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Ref:

9 April 2018

Dr Patrick Walsh
Commissioner
Utilities Commission Northern Territory

Level 14, Charles Darwin Centre 19 The Mall
DARWIN NT 0800

Dear Dr Walsh,

INPEX Submission re 2018 Port Access and Pricing Review

Thank you for the opportunity to make a submission to the Northern Territory Utilities Commission's (the Regulator) 2018 Port Pricing and Access review.

[Redacted]

In sum, the key issues for INPEX remain:

1. **Monopolies and Passive Regulation.** The Port is a natural monopoly. There are no alternative Ports close by; such as on the East Coast for example. Even if there were alternatives companies like INPEX, with immovable infrastructure, have little commercial leverage to level the playing field. In these circumstances a passive regulatory framework is of questionable influence on the Port Operator's behaviour and creates risk for industry. An example is the Bladin Channel Levy being established without, in INPEX's view, appropriate and transparent commercial justification and the Regulator having no mechanism to meaningfully intervene.
2. **DMSB.** The Darwin Marine Supply Base delivering Prescribed Services without regulatory oversight.
3. **Sub-Leasing of Prescribed Services.** The ability to potentially sub-lease a Prescribed Service and avoid regulatory oversight. [Redacted]
4. **Commercial Imbalances.** The maintenance of access on reasonable terms such that access changes do not create commercial harm to the Ichthys' investment. An example could be a channel shoaling, reducing port entry and exit availability which is of little commercial consequence to the Port who may not want to expend capital

on dredging but may be of significant consequence to Ichthys. Another example may be delaying one service to increase the revenue stream in another.

5. **Reporting.** *The Regulator must have visibility of disputes and non-compliances with the Access Policy. INPEX offers such reporting is an important measure of Access Policy commercial effectiveness and a Port Operator granting access on reasonable terms.*

Please find attached a table with the list of questions from the 2018 Ports Access and Pricing Review and brief, INPEX answers. [Redacted].

INPEX appreciates the Regulator's ongoing engagement and is available to discuss as required.

Yours sincerely,

Original Signed By,

DAVID GWYTHHER JP
Deputy General Manager - Darwin

CC. Mr Michael Tennant, CE Department of Trade, Business and Innovation

Attachment:

1. *INPEX Tabulated 2018 Port Access and Pricing Review Questions and Responses.*

2018 Ports Access and Pricing Review Questions	INPEX	Comment
<i>Issue 1: Market power</i>		
Q 1a: Since the commencement of the regime, have there been any major changes in the market that may alter the need for regulatory oversight to continue?	No	
Q 1b: Are there any expected future developments that may change the need for regulatory oversight?	No	However the start-up of Ichthys LNG will have a dramatic impact on Port activity and revenue. The Access regime has attempted to anticipate this, but it remains to be seen whether the regime is totally effective. If arrangements were not effective, under the current legislation the Regulator has very little ability to respond or intervene in a timely fashion.
Q 1c: Is there any evidence that additional constraints on the potential for the port operator to exercise market power are needed in the regime?	Yes	The arbitrary determination and lack of commercial justification for the Bladin Channel Levy [Redacted]
Q 1d: Is the regime's approach to addressing the potential for the exercise of market power sufficient, given the possibility that a port operator may expand its business operations into upstream or downstream markets?	No	The MSB is a good example how the commercial structure or restructure of a Port Operator (PO) may impact on the ability of the Regulator to regulate access to both Prescribed Services and access to the Port on reasonable terms.
<i>Issue 2: Impact of the regime</i>		
Q 2a: Does the access and pricing regime promote the economically efficient operation of and investment in major ports, and competition in upstream and downstream markets?	No	There is an inherent conflict in a regime which allows cost plus pricing through the price determination and seeks to promote efficiency, particularly in a natural monopoly context. The PO is potentially rewarded for inefficiency and excessive spending if all costs can be recovered. Vertical integration would also pose a risk if the Operator's affiliates provide services from outside of the Regulated scope.
Q 2b: What are the benefits and costs of the access and pricing regime?	-	It is low cost but is also low effectiveness, particularly in the absence of market efficiency drivers and natural competition.
Q 2c: Are there any effective alternatives?	Yes	The Regulator can be given the authority to intervene if the circumstances warrant. The Regulator can be given the tools to compel the Port Operator to demonstrate the PO is driving efficiency and setting the conditions conducive to investment in the Port. If the PO does not so demonstrate the Regulator can be given the power to induce the PO to change behaviour.
<i>Issue 3: Exemption of services provided under lease</i>		
Q 3a: Is the application of regulation 12(2) too wide in allowing the port operator to lease prescribed services, and thus	Yes	The Darwin Marine Supply Base (DMSB) is a very good example. The fact pilotage is run through a separate company Darwin Port Pilotage is another.

potentially setting these services outside of the regime?		
Q 3b: Are there any effective alternatives?	Yes	No exemptions for the regulation of Prescribed Services by the Port Operator and limit the ability to sub lease or sell. Treat a lease the same as ownership.
<i>Issue 4: Regulated services</i>		
Q 4a: Is it necessary to regulate all of the current prescribed services?	Yes	Yes, since all of these are provided under the monopoly. Regulation should only be relaxed if there is effective competition and commercially feasible and reasonable alternatives for provision of the service.
Q 4b: Are there any services not currently prescribed that should be?	Yes	Fuel bunkering is not a prescribed service. At present the PO has a monopoly on the provision of fuel infrastructure unless a bunker barge operation is introduced. .
<i>Issue 5: Price monitoring</i>		
Q 5: Is price monitoring alone a sufficient form of price regulation?	No	Regulation implies an active rather than passive approach. The current regime is far too passive which INPEX offers is not appropriate in the absence of natural competition.
<i>Issue 6: Threat of regulatory intervention</i>		
Q 6a: Should arbitration be included in the <i>Ports Management Act</i> or Regulations rather than the port operator's access policy?	No	As long as: a negotiate, mediate, arbitrate regime is embodied in the regime, the core conditions are clearly understood, the regime has broad application to the settlement of disputes relating to the negotiation, execution and termination of access agreements and the operation of the legislation, and the Regulator has visibility, then where the requirement is located is a matter for Government and Regulator.
Q 6b: Should the regulator have flexibility to use other forms of price regulation where price monitoring is insufficient? If so how?	Yes	Yes. The authority to approve a schedule of fees and charges. The authority to intervene if the circumstances meet certain criteria.
<i>Issue 7: Assessing the access the regime</i>		
Q 7: Are the criteria for certification (clause 6 of the Competition Principles Agreement) an appropriate tool for assessing the access regime for the purposes of this review?	-	Not entirely. For the Regulator to be able to form a view that access is being granted on reasonable terms and the PO is setting conditions to attract investment there should also be demonstrable improvement in efficiency – demonstrated through benchmarking with other ports (as per appendix in the GHD report) and evidence of continuous improvement.
<i>Issue 8: Consultation on the initial access policy</i>		
Q 8: Should the legislation be changed to include the requirement for consultation by the private port operator with port users on the initial access policy?	Yes	The process to approve the current Access Policy is evidence of such a requirement. INPEX is confident had the issues been talked through prior to the first draft, the process would have been much more efficient.
<i>Issue 9: Amending the access policy</i>		
Q 9a: Should the port operator publicly report on the outcome of the review of the access policy and should this report be assessed or approved by the Commission?	Yes	
Q 9b: Should the port operator be required to revise the access	Yes	The Regulator should have the authority to require that the PO change the Access

policy and, if so, in what circumstances?		Policy should there be a material change in the market or Commonwealth or State legislation.
Q 9c: Should the Commission have the power to require amendments be made to the access policy and, if so, in what circumstances?	Yes	Yes, if the UC can demonstrate that the regime is not delivering competitive and efficient service provision and access on reasonable terms.
Q 9d: Is it necessary to amend the regime to ensure there is an access policy in place at all times?	Yes	Otherwise there is a gap in compliance with the legislation.
<i>Issue 10: Decision-making framework for approving the access policy</i>		
Q 10: In considering whether to approve a draft access policy, should the scope of the matters the Commission may have regard to be changed?	Yes	Please see comments on price approval and benchmarking.
<i>Issue 11: Conflict with other agreements</i>		
Q 11: Should the regime include guidance on how to resolve a conflict between the access policy and other agreements the port operator is bound by?	Yes	[Redacted] Further and in particular, the Access Policy must take precedence over any commercial agreements The PO may have or make.
<i>Issue 12: Hindering access and unfairly differentiating</i>		
Q 12a: Should the access policy allow the port operator to create exceptions to the hindering access and unfairly differentiating provisions through the access policy?	-	In general, it would seem difficult to hinder access while assuring access on reasonable terms to all Port users; other than exceptions already contemplated in the Access Policy. For example access is unsafe or might say block an access channel for an extended period of time.
Q 12b: Should the legislation expressly permit the Commission to take the hindering access and unfairly differentiating provisions into account when considering a draft access policy for approval?	-	Is this not already available to the Regulator in taking a broad view of access on reasonable terms, satisfying efficiency requirements and encouraging investment under the current legislative regime.
Q 12c: Would it be beneficial for the Commission to have the power to consider the merits of the port operator's priority/queueing policy and how it operates in practice?	No	Unless, on balance, such a policy precluded access on reasonable terms to other Port Users or it resulted in some other noncompliance with the legislative regime, then it is considered sufficient that the Regulator approves the Access Policy which includes priority/queueing policy.
<i>Issue 13: Matters to be taken into account by an arbitrator</i>		
Q 13a: Regarding dispute resolution, should the legislation specify the matters that must be taken into account by the arbitrator?	-	Not necessarily, an arbitrator must have regard to the arrangements between the parties. This includes the Access Agreement, the Access Policy and the legislative regime within which the PO must provide access and deliver prescribed services on reasonable terms to a Port User. Equally, the Operator should not be allowed to limit what an arbitrator considers through the Access Policy
Q 13b: If so, is there a preferred decision-making framework?	No	As long as the dispute resolution process is articulated and is applied clearly, transparently and consistently, this is not considered necessary at this point in time. Experience may suggest differently in due course.
<i>Issue 14: Reporting breaches with the access policy</i>		

Q 14a: Under the regime, should port users and industry stakeholders be able to report a material instance of non-compliance with the access policy to the Commission?	Yes	At present no safety valve other than to Port Operator themselves [Redacted]
Q 14b: Regarding the access policy, should the port operator report to the Commission on broader information such as the access sought, provided, refused or the time it takes for negotiations?	Yes	If not how can Regulator assess compliance with Access Policy and the legislation?
Q 14c: Should the Chief Executive Officer of the port operator sign a compliance certificate?	Yes	This improves accountability.
Q 14d: Should the regime include penalties to be imposed on the private port operator if it fails to report any material instances of non-compliance with its access policy?	Yes	At present the passive regulatory regime as almost no levers to modify the behaviour of the PO which has a monopoly.
<i>Issue 15: Access to meaningful information</i>		
Q 15a: Regarding prices for prescribed services, should the regime include powers for the Commission to obtain information from the private port operator about profit, cost and investment levels?	Yes	Without such information how can the Regulator assess pricing is consistent with the intent of the Act and the PO is being efficient? See earlier benchmarking comments.
Q 15b: Should the regime specifically require the port operator to keep separate accounts and records about prescribed services, rather than the Commission relying on its information gathering powers under the <i>Utilities Commission Act</i> ?	Yes	
Q 15c: Should the regime include powers for the Commission to initiate an independent audit of the port operator's compliance with the regime?	Yes	However the circumstances must be limited. This is a costly exercise and the attribution of costs and the interruption to the PO business are valid and relevant considerations. Without an audit regime, the Regulator has no assurance mechanism and relies solely on the PO's recognisance.
Q 15d: Is it appropriate for the Commission to have an investigative function for breaches of the port operator's obligations under the regime?	Yes	What would be the ACCC without powers of investigation? Again such a power should be limited to material breaches. Investigations are time consuming, expensive and resource intensive. They should not be shied away from, but must be judiciously employed as a tool for compliance. To protect the PO, there also needs to be an avenue the Minister appoints an independent investigator for circumstances where the Regulator may have a conflict. Perhaps a point system can be put in place for lesser breaches and when a certain number of points have accrued the PO is fined?
<i>Issue 16: Standards of service</i>		
Q 16: Should the Commission be able to specify or insist on a commitment to service standards for prescribed services by the port operator?	Yes	To ensure safety, commercial efficiency and to address circumstances where the PO delays one service to profit from the increased charge against another. [Redacted]