2018 Ports Access and Pricing Review

Response to Draft Report

Contents

Definitions

Act	the *Ports Management Act 2016* (NT)
Access Policy	the access policy for the Port approved by the Commission on 30 June 2017
Commission	the Utilities Commission of the Northern Territory
Draft Report	*The 2018 Ports Access and Pricing Review - Draft Report* released by the Commission on 1 August 2018
Issues Paper	the *2018 Ports Access and Pricing Review Issues Paper* released on 22 February 2018 by the Commission
DPO (or **Operator**)	Darwin Port Operations Pty Ltd (ABN 62 603 472 788), the private port operator for the Port
ESCOSA	Essential Services Commission of South Australia
GHD	GHD Pty Ltd, as advisor to the Commission in relation to the review of the Regime
Government	means the Northern Territory government
Landbridge	Landbridge Port Pty Ltd (ACN 606 908 945) as trustee for the Landbridge Darwin Port Lessee Trust, the lessee of the Port and a related body corporate of DPO
Lease	the lease between the Government and Landbridge dated 16 November 2015 being a 99 year concurrent lease of port land and improvements at East Arm Wharf and Fort Hill Wharf
MSB	The oil and gas facility at the Port known as the Marine Supply Base, which is currently operated by ASCO Australia Pty Ltd
Port	the Port of Darwin
Prescribed Services	means the services prescribed by Regulation 12(2), being specifically: (a) providing or allowing for, access for vessels to the Port; (b) providing facilities for loading or unloading vessels at the Port; (c) providing berths for vessels at the Port; (d) providing or facilitating the provision of pilotage services in a pilotage area within the Port; and (e) allowing entry of persons and vehicles to any land on which Port facilities are located.
Regime	the regulatory framework for the Port, comprising the Act, Regulations and the Access Policy and associated determinations

Regulations	*Ports Management Regulations* (as in force from 16 March 2016)
TEU	Twenty foot equivalent unit – a standard measure for cargo volumes. The dimensions of one TEU are equal to a standard shipping container that is 20 feet long and 8 feet high (or approximately 6.096m x 2.45m).
UC Act	The *Utilities Commission Act 2016* (NT)

1 Introduction

DPO welcomes the release of the Draft Report, and the opportunity to provide further responses to the Commission's preliminary findings as set out in that Draft Report.

As noted in the Draft Report, the review process to date has included extensive engagement and information exchange between members of the Commission and DPO's personnel, and DPO is grateful for the Commission's constructive approach to the review process so far.

By way of an initial comment, DPO endorses the Commission's key conclusions in the Draft Report in response to the questions outlined in paragraphs 123(2)(b)-(c) of the Act, which are summarised in the report's Executive Summary as follows:

- at this time, there is no need to change the form of regulatory oversight for access so the negotiate/arbitrate model should continue; and
- at this time, there is no need to change the form of regulatory oversight for prices so price monitoring should continue.

In DPO's view, the above conclusions (which are consistent with DPO's submissions in response to the Issues Paper) are also strongly supported by the Commission's findings in the body of the Draft Report. Accordingly, DPO sees no reason for any of the above findings to change in the Commission's final report to the Minister.

Proposed changes in the Draft Report

DPO notes that in relation to the question directed by paragraph 123(2)(d) of the Act – regarding the need for any amendments to the regulatory regime under the Act and the Regulations – the Commission's initial response is as follows:

> *… the commission has identified several deficiencies in the current regime that suggest the need for amendment to part 11 of the PM Act and regulations to ensure the regime is effective, fit for purpose and better meets its legislative objectives.*[1]

The majority of this submission deals with DPO's views on the various proposals for prospective change to the Act and the Regulations that are canvassed in the Draft Report.

There are some proposals for changes to the regime that DPO considers:

(a) are not supported by evidence in the Draft Report which indicates any compelling reason to make a change to the current regime;

(b) are lacking in detail as to how they would (or could) be implemented; and/or

(c) would be difficult, impractical, complex or expensive to implement.

Other changes identified by DPO

In addition to the changes that DPO has concerns about, DPO has identified some additional changes to the Act and the Regulations that could be made to improve the overall operation of the regime, which are also outlined in this submission.

While a number of these could be classified as "minor" or "technical" amendments, they are outlined in this submission for the Commission's consideration, in the event that an

[1] Draft Report, p 6

opportunity arises to introduce amendments to the Act and Regulations as a result of the final conclusions from the Commission's review.

In keeping with the productive exchange of information and dialogue following the release of the Issues Paper, DPO anticipates supplementing some of the points raised in this response with further information in due course. In addition however, DPO would welcome the opportunity to discuss any questions from the Commission in relation to this submission or provide further input upon request.

2 Preliminary observations

As indicated above, DPO welcomes the release of the Draft Report and the opportunity to make further submissions in response to the issues raised in it.

Overall, DPO considers the Draft Report to be generally correct in its findings in relation to the operation of the Port and the Regime since DPO commenced operating the Port under the Regime.

In particular, the Draft Report confirms DPO's submissions in response to the Issues Paper that the Regime has been operating as expected, and there is no evidence to suggest that market power has been exercised, or any additional constraints are needed on the possible exercise of market power by DPO. Specifically, on the question of pricing for, and access to, Prescribed Services at the Port, DPO considers that it has been able to satisfactorily meet the requirements of its major customers and other Port users since commencement of the Lease.

"Clause 6 Principles"

It is apparent from the Draft Report that many of the proposed changes are prompted by the Commission's approach of comparing the current Regime to the principles for access to services provided by significant infrastructure facilities set out in the Competition Principles Agreement[2] (referred to in the Draft Report as the "Clause 6 Principles").

As DPO noted in response to the Issues Paper, there are a number of reasons why the Regime may not precisely mirror the Clause 6 Principles, including the following:

- there has been a deliberate decision by the Government to establish a 'light-handed' regulatory framework in relation to the Port;
- the Port is a developing port, and the Regime needs to allow DPO sufficient flexibility to develop and grow the facilities and throughput at the Port;
- the Port may not necessarily meet the applicable criteria for declaration under the National Access Regime under Part IIIA of the *Competition and Consumer Act 2010* (Cth) (for reasons that include it may not satisfy the test for a facility of 'national significance')[3]; and
- no application for certification of the access regime at the Port has been made.

In relation to the question of how to assess 'light-handed' regulatory regimes, DPO notes the Commission's citation of ACCC Chairman Rod Sims' observations about the regulation of infrastructure.[4] However, the further context of the Chairman's speech is that it is directed

[2] Council of Australian Governments - *Competition Principles Agreement – 11 April 1995* (as amended to 13 April 2007)
[3] As that test now applies pursuant to the meaning of the declaration criteria set out in section 44CA of the *Competition and Consumer Act 2010* (Cth), following the amendments that took effect on 6 November 2017.
[4] Speech by Rod Sims, Gilbert + Tobin Regulated Infrastructure Policy Workshop (29 October 2015). https://www.accc.gov.au/speech/how-did-the-light-handed-regulation-of-monopolies-become-no-regulation

towards what the Chairman described as "natural monopolies", citing examples such as the Port of Newcastle – one of the largest coal export facilities in the world.

Plainly, facilities such as the Port of Newcastle are not comparable to the operations or regulatory requirements at the Port.

Further, DPO agrees with the Commission's observation that:

> "…*the question should not be limited to a measure of light-handedness, as even the most light-handed regimes still need to be effective and fit for purpose.*"[5]

On any measure, DPO believes the conclusions in the Draft Report about the operation of the Regime to date demonstrate clearly that it is meeting the criteria for "effectiveness", and the Regime remains "fit for purpose".

In its initial response to the Issues Paper, DPO noted the observations of ESCOSA in its 2017 review of access and price regulation of ports in South Australia, which found that while port operators may have had the ability to exercise market power, they had not been doing so.

As a consequence, ESCOSA found a lack of grounds for modifying the regimes because there appeared to be no major problems, and there would be time and financial costs associated with introducing more stringent regulatory regimes, and [6]ESCOSA stated that:

> "*If there is no evidence of the exercise of market power, it would be difficult for the Commission to recommend further consumer protections than those already afforded under the regimes.*"[7]

In DPO's view, while the clause 6 principles are a helpful comparator for the purpose of analysing the framework and substance of the existing Regime, DPO does not agree that it is necessary or desirable to make amendments to what is still a relatively nascent regulatory model, purely for the purposes of "ticking every box"; particularly in circumstances where the clause 6 principles have been framed with much more significant infrastructure facilities in mind.

Market conditions

The Draft Report also makes a number of observations about the nature of the Port, the markets it operates in, and its relative competitive position.

In DPO's view, comments regarding the degree of "market power" the Port possesses may be overstated. Contrary to the view expressed in finding 5(a) that DPO has "substantial market power", DPO considers that it faces competitive pressure both within the Northern Territory and from elsewhere in Australia.

This includes substantial competition for services to business in central Australia that comes from the ports operated by Flinders Ports in South Australia, as well as ports in Wyndham and Broome in the case of customers from the north-western part of Australia. In addition, the Port faces competition from road and rail services, often in combination with other ports located within Australia.

The Port's infrastructure is not unique in northern Australia, and DPO competes daily for trade, including cattle exports, bulk material imports and exports as well as containers and other commodities.

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[5] Draft Report [4.5] p 24-25
[6] ESCOSA – *2017 Ports Access and Pricing Review* – Final report (September 2017) section 3.2
[7] ESCOSA (above, note 6) at 3.2 (p14)

By virtue of its location, the Port is one of the most geographically remote facilities in Australia, and the costs of transport to the Port can be a deterrent for customers. Even in the case of goods destined for the Asia region, these transport costs will often outweigh the benefit of shorter shipping times. For export destinations in Europe or the Americas, the Port offers no material benefits for shipping time, so competitive pricing and service quality are the only means with which the Port could attract such customers.

DPO is aware of numerous examples of potential port users located in the Northern Territory or otherwise in northern Australia who have (or are currently) exploring options other than the Port for their export requirements. In DPO's view, there is only a small number of users for whom the Port represents the only viable option for export shipping requirements.

In the case of dry bulk cargo in particular, DPO believes it is incorrect to state that there are no substitutes for the Port. To the contrary, DPO understands that customers seeking shipping for dry bulk cargo will weigh the costs of transportation against the benefits of shorter shipping time, with the cost of the cargo in question often being a critical determinant. While the back loading costs identified in the Draft Report are a consideration for customers in relation to Flinders Ports in particular, DPO believes these costs are less influential than the savings in transport costs that users can achieve in relation to the costs of container shipping to the South Australian ports.

DPO is also aware of mining developments that are exploring alternative options such as Roper Bar as a potential alternative export point, to avoid the transport costs associated with shipping to the Port (but not in any way influenced by the charges at the Port itself).

Insofar as barriers to entry are concerned, the observations in the Draft Report fail to take into account the example of the increased capabilities at Port Melville[8] (approximately 60 nautical miles from Darwin), which is now handling some bulk fuel supplies that were previously shipped to the Port.

3 Leasing

Changes to Regulation 12(2) – the exemption for leased premises

Section 6.3 of the Draft Report is focussed on the exemption granted by Regulation 12(2) of the Regulations, which effectively excludes any services provided by or from leased premises from being subject to the regime for "Prescribed Services".

Regulation12(2) operates to preclude services provided at the MSB from being Prescribed Services. The MSB is currently operated by ASCO Australia Pty Ltd under a concession arrangement which was entered into before the Lease of the Port was granted.

As correctly noted in the Draft Report, it was the Government's intention that services provided by the MSB would be excluded from the definition of Prescribed Services.

However, it does not necessarily follow that Regulation 12(2) applying to any other premises leased by the Operator to a private party is an "unintended consequence"[9] of the Regime, as suggested in the Draft Report.

To the contrary, the wording of Regulation 12(2) does not refer to the MSB specifically, and instead relates to "*any service provided under a lease granted by the private port operator*".

As DPO has already explained to the Commission, although the effect of Regulation 12(2) is to exclude any services supplied by a private lessee from the definition of "Prescribed

[8] https://www.ntportandmarine.com/about-us/port-melville/
[9] Draft Report, p 90

Services", no such lease can be entered into by DPO unless it complies with the requirements of both the Access Policy and the Lease.

While DPO agrees that Regulation 12(2) is not intended to be used as a mechanism to avoid the application of the Regime to the Prescribed Services, it should be noted that the practical likelihood of such an outcome is very low. As the lessee and principal obligor under the Lease, if DPO were to grant a private party a lease over a substantial operational component of the Port, DPO would be legally exposed under the Lease for any actions by the lessee that failed to comply with the requirements of the Lease.

Recommendations are problematic

From a practical perspective, DPO is also concerned that the recommendations in the Draft Report – which propose an effective "sunset" date for Regulation 12(2) and would require the MSB to cease being exempted from the Regime upon expiry of the current agreement – are proposals which lack definition and would present significant practical problems for implementation.

Chief amongst these issues is the question of how to ensure a private port lessee complies with the requirements of the Regime in the provision of any Prescribed Services. While DPO remains responsible for ensuring compliance with the Regime, a lease granting a private operator with exclusive possession of an area within the Port will necessarily limit the ability of DPO to monitor and enforce a lessee's compliance with the requirements of the Regime.

DPO believes a more workable proposal may be to require the Operator to consult with the Commission before renewing the agreement for the MSB, and otherwise before entering into a lease over a facility or berth where it is proposed the lessee would supply third parties with services of the kind that would constitute Prescribed Services under Regulation 12(1)(a)-(c) instead of the Operator.

4 Form of regulatory oversight

As noted above, DPO agrees with and accepts the following recommendations from the Draft Report:

7(e) It is the commission's recommendation an effective, well-informed negotiate/arbitrate model should continue as the form of regulatory oversight for access to prescribed services for the next review period.

7(g) The commission recommends at this time that price monitoring continues as the form of price regulation for prescribed services.

7(j) At the present time, the commission does not recommend any legislative amendment to strengthen its powers regarding the establishing of a different form of price regulation.

Recommendation 7(f) – negotiate/arbitrate model to be specified in the Act

As discussed above, DPO supports the ongoing use of a negotiate/arbitrate model, which allows access arrangements to be achieved most fairly and efficiently, via commercial negotiation.

In this regard, clause 7 of DPO's Access Policy, which has been approved by the Commission, clearly sets out the negotiate/arbitrate model that applies to access requests at the Port.

Clause 7 of the Access Policy is compliant with the requirements of Regulation 13(2)(f), which stipulate a number of matters relating to the negotiation and arbitration process that ***must*** be

included in the Access Policy.[10] Under the existing regime, compliance with Regulation 13(2)(f) (amongst others) is mandatory for any Access Policy.

Accordingly, it is unclear why the Commission believes it is necessary to amend the Act in relation to making express reference to the negotiate/arbitrate model, as this would presumably just involve replicating the existing requirements in the Regulations.

5 Provision of information

Recommendation 7(h), 7(q) and 7(r) – access to, and provision of, information to users and the Commission

Section 7.2.3 of the Draft Report makes a number of references to the ability of users to access "meaningful information" as part of the negotiate/arbitrate process under the Regime.

Of particular focus is "financial information". The Draft Report refers to "relevant financial information", and suggests that "*operators of regulated infrastructure are able to provide financial information that concentrates exclusively on the parts of the business regulated by the regime*". The relevant financial information is also described as being "*information on profit, cost and investment*". [11]

One concern DPO has with the discussion in this section 7.2.3 is that there is a lack of precision (beyond general descriptors) when discussing the information the Commission considers is not presently available to access seekers, arbitrators and itself. This lack of precision causes concern as it is unclear what the expected outcomes of this recommendation are. Financial information can take many forms, and the collection and provision of such information can have a significant impact on the operating costs of the business. The Port is small in comparison to the other ports referenced in the Draft Report and as such any increase in reporting requirements could have a more significant impact on the operating costs for DPO.

More broadly however, it is unclear from the Draft Report exactly how the absence of any particular "meaningful information" is leading to any sub-optimal outcomes under the current Regime.

The Draft Report references the 2013 report of the Productivity Commission's Inquiry into the National Access Regime[12] as its source for the comments regarding potential for "information asymmetry" to lead to market failure.[13] While it is absolutely correct to say that information asymmetry can lead to market failure, as far as DPO can determine, the relevant comments cited from the Productivity Commission are directed towards the economic issues (i.e., the risk of market failure) that may warrant the establishment of infrastructure access regulation itself, ***not*** the mechanisms required for an effective negotiate/arbitrate model *within* an established access regime.

In the present case, as the Draft Report concludes, the Commission has found:

(a) no evidence of DPO exercising any form of market power in its operation of the Port to date;[14] and

[10] Including a requirement that any arbitration must be conducted in accordance with Part 5 of the *Commercial Arbitration (National Uniform Legislation) Act* – see clause 13(2)(f)(vi) of the Regulations.
[11] Draft Report, [7.2.3] p 50
[12] Productivity Commission - *National Access Regime Inquiry Report* (No. 66, 25 October 2013)
[13] Draft Report, [7.2.3] p 50 (see footnote 114).
[14] Draft Report [5.5.4] finding 5(b), p 34

(b) that there is nothing to indicate DPO is generating excessive profits for the current review period.[15]

Further, the Commission has recommended the existing regulatory model should be retained.

Moreover, the benchmarking report prepared by GHD found (amongst other things) that:

- *… the published port charges for the prescribed services for the Port of Darwin have experienced only relatively minor increases when compared to other interstate ports studied and taking into account local CPI changes;*
- *overall, the call costs for Darwin currently appear to only represent a small percentage of cargo shipment values;*
- *the relative position of total port call costs for the Port of Darwin appears to have improved over the last three years due to the lower rate of increase in port charges compared with the other interstate comparator ports.*[16]

Accordingly, in DPO's view, an assertion that there has been any form of "market failure" on the basis of 'information asymmetry' (or any other issue) seems inconsistent with the key conclusions in the Draft Report.

As the Commission correctly notes in the Draft Report, the role of price monitoring under the Regime[17] is "*not designed to assess individual charges but rather, overall changes in prices and ensuring transparency of charges*."[18]

Critically on this front, the Draft Report has concluded that there is no need to change the level of regulatory oversight for pricing at the Port, and that the price monitoring process should continue.[19] Further to this, draft finding 7(i) specifically states that:

> *"In the event market power is exercised by the port operator such that price monitoring becomes insufficient as the form of price regulation, the commission would seek to deal with the matter using its existing legislative powers, with the aim of making a recommendation to the minister about a stronger form of regulation."*[20]

Despite these findings, the Draft Report appears to be suggesting that the price monitoring regime should now be changed to allow the Commission to "to assess and report on the efficiency" of the prices charged by DPO for individual services.

Accounting separation

The Draft Report argues that DPO should be required to prepare a separate set of accounts in order to mitigate against the risks of "*anti-competitive behaviour such as using cross-subsidies between regulated and non-regulated services as a way of disguising monopoly pricing*."

While the concept of accounting separation is a common means of mitigating against anti-competitive conduct by vertically integrated service providers,[21] DPO is ***not*** a vertically-integrated operator, and it has no material or relevant interests in any market "upstream" or "downstream" from the Port. To the contrary, as noted in the Draft Report, under the Lease

[15] Draft Report, [5.5.3] p 37
[16] Findings extracted from the summary on page 19 of the Draft Report.
[17] By operation of the provisions in Regulation 16(2) and section 132 of the Act
[18] Draft Report [5.5.4] p 33
[19] See Recommendation 7(g)
[20] Draft Report [7.2.1] p 47
[21] Productivity Commission - *National Access Regime Inquiry Report* (above, note 12), p 97; see also Productivity Commission - *Wheat Export Marketing Arrangements*, Inquiry Report no. 51, 2010.

both Landbridge and DPO are expressly prevented from becoming an 'integrated operator' without the express prior consent of the Government.[22]

The Draft Report also references (as justification for accounting separation) the access undertaking in place for the Dalrymple Bay Coal Terminal (**DBCT**) in Queensland, and those ports in South Australia proclaimed as being subject to the regime established by the *Maritime Services (Access) Act* 2000 (SA) (**MSA**).

However, these facilities are not comparable to the Port. DBCT is one of the largest coal exporting ports in the world and has a significantly larger (in terms of throughput and turnover) common-user facility dedicated to facilitating seaborne coal exports from one of the most significant coal-producing regions in Australia, whose ultimate owner has substantial interests in 'downstream' businesses.[23] As noted on the Queensland Competition Authority website, of Queensland's 20 ports that are crucial to the state's export driven economy, DBCT is the only regulated port in Queensland.[24]

Similarly, ports regulated under the MSA are operated by Flinders Ports, which is an entity that operates multiple ports and is also a vertically-integrated provider of stevedoring and logistics services,[25] which means it competes "downstream" with other service providers. The other ports which are referred to in the Draft Report, being the Port of Melbourne and Port of Newcastle, are also notably larger ports than the Port.

The Port of Melbourne is the largest container and general cargo port in Australasia and one of the top four container ports in the Southern Hemisphere, handling around 2.64 million TEU annually, and over 1000 motor vehicles per day.[26]

Accordingly, in the examples used in the Draft Report, the case for separate accounts for regulated port services has far more justification than for DPO.

As DPO has already explained to the Commission on previous occasions, its current accounting structure does not include separated accounts for the parts of its business that perform the Prescribed Services. Given the nature of the price-monitoring established as part of commencement of the Regime, DPO did not undertake any exercise to attribute valuations to the various assets that would be subject to regulation.

Accordingly, any requirement to create separate regulated accounts could involve substantial up-front costs for DPO for matters such as obtaining expert valuations and accounting advice, as well as the substantial technology costs involved in overhauling its existing accounting and IT systems. Added to this would be the increased ongoing operating expenses for DPO to maintain the separate accounting structure and prepare the form of dedicated reports contemplated by the Commission.

Provision of financial information

As a further point, DPO disagrees with the inferences in the Draft Report that there is inadequate financial information available to the Commission, and to access seekers and arbitrators.

[22] Draft Report [Appendix B] p 80.
[23] See, for example - *Brookfield consortium – proposed acquisition of Asciano Limited* ACCC Statement of Issues (15 October 2015).
[24] http://www.qca.org.au/Ports
[25] See https://www.flindersports.com.au/marine-services/
[26] https://www.portofmelbourne.com/about-us/trade-statistics/

This includes the assertion that there is *"a material risk*" that users will be unable to access "*sufficient information for informed negotiations, and the arbitrator being unable to obtain sufficient information to make an efficient decision*."[27]

In DPO's view, it is premature to suggest such a "material risk" exists in relation to the arbitration process, particularly given the key findings of the Draft Report, but also given that the Draft Report has been released at a point in the lifetime of the Regime before a single arbitration process has been commenced.

As the Draft Report acknowledges, the process under the Access Policy offers participants the right to access information reasonably required to make an application for access, which must be provided by DPO, unless it meets one of the limited exceptions in the Access Policy.[28] The same is true where a dispute arises under the Access Policy.[29]

Importantly however, the role of the Access Policy is to regulate the process for users obtaining access to the Prescribed Services, while the form of price regulation imposed at the Port is a price monitoring regime that is supported by the Price Determination. In DPO's view, the discussion of pricing information that should be available to users and access seekers in the Draft Report appears to conflate the role and purpose of the two separate regimes.

In addition to this, DPO considers the concerns expressed in the Draft Report about the degree of 'financial' information available to the Commission to be overstated. Regulation 16(2)(e) already requires DPO to provide the Commission with a report which must include the amount of revenue received by the Operator from charges for the supply of Prescribed Services, along with details of all negotiated agreements (and their terms).

Further, as the Draft Report notes, for the purposes of the Review, DPO was able to provide the Commission with access to audited special purpose financial statements that detailed the commercial operations of the Port in sufficient detail for it to make an assessment that no "monopoly profits" are being generated. Additionally, these reports are publicly available as part of the reporting requirements under the *Corporations Act 2001* (Cth).

Finally, DPO has concerns that a requirement disclose financial information could, in some instances, lead to a situation where DPO is compelled to disclose information that is confidential and competitively sensitive. The disclosure of such information could be exploited by the Port's commercial rivals to the detriment of the Port's competitive position.

In light of the above, and in the absence of any evidence that suggests the current regime is not functioning correctly, DPO believes that recommendations 7(q) and 7(r), which would substantially increase the regulatory burden on the Operator if introduced, are unnecessary at this stage, and unlikely to be consistent with the objectives of promoting economic efficiency at the Port under the Act,[30] or the equivalent objectives outlined in the UC Act.[31]

6 Access Policy - statutory approval process and carve-outs

Recommendation 7(n)

DPO agrees with the proposal in recommendation 7(n) to amend section 127 of the Act and Regulation 13(2), so as to ensure the Commission may have regard to sections 124 and 125 of the Act when approving a draft Access Policy.

[27] Draft Report, [7.2.3] p 50
[28] Access Policy – clause 6.4
[29] Access Policy – clause 7.8
[30] See section 117 of the Act
[31] See in particular, section 1 and paragraph 6(2)(d) of the UC Act

Recommendation 7(m)

DPO does not support the proposal in recommendation 7(m) of the Draft Report to amend sections 124 and 125 of the Act, so as to remove the carve-outs to those sections for matters done in accordance with (or permitted by) the Access Policy. DPO does not believe there is any basis for such amendments, which would remove carve-outs which currently provide important practical flexibility for DPO in dealing with access seekers in some limited circumstances.[32]

Specifically, DPO does not believe the current provisions lead to any risk for current or prospective users that they would be unfairly hindered or discriminated against. This is because, as noted above, DPO is not an "integrated operator", and so has no financial incentive to unfairly discriminate in access arrangements in favour of any 'associated' businesses.

Further, as DPO has noted to the Commission, and as acknowledged in the Draft Report, clause 1.3 of the Access Policy expressly states nothing in the Access Policy is intended to require or permit DPO to engage in conduct in breach of sections 124(1) or 125(1) of the Act.

The Commission has previously provided its approval for the final form of the Access Policy on 30 June 2017[33], and DPO cannot amend the Access Policy without obtaining a further approval from the Commission (and also consult with Port users).[34]

In such circumstances, the proposed legislative change appears unnecessary, and would only serve to limit DPO's ability to administer the Access Policy in a flexible and practical manner.

7 Wharfage for dry bulk minerals

Recommendation 7(v)

In accordance with draft finding 7(s) of the Draft Report, the Commission believes the current classification of dry bulk minerals as a 'non-standard' charge is "*creating uncertainty and ambiguity for potential port users*". To mitigate against this concern, draft recommendation 7(v) suggests an amendment to the Regulations to require DPO to publish reference tariffs and associated standard terms in the Access Policy for dry bulk mineral exports.[35]

As an initial observation, DPO disagrees with the suggestion that the Port faces no competition for "dry bulk minerals". Leaving aside the question of the correct market definition to apply, the commercial reality for the Port is that its location, and the available transport operations, means there are a number of other options for dry bulk mineral exporters that will or may be substitutes for the Port, particularly if the test applies is a standard "hypothetical monopolist" (or "**SSNIP**") test.

Nevertheless, to the best of DPO's knowledge, the concerns expressed in the Draft Report are referring (and are limited) to the experiences of one user. DPO has engaged productively with a number of other users for the export of dry bulk minerals from the Port, including OM Manganese, which currently exports dry bulk minerals via the Port. With the exception of one user, DPO's practice of providing prospective users with indicative wharfage pricing has raised no concerns for any other user.

[32] For example, hindering or differentiating access between users may be necessary in circumstances where a port user does not comply with the necessary prudential requirements; or where the specific access sought is not feasible because of issues such as health and safety risks that could endanger other users.
[33] http://www.utilicom.nt.gov.au/Ports/PortAccessRegulation/Pages/Access-Policy.aspx
[34] See subsections 127(10) and 127(11) of the Act.
[35] Draft Report [7.2.3] p 55.

The fact that indicative pricing has been satisfactory for almost all other users is consistent with DPO's understanding of accepted industry practices, particularly given the relative cost of wharfage services in the overall production cost profile of most dry bulk mineral exporters.[36]

DPO agrees there is no doubt that information about wharfage and other Port charges will be useful to prospective users, where it can be appropriately determined. Of course, this must be balanced, as acknowledged by the Draft Report, by the fact that ***both*** DPO and port users need scope to negotiate the commercial terms for access and use of services at the Port, which necessarily means that different terms may apply, even where the services provided are broadly similar.

In the case of wharfage rates for dry bulk materials, as DPO has indicated to the Commission previously, the practical reality is that it is difficult to determine a "one size fits all" wharfage rate in circumstances where the nature of the commodity (including details such as product type, form, quality, quantity and loading infrastructure requirements) will lead to variances in cost for supplying wharfage.

While the Draft Report identifies a number of ports that publish a tariff rate for dry bulk mineral exports, DPO notes that comparisons between ports in this regard are only of limited value, given the vast differences in operations. For example, in the case of DBCT, aside from the regulatory requirements, DBCT operates solely and exclusively to export one commodity (coal), which makes it much less complex to develop a "reference" or "standard" tariff for all users.

However, in the case of ports handling variable bulk minerals, DPO's understanding of the practical reality is that the actual pricing for many users' bulk mineral handling requirements will be determined by direct commercial negotiation between the user and the port operator.

The same is typically true for the terms of service, given each user will have different requirements depending on the commodity being exported (and other operational details). For this reason, DPO has preferred the approach of developing a bespoke operating agreement which more accurately deals with each users' service requirements.

For these reasons, DPO questions whether the publication of a highly standardised "reference" tariff is necessary or appropriate, given the practical reality of:

(a) the variable nature of dry bulk mineral commodities available for export;

(b) the way in which the Port operates; and

(c) the individual needs of prospective users.

Recommendation 7(w)

As an adjunct to the discussion about wharfage charges for dry bulk minerals, the Draft Report also proposes that the Regime be amended to provide the Commission with "greater regulatory oversight" into the process for determining what services must be the subject of published standard terms.

It is unclear from the Draft Report exactly what is contemplated by increasing the "regulatory oversight", but as a practical and commercial matter, DPO notes that as the Operator of the Port, it is in by far the best position to determine what should constitute a "standard service", which is a complex commercial question.

8 Negotiation and arbitration

[36] DPO is aware of modelling which puts port costs at between 2-6% of the overall production cost for a bulk minerals exporter

Recommendation 7(y) - Negotiation

In principle, DPO agrees with the discussion in section 7.3 of the Draft Report regarding the importance of the parties following a commercial negotiation process in good faith before raising an access dispute.

However in DPO's view, this is already the process that is to be followed in practice under the current negotiate/arbitrate model, which includes a requirement under the Access Policy for the parties to negotiate in good faith.[37] This requirement in turn reflects the existing requirement for good faith negotiations to form part of the negotiate/arbitrate model in accordance with Regulation 13.[38]

Therefore, aside from the results of a comparison of the current Regime against the "clause 6 principles", it is unclear to DPO why the Draft Report has recommended changes to the Regime, or what changes the Commission would specifically make.

Recommendations 7(ad), 7(ae), 7(af) and 7(ag) - Arbitration

The Draft Report makes a number of minor recommendations about the arbitration aspects of the current Regime. DPO's comments in response are as follows:

Recommendation	*DPO Comment*
7(ad) – that provisions relating to arbitration are expressly specified in the regime, rather than the regulations requiring the Access Policy to contain provisions about arbitration in order for it to be approved.	The arbitration provisions are currently expressed in the Regulations and must be included in the Access Policy, which must in turn be approved by the Commission. Accordingly, it is difficult to see any risk that the relevant provisions could be avoided by DPO (or any other operator).
7(ae) – that amendments be made to the Regulations to include the matters to be taken into account by the arbitrator in the dispute resolution process.	Clause 7.7 of the approved Access Policy specifies the matters that must be taken into account by the arbitrator, so again it is unclear why such amendments are necessary. DPO notes that any amendments to the Act would need to be consistent with the existing Access Policy, to avoid any inadvertent breach of either aspect of the Regime.
7(af) – that the regulations be amended to provide guidance on resolving conflicts between the Access Policy and other agreements regarding prescribed services for the Port.	It is unclear exactly what the effect of such amendments would be intended to achieve, but DPO notes that it has pre-existing commitments to the Government which it must adhere to (in order to avoid a breach of the Lease, which could lead to a termination by the Government, in an extreme case).
7(ag) - that the Regulations be amended to include an obligation that arbitration decisions are provided to the Commission.	DPO expects such a decision would be provided to the Commission in the ordinary course (subject to any applicable confidentiality arrangements) under the existing Regime, but see no concern with inserting this as a specific amendment to the Regulations (subject to any necessary protections for confidential information).

[37] See clause 7.2 of the Access Policy
[38] See Regulation 13(2)(f)(ii) in particular

9 Compliance and enforcement

As an overall comment, DPO notes that the issues raised and recommendations proposed in section 7.5 of the Draft Report are all made on the basis of "potential" future concerns, rather than any evidence of any material instances of non-compliance (however defined) by DPO under the Regime to date that require rectification.

Recommendation 7(ai)

- **"Material instance of non-compliance"**

  With respect to the proposal to include a definition of "material instance of non-compliance" in the Regime, it should be recognised that such definition is already included in the finalised, approved form of the Reporting Guidelines.[39] Accordingly, DPO sees no need to include a definition elsewhere in the Regime, but in the event that this recommendation proceeds, it would be important to ensure there is no variance between the definition in the Reporting Guidelines and any other definition.

- **Reporting of non-compliance by other users or stakeholders**

  As noted in its earlier submission, DPO sees no obvious benefit to including an "express provision" for Port users and industry stakeholders to be able to report "a material instance of the operator's non-compliance with the Access Policy, as there is nothing which currently prevents Port users from writing to the Commission in the event they are dissatisfied with any action or inaction by DPO.

  Moreover, the practical implications of such a provision should be explored. What level of certainty or veracity would be required for such a report to be made by a user or stakeholder? What evidence would need to be provided in support of the report? Would DPO have an opportunity to review and respond to such reports, or would the Commission presume that such a report was correct?

- **Additional investigatory powers and penalties**

  The most immediate concern with the proposal to give the Commission express powers to investigate issues reported to it, or conduct an independent audit of an operator's compliance with the Regime is the additional regulatory burden and cost this would place on an operator such as DPO. Such compliance processes are often not simple exercises, as collecting, processing and analysing data is not an easy or inexpensive task. Compliance with such processes would presumably require DPO to divert staff and resources away from operational requirements at the Port in order to comply with any investigation or audit initiated by the Commission.

  In DPO's view, such additional regulatory risks (and particularly the need to have adequate resources on hand to comply with these processes) are not consistent with the "light-handed" form of regulation that the Regime was intended to establish (in concert with the very real threat of more restrictive regulation in the event of non-compliance with the Regime). This is particularly the case where the Reporting Guidelines already establish mandatory and recurring reporting obligations for instances of non-compliance by the Operator. In addition, as previously noted:

  (i) DPO reports quarterly on its trade statistics which are made available publicly on the Port's website; and

[39] As amended on 28 March 2018, with effect from 2 May 2018. See clause 2.

(ii) DPO already has significant reporting obligations under other agreements it has in place with the Government.

Finally, DPO also notes that a key platform of any "light-handed" regulatory regime is the constant prospect that failure to comply with the requirements of the regime will lead to the imposition of more stringent regulatory controls. This prospect remains one of the key incentives for DPO to achieve full and comprehensive compliance with the current Regime, which it believes it has done so to date. Accordingly, in the absence of any evidence that the existing Regime is not achieving the desired compliance, DPO questions what benefit would be achieved by introducing the penalties contemplated in the Draft Report.

Put simply, DPO considers that the Draft Report has not identified any issue or risk that warrants the introduction of penalties to improve the overall effectiveness of the Regime.

Recommendations 7(ak) and 7(al) - Service standard reporting

As DPO noted in response to the proposals for service standard reporting in the Issues Paper, it does not believe that there is any basis for justifying the additional administrative costs and obligations these requirements would impose on any port operator.

DPO also does not agree with the unsupported assertion in the Draft Report that it would be incentivised to reduce the quality of any service supplied. To the contrary, and as already noted to the Commission, DPO's primary commercial objective is to drive increased use, patronage of and throughput at the Port. Any business strategy that sought to reduce service standards or quality would be antithetical to that objective.

Further, the practical reality is that Port users have a diverse range of requirements in terms of service delivery (and pricing), even for the same Prescribed Service. Accordingly, reporting on performance against 'standardised' KPIs for any particular service is likely to be of limited empirical or analytical value.

As the Commission correctly points out, DPO does currently conduct customer satisfaction surveys, and there may be scope to share some aggregated data or results of these with relevant stakeholders on a regular basis.

10 Other issues

Recommendation 8(m) – Definition of designated port

As indicated to the Commission in response to the Issues Paper, the existing definition of designated port in the Act is much larger than the area that DPO controls - in terms of its ability to provide access to Prescribed Services.

Under the existing definition, DPO does not have the authority to grant access to all parts of the 'designated port', which has the potential to lead to statutory anomalies, given the structure of the Regime and the use of the term 'designated port'.

Accordingly, DPO's recommendation is that the definition be revised to be limited to the leased areas and shipping channels which the designated port operator has the right to grant access.

DPO would be happy to prepare suggested drafting for such an amendment as required.