

2019 – 2022

PRESCRIBED PORT SERVICES

PRICE DETERMINATION

PORT OF DARWIN

FINAL DETERMINATION

13 February 2019

Table of Contents

Inquiries	ii
Important Notice and Disclaimer	ii
PART A: GENERAL.....	1
1. Introduction.....	1
2. Variations to the Determination	1
3. Definitions and interpretation.....	1
PART B: DETERMINATION.....	2
4. Application.....	2
5. Term	2
6. Price Monitoring and Price Monitoring Reports	2
7. Published charges.....	3
8. Change to a standard charge or fixing a standard charge for the first time	3
9. Information to be provided about changes to charges.....	4
10. Annual reports.....	4
11. Requirement to provide further information.....	5
12. Territory law prevails.....	5
PART C: STATEMENT OF REASONS.....	6
13. Introduction	6
14. Issues for consideration in the determination.....	6
15. Information used in making this determination.....	9
16. Publication of the final determination	10
PART D: DEFINITIONS AND INTERPRETATION.....	11
17. Definitions	11
18. Interpretation.....	12
APPENDIX: LIST OF STAKEHOLDERS.....	14

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PART A: GENERAL

1. Introduction

- (a) This document is a *determination* which the *Commission* is authorised to make under section 132 of the *Ports Management Act* and section 20(1)(a) of the *Utilities Commission Act*. It relates to the charges fixed by a *private port operator* of a *designated port* in relation to the provision of *prescribed services*.
- (b) The *Darwin Port Operator* is the *private port operator* of the Port of Darwin, which is a *designated port*.
- (c) This *determination* relates to the charges fixed by the *Darwin Port Operator* for providing *prescribed services* at the Port of Darwin. It replaces the *determination* made by the *Commission* in 2016 which will expire on 15 February 2019.
- (d) The *Commission's* statement of reasons applicable to this *determination* is set out in Part C.
- (e) In making this *determination*, the *Commission* has had regard to sections 6(2) and 21(2) of the *Utilities Commission Act* and all matters that it is required to have regard to or consider under regulation 16(1) of the *Ports Management Regulations* and the *Ports Management Act*.
- (f) In making this *determination*, the *Commission* must also give effect to regulation 16(2)(a) of the *Ports Management Regulations*, which provides that the *determination* must use monitoring of the price levels of a *prescribed service* as the form of price regulation for that service.

2. Variations to the Determination

- (a) In accordance with section 22(9) of the *Utilities Commission Act* and all other enabling powers, the *Commission* may vary a *determination* during the *determination* period.
- (b) In varying a *determination*, the *Commission* must have regard to sections 6(2) and 21(2) of the *Utilities Commission Act* and all matters that it is required to have regard to under the *Ports Management Act* and *Ports Management Regulations*.

3. Definitions and interpretation

- (a) Words and phrases printed in italics like *this* have the meaning given in clause 17.
- (b) The rules of interpretation applicable to the *determination* are set out in clause 18.

PART B: DETERMINATION

4. Application

This *determination*:

- (a) applies to prices fixed by the *Darwin Port Operator* for *prescribed services* provided at the Port of Darwin during the term of the *determination*; and
- (b) applies to prices for pilotage services provided at the Port of Darwin by the *Darwin Pilotage Provider*, the provision of which have been facilitated by the *Darwin Port Operator*; and
- (c) binds the *Darwin Port Operator* providing *prescribed services* at the Port of Darwin.

5. Term

- (a) The *determination* commences on 16 February 2019.
- (b) The *determination* expires 3 years from the date of commencement, on 15 February 2022.

6. Price Monitoring and Price Monitoring Reports

- (a) In accordance with the *Ports Management Act* and regulation 16(2) of the *Ports Management Regulations*, the *Commission* shall, during the period of this *determination*, monitor the price levels of *prescribed services* by the *Darwin Port Operator*.
- (b) In accordance with regulation 16(2)(b) of the *Ports Management Regulations*, the basis upon which the *Commission* intends to monitor price levels is benchmarking against changes in the *National CPI*.
- (c) Benchmarking will be undertaken so as to enhance transparency by comparing changes in prices for *prescribed services* to the chosen benchmark over time and providing that information to *port users* and other stakeholders. The *National CPI* will be used as the reference point when monitoring and reporting on price changes for *prescribed services*. The *National CPI* will not be used to measure the efficiency of prices for *prescribed services* at the Port of Darwin.
- (d) In undertaking benchmarking, the *Commission* may invite the *Darwin Port Operator*, the *Darwin Pilotage Provider* and other persons the *Commission* reasonably considers appropriate to provide information relevant to differences between changes in prices for *prescribed services* compared to changes in the *National CPI*.

- (e) The *Commission* may:
 - (i) publish reports on prices charged for *prescribed services* by the *Darwin Port Operator*; and
 - (ii) monitor and publish reports on matters relating to prices charged for *prescribed services* by the *Darwin Port Operator*.

7. Published charges

- (a) The *Darwin Port Operator* must, within 14 days of the commencement of this *determination*, publish in a prominent position on its website the following information:
 - (i) the *Darwin Port Operator's standard charges* for *prescribed services*;
 - (ii) the standard rate of other charges charged by the *Darwin Port Operator* for, or in respect of, the use of port facilities at the Port of Darwin;
 - (iii) a statement informing potential *port users* that if their access requests involve new capital investments then the price information provided may require adjustments to reflect the additional capital costs and noting that the *Access Policy* will apply to the request.
- (b) The *Darwin Port Operator* is not required to publish on its website any *negotiated charges*.

8. Change to a standard charge or fixing a standard charge for the first time

- (a) If the *Darwin Port Operator* proposes to make any change to its *standard charges* for the provision of the *prescribed services* (including a change in an existing *standard charge* or the removal of an existing *standard charge*), it must:
 - (i) provide notice of the proposed change to the *standard charge* to the *Commission*, that provides the information described in clause 9, at least 20 days before the change is proposed to be made; and
 - (ii) publish a notice of the proposed change to the *standard charge*, that provides the information described in clause 9, in a prominent position on its website, at least 10 days before the change is proposed to apply.
- (b) If the *Darwin Port Operator* proposes to fix a *standard charge* for the first time, it must:
 - (i) provide notice of the proposed *standard charge* to the *Commission*, that provides the information described in clause 9, at least 20 days before the *standard charge* is proposed to apply; and

- (ii) publish a notice of the proposed *standard charge*, that provides the information described in clause 9, in a prominent position on its website, at least 10 days before the *standard charge* is proposed to be apply.

9. Information to be provided about changes to charges

A notice provided in accordance with clause 8(a) or clause 1.1(b) must, for each separate *standard charge* to which the notice relates:

- (a) identify the *standard charge*; and
- (b) provide the following information about the *standard charge*:
 - (i) the basis on which the amount of the *standard charge* is calculated including, for a *standard charge* payable on a unit basis (such as a unit of vessel cargo capacity or vessel gross tonnage), the unit on which the *standard charge* is imposed;
 - (ii) for a change in an existing *standard charge* or the removal of an existing *standard charge*, the reason for the change or removal; and
- (c) if the charge is being fixed for the first time, also provide the following information about the *standard charge*:
 - (i) the purpose and function of the *standard charge*;
 - (ii) the basis on which the amount of the charge is calculated; and
 - (iii) the persons who will be required to pay the charge.

10. Annual reports

The *Darwin Port Operator* must submit an annual report to the *Commission* by 30 September each year containing the following information in respect of the immediately preceding financial year:

- (a) a list of the types of charges for *prescribed services* that the *Darwin Port Operator* has charged;
- (b) the amount of revenue received by the *Darwin Port Operator* from charges for *prescribed services* (showing the amount of revenue for each separate charge);
- (c) for a charge for a *prescribed service* payable on a unit basis (such as a unit of vessel cargo capacity or vessel gross tonnage), the total number of units charged for, or in respect of, each separate charge;
- (d) if, during the year, there was a change in an existing charge for a *prescribed service*, the amount of the change and the reason for it; and
- (e) if, during the year, the *Darwin Port Operator* entered into an agreement to fix a *negotiated charge* for a *prescribed service*, the number of those agreements and their terms.

11. Requirement to provide further information

The *Commission* may require the *Darwin Port Operator* to provide it with further information in accordance with its powers under Division 4 of Part 11 of the *Ports Management Act* and Parts 2 and 5 of the *Utilities Commission Act*.

12. Territory law prevails

In the event that this *determination* is found to be inconsistent with any applicable Territory law, the applicable Territory law will prevail over this *determination* to the extent of that inconsistency.

PART C: STATEMENT OF REASONS

13. Introduction

- (a) The *Commission* is authorised to make a *determination* under section 132 of the *Ports Management Act* and section 20(1)(a) of the *Utilities Commission Act* relating to the charges fixed by a *private port operator* of a *designated port* in relation to the provision of *prescribed services*.
- (b) The *Darwin Port Operator* is the *private port operator* of the Port of Darwin, which is a *designated port*.
- (c) On 16 February 2016, the *Commission* made a *determination* relating to the charges fixed by the *Darwin Port Operator* for providing *prescribed services* at the Port of Darwin. That *determination* expires on 15 February 2019.
- (d) On 30 November 2018, the *Commission* approved a draft *determination* to replace the *determination* made in 2016. In accordance with regulation 17(1) of the *Ports Management Regulations*, the *Commission* provided a copy of the draft *determination* to the *Minister*, the *Darwin Port Operator* and other persons that the *Commission* identified as likely to be affected by the final *determination*. The Appendix lists the stakeholders the *Commission* identified as likely to be affected by the final *determination*, which includes *port users* and others who have been involved in various previous consultations relating to the Port of Darwin.
- (e) The draft *determination* was also published on the *Commission's* website.
- (f) The *Commission* invited responses to the draft *determination* by 9 January 2019.
- (g) The *Commission* received consultation responses from Landbridge Darwin Port (DPO) on behalf of the *Darwin Port Operator* and *Darwin Pilotage Provider*¹ and the Association of Mining and Exploration Companies (AMEC).²

14. Issues for consideration in the determination

- (a) In the draft *determination*, the *Commission* proposed that the new *determination* would commence on 16 February 2019 and expire 3 years after the date of commencement. Section 132(4) of the *Ports Management Act* specifies this is the maximum term for which a *determination* can be made.
- (b) Responses to the draft *determination* did not comment on the period the *determination* should remain in effect. The *Commission* confirms its conclusion

¹ Landbridge Darwin Port, letter to the Utilities Commission dated 9 January 2019.

² Association of Mining and Exploration Companies, letter to the Utilities Commission dated 10 December 2018.

that the new *determination* should have a 3-year term, consistent with the maximum term permitted under the *Ports Management Act*.

- (c) As stipulated by the *Ports Management Regulations*, the *Commission* will continue to use price monitoring as the form of price regulation.
- (d) Section 132(2)(b) of the *Ports Management Act* requires a *determination* to be consistent with the access and pricing principles in section 133 of the *Ports Management Act*. The *Commission* observed in its review under section 123 of the *Ports Management Act* that price monitoring does not give the *Commission* information to determine whether prices are consistent with the access and pricing principles. The *Commission's* draft conclusion was that the *Commission* may nonetheless exercise its powers to make a *determination* consistent with the requirements of the *Ports Management Act* and *Ports Management Regulations*. The submissions did not comment on this point. The *Commission* confirms that it adopts its draft conclusion in this final *determination*.
- (e) Regulation 16(2)(b) of the *Ports Management Regulations* requires a *determination* to specify the basis on which, or the standard against which, the *Commission* intends to monitor price levels. In the draft *determination*, the *Commission* indicated that:
 - (i) it had conducted research into the various types of indices that may be suitable for monitoring prices for *prescribed services* at the Port of Darwin and examined the indices used around Australia in other comparable regimes;³
 - (ii) the *Commission's* draft conclusion was that it would monitor prices against the *National CPI*; and
 - (iii) the *Commission* had considered the use of the Darwin CPI as an alternative but considered that index was likely to be too volatile in the short term.
- (f) DPO submitted that by specifying only the *National CPI*, the *Commission* is limiting the scope of the matters that it can consider in monitoring price levels and so may fail to take into account all matters which impact the operating costs of Darwin Port. DPO indicated by way of example that a significant portion of its operating costs is labour and so the Wage Price Index is also a relevant consideration. DPO proposed that the *Commission* include a general statement that it will have regard to such other matters as may impact the

³ The Essential Services Commission of South Australia (ESCOSA) uses the Adelaide March to March annual CPI for price monitoring for ports in South Australia. The *National CPI* is used for the Port of Melbourne pricing regime and by the Australian Competition and Consumer Commission (ACCC) for airport price monitoring. For wheat terminal price monitoring, the ACCC uses an average for CPI figures for the capital cities of Adelaide, Perth, Melbourne, Sydney and Brisbane, averaged to make a 'five city average' and based on wheat shipping years, which run from October to September.

Darwin Port Operator's operating costs and which are not reflected in the *National CPI*.

- (g) While AMEC supported the use of the *National CPI*, it considered that benchmarking against CPI rather than a metric such as an internal rate of return or weighted average cost of capital did not encourage the optimal use of the port asset. AMEC commented that the approach could guarantee a fixed *National CPI* port price increase year on year at *Darwin Port*.
- (h) The *Commission* has taken into account the responses from DPO and AMEC and in the final *determination* has clarified the purpose of benchmarking. This reflects the following considerations:
 - (i) The purpose of benchmarking is to enhance transparency by comparing changes in prices for *prescribed services* to the chosen benchmark over time and providing that information to *port users* and other stakeholders. This has been clarified in the final *determination*.
 - (ii) The *Commission* accepts that a range of matters may influence the costs of providing *prescribed services* and that these may be different to the matters underlying changes in the *National CPI*. The *Commission* will take a range of matters into consideration when assessing whether price changes are consistent with the *determination*. The final *determination* provides that the *Commission* may invite the *Darwin Port Operator* and other stakeholders to provide information about the reasons for variations in prices against the benchmark. DPO and other stakeholders will also have an opportunity to provide information about the reasons for price movements in the course of other reviews undertaken by the *Commission* under the *Ports Management Act*.
 - (iii) As to the choice of benchmark, the *Commission* confirms the use of the *National CPI*. The *Commission* accepts that the other measures suggested by AMEC may enhance transparency and promote efficient prices. However, those measures are not available to the *Commission* under the statutory framework governing the *Commission's* price monitoring role.
- (i) The *Darwin Pilotage Provider* has been appointed as the pilotage services provider for the Port of Darwin under section 85 of the *Ports Management Act*. Pilotage services are a standard service under the *Access Policy*. The *Darwin Port Operator* publishes *standard charges* for pilotage services and arranges for the *Darwin Pilotage Provider* to be the party to access agreements for the provision of pilotage services, as provided for in the *Access Policy*.
- (j) Under the *Ports Management Regulations*, the *Darwin Port Operator* facilitating the provision of pilotage services at the Port of Darwin is a *prescribed service*. In the current *determination* period, the *Darwin Port Operator* has included charges for pilotage services in its reporting under the *determination*. In the draft *determination*, the *Commission* proposed that the new *determination* should expressly state that it extends to prices for pilotage

services at the Port of Darwin. The submissions did not comment on this point. The *Commission* confirms its draft conclusion on this point.

- (k) As outlined in the draft *determination*, the *Commission* may publish reports on prices. In the draft *determination*, the *Commission* indicated its intention to commence publishing an annual price monitoring report for the Port of Darwin to inform *port users* and other stakeholders.
- (l) AMEC supported the publication of an annual price monitoring report. DPO expressed concern about the potential administrative burden and cost, referring to the review process undertaken by the *Commission* during the course of 2018. It submitted that the new provision was not required, and that the *Commission* should engage with DPO to agree a methodology for future price monitoring reports to avoid DPO incurring unnecessary costs and expense.
- (m) In relation to whether a reference to the report is required in the *determination*, the *Commission* considers the reference enhances transparency.
- (n) In relation to DPO's comments about costs, the *Commission* acknowledges these are a relevant consideration. The *Commission* understands DPO's submission to be referring to the statutory review of the access and pricing regime undertaken by the *Commission* during the course of 2018. The 2018 review inquired into a wide range of matters relating to the effectiveness of the ports access and pricing regime in order to respond to the matters specified in section 123 of the *Ports Management Act*. The *Commission* intends the annual price monitoring reports to have a much narrower role such that they provide, in a readily accessible form, information relating to prices for *prescribed services* derived from the *Commission's* price monitoring role. The *Commission* will produce the reports based on information provided by the *Darwin Port Operator* under the *determination* and information that may be provided to inform the benchmarking process.
- (o) The *Commission* accepts that there may be incremental time and cost for DPO in considering draft annual price monitoring reports and, if it wishes to do so, preparing a response. The *Commission* intends to engage with DPO about proposed price monitoring reports and during this process will be able to take any costs associated with the proposed report into account and consider whether they are proportionate.
- (p) For these reasons, the *Commission* has determined to retain a reference to the annual price monitoring report in the final *determination*. The *Commission* will consider cost issues when deciding on the form of the report.

15. Information used in making this determination

- (a) The information used in making this *determination* comprises the *Ports Management Act*, the *Ports Management Regulations*, the *Access Policy*, information from the *Darwin Port Operator* about the appointment of the *Darwin Pilotage Provider* and the materials considered for research into the various

types of indices that may be suitable for monitoring prices for *prescribed services* at the Port of Darwin.

- (b) The *Commission* has also had regard to the consultation responses from DPO and AMEC.

16. Publication of the final determination

- (a) As soon as practicable after making the final *determination*, the *Commission* will provide a copy to the *Minister*, the *Darwin Port Operator* and the list of stakeholders in the Appendix.
- (b) The *Commission* will publish the final *determination* on its website.

In accordance with section 22(4) and (5) of the *Utilities Commission Act*, the *Commission* will publish a notice of the making of the *determination* in the Northern Territory Government Gazette and place a notice in a newspaper that circulates generally in the Northern Territory.

PART D: DEFINITIONS AND INTERPRETATION

17. Definitions

<i>Access Policy</i>	The access policy made by Darwin Port Operations Pty Ltd pursuant to section 127 of the <i>Ports Management Act</i> and regulation 13 of the <i>Ports Management Regulations</i> , and approved by the Utilities Commission on 30 June 2017.
<i>Darwin Pilotage Provider</i>	Darwin Port Pilotage Pty Ltd in its capacity as trustee for the Darwin Port Pilotage Trust (ABN 98 744 318 229).
<i>Darwin Port Operator</i>	Darwin Port Operations Pty Ltd (ACN 603 472 788), the <i>private port operator</i> of the Port of Darwin.
<i>Designated port</i>	Has the same meaning as is given to that term in the <i>Ports Management Act</i> .
<i>determination</i>	A determination made by the <i>Commission</i> relating to charges fixed by a <i>private port operator</i> in relation to the provision of <i>prescribed services</i> .
<i>Commission</i>	The Utilities Commission of the Northern Territory established by the <i>Utilities Commission Act</i> .
<i>Minister</i>	The <i>Minister</i> to whom the <i>Ports Management Act</i> is committed, currently the Minister for Infrastructure, Planning and Logistics.
<i>National CPI</i>	The consumer price index (all groups, weighted average of 8 capital cities) published by the Australian Bureau of Statistics.
<i>negotiated charge</i>	A charge for a prescribed service that is different to the <i>standard charge</i> for that prescribed service published in accordance with clause 7(a) of this <i>determination</i> , which is fixed by means of an agreement between the <i>Darwin Port Operator</i> and a <i>port user</i> of a kind contemplated by regulation 18 of the <i>Ports Management Regulations</i> or section 110 of the <i>Ports Management Act</i> .
<i>port user</i>	Has the same meaning as is given to that term in the <i>Ports Management Act</i> .
<i>Ports Management Act</i>	The <i>Ports Management Act</i> (NT).
<i>Ports Management Regulations</i>	The <i>Ports Management Regulations</i> (NT).
<i>prescribed services</i>	As defined by regulation 12 of the <i>Ports Management Regulations</i> .

<i>private port operator</i>	Has the same meaning as is given to that term in the <i>Ports Management Act</i> .
<i>standard charge</i>	A charge for a <i>prescribed service</i> , which is published in accordance with clause 8(a) and (b) of this <i>determination</i> , and is not a <i>negotiated charge</i> .

18. Interpretation

In this *determination*, unless the context otherwise requires:

- (a) headings are for convenience only and do not affect the interpretation of this *determination*;
- (b) words importing the singular include the plural and vice versa;
- (c) words importing a gender include any gender;
- (d) when italicised, other parts of speech and grammatical forms of a word or phrase defined in this *determination* have a corresponding meaning;
- (e) an expression importing a natural person includes any company, partnership, trust, joint venture, association, corporation or other body corporate and any government agency;
- (f) a reference to anything includes a part of that thing;
- (g) a reference to a chapter, condition, clause, schedule or part is to a chapter, condition, clause, schedule or part of this *determination*;
- (h) a reference to any statute, regulation, proclamation, order in council, ordinances or by-laws includes all statutes, regulations, proclamations, orders in council, ordinances and by-laws varying, consolidating, re-enacting, extending or replacing them and a reference to a statute includes all regulations, proclamations, orders in council, ordinances, by-laws and determinations issued under that statute;
- (i) a reference to a document or a provision of a document includes an amendment or supplement to, or replacement or novation of, that document or that provision of that document;
- (j) a reference to a person includes that person's executors, administrators, successors, substitutes (including persons taking by novation) and permitted assigns;
- (k) mentioning anything after include, includes or including does not limit what else might be included; and
- (l) a period of time:

- (i) which dates from a given day or the day of an act or event is to be calculated exclusive of that day; or
- (ii) which commences on a given day or the day of an act or event is to be calculated inclusive of that day.

List of Stakeholders

In addition to the Minister for Infrastructure, Planning and Logistics and the port operator, the following stakeholders were identified by the *Commission* as likely to be affected by the final *determination*. Stakeholders were provided with a copy of the draft *determination* and were invited to make a submission.

AGC Ausgroup

Arafura Resources

Argonaut Marine Group

Association of Mining and Exploration Companies

Australasian Railway Association

Australian Border Force (Commonwealth)

Australian Cruise Association

Australian Exporters

Australian Federation of International Forwarders

Australian Ilmenite Resources Pty Ltd

Australian Maritime Officers Union

Australian Petroleum Production and Exploration Association

Australian Railway Corporation

Barge Express

BGC (Australia) Pty Ltd

Bhagwan Marine

Chamber of Commerce Northern Territory

Coastal Tug and Barge Pty Ltd

ConocoPhillips Australia

Core Exploration

Department of Defence (Commonwealth)

DOF Subsea

East Arm Logistics Precinct (Land Development Corporation Northern Territory Government)

Genesee and Wyoming

Hall Contracting Pty Ltd

Infrastructure Australia

Infrastructure Partnerships Australia

INPEX Operations Australia

KGL

Maritime Industry Australia Limited

Maritime Union of Australia (Northern Territory Branch)

Meat and Livestock Australia

Minerals Council of Australia

National Transport Commission

Northern Territory Business Council

Northern Territory Cattleman's Association

Northern Territory Department of Business Trade and Innovation

Northern Territory Department of Chief Minister

Northern Territory Department of Infrastructure, Planning and Logistics

Northern Territory Department of Treasury and Finance

Northern Territory Livestock Export Association

Northern Territory Port and Marine

OM Manganese Limited

Perkins Shipping

Ports Australia

Qube Group

Regional Harbourmaster for the Port of Darwin

Royal Vopak

Sea Swift

Shipping Australia

Shorelands

Svitzer Australia

Tellus Holdings

TNG Limited

Toll Group

Tourism and Transport Forum

Tourism NT

Toxfree Australia Pty Ltd

Verdant Minerals

Ward Keller Lawyers