

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 12 April 2022, the Commission approved DPO's second access policy (current access policy) for the Port of Darwin. The current access policy nominally expires on 12 April 2027 (in accordance with section 127(10) of the PM Act).
- 1.3 DPO proposes changes to certain terms and conditions in the current access policy and on 12 October 2023, submitted a new draft access policy for that purpose. Consistent with the current approved access policy, and 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 Of these documents, the Access Policy of Darwin Port Operations Pty Ltd is unchanged from that approved on 12 April 2022. In the other documents, DPO has amended six clauses as described under section 4 of this Statement of Reasons.
- 1.5 Section 127(2A) of the PM Act requires DPO to consult with port users after preparing a draft access policy and to provide a summary of the comments received during the consultation to the Commission. DPO published the draft Port of Darwin Standard Services Terms and Conditions and Darwin Port Payment Terms and Conditions on its website on 12 October 2023 and alerted port users via email to the documents and proposed changes. Feedback from port users was requested by 26 October 2023. DPO advised that no submissions were received.

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 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).

3 Compliance with the PM Act and Regulations

- 3.1 The draft access policy addresses all the matters prescribed by regulation 13(2) of the PM Regulations and the Commission notes clause 1.3 of the 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 section 124(1) of the PM Act, which prohibits conduct that would prevent or hinder access, or section 125(1), which prohibits unfair differentiation between port users.

4 Amendments to access policy documents

- 4.1 DPO has amended clauses to ensure alignment with requirements under the *Competition and Consumer Act 2010* (Cth). More specifically, DPO changed the Port of Darwin Standard Services Terms and Conditions as follows:
 - Request for use of the Facilities and the Services, clause 2(f)(ii) – clarifies that cancellation charges are published in the schedule of port charges on DPO's website
 - Use of Facilities and the Services, clause 6(b) and Limitation of Liability, clause 17(b) – clarifies the clauses are subject to Australian Consumer Law
 - Indemnity by Users, clause 7(b)(i) – deletion of the indemnity for breach of contract
 - Termination by Darwin Port, clause 11(a)(ii) – amended so termination only applies to a breach of a material (rather than any) term
- 4.2 DPO changed clause 2(d) of the Port of Darwin Standard Services Terms and Conditions regarding payments to limit the extent that DPO can reopen accounts to six months after the invoice date (currently indefinite) and give a port user the parallel right to notify DPO if an amount has been incorrectly charged.
- 4.3 The Commission notes the amendments improve transparency including the application of Australian Consumer Law, remove elements not reasonably necessary to protect DPO's interests and add corresponding rights for port users.

5 Commission's decision

- 5.1 In accordance with section 127(3) of the PM Act, the Commission approves the draft access policy submitted on 12 October 2023. In making this decision, the Commission has had regard to Part 11 of the PM Act and regulation 13(2) of the PM Regulations.
- 5.2 Regulation 13(3) of the PM Regulations, requires DPO to publish a copy of the approved access policy on its website within 5 days of the Commission's approval of the draft access policy. The access policy will nominally expire five years after the day on which it was approved by the Commission. In accordance with section 127(12) of the PM Act, DPO must comply with the access policy.