UTILITIES COMMISSION
OF THE NORTHERN TERRITORY

2023 Review of the Port Access and Pricing Regime

Final recommendations and reasoning for changes to the Port Access and Pricing Regime

Final Report

November 2023

www.utilicom.nt.gov.au

The Utilities Commission

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Acknowledgement – cover photo

The photo of East Arm Wharf, Port of Darwin, is reproduced with the permission of Landbridge Darwin Port.

Contents

Abbreviations and acronyms

2018 Review	2018 Ports Access and Pricing Review, conducted by the Commission in accordance with section 123 of the *Ports Management Act 2015* and completed on 15 November 2018
2023 Review	2023 Ports Access and Pricing Review, currently being undertaken by the Commission in accordance with section 123 of the *Ports Management Act 2015*
AMEC	Association of Mining and Exploration Companies
CA Act	*Commercial Arbitration (National Uniform Legislation) Act 2011*
CEO	chief executive officer
Commission	Utilities Commission of the Northern Territory
CPI	consumer price index
DIPL	Department of Infrastructure, Planning and Logistics
DPO	Darwin Port Operations Pty Ltd
LNG	liquefied natural gas
MASDP	Middle Arm Sustainable Development Precinct
Minister	The Minister responsible for the *Ports Management Act 2015*, being the Minister for Infrastructure, Planning and Logistics
PM Act	*Ports Management Act 2015*
PM Regulations	Ports Management Regulations 2015
QCA	Queensland Competition Authority
QCA Act	*Queensland Competition Authority Act 1997* (Qld)
UC Act	*Utilities Commission Act 2000*
Verdant	Verdant Minerals Pty Ltd
WACC	weighted average cost of capital

Executive summary

The *Ports Management Act 2015* (PM Act) requires the Commission to complete a second review of the Northern Territory's port access and pricing regime (2023 Review) and provide its report to the Minister by 15 November 2023. Consistent with section 123(2) of the PM Act, the purpose of the 2023 Review is to determine:

- whether there is an on-going need for regulatory oversight of access to, and pricing of, prescribed services at the Port of Darwin
- whether there is a need to change the form of regulatory oversight of access and if so, how
- whether there is a need to change the form of regulatory oversight of prices and if so, how
- whether amendments should be made to Part 11 of the PM Act or the Ports Management Regulations 2015 (PM Regulations) and, if so, the nature of those amendments.

This Final Report sets out the Commission's final recommendations and associated reasoning for changes to the regulatory oversight of port access and pricing, as summarised below. The Final Decision follows release of an Issues Paper in November 2022, and the Commission's Draft Report in May 2023. In making its Final Decision, the Commission considered stakeholders' responses to the Issues Paper and Draft Report.

The Commission's final recommendations are the same as those in the Draft Report except for recommendations 3 and 4. In this Final Report, recommendation 3 is a new recommendation that the PM Act or PM Regulations be amended to address key matters related to the conduct of access dispute arbitrations including providing that the *Commercial Arbitration (National Uniform Legislation) Act 2011* (CA Act) applies to arbitrations, rather than leaving these matters to the port operator's access policy. This new recommendation is consistent with the reasoning in the Draft Report, but was not included as an explicit recommendation in the Draft Report. Recommendation 4 combines recommendations 3 and 4 from the Draft Report.

The content of the Final Report is similar to the Draft Report, but includes summary information from submissions to the Draft Report, further information on the Commission's reasoning for its recommended changes to the port access and pricing regime and updated information on port activity, price movements and revenues from prescribed services.

Need for ongoing regulatory oversight (Chapter 4)

The Commission considers Darwin Port Operations Pty Ltd (DPO) has substantial market power and the potential to exercise that power, if DPO so chose, but notes there is no evidence to suggest DPO is currently improperly using that power. This is likely to reflect, at least in part, the constraints imposed on DPO under the port access and pricing regime and DPO's compliance with those requirements. The Commission notes there was no advocacy among stakeholders for removal of regulatory oversight. The Commission considers there are no developments that would substantially increase the level of competition or availability of substitutes for services at the Port of Darwin to negate the need for regulatory oversight during the 2023-28 regulatory period.

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.

Form of regulatory oversight for access and improvements to be made

No need to change the form of regulatory oversight for access (Chapter 5)

The Commission assessed the adequacy of the current form of regulatory oversight of access based on DPO's conduct and compliance with current requirements, the information available to port users for negotiations, the effectiveness of dispute resolution mechanisms and the costs and benefits of regulatory oversight. No instances of non-compliance have been reported by DPO and the Commission has received no complaints regarding DPO's compliance with regulatory requirements from other sources. The

Commission considers changes to the negotiate/arbitrate model following the initial review of the port access and pricing regime in 2018 (2018 Review) have strengthened the negotiation position of port users, but further improvements could be made.

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.

Improvements to the negotiate/arbitrate framework (Chapter 6)

The Commission considers there are four shortcomings in the negotiate/arbitrate model that require addressing. First, setting out the negotiate/arbitration process under the private port operator's access policy (rather than being contained within the PM Act) creates the risk that the threat of arbitration is weakened and the access policy either does not sufficiently deal with matters or matters are constructed in a way that is more favourable to the port operator. Furthermore, since the access policy is only binding on the port operator, there is uncertainty regarding the enforceability of matters such as rules related to the conduct of the arbitration, confidentiality, provision of information, the attribution of costs and enforceability of decisions by the arbitrator. Second, a gap exists with an access seeker engaged in an access dispute and arbitrators potentially unable to obtain information on how prices were calculated or costs and thus, whether the prices offered are reasonable and consistent with the access and pricing principles. Third, while the private port operator is bound by an arbitral award an access seeker can choose not to be bound, but there is no process or countervailing protection for the private port operator were that to occur. Finally, an access policy must specify a mechanism for sharing arbitration costs, but as this is not binding on the access seeker an extra step is required to gain agreement from all parties to a cost sharing approach before matters proceed to arbitration.

Recommendation 3: The Commission recommends amending the PM Act or PM Regulations to specify key procedural and enforceability matters related to access dispute arbitrations and provide that the *Commercial Arbitration (National Uniform Legislation) Act 2011* (CA Act) applies to those arbitrations.

Recommendation 4: The Commission recommends amending the PM Regulations to:

- include provisions under which an access seeker engaged in an access dispute is given financial information that will enable that access seeker to understand how the price has been calculated and assess whether prices are consistent with the access and pricing principles
- provide for the arbitrator to be given the financial information required to assess whether prices are consistent with the access and pricing principles.

Recommendation 5: The Commission recommends amending the PM Regulations to provide for:

- an 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.

Form of regulatory oversight for pricing and improvements to be made (Chapter 7)

The Commission's recommendations regarding the form of regulatory oversight for pricing were informed by consideration of DPO's conduct and compliance; information gathered through the Commission's regulatory activities; and the costs and benefits of administering the price and performance monitoring framework including more prescriptive regulation. The current form of regulatory oversight – price monitoring – is the least prescriptive form of oversight, but is also not overly costly in terms of administration or compliance. It

provides transparency on pricing and allows for movements in prices and trends in revenue to be assessed and for information, including the Commission's assessments, to be provided to the public.

No instances of non-compliance in relation to pricing have been reported by DPO or from other sources. The Commission considers the trends in prices and revenue do not support a need for a more prescriptive form of price regulation; however, the price monitoring regime requires enhancement to provide information on the cost or profits associated with providing prescribed services to enable the Commission to more effectively monitor prices and assess their reasonableness. While this will increase the regulatory burden, there may be some offset by reducing the regulatory burden associated with renewal of price determinations through extending the maximum timeframe that a price determination can be in place from three to five years.

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.

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. 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 guidelines would allow a private port operator and private pilotage service provider to prepare a single set of accounts when they are within the group of entities if the Commission considers it appropriate. 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.

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

Other improvements to the port access and pricing regime (Chapter 8)

In the final report for the 2018 Review, the Commission recommended a number of changes to improve the operation of the ports access and pricing regime. The Northern Territory Government subsequently made amendments to the PM Act and PM Regulations in 2020, which partially addressed the Commission's recommendations. The Commission reviewed the outstanding matters from the 2018 Review and has made further recommendations reflecting its present views given developments (if any) since that time.

Services under lease

Part 11 of the PM Act applies to prescribed services, which are defined in regulation 12 of the PM Regulations. Under regulation 12, any service provided under a lease granted by the private port operator is defined not to be a prescribed service. This creates an avenue for a private port operator to provide prescribed services outside the reach of the regulatory regime and changes are needed to ensure all prescribed services, whether provided under a lease or not, are subject to the regulatory regime. Clarity is also needed to confirm that the exclusion does not apply to DPO's provision of prescribed services, noting that DPO operates the port under a sub-lease. The Commission recommends the following changes to address these issues:

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).

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.

Carve outs under sections 124 and 125 of the PM Act

Section 124 of the PM Act is intended to prevent a private port operator or private pilotage provider from engaging in conduct that prevents or hinders access to a prescribed service. Section 125 of the PM Act is intended to prevent a private port operator or private pilotage provider from unfairly differentiating between port users in a way that has a material adverse effect on their ability to compete with other port users. Sections 124 and 125 allow for the exemption of certain conduct where an act is done in accordance with the private port operator's access policy, but no oversight is attached to this 'carve out' of particular acts or behaviours. While there is not presently a problem in relation to DPO's access policy, the Commission recommends modifications to the port access and pricing regime to ensure there is an appropriate level of regulatory oversight before carve outs can be included in an access policy.

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.

Oversight of the classification of services

Under the current access policy, prescribed services are divided into standard services and non-standard services. Standard services are available to access seekers on published standard terms and prices, with the standard terms approved by the Commission as part of approval of the access policy. Non-standard terms are provided through a more complex negotiated process to agree terms and prices.

The access policy currently provides that the private port operator determines what constitutes a standard prescribed service. The process for accessing standard services is more straightforward, with terms and conditions and pricing known, and changes in these transparent. At present, there is no regulatory oversight of what services are subject to standard terms and conditions and the Commission recommends it be required to approve the classification of services as standard or non-standard. The Commission also recommends that it be given the ability to approve a third category of services, termed reference services, which are a sub-set of non-standard services where indicative terms and prices are required to be published. These recommendations stem from stakeholder concerns about the lack of clarity and certainty about prices and terms of access for exporting dry bulk minerals, which are currently a non-standard service.

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 prescribed services as standard services, non-standard services or reference services.

Recommendation 11b: The Commission recommends amending the port access and pricing regime to require a private port operator to publish indicative terms, and where feasible for the service, indicative charges (reference tariffs) for reference services.

Power to require independent audits

In contrast to other industries that it regulates, there are currently no powers under the port access and pricing regime for the Commission to initiate an independent audit to verify compliance. Independent audits are useful for detecting weaknesses in record keeping, compliance monitoring and reporting processes and misalignment between business practices and legislated requirements. The findings from independent audits can reduce the risk of non-compliance, enhance service delivery, and improve the quality and reliability of information provided to the Commission.

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.

Non-compliance and enforcement

Material instances of non-compliance with the access policy and price determination are required to be reported to the Commission who in turn reports these to the Minister, with the Commission's report then tabled in the Legislative Assembly. There is, however, no legislated definition or guidance on what constitutes a 'material instance of non-compliance' creating uncertainty about what should be reported. There is also no specific provision in the PM Act or PM Regulations to expressly allow another entity such as a port user to report an instance of non-compliance.

Although there is visibility of material non-compliance through the reporting process, beyond this, there is no specific legislated penalty for non-compliance or failing to report a material instance of non-compliance. There may be consequences associated with a breach of the lease for the Port of Darwin due to non-compliance, but the penalties and their application under the lease lacks transparency and independent and impartial adjudication. The Commission notes the power under section 126(2) of the PM Act for a court of competent jurisdiction to enforce compliance where a private port operator or private pilotage provider has engaged in conduct to prevent or hinder access or to unfairly differentiate between users, but considers these powers should be extended to cover the failure to comply with an access policy and failure to comply with the obligation to negotiate in good faith with an access seeker.

The Commission recommends the following changes to address these issues:

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'.

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.

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.

Measures of service

There are no requirements for the private port operator or private pilotage provider to report on measures of service or performance levels for prescribed services. Visibility and monitoring of these is important as a monopoly provider does not face competitive pressure to maintain or lift its service performance and it can reduce service quality (through cost reductions) while maintaining prices and thus, increase profits. The Commission considers a private port operator and a private pilotage provider should propose and report on measures of service and associated targets, approved by the Commission. To minimise the additional cost and obligations, a private port operator and a private pilotage provider could leverage off existing performance indicators or other tools used internally to monitor and improve business performance.

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 and associated targets for reporting purposes.

Recommendation 14b: 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 targets, 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 and targets.

Improvements in the access policy approval process

Despite amendments following the 2018 Review, the Commission still considers there are deficiencies in what it is permitted to take into account in approving a draft access policy. In particular, the Commission is required to approve a draft access policy if it meets the requirements in regulation 13(2) of the PM Regulations and any matter required by the Minister under section 129 of the PM Act (currently there are none). However, matters specified in regulation 13(2) are functional in nature giving rise to a checklist

approach to approving an access policy with little discretion for the Commission to take other matters into account. For example, there is no requirement for the Commission to consider implications for economic efficiency and effective competition (as per the objects of Part 11), the access and pricing principles or more broadly matters under section 6(2) of the UC Act including fair market conduct and reliability and quality of services. The Commission makes the following recommendation to broaden the matters to be taken into consideration when approving (or not) a draft access policy:

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 of the PM Act
- any other matters the Commission considers relevant.

1 | Introduction

This Final Report presents the Commission's recommendations, and associated reasoning, on whether or not the Northern Territory's port access and pricing regime should continue to apply and if so, whether changes are needed to the form of regulatory oversight or the legislative framework for the regime.

Context to the Final Report

Part 11 of the PM Act and Part 3 of the PM Regulations set out the regulatory framework (port access and pricing regime) for designated ports in the Northern Territory. The object of the port access and pricing regime is "to promote the economically efficient operation of, use of and investment in major port facilities in the Northern Territory, so as to promote effective competition in upstream and downstream markets".[1]

The port access and pricing regime applies to certain (prescribed) services at designated ports and declared private port operators and private pilotage providers for those ports. At present, the regime applies to only one port – the Port of Darwin (a description of the port is provided in Appendix A) – and the private operator of the port (DPO). DPO's operations encompass pilotage activities undertaken by Darwin Port Pilotage Pty Ltd. DPO is part of the Landbridge Group, which is a private company based in Rizhao city in Shandong Province in China. While there is other port infrastructure in the Northern Territory, those ports have not been declared as designated ports for the purpose of the PM Act.

Under section 123 of the PM Act, the Commission is required to review the operation of Part 11 of the PM Act in the third year after its commencement and thereafter, every five years. The Commission conducted the initial three year review (2018 Review), providing its final report to the Minister in November 2018. A copy of the final report and other documentation relating to the 2018 Review is available on the Commission's website.[2] The Commission's recommendations for change to the port access and pricing regime from the 2018 Review and associated outcomes are listed in Appendix B.

This review (2023 Review) is the Commission's second appraisal of the port access and pricing regime. In accordance with section 123(2) of the PM Act, the purpose of the review is to determine:

- whether there is an on-going need for regulatory oversight of access to, and pricing of, prescribed services provided by the private port operator or private pilotage provider
- whether there is a need to change the form of regulatory oversight of access and if so, how
- whether there is a need to change the form of regulatory oversight of prices and if so, how
- whether amendments should be made to Part 11 of the PM Act or the PM Regulations and, if so, the nature of those amendments.

In undertaking the 2023 Review, the Commission is required by section 123(3) of the PM Act to consult with each private port operator and private pilotage provider (that is, DPO as both operator for the Port of Darwin and pilotage provider). However, as a matter of good regulatory practice, the Commission also undertakes public consultation to give port users, other stakeholders and interested parties the opportunity to provide input to the review.

Issues Paper

On 11 November 2022, the Commission commenced the 2023 Review with release of an Issues Paper[3], which sought stakeholders' views on matters including:

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[1] PM Act, section 117.

[2] At https://utilicom.nt.gov.au/projects/projects/2018-review-of-the-port-access-and-pricing-regime.

[3] Available at https://utilicom.nt.gov.au/__data/assets/pdf_file/0007/1166029/2023-Review-of-the-Port-Access-and-Pricing-Regime-Issues-Paper.pdf

- recent or future changes in the ports sector that could affect competition, alter the market power of DPO or alter the balance between the benefits and costs of the port access and pricing regime
- the sufficiency of reporting requirements and any barriers to notifying the Commission of instances of non-compliance with the access and pricing regime
- the effectiveness of the negotiate/arbitrate framework for establishing access arrangements
- the effectiveness of price monitoring as the form of price regulation
- factors that could change recommendations from the 2018 Review that have yet to be actioned
- extension of the maximum timeframe for a price determination.

The Issues Paper posed 18 questions to help guide feedback. Stakeholders were also invited to provide feedback on any other matters that require consideration as part of the 2023 Review.

The Issues Paper was open for submissions for a 12 week period ending on 3 February 2023 and three submissions were received from the Association of Mining and Exploration Companies (AMEC), DPO and the Department of Infrastructure, Planning and Logistics (DIPL). AMEC represents mineral explorers, emerging miners, producers and other businesses, with 34 member companies actively working in the Northern Territory in 2022. DIPL is responsible for the functions of the Regional Harbour Master, managing the Darwin Port Agreement and facilitating private sector investment projects. Submissions to the Issues Paper are available on the Commission's website[4].

Draft Report

Following consideration of the responses to the Issues Paper, the Commission released its Draft Report[5] for the 2023 Review for consultation on 8 May 2023. The Draft Report presented 15 draft recommendations including that:

- regulatory oversight of access to, and pricing of, prescribed services at the Port of Darwin should continue
- the form of regulatory oversight for access and pricing does not require changing, but could be enhanced by addressing shortcomings in the negotiate/arbitrate model and access to financial information on prescribed services
- amendments should be made to the PM Act or PM Regulations to
    - close potential avenues to provide prescribed services outside of the regulatory regime
    - extend the Commission's oversight to include the classification of services and measures of service performance
    - improve the framework for compliance monitoring and enforcement.

The Draft Report was open for submissions for an eight week period ending on 30 June 2023 and five submissions were received from AMEC, Crowley, DPO, DIPL and Verdant Minerals Pty Ltd (Verdant). Submissions can be accessed on the Commission's website. The Commission also met with representatives from Crowley who provided background information for their submission on a confidential basis. Crowley is a privately owned and operated logistics, marine, and energy solutions company headquartered in Jacksonville, Florida that is constructing a bulk fuel storage facility for the United States Department of Defense at East Arm in Darwin. Verdant is a privately owned company developing the Ammaroo Phosphate Project near Tennant Creek.

[4] At https://utilicom.nt.gov.au/projects/projects/2023-review-of-the-port-access-and-pricing-regime

[5] Available at https://utilicom.nt.gov.au/__data/assets/pdf_file/0019/1221472/2023-Review-of-the-Port-Access-and-Pricing-Regime-Draft-Report.pdf

Structure of the Final Report

The Final Report sets out the regulatory framework for prescribed ports in the Northern Territory and the Commission's final recommendations and reasoning for maintaining or changing the framework. It includes discussion on matters raised in the Issues Paper and stakeholders' views on those matters as well as stakeholder's responses to the Commission's draft recommendations. Information on port activity, movements in prices for, and revenue earnt from, prescribed services has also been updated. The Final Report is arranged as follows:

- Chapter 2 describes the port access and pricing regime
- Chapter 3 discusses the economic context for the 2023 Review
- Chapter 4 provides the Commission's recommendation and reasoning for ongoing regulatory oversight
- Chapter 5 provides the Commission's recommendation and reasoning for maintaining the current form of regulatory oversight of access
- Chapter 6 provides the Commission's recommendation and reasoning for amendments to the negotiate/arbitrate framework
- Chapter 7 provides the Commission's recommendation and reasoning for enhancing the current form of regulatory oversight of pricing
- Chapter 8 provides the Commission's recommendations and reasoning for other amendments to the regulatory framework.

Timetable for the review

Table 1 shows the key stages in the review process and associated timeframes.

The Commission must provide a final report for the 2023 Review to the Minister no later than 15 November 2023. The Minister must table the report in the Legislative Assembly within seven sitting days of receipt. Once tabled, the final report will be made available on the Commission's website (https://utilicom.nt.gov.au/).

Table 1 Key stages and timeframes for the 2023 Review of the port access and pricing regime

Stage	Expected timing
Issues paper released	Completed November 2022
Public consultation	Completed February 2023
Draft Report released	Completed May 2023
Public consultation	Completed June 2023
Final report provided to the Minister	1 November 2023
Tabling of Final Report in Legislative Assembly	Within 7 sitting days of receipt
Commission publication of Final Report	Following tabling

2 | Summary of the port access and pricing regime

Port operations and pilotage services are generally considered to have natural monopoly characteristics with a single supplier typically serving the market due to high fixed costs, specialist expertise, geographic location and other barriers to entry. Without competition, a single (monopoly) supplier is able to exercise market power, for example, through the imposition of unreasonable terms and conditions or charging excessive prices. This in turn can adversely impact upstream and downstream competitive markets including shipping, logistics and import and export markets.

The monopoly status of a port operator is established in section 8(2) of the PM Act, which provides for there to be only one port operator for a designated port in the Northern Territory at any time. For pilotage services at a designated port, section 85(1) provides for the Minister to appoint a person to be a pilotage provider for a pilotage area. Although this could allow for the appointment of more than one pilotage provider, section 86 of the PM Act permits the Minister to enter into a contract with a pilotage provider without undertaking a competitive tender process and on an exclusive basis within the relevant pilotage area. Regulation 28(2) of the PM Regulations outlines matters the Minister must take into account in appointing a pilotage provider.

The port access and pricing regime is intended to protect existing and potential port users (port users) at designated ports from the exercise of market power by a private port operator or private pilotage provider.

Part 11 of the PM Act, which establishes the port access and pricing regime, has four components:

- Division 1 deals with legal and administrative matters including the object and application of the Part and regulatory reporting requirements.
- Division 2 deals with access regulation including provisions for the development of an access policy and restraints on private port operators or private pilotage providers regarding conduct that prevents or hinders access to prescribed services or unfairly differentiates between port users.
- Division 3 deals with price regulation including pricing principles and empowering the Commission to make price determinations.
- Division 4 deals with the Commission's information-gathering powers and confidentiality.

Part 3 of the PM Regulations supplements Part 11 of the PM Act by defining the "prescribed services" to which Part 11 applies. Prescribed services are:

- providing, or allowing for, access for vessels to the designated port
- providing facilities for loading or unloading vessels at the designated port
- providing berths for vessels at the designated port
- providing or facilitating the provision of pilotage services in a pilotage area within the designated port and
- allowing entry of persons and vehicles to any land on which port facilities of the designated port are located.

Part 3 of the PM Regulations also states that the following are not prescribed services:

- any of the above services where they are provided under a lease granted by the private port operator
- a towage service for facilitating access to the designated port
- a bunkering service at the designated port
- a service for the provisioning of vessels (including the supply of electricity and water) at the designated port and
- a service for the removal of waste from vessels at the designated port.

Further, Part 3 of the PM Regulations:

- establishes requirements in relation to an access policy of a private port operator

- details requirements and procedures for the making of a price determination including that price monitoring must be used as the form of price regulation and
- provides for a private port operator or private pilotage operator to negotiate charges for a prescribed service.

For access regulation, the port access and pricing regime applies a negotiate/arbitrate framework. This is a low cost form of regulatory protection that improves a port user's position in commercial negotiation, with recourse to an arbitration process when a dispute arises that cannot be resolved between the parties. The PM Regulations specify the aspects of the negotiate/arbitrate framework that must be included in a private port operator's access policy. The access policy must be approved by the Commission, but only if it includes negotiation, arbitration and other requirements specified in the PM Regulations.

Further, the port access and pricing regime prevents a private port operator from engaging in conduct that prevents or hinders access to a prescribed service (section 124 of the PM Act) and unfairly differentiating in a way that adversely affects a port user's ability to compete with other port users (section 125 of the PM Act). If a private port operator engages, or proposes to engage in such conduct, section 126 of the PM Act provides for a court of competent jurisdiction to make orders against the private port operator preventing further misconduct and providing compensation for losses and damage suffered by a person as a result of a contravention of these obligations.

For a private pilotage provider, there is no requirement to have an access policy, but sections 124 to 126 of the PM Act apply to a private pilotage provider. Accordingly, a private pilotage provider is not allowed to prevent or hinder access to, or unfairly differentiate between port users in providing, pilotage services and these obligations are subject to court enforcement.

For price regulation, the Commission is empowered under section 132(1) of the PM Act to make a price determination under section 20(1)(a) of the UC Act relating to the charges fixed by a private port operator or private pilotage provider. The UC Act allows the Commission to apply any form of price regulation that it considers appropriate; however, this discretion is negated in the port access and pricing regime with regulation 16(2)(a) of the PM Regulations specifying price monitoring as the form of price regulation.

Other jurisdictions, such as South Australia[6], have sought to certify their ports regulatory regime under Part IIIA of the *Competition and Consumer Act 2010* (Cth), but the Northern Territory Government has not chosen to take this path. The certification process of the National Competition Council assesses the effectiveness of a ports regulatory regime by applying relevant principles from clause 6 of the Competition Principles Agreement. While the Commission undertook an assessment of the port access and pricing regime against these principles in the 2018 Review, it has not done so in the 2023 Review as the government can seek certification, if it wishes to do so.

The port access and pricing regime is a 'light-handed' approach to regulation. This does not imply non-compliance will be accepted or the regime not enforced; rather, it means strategies for regulatory oversight aim to achieve the highest levels of compliance while keeping costs as low as practical. For example, the regime allows the private port operator the freedom to make price, quality and investment decisions without approval from the Commission or Northern Territory Government, but requires independent approval of an access policy, imposes reporting requirements in relation to pricing and compliance and provides users with access to a negotiation and arbitration regime. While a stronger form of regulation may offer more benefits to port users, this would substantially increase the cost of administration and compliance with these passed on to port users and taxpayers.

[6] National Competition Council, Application for certification of the South Australian Ports Access Regime (Final recommendation and decision), accessed on 10 June 2022 at https://ncc.gov.au/application/application-for-certification-of-the-south-australian-ports-access-regime/5

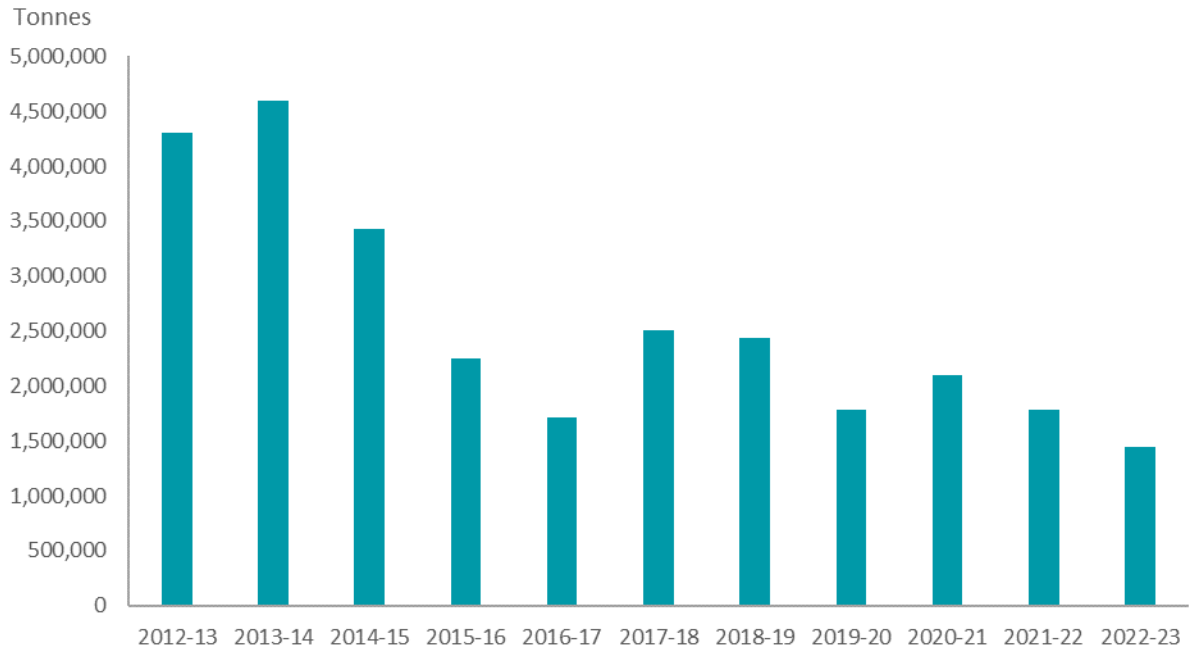
3 | Economic context for the 2023 review

This chapter describes trends in throughput, factors influencing trade and changes in the Northern Territory's ports industry that may affect activity at the Port of Darwin. The information presented has been updated from the Draft Report to include throughput and revenue for 2022-23.

Throughput at the Port of Darwin

Prior to lease of the Port of Darwin in 2015, there was a peak in the volume of total trade (exports and imports) in 2013-14, boosted by the construction phase of the Ichthys liquefied natural gas (LNG) project (Figure 1). The annual report of the then port operator (Darwin Port Corporation) indicated that a total of 3,178 trading vessels visited the port, but utilisation of East Arm Wharf was only at 43%.[7]

Figure 1 Port of Darwin, total trade, 2012-13 to 2022-23



Source: Landbridge Darwin Port, Trade & Port Statistics website, total trade, accessed on 21 September 2023 at https://www.darwinport.com.au/trade/total-trade

Since that time, total trade has reduced. Over the period that DPO has operated the Port of Darwin, total trade has ranged between 1.4 million and 2.5 million tonnes per annum. In 2019-20, total trade was affected by a COVID-19 induced downturn and while there was some recovery in throughput in 2020-21, total trade has since declined to about 1.4 million tonnes in 2022-23. This is less than a third of the level of total trade in 2013-14 of 4.6 million tonnes. While DPO has not published a current utilisation rate for the wharf, at a total of 1,569 trading vessels in 2022-23,[8] there remains substantial spare capacity at the Port of Darwin. This was confirmed in DPO's submissions to the 2023 Review.

[7] Darwin Port Corporation. Annual Report 2013-14, page 45.

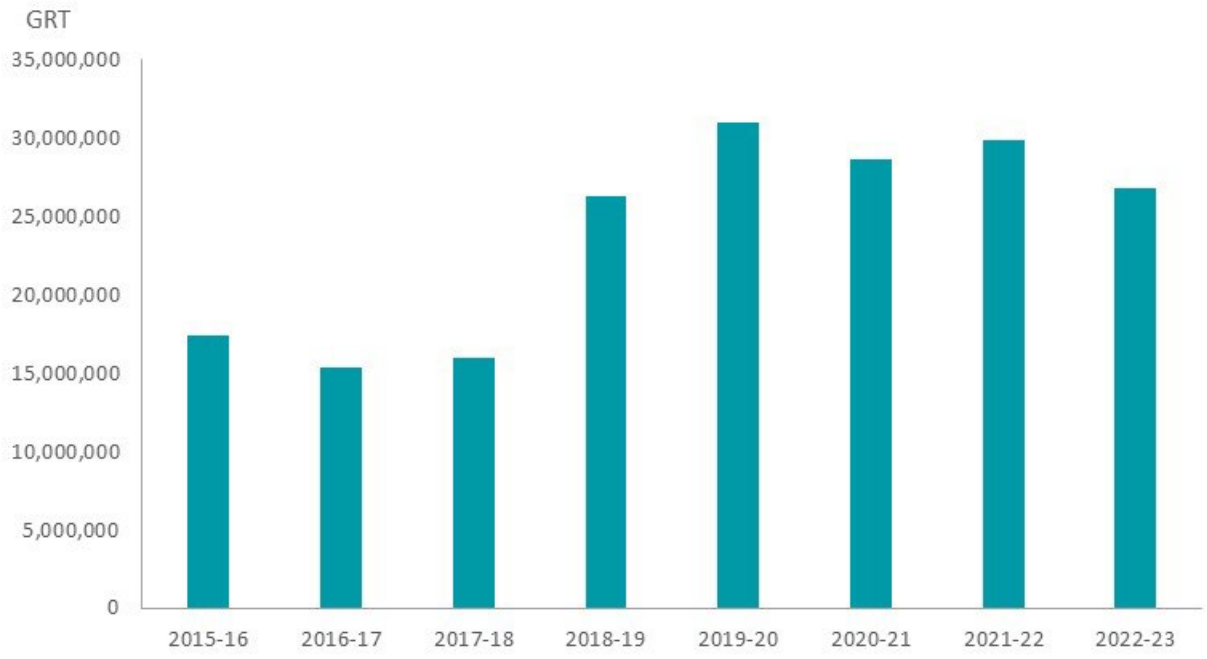
[8] Landbridge Darwin Port. Trade & Port Statistics website, vessel visits, accessed 21 September 2023 at https://www.darwinport.com.au/trade/vessel-visits.

In May 2022, the Northern Territory Government released its Cruise Tourism Strategy 2022-2025, which seeks to facilitate recovery of the sector and identify opportunities to grow cruise tourism through the medium and long term.[9] Cruise ships typically berth at Fort Hill Wharf. In recent years, there was a downturn in cruise ship visits due to restrictions associated with the COVID-19 pandemic, but post pandemic, there has been a recovery with 91 visits in 2022-23, carrying 56,358 passengers and crew. While this is the greatest number of cruise ships to have visited since the Port of Darwin was leased, the number of passengers and crew remains below the peak of 95,252 in 2016-17 (from 75 cruise ship visits).[10] This likely reflects, in part, an increase in visits by small cruise ships of less than 50,000 gross tonnage in size (74 in 2022-23 compared with 49 in 2016-17).

With the transition of the Ichthys LNG project to the production phase, LNG vessel visits increased, up from 50 in 2017-18 to a peak of 166 in 2021-22. In 2022-23, LNG vessel visits declined to 126 visits.[11,12] This is consistent with an expected decrease in shipments from the Santos Darwin LNG processing facility as production from the Bayu-Undan gas field, which supplies the facility, is exhausted.[13]

Consistent with the increase in LNG vessels, gross registered tonnage through the Port of Darwin has risen and over the past five years, it has been in excess of 26 million tonnes per annum (Figure 2). LNG vessels utilise pilotage services provided by DPO and incur port dues, but they berth at private facilities at Bladin and Wickham Points servicing the LNG processing facilities based within the Port of Darwin.

Figure 2 Port of Darwin, gross registered tonnage, 2015-16 to 2022-23



Source: Landbridge Darwin Port, Trade & Port Statistics website, total trade, accessed on 21 September 2023 at https://www.darwinport.com.au/trade/total-trade

[9] Accessed on 25 May 2022 at https://www.tourismnt.com.au/system/files/uploads/files/2022/cruise-strategy-2022-2025.pdf.

[10] Landbridge Darwin Port. Trade & Port Statistics website, cruise ships, accessed 18 October 2022 at https://www.darwinport.com.au/trade/cruise-ships.

[11] Landbridge Darwin Port. *A Year in Review 2018-19*, accessed 17 May 2022 at https://www.darwinport.com.au/about/publications.

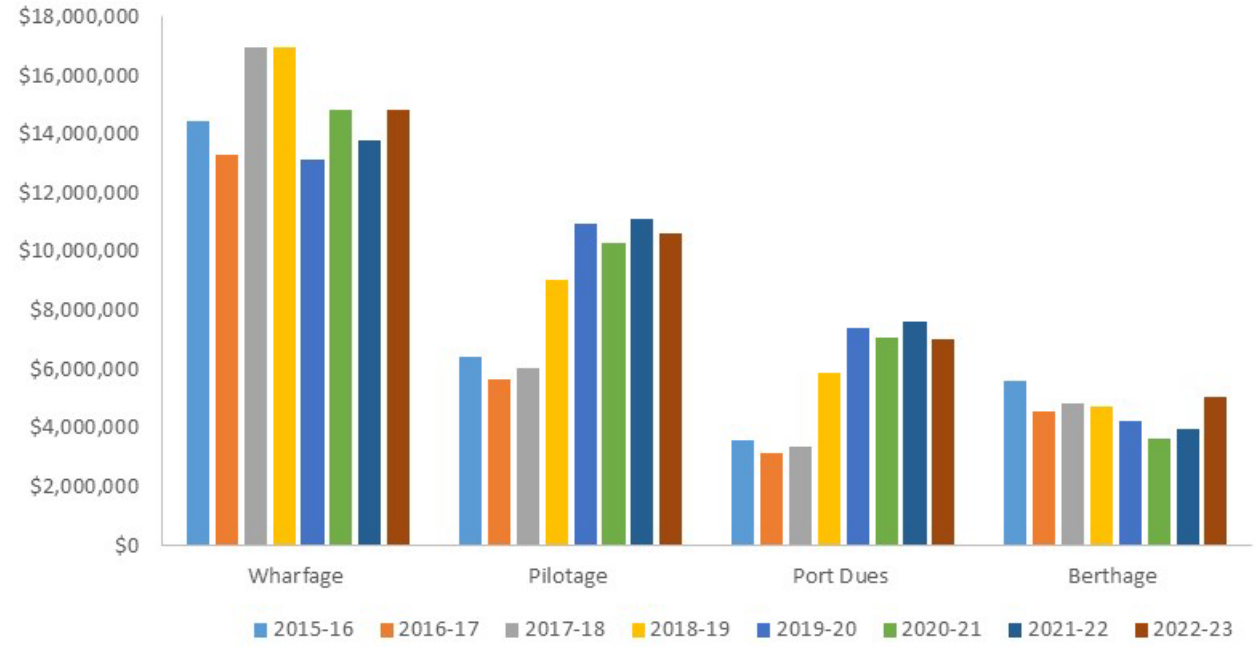
[12] Landbridge Darwin Port. Trade & Port Statistics website, vessel visits, accessed 18 October 2022 and 21 September 2023 at https://www.darwinport.com.au/trade/vessel-visits.

[13] Santos. Annual Report 2022, accessed 21 September 2023 at https://www.santos.com/wp-content/uploads/2023/02/2022-Annual-Report.pdf

Revenue trends

Consistent with subdued activity at the Port of Darwin, there has been no sustained growth in revenue from wharfage or berthage over the period from 2015-16 to 2022-23 (Figure 3). Revenue from wharfage peaked in 2017-18, but has since declined and in 2022-23, revenue from wharfage was similar to that earned in 2015-16. After a period of decline, revenue from berthage increased in 2022-23 consistent with the resumption of cruise ship visits. The increase in pilotage and port dues over the period from 2017-18 to 2019-20 reflects the commencement of shipments from the Ichthys LNG processing facility, but growth in pilotage and port dues has now plateaued. Revenue relating to access to port land and the occupation and use of port land (not shown in Figure 3) was minor at about $1 million in 2022-23.

Figure 3 Revenue by prescribed service, 2015-16 to 2022-23



Future changes impacting on the Northern Territory's ports industry

The Northern Territory Government's 2023-24 Budget indicated a number of mining projects in development or pending final approvals.[14] Similarly, the 2022-2023 Progress and Outlook report by Investment Territory indicates there are 29 projects (14 relating to minerals) worth more than $33 billion in Investment Territory's Priority Portfolio, which are anticipated to reach final investment decision in the next three to five years.[15] Submissions from AMEC and DIPL to the Issues Paper for the 2023 Review noted the Northern Territory Government's goal to grow the local economy to $40 billion by 2030 with AMEC stating this would require 10 new operational mines. AMEC advised that to help facilitate this development, port access and pricing would be crucial to ensure production from the mines reach their intended markets. DIPL was of a similar view.

The Commission notes if the proposed projects come to fruition, some may result in an increase in port activity and throughput. Equally, however, the Commission notes some previously proposed projects such as

[14] Northern Territory Government. 2023-24 Budget, Industry Outlook, Map 1. Accessed on 25 July 2023 at https://budget.nt.gov.au/industry-outlook/mining-and-manufacturing.

[15] Accessed on 25 July 2023 at https://invest.nt.gov.au/__data/assets/pdf_file/0006/1113792/investment-territory2021-22-progress-and-outlook-report.pdf.

Project Sea Dragon (a prawn farm) and the luxury hotel development at the Darwin Waterfront are no longer progressing as originally planned. [16,17]

The Commonwealth Government's 2022-23 Budget in May 2022 announced $1.5 billion to build "new port infrastructure such as a wharf, an offloading facility and dredging of the shipping channel".[18] The port infrastructure would be part of a proposed industrial and low emission energy hub at Darwin's Middle Arm. The Commonwealth Government's October 2022-23 Budget reconfirmed its investment in the Middle Arm Sustainable Development Precinct (MASDP), which includes "common use marine infrastructure".[19]

The MASDP project overview[20] indicates the first stage of the project is to obtain necessary environmental approvals with the project timetable indicating a decision is expected in 2025. Subject to approvals, construction of enabling infrastructure is projected to begin in early 2026.

Submissions from DPO and DIPL on the Issues Paper discussed the proposed common-use marine infrastructure at the MASDP. DIPL stated the proposed infrastructure would not create substitute access to international markets or create competition for the industries that rely on the Port of Darwin. Instead, DIPL was of the view that the development and operation of the MASDP will rely on the Port of Darwin for import and export of many varied components and commodities. DIPL considers this will result in significantly higher volumes of freight reliant on the Port. In contrast, DPO expressed the view that the proposed infrastructure is likely to compete directly for some of its services in the future.

Consideration of the MASDP and other major projects

The Commission considers any substantive impact from the MASDP and other major projects is not likely to be felt in the near term and their implications for the need for, and form of, regulation for the Port of Darwin should be considered in the next (2028) review. At that time, construction of the MASDP may have been completed and what industries are establishing in the MASDP and associated demand on the Port of Darwin should be better known. Similarly, it will be clearer what major projects have progressed beyond the final investment decision stage and into construction and operational stages.

The Commission observes the MASDP project requires environmental and other approvals and proposed timelines for construction are dependent on those approvals. The project delivers a development ready industrial precinct, but depends on industry to uptake that land. Therefore, while there may be some impact during construction, the impact on throughput at the Port of Darwin post construction will depend on what industry establishes in the MASDP and how that industry uses the marine infrastructure at the MASDP and prescribed services at the Port of Darwin.

The Port of Darwin is currently operating well below capacity. This suggests any uplift in throughput from the MASDP and other projects (even if they are more substantive investments), is likely capable of being accommodated at the Port.

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[16] Landbridge Darwin Luxury Hotel website accessed on 20 May 2022 https://landbridgedarwinhotel.com.au/.

[17] Seafarms Group Limited. Project Sea Dragon Review - Investor Briefing Presentation accessed on 20 May 2022 at https://seafarms.com.au/wp-content/uploads/2022/04/Project-Sea-Dragon-Review-Investor-Briefing-Presentation-March-31-2022-1.pdf.

[18] The Hon Barnaby Joyce MP, Media Releases, *2022-23 Budget delivers $7.1 billion to turbocharge our regions*. Accessed 17 May 2022 at https://minister.infrastructure.gov.au/joyce/media-release/2022-23-budget-delivers-71-billion-turbocharge-our-regions.

[19] Commonwealth Government Budget October 2022-23. Budget measures, Budget Paper no. 2. Accessed 2 November 2022 at https://budget.gov.au/2022-23-october/content/bp2/download/bp2_2022-23.pdf.

[20] DIPL. Project Overview MASDP. Accessed on 28 February 2023 at https://dipl.nt.gov.au/__data/assets/pdf_file/0005/1103756/masdp-project-overview-factsheet.pdf.

4 | Need for ongoing regulatory oversight

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.

The Commission's recommendation that there is an ongoing need for regulatory oversight of access to and pricing of prescribed services provided by private operators at the Port of Darwin remains unchanged from the Draft Report. Submissions to the Draft Report either explicitly stated or provided implicit support for this recommendation. No submissions advocated for removal of regulatory oversight.

The recommendation was informed by the Commission's assessment of the existence of market power, constraints on DPO (as the regulated operator of the port and provider of pilotage services) from exercising that power and the costs and benefits of applying the regime. The sections to follow discuss these matters including the Commission's position and reasoning on specific matters.

The discussion draws on information from the previous chapter and includes responses from submissions to the Commission's Issues Paper for the 2023 Review. The Issues Paper asked what changes may substantially affect competition or alter the market power of DPO including what port services may be affected by those changes and how it would potentially change the need for regulatory oversight or alter the balance between the benefits and costs of the port access and pricing regime. The discussion also summarises feedback from stakeholders on the Commission's draft recommendation and related information in the Draft Report.

The Commission notes concerns about the lease of the Port of Darwin to a Chinese company continue to be aired in the media. These issues are not relevant to the Commission's review and not a matter of consideration as they do not relate to the extent or exercise of DPO's market power or the need for an access and pricing regulatory regime.

Existence of market power

Background

Substantial market power is generally held when a firm does not face effective competition from other businesses due to there being no or few close competitors in the same market, few substitutes for the services it provides and high barriers to entry for potential rivals. This contrasts with a competitive market where the attention of competing businesses will be on production costs, pricing structures and product/service quality so they can gain and retain customers. A business that has market power, however, has the ability to set and keep prices above the level that would occur in a competitive market and/or provide a lower level of output or service than might otherwise be delivered in a competitive market.

In the 2018 Review, the Commission formed the view that DPO has substantial market power and potential to exercise that power (if it so chose) based on:

- limited competition for the provision of most prescribed services, for example, there are no other nearby ports of equivalent size or services
- a lack of substitutes for most prescribed services, for example, few avenues that are economically viable for exporting or importing goods particularly for port users based in the Top End of the Northern Territory (such as shipping by road or rail to interstate ports), and port users locked into using DPO's services and infrastructure due to the location of their business (such as on-shore LNG processing facilities) or those servicing other port users (such as towage and tug operators)
- the existence of high barriers to entry for potential competitors for the provision of prescribed services at the required scale (for example, high fixed costs for infrastructure and limited options for the location of a deep water port)
- limited countervailing market power (particularly for established users), that is, there are few port users who are in a strong position to counteract DPO's market power with viable alternative options, for

example, being able to switch to an alternative provider or vertically integrate and provide the relevant service themselves

- the balancing of commercial incentives, that is, while there may be a commercial objective to increase use and patronage of and throughput at the port, DPO still has the ability (if it chose to exercise it) to increase prices and profit without increasing port throughput or improving the quality of services as there are few alternatives available to port users
- limitations on port users relying on additional constraints on DPO through the port lease[21] (instead of the access and pricing regime) as these do not address the key risks associated with the exercise of market power, although DPO is prevented from becoming an integrated operator (for example, by providing stevedoring or road, rail or marine transport services) without the consent of the Northern Territory Government.

These conclusions and the Commission's reasoning are discussed in more detail in Chapter 5 of the Commission's final report for the 2018 Review and are not reproduced in this paper. A copy of the final report and other documents for the 2018 Review can be accessed on the Commission's website (https://utilicom.nt.gov.au/projects/projects/2018-review-of-the-port-access-and-pricing-regime).

The Issues Paper for the 2023 Review took the position that the findings from the 2018 Review remained relevant unless there had been changes in the ports market or industry since that time or there were future developments that would substantially change the findings from the 2018 Review. Responses to the Issues Paper from DPO and DIPL commented on the existence and exercise of market power.

DPO advised it does not necessarily accept the extent of findings from the 2018 Review in relation to the existence of market power, having regard to the degree of competition faced by other ports and the countervailing power of some port customers. DPO considers the Port of Darwin is subject to competitive pressures from other port and infrastructure suppliers and cited examples where customers or potential customers use other ports. DPO also said large customers with commercial countervailing bargaining power such as Inpex, Santos and Svitzer have the ability to exercise this power, particularly if they identified any aspect of DPO's services as uncompetitive with equivalent services offered elsewhere.

DPO advised that impacts associated with the COVID-19 pandemic and escalating energy prices would contribute to economic uncertainty for the Port of Darwin throughput into the future. DPO stated it was not in a position to take advantage of an environment in which there is excess demand that could allow it to exercise greater leverage in matters such as pricing or terms for prescribed services.

DPO was of the view that there have been no material changes to relevant markets to suggest a change to the level of competition or any likely changes in the immediate future to warrant changes to the port access and pricing regime. Similarly, DPO considers there are already sufficient constraints on itself through the regime and contractual documents with the Northern Territory Government and additional constraints are not needed.

DIPL expressed the view that the Port of Darwin has few competitors and substitutes for the services it provides. DIPL also advised pilotage services were subject to a 10 year exclusivity period from the lease commencement date and this period will expire during the 2023-28 regulatory period. DIPL considers effective regulation to be necessary given the Port is a critical component in the supply chain for existing and developing projects and is important for growth and expansion of the Northern Territory economy.

Submissions to the Draft Report

Submissions from Crowley, DPO, DIPL and Verdant to the Draft Report commented on market power.

Crowley considers the Port of Darwin has a natural monopoly position due to the lack of viable alternative ports and a lack of economic competition. Crowley stated that this monopoly position and market power has

[21] A summary of constraints in the port lease is provided in Appendix B of the Commission's final report for the 2018 Review available at https://utilicom.nt.gov.au/publications/reports-and-reviews/ports-access-and-pricing-review-final-report-2018.

the potential to negatively affect economic growth and as such it is critical that appropriate regulation is in place where the Port of Darwin is unconstrained by competition.

DPO continued to disagree with the finding that it has market power and considers this finding insufficient, in and of itself, to support increased regulation.

DIPL noted natural monopolies can bring about certain advantages such as cost efficiencies and streamline operations, but stated these can only be realised through appropriate regulation. DIPL considers the failure to establish such regulation can result in a range of detrimental effects including diminished innovation, lower service quality and reduced affordability for consumers; barriers for new entrants; inefficiencies; and declining productivity.

Verdant noted that the form of regulatory oversight of pricing had an ex-post focus (that is, price monitoring detects use of monopoly power after it occurs). Verdant was of the view that it was equally important to have ex-ante frameworks and protections (such as those proposed in draft recommendation 11) to prevent the exploitation of monopoly power.

Commission's position and reasons

The Commission considers its findings from the 2018 Review remain relevant in the 2023 Review. That is, the Commission considers DPO has substantial market power and the potential to exercise that power to the detriment of port users, if DPO so chose. Furthermore, there are no developments that would substantially increase the level of competition or availability of substitutes for services at the Port of Darwin to negate the need for regulatory oversight of the private port operator during the 2023-28 regulatory period.

The Commission observes the 10 year exclusivity arrangement for pilotage services creates monopoly provision of those services. Sections 85 and 86 of the PM Act provide for such an arrangement to continue including that the Minister may enter into a pilotage services contract without a competitive tender process having been undertaken. While arrangements beyond the current exclusivity period are unknown, the volume of vessels and revenue earned from pilotage is relatively small and unlikely to support a sufficient number of service providers to result in a competitive market. Accordingly, the Commission considers there to be a continued need for regulatory oversight of pilotage services.

The Commission observes the need for government funding for development of the MASDP points to the cost barriers to entry for new marine infrastructure. A further barrier to entry is the inability of other potential port operators and pilotage providers to secure operational rights for as long as the lease and other arrangements give DPO exclusive control over the provision of prescribed services.

The Commission notes there are factors that create the commercial incentive for DPO to price competitively to attract and retain business, including DPO's desire to grow trade through the Port of Darwin (which continues to operate well below capacity), and that some customers have opted to use alternative ports. Regardless, in the absence of an access and pricing regulatory regime, these factors would not prevent DPO from engaging in monopolistic behaviour if it wishes, as there are many port users where internal transport costs will rule out the use of other ports or they are locked into using DPO's services and facilities because of their location or customer base. Further, while there may be some large port users who have countervailing market power, this is unlikely to be the case for smaller port users.

Evidence of the exercise of market power

Compliance with the access policy and price determination

DPO has met all requirements under the port access and pricing regime since the regime's commencement in 2015. These requirements include:

- annual reporting to the Commission on any instances of material non-compliance with DPO's access policy by 30 September each year
- annual reporting on charges and revenue by 30 September each year

- providing notice of changes to or new standard charges to the Commission at least 20 days before the change is to be made and publishing a notice of the proposed change on DPO's website at least 10 days before it is to apply
- consultation with port users on DPO's draft 2022 access policy
- submission of a new draft access policy to the Commission for approval prior to expiry of DPO's existing access policy.

DPO has reported no material instances of non-compliance with its access policy or the price determination. Further, in its submissions to the Issues Paper and Draft Report, DPO advised no customer or access seeker has sought to invoke dispute resolution provisions and DPO has established and embedded effective compliance systems, which have ensured that its operations have followed the letter and spirit of the port access and pricing regime.

Pricing and profits

In terms of pricing, DPO can increase existing prices and establish new pricing structures without seeking Commission approval. It must, however, meet notification timelines, as set out in the Commission's Prescribed Port Services Price Determination Port of Darwin. As noted above, DPO has provided advice within relevant timeframes.

The access and pricing principles in section 133 of the PM Act provide for the prices for prescribed services to be set to generate expected revenue at least sufficient to meet the efficient costs of providing access and to include a return on investment commensurate with the regulatory and commercial risks involved. The principles also state price structures should allow multi-part pricing and price discrimination when it aids efficiency and the access pricing regime should provide incentives to reduce costs or otherwise improve productivity.

The following insights regarding DPO's initial pricing were gained during the 2018 Review:

- In advance of the lease transaction with Landbridge, the Northern Territory Government and the Darwin Port Corporation undertook a detailed pricing review with prices based on an efficient capital structure (which establishes a value for the regulatory asset base at that time), an appropriate weighted average cost of capital and demand assumptions reflective of known and anticipated throughput.
- The port lease requires Landbridge to at all times use reasonable endeavours to contribute to the ongoing improvement of productivity and efficiency at the Port of Darwin and port related supply chains.

As will be discussed in Chapter 7, since the commencement of the lease, DPO's price increases have been in line with the Commission's chosen price benchmark and are comparable to price changes in other Australian ports. The Commission notes, however, that submissions to the Issues Paper expressed concern about the potential for prices to be cost prohibitive to existing and potential port users. Concerns about pricing and the reasonableness of DPO's terms and conditions were also raised in submissions to the Draft Report.

DPO does not maintain audited separate regulatory accounts for prescribed services nor is it obliged under the port access and pricing regime to provide financial information (other than information on revenue) to the Commission. At the request of the Commission (in this and the 2018 Review), DPO provided annual financial accounts covering all of its activities (regulated and unregulated) for each financial year from 2015-16 to 2021-22. The aggregated information provided does not indicate DPO is generating a profit in excess of that commensurate with the regulatory and commercial risks involved. However, financial information received by the Commission is not specific to prescribed services and the financial reports indicate a substantive proportion of DPO's total revenue comes from non-prescribed services. This means the Commission is currently unable to form a view on the efficiency of prices for prescribed services.

Conduct of the port operator and pilotage provider

The Commission has received no complaints regarding non-compliance by DPO. The Commission notes, however, that port users may be reluctant to raise issues if they are concerned it may jeopardise their relationship or negotiating position with DPO, particularly if they have no other option than to use DPO's

services. Notwithstanding this, port users are encouraged to approach the Commission if they have concerns regarding potential non-compliance with the port access and pricing regime.

Submissions to the Draft Report

In its submission to the Draft Report, DPO advised that it is entitled to expect that any proposal to amend the regime that materially increases DPO's costs or risks in operating the Port of Darwin should be evidence-based and be justifiable on the grounds of clear and identifiable issues that require resolution. DPO is of the view that in the absence of evidence of improper use of market power, any complaint about non-compliance with the regime or invocation of the dispute resolution provisions, it is difficult to see a clear reason to raise the level of regulation.

DIPL's submission stated that it had observed the emergence of a number of issues at the Port of Darwin in recent years, supported by empirical data and anecdotal evidence from industry participants. DIPL advised these issues vary in severity but collectively demonstrate clear and substantial challenges faced by proponents wishing to access services at the Port of Darwin.

DIPL's comments were partially supported by submissions from Crowley and Verdant. Crowley stated it had experienced a number of challenges related to obtaining access to non-standard services. In general terms, Crowley advised the challenges related to a limited ability to receive an indication of terms of access, in particular transparency of risk exposure, which is important as it may influence investment decisions; the negotiation of access on reasonable terms and in a timely manner; and a lack of information regarding the formulation of access pricing.

Verdant's submission pointed to a lack of transparent pricing schedule for bulk minerals. Verdant advised that to secure financing for developing projects such as its Ammaroo Phospate Project, certainty of route to market is a key element. Verdant considers it is important to have ex-ante frameworks and protections to facilitate a greater degree of certainty on access and pricing for use of port infrastructure. Without a high degree of certainty, new projects will either not be able to raise finance or if they are, be forced to accept higher financing costs to account for such risks.

Commission's position and reasons

The Commission considers that while DPO has market power, it is not evident that DPO is improperly using that power in relation to access or pricing of prescribed services. This is likely to reflect, at least in part, the constraints imposed on DPO under the port access and pricing regime and DPO's compliance with those requirements.

The Commission notes concerns by some port users about the level of DPO's prices, but in the absence of information on the underlying cost base and the efficiency of pricing, these concerns in and of themselves do not evidence market power being exercised. The concerns do, however, reinforce the need for continued regulatory oversight and are relevant to the form of price regulation that should be applied.

Views have been expressed on challenges to negotiate access, pricing or terms where a service is not 'standard' or not a prescribed service. The Commission's recommendations in the chapter to follow may, if accepted and implemented by the Territory Government, address some concerns. However, the Commission observes while there may be dissatisfaction with the DPO's position or the duration of negotiations, no port users have utilised the negotiate/arbitrate framework. Accordingly, it has not been evidenced that the current regulatory framework cannot deliver fair and reasonable outcomes for the negotiating parties within a reasonable timeframe.

The Commission disagrees with DPO's perception that the recommendations for change to the port access and pricing regime are an increase in regulation. Rather, the recommendations address gaps in the regulatory framework. That is, they introduce elements that would be expected in a sound economic regulatory framework and exist in other access and pricing frameworks that are based on a similar negotiate-arbitrate regime (for example, other Australian regulatory regimes for ports, rail and gas pipelines). The Commission is not recommending a change to a more prescriptive style of regulation such as those listed in section 134(2)(c) to 134(2)(g) of the PM Act.

Costs and benefits of regulation

Background

As noted in Chapter 2, the port access and pricing regime is a 'light-handed' approach to regulation that aims to achieve efficient pricing and access outcomes while keeping costs as low as practical.

The benefits of access and price regulation are likely to be highest when there is a monopoly service provider as any excess profits will be paid for by users and not reduced by competition. A monopoly provider's access or pricing behaviour may also limit investment and innovation in upstream or downstream industries, thereby impacting on the growth and productivity of the Northern Territory's economy. For example, a company may not invest in new equipment to reduce costs or increase output if the benefits of the investment could be captured by the monopoly provider increasing its charges.[22]

While an effective regulatory regime can inhibit the exercise of market power, it imposes administrative and compliance costs on the regulated entity as well as costs to the regulator and government in giving effect to the regulatory regime. These are offset by benefits such as more certainty and protections for port users and more transparent information on prices, market conditions and terms and conditions of access.

Submissions to the Issues Paper and Draft Report

In response to the Commission's Issues Paper, AMEC advised it is crucial that DPO is effectively regulated to allow for greater certainty, compliance and protections for port users. It considered the administrative and compliance costs would be outweighed by the potential investment opportunities that arise from easier and more affordable port access agreements. DIPL made a similar argument that the significant number of developing projects across the Northern Territory alters the balance between the benefits and costs of the port access and pricing regime.

Conversely, DPO's submission to the Issues Paper advised current reporting requirements were appropriate and DPO did not consider there to be any justification for more onerous reporting requirements, which would increase its compliance costs. DPO's submission to the Draft Report reiterated this view.

Commission's position and reasons

The Commission notes there is no advocacy among stakeholders for removal of regulatory oversight and thus, implicit acceptance of current requirements and their costs. Stakeholders differ, however, in their views about the degree of regulatory oversight and this will be assessed in the chapters to follow.

The Commission considers the benefits from the application of the port access and pricing regime outweigh the costs. In its present form (and noting that the establishment phase for requirements under the regime has passed), the regime imposes relatively modest on-going reporting, review, compliance and approval requirements on DPO and the Commission. In terms of benefits, the regime benefits port users by constraining DPO's ability to exercise its market power. It also provides clarity on the process, requirements and obligations (on both the access seeker and DPO) for negotiating access. There is also greater transparency to aid negotiations between DPO and existing and potential port users through published tariffs for standard services, benchmarking of price movements and visibility of trends in revenue earnt from prescribed services.

[22] R Sims. *How did the light handed regulation of monopolies become no regulation?* Speech at Gilbert + Tobin Regulated Infrastructure Policy Workshop, 29 October 2015. Accessed on 24 May 2022 at https://www.accc.gov.au/speech/how-did-the-light-handed-regulation-of-monopolies-become-no-regulation.

5 | Continue the current form of access regulation

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.

The Commission's recommendation to continue the current form of regulatory oversight for access to prescribed services remains unchanged from the Draft Report. Submissions from AMEC, Crowley and DIPL to the Draft Report supported (draft) recommendation 2.

The Commission's recommendation was informed by assessment of DPO's conduct and compliance with current regulatory requirements, the sufficiency of information for port users for negotiations, the effectiveness of dispute resolution mechanisms and the costs and benefits of the current form of regulatory oversight. The sections to follow discuss these matters including relevant input from stakeholders and the Commission's position and reasoning on specific matters.

While the Commission does not consider there is a need to change the form of regulatory oversight for access, the Commission is of the view that improvements could be made to the current negotiate/arbitrate model (see Chapter 6) and other aspects of the access regulation regime (see Chapter 8).

Current form of regulatory oversight of access

Section 127 of the PM Act establishes the requirement for a private port operator to have an access policy (as noted in Chapter 2, there is no requirement for a private pilotage provider to have an access policy). The access policy must include any requirements prescribed by regulation, any matter required by the Minister (under section 129) and it may consist of more than one document. Regulation 13(2) of the PM Regulations specifies the matters that must be included in an access policy. The Commission must approve an access policy if it meets these requirements.

The matters specified in regulation 13(2) include the requirement for the private port operator to set out a process for the negotiation of access and resolution of disputes and the key elements that those processes must contain, that is, the negotiate/arbitrate model. The strength of the negotiate/arbitrate model is that it allows commercial negotiations to occur and avoids the need for the Commission to set regulated access terms and conditions. Instead, the negotiate/arbitrate model seeks to provide port users with greater leverage in dealing with the monopoly provider of prescribed services and promote effective and well-informed negotiations. This is achieved by requiring DPO, through its access policy, to articulate its processes and preferred form for making an access request, negotiate in good faith, provide port users with certain information and have a process for resolving access disputes including referral to mediation and then independent arbitration when the parties cannot resolve matters.

As discussed in Chapter 2, there are also additional obligations which apply to a private port operator and private pilotage provider under sections 124 and 125 of the PM Act. These require a private port operator and private pilotage provider to not prevent or hinder access to, or unfairly differentiate between port users in providing, prescribed services. The obligations are subject to court enforcement (refer section 126).

Submissions to the Draft Report

DIPL's submission to the Draft Report suggested clarifying the process for developing and approving access policies to ensure transparency and stakeholder involvement.

Commission's position and reasons

Section 127(2A) of the PM Act requires DPO after preparing a draft access policy (other than an amended policy under section 127(5) or 127(6)) to consult with port users on the draft policy and prepare a written summary of comments received during the consultations. A copy of the summary must be given to the Commission when the draft access policy is submitted for approval. Consistent with its standard processes

and good regulatory practice, the Commission also consults on a draft access policy. This involves publishing the draft access policy and an associated news article on the Commission's website inviting public submissions, inclusion in the Commission's weekly newsletter which is emailed to parties who have registered their interest in receiving news from the Commission about port matters and sending an email calling for submissions to about 70 entities on the Commission's list of port users and stakeholders.

For the second access policy established in 2022, the above consultation processes were conducted. DPO advised the Commission that although it had invited 230 port users to make a submission, none were received. The Commission received one submission to its consultation from AMEC.

The Commission considers there is sufficient transparency and opportunities for port users and other stakeholders to be involved in the development and approval process for access policies. Further, clause 1.1(f) of DPO's access policy states its nominal expiry date and clause 1.1(g) advises the port operator (DPO) has to give the regulator (the Commission) a new draft access policy before the existing policy expires. This means interested stakeholders can anticipate the timing of development and consultation on the next access policy and take a proactive approach to involvement, if they so wish.

Consequently, the Commission has not made any recommendations for amendments to processes under section 127 of the PM Act for the development and approval of access policies with the exception of the additional matters the Commission recommends be taken into consideration in approving an access policy (refer recommendation 15).

DPO's conduct and compliance with its access policy

The Commission is reliant on self-reporting by DPO of non-compliance with its access policy (under section 130 of the PM Act), possibly supplemented by reports or complaints by port users. As noted in the previous chapter, DPO has reported no instances of material non-compliance with its access policy and advised no access seeker has sought to invoke dispute resolution provisions. Minor non-compliance is not required to be reported nor has the Commission been advised of any major or minor breaches through other sources including responses to the Issues Paper (which specifically asked stakeholders whether they were aware of any instances of non-compliance) or the Draft Report for the 2023 Review.

Stakeholders did not identify any enhancements that needed to be made to the access and pricing regime to ensure DPO complies with its access policy and reports appropriately to the Commission. There were, however, responses to the Commission's questions in the Issues Paper regarding the absence of a legislative definition of materiality and non-compliance, and this is discussed further under Chapter 8.

Sufficiency of information for negotiations

During the negotiation and decision-making process, port users need to have access to information to inform discussions and understand whether the terms offered by the private port operator are reasonable. To facilitate this and reduce search and other costs for port users, the PM Regulations require the private port operator's access policy to include a number of commitments and undertakings aimed at improving transparency and addressing information imbalances. These include:

- a commitment to give (upon request) a port user information about the availability of, and the terms and conditions of access to, a prescribed service
- setting out the process for making an access request including information on fees and the information required for an access request (as well as what information cannot be required)
- specifying a preferred form of access request, but allowing an applicant to use an alternative written form provided it contains the required information
- providing the terms on which access will be provided
- setting out the approach and factors considered in scheduling of vessels accessing the port
- providing information on how the private port operator will determine access when demand exceeds capacity (priority or queuing principles).

The Issues Paper sought input from stakeholders on whether there were information barriers that impeded the successful negotiation of access arrangements and whether the negotiate/arbitrate framework was successful and timely in resolving access disputes. Responses were received from AMEC and DPO.

AMEC suggested the Commission produce and share further guidance material to help companies navigate the negotiate/arbitrate framework.

DPO advised it has experienced submission of access requests that lacked adequate information on the size or extent of the project relevant to the request, the timelines for access or details about products or the product requirements. DPO believes engaging at this very preliminary stage is likely driven by a desire to reserve relevant land/or capacity at the Port of Darwin before there has been a commitment to proceed with a commercial project. DPO advised its engagement with such access seekers often results in material changes to the size and scope of the requested service and has resulted in access arrangements that bear little resemblance to the original access proposal. DPO advised it incurs significant costs and time in managing these "evolving" access requests as well as seeking to ensure other access seekers are treated fairly.

DPO noted there can be inherent commercial uncertainties, which drive the need for revisions to the size, scope and timing for any commercial project and the 'open' nature of the application process is a means to encourage access seekers to engage with DPO on potential requirements. DPO suggested, however, that if more access seekers start to use the process for overly speculative projects or the purpose of merely reserving Port land and/or capacity, there may be a need to consider stricter information requirements for eligible access requests.

Submissions to the Draft Report

AMEC's submission to the Draft Report advised the negotiate/arbitrate framework allows for greater leverage when negotiating with DPO, but continues to believe the Commission should provide port users with greater guidance materials to help companies traverse the framework.

Commission's position and reasons

The Commission notes AMEC's request for further guidance material to help companies navigate the negotiate/arbitrate framework; however, the framework only specifies what DPO must include in its access policy. Therefore, it is DPO's access policy and associated documents that state the approaches, processes and requirements on access seekers as well as commitments and obligations on DPO. Where a potential access seeker finds it difficult to understand the requirements and obligations on either themselves or DPO, they should, in the first instance, contact DPO to obtain clarity. Where, however, it is identified that there are shortcomings in the access policy, access seekers are encouraged to bring the issue to the Commission's attention.

The Commission notes the legalistic style and length of the access policy. To assist prospective applicants to understand the access policy including the negotiate/arbitrate framework, it might be useful for DPO to consider producing a summary of the access policy. As a precedent, the Commission notes that under section 91 of the *Electricity Reform Act 2000*, an electricity entity must fix standard terms and conditions for the sale of electricity (including the service on making connections to the electricity network) to certain types of customers. The electricity entity is also required to prepare a summary of the standard terms and conditions to be distributed to customers (or prospective customers).

The Commission notes DPO's advice that it is being approached at a very early stage on potential requirements for prescribed services. Where some of the issues encountered have been due to a lack of understanding of requirements or processes under the access policy, this may be addressed through the summary suggested above. Beyond this, it is reasonable to expect and presumably desirable for both parties to engage at an early stage, but the negotiate/arbitrate framework is premised on access seekers having a reasonably concrete understanding of their requirements and a firm commercial basis for their requirements. Without this, it is difficult for an access seeker to negotiate in good faith (as is intended by sub-regulation 13(2)(ea)(ii)) in order to commercially contract for access to prescribed services. It is also not reasonable to expect a port operator to reserve capacity without a commercial contract and thus, potentially exclude port users with more concrete needs and ability to settle terms.

The Commission considers there is a need for indicative terms and tariffs for some non-standard services, a matter discussed further in Chapter 8 (refer section on oversight of the classification of services and recommendations 11a and 11b). Publication of such information may reduce the need for potential access seekers to use the access application process in order to obtain information while they are only in the preliminary stages of project development.

The Commission notes regulation 13(2)(ac) provides for fees to be charged for access requests and DPO's access policy provides for a fee to be charged for a Complex Access Application (with this defined in the access policy). This should allow DPO to recover costs associated with assessing an "evolving" access request. The Commission notes, however, that the requirement to give upfront notification of the fee may make it difficult to determine a fee that recovers costs with reasonable accuracy given the time and effort to accurately ascertain an access seeker's needs which may be unknown at that time.

For the negotiate/arbitrate model to be effective, it must be informed by adequate information. Potential port users need to have access to information to inform the negotiations and understand whether the terms offered by the port operator or pilotage provider are reasonable. The Commission considers the partial implementation of recommendations from the 2018 Review improved the negotiation position of port users. The Commission revisits recommendations that remain outstanding in relation to the negotiate/arbitrate model in the next chapter.

Effectiveness of dispute resolution mechanisms

The recourse to independent binding arbitration needs to be a realistic and credible threat capable of constraining the market power of a private port operator and encouraging the parties to negotiate in good faith. Equally, if there are weaknesses in the model, it may allow the private port operator to refuse to negotiate reasonable terms and proceed through a lengthy dispute resolution process as a means of delaying the provision of access on reasonable terms and conditions. In this case, access seekers would face increased uncertainty, risk and costs.

Regulation 13(f) of the PM Regulations requires an access policy to set out a process for the resolution of access disputes. It provides for the process to include:

- for a port user to give written notice of a dispute within a specified period
- the private port operator to commit to undertake genuine and good faith negotiations with a view to resolving the dispute as quickly as possible
- referral to mediation or conciliation to resolve the dispute
- referral to arbitration when mediation or conciliation is not successful
- the method by which an arbitrator will be appointed and costs apportioned.

Regulation 13(f) also requires the access policy to set out the powers and duties of the arbitrator, matters which the arbitrator must take into account and disclosure limitations relating to arbitration outcomes. The access policy must include an obligation on the private port operator to provide a copy of the arbitrator's decision to the Commission. The access policy must also provide for the decision of the arbitrator to be treated as an award under the CA Act, making the decision binding on the private port operator.

The requirement to provide a copy of the arbitrator's decision to the Commission was added to regulation 13(f) in July 2020 and subsequently included by DPO in its new access policy, which came into effect in April 2022. To date, the Commission has not received any arbitrator decisions, consistent with DPO's advice that no access seeker has sought to invoke dispute resolution provisions.

Submissions to the Issues Paper and Draft Report

In its submission to the Issues Paper for the 2023 Review, DIPL noted potential port users have an imperative to maintain an effective working relationship with DPO. DIPL suggested a potential increase in DPO's market power, due to increased demand for the services at the Port of Darwin from developing projects, may increase the barriers to notifying or escalating matters when there are difficulties in negotiations. Further, DIPL considers enforcement provisions in the access regulatory framework to be

weak. The negotiate/arbitrate framework provides for mediation and arbitration and section 126 of the PM Act provides for a court to make orders when a private port operator or private pilotage provider is (or proposes to) engaging in conduct that prevents or hinders access or unfairly differentiates between port users. DIPL observed enforcing obligations through court processes or arbitration is costly in terms of expense and time and acts as a significant disincentive to potential port users and enhances the opportunity for monopolistic behaviour.

Crowley's submission to the Draft Report was supportive of the recommendations in the Draft Report, but Crowley was critical of the negotiate/arbitrate model. Crowley sees the negotiate/arbitrate model as a significant barrier because "it is likely that a potential user will face the decision to either accept unsatisfactory terms or suffer economic loss because of the duration of the arbitration process".

Commission's position and reasons

Beyond the requirement to provide a copy of an arbitrator's decision, there are no reporting requirements that give the Commission visibility on negotiations that have gone to either mediation/conciliation or arbitration. This means there is no information on whether disagreements have arisen between DPO and port users and whether the regime's dispute resolution provisions are facilitating negotiations or resolution where a dispute does arise. In the Draft Report, the Commission urged affected port users to bring any concerns to its attention and the Commission thanks Crowley for discussing its views on limitations with the negotiate/arbitrate model.

The Commission considers feedback from Crowley and DIPL point to weaknesses of the current form of access regulation with port users wishing to maintain relationships and the cost and time of taking matters to court or arbitration creating potential barriers. The Commission notes, however, that as Crowley (or any other port user) has not taken a matter to arbitration, there is no information to quantify or illustrate the potential barriers of time and cost. The issue of being forced to accept unsatisfactory terms is discussed in the next chapter and it is the Commission's view that an access seeker can choose not to proceed with arbitrated terms, but for the avoidance of doubt, this could be clarified in the PM Act or PM Regulations

While a more prescriptive form of regulatory oversight may reduce or eliminate these barriers, the evidence before the Commission does not warrant a recommendation of more stringent oversight. The Commission notes, however, that recommendations for improvement to the regulatory framework in Chapters 6 and 8 may reduce the likelihood of matters arising that could lead to disputes and associated court action or arbitration.

Costs and benefits of access regulation

Access regulation imposes costs on a private port operator to establish and maintain an access policy and to comply with the access policy including the negotiate/arbitrate framework. The Commission also incurs approval and compliance monitoring costs. The cost imposition is, however, relatively low compared to other forms of regulation such as greater prescription of the processes to be followed, terms and conditions of access and/or performance standards to be met or application of a compulsory access regime. While a stronger form of regulation may offer more certainty and protection to port users, it comes with higher cost of administration and compliance (which would be passed on to port users and taxpayers), and reduces flexibility and the ability for a port operator to employ more efficient processes and decisions about scheduling and use of assets. As noted above, at this point, it is not evident to the Commission that the benefits of stronger regulation would outweigh the additional costs.

6 | Recommendations for improvements to the negotiate/arbitrate framework

Recommendation 3: The Commission recommends amending the PM Act or PM regulations to specify key procedural and enforceability matters related to access dispute arbitrations and provide that the CA Act applies to those arbitrations.

Recommendation 4: The Commission recommends amending the PM Regulations to:

- include provisions under which an access seeker engaged in an access dispute is given financial information that will enable that access seeker to understand how the price has been calculated and assess whether prices are consistent with the access and pricing principles
- provide for the arbitrator to be given the financial information required to assess whether prices are consistent with the access and pricing principles.

Recommendation 5: The Commission recommends amending the PM Regulations to provide for:

- an 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.

Recommendation 3 is a new recommendation that the PM Act or PM Regulations be amended to address key matters related to the conduct of access dispute arbitrations including providing that the CA Act applies to arbitrations, rather than leaving these matters to the port operator's access policy. Recommendation 3 is consistent with the reasoning in the Draft Report, but was not included as an explicit recommendation in the Draft Report. Recommendation 4 combines recommendations 3 and 4 from the Draft Report regarding the provision of financial information, but limits this to circumstances where an access dispute has arisen. Recommendation 5 is the same as the Draft Report except for a minor change to wording.

In the 2018 Review, the Commission made a number of recommendations aimed at strengthening the negotiate/arbitrate framework. Of these, the following matters were addressed through changes to the PM Regulations in 2020:

- an obligation for the private port operator and port user to engage in good faith negotiations prior to an access dispute being raised
- a more extensive list of matters to be taken into account by the arbitrator in the dispute resolution process
- an obligation to provide arbitration decisions to the Commission.

The following recommendations (in brief) were not adopted:

- amending the PM Act to provide for reference of access disputes to arbitration under the CA Act (in its entirety not just Part 5)
- the provision of financial information to enable an access seeker to assess whether prices are consistent with the access and pricing principles
- provisions relating to access by the arbitrator to financial information
- a constraint in repeat access requests where an access determination was declined, arbitration cost apportionment and matters allowable in and enforcement of an access determination.

The Issues Paper for the 2023 Review asked stakeholders whether they had any further feedback and comments on the outstanding recommendations from the 2018 Review and how that would affect the Commission's previous recommendations for change. Where stakeholders responded to the questions in the Issues Paper or provided feedback on the draft recommendations in the Draft Report, this is discussed in the following sections, which revisit the outstanding recommendations and provide the Commission's current views and associated reasoning on how the negotiate/arbitrate model could be further strengthened.

Legislative basis for negotiate/arbitration model

Consistent with its views in the 2018 Review, the Commission considers it is a weakness of the ports access regime that the negotiate/arbitration process is not contained within the PM Act (there is no reference to negotiation or arbitration in the PM Act). Rather, regulation 13(2)(f) requires the process to be set out by the private port operator in its access policy.

Setting out the negotiate/arbitration process under the access policy creates the risk that the threat of arbitration is weakened and the access policy either does not sufficiently deal with matters or matters are constructed in a way that is more favourable to the port operator. Furthermore, since the access policy is only binding on the port operator, there is uncertainty regarding the enforceability of matters such as rules related to the conduct of the arbitration, confidentiality, provision of information, the attribution of costs and enforceability of decisions by the arbitrator (this issue discussed later in the chapter).

A preferable approach would be to amend the PM Act (or PM Regulations) to set out key matters related to the conduct and enforceability of the arbitration process and provide that the CA Act applies to an arbitration except where the PM Act or PM Regulations provide otherwise. The PM Act or PM Regulations would include procedural matters such as selection and appointment of the arbitrator, the provision of information to the arbitrator, matters to be taken into account in making an arbitral award and termination of arbitration, as currently specified in relation to access policy requirements.

The Commission notes the amendments adopted from the 2018 Review have strengthened the negotiate/arbitration model, but there has not been broader application of the CA Act as the Commission proposed. The Commission still remains of the view that the CA Act should apply in its entirety when a dispute goes to arbitration, except where the PM Act or PM Regulations provide otherwise.

Parties to negotiations and arbitration need to have confidence in the processes and the ability of those processes to produce outcomes that are commercially viable, consistent and fair. Setting out the arbitration process under the PM Act or PM Regulations would mean the principles for an effective arbitration process are agreed by and set out by policy makers rather than leaving it to the port operator to define and test the boundaries through the access policy approval process. Chapter 4 of the Final Decision for the 2018 Review examples these risks, based on the Commission's experience in considering early drafts of DPO's first access policy.

Moving the arbitration process into the PM Act or PM Regulations would enhance transparency, consistency and certainty for the port operator (it would no longer be part of the access policy approval process) and for port users. It would also provide for a uniform framework if any other port service providers in the Territory are brought into the scope of the regime.

Provision of financial information

Despite the improvements to the negotiate/arbitrate framework following the 2018 Review, the Commission considers the information advantage still remains skewed toward the private port operator as there are no specific requirements to provide financial information to access seekers and arbitrators. Crowley's submission to the Draft Report makes this point, stating a challenge in negotiations was (among other things) a lack of information regarding the formulation of access pricing.

The Commission notes the PM Regulations were amended to include the requirement for an access policy to contain a commitment that the private port operator will (on request) give information on the availability of a prescribed service and the terms and conditions of access if that information is reasonably required by the access seeker to make an access request (regulation 13(2)(ab)). The amendment does not, however, refer to

the provision of information on the calculation of prices or costs, which the Commission considers would support effective and well-informed negotiations.

As a result of amendments to regulation 13(2)(f) in 2020, an access policy is now required to set out the powers and duties of the arbitrator including the power to order a party to the arbitration to produce information that is requested by the other party and reasonably necessary for the resolution of the dispute. It is not clear that this would extend to the provision of financial information noting the restrictions on information that can be requested by an access seeker in preparing an access request, discussed in previous paragraphs. This uncertainty is concerning given the requirement for an arbitrator, in conducting an arbitration, to take into account the access and pricing principles (which may require information on profit, costs and investment to determine if prices are efficient) and the cost to the private port operator of providing access to the relevant prescribed service.

The Commission notes clauses 6.4(d) and 7.8(c) in DPO's access policy serve to limit DPO's provision of information to access seekers and a requesting party in the case of a dispute. In particular, the clauses provide for DPO to decline to provide information that is commercially sensitive, which is likely to cover cost and other financial information. Refusal is also possible on the basis that the requested information is not ordinarily and freely available, such as separate financial accounts for prescribed services, which currently do not appear to exist.

Submissions to the Issues Paper and Draft Report

AMEC's submission on the Issues Paper emphasised the importance of appropriate regulation to act on and constrain the pricing of a port owner when there is no competition. AMEC supported the Commission's recommendation that a port user engaged in access negotiations is given financial information that will enable the port user to assess whether prices are consistent with the access and pricing principles. AMEC believes this would provide greater clarity and transparency for port users when negotiating port access with DPO. Similarly, AMEC's submission to the Draft Report was supportive of draft recommendations to provide financial information to port users and arbitrators to enable assessment of whether prices are consistent with the access and pricing principles.

DIPL's submission to the Draft Report also supported the draft recommendations on the provision of financial information. In relation to the recommendation for financial information to be provided to arbitrators, DIPL suggested including clear guidelines on disclosure and confidentiality of financial information to protect sensitive commercial data.

DPO's submission to the Draft Report expressed a view that the absence of any evidence that it is pricing in an unreasonable manner or departing from the framework set out in the regime means there is no basis for additional provisions requiring it to share financial information with an access seeker. Furthermore, the vagueness of what DPO may be required to disclose may create an onerous administrative burden and require disclosure of confidential or commercially sensitive information. DPO states its experience is that port users are sophisticated commercial entities that are able and do act strategically and in their own best interests in negotiations. DPO considers that providing copies of negotiated agreements to the Commission gives a further layer of protection and assurance that DPO is negotiating in accordance with the regime. DPO also objected to the recommendation to give financial information to an arbitrator for the same reasons and advised it considered such an amendment unnecessary as regulation 13(2)(f)(vii)(A) means there is already a function built into the regulations for the access seeker to request this information and the arbitrator, in turn, to have access to it.

Commission's position and reasoning

The Commission considers that without specific reference to providing financial information to access seekers and arbitrators there remains a gap (noting in particular the uncertainty regarding regulation 13(2)(f) discussed earlier) with access seekers potentially unable to obtain information on how prices were calculated or how prices compare to costs and as a result, whether the prices offered are reasonable and consistent with the access and pricing principles. This is pertinent given stakeholder feedback indicates concern that DPO's pricing may be unduly high or inefficient (as will be discussed in Chapter 7) and Crowley's advice on challenges experienced during negotiations.

While the Commission may receive copies of negotiated agreements, this information comes after negotiations have been completed and is therefore ineffective as a means of addressing the informational imbalance during the negotiation phase. Further, negotiated agreements do not provide any information on how prices were calculated or underlying costs to allow the Commission to draw conclusions regarding their reasonableness or compliance with access and pricing principles. The agreements only allow assessment of the reasonableness of terms and conditions, but as these have already been negotiated and agreed, any areas of concern to the Commission can only be addressed in future agreements.

In relation to DIPL's suggestion for guidelines on disclosure and confidentiality of financial information to protect sensitive commercial data in relation to arbitration, the Commission notes that arbitration proceedings are private and sections 27E to 27I of the CA Act deal with disclosure of confidential information. The Commission notes that guidelines, by their very nature, are typically not binding and should government wish to place bounds on the obligation to provide financial information including requirements for an access seeker to maintain the confidentiality of financial information, it should be encapsulated in the provisions in the PM Regulations.

The Commission considers financial information would be most valuable to parties seeking access to non-standard prescribed services and/or prescribed services with non-standard terms and conditions (that is, services provided under negotiated agreements), rather than parties accessing 'standard' services. During negotiations, the provision of financial information may improve transparency and allay access seekers' concerns about a private port operator's (or pilotage provider's) the price setting behaviour. It does, however, increase the administrative burden on a port operator and this could be undue when there is no evidence of the misuse of market power.

The Commission considers the ability to request financial information will be most important where an access dispute has arisen (that is, a notice of dispute has been given to the port operator). The provision of financial information at this time may assist the parties to complete their negotiations and avoid a dispute progressing to mediation or arbitration. Consequently, the Commission has modified its recommendation to limit the instances where financial information can be requested by an access seeker to circumstances where an access dispute has arisen. The Commission's recommendation relating to the ability for an arbitrator to request financial information remains unchanged.

For clarity, the Commission has also modified its recommendation to make it clear that financial information includes information about the way in which the price is calculated as well and information to enable an access seeker (or arbitrator) to assess whether the price complies with the access pricing principles in section 133 of the PM Act. To assess compliance with the access pricing principles would likely require provision of information on the costs of providing the service including capital, operation and maintenance costs and the value of the assets used for the provision of the services including the way in which the value is calculated.

Outcomes from arbitration

Enforcement of access determinations

Regulation 13(2)(f)(ix) requires the process for resolution of access disputes set out in an access policy must provide for the decision of the arbitrator to be treated as an award under the CA Act. The Commission notes the treatment as an award is only enforceable on the private port operator who must comply with its access policy. The access policy cannot bind the access seeker. To be binding on both parties, the requirement would have to be specified in the PM Act or PM Regulations, not the access policy.

In the 2018 Review, the Commission was of the view that there was the possibility access seekers may be deterred from proceeding to arbitration if at its end there is the risk of an adverse result that could see them forced into a contract that is not commercially viable or acceptable. The impact from this could be disproportionately high for the access seeker. The Commission recommended the regime provide the access seeker with the ability to choose not to proceed on the basis of the arbitrated terms, but there should also be balancing measures to protect the private port operator in such circumstances. Assuming a continuation of the current approach of setting out the arbitration process in the access policy, there is no need for change, but for the avoidance of doubt, the PM Regulations could clarify that an access seeker can elect not to be bound by an arbitral award.

Where, however, an access seeker chooses not to be bound by an arbitral award, there should be a process and countervailing protection for the private port operator. First, there should be a provision in the PM Regulations (or the PM Act) specifying a timeframe within which the access seeker must make and notify of their decision. The Commission considers the access seeker should provide written notice to the private port operator and the Commission of its decision within 14 days of the making of the arbitral award.

Second, the Commission considers an access seeker who has declined should also be precluded from making a repeat access request for 12 months unless agreed by the private port operator or the Commission. This will prevent the access seeker from imposing more processing costs on DPO when the outcome of the request is unlikely to change (because there has been no change in circumstances since the first application).

Costs of arbitration

Regulation 13(2)(f)(viii) requires the port operator to provide a mechanism for the apportionment of the costs of an arbitration. DPO's access policy specifies the arbitrator's costs and the costs of the parties to the arbitration will be borne by the parties in proportions determined by the arbitrator and the parties can make submissions to the arbitrator on the issue of costs ahead of the arbitrator's decision (clause 7.7(f)). The access policy then allows for the arbitrator not to be required to proceed with arbitration unless and until the parties to the dispute have agreed to pay the arbitrator's and other costs as determined in accordance with that approach. This provides transparency on the port operator's intended approach to sharing costs, but as that can only bind the private port operator, an extra step is required whereby the access seeker must agree to the proposed cost sharing approach to proceed to arbitration.

The Commission considers this inefficient and a superior approach would be for the mechanism for apportioning the costs of arbitration to be specified in the PM Regulations. The access policy may then reference those requirements. The Commission considers a fair approach would be that each party bears its own costs and the costs of the arbitration should be borne in proportions decided by the arbitrator. As a backstop, in the absence of a decision by an arbitrator, the costs of arbitration should be borne in equal proportions.

Submissions to the Draft Report

Submissions from AMEC and DIPL to the Draft Report supported draft recommendation 5 although DIPL appeared to have residual concerns that there may still be undue burden on access seekers.

Crowley's submission to the Draft Report expressed criticism of the negotiate/arbitrate model as a significant barrier because "it is likely that a potential user will face the decision to either accept unsatisfactory terms or suffer economic loss because of the duration of the arbitration process".

Commission's position and reasoning

The Commission considers that its recommendations will provide clarity for Crowley and other access seekers that they would not be forced to accept an arbitral award should it not be considered viable or acceptable. There needs, however, to be counterbalancing measures to protect the private port operator and the Commission considers that recommendation 5 reasonably balances the needs of both parties.

The Commission has not made any recommendations in relation to the duration of the arbitration process as without evidence through matters going to arbitration it is not possible to make judgements on this matter. Further, the Commission observes that the duration of arbitration will likely vary depending on the nature and complexity of the dispute. The Commission notes the object of the CA Act is to facilitate the fair and final resolution of commercial disputes by impartial arbitral tribunals without unnecessary delay or expense.

7 | Recommendations for improvements to price regulation

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.

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. 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 guidelines would allow a private port operator and private pilotage service provider to prepare a single set of accounts when they are within the group of entities if the Commission considers it appropriate. 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.

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

The Commission's recommendations regarding the current form of regulatory oversight (price monitoring), requiring the provision of financial accounts, and increasing the maximum timeframe for a price determination are unchanged from the Draft Report.

This chapter begins with a description of the current regulatory framework then addresses the matters considered by the Commission in making its recommendations. It includes discussion of stakeholder responses to questions in the Issues Paper and Draft Report and the Commission's decisions and reasoning on specific matters.

The Commission's recommendations were informed by consideration of DPO's conduct and compliance; information on price movements, revenue and negotiated agreements gathered through the Commission's regulatory activities; options for more prescriptive forms of price regulation raised by stakeholders; and the costs and benefits of administering the price and performance monitoring framework.

Current form of regulatory oversight for pricing

Section 132 of the PM Act and regulation 16 of the PM Regulations set out the price regulation framework for the port access and pricing regime. Under the framework, the Commission is authorised to make a price determination at least every three years, but the price determination must use price monitoring as the form of regulation. The price determination must also specify the basis or standard that the Commission will use to monitor price levels. The content of the price determination is further prescribed, requiring it to place obligations on private port operators and private pilotage providers to:

- notify the Commission of changes in standard charges for prescribed services including providing reasoning for the change and in the case of new charges, further explanatory information
- publish standard charges and changes in those charges and
- annual reporting which may include the requirement to provide information on any fixed charge or other agreements negotiated during the reporting year.

For the Port of Darwin, the Commission monitors the change in prices for prescribed services using the annual change in the national consumer price index (CPI) as the benchmark.[23] In assessing the change, the Commission also considers other information including advice from DPO on differences between the change in prices and change in national CPI. Each year since 2019, the Commission has published a price monitoring report providing information on trends in standard charges and revenue. Information from these reports is reproduced in subsequent sections of this chapter.

As discussed in Chapter 4, the Commission takes the position that the Northern Territory Government was satisfied that, at the commencement of the port access and pricing regime, pricing for prescribed services at the Port of Darwin was consistent with the access and pricing principles. That is, the prices would generate expected revenue at least sufficient to meet the efficient costs of providing access and to include a return on investment commensurate with the regulatory and commercial risks involved. Furthermore, multi-part pricing and price discrimination is allowed when it aids efficiency.

The access and pricing principles also state the access pricing regime should provide incentives to reduce costs or otherwise improve productivity. However, as price monitoring is specified as the form of regulatory oversight for pricing, there is no ability for the Commission to apply incentives to achieve these ends nor does price monitoring require DPO to demonstrate what measures it takes to reduce costs or improve productivity.

DPO's compliance with the price determination

As noted in Chapter 4, DPO has met all requirements under the Commission's price determinations to annually report on charges and revenue, provide notice of changes to or new standard charges and publish a notice of the proposed change on its website prior to application of the new charges.

Analysis of price movements, revenue and negotiated agreements

Information in the following sections has been updated from the Draft Report to include price increases for 2023-24 and revenue for 2022-23.

Price changes

Table 2 compares the annual change in DPO's prices compared with the Commission's nominated benchmark in the years following privatisation of the Port of Darwin in 2015-16. For six out of the eight years in the assessment period, DPO's price increases were the same or less than national CPI. It is noted, however, that caution is needed in assessing difference over the period from 2019 to 2022 due to the economic impact of the COVID-19 pandemic on national CPI.

Apart from the absence of a price increase in 2016-17, DPO's price increases have generally been within the same band and followed a similar trajectory as national CPI. That is, DPO's annual price increases have been within 1.1% and 2.2%, except for 2022-23 when, consistent with an upturn in national CPI, they rose to around 5% and in 2023-24, when they increased by nearly 7%. Between 2015-16 and 2023-24, DPO's prices increased by 21.9% compared with a 24.1% increase in national CPI (Figure 4).

In setting its prices, DPO has advised the Commission that price increases are calculated after a review of DPO's operating costs, taking into account the increase in labour costs (in accordance with its enterprise agreement) as well as applying the national CPI to other costs on a weighted average basis.

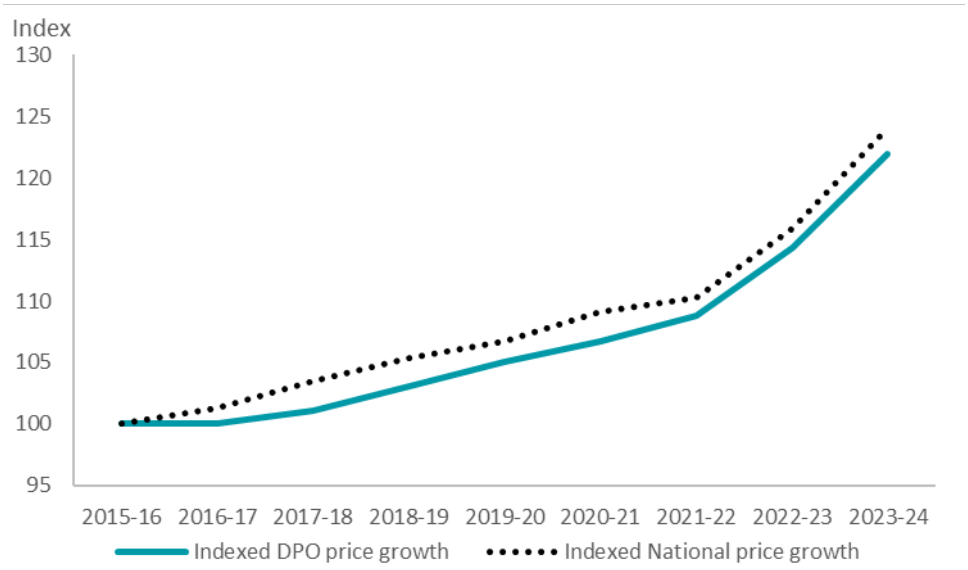
[23] Refer the Commission's 2022-25 Prescribed Port Service Price Determination Port of Darwin, clause 6. Available at https://utilicom.nt.gov.au/ports/price-regulation/price-determination.

Table 2 Change in DPO's prices for prescribed services and national CPI, 2016-17 to 2022-23

Year	DPO price increase	National CPI increase	Difference
	%	%	ppts[1]
2016-17	Unchanged	1.3	-1.3
2017-18	1.1	2.1	-1.0
2018-19	1.9	1.9	0.0
2019-20	2.0	1.3	0.7
2020-21	1.6	2.2	-0.6
2021-22	2.0	1.1	0.9
2022-23	5.0	5.1	-0.1
2023-24	6.7	7.0	-0.3

[1] ppts – percentage points

Figure 4 Indexed growth in DPO prices compared with national price growth



Price movements at interstate ports

As part of the 2018 Review, the Commission engaged GHD Advisory to conduct a price benchmarking study comparing the prices charged at the Port of Darwin with those for comparable interstate ports. The study found that in 2017, total port call costs by cargo sector at the Port of Darwin were not the most expensive among the comparator ports except for motor vehicle imports and cruise ship visits (in part due to relatively high pilotage costs for large vessels). Further, the relative position of total port call costs for the Port of Darwin had improved over the period from 2014 to 2017 due to a lower rate of increase in port charges compared with other comparator ports.

The Commission has not undertaken a full price benchmarking study in this review, noting there is now more information on DPO's pricing patterns and these can be compared to price increases at other ports. Table 3 shows the increase in prices at the Port of Darwin compared with other ports for which current and 2016-17 pricing information could be obtained. The increase in prices at the Port of Darwin falls within the range of price increases at other interstate ports except for Townsville Port, which is slightly lower (18% compared with 20-22% for the Port of Darwin). This suggests that if a benchmarking exercise were to be conducted, the results would be largely similar. That is, total port call costs at the Port of Darwin would not be the most expensive among comparator ports.

Table 3 Price increases at Port of Darwin and interstate ports

Port	Price increase 2016-17 to 2023-24
	%
Port of Darwin	20.0 – 22.0[a]
Flinders Port (South Australia)	26.6 – 50.4[b]
Fremantle Port (Western Australia)	16.0 – 20.0
Townsville Port (Queensland)	18.0[c]
Port of Melbourne (Victoria)	Limited to CPI – 22.5

Source: Commission staff calculations based on published tariffs

Note: [a] At Darwin Port, a common price increase has generally been applied across prescribed services each year until 2023-24 when pilotage charges were increased by 5% compared with an increase of 6.7% for other prescribed services.

[b] At Flinders Port, the annual increase in pilotage services has typically been higher than for other service types, except between 2022-23 and 2023-24, there was an increase in navigation charges of 20%. This broadened the range of price increase shown in the table.

[c] Excepting prices for heavy lift/cargo project imports at Townsville Port, which increased by 41%.

The Commission notes a major limitation of a price benchmarking study is that it provides no information on relative costs and return on investment. It would be simplistic to assume that high prices at a port reflect avoidable inefficiencies or excess profits. Variation in costs will arise from differences in each port's characteristics (e.g., location and infrastructure), volume of throughput (scale of operations) and the range and types of cargo and associated handling equipment.[24]

Negotiated agreements

DPO negotiates agreements for 'non-standard' services which include prescribed services where non-standard terms and conditions and pricing are applicable and non-prescribed services. The Commission notes the number of negotiated agreements varies from year to year and there are no discernible trends in their number or the type of agreements to suggest that deficiencies in DPO's standard terms and conditions or published tariffs are causing port users to negotiate more favourable agreements with DPO. Rather, the agreements negotiated with DPO appear specific to the requirements of relevant port users.

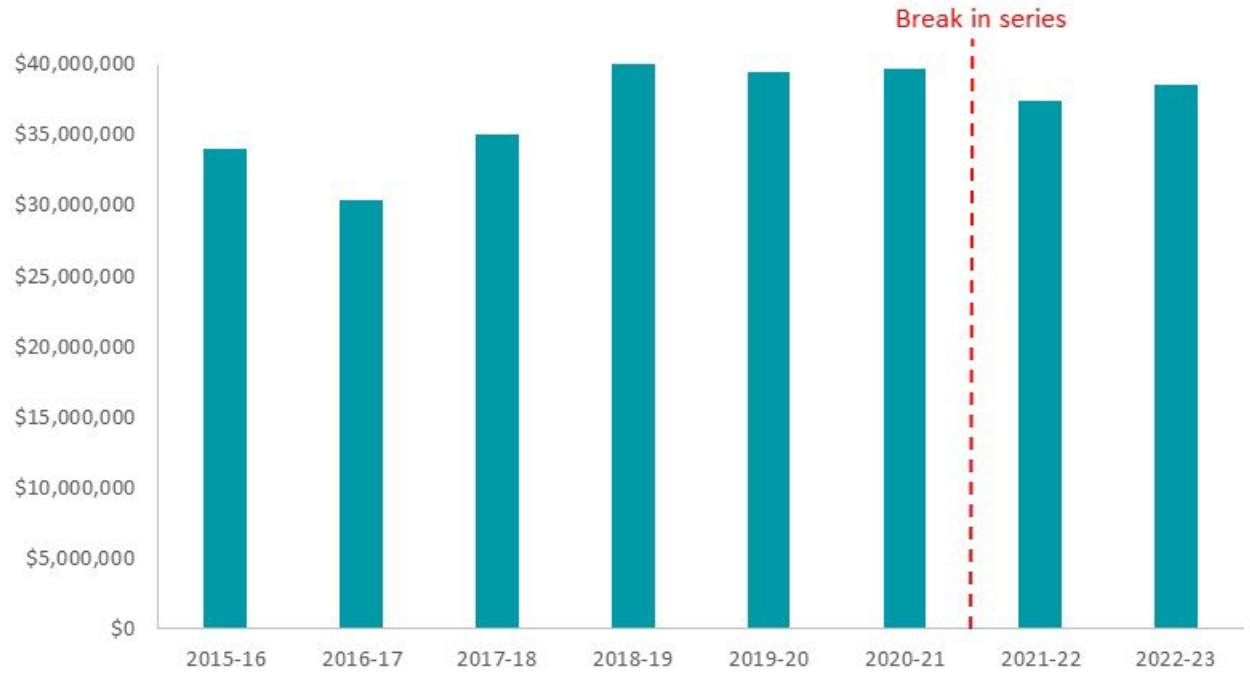
Revenue

Figure 5 shows total revenue reported by DPO over the period from 2015-16 to 2022-23. Total revenue for prescribed services was $38.6 million in 2022-23, an increase of 3.3% from 2021-22 ($37.4 million). While lower than revenue in the years prior to 2021-22, the data is not directly comparable, as in 2021-22 DPO reclassified and removed revenue generated from the sublease of port land because this is not a prescribed service (revenue from this source is included in prior years where received).

Trends in revenue from major prescribed service sources (wharfage, pilotage, port dues and berthage) are shown in Chapter 3. As discussed in that chapter, revenue from pilotage and port dues grew during 2018-19 and 2019-20, but has now plateaued. Combined, they accounted for nearly half of DPO's revenue from prescribed services in 2022-23 (Table 4). The growth in revenue from these sources has, however, been offset by declines in revenue from other sources, leading to little growth in total revenue over the period from 2018-19 to 2022-23 regardless of whether or not revenue from the sublease of port land is included.

[24] Meyrick and Associates. Benchmarking of port prices in Australia. Final report prepared for Essential Services Commission of South Australia, April 2007. Accessed on 14 March 2023 at https://www.escosa.sa.gov.au/ArticleDocuments/688/070427-PortsBenchmarkingAustralia-MeyrickReport-.pdf.aspx?Embed=Y.

Figure 5 Total revenue for prescribed services, 2015-16 to 2022-23



Note: Revenue in 2021-22 and 2022-23 is not directly comparable with prior years due to removal of revenue from the sublease of port land, which is not a prescribed service.

Table 4 Contribution to total revenue by revenue source, 2022-23

Prescribed service	Proportion of revenue 2022-23
Wharfage	38%
Pilotage	28%
Port dues	18%
Berthage	13%
Land related services	3%

Submissions to Issues Paper

The Issues Paper for the 2023 Review asked stakeholders how effective price monitoring is as a means of ascertaining whether DPO's pricing practices comply with the access and pricing principles. Responses to the question were received from AMEC and DPO. DIPL responded more generally.

AMEC pointed to comments from the (then) Chair of the Australian Competition and Consumer Commission in 2016. The Chair's comments were critical of the use of price monitoring considering "it does not amount to any form of regulation" and will not constrain monopoly pricing at ports.[25] As noted in the previous chapter, AMEC also supported the Commission's recommendation regarding the provision of financial information to access seekers to enable assessment of whether prices are consistent with the access and pricing principles.

[25] Sims R. Ports: What measure of regulation keynote address at the Ports Australia Conference, 20 October 2016. Accessed on 9 March 2023 at https://www.accc.gov.au/speech/ports-what-measure-of-regulation-keynote-address.

DPO cautioned that more prescriptive regulatory control would result in additional costs including commercial limitations and a greater administrative and compliance burden. DPO considers these, along with additional costs to the Commission, would be disproportionate to any purported benefit. DPO also expressed concern regarding paragraph 4.14 of the Issues Paper, which discusses the impact of price increases on the efficiency of prices, may infer monopolist behaviour. DPO rejected any such inference, suggesting passing through cost increases that are no more than commensurate with CPI is, if anything, suggesting the opposite.

DIPL stated monitoring price levels against CPI was an incomplete form of regulatory oversight. DIPL considers a more holistic form of regulatory oversight would include measures of stakeholder perception and satisfaction across a broad range of stakeholders and a broad range of measures. Furthermore, DIPL considers separate financial accounts for prescribed services are required.

More generally, DIPL considered that to minimise the costs of regulation and increase the ease of doing business, the range of services that are considered "standard" should be increased. DIPL observed standard services have a more streamlined process, avoiding the need for individual, bespoke negotiation. DIPL was of the view that standard services should encompass standard pricing, but also standard conditions and requirements such as insurance. DIPL was also concerned about the visibility and sufficiency of information on "hidden" or excluded charges such as warehousing and storage, ship loading and unloading, insurance and development costs. These impact on the overall cost to port users and thus, the competitiveness of the Port of Darwin.

DIPL noted the Commission did not intend to undertake benchmarking of the cost of specific cargoes against competitor and comparison ports. DIPL was of the view that a thorough and independent benchmarking review should be undertaken given the previous study found costs were higher than comparator ports for some port users in part due to relatively high pilotage costs for large vessels. DIPL considers benchmarking information to be important prior to a decision being reached regarding pilotage operations, which are subject to a 10 year exclusivity term.

DIPL was critical of the information in Figure 3 of the Issues Paper on total revenue (Figure 5 in this report), considering the revenue from 2015-16 to 2021-22 requires recalculation or re-reporting to demonstrate comparative revenue levels. DIPL also expressed concern that there was an increase in pilotage revenue between 2017 and 2022 (refer Figure 3 in this report) on decreasing freight volumes (refer Figure 1 on total trade in this report).

Submissions to Draft Report

The Draft Report recommended continuing the current form of regulatory oversight (price monitoring) for the pricing of prescribed services (draft recommendation 6). DIPL's submission supported the recommendation while AMEC and Verdant provided feedback on price monitoring as a form of price regulation.

AMEC considers price monitoring to be the lowest form of regulatory oversight, but that it was apparently being successful in ensuring DPO provides a competitive service and price in the absence of a market competitor. As discussed in Chapter 4, Verdant noted that price monitoring has an ex-post focus and appropriate frameworks and protections need to be available on an ex-ante basis such as those proposed in draft recommendation 11.

Commission's position and reasoning

Among the forms of price regulation listed in section 134 of the PM Act, price monitoring is the least prescriptive, but it is also not overly costly in terms of administration or compliance. It provides transparency on pricing and allows for the reasonableness of new prices, movements in prices and trends in revenue to be assessed and for information including the Commission's assessments to be provided to the public. The Commission considers the trends in prices and revenue do not support a need for a more prescriptive form of price regulation; however, the current price monitoring regime requires enhancement to provide information on costs. This matter and the Commission's reasoning is discussed in the following section on financial accounts.

As noted by DIPL in its submission to the Issues Paper, the Commission considers there should be greater regulatory oversight of what is classified as "standard services". Further commentary on this issue, including feedback from DIPL and the Commission's position, is made in Chapter 8 in the section discussing the oversight of the classification of services.

The Commission notes DIPL's concerns in its submission to the Issues Paper regarding the data on total revenue. The Commission observes that even if all revenue from land related activities were removed from prior years' data on total revenue, it would not substantially alter the information provided by Figure 5, that is, there has been no substantive growth in revenue over the period from 2018-19 to 2021-22. While the Commission requested revised information, DPO advised that it would be resource intensive and potentially difficult to identify and remove revenue from relevant subleases in prior years. Noting the lack of substantive growth to date, it will be trends in revenue from 2021-22 onward that will be informative for monitoring purposes. Accordingly, the Commission considers there is little benefit to warrant requiring DPO to incur the additional cost to produce revised data for past periods.

The Commission also notes DIPL's concerns regarding the increase in pilotage revenue on decreasing freight volumes. As noted in Chapter 2 and the Issues Paper for the 2023 Review, this reflects an increase in LNG vessels when the Ichthys LNG project entered its production phase. LNG is shipped from private facilities located within the Port of Darwin and will not appear in DPO's total trade figures. It is, however, reflected in gross registered tonnage through the Port and Figure 2 has been included in this report (and the Draft Report) to show relevant growth patterns.

The Commission notes DPO's concern in its response to the Issues Paper that the Commission's comment on the efficiency of DPO's prices may suggest monopolistic behaviour. The Commission does not have any evidence of monopolistic behaviour. However, the Commission reiterates the point that simply increasing prices of every service by anticipated inflation without adjustments for actual cost changes would reasonably be expected, over time, to lead to inefficient prices that do not reflect underlying costs. This is because actual cost increases will vary across prescribed services reflecting differences in inputs (the relative use of labour, capital and corporate services). Furthermore, changes and growth in port activity, capital investment and labour productivity over time will affect the cost of each prescribed service.

The Commission observes a firm with market power is in a position to charge inefficient and potentially excessive prices whereas a business operating in a competitive environment is incentivised to adjust its prices to account for changes in its cost base in order to retain or expand its market share (otherwise it will lose out to more efficient competitors or new entrants). Competitive firms also have greater incentives to improve efficiency so that prices can be reduced (or increased by less than inflation) without affecting profitability. In the absence of competitive market conditions, price regulation seeks to incentivise similar pricing behaviour. The risk of price monitoring is that it may not be a sufficiently strong form of regulatory oversight to achieve this end.

While the Commission may have reservations that it has very limited information about the efficiency of prices at the Port of Darwin, particularly with the passage of time, an efficiency review of DPO's prices is beyond the Commission's powers under the price monitoring framework. Further, it would require more evidence that DPO is acting in a manner inconsistent with the access and pricing principles to warrant such an undertaking, which would be resource intensive and costly.

Notwithstanding this, the Commission notes the access and pricing principles state the access pricing regime should provide incentives to reduce costs or otherwise improve productivity. Under the current form of regulatory oversight, there are limited incentives of this nature and the Commission has very little information to assess whether steps are being taken to achieve these ends.

The Commission acknowledges DIPL's desire for a price benchmarking study to provide information on relative pricing for particular cargos. As noted above, such a study would likely yield similar results to the last study and provide little additional benefit for the resources expended as it provides no information on differences in underlying costs. The Commission notes DIPL has a particular focus on the relative prices of pilotage for its review of pilotage arrangements. Pilotage tariffs at interstate ports are published online and readily accessible to DIPL for comparative purposes; however, as with other services, the Commission observes this offers no insight on relative costs, which are likely to differ depending on task complexity, scale of operations, relative wages and equipment and capital requirements.

DIPL's reference to "hidden" charges in its submission to the Issues Paper appears to refer to charges for non-prescribed services and items that are part of the terms or conditions of providing prescribed services (such as insurance). Where such charges are tied to charging for prescribed services (that is, they cannot be avoided) and are unreasonable in their nature and extent, these may be matters for recourse to mediation or arbitration. There was insufficient evidence on these charges in the 2023 Review including how they have acted as barriers for access seekers and port users and outcomes from mediation or arbitration to warrant consideration of more stringent forms of regulation, but they can be reconsidered in the next (2028) review.

Provision of financial accounts

Information on costs is not currently provided or required under the price monitoring framework. DPO published information on its financial performance in its initial Year in Review publications (reports for 2017-18 and 2018-19). DPO's 2017-18 report showed earnings before interest, tax, depreciation and amortisation was $10.3 million in 2016-17 and increased to $21.5 million in 2017-18. Net profit after tax was a loss of $31.0 million in 2016-17, which reduced to a loss of $19.3 million in 2017-18. DPO's 2018-19 report advised earnings before interest, tax, depreciation and amortisation in 2018-19 had risen to $25.2 million, but net profit after tax was not provided. DPO's more recent Year in Review publications (2019-20 and 2020-21) do not provide any financial information.

The port access and pricing regime does not provide for the Commission to receive financial records specifically relating to prescribed services. Instead, the Commission must rely on general information gathering powers under the UC Act.[26] What the Commission receives in response to its request depends on how DPO structures its financial accounting arrangements. To date, financial information received by the Commission is not specific to prescribed services. The Commission's analysis of revenue in the financial reports indicates a substantive proportion of DPO's total revenue comes from non-prescribed services and other sources, meaning the available financial information, particularly in relation to costs and profits, is of limited value.

As noted in the 2018 Review, this contrasts with comparable regulatory regimes elsewhere in Australia, which require the keeping of separate accounts for regulated services and the provision of these to the regulator. While the Commission recommended amendments to the PM Act and PM Regulations in the 2018 Review to require a private port operator to maintain separate financial accounts, this has not been effected.

The Commission notes the absence of financial reporting has also been identified as a weakness of the South Australian ports access regime. Similar to the Commission, the Essential Services Commission of South Australia's final report for stage one of its review of the ports access regime and price determination has recommended the current price monitoring scheme be complemented by a financial performance monitoring scheme.[27] The proposed financial monitoring is in respect of prescribed services and excludes financial information on non-prescribed services.

Presently, the Commission's annual price monitoring reports enhance transparency by reporting trends in prices (relative to general price increases) and revenue. While informative, it provides no visibility on trends in the cost or profits associated with providing prescribed services or whether the prices are consistent with the access and pricing principles.

Submissions to Draft Report

In brief, the Draft Report recommended the regime require a private port operator or private pilotage provider to provide to the Commission financial accounts for prescribed services with guidance on requirements provided under the PM Regulations or through guidelines established by the Commission

[26] UC Act, section 25.

[27] Essential Services Commission of South Australia. 2022 Ports Access Regime and Price Determination Review: Stage one Final Report August 2022. Accessed on 17 October 2022 at https://www.escosa.sa.gov.au/projects-and-publications/projects/ports/pricing-and-access-review-2022.

(draft recommendation 7). Responses to the draft recommendation were received from AMEC, DPO and DIPL.

AMEC and DIPL supported draft recommendation 7. AMEC believes the weighted average cost of capital (WACC) should also be included in the financial accounts. DIPL noted financial information is essential for effective monitoring and assessment of proposed price changes and suggested providing clear guidance on the nature of the accounts, confidentiality measures and reporting requirements.

DPO reiterated its concerns from the 2018 Review about the potentially significant upfront and on-going costs it would incur in complying with this requirement as it would require preparation of bespoke financial accounts in the form sought by the Commission plus explanatory comments or responses to questions about the accounts. DPO considers the provision of financial information unnecessary with the most cogent information available being the actual price at which DPO provides services (information the Commission has) and the financial accounts will not provide any additional information that the Commission requires to effectively carry out its price monitoring functions. Further, DPO considers the additional compliance burden to be unwarranted in the absence of any evidence that the current regime is not operating effectively, and given DPO's cost increases are no more than commensurate with CPI levels.

Commission's position and reasoning

Without regular access to relevant financial information, it is difficult for the Commission to make any form of assessment as to whether a private port operator or private pilotage provider is pricing in accordance with the access and pricing principles set out in the PM Act. This significantly limits the effectiveness of the current price monitoring regime and the Commission's ability to assess whether proposed price changes are reasonable and efficient.

Noting, however, that the establishment and provision of separate financial accounts for each prescribed service could be costly for a private port operator, the Commission's recommendation in the 2018 Review was for the port operator to maintain and provide separate financial accounts for prescribed services as a whole. The Commission has retained this recommendation for the 2023 Review, noting that at present there is no evidence to suggest more detailed scrutiny by prescribed service type is needed.

To clarify, the Commission does not intend for DPO to be required to allocate costs to the five separate prescribed service types (allocation is only required for prescribed services as a whole) although the Commission notes this is not the ideal given earlier commentary on the efficiency of pricing. Notwithstanding this, information on the whole of DPO's operations relating to prescribed services would enable the Commission to draw some conclusions on the risk of potential misuse of market power. However, the Commission considers it unusual for DPO not to have some separation in its systems and accounting to enable information to be provided to management on the relative performance of the different types of services it provides.

The Commission considers the PM Act and PM Regulations should give the Commission the power to make binding "guidelines" (or rules) containing the detail of requirements for the financial accounts. The Commission recommends the PM Regulations provide guidance about the nature of the accounts to be required under the guidelines and considers the following should be provided each year:

- balance sheets (showing assets/liabilities/financial position)
- income statements or profit and loss statements (showing revenue, expenses and profit)
- cash flow statements.

The Commission also considers the PM Act or PM Regulations should provide flexibility to require more detailed information, for example, if there is a substantial new infrastructure development at the port for which more detailed information is required to undertake effective price monitoring or concerns about the pricing of a particular type of prescribed service.

The PM Regulations and guidelines would require the financial accounts to be separated according to whether they are for regulated (prescribed services) or non-regulated services with the former to be provided to the Commission. The Commission also would expect to have a role in oversighting the methodology a private port operator or private pilotage provider would apply in allocating costs between regulated and non-regulated services (cost allocation methodology). The financial accounts would be

required to be prepared in accordance with normal and accepted Australian accounting standards and the private port operator or private pilotage provider required to identify which accounting standard(s) it relied on in preparing the accounts.

As there are trust arrangements in place, the PM Regulations would permit the guidelines to require the accounts to extend to all of the entities (including trusts) providing or relevant to the provision of prescribed services. The PM Regulations would also permit the guidelines to require supporting information to be provided to satisfy the Commission that the financial accounts present a true and fair view, for example information about corporate structure and to identify payments to and from related entities.

The PM Regulations and guidelines would permit the port operator or private pilotage service provider to present a single set of accounts when they are within the group of entities if the Commission considers it appropriate. The financial accounts should preferably be audited, or alternatively, could include a responsibility statement signed by the Chief Executive Officer (CEO). The PM Regulations and guidelines would not require the private port operator or private pilotage service provider to calculate regulatory asset values for the assets used to provide prescribed services.

Separate financial accounts for prescribed services prepared on the basis outlined above are the minimum level of information the Commission requires to perform its price monitoring function for prescribed services at the Port of Darwin more effectively. The Commission acknowledges this form of accounting information has limitations, for example, it will not allow the Commission to assess whether prices and price structures are efficient. The recommendation is, however, consistent with a light-handed approach, and involves less intrusive regulation and lower compliance costs than the approaches adopted in many similar regulatory regimes for ports and other regulated infrastructure.

The Commission notes the sensitivity of financial information and would not publish the financial accounts. The Commission's annual reporting may include its observations and some high-level information to support its assessment of whether prices are consistent with the access and pricing principles. This will allow the Commission to flag when it has concerns a private port operator or private pilotage provider may not be acting in accordance with the access and pricing principles, thereby strengthening the threat of more restrictive regulation and discouraging the potential misuse of market power.

Other forms of price regulation

AMEC raised concerns to the Commission on the transparency and efficiency of prices at the Port of Darwin in the 2018 Review and again as part of the Commission's consultation on the 2022-25 Prescribed Port Services Price Determination Port of Darwin and DPO's draft access policy 2022.

AMEC suggested the Commission needs greater line of sight of DPO's financial statements, in particular, it recommends the WACC be documented in the Commission's annual price monitoring reports. AMEC considers the WACC can assist in identifying whether excessive pricing is occurring.

AMEC has also advocated for the introduction of an efficiency dividend model. An efficiency dividend is an annual funding reduction used by governments including the Northern Territory Government[28], to reduce agency budgets in anticipation of efficiencies being found. According to the Commonwealth Department of Finance, an efficiency dividend provides a financial incentive to continually seek new or more efficient ways of undertaking ongoing government business and demonstrates public service efficiencies resulting from improvements in management and administrative practices. AMEC considers the efficiency dividend to be a simple, predictable and administratively effective tool, which would incentivise DPO to pursue more efficient operations.

[28] Department of Treasury and Finance. Program review: root and branch review. Accessed on 31 May 2022 at https://treasury.nt.gov.au/__data/assets/pdf_file/0005/683834/Root-and-branch-review-for-web-new.pdf.

Submissions to the Issues Paper

The Issues Paper noted the form of price regulation would need to be changed by the Northern Territory Government in order to implement AMEC's suggestions. The Issues Paper asked stakeholders what would be the benefits and costs of applying an efficiency dividend or other tools to incentivise DPO to undertake efficient investments and operation of prescribed services. Responses to the question were received from AMEC and DPO.

AMEC sees an efficiency dividend as a means to see a decrease in the overall costs of operations or prescribed activities. AMEC was concerned, however, that ahead of employment of an efficiency dividend there may be an increase in pricing as DPO passes on the cost of new investment.

DPO does not support use of the WACC or efficiency dividends. DPO noted its revenue is not assured or guaranteed in contrast to regulated assets that enjoy firm demand and returns. It considers the additional reporting and administrative burdens required to produce relevant inputs to allow the Commission to accurately develop a WACC model would not be justified.

DPO noted efficiency dividends are often developed for use in public sector businesses and agencies as a means of delivering greater cost control in the absence of standard commercial pressures. DPO rejected the implied assumption behind an efficiency dividend that it is not otherwise incentivised to pursue opportunities for cost reduction at the Port of Darwin.

Commission's position and reasoning

The suggestion for tools such as efficiency dividends and WACC models shows industry concern about the level and reasonableness of DPO's pricing given its ability, as a monopoly provider, to potentially price well in excess of costs. The Commission's approach to addressing this concern is to be able to regularly access and scrutinise financial information as part of its price monitoring function and publicly articulate its conclusions about whether prices are consistent with the access and pricing principles. To date, at a high level, the Commission has not seen evidence of excess profits or returns on investment to suggest a need for a more prescriptive form of price regulation, but the Commission currently has very limited information on which to make an informed assessment about the efficiency of DPO's prices and closer scrutiny may be warranted in the future.

Maximum duration of price determinations

Section 134(4) of the PM Act states a price determination cannot have effect for a period of more than three years. The Commission notes this timeframe is now out of step with the renewal timeframe for access policies, which can be in place for a maximum of five years and the five-yearly cycle for review of the regime. As the form of price regulation is price monitoring and much of the content of price determinations is prescribed under regulation 16 of the PM Regulations, there is unlikely to be major change between one price determination and the next unless the form of price regulation were to change (even with the expansion to include financial information).

Extending the period for which a price determination can be in effect to five years would reduce the administrative burden on the Commission and give greater certainty to DPO. The discretion would still remain with the Commission to put a price determination in place for a shorter period, if needed. Furthermore, if the Northern Territory Government were to decide to change or enhance the form of price regulation in the future, this would require amendment to the PM Regulations. At that time, the government could reassess whether the maximum timeframe for a price determination should remain at five years or whether it should be shortened if this was more suitable given the new form of price regulation.

Submissions to the Issues Paper and Draft Report

The Issues Paper for the 2023 Review sought the views of stakeholders on the benefits and risks of extending the maximum timeframe for a price determination to five years. Only AMEC responded to the question indicating that it did not see any issues with the proposal, noting it did not restrict the ability for a shorter timeframe and it may have the benefit of greater certainty for port users and DPO.

The Draft Report recommended extending the maximum timeframe for a price determination to five years (draft recommendation 8). Submissions from AMEC and DIPL supported the recommendation.

Commission's position and reasoning

The Commission considers enabling price determinations to be in effect for a longer period to be a low risk option for reducing the regulatory administrative burden. This would offset in some part, the increased burden associated with monitoring of financial and service performance. The Commission considers a five year period to be sufficient as a maximum length of time and is consistent with the timeframes for access policies to be in effect and the period for reviews of the port access and pricing regime.

8 | Other changes to the regulatory framework

In the final report for the 2018 Review, the Commission recommended a number of changes to improve the operation of the ports access and pricing regime. The Northern Territory Government subsequently made amendments to the PM Act and PM Regulations in 2020, which partially addressed the Commission's recommendations. Appendix B provides a summary of the Commission's recommended changes to the regime and associated outcomes in terms of implementation.

The sections to follow discuss the matters that remain outstanding from the 2018 Review and the Commission's recommendations on these matters for the 2023 Review. The commentary includes feedback from stakeholders to the Issues Paper and Draft Report for the 2023 Review. Each section contains recommendations on the relevant matter, the basis of which is the 2018 Review recommendations amended to reflect the Commission's present views given developments (if any) since that time.

Pilotage services

In the 2018 Review, the Commission recommended applying sections 124 and 125 of the PM Act and the price monitoring regime to prescribed services provided by a private pilotage service provider. The recommendation was intended to address a gap in the regime where a private port operator and private pilotage provider are different entities. In this case, only the private port operator was bound by the access and pricing regime.

In response to the Commission's recommendation, the Territory Government made amendments to the regime to ensure the following applied to a private pilotage provider:

- the UC Act in the same manner it applies to a private port operator
- section 123 reviews by the Commission and the powers of the minister to change the form of price regulation under the regime
- section 124 to 126 relating to preventing or hindering access and unfairly differentiating and enforcement of those obligations
- the making of a price determination by the Commission and the obligations to provide information about charges to the Commission in accordance with the price determination.

It was not recommended that the requirement for an access policy be applied to a private pilotage provider; however, the Commission notes this approach has some potential limitations. First, DPO's access policy provides transparency on how it will make decisions on the allocation of pilots to vessels through inclusion of pilotage scheduling principles. However, there is no requirement for a private pilotage provider (that is not the private port operator) to publish equivalent information and no ability for the Commission to assess whether those principles are consistent with sections 124 and 125 of the PM Act although the private pilotage provider would still have to comply with those sections and ensure it did not prevent or hinder access or unfairly differentiate between port users.

Second, an access policy is required to set out the terms on which access to a prescribed service will be provided and those terms must be reasonable. There are no similar requirements on a private pilotage provider and thus, no regulatory oversight of standard terms and conditions for access to pilotage services (although they would still have to be compliant with sections 124 and 125).

Finally, the Commission notes prescribed services provided by a private port operator include facilitating the provision of pilotage services in a pilotage area within a designated port. This creates an obligation on a private port operator to work with providers of pilotage services. There is no corresponding requirement on a private pilotage provider to work with a private port operator, which is of concern as an effective working relationship between the two parties is important for the efficient operation of a port.

The Commission notes that currently the risks of these omissions are low with pilotage services covered under DPO's access policy. Circumstances may change, however, and there would be merit in the Territory Government considering these matters and whether changes to the regime are required as part of its consideration of arrangements for pilotage services at the end of the 10 year exclusivity period.

Services under lease

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).

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.

The Commission's recommendations for amendments relating to services under lease are unchanged from the Draft Report.

Part 11 of the PM Act applies to prescribed services, which are defined in regulation 12 of the PM Regulations. Regulation 12 also clarifies services that are not prescribed services with these including "any service provided under a lease granted by the private port operator" (regulation 12(2)). As noted in the final report for the 2018 Review, the Commission understands the purpose of the regulation 12(2) exclusion was to ensure the Marine Supply Base (a dedicated oil and gas support facility) was excluded from regulatory oversight when the Port of Darwin was leased in 2015.

The Commission understands that this exclusion was not intended to apply to services provided by a private port operator under a lease, that is, it does not apply to DPO's provision of prescribed services (which operates the port under a sub-lease from Landbridge). The Commission recommended in the 2018 Review that regulation 12(2) be amended to clarify this exclusion and remains of the view that such an amendment is desirable to eliminate any uncertainty.

The regulation 12(2) exclusion would, however, apply to any prescribed service provided under lease granted by a private port operator (that is, when the service is no longer provided directly by the private port operator). This exclusion, combined with the fact that the access regime only applies to the private port operator and not to another entity who is a lessee, creates an avenue for a private port operator to circumvent the port access and pricing regime by leasing out the provision of prescribed services. Further, the access regime would also not apply where the private port operator enters into a sublease over a facility or berth where the lessee supplies port users with what would otherwise be prescribed services (but for the sublease). The port lease imposes obligations on DPO with respect to ongoing access where a sublease is granted, but the Commission notes these provisions are not as extensive as the port access and pricing regime nor are they directly enforceable by an access seeker or the Commission as regulator.

The Commission notes it is not aware of DPO using the exclusion to circumvent the regulatory regime nor have there been any complaints in relation to services provided under lease arrangements. Regardless, the potential for a lessee of a private port operator to provide prescribed services outside the reach of the regulatory regime remains a weakness of the current port access and pricing regime. The weakness was also identified in DIPL's submission to the Issues Paper, which stated all prescribed services whether under a lease or not should be subject to the regulatory regime.

Submissions to the Draft Report

In the Draft Report, the Commission recommended amendments to clarify regulation 12(2) does not apply to services provided by a port operator under a lease and to require Commission approval of any lease by the private port operator of the provision of prescribed services (draft recommendations 9a and 9b). Only DIPL's submission commented on the recommendations, providing support and stating the measures will ensure appropriate oversight and adherence to access and pricing principles and that prescribed services cannot be delivered outside the regulatory regime

Commission's position and reasoning

In the absence of any contrary views, the Commission's recommendations in the Draft Report on services under lease have been retained, unchanged, in this Final Report.

Carve-outs under sections 124 and 125 of the PM Act

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.

The Commission's recommendation to prevent carve-outs being permitted under an access policy is unchanged from the Draft Report.

Section 124 of the PM Act is intended to prevent a private port operator or private pilotage provider from engaging in conduct that prevents or hinders access to a prescribed service. Section 125 of the PM Act is intended to prevent a private port operator or private pilotage provider from unfairly differentiating between port users in a way that has a material adverse effect on their ability to compete with other port users.

These restrictions are particularly important where a vertically integrated provider (e.g., a port operator who also has businesses in up or downstream markets) may provide access to its own businesses or associated businesses on more favourable terms. The Commission notes the lease for the Port of Darwin contains a restriction on DPO from becoming an integrated operator without the consent of government. This provides an additional constraint and thus protection for port users. The Commission notes conditions in the port lease are outside the regime regulated by the Commission and are matters for the Northern Territory Government to enforce.

Sections 124 and 125 allow for the exemption of certain conduct that might otherwise be considered to be preventing or hindering access or unfairly differentiating between port users. In the case of hindering access, the restriction would not apply where an act was done in accordance with the private port operator's access policy. Similarly, the restriction regarding differential treatment does not apply where different treatment is expressly required or permitted by the private port operator's access policy. This opportunity to 'carve out' particular acts or behaviours through the access policy has no oversight attached as the Commission is not required (or allowed) to take into account the provisions relating to hindering access and unfairly differentiating (i.e., sections 124(1) and 125(1)) when approving an access policy.

The Commission notes DPO has included a clause in its access policy (clause 1.3) that expressly states nothing in the access policy is intended to require or permit DPO to engage in conduct in breach of sections 124(1) or 125(1) of the PM Act. This means the issue is not presently a problem in relation to DPO's access policy, but the vulnerability remains in the absence of modifications to the port access and pricing regime. This could be achieved through amendments to section 125 and 124 or, alternatively, requiring the Commission to have regard to those sections when approving a draft access policy.

Submissions to the Draft Report

The Draft Report recommended the regime be amended to prevent carve-outs, but was not prescriptive in the approach to be taken to the amendments (draft recommendation 10). Submissions from AMEC and DIPL were supportive of the intent of the recommendation, but DPO considered in the absence of any problem with its access policy, there was no credible theory of harm to warrant change.

Commission's position and reasoning

The Commission remains of the view that this weakness should be remedied regardless of the current content of DPO's access policy. This will ensure there is not the potential for an access policy (of any private port operator) to negate intended protections for port users and there is an appropriate level of regulatory oversight before carve-outs can be included in an access policy. Accordingly, the Commission's recommendation remains unchanged from the Draft Report.

Oversight of the classification of services

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 prescribed services as standard services, non-standard services or reference services.

Recommendation 11b: The Commission recommends amending the port access and pricing regime to require a private port operator to publish indicative terms, and where feasible for the service, indicative charges (reference tariffs) for reference services.

The Commission has retained recommendations 11a and 11b from the Draft Report in this Final Report, although the wording has been updated to clarify the Commission's proposed process.

Under DPO's current access policy, prescribed services are divided into standard services and non-standard services. Standard services are available to access seekers on published standard terms and prices, with the standard terms approved by the Commission as part of approval of the access policy. Non-standard terms are provided through a more complex negotiated process to agree terms and prices.

Under the current port access and pricing regime, DPO determines what constitutes a standard prescribed service, and the terms and standard charges applying to those services. Where a port user requires a non-standard service, for example prescribed services to which standard terms do not apply or where a variation to the standard terms or pricing for a prescribed service is required, DPO and the port user negotiate the terms and price for those services and enter into a negotiated agreement. The Commission currently approves the standard terms that apply to standard services as part of its approval of the access policy. However, the Commission currently has no oversight or approval role in relation to which services are classified as standard or non-standard services.

In the 2018 Review, the Commission found it was a weakness of the current regime that there was no regulatory oversight of what services were subject to standard terms and conditions. Under DPO's access policy, the process for accessing standard services is more straight-forward with terms and conditions and pricing known and changes in these transparent. The Commission proposed it be given regulatory oversight, through the access policy approval process, of the classification of services as standard services.

The Commission also proposed it be given the ability to determine a third category of services, termed reference services, which are a sub-set of non-standard services for which indicative terms (reference terms) would be published. The price determination could also require indicative prices (reference tariffs) to be published for those services. This recommendation stemmed from a lack of clarity and certainty about prices and terms of access for exporting dry bulk minerals from the Port of Darwin. Instead, prospective users must request indicative pricing from DPO.

As an alternative, the Commission strongly encouraged DPO to voluntarily publish more information for port users about the terms and prices for exporting dry bulk minerals. The Commission notes this has not occurred with DPO's 2023-24 schedule of port charges[29] still listing the price of bulk minerals as POA (price on application). This would have been a less prescriptive option (than regulation) for providing more information for mineral producers.

Advice from stakeholders in the 2018 Review indicated mining companies needed to be able to demonstrate certainty of access and pricing to secure finance for project development so reference terms and prices would be valued by specific users. The importance of this information for mining companies was reiterated in feedback from stakeholders to the Issues Paper for the 2023 Review.

[29] Available at https://www.darwinport.com.au/trade/access-policy-tariffs.

DIPL's submission to the Issues Paper expressed the view that the range of services that are considered "standard" as set out in DPO's access policy should be increased. In particular, DIPL was of the view that standard services should include the following operations, which are currently excluded through Schedule 1 of DPO's access policy:

- use of the rail mounted dry bulk ship loader on East Arm Wharf Berth 2
- the train unloading facility, dumping facility, stockpile areas, dump station, conveyor systems and related equipment and facilities.

DIPL was also of the view that any other port operations considered accepted market practice in Australia should also be included as standard services. DIPL considers DPO should publish prices for bulk minerals including the specification of what loading method is utilised, for example, a published tariff for export of bulk minerals using the dry bulk ship loader and a separate tariff for not utilising the dry bulk ship loader.

Submissions to the Draft Report

The Draft Report recommended the Commission be given regulatory oversight of the classification of services as standard services (draft recommendation 11a) and the power to approve non-standard services for which a private port operator must publish indicative terms, and where feasible, reference tariffs (draft recommendation 11b).

All submissions commented on the classification of services and, with the exception of DPO, were supportive of the recommendations.

Crowley's submission advised an indication of access terms for non-standard services would provide important information for potential port users ahead of financial commitments and commercial negotiations. It considers access terms should be published to provide clarity and certainty of access on reasonable terms including transparency on the allocation of risks, which may influence investment decisions.

DIPL's submission advised the recommendations will close a current gap in the regulatory regime including eliminating opaque fee structures and hidden terms and conditions and improve certainty for proponents wishing to negotiate access to the Port of Darwin. DIPL suggested ensuring clear guidelines and criteria for service classification and the publication of indicative terms and charges, where feasible, to promote transparency and consistency.

Verdant strongly supported recommendation 11b and the views in DIPL's submission to the Issues Paper (see earlier paragraphs in this section). Verdant also supported DIPL's recommendation that DPO publish prices for bulk minerals including the specification of loading method (for example, separate tariffs for using or not using the dry bulk ship loader).

DPO's submission did not support the recommendations, considering it manifestly unclear as to what purpose such a function would serve or how it would be carried out in practice (what form it would take, what criteria would be used to form an assessment) and DPO would bear the burden of providing information to the Commission to justify its decisions. DPO noted that clause 5.2(a) of its access policy provides that it may, but is not obliged to prepare standard terms upon which certain services can be offered. It does so and reserves non-standard services as those needing to be provided on bespoke negotiated terms and conditions due to variations in customer requirements. DPO states that it is best placed to make an assessment from a commercial standpoint on how a service should be classified and it is difficult to understand what improvements these recommendations would achieve.

DPO considers it is not feasible to publish indicative terms and exampled the difficulty in relation to dry bulk minerals listing 13 variables that impact on labour, maintenance, running and other costs and need to be considered in determining terms and charges. The variables relate to product type, form, quantity and quality; infrastructure depletion and additions; risk factors; storage requirements; third party involvement; and vessel size.

Commission's position and reasoning

In 2022-23, the mining industry accounted for 31.7% of the Northern Territory's gross state product and was the largest contributor to the Territory economy.[30] Given the importance of the industry, the number of projects in Investment Territory's Priority Portfolio (refer Chapter 3) and a desire for the Territory to accelerate mining development[31], there would be benefit in providing mineral producers with more certainty about access and pricing for port services, where feasible.

Given the infrastructure at the Port of Darwin is well established to facilitate the export of dry bulk minerals, the Commission considers DPO should be able to provide indicative terms and reference tariffs for key minerals, particularly where it has experience of exporting those minerals. Furthermore, the Commission observes publication of reference tariffs for bulk dry minerals is not unique with the Port of Townsville's tariff schedule including a price for dry bulk exports covering iron ore, nickel ore, metal concentrates and zinc ferrites as well as a price for heavy lift / project cargo.[32] The Pilbara Ports Authority provides a price for the export of bulk minerals from the Port of Port Hedland.[33]

The Commission considers it will promote the objectives of, and build greater flexibility and responsiveness into, the port access and pricing regime for there to be regulatory oversight of the classification of services and for the private port operator to publish indicative terms and tariffs for approved reference services. The Commission notes, however, that this would not remove the need for access seekers to negotiate actual prices and terms of access, but it would be reasonable to expect that negotiations would commence from a more advanced stage than in the absence of reference information.

The Commission's recommendations from the Draft Report have been retained, but recommendation 11b has been modified to remove reference to the indicative terms forming part of the access policy, which may be unduly restrictive. The Commission notes the uncertainty expressed by DPO about how the recommendations would work in practice and seeks to clarify the intention of its recommendations in the following paragraphs.

In terms of an access policy, the Commission intends that a private port operator be required to classify prescribed services as follows:

- standard services which are offered on the published standard terms (these currently form part of DPO's access policy) and standard prices (published in accordance with the price determination)
- non-standard services for which (consistent with the access policy) terms and prices are negotiated
- reference services, a subset of non-standard services, for which indicative terms and, where feasible, prices are published.

DPO has already established a set of standard services identified through its schedule of port charges. The Commission notes the schedule also includes some non-standard services (classified as such because standard terms do not apply, but there is a published price for the service) and may also include non-prescribed services. This is desirable as it gives transparency on pricing for non-standard services (which serves to evidence the outcome that the Commission's recommendations are intended to achieve), and extra services (outside the regulatory regime) available to port users.

In preparing a draft access policy, a private port operator must consult with port users (in accordance with section 127(2A) of the PM Act). This would include consultation on the private port operator's proposed classification of services. The Commission notes stakeholders provided examples in their submissions to the 2023 Review of services provided by DPO that they wish to see included as standard or reference services (see earlier paragraphs). A summary of comments received during consultations must be provided to the

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[30] Northern Territory Government. Budget 2023-24 Industry Outlook, Mining and manufacturing. Accessed 1 August 2023 at https://budget.nt.gov.au/industry-outlook/mining-and-manufacturing.

[31] Refer the Mineral Development Taskforce at https://resourcingtheterritory.nt.gov.au/minerals/mineral-development-taskforce.

[32] Available at https://www.townsville-port.com.au/operations/port-charges/.

[33] Available at https://www.pilbaraports.com.au/business-and-trade/fees-and-charges.

Commission along with the draft access policy for approval. The Commission would expect that summary to explain how DPO had addressed (or was unable to address) port users' views regarding the classification of services. This (along with input from the Commission's own consultation during the approval process) would inform the Commission's consideration of the reasonableness of DPO's classifications.

The Commission acknowledges this may increase the regulatory requirement in preparing and approving a draft access policy, but it is introducing a new element for consideration, not a new process. As such, a key impost on DPO will be in preparing pricing and terms for new standard or reference services (the intended outcome of the recommendation) or evidencing why port users' requested services are unsuitable as standard or reference services. The Commission notes there may be valid reasons why particular prescribed services are excluded from standard services, but these should be transparent and subject to scrutiny and approval by the Commission.

The Commission's role will be to approve (or not) DPO's classification of services as part of the draft access policy approval process. It is not intended that the Commission identify and determine the classification of prescribed services in its own right as the Commission does not have detailed expertise or knowledge of the port industry, and as pointed out by DPO, the port operator is best placed to do this.

The Commission has, however, modified recommendation 11b to clarify that indicative terms for reference services are not part of the access policy. Indicative terms are likely terms that may apply, not the actual terms. Actual terms for a reference service must still be negotiated between the port operator and access seeker. The intent of the indicative terms is to increase transparency on the terms and conditions and this can achieved through a requirement for their publication on the private port operator's website. There is no ability to amend an approved access policy (a new draft access policy must be submitted), which means it would be unduly restrictive and onerous to change indicative terms. It may also discourage a port operator from voluntarily expanding its range of reference services during the term of an access policy.

The Commission considers the increased regulatory burden associated with classifying services and publication of indicative terms and charges would be offset by the benefits to port users with the information, even if only indicative, being of value. There are efficiencies in requiring the classification of services as part of the draft access policy approval process (rather than a separate process) and potentially there are savings for a private port operator in terms of lower negotiation costs and growth in port throughput as these arrangements facilitate mineral projects coming to fruition.

Port lease and other binding obligations

No amendments have been made in response to the Commission's 2018 Review recommendation that the PM Act be changed to provide for the Commission to take into account the port lease when approving an access policy. This means uncertainty remains as to how conflicts between the access policy and DPO's obligations under other agreements to which it is bound (including the lease with the Northern Territory Government) should be resolved.

The Commission notes no conflicts arose as part of the approval process for DPO's 2022 access policy although this was not unexpected as the changes between the new and previously approved access policy largely related to incorporating additional requirements following changes to the PM Regulations in 2020. Further, in approving an access policy, the Commission is not necessarily aware of other contractual obligations on a private port operator (other than the port lease) and whether these could have consequences for the operator's ability to comply with its access policy.

The Commission notes, however, that as part of changes to the PM Regulations in 2020, an arbitrator must now take into account the firm and binding contractual obligations of the private port operator and of other persons already using the relevant port facility in conducting arbitration (regulation 13(2)(f)(viia)(E)). This is consistent with the approach taken in other jurisdictions.

With this inclusion, there is a mechanism for considering and adjudicating on any potential disputes that may arise from a conflict between the access policy and other contractual obligations. The Commission would receive any such arbitration decisions and, as might be needed, can apply that knowledge in approving a future draft access policy.

The Commission notes its recommendation in the 2018 Review focussed on taking into account the port lease and as such, would only provide for consideration of a known obligation, which is specific to the Port of Darwin (rather than being broadly applicable to any designated port). The Commission also notes that where access seekers consider contractual obligations are being used to mask anti-competitive competitive behaviour, they can lodge a complaint with the Commission. Given this and that there are now arrangements to consider contractual obligations at arbitration, the Commission does not propose to continue to recommend amendments to the PM Act to enable the port lease to be taken into account when approving an access policy.

Power to require independent audits

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.

The Commission has retained, unchanged, the recommendation from the Draft Report in this Final Report for the port access and pricing regime to be amended to give the Commission the power to initiate an independent audit.

The current port access and pricing regime provides the Commission with no powers to initiate an independent audit. An independent audit is an important tool available to the Commission for its role in regulating other industries. While the intent is that such audits verify compliance, from the Commission's experience, independent audits have been useful for detecting weaknesses in record keeping, compliance monitoring and reporting processes and misalignment between business practices and legislated requirements. Regulated entities are able to use the findings from independent audits to reduce the risk of non-compliance, enhance service delivery, and improve the quality and reliability of information provided to the Commission.

Accordingly, the Commission considers the port access and pricing regime should be amended to include provisions which enable the Commission to require a private port operator or private pilotage provider to engage an independent auditor, at the operator's or provider's cost, to audit the operator's or provider's compliance with the requirements of the PM Act and PM Regulations in relation to access and pricing. Additionally, provision should be made for the Commission to approve the proposed auditor (to ensure they are independent) and terms of reference for the audit (ensure its scope is appropriate).

The Commission notes where it is satisfied that the risk of non-compliance is low, the Commission is unlikely to have a reason to exercise an audit power. The Commission is also cognisant of the additional cost that such audits may impose and therefore, the need to have a clear purpose or defined time interval for such audits. For example, the Commission's Electricity Industry Performance Code requires relevant licensees to every three years audit the integrity and accuracy of the performance data they collect and report on.

The Commission notes that following the 2018 Review, the PM Act was amended to require information and documents provided to the Commission to be certified as correct by the CEO (or another specified officer) of a private port operator or private pilotage provider. While this is expected to promote compliance, it does not provide an avenue for the Commission to obtain independent verification of compliance or accuracy if it has concerns.

Relevantly, the Commission considers the current risk of non-compliance by DPO to be low and therefore, at the moment, the Commission is unlikely to have any reason to request DPO to undertake an independent audit.

Submissions to the Draft Report

The Draft Report recommended inclusion of independent audit provisions (draft recommendation 12). Submissions from AMEC and DIPL were supportive of the recommendation. AMEC considered it will

provide another layer of regulatory oversight to ensure adherence to the regime while DIPL stated the audit process, conducted at the private port operator's or pilotage provider's cost, would enhance accountability and ensure adherence to regulatory requirements.

DPO's submission advised that it considers the threat of further regulation operates as a disincentive to engaging in any conduct that might evidence non-compliance with the port access and pricing regime and given the absence of any non-compliance, DPO considers the introduction of an audit regime premature. DPO also considers there may be other less costly alternatives than independent audit if there are concerns about its compliance. DPO noted that the Commission does not anticipate needing to use the audit power, but considers any power has the potential for misuse or overuse and an audit function is unnecessary or inconsistent with the light-touch approach to regulation that DPO considers is operating effectively.

Commission's position and reasoning

The Commission considers the lack of a power for it to initiate an independent audit to be a major deficiency in the compliance provisions of the port access and pricing regime and recommends this be rectified. It is inconsistent for a regulatory regime to require compliance, but not provide the regulator with the capability to verify compliance. Independent audits provide this capability and offer accountability, reliability and assurance for the Commission, port users and all industry stakeholders.

Although an independent audit would impose costs on a private port operator or private pilotage provider, the Commission considers it consistent with light-handed regulation for an audit power to be available to the regulator. As noted above, the Commission sees no present need for an audit of DPO's compliance and the audit power would be exercised on the basis of a risk assessment.

Non-compliance and enforcement

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'.

The guidance would address what matters should be taken into account to determine the substantiveness of a non-compliance such as the nature and extent of the breach (including whether there is a series of breaches), the effect of the breach and the impact on, or potential consequences for, access seekers or port users.

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.

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.

The Commission has retained, unchanged, the recommendations from the Draft Report in this Final Report.

Definition of material instance of non-compliance

Section 130 of the PM Act, requires a private port operator to report to the Commission, by 30 September each year, on any material instance of non-compliance with the port operator's access policy in the immediately preceding financial year. Section 121 requires the Commission, in turn, to make an annual report to the Minister, by 1 December each year, on any material instances of non-compliance. This includes

material non-compliance against the price determination. The Minister must table the Commission's report within seven sitting days[34], and once tabled, the report is also published on the Commission's website.

The Commission notes neither the PM Act nor PM Regulations provide a definition or guidance on what constitutes a 'material instance of non-compliance'. To address this gap, the Commission provides guidance on what it considers to be 'non-compliance' and 'material' through its Port of Darwin Reporting Guidelines. The Commission's guidance is that an instance of non-compliance is an action taken, or a failure to take action, by a private port operator which is not consistent with the access policy of the private port operator. An instance of non-compliance is material when it will:

- affect a significant number of port users; or
- have an adverse financial impact on one or more port users; or
- adversely affect access to prescribed services by one or more port users; or
- significantly compromise, or be likely to significantly compromise, the private port operator's ability to provide one or more prescribed services.

The Issues Paper for the 2023 Review asked what uncertainty and consequences arise (if any) from the absence of a legislative definition of 'materiality' and 'non-compliance'. Responses were received from AMEC and DPO. AMEC considers these terms should be defined in legislation, believing that by not clearly defining the terms, it leaves both open to interpretation creating the possibility of detrimental, unforeseen circumstances. DPO expressed concern at the broadness of the Commission's definition of material non-compliance stating that it could capture less significant and potentially technical breaches of the regime. DPO considers any statutory formulation for a material breach would need to be more precise and narrow in scope.

Reporting of material non-compliance

The Commission notes there is no specific provision in the PM Act or PM Regulations to allow another entity such as a port user to report an instance of non-compliance. Equally, however, there is no provision preventing such a report. The Commission has general powers under section 6 of the UC Act including to investigate and help resolve complaints relating to the conduct or operations of licensed entities under relevant industry regulation Acts. Although there is no licensing arrangement under the PM Act, section 119(4) provides for a private port operator or private pilotage operator to be taken to be a licenced entity for the purpose of the UC Act. Accordingly, those provisions would enable the Commission to act on any complaint relating to a private port operator or private pilotage provider at the Port of Darwin.

The Issues Paper for the 2023 Review asked whether there are any barriers faced by port users in notifying the Commission of instances of non-compliance. AMEC responded to this question stating further clarification was needed to remove any potential barriers that port users feel may stop them from notifying the Commission.

Penalties for non-compliance

As noted above, the Commission reports annually to the Minister on any material instances of non-compliance and the report is tabled in the Legislative Assembly and published on the Commission's website. This means there would be public visibility of any material non-compliance; however, beyond this, there is no specific penalty for non-compliance by a private port operator or private pilotage provider. Furthermore, there is no penalty for failing to report a material instance of non-compliance although this would be taken into account during a review and may influence whether the Commission recommends a more stringent form of regulation.

DPO's submission to the Issues Paper advised although there was not a specific penalty, a breach of its access policy or the PM Act would be a breach of its lease, which may have adverse consequences, as well

[34] PM Act, section 121(2).

as the threat of more stringent regulation. The Commission notes while there may be consequences associated with a breach of the lease, the penalties and their application lacks transparency and independent and impartial adjudication.

The Commission notes section 126(2) of the PM Act provides the power for a court of competent jurisdiction to enforce compliance with sections 124(1) and 125(1), which prohibit a private port operator or private pilotage provider from engaging in conduct to prevent or hinder access or to unfairly differentiate between users. The court can make orders granting injunctions, orders for compensation or any other order the court considers appropriate. The Commission is of the view that these powers should be extended to specifically cover the failure to comply with an access policy and failure to comply with the obligation to negotiate in good faith with an access seeker.

While it might be argued such failures could be linked back to a non-compliance against sections 124(1) and 125(1), this creates uncertainty and seems overly circuitous. Instead, the Commission considers there is merit in clearly and unequivocally setting out in the PM Act that penalties apply for non-compliance with the access policy (which is now required to include obligations to negotiate in good faith).

Submissions to the Draft Report

The Draft Report recommended amendments to give guidance on the definition of 'material instance of non-compliance' (draft recommendation 13a); allow parties to be able to report to the Commission material instances of non-compliance and for the Commission to be able to investigate third-party reports of non-compliance (draft recommendation 13b) and to make enforcement orders for the failure to comply with an access policy or failure to negotiate in good faith (draft recommendation 13c).

Submissions from AMEC, Crowley and DIPL supported the draft recommendations. Crowley considers the complaints process would provide an alternative pathway for potential port users to seek support in challenging commercial situations. DIPL recommended there be clear guidelines and procedures for reporting and enforcement mechanisms

DPO's submission advised additional guidance on material non-compliance would duplicate that in the Commission's Port of Darwin Reporting Guidelines so there is no issue to which draft recommendation 13a is directed. DPO also considered in the absence of any non-compliance or failure to negotiate in good faith, draft recommendation 13c is unnecessary.

Commission's position and reasoning

The Commission currently provides guidance on its view of what constitutes material non-compliance in its guidelines. However, the Commission's guidelines cannot affect the interpretation of the PM Act and only provide non-binding guidance. If contested, the PM Act would apply and need to be interpreted by a court. Accordingly, the Commission remains of the view that this uncertainty should be resolved through inclusion in the PM Act or PM Regulations of a definition for a 'material instance of non-compliance'.

Noting there may be a reluctance by some parties to come forward to the Commission with complaints (as discussed in Chapter 4), the Commission considers it is important there is clear authority under legislation for third parties to report potential non-compliance to the Commission and that the Commission is permitted to investigate those complaints. The Commission considers these powers should not be unduly prescriptive about who can report potential non-compliance and how it can be reported so as not to create barriers to engaging with the Commission.

Equally, the provisions should also give the Commission flexibility in whether or not to investigate a reported matter, for example, if a matter is vexatious or frivolous. If the Commission does not intend to proceed with an investigation, the PM Act or PM Regulations could require the Commission to notify the party in writing (unless anonymous) of its decision and associated reasons; however, the Commission would typically do this as a matter of good regulatory practice.

Any matter where the Commission investigates and substantiates a material non-compliance, would be reported to the Minister through the annual reporting requirement under section 121 of the PM Act. This would include any recommendations on how the non-compliance should be overcome, if not already addressed by the private port operator.

The Commission does not see the relevance of guidelines on enforcement, as suggested by DIPL. Beyond repercussions under the lease or action taken by the Minister in response to reports of material non-compliance, there is no specific enforcement action or penalty for the failure to comply with an access policy or the obligation to negotiate in good faith with an access seeker. This contrasts, for example, with the *Electricity Reform Act 2000* where it is an offence if an electricity entity contravenes a condition of its licence (refer section 31).

The Commission's recommendation is, however, to extend section 126 to cover failures relating to compliance with an access policy or negotiation in good faith. This means obligations would be enforceable by a court of law (not the Commission) and is consistent with the commercial nature of the negotiate/arbitrate model. It would achieve an outcome for a port user including compensation as might be appropriate. Additional to this, the Territory Government may wish to review whether repercussions under the lease or from the Minister would be sufficient or whether a penalty under the PM Act might be appropriate for non-compliance with an access policy (or a price determination).

Measures of service

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 and associated targets for reporting purposes.

Recommendation 14b: 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 targets, 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 and targets.

The Commission has retained the recommendations from the Draft Report in this Final Report, but for the avoidance of doubt, clarified that measures of service would require setting specific levels of performance (targets) for those measures against which performance is assessed.

There remains a gap in the port access and pricing regime with no requirements for the private port operator or private pilotage provider to report on measures of service or performance levels (targets) for prescribed services. This is of concern as a monopoly provider does not face competitive pressure to maintain or lift its service performance and it can reduce service quality (through cost reductions) while maintaining prices thereby increasing profits.

The Commission's final report for the 2018 Review recommended a private port operator and a private pilotage provider propose and report on measures of service, approved by the Commission. The Commission would publish an annual report on performance against those measures of service. Allowing the private port operator to propose measures of service would allow DPO to leverage off existing performance indicators or other tools used to improve business performance and minimise the additional cost and obligations.

An alternative would be for DPO to voluntarily report on an agreed set of performance indicators, with such a model being implemented in 2020 in Victoria in relation to the landside container supply chain at the Port of Melbourne[35]. The Commission notes DPO publishes trade and port statistics on its website and an annual A Year in Review report (last published in 2020-21), but the statistics provided are focussed on volumetric throughput rather than service performance. The website and publication could, however, provide an avenue for providing information on customer satisfaction and performance related measures. This would provide transparency without the need for additional regulation. It also aligns with views expressed in DIPL's

[35] Voluntary Port of Melbourne Performance Model – refer https://transport.vic.gov.au/ports-and-freight/commercial-ports/voluntary-port-performance-model/performance-indicator-dashboard.

submission that stakeholder perception and satisfaction and quality of service are valuable to measure (in addition to monitoring prices) as these are essential for the growth of trade at a port.

Submissions to the Draft Report

The Draft Report recommended amendments to provide for the Commission to approve measures of service for a private port operator and private pilotage provider (draft recommendation 14a) and for reporting on those measures (draft recommendation 14b).

Submissions from AMEC and DIPL supported the recommendations. DIPL was of the view that the provision of annual reports to the Commission was the best mechanism to enhance transparency and enable stakeholders to make informed decisions.

DPO's submission objected to the draft recommendations with the additional compliance burden considered unwarranted. DPO was of the view that the concerns justifying draft recommendation 14a were subjective and hypothetical and should not in the absence of any evidence of reduced service quality or other identifiable issues, be used to justify increased regulation. DPO noted, given substantial spare capacity at the Port of Darwin, it is not in its interests to lower service quality, instead illustrating, with three examples, where it considered commercial incentives had translated to high quality service delivery outcomes to attract and retain port users and maximise throughput. If draft recommendation 14a were to be implemented by government, DPO considered a more reasonable starting point for reporting would be to report on complaints received regarding material failures to comply with any measures of service rather than proactive reporting obligations to the Commission or publicly (as per draft recommendation 14b).

Commission's position and reasoning

The Commission considers the establishment and monitoring of measures of service and associated targets to be an important means for measuring the effectiveness of regulatory oversight and ensuring a minimum quality of service.

The Commission observes the provision to set or approve measures of service are a feature of other regulatory frameworks. For example, section 9 of the *Maritime Services (Access) Act 2000* (SA) provides for the Essential Services Commission of South Australia to develop and issue standards regarding a maritime service; the Competition and Consumer (Industry Code – Port Terminal Access (Bulk Wheat)) Regulation 2014 requires a port terminal service provider to publish performance indicators (clause 29) and section 55(1) of the *Port Management Act 1995* (Vic) provides for the Essential Services Commission of Victoria to develop and issue standards and conditions of service and to monitor and report on compliance with those standards and conditions. In the Territory, the Commission has established the Electricity Industry Performance Code (under section 24 of the *Utilities Commission Act 2000* and Regulation 2B of the Utilities Commission Regulations 2001), which sets out standards of service and performance indicators for licensed entities in the electricity supply industry.

The Commission considers its recommendations address a gap in the port access and pricing regime and the need for transparency on service performance. As noted earlier, the Commission has recommended an approach that should minimise the administrative burden on DPO while providing data on general service trends to complement information about prices. It allows DPO to use customer satisfaction surveys, key performance indicators or other measures that are likely already recorded for DPO's own use.

Improvements to the access policy approval process

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.

The Commission has retained, unchanged, recommendation 15 from the Draft Report in this Final Report.

Following the 2018 Review, a number of amendments were made to clarify and improve the access policy approval process. These include setting a nominal expiry date for an access policy, clarifying that the private port operator must continue to comply with its access policy until it is replaced by a new approved access policy and allowing for the Commission to give notice that an extension (of a further 60 days) is required to consider a draft access policy.

While these address key concerns, the following matters were not adopted:

- for the Commission to take further matters into account in approving a draft access policy including section 6(2) of the UC Act, the object of Part 11 of the PM Act, the principle that access to prescribed services should be on reasonable terms, the access and pricing principles, applicable provisions in the port lease and any other matter the Commission considers relevant.
- an obligation for the private port operator to publish the findings of a review of its access policy and provide a copy to the Commission.

The Commission considers the second of these matters is now largely redundant. A private port operator is required to provide a new draft access policy at least every five years and in developing a draft access policy, the private port operator must consult with port users and provide a summary of the comments received during consultation to the Commission. Along with the Commission's own consultation on a draft access policy (conducted in accordance with best practice regulation), this means there are several avenues by which the Commission can be informed of port users' views and potential issues on a draft access policy.

In relation to the first matter, the Commission still considers there are deficiencies in what it is permitted to take into account in approving a draft access policy. Section 127(4) of the PM Act requires the Commission to approve a draft access policy if it meets the requirements of section 127(2). That is, the access policy meets the requirements in regulation 13(2) of the PM Regulations and any matter required by the Minister under section 129 of the PM Act (currently there are no matters specified under section 129). There are now additional requirements under regulation 13(2); however, these relate to the inclusion of obligations to provide information to port users, clarifications regarding content of an access application and improvements to the negotiate/arbitrate framework.

The matters specified in regulation 13(2) are functional in nature, for example, that the access policy must state the approach and factors to be taken into account in allowing access to the port and scheduling vessels, contain a commitment to give certain information and set out a process for resolving disputes. This lends itself to a checklist approach to approving an access policy, but gives the Commission little discretion to take other matters into account. Notably, it means there is no requirement for the Commission to consider, for example, implications for economic efficiency and effective competition (as per the object of Part 11), the access and pricing principles or more broadly matters under section 6(2) of the UC Act including fair market conduct and reliability and quality of services. The Commission remains of the view that it is important the Commission has the ability to take these matters into consideration when approving (or not) a draft access policy.

Submissions to the Draft Report

The Draft Report recommended amending the PM Act to take into consideration section 6(2) of the UC Act, the object of part 11 of the PM Act, access is on reasonable terms, the access and pricing principles and any other relevant matters (draft recommendation 15).

Submissions from Crowley and DIPL supported draft recommendation 15; however, DIPL considers the last component (any other matters the Commission considers relevant) should be tempered or limited to some degree such as only considering matters that are reasonable.

In its submission, DPO observed the PM Regulations contain detailed provisions for what must be included in an access policy. DPO considers that while the provisions ensure an access policy has defined processes and procedures for access, the prescribed process is aligned with the aspirational matters in section 6(2) of the UC Act and Part 11 of the PM Act. Accordingly, DPO considers the proposed amendments to be 'form over substance' and presume the access policy is not in line with section 6(2) and Part 11 or it would have required more stringent review if regard had to be given to these matters. DPO considers the additional matters would not have resulted in any real change to the nature and content of an access policy, taking into account the provisions that already exist in the PM Regulations.

Commission's position and reasoning

The Commission considers the functional focus of regulation 13 potentially undermines the regime by effectively restricting the Commission's consideration of an access policy to the 'ticking of boxes' rather than allowing the Commission to also take pertinent factors into account. The Commission considers a better approach is exampled by the process to approve (or not) a draft access undertaking for the Dalrymple Coal Bay Terminal.

In granting approval (or not) of a draft access undertaking, the Queensland Competition Authority (QCA), as regulator, must have regard to the matters in section 138(2) of the *Queensland Competition Authority Act 1997* (Qld) (QCA Act).[36] These include the object of the part (that is, Part 5 Access to services of the QCA Act), the interests of the owner or operator, public and access seekers, pricing principles and any other matter the QCA considers relevant. These provide broad objectives, giving the QCA discretion in determining what is appropriate to be included in a draft access undertaking. While 'other matters considered relevant' is a broad provision, the Commission considers it necessary to be able to have regard to feedback received from port users and best industry practice standards, for example.

Regulation 13 usefully guides a private port operator in preparing their draft access policy, but it is the detail of the required approaches, commitments, information, forms and processes to be in the access policy where the factors listed in recommendation 15 need to be taken into account. It is possible that if these factors were taken into account in considering DPO's current access policy, it may not result in any real change. That, however, may be more reflective of the lengthy, intensive, but constructive (that is, DPO's willingness to amend its access policy) engagement between the Commission and DPO in approving the initial access policy.

The Commission has not adopted DIPL's suggestion to replace "relevant" with "reasonable". The Commission used the QCA Act as the precedent for its recommendation and the Commission considers that "reasonable" would introduce greater uncertainty and subjectivity as it lacks a reference for judgement purposes and boundaries on its scope.

[36] QCA. Final decision DBCT 2019 draft access undertaking March 2021. Accessed on 1 August 2023 at https://www.qca.org.au/wp-content/uploads/2021/03/qca-final-decision.pdf.

Appendix A: About the Port of Darwin

The Port of Darwin is a multi-use, mixed cargo and marine services port. It services various markets, including livestock, dry bulk products, petroleum and other bulk liquids, container cargo, general cargo, cruise vessels, naval vessels, offshore and gas rig servicing and is an offshore industry support hub for most cargoes used in the oil and gas industry in the Arafura and Timor seas as well as waters off Western Australia.

The Port of Darwin is linked to Adelaide by the Tarcoola-Darwin Railway, connected by major road transport highways to other capital cities and Australia's closest shipping port to Asia.

The Port of Darwin is composed of several distinct areas including East Arm Wharf, Fort Hill Wharf, the Marine Supply Base, Stokes Hill Wharf, Fisherman's Wharf, Hornibrook Wharf and the Frances Bay Mooring Basin (see Figure 6 below). Not all areas of the port were leased to Landbridge Port Operations Pty Ltd in 2015 with Stokes Hill Wharf, Fisherman's and Raptis wharves, Hornibrooks pontoon and the Frances Bay Mooring Basin continuing to be owned and operated by the Northern Territory Government. The Darwin Marine Supply Base is leased and operated by ASCO Australia Pty Ltd. The lease for the Darwin Marine Supply Base was established prior to DPO commencing as private port operator and the facility is excluded from the port access and pricing regime under regulation 12(2) of the PM Regulations. Jetties at Bladin and Wickham Points are private facilities servicing the two LNG processing facilities based within the port.

Figure 6 Port of Darwin

Source: Department of Infrastructure, Planning and Logistics, Geospatial Services, Land Information, 2022

Appendix B: Recommended changes and outcomes from the 2018 Review

Table 5 provides a summary of the Commission's recommendations for changes to the port access and pricing regime from the 2018 Review and associated outcomes in terms of implementation following amendments to the PM Act and PM Regulations in 2020.

Table 5 Recommended changes and outcomes from the 2018 Review

Issue and associated recommendations	Outcome
Prescribed services provided under lease	
6h. 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. 6i. The Commission recommends amendments to: • the PM Act 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 • the PM Regulations to set out the approval framework and to allow approval to be subject to conditions determined by the Commission.	No amendments to PM Act or PM Regulations address these matters
Private pilotage provider	
6j. The Commission recommends applying sections 124 and 125 of the PM Act and the price monitoring regime to prescribed services provided by a private pilotage service provider. This should cover: • the application of the UC Act in the same manner it applies to a private port operator • section 123 reviews by the Commission and the powers of the minister to change the form of price regulation under the regime • the making of a price determination by the Commission and the obligations to provide information about charges to the Commission in accordance with the price determination • obligations to maintain separate financial accounts • related provisions dealing with audit and information to be provided to the Commission.	Implemented through changes to the PM Act and PM Regulations, noting the recommendation to require separate financial accounts for prescribed services (7f) has not been implemented
Carve outs under sections 124 and 125 of PM Act	
7d. The Commission recommends sections 124 and 125 of the PM Act be amended to prevent carve outs through a port operator's access policy that reduce the protections offered by these sections unless approved by the Commission in the access policy approval process. An alternative is to provide for the Commission to have regard to sections 124 and 125 when approving a draft access policy of a private port operator.	No amendments to PM Act or PM Regulations address this matter

Separate financial accounts	
7f. The Commission recommends amending the regime to allow the Commission to require a private port operator to maintain and provide to the Commission separate financial accounts for prescribed services as a whole in accordance with guidelines published by the Commission. The PM Act should include the head of power and the PM Regulations should provide guidance about the nature of the accounts and supporting information that can be required by the guidelines. The accounts should be limited to balance sheet, income or profit and loss statements and cash flow statements prepared in accordance with Australian accounting standards and for the prescribed services as a whole, with supporting information to address issues arising from the trust and related arrangements. The accounts should be required to give a true and fair view of the financial position and performance of the private port operator or private pilotage service provider in the provision of prescribed services. A private port operator and private pilotage service provider should be permitted to prepare a single set of accounts when they are within the group of entities.	No amendments to PM Act or PM Regulations address this matter
Oversight of the classification of services	
7h. The Commission recommends amending the regime to give the Commission regulatory oversight, through the access policy approval process, of the classification of services as standard services. 7j. The Commission recommends amending the 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. This would be achieved by requiring an access policy to classify services as standard, non-standard or reference, requiring indicative terms for reference services to be published as part of the access policy, and indicative prices where required by the price determination.	No amendments to PM Act or PM Regulations address these matters
Improvements to negotiate/arbitrate framework	
7l. The Commission recommends the regime be amended to include provisions designed to ensure the private port operator and a port user have an obligation to engage in good faith negotiations prior to an access dispute being raised and to include provisions to promote effective and well-informed negotiations. This could be achieved with prescriptive provisions or with appropriate changes to regulation 13(2) coupled with broad discretion for the Commission when approving an access policy to ensure the provisions in the access policy are appropriate and fit for purpose. 7m. The Commission recommends amending the PM Act and PM Regulations to include provisions under which a port user engaged in access negotiations is given financial information that will enable the port user to assess whether prices are consistent with the access and pricing principles, to support effective and well-informed negotiations. 7r The Commission recommends amending the PM Act to provide for reference of access disputes to arbitration under the CA Act, supplemented by provisions in the PM Act or PM Regulations including provisions for:	Negotiate/arbitrate framework remains in PM Regulations (not transferred to the PM Act) and continues to be defined by private port operator in an access policy. Amendments to PM Regulations give effect to 7l. No amendments address 7m. Broader application of the CA Act not adopted and no amendments address further requirements outlined in 7r. 7s mostly implemented through access policy requirements in PM Regulations 7u implemented through access policy requirements in PM Regulations

• the arbitrator to be given financial information required to assess whether prices are consistent with the access and pricing principles • the right of a prospective port user not to enter into a contract on the terms of the access determination subject to being precluded for a 12 month period from making the same request for access unless it obtains the Commission's consent • parties to bear their own costs, and other costs of the arbitration to be shared or apportioned as determined by the arbitrator • matters that may be provided for in an access determination • enforcement of an access determination 7s. The Commission recommends amending the PM Act to specify the following matters to be taken into account by the arbitrator in the dispute resolution process: • the object of part 11 • the access and pricing principles in section 133 • the operator's legitimate business interest and investment in the port or port facilities • the costs to the operator of providing the service (including the costs of any necessary modification to, or extension of, a port facility) but not costs associated with losses arising from increased competition in upstream or downstream markets • the interests of all persons holding contracts for use of any relevant port facility • firm and binding contractual obligations of the operator or other persons (or both) already using any relevant port facility • the operational and technical requirements necessary for the safe and reliable provision of the service • the economically efficient operation of any relevant port facility • the benefit to the public from having competitive markets 7u. The Commission recommends amending the PM Act to include an obligation to provide arbitration decisions to the Commission.	
Port lease and access policy 7t. The Commission recommends amending the PM Act to provide for the Commission to take into account the port lease when approving an access policy	No amendments to PM Act or PM Regulations address this matter
Improvements to compliance framework 7w. The Commission recommends amending the regime to include: • guidance on the definition of 'material instance of non-compliance' that provides for matters to be taking into account including the provision breached, the effect of the breach, where there is a series of breaches, the effect on port users and the timeliness of steps taken to remedy the breach • an express provision for other parties to be able to report to the Commission on material instances of non-compliance with an access policy	No amendments to PM Act or PM Regulations address these matters except the requirement for CEO certification

• a power for the Commission to investigate third-party reports of material instances of non-compliance with an access policy • a power in section 126 of the PM Act for a court to make enforcement orders for failure to comply with an access policy and failure to negotiate in good faith • a requirement on the CEO of a private port operator or other officer approved by the Commission to certify the information it submits to the Commission is accurate • a power for the Commission to initiate an independent audit of a port operator's compliance with the regime	
Measures of service	
7y. The Commission recommends amending the regime to include a process for a private port operator to propose, and have approved by the Commission, measures of service and to require a private port operator to report to the Commission on performance against those measures of service. 7z. The Commission recommends the regime should require it to publish an annual report on a port operator's performance against the measures of service.	No amendments to PM Act or PM Regulations address these matters
Improvements to access policy approval process	
8b. The Commission recommends amending section 127(2) of the PM Act to include an obligation on a port operator to consult with port users on an initial access policy. 8d. The Commission recommends amending the PM Act to allow the Commission 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 • provisions in a port lease applicable to access to prescribed services • any other matters the Commission considers relevant 8f. The Commission recommends amending section 127 of the PM Act to allow the Commission to determine the approval time for the draft access policy. 8j. The Commission recommends amending regulation 15 to include an obligation for a port operator to publish and provide to the Commission, the findings of a review of its access policy. 8k. The Commission recommends amending the PM Act and the PM Regulations to require a private port operator to submit a revised draft access policy for approval by a date specified in the access policy (and each approved revised policy). 8l. The Commission recommends amending section 127 to provide an approved access policy remains in place until it is replaced with an approved revised access policy.	Amendments to PM Act give effect to 8b No amendments to PM Act or PM Regulations address 8d Amendments to PM Act address 8f by allowing for a 60 day extension of the approval time for a draft access policy No amendments to PM Act or PM Regulations address 8j Amendments to PM Act address 8k by requiring submission of new draft access policy before expiry of current access policy Amendments to PM Act give effect to 8l

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