



15 September 2017

Mr Charles Millstead  
Chief Executive Officer  
Queensland Competition Authority

Dear Mr Millstead

**DBCT 2017 AU — Modification DAAU**

DBCTM has identified a number of drafting issues in the DBCT 2017 AU. DBCTM proposes to address these matters through this Modification DAAU which is submitted pursuant to section 142(1) of the QCA Act. The relevant amendments to the 2017 AU are attached to this submission.

The purpose of the proposed amendments is to:

- (a) clarify a number of inconsistencies between the QCA's final decision of 21 November 2016 (**QCA Final Decision**) and the 2017 AU;
- (b) clarify internal inconsistencies between the various provisions of the 2017 AU;
- (c) implement the expected changes such as updating placeholders and deleting amendments approved as part of the DBCT Incremental Expansion Study DAAU; and
- (d) address typographical errors and formatting issues.

This is intended to avoid uncertainty regarding the terms and legal effect of the 2017 AU both for the duration of the current undertaking and the negotiation of future undertakings.

Further details in relation to the changes described in (a) and (b) above are set out in Schedule 1.

A number of minor changes are also proposed to implement expected changes, use defined terms where appropriate, and correct various typographical errors. Those changes described in (c) and (d) above are explained in Schedule 2.

DBCTM does not consider any of the proposed amendments to be contentious but can provide QCA and other relevant stakeholders with further explanation to the extent necessary.

DBCTM has provided a draft of the proposed changes to the DBCT User Group for review and comment prior to the date of this submission.

Please contact Jonathan Blakey on 3002 3113 if you have any related queries.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'Anthony Timbrell', written over a light blue horizontal line.

Anthony Timbrell  
Chief Executive Officer  
**DBCT Management**

## SCHEDULE 1 — AMENDMENTS TO THE DBCT 2017 AU

### 1 Definitions

Words and phrases which are capitalised but not defined in this submission have the meaning given in the 2017 AU. Section references are references to sections in the 2017 AU.

### 2 Proposed amendments

The basis for DBCTM's proposed changes to the 2017 AU are outlined below. The proposed drafting is set out in Attachment 1.

#### 2.1 The Operator and the OMC: Section 3.2 and Section 3.3

Section 3.2 states that DBCTM acknowledges and agrees to a number of facts, to the effect that:

- (a) the Operator is and will remain Dalrymple Bay Coal Terminal Pty Ltd (**DBCT PL**) and that DBCT PL is majority owned or wholly owned by Access Holders;
- (b) each Access Holder has a right under the constitution of DBCT PL to become a shareholder of DBCT PL;
- (c) an Access Holder (which is not presently a DBCT PL shareholder) may become a DBCT PL shareholder in accordance with the constitution of DBCT PL; and
- (d) the Operator carries out its obligations under the Operation & Maintenance Contract (**OMC**) and Terminal Regulations independently of DBCTM.

Under section 3.3 DBCTM undertakes to maintain the OMC and ensure that the OMC (if amended) remains substantially consistent with the terms set out in the schedule to the 2017 DAU.

The sections above relate to the QCA Final Decision<sup>1</sup> which provides that the following features of the framework for the relationship between the Operator and DBCTM are to be specified in the 2017 AU (emphasis added):

- *DBCT PL is the Operator of the Terminal, **and will remain the Operator for the term of the undertaking.***
- *DBCT PL is contracted to be the Operator of the Terminal under the OMC **until 2021**, and any amendments to the OMC must ensure that it nonetheless remains consistent with minimum requirements set out in a new Schedule to the 2015 DAU.*

This simply reflects the circumstances prevailing at the time of the QCA Final Decision. The QCA has not endorsed or otherwise mandated the entrenchment of the Operator for any subsequent period.

DBCTM considers that the wording "During the term of the Access Undertaking" should be inserted at the commencement of sections 3.2 and 3.3 of the 2017 AU to clarify that the statement of facts in section 3.2 and the undertaking in section 3.3 only apply to the duration of the undertaking:

- (a) for consistency with the text of the QCA Final Decision; and
- (b) to not prejudice the consideration of any potential future changes to the framework for the management and operation of the Terminal in subsequent undertakings.

Under the proposed changes DBCTM could submit a DAAU if it wished to make changes to the existing framework for the management and operation of the Terminal during the term of the 2017 AU.

#### 2.2 Removal from Queue where Indicative Access Proposal not accepted

DBCTM has proposed an amendment to section 5.6(a) of the 2017 AU to allow DBCTM to remove an Access Seeker from the Queue, rather than have the Access Seeker's Access Application automatically lapse, if the Access Seeker does not respond to an Indicative Access Proposal (**IAP**) within the time frame required by the section.

At present, section 5.6(a) provides that on receipt of an IAP, if the Access Seeker intends to progress its Access Application on the basis of the arrangements set out in the Indicative Access Proposal, it must notify DBCT Management of its intention to do so within 30 Business Days after receipt of the IAP. If the Access Seeker does not notify DBCTM of its intent to progress, its Access Application is deemed to have lapsed and the Access Seeker must re-apply for access if it wishes to proceed.

<sup>1</sup> QCA Final Decision November 2016 p44

Under section 5.4(d) of the 2017 AU, (which is a new provision added in the 2017 AU) whenever capacity becomes available, DBCTM must provide an IAP for that capacity to the Access Seeker first in the Queue. DBCTM has now had the opportunity to apply this provision as a number of the current user agreements are reaching expiry and not all tonnage is being renewed. Following the application of this new section, it is DBCTM's view that if the IAP does not match the Access Seeker's requirements (and is therefore not taken up), the Access Seeker's Access Application should not automatically lapse. The proposed change to section 5.6(a) is to allow DBCTM discretion as to whether the Access Seeker is removed on grounds similar to those that DBCTM is to consider under section 5.4(i)(2) when determining whether to remove a Notified Access Seeker from the Queue, namely:

- (a) the date that the Access Seeker proposes to commence delivering coal to the Terminal in its Access Application in comparison with the date for the commencement of available Access in the Indicative Access Proposal;
- (b) the tonnes that the Access Seeker seeks in its Access Application in comparison with the available tonnes in the Indicative Access Proposal; and
- (c) the likelihood of future Access becoming available at the Terminal on or prior to the date for commencement of Access sought by the Access Seeker in its Access Application.

DBCTM proposes that this amendment is required to allow for the circumstances where the IAP offered does not match the capacity requested by the Access Seeker but the Access Seeker is otherwise bona fide.

### **2.3 Interaction between Notifying Access Seeker process and any negotiations on foot**

In section 5.7(a)(6) DBCTM has proposed new drafting to clarify that where there is a Queue and negotiations are underway with the Access Seeker first in the Queue as a result of capacity becoming available, these negotiations should be suspended in circumstances where an Access Seeker later in the Queue uses the "Notifying Access Seeker" process in section 5.4(e).

DBCTM considers that this is the intention of sections 5.4(f) to (h), and therefore does not view the proposed amendment as changing the substantive provisions of the Access Undertaking but simply clarifying the inter-relationship between sections 5.4 and 5.7.

### **2.4 Expansion Price Ruling: Section 5.12**

Section 5.12(a)(2) contains an unqualified obligation on DBCTM to apply to the QCA within 20 Business Days of completion of a FEL 2 Feasibility Study for a ruling as to how the QCA intends to treat certain matters (relating to pricing and variation of terms) under any DAAU submitted by DBCTM in respect of the Terminal Capacity Expansion. The obligation to apply for a ruling exists even where the FEL 2 Feasibility Study does not support the proposed expansion. Under those circumstances, DBCTM submits such a ruling would not be efficient for any of the parties involved. DBCTM therefore considers that it should not be required to apply for a ruling if the FEL 2 Feasibility Study does not support the proposed expansion.

### **2.5 Supply Chain Businesses: Section 9.1**

Section 9.1(a) contains an unqualified statement that DBCTM and its Related Bodies Corporate do not own or operate a Supply Chain Business (other than a Trading SCB) in any market that is related to or uses the Terminal.

The QCA Final Decision relating to section 9.1 indicates that the restriction on vertical integration was intended to reflect the circumstances prevailing at the time of the QCA Final Decision rather than to prevent DBCTM or its Related Bodies Corporate from investing further in the supply chain. DBCTM would need to seek an amendment to the 2017 AU where it or its Related Bodies Corporate are considering the acquisition of a direct or indirect interest in a Supply Chain Business in any market related to the Terminal<sup>2</sup> during the term of the 2017 AU.

This ability for DBCTM to seek an amendment to the 2017 AU in these circumstances is also referenced in QCA's letter to DBCTM dated 2 February 2017.

To accurately reflect the points outlined above DBCTM considers that section 9.1(a) should be amended so that:

- (a) the statement regarding DBCTM not owning or operating a Supply Chain Business (other than a Trading SCB) in any market that is related to or uses the Terminal is expressed to be given as at the date of Access Undertaking; and
- (b) DBCTM expressly acknowledges that it will not own or operate a Supply Chain Business (other than a Trading SCB) in any market that is related to or uses the Terminal without submitting a draft amendment to the 2017 AU

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<sup>2</sup> QCA Final Decision November 2016 p188

(in accordance with the QCA Act) relating to the relevant acquisition and having those amendments approved by the QCA.

DBCTM has also proposed corresponding amendments to paragraphs (a), (b) and (c) of the definition of "Supply Chain Business" in Schedule G to clarify that those limbs of the Supply Chain Business definition only apply to activities which interact with the Terminal.

This proposed amendment would clarify both the extent of the QCA's decision in relation to DBCTM owning or operating a Supply Chain Business as well as DBCTM's ability to seek an amendment to the 2017 AU should it undertake an acquisition to which section 9.1(a) (as amended) applies.

## **2.6 60/60 Tonnage Exclusion: Section 12.5(h)(1)(C)**

The effect of section 12.5(h)(1)(C) is to exclude tonnage held by an Access Holder (or a related body corporate) under an Access Agreement to which section 12.5(h)(1)(A) applies when determining its voting rights in respect of the 60% "tonnage test" under section 12.5(h)(1)(B).

DBCTM considers that this exclusion is prejudicial. This is because an Expansion Party with no relationship to an Access Holder is able to count its expansion tonnage when calculating its voting entitlement, but an Access Holder who holds expansion tonnage (either directly or through a related body corporate) is not.

DBCTM submits that 12.5(h)(1)(C) should be deleted to allow both Access Holders and Expansion Parties to vote on the approval of the Terminal Capacity Expansion under section 12.5(h)(1)(B) (as amended).

## **2.7 Fees for QCA Regulatory Services: Schedule C Part A Section 4**

Sub-section 4(a)(3) provides for pass-through to Access Holders of QCA fees for regulatory services via the ARR as part of the annual roll-forward, or as a "later amendment". In response to concerns about the lack of clear mechanism recently raised by the QCA, DBCTM proposes a new sub-section 4(h) which provides a clear mechanism for such a later amendment. This change is consistent with the submission DBCTM put forward in June 2011 with the QCA Fee DAAU that introduced an amendment to DBCTM's 2010 Access Undertaking to allow for recovery of the QCA's actual fees. In that submission, DBCTM sought:

*"...approval for the inclusion of the QCA fee, in future years, in the ARR using a process similar to the current annual roll forward. That is, DBCTM would not need to submit additional DAAUs to seek approval for the inclusion of QCA fee into the ARR."*

The QCA Fee DAAU was approved by the QCA. DBCTM submits this amendment is administrative in nature, and is not controversial in that it provides a clear mechanism to support pass-through of the QCA fees as intended.

## **2.8 Streamlined NECAP Approvals: Schedule C Part A Section 4 & Schedule H Review Event definition**

In previous undertakings, NECAP costs pursuant to s.12.10(b) were submitted to the QCA for approval as a Review Event in accordance with sub-section 4(f)(1) of Schedule C Part A. However, this sub-section does not provide a clear mechanism for submission of such NECAP expenditure. DBCTM proposes to amend the definition of Review Event (e)(1) in Schedule G to explicitly provide for NECAP expenditure under s.12.10(b), and further to explicitly provide for such a Review Event in sub-section 4(f)(1) of Schedule C Part A. DBCTM submits that this amendment is administrative in nature, and should not be controversial in that it provides a clear mechanism to support streamlined approvals of NECAP as intended.

## **2.9 ETS: Schedule C Part A Section 2.**

The effect of the ETS in section 2 of Schedule C Part A is a reduction of the Revenue Cap by the value of the security held by DBCTM in respect of an Access Agreement which is subject to Early Termination.

The QCA intended the ETS to prevent "double recovery"<sup>3</sup> which would occur if the lost revenue was recovered by socialisation due to a Review Event, and recovered again by realising the security under the Access Agreement:

*We agree that DBCTM should not recover lost revenue more than once—that is, through an access holder's security payment as well as through a review event. To do so would be inconsistent with the interests of access holders and access seekers, and the pricing principles in the QCA Act (ss. 138(2)(e), (g) and (h)). Therefore, we have amended the 2015 DAU to provide that a review event calculation as a result of user default should account for security deposits and other related measures in order to avoid double-recovery.*

However, the relevant Review Event (a change in Reference Tonnage) does not recover revenue lost prior to termination (**Pre-Termination Losses**), only revenue lost after termination. This means that the Revenue Cap would not correctly

<sup>3</sup> QCA Final Decision November 2016 p265

DBCT Management

"account for security deposits and other related measures" as it would not include an adjustment for Pre-Termination Losses. The ETS therefore must similarly exclude Pre-Termination Losses in order that the Revenue Cap is appropriately adjusted to prevent double recovery.

DBCTM considers its proposed amendments to the definition of ETS are consistent with all aspects of the QCA Final Decision on this matter.

#### **2.10 Amendments to Schedule I – summary of the OMC terms**

DBCTM has made a number of clarifications to the summary of the terms of the Operations and Maintenance Contract (**OMC**) terms contained in Schedule I to better reflect the actual provisions of the OMC. DBCTM acknowledges that the QCA based the table included in Schedule I on the summary table provided by Brookfield to the ACCC in December 2015 as part of its undertaking offered under section 87B of the *Competition and Consumer Law Act 2010*, with some amendments (ultimately, no undertaking was accepted by the ACCC as the nature of the proposed transaction was changed). However, given that clause 3.3(b) requires DBCTM to ensure that the terms of the Operation and Maintenance Contract, if amended at any time, remain substantially consistent with the terms set out in Schedule I, DBCTM considers that a number of clarifications to the summary are warranted. Clarifying changes to the definition of "Operation and Maintenance Contract" have also been included.

## SCHEDULE 2 — TABLE OF TYPOGRAPHICAL CHANGES

Item	Section	Change	Reason for change
1	<b>1.1 (Operator)</b>	<b>Delete:</b> The framework for the operation of the Terminal was previously set out in the Operations and Management Contract which was novated to the original lessee of the Terminal. <b>Insert:</b> An Operator is contracted to operate the Terminal on behalf of DBCT Management pursuant to an operations and maintenance contract.	<b>Minor amendment:</b> This amendment clarifies that the current contractual arrangement between the Operator and DBCTM is not the original contract that was novated to the original lessee of the Terminal (as the novated version has been superseded by the amended and restated version).
2	<b>1.1 (Previous access undertakings)</b>	<b>Delete:</b> is due to expire on 30 June 2016 <b>Insert:</b> was due to expire on 30 June 2016 but was extended by an extension DAAU until approval of this Undertaking.	<b>Minor amendment:</b> reflects the history of the 2010 access undertaking and the extension DAAU.
3	<b>1.1 (Background to this Undertaking)</b>	<b>Delete:</b> this <b>Insert:</b> an <b>Delete:</b> [insert] <b>Insert:</b> 9 October 2015	<b>Minor amendment:</b> Insert date the undertaking was submitted.
4	<b>1.1 (Approval of this Undertaking)</b>	<b>Delete:</b> [insert] <b>Insert:</b> 16 February 2017	<b>Minor amendment:</b> Insert date the undertaking was approved.
5	<b>3.1(f), 3.1(g)</b>	Replace references to "Related Party" with "Related Body Corporate".	<b>Typographical:</b> "Related Body Corporate" is the correct defined term in Schedule G.
6	<b>5.4(d)</b>	<b>Delete:</b> DBCTM <b>Insert:</b> DBCT Management <b>Delete:</b> Indicated <b>Insert:</b> Indicative	<b>Typographical:</b> amended to use the correct defined terms in Schedule G.
7	<b>5.4(n)</b>	<b>Delete:</b> tonnage <b>Insert:</b> Tonnage	<b>Typographical:</b> "Tonnage" is the correct defined term in Schedule G.
8	<b>5.4(o)</b>	<b>Insert:</b> "below" before "rail access"	<b>Minor amendment:</b> to match industry terminology
9	<b>5.10(o)(3)</b>	<b>Delete:</b> Part <b>Insert:</b> Section	<b>Typographical:</b> "Section" is used throughout the 2017 AU (not "Part").
10	<b>5.10(q)(3), 5.10(q)(9)(B)</b>	<b>Delete:</b> "of" <b>Delete:</b> DBCTM Management" <b>Insert:</b> DBCT Management"	<b>Typographical:</b> sentence should correctly read "all circumstances" not "all of circumstances". DBCT Management is the correct defined term in Schedule G.
11	<b>5.10(r)</b>	<b>Delete:</b> All consequential amendments associated with the DBCT Incremental Expansion Study DAAU	<b>Minor amendment:</b> As set out in the drafting note following s.5.10(r) this section can be deleted (along with Schedule J and the other consequential amendments) as the costs of the DBCT Incremental Expansion Study DAAU has been approved and these provisions serve no further purpose going forward.
12	<b>5.12(2)(D)</b>	<b>Insert:</b> numbering for sub-section (D)	<b>Typographical:</b> Section formatting correction.

Item	Section	Change	Reason for change
13	5.13(a)	<b>(1) Delete:</b> this Agreement <b>Insert:</b> its Access Agreement <b>(2) Insert:</b> has not <b>Delete:</b> provides <b>Insert:</b> provided	<b>Typographical:</b> This section reflects the QCA Final Decision that DBCTM must approve a transfer unless it is reasonably satisfied that the assignee would not be ready, willing or able to perform under an access agreement. The reference to “this Agreement” in sub clause (1) was taken from the drafting included in the SAA. In the AU, it should be properly updated to refer to the relevant Access Agreement. The words underlined were omitted from sub clause 2: <i>"DBCT Management must consent to any such proposed transfer unless... the assignee is not of good financial standing... or the assignee <u>has not</u> otherwise <u>provided</u> security in a form acceptable to DBCT Management..."</i>
14	6	<b>Subheadings added</b>	<b>Minor amendment:</b> for ease of reading and consistent with style throughout the AU.
15	6.1 (c) and (d)	<b>Insert: Approvals</b>	<b>Minor amendment:</b> to clarify that DBCTM should be able to consider the requirements of authority approvals for the Terminal, in addition to applicable laws and regulatory standards and Good Operating and Maintenance Practices, when considering amendments to the Terminal Regulations.
16	6.2(g)(1)	<b>Delete:</b> the amendments by <b>Insert:</b> DBCT Management’s refusal to give its consent to a proposed amendment to the Terminal Regulations	<b>Minor amendment:</b> Where an Access Holder, Access Seeker or Expansion Party objects to DBCTM’s decision to not consent to a proposed amendment to the Terminal Regulations, the time period for raising the objection with the QCA should be from the date that DBCTM notifies those parties of its decision not to consent, not the date on which the proposed amendments were first publicised (as the objection is to DBCTM’s decision to not consent, so the time should not run before such a decision has been made).
17	7	<b>Insert:</b> Information or documents provided to the QCA may be subject to obligations of confidence in accordance with section 239 of the QCA Act.	<b>Minor amendment:</b> The amendment recognises DBCTM's right under the QCA Act to request that information or documents are treated as confidential by the QCA, notwithstanding that the information or document is provided under the AU.
18	9.1(c)	<b>Delete:</b> Schedule I <b>Insert:</b> Schedule H	<b>Typographical:</b> Cross referencing error.
19	10.2(i)	<b>Insert:</b> written	<b>Minor amendment:</b> The amendment clarifies that DBCTM obligation is to report written complaints it receives in relation to compliance with the AU.
20	12.5(j)	<b>Insert:</b> relevant <b>Delete:</b> Differentiated Expansion Component’s	<b>Minor amendment:</b> The section has been amended for consistency with section 12.5(e)(1), which provides that the process set out in section 12.5(e) applies to any Expansion Component (not only a Differentiated Expansion Component). The amendment is also consistent with the drafting in section 12.5(k).
21	12.5(o)	<b>Delete:</b> be	<b>Typographical:</b> "be" was included in error.
22	12.5(p)	<b>Delete:</b> AAR <b>Insert:</b> ARR	<b>Typographical:</b> ARR is the abbreviation of "Annual Revenue Requirement".
23	13.1(f)	<b>Delete:</b> DBCTM <b>Insert:</b> DBCT Management	<b>Typographical:</b> “DBCT Management” is the defined term in Schedule G.
24	Schedule A	Access Application Form and Renewal Application Form have been replaced.	<b>Minor amendment:</b> formatting changes
25	Schedule C Part A s.4(a)(1)	<b>Delete:</b> [insert] <b>Insert:</b> 21 November 2016	<b>Minor amendment:</b> Insert the date of the QCA Final Decision.

Item	Section	Change	Reason for change
26	Schedule C Part A s.4(a)(1)	<b>Insert:</b> or section 150L of the QCA Act	<b>Minor amendment:</b> Schedule C provides for the pass-through of the fees for QCA regulatory services pursuant to the <i>Queensland Competition Authority Regulation 2007</i> . However, The costs of a Price Ruling are dealt with under section 150L of the QCA Act. This amendment is consistent with the principle that DBCTM can pass through the costs of regulatory services via the ARR.
27	Schedule C Part A s.4(e)	<b>Delete:</b> this subsection and renumber subsequent sections.	Subsection covered by the content of s.4(d).
28	Schedule C Part A s.4(e)(1)	<b>Delete:</b> or (c)	<b>Typographical error:</b> Paragraph (c) of the definition of "Review Event" is a Capacity Expansion, which is already provided for in Schedule C Part A s.4(f)(2).
29	Schedule C Part A s.4(g)	<b>Delete:</b> s4(g) <b>Insert:</b> s4(e)	<b>Typographical error:</b> incorrect clause reference.
30	Schedule D	<b>Insert:</b> 16 February 2017	<b>Minor amendment:</b> date of QCA's approval of AU added to definition of "Access Undertaking"
31	Schedule E s.1	<b>Delete:</b> Users <b>Insert:</b> Access Holders	<b>Typographical error:</b> "Access Holder" is a defined term in Schedule G.
32	Schedule G	<b>Delete:</b> definition of "DBCT Incremental Expansion Study", references to DBCT Incremental Expansion Study in the definitions of FEL1, FEL2 and FEL 3 Feasibility Study and in the definition of "Review Event". <b>Delete:</b> DBCTM <b>Insert:</b> DBCT Management <b>Delete:</b> "(but limited to 20% of the prudent cost of the Feasibility Study if the proposed Terminal Capacity Expansion does not proceed);" from subsection (e)(5) of the definition of "Review Event"	<b>Minor amendment:</b> Removal of definitions associated with the DBCT Incremental Expansion Study DAAU (see Item 11 above); <b>Typographical:</b> "DBCT Management" is the defined term in Schedule G. <b>Minor amendment:</b> section 5.10(o) itself sets out the costs recoverable.
33	Schedule H s.4.1(c)	<b>Delete:</b> Users (x2) <b>Insert:</b> Access Holders (x2) <b>Insert:</b> 16 February 2017	<b>Typographical error:</b> "Access Holder" is a defined term in Schedule G. <b>Minor amendment:</b> date of QCA's approval of AU added to definition of "Access Undertaking".
34	Schedule J	<b>Delete:</b> Schedule J	<b>Minor amendment:</b> Removal of provisions from 2010 AU associated with the DBCT Incremental Expansion Study DAAU (see Item 11 above).



