where the incremental costs or differences in capacity consumed for those small variations would be very difficult to measure, and do not warrant differential pricing…

Recognising differences in service offering more fairly balances the interests of stakeholders

113 The provision of blending and co-shipping services at DBCT reduces the maximum capacity utilisation of the Terminal, requiring additional capital infrastructure compared to a situation where no blending and co-shipping services are offered.

[35] User Group March 2019 declaration review submission, pages 24-25
[36] Peabody March 2019 declaration review submission, page 2
[37] User Group September 2019 submission, page 5

114 If some users are benefiting from a highly valued, premium service, and not others, it is not a balanced approach to apply a one-size-fits-all reference tariff to all users. Instead, this approach favour users who use premium services (which impact on the terminal's overall efficiency), while disadvantaging those who do not.

115 The negotiate/arbitrate model allows for DBCTM to negotiate more balanced, bespoke agreements which recognises the benefits to the user of providing premium services over and above standard coal handling services, and the impact that providing that service has on the efficiency of the terminal.

116 This will promote allocative efficiency by incentivising DBCTM to invest, and offer these services, when they provide additional value to users (and that value offsets any resulting terminal inefficiencies).

117 This is consistent with the section 168A pricing principles (which the QCA must take into account in deciding whether to approve an access undertaking) which provide that prices should allow for multi-part pricing and price discrimination where it aids efficiency.

Service differentiation is not uncommon at other ports

118 The User Group notes that no other Australian coal terminal applies differential pricing based on the extent of user's blending or co-shipping services.[38] This assertion is not correct – the WICET access policy provides for surcharges to be applied to reflect the additional costs or efficiency impacts of additional services, including blending requirements:[39]

> Additional costs incurred by WICET in providing the Services which adversely affect the efficient operation of the Terminal *such as unusual blending requirements*, inefficient train unloading, or other specific services required by a Shipper will be charged to that particular Shipper in addition to the THC

119 However, even if other terminals did not charge for blending or co-shipping services, this would not be valid grounds for concluding that differential pricing on this basis is inappropriate. As set out in detail in the User Group's previous submissions, no other coal terminal in Australia offers the superior services that are available at DBCT. It follows that, if this is the case, there would be less reason for other terminals to differentiate pricing for these services.

120 Further, while there may be limited examples of blending or co-shipping services being treated on a differentiated basis, there are ample other examples of other services being differentially priced at Australian ports. Differential pricing is commonly applied for services in excess of the standard services for both port and terminal assets. The basis for differential pricing is often linked to how the capacity-usage behaviour of customers affects the port or terminals' ability to make capacity available to other customers and make capital investment and maintenance decisions, as well as the value of the service to the user. Figure 4, below, outlines some examples of differential pricing applied at other Australian ports/terminals.

Figure 4: Differential pricing at other Australian ports/terminals

Port / terminal	Differential price	Reference
Port of Port Hedland (via Pilbara Ports Authority)	Cape size vessel surcharge to all vessels with a GRT exceeding 60,000. It is applied to the total GRT of the vessel in addition to the Tonnage fee.	Page 1 of Schedule of Port Charges Effective 1 July 2019.[40]

[38] User Group September 2019 submission, page 5

[39] http://www.wicet.com.au/irm/PDF/1514_0/wicetaccesspolicy page 26 [emphasis added]

[40] https://www.pilbaraports.com.au/PilbaraPortsAuthority/media/Documents/PORT%20HEDLAND/Port%20Operations/PORT-OF-PORT-HEDLAND-PRICING-1920.pdf

Port / terminal	Differential price	Reference
Port of Port Hedland (via Pilbara Ports Authority)	Applies a differential price for the handling of bulk minerals using the East Side Berths relative to Utah Point.	Page 1 of Schedule of Port Charges Effective 1 July 2019.[41]
Port of Darwin	Applies a differentiated price for vessels accessing the shipping channels and those accessing the Bladin Channel.	Page 2 of Schedule of Port Charges Effective 1 July 2019.[42]
Port of Fremantle	Applies a port improvement fee on **container vessels only** to reflect the additional dredging costs associated with the Inner Harbour.	Page 3 of the 2019 Pricing Schedule.[43]
Port of Newcastle	Applies different navigation charges for coal/non-coal vessels **of the same size**.	Page 3 of the Schedule of Service Charges, effective 1 July 2019.[44]
Port of Melbourne	Applies a dedicated channel fee on vessels using the Dedicated and Geelong channels on the same entry to Port Phillip Bay (subject to some exemptions and special circumstances).	Page 7 of the Port of Melbourne Reference Tariff Schedule, effective 1 July 2019.[45]

A number of protections for new and existing users based on the 2017 AU

121 Finally, when considering the extent to which the 2019 DAU balances the various interests of stakeholders, it should be recognised that the 2019 DAU is substantively the same as previous access undertakings, except for the removal of a reference tariff.

122 This means that access seekers will be entitled to the same access protections that current access holders benefited from, when they first gained access to DBCT, many of which are contractually cemented into access holders' user agreements.

123 These protections are discussed in greater detail in the response to question 5.

4.2 DBCTM will work with the QCA and users to ensure that the implementation of the negotiate/arbitrate model in the 2019 DAU is appropriate

124 DBCTM considers that the 2019 DAU is appropriate and already balances the interests of various stakeholders, in an effective manner.

125 This being said, DBCTM is happy to work constructively to address any bona fide concerns raised by users or the QCA, to ensure that the 2019 DAU is fit for purpose.

126 DBCTM was disappointed by the users' lack of engagement with the QCA's last round of questions, which clearly asked for submissions to identify potential improvements that could be made to ensure an effective

[41] https://www.pilbaraports.com.au/PilbaraPortsAuthority/media/Documents/PORT%20HEDLAND/Port%20Operations/PORT-OF-PORT-HEDLAND-PRICING-1920.pdf
[42] https://www.darwinport.com.au/sites/default/files/uploads/2019/Tariff%20Schedule%20FY19-20%20Effective%201%20Jul%202019_.pdf
[43] https://www.fremantleports.com.au/docs/default-source/shipping-docs/ship-and-cargo-charges-from-1-july-20197b35078c90d94aa698b0830e88b0b320.pdf?sfvrsn=2557b1de_0
[44] https://www.portofnewcastle.com.au/wp-content/uploads/2019/09/Schedule-of-service-charges-2019.pdf
[45] https://www.portofmelbourne.com/wp-content/uploads/RTS-2019-20.pdf

process, as well as identifying issues.[46] This represented a missed opportunity for the users to identify genuine concerns and propose solutions that could address these.

127 Instead the User Group attacked the premise, without constructively engaging on how the proposed DAU could be made workable.

128 As such, DBCTM welcomes the QCA's proposal to make an interim decision on whether a negotiate/arbitrate model is, in principle, appropriate under the QCA Act. This will enable stakeholders to then focus on how to ensure that the model can be implemented successfully, rather than identifying problems without considering solutions.

[46] QCA *DBCT Management's 2019 DAU—QCA staff questions for stakeholders* (23 August 2019)

5 Question 2 – interaction with existing user agreements

129 The QCA's second question relates to the interaction between the negotiate/arbitrate model and existing user agreements:

> 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?

130 The negotiate/arbitrate model will complement the provisions of the existing user agreements, which already provide for a negotiate/arbitrate process for determining access charges when a review event occurs. This protects existing users from the exercise of any market power by DBCTM in the same way that the 2019 DAU protects new users – by providing recourse to the QCA to determine the terms and conditions of access, in circumstances where a mutually agreeable commercial outcome is not achieved.

5.1 How will the proposed negotiate/arbitrate model interact with existing user agreements?

The relevant provisions of the existing user agreements

131 DBCTM laid out, in detail, the relevant provisions of the existing user agreements in its July 2019 DAU submission.[47] In short, the relevant aspects of the existing user agreements are:

131.1 The existing Access Agreements that users have willingly executed already reflect the negotiate/arbitrate model with respect to regular pricing reviews.

131.2 Existing Access Agreements provide for a review of access charges prior to each 'Agreement Revision Date' under which DBCTM and the user must endeavour to agree the basis of and amount of new charges to apply from the 'Agreement Revision Date', with recourse to arbitration where the parties do not reach agreement.

131.3 This process applies for each 5-year period of the evergreen contracts, and effectively from the date of commencement of each access undertaking.

131.4 If the matter is referred to arbitration then the QCA will typically determine the matter, unless it is unwilling or unable to do so, in which case the matter will be determined by an independent arbitrator.

131.5 In undertaking the review, regard must be had to, amongst other things, the current access undertaking as at the Agreement Revision Date.

132 So how do the provisions of the existing access agreements interact with the 2019 DAU?

133 First and foremost, it is worth noting that the provisions in the existing user agreements are designed in a way that they are standalone – that is, they can operate without an access undertaking in place at all, and even if DBCTM is undeclared (as established throughout the declaration review).

134 However, the existing user agreements do expressly provide for the review of access charges to have regard to the access undertaking in place at the time of the Agreement Revision Date. This allows the QCA to apply the same arbitration factors that apply to access seekers under the 2019 DAU, to the determination of any arbitration for existing users under their existing user agreements – ensuring a level playing field.

[47] See section 4.5

135 The Existing User Agreements also allow the review to have regard to a reference tariff set by the QCA, but notably, expressly consider the possibility that there would be no such tariff stating, 'if any'.[48]

5.2 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?

136 If the QCA does not set a TIC as part of the DAU review process, the price reset process will operate in accordance with the provisions of the existing user agreements. In practice this is likely to involve:

136.1 DBCTM and existing users will commence a review of the access charges no later than 18 months prior to the Agreement Revision Date.[49] This will involve a negotiation process whereby DBCTM and the user attempt to agree to the access charges that will apply for the next pricing period.

136.2 The parties must endeavour to reach an agreement on the access charges to apply for the next period as early as practicable, but no later than the Agreement Revision Date.[50]

136.3 If negotiations are successful, then an agreement will be entered into between the parties which sets out the access charges applicable for the next pricing period.

136.4 In cases where there is no agreement by the date 6 months prior to the agreement revision date, either party may refer the matter to arbitration.[51]

136.5 DBCTM expects that in these cases the QCA will be willing and able to act. In these cases, the QCA may conduct the arbitration in the way that it sees fit, and will determine the access charges applicable for the next pricing period.

5.3 To what extent would existing users be protected from a potential exercise of market power by DBCT Management under their existing user agreements?

Arbitration by the QCA acts as a strong constraint on DBCTM's market power

137 The User Group relies heavily on the QCA's draft recommendation on declaration, to establish that DBCTM would exercise market power, and uses this to assert that a negotiate/arbitrate model is not appropriate. As already pointed out, the QCA's assessment of DBCTM's ability and incentive to exercise market power without declaration is clearly not relevant to assessing whether it would do so in circumstances in which it is declared, and access holders have the ability to refer pricing disputes to the QCA for arbitration.

138 As already discussed, this ability provides a strong constraint on DBCTM's ability to exercise market power under the existing user agreements:

138.1 First, it prevents DBCTM from having *an incentive* to exercise market power in the first place, as if it does so the matter will ultimately be determined by the QCA. This gives users significant countervailing power in undertaking negotiations with DBCTM (in addition to their existing countervailing power).

138.2 Secondly, in cases where DBCTM *did* attempt to exercise market power, the QCA would be able to rectify this by arbitrating the matter.

[48] Clause 7.2(b)(ii) which states that the review may have regard to 'the relevant Reference Tariff (if any) effective from the relevant Agreement Revision Date'

[49] Clause 7.2(c) of the Standard Access Agreement

[50] Clause 7.2(c)(i) of the Standard Access Agreement

[51] Clause 7.2(c)(ii) of the Standard Access Agreement

The users' have already accepted that existing user agreements will protect them

139 As discussed in section 2 above, throughout the declaration review the User Group has strongly advocated that the protections contained under the existing user agreements adequately protect them against DBCTM's market power (to the extent that it would create a material asymmetry between new and existing users). The User Group considered that these protections would function, even in circumstances where a private arbitrator would be required to determine pricing disputes (which the User Group argue is an inferior protection to the QCA determining the dispute).

140 For example, in the following passage the user group identifies the significant protections which the existing user agreements provide *without declaration* and goes on to note that these protections would be even greater if declaration remains in place:[52]

> Existing DBCT access holders will have the protection of the existing user agreements continuing, which provides certainty of access for as long as the renewal rights are exercised, and some arrangement in relation to future pricing through the contractual price review and arbitration rights (albeit with less protections and certainty than would exist if they owned the terminal or regulation had remained in place…

141 As explained in detail in section 2, the QCA has also previously confirmed that existing users are protected from the exercise of market power, by their existing user agreements. In short:[53]

> existing DBCT users are protected from DBCT Management's exercise of market power in the absence of declaration, due to the evergreen nature of their existing user agreements.

142 It follows that if existing users would be protected from DBCTM's exercise of market power by their existing user agreements without declaration, this would be the case, with declaration.

143 DBCT's entire existing capacity is contracted on the terms of these existing user agreements, which are evergreen, providing for the option to extend these agreements indefinitely. This means that all the users of the existing capacity of DBCT will be adequately protected, even without the 2019 DAU. It also follows that if access seekers enter into contracts on substantially the same terms as the existing user agreements (such as the 2019 standard access agreement), they too will be adequately protected.

Existing users are well-placed to negotiate with DBCTM

144 The majority of existing users of DBCT are largely multi-national corporations with diverse portfolios that extend beyond the coal industry, with just five of these users accounting for nearly 90 per cent of DBCT's existing capacity.[54]

145 The users of DBCT are sophisticated decision-makers with the knowledge and resources to negotiate with DBCTM in the first instance. This is distinctly different to the users of other fully regulated facilities, such as water utilities, where customers are small and numerous, with extremely limited market share and bargaining power.

[52] https://www.qca.org.au/wp-content/uploads/2019/05/33692_3-DBCT-User-Group-Submission-2.pdf, page 4

[53] QCA Draft Recommendation, page 37

[54] Customer 1: [redacted] Mtpa ([redacted]%); Customer 2: [redacted] Mtpa ([redacted]%); Customer 3: [redacted] Mtpa ([redacted]%); Customer 4: [redacted] Mtpa [redacted]%); Customer 5: [redacted] Mtpa ([redacted]%).

6 Questions 3 and 4 – are users fully protected under their existing user agreements?

146 Question three asks for further evidence as to whether access holders are protected by 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?

147 Similarly question four asks:

> 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?

148 Existing users are fully protected from DBCTM's market power under their existing user agreements. This is because:

148.1 The majority of existing users' terms and conditions of access are already locked-in under their existing agreements, which were willingly entered into under previous versions of the access undertaking. The only aspect of access that is not contractually locked down is access charges.

148.2 With respect to the access charges, existing users are fully protected from DBCTM exercising market power to extract monopoly access charges, due to their ability to refer the matter to the QCA for arbitration in circumstances where they cannot reach a mutually agreed outcome.

148.3 This has the flow on effect of ensuring that DBCTM does not have an incentive to exercise market power, due to the threat of arbitration – meaning DBCTM has an incentive to reach a mutually agreeable middle-ground with users.

6.1 What does fully protected mean?

149 While 'full protection' is not part of the statutory test for approving an access undertaking, it is worth reflecting on what an appropriate level of protection would be.

150 DBCTM submits that a user will be 'fully protected' when that user is protected from DBCTM exercising market power, and can gain access to DBCT on reasonable terms and conditions.

151 Full protection does not require existing users to be spoon-fed and have absolute certainty in the form of a reference tariff. Rather, existing users will be fully protected where they have the option of arbitration as a backstop to commercial negotiations, enabling them to negotiate with DBCTM on an equal footing.

6.2 User Group arguments that existing users are not fully protected are unfounded

152 The User Group argues that the negotiate/arbitrate regime is less favourable to existing users than regulatory reference tariffs as:[55]

> (a) it removes the certainty provided by up-front terminal infrastructure charges being determined by the QCA – which will have a detrimental impact on investment incentives for such coal users;
>
> (b) it relies on more costly arbitration mechanisms and will result in numerous costly and protracted bi-lateral contractual negotiations – when, by contrast, reference tariffs and standard access agreement terms currently provide for very efficient negotiations and a single multi-lateral regulatory process which resolves matters for all stakeholders at once;

[55] User Group September 2019 submission, page 12

(c) the prospects of arbitration being called on appear extremely high given the differences between users and DBCTM's views of an appropriate WACC and efficient costs as evidenced in all previous undertaking processes – as discussed in detail in the PwC Report; and

(d) it is likely to result in inefficient price discrimination for reasons unrelated to cost or risk, as not all access seekers will have the resources to participate in costly arbitrations, and some will settle at pricing that is higher than efficient or appropriate levels due to the negotiating dynamics produced by DBCTM's market power.

153 However, these concerns are misguided, and in any event, do not establish that existing users would be subject to DBCTM exercising market power. We address these points in turn.

Upfront certainty

154 Upfront certainty is still available through the agreement or arbitration of access charges. This process results in access charges that will be agreed in advance on a contractual basis for the next 5 years (or longer if agreed), providing certainty for the existing users.

155 Even under a reference tariff system, access charges are reset every 5 years, so it is difficult to see how that system would provide greater up-front certainty. The only change under the negotiate/arbitrate model is the process for resetting charges, and even then, the negotiate/arbitrate model still allows for charges to be determined by the QCA if a negotiated solution is not achieved.

156 In reality, the negotiate/arbitrate model provides for far greater up-front certainty than existing users face in other aspects of their businesses (such as labour costs, or coal prices). The unfounded assertion that the relatively immaterial access charges at DBCT (historically ranging from ~$2.50-$3.20/t), would impact on investment (which in the same period coal prices have fluctuated between by more than $100/t), is clearly without foundation.

Efficiency of the process

157 The User Group argues that the negotiate/arbitrate regime will result in numerous costly and protracted bi-lateral contractual negotiations, rather than the efficient multiparty process that has occurred in the past.

158 The reality is that the process to determine a reference tariff itself has historically been protracted and lengthy, with the added complexity of dealing with multiple different parties, with differing service requirements, at once.

159 The negotiate/arbitrate regime provides an opportunity to avoid this process and for existing users to reach a negotiated agreement with DBCTM, without relying on the QCA to do all of the heavy lifting.

160 In cases where the dispute is referred to arbitration, bilateral arbitrations will be more efficient than a public refence tariff setting process, as they avoid the need for public consultations, and provide flexibility for the QCA to determine an outcome which meets the specific needs of the parties, rather than finding a one-size-fits-all solution, that will suit all users. The arbitration process also allows the opportunity for the parties to leverage off negotiations and narrow the scope of issues for the QCA to determine, providing for an even more efficient arbitration processes.

161 The arbitration provisions of the QCA Act (under which the 2019 DAU arbitration process is undertaken), emphasise the need for arbitrations to be conducted in an expedient and efficient way. This emphasis is backed up by powers to enable the QCA to achieve this. For example:

161.1 Section 196(1) provides that the QCA must act “with as little formality as possible”, “is not bound by technicalities, legal forms or rules of evidence”, and “must act as speedily as a proper consideration of the dispute allows”.

161.2 Section 196(2) provides that the QCA "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".

161.3 Section 197(1)(f) provides the QCA the power to "generally give directions, and do things necessary or expedient for the speedy hearing and determination of the dispute.

162 The User Group provides no basis for its assertion that the negotiate/arbitrate regime will be costly and protracted. Rather, DBCTM considers that the QCA will be well-placed to facilitate timely and efficient arbitrations in circumstances that negotiations are not successful between the parties.

Differing negotiating positions

163 As discussed in more detail above, differing negotiating positions are simply a part of any commercial negotiation process. It does not mean that a negotiated resolution is not viable.

164 Further, to the extent that the matters that are disputed by the parties can be narrowed to a small number of discrete issues, arbitrations under the regime will be able to be conducted in an expedient and efficient manner by the QCA.

165 The Access Undertaking includes provisions which ensure that the QCA must give effect to any matters already agreed between the parties.[56]

Users settling for inefficient pricing

166 As previously explained, any market power possessed by DBCTM is nullified by the ability of existing users to refer the matter to arbitration by the QCA.

167 This provides existing users with significant additional countervailing power in their negotiations meaning they are perfectly capable of representing their interests in negotiations with DBCTM.

168 It is implausible that existing users would settle for 'pricing that is higher than efficient or appropriate levels' in circumstances where they could refer the matter to the QCA for arbitration.

[56] Section 17.4 of the 2019 DAU

7 Question 5 – will new users have the same protections

169 Question five queries whether new and existing users will have access to the same protections:

> 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?

170 New users *will* have substantively the same protections as existing users. New users will have:

170.1 The ability to negotiate charges with DBCTM, with a recourse to arbitration by the QCA in circumstances where this is not possible;

170.2 The right to request a significant amount of information to inform commercial negotiations and address any information asymmetries;

170.3 The ability to insist on a standard access agreement on substantively the same terms and conditions as the existing user agreements; and

170.4 The benefit of a wide raft of access provisions in the 2019 DAU which are substantively similar, if not identical, to those which were in place when the existing users entered into their agreements under previous versions of the access undertakings.

171 Further, new users are likely to have optionality when it comes to deciding where to ship their coal, providing additional countervailing power against DBCTM.

7.1 Ability to negotiate with recourse to arbitration

172 New users will have the same ability as existing users to negotiate access charges with DBCTM, with recourse to QCA arbitration where such negotiations are unsuccessful.

173 The ultimate recourse to arbitration by the QCA ensures that in any instance where an access dispute occurs, any harm (legitimate or otherwise) identified by access seekers will ultimately be able to be addressed through the arbitration process.

7.2 The right to request information to inform negotiations

174 The User Group asserts that information asymmetry will 'make it impossible for a negotiate/arbitrate regime to result in efficient and appropriate pricing for all users.[57] However, the 2019 DAU has provisions expressly intended to mitigate the risk of any information asymmetry.

175 To ensure that access seekers are provided with an appropriate level of information to enable access seekers to negotiate from an informed position, the 2019 DAU (section 5.2(c)(2)) provides that prior to submitting an access application, an access seeker may request from DBCTM a wide range of information. This includes:[58]

175.1 Information about the price at which the access provider provides the service, including the way which price is calculated;

175.2 Information about the costs of providing the service, including the capital, operation and maintenance costs;

[57] User Group September 2019 submission, page 44
[58] Via, section 101(2) of the QCA Act

175.3 Information about the value of the access provider's assets, including the way in which value is calculated;

175.4 An estimate of spare capacity;

175.5 A diagram or map of the facility used to provide the service;

175.6 Information about the operation of the facility;

175.7 Information about the safety system for the facility; and

175.8 If the QCA makes a determination in an arbitration about access to the service – information about the determination.

176 These information requirements are also in place under the legislative regime. In recommending to certify the DBCT access regime, the NCC noted the Queensland Government's view that:[59]

> …the DBCT Access Regime 'provides for the primacy of commercial negotiation and provides extensive information to access seekers' and that '[t]here is independent and transparent regulation and enforcement' of the regime' (Application, p 41).

177 The User Group attempts to downplay the impact of these information entitlements characterising them as 'extremely high level and clearly inadequate for enabling an informed negotiation.'[60]

178 To the contrary, 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. Further, access seekers have the added assurance that any dispute as to DBCTM's compliance with its information obligations will be adjudicated by an independent expert in accordance with the dispute resolution provisions of the 2019 DAU.[61]

179 To the extent that the QCA considers that there are genuine issues with asymmetry of information, DBCTM is happy to revisit these provisions following the QCA's interim decision.

180 In addition to the information rights that access seekers have under the 2019 DAU, they will also have access to an abundance of information on DBCT which is already in the public domain, including the immense amount of information published by the QCA over the past two decades, through various regulatory processes which DBCTM has been involved in.

181 For the purposes of the upcoming regulatory period access seekers will be seeking access to expansion capacity. As part of the expansion process new users will have access to three detailed feasibility studies, a price ruling, and other expansion information, prior to finalising access negotiations, in addition to the existing available information and the right to request further information.

Membership of DBCT P/L not necessary to gain access to information needed to effectively negotiate

182 Whitehaven's submission suggests that information asymmetry will be especially pronounced because they will not be shareholders of DBCT Pty/Ltd.

183 This concern is clearly misplaced for several reasons.

183.1 First, as set out above, the 2019 DAU already provides ample opportunity for users to gain access to the information needed to inform negotiations with DBCTM.

183.2 Second, it is not clear that the DBCT Pty/Ltd holds *any* information that is relevant to negotiations with DBCTM, that is not readily available to access seekers.

184 Whitehaven's submission further submits that "it will not be sufficient to attempt to modify or expand the categories of information an access seeker is entitled to obtained from DBCT Management".[62] These

[59] NCC, Dalrymple Bay Coal Terminal Access Regime, Final Recommendation (10 May 2011), page 19
[60] User Group September 2019 submission, page 45
[61] 2019 DAU, section 17
[62] Whitehaven September 2019 submission, page 3

comments are disappointing, as they demonstrate the cynical approach of the users to the access undertaking process – proposing problems, without solutions. Whitehaven is essentially arguing that no amount of information provided by DBCTM could possibly cure the information asymmetry faced by users. This is clearly not the case, and to the extent that Whitehaven can identify further information that it genuinely needs for negotiations with DBCTM, but cannot access under the existing provisions, DBCTM is happy to consider amendments to the 2019 DAU.

7.3 The ability to insist on the standard access agreement

185 New access seekers will also be able to make use of the standard access agreement set out in the 2019 DAU (**2019 SAA**). Section 13.1 of the 2019 DAU provides that if an access seeker so requires the access agreement will, in all material respects be consistent with the 2019 SAA.

186 The 2019 SAA is substantively the same as the standard access agreements in former Access Undertakings, which formed the basis for the existing user agreements.

187 In this sense, access seekers will have access to near-identical protections to existing users.

7.4 Access rights and obligations

188 New access seekers at DBCT have access to all the same access protections that were in place under the 2017 AU, though some minor changes have been made to some of these processes (some of which have been accepted as necessary by the User Group).

189 These protections include (amongst others):

189.1 An obligation to negotiate in good faith (section 5.1(c));

189.2 A prohibition against unfairly differentiating between access seekers in a way that has a material adverse effect on the ability of 1 or more of the access seekers to compete with other access seekers (section 5.1 (d));

189.3 A fair and transparent queuing process by which users can obtain access to existing and expanded capacity at DBCT (section 5.4);

189.4 Requirements 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 (section 5.1 (b)); and

189.5 Reporting requirements under section 10 of the 2019 DAU and information gathering powers for independent experts.

7.5 The expansion provisions are substantively identical

190 Given that DBCT is now fully contracted, new access seekers will almost certainly be expansion parties. The provisions of the 2019 DAU are substantively the same as those contained in the 2017 AU, with some changes to ensure that the process gives effect to the negotiate/arbitrate model.

191 The key challenge in designing an expansion process is balancing:

191.1 the need for certainty as to the access charges which will apply to the expanded terminal, prior to the expansion of the terminal (in order to allow DBCTM to secure funding to invest in the expansion and access seekers to commit to taking capacity post-expansion); with

191.2 the need for access charges to account for the actual costs of constructing the terminal.

192 Another key challenge is giving effect to the intent of the queuing provisions in circumstances where access charges may not have yet be determined.

193 These challenges exist equally under the former version of the access undertaking, under which a reference tariff would be set by the QCA following the expansion of the terminal, arguably not giving DBCTM the requisite certainty to secure funding for an expansion.

194 DBCTM considers that the expansions provisions in the 2019 DAU strike a reasonable balance between these differing considerations, but accepts the provisions are in some respects untested and may require some amendments. However, this was equally the case under the previous undertakings – the negotiate/arbitrate model does not change this.

195 Following the QCA's interim draft decision on the form of the next access undertaking, DBCTM looks forward to working with the QCA and User Group to ensure that the expansion provisions are fit-for-purpose (whether that be as part of the 2019 DAU process, or through a draft amending access undertaking process, closer to an actual expansion).

7.6 Other issues raised by the User Group regarding new access seekers

196 The User Group argues that the 2019 DAU would be substantially worse for existing access seekers as:[63]

> (a) the access negotiation will occur under time pressure where the access seeker will be pressured to reach agreement to increase their prospects of obtaining limited available access (through an expansion and notifying access seeker process);
>
> (b) many access seekers are smaller companies with lesser resources or experience with DBCT than existing access holders (and unlikely to have any insight through being shareholders of the independent operator, Dalrymple Bay Coal Terminal Pty Ltd, in the way many existing access holders are); and
>
> (c) access seekers are more likely to be making contracting decisions at the same time as they are making other project investment and contracting decisions as part of a greenfield project – such that uncertain costs of access, and uncertain timing for resolving whether access is able to be obtained are more challenging for them than existing access holders.

197 These assertions by the User Group are clearly without basis:

197.1 First, potential access seekers at DBCT know that they will need access to the terminal a number of years before they actually start shipping. This provides ample time to enter into negotiations with DBCTM, and, if unsuccessful, have the matter arbitrated by the QCA. The access queue provides protections to ensure that access seekers are treated on a first-come first-served basis, and (provided an access seeker is genuinely prepared to contract for capacity at DBCT), provides time for negotiation and the arbitration of any disputes, alleviating any pressure for access seekers to accept unreasonable terms to secure access.

197.2 Second, the QCA arbitration process allows the QCA to balance the interests of DBCTM with smaller companies who may not be as well-resourced or informed, tailoring any arbitration process to account for the specific user. As previously submitted by the User Group, the QCA is well-placed to undertake this role.[64] Further, this backstop will provide significant leverage for smaller companies in negotiations with DBCTM.

197.3 Finally, the fact that access seekers may be making contracting decisions for other aspects of a project at the same time as they are contracting with DBCTM is simply the commercial reality of a mining project – it is part of doing business. This is not a good reason to treat one aspect

[63] User Group September 2019 submission, page 14
[64] User Group April 2019 declaration review submission, page 92

of a mining project's delivery differently from the numerous other aspects which must all be negotiated in a commercial environment.

198 DBCTM also notes the analysis, previously provided by HoustonKemp, which clearly shows that the expiration of DBCTM's declaration and the 2017 DAU has had no impact on the participation of miners without existing capacity at DBCT in the coal tenements markets.[65]

[65] See DBCTM April 2019 submission on the declaration review, Appendix 2 – HoustonKemp report on Goonyella System Tenement transaction

8 Question 6 – application of the 'willing but not anxious' test

199 Question six asks how the willing but not anxious test will be applied by the QCA:

> 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?

200 The negotiate/arbitrate model in the 2019 DAU is based on the legislative model under the QCA Act, with the addition of the 'willing but not anxious' test to help frame the task for the QCA. As with the legislative model, the QCA does not need to determine the exact approach to assessing the appropriate TIC under the 2019 DAU, prior to the arbitration.

201 The process that will be followed by the QCA to determine the TIC in an arbitration (including the application of the 'willing but not anxious' test) will be determined by the QCA as part of the arbitration process. DBCTM expects that the QCA will seek submissions from the parties to an arbitration, which will guide its determination as to the appropriate approach in the given circumstances. This is consistent with the process undertaken in commercial arbitrations.

202 In terms of the information required to apply the test, DBCTM expects that information relating to each of the mandatory considerations for the QCA would be an appropriate starting point, though the QCA would have the ability to request further information as necessary.

8.1 Under a proposed negotiate/arbitrate model, how would the QCA apply the 'willing but not anxious' standard in an arbitration?

203 The exact process that will be followed to determine a TIC under the 'willing but not anxious' test, will be at the QCA's discretion. The negotiate/arbitrate model in the 2019 DAU is based on the legislative model under the QCA Act, with the addition of the 'willing but not anxious' test to help frame the QCA's consideration of the appropriate access charges. As accepted by the User Group, the 'willing-but-not-anxious' test is commonly applied in commercial contexts in relation to providing a test for independent market valuations. [66]

204 The 'willing but not anxious' test sets the task for the QCA as to determine the hypothetical bargain that would be made by two parties on a level playing field. As explained by the ACCC in its, now final, copyright guidelines, this approach, due to its symmetry, is designed to reduce the effect of any market power that may be held by one party over the other:[67]

205 The hypothetical bargain approach refers to a hypothetical bargain between a willing but not anxious licensor and a willing but not anxious licensee. This description is symmetrical and implies that neither party has particular power over the other. In this sense it reduces the effect of any market power held by the collecting society. It does so by assuming symmetry in power between the parties. In determining the hypothetical bargain that would be struck, the QCA would be required to have regard to the considerations set out in section 11.4(d) of the 2019 DAU.

206 As is standard practice in commercial arbitrations, DBCTM also expects that the QCA will seek submissions from the parties to an arbitration, on a case-by-case basis, to assist in determining the appropriate methodology of determining the appropriate access charges in the circumstances, in line with the QCA Act and the 2019 DAU (including the application of the 'willing but not anxious' test). In some cases it may be that there is some common ground between the parties to the arbitration as to the method to be used to

[66] User Group September 2019 submission

[67] ACCC Guidelines – To assist the Copyright Tribunal in the determination of copyright remuneration (April 2019)

apply the test. Accordingly, the QCA is not required to determine now how it may apply the test, should it be relevant to any future access dispute.

207 In anticipation of arguments from the User Group that the willing but not anxious standard is incapable of application, DBCTM notes that this standard provides ***greater*** guidance than the arbitration provisions of the QCA Act. If the arbitration provisions of the 2019 DAU are incapable of application, then this must equally, if not more so, be true of the arbitration provisions in the QCA Act, which is clearly not plausible.

The willing but not anxious test is designed to negate any market power

208 The User Group argues that the willing but not anxious test is not appropriate given the market circumstances which exist in relation to the DBCT service – that is a market where DBCTM has market power and which is not workably competitive.[68]

209 These comments completely miss the point. Consistent with the ACCC's comments in the copyright guidelines, the fundamental purpose of the 'willing but not anxious' test is to put aside any market power held by a party to the dispute, and evaluate the access charges that would be agreed on a level playing field. To the extent that the QCA considers that DBCTM is attempting to exercise market power over access seekers, that it will take this into account in evaluating the charges that would be agreed on a level playing field.

8.2 What facts would the QCA require to effectively apply this standard?

210 DBCTM expects that most of the relevant information will be provided initially through submissions from each of the parties to the arbitration.

211 The QCA could then request further information necessary to undertake its assessment of the appropriate TIC. DBCTM considers that this would likely include information on each of the mandatory considerations, set out in section 11.4(d)(1) of the 2019 DAU, to the extent that these were not covered off in the submissions of the parties.

212 To the extent that the required information was not readily forthcoming, the QCA has the power to compel the parties to provide the information requested thereby removing the ability of parties to game the arbitration by withholding information.[69]

[68] User Group September 2019 submission, section 16.1

[69] For example, the QCA's power to compel information or documents under section 205 for the purposes of an arbitration hearing