31 JANUARY 2023

DARWIN PORT RESPONSE TO UC ISSUES PAPER

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
ESCOSA	Essential Services Commission of South Australia
ESCOSA Report	Means the report by ESOSA titled *2022 Ports Access Regime and Price Determination: Stage One* - Final Report (August 2022): https://www.escosa.sa.gov.au/ArticleDocuments/21920/20220929-Ports-AccessRegimeAndPriceDetermination-StageOne-FinalReport.pdf.aspx?Embed=Y
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
Port Operating Deed	means the document titled Port Operating Deed between DPO and the Government entered into on 30 June 2015
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 this submission to the Commission for the purposes of its review of the Regime in operation at the Port, as required by section 123 of the Act.

As the private port operator, DPO considers that it is uniquely positioned to provide its observations about the effectiveness of the Regime.

As noted in the Issues Paper, the Regime is governed in principle by Part 11 of the Act (supplemented by Part 3 of the Regulations). Section 117 of the Act specifies that the object of Part 11 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.*"

The Issues Paper further states that: "*The Northern Territory's port access and pricing regime is intended to protect existing and potential port users (port users) at designated ports from the exercise of market power by a private port operator or private pilotage provider.*"[1]

As an overall observation, DPO considers 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.

As concluded in the 2018 Review, DPO remains of the view that the existing price monitoring regime is broadly effective. Based on the operations of the Port since 2018, 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.

Further detail in relation to these observations is set out in this submission in response to the questions from the Issues Paper. DPO would welcome the opportunity to discuss any questions from the Commission in relation to this submission or provide further input upon request.

2 Market power

As the Commission notes in the Issues Paper, it adopted the same broad conclusions as to the extent of the Port's "market power" that were identified in the 2018 Review.

DPO does not necessarily accept the extent of the findings from the 2018 Review in relation to the existence of market power, particularly having regard to:

(i) the degree of competition faced by other ports; and

(ii) the countervailing power of some Port customers.

As a preliminary comment, DPO notes that references to "market power" are regularly made in respect of Australian port infrastructure assets, principally in the context of considering the level of economic regulation that should apply to them, and this appears the case for the Issues Paper.

However, DPO would draw attention to the recent draft findings of the Productivity Commission into Australia's maritime logistics system. The Productivity Commission was tasked with reviewing the long-term trends in system performance, as well as focusing on the competition, industrial relations, infrastructure constraints and technology uptake. In its draft report, in considering the scope of regulatory settings, the Productivity Commission noted as follows:

[1] Issues Paper, at [1.5]

The major container ports face regulation of their interactions with both shipping lines and tenants, such as terminal operators.

In the case of shipping lines, prices for services provided by ports are typically monitored (or face the threat of further regulation). The Commission received few complaints about port pricing to shipping lines, consistent with this regulation acting as a constraint on the ability of each port to exercise market power over the shipping lines.

For landside tenants, container ports in Brisbane, Sydney, Adelaide and Fremantle operate under light-touch regulatory regimes and these jurisdictions have reserved the right to impose more comprehensive economic regulation. The Commission discovered little by way of complaint from tenants about the conduct of these ports in spite of inquiries.[2]

While the Port was not referenced specifically in the above passage, as outlined in this submission, DPO considers that the same conclusions can be drawn in respect of DPO's operation of the Port in the period since commencement of the Lease.

2.1 Competitive threat from other ports

DPO considers the Commission's observation that there is "*limited competition for the provision of most prescribed services, for example, there are no other nearby ports of equivalent size or services*"[3] does not reflect commercial reality, as it significantly understates the degree to which the Port is subject to competitive pressures from other port and infrastructure suppliers.

This view is shared by the Flinders Ports group, who noted in its submission in response to the 2022 ESCOSA review that there were a number of instances of interstate competition for port services; and citing the recent success of Flinders Ports' in securing a long term agreement with Oz Minerals in relation to the export of copper concentrate from its Prominent Hill mining operations, winning this business away from the Port of Darwin.[4]

There are several other examples DPO is aware of in which customers or potential customers of the Port have opted to use other ports, in some cases which are further away that the Port from their operations. These include:

- KGL Resources, who as part of their feasibility study for the Jervois copper concentrate project which is located in the Northern Territory[5], have decided to transport this copper concentrate to Mt Isa for treatment through the Glencore copper smelter, rather than send it to Darwin.
- The West Musgrave nickel/copper mine being developed near Warburton in WA will have mining commodities transported almost 1800km by road to Esperance in Western Australia, despite this mine being located approximately 800km (by road + rail) from the Port.
- The Groote Eylandt Mining Company (**GEMCO**) – a joint venture between South 32 and Anglo America Plc operates a manganese ore mining facility on the island of Groote

[2] Productivity Commission: *Lifting productivity at Australia's container ports: between water, wharf and warehouse* Draft Report 99, 21 December 2022, at pp 16-17: https://www.pc.gov.au/inquiries/completed/maritime-logistics/report/maritime-logistics.pdf

[3] Issues Paper, at [2.3]

[4] Flinders Ports submission in response to the *2022 Ports Access Regime and Price Determination Review: Stage one* (5 July 2022): https://www.escosa.sa.gov.au/ArticleDocuments/21898/20220722-Ports-AccessAndPricingReview2022-DraftReportSubmission-FlindersPorts.pdf.aspx?Embed=Y

[5] https://www.kglresources.com.au/jervois-project

Eylandt near the Gulf of Carpentaria.[6] GEMCO has opted to ship its manganese ore directly from Groote Eylandt, rather than transport it to the Port for export.

- Large customers are also able to self-supply their port service needs. For example, aluminium bauxite extracted from Rio Tinto's mine on the Gove peninsula[7] in the north eastern corner of Arnhem Land is shipped directly from the Gove site for export, as well as to Australian customers.

2.2 Countervailing power of customers

DPO welcomes the Commission's specific acknowledgement of the countervailing power of large port users in the Issues Paper.[8] The Rio Tinto example and others above highlights the capacity for larger customers to self-supply their needs if necessary.

In addition, as is the case for many other commercial ports in Australia, users of the Port are, for the most part, sophisticated commercial entities themselves, and have extensive shipping and port usage operations in Australia and (often) internationally. It should be expected that these customers, such as Inpex, DLNG and Svitzer, have the financial and commercial capacity to exercise commercial countervailing bargaining power on DPO, particularly if they identified any aspect of DPO's services at the Port which is uncompetitive with equivalent services offered elsewhere.

In DPO's experience, the prevalence of integrated logistics and transport providers such as Linx, Qube and Aurizon in southern parts of Australia has an influence on the number customers willing to use the Port for seaborne trade. DPO believes that the extensive investments made by these businesses at larger ports in Southern and Eastern Australia produces a strong incentive for them to encourage customers to use the larger ports in preference to the Port in order to recover a return on these investments.

In this regard, DPO notes that the recent acquisition of One Rail Australia (as the lessee for the Adelaide to Darwin rail line) by Aurizon may offer opportunities for the Port to increase throughput as Aurizon seeks to reinvigorate the operations and the utilisation of that rail network.

2.3 Economic impacts and market conditions

Insofar as the Commonwealth Government's funding commitments for infrastructure to support the development of an industrial and low emission energy hub at Darwin's Middle Arm, DPO notes that this commitment refers to "common-use marine infrastructure", which would be very likely to introduce geographically proximate port infrastructure that is likely to compete directly for some of the Port services in the future.

While the Commission notes in the Issues Paper that there will be a "lengthy planning, procurement and construction" process for this development,[9] DPO notes that the Northern Territory government provided a further update for the Middle Arm development in September 2022, which noted the project is intended to feature the development of marine infrastructure including "common user jetties, a shipping channel and a module offloading facility."[10] As part of that update, the Northern Territory Government has foreshadowed

[6] https://www.south32.net/our-business/australia/gemco

[7] https://www.riotinto.com/en/operations/australia/gove

[8] Issues Paper, at [2.17]

[9] Issues Paper, at [2.7]

[10] Middle Arm Sustainable Development Precinct – Project Overview (September 2022) www.dipl.nt.gov.au/__data/assets/pdf_file/0005/1103756/masdp-project-overview-factsheet.pdf

construction of enabling infrastructure to commence by “early 2026”, assuming all environmental approvals are obtained.[11]

Subject to those observations, DPO broadly concurs with the observations in the Issues Paper insofar as the list of matters of relevance to the economic performance of the Port since 2018.[12]

DPO’s view is that there have accordingly been no material changes to the relevant markets that would suggest a change to the level of competition, and it is not aware of any changes that are likely to occur in the immediate future, which would warrant changes to the Regime.

Two of the more significant macroeconomic issues to have impact on the level of trade at the Port (and seaborne trade in general) since the 2018 Review have been:

(i) the impact of the COVID 19 pandemic; particularly the associated containment and quarantine measures enacted in response to it by various governments, including Australia; and

(ii) escalating energy prices.

As touched on in the Issues Paper, the emergence of COVID 19 significantly impacted throughput at the Port from 2019 onwards; and continues to be a driver of economic uncertainty as new variants of the virus emerge and businesses seek to cope with a variety of differentiated international restrictions. Escalating Australian energy prices[13] have similarly contributed to a strong degree of economic uncertainty and implications for throughput at the Port.

Rising energy costs have implications for businesses in determining not only production levels for industries such as manufacturing and mining, but also because of increased costs for transportation, logistics and shipping that can impact decisions regarding export and import volumes.

DPO’s view is that these economic uncertainties will continue to impact on business confidence into 2023 and beyond. As the Issues Paper rightly observes, there is substantial spare capacity at the Port on account of these (and other) factors, and DPO is accordingly not in a position to take advantage of an environment in which there is excess demand from customers that could allow it to exercise greater leverage in matters such as pricing or terms for prescribed services (notwithstanding that the same factors are expected to contribute to increased operating costs for the Port).

2.4 DPO’s commercial incentive is expansion

As the Port is still a relatively small commercial port (by comparison to other major Australian ports), a further effective source of commercial constraint on DPO is the strong incentive to maximise throughput and encourage increased demand for Port services. The Development Plan for the Port illustrates that DPO is actively seeking to develop the Port and increase trade flow through Darwin.[14]

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[11] DPO notes that on 11 January 2021 the Sun Cable Group entered into voluntary administration (. The impact on the development of this on the Middle Arm development is unclear at this stage.

[12] See Issues Paper at [2.5 – 2.13]

[13] As reported by, for example, the Reserve Bank of Australia in August 2022: https://www.rba.gov.au/publications/smp/2022/aug/box-a-recent-developments-in-energy-prices.html

[14] See https://www.darwinport.com.au/trade/projects

As part of the decision to grant the initial Lease to DPO, the Government acknowledged DPO's role was to grow and develop the Port and associated infrastructure, to accommodate the growth the Northern Territory's economy.[15]

Accordingly, in addition to the commercial incentive to deliver a return on investment, increasing the level of demand for Port services by offering competitive pricing and services can underwrite additional capital expenditure by DPO for expansion of the Port, and to improve Port services for customers (including, for example, upgrades to land-side loading and other facilities).

2.5 Operation of the Regime since 2018 Review

'Macro' considerations aside, DPO considers that the Regime has been operating as expected, and there is no evidence to suggest that additional constraints are needed on the possible exercise of market power by DPO. There are already sufficient constraints on DPO, not only in the Regime itself, but also under the contractual documents which DPO has entered into with the Government.

Insofar as pricing and access matters are concerned, DPO considers that it has been able to satisfactorily meet the requirements of its major customers and other Port users, in the supply of the Prescribed Services since commencement of the Lease.

In particular, no customer or access seeker has sought to invoke the dispute resolution provisions in the Regime in respect of any Prescribed Service.

For these reasons, as the Commission concluded as part of the 2018 Review, DPO sees no basis or need for the Regime to be expanded beyond the existing suite of prescribed services.

3 Reporting

Q.3 Do current reporting requirements give sufficient reassurance and visibility of compliance with the access and pricing regime and visibility? If not, how could they be enhanced?

DPO considers the current reporting requirements under the regime to be entirely appropriate, and do not consider there is any need for material enhancements.

The objective of compliance reporting is to provide assurance to regulators (and users) that a regulated entity has a sound and robust compliance system[16] and to ensure accurate information is provided about the way in which a regime is functioning.

As is summarised in the in the Issues Paper[17], DPO has reported no material instances of non-compliance with its access policy, and no complaints or indications from customers or Port users have been received which would suggest otherwise. Indeed, the Commission has not been made aware of any minor breaches via 'other sources'. DPO submits that this is because it has established and embedded effective compliance systems which have ensure that its operations at the Port have followed the letter (and the spirit) of the Regime. Given this, DPO does not consider there are any grounds to justify more onerous reporting requirements, which would increase DPO's compliance costs.

Finally, and while not strictly related to reporting, DPO also considers that the statement "there is no specific penalty for non-compliance by DPO" risks understating the overall

[15] See *NT Government selects Landbridge as its partner for the Port of Darwin* (Media release 15 October 2015) http://newsroom.nt.gov.au/api/attachment/byId/7260

[16] See, for example, ESCOSA: *COMPLIANCE SYSTEMS AND REPORTING* (Energy Industry Guideline No. 4) September 2013, section 3.1: Objectives of Compliance Reporting.

[17] Issues Paper, at [3.3]

regulatory imposts of the Regime. In many cases, a failure by DPO to comply with the Access Policy and/or the Act would be a breach of the Lease, for which consequences can flow.

Further, any breach of the Regime brings with it the risk for DPO of adverse consequences, and in particular the threat of more stringent regulation. Because it is always possible for Parliament to change the Regime, DPO faces the very real risk that any failure to comply with the light-handed approach will prompt a decision to move to a more intrusive set of regulatory arrangements. In this regard, it is noted that one the objectives of the Commission's current review (and part of the scope of review objectives under the Act) is to determine whether there is any need to change the Regime.

4 Access Policy

Q.6	***How effective is the current access and pricing regime at ensuring DPO complies with its access policy and reports appropriately to the Commission if there is a material breach? If not effective, what changes are required?***
Q.7	***What uncertainty and consequences arise, if any, from the absence of a legislative definition of 'materiality' and 'non-compliance'?***
Q.8	***Are there any barriers faced by port users in notifying the Commission of instances of non-compliance? If yes, what are they?***

As already noted, there have been no instances of non-compliance by DPO in respect of the Regime in the last 5 years, and there have been no disputes raised under the Access Policy. 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.

Prima facie, this would indicate that the Regime is operating effectively, insofar as the Access Policy is concerned. However, DPO acknowledges that one of the most common drivers for access disputes is the circumstance where an access request is denied on the basis of insufficient capacity at the relevant facility, which is not currently the case at the Port as noted above.

Based on the growth projections of DPO and the Northern Territory Government; and taking into account the economic uncertainty currently facing the Port noted above DPO has no reason to expect the Port will become capacity constrained in respect of any prescribed services on or before the Commission's next access review (scheduled for 2028).

In DPO's view, there are no adverse consequences that flow from the lack of a statutory definition of the term "material", because 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*". Specifically, the definition captures any instance of non-compliance that:[18]

a) *affects a significant number of port users; or*

b) *has an adverse financial impact on one or more port users; or*

c) *adversely affects access to prescribed services by one or more port users; or*

d) *significantly compromises (or is likely to significantly compromises) the private port operator's ability to provide one or more prescribed services.*

Currently, DPO is required to prepare reports in accordance with the Reporting Guidelines, as stipulated in subsection 130(3) of the Act. Failure by DPO to comply would be a breach of

[18] Reporting Guidelines, section 2.2

the Act and therefore a breach of DPO's obligations under the Port Operating Deed and the Lease.

DPO considers the above definition to be very broad. It would certainly capture any breach of the Regime that could possibly have an adverse impact on "the economically efficient operation of, use of and investment in the Port"[19], and would also apply to many less significant and potentially quite technical breaches of the Regime. DPO considers that such a broad definition can be applied in guidelines in the context of a "light-touch" regulatory regime, but far more rigour and specificity would need to be applied to any definition that was intended to have legislative effect. Accordingly, although DPO would strongly argue it is unnecessary, and proposal to introduce a statutory formulation for a "material breach" of the Regime would necessarily have to be more precise (and narrow) in scope.

5 Information

Q.10 Are there any information barriers that impede successful negotiation of access arrangements between port users and the private port operator? If so, what information would be needed to address the imbalance?

As summarised in the Issues Paper, the Regulations already prescribe a number of information requirements that must be included in the Access Policy. As the Commission is aware, DPO's new Access Policy was approved on 12 April 2022[20], and these information requirements (amongst others) are reflected throughout the Access Policy.

In practice, DPO's experience is that some access requests are submitted to DPO without adequate information about the size or extent of the project that is the subject of the request, the timelines for access, or details about products or the product requirements. In DPO's view, some users are engaging with the access process at a very preliminary stage, and this is likely driven by a desire to reserve the relevant land and/or capacity at the Port, before they have committed to proceeding with their commercial project.

DPO seeks to manage these information issues by engaging directly with access seekers to understand the scope (and timing) of their requirements. These discussions often result in material changes to the size and scope of the requested service, as the user's project evolves. This has resulted in access arrangements which bear little resemblance to the original access proposal.

DPO incurs significant costs and time in managing these "evolving" access requests, as well as seeking to ensure other access seekers are treated fairly, consistent with the objectives of the Access Policy (as stated in clause 1.2).

Reform not required at this stage

In DPO's view, the Access Policy currently strikes a reasonable balance, insofar as the information provisions are concerned.

The Regulations and section 127(10) of the Act specify a clear process for amendments to be made to an Access Policy, including following a review by the Commission as required under Regulation 15.

These regulatory arrangements are consistent with the "light-handed" regulatory approach under which the Regime has been designed, and DPO considers that amendments to the Access Policy should only be made where strictly necessary. It is worthwhile to also consider the regulatory principles that underpin the current Regime, in particular:

[19] See section 117 of the Act

[20] https://utilicom.nt.gov.au/ports/access-regulation/access-policy

- the statutory framework should be consistent with the level of regulatory oversight intended by the Regime (i.e., a 'light touch' approach);
- any changes to the Access Policy should be limited to very narrow circumstances, and should be subject to appropriate review and appeal rights; and
- changes to an Access Policy should not have inadvertent flow-on effects to the efficient operation of the Port.

DPO appreciates that there can be inherent commercial uncertainties which drive the need for revisions to the size, scope and timing for any commercial project, and accordingly considers that the 'open' nature of the application process is a commercially convenient means for encouraging access seekers to engage with DPO on potential access requirements.

Accordingly, and having regard to the principles for regulatory arrangements outlined above, DPO would be reluctant to press for any amendments to the information provision requirements in the Access Policy to impose stricter information requirements for eligible access requests.

However, if more access seekers start to use the process for overly speculative projects, or for the purpose of merely reserving Port land and/or capacity for themselves in the future, this may need to be revisited.

Q.11 Has the negotiate/arbitrate framework proven successful and timely in resolving access disputes?

Q.12 What variations could be made to the negotiate/arbitrate model to better address access disputes?

In DPO's view, the negotiate/arbitrate framework has functioned extremely well to date.

Since 1 July 2018, DPO has successfully negotiated 46 access agreements for non-standard services with Port users, and there have been no disputes or referrals of any matter for arbitration. This is despite the dispute resolution process being clearly described and detailed in the Access Policy.

Further, the Commission is provided with a copy of each negotiated access agreement for review. As these agreements illustrate, the parties have successfully negotiated fair and reasonable terms of access for Prescribed Services on each occasion. DPO's consistent experience is that Port users are sophisticated commercial entities that are well aware of the requirements of the Regime, and are able to negotiate effectively with DPO in respect of the arrangement for Prescribed Services.

More generally, DPO considers that the 'negotiate/arbitrate' framework is an entirely appropriate model for managing access requests for an infrastructure asset such as the Port. This framework is used in many other regulatory access arrangements,[21] and is widely regarded as an efficient and balanced means of managing access to infrastructure assets, particular in circumstances where the regulatory objective is to establish "light-handed" regulation to allow commercial parties to reach appropriate arrangements as between themselves. For example, as the ACCC has noted:

[21] For example, see Part 3 of the *Maritime Services (Access) Act* 2000 (South Australia); Parts 8-12 and Part 23 of the *National Gas Rules* under the *National Gas Act 2008* in relation to access to both "scheme" and "non-scheme" gas transmission pipelines; and section 5 of the *Dalrymple Bay Coal Terminal 2021 Access Undertaking* (http://www.qca.org.au/wp-content/uploads/2021/08/2021-au.pdf)

> *…one of the advantages of the negotiate-arbitrate framework is that the threat of regulatory intervention can support the primacy of commercial negotiations and avoid the need for the regulator to set regulated access terms and conditions.*[22]

In light of the above, DPO would be strongly supportive of maintaining the current model, and there are no matters or examples which warrant any changes to the Regime in this regard.

6 Price regulation

Q.13	***How effective is price monitoring as a means of ascertaining whether DPO's pricing practices comply with the access and pricing principles***
Q.14	***Is there additional evidence or information (e.g., the WACC) that should be available to the Commission to enable evaluation of whether the form of price monitoring needs to change? What would be the benefits and costs of requiring such information?***
Q.15	***What would be the benefits and costs of applying an efficiency dividend or other tools to incentivise DPO to undertake efficient investments and operation of prescribed services?***

In conducting its review, DPO considers that the Commission should be mindful 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.

In DPO's view, 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).

The Port is different from some of the other Australian ports mentioned in the Issues Paper because it is a developing port, operating within a relatively small economic zone (compared to, for example, the Port of Melbourne, which is Australia's largest container and general cargo port[23]).

The Port was privatised to encourage its development, and it is important that any regulation of the Port is sufficiently flexible to allow DPO to grow the Port, including through expansion of facilities and growth of throughput. For this reason and others, there was a deliberate decision by the Government to establish a 'light-handed' regulatory framework in relation to the Port.

The broad obligations on DPO to provide access to Prescribed Services on 'reasonable terms' are sufficiently firm obligations to ensure access to all prescribed services is on competitive terms for all potential access seekers. By far the best evidence to support this is that fact that, since the commencement of the Lease, there have been no access seekers or Port users invoke the dispute resolution process in relation to the access or terms on which Prescribed Services have been supplied by DPO.

In addition, 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.

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[22] ACCC Submission - *Productivity Commission Review of the National Access Regime ACCC* (February 2013) at p. 6

[23] See, e.g., https://www.portofmelbourne.com/about-us/factsandfigures/

This reality was noted in the Issues Paper, 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.[24] This pricing approach is also broadly consistent with the approach taken at other ports, although DPO again cautions that some of 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.

Further to this, DPO has some concerns about the observations in paragraph 4.14 of the Issues Paper. To begin with, the commercial reality the Port operates under strongly suggests that caution should be exercised in making any claim that DPO is a 'monopolist' or is exercising any form of 'monopoly power' in relation to the Port (see the comments in section 2 above). But aside from that, 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. To the extent any inference of monopolist behaviour is intended in the observations in paragraph 4.14, these are rejected entirely.

6.1 No benefit but additional costs

Additionally, continuance of a '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.

Finally, while DPO acknowledges that a price monitoring regime offers a more limited degree of regulatory control than other more prescriptive regimes, the introduction of more intrusive regulatory arrangements (such as the fixing of prices) would bring about significant additional costs to both DPO (including the costs of additional compliance obligations, as well as the ensuing commercial limitations) and the Commission (including the costs of ongoing pricing surveillance to ensure any fixed pricing is appropriate and reflects efficient business operating conditions).

In this respect, DPO considers that the conclusions of the most recent ESCOSA Review in 2022 are equally applicable to the Regime covering the Port. In particular, in determining that it was appropriate to retain a price monitoring regime for a further 5-year period despite considering a range of more prescriptive regulatory regimes, ESCOSA noted that:

> *While there were a range of potential regulatory options available, the costs of prescriptive approaches were considered large and therefore the hurdle to introduce them was too high. In contrast, the draft proposal was low-cost and not expected to weaken investment incentives.* [25]

6.2 WACC and efficiency dividend proposals are not supported

Further, in relation to Question 14, DPO would not support the use of the Weighted Average Cost of Capital (**WACC**) by the Commission as a metric by which to evaluate pricing at the Port. In infrastructure regulation, the WACC is typically used by regulators to inform determination of appropriate economic returns for entities under full price regulation.[26]

Unlike these price regulation regimes, the Regime does not call for a prescriptive assessment of the regulated entities' returns, and nor is any of DPO's revenue assured or guaranteed, which in turn delivers a difference commercial risk profile for DPO, as compared to a fully-

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

[25] ESCOSA Report, at [3.4.8.2]

[26] See for example, the AER's regulation of electricity and transmission distribution assets: https://www.aer.gov.au/networks-pipelines/guidelines-schemes-models-reviews/rate-of-return-omnibus-papers

regulated asset owner (such as a *Transmission Network Service Operator* under the National Electricity Rules[27]).

Further, a WACC would not fully represent the commercial risk profile that the Port is exposed to. For example, there are many projects that potentially require significant investment but potentially without "downside" protection against early closure, lower throughput, commercial failure etc. These factors, in contrast to a regulated asset that enjoys firm demand (and returns), illustrate a much different risk profile for the Port and suggest it is unsuited to analysis in the form of a typical WACC approach.

When coupled with the significant additional reporting and administrative burdens that would be imposed on DPO if it was required to produce the relevant inputs to allow the Commission to accurately develop a WACC model, DPO sees no benefit in the Commission introducing such a requirement into the Regime.

DPO considers many of the same issues arise in relation to any suggestion for an "efficiency dividend", the concept of which is uncertain but appears to make an assumption that DPO is not otherwise incentivised to pursue opportunities for cost reduction at the Port.

As already summarised in this submission, such an assumption is incorrect, and also ignores that one of the original objectives of the Regime and the privatisation was to encourage efficient private investment and operation in the Port. In contrast, efficiency dividends are often developed for use in public sector businesses and agencies, as a means of delivering greater cost control in the absence of the standard commercial pressures borne by the need to operate business on a profitable basis, to pass on gains from increased productivity and to deliver an appropriate commercial rate of return to equity owners.[28]

7 Comments on key conclusions

Q.16	***Do stakeholders have further feedback and comments on the above issues and associated recommendations for amendments from the 2018 Review? How would your comments affect the Commission's previous recommendations for change to the regulatory regime?***

DPO endorsed the Commission's key conclusions in the 2018 Report in response to the questions outlined in paragraphs 123(2)(b)-(c) of the Act, which are summarised in the report's Executive Summary as follows:

- there was no need to change the form of regulatory oversight for access so the negotiate/arbitrate model should continue; and
- there was no need to change the form of regulatory oversight for prices so price monitoring should continue.

In DPO's view, the above conclusions which are consistent with DPO's submissions in response to the current Issues Paper and were strongly supported by the Commission's findings in the 2018 Report.

[27] See generally, *National Electricity Rules* Chapter 6A, *Economic Regulation of Transmission Services*: https://energy-rules.aemc.gov.au/storage/rules/8dac85a5a719e5465f361e7f98a09daee2037fc7/assets/files/NER%20-%20v193%20-%20Chapter%206A.pdf

[28] See for example, Department of Finance and Deregulation, *Report of the review of the measures of agency efficiency*, March 2011: www.finance.gov.au/publications/measures_of_agency_efficiency/docs/measures_of_agency_efficiency.pdf; and

N Horne, *the Commonwealth efficiency dividend: an overview* 13 December 2012: https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/2012-2013/EfficiencyDividend#_ftn7

DPO sees no reason for any of the above findings to change in in the context of the 2018 Report in the context of the current review.

7.1 Regime Certification

DPO agrees with the Commission's recommendation, consistent with the 2018 findings, that it is not necessary to proceed with the process of certification for the Regime under Part IIIA of the *Competition and Consumer Act 2010* (Cth).[29]

While DPO is of the view that the Regime would be regarded by the National Competition Council as an effective access regime that is consistent with objects and principles set out in clause 6 of the Competition Principles Agreement,[30] as noted in this submission, DPO also believes that the Regime has been developed in a way that reflects the specific characteristics of the Port and the unique circumstances and challenges for economic regulation of infrastructure in a small regional economic centre such as Darwin.

These features and characteristics are not immediately comparable with the assets and economic contexts applicable to other regulatory regimes that have undergone national certification. In this regard, there are a number of reasons why the Regime may not precisely mirror the clause 6 principles, including the following:

- there has been a deliberate decision by the Government to establish a 'light-handed' regulatory framework in relation to the Port;
- the Port is a developing port, and the Regime needs to allow DPO sufficient flexibility to develop and grow the facilities and throughput at the Port;
- the Port may not necessarily meet the applicable criteria for declaration under the National Access Regime under Part IIIA of the *Competition and Consumer Act 2010* (Cth) (for reasons that include it may not satisfy the test for a facility of 'national significance')[31]; and
- no application for certification of the access regime at the Port has been made.

In DPO's view, while the clause 6 principles are a helpful comparator for the purpose of analysing the framework and substance of the existing Regime, DPO does not agree that it is necessary or desirable to make amendments to what is still a relatively nascent regulatory model, purely for the purposes of "ticking every box"; particularly in circumstances where the clause 6 principles have been framed with much more significant infrastructure facilities in mind.

7.2 Irrelevant considerations

DPO further agrees with the Commission's comments that criticism of the ownership status (including nationality) of lessor of the Port are not matters that are relevant for the Regime, or the 2023 Review.

[29] Issues Paper, at [1.11]

[30] *Competition Principles Agreement* 11 April 1995 (as amended 13 April 2007) www.ncc.gov.au/images/uploads/cpa_amended_2007.pdf

[31] As that test now applies pursuant to the meaning of the declaration criteria set out in section 44CA of the *Competition and Consumer Act 2010* (Cth), following the amendments that took effect on 6 November 2017.