

DBCT MANAGEMENT



DBCT 2021 Access Undertaking

DBCT Management Collaborative Submission

5 June 2020

Contents

Contents	2
1 Introduction.....	3
2 Collaborative submission	4
2.1 QCA questions for collaborative submissions.....	4
2.2 DBCTM engagement with stakeholders	4
2.3 Proposed amendments to 2019 DAU to address non-price issues raised.....	5
2.4 Potential further amendments if necessary	5
3 Issues with the User Group’s submission.....	6
3.1 Statutory Framework for approving a DAU	7
3.2 The User Group’s key arguments against the 2019 DAU are flawed	9
3.3 Assessment of s 138(2) factors	15
3.4 Socialisation and existing user agreements.....	23
3.5 Reference tariff and PwC WACC	26
3.6 User Group’s misleading comments regarding Conditional Access Agreements.....	26
Appendix 1 Response to User Group comments re non-pricing 2019 DAU amendments.....	30
Appendix 2 Contract Profile & Access Seekers	45
Appendix 3 Expansion Notice and Conditional Access Agreement	47
Appendix 4 Underwriting Notice and SUA.....	48

1 Introduction

- 1 On 29 April 2020, following submissions on its Interim Draft Decision (**Interim Decision**), the QCA invited stakeholders to provide collaborative submissions on DBCT Management’s 2019 draft access undertaking (**2019 DAU**).
- 2 Section 2 of this submission addresses the QCA’s questions regarding the non-pricing elements of the 2019 DAU. Where possible, DBCTM has sought to collaborate with the DBCT User Group (**User Group**) to reach consensus on aspects of the 2019 DAU.
- 3 Section 3 of this submission addresses a number of issues with the User Group’s 24 April 2020 submission in response to the QCA’s Interim Decision (**User Group April 2020 Submission**), and explains why the User Group has provided no valid reasoning for the QCA to refuse to approve the 2019 DAU with DBCTM’s proposed amendments.

2 Collaborative submission

- 4 This section addresses the questions raised by the QCA in its request for collaborative submissions. It sets out DBCTM's proposed amendments to the 2019 DAU to address non-price issues raised with the 2019 DAU in the User Group's September 2019 submission.
- 5 DBCTM has comprehensively addressed the vast majority of non-pricing issues raised by the User Group, adopting many of the changes suggested by the User Group and proposing reasonable alternatives where the User Group's suggestions were inappropriate. DBCTM has also identified a limited number of issues for further discussion with the User Group.

2.1 QCA questions for collaborative submissions

- 6 Following submissions on its Interim Decision, the QCA offered an opportunity for stakeholders to provide collaborative submissions to the QCA.
- 7 In doing so, the QCA encouraged stakeholders to take the opportunity to collaborate and, where possible, provide joint submissions on agreed positions. The QCA also laid out three areas which it would like stakeholders to focus their submissions:

Stakeholders have expressed general support for DBCT Management's proposals for the notifying access seeker process, queuing mechanism and arrangements for short term available capacity under the 2019 DAU. What amendments do stakeholders consider necessary in order to sufficiently protect the interests of DBCT Management and access seekers in these processes?

Stakeholders have expressed concerns on the proposed approach to non-pricing aspects for expansions under the 2019 DAU, such as the proposed approach to conditional access agreements. What amendments do stakeholders consider necessary for their interests to be appropriately protected during an expansion process?

Do stakeholders consider other non-pricing terms proposed by DBCT Management in the 2019 DAU appropriate and if not, what amendments would be required for the matters to be appropriate? This includes non-pricing terms contained in the schedules to the DAU, including the proposed Standard Access Agreement.

- 8 In essence, the QCA has asked for collaborative submissions on the non-pricing components of the 2019 DAU.

2.2 DBCTM engagement with stakeholders

- 9 During recent weeks, DBCTM sought to engage with the User Group in order to develop solutions to non-pricing issues raised by the User Group regarding the 2019 DAU. In response, the User Group referred to DBCTM to its previous submissions regarding non-pricing issues with the 2019 DAU, and noted it would welcome any proposals that DBCTM has in relation to addressing the issues it raised in previous submissions about non-pricing issues.
- 10 The primary non-pricing issues identified by the User Group were set out in section 20 and schedule 3 of the User Group's September 2019 submission. As explained in the executive summary to that submission:¹

While the DBCT User Group is fundamentally opposed to the inappropriate and drastic changes DBCTM is proposing to pricing regulation for the DBCT service (and related consequential wording

¹ User Group September 2019 Submission, p. 7

changes), it recognises the reasonable nature of some of the non-pricing related changes to the drafting of the undertaking requested.

Accordingly, Section 20 and Schedule 3 of this submission provide additional commentary around the wording changes to the access undertaking and standard access agreement terms that are proposed in the 2019 DAU to assist the QCA in reaching a decision on the appropriateness of those wording amendments.

The merits of each of those changes should be assessed on an individual basis (as the DBCT User Group has assessed them), leading to a mix of support for changes, opposition to others, and conditional support for others subject to further refinements and amendments.

- 11 DBCTM worked through all of the issues identified by the User Group and provided its response and proposed solutions to the User Group via email. However, DBCTM notes this was only provided to the User Group in the days leading to the submission. The table in Appendix 1 sets out DBCTM's response.

2.3 Proposed amendments to 2019 DAU to address non-price issues raised

- 12 DBCTM's detailed response to the non-pricing issues identified in the User Group's September 2019 Submission is set out in Appendix 1 of this submission.
- 13 In summary DBCTM has agreed to address the vast majority of the issues raised by the User Group, adopting almost all of its proposed changes.
- 14 For a small number of issues DBCTM has proposed that the User Group and DBCTM discuss the issue further to better understand the problem and discuss alternative solutions.
- 15 For example, the User Group is only willing to support the provision of aggregated information to the rail network provider but not information on individual Users who do not extend or renew in whole or in part, stating that the appropriate place for managing any misalignment is the Aurizon Network access undertaking where port capacity should be demonstrated before rail capacity is contracted.
- 16 DBCTM considers that the provision of aggregated information as proposed by the User Group would hinder DBCTM's ability to achieve its objective of supply chain alignment and that it would produce better outcomes if it is able to identify relevant Access Holders in order to improve the efficiency of the system.
- 17 DBCTM has proposed to discuss this and other issues with the User Group, in order to form a clear problem definition. DBCTM will then consider if there are alternative protections that can be put in place to address the User Group's concerns, that do not come at the cost of supply chain efficiency.
- 18 If DBCTM and the User Group are able to agree to further changes, DBCTM will submit a supplementary collaborative submission.

2.4 Potential further amendments if necessary

- 19 As previously indicated, DBCTM is committed to ensuring a pricing model without reference tariffs is implemented effectively. As such, to the extent that the non-pricing provisions of the 2019 DAU require further refinement, DBCTM is committed to working with the QCA, users and access seekers to ensure that the 2019 DAU is fit-for-purpose.

3 Issues with the User Group's submission

- 20 On 24 April 2020 the User Group provided a submission on the QCA's Interim Decision.
- 21 The User Group April 2020 Submission sought to establish that a reference tariff model would be more optimal than the negotiate arbitrate model proposed by DBCTM in the 2019 DAU.
- 22 Disappointingly, the User Group submission did not engage with the QCA's questions about how a negotiate arbitrate model could be effectively implemented, and instead focussed on making erroneous arguments as to why the 2019 DAU model was not appropriate – creating largely fictitious issues, rather than offering solutions.
- 23 While DBCTM considers that its April 2020 submission deals with most, if not all, of the issues raised in the User Group April 2020 Submission, for completeness this section responds to that submission by identifying the gaps in the User Group's reasoning and evidence:
- 23.1 The first subsection explains why the User Group's characterisation of the statutory framework is incorrect, and is inconsistent with the statutory text and the relevant precedent. In particular, DBCTM explains why it is not the QCA's role to determine a hypothetical optimal possible access undertaking. Rather, the QCA is required to determine whether the 2019 DAU, as submitted, is appropriate having regard to the matters set out in section 138(2) of the QCA Act.
- 23.2 The second subsection outlines how DBCTM has comprehensively demonstrated in its submissions to date that the User Group's key arguments - as to why the negotiate arbitrate model in the 2019 DAU is not appropriate and a reference tariff should be preferred - are without merit.
- 23.3 The third subsection responds to the User Group's erroneous analysis of the s 138(2) factors and explains why, under a proper analysis, the factors support a conclusion that the 2019 DAU is appropriate for approval.
- 23.4 The fourth subsection deals with the User Group's erroneous and misleading comments regarding revenue socialisation and existing user agreements, and explains why these issues present no impediment to moving to a negotiate arbitrate pricing model without a reference tariff.
- 23.5 While not delving into the detail, the fifth subsection deals with User Group's proposed WACC for the purposes of calculating a reference tariff, and explains why engaging in debate over an appropriate WACC is not appropriate given the 2019 DAU proposed by DBCTM does not provide for a reference tariff.
- 23.6 Finally, the sixth subsection explains why the concerns raised by the User Group regarding the expansion process are unfounded and misleading.

3.1 Statutory Framework for approving a DAU

User Group misinterprets statutory framework for approval of DAU

- 24 The User Group suggests that the test for the approval of a DAU under section 138(2) of the QCA Act requires the QCA to decide on the *most* appropriate undertaking.² There is no basis for such a construction. In doing so, the User Group is misinterpreting the statutory test and erroneously importing words into section 138(2) which are not there.
- 25 The User Group states:
- “... it necessarily follows from the meaning of appropriate that the QCA is not required, and it would actually be an invalid exercise of its power, to settle for a less suitable alternative”³
- and
- “whether the proposed terms of an undertaking are appropriate must be assessed relative to the alternative terms which could be adopted in the draft access undertaking”⁴
- 26 This is incorrect.
- 27 Given the word “appropriate” is not defined in the QCA Act, it takes its ordinary meaning being “suitable or fitting for a particular purpose, person, occasion, etc.”.⁵ Contrary to the User Group’s contention,⁶ “appropriate” is not a relative term. It does not of itself mean “most appropriate”.
- 28 Section 138(2) provides that the QCA “may approve a draft access undertaking only if it considers it appropriate to do so having regard to each of” the factors listed in section 138(2). That is not a requirement for the QCA to assess a DAU provided by an infrastructure owner or operator against other potential access undertakings and only approve the DAU if it is hypothetically the most appropriate.
- 29 Rather, section 138(2) requires the QCA to assess the DAU against the factors in section 138(2) and determine whether it is appropriate to accept the undertaking having regard to those factors.
- 30 The statutory scheme is one where the QCA must assess the undertaking provided to it as appropriate. The QCA correctly acknowledges in its Interim Decision that the starting point for the QCA’s task is the DAU as submitted.⁷ This is clear from section 134(1) of the QCA Act which provides that:
- “The authority must consider a draft access undertaking given to it in response to an initial undertaking notice and either approve, or refuse to approve, the draft access undertaking.”
- 31 In assessing the submitted undertaking against the section 138(2) factors, the QCA is not required to opine as to whether another form of undertaking would be more appropriate. Instead where the QCA’s consideration of the terms of the undertaking against the section 138(2) factors results in a conclusion that the undertaking is not appropriate, the QCA would refuse to approve the draft access undertaking. In those circumstances, the QCA would give consideration to amendments to the draft access undertaking that it considers appropriate so that it can give the owner or operator notice of those amendments in accordance with section 134(2)(a) of the QCA Act.
- 32 The User Group also suggests that there is a requirement in section 134(2)(a) for the QCA to formulate amendments that are the “most” appropriate amendments.⁸ Rather, the requirement is for the QCA to ask the owner or operator to amend the DAU in “the way the Authority considers appropriate” – again, there

² User Group, Submission in response to Queensland Competition Authority Interim Draft Decision, 24 April 2020 (**User Group April 2020 Submission**), p. 6

³ User Group April 2020 Submission, p. 7

⁴ User Group April 2020 Submission, p. 7

⁵ Macquarie Dictionary

⁶ User Group April 2020 Submission, p. 7

⁷ QCA’s Interim Draft Decision, p. 21

⁸ User Group April 2020 Submission, pp. 8-9

is no “most” before “appropriate” in section 134(2)(a) and “appropriate” does not of itself mean “most appropriate”.⁹ Further, the starting point for the QCA’s amendments must be the access undertaking as submitted by the owner or operator.

- 33 The User Group also suggests that different kinds of undertakings cannot both be considered to be appropriate having regard to the section 138(2) factors. To the contrary, there may be a range of undertaking outcomes that could be considered appropriate having regard to the section 138(2) factors.
- 34 The User Group refers to some comments of the QCA regarding a reference tariff model in the Interim Decision and asserts that those views are inconsistent with a conclusion that a non-reference tariff model could be appropriate.¹⁰ The QCA’s comments were made in the context where the QCA was of the view that the DAU should be amended in order to be capable of approval. In its April 2019 submission in response to the Interim Decision, DBCTM proposed a number of amendments to the 2019 DAU to comprehensively address the QCA’s concerns and ensure that the 2019 DAU is appropriate for approval by the QCA.

Reference tariffs in undertakings in the QCA Act

- 35 The User Group appears to suggest by reference to sections 137(2)(a) and 101(4) that the QCA Act contemplates that an access undertaking will normally include a reference tariff.¹¹ This is incorrect. As the QCA correctly notes in its Interim Decision, the QCA Act does not require an access undertaking to include a reference tariff, however, it does not preclude a reference tariff being included in an access undertaking.¹²
- 35.1 While section 137(2)(a) provides that an access undertaking may include details of how charges for access to the service are to be calculated, there is no requirement to include such details, and nor does section 137(2)(a) specify that such details would take the form of a reference tariff.
- 35.2 Section 101(4) concerns the negotiation of access agreements rather than the terms of access undertakings. Further, it does not suggest that a reference tariff would be a normal occurrence in an access agreement. It simply enables the QCA to allow the pricing information described in section 101(2)(a) to (c) to be given in the form of a reference tariff.
- 36 As set out in DBCTM’s previous submissions, negotiated outcomes resolving the terms and conditions of access are preferable to regulated outcomes and negotiation can limit the potential for regulatory error.¹³ The QCA accepted in its Interim Decision that there are costs associated with regulatory error.¹⁴ Contrary to the User Group’s contention,¹⁵ access seekers and users are in a better position than the QCA to know about the costs and benefits of access to DBCT. Access seekers and users will know their own business circumstances, how and why access will benefit them, and what it may cost. Negotiations can then be tailored to these individual costs and benefits, for example, charges could be specified in foreign currency, billing could be undertaken on different terms, amendments could be made to the standard risk-sharing arrangement set out in the Standard Access Agreement, etc. The information which DBCTM has undertaken to provide to access seekers in response to the Interim Decision will ensure that access seekers enter access negotiations from an informed position both as to their circumstances and to those at DBCT. Further, contrary to the User Group’s contention, rather than facilitating efficient negotiation of access to DBCT, the reference tariff approach has precluded commercial access negotiations.¹⁶

⁹ User Group April 2020 Submission, pp. 8-9

¹⁰ User Group April 2020 Submission, p. 7

¹¹ User Group April 2020 Submission, p. 9

¹² QCA Interim Draft Decision, p. 21

¹³ DBCTM July 2019 Submission, p. 30; DBCTM November 2019 Submission, p. 7; Productivity Commission Inquiry Report, National Access Regime, 25 October 2013, p. 115

¹⁴ QCA Interim Draft Decision, p. 59

¹⁵ User Group April 2020 Submission, p. 10

¹⁶ DBCTM July 2019 Submission, pp. 31-32

3.2 The User Group's key arguments against the 2019 DAU are flawed

- 37 The key arguments in the User Group's April 2020 Submission in favour of a reference tariff model and against the 2019 DAU can be distilled into a few simple assertions:
- 37.1 DBCTM's market power can only be constrained by a reference tariff and cannot be adequately constrained under a negotiate arbitrate model;
 - 37.2 Access seekers will be disadvantaged as compared to existing users; and
 - 37.3 Access seekers are faced with less certainty without a reference tariff.
- 38 DBCTM has comprehensively addressed these arguments in its previous submissions as demonstrated in the table below.

User Group submission	Reference to DBCTM response
DBCTM's market power can only be constrained by a reference tariff and cannot be adequately constrained under a negotiate arbitrate model. ¹⁷	The 2019 DAU effectively constrains any ability and incentive to exercise market power. ¹⁸
Access seekers will be disadvantaged as compared to existing users. ¹⁹	Set out below
Access seekers face greater information asymmetry than existing users. ²⁰	DBCTM has proposed extensive information disclosure obligations which ensures that access seekers have the necessary information to facilitate effective negotiations. ²¹
Access seekers face inappropriate time pressures. ²²	The User Group have not clearly explained these 'asymmetric' time pressures. If it can do so DBCTM is happy to reconsider the timeframes set out in the 2019 DAU, to ensure that a timely outcome is possible for access seekers and that they do not face undue time pressures. DBCTM also considers that the guidance document should include discussion and clarification of the timelines for any arbitration. ²³
Access seekers have lesser resources to pursue arbitration if a mutually agreed outcome cannot be reached. ²⁴	DBCTM has demonstrated that access seekers in the queue are sophisticated, large, well-resourced mining companies. ²⁵ In any event there is no reason why arbitrations would not be conducted in an efficient, cost-effective manner.
Access seekers do not have the protections of the existing user agreements. ²⁶	Access seekers are fully protected by the 2019 DAU from the exercise of any market power on the part of DBCTM, and have substantively the same protections as existing users. ²⁷

¹⁷ User Group April 2020 Submission, section 5.1, 6.1

¹⁸ DBCTM November 2019 Submission, sections 5.3, 7

¹⁹ User Group April 2020 Submission, section 5.2

²⁰ User Group April 2020 Submission, section 4.5, 5.3

²¹ DBCTM April 2020 Submission, section 3.3

²² User Group April 2020 Submission, section 6.2(b)

²³ DBCTM April 2020 Submission, section 3.6

²⁴ User Group April 2020 Submission, section 4.1(b), 4.5(c), 5.2(c)

²⁵ DBCTM April 2020 Submission, section 2.2

²⁶ User Group April 2020 Submission, section 5.2(c)

²⁷ DBCTM November 2019 Submission, section 7, appendices 1 and 2

User Group submission	Reference to DBCTM response
Access seekers are faced with less certainty without a reference tariff.	A reference tariff model will not provide access seekers with any certainty. ²⁸ Access seekers will require access to expansion capacity. A reference tariff set by the QCA prior to an expansion being undertaken will not provide any certainty to access seekers.
The arbitration criteria are inappropriate.	DBCTM has aligned the arbitration criteria in the 2019 DAU with the arbitration criteria set out in the QCA Act, so there can be no question as to appropriateness. ²⁹

- 39 This subsection provides a brief outline of DBCTM’s previous detailed submissions which explain why these assertions are unfounded.
- 40 The User Group also notes that the arbitration criteria set out in the 2019 DAU are not appropriate. DBCTM has now proposed to align the arbitration criteria under the 2019 DAU with those in the QCA Act, which the User Group agrees ‘present an improved and more balanced set of criteria’.³⁰ As such, this submission does not address these concerns.

The 2019 DAU effectively constrains DBCTM’s market power

- 41 The User Group’s most recent submission once again focuses on the asserted characteristics of DBCTM, and its purported market power without regulation, rather than engaging in a proper analysis of whether the 2019 DAU will appropriately constrain DBCTM’s market power.³¹

In particular, the DBCT User Group emphasises that is clear from the QCA’s analysis in the declaration review and the Interim Draft Decision that the DBCTM has significant market power, which it is incentivised to utilise to engage in market power and that DBCTM’s ability to exercise that market power is not constrained by countervailing power of any user or competitive threat of new entry.

Accordingly, regulation is the *only* potential constraint on DBCTM’s market power. Where that is the case, a stronger form of regulation is required than a ‘light handed’ negotiate-arbitrate model to ensure that DBCTM does not engage in monopoly pricing.

- 42 As explained in section 3.1, the question for the QCA is not: ‘what is the appropriate form of regulation for DBCTM? Rather, the proper question is: ‘is the 2019 DAU appropriate, having regard to the factors in section 138(2) of the QCA Act?’, and flowing from that: ‘does the 2019 DAU adequately constrain DBCTM’s market power?’ The QCA’s final recommendation on the declaration of DBCT also did not find that ‘regulation is the only potential constraint on DBCTM’s market power.’ Indeed, it found that the Access Framework provided a sufficient constraint. This finding is consistent with the proposed 2019 DAU, and inconsistent with the User Group’s contention that ‘a stronger form of regulation’ is required.
- 43 DBCTM has put forward strong evidence which demonstrates the 2019 DAU will effectively constrain any potential exercise of market power.³² At its simplest:
- 43.1 DBCTM has no incentive to exercise market power in negotiations with access seekers as it would result in the dispute being referred to the QCA for arbitration (which would presumably look unfavourably on any attempt to exercise market power). Rather, DBCTM is incentivised to

²⁸ DBCTM April 2020 Submission, section 2.1

²⁹ DBCTM April 2020 Submission, section 3.4

³⁰ User Group April 2020 Submission, p. 23

³¹ See User Group April 2020 Submission, p. 17

³² See for example DBCTM November 2019 Submission, section 2.5; [95]-[99]; [104]-[109]; section 5.3; section 7.1

reach a mutually acceptable middle-ground with access seekers, instead of having the matter determined by the QCA.

43.2 Furthermore, as a non-vertically integrated provider of coal handling services at DBCT, there is a strong incentive for DBCTM to maximise throughput of the terminal and to not exercise any market power that may reduce, or risk, the maximisation of throughput at the terminal. This incentive consequently includes a strong incentive for DBCTM to facilitate new entry to the market for DBCT's services wherever possible.

43.3 In circumstances where a mutually acceptable outcome is not possible, access seekers will *always* have the opportunity to refer the access dispute to the QCA for determination, which has the ability to determine disputes in such a way that constrains DBCTM's market power. Arbitration (and the mere threat of arbitration) is the fundamental tool to constrain any exercise of market power by DBCTM. The QCA will determine the terms of access in accordance with arbitration criteria which ensures that there cannot be any exercise of market power. The National Access Regime set out in Part IIIA of the Competition and Consumer Act is a negotiate-arbitrate regime without any express requirement for reference tariffs. If the User Group submission were to be accepted it must logically follow that the National Access Regime does not effectively constrain any future exercise of market power by the provider of a declared service.

44 The effect of this is that any market power DBCTM may have is nullified under the 2019 DAU and the 2019 DAU is appropriate for approval with regard to its constraints on market power.

Equity among existing and new users

45 The User Group argues that a reference tariff is preferable because under the 2019 DAU access seekers would be disadvantaged in negotiations with DBCTM as compared to existing users, because:

45.1 access seekers face greater information asymmetry than existing users;³³

45.2 access seekers have lesser resources to pursue arbitration if a mutually agreed outcome cannot be reached;

45.3 access seekers face inappropriate time pressures; and

45.4 access seekers do not have the protection of the existing user agreements.

Information asymmetry

46 As explained in DBCTM's April 2020 submission, DBCTM has proposed changes to the 2019 DAU that provide access seekers with a vast amount of information in order to ensure that they are able to effectively assess the reasonableness of DBCTM's access offers.³⁴ The provision of this information ensures that access seekers have all the information needed to effectively negotiate with DBCTM and that there will be no material difference in information available to existing users and access seekers.

47 DBCTM has proposed to provide this information despite the fact that there is already substantial information in the public domain to assist access seekers in determining the reasonableness of DBCTM's access offers. To date, DBCTM's access charges have been regulated through the QCA's public access undertaking process, meaning there is substantial information regarding the access charges for the terminal in the public domain. DBCTM invites the User Group to identify any further information available to existing users but not to access seekers, and explain how this will affect the ability of access seekers to negotiate as

³³ User Group April 2020 Submission, section 5.3, p. 18

³⁴ User Group April 2020 Submission, section 3.3

compared to existing users. If the User Group can do this DBCTM will consider further information disclosures to ensure a level playing field.

Resources to pursue arbitration

- 48 The User Group has not provided any evidence that access seekers have inadequate resources to pursue an arbitration. As shown in DBCTM's April 2020 submission,³⁵ none of the mining companies in the access queue are small businesses, and it is unrealistic to assume that given the substantial size of their investments these access seekers would be unable or unwilling to fund an arbitration, especially if there was a lot to be gained because DBCTM was acting unreasonably. Further, as discussed in confidential Appendix 2, DBCTM has now executed underwriting agreements with access seekers for 14.87mtpa of capacity, which is 1.57Mtpa more than the total capacity (13.30Mtpa) that all four phases of the 8X expansion can potentially deliver. The access seekers who have executed underwriting agreements are all large, sophisticated, well-resourced mining companies.³⁶
- 49 For the User Group submission to be accepted the User Group would need to prove that the costs of arbitration are materially greater than any other category of costs that a miner would face in developing and operating a mine. No such evidence has been provided and therefore the proposition must be rejected.
- 50 The access regime for non-scheme pipelines, set out in Part 23 of the National Gas Rules, operates a negotiate arbitrate model effectively despite the fact that many of the access seekers to these pipelines are small gas producers and shippers. Accordingly, by analogy there is no basis to the User Group's concern.
- 51 DBCTM does not accept that arbitrations need to be resource intensive. The QCA is well-positioned, with over 20 years of experience regulating DBCTM, to arbitrate any access disputes in a way that ensures that access seekers are not disadvantaged in an arbitration due to a lack of information or resources. As previously explained,³⁷ arbitrations under the 2019 DAU are likely to occur at the same time adding to the efficiency of any arbitration process.

Time pressures

- 52 The User Group argues that access seekers face 'asymmetric time pressures' in negotiations with DBCTM because:³⁸
- (i) access seekers are typically seeking access for a particular greenfield mine or brownfield expansion, and access must be obtained at a certain stage of the development in order for final investment decisions to be made, financing to be obtained or joint venture approvals to be given (whereas, by contrast, existing users can often make use of capacity contracted for previous projects to support such future projects);
 - (ii) access seekers will also be negotiating rail access and rail haulage in parallel due to the substantial costs of take or pay and lost sales arising from any misalignment of contracted capacity;
 - (iii) contrary to DBCTM's submissions, the access queuing mechanisms do not resolve these issues – the need to respond to the notifying access seeker process in short periods in the context of competition for limited available capacity and the way DBCTM is permitted to manage expansions (as described in section 13.2 of these submissions below), entrenches the time pressure; and

³⁵ DBCTM April 2020 Submission, Appendix 2 – Information on the scale of access seekers' operations

³⁶ See DBCTM April 2020 Submission, Appendix 2 – Information on the scale of access seekers' operations

³⁷ DBCTM April 2020 Submission, paras [24]-[25]

³⁸ User Group April 2020 Submission, p. 20

(iv) the terminal is effectively fully contracted, with a material access queue remaining, such that DBCTM's incentives to attract incremental users, by making concessions in negotiations, are (and will continue to be) very limited.

53 To the extent that users are faced with pressure to secure access at a certain stage of the development process, the negotiate arbitrate model does not affect this pressure. As previously explained, the process for gaining access is the same with and without a reference tariff – the right to access is completely independent of the price that is agreed.³⁹

54 Public announcements by access seekers show that investment decisions are often made prior to access being assured. DBCTM's previous submissions have provided evidence that investment decisions are not contingent on securing access to DBCT specifically. For example:

█ [REDACTED]

55 If, contrary to experience and in the absence of any evidence, the queuing process could provide time pressure to sign up for capacity at DBCT, DBCTM is open and willing to consider alterations to the timing for responding to the notifying access seeker process which removes this time pressure while still ensuring that the queue can be dealt with in an efficient manner (see for example Appendix 1). That being said, DBCTM reiterates that any such time pressure does not provide pressure to agree to an inappropriate access charge, as the process for determining charges is dealt with separately.

Existing user agreements

56 While access seekers naturally will not have existing user agreements, the 2019 DAU (including the amendments proposed in DBCTM's April 2020 submission) mirrors the protections in the existing user

³⁹ DBCTM April 2020 Submission, para 131-132

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

agreements – most importantly by providing access seekers with the right to have access disputes arbitrated by the QCA.

Differentiated expansion would be most likely source of inequity between existing users and access seekers

- 57 Contrary to the User Group’s assertions, the most likely source of differentiation between access holders and access seekers would arise if the QCA determined that an expansion should be differentially priced. This is the default position under the 2017 AU,⁴⁴ following the User Group’s submissions to the QCA advocating for this position, and has therefore been adopted in the 2019 DAU.⁴⁵
- 58 The prospect of differential pricing, and the uncertainty regarding whether there is sufficient capacity available to obtain access, are the primary sources of any uncertainty that access seekers face over the upcoming regulatory period.

Pricing certainty

- 59 As explained in DBCTM’s April 2020 submission, given that the terminal is at full capacity, the inclusion of a reference tariff will provide no additional certainty for access seekers under the 2019 DAU.⁴⁶ This is because, under previous access undertakings, the reference tariff is not determined for expansions until after the expansion occurs. In contrast, the negotiate arbitrate model allows for access seekers and DBCTM to agree the method of determining post-expansion charges, or even the charges themselves.
- 60 Notwithstanding that a reference tariff model provides no additional certainty for access seekers in this regulatory period, it is important to note that absolute certainty is neither necessary nor desirable. The User Group argues:⁴⁷

While greater information disclosure, QCA guidelines and improving the arbitration criteria may reduce the uncertainty inherent in a negotiate-arbitrate model to some degree, they will never achieve the certainty provided by a reference tariff.

- 61 It would not be appropriate for the QCA to refuse to approve the 2019 DAU simply on the basis that it does not provide the level of certainty that including a reference tariff might. Rather, the QCA must assess the 2019 DAU against the factors in section 138(2) of the QCA Act, and to the extent the QCA considers certainty relevant to those factors, the QCA should consider the trade-offs that additional certainty entails (such as thwarting negotiated outcomes, potential impacts on the prospects of expansion, and an increased likelihood of regulatory error).⁴⁸
- 62 Certainty as to pricing outcomes for access seekers is not necessary or possible when an expansion is needed to deliver access. Rather, the 2019 DAU provides access seekers with certainty as to: the process for negotiating or determining access charges; access in terms of the queue; and that the QCA will not allow inappropriate access outcomes if a mutually agreed outcome cannot be reached and the matter is referred to arbitration.
- 63 The User Group has previously asserted that a level of certainty flows from having the QCA as a ‘certain backstop’ to arbitrate disputes:⁴⁹

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

⁴⁴ 2017 AU, section 11.13

⁴⁵ https://www.qca.org.au/wp-content/uploads/2019/05/28995_DBCT_Differential-Pricing-Final-Decision-1.pdf

⁴⁶ DBCTM April 2020 Submission, paras [13]-[17], [21]-[22]

⁴⁷ User Group April 2020 Submission, p. 11

⁴⁸ See also DBCTM April 2020 Submission at [213] to [220]

⁴⁹ User Group April 2019 Declaration Review Submission, p. 91

- 64 Despite the uncertainty regarding the future regulatory status of DBCT throughout the declaration review process a number of access seekers have entered into conditional access agreements and underwriting agreements. This strongly supports the view that a building blocks based reference tariff is in no way determinative of investment in the supply chain, and demand for access at DBCT.
- 65 Further, the access seekers that have executed conditional access agreements and underwriting agreements have done so without any certainty of price – whether socialised or differential, regulated or unregulated, heavy or light handed. This irrefutable evidence shows that pricing certainty does not inhibit access seekers’ ability or incentive to gain access to DBCT.

3.3 Assessment of s 138(2) factors

- 66 Section 138(2) of the QCA Act sets out the factors that the QCA must have regard to in determining whether the 2019 DAU is appropriate for approval.
- 67 The User Group April 2020 Submission sets out the reasons why it considers that applying these factors favours a reference tariff.⁵⁰
- 68 Notwithstanding that section 138(2) does not require the QCA to consider whether the factors support an alternative model than that proposed, this subsection responds to the User Group’s erroneous analysis of the s 138(2) factors and explains why, under a proper analysis, the factors support a conclusion that the 2019 DAU *is* appropriate for approval.

Object of Part 5 of the QCA Act

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

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

Constraining the potential exercise of market power

- 70 In its April 2020 submission the User Group agrees with the QCA's conclusions in its Interim Decision that 'economically efficient outcomes are facilitated, among other things, by a robust access framework that constrains the potential exercise of market power by the owner of a facility with monopoly characteristics', and the QCA's resulting views as to what the access undertaking for the DBCT service should be directed at.
- 71 As explained in section 3.2 above, DBCTM has put forward strong evidence which demonstrates the 2019 DAU will effectively constrain any potential exercise of market power. Despite this, in its assessment of whether the object of Part 5 supports the approval of the 2019 DAU, the User Group argues that the negotiate arbitrate model will:⁵¹
- (a) result in unfair differentiation between access holders and access seekers based on different levels of information asymmetry and resources to pursue arbitrations – rather than efficiency;
 - (b) create risks of monopoly pricing, that restricts or delays efficient entry or hinders competition in dependent markets; and
 - (c) create uncertainty of outcomes, inconsistent with the desire for a stable, transparent, well-understood and predictable regulatory framework.

⁵⁰ User Group April 2020 submission, section 4, pp. 10 to 16

⁵¹ User Group April 2020 Submission, p. 11

72 These arguments are unsubstantiated and erroneous, as explained in the following paragraphs

Differentiation between access holders and access seekers

73 DBCTM explains why the User Group's argument that differences in the level of information and resources available to access seekers will not disadvantage access seekers in negotiations with DBCTM, in section 3.2 above.

Monopoly pricing

74 The User Group provides no valid basis for its assertion that an access undertaking would create the risk of monopoly pricing which would restrict or delay efficient entry, or hinder competition in dependent markets. Indeed this is inconsistent with the User Group's comments in the recent declaration review, that declaration and arbitration would protect new access seekers.⁵²

75 As explained in section 3.2 above, DBCTM has no incentive to seek excessive pricing because if it did, access seekers will simply refer the dispute for determination by the QCA. Unless the User Group is suggesting that the QCA would determine access disputes in a way that allows for monopoly pricing, there is no basis for the contention that there is a risk of monopoly pricing under a negotiate arbitrate model.

Certainty

76 DBCTM explains above in section 3.2 why a reference tariff will provide *no* additional certainty to access seekers in the current environment and why absolute certainty as to pricing is not desirable in any event.

The 2019 DAU will promote the object of Part 5

77 Where an expansion is required to facilitate access, it is particularly important that the QCA has regard to the object of Part 5, and in particular considers whether the access undertaking promotes 'investment in, significant infrastructure by which services are provided' to ensure that competition between existing users and access seekers is promoted in dependent markets.

78 As explained in DBCTM's April 2020 submission, the critical factor to promoting effective competition in dependent markets is that access seekers can obtain access to DBCTM.⁵³ The single biggest impact that DBCT could have on competition in dependent markets would be if there was no expansion at DBCT. This means that, consistent with the object of Part 5, it is critical that the access undertaking includes appropriate incentives to promote investment in the terminal.

79 As previously explained, the negotiate arbitrate model allows DBCTM to agree with access seekers what the appropriate incentives are, and ensure that an expansion happens, while providing the safety net of the QCA to ensure that DBCTM is not able to apply any market power to the negotiations. The negotiate arbitrate regime will allow DBCTM and access seekers to determine how best to facilitate an expansion and to remove the potential for heavy handed tariff regulation to inhibit or hinder investment in a terminal expansion (and therefore competition in dependent markets).

The legitimate business interests of DBCTM (as operator)

A negotiate arbitrate model reduces the risk of regulatory error

80 The User Group argues that DBCTM's concerns regarding the risk for regulatory error are unfounded on the basis that:⁵⁴

⁵² See for example, QCA Draft Recommendation, Part C: DBCT declaration review, December 2018, p. 91

⁵³ DBCTM April 2020 submission, section 2.1

⁵⁴ User Group April 2020 submission, p. 12

- (i) any such error would be expected to 'balance out' over a number of regulatory periods, as there is no suggestion there is a persistent downwards bias to the QCA's decision making;
- (ii) if anything, the QCA has demonstrated an upwards bias to ensure that revenue adequacy is achieved – for example adopting an asset beta of 0.45 for the existing DBCT reference tariffs, despite Incenta's estimate of 0.40 being accepted by the QCA as the best empirical estimate; and
- (iii) to the extent that the QCA has concerns about 'regulatory error' leading to a reference tariff being set below revenue adequacy levels, it is clear from QCA decisions, such as that in relation to Aurizon Network's UT5 reference tariffs that the QCA is willing to exercise its judgement to depart from a bottom-up WACC estimate to ensure that does not occur.

81 These arguments are flawed as explained in the following paragraphs.

Regulatory errors do not 'balance out'

82 DBCTM *does* consider that there is some evidence to suggest that the QCA has historically under estimated the efficient costs of providing the DBCT Service, and therefore these regulatory errors do not 'balance out'. Some examples include, inter alia:

- 82.1 The impact of inflation on DBCTM's Annual Revenue Requirement (**ARR**) has suffered a downward bias nearly every year for the past two regulatory periods. The fixed estimated 'default inflation' has consistently been deducted from the ARR at a higher rate than the floating 'outturn inflation' has indexed the RAB;
- 82.2 The 'on the day' method of fixing the market-based parameters for an entire regulatory period has been negatively influenced by short-term events. For example the 2017 AU risk-free rate was set over 20 days immediately following an RBA decision to cut the cash rate, which had a short-term negative impact on the risk-free rate (which in the preceding months had been higher);
- 82.3 DBCTM has not been able to remedy modelling issues identified that may have an upward effect on the ARR, for example those identified in the Modelling DAAU (e.g. tax treatment of remediation obligations). However, DBCTM has corrected modelling issues in the past which are to the benefit of Users. The QCA has been significantly more vigilant on behalf of users than DBCTM, in respect of such issues.

83 Even if regulatory errors did 'balance out' over a number of periods, this could still result in damaging impacts on investment in the terminal in the short term, and flow-on impacts for investment in dependent markets. For example, if a regulatory error occurred during a regulatory period where the terminal was fully utilised and an expansion is required to provide access (such as the current period), regulatory error which does not adequately compensate DBCTM for the efficient costs and risks of undertaking an expansion would have the effect of stalling the expansion. While existing users may not be harmed by this (in fact it may benefit existing users by decreasing competition in dependent markets from access seekers), access seekers and DBCTM would be.

84 DBCTM notes the evidence provided in its April 2020 submission regarding the asymmetric nature of the harm of underinvestment vs overinvestment.⁵⁵

The QCA has not displayed an upward bias

85 DBCTM disagrees that the QCA has displayed an upward bias in determining a slightly higher asset beta than its consultants' estimate for the current regulatory period, for the following reasons:

⁵⁵ DBCTM April 2020 Submission, section 4.3

- 85.1 The asset beta and resulting equity beta arrived at by the QCA for the 2017 AU (referred to by the User Group) was materially lower than the estimate of DBCTM's expert;⁵⁶ and
- 85.1 In its decision on the 2006 and 2010 AUs, the QCA determined that an incentive equity beta of 1.0 was required to facilitate DBCTM's \$1.5 billion investment in the terminal for the 7X expansion.⁵⁷ Subsequent to the sunk investment, the QCA reduced the asset beta (the basis of the equity beta) from 0.5 to 0.45, albeit not as significant a reduction as proposed by the User Group and the QCA's consultant.⁵⁸ The lesser reduction of equity beta by the QCA reflected an attempt to address the harm to investment certainty and the appetite for investment at DBCT by significantly reducing the asset beta once DBCTM's investment was sunk. However, this has still created significant uncertainty for future expansions of DBCT, as returns on investment cannot be reliably estimated under the current ex ante building blocks model.
- 86 The QCA's decision to reduce the equity beta from 1.0 to 0.87 has created uncertainty and potentially harmed investment incentives at DBCTM. This remains a significant concern for DBCTM heading into an expansion period, as under a reference tariff model DBCTM is not only exposed to regulatory error in the upcoming Regulatory Period, but also subsequent periods over which DBCTM seeks to recover its investment.
- 87 Contrary to the User Group's assertions that the terminal has expanded significantly under the reference tariff model,⁵⁹ the reality is that DBCTM has *never* committed to an expansion under the reference tariff model, with all expansions over this period being pre-committed, as explained by DBCTM throughout the Declaration Review. DBCTM's July 2018 Declaration Review Submission explained:⁶⁰

The User Group has failed to note that all expansions at DBCT were committed to prior to the first Access Undertaking coming into effect in 2006.

...

As shown above, all expansions of DBCT were commenced prior to the 2006 AU. DBCTM committed \$330M to 7X prior to the QCA approval of 7X Phase 1 in August 2006 and 7X Phase 2/3 in October 2006, which irrefutably establishes that these expansions would have occurred irrespective of declaration (and did not occur because of declaration).

Aurizon

- 88 The Aurizon example clearly evidences how a building blocks reference tariff may result in charges being set so low that it would impact investment incentives. In this case, the WACC used by the QCA was set so low that users and access seekers needed to propose a higher WACC due to the detrimental impact that the reference tariff would have on investment incentives.

Legitimate business interests of DBCT Holdings (as owner)

- 89 The User Group argues that DBCT Holdings' interests favour a reference tariff model due to the asserted benefits to the State delivered by certainty of efficient pricing such as investment, economic growth, employment and greater coal royalties (noting that higher terminal charges will immediately reduce royalties, as such charges are a deduction from coal royalty calculations).⁶¹
- 90 This is completely inconsistent with the reality of the situation.

⁵⁶ See DBCTM 2015 DAU, Attachment C – Required Return on Equity for DBCT (12 October 2015) – Frontier Report on the required return on equity for DBCT; QCA, Final Decision on DBCT Management's 2015 Draft Access Undertaking, November 2016, p. 123

⁵⁷ QCA, Final Decision on DBCT Management's 2015 Draft Access Undertaking, November 2016, section 4.8.2

⁵⁸ QCA, Final Decision on DBCT Management's 2015 Draft Access Undertaking, November 2016, p. 93

⁵⁹ User Group April 2020 Submission, p. 20

⁶⁰ DBCTM July 2018 Declaration Review Submission, pp.101 and 102, see also figure 18

⁶¹ User Group April 2020 Submission, section 4.3, p. 13

- 90.1 First, a reference tariff will give no certainty as to pricing for access seekers given they will be seeking access to expanded capacity.
- 90.2 Secondly, DBCT Holdings' interests will be best promoted by an access undertaking which promotes investment. Investment in the expansion of DBCT will result in further investment in the coal industry throughout the region, resulting in increased employment and coal royalties for the State. The 2019 DAU promotes investment by ensuring that DBCTM has the opportunity to negotiate appropriate access charges with access seekers, which directly improves the prospects of an expansion of DBCT and as a result the further development of the Queensland coal industry.
- 91 In contrast, if the QCA were to set a reference tariff by applying, for example, the punitively low WACC proposed by PwC in the User Group April 2020 Submission, this would have the effect of stalling investment in the terminal and could have wide-ranging implications for infrastructure throughout Queensland, which would clearly be contrary to DBCT Holdings' legitimate business interests.

The public interest, including the public interest in having competition in markets

Promoting development of the Queensland coal industry

- 92 The User Group agrees with the QCA's assessment of the public interest criterion, emphasising its strong agreement with the conclusion that:³²
- There is public interest in the promotion of sustainable and efficient development of the Queensland coal industry, which in turn, provides a stimulus to the Queensland economy, local employment and regional development.
- 93 While this is not the only consideration to be taken into account in assessing the public interest, DBCTM also agrees with this conclusion.
- 94 Crucially, for there to be development of the Queensland coal industry there *must* be incentives for efficient investment in the coal industry, and in the case of DBCT, there must be adequate incentives for an expansion such that access seekers are not hindered in their ability to develop the industry and compete with the existing users. The 2019 DAU achieves this, by providing the flexibility for DBCTM and access seekers to agree to terms that facilitate an expansion of the terminal, while providing the safety net of the QCA to ensure that pricing offered by DBCTM is efficient and reasonable (via arbitration).
- 95 The expansion of the terminal would result in over \$1.2bn of direct investment in the terminal expansion, creating an additional coal export capacity of 13.3Mtpa for decades to come, and allowing miners seeking access to DBCT to develop projects throughout the Queensland coal industry and compete with existing users in those markets.
- 96 In contrast, a reference tariff based on the WACC estimated by PwC in the User Group's April 2020 Submission would have the opposite effect. It would significantly hinder DBCTM's capability to finance an expansion to the terminal. This would have significant flow on impacts throughout the Queensland coal industry and would stifle competition in dependent markets (such as the coal tenements markets) as new access seekers would struggle to compete with existing users of DBCTM. The knowledge that they will not be able to export their coal from DBCT would also likely deter efficient new entrants from entering the coal tenements markets in the Goonyella system.
- 97 While these outcomes are clearly contrary to the public interest, it is worth noting that they are in the interests of incumbent existing users who have secured evergreen access to DBCT. It is important that the QCA critically assesses whether the User Group's views reflect those of access seekers (i.e. competitors of existing users) and the public interest, or those of its membership which consists predominantly of existing users.

Regulatory certainty and stability

98 The User Group argues:⁶²

In addition to the factors specifically recognised in the Interim Draft Decision, the DBCT User Group submits that regulatory certainty and stability of regulation is an important public interest factor, that falls well within the scope of the wide breadth of matters³³ that are encompassed in consideration of the public interest.

99 Regulatory certainty and stability is provided under Part 5 by providing the ultimate right to have access disputes, including access charges, determined by the QCA. This is supplemented by access undertakings which provide even greater regulatory certainty over the period of the access undertaking.

100 The benefits of regulatory certainty and stability do not mean that the regulatory settings should remain static or should not evolve over time. As previously explained, this interpretation would undermine the effect of the statute, which clearly anticipates that at the expiry of an access undertaking the QCA can approve a completely different access undertaking (or indeed no access undertaking), despite the ongoing declaration of the service.⁶³

101 In any event, as previously submitted the 2019 DAU provides for substantial regulatory stability for access seekers, adopting substantially the same non-pricing regulatory processes as were in place in previous access undertakings.⁶⁴

Certainty of approach to pricing

102 DBCTM strongly disagrees that the User Group's suggestion that the promotion of sustainable and efficient development of Queensland coal industry, and the public interest, requires absolute certainty as to the approach to pricing.⁶⁵

There is absolutely no doubt that the promotion of sustainable and efficient development of the Queensland coal industry require...certainty of the approach to pricing.

103 First, absolute certainty of pricing is simply not achievable in the current circumstances. As explained above, given DBCT requires an expansion to serve new access seekers, there can be no pricing certainty, even under the existing reference tariff model.

104 Secondly, the prospect that the efficient development of the Queensland coal industry requires absolute certainty as to approach to pricing is plainly inconsistent with the observed reality.

105 The 2019 DAU already offers significant certainty for existing users, more so than any other segment of the supply chain, through the non-price access protections such as the queuing and expansion processes.

106 Finally, all access seekers have the certainty under the 2019 DAU that any pricing dispute can ultimately be referred to the QCA for determination. This provides significant certainty to access seekers that the price ultimately determined for access will be reasonable and efficient.

The interests of access seekers

107 The User Group argues that access seekers are disadvantaged as compared to existing users under the 2019 DAU:⁶⁶

⁶² User Group April 2020 submission, p. 13

⁶³ DBCTM April 2020 Submission, section 2.3

⁶⁴ DBCTM April 2020 submission, section 2.3; DBCTM November 2019 submission, section 7;

⁶⁵ User Group April 2020 submission, p. 13

⁶⁶ User Group April 2020 submission, p. 14

The difficulties of negotiation (in the absence of a reference tariff) are significant [sic] exacerbated for access seekers due to:

(a) being likely to suffer more from information asymmetry;

(b) typically being under greater time pressure due to having to develop a mining project, obtain approvals, obtaining financing and equity funding, and contract rail access and rail haulage in parallel to negotiations of access to DBCT;

(c) being more likely to be a less established resources company with less financial resources to fund an arbitration and being less likely to have a portfolio of mines to spread the costs across; and

(d) not having any protections under an existing access agreement.

All of those factors leave future users more exposed to monopoly pricing under a negotiate-arbitrate model.

108 DBCTM has comprehensively addressed these arguments in its previous submissions.⁶⁷ DBCTM's response to these arguments is outlined in section 3.2 above.

109 In having regard to the interests of access seekers, the most important consideration is that without an expansion access seekers simply will not be able to gain access to DBCT. The 2019 DAU ensures that access seekers can gain access by providing the flexibility for access seekers and DBCTM to negotiate access in a way that enables an expansion to occur.

110 While existing users of DBCTM may prefer a reference tariff, in the current environment the interests of existing users are clearly not aligned with access seekers. If access seekers cannot gain access to DBCT, this advantages existing users as there is no risk of the costs of expansion being socialised, and their positions in dependent markets are protected.

The effect of excluding existing assets for pricing purposes

111 DBCTM agrees with the User Group that this factor has little impact on the issue of the appropriate pricing model.⁶⁸

112 However, the suggestion that the factor favours a reference tariff, as it 'would result in a more conscious and transparent choice in relation to the exclusion of any existing assets for pricing purposes'⁶⁹ is clearly absurd and should be given no weight. The analysis of this factor is simple – there are no relevant assets which could be excluded for pricing purposes and this factor is not relevant to the QCA's consideration of whether to approve the 2019 DAU.

113 These types of argument demonstrate that the User Group is simply attempting to make any argument that it can conceive, rather than taking a principled opposition to the 2019 DAU.

Section 168A pricing principles

114 The User Group argues that the pricing principles in section 168A, which must be had regard to in deciding whether to approve the DAU via section 138(2)(g), favour the adoption of a reference tariff:⁷⁰

Again, the DBCT User Group considers that this factor favours a reference tariff, as it would result in a more conscious and transparent choice about how pricing was being set to achieve these

⁶⁷ DBCTM April 2020 Submission, sections 3.3, 3.6, 2.2, appendices 1 and 2 ; DBCTM November 2019 Submission, section 7

⁶⁸ User Group April 2020 submission, section 4.6

⁶⁹ User Group April 2020 submission, section 4.6

⁷⁰ User Group April 2020 submission, section 4.7

outcomes (or where there was tension between these outcomes, how it had been determined to weigh or balance these outcomes against each other).

- 115 The User Group seems to suggest that section 138(2)(g) supports a reference tariff as it would enable the QCA to directly apply the pricing principles as part of the access undertaking process. This is clearly not the case, rather, the QCA should ensure that the access undertaking facilitates pricing to be agreed which gives effect to the pricing principles.

At least the efficient costs

- 116 Section 168A(a) requires that prices generate expected revenue for the service that is at least enough to meet the efficient costs of providing access to the service and include a return on investment commensurate with the regulatory and commercial risks involved.
- 117 This pricing principle is fundamental to the QCA's consideration as it provides a specific direction as to the minimum prices should be set for the regulated service – that is, they should provide for DBCTM to recover at least the efficient costs of providing the service.
- 118 This principle is particularly important in the current expansionary environment. If prices are set too low, and DBCTM cannot recover the efficient costs of undertaking an expansion, then an expansion will not take place. The negotiate arbitrate model enables access seekers and DBCTM to agree access charges that enable DBCTM to recover the costs of an expansion, reducing the risk of regulatory error.

Multi part pricing

- 119 Section 168A(b) specifies that prices should allow for multi-part pricing and price discrimination when it aids efficiency.
- 120 DBCTM considers that differences in pricing under the 2019 DAU, if any, would be immaterial. The QCA has signalled that the narrow range of historical prices are likely to be appropriate.⁷¹

In the context of impacts on investment incentives, we do not consider the possible range of access charges between users, if similar to historical ranges reported by DBCTM, would have a material impact on investment incentives relative to other matters, particularly the market price of coal.

- 121 Naturally this signal will be taken into account by the parties in negotiating access charges. DBCTM only intends to offer different prices where it reflects a difference in the service provided or a difference in the risk profile of the contract. This will allow DBCTM to tailor to the contractual and shipping needs of individual access seekers – aiding efficiency.

Related access provider

- 122 The principle set out in section 168A(c) relates to circumstances where the service provider is vertically integrated. Given that DBCTM is not vertically integrated, this pricing principle is not relevant to the QCA's consideration of the 2019 DAU.

Incentives to reduce costs or otherwise improve productivity

- 123 Section 168A(d) provides that prices should provide incentives to reduce costs or otherwise improve productivity. The negotiate arbitrate model enables access seekers to negotiate unique pricing incentives to reduce costs or otherwise improve productivity with DBCTM, based on the individual access seeker's needs.

⁷¹ QCA Interim Decision, p. 35

3.4 Socialisation and existing user agreements

Socialisation is appropriate under the negotiate arbitrate regime

124 The User Group argues that it is not appropriate to have revenue socialisation under a negotiate arbitrate model.⁷²

Yet, DBCTM's model seeks to preserve all the regulatory protections that have been introduced as an appropriate part of a reference tariff regime, with the principal example being automatic socialisation of matters including changes in volume and new capital expenditure. That is, DBCTM seeks to change the pricing model to increase its pricing while not changing the commercial and regulatory risks it faces.

125 Under the negotiate arbitrate model, socialisation will ultimately be a matter for negotiation between the parties taking into account the individual circumstances of the access seekers (or for the arbitration in circumstances where agreement cannot be reached).

126 A benefit of the negotiate arbitrate model is that it allows for more tailored outcomes accounting for the individual circumstances of the access seeker. DBCTM will be able to offer different approaches to socialisation to access seekers based on their individual risk appetite and cost sensitivity. For example:

126.1 User A who is content with the current risk allocation under the 2017 AU may agree to an access agreement that provides for socialisation.

126.2 User B, who may be more risk averse than User A, may negotiate an access agreement which does not provide for socialisation, at a slightly higher TIC which reflects the increased costs associated with the transfer of volume risk to DBCTM.

127 In circumstances where a user defaulted and contracted volumes at DBCT reduced, User A's access charges would be proportionally increased (based on the change in volumes contracted), while User B's access charges would remain the same.

128 Consideration of these trade-offs is common under other negotiate arbitrate regimes and socialisation provisions are often included in the contractual agreements under other negotiate arbitrate regimes in Australia (though naturally these contracts are confidential).⁷³ The User Group's contention that it would 'obviously be an inappropriate result' to have different approaches to socialisation, is anything but obvious.⁷⁴ Rather, the ability to tailor to different access agreements to different users and access seekers is desirable and improves allocative efficiency.

No incentive for DBCTM to take on greater credit risks

129 The User Group's assertion that DBCTM could accept greater counterparty credit risks to the detriment of other users is misguided. DBCTM has no incentive to prefer access seekers who are not creditworthy. The access queue ensures that access seekers are dealt with on a first-come first-served basis. While DBCTM can remove access seekers from the queue on the basis that they are not creditworthy,⁷⁵ it is unclear how DBCTM would leverage this ability to extract higher access charges from access seekers, who will retain the ability to have disputes regarding access charges determined by the QCA.

⁷² User Group April 2020 Submission, p. 30

⁷³ DBCTM notes that a number of its current users would have negotiated contracts with socialisation mechanisms at other terminals that do not include reference tariffs

⁷⁴ User Group April 2020 Submission p. 30

⁷⁵ 2019 DAU, s 5.9

- 130 In any event, over the upcoming regulatory period all planned expansions at DBCT are oversubscribed, meaning that if a user at DBCT were to default, there would be sufficient demand to replace it, such that there is no change in contracted tonnages.

Socialisation does not spread the agreed charges with other users

- 131 The User Group appears to suggest that if socialisation is included in an access seeker or user's access agreement, then the actual TIC agreed with another user would be spread across the remaining users if it were to default and drop its tonnages:⁷⁶

To put it plainly, socialisation means that users that are not party to commercial negotiations and arbitrations can be affected by the pricing arrangements agreed or determined without affected users having any opportunity to even raise their reviews. That is the very antithesis of the circumstances in which socialisation should apply.

- 132 This is simply not the case. Rather, if total contracted tonnage at DBCT were to reduce or increase then socialisation provisions would ensure that there would be an adjustment to the TICs of users proportionate with the change in tonnages. No regard would be given to the TIC agreed by the defaulting user or new access seeker.

Socialisation of capital expenditure.

- 133 The User Group's suggestion that new capital expenditure would be socialised without any mechanism for the review of the prudence of that expenditure is demonstrably false and shows that the User Group has not sought to meaningfully engage with the terms of the 2019 DAU.

- 134 Section 12.10 of the 2019 DAU clearly lays out the process that applies before non-expansion capital expenditure can be included in the NECAP asset base (which is recovered from users) by the QCA, for the purposes of determining disputes regarding the amended TIC following a review event⁷⁷ Specifically:⁷⁸

134.1 It provides for the QCA to approve the expenditure where access holders unanimously approve the expenditure (or do not object) and the operator has recommended the expenditure in writing.

134.2 Alternatively, the QCA can approve the expenditure following its own review of the prudence of the expenditure have regard to the factors listed in section 12.10(c).

- 135 The 2019 DAU also provides an extensive process for the review of potential expansions as set out in clearly section 12.

Existing user agreements do not prevent transition to non-socialised model

- 136 The User Group's argument that the existing user agreements would prevent a transition to a non-socialised model is confused.

- 137 The User Group initially argues that the 2019 DAU cannot be used to amend the existing user agreements which contractually provide for socialisation occurring, and will not be amended by changes to the standard access agreement,⁷⁹ suggesting that this is the only mechanism under which changes to socialisation could occur.

⁷⁶ User Group April 2020 Submission, p. 30

⁷⁷ See 2019 DAU, section s11.5(b)

⁷⁸ 2019 DAU, section 12.10

⁷⁹ User Group April 2020 Submission, p. 30

138 This characterisation is misleading. While the existing user agreements contractually provide for the socialisation of revenue, as the User Group is aware, they also provide for regular reviews of the access charges including any adjustments. Clause 7.2(a) of those agreements provides that:⁸⁰

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 each Agreement Revision Date, in accordance with the following provisions of this clause 7.2.

139 The review provisions in clause 7.2 provide for the user and DBCTM agree to the basis and amount of new charges, and where this is not possible the matter may be referred to arbitration.⁸¹

140 Given this provision, it is plain that as part of this review the socialisation provisions *could* be revisited, though as noted above, this would likely involve a compensating increase in the TIC to account for the increase in efficient costs.

141 The User Group then goes on to acknowledge that users could agree to remove socialisation, but argues that they have little incentive to:⁸²

Yet, it is difficult to see how existing users are incentivised to assist DBCTM by agreeing amendments to introduce a pricing approach they consider will allow DBCTM to engage in monopoly pricing.

In other words in the current circumstances it is not actually possible to uniformly remove socialisation across users of the terminal. Yet, without doing so, it is clear that a non-reference tariff pricing model is not appropriate.

142 The User Group is clearly trying to paint the 2019 DAU as unworkable, despite the fact that this is a non-issue. This stems from the User Group's misconception that socialisation must either apply to all users or none, which is not the case.

143 In reality users would have an incentive to remove socialisation if they considered it inappropriate as contended. The prospect that users would not have an incentive to agree to changes to remove socialisation directly contradicts the User Group's argument that socialisation is not appropriate under a negotiate arbitrate model.

144 Even if users did not have an incentive to agree to such changes, the User Group ignores that where an agreement is unable to be reached, the review of access charges is to be referred to arbitration. In these circumstances the QCA could decide either to retain socialisation or not.

145 In any event, it is disingenuous to suggest that the existing user agreements prevent a transition to a non-socialised model, if it were appropriate in the circumstances.

Existing user agreements are well-equipped for removal of reference tariff

146 The User Group's argument that a non-reference tariff model is inappropriate given the terms of the existing user agreements is nonsensical.⁸³

147 The User Group points to provisions in the existing user agreements which integrate the mechanics of the current 2017 AU and the reference tariff model noting that the provisions 'do not appear to operate as

⁸⁰ DBCT 2017 Access Undertaking, Standard Access Agreement, cl. 7.2(a)

⁸¹ DBCT 2017 Access Undertaking, Standard Access Agreement, cl. 7.2(c)

⁸² User Group April 2020 Submission, p. 31

⁸³ User Group April 2020 Submission, section 10, p. 32

intended without reference tariffs'.⁸⁴ The User Group uses this to argue that an access undertaking without a reference tariff would result in uncertainty and that the existing user agreements would not function as intended.

148 Naturally, the current existing user agreements contemplate that *during the current regulatory period* there will be a reference tariff and include terms that reflect this.

149 However the User Group conveniently ignores that the existing user agreements *clearly* provide for these provisions to be periodically revised, as noted above.⁸⁵

150 The existing user agreements clearly envisage that the method of determining access charges may vary over time and include clause 7.2 in order to allow for drafting changes to be made to address this.

151 The issues raised by the User Group in this regard are completely without foundation.

3.5 Reference tariff and PwC WACC

152 DBCTM does not propose to engage with the PwC report provided by the User Group as part of its April 2020 submission, as the 2019 DAU as proposed by DBCTM does not require that a WACC be determined by the QCA as part of the access undertaking.

153 However, DBCTM does note that if the QCA were to adopt a reference tariff model applying the WACC proposed by the User Group, this would have significant adverse impacts on access seekers at DBCTM, as it would not be sufficient to allow DBCTM to recover the efficient costs of expanding the terminal. Without an expansion to the terminal, access seekers would not be able to ship coal at DBCT, and would be prevented from competing with existing users in dependent markets, such as the coal tenements markets. The PwC report did not seem to consider a critical component of the Object of Part 5 of the QCA Act, being 'investment in' the infrastructure.

3.6 User Group's misleading comments regarding Conditional Access Agreements

154 The User Group seeks to mislead the QCA and stakeholders when it argues that DBCTM's implementation of the existing access queue process is inappropriate, despite the demonstrable fact that DBCTM's actions were in full compliance with the 2017 AU. DBCTM submits that the QCA should dismiss such arguments, which are quoted below:⁸⁶

In particular, since the 1st User Group Submissions, DBCTM has sought to require that:

(a) access seekers sign a conditional access agreement committing to :

(i) without any specific expansion specified (and therefore the potential cost and capacity of such expansion unknown);

(ii) without any of the conditions precedent specified in clause 5.4(j) in relation to expansion development proceeding within a certain time and cost, corresponding supply chain expansions and obtaining matching supply chain rights being included; and

(b) access seekers sign an underwriting agreement to fund feasibility studies without any specific expansion, scope of study or funding envelope included, and threatened to remove access seekers from the queue who did not sign such arrangements.

⁸⁴ User Group April 2020 Submission, section 10, p. 32

⁸⁵ DBCT 2017 Access Undertaking, Standard Access Agreement, cl. 7.2(a)

⁸⁶ User Group April 2020 submission, section 3.2 ,p. 39

That conduct has made it clear that the existing expansion framework provides insufficient protection to access seekers in relation to expansion proposals.

Scope of expansion

- 155 The User Group contention that access seekers were asked to sign up to a Conditional Access Agreement (CAA) and Standard Underwriting Agreement (SUA) "...without any specific expansion specified..." is demonstrably false.
- 156 The CAA and the Expansion Notice both specify that the CAA relates to the proposed 8X expansion.⁸⁷ The 2017 AU does not require DBCTM to specify the potential cost and capacity of the expansion (indeed clarifying the cost and capacity of an expansion is the primary purpose of conducting feasibility studies). Notwithstanding this, the CAA references DBCTM's 2019 Master Plan which clearly lays out DBCTM's current expectations regarding the cost and increase in capacity from the 8X expansion.
- 157 Likewise the SUA which was issued to access seekers in February 2020 sets the specific expansion, scope of study and funding envelope summarised in Annexure 1 to the SUA issued to Access Seekers.⁸⁸

Conditions precedent

- 158 DBCTM is not required to include any of the conditions precedent specified in clause 5.4(j) as part of a CAA. Specifically section 5.4(j)(3) of the 2017 AU states that the CAA "...may be (**but need not be**) subject to..." such conditions precedent. In any case, these issues are contemplated in termination provisions of the CAA, in the Standard Access Agreement attached to the CAA, and in the Access Applications to which the CAA relates. DBCTM implemented a single practical condition precedent, which was the execution of an SUA for the required FEL 2 Studies. Importantly, this approach made the CAA effective within the window provided by clause 20(e) of the Existing User Agreements in the concurrent options extension process, allowing DBCTM to more efficiently manage the demand for the terminal.

Potential removal of non-complying access seekers

- 159 DBCTM rejects the pejorative contention that it 'threatened' to remove access seekers from the queue. The attached expansion and underwriting notices show that no such threats were made or implied. DBCTM simply reminds access seekers that, consistent with the 2017 AU, an access seeker may be removed from the queue if they do not enter into an SUA. This reminder was included in the notices for the convenience of the access seekers. In many cases in the past DBCTM has agreed to extend deadlines where the relevant party requires additional time. However, in this case DBCTM was less inclined to extend past the deadline as it would result in material flow-on effects to the expansion timeline. Given this, DBCTM considered it appropriate to remind access seekers that under the 2017 AU they may be removed from the queue if they did not commit to underwrite a feasibility study.
- 160 It is also important to note that the ability to remove access seekers from the queue who do not intend to take capacity, or who are not prepared to fund an expansion, is a crucial part of the efficient operation of the access queue.

DBCTM has consulted extensively throughout the expansion process to the benefit of access seekers

- 161 The User Group's contention that the existing expansion framework provides insufficient protection to access seekers in relation to expansion proposals, is in direct contrast to the open and collaborative expansion process that DBCTM has undertaken to date.

⁸⁷ See Appendix 3

⁸⁸ See Appendix 4

- 162 All access seekers have been consulted comprehensively on a group and individual basis throughout the expansion process, in the lead-up to creating a bona fide queue for access to genuinely required capacity for expansion tonnage, which is facilitated by the underwriting of committed access seekers of the required next step in the expansion, being the FEL 2 studies.
- 163 DBCTM has diligently and expeditiously progressed this critical part of the expansion process, to the benefit of all bona fide access seekers, consistent with the intent of section 5.4(l) and other provisions of the 2017 AU. This has been demonstrated by the reduction of the Queue from 56.6Mtpa of access applications, to 27.0Mtpa of CAAs offered by Access Seekers, to the resultant 14.87Mtpa of CAAs becoming effective (for the purposes of clause 20(e) of the Existing User Agreements) due to SUAs being offered by the relevant access seekers in May 2020 and subsequently executed by DBCTM.

Reference tariff provides no certainty to expanding access seekers

- 164 The User Group argues that the lack of a reference tariff would exacerbate uncertainty regarding the access charges faced by expanding access seekers:⁸⁹

That position will be significantly exacerbated in the absence of a reference tariff as that would produce even greater uncertainty as to the potential charges that an access seeker would be committing to. It is highly inappropriate that access seekers are being required to commit to expansion capacity without even knowing whether reference tariffs will remain applicable at the time of any expansion being developed.

- 165 This is patently false. As previously explained, a pre-expansion reference tariff provides no certainty of the access charges applying to expansion capacity. The 2019 DAU provides the same, or even greater, certainty for expanding access seekers as the current 2017 AU. Expanding access seekers are provided certainty throughout the process by the price ruling of the QCA. They also have the ability to agree an expansion pricing approach, with recourse to the QCA to determine the expansion pricing approach in circumstances where this cannot be mutually agreed.

Amendments proposed by the User Group

- 166 The User Group proposes two amendments to address the issue it identifies:⁹⁰

Accordingly, the DBCT User Group members submit that to be appropriate the 2019 DAU would also need to be amended to:

- (a) require the underwriting agreement to define the expansion(s) to be studied and the funding envelope for the study; and
- (b) require that a conditional access agreement cannot be issued to access seekers until there is sufficient definition regarding the capacity expansion to which the conditional access agreement relates as a result of such studies.

- 167 The User Group's first proposed amendment (to require the SUA to define the expansion and study envelope) is already in place in the 2017 AU (and the 2019 DAU), demonstrating that the User Group has not meaningfully engaged with the 2019 DAU, but rather sought to oppose its implementation regardless of the content.

- 168 The User Group's second proposed amendment that the CAA cannot be issued to Access Seekers until after the FEL 3 studies are completed is not practical, as DBCTM has determined in undertaking the current process. For example:

⁸⁹ User Group April 2020 submission, section 3.2 ,p. 39

⁹⁰ User Group April 2020 submission, section 3.2 ,p. 39

- 168.1 The effect of this amendment would be that DBCTM could not secure the outcomes of the process set out in clause 20(b) of the existing user agreements until after the FEL 3 studies were completed.
 - 168.2 The 20(b) process enables DBCTM to require existing users that have an option to extend their existing user agreements to either exercise the option to extend the agreement or waive it, in circumstances where demand for terminal capacity cannot be met without an expansion. This process allows DBCTM and access seekers to avoid inefficient expenditure in the development of an expansion (i.e. through feasibility studies), where there is likely to be sufficient capacity at the Terminal without an expansion because an existing user's access agreement will lapse.
 - 168.3 This means that if sufficient waived capacity was subsequently made available to satisfy the queue, then the expansion would not be required and the significant expenditure (in the order of \$20m) up to the FEL 3 feasibility study would be wasted, and potentially borne by the underwriting access seekers.
- 169 The User Group's proposal only seeks to protect existing users from the triggering of 20(b) process under the existing user agreements, and provides no benefit to access seekers. Therefore DBCTM considers that this amendment is inappropriate.

Appendix 1 Response to User Group comments re non-pricing 2019 DAU amendments

Item	Provision of DAU	DBCTM Comments	DBCT User Group September 2019 Submission	DBCTM comment
1.	1.6 - Amendments to current Access Undertaking during DAU process	It is DBCTM's intention that any amendments to the 2017 AU submitted for approval by way of draft amending access undertaking and approved by the QCA prior to the commencement of this new DAU will be captured in the DAU prior to its final approval by the QCA. DBCTM has made note of this intent in clause 1.6 of the 2019 DAU.	<p>While the DBCT User Group appreciates that is DBCTM's intention (and the new clause 1.6(b) only records that intention) – without knowing what amendments DBCTM is proposing, the DBCT User Group is not comfortable that it is appropriate to record such an intention in the undertaking.</p> <p>The DBCT User Group notes the number of draft amending access undertakings that have been rejected by the QCA as not appropriate or withdrawn by DBCTM during the current undertaking.</p>	<p>Adopt</p> <p>DBCTM is content to remove this provision as it has no practical effect.</p>
2.	3.1(f) – remove “Trading SCB”	DBCTM will de-register the Trading SCB prior to the effective date of the 2019 DAU and has removed all references to the “Trading SCB”.	<p>DBCT User Group is willing to support this amendment provided the ultimately approved undertaking contains a clear commitment from DBCTM and its Related Bodies Corporate not to own Supply Chain Businesses (which in turn is defined widely enough to including an entity like the Trading SCB).</p> <p>It would be appropriate for DBCTM to be required to prove that it has deregistered the Trading SCB and ceased all of its operations before any changes of this nature are made (given that DBCTM promised this would occur in the declaration review processes but based on DBCTM's submission in this process it appears that that has still not occurred a long time after DBCTM first announced that intention).</p>	<p>Adopt</p> <p>DBCTM is comfortable to make a commitment not to own a Supply Chain Business, recognising that amendments to the Access Undertaking may be required in circumstances where ownership of DBCTM changed.</p> <p>DBCTM has applied to ASIC for the Trading SCB's deregistration</p>

3.	3.3 – OMC	Section 3.3 is removed in the 2019 DAU as it is not required in light of Section 3.2.	<p>The DBCT User Group continues to consider the previous clause 3.3 is appropriate for the reasons set out in the QCA decisions and DBCT User Group submissions on the inclusion of clause 3.3 in the current access undertaking.</p> <p>In particular, the independent operator is critically important to Users in terms of transparency and operational involvement of users and underpins fundamental parts of the undertaking and access agreements including the approach to pass through of operational charges.</p> <p>The purpose and effect of clause 3.3 is also different to that of clause 3.2. Clause 3.3. requires DBCTM to maintain and comply with the Operation and Maintenance Contract and ensure that it remains consistent with the principles set out in the Schedule. This provides certainty for the Users regarding the operation and maintenance of the Terminal and the terms of the Operator's appointment (which go beyond the matters dealt with in clause 3.2).</p> <p>In any event, given DBCTM's acceptance that it will need to submit a draft amended access undertaking if it was to change the operator, the DBCT User Group does not understand how this section imposes any additional burden on DBCTM.</p>	<p>Adopt</p> <p>While DBCTM maintains the view that section 3.3 is unnecessary in light of section 3.2 (indeed the User Group acknowledges this does not impose any additional burden on DBCTM), DBCTM is prepared to reinstate the provision.</p>
4.	5.3(f) - Expiry of Access Application	The 2019 DAU removes the transitional provisions around the expiration of access applications that existed at the commencement of the current Access Undertaking. The 2019 DAU provides that each Access Application will expire on the 31st August each year, regardless of when submitted.	<p>The DBCT User Group is willing to support this change, provided that paragraph (b) of the definition of Access Application also extends to clause 5.3 (to make it clear that access applications submitted prior to commencement will be Access Applications for the purposes of clause 5.3).</p> <p>The DBCT User Group accepts that a single, uniform date will reduce administrative burden and provide greater certainty for all parties in the supply chain.</p> <p>Paragraph 5.3(f)(2) is not necessary where all applications must be renewed annually. The DBCT User Group proposes clause 5.3(f) is simplified as follows:</p> <p><i>"Subject to an Access Application or Renewal Application (as applicable) lapsing or otherwise being rejected by DBCT Management in accordance with this Undertaking, any Access Application will expire on the next occurring 31 August, unless renewed under section 5.3A."</i></p>	<p>Adopt</p> <p>DBCTM is comfortable with the proposed simplification of wording.</p>

5.	5.3(g) - Notice of Expiry	Under the 2019 DAU, DBCTM is not required to notify Access Seekers about the need to renew their Access Application.	The DBCT User Group does not support this change. The User Group considers that a notice should be given to all Access Seekers at least 60 days before expiry of the Access Applications to ensure that the automatic expiry date does not result in applications not being renewed simply due to administrative oversight by an Access Seeker. The User Group does not consider that this would create a burden on DBCTM particularly given the proposed alignment of the same date for all access applications expiring and the potential importance of these applications to Access Seekers.	<p>Adopt</p> <p>While DBCTM considers that sophisticated access seekers are more than capable of managing their renewal timelines, DBCTM is prepared to reinstate the notification requirement.</p>
6.	5.3A - Renewal	The criteria for a Renewal Application under the 2019 DAU ensure that the nominated start date for access is not a date in the past, and clarify a number of points in the renewal application form in Schedule A.	<p>The DBCT User Group is willing to support the change to require the revised date of access to be a date in the future and agrees with DBCTM that that will assist with improving how the 'notifying access seeker' provisions function. The User Group suggests that the wording be clarified as the current wording may allow a date in the past provided that it is a different past date than the date previously nominated. The following is suggested to replace the proposed clause 5.3A(1):</p> <p><i>"a revised date for commencement of Access which must be no earlier than 1 September following the date of the Renewal Application"</i></p> <p>Further, the DBCT User Group notes that the term 'Renewal Application' is having 'the meaning given in Section 5.3A'. However, a meaning is not expressly given to the term in that section. The DBCT User Group suggests that the definition should be as follows:</p> <p><i>"Renewal Application means an application to renew an Access Application made under section 5.3A."</i></p> <p>In relation to the Renewal Form, the DBCT User Group queries the addition of a requirement to provide information in relation to the status of environmental approvals for the project. The DBCT User Group agrees that there is benefit in the queue being more representative of projects that may actually progress. However, the preceding item already requires a description of progress in obtaining 'necessary approvals'. The DBCT User Group therefore requests clarification from DBCTM as to what additional information it is hoping to receive, noting that in most cases it will not be possible to provide any information that is not already publicly available in relation to such approvals and is not willing to support this change until such clarification is provided.</p>	<p>Adopt/Discuss</p> <p>DBCTM proposes to adopt the User Group's proposed changes regarding the revised date of access and definition of renewal application.</p> <p>Regarding the User Group's request for clarification regarding the additional information, DBCTM hopes to receive reasonable evidence to show that mining operations are likely to commence around the time requested in the access application. DBCTM expects it may be appropriate to provide information not in the public domain where appropriate confidentiality protections are in place. DBCTM proposes to discuss this provision further with the User Group to ensure that it is fit for purpose.</p>

<p>7</p>	<p>Short Term Available Capacity 5.4(d) – (i) – various</p>	<p>In order to promote the efficient allocation of short-term capacity which may become available from time to time, the 2019 DAU includes a Notifying Access Seeker process for 'Short-Term Available Capacity'. 'Short-Term Available Capacity' is defined as "Available System Capacity which is available commencing within the next 12 months and that is not able to be renewed".</p>	<p>The DBCT User Group is aligned with DBCTM on wanting to promote short term surplus capacity being utilised.</p> <p>However, the DBCT User Group considers that some more guidance should be set out in the DAU about what will constitute 'Short-Term Available Capacity' and how that Short-Term Available Capacity may be offered to the access seekers in the queue.</p> <p>The current definition (coupled with the terms of the Standard Access Agreement which only provided renewal rights if the term is longer than 10 years) suggest that 'Short-Term Available Capacity' is capacity with a term of anything less than 10 years. If that is the intention – it changes the nature of how 'Short-Term Available Capacity' should be dealt with in the undertaking – give that, for example, it is a major commitment to sign an access agreement for 9 years.</p> <p>The DBCT User Group is concerned that the limited criteria the definition of Short-term Capacity may result in capacity that should be offered as long-term capacity instead being offered as Short-Term within Capacity which does not have the same renewal rights and protections afforded to long-term Users.</p> <p>The DBCT User Group considers that only capacity that is available either due to a ramp-up period (which should only ever be available for up to 4 years given the changes proposed to the access application forms) or capacity that is available for a limited period between the expiry/termination of a contract and the known commencement of a new contract (which again should only ever be for a period of a few years) should be offered as long-term capacity (except in the situation where it has been allocated to a User from a future date). However, under current drafting, the DBCT User Group is concerned that capacity could be offered as Short-Term Available Capacity at DBCTM's discretion (even if it was available as long-term renewable capacity).</p>	<p>Discuss/Adopt</p> <p><i>Rights to renewal</i></p> <p>DBCTM proposes to discuss this issue further with the User Group.</p> <p>For context, in the upcoming regulatory period there is a maximum available capacity of 1.4 mtpa in 2021-22. This means that there is no risk that DBCTM will offer capacity that should be offered as long term capacity as short-term capacity, and there seems to be little need for greater prescription regarding what constitutes Short-Term Available Capacity in the 2019 DAU.</p> <p>More generally, DBCTM will offer long-term capacity (with renewal rights) where available. DBCTM does not consider it appropriate to offer renewal rights for contracts under 10 years. To do so would afford greater rights to new access seekers who, without committing to long term capacity, would secure evergreen renewal rights. This may create unintended incentives for capacity hoarding whereby the attractiveness of evergreen rights means the access seeker secures capacity in the short term to reserve its evergreen status.</p>
----------	---	---	--	---

			<p>It is also not clear whether any Short-Term Available Capacity will be offered in a bundle, or if not, how DBCTM may choose to parcel it up. For example, in a situation where the capacity is available during a ramp up of a new access agreement, will the available capacity over the ramp up period be offered to the Queue as a single block (of decreasing capacity over the 4 year ramp up period) or offered as 4 x 1 year blocks. If there is 10MT of available capacity will that be offered as 10MT or two parcels of 5MT etc? The way that the capacity is packaged would impact upon a User's ability to use it and the User Group therefore requests clarity on this issue.</p> <p>The DBCT User Group is happy for the Short-Term Available Capacity to be offered to the Queue in a similar manner to other Available System Capacity but with shorter timeframes applying. However, rather than the 30 day timeframe proposed, the DBCT User Group submits that 60 days would be a more appropriate timeframe for Users to make a decision whether to take up the Short-Term Available Capacity and organise the relevant documents and security where the Short-term Capacity is for a term of 5 years or less and 90 days if it is for a period of over 5 years.</p> <p>The DBCT User Group agrees with DBCTM's acknowledgement that not all access seekers will want 'Short-Term Available Capacity', such that it is critically important if this process is included to include (i)(2) regarding a failure to submit an access agreement in respect of Short-Term Available Capacity not affecting an access seekers' position in the queue.</p>	<p><i>Timeframes</i></p> <p>DBCTM is comfortable adopting the changes to the timeframes for accepting an offer of short-term capacity.</p>
--	--	--	--	--

8.	5.4(e)(1) - Notifying Access Seeker date for commencement of Access	To promote the efficient allocation of Available Capacity to Access Seekers in the Queue, the 2019 DAU has removed the requirement for a Notifying Access Seeker to seek Access at a date which 6 months earlier than that of the Access Seeker who is first in the Queue. A Notifying Access Seeker need only seek Access from a date that is earlier than that of the Access Seeker who is first in the Queue.	<p>The DBCT User Group supports the concept that the Notifying Access Seeker does not need to nominate a date that is at least 6 months before the access seeker which is then first in the queue – but considers that it should be made clear that the notifying access seeker:</p> <ul style="list-style-type: none"> cannot nominate a date in the past (given that to obtain access, other access seekers in the queue have to match the commencement date sought); and will be deemed to have sought access from a date earlier than that of the first access seeker if it seeks access commencing within 3 months of giving the notice that triggers the notifying access seeker process if for any reason the access seeker that is first in the queue has a date for commencing access that is already in the past 	<p>Discuss</p> <p>DBCTM is comfortable with the changes proposed by the User Group, however, it considers that 6 month period makes more sense from a commercial perspective.</p> <p>DBCTM proposes to discuss an appropriate time period with the User Group.</p>
9.	5.4(e)(4) - Notifying Access Seekers and the Queue	The 2019 DAU provides that all Access Seekers in the Queue are to be notified when a Notifying Access Seeker requests Access. This will mean that all Access Seekers in the Queue (and not just those higher in the Queue) will be 'Notified Access Seekers'.	<p>The DBCT User Group supports the principle that all access seekers in the queue should be notified.</p> <p>However, the DBCT User Group submits that:</p> <ul style="list-style-type: none"> DBCTM's amendments appear to unintentionally mean that all access seekers in the queue (who by this amendment are Notified Access Seekers) would have priority over the Notifying Access Seeker – which should not be the case if the Notifying Access Seeker is already in the queue (unless they are actually last in the queue). Priority should be based on order in the queue – which means that the Notifying Access Seeker should have priority over those access seekers who are behind them in the queue (if any). This would require some consequential amendments. DBCTM's proposed Security requirements should be included in the notice to permit interested Users to consider these obligations in connection of its assessment whether to take up the offered capacity and obtain any required Security within the relevant timeframes. 	<p>Partial Adoption / Rejection</p> <p>DBCTM agrees with the issue identified in the first point and proposes to make amendments to address this issue.</p> <p>DBCTM does not consider that the suggestion in the second point is practically workable, however DBCTM is willing to engage with access seekers on a case-by-case basis to discuss DBCTM's likely security requirements.</p>

<p>10.</p>	<p>5.4(f)(3) –Start date for access in NAS process</p>	<p>Section 5.4(f)(3) provides that if the NAS notification period of three months spans two financial years, the earliest possible commencement date for Access for both the Notifying Access Seeker and all Notified Access Seekers will be deemed to be the first day of the new Financial Year. DBCTM considers this a reasonable outcome in circumstances where the relevant Notified or Notifying Access Seeker has not actually received access during the relevant Financial Year. Practically, because of the annual true up mechanisms for Access charges under the Standard Access Agreements, it is not possible for DBCTM to later enter into a contract that has a commencement date in the previous Financial Year, as this would impact the charges paid by all Access Holders.</p>	<p>The DBCT User Group supports this amendment and agrees with the practicalities of calculation that DBCTM has raised.</p>	<p>No issue</p>
------------	--	--	---	------------------------

11.	5.4(f) – grounds to cease negotiations with Notified or Notifying Access Seeker	The 2019 DAU clarifies that DBCTM should not be obliged to enter into an Access Agreement with a Notified Access Seeker in circumstances where, had the normal Indicative Access Proposal process been followed in accordance with Sections 5.6- 5.8, DBCTM would be entitled to cease negotiations under Section 5.8.	<p>In principle, the DBCT User Group supports this amendment, because as a matter of principle the ability to cease negotiations should be equal between these circumstances. However, as set out below, the DBCT User Group is not supportive of all of DBCTM's proposed amendments to section 5.8 which go further than the issues described here.</p> <p>As mentioned above in item 9, in order for required Security to be obtained within the required timeframe under clause 5.4(f)(2) DBCT should be obliged to notify its Security requirements to each Notified Access Seeker at the time of issue of the Notice under clause 5.4(e)(4).</p>	<p>No issue</p> <p>No issue with this specific provision.</p> <p>DBCTM does not have sufficient information available at the time it issues the notice to be able to advise of the security requirements, so cannot adopt this suggestion</p>
12.	5.4(g) - Issues with provision of Security	To promote the timely negotiation and conclusion of Access Agreements if an Access Seeker has an issue with the Security requested by DBCTM, the Access Seeker should raise the dispute within 14 days of receiving notice of such Security requirement.	The DBCT User Group supports this amendment but prefers that the timeframe be specified as 10 Business Days rather than 14 days (in case this process is triggered at a time of year when there are numerous public holidays and the timeframe is effectively less working days than anticipated).	<p>Adopt</p> <p>DBCTM is comfortable with the User Group's proposed alternative timeline.</p>
13.	5.4(h) – time period for acceptance of offer by Notifying Access Seeker	2019 DAU includes a time period for a Notifying Access Seeker to accept an offer and enter into an Access Agreement for Capacity remaining at the end of the NAS process.	The DBCT User Group supports this change, subject to the Notifying Access Seeker being afforded the same rights to dispute the required Security and additional timeframe to obtain Security as afforded to Notified Access Seekers under clause 5.4(g).	<p>Adopt</p> <p>DBCTM is comfortable with this proposed change.</p>

<p>14.</p>	<p>5.4(i)(1) - Position in Queue may be lost by not executing Access Agreement</p>	<p>To promote the efficient operation of the Queue and the efficient allocation of capacity, the 2019 DAU provides that Notified Access Seekers:</p> <p>1 with a commencement date that is within 2 years of the Notifying Access Seeker's nominated start date;</p> <p>2 who do not respond with a signed Access Agreement within the 3-month notification period,</p> <p>may be removed from the Queue.</p> <p>The ability to remove Access Seekers from the Queue does not apply where an Access Seeker has not accepted an offer of Short-Term Available Capacity.</p>	<p>The DBCT User Group supports efforts to provide clearer and more objective rules (and therefore greater certainty to all participants) as to which access seekers would be removed from the queue in these circumstances.</p> <p>The DBCT User Group also supports the ability to remove a Notified Access Seeker from the Queue if they do not take up capacity with a commencement date within only a short timeframe in advance of their proposed access commencement date. However, the DBCT User Group considers that 12 months, rather than 2 years, is a more appropriate timeframe in this situation as an additional 2 years of charges is so significant a cost that refusal to take on that obligation should not result in removal from the queue. The requirement that a dispute be 'bona fide' should be removed from this clause. Any dispute (whether or not in DBCTM's view it is bona fide) should have to be resolved before an Access Seeker is removed from the queue.</p> <p>The DBCT User Group requests that a clarification should be included to confirm that if a Notified Access Seeker responds with a signed Access Agreement in respect of a lower Tonnage, or shorter term than their Access Application, they will retain their place in the Queue in respect of the remaining Tonnage or term applied for.</p> <p>In addition, the DBCT User Group is concerned that when clause 5.4(i)(1) refers to execution of an access agreement it does not confine that to one that has a start date sufficient to give the Notified Access Seeker priority under clause 5.4(f) (which is presumably what was intended).</p>	<p>Adopt / Discuss</p> <p><i>Timeframe</i></p> <p>DBCTM is comfortable reducing the timeframe to 1 year</p> <p><i>Bona fide disputes</i></p> <p>DBCTM is comfortable removing the reference to the access dispute being 'bona-fide'.</p> <p><i>Queue position for lower tonnages</i></p> <p>DBCTM is reluctant to make this amendment/clarification. DBCTM is concerned that this change could create an incentive for access seekers to mount very large access applications to reserve places in the queue for tonnage not contracted for in the first tranche(s). DBCTM proposes to discuss this issue and potential solutions with the User Group.</p> <p><i>Start date</i></p> <p>DBCTM is comfortable clarifying the reference to the execution of an access agreement is confined to where the start date is sufficient to give the Notified Access Seeker priority.</p>
------------	--	--	--	--

15.	5.4(i)(5) - Access Seeker may accept lesser tonnage if insufficient capacity for tonnage applied for	The 2019 DAU includes a time period for an Access Seeker to accept an offer and enter into an Access Agreement for capacity if the available Capacity is less than that required in the Access Seeker's Access Application.	<p>The DBCT User Group supports the introduction of a timeframe for accepting offers of lesser capacity.</p> <p>However, the DBCT User Group does not consider it appropriate for DBCTM to be able to remove an Access Seeker from the Queue if they do not take up an offer for a lesser amount than sought in an Access Application as proposed in clause 5,4(i)(6). It may be, for example, that access for the full amount is necessary to support a greenfield mine development or mine expansion and the lesser amount is not sufficient and is therefore not accepted (even though the access seeker remains genuinely interested in the greater volume of capacity applied for). Such a right may be appropriate only if the tonnage offered was not materially lesser than the tonnage sought and DBCTM was obliged to act reasonably and provide the Access Seeker with an opportunity to justify why it should not be removed from the queue.</p>	<p>Adopt</p> <p>DBCTM is comfortable removing its ability to remove an access seeker from the queue where it does not take up a lesser amount than it was seeking in its access application.</p>
15a			<p>The DBCT User Group notes the insertion of the new clauses 5.4(j) and (k) and (l)(15) but has not commented on those clauses in this submission given the DBCT User Group's submission that the TIC should clearly remain regulated by reference tariffs (which would make these provisions unnecessary).</p> <p>If anything, these provisions demonstrate the real practical difficulties created by the removal of reference tariffs – as they involve parties being forced to sign up to long term take or pay agreements without knowing the price at which they are doing so. That evidently supports the DBCT User Group's submission that the TIC should remain regulated by reference tariffs.</p>	<p>Discuss</p> <p>The provisions referred to by the User Group have been included to ensure that the pricing model without a reference tariff is practically workable, it does not demonstrate that it is not.</p> <p>DBCTM welcomes any feedback from the User Group on how these provisions could be made more practically workable. DBCTM understands the User Group's position regarding the removal of the reference tariff. DBCTM does not consider that it will prejudice the User Group's position if it collaborates with DBCTM on how to make the AU workable in the event that the QCA decides that it is appropriate without a reference tariff.</p>

16.	5.4(w) - Dispute in relation to reordering of a queue	The 2019 DAU requires that any dispute in relation to the re-ordering of a queue be raised by an Access Seeker within 15 Business Days after receiving notice of the re-ordering. This will allow any Dispute to be raised and resolved in a timely manner which is to the benefit of all Access Seekers.	The DBCT User Group supports this amendment.	No issue
17.	5.6(a) - Response to IAP for Short-Term Available Capacity	The 2019 DAU includes a requirement for Access Seekers to notify DBCTM of any intention to progress an Access Application for Short-Term Available Capacity within 14 days after receiving the Indicative Access Proposal (IAP).	The DBCT User Group supports this amendment but prefers that the timeframe be specified as 10 Business Days rather than 14 days (in case this process is triggered at a time of year when there are numerous public holidays and the timeframe is effectively less working days than anticipated).	Adopt
18.	5.7(a) - Parties to negotiate if Access Seeker wishes to enter Access Agreement	The 2019 DAU requires Access Seekers to commence negotiations within 14 days of indicating an intention to progress an Access Application on the basis of an Indicative Access Proposal.	The DBCT User Group supports this amendment but prefers that the timeframe be specified as 10 Business Days rather than 14 days (in case this process is triggered at a time of year when there are numerous public holidays and the timeframe is effectively less working days than anticipated).	Adopt

19.	5.8 Negotiation Cessation Notice	In order to promote efficient negotiation with Access Seekers, the 2019 DAU allows for additional grounds to cease negotiation with those Access Seekers who do not have the ability to utilise the capacity sought from the nominated commencement date or who are not willing to provide the necessary Security required by DBCTM. The 2019 DAU includes the broader definition of "Related Entity".	<p>While the User Group understands the intention behind these amendments, the wording should recognise that many factors may impact upon the date of commencement of shipping and a User's position in relation to financing over the period that an Access Seeker is negotiating access. The following wording is proposed:</p> <p>5.8(a)(3) amend proposed wording as follows "or <u>within a reasonable period after from</u> the nominated commencement date for Access;"</p> <p>5.8(a)(4) amend proposed wording as follows: "or that the Access Seeker is not willing or able to provide security reasonably requested by DBCT Management in accordance with Section 5.9 <u>by the time that Security is required to be provided in accordance with an Access Agreement</u>"</p>	<p>Adopt / Discuss</p> <p>DBCTM is comfortable adopting the first amendment proposed by the User Group.</p> <p>DBCTM proposes to discuss the second proposed amendment. The purpose of the second amendment is unclear, and does not seem workable from a practical perspective given that negotiations will occur prior to entering into an Access Agreement.</p>
20.	5.13 – Access Transfers	The 2019 DAU's criteria in Section 5.13(a)(1) and (2) are drafted as alternatives, and not cumulative, criteria. DBCTM considers this was the intended operation of the section in the current access undertaking	While the previous drafting did not include either an 'and' or an 'or' between the subsections, the DBCT User Group agrees the intent was for these to be alternatives, and accepts that it is appropriate that DBCTM is not required to consent to an access transfer where either the assignor is in material breach of their access agreement <i>or</i> one of the matters in subsection (2) about financial standing, capability to perform or matching of below rail entitlements applies.	<p>No issue</p>

<p>21.</p>	<p>8.4 - Reporting of aggregated information</p>	<p>In order to promote the efficient operation of the rail network and capacity at DBCT, the 2019 DAU provides DBCTM the ability to provide the rail network provider with notice when an Access Holder does not renew its Annual Contract Tonnage in whole or in part (noting that exercise of options to extend generally occur 1 year out from the expiry date).</p>	<p>The DBCT User Group is willing to support provision of aggregated information to the rail network provider but not information on individual Users who do not extend or renew in whole or part. While, the DBCT User Group understand the intention of trying to produce greater alignment – the terminal regulatory framework already has measures which seek to address that (by making rail capability part of the access application process and having the capacity available for contracting based on system capacity for example). The appropriate place for managing the misalignment is the Aurizon Network access undertaking where port capacity should be being demonstrated before rail capacity is contracted.</p>	<p>Discuss</p> <p>The provision of aggregated information as proposed by the User Group would hinder DBCTM's ability to achieve its objective of supply chain alignment. DBCTM considers it will produce better outcomes if it is able to identify relevant Access Holders in order to improve the efficiency of the system.</p> <p>DBCTM proposes to discuss this issue with the User Group, in order to form a clear problem definition. DBCTM will then consider if there are alternative protections that can be put in place to address the User Group's concerns, that do not come at the cost of supply chain efficiency.</p>
------------	--	---	---	---

22.	9 – Ring Fencing	DBCTM will de-register the Trading SCB prior to the effective date of the 2019 DAU and has removed all references to the Trading SCB, including the consequential amendments to Section 9.	<p>The DBCT User Group is willing to support this amendment provided the ultimate undertaking contains a clear commitment from DBCTM and its Related Bodies Corporate not to own Supply Chain Businesses (which in turn is defined widely enough to include an entity like the Trading SCB).</p> <p>It would be appropriate for DBCTM to be required to prove that it has deregistered the Trading SCB and ceased all of its operations before any changes of this nature are made (given that DBCTM promised this would occur in the declaration review processes but based on DBCTM's submission in this process it appears that it may not yet have occurred despite a long time having passed since DBCTM announced this intention).</p>	<p>Adopt</p> <p>DBCTM is comfortable to make a commitment not to own a Supply Chain Business, recognising that amendments to the Access Undertaking may be required in circumstances where ownership of DBCTM changed.</p> <p>If the QCA requires, DBCTM will produce clear evidence that all operations of the Trading SCB have long since ceased. DBCTM has almost completed the process of the official deregistering of the Trading SCB (and can provide evidence of such), but notes the remarkably drawn out process involved in dissolving an entity</p>
23.	12.1(h) - Independent expert to consult	Given the make-up of the ILC, if the ILC is the independent expert in respect of a capacity estimation, DBCTM considers it reasonable to assume that the membership of the ILC will be have been consulted as necessary for any ILC determination.	<p>The User Group opposes this change.</p> <p>The Integrated Logistics Company (ILC) is intended to be an independent supply chain body. It cannot be assumed that all entities that are members will have been consulted when the ILC is engaged by DBCTM to provide capacity estimates.</p> <p>The DBCT User Group also notes that the membership of the ILC can change (noting some users have withdrawn from their membership of the ILC in recent years). Given consultation can occur with the User Group in capacity forums together – it is not clear how DBCTM's position would reduce the time and process involved in consultation in any case.</p>	<p>Discuss</p> <p>DBCTM proposes to discuss this change with the User Group.</p> <p>This change was intended to improve the efficiency of the process, by avoiding duplication in the consultation process. A requirement for all access holders to be consulted could extend timeframes significantly, potentially resulting in periods of time where DBCTM is unable to contract capacity when it otherwise could.</p>

24.	12.1(i) - Objection to estimation by independent expert	To promote certainty and to ensure there are no unnecessary challenges to the independent expert's decision, the 2019 DAU provides that the only grounds of objection to the capacity assessment undertaken by an independent expert should be that it is made in breach of the AU or an Access Agreement or in manifest error.	<p>The User Group opposes this change.</p> <p>No justification of any merit has been provided as to why determinations made in bad faith should not be able to be disputed (which is one of the outcomes of DBCTM's changes).</p> <p>In addition, the DBCT User Group continues to consider that it is appropriate that where a material volume of Users (by tonnage) object on similar grounds – as was the case under the previous drafting of clause 12.1(i) – that there is an ability to dispute the estimate.</p> <p>Manifest error is too high and unclear a standard for these purposes. All of the changes to this provision should therefore be rejected.</p>	<p>Adopt</p> <p>The proposed changes were designed to improve efficiency by removing the ability to make ambit challenges that would likely result in the QCA ruling against the challenger in any event.</p> <p>DBCTM is content to reinstate the original drafting of this clause, given the User Group's concerns.</p>
25.	Schedule A	The 2019 DAU updates the form of the Access Application and Renewal Application contained in Schedule A.	The DBCT User Group accepts that for the most part these updates are simply clarifications or consequential changes and does not object to them except as set out in Item 6 above.	<p>No issue</p>

Appendix 2 Contract Profile & Access Seekers

- 1 DBCTM confirmed in its April submission that the terminal is currently contracted to its System Capacity of 84.2Mtpa.⁹¹ DBCTM can further confirm that a long term contract for 0.13Mtpa (which was being finalised at the time of the April submission) was executed [REDACTED] and that the terminal is unconditionally contracted to its System Capacity of 84.2Mtpa.
- 2 In the same submission, DBCTM noted that it is fully contracted to 84.2Mtpa until at the earliest 30 June 2028, following the contract extensions exercised by users under the clause 20(b) process. The users did not waive any extensions, and consequently no existing capacity is available to the access queue.⁹² Access Seekers will therefore have to contract 8X expansion capacity.⁹³
- 3 DBCTM received signed Conditional Access Agreements (CAAs) as part of the 8X expansion study totalling 27.0Mtpa (at peak). In February 2020, Access Seekers were requested to submit signed Standard Underwriting Agreements (SUAs) to DBCTM in order to underwrite the FEL 2 feasibility studies required for the expansion.
- 4 In May 2020, DBCTM received signed SUAs from Access Seekers supporting CAAs for 14.87Mtpa, which is 1.57Mtpa more than the total capacity (13.30Mtpa) provided by all four phases of the 8X expansion.
- 5 Access Seekers that did not submit a CAA or SUA were removed from the access queue in May 2020, effectively maintaining 14.87Mtpa of demand in the new queue. Subsequent to their removal from the queue, three Access Seekers submitted new Access Applications, increasing total demand in the new queue to 23.9Mtpa (at peak) as at 1 June 2020. The new queue is summarised below.

Position	Access Seeker	Mine	Access Type ⁹⁴	Max Mtpa	Term (years)
1	[REDACTED]	[REDACTED]	CAA & SUA	[REDACTED]	10.0
2	[REDACTED]	[REDACTED]	CAA & SUA	[REDACTED]	10.0
3	[REDACTED]	[REDACTED]	CAA & SUA	[REDACTED]	10.0
4	[REDACTED]	[REDACTED]	CAA & SUA	[REDACTED]	10.0
5	[REDACTED]	[REDACTED]	CAA & SUA ⁹⁵	[REDACTED]	10.0
6	[REDACTED]	[REDACTED]	Access Application	[REDACTED]	10.0
7	[REDACTED]	[REDACTED]	Access Application	[REDACTED]	10.0
8	[REDACTED]	[REDACTED]	Access Application	[REDACTED]	10.0
Total				23.87	

- 6 The Access Seekers in the new queue either signed CAAs & SUAs (thereby oversubscribing the 8X expansion) or submitted Access Applications to DBCTM recently - with the uncertainty of whether DBCT would be regulated or not, whether or not a reference tariff would apply, and in knowledge of the proposed 2019 DAU.
- 7 The above facts are compelling evidence that Access Seekers are resilient to high levels of uncertainty. This directly refutes the misleading assertions made by the DBCT User Group in its April submission, some of which are:

A reference tariff is the only method by which upfront certainty can be provided.⁹⁶

⁹¹ DBCTM April 2020 submission, p. 46

⁹² [REDACTED]

⁹³ DBCTM April 2020 submission, pp. 46-47

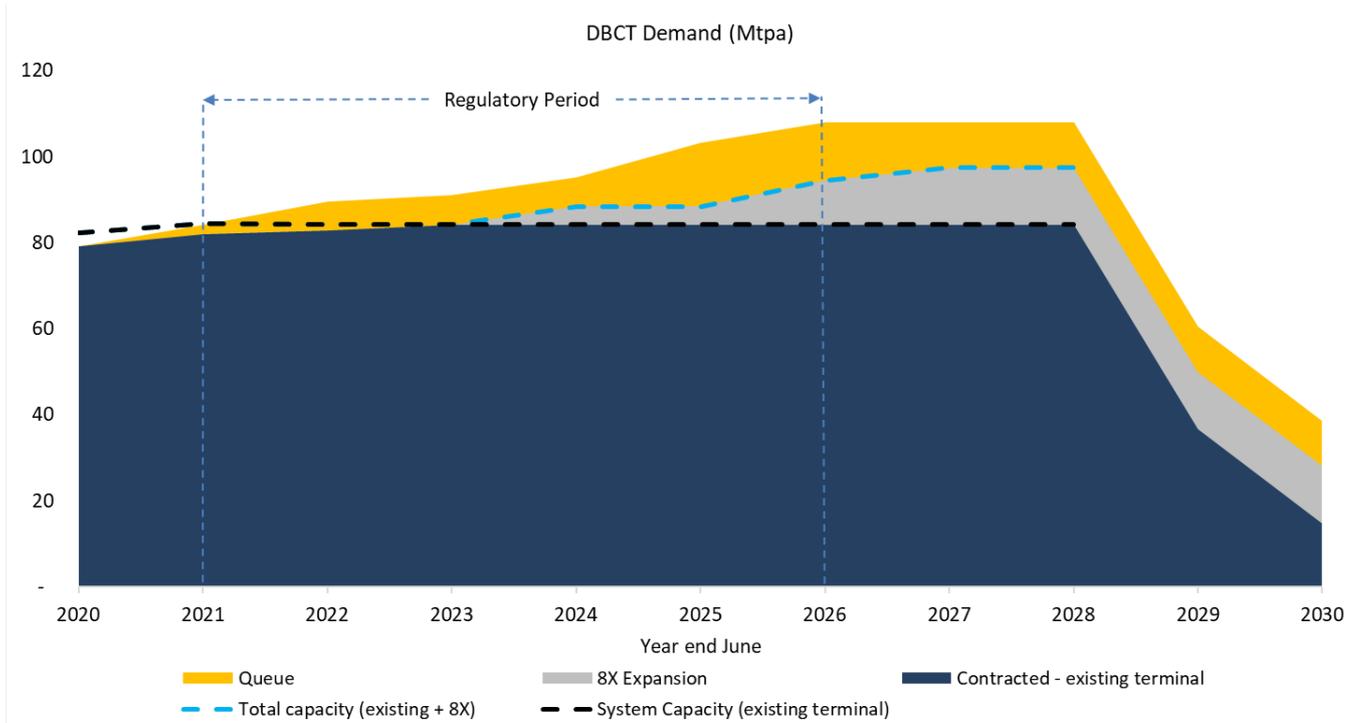
⁹⁴ Access Type CAA & SUA – as supported by signed CAAs and SUAs for the 8X expansion

⁹⁵ [REDACTED]

⁹⁶ User Group April 2020 submission, p. 24

That position will be significantly exacerbated in the absence of a reference tariff as that would produce even greater uncertainty as to the potential charges that an access seeker would be committing to. It is highly inappropriate that access seekers are being required to commit to expansion capacity without even knowing whether reference tariffs will remain applicable at the time of any expansion being developed.⁹⁷

8 The graph below has been updated since the April submission to illustrate the latest contract profile, demand in the queue, the 8X expansion capacity and the Regulatory Period under review.



⁹⁷ User Group April 2020 submission, p. 39

Appendix 3 Expansion Notice and Conditional Access Agreement

Redacted

Appendix 4 Underwriting Notice and SUA

Redacted