

# **Dalrymple Bay Coal Terminal Access Holders and Access Seekers**



**Application for Authorisation to the Australian Competition and  
Consumer Commission**

21 December 2020

## 1 Introduction

This application for authorisation (the **Application**) is made by existing access holders and access seekers of the Dalrymple Bay Coal Terminal (**DBCT**), located in the Port of Hay Point, south of Mackay in Queensland.

The applicants collectively represent the vast majority of the existing users of DBCT, and a number of companies that have signed a conditional access agreement in relation to future access to DBCT utilising proposed expansion capacity.

Authorisation is being sought for:

- (a) the collective negotiation by such existing and potential future users with the access provider, DBCT Management Pty Ltd (**DBCTM**) of the terms and conditions of access (principally pricing) relating to use of DBCT's coal handling service; and
- (b) a potential collective arbitration if those negotiations fail to resolve the terms of access.

Accordingly, the Application is made under section 88 of the *Competition and Consumer Act 2010* (Cth) (**CCA**) seeking authorisation for the making or giving effect to any potential:

- (c) contract, arrangement or understanding which may be a cartel provision within the meaning of Division 1 of Part IV of the CCA; or
- (d) contract, arrangement or understanding or concerted practice that may result in a substantial lessening of competition in a market,

arising from such a collective negotiation and potential collective arbitration.

Authorisation is sought both for the named Applicants (and their successors, joint venturers and related bodies corporate) and for the benefit of any other future access seekers and access holders of DBCT.

This application is being made because of changes in the Queensland access regulation framework that applies to DBCT, which would remove the independently determined reference tariff that currently constrains DBCTM's market power.

Given the imminent timing of those changes being implemented and the access and pricing negotiations they will necessitate, the Applicants also seek interim authorisation.

## 2 Parties to the Proposed Conduct

1. Provide details of the applicants for authorisation, including:

1.1 name, address (registered office), telephone number and ACN

1.2 contact person's name, position, telephone number and email address

1.3 a description of business activities

1.4 email address for service of documents in Australia

### 2.1 Applicants

The Applicants are all mining companies with operating coal mines or coal development projects in the central Bowen Basin, which utilise, or propose to utilise, the coal handling services provided by DBCT.

Details of each of the Applicants, their business and appropriate contacts in respect of this Application are provided below:

Applicant	Description of business activities	Contact Details
Anglo American Metallurgical Coal Pty Ltd (ACN 076)	The Australian metallurgical coal business unit of global mining company Anglo American. Currently an access	Ken More Manager – Infrastructure Strategy T: [REDACTED]

059 679)	holder in respect of DBCT for the Moranbah North and Grosvenor mines.	E: [REDACTED] A: Level 11, 201 Charlotte Street, Brisbane QLD 4000
BHP Billiton Mitsui Coal Pty Ltd (ACN 009 713 875)	Incorporated joint venture, 80% owned by BHP Billiton and 20% by Mitsui and current access holder at DBCT.	Alexandra Robertson Head of Integrated Operations and Engineering T: [REDACTED] E: [REDACTED] A: Level 14, 480 Queen Street, Brisbane QLD 4000
BM Alliance Coal Operations Pty Limited (ACN 096 412 752)	Manager of the BHP Mitsubishi Alliance (BMA) joint venture between BHP and Mitsubishi and current access holder at DBCT	Dan Kadziela General Manager - IROC T: [REDACTED] E: [REDACTED] A: Level 14, 480 Queen Street, Brisbane QLD 4000
Glencore Coal Assets Australia Pty Limited (ACN 163 821 928)	Australian holding company for the Australian coal business unit of global mining company Glencore. Glencore companies are currently access holders in respect of DBCT for the Hail Creek, Oaky Creek and Rolleston mines	Frank Coldwell T: [REDACTED] E: [REDACTED] A: Level 44, 1 Macquarie Place, Sydney NSW 2000
Clermont Access Pty Ltd (ACN 167 493 601)	Access holder in respect of DBCT for the Clermont mine, ultimately owned by the Clermont joint venture participants.	
Fitzroy Australia Resources Pty Ltd (ACN 615 772 391)	Privately owned coal company. A Fitzroy Australia Resources company is currently an access holder in respect of DBCT for the Carborough Downs mine.	Paul Hartfiel Manager – Marketing Operations T: [REDACTED] E: [REDACTED] A: Level 13, 120 Edward Street, Brisbane QLD 4000
Foxleigh Management Pty Ltd (ACN 089 726 492)	Subsidiary of privately owned coal company QMetco Limited, and manager of the Foxleigh joint venture. Currently an access holder in respect of DBCT for the Foxleigh mine.	Jed Davis Manager Trading & Logistics T: [REDACTED] E: [REDACTED] A: Level 15, 12 Creek Street, Brisbane QLD 4000
Peabody Energy Australia Pty Ltd (ACN 096 909 410)	Australian holding companies for the Australian operations of the US headquartered coal mining company Peabody Energy. Peabody Energy companies are currently access holders in respect of the North Goonyella, Millennium, Coppabella and Moorvale mines.	Mark Vale Associate General Counsel T: [REDACTED] E: [REDACTED] A: 100 Melbourne Street, South Brisbane QLD 4101
Peabody Energy Australia PCI (C&M Management) Pty Ltd (ACN 077 890 932)		
Pembroke Olive Downs Pty Ltd (ACN 611 674 376)	Privately owned coal company. Currently an access holder in respect of DBCT for the Olive Downs project.	Kate Lindner T: [REDACTED] E: [REDACTED] A: Level 19, 1 Macquarie Place, Sydney NSW 2000
Stanmore IP Coal Pty Ltd (ACN 606 244 615)	Subsidiary of ASX listed Australian coal miner, Stanmore Coal. Currently an access holder in respect of DBCT for the	Frederick Kotzee Chief Financial Officer T: [REDACTED] E: [REDACTED]

	Isaac Plains mine.	A: Level 15, 133 Mary Street, Brisbane QLD 4000
South32 Eagle Downs Pty Ltd (ACN 624 045 067)	Subsidiary of global mining company South 32. Currently an access seeker in respect of DBCT for the Eagle Downs coal project.	Jenna Tan – Manager JV Projects T: [REDACTED] E: [REDACTED] A: Level 7, 545 Queen Street, Brisbane QLD 4000
Whitehaven Coal Mining Limited (ACN 086 426 253)	ASX listed Australian coal miner. Currently an access seeker in respect of DBCT for the Winchester South coal project.	Keiron Rochester General Manager – Infrastructure T: [REDACTED] E: [REDACTED] A: Level 28, 257 George Street, Sydney NSW 2000

The Applicants are collectively represented by Allens in respect of this Application and the address for service of documents on the Applicants is:

John Hedge, Partner, Allens  
Level 26, 480 Queen Street, Brisbane QLD 4000  
Email: [REDACTED]

## 2.2 Other parties

*2. If applicable, provide details of the other persons and/or classes of persons who also propose to engage, or become engaged, in the proposed conduct and on whose behalf authorisation is sought. Where relevant provide:*

*2.1 name, address (registered office), telephone number and ACN*

*2.2. contract person's name, telephone number and email address*

*2.3 a description of business activities*

For the purposes of this application, 'Applicants' is intended to include:

- (a) each of the named applicants;
- (b) their respective successors and assignees;
- (c) their respective related bodies corporate and associated entities (noting that it is common for there to be multiple companies within a corporate group which hold user agreements where a corporate group manages multiple mines); and
- (d) joint venture participants in the joint ventures which the named Applicants are participants in or operators of.

This broader coverage of the authorisation applied for is necessary to ensure that the authorisation properly provides statutory immunity for all relevant parties.

In addition, the class of parties permitted to collectively negotiate under the protection of the proposed authorisation is not intended to be closed. In accordance with section 88(2) of the CCA, the authorisation is sought on terms that would allow other future access seekers to have the benefit of the authorisation if they subsequently choose to participate in the collective negotiation. This is particularly important as there is no way of knowing with certainty at the date of this application who the future access seekers in respect of DBCT capacity might be, and the Applicants are conscious of ensuring that the authorisation does not provide an impediment to future efficient new entry by excluding any future access seeker from its scope.

Details of other currently known users of DBCT which are not Applicants are provided below:

TerraCom Limited	ASX listed coal miner. Currently an access holder in respect of DBCT for the Blair Athol mine	T: [REDACTED] A: Blair Athol Mine Access Road. PO Box 131, Clermont QLD 472
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The Applicants are seeking to ensure that such users are also given the coverage of the authorisation if they seek to be included in collective negotiations in the future (which would of course be voluntary).

### **3 Proposed Conduct**

*3. Provide details of the proposed conduct, including:*

*3.1 a description of the proposed conduct and any documents that detail the terms of the proposed conduct*

*3.2 the relevant provisions of the Competition and Consumer Act 2010 (Cth) which might apply to the proposed conduct*

*3.3. the rationale for the proposed conduct*

*3.4 the term of authorisation sought and reasons for seeking this period.*

#### **3.1 Description of the proposed conduct**

The Applicants seek authorisation from the ACCC to allow them to collectively negotiate (and, if needed, collectively arbitrate) the terms of access to DBCT, most importantly in respect of pricing, with DBCTM.

More specifically, the Applicants anticipate that this would involve:

- (a) joint discussions between DBCTM and multiple users of and access seekers to DBCT;
- (b) discussions between the users of DBCT and access seekers to DBCT about those negotiations and the positions they should take in them;
- (c) joint engagement of economic, legal and other advisers to assist in such joint negotiations;
- (d) the entering into and giving effect to user agreements with terms, including pricing, resulting from those collective negotiations; and
- (e) collective arbitration of access terms where access terms are not able to be agreed with DBCTM.

#### **3.2 Proposed conduct: negotiation by existing users**

The current contractable capacity at DBCT is fully contracted, under user agreements which (for all but one existing user) are 'evergreen' in nature. That 'evergreen' nature arises from the fact that the user has an ongoing right to extend the contract for a further 5 years on or before 12 months of the then current term expiring.<sup>1</sup>

However, despite the existing capacity being fully contracted, the terms of the existing user agreements do not fix the price for the term of those contracts. Instead the existing user agreements provide for a price review to occur in respect of each successive 5 year pricing period.

As discussed further in sections 3.5 and 5 of this application below, in previous periods this review has, in practice, not occurred. Instead the price has been set by Queensland Competition Authority (**QCA**) approved reference tariffs, determined as part of the DBCT access undertaking. However, there is now significant uncertainty as to whether that will continue to be the case.

A copy of the current standard access agreement which effectively defines (in clause 7) the likely scope of negotiations that existing DBCT users and DBCTM would engage in is available from DBCTM's [website](#).

Existing user agreements are understood to all be on identical or near-identical terms in this respect.

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<sup>1</sup> Clause 20 Standard Access Agreement.

Clause 7.2 of such access agreements relevantly provides:

**7.2 Reviews on Agreement Revision Dates**

(a) *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.*

(b) *Each review pursuant to clause 7.2(a) will determine the types, calculation, payment and reconciliation of charges payable by the User pursuant to this Agreement, and may have regard to (amongst other things):*

...

*and is intended to be undertaken at the same time, in conjunction with, and on the same basis as reviews under other User Agreements which are in terms similar to this Agreement where a similar review is due at the same time.*

In practical terms, clause 7 envisages a five yearly price review, and while consequential changes to other terms may potentially be an outcome of negotiations, the Applicants (and DBCTM) anticipate the negotiation to focus nearly exclusively on price.

**3.3 Proposed conduct: negotiation by access seekers / future users**

The proposed conduct in respect of future access seekers is not anticipated to be materially different in nature.

In particular:

- (a) a number of access seekers have signed conditional access agreements which relate to the proposed '8X' expansion of the terminal which provide for access to occur on the terms of the standard access agreement current at the time they become unconditional; and
- (b) for access seekers seeking non-expansion capacity or capacity from future expansions, it is anticipated there will continue to be a standard access agreement which provides common access terms, in respect of which there is limited potential for changes to non-pricing terms given the common user nature of the terminal, the common infrastructure utilised to provide the service and need for consistency of many terms among users.

As a result, the Applicants anticipate collective negotiations involving access seekers to also be principally focused on price.

**3.4 Potentially relevant provisions of the CCA**

Because each of the users of DBCT acquire capacity from DBCTM, and pending further expansion capacity being developed that capacity is potentially constrained in the short term, the Applicants consider that the users of DBCTM may potentially be considered competitors for the purposes of acquiring capacity at DBCT.

On that basis, the proposed conduct may (but for the authorisation being sought) contravene the CCA in that the conduct may involve:

- (a) the making and giving effect to a provision of a contract, arrangement or understanding which may be a cartel provision within the meaning of Division 1 of Part IV of the CCA (for example, where agreement on a common price for the DBCT service is reached as a product of such collective negotiations); and/or

- (b) a contract, arrangement or understanding or concerted practice arising that may result in a substantial lessening of competition in a market (section 45 CCA).

However, the Applicants are firmly of the view that there is no substantial lessening of competition arising from the proposed conduct and, in any case, the public benefits that will arise from the proposed conduct will outweigh any limited detriment, such that the authorisation should be granted.

### 3.5 Rationale for the proposed conduct

The rationale for the proposed conduct is best understood in the context of the market power held by DBCTM and the imminent and adverse changes to the likely future regulatory regime in respect of DBCT that expose coal producers to that market power.

Accordingly, the rationale for the proposed conduct is detailed in section 5 of this Application below, after an explanation is provided of the market in which DBCT's coal handling service is provided and the regulatory and contractual framework relevant to DBCT.

### 3.6 Term of authorisation

#### *Term sought*

The Applicants seek:

- (a) authorisation for this conduct for a period from the date of the Australian Competition and Consumer Commission's (**ACCC**) decision (the **Authorisation**) until 30 June 2031 – likely to be between 10-11 years; and
- (b) interim authorisation to enable collective negotiations with DBCTM to commence as soon as possible (discussed further in section 9 of this Application below).

#### *Rationale for term*

The proposed term is sought with the intention of covering:

- (a) discussions and negotiations in relation to the next two pricing review periods which will occur in respect of existing user agreements applying to DBCT, which necessitates covering:
  - (i) the two pricing review periods from 1 July 2021 to 30 June 2026 and 1 July 2026 to 30 June 2031; and
  - (ii) the period from the grant of the authorisation to the start of the first pricing review period on 1 July 2021;
- (b) a timeframe which covers anticipated development of further expansions of the terminal and price negotiations for at least access seekers which contract that expansion capacity, (and potentially existing access holders where DBCTM seeks socialisation of the costs of that expansion). This period has been found by the QCA and the Treasurer in the recent declaration review to cover at least the currently contemplated 8X expansion and the initial phase of any future 9X expansion where demand justifies DBCTM progressing it.<sup>2</sup>

An authorisation term of this nature is also considered important to provide long term certainty in the context of coal producers potentially making long term project development investment decisions and typically making corresponding take or pay rail haulage and rail access contracting decisions, in parallel to resolving access terms to DBCT. As rail haulage and rail access contracts typically have 10 year contract terms, the proposed authorisation term covering two five year pricing period is regarded as appropriate.

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<sup>2</sup> Extraordinary Queensland Government Gazette no. 31 for 1 June 2020, vol. 384 at 286; Queensland Competition Authority, *Final Recommendation - Part C: DBCT Declaration Review*, March 2020, at 55 and 58.

The Applicants submit that it is not appropriate to have the protection of authorisation only apply on a more short term basis, as that may result in inefficient contracting decisions (principally through efficient access seekers determining not to contract access) due to concerns about the pricing they will be charged in the subsequent price review period.

### **Relevance of user agreement price review provision**

The Applicants particularly note that clause 7 of the [standard access agreement](#) and existing user agreements envisage negotiations for each price review occurring up to 18 months prior to the commencement of the next price review period (i.e. well before 1 July 2021), such that the applicants are

- (a) seeking for the Authorisation to apply as soon as it is granted; and
- (b) have also applied for interim authorisation (as discussed in section 9 below).

### **3.7 No relevant documentation**

*4. Provide documents submitted to the applicant's board or prepared by or for the applicant's senior management for purposes of assessing or making a decision in relation to the proposed conduct and any minutes or record of the decision made.*

This Application is not an approach which has been long contemplated by the Applicants.

Rather the Applicants have concentrated their efforts on making submissions to the QCA to seek that an access undertaking is only approved where it contains a QCA approved reference tariff which will constrain DBCTM's market power.

However, as discussed in further detail in section 9.2, the Application is being made now to seek to mitigate adverse outcomes of imminent adverse regulatory changes that expose users and access seekers to negotiating with an entity with market power and the ability and incentive to engage in monopoly pricing. In particular, it is being made following:

- (a) the QCA's publication of a Draft Decision indicating it was willing to approve a new access undertaking without a reference tariff;<sup>3</sup> and
- (b) a QCA stakeholder forum held on 18 November 2020 which has led the Applicants to consider that QCA will not change that view despite the Applicants' concerns.

As a result, the Applicants confirm no such documents of this type exist.

Participation in collective negotiations would of course be voluntary, and the Applicants' intention is that DBCT users and access seekers could confirm their decision to be involved in the collective negotiation after authorisation (or interim authorisation) is granted.

### **3.8 Other entities which may be impacted**

*5. Provide the names of persons, or classes of persons, who may be directly impacted by the proposed conduct (e.g. targets of a proposed collective bargaining arrangements; suppliers or acquirers of the relevant producers or services) and detail how or why they might be impacted.*

The key entity directly impacted by the proposed conduct would be DBCTM as the counterparty to the proposed collective negotiation.

DBCTM is the long term lessee of DBCT from a State owned corporation (DBCT Holdings Pty Ltd), under a 50 year initial lease (expiring in 2051) with a further 49 year extension option.

As a result of that position, it is the provider of access to DBCT, and the counterparty to the access agreements for use of DBCT by coal producers such as the Applicants.

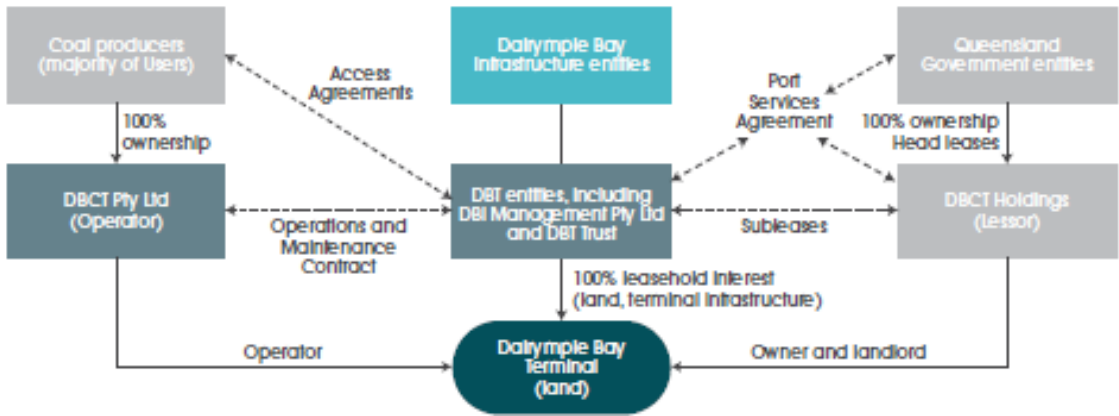
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<sup>3</sup> Queensland Competition Authority, *Draft Decision – DBCT Management's 2019 draft access undertaking*, 26 August 2020



DBCTM is owned by Dalrymple Bay Infrastructure Limited (**DBI**), which was recently listed on the ASX, and which remains 49% owned by Brookfield, a global investment fund.

The below is a simplified structure of DBCTM's ownership position and its contractual arrangements taken from DBI's recent prospectus:<sup>4</sup>



Contact details for DBCTM are:

DBCT Management Pty Limited (ACN 097 698 916)	Jonathon Blakey General Manager- Commercial and Regulatory T: [REDACTED] E: [REDACTED] A: Level 15, Waterfront Place, 1 Eagle Street, Brisbane QLD 4000
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#### 4 Market information and concentration

##### 4.1 Applicants

6. Describe the products and/or services, and the geographic areas, supplied by the Applicants. Identify all products and services in which two or more parties to the proposed conduct overlap (compete with each other) or have a vertical relationship (e.g. supplier-customer).

The Applicants are all coal producers and/or developers of coal projects.

As a result they compete with each other in global markets for the sale of metallurgical coal (for use in steel production) and/or the sale of thermal coal (for use in electricity generation).

Most of the Applicants solely or predominantly produce metallurgical coal from the operations which utilise DBCT (with approximately 80% of DBCT's current annual throughput being metallurgical coal).

As coal producers and/or developers of coal projects they are also acquirers of a range of goods and services needed to support coal exploration, development and production including:

- (a) coal terminal access;
- (b) rail haulage;
- (c) below rail access;
- (d) coal tenements; and
- (e) other mining inputs and mining services.

Authorisation is not sought for, and the proposed collective negotiations would not involve, any cooperation in relation to metallurgical or thermal coal markets or related goods or services markets other than in the market for access to DBCT's coal handling services.

<sup>4</sup> Dalrymple Bay Infrastructure Limited, *Dalrymple Bay Infrastructure Prospectus*, 20 November 2020, at 13.

*8. In respect of the overlapping products and/or services identified, provide estimate market shares for each of the parties where readily available.*

The Applicants submit that their market shares are not particularly relevant to the merits of the Application.

In particular, no authorisation is sought for the Applicants or other coal producers and/or coal project developers to discuss their production, strategy, marketing or pricing in respect of coal.

The nature of the pricing structure which applies at DBCT (as 100% take or pay and not being in any way linked to coal price outcomes) means there is no need for such discussions to occur as part of the proposed collective negotiation. Each of the Applicants is conscious of the need to ensure that any discussions do not cover such subjects.

However, for completeness the Applicants note that:

- (a) the global thermal and metallurgical coal markets are fragmented with numerous suppliers outside of Australia (and numerous suppliers who are coal producers with assets located in other coal fields in Australia that are not in the 'DBCT catchment');
- (b) in aggregate DBCT handles approximately 15% of global export metallurgical coal volumes,<sup>5</sup> and a significantly lesser proportion of thermal coal exports;
- (c) the Applicants are price takers in global thermal and metallurgical coal markets; and
- (d) Australia is a significant net exporter of coal, and with all of the Applicant's throughput via DBCT exported, there cannot be any impact arising from the on competition in coal markets in Australia.

## **4.2 The Dalrymple Bay Coal Terminal**

*7. Describe the relevant industry or industries. Where relevant describe the sales process, the supply chains of any products or services involved, and the manufacturing process.*

DBCT is a common user coal terminal in the Port of Hay Point, south of Mackay in Queensland.

It provides a coal handling service facilitating exports of coal produced from the central Bowen Basin. Approximately 80% of the coal throughput of DBCT is metallurgical coal and 20% is thermal coal.<sup>6</sup>

First developed in 1983, DBCT was privatised in 2001 through a long term lease from a Queensland government owned corporation, with an initial lease term of 50 years (expiring in 2051) and a further 49 year option.

Having initially been developed with a capacity of 15 million tonnes per annum, DBCT has undergone numerous significant expansions to now be the largest coal export terminal in Queensland with a nameplate capacity of 85 million tonnes per annum.

It is a natural monopoly with significant economies of scale.

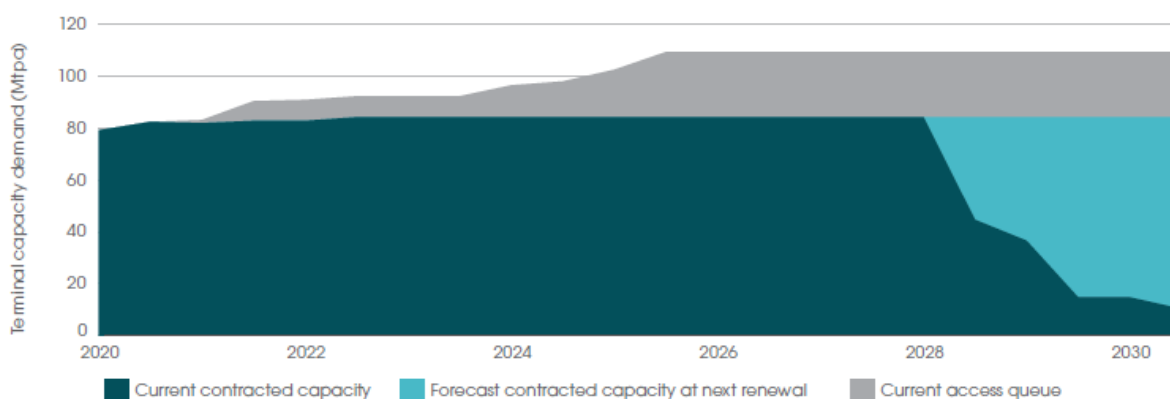
All of that existing capacity is understood to be currently contracted under long term take or pay user agreements (all but one of which have evergreen renewal rights), with the current contract profile shown below:<sup>7</sup>

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<sup>5</sup> Dalrymple Bay Infrastructure Limited, *Dalrymple Bay Infrastructure Prospectus*, 20 November 2020, at 30.

<sup>6</sup> Dalrymple Bay Infrastructure Limited, *Dalrymple Bay Infrastructure Prospectus*, 20 November 2020, at 80.

<sup>7</sup> Dalrymple Bay Infrastructure Limited, *Dalrymple Bay Infrastructure Prospectus*, 20 November 2020, at 80.

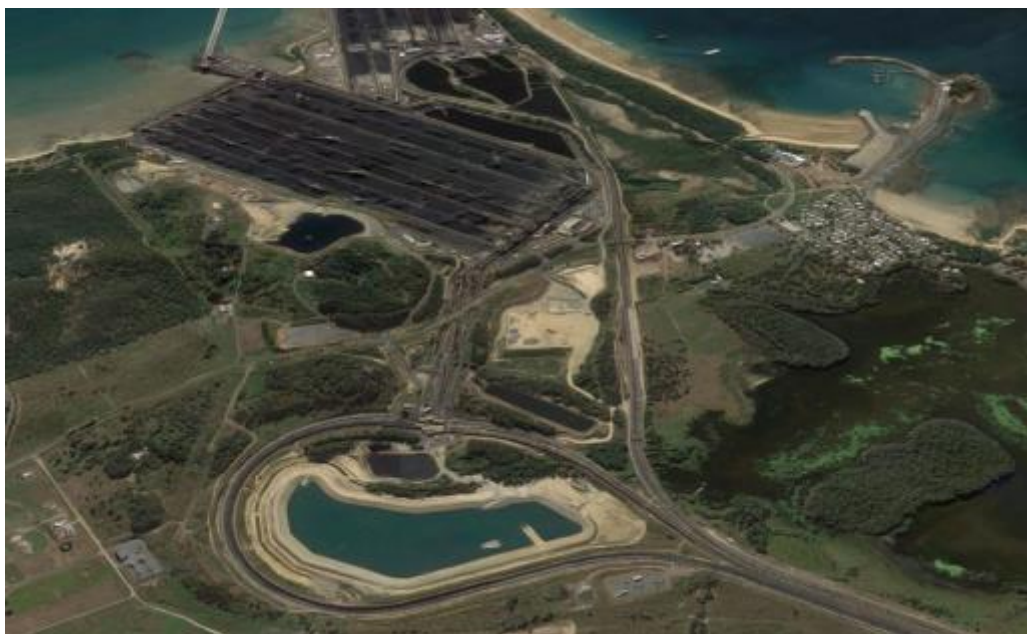


DBCT involves extensive onshore and offshore infrastructure including:

- (a) 3 rail receiving stations;
- (b) a coal stockyard with 7 ½ stockpile rows, each approximately 1.1 km in length (with a total yard holding capacity of approximately 2.3 million tonnes of coal);
- (c) 4 stackers, 3 reclaimers, 5 stacker-reclaimers;
- (d) 3 outloading systems and 3 shiploaders;
- (e) 4 offshore berths capable of receiving cape size vessels; and
- (f) a series of conveyor systems connecting inloading, stockyard and outloading operations,

located on approximately 214 hectares of strategic port land and 160 hectares of offshore sea-bed lease.

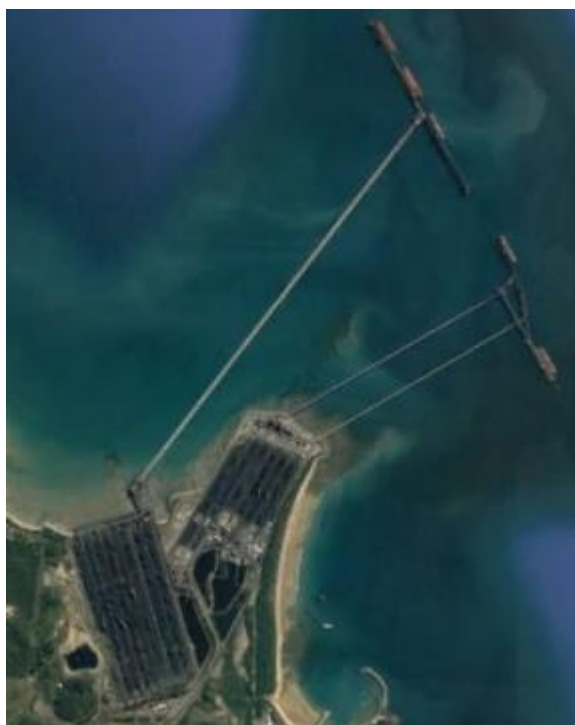
The aerial pictures below show the rail balloon loop, coal stockyard and onshore infrastructure:



Source: DBCTM 2019 Master Plan<sup>8</sup>

and the offshore berths (with the smaller adjacent terminal being BMA's Hay Point Coal Terminal):

<sup>8</sup> DBCTM, *DBCT 2019 Master Plan Expansion Opportunities at the Dalrymple Bay Coal Terminal*, 21 August 2019 at 8.



Source: DBCTM 2019 Master Plan<sup>9</sup>

DBCTM is currently undertaking feasibility studies in respect of a further '8X' expansion to increase DBCT's capacity to 97.5 mtpa.

DBCTM has signed conditional access agreements with a number of access seekers in respect of all of that 8X expansion capacity, and underwriting agreements with those access seekers to fund the undertaking of feasibility studies in relation to its development. A feasibility study in relation to that expansion is currently underway.

DBCTM's Master Plan<sup>10</sup> also indicates the possibility of a further 9X expansion, should sufficient demand exist to justify such a development.

### 4.3 The DBCT coal supply chain

DBCT is essential bottleneck infrastructure which operates at the end of the DBCT coal supply chain.

The Goonyella supply chain involves:

- (a) coal being produced by mines in the central Bowen Basin;
- (b) that coal being transported by rail by one of four rail haulage operators contracted by coal producers (Pacific National, Aurizon Operations, OneRail, BMA Rail);
- (c) that rail haulage occurring utilising Aurizon Network's Goonyella rail system, shown in yellow in the third diagram below, where access is contracted by coal producers or the haulage providers; and
- (d) that coal being exported through DBCT, and loaded on to vessels for shipping to export customers, principally in Asia.

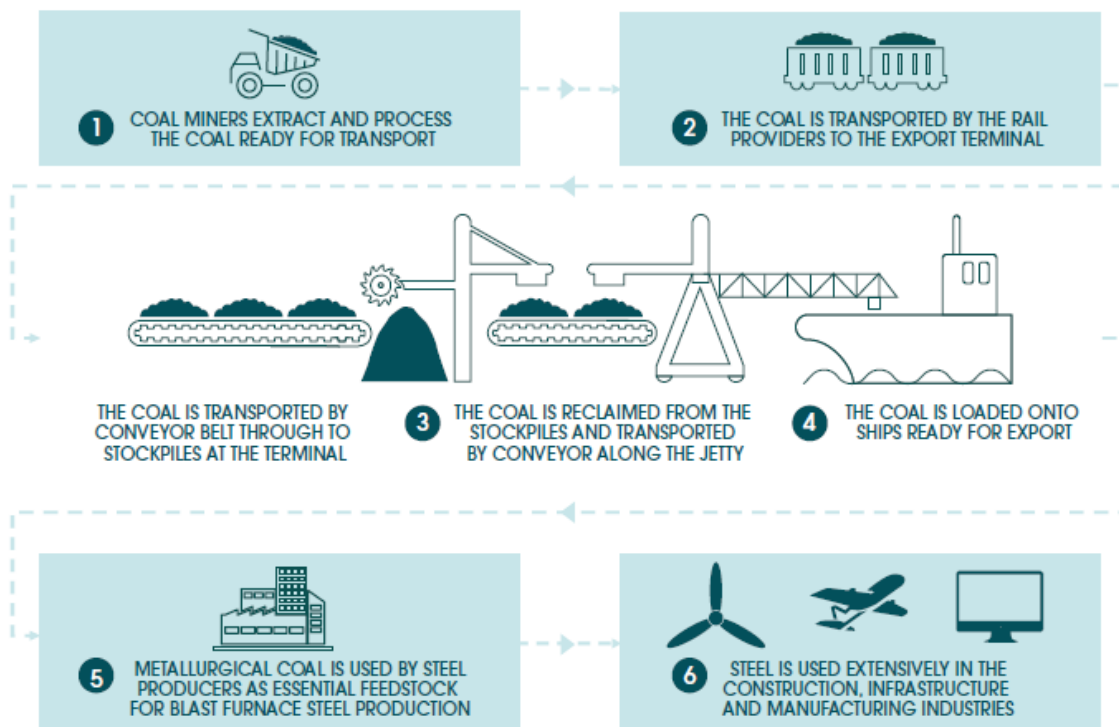
<sup>9</sup> DBCTM, *DBCT 2019 Master Plan Expansion Opportunities at the Dalrymple Bay Coal Terminal*, 21 August 2019 at 9.

<sup>10</sup> DBCTM, *DBCT 2019 Master Plan Expansion Opportunities at the Dalrymple Bay Coal Terminal*, 21 August 2019

## DBCT coal supply chain

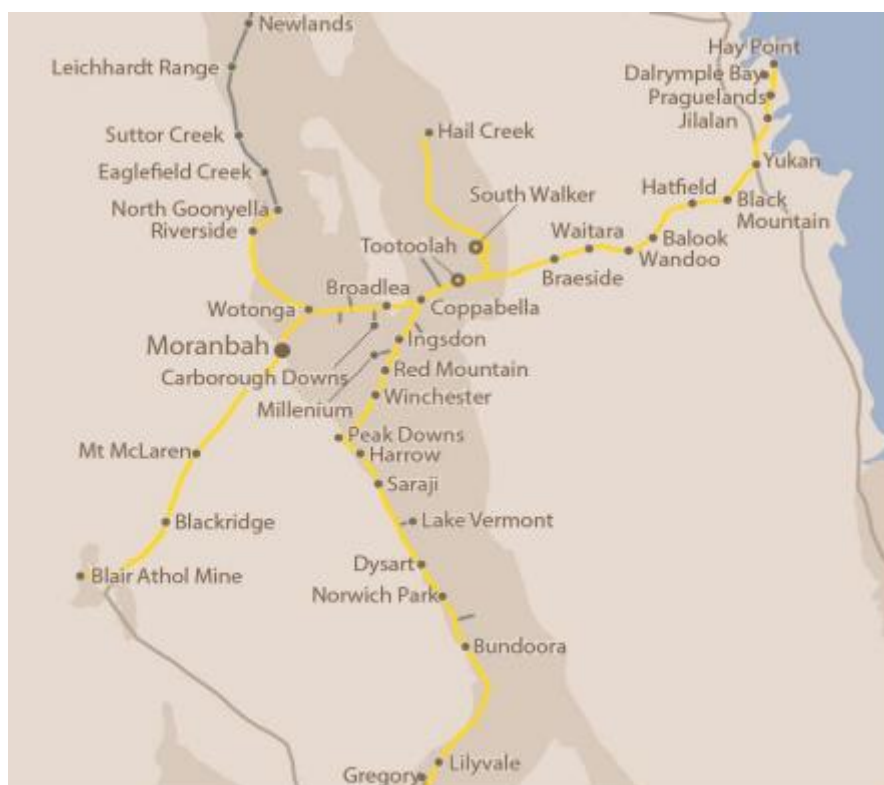


The below diagram shows how the terminal is a critical element in the broader supply chain for metallurgical coal and ultimately steel production:<sup>11</sup>



<sup>11</sup> Dalrymple Bay Infrastructure Limited, *Dalrymple Bay Infrastructure Prospectus*, 20 November 2020, at 31

### Goonyella rail system detail



Source: Aurizon Baseline Capacity Assessment, 2019.

As discussed further in section 4.4 below, as a result of its position as the only common user coal export terminal in the DBCT supply chain and economies of scale, DBCT is effectively the only economic and practical supplier of multi-user coal handling services, and therefore clearly essential bottleneck infrastructure.

Given that coal producers are price takers in global thermal and metallurgical coal markets, infrastructure charges (including the costs of accessing DBCT) have a material impact on the competitiveness of coal producers, dependent markets and the economics and incentives of coal producers investing in future coal projects in the region.

This led to the Queensland Treasurer determining in the recent declaration review, that declaration of DBCT's coal handling service would promote a material increase in competition in the coal development tenements market due to providing a constraint on DBCTM's ability to engage in monopoly pricing.<sup>12</sup>

#### 4.4 DBCTM market power and the absence of competition from other terminals

*9. In assessing an application for authorisation, the ACCC takes into account competition faced by the parties to the proposed conduct. Describe the factors that would limit or prevent any ability for the parties involved to raise prices, reduce quality or choice, reduce innovation, or coordinate rather than compete vigorously. For example, describe:*

*9.1. existing competitors*

*9.2 likely entry by new competitors*

*9.3 any countervailing power of customers and/or suppliers*

*9.4 any other relevant factors.*

<sup>12</sup> Extraordinary Queensland Government Gazette no. 31 for 1 June 2020, vol. 384 at 298.



While there are a number of coal terminals in Queensland, it has been well established through previous regulatory assessments that DBCT has a natural monopoly position, with significant market power and no close substitutes or constraints from competition. Mines in the central part of the Bowen Basin are economically captive to DBCT.

That is reflected in the previous findings by both the ACCC in its merger assessment of Brookfield's previous acquisition of Asciano<sup>13</sup> and the QCA in the declaration review in respect of the DBCT coal handling service,<sup>14</sup> that there is a separate market for supply of coal handling services by DBCT.

The Applicants strongly agree with those conclusions from the previous assessments.

That market definition, and the finding that the coal handling services of other Queensland coal terminals are demonstrably not close substitutes is appropriate because:

- (a) the significantly greater distances from mines in the 'DBCT catchment' in the Goonyella system to other terminals, makes access to DBCT substantially cheaper than more distant coal terminals taking into account rail access and rail haulage costs, noting that:
  - (i) even for mines at the boundary of the Goonyella system, the distance to other terminals is significantly greater (North Goonyella, 217km to DBCT, 243 to Abbot Point Coal Terminal, Blair Athol 282km to DBCT, 391km to Abbot Point Coal Terminal, Oaky Creek, 298km to DBCT, 384 km to RG Tanna / Wiggins Island Coal Export Terminal);<sup>15</sup> and
  - (ii) the QCA has calculated the average supply chain cost to Goonyella system users of accessing alternative coal terminals as at least 21% (for Abbot Point), 23% (for RG Tanna) and 97% (for Wiggins Island Coal Export Terminal) as shown in the table below:<sup>16</sup>

**Table 6 Average supply chain cost to Goonyella system users of accessing alternative coal terminals with Goonyella and DBCT expansions (\$ per tonne)**

<i>Cost components</i>	<i>DBCT (\$/t)</i>	<i>AAPT (GAPE) (\$/t)</i>	<i>RG Tanna (\$/t)</i>	<i>WICET (\$/t)</i>
Below-rail cost <sup>a</sup>	2.56	2.48	4.63	4.63
Above-rail cost	4.21	5.97	5.88	5.88
Coal handling cost	5.99	7.01	5.18	14.67
Other port and shipping costs	0.05	0.05	0.05	0.05
<b>Supply chain cost</b>	<b>12.80</b>	<b>at least 15.52</b>	<b>at least 15.73</b>	<b>at least 25.22</b>
<i>Cost difference relative to accessing DBCT</i>	–	<i>at least 2.72 (21%)</i>	<i>at least 2.93 (23%)</i>	<i>at least 12.42 (97%)</i>

- (b) while theoretically physically connected, capacity constraints both on Aurizon Network's rail network and at the other coal terminals practically prevent users switching to other terminals;
- (c) the long term 'take or pay' nature of below rail, above rail and port access contracts makes it uneconomic to switch terminals (noting that rail haulage and rail access contracts are typically entered on a 10 year basis which may not align with the timing for the DBCT user agreement renewal/extension decision);

<sup>13</sup> ACCC, *Statement of Issues*, 15 October 2015, 12-14.

<sup>14</sup> QCA, *Final Recommendation, Part C: DBCT Declaration Review*, March 2020, at 13-37.

<sup>15</sup> QCA, *Final Recommendation, Part C: DBCT Declaration Review*, March 2020 at 19.

<sup>16</sup> QCA, *Final Recommendation, Part C: DBCT Declaration Review*, March 2020 at 20.

- (d) transporting coal through the Newlands system to Abbot Point involves utilising a non-electrified system (such that it is only suitable for diesel locomotives) which provides another barrier to switching where a user's haulage provider uses electric locomotives;
- (e) some mines would require material investment to align the mine site or rail infrastructure appropriately to allow coal to be transported to an alternative terminal, such as new angle turn-outs or reconfigurations of mine site balloon loops;
- (f) the high proportion of metallurgical coal, and different grades of metallurgical coal, shipped through DBCT makes it highly attractive to coal producers because of the ability to co-ship coal with other metallurgical coal producers (which steel mill customers often require as part of achieving an appropriate blend of metallurgical coals). This is particularly important to smaller producers and producers of PCI or lower quality metallurgical coals for who co-shipping represents a higher proportion of their shipments. By contrast, other Queensland coal terminals export a much higher proportion of thermal coal; and
- (g) the high volumes and proportion of metallurgical coal, and terminal infrastructure at DBCT which enables the creation of homogenous blends of up to three different coal products (in a manner that is not achievable at other coal terminals), also makes shipping through DBCT highly attractive as blending creates additional marketing opportunities for producers.

Some of these factors are reflected in the earlier ACCC analysis and all of these factors are referred to in the QCA market analysis in the recent declaration review.<sup>17</sup>

As a result of those factors coal mines in the Goonyella system or DBCT catchment are effectively economically 'captive' to utilising DBCT with the QCA concluding that:<sup>18</sup>

*there are no close substitutes to DBCT's coal handling service for mines in this market. Rather, it is evident that DBCT is overwhelmingly the dominant coal handling facility in this market.*

The map below taken from DBI's recent prospectus<sup>19</sup> shows the 'DBCT catchment' of coal mines and coal mining projects which are effectively captive (noting that the adjacent Hay Point Coal Terminal is not a multi user coal terminal).

The Applicants mines and projects are all located in that 'DBCT catchment'.

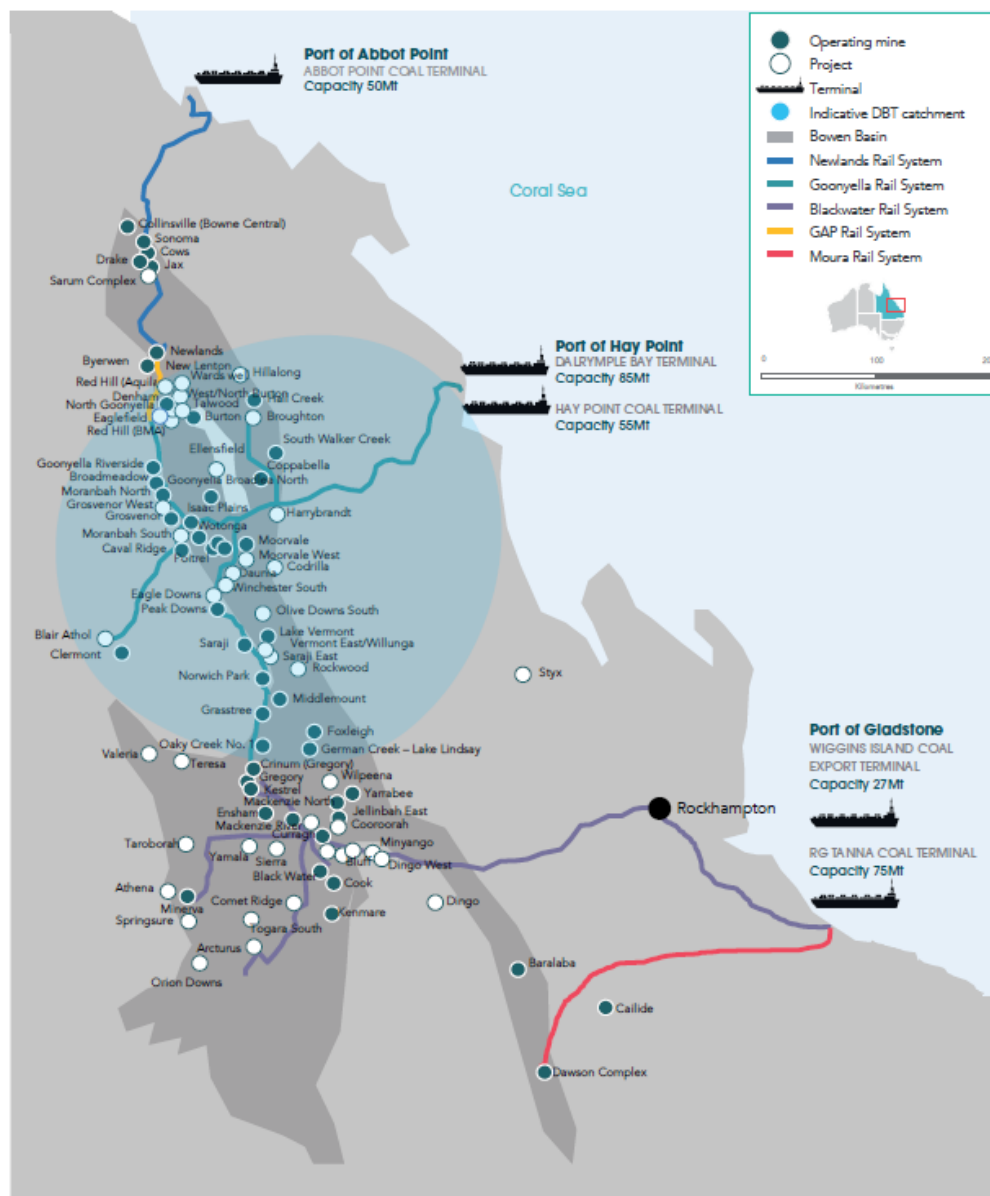
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<sup>17</sup> Queensland Competition Authority, *Final Recommendation, Part C: DBCT Declaration Review*, March 2020 at 13-37.

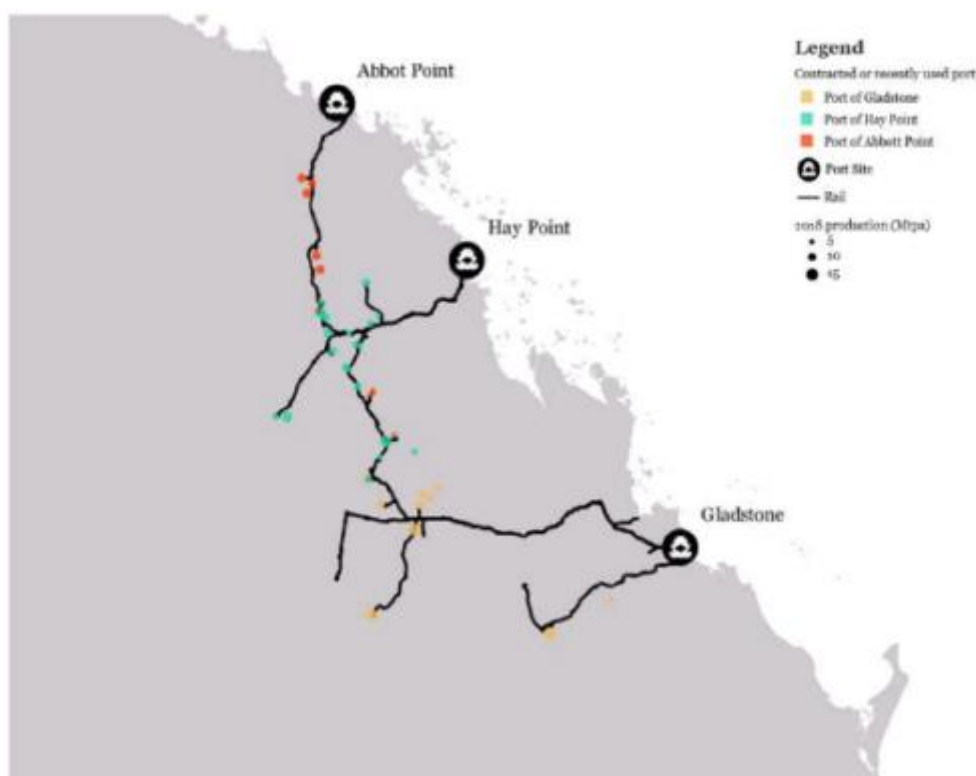
<sup>18</sup> Queensland Competition Authority, *Final Recommendation – Part C: DBCT Declaration Review*, March 2020, at 36.

<sup>19</sup> Dalrymple Bay Infrastructure Limited, *Dalrymple Bay Infrastructure Prospectus*, 20 November 2020, at 32.





The captive nature of mines to their closest ports due to the costs of transportation is also clearly demonstrated by the below diagram which demonstrates the clear way in which coal mines located on the Goonyella system nearly exclusively use terminals at the Port of Hay Point, rather than the more distant coal terminals at the Ports of Abbot Point and Gladstone (which are instead used by their more proximate mines).



## 4.5 Regulatory Arrangements and Threatened Imminent Changes

### ***QCA Act regime***

In conjunction with the privatisation of DBCT in 2001, the State government introduced a regulatory third party access regime for DBCT under the *Queensland Competition Authority Act 1997* (Qld) (***QCA Act***).

Part 5 of the QCA Act provides a third party access regime that is very similar in nature to the national access regime in Part IIIA of the *Competition and Consumer Act 2010* (Cth).

Infrastructure services provided by Aurizon Network, Queensland Rail and DBCT are currently administered under this QCA Act regime, in each case subject to a QCA approved access undertaking.

Coal services provided by all three infrastructure providers have, since the introduction of the regime, always been subject to a QCA approved reference tariff determined as part of approval of the applicable access undertaking.

### ***Declaration and Declaration Review Process***

The coal handling services provided at DBCT are currently a declared service for the purposes of Part 5 of the QCA Act.

From the time of the initial privatisation until 8 September 2020, that declaration occurred by regulation or a transitional provision of the QCA Act itself.<sup>20</sup>

In accordance with the process specified under the QCA Act a 'declaration review' process has recently been conducted to determine whether the declaration would be continued after that period.

That process was recently finalised with Queensland Treasurer determining to declare the DBCT coal handling service for a further 10 year until 8 September 2030.<sup>21</sup>

In particular, the Queensland Treasurer concluded in the declaration review that:

<sup>20</sup> Section 250 *Queensland Competition Authority Act 1997* (Qld).

<sup>21</sup> Extraordinary Queensland Government Gazette no. 31 for 1 June 2020, vol. 384, pp. 203–306.

- (a) DBCT has an incentive to maximise profits by seeking to achieve as high an access charge as possible and the ability and incentive to exercise market power in the absence of declaration;<sup>22</sup>
- (b) the pricing approach proposed by DBCTM to apply in the absence of declaration would not be sufficient to constrain DBCT's exercise of market power,<sup>23</sup> and would allow for at least some degree of monopoly pricing;<sup>24</sup> and
- (c) without declaration new users would potentially pay up to \$3/tonne more than existing users (which is a significant different in the context of a current Terminal Infrastructure Charge of \$2.45/tonne).<sup>25</sup>

As a result, the DBCT coal handling service remains declared, and the QCA retains the right under the QCA Act to require DBCTM to have an access undertaking regulating access to the declared service.

### ***DBCTM Judicial Review Application***

Following the Treasurer's declaration decision, DBCTM lodged a judicial review application in the Queensland Supreme Court challenging the validity of that decision.<sup>26</sup>

The trial for those proceedings was heard in late November 2020.

While the Applicants (many of who were joined to the proceedings) strongly believe that DBCTM's judicial review application had no merit and will be denied, the judicial review creates the potential risk that DBCT will cease to be economically regulated at all, with material adverse outcomes for access holders and access seekers in respect of the terms (and particularly pricing) on which they can access DBCT.

Justice Davis (who presided over the trial) indicated that a decision would be provided in the new year.

If DBCTM's application is denied as anticipated, it is possible that DBCTM will appeal such that this risk will not immediately cease.

### ***2019 Draft Access Undertaking Process***

DBCTM is currently subject to an access undertaking approved under the QCA Act which applies until 30 June 2021 (but would terminate earlier if the declaration under the QCA Act was to cease).

That existing access undertaking, like every approved access undertaking which has applied to DBCT since privatisation, contains a QCA determined reference tariff for the Terminal Infrastructure Charges (**TIC**) levied on users of DBCT.

As a result of the declaration of the DBCT coal handling service, the QCA was empowered to require DBCT to submit a replacement draft access undertaking to apply from 1 July 2021<sup>27</sup> and did so.<sup>28</sup>

The draft access undertaking which has been submitted by DBCTM (the **2019 DAU**) is contentious because DBCTM is proposing that the undertaking would no longer provide a QCA approved reference tariff (as every previous undertaking since privatisation has) and instead would rely on a negotiate-arbitrate model to set the price for the declared service.

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<sup>22</sup> Extraordinary Queensland Government Gazette no. 31 for 1 June 2020, vol. 384, at 292.

<sup>23</sup> Extraordinary Queensland Government Gazette no. 31 for 1 June 2020, vol. 384, at 284.

<sup>24</sup> Extraordinary Queensland Government Gazette no. 31 for 1 June 2020, vol. 384, at 283.

<sup>25</sup> Extraordinary Queensland Government Gazette no. 31 for 1 June 2020, vol. 384, at 282.

<sup>26</sup> Queensland Supreme Court proceedings in *DBCT Management Pty Limited v Treasurer and Minister for Infrastructure and Planning (Queensland) and Ors*.

<sup>27</sup> Section 133 *Queensland Competition Authority Act 1997* (Qld).

<sup>28</sup> QCA, *Initial Undertaking Notice*, 12 December 2017.

The QCA's consideration of the 2019 DAU is underway and has progressed to a recent QCA [Draft Decision](#).<sup>29</sup>

Despite the Draft Decision indicating the QCA did not consider the 2019 DAU appropriate to approve, it suggested the QCA's preliminary view was that, with amendments, an undertaking without a reference tariff – i.e. entirely reliant on the negotiate-arbitrate model for price setting – could be made appropriate.

This approach has created the clear risk that Applicants (and other users or access seekers in respect of DBCT) will shortly be exposed to negotiating pricing with a monopolist in circumstances where:

- (a) DBCT has been found to have market power and an incentive to raise access charges;
- (b) users and access seekers have no countervailing power – because there are no substitute coal handling services which they can switch to or even credibly threaten to switch to;
- (c) as discussed in section 4.6 below, users have already agreed all the non-price terms of their access agreement and made substantial sunk capital investments in mine development, such that there is no actual scope for negotiation or bargaining power arising from the ability to not proceed to contract; and
- (d) any arbitration will be costly and highly uncertain, particularly as it will be the first time that the pricing for DBCT has been determined in this way (or for that matter, the first time that the QCA has arbitrated any pricing dispute under Part 5 of the QCA Act to the Applicant's knowledge).

DBCTM has made it clear in submissions to the QCA that it believes it should be entitled to charge higher prices under this negotiate-arbitrate model than it currently is under a QCA determined reference tariff. In particular, DBCTM has made express submissions that pricing should be between the efficient costs of providing access (including a return on and of capital commensurate with the regulatory and commercial risks involved) and the value of the service to access seekers or users.<sup>30</sup> Given the essential infrastructure nature of DBCT and lack of competitive alternatives, the 'value' to access seekers (in the sense of being the marginal cost at which they break even) is considerably higher than the efficient price.

The Applicants consider the QCA's Draft Decision inappropriate in many respects and have made further submissions to the QCA regarding the inappropriate nature of the 2019 DAU, and how such an outcome facilitates DBCTM engaging in monopoly pricing.<sup>31</sup>

#### ***Application for Authorisation to Supplement QCA Negotiate-Arbitrate Regime***

However, given:

- (a) the time taken to obtain authorisation;
- (b) the timing for the QCA's anticipated final decision on the 2019 DAU of February 2021;
- (c) the next pricing period for which pricing needs to be determined commences on 1 July 2021;
- (d) the anticipated timing for negotiations for the current pricing review under the existing user agreements (discussed further in section 9); and
- (e) the Applicants' impression from the stakeholder forum held by the QCA on 18 November 2020 that the QCA's view remained as set out in the Draft Decision,

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<sup>29</sup> QCA, Draft Decision – DBCT Management's 2019 draft access undertaking, August 2020.

<sup>30</sup> DBCTM Submission, DBCT 2021 Access Undertaking – DBCT Management response to QCA Interim Draft Decision, 24 April 2020 at section 4.

<sup>31</sup> DBCT User Group Submission, 4 December 2020.

the Applicants have determined they cannot wait until the finalisation of the 2019 DAU process to apply to the ACCC for authorisation.

#### **4.6 Nature of Existing DBCT Access Arrangements**

All existing users of DBCT have entered access agreements with DBCTM on materially the same (in many cases identical) terms, based on the terms of the standard access agreement approved by the QCA for the DBCT access undertaking which existed at the time of contracting.

There have been minor changes to the standard access terms through the various DBCT access undertaking, but all pricing matters have remained identical.

Relevantly for the purposes of the ACCC's consideration of this Application:

- (a) all but one of those user agreements is 'evergreen' in nature, in that after an initial term of 10 or more years, it provides a continuing right to extend the access term by up to a further 5 years on 12 month's prior written notice;<sup>32</sup>
- (b) each of the user agreements contains a clause providing for a 5 yearly price review of the Terminal Infrastructure Charge (the TIC),<sup>33</sup> which provides for:
  - (i) the reviews under each agreement to occur in conjunction with each other;
  - (ii) the parties to discuss the appropriate TIC; and
  - (iii) failing resolution the parties to refer pricing to arbitration by the QCA (or where the QCA is unwilling to act, which is anticipated to be the case if the service ceased to be declared, by a commercial arbitrator).

In the past, the price review clause has not been formally activated in that manner as all parties (both coal producers and DBCTM) implicitly accepted that the price was being set by QCA through reference tariffs. Given the contractual requirements to have regard to the reference tariffs and access undertaking, it was assumed that those reference tariffs would be applied in the event of a QCA arbitration in any case.

In the absence of a reference tariff (or in the absence of regulation if DBCTM was to succeed in its judicial review application), the existing users will for the first time since privatisation be required to negotiate pricing for access to DBCT without prior QCA guidance on the appropriate price that reflects the efficient costs of supplying DBCT's monopoly infrastructure service.

As discussed earlier in this Application, the Applicants will have no countervailing power or bargaining position in those negotiations because:

- (a) no other coal terminal provides an alternative provider which can be economically switched to;
- (b) producers' substantial investments in development of their mining operations are a sunk cost;
- (c) producers' have significant take or pay contracts in the other parts of the Goonyella supply chain (rail haulage and rail access) and there are other issues like capacity constraints that prevent switching; and
- (d) the terms of their access agreements are already resolved,

such that they cannot cease contracting or switch to using alternative coal terminals, when faced with monopoly pricing.

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<sup>32</sup> See Clause 20, DBCT Standard Access Agreement

<sup>33</sup> See clause 7, DBCT Standard Access Agreement

#### **4.7 Position of Access Seekers for 8X Expansion Capacity**

Similarly, those access seekers which have recently signed conditional access agreements in respect of the 8X expansion capacity, have agreed to access DBCT on the then current standard access agreement terms.

As a result, if the 8X expansion was to proceed and the conditions of their access agreements were to be satisfied, such access seekers would also be in the position of having agreed terms of access and having no real bargaining position in respect of pricing.

Importantly the standard form of such conditional access agreements provide such access seekers with no rights to terminate the arrangement if they consider the pricing to be unreasonable.

### **5 Rationale for the Proposed Conduct**

The imminent potential changes to the regulatory regime applying to the DBCT service have fundamentally changed the position of existing users and future access seekers in relation to pricing for access to DBCT.

As discussed above, it now appears likely that the 2019 DAU process will result in there being no QCA approved reference tariff, such that for the first time since privatisation users will no longer have the protection of an independently determined efficient price.

Instead users and access seekers will be exposed to significant uncertainty in relation to future pricing, and become far more reliant on negotiations with an entity with significant market power to determine such pricing.

While that negotiation will occur in the context of an arbitration as a 'back-stop' it is clear from submissions that DBCTM has made in the 2019 DAU process that it believes it should be entitled to materially higher prices under a negotiate-arbitrate model.

DBCTM has not been willing to provide any indication of the pricing it seeks to achieve (either to the QCA or to existing users) – and has not meaningfully engaged in relation to the report on an appropriate weighted average cost of capital provided by the DBCT User Group during the 2019 DAU process.

Rather DBCTM has submitted that there is no requirement for the access undertaking to have a reference tariff or that a weighted average cost of capital be determined by the QCA,<sup>34</sup> and that it should be entitled to earn more than the efficient cost of providing access and up to the 'value' of the service.<sup>35</sup>

In addition there is a very high level of uncertainty about the potential pricing that the QCA will determine in any arbitration, which limits its utility as an incentive to reach a negotiated outcome. In particular that uncertainty arises from:

- (a) to the best of the Applicants' knowledge, this being the first time the QCA will be called on to arbitrate pricing under Part 5 of the QCA Act – both generally and in respect of DBCT;
- (b) the criteria provided for such an arbitration under the QCA Act<sup>36</sup> being very high level in nature; and
- (c) the criteria including reference to the value of access – which will be significant given DBCT's monopoly position – and which the QCA's Draft Decision indicates 'may differ considerably' for each access seeker.<sup>37</sup>

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<sup>34</sup> DBCTM Submission, 5 June 2020 at 26.

<sup>35</sup> DBCTM Submission, DBCT 2021 Access Undertaking – DBCT Management response to QCA Interim Draft Decision, 24 April 2020 at section 4.

<sup>36</sup> See section 120 *Queensland Competition Authority Act 1997* (Qld).

<sup>37</sup> QCA, *Draft Decision - DBCT Management's 2019 draft access undertaking*, August 2020, footnote 255 at 72.

The Applicants consider that it has become evident from the Draft Decision, and the stakeholder forum held on 18 November 2020, that the QCA has determined to cease the application of a reference tariff and its final decision will instead confirm its willingness to approve a negotiate-arbitrate form of regulation.

Accordingly, the Applicants are applying for authorisation with a view of seeking to mitigate the serious difficulties presented by negotiating pricing with DBCTM in the absence of an independently determined reference tariff.

## **6 Test for Authorisation**

The ACCC may grant authorisation where it considers the public benefit of the proposed conduct will outweigh the anti-competitive detriment.<sup>38</sup>

This involves an assessment on a 'with and without' basis of the likely future outcomes with and without the proposed conduct.

From the Applicants' perspective, where the proposed conduct:

- (a) is authorised, the existing access holders and future access seekers will be able to collectively negotiate pricing with DBCTM; and
- (b) is not authorised, each individual access holder and access seeker will effectively be forced to engage in individual bilateral negotiations of pricing with DBCTM.

## **7 Public Benefits**

*10. Describe the benefits to the public that are likely to result from the proposed conduct. Provide information, data, documents or other evidence relevant to the ACCC's assessment of the public benefits.*

### **7.1 Improving efficiency, and reducing costs, of negotiations**

The proposed Authorisation would allow more efficient negotiation of future DBCT pricing compared to a series of bilateral negotiations between DBCTM and individual users and access seekers.

The Applicants consider that is particularly important, in light of the fact that:

- (a) there is limited time left until the new pricing regime is scheduled to commence on 1 July 2021;
- (b) these negotiations are anticipated to be complex given it will be the first time the parties will experience such a negotiation in respect of DBCT since its privatisation in 2001, and based on past regulatory submissions DBCTM and users have highly divergent views on appropriate pricing; and
- (c) there is a relatively large number of users of DBCT, such that the cost savings of a single collective negotiation (rather than a series of bilateral negotiations) will be very significant.

The proposed conduct would be anticipated to materially reduce negotiating costs through:

- (d) users being able to engage a common external legal adviser (and share the costs of doing so);
- (e) users being able to engage a common economic adviser (and share the costs of doing so); and
- (f) significantly less meetings being required with DBCTM relative to a series of bilateral negotiations between DBCTM and individual users.

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<sup>38</sup> Section 90, *Competition and Consumer Act 2010* (Cth).

Given the complexity of the negotiations and relatively large number of individual users, over the period of the proposed authorisation these transaction savings will be highly significant for users and access seekers.

There are also anticipated to be no issues specific to individual access holders relevant to the negotiations which would detract from such cost savings. That follows because of the common nature of the service provided and the common infrastructure by which it is provided, the near identical terms on which all existing users have contracted (and future users are likely to contract given the standard access agreement terms), and the indications based on the QCA Draft Decision that the anticipated foundation for the pricing is a 'building blocks' type approach.

Further costs savings would be anticipated to arise to DBCTM, users and access seekers through a collective arbitration for similar reasons (with there also being additional savings in costs of the QCA in conducting a single arbitration rather than multiple bilateral arbitrations).

## **7.2 Improving the negotiating position of smaller / less experienced producers**

The Applicants also note that not all users are in the same position when it comes to negotiations of access terms with DBCTM.

DBCTM has sought to argue in its submissions to the QCA that larger global mining companies in particular have:

- (a) access to substantially greater internal technical, commercial, legal and economic resources to inform and assist with negotiations;
- (b) greater financial resources to pursue arbitration – such that it is a more credible 'backstop' for them;
- (c) in many cases, potentially more insight into the terminal through being shareholders in the user-owned entity contracted by DBCTM to operate and maintain DBCT; and
- (d) through their portfolio of Australian mines, greater experience with pricing discussions (both in an economic regulation and commercial setting) across numerous Australian coal terminals.

However, that is not the position of a number of the independent, single mine only, access holders or access seekers.

Where such users or access seekers have to negotiate on their own, they will be far more likely to settle for an inefficient access price – both due to having greater difficulty in determining what constitutes an efficient price, and not having the resources for arbitration to be a credible alternative or backstop. This clearly creates the potential for inefficient price discrimination, based on differences in bargaining power and resources rather than the costs or risks of providing the service, which distorts investment incentives and competition in dependent markets.

By contrast, collective negotiation will provide public benefits by:

- (a) allowing smaller users without those advantages to collectively negotiate being more likely to result in a common price rather than such price discrimination against smaller or less well-resourced users or access seekers; and
- (b) in turn, promoting efficient outcomes in coal markets and dependent markets which will otherwise be distorted.

## **7.3 Likelihood of increasing transparency and reducing information asymmetry**

A core concern that users of DBCT have raised in the 2019 DAU process is the lack of transparency and the information asymmetry that will exist between DBCTM and users.



That particularly exists in relation to issues like:

- (a) large costs associated with items like:
  - (i) proposed expansions (where DBCTM's own cost estimates have varied by hundreds of millions);
  - (ii) significant capital expenditure on major terminal plant and equipment like stackers and reclaimers;
  - (iii) remediation at the end of DBCTM's useful life (where DBCTM's estimated useful costs are nearly \$400 million higher than the QCA's consultant's current estimate);
- (b) useful life of the terminal;
- (c) DBCTM's efficient costs of debt and equity; and
- (d) DBCTM's efficient corporate overhead and tax costs.

In particular, the previous regulatory approach of a reference tariff provided users and access seekers with an independent assessment of the prudence of costs and the appropriateness and efficiency of the weighted average cost of capital and building blocks used to calculate the price.

In the absence of a reference tariff, the Applicants strongly consider a collective negotiation provides the greatest potential for mitigating that information asymmetry by allowing:

- (e) more informed users (whether obtained through experiences of costs and pricing with other coal terminals and infrastructure, information obtained as a shareholder in the user owned operator, or greater internal resources) to share information; and
- (f) greater access to professional advisers through the ability to share costs (as discussed in 7.1).

Given the reliance of a negotiate-arbitrate model on negotiating parties having sufficient information to resolve efficient and appropriate terms of access, this is a clear public benefit.

#### **7.4 Reducing the inequality of bargaining power**

As discussed earlier in this Application, DBCTM's market power and users and access seekers dependence on DBCT as bottleneck essential infrastructure in the Goonyella supply chain, creates a drastic inequality of bargaining power between individual users and access seekers and DBCTM.

That inequality of bargaining position will be exacerbated where users are required to engage in bilateral negotiations with DBCTM on an individual basis.

Existing access holders have absolutely no bargaining position. The long term nature of their existing access agreements and sunk capital investments in major mining projects, means they cannot cease contracting access until end of life of their mining projects, and the lack of competition means that DBCT is their only choice of access. The vast majority of existing users are completely economically captive to DBCT.

The position is not materially different for access seekers. Access seekers are highly dependent on DBCTM to obtain access in order to enable economic development of their future coal project, and will likely have material time pressure to reach agreement on access terms in a window in which they can also align other elements necessary for a final investment decision (such as rail haulage and rail access, funding and financing, and government approvals). Whereas DBCTM has no similar dependence on an individual access seeker, where they have indicated their last expansion was oversubscribed and there is additional remaining demand.

A collective negotiation has the potential to go some way to mitigating that significant imbalance of bargaining power. That is partly the case because while certainty of price in relation to a single user is not particularly important to DBCTM, certainty of price to the vast majority of users is anticipated to have some importance – such that a collective negotiation will create some degree of co-dependency that will not exist in individual bilateral negotiations.

At a minimum, it will make it significantly harder for DBCTM to engage in 'divide and conquer' tactics where price discrimination occurs not on the basis of efficiency, but on the basis of differences in experience, resources, and information levels of the counterparty. As discussed above, it is also likely to provide some assistance in resolving information asymmetry and support for those users or access seekers with the least bargaining power, resources and experience.

## **7.5 Promotion of more efficient outcomes and competition in dependent markets**

Given that coal producers are price takers in global thermal and metallurgical coal markets, where the costs of accessing DBCT are set at inefficient levels it will have a material impact on the competitiveness of coal producers, activity in dependent markets and the economics and incentives of coal producers investing in future coal projects in the region.

It follows from the analysis above that a collective negotiation has a greater prospect of leading to an effective negotiation than a series of bilateral negotiations as it goes some way to mitigating:

- (a) costs of negotiation;
- (b) inequality of bargaining power among users/access seekers;
- (c) inequality of bargaining power between users/access seekers and DBCTM; and
- (d) information asymmetry.

While participation in the collective negotiation is voluntary and there is no guarantee that DBCTM will agree to make any concessions on price, a collective negotiation in those circumstances has a better prospect of resulting in a price closer to that which is efficient. A series of bilateral negotiations will, by contrast, exacerbate those problems and are highly likely to result in many users and access seekers paying inefficient prices.

In addition a collective acquisition is far more likely to produce an efficient outcome in the environment where:

- (e) as concluded by the QCA in the 2019 DAU process,<sup>39</sup> there is no material differentiation between the service provided to each user which are all part of the same core coal handling service – with the same infrastructure used to service all customers; and
- (f) based on the QCA's position in the Draft Decision, access prices are likely to be based on a building blocks type methodology with socialisation,

such that an identical industry wide outcome is more appropriate.

A more efficient price has a large range of public benefits including:

- (a) increasing the international competitiveness of coal mines utilising DBCT;
- (b) improve their profitability during a time of a significant downturn in coal prices and thereby retaining and supporting future employment, exports, Queensland coal royalties and other indirect economic contributions;
- (c) incentivising efficient future investment in the coal industry and dependent industries; and

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<sup>39</sup> QCA, Draft Decision, DBCT Management's 2019 draft access undertaking, August 2020 at 43.

- (d) preventing the distortion in competition and markets that would arise from bilateral negotiations resulting in a series of inefficient price discrimination outcomes.

## **8 Public Detriment (including likely competitive effects))**

*11. Describe any detriments to the public likely to result from the proposed conduct including those likely to result from any lessening of competition. Provide information, data, documents or other evidence relevant to the ACCC's assessment of the detriments.*

The Applicants consider there is limited, if any, potential public detriment caused by allowing users of DBCT to engage in the proposed conduct.

The Applicants submit that is the case because:

- (a) the conduct is voluntary - DBCTM (and individual access holders or access seekers) would not be compelled to collectively negotiate (unless, in DBCTM's case, the QCA determines that it would be appropriate for the DBCT access undertaking to compel DBCTM to engage in collective negotiations which had been authorised by the ACCC);
- (b) there is no collective boycott activity proposed by the users of DBCT (and of course any attempt to do so would be completely impractical given the monopoly position of DBCTM and their essential infrastructure nature in the Goonyella supply chain with the Applicants' mines being economically captive);
- (c) the exchange of information between the Applicants and the reaching of any arrangements or understandings will only related to the proposed conduct (i.e. the terms of access to DBCT). The conduct will not involve or require any sharing of commercially sensitive information between users in relation to coal markets (such as downstream customers, customer pricing, volume projections or marketing strategies) or any other markets in which they may be competitors;
- (d) there is no actual competition for access to the Terminal between the entities that have already contracted capacity that can be lessened by the collective negotiation, or any potential for allocative efficiency that will be diminished by the collective negotiation – as the capacity is already allocated under evergreen contracts;
- (e) given the existing user agreement (for existing users) or standard access agreement (for access seekers) provide non-pricing terms and DBCT provides a common multi-user service utilising common infrastructure, there is very limited practical scope for customised or tailored terms which would theoretically be foregone by collective negotiations;
- (f) if resolution is not reached through collective negotiation, then all parties are no worse off, and it appears likely that there will be some form of arbitration that applies at that point to determine the terms of access; and
- (g) DBCTM has such a strong bargaining position arising from its clear market power and monopoly position that it will be more than able to protect its interest in any collective negotiation (and will have the same right to resort to arbitration that the Applicants will).

## **9 Interim Authorisation**

### **9.1 Justification for interim authorisation**

The Applicants are also seeking interim authorisation.

The Applicants submit that granting interim authorisation is appropriate in these circumstances on the basis that:

- (a) while the new pricing period under the existing user agreements only commences on 1 July 2021, the existing user agreements provide that:
  - (i) the price review process is to occur 'in conjunction with' the price review which occurs under other user agreements on materially similar terms<sup>40</sup>
  - (ii) the price review process is to commence 18 months before the commencement of the next pricing review period (such that negotiations were notionally scheduled to commence 1 January 2020),<sup>41</sup>
  - (iii) a right to arbitration exists where prices are not resolved by 1 January 2020;<sup>42</sup>
- (b) DBCTM has already sought to commence the price review process under the existing user agreements prior to the approval of DBCT's access undertaking, such that the Applicants are being placed under commercial pressure to engage in bilateral negotiations that will place them at a serious disadvantage;
- (c) negotiations in relation to the existing user agreement price reviews would be anticipated to be expedited following it being confirmed that there will be no reference tariff – currently anticipated to occur in February 2021 when the QCA's final decision in the 2019 DAU process is currently scheduled to be made (or potentially earlier if DBCTM was successful in its judicial review application in which a decision is likely early in 2021); and
- (d) the statutory 6 month timeframe for granting of authorisations is likely to result in the ACCC authorisation not being provided until after the point at which the DBCT access undertaking may have been approved without reference tariffs and negotiations and potentially arbitrations will be very advanced.

In that scenario, it is preferable for collective negotiations to be able to commence as early as possible in order to maximise the prospects of resolving pricing under the existing user agreements (whether by collective negotiation, or arbitration) before 1 July 2021.

## 9.2 Reason for timing of authorisation application

As discussed in section 3.7, this Application was not made earlier as the Applicants were making submissions to the QCA regarding the appropriate form of the DBCT access undertaking, and had anticipated that given the QCA's recognition that DBCTM has market power, no competition and an ability and incentive to engage in monopoly pricing it was unlikely that the reference tariff form of regulation would be removed.

However, following the QCA reaching the preliminary conclusion in its October draft decision and the 18 November 2020 stakeholder forum, the Applicants consider it is now clear that the QCA is highly likely to determine that it will cease reference tariff regulation and approve a form of negotiate-arbitrate regulation.

Accordingly, the Applicants have swiftly prepared and lodged this application for Authorisation and interim authorisation.

## 9.3 No detriment caused by interim authorisation

The Applicants consider that in addition to the timing urgency created by those circumstances, granting interim authorisation is appropriate because:

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<sup>40</sup> Clause 7.2(b) Standard Access Agreement.

<sup>41</sup> Clause 7.2(c) Standard Access Agreement.

<sup>42</sup> Clause 7.2(c)(ii) Standard Access Agreement.

- (a) as discussed in section 8, the proposed conduct will not cause any detriment or lessening in competition – and that is particularly the case in relation to the short period during which only interim authorisation would apply;
- (b) as the terminal is fully contracted, there is no prospect of the interim authorisation changing outcomes in terms of which users or access seekers contract DBCT capacity during that interim period; and
- (c) the only negotiation that is likely to occur during the period in which only interim authorisation would apply is the price review under the existing user agreements, the outcomes of which do not apply permanently, such that if authorisation was not ultimately granted, there will definitely not have been any permanent alteration in the market caused by interim authorisation.

## 10 Contact details of other potentially relevant stakeholders

*12. Identify and/or provide names and, where possible, contract details (phone number and email address) for likely interested parties such as actual or potential competitors, key customers and suppliers, trade or industry associations and regulators.*

The Applicants consider that the only party that will be directly impacted by the proposed conduct is DBCTM.

Coal producers are price takers in global coal market, so the higher prices that DBCTM is seeking to obtain will reduce producers' profitability, not be passed through to customers (albeit that over the medium term prices rises will give rise to inefficient underinvestment and potential early closures of coal projects, which will reduce supply and potentially increase prices).

However, for completeness, the Applicants note each of the following are parties that may have some interest in the Application.

Stakeholder	Description	Contact Details
DBCT Holdings Pty Ltd	Government owned corporation that is the long term lessor of the terminal to DBCTM	Richard Somerville Company Secretary T: [REDACTED] E: [REDACTED]
Aurizon Network	Owner and operator of the Goonyella below rail system which connects coal mines to DBCT	T: 13 23 32 GPO Box 456, Brisbane QLD 4001
Aurizon Operations	Above rail haulage operators which are contracted to operate services for haulage of coal to DBCT	T: (02) 8484 8000 Level 16, 15 Blue Street North Sydney NSW 2060
Pacific National		T: (08) 8343 5455 E: one.rail@1rail.com.au PO Box 309 Marleston DC SA 5033
OneRail		
Queensland Competition Authority	Queensland economic regulator responsible for the 2019 draft access undertaking process and administration of the Part 5 QCA Act regime	Charles Milstead T: [REDACTED] E: [REDACTED]

## 11 Additional Information

*13. Provide any other information or documents you consider relevant to the ACCC's assessment of the application.*

### 11.1 Application is analogous to numerous previous collective negotiation authorisations

For completeness, the Applicants note the strong regulatory precedent that exists for the ACCC granting authorisation for collective negotiations with monopoly infrastructure providers of a similar nature.

In particular, even confining the analysis to ACCC decisions relating to coal companies collectively negotiating with coal supply chain monopoly infrastructure providers, each of the following have received authorisation from the ACCC:

- (a) NSW Mineral Council – authorisation of collective negotiation with Port of Newcastle Operations (2020);
- (b) RG Tanna Coal Export Terminal Producers – authorisation of collective negotiations with Gladstone Ports Corporation (2014);
- (c) Dudgeon Point Coal Export Terminal Producers – authorisation of collective negotiations with QR Network and Dudgeon Point Project Management Pty Ltd (2012);
- (d) Abbot Point Coal Terminal Producers – authorisation of collective negotiations with QR Network and (2012); and
- (e) Queensland Coal Producers – authorisation of collective negotiations with SunWater (2012-2013).
- (f) Wiggins Island Coal Export Terminal producers – authorisation of collective negotiation with QR Network (2010).

The Applicants consider that many of the grounds for granting authorisations for those collective negotiations referred to in the ACCC's previous decisions would equally apply to this Application.

Those previous authorisation decisions demonstrate the clear merits of authorisation being granted for this Application and the reasonable nature of the scope and time period for which authorisation is being requested.

### 11.2 Authorisation is justified in the circumstances of the proposed form of QCA regulation

The Applicants acknowledge that it is likely that DBCT's coal handling service will continue to be regulated to some degree under Part 5 of the QCA Act as a declared service (given their views that DBCTM's judicial review application will be denied).

However, the Applicants strongly submit that the existence of some form of QCA regulation is not a reason to refuse the requested authorisation.

In particular, the QCA's Draft Decision places significant emphasis on arbitration by the QCA as a 'backstop' to provide a constraint on DBCTM's market power.

However, under the 'negotiate-arbitrate' regulatory framework contemplated in the Draft Decision the QCA will have no involvement in negotiations of access terms and pricing that occur before arbitration.

Where:

- (a) it is recognised that there are challenges to a successful negotiation occurring due to factors like:
  - (i) DBCTM's market power;
  - (ii) users/access seekers' lack of countervailing power due to the lack of any competing service providers that could be switched to;

- (iii) information asymmetry; and
- (b) the 'backstop' being relied upon to constrain DBCTM's market power has significant disadvantages in terms of costs, timing and uncertainty of outcome,

the Applicants submit there is clear merit in the ACCC providing an authorisation that improves the ability to effectively negotiation of the users and access seekers in respect of DBCT during the negotiations which would precede arbitration.

A member of the QCA also raised the potential for the Applicants to seek authorisation from the ACCC during the stakeholder forum held on 18 November 2020 and the Applicants foreshadowed their intention to do so in their latest submission to the QCA of 4 December 2020.

If the QCA is principally going to place reliance on commercial negotiations, the Applicants submit that it is appropriate for the ACCC to provide authorisation for collective negotiations to ensure those negotiations are as effective as possible.

## **12 Conclusion**

For the reasons set out in this application, the Applicants request that the ACCC approve the application for authorisation and interim authorisation of the collective negotiation (and where required collective arbitration) of access terms and pricing with DBCTM.

The Applicants consider that:

- (a) in light of the imminent regulatory changes, authorisation is appropriate to:
  - (i) mitigate the disadvantages of pricing being negotiated with an entity with significant market power, no competition and an incentive to engage in monopoly pricing;
  - (ii) provide access holders and access seekers with a greater ability to effectively negotiate and thereby enhance the prospects of efficient negotiated outcomes; and
  - (iii) reduce the costs that would arise through a series of bilateral negotiations and arbitrations of access terms; and
- (b) the public benefits of the proposed conduct would clearly outweigh any potential anticompetitive detriment.

Please do not hesitate contact John Hedge of Allens on [REDACTED] if you have any queries in relation to aspects of this submission.

## Schedule 1

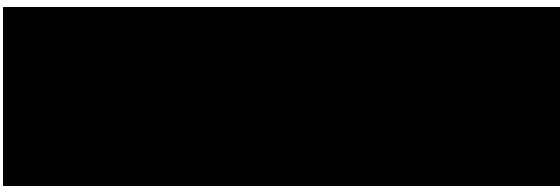
### Declaration by Applicants

Authorised persons of the applicant(s)

The undersigned declare that, to the best of their knowledge and belief, the information give in response to questions in this form is true, correct and complete, that complete copies of documents required by this form have been supplied, that all estimates are identified as such and are their best estimates of the underlying facts, and that all the opinions expressed are sincere.

The undersigned undertake(s) to advise the ACCC immediately of any material change in circumstances relating to the application.

The undersigned are aware that giving false or misleading information is a serious offence and are aware of the provisions of section 137.1 and 149.1 of the *Criminal Code* (Cth).



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Signature of authorised person

John Hedge

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(Print) Name of authorised person

Office held

Partner, Allens (signed as a solicitor on behalf of each of the Applicants)

This 21<sup>st</sup> day of December 2020

Note: If the Applicant is a corporation, state the position occupied in the corporation by the person signing. If signed by a solicitor on behalf of the Applicant, this fact must be stated.