12 February 2021

David Hatfield
Director - Adjudication
Australian Competition and Consumer Commission

Dear Mr Hatfield,

Re: Dalrymple Bay Coal Producers AA1000541 - Submission

DBI Management (DBIM) welcomes the opportunity to make a submission on the Applicants' application for authorisation to collectively bargain with DBIM.

While this submission deals with the substantive authorisation application, it briefly covers elements of the Applicants' response to DBIM's submission on interim authorisation. DBIM reiterates that there is no need for interim authorisation as DBIM has clearly indicated that it does not intend to make a pricing offer prior to the release of the QCA's final access undertaking decision where the terms of engagement for negotiations are set in stone. Any delays will not disadvantage either party thanks to the true-up provisions in existing users' access agreements. On the other hand, permitting the Applicants to form what would otherwise be considered a buy-side cartel will result in significant and irreversible detriments.

The submission elaborates on the existing Queensland access regime, administered by the QCA, and explains why collective bargaining authorisation will significantly interfere with the anticipated regulatory arrangements applying from July 2021. Further, it explains the nature of the existing independent bilateral agreements between DBIM and its users, which cover the entire capacity of the terminal, and how authorisation will interfere with those existing contractual rights. DBIM considers that as a matter of public policy it is not appropriate for a regulatory decision to enable the reopening of existing contractual relationships.

A grant of authorisation would materially prejudice the interests of DBIM, would result in a net public detriment, and would undermine the Queensland access regime. Accordingly, DBIM strongly submits that the ACCC should reject the Applicants' request for authorisation.

Yours sincerely,

Jonathan Blakey
General Manager – Commercial & Regulation
Dalrymple Bay Infrastructure Limited
Attached: DBIM submission on authorisation application (ref: AA1000541)

Dalrymple Bay Infrastructure

DBIM submission to the ACCC on authorisation application by Queensland coal mining companies

Reference AA1000541

February 2021

Public version

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1 Introduction and summary of submission

1.1 The Application

1 The Australian Competition and Consumer Commission (**ACCC**) has received an authorisation application (**Application**) from a group of 13 coal mining and project development companies (**Applicants**) who are future or current access holders at the Dalrymple Bay Terminal (**DBT**). The Application seeks authorisation to collectively bargain with Dalrymple Bay Infrastructure Management Pty Ltd (**DBIM**).[1]

2 On 22 December 2020 the ACCC invited DBIM to make submissions to assist with its assessment of the Application, as well as the Applicants' request for interim authorisation.

3 On 29 January 2020 DBIM made a brief submission setting out the reasons why it would be inappropriate for the ACCC to grant interim authorisation in the circumstances.

4 This submission expands on DBIM's submission on the request for interim authorisation, and explains in further detail why the test for authorisation is not satisfied and the ACCC should reject the Application. It also responds to some of the substantive points raised in the Applicants' submission of 5 February 2021 (**February 2021 Submission**).

1.2 No net public benefit

5 To authorise the conduct proposed in the Application (**Proposed Conduct**) the ACCC must be satisfied that there is a net public benefit that would arise as a result of the conduct and that the benefits arising from the conduct outweigh the detriments. The Applicants have failed to provide any credible evidence that the standard required by section 90 of the *Competition and Consumer Act 2010* (**CCA**) is met.

Public benefits are non-existent

6 The purported benefits outlined in the Application are non-existent or at best significantly overstated, unsubstantiated and largely speculative.

7 The Applicants' primary rationale for the Application is that it is needed to constrain market or bargaining power possessed by DBIM. However, this argument is fundamentally flawed. In reality, DBIM has *no* ability to exercise market power in the current environment, due primarily to the following two facts:

7.1 First, DBT is subject to economic regulation. The coal handling service at DBT (**DBT Service**) is regulated by the Queensland Competition Authority (**QCA**) under an access regime certified to be effective under the CCA. The QCA exercises its wide powers to constrain any market power possessed by DBIM.

7.2 Secondly, Existing Users are protected under their access agreements with DBIM. The QCA, the Queensland Treasury Department and the Queensland Treasurer have all determined that existing users of DBIM are protected from DBIM's market power by virtue of their existing contractual agreements with DBIM.

8 Accordingly, the Applicants' primary rationale for the authorisation, and the associated public benefits, are invalid and logically cannot arise.

9 Additionally, DBIM has no incentive to collectively negotiate with users, meaning that any purported benefits flowing from collective negotiations are purely speculative in any case, as they would not arise in practice. DBIM would not collectively negotiate with the Applicants for two key reasons:

[1] On 19 October 2020 DBCT Management Pty Ltd changed its name to Dalrymple Bay Infrastructure Management Pty Ltd (**DBIM**). 'DBIM' is used throughout this submission to refer to the company, irrespective of its name at that time

9.1 First, collective negotiations are inconsistent with the existing contractual framework for existing users. Existing users of the terminal already have guaranteed rights to access pursuant to their individual long term access agreements. Each access agreement provides for DBIM and the individual user to bilaterally negotiate access charges, and failing agreement, for access charges to be determined in arbitration by either the QCA or a commercial arbitrator. Accordingly, the application for authorisation is contrary to the original intent of the long term contracts voluntarily entered into by existing users.

9.2 Secondly, DBIM has no rationale incentive to engage in collective negotiations, as:

9.2.1 the collective negotiator would have no ability to bind participants, meaning individual participants could press for additional concessions even if a collectively negotiated outcome was reached; and

9.2.2 the negotiating bloc would likely adopt an unreasonable negotiating position (in order to satisfy the 'lowest common denominator'), which would act as an impediment to effective negotiations and result in unnecessary arbitrations.

10 As DBIM will not engage in collective negotiations there can be no public benefits flowing from collective negotiations.

11 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 representatives to negotiate with DBIM, is likely result in increased and unnecessary negotiation costs with no corresponding benefit.

12 In order to reduce information asymmetry and facilitate effective negotiations, DBIM's draft access undertaking sets out requirements for DBIM to provide access seekers an extensive range of detailed cost information for the service. DBIM has also committed to providing the Applicants with a model which can be populated with this information (or the Applicants' own inputs) in order to estimate the cost of providing the DBT Service. Accordingly, the legal and economic costs faced by the Applicants are likely to primarily relate to factors specific to individual Applicants (such as the value of the service to the user) – costs which cannot be reduced by preparing for negotiations collectively.

13 Existing user agreements make no provision for collective arbitrations, meaning any cost savings related to collective arbitrations are purely speculative, and in any event would likely to be outweighed by the increased number of users proceeding to arbitration.

Authorisation will create significant detriments

14 While there are no clear material benefits that will arise from Authorisation, the authorisation will lead to real and significant detriments.

15 The Applicants are seeking authorisation to engage in what would otherwise be criminal cartel behaviour, the most serious form of anti-competitive conduct. Cartel conduct is per se prohibited because it is acknowledged to be inherently detrimental. Accordingly there must be significant public benefits arising from the proposed conduct for the ACCC to grant authorisation.

16 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.

17 This Application is merely forum shopping. As expressly 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 DBT Service. 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.

18 Authorisation would enable the existing users to use the threat of multiple arbitrations to circumvent the negotiation process set out in the existing access agreements. As a matter of public policy it is not the place of the ACCC to enable the reopening of existing contractual relationships. To do so would undermine the fundamental principle of freedom of contract and result in a public detriment.

19 DBIM is also concerned 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.

20 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. 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.

21 Finally, 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 anti-competitive collusion and coordination in those markets.

Conclusion on net public benefit test

22 DBIM submits that the speculative, or at best marginal, benefits arising from the authorisation would be significantly outweighed by the clear and significant detriments that would occur if authorisation was granted. Accordingly DBIM submits that there is no basis for the ACCC to approve the Application.

1.3 Authorisation duration

23 DBIM submits that the 10-11 year authorisation duration is excessive as the regulation applying to DBIM beyond the next 5 years is completely uncertain.

24 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.

1.4 Structure of this submission

25 This submission is structured as follows:

- 25.1 Section 2 provides relevant background and context for the ACCC's assessment of the Application, including an overview of the economic regulation that applies to the DBT Service and an explanation of the existing contractual relationships that DBIM has with users of the terminals;
- 25.2 Section 3 sets out the net public benefit test that the ACCC must apply in assessing the Application;
- 25.3 Section 4 looks briefly at the state of the market for the DBT Service with and without authorisation to provide the basis for the ACCC's assessment of the public benefits and detriments that would arise from authorisation;
- 25.4 Section 5 scrutinises the public benefits purported by the Applicants and explains why these are materially overstated;
- 25.5 Section 6 outlines the significant detriments that would arise if the authorisation were approved;

25.6 Section 7 concludes that when weighed against the detriments, the public benefits, if any, arising from authorisation would not result in a net public benefit;

25.7 Section 8 explains why, in the event the ACCC approved the authorisation, the authorisation period should be limited to a period of five years; and

25.8 Section 9 explains why the Applicants' claims that they hold no relevant documentation is implausible and gives cause for concern.

2 Context and background

2.1 Regulation of the terminal

26 DBT is the only coal terminal in Australia that is subject to economic regulation. This subsection provides a brief overview of that regulation as it applies to the terminal.

The Queensland Access Regime

27 The DBT Service has been declared under the *Queensland Competition Authority Act 1997* (Qld) (**QCA Act**) since 2001 and is declared until 2030.

28 The QCA Act is certified as an effective access regime for the purposes of Part IIIA of the CCA.[2]

29 The access regime under Part 5 of the QCA Act (**Queensland access regime**) operates similarly to the access regime under Part IIIA of the CCA. It provides a process for parties to negotiate the terms of access to declared infrastructure, and where agreement is not possible, it provides a right for the parties to refer the dispute to the QCA to arbitrate the terms of access.

30 As a result of declaration, access to the DBT service is regulated by the QCA. The QCA is a sophisticated expert regulator which has regulated DBIM since the terminal's privatisation in 2001.[3]

31 Accordingly, any market power of DBIM is regulated by the Queensland Access Regime. Furthermore, no additional regulation or regulatory intervention such as authorisation of collective bargaining can improve competition in any relevant market. To conclude otherwise would logically require a conclusion that the Queensland access regime is not an effective access regime under Part IIIA of the CCA or that the QCA has failed to discharge its functions in accordance with the QCA Act.

Negotiate-arbitrate regulation

32 To facilitate negotiated outcomes for access requests, the QCA Act requires that:

32.1 the service provider must, if required by an access seeker, negotiate with the access seeker for making an access agreement relating to the service;[4]

32.2 the service provider and access seeker must negotiate in good faith towards reaching an access agreement;[5]

32.3 the service provider must not unfairly differentiate between access seekers in a way that has a material adverse effect on the ability of one or more of the access seekers to compete with other

[2] See https://ncc.gov.au/application/application_for_certification_of_the_dalrymple_bay_coal_terminal_access_reg/5
[3] DBIM was first declared following privatisation of the Terminal in 2001, with DBIM's first draft access undertaking submitted in June 2003
[4] QCA Act, section 99
[5] QCA Act, section 100(1)

access seekers.[6] However, this does not prevent the service provider treating access seekers differently to the extent the different treatment is:

32.3.1 reasonably justified because of the different circumstances, relating to access to the declared service, applicable to the service provider or any of the access seekers; or

32.3.2 expressly required or permitted by an approved access undertaking or an access determination;[7]

32.4 in negotiations, the service provider must make all reasonable efforts to try to satisfy the reasonable requirements of the access seeker;[8] and

32.5 the service provider must give the access seeker significant information, including for example; cost and asset value information, information about the price of access and how prices are calculated, estimates of spare capacity and other facility information.[9]

33 In the event that a service provider and an access seeker cannot agree on an aspect of access to the declared service, and there is no access agreement in place, either party may notify the QCA that an access dispute exists.[10]

34 The QCA may then refer the matter to mediation if there has been no previous attempt to solve the matter by mediation and the QCA considers that a mediated resolution of the dispute can be achieved.[11] Otherwise, if the access dispute notice states that the dispute is to be dealt with by arbitration, the matter will be referred to the QCA for arbitration.[12]

35 Once a matter has been referred to arbitration, the QCA must use best endeavours to make an access determination within 6 months.[13] An access determination may deal with any matter relating to access to the service by the access seeker,[14] except for the specific matters set out in section 119 of the QCA Act. Before making an access determination the QCA must give a draft determination to the parties and when making an access determination the QCA must give reasons for its determination.

36 The negotiate-arbitrate regime applies to a declared service, irrespective of whether it is subject to a QCA approved access undertaking.

Access Undertakings

37 Unlike Part IIIA, the Queensland Access Regime gives the QCA power to ***require*** a declared service provider to submit a draft access undertaking for assessment.[15] Access undertakings may contain a wide range of obligations on service providers to ensure that access seekers are appropriately protected. These include details of how charges are to be calculated, information to be given to access seekers, reporting obligations, timeframes for negotiations, terms that must be included in access agreements, etc.[16]

38 Following the submission of a draft access undertaking the QCA undertakes a consultation process and ultimately determines whether or not the draft access undertaking is appropriate for approval having regard to the factors set out in section 138 of the QCA Act, including:

[6] QCA Act, section 100(2)
[7] QCA Act, section 100(3)
[8] QCA Act, section 101(1)
[9] QCA Act, section 101(2)
[10] QCA Act, section 112
[11] QCA Act, section 115A
[12] QCA Act, section 116
[13] QCA Act, section 117A
[14] QCA Act, section 117(3)
[15] QCA Act, section 133
[16] QCA Act, section 137

38.1 the object of Part 5 of the QCA Act, 'to promote the economically efficient operation of, use of and investment in, significant infrastructure by which services are provided, with the effect of promoting effective competition in upstream and downstream markets;'[17]

38.2 the legitimate business interests of the owner or operator of the service;

38.3 if the owner and operator of the service are different entities—the legitimate business interests of the operator of the service are protected;

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

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

38.6 the effect of excluding existing assets for pricing purposes;

38.7 the pricing principles mentioned in section 168A of the QCA Act; and

38.8 any other issues the QCA considers relevant.

39 In circumstances where the QCA does not approve a draft access undertaking, it has wide discretion to require the service provider to make amendments to the draft access undertaking in the way that the QCA considers appropriate.[18]

DBIM declaration review

40 The declaration of the DBT Service has recently been reviewed under the QCA Act. While both the QCA and Treasury Department recommended that the DBT Service not be redeclared, on the basis that declaration would not promote a material increase in competition in a dependent market, the Queensland Treasurer ultimately declared the service for a period of ten years until 8 September 2030.[19]

41 The Treasurer declared the service on the basis of a narrow harm to competition in a single market, being the development stage tenements market in the Hay Point catchment, that he considered would occur without declaration. The competition issue related to uncertainty faced by access seekers as to the terms of access beyond 2030 and the risk of 'hold up'. The Treasurer determined that this risk was sufficient to discourage new users from entering the development stage tenements mark and that this would have a material impact on competition as compared to with declaration.

42 Importantly though, the competitive harm identified by the Treasurer did not affect existing users. Throughout the declaration review, the QCA, the Treasury Department, the Treasurer and the Users of DBT all expressly acknowledged that the contractual terms of existing users' access agreements provided an effective constraint on DBIM's ability and incentive to exercise market power, with the Queensland Treasurer ultimately determining:[20]

> I accept the QCA's recommendation that for Existing Users, in relation to the capacity provided for in their existing user "evergreen" contracts, **those existing user agreements are an effective constraint on DBCTM's ability and incentive to exercise market power** with and without declaration up to the volumes specified in those agreements. (emphasis added)

[17] QCA Act, section 69E
[18] QCA Act, section 134(2)
[19] Queensland Government Gazette 1 June 2020 Vol 384 No. 31, at p 267
[20] Queensland Treasurer *Statement of Reasons concerning the declaration of the handling of coal at Dalrymple Bay Coal Terminal by the Terminal Operator* 1 June 2020, at para [4.6.5]

Previous access undertakings

43 Since the DBT service was initially declared, the QCA has approved three access undertakings (**AUs**) in 2006, 2010 and 2017. A number of amendments have also been made to the AUs over time as the QCA and DBIM have refined the regulation applying to DBIM.

44 All of these access undertakings have contained a 'reference tariff' which DBIM has been required to offer to all users of the terminal. The reference tariff has been determined by the QCA applying a building blocks methodology, with the effect being that, to date, DBIM has been subject to full price regulation.

45 In addition to regulating prices, DBIM's previous access undertakings have contained numerous other protections for access , including:

45.1 the right to request a significant amount of information to inform commercial negotiations and address any information asymmetries;

45.2 the ability to insist on the terms set out in a QCA approved standard access agreement;

45.3 an obligation to negotiate in good faith;

45.4 a prohibition against unfairly differentiating between access seekers in a way that has a material adverse effect on the ability of 1 or more of the access seekers to compete with other access seekers;

45.5 a fair and transparent queuing process by which users can obtain access to existing and expanded capacity at DBT;

45.6 requirements to take all reasonable steps to progress each access application and any negotiations to develop an access agreement with an access seeker in a timely manner;

45.7 requirements to undertake annual reporting to the QCA;

45.8 information gathering powers for independent experts; and

45.9 a detailed process governing the approval, by the QCA, of any capital expenditure or expansions to the terminal.

The 2019 Draft Access Undertaking

46 On 12 October 2017 the QCA served an Initial Undertaking Notice on DBIM requiring it to submit a draft access undertaking to apply from 1 July 2021.[21] On 1 July 2019 DBIM submitted a draft access undertaking (the **2019 DAU**) in response to that notice.[22]

47 While substantively the 2019 DAU was largely identical to previous undertakings (including all of the same protections for access seekers listed above), rather than including a prescriptive reference tariff to be applied by DBIM, the 2019 DAU proposed a pricing model based on the legislative negotiate-arbitrate regimes set out in Part 5 of the QCA Act and Part IIIA of the CCA.

48 The key purposes of the negotiate-arbitrate model in the 2019 DAU are to:

48.1 increase the likelihood of mutually agreed, commercially negotiated outcomes;

48.2 improve the ability for DBIM to tailor access agreements to individual user needs;

48.3 reduce regulatory costs associated with determining a one-size-fits-all, ex-ante reference tariff; and

[21] https://www.qca.org.au/wp-content/uploads/2019/05/32254_DBCTM-Initial-Undertaking-Notice1262582_2-1.pdf
[22] https://www.qca.org.au/project/dalrymple-bay-coal-terminal/2019-draft-access-undertaking/

48.4 provide a pricing model that is proportionate to the narrow risk of competition harm identified in the declaration review.

Extensive consultation process

49 Following submission of the 2019 DAU, the QCA began an extensive process of analysing and consulting upon the 2019 DAU over a period of 20 months, to date. This has included:

49.1 **Initial consultation on the 2019 DAU**. Initial consultation comprised of two rounds of submissions in September and November 2019, following publication of a list of QCA staff questions for stakeholders in August 2019.

49.2 **Interim Draft Decision**. Following submissions from users which refused to constructively engage with the negotiate arbitrate model proposed in the 2019 DAU, DBIM requested that the QCA publish an interim position indicating whether a negotiate-arbitrate model may be appropriate for approval so that users could effectively engage with the detail of the 2019 DAU. On 24 February 2020 the QCA published its interim draft decision which indicated that a pricing model without a reference tariff, as proposed by DBIM, could be appropriate to approve, with suitable amendments.[23]

49.3 **Consultation on Interim Draft Decision**. The QCA received two rounds of submissions following the publication of its interim draft decision in April and June 2020.

49.4 **Draft Decision**. On 26 August 2020 the QCA released its full draft decision. Consistent with its interim draft decision, the QCA found that a pricing model without a reference tariff may be appropriate to approve for DBIM's 2019 DAU, and outlined the amendments that the QCA considered necessary for such a model to be appropriate to approve.[24]

49.5 **Consultation on Interim Draft Decision**. The QCA received two rounds of submissions following the publication of its Draft Decision in October and December 2020.

49.6 **QCA Forum**. In 18 November 2020 the QCA also hosted a forum, split into two parts. The first part was a general forum in which stakeholders had an opportunity to speak, respond to questions from the QCA circulated prior to the forum, as well questions raised by the QCA at the forum. The second part was a technical forum regarding the remediation plan for the terminal. The QCA described the forum as an opportunity to 'facilitate open discussion of stakeholder views' noting 'any comments made by the QCA Members or staff do not represent the QCA Board's considered views on the matters being discussed, nor are they binding on the QCA.'[25] Accordingly, it is absurd that the prospect of authorisation being raised ***as a question***, by a single member of the QCA, could be interpreted as 'strongly suggesting' that an authorisation was perceived by the QCA as a possible complement to regulation as suggested by the Applicants[26] – especially given the prospect has never been mentioned by the QCA in written communications or publications.

50 Under the QCA Act, the QCA must use its best endeavours to approve, or refuse to approve, a draft access undertaking within a six month timeframe (with some excluded periods).[27] After allowing for excluded periods of time, the six-month period for the 2019 DAU expired on 1 August 2020. On 26 August 2020 the QCA published a notice explaining that additional consultation steps meant that it would exceed the statutory timeframe for its decision.[28] This reiterates the robustness of the QCA's consultation process, the ample opportunities stakeholders have had to make submissions on the 2019 DAU and the significant time

[23] See: QCA *DBCT Management's 2019 draft access undertaking – Interim draft decision* February 2020, at p. 37
[24] See: QCA *DBCT Management's 2019 draft access undertaking – Draft decision* August 2020, at p. 58
[25] Email from QCA to stakeholders dated 11 November 2020
[26] Applicants' February 2021 Submission, section 3.5
[27] QCA Act, section 147A
[28] https://www.qca.org.au/wp-content/uploads/2020/08/qca-notice-for-submissions-on-draft-decision-and-expiry-of-assessment-timeframe.pdf

that the QCA has taken to thoroughly consider issues raised by stakeholders regarding the negotiate-arbitrate model.

Proposed amendments – refinements to the 2019 DAU

51 The QCA's extensive consultation process has provided an opportunity to stress-test, refine and improve the negotiate arbitrate framework set out in the 2019 DAU.

52 The QCA's Interim Draft Decision set out what the QCA considered would be required to ensure that the 2019 DAU was appropriate for approval without a reference tariff:[29]

> We consider that it could be appropriate to approve a pricing model without reference tariffs where it features the following characteristics:
>
> - information provisions that facilitate negotiations, reducing the dependence on costly and time consuming arbitrations
> - arbitration criteria that constrain asymmetrical market power
> - arbitration criteria that do not impede competition for access to capacity
> - clear and efficient processes for negotiation and arbitration, and transparency around arbitrated outcomes.
>
> We have provided suggested amendments within this interim draft decision that seek to achieve these characteristics.

53 In response to the Interim Draft Decision, DBIM's proposed extensive amendments to the 2019 DAU in order to comprehensively address the issues raised by the QCA in the Interim Draft Decision, adopting the vast majority of the QCA's suggested amendments.[30] These included the proposed amendments set out in the table below.[31]

Figure 1 – Proposed amendments to 2019 DAU in DBIM's April 2020 submission

QCA Criteria for approval	DBIM proposed amendments to 2019 DAU
Information provisions that facilitate negotiations	Adopt the QCA's suggestion to introduce new, prescriptive information requirements which will require DBIM to disclose key information in a pre-determined format. The information is tailored to facilitate effective negotiations. DBIM will provide (amongst other things): • information about the utilisation of the terminal, including the current and future • contracted position of the terminal and the availability of spare capacity; • historical pricing at the terminal; • information on the historical regulated asset base, as well as the current and forecast capital base, updated to account for indexation, depreciation and capital expenditure; • an independent assessment of efficient corporate costs for DBIM; and • historical and current estimates of DBIM's weighted average cost of capital. The 2019 DAU will also refer explicitly to compliance and enforcement provisions of the QCA.
Arbitration criteria that constrain asymmetrical market power	Adopt the QCA's suggestion to amend the arbitration criteria in the 2019 DAU to align with s120 of the QCA Act.
Certainty that the arbitration criteria do not impede	Adopt the QCA's suggestion to amend the arbitration criteria in the 2019 DAU to align with s120 of the QCA Act.

[29] QCA *Interim Draft Decision on DBCT Management's 2019 Draft Access Undertaking* February 2020, at iv-v
[30] DBCT Management *Response to QCA Interim Draft Decision* 24 April 2020 (**April 2020 DAU Submission**).
[31] This table is reproduced from DBIM's April 2020 DAU Submission at pp. 4-5

QCA Criteria for approval	DBIM proposed amendments to 2019 DAU
competition for access to capacity	Adopt the QCA's suggestion to include provisions in the 2019 SAA which align the arbitration criteria applicable when arbitrated by a commercial arbitrator, with the criteria applicable under the existing user agreements.
Clear and efficient process in negotiation and arbitration and transparency around arbitrated outcomes	Reconsider the timeframes set out in the 2019 DAU, to ensure that a timely outcome is possible for access seekers and that they do not face undue time pressures. Clarify timelines for arbitrations in the QCA's arbitration guidance document. Adopt the QCA's suggestion to allow the outcomes of arbitration determinations to be released to (non-participating) access seekers, whether arbitration is conducted by the QCA or another party.

54 In response to the QCA's invitation for collaborative submissions on non-pricing issues, the DBCT User Group (**User Group**) – an industry group representing the interests of the current users of DBT and some access seekers, including the Applicants – referred DBIM to a long list of non-price issues with the 2019 DAU identified in its first submission. DBIM's June 2020 submission offered numerous concessions to address all but a small few of the issues raised by the User Group, which were then addressed in DBIM's October 2020 Submission and accompanying proposed amendments.

Draft Decision

55 On 26 August 2020, the QCA issued a Draft Decision on the 2019 DAU. The Draft Decision proposed to adopt all of DBIM's proposed amendments, noting that DBIM had made a significant attempt to address the issues raised by the QCA. The QCA also reiterated its view that an access undertaking without a reference tariff may be appropriate for approval and suggested a small number of additional amendments.

> Overall, we consider that DBCTM's proposed amendments make a significant attempt to address the issues identified with the 2019 DAU.
>
> We are of the view that a pricing model without reference tariffs may be appropriate to approve for the service at DBCT. We consider it appropriate for the 2019 DAU to adopt DBCTM's proposed amendments. However, we consider that further amendments are required in order for the 2019 DAU to be appropriate to be approved. Broadly, these additional amendments centre around:
>
> - the provision of information—in particular, information on depreciation and remediation cost estimates, along with information for parties who enter negotiations towards the end of the regulatory period
> - addressing issues with specific non-pricing provisions, including the requirement for parties to enter into binding access agreements

56 DBIM's October 2020 Submission in response to the QCA Draft Decision agreed to adopt the vast majority of the QCA's suggested amendments, including requirements to:

56.1 provide more prescriptive and detailed information on a number of matters including WACC and inflation forecasts, corporate cost benchmarking, the QCA approved rehabilitation cost estimate, and a QCA specified depreciation methodology;

56.2 provide information about arbitration outcomes to access seekers;

56.3 provide information on expected expansion pricing approach to expanding access seekers; and

56.4 include the ability to terminate (in certain circumstances) in all conditional access agreements (used by access seekers seeking access to capacity that requires a terminal expansion), unless agreed otherwise.

57 Following the QCA's stakeholder forum, DBIM proposed further measures to provide additional constraints on DBIM , namely:[32]

57.1 amendments to introduce an evidentiary limit, which would require parties to 'put their cards on the table' prior to referring a dispute to arbitration, eliminating any perceived information asymmetry not already addressed by the information requirements;

57.2 amendments to allow the QCA to terminate vexatious arbitrations; and

57.3 a commitment to provide a cost of service model to further assist access seekers to assess the efficient costs of providing the service and to assist in considering the reasonableness of DBIM's access offer.

58 Throughout the access undertaking process DBIM has been committed to refining its proposed pricing model and welcomed suggestions to improve the efficiency and effectiveness of the negotiate-arbitrate model in the 2019 DAU. The extensive amendments offered by DBIM mean that the amended 2019 DAU provides comprehensive protection for access seekers – well beyond the protections included under the Commonwealth access regime. A full list of DBIM's proposed amendments is set out in Appendix 6 and 7 of DBIM's October 2020 submission on the 2019 DAU, which can be accessed via the footnoted hyperlink.[33] Similarly, a copy of the 2019 DAU with DBIM's proposed amendments can be accessed via the footnoted hyperlink.[34]

The QCA's Final Decision

59 On 3 February 2021 the QCA published a stakeholder notice advising that the timing of the final decision will be delayed (from its previously expected February 2021) by a short period, to enable the QCA to give proper consideration to all matters raised in submissions.[35]

60 The QCA advises that it intends to release the final decision on the 2019 DAU as soon as reasonably practicable and that it remains confident that the timing of release of the final decision will allow sufficient time for the approval of a new access undertaking when the 2017 undertaking notionally terminates on 1 July 2021.

2.2 The Applicants

61 The Applicants consist of existing users of the terminal, two current access seekers, as well as unspecified future access seekers to the terminal.

62 The known Applicants are large, sophisticated multinational mining companies.[36] These companies are well resourced and experienced in negotiating commercial contracts with their suppliers. The Applicants include BHP Mitsui, Glencore, Anglo American, Peabody Energy, Fitzroy Resources, Middlemount Coal, Foxleigh and Stanmore.

Existing users of the terminal

63 The current users of the terminal comprise 10 large mining companies. DBIM notes that the Application did not provide market information on the Applicants in the primary market that would be affected by the

[32] See DBIM's December 2020 Submission on the 2019 DAU, section 3 : https://www.qca.org.au/wp-content/uploads/2020/12/dbctm-further-submission-redacted.pdf
[33] DBIM October 2020 submission on the 2019 DAU: https://www.qca.org.au/wp-content/uploads/2020/10/dbctm-submission-on-dd.pdf
[34] DBIM amended 2019 DAU: https://www.qca.org.au/wp-content/uploads/2020/10/dbctm-amended-2019-dau-2-mark-up.pdf
DBIM amended 2019 DAU standard access agreement: https://www.qca.org.au/wp-content/uploads/2020/10/dbctm-amended-2019-saa-2-mark-up.pdf
[35] https://www.qca.org.au/wp-content/uploads/2021/02/qca-notice-on-timing-for-final-decision.pdf
[36] Confidential Appendix 2 provides information on the scale and sophistication of the Applicants

authorisation (the market for acquisition of coal handing services at DBT), rather focussing on DBIM's position in the market supplying the service.

64 Confidential Appendix 1 sets out information on DBIM's current users and their contract profile going forward. It illustrates that there is a small number of existing players in the market, and they are large, sophisticated mining businesses.

65 All of these existing users have guaranteed rights of access to the DBT service pursuant to evergreen long term access agreements.

66 Existing users' access agreements all contain rights for users to have any dispute about access prices referred to binding arbitration by either the QCA or a commercial arbitrator. Such compulsory arbitration in accordance with the users' access agreements constrains any market power which DBIM may have. This is a key distinguishing factor between DBIM and the Port of Newcastle and other unregulated terminals (discussed further below in section 5).

Pricing reviews under user access agreements

67 Under each existing user's individual long term access agreement, the parties are to negotiate the charges for the provision of service to that individual user, and failing agreement the price will either arbitrated by the QCA or a commercial arbitrator. Clause 7.2(a) of DBIM's current standard access agreement (which DBIM's current access agreements are based on) provides for access charges to be periodically reviewed:

> **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.

68 Clause 7.2(c) and (d) sets out the process for the review and how arbitration must be effected:

> (c) DBCT Management and the User must commence each review pursuant to clause 7.2(a) no later than 18 months prior to the scheduled relevant Agreement Revision Date, and:
>
> (i) the parties must endeavour to agree as early as it is practicable to do so (if possible, by no later than the Agreement Revision Date) on the basis and amount of new charges to apply from the relevant Agreement Revision Date;
>
> (ii) if the parties do not reach agreement by the date 6 months prior to the scheduled Agreement Revision Date, either party may refer the determination of the issues to arbitration in accordance with this clause 7.2, and if the arbitrator is the QCA, the parties must request the arbitrator to progress the arbitration in conjunction with the process at that time for development of a new Access Undertaking (with the intention that reviewed charges will be determined no later than the commencement of the new Access Undertaking);
>
> (iii) if there is no agreement or determination by the relevant Agreement Revision Date then:
>
> (A) the charges (and method of paying and reconciling them) applying prior to that Agreement Revision Date will continue to apply until otherwise agreed or determined; and
>
> (B) any determination or agreement will (unless the parties otherwise agree) operate retrospectively from the relevant Agreement Revision Date and, as soon as practicable after the determination or agreement, an adjustment will be paid by the relevant party (based on the amounts which have been paid to that date on an

> interim basis and the amounts which are agreed or determined to be payable from the Agreement Revision Date to the date the adjustment is paid) together with interest on the amount of the adjustment at the No Fault Interest Rate. The amount of interest will be determined by reconciling the amounts and timings of payments made on an interim basis with amounts payable and timing of those payments which would have applied in accordance with the agreement or determination
>
> (d) If the matter is referred under clause 7.2(c)(ii) to arbitration, then arbitration must be effected as follows:
>
> (i) by the QCA in such manner as it sees fit, after consultation with the parties; or
>
> (ii) if the QCA is unwilling or unable to act, by a single arbitrator agreed upon between the parties; or
>
> (iii) in default of agreement under clause 7.2(c)(ii) within 10 days after the matter is referred to arbitration, by a single arbitrator selected by the Chair of the Queensland Chapter of the Institute of Arbitrators and Mediators, Australia.
>
> …

Existing users are protected under their access agreements with DBIM

69 As discussed briefly above, throughout the declaration review, the QCA, the Treasury Department, the Treasurer and the User Group all expressly acknowledged that the contractual terms of existing users' access agreements provided an effective constraint on DBIM's ability and incentive to exercise market power. The QCA's Draft Recommendation explained:[37]

> The existing user agreements provide for regular reviews of the method of calculating charges based on negotiation between DBCT Management and the user, and a dispute resolution mechanism for determination of charges, which is intended to produce an outcome similar to that which the QCA would have been expected to determine.
>
> Therefore, in the absence of declaration, existing user agreements will provide an effective constraint on DBCT Management's exercise of market power up to the volumes specified in those agreements.

70 This position was confirmed in the QCA's Final Recommendation where it explained that:[38]

> Existing users would continue to get the benefit of constraints in existing user agreements up to the volumes in those agreements, with or without declaration. Also, the QCA Act provides that an access agreement entered into before expiry of declaration or revocation is protected for its life.

71 In making the ultimate decision on declaration, the Queensland Treasurer adopted the QCA's reasoning, explaining in his statement of reasons:[39]

> I accept the QCA's recommendation that for Existing Users, in relation to the capacity provided for in their existing user "evergreen" contracts, those existing user agreements are an effective constraint on DBCTM's ability and incentive to exercise market power with and without declaration up to the volumes specified in those agreements.

[37] QCA *Draft Recommendation - Part C: DBCT declaration review* December 2018, at p. 66
[38] QCA *Final Recommendation - Part C: DBCT declaration review* March 2020, at p. 101
[39] Queensland Treasurer *Statement of Reasons concerning the declaration of the handling of coal at Dalrymple Bay Coal Terminal by the Terminal Operator* 1 June 2020, at para [4.6.5]

72 Even the User Group, which represents the Applicants, acknowledged that DBIM was constrained under users' access agreements:

> Consistent with the DBCT User Group's previous submissions on this issue (and the legal advice from Allens included in the DBCT User Group's initial submission), the DBCT User Group agrees with the QCA that for existing users the combination of:
>
> (a) the 'evergreen' renewal rights allowing 5 year extensions …; and
> (b) the price review and arbitration provisions of those existing user agreements…
>
> **results in existing users having an ability to constrain DBCTM**, but only in relation to their currently contracted capacity. (emphasis added)

73 Accordingly, the assertion by the Applicants that authorisation of collective bargaining is required to address DBIM's market or bargaining power is clearly without foundation. It is directly contradictory to the determinations of the QCA, Queensland Treasury and the Queensland Treasurer in relation to existing users. Accordingly no public benefits arise from addressing market power through collective negotiations for existing users.

Existing Users' access agreements are intended to be bilaterally negotiated

74 Existing users' access agreements are bilateral agreements negotiated between DBIM and each user individually at various points in time over the last two decades. Each access agreement is confidential to the user and DBIM, with some agreements having been amended and varied over time.

75 At all times users' access agreements have been treated as, and have operated independently of, all other access agreements. Any assertion to the contrary – that existing user agreements are not independent bilateral agreements or that they have not operated accordingly – would invite the conclusion that such users have historically engaged in cartel conduct for which there would be no immunity as no prior authorisation exists.

76 As pricing of access is expressly determined in accordance with existing users' access agreements and those access agreements are independent bilateral agreements, DBIM does not intend to collectively negotiate with users. The existing contractual structure does not contemplate any collective negotiations.

Access seekers

77 The existing terminal is currently fully contracted and will be for the foreseeable future. Accordingly, DBIM will need to undertake an expansion to the terminal to allow access to new users. The current estimate of the earliest date an expansion to the terminal can be completed is 2027 for the 8X expansion.

78 As shown in Confidential Appendix 1, the capacity for this expansion is also fully contracted to new access seekers under conditional access agreements.

79 Upon completion of the expansion these conditional access agreements will become effective, and the access seekers will become users of the terminal.

80 Confidential Appendix 2 provides information on each of the access seekers that are likely to gain access to the terminal in the next decade (based on the capacity queueing provisions in the current and draft access undertakings). In particular, it provides information on the scale of these access seekers, illustrating that even the smaller access seekers at DBIM are still large, sophisticated mining entities, which are well positioned to negotiate commercial contracts with other businesses in the supply chain.

3 The net public benefit test

81 This section briefly sets out the test for authorisation and how it is to be applied in this context.

3.1 The test that must be applied by the ACCC

82 Section 90(7) of the CCA provides that the ACCC must not make a determination granting authorisation under section 88 unless it is satisfied that the conduct would result in, or be likely to result in, a public benefit which outweighs any public detriment.

83 That is, the ACCC must be affirmatively satisfied that any benefits of the authorisation outweigh the costs, with the onus on the Applicants to establish a factual basis on which the ACCC can base such a decision.

3.2 With and without test

84 In applying the authorisation test, the ACCC compares the likely future with the conduct that is the subject of the authorisation, to the likely future without the conduct. In particular, the ACCC will compare the public benefits and detriments likely to arise in the future where the conduct occurs, against the future in which the conduct does not occur. This approach enables the ACCC to focus its assessment on the impact of the conduct rather than other effects that would occur irrespective of whether the conduct occurs.

85 In undertaking the 'with and without' analysis, the ACCC does not take into account mere possibilities and must focus on outcomes that are likely to occur. As explained in the ACCC authorisation guideline:[40]

> The ACCC determines the likely future 'with and without' positions on a case-by case basis. In identifying what is likely, **the ACCC does not take into account mere possibilities**. The ACCC is concerned with whether there is a real chance of an outcome occurring. (emphasis added)

3.3 Benefits must not be speculative

86 It is well established that the ACCC must not grant authorisation on the basis of benefits (or detriments) that are merely speculative, and which do not have a real likelihood of arising based on the commercial reality.

87 As articulated by the Australian Competition Tribunal in Qantas Airways Limited, it is not enough that the claimed public benefit is a theoretical possibility. The Applicants must be able to establish a causal nexus between the proposed authorised conduct and the public benefits being achieved:[41]

> ...**for a benefit or detriment to be taken into account, we must be satisfied that there is a real chance, and not a mere possibility, of the benefit or detriment eventuating**. It is not enough that the benefit or detriment is speculative or a theoretical possibility. **There must be a commercial likelihood that the applicants will, following the implementation of the relevant agreements, act in a manner that delivers or brings about the public benefit** or the lessening of competition giving rise to the public detriment. We must be satisfied that the benefit or detriment is such that it will, in a tangible and commercially practical way, be a consequence of the relevant agreements if carried into effect and must be sufficiently capable of exposition (but not necessarily quantitatively so) rather than "ephemeral or illusory", to use the words of the Tribunal in Re Rural Traders Co-operative (WA) Ltd (supra) at 263. (emphasis added)

[40] ACCC *Guidelines for Authorisation of Conduct (non-merger*) March 2019
[41] *Qantas Airways Limited (2005)*, ACompT 9 at 1456

4 With and without authorisation

88 This section explains at a high level the parties' likely conduct without authorisation, and with authorisation. The following section goes on to discuss the benefits and detriments that would arise from the conduct.

4.1 Without authorisation

89 Without authorisation, 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.

90 Based on the QCA's draft decision on DBIM's 2019 DAU, it is likely to approve the 2019 DAU without a reference tariff. Accordingly, access seekers will negotiate with DBIM on a bilateral basis, safe 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.

91 Similarly, 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.

92 DBIM anticipates that it will be able to reach negotiated outcomes with the majority of the Applicants.

4.2 With authorisation

Authorisation will permit the Applicants to form a buy-side cartel

93 Authorisation would allow the Applicants to form what would otherwise be a buy-side cartel, by permitting the Applicants to share information on price expectations and to fix a maximum price, above which the participants would refuse to reach a pricing agreement with DBIM.

94 While the proposed conduct does not extend to collective boycotts, it does not prevent the Applicants from agreeing to refer the matter to arbitration if DBIM does not agree to the fixed price (whether reasonable or not) in commercial negotiations.

95 Any price cap fixed by the Applicants would almost certainly be unreasonable. This follows as the price would be the product of discussions between the Applicants and is therefore likely to reflect the 'lowest common denominator' – that is the lowest, most aggressive and unreasonable price advocated for by a participant within the group (even if this price is below the efficient costs of providing the service and would disincentivise investment preventing expansion of the terminal).

96 This has the potential to result in a material increase in costs, as it substantially reduces the likelihood of a negotiated outcomes and therefore increases the number of parties referring pricing disputes to arbitration.

97 Parties that would otherwise reach a reasonable mutually agreeable outcome with DBIM may be more likely to refer the matter to arbitration in order to save face, even if the QCA is likely to determine prices in line with DBIM's proposal.

DBIM does not intend to engage in collective negotiations

98 The ACCC may not be required to assess the specific outcomes that would occur if collective negotiations were to take place. However, it is required to consider if the authorised conduct would deliver real benefits in practice, and not benefits that are merely speculative or theoretical. It follows then that a relevant question for the ACCC is whether DBIM would engage in collective negotiations.

99 DBIM has no rational incentive to engage in collective negotiations, for the following reasons:

99.1 As explained above, authorisation will allow the Applicants to form what would otherwise be considered a buy-side cartel and it is likely to lead to the collective adopting unreasonable negotiating positions. Collective negotiations would only act to entrench these unreasonable positions and eliminate any possibility of reasonable commercially negotiated outcomes.

99.2 Participation in collective negotiations would be purely voluntary and the collective negotiator would have no ability to bind participants to a collectively negotiated outcome. Accordingly, if DBIM were to engage in collective negotiations and make concessions to reach a negotiated outcome, individual participants could still press DBIM individually for further pricing concessions, having already secured a reasonable offer.

Accordingly there is no incentive for DBIM, acting as a rational firm, to engage in collective negotiations.

100 Negotiating collectively with existing users would also undermine DBIM's existing contractual relationships. Existing users of the terminal (which currently contract for the full capacity of the terminal to 2028) are subject to long term contracts for access of services at DBT. Under each individual long term contract the parties are to negotiate the price for the provision of services to individual users, and failing agreement, the price will be arbitrated by either the QCA or a commercial arbitrator. Accordingly the application for authorisation is contrary to the original intent of the long term access agreements voluntarily entered into by users.

101 For these reasons DBIM has no reason to engage in collective negotiations, and as a result there cannot be any public benefits flowing from collective negotiations.

102 DBIM appreciates that it is not uncommon for the 'target' to argue that it will not engage in collective negotiations and that it would be inappropriate for the ACCC to accept such assertions without scrutiny.

103 However, the ACCC must undertake an assessment of the incentives on DBIM to engage in collective negotiations and determine whether there is a real prospect that, if authorisation is granted, the proposed conduct would lead to collective negotiations and whether the purported benefits flowing from collective negotiations would arise in practice. This is particularly important in circumstances where the detriments arising from the proposed conduct would occur irrespective of whether collective negotiations occur or not.

104 It would lead the ACCC into error if it were to accept that benefits would occur from collective negotiations without an appropriate assessment of whether these benefits are likely to arise in practice.

4.3 Judicial review of Treasurer's declaration decision

105 DBIM is currently awaiting the judgment in its application for judicial review of the Treasurer's decision to declare the DBT Service.

106 However, the Treasurer's decision forms the factual basis for the regulation applying to DBIM. Given this, for the purposes of assessing the authorisation application DBIM considers it reasonable to analyse the impact of the authorisation on the assumption that DBIM remains declared.

107 DBIM does not consider it necessary for the ACCC to speculate on what would occur if the appeal is successful at this stage. In circumstances where the judicial review was successful and a key part of the factual matrix applying to the authorisation shifted, DBIM considers it would be appropriate for the ACCC to call for further submissions on the impact of authorisation.

108 Of course, if the ACCC considers it relevant for DBIM to provide views on the public benefits and detriments that would arise if DBIM ceases to be regulated, DBIM is happy to provide a supplementary submission on this issue.

5 Purported benefits of authorisation

5.1 Introduction

109 DBIM considers that the Application significantly overstates the materiality of any benefits that would arise from authorisation.

110 This section explains why the purported benefits are non-existent or, at best, immaterial. Specifically, it explains:

110.1 That no benefits will occur from constraining DBIM's market power. Any market power is comprehensively addressed through regulation under the QCA Act and existing users' access agreements. To find that the authorisation will further constrain DBIM's market power would be to second guess the extensive access undertaking assessment process undertaken by the QCA.

110.2 DBIM has no incentive to engage in collective negotiations, so any benefits flowing from collective negotiations are purely speculative.

110.3 Negotiation and arbitration cost savings have not been established, and collective negotiations may result in higher negotiation costs.

110.4 Given that authorisation is not needed to constrain DBIM's market power, it does not follow that authorisation would lead to more efficient pricing outcomes or the promotion of competition in dependent markets.

5.2 Market power is already constrained through regulation and access agreements

111 The Applicants describe the rationale for the Application as:[42]

> 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.

112 Indeed, the main thrust of the Application can be surmised as *DBIM possesses market power so Authorisation is needed constrained to constrain that market power*,[43] and that 'the Applicants will have no countervailing power or bargaining position in …negotiations'.[44] Based on this fundamental premise the Applicants go on to argue that

112.1 small and less experienced users will benefit from collective negotiations with DBIM as they would otherwise be likely to settle for inefficient access charges; and

[42] Application, at p. 7
[43] See for example, Application at sections 3.5, 4.4,7.4
[44] Application, at p. 21

112.2 collective bargaining will create benefits by reducing information asymmetry and increasing transparency.

113 However, the Applicants' arguments for these purported benefits operate on a fundamentally erroneous premise – that any market power possessed by DBIM is unconstrained by regulation or contractual arrangements. When these two factors are taken into account it is clear that DBIM has no ability to exercise market power in bilateral negotiations with the Applicants.

DBIM is effectively constrained by regulation

114 Throughout the Application, the Applicant's rely on the fact that the QCA has previously found that DBIM possesses some market power. Indeed, DBIM acknowledges that the QCA has found that DBIM does possess some market power ***without*** regulation. However, it is important to recognise that this is the QCA's assessment of the state of the market ***without*** regulation.

115 In reality, as explained in section 2.1, the DBT 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.

116 The QCA is a sophisticated regulator with decades of experience regulating the terminal,[45] and the access regime applying to the DBT Service is certified as an effective access regime under Part IIIA of the CCA.

117 Accordingly, there is simply no basis for the Applicants' contentions that DBIM has unchecked market power that necessitates the Authorisation.

118 To accept the suggestion that the changes arising from the draft access undertaking process are 'adverse' or will not adequately constrain any market power on the part of DBIM is to second-guess the specialist regulator who has been responsible for the regulation of DBT for the past two decades.

119 Importantly though, DBIM does not submit that it is ***impossible*** for authorisation to deliver public benefits while regulation is in place as suggested by the Applicants.[46] Rather, in circumstances where regulation already acts to effectively constrain market power, it logically follows that it is not possible for public benefits to arise by providing a different constraint on DBIM's market power. Any public benefits arising from constraining DBIM's ability to exercise market power arise without authorisation. Therefore, the public benefits do not flow from the proposed conduct. Without a causal nexus the ACCC cannot attribute the public benefits of constraining DBIM's market power to the authorisation.

The Access Undertaking will continue to constrain market power

120 The Applicants cite the potential changes to the pricing model under the 2019 DAU as a cause for concern – equating a move to a negotiate-arbitrate regime with a licence for DBIM to exert unconstrained market power on its users.

121 In reality, as set out in detail above, DBIM will be unable to exert any market power under the 2019 DAU as:

121.1 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);

121.2 the 2019 DAU includes numerous other protections, as set out in paragraphs 45, 53, 56 and 57 above; and

121.3 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.[47] The final decision of the

[45] DBIM was first declared following privatisation of the Terminal in 2001, with DBIM's first draft access undertaking submitted in June 2003

[46] Applicants' February 2021 Submission, section 3

[47] The QCA's Final Decision is expected by March 2021

QCA will be on the basis that the approved Access Undertaking will appropriately constrain DBIM's market power.

122 Irrespective of whether the ACCC considers the 2019 DAU to be an effective constraint on DBIM's market power, the reality is that 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 before the ACCC have also been raised before 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

Existing users are protected under the terms of their access agreements

123 DBT 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 DBT. 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 complete constraint on DBIM's ability to exercise any market power.

124 As explained in section 2.2 above, it has been repeatedly established that DBIM's market power is already effectively constrained under its access agreements with existing users. Accordingly, no benefits can arise from further constraints by allowing the Applicants to form a buy-side cartel.

Smaller and less experienced producers are also protected by regulation

125 The Applicants argue that the authorisation will improve the negotiating position of smaller, less experienced producers, and will mean those producers are less likely to settle for inefficient access charges.[48]

126 Even DBIM's smallest customers are far from 'mum and dad' consumers. As discussed in section 2.2 (and illustrated in Confidential Appendix 2), DBIM's 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 DBT and are familiar with the regime.

127 In any event, 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. DBIM has publicly expressed its view that it may be appropriate for the QCA to take the scale of the producer into account in the conduct of an arbitration, such that arbitration is accessible to all access seekers:[49]

> Finally, DBCTM expects that the QCA will conduct arbitrations in an efficient and pragmatic way. This may include having regard to the size of the individual access seeker. For example, for particularly small access seekers it may be appropriate for the QCA to adopt a more inquisitorial role, to ensure that the access seeker's interests are adequately protected (and had regard to as per the arbitration criteria). This principle could be included in the arbitration guidelines if the QCA

[48] Application, section 7.2

[49] DBCT Management *DBCT 2021 Access Undertaking - further submission on QCA Draft Decision* December 2020

> considers it will give small access seekers greater confidence that arbitrations will be a viable backstop.

128 If the QCA determines accessibility of arbitration for smaller users to be a genuine issue it has the ability to require amendments to the 2019 DAU to address it.

The 2019 DAU provides for transparency and significant information to reduce information asymmetry

129 The Applicants assert that:[50]

> [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

130 And argue that:

> [i]n the absence of a reference tariff, the Applicants strongly consider a collective negotiation provides the greatest potential for mitigating that information asymmetry.

131 However, the Application neglects to mention 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 Applicants' February 2021 Submission acknowledges that DBIM will provide much of the information used by the Applicants' in negotiations:[51]

> much of the information being shared is information which DBIM will be required to publish as part of the DBCT access undertaking, such that it would be available to all users and access seekers irrespective of interim authorisation.

132 As discussed in section 2.1, the 2019 DAU provides for (amongst other things):

132.1 extensive prescriptive information requirements, including two comprehensive schedules of information requirements;[52]

132.2 an ability request a broad range of information from DBIM;

132.3 a proposal to introduce an evidentiary limit.[53] An evidentiary limit would require DBIM and access seekers to provide all of the information the parties seek to rely on before the matter could be referred to arbitration – put simply, it would require the parties must put their cards on the table. This would conclusively address any suggestion that DBIM could withhold information relevant to an access seeker's assessment of DBIM's pricing position. If DBIM withheld relevant information, it would be prevented from relying on that information in any subsequent arbitral proceedings. Hence, DBIM has a strong incentive to fully disclose any information it considers could assist it in arbitration. This ensures that access seekers are fully informed, and can make an assessment of the reasonableness of DBIM's offer and an informed decision on whether to refer the matter to arbitration.

133 These new protections are in addition to the existing regulatory reporting requirements and detailed capital expenditure and expansion approval processes set out in the current access undertaking which are retained in the 2019 DAU. To provide an insight to the level of detailed planning information that is publicly available under the current reporting requirements, DBIM provides in the following footnote a link to its current Terminal Master Plan, which runs to 67 pages.[54]

134 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 appropriately dealt with under the 2019 DAU. The Applicants rely on the proposition that the QCA's final

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[50] Application, at p. 24

[51] Applicants' February 2021 Submission

[52] See DBCT Management *Amended 2019 DAU* 23 April 2020, accessible at: https://www.qca.org.au/wp-content/uploads/2020/04/dbctm-amended-2019-dau-mark-up.pdf

[53] DBCT Management *Further submission on QCA 2021 Access Undertaking Draft Decision* December 2020

[54] https://dbinfrastructure.com.au/wp-content/uploads/2019/09/Approved-Master-Plan-2019.pdf

decision will leave unresolved a bona-fide issue regarding information asymmetry and transparency, which it has considered in detail. It would not be reasonable for the ACCC to accept this proposition.

135 It is difficult to reconcile these comments with the Applicants' earlier comments that 'collective negotiation provides the greatest potential for mitigating that information asymmetry'.

Comparisons to other applications

Comparisons to other unregulated terminals are irrelevant

136 The Applicants point to a number of other authorisations for collective negotiations with coal terminals, arguing that they are analogous with the current Application.

137 The argument that the Application is analogous to numerous other collective negotiation authorisations is only valid at the most superficial level – they did relate to access seekers at other Australian Ports.

138 However, even under basic scrutiny it is clear that the facts in each of the authorisations referenced were significantly different to those applying here. In fact, the argument that these cases are analogous only operates to highlight the fundamental flaw that underpins the Application, as the cases referred to by the Applicants all pertained to unregulated ports and terminals – that is they did not face the fundamental constraint that regulation places on DBIM's market power.

139 The ACCC must consider each case on its merits and when the cases are examined less superficially it is clear that the reasons for approving authorisation in the previous applications referred by the Applicants are plainly not applicable to DBT.

140 To take just one example, in the most recent referenced authorisation the ACCC authorised a group of miners to collectively negotiate with the Port of Newcastle. The ACCC found that the conduct would result in public benefits as it would lead to the bargaining group having greater input into the terms and conditions of access under the 'Producer Deed', and increased transparency around capital expenditure plans and cost allocation at the Port.

141 These are clearly not issues at DBIM. In stark contrast to the situation at the Port of Newcastle, DBIM's current and future access undertakings both:

141.1 allow for access seekers to demand the use of terms and conditions as set out in a standard access agreement which users and access seekers of DBIM, along with the QCA, have had extensive input into over the years; and

141.2 set out an extremely detailed and transparent process for the consultation on and approval of both expansion and non-expansion capital expenditure.[55]

142 Accordingly, the Port of Newcastle authorisation matter provides no authority or useful guidance in this matter. To rely upon any conclusion in an authorisation decision relating to an unregulated terminal, without a proper consideration of the constraints applying to DBIM, would be an error.

Comparison to Queensland Rail authorisation

143 The Applicants' February 2021 Submission also cites the ACCC's authorisation for a group of miners to collectively negotiate with Queensland Rail (**Queensland Rail decision**), claiming that the reasoning in that case equally applies to this Application.[56] However, that authorisation can clearly be distinguished from the current Application.

144 Most importantly, in the Queensland Rail decision the ACCC found *no* public benefits would arise from addressing market or bargaining power held by Queensland Rail – the monopoly below rail service provider

[55] See DBIM's current access undertaking at sections 12, 15 https://www.qca.org.au/wp-content/uploads/2019/05/33818_06-Trading-SCB-DAAU-clean-1300187_1-1.pdf

[56] Applicant's February 2021 Submission, at p. 5

in the region. Queensland Rail was subject to the same Queensland access regime - which operated to effectively constrain Queensland Rail's market power – as that applying to DBIM.

145 Rather, the main public benefit identified by the ACCC was transaction cost savings. Section 5 explains why in this case the authorisation is unlikely to result in material transaction costs savings, given the provisions in the 2019 DAU (which are different to the AU that applied to Queensland Rail) designed to reduce the cost of effective negotiations, and the fact that the majority of the legal and economic advice provided to the users will necessarily be user specific.

146 The ACCC also found that the collective bargaining arrangements *could* deliver additional public benefits through:[57]

146.1 ensuring that Queensland Rail Network and the applicants develop an accurate and uniform view of the Applicants' development and capacity needs in relation to the Below Rail Infrastructure, which may lead to improvements in business and infrastructure investment efficiency; and

146.2 avoiding unnecessary delays in the construction of the DPPM Terminal, and thus delays in any resulting benefits that flow from its construction.

147 The first of these is clearly not relevant to DBIM given that the 2019 DAU contains a detailed and extensive planning and approval process which provides for a collaborative and transparent approval process for the development of the terminal infrastructure. Collective negotiations will not alter this.

148 With respect to delays in investment, as discussed below in section 6 authorisation is more likely to result in delays to expansion of the terminal.

149 Further, DBT's Terminal Regulations are designed to promote efficiency in the operation of the terminal and the 2019 DAU provides that these may only be amended following consultation with users. DBIM notes that the Operator of the terminal is entirely owned by a subset of users of DBT and is responsible for proposing amendments to the Terminal Regulations. In recent disputes, determined by the QCA, a number of the Applicants took opposing positions on the proposed amendments to the Terminal Regulations – indicating that authorising collective negotiations is unlikely to build consensus regarding the efficient operation of the terminal.[58]

5.3 Cost savings have not been established

150 The Applicants argue that authorisation will 'allow for' cost savings, claiming that the proposed conduct would be anticipated to materially reduce negotiating costs through:[59]

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

151 The Applicants have provided no evidence which demonstrates that this would result in material cost savings compared to without authorisation. DBIM submits that the costs of negotiation are likely to be similar with and without authorisation.

[57] ACCC *Application for authorisation A91278 – Determination* 16 February 2012, at p. 11

[58] See https://www.qca.org.au/project/dalrymple-bay-coal-terminal/2017-access-undertaking-process/proposed-amendments-to-dbct-terminal-regulations/

[59] Application, at p. 23

Economic and legal costs

152 The Applicants argue that the collective negotiation process will allow the Applicants to share the costs of economic and legal advisers in preparing for and negotiating with DBIM.

153 These costs will be similar with and without authorisation.

154 The 2019 DAU (including DBIM's proposed amendments) goes to great lengths to reduce the economic and legal costs associated with negotiating a price with DBIM. For example:

154.1 DBIM is required to provide access seekers with a vast amount of information that can be used to determine the efficient costs of providing the service;[60]

154.2 DBIM is required to provide a detailed substantiation for its offer price;[61] and

154.3 DBIM has committed to providing a model (which would otherwise form a key cost in producing a building blocks estimate) that will enable even the least sophisticated users to easily test the reasonableness of DBIM's offer, test assumptions, and produce modelling based on their own assumptions.

155 The effect of this is that external economic and legal costs of negotiation will be minimal, regardless of whether the Applicants are collaborating.

156 The most material legal and economic costs will relate to individual users' specific circumstances which cannot be shared by the Applicants. In particular:

156.1 the arbitration criteria under the 2019 DAU include a number of user-specific considerations, such as the value of the service to the user and the specific mix of services taken by the user; and

156.2 Individual users have indicated different needs in terms of the form access charge. For example, in bilateral discussions some users have indicated a preference for charges to be set in foreign currencies.

157 Determination of these individual-specific factors and their impact on prices are likely to be the primary source of economic and legal costs for the Applicants. These costs are unlikely to be materially reduced through collaboration. The Applicants' comments that there are unlikely to be user specific issues[62] are disingenuous for the reasons set outabove.

158 Arguments for reduced transaction costs will typically be relevant where there is a large number of small, poorly resourced negotiating parties. This is clearly not the case here. As explained in section 2.2 above, there are only 10 current users of the terminal who are all large, sophisticated mining businesses with significant experience negotiating contracts within their supply chain.

Meeting costs

159 As set out in the paragraphs above, DBIM has no incentive to engage in collective negotiations and accordingly there will be no cost savings associated with a reduction in individual meetings.

160 Even if this were not the case, collective negotiations typically require the appointment of an independent negotiator to act as a middleman and attempt to coordinate not two, but multiple participants. Each Applicant would still have to consider its own position, its preferred contractual terms, the value of the service to the user, the mix and quality of services used, and what trade-offs it is prepared to make, in addition to having the terms of the agreement reviewed and approved by its own legal representatives. The parties will then have to incur further cost in engaging in the back-and-forth required to decide on a common negotiating position, while paying the additional costs of the negotiator. Further back- and-forth

[60] Substantively similar information will also be provided to existing users.
[61] Substantively similar information will also be provided to existing users.
[62] Application, at p. 24

would then be required to seek the Applicants' views on DBIM's engagement, and to ultimately settle on an agreement.

161 It is clear that, at best, any transaction cost savings resulting from collective negotiations will be immaterial. When the actual steps required to make collective negotiations work are considered, it is clear that transaction costs are more likely to eclipse the transaction costs that will be required through bilateral negotiations.

Arbitration costs

162 The Applicants also argue that there would be cost savings in any arbitration:[63]

163 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.

164 Even if collective arbitrations were permitted, any cost savings are likely to be immaterial or non-existent as:

164.1 the parties to the arbitration and the arbitrator would still have to deal with user specific factors, discussed above;

164.2 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

164.3 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, for the reasons set out in section 4.2.

5.4 Unconstrained market power needed for authorisation to result in more efficient outcomes and improved competition in dependent markets

165 The Applicant's argue in section 7.5 of the Application that authorisation will result in more efficient pricing outcomes and therefore competition in dependent markets will be promoted.

166 However this argument is premised on a huge leap in logic. Section 7.5 of the Application espouses the potential benefits of a more efficient price, but provides ***no*** evidence that collective negotiations would lead to a more efficient pricing outcomes. This is because there is none.

167 As previously discussed, DBIM is regulated by the QCA and both existing users and access seekers have the ability to refer pricing disputes to arbitration if DBIM pressed for an inefficient price. This threat of arbitration, in turn provides a strong incentive for DBIM to act reasonably in negotiations and agree to efficient pricing outcomes. The Applicants' argument can only hold if it established the fundamentally flawed premise that the arbitrator, most likely the QCA, would determine inefficient prices in an arbitration. This is simply not plausible.

168 In fact, inefficient prices are more likely to occur ***with*** authorisation.

168.1 Without authorisation each party will be free to agree to price and other terms that are reasonable and efficient, taking into account that users individual needs. If DBIM offers an inefficient price, the user can refer the dispute to arbitration.

168.2 With authorisation this process is likely to be undermined. The buy-side cartel 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.

[63] Application, at p. 24

169 Similarly, the Applicants' February 2021 Submission argues:[64]

> the Applicants submit there is clear merit in the ACCC providing an authorisation that improves the ability of the users and access seekers to effectively negotiate the terms of the DBCT service

170 Again, for the ACCC to accept this it would have to rely on the erroneous assumption that the QCA would approve an access undertaking that would allow for ineffective negotiations and that does not constrain DBIM's market power. The Applicants have provided no evidence to establish that this would be the case.

6 Public Detriments

6.1 Introduction

171 The Applicants argue that there is limited, if any, potential public detriment caused by allowing users of DBT to engage in the proposed conduct.[65] This section explains the various detriments that were not addressed in the Application, which amount to a significant public detriment. Specifically, it explains that authorisation:

171.1 Is sought to engage in what would otherwise be considered criminal cartel behaviour, which is a per se offence because it is acknowledged to be inherently detrimental. Accordingly there must be significant public benefits arising from the proposed conduct for the ACCC to grant authorisation;

171.2 Would frustrate bilateral commercially negotiated outcomes, and the benefits (acknowledged by the QCA) that they give rise to;

171.3 Is likely to result in more parties unnecessarily proceeding to arbitration and the additional costs associated with those arbitrations, in circumstances where mutually acceptable outcomes would otherwise be possible;

171.4 Greatly increases the risk that groups of users will collaborate to detriment of other groups of access seekers or users;

171.5 Would interfere with the contractual rights and the framework for negotiation under the existing users' access agreements; and

171.6 Would likely result in sharing of sensitive information regarding other parts of the supply chain in order to determine an appropriate negotiating position for collective negotiations.

172 Importantly, these detriments are likely to arise, irrespective of whether DBIM engages in collective negotiations with the Applicants or not.

6.2 Cartel conduct is inherently detrimental to the public interest

173 It is important that the ACCC keeps front of mind that the Applicants are seeking authorisation to engage in what would otherwise be considered criminal cartel behaviour, the most serious form of anti-competitive conduct.

174 Relevantly, the ACCC's website explains:[66]

> Cartels are immoral and illegal because they not only cheat consumers and other businesses, they also restrict healthy economic growth by:

[64] Applicants' February 2021 Submission, section 3.3
[65] Application, at p. 27
[66] https://www.accc.gov.au/business/anti-competitive-behaviour/cartels

…

- reducing innovation and choices by protecting their own inefficient members who no longer have to compete so don't bother to invest in research and development
- reducing investment by blocking new industry entrants that might invest in opportunities, economic growth and jobs
- locking up resources because they interfere with normal supply and demand forces and can effectively lock out other operators from access to resources and distribution channels
- destroying other businesses by controlling markets and restricting goods and services to the point where honest and well-run companies cannot survive

…

175 Cartel conduct is per se prohibited because it is acknowledged to be inherently detrimental. Accordingly there must be significant public benefits arising from the proposed conduct for the ACCC to grant authorisation.

6.3 Authorisation will reduce the likelihood of bilaterally negotiated outcomes

176 As explained in section 2.1 above, the 2019 DAU was designed to give primacy to commercially negotiated outcomes, consistent with the Competition Principles Agreement.

177 The key purposes of the negotiate-arbitrate model are to:

177.1 increase the likelihood of mutually agreed, commercially negotiated outcomes;

177.2 improve the ability for DBIM to tailor access agreements to individual user needs;

177.3 reduce regulatory costs associated with determining a one-size-fits-all, ex-ante reference tariff; and,

177.4 provide a pricing model that is proportionate to the narrow risk of competition harm identified in the declaration review.

178 In its Draft Decision on the 2019 DAU the QCA explicitly acknowledged the benefits of commercially negotiated outcomes, stating:[67]

> **Primacy of negotiated outcomes**
>
> We are of the view that where possible, DBCTM and access seekers should be encouraged to reach agreement on the terms and conditions of access. **Negotiated outcomes resolving terms and conditions of access may have a number of benefits for the parties.**
>
> Negotiated outcomes may be tailored to reflect the **individual** preferences of access seekers, including differences to non-price access terms or risk-sharing arrangements and may better reflect the value of access to a user, given individual access seekers have better knowledge than the QCA of how much they each value access—indeed this is not an issue incorporated in the setting of reference tariffs. That is not to say that the parties cannot negotiate those non-price terms or risk-sharing arrangements while a reference tariff exists, but we accept that the parties may be less inclined to engage in commercial negotiation of non-price terms when there is a reference tariff. (emphasis added)

179 As detailed in section 4.2 above, the authorisation will eradicate these benefits by enabling the Applicants to form a buy-side cartel for the DBT Service and materially reduce the likelihood of successful bilateral negotiations as participants are likely to adopt the most aggressive and unreasonable position of the collective.

180 If DBIM were to engage in collective negotiations, this would remove the Applicants' unique interests from the negotiation table and instead create a single, homogenous interest – that of the negotiating bloc as a whole. As explained above, in order to arrive at such a collective negotiating position the participants would have to arrive at a 'lowest common denominator' position; in other words, a position in terms of both price and non-price terms that was acceptable to all participating DBT users. In practice, it is DBIM's belief that this position would inevitably favour the interests of the largest exporters, or at the very least a position closely aligned to those exporters' interests. In this scenario, the interests of smaller exporters and other port users are marginalised.

181 If DBIM were to engage in collective negotiations it would practically remove the ability to offer tailored service and contract offerings based on individual user needs. Some examples of aspects of access arrangements that can be tailored and have been discussed with existing users to date include the following:

181.1 Variations to the frequency of the standard five year access charge review under the existing user agreements (i.e. the term of the pricing arrangements, not the term of the contract). For example, the parties could decide to take advantage of the prevailing low interest rates to lock in access charges for a period of ten years, rather than the standard five.

181.2 Payment of access charges in foreign currency.

181.3 Linking charges to prevailing coal prices, such that DBIM could share some exposure to market volatility.

181.4 Incentives for efficient operational behaviours, which could lead to more efficient operation of the terminal.

181.5 Simple matters of convenience, such as the form of notice requirements.

182 These are just some of the many aspects which are able to be negotiated between the parties. It would not be possible to meaningfully negotiate tailoring of this sort on a collective basis.

6.4 Authorisation will result in unnecessary arbitrations

183 As explained in section 4.2 above, 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.

184 This in turn, will result in a greater number of unnecessary arbitrations than would otherwise be the case.

185 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.

186 However, 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.

6.5 Authorisation may prejudice certain groups of users or access seekers

187 DBIM is concerned that where the interests of all users and access seekers are not aligned, authorisation would provide an opportunity for groups of users to collaborate in a way that could disadvantage other users or, in particular, access seekers.

188 This is perhaps best illustrated by the tension between the interests of existing users and access seekers with respect to expanding the terminal.

189 Except where existing users require additional capacity, it is generally not in existing users' interest for an expansion to occur. This is because:

189.1 an expansion to the terminal has the potential to increase the costs for existing users of the terminal, without any corresponding benefit, if the cost of the expansion is socialised;

189.2 from a competition perspective, expansion facilitates new entry of new mining companies in the region which compete with existing users.

190 On the other hand, given DBIM is fully contracted for the foreseeable future, expansion of the terminal is critical to new access seekers, as they will be unable to ship coal from DBT without it.

191 This tension has borne out in practice, with existing users adamantly opposing the socialisation of any expansion costs where it would increase the price paid for access to the terminal. This materially harms the interests of access seekers for two reasons:

191.1 first, because without socialisation access seekers would have to pay a materially higher price for access to the terminal, thereby increasing costs and putting them at a competitive disadvantage in the downstream coal export market and upstream tenement acquisition markets; and

191.2 secondly, because without the ability to socialise an expansion it is highly unlikely that DBIM would be able to finance an expansion to the terminal – thereby denying new access seekers from access to a critical piece of infrastructure needed to compete with existing users.

192 Authorisation would enable existing users to aggressively pursue terms, with the threat of multiple arbitrations, that operate to practically prevent DBIM from socialising the cost of an expansion amongst existing users. This could occur at the negotiation phase, where the QCA would not have the ability to ensure the appropriate application of the expansion process.

193 Similarly, users could pursue access charges that would operate to prevent any expansion of the terminal. DBIM has already invested in the infrastructure needed to provide the DBT Service to existing users, who have already secured ongoing access to the terminal. Accordingly, existing users have an incentive to pursuing the lowest possible prices for access, even if this does not allow DBIM to recover its sunk costs, as this will not prevent the provision of the service to those users. Pricing below the efficient cost for the service (including a reasonable return on capital) would prevent DBIM from undertaking an expansion and would thereby prevent new access seekers from gaining access to the terminal.

194 If authorisation enables any group of users to negotiate terms that disadvantage another group of users or access seekers this will result in significant public detriment, creating harm to competition in dependent markets such as the coal tenements markets and harming Australia's competitiveness in the global seaborne coal markets.

6.6 Authorisation will interfere with contractual rights of users who have already secured access

195 DBIM submits that it would be inappropriate for the ACCC to authorise conduct which essentially permits existing users to attempt to leverage open, with the threat of multiple arbitrations, their existing contractual arrangements with DBIM, rather than comply with the process set out in the terms of those agreements.

196 Users entered into their access agreements with DBIM freely, and gained the benefit of QCA approved standard access agreements which it is has been thoroughly established protects the rights of users.

197 DBIM considers that as a matter of public policy it is not the place of regulation to enable the reopening of existing contractual relationships. To do so undermines the fundamental principle of freedom of contract and results in a public detriment.

6.7 Risk of improper information exchange

198 There is also a real risk that the proposed conduct would lead to the Applicants' sharing competitively sensitive information relevant to other markets in the supply chain.

199 For example, in order to calculate the value of the service (a consideration for the arbitrator under the 2019 DAU and the QCA Act), a necessary input would be the costs that individual users face in the competitive above-rail haulage market.

200 This could lead to harm to competition in markets other than the market for the DBT Service.

201 The Applicants have not provided any information on compliance policies, or other measures put in place to limit the sharing of competitively sensitive information and accordingly the ACCC must acknowledge that there is a risk of anticompetitive information exchange.

7 Test for authorisation not satisfied – detriments outweigh benefits

202 When properly considered, having regard to the constraint that regulation has on DBIM's market power and the fact that DBIM has no incentive to negotiate collectively with the Applicants, the benefits arising from the authorisation are likely to be minimal, if any.

203 In contrast, DBIM has identified real and significant detriments which will occur if the authorisation is to be granted. These detriments will occur irrespective of whether DBIM negotiates with the Applicants or not.

204 When balanced against each other it is clear that the minimal benefits that would arise from authorisation cannot outweigh the significant detriment arising from the users engaging in what would otherwise be criminal cartel behaviour.

8 Authorisation duration

205 The Applicants seek Authorisation for a term of 10-11 years until 2031 (**Proposed Term**).[68] The Applicants explain that the proposed term is intended to extend over the next two pricing review periods and the development of the 8X expansion of the terminal and the potentially the initial stages of any 9X expansion.

206 DBIM submits that a long term authorisation of this nature is clearly not appropriate in the circumstances. If the ACCC is minded to grant authorisation, it should be granted for a maximum of 5 years – that is to cover the upcoming 5 year pricing period. As explained throughout this submission the access undertaking applying to DBIM, which is reassessed every 5 years, provides a key constraint on DBIM. Accordingly, in circumstances where the ACCC finds that it does not provide a sufficient constraint, it is likely the next iteration of the access undertaking will be amended to address the issue is identified by the ACCC, resulting in a key change to the factual matrix in place at the beginning of the next pricing period. This in turn means that the ACCC's analysis is unlikely to hold beyond the upcoming pricing period.

207 Given this, DBIM submits that, in the event the ACCC determines authorisation is appropriate, authorisation should apply only for the duration of the upcoming 5 year pricing period, at the maximum. 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.

[68] Application, section 3.6

9 Lack of relevant documentation

208 The standard authorisation application form asks for applicants to provide documents submitted to the applicant's board or prepared by or for the applicant's senior management for the purposes of assessing or making a decision in relation to the proposed conduct and any minutes or record of the decision made. Section 3.6 of the Application explains that *no such documents exist*.

209 DBIM submits that it is simply not plausible that there is not a single document that has been provided to the Applicants' senior management or board that records the decision to submit an application.

210 DBIM is concerned that a reason that the relevant documentation has not been provided may be that it would in fact disclose collaboration on the part of the Applicants that predates any authorisation Application.

211 DBIM has long held concerns that the Applicants, operating as members of the User Group, have been coordinating negotiations with DBIM to date. This is particularly concerning to the extent that it extends to negotiation strategy and consideration of prices, which could constitute criminal cartel conduct. These concerns initially arose following initial fruitful discussions with some users, which were followed by a notable cooling of negotiations and default references to the User Group's positions. This raised concerns with DBIM that the negotiating strategies of existing users were being coordinated via a hub and spoke arrangement with the User Group.

212 These concerns were further reinforced by the Applicants' February Submission, which sets out what appears to be the Applicants' joint position on the application of the arbitration criteria, suggesting that the Applicants may already be collaborating with respect to the positions they will take in negotiations with DBIM:[69]

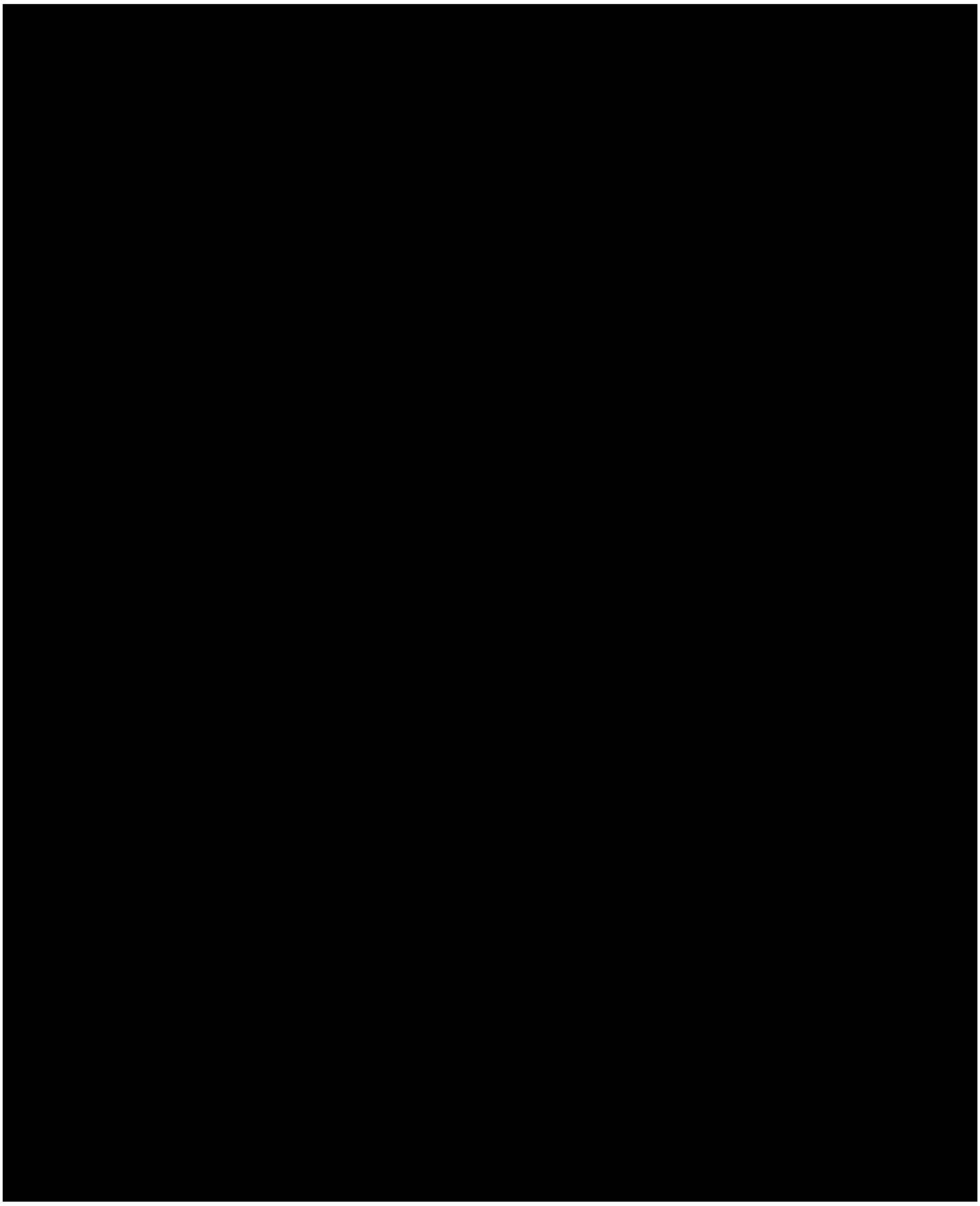
> It is acknowledged that section 120 of the QCA Act provides that in an arbitration the QCA must have regard to 'the value of the service to the access seeker or a class of access seekers or users'. However, **the Applicants do not consider** that requires disclosure of commercially sensitive input costs by each of the individual Applicants. **The Applicants consider that** this criterion refers to the economic value to users and access seekers in a competitive market (as a guide to determining an efficient and appropriate price for the service). (emphasis added)

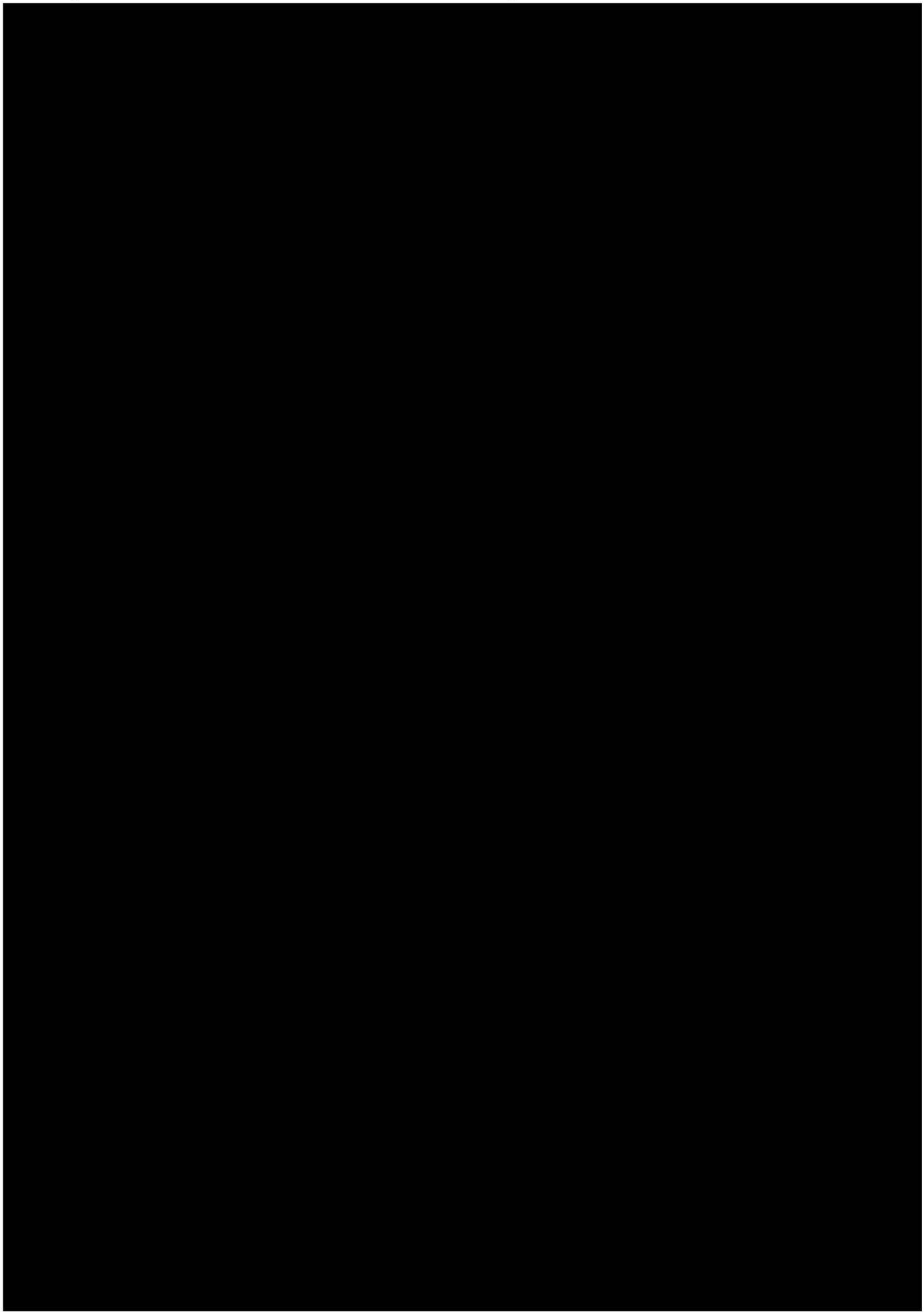
213 Needless to say, it would clearly be inappropriate if the Applicants are applying for authorisation in order to legitimise ongoing conduct which contravenes the CCA. However, without access to the proper documentation analysing and approving the decision to apply for authorisation, the ACCC is unable to have confidence that this is not the case.

214 The lack of relevant documentation is also particularly concerning given there seems to have been no consideration on the part of the Applicants (who are all competitors) as to how to manage competition risks. Given the Proposed Conduct could amount to a cartel, without authorisation, it should be expected that the Applicants have appropriate protocols in place (for both historical regulatory exercises and the preparation of the Application), to prevent the trading of sensitive information or a tacit agreement as to negotiating positions, without authorisation. However, the purported lack of any relevant documentation suggests this is not the case.

[69] Applicants' February 2021 Submission, at p. 11

Appendix 1 - Confidential - DBIM Contracted Profile and Access Seekers





Appendix 2 - Confidential - Information on scale of DBIM's current Users and Access Seekers