

Key features of the proposed Utah Point Bulk Handling Facility regime

General obligations

1. The objects of the regime are to
 - (a) promote the economically efficient use of, operation and investment in the Utah Point Bulk Handling Facility in order to promote effective competition in upstream or downstream markets; and
 - (b) facilitate junior miners negotiating access to regulated services on fair commercial terms at the Utah Point Bulk Handling Facility.
2. Subject to usual exceptions for efficient operation of the port, the terminal operator must not engage in conduct which unreasonably prevents or hinders a person from accessing services provided by means of port facilities under the terminal operator's ownership or control.
3. Terminal operator must not unfairly differentiate between users in a way that has a material adverse effect on the ability of one or more of the users to compete with other users by imposing different terms and conditions (including in relation to price) upon users of port services. The exceptions to this obligation are:
 - (a) if the different terms reflect the cost or risk of providing access to the user or potential user which is higher than the cost or risk of providing access to other applicants or users; or
 - (b) if the different terms are reasonably justified because of the different circumstances relating to access to the service which are applicable to the terminal operator or the relevant port user(s); or
 - (c) are agreed between the parties; or
 - (d) are imposed by the independent arbitrator; or
 - (e) the different terms are under an existing contract or pursuant to a State Agreement.

Access and pricing

4. The terminal operator must publish on its website its access policy which includes information as to how an access seeker may make an access request, the information required from the access seeker and the details of any dispute resolution process offered by the terminal operator. The terminal operator must also provide specified information on request. The access policy will not apply to services the subject of an existing contract or to services provided under a State Agreement.
5. The terminal operator has a 6 month obligation to negotiate with access seekers and must use best endeavours to provide regulated services to access seekers on fair commercial terms which meet the access seeker's reasonable requirements, are agreed between the terminal operator and an access seeker by good faith negotiation and are no less favourable than to comparable users.
6. If the parties cannot agree terms there is the ability for a party to enter into binding arbitration to determine the terms of access including the price.
7. The terminal operator may only initially negotiate with junior miners for capacity at the terminal. A junior miner will be defined as being an entity that is not a major miner (e.g. BHPB, Rio Tinto, FMG, Roy Hill or any entity specified by the Minister, a related entity of any of those or any associate of those).
8. The terminal operator will deal with the access seekers provided that the junior miner can demonstrate that it has the requisite financial and technical ability. That is, the access request is a bona fide request. If the terminal operator and the access seeker cannot agree terms, the access seeker may seek binding arbitration on the terms of access (including the price).

9. If the terminal operator cannot come to terms with the junior miner within a 6 month period, which may be extended by reason of referral to arbitration, or there are no junior miners seeking access then the terminal operator may apply to the ERA for approval to negotiate with a non-junior miner. The regulations will specify the matters the ERA must take into account in determining whether to grant approval including the price offered to the junior miner. If the ERA provides approval for the terminal operator to negotiate with a non-junior miner then the ERA must advise the Minister.
10. If the ERA provides approval for the terminal operator to negotiate with a non-junior miner(s), the terminal operator must ensure that 50% of the facility's capacity can be made available within the prescribed period (180 days) to allow a junior miner the ability to access capacity (if sought) within the prescribed period or such later time as agreed with the non-junior miner.
11. The terminal operator must publish a capacity management policy and, subject to the regulator's approval, has rights to resume capacity where a user is not using capacity to export. Capacity resumption will be set out in the regulations and provide that if for a period of 3 months the miner is not shipping, the terminal operator may issue a "show cause" notice which will provide a minimum period of 3 months for the miner to commence shipping. If, after that time, the miner has not commenced shipping then, unless otherwise agreed, the terminal operator may terminate the contract and resume the capacity. The resumed capacity will be subject to the access and pricing regime (including the junior miner preference).
12. The terminal operator must provide an annual compliance report to the regulator setting out details of access seeker requests including the timeframes involved, any requests it refused and the reasons why it refused the requests.
13. The regulator must publish an annual report on access and pricing of regulated services. The regulator will review the regime to ensure it is still achieving the objects of the regime every 3 years initially then every 5 years and make a recommendation to the Minister as to whether a different form of access and pricing regulation is required. There will also be defined events which trigger a requirement for the regulator to review the regime being:
 - (a) if the regulator grants approval for the terminal operator to negotiate with a non-junior miner;
 - (b) if the regulator considers the terminal operator has engaged in conduct which unreasonably prevents or hinders a person from accessing services;
 - (c) if the regulator considers the terminal operator has unfairly differentiated between users in a way that has a material adverse effect on the ability of one or more of the users to compete with other users;
 - (d) if a junior miner which used the facility ceases to use the facility; or
 - (e) if the lease or port services agreement is amended.
14. The Minister may respond to the recommendation by amending the regime.

Matters the regime does not apply to

15. The regime will not apply to existing contracts, any excluded services (such as services that are subject to third party competition) and it will not apply to arrangements the subject of a State Agreement. Where the regime applies, parties are free to contract at whatever terms they agree (subject to compliance with the regime) but the provisions of the regime cannot be excluded by contract.