Undertaking to the Australian Competition and Consumer Commission

Given under section 87B of the *Competition and Consumer Act 2010* (Cth) by DBCT Management Pty Ltd (ACN 097 698 916) and Nitro Holdings No 1 Pty Ltd (ACN 608 022 260)
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Undertaking to the Australian Competition and Consumer Commission

Date ▶

This undertaking is given to the Australian Competition and Consumer Commission by DBCT Management Pty Ltd (ACN 097 698 916) and Nitro Holdings No 1 Pty Ltd (ACN 608 022 260) pursuant to section 87B of the Competition and Consumer Act 2010 (Cth).
1 Background

1.1 The Parties - Brookfield

(a) Brookfield Asset Management Inc. (BAM) is a global alternative asset manager focussed on property, renewable power and infrastructure assets with approximately US$200 billion of assets under management.

(b) BAM manages Brookfield Infrastructure Partners L.P. (BIP). BIP is a publicly traded limited partnership. Units in BIP trade on the New York Stock Exchange and the Toronto Stock Exchange.

(c) In the context of this Undertaking, BIP’s relevant Australian business is Dalrymple Bay Coal Terminal (DBCT) in Queensland.

1.2 The Parties – Asciano

(a) Asciano is a listed Australian freight logistics business. It owns infrastructure and focusses on transport including port and rail assets. Shares in Asciano trade on the Australian Securities Exchange.

(b) In the context of this Undertaking, Asciano’s relevant Australian business is Pacific National, which provides above rail haulage services across the coal, intermodal and bulk sectors, and provides coal above rail haulage services to DBCT.

1.3 The proposed acquisition

(a) A consortium assembled by BAM, that includes BIP, proposes to acquire Asciano (Proposed Acquisition). Nitro Corporation is the bidder through which the consortium proposes to acquire Asciano. Nitro Corporation is an indirect wholly owned subsidiary of Nitro.

(b) The Binding Offer is subject to a minimum acceptance condition that requires Nitro Corporation, together with its Associates (as defined in the Bidder’s Statement) to have a Relevant Interest (as defined in sections 608 and 609 of the Corporations Act) in at least 50.1% of the fully paid ordinary shares in the capital of Asciano.

1.4 DBCT

(a) DBCT is a common user coal terminal which includes in-loading, stockpiling, reclaiming, out-loading, and associated facilities for the handling of coal. DBCT is located at the Port of Hay Point, south of Mackay in Queensland.

(b) The DBCT business comprises a coal terminal that exports metallurgical and thermal coal mined in the central Bowen Basin region of Queensland. DBCTM is owned by BIP. DBCTM, together with DBCT Trustee, is the long term lessee of DBCT. DBCTM is also a party to the ‘DBCT Port Services Agreement’ with DBCT Holdings, DBCT Trustee and Ports Corporation of Queensland Limited (ACN 126 302 994) (now known as North Queensland Bulk Ports Corporation Limited (NQBP)) (PSA). NQBP is a port authority established under the Transport Infrastructure Act 1994 (Qld).
1.5 The current access arrangements applicable to DBCT

(a) Declared service under QCA Act

In March of 2001, the State of Queensland passed a regulation under which the handling of coal at DBCT was made a “declared service” for the purposes of the Queensland Competition Authority Act 1997 (Qld) (QCA Act). The regulator under the QCA Act is the QCA. DBCTM is currently subject to an access undertaking that was approved by the QCA on 30 September 2010 and is due to expire on 30 June 2016.

(b) Port Services Agreement

Under the PSA, DBCTM must:

(1) comply with, and give effect to, an approved access undertaking and any applicable laws relating to the provision of third party access to the services of DBCT (section 9.8(a) PSA);

(2) use its best endeavours to ensure that an approved access undertaking is in force in respect to DBCT at all times during the lease (section 9.12 PSA); and

(3) ensure that it does not materially alter the operation and maintenance agreement for DBCT without the prior consent of DBCT Holdings (section 7.1(a) PSA).

A failure to comply with the above obligations is considered a material breach which could result in termination of the PSA, the DBCT leases (section 21.1(c) PSA) and DBCTM’s finance arrangements.

1.6 The ACCC’s competition concerns

(a) Brookfield applied for informal merger clearance on 31 July 2015 and provided a supplementary submission on 28 August 2015.

(b) On 15 October 2015, the ACCC published a Statement of Issues in respect of the Proposed Acquisition which identified the ACCC’s preliminary view in relation to the impact of the vertical integration of DBCTM and Pacific National (a subsidiary of Asciano) in Queensland.

(c) In the Statement of Issues, the ACCC expressed its preliminary view that the Proposed Acquisition will permit the merged entity to engage in conduct that will lead to a substantial lessening of competition in the market for the supply of above rail haulage services on the Goonyella coal rail system.

(d) The Statement of Issues states that market participants identified a number of potential foreclosure strategies that Brookfield could engage in post-acquisition including:

(1) raising access charges to coal producers that use competitors of Pacific National for above rail haulage services to DBCT;

(2) cost shifting between Pacific National and DBCTM or engaging in cross-subsidisation;

(3) discrimination in respect of new access and capacity expansion (for example, in relation to the timing and allocation of capacity within expansions of DBCT);

(4) providing more favourable operating arrangements (such as stockpiling and unloading pit allocations); and
(5) the bundling of port and rail capacity.

(e) The ACCC noted that the OMC prevents DBCTM from managing the day-to-day operations or maintenance of DBCT. However, market participants raised concerns that these operational arrangements could be changed by Brookfield in the future.

(f) The ACCC noted that the relevant access regime in Queensland does mitigate some of the concerns and reviews of proposed amendments to the current regime are currently in progress, however the timing and outcome for the QCA’s review of the revised access undertaking is uncertain.

(g) DBCTM does not agree that the concerns set out in clauses 1.6(b) to 1.6(e) are likely to arise or that the Proposed Acquisition will have the effect, or be likely to have the effect, of substantially lessening competition in any market including because DBCTM is subject to an effective access regime pursuant to the PSA, the access undertaking given by DBCTM and approved by the QCA on 30 September 2010, the Terminal Regulations, and the OMC.

(h) However, DBCTM acknowledges that the ACCC is concerned to ensure that DBCTM is subject to an appropriate set of standalone rules which apply from the Commencement Date. On that basis DBCTM provides this Undertaking.

1.7 Objective of this Undertaking

(a) The objective of this Undertaking is to address the competition concerns submitted to the ACCC by market participants, as set out in clause 1.6.

(b) This Undertaking aims to achieve the objective referred to in clause 1.7(a) by placing obligations on DBCTM to comply with the obligations specified in clauses 3 to 8 regarding:

(1) the terms of the OMC and the independence of the operator of DBCT;

(2) the requirement for accounting separation;

(3) prohibitions against bundling;

(4) confidentiality obligations;

(5) ring-fencing arrangements; and

(6) the Queue for Access.

1.8 Nitro and DBCTM to procure compliance by Trading SCBs

Without limiting DBCTM’s obligations under clause 7.8 or clause 12(a), Nitro and DBCTM must procure that each Trading SCB complies with the obligations imposed on Trading SCBs in respect of this Undertaking.

2 Term

2.1 Commencement of this Undertaking

(a) Subject to clause 2.1(b), this Undertaking comes into effect on the date that the following have occurred:

(1) this Undertaking has been executed by DBCTM and Nitro;
(2) this Undertaking so executed has been accepted by the ACCC; and

(3) the Control Date has occurred,

(the Commencement Date).

(b) Notwithstanding clause 2.1(a), if the Control Date has not occurred before the date that is 4 months after the date that this Undertaking, as executed by DBCTM and Nitro, has been accepted by the ACCC then this Undertaking will not come into effect.

2.2 Expiry of this Undertaking

This Undertaking expires on the earliest to occur of:

(a) DBCTM ceasing to hold a leasehold interest in DBCT and the ACCC confirms this in writing; and

(b) the ACCC consenting to DBCTM and Nitro withdrawing this Undertaking pursuant to section 87B of the Act.

2.3 Revocation of this Undertaking

The ACCC may, at any time, revoke its acceptance of this Undertaking if the ACCC becomes aware that any information provided to it was incorrect, inaccurate or misleading in a material respect.

2.4 Waiver

The ACCC may, at any time, expressly waive in writing any of the obligations contained in this Undertaking.

3 Independent operator

(a) Other than in accordance with the ACCC’s prior written approval, DBCTM undertakes to maintain:

(1) the OMC; or

(2) a contract which is substantially on the terms specified in Schedule 1 with a party (as operator):

(A) in which at least 50% of the issued shares in the party are held by Access Holders;

(B) in which DBCTM holds no economic interest; and

(C) that is not a Related Body Corporate of DBCTM,

to the extent that maintaining the relevant contract, or contracting on substantially the same terms as those specified in Schedule 1, is within DBCTM’s reasonable control.

(b) As soon as reasonably practicable after DBCTM becomes aware that maintaining either:

(1) the OMC; or
(2) a contract which is on substantially the same terms as those specified in Schedule 1 with a party (as operator) that satisfies the criteria in clause 3(a)(2), is likely to cease to be within DBCTM’s reasonable control, DBCTM must give the ACCC a notice which specifies:

(3) that maintaining the OMC or the contract referred to in clause 3(b)(2) (as applicable) is likely to cease to be within DBCTM’s reasonable control;

(4) the reason for the state of affairs referred to in clause 3(b)(3); and

(5) the steps that DBCTM will undertake to engage a new party (as the operator) that satisfies the criteria specified in clause 3(a)(2).

(c) DBCTM undertakes not to terminate the OMC or any contract which replaces the OMC (each, an Existing OMC) unless:

(1) DBCTM has engaged a replacement operator which satisfies the criteria specified in clause 3(a)(2) under a contract which is on substantially the same terms as those specified in Schedule 1 (Replacement OMC); and

(2) the Replacement OMC will take effect on termination of the Existing OMC.

(d) Subject to clause 3(f), DBCTM undertakes to only exercise its step-in rights in respect of the OMC in accordance with the terms of the OMC.

(e) Without limiting clause 3(d), if DBCTM exercises its step-in rights then it must:

(1) immediately give the ACCC a notice which specifies that DBCTM has exercised its step-in rights under the OMC and provides reasonable details of the circumstances giving rise to DBCTM’s exercise of the step-in rights;

(2) within four days after DBCTM exercises the step-in rights, give the ACCC a report which sets out, in reasonable detail, the steps that DBCTM proposes to take, and the steps that DBCTM proposes the operator must take, in order for DBCTM to cease exercising its step-in rights; and

(3) use reasonable endeavours to promptly agree a plan with the ACCC which sets out, in reasonable detail, the steps that DBCTM and the operator must take in order for DBCTM to cease exercising its step-in rights.

For the avoidance of doubt, DBCTM must cease exercising its step-in rights once the breach giving rise to DBCTM’s exercise of the step-in rights has been remedied.

(f) If, pursuant to DBCTM’s exercise of its step-in rights under the OMC, DBCTM proposes to engage a third party to carry out the ‘Services’ (as defined in the OMC), DBCTM must not engage the third party unless and until the ACCC has approved that third party.

(g) Any contract entered into by DBCTM which replaces the OMC must be approved by the ACCC.

(h) DBCTM acknowledges that the ACCC may audit DBCTM’s compliance with this clause 3 pursuant to clause 11.
4 Accounting separation

(a) DBCTM must prepare, and must ensure that any of its Subsidiaries that are engaged in any Access-related functions prepare, separate financial statements and accounts on an annual basis in accordance with relevant legislation and applicable Australian accounting standards.

(b) If DBCTM receives a request in writing from an Access Holder for a copy of DBCTM’s audited accounts in respect of any period:
   
   (1) commencing on or after the Commencement Date; and
   
   (2) during which the Access Holder held Access rights,

   then DBCTM must provide to the Access Holder a copy of the audited accounts specified in the Access Holder’s request.

5 No bundling

(a) DBCTM undertakes not to:
   
   (1) supply or offer to supply a bundle of Access and an Above Rail Service;
   
   (2) supply, or offer to supply, Access;
   
   (3) supply, or offer to supply, Access at a particular price; or
   
   (4) give or allow, or offer to give or allow, a discount, allowance, rebate or credit in relation to the supply or proposed supply of Access by DBCTM,

   on the condition that:
   
   (5) the person to whom DBCTM supplies or offers or proposes to supply the Access; or
   
   (6) a Related Body Corporate of the person referred to in clause 5(a)(5), will acquire Above Rail Services from a Related Body Corporate of DBCTM.

(b) Nitro undertakes not to, and to procure that its Related Bodies Corporate do not:
   
   (1) supply or offer to supply a bundle of Access and an Above Rail Service;
   
   (2) supply, or offer to supply, Above Rail Services;
   
   (3) supply, or offer to supply, Above Rail Services at a particular price; or
   
   (4) give or allow, or offer to give or allow, a discount, allowance, rebate or credit in relation to the supply or proposed supply of Above Rail Services by Nitro or any of its Related Bodies Corporate,

   on the condition that:
   
   (5) the person to whom Nitro or its Related Body Corporate supplies or offers or proposes to supply the Above Rail Services; or
   
   (6) a Related Body Corporate of the person referred to in clause 5(b)(5), will acquire Access from DBCTM.
Each Trading SCB undertakes not to:

1. supply or offer to supply a bundle of Secondary Capacity Trading services and an Above Rail Service;
2. supply, or offer to supply, Secondary Capacity Trading services;
3. supply, or offer to supply, Secondary Capacity Trading services at a particular price; or
4. give or allow, or offer to give or allow, a discount, allowance, rebate or credit in relation to the supply or proposed supply of Secondary Capacity Trading services by the Trading SCB,

on the condition that:

5. the person to whom the Trading SCB supplies or offers or proposes to supply the Secondary Capacity Trading services; or
6. a Related Body Corporate of the person referred to in clause 5(c)(5), will acquire Above Rail Services from a Related Body Corporate of DBCTM.

For the purpose of this clause 5, 'Access' includes any Access to be created in the future upon completion of a Terminal Capacity Expansion.

6 Confidentiality

6.1 Protection of Confidential Information provided by Access Seekers and Trading SCB Customers

DBCTM and each Trading SCB (as applicable) must keep confidential and not disclose any Confidential Information:

1. provided to DBCTM by an Access Seeker; or
2. provided to a Trading SCB by a Trading SCB Customer or collected or received by a Trading SCB in connection with Secondary Capacity Trading,

except:

3. where disclosure is required by any law or legally binding order of any court, government, semi-government authority, administrative or judicial body, or requirement of a stock exchange or regulator;
4. with the prior written consent of the relevant Access Seeker or Trading SCB Customer (as applicable);
5. where disclosure is to DBCTM’s or the Trading SCB’s (as applicable) professional advisors provided that such professional advisors are under a duty of confidentiality;
6. to the extent disclosure is necessary for notifications to brokers, insurers or claims assessors, or reasonably necessary in connection with seeking financing from a bona fide financier, or in connection with a sale of DBCT or an interest therein to a bona fide potential purchaser, provided that the broker, insurer, claims assessor or financier or potential purchaser to whom the disclosure is made is under a legal obligation to keep the information confidential;
(7) where disclosure is made to any person or body established to provide coordination in the Goonyella coal chain;

(8) where disclosure is to an expert or the ACCC to the extent necessary for resolving a dispute that arises under this Undertaking or any other dispute between:

(A) DBCTM and the Access Seeker provided that DBCTM does not disclose the Confidential Information of one Access Seeker to another Access Seeker without the first Access Seeker's consent; or

(B) a Trading SCB and the Trading SCB Customer provided that the Trading SCB does not disclose the Confidential Information of the Trading SCB Customer to another Trading SCB Customer without the first Trading SCB Customer's consent; or

(9) disclosure is otherwise allowed under a confidentiality deed poll which has been entered into by the Trading SCB in accordance with clause 6.4(a).

(b) DBCTM and each Trading SCB must otherwise only use Confidential Information provided by an Access Seeker to DBCTM or by a Trading SCB Customer to a Trading SCB (as applicable) for the purposes for which it was provided.

6.2 Restrictions on disclosure of Confidential Information to Supply Chain Businesses

Without limiting clause 6.1, DBCTM and each Trading SCB must keep confidential and not disclose to a Supply Chain Business any Confidential Information disclosed to DBCTM or the Trading SCB by an Access Holder, Access Seeker or a Trading SCB Customer, except:

(a) with the prior written consent of the relevant Access Holder, Access Seeker or Trading SCB Customer; or

(b) as may otherwise be allowed in accordance with clause 6.1.

6.3 Allowable disclosures of Confidential Information

(a) This clause 6 does not prevent:

(1) DBCTM from disclosing Confidential Information to the individuals, boards, divisions and business units specified in clause 6.3(b) (Recipient Parties); or

(2) prevent the Recipient Parties from otherwise having access to Confidential Information, to the extent such disclosure or access is reasonably necessary and provided that the Recipient Parties:

(3) have a bona fide need to have access to the Confidential Information in order to perform their usual functions;

(4) only use the Confidential Information for the purposes of DBCTM's business or the financial management of the Brookfield Group; and

(5) do not:
(A) use, or seek to use, the Confidential Information contrary to the requirements of clause 7.2; or
(B) disclose the Confidential Information to a Supply Chain Business.

(b) The following individuals, boards, divisions and business units are ‘Recipient Parties’ for the purpose of clause 6.3(a):
(1) the board of directors and senior executive leadership team of:
   (A) BIP;
   (B) BAM; or
   (C) any entity in the Brookfield Group that is Controlled by BIP or BAM other than a Supply Chain Business;
(2) the board of directors of DBCTM;
(3) the audit, information technology, financial, legal and tax divisions within the Brookfield Group; and
(4) any person providing executive support, or clerical or administrative assistance, to the individuals, boards, divisions or business units identified by clauses 6.3(b)(1) to 6.3(b)(3),

(c) A person who is a director or member of the senior executive leadership team of both:
(1) a Supply Chain Business; and
(2) an entity referred to in clause 6.3(b)(1)(C),
will not be prevented from accessing Confidential Information, and DBCTM will not be prevented from disclosing Confidential Information to that person, by virtue solely of that person’s position in, or with respect to, the Supply Chain Business.

(d) Nothing in this clause 6 prevents DBCTM or a Trading SCB from disclosing, in the ordinary course of business, financial reporting information which has been aggregated with other information of a similar nature such that it cannot reasonably be identified with, attributed to or used to identify, any Access Seeker, Access Holder or Trading SCB Customer.

6.4 Additional confidentiality obligations imposed on Trading SCB
(a) Each Trading SCB will enter into a confidentiality deed poll in favour of any Trading SCB Customer that discloses, or notifies the Trading SCB that it intends to disclose, Confidential Information to the Trading SCB.
(b) Each Trading SCB will not disclose to a Trading SCB Customer that acquires Access from the Trading SCB the identity of the Trading SCB Customer that assigned that Access (or any part thereof) to the Trading SCB.

7 Ring-fencing arrangements

7.1 No Above Rail Services by DBCTM or its Subsidiaries
DBCTM undertakes that it will not, and will ensure that its Subsidiaries do not, engage in any Above Rail Services.
7.2 Non-discrimination

(a) DBCTM will not:

(1) engage in conduct for the purpose of preventing or hindering an Access Holder’s or Access Seeker’s Access;

(2) unfairly differentiate between Access Seekers or Access Holders; or

(3) provide Access directly to:

(A) a Supply Chain Business; or

(B) a customer, or a person who is negotiating to become a customer, of a Supply Chain Business in relation to the provision of a service by the Supply Chain Business which relates to Access,

on more favourable terms than the terms on which DBCTM provides Access directly to:

(C) competitors of the Supply Chain Business referred to in clause 7.2(a)(3)(A); or

(D) persons who are, or who are negotiating to become, customers of any such competitor.

(b) DBCTM will:

(1) carry out its obligations and functions with respect to the provision of Access independently of other members of the Brookfield Group; and

(2) ensure that all transactions between DBCTM and any Supply Chain Businesses in relation to Access are conducted on an arm’s length basis.

(c) DBCTM will not engage in anti-competitive cost shifting, anti-competitive cross-subsidies or anti-competitive price or margin squeezing.

7.3 Management, directors and employees of DBCTM

(a) DBCTM will ensure that Supply Chain Businesses do not participate in the process for the appointment of DBCTM’s Chief Executive Officer or any other person to the DBCTM Executive Team.

(b) DBCTM’s Chief Executive Officer or any other person appointed to the DBCTM Executive Team:

(1) must not have management responsibility for a Supply Chain Business;

(2) may have management responsibility for a Brookfield Group business unit that is not a Supply Chain Business; and

(3) must have an independent management reporting line that does not include any person with management responsibility for a Supply Chain Business.

(c) Subject to clause 7.3(d), DBCTM’s employees must not undertake work for a Supply Chain Business.

(d) Clause 7.3(c) does not apply to any employee of DBCTM:
(1) in the audit, information technology, financial, legal or tax divisions within the Brookfield Group in connection with providing services ordinarily provided by such divisions; or

(2) that provides executive support, or clerical or administrative assistance, to the business units identified in clause 7.3(d)(1) in connection with performing their usual role.

(e) DBCTM will ensure that the DBCTM Executive Team and all of its employees are appropriately trained in respect of DBCTM’s obligations under clause 6.2 and this clause 7.

(f) The requirements of this clause 7.3 do not apply to a Trading SCB, subject to Trading SCB’s compliance with the obligations imposed on Trading SCB pursuant to this Undertaking.

(g) DBCTM’s directors must not be a director of a Supply Chain Business.

7.4 Access to office premises

(a) Subject to clause 7.4(b), DBCTM will ensure that its office premises have adequate security measures to ensure that Supply Chain Business employees are unable to access DBCTM’s office premises, unless access is authorised by a DBCTM employee or the relevant person is accompanied by a DBCTM employee, to the extent reasonably practicable.

(b) Clause 7.4(a) does not prevent any officer or employee of DBCTM who operates or otherwise undertakes work for the benefit of, or has management responsibility for, a Trading SCB from accessing DBCTM’s office premises provided that the Trading SCB complies with the obligations imposed on Trading SCB pursuant to this Undertaking.

(c) Clause 7.4(a) does not require that any offices of DBCTM be located in a different building to the building in which the offices of a Supply Chain Business are located.

7.5 Transfer of employees

(a) Secondments and transfers of employees between DBCTM and a Supply Chain Business are not permitted. This clause 7.5(a) does not prevent transfers or secondments of any employee in the audit, information technology, financial, legal or tax divisions within the Brookfield Group.

(b) DBCTM will:

(1) not seek to obtain Confidential Information from any individual that is or was previously an employee of a Supply Chain Business that was disclosed to the Supply Chain Business by an Access Holder or Access Seeker;

(2) use its reasonable endeavours to procure that any individual that is or was previously an employee or secondee of DBCTM and has become an employee or secondee of a Supply Chain Business complies with DBCTM’s obligations under clauses 6.2, 7.4 and this clause 7.5;

(3) without limiting clause 7.5(b)(2), if a DBCTM employee leaves DBCTM to work for a Supply Chain Business, they will undergo a debriefing process and be asked to sign an exit certificate; and
(4) otherwise use its reasonable endeavours to procure that the individual referred to in clause 7.5(b)(2) does not engage in any conduct that would be contrary to clause 6.2 or this clause 7.

(c) DBCTM will establish and maintain a ring fencing register for the purpose of recording the names of persons within a Related Body Corporate of DBCTM (excluding those persons gaining access to Confidential Information in accordance with clause 6.3) to whom DBCTM discloses Confidential Information of an Access Seeker or Access Holder.

7.6 Compliance measures

(a) DBCTM will implement and maintain systems and procedures to ensure that it complies with clause 6.2 and this clause 7 and will provide the ACCC with evidence of such systems and procedures if requested to do so by the ACCC.

(b) If the ACCC is of the view that DBCTM is not complying with clause 7.6(a), the ACCC may require DBCTM to conduct an audit or implement a rectification plan.

(c) DBCTM will take reasonable steps to monitor and identify any breaches of clause 6.2 and this clause 7 and must promptly notify the ACCC and any affected Access Seeker or Access Holder of the details of that breach.

7.7 Restrictions on Trading SCBs

(a) In carrying out Secondary Capacity Trading, a Trading SCB will not:

(1) engage in conduct for the purpose of preventing or hindering an Access Holder’s or Access Seeker’s Access;

(2) unfairly differentiate between Access Seekers or Access Holders; or

(3) engage in Secondary Capacity Trading with:

(A) a Supply Chain Business; or

(B) a customer, or a person who is negotiating to become a customer, of a Supply Chain Business (other than Trading SCB),

in relation to the provision of a service by the Supply Chain Business which relates to Access on more favourable terms than the terms on which the Trading SCB engages in Secondary Capacity Trading with:

(C) competitors of the Supply Chain Business; or

(D) persons who are, or who are negotiating to become, customers of any such competitor.

(b) If, at any time, a Trading SCB holds Access, DBCTM must not provide services, or procure the supply of services, to the Trading SCB in relation to train scheduling, train unloading, reclaiming and vessel loading or stockpiling and blending at DBCT with respect to the Access held by Trading SCB at the relevant time.

(c) A Trading SCB may only acquire Access from Access Holders and must not acquire, or seek to acquire, from DBCTM or any of its Subsidiaries any Access which DBCTM (or any of its Subsidiaries) has not previously granted to an Access Holder.

(d) DBCTM will not grant, or seek to grant, to a Trading SCB any Access which DBCTM has not previously granted to an Access Holder.
7.8 Compliance of the Brookfield Group

(a) DBCTM must:

(1) procure that each relevant entity within the Brookfield Group complies with the obligations imposed on the relevant entity under clause 6.2 and this clause 7 and conducts itself in a manner which allows DBCTM to comply with those clauses; and

(2) procure, by way of a deed between DBCTM and the relevant holding company of any relevant Supply Chain Business, an undertaking in favour of DBCTM, each Access Holder from time to time and the ACCC from the relevant holding company that it will ensure that the Supply Chain Business complies with the obligations imposed on the Supply Chain Business under clause 6.2 and this clause 7.

(b) For clarification, the ‘obligations imposed on’ each entity within the Brookfield Group (including, for the avoidance of doubt, each Supply Chain Business) (as referred to in clause 7.8(a)(1)) includes each act or omission that DBCTM is required to procure, or seek to take reasonable steps to procure, that such a Brookfield Group member does or does not do. Brookfield Group members are not otherwise required to comply with the obligations imposed on DBCTM as though they were imposed on that entity.

8 Queue for Access

8.1 Priority of Access applications

(a) Subject to this clause 8, the priority of an Access Seeker’s Access application that is in the queue for Access (Queue) will be determined by the date that the Access Seeker’s Access application was received by DBCTM, with an earlier Access application having priority in the Queue over any later Access application.

(b) Promptly after each occasion on which the Queue is increased or decreased, DBCTM must notify each Access Seeker in the Queue of:

(1) the annual contract tonnage applied for in priority to that Access Seeker in the Queue; and

(2) the total annual contract tonnage applied for in the Queue at that time.

(c) If an Access Seeker who is not first in the Queue (the Notifying Access Seeker) notifies DBCTM that it is prepared to enter into an access agreement consistent with its Access application (or for a lower tonnage or shorter term if there is a bona fide commercial reason for the lower tonnage or shorter term) on:

(1) the terms of the standard access agreement; or

(2) subject to clause 7.2(a), terms otherwise agreed with DBCTM,

then DBCTM must:

(3) notify all Access Seekers that are ahead of the Notifying Access Seeker in the Queue (each a Notified Access Seeker); and

(4) allow 20 Business Days after the date such notice is given for each Notified Access Seeker to deliver to DBCTM two signed copies of an
access agreement consistent with its Access application (or for a lower tonnage or shorter term if there is a bona fide commercial reason for the lower tonnage or shorter term) on the terms of the standard access agreement or, subject to clause 7.2(a), terms otherwise agreed with DBCTM, and deliver to DBCTM any required security.

(d) If, during the 20 Business Day period referred to in clause 8.1(c)(4), one or more of the Notified Access Seekers delivers to DBCTM signed copies of an access agreement and provides any security required by DBCTM, then DBCTM must:

1. give priority to such of those Notified Access Seekers that have the highest ranking in the Queue;
2. (subject to there being sufficient capacity at the relevant time) execute those copies of the access agreement; and
3. repeat that process down the Queue with each successive Notified Access Seeker (if any) which has delivered to DBCTM during the 20 Business Day period a signed access agreement and the required security.

(e) If there is still available system capacity after:

1. DBCTM has executed access agreements with all Notified Access Seekers who have delivered signed access agreements and provided security to DBCTM; or
2. negotiations between DBCTM and all other Notified Access Seekers have ceased,

then DBCTM will conclude an access agreement with the Notifying Access Seeker for that available system capacity (or that part of it which the Notifying Access Seeker requires).

8.2 Access agreements conditional on Terminal Capacity Expansion

(a) Whenever there is a Queue, DBCTM may invite an offer from each Access Seeker in the Queue to enter into an access agreement which is conditional on a Terminal Capacity Expansion occurring.

(b) DBCTM must give the invitation referred to in clause 8.2(a) to each Access Seeker in the Queue at the same time. The invitation must invite the Access Seekers to submit to DBCTM two signed copies of an access agreement which is conditional on the relevant Terminal Capacity Expansion occurring and consistent with their access application (or for a lower tonnage or shorter term if there is bona fide commercial reason for the lower tonnage or shorter term) on:

1. the terms of the standard access agreement; or
2. subject to clause 7.2(a), terms otherwise agreed with DBCTM.

(c) If, during the 20 Business Day period after the invitation is given to the Access Seekers, one or more of the Access Seekers in the Queue delivers to DBCTM such signed copies of a conditional access agreement and provides any required security, DBCTM will give priority to the Access Seeker so doing which has the highest ranking in the Queue and (subject to there being sufficient available capacity should the relevant Terminal Capacity Expansion proceed) will execute their conditional access agreement.
(d) DBCTM will then repeat the process down the Queue with each successive Access Seeker (if any) which has delivered such a signed conditional access agreement and any relevant security during the 20 Business Day period referred to in clause 8.2(c) (Conditional Access Seekers) until:

1. DBCTM considers that the capacity which is estimated to be created upon completion of the Terminal Capacity Expansion has been fully allocated; or
2. DBCTM has undertaken the process with every Conditional Access Seeker.

(e) DBCTM is not obliged to undertake any Terminal Capacity Expansion unless it agrees to do so.

8.3 Impact of funding feasibility studies on priority of Access applications

(a) If DBCTM considers that:

1. the aggregate annual contract tonnages applied for in Access applications; and
2. all other relevant circumstances,

justify a study being undertaken to determine the feasibility of a relevant Terminal Capacity Expansion, then DBCTM may request Access applicants in the Queue (starting with the first Access applicant in the Queue and proceeding to each successive Access applicant, as relevant to the contemplated increase in annual contract tonnage which would be facilitated by the Terminal Capacity Expansion under consideration) to enter into an agreement with DBCTM to fund or underwrite the funding of the reasonable and proper costs of feasibility studies in respect of that proposed Terminal Capacity Expansion.

(b) DBCTM will request that any funding of the feasibility studies referred to in clause 8.3(a) be proportionate amongst the relevant participating Access applicants, according to the respective aggregate annual contract tonnages requested in their Access applications over the first 10 years of handling under the access agreement applied for by them.

(c) If an Access applicant is requested by DBCTM to provide any funding (and security for that funding) but:

1. declines to do so; or
2. does not provide security for the amount of funding required within 20 days after being requested by DBCTM to do so,

then to the extent that any one or more of the Access applicants after that Access applicant in the Queue within 20 days thereafter agree to provide funding and provide security for funding (of at least the amount referred to in clause 8.3(a) in the proportion to which the tonnage applied for by an Access Seeker bears to the aggregate additional annual contract tonnage that will be facilitated by the contemplated Terminal Capacity Expansion), those subsequent Access applicants will, from the date on which they are legally committed to provide such feasibility funding and provide relevant security, have priority in the Queue ahead of the Access applicant which declined to provide feasibility funding or failed to provide security as referred to above.

(d) If an Access applicant obtains a higher priority in the Queue as a result of clause 8.3(c), and DBCTM elects not to proceed with the relevant feasibility
study, then the relevant Access applicant will again have the same priority in the Queue as it had as if clause 8.3(c) did not apply.

9 Review of Undertaking

9.1 Review and Amendment Notice

(a) The ACCC may review the terms of this Undertaking:
   (1) within 6 months after the Commencement Date; and
   (2) thereafter not more than once every 5 years,

to consider whether any changes to the terms of this Undertaking are necessary given the Undertaking Objective.

(b) On deciding to conduct a review pursuant to clause 9.1(a), the ACCC may invite DBCTM and other parties with an interest in the terms of this Undertaking to make submissions to the ACCC on whether any changes to the terms of this Undertaking are necessary in order to ensure that this Undertaking continues to achieve the Undertaking Objective.

(c) Following a review in accordance with clauses 9.1(a) and 9.1(b), if the ACCC is satisfied that a variation is necessary to ensure that this Undertaking continues to achieve the Undertaking Objective, the ACCC may give DBCTM a notice which:
   (1) specifies any changes that the ACCC considers should be made to this Undertaking; and
   (2) includes an explanation for those changes,

(Amendment Notice).

(d) The ACCC will, subject to removing any Confidential Information of DBCTM or any other person:
   (1) publish the Amendment Notice on the ACCC’s website; and
   (2) publicly consult on the Amendment Notice.

9.2 Proposed variations to this Undertaking following ACCC review

(a) If, after any consultation conducted by the ACCC on the Amendment Notice, the ACCC determines that changes to this Undertaking are necessary in order to ensure that this Undertaking continues to achieve the Undertaking Objective, the ACCC will give DBCTM a notice setting out the terms of a variation to this Undertaking which is acceptable to the ACCC (Variation Notice).

(b) DBCTM must:
   (1) consult with the ACCC in good faith with a view to proposing variations to this Undertaking which will address the matters stated in the Variation Notice; and
   (2) notify the ACCC within 30 days after receiving a Variation Notice whether DBCTM agrees to seek a variation to this Undertaking.

(c) If DBCTM notifies the ACCC under clause 9.2(b)(2) that it agrees to seek a variation to this Undertaking, DBCTM must, within 30 days after receiving a Variation Notice, notify the ACCC whether it agrees to seek the variation either:
(1) in the form set out in the Variation Notice; or
(2) in a form agreed between the ACCC and DBCTM following the consultations undertaken in accordance with clause 9.2(b)(1).

(d) If DBCTM gives the ACCC a notice under clause 9.2(c), then DBCTM must, on the date that DBCTM gives the notice to the ACCC:

(1) submit to the ACCC the proposed variation to this Undertaking which is referred to in the notice; and
(2) request the ACCC’s consent to the proposed variation in accordance with section 87B(2) of the Act.

9.3 Referral to expert determination

(a) If DBCTM notifies the ACCC under clause 9.2(b)(2) that it does not agree to seek a variation to this Undertaking (Variation Dispute), then DBCTM must provide written notice to the ACCC of the Variation Dispute, including:

(1) written reasons explaining why DBCTM does not propose to seek a variation to this Undertaking;
(2) the identity of a proposed independent expert who will be appointed to conduct the expert determination (Proposed Independent Expert); and
(3) details of the Proposed Independent Expert’s relevant qualifications and experience necessary to carry out the expert determination independently of DBCTM.

(Variation Dispute Notice).

(b) The Proposed Independent Expert must not be:

(1) an employee or officer of DBCTM or its Related Bodies Corporate, whether current or in the past three years;
(2) a professional adviser of DBCTM or its Related Bodies Corporate, whether current or in the past three years;
(3) a person who has a contractual relationship with DBCTM or its Related Bodies Corporate; or
(4) an employee or contractor of a firm or company referred to in clause 9.3(b)(3).

(c) Within 10 Business Days after DBCTM provides a Variation Dispute Notice to the ACCC, the ACCC will provide written notice to DBCTM informing DBCTM of its decision to agree or not agree to the Proposed Independent Expert identified by DBCTM pursuant to clause 9.3(a)(2).

(d) If DBCTM and the ACCC cannot agree on an independent expert to be appointed to determine the Variation Dispute within 20 Business Days after DBCTM provides a Variation Dispute Notice to the ACCC then DBCTM and the ACCC must:

(1) request that the President of the Queensland Bar Association determine the identity of the independent expert; and
(2) refer the Variation Dispute to the independent expert selected by the President of the Queensland Bar Association for determination.

(e) If:
(1) the President of the Queensland Bar Association declines to select the independent expert; or
(2) the Queensland Bar Association or the position of President does not exist at the relevant time,
then:
(3) DBCTM must request that the ACCC select the independent expert; and
(4) DBCTM and the ACCC must refer the Variation Dispute to that independent expert for determination.
(f) The cost of the independent expert will be borne by DBCTM unless otherwise agreed.
(g) DBCTM will use best endeavours to ensure that the independent expert is provided with:
(1) all relevant information available to DBCTM in relation to the Variation Dispute; and
(2) all reasonable assistance, in a timely manner, to enable the independent expert to make a determination in relation to the Variation Dispute Notice within 40 Business Days after the referral to that independent expert.

9.4 Determination by independent expert

(a) The ACCC and DBCTM must instruct the independent expert appointed pursuant to clause 9.3 (Independent Expert) to determine whether the ACCC’s proposed variation to this Undertaking, as set out in the Variation Notice, is necessary to ensure that this Undertaking continues to meet the Undertaking Objective.

(b) If the Independent Expert determines that the ACCC’s proposed variation to this Undertaking, as set out in the Variation Notice (with such minor modifications as the expert considers necessary), is necessary to ensure that this Undertaking continues to meet the Undertaking Objective, then DBCTM must:
(1) submit to the ACCC the proposed variation to this Undertaking in accordance with the ACCC’s proposed variation; and
(2) request the ACCC’s consent to the proposed variation in accordance with section 87B(2) of the Act,
within five Business Days after the Independent Expert gives a copy of its determination to DBCTM.

(c) If the Independent Expert determines that a variation is not necessary to ensure that this Undertaking continues to meet the Undertaking Objective then the Variation Notice will lapse with effect from the date of the Independent Expert’s determination.

(d) The Independent Expert’s determination will be final and binding on DBCTM and DBCTM must take all steps to ensure that the Independent Expert’s decision is fulfilled or otherwise given effect to.

(e) Nothing in this clause 9 prevents the ACCC from:
(1) investigating a potential breach of this Undertaking; or
(2) applying to the court for orders pursuant to section 87B of the Act in respect of a breach of this Undertaking at any time.

10 Complaints

(a) Access Seekers, Access Holders, Trading SCB Customers and any other parties with an interest in the terms of this Undertaking may submit a complaint to DBCTM, Nitro or the ACCC regarding a Brookfield Party’s compliance with this Undertaking (including, for the avoidance of doubt, the obligation of DBCTM and Nitro under clause 1.8 to procure the compliance of each Trading SCB with the obligations imposed on each Trading SCB in respect of this Undertaking).

(b) If the ACCC:

(1) receives a complaint regarding a Brookfield Party’s compliance with this Undertaking; and

(2) considers that the complaint warrants recording or investigation as a breach, or potential breach, of this Undertaking,

then it must provide a copy of the complaint to the Brookfield Party and request that the Brookfield Party take follow up action in response to the complaint which may include a request that the Brookfield Party procures the conduct of an audit of the Brookfield Party’s compliance with the relevant provision of this Undertaking in accordance with clause 11.3.

(c) If the ACCC:

(1) itself has a complaint regarding a Brookfield Party’s compliance with this Undertaking; and

(2) considers that the complaint warrants recording or investigation as a breach, or potential breach, of this Undertaking,

then it may provide a copy of its complaint to the Brookfield Party and request that the Brookfield Party take follow up action in response to its complaint which may include a request that the Brookfield Party procures the conduct of an audit of the Brookfield Party’s compliance with the relevant provision of this Undertaking in accordance with clause 11.3.

(d) If a Brookfield Party receives a complaint which claims that a breach, or potential breach, of the Brookfield Party’s obligations under this Undertaking has occurred then:

(1) the Brookfield Party will provide an acknowledgment of receipt of the complaint to the complainant; and

(2) the Responsible Manager of the Brookfield Party will determine if the complaint identifies a breach of this Undertaking.

(e) For the purposes of this clause 10, a breach of this Undertaking is a departure from this Undertaking by a Brookfield Party which may actually, or potentially, adversely impact an Access Seeker, Access Holder or Trading SCB Customer.

(f) If the Responsible Manager referred to in clause 10(d)(2) determines that the complaint identifies a breach of this Undertaking then the following actions will be initiated:

(1) the Responsible Manager will advise the chief executive officer of the relevant Brookfield Party of the breach as soon as practicable;
the Brookfield Party will submit notice of the breach to the ACCC within 5 Business Days after the Responsible Manager determines that the complaint identifies a breach of this Undertaking; and

(3) the breach will be investigated by the Responsible Manager to establish:

(A) how the breach occurred including whether there was an inadvertent or deliberate departure by the Brookfield Party from this Undertaking; and

(B) the causes and reasons for the breach including whether there was a process or technology failure,

(Breach Investigation).

(g) The Responsible Manager referred to in clause 10(d)(2) must submit to the chief executive officer of the relevant Brookfield Party a report in relation to the Breach Investigation (Breach Investigation Report) which must specify:

(1) the outcomes of the Breach Investigation; and

(2) if, pursuant to the Breach Investigation, the Brookfield Party finds that a breach of this Undertaking occurred, recommendations to prevent any re-occurrence of the breach.

(h) If the chief executive officer referred to in clause 10(g) endorses the recommendations in the Breach Investigation Report, then the recommendations must be implemented by the relevant Brookfield Party. The recommendations may include counselling and or disciplinary action if the Breach Investigation Report specifies that an employee of the relevant Brookfield Party breached this Undertaking.

(i) If, pursuant to the Breach Investigation, the Responsible Manager referred to in clause 10(d)(2) finds that a breach of this Undertaking occurred, then as soon as reasonably practicable after the relevant Brookfield Party initiates the implementation of the recommendations specified in the Breach Investigation Report, the Brookfield Party will submit a report to the ACCC which specifies:

(1) the outcomes of the Breach Investigation; and

(2) recommendations to prevent any re-occurrence of the breach.

(j) The Responsible Manager of each Brookfield Party must maintain a register which records the following information:

(1) complaints referred to in clauses 10(a), 10(b) and 10(c) which claim that a breach, or a potential breach, of this Undertaking by the relevant Brookfield Party has occurred; and

(2) when the recommendations specified in any Breach Investigation Report have been fully implemented by the relevant Brookfield Party.

11 Audit

11.1 Subject of audit

In respect of each year ending 30 June, an audit of the Brookfield Parties’ compliance during that year with their material obligations under this Undertaking will be conducted in accordance with clause 11.3.
11.2 Audit report

The Auditor will compile an audit report identifying:

(a) to the extent feasible, whether the Brookfield Parties have complied in all material respects with their material obligations under this Undertaking, and, if not, details as to the relevant non-compliance;

(b) the process adopted for the conduct of the audit;

(c) any complaints made by an Access Seeker, Access Holder or Trading SCB Customer to a Brookfield Party about the Brookfield Party’s compliance with its material obligations under this Undertaking, and the outcome of any such complaint;

(d) any disputes initiated by an Access Seeker or Access Holder under this Undertaking, and the outcome of any such dispute;

(e) any recommendations by the Auditor to improve the Brookfield Parties’ processes or reporting systems in relation to their compliance with their material obligations under this Undertaking; and

(f) the implementation and outcome of any prior recommendations by the Auditor to improve the Brookfield Parties’ processes or reporting systems in relation to their compliance with their material obligations under this Undertaking.

11.3 Conduct of audit

An audit required under clause 10(b), 10(c) or 11.1 must be conducted in accordance with the following process:

(a) the Brookfield Parties will annually appoint the auditor subject to the ACCC’s prior approval of the auditor. Where the ACCC does not approve the appointment of a particular auditor, the Brookfield Parties must nominate an alternative auditor or replacement auditor as soon as practicable after the ACCC notifies the Brookfield Parties of such non-approval;

(b) the auditor must be:
   (1) independent of the Brookfield Parties; and
   (2) appropriately qualified and experienced;

(c) the ACCC’s approval of an auditor (or replacement auditor) in accordance with clause 11.3(a) continues unless and until withdrawn in accordance with clause 11.3(d);

(d) if the ACCC is of the reasonable belief that an audit conducted by an Auditor has not been conducted to a satisfactory standard, the ACCC may, within three (3) months after completion of the audit, notify the Brookfield Parties in writing that its approval of the Auditor in relation to the next audit of those matters is withdrawn;

(e) the Auditor will have a duty of care to the ACCC in the provision of the audit and, in the event of a conflict between the Auditor’s obligations to the Brookfield Parties and its duty of care to the ACCC, the Auditor’s duty of care to the ACCC will take precedence;

(f) prior to commencing the audit the Auditor must agree an audit plan with the Brookfield Parties, document that audit plan and obtain the ACCC’s approval of the audit plan;

(g) the audit plan will:
consist of a proposed work program for the execution of the audit, including audit costs (which are payable by the Brookfield Parties);

(2) provide that the audit must:

(A) if it is being conducted in accordance with clause 11.1, be completed by 30 September immediately following the year ending 30 June in respect of which the audit is being undertaken or such later date as may be agreed between the Auditor and the Brookfield Parties; or

(B) if it is being conducted in accordance with clause 10(b) or 10(c), be completed within 3 months after the ACCC requests that Brookfield Parties procure the conduct of the relevant audit or such later date as may be agreed between the Auditor and Brookfield Parties; and

(3) provide for the establishment of an audit liaison group, comprising the Auditor, the Brookfield Parties and the ACCC, during the course of the audit to provide a forum for the resolution of any audit issues that arise;

(h) the Brookfield Parties will:

(1) provide any relevant information the Auditor reasonably requires for the purpose of conducting the audit within a nominated timeframe that is determined by the Auditor to be reasonable after consultation with the Brookfield Parties; and

(2) not interfere with, or otherwise hinder, the Auditor’s ability to carry out his or her functions under this clause 11.3;

(i) the Auditor will be required to enter into a confidentiality agreement, on terms acceptable to the Brookfield Parties, in relation to any information provided by the Brookfield Parties, to the effect that it must keep the information confidential and only use that information for the purpose of conducting the audit and completing the audit report;

(j) the Auditor will provide to the Brookfield Parties and the ACCC a copy of:

(1) the audit report (which the ACCC may publish provided that the ACCC must ensure that any specified Confidential Information is redacted in the published version of the audit report); and

(2) any letter or report from the Auditor accompanying the audit report which explains the audit findings in greater detail;

(k) the Brookfield Parties must use reasonable endeavours to implement any recommendations made by the Auditor in the audit report or any other letters or reports provided in accordance with clause 11.3(j) (except to the extent the non-implementation is approved by the ACCC) as soon as reasonably practicable after the documents are provided by the Auditor; and

(l) the Brookfield Parties must use reasonable endeavours to comply with any direction of the ACCC in relation to matters arising from the audit report as soon as reasonably practicable.
12 Obligation to procure, direction to DBCTM personnel and assistance from Related Bodies Corporate

(a) Subject to clause 7.8, where the performance of an obligation under this Undertaking requires a Related Body Corporate of DBCTM to take or refrain from taking some action, DBCTM must procure that Related Body Corporate to take or refrain from taking that action.

(b) As soon as practicable after the Commencement Date, DBCTM must direct its personnel, including its directors, employees and agents, not to do anything inconsistent with DBCTM’s obligations under this Undertaking.

13 No derogation

Nothing in this Undertaking is intended to restrict the right of the ACCC to take action under the Act for penalties or other remedies in the event that DBCTM does not fully implement or perform its obligations under this Undertaking, or in any other event where the ACCC decides to take action under the Act for penalties or other remedies.

14 Delegation by the ACCC

(a) The ACCC may, by giving DBCTM and Nitro at least 20 Business Days' notice in writing, appoint a delegate to perform the ACCC’s functions on behalf of the ACCC under clauses 10 and 11 of this Undertaking.

(b) If the ACCC appoints a delegate under clause 14(a), Nitro will pay the reasonable expenses and professional fees of the delegate which have been properly incurred by the delegate in performing the ACCC’s functions on behalf of the ACCC under clauses 10 and 11 of this Undertaking.

(c) If the ACCC withdraws the delegation referred to in clause 14(a), the ACCC must notify DBCTM and Nitro of the withdrawal within 5 Business Days after the withdrawal takes effect.

(d) The appointment of a delegate by the ACCC under clause 14(a) does not restrict the rights of DBCTM and Nitro to take action against the ACCC in connection with this Undertaking including in relation to any act or omission of the delegate in connection with this Undertaking.

(e) Despite the appointment of a delegate by the ACCC under clause 14(a):

(1) DBCTM and Nitro may continue to issue notices under this Undertaking to the ACCC using the most recently advised contact details for the ACCC; and

(2) DBCTM and Nitro will be taken to have complied with its notification obligations under this Undertaking if DBCTM and Nitro issue notices to the ACCC in accordance with the most recently advised contact details for the ACCC and otherwise comply with the notice requirements specified in this Undertaking.
15 Notices

15.1 Giving notice

(a) Any notice or communication to the ACCC pursuant to this Undertaking must be sent to:

Email address: mergers@accc.gov.au
Attention: Executive General Manager
Mergers and Acquisitions Review Division

With a copy sent to:

Email address: mergersucu@accc.gov.au
Attention: Director, Undertakings Compliance Unit
Coordination and Strategy Branch
Mergers and Acquisitions Review Division

(b) Any notice or communication to DBCTM or Nitro pursuant to this Undertaking must be sent to:

Name: Anthony Timbrell
Address: PO Box 7823, Waterfront Place, QLD, 4001
Email address: anthony.timbrell@dbctm.com.au

15.2 When a notice is received

(a) If sent by post, notices are taken to be received 3 Business Days after posting (or 7 Business Days after posting if sent to or from a place outside of Australia).

(b) If sent by email, notices are taken to be received at the time shown in the email as the time the email was sent.

15.3 Change of contact details

(a) DBCTM must notify the ACCC of a change to its contact details within 3 Business Days after the change is effected.

(b) Any notice or communication will be sent to the most recently advised contact details and, subject to clause 15.2, will be taken to be received.
16 Definitions and interpretation

16.1 Definitions

The meanings of the terms used in this Undertaking are set out below.

<table>
<thead>
<tr>
<th>Term</th>
<th>Meaning</th>
</tr>
</thead>
<tbody>
<tr>
<td>Above Rail Services</td>
<td>the provision of rail haulage services for the purpose of transporting coal to DBCT.</td>
</tr>
<tr>
<td>ACCC</td>
<td>the Australian Competition and Consumer Commission.</td>
</tr>
<tr>
<td>Access</td>
<td>access to the services to be provided by DBCTM at DBCT under an access agreement.</td>
</tr>
<tr>
<td>Access Holder</td>
<td>a party who has an entitlement to Access under an access agreement with DBCTM.</td>
</tr>
<tr>
<td>Access Seeker</td>
<td>a party seeking Access, or increased Access, to the services provided by DBCTM at DBCT.</td>
</tr>
<tr>
<td>Act</td>
<td>the <em>Competition and Consumer Act 2010 (Cth).</em></td>
</tr>
<tr>
<td>Amendment Notice</td>
<td>the meaning given in clause 9.1(c).</td>
</tr>
<tr>
<td>Annual Budget</td>
<td>the annual budget in respect of DBCT which is required to be prepared by the Operator and submitted by the Operator to DBCTM in accordance with the OMC.</td>
</tr>
<tr>
<td>Asciano</td>
<td>Asciano Limited (ACN 123 652 862).</td>
</tr>
<tr>
<td>Auditor</td>
<td>subject to clause 11, an auditor appointed by the Brookfield Parties and approved by the ACCC in accordance with clause 11.3(a).</td>
</tr>
<tr>
<td>BAM</td>
<td>the meaning given in clause 1.1(a).</td>
</tr>
<tr>
<td>Bidder’s Statement</td>
<td>the Bidder’s Statement lodged with ASIC and the ASX on behalf of Nitro Corporation on 23 November 2015.</td>
</tr>
<tr>
<td>Term</td>
<td>Meaning</td>
</tr>
<tr>
<td>-----------------------------</td>
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</tr>
<tr>
<td>Binding Offer</td>
<td>the off-market takeover bid by Nitro Corporation to acquire all of the ordinary shares in Asciano that it does not presently own, on the terms and conditions set out in section 12.1 of the Bidder’s Statement.</td>
</tr>
<tr>
<td>BIP</td>
<td>the meaning given in clause 1.1(b).</td>
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<tr>
<td>Breach Investigation</td>
<td>the meaning given in clause 10(f).</td>
</tr>
<tr>
<td>Breach Investigation Report</td>
<td>the meaning given in clause 10(g).</td>
</tr>
<tr>
<td>Brookfield Group</td>
<td>the companies that are Controlled by BAM.</td>
</tr>
<tr>
<td>Brookfield Party</td>
<td>DBCTM or Nitro, as applicable</td>
</tr>
<tr>
<td>Business Day</td>
<td>a day other than a Saturday or Sunday on which banks are open for business generally in Brisbane, Queensland.</td>
</tr>
<tr>
<td>Commencement Date</td>
<td>the meaning given in clause 2.1(a).</td>
</tr>
<tr>
<td>Conditional Access Seeker</td>
<td>the meaning given in clause 8.2(d).</td>
</tr>
<tr>
<td>Confidential Information</td>
<td>information that has not been made public and that:</td>
</tr>
<tr>
<td></td>
<td>• is by its nature confidential;</td>
</tr>
<tr>
<td></td>
<td>• was specified to be confidential by the person who supplied it; or</td>
</tr>
<tr>
<td></td>
<td>• is known by a person using or disclosing it to be confidential, but does not include information that:</td>
</tr>
<tr>
<td></td>
<td>• subsequently becomes available other than through a breach of confidence or a breach of this Undertaking;</td>
</tr>
<tr>
<td></td>
<td>• was in the lawful possession of the recipient before being provided to the recipient by the discloser;</td>
</tr>
<tr>
<td></td>
<td>• ceases to be confidential in nature by any other lawful means; or</td>
</tr>
<tr>
<td></td>
<td>• is received by the recipient from a third party free to disclose such information.</td>
</tr>
<tr>
<td>Term</td>
<td>Meaning</td>
</tr>
<tr>
<td>---------------------------------</td>
<td>----------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Control</td>
<td>the meaning given to that term in the Corporations Act and <strong>Controlled</strong> has a corresponding meaning.</td>
</tr>
<tr>
<td>Control Date</td>
<td>the date on which Nitro Corporation declares the Binding Offer to be unconditional.</td>
</tr>
<tr>
<td>Corporations Act</td>
<td>the <em>Corporations Act 2001 (Cth).</em></td>
</tr>
<tr>
<td>DBCT</td>
<td>the meaning given in clause 1.1(c).</td>
</tr>
<tr>
<td>DBCT Holdings</td>
<td>DBCT Holdings Pty Limited (ACN 096 395 783).</td>
</tr>
<tr>
<td>DBCTM Executive Team</td>
<td>the team comprising DBCTM’s Chief Executive Office and his or her direct reports and any other person nominated by DBCTM’s Chief Executive Officer.</td>
</tr>
<tr>
<td>DBCT Trustee</td>
<td>DBCT Investor Services Pty Ltd (ACN 052 156 082) as trustee of the DBCT Trust.</td>
</tr>
<tr>
<td>DBCTM</td>
<td>DBCT Management Pty Ltd (ACN 097 698 916).</td>
</tr>
<tr>
<td>Existing OMC</td>
<td>the meaning given in clause 3(c).</td>
</tr>
<tr>
<td>Independent Expert</td>
<td>the meaning given in clause 9.4(a).</td>
</tr>
<tr>
<td>Nitro</td>
<td>Nitro Holdings No 1 Pty Ltd (ACN 608 022 260).</td>
</tr>
<tr>
<td>Nitro Corporation</td>
<td>Nitro Corporation Pty Ltd (ACN 607 605 701).</td>
</tr>
<tr>
<td>Notified Access Seeker</td>
<td>the meaning given in clause 8.1(c)(3).</td>
</tr>
<tr>
<td>Notifying Access Seeker</td>
<td>the meaning given in clause 8.1(c).</td>
</tr>
<tr>
<td>Term</td>
<td>Meaning</td>
</tr>
<tr>
<td>----------------------------------</td>
<td>-------------------------------------------------------------------------</td>
</tr>
<tr>
<td>NQBP</td>
<td>the meaning given in clause 1.4(b).</td>
</tr>
<tr>
<td>OMC</td>
<td>the ‘Operation and Maintenance Contract’ between DBCTM, Dalrymple Bay Coal Terminal Pty Ltd (ACN 010 268 167) and DBCT Investor Services Pty Limited (ACN 052 156 082) dated 9 April 1999 as amended and restated on 4 December 2012 (with effect from 1 November 2012) in relation to the operation of DBCT.</td>
</tr>
<tr>
<td>Pacific National</td>
<td>Pacific National Pty Ltd (ACN 098 060 550).</td>
</tr>
<tr>
<td>Proposed Acquisition</td>
<td>the meaning given in clause 1.3(a).</td>
</tr>
<tr>
<td>Proposed Independent Expert</td>
<td>the meaning given in clause 9.3(a)(2).</td>
</tr>
<tr>
<td>PSA</td>
<td>the meaning given in clause 1.4(b).</td>
</tr>
<tr>
<td>QCA</td>
<td>the Queensland Competition Authority.</td>
</tr>
<tr>
<td>QCA Act</td>
<td>the meaning given in clause 1.5(a).</td>
</tr>
<tr>
<td>Queue</td>
<td>the meaning given in clause 8.1(a).</td>
</tr>
<tr>
<td>Recipient Parties</td>
<td>the meaning given in clause 6.3(a).</td>
</tr>
<tr>
<td>Related Body Corporate</td>
<td>the meaning given in the Corporations Act.</td>
</tr>
<tr>
<td>Replacement OMC</td>
<td>the meaning given in clause 3(c)(1).</td>
</tr>
<tr>
<td>Responsible Manager</td>
<td>the person that is the responsible manager within DBCTM or Nitro (as applicable) with the relevant delegated authority, as the context requires.</td>
</tr>
<tr>
<td>Term</td>
<td>Meaning</td>
</tr>
<tr>
<td>------------------------------------------</td>
<td>------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td><strong>Secondary Capacity Trading</strong></td>
<td>the carrying out of any one or more of the following activities:</td>
</tr>
<tr>
<td></td>
<td>• acquiring contracted Access from Access Holders;</td>
</tr>
<tr>
<td></td>
<td>• aggregating contracted Access which has been acquired from Access Holders; and</td>
</tr>
<tr>
<td></td>
<td>• selling the contracted Access which has been acquired from Access Holders to Access Seekers or Access Holders.</td>
</tr>
<tr>
<td><strong>Subsidiary</strong></td>
<td>the meaning given in the Corporations Act.</td>
</tr>
<tr>
<td><strong>Supply Chain Business</strong></td>
<td>an entity (or group of entities) in the Brookfield Group which:</td>
</tr>
<tr>
<td></td>
<td>• provides, or proposes to provide, above rail services in Queensland; or</td>
</tr>
<tr>
<td></td>
<td>• trades in capacity at DBCT.</td>
</tr>
<tr>
<td><strong>Terminal Capacity Expansion</strong></td>
<td>the construction, upgrade, refinement, purchase, installation or erection of new works or items or modifications of existing works or items intended to materially increase the capacity of DBCT.</td>
</tr>
<tr>
<td><strong>Terminal Regulations</strong></td>
<td>the regulations in force from time to time governing procedures for the operation of DBCT and provision of services by DBCTM to Access Holders.</td>
</tr>
<tr>
<td><strong>Trading SCB</strong></td>
<td>a Supply Chain Business that solely engages in the trading of secondary capacity at DBCT and which includes, as at the Commencement Date, Brookfield Port Capacity Pty Ltd (ACN 134 741 567).</td>
</tr>
<tr>
<td><strong>Trading SCB Customer</strong></td>
<td>a customer, or any person who is negotiating to become a customer of, a Trading SCB in respect of Secondary Capacity Trading.</td>
</tr>
<tr>
<td><strong>Undertaking</strong></td>
<td>this document (including any schedules or annexures to this document) as varied from time to time under section 87B of the Act.</td>
</tr>
<tr>
<td><strong>Undertaking Objective</strong></td>
<td>the objective of this Undertaking as described in clause 1.7(a).</td>
</tr>
<tr>
<td><strong>Variation Dispute</strong></td>
<td>the meaning given in clause 9.3(a).</td>
</tr>
</tbody>
</table>
16.2 Interpretation

In the interpretation of this Undertaking, the following provisions apply unless the context otherwise requires:

(a) a reference to this Undertaking includes all of the provisions of this document including its schedules;

(b) headings are inserted for convenience only and do not affect the interpretation of this Undertaking;

(c) if the day on which any act, matter or thing is to be done under this Undertaking is not a Business Day, the act, matter or thing must be done on the next Business Day;

(d) a reference in this Undertaking to any law, legislation or legislative provision includes any statutory modification, amendment or re-enactment, and any subordinate legislation or regulations issued under that legislation or legislative provision;

(e) a reference in this Undertaking to any company includes a company over which that company is in a position to exercise control within the meaning of section 50AA of the Corporations Act;

(f) a reference in this Undertaking to any agreement or document is to that agreement or document as amended, novated, supplemented or replaced;

(g) a reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Undertaking;

(h) an expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency;

(i) where a word or phrase is given a defined meaning, another part of speech or other grammatical form in respect of that word or phrase has a corresponding meaning;

(j) a word which denotes the singular also denotes the plural, a word which denotes the plural also denotes the singular, and a reference to any gender also denotes the other genders;

(k) a reference to the words ‘such as’, ‘including’, ‘particularly’ and similar expressions is to be construed without limitation;

(l) a construction that would promote the purpose or object underlying this Undertaking (whether expressly stated or not) will be preferred to a construction that would not promote that purpose or object;

(m) material not forming part of this Undertaking may be considered to:
(1) confirm the meaning of a clause is the ordinary meaning conveyed by the text of the clause, taking into account its context in this Undertaking and the competition concerns intended to be addressed by this Undertaking and the clause in question; or

(2) determine the meaning of the clause when the ordinary meaning conveyed by the text of the clause, taking into account its context in this Undertaking and the purpose or object underlying this Undertaking, leads to a result that does not promote the purpose or object underlying this Undertaking;

(n) in determining whether consideration should be given to any material in accordance with clause 16.2(m), or in considering any weight to be given to any such material, regard must be had, in addition to any other relevant matters, to the:

(1) effect that reliance on the ordinary meaning conveyed by the text of the clause would, have (taking into account its context in this Undertaking and whether that meaning promotes the purpose or object of this Undertaking); and

(2) need to ensure that the result of this Undertaking is to completely address any ACCC competition concerns;

(o) the ACCC may authorise the Mergers Review Committee, a member of the ACCC or a member of the ACCC staff, to exercise a decision making function under this Undertaking on its behalf and that authorisation may be subject to any conditions which the ACCC may impose;

(p) in performing its obligations under this Undertaking, DBCTM will do everything reasonably within its power to ensure that its performance of those obligations is done in a manner which is consistent with promoting the purpose and object of this Undertaking; and

(q) a reference to:

(1) a thing (including, but not limited to, a chose in action or other right) includes a part of that thing;

(2) a party includes its successors and permitted assigns; and

(3) a monetary amount is in Australian dollars.
## Schedule 1

### Terms of operation of maintenance contract

<table>
<thead>
<tr>
<th>Term</th>
<th>Summary of term</th>
</tr>
</thead>
<tbody>
<tr>
<td>Parties</td>
<td>DBCT Management Pty Ltd (DBCTM), DBCT Investor Services Pty Limited as trustee of the DBCT Trust (DBCT Trustee) and the operator (Operator). The substantive obligations under the operation and maintenance contract (Contract) are imposed on DBCTM and the Operator.</td>
</tr>
<tr>
<td>Ownership of operator</td>
<td>The Operator acknowledges that any entity that is a party to an access agreement with DBCTM with respect to capacity at the Dalrymple Bay Coal Terminal (Terminal) has a right under the constitution of the Operator to become a shareholder of the Operator.</td>
</tr>
<tr>
<td>Initial Term</td>
<td>The Contract will expire on the specified expiry date unless terminated earlier. Other than for default of DBCTM (refer further below), the Operator cannot terminate the Contract before this date. DBCTM can terminate for convenience by giving 5 years’ prior notice of termination.</td>
</tr>
<tr>
<td>Extension of the Initial Term</td>
<td>If the specified expiry date has been reached and neither party has exercised a right of termination, the Contract will be extended indefinitely. During this time:</td>
</tr>
<tr>
<td></td>
<td>• If DBCTM wishes to terminate the Contract other than for the Operator’s default, DBCTM must give 5 years’ prior notice of termination; and</td>
</tr>
<tr>
<td></td>
<td>• If an access undertaking is in place and the Operator wishes to terminate other than for DBCTM’s default, the Operator can terminate with effect from earlier of expiry of the access undertaking and 5 years after the date that a notice of termination is given. The notice of termination must be given at least 2 years before the effective date of termination.</td>
</tr>
<tr>
<td>Fundamental intentions of the parties</td>
<td>The parties’ intentions include (amongst others):</td>
</tr>
<tr>
<td></td>
<td>• The Operator will be responsible for day-to-day operation and maintenance of the Terminal; and</td>
</tr>
<tr>
<td></td>
<td>• Subject only to the express reservations in the Contract (for example in relation to default by the Operator), DBCTM will not interfere in the day-to-day operation and maintenance of the Terminal.</td>
</tr>
<tr>
<td>Operator’s</td>
<td>The Operator is appointed to perform the services. The Operator’s</td>
</tr>
<tr>
<td>Term</td>
<td>Summary of term</td>
</tr>
<tr>
<td>------</td>
<td>----------------</td>
</tr>
<tr>
<td>appointment</td>
<td>appointment is as independent contractor and not as agent of DBCTM. The services include all things necessary for the operation, maintenance and management of the Terminal.</td>
</tr>
</tbody>
</table>
| Operational Services to be performed by the Operator | Operation of the Terminal specifically includes the following services:  
- train scheduling and ordering;  
- train unloading;  
- stockpile management and reclamation;  
- coal blending if required by users of the Terminal;  
- vessel ordering; and  
- vessel loading (which is to be conducted in order of vessel arrival, subject to there being relevant coal at the Terminal and all prerequisites to loading having been complied with).  
These services will be further detailed in an Appendix to the specification included in the Contract.  
In conducting the operational services, the Operator is required to, insofar as is practicable:  
- coordinate train unloading with vessel loading;  
- carry out train unloading in accordance with (among other things) shipping programs; and  
- carry out stockpile management and handling to minimise delay to train unloading and vessel loading. |
| Maintenance Services to be performed by the Operator | The Operator must maintain the Terminal and each component of the Terminal at its operating capacity as specified in the Contract. This specifically includes:  
- planned maintenance and repair in accordance with an annual operation, maintenance and capital plan (prepared by the Operator);  
- unplanned maintenance and repair as required (for example following equipment breakdown);  
- condition monitoring and maintenance management; and  
- upkeep of the Terminal, including activities such as maintenance of access roads and dust suppression. |
| Standard of Operator’s performance | The Operator must perform the services in accordance with, among other things:  
- good operating and maintenance practice; and  
- so as to achieve the best and most cost effective outcome, taking account of certain specified factors.  
These obligations are subject to DBCTM having expended appropriate capital if relevant. |
<table>
<thead>
<tr>
<th>Term</th>
<th>Summary of term</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>The Operator must provide everything that is necessary for performance of the services, other than any things specified in the Contract as to be provided by DBCTM. The Operator’s supply obligations include the supply of water and power to the Terminal. The Operator is also required to supply and maintain spares for the Terminal. The Operator can subcontract parts of the services without DBCTM consent, however remains liable for the standard of performance. The Operator is specifically required to supervise the execution of all services.</td>
</tr>
</tbody>
</table>
| Payments to the Operator | DBCTM pays the Operator the actual costs of performing the services (that is, operating and maintaining the Terminal in accordance with the Contract) plus a margin. Payments are made monthly, with potential later adjustments to ensure that the Operator has been reimbursed in accordance with the Contract. The Operator is also entitled to be paid:  
  • reimbursement of capital expended by the Operator, subject to certain conditions;  
  • consulting fees in respect of capital works (refer further below in relation to capital works); and  
  • a project management commission if the Operator project manages a non-expansion capital project.  
The Contract acknowledges that it is intended that amounts paid to the Operator will be recovered by DBCTM from users under their user agreements. The Operator has obligations to assist DBCTM to facilitate this pass through. |
<p>| Terminal Regulations | Both the Operator and DBCTM are required to comply with the Terminal regulations. The Operator may propose amendments to the Terminal regulations for DBCTM's consent, which DBCTM must not unreasonably withhold but which will be subject to the requirements of the access undertaking in relation to such amendments. DBCTM must require each Terminal user pursuant to their user agreement(s) to comply with the Terminal regulations as applicable from time to time. |
| Access to the Terminal | DBCTM grants the Operator a licence to use, occupy and control the Terminal as is necessary to perform the services in accordance with the Contract. The Operator must give DBCTM and its personnel such access to the Terminal as they reasonably require from time to time. However, such access is subject to compliance with the Operator’s applicable procedures (including safety requirements). DBCTM must also take reasonable measures not to impede the Operator’s performance of the services. |</p>
<table>
<thead>
<tr>
<th>Term</th>
<th>Summary of term</th>
</tr>
</thead>
<tbody>
<tr>
<td>Care of and risk in the Terminal</td>
<td>The Operator has care of the Terminal and assumes the risk of damage to the Terminal and all things located at it (including coal). The Operator must insure the Terminal in accordance with the insurance program detailed in the Contract.</td>
</tr>
<tr>
<td>Safety and environmental compliance</td>
<td>The Operator has primary responsibility for the management of safety at the Terminal and for compliance with legal requirements with respect to safety at the Terminal.</td>
</tr>
<tr>
<td></td>
<td>The Operator also has primary responsibility for the compliance of the Terminal with all relevant environmental laws and requirements. Among other things, the Operator is required to obtain and maintain all required approvals from authorities with respect to the performance of the services.</td>
</tr>
<tr>
<td>Records and audits</td>
<td>The Operator must maintain records (including financial records) relating to the services.</td>
</tr>
<tr>
<td></td>
<td>From time to time, DBCTM may appoint a suitably qualified person to conduct an audit of the records maintained by the Operator and/or of the Operator’s relevant systems and procedures.</td>
</tr>
<tr>
<td>Continuous improvement</td>
<td>The Operator must work with DBCTM in undertaking reviews to identify and develop options for improved efficiency of the Terminal as well as of the coal transport chain. The parties have coordination obligations in relation to the implementation of the findings of such reviews.</td>
</tr>
<tr>
<td>Capital works</td>
<td>Either the Operator or DBCTM can propose that capital works are undertaken. The Operator has obligations to participate in planning for proposed capital works. The Operator is entitled to be paid consulting fees (which are separate and additional to its usual monthly payments) for this participation.</td>
</tr>
<tr>
<td></td>
<td>If capital works are to proceed, the Operator can agree to effect the capital works itself or DBCTM can procure the capital works using another contractor.</td>
</tr>
<tr>
<td></td>
<td>There is a handover process which applies once capital works have been completed. From the time of handover, the capital works become part of the Terminal and the Operator’s obligations to provide the services extend to include that part of the Terminal.</td>
</tr>
<tr>
<td>Force majeure</td>
<td>The Contract defines events of force majeure. If a party is affected by such an event, it may be granted relief from performance of its affected obligations under the Contract, subject to compliance with certain requirements.</td>
</tr>
<tr>
<td>Dispute resolution</td>
<td>The Contract specifies a dispute resolution procedure which includes the following provisions:</td>
</tr>
</tbody>
</table>
### Term

<table>
<thead>
<tr>
<th>Summary of term</th>
</tr>
</thead>
<tbody>
<tr>
<td>• If a dispute between DBCTM and the Operator arises out of or in connection with the Contract, then either party may give the other party a notice of dispute.</td>
</tr>
<tr>
<td>• Neither party may commence any court proceedings or arbitration in respect of any dispute which is the subject of a notice of dispute until the party has complied with the dispute resolution procedure specified in the Contract.</td>
</tr>
<tr>
<td>• Within 14 days after service of a notice of dispute, the senior executives of each party must confer at least once to attempt to resolve the dispute and failing resolution, to consider and, if possible, agree on methods of resolving the dispute by other means.</td>
</tr>
<tr>
<td>• If the dispute cannot be resolved by the senior executives after a further period of 14 days or if at any time either party considers that the other party is not making reasonable efforts to resolve the dispute, either party may refer the dispute to conciliation.</td>
</tr>
<tr>
<td>• If the dispute is not resolved by conciliation within a period of 14 days after nomination of the conciliator, the parties may agree to refer the dispute to arbitration or either party may pursue any other means of dispute resolution including litigation.</td>
</tr>
<tr>
<td>• The Contract will specify procedures with respect to conciliation and arbitration.</td>
</tr>
<tr>
<td>• The dispute resolution procedure does not prevent any party from seeking urgent interlocutory or declaratory relief from a court of competent jurisdiction where, in that party’s reasonable opinion, that action is necessary to protect its rights.</td>
</tr>
</tbody>
</table>

__________

### Change in control of the Operator

<table>
<thead>
<tr>
<th>There is a deemed assignment of the Contract if:</th>
</tr>
</thead>
<tbody>
<tr>
<td>• a person who is not a user or its related body corporate acquires an interest in the Operator; or</td>
</tr>
<tr>
<td>• a user or its related body corporate acquires an interest in the Operator which exceeds its proportionate usage of the Terminal.</td>
</tr>
</tbody>
</table>

An assignment of the Contract by the Operator is a breach of the Contract unless DBCTM has given its prior written approval.

__________

### Termination for default by either party

| Each party has termination rights if the other commits a relevant default under the Contract. The precise rights differ between the Operator and DBCTM, but in each case allow the non-defaulting party to require rectification or require the defaulting party to show cause, before the non-defaulting party’s right to terminate the Contract is triggered. |
Executed as an undertaking

DBCTM

Executed by DBCT Management Pty Ltd (ACN 097 698 916) in accordance with section 127 of the Corporations Act 2001 (Cth)
by

sign here ►
Company Secretary/Director

print name ___________________________
date ___________________________

sign here ►
Director

print name ___________________________
date ___________________________

Nitro

Executed by Nitro Holdings No 1 Pty Ltd (ACN 608 022 260) in accordance with section 127 of the Corporations Act 2001 (Cth)
by

sign here ►
Company Secretary/Director

print name ___________________________
date ___________________________

sign here ►
Director

print name ___________________________
date ___________________________
ACCC

Executed by
the Australian Competition and Consumer Commission
pursuant to section 87B of the
Competition and Consumer Act 2010 (Cth)
by

sign here ►

on behalf of the Australian Competition and
Consumer Commission

print name

date