



DARWIN PORT OPERATIONS PTY LTD:

DRAFT ACCESS POLICY FOR THE PORT OF DARWIN

DRAFT DECISION

19 May 2017

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Purpose of this Paper

The purpose of this paper is to provide stakeholders the opportunity to comment on the Utilities Commission's draft decision on the Draft Access Policy submitted by Darwin Port Operations Pty Limited (DPO) for the Port of Darwin.

The Commission's objective is to provide transparency regarding the decision making process in accordance with the *Ports Management Act* and Ports Management Regulations and pursuant to the objects of the *Utilities Commission Act*.

The Commission invites comments on this draft decision on the Draft Access Policy by **9 June 2017**.

Any comments received will be made available on the Commission's website www.utilicom.nt.gov.au. To facilitate publication, comments should be provided in Adobe Acrobat or Microsoft Word format. Any questions should be directed to the Utilities Commission by email utilities.commission@nt.gov.au or telephone (08) 8999 5480.

Confidentiality

During the consultation process on the draft access policy, a number of submissions were received which were identified by the submitting party as confidential and or commercial-in-confidence.

In order to preserve the confidentiality of those submissions, the Commission has not provided a summary of submission received.

The Commission requests that any confidential material included in responses to this draft decision be provide separately to any non-confidential materials.

Glossary of Terms

Term	Definition
Act	<i>Ports Management Act</i>
ASCO	ASCO Australia Pty Ltd, operator of the Marine Supply Base
Commission	Utilities Commission of the Northern Territory
DPO	Darwin Port Operations Pty Limited (ABN 62 603 472 788)
Feasible	As defined by clause 4.3 of the draft access policy (as received 16 May 2017)
Landbridge	Landbridge Infrastructure Australia Pty Ltd
Minister	Minister for Infrastructure, Planning and Logistics as defined by the Administrative Arrangements Order
NTG	Northern Territory Government
Payment Terms	Payment Terms for Standard Services (received 16 May 2017)
Prescribed Service	Services provided by a private port operator to which Part 11 of the <i>Ports Management Act</i> applies as declared in Regulation 12 of the Ports Management Regulations
Regulations	Ports Management Regulations
Standard Service	Services identified in Schedule 1 of the Draft Access Policy to which the Standard Terms apply
Standard Terms	Terms and conditions for access to Standard Services (received 16 May 2017)

Chapter 1: Executive Summary

- 1.1 The *Ports Management Act* (the Act) provides for the control, management and operation of ports. Part 11 of the Act relates to port access and pricing and the object of Part 11, as declared by section 117, is to promote economically efficient operation of, use of and investment in major port facilities in the Northern Territory by which services are provided, so as to promote effective competition in upstream and downstream markets.
- 1.2 Part 11 of the Act applies to prescribed services provided by a port operator of a designated port that is not a public sector entity, the latter being defined as a private port operator. Section 119 of the Act declares the provision of prescribed services by a private port operator to be a regulated industry for the *Utilities Commission Act*.
- 1.3 Under Part 11 of the Act, the Utilities Commission (the Commission) has a role in relation to port access and price regulation for prescribed services which commences with the appointment of a private port operator.
- 1.4 DPO was declared the operator of the Port of Darwin in accordance with section 8(1) of the Act on and from 1 July 2015. On 15 November 2015, ownership of Darwin Port Operations Pty Limited (DPO) was acquired by Landbridge Infrastructure Australia Pty Ltd (Landbridge) and with that change of status to a private port operator, the application of Part 11 of the Act to the Port of Darwin commenced.
- 1.5 Pursuant to section 127(1) of the *Ports Management Act* (the Act) and Regulation 13(1) of the Ports Management Regulations, DPO has submitted a draft access policy for the Port of Darwin.
- 1.6 The draft access policy aims to provide a framework for port users requesting access to prescribed services, the approach to be taken by DPO in determining access and the terms on which access will be provided at the Port of Darwin.
- 1.7 The requirements for an access policy are specified in section 127(2) of the Act. That section in turn refers to regulations made under section 129, which are set out in Regulation 13(2) of the Ports Management Regulations.
- 1.8 The Commission must approve a draft access policy that meets the requirements of 127(2) of the Act. Section 127(3) provides that, within 60 days after receiving a draft access policy, the Commission must give written notice that the Commission either:
 - a) approves the draft access policy; or
 - b) does not approve the draft access policy because it does not meet the requirements of 127(2) and the private port operator must amend the draft access policy as directed by the Commission so it meets those requirements.

- 1.9 If the Commission fails to give written notice of its decision within 60 days, the draft access policy is taken to have been approved by the Commission.
- 1.10 Section 127(5) of the Act, requires that a private port operator who receives notice mentioned in 127(3)(b) of the Act must, within 30 days after the date of the notice, resubmit the draft access policy, as directed, to the Commission, for approval.

Review Process

- 1.11 Section 127(10) of the Act requires the private port operator to consult with port users prior to submitting for approval any amendments to its access policy and Regulation 15 requires consultation with port user on a review of the access policy every five years. There is no legislative requirement for the private port operator to consult with port users and interested stakeholders on the first access policy. The Commission and DPO considered it would be good practice to consult with interested stakeholders on the first access policy of the Port of Darwin.
- 1.12 The Commission sought submissions from interested stakeholders on a draft access policy received 10 March 2016. This version of the access policy is provided at Attachment A. A consultation notice was published on the Commission's website and the Northern Territory News with the consultation period closing on 7 April 2016. The Commission received two confidential submissions from interested stakeholders.
- 1.13 The submissions received were provided to DPO for consideration. Following consideration of the submissions and further discussions with the Commission, DPO made amendments to the draft access policy and submitted this to the Commission for consideration. DPO also engaged with stakeholders who made submissions to clarify specific aspects of the draft access policy and its proposed application.
- 1.14 Section 127(6) of the Act allows a private port operator to amend a draft access policy that has not been approved and give it the Commission.
- 1.15 Between March and August 2016, DPO further considered the views of the Commission, reviewed the submissions received from stakeholders and amended the draft access policy.
- 1.16 On 16 August 2016, the Commission received an amended draft access policy with proposed Standard Services Terms and Conditions and Payment Terms and Conditions. The Commission sought further comments from stakeholders on the August version of the draft access policy and associated terms and conditions. A consultation notice for the amended draft access policy was published on the Commission's website on 9 September 2016 and in the Northern Territory News.
- 1.17 The Commission received three commercial-in-confidence submissions from stakeholders. The submissions were provided to DPO with the approval of the submitting parties. Following its review of stakeholder submissions, DPO submitted an amended draft access policy on 19 October 2016.
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- 1.18 The Commission thanks each of the organisations that made a submission on the draft access policy and DPO for considering stakeholder views in preparing the draft access policy.
- 1.19 As submissions were identified by stakeholders as commercial-in-confidence, this draft decision only provides a broad summary of the issues raised and the Commission's position in relation to those issues.
- 1.20 Between October 2016 and March 2017, the Commission engaged in further discussions with DPO and amended versions of the access policy were submitted addressing the Commission's concerns. The Commission thanks DPO for engaging constructively with the Commission throughout its consideration of the draft access policy and the Commission recognises that many issues were resolved through this process.
- 1.21 On 16 May 2017, DPO submitted an amended access policy to the Commission consideration. This version of the access policy is provided at Attachments B, C and D and is the subject of the Commission's Draft Decision.

Commission's Draft Decision

- 1.22 The draft access policy submitted by DPO on 16 May 2017 consists of three documents, entitled:
- a) 'Access Policy of Darwin Port Operations Pty Ltd (ACN 603 472 788)';
 - b) 'Port of Darwin Standard Service Terms and Conditions'; and
 - c) 'Darwin Port Payment Terms and Conditions'.
- 1.23 The Commission's draft decision is to approve the draft access policy received on 16 May 2017 pursuant to section 127(3) of the Act. The Commission considers that the draft access policy meets the requirement of 127(2) of the Act.
- 1.24 In making this draft decision, the Commission has had regard to Part 11 of the Act and Regulation 13 of the Ports Management Regulations (the Regulations).

Next Steps

- 1.25 The Commission invites comments on this draft decision. Any comments should be forwarded to the Commission by 9 June 2017.
- 1.26 Subject to consideration of any final comments, the Commission will issue its final decision by 30 June 2017.

Chapter 2: The Regulatory Framework

Background

- 2.1 The *Port of Darwin Act* (Act No. 10 of 2015), *Ports Management Act* (Act No.11 of 2015), and *Ports Management (Repeals and Related and Consequential Amendments) Act* (Act No. 12 of 2015) commenced on 9 June 2015 (Gazette No. S57 of 9 June 2015), with parts of the *Ports Management Act* and *Ports Management (Repeals and Related and Consequential Amendments) Act* commencing on 1 July 2015.
- 2.2 The package of legislation establishes a uniform framework for regulation of ports in the Territory, by which ports could be progressively brought into that framework by designation, starting with the Port of Darwin.¹ The legislation facilitates the privatisation of the Port of Darwin and incidental leasehold interests in the Port, subject to safeguards that include price monitoring and an access regime.
- 2.3 The object of Part 11 of the Act is to promote the economically efficient operation of, use of and investment in major port facilities in the Territory by which services are provided, so as to promote effective competition in upstream and downstream markets.²
- 2.4 Part 11 of the Act establishes a role for the Commission in relation to access and price regulation of prescribed services. The access and price regulation regime applies to prescribed services provided by a port operator of a designated port that is not a public sector entity (a private port operator).³
- 2.5 The ports access and price regulation regime is defined by Part 11 of the Act and the Ports Management Regulations (the Regulations). The Regulations commenced on 1 July 2015 (Gazette No. S69 of 30 June 2015).
- 2.6 On 30 June 2015, the Minister for Transport in accordance with section 8(1) of the Act declared DPO (ABN 62 603 472 788) to be the operator of the Port of Darwin on and from 1 July 2015.
- 2.7 On 16 November 2015, a controlling stake in DPO was acquired by private owners (Landbridge) at the same time as the commencement of a 99 year lease by Landbridge of the Port of Darwin.

¹ Second Reading Speech for the Ports Management Bill 2014, the Hon. Adam Giles, Minister for Economic Development and Major Projects, Parliamentary Record (Hansard) 27 November 2014.

² Section 117 of the Act

³ Section 118 of the Act

Initial draft

- 2.8 Section 127 of the Act details a process for a private port operator to submit a draft access policy for consideration by the Commission.
- 2.9 Section 127(1) of the Act requires the private port operator to prepare a draft access policy in accordance with the Act and Regulations. Section 127(2) requires that an access policy:
- a) must be prepared in accordance with any requirement prescribed by Regulation;
 - b) contain any matter required by the Minister under section 129 of the Act (the Minister may, by Gazette notice, require that an access policy deal with a matter specified in the notice); and
 - c) may consist of more than one document.
- 2.10 As at 31 March 2017, the Minister had not issued a notice under section 129 of the Act.
- 2.11 Regulation 13(1) requires a private port operator to give to the Commission a draft access policy no later than four months after the operator becomes a private port operator. DPO commenced as the private port operator on 16 November 2015 and submitted its initial draft access policy on 10 March 2016.

Revised draft

- 2.12 In accordance with section 127(6) of the Act, the private port operator may amend a draft access policy that has not been approved and give it to the regulator. Several amended versions of the draft access policy were submitted by DPO following consideration of stakeholder submissions and discussions with the Commission.

Commission approval

- 2.13 The Commission must approve a draft access policy that meets the requirements of 127(2) of the Act. Within 60 days after receiving a draft access policy, the Commission must give written notice that the Commission either:
- a) approves the draft access policy; or
 - b) does not approve the draft access policy because it does not meet the requirements of 127(2) and the private port operator must amend the draft access policy as directed by the Commission to meet those requirements.
- 2.14 If the Commission fails to give written notice of its decision within 60 days, the draft access policy is taken to have been approved by the Commission.

Compliance and reporting by the private port operator

- 2.15 Section 127(12) of the Act requires a private port operator to comply with its access policy.
- 2.16 The private port operator is required to report to the Commission each year on material instances of non-compliance with its access policy and the Commission will report to the Minister each year on material instances of non-compliance with a private port operator's access policy and if there has been any material instance of non-compliance with the Commission's determination.

Access policy requirements

- 2.17 Section 127(2) requires that an access policy must be prepared in accordance with any requirement prescribed by Regulation. Regulation 13(2) requires that an access policy of a private operator must:
- a) state the approach to be taken by the operator to providing, or allowing for, access for vessels to the designated port, including the factors that it takes into account in carrying out vessel scheduling; and
 - b) contain a commitment that the operator will respond to an access request within a specified period (which must be reasonable); and
 - c) contain a commitment that the operator will provide access to a port user to any prescribed service on reasonable terms; and
 - d) set out the basis on which the port operator will determine access to a prescribed service that is the subject of an access request if the demand for access from port users exceeds the capacity to provide access; and
 - e) set out the terms on which access to a prescribed service will be provided; and
 - f) set out a process for the resolution of access disputes that are not frivolous or vexatious that:
 - i. provides for a port user to give written notice of a dispute to the operator within a specified period; and
 - ii. requires the operator to undertake genuine and good faith negotiations through discussion with the port user with a view to resolving the dispute as quickly as possible; and
 - iii. if the dispute is not resolved through discussion – provides for the operator to arrange mediation or conciliation to resolve the dispute; and
 - iv. if the dispute is not resolved through mediation or conciliation – provides for it to be referred to arbitration by an independent arbitrator appointed by the parties to the dispute; and
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- v. specifies the method by which the independent arbitrator is to be appointed which may be, but is not required to be, requesting the Regulator to nominate a person for appointment as an independent arbitrator; and
 - vi. requires that the arbitration be conducted in accordance with Part 5 of the *Commercial Arbitration (National Uniform Legislation) Act*; and
 - vii. sets out the powers and duties of the arbitrator in conducting the arbitration, including a requirement to take into account the access and pricing principles set out in section 133 of the Act; and
 - viii. provides a mechanism for the apportionment of the costs of an arbitration; and
 - ix. provides for the decision of the arbitrator to be treated as an award under the *Commercial Arbitration (National Uniform Legislation) Act*; and
 - x. requires the parties to an arbitration not to disclose its outcome to third parties; and
- g) require the parties to an access dispute to keep confidential information provided during any access request negotiations or access dispute resolution process; and
 - h) provide for the right of each party to an access dispute to request from the other party, within a specified period, information specified by the requesting party that, in the opinion of the requesting party, is reasonably necessary for the resolution of the dispute; and
 - i) require a party to comply with a request of a kind mentioned in paragraph (h) within a specified period; and
 - j) require the operator to give reasons for any decision made by the operator that affects a port user.

Prohibitions on Certain Conduct – Hindering Access and Unfairly Differentiating

- 2.18 Division 2 of Part 11 of the Act prohibits certain conduct of private port operators:
- a) a prohibition on conduct for the purpose of preventing or hindering the access of a user or potential user to any prescribed service (section 124(1)); and
 - b) a prohibition, in negotiating access to a prescribed service, on unfairly differentiating between port users in a way that has a material adverse effect on the ability of one or more of them to compete with other port users (section 125(1)).
- 2.19 Section 127 of the Act does not expressly state that the Commission should take into consideration sections 124(1) and 125(1) in its decision whether to approve the

access policy. However, sections 124(5)(b) and 125(2)(c) allow an access policy to create exceptions to sections 124(1) and 125(1).

- 2.20 For the reasons explained below, the Commission has adopted the position that it should consider the extent to which a draft access policy might create exceptions to sections 124(1) and 125(1).

Prescribed Services

- 2.21 Part 11 of the Act applies to 'prescribed services' provided by a 'port operator of a designated port that is not a public sector entity'. The provision of prescribed services by a private port operator is a regulated industry for the *Utilities Commission Act* (section 119(1)).
- 2.22 Regulation 12(1) identifies the following services provided by a private port operator to which Part 11 of the Act applies:
- a) providing, or allowing for, access for vessels to the designated port;
 - b) providing facilities for loading or unloading vessels at the designated port;
 - c) providing berths for vessels at the designated port;
 - d) providing, or facilitating the provision of, pilotage services in a pilotage area within the designated port; and
 - e) allowing entry of persons and vehicles to any land on which port facilities of the designated port are located.
- 2.23 Regulation 12(2) confirms that a service mentioned in 12(1) does not include any service provided under a lease granted by the private port operator.
- 2.24 Regulation 12(3) confirms the following services provided by a private port operator are not services to which Part 11 of the Act applies:
- a) a towage service for facilitating access to the designated port;
 - b) a bunkering service at the designated port;
 - c) a service for the provisioning of vessels (including the supply of electricity and water) at the designated port; and
 - d) a service for the removal of waste from vessels at the designated port.
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Chapter 3: Review of Draft Access Policy

Approach of the Commission

- 3.1 The Commission must approve a draft access policy that meets the requirements of 127(2) of the Act. The matters that must be included in an access policy are set out in Regulation 13(2) of the Ports Management Regulations.
- 3.2 The Commission reviewed the draft access policies provided by DPO to consider whether the matters prescribed in Regulation 13(2) were each included. In doing so, the Commission considered whether any other contents of the access policy were directly or indirectly inconsistent with those prescribed matters. This included considering whether the access policy as a whole contains a commitment to the provision of access to a port user to any prescribed service on reasonable terms as required by Regulation 13(2)(c) and a process for the resolution of access disputes that are not frivolous or vexatious as required by regulation 13(2)(f).
- 3.3 In the course of its reviews, the Commission identified matters that it considered required to be changed to meet the requirements of Regulation 13(2) and raised those matters with DPO. A number of these matters were also identified in submissions from interested stakeholders and are mentioned in the commentary below.
- 3.4 The Commission is satisfied that the revised draft access policy in Appendices B, C and D includes the matters prescribed by Regulation 13(2).
- 3.5 The Commission also considered the extent to which a draft access policy creates exceptions to sections 124(1) and 125(1), given that such exceptions might defeat the operation of the provisions that are required by Regulation 13(2) and in light of the objects of Part 11 of the Act.
- 3.6 The draft access policy expressly states in clause 1.3 that nothing in the access policy is intended to require or permit the Port Operator to engage in conduct in breach of section 124(1) or section 125(1) of the Act.

Key issues raised in submissions

- 3.7 The Commission sought submissions from interested stakeholders on the 10 March and 16 August 2016 version of the draft access policy. In relation to the first consultation process, the Commission received two submissions. For the second consultation process, the Commission received three submissions. All submitting parties requested their submissions be treated as confidential.
- 3.8 Submissions received also raised issues regarding compliance with the Act and Regulations, made suggestions for improvements to the access policy and sought amendments and clarifications regarding operational aspects of the proposed access policy.

Objectives

- 3.9 The March 2016 draft of the access policy contained comments about the objectives in clause 1.2 of the access policy. The comments sought, for example, the addition of objectives and clarification about how the objectives would be applied. The objectives have since been amended.
- 3.10 Regulation 13(2) does not require objectives to be included in the access policy. The Commission has considered whether the objectives in the draft access policy as now formulated are inconsistent with Regulation 13(2) and is satisfied that they are not.

Feasibility Test

- 3.11 A number of submissions raised concerns with the proposed feasibility test (clause 4.2) in the earlier versions of the draft access policy, with particular concern about provisions that would have allowed for consideration of corporate objectives and contractual obligations of DPO. The concerns focused on DPO having potentially wide discretion in determining feasibility and denying access to the prescribed services at the Port.
- 3.12 The Commission considered the proposed feasibility test in light of the requirements of the Act and the Regulations. The Commission's position is that the feasibility test should not operate in such a way as to defeat the substantive operation of the provisions that are required by Regulation 13(2) including the commitment to provide access to a port user to any prescribed services on reasonable terms.
- 3.13 The Commission engaged in further discussion with DPO on the feasibility test and a number of amendments were made, including removal of requirement to be consistent with the corporate objectives of the Port Operator and removal of the provision requiring access to be possible at a reasonable price, having regard to the Pricing Principles. Other drafting changes were made to address concerns about the detailed application of the test and how it was applied under the access policy.

Contractual obligations

- 3.14 The Commission was concerned with DPO's proposal to include provisions in the feasibility test that would enable the Port Operator to reject an access application on the grounds of consistency with any of its contractual or other obligations. Some stakeholders also raised concerns on this point.
- 3.15 The Commission does accept that contractual obligations may be relevant in determining whether the terms offered by the Port Operator are reasonable.
- 3.16 The Commission's position is that the extent to which the feasibility test may include any reference to contracts, the reference should be only to contracts for port access. DPO has amended the draft access policy submitted 16 May 2017 to reflect this position.
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- 3.17 DPO also amended the draft access policy to restrict the application of the contractual obligations to exclude prohibited contracts. Prohibited contracts are defined in the draft access policy under clause 2.1 as an agreement or arrangement that is prohibited by section 124 or 125 of the Act. This supports the prohibition on conduct for the purpose of preventing or hindering the access of a user or potential user to any prescribed service (section 124(1)), and on unfairly differentiating between port users in a way that has a material adverse effect on the ability of one or more of them to compete with other port users (section 125(1)).

Commitment to access on reasonable terms

- 3.18 Clause 4.1 of the draft access policy provides an undertaking that the port operator will provide access to prescribed services on reasonable terms, as required by Regulation 13(2). Submissions on earlier drafts of the access policy raised concerns about qualifications to this commitment. These qualifications have been removed.
- 3.19 The Commission accepts that contractual obligations may be relevant considerations in deciding what are reasonable terms. This is reflected in clause 4.1(b) which notes that in determining whether the terms of an access agreement are reasonable, regard may be had to the objectives of the access policy including the legitimate business interests of the Port Operator.

Port lease and related agreements

- 3.20 Clause 4.1(b) states that without limitation, the legitimate business interests of the Port Operator include (in summary) compliance with its contractual obligations owed to the Northern Territory Government. Clause 7.7(a)(iv) refers to the need for the arbitrator to have regard to the need for the Port Operator to comply with those agreements in deciding disputes.
- 3.21 The reference to contractual obligations owed to the Northern Territory Government reflects that DPO and its related entities have entered into a suite of agreements with the Northern Territory Government in relation to the Port. While some of these are on the public record, most are not. The Commission did not consider that these agreements should be included in the feasibility test such that they could justify a refusal of access. The Commission accepts that a reference to them in clauses 4.1(b) and 7.7(a)(iv) is consistent with Regulation 13(2).

Prudential requirements

- 3.22 Stakeholder submissions raised concerns about the definition of Prudential Requirements and in particular, the difficulty of demonstrating compliance with some elements of the definition. The Commission notes that new provisions in the draft access policy at clause 6.3 give applicants an opportunity to provide additional information to the Port Operator to demonstrate the applicant meets the Prudential Requirements and that a disagreement about whether the Prudential Requirements are met may be the subject of a dispute.

- 3.23 The Commission is satisfied that the Prudential Requirements as applied under the draft access policy are consistent with the commitment to provide access on reasonable terms.

Access Disputes

- 3.24 Stakeholder submissions previously raised concerns with the definition of access and the dispute resolution process not applying to disputes in relation to an access agreement once executed.
- 3.25 The Commission's view is that the amended draft access policy received 16 May 2017 aligns with the definition of access dispute in clause 2.1 with the Regulations.
- 3.26 The Commission's position is that requiring the access policy to define the dispute resolution process in an access agreement is outside the Commission's authority under the Act and Regulations.

DPO as trustee for the Darwin Port Manager Trust

- 3.27 Previous versions of the draft access policy were submitted by 'Darwin Port Operations Pty Ltd (ACN 603 472 788) as trustee for the Darwin Port Manager Trust'.
- 3.28 The Commission noted that the Declaration of Operator of Port of Darwin made by the Minister for Transport on 30 June 2015 declared 'Darwin Port Operations Pty Ltd ABN 62 603 472 788' as the operator.
- 3.29 For this reason, the Commission formed the view that the access policy must be submitted by the entity named in the Declaration and the references to trust arrangements should be omitted. The draft access policy received on 16 May 2017 reflects this change.
- 3.30 The draft access policy has been amended to reflect that the services (other than pilotage services) provided under the access policy are provided by the DPO in its capacity as trustee for the Darwin Port Manager Trust (ABN 60 269 541 845) and pilotage services are provided for by Darwin Port Pilotage Pty Ltd in its capacity as trustee for the Darwin Port Pilotage Trust (ABN 98 744 318 229).

Application of Access Policy to the Marine Supply Base

- 3.31 Submissions raised issues with the application of regulatory oversight at the Marine Supply Base. The Commission understands that the Marine Supply Base is currently operated by ASCO Australia Pty Ltd (ASCO) under a fee for service arrangement with a term up to 20 years from June 2014. As a result, the services are not provided by the declared port operator and cannot be regulated by the Commission.
- 3.32 The Commission also notes stakeholder comments that similar arrangements where DPO is able to 'lease out' or sell the ability to deliver prescribed services could be used to avoid regulatory oversight.
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- 3.33 The Commission notes stakeholder concerns regarding a lack of regulatory oversight of commercial arrangements at the Marine Supply Base and the possibility of large price increases by ASCO. The Commission's position is provision of prescribed services at the Marine Supply Base are outside the scope of the port access and price regulation framework unless the prescribed service is delivered by the DPO as the port operator.
- 3.34 This issue may be further considered as part of the Commission's review of the access and price regulation regime due to commence in late 2017.

Queuing and priority

- 3.35 Stakeholders made a number of comments about the queuing and priority arrangements in earlier drafts of the access policy.
- 3.36 Regulation 13(2) requires the access policy to state the factors it will take into account in carrying out vessel scheduling and how it will determine access where demand exceeds capacity. The draft access policy states those factors and changes have been made to earlier drafts to ensure that the principles in the access policy are reflected in access agreements. The Commission's position is that (subject to the Act and its other legal and regulatory obligations) the Regulation otherwise leaves the queuing and priority arrangements to be determined by the Port Operator.

Standard Terms and Payment Terms

- 3.37 The amended draft access policy includes a provision that any changes arising from a review of the access policy or to the Standard Terms and Payment Terms will be subject to sections 127(10) and (11) of the Act. This reflects that the Standard Terms and Payment Terms form part of the access policy.
- 3.38 Stakeholder comments sought clarification of the priority of the Standard Terms, Payment Terms and other instruments. The Commission notes that this has been sufficiently clarified in the draft access policy.
- 3.39 Stakeholder consultation raised some issues in relation to the Standard Terms and Payment Terms. The amended draft access policy incorporates changes to the proposed Standard Terms and Payment Terms, including some changes that address the points raised by stakeholders.
- 3.40 The Commission reviewed the Standard Terms and Payment Terms to consider whether they contained any provisions that were directly or indirectly inconsistent with the commitment in the access policy to provide access on reasonable terms.
- 3.41 DPO amended the draft Standard Terms and Payment Terms in response to issues identified by the Commission, including changes to the draft indemnities and limitation of liability. The Commission is satisfied that the issues it identified have been adequately addressed.

Chapter 4: Draft Decision

- 4.1 In making this decision, the Commission has had regard to section 127 of the Act, the objective in Part 11 of the Act and the Ports Management Regulation 13.
- 4.2 The draft access policy submitted by DPO on 16 May 2017 consists of three documents, entitled:
- a) 'Access Policy of Darwin Port Operations Pty Ltd (ACN 603 472 788)';
 - b) 'Port of Darwin Standard Service Terms and Conditions'; and
 - c) 'Darwin Port Payment Terms and Conditions'.
- 4.3 Pursuant to section 127(3) of the Act, the Commission gives notice that its draft decision is to approve the draft access policy received on 16 May 2017. The Commission considers that the draft access policy meets the requirement of 127(2) of the Act.

Appendix A: Draft Access Policy submitted March 2016

Appendix B: Draft Access Policy submitted 16 May 2017

Appendix C: Draft Standard Service Terms submitted 16 May 2017

**Appendix D: Draft Standard Service Payment Terms submitted
16 May 2017**