



# Draft Determination

Application for authorisation lodged by  
Dalrymple Bay Coal Terminal Access Holders and Access Seekers

in respect of collective negotiation and collective arbitration with  
Dalrymple Bay Infrastructure Management Pty Ltd, for access to  
Dalrymple Bay Coal Terminal

Authorisation number: AA1000541

Date: 6 May 2021

Commissioners: Keogh  
Rickard  
Brakey  
Court  
Ridgeway

## Summary

The ACCC proposes to grant authorisation to enable mining companies that are current (and future) access users and access seekers to the Dalrymple Bay Coal Terminal (the **Terminal**), and which use the coal handling services provided at the Terminal to collectively negotiate and participate collectively in any arbitration of access terms and conditions (principally price) with the terminal access provider, Dalrymple Bay Infrastructure Management Pty Ltd (**DBIM**).

On 5 March 2021, the ACCC granted interim authorisation (with a condition) to enable Terminal access users and access seekers to commence collective negotiations with DBIM while the ACCC considers the substantive application for authorisation.

Regulatory changes are likely to result in a change to the way access prices are determined. Access users and access seekers wishing to export coal through the Terminal will need to negotiate access prices with DBIM. Previously, the regulator determined a reference tariff, which was accepted and used as the access price.

Access users and future access seekers are likely to be at a disadvantage when negotiating with DBIM because there are no close substitutes for the export facilities at the Terminal. Access users and future access seekers have sought authorisation to collectively negotiate and where necessary, collectively arbitrate access terms and conditions to mitigate any difficulties in negotiating access.

DBIM does not support collective negotiation and does not consider collective negotiations will result in public benefits because it does not intend to engage in collective negotiations. DBIM prefers bilateral negotiations on terms and conditions of access.

Regulatory changes are likely to require DBIM to engage in collective negotiations where lawful and where requested by access users and access seekers.

The ACCC considers that the proposed collective negotiations are likely to result in public benefits by creating transaction cost savings and increased efficiency from improving input into access negotiations. These outcomes will enhance the international competitiveness of the Dalrymple Bay Coal Terminal users with employment and investment benefits in Australia.

The ACCC considers the proposed conduct is unlikely to result in significant public detriment.

The ACCC proposes to grant authorisation, with a condition, until 30 June 2031.

The proposed condition will require the Applicants to notify the ACCC of any additional parties that seek to join the collective negotiations in the future.

### Next steps

The ACCC invites submissions on this draft determination by 21 May 2021 before making its final determination. The applicants and interested parties may also request the ACCC to hold a conference to allow oral submissions on the draft determination.

## 1. The application for authorisation

- 1.1. On 21 December 2020, a group of 13 coal miners who are current access holders and current access seekers to the Dalrymple Bay Coal Terminal (the **Terminal**), lodged an application for authorisation with the ACCC, to collectively negotiate the terms and conditions of access (principally price) to the Terminal and to potentially participate collectively in any arbitration with the access provider, Dalrymple Bay Infrastructure Management Pty Ltd (**DBIM**)<sup>1</sup>.
- 1.2. Authorisation is sought until 30 June 2031.
- 1.3. The ACCC may grant authorisation, which provides businesses with protection from legal action under competition provisions in Part IV of the *Competition and Consumer Act 2010* (the **Act**) specified in the authorisation, for arrangements that may otherwise risk breaching those provisions, but are not harmful to competition and/or are likely to result in overall public benefits.

### The Applicants

- 1.4. The application for authorisation was lodged on behalf of the following named parties, which are current access holders and current access seekers to the Terminal:
  - Anglo American Metallurgical Coal Pty Ltd
  - BHP Billiton Mitsui Coal Pty Ltd
  - BM Alliance Coal Operations Pty Limited
  - Glencore Coal Assets Australia Pty Limited
  - Clermont Access Pty Ltd
  - Fitzroy Australia Resources Pty Ltd
  - Foxleigh Management Pty Ltd
  - Peabody Energy Australia PCI (C&M Management) Pty Ltd
  - Peabody Energy Australia Pty Ltd
  - Pembroke Olive Downs Pty Ltd
  - Stanmore IP Coal Pty Ltd
  - South32 Eagle Downs Pty Ltd
  - Whitehaven Coal Mining Limited(together, the **Applicants**)
- 1.5. The Applicants also sought authorisation for:
  - their respective successors and assignees
  - their respective related bodies corporate and associated entities, and
  - joint venture participants in the joint ventures which the named Applicants are participants in or operators of

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<sup>1</sup> The application for authorisation identified the access provider as Dalrymple Bay Coal Terminal Management Pty Ltd (**DBCTM**). On 19 October 2020, DBCTM changed its name to Dalrymple Bay Infrastructure Management Pty Ltd (**DBIM**). Accordingly, the ACCC refers to DBIM as the access provider in this Draft Determination.

(together, the **Other Parties**).

- 1.6. Authorisation is also sought for future access seekers to the Terminal (**Future Access Seekers**) to have the benefit of the authorisation if they subsequently choose to participate in the collective negotiation and/or collective arbitration.
- 1.7. The Applicants have not sought to engage in collective boycott activity.

## The Proposed Conduct

- 1.8. The Applicants seek authorisation to enable the Applicants, Other Parties and Future Access Seekers to engage in:<sup>2</sup>
  - (a) the collective negotiation with the access provider DBIM, of the terms and conditions of access (principally pricing) relating to use of the Terminal's coal handling service; and
  - (b) potential collective arbitration if those negotiations fail to resolve the terms of access(the **Proposed Conduct**).
- 1.9. The Applicants submit that the Proposed Conduct would involve:<sup>3</sup>
  - (a) joint discussions between DBIM and multiple users of and access seekers to the Terminal;
  - (b) discussions between the users of the Terminal and access seekers to the Terminal 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 DBIM.

## 2. Interim Authorisation

- 2.1. On 5 March 2021, the ACCC granted conditional interim authorisation to enable the Applicants, the Other Parties, and Future Access Seekers, to commence engaging in the Proposed Conduct.<sup>4</sup>
- 2.2. Interim authorisation was granted on condition that the Applicants notify the ACCC of the names of each of the Other Parties, and Future Access Seekers that seek to engage in the Proposed Conduct that they wish to be covered by the interim authorisation before they engage in the Proposed Conduct.
- 2.3. Interim authorisation remains in place until it is revoked, the date the ACCC's final determination comes into effect or the date on which the application for authorisation is withdrawn.

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<sup>2</sup> Application for authorisation, 21 December 2020, p. 2, Available: [Public Register for DBCT](#)

<sup>3</sup> Application for authorisation, 21 December 2020, p. 5, Available: [Public Register for DBCT](#)

<sup>4</sup> ACCC, Interim authorisation decision, 5 March 2021, Available: [Public Register for DBCT](#)

### 3. Background

- 3.1. The Terminal is a common user coal terminal located at the end of the Dalrymple Bay Coal Terminal coal supply chain. It provides a coal handling service facilitating exports of coal produced from the central Bowen Basin and transported to Dalrymple Bay by rail.
- 3.2. The Applicants submit that it has been well established through previous regulatory assessments that the Terminal has a natural monopoly position, with significant market power and no close substitutes or competitive constraints; mines in the central part of the Bowen Basin are effectively economically captive to utilising the Terminal. Given that coal producers are price takers in global thermal and metallurgical coal markets, infrastructure charges (including the costs of accessing the Terminal) 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.
- 3.3. The coal handling services provided at the Terminal have been a declared service under the Queensland Competition Authority (**QCA**) Act since privatisation in 2001. Following a recent declaration review, the Queensland Treasurer decided to declare the Terminal coal handling service for a further 10 years, until 2030.
- 3.4. DBIM applied for judicial review of the Queensland Treasurer's decision to declare the service for a further 10 years. The appeal was heard in late November 2020 but a decision is yet to be released.
- 3.5. DBIM is currently subject to an access undertaking until 30 June 2021 and in 2019 it lodged a draft access undertaking (the **2019 DAU**) with the QCA to apply from 1 July 2021. In the 2019 DAU, DBIM proposed that the undertaking no longer include a QCA approved reference tariff to determine the price of coal handling services for access users (as it has done in the past) and instead rely on a negotiate-arbitrate model to set the price for the declared service.
- 3.6. In its Draft Decision on DBIM's 2019 DAU, the QCA stated that DBIM's pricing model, as proposed in its 2019 DAU, could be appropriate to approve, with amendments as outlined in the QCA Draft Decision.
- 3.7. At the time of the application, the Applicants submitted that it appears likely that the outcome of the 2019 DAU process will be that there is no QCA approved reference tariff and existing users and access seekers will be exposed to uncertainty in relation to future pricing and will need to negotiate prices with DBIM, which the Applicants consider, has significant market power.
- 3.8. On 30 March 2021, the QCA released its Final Decision refusing to approve the 2019 DAU.<sup>5</sup> The QCA requested DBIM to amend the 2019 DAU in a number of ways, and to give the QCA a copy of the amended 2019 DAU within 60 days of issuing the Final Decision. If DBIM does not comply with this request, the QCA may prepare and approve an access undertaking for the declared service.
- 3.9. In the Final Decision, the QCA decided that it is appropriate for DBIM to amend the 2019 DAU such that DBIM is required to collectively negotiate with access seekers and/or existing users, where lawful, and where requested to do so by access seekers

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<sup>5</sup> QCA, Final Decision, DBCT 2019 Draft Access Undertaking, March 2021, available: <https://www.qca.org.au/project/dalrymple-bay-coal-terminal/2019-draft-access-undertaking/>

and/or existing users, subject to certain minimum requirements (including that the group can establish sufficient commonality in the issues to be negotiated).<sup>6</sup>

## Rationale for the Proposed Conduct

- 3.10. The Applicants submit that imminent potential changes to the regulatory regime applying to the Terminal service have fundamentally changed the position of existing users and future access seekers in relation to pricing for access to the Terminal. Submissions made by DBIM during the 2019 DAU process indicate that DBIM believes it should be entitled to materially higher prices under a negotiate-arbitrate model.
- 3.11. The Applicants submit that they seek authorisation to mitigate the serious difficulties presented by negotiating pricing with DBIM in the absence of an independently determined reference tariff.

## 4. Consultation

- 4.1. A public consultation process informs the ACCC's assessment of the likely public benefits and detriments from the Conduct.
- 4.2. The ACCC invited submissions on the application for authorisation from a range of potentially interested parties including DBIM, each of the Applicants, infrastructure owners in the Port of Hay Point coal chain and relevant government departments.
- 4.3. The ACCC notes that all submissions were made before the QCA published its Final Decision on the 2019 DAU, in which the QCA stated that DBIM will be required to collectively negotiate with access seekers and/or existing users, where lawful, and where requested to do so by access seekers and/or existing users, subject to certain minimum requirements.
- 4.4. The ACCC invites DBIM and any other stakeholder to make further submissions on the application and Draft Determination in light of the QCA's Final Decision.

### Submissions before the draft determination

- 4.5. DBIM opposes authorisation. Prior to the QCA's Final Decision in relation to the 2019 DAU, DBIM submitted that:
  - (a) Authorisation would result in harm by allowing the Applicants to form a cartel, share information on price expectations and agree a maximum price, above which the participants would collectively refer the matter to arbitration, resulting in potentially multiple arbitrations. This would undermine the negotiate-arbitrate regime set out in DBIM's 2019 DAU.
  - (b) Any market power held by DBIM is constrained by QCA regulation.
  - (c) The Terminal users are already protected under existing user agreements.
  - (d) The Proposed Conduct will not result in public benefits because DBIM will not collectively negotiate with users and access seekers.<sup>7</sup>

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<sup>6</sup> QCA, Final Decision, DBCT 2019 Draft Access Undertaking, March 2021, available: <https://www.qca.org.au/project/dalrymple-bay-coal-terminal/2019-draft-access-undertaking/>

<sup>7</sup> DBIM's submissions were made before the QCA released its Final Decision requiring DBIM to collectively negotiate with users and access seekers where lawful to do so.

- 4.6. BHP Billiton Mitsui Coal Pty Ltd and BM Alliance Coal Operations Pty Limited (both applicants) support the application for authorisation, for the reasons set out in the application.
- 4.7. Foxleigh Management Pty Ltd, also an applicant, supports authorisation, submitting that changes in the Queensland access regulation framework that apply to the Terminal would remove the independently determined reference tariff. Foxleigh submits that DBIM holds a monopoly position which limits the negotiation power of smaller existing access holders and access seekers.
- 4.8. The Applicants responded to DBIM's submissions re-stating their rationale for authorisation and likely public benefits of the Proposed Conduct.
- 4.9. Public submissions are available on the [ACCC Public Register for DBCT](#)

## 5. ACCC assessment

- 5.1. The ACCC's assessment of the Proposed Conduct is carried out in accordance with the relevant authorisation test contained in the Act.
- 5.2. The application for authorisation was made under section 88 of the Act because the Proposed Conduct would or might:
  - (a) include a cartel provision within the meaning of Division 1 of Part IV of the Act; or
  - (b) result in a substantial lessening of competition within the meaning of section 45 of the Act.
- 5.3. Consistent with subsection 90(7) and 90(8) of the Act as they apply to this application for authorisation, the ACCC must not grant authorisation unless it is satisfied, in all the circumstances, that the conduct would result or be likely to result in a benefit to the public, and the benefit would outweigh the detriment to the public that would result or be likely to result from the conduct (**authorisation test**).

### Relevant areas of competition

- 5.4. To assess the likely effect of the Proposed Conduct, the ACCC identifies the relevant areas of competition likely to be impacted.
- 5.5. The ACCC considers that the most relevant area of competition affected by the Proposed Conduct is competition by coal exporters for access to port services at the Terminal, provided by access provider DBIM.

### Future with and without the Proposed Conduct

- 5.6. In applying the authorisation test, the ACCC compares the likely future with the Proposed Conduct that is the subject of the authorisation to the likely future in which the Proposed Conduct does not occur.
- 5.7. In its Final Decision, the QCA has indicated that adoption of a pricing model without a reference tariff, if properly designed, is appropriate for the declared service at Dalrymple Bay. On this basis, the ACCC considers that, should the Terminal service remain declared, access pricing is likely to be determined via a negotiate-arbitrate regime. If the service does not remain declared, the ACCC anticipates that Terminal users and access seekers are still likely to need to negotiate the terms and conditions of Terminal access with DBIM.



## **Future with the Proposed Conduct**

- 5.8. The Applicants submit that if the Proposed Conduct is authorised, the existing access holders and future access seekers will be able to collectively negotiate access pricing with DBIM.
- 5.9. DBIM submits that in the future with the conduct, the Applicants will form a buy side cartel and DBIM does not intend to engage in collective negotiations with them. DBIM submits that the Proposed Conduct will not result in public benefits and there will be public detriments arising from authorisation, resulting in a net public detriment.<sup>8</sup>
- 5.10. The ACCC's role is to assess the public benefits and detriments that are likely to arise in the future with and without the Proposed Conduct. It is not the ACCC's role to attempt to predict whether the Proposed Conduct will be engaged in by the parties.
- 5.11. The ACCC considers that, in the future with the Proposed Conduct there will be joint discussions between the Applicants about collective negotiations and the positions they will take and then the Applicants will seek to collectively negotiate with DBIM. The Applicants are likely to jointly engage economic, legal and other advisers to assist in collective negotiations. The Applicants would enter into and give effect to user agreements with terms, including pricing, and where agreements cannot be achieved collectively arbitrate access terms.

## **Future without the Proposed Conduct**

- 5.12. The Applicants submit that if the Proposed Conduct is not authorised, each individual access holder and access seeker will engage in individual bilateral negotiations of pricing with DBIM.
- 5.13. DBIM submits that without the Proposed Conduct:<sup>9</sup>
  - (a) DBIM will still be subject to regulation by the QCA under the QCA Act. It will be subject to the legislative negotiate-arbitrate regime, as well as a QCA approved access undertaking which will take effect on 1 July 2021. Based on the QCA's draft decision on DBIM's 2019 DAU (as the QCA's Final Decision was not available at the time DBIM provided the submission), it is likely that the QCA will approve the 2019 DAU without a reference tariff. Accordingly, access seekers will negotiate with DBIM on a bilateral basis, in the knowledge that if DBIM does not act reasonably, they have recourse to the QCA to arbitrate access disputes. They also benefit from the extensive non-price related protections in the 2019 DAU, including both broad and prescriptive information requirements, detailed capital expenditure approval processes and non-discrimination obligations.
  - (b) existing users who already have access to DBIM will continue to receive the benefits of their access agreements, including the ability to refer pricing disputes to arbitration. DBIM has committed publicly to providing substantively similar information to existing users as it will to access seekers under its access undertaking, including a cost of service model.
  - (c) DBIM anticipates that it will be able to reach negotiated outcomes with the majority of the Applicants.

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<sup>8</sup> DBIM submissions on the application for authorisation, available: [ACCC Public Register for DBCT](#)

<sup>9</sup> DBIM submission on the substantive application for authorisation, 12 February 2021, available: [ACCC Public Register for DBCT](#)



- 5.14. The ACCC considers that without the Proposed Conduct, each existing access holder and each future access seeker will negotiate the terms and conditions of access to the Terminal with DBIM. It is likely that each existing access holder and each future access seeker would engage its own economic, legal and other advisors for these bilateral negotiations with DBIM.

## Public benefits

- 5.15. The Act does not define what constitutes a public benefit. The ACCC adopts a broad approach. This is consistent with the Australian Competition Tribunal (the **Tribunal**) which has stated that the term should be given its widest possible meaning, and includes:

*...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements ... the achievement of the economic goals of efficiency and progress.<sup>10</sup>*

- 5.16. DBIM submits that it has no incentive to collectively negotiate with users, meaning that any purported benefits flowing from collective negotiations are purely speculative, as they would not arise in practice.<sup>11</sup> DBIM further submits that neither the 2019 DAU, nor the existing users' access agreements, make provision for collective arbitrations. Accordingly, any purported cost savings related to collective arbitrations are purely speculative and cannot be taken into account as a public benefit.<sup>12</sup>
- 5.17. The ACCC notes that upfront statements from 'targets' of proposed collective negotiation, such as DBIM, that they will not engage with a bargaining group does not mean there can be no public benefits from the proposed conduct. We note, however, that the QCA Final Decision would require DBIM to engage in lawful collective negotiation.
- 5.18. A collective bargaining authorisation granted by the ACCC, when it does not include a collective boycott, does not compel the target to deal with the group. It is not uncommon in these circumstances for the target to submit that they will not engage with the group. However, the ACCC's role is to assess the public benefits that are likely to result from the proposed collective negotiation conduct if it is engaged in by the parties in the future.
- 5.19. In addition, the ACCC considers that public benefits result from providing the opportunity for the group to form and attempt to collectively negotiate, even when the target advises that it will not deal with the group.
- 5.20. Generally, the ACCC considers that collective negotiation can result in public benefits by improving the efficiency of contracting between the 'target' and members of the group - for example, generating mutual benefits by reducing transaction costs or reducing information asymmetries between negotiating parties.
- 5.21. In assessing the current application for authorisation, the ACCC has assessed the public benefits and public detriments that are likely to arise if the Applicants have the opportunity to collectively negotiate with DBIM, including any public detriments resulting from a lessening of competition.

## Transaction cost saving for future negotiations

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<sup>10</sup> Queensland Co-operative Milling Association Ltd (1976) ATPR 40-012 at 17,242; cited with approval in Re 7-Eleven Stores (1994) ATPR 41-357 at 42,677.

<sup>11</sup> DBIM 12 February, Submission on substantive application, pp. 3-4, available: [ACCC Public Register for DBCT](#)

<sup>12</sup> Ibid, p.27

### *Applicants' submission*

- 5.22. The Applicants submit that the Proposed Conduct will result in more efficient negotiation of future access pricing with DBIM, particularly considering:<sup>13</sup>
- (a) The new pricing regime is scheduled to commence on 1 July 2021;
  - (b) Negotiations are anticipated to be complex given it will be the first time the parties will experience such a negotiate-arbitrate pricing regime in respect of the Terminal since its privatisation in 2001, and based on past regulatory submissions, DBIM and users have highly divergent views on appropriate pricing;
  - (c) there is a relatively large number of users of the Terminal, such that the cost savings of a single collective negotiation (rather than a series of bilateral negotiations) will be very significant.
- 5.23. The Applicants submit that the Proposed Conduct would significantly reduce negotiating costs through:<sup>14</sup>
- (a) users being able to engage a common external legal adviser and a common economic advisor, and share the costs of doing so,
  - (b) significantly less meetings being required with DBIM relative to a series of bilateral negotiations between DBIM and individual users under the future without the Proposed Conduct.
- 5.24. The Applicants do not anticipate that there will be issues specific to individual access holders relevant to the negotiations which would detract from the identified cost savings. This is due to 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.<sup>15</sup>
- 5.25. The Applicants submit that, in the event arbitration is required, additional cost savings would arise for DBIM, users and access seekers (and the arbitrator) if arbitration were conducted collectively compared to a situation where multiple bilateral arbitrations are required.

### *DBIM submission*

- 5.26. DBIM submits that the Applicants have provided no evidence that collective negotiations would lead to reduced negotiation or arbitration costs. In fact, the coordination of a negotiating position amongst the many Applicants, along with the additional costs associated with the appointment of legal and economic representatives to negotiate with DBIM, is likely result in increased and unnecessary negotiation costs with no corresponding benefit.<sup>16</sup>
- 5.27. DBIM submits that neither the 2019 DAU, nor the existing users' access agreements, make provision for collective arbitrations. Accordingly, any purported cost savings related to collective arbitrations are purely speculative and cannot be taken into

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<sup>13</sup> Application for authorisation, 21 December 2020, p. 23. : Available: [ACCC Public Register for DBCT](#)

<sup>14</sup> Application for authorisation, 21 December 2020, pp. 23-24, : Available: [ACCC Public Register for DBCT](#)

<sup>15</sup> Application for authorisation, 21 December 2020, p. 24, : Available: [ACCC Public Register for DBCT](#)

<sup>16</sup> DBIM submission 12 February 2021, p. 4, Available: [ACCC Public Register for DBCT](#)

account as a public benefit. Even if collective arbitrations were permitted, any cost savings are likely to be immaterial or non-existent as:<sup>17</sup>

- (a) the parties to the arbitration and the arbitrator would still have to deal with user specific factors, discussed above;
- (b) the practical difficulties of managing a huge collective arbitration and coordinating not two, but many parties is likely to result in inefficiencies resulting in increased costs; and
- (c) overall the cost of arbitration is likely to increase as there is likely to be an increased number of users unnecessarily proceeding to arbitration with authorisation, because users are likely to adopt the most aggressive bargaining position of the participants.

#### *ACCC view*

- 5.28. The ACCC receives and considers many applications for authorisation for collective negotiation/bargaining. The ACCC accepts that generally collective negotiation/bargaining results in increased efficiency including from transaction cost savings.
- 5.29. The ACCC accepts that each of the Applicants, Other Parties and Future Access Seekers individually negotiating with DBIM will incur transaction costs, such as the time taken to negotiate and legal or other expert advice costs. Collective negotiation and engaging legal and economic advisors to assist the group is likely to result in efficiencies including transaction costs savings for the Applicants, Other Parties and Future Access and DBIM. Given the number of parties involved these efficiencies are likely to be significant.
- 5.30. The ACCC also notes the QCA has clarified that no amendments to the 2019 DAU are required to implement collective arbitration because the existing legislative regime in Queensland already provides for collective arbitration of disputes in certain circumstances.<sup>18</sup>

### **Increased efficiency from improving input into negotiations for access to the Terminal**

#### Improving transparency and reducing information asymmetry

##### *Applicants' submission*

- 5.31. The Applicants submit that a core concern that users of the Terminal have raised in the 2019 DAU process is the lack of transparency and the information asymmetry that will exist between DBIM and users, particularly in relation to:<sup>19</sup>
  - (a) large costs associated with items such as proposed expansions, significant capital expenditure on major terminal plant and equipment and remediation at the end of DBIM's useful life
  - (b) useful life of the terminal
  - (c) DBIM's efficient costs of debt and equity

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<sup>17</sup> DBIM submission 12 February 2021, p.27, Available: [ACCC Public Register for DBCT](#)

<sup>18</sup> QCA, Final Decision, 30 March 2021, p. 110, available: <https://www.qca.org.au/project/dalrymple-bay-coal-terminal/2019-draft-access-undertaking/>

<sup>19</sup> DBIM submission 12 February 2021, p.27, Available: [ACCC Public Register for DBCT](#)

- (d) DBIM's efficient corporate overhead and tax costs.
- 5.32. DBIM submits that the previous regulatory approach, where the QCA determined 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.
- 5.33. In the absence of a reference tariff, the Applicants consider a collective negotiation provides the greatest potential for mitigating that information asymmetry by allowing:
- (a) more informed users sharing information (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), and
  - (b) greater access to professional advisers through the ability to share costs.
- 5.34. The Applicants submit that given the reliance of a negotiate-arbitrate model on negotiating parties having sufficient information to resolve efficient and appropriate terms of access, is a clear public benefit.

#### *DBIM submission*

- 5.35. DBIM submits that this issue has been considered in great detail by the QCA, and DBIM has proposed extensive amendments to the 2019 DAU to eliminate any concerns regarding information asymmetry. The 2019 DAU submitted by DBIM to the QCA provided for:<sup>20</sup>
- (a) extensive prescriptive information requirements, including two comprehensive schedules of information requirements,
  - (b) an ability request a broad range of information from DBIM,
  - (c) a proposal to introduce an evidentiary limit.
- 5.36. DBIM submits that the Applicant's position that collective negotiations are needed to address information asymmetry contradicts the findings of the QCA that with appropriate amendments information asymmetry can be dealt with under the 2019 DAU. The Applicants rely on the proposition that the QCA's final decision will leave unresolved a bona-fide issue regarding information asymmetry and transparency, which it has considered in detail.<sup>21</sup>

#### *Applicants' response to DBIM submission*

- 5.37. The Applicants submit Authorisation can (and will) act as a complement and enhancement to the QCA's regulatory arrangements, in a way that the QCA is not empowered to provide – through enabling a reduction in costs, increasing the information that users will have access to, and improving the bargaining position of users and access seekers.<sup>22</sup>
- 5.38. The Applicants submit that the fact that the QCA regime may provide some degree of assistance with those matters does not mean that the Proposed Conduct cannot provide further benefits. The QCA has, in fact, expressly indicated that it does not

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<sup>20</sup> DBIM submission 12 February 2021, p. 23, Available: [ACCC Public Register for DBCT](#)

<sup>21</sup> DBIM submission 12 February 2021, pp. 23-24, Available: [ACCC Public Register for DBCT](#)

<sup>22</sup> Application for authorisation, 25 February 2021, p. 7, Available: [ACCC Public Register for DBCT](#)

consider its role is to only approve the most appropriate possible undertaking or consider whether other variations would have been preferable.<sup>23</sup>

#### *ACCC view*

- 5.39. In its Draft Decision and Final Decision, the QCA noted that the provision of sufficient information is likely to result in successful and efficient negotiations. The QCA stated that given DBIM proposed to remove the reference tariff and replace it with a negotiate-arbitrate pricing regime, information provision requirements must reduce information asymmetry so as to encourage and facilitate effective negotiation. Accordingly, the QCA requires DBIM to provide users and access seekers with certain specific information.
- 5.40. The QCA also stated that an overly prescriptive approach to information provision risks limiting the scope for parties to negotiate on pricing terms of access. Where there is scope for commercial judgement and flexibility around elements of a pricing proposal, there may be an opportunity for the parties to negotiate without regulatory intervention.<sup>24</sup>
- 5.41. The ACCC considers that the Proposed Conduct is likely to provide some opportunity for the parties to identify common contractual issues and then negotiate contractual terms in a way that better reflects the circumstances of the parties. The proposed collective negotiations will also likely mean that members of the bargaining group become better informed about relevant market conditions. These factors should facilitate improved input into contract negotiations and thus the negotiation of more efficient access prices compared to the situation where bilateral negotiations occur.
- 5.42. The ACCC considers that the Proposed Conduct complements the QCA's regulatory arrangements in this aspect and on this basis is likely to result in some public benefit.

#### Facilitating more efficient prices

##### *Applicants' submission*

- 5.43. The Applicants submit that while there are a number of coal terminals in Queensland, it has been well established through previous regulatory assessments that the Terminal 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 the Terminal.
- 5.44. The Applicants submit that users and access seekers' dependence on the Terminal as bottleneck essential infrastructure in the Goonyella coal supply chain, creates an inequality of bargaining power between individual users and access seekers and DBIM. This inequality of bargaining position will be exacerbated where users are required to engage in bilateral negotiations with DBIM on an individual basis.
- 5.45. The Applicants submit that the long term nature of their existing access agreements and sunk capital investments in major mining projects, means they cannot cease contracting access until the end of life of their mining projects, and the lack of competition means that the Terminal is their only choice of access. The vast majority of existing users are completely economically captive to the Terminal.

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<sup>23</sup> Application for authorisation, 25 February 2021, p. 7, Available: [ACCC Public Register for DBCT](#)

<sup>24</sup> QCA, Final Decision, p.60, available: <https://www.qca.org.au/project/dalrymple-bay-coal-terminal/2019-draft-access-undertaking/>

- 5.46. The Applicants submit that the findings of the ACCC in its assessment of Brookfield's acquisition of Asciano and the QCA in its declaration review of the Terminal coal handling service indicate that there is a separate market for the supply of coal handling services by the Terminal.<sup>25</sup> The Applicants submit that other Queensland coal terminals are not close substitutes because:<sup>26</sup>
- (a) Rail access and haulage costs from coal mines to the Terminal are significantly cheaper compared to transportation costs to other terminals,
  - (b) 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,
  - (d) transporting coal through the Newlands system to Abbot Point involves utilising diesel locomotives, which provides another barrier to switching where a user's haulage provider uses electric locomotives,
  - (e) some mines require infrastructure changes for coal to be transported to other terminals,
  - (f) a high proportion of coal shipped from DNBCT is metallurgical coal and coal producers can co-ship with other producers (and this is particularly attractive for smaller producers),
  - (g) the Terminal infrastructure enables the shipping of homogenous blends of coal and this creates marketing opportunities for coal producers using the Terminal.
- 5.47. The Applicants submit that the position is not materially different for access seekers. Access seekers are highly dependent on DBIM 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 DBIM has no similar dependence on an individual access seeker, where they have indicated their last expansion was oversubscribed and there is additional remaining demand.
- 5.48. 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 DBIM, 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.
- 5.49. The Applicants submit that at a minimum, it will make it significantly harder for DBIM 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. The Applicants submit that 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.
- 5.50. At the time of the applicant, the Applicants submitted that while participation in the collective negotiation is voluntary and there is no guarantee that DBIM will agree to

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<sup>25</sup> Application for authorisation, 21 December 2020, p. 15 Available: [ACCC Public Register for DBCT](#)

<sup>26</sup> Application for authorisation, 21 December 2020, pp. 15-16 Available: [ACCC Public Register for DBCT](#)



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.

- 5.51. A collective negotiation is far more likely to produce an efficient outcome in the environment where:
- (a) as concluded by the QCA in the 2019 DAU process, 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
  - (b) 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.
- 5.52. A more efficient price has a large range of public benefits including:
- (a) increasing the international competitiveness of coal mines utilising the Terminal;
  - (b) improving 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
  - (d) preventing the distortion in competition and markets that would arise from bilateral negotiations resulting in a series of inefficient price discrimination outcomes.
- 5.53. The Applicants submit that some of the Applicants are independent, single mine access holders or access seekers. Where these 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 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.
- 5.54. The Applicants submit that the Proposed Conduct will provide public benefits by:
- (a) allowing smaller users to collectively negotiate with larger users, resulting in a common price rather than price discrimination against smaller or less well-resourced users or access seekers,
  - (b) in turn, promoting efficient outcomes in coal markets and dependent markets which would otherwise be distorted.

*DBIM submission*

- 5.55. DBIM submits that throughout the Application, the Applicants rely on the fact that the QCA has previously found that DBIM possesses some market power. DBIM acknowledges that the QCA has found that DBIM does possess some market power without regulation. However, this is the QCA's assessment of the state of the market without regulation.



- 5.56. DBIM submits that the Terminal service is declared and therefore regulated under the QCA Act by the QCA, who is empowered to ensure that DBIM cannot exercise any market power.
- 5.57. DBIM submits that DBIM will be unable to exert any market power under the 2019 DAU as:
- (a) if DBIM attempts to exert market power, the Applicants will have the ability to refer the matter to be determined by an independent arbitrator, most likely the QCA (whether under the 2019 DAU or existing user agreements),
  - (b) any changes to the regulatory regime will be the result of a thorough analysis by the QCA, including extensive public consultation, over a period of 20 months. The final decision of the QCA will be on the basis that the approved Access Undertaking will appropriately constrain DBIM's market power.
- 5.58. DBIM submits that irrespective of whether the ACCC considers the 2019 DAU to be an effective constraint on DBIM's market power, the QCA has undertaken a thorough analysis of the 2019 DAU and will determine the outcome that it considers appropriate in light of this. All concerns raised by the Applicants in the application for authorisation have also been raised with the QCA, which has had the time and opportunity to thoroughly consider these concerns. Given the robustness of this process it is reasonable for the ACCC to adopt an assumption that the QCA understands and is across the issues raised by the Applicants. Ultimately, if the QCA decides to approve the 2019 DAU without a reference tariff, it will be because it determines that the access undertaking will adequately constrain any market power on the part of DBIM (indeed, the QCA has expressly identified that the access undertaking must constrain DBIM's market power in order to be appropriate to approve). If the QCA determines that DBIM's market power is not constrained under the 2019 DAU, the QCA will require DBIM to make amendments to the 2019 DAU such that its market power is constrained.
- 5.59. DBIM submits that the Terminal is currently fully contracted for the foreseeable future. The only negotiations currently on foot relate to the price for existing users, who already have access to the Terminal. These negotiations are governed by the existing rights and obligations contained in existing users' access agreements. These negotiations are subject to binding arbitration by the QCA or a commercial arbitrator, which is a constraint on DBIM's ability to exercise any market power.
- 5.60. DBIM submits that there is no evidence that the Proposed Conduct would result in efficient prices. DBIM is regulated by the QCA and users and access seekers can refer disputes to the QCA for arbitration if DBIM pursues an inefficient price.
- 5.61. DBIM submits that in the future without the Proposed Conduct, each party will agree to price and other terms that are reasonable and efficient, taking into account each users individual needs. If DBIM offers an inefficient price, the user can refer the dispute to arbitration.
- 5.62. DBIM submits that in the future with the Proposed Conduct the group is likely to adopt the most aggressive bargaining position of its participants, which may be below the efficient cost of providing the service, leading to increased risk to future investment and increased likelihood of unnecessary arbitrations.
- 5.63. Regarding the position of smaller users and access seekers, DBIM submits that its customers are large, sophisticated, mining companies who deal with significant uncertainty on a day-to-day basis. The need to negotiate charges with DBIM is no

different from other (unregulated) negotiations that small miners face on a day-to-day basis. Many existing users of the terminal have successfully negotiated charges at other unregulated terminals, and most have a very long history at the Terminal and are familiar with the regime.<sup>27</sup>

- 5.64. DBIM submits that small and less experienced producers will have the same recourse to arbitration as large suppliers (either under their access agreements or the 2021 access undertaking) where the arbitrator can ensure that these producers are not exploited.<sup>28</sup>

#### *ACCC view*

- 5.65. The ACCC accepts the Applicants' submissions that the coal handling services at other Queensland coal terminals, such as Abbot Point and Gladstone are not close substitutes for the services provided at the Terminal. The ACCC considered this issue in its assessment of Brookfield Consortium's proposed acquisition of Asciano Limited.<sup>29</sup>
- 5.66. The ACCC considers that the Proposed Conduct is likely to enable individual members of the group to be more informed and engaged in negotiations. This is likely to result in more comprehensive terms and conditions of access, resulting in more efficient outcomes, including more efficient prices. The ACCC considers that the ability for access users and access seekers to engage in both collective negotiation and collective arbitration (in the event collective negotiation does not result in efficient outcomes) is likely to result in public benefits.
- 5.67. More efficient outcomes, including more efficient access prices are likely to result in the coal producers that compete with other producers in a global market, being more competitive.
- 5.68. Coal producers contribute to the local communities in which they operate by, amongst other things, employing people in the local community and contracting with local businesses for services.
- 5.69. The ACCC considers that smaller, resource constrained businesses benefit from collective negotiations. In this case, the ACCC notes that while some of the users are significantly smaller than others, they are still reasonably large businesses. However, the ACCC accepts that there is a risk that these businesses, negotiating bilaterally with DBIM may settle for inefficient prices rather than pursue prolonged negotiations and potentially arbitration. Accordingly, the Proposed Conduct is likely to result in some public benefit by improving the negotiating position of smaller, less well-resourced users and access seekers. We note that, in addition to our reasoning, the QCA final decision requires DBIM to engage in lawful collective negotiation in certain circumstances.
- 5.70. A more efficient price will likely result in public benefits by improving the competitiveness of coal producers; retaining and supporting future employment, increased exports, Queensland coal royalties and other indirect economic contributions; and incentivising more efficient future investment in the coal industry and dependent industries.

#### **Summary of likely public benefits**

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<sup>27</sup> DBIM submission 12 February pp. 22-23, available: [ACCC Public Register for DBCT](#)

<sup>28</sup> DBIM submission 12 February pp. 22-23, available: [ACCC Public Register for DBCT](#)

<sup>29</sup> See ACCC, 2015, *Statement of Issues*, pp13-14., available: <https://www.accc.gov.au/public-registers/mergers-registers/public-informal-merger-reviews/brookfield-consortium-proposed-acquisition-of-asciano-limited>

- 5.71. The ACCC considers that the Proposed Conduct is likely to result in public benefits in the form of:
- Transaction cost savings, and
  - Increased efficiency from improving input into negotiations for access to the Terminal.
- 5.72. The ACCC considers these outcomes will enhance the international competitiveness of the Dalrymple Bay Coal Terminal users, with investment and employment benefits in Australia.

## Public detriments

- 5.73. The Act does not define what constitutes a public detriment. The ACCC adopts a broad approach. This is consistent with the Tribunal which has defined it as:
- ...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.*<sup>30</sup>
- 5.74. The Applicants submit that there is limited, if any, potential public detriment caused by allowing users of the Terminal to engage in the Proposed Conduct.
- 5.75. The Applicants submit that is the case because:<sup>31</sup>
- (a) The Proposed Conduct is voluntary - DBIM (and individual access holders or access seekers) would not be compelled to collectively negotiate (unless, in DBIM's case, the QCA determines that it would be appropriate for the Terminal access undertaking to compel DBIM to engage in collective negotiations which had been authorised by the ACCC).<sup>32</sup>
  - (b) The Proposed Conduct does not include collective boycott activity by the users of the Terminal.
  - (c) The exchange of information between the Applicants and the reaching of any arrangements or understandings is only related to the Proposed Conduct. The Applicants are not able to share commercially sensitive information 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 the Terminal provides a common multi-user service utilising common infrastructure, there is

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<sup>30</sup> Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

<sup>31</sup> DBCT, 21 December 2021, Application for authorisation, p.27, available: [ACCC Public Register for DBCT](#)

<sup>32</sup> The QCA Final Decision, released on 30 March 2021 states: *It is appropriate for DBIM to amend the 2019 DBCT DAU such that: DBIM is required to collectively negotiate with access seekers and/or existing users, where lawful, and where requested to do so by access seekers and/or existing users, subject to certain minimum requirements (including that the group can establish sufficient commonality in the issues to be negotiated).*

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) DBIM has a strong bargaining position and is able to protect its interest in any collective negotiation (and will have the same right to resort to arbitration as the Applicants).

5.76. The ACCC has considered the following possible public detriments.

### **Potential for authorisation to undermine the access regime**

#### *DBIM and QCA submissions*

- 5.77. DBIM submits that Authorisation would undermine the certified Queensland access regime and the Queensland regulator, the QCA. In particular, the regulatory regime likely to apply to DBIM from July 2021 is designed to promote tailored, bilaterally negotiated pricing outcomes, outcomes which the QCA has recognised will deliver real public benefits. The authorisation would undermine these bilateral negotiations, and the associated benefits, resulting in unnecessary arbitrations and increased costs.
- 5.78. DBIM submits that the application for authorisation is merely forum shopping and as acknowledged by the Applicants, the Application is made because the Applicants consider that they are not going to get a favourable outcome from the QCA under the certified access regime applying to the Terminal Service. According to DBIM, the Applicants are seeking authorisation to subvert the likely outcomes of the QCA's regulatory process in which it has thoroughly considered the issues raised by the Applicants, over a period of over 20 months. Such forum shopping and regulatory gaming undermines confidence in the national access framework, and creates cost and uncertainty which is unnecessary given the terminal is already fully regulated under an access regime which is certified to be effective
- 5.79. Before releasing its Final Decision on the 2019 DAU, the QCA submitted that it does not consider any decision the ACCC makes on the application will interfere with its consideration of the 2019 DAU, or with the development and release of its Final Decision on the 2019 DAU. As a result, the QCA submitted that the ACCC should consider the application on its merits.

#### *ACCC view*

- 5.80. The ACCC does not consider that the Proposed Conduct has or will undermine the Queensland access regime. The ACCC notes the QCA's views set out above and that the QCA:<sup>33</sup>
- (a) has decided to require DBIM to collectively negotiate with existing terminal users and access seekers, where lawful and where requested to do so by existing users and access seekers.
  - (b) considers that no amendments to the 2019 DAU are required to implement collective arbitration because the existing legislative regime in Queensland already provides for collective arbitration of disputes in certain circumstances.

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<sup>33</sup> QCA, Final Decision, 30 March 2021, pp100-110, available: <https://www.qca.org.au/project/dalrymple-bay-coal-terminal/2019-draft-access-undertaking/>

## Potential for collective activity beyond that authorised

### *DBIM submissions*

- 5.81. DBIM submits that there is a real risk that the Proposed Conduct would lead to the Applicants sharing competitively sensitive information relevant to other markets in the supply chain, which could lead to the risk of anticompetitive collusion and coordination in those markets.

### *Applicants' submission*

- 5.82. As noted, the Applicants submit that the exchange of information between them and the reaching of any arrangements or understandings will only be related to the Proposed Conduct (i.e. the terms of access to the Terminal).

### *ACCC view*

- 5.83. Authorisation raises the potential for anticompetitive coordination beyond the scope of the conduct for which authorisation is sought. However, any such conduct would not be protected under the proposed authorisation, and would likely breach the Act. The ACCC notes that the Applicants' submission in support of their application for authorisation indicates that they are aware of their responsibilities under the Act. The Applicants will be aware that there is an increased risk of detection if they engage in unauthorised conduct. On this basis, the ACCC considers that this detriment is unlikely to arise.

## Prejudice future access seekers

### *DBIM submission*

- 5.84. DBIM submits that authorisation would provide the opportunity for groups of users to collaborate in a way that could prejudice the interests of other users or, in particular, access seekers. DBIM submits that, for example, without an expansion to the terminal it is unlikely that access seekers will be able to gain access to the terminal. However, the cost of an expansion, if socialised amongst all users, is likely to incrementally increase the access charges at the terminal for all users. Accordingly, the interests of access seekers and existing users are not aligned with respect to the socialisation of an expansion.
- 5.85. Given that collective negotiations are voluntary and all users and access seekers do not need to participate, there is a risk that a group of users use the threat of multiple arbitrations to seek terms from DBIM that prejudice the position of other users or access seekers.

### *Applicants' submission*

- 5.86. The Applicants submit that they have sought authorisation on behalf of all future users and access seekers; there is no intention to exclude or prejudice any entity. The Applicant submit that an existing user can also be an access seeker; it is unlikely that existing users would agree to a collective position to damage access seekers.<sup>34</sup>

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<sup>34</sup> DBCT, 25 February 2021, 2nd submission to the ACCC, p-5-6, available: [ACCC Public Register for DBCT](#)

## *ACCC view*

- 5.87. The ACCC does not consider that it is in the interests of the Applicants to exclude future members from seeking to join the group and notes they have sought authorisation to extend to future parties.

## **The risk of multiple threats of arbitration**

### *DBIM submissions*

- 5.88. DBIM submits that the Proposed Conduct would enable the Applicants to use the threat of multiple arbitrations to circumvent the negotiation process.<sup>35</sup>
- 5.89. DBIM submits that authorising the formation of what would otherwise be considered a cartel is likely to result in the Applicants collectively adopting an unreasonable pricing position in negotiations with DBIM, which may not allow DBIM to recover the efficient costs of providing the service. This in turn, will result in a greater number of unnecessary arbitrations than would otherwise be the case.<sup>36</sup>
- 5.90. DBIM submits that without authorisation, the Applicants would be required to negotiate individually. This would enable DBIM to reach mutually agreeable negotiated outcomes with the majority of reasonable users. On occasion there may be a dispute, which would be referred to arbitration where it could be dealt with efficiently and expediently by the QCA.
- 5.91. DBIM submits that authorising the Applicants to form a buy-side cartel means that a greater number of users are likely to adopt an unreasonable negotiating position and refuse to accept a reasonable offer by DBIM. This will lead to unnecessary arbitrations and increased arbitration costs.

### *Applicants' submission*

- 5.92. The Applicants submit that DBIM's submission relies on the assumption that a collective negotiation will automatically result in the Applicants' collectively adopting an unreasonable pricing position in negotiations with DBIM by following the most 'aggressive' and 'unreasonable' price advocated for by any user.
- 5.93. The Applicants submit that DBIM's underlying assumption:
- (a) is inconsistent with the Applicants' stated purpose for seeking authorisation – namely to collectively negotiate an appropriate price (and if needed to pursue a single collective arbitration) to avoid the need and cost for multiple arbitrations;
  - (b) is inconsistent with all of DBIM's own submissions that the QCA arbitrations will provide an appropriate price (such that, based on their own submissions, DBIM would clearly not regard multiple arbitrations as a credible threat in response to which they would accept a price below the efficient costs of providing the service and it would be irrational for the Applicants to consider they would achieve such a price through such threats);
  - (c) does not acknowledge that participation by a user in a collective negotiation would be voluntary and where DBIM can convince an existing user that there are benefits in negotiating separately that avenue remains equally available with

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<sup>35</sup> DBIM, 12 February 2021, p.5, available: [ACCC Public Register for DBCT](#)

<sup>36</sup> DBIM 12 February p. 30, Available: [ACCC Public Register for DBCT](#)

authorisation – such that they are not locked into pursuing an unreasonable common outcome; and

- (d) requires the ACCC to assume that the Applicants will act contrary to the rational and economic incentives they will face – as they will be highly incentivised to not to be dragged into unnecessary arbitrations (involving significant costs and on DBIM's theory presumably a higher 'reasonable' price being found by the QCA) by being part of a collective pursuing unreasonable outcomes in negotiations. In DBIM's unrealistic hypothetical environment where the collective negotiating position was an unreasonable price cap, users would be incentivised to seek bilateral negotiations.

5.94. The Applicants submit that they are not seeking to circumvent the negotiation process, but to enhance it by seeking to engage in the negotiation collectively, so as to lower transaction costs and make the negotiations more informed and effective.

#### *ACCC view*

5.95. As outlined in the interim authorisation decision, the ACCC notes DBIM's concerns that, if authorisation is granted and the parties engaging in collective negotiation collectively decide on a maximum price for the service, which DBIM rejects, the parties to the conduct may refer the matter to collective arbitration, potentially resulting in multiple arbitrations.

5.96. The ACCC does not share this concern: collective arbitration is likely to reduce the number of arbitrations compared to a future with bilateral negotiation/arbitration. Further, the ACCC considers that any arbitration would likely determine a price based on the efficient cost of supply, rather than a price agreed between coal producers. Once one arbitration had determined an efficient price, there would be little incentive for other producers to try to hold out for their previously agreed price. On this basis, the ACCC considers that this detriment is unlikely to arise.

#### **Summary of likely public detriment**

5.97. The ACCC considers that there are limited public detriments from:

- Potential for authorisation to undermine the access regime.
- Potential for collective activity beyond that authorised.
- Prejudice future access seekers.
- The risk of multiple threats of arbitration.

5.98. For the reasons outlined above, the ACCC concludes that the Proposed Conduct is unlikely to result in significant public detriment.

#### **Proposed reporting condition**

5.99. The Applicants seek authorisation for themselves, Other Parties, defined in paragraph 1.5 and Future Access Seekers, described in paragraph 1.6. The primary participants in the Proposed Conduct will be the 13 parties named in the application and the Other Parties and Future Access Seekers would be other parties with an interest in exporting coal via the terminal now or in the future, including entities with a minority interest based overseas.

5.100. The ACCC proposes to impose a reporting condition requiring the Applicants to notify the ACCC of the names of additional parties before they engage in the Proposed



Conduct. The ACCC considers it should be aware of the entities that have the benefit of authorisation. The proposed condition set out below will achieve this.

5.101. The ACCC imposed this reporting condition in the interim authorisation.

## Balance of public benefit and detriment

5.102. For the reasons outlined in this draft determination, the ACCC is satisfied that the Proposed Conduct is likely to result in a public benefit and that this public benefit would outweigh any likely detriment to the public from the Proposed Conduct.

## Length of authorisation

5.103. The Act allows the ACCC to grant authorisation for a limited period of time.<sup>37</sup> This enables the ACCC to be in a position to be satisfied that the likely public benefits will outweigh the detriment for the period of authorisation. It also enables the ACCC to review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.

5.104. In this instance, the Applicants seek authorisation until 30 June 2031, approximately 10 years.

5.105. DBIM submits that the proposed period of authorisation is excessive as regulation applying to DBIM beyond the next 5 years is completely uncertain. In the event the ACCC determines authorisation is appropriate, DBIM submits that authorisation should apply only for the duration of the upcoming 5 year pricing period, at the most. The Applicants could then reapply for authorisation after this period and the ACCC could assess the application in view of the factual circumstances that will apply to that period.<sup>38</sup>

5.106. The Applicants submit that the proposed authorisation period of 10 years will ensure that the negotiations for the next pricing period are properly covered within the scope of the authorisation. The Applicants submit that this is important because under the terms of the existing user agreements, where prices are not determined by the start of the next pricing period, the agreed or arbitrated prices are backdated.<sup>39</sup>

5.107. The Applicants submit that where authorisation is only granted for the limited period that DBIM is seeking, that there will be no protection if negotiations or an arbitration continued past 30 June 2026. Where (as is the case currently) price is not resolved near the end of the pricing period, the limited period proposed by DBIM would practically force the Applicants to reapply for authorisation to ensure that if negotiations or arbitrations continued after 1 July 2026 there would still be an authorisation in place, despite the fact that there has been no change in circumstances.<sup>40</sup>

5.108. In light of the ACCC's net public benefit assessment and the possibility that pricing negotiation/arbitration for the next five-year pricing period may extend beyond 30 June 2026, the ACCC proposes to authorise the Applicants to engage in the Proposed Conduct until 30 June 2031.

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<sup>37</sup> Subsection 91(1).

<sup>38</sup> DBIM 12 February 2021, Submission on the substantive application for authorisation, p.5, Available: [ACCC Public Register for DBCT](#)

<sup>39</sup> DBCT 2 March 2021, 3<sup>rd</sup> Submission to the ACCC, p. 12, available: [ACCC Public Register for DBCT](#)

<sup>40</sup> *ibid*

## 6. Draft determination

### The application

- 6.1. On 21 December 2020, a group of 13 coal miners who are current access holders and current access seekers to the Terminal lodged an application for authorisation with the ACCC, to collectively negotiate the terms and conditions of access (principally price) to the Terminal and to potentially participate collectively in any arbitration with the access provider DBIM. This application for authorisation AA1000541 was made under subsection 88 of the Act.
- 6.2. The Applicants seek authorisation, on behalf of themselves (as defined in paragraph 1.4), the Other Parties, as defined in paragraph 1.5 and Future Access Seekers, as described in paragraph 1.6 to engage in the Proposed Conduct, as outlined in paragraph 1.8 and paragraph 1.9.
- 6.3. Subsection 90A(1) of the Act requires that before determining an application for authorisation, the ACCC shall prepare a draft determination.

### The authorisation test

- 6.4. Under subsections 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied in all the circumstances that the Conduct is likely to result in a benefit to the public and the benefit would outweigh the detriment to the public that would be likely to result from the Conduct.
- 6.5. For the reasons outlined in this draft determination, the ACCC is satisfied, in all the circumstances, that the Proposed Conduct would be likely to result in a benefit to the public and the benefit to the public would outweigh the detriment to the public that would result or be likely to result from the Proposed Conduct, including any lessening of competition.
- 6.6. Accordingly, the ACCC proposes to grant authorisation.

### Conduct which the ACCC proposes to authorise

- 6.7. The ACCC proposes to grant authorisation AA1000541 to enable the Applicants, as defined in paragraph 1.4, the Other Parties, as defined in paragraph 1.5 and Future Access Seekers, as described in paragraph 1.6, to engage in the Proposed Conduct, as outlined in paragraphs 1.8 and 1.9.
- 6.8. The Proposed Conduct does not include the sharing of commercially sensitive information in relation to coal markets (such as downstream customers, customer pricing, volume projections or marketing strategies) or any other markets in which the Applicants, the Other Parties and Future Access Seekers are or may be competitors.
- 6.9. The Proposed Conduct may involve a cartel provision within the meaning of Division 1 of Part IV of the Act, or may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the Act.
- 6.10. The ACCC proposes to grant authorisation AA1000541, with the following condition, until 30 June 2031.
- 6.11. This draft determination is made on 6 May 2021.

## Proposed Condition of authorisation

- 6.12. The ACCC proposes to grant authorisation on condition that the Applicants, as defined in paragraph 1.4, notify the ACCC of the names of each of the Other Parties, as described in paragraph 1.5, and Future Access Seekers, as described in paragraph 1.6, that seek to engage in the Proposed Conduct by sending an email to [exemptions@accc.gov.au](mailto:exemptions@accc.gov.au) with the subject '*AA1000451 – Dalrymple Bay Coal Producers - Notification of entity*' identifying the entity(ies) that they wish to be covered by this interim authorisation before they engage in the Proposed Conduct.
- 6.13. The ACCC may publish on its public register a list of the notified parties.

## 7. Next steps

- 7.1. The ACCC now invites submissions in response to the application and this Draft Determination, particularly in light of the QCA's Final Decision by 21 May 2021. In addition, consistent with section 90A of the Act, the Applicants or an interested party may request that the ACCC hold a conference to discuss the draft determination.