Queensland Competition Authority

Draft decision

DBCTM's Modification DAAU

March 2018

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

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SUBMISSIONS

Closing date for submissions: 27 April 2018

Public involvement is an important element of the decision-making processes of the Queensland Competition Authority (QCA). Therefore submissions are invited from interested parties concerning its assessment of DBCT Management's Modification DAAU. The QCA will take account of all submissions received within the stated timeframes.

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

Queensland Competition Authority
GPO Box 2257
Brisbane Q 4001

Tel (07) 3222 0587
Fax (07) 3222 0599
www.qca.org.au/submissions

Confidentiality

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

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

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

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

Public access to submissions

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

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EXECUTIVE SUMMARY

The Queensland Competition Authority's (QCA) draft decision is to refuse to approve DBCT Management Pty Ltd's (DBCTM) modification draft amending access undertaking (Modification DAAU), for the reasons detailed in Chapters 3 to 5 of this draft decision.

We consider the majority of the typographical amendments DBCTM is seeking to make are justified and would improve the clarity of the 2017 access undertaking. This is reflected in Chapter 5.

However, we consider five out of the ten substantive changes proposed do not appropriately balance the legitimate business interests of DBCTM's with the interests of access holders and seekers, and/or do not promote regulatory certainty or the economically efficient operation of, use of and investment in the terminal.

Background

Dalrymple Bay Coal Terminal's 2017 access undertaking, which came into effect on 16 February 2017, sets out the terms and conditions for negotiating access to the terminal during the regulatory period.

On 15 September 2017, DBCTM submitted the Modification DAAU, seeking to amend the wording of the 2017 access undertaking.

Key draft positions

In the Modification DAAU, DBCT Management proposed a number of amendments that purportedly would remove ambiguity from the 2017 access undertaking, for example, by clarifying:

- that DBCT Management is not obliged to apply for a differential pricing ruling if a FEL[1] 2 feasibility study does not recommend proceeding to a FEL 3 study
- the summary of the Operations and Maintenance Contract in Schedule I of the 2017 access undertaking
- that the streamlined non-expansion capital expenditure approval process does not require a DAAU.

Where the proposed amendments meet the approval criteria[2], we propose to accept them.

However, some amendments proposed by DBCTM would significantly change the terms of the undertaking and do not meet the approval criteria. These amendments include:

- deleting the exclusion clause from the 60/60 requirement
- amending the definition of early termination security.

Our draft decision therefore is to refuse to approve the Modification DAAU.

Next steps

We are seeking stakeholder comments by **Friday 27 April 2018**. Subject to stakeholders' comments, the QCA will endeavour to publish a final decision within the six-month period (as per s. 147A(2) of the *Queensland Competition Authority Act 1997 (*QCA Act)).

[1] FEL: front-end loading
[2] Under sections 143(2) and 138(2) of the *Queensland Competition Authority Act 1997*.

THE ROLE OF THE QCA—TASK, TIMING AND CONTACTS

The QCA is an independent statutory body which promotes competition as the basis for enhancing efficiency and growth in the Queensland economy.

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

The DAAU review

On 15 September 2017, DBCTM submitted a draft amending access undertaking (DAAU) to the QCA for approval.

Under section 142 of the QCA Act, the QCA is required to consider the DAAU and either approve, or refuse to approve, it. The QCA has assessed the DAAU in the context of the statutory access regime in the QCA Act and, in particular, the object of Part 5 (s. 69E) and the other criteria for review of undertakings in section 138(2) of the QCA Act.

The criteria include promoting economically efficient operation of, use of and investment in regulated infrastructure with the effect of promoting competition in related markets. They also encompass the legitimate business interests of DBCTM and current terminal users, the interests of access seekers and, more broadly, the public interest.

In assessing DBCTM's Modification DAAU, the QCA has considered the arguments and information put forward by DBCTM and stakeholders, and has undertaken its own analysis. The QCA initiated a public consultation process on the DAAU, and initial submissions were due by 20 October 2017.

Key dates

In accordance with section 147A(2) of the QCA Act, the QCA must use its best endeavours to decide whether to approve, or refuse to approve, the DAAU within six months, excluding any day when submissions are sought.

In accordance with those requirements, the six-month period commenced on 23 October 2017 and is scheduled to expire on 28 May 2017.

Meeting this timetable will depend on the scope and complexity of issues raised by stakeholders in response to this draft decision, as part of the consultation and submission phases.

Submissions

Submissions on this draft decision are invited by **Friday 27 April 2018**. We will consider all submissions received within this timeframe.

Contacts

Enquiries regarding this project should be directed to:

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1 INTRODUCTION

1.1 Background

The Dalrymple Bay Coal Terminal (DBCT, or the terminal) is a common-user coal export terminal servicing mines in the Goonyella system of the Bowen Basin coal fields. Commissioned in 1983, DBCT is located 40 kilometres south of Mackay, and is Queensland's largest multi-user coal export terminal.

The services provided at DBCT are declared for third party access under Part 5 of the QCA Act.

The regulatory framework for DBCT is governed by the 2017 access undertaking (2017 AU), which was approved by the QCA and took effect on 16 February 2017.

1.1.1 Structural arrangements

Ownership

DBCT is owned by the Queensland Government through DBCT Holdings Pty Ltd (DBCT Holdings), which is an entity that is wholly controlled by the government. In 2001, DBCT Holdings leased the terminal to DBCT Management Pty Ltd and the DBCT Trustee (collectively referred to as DBCTM). DBCTM has the option to extend the lease, which expires in 2051, for a further 49-year period.

DBCTM is 100 per cent legally owned by its Australian parent, BPIH Pty Ltd (formerly Brookfield PIH Pty Limited). BPIH Pty Ltd, in turn, is 100 per cent owned (through a number of interposed entities) by Brookfield Infrastructure Partners (BIP), with 29 per cent of BIP held by Brookfield Asset Management (BAM) and 71 per cent publicly listed on the New York and Toronto stock exchanges. BAM is 100 per cent publicly listed on the New York and Toronto stock exchanges.

DBCTM's operation of, use of, and investment in the terminal are subject to legislative and contractual arrangements put in place by the Queensland Government, prior to the lease of the terminal in 2001.

Port Services Agreement

The Port Services Agreement (PSA) between DBCTM and DBCT Holdings establishes the rights and responsibilities of DBCTM with respect to the operation, management and expansion of the terminal.

Operations and Maintenance Contract

Of particular relevance, the day-to-day operational management of the terminal is subcontracted by DMCTM to DBCT Pty Ltd (DBCT PL or 'the Operator') as the Operator under the Operations and Maintenance Contract (OMC).[3] The Operator is an independent service provider owned by a majority of the existing users of the terminal. Neither Brookfield nor DBCTM has any ownership interest in the Operator.

The Operator is contracted by DBCTM under the OMC to oversee the day-to-day operations and maintenance of the terminal. In accordance with the OMC, the Operator is also responsible for some long-term asset management and maintenance planning.

[3] DBCT PL is the 'Operator' under the Operations and Maintenance Contract (OMC), while DBCTM is the ‘operator’ of the terminal for the purposes of Part 5 of the QCA Act.

The OMC and the 2017 AU require that both DBCTM and the Operator comply with the Terminal Regulations, which give detailed requirements of the day-to-day operations at the terminal. The Terminal Regulations must be adhered to by all access holders (according to the terms of their access agreements), and may be amended by the Operator, with the consent of DBCTM.

User agreements

The users of DBCT are coal companies holding user agreements that provide them with the ability to ship coal through the terminal, assign some or all of their access rights to a third party and/or permit another user or third party to ship coal through the terminal using their access rights. The agreements give users an evergreen right to renew their contract on expiry.

Users and third parties can apply for access to the terminal through the negotiation framework, which establishes an access queue and an allocation by DBCTM of any access rights according to the queue; or through a capacity expansion process, which allows access seekers to trigger DBCTM's general obligation to undertake terminal capacity expansions.

Trading SCB

In 2012, DBCTM established a trading supply chain business (Trading SCB) to manage unused capacity entitlements at the terminal. The Trading SCB provides an access arbitrage service ('secondary access market') for access holders, access seekers and third parties wishing to ship through the terminal. The service is established via side agreements with participating users.

1.1.2 The 2017 access undertaking

The 2017 AU sets out the terms and conditions under which DBCT Management will provide access to the terminal. It also addresses the process required for an access seeker to negotiate access to the infrastructure and the way in which any disputes in relation to access are to be resolved.

The 2017 AU incorporates measures to mitigate potential adverse effects on competition that could arise out of the common ownership within the Brookfield Group of both DBCT Management and the Trading SCB.

The undertaking may be subject to amendment through a draft amending access undertaking (DAAU) process under the QCA Act.

1.2 DBCTM's Modification DAAU

DBCTM submitted that it had identified a number of drafting issues in the DBCT 2017 AU and proposed a number of amendments. It said that the purpose of the amendments was to:

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

DBCTM submitted that the amendments were intended to avoid uncertainty regarding the legal terms and legal effect of the 2017 AU, for the duration of the undertaking and for the negotiation of future undertakings. DBCTM considered that the changes were not contentious and advised that it had provided a draft of the amendments to the DBCT User Group for review and comment.

We have considered the matters raised within the DAAU in making this draft decision.

1.3 Public consultation

The QCA invited stakeholder submissions on the DAAU. The DBCT User Group made a submission, which we considered in making this draft decision. The DBCT User Group consists of the following users of the terminal: Anglo American, BHP Mitsui Coal, Fitzroy Australia Resources, Glencore, Stanmore Coal, Middlemount South, Peabody Energy and Rio Tinto.

1.4 Structure of the draft decision

The QCA's draft decision primarily focuses on the differences of views held by DBCTM and the DBCT User Group. The structure of the draft decision is as follows:

- Chapter 2: the regulatory framework and the overarching issues arising from the DAAU
- Chapter 3: the substantive matters in DBCTM's proposals on which the DBCT User Group agrees with DBCTM
- Chapter 4: the substantive matters where there is disagreement
- Chapter 5: non-substantive amendments, identified as typographical, and other formatting errors.

2 LEGAL FRAMEWORK

2.1 Part 5 of the QCA Act

Part 5 of the QCA Act establishes an access regime to provide a legislated right for third parties to acquire services which use significant infrastructure with natural monopoly characteristics.

The object of Part 5 of the QCA Act

The object of Part 5 of the QCA Act is set out in section 69E:

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

Section 69E is principally directed at promoting economic efficiency and, in particular, the economically efficient operation of, use of, and investment in facilities.

We consider economically efficient outcomes are facilitated, among other things, by an access framework that mitigates the potential exercise of market power by the owner of a facility with natural monopoly characteristics (such as those services which are declared under Part 5 of the QCA Act).

Factors affecting approval of a DAAU (section 138(2))

Section 143(2) of the QCA Act states that the QCA may approve a DAAU only if it considers it appropriate having regard to the matters mentioned in section 138(2), which in turn provides that the QCA is to have regard to each of the following:

(a) the object of Part 5 of the QCA Act, as outlined above

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

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

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

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

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

(g) the pricing principles in section 168A of the QCA Act, which in relation to the price of access to a service are that the price should:

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

  (ii) allow for multi-part pricing and price discrimination where it aids efficiency

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

(iv) provide incentives to reduce costs or otherwise improve productivity

(h) any other issues the QCA considers relevant.

Section 138(2) of the QCA Act is drafted as a simple list, recognising that the weight and importance of each of the factors is a matter to be determined by the QCA on a case-by-case basis, having regard to the circumstances.[4] No individual factor is regarded as having fundamental weight or is required to be determinative in every case.

Moreover, the matters listed in section 138(2) give rise to different, and, at times competing, considerations which need to be assessed and balanced in deciding whether it is appropriate to approve a DAAU. For instance, there may be some tension between the legitimate business interests of DBCTM (as the operator of the terminal) and the interests of access seekers and access holders, or other stakeholders. Broader public interest considerations may also, at times, need to be balanced against the interests of individual stakeholders.

The QCA has further outlined its assessment approach in applying the statutory factors in section 138(2) in the final decision made by the QCA in respect of DBCTM's 2015 DAU.[5] The same approach has been adopted in assessing DBCTM's Modification DAAU.

2.2 Overarching matter

2.2.1 Regulatory certainty

DBCTM submitted that its proposed amendments were intended to avoid uncertainty about the legal effect of the terms of the 2017 AU. As noted above, DBCTM did not consider that any of the amendments were contentious.[6]

Stakeholders' comments

The DBCT User Group did not agree that none of DBCTM's proposals were contentious. In its submission, the DBCT User Group focused on the amendments it considered to be contentious, noting that the acceptance of those matters would undermine regulatory certainty. It considered that DBCTM's attempt to seek to 'reopen' the terms of the 2017 AU so soon after it was approved by seeking amendments to improve its own position (rather than due to a change in circumstances) was an inappropriate use of the processes available under the QCA Act.[7]

The DBCT User Group noted further that the amendments were being proposed only 7.5 months after the final decision to approve the 2017 AU was made. The Group opposed 'the use of the DAAU process to amend the 2017 AU to benefit DBCTM under the guise of "administrative" changes (that—coincidentally—solely benefit DBCTM rather than users)'. The Group urged the QCA to preference the preservation of regulatory certainty over the interests of DBCTM. However, the Group's submission acknowledged that many of the amendments were corrections of errors and did not change the underlying operation of the 2017 AU.[8]

QCA response

The principle of regulatory certainty, although not specifically a factor under section 138(2), is relevant when considering the legitimate business interests of DBCTM, the interests of access

[4] *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 41 (Mason J).
[5] QCA, DBCTM's 2015 DAU, final decision, November 2016, Chapter 2.
[6] DBCTM, 2017: 1.
[7] DBCT User Group, 2017: 2.
[8] DBCT User Group, 2017: 2.

seekers and access holders, and the public interest (ss. 138(2)(b),(d), (e) and (h)). It is also a matter that the QCA may in any event have regard to (independent of other related considerations) pursuant to section 138(2)(h). The QCA generally supports regulatory certainty by seeking to provide consistent, transparent and timely decisions that take account of all available relevant information.

However, the QCA also recognises that the QCA Act makes the DAAU process available to the owner or operator of a facility without placing any constraint on when a DAAU may be submitted.[9] In each case, the QCA must consider the appropriateness of any proposed changes, having regard to the factors in section 138(2)—and not simply the timing of the request.

In most cases, the correction of errors or amendments that simply improve clarity of the current 2017 AU will promote regulatory certainty.

However, where amendments give rise to a material change to the 2017 AU including through any reallocation of risk between stakeholders, then the question of regulatory certainty is likely to be a relevant consideration. Where the QCA considers that this may be the case in relation to the Modification DAAU, the QCA recognises the concern raised by the DBCT User Group that there has only been a limited period since the 2017 AU was approved and that material shifts in the risks faced by stakeholders, in the absence of any change in circumstances, may risk undermining confidence in the predictability of the regime.

The QCA notes, in this regard:

- the value of promoting regulatory certainty as a matter that it considers relevant (s.138(h)), and
- the public interest in the operation of a stable, transparent and consistent regulatory framework (s.138(d)).

In some cases therefore, while not determinative, the question of timing of the Modification DAAU may be a factor that weighs against approving the DAAU.

[9] Contrast, in this regard, a request to amend a water pricing determination, which may be refused by the QCA under section 170ZP where the QCA considers that there has not been a material change in circumstances. No similar provision applies in relation to DAAUs.

3 MATTERS SUPPORTED BY THE USER GROUP

This chapter considers the three substantive matters in DBCT's Modification DAAU that are supported by the DBCT User Group:

(1) Expansion pricing ruling (cl. 5.12)

(2) Interaction between notifying access seeker process and negotiations underway (cl. 5.7)

(3) Summary of OMC terms in Schedule I.

Given the User Group's support for these matters, the QCA has presumed these to be in the interests of both the terminal's operator and existing access holders—some of whom may seek renewed or additional access to the terminal in the future.

The QCA's investigation of these matters therefore focused on the public interest (s. 138(2)(d)) and on the interests of access seekers who are not currently members of the DBCT User Group (s. 138(2)(e)).

3.1 Expansion pricing ruling (cl. 5.12)

Clause 5.12 aims to allow users to properly assess their commercial position when a terminal expansion is being considered, by providing them with information on access charges, and the possible need for the expansion to be differentially priced.

DBCTM's Modification DAAU proposal

DBCTM said clause 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 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.

DBCTM said such a ruling would not be efficient for any of the parties involved, and it should not be required to apply for a ruling if the FEL 2 feasibility study does not support the proposed expansion.[10]

Stakeholders' comments

The DBCT User Group supported the proposed amendment to clarify that DBCTM is only obliged to proceed to a FEL 3 feasibility study where the FEL 2 feasibility study supports proceeding. This will mean that costs are not wasted on a FEL 3 feasibility study for an expansion project that is not found to be feasible by a FEL 2 feasibility study.[11]

QCA analysis and draft decision

Having considered the proposed amendment to clause 5.12(a)(2) and the DBCT User Group's submission, the QCA's draft decision is to approve DBCTM's proposal. The QCA agrees with DBCTM that it makes little sense to apply for a differential pricing ruling from the QCA if the FEL 2 feasibility study does not support proceeding to a FEL 3 study.

[10] DBCTM 2017b, *DBCTM's Modification DAAU,* explanatory submission, September, p. 3.
[11] DBCT User Group 2017, Submission to the QCA, *DBCTM's Modification DAAU*, October, p. 4.

The QCA notes it is unclear whether there is any express obligation on DBCTM to proceed to a FEL 3 study even if the FEL 2 study supports proceeding, as characterised by the DBCT User Group. However, there is an overarching obligation for DBCTM to undertake terminal capacity expansions under clause 12.3.

This proposed amendment is consistent with the public interest and the interests of access seekers (ss. 138(2)(d) and (e) of the QCA Act).

We consider it appropriate to make this draft decision having regard to each of the matters set out in section 138(2) of the QCA Act, for the reasons set out above.

Draft decision 3.1: Expansion pricing ruling

The QCA's draft decision is to approve DBCTM's proposed amendment to clause 5.12 of the 2017 AU, with regard to the expansion pricing ruling being unnecessary when the FEL 2 feasibility study does not support proceeding to a FEL 3 study.

3.2 Interaction between notifying access seeker process and any negotiations underway (cl.5.7)

Clause 5.7 sets out the negotiation process as the access seeker progresses its access application.

DBCTM's Modification DAAU proposal

DBCTM proposed to insert a new clause 5.7(a)(6), 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 further down the queue uses the 'Notifying Access Seeker' process in clause 5.4(e).

DBCTM considered this was the intention of clauses 5.4(f)–(h), and therefore it did not view the proposed amendment as changing the substantive provisions of the AU, but simply as clarifying the interrelationship between clauses 5.4 and 5.7.[12]

Stakeholders' comments

The DBCT User Group supported the amendments to clause 5.7(a)(6)—as clarifying how the process in clauses 5.4(e) and (f) should interact with the normal course process of negotiating in order of the queue under clause 5.7.[13]

QCA analysis and draft decision

The QCA reviewed the amendment to include a new clause 5.7(a)(6), and the consequential amendments to clause 5.7(b), proposed by DBCTM and supported by the DBCT User Group. The QCA considers the amendments to be consistent with the queuing mechanism in place and to be in the interest of access seekers (s. 138(2)(e) of the QCA Act). In addition, the QCA considers these proposed amendments to improve clarity of the current 2017 AU so as to promote regulatory certainty (s. 138(2)(h)).

Therefore, the QCA's draft decision is to approve DBCTM's proposed amendment regarding the interaction between the notifying access seeker process and any negotiations on foot.

[12] DBCTM 2017b, *DBCTM's Modification DAAU,* explanatory submission, September, p. 3.
[13] DBCT User Group 2017, Submission to the QCA, *DBCTM's Modification DAAU*, October, p. 3.

In addition, the QCA suggests further amending the reference in clause 5.7(b) to the negotiation process 'ceasing' (which implies that negotiations terminate) to the negotiation process 'being suspended'. This change would better reflect the meaning of this clause and is consequential to the amendment proposed by DBCTM.

We consider it appropriate to make this draft decision having regard to each of the matters set out in section 138(2) of the QCA Act, for the reasons set out above.

Draft decision 3.2: Interaction between the notifying access seeker process and any negotiations underway

The QCA's draft decision is to approve DBCTM's proposed amendment to clause 5.7(a)(6) and 5.7(b) of the 2017 AU, with regard to the interaction between the notifying access seeker process and any negotiations underway.

Draft decision 3.3: Replace 'ceasing' by 'being suspended' in clause 5.7(b)

The QCA's draft decision is that the reference in clause 5.7(b) to the negotiation process 'ceasing' (which implies that negotiations terminate) be amended to the negotiation process 'being suspended'.

3.3 Summary of the Operations and Maintenance Contract in Schedule I

Schedule I of the 2017 AU summarises the terms of the Operations and Maintenance Contract (OMC).

DBCTM's Modification DAAU proposal

DBCTM said it made a number of clarifications to the summary of the terms of the OMC contained in Schedule I to 'better reflect the actual provisions of the OMC'.[14] DBCTM acknowledged the QCA had based the table included in Schedule I on a summary table provided by Brookfield to the ACCC in December 2015 as part of DBCTM's undertaking offered under section 87B of the *Competition and Consumer Act 2010*. However, given clause 3.3(b) of the 2017 AU requires DBCTM to ensure that the terms of the OMC, if amended at any time, remain substantially consistent with the terms set out in Schedule I, DBCTM considered a number of clarifications to the summary were warranted. Clarifying changes to the definition of 'Operation and Maintenance Contract' were also included.[15]

Stakeholders' comments

The DBCT User Group considered the proposed clarifications to the OMC terms were accurate and could be accepted in their entirety.[16]

[14] DBCTM 2017b, DBCTM's *Modification DAAU, explanatory submission*, September, p. 5.
[15] DBCTM 2017b, *DBCTM's Modification DAAU,* explanatory submission, September, p. 5.
[16] DBCT User Group 2017, Submission to the QCA, *DBCTM's Modification DAAU*, October, p. 6.

QCA analysis and draft decision

Having considered DBCTM's and the DBCT User Group's respective submissions, the QCA draft decision is to approve the amendments to Schedule I of the 2017 AU in relation to the summary of the terms of the OMC, as well as the amendment to the definition of OMC in Schedule G.

The QCA notes the 2017 AU is a publicly available document, while the OMC is not. It is therefore in the public interest and in the access seekers' interests that the contents of the OMC be characterised as accurately as possible in Schedule I (ss. 138(2)(d) and (e) of the QCA Act).

We consider it appropriate to make this draft decision having regard to each of the matters set out in section 138(2) of the QCA Act, for the reasons set out above.

Draft decision 3.4: Summary of the terms of the OMC

The QCA's draft decision is to approve DBCTM's proposed amendment to Schedule I of the 2017 AU, with regard to the summary of the terms of the Operations and Maintenance Contract, as well as the proposed amendment to the definition of OMC in Schedule G of the 2017 AU.

4 MATTERS NOT SUPPORTED BY THE USER GROUP

This chapter considers the seven substantive matters proposed by DBCTM that are not supported by the DBCT User Group, namely:

(1) The role of the Operator and the OMC

(2) Removal from the queue where an indicative access proposal is not accepted (cl. 5.6(a))

(3) Supply chain business (cl. 9.1)

(4) 60/60 tonnage exclusion (cl.12.5)

(5) Fee for QCA regulatory services (Sch. C, Part A, cl.4)

(6) Streamlined NECAP approvals

(7) Early termination security (Sch. C, Part A, cl. 2).

4.1 The role of the Operator and the OMC

DBCTM leases the terminal from the state, and the day-to-day operational management of the terminal is subcontracted to DBCT Pty Ltd (DBCT PL or Operator) as the Operator under the OMC. DBCT PL is an independent service provider owned by a majority of the existing users of the terminal. DBCTM does not have any ownership interest in DBCT PL.[17]

Background

As part of its October and November 2015 Ring-Fencing DAAUs[18], DBCTM proposed to insert a clause to the access undertaking on the role of the Operator (cl. 3.2), which was simultaneously mirrored in the proposed 2017 AU.

As part of its final decision on the 2017 AU, the QCA required inclusion of a new clause 3.3, stipulating DBCTM's obligation to maintain the OMC and ensure its terms remained consistent with Schedule I of the 2017 AU.

Following the QCA's final decision, DBCTM wrote to the QCA on 22 December 2016 to raise concerns with the requirement to retain DBCT PL as Operator of the terminal, and to seek for clauses 3.2 and 3.3 to state expressly that DBCTM's obligation is for the period covered by the undertaking.[19] The QCA responded to DBCTM's letter, explaining the DAAU process under the QCA Act.[20]

On 16 February 2017, the QCA approved DBCTM's 2017 AU (as provided to the QCA by DBCTM on 9 February 2017), confirming that it was compliant with the QCA's final decision (no further amendments were made by DBCTM).[21] As part of its resubmission, DBCTM said it would submit

[17] Set out in more detail in QCA 2016a, *DBCTM's 2015 DAU*, draft decision, April, p. 4.

[18] The October and November 2015 Ring-Fencing DAAUs sought to include ring-fencing arrangements, and related provisions, in DBCTM's 2010 AU. DBCTM submitted the Ring-Fencing DAAUs to the QCA with the intention of ameliorating vertical integration concerns arising from the then proposed acquisition of Asciano (which owns the Pacific National above-rail business) by Brookfield (which owns DBCTM). DBCTM withdrew its Ring-Fencing DAAU on 24 March 2016.

[19] DBCTM 2016, *DBCT 2015 DAU—QCA's final decision*, letter to the QCA, 22 December, p. 2.

[20] QCA 2017a, *DBCT 2015 DAU—QCA's final decision*, letter to DBCTM, January.

[21] QCA 2017b, *Approval: DBCT Management's 2015 Draft Access Undertaking*, letter to DBCTM, February.

a DAAU to address concerns raised in its December 2016 letter.[22] The QCA understands this to be the present Modification DAAU.

DBCTM's Modification DAAU proposal

DBCTM proposed to insert the wording 'During the term of the Access Undertaking' at the start of clauses 3.2 and 3.3 of the 2017 AU, which have regard to the role of the Operator and the OMC. DBCTM said this was to clarify that the statement of facts (in cl. 3.2) and the undertaking (in cl. 3.3) only apply for the duration of the undertaking.[23]

Stakeholders' comments

The DBCT User Group considered the proposed changes to clauses 3.2 and 3.3 were unnecessary, as they did not alter the substantive application of those clauses in any way, because all provisions of the undertaking apply 'during the term of undertaking'.[24]

The DBCT User Group also requested that the QCA make clear in its decision that the DBCT User Group has not accepted that it would cease to be appropriate for DBCT PL to remain the Operator beyond the term of the 2017 AU.[25]

QCA analysis

The QCA agrees with the DBCT User Group that the proposed amendments to clauses 3.2 and 3.3 do not alter the application of clause 3.

The QCA understands from DBCTM's correspondence that this amendment is important to DBCTM and that the proposed amendments provide some level of comfort.

In those circumstances, the QCA is willing to accept DBCTM's amendment, noting this acceptance reflects no judgement (either way) on the appropriateness of DBCT PL remaining the Operator or on the operations of the OMC beyond the term of the 2017 AU. For avoidance of doubt, the QCA's acceptance of these amendments should not be read so as to imply that other provisions of the 2017 AU do not apply 'during the term of the AU'.

Given the proposed amendments do not alter the application of the 2017 AU, the QCA considers they are appropriately balanced in consideration of all matters under section 138(2) of the QCA Act.

QCA draft decision

Taking into account the above factors, the QCA's draft decision is to approve DBCTM's proposed amendments to clauses 3.2 and 3.3 of the 2017 AU, with regard to the role of the Operator and the OMC.

We consider it appropriate to make this draft decision, having regard to each of the matters set out in section 138(2) of the QCA Act, for the reasons set out above.

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[22] DBCTM 2017a, *DBCT 2015 DAU—Compliance with Secondary Undertaking Notice*, letter to the QCA, February.
[23] DBCTM 2017b, *DBCTM's Modification DAAU,* explanatory submission*,* September, p. 2.
[24] DBCT User Group 2017, Submission to the QCA, *DBCTM's Modification DAAU*, October, pp. 2–3.
[25] DBCT User Group 2017, Submission to the QCA, *DBCTM's Modification DAAU*, October, p. 2.

Draft decision 4.1: Operator and OMC

The QCA's draft decision is to approve DBCTM's proposed amendment to clauses 3.2 and 3.3 of the 2017 AU, with regard to the role of the Operator and the Operation and Maintenance Contract.

4.2 Removal from the queue when an indicative access proposal is not accepted (cl. 5.6(a))

Clause 5.6(a) of the 2017 AU provides that if an access seeker does not notify DBCTM of its intention to progress its application on the basis of the arrangements set out in the indicative access proposal (IAP) within 30 business days, its access application will be deemed to have lapsed and the access seeker may apply again for access.

Background

There was no change made to clause 5.6(a) of the 2010 AU as part of the 2017 AU approval process.

DBCTM's Modification DAAU proposal

DBCTM proposed to amend clause 5.6(a) to allow DBCTM to remove an access seeker from the queue, rather than having the access seeker's access application automatically lapse, if the access seeker does not respond to an IAP within the required timeframe.

DBCTM said this amendment would allow for the circumstance where the IAP offered does not match the capacity requested, but the access seeker is acting in good faith.[26]

Stakeholders' comments

The DBCT User Group did not consider the queuing arrangements were deficient or required amendment. The DBCT User Group was concerned about the extent of discretion DBCTM would have, under the proposed amendments to clause 5.6(a), in deciding to remove an access seeker from the queue. It said this had the potential to result in an inequitable application of the queuing mechanism, and appeared to undermine the certainty and transparency of the process.[27]

QCA analysis

Having considered both DBCTM and the DBCT User Group's submissions, the QCA considers that DBCTM has not clearly identified a failing in the existing 2017 AU wording of clause 5.6(a). In the absence of a compelling reason for the amendment, and without support from the DBCT User Group, the QCA considers it prudent to refuse to approve DBCTM's proposed amendment to clause 5.6(a). This is because the QCA does not consider the proposed amendment improves clarity of the 2017 AU so as to promote regulatory certainty (s. 138(2)(h)).

However, the QCA seeks further submissions from stakeholders on the practical implications of the existing drafting, as well as stakeholders' views on the existing queuing mechanism. In particular, the QCA would be interested in the views of potential access seekers who do not

[26] DBCTM 2017b, *DBCTM's Modification DAAU,* explanatory submission, September, p. 2.
[27] DBCT User Group 2017, Submission to the QCA, *DBCTM's Modification DAAU*, October, p. 3.

already hold access rights at DBCT, or access holders who have experienced the queuing mechanism as an access seeker.

In the interim, given the information presented to us, we consider our draft decision appropriately balances the legitimate business interests of DBCTM with the interests of access holders and seekers (ss. 138(2)(c), (e) and (h) of the QCA Act).

QCA draft decision

Taking into account the above factors, the QCA's draft decision is to refuse to approve DBCTM's proposed amendment to clause 5.6(a), with regard to removal of access seekers from the queue when an IAP is not accepted.

We consider it appropriate to make this draft decision, having regard to each of the matters set out in section 138(2) of the QCA Act, for the reasons set out above.

Draft decision 4.2: Removal from the queue when indicative access proposal not accepted (cl. 5.6(a))

The QCA's draft decision is to refuse to approve DBCTM's proposed amendment to clause 5.6(a), with regard to removal of access seekers from the queue when the indicative access proposal is not accepted.

We consider it appropriate for clause 5.6(a) of the 2017 AU to remain unchanged.

4.3 Supply chain business (cl. 9.1 and Sch. G)

Clause 9 of the 2017 AU sets out the ring-fencing arrangements and clause 9.1(a) states that DBCTM and its related bodies corporate 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.

Background

As part of its October and November 2015 Ring-Fencing DAAUs, DBCTM proposed ring-fencing arrangements in the context of the then proposed purchase of Asciano by Brookfield, which were simultaneously mirrored in the proposed 2017 AU.

In August 2016, DBCTM submitted a replacement clause 9 (following the withdrawal of Brookfield's bid to purchase Asciano). The QCA's final decision in respect of the 2017 AU accepted DBCTM's revised clause 9.1(a)[28], although with slightly modified wording.

DBCTM's Modification DAAU proposal

DBCTM proposed to insert (at cl. 9.1(a)) the phrase 'at the date of the access undertaking', and wording to indicate that DBCTM would not own or operate a supply chain business unless it first submits a DAAU to reflect ownership or operation, and that DAAU is approved by the QCA. DBCTM also proposed to amend the wording of the definition of supply chain business (Sch. G).

DBCTM said these amendments aimed to clarify the QCA's decision and DBCTM's ability to seek amendment to the 2017 AU, should it undertake an acquisition to which clause 9.1(a) applies.[29]

[28] QCA 2016b, *DBCT Management's 2015 draft access undertaking*, final decision, November, p. 188.
[29] DBCTM 2017b, *DBCTM's Modification DAAU,* explanatory submission, September, p. 4.

Stakeholders' comments

The DBCT User Group said the proposed changes were unnecessary and did not alter the substantive application of the clause. The DBCT User Group opposed any implication this clause (and the manner in which it regulates vertical integration) had been pre-emptively determined to be more appropriate to be altered in the future.[30]

The DBCT User Group did not support the amendments to the definition of supply chain business, which it was concerned narrowed the definition inappropriately. The User Group said while a broad definition would result in a swift DAAU where the acquisition was not problematic, a narrow definition risked not allowing for amendment of the 2017 AU to resolve the problems arising from vertical integration.[31]

QCA analysis

Having considered the amendments proposed by DBCTM and the DBCT User Group's submission, the QCA considers the wording of clause 9.1(a) should remain unchanged, while the definition of Supply Chain Business (Sch. G) should be amended as proposed.

The QCA considers the 2017 AU wording of clause 9.1(a) to be clear and effective as it is. As stated in the QCA's final decision on the 2017 AU of November 2016, should it become apparent to DBCTM during the term of the approved undertaking that either DBCTM (or a related party) is considering the acquisition of a direct or indirect interest in any related market to the terminal, then DBCTM can exercise its rights under Division 7, Part 5 of the QCA Act (in order to seek to have the AU amended to modify the constraint in clause 9.1(a)).[32]

The QCA Act takes precedence over an access undertaking and, as a consequence, the QCA sees no need to refer to the DAAU process set out in the QCA Act expressly in clause 9.1(a) of the 2017 AU.

The QCA considers this position appropriately balances the legitimate business interests of DBCTM and the access holders (ss. 138 (2)(c) and (h) of the QCA Act). In addition, the QCA does not consider the proposed amendments are required to improve clarity of the current 2017 AU so as to promote regulatory certainty (s. 138(2)(h)).

With regard to DBCTM's proposed amendments to the definition of supply chain business in Schedule G, the QCA considered the focus of the ring-fencing provisions in the 2017 AU is to address the incentive and ability which DBCTM may otherwise have to discriminate in favour of businesses in related markets. The definition of supply chain business in Schedule G was originally proposed by DBCTM as part of the 2015 DAU, simultaneously to the ring-fencing DAAUs, in the context of the then proposed purchase of Asciano by Brookfield, which would have led to direct vertical integration. Following the withdrawal of Brookfield's bid to purchase Asciano, DBCTM left its proposed definition of supply chain business unchanged, and the QCA approved it as part of its final decision on the 2017 AU. The amendments proposed as part of the Modification DAAU narrow the definition to cover only activities which have a direct connection to the terminal, which the QCA finds is consistent with the ring-fencing approach. The QCA notes that if DBCTM or Brookfield acquired a coal business initially not related to the terminal, but this arrangement changed (even temporarily) then appropriate approval would be required under the DAAU process.

[30] DBCT User Group 2017, Submission to the QCA, *DBCTM's Modification DAAU*, October, p. 4.
[31] DBCT User Group 2017, Submission to the QCA, *DBCTM's Modification DAAU*, October, p. 4.
[32] QCA 2016b, p. 188.

Having ring-fencing provisions that are appropriate to the vertical integration situation also promotes the economically efficient operation of, use of and investment in the terminal, with the effect of promoting effective competition in upstream and downstream markets (s. 138(2)(a) of the QCA Act) because it can prevent a related party from gaining unfair advantage on its competitors. The wording of clause 9.1(a) is in the legitimate business interests of DBCTM (s. 138(2)(c) of the QCA Act), as well as in the public interest and the interests of access seekers and access holders (ss. 138(2)(d), (e) and (h) of the QCA Act), as it is clear to all parties.

QCA draft decision

Taking into account the above factors, the QCA's draft decision is to:

(a) refuse to approve DBCTM's proposed amendment to clause 9.1(a) and

(b) approve the proposed amendments to the definition of supply chain business (Sch. G).

We consider it appropriate to make this draft decision having regard to each of the matters set out in section 138(2) of the QCA Act, for the reasons set out above.

Draft decision 4.3: Supply chain business (cl. 9.1(a))

The QCA's draft decision is to refuse to approve DBCTM's proposed amendment to clause 9.1(a), with regard to owning a supply chain business.

We consider it appropriate for clause 9.1(a) of the 2017 AU to remain unchanged.

Draft decision 4.4: Definition of supply chain business (Sch. G)

The QCA's draft decision is to approve DBCTM's proposed amendment to Schedule G of the 2017 AU, with regard to the definition of supply chain business.

4.4 60/60 tonnage exclusion (cl. 12.5(h))

Clause 12.5 of the 2017 AU addresses terminal capacity expansions, with clause 12.5(h) relating to the 60/60 requirement. More specifically, clause 12.5(h)(1) states that, in order for the QCA to accept the deemed need for expansion:

- DBCTM must hold executed access agreements from access holders for at least 60 per cent of the proposed terminal capacity increment (contracted capacity threshold) (cl. 12.5(h)(1)(A)), and
- 60 per cent of access holders and expansion parties[33] must not oppose the terminal capacity expansion (expansion support threshold) (cl. 12.5(h)(1)(B)).

Background

The 60/60 requirement was created as part of the 2006 AU approval process, as a trigger for an expansion process, to 'manage the demand and regulatory uncertainties faced by' DBCTM.[34] At the time the QCA said it believed:

[33] Measured in tonnage.
[34] QCA 2005, *Dalrymple Bay Coal Terminal Draft Access Undertaking*, final decision, April, p. 44.

> that these triggers will assist the regulatory process as they bring users and access seekers into the regulatory decision making framework in such a way that, if they demonstrably are in favour of the proposed expansion, then the regulatory process should simply and quickly confirm the commercial requirements of the parties.[35]

In the 2015 DAU process, DBCTM proposed to amend the 60/60 approval requirement, and the way this would 'work for existing access holders who will become Differentially Priced Access Holders in respect of an expansion'.[36]

In our draft decision on the 2015 DAU, clause 12.5(h) was amended to provide all users with the opportunity to vote in a terminal capacity expansion application.[37] This decision was effectively maintained in the drafting provided along with our final decision.

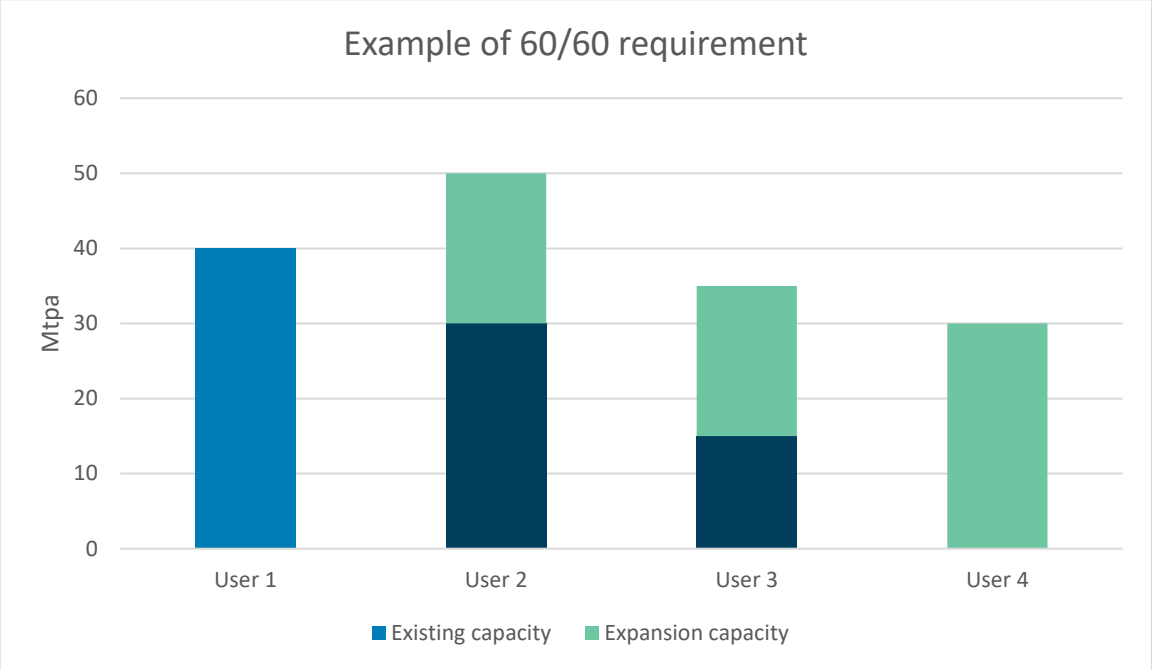
Neither DBCTM's proposal nor the QCA's decisions amended clause 12.5(h)(1)(C) from the wording of the 2010 AU, which itself was similar to the wording of the 2006 AU. This provision qualifies the expansion support threshold, so that tonnages of any access holder of existing capacity at the terminal who is also an expansion party do not apply towards the threshold (in cl. 12.5(h)(1)(B)).

Figure 1 provides an example of the 60/60 requirement and illustrates how clause 12.5(h)(1) works:

- User 1—its 40 mtpa of existing capacity is counted towards the expansion support threshold [represented in light blue].
- User 2—its 20 mtpa of expansion capacity is counted towards the contracted capacity threshold [represented in green]; however, its 30 mtpa of existing capacity is excluded from expansion support threshold [represented in dark blue].
- User 3—its 20 mtpa of expansion capacity is counted towards the contracted capacity threshold [represented in green], however, its 15 mtpa of existing capacity is excluded from the expansion support threshold [represented in dark blue].
- User 4—its 30 mtpa of expansion capacity is counted towards the contracted capacity threshold [represented in green] as well as towards the expansion support threshold.

[35] QCA 2005, *Dalrymple Bay Coal Terminal Draft Access Undertaking*, final decision, April, p. 44.
[36] DBCTM 2015a, Submission to the QCA, *DBCTM's 2015 DAU*, October, p. 71.
[37] QCA 2016a, p. 248.

Figure 1 Example of the 60/60 requirement



As a result, only User 1's existing capacity is counted towards the expansion support threshold , while the expanding users, existing (Users 2 and 3) and new (User 4), have their expansion capacity—but not their existing capacity—counted towards the expansion support threshold. From this, we derive a total of 110 mtpa of eligible volume for the expansion support threshold (40 mtpa (User 1) +20 mtpa (User 2) +20 mtpa (User 3) +30 mtpa (User 4)). If all expanding users vote in favour of the expansion and User 1 votes against, that would represent 70/110 mtpa or 64 per cent and the 60 per cent threshold in clause 12.5(h)(1)(B) would be met. If the expansion is for a 100 mtpa terminal and Users 2, 3 and 4 have signed their access agreements, the 60 per cent threshold in clause 12.5(h)(1)(A) is also met, so in total, the 60/60 requirement is met.

DBCTM's Modification DAAU proposal

DBCTM proposed to delete the exclusion at clause 12.5(h)(1)(C) for the tonnages of any access holder of existing capacity at the terminal who is the same entity as, or the related body corporate of, the entity that is also an expansion party when determining the voting rights in respect of the expansion support threshold.

DBCTM said this exclusion was prejudicial '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 also holds expansion tonnage (either directly or through a related body corporate) is not' [sic].[38] Therefore, DBCTM submitted that clause 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 to the full extent of their tonnage.[39]

[38] Note: The QCA understands this section of DBCTM's comments may have misconstrued the operation of the 60/60 clause, as the existing capacity tonnage of users is excluded, not the expansion capacity tonnage.
[39] DBCTM 2017b, *DBCTM's Modification DAAU,* explanatory submission, September, p. 4.

Stakeholders' comments

The DBCT User Group opposed the deletion of clause 12.5(h)(1)(C), saying the exclusion ensures that the existing access holders' vote is not influenced by those who have a vested interest in the expansion proceeding due to also being expansion access seekers (or related to such access seekers). The DBCT User Group said the 60/60 vote is intended to provide a methodology for measuring the support among two different groups of users which may have different interests —existing users and expansion users. The DBCT User Group said the removal of the exclusion would be prejudicial to the existing access holders who were independent of the proposed expansion access seekers.

The DBCT User Group also queried the necessity of amending the 2017 AU in the absence of planned short- or medium-term expansion, and when these provisions were recently determined by the QCA as part of the 2017 AU process.[40]

QCA analysis

The original purpose of the 60/60 requirement was to involve both groups, access holders and access seekers, in the regulatory decision-making process.[41] The QCA decisions at the time did not specifically state the rationale for the exclusion of existing users who are also expansion parties.

Having reviewed DBCTM's proposal and the DBCT User Group's submission in light of the QCA Act's section 138(2) criteria, the QCA considers the exclusion set out at clause 12.5(h)(1)(C) should be maintained. The QCA agrees with the DBCT User Group that the effect of the exclusion clause is to differentiate between the two groups: the existing users and the expansion users. In general, the interests of the existing users who are also expansion users should coincide with the interests of the purely expansion users, and these may differ from the interests of the purely existing users. If the existing volumes of expansion users are counted, it in effect becomes expansion volume and biases the outcome of the vote.

While the exclusion clause as it stands might seem to favour the non-expansion existing users over the new expansion users (which could be likened to access seekers), removing clause 12.5(h)(1)(C) could potentially 'dilute' the non-expansion users' voting rights. Therefore, keeping the exclusion clause is in the interest of existing access holders (s. 138(2)(h) of the QCA Act) and provides some regulatory certainty over the conditions under which access holders might have to fund an expansion.

The existing and new expansion users' tonnages are represented in the clause 12.5(h)(1)(A) criteria, which we find to be in the interests of access seekers and access holders (ss. 138(2)(e) and (h) of the QCA Act).

The trigger mechanism itself (cl. 12.5(h)), as introduced in the 2006 AU, provides DBCTM with certainty in the regulatory approval process for expansion, which is consistent with the legitimate business interests of DBCTM and promoting economically efficient investment in the terminal, with the effect of promoting effective competition in upstream and downstream markets (ss. 138(2)(a) and (c) of the QCA Act). The QCA also notes that, even if an expansion is not supported under the 60/60 process (because it is rejected by existing users)—it is still able to be submitted to, and approved by, the QCA.

[40] DBCT User Group 2017, Submission to the QCA, *DBCTM's Modification DAAU*, October, pp. 4–5.
[41] QCA 2006, p. 18.

QCA decision

Taking into account the above factors, the QCA's draft decision is to refuse to approve DBCTM's proposed deletion of the exclusion clause 12.5(h)(1)(C) and consequential amendment to clause 12.5(h)(1)(B).

We consider it appropriate to make this draft decision, having regard to each of the matters set out in section 138(2) of the QCA Act, for the reasons set out above.

Draft decision 4.5: 60/60 tonnage exclusion (cl. 12.5(h)(1)(C))

The QCA's draft decision is to refuse to approve DBCTM's proposed deletion of the exclusion clause 12.5(h)(1)(C) and the consequential amendment to clause 12.5(h)(1)(B).

We consider it appropriate for clause 12.5(h)(1) of the 2017 AU to remain unchanged.

4.5 Fee for QCA regulatory services (Sch. C, Part A, cl. 4)

Schedule C, Part A, clause 4 of the 2017 AU sets out the determination of the annual revenue requirement (ARR), including that the ARR will be based on any amendment required to reflect the fees charged to DBCTM by the QCA in providing regulatory services to the terminal.

Background

As set out in the QCA's 2016–17 Fee Framework, the QCA sets in advance a fee for services to be provided or functions to be performed, based on a conservative estimate.[42] At year-end, the QCA undertakes a reconciliation of actual versus estimated costs and makes an adjustment to the fee levied to the regulated entity. Any under-recovery will be charged in October of the following financial year, after financial accounts have been audited.[43]

Under the 2017 AU, the ARR will reflect the fees charged by the QCA to DBCTM. Any known but yet uncharged under-recovery in QCA fees is not calculated in the ARR until it has been officially charged by the QCA to DBCTM.

DBCTM's Modification DAAU proposal

Mechanism for later amendment to the ARR

DBCTM proposed various changes to Schedule C, Part A, clause 4, in order to provide a 'clear mechanism' for a later amendment to the ARR, after the annual roll-forward, including:

- insertion of 'or which the QCA has notified DBCT Management will be charged to DBCT Management' [Sch. C, Part A, cl. 4(a)(3)]
- deletion of 'any amendment made pursuant to sub-section 4(e) [sic] above will be effective from the relevant 1 July' [formerly Sch. C, Part A, cl. 4(e)]
- insertion of new subclause 4(h) allowing for the amendment of the ARR, revenue cap and reference tariff.

[42] QCA 2016, *Report on the 2016 Fee Framework Consultation*, Appendix B: Fee Framework, May, p. 2.
[43] QCA 2016, *Report on the 2016 Fee Framework Consultation,* Appendix B: Fee Framework, May, pp. 2–3.

DBCTM submitted this amendment was administrative in nature, and not controversial, in that it provided a clear mechanism to support the pass-through of the QCA fees as intended.[44]

Pass-through of ruling fees

In addition, DBCTM proposed to insert 'or section 150L of the QCA Act' (Sch. C, Part A, cl. 4(a)(3)); it said Schedule C provides for the pass-through of the fees for QCA regulatory services pursuant to the *Queensland Competition Authority Regulation 2007* (QCA Regulation), but the costs of a price ruling are dealt with under section 150L of the QCA Act, not the QCA Regulation. DBCTM said this amendment is consistent with the principle that DBCTM can pass through the costs of regulatory services via the ARR.[45]

Stakeholders' comments

The DBCT User Group accepted the deletion of Schedule C, Part A, clause 4(e) as a non-substantive amendment.[46] However, it did not support the proposed amendment to Schedule C, Part A, clauses 4(a)(3) and 4(h).

In particular, the DBCT User Group opposed the insertion of 'or section 150L of the QCA Act', which it said creates 'skewed incentives', by allowing DBCTM to recover costs it would incur by seeking a ruling in its favour, even if it were clear under section 11.13 of the 2017 AU that an expansion should be differentially priced.

The DBCT User Group considered this amendment did not:

- clarify any inconsistencies
- implement an anticipated change
- address a typographical error, or
- reduce any uncertainty in the 2017 AU.

Rather, such an amendment would change the outcome of the 2017 AU by amending the allocation of costs in a way that favours DBCTM.[47]

The QCA notes the DBCT User Group did not specifically comment on the mechanism for a later amendment to the ARR proposed by DBCTM, rather focusing its submission on the proposed pass-through of ruling fees.

QCA analysis

Mechanism for later amendment to the ARR

The QCA's draft decision is to refuse to approve DBCTM's proposal for a mechanism for the later amendment to the ARR in its currently drafted form, but to approve in principle the adoption of a mechanism for later amendment to the ARR, on the basis set out in the alternative drafting proposed at 0.

The 2017 AU does not provide a mechanism for a later amendment to the ARR, which means DBCTM can only amend the ARR to account for regulatory fees at the time of the annual roll-forward. In addition, there is no provision for the accrual of interest on these amounts. For example, in October 2017, the QCA invoiced DBCTM the amount of $912,660 in respect of under-

[44] DBCTM 2017b, *DBCTM's Modification DAAU,* explanatory submission*,* September, p. 4.
[45] DBCTM 2017b, *DBCTM's Modification DAAU,* explanatory submission*,* September, p. 8.
[46] DBCT User Group 2017, Submission to the QCA, *DBCTM's Modification DAAU*, October, p. 8.
[47] DBCT User Group 2017, Submission to the QCA, *DBCTM's Modification DAAU*, October, p. 5.

recovered fees, which was payable in November 2017. DBCTM will be able to recover this amount from users from 1 July 2018, but without the benefit of interest accruing in the interim. Similarly, on 30 October 2015, DBCTM received an over-recovery credit of $2.131 million from the QCA, for which it could not adjust the ARR until 1 July 2016. Interest on this amount for the intervening period did not accrue for the benefit of access holders. These two examples illustrate the necessity for a more timely adjustment to the ARR upon receipt of the official reconciliation of the QCA fees. The QCA notes Aurizon Network and Queensland Rail both use a process called 'endorsed variation event' to this effect; however, this process is not part of DBCTM's 2017 AU.

The wording of clause 4(a)(3) of Schedule C also suggests it was envisaged that that a mechanism for later amendment to the ARR would be available under the 2017 AU:

> An amendment under this sub-clause (3) may be submitted to the QCA at the same time as the relevant ARR under sub-(c) below**, or as a later amendment to the relevant ARR**, during the relevant Financial Year.'[48]

The drafting proposed by DBCTM used the words 'which the QCA has notified DBCT Management will be charged'. The QCA considers this amendment could include forecast amounts provided by the QCA to DBCTM for budgeting purposes only, prior to the end of the financial year. By nature, these forecasts are only estimates; they are therefore different to the reconciled amount invoiced to DBCTM in October, and as a result, the use of these forecasts would require a further adjustment later. The QCA therefore considers the drafting should be amended to ensure only reconciled and invoiced amounts would be recovered via a later amendment to the ARR.

The QCA also proposes to insert subclause 4(i) (see Appendix B) in the event DBCTM does not amend the ARR following an invoice or the receipt of an over-recovery credit for the QCA fees. This is to provide certainty to all stakeholders that the ARR will be amended timely after reconciliation and invoicing of QCA fees.

The certainty and timely adjustment of the ARR upon formal reconciliation of the QCA fees is in the interest of both DBCTM and access holders, as demonstrated by the two examples cited above (ss. 138(2)(c) and (h)). In addition, it promotes the economically efficient operation of, use of and investment in the terminal with the effect of promoting competition in upstream and downstream markets (s. 138(2)(a)).

Pass-through of ruling fees

The QCA considered DBCTM's proposal and the DBCT User Group's objection regarding the pass-through of ruling fees. The QCA's draft decision is to approve DBCTM's insertion of 'or section 150L of the QCA Act' into clause 4(a)(3).

Section 150L falls under division 7A of the QCA Act. While the QCA Regulation expressly enables the QCA to levy fees in relation to its functions under Part 5, division 7 of the QCA Act (cls. 8–11 of sch. 1), functions under division 7A of the QCA Act are not expressly referred to within the QCA Regulation. Clause 4(a)(3) currently only permits amendment of the ARR in relation to fees levied pursuant to the QCA Regulation. The amendment proposed by DBCTM is therefore required for DBCTM to be able to recover fees levied by the QCA in relation to rulings pursuant to section 150L of the QCA Act (in the appropriate circumstances). This decision is consistent with DBCTM's legitimate business interests (s. 138(2)(c) of the QCA Act) and the pricing principles (ss. 138(2)(g) and 168A(a) of the QCA Act).

[48] Emphasis added.

With regard to the concerns expressed by the DBCT User Group, the QCA noted that section 150L of the QCA Act provides the QCA with discretion as to the payment of the costs incurred by the QCA in making a ruling (the QCA may make 'any order it considers appropriate about the payment' of the costs or part of the costs). In the event DBCTM was to make a vexatious application for a ruling with regard to differential pricing of an expansion, as suggested by the DBCT User Group, the QCA would have the discretion under section 150L to order DBCTM to pay the QCA's costs and not to pass them through via the ARR. Therefore, this draft decision to approve DBCTM's proposal for the pass-through of ruling fees remains consistent with the interests of access seekers and access holders (ss. 138(2)(e) and (h)).

Moreover, it appears that the primary reason for the DBCT User Group's criticism is that allowing cost recovery for any QCA ruling would skew incentives (presumably by encouraging DBCTM to seek too many rulings). However, DBCTM does not have any discretion in this regard because clause 5.12(a)(2) of the 2017 AU requires DBCTM to seek a ruling following a successful FEL 2 study. The use of the ruling mechanism in this way was previously viewed by the QCA as providing greater certainty for DBCTM and users around the pricing approach, prior to moving into FEL 3. Given that DBCTM has no effective discretion in relation to seeking a ruling, it is appropriate that the QCA fees associated with this step be passed through.

QCA draft decision

Taking into account the above factors, the QCA's draft decision is to:

(a) refuse to approve DBCTM's proposed mechanism for later amendment to the ARR (Sch. C, Part A, cls. 4 (a) and (h))

(b) approve DBCTM's proposed pass-through of ruling fees (Sch. C, Part A, cl. 4(a)).

We consider it appropriate to make this draft decision, having regard to each of the matters set out in section 138(2) of the QCA Act, for the reasons set out above.

Draft decision 4.6: QCA fee: mechanism for later amendment to the ARR

The QCA's draft decision is to refuse to approve DBCTM's proposed mechanism for later amendment to the ARR (Sch. C, Part A, cls. 4 (a) and (h)).

We consider it appropriate for DBCTM to amend the Modification DAAU as set out at 0.

Draft decision 4.7: Pass-through of QCA ruling fees

The QCA's draft decision is to approve DBCTM's proposed pass-through of QCA ruling fees pursuant to section 150L of the QCA Act (Sch. C, Part A, cl. 4(a)(3)).

4.6 Streamlined NECAP approvals

Non-expansion capital expenditure (NECAP) is capital spending which does not relate to a capacity expansion. Examples can include asset replacements and work necessary to ensure compliance with safety and environmental obligations.

Background

As part of the 2010 AU process, DBCTM submitted that the 2006 AU did not provide sufficient detail on the treatment of NECAP and, as a consequence, it was treated as a review event requiring a DAAU[49], which the QCA had to consider under the statutory criteria in the QCA Act.

Therefore, DBCTM proposed a streamlined approval process of NECAP for the 2010 AU. The 2010 AU had the support of the DBCT User Group[50], and the QCA approved it as proposed by DBCTM.[51] The streamlined approval process for NECAP obliged the QCA to accept prudent NECAP that was:

- **capital expenditure—**DBCTM confirmed the expenditure met the definition of capital expenditure.
- **Operator-recommended**—the Operator (DBCT PL) had recommended in writing the incurring of the expenditure.
- **capped**—the expenditure was less than or equal to $20 million in the relevant financial year, and total NECAP expenditure for the regulatory period was less than $110 million.
- **not objected to by access holders**—no access holder objected to the NECAP within 15 business days of receiving written notice.

As part of the 2017 AU, some amendments were made to the streamlined NECAP approval process, so that it now requires:

- **capital expenditure—**DBCTM confirms the expenditure meets the definition of capital expenditure.
- **Operator-recommended**—the Operator (DBCT PL) has recommended in writing the incurring of the NECAP expenditure.
- **access-holders approved**—the capital expenditure is unanimously approved by all access holders whose reference tariff is calculated by reference to the relevant regulated asset base(s) *or* **not objected by access holders**—no access holder at the relevant time objected to the capital expenditure within 20 business days after receiving written notice of the estimated capital expenditure from DBCTM (which expressly drew their attention to this section).

DBCTM said these amendments reflected streamlining amendments agreed between DBCTM and existing users, during consultation on the draft access undertaking.[52]

In its submission on the 2015 DAU, the DBCT User Group supported DBCTM's proposed amendments to sections 12.10(b) and 12.10(c) of the undertaking because these terms continued to provide sufficient protections against imprudent NECAP.[53]

Both the DBCT User Group and Vale were concerned that a WACC that was lower than during the 2010 AU regulatory period might cause DBCTM to underinvest in NECAP, and that users would therefore bear additional maintenance costs through DBCT PL.[54] The DBCT User Group proposed

[49] DBCTM 2010, *DBCTM 2010 access undertaking*, explanatory submission, March, p. 24.
[50] DBCT User Group 2010, Submission to the QCA, *Dalrymple Bay Coal Terminal—draft access undertaking*, letter to the QCA, March, p. 1.
[51] QCA 2010, *Dalrymple Bay Coal Terminal 2010 Draft Access Undertaking*, final decision, September, p. iii.
[52] DBCTM 2015b, *2015 DAU Mark Up*, October, p. 85.
[53] DBCT User Group, Submission to the QCA, *2015 DAU*, November 2015, pp. 37–38.
[54] Vale, Submission to the QCA, *2015 DAU*, November 2015, pp. 11–12 and DBCT User Group, Submission to the QCA, *2015 DAU*, November 2015, pp. 37–38.

that DBCTM be required to invest in the NECAP recommended by DBCT PL (as the Operator of the terminal) because users, as the shareholders of DBCT PL, had an incentive to minimise costs while maintaining capacity and productivity.[55]

The QCA's final decision on the 2017 AU accepted the amendments put forward by DBCTM[56], because they continued to provide sufficient controls over imprudent NECAP and were likely to further increase the efficiency of the approval process.[57]

DBCTM's Modification DAAU proposal

In its Modification DAAU, DBCTM proposed to amend the definition of 'review event' at (e)(1) in Schedule G, to explicitly provide for NECAP under clause 12.10(b) and as a review event in Schedule C, Part A, clause 4(f)(1).[58] In essence, DBCTM proposed that the procedure for amendment to the ARR following a review event in the form of a streamlined NECAP approval be effected by way of request to the QCA, and not by way of a DAAU.

DBCTM submitted this amendment was administrative in nature, and provided a clear mechanism to support streamlined approvals of NECAP as intended. [59]

Stakeholders' comments

The DBCT User Group did not support this proposed amendment, as it considered the current process regarding NECAP approvals was not inappropriate or inefficient and had not caused any adverse outcomes.

The User Group considered that even if a NECAP proposal was uncontroversial and supported by stakeholders, the requirement to go through a DAAU process was not a significant burden on DBCTM or the QCA, but provided beneficial transparency. The User Group said clause 12.10 applied where there was a lack of objection from access holders, leading to the potential for it to apply through oversight by an access holder who wished to object.

The User Group said the only time the DAAU process would require material resources or time would be when the DAAU was controversial.[60]

QCA analysis

In considering DBCTM's proposed amendment to the definition of a review event (Sch. G) and the provision relating to the procedures for amendment of the ARR in the event of a review event (Sch. C, Part A, cl. 4(e)(1)), the QCA considered the ultimate purpose of using DAAUs is to ensure sufficient consultation is undertaken and the statutory criteria are appropriately applied.

The streamlined approval of NECAP in the 2010 AU (cl. 12.10(b)) was introduced to avoid the need for this additional test.[61] In approving the 2010 AU, the QCA accepted that DBCTM's proposal appropriately balanced increasing the flexibility of the NECAP approvals process and reducing compliance costs, while retaining controls to ensure that such expenditure was

[55] DBCT User Group, Submission to the QCA, *2015 DAU*, November 2015, pp. 37–38.
[56] QCA 2016b, *DBCT Management's 2015 draft access undertaking*, final decision, November, p. 223.
[57] QCA 2016a, *DBCT Management's 2015 draft access undertaking*, draft decision, April, p. 207.
[58] In the 2017 AU, this was Sch. C, Part A, cl.4(f)(1). In the Modification DAAU, DBCTM ha proposed to delete sublclause 4(e), so the same clause becomes Sch. C, Part A, cl. 4(e)(1).
[59] DBCTM 2017b, *DBCTM's Modification DAAU,* explanatory submission*,* September, p. 4.
[60] DBCT User Group 2017, Submission to the QCA, *DBCTM's Modification DAAU*, October, p. 5.
[61] See DBCTM 2010, Submission to the QCA, *2010 Access Undertaking*, March, pp. 24–25.

appropriate.[62] As a result, both the QCA and DBCTM historically took the view the streamlined approval of NECAP avoided the need for a DAAU in practice. The amendments proposed by DBCTM as part of the Modification DAAU formalise the process by clarifying, in the definition of review event, and the rules for amending the ARR, that no DAAU is required for the streamlined approval of NECAP.

While the DBCT User Group did not support this amendment, it also stated the current process regarding NECAP approvals was neither inappropriate nor inefficient and had not caused any adverse outcomes.[63] The QCA notes that, in effect, the streamlined approval of NECAP has functioned without the use of DAAUs since the 2010 AU.

In addition, the QCA notes the DBCT User Group did not object to the streamlined NECAP process specifically during the:

- 2010 AU approval process
- 2011 NECAP Approval Process DAAU (which enabled pre-2010 AU expenditure to be considered under the streamlined process)
- 2017 AU approval process (where it focused submissions on the risk of underinvestment rather).

The QCA also notes neither Aurizon Network's nor Queensland Rail's 2016 access undertaking (UT4 and AU1 respectively) requires a DAAU for accepting capital expenditure into their respective regulated asset bases.

While the rail capital expenditure approval process is slightly different (having a capital indicator approved for the regulatory period), it does not distinguish between approval of expansion and non-expansion capital expenditure, and does not require a DAAU for either. Aurizon Network and Queensland Rail share similar characteristics with DBCTM—namely, they operate significant infrastructure declared for access under the QCA Act, they handle coal and they share some customers/access holders with DBCTM.

The following factors are relevant when considering DBCTM's proposal to amend the definition of a review event as well as procedures for amendment to the ARR[64]:

- The Operator, DBCT PL, is owned by the majority of the access holders.
- DBCT PL recommends the expenditure in writing.
- The access holders must either be given the opportunity (20 business days) to object to the capital expenditure, or give approval to the expenditure.
- DBCTM must confirm the expenditure meets the definition of capital expenditure.

The QCA considers the existing provisions (2017 AU, cl. 12.10(b)) provide for adequate consultation, and this remains the case with the proposed amendments.

Also, the QCA notes the proposed amendments provide only for NECAP under clause 12.10(b) not to require a DAAU, while NECAP not meeting the above criteria would be considered under

[62] QCA 2010, *Dalrymple Bay Coal Terminal 2010 draft access undertaking*, final decision, September, p. 20.
[63] DBCT User Group 2017, Submission to the QCA, *DBCTM's Modification DAAU*, October, p. 5.
[64] To clarify, a DAAU is not currently required for streamlined approval of NECAP, only in relation to an ARR amendment that is related to said approval as a review event.

clause 12.10(c) (and require a DAAU). This is consistent with the DBCT User Group's view that controversial NECAP applications would require material resources and time.

In addition, the QCA considers the streamlined approval of NECAP promotes the economically efficient operation of and investment in the terminal (s. 138(2)(a) of the QCA Act), as it reduces the regulatory burden on DBCTM and the assessment costs for the QCA (ultimately paid by the access holders via the QCA fee and QCA levy processes). A more efficient and timely process will be in the legitimate business interests of the operator, in terms of its commitment of resources and management time (s. 138(c)).

When considering the public interest (s. 138(2)(d)), undertaking a formal DAAU process and public consultation would likely not achieve a better outcome, as typical capital expenditure applications are only published at a very aggregated level and result in submissions only from the affected access holders.

It is reasonable to assume the interests of access seekers (s. 138(2)(e)) in relation to NECAP converge with the interests of access holders (s. 138(2)(h)), given access holders' involvement in the NECAP process via DBCT PL, and given the nature of NECAP (asset replacements, safety upgrades, environmental compliance). This is different to expansion capital expenditure.

While approval of NECAP ultimately impacts on the terminal infrastructure charge TIC, the pricing principles (s. 138(2)(g)) were not considered a relevant consideration for this amendment.

QCA draft decision

Taking into account all of the above factors, the QCA's draft decision is to approve DBCTM's proposed amendments to the definition of review event (Sch. G) and procedures for the amendment of the ARR (Sch. C, Part A, cl. 4(f)) with regard to the streamlined approval of NECAP.

We consider it appropriate to make this draft decision having regard to each of the matters set out in section 138(2) of the QCA Act, for the reasons set out above.

Draft decision 4.8: Streamlined NECAP approvals

The QCA's draft decision is to approve DBCTM's proposed amendment to the definition of review event (Sch. G) and the amendment of procedures for amendment of the ARR (Sch. C, Part A, cl. 4(f)), with regard to the streamlined approval of NECAP.

4.7 Early termination security (Sch. C, Part A, cl. 2)

The standard user agreement (SUA) for the 2017 AU allows for:

- DBCTM to request security from the access holders (SUA, Sch. 8)
- suspension of a user's rights for default of payment (SUA, cl. 14.1(a))
- termination of the agreement by DBCTM, if the default has not been remedied (SUA, cl. 14.2).

Background

In the 2017 AU approval process, DBCTM proposed to amend the definition of 'notional contracted tonnage' to remove the addition of an access holder's annual contract tonnage which it is no longer entitled to have handled due to an early termination of an access agreement.

In effect, DBCTM proposed to socialise the loss of revenue from a user default across the remaining access holders—provided that capacity is not taken up by another access seeker. Under the 2006 and 2010 AUs, DBCTM carried a share of this cost for the remainder of the regulatory period.

The QCA's final decision was that DBCTM should be permitted to socialise any revenue lost after the date of the early termination under a user agreement, but not revenue lost pre-termination. This was because the QCA considered DBCTM had the ability to manage revenue risk associated with user default in the period prior to the termination date, including by seeking and drawing upon security.

In addition, the QCA determined that DBCTM should not be permitted to recover revenue more than once—through a review event, as well as by calling on an access holder's security payment. The QCA therefore amended the calculation of the revenue cap for a review event as a result of user default to remove any security amounts from the revenue cap to avoid the potential for double-recovery.[65]

DBCTM's Modification DAAU proposal

DBCTM proposed to amend the definition of ETS (or Early Termination Security) in Schedule C, Part A, clause 2 to specify the security was 'to recover losses suffered after' early termination. DBCTM said this amendment was to exclude pre-termination losses in order for the revenue cap to be adjusted to prevent double-recovery.

DBCTM considered its proposed amendments to the definition of ETS and the formula in Schedule C were consistent with all aspects of the QCA's final decision on this matter.[66]

Stakeholders' comments

The DBCT User Group did not support this amendment, as it considered allowing the proposed qualifications on the deduction to be made from the revenue cap would remove or blunt DBCTM's incentives to call on the security it holds as soon as that is possible.

The DBCT User Group said if early termination occurred 'without DBCTM having called on security to recover any of its pre-termination losses, it should not be able to then make itself immune from that failure to call on the security so at to mitigate those losses by the revenue cap only being reduced by part of the value of the security held.'[67]

QCA analysis

It appears DBCTM and the DBCT User Group are not in disagreement with regard to the principle that security should in the first instance be applied against pre-termination losses.

The existing definition of ETS in the approved 2017 AU has the effect of requiring a deduction of the full amount of any security held by DBCTM in respect of an access agreement that has been terminated early from the revenue cap. The reason for taking this approach is that DBCTM should be incentivised to recover as much of any losses it incurs as a consequence of early termination from the relevant access holder, before it is then able to socialise any remaining losses across others through a review event. While this is most obviously the case in relation to pre-termination losses, in circumstances where DBCTM may have available security that exceeds those losses and

[65] QCA 2016b, *DBCT Management's 2015 draft access undertaking*, final decision, November, pp. 264–65.
[66] DBCTM 2017b, *DBCTM's Modification DAAU,* explanatory submission, September, pp. 4–5.
[67] DBCT User Group 2017, Submission to the QCA, *Modification DAAU*, October, p. 6.

would be sufficient to contribute to any post-termination losses, the same principle would hold. DBCTM should not be able to either (a) double recover, or (b) choose whether to deal with those losses using either a call on security held or socialisation.

In the circumstances, the QCA considers the risk of double-recovery exists in relation to any losses covered by a security amount (whether in relation to pre- or post-termination losses) and accordingly, DBCTM should be required to fully account for the value of any security, by removing it from the revenue cap, before a review event is used to socialise any remaining, post-termination losses.

The QCA understands that the current drafting has this effect and therefore the QCA's draft decision is to refuse to approve DBCTM's amendment to the ETS definition. This is consistent with the QCA's final decision on the 2017 AU, which found DBCTM had a greater ability to manage revenue risk associated with user default in the period prior to the termination date. The QCA also considers that the same reasoning should apply in relation to any post-termination losses, where security is sufficient to cover any part of those losses. By removing the full value of the ETS from the revenue cap, DBCTM is fully incentivised to maximise recovery of any security amounts held from the terminating access holder. The QCA agrees with the DBCT User Group that the amendment proposed by DBCTM could blunt DBCTM's incentives to call on security as early as possible in the termination process (and as fully as possible), knowing any post-termination losses can be socialised among remaining access holders in a review event. This outcome would be inconsistent with the object clause and interests of access seekers and holders (ss. 138(2)(a), (e) and (h)). In addition, the QCA does not consider the proposed amendments are required to improve clarity of the current 2017 AU so as to promote regulatory certainty (s. 138(2)(h)).

QCA draft decision

Having considered DBCTM's amendments and the DBCT User Group's comments, the QCA's draft decision is to refuse to approve DBCTM's proposed amendments to the definition of ETS in Schedule C, Part A, clause 2 of the 2017 AU.

Draft decision 4.9: Early termination security

The QCA's draft decision is to refuse to approve DBCTM's proposed amendment to the definition of ETS in Schedule C, Part A, clause 2.

We consider it appropriate for clause 12.5(h)(1) of the 2017 AU to remain unchanged.

5 TYPOGRAPHICAL CHANGES

This chapter considers non-substantive changes, in four different categories:

(1) changes marked-up and listed by DBCTM

(2) changes marked-up but not-listed by DBCTM

(3) [DBCTM] non-marked-up formatting changes, and

(4) QCA-identified changes.

5.1 Changes marked-up and listed by DBCTM

DBCTM put forward a list of 34 typographical changes to the 2017 AU. The DBCT User Group said most typographical changes were not contentious; however, it opposed five of them and suggested one further change.

To make it easier to get an overview, the QCA reproduced DBCTM's list of changes and the DBCT User Group's comments in Table 5 in Appendix A. The QCA added a column to record its draft position on each matter.

For each of the QCA draft positions listed in Table 5, the QCA considered the amendments proposed by DBCTM and the comments made by the DBCT User Group in the context of section 138(2) of the QCA Act. The QCA came to its draft positions having regard to the interests of DBCTM, access holders, access seekers and the public, as well as regulatory certainty which the QCA considers promotes the economically efficient operation of, use of and investment in the terminal.

Draft decision 5.1: Typographical changes identified by DBCTM

The QCA's draft decision is to refuse to approve four of the typographical changes proposed by DBCTM, and approve all the other typographical changes listed at Appendix A.

We consider it appropriate for DBCTM to amend the 2017 AU as listed and described in Appendix A, Table 5 and in Appendix B.

5.2 Changes marked-up but not-listed by DBCTM

The QCA found a small number of marked-up changes that were not expressly included in the list of changes provided by DBCTM in its submission and not commented upon by the DBCT User Group. The QCA found the changes to be immaterial, as shown in Table 1 below.

Table 1 Marked-up but not-listed changes

Clause	*Change*
cl. 5.6(b)	Replace 'Indicative Access Proposal' with 'Access Application'.
cl. 5.7(b)	Make a consequential change to the insertion of cl. 5.7(a)(6).
cl. 5.10(k)	Insert a comma.
cl. 8	Insert subparagraph numbering.
cl. 14	Insert subparagraph numbering.
Sch. C, Part A, cl.5(d)(2)	Amend punctuation.
Sch. G Review Event definition, (e)(4)	Insert 'and'
Sch. H	Amend the signature block.

Draft decision 5.2: Marked-up but not-listed changes

The QCA's draft decision is to approve DBCTM's changes which were marked-up, but not listed in Appendix A, Table 5.

We consider it appropriate for DBCTM to amend the 2017 AU as listed in Table 1.

5.3 DBCTM non-marked-up formatting changes

DBCTM has also made a large number of formatting changes as part its Modification DAAU, which were not included in its list of 34 typographical changes. The QCA built comparative mark-ups to examine these changes, and while the majority of them were immaterial, the QCA disagreed with a few of them.

Examples of immaterial non-listed changes are presented in Table 2 below.

Table 2 Examples of immaterial non-marked-up changes (non-exhaustive)

Clause reference	*Change*
Heading of each page	Delete 'Dalrymple Bay Coal Terminal Access Undertaking' and insert clause number and clause name.
Throughout the document.	Delete 'Part' and insert 'Section'.
cl. 5.2	Fix the subclause numbering in clause 5.2, to go from (a) to (j) without repetition.
cl. 5.4 (f)(4)	Change numbering from (i) and (ii) to (A) and (B).
cl. 12.1(i)(2)	Change wording from 'aggregated' to 'aggregate'.
cl. 12.5(a)(2)(i)(1–3)	Change indents.
cl. 12.5(a)(2)(k)(3)	Change indents.
cl. 12.5(a)(3)(m)(3)	Change indents.

The QCA examined each of these changes and concluded they were immaterial to the meaning of the 2017 AU. In most cases, they improved the readability of the document.

The QCA therefore considers the proposed amendments improve the clarity of the 2017 AU and promote regulatory certainty (s. 138(2)(h)).

Draft decision 5.3: Immaterial non-marked-up formatting changes

The QCA's draft decision is to approve DBCTM's non-marked-up formatting changes, with the exception of the 20 changes listed at Table 3.

However, the QCA also found a number of formatting changes which it believed should not have been proposed by DBCTM. These are presented in Table 3 below.

Table 3 Non-marked-up of formatting changes not supported by the QCA

	Clause reference	*DBCTM change*	*Reasons for reverting to existing drafting of the 2017 AU*
(1)	cl. 1.4	Insert (3) under section 1.4(a).	This last part should not be part of the list from (1) to (2) prior, but rather the conclusion of the 'if—then' statement in clause 1.4 (a).
(2)	cl. 5.4 (i)(1)(B)	Delete a closing bracket.	Closing bracket deleted after 'that Access Agreement', before 'and the Access Application'.
(3)	cl. 5.4(j)(8)(B)	Increase the indent.	To match the original document—the second part of subclause (B) should be indented left.
(4)	cl. 5.4(j)(12)(A)	Insert additional <space>.	Typo error—remove the space between 'capacity' and comma in first line.
(5)	cl. 5.4 (t)	Insert '(4)' in front of last part of subclause (t).	This last part should not be part of the list from (1) to (3) prior, but rather the conclusion of the 'if—then' in subclause (t).
(6)	cl. 5.5(d)(5)(B)	Add 's' to 'Access Charges(s)'.	Should read 'Access Charge(s)'.
(7)	cl. 5.5(d)(5)(B)	Increase indent in the last part of subclause (B).	As part of subclause (B), the indent should match that of (B).
(8)	cl. 5.5 (d)(6)(E)	Increase indent in the last part of subclause (E).	As part of subclause (E), the indent should match that of (E).
(9)	cl. 5.5 (h)	DBCTM replaced the reference to Part 12 by a reference to Section 5. (DBCTM's Modification DAAU mark-up has references to section 5 three times, then to section 17.)	This should be Section 12. (There are four references to other sections in the subclause, which should be, in order, to section 5, then 12, then 5 and then 17.)
(10)	cl. 6.2(f)(1)(B)	Increase indent.	The third part of subclause (1) should be indented left.
(11)	cl. 10.3 (f)(1-5)	Delete numbering of 'vessel queuing times'.	Need to renumber the list under subsection (f) to run from 1–5, not from 1–4.
(12)	cl. 11.4(d)	Change two references to Sch. C, Part A, Sections 4(c) and 4(f).	Original references were to Sch. C, Part A, S. 4(c) and (g). However, the references need to be changed to reflect changes in Sch. C, Part A, cl. 4. New references should be to Sch. C, Part A, S. 4(c), (e) and (h).

	Clause reference	*DBCTM change*	*Reasons for reverting to existing drafting of the 2017 AU*
(13)	cl. 11.12	Delete space between 11.12 and words.	The heading for section requires a space to be reinserted.
(14)	cl. 11.13	Delete space between 11.13 and words.	The heading for the section requires space to be reinserted.
(15)	cl. 13.1(d)	Increase indent of last segment of clause.	The last segment of subclause (d) should have the same indent as subclause (d), as the conclusion of the 'if—and if' statement.
(16)	Schedule C – part A cl. 3	Change indents.	Add right indents to RC, ART, RCi and ARTi.
(17)	Schedule D – part 1.1 Specified Person definition	Insert numbering (g).	Should not be added, as the list is from (a) to (f), and the last segment of the definition completes the meaning of Specified Person.
(18)	Schedule E – cl. 3(b)	Replace reference to paragraph 3(a) with reference to paragraph 13(a).	Correct paragraph reference is 3(a), not 13(a).
(19)	Schedule G – part 1, Funding Agreement definition (a)	Delete 'a FEL 1 Feasibility'.	Reinsert so that it reads '(a) a FEL 1 Feasibility Study; and'.
(20)	Schedule G – part 2	Change numbering to (c) to (q).	Revert numbering to (a) to (n) and do not number the last paragraph, which is about headings.

As a consequence, the QCA's draft decision is to refuse to approve the 20 changes listed at Table 3. This is because the introduction of these changes would reduce the clarity and accuracy of the 2017 AU and not promote regulatory certainty, and thus not be in the public interest, the interest of access seekers, access holders or DBCTM (ss. 138(2)(d), (e), (h) and (c)). Having clear and accurate drafting of the undertaking promotes the economically efficient operation of, use of and investment in the terminal (s. 138(2)(a)).

Draft decision 5.4: Non-marked-up formatting changes

The QCA's draft decision is to refuse to approve the 20 DBCTM non-marked-up formatting changes listed in Table 3.

5.4 QCA-identified changes

In addition to the typographical changes identified by DBCTM and the DBCT User Group, the QCA identified other changes which it considers should also be made as part of this DAAU process, as set out in Table 4 and in Appendix B with regard to schedule C, Part A, clause 4.

Table 4 QCA-identified changes

Section	*Change*
cl. 1.3	Change 'Commencement Date' to 'Approval Date'.
cl. 1.4(a)(2)	Change 'Commencement Date' to 'Approval Date'.
cl. 5.3A(d)	The references in the last paragraph to sections 5.3(a) and 5.3(e) should be changed to sections 5.3A(a) and 5.3A(e) respectively. For clarity, reference to section 5.3(f) is to remain as is.
cl. 5.4(e)(5)(A)	A bracket is opened on the second line and not closed; the closing bracket can be inserted on the last line, just before the semi-colon.
cl. 12.5(h)(2)	Need to capitalise the word 'section' in the reference to section 12.5(h)(1)(b).
cl. 12.5(m)(4)	The word 'clause' should be changed to 'section' in 'clause 11, Schedule E of this Undertaking'.
Sch. C, Part A, cl. 4	Compared with the 2010 AU, it appears that subclause references in the 2017 AU need to be updated to account for the deletion of subclause 4(a) (setting the amount of the ARR for the commencement year). The deletion of this subclause has also left the following subclause with a missing reference ('subsequent year'). The reference to the pricing objectives also needs to be updated to 11.2 (instead of 11.1) The QCA's suggested changes to Sch. C, Part A, cl. 4 are show in Appendix B.
Sch. G—Definitions	Insert a new definition: 'Approval Date means 16 February 2017'.

Draft decision 5.5: QCA-identified typographical changes

We consider it appropriate for DBCTM to amend the 2017 AU as listed and described in Table 4 and Appendix B.

GLOSSARY

2006 AU	Dalrymple Bay Coal Terminal 2006 Access Undertaking
2010 AU	Dalrymple Bay Coal Terminal 2010 Access Undertaking
2017 AU	Dalrymple Bay Coal Terminal 2017 Access Undertaking
ACCC	Australian Competition and Consumer Commission
ARR	Annual revenue requirement
AU	Access undertaking
AU1	Queensland Rail's Access Undertaking 1
DAAU	Draft amending access undertaking
DAU	Draft access undertaking
DBCT	Dalrymple Bay Coal Terminal
DBCTM	DBCT Management Pty Ltd (owner of the terminal)
DBCT PL	DBCT Pty Ltd (Operator of the terminal)
DBCT User Group	Anglo American, BHP Mitsui Coal, Fitzroy Australia Resources, Glencore, Middlemount South, Stanmore Coal, Peabody Energy and Rio Tinto
ETS	Early termination security
FEL	Front-end loading
IAP	Indicative access proposal
mtpa	Million tonnes per annum
NECAP	Non-expansion capital expenditure
OMC	Operations and maintenance contract
operator	DBCTM, for the purposes of Part 5 of the QCA Act
Operator	Presently DBCT PL, under the OMC
QCA	Queensland Competition Authority
QCA Act	*Queensland Competition Authority Act 1997*
QCA Regulation	Queensland Competition Authority Regulation 2007
RAB	Regulatory asset base
SCB	Supply chain business
SUA	Standard user agreement
Terminal	The Dalrymple Bay Coal Terminal
TIC	Terminal infrastructure charge
UT4	Aurizon Network's 2016 Access Undertaking
WACC	Weighted average cost of capital

APPENDIX A: SUMMARY OF TYPOGRAPHICAL CHANGES

Table 5 Changes proposed by DBCTM

Item	*Section*	*Change*	*Reason for change*	*DBCT User Group*	*QCA draft position*
1	1.1 (Operator)	Delete: 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. Insert: An Operator is contracted to operate the Terminal on behalf of DBCT Management pursuant to an operations and maintenance contract.	Minor amendment: 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).	Accepted as an accurate clarification.	Approve
2	1.1 (Previous access undertakings)	Delete: is due to expire on 30 June 2016 Insert: was due to expire on 30 June 2016 but was extended by an extension DAAU until approval of this Undertaking.	Minor amendment: reflects the history of the 2010 access undertaking and the extension DAAU.	Accepted as an accurate clarification.	Approve
3	1.1 (Background to this Undertaking)	Delete: this Insert: an Delete: [insert] Insert: 9 October 2015	Minor amendment: Insert date the undertaking was submitted.	Accepted as correct insertion of date of DBCTM submission of initial draft access undertaking in response to initial undertaking notice.	Approve
4	1.1 (Approval of this Undertaking)	Delete: [insert] Insert: 16 February 2017	Minor amendment: Insert date the undertaking was approved.	Accepted as correct insertion of date of final approval of 2017 AU.	Approve
5	3.1(f), 3.1(g)	Replace references to 'Related Party' with 'Related Body Corporate'.	Typographical: 'Related Body Corporate' is the correct defined term in Schedule G.	Accepted as amendment that reflects the defined term. Suggested further change: The same change of 'Related Party' to 'Related Body Corporate' should be made in section 5.8(c)(2) and 17.3(b)(3).	Approved and also make the changes proposed by the DBCT User Group.
6	5.4(d)	Delete: DBCTM Insert: DBCT Management Delete: Indicated Insert: Indicative	Typographical: amended to use the correct defined terms in Schedule G.	Accepted as amendment that reflects the defined term.	Approve
7	5.4(n)	Delete: tonnage Insert: Tonnage	Typographical: 'Tonnage' is the correct defined term in Schedule G.	Not appropriate: the defined term 'Tonnage' refers to the volume of Access supplied under an Access Agreement. The reference to 'tonnage' in section 5.4(n) refers to the tonnage the subject of access applications, such that the change is not appropriate.	**Refuse to approve.** Agree with DBCT User Group that tonnage refers to access application, not volume, under Access Agreement.
8	5.4(o)	Insert: 'below' before 'rail access'	Minor amendment: to match industry terminology	Accepted as a non-substantive change in terminology.	Approve
9	5.10(o)(3)	Delete: Part Insert: Section	Typographical: 'Section' is used throughout the 2017 AU (not 'Part').	Accepted as correction in terminology.	Approve.
10a	5.10(q)(3)	Delete: 'of'	Typographical: sentence should correctly read 'all circumstances' not 'all of circumstances'.	**Not appropriate:** the reference was intended to be to a Proposed Standing Funding/Underwriting Agreement have to be 'reasonable in all of the circumstances'. Consequently, the word 'the' should be added after the word 'of' rather than deleting 'of'.	**Refuse to approve.** Agree with DBCT User Group, insert 'the', as the intent was not to refer to 'all circumstances' but to 'all of the circumstances having regard to the terms of the Undertaking and s 138(2) of the QCA Act'.
10b	5.10(q)(9)(B)	Delete: DBCTM Management" Insert: DBCT Management"	DBCT Management is the correct defined term in Schedule G.	Accepted as correction of a typographical error.	Approve
11	5.10(r)	Delete: All consequential amendments associated with the DBCT Incremental Expansion Study DAAU	Minor amendment: 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.	Accepted as deletion of a now redundant section regarding the Incremental Expansion Study DAAU.	Approve

Item	*Section*	*Change*	*Reason for change*	*DBCT User Group*	*QCA draft position*
12	5.12(a)(2)(D)	Insert: numbering for sub-section (D)	Typographical: section formatting correction.	**Not appropriate:** Paragraphs (A)–(C) of section 5.12(2) are the matters that DBCTM must apply to the QCA for a ruling in relation to *[sic]*. The further paragraph (that DBCTM is proposing becomes (D)) was intended to the margin in the 2017 AU as it was intended as a stand-alone obligation on DBCTM that if Different Terms are approved by the QCA, those Different Terms will be included in any Access Agreement that applies to the Price Ruling. It is not a matter for which a ruling should be sought, such that the amendment is not appropriate.	Approve two minor amendments to cl. 5.12: • 5.12(a)(2)(B)—insertion of 'the' • Subject to comments below regarding re-numbering, 5.12(a)(2)(D)—insertion of a full stop at the end. Noting the numbering of subclause (D) has been part of the 2017 AU since the QCA's draft decision on the 2015 DAU in April 2016. However, having examined the clause, there appears to be a numbering error. The QCA's draft position therefore is **not to approve** the numbering for subclause (D), given it is not a matter to be considered by the QCA as part of a ruling, but rather a consequence of the outcome of the QCA's assessment of the matter listed at (C). This is indicated by the additional 'and;' at the end of sub-clause (C). That statement should therefore constitute part of sub-clause 5.12(a)(2).
13	5.13(a)	(1) Delete: this Agreement Insert: its Access Agreement (2) Insert: has not Delete: provides Insert: provided	Typographical: 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 subclause 2: '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 … '	Accepted as appropriate corrections to achieve the intention of the 2017 AU in respect of this section.	Approve
15	6.1 (c) and (d) [sic]	Insert: Approvals	Minor amendment: 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.	Accepted that Approvals are an appropriate part of the consideration of amendments to the Terminal Regulations, provided that an independent user owned operator remains responsible for proposing any amendments to the Terminal Regulations (as is proposed to be retained unchanged in the Modification DAAU).	Approve
16	6.2(g)(1)	Delete: the amendments by Insert: DBCT Management's refusal to give its consent to a proposed amendment to the Terminal Regulations	Minor amendment: 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).	Accepted as an appropriate correction to achieve the intention of the 2017 AU in respect of this section.	Approve
17	7	Insert: Information or documents provided to the QCA may be subject to obligations of confidence in accordance with section 239 of the QCA Act.	Minor amendment: The amendment recognises DBCTM's right under the QCA Act to request that information or documents are treated as confidential	Accepted as recognition of statutory confidentiality regime (which may apply irrespective of whether it is referenced in the 2017 AU).	Approve

Item	*Section*	*Change*	*Reason for change*	*DBCT User Group*	*QCA draft position*
			by the QCA, notwithstanding that the information or document is provided under the AU.		
18	9.1(c)	Delete: Schedule I Insert: Schedule H	Typographical: cross-referencing error.	Accepted as appropriate cross-referencing correction.	Approve
19	10.2(i)	Insert: written	Minor amendment: The amendment clarifies that DBCTM obligation is to report written complaints it receives in relation to compliance with the AU.	Accepted that it is appropriate for DBCTM reporting of complaints to be confined to written complaints.	Approve
20	12.5(j)	Delete: Differentiated Expansion Component's Insert: relevant	Minor amendment: 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).	Accepted as an appropriate correction to achieve the intention of the 2017 AU in respect of this section.	Approve
21	12.5(o)	Delete: be	Typographical: 'be' was included in error.	Accepted as correction of a typographical error.	Approve
22	12.5(p)	Delete: AAR Insert: ARR	Typographical: ARR is the abbreviation of 'Annual Revenue Requirement'.	Accepted as amendment that reflects the defined term.	Approve
23	13.1(f)	Delete: DBCTM Insert: DBCT Management	Typographical: 'DBCT Management' is the defined term in Schedule G.	Accepted as amendment that reflects the defined term.	Approve
24	Schedule A	Access Application Form and Renewal Application Form have been replaced.	Minor amendment: formatting changes.	Accepted as non-substantive formatting changes	Approve
25	Schedule C Part A s.4(a)(1)	Delete: [insert] Insert: 21 November 2016	Minor amendment: Insert the date of the QCA Final Decision.	Accepted as correct insertion of date of final approval of 2017 AU.	Approve
26	Schedule C Part A s.4(a)(1)	Insert: or section 150L of the QCA Act	Minor amendment: Schedule C provides for the pass-through of the fees for QCA regulatory services pursuant to the Queensland Competition Authority Regulation 2007. 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.	**Not appropriate:** The inclusion of the reference to section 150L of the QCA Act, provides for additional costs to be recovered from users that are not currently able to be recovered. The ability to recover these costs from users will create perverse incentives for DBCT Management to make extensive submissions on cost rulings that make the process protracted, knowing that users will be required to pay for both costs of their own advisers and the costs of the QCA. To the extent DBCT Management is seeking to have an expansion socialised that increases the TIC (which is adverse to the interests of the existing users), it is not reasonable for existing users to be required to pay the QCA costs caused by DBCT Management prosecuting that position.	Approve. See discussion at section 4.5 of this draft decision on the pass-through of QCA ruling fees.
27	Schedule C Part A s.4(e)	Delete: this subsection and renumber subsequent sections.	Subsection covered by the content of s. 4(d).	Accepted as non-substantive amendment.	Approve
28	Schedule C Part A s.4(e)(1)	Delete: or (c)	Typographical error: 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).	Accepted as appropriate clarification to remove the confusion about whether s. 4(e)(1) or (2) applies to paragraph (c) Review Events.	Approve
29	Schedule C Part A s.4(g)	Delete: s4(g) Insert: s4(e)	Typographical error: incorrect clause reference.	Accepted as appropriate cross-referencing corrections.	Approve **with further amendments** to clauses references to Sch. C, Part A, cl. 4 identified by the QCA and presented in 0.
30	Schedule D	Insert: 16 February 2017	Minor amendment: date of QCA's approval of AU added to definition of 'Access Undertaking'.	Accepted as correct insertion of date of final approval of 2017 AU.	Approve

Item	*Section*	*Change*	*Reason for change*	*DBCT User Group*	*QCA draft position*
31	Schedule E s.1	Delete: Users Insert: Access Holders	Typographical error: 'Access Holder' is a defined term in Schedule G.	Accepted as amendment that reflects the defined term.	Approve
32a	Schedule G	Delete: 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”. Delete: DBCTM Insert: DBCT Management	Minor amendment: Removal of definitions associated with the DBCT Incremental Expansion Study DAAU (see Item 11 above); Typographical: 'DBCT Management' is the defined term in Schedule G.	Amendments relating to Incremental Expansion Study DAAU accepted as deletions of redundant sections. Amendment of DBCTM is accepted as an amendment that reflects the defined term.	Approve
32b	Schedule G	Delete: '(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'	Minor amendment: section 5.10(o) itself sets out the costs recoverable.	Not appropriate: Amendments to definition of 'Review Event' are not merely a typographical amendment. The deletion of the 20% cap on cost recovery for Feasibility Studies is not perfectly reflected in the wording of section 5.10(o) such that the DBCT User Group is concerned its deletion may change the application of the cap. In particular, the reference to 'Feasibility Study' is broader than the references in section 5.10(o)(2).	**Refuse to approve**. Having reviewed both submissions, the QCA agrees with the DBCT User Group that the wording in the definition of Review Event is broader than in clause 5.10(o)(2) and should therefore remain in the definition of Review Event.
33	Schedule H s.4.1	Insert: 16 February 2017 Delete: Users (x2) Insert: Access Holders (x2) (at s.41(c))	Minor amendment: date of QCA’s approval of AU added to definition of 'Access Undertaking'. Typographical error: 'Access Holder' is a defined term in Schedule G.	Accepted as amendments that reflect the defined term and correctly insert the date of final approval of 2017 AU.	Approve.
34	Schedule J	Delete: Schedule J	Minor amendment: removal of provisions from 2010 AU associated with the DBCT Incremental Expansion Study DAAU (see Item 11 above).	Accepted as deletion of a now redundant section regarding the Incremental Expansion Study DAAU.	Approve.

APPENDIX B: PROPOSED REDRAFTING FOR SCHEDULE C, PART A, CLAUSE 4

4 Determination of ARR

(a) The ARR that will apply in each ~~subsequent~~ Financial Year ~~(of 12 Months)~~ will be calculated based on:

(1) principles set out by the QCA in its Final Decision on the Dalrymple Bay Coal Terminal Draft Access Undertaking dated ~~[*insert*]~~21 November 2016 and the Cost Allocation Manual (or where none exists, the Cost Allocation Principles);

(2) any amendment to the Access Undertaking or the relevant ARR, Revenue Cap or Reference Tariff made pursuant to Sub-Sections 4(c)~~,~~ and (e) ~~and (g)~~ below; and

(3) any amendment to the relevant ARR, Revenue Cap and Reference Tariff required to reflect the fees charged to DBCT Management~~, or which the QCA has notified DBCT Management will be charged to DBCT Management,~~ by the QCA in respect of that or any prior period ~~after 1 July 2010~~ (to the extent not previously recovered) pursuant to the Queensland Competition Authority Regulation 2007 or section 150L of the QCA Act ~~,~~ in providing regulatory services in connection with the Terminal. An amendment under this ~~sub-clause~~ Sub-Section may be submitted to the QCA at the same time as the relevant ARR, Revenue Cap and Reference Tariff ~~,~~ under ~~sub~~Sub-~~section~~ Section 4(b) ~~4(d)~~ below, or effected as a later amendment to the relevant ARR, Revenue Cap and Reference Tariff during the relevant Financial Year under Sub-Sections 4(h) ~~4(i)~~ or (i) below.

Annual amendment of the ARR, Revenue Cap and Reference Tariff

(b) By each 15 May after the Commencement Date, DBCT Management, after consultation with Access Holders, will submit each relevant ARR to apply for the next Financial Year to the QCA for approval.

(c) The QCA must approve each relevant ARR submitted by DBCT Management if it considers it has been calculated in accordance with Sub-Section 4(a) ~~4(b)~~ above.

(d) Each Reference Tariff will be amended annually on 1 July to reflect the new relevant ARR and any variation to reflect the relevant Increment, Aggregate Reference Tonnage and the Notional Contract Tonnage applicable for that Financial Year.

~~Any amendment made pursuant to Sub-Section above will be effective from the relevant 1 July.~~

Amendment of the ARR, Revenue Cap and Reference Tariff if a Review Event occurs

(e) If a Review Event occurs, and where described in Section 12.5(o), DBCT Management will submit to the QCA for approval:

(1) in the case of a Review Event referred to in paragraphs (a), (b) ~~or~~ or (e)(1)(A) of the definition of Review Event, a request to amend; or

(2) in the case of a Review Event referred to in paragraphs (c), (d) or (e) other than (e)(1)(A) of the definition of Review Event or in the case of Section 12.5(o), a draft amending access undertaking to make any necessary amendments to,

any one or more of each relevant ARR, Revenue Cap and Reference Tariff to the extent required because of the Review Event. The QCA may approve a request to amend any one or more of each relevant ARR, the Revenue Cap and the Reference Tariff or the draft amending access undertaking (as the case may be) in accordance with this Sub-Section only if it considers it appropriate having regard to the pricing objectives in Section ~~11.1~~ 11.2 of this Undertaking.

(f) Any amendment made pursuant to Sub-Section 4(e) ~~4(f)~~ above will be effective from the first day of the Month following the Month in which the Review Event occurs, except for those Review Events of the kind described at paragraph (e) of the Review Event definition, which will be effective from the relevant 1 July.

(g) For clarification, if a review under Sub-Section 4(c) ~~4(e)~~ above occurs simultaneously with a review under Sub-Section 4(e)~~4(f)~~ they will be reviewed together and become effective on the relevant 1 July.

Amendment of the ARR, Revenue Cap and Reference Tariff to include fees for regulatory services

(h) DBCT Management may submit to the QCA a request to amend the relevant ARR, Revenue Cap and Reference Tariff to the extent required pursuant to Sub-Section 4(a)(3) above. The QCA may approve a request to amend in accordance with this Sub-Section if the amendment is in accordance with Sub-Section 4(a)(3) above. Any amendment made pursuant to this Sub-Section will be effective from the first day of the Month following the Month in which the request to amend is submitted to the QCA.

(i) In the event that DBCT Management does not submit a request to the QCA pursuant to Sub-Section 4(h) above, in circumstances where the QCA deems amendment to the relevant ARR, Revenue Cap and Reference Tariff are required pursuant to Sub-Section 4(a)(3) above, the QCA may give notice to DBCT Management requiring it to submit a request pursuant to Sub-Section 4(h) ~~above~~. If DBCT Management does not submit a request (pursuant to Sub-Section 4(h)) within 14 days of said notice, the QCA may effect amendment to the relevant ARR, Revenue Cap and Reference Tariff in accordance with Sub-Section 4(a)(3) ~~above~~. Any amendment made pursuant to this Sub-Section will be effective from the first day of the Month following the Month in which notice is given to DBCT Management requiring it to submit a request pursuant to Sub-Section 4(h) ~~above~~.

REFERENCES

DBCT Management (DBCTM) 2010, *DBCTM 2010 access undertaking,* explanatory submission*,* March.

——2015a, *2015 DAU,* explanatory submission*,* October.

—— 2015b, *2015 DAU Mark Up*, October.

—— 2016, *DBCT 2015 DAU—QCA's final decision*, letter to the QCA, December.

—— 2017a, *DBCT 2015 DAU—Compliance with Secondary Undertaking Notice*, letter to the QCA, February.

—— 2017b, *DBCTM's Modification DAAU,* explanatory submission*,* September.

DBCT User Group 2010, Submission to the QCA*, Dalrymple Bay Coal Terminal—draft access undertaking*, March.

—— 2015 Submission to the QCA, *2015 DAU*, November.

—— 2017, Submission to the QCA, *Modification DAAU*, October.

Queensland Competition Authority (QCA) 2005*, Dalrymple Bay Coal Terminal Draft Access Undertaking*, final decision, April.

—— 2006, *Dalrymple Bay Coal Terminal 2006 Draft Access Undertaking*, decision, June.

—— 2010, *Dalrymple Bay Coal Terminal 2010 Draft Access Undertaking*, final decision, September.

—— 2016a, *DBCT Management's 2015 draft access undertaking*, draft decision, April.

——2016b, *DBCT Management's 2015 draft access undertaking*, final decision, November.

—— 2017a, *DBCT 2015 DAU—QCA's final decision*, letter to DBCTM, January.

—— 2017b, *Approval: DBCT Management's 2015 Draft Access Undertaking*, letter to DBCTM, February.

Vale 2015, Submission to the QCA, *2015 DAU*, November.