

STATEMENT OF REASONS

1 Introduction

- 1.1 The *Ports Management Act 2015* (PM Act) provides for the control, management and operation of ports, with Part 11 of the PM Act relating to port access and pricing. Under Part 11, the Utilities Commission (Commission) has the function of approving an access policy from a private port operator for prescribed services at a designated port. An access policy provides a framework for requests to access prescribed services at a designated port, the approach to be taken by the private port operator in determining access and the terms on which access will be provided at the port
- 1.2 Darwin Port Operations Pty Ltd (DPO) is the private port operator of the Port of Darwin, which is a designated port. On 30 June 2017, the Commission approved DPO's initial access policy for the Port of Darwin and in accordance with section 127(10) of the PM Act, this policy will nominally expire 5 years after the day on which it was approved. Section 127(1)(c) of the PM Act requires DPO to give a new draft access policy to the Commission before the expiry of the initial access policy.
- 1.3 On 23 February 2022, DPO submitted a new draft access policy to the Commission for approval. As provided for under section 127(2)(c) of the PM Act, the draft access policy consists of three documents:
 - Access Policy of Darwin Port Operations Pty Ltd (ACN 603 472 788)
 - Port of Darwin Standard Services Terms and Conditions and
 - Darwin Port Payment Terms and Conditions.
- 1.4 Section 127(2A) of the PM Act requires DPO to consult with port users prior to submitting a draft access policy for approval and provide a summary of the comments received during the consultation to the Commission. DPO advised the Commission that it went out to 230 port users for consultation on 10 December 2021 with feedback requested by 30 January 2022. DPO advised that no submissions were received.
- 1.5 On 7 April 2022, DPO provided the Commission with an amended draft access policy, as permitted under section 127(6) of the PM Act, which provided clarifications regarding fees, the form for access applications and changed the timeframe for providing a final access agreement at clause 6.9(d) in the Access Policy from 3 to 7 business days. Section 127(2A) does not require DPO to undertake consultation on an amended draft access policy.

2 Review process

- 2.1 Sections 127(3) and (3A) of the PM Act require the Commission to, within 60 days of receipt of the draft access policy, give written notice to DPO that the Commission either approves the draft access policy; does not approve the draft access policy and provide directions to amend the draft access policy so that it meets legislated requirements; or requires further time and is extending the period for consideration of the draft access policy from 60 to 120 days. Should, however, the Commission fail to

- act within the 60 day timeframe, the draft access policy is taken to have been approved on the expiry of that period of time.
- 2.2 The Commission must approve DPO's draft access policy if it meets the requirements of section 127(2) of the PM Act and the matters set out in regulation 13(2) of the Ports Management Regulations 2015 (PM Regulations).
 - 2.3 On 25 February 2022, the Commission released the draft access policy for public consultation, requesting submissions by 18 March 2022. The Commission received one submission which supported the draft access policy.

3 Compliance with the PM Act and Regulations

- 3.1 The Commission considered the amended draft access policy, and assessed whether it addressed all the matters prescribed by regulation 13(2) of the PM Regulations, including new requirements added in 2020 relating to processes for making an access request, negotiating access and arbitration.
- 3.2 The Commission also considered the extent to which the policy may create exceptions to section 124(1) of the PM Act, which prohibits conduct that would prevent or hinder access; and section 125(1), which prohibits unfair differentiation between port users. The Commission assessed whether the amended draft access policy could give rise to any exceptions and considers the risk to be low, noting clause 1.3 of the amended draft access policy expressly states that nothing in the access policy is intended to require or permit DPO to engage in conduct in breach of these sections of the PM Act.
- 3.3 The Commission considers that the amended draft access policy meets all of the requirements under section 127(2) of the PM Act.

4 Other issues considered

Complex Access Applications

- 4.1 DPO advised that an additional classification of application is necessary to allow sufficient time to properly consider more complicated access applications. The amended draft access policy defines a Complex Access Application as an access application that requires the procurement, installation or construction of new infrastructure, or concerns a new product that has not previously been exported or imported to or from the Port of Darwin, or involves a material alteration to existing infrastructure.
- 4.2 DPO provided the Commission with a confidential example of a complex access application and the difficulties encountered processing the application within the timeframes under DPO's initial access policy. DPO considers that differential treatment of Complex Access Applications will benefit port users by providing greater certainty on the cost of access.
- 4.3 The Commission considers the types of applications defined as complex are more likely to require external advice and/or a longer period for consideration and inclusion of the Complex Access Application classification and associated processes to accommodate these applications is reasonable.
- 4.4 The Commission notes the draft access policy complies with regulation 13(2)(ac), advising there may be an application fee (to cover reasonable costs of assessing the access request) for a Complex Access Application (refer clause 6.5(d)).

- 4.5 The Commission also notes that new clause 6.5(a)(v) places the onus on the applicant to provide detail to DPO on any proposed new facilities including concept design drawings and design assumptions. The Commission considers this to be reasonable with the applicant best placed to understand the product and its particular requirements. Where information is required from DPO to prepare such drawing, clause 6.4(a) obliges DPO to provide information to the applicant (as reasonably required).

Amendments and clarifications to timeframes

- 4.6 The amended draft access policy
- revises the definition of a business day to exclude a 2 week period over Christmas and New Year (25 December to 7 January)
 - clarifies a business day ends at 4.30 pm for receipt of notices, applications or other communications (clause 2.2(e))
 - imposes a time limit (10 business days) for DPO to give a Decision Notice confirming a Feasibility Study is required or longer (“as may reasonably be required”) in the case of a Complex Access Application (clause 6.6(e))
 - replaces the 3 business day time limit for DPO to provide a final Access Agreement (or amendment to an existing Access Agreement) with a 7 business day time limit (clause 6.9(d)).
- 4.7 The Commission accepts these changes, noting DPO’s advice that they reflect staffing and other practicalities of business operations and no submissions were received which raised concerns with these changes.

Standard Services Terms and Conditions

- 4.8 DPO inserted a new clause 2(g) in the Port of Darwin Standard Terms and Conditions relating to instances where a shipping agent submits a Notice of Arrival on behalf of a port user. The clause requires the port user and the shipping agent to warrant that the agent has been engaged by, and has the authority to act for, the port user and that prior to accessing DPO’s facilities and services the shipping agent notifies the port user of the conditions and cost of access and all Port Requirements. Port Requirements include notices, directions or regulations issued by DPO, the regional harbourmaster or other government authorities.
- 4.9 The Commission accepts the insertion noting DPO’s advice that it is standard business practice for port users to utilise the services of shipping agents and the Commission considers the clause appropriately assigns responsibility for risk to relevant parties.

5 Commission’s decision

- 5.1 In accordance with section 127(3) of the PM Act, the Commission approves the amended draft access policy submitted on 7 April 2022.
- 5.2 In making this decision, the Commission has had regard to Part 11 of the PM Act and regulation 13(2) of the PM Regulations.
- 5.3 In accordance with section 127(12) of the PM Act, DPO must comply with the access policy.

- 5.4 In accordance with regulation 13(3) of the PM Regulations, DPO must publish a copy its access policy on its website within 5 days of the Commission's approval of the draft access policy.