

29 January 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 respond to the ACCC's invitation for submissions to assist with its assessment of the Applicants' request for interim authorisation to collectively bargain with DBIM.

As the ACCC is aware, DBIM is currently the subject of a certified access regime which is administered by the Queensland Competition Authority (QCA). As outlined in this submission, interim collective bargaining authorisation will significantly interfere with the QCA's consideration of the current draft access undertaking and will potentially create irreversible harm to the access undertaking design and process that has been underway since 1 July 2019. This application for interim authorisation to engage in what would otherwise be criminal cartel conduct by significant global companies should therefore be rigorously assessed by the ACCC.

The purported benefits of the authorisation would not arise in practice as the QCA has wide powers to constrain any market power possessed by DBIM, meaning the Applicants' primary rationale for the authorisation, and the associated public benefits, are invalid. Further, any grant of interim authorisation will materially prejudice the interests of DBIM and will undermine the Queensland access regime. Accordingly, DBIM strongly submits that the ACCC should reject the Applicants' request for interim authorisation.

DBIM's position with respect to the authorisation will be addressed more comprehensively in its substantive submission on the Application.

Yours sincerely,



Jonathan Blakey  
General Manager – Commercial & Regulation  
**Dalrymple Bay Infrastructure Limited**

Attached: DBIM submission on interim authorisation application (ref: AA1000541)



**DBIM Submission to ACCC on interim authorisation application by Queensland coal mining companies**

**Reference: AA1000541**

**January 2021**

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## 1 Introduction and summary

### 1.1 Application and request for submissions

- 1 The Australian Competition and Consumer Commission (**ACCC**) has received an authorisation 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**),<sup>1</sup> along with interim authorisation so that the Applicants can begin preparations for collective negotiations immediately.
- 2 On 22 December 2020 the ACCC invited DBIM to make a submission to assist with its assessment of the Applicants' request for interim authorisation. On 7 January 2020 the ACCC provided DBIM an extension to 29 January 2020 to make its submission regarding the application for interim authorisation.

### 1.2 DBIM opposes Authorisation

- 3 DBIM opposes the proposed authorisation which, if granted, would enable the Applicants to form a cartel and potentially fix the prices that users of the DBT service (**users**) could seek from DBIM for the provision of coal handling services. The test for authorisation is clearly not satisfied. In brief, this is because:
  - 3.1 The purported benefits of the authorisation would not arise in practice for two principle reasons:
    - 3.1.1 First, the coal handling service at DBT is regulated by the Queensland Competition Authority (**QCA**) under an access regime certified under the Competition and Consumer Act 2010 (**CCA**). The QCA has wide powers to constrain any market power possessed by DBIM, meaning the Applicants' primary rationale for the authorisation, and the associated public benefits, are invalid.
    - 3.1.2 Secondly, DBIM does not intend to collectively negotiate with users as to do so is inconsistent with the existing contract framework. Users currently have existing long term contracts for access to services at DBT. As a result, users already have guaranteed rights to access pursuant to their individual long term contracts. Under each individual long term contract the parties are to negotiate the price for the provision of the service to the user, and failing agreement the price will be either arbitrated by 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 users. DBIM also has no incentive to engage in collective negotiations, as they would likely lead to unreasonable negotiating positions being taken by users and unnecessary arbitrations. For these reasons DBIM will not engage in collective negotiations with users. Therefore, as there will be no collective negotiations, there cannot be any public benefits flowing from collective negotiations.
  - 3.2 On the other hand, the authorisation is likely to cause significant harm and risks undermining the Queensland access regime, including the benefits of tailored, bilaterally negotiated outcomes that DBIM's new access undertaking is designed to achieve.
- 4 DBIM's position with respect to the authorisation will be addressed more comprehensively in its substantive submission on the Application. This submission focuses on the Applicants' request for interim authorisation and seeks to briefly explain the irreversible harm that would occur if interim authorisation was granted, and why in any event interim authorisation is not necessary, nor appropriate, in the circumstances.

<sup>1</sup> 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

### 1.3 Interim authorisation will cause irreversible harm

- 5 As explained in this submission, the proposed conduct, even in the short term, is likely to result in significant and irreversible harm that could not be remedied simply by revoking interim authorisation.
- 6 In particular it would allow the Applicants to form a cartel, share information on price expectations and to agree a maximum price that they would each seek to agree with DBIM, above which the participants would collectively refer the matter to arbitration (i.e. Applicants could agree a price cap that they each seek from DBIM and seek in any subsequent individual arbitration). This cartel conduct would wholly undermine the negotiate arbitrate regime contained in DBIM's 2019 Draft Access Undertaking currently under assessment by the QCA.
- 7 Once pricing information and price expectations have been shared amongst the Applicants, each of which is a competitor, it cannot be unshared. While any price fixing agreement or understanding of a price cap may no longer be permitted if authorisation is revoked, the existence of a previously agreed price cap would likely result in tacit collusion, even if interim authorisation is subsequently revoked and final authorisation is refused. Therefore, the position of the parties prior to interim authorisation cannot be reinstated if interim authorisation is subsequently revoked or if final authorisation is not granted. Accordingly, on this basis alone it would be inappropriate for the ACCC to grant interim authorisation.

### 1.4 Interim authorisation is unnecessary

- 8 The Applicants have not established a bona fide *need* for interim authorisation.
- 9 The rationale for the Application is premised on changes to the DBIM's access undertaking. The QCA is yet to make its final decision on these changes in determining the access undertaking that will apply to DBIM from 2021 (**Final Decision**) and, accordingly, interim authorisation should not be granted in circumstances where there may yet be no need for it.
- 10 The current state of negotiations with existing users of the terminal does not increase the authorisation's urgency. While DBIM has formally initiated negotiations with existing users (as required under its agreements), it has yet to propose pricing or materially progress negotiations. This is due to the fact that the QCA is yet to make its Final Decision on the access undertaking to apply from July 2021.
- 11 The Final Decision is a necessary prerequisite to effective negotiations with users and is needed to inform a reasonable pricing offer. For example, the QCA has indicated that it will determine key pricing inputs such as depreciation and remediation costs. These inputs, along with the overarching pricing framework, will not be determined until the QCA makes its Final Decision, expected in the first quarter of 2021. Therefore, there is limited merit in any party undertaking detailed negotiation preparations at this stage.
- 12 It is therefore highly unlikely that negotiations will progress materially prior to the release of the QCA's Final Decision, removing any urgency and need for interim authorisation to begin preparation for collective negotiations.
- 13 Further, existing users' access agreements all contain true-up provisions, which provide for any agreed, or arbitrated, price to be backdated in circumstances where the price is not determined until after the price review date. This further relieves any urgency to begin preparations for negotiations with DBIM, collective or otherwise.
- 14 It is also worth noting that representatives of the Applicants were first advised that DBIM was seeking a negotiate-arbitrate form of regulation in October 2018. The timing adopted by the Applicants is a strategic and cynical attempt to create a false sense of urgency, in order to gain interim authorisation before the ACCC has had an opportunity to properly consider the Application and without the benefit of full substantive submissions.
- 15 Finally, as DBIM will not engage in collective negotiations there is genuine doubt as to whether any public benefits will flow from the proposed conduct. In circumstances where there is a real possibility that no public benefits will flow from the proposed conduct, it would be inappropriate for the ACCC to grant interim authorisation to engage in cartel conduct, the worst form of anti-competitive conduct.



- 16 To grant interim authorisation to engage in cartel conduct the ACCC must be satisfied that there are overwhelming benefits and that such benefits will arise in practice. In this case, the ACCC cannot be satisfied of either matter at this stage of the authorisation process.
- 17 Accordingly, DBIM strongly submits that the ACCC should reject the Applicants' request for interim authorisation.

## 1.5 Structure of this submission

- 18 The remainder of this submission is split into three sections:
- 18.1 Section 2 briefly deals with the Applicants' purported rationale for the Application and provides important relevant context which demonstrates that the fundamental premise of the rationale is erroneous.
- 18.2 Section 3 explains some of the potential harms that could arise from interim authorisation and why that harm cannot be rectified by revoking interim authorisation.
- 18.3 Section 4 explains why there is no bona-fide need for interim authorisation and how the timing adopted by the Applicants is cynical and intended to create a false sense of urgency, in order to gain interim authorisation, before the ACCC has had an opportunity to properly consider the circumstances and without the benefit of full substantive submissions.

## 2 Rationale for Authorisation

- 19 While DBIM will further elaborate in its substantive submission, it is useful to briefly address the Applicants' purported rationale for the Application.
- 20 The Applicants describe the rationale for the Application as:<sup>2</sup>
- 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.
- 21 Indeed, the main thrust of the Application can be surmised as *DBIM possesses market power so Authorisation is needed to constrain that market power.*<sup>3</sup>
- 2.4 However, this rationale (and the purported benefits associated with it) operates on a fundamentally erroneous premise – that any market power possessed by DBIM is unconstrained by regulation.

### 2.1 DBIM is subject to regulation under the Queensland Competition Authority Act

- 22 In reality, the DBT Service is declared under the *Queensland Competition Authority Act 1997 (Qld) (QCA)*.
- 23 This means that, under the QCA Act, the QCA has *extensive* powers (beyond those afforded to the ACCC under Part IIIA) to regulate DBIM, including the ability to request a draft access undertaking, to make amendments to that undertaking, and where appropriate to determine the maximum prices that DBIM can charge for providing access to the terminal.
- 24 The QCA is a sophisticated regulator with decades of experience regulating the terminal,<sup>4</sup> and the access regime applying to the DBT Service is certified as an effective access regime under Part IIIA of the CCA.

<sup>2</sup> Application at p. 7

<sup>3</sup> See for example, Application at sections 3.5, 4.4,.7.4

<sup>4</sup> The DBT Service was first declared following privatisation in 2001, with DBIM's first draft access undertaking submitted in June 2003

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

## 2.2 Users are protected under their existing user agreements

- 26 It is important to emphasise that DBT is currently fully contracted for the foreseeable future. The current estimate of the earliest date the next expansion of the terminal (8X Expansion) can be completed is in 2027. Accordingly, there is no basis for the Applicants to argue there is any pressing need to negotiate *access* to the terminal. Rather, 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 .
- 27 Throughout the declaration review, the QCA, the Treasury Department, and the Treasurer 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 determining in his statement of reasons:<sup>5</sup>

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.

- 28 Under each existing user's individual long term contract the parties are to negotiate the price for the provision of service to that user, and failing agreement the price will either arbitrated by the QCA or a commercial arbitrator. Accordingly the application for authorisation is contrary to the original intent of the long term contract voluntarily entered into by users.
- 29 For these reasons, and others that will be explained in DBIM's substantive submission, DBIM will not engage in collective negotiations with users. As there will therefore be no collective negotiations there cannot be any public benefits flowing from collective negotiations.

## 2.3 The 2019 Draft Access Undertaking

- 30 On 1 July 2019 DBIM submitted a draft access undertaking (**2019 DAU**) in response to a request by the QCA.<sup>6</sup>
- 31 While the 2019 DAU was substantively similar to previous undertakings (including extensive protections for access seekers, such as a standard form access agreement, non-discrimination obligations and capex approval processes), rather than adopt a prescriptive reference tariff, the 2019 DAU proposed a pricing model based on the negotiate arbitrate regimes in Part 5 of the QCA Act and Part IIIA of the CCA. The purpose of the negotiate arbitrate model was to promote the likelihood of mutually agreeable commercially negotiated outcomes, reduce regulatory costs, and to provide a model that was proportionate to the limited risk of competition harm identified in the declaration review.<sup>7</sup>

<sup>5</sup> 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]

<sup>6</sup> <https://www.qca.org.au/project/dalrymple-bay-coal-terminal/2019-draft-access-undertaking/>

<sup>7</sup> The Declaration Review was a separate process by which the QCA was to consider whether DBT Service should remain declared and make a recommendation to the Queensland Treasurer. While the QCA and Treasury Department both recommended that the DBT Service should not be declared, the Treasurer ultimately declared the service on the basis that it could cause a narrow competition harm in the development stage coal tenements markets. DBIM intends to provide more detail about this process on this in its substantive submission

- 32 In its Draft Decision, the QCA explained that it considered the 2019 DAU and the negotiate arbitrate regime was capable of approval with some amendments. In doing so it acknowledged the number of benefits that arise from giving primacy to commercially negotiated outcomes:<sup>8</sup>

**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].

- 33 The Applicants cite the potential changes to the pricing model 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.
- 34 In reality, DBIM will be unable to exert any market power under the 2019 DAU as:
- 34.1 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);
  - 34.2 the 2019 DAU includes numerous other protections, including extensive information disclosure requirements (which ensure a high level of transparency and minimal costs involved in assessing pricing offers), a detailed process for the approval of capital expenditure, a standard form access agreement, and many other protections for users of the DBT service;<sup>9</sup> and
  - 34.3 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 ~22 months.<sup>10</sup> The Final Decision of the QCA will be on the basis that the approved Access Undertaking will appropriately constrain DBIM's market power.
- 35 In suggesting that the changes arising from the QCA's thorough process and analysis are 'adverse' or will not adequately constrain any market power, the Applicants are inviting the ACCC to second-guess a specialist regulator who has been responsible for the regulation of DBCT under a certified regime since the terminal's privatisation in 2001. DBIM respectfully submits that there is no basis for the ACCC to do so.

<sup>8</sup> QCA *DBCT Management's 2019 Draft Access Undertaking – Draft Decision* August 2020, at p. 53

<sup>9</sup> DBIM intends to explain the extensive protections included in the 2019 DAU in greater detail in its substantive submission

<sup>10</sup> The QCA's Final Decision is expected in Q1-2021.



### 3 Irreversible harm from interim authorisation

36 This section explains some of the potential harm that could arise from interim authorisation and why that harm cannot be rectified by revoking interim authorisation.

#### 3.1 Interim Authorisation would permit the formation of a buy-side cartel

37 Interim authorisation would allow the Applicants to form 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.

38 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.

39 It is reasonable to expect that any price cap fixed by the cartel would be unreasonable. This follows as the price would be the product of discussions between the participants 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).<sup>11</sup>

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

41 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. Indeed, in conversations with existing users some users have explained that the risk that another coal producer will attain a lower price from DBIM is likely to be an impediment to reaching a negotiated outcome with respect to an otherwise reasonable offer.

42 A collective price-fixing agreement of this sort, which would be permitted if interim authorisation is granted, has the potential to completely undermine the forthcoming access undertaking that will be approved by the QCA, along with the benefits that commercially negotiated and individually tailored outcomes deliver.

#### 3.2 Discriminatory collusion against access seekers

43 DBIM is also concerned that the interim authorisation will enable a certain group of users or access seekers to collaborate to form an agreement that will disadvantage access seekers or existing users that are not involved in the collective negotiations.

44 The interests of existing users and access seekers are often not aligned. This means interim authorisation would allow for certain groups to form a cartel that could negotiate for contracts that would disadvantage another group.

45 A key example of this is with respect to expansions.

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<sup>11</sup> In this respect, DBIM notes that Existing Users largely do not support any further expansion of the terminal, and are incentivised to reduce costs by extracting a tariff that does not compensate DBIM for its sunk investments as well as to prevent expansions, which would have the effect of precluding competitors from gaining access

- 45.1 There has historically been significant tension between the interests of existing and new users as to how the costs of any expansion should be treated, with existing users arguing the cost should be borne in full by new users, and expansion access seekers (and DBIM) of the firm view that the cost should be socialised across all users at the terminal, so that new users do not face an unlevel playing field in competing with existing users and there is no impediment to DBIM's financing of the future expansion.<sup>12</sup>
- 45.2 Interim authorisation could allow existing users to pressure (with the threat of multiple arbitrations) DBIM to accept terms which do not realistically allow for the socialisation of expansion costs or other terms which could deter new users or prevent the viability of expansion.

### 3.3 Information sharing in other competitive markets

- 46 There is also a significant risk that the proposed conduct would lead to the Applicants sharing competitively sensitive information relevant to other markets in the supply chain. 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.
- 47 This could lead to harm to competition in markets other than the market for the DBT Service.

### 3.4 Revocation of interim authorisation would not rectify harm

- 48 Once competitively sensitive information has been shared, this cannot be unshared. Similarly, while any express price fixing agreements may no longer be permitted if interim authorisation is revoked, the existence of a previous agreement on the maximum prices that would be accepted is highly likely to impact the parties' actions going forward, resulting in tacit collusion even if interim authorisation is subsequently revoked.
- 49 Further to this risk, and in an environment where DBT is regulated by the QCA, and the Applicants' are primarily large and sophisticated multinational mining companies, DBIM respectfully submits that there is no justification for interim authorisation.

## 4 Interim authorisation is not needed

- 50 This section explains why there is no bona fide need for interim authorisation.

### 4.1 Basis for authorisation is not established

- 51 The Applicants' rationale (which DBIM strongly disputes) for the Application is premised on changes to the access undertaking that regulates the DBT service, which the Applicants do not think are appropriate (and have made extensive submissions opposing).
- 52 However, the QCA is yet to make its Final Decision on the appropriate form of the access undertaking.
- 53 Accordingly, interim authorisation should not be granted in circumstances where the driver for the authorisation may not even eventuate. The QCA's Final Decision is imminent, with the QCA recently indicating it is likely to be published in the first quarter of 2021. Interim authorisation should not be granted until the QCA Final Decision is released and it is certain that the Applicants' purported rationale is relevant.

### 4.2 Negotiations cannot progress materially prior to the QCA's Final Decision

<sup>12</sup> See submissions and decision documents relating to DBIM's differential pricing draft amending access undertaking process accessible here: <https://www.qca.org.au/project/dalrymple-bay-coal-terminal/2010-access-undertaking/differential-pricing-daau/>

- 54 The lack of a Final Decision on the access undertaking also influences the progress of price review negotiations under the existing user agreements. While DBIM has formally initiated bilateral negotiations under its agreements with existing users, it has yet to progress these negotiations substantially on the basis that the QCA has not yet made its final decision.
- 55 The Final Decision will directly inform the prices offered in negotiations. For example, the QCA has indicated it will determine key inputs into any pricing offer, such as depreciation and remediation costs. The Final Decision will likely specify a myriad of further amendments to the DAU designed to ensure any potential market power held by DBIM is appropriately constrained. Accordingly, it is highly unlikely that any negotiations will be progress materially prior to the release of the QCA's Final Decision.
- 56 This is evidenced in correspondence with the DBCT User Group in which DBIM advised that it intends to provide existing users with information that will be provided to access seekers and that will be specified in the QCA's Final Decision. A copy of this letter is set out in Attachment A. DBIM has also informed individual users that it is not in a position to provide an offer price until the QCA has made its Final Decision on the access undertaking.

### 4.3 Scope for delayed negotiations to accommodate QCA Final Decision

- 57 While there is a right under the existing user agreements for either party to refer the price review to arbitration from 1 January 2021, DBIM has no intention, nor incentive to do so before it has undertaken meaningful attempts to reach a negotiated solution with users. The underlying premise of the 2019 DAU is to promote commercially negotiated outcomes, and immediate reference to arbitration would undermine this purpose (which DBIM has strongly advocated for).
- 58 The existing user agreements contain true-up provisions which provide for any subsequently agreed, or arbitrated, price to be backdated in circumstances where the price is not determined until after the price review date.<sup>13</sup> This means that in the event that a price is not determined by 1 July 2021 (the end of the current pricing period), any under or over recovery will be rectified meaning that no party will be commercially prejudiced by a delay.
- 4.10 As such, there is no evidence to suggest that interim authorisation is needed.

## 5 Timing of the Application

- 59 This section explains why the timing adopted by the Applicants is cynical and intended to create a false sense of urgency, in order to gain interim authorisation, before the ACCC has had an opportunity to properly consider the circumstances and without the benefit of full substantive submissions.
- 60 The ACCC's authorisation guideline explains that the ACCC will determine whether to grant interim authorisation taking into account (inter alia):<sup>14</sup>
- the urgency of the need for interim authorisation. Relevant to this, the ACCC will consider whether an application could have been lodged earlier to avoid the need for an urgent request for interim authorisation [emphasis added]
- 61 The Applicants argue that they have 'swiftly prepared and lodged this application for Authorisation and interim authorisation' and that:<sup>15</sup>

<sup>13</sup> See cl 7.2 of DBIM's current standard access agreement which reflects, in all material respects, the terms of DBIM's access agreements with Existing Users, accessible on the QCA's website

<sup>14</sup> ACCC *Guidelines for Authorisation of Conduct (non-merger)* March 2019 at [10.3]

<sup>15</sup> Application, section 9.2

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

- 62 With respect, DBIM submits that these comments by the Applicants are disingenuous.
- 63 The DBCT User Group were first advised that DBIM was seeking a negotiate arbitrate form of regulation in discussions with its Chair and legal adviser in October 2018. These discussions were fleshed out in greater detail in an initial meeting on 1 March 2019 when DBIM sought feedback on its intended framework, with DBIM submitting its full proposal to the QCA on 1 July 2019.<sup>16</sup>
- 64 While the Applicants' submission suggests that QCA's first indication that the form of regulation in the 2019 DAU may be appropriate for approval was the QCA's Draft Decision in October 2020, this is simply not the case. In order to provide greater certainty and promote meaningful submissions on the DAU, the QCA published an Interim Draft Decision indicating whether a negotiate-arbitrate model may be appropriate for approval. On 24 February 2020 the QCA published its Interim Draft Decision which indicated that the negotiate arbitrate form of regulation proposed by DBIM could be appropriate for approval, with appropriate amendments.<sup>17</sup>
- 65 However, instead of submitting an application with sufficient time to be determined prior to entering negotiations, the Applicants have deferred the submission of the application until two days before Christmas 2020, presumably in the knowledge that a substantial number of DBIM's staff and advisers planned leave over this period.
- 66 The Applicants' timing is strategic and cynical attempt to create a false sense of urgency in order to attain interim authorisation, which would allow the parties to share sensitive information on pricing expectations and agree to a maximum price, without the Application undergoing the full scrutiny of the authorisation process (information that would be retained even if interim authorisation was subsequently revoked).
- 67 Accordingly, consistent with the ACCC's authorisation guideline, DBIM submits that it would be inappropriate to allow for interim authorisation in circumstances where an application could have been lodged earlier in order to avoid the purported needed for interim authorisation.

## 6 Conclusion

- 68 In conclusion, DBIM submits that given:
- 68.1 the potential, irreversible, harm that could occur as a result of interim authorisation;
  - 68.2 the lack of urgency for the authorisation; and
  - 68.3 the opportunistic and strategic timing of the Application, which could have been avoided;
- the ACCC should reject the Applicants' request for interim authorisation.

If the ACCC requires any further information regarding DBIM's position on interim authorisation, DBIM is happy to provide further assistance. DBIM looks forward to providing the ACCC with its substantive submission in which it will demonstrate that the test for authorisation is clearly not made out.

<sup>16</sup> See <https://www.qca.org.au/project/dalrymple-bay-coal-terminal/2019-draft-access-undertaking/>

<sup>17</sup> QCA *DBCT Management's 2019 draft access undertaking – Interim draft decision* February 2020

**Appendix 1 Letter from DBIM to DBCT User Group regarding negotiations**



02 October 2020

John Hedge  
Partner  
Allens  
480 Queen Street  
Brisbane QLD 4000

Mark Smith  
Director - Infrastructure  
Peabody Australia  
100 Melbourne Street  
South Brisbane QLD 4101

Dear John and Mark

**Re: DBCT Terminal Infrastructure Charge 1 July 2021 – 30 June 2026**

I refer to your letter of 25 September 2020.

DBCTM has recently commenced the process to discuss pricing for 2021-2026 with users, including the issues raised in your letter of 25 September 2020. DBCTM agrees with the QCA's findings that 'negotiated outcomes may be tailored to reflect the individual preferences of access seekers' and that it considers 'it is appropriate to take into consideration the individual circumstances of the parties involved.' Our engagement with users will cover the issues raised in your letter in the context of the individual circumstances of users and their specific requirements.

As outlined in the 2019 DAU process to date, DBCTM will furnish access seekers with a great deal of information to inform negotiations. DBCTM intends to provide existing users with the same information. This will include the information set out in your letter being:

- (a) the TIC DBCTM is seeking from parties to the existing User Agreements as of 1 July 2021
- (b) the methodology for calculating that initial TIC; and
- (c) the methodology for calculating the TIC across the balance of the period through to 30 June 2026

Accordingly, we do not see the need to undertake a duplicative process covering the same subject matter as suggested in your letter.

However, we welcome constructive engagement from the User Group in relation to the non-pricing issues set out in DBCTM's letter of 23 September 2020, as well as the issues the QCA has raised in its draft determination in respect of remediation, review events and an appropriate depreciation methodology. To this end we hope that collaborative submissions on these issues can be prepared and filed with the QCA by 23 October 2020.

We look forward to the User Group's response to our letter of 23 September 2020. We will also send through our proposed approach to depreciation methodology shortly for your consideration.

Yours sincerely



Jonathan Blakey  
General Manager – Commercial & Regulation  
**DBCT Management**