26 JUNE 2023

DPO RESPONSE TO UC DRAFT REPORT

2018 Review	The Commission's first *Ports Access and Pricing Review* under the Act, which was concluded in November 2018.
Act	the *Ports Management Act 2015* (NT)
Access Policy	the revised access policy for the Port, as approved by the Commission on 12 April 2022
Commission	the Utilities Commission of the Northern Territory
DPO	Darwin Port Operations Pty Ltd (ABN 62 603 472 788), the private port operator for the Port
Government	means the Northern Territory government
Reporting Guidelines	means the document titled *Port Of Darwin Reporting Guidelines* published by the Commission on August 2021 and available at the following link: https://utilicom.nt.gov.au/__data/assets/pdf_file/0017/1040327/Utilities-Commission-Port-of-Darwin-Reporting-Guidelines-August-2021.pdf
Issues Paper	the 2023 *Issues Paper* released in November 2022 by the Commission
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
Port	the Port of Darwin
Prescribed Services	means the services prescribed by Regulation 12(2), being specifically: 1.1 providing or allowing for, access for vessels to the Port; 1.2 providing facilities for loading or unloading vessels at the Port; 1.3 providing berths for vessels at the Port; 1.4 providing or facilitating the provision of pilotage services in a pilotage area within the Port; and 1.5 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 2015 (NT)* (as amended from time to time)

1 Executive summary

DPO welcomes the opportunity to provide its submission in response to the Commission's May 2023 Draft Report for the purposes of its review of the Regime in operation at the Port, as required by section 123 of the Act (**Draft Report**).

DPO reiterates its views from its submission dated 31 January 2023 (**DPO Submission)** in response to the Issues Paper:

- that the Regime is operating effectively and there have been no instances of market failure or adverse economic outcomes in the operation of the Port; and
- that the existing price monitoring regime is broadly effective.

In this context, DPO does not consider there are any compelling reasons to introduce a more direct form of price regulation, which could risk having adverse effects on DPO's ability to grow the facilities, commercial operations and throughput at the Port.

As noted throughout this response and previously, the imposition of additional regulatory obligations that move away from the original intention for a 'light-handed' regulatory framework should not be made lightly. DPO believes it is entitled to expect that any proposal to amend the existing Regime in a way that materially increases the costs or risks for DPO in respect of its operation of the Port should be evidence-based; and be justifiable on the grounds of clear and identifiable issues that require resolution.

DPO considers that "regulatory creep" which occurs in the absence of such evidence directly undermines the policy intention behind the design of the original Regime.

DPO has set out further information in response to certain recommendations in the Draft Report below.

2 Market power

DPO notes the Commission's views on market power in the Draft Report. While DPO does not necessarily agree that it has market power, as the Commission has noted:

- there is no evidence that DPO is improperly using that market power (if it exists);
- DPO has not reported any material instances of non-compliance with the Access Policy or the pricing determination;
- the Commission has not received any complaints about DPO's compliance with regulatory requirements from other sources;
- no customer or access seeker has ever sought to invoke dispute resolution provisions.

A finding that the DPO has market power (which DPO does not accept) is insufficient, in-and-of itself, to support increased regulation at the Port.

As noted in the DPO Submission:

- DPO does not make excessive profits from the provision of Prescribed Services. Previous price benchmarking analysis and price increase trends demonstrate that increases in prices for Prescribed Services are consistent with increases in prices at other Australian ports.
- Since the commencement of the Regime DPO has only deployed increases to the standard charges for prescribed services that are in line with increases under the national Consumer Price Index (**CPI**).[1] This pricing approach is also broadly consistent with the approach taken at other ports, although DPO again cautions that some of

[1] Issues Paper, table 2 at [4.10]. Noting DPO did not increase prices at all in FY 2016-2017

the comparator ports in the Issues Paper – particularly the Port of Melbourne – are not sufficiently similar in size or commercial operation to the Port to be relied upon as a comparator.

The fact that DPO is passing though cost increases which are no more than commensurate with CPI levels cannot be evidence of any monopolistic behaviour – if anything it should suggest the opposite. In DPO's view, absent any evidence of improper use of market power, any complaint regarding non-compliance with the Regime or any invocation of the dispute resolution provisions, it is difficult to see a clear reason to raise the level of regulation at the Port.

Responses to draft recommendations

Draft recommendation 3: The Commission recommends amending the PM Regulations to include provisions under which a port user engaged in access negotiations is given financial information that will enable that port user to assess whether prices are consistent with the access and pricing principles.

As noted in the DPO Submission, DPO considers that further intervention in the market - particularly at this early stage – may result in unintended consequences, or impose an administrative or compliance burden which is disproportionate to any purported benefit.

DPO also considers that the implementation of further regulatory oversight must be based on quantifiable, objective evidence justifying the increased regulation rather than subjective, hypothetical concerns about issues which the Commission thinks *could* materialise but which there has been no evidence of. As the Commission acknowledges in the Draft Report, "*no complaints regarding DPO's compliance with regulatory requirements*" have been received and "*changes to the negotiate/arbitrate model following the [2018 Review] have strengthened the negotiation position of port users*".[2]

Since acquiring the Lease, DPO has almost always increased prices for Prescribed Services in line with increases under the national Consumer Price Index.[3]

In the absence of any evidence of DPO pricing in a manner that is unreasonable or departs from the framework set out in the Regime, DPO submits that there is no basis to impose additional compliance obligations on it to share financial information with port users. The broad obligations on DPO to provide access to Prescribed Services on 'reasonable terms' are sufficiently clear and firm to ensure access to Prescribed Services is on competitive terms for all Port users and potential access seekers.

Further, the Commission's Prescribed Port Services Price Determination (**Price Determination**) ensures that changes to DPO's standard charges for Prescribed Services are published and available to Port users on DPO's website; further facilitating the Commission's ability to monitor and report on DPO's pricing approach.

In addition, DPO agrees with the Commission that the negotiate/arbitrate framework has strengthened the negotiation position of Port users and believes the framework has functioned extremely well to date. DPO's consistent experience is that Port users are sophisticated commercial entities that are able to (and do) act strategically and in their own best interests in negotiations with DPO. In DPO's experience, these parties are also well aware of the applicable access and pricing principles, and use them to negotiate

[2] Executive Summary, page ii.

[3] Issues Paper, table 2 at [4.10]. Noting DPO did not increase prices at all in FY 2016-2017.

effectively with DPO in respect of the pricing, arrangement and provision of Prescribed Services.

The fact that the Commission is provided with a copy of each negotiated access agreement for review provides a further layer of protection and assurance that DPO is negotiating in accordance with the Regime's access and pricing principles (and will continue to do so).

The vagueness as to the financial information that DPO might be required to disclose under draft recommendation 3 also gives rise to concerns regarding the operating costs that DPO may incur in order to collect, compile and disclose such information and the risk that DPO may be required to disclose information that may be confidential or commercially sensitive to DPO or indeed other users of the Port to their detriment.

In DPO's view, implementing draft recommendation 3 would create a potentially onerous administrative burden for DPO without proper basis.

Draft recommendation 4: The Commission recommends amending the PM Regulations to provide for the arbitrator to be given the financial information required to assess whether prices are consistent with the access and pricing principles.

DPO refers to and repeats its submission on draft recommendation 3 above in response to draft recommendation 4.

In addition, DPO notes that clause 13(2)(f)(vii)(A) of the Regulations allows the arbitrator to order a party to the arbitration to produce information that is requested by the other party and reasonably necessary for the resolution of the dispute. Accordingly, there is already a function built into the Regulations for the Port user/access seeker to obtain this information.

In DPO's view, it is therefore unnecessary to impose a requirement for DPO to provide financial information to arbitrators as a matter of course. Where additional further information is reasonably necessary, the Port user/access seeker can request it and the arbitrator will, in turn, have access to it.

There is no reasonable basis to impose the further administrative burden proposed in draft recommendation 4 on DPO.

Draft recommendation 7: The Commission recommends amending the regime to require a private port operator or private pilotage provider to maintain and provide to the Commission financial accounts for prescribed services as a whole. A private port operator and private pilotage service provider could prepare a single set of accounts when they are within the group of entities. Guidance about the nature of the accounts and supporting information would be provided under the PM Regulations or through guidelines established by the Commission. The financial accounts would be treated as confidential information and not published by the Commission although high level information from the accounts may be published in the Commission's reports. The Commission would use this information to inform its monitoring of prices and its assessment of whether proposed price changes are reasonable, reflect efficient costs and are consistent with the access and pricing principles.

As noted in the DPO Submission, the 'light-handed' model of regulatory oversight remains appropriate for the Port, and there is no compelling basis for moving to a more detailed and intrusive form of regulatory oversight (in particular, in relation to pricing for Prescribed Services).

Continuance of this 'light-handed' regulatory approach offers strong commercial incentives for DPO to continue to comply with the requirements of the regulatory framework, by virtue of the threat of a more intrusive regulatory regime if it fails to do so. Tellingly, the Draft Report does not identify any examples of conduct by DPO which would justify a departure from the light-handed approach in the Regime.

In this context, DPO considers that the recommendation to provide financial accounts would result in significant additional reporting and administrative burdens. In particular, the recommendation to provide such accounts would require DPO to:

1. Prepare bespoke financial accounts in the form sought by the Commission; and
2. Provide any explanatory comments on the accounts / respond to questions from the Commission about the accounts.

One of the original objectives of the Regime and the privatisation was to encourage efficient private investment and operation in the Port.

To require the DPO to provide financial information suggests that the Commission might use that information to somehow inform its price monitoring function. DPO submits that the actual price at which DPO supplies Prescribed Services is the most cogent information available to the Commission to perform its price monitoring function (which information the Commission already has access to).

A similar recommendation was put forward by the Commission in its 2018 Review and we refer the Commission to DPO's response to the 2018 Review. DPO reiterates its concerns expressed in its response to the 2018 Review regarding the potentially significant upfront and ongoing costs that DPO would need to incur to comply with such a requirement.

As above, DPO considers the imposition of these additional compliance burdens are unwarranted, in the absence of any evidence that the current Regime is not operating effectively, and in a context where DPO has passed though cost increases which are no more than commensurate with CPI levels. Put simply, a requirement to provide bespoke financial reporting information appears entirely unnecessary, and would **not** result in the production of any information that the Commission requires in order to effectively carry out its price monitoring functions.

Draft recommendation 10: The Commission recommends the port access and pricing regime be amended to prevent an access policy permitting carve-outs from the non-hindering or non-discriminatory obligations in sections 124 and 125 of the PM Act.

The Commission has noted in the Draft Report that the Access Policy already contains a clause that 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 further noted that this means the issues is not presently a problem but that there is a vulnerability remaining in the absence of modifications to the Regime on this point. DPO considers that in the absence of any problem with the Access Policy, where DPO already has an express provision regarding section 124(1) and 125(1) and given the existing regulation existing in the Regime, there is no credible theory of harm to which this draft recommendation 10 could respond.

Draft recommendation 11a: The Commission recommends amending the port access and pricing regime to give the Commission regulatory oversight, through the access policy approval process, of the classification of services as standard services.

DPO does not consider it is necessary for the Commission to have an oversight function of the classification of services as standard services. It is manifestly unclear as to what purpose such a function would serve, or how it would be carried out in practice.

Under the current Regime, DPO designates services as standard services where it feels it can usefully offer those services on standard terms and conditions at a set published rate. DPO reserves as non-standard services those services that need to be provided on bespoke negotiated terms and conditions (due to variations in customer requirements, as discussed further below in response to draft recommendation 11(b)).

DPO considers oversight of these decisions to be an unnecessary level of intervention, because DPO would bear the burden of providing information to the Commission regarding its decisions to classify or not classify services as standard services. This is in circumstances where there has been no complaints regarding DPO's compliance with the regulatory regime. If there were issues in relation to DPO's decisions in relation to which services it will offer on standard terms, DPO assumes the Commission would have received complaints about this. In the absence of any such complaints, DPO suggests there is no basis for the Commission to make this recommendation.

Moreover, there is no clarity in the Draft Report as to what form of "oversight" this recommendation would entail, and what criteria the Commission would use to form an assessment as to whether a service ought to be classified as standard or not. In circumstances where DPO is best placed to make this assessment from a commercial standpoint, it is difficult to understand what improvements to the Regime this recommendation would achieve.

DPO also notes that cl 5.2(a) of the Access Policy provides that the Port Operator 'may, but is not obliged to' prepare Standard Terms upon which certain services can be offered. The Access Policy further provides that all services to which Standard Terms apply are Standard Services. In this context, it is difficult to see the rationale for the Commission having an oversight function in relation to which services will be offered on Standard Terms, in circumstances where DPO has no obligation to do so.

Draft recommendation 11b: The Commission recommends amending the port access and pricing regime to allow the Commission to determine non-standard services for which a private port operator must publish indicative terms in its access policy, and where feasible for the service, indicative charges (reference tariffs).

DPO's strong view is that i) it is best placed to determine which services are non-standard, and ii) that it would not be feasible to publish indicative terms or charges for non-standard services in the Access Policy.

This is because non-standard services are inherently difficult to offer on standard terms, given variations in customer requirements (i.e. they are not standard services for a reason).

DPO understands from the Draft Report that stakeholders have raised concerns about lack of clarity and certainty around the export of dry bulk minerals (presently a non-standard service). Taking this service as an example, the variables that would need to be considered when determining terms and charges for the service include the following:

- product type
- product form (e.g. lump, fines, water content, flow properties)
- infrastructure required

- impact on that infrastructure based on product type (e.g. copper concentrate is highly corrosive and requires increased frequency of infrastructure treatment)
- additional infrastructure requirements (e.g. some commodities may require a sealed system in order to mitigate dust generation that could lead to environmental contamination)
- quantity of product
- quality of product
- variance in required cleaning time for infrastructure to mitigate cross-contamination risk – where the products are relatively similar (e.g. iron ore and manganese) the cleaning takes around 3 hours for the rail dump and 12 hours for the ship loader. For copper concentrate, the cleaning regime takes around 24 hours in total to remove the risk of contamination
- environmental risk (e.g. dust and water pollution)
- occupational health and safety risk
- storage requirements
- third-party involvement (e.g. stevedores, trucking)
- vessel size

All of these factors lead to variations in load time, which directly impacts DPO's operating costs in areas such as labour, maintenance and running costs. These costs need to be determined before a price for exporting bulk products can be set.

Given these variables, DPO considers publishing indicative terms and pricing for non-standard services would have limited value for customers.

DPO is not aware of any equivalent port regulatory regime in Australia that seeks to standardise terms for such a variety of commodities. We consider it highly likely that the explanation for this can be drawn from the factors highlighted above.

Draft recommendation 12: The Commission recommends amending the port access and pricing regime to give the Commission the power to initiate an independent audit of a port operator's or pilotage provider's compliance with the regime, at the operator's or provider's cost, and for the operator or provider to propose and have approved by the Commission the proposed auditor and terms of reference for the audit.

DPO welcomes the Commission's comments acknowledging the additional costs that would be imposed on DPO if an audit function was enlivened. DPO also notes the Commission's comments that the current risk of non-compliance by DPO is low and therefore, at the moment, the Commission is unlikely to have any reason to request DPO to undertake an independent audit.

DPO considers that the threat of further regulation operates as a significant disincentive to engaging in any conduct that might evidence non-compliance with the Regime. In the absence of any actual non-compliance, DPO considers the introduction of an audit regime is premature, and that there may be other less costly alternatives than independent audit if there were concerns about DPO's compliance.

While DPO of course appreciates that the Commission doesn't anticipate needing to use this audit power, DPO considers that any power has the potential for misuse or overuse,

and again, does not consider an audit function is necessary or consistent with the light touch approach to regulation that DPO considers is operating effectively.

Draft recommendation 13a: The Commission recommends the port access and pricing regime be amended to include guidance on the definition of 'material instance of non-compliance'.

As noted in the DPO submission, the Commission's Reporting Guidelines (which are freely available on the Commission's website) provides a broad formulation of what constitutes a "*material instance of non-compliance*". DPO considers additional guidance in the Regime on the same point would be duplicative.

To DPO's knowledge (and as acknowledged by the Commission) there have also been no material complaints raised by customers or Port users about the way in which the Regime functions. In this context, DPO does not understand there to be an issue to which this recommendation is directed.

Draft recommendation 13c: The Commission recommends amending section 126 of the PM Act to make enforcement orders for the failure to comply with an access policy or failure to negotiate in good faith.

As above in response to draft recommendation 13a, DPO considers that the threat of further regulation operates as a significant disincentive to failing to comply with the Access Policy.

In the absence of any actual non-compliance or failure to negotiate in good faith, DPO considers the introduction of enforcement orders is unnecessary.

Draft recommendation 14a: The Commission recommends amending the port access and pricing regime to include a process for a private port operator and a private pilotage provider to propose, and have approved by the Commission, measures of service.

This recommendation is premised on the Commission's concern that "*a monopoly provider can reduce service quality (through cost reductions) while maintaining prices*" and seems to assume that there is no incentive for DPO to supply a high quality of service at the Port. DPO's view is that subjective, hypothetical concerns like this should not, in the absence of any evidence of reduced service quality or other identifiable issues, be used to justify increased regulation.

A finding that DPO has market power (which DPO does not necessarily accept) and the Commission's concern about what a hypothetical service provider with market power ***might*** do is insufficient, in-and-of itself, to support introducing a requirement for measures of service at the Port to be approved by the Commission in respect of any service.

As noted in the DPO Submission, many factors have impacted on throughput for the Port since February 2022 and rising energy costs have meant that businesses need to make decisions on export and import volumes based on increased costs for logistics and shipping.

As the Commission is aware, there is substantial spare capacity at the Port, such that DPO is not in a position to lower service quality - rather, it is in DPO's interests to offer a high quality of service to attract and retain port users, and to maximise throughput (and utilisation more generally).

The following are some examples which illustrate the way in which these commercial incentives have translated into high quality service delivery outcomes for customers at the Port:

- On several occasions where prospective customers have failed to satisfy the Prudential Requirements prescribed by the Access Policy, DPO has actively worked with these customers to find a resolution and, despite not being obliged to provide access, has negotiated with these customers for the provision of appropriate financial securities (e.g. parent company guarantees, bank guarantees and cash deposits) commensurate to the risk DPO is taking on so as to allow these customers to begin accessing the Port.
- Recently, a prospective customer was under significant time and financial pressure to undertake a first shipment of a new product through the Port, the funds from which were required for the customer to be able to pay DPO. Despite the product being new and untested with the Port infrastructure, DPO negotiated an access agreement which waived the requirement for a Feasibility Study (which is typically required under the Access Policy), allowing the customer to expedite the first shipment through the Port.
- DPO recently negotiated with a different customer to offer reduced pricing for the initial stages of the customer's project. This reduced pricing offer was made by DPO in recognition of the nascency of the customers' operations, and the desire to support the customer to get 'up and running'.

Draft recommendation 14b: The Commission recommends the port access and pricing regime should require the private port operator and private pilotage provider to either:

- ***report annually to the Commission on performance against those measures, and for the Commission to then publish an annual report based on that information or***
- ***report directly to the public on performance against those measures.***

DPO is concerned that imposing reporting obligations in relation to any measures of service would impose a compliance burden that is unwarranted in light of its response to draft recommendation 11(a) above.

In the event that any measures of service were approved by the Commission (which DPO considers is unnecessary), DPO considers a more reasonable starting point would be for DPO to be required to report to the Commission on any complaints it receives regarding material failures to comply with any measures of service, rather than any proactive reporting obligation (to the Commission or more broadly to the public). DPO considers that any additional compliance burden needs to be carefully considered, to ensure the burden is proportionate and necessary in the context of the existing regulation covered by the Regime.

Draft recommendation 15: The Commission recommends amending the PM Act to take the following matters into consideration when approving a draft access policy:

- ***the matters in section 6(2) of the UC Act***
- ***the object of part 11***
- ***the principle that access to prescribed services should be on reasonable terms***
- ***the access and pricing principles specified in section 133***
- ***any other matters the Commission considers relevant.***

DPO notes that s 127 of the PM Act requires an access policy to be in accordance with any regulations prescribed by the PM Regulations. The PM Regulations already contain (at r 13, “requirements in relation to access policies”) detailed provisions in relation to what must be included in an access policy. While these provisions are directed at ensuring an access policy has defined processes and procedures for access (and are less aspirational than the matters in section 6(2) of the UC Act or the object of Part 11 of the PM Act), DPO considers that the prescribed process are aligned with these aspirational matters.

In this respect, DPO considers any amendment to the PM Act on this basis is ‘form over substance’ and again, is based on a presumption that the Access Policy is not in line with the matters in section 6(2) of the UC Act or the object of Part 11 of the PM Act (or that the Access Policy would have been subject to more stringent review if the Commission did have to have regard to these additional matters).

DPO’s view is that it is unlikely that adding additional matters for the Commission to have regard to will result in any real change to the nature and content of an access policy, taking into account the provisions that already exist in the Regulations.