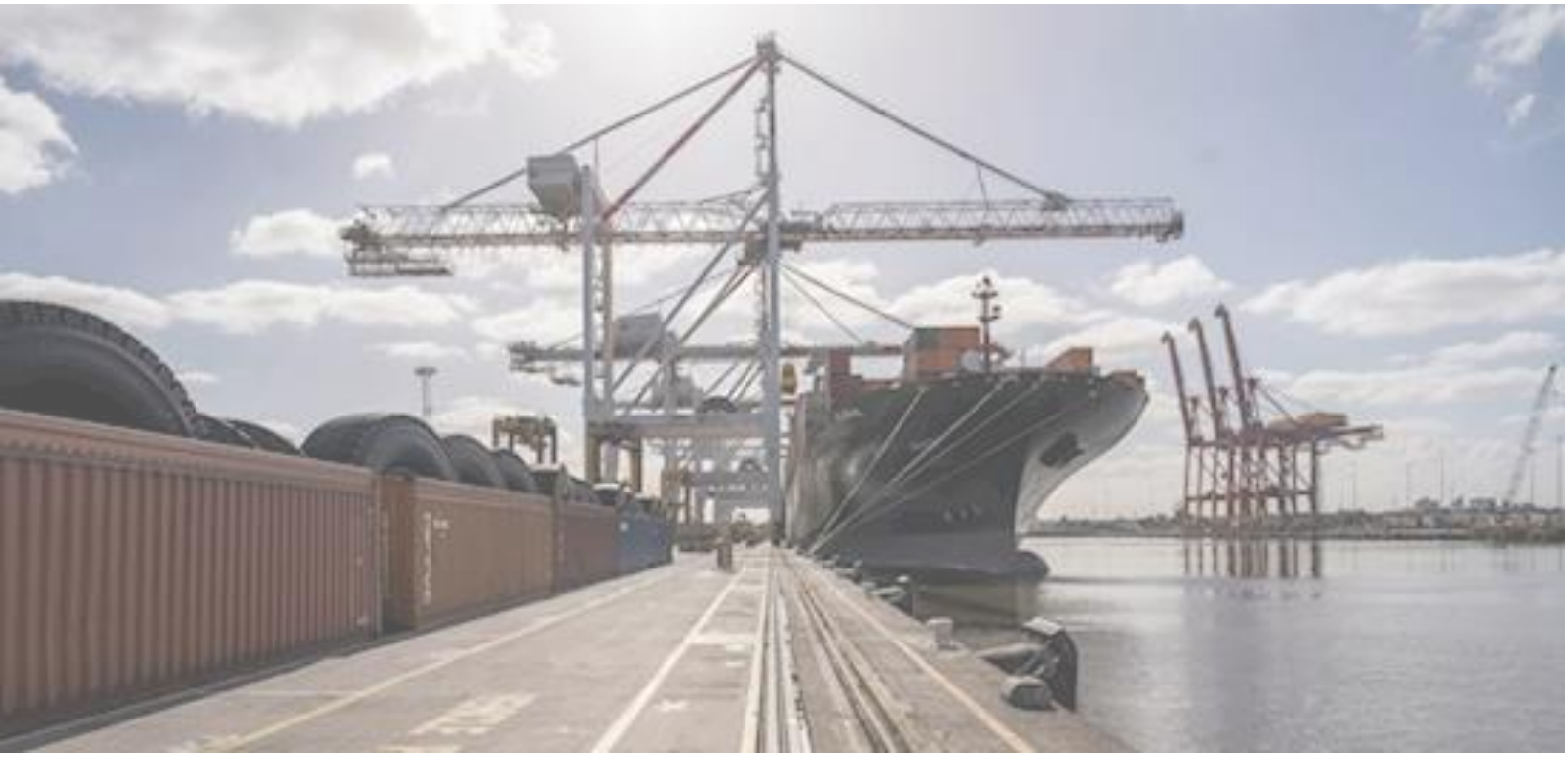
DP World Australia

Submission to Productivity Commission in response to draft inquiry report into maritime logistics

28 October 2022



1 Summary

DP World welcomes the opportunity to submit a response to the Productivity Commission's draft report titled Lifting productivity at Australia's container ports: between water, wharf and warehouse dated September 2022 (**Draft Report**).

This response focuses on findings in the Draft Report that are most directly relevant to DP World.

1.1 Port productivity data and benchmarking

DP World questions the need for the development of any further independent, regulatory data collection and benchmarking of terminal performance. The Draft Report recognises that competition between stevedores is "fierce"[1] and improved productivity metrics (however determined) is not an end in itself – but that stevedores compete to achieve the most efficient balancing of terminal productivity and cost. DP World routinely adopts its own internal analysis of comparative performance across its network of over 80 marine and inland ports and terminals over 50 countries and 6 continents.[2]

In this context, DP World submits that further regulatory oversight and benchmarking is unnecessary, costly and risks distorting investment signals.

Moreover, DP World submits that a number of the preliminary conclusions reached in the Draft Report overstate the findings that can safely be made based on that data. The Draft Report largely adopted the findings of the World Bank's Container Port Performance Index (**CPPI**). Based almost entirely on this data, the Draft Reports finds that "*Australian ports do not compare well against international peers*" and that the Commission's task was to use the CPPI data "*to look at why Australian ports apparently performed so poorly*."[3]

DP World submits the CPPI data is at an early stage of development, is limited in its scope and is unreliable as the basis for any firm findings regarding port productivity.

First, the CPPI data is almost entirely limited to vessel turnaround time, in the limited sense of operational times. This is a narrow view of port productivity and one that DP World does not accept reflects "port performance" nor does it provide a meaningful way to compare the relative performance of the Australian maritime logistics system – which is the emphasis of the terms of reference for the Inquiry.

Second, in discussions with DP World, IHS Markit concedes that the CPPI data and benchmarking remains at an early stage of development. As the first IHS Markit report of its kind, the rankings generated by the data raised a number of anomalies that highlight that more work was needed. This is to be expected with any new attempt at market analysis – and is accepted by IHS Markit. Amongst other things, DP World is working with IHS Markit to help it develop separate rankings for different types of ports, which would prevent an unhelpful attempt to compare vessel turnaround times at transit ports (which have a low call size and limited landside interactions) against origin/destination ports such as Australian container ports (which have a much larger call sizes and substantial landside movements).

[1] Draft Report, p.189.

[2] Container terminal operators have (in general) a fixed quay line and provide services based on specific shipping slots. In order to be more competitive and obtain the greatest revenue, container terminal operators are incentivised to sell as many quay line slots as it can service and turnover ships as fast as possible. This is also advantageous to shipping lines who always encourage container terminal operators to provide services quickly and efficiently.

[3] Draft Report, p.10.

Third, DP World submits that the evidence available to the Commission does not support the conclusions reached in the Draft Report. In particular, the Commission had access to evidence that demonstrated that on a number of critical metrics, Australian ports operate amongst the best and most efficient in the world. This was not acknowledged.

We would respectfully submit that the Commission adopt the following, more balanced, approach in finalising its position:

1 Identify and define a view of 'end to end' port productivity that the Commission considers appropriate for stakeholders and policymakers to use when assessing the relative performance of Australian ports. We submit that this should include measures governing both quayside and landside, operations and productivity. It should not be limited to an undue emphasis on vessel turnaround time simply because that is the one measure where the Commission has access to a set of global data (i.e. CPPI).

   For example, In DP World's Submission to Productivity Commission inquiry into Australia's Maritime Logistics System dated 18 February 2022 (**DP World's Initial Submission**), we explained the basis upon which it measures productivity within its own global port network. The four components that DP World considers appropriate to be tracked and assessed to measure a port's overall performance are:

   - **vessel wait time** – the time the vessel takes to get onto a berth, as vessels at times must wait on anchorage if there is congestion at a berth;
   - **container lift rates (gross moves per hour or gmph)** – the rate at which containers are loaded or unloaded;
   - **container dwell time (days)** – the amount of time each container spends in its terminal; and
   - **truck turnaround time (minutes)** – the time taken for a truck to access a terminal, collect a container from a container terminal and exit.

2 If the Commission does not have sufficient data to reach a firm or evidence-based view on relative performance of productivity, as more widely and appropriately defined, then it should not express conclusions but note the need for more work and data.

3 To the extent that IHS Markit data or findings are relied upon by the Commission to reach a view as to the relative performance of Australian ports in relation to vessel turnaround time, those conclusions need to be qualified based on the early stage of development of the CPPI data and analysis (and, if possible, any findings should be tested with IHS Markit prior to finalisation).

4 Where full or complete data is not available in relation to other port productivity measures, such as those for landside performance, the Commission could express a view directionally about Australian performance based on the material it has been provided. For example, DP World has provided the Commission with detailed comparative data on dwell time and truck turnaround time, and this data is routinely made available to Port Managers by container stevedores.

The findings of the Draft Report in relation to port performance highlight the practical challenges of achieving robust benchmarking of port performance.

DP World invites the Commission to work with stakeholders to test and refine its approach to defining productivity, data analysis and benchmarking before finalising any conclusions on productivity, to ensure that appropriate comparisons are achieved that properly reflect the complex realities and interactions within global shipping and the wider marine logistics supply chain.

1.2 Terminal access charges (TACs)

DP World strongly opposes Draft Recommendation 6.2, which would prohibit stevedores from levying fixed landside charges from transport operators and would effectively require stevedores to obtain substantially all of their revenue only from shipping lines.

This significant intervention would reverse almost two decades of evolution and increased diversification in the revenue models adopted by stevedores.

In short:

- **The Draft Report fails to make a case for regulatory intervention**

  The Commission's findings of pricing as an exercise of market power are not supported by evidence. To the contrary, DP World provided evidence to the Commission of the drivers behind its diversification of revenues (in the context of falling margins and rising landside costs).

  DP World also respectfully submits that it is not an answer to this concern for the Commission to say, in relation to TACs, that its policy recommendation is justified by the structure of the market alone and does not require evidence of market failure. In other parts of the Draft Report, the Commission rightly identified monopoly power on the part of port operators in their bargaining position *vis* tenants,[4] but indicated that the Commission saw no case for intervention in the absence of evidence of actual market conduct.

  Unlike port operators, which are genuine monopolies with no effective regulatory oversight, stevedores operate in a competitive market, with both direct and indirect constraints and a high degree of federal and state regulatory oversight.

  Rebalancing of revenues to provide greater cost recovery from landside users is both more equitable, and more transparent – providing better locational signals and incentivising investment in landside infrastructure. This is acknowledged by the Australian Competition and Consumer Commission (**ACCC**) and others.[5]

- **The comparison with ATM and inter-bank fees is flawed and the recommendation would have the opposite effect to those fees**

  The purpose of the regulation of ATM fees in 2009 was to make ATM fees incurred by customers more transparent by requiring them to be directly notified to, and borne by, the customer. By contrast, Draft Recommendation 6.2 would *reduce* transparency around landside charges and move the cost of those charges *further away from* the stakeholder that ultimately bears them: the shipper.

[4] Draft Report at p.172.

[5] ACCC Container Stevedoring Monitoring Report 2017-18, p.20.

- **The recommendation favours shipping lines at the expense of all other stakeholders in the supply chain**

  The Draft Report accepts that lower stevedore costs (in the form of terminal handling charges (**THCs**)) are currently not being passed through by shipping lines to shippers.[6] There is therefore no basis for the Draft Report to assume that shipping lines would pass through any reduction in landside charges. Shipping lines are likely to instead use the opportunity created by such a regulatory intervention to expropriate margin currently obtained by carriers, when passing on landside costs (in the form of administrative fees and margin).

  Australian shippers will see no improvement in costs (and may see an increase) but will face a less transparent and more costly process, which relies upon bilateral negotiations with shipping lines rather than published, standardised tariffs. Given their weaker bargaining position with shipping lines, smaller shippers can be expected to bear a larger proportion of landside costs under the alternative model.

  The administrative charges (and associated margin) applied to landside charges by carriers when passing them on to shippers has become an important component of revenue for many carriers. The Commission's recommendation would transfer this revenue to shipping lines.

  The ACCC and state governments would lose the benefit of the current notification and publication requirements around landside charges.

- **The change would distort investment incentives towards quayside infrastructure and away from landside infrastructure**

  As noted in DP World's Initial Submission, Australian ports have achieved leading levels of landside productivity – as measured by dwell time and truck turnaround times. This is due, to a significant degree, to a high level of scrutiny and focus and sustained investment in landside infrastructure, supported by a stable and transparent source of cost recovery through landside charges.

  Shipping lines have limited, if any, direct interest in improving landside operations or efficiency. A regulatory intervention of the kind proposed by the Commission, which forces substantially all stevedore revenue to be derived from negotiations with shipping lines will, necessarily, mean that the focus of stevedore incentives and investment will move to those factors that matter to shipping lines at the expense of landside investment and productivity.[7]

  Carriers would face substantially greater costs and adverse economic consequences from a reduction in landside productivity levels than they face from landside charges – which carriers have the ability to pass through to shippers and which, in any event, have increased significantly less than other port supply chain costs (such as empty container park charges and blue water freight rates).

[6] Draft Report, p.180.

[7] While the Commission flags the prospect of some variable charges potentially continuing to be levied on carriers (e.g. where this incentivises performance by carriers, and subject to regulatory price monitoring), this is unlikely to amount to a material level of revenue and would be focused on providing incentives for carriers in their efficient use of terminals, and not on incentives for stevedores in their investment priorities around landside infrastructure.

- **Any regulation that imposed a redirection of revenue would inevitably lead to calls for more regulatory intervention to overcome these issues.**

  DP World is concerned that any regulatory intervention of the kind proposed in the Draft Report (that distorted the diversification of stevedore revenues) would likely lead to calls for further intervention to overcome the adverse effects, including:

  – *regulation of shipping line charges as they relate to landside costs* – to ensure an improved level of transparency (commensurate with the high level of transparency that currently applies to landside charges); and

  – *increased scrutiny of landside metrics and investment* – given the weakened investment signals that would result from redirecting revenues and therefore stevedore incentives towards shipping lines and quay side performance.

In circumstances where there are already tailored, state-based interventions in place to govern the transparency of landside charges and ongoing, annual price monitoring by the ACCC, any further regulatory intervention would do far more harm than good. DP World therefore submits that the Commission adopt Option 1 – a status quo approach, in relation to the issue of TACs.

1.3 Market power of port owners in lease negotiations

DP World considers that the Commission's finding that ports operators do not have market power in relation to stevedores is internally inconsistent with other findings in the Draft Report, as well as at odds with market reality and evidence.

The Victorian Essential Services Commission (**ESC**) provided substantial evidence that the Port of Melbourne (**PoM**) held and used market power in its dealing with port tenants, including stevedores.[8] The ESC reviewed and provided various examples on non-standard terms in port leases, imposed by PoM as part of lease negotiations, that were not reflective of it being subject to competitive constraint. It is therefore at odds for the Draft Report to suggest it has no available evidence of the exercise of market power in this context.[9]

DP World does not accept the finding that the market power of port operators can be ameliorated through the terms of long-term terminal leases, given that:

- a stevedore is forced to negotiate or renew its terminal lease in circumstances where the port has and exercises market power, including due to the significant sunk investment at the port by stevedores; and

- it is unreasonable to assume that a stevedore is in a position to anticipate and contractually mitigate the exercise of all expressions of market power over several decades into the future (and in a particular form of legal agreement, i.e., a lease).

This is also at odds with the 'lived experience' of stevedores and other tenants in their negotiations with port operators. The ACCC has expressed similar concerns regarding rising lease costs at Australian container ports.[10]

Finally, the Draft Report concludes that no further regulation is required in large part because of existing regulatory mechanism such as the Tenancy Customer Charter (**the Charter**) at the Port of Melbourne. This finding is made despite acknowledging that it

[8] Draft Report, p.171.

[9] Draft Report, p.169.

[10] ACCC Container Stevedoring Monitoring Report 2020-21, p.43.

does not apply to, and therefore does not address the issues experienced by, two of the three major container stevedores operating in Melbourne (DP World and VICT).[11]

1.4 Vessel size and capacity planning processes

As noted in DP World's Initial Submission, the issue of vessel size is complex and multi-faceted – and the implications for port capacity and growth are significant.

While the Draft Report largely proceeds on the assumption that investment in additional port capacity will need to occur, it does not engage with the critical question of ***when*** that investment should occur. Given the current and significant levels of underutilisation at Australian ports, appropriate staging of capacity is important irrespective of vessel sizes.

To the extent that the Draft Report looks at investment planning (section 7.4), the Commission adopts a narrow frame of reference and looks only at state government infrastructure plans.[12] The focus is principally on when new ports might be justified over the long-term time horizon (to 2050 and beyond).

DP World invites the Commission to revisit and address the issue of whether capacity planning processes at Australian ports provide sufficient transparency and certainty around medium term capacity (i.e., 10 - 15 years) to promote and support investment by stevedores and others. For example, the timing of development of the fourth container terminal at the Port of Melbourne is a major and contentious issue, which is not addressed or resolved by state government strategies. DP World refers the Commission to its Initial Submission, where concrete recommendations and suggestions were offered in this regard.[13]

1.5 Reform of workplace relations framework

DP World welcomes the detailed assessment of the workplace relations framework by the Commission in the Draft Report. We consider that substantive reform of the framework would yield productivity improvements.

As stated in section 6 of this further submission, DP World considers that there are two key goals that reform to the workplace relations framework should centre upon to best support productivity:

1 The introduction of an effective 'safety valve' for protracted and harmful bargaining disputes, with the Fair Work Commission (**FWC**) having scope to oversee the bargaining process and intervene (if necessary) to terminate protected industrial action and commence arbitration of workplace disputes, which will keep bargaining on track and impose discipline to the process.

2 The introduction of clearer boundaries for all parties involved in negotiating the terms of enterprise agreements, which will pertain to good faith provisions and prohibit excessive constraint as suggested in Draft Recommendation 9.1.

1.6 Part X

DP World reiterates its support for the repeal of Part X of the *Competition and Consumer Act 2010* (Cth) (**CCA**), and its replacement with either a class exemption or specific authorisations overseen and regulated by the ACCC.

[11] The Charter was amended by the Port of Melbourne (without consultation) to apply only to tenants that entered leases after privatisation. DP World and VICT both hold leases entered into or renewed prior to privatisation.

[12] Draft Report, p.243.

[13] See section 6.4 of the DP World's Initial Submission.

2 Port data and performance benchmarking

2.1 Any findings about relative performance of Australian ports needs to reflect a full view of port productivity

The Draft Report largely adopted the findings of the World Bank's CPPI and relied upon this data to reach strong and critical findings regarding the performance of Australian ports. The Draft Report expressed the preliminary view that "*Australian ports do not compare well against international peers*" and said its task was to use the CPPI data "*to look at why Australian ports apparently performed so poorly*."[14]

DP World submits that the evidence available to the Commission does not support these conclusions. In this submission, we make the following observations:

- The analysis undertaken by the Commission is almost entirely limited to vessel turnaround time, in the limited sense of operational times as measured by the CPPI data. This is a very narrow view of port productivity and one that DP World does not accept reflects "port performance" or provides a meaningful way to compare the relative performance of the Australian maritime logistics system.

- For example, while the Draft Report acknowledges landside performance as measured by dwell time and truck turnaround times may be relevant – it does not acknowledge that, on these measures, Australian ports are amongst the most efficient globally. DP World has previously provided the Commission with detailed comparative dwell time and truck turnaround time data for its Australian and global operations, and this data is also routinely submitted to Port Managers by each container stevedore.

- In discussions with DP World, IHS Markit concedes that the CPPI data and benchmarking is at an early stage of development. This first IHS Markit report raised several anomalies that highlighted more work is needed. Amongst other things, DP World is working with IHS Markit to develop separate rankings for different types of ports – which would then prevent an unhelpful attempt to compare turnaround time at a transit port (with a very low call size and limited landside interactions) with an origin/destination port (with a much larger call size and substantial landside movements).

The Commission acknowledges that its analysis is subject to data gaps, especially in relation to landside performance.[15] However, the conclusions about port performance reached in the Draft Report are expressed strongly and are not framed as limited to only one (limited) aspect of port productivity. DP World respectfully submits that, given the potential importance of any final findings for policy work in this area, conclusions should not overstate those that can be safely drawn from available evidence.

DP World would respectfully submit that the Commission adopt the following approach in finalising its position:

1 Identify and define a view of 'port productivity' that the Commission considers would be most appropriate for stakeholders and policymakers to use when assessing the relative performance of Australian ports relative to international peers. DP World submits that this should include measures governing both quayside and landside, operations and productivity.

[14] Draft Report, p.10.

[15] Draft Report, p.9.

2 If the Commission does not have sufficient data to reach a firm or evidence-based view on relative performance of productivity (as defined), then it should not seek to do so.

3 To the extent that IHS Markit data or findings are relied upon by the Commission in reaching a view on relative performance of Australian ports in relation to vessel turnaround time, those conclusions need to be qualified (and, if possible, tested with IHS Markit prior to finalisation).

4 Where full or complete data is not available in relation to landside performance, the Commission might express a view directionally about Australian performance based on the material it does have.

DP World reiterates that it operates an international network of over 80 marine and inland ports and terminals over 50 countries and 6 continents. In the context of that diverse global network, our Australian ports perform strongly.

We welcome continued work by BITRE, IHS Markit and others to seek to develop helpful data that can be used to test and understand port performance and productivity. However, we are wary of any attempt to simplistically compare or "rank" ports, especially around a single operational metric. Any useful comparison of port performance is highly complex and must take into account differences in port operations (i.e. transit, origin/destination etc), volumes, vessel dynamics, geography, landside interfaces, yard space etc – all of which play an important role. Simplistically measuring the vessel turnaround time achieved at the Port of Lyttleton in New Zealand and comparing it with the same metric at Port of Melbourne or Port Botany[16] is of little, if any, practical benefit and risks creating a misleading impression of relative performance. DP World submits the same concern exists with comparing Yokohama with Australian container ports.

DP World therefore invites the Commission to work with stevedores and other stakeholders to revisit its analysis and shift to both expand its approach to productivity, as well as testing and applying the IHS Markit Data when preparing its final report.

2.2 DP World's invites the Commission to adopt an 'end to end' view of port productivity

In DP World's Initial Submission, DP World explained the basis upon which it measures productivity within its own global port network.

The four components that DP World considers appropriate to be tracked and assessed to measure a port's overall performance are:

(a) **vessel wait time** – the time the vessel takes to get onto a berth, as vessels at times must wait on anchorage if there is congestion at a berth;

(b) **container lift rates (gross moves per hour or gmph)** – the rate at which containers are loaded or unloaded;

(c) **container dwell time (days)** – the amount of time each container spends in its terminal; and

(d) **truck turnaround time (minutes)** – the time taken for a truck to access a terminal, collect a container from a container terminal and exit.

[16] A comparison undertaken by the ACCC Container Stevedoring Monitoring Report 2020-21 (at pp. 62-63), based also on a similar approach to the World Bank Markit analysis and data to that used by the Commission.

Performance in relation to all of these elements are important to achieving port performance. For example, at times during 2021, the Port of Los Angeles operated with reasonable crane rates, dwell times and vessel turnaround times (i.e. cargo operation times), but vessels were waiting at anchor for days and containers, once unloaded, sat within the yard in excess of six to seven days. The end to end performance of the port was therefore extremely poor during these periods, and significantly worse than any Australian port.

DP World previously provided the Commission with our internal assessment of Australian DP World terminals on the measures above,[17] relative to our international network. On this view, our Australian ports are world class.

As provided in DP World's Initial Submission, [18] DP World's Australian ports have achieved leading levels of landside productivity – as measured by container dwell time (see **Figure 1**), truck turnaround time (see **Figure 2**Error! Reference source not found.) and container lift rates (see **Figure 3)**.

More specifically:

- dwell time (**Figure 1**) for imports was [redacted] across all DP World's Australian terminals in 2021, placing them all in the top quartile. [redacted]
- truck turnaround time (**Figure 2**Error! Reference source not found.) performance was strong, [redacted]
- all DP World's Australian terminals have strong crane rates (**Figure 3)** [redacted]

When considering this data holistically, DP World considers that its Australian terminals are [redacted] of its global network of ports.

[17] Section 4.2 of DP World's Initial Submission.

[18] DP World's Initial Submission, pp.5-6, 41.

[redacted]

DP World acknowledges that benchmarking port performance is complex and multi-faceted. We also accept that the IHS Markit analysis remains new and under-developed. However, based on our own extensive internal assessment of our global network, there is simply no sense in which Australian port performance is 'poor' or falls within the lowest 20% of global ports. Privately, the IHS Markit team agree – and it highlights the need for further work on the robustness of their data and approach.

We welcome further work being done to refine and develop global benchmarking data. However, until that work is complete, we caution Australian policy makers from drawing strong conclusions from an incomplete and under-developed data set. Any attempt to "rank" or compare the performance of ports fairly must also take in account the complexities of port operations, and the various interfaces within the supply chain.

2.3 Other concerns with over-reliance on CPPI quantitative analysis

As well as the failure to account for landside performance, DP World also makes the following additional comments in relation to the HIS Markit Data, that impact upon the robustness of the Draft Report conclusions.

(a) Call size

The call sizes of vessels serviced at different global ports diverge substantially (see **Table 1**). DP World acknowledges that the Commission sought to take steps in its analysis on port performance to "neutralise" the differences in call size and determine an average call size for ships. However, DP World does not accept that the averaging approach that has been adopted has sufficiently addressed the significant anomalies that are thrown up in the IHS Markit dataset due to call size and the impact this has on assessing port performance.

IHS Markit is also looking at the issue. It is extremely difficult to fairly compare or contrast vessel turnaround times for a port (such as Yokohama) with a call size of only 618 (ranked 272 in call size) against Melbourne, which has a call size of 2000+ and is ranked 25th by call size. This issue alone makes unreliable any findings or rankings based solely on this data set.

Table 1. Ranking of global ports by call size (moves per vessel) – with Draft Report examples highlighted

Rank	Port	Total moves	Moves per vessel
1	Los Angeles	4,023,568	5,635
2	Long Beach	2,494,491	4,910
3	Gdansk	1,355,213	3,861
4	Prince Rupert	523,038	3,607
5	Tacoma	465,432	3,082
6	Dammam	980,450	3,017
7	Durban	1,306,715	2,936
8	Lagos (Nigeria)	289,094	2,920
9	Tianjin	3,132,098	2,881
10	Port Sudan	8,077	2,692
19	Qingdao	5,716,858	2,260
25	Melbourne	1,482,876	2,051
35	Tanjung Pelepas	7,136,286	1,863
44	Port Botany (Sydney)	1,288,547	1,795
74	Fremantle	410,989	1,452
94	King Abdullah Port	225,015	1,316
153	Brisbane	698,540	992
154	Adelaide	261,928	988
272	Yokohama	892,067	618
429	Bridgetown	1,334	167

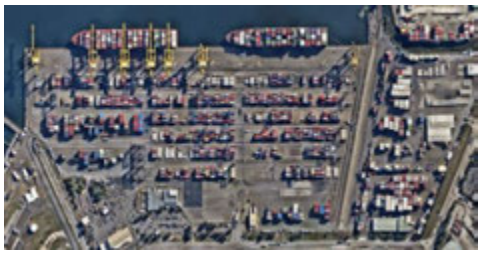
448	Hosohima	734	61
449	Basseterre	39	39

(b) Crane and landside intensity

The analysis in the Draft Report also fails to account properly for differences in crane intensity and the interaction of cranes with landside productivity measures, despite accepting that crane intensity is a key factor in assessing port performance.[19]

For example, in the case of Yokohama, the port's crane intensity rate (measured as TEU/Ha) is significantly lower than that of the other ports that were called out in the Draft Report for low levels of productivity, such as Sydney and Malaysia – see **Table 2** below. Yokohama also operates with approximately half the TEU per hectare of Sydney (see **Figure 4**), but Yokohama has 11 cranes operating to 7 cranes at Botany. In effect, Yokohama is handling fewer containers, on smaller vessels, with more cranes.

Figure 4. Visual of TEU per hectare – Sydney and Yokohama



[redacted]

	[redacted]	[redacted]	[redacted]
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[19] Draft Report, pp.10 and 120.

[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]

(c) Terminal infrastructure limitations

In considering productivity, the Draft Report also fails to have regard to the infrastructure limitations of existing Australian quay line. Australian quays are up to 50 years old and most load restrictions are typical of the time they were constructed.

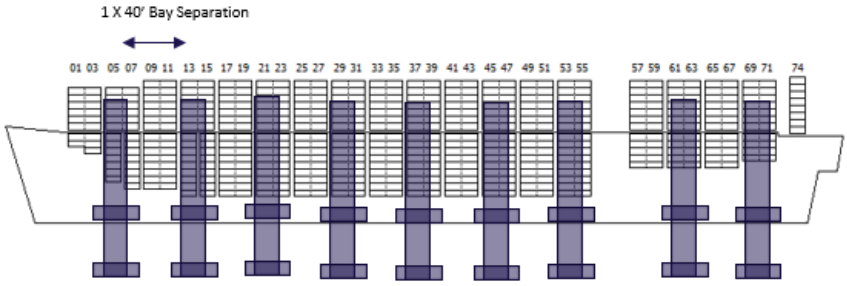
Most Australian quay cranes are 31m wide and are longer than most overseas cranes, which are typically 28m. This is necessary to house extra wheels on Australian cranes to distribute the weight/load, given the age and specifications of the quay line.

Quay cranes overseas can also work beside each other with only 1 X 40' bay separating. This is not currently achievable in Australian terminals due to the age of the quay line.

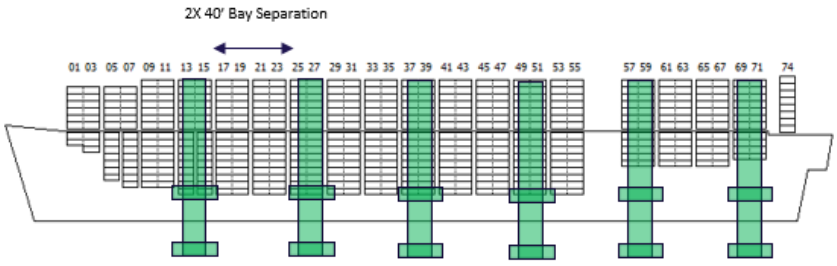
Figure 5 below illustrates the difference in operating characteristics of Australian terminals and modern international operations (based on servicing a 320m vessel).

Figure 5. Comparison of crane configuration – Australian and modern global quay lines

Modern terminal configuration (9 quay cranes can be used)



Australian berth configuration (6 quay cranes can be used)



(d) Failure to account for steaming and anchorage time in total vessel turnaround time

Other errors in the analysis undertaken by IHS Markit and relied upon in the Draft Report include a failure to recognise how steaming and anchorage time is included in vessel turnaround time.

Evidently, where the geography of a port means that it is subject to longer pilot or steaming times, these cannot be said to reflect relative productivity or performance by stevedores. DP World submits that the valid metric in assessing performance is operating data based around berth moves per hour, which is not subject to these issues.

DP World notes that it provides, along with the other stevedores, a substantial amount of data each month to local port authorities and the ACCC regarding dwell times and other data who use aggregates of this data to assess port performance. DP World considers that the Commission should request access to that data to assist in assessing port productivity.

2.4 Is there a need for independent benchmarking of a competitive industry?

More fundamentally, DP World questions the need for the development of any further independent, regulatory data collection and benchmarking of terminal performance.

The Commission rightly identifies that:

- First, competition between container terminal operators in Australia for shipping lines is '*fierce*'.[20]

- Second, improved productivity metrics (however determined) are not an end in themselves. Rather, the Australian economy is best served by stevedores achieving the most efficient balancing of terminal productivity, with the cost of services to shipping lines and other users and, ultimately, Australian exporters and importers.[21]

Container terminal operators have strong market-based incentives to continue to improve terminal performance and productivity, whilst achieving the optimum trade off with costs, including:

- the obvious and direct benefit of improved productivity in lowering costs and therefore allowing for more competitive THCs; and

- greater terminal productivity provides for faster vessel handling and therefore also increases available window capacity – essentially providing increased capacity available for sale.

It is clear that these market-based incentives have worked in Australia to drive continued improvement in operational productivity of berths/quay line.

DP World considers that there is already a degree of data collection and scrutiny on performance benchmarking of Australian ports that is at odds with the approach taken in other industries. DP World submits that any additional data collection or performance monitoring needs to be justified, and the objectives of doing so clearly explained.

[20] Draft Report, p.189.

[21] Container terminal operators have (in general) a fixed quay line and provide services based on specific shipping slots. In order to be more competitive and obtain the greatest revenue, container terminal operators are incentivised to sell as many quay line slots as it can service and turnover ships as fast as possible. This is also advantageous to shipping lines who always encourage container terminal operators to provide services quickly and efficiently.

Certainly, DP World would be concerned if this reflected a trend toward regulatory oversight of terminal operations – which has the potential to distort market incentives.

3 Terminal access charges

3.1 Commission draft findings

The Draft Report recognises that, over recent years, DP World and other Australian container stevedores have taken steps to diversify their revenue model.

This involved a transition from an approach in which stevedores recovered substantially all revenue from shipping lines (through stevedore charges) to a more balanced model involving a combination of:

- Quayside revenues – which are those charges levied on shipping lines and principally comprise terminal handling charges and other stevedoring tariffs.
- Landside surcharges – which are levied on carriers (or shippers) and apply to entry into the terminal to deliver or collect containers.
- Other charges – which can include vehicle book fees (applied to use of the automated booking system, overweight fees etc). However, these make up a relatively small proportion of overall revenues.

While the Commission suggests in the Draft Report that falling quay-side revenue over the last two decades primarily reflects "fierce" competition between stevedores for services[22], and this is partly true, it is also reflective of a rebalancing of revenues.

The Commission acknowledges that it cannot explain why significant increases to landside charges occurred only recently (since 2017) and why, if they reflect an exercise of unconstrained pricing power, this did not lead to an improvement in stevedore margins over the same period.[23] To the contrary, over the period between 2017 and 2020, stevedore margins fell significantly.[24]

The Commission nonetheless concludes that:

- Stevedores hold market power with respect to transport operators.
- The increase in landside charges since 2017 reflects an exercise of that market power. To this end, there has been no evidence of any indirect constraint on the exercise of market power by stevedores.

With respect, these conclusions are not grounded in the evidence provided to the Commission or as set out in the Draft Report. They are also directly inconsistent with those of the ACCC[25] and others that have reviewed the issue.[26]

Consistent with its earlier submission and the substantial material provided to the Commission as well as the ACCC, TfNSW, and the Victorian Government:

[22] Draft Report, p.189.

[23] Draft Report, p.193.

[24] Draft Report, p.195 and ACCC Container Stevedoring Monitoring Report 2020-21, p.36.

[25] ACCC Container Stevedoring Monitoring Report 2020-21, p.49.

[26] Victoria's Department of Transport *Independent review of the Victorian Port System*, final report dated November 2020 , pp.82-83.

- DP World's introduction and rebalancing of the revenue model since 2017 reflects a range of factors, including:
  - A desire by DP World to diversify the revenue base away from only relying upon shipping lines and charges. This reflected, amongst other things, the substantial margin pressure that was faced by shipping lines in the mid-2010s, which impacted upon their capacity to absorb increasing costs.
  - DP World considered it would be more efficient and transparent to align our revenue base more directly with our cost structure – which varied between locations. Most stevedore charges are negotiated on a national basis with shipping lines. However, our cost base has increasingly varied between different ports due to landside costs (e.g., rent, infrastructure, levies etc). Increasing the amount of recovery from landside revenues provided a means for stevedores to better reflect those differences.
  - DP World saw increasing focus by government and other stakeholders on landside performance by stevedores and carriers. In this context, it is important for stakeholders to appreciate that regulatory intervention in landside standards is not "costless" but requires substantial investment.
- There has been no indication of any adverse effect on logistics market arising from the rebalancing of tariffs. The evidence provided by DP World to the ACCC in this regard demonstrated that:
  - The adjustment of stevedore revenues to increase recovery from landside customers has not led to any overall uplift in the cost of transporting a container for shippers through the supply chain (see Schedule 3 of DP World's Initial Submission). Indeed, while the overall cost of transporting a shipping container has increased over the last decade, the proportion of costs relating to stevedoring has remained relatively constant.
  - In fact, the Deloitte analysis provided to the Commission shows that stevedoring costs have ***declined*** as a proportion of total transport costs over the past decade, notwithstanding the increase in landside charges.
  - There is no evidence of carriers being unable to pass through landside charges to shippers. To the contrary, carriers typically include an 'administrative charge' as part of this pass through of landside charges to shippers and therefore benefit from increased margin.
  - DP World has observed that in the years since 2017, the number of transport companies using DP World's terminals (as indicated by annual renewals of carrier access agreements) has remained relatively constant. The initial fears raised by the transport lobby of landside charges driving small carriers from the market appear unfounded.

It is notable that the ACCC and successive government reviews have acknowledged that such charges are not monopolistic or excessive[27] and no stakeholder (including the carrier associations) have called for landside charges to be abolished.

[27] ACCC Container Stevedoring Monitoring Report 2020-21, p.48.

3.2 Are there *indirect* constraints on stevedores or shippers?

The Draft Report finds that stevedores are unconstrained in their approach to landside revenue with no indirect influence from shippers or other stakeholders around those costs or charges.[28]

This is not correct. DP World, like other stevedores, is constrained in relation to its approach to landside and other charges by shippers and the broader supply chain (including carriers and regulatory stakeholders). DP World continues to adjust its approach to landside charges to reflect shipper requirements. For example, in early 2020, in response to feedback from a customer, DP World adjusted the structure of its landside revenues to differentiate between import and export containers.

DP World notes that substantial Australian exporters and importers are responsible for sufficient volumes to have material bargaining power with shipping lines in relation to supply chain costs, including any landside costs.

Stevedores, including DP World, are also subject to continuous price monitoring and associated risk of regulatory intervention. This provides a real and effective indirect constraint on landside charges, consistent with the Commission's findings in other markets (such as airport regulation[29]).

By contrast, the Commission's approach appears to assume that shifting recovery of all stevedore landside costs to shipping lines will give rise to greater constraint on those charges and that shipping lines would then pass on lower landside costs to shippers.[30]

However, the Commission itself acknowledges that shipping lines do not currently pass through more competitive THCs and that the rates paid by shippers have not fallen.[31] The Commission also, rightly, recognises that blue water freight rates are substantially greater than stevedore costs and so these tend to be the focus of negotiations between shippers and shipping lines.[32] This is a point that had also been quantified by Deloitte in DP World's Initial Submission.

There is therefore no evidence to support relying upon shipping lines to pass through any reduction in landside charges. As noted below, the proposal in the Draft Report instead *reduces* transparency for shippers (given that shipping lines are not subject to any oversight of their approach to passing through landside charges and associated administrative fees or margin) and *removes* the indirect constraints that currently apply to stevedores when setting those charges.

3.3 The Commission recommendation

Despite not identifying with any precision a market failure or any exercise of market power that justifies intervention, the Commission's Draft Recommendation 6.2 would nonetheless impose one of the most significant interventions for two decades and one that DP World considers more severe and damaging than tariff regulation.

DP World also respectfully submits that it is not an answer to this concern for the Commission to state, in relation to TACs charges, that its policy recommendation is justified by the *structure* of the market alone and therefore does not require evidence of market failure. In other parts of the Draft Report, the Commission identified monopoly

[28] Draft Report, p.199.

[29] Productivity Commission Industry Report, *Economic Regulation of Airports,* No.92 dated 21 June 2019.

[30] Draft Report, pp.199-200.

[31] Draft Report, p.180.

[32] Draft Report, pp.180-81.

power on the part of port operators in their bargaining position *vis* tenants,[33] but indicated that the Commission saw no case for intervention in the absence of evidence of actual market conduct. The contrast in approach is stark.

Unlike port operators, which are genuine monopolies with no effective regulatory oversight, stevedores operate in a highly competitive market, with both direct and indirect constraints and a high degree of federal and state regulatory oversight.

The Commission in the Draft Report also seeks to draw a parallel between the structure of the port supply chain and the inter-bank payments system.

The Draft Report argues that, like regulation of ATM fees, there should be a redirection of charges away from landside users and back to shipping lines. The Commission does this by proposing a draft recommendation for a prohibition on fixed fees being recovered by Australian container stevedores from landside users. Substantially all stevedore revenues would therefore be required by regulation to be recovered only from shipping lines.

If implemented, the Commission's recommendation would represent one of the most significant and disruptive regulatory interventions in the port supply chain in the last two decades. It would set back the development of the market and have far reaching and adverse consequences.

There is also a high likelihood that any regulation that prohibited fixed landside revenues by stevedores would inevitably lead to further and more intrusive regulation of:

- landside charging by shipping lines – to reinstate transparency to shippers around landside charges, which is currently a feature of the regulatory frameworks (and would be lost through the Draft Recommendation); and

- landside operational metrics – given the likely adverse impact on landside incentives associated with a shift in revenues entirely to shipping line customers and associated quay line performance.

3.4 DP World response to Commission recommendation

(a) <u>The Commission has not established a case for regulatory intervention</u>

For the reasons set out above, the Commission has not established that there is a case for regulatory intervention. The preliminary findings of pricing as an exercise of market power are not supported by evidence.

To the contrary, DP World has provided evidence to the Commission of the drivers behind its diversification of revenues (in the context of falling margins and rising landside costs). The evidence is hardly supportive of a finding of any excessive or monopolistic pricing, or the exercise of market power. To the contrary, the rebalancing is more equitable as between supply chain participants, reflects greater transparency in the landside costs at different locations and better recognises the substantial costs of landside infrastructure.

The Draft Report appears to imply that an investigation by the ACCC in relation to unfair contract terms may be evidence of market power on the part of stevedores.[34] With respect, DP World did not make any admissions as to the unfairness of any of its contractual terms of access in response to the ACCC investigation. DP World submits

[33] Draft Report, p.172.

[34] Draft Report, p.201-202.

that the Commission should be wary of assuming that an investigation by the ACCC in any market amounts to evidence of the existence or use of market power in that market.

To a significant degree, the increase in landside charges over the last five years is reflective of a maturing and dynamic market, in which the contribution of landside revenue to cost recovery has increased from almost nothing. Like any market disruption, this has resulted in a short period of significant increases in landside charges (although not overall revenues for stevedores). Once greater and more sustainable balance has been achieved, the market can be expected to return to greater equilibrium. It would be damaging to seek to both pre-empt and distort this process through regulatory intervention of the kind proposed in the Draft Report.

(b) The comparison with ATM and inter-bank fees is flawed and the recommendation would have the opposite effect to the redirection of charging in relation to ATM fees

The primary purpose of the regulation of ATM fees in 2009 was to make ATM fees incurred by customers more transparent by requiring them to be directly notified to, and directly borne by, the customer.

By contrast, Commissions' proposal would have the opposite effect. Unlike ATM fees, landside charges are a cost element that is ultimately not borne by either shipping lines nor carriers – it is passed through to shippers. The Commission's proposal would therefore reduce transparency around landside charges and move the cost of those charges *further away from* the stakeholder that ultimately "wears" them: the shipper.

Specifically:

- Today, landside charges take the form of a standardised, published reference tariff, akin to the cost of entry to a car park. These are required by Victorian and NSW regulatory requirements to be notified to relevant state departments and to carriers in advance of being implemented, together with reasons for any change. Because of this model, shippers have visibility of the underlying landside charge at each port and can understand the amount of any mark up or administrative charge applied by carriers.

- The Commission's approach would lead to landside charges being negotiated on a private and bilateral basis with individual shipping lines – there would be no transparency to shippers or government around the charges.

- Shipping lines would pass through the landside charges with their own administrative fees or added margin. The amount of this mark-up could not be readily identified by shippers.

- Given the lack of transparency around charges, it is also likely that the amount of any mark-up imposed by shipping lines when passing through those costs would vary between shippers, depending upon their bargaining power. Inevitably, smaller shippers would incur a greater proportion of those costs.

Unlike ATM fees, which increased transparency and placed pressure on those fees by creating a capacity for end customers to switch – the Commission's proposal will reduce transparency and make it more difficult for shippers (and particularly smaller shippers) to assess or respond to changes in landside costs.

(c) Recommendation favours shipping lines at the expense of the rest of the supply chain

The Commission accepts that shipping lines have substantial bargaining power and are using this to press for lower charges from stevedores. However, the Commission also

accepts that lower stevedore costs are not being passed through to by shipping lines to shippers.[35] Instead, the economic rent achieved through the exercise of this bargaining power is retained by shipping lines themselves.

The wider implications of the Commission's recommendation are:

- The unambiguous "winners" from the regulatory intervention would be the global shipping consortia, which will be given an opportunity to exercise their power in negotiations with both stevedores and shippers in relation to landside revenue – as they have done for some time in relation to other stevedore charges.

- As the Commission acknowledges, there is very little likelihood that any reduction in landside charges will be passed through to the Australian supply chain, and shippers. Shipping lines will instead use this opportunity to expropriate the additional margin currently obtained by carriers, when passing on the landside costs.

- Most Australian shippers will lose. They will see no improvement in costs (and may see an increase) but will face a less transparent process, which relies upon bilateral negotiations with shipping lines rather than published, standardised tariffs. Smaller shippers will lose the most, given their weaker bargaining position with shipping lines. The only exception to this is, perhaps, very large importers (such as the major supermarkets), who may consider they are in a position negotiate directly with shipping lines to reduce costs. Even if this did occur, which is doubted, it would most likely shift those costs on to smaller shippers.

- Carriers will also lose. While carriers and their associations have been vocal in arguing for greater transparency about the drivers of increased landside charges, they have not called for them to be prohibited. The administrative charges (and associated margin) applied to landside charges when passed through to shipper has become an important additional component of revenue and margin for many carriers. The Commission's recommendation would transfer this revenue and margin to shipping lines.

- The ACCC and state government departments lose the benefits of the current notification and publication requirements around landside charges.

- DP World does not consider it likely that the interests of smaller shippers can be effectively mitigated through use of freight forwarders. Freight forwarders are unlikely to control sufficient national volumes to have any materially better negotiated outcomes from shipping lines than individual shippers.

(d) <u>Implications for investment in landside infrastructure and operations</u>

Stevedores are acutely aware that stakeholder and regulatory scrutiny of increased landside charges under the current model drives an expectation of continued investment and improved performance in their landside operations and infrastructure.

The restructuring of revenue over the last decade, to facilitate increased recovery from landside users, has also better aligned stevedore revenues with underlying costs (although the ACCC concedes that, even with the increased charges since 2017, this remains heavily weighted toward quayside revenue).

Earlier in this submission, DP World noted again the level of performance and productivity achieved in Australian landside operations, which is world leading (see **Figure 1** and **Figure 2** above). This has been achieved, at least in part, because of a sustained focus

[35] Draft Report, p.180.

on landside performance and investment by stevedores, underwritten by an increase in the share of costs recovered through fixed landside charges.

Any assessment of the approach to landside charges must take into account the current high level of efficiency and landside performance achieved by Australian ports, relative to global peers. Any regulated redirection of revenues would put this at risk. Carriers and other stakeholders would suffer considerably more from a small reduction in landside performance by stakeholders than they would gain from a substantial reduction in TACs.

Landside productivity is a concern to stevedores, carriers, shippers and government, but is not of great concern to shipping lines. Shipping lines have no direct commercial interest in improving landside operations or efficiency because, ultimately, the commercial driver for shipping lines is focused on turning around ships at each port as quickly and reliably as possible – not the speed or efficiency with which containers move through ports to or from their destination. While larger shippers may attempt, over time, to influence shipping lines to raise landside performance with stevedores, this is likely to be a weak and indirect signal and would likely only occur after landside performance deteriorates significantly.

A regulatory intervention of the kind proposed by the Commission, which forced substantially all stevedore revenue to be derived from shipping lines, may necessarily mean that the focus of stevedore incentives and investment overwhelmingly moves to those factors that matter to shipping lines – quayside operations.[36]

DP World submits that it is no answer to the regulatory distortion of investment incentives to argue for increased landside regulation of operations and performance metrics in an effort to replace or cure the investment problem that has been created. This kind of heavy-handed regulatory intervention is unnecessary, damaging and costly (as acknowledged by the Commission itself in the Draft Report)[37] – and ultimately will do nothing to improve efficiency or to reduce costs for the supply chain.

It is unrealistic to expect that shippers, carriers or regulators will otherwise overcome this market-based investment bias.

(e) Proposed approach

For the reasons set out above, in the absence of an identified problem and given the substantial risks and costs associated with intervention, DP World submits that the existing combination of ACCC monitoring and state-based regulation of landside charges be retained.[38]

As acknowledged by the Commission, the ACCC already has the capacity to recommend regulation if it observes that the levels of landside fees and profits are inconsistent with competitive behaviour.[39] It has not done so.

The intervention proposed by the Draft Report would be blunt and have a significant and adverse impact on the market, and investment incentives. By contrast, each State already has a range of alternative mechanisms that are more targeted and can be utilised if needed to address the issue. For example:

[36] While the Commission flags the prospect of some variable charges potentially continuing to be levied on carriers (e.g. where this incentivises performance by carriers, and subject to regulatory price monitoring), this is unlikely to amount to a material level of revenue and would be focused on providing incentives for carriers in their efficient use of terminals, and not on incentives for stevedores in their investment priorities around landside infrastructure.

[37] Draft Report, p.199.

[38] Draft Report, p.199.

[39] Draft Report, p.199.

- NSW has the *Port Botany Landside Improvement Standard* – that couples oversight of landside charges with performance requirements for both stevedores and landside users (and includes a penalty regime).

- In Victoria - the Voluntary Pricing Protocol provides standardised timing and transparency around landside price increases. Additionally, the Voluntary Performance Monitoring Framework requires stevedores to provide data on performance indicators, which is provided to industry and Government to assess the performance of the Port of Melbourne landside container supply chain.

- In Western Australia – the Port of Fremantle has reflected commitments in relation to landside charging and operational standards in its lease arrangements with stevedores.

It is not clear how the recommended approach in the Draft Report would work alongside these established and tailored state approaches.

(f) Conclusion

In short, the Commission's proposed intervention will:

- further concentrate market power in the hands of shipping lines;

- distort stevedore investment incentives away from landside infrastructure and services, by giving shipping lines, through their control of stevedore revenues, substantial control over container terminal investment priorities;

- reduce transparency and standardisation of landside costs and charges, including dismantling the current price monitoring and notification arrangements in NSW, Victoria and through the National Transport Commission;

- transfer rents (in the form of administrative fees and associated margin passed on with landside charges) from carriers to shipping lines;

- impose additional costs on shippers as well as increasing the likely share of landside costs incurred by smaller shippers; and

- create the risk of substantial additional regulation to correct for the distortions created by the redirection of revenue, including to impose obligations on shipping lines to ensure improved transparency around landside costs passed through to shippers and potentially to maintain landside performance metrics, given the weakened investment incentives created by the new revenue structure.

In circumstances where there are already tailored interventions in place to regulate stevedores at a state level and ongoing and annual price monitoring by the ACCC, any further regulatory intervention of the kind proposed by the Commission would do far more harm than good. DP World submits that the Commission should proceed with Option 1 – a status quo approach.

4 Market power – port owners

4.1 Draft findings of the Commission in relation to market power of port operators

The Draft Report comes to different conclusions in relation to the position of Australian port owners, as between shipping lines and stevedores. Relevantly, it finds that port operators:

(a) have market power in their dealings with shipping lines; but

(b) do not have market power with regards to container stevedores.[40]

DP World submits that there is ample evidence that port operators hold and exercise market power in respect of both shipping lines and stevedores.

The Draft Report also found that there was no case for further regulation of ports.

4.2 DP World response

DP World considers that the Commission's finding that ports operators do not have market power in relation to stevedores is internally inconsistent (with other findings in the Draft Report) as well as at odds with market reality and evidence.

The Draft Report accepts that stevedores have little, if any, countervailing power with respect to port operators. The Commission also accepts that if stevedores enjoyed bargaining power this would be most apparent in their negotiation and revaluation of leases (and rents reviews), from time to time.

While the Commission fails to further consider this point (on the basis that rent negotiations are confidential), it was precisely the market evidence considered in detail by the Victorian ESC and on which the ESC determined that the PoM held and used market power in its dealing with port tenants, including stevedores.[41] The ESC reviewed and provided a number of examples on non-standard terms in port leases, imposed by PoM as part of lease negotiations, that were not reflective of it being subject to competitive constraint.

Despite accepting the weak position of stevedores in their bargaining position with port operators, the Commission nonetheless concludes that port operators do *not* hold sustainable market power in relation to stevedores.[42] This apparent inconsistency is explained in the Draft Report as follows:[43]

> *While it is tempting to view container terminal operators as captive clients of port owners, terminal operators are adept at protecting their position on the docks. Container terminals operate significant infrastructure as tenants of the ports, have large setup costs and large sunk assets that can be held captive by a port in the event of expiry or renegotiation of a lease. As such, switching costs appear to be significant and the prevalence of local port monopolies mean there is often little to switch to.*
>
> *However, a terminal operator's presence on a dock is the result of a negotiation between two parties, and the operator can choose not to service a port if initial terms are not favourable. Assets are also protected by long-term leases (running to the mid-2060s in the case of the Port of Melbourne), so there is no issue of sustained market power between ports and container terminal operators.*

DP World understands this to mean that the Commission considers that stevedores, by holding a long-term lease, can ameliorate the other factors that provide port operators with market power (i.e. the monopoly position of the port, the lack of any available bypass or alternatives for stevedores, large sunk and fixed costs etc).

[40] Draft Report, p.171.

[41] Draft Report, p.171.

[42] Draft Report, p.164.

[43] Draft Report, p.165.

This is also directly at odds with the 'lived experience' of stevedores and other tenants in their negotiations with port operators, as found by the ESC. The ACCC has expressed similar concerns regarding rising lease costs at Australian container ports.[44]

The implication that a long-term lease negotiated by a stevedore with a monopoly port operator (and often renegotiated in circumstances after the stevedore has significant sunk investment at the port), could anticipate and mitigate the future exercise of market power by the port operator is clearly wrong.

The Commission cannot accept that tenants (including stevedores) have limited bargaining power with port operators, on the one hand, but on the other suggest that stevedores are in a position to negotiate long-lived lease terms that ameliorate the future exercise of market power by the port operator.

Finally, DP World notes that in relation to the finding that there is no case for further regulation at Australian ports, the Draft Report found (in Draft Finding 5.4, at p.172) that:

> *For the Port of Melbourne, the current arrangement of reviewing the Port's adherence to the Tenancy Customer Charter alongside land rents in 2025 appears to be a next logical step in addressing issues around the Port exercising its market power over tenants.*

Again, this finding highlights a lack of commercial reality inherent in the Commission's approach to the issue of port market power. The Charter is substantially deficient and has yet to be used effectively. Moreover, even if it was effective, the Charter simply does not apply to two of the three major container stevedores operating in Melbourne (DP World and VICT).[45] The existence of the Charter therefore cannot be found to play any role in mitigating the market power held by the PoM in its dealings with those stevedores.

5 Vessel size and capacity planning processes

5.1 Increased vessel size in Australia

DP World largely accepts the general propositions in the Draft Report that:

(a) there has been, and will likely continue to be, a global trend towards increased vessel sizes; and

(b) as larger vessels are added to high volume shipping routes in other areas of the world, smaller vessels will over time be cascaded to service Australia and other lower volume destinations.

However, as DP World noted in its original submission to the Commission, the issue of vessel size is complex and multi-faceted. Although there has been a recent 'macro' trend of increase in the physical size of vessels comprising the global shipping fleet, it is important not to oversimplify the drivers of this trend or to assume that it will continue in a linear way or that continuing growth in vessel size will be uniform across all services and ports.

5.2 The relationship between vessel size and investment in capacity

The Draft Report largely proceeds on the assumption that because there has been a sustained increase in vessel size over the last few decades, investment in additional port

[44] ACCC Container Stevedoring Monitoring Report 2020-21, p.43.

[45] The Charter was amended by the Port of Melbourne (without consultation) to apply only to tenants that entered leases after privatisation. DP World and VICT both hold leases entered into or renewed prior to privatisation.

capacity will need to occur. However, the Draft Report does not engage with the question of *when* that investment should occur.

DP World maintains its view, based on the evidence previously provided to the Commission,[46] that there is little prospect of a significant number of large vessels (10,000+ TEU) servicing Australia over the next decade. Of the nine new services to commence in Australia over the 2020 - 2022 period, the largest involved a vessel size of only 4,500 TEU and the average vessel size was 2,400 TEU.

There are also currently significant levels of underutilisation at Australian ports which do not justify any further expansion in container terminal capacity at the current time. This is unlikely to change in the short-term irrespective of vessel sizes.

5.3 The risk of over-dimensioning port capacity and the need for more rigorous and transparent capacity planning by port operators

The Draft Report mentions, but does not meaningfully engage with, the risks that arise from over-dimensioning of quay line and associated terminal capacity at ports.

Inefficient investment in port capacity can have serious commercial implications and adverse impacts on port users, including container terminal operators. The commercial experience of Hutchison as a third terminal operator at the Port of Brisbane since 2013 highlights these risks. The challenges for Hutchison resulting from premature investment in a third operator have been acknowledged by the ACCC.[47] Similar concerns have previously been raised by Infrastructure Victoria.[48]

The Draft Report briefly acknowledges that there is a risk associated with over-investment (or premature investment) in capacity, particularly in the Port of Melbourne. However, it does not consider or address the risks this raises or what might mitigate those risks.

To the extent that the Draft Report looks at investment planning (Section 7.4), the Commission adopts a narrow frame of reference and looks only at state government infrastructure plans.[49] The focus is principally on when new ports might be justified over the long-term time horizon (to 2050 and beyond).

With respect, DP World considers that the more immediate, important and concrete area for reform is the approach adopted to capacity planning and investment by port operators, not state governments. Investment by container terminal operators and other parties involves substantial and long-term capital investment. These investment plans are based principally on the port development strategies and capacity forecasts provided by port operators, not the long-term infrastructure policies of state governments.

This is not an issue that appears to be currently addressed by the Commission, despite having been the subject to substantial recent debate and findings of the ESC in Victoria.[50]

DP World invites the Commission to revisit and address the issue of whether capacity planning processes at Australian ports provide sufficient transparency and certainty around medium term capacity (i.e. 10 - 15 years) to promote and support investment by stevedores and others.

[46] Section 3.9 of DP World's Initial Submission.

[47] ACCC Container Stevedoring Monitoring Report 2020-21, pp.38-42.

[48] DP World's Initial Submission, p.70.

[49] Draft Report, p.243.

[50] ESC, *Inquiry Into Port of Melbourne Compliance with the Pricing Order 2021 - Public Report*, 31 December 2021, p iii.

DP World refers the Commission to its earlier submission, where concrete recommendations and suggestions were offered in this regard.[51]

6 Workplace Relations

DP World welcomes the detailed assessment of the workplace relations framework by the Commission in the Draft Report. We consider that substantive reform of the framework would yield productivity improvements.

In this section, we specifically respond to a number of the questions and information requests raised in respect of workplace relations issues in the Draft Report.

In DP World's view there are three key goals that reform of the framework should centre upon to best support productivity for the industry.

6.1 Safety valves in the Fair Work Act to support efficient bargaining and enable cessation of protected industrial action

DP World agrees with the premise of the Commission's findings that the workplace arrangements in place in the industry are no longer supporting improvements in productivity.

Current legislation lacks an effective 'safety valve' for protracted and harmful bargaining disputes. Negotiations can drag on for years and there are no options available to employers to constructively bring the negotiations to a conclusion (i.e. the regime incentivises disruptive alternatives).

DP World agrees with Draft Findings 9.5 and 9.6 that negotiations over recent agreements with stevedores have been excessively lengthy and additional mechanisms are needed to ensure more constructive ways of concluding bargaining are implemented across the industry.

DP World considers that, to ensure bargaining is kept on track, the FWC should have scope to supervise the bargaining process and intervene when certain 'trigger points' are reached in bargaining activity in the ports. This will provide the FWC with scope to intervene in protected industrial action and commence arbitration of a workplace determination (Draft Recommendations 9.2 and 9.9).

The Commission acknowledges that there are limited effective remedies to deal with protracted bargaining and industrial action. As noted in DP World's Initial Submission,[52] DP World believes that the current model is cumbersome and inefficient to bring about the cessation of industrial action. DP World supports:

- Draft Findings 9.7 and 9.8 that extensive protracted industrial action in the ports causes disruption and considerably impacts productivity. DP World has submitted considerable information about these disruptions and the economic costs caused to the supply chain.
- Draft Recommendation 9.5 that notices periods for industrial action should be lowered to reflect the impact to the economy

[51] Section 6.4 of the DP World's Initial Submission.

[52] See section 5 of DP World's Initial Submission.

- Draft Recommendation 9.8 that the FW Act should be adjusted to allow for the suspension or termination of industrial action when it causes significant economic harm to the employer or employees.

6.2 Bargaining Boundaries need to be clear for all parties

The parties bargaining in this industry are experienced, having been through many rounds of bargaining since the waterfront dispute in 1999.

As DP World has previously submitted, the current model has traded off any mechanisms to place productivity offsets at the heart of bargaining and the industry is now in a phase of "rachet bargaining". Clear boundaries for bargaining are required to help move the parties back to bargaining for what is central to improving the productivity in the industry, which needs to be underpinned by a functional modern award.

DP World supports and agrees with Draft Recommendation 9.1 that amendments should be made to the FW Act to limit excessive agreement content, which in turn should be made to improve bargaining practices across the industry.

DP World also submits that the Commission should move to make a recommendation that *Stevedoring Industry Award 2020* should be commenced.

DP World encourages the Commission to consider the recommendations in relation to ensuring that there should not be any further progression towards prohibition of automation and associated productivity improvements occurring in the industry (Draft Finding 9.4). In respect of the specific requests for Information regarding these and related issues DP World makes the below comments:

The inherent inflexibility led DP World to pursue a cancellations model, to enable a level of 'swapping' rostered days in its most recent Enterprise Agreement. However, noting the current variability of vessel arrivals, which Australia has been experiencing for some time, means that such a scheme is not able to properly meet customer demand.

6.3 Role of the Stevedoring Award (Information request 9.1)

The *Stevedoring Industry Award 2020* (the **Stevedoring Award**) plays a limited role at container stevedoring terminals and is not a realistic alternative to enterprise agreement regulation for a range of reasons, including that:

(a) it is premised on the norm of daytime work through seven-hour shifts, whereas the industry has operated continuously on shifts of eight hours (or more in the case of some maintenance and supervisory employees) since 1998;

(b) alternative arrangements require the agreement of the MUA and/or a majority of employees; and

(c) the award does not contemplate bespoke categories of employment, rostering systems and "payback" arrangements that have developed in different enterprises. Each of these cannot be replicated under the Stevedoring Award without agreement.

While the Stevedoring Award has undergone minor amendments in 2013/14 and 2014/15, the vast bulk of the current modern award is consistent with the now highly outdated Stevedoring Industry Award 1999.

DP World would support an amendment to the "modern awards objective" in section 134 of the *Fair Work Act 2009* (Cth) (**FW Act**) to ensure that awards should be tailored to the specific nature of working arrangements in the industry.

DPW World also supports the FWC conducting review into the Stevedoring Award terms that are currently in operation in the stevedoring industry.

6.4 Permitted content for enterprise agreements (Information request 9.8)

Draft recommendation 9.1 states:

> *The Australian Government should amend the Fair Work Act 2009 (Cth) to introduce a short list of unlawful terms in enterprise agreements in the ports. The list should aim to prohibit excessive constraints on:*
>
> - *merit based hiring, promotion and training*
> - *the number of casual workers and other workers with flexible rosters*
> - *strict rules determining the 'order of pick'*
> - *innovation and workplace change.*

DP World supports draft recommendation 9.1. We would submit that it should also include the other clauses that:

(a) prohibit or limit the right to implement automation or changes to technology or work processes;

(b) prevent employers from determining the composition of their own workforce; or

(c) limit or prohibit contracting out.

In respect of the technical or legal issues that should be addressed DP World makes the following comments:

- DP World considers that reliance on the "matters pertaining" formulation in section 172 of the FW Act is not an appropriate scope of "permitted matters" as it perpetuates reliance on a lengthy, confusing and inconsistent body of case law that does not give clear answers, particularly in relation to emerging issues.
- The FW Act should be amended to adjust section 228 of the FW Act to clarify that parties are obliged to limit their claims to matters that can be included in an enterprise agreement and counterparties are not required to engage with these claims.
- A civil penalty provision should be inserted for any claims relating to matters that are on the prohibited matters list to give clarity and certainty to the boundaries of bargaining claims and to aid in decreasing the time taken to resolve bargaining rounds.

6.5 Tenure and training (Information request 9.2)

Tenure is not a deciding factor on who receives training at DP World container terminals.

Selection for training is dictated by criteria in enterprise agreements (and that reflect bargained, often longstanding, outcomes). An outdated principle continues to exist within the maritime sector that promotions are based on the tenure of a person's employment

rather than on merit (i.e. who is the most capable and has the aptitude to undertake a specific skill set).

The result is that more stevedoring personnel are trained in roles than are likely to perform those roles – because staff are often trained (in order to be formally eligible for a promotion) but who will not perform a role.

While this is sub-optimal, DP World considers that addressing this issue is of less importance than other matters in the Draft Report.

6.6 Rostering and flexibility (Information request 9.3)

In DP World's experience, permanent rostered workgroups tend to favour longer serving employees who also tend to have more senior skills, the rosters are skewed towards working more time Monday- Friday and less time on weekends.

This type of fixed rostering cannot provide sufficient flexibility in meeting customer demand. For this reason there are significant numbers of permanent, but non rostered employees and a group of supplementary (casual) employees engaged in containerised stevedoring.

The inherent inflexibility led DP World to pursue a cancellations model, to enable a level of 'swapping' rostered days in its most recent Enterprise Agreement. However noting the current variability of vessel arrivals Australia has been experiencing for some time, such a scheme is not able to properly meet customer demand.

6.7 Restrictions on subcontracting (Information request 9.4)

In DP World's view, restrictions on the use of contracting or subcontractors limits the ability for a range of employers to be engaged in supporting the stevedoring industry. This drives a monopolisation of skills within the stevedoring companies and, importantly, the influence of the MUA.

6.8 Ports Code (Information request 9.5)

DP World does not support the introduction of a specific ports code, in a manner similar to the use of the former Building Code.

In respect of the Building Code, DP World notes that:

(a) Compliance was necessary for industry participants to tender for and be awarded contracts on the Commonwealth government or government-funded projects. It is unclear whether a similar mechanism under a port code should be introduced at ports given the lack of government contracts as an incentive for compliance.

(b) The Building Code was complex and required significant work to ensure that agreements were compliant.

(c) The Building Code has recently (and appropriately) been repealed.

We consider that a ports code risks introducing unnecessary and unhelpful complexity into the existing arrangements. It is also likely to be controversial, given the repeal of the Building Code by the new ALP Government.

6.9 Should ports be an Essential Service under the Fair Work Act 2009 (FW Act)? (Information request 9.6)

Currently, the FW Act does not have a definition for an 'essential service'. DP World would support clarity being provided in the FW Act for essential services business such as container stevedoring.

Introducing a definition of an 'essential service' could provide a mechanism to implement additional changes to bargaining practices. For example, the requirement for FWC intervention when certain thresholds in bargaining activity in the ports are reached.[53]

DP World considers that the FW Act should be amended to require seven working days' notice to be given to an essential services employer for the purposes of section 414(2)(a) of the FW Act.

6.10 Use of side deals (Information request 9.7)

Side deals are common. These typically take the form of deeds entered into alongside new enterprise agreements. While side deals are typically confidential, they are used to obtain commitments which cannot be included in enterprise agreements due to the "permitted content" regime.

In DP World's recent experience, the content sought to be included in side deals relates to claims for limitations on changes to the business that would enhance the productivity of container terminals (such as automation or outsourcing arrangements). An example of the kind of side deals sought by MUA were the subject of *DP World Sydney Ltd v Construction, Forestry, Maritime, Mining and Energy Union* [2020] FCA 87 at [14].

DP World considers that the proliferation of arrangements outside of the formal bargaining framework is a concern for enterprise bargaining. We submit that a civil penalty provision should be included in the FW Act prohibiting side deals.

6.11 Addressing protracted bargaining (Information request 9.9)

In principle, DP World supports draft recommendation 9.2.

Current legislation lacks an effective 'safety valve' for protracted and harmful bargaining disputes. Negotiations can drag on for years and there are no options available to employers to constructively bring the negotiations to a conclusion (i.e. the regime incentivises disruptive alternatives. More constructive ways of bringing bargaining to an end are required.

DP World submits that the Commission should consider the following matters:

(a) A requirement for employers and unions in certain industries or designated in some way as critical (which stevedoring terminals currently are not, in any official way - see response to information request 9.6), to participate in conciliation with the oversight of the FWC at an early stage and to regularly report back. This would mandate a process that some unions and employers have already adopted voluntarily, with good results.

(b) Establish trigger points to terminate industrial action for agreements, either generally or in specific industries when one or more given threshold(s) is/are met. For example:

[53] Draft Report, Recommendation 9.2.

(i) Industrial action occurring on a given total number of days.

(ii) Specific period of time since the issue of protected action ballot order or commencement of industrial action.

(iii) Specific period of time or number of meetings since commencement of bargaining.

(iv) Determination by the FWC on application or its own initiative that negotiations have reached an intractable impasse.

(v) A finding being made by the FWC that a party is not bargaining in good faith.

If one of these triggers applied, there would be an arbitration of a workplace determination by the FWC, following a cooling-off period, in the same way as it presently makes industrial action-related workplace determinations. Neither party would be permitted to engage in protected industrial action once the FWC found that the trigger point had been established.

To prevent deliberate attempts to deliberately escalate or draw out bargaining to obtain arbitration, the FWC should be required to take into account the conduct of the parties, including in triggering arbitration, in making its determination.

Currently, there is nothing mechanism to stop bargaining from dragging on indefinitely resulting in long-term damaging industrial action. The current legislative threshold in section 424 of the FW Act regarding "significant harm to the Australian economy (or an important part of it)" is too high.

6.12 Level of penalties (Information request 9.10)

DP World submits that the current levels of penalties have not proven effective at deterring unlawful industrial action.[54]:

There is no congruence between a maximum penalty of $63,000 and the level of disruption which unlawful industrial action can cause. Civil penalties have also, in the past, been unable to achieve deterrence as organisation of a week-long unlawful strike at stevedoring terminals in two cities results in a single penalty of $38,000.[55]

Penalties must be set at a level that generally provides a deterrent for unlawful behaviour. One starting point for considering a level that sends appropriate messages regarding general deterrence might be the under-utilised "serious contravention" regime, which increases maximum penalties tenfold.

6.13 Employer industrial action (Information request 9.12)

DP World doubts that a broader range of "employer response action" would assist stevedores and other port employers. There are mechanisms in the FW Act, other than employer response action, which can used in response to protected industrial action.

The real problem with employer response action is that it in turns enlivens the right for employees to take "employee response action" which is:

[54] See *Patrick Stevedores Holdings Pty Ltd v Construction, Forestry, Maritime, Mining and Energy Union* [2021] 492 at [24] which states the MUA's antecedents; *Patrick Stevedores Holdings Pty Ltd v Construction, Forestry, Maritime, Mining and Energy Union (No 4)* [2021] FCA 148; *Patrick Stevedores Holdings Pty Ltd v Construction, Forestry, Maritime, Mining and Energy Union (No 5)* [2021] FCA 1645; *DP World Sydney Ltd v Construction, Forestry, Maritime, Mining and Energy Unio*n [2021] FWC 1746, where subsequent Court proceedings NSD445/2021 were discontinued by agreement.

[55] *Fair Work Ombudsman v Construction, Forestry, Maritime, Mining and Energy Union* [2019] FCA 1942

- not limited to forms of industrial action authorised in the protected action ballot order; and

- not subject to the requirement to give three working days' notice, or any longer period specified by the FWC in a protected action ballot order.

Amendments to the FW Act to enable more effective employer responses to industrial action would therefore be better targeted at other mechanisms.[56]

6.14 Reasonable continency plans (Information request 9.13)

DP World maintains a neutral position in relation to access to contingency planning. While in principle the idea of a 'balancing' the impact on employers of withdrawal of industrial action at short notice- it remains difficult to see how in practice this provision would work, especially if a reasonableness test is imposed.

In its experience, a comparative provision may be found existing provisions on stand down (s524 *Fair Work Act 2009* (Cth), this has been the subject of litigation between DP World and the MUA. For example:

- FWC proceedings whereby employees were awarded half pay for a period that they refused to work on a vessel that their colleagues in Brisbane had worked with no issue a few days earlier: *Construction, Forestry, Maritime, Mining and Energy Union v DP World Sydney Ltd* [2020] FWC 4623.

- A dispute, which was heard to completion but discontinued before the FWC handed down its decision, about whether DP World was entitled to stand down employees who became surplus to requirements following a crane breakdown. DP World had sought to productively use (and pay) all employees by working all cranes continuously rather than all employees taking breaks at the same time; the employees refused to cooperate (FWC Matter C2020/280).

On this basis DP World is of the view that introduction of contingency plan and access to the FWC in the event of limited notice before removal of industrial action would be a useful remedy but a priority issue for DP World, as compared to other adjustments to the Fair Work Act that would provide fast and efficient support during industrial action.

As an alternative we urge the Commission to consider proposals to amend s524 to enable the following:

- Right for employers to decline to accept work during a period where an employee's bargaining representative has previously indicated they will not perform work, and such notice has been withdrawn on less than a specified period of notice.

- Right for employers to stand down an employee where their bargaining representative has previously indicated they will not perform work and the employer has made contingency arrangements on that basis, not qualified by the "cannot usefully be employed" formulation in section 524.

[56] DP World submits that consideration should be given to (a) amending section 414 to make it clear that bargaining representatives must only give notice of industrial action which they genuinely intend to take; and (b) amending section 524 to allow an employer to stand down employees where contingency plans have been implemented and bargaining representatives notify industrial action which they withdraw from without at least 24 hours' notice. Section 471 should also be simplified to make the issuance of partial work bans a more straightforward process to minimise cost and delay incurred by 'slow burn' industrial action.

6.15 Notice periods for protected industrial action (Information request 9.14)

Draft recommendation 9.5 provides:

> *The Australian Government should amend the Fair Work Act 2009 (Cth) to lower the threshold for applications to extend the mandatory three-day notice period for protected industrial action to seven days for operators in the ports to enable employers to better prepare for industrial action.*

DP World supports draft recommendation 9.5. There is a public interest in there being a longer period of notice at stevedoring terminals.

Employers must currently establish on every occasion that there are "exceptional circumstances" justifying a notice period of more than three working days in relation to industrial action. Employees must obtain evidence and make their case for such an order at short notice, as the FWC must deal with protected action ballot order applications within two days, where practicable (per section 441 of FW Act).

This should not be necessary in circumstances where the economic significance of the industry itself – and its role within the logistics supply chain –creates "exceptional circumstances" in every case.

DP World proposes that this could be address in two ways, either by:

(a) amendment of sections 414(2) and/or 443(5) of the FW Act to allow the making of regulations prescribing a longer default period for some industries, and the prescription by regulation of five (or seven) working days for containerised stevedoring; or

(b) amendment of section 443(5) of the FW Act to allow the FWC to require more than three working days' notice where there are either "exceptional circumstances" and/or a public interest considerations or effects on one or more third parties that justify the provision of additional notice.

6.16 Parties with standing (Information request 9.15)

Draft recommendation 9.7 provides:

> *The Australian Government should amend the Fair Work Act 2009 (Cth) to widen the range of third parties who can make applications to suspend or terminate protected industrial action under the Act for operators in the ports, to include entities, for example, with an interest but who may find it difficult to show they are directly affected (such as employer associations, employee organisations or third parties like importers/exporters).*

DP World supports draft recommendation 9.7. Sections 423 to 426 of the FW Act confer a regulation-making power that allows the prescription of additional persons with standing to commence proceedings. This means that this recommendation should be capable of implementation by adding relevant employer parties to the Regulations (3.10(b)) in a simple administrative process.

7 Part X

The Draft Report recommends that Part X of the CCA be repealed (Draft Recommendation 6.1).

The Commission acknowledges that this recommendation is the latest of a number of reviews (by the Commission itself and others, such as the Harper Review and the ACCC) that have all found that Part X is outdated and administratively cumbersome and should be revoked.

Consistent with the views expressed in our earlier submission,[57] DP World supports this recommendation. Part X should be repealed and be replaced with a fit for purpose and transparent alternative, such as an appropriately tailored class exemption or individual authorisations, overseen by the ACCC.

[57] DP World's Initial Submission, p.78.