



28 October 2019

Professor Flavio Menezes  
Chair  
Queensland Competition Authority

Dear Professor Menezes

**DBCT Declaration Review - Response to QCA Consultation Paper**

1. I am pleased to attach DBCTM's submission in response to the QCA's latest Consultation Paper.
2. Since the QCA's draft recommendation on the declaration of the DBCT service in December 2018, DBCTM has made a number of changes to the Deed Poll and Access Framework (**Framework**) to address concerns raised by the QCA and the DBCT User Group, and has duly executed and bound itself to this Framework. DBCTM has provided further material to demonstrate that access criterion (a) is not met.
3. With the benefit of the further information, it is clear that the propositions on which the QCA's draft recommendation was made, no longer hold. After considering this information, and the Users' submissions in response, the QCA has now sought further comment on DBCTM's ability to exercise market power without declaration, and what impact this would have on competition in the coal tenements markets.
4. The QCA accepts that both with and without declaration, existing users of DBCT will be protected by their existing agreements. These protected agreements cover 100% of DBCT's existing capacity and will still cover at least 91% of capacity at DBCT when the terminal has been expanded to meet future demand.
5. This means that any impact on competition in the coal tenements market would have to arise from the terms and conditions of access for new capacity. The implementation of the Framework, along with the threat of declaration, ensures that the small group of access seekers not covered by existing agreements will be able to gain access to DBCT on reasonable terms and conditions, such that there will be no adverse impact on competition in the coal tenements markets.
6. The QCA would usually be required to make a forward looking assessment of the effect that the threat of declaration would have. However, in this case the QCA has the opportunity to examine evidence already before it which clearly demonstrates that the threat of declaration will constrain DBCTM's market power without declaration. It is difficult to envisage better evidence of the effectiveness of the threat of declaration than DBCTM voluntarily offering, prior to deregulation, a binding commitment to comply with a comprehensive Framework which significantly restricts its behaviour without declaration.
7. If the QCA concludes that criterion (a) is not satisfied, the binding commitments DBCTM has made to comply with the Framework are likely to be the key determinant. As such, DBCTM is abundantly aware that if it does not strictly abide by these commitments, both to the letter of the law and in spirit, then it will likely be re-declared. DBCTM has every incentive to ensure it diligently conducts itself in accordance with the Framework.
8. We look forward to the QCA's consideration of this submission and its final recommendation to the Minister.

Yours sincerely

Anthony Timbrell  
Chief Executive Officer  
**DBCT Management**

Attachment 1: DBCTM response to QCA Consultation Paper

DBCT MANAGEMENT



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## **DBCT declaration review**

**DBCT Management response to QCA consultation paper**

**28 October 2019**

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## 1 Introduction and summary

- 1 DBCTM provides this submission, and the attached expert report from HoustonKemp economists (**October 2019 report**), in response to the QCA's consultation paper of 4 October 2019 regarding constraints on DBCTM's ability and incentive to exercise market power in the absence of declaration (**Consultation Paper**).
- 2 The QCA's review of the declaration of coal handling services at Dalrymple Bay Coal Terminal (**the DBCT service**) has been in progress since April 2018, with the QCA's draft recommendation published in December 2018.
- 3 Since the QCA's draft recommendation, DBCTM has made a number of changes to the Deed Poll and Access Framework (**Framework**) to address concerns raised by the QCA and the DBCT User Group, and has provided further material to demonstrate that access criterion (a) is not met.
- 4 As set out in the Consultation Paper, the QCA's draft recommendation that criterion (a) is satisfied was based on the propositions that:<sup>1</sup>
  - 4.1 although DBCTM had proposed a Deed Poll and an Access Framework to apply in the absence of declaration, at the time of the draft recommendation, it had not executed the Deed Poll;
  - 4.2 a future without declaration would result in asymmetric access terms and conditions between potential DBCT users (i.e. new coal miners, who would be exposed to DBCTM's market power) and existing DBCT users (i.e. existing coal miners, who would be protected from DBCTM's market power due to the terms set out in their existing 'evergreen' user agreements); and
  - 4.3 DBCTM would not be constrained from imposing an access charge that would appropriate all available rents from potential DBCT users, which would in turn deter potential efficient entrants from participating in the coal tenements market, and competing with existing users.
- 5 With the benefit of the further information provided in response to the draft recommendation, it is clear that these propositions no longer hold. In particular:
  - 5.1 DBCTM has now executed the binding irrevocable Deed Poll, and unequivocally expressed its intention to be bound by its terms;
  - 5.2 DBCTM has made publicly available legal advice which establishes that the Deed Poll and Access Framework are enforceable;
  - 5.3 the final Framework includes hard-coded terms which prevent DBCTM from charging new users more than \$3 more than the prices which would be determined under a QCA administered pricing regime, meaning that there can be no greater asymmetry between new and existing users than what would occur with declaration in any event, under a differentiated expansion;
  - 5.4 DBCTM has provided evidence that it is fully contracted; and
  - 5.5 DBCTM has provided robust real-world data on transactions in the tenements market which shows that the coal price is by far the most significant driver of tenement transactions and the market is not affected by the terms of access to DBCT .
- 6 After considering this information, and the Users' submissions in response, the QCA has now sought further comment on what impact declaration would have on competition in the coal tenements markets, if any, having regard to the operation of the Framework.

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<sup>1</sup> Consultation Paper, pages 1 and 2

- 7 DBCTM appreciates the opportunity to provide a further submission to reinforce and further explain the points made in previous submissions.
- 8 The QCA accepts that both with and without declaration, existing users of DBCT will be protected by their existing agreements. These protected agreements cover 100% of DBCT’s existing capacity and will still cover at least 91% of contracted capacity at DBCT when the terminal has been expanded to meet future demand.<sup>2</sup> This means that any impact on competition in the coal tenements market would have to arise from the terms and conditions of access to new capacity. DBCTM submits that the implementation of the Framework combined with the threat of declaration ensures that the small group of access seekers not covered by existing agreements will be able to gain access to DBCT on reasonable terms and conditions, such that there will be no adverse impact on competition in the coal tenements markets.
- 9 A summary of DBCTM’s response to each question is set below.

QCA question	Summary of DBCTM response
<p><b>Question One</b></p> <p>Whether the implementation of the Deed Poll and access framework on their terms, combined with the threat of declaration, would be sufficient to constrain DBCTM’s conduct in the absence of declaration—such that access (or increased access) as a result of declaration would not promote a material increase in competition in the coal tenements market?</p>	<p>The execution of the Deed Poll, combined with the added threat of declaration, will ensure that DBCTM complies with the terms of the Framework without declaration. DBCTM has a strong disincentive not to comply with the Framework, as doing so will risk redeclaration.</p> <p>The Framework is the same, in all material respects, as the current QCA approved Access Undertaking (except for pricing) meaning there will be no material impact on competition in the coal tenements market.</p> <p>The pricing framework ensures that there can be no material reduction in competition without declaration. This is because:</p> <ul style="list-style-type: none"> <li>Under the Framework, prices cannot increase more than \$3 above the prices which would be determined by the QCA for the existing terminal component;</li> <li>New users of the terminal will likely face a \$3.50 increase in prices with declaration in any event, given that any expansion capacity will by default under the 2017 AU be differentially priced;<sup>3</sup></li> <li>Even if this were not the case, a \$3 increase in prices is not sufficient to deter efficient new entrants from entering the coal tenements markets; and</li> <li>Charges for new users are likely to be below the \$3 Cap.</li> </ul>
<p><b>Question Two</b></p> <p>Whether DBCTM has demonstrated by its actions following the draft recommendation, including by putting in place the \$3 price cap, that the threat of declaration is a constraint on DBCTM’s ability to exercise market power?</p>	<p>DBCTM has already demonstrated the effectiveness of the threat of declaration as a constraint. DBCTM has made public and binding commitments to ensure that users will be able to gain access to DBCT on reasonable terms and conditions post-declaration, such that there will be no impact on competition in dependent markets if DBCTM is no longer declared.</p> <p>This includes:</p> <ul style="list-style-type: none"> <li>Seeking to engage with users to ensure the Framework is fit-for-purpose;</li> <li>Executing the binding Deed Poll;</li> <li>Introducing the ‘\$3 Cap’;</li> <li>Making numerous changes to the draft framework to address any and all concerns raised by the User Group and QCA; and</li> <li>Publically defending the enforceability of the Framework.</li> </ul> <p>It is hard to conceive of better evidence of the effectiveness of the threat of declaration as an effective constraint on DBCTM’s market power than DBCTM voluntarily executing a binding access framework which significantly restricts its future conduct, including with regard to pricing.</p>

<sup>2</sup> Based on the maximum forecast demand of 93Mtpa in the QCA’s draft recommendation

<sup>3</sup> QCA Draft Recommendation, page 86

QCA question	Summary of DBCTM response
	This constraint will continue to operate where the DBCT service is not redeclared and will ensure that DBCTM does not act in a way which would jeopardise either competition in the coal tenements market, or the terminal's undeclared status.

- 10 Due to the binding and irrevocable Deed Poll and the terms of the Access Framework, DBCTM has previously explained how it has no *ability* to exercise market power in the absence of declaration. This submission also explores further the issue of whether DBCTM has any *incentive* to exercise market power, and explains that it clearly does not.
- 11 If the QCA concludes that criterion (a) is not satisfied, the binding commitments DBCTM has made to comply with the Access Framework are likely to be the key determinant. As such, DBCTM is abundantly aware that if it does not strictly abide by these commitments, both to the letter of the law and in spirit, then it will likely be re-declared. DBCTM therefore has every incentive to ensure it diligently conducts itself in accordance with the Framework.
- 12 DBCTM submits that it cannot, and in any event would not, exercise market power without declaration.

## 2 Question 1 – constraints ensure no material impact on competition

- 13 The QCA's first question relates to whether the constraints on DBCTM imposed by the Deed Poll, along with the threat of declaration, are sufficient to ensure that without declaration there would not be a material reduction in competition in the coal tenements markets. Stakeholders were asked:

Whether the implementation of the Deed Poll and access framework on their terms, combined with the threat of declaration, would be sufficient to constrain DBCT Management's conduct in the absence of declaration—such that access (or increased access) as a result of declaration would not promote a material increase in competition in the coal tenements market

- 14 In summary, DBCTM submits that:
- 14.1 The execution of the binding Deed Poll, combined with the added threat of declaration, will ensure that DBCTM complies with the terms of the Framework without declaration;
  - 14.2 The Framework is the same, in all material respects as the current QCA-approved Access Undertaking (except for pricing); and
  - 14.3 Pricing under the Framework ensures that there can be no material reduction in competition without declaration. This is because:
    - 14.3.1 Under the Framework, charges for new users cannot be more than \$3/t above the charges which would be determined by the QCA for existing users;<sup>4</sup>
    - 14.3.2 New users of the terminal would likely face a \$3.50 increase in charges with declaration in any event, given that the terminal is fully contracted and any expansion capacity will by default be differentially priced; and
    - 14.3.3 A \$3/t increase in charges is not sufficient to deter efficient new entrants from entering the coal tenements markets.
- 15 This means that criterion (a) cannot be satisfied for the DBCT service and the QCA must recommend the service not be declared.
- 16 DBCTM has previously submitted why the geographic dimension of the coal tenements market is wider than the Hay Point catchment.<sup>5</sup> If the market is drawn more widely, for example extending to central Queensland, then it is clear that the QCA could not reach the view that the removal of declaration would materially affect competition, even without the Framework. This is because under a wider market definition miners would be able to access tenements in different regions which could be served by coal terminals other than DBCT.
- 17 The following analysis is provided on the basis of the narrow market definition set out in the QCA's draft recommendation, to demonstrate that criterion (a) cannot be satisfied even if the geographic dimension of the market for tenements is erroneously confined to the Hay Point catchment.

<sup>4</sup> Unless the QCA determined TIC for a new terminal component, priced differentially, would exceed this amount. In this case pricing cannot be more than what the QCA would have determined for the differentially priced terminal component.

<sup>5</sup> See, inter alia, DBCTM March 2019 submission, pages 61-63; HoustonKemp March 2019 Report on (a) pages 26-32; DBCTM April 2019 pages 32-34; HoustonKemp April 2019 Report on economic concepts underpinning the assessment of access criteria, pages 4-5

## 2.1 DBCTM will comply with the Framework

18 Both of the QCA's questions seek to explore the role which the threat of declaration will play in constraining DBCTM's exercise of market power without declaration. This section focuses on the nature of the constraint and how it ensures that DBCTM will comply with the Framework, even in the unlikely circumstances where it was found to be unenforceable.<sup>6</sup> The response to question two goes on to explain how DBCTM's actions to date have already evidenced the effectiveness of this constraint on DBCTM's market power, and how the constraint will continue to operate when the DBCT service is no longer declared.

### *The threat of declaration is a well-established constraint on the exercise of market power*

19 The threat of declaration (or other regulation) is a well-established constraint on the exercise of market power and has been considered an effective constraint by a number of regulatory bodies in recent decisions.

20 The Productivity Commission's recent report on the Economic Regulation of Airports concluded:<sup>7</sup>

An airport operator that exercises its market power also faces the threat of additional regulation from government. The Commission would not hesitate to recommend regulatory changes, including price regulation, if it found in the future that airport operators had systematically exercised their market power to the detriment of the community. **The ongoing threat of additional regulation acts as a deterrent against the exercise of market power.**[emphasis added]

21 This view was supported by the National Competition Council (NCC), which stated:<sup>8 9</sup>

The Commission's Draft Report also recognises that declaration under the National Access Regimes further imposes a credible threat of consequences and constrains the exercise of market power by airports. The Council agrees with this view of the Commission.

22 The NCC also opined on the threat of regulation as a constraint in its consideration of the declaration status of the Port of Newcastle (**PNO**). The NCC acknowledged that the threat of, or actual, regulation would act as a constraint on PNO and that the state government would be likely to intervene if PNO imposed excessive prices which would adversely impact competition in dependent markets:<sup>10</sup>

On balance, therefore, the Council expects that the NSW Government would be likely to intervene if PNO imposed excessive price increases or other access limitations that had the potential to have a material adverse impact on competition in the dependent markets; or otherwise harm the public interest.

### *The threat of declaration complements the Framework as a constraint on DBCTM without declaration*

23 In the context of DBCTM, the executed Framework combined with the threat of declaration will provide a strong constraint without declaration.

<sup>6</sup> DBCTM's public submissions have clearly established that the Deed Poll is binding and irrevocable. See for example DBCTM's July 2019 submission

<sup>7</sup> Productivity Commission *Inquiry Report - Economic Regulation of Airports* (21 June 2019) <https://www.pc.gov.au/inquiries/completed/airports-2019/report/airports-2019-overview.pdf>

<sup>8</sup> National Competition Council *Submission on the Economic Regulation of Airports* (29 March 2019), pages 2 and 3; [http://ncc.gov.au/images/uploads/Port\\_of\\_Newcastle\\_-\\_Recommendation\\_22.7.2019.pdf](http://ncc.gov.au/images/uploads/Port_of_Newcastle_-_Recommendation_22.7.2019.pdf)

<sup>9</sup> The NCC also further stated that "However, in order for the threat of declaration to continue to be an effective constraint on the exercise of market power, airport users (and indeed all access seekers in other industries) must be free to seek it without constraint by access providers, as it is their right." As pointed out, there is no constraint on future users' seek declaration of DBCT in future.

<sup>10</sup> National Competition Council *Revocation of the declaration of the shipping channel service at the Port of Newcastle – Recommendation* (22 July 2019), para 7.11; [http://ncc.gov.au/images/uploads/Port\\_of\\_Newcastle\\_-\\_Recommendation\\_22.7.2019.pdf](http://ncc.gov.au/images/uploads/Port_of_Newcastle_-_Recommendation_22.7.2019.pdf)



- 24 If the QCA recommends that the DBCT service is not declared on the basis that the terms of the Framework will provide an adequate constraint on DBCTM's market power, the threat of re-declaration provides an overwhelming incentive for DBCTM to comply with the specifics, as well as the spirit, of the Framework.
- 25 DBCTM strongly refutes the User Group's claims relating to the enforceability of the Framework.<sup>11</sup> However, in the extremely unlikely event that the Framework could be found to be technically unenforceable, for example due to an unforeseen technicality which is incapable of remedy, the threat of declaration ensures that DBCTM will continue to comply with the spirit and the terms of the Framework in practice. This would include DBCTM's immediate action to remedy any issues where possible, to comply with all access and pricing arrangements, and otherwise to conduct itself in accordance with the wording of the Framework in its entirety.
- 26 The reasoning for this is straightforward. In circumstances where the existence of the Framework is a key reason for the DBCT service not being declared, no rational business would then seek to circumvent, or even be perceived to circumvent, its obligations. To do so would undermine the enforceability of that very Framework and risk immediate re-declaration.

*Why the threat of declaration is a real and credible constraint*

- 27 The threat of declaration is not a nebulous, intangible risk for DBCTM, as it may be for firms which have not been subject to declaration in the past. Rather, the DBCT service has been declared since 2001, and at the expiry of its current declaration DBCTM will have been subject to heavy-handed regulation for almost two decades. The threat of declaration is therefore a well understood and tangible risk for DBCTM.
- 28 Adding to this is:
- 28.1 the existence of a well-resourced and experienced User Group, which has demonstrated through this process that it is willing to vigorously pursue declaration;
  - 28.2 the fact that a request for declaration can be made at any time;<sup>12</sup>
  - 28.3 the existence of a regulator which is intimately familiar with the relevant issues and the regulated service, after nearly two decades of regulation, meaning that any redeclaration process would be relatively quick and efficient, leveraging off the analysis and conclusions already undertaken through this process.
- 29 These factors mean that there is a very real prospect that if DBCTM stepped a 'toe out of line' once undeclared, the QCA could expeditiously redeclare the DBCT service. This threat will loom over DBCTM post-declaration and will effectively constrain its market power.
- 30 For the QCA to conclude that the threat of declaration does not provide a constraint and that DBCTM would not act in accordance with the Framework, it would have to be satisfied that if the DBCT service was not declared then DBCTM would act in a way that would almost certainly result in redeclaration. This is clearly not plausible.
- 31 Rather, DBCTM will go to great lengths to avoid jeopardising its undeclared status. Indeed, it has already demonstrated this by voluntarily executing the binding Deed Poll which significantly constrains its future behaviour. This, and the other evidence which already exists to demonstrate that the threat of declaration is an effective constraint, is discussed further below in DBCTM's response to question two.

<sup>11</sup> See, inter alia, DBCTM July 2019 further submission; DBCTM April 2019 submission pages 22-25

<sup>12</sup> *Queensland Competition Authority Act 1997* (Qld), section 77

## 2.2 The Framework is the same, in all material respects, as the current Access Undertaking

- 32 As set out in DBCTM's previous submissions, the Framework is the same in all material respects as DBCTM's current QCA-approved Access Undertaking (**2017 AU**), apart from pricing.<sup>13</sup>
- 33 The table below, which DBCTM has submitted previously, shows that the same (or substantively identical) constraints exist under the 2017 AU and DBCTM's Framework. The table sets out the constraints identified by the User Group that exist with declaration in the left column,<sup>14</sup> and the analogous constraints that exist without declaration in the right column.

**Figure 1: Constraints identified by User Group with declaration and equivalent constraints without declaration**

Constraint identified by User Group with declaration <sup>15</sup>	Equivalent provision applicable under Framework without declaration
(i) a statutory obligation on DBCTM to negotiate in good faith (s99-100 QCA Act)	Obligation under the Framework to negotiate in good faith (s5.1(c) of the final Framework)
(ii) a statutory prohibition on 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 (s100 QCA Act)	Prohibition under the Framework 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 (s5.1 (d) of the final Framework)
(iii) a statutory obligation on DBCTM to provide information to an access seeker to inform access negotiations (s101 QCA Act)	Obligation under the Framework on DBCTM to provide information to an access seeker to inform access negotiations (s5.2(d) of the final Framework)
(iv) a right to seek QCA arbitration where access negotiations fail	A right under the Framework to seek arbitration by an independent expert where access negotiations fail
(v) standard access terms which provide reasonable terms and conditions	Standard access terms which provide reasonable terms and conditions (in the form of a standard access agreement which access seekers have the right to use under the Framework)
(vi) QCA approved reference tariffs which provide reasonable charges	Access charges determined by an independent expert (where negotiation is unsuccessful), on reasonable terms that would be agreed by a willing but not anxious buyer and seller, and in no event greater than \$3/t more than the price that would be determined under a QCA administered pricing regime.
(vii) a queuing process by which to obtain access to existing capacity	A queuing process by which to obtain access to existing capacity (see s5.4 of the final Framework)
(viii) statutory prohibitions on preventing or hindering access under an access agreement or access determination (section 104 and 125 QCA Act)	Requirements under the Framework to negotiate in good faith and to take all reasonable steps to progress each access application and any negotiations to develop an access agreements with an access seeker in a timely manner (s5.1).
(ix) a statutory obligation on DBCTM to comply with the applicable approved access undertaking (s150A QCA Act)	An enforceable obligation on DBCTM to comply with the Access Framework (see cl 4 of the executed Deed Poll).

<sup>13</sup> See for example DBCTM April 2019 submission, pages 46-47

<sup>14</sup> User Group March 2019 submission, page 71

<sup>15</sup> User Group March 2019 submission, page 71

Constraint identified by User Group with declaration <sup>15</sup>	Equivalent provision applicable under Framework without declaration
(x) information gathering powers for the QCA to monitor compliance with the applicable approved access undertaking (s150AA QCA Act)	Reporting requirements under section 9 of the Framework and information gathering powers for independent expert, and arbitrator (through discovery orders on the part of the arbitrator).
(xi) rights for a party to an access determination to obtain court orders to enforce access determinations (s152 QCA Act)	Rights for a party to enforce an arbitral award in relation to an access dispute are available through the courts pursuant to s35 of the <i>Commercial Arbitration Act 2013</i> (Qld).
(xii) rights for the QCA and other persons to obtain court orders to enforce access undertakings (s158A QCA Act)	rights for the persons to obtain court orders to enforce the Deed Poll (cl 9). Terms of the Framework can also be enforced through the dispute resolution provisions of the Framework, with arbitral decisions enforceable as per the box above.

34 The table shows that the terms of access are, in all material respects, the same with and without declaration. This means that DBCTM will be unable to unilaterally determine the terms of access in a way that would impact on competition in dependent markets.

35 In its Consultation Paper, the QCA appropriately focuses on the main difference between the 2017 AU and the Framework, which is the approach to pricing and in particular the \$3 Cap.<sup>16</sup> In previous submissions, DBCTM has demonstrated that the pricing framework has been designed such that there can be no adverse impact on competition in the coal tenements markets.

### 2.3 Pricing under the Framework ensures that there can be no material impact on competition

36 The pricing restrictions under DBCTM’s Framework have been designed with the express purpose of ensuring that there can be no material impact on competition in the coal tenements markets if DBCTM is to become undeclared. This means that criterion (a) cannot be satisfied for the DBCT service because:

- 36.1 The \$3 Cap will effectively constrain DBCTM’s ability to raise prices without declaration.
- 36.2 A \$3 increase in Terminal Infrastructure Charges (TIC) would not materially impact competition in the coal tenements markets.
- 36.3 With declaration the TIC for new capacity at DBCT is likely to be more than \$3 higher than the TIC for existing users in any event, as a result of the 2017 AU’s differentiation provisions. Therefore there is unlikely to be any material difference in the terms of access for users with or without declaration.
- 36.4 The Framework includes other restrictions on the TIC that can be determined by an arbitrator.

#### The \$3 price cap

37 While DBCTM expects that the QCA will review the specific terms of the Deed Poll and Access Framework, it is helpful to recap, specifically, what is meant by the ‘\$3 Cap’.

38 Under the executed Deed Poll and Framework, DBCTM is explicitly prevented from charging new users a TIC that is more than \$3.00 per tonne higher than the TIC that the QCA would determine for the existing terminal component. The only circumstances where DBCTM could charge more than this is where the QCA determined TIC for a new terminal component would exceed this cap (e.g. in the case of a differentially-

<sup>16</sup> Consultation Paper, page 4

priced expansion). In those circumstances DBCTM could only charge up to the TIC which would be determined by the QCA for that new terminal component.

- 39 A 'price cap' is often used to refer to the regulated prices that *are actually charged* by regulated firms. It is important to note that the \$3 Cap is *the maximum that can be charged*, and there are other constraints on DBCTM's pricing, discussed below, which mean in reality actual charges are likely to be lower.

**The terms of access are likely to be the same with and without declaration meaning there can be no impact on competition in the coal tenements market**

*If the terms of access are the same, or similar, criterion (a) cannot be satisfied*

- 40 The QCA's task is to compare the likely terms and conditions of access with and without declaration, in order to determine whether declaration would promote a material increase in competition in a dependent market.
- 41 If the terms and conditions of access with and without declaration are materially similar, then there can be no impact on competition in dependent markets. If this is the case, then the terms and conditions of access as a result of declaration would lack a causal link to any competition effect.
- 42 While it is relevant to explore the effect of a \$3 increase in prices for new entrants on competition in the coal tenements market, it is important to consider that if competition would be affected in the same way with declaration, criterion (a) cannot be satisfied.
- 43 The QCA accepts that both with and without declaration, existing users will be protected by their existing agreements. This means that any impact on competition in the coal tenements market would have to arise from the terms and conditions of access to new capacity.<sup>17</sup>
- 44 Given that DBCT is now fully contracted, both with and without declaration a new entrant to the coal tenements market would anticipate that expansion capacity would be subject to differentiated pricing (which the QCA estimates would be ~\$3.50/t more than for existing users).<sup>18</sup> This means that the price, or at least the perceived price, for new capacity at DBCT is likely to be the same with and without declaration. Accordingly, competition in the coal tenements market cannot be affected as a result of declaration. This is explored further in the paragraphs below.

*Differential pricing is likely to apply at DBCT*

- 45 Differential pricing is likely to apply to all new capacity at DBCT. As previously submitted,<sup>19</sup> under the 2017 AU (and the Framework) the decision on whether expansion costs will be socialised or differentiated is based on the socialisation pricing principles set out at section 11.13 (and 10.8 of the Framework). In essence those sections provide:
- 45.1 Where the socialisation of expansion costs would decrease access charges the expansion will be treated as forming part of the existing terminal.
- 45.2 Where socialisation of the expansion costs would increase access charges the expansion will be deemed a "cost sensitive expansion" and a presumption will apply that it should be treated as a separate terminal component (a differentiated expansion component).
- 45.3 However, a cost sensitive expansion may be treated as forming part of the existing terminal where circumstances exist that justify socialisation. Section 11.13(c)(1)-(5) sets out

<sup>17</sup> DBCTM is currently fully contracted (84.07Mtpa/84.20Mtpa, with the final 0.13Mtpa expected to be contracted imminently). The QCA's draft recommendation estimates maximum demand for the service of 93Mtpa, see table 8

<sup>18</sup> QCA Draft Recommendation page 86 – refers to differentiated TIC resulting in a charge of \$8.50 per tonne

<sup>19</sup> DBCTM April 2019 submission, page 42

considerations for the QCA in determining circumstances that warrant socialisation, which includes any factor that the QCA considers relevant.

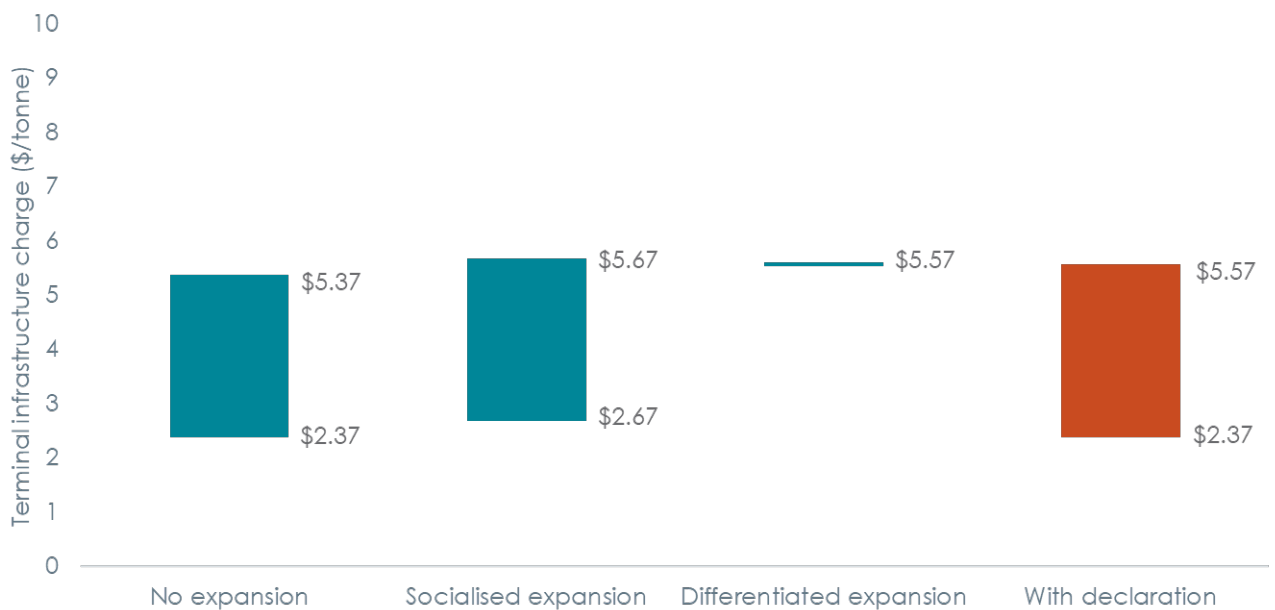
46 In order to accommodate new demand for capacity at DBCT (and on the QCA’s forecast demand used in its draft recommendation), DBCTM will be required to undertake expansions. The QCA’s analysis shows that if the expansion costs of projects to accommodate the QCA’s forecast demand were socialised, the coal handling charge at DBCT would increase by 9 cents.<sup>20</sup>

47 Therefore, unless specific circumstances exist that justify socialisation, it would be reasonable to assume that the expansions would be treated separately and pricing would be differentiated for new users who seek access to expanded terminal capacity. Importantly, this means any new users currently assessing likely charges for expanded capacity at DBCT under declaration would rationally therefore anticipate differential pricing.

*Access charges for new capacity will be the same with and without declaration*

48 Because expansion capacity will most likely be differentially priced, access seekers for new capacity will face a similar range of prices for access to DBCT with and without declaration. These ranges are set out in the chart , drawn from HoustonKemp’s October 2019 report, below.

**Figure 2: Terminal infrastructure charge at DBCT without and with declaration<sup>21</sup>**



**With declaration**

- With declaration, the lowest TIC that a new entrant could gain access to DBCT for would be the socialised QCA determined price (which the QCA considers would be a 9 cent increase on the current TIC – HoustonKemp’s analysis suggests that this would be an increase of 30 cents).
- However, the more likely TIC would be the differentiated price, which the QCA estimates would be \$3.50 more than the current TIC for the existing terminal (HoustonKemp estimates this as \$3.20 more than the non-expansion TIC). This results in an approximate TIC range for new capacity at DBCT of between \$0.09 and \$3.50 more than the current TIC for existing capacity (or between \$0.30 and \$3.20 by HoustonKemp’s estimate).

<sup>20</sup> QCA Draft Recommendation, page 85

<sup>21</sup> HoustonKemp October 2019 submission, figure 3.1

**Without declaration**

- Without declaration the range of possible charges will be between the Floor TIC and the \$3 Cap.
- However if the \$3 Cap is lower than the TIC that would be determined by the QCA for the expanded capacity, the estimate of the QCA TIC will apply. This will be the case where a differentiated TIC results in a \$3.50 uplift from the current TIC for the existing terminal, meaning that in practice, without declaration an access seeker will face the same expected pricing range of between \$0.09 and \$3.50 more than the current TIC for existing capacity as it would with declaration (or between \$0.30 and \$3.20 by HoustonKemp's estimate).

49 Given that the range of access charges are the same with and without declaration there can be no material increase in competition as a result of declaration.

50 Potential entrants to the tenement markets will use the same, or similar, ranges of expected charges to determine the value of tenements, with and without declaration. This means that, even in the unlikely circumstances that a \$3 pricing differential would deter an efficient new entrant from entering the tenements markets,<sup>22</sup> this deterrence would not arise *as a result* of declaration. It would occur both with and without declaration, meaning that it lacks the causal link required to satisfy criterion (a).

51 HoustonKemp also addresses this point in its October 2019 report:

Criterion (a) requires an assessment of whether declaration would promote a material increase in competition for at least one related market. Given that DBCTM's access framework provides for similar outcomes without declaration as would apply with declaration, there is no basis to conclude that declaration would materially increase the value that access seekers would place on coal tenements.

*There is no evidence to suggest differential pricing has affected transactions in the tenements market*

52 Differential pricing has been a feature of DBCTM's Access Undertaking since 2015 and DBCT has been approaching full capacity for some time. This means that potential entrants to the tenement exploration and development markets have been fully aware that they will likely have to pay a differentiated price for access to DBCT for a number of years.

53 Despite this, there is no evidence to suggest any detrimental impact on the coal tenements markets to date. To the contrary, as shown by the tenements data provided by HoustonKemp, there has been no dampening in activity in the exploration and development tenement markets – rather market activity has been driven by global coal prices.<sup>23</sup>

54 DBCTM notes that the same can be said for the expiry of its current declaration which has been scheduled to expire since 2010 and has been publicly consulted upon since early 2018, and has had no discernible impact on market activity in the coal tenements market.<sup>24</sup> Rather, the data produced by HoustonKemp clearly shows a number of miners transacting exploration and development tenements without access to DBCT.

### **A price differential of \$3.50 or less will not inhibit competition in the coal tenements markets**

55 Even if differentiated pricing was not possible with declaration, DBCTM submits that – consistent with the QCA's comments in its draft recommendation – a pricing differential in the order of \$3 between new and existing users, would be immaterial and would not impact competition in the coal tenement markets.

<sup>22</sup> DBCTM submits this cannot be the case. See HoustonKemp April 2019 report and HoustonKemp October 2019 report.

<sup>23</sup> DBCTM April 2019 submission, pages 19-22 and 25-26

<sup>24</sup> DBCTM April 2019 submission, pages 17-22; HoustonKemp April 2019 Report on transactions of coal tenements in the Goonyella system

- 56 This is because:
- 56.1 Global coal prices are the key driver for the valuation of tenements. In this context, standing back it is clear that \$3 represents a tiny fraction of the price for metallurgical coal, and is so immaterial that it could not have a material impact on competition.
  - 56.2 Uncertainty of access to coal handling services, not the price of that access, is the fundamental driver of differences in the valuation of coal projects between parties with existing access to DBCT and those without.
  - 56.3 Access holders' rights to use the coal handling services at DBCT at existing charges are limited to the tonnages specified under the existing user agreements. Existing users wishing to ship greater tonnages of coal will be subject to the same terms of access as new users. This means that any increase in the TIC paid under the Access Framework would affect equally the valuation of any tenements that are traded at the margin.
  - 56.4 Users without access to DBCT can develop tenements and on-sell them to existing users with capacity at DBCT to operate, meaning they do not need access at DBCT to enter the exploration and development markets.
  - 56.5 In the unlikely circumstances where a potential entrant to the coal tenements market was deterred from entering by a \$3 cost increase, that entrant would be inefficient in any event. As a result, and consistent with the recent NCC decision, this will not materially impact competition in the coal tenements markets.

### *Global coal prices a key determinant of tenement valuation*

- 57 In assessing the impact of a \$3 price differential, the QCA must consider the materiality of the difference in access charges in the context of the other factors influencing investment decisions in coal tenements.
- 58 DBCTM's March 2019 submission explained that global coal prices are the key driver for the valuation of tenements. In this context, \$3 represents a tiny fraction of the price for metallurgical coal, such that it could not have a material impact on competition. As previously explained:<sup>25</sup>

DBCT's current capital charges represent less than 1% of the current spot price for metallurgical coal which is currently ~\$300 per tonne. It is not tenable that potential moderate increases in access charges of (at a maximum) this magnitude would deter investment by miners who would otherwise invest in an industry where coal prices over the last 8 years have fluctuated by more than US\$200 per tonne.

Terminal charges are a tiny fraction of the total costs faced by miners to take their coal to market, with the TIC currently represents 3% of total costs for miners in the Goonyella system. Uncertainty regarding a small increase in these charges would not materially influence investment decisions of miners.

Miners face very high risks in undertaking mining activity, with many tenements never producing coal due to geological, political and regulatory issues. Again, any alleged uncertainty regarding access charges would not have a determinative effect on miners decisions to invest.

- 59 A recent report prepared by the Queensland Exploration Council summarises how the economics for developing mineral resources have changed in 2018.<sup>26</sup> The report discusses, amongst other things, regulatory and policy stability. However, there is no mention of port access at all, lending weight to the

<sup>25</sup> DBCTM acknowledges that the coal prices have shifted since this submission, further demonstrating the irrelevance of a \$3 increase in access charges.

<sup>26</sup> Queensland Exploration Scorecard – 2018 Optimism Abounds <https://www.qrc.org.au/wp-content/uploads/2018/12/QEC-Exploration-Scorecard-2018.pdf>

proposition that access charges at DBCT are not a significant factor in determining the viability of a tenement.

- 60 The relative size of the access charges provides a good sense-test for whether declaration is likely to materially impact competition. In this context it is clear that charges at DBCT are simply too immaterial to impact competition in the coal tenements markets.

*Uncertainty of access a bigger issue for new entrants with and without declaration*

- 61 Uncertainty of access to coal handling services, not the price of that access, is the fundamental driver of differences in the valuation of coal projects between parties with and without existing access to DBCT. As such, a \$3 pricing differential between new and existing users cannot be said to be the cause of any material difference in valuations between new and existing users which would impact competition in the coal tenements markets.

- 62 HoustonKemp's October 2019 report scrutinises the analysis put forward in the User Group's April 2019 submission which considers the impact of a \$3 price differential on tenement values. HoustonKemp explains how the analysis, undertaken by PwC, does not account for this uncertainty and as a result significantly overstates the impact of the price differential on the valuation of tenements:<sup>27</sup>

PwC's comparison of tenement value proceeds on the assumption that all tenement holders have certainty of access to the coal handling service at DBCT. This assumption appears likely to overstate significantly the effect of an increase in the TIC on the economics of developing any particular tenement and so its valuation. We have previously noted that uncertainty associated with the ability to obtain access to coal supply infrastructure in Queensland, including at DBCT, would likely play a much greater role in decisions of whether to develop a tenement than the price of that access.

- 63 HoustonKemp reiterates the comments made in its previous submissions that certainty of access to DBCT is the primary determinant of coal tenement market entry:<sup>28</sup>

Consistent with these observations, we explained in a previous report that:

*...with or without declaration, new entrants in the market for tenements can have no certainty about the availability of access to the DBCT service, or potentially other infrastructure services over the period for which the DBCT service would be declared. In other words, an investment in a tenement is required before a new entrant can enter the access queue and begin to form expectations about when, and on what terms, they may be able to obtain access to the DBCT service. This is a significant barrier to entry that will persist whether the DBCT is declared or otherwise.*

- 64 HoustonKemp concludes that any impact of a \$3 pricing will be modest compared to the pre-existing effect that exists:<sup>29</sup>

It follows that any difference between the valuation placed on tenements by access holders and access seekers caused by a \$3 per tonne increase in the TIC is likely to be modest compared to the pre-existing effect that exists, with or without declaration, due to uncertainty of access.

- 65 This means if a new entrant to the coal tenements markets can overcome the more general uncertainty surrounding future access to DBCT, it is highly unlikely that a modest increase in access charges would deter entry, or impact on competition in the coal tenements markets.

<sup>27</sup> HoustonKemp October 2019 report, page 8

<sup>28</sup> HoustonKemp October 2019 report, page 8

<sup>29</sup> HoustonKemp October 2019 report, page 8



### *Competition at the margin is not affected by access holders' entitlements*

66 Existing users' rights to access at DBCT at existing charges are limited to the tonnages specified under the existing user agreements.

67 Existing users wishing to ship increased tonnages of coal will be subject to the same terms of access as new users. This means that any increase in the TIC paid under the Access Framework would affect equally the valuation of any tenements that existing users acquire which cannot be used to replace production coming to an end for an existing mine with capacity at DBCT.

68 HoustonKemp explains:<sup>30</sup>

Any competitive advantage that incumbent holders of access entitlements at DBCT may enjoy in the form of their ability to acquire tenements, whether because of the factors discussed at section 3.2 or as otherwise contended by the DBCT User Group, could apply only up to the limits of these entitlements set out in the relevant user agreements. Such advantage could therefore only apply in respect of tenements for which incumbent miners seek to replace tonnages that cease production over the period that declaration would apply.

69 The result of this is that any tenements which are traded at the margin, whether it be by a new or existing user, will be valued on the basis of the Framework terms. The result being that a difference in valuations for a small number of tenement transactions is not likely to impact competition in the market. HoustonKemp explains:<sup>31</sup>

In its submission responding to the QCA's draft recommendation, DBCTM drew attention to those contracts for capacity associated with mines with economic lives that end during the period over which declaration would apply. Users with mines ceasing production ... would presumably seek to retain their access rights to DBCT by replacing this with production from newly developed or acquired mines.

...

However, the QCA states that foreseeable demand for the coal handling services at DBCT exceeds the existing capacity of the terminal. To meet this demand, the terminal will need to be expanded and provide new coal handling services.

It follows from these observations that the marginal value placed on coal tenements will reflect their development into operating mines that use expanded capacity at DBCT. The prospect of an increase in the TIC that might be applied without declaration applies equally to coal from these tenements, regardless of whether this is produced by a holder of existing access entitlements at DBCT or otherwise. In other words, at the margin, there is no advantage conferred on incumbent holders of access entitlements at DBCT.

70 To put this into context, DBCTM conservatively estimates that tenements traded in the Hay Point catchment ***each year*** could produce around 12Mtpa of metallurgical coal and 18Mtpa of thermal coal.<sup>32</sup> In 2018 there were 57 coal tenements transacted, consistent with annual production potential of around 23Mtpa of metallurgical coal and 34Mtpa of thermal coal.

71 In comparison, ***over the entire declaration period***, mines expected to cease production with contracted capacity at DBCT total just 22.9Mtpa.<sup>33</sup> As a result, the number of transactions that would be affected by any difference in valuation, between new users and users with existing capacity at DBCT, will be far eclipsed by other transactions in the market. This means that preferential terms for existing users will only affect a

<sup>30</sup> HoustonKemp October 2019 report, page 9

<sup>31</sup> HoustonKemp October 2019 report, pages 9 and 10

<sup>32</sup> See Appendix 1

<sup>33</sup> HoustonKemp October 2019 report, table 3.1

small percentage of tenement transactions in the market and as a result could not materially impact competition.

- 72 Further, to the extent that existing users already have a portfolio of tenements which they can draw from, any difference in valuation for existing users is going to have an even smaller impact. As explained by HoustonKemp:<sup>34</sup>

Drawing inferences about competition for tenements from a comparison of the values that two different parties place on tenements assumes that these parties might both be competing to acquire similar tenements. However, if incumbent miners already have substantial tenement holdings to replenish production handled at DBCT under their existing user agreements, they may not need to go into the market to acquire tenements.

#### *Access seekers can re-sell tenements to incumbent access holders*

- 73 Miners do not need access to DBCT in order to undertake exploration and development activities. Rather they can purchase and develop tenements to a point where they can on-sell those tenements to miners with existing capacity at DBCT. HoustonKemp explains that the User Group has not taken this into account in its assessment of the valuation of tenements:<sup>35</sup>

Further, PwC's assessment assumes that tenement value depends on the terms of access to DBCT that the tenement owner can establish. However, this assessment does not take into account that the value of a tenement to a buyer could include the prospect of developing the tenement and selling it to another party with access entitlements (or improved prospects of access entitlements) at DBCT.

In these circumstances, any differences in valuation between existing access holders and access seekers for infra-marginal tenements (those that are required by existing access holders to utilise their access entitlements) will depend on the extent to which there is competitive tension between existing access holders to acquire these tenements.

- 74 DBCTM submits that without declaration, miners will continue to enter the exploration and development tenements markets, and develop tenements to on-sell these tenements to existing users for conversion into operating mines. This process will not be affected by a difference in the costs of accessing DBCT.

#### *Any impact on new users not likely to deter efficient entrants*

- 75 While the Framework ensures that miners without access to DBCT will not be deterred from entering the coal tenements market, if the QCA concludes otherwise, it must also give consideration as to whether the miners that would be deterred would have a material impact on competition in any event.
- 76 DBCTM has previously submitted that the only circumstances where a change in valuation brought about by a \$3 cost increase would affect a new entrant's decision to enter the coal tenements market would be where the decision was on an economic 'knife-edge', and that in those circumstances the impact on competition would be trivial.<sup>36</sup>
- 77 If a miner's entry is on an economic 'knife-edge', it is highly unlikely to be an 'efficient new entrant'. The NCC in recommending to revoke declaration of PNO, concluded that where smaller, high cost miners are deterred, this is unlikely to materially impact competition in the market for tenements.<sup>37</sup>

<sup>34</sup> HoustonKemp October 2019 report, page 10

<sup>35</sup> HoustonKemp October 2019 report, page 10

<sup>36</sup> DBCTM April 2019 submission, page 13 and 14

<sup>37</sup> National Competition Council *Revocation of the declaration of the shipping channel service at the Port of Newcastle – Recommendation* (22 July 2019), paras 7.337 and 7.338

The Council has also considered submissions that the risk of higher (and more uncertain) charges for the Service might disproportionately effect smaller, higher cost miners from bidding for future tenements. The Council also notes submissions that this may lead to less bidders in markets for future tenements, with a consequent reduction in competitive tension in bidding processes.

The Council is not persuaded that any such consequence in a future without declaration of the Service would be likely to be material, or amount to a decrease in competition in the market(s) for tenements. This is because if less efficient miners drop out of bidding processes and are unable to acquire particular tenements, this would be consistent with the process of competition in competitive markets for tenements.

- 78 DBCTM submits that to the extent that a miner is deterred from entering the coal tenements market by a small \$3 increase in costs, then these ‘knife-edge’ miners are unlikely to provide a material competitive effect on the market in any event. This means, even in the unlikely event that these entrants are deterred as a result of a \$3 increase in access charges, it will not materially impact competition in an already competitive tenements market. As HoustonKemp notes with regard to daily swap prices for Australian hard coking coal:<sup>38</sup>

Since the series began reporting on 11 May 2016, over the 762 daily movements reported since then:

- 461 daily movements – or 60 per cent in total – are greater than \$1 per tonne in either direction; and
- 202 daily movements – or 27 per cent in total – are greater than \$3 per tonne in either direction.

These figures support our view that a project that would be rendered unprofitable with a relatively small change in forward-looking coal prices is extremely unlikely to proceed.

#### *PwC modelling cannot be properly scrutinised*

- 79 DBCTM notes that the User Group’s April 2019 submission attached modelling by PwC which sought to show the valuation impact of a \$3 increase in access charges.
- 80 HoustonKemp’s October 2019 report analyses this data and identifies a number of issues with PwC’s analysis, which suggest that it cannot be relied on to substantiate the conclusions which it has implied.
- 81 Apart from the cost of capital, PwC does not disclose any of the underlying data that it draws upon from Wood Mackenzie.
- 82 Although HoustonKemp has sought to infer representative estimates for some of this information based on numbers and figures disclosed by PwC, which has enabled it to identify a number of issues in PwC’s analysis, this lack of transparency has limited the extent to which DBCTM has been able to fully respond to the PwC report, and as such the QCA should not give weight to this analysis.

#### **Access charges under the Framework are likely to be lower than the \$3 Cap**

- 83 The QCA notes in the Consultation Paper that ‘a key aspect of DBCT Management’s contention rests on the operation of the \$3 cap’.<sup>39</sup>
- 84 While DBCTM considers that the \$3 Cap puts the effect of the Framework beyond any doubt, and has already demonstrated why a \$3 price increase would not materially impact competition in the coal

<sup>38</sup> HoustonKemp October 2019 report, page 14

<sup>39</sup> QCA October 2019 Consultation Paper, page 4

tenements markets, it is important that the QCA has regard to the other pricing protections included in the Framework as well. In particular:

84.1 The willing but not anxious test; and

84.2 The originally proposed ceiling price (which was included in the final Framework as an additional protection).

85 Further, DBCTM is strongly incentivised to reach a commercially negotiated agreement that is satisfactory to all parties, rather than proceeding to arbitration.

#### *The willing but not anxious test*

86 The primary method for an arbitrator to determine the access charges is not the \$3 Cap, but rather the charge that would be agreed by a willing but not anxious buyer and seller of the DBCT Service. As explained in DBCTM's previous submissions, the willing-but-not-anxious test ensures that a fair market value for the service is determined, which may be well below the \$3 Cap.<sup>40</sup>

87 In the extremely unlikely circumstances where a \$3 price differential would harm competition in the coal tenements market (for example by deterring efficient new entrants), it is reasonable to expect that an arbitrator would determine a price which is lower than the \$3 Cap as it is highly unlikely that a willing but not anxious buyer of the DBCT Service would agree to prices at levels which would have the effect of deterring efficient new entrants to the coal tenements market.

88 As mentioned above, the Framework also prohibits DBCTM from unfairly differentiating between users in a way that has a material adverse effect on the ability of an access seeker to compete with other access seekers.<sup>41</sup>

#### *The original ceiling is retained*

89 The QCA should also have regard to the original ceiling, which DBCTM first proposed, along with the first iteration of its proposed Framework.<sup>42</sup> This protection is still in place as an additional protection under the final Framework and ensures that DBCTM cannot charge at levels which would reduce the volumes served at DBCTM.

90 DBCTM draws the QCA's attention to paragraphs 246-253 of DBCTM's March 2019 submission, as well as its earlier submissions and reports by HoustonKemp where DBCTM explains how the ceiling ensures that competition cannot be impacted in the coal tenements markets:

**Under the ceiling TIC DBCTM cannot charge at levels which would foreclose new entrants from entering the coal tenements market**

246 In addition, DBCTM maintains its position (as explained in DBCTM's May 2018 Submission), that the design of the ceiling TIC means that it is impossible that DBCTM's charges would have an adverse impact on competition in a dependent market without declaration.

247 The QCA has not engaged with DBCTM and HoustonKemp's reasoning on this point.

248 The ceiling TIC provisions specify that the maximum TIC that can be charged by DBCTM for a terminal component is the highest TIC that could be charged while serving the same coal volumes as at the floor TIC.

...

<sup>40</sup> See for example DBCTM March 2019 submission pages 52-53

<sup>41</sup> Section 5.1(d) of the executed Access Framework

<sup>42</sup> DBCTM June 2018 submission.

251 As explained by HoustonKemp, this means that there can be no change in utilisation of DBCT without declaration. This means that any efficient new entrants that would contract for access to DBCT with declaration (at the floor price), will continue to do so at access charges up to the ceiling TIC. The corollary is that these efficient new entrants would also continue to participate in the coal tenements market, and provide competition in that market.

252 With or without declaration, existing users are likely to continue to use DBCT. If, as suggested by the QCA, efficient new entrants would be deterred by high access charges at DBCT, then those charges would violate the ceiling TIC as they would cause a reduction in volumes served at DBCT. Therefore, charges at DBCT must be set at a level that does not allow any efficient new entrant to be priced out of the coal tenements market.

253 As a result, DBCTM cannot provide access to DBCT at charges that would have an adverse impact on competition in dependent markets, and therefore criterion (a) cannot be satisfied.

- 91 These two additional pricing protections mean that it is unlikely that the actual price that would be determined by an arbitrator would be at, or even near, the \$3 Cap – especially in the unlikely circumstances that pricing at the \$3 Cap would be likely to materially impact competition in the coal tenements markets.

*DBCTM is incentivised to reach a commercially negotiated agreement below the \$3 Cap*

- 92 Even putting the specifics of the Framework aside, the commercial reality is that it is much more likely that DBCTM will reach a commercially negotiated outcome with new access seekers.

- 93 In Castalia's April 2019 report they comment:<sup>43</sup>

Under the Framework, each new entrant would individually negotiate a price between the TIC floor and ceiling with DBCTM. DBCTM has no incentive to offer anything but the profit maximising price – the cap. This means that each new entrant would be forced into arbitration and receive a price between the floor and the ceiling.

- 94 This is at complete odds with the commercial reality of access negotiations. Rather, DBCTM has every incentive to avoid the costs associated with arbitration and agree to a negotiated price which is acceptable to both parties. The Framework is designed to incentivise the parties to make a genuine effort to reach a negotiated commercial outcome, rather than relying on the QCA to determine reference tariffs as the default.

- 95 In circumstances where the matter is referred to arbitration, the key test that the arbitrator will apply is the willing but not anxious test. This could result in a TIC that is well below the \$3 Cap. DBCTM is strongly incentivised to negotiate a commercial outcome, which avoids the risk of an arbitrator determining an unfavourably low TIC (for example the floor TIC).

- 96 Assuming that DBCT can expand to service total demand in the market at the lowest cost, and provided it can recover the efficient costs of its investment (including the cost of capital), DBCTM has an economic incentive to maximise usage at DBCT (including for expansion capacity). This means that even without the Framework, DBCTM has a strong incentive to offer terms and conditions that encourage use of the terminal.

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<sup>43</sup> User Group April 2019 submission, schedule 6

### 3 Question two – DBCTM has already demonstrated that the threat of declaration is a constraint

- 97 The QCA's second question relates to the steps taken by DBCTM, following the QCA draft recommendation, to demonstrate that the threat of declaration is a constraint on its market power. The QCA asked:
- whether DBCT Management has demonstrated by its actions following the draft recommendation, including by putting in place the \$3 price cap, that the threat of declaration is a constraint on DBCT Management's ability to exercise market power.
- 98 The nature of the constraint on DBCTM was discussed in the section above. That is, in circumstances where the existence of the Framework is a key reason for the DBCT service not being declared, no rational business would then seek to circumvent (or even be perceived to circumvent) its obligations and undermine the enforceability of that very Framework.
- 99 This section focuses on the strong evidence, already available, that the threat of declaration is an effective constraint on DBCTM, and how this will continue to constrain DBCTM's conduct without declaration.
- 100 It is difficult to envisage better evidence of the effectiveness of the threat of declaration than DBCTM voluntarily offering, prior to deregulation, a binding commitment to comply with a comprehensive Access Framework which significantly restricts its behaviour without declaration. In doing so, DBCTM has made every effort to ensure that the final Framework addresses the QCA and User Group's concerns and ensures that access will be available on reasonable terms and conditions, without declaration, such that there can be no material impact on competition in the coal tenements market.
- 101 This section begins by setting out the numerous steps that DBCTM has taken since the QCA's draft recommendation to ensure that new users can gain access to the DBCT Service on reasonable terms and conditions without declaration.
- 102 It then explains how this evidences the fact that the threat of declaration has already, and will continue to, constrain DBCTM after the declaration of the DBCT service has expired.

#### 3.1 Threat of declaration is already impacting DBCTM's behaviour

- 103 DBCTM has taken a number of steps which clearly demonstrate that the threat of declaration is already acting as a constraint on its ability to exercise market power. Specifically, DBCTM has:
- 103.1 made numerous attempts to engage and collaborate with users to ensure that the Framework is fit-for-purpose;
  - 103.2 made extensive changes to its proposed Framework to address concerns raised by Users and the QCA, significantly by including an express \$3 cap to pricing for new users;
  - 103.3 executed the Deed Poll;
  - 103.4 obtained and provided to the QCA comprehensive legal advice on the enforceability of the Deed Poll; and
  - 103.5 as part of this submission, explicitly acknowledged that it would expect to be redeclared should it not comply with the Framework, both legally and in spirit.

#### Since the QCA's draft recommendation DBCTM has taken extensive steps to address any and all concerns raised by the User Group and QCA

- 104 DBCTM first raised the concept of the Framework in its first submission in the declaration review process in early 2018. Since then, DBCTM has made numerous attempts to engage with users to ensure that the final Framework will deliver reasonable terms and conditions for access seekers.

- 105 DBCTM submitted its draft version of the Framework in May 2018. In its July 2018 submission the User Group identified a number of concerns with the Framework, most of which DBCTM did not agree with. The QCA's draft recommendation also identified a number of concerns with the operation of the Framework.
- 106 Despite DBCTM not agreeing with the majority of the concerns raised by the User Group and the QCA, prior to the execution of the final Deed Poll and Framework, DBCTM worked systematically through the User Group and QCA's concerns and made a significant number of changes to the final documents to comprehensively address these concerns.
- 107 A comprehensive list of all the changes that have been made to the final Framework is contained in DBCTM's March 2019 Submission at appendix 9.<sup>44</sup>
- 108 A summary of some of the key changes DBCTM made, from the March 2019 submission, is set out in the table below.

**Figure 3: Summary of key changes that have been made to address User Group concerns**

QCA/ User Group concern	How DBCTM has addressed the concern
DBCTM has not executed the Deed Poll	On 11 March 2019 DBCTM duly executed the binding and irrevocable Deed Poll, requiring DBCTM to comply with the Access Framework.
Significant differences in access charges between new and existing users without declaration will cause potential efficient new users to be deterred from entering the coal tenements market	The final, executed, version of the Deed Poll includes provisions which will prevent DBCTM from charging new users more than \$3 per tonne more than the charges that would be determined by the QCA for the existing terminal (maximum spread).  In circumstances where a costly expansion would result in differentiated expansion costs for a terminal component which would exceed the maximum spread, DBCTM will be limited to charging the charges that would be determined by the QCA for that terminal component.
The Framework objective itself can be changed which would undermine the amendment process protections	DBCTM's final Deed Poll 'hard-codes' the Framework Objective, as well as the \$3 maximum spread provisions. These provisions cannot be amended in any circumstances.
The Framework can effectively be changed however DBCTM chooses	DBCTM has introduced further protections into the executed Deed Poll to ensure that any amendments to the Framework are appropriate.  These include amendments to: <ul style="list-style-type: none"> <li>• Increase the transparency of the amendment process;</li> <li>• lengthen timeframes for appeals;</li> <li>• reduce barriers to challenging amendments, and</li> <li>• require DBCTM to have proper regard to mandatory considerations.</li> </ul> DBCTM has also 'hard-coded' key provisions in the Deed Poll as referred to above.
DBCTM would be able to unfairly differentiate between users	DBCTM has replicated the same restrictions on unfairly differentiating between users that are in place under the QCA approved 2017 AU.
Access to terminal capacity would be subject to an access seeker's willingness to pay relative to other access seekers	DBCTM has made changes to the Framework to ensure that the process for determining access charges operates completely independently from the process for allocating capacity, by allowing for access charges to be determined through the negotiate/arbitrate process, <i>after</i> capacity has been allocated through the queuing mechanism.

<sup>44</sup> <https://www.qca.org.au/wp-content/uploads/2019/05/30-dbct-user-group-submission-on-draft-recommendations.pdf>

- 109 In addressing all of the issues that are relevant to declaration, DBCTM has demonstrated that the threat of declaration is an effective constraint.

### **DBCTM has executed the Deed Poll**

- 110 On 11 March 2011 DBCTM executed the binding, irrevocable Deed Poll, which requires DBCTM's compliance with the Access Framework. This unprecedented step of a firm voluntarily imposing significant, binding and irrevocable constraints on its ability to determine the terms and conditions for its service, is a clear indication of the constraint that the threat of declaration imposes on DBCTM, and shows how the constraint leads directly to access being offered on reasonable terms and conditions.
- 111 It is worth noting that the Port of Newcastle, which has recently had declaration revoked, did not go to such measures.<sup>45</sup> DBCTM has gone above and beyond to demonstrate to the QCA that if the DBCT service is undeclared, there can be no material adverse impact on competition.

### **Introduction of the \$3 Cap**

- 112 The QCA clearly set out in its draft recommendation that it did not consider a \$3.50 pricing differential to be material, with regards to competition in the coal tenements market.<sup>46</sup>
- 113 The QCA's draft recommendation also concluded that DBCTM would significantly increase its charges post-declaration in the order of \$15/t. While this was never a correct application of the draft Framework's pricing provisions, to put it beyond doubt, and having regard to the \$3.50/t which may occur in a regulated environment, DBCTM self-imposed a \$3/t cap on pricing under the Framework.
- 114 This demonstrates that the threat of declaration has already, and will continue to, constrain DBCTM from pricing in a way that will materially impact competition in the coal tenements market.

### **DBCTM has vigorously defended the enforceability of the Deed and Framework**

- 115 The User Group has made a number of claims in its attempts to undermine the Deed Poll, to which DBCTM has responded with legal advice which comprehensively establishes the enforceability of the Deed Poll. In contrast to the User Group which attempted to redact its advice regarding the enforceability of the Deed Poll (presumably in order to preserve its position on the enforceability of the Deed Poll in circumstances where the service is not redeclared), DBCTM has made public its response, and is on-record defending the enforceability of the Deed Poll.
- 116 DBCTM has stated and continues to state unequivocally its intention to be constrained by the Framework.

### **Conclusion on steps that DBCTM has taken which demonstrate that the threat of declaration is a real and effective constraint**

- 117 The threat of regulation has long been recognised as a potential constraint on the ability of a firm to exercise market power.<sup>47</sup> However, never before has there been such overwhelming evidence *prior to declaration* that the threat of declaration is an effective constraint.
- 118 The regulator is usually required to make a forward looking assessment of the effect that the threat of declaration *would* have. However, in this case the QCA has the advantage of being able to examine evidence

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<sup>45</sup> See ,National Competition Council *Revocation of the declaration of the shipping channel service at the Port of Newcastle – Recommendation* (22 July 2019)

<sup>46</sup> QCA Draft Recommendation, pages 86 and 87

<sup>47</sup> See for example the Productivity Commission's recent report on the Economic Regulation of Airports, pages 6 and 7 <https://www.pc.gov.au/inquiries/completed/airports-2019/report/airports-2019.pdf>



already before it which clearly demonstrates that the threat of declaration will constrain DBCTM's market power without declaration.

### 3.2 The threat of declaration is a real and effective constraint on DBCTM without declaration

- 119 DBCTM has shown that the threat of declaration has already constrained its ability to exercise market power if it is undeclared, and has already ensured that access will be available on reasonable terms and conditions without declaration. However, the constraint will not be limited to the Framework, and will continue to operate once the DBCT service is undeclared.
- 120 As discussed earlier in this submission, the threat of declaration will continue to loom as a real risk for DBCTM, with a sophisticated regulator and well-resourced (and apparently highly motivated) User Group able to seek redeclaration at any time.
- 121 The threat of declaration will continue to affect DBCTM's behaviour without declaration by ensuring compliance with the spirit of the Framework and ensuring that DBCTM does not act in any way which would (or would even be perceived to) create a risk of materially harming competition in the coal tenements markets.

#### **Even if the QCA determines that DBCTM could price at levels that would materially affect competition in the coal tenements markets, it must still consider whether DBCTM would charge at these levels**

- 122 In the unlikely event that the QCA determines that pricing under the Framework, including the \$3 Cap, the willing-but-not-anxious test and the original ceiling, could have a material impact on competition in the coal tenements market (as compared to with declaration), the QCA must go on to consider whether DBCTM would in fact charge at this level, given the ongoing threat of declaration.
- 123 DBCTM submits that the evidence that the threat of declaration has already constrained DBCTM clearly demonstrates that DBCTM would not act in a way that would impact on competition, and would not price at levels which the QCA determines would impact on competition in dependent markets.
- 124 DBCTM has and will continue to take any step necessary to ensure its ability to exercise market power is constrained so as to minimise the risk of redeclaration.
- 125 As such, access (or increased access) as a result of declaration will not promote a material increase in competition in the coal tenements market, criterion (a) cannot be satisfied, and the QCA must recommend that the DBCT Service is not declared.

## 4 Conclusion

- 126 The Framework was executed to demonstrate and ensure that access seekers would be able to gain access to DBCT on reasonable terms and conditions without declaration. This step was taken in response to the threat of declaration, and the threat of declaration will continue to constrain DBCTM without declaration. This will ensure that DBCTM strictly abides by the Framework, and otherwise does not act in a way which will impact competition in dependent markets.
- 127 As such, access (or increased access) on reasonable terms and conditions as a result of declaration will not promote a material increase in competition in the coal tenements market, and criterion (a) cannot be satisfied for the DBCT Service.

## Appendix 1 Estimate of potential annual coal production from tenements transacted

This appendix explains the methodology undertaken by DBCTM to estimate the annual tonnages which could be produced by tenements transacted in the coal tenements markets. While this is a conceptual or high-level calculation, DBCTM considers it should provide a reasonable approximation of the size (in annual tonnages) of the coal tenements markets.

This analysis is based on an inventory of coal resources in Queensland, completed by the Department of Natural Resources, Mines and Energy. It indicates that:<sup>48</sup>

- total (both measured and indicated) resources of coking coal and PCI amounting to 16,913 mt and 8,421 mt respectively, as well as 37,660 mt of thermal coal resources; whereas
- operating mines account for total resources of 6,048 mt of coking coal and 3,686 mt of PCI, but this information is not provided for thermal coal

Total production of saleable coking coal (including PCI) in Queensland was 159.5 mt in 2017-18, reflecting aggregate losses of approximately 21 per cent of raw product during production.<sup>49</sup> This suggests that total coal reserves at operating mines provide for a further 48 years of production at current rates of extraction.<sup>50</sup>

If the remaining sources of coking coal and PCI that are located at 'care and maintenance projects', 'advanced projects' or in a lesser state of development were extracted at the same rate with the same losses, they would amount to additional production of approximately 257 mtpa in Queensland.<sup>51</sup>

HoustonKemp's April 2019 Coal Tenements Report states that there are a total of 482 EPCs, 138 MDLs and 453 MLs in Queensland – a total of 1,073 tenements. If these tenements contain all measured and indicated coal resources in Queensland, then this represents an average production potential for metallurgical coal of around 0.4 mtpa per tenement.<sup>52</sup> Similar calculations for thermal coal, assuming a 48 year mine life, give rise to an estimate of 0.6 mtpa per tenement.<sup>53</sup>

HoustonKemp's data suggests that there are typically around 30 Goonyella tenements transacted a year, which would indicate annual production potential of around **12Mtpa** of metallurgical coal and **18Mtpa** of thermal coal on an averaged basis. In 2018 there were 57 coal tenements transacted, consistent with annual production potential of around **23Mtpa** of metallurgical coal and **34Mtpa** of thermal coal.

<sup>48</sup> Department of Natural Resources, Mines and Energy, *Queensland coal inventory report*, December 2018, Table 3.

<sup>49</sup> Department of Natural Resources, Mines and Energy, *Coal industry review statistical tables / Table 2 – Queensland production by individual mines (tonnes)*, June 2019. The DNRME's practice direction associated with submission of statistical data relating to coal production and sales adopts a convention of reporting total production and sales of coking coal to include PCI. See: Department of Natural Resources, Mines and Energy, *Practice direction: submission of statistical data relating to coal production and sales*, October 2019, p 6.

<sup>50</sup> Calculated as  $(6,048 + 3,686) / (159.5 / (1 - 0.21))$ .

<sup>51</sup> Calculated as  $(16,913 + 8,421 - 6,048 - 3,686) \times (1 - 0.21) / 48$ .

<sup>52</sup> Calculated as  $(159.5 + 257) / 1,073$ .

<sup>53</sup> Calculated as  $37,660 \times (1 - 0.21) / 48 / 1,073$ .

**Appendix 2 HoustonKemp October 2019 Report on criterion (a)**



**HOUSTONKEMP**  
Economists

# Effect of DBCT declaration on competition for coal tenements

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A report for DLA Piper

28 October 2019

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# 1. Introduction

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The Queensland Competition Authority (QCA) is reviewing whether the coal handling service supplied at Dalrymple Bay Coal Terminal (DBCT) and specified in section 250 of the *Queensland Competition Authority Act 1997* (QCA Act) should be declared following the expiry of its existing declaration on 8 September 2020. For the QCA to recommend that DBCT service be declared, it must reach the view that each of criteria (a), (b), (c) and (d) of section 76(2) of the QCA Act is satisfied.

In its initial submission to the QCA on 30 May 2018, DBCT Management (DBCTM) stated that if the coal handling service at DBCT were not declared, it would continue to provide open access to terminal services on substantively the same terms as it does under the current undertaking. To give effect to this, it proposed that access seekers would have access to a binding and effective access framework. The access framework would limit the prices that DBCTM may seek to charge in the future without declaration and provides for arbitration of price disputes.<sup>1</sup> Final drafting for the access framework and standard user access agreements giving effect to these changes were provided to the QCA on 29 June 2018.<sup>2</sup>

On 18 December 2018, the QCA published its draft recommendation. It concluded that each of the relevant criteria is satisfied in respect of the DBCT service. In its draft recommendation, the QCA did not consider the detail of DBCTM's proposed access framework or how it might constrain access prices if the coal handling service at DBCT were not declared. Rather, the QCA observed that:

- DBCTM had not executed the deed poll that would give effect to the access framework;<sup>3</sup> and
- DBCTM has the ability and incentive under the access framework to price above cost and provide access to terminal capacity based on willingness to pay, with the effect that;<sup>4</sup>
  - ...potential DBCT users would face the risk of paying a materially higher access charge reflecting the cost of accessing WICET as well as the uncertainty as to whether and when they would obtain access to the terminal.

In its submission responding to the QCA's draft recommendation, DBCTM submitted a revised access framework and executed a deed poll giving effect to that framework. The revised framework introduced an additional constraint on the prices that DBCTM may seek to charge in the future without declaration, limiting these to no more than the existing terminal TIC plus \$3 per tonne. DBCTM considered that making this commitment and executing the deed poll would provide greater clarity and increase certainty for access seekers, as well as addressing the QCA's other concerns.<sup>5</sup>

Subsequently, on 4 October 2019 the QCA published a paper seeking submissions about the operation of the DBCT Management's (DBCTM) executed deed poll and access framework. The QCA acknowledges that, since the deed poll has been executed, it will consider its effect on access to the coal handling service at DBCT and on competition in dependent markets for the purpose of assessing whether criterion (a) is satisfied.<sup>6</sup>

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<sup>1</sup> DBCT Management, *DBCT Management submission to the QCA*, 30 May 2018, paras 266-267.

<sup>2</sup> Available on the QCA's website at [https://www.qca.org.au/wp-content/uploads/2019/05/33820\\_DBCT-Management-Late-Submission-29-Jun-18-2.pdf](https://www.qca.org.au/wp-content/uploads/2019/05/33820_DBCT-Management-Late-Submission-29-Jun-18-2.pdf), accessed 23 October 2019.

<sup>3</sup> Queensland Competition Authority, *Draft recommendation | Part C: DBCT declaration review*, 18 December 2018, p 68.

<sup>4</sup> Queensland Competition Authority, *Draft recommendation | Part C: DBCT declaration review*, 18 December 2018, p 72.

<sup>5</sup> DBCT Management, *DBCT Management response to the QCA draft recommendation*, 11 March 2019, paras 186-189.

<sup>6</sup> Queensland Competition Authority, *QCA consultation paper | DBCT Management's executed deed poll*, 4 October 2019, p 3.



Specifically, the QCA is seeking submissions on the extent to which the executed deed poll and access framework, and the threat of declaration, will constrain DBCTM if it were no longer declared. Stakeholders are invited to comment on:<sup>7</sup>

- whether the implementation of the Deed Poll and access framework on their terms, combined with the threat of declaration, would be sufficient to constrain DBCT Management's conduct in the absence of declaration—such that access (or increased access) as a result of declaration would not promote a material increase in competition in the coal tenements market; and
- whether DBCT Management has demonstrated by its actions following the draft recommendation, including by putting in place the \$3 price cap, that the threat of declaration is a constraint on DBCT Management's ability to exercise market power.

DLA Piper (DLA) has asked us to assess whether declaration of the coal handling service at DBCT will promote a material increase in competition in the market for coal tenements, having regard to the executed deed poll and access framework entered into by DBTCM and the questions posed by the QCA. DLA has also asked us to review the modelling undertaken by PwC, on behalf of the DBCT User Group, which assesses the impact of a \$3 per tonne increase in TIC on tenement valuation.<sup>8</sup>

The remainder of this report is structured as follows:

- section 2 provides relevant context to this advice, including a description of PwC's modelling results;
- section 3 reviews the extent to which an increase in the TIC of \$3 per tonne might be expected to affect the valuation for tenements for access seekers as compared to existing access holders; and
- section 4 assesses the extent to which an increase in the TIC of \$3 per tonne might be expected to result in a coal tenement project not proceeding where it otherwise would have proceeded.

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<sup>7</sup> Queensland Competition Authority, *QCA consultation paper | DBCT Management's executed deed poll*, 4 October 2019, p 4.

<sup>8</sup> PwC, *DBCT User Group | 2020 access declaration review*, April 2019, pp 34-37.

## 2. Context for our assessment

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The assessment of criterion (a) requires a comparison between the future in which coal handling services at DBCT are declared and the future in which they are not declared. In this section, we set out the context to our assessment of the deed poll and access framework for the purpose of this comparison, including:

- the narrowing of the relevant markets to the market (or markets) for coal tenements;
- the theory of harm adopted by the QCA in its draft recommendation, being that differential terms of access between holders of existing access entitlements and potentially emergent access seekers without declaration means that criterion (a) is satisfied; and
- PwC's analysis of the impact of a \$3 per tonne increase on the TIC on the valuation of tenements.

### 2.1 Focus of analysis has narrowed to coal tenements

In the QCA's draft recommendation and at the subsequent public forums, the focus of discussion in relation to criterion (a) has been on the markets for coal tenements. We have previously noted that the DBCT User Group's representative emphasised that the criterion (a) competitive harm arises for exploration and development tenement holders.<sup>9</sup>

For concerns to arise as to the effect of actions by DBCTM on competition in the market for tenements the geographic boundary of the tenements market must be confined to the Hay Point catchment. If the QCA were to adopt a view that the market for tenements is broader than the Hay Point catchment – say extending to central Queensland – in our view it would be unable to conclude that DBCTM's conduct could materially affect competition in that market, either with or without the deed poll and access framework.

The critical element determining the substitutability of tenements within the Hay Point catchment as compared to other areas is the ability of buyers to re-deploy capital and expertise from one region to another so as to bring about an equalisation in expected returns. We have provided evidence that many coal miners undertake operations across diverse geographic portfolios within Queensland,<sup>10</sup> while it is reasonable to assume that financial capital operates without regard to geographic distinctions, at least within Queensland.

Nevertheless, for the purposes of this report, we assume that the market for tenements is confined to the Hay Point catchment. This assumption allows us to focus on the extent to which the deed poll and access framework constrain DBCTM's conduct in a way that could potentially affect competition in that market.

### 2.2 QCA draft contends harm to access seekers without declaration

The rationale advanced by the QCA in its draft recommendation as to why criterion (a) is satisfied in the market for coal tenements is that, given the prospect that DBCTM may seek to apply an increase in TIC without declaration:

- incumbent users of DBCT access the service using 'evergreen' contracts, which protect them from this increase;
- future potential users of DBCT are not protected from this increase and may therefore be exposed to a higher TIC than incumbent users without declaration; and
- the difference in TIC between incumbent users and future potential users is such that more efficient entrants would be kept out of the tenements market by less efficient incumbents, who would have a higher willingness to pay for tenements because of their preferential terms of access.

<sup>9</sup> HoustonKemp, *Economic concepts underpinning the assessment of access criteria*, April 2019, p 4.

<sup>10</sup> HoustonKemp, *Assessment of the QCA's draft recommendation to declare the DBCT service – criterion (a)*, March 2019, pp 27-32.

## 2.3 PwC undertakes modelling of coal tenement projects

PwC, on behalf of the DBCT User Group, presents analysis showing the effect of a \$3 per tonne increase in the TIC on five development projects located in the Goonyella system. The DBCT User Group discloses that these projects are [REDACTED].

This analysis indicates that four of the five projects would be profitable at existing terminal charges, but that a \$3 per tonne increase in the TIC would render one of these (Project 2) unprofitable.<sup>11</sup> PwC suggests that even the value of projects that remain profitable with a higher TIC would be significantly affected, with the increase in TIC reducing the valuation of such projects by between [REDACTED].

We note at the outset that reviewing and responding to PwC's analysis is complicated by the fact that, apart from the cost of capital, it does not disclose any of the underlying data that it draws upon from Wood Mackenzie. In particular, PwC does not provide estimates of:

- the production of coal in each year anticipated from each of the projects;
- the price associated with the coal produced from each of the projects; and
- the costs, both fixed and operating, associated with each of the projects.

Although we have sought to infer representative estimates for some of this information based on numbers and figures disclosed by PwC, the absence of transparency in relation to these parameters limits the extent to which we can fully scrutinise PwC's modelling and provide an unqualified response.

Notwithstanding these shortcomings, we reproduce the results of PwC's assessment at table 2.1 below.

Table 2.1: PwC's assessment of impact of additional TIC on project present value

	Project 1	Project 2	Project 3	Project 4	Project 5
Project present value at existing TIC	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Impact of additional TIC	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Project present value at updated TIC	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Change in project present value	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

Source: PwC – Figure B1 and Table B1

The focus of PwC on the change in project value reflects the contentions of the DBCT User Group. The DBCT User Group submits that a \$3 per tonne price difference for access is:<sup>12</sup>

...highly material and will have a real impact on the level of value that a future user purchaser will see in a coal tenement relative to an existing user.

It goes on to contend that:<sup>13</sup>

...without declaration this asymmetric treatment and monopoly pricing to future uses [sic] creates a clear and material barrier to entry which materially impacts on the likelihood of future users entering the market for exploration and development coal tenements in the Hay Point catchment.

Consequently it is clear that criterion (a) is satisfied.

<sup>11</sup> PwC, *DBCT User Group | 2020 access declaration review*, April 2019, pp 34-37.

<sup>12</sup> DBCT User Group, *Submission in response to Queensland Competition Authority draft decision*, 26 April 2019, p 98.

<sup>13</sup> DBCT User Group, *Submission in response to Queensland Competition Authority draft decision*, 26 April 2019, p 98.

PwC's analysis suggests that a \$3 per tonne increase in the TIC could:

- exert a significant effect on the valuation of tenements, with the implication that users without access under existing user agreements will be materially disadvantaged competing in the market for tenements; and
- reduce the profitability of coal projects such that some which would have proceeded with the existing TIC might no longer proceed with the higher TIC.

In sections 3 and 4 below we review these contentions to assess whether they are reasonable and, to the extent they are, whether they would be expected to be factors that materially affect competition in the market for tenements.



### 3. Effect of increased TIC on tenement value

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PwC assesses the effect of a \$3 per tonne increase in the TIC on access seekers through a comparison of tenement value under two scenarios in which:

- developers of prospective mines gain certain access to DBCT at existing charges; and
- developers of prospective mines gain certain access to DBCT at existing charges plus an additional impost of \$3 per tonne.

The context of PwC's analysis might be construed as suggesting that a decision not to declare the coal handling service at DBCT would drive a significant divergence between:

- the valuation that existing holders of access rights at DBCT, or access seekers with declaration, would place on a tenement, as measured in the first scenario; and
- the valuation that access seekers without declaration would place on the same tenement, as measured in the second scenario.

However, PwC's analysis does not establish this result. It does not do so because:

- access seekers would face the prospect of paying a higher TIC than applies for use under existing user agreements both with and without declaration, since the approved access undertaking for DBCT (and the access framework) provides for differentiated expansions;
- uncertainty of access to coal handling services, rather than the price of that access, is the most fundamental driver of differences in the valuation of coal projects between parties with and without available existing access entitlements; and
- access holders' rights to use the coal handling service at DBCT at existing charges are limited to the tonnages specified under their existing user agreements and, given demand for the service, any increase in the TIC paid under the access framework will affect equally the valuation of tenements that are traded at the margin.

These propositions suggest that there may be little difference between the valuation that an existing holder of access rights would place on a tenement as compared to an access seeker without such rights.

We have previously collected and presented empirical evidence of tenement transactions that is consistent with these propositions. In the remainder of this section we assess these propositions in greater detail and explain why we consider that they are consistent with observed transactions for tenements.

#### 3.1 Approved access undertaking provides for differentiated expansions

Under both the current approved access undertaking and DBCTM's access framework, the costs for expansions of DBCT's capacity may either be 'socialised' or 'differentiated', where:

- socialisation provides for the costs of the expansion to be recovered from all users with the determination of a socialised access charge; whereas
- differentiation provides for the costs of the expansion to be recovered only from the users of the expansion with the determination of a differentiated access charge.

It follows that, with declaration, there is a prospect that the costs of an expansion could be differentiated, such that access seekers face a higher TIC than applies for existing user entitlements. In its draft

recommendation, the QCA estimated that a differentiated TIC could be at most \$6 per tonne – approximately \$3.50 per tonne higher than the TIC for existing capacity.<sup>14</sup>

The prospect of a higher TIC applying to access seekers also exists without declaration, since DBCTM's ceiling price commitment under the executed deed poll and access framework imposes a 'maximum spread' of \$3 per tonne over the TIC for existing terminal capacity. Because the access framework also adopts the same provisions as the approved access undertaking in respect of expansions, this means that the highest TIC that might arise from application of the terms of the access framework is approximately \$5.50 per tonne or the differentiated TIC (if this is higher).

Figure 3.1 below shows the potential ranges for the TIC that could result under the executed deed poll and access framework, given the QCA's own estimates (with teal shading) as compared to those that could apply with declaration (with red shading). We describe the derivation of these estimates in an earlier report.<sup>15</sup>

Figure 3.1: Terminal infrastructure charge at DBCT without and with declaration



Source: Estimates based on QCA data

Given the potential outcomes for the TIC without declaration – as indicated in left three columns of figure 3.1 – there does not appear to be any basis to assume that these would be materially different in prospect to those that might arise with declaration. These conclusions are also reflected in our previous report on this issue.<sup>16</sup>

Criterion (a) requires an assessment of whether declaration would promote a material increase in competition for at least one related market. Given that DBCTM's access framework provides for similar outcomes without declaration as would apply with declaration, there is no basis to conclude that declaration would materially increase the value that access seekers would place on coal tenements.

<sup>14</sup> Queensland Competition Authority, *Draft recommendation | Part C: DBCT declaration review*, December 2018, p 86.

<sup>15</sup> HoustonKemp, *Economic concepts underpinning the assessment of access criteria*, April 2019, p 3.

<sup>16</sup> HoustonKemp, *Economic concepts underpinning the assessment of access criteria*, April 2019, p 6.

### 3.2 Uncertainty of access is the critical determinant of valuations

PwC's comparison of tenement value proceeds on the assumption that all tenement holders have certainty of access to the coal handling service at DBCT. This assumption appears likely to overstate significantly the effect of an increase in the TIC on the economics of developing any particular tenement and so its valuation. We have previously noted that uncertainty associated with the ability to obtain access to coal supply infrastructure in Queensland, including at DBCT, would likely play a much greater role in decisions of whether to develop a tenement than the price of that access.<sup>17</sup>

In particular, in the comparison of the worlds with or without declaration, there is likely to be a substantial difference between the valuation placed on coal tenements by parties that:

- on the one hand, have a right of access to a coal handling service and can draw upon this right in respect of the coal resources extracted from the development of a tenement; and
- on the other hand, have no right of access to a coal handling service and have no certainty as to the availability or timing of such access.

Whereas the former have the means to monetise the output of their tenements with certainty – and value tenements accordingly – the latter must value tenements based only on their probabilistic assessment of whether and when they might be able to gain such access to a suitable coal handling facility (whether at DBCT or any other terminal) and realise the value of the coal resource. Further, the attainment of such access is not within those tenement holders' direct control, since it will depend on the timing and size of expansions of DBCT or any other terminal. It follows that this second group must necessarily place substantially lower valuations on tenements than the first.

Consistent with these observations, we explained in a previous report that:<sup>18</sup>

...with or without declaration, new entrants in the market for tenements can have no certainty about the availability of access to the DBCT service, or potentially other infrastructure services over the period for which the DBCT service would be declared. In other words, an investment in a tenement is required before a new entrant can enter the access queue and begin to form expectations about when, and on what terms, they may be able to obtain access to the DBCT service. This is a significant barrier to entry that will persist whether the DBCT is declared or otherwise.

It follows that any difference between the valuation placed on tenements by access holders and access seekers caused by a \$3 per tonne increase in the TIC is likely to be modest compared to the pre-existing effect that exists, with or without declaration, due to uncertainty of access.

By way of illustrating the strength of these observations, there are many tenements located within the Goonyella system. We have previously identified 109 exploration permits for coal (EPCs), 46 mineral development licences (MDLs) and 154 mining leases (MLs).<sup>19</sup> Across these tenements, there are likely to be many potential projects that may eventually be developed into an operating mine. It would be unrealistic in the extreme to assess the value of each of these potential projects on the basis that they would all be able to access DBCT with certainty at any particular time.

DBCTM states that its fastest possible rate of expansion would be:<sup>20</sup>

- Zone 4 by September 2023, increasing capacity by 4 mtpa;
- 8X Phase 1 by September 2025, increasing capacity by 5 mtpa;

<sup>17</sup> HoustonKemp, *Assessment of the QCA's draft recommendation to declare the DBCT service – criterion (a)*, March 2019, pp 35-37.

<sup>18</sup> HoustonKemp, *Assessment of the QCA's draft recommendation to declare the DBCT service – criterion (a)*, March 2019, pp 36-37.

<sup>19</sup> HoustonKemp, *Transactions of coal tenements in the Goonyella system*, April 2019, p 8.

<sup>20</sup> DBCT Management, *DBCT Management response to QCA draft recommendation*, 11 March 2019, para 159.

- 8X Phase 2 by February 2027, increasing capacity to 8 mtpa;

Taking into account this rate of expansion, and assuming that access holders under existing user agreements continue to use their full entitlements, the maximum additional revenue that could be extracted from new mining developments over the term of the access framework, and at the maximum spread of \$3 per tonne, is \$96.8 million.<sup>21</sup> In contrast, PwC's modelling indicates a total impact across four projects of ██████████ in present value terms.

The higher values estimated by PwC builds from its presentation of options that:<sup>22</sup>

- take into account payments that extend well beyond the term of the access framework, as far forward as 2061 in the case of one project; and
- reflect an impossible path of expansion for DBCT, with two of the projects projected to be developed in 2021, one in 2022, another in 2024 and another in 2026.

At face value, these assumptions appear to be of more consequence for the assessment of criterion (b) than for criterion (a), since they suggest there may be foreseeable demand for coal handling services in the market in which the coal handling service at DBCT is supplied, some of which cannot be met by DBCT.

### 3.3 Competition at the margin unaffected by access holders' entitlements

Any competitive advantage that incumbent holders of access entitlements at DBCT may enjoy in the form of their ability to acquire tenements, whether because of the factors discussed at section 3.2 or as otherwise contended by the DBCT User Group, could apply only up to the limits of these entitlements set out in the relevant user agreements. Such advantage could therefore only apply in respect of tenements for which incumbent miners seek to replace tonnages that cease production over the period that declaration would apply.

In its submission responding to the QCA's draft recommendation, DBCTM drew attention to those contracts for capacity associated with mines with economic lives that end during the period over which declaration would apply.<sup>23</sup> Users with mines ceasing production, identified in table 3.1 below, would presumably seek to retain their access rights to DBCT by replacing this with production from newly developed or acquired mines.

Table 3.1: Contracted capacity at DBCT allocated to mines expected to cease production

Miner and mine	Contracted capacity	Economic life ending
██████████	████	██████
██████████	████	██████
██████████	████	██████
██████████	████	██████
██████████	████	██████
██████████	████	██████
██████████	████	██████
██████████	████	██████

Source: DBCTM

<sup>21</sup> We calculate this value using a cost of capital of 13.75 per cent, consistent with PwC's assumption.

<sup>22</sup> These timelines are apparent from figure B2 of PwC's report, indicating the operating life of each project.

<sup>23</sup> DBCT Management, *DBCT Management response to QCA draft recommendation*, 11 March 2019, Figure 24.



However, the QCA states that foreseeable demand for the coal handling services at DBCT exceeds the existing capacity of the terminal. To meet this demand, the terminal will need to be expanded and provide new coal handling services.

It follows from these observations that the marginal value placed on coal tenements will reflect their development into operating mines that use expanded capacity at DBCT. The prospect of an increase in the TIC that might be applied without declaration applies equally to coal from these tenements, regardless of whether this is produced by a holder of existing access entitlements at DBCT or otherwise. In other words, at the margin, there is no advantage conferred on incumbent holders of access entitlements at DBCT.

Further, even if there were a residual advantage held by incumbent holders of access entitlements at DBCT – although in our opinion there is not – this advantage would be limited by the extent to which:

- incumbent miners already have substantial tenement holdings that they can draw from to meet their needs for additional production; or
- competition between incumbent miners provides robust resale opportunities for access seekers who acquire tenements to develop but subsequently cannot obtain access to coal handling services.

Drawing inferences about competition for tenements from a comparison of the values that two different parties place on tenements assumes that these parties might both be competing to acquire similar tenements. However, if incumbent miners already have substantial tenement holdings to replenish production handled at DBCT under their existing user agreements, they may not need to go into the market to acquire tenements.

We have previously shown that, of the users in table 3.1 above, Peabody and Fitzroy already have substantial portfolios of tenements in the Goonyella system, which include EPCs and MDLs. Glencore holds only a single MDL but also 14 MLs, while Terracom retains only one ML.<sup>24</sup>

Further, PwC's assessment assumes that tenement value depends on the terms of access to DBCT that the tenement owner can establish. However, this assessment does not take into account that the value of a tenement to a buyer could include the prospect of developing the tenement and selling it to another party with access entitlements (or improved prospects of access entitlements) at DBCT.

In these circumstances, any differences in valuation between existing access holders and access seekers for infra-marginal tenements (those that are required by existing access holders to utilise their access entitlements) will depend on the extent to which there is competitive tension between existing access holders to acquire these tenements.

### 3.4 Empirical evidence for these propositions

We have previously examined evidence about tenement transactions in the Goonyella system over time, collating this evidence by reference to:

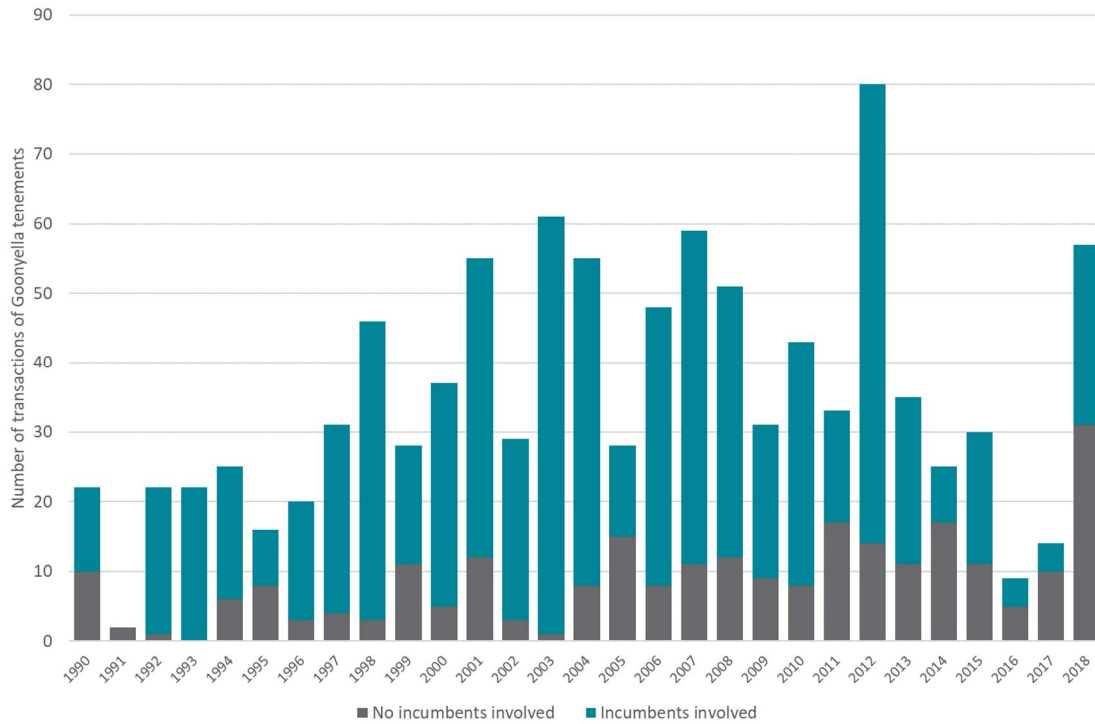
- whether each transaction involved acquiring parties that are only future potential miners with the result that the transaction results in the tenement being held *entirely* by future potential miners; and
- the type of tenement transacted, distinguishing tenements that are permits for the purpose of exploration and development of coal resources – EPCs and MDLs.

Figure 3.2 and figure 3.3 below set out this evidence – for coal tenements generally, and for exploration and development tenements. It indicates strong involvement of potential miners in the acquisition of tenements, particularly in recent years. This effect is even stronger in respect of tenements for exploration and

<sup>24</sup> HoustonKemp, *Transactions of coal tenements in the Goonyella system*, April 2019, p 9.

development. For example, in 2018 there were 26 transactions of Goonyella exploration and development tenements, of which 20 resulted in the tenement being held only by potential users of DBCT.

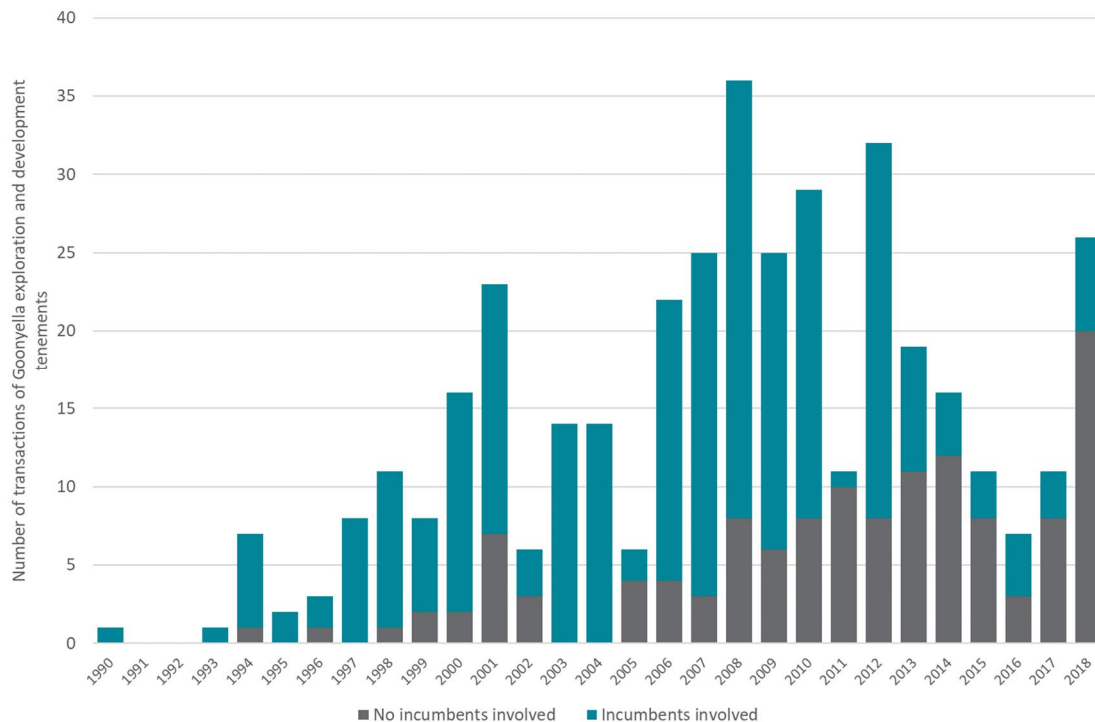
Figure 3.2: Transactions of coal tenements in the Goonyella system



Source: HoustonKemp analysis; <https://myninesonline.business.qld.gov.au/suite/apps>, accessed 2 April 2019.



Figure 3.3: Transactions of exploration and development coal tenements in the Goonyella system



Source: HoustonKemp analysis; <https://myminesonline.business.qld.gov.au/suite/apps>, accessed 2 April 2019.

This evidence lends support to the propositions that we set out above, which underpin our view that there may be little difference between the valuation that an existing holder of access rights would place on tenement as compared to an access seeker without such rights. If this were not the case, we would not expect to see strong and increasing involvement from new entrants in the tenements market, particularly in the context of recent years in which the prospect of a declaration review has arisen. We explained that:<sup>25</sup>

...the results of our review of the available evidence indicate that non-incumbent users have not been dissuaded from entering into tenement transactions in recent years. This is despite the expiry of declaration at DBCT in September 2020 and the prospect that the terminal would no longer be declared, with the potential implications for access charges at the terminal.

Our review of the evidence suggests that the price of coal, not the status of declaration at DBCT or the prospective level of access charges, is the most relevant factor determining the level of economic activity in tenement transactions, including by prospective users.<sup>26</sup> This findings appears sensible given that the price of coal is the primary driver of the value of coal tenements.

<sup>25</sup> HoustonKemp, *Transactions of coal tenements in the Goonyella system*, April 2019, p 15.

<sup>26</sup> HoustonKemp, *Transactions of coal tenements in the Goonyella system*, April 2019, pp 15-16.

## 4. Effect of the TIC on tenement development

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PwC's analysis indicates a \$3 per tonne increase in the TIC gives rise to a change in the value of Project 2 from [REDACTED] to [REDACTED]. This result appears to raise the prospect that an increase of TIC of this magnitude might cause a project not to proceed. However, we consider that this prospect is remote because:

- Project 2 is unlikely to proceed with declaration in any case, since its investment proposition is extremely marginal and other projects are likely to proceed before it; and
- If Project 2 does proceed with declaration, then it will likely also proceed without declaration under plausible alternative assumptions and taking into account the ceiling TIC under the access framework.

In the remainder of this section we explain the basis for these propositions in greater detail.

### 4.1 Project 2 is unlikely to proceed with declaration

PwC does not state whether it considers that Project 2 would proceed with declaration. In our view, there are very good reasons to believe this is highly unlikely, since:

- the investment proposition provided by Project 2 is extremely marginal and could be eliminated by a very minor movement in the coal price; and
- at current coal prices there are likely to be many tenement projects that have positive present values (conditional on access) so that Project 2 appears unlikely to proceed ahead of others given its low value proposition.

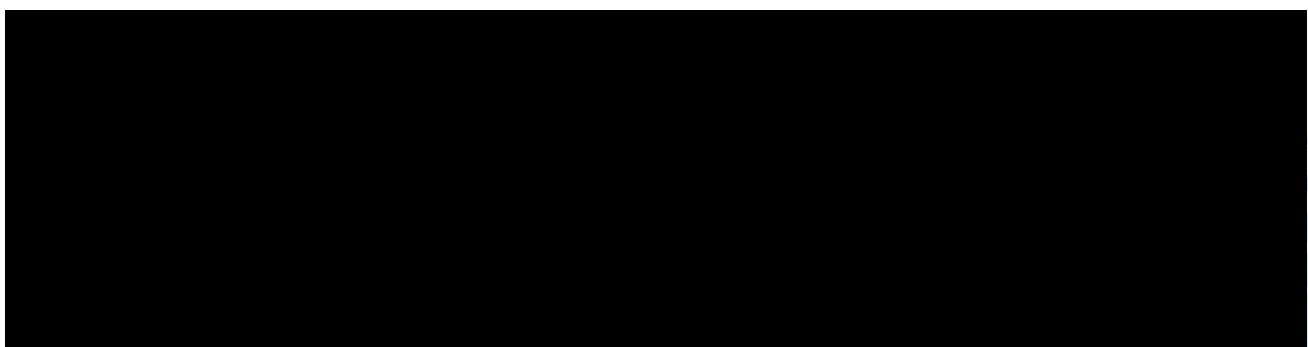
We describe the basis for these opinions in more detail below.

#### 4.1.1 Project 2 is a marginal investment proposition

Coal prices are the most fundamental factor determining the valuation for a tenement. Changes in the price of coal gives rise to significant changes in tenement valuation. For this reason, it appears unlikely that a tenement with a positive present value of [REDACTED], as Project 2 does, would be considered a viable prospect.

Although PwC has not provided the cashflow and volume data that it uses for each project, we have inferred representative estimates from the information that it has provided.<sup>27</sup> We estimate from this information that a decrease in coal price in the order of \$1 per tonne would be sufficient to render the value of Project 2 negative.<sup>28</sup>

Figure 4.1 below shows quarterly free-on-board prices for Australian coking and thermal coal, sourced from Bloomberg.<sup>29</sup> The figure shows that coal prices are highly variable and support a view that there is likely to be significant uncertainty about future coal prices when developing a project. Given the extent of this



variability and resulting uncertainty, it appears very unlikely that a tenement that would be rendered unprofitable in the face of a decrease in the coal price in the order of \$1 per tonne would proceed.

Figure 4.1: Quarterly prices for coking and thermal coal (A\$ per tonne)



Source: Bloomberg

We further note that, although figure 4.1 indicates changes quarterly prices of coal, even daily expectations of coal prices can change by substantially more than \$1 per tonne. By way of example, daily swap prices for Australian hard coking coal free-on-board from Hay Point often vary by considerably more than this amount. Since the series began reporting on 11 May 2016, over the 762 daily movements reported since then:

- 461 daily movements – or 60 per cent in total – are greater than \$1 per tonne in either direction; and
- 202 daily movements – or 27 per cent in total – are greater than \$3 per tonne in either direction.

These figures support our view that a project that would be rendered unprofitable with a relatively small change in forward-looking coal prices is extremely unlikely to proceed.

#### 4.1.2 With declaration, other tenement projects are likely to be developed ahead of Project 2

We explain at section 3.2 that any potential expanded capacity at DBCT over the period for which the service would be declared is finite. Given current prices for coal, the availability of expanded capacity is likely to be low in comparison to the tonnages of coal that could be developed from potential projects. These observations suggest that only a fraction of potential projects will be successfully developed into operating mines with access to coal handling services.

Given this dynamic, it is implausible that, with declaration, a project with the characteristics of Project 2 would be developed ahead of other more lucrative projects. This observation follows from:

- the greater incentives that tenement developers have to pursue projects with higher returns, given the constraint posed by potential terminal capacity; and

- the object of Part 5 of the QCA Act which refers to the promotion of, amongst other things, the efficient use of significant infrastructure.<sup>30</sup>

## 4.2 If Project 2 proceeds it will also proceed without declaration

If one were to conclude that Project 2 may proceed to production at the existing TIC despite the reasons that we discuss at section 4.1 above, there are still good reasons to believe that it would not be affected by a \$3 per tonne increase in TIC, since:

- the result that Project 2's present value is rendered uneconomic by a \$3 per tonne increase in TIC is very sensitive to assumptions made by PwC; and
- the access framework provides further pricing protections and, in some circumstances, may impose a lower ceiling than the \$3 per tonne modelled by PwC.

### 4.2.1 Project 2 may not be rendered uneconomic by a \$3 per tonne increase in TIC

PwC has not provided details of the data that inform its modelling, aside from the cost of capital. In this section we show that very plausible alternative values for this parameter could change the result that a \$3 per tonne increase in TIC makes Project 2 uneconomic. Although PwC has selected a cost of capital of 13.75 per cent, we estimate that:<sup>31</sup>

- at a cost of capital of less than [REDACTED], Project 2 would be economic both with and without the \$3 per tonne increase in TIC; and
- at a cost of capital of more than [REDACTED], Project 2 would be uneconomic both with and without the \$3 per tonne increase in TIC.

We have not reviewed PwC's estimate in detail. However, we note that, relative to conventional approaches, its estimate of the cost of equity appears to be substantially inflated, reflecting:

- a risk free rate of 4.0 per cent, which is substantially higher than long term government bond yields have been since 2014;<sup>32</sup>
- an 'asset specific risk premium' of 2.5 per cent, which PwC does not justify or explain.

Recalculating the cost of capital with a risk free rate of 1.0 per cent and without the asset specific risk premium, gives rise to a revised estimate of 9.75 per cent. At this revised cost of capital estimate, the value of Project 2 is approximately:

- [REDACTED] with the existing TIC; and
- [REDACTED] with a TIC that is \$3 per tonne higher.

This establishes that the contended result that Project 2 would be rendered uneconomic by a \$3 per tonne change in TIC is very sensitive to input assumptions. PwC's less conventional estimate of the cost of capital fits within a narrow window within which Project 2 is viable without the \$3 per tonne maximum spread but unviable with it. With the adoption of more conventional cost of capital assumptions, this result no longer applies.

<sup>30</sup> We have previously discussed this aspect of the regulatory regime. See HoustonKemp, *Does DBCT's coal handling service satisfy criterion (a)?*, 29 May 2018, pp 19-20.

<sup>31</sup> The assumptions underpinning these calculations are described in footnote 27 above.

<sup>32</sup> Further, PwC's estimate of the cost of debt for a mining business is 3.0 per cent – lower than its estimate of the risk free rate. This defies common sense. If a mining business can obtain debt financing at 3.0 per cent, then the risk free rate must be lower, not higher, than this.

#### 4.2.2 The access framework may impose a lower ceiling than \$3 per tonne

The \$3 per tonne maximum spread is only one component of the pricing commitment provided by DBCTM in the access framework.

Under the access framework, the TIC may not exceed the ceiling TIC, the formulation for which is set out at schedule C2 of DBCTM's access framework. The essential elements of the calculation are that the ceiling TIC is not to exceed the floor TIC by more than \$3 per tonne (in 2020-21 price terms) and, subject to this:<sup>33</sup>

...set equal to the lowest 'willingness to pay' (as defined in paragraph (d) below) to be served at the relevant Terminal Component of those mines expected to be served at the Terminal Component, where:

- (1) mines are served at the Terminal Component in the order of their 'willingness to pay' to be served at that Terminal Component, with those with higher 'willingness to pay' served before those with lower 'willingness to pay'; and
- (2) the coal volumes to be served at the Terminal Component are the same as if the Floor TIC in respect of that Terminal Component applied and do not exceed the capacity of that Terminal Component to serve those coal volumes.

It follows from this formulation that if coal from Project 2 would be expected to be handled at DBCT, given its ranking in terms of its willingness to pay, then the ceiling TIC can be no more than the willingness to pay of the project. Based on the information provided by PwC, we estimate that this would be approximately \$1.12 per tonne above the existing TIC.<sup>34</sup>

Further, the access framework directs the arbitrator to determine a price that *'would be agreed between a willing but not anxious buyer and a willing but not anxious seller'* – a concept that we have previously discussed in detail.<sup>35</sup> This is the primary guidance supplied to the arbitrator, and is constrained only by the resulting price being bounded below and above by the floor TIC and the ceiling TIC. In the circumstances implied by PwC's Project 2, it would seem very likely that the actual TIC applying to that project would be less than the ceiling TIC.

These additional commitments provide that, if coal from Project 2 would be profitably and efficiently handled at DBCT with declaration, then it also would be profitably and efficiently handled at DBCT without declaration.

<sup>33</sup> DBCTM access framework, schedule C2(b) and (c).

<sup>34</sup> We calculate this as the increase in TIC, under the assumptions set out in footnote 27 above, the makes the project value equal to zero.

<sup>35</sup> HoustonKemp, *Assessment of the QCA's draft recommendation to declare the DBCT service – criterion (a)*, March 2019, pp 11-12.



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