

# **DBCT 2019 Draft Access Undertaking STANDARD ACCESS AGREEMENT**

Execution Date: *[Insert date of execution of this agreement]*

**DBCT MANAGEMENT PTY LIMITED**

("DBCT Management")

**DBCT INVESTOR SERVICES PTY LTD as trustee of the DBCT Trust**

("DBCT Guarantor")

*[Insert User name]*

("User")

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**This Agreement** is made on the Execution Date

**BETWEEN DBCT MANAGEMENT PTY LIMITED ABN 16 097 698 916**  
**("DBCT Management")**

**AND THE USER DESCRIBED IN SCHEDULE 1**  
**("User")**

**AND DBCT INVESTOR SERVICES PTY LTD ABN 11 052 156 082, as trustee of the DBCT TRUST**  
**("DBCT Guarantor")**

## **RECITALS**

- A. DBCT Management is the lessee of the Terminal under long term leases.
- B. The Operator operates and maintains the Terminal on behalf of DBCT Management.
- C. The User wishes to use the Terminal to Ship its Coal.
- D. DBCT Management has agreed to grant Access to the User on the terms and conditions contained in this Agreement.

## **IT IS AGREED**

### **1. DEFINITIONS AND INTERPRETATIONS**

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#### **1.1 Definitions**

Unless the subject or context is inconsistent, each of the capitalised terms used in this Agreement has the meaning assigned to it in Schedule 9.

#### **1.2 Interpretation**

The rules set out in Schedule 9 apply to and govern the interpretation of this Agreement.

### **2. TERM**

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Subject to clause 29.1, this Agreement commences on the Effective Date and continues in force until the end of the Term specified in Item 66 of Schedule 1 (unless terminated earlier pursuant to clause 14.2 or clause 14.3).

### **3. HANDLING OF COAL**

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#### **3.1 Agreement to provide Access**

DBCT Management grants Access to the User on the terms of this Agreement.

#### **3.2 Provision and operation of the Terminal**

In granting to the User the Access referred to in clause 3.1, DBCT Management must, subject to this Agreement:

- (a) make the Terminal available and operate it to enable the Annual Contract Tonnage (subject to delivery to the Terminal and the availability of vessels) to be Handled at the Terminal in each Financial Year; and
- (b) provide Services as required by the User.

### 3.3 Delivery by rail

The User must ensure that its Coal is delivered to the Terminal by rail utilising rolling stock which is compatible with and (as far as it is practicable for the User to control) efficiently utilises the unloading facilities at the Terminal.

### 3.4 User to use reasonable endeavours to Ship its Annual Contract Tonnage

The User must use all reasonable endeavours to Ship its Annual Contract Tonnage through the Terminal in each Financial Year.

### 3.5 Even Shipments

The User must work towards, and must use all reasonable endeavours to achieve, the Shipping of its Coal through the Terminal at an even rate throughout each Financial Year (and, where Item 7 in Schedule 1 provides for a specific tonnage in respect of a nominated shorter period at some time during the Term, then at an even rate throughout that shorter period). The parties recognise that vessel arrival times, rail scheduling, maintenance and other factors can result in some short-term, routine unevenness to an even rate of Shipping.

### 3.6 Terminal Regulations

- (a) DBCT Management must comply with, and will use its best endeavours to ensure that the Operator complies with, the Terminal Regulations in force from time to time.
- (b) The User must observe the Terminal Regulations, in force from time to time, as a condition of Access to and the right to have its Coal Handled at the Terminal.
- (c) The User acknowledges that Terminal Regulations may include terms which:
  - (i) require scheduling of Access Holders' railing in and Handling of Coal in ways which promote Terminal efficiency and endeavour to achieve the objective set out in clause 3.5;
  - (ii) temporarily reduce the tonnage of Coal which may be Handled or Services provided under this Agreement, during such periods as capacity of the Terminal or relevant Services becomes restricted, provided that such reductions and restrictions affect all Access Holders equitably (but this does not relieve the User or DBCT Management respectively from any liability which they might have in respect of the capacity or Services having become restricted);
  - (iii) prescribe requirements for cargo building windows, unloading of trains, stockpiling and cargo assembly, vessels, arrival of vessels, loading of vessels, pre-loading requirements, order of loading and unloading and other matters where possible (including matters of the type dealt with in the Terminal Regulations at the Commencement Date) which promote the efficient, safe and equitable utilisation of capacity at the Terminal and Terminal Services;
  - (iv) require Access Holders to co-operate with the Operator and other Access Holders in relation to scheduling, loading, unloading, priorities and other matters relating to the operation of the Terminal; and
  - (v) allow the exercise of discretions on the part of the Operator in limited cases, where it is reasonable to do so, to optimise Terminal efficiency (such power to be exercised in good faith and in a non-discriminatory way).
- (d) The User acknowledges and agrees that the Operator may, from time to time, by written notice to DBCT Management, propose amendments to the Terminal Regulations regarding operational issues.
- (e) If the Operator submits to DBCT Management a proposed amendment to the Terminal Regulations DBCT Management must:

- (i) promptly notify the User of any proposed amendments to Terminal Regulations;
  - (ii) provide the User with a copy of such proposed amendments to the Terminal Regulations (which may be by displaying it on DBCT Management's website);
  - (iii) conduct reasonable consultation with the User in relation to the proposed amendment; and
  - (iv) following the completion of such reasonable consultation, notify the User:
    - (A) of the wording of the proposed amendment;
    - (B) whether it has given its consent to the proposed amendment;
    - (C) of the detailed reasons for its decision to give (or not give) consent to the proposed amendment; and
    - (D) that there is a 30 day period for notifying DBCT Management of any objections to the decision to consent or not consent (as applicable) to the amendment.
- (f) A proposed amendment to the Terminal Regulations will not be implemented unless:
- (i) DBCT Management has conducted reasonable consultation with Access Holders, Access Seekers, Expansion Parties and Rail Operators in accordance with the Access Undertaking; and
  - (ii) one of the following has occurred:
    - (A) DBCT Management has consented to the proposed amendment to the Terminal Regulations and no Access Holder, Access Seeker or Expansion Party has given notice to DBCT Management objecting to consent being provided to the proposed amendments within 30 days of being notified of the amendments by DBCT Management;
    - (B) DBCT Management has consented to the proposed amendments to the Terminal Regulations and while an Access Holder, Access Seeker or Expansion Party has given notice to DBCT Management objecting to consent being provided to the proposed amendments within 30 days of being notified of the amendments by DBCT Management, the QCA has rejected that objection; or
    - (C) DBCT Management has not consented to the proposed amendments to the Terminal Regulations, but an Access Holder, Access Seeker or Expansion Party has given notice to DBCT Management objecting to consent not being provided, and the QCA has upheld that objection.
- (g) DBCT Management will only give its consent to a proposed amendment to the Terminal Regulations under clauses 3.6(f)(ii)(A) or 3.6(f)(ii)(B) if it has conducted reasonable consultation with Access Holders, Access Seekers, Expansion Parties and Rail Operators in accordance with the Access Undertaking and, taking into account the results of such consultation, it reasonably considers that:
- (i) the amendments relate to operational issues;
  - (ii) the amended Terminal Regulations, as a whole, will operate equitably amongst Access Holders, Access Seekers (should they become Access Holders) and Expansion Parties (should they become Access Holders) and, where the relevant amendments affect Rail Operators, amongst affected Rail Operators;
  - (iii) the amendments are consistent with the Access Undertaking, and any Access Agreements; and
  - (iv) the amendments are reasonably necessary for the operation of the Terminal in accordance with applicable laws and regulatory standards, Approvals, Good Operating and Maintenance Practice or any costs or obligations imposed are justified by the efficiency benefits arising from those costs or obligations.

- (h) If DBCT Management does not provide its consent to a proposed amendment to the Terminal Regulations, the User may object to DBCT Management's refusal to provide consent if it reasonably considers that:
- (i) the amendments relate to operational issues;
  - (ii) the amended Terminal Regulations, as a whole, will operate equitably amongst Access Holders, Access Seekers (should they become Access Holders) and Expansion Parties (should they become Access Holders) and, where the relevant amendments affect Rail Operators, amongst affected Rail Operators;
  - (iii) the amendments are consistent with the Access Undertaking and this Agreement; and
  - (iv) the amendments are reasonably necessary for the operation of the Terminal in accordance with applicable laws and regulatory standards, Approvals, Good Operating and Maintenance Practice or any costs or obligations imposed are justified by the efficiency benefits arising from those costs or obligations.
- (i) DBCT Management must notify all Access Holders, Access Seekers, Expansion Parties and Rail Operators of any amendments to the Terminal Regulations that have been approved by the QCA and must provide a copy of the amended Terminal Regulations to these parties (which may be by way of reference to the website on which the amended Terminal Regulations are available in accordance with 3.6(o)).
- (j) If:
- (i) DBCT Management has given its consent to a proposed amendment to the Terminal Regulations; and
  - (ii) the User objects to the proposed amendment on the basis that it reasonably considers that the criteria specified in clauses 3.6(g)(i) to 3.6(g)(iv) are not satisfied,
- then the User may, within 30 days after being notified of DBCT Management's consent, notify DBCT Management and the QCA of its objection to the consent to the proposed amendment.
- (k) If, in response to an objection notified to the QCA by the User under clause 3.6(i), the QCA determines that the criteria specified in clauses 3.6(g)(i) to 3.6(g)(iv) are not satisfied, then:
- (i) the proposed amendment and DBCT Management's consent to the proposed amendment will be taken to have been withdrawn; and
  - (ii) the proposed amendment will not be made.
- (l) If:
- (i) DBCT Management has refused to give its consent to a proposed amendment to the Terminal Regulations; and
  - (ii) the User objects to DBCT Management not providing consent to the proposed amendment on the basis that it reasonably considers that the criteria specified in clauses 3.6(g)(i) to 3.6(g)(iv) are satisfied,
- then the User may, within 30 days of being notified of the amendments by DBCT Management, notify DBCT Management and the QCA of its objection to DBCT Management not providing consent for the proposed amendment.
- (m) If, in response to an objection notified to the QCA by the User under clause 3.6(l), the QCA determines in accordance with the process under Section 17.4(b) of the Access Undertaking that the criteria in in clauses 3.6(g)(i) to 3.6(g)(iv) are satisfied, then:
- (i) DBCT Management's consent to the proposed amendment will be deemed to have been given; and
  - (ii) the proposed amendment will be made.

- (n) Subject to DBCT Management complying with clause 3.6(f), DBCT Management will not be liable to the User on any basis whatsoever as a result of DBCT Management consenting to an amendment to the Terminal Regulations or the due implementation and observance of an amendment to the Terminal Regulations, as long as DBCT Management had in all respects acted reasonably and in good faith and (acting reasonably and in good faith) had formed the opinion required by clause 3.6(g). For clarification, this does not affect DBCT Management's obligation to do anything required on its part to cause the termination or consequential amendment of a Terminal Regulation after any determination that the Terminal Regulation breaches this Agreement or the Access Undertaking.
- (o) DBCT Management must make a copy of the Terminal Regulations available to the User (which may be by displaying it on DBCT Management's website).

### **3.7 Addressing disproportionate use of Terminal capacity and risk minimisation**

- (a) If at any time DBCT Management, acting reasonably and on the recommendation of the Operator, considers that:
  - (i) the User is disproportionately consuming the capacity of the Terminal (when compared with other Access Holders on a per tonne basis) and other Access Holders are materially adversely affected as a result; or
  - (ii) the provision of the User's Coal to the Terminal or Handling of that Coal at the Terminal creates a disproportionate risk to the Terminal (when compared with Coal of other Access Holders),
 and that it is reasonably practicable for the User to reduce that disproportionate consumption of capacity or disproportionate risk, DBCT Management may give written notice to the User to that effect.
- (b) If DBCT Management gives notice to the User pursuant to clause 3.7(a) the User must:
  - (i) meet with DBCT Management (or with the Operator if DBCT Management gives notice that the Operator is authorised to act as its nominee) to attempt to agree on an appropriate action plan; and
  - (ii) promptly, and in any event, within 60 days of the meeting referred to in clause 3.7(a)(i), develop and implement an action plan agreed between the parties or (if there is no agreement, but it is consistent with clause 3.7(c)) an action plan required by DBCT Management.
- (c) DBCT Management is not entitled to require anything in an action plan which would be:
  - (i) unreasonable or uneconomic for the User in all the circumstances; or
  - (ii) inconsistent with what is generally accepted as good operating practice in the prevailing circumstances.
- (d) A dispute between DBCT Management (or the Operator) and the User in respect of this clause 3.7 may be referred to dispute resolution in accordance with clause 15

## **4. PAYMENT OF CHARGES AND ADJUSTMENTS**

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### **4.1 Interpretation of Pricing Provisions**

In this Agreement, the following principles of interpretation shall apply:

- (a) for so long as there is a single Terminal Component, the terms and definitions of this Agreement relevant to pricing apply to all Access collectively; and
- (b) where there are multiple Terminal Components, the terms and definitions of this Agreement relevant to pricing apply to each Terminal Component separately.

For the avoidance of doubt, the Access contracted under this Agreement relates to [the Existing Terminal / a Differentiated Expansion Component].

#### **4.2 Charges payable regardless of remedies**

The charges payable pursuant to this clause 4 must be paid by the User promptly when due, regardless of any remedies which might be available to the User pursuant to clause 13 except to the extent that clause 5.3 applies;

- (a) unless and until, and to the extent that, it is determined through dispute resolution or agreed that the charges are not payable pursuant to clause 13.4(b); and
- (b) unless a relevant Delay is caused by Wilful Default by DBCT Management (clause 13.5).

#### **4.3 Access Charges**

Access Charges for each Terminal Component will comprise two parts:

- (a) a TIC; and
- (b) a charge to recoup the costs of operation and maintenance of the Terminal, being:
  - (i) the Handling Charge – Fixed;
  - (ii) the Handling Charge – Variable; and
  - (iii) where applicable, charges for Miscellaneous Services.

#### **4.4 User to pay TIC**

The User must pay the TIC to DBCT Management for each tonne of Annual Contract Tonnage by monthly instalments (each a Monthly Payment) in accordance with clause 5.1(b).

#### **4.5 User to pay Handling Charge - Fixed**

- (a) The User must pay HCF to DBCT Management, calculated in accordance with clause 6.2.
- (b) On an interim basis (subject to end-of-Financial Year reconciliations and adjustments pursuant to clause 5.1(d)) the User must pay DBCT Management monthly instalments each equal to one-twelfth of the annual HCF reasonably estimated by DBCT Management at the commencement of the relevant Financial Year.

#### **4.6 User to pay Handling Charges - Variable**

- (a) The User must pay HCV to DBCT Management, calculated in accordance with clause 6.3.
- (b) On an interim basis (subject to end-of-Financial Year reconciliations and adjustments pursuant to clause 5.1(d)) the User must pay DBCT Management monthly instalments each equal to one-twelfth of the annual HCV reasonably estimated by DBCT Management at the commencement of the relevant Financial Year.

#### **4.7 User to pay Miscellaneous Services charges**

The User must pay DBCT Management for Miscellaneous Services provided at the Terminal where such services are charged separately from HCF and HCV, at the rates applicable pursuant to clause 6.4.

#### **4.8 DBCT Management's business interruption insurance**

Any insurance premium which relates to business interruption cover for DBCT Management will not form part of any HCV, HCF or Miscellaneous Charge. (For clarification, this is because of the obligation of Access Holders whose Access Agreement is on the terms of the Standard Access Agreement to continue paying Access Charges whilst an event of Force Majeure continues - clause 13.3(b)).



## **5. ACCOUNTS**

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### **5.1 Calculation, rendering and payment of tax invoices**

- (a) DBCT Management and the User must give each other appropriate tax invoices or adjustment notes for any charge payable by the User to DBCT Management or any amounts payable by DBCT Management to the User under clause 4.
- (b) With respect to the Monthly Payment, HCF, HCV, and charges for Miscellaneous Services, the User must pay each tax invoice duly given to it by DBCT Management by no later than that date (the "Due Date") which is 30 days after the date of receipt of that tax invoice.
- (c) Tax invoices may only be rendered by DBCT Management monthly in arrears for the Monthly Payment, and monthly instalments of HCF, HCV and charges for Miscellaneous Services.
- (d) With respect to the annual reconciliation and adjustment of HCF and HCV:
  - (i) DBCT Management must calculate and notify the User of any adjustment required against interim amounts paid in respect of HCF and HCV within one month from the end of the Financial Year to which it relates.
  - (ii) DBCT Management or the User (as applicable) must then give the other an appropriate tax invoice reflecting the payment to be made pursuant to any adjustment under clause 5.1(d)(i) on or before the date 14 days after the amount of the adjustment is notified to the User by DBCT Management (or, if later, within 14 days after the resolution of any dispute over the calculations of adjustments, including any dispute referred to in clause 5.1(d)(iv)).
  - (iii) The parties must pay the adjustment relevant under this clause 5.1(d) within 14 days after the receipt of a relevant tax invoice pursuant to clause 5.1(d)(ii).
  - (iv) If the adjustment contemplated under this clause 5.1(d) is wholly or partially impacted by a dispute (as between two or more of the User, another Access Holder and DBCT Management), no amount need be paid in respect of that disputed amount until that dispute has been resolved but, as far as it is practicable, undisputed amounts must be promptly paid (with tax invoices being given accordingly, but the giving of a tax invoice in respect of the undisputed part of a payment will not prejudice the dispute). DBCT Management and the User must use reasonable endeavours to attempt to expeditiously resolve any such dispute to which they are a party.

### **5.2 Interest on late payments**

- (a) If the User does not pay a tax invoice by the Due Date, DBCT Management, without prejudice to its other rights under this Agreement, may charge interest to the User on the amount owed computed from the Due Date to the actual date of payment at the Default Interest Rate, and unpaid interest may be compounded and itself incur interest, on a monthly basis until payment at a rate equal to 1/12th of the Default Interest Rate.
- (b) If DBCT Management does not make a payment to the User on the date due for such payment or does not notify the User of the amount of an adjustment to be paid by DBCT Management by the required date to do so, the User, without prejudice to its rights under this Agreement, may charge interest to DBCT Management on the amount owed computed from the date due for such payment (or the date on which payment would have become due had the adjustment been duly notified) to the actual date of payment at the Default Interest Rate, and unpaid interest may be compounded and itself incur interest on a monthly basis until payment at a rate equal to 1/12th of the Default Interest Rate.

**5.3 Disputes over accounts**

- (a) Subject to clause 5.1(d)(iv) if the User disputes the amount of a tax invoice from DBCT Management on the basis that it contains a manifest administrative error or is incorrectly calculated, then the User must pay:
- (i) the whole of the undisputed part of the tax invoice by the Due Date; and
  - (ii) 50% of the disputed portion, pending resolution of that dispute (and the User will not be in default for non-payment, if it does so).
- (b) Payment in accordance with clause 5.3(a) will not prejudice the User's rights under clause 15.
- (c) If following the resolution of a dispute, DBCT Management refunds that portion of the disputed tax invoice which has been paid or the User pays the unpaid portion of a disputed tax invoice, then DBCT Management or the User shall pay interest at the No Fault Interest Rate on the refunded amount (in the case of DBCT Management) or the paid amount (in the case of the User) computed from the date on which the disputed amount was originally due to the date the adjustment is paid.

**6. HANDLING CHARGES**

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**6.1 Utilisation Advice**

- (a) As soon as practicable after the Execution Date, the User must give a Utilisation Advice to each of DBCT Management and the Operator relating to the balance of the then current Financial Year (on a monthly basis) and the next 3 full Financial Years of the Term (on an annual basis).
- (b) By no later than 15 February in each Financial Year, the User must give a Utilisation Advice to each of DBCT Management and the Operator relating to the next full Financial Year (on a monthly basis) and the 3 full Financial Years of the Term following that next Financial Year (on an annual basis).
- (c) In the five Business Days preceding each 1 July, 1 October, 1 January and 1 April in each Financial Year, the User must update DBCT Management and the Operator with a revised Utilisation Advice relating to that Financial Year, together with projections of similar information for the 12 month period commencing on the date of that update.
- (d) The User will be under no liability to DBCT Management if the actual number, types or tonnages of vessels or the amount of Coal is or are greater or fewer than the number, types, tonnages or amounts estimated in this clause 6.1 or estimated in any advice given pursuant to this clause 6.1.

**6.2 HCF**

- (a) HCF for each Financial Year in respect of the Terminal Component is calculated as follows:

$$HCF = [OFC + DC + MC] \times \frac{ACT}{TACT}$$

Where:

OFC is the aggregate of all Fixed Operating Costs for the Financial Year in respect of the relevant Terminal Component;

DC is other expenditure (not being Capital Expenditure) incurred by the Operator for the operation and maintenance of the relevant Terminal Component (including any Operator's margin) for that Financial Year and reimbursable by DBCT Management pursuant to the Operation & Maintenance Contract;

MC is the minor Capital Expenditure for the relevant Terminal Component (not included in DC) in the relevant Financial Year, to a maximum of \$3 million;

ACT is the User's Annual Contract Tonnage in respect of the relevant Terminal Component; and

TACT is the total of the annual contract tonnages (or if an Access Holder's actual tonnage Shipped is greater than its annual contract tonnage, the actual tonnage Shipped) of all Access Holders for each relevant Financial Year in respect of the relevant Terminal Component.

- (b) As soon as practicable after each 31 May, having consulted with the Operator, DBCT Management must advise the User in writing of the estimated HCF payable by the User during the forthcoming Financial Year in respect of the relevant Terminal Component.

### 6.3 HCV

- (a) HCV for each Financial Year in respect of the Terminal Component is calculated as follows:

$$HCV = \frac{OVC}{TTCS} \times ATTS$$

Where:

OVC is the aggregate of all Variable Operating Costs in respect of the Handling of all Coal through the relevant Terminal Component for a Financial Year;

ATTS is the actual number of tonnes of Coal Shipped by the User pursuant to this Agreement in the relevant Financial Year in respect of the relevant Terminal Component; and

TTCS is the total number of tonnes of Coal Shipped through the relevant Terminal Component during that Financial Year.

- (b) As soon as practicable after each 31 May, and having consulted with the Operator, DBCT Management must advise the User in writing of the estimated HCV payable by the User during the forthcoming Financial Year in respect of the relevant Terminal Component.

### 6.4 Miscellaneous Services

- (a) Charges for Miscellaneous Services must be an amount which the Operator reasonably estimates as:
- (i) relevant reasonable additional costs to be incurred by the Operator as a result of the Miscellaneous Services including the Operator's profit margin; and
  - (ii) any other additional costs likely to be incurred by other Access Holders (for example, additional demurrage) as a result of the delays in Handling other Coal, arising out of the Miscellaneous Services.
- (b) Any charges recovered under this clause 6.4 or an equivalent clause in another User Agreement must be deducted from operating costs and the Operator's margin in respect of those operating costs for the purposes of calculating HCF and HCV.
- (c) The parties recognise that the Operator has historically charged Access Holders directly for some services provided at the Terminal, and nothing in this Agreement precludes that practice from continuing.

## 7. REVIEW OF ACCESS CHARGES

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### 7.1 Amendments to TIC

Subject to clause 7.2, the TIC will be amended from time to time throughout the Term in accordance with Schedule 2.

### 7.2 5 year review of charges

- (a) At the request of either party by notice to the other party no later than 18 months prior to the start of a Pricing Period, all charges under this Agreement and the method of calculating, paying and reconciling them (including the terms of Schedule 2) and any consequential changes in drafting of

provisions will be reviewed in their entirety, effective from the start of each Pricing Period, in accordance with the following provisions of this clause 7.2.

- (b) Each review pursuant to clause 7.2(a) will determine the types, calculation, payment and reconciliation of charges payable by the User pursuant to this Agreement, and may have regard to the terms of the Access Undertaking effective at the time of review.
- (c) DBCT Management and the User must commence each review pursuant to clause 7.2(a) no later than 18 months prior to the start of a Pricing Period, and:
  - (i) the parties must endeavour to agree as early as it is practicable to do so (if possible, by no later than the start of the relevant Pricing Period) on the basis and amount of new charges to apply from the start of that Pricing Period;
  - (ii) if the parties do not reach agreement by the date 6 months prior to the start of the relevant Pricing Period, either party may refer the determination of the issues to arbitration in accordance with [this clause 7.2](#)~~the Access Undertaking~~;
  - (iii) if there is no agreement or determination by the start of the relevant Pricing Period then:
    - (A) the charges (and method of paying and reconciling them) applying prior to that Pricing Period will continue to apply until otherwise agreed or determined; and
    - (B) any determination or agreement will (unless the parties otherwise agree) operate retrospectively from the start of the relevant Pricing Period and, as soon as practicable after the determination or agreement, an adjustment will be paid by the relevant party (based on the amounts which have been paid to that date on an interim basis and the amounts which are agreed or determined to be payable from the start of the relevant Pricing Period to the date the adjustment is paid) together with interest on the amount of the adjustment at the No Fault Interest Rate. The amount of interest will be determined by reconciling the amounts and timings of payments made on an interim basis with amounts payable and timing of those payments which would have applied in accordance with the agreement or determination.

(d) If the matter is referred under clause 7.2(c)(ii) to arbitration, then arbitration must be effected as follows:

- (i) by the QCA in such manner as it sees fit, after consultation with the parties; or
- (ii) if the QCA is unwilling or unable to act, by a single arbitrator agreed upon between the parties; or
- (iii) in default of agreement under clause ~~7.2(c)(ii)~~7.2(d)(ii) within 10 days after the matter is referred to arbitration, by a single arbitrator selected by the Chair of the Queensland Chapter of the Institute of Arbitrators and Mediators, Australia.

(e) If a matter is referred to arbitration under clause 7.2(d)(ii) or clause 7.2(d)(iii), then the arbitrator must have regard to the following matters:

- (i) an appropriate asset valuation of the Terminal and the relevant Terminal Component;
- (ii) an appropriate rate of return for DBCT Management;
- (iii) the terms of this Agreement;
- (iv) the expected future tonnages of Coal anticipated to be Handled through the Terminal and the relevant Terminal Component;
- (v) any other matter agreed to by the User and DBCT Management and notified by them in writing to the arbitrator;
- (vi) any other matter which is submitted by either the User or DBCT Management and accepted by the arbitrator as being relevant; and

(vii) the then current approach of the QCA in respect of appropriate charges for services comparable to the Services (with the intent that the arbitration should produce an outcome similar to that which might have been expected had the QCA determined it).

~~(d)~~(f) If a matter is referred under clause ~~7.2(c)(ii)~~7.2(~~(c)~~(ii)) to arbitration, then the arbitration must be conducted in accordance with the Access Undertaking.

~~(e)~~(g) If a party requests a review under clause 7.2(a), the parties will, at the request of either party and in addition to reviewing the charges under this clause 7.2, meet together in good faith to negotiate any amendments to this Agreement which they consider to be relevant as a result of the changed circumstances following the start of the relevant Pricing Period. Neither party will have any obligation to reach agreement on any revised terms.

## **8. SET-OFF**

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### **8.1 DBCT Management may set-off**

Unless otherwise stated, DBCT Management may set-off against any amount payable to the User under this Agreement any amount which is due and payable by the User to DBCT Management under this Agreement.

### **8.2 Amount set-off deemed to have been paid**

Any amount set-off by DBCT Management is deemed to have been paid by the User and the amount against which the set-off has been effected is deemed to have been paid by DBCT Management to the User.

### **8.3 User may set-off**

Unless otherwise stated, the User may set-off against any amount payable to DBCT Management under this Agreement any amount which is due and payable by DBCT Management to the User under this Agreement.

### **8.4 Amount set-off deemed to have been paid**

Any amount set-off by the User is deemed to have been paid by DBCT Management and the amount against which the set-off has been effected is deemed to have been paid by the User to DBCT Management.

## **9. DETERMINATION OF TONNAGE**

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### **9.1 Certificate of weight and Cargo Manifest**

The User must:

- (a) commission an independent surveyor to issue a certificate of weight of each cargo of the User's Coal loaded on a vessel at the Terminal, based on vessel draught measurements at the Port, or otherwise cause the weight of each cargo to be determined and certified in another way which is independent and acceptable to DBCT Management (acting reasonably) and (if DBCT Management so requires) adopted by all Access Holders;
- (b) send the Cargo Manifest (which must include a statement as to the weight so certified under clause 9.1(a)) to DBCT Management (with a copy to the Operator) upon completion of the loading of each vessel with a cargo of the User's Coal; and
- (c) ensure that a Product Shipment Notice is attached to each Cargo Manifest.

### **9.2 Basis of calculation**

DBCT Management must use the information contained in each Cargo Manifest and Product Shipment Notice as the basis of calculating charges payable under this Agreement.

### 9.3 Further account

- (a) If at any time:
- (i) DBCT Management can demonstrate that an account previously sent to the User was incorrectly calculated, or based on incorrect information, so that DBCT Management was paid less than it was entitled to, DBCT Management may calculate and send to the User a further tax invoice for the difference owed to DBCT Management; and
  - (ii) the User can demonstrate that an account previously sent to the User was incorrectly calculated, or based on incorrect information, so that DBCT Management was paid more than it was entitled to, DBCT Management must upon request by the User and delivery of a tax invoice or adjustment note, either pay to the User the difference owed to the User or issue a credit note to the User for the difference owed to the User.
- (b) In addition to payment of the amount referred to under clause 9.3(a) ("**Applicable Amount**"), DBCT Management (in the case of clause 9.3(a)(i)) or the User (in the case of clause 9.3(a)(ii)) shall be entitled to interest on the Applicable Amount calculated at the No Fault Interest Rate and calculated from the date on which the incorrectly calculated invoice was paid to the date on which the Applicable Amount was actually paid.

## 10. EXPANSION OF TERMINAL

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### 10.1 Actions preliminary to decision to expand the Terminal

Before making any decision to expand the Terminal, DBCT Management must:

- (a) advise the User of the reasons for, extent, timing and estimated cost of any Expansion Component under consideration;
- (b) consult the User as to whether changes in the User's Annual Contract Tonnage or the method of operation of the Terminal, including the User's arrangements for Shipping its Coal, would avoid or delay the need for the Expansion Component or reduce the extent or estimated cost of the Expansion Component; and
- (c) consider how to maximise the utilisation of the Terminal.

Nothing in this clause 10.1 limits any provision of the Access Undertaking.

### 10.2 Minimisation of interference

DBCT Management must use all reasonable endeavours to carry out any Terminal Capacity Expansion or other work at the Terminal and any infrastructure connected to the Terminal so as to minimise interference with the Handling of the User's Coal.

### 10.3 Terminal and System Capacity

- (a) DBCT Management will from time to time estimate Terminal Capacity (and Expansion Component Capacity, including Socialised Terminal Capacity or Differentially Priced Capacity for each Expansion Component, as applicable) and System Capacity in accordance with the Access Undertaking (or if there is no provision for doing so in an Access Undertaking at a relevant time, in accordance with the process applying under the last access undertaking in which such a process was provided for).
- (b) DBCT Management must reassess Terminal Capacity, each relevant Expansion Component Capacity and System Capacity before entering into any new User Agreement or otherwise increasing the aggregate tonnage of Coal contracted to be Handled through the Terminal, unless it considers that none of the factors to be taken into account in determining Terminal Capacity, any relevant Expansion Component Capacity and System Capacity have materially changed since the most recent determination of Terminal Capacity, any relevant Expansion Component Capacity and System Capacity and that determination was made less than 12 months previously.

- (c) DBCT Management must not enter into any User Agreement if the Aggregate Annual Contract Tonnage would (after including the tonnage under the new User Agreement if it was entered into) exceed the System Capacity (as determined for the relevant time), unless otherwise required or permitted to do so by the Access Undertaking, law or an agreement relating to its tenure of the Terminal (including the Framework Agreement and the Port Services Agreement). For clarification:
- (i) without limiting clause 19, this does not prohibit DBCT Management from entering into a Conditional Access Agreement, as long as the terms of all such Conditional Access Agreements are such that the increase in Aggregate Annual Contract Tonnage consequent on such Terminal Capacity Expansion occurring will nevertheless not cause Aggregate Annual Contract Tonnage to exceed System Capacity (based on the estimated System Capacity at the completion of the relevant Terminal Capacity Expansion); and
  - (ii) DBCT Management will not be in breach of this Agreement if it has complied with the Access Undertaking (or made good faith and reasonable attempts to comply) but an assessment of System Capacity (after the assessment required by the Access Undertaking following the completion of a relevant Terminal Capacity Expansion) reveals that System Capacity is less than the Aggregate Annual Contract Tonnage at that time.
- (d) Notwithstanding any other provisions of this Agreement, if DBCT Management complies (or makes a good faith and reasonable attempt to comply) with the provisions of this clause 10.3, DBCT Management will not have any liability (whether for loss, damage, cost, expense or other remedy) nor will it be liable to the User:
- (i) for any breach of this clause 10.3;
  - (ii) for any delay which arises as a result of the Aggregate Annual Contract Tonnage (which was expected not to exceed Terminal Capacity, Expansion Component Capacity or System Capacity) subsequently exceeding Terminal Capacity, Expansion Component Capacity or System Capacity for any reason;
  - (iii) if one or more factors related to utilisation of capacity of the Terminal or any other part of the System subsequently changes (for example, changes in service levels required pursuant to a right of Access Holders under an Access Agreement, the nature of coal Handled, an Access Holder's use of the Terminal, vessel mix, railway infrastructure, rolling stock or locomotives, rail loading facilities of mines or any other relevant factor) provided that such factor is not a breach by DBCT Management of any other part of the Access Undertaking, this Agreement or any other Access Agreement); or
  - (iv) for any defect, error or omission on the part of the independent expert appointed under the Access Undertaking to assist with the assessment of Terminal Capacity, each relevant Expansion Component Capacity (including Socialised Terminal Capacity and Differentially Priced Capacity) and System Capacity.
- (e) Subject to the provisions of this Agreement and to the requirements and provisions of the Access Undertaking, any statute and any agreement in respect of the tenure of the Terminal (including the Framework Agreement and the Port Services Agreement), DBCT Management agrees with the User that any request by the User for an increase in Annual Contract Tonnage pursuant to clause 11.1 will be agreed to, to the extent that it does not cause System Capacity to be exceeded and in accordance with the provisions relating to Access Seekers seeking increased Access under Section 5 of the Access Undertaking.

## **11. CHANGES TO ANNUAL CONTRACT TONNAGE**

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### **11.1 Adjustments at User's request**

- (a) The User may only adjust its Annual Contract Tonnage pursuant to this clause 11.1 or clause 12.2.

- (b) [From the date 5 years after the commencement of the Shipment (or increased rate of Shipment) of Coal arising out of the Current Expansion - ***add these words for a User Agreement under which Coal is Shipped for 10 years or more and which necessitated an Expansion***] The User may without penalty reduce the Annual Contract Tonnage by giving not less than five years notice to DBCT Management of the extent and the period of the reduction required.
- (c) If the User wishes to increase the Annual Contract Tonnage (for all or any part of the remainder of the Term), either:
- (i) from the Annual Contract Tonnage at the Effective Date; or
  - (ii) from a lesser or greater Annual Contract Tonnage previously adjusted under this clause 11.1,
- then the User may so notify DBCT Management, which may:
- (iii) subject to the availability of unallocated Terminal Capacity and System Capacity and the provisions of clauses 10.3 and 29.3, the Access Undertaking, any statute, and any agreement in respect of the tenure of the Terminal as it existed at 1 July 2005 (including the Port Services Agreement and the Framework Agreement), allow the User to increase the Annual Contract Tonnage (wholly or partially) to the respective amounts and periods requested, in accordance with the provisions relating to Access Seekers seeking increased Access under Section 5 of the Access Undertaking; or
  - (iv) advise the User that no increase can occur, because it would cause Terminal Capacity or System Capacity to be exceeded.
- (d) Nothing in this clause limits any other rights which the User may have as an Access Seeker under the Access Undertaking or in clause 12.3.

### 11.2 Shipping Coal in excess of Annual Contract Tonnage

The User must not Ship Coal in excess of its Annual Contract Tonnage. If the User wishes to Ship Coal in excess of its Annual Contract Tonnage, the User may seek from another Access Holder the assignment of additional Annual Contract Tonnage under clause 12.2. In accordance with clause 12.3, DBCT Management will not unreasonably refuse to consent to such a proposed assignment.

### 11.3 User not using Annual Contract Tonnage

If, in the reasonable opinion of DBCT Management, a User has not Shipped and is unlikely to Ship its Annual Contract Tonnage over a sustained period and such failure is not due to a Force Majeure event at the Terminal or a failure by DBCT Management to Ship the User's Coal, then the following will apply:

- (a) DBCT Management may notify the User that DBCT Management has formed the opinion that the User has not Shipped and is unlikely to Ship its Annual Contract Tonnage over a sustained period and that there is a reasonable expectation of demand from other Access Holders or Access Seekers for the User's underutilised tonnage;
- (b) the User must make submissions as to whether the User has not Shipped and is unlikely to Ship its Annual Contract Tonnage over a sustained period within 21 days of receiving the notice from DBCT Management;
- (c) if the User fails to produce reasonable evidence that demonstrates that it is likely in future to substantially Ship the whole of its Annual Contract Tonnage, then DBCT Management may notify the User that it intends to appropriately reduce the User's Annual Contract Tonnage;
- (d) if the User considers that DBCT Management has not complied with the requirements of this clause in reducing the User's Annual Contract Tonnage, then the User may, within 21 days of receiving notice under clause 11.3(c), refer the matter to dispute resolution in accordance with clause 15; and



- (e) DBCT Management must not implement a reduction in Annual Contract Tonnage until the expiration of the period for resolution of a dispute referred to in clause 11.3(d).

#### **11.4 Capacity to be taken into account only once**

If the User notifies DBCT Management that the User is unable to, and forgoes its right to, Ship all or part of its Annual Contract Tonnage (the "**Notified Tonnage**") through the Terminal for any period (the "**Notified Period**"), then, for the purpose of charges otherwise payable by the User for the Notified Period, the User's Annual Contract Tonnage will be taken to be reduced by such part of the Notified Tonnage in respect of which DBCT Management grants additional annual contract tonnage to another Access Holder (for the same or comparable charges to those reduced under this clause) and which DBCT Management would not have been able to grant (due to lack of capacity) but for the User foregoing its right to Ship the Notified Tonnage through the Terminal.

#### **11.5 Reduction in tonnes Handled where User fails to obtain rail access**

- (a) Before the User is entitled to have coal Handled pursuant to this Agreement, it must produce evidence reasonably satisfactory to DBCT Management that the Annual Contract Tonnage under this Agreement is matched by an entitlement held by the User (or a person on its behalf) to railway track access relating to the coal the subject of this User Agreement:
  - (i) for the whole of the Term; or
  - (ii) for any relevant shorter period.
- (b) If the User only produces such evidence of access to railway track entitlement pursuant to clause 11.5(a)(ii) for a period shorter than the entire Term, it must continue to provide evidence of such access before the commencement of each successive period during the Term for which such evidence has not previously been produced, and the provisions of clause 11.5(c) will apply in respect of each of the first and each successive such period during the Term.
- (c) To the extent the tonnage in respect of which the User is able to demonstrate an entitlement to railway track access for a relevant period is less than the Annual Contract Tonnage for that period, the Annual Contract Tonnage will (despite any other provisions of this Agreement):
  - (i) be deemed to be reduced to that lesser tonnage, for all purposes relevant to the entitlement to have coal Handled at the Terminal pursuant to this Agreement during such period; but
  - (ii) will remain unchanged for all other purposes pursuant to this Agreement, and specifically for the purposes of the liability of the User to pay Access Charges and any other amount payable pursuant to this Agreement based on the actual Annual Contract Tonnage.
- (d) DBCT Management will in good faith make an assessment of the tonnage of coal able to be railed to the Terminal pursuant to an entitlement to railway track access (which would normally be expressed as a number of train paths for any relevant period) and (subject to clause 15) the tonnage so determined shall be the tonnage which is adopted for the purpose of comparison with the Annual Contract Tonnage for a period for the purposes of this clause 11.5.
- (e) Where a relevant period is not a whole Financial Year or not two or more whole Financial Years, references in this clause to Annual Contract Tonnage over that period will mean that part of the Annual Contract Tonnage which accrues over that period, assuming it accrues throughout each Financial Year in equal increments.

## **12. ASSIGNMENT**

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### **12.1 DBCT Management may assign**

After consultation with the User, DBCT Management may assign all or any part of its benefits under this Agreement to any person who is responsible and has the expertise and financial capacity needed to operate and maintain the Terminal and comply with the obligations of DBCT Management under this Agreement.

### **12.2 User may assign**

With the prior consent of DBCT Management, which consent will not be unreasonably withheld, a User may assign all or part of its rights or entitlements under this Agreement (including, in particular, all or part of its Annual Contract Tonnage) permanently or temporarily on the following basis:

- (a) the assignment will not be effective unless the assignee enters into a deed (prepared by DBCT Management at the expense of such assignee) with DBCT Management substantially in the form contained in Schedule 6 by which DBCT Management and the assignee agree to be bound by the terms, conditions and obligations of this Agreement or the assignee's User Agreement (as DBCT Management, acting reasonably, determines) in respect of the assigned rights or entitlements as if the assignee were the User in respect of those assigned rights and entitlements;
- (b) when the assignment takes effect, the User will be discharged from all terms, conditions and obligations of this Agreement (except to the extent that they accrued prior to the assignment) in respect of the rights and entitlements assigned; and
- (c) if the User assigns only part of its rights or entitlements to another person, this Agreement will be treated from that time as if it were only an Agreement in respect of the unassigned rights or entitlements.

For clarification, "assign" and "assignment" includes novation or variation to the parties' respective User Agreements.

### **12.3 Response to requests for consent to assignment by User**

- (a) DBCT Management must consent to a proposed assignment of rights or entitlements under clause 12.2 (whether by way of assignment or novation) unless DBCT Management (acting reasonably) is satisfied that:
  - (i) the assignor is in material breach of this Agreement; or
  - (ii) the assignee:
    - (A) is not of good financial standing, creditworthy and able to fully discharge the financial obligations of the Access Holder under the relevant Access Agreement and does not otherwise provide security in a form acceptable to DBCT Management (acting reasonably) for the performance of the obligations under this Agreement in respect of the transferred rights or entitlements;
    - (B) is incapable of performing the obligations of the Access Holder under the Access Agreement in respect of the transferred rights or entitlements, including complying with the Terminal Regulations; or
    - (C) is unable to reasonably demonstrate that the rights or entitlements to be transferred under the relevant Access Agreement are matched by an entitlement to railway track access held by the assignee or a person on its behalf.
- (b) The assignor must provide all information reasonably required by DBCT Management to assess the criteria specified in clause 12.3(a) to DBCT Management in a timely manner.
- (c) DBCT Management must take all steps necessary to assess and respond to any request for a transfer as soon as reasonably practicable.

- (d) Without limitation to clause 15, an Access Holder or an Access Seeker may refer to the QCA as a dispute under this Agreement :
- (i) any refusal by DBCT Management to consent to a transfer;
  - (ii) any failure to agree the reasonable terms governing an Access Agreement which is the subject of a transfer; and
  - (iii) any failure by DBCT Management in assessing or responding to a request for transfer in a timely manner.

#### **12.4 Change of control of User**

- (a) The User must obtain DBCT Management's consent (not to be unreasonably withheld or delayed) to any Change of Control in the User. DBCT Management's consent may be subject to reasonable conditions (including the provision of reasonable security) and the User must comply with any conditions.
- (b) Any dispute in respect of the reasonableness of any refusal by DBCT to consent to a Change of Control, or of any conditions sought by DBCT Management under this clause 12.4, may be referred as a dispute under clause 15.

#### **12.5 Permission to third party to Ship**

The User may permit a third party to Ship Coal through the Terminal treating that cargo as part of the User's Annual Contract Tonnage, without complying with clause 12.2. In such case:

- (a) the User will remain liable for the performance of its obligations under this Agreement in respect of all Coal so Handled, and for all purposes that Coal will be taken to be the Coal of the User Handled pursuant to this Agreement;
- (b) the User must give DBCT Management and the Operator a notice in the form of Schedule 7 not less than 14 days prior to the scheduled departure of the relevant vessel, but DBCT Management must accept such shorter period of notice as causes no unreasonable adverse consequences to it, the Operator or other Access Holders;
- (c) the cargo must be made in accordance with the notice provided under clause 12.5(b); and
- (d) the Product Shipment Notice attached to the Cargo Manifest provided by the User under clause 9.1 must disclose the name or names of any third party so using the User's Annual Contract Tonnage, and the tonnages of Coal so Handled for that third party.

### **13. REMEDIES**

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#### **13.1 DBCT Management's remedies in the event of Delay**

- (a) To the extent that the User is responsible for a Delay, or a Delay arises from events external to the Terminal, DBCT Management's remedies will be limited to its entitlement to payment of the charges provided for in clause 4 of this Agreement.
- (b) Nothing in this clause 13.1 precludes DBCT Management from applying for an injunction, declaration or specific performance in respect of the User's obligations under this Agreement.

#### **13.2 User's remedies in the event of Delay**

To the extent that the User is not responsible for a Delay and to the extent that a Delay does not arise from events external to the Terminal, the User's remedies against DBCT Management in respect of the Delay are limited as set out below:

- (a) If the Delay is a Permissible Delay, DBCT Management will have no liability to the User in respect of any Claim for Loss arising from the Delay;

- (b) If the Delay arises from Force Majeure affecting DBCT Management's ability to comply with its obligations, clause 13.3 applies;
- (c) If the Delay arises from Wilful Default by DBCT Management, clause 13.5 applies; and
- (d) In all other circumstances, and without prejudice to its right to dispute responsibility for the Delay, the User must continue to meet its payment obligations under clause 4 unless and until the adjudication of an arbitrator, order of the Court or agreement between the parties, determines responsibility for the Delay, in which case clause 13.4 applies.

Nothing in this clause 13.2 precludes the User from applying for an injunction, declaration or specific performance in respect of DBCT Management's obligations under this Agreement.

### **13.3 Force Majeure**

- (a) If DBCT Management is affected by an event of Force Majeure, such that it will be unable to fulfil all or part of its obligations under the Agreement (the "**Affected Obligations**"), and anticipates Delays exceeding 48 hours, it must notify the User within 7 days after the occurrence of the event, providing full details of:
  - (i) the Affected Obligations and Delays expected;
  - (ii) the action that DBCT Management has taken and proposes to take to remedy the situation; and
  - (iii) DBCT Management's estimate of the time during which it will be unable to carry out the Affected Obligations due to the event of Force Majeure.
- (b) DBCT Management's Affected Obligations under this Agreement shall be suspended (without it being in default) to the extent of and for the period that the performance of such obligations are affected by an event of Force Majeure, provided that it complies with clause 13.3(c). However, the User's obligations to pay the Charges in clause 4 will not abate during a period where DBCT Management is affected by an event of Force Majeure.
- (c) DBCT Management must:
  - (i) use all reasonable efforts (including the expenditure of reasonable sums of money) to mitigate the effect of the event of Force Majeure upon its performance of this Agreement; and
  - (ii) keep the User informed (not less than fortnightly) of the steps being taken to mitigate the effect upon the performance of this Agreement, including an estimate of the continued duration of the Delay.

### **13.4 User's rights for Delays attributable to other circumstances**

In the circumstances in clause 13.2(d), DBCT Management's liability to the User is limited to:

- (a) the Third Party Amount; plus
- (b) if the adjudication of an arbitrator, order of a court or agreement between the parties determines that the Delay was at least 66% DBCT Management's Personal Responsibility, and to the extent that there is any shortfall in the recovery by the User of its Direct Loss from the Third Party Amount - the User's Direct Loss in respect of the Delay, but not exceeding the percentage of the User's Direct Loss equivalent to the percentage of DBCT Management's Personal Responsibility.

### **13.5 Wilful Default by DBCT Management**

If a Delay is caused by Wilful Default by DBCT Management, the User:

- (a) is relieved to that extent of any corresponding payment obligations under clause 4;
- (b) may terminate this Agreement pursuant to clause 14.3; and

- (c) may sue DBCT Management for damages for breach of contract.

### 13.6 Long Term Delays

- (a) This clause 13.6 sets out certain rights and obligations of the parties in respect of Delays, including Long Term Delays. This clause 13.6 is:
- (i) in addition to, and does not limit any other provision of this Agreement; and
  - (ii) does not limit or affect any other right which a party may have against another party in respect of an act or omission of the other party.
- (b) If Loss, damage or destruction occurs in respect of the Terminal, DBCT Management must promptly claim and thereafter promptly apply all relevant available insurance proceeds towards reinstatement of the damaged property, unless (having regard to factors such as the reasonably foreseeable ongoing needs for Handling at the Terminal) DBCT Management considers that reinstatement is not in the interests of stakeholders and no less than 60% of Access Holders (by tonnage), and the QCA and DBCT Holdings all agree that reinstatement should not occur.
- (c) If Long-Term Delays occur, such that the capacity of the Terminal (as demonstrated by its performance) on a sustained on-going basis is less than 95% of the Aggregate Annual Contract Tonnage at that time (the difference being referred to as the "**Shortfall**"), then DBCT Management must undertake a Terminal Capacity Expansion sufficient to eliminate the Shortfall if (and on the same basis as) DBCT Management would have been obliged under the terms of the Access Undertaking (in particular considering sections 12.3, 12.4, 12.7 and 12.8 of the Access Undertaking) to undertake a Terminal Capacity Expansion had the amount of the Shortfall been the annual contract tonnage sought by new Access Seekers whose offers to enter into User Agreements prima facie triggered the requirement for a Terminal Capacity Expansion. For clarification, DBCT Management will not be obliged to undertake a Terminal Capacity Expansion under this Agreement:
- (i) if such Terminal Capacity Expansion is unreasonable and uneconomic pursuant to section 12.7 of the Access Undertaking; or
  - (ii) if section 12.8 of the Access Undertaking applies.
- (d) If at any time:
- (i) the capacity of the Terminal on a sustained ongoing basis is reduced to the order of 10%, or less, of the Aggregate Annual Contract Tonnage of all Access Holders at the time;
  - (ii) the reduction of capacity referred to in clause 13.6(d)(i) above, is not attributable to an act or omission of the User; and
  - (iii) DBCT Management does not, within a reasonable time after a written request by the User to do so ("reasonable" being assessed according to the extent of works needed to redress the situation), commence and expeditiously proceed with the works necessary to reinstate the Terminal to a capacity sufficient to meet the reasonably expected sustained ongoing demand for Handling of Coal (whether or not DBCT Management has an obligation to undertake such works),

the User may terminate this Agreement, on giving not less than 30 days' notice to DBCT Management to that effect in writing. Neither party will be liable to the other arising from such a termination (other than a liability which arises prior to the date of termination).

### 13.7 Limitation period for notice of Claims by User

- (a) The User shall not be entitled to make any Claim against DBCT Management in respect of any Delay unless written notice of the Claim specifically reserving the User's rights under clause 13.2 has been given to DBCT Management by the date 4 months after the end of the Financial Year in which the Delay first occurred (or, if a material fact of a decisive character relating to the right to Claim against DBCT Management was not within the means of knowledge of the User until after that time, within

2 months of the date on which the User first becomes aware of that material fact). Any subsequent loss arising directly or indirectly from the cause of the first occurrence may be included in the Claim without further notice being given, but a separate notice must be given for each different and unrelated cause from which it is alleged a Claim arises.

- (b) This clause 13.7 does not apply to a Claim to the extent that it is made under clause 13.6.

## **14. TERMINATION**

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### **14.1 Suspension**

If the User is in default in the due and punctual performance of an obligation under this Agreement and:

- (a) in respect of the User's default of an obligation to pay money or to provide any Security required pursuant to clause 29, such default has not been remedied within 30 days after DBCT Management has given written notice to the User of the default; or
- (b) in respect of the User's default of a material obligation (other than an obligation to pay money or provide Security), such default has not been remedied, or the User has not expeditiously commenced to remedy it, within 60 days after DBCT Management has given written notice to the User of the default,

then, without prejudice to DBCT Management's other rights under this Agreement, DBCT Management may (by written notice to the User pursuant to this clause) suspend the User's rights to have its Coal Handled under this Agreement until payment (including interest under clause 5.2) is made, Security is provided or the other relevant default is remedied or commenced to be expeditiously remedied. If such suspension occurs, the User's obligations based on its Annual Contract Tonnage (for example charges based on those amounts) will be unchanged, but DBCT Management's obligations to Handle those amounts for the relevant Financial Year will be reduced proportionately.

### **14.2 Termination by DBCT Management**

Subject to clause 14.5, if DBCT Management has duly given notice that it has suspended the User's rights to have its Coal Handled (but not the User's obligations) under this Agreement pursuant to clause 14.1 and if the default still has not been remedied after a further period of 14 days from the notice of suspension, DBCT Management may terminate this Agreement forthwith by further notice to the User pursuant to this clause.

### **14.3 Termination by User**

Subject to clause 14.5, the User may terminate this Agreement by written notice to DBCT Management as follows:

- (a) if DBCT Management is in default in the due and punctual performance of an obligation to pay money under this Agreement and such default has not been remedied for a period of 30 days after the User has given to DBCT Management written notice specifying the default and requiring the default to be remedied; or
- (b) if DBCT Management is in default in the due and punctual performance of a material obligation under this Agreement (not being an obligation to pay money or a Delay) and such default has not been remedied or DBCT Management has not expeditiously commenced to remedy such default within a period of 60 days after the User has given to DBCT Management written notice specifying the default and requiring the default to be remedied.

### **14.4 Abandonment of Coal on termination**

The User must remove any of its Coal remaining in the Terminal within three months from the termination of this Agreement, whether by expiry or otherwise, failing which the Coal will be deemed abandoned.

### 14.5 Disputes about defaults

If an event or circumstance is alleged to constitute a default referred to in clause 14.2 or clause 14.3 and is the subject of a dispute under clause 15, then DBCT Management or the User (as applicable) shall not exercise any right to suspend or terminate this Agreement unless and until the default has not been rectified within a reasonable time (being not less than 14 days) after the end of the resolution process in clause 15.

## 15. DISPUTE RESOLUTION

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### 15.1 Notice of dispute

If a dispute between DBCT Management and the User arises out of or in connection with this Agreement, then either party may give to the other party a notice of dispute in writing adequately identifying and providing details of the dispute.

### 15.2 Further steps required before court proceedings

- (a) Subject to clause 15.5, no party may commence any court proceedings or arbitration in respect of any dispute notified or notifiable under this clause 15 until that party has complied with the requirements of this clause 15.2 and clause 15.3.
- (b) Within 14 days after service of a notice of dispute, the senior executives of DBCT Management and the User (or people for the time being acting in that role) must confer at least once to attempt to resolve the dispute, and failing resolution of the dispute to consider and if possible agree on methods of resolving the dispute by other means.
- (c) If the dispute cannot be so resolved after a further period of 14 days or if at any time either DBCT Management or the User considers that the other party is not making reasonable efforts to resolve the dispute, either party may by notice in writing given to the other party refer such dispute to conciliation in accordance with clause 15.3.

### 15.3 Conciliation

Conciliation of the dispute must:

- (a) be conducted at Brisbane in accordance with the Guidelines for Commercial Conciliation of the Australian Commercial Disputes Centre Limited in force at the Execution Date;
- (b) be at the cost and expense of the parties equally (except that each party must pay its own advisers, consultants and legal fees and expenses) unless the parties otherwise agree;
- (c) if not earlier resolved, be continued for a period expiring on the date being 14 days after the nomination of the conciliator,

after which:

- (d) the parties may agree to refer such dispute to arbitration in accordance with clause 15.4; or
- (e) either party may pursue any other means of dispute resolution (for example, litigation).

### 15.4 Arbitration procedure

- (a) If any dispute is referred to arbitration under this Agreement, [except a dispute referred to arbitration under clause 7.2\(d\)\(ii\)](#), arbitration must be effected either:
  - (i) by a single arbitrator agreed upon between the parties; or
  - (ii) in default of such agreement within 10 days after the dispute is referred to arbitration, then by a single arbitrator selected by the Chair of the Queensland Chapter of the Institute of Arbitrators and Mediators, Australia.
- (b) The arbitration must be conducted in accordance with and subject to the Institute of Arbitrators and Mediators Australia Rules for the Conduct of Commercial Arbitrations.

- (c) Subject to any other provision of this Agreement, the arbitrator may award any interest that the arbitrator considers reasonable.
- (d) Any party to the arbitration may be represented before the arbitrator by a member of the legal profession without the need for leave of the arbitrator.
- (e) The venue for any arbitration will be Brisbane, Queensland.

### 15.5 Interlocutory relief

This clause 15 does not prevent any party from seeking urgent interlocutory or declaratory relief from a court of competent jurisdiction where, in that party's reasonable opinion, that action is necessary to protect its rights.

### 15.6 QCA

For the avoidance of doubt, the parties may agree to refer any dispute in connection with this Agreement to the QCA for resolution.

### 15.7 Obligations continue

During the existence of a dispute, the parties must continue to perform all of their obligations under the Agreement, without prejudice to their position in respect of the dispute.

## 16. WARRANTIES

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### 16.1 Warranties by DBCT Management

DBCT Management agrees and acknowledges that:

- (a) Subject to:
  - (i) an event of Force Majeure;
  - (ii) Maintenance Work; and
  - (iii) any decision to cease or reduce Maintenance Work for a component of the Terminal on the basis that it is more cost-efficient to replace it and it is to be replaced,

each Terminal Component will be maintained to be available to operate to at least its rated design capacity;
- (b) it will ensure that the Terminal is maintained in accordance with Good Operating and Maintenance Practice;
- (c) it will consult with the User in relation to the appointment of any replacement Operator of the Terminal and will promptly on request negotiate amendments to this Agreement to reflect the terms of any new Access Undertaking, from the time (should it occur) that Dalrymple Bay Coal Terminal Pty Ltd ceases to be the Operator;
- (d) DBCT Management will not differentiate Access Charges between Access Holders or between Access Holders and Access Seekers, other than:
  - (i) to reflect differences in cost (direct or indirect) or risks to DBCT Management of providing access to Services; or
  - (ii) as otherwise permitted or required by the Access Undertaking (including for the avoidance of doubt, Differentiation based pricing);
- (e) the User will (at no charge, but at its own cost) be granted reasonable access to the Terminal for reasonable purposes, including customer goodwill inspections, performance of shipping agent functions, Coal sampling and User inspections of Operations, provided that on each occasion the User complies with the Operator's site rules, DBCT Management's reasonable visitor notification



requirements and the User is accompanied by an authorised person at such times while on the Terminal site as DBCT Management or the Operator reasonably requires (provided that they make such a representative available, having been given reasonable notice by the User).

## 16.2 Warranties by the parties

Each party warrants to the others that it has the requisite power to enter into this Agreement from the Execution Date.

## 17. USER COMMITTEE AND IMPROVEMENT PROGRAM

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### 17.1 Participation in User Committee

DBCT Management and the User agree to participate in a committee consisting of one representative of each of DBCT Management, the Operator and each Access Holder (the "**User Committee**").

### 17.2 Terms of reference of User Committee

The User Committee is established for the following purposes:

- (a) to provide a forum for consultation between all participants on matters relating to the operation and performance of the Terminal, including (without limitation) any factors relating to any participant which may impact on the future performance or efficiency of the Terminal;
- (b) to enable consultation between all participants on current and planned Terminal facilities, including all proposals for any enhancement of the Terminal; and
- (c) to consult on matters relating to the Terminal Regulations, including (without limitation) any proposed changes to the Terminal Regulations.

### 17.3 Frequency of meetings

DBCT Management and the User acknowledge that it is intended that the User Committee meet on a quarterly basis and at such further times as participants in the User Committee agree.

### 17.4 Representation

DBCT Management and the User will each appoint, and acknowledge that each other prospective member of the User Committee is entitled to appoint, a person to represent its respective interests on the User Committee (each a "**Representative**"). If a Representative is not available to attend a meeting of the User Committee, the relevant member of the User Committee may nominate an alternate person to represent its interests at the User Committee.

### 17.5 Chairperson

The User agrees that the Representative appointed by DBCT Management will act as chairman of the User Committee.

### 17.6 Role of the Operator

DBCT Management must, as far as the Operation & Maintenance Contract allows, procure that the Operator provides appropriate support to the User Committee, including the provision of any relevant operational reports, as the User Committee may reasonably request the Operator to provide from time to time.

## 18. NOT USED

## 19. EXPANSION TONNES

***[A Conditional Access Agreement in which all or part of the Annual Contract Tonnage does not apply until a Terminal Capacity Expansion (the 'Current Expansion') has occurred, in circumstances where that***

***Terminal Capacity Expansion will form part of the Terminal under this Agreement once completed, will include a clause, an outline of terms of which are as follows:]***

- (a) Subject to clause 19(e), the Annual Contract Tonnage will be [increased by] **[insert]** Mtpa for the period commencing on the first day of the Month following completion and successful commissioning of the Current Expansion until the end of that Financial Year, and thereafter in each subsequent Financial Year. The target date for this to occur is **[insert]**.
- (b) DBCT Management must provide at least monthly progress reports to the User in relation to the Current Expansion and such further progress reports as may reasonably be required as the Current Expansion nears completion.
- (c) DBCT Management's obligation to commence Handling, and the User's obligation to commence paying charges, in respect of the additional Annual Contract Tonnage arising out of the Current Expansion or any part thereof (as applicable) only begins on the first day of the Month following the date that DBCT Management gives the User a notice that the User is:
  - (i) awarded the additional Annual Contract Tonnage or any part thereof (as applicable); and
  - (ii) entitled to have the additional Annual Contract Tonnage or any part thereof (as applicable) handled at the Terminal.
- (d) DBCT Management must use reasonable endeavours to have the Current Expansion completed as close as practicable to the target date referred to in clause 19(a), but it will not be required to expend additional amounts to overcome delays caused by third parties or otherwise beyond the reasonable control of DBCT Management.
- (e) DBCT Management will proportionately reduce the Annual Contract Tonnage under this Agreement and the annual contract tonnages under all other User Agreements entered into with the intention of utilising additional capacity arising out of the Current Expansion, if the actual Terminal Capacity following completion of the Current Expansion is less than the estimate of (expanded) Terminal Capacity made at the time this Agreement was entered into. That reduction will be by the proportion which the additional Terminal Capacity resulting from the Current Expansion as estimated at the time this Agreement was entered into bears to the actual additional Terminal Capacity arising from the Current Expansion. In relation to:
  - (i) Socialised Terminal Capacity, the allocation of proportionately reduced capacity will occur after first deducting any capacity required from the Current Expansion to "make up" any shortfall between already existing aggregate annual contract tonnages and actual Terminal Capacity which existed prior to the Current Expansion; and
  - (ii) Differentially Priced Capacity resulting from the Current Expansion will be allocated to meet the full entitlements under this Agreement and any other User Agreements associated with the Differentially Priced Capacity.

## **20. OPTIONS**

If the period during which Coal is to be Shipped during the Term is 10 years or more, the following clauses apply:

- (a) The User has an option to extend the Term for 5 years or more (or a lesser period, if it coincides with an expected end-of-mine-life), as nominated by the User at the time of exercise, exercisable at any time up to 12 months prior to the end of the Term (including the Term as already extended by the exercise of an option under this clause 20(a) for 5 years or more).
- (b) If DBCT Management receives an Access Application for additional capacity which cannot be met without a Terminal Capacity Expansion if the option in clause 20(a) and other relevant options are exercised, it may notify the User, requiring it to respond within 90 days, either exercising the option in clause 20(a) in respect of all or part of an extended Term and/or tonnage the subject of the option, or waiving it.

- (c) DBCT Management must give notices under clause 20(a) to relevant Access Holders with options, in order of the earliest expiring User Agreement, for the purposes of deciding which option date is to be accelerated first. Where an Access Holder/s with the earliest expiring date exercise/s its/their option by the accelerated date, DBCT Management may then go to the next Access Holder/s in order of expiring agreements until there has been a waiver of sufficient options to ensure that the bona fide request can be accepted without the necessity for a Terminal Capacity Expansion. Access Holders whose terms expire within 6 months of each other will, for the purposes of this clause 20, be deemed to have terms which expire on the same date, and must be given notices at the same time.
- (d) Where more than one Access Holder has tonnages which expire (or which are deemed to expire) on the same date, those Access Holders which do not exercise their accelerated option will lose the amount of tonnes the subject of the option proportionately with their respective annual contract tonnages immediately prior to the end of the current term. (For example, if a bona fide request for 5 Mtpa is received and Access Holders with 10, 5, 2 and 3 Mtpa of contracted tonnages do not exercise their options, then the options for those Access Holders will be reduced by 2.5, 1.25, 0.5 and 0.75 Mtpa respectively).
- (e) If the Access Application referred to in clause 20(a) is not converted into a User Agreement within 3 months after the above process is completed, the status quo existing before notice from DBCT Management will be re-instated (i.e. options will not be taken to have been forfeited merely because the accelerated date for exercise has not been complied with, and any accelerated exercise of an option will be taken not to have occurred).

## 21. GST

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- (a) Any reference in this clause to a term defined or used in the A New Tax System (Goods and Services Tax) Act 1999 is, unless the context indicates otherwise, a reference to that term as defined or used in that Act.
- (b) Unless expressly included, the consideration for any supply made under or in connection with this Agreement does not include an amount on account of GST in respect of the supply ("**GST Exclusive Consideration**") except as provided under this clause.
- (c) Any amount referred to in this Agreement (other than an amount referred to in clause 21(f)) which is relevant in determining a payment to be made by one of the parties to the other is, unless indicated otherwise, a reference to that amount expressed on a GST exclusive basis.
- (d) To the extent that GST is payable in respect of any supply made by a party ("**Supplier**") under or in connection with this Agreement, the consideration to be provided under this Agreement for that supply (unless it is expressly stated to include GST) is increased by an amount equal to the GST Exclusive Consideration (or its GST exclusive market value if applicable) multiplied by the rate at which GST is imposed in respect of the supply.
- (e) The recipient must pay the additional amount payable under clause 21(d) to the Supplier at the same time as the GST Exclusive Consideration is otherwise required to be provided.
- (f) Whenever an adjustment event occurs in relation to any taxable supply made under or in connection with this Agreement the Supplier must determine the net GST in relation to the supply (taking into account any adjustment) and if the net GST differs from the amount previously paid under clause 21(d), the amount of the difference must be paid by, refunded to or credited to the recipient, as applicable.
- (g) If one of the parties to this Agreement is entitled to be reimbursed or indemnified for a Loss, cost, expense or outgoing incurred in connection with this Agreement, then the amount of the reimbursement or indemnity payment must first be reduced by an amount equal to any input tax credit to which the party being reimbursed or indemnified (or its representative member) is entitled in relation to that Loss, cost, expense or outgoing and then, if the amount of the payment is

consideration or part consideration for a taxable supply, it must be increased on account of GST in accordance with clause 21(f).

## **22. NOTICES**

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### **22.1 Notices and other communications**

All notices and other communications provided for or permitted under this Agreement must be in writing and must be given by courier, mail, or email transmission as follows:

(a) if to DBCT Management, to:

Attention: Chief Executive Officer  
Address: Level 15, 1 Eagle Street, Brisbane, QLD 4000  
Post: PO Box 7823, Brisbane QLD 4001  
Email: anthony.timbrell@dbctm.com.au

(b) if to the User, to the address set out in Schedule 1,  
or to such other address or person as either party may specify by notice in writing to the other.

### **22.2 Deemed to have been given or made**

All such notices or communications are deemed to have been duly given or made:

- (a) on the date upon which the notice or communication would, in the ordinary course of the post or courier, have been delivered to the address to which it was posted or couriered;
  - (b) when delivered; or
  - (c) if sent by email transmission, at the conclusion of an apparently successful transmission,
- but if the delivery or email is effected on a day that is not a Business Day or after 5pm in the place of receipt on a Business Day, it will be taken to have been given or made on the next Business Day.

## **23. SURVIVAL OF REMEDIES**

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The remedies of the parties arising by law, by the terms of this Agreement or otherwise are cumulative and will survive the termination of this Agreement by effluxion of time or otherwise.

## **24. WAIVER**

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A waiver by either party of any default in the strict and literal performance of or compliance with any provision of this Agreement will not be deemed to be a waiver of strict and literal performance of and compliance with any other provision of this Agreement nor to be a waiver of, or in any manner release the other party from, strict compliance with any provision, in the future nor will any delay or omission of either party to exercise any right under this Agreement in any manner impair the exercise of any such right accruing to it thereafter.

## **25. COSTS**

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Whether or not any of the transactions contemplated by this Agreement are consummated, each party must pay its own fees and expenses of and incidental to the negotiation, preparation and execution of this Agreement. The User will pay on demand any stamp duty payable on this Agreement.

## 26. ENTIRE AGREEMENT

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### 26.1 Full and Complete Understanding

This Agreement constitutes the full and complete understanding between the parties with respect to the subject matter of this Agreement. There is no other oral understanding, agreement, warranty or representation whether express or implied in any way extending, defining or otherwise relating to the provisions of this Agreement or binding on the parties with respect to any of the matters to which this Agreement relates.

### 26.2 No inducement

Each of the parties covenants and irrevocably acknowledges that it has not been induced to enter into this Agreement by any statement, warranty, representation, understanding, act, omission, fact, matter, thing or conduct by or on behalf of any person including the other party, other than as expressly recorded in this Agreement.

### 26.3 Provision is to remain in full force and effect

The provisions of this clause 26 will operate and remain in full force and effect. No other fact, matter or circumstance, including breach of the provisions of the *Competition and Consumer Act 2010* (Cth) by a party to this Agreement, will interfere with or in any way derogate from the operation and effect of this clause.

## 27. SEVERANCE

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If any term of this Agreement is for any reason acknowledged by the parties, or adjudged by a court of competent jurisdiction or held by any competent government authority to be invalid, illegal or unenforceable, such term or provision will be severed from the remainder of the provisions of this Agreement and will be deemed never to have been part of this Agreement and the remainder of the provisions of this Agreement will subsist and remain in full force and effect, unless a basic purpose or purposes of this Agreement would thereby be defeated.

## 28. JOINT VENTURE LIABILITY

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**[insert as relevant]**

### 28.1 Definitions

In this clause:

- (a) **“Financial Obligation”** means an obligation of a party under or arising out of this Agreement to pay or cause to be paid an amount of money, including a liability for damages for a breach of a Performance Obligation;
- (b) **“Joint Venture”** means the joint venture between the Joint Venturers, details of which are set out in Item ~~33~~ of Schedule 1;
- (c) **“Joint Venture Percentage”** means the respective percentage interest of each Joint Venturer in the Joint Venture, as set out in Item ~~33~~ of Schedule 1;
- (d) **“Joint Venturers”** means each of the entities set out in Item ~~33~~ of Schedule 1 as holding a Joint Venture Percentage.
- (e) **“Performance Obligation”** means any obligation of a party arising under this Agreement, other than a Financial Obligation.

### 28.2 User agent for Joint Venturers

- (a) The User enters into this Agreement as agent for and on behalf of the Joint Venturers, and the User warrants that it is duly authorised to do so.

- (b) The User will not be personally liable under this Agreement in its capacity as agent for the Joint Venturers.

**OR**

**[Joint Venturers comprise a single party**

The Joint Venturers comprising the User will be a single party to this Agreement, but their respective rights against and liabilities to DBCT Management and DBCT Guarantor will be determined in accordance with this clause 28.]

**28.3 Financial Obligations of Joint Venturers are several**

Subject to clauses 28.4 and 28.5 (and any other provision of this Agreement which may expressly provide otherwise), the liability of each Joint Venturer in respect of each Financial Obligation of the User is several, and each Joint Venturer will only be liable for an amount owing by the User equivalent to its Joint Venture Percentage of that amount.

**28.4 Rights and Performance Obligations of Joint Venturers are joint**

- (a) Each right of the User under this Agreement can only be exercised by the User or by **[delete highlighted words where the Joint Venturers are all signatories in their own right]** the Joint Venturers jointly.
- (b) Each Joint Venturer will be jointly liable in respect of each Performance Obligation of the User (other than any Performance Obligation expressed to be imposed on an individual Joint Venturer).

**28.5 Individual Joint Venturer default**

- (a) If:
- (i) a Joint Venturer defaults in respect of the performance of a Financial Obligation of the User;
  - (ii) the other Joint Venturers are not in default in respect of that Financial Obligation; and
  - (iii) **[where there is a single User, as agent for the Joint Venturers]** the User gives a notice to DBCT Management, copied to the defaulting Joint Venturer, identifying the defaulting Joint Venturer and its default,

**OR**

- (iv) **[where the Joint Venturers are all signatories in their own right ]** the other Joint Venturers give a notice to DBCT Management, copied to the defaulting Joint Venturer, identifying the defaulting Joint Venturer and its default,

then that defaulting Joint Venturer (unless it disputes the default in writing to DBCT Management within 7 days of receiving a copy of the notice) will be solely liable, to the extent of the default, in the performance of that Financial Obligation.

- (b) Any notice given pursuant to clause 28.5(a)(iii) and not disputed by the defaulting Joint Venturer within the time prescribed is conclusive evidence that the defaulting Joint Venturer specified in the notice is in default to the extent stated and the notice binds all parties unless and until revoked or amended by the User.
- (c) If more than one (but not all) Joint Venturers default and are subject to a notice under clause 28.5(a)(iii), they will be severally liable in proportion to their respective relevant Joint Venture Percentages.
- (d) Nothing in this clause 28 affects DBCT Management's rights under clauses 14.1 and 14.2 of this Agreement.

## 28.6 Clarifications

For clarification:

- (a) any assignment by a Joint Venturer of any part of its Joint Venture Percentage in respect of this Agreement will be an assignment to which clause 12.2 applies, but in such a case references in that clause to the "User" and "assignee" respectively will be taken to refer only to the relevant Joint Venturer and the intended assignee from it;
- (b) any assignment by the User which is merely the substitution of a new agent for the Joint Venture (where there is no change in the Joint Venturers or the Joint Venture Percentages) will be consented to by DBCT Management unless it has reasonable grounds to object to the proposed new agent (for example, it is insolvent or has a history of default).

## 29. GUARANTEES OF USER

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### 29.1 User to provide Security [*insert if provision of security is a condition precedent*]

[Notwithstanding clause 2], it is a condition precedent to this Agreement that the User must provide to DBCT Management, the Security in Schedule 8, effective not later than the Effective Date, to secure the obligations of the User to DBCT Management under this Agreement.

### 29.2 Failure to provide Security [*insert if relevant*]

If the User does not provide the Security referred to in clause 29.1, then this Agreement will have no force or effect.

### 29.3 Guarantee if User does not remain in good financial standing

(a) If after the Execution Date:

- (i) the User applies to DBCT Management to increase the Annual Contract Tonnage;
- (ii) in the reasonable opinion of DBCT Management, there is a likelihood that the User (or, if applicable, a provider of Security) may have ceased or will cease to be reputable or of good financial standing; or
- (iii) a Security previously given in connection with this Agreement is due to expire within 90 days,

the User must provide such information to DBCT Management as may be reasonably requested by DBCT Management by notice to establish that the User (or, as applicable, a provider of Security) is reputable and of good financial standing. DBCT Management must keep any such information in the strictest confidence, except that DBCT Management may disclose such information on a confidential basis to its financiers and consultants who require such information to assess the solvency and creditworthiness of the User or provider of Security.

(b) If, after the Execution Date, in the reasonable opinion of DBCT Management:

- (i) the User (or, as applicable, a provider of Security) has ceased to be reputable or of good financial standing with the capability to fulfil all of its obligations under (or in respect of) this Agreement; or
- (ii) [*where this Agreement concerns Access to a Differentiated Expansion Component*] there is a materially increased risk that the circumstances in clause 29.3(b)(i) will occur prior to the earlier of the Terminating Date and the end of the Term,

then the User must provide, within 20 Business Days after written notice from DBCT Management, to DBCT Management, a Security which:

- (iii) secures (to an extent reasonable in the circumstances) the obligations under this Agreement of the User to DBCT Management;

- (iv) is from an entity which, in the reasonable opinion of DBCT Management, is reputable and of good financial standing and with the capability to fulfil or cause the fulfilment of all of the financial obligations of the User under this Agreement; and
  - (v) is in a form, and for an amount and period, satisfactory to DBCT Management (acting reasonably).
- (c) If the User does not provide such Security within 20 Business Days of receiving such written notice from DBCT Management, then the User will be in breach of a material obligation under this Agreement.
- (d) The User is entitled to dispute a conclusion by DBCT Management on which a notice under clauses 29.3(a) or 29.3(b) is based.

#### **29.4 Request to remove or reduce Security**

- (a) If the User has provided a Security pursuant to this clause 29 and considers that its financial circumstances have improved or any other relevant circumstances have changed since the provision of the Security, it may request DBCT Management to release or reduce the Security.
- (b) The User must provide to DBCT Management such evidence of its financial circumstances, or other relevant circumstances, as DBCT Management reasonably requests, before DBCT Management is obliged to consider the request.
- (c) DBCT Management must not unreasonably refuse any such request, but it may have regard to (amongst other things) the circumstances in which the Security was originally provided, changes in circumstances since that time, and any reasonable custom and practice of DBCT Management in respect of requiring security from new Access Holders.

### **30. GUARANTEE OF DBCT MANAGEMENT'S OBLIGATIONS**

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#### **30.1 Guarantee**

DBCT Guarantor irrevocably and unconditionally guarantees to the User on demand payment of all amounts payable by DBCT Management under or arising out of this Agreement (including all amounts for which DBCT Management may become liable in respect of any breach of this Agreement).

#### **30.2 Unconditional nature of guarantee**

DBCT Guarantor agrees that DBCT Guarantor's obligations under this Agreement are unconditional (irrespective of the validity, regularity or enforceability of any provision of this Agreement or the absence of any action to enforce the same or the waiver or the consent of the User in respect of any provision of this Agreement or the recovery of any judgment against DBCT Management or any action to enforce the same or any variation of the terms of this Agreement or any other dealings, transactions or arrangements between the User and DBCT Management or other circumstances which might otherwise constitute a legal or equitable discharge of or defence to a surety). This guarantee shall be a continuing guarantee which shall not be discharged except by a complete performance of all obligations of DBCT Management under this Agreement.

#### **30.3 Guarantee not affected by changed circumstances**

The liability of DBCT Guarantor under this Agreement will not be lessened, affected or impaired by any time or indulgence granted to DBCT Management by the User or any dealings or transactions between the User and DBCT Management (whether or not DBCT Guarantor is a party or cognisant of the same) or by the dissolution of DBCT Management or any change in the status, functions, control or ownership of DBCT Management or any consolidation, merger, conveyance or transfer by DBCT Management or any waiver, variation or novation of this Agreement or other dealings, transactions or arrangements between the User and DBCT Management which might otherwise constitute a discharge to a surety.



**30.4 Capacity of DBCT Guarantor**

- (a) DBCT Guarantor enters into this Agreement as trustee of the DBCT Trust and in no other capacity.
- (b) Any liability of DBCT Guarantor arising from this Agreement can be enforced against DBCT Guarantor only to the extent to which it can be satisfied out of the property of the DBCT Trust and out of which the DBCT Guarantor is actually indemnified for the liability. This provision applies despite any other provision of this Agreement.
- (c) A person entitled to the benefit of this Agreement may not sue DBCT Guarantor personally or seek the appointment of a liquidator, administrator, receiver or similar person to DBCT Guarantor personally or prove any liquidation, administration or arrangement of or affecting DBCT Guarantor personally.
- (d) The provisions of this clause 30.4 do not apply to any obligation or liability of DBCT Guarantor to the extent that it is not satisfied because under its constitution or deed of trust or by operation of law there is a reduction in the extent of DBCT Guarantor's indemnification over the assets of the DBCT Trust, as a result of DBCT Guarantor's fraud, negligence, breach of trust or breach of duty.
- (e) All of the provisions of this clause 30 are subject to this clause 30.4.

**SCHEDULE 1. REFERENCE SCHEDULE**

Item	Reference	Definition/Details	
1	DBCT Management	DBCT Management Pty Limited ABN 16 097 698 916	
2	DBCT Guarantor	DBCT Investor Services Pty Ltd as trustee for the DBCT Trust ABN 11 052 156 082	
3	User	[Refer Note 1]	
4	Execution Date	[Refer Note 2]	
5	Effective Date		
6	Term	[ ] years [Refer Note 3]	
7	Annual Contract Tonnage	<b>Period</b>	<b>Tonnage</b>
8	Terminal Component	[Refer Note 4]	

**Notes**

1. Insert Access Holder name, ABN, address for notices and contact details, and also add Access Holder name and ABN to the cover sheet of this document.
2. Execution date also to be entered on the cover sheet of this Agreement.
3. If this Agreement provides for a Term of 10 years or more, the Option and rolling 12 month extension process in clause 20 applies.
4. For an Agreement which is entered by an Expansion Party in respect of one or more Expansion Component(s) only, insert details of the Expansion Component(s). For an Agreement which is entered in respect of the Existing Terminal (excluding Expansion Components), identify the Existing Terminal excluding any Expansion Components.

## SCHEDULE 2. CALCULATION OF TIC AND MONTHLY PAYMENT

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### 1. Monthly Payment (MP)

For each Terminal Component the User must pay to DBCT Management a Monthly Payment in each Month "m" of each Financial Year ( $MP_{u,m}$ ), calculated as follows:

$$MP_{u,m} = TIC \times MRT_{u,m}$$

where:-

**TIC** is the Terminal Infrastructure Charge per tonne of Annual Contract Tonnage applicable for a relevant Financial Year to the Terminal Component as specified under Schedule 2, Section 2 and amended or adjusted in accordance with Schedule 2, Section 3; and

**MRT<sub>u,m</sub>** is the number of tonnes which is the proportion of the Annual Contract Tonnage attributable to each Month "m" of a Financial Year in respect of the Terminal Component. Where the rate of the Annual Contract Tonnage for the User does not vary during a Financial Year and applies to the full Financial Year, the MRT<sub>u,m</sub> for the User will be one-twelfth of the Annual Contract Tonnage for the relevant Financial Year. Where the rate of the Annual Contract Tonnage for the User varies during a Financial Year, the MRT<sub>u,m</sub> will vary from Month to Month to reflect one-twelfth of the annualised rate of the Annual Contract Tonnage at that time.

The Monthly Payment will be adjusted during a Financial Year where the TIC is amended or adjusted in accordance with Schedule 2, Section 3.

### 2. Terminal Infrastructure Charge (TIC)

The Initial TIC for the Terminal Component for the Financial Year commencing on the Effective Date, being a charge per tonne of Annual Contract Tonnage for the Terminal Component, is \$[insert amount agreed between DBCTM and User or determined by the arbitrator in the event the Initial TIC is referred to arbitration under the Access Undertaking].

### 3. Amendment of the TIC

- (a) The TIC will be amended and adjusted annually and on the occurrence of a Review Event in accordance with Section 11 and Schedule C of the Access Undertaking.
- (b) DBCT Management will notify the User of any amendment or adjustment to the TIC in accordance with Schedule C of the Access Undertaking.
- (c) Any amendment to the TIC will be effective from the date specified in the Access Undertaking.

**SCHEDULE 3. SERVICES**

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**1. Train scheduling**

DBCT Management must (subject to availability of trains and factors beyond its control) co-ordinate cargo assembly windows at the terminal to receive Coal parcels and provide train operators and Users with details of cargo receipt windows suitable for terminal acceptance of trains and ensure sufficient unloading capacity is made available at the Terminal, to allow each Access Holder to ship its Annual Contract Tonnage of Coal in each Financial Year.

**2. Train unloading**

If a train carrying an Access Holder's Coal arrives at the Terminal within its designated cargo build window, DBCT Management must ensure that the train is unloaded at a rate (consistent with the type and condition of the Coal) consistent with achieving Handling of the Annual Contract Tonnage of Coal for an Access Holder.

**3. Reclaiming and vessel loading**

DBCT Management must:

- (a) make the Terminal available for berthing by vessels (which are satisfactory in all respects to receive Coal) nominated by the User, such that not less than the Annual Contract Tonnage can be Handled by DBCT Management in each Financial Year (as long as the vessel and/or cargo mix required by the User or its customer does not unreasonably impact on the efficiency of the Terminal); and
- (b) load the User's Coal into a vessel which is nominated by the User and is available for loading so as to achieve the objective in section 3(a).

**4. Incidental services**

DBCT Management must provide the following services, incidental to Coal handling (unless provided directly by the Operator):

- sampling and survey services;
- vessel monitoring;
- co-ordination with ships' agents, masters, customers and other relevant entities;
- crew disembarkation services; and
- wharfage and line services.

**5. Miscellaneous services**

If required by the User or any Approval or statutory authority notified to DBCT Management, DBCT Management must provide the following Miscellaneous Services to the User:

- moisture adding;
- compacting;
- surfactant adding;
- dozing;
- blending (subject to section 6(d) below); and
- any other services reasonably requested from time to time in writing by the User to DBCT Management, provided that such services will not unreasonably impact on the efficiency or capacity of the Terminal.

**6. Stockpiling and blending**

- (a) DBCT Management must provide to the User sufficient stockpile areas to allow cargo assembly (i.e. assembly of cargo for a nominated vessel with an appropriate arrival time) for vessels onto which the User's Coal is to be loaded.
- (b) Remnant management areas will be determined by the Operator in areas of the Terminal which are not required for cargo assembly and which can be made available for dedicated stockpiling without materially affecting efficiency of the Terminal. DBCT Management must ensure that the User is offered the opportunity to use a proportion of that stockpiling area which accords with its proportion of the total annual contract tonnage under all User Agreements.
- (c) The stockpiling rights in sections 6(a) and 6(b) are subject to any other obligation of DBCT Management under any User Agreement with another Access Holder entered into prior to 1 July 2004 (to the extent that such obligation has not been waived).
- (d) DBCT Management must blend Coal if so requested, but subject to requirements in the Terminal Regulations from time to time, which may:
  - (i) require Coal to be blended before it is received at the Terminal, where reasonably practicable;
  - (ii) require Coal to be blended into a stockpile where reasonably practicable (rather than being blended from stockpile); and
  - (iii) limit the proportions in which Coal may be blended (to limit the increase in consumption of capacity of the Terminal consumed because of blending).
- (e) DBCT Management must transfer the User's Coal from the train unloading facility at the Terminal to the relevant stockpile area or a cargo assembly area and stockpile the User's Coal in that area (except to the extent that a quality plan under the Terminal Regulations has been agreed to which provides for direct loading from train to vessel).

#### **7. Prevention of contamination**

DBCT Management must take all practicable measures to maintain the integrity of the User's Coal at the Terminal, including (without limitation) by:

- (a) avoiding contamination of the User's Coal, including (without limitation) contamination with other Coal or waste material; and
- (b) minimising handling and associated degradation of the User's Coal.

#### **8. Data provision**

DBCT Management must provide such information and access to systems as are reasonable to inform Access Holders of relevant data relating to handling of their Coal.

#### **9. Co-ordination**

Subject to the User providing relevant information to DBCT Management within a reasonable time, DBCT Management must:

- (a) ensure, as far as practicable, that it discharges its obligations in this Schedule in accordance with the requirements of the User's reasonable quality plans, reasonable shipping programs and contracts as notified to DBCT Management and the Operator from time to time consistent with Terminal Regulations, and
- (b) (subject to the foregoing and having regard to equity amongst Access Holders) use its best endeavours to minimise the aggregate cost to the User arising out of Handling at the Terminal (including Demurrage Costs and rail freight).

**10. Terminal Regulations, Force Majeure, Laws and Operation & Maintenance Contract**

The provision of each of the above services by DBCT Management is subject to (and DBCT Management's obligations are modified to the extent of):

- (a) any relevant provisions of the Terminal Regulations;
- (b) any specific provision of this Agreement including any provisions relating to an event of Force Majeure;
- (c) the ability of DBCT Management to require the Operator under the Operation & Maintenance Contract to provide the Services; and
- (d) without limiting section 10(c) any specific provision in the Operation & Maintenance Contract including any provisions relating to an event of force majeure.

**11. Standard for Services**

- (a) The provision of the above Services by DBCT Management must be carried out in accordance with due skill, care and diligence in accordance with the Access Undertaking, the Terminal Regulations, Good Operating and Maintenance Practice and all applicable Laws.
- (b) When providing the above Services, DBCT Management must take into account the following factors, where relevant:
  - (i) lowest total whole of life cost;
  - (ii) reliability and economy of performance;
  - (iii) maximising the effective life of the Terminal; and
  - (iv) DBCT Management's non-discrimination obligations under the Access Undertaking.

**SCHEDULE 4. UTILISATION ADVICE**

This Utilisation Advice template is provided to support the User's obligations under clause 6.1. The template is also available as an Excel spreadsheet.

Calendar Year															
Mine															
Annual Forecast		Updated Forecast					Additional Information							Comments or Exceptions (Include comments on any special requirements, or exceptions from existing practice for the period)	
Due Date						Planned Mine Outages	Rail Entitlement (Note 3)	Ship Mix							
	15 Feb	01 Jul	01 Oct	01 Jan	01 Apr			Handimax	Panamax – single parcel	Panamax – multi-parcel	Japmax	Cape – single parcel & VLC	Cape – multi parcel & VLC		Unknown (Note 4)
Units	kt					days	kt								
Apr															
May															
Jun															
Jul															
Aug															
Sep															
Oct															
Nov															
Dec															
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May															
Jun															
Jul															
Aug															
Sep															
Oct															
Nov															
Dec															
Jan															
Feb															
Mar															
<b>Total</b>															
FY+1															
FY+2															
FY+3															

**Notes**

- This Utilisation Advice will satisfy the User's obligations under Clause 6.1 of the Access Agreement
- The User will be under no liability to DBCT Management if the actual number, types or tonnages of vessels or the amount of Coal is or are greater or fewer than the number, types, tonnages or amounts estimated in this clause 6.1 or estimated in any advice given pursuant to this clause 6.1. The User will be under no liability to DBCT Management if the actual number, types or tonnages of vessels or the amount of Coal is or are greater or fewer than the number, types, tonnages or amounts estimated in this clause 6.1 or estimated in any advice given pursuant to this clause 6.1.
- Annual railing capacity is to be provided subject to the consent of the contractor providing rail haulage services to the User (which the User will endeavour to obtain)
- Unknown = same as historic if all tonnage included in this column

Form  
Form  
Form

**SCHEDULE 5. PRODUCT SHIPMENT NOTICE**

This Product Shipment Notice template is provided to support the User's obligations under clause 9.1. The template is also available as a Word document.

<b>TO</b>	North Queensland Bulk Ports Corporation Limited DBCT Management Pty Limited
<b>FROM</b>	<i>[User shipping coal]</i>
<b>SUBJECT</b>	Product Shipment Notice – DBCT
<b>DATE</b>	

<b>Product Shipment Notice</b> pursuant to clause 9.1(c) of the Access Agreement	
<b>Ship Name</b>	
<b>Date Departed</b>	
<b>Shipping Number</b>	
<b>Mine Name</b>	
<b>Access Agreement Name</b>	
<b>Party liable for Access Agreement charges</b>	
<b>Total Tonnes</b>	[Refer Note 1]
<b>Does Manifest include more than one cargo?</b>	<input type="checkbox"/> Yes <input type="checkbox"/> No

<b>Access Holder representative acknowledgement</b>	
<b>Full name</b>	
<b>Signature</b>	
<b>Date signed</b>	

**Notes**

1. This total **MUST** agree with Manifest. If the Manifest covers multiple cargoes, separate Product Shipment Notices for each cargo must be completed



**SCHEDULE 6. TEMPLATE FOR ASSIGNMENT OF ANNUAL CONTRACT TONNAGE**

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This Assignment of Annual Contract Tonnage template is provided to support the User's obligations under clause 12.2. The template is also available as a Word document.

**Deed of Variation**

**DBCT Management Pty Limited**

**[User 1 full name]**

and

**[Assignee full name]**

## This Deed of Variation

is made on [Execution date] between the following parties:

- 1 **DBCT Management Pty Limited**  
ACN 097 698 916)  
of Level 15, 1 Eagle Street, Brisbane, Queensland  
**(DBCT Management)**
- 2 **The User named in Item 1 of the Schedule**  
([User 1])
- 3 **The person named in Item 3 of the Schedule**  
([Assignee])

**Recitals** [Option 1 – Select this option where the Assignee is not an existing User.]

- A. DBCT Management is the owner of a long term lease of the Terminal.
- B. [User 1] is a party to a User Agreement with DBCT Management, and under the User Agreement DBCT Management grants [User 1] a right to have an Annual Contract Tonnage of Coal Handled at the Terminal.
- C. [User 1]'s entitlement to Ship Coal through the Terminal in the Swap Period under [User 1]'s User Agreement exceeds its requirements by the Swap Contract Tonnage.
- D. [Assignee] wishes to Ship Coal through the Terminal in the Swap Period under a User Agreement.
- E. [User 1] wishes to vary the Annual Contract Tonnage in its User Agreement so that [Assignee] is entitled to Ship the Swap Contract Tonnage through the Terminal in the Swap Period, and [User 1]'s entitlement to Ship Coal under [User 1]'s User Agreement is reduced accordingly.
- F. [Assignee] wishes to enter into a User Agreement with DBCT Management to Ship the Swap Contract Tonnage through the Terminal in the Swap Period.
- G. DBCT Management has agreed to consent to the variation to [User 1]'s User Agreement to achieve that objective, on the terms of this deed.

**Recitals** [Option 2 – Select this option where the Assignee is an existing User.]

- A. DBCT Management is the owner of a long term lease of the Terminal.
- B. [User 1] and [Assignee] are each a party to a User Agreement with DBCT Management, and under each User Agreement DBCT Management grants them a right to have an Annual Contract Tonnage of Coal Handled at the Terminal.
- C. [User 1]'s entitlement to Ship Coal through the Terminal in the Swap Period under [User 1]'s User Agreement exceeds its requirements by the Swap Contract Tonnage.
- D. [Assignee] wishes to Ship more Coal through the Terminal in the Swap Period than its entitlement under [Assignee]'s User Agreement.
- E. [User 1] and [Assignee] wish to vary the Annual Contract Tonnages in their respective User Agreements so that [Assignee] is entitled to Ship the Swap Contract Tonnage through the

Terminal in the Swap Period (in addition to its existing Annual Contract Tonnage), and [User 1]'s entitlement to Ship Coal under [User 1]'s User Agreement is reduced accordingly.

- F. DBCT Management has agreed to consent to the variations to the User Agreements to achieve that objective, on the terms of this deed.

### The deed witnesses

that in consideration of, among other things, the mutual promises contained in this deed, the parties agree:

## 1 Definitions and interpretation

### 1.1 Definitions

**Effective Date** means the date set out in Item 77 of the Schedule.

**Swap Contract Tonnage** means the absolute tonnages (or respective tonnages for respective periods) set out in Item 66 of the Schedule. Where the Swap Period relates to part, but not all, of a Financial Year, the Swap Contract Tonnage in respect of that period is expressed:

- (a) as an annualised rate for that period - for the purposes of calculating the Monthly Charges for the Swap Period under the User Agreement and determining the rate at which Shipping is permitted in that period.

**Swap Period** means the period set out in Item 55 of the Schedule.

[User 1]'s User Agreement means an agreement between DBCT Management and [User 1] bearing the date set out in Item 2 of the Schedule.

[[Assignee]'s User Agreement means an agreement between DBCT Management and [Assignee] bearing the date set out in Item 44 of the Schedule and DBCT Management.] **[Drafting Note: Select this option if the Assignee is an existing User.]**

[[Assignee]'s User Agreement means a User Agreement to be entered into between DBCT Management and [Assignee]. **[Drafting Note: Select this option if the Assignee is not an existing User.]**

User Agreement means one or more of [User 1]'s User Agreement and [Assignee]'s User Agreement as the context requires.

### 1.2 Interpretation

- (a) Terms which are defined in the User Agreement/s or Terminal Regulations have the same meaning in this deed (except where the context otherwise requires).
- (b) The interpretation provisions of the User Agreement/s apply in respect of the interpretation of this deed, as if set out in this deed.

## 2 Variations to User Agreement/s

### 2.1 [User 1]'s User Agreement

As of the Effective Date, the Annual Contract Tonnage in [User 1]'s User Agreement is reduced by the Swap Contract Tonnage for the Swap Period.

## 2.2 [Assignee]'s User Agreement

As of the Effective Date, the Annual Contract Tonnage in [Assignee]'s User Agreement will be the Swap Contract Tonnage for the Swap Period. **[Drafting Note: Delete this paragraph if the Assignee is an existing User.]**

As of the Effective Date, the Annual Contract Tonnage in the [Assignee]'s User Agreement is increased by the Swap Contract Tonnage for the Swap Period. **[Drafting Note: Delete this paragraph if the Assignee is not an existing User.]**

## 2.3 Revised Consolidated Annual Contract Tonnages

DBCT Management will provide to [User 1] and [Assignee] respectively a revised, consolidated table of Annual Contract Tonnages for the Term of their User Agreement, to reflect the amendments [and new entitlements] pursuant to this deed. In the absence of manifest error, that table will be taken to replace the table of Annual Contract Tonnages previously applicable under the relevant User Agreement (if applicable). **[Drafting Note: Delete words in square brackets if the Assignee is an existing User.]**

## 2.4 Calculation of Entitlement under the Terminal Regulations

For the avoidance of any doubt, it is intended that [Assignee] will become entitled to the "Entitlement" under the Queue Management Procedures currently in place under the Terminal Regulations which [User 1] would (but for this deed) have previously been entitled to in relation to the Swap Contract Tonnage for the Swap Period, but that neither parties' Entitlements outside the Swap Period (if any) will be affected. **[Note: only required if Terminal Regulations include a Queue Management System at the time this deed is entered into]**

## 2.5 Transitional

- (a) The parties recognise that certain determinations (for example, the annualised amount of HCF and HCV) may have been made to date in respect of a current Financial Year before the variations in this deed were agreed.
- (b) DBCT Management shall, as soon as practicable, cause appropriate adjustments to be made in respect to the amounts charged under [[User 1]'s User Agreement/the respective User Agreements], to reflect the variations arising out of this deed. **[Drafting Note: Select the relevant option depending in whether the Assignee is an existing User.]**
- (c) Nothing in this deed requires DBCT Management or the Operator to pay or repay amounts other than adjustments of the kind already contemplated by [[User 1]'s User Agreement/the User Agreements]. In particular, DBCT Management is not as a result of the variations effected by this deed required to accelerate a payment, or to make a payment to either of the other parties which, in aggregate, is more than it would have otherwise have been required to make but for this deed. **[Drafting Note: Select the relevant option depending in whether the Assignee is an existing User.]**

## 2.6 User Agreements still in force

Except as set out in clauses 2.1 and 2.2 of this deed, the parties agree and acknowledge that all other provisions of [User 1]'s User Agreement/the User

Agreements] remain in full force and effect. ***[Drafting Note: Select the relevant option depending in whether the Assignee is an existing User.]***

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### **3 Costs and stamp duty etc**

- (a) [User 1] and [Assignee] will each bear their own costs and expenses in respect of the negotiation, preparation and execution of this deed.
  - (b) [Assignee] will be liable for the costs and expenses (including legal costs) of DBCT Management in respect of the negotiation, preparation and execution of this deed, and any stamp duty and other duties, taxes or other amounts payable as a result of this deed.
- 

### **4 Governing law**

This deed is governed by the laws of Queensland. Each party hereby submits to the exclusive jurisdiction of the Courts of Queensland.

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### **5 Counterparts**

This deed may be executed in any number of counterparts. All counterparts taken together will be taken to constitute one instrument.

## Schedule to Deed of Variation

(clause 12.2 Standard Access Agreement)

Item

1.	User reducing Annual Contract Tonnage	<i>[insert User 1 full name ]</i>
2.	<b>[User 1]</b> 's User Agreement (date)	<i>[insert date]</i>
3.	User [increasing / acquiring] Annual Contract Tonnage <b>[Drafting Note: Select the relevant option depending on whether the Assignee is an existing User.]</b>	<i>[insert Assignee's full name ] [insert date]</i>
4.	<b>[Assignee]</b> 's User Agreement (date)	<i>[insert date] [Drafting Note: Insert 'Not applicable' if the Assignee is not an existing User.]</i>
5.	Swap Period	<i>[insert start and end dates of Swap Period]</i>
6.	Swap Contract Tonnage	<i>[insert absolute no. of tonnes swapped for each relevant period and annualised rate for each period]Mt</i> (Annualised rate*:[____] Mtpa)
7.	Effective Date	<i>[insert date of agreement to swap]</i>

\* Annualised rate = (Swap Contract Tonnage / No. of days in Swap Period) x 365

**Executed as a deed:**

**Signed sealed and delivered by  
DBCT Management Pty Limited:**

\_\_\_\_\_  
Secretary/Director

\_\_\_\_\_  
Director

\_\_\_\_\_  
Name (please print)

\_\_\_\_\_  
Name (please print)

**Signed sealed and delivered by  
[User 1 full name]:**

\_\_\_\_\_  
Secretary/Director

\_\_\_\_\_  
Director

\_\_\_\_\_  
Name (please print)

\_\_\_\_\_  
Name (please print)

**Signed sealed and delivered by  
[Assignee full name]:**

\_\_\_\_\_  
Secretary/Director

\_\_\_\_\_  
Director

\_\_\_\_\_  
Name (please print)

\_\_\_\_\_  
Name (please print)

**SCHEDULE 7. TEMPLATE NOTICE FOR PERMISSION FOR THIRD PARTY TO SHIP**

**(clause 12.5)**

**TO** : Dalrymple Bay Coal Terminal Pty Ltd (Fax: 07 4956 3353)  
 DBCT Management Pty Limited (Fax: 07 3002 3101)

**FROM** : *[Principal's name*  
*Beneficiary's name]*

**SUBJECT** : Notice of Permission for Third Party to Ship Coal

**DATE** :

<b>User offering the Capacity (Principal):</b>	
<b>Company accepting the Capacity (Beneficiary):</b>	
<b>Period pertaining to the swap:</b>	
<b>Total Number of Tonnes:</b>	
<b>Nominated Vessel (where known):</b>	
<b>Is this a:</b> (a) Transfer (i.e. a one-way transaction) that will not be repaid; or (b) Swap (i.e. a two-way transaction) that will be repaid? <b>When is repayment expected?</b>	↑ ↑ <b>Repayment date:</b> / /

Acknowledgement of this notice is subject to receipt of separate Product Shipment Notice (PSN) for all cargos. Invoicing will be in strict accordance with User Agreement terms (i.e. all charges will be to the Principal).

\_\_\_\_\_  
 Principal

Date of Request:

\_\_\_\_\_  
 Beneficiary

Date of Request:

**Notice Acknowledged:**

\_\_\_\_\_  
 DBCT Management Pty Limited  
 Date of Acknowledgment:



**SCHEDULE 8. SECURITY**

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**(clause 29)*****[Insert details, if applicable]***

*[e.g. The User must provide the following Security from an entity which, in the reasonable opinion of DBCT Management, is reputable and of good financial standing, with the capability to fulfil all of the obligations of the User under this Agreement.]*

## SCHEDULE 9. DEFINITIONS AND INTERPRETATION

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### Definitions

**Access** has the meaning given in the Access Undertaking.

**Access Agreement** has the meaning given in the Access Undertaking.

**Access Application** has the meaning given in the Access Undertaking.

**Access Charges** means amounts payable by an Access Holder under a User Agreement for Access.

**Access Holder** has the meaning given in the Access Undertaking.

**Access Seekers** has the meaning given in the Access Undertaking.

**Access Undertaking** means the access undertaking submitted by DBCT Management from time to time relating to provision of the Services by it, and at the commencement of this Agreement means the access undertaking approved by the QCA on **[insert date]**.

**Aggregate Annual Contract Tonnage** has the meaning given in the Access Undertaking.

**Agreement** means this agreement, including all schedules attached to it.

**Annual Contract Tonnage** means the maximum quantity of Coal that the User is entitled to deliver to and have Handled through the Terminal in a relevant Financial Year under this Agreement in accordance with Item ~~77~~ of Schedule 1 (as amended from time to time pursuant to this Agreement), including tonnage which the User is entitled to have Handled but which may not, at a practical level, be able to be Handled due to circumstances such as a force majeure event or relevant provisions of Terminal Regulations and any tonnage which the User would be entitled to have Handled but for the suspension of the User's right to have the tonnage Handled under this Agreement.

For clarification, where a Financial Year or any relevant period is less than twelve months, or the annualised rate of Annual Contract Tonnage varies during a Financial Year, the Annual Contract Tonnage will be expressed as the relevant annualised rate at a point in time for the purposes of calculating the charges payable each Month, but will nevertheless be the absolute amount of tonnes which the User is entitled to have Handled over the entire Financial Year for purposes such as any annual reconciliation of HCF and the tonnages included in the Aggregate Annual Contract Tonnage.

**Approval** has the meaning given in the Access Undertaking.

**Business Day** means any day other than a Saturday, a Sunday, or a public holiday in Brisbane.

**Capital Expenditure** means expenditure which:

- (a) relates to replacement or expansion of any part of the Terminal;
- (b) relates to the refurbishment or upgrade of any part of the Terminal which can reasonably be expected to extend the life of the relevant part beyond its original useful life; or
- (c) otherwise relates to the refurbishment or upgrade of Terminal plant and/or infrastructure which is reasonably expected to improve whole of life cost or is incurred with the agreement of the Operator,

but not expenditure recovered through HCF or HCV.

**Cargo Manifest** means the manifest referred to in clause 9.1.

**Cash Rate Target** means, at a relevant time, the cash rate target then prevailing and published by the Reserve Bank of Australia on its website ([www.rba.gov.au](http://www.rba.gov.au)) at that time.

**Change of Control** will occur in the User if at any time during the term of this Agreement, any person obtains, or ceases to hold, directly or indirectly:

- (a) beneficial ownership of 50% or more (in aggregate) of the voting shares in the corporation; or

- (b) effective control of the board of directors of the corporation, other than as a result of the transfer of securities in a corporation listed on any recognised stock exchange.

**Claim** means any action, proceeding, allegation, demand or claim in any form for relief or compensation of any nature.

**Coal** means coal and other like materials as are approved by DBCT Management.

**Commencement Date** has the meaning given in the Access Undertaking.

**Conditional Access Agreement** has the meaning given in the Access Undertaking.

**[Current Expansion** means *(to be inserted as applicable)*].

**Default Interest Rate** means, at a relevant time, the rate per annum equal to the Cash Rate Target at that time plus 3.5%.

**DBCT Management's Personal Responsibility** means DBCT Management's personal liability as a result of its own acts or omissions, independently of and excluding any liability which it might have directly or indirectly arising from the acts or omissions of the Operator or third parties (including contractors and subcontractors of DBCT Management).

**Delay** means any delay, inability or failure (for any reason, including breach of this Agreement or negligence) to Ship or Handle Coal in the tonnages and at the rates contemplated in this Agreement. For the User, this includes a failure to deliver Coal to the Terminal or an inability to schedule vessels to load Coal. For DBCT Management, this includes the inability to provide Services at the Terminal (in whole or part) for any reason when Coal would otherwise have been made available by the User.

**Demurrage Costs** means the average cost across all Access Holders of demurrage in respect of the loading of Coal on vessels at the Terminal over any period of 3 consecutive months (as estimated by the Operator in accordance with its historical practice of estimating notional demurrage costs).

**Differentially Priced Capacity** has the meaning given in the Access Undertaking.

**Differentiated Expansion Component** has the meaning given in the Access Undertaking.

**Differentiation and Differentiated** has the meaning given in the Access Undertaking.

**Direct Loss** means charges actually paid pursuant to this Agreement in respect of the period of the Delay. For the purposes of clause 13.4, the User's Losses arising out of a Delay will be taken to include the amount of the relevant Direct Losses.

**Due Date** has the meaning given in clause 5.1.

**Early Termination** means the termination of a User Agreement (the **Terminated Agreement**) before its originally scheduled expiry date (but not where that occurred as a result of the exercise of a contractual right to terminate which was included in the Terminated Agreement when it was entered into, other than a right to do so for default in payment or insolvency of the Access Holder, or default by DBCT Management. For the purpose of this definition, termination for default in payment or insolvency will be taken to have occurred if DBCT Management terminates the Terminated Agreement on other grounds but in circumstances where a default in payment or the insolvency of the Access Holder could have been reasonably expected within a reasonably short time thereafter had that termination not occurred).

**Effective Date** means [subject to prior satisfaction of the condition precedent in clause 29.1] the date set out as such in Schedule 1.

**Execution Date** is the date described as such in Schedule 1 and will be completed as the day this Agreement is executed by the last of the parties to execute it.

**Existing Terminal** has the meaning given in the Access Undertaking.

**Existing User Agreement** has the meaning given in the Access Undertaking.

**Expansion Component** has the meaning given in the Access Undertaking.

**Expansion Component Capacity** has the meaning given in the Access Undertaking.

**Expansion Party** has the meaning given in the Access Undertaking.

**Financial Year** means:

- (a) the First Financial Year; and
- (b) each 12-month period from July 1 of one calendar year to June 30 of the next ensuing calendar year; and
- (c) any period from the last July 1 in the Term until the end of the Term.

**First Financial Year** means the period from the Effective Date to the next following 30 June.

**Fixed Operating Costs** means the aggregate of all amounts:

- (a) reasonably incurred or charged by the Operator (including any margin payable to the Operator under the Operation & Maintenance Contract);
- (b) reasonably incurred or charged by DBCT Management with the express written consent of not less than two thirds of Access Holders by contract tonnage; and
- (c) reasonably incurred by DBCT Management in exercising its rights under the Operation & Maintenance Contract to step in or take work out of the hands of the Operator (as a result of a default by the Operator),

to the extent that they represent a fixed cost of operating the Terminal.

**Force Majeure** means any event or circumstance not within the control of DBCT Management, and which, by the exercise of a reasonable standard of care and diligence, DBCT Management could not have overcome. Any act or omission of the Operator will be assumed to be beyond the control of DBCT Management, unless it has been specifically directed by DBCT Management and carried out by the Operator in the manner in which it can reasonably be inferred that DBCT Management intended.

**Framework Agreement** means the framework agreement between DBCT Holdings Pty Ltd, the State of Queensland, DBCT Management and others dated 31 August 2001.

**Funding Access Seeker** has the meaning given in the Access Undertaking.

**Good Operating and Maintenance Practice** means, in the performance of any obligation under this Agreement, adherence to a standard of practice which includes the exercise of that degree of skill, diligence, prudence and foresight which would reasonably be expected from a competent, experienced and qualified operator of a facility comparable with the Terminal.

**GST Exclusive Consideration** has meaning given to it in clause 21(b).

**Handle** means the receiving by rail, unloading, stacking, storing, reclaiming and loading of vessels with Coal, including any other relevant Services required by the User using infrastructure at the Terminal.

**HCF or Handling Charge - Fixed** means the charge determined under clause 6.2.

**HCV or Handling Charge - Variable** means the charge determined under clause 6.3.

**Initial TIC** means the TIC for the Terminal Component to apply under this Agreement from the Effective Date or the commencement of a Pricing Period. The Initial TIC for the Terminal Component for the Financial Year commencing on the Effective Date is the amount specified in Schedule 2, clause 2.

**Law** means any law, statute, by-law, regulation, rule, order, ordinance, proclamation, or delegated or subordinated legislation of the Commonwealth or of any State or Territory of Australia or of any local government.

**Long Term Delays** means ongoing, sustained Delays that arise out of physical loss, destruction or damage at the Terminal.

**Loss** means any damage, loss (including loss of reputation), cost, expense, fine, penalty or liability incurred by the person concerned, however it arises and whether it is present or future, fixed or unascertained, actual or contingent.

**Maintenance Work** means any work involving maintenance of or repairs to (including repair by replacement) any part of the Terminal, including any inspections or investigations required by Good Operating and Maintenance Practice.

**Miscellaneous Services** means:

- (a) services requested by the User from time to time which services are nominated in Schedule 3 as Miscellaneous Services; or
- (b) services to the extent that they are materially different (in nature, extent or cost) to the Services provided to other Access Holders at the Terminal including as a result of the nature of the User's Coal (or any contaminants in it) or requirements in respect of its handling, storage, blending, unloading or loading which result in materially additional costs or delays.

**Month** means a calendar month.

**Monthly Payment** means the monthly instalment of the TIC payable pursuant to clause 4.4, calculated (and adjusted as required) in accordance with Schedule 2.

**Mtpa** means million tonnes per annum.

**No Fault Interest Rate** means, at a relevant time, the rate per annum equal to the Cash Rate Target at that time plus 0.2%.

**Notified Period** has the meaning given in clause 11.4.

**Notified Tonnage** has the meaning given in clause 11.4.

**Notional Contracted Tonnage** means, in respect of a Financial Year the Aggregate Annual Contract Tonnage.

**Operation & Maintenance Contract** means the agreement under which the Operator agrees to operate and maintain the Terminal on a day to day basis, and includes any other agreement in substitution for it under which DBCT Management agrees with a person to operate the Terminal.

**Operator** means Dalrymple Bay Coal Terminal Pty Ltd ACN 010 268 167 or such other contractor engaged by DBCT Management under the Operation & Maintenance Contract.

**Permissible Delay** means:

- (a) any Delay from which DBCT Management is released from liability pursuant to clauses 3.6(l) or 10.3; or
- (b) any Delay which is imposed by DBCT Management, acting reasonably:
  - (i) because it considers it necessary for the safety of any person or to prevent material damage to property (except where the threat to the person or property arises out of Wilful Default or reckless neglect on the part of DBCT Management); or
  - (ii) to facilitate the performance of Maintenance Work (other than Maintenance Work to the extent it is necessitated by Wilful Default or reckless neglect on the part of DBCT Management) or of a Terminal Capacity Expansion in accordance with clause 10.2.

**Port** means both the harbour of Hay Point proclaimed by the Governor-in-Council by Order-in-Council dated 30 October 1983, and all real property held by DBCT Management as part of or relating to that Port.

**Port Services Agreement** has the meaning given in the Framework Agreement.

**Pricing Period** means the period ending on 30 June 2026 and each subsequent 5 year period during the Term.

**Product Shipment Notice** means a notice in the form of .

**QCA** means the Queensland Competition Authority established under the QCA Act or any other relevant body from time to time having substantially similar powers in respect of the Terminal, including the power to arbitrate disputes over charges payable for access to services or to otherwise determine such charges.

**QCA Act** means the Queensland Competition Authority Act 1997 (Qld).

**Quarter** means:

- (a) each 3 month period commencing on 1 July, 1 October, 1 January and 1 April; and
- (b) in respect of the first quarter, commencing on the Effective Date and ending on the day before the commencement of the next quarter.

**Rail Operator** has the meaning given in the Access Undertaking.

**Representative** has the meaning given to it in clause 17.4

**Review Event** has the meaning given to it in the Access Undertaking.

**Security** means any form of security or guarantee required to be provided or in fact provided pursuant to clause 29.

**Services** means the services described in Schedule 3.

**Ship** means the delivery of Coal to the Terminal by rail and the arrangement of vessels by the User such that DBCT Management is able to Handle the User's Annual Contract Tonnage.

**Socialised Terminal Capacity** has the meaning given in the Access Undertaking.

**Standard Access Agreement** has the meaning given in the Access Undertaking.

**Supplier** has the meaning given to it in clause 21(d).

**System** has the meaning given in the Access Undertaking.

**System Capacity** has the meaning given in the Access Undertaking.

**Term** means the term of this Agreement as specified in Item ~~66~~ of Schedule 1, as extended in accordance with this Agreement.

**Terminal** means the Terminal Component of the land and port infrastructure located at the Port of Hay Point which is owned by DBCT Holdings Pty Ltd or the State of Queensland and leased to DBCT Guarantor and/or DBCT Management, and known as the Dalrymple Bay Coal Terminal, and includes the following which form part of the Terminal Component:

- (a) loading and unloading equipment;
- (b) stacking, reclaiming, conveying and other handling equipment;
- (c) wharves and piers;
- (d) deepwater berths; and
- (e) shiploaders.

**Terminal Capacity** has the meaning given in the Access Undertaking.

**Terminal Capacity Expansion** has the meaning given in the Access Undertaking.

**Terminal Component** means the part of the Terminal as specified in Item ~~88~~ of Schedule 1.

**Terminal Infrastructure Charge** or **TIC** means the amount (per tonne) payable on the Annual Contract Tonnage specified in Schedule 2, as adjusted in accordance with Schedule 2 and the Access Undertaking.

**Terminal Regulations** means regulations in force and available on DBCT Management's website governing procedures for the operation of the Terminal existing as at the commencement of this Agreement as amended from time to time in accordance with the Access Undertaking.

**Terminating Date** has the meaning given in the Access Undertaking.

**Third Party Amount** means the amount for which DBCT Management is actually indemnified by the Operator and/or another third party (including a liability insurer) in respect of liability for any Claim made by the User, less DBCT Management's costs of recovery of that amount. For clarification, if a Delay affects more than one Access Holder, then the aggregate amount of any payment received by DBCT Management which related to a common Third Party Amount claimed by such affected Access Holders will be distributed to them in the proportions of their respective annual contracted tonnages.

**User** means the person specified in item 33 of Schedule 1.

**User Agreement** means an agreement for the provision of Access to the Services.

**User Committee** has the meaning given to it in clause 17.1.

**Utilisation Advice** means a notice in the form in Schedule 4 given by the User to DBCT Management under clause 6.1.

**Variable Operating Costs** means the aggregate of all amounts:

- (a) reasonably incurred or charged by the Operator (including any margin payable to the Operator under the Operation & Maintenance Contract);
- (b) reasonably incurred or charged by DBCT Management with the express written consent of not less than two thirds of Access Holders by contract tonnage; and
- (c) reasonably incurred by DBCT Management in exercising its rights under the Operation & Maintenance Contract to step in or take work out of the hands of the Operator (as a result of a default by the Operator),

to the extent that they represent a variable cost of operating the Terminal.

**Vessel Nomination** means a vessel nomination notice given by the User under the Terminal Regulations for the purpose of finalising the relevant nominated parcel and vessel details for a proposed shipment.

**Wilful Default** means a deliberate act or omission which will result in (and can reasonably be expected to have been intended to result in) a breach of this Agreement and which, as soon as practicable, but in any event within 30 days after written notice (particularising the alleged breach) is given to the party alleged to be in default, is not either:

- (a) acknowledged by the defaulting party and rectified; or
- (b) disputed by the party allegedly in default and referred to dispute resolution in accordance with clause 15, but if the notice of default is ultimately determined by arbitration or order of a court or agreement to have been justified, then rectified as soon as practicable but in any event within 30 days of the adjudication or agreement.

For the purposes of this definition, rectification will be taken to have occurred within the time period stated above, even if not actually completed within that time period, if rectification is reasonably practicable and commences within the stated period and proceeds at all times expeditiously.

## Interpretation

1. In this Agreement headings are for convenience only and do not affect its interpretation.
2. Except to the extent that the context otherwise requires:
  - (a) reference to any statute or statutory provision includes any modification or re-enactment of, or any legislative provisions substituted for, and all legislation and statutory instruments issued under such legislation or such provision;
  - (b) words denoting the singular include the plural and vice versa;
  - (c) words denoting persons or individuals include corporations, associations, trustees, instrumentalities and partnerships and vice versa;
  - (d) words denoting any gender include all genders;
  - (e) references to parties, clauses and Schedules are references to parties, clauses and Schedules to this Agreement as modified or varied from time to time;
  - (f) references to any document, deed or agreement include references to such document or agreement as amended, novated, supplemented, varied or replaced from time to time;
  - (g) references to any party to this Agreement or any other document, deed or agreement include its successors or permitted assigns;
  - (h) all references to dates and times are to Brisbane time;
  - (i) all references to "\$" and "dollars" are to the lawful currency of Australia;
  - (j) a reference to "including" shall be construed as "including, but not limited to," and "include" and "includes" shall be construed similarly;
  - (k) where a provision provides that a party "may" do something, "may" shall be construed as discretionary and without obligation;
  - (l) where any word or phrase is given a defined meaning, any other grammatical form of that word or phrase has a corresponding meaning;
  - (m) where a provision provides that a party will act reasonably or prudently, that shall (where the context permits) be construed in the context of DBCT Management's obligation to act in accordance with Good Operating and Maintenance Practice;
  - (n) where there is a requirement under this Agreement to consider whether the User or Access Holders are being treated or will be affected equitably, the party so considering must have regard to (amongst other things) the Access Holder's respective annual contract tonnage; and
  - (o) where measurement of Coal "Handled" (or in the context of the User, "Shipped") is being made in respect of a period, the tonnage loaded into vessels as determined in accordance with clause 9 will be taken to be the tonnage Handled (or, as the context requires, Shipped) in that period.
3. Payments on Business Days

Where the day on which any payment of money under this Agreement is to be made is not a Business Day, the payment may be made on the next Business Day.



**EXECUTION**

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**Executed as an agreement**

**Signed for**  
**DBCT Management Pty Limited**  
by its representative in the presence of:

\_\_\_\_\_  
Witness

\_\_\_\_\_  
Director

\_\_\_\_\_  
Name (please print)

\_\_\_\_\_  
Name (please print)

**Signed for**  
**DBCT Investor Services Pty Ltd as trustee for the DBCT Trust**  
by its representative in the presence of:

\_\_\_\_\_  
Witness

\_\_\_\_\_  
Director

\_\_\_\_\_  
Name (please print)

\_\_\_\_\_  
Name (please print)

**Signed for**  
**[Insert User name]**  
by its representative in the presence of:

\_\_\_\_\_  
Witness

\_\_\_\_\_  
Director

\_\_\_\_\_  
Name (please print)

\_\_\_\_\_  
Name (please print)