

7 July 2023

Mr Lyndon Rowe  
Utilities Commissioner  
Utilities Commission of the Northern Territory  
GPO Box 915  
DARWIN NT 0801

Dear Mr ~~Rowe~~

*Lyndon*

**Re: Utilities Commission of the Northern Territory's 2023 Review of the Port Access and Pricing Regime: Draft Report**

The Department of Infrastructure, Planning and Logistics ("DIPL") is dedicated to driving the sustainable, economic, and social advancement of the Northern Territory (NT). As the lead department responsible for land use and transport planning, infrastructure investment, and supporting effective logistics supply chains, DIPL plays a pivotal role in shaping the strategic development and growth of the NT. DIPL welcomes this opportunity to provide comments on the Utilities Commission of the Northern Territory's (the "Utilities Commission") *2023 Review of the Port Access and Pricing Regime* (the "Draft Report").

DIPL commends the Utilities Commission for its draft recommendations and the continued regulatory oversight of access to, and pricing of, prescribed services at the Port of Darwin. We believe this oversight is crucial to ensure fairness and efficiency in the port operations for the benefit of proponents and the wider NT public alike. To assist the Utilities Commission in the finalisation of its report, DIPL has provided comments below on the draft recommendations in the Draft Report.

Recognising the significance of this review and its implications for the NT's economic progress, we are committed to offering valuable insights and assistance to the Utilities Commission as it finalises the draft recommendations and the Draft Report. DIPL is also committed to supporting a conducive regulatory environment and a robust and equitable Port Access and Pricing Regime that aligns with our goal of driving sustainable development and effective logistics supply chains in the Northern Territory.

Introductory comments

The Draft Report consistently highlights the potential adverse consequences that an inappropriately regulated private port operator or private pilotage provider could impose on the NT economy, given its significant position as a natural monopoly. DIPL has observed the emergence of a number of issues at the Port of Darwin in recent years, supported both by empirical data and anecdotal evidence from industry participants. These issues vary in severity but collectively demonstrate clear and substantial challenges faced by proponents wishing to access services at the Port of Darwin.

While natural monopolies can bring about certain advantages such as cost efficiencies and streamlined operations, these benefits can only be realised through appropriate regulation that ensures our regulatory framework remains suitable for an ever evolving landscape. Failure to establish such regulation can result in a range of detrimental effects, including:

- Reduced competition leading to diminished innovation, lower service quality, and limited options for consumers.
- Inflated prices imposed on stakeholders seeking access to essential infrastructure, thereby reducing affordability for consumers.
- Restricted access controlled by the monopoly operator, creating barriers for new entrants and stifling market entry.
- Decreased operational efficiency and cost reduction incentives for the monopoly operator due to the absence of competitive pressure, resulting in inefficiencies, poor service quality, and declining productivity over time.

Addressing these risks necessitates the implementation of effective regulatory measures. In the context of the NT, this entails an adaptable regulatory regime capable of addressing emerging challenges and unique circumstances, while satisfying the demands of both the private port operator, private pilotage provider and the public. Therefore, the regulatory framework should:

- Ensure equal opportunities for all market participants to access and utilise essential infrastructure by establishing transparent, non-discriminatory access rules, reasonable terms and conditions comparable to other Australian jurisdictions, preventing monopolistic practices, and ensuring fair and equitable treatment of all users.
- Empower regulators to oversee pricing and prevent monopolistic pricing abuses by implementing price caps, cost-based pricing methodologies, or benchmarking against similar service offerings in other jurisdictions. This approach should strike a balance between allowing reasonable returns for the infrastructure operator and safeguarding proponents and consumers from exorbitant prices.
- Establish minimum standards for service quality, reliability, and performance through regular monitoring and enforcement, ensuring that proponents receive adequate service levels from the infrastructure operator.
- Foster a regulatory environment that promotes innovation and embraces disruptive solutions, while avoiding overly prescriptive regulations that stifle progress.
- Provide regulators with independence from industry influence, enabling them to effectively oversee and enforce regulations. This independence will help prevent the incumbent infrastructure operator from exerting undue influence and ensure a level playing field for all market participants.

By ensuring these key principles are met, the regulatory framework can not only safeguard against the potential negative impacts of natural monopolies but also encourages competition, innovation, and sustained economic growth in the NT.



## Comments on draft recommendations

**Draft recommendation 1:** The Commission recommends continuing regulatory oversight of access to, and pricing of, prescribed services provided by the private port operator and private pilotage operator at the Port of Darwin.

DIPL **supports** the Utility Commission's draft recommendation to continue regulatory oversight of access to, and pricing of, prescribed services provided by the private port operator and private pilotage operator at the Port of Darwin. This oversight plays a vital role in maintaining a level playing field for all stakeholders.

**Draft recommendation 2:** The Commission recommends continuing the current form of regulatory oversight for access to prescribed services provided by a private port operator. This regime includes a requirement for a private port operator to have in place, and comply with, an access policy and through the access policy, application of a negotiate/arbitrate model.

DIPL **supports** the Utility Commission's draft recommendation to continue the current form of regulatory oversight for access to prescribed services provided by a private port operator, including the requirement for an access policy and the application of a negotiate/arbitrate model. DIPL suggests further clarifying the process for developing and approving access policies to ensure transparency and stakeholder involvement.

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

DIPL **supports** the Utility Commission's draft recommendation to amend the *Ports Management Regulations 2015* (NT) to provide port users engaged in access negotiations with relevant financial information. This will enable them to assess the consistency of prices with the access and pricing principles, promoting transparency and fair negotiations.

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

DIPL **supports** the Utilities Commission's proposal to provide the arbitrator with the necessary financial information to assess price consistency as it is crucial for an objective determination. DIPL suggests including clear guidelines on the disclosure and confidentiality of financial information to protect sensitive commercial data.



**Draft recommendation 5:** The Commission recommends amending the PM Regulations to provide for:

- a prospective port user (access seeker) who chooses not to enter into a contract on the terms of an arbitral award be required to give written notice to the port operator and the Commission within 14 days of the making of the arbitral award
- an access seeker who has declined to be bound by an arbitral award is precluded for a 12 month period from making the same request for access unless the access seeker obtains consent from the port operator or the Commission
- the parties to an arbitration bear their own costs and the costs of the arbitration are apportioned as determined by the arbitrator or, in the absence of an arbitrator's decision, in equal proportions

DIPL **notes** the Utilities Commission's proposed amendments to the *Ports Management Regulations 2015* (NT) regarding access seeker obligations and the cost allocation of arbitration. DIPL also suggests considering additional provisions to ensure fairness and prevent undue burden on access seekers while maintaining the overall integrity of the arbitration process.

**Draft recommendation 6:** The Commission recommends continuing the current form of regulatory oversight for pricing of prescribed services provided by a private port operator or private pilotage provider, that is, the recommended form of regulatory oversight should continue to be price monitoring.

DIPL **supports** the Utilities Commission's draft recommendation to continue price monitoring as the form of regulatory oversight for pricing of prescribed services provided by a private port operator or private pilotage provider. Regular monitoring will help identify any potential anti-competitive behaviour or unjustifiable pricing practices.

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

DIPL **supports** the Utilities Commission's proposal to require private port operators or private pilotage providers to maintain and provide financial accounts for prescribed services, and notes this is essential for effective monitoring and assessment of proposed price changes. DIPL suggests providing clear guidance on the nature of the accounts, confidentiality measures, and reporting requirements.



**Draft recommendation 8:** The Commission recommends increasing the maximum timeframe that a price determination can be in effect from three to five years.

DIPL **supports** the Utilities Commission's draft recommendation to increase the maximum timeframe for a price determination from three to five years. This adjustment will provide greater stability and certainty for all stakeholders.

**Draft recommendation 9a:** The Commission recommends amending the PM Regulations to clarify regulation 12(2) does not apply to services provided by a private port operator under a lease, that is, it does not capture the provision of prescribed services by DPO (as sub-lessee).

**Draft recommendation 9b:** The Commission recommends amendments to the PM Act or PM Regulations to:

- require the Commission's approval of any lease granted by a private port operator resulting in services that would otherwise be prescribed services being provided by a person who is not a private port operator
- set out the approval framework and to allow approval to be subject to conditions determined by the Commission.

DIPL **supports** the Utilities Commission's draft recommendations to clarify the application of regulation 12(2) of the *Ports Management Regulations 2015* (NT) and establish an approval framework for leases resulting in the provision of prescribed services by non-port operators. These measures will ensure appropriate oversight and adherence to access and pricing principles, and that prescribed services cannot be delivered outside the regulatory regime.

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

DIPL **supports** the Utilities Commission's draft recommendation to prevent an access policy permitting carve-outs from the non-hindering or non-discriminatory obligations in sections 124 and 125 of the *Ports Management Act 2015* (NT). Where there is currently no oversight, amendments will ensure an appropriate level of regulatory oversight before carve-outs can be included in an access policy.



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

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

DIPL **supports** the Utilities Commission's draft recommendations to provide further regulatory oversight of service classification and the determination of non-standard services, including giving the Utilities Commission the role to determine what services are subject to standard terms and conditions. DIPL suggests ensuring clear guidelines and criteria for service classification and the publication of indicative terms and charges, where feasible, to promote transparency and consistency. These draft recommendations together ensure that the current gap in the regulatory regime is closed, including eliminating, as far as possible, opaque fee structures and hidden terms and conditions. This will improve certainty for proponents wishing to negotiate access to the Port of Darwin.

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

DIPL **supports** the Utilities Commission's recommendation to grant the Commission the power to initiate independent audits of port operators and pilotage providers' compliance with the regime. This auditing process, conducted at the operator's or provider's cost, will enhance accountability and ensure adherence to regulatory requirements.

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

**Draft recommendation 13b:** The Commission recommends inclusion in the PM Act of an express provision for parties to be able to report to the Commission material instances of non-compliance with an access policy and a power for the Commission to investigate third-party reports of non-compliance.

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

DIPL **supports** the Utilities Commission's draft recommendations to legislate a definition of and guidance on "material instance of non-compliance", as well as creating mechanisms for reporting of non-compliance by parties negotiating access under an access policy, and enabling enforcement orders for a failure to comply with an access policy or negotiate in good faith are valuable steps toward maintaining the integrity of the access policy and promoting compliance. DIPL recommends providing clear guidelines and procedures for reporting and enforcement mechanisms.



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

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

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

DIPL **supports** the Utilities Commission's draft recommendation to establish measures of service and performance reporting obligations for private port operators and private pilotage providers. DIPL is of the view that the provision of annual reports on performance to the Utilities Commission is the best mechanism to enhance transparency and enable stakeholders to make informed decisions.

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

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

DIPL **supports** the Utilities Commission's draft recommendation to consider various factors when approving a draft access policy. The inclusion of specific considerations, such as the access and pricing principles in s 133 of the *Ports Management Act 2015* (NT), the object of part 11, and relevant matters from section 6(2) of the *Utilities Commission Act 2000* (NT), will ensure that access policies align with regulatory objectives and promote fair access to prescribed services. The proposed discretion for the Utilities Commission to take other matters it considers relevant into account when approving a draft access policy should be tempered or limited to some degree such as only considering matters that are "reasonable".

#### Concluding comments

DIPL appreciates the Utilities Commission's efforts in conducting this review and developing the draft recommendations which will, if adopted, ensure the Port Access and Pricing Regime is fit-for-purpose and serves the needs of the private port operator and private pilotage provider, proponents and the wider NT community. By incorporating the suggested refinements and clarifications, the regulatory regime can be further strengthened to ensure fairness, transparency, and efficiency in port access and pricing in the NT.



Finally, DIPL recognises that successful implementation of the draft recommendations will necessitate legislative amendments. DIPL looks forward to engaging with the Utilities Commission further regarding the implementation process, with the aim of adequately preparing legislative instruments for consideration by the NT Government.

Yours Sincerely,

A solid black rectangular box used to redact the signature of Louise McCormick.

Louise McCormick  
Acting Chief Executive