The Utilities Commission of the Northern Territory

2018 Ports Access and Pricing Review

Draft Report

July 2018

www.utilicom.nt.gov.au

Introduction

The *Ports Management Act* requires the Utilities Commission of the Northern Territory to complete a review of the Northern Territory ports access and pricing regime[1] (regime) by 15 November 2018[2]. This report represents the draft findings and draft recommendations of the commission arising from the review.

About the Utilities Commission

The Utilities Commission is an independent statutory body established by the *Utilities Commission Act* with defined roles and functions for economic regulation in the electricity, water and sewerage industries and designated ports in the Territory.

The commission is responsible for the economic regulatory framework for regulated industries that promotes and safeguards competition as well as fair and efficient market conduct. In the absence of a competitive market, the commission's aim is to promote the simulation of competitive market conduct and prevention of the misuse of monopoly power[3].

The commission has functions under various Acts (and associated regulations) including the *Utilities Commission Act*, *Electricity Reform Act*, *Water Supply and Sewerage Services Act* and the *Ports Management Act*.

Submissions

This Draft Report considers the issues identified by the commission in the Issues Paper as well as those raised by stakeholders in submissions and discussions. This report sets out the commission's draft findings and recommendations, and seeks feedback from all stakeholders involved in the ports industry. All interested parties are invited to make submissions on the Draft Report by **Friday, 31 August 2018**.

In the interest of transparency, the commission will make submissions publicly available with the exception of any confidential information, which includes:

- information that could affect the competitive position of an entity or other person
- or information commercially sensitive for some other reason.

Submissions must clearly specify the document (or part of it) that contains confidential information. A version of the submission suitable for publication (that is, with any confidential information removed) should also be submitted.

To facilitate publication, submissions should be provided electronically by email to utilities.commission@nt.gov.au in Abode Acrobat or Microsoft Word format.

Any questions regarding this Draft Report or the review should be directed to the Utilities Commission by telephone (08) 8999 5480 or email utilities.commission@nt.gov.au.

1 Part 11 of the *Ports Management Act* and Part 3 of the Ports Management Regulations.
2 Section 123(1) of the *Ports Management Act*.
3 Section 2 of the *Utilities Commission Act*.

Timetable

The essential dates for the review of the regime are as follows:

Stage	Time
Issues Paper released	22 February 2018
Public consultation	February – April 2018
Draft Report released	20 July 2018
Public consultation	July – August 2018
Final Report provided to the Minister	November 2018

The Final Report is due to the minister by 15 November 2018. The minister is required to table the report in the Legislative Assembly within seven sitting days of receipt.

The Final Report will be available on the commission's website www.utilicom.nt.gov.au once the minister has tabled the report in the Legislative Assembly.

Contents

Glossary

Term	Definition
ACCC	Australian Competition and Consumer Commission
Access Policy	The Access Policy made by Darwin Port Operations Pty Ltd pursuant to section 127 of the *Ports Management Act* and regulation 13 of the Ports Management Regulations, and approved by the Utilities Commission on 30 June 2017
CC Act	*Competition and Consumer Act 2010* (Cth)
Clause 6 Principles	Clause 6 of the Competition Principles Agreement
COAG	Council of Australian Governments
commission	The Utilities Commission of the Northern Territory
Competition Principles Agreement	Competition Principles Agreement, referred to in section 4 of the *Competition and Consumer Act 2010* (Cth)
CPA	Competition Principles Agreement
CPI	consumer price index
designated port	The same meaning as given to this term in the *Ports Management Act*
dispute	Means an access dispute as defined by the Ports Management Regulations
DPO	Darwin Port Operations Pty Ltd (ABN 62603 472 788), the private port operator for the Port of Darwin
GT	gross tonnage
integrated operator	As defined in the lease for the Port of Darwin entered into by the Northern Territory of Australia and Landbridge Port Pty Ltd as trustee for the Landbridge Darwin Port Lessee Trust on 16 November 2015 and means a person who owns, operates or has a material influencing interest in a business that provides any of the following services to users of the port at the Port of Darwin: stevedoring services, road transport or logistics services, marine transport services, rail transport services or services of a marine supply base. It does not include a person who would otherwise be included merely because that person is an importer or exporter of goods or occupies commercial offices at the Port of Darwin
Issues Paper	The 2018 Ports Access and Pricing Review Issues Paper published by the Utilities Commission on 22 February 2018
LNG	liquefied natural gas
LPG	liquefied petroleum gas
minister	The minister to whom the *Ports Management Act* is committed, currently the Minister for Infrastructure, Planning and Logistics
MSB	Marine Supply Base
MUA	Maritime Union of Australia
National Third Party Access Regime	The regime for access services set out in Part IIIA of the *Competition and Consumer Act 2010* (Cth)
NCC	National Competition Council
negotiated charge	A charge for a prescribed service that is different to the standard charge for the prescribed service published in accordance with clause 7(a) of the Price Determination, which is fixed by means of an agreement between a private port operator and a port user of a kind contemplated by regulation 18 of the Ports Management Regulations or section 110 of the *Ports Management Act*

Term	Definition
non-standard service	As defined by clause 6.2 of the Access Policy
payment terms	Payment terms and conditions for standard services, as contained in the Access Policy
PM Act	*Ports Management Act* (NT)
port user	The same meaning as given to this term in the *Ports Management Act*
prescribed service	As defined by regulation 12 of the Ports Management Regulations
private port operator	The same meaning as given to this term in the *Ports Management Act*
Price Determination	The 2015-18 Prescribed Port Services Price Determination for the Port of Darwin published by the Utilities Commission on 16 February 2016 pursuant to section 132 of the *Ports Management Act* and regulation 16 of the Ports Management Regulations
regime	Part 11 of the *Ports Management Act* and Part 3 of the Ports Management Regulations
regulations	Ports Management Regulations (NT)
regulator	The Utilities Commission of the Northern Territory, as provided for by section 119(3) of the *Ports Management Act* and as established under the *Utilities Commission Act*
Reporting Guidelines	The Port of Darwin Reporting Guidelines dated 28 March 2018 published by the Utilities Commission and made pursuant to section 128 of the *Ports Management Act* and Regulation 14 of the Ports Management Regulations
review	The 2018 Ports Access and Pricing Review, required to be conducted by the regulator in accordance with section 123 of the *Ports Management Act*
review period	As defined by section 123(6) of the *Ports Management Act*
standard charge	A charge for a prescribed service, which is published in accordance with clause 8(a) of the Price Determination and not a negotiated charge.
standard service	Services identified in schedule 1 of the Access Policy to which the standard services terms and conditions apply.
standard terms	Standard services terms and conditions for standard services, as contained in the Access Policy.
UC Act	*Utilities Commission Act*

Executive summary

The *Ports Management Act* (PM Act) and Ports Management Regulations commenced in mid-2015 as a result of the Northern Territory Government's commitment to implement an improved regulatory regime for designated ports in the Territory, and to facilitate a commercially efficient port that would expand and grow in line with the Territory's economy.

Part 11 of the PM Act and part 3 of the regulations establish an access and pricing regime for Territory ports. The access regime is essentially of the negotiate/arbitrate type, while the pricing regime is based on price monitoring. The object of part 11 and the associated regulations is to promote the economically efficient operation and use of and investment in major port facilities in the Territory by which services are provided to promote effective competition in upstream and downstream markets. Under the regime, the Utilities Commission of the Northern Territory is the regulator of port access and pricing for prescribed services provided by a private port operator at a designated port.

Darwin Port Operations Pty Ltd (DPO) was declared the operator of the Port of Darwin under the PM Act on and from 1 July 2015. On 15 November 2015, ownership of DPO was acquired by Landbridge Infrastructure Australia Pty Ltd (Landbridge) as part of Landbridge's 99-year lease of the assets of the Port of Darwin. The change of status of DPO to a private port operator triggered the commencement of the access and pricing regime, including the commission's role as the economic regulator for ports.

The PM Act requires the commission to complete a review of the regime by 15 November 2018. This is the first review of the regime since it began two and a half years ago.

The review assesses the need for and effectiveness of the port access and pricing regime, and whether any changes to the regime should be made. In short, the fundamental question for the commission to answer is whether the regime remains fit for purpose. Section 123 of the PM Act expressly specifies the review is to determine whether:

- there is an ongoing need for regulatory oversight of access to and pricing of prescribed services provided by private port operators
- there is a need to change the form of regulatory oversight of access and, if so, how
- there is a need to change the form of regulatory oversight of prices and, if so, how
- amendments should be made to part 11 of the PM Act or the regulations and, if so, the nature of those amendments.

In order to answer these questions, the commission commenced the review with the publication of an Issues Paper on 22 February 2018. The Issues Paper identified topics the commission believed should be considered as part of the review. The commission publicly consulted with port industry stakeholders, including DPO, about the review and the issues highlighted in the Issues Paper. The commission received six formal submissions, which were published on the commission's website.

As part of the review the commission considered the submissions received from stakeholders as well as carrying out its own research and obtained specialist advice about the port industry and market. This information is discussed in more detail in the following chapters of this Draft Report, including the commission's draft findings and recommendations.

In undertaking the review, the commission was guided by relevant legislative objectives, including those specified in part 11 of the PM Act, together with the commission's general objectives contained in the *Utilities Commission Act* (UC Act).

The commission also assessed the regime against the access principles specified in clause 6 of the Competition Principles Agreement (CPA) entered into by the Commonwealth, and all state and territory governments in April 1995. The clause 6 principles represent a template for promoting consistency and quality for a regulatory regime that seeks to provide access to the services provided by significant monopoly infrastructure, such as the prescribed services provided through the Port of Darwin. A state or territory-based access regime that meets the clause 6 principles, as assessed by the National Competition Council (NCC) may then be certified as an effective access regime for the purposes of part IIIA of the *Competition and Consumer Act 2010* (Cth).

The Port of Darwin plays a critical role in the Territory economy and is a natural monopoly with limited substitutes. Port services are essential to the operation and performance of many dependent upstream and downstream markets, such as shipping, logistics, and imports and exports. As a result, an effective port access and pricing regime is needed to address the risk of the DPO exercising its market power through the imposition of unreasonable terms and conditions of access or charging excessive prices. If the access and pricing regime is not effective in preventing such behaviour, there could be significant impacts on other markets and therefore consumers and the broader Territory economy.

Overall, the commission's draft finding is the operator of the Port of Darwin does have substantial market power and the potential to exercise it. However, no evidence has been provided to the commission to suggest DPO has exercised its market power during the current three-year review period. In any case, the regime is still in its very early stages and therefore there is little practical experience on which to judge the effectiveness of the regime. The commission also formed the opinion that given the substantial market power of DPO and the light-handed regime currently in place, the benefits of the current regulatory regime outweigh the costs associated with its implementation. Nevertheless, the commission has noted several areas in which the regime, as established through the PM Act and regulations, does not meet the clause 6 principles such that the NCC would be unlikely to recommend certification of the regime.

Therefore, the commission's draft response to the four questions above that are the subject of this review are as follows:

- there is an ongoing need for regulatory oversight of access to and pricing of prescribed services provided by the private port operator at the Port of Darwin
- at this time, there is no need to change the form of regulatory oversight for access so the negotiate/arbitrate model should continue
- at this time, there is no need to change the form of regulatory oversight for prices so price monitoring should continue
- however, the commission has identified several deficiencies in the current regime that suggest the need for amendment to part 11 of the PM Act and regulations to ensure the regime is effective, fit for purpose and better meets its legislative objectives.

On this last point, the commission is recommending changes that would improve the operation of any generic light-handed negotiate/arbitrate access model and should not

necessarily be seen as a reaction to the operation or activities of DPO under the current legislation.

The commission now seeks feedback from port stakeholders on the draft findings and draft recommendations contained in this report, which will inform the commission's Final Report for the review of the regime. The Final Report will be delivered to the minister before 15 November 2018. The minister is required to table the Final Report in the Legislative Assembly within seven days of receipt.

Any subsequent amendments to the regime following the commission's findings and recommendations are entirely a matter for consideration and decision by the Territory Government and Parliament.

The commission thanks each of the organisations that made a submission on the Issues Paper, as well as DPO for engaging constructively with the commission and providing the necessary information to assist in the conduct of the review. The commission looks forward to continuing to engage with DPO and port stakeholders throughout the rest of the review.

1 Access and pricing regime

1.1 Background

The *Ports Management Act* (NT) (PM Act) and regulations commenced in 2015 as a result of the Northern Territory Government's commitment to introduce an improved regulatory regime for designated ports in the Territory and facilitate a commercially efficient port that would expand and grow in line with the Territory's economy.[4]

Part 11 of the PM Act and part 3 of the regulations set up the access and pricing regime for Territory ports. The regime appoints the Utilities Commission of the Northern Territory as the regulator of port access and pricing for prescribed services provided by a private port operator at a designated port.

Darwin Port Operations Pty Ltd (DPO) was declared the operator of the Port of Darwin under the PM Act on and from 1 July 2015. On 15 November 2015, ownership of DPO was acquired by Landbridge Port Pty Ltd as part of the 99-year lease of the Port of Darwin. The change of status of DPO to a private port operator activated the regime, including the commission's role as the regulator for ports.

1.2 Overview of the regime

The object of the regime (part 11) is set out at section 117 of the PM Act. It is 'to promote the economically efficient operation of, use of and investment in major port facilities in the Territory by which services are provided, so as to promote effective competition in upstream and downstream markets'.

Part 11 of the PM Act has five components, summarised as:

i. division 1 deals with legal and administrative matters (such as the object of the part, the requirement for the regime to be reviewed by the commission and the making of regulations)

ii. division 2 contains provisions aimed at preventing anti-competitive conduct by a port operator

iii. division 2 also contains provisions for the development of an access policy by a port operator and reporting in relation to it

iv. division 3 deals with price determinations made by the commission

v. division 4 deals with the commission's information-gathering powers and confidentiality.

Part 3 of the regulations supplements part 11 by:

- defining the prescribed services to which the regime applies (regulation 12)
- establishing requirements of an access policy by a private port operator (regulations 13 to 15)
- setting out the requirements for the commission in making a price determination (regulations 16 and 17)
- establishing the ability for a port operator and port users to agree on a charge for

4 Giles, Adam. 2014. "Second Reading Speech: Ports Management Bill." Northern Territory Parliament, page 1.

a prescribed service that is different to the standard charge (negotiated charge) (regulation 18).

The regime also imposes two restraints on the conduct of a port operator regarding behavior that prevents or hinders access or unfairly differentiates between port users. These are contained in sections 124 and 125 of the PM Act.

Under section 124(1) a private port operator must not engage in conduct for the purpose of preventing or hindering the access of a port user (or potential port user) to any prescribed service. Conduct taken to breach this prohibition is where a private port operator provides (or proposes to provide) access to the prescribed service to itself, or a related body corporate of itself, on more favourable terms than the terms on which it provides (or proposes to provide) access to the prescribed service to a competitor.

Under section 125(1), in negotiating arrangements to provide access to any prescribed service or a change to any such arrangement, a private port operator must not unfairly differentiate between port users in a way that has a material adverse effect on the ability of one or more of the port users to compete with other port users.

Note, both sections are subject to carve-outs through DPO's Access Policy, which may weaken the restriction imposed on DPO. For example, in the case of hindering, the restriction does not apply where an act is done in accordance with DPO's Access Policy. In regards to differential treatment, the restriction does not apply where DPO is expressly permitted to do so by the Access Policy. This issue is discussed in more detail in Chapter 7.

At present, there is only one private port operator (DPO) and one designated port (Port of Darwin) subject to the regime. However, other ports may be brought into the regime through designation by the Territory Government.[5] The present review only applies to the regime as it is operating with respect to one designated port.

The regime applies to prescribed services specified by the regulations as the following service provided by a private port operator:

- providing or allowing for access by 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
- allowing entry of persons and vehicles to any land on which port facilities of the designated port are located[6].

The form of access regulation in the regime may be classified as being of the negotiate/arbitrate type, where access to a prescribed service by a port user is to be the subject of commercial negotiation between the user and the DPO, with recourse to an arbitration process if a dispute arises that cannot be resolved between the parties. The negotiate/arbitrate requirements are specified in the regulations as criteria to be applied by the commission in approving the DPO's Access Policy and are therefore ultimately embedded in the Access Policy.

5 Sections 3 and 6 of the *Ports Management Act* and Giles, Adam. 2014. "Second Reading Speech: Ports Management Bill." Northern Territory Parliament.

6 Regulation 12(2) of the Ports Management Regulations. A listed service, when provided under a lease, is not a prescribed service – regulation 12(3) of the Ports Management Regulations.

The form of price regulation in the regime is of the price monitoring type. The commission is empowered to make a ports price determination under part 3 of the UC Act, which provides the possibility that any form of price regulation the commission considers appropriate could be applied. However, this discretion is negated by the regulations that specify price monitoring as the form of price regulation to be used by the commission[7].

Overall, the intention of the access and pricing regime is to protect port users and potential users of the prescribed services from the potential exercise of market power by a private port operator. This is because such services are generally considered to have natural monopoly characteristics and the potential often exists for market power to be exercised by the provider of these services. For example, this could be through the imposition of unreasonable terms and conditions of access or charging excessive prices. This can adversely impact upstream and downstream markets, such as shipping, logistics and imports and exports.

1.3 Commission activity since commencement of the regime

Since the commencement of the regime in November 2015, the commission has discharged its role in accordance with the legislative requirements, through:

- developing and publishing a Price Determination for the Port of Darwin in February 2016
- approving the DPO's Access Policy in June 2017
- producing and publishing Reporting Guidelines in March 2018.

All of these processes involved public consultation with relevant stakeholders.

Note, the current Price Determination will expire in February 2019. In the coming months the commission will commence a review of the current Price Determination, including public consultation in preparation for its replacement. The commission intends to make a new Price Determination to take effect at the time of expiry of the current Price Determination.

The commission also monitors DPO's compliance with both the Price Determination and Access Policy and reports annually to the minister. The commission's report to the minister is required to be tabled in Parliament and is published on the commission's website.[8]

7 Regulation 16(2)(a) of the Ports Management Regulations.
8 Section 121 of the *Ports Management Act*.

2 Review of the regime

2.1 Purpose of the review

Section 123(1) of the PM Act requires the commission to periodically conduct and complete a review of the operation of the regime. The first review is to be undertaken within the third year following commencement of the regime (during the year ending 15 November 2018). All subsequent reviews are to be conducted every five years.

The review assesses the need for and effectiveness of the regime, and whether any changes are recommended. The fundamental question the commission is being asked to answer is whether the regime remains fit for purpose. Specifically, the review determines whether:

- there is an ongoing need for regulatory oversight of access to and pricing of prescribed services provided by private port operators
- there is a need to change the form of regulatory oversight of access and if so, how
- there is a need to change the form of regulatory oversight of prices and if so, how
- amendments should be made to part 11 of the PM Act or the regulations and if so, the nature of these amendments[9].

The outcome of the review will be the commission's Final Report, which will make findings and recommendations about these matters. The minister is required to table the Final Report in Parliament. Any subsequent amendments to the regime following the commission's findings and recommendations are a matter solely for consideration by the Territory Government and Parliament.

2.2 Objectives of the review

The commission has examined whether there is an ongoing need for regulatory oversight and if any changes are required to the nature of this oversight. In answering this question, the commission has conducted the review by reference to:

- the object of part 11 (section 117 of the PM Act)
- the matters set out in section 123 of the PM Act.

The commission has also taken into account the access and pricing principles established under section 133 of the PM Act, which state:

a) the price of access to a prescribed service should be set to:
   - generate expected revenue from the service that is at least sufficient to meet the efficient costs of providing access to it
   - include a return on investment commensurate with the regulatory and commercial risks involved

b) price structures should:
   - allow multi-part pricing and price discrimination when it aids efficiency
   - not allow a vertically integrated provider of access to services to set terms and

9 Section 123(2) of the *Ports Management Act*.

conditions that discriminate in favour of its downstream operations, except to the extent the cost of providing access to others is higher

c) access and pricing regimes should provide incentives to reduce costs or otherwise improve productivity.

When making a price determination, the commission must ensure it is consistent with the access and pricing principles.[10] Regulation 16 sets out a number of other matters the commission must have regard to, such as the requirement to use price monitoring as the form of price regulation.[11] Therefore, in conducting the review, the commission has considered whether part 11, together with the requirements of regulation 16, are operating so prices have been (and will be) consistent with the access and pricing principles.

The commission has also taken into account the factors under the *Utilities Commission Act* (UC Act) that it must have regard to when performing its functions, which are the need to:

- promote competitive and fair market conduct
- prevent misuse of monopoly or market power
- facilitate entry into relevant markets
- promote economic efficiency
- ensure consumers benefit from competition and efficiency
- protect the interests of consumers with respect to reliability and quality of services and supply in regulated industries
- facilitate maintenance of the financial viability of regulated industries
- ensure an appropriate rate of return on regulated infrastructure assets[12].

In this review, the commission has also assessed the access component of the regime against the access principles specified in clause 6 of the Competition Principles Agreement (CPA) entered into by the Commonwealth, and all state and territory governments in April 1995. This matter is discussed further in Chapter 4 of this report.

2.3 Methodology

In carrying out the review, the commission has conducted research and sought specialist advice on the port industry and market. The research and information gathered by the commission as part of the review includes:

- appraisal of issues with the regime as highlighted through the approval process for DPO's Access Policy
- comparison of volume and revenue for the Port of Darwin for 2013 to 2017
- commissioning of the 2017 port price benchmarking study and report
- ongoing consultation with DPO, port users and stakeholders (through meetings and submissions)
- analysis of recent and future changes at ports in the Territory and markets served by them

10 Section 132 of the *Ports Management Act*.
11 Regulation 16 of the Ports Management Regulations.
12 Section 6(2) of the *Utilities Commission Act*.

- comparative research on relevant port access and pricing regimes across Australia
- assessment of the current regime against clause 6 of principles and the criteria for recommendation for certification as an effective regime under the national regime
- assessment of the financial accounts for DPO for 2015-16 and 2016-17
- evaluation of the relevant clauses in the port lease and sublease.

2.4 Consultation

In addition to being good regulatory practice, there is a legislative requirement for the commission to consult with DPO during the review[13]. The commission has met with DPO on a number of occasions to discuss the review and issues under consideration. DPO has assisted the commission by providing information necessary for the review, tours of the port and facilities, as well as making a submission on the Issues Paper. The commission has taken into account all relevant information provided to it by DPO and will continue to engage with DPO throughout the next stages of the review.

The commission has also engaged with numerous port users to discuss their experiences regarding access to the prescribed services at the Port of Darwin.

The commission released an Issues Paper for the review on 22 February 2018. All parties with an interest in port services provided at the Port of Darwin were invited to formally comment on the topics raised in the Issues Paper and highlight any additional issues for consideration. The Issues Paper was published on the commission's website and all major stakeholders were sent a copy and informed by email.

To ensure all port users and stakeholders were aware of the review and to encourage a broad range of participation in the submissions and review process, the commission prepared a Consultation Plan. The plan lists stakeholders identified through the commission's research. All listed stakeholders were informed about the review and sent a copy of the Issues Paper. Additionally, the commission contacted listed stakeholders by phone, encouraging feedback on the Issues Paper and offering to provide further information about the regime and the review, if required. A list of the stakeholders contacted is included in Appendix A.

Regarding the Issues Paper, submissions were received from DPO, INPEX, ConocoPhillips and its stakeholders, Svitzer, Verdant Minerals and the Maritime Union of Australia (MUA). The commission met with these stakeholders to discuss their submissions. The submissions (excluding confidential material) were published on the commission's website on 29 May 2018.

The commission intends to follow a similar consultation process for this Draft Report.

13 Section 123(3) of the *Ports Management Act*.

3| The Port of Darwin

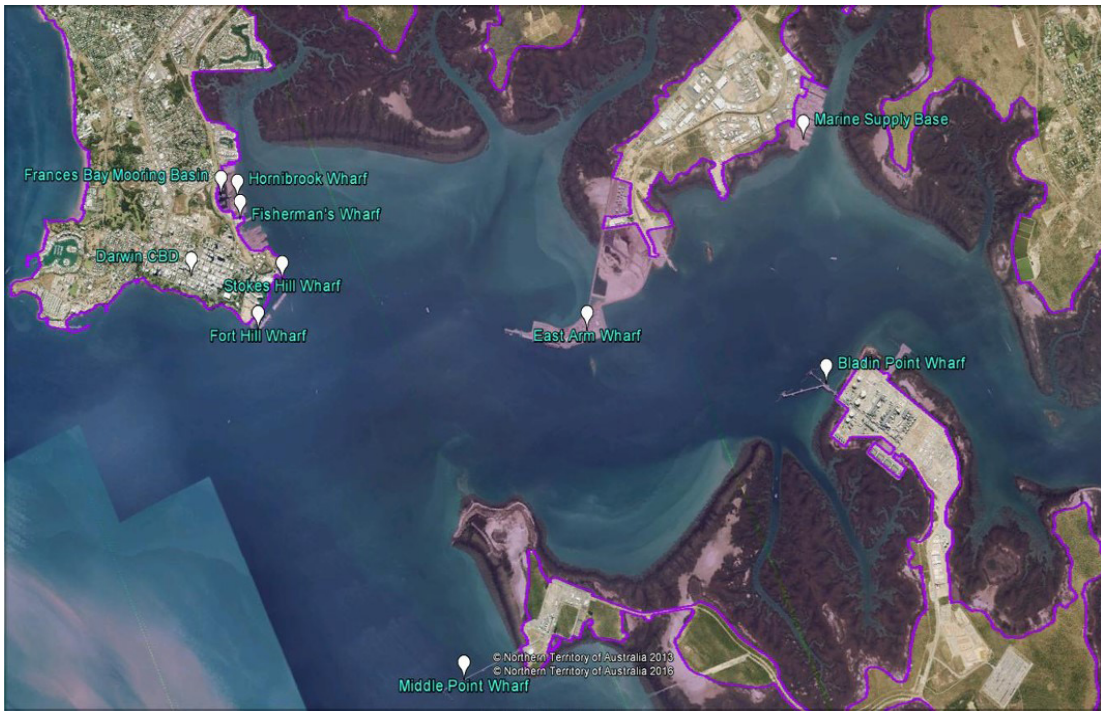
3.1 About the Port of Darwin

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, and offshore and gas rig servicing. Two high pressure natural gas pipelines pass through the Port of Darwin that service the two gas liquefaction terminals based within the port. It is a major 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.[14]

The port is directly linked to Adelaide by the Tarcoola-Darwin Railway, is connected by major road transport highways to other capital cities and is Australia's closest shipping port to Asia.[15]

The Port of Darwin is composed of several distinct areas including East Arm Wharf, Fort Hill Wharf, the Marine Supply Base (MSB), Stokes Hill Wharf, Fisherman's Wharf, Hornibrook Wharf and the Frances Bay Mooring Basin (see Map 1 below). Not all areas were leased to Landbridge. Stokes Hill Wharf, Fisherman's Wharf, Hornibrook Wharf and Frances Bay Mooring Basin continue to be owned and operated by the Territory Government, leaving East Arm Wharf and Fort Hill Wharf with DPO and the MSB with ASCO Australia Pty Ltd.

Map 1: Port of Darwin (extract)



14 Darwin Port. 2017. "About Us." Accessed 14 November 2017. www.darwinport.comau/about-darwin-port paragraph 2.

15 Darwin Port. 2017. "About Us." Accessed 14 November 2017. www.darwinport.comau/about-darwin-port paragraph 2.

3.2 Recent trends

Following a peak in 2013-14, there has been a progressive downturn in the total trade through the port over the last three years, with a shift in top traded commodities and main sources of revenue. This is a result of the commodities downturn (especially for iron ore and manganese) and the near completion of the construction phase of the INPEX Ichthys liquefied natural gas (LNG) project. There has been a steady decrease in vessel visits to the port. Even at its peak in 2013-14, the utilisation of berthage at East Arm Wharf was estimated at 43 per cent.

For 2013-14, revenue from wharfage, berthage, pilotage and port dues was $41.2 million.[16] Revenue from the same services for 2014-15 was $41.5 million. This is a slight increase, despite the decline in bulk cargo volume. This may be due to an increase in prices by the (then government-owned) Darwin Port Corporation in February 2015, including the introduction of a new fixed berthage fee.[17] Following the change in port operators in late 2015, revenue for equivalent services for 2015-16 was $30 million and $26.7 million for 2016-17.

It should be recognised there have been changes to the way revenue data is reported since the appointment of a private port operator. In 2013-14 and 2014-15 the port was operated by government, which published shipping and cargo revenue in its annual report. Shipping and cargo revenue includes wharfage, berthage, pilotage and port dues. Following the leasing of the port and the commencement of the regime, DPO reports to the commission each year on revenue for prescribed services[18]. Revenue for prescribed services includes wharfage, berthage, pilotage, port dues as well as entry/access to land. Therefore, these differences need to be taken into account when comparing revenue figures.

Another key difference between the figures is the figures reported by the then government-owned port operator included an amount for rig tenders. As services provided at the MSB are not prescribed services, the figures for 2015-16 and 2016-17 exclude the MSB and rig tenders, which would be higher if rig tender revenue was included. Additionally, prior to the commencement of the MSB, rig tenders were supported by the East Arm Wharf rather than the MSB.

Regarding future developments, DPO committed to invest an initial $35 million of new growth investment over five years in the port[19] and has already completed a number of projects up to approximately $13 million, including a new refrigerated container storage area. Other future projects include the strategic hardstand development, the harbour support vessel facility and the expansion of East Arm Wharf.

Since it became the private port operator, DPO has increased prices once on standard charges for prescribed services. The new charges came into effect on 1 August 2017. All charges for prescribed services (except one) increased by 1.1 per cent. The exception, the charge for bulk liquid fuels (inbound) increased by 3.6 per cent. DPO explained the reason for the higher increase for this service was to receive an acceptable rate of return for the bulk liquids fuel berth infrastructure upgrades.

16 Revenue for wharfage, berthage, pilotage and port dues is reported collectively as shipping and cargo revenue: Darwin Port Corporation. 2014. 2013-2014 Annual Report, page 136.
17 Darwin Port Corporation. 2014. 2013-2014 Annual Report, page 116 and 118.
18 Regulation 16(2)(e) Ports Management Regulations and clause 10 of the Price Determination.
19 Landbridge, Media Release, 13 October 2015.

DPO introduced a new standard charge for a prescribed service in August 2017, the Bladin Channel port dues levy, which will apply to vessels larger than 20 000 gross tonnage (GT) accessing the Bladin Channel. DPO has explained the reason for the new charge is to recover investment made by it to specifically support the INPEX Ichthys LNG project. The commission understands, at present, the only large vessels expected to use the Bladin Channel are INPEX's customers.

On 29 June 2018, DPO advised the commission of intended changes to its Darwin Port Tariff Schedule for 2018-19, which covers prices for standard charges for prescribed services.[20] The new tariff schedule will commence on 1 August 2018 and will be published on DPO's website.[21] All charges (excluding port induction fees) will increase by 1.9 per cent. This is consistent with the rise in the national consumer price index (CPI) for the year to the March quarter 2018.[22] The following additional changes to the Tariff Schedule are also planned:

- to include a statement informing potential port users that if their access request involves new capital investments then the price information provided may require adjustments to reflect the additional capital costs
- additional explanations of several tariff line items
- the removal of several tariff line items no longer levied by the Darwin Port
- the removal of the alternative charges (based on crane capacity) for privately operated cranes at East Arm and Fort Hill wharves, adopting the lower rate of the two that appear in the 2017-18 schedule.

The commission is currently reviewing the changes to the Darwin Port Tariff Schedule for 2018-19 and will publish a brief statement on its website.

Since 2015, DPO has entered into 12 negotiated agreements for non-standard services, for example, leases and licences for facilities such as warehouses and demountable buildings.[23]

A copy of the commission's Port of Darwin Comparative Report, which provides further information on the comparison of the annual reporting for the Port of Darwin for 2013 to 2017 is available on the commission's website.

3.3 Price benchmarking

As part of this review, the commission engaged the specialist services of GHD Advisory (GHD) to undertake a benchmarking study of port prices for the Port of Darwin against comparable interstate ports. The ports included in the study were Darwin, Broome, Port Hedland, Fremantle, Adelaide, Cairns, Townsville and Gladstone.

Note, undertaking a comparison of ports is inherently difficult due to the different characteristics of each port, the types of markets served by the port and differing volumes going through the ports. The fixed costs of a port are generally high and accordingly there

20 As required by regulation 16(2)(c)(i) of the Ports Management Regulations and clause 9(a)(i) of the Price Determination.

21 As required by regulation 16(2)(c)(ii) of the Ports Management Regulations and clause 9(a)(ii) of the Price Determination.

22 Australian Bureau of Statistics, Media Release: CPI rose 0.4 per cent in the March quarter 2018, 24 April 2018, page 1.

23 Landbridge Darwin Port. 2018. Submission to the Utilities Commission: 2018 Ports Access and Pricing Review Issues Paper, page 4.

are normally large economies of scale involved. In general, ports with larger volumes would be expected to have lower costs per unit.

The GHD report aims to provide stakeholders and the commission with a general understanding of the port industry, an indication of the information available and the relative cost imposed by the Port of Darwin compared to other ports across Australia. The report is not seeking to measure the efficiency of the Port of Darwin or DPO.

The main findings as reported by GHD are as follows:

- Over the last three years, the published port charges for the prescribed services for the Port of Darwin have experienced only relatively minor increases when compared to other interstate ports studied and taking into account local CPI changes. The main reasons for this may be due to a combination of declining total trade at the Port of Darwin (caused by bulk mineral exports), the lack of significant new large-scale investments in port infrastructure compared with other ports and unchanging financial return requirements since DPO became a private port operator.
- The Port of Darwin appears to have relatively high levels of pilotage costs for large (high GT) vessels calling at the port. This is particularly true for pure car carriers and cruise ships.
- In terms of visible total port call costs for 2017, generally the port appears not to be the most expensive of the comparator ports for the various cargo sectors, with the exception of motor vehicle imports and cruise ship visits. For cruise ship visits, Darwin is closely followed by Cairns. The Port of Darwin is strongly cost competitive for livestock vessels, which confirms its key national position in this export trade.
- Overall, the call costs for Darwin currently appear to only represent a small percentage of cargo shipment values.
- The relative position of total port call costs for the Port of Darwin appears to have improved over the last three years due to the lower rate of increase in port charges compared with the other interstate comparator ports.[24]

The full 2017 Darwin Port Price Bench Marking Study completed by GHD is available on the commission's website.

24 GHD Advisory. 2017. Darwin Port Price Benchmarking Study 2017, page 20.

4 Competition Principles Agreement

4.1 Overview

The CPA was entered into by the Commonwealth, states and territories (including the Northern Territory) in April 1995 and modified in April 2007.[25] The CPA is part of the National Competition Policy, which committed to a program of economic reforms in Australia. One of the outcomes of the program was the introduction of a national regime for access to services provided by nationally significant infrastructure facilities.[26] This is known as the National Third Party Access Regime (national regime) and is established by Part IIIA of the *Competition and Consumer Act 2010* (Cth).

The national regime seeks to promote third-party access to significant infrastructure by means in which services are provided, thereby promoting effective competition in upstream and downstream markets.[27] The national regime creates four approaches to facilitate third-party access:

i. a voluntary access undertaking given by a service provider and accepted by the Australian Competition and Consumer Commission (ACCC)

ii. declaration and negotiation/arbitration

iii. certification of effective state or territory-based access regimes

iv. competitive tender process for government-owned facilities.

The ACCC is responsible for assessing access undertakings proposed by service providers of infrastructure facilities. The ACCC also arbitrates access disputes where a service has been declared. The National Competition Council (NCC) is responsible for making recommendations to relevant ministers regarding applications for declaration of services, as well as recommendations for certification of effective access regimes.[28]

4.2 Certification

State and territory governments can establish access regimes for infrastructure services within their jurisdiction and apply to the NCC to have the regime recommended for certification. The effect of certification is that the state or territory regime applies exclusively to the specific infrastructure services and both the access undertaking and declaration pathways under the national regime are no longer available.[29]

The Territory Government has made a commitment that all territory access regimes for services provided by significant infrastructure facilities would be submitted for

25 Competition Principles Agreement 11 April 1995 (as amended to 13 April 2007), Council of Australian Governments.

26 National Competition Policy, Website – Overview, http://ncp.ncc.gov.au/pages/overview accessed 7 May 2018.

27 Section 44AA of the *Competition and Consumer Act (2010)* Cth.

28 National Competition Policy, Website – About Us, accessed 7 May 2018 http://ncc.gov.au/about/about_us and Australian Competition and Consumer Commission, Website – National Access Regime Under Part IIIA.

29 Section 44F(1)(a) of the CCA (a service cannot be declared if it is the subject of an effective access regime); section 44ZZA(3AA) (the ACCC cannot accept an undertaking if the service is the subject of an effective access regime).

certification.[30] For example, the Tarcoola-Darwin railway, which is subject to a third-party access regime established under the *AustralAsia Railway (Third Party Access) Act*, was certified in March 2000 for 30 years.[31]

Other examples of state and territory regimes that have been certified include the Northern Territory electricity distribution networks access regime, the Northern Territory covered pipelines access regime, the South Australian ports access regime, the Western Australian rail access regime and the Dalrymple Bay Coal Terminal access regime.[32] To date, the Northern Territory port access and pricing regime has not received certification because the Territory Government has not yet made an application. Whether it seeks certification of the regime is entirely a matter for the Territory Government.

4.3 Clause 6 of the Competition Principles Agreement

Applications for certification are assessed against clauses 6(2) – 6(5) of the CPA, which set the types of infrastructure services that may be subject to an access regime, as well as the broad requirements for regulated access.[33] A state or territory must take a reasonable approach to incorporating the clause 6 principles in an access regime if it is to be certified as effective for the purpose of part IIIA of the *Competition and Consumer Act 2010* (Cth).[34]

In the Issues Paper, the commission asked stakeholders whether the clause 6 principles were an appropriate tool for assessing the access regime for the purposes of the review.[35] The submission from ConocoPhillips and its stakeholders supported this approach,[36] while the MUA and DPO made submissions to the contrary. The remaining submissions did not comment on the topic.

The MUA commented that the clause 6 principles are not the appropriate tool for assessing the regime and instead the assessment should be much wider. It proposed the critical public interest that ports serve should guide regulation and decision making.[37] The commission acknowledges the MUA's recommendation and the notion that the welfare of Australians is an important aspect of economic regulation of monopoly infrastructure.[38]

30 Competition and Infrastructure Reform Agreement 10 February 2006 (as amended 13 April 2007), clauses 2.9 and 4.1, accessed 19 December 2017. This commitment was reaffirmed by the Northern Territory Government with the signing of the COAG Intergovernmental Agreement on Competition Productivity-Enhancing Reforms by the Chief Minister on 9 December 2016, which is yet to come into force.

31 The decision of the then Treasurer is available on the NCC's website at http://ncc.gov.au/images/uploads/CERaNtDe-001.pdf.

32 For more examples of certified state and territory access regimes see the National Competition Council [website], Past Applications Register, Northern Territory Access to Services of Electricity Distribution Networks - certified 21 March 2002 http://ncc.gov.au/applications-past/past_applications accessed 7 May 2018.

33 *Competition and Consumer Act*, section 44NA(4) which in turn requires the NCC to make its assessment in accordance with section 44M(4). That section requires the assessment to be made applying the clause 6 principles and having regard to the objects of part IIIA. Section 44N(2) applies the same requirements to the minister. Section 44DA specifies that the obligation of the NCC and the minister to apply the clause 6 principles is an obligation to treat each individual relevant principle as having the status of a guideline rather than a binding rule.

34 National Competition Council, Access to Monopoly Infrastructure in Australia – National Third Party Access Regime (*Competition and Consumer Act 2010*, Part IIIA), December 2017, page 2.

35 Utilities Commission, 2018 Ports Access and Pricing Review Issues Paper, 22 February 2018, page 18.

36 ConocoPhillips and its stakeholders, Comments on the 2018 Ports Access and Pricing Review Issues Paper, April 2018, Issue 7.

37 Maritime Union of Australia, Submission Ports Access and Pricing Review NT Utilities Commission, 6 April 2018, page 19.

38 Harper, I., Anderson, P., McCluskey & S., O'Bryan, M., Competition Policy Review: Final Report, March 2015, page 470.

As mentioned in Chapter 2, in conducting the review the commission took into account the factors under the UC Act that it must regard when performing its functions. These include ensuring consumers benefit from competition and efficiency and the protection of consumer interests with respect to reliability and quality of services and supply in regulated industries.[39]

DPO proposed an assessment of the current regime should focus on whether:

- the objects of part 11 of the PM Act are being achieved
- port users have been subjected to any anti-competitive behaviour by DPO in relation to prescribed services.[40]

The commission acknowledges these as appropriate measures for conducting the review and regarded both. However, the commission's view is these are not the only measures to be considered when assessing the need for and effectiveness of the port access and pricing regime, and whether any changes are required.[41]

In its 2013 inquiry into the National Access Regime, the Productivity Commission affirmed the clause 6 principles as a template for providing a minimum quality standard and consistency for access regulation.[42] An effective regime is one that conforms to the principles set out in clause 6 of the CPA.[43] Overall, adherence to the clause 6 principles has improved the consistency and quality of state and territory access regimes and is an appropriate benchmark.[44] The commission has therefore used the clause 6 principles as one measure to assess whether there is a need to change the form of access oversight or amendments to the current regime are required.[45]

4.4 Assessing the regime against clause 6 of the CPA

The commission has completed an assessment of whether the regime, in its current form, would satisfy the clause 6 principles. This task was completed using the NCC's Guide to Certification, which is intended to assist parties in assessing the merits of an application for certification and reflects the NCC's current approach.[46]

The NCC groups the clause 6 principles into five areas, namely:

i. scope of the access regime

ii. interstate issues

iii. negotiation framework

iv. dispute resolution framework

39 Section 6(2) of the *Utilities Commission Act*.
40 Landbridge Darwin Port, Submission to the Utilities Commission 2018 Ports Access and Pricing Review Issues Paper, April 2018, page 10.
41 Section 123 of the *Ports Management Act*.
42 Australian Government: Productivity Commission. 2013. National Access Regime: Inquiry Report no. 66, page 188.
43 National Competition Council, Certification of State and Territory Regimes – A Guide to Certification under Part IIIA of the *Competition and Consumer Act 2010* (Cth), December 2017, pages 8 and 10.
44 Australian Government: Productivity Commission. 2013. National Access Regime: Inquiry Report no. 66, pages 183, 188 and 252.
45 Section 123(2)(b) and (c) of the *Ports Management Act*.
46 National Competition Council, Certification of State and Territory Regimes – A Guide to Certification under Part IIIA of the *Competition and Consumer Act 2010* (Cth), December 2017, page 9.

v. terms and conditions of access.[47]

The commission's concludes the regime would not satisfy the clause 6 principles. Generally, most of the shortcomings are due to limitations of the commission's powers regarding pricing and information collection, as well as the absence of important elements of the negotiate/arbitrate framework from the regime.

Appendix D provides full details of the assessment undertaken by the commission and Chapter 7 of this report addresses in more detail the specific areas of the regime that fall short of the clause 6 principles.

4.5 Is it necessary for the current regime to meet the clause 6 principles?

In its submission, DPO put forward various reasons why it believes the regime does not need to be as extensive as the clause 6 principles. This section will consider those points and discuss the commission's conclusions.

The commission is concerned the highlighted shortcomings of the regime increase the risk of ineffective access regulation for the next review period, particularly if activity at the Port of Darwin were to increase. The commission notes the planned commencement of the operational stage of the INPEX project later in 2018, as well as DPO's intention to increase vessel numbers and trade volumes for the port in general. The risks and consequences of an ineffective regime, as well as the commission's observations about the negotiated agreements are dealt with in more detail in Chapter 7.

DPO argues the regime is intended to be light-handed and therefore it is appropriate for it to not be as extensive as the clause 6 principles.[48]

The commission acknowledges the Territory Government intended to establish a light-handed regulatory framework for ports in the Territory. However, it also intended to implement a regime that was robust and capable of mitigating the inherent risks in the move from a public to privately operated port.[49] The Northern Territory Government Port of Darwin Project Steering Committee highlighted the intention of the regime was to recognise and be consistent with regulatory frameworks adopted in other port transactions around Australia.[50] This supports the use of the clause 6 principles as an appropriate measure for assessing the Territory regime.

As already mentioned, incorporation of the clause 6 principles improves the consistency and quality of state and territory access regimes, and is a suitable standard.[51] It is the commission's view that the question should not be limited to a measure of

47 Australian Government: Productivity Commission. 2013. National Access Regime: Inquiry Report no. 66, page 197.

48 Landbridge Darwin Port, Submission to the Utilities Commission 2018 Ports Access and Pricing Review Issues Paper, April 2018, page 10.

49 Northern Territory Government: Port of Darwin Project Steering Committee. 2015. Submission to the Port of Darwin Select Committee.

50 Northern Territory Government: Port of Darwin Project Steering Committee. 2015. Submission to the Port of Darwin Select Committee.

51 Australian Government: Productivity Commission. 2013. National Access Regime: Inquiry Report no. 66, pages 183 and 188.

light-handedness, as even the most light-handed regimes still need to be effective and fit for purpose.[52]

DPO noted the Port of Darwin as a developing port, and the regime needs to allow DPO sufficient flexibility to develop and grow the facilities and throughput for the port.[53] The commission does not think this is reason enough to not take the clause 6 principles into account, as they are sufficiently flexible to allow for port development. The clause 6 principles have led to broad consistency across certified state and territory access regimes in key areas. This is despite industries and jurisdictions having different characteristics, as the clause 6 principles are deliberately flexible to take these characteristics into account. A good example of this is rail access regimes that differ across jurisdictions even though the majority of regimes are certified.[54]

DPO also stated the Port of Darwin may not necessarily meet the criteria for declaration under the national regime, as it may not satisfy the test for a facility of national significance.[55] As the clause 6 principles are relevant to certification rather than declaration, DPO's argument is that there is no need to have the current regime certified as there is little risk of it being declared.

While one benefit of certification is to provide certainty about the form of access regulation that applies to significant infrastructure, the commission supports the findings of the Productivity Commission that the clause 6 principles are a template for helping to improve the consistency and quality of state and territory access regimes.

DPO also commented that to date, the Government has not made an application for certification of the regime. The commission agrees this is factually correct, but it is not relevant to the questions the commission is called on to consider in this review.

Draft findings

4.a) The commission's view is the clause 6 principles are an appropriate tool for assessing the access and pricing regime for the purpose of the review.

4.b) The commission has formed the opinion that the current Northern Territory ports access and pricing regime does not satisfy the clause 6 principles.

52 Sims, Rod. 2015. "How did the light handed regulation of monopolies become no regulation?" ACCC conference speaker, October 29, 2015, pages 2, 4, 5 and 8.

53 Landbridge Darwin Port, Submission to the Utilities Commission 2018 Ports Access and Pricing Review Issues Paper, April 2018, page 10.

54 Australian Government: Productivity Commission. 2013. National Access Regime: Inquiry Report no. 66, page 191.

55 Landbridge Darwin Port, Submission to the Utilities Commission 2018 Ports Access and Pricing Review Issues Paper, April 2018, page 10.

5 Market power

5.1 Overview

In general, access and pricing regimes aim to protect consumers from the exercise of market power and promote competition in related markets. Industries should only be subject to economic regulation of this kind where there is a need to prevent the potential misuse of market power and to promote competition in upstream or downstream markets. This is consistent with the object of Part 11 of the PM Act, which is 'to promote the economically efficient operation of, use of and investment in major port facilities in the Territory by which services are provided, so as to promote effective competition in upstream and downstream markets'.

Therefore, for this review the key questions the commission needs to consider are whether DPO has market power and is there potential for the exercise of that market power (or evidence of the actual exercise of market power) by DPO.

To achieve this, the commission has assessed the extent of DPO's market power by looking at several indicators such as competition, substitutes, barriers to entry, countervailing market power, commercial incentives and additional constraints. The commission has then examined whether there is any evidence of market power having been exercised, by examining DPO's compliance with the Access Policy and Price Determination, stability of prices, whether excessive profits are being generated, as well as the conduct of DPO.

Only limited conclusions can be drawn from a finding as to whether DPO has exercised market power to date. A finding of no exercise of market power obviously does not justify removing the current regulatory regime as it may be the existence of the current regulatory regime that prevented the exercise of market power.

5.2 Assessment of the existence of market power

5.2.1 Competition

A market is an area of close competition or rivalry. Markets function properly where businesses aim to develop and provide products and services that are more appealing to customers than what is offered by competitors. Competitive markets are made up of numerous buyers and sellers, with prices reflecting efficient costs.

Substantial market power is generally held by a business that does not face effective competition from rivals in the same market. The business has the ability to persistently participate in the market free of competitive constraints. It is able to set and keep prices above the level that would occur in a competitive market. A business can have substantial market power where there are limited close substitutes and high barriers to entry, with a natural monopoly being the extreme example of a business with market power.

Market power can be exercised through prices being set too high and output or service being too low, leading to distortion within the market. Regulation is designed to address the exercise of market power, reducing inefficient outcomes.

Before discussing market power in detail, it is necessary to first define the relevant market. In general, a market is where trading takes place and encompasses the supply and demand relationship for particular goods or services. A market for services (such as those offered at

major ports) includes all services in close competition or rivalry with that service. Therefore, market definition is inherently difficult as it involves an assessment of potential substitutes for the services.

The market for the purpose of this review can be defined as the market for the provision of port infrastructure services for mixed import and export commodities in the Darwin region of the Territory. The precise boundaries of the services to be included in the relevant market and its geographic boundaries are open to some debate. However, in this case an exact definition of the relevant market is not critical as the commission considers DPO as likely to have substantial market power regardless of the exact parameters of the geographical and product dimensions of the market.

Port infrastructure services have natural monopoly characteristics as the high costs required to enter the market, large fixed costs and limited competition with ports in other geographical locations or other modes of transport mean it is only economically viable to provide such services in this market by a single provider. This creates a market where port users have no, or limited, options to obtain alternative services.

As effective competition is absent from natural monopolies, an imbalance in bargaining power is created between the port operator and port users seeking to access the services. Consequently, a natural monopolist has substantial market power and, for example, can increase prices, reduce quality and quantity of services and discriminate against access seekers to benefit its own interests.

Port infrastructure services are essential to the operation and performance of dependent upstream and downstream markets (such as shipping, logistics, and imports and exports). Where competition in related markets is dependent on access to the services provided by a port operator, competition in those markets is unlikely to be effective, resulting in reductions in efficiency and innovation.

Some of the key issues relevant to market power are the extent of the availability of substitutes, the nature and extent of barriers to entry, and whether customers hold countervailing market power. Each of these issues is discussed below.

5.3 Does the port operator have market power?

5.3.1 Substitutes

The Port of Darwin is the primary port for the Territory and is Australia's closest shipping port to Asia. Although there a number of small local ports along the Territory coastline, there are no other ports nearby of equivalent size or service. While there are a number of ports around Australia that offer similar services, the geographical isolation of exporters located in the Territory means these alternative ports are unlikely to not be realistic substitutes for many of the users of the Port of Darwin. In addition, the possibility of substitutes is varied for different commodities.

During the review, the commission considered that in some instances, while further in distance, it can be less expensive to send cargo south to Adelaide on the Tarcoola-Darwin Rail, than it is to send cargo north to Darwin. This is particularly the case if cargo is being moved from the central Australia region. This is due to back loading, where the demand for rail services going south is lower than the demand for services going north. As a result, this shifts the breakeven point north. In limited circumstances, South Australian ports may provide competition for some limited types of cargo. This is particularly true for smaller

volumes of cargo (such as a single car or a container), but it is not the case for large volumes of cargo such as dry bulk minerals.

Darwin harbour is the home to two large-scale onshore gas liquefaction terminals (ConocoPhillips Darwin LNG and INPEX Ichthys LNG). Billions of dollars have been invested in establishing these major capital projects. Once the decision was made to construct the terminals in Darwin harbour, and contracts entered into, the operators of the terminals are locked in to using the Port of Darwin. These businesses then become dependent on DPO providing prescribed services.

Some port users are service providers to other port users, for example towage and tug operators. In order to deliver these services, they must remain in close proximity to the vessels they support. Generally, the cost of berthing outside the port is prohibitive and, as there are no practical alternatives, they must berth in the Port of Darwin to operate their businesses. Otherwise, it would not be economically viable to provide their services at all.

There are also a number of remote communities, for example, the Tiwi Islands, that are not accessible by road. There are additional communities that have road access but are frequently cut off during the wet season. These communities rely on barge services to deliver essential supplies for residents.[56] Because of distance and remote locality, it is not viable for essential goods to be sourced from another major town or city and delivered from another port.

5.3.2 Barriers to entry

It is not always economically and practically feasible to have more than one provider where large scale infrastructure (and significant capital investment) is required. Therefore, a natural monopoly exists when it is more economical for one facility to provide a service than for two or more facilities to do so. Regarding the prescribed services offered at the Port of Darwin, it would not be economical or practical to duplicate the port facilities due to the high fixed costs of constructing the infrastructure. Also, there is no other suitable area to locate a deep water port sufficiently close to the city of Darwin for it to be a viable competitor. This creates a significant barrier for new competitors to enter the market.

The port infrastructure is subject to a long-term lease between the Territory Government and the private port operator, providing it with control of a unique key resource. For the life of the lease, this creates a considerable barrier to entry as other potential port operators are highly unlikely to be able to secure access rights to operate the port while the lease is in place.

5.3.3 Countervailing power

Countervailing power exists when customers are able to counteract market power held by the provider of port infrastructure services. This generally occurs when a user is in a strong negotiating position with a service provider and can threaten to either switch to an alternative provider or vertically integrate to provide the relevant service to itself.

It is accepted that a number of port users at the Port of Darwin are large national and international companies, experienced in negotiating with port operators.[57] DPO has entered into 12 negotiated agreements for prescribed services with port users since the

56 Maritime Union of Australia, Submission Ports Access and Pricing Review NT Utilities Commission, 6 April 2018, page 6.

57 Landbridge Darwin Port, Submission to the Utilities Commission 2018 Ports Access and Pricing Review Issues Paper, April 2018, page 4.

commencement of the regime.[58] This could be an indicator that port users are able to successfully negotiate with DPO. Negotiated agreements are discussed in more detail in Chapter 7.

However, many port users do not have any viable alternative option but to use the services provided at the Port of Darwin, which significantly reduces their commercial leverage and ability to rely on any countervailing market power.

Large users considering an investment in facilities that rely on access to the port most likely have countervailing power in negotiations prior to making their investment decision, as at this stage they have alternative options. Once the decision to invest in facilities at a specific port has been made, alternative options become very limited. Therefore new users may be able to protect themselves by entering into long-term contracts with DPO before committing to invest.

The commission accepts the relationship between DPO and large port users is to a degree more balanced. For example, DPO needs the business of the large port users just as much as the port users need to access the port infrastructure and services. However, not all port users fall into this category and, in these circumstances, countervailing power is unlikely to exist.

Since the commencement of DPO's Access Policy on 30 June 2017, the commission is not aware of any disputes regarding negotiations for access that have been referred to arbitration. This may suggest port users have a degree of countervailing power they can rely on when negotiating with DPO. Alternatively, this may also signify an unwillingness of port users to utilise the dispute resolution process due to the potential negative impact to the ongoing relationship between the operator and user. It may also reflect a reluctance to incur the time and cost associated with dispute resolution or deficiencies in the dispute resolution process that should be addressed as part of this review.

5.4 Potential constraints on the exercise of market power

Where a firm holds market power, a number of factors may limit its incentive or ability to exercise that market power. This section considers two such potential constraints that could apply to DPO: commercial incentives and additional constraints under its agreements with the Territory Government.

5.4.1 Commercial incentives

As discussed in Chapter 3, there has been a progressive downturn in the total trade for the port over the last three years, with a shift in top trade commodities and main sources of revenue for DPO. There has been a steady decrease in vessel visits to the port. Overall, this is a result of the commodities downturn and the near completion of the construction phase of the INPEX Ichthys LNG project.

Landbridge acquired DPO as an investment with the intention of it being profitable. At present, throughput is not at previous levels. The commission accepts the submission from DPO that it has a strong commercial incentive to maximise throughput and encourage increased demand for port services.

Nevertheless, DPO is a commercial entity with an incentive to increase its profits. As there are very limited substitutes for the prescribed services available to port users, DPO has

58 Landbridge Darwin Port, Submission to the Utilities Commission 2018 Ports Access and Pricing Review Issues Paper, April 2018, page 4.

the ability to increase prices without a material impact on the demand for its services. This would provide an increase in profit for DPO, without having to improve throughput for the port or quality of services. Over the last three years DPO has experienced a downturn in port throughout, which would impact on its revenue and profitability. This may provide an incentive to increase profits through raising prices.

5.4.2 Additional constraints

The submission of DPO refers to obligations contained in the port lease that restricts its behaviour.[59] The port lease is registered with the Northern Territory Land Titles Office and is accessible by the public. The commission has assessed the lease and Appendix B sets out a summary. The main clauses that provide additional constraints on DPO and are of interest to the commission include:

- a prohibition on DPO (or any entity that controls it) from becoming an integrated operator without the consent of the Territory Government
- when granting a third-party user a right to use or occupy the port for the purpose of providing services to third parties, the obligation on DPO to ensure third-party users have a contractual obligation to offer access to those services on reasonable commercial terms
- an obligation on DPO to manage, operate and maintain the port in accordance with good operating practices
- an obligation on DPO to ensure the port is capable of providing access to trade within the Territory, interstate and internationally
- an obligation on DPO to ensure the port is no less capable of providing access to the port for trade within the Territory and interstate rail and road transport than is usual at the date of the commencement of the lease
- an obligation on DPO to use reasonable endeavours to contribute to the ongoing improvement of productivity and efficiency in the port and port-related supply chains
- an obligation on DPO to cooperate with relevant industry bodies to the extent reasonably required to achieve the port objective.

These restrictions may impose some constraints on DPO's conduct. However, they do not address the key risks associated with the exercise of market power. For example, they do not impose any restrictions on the ability to charge monopoly prices.

In addition, it should be recognised it is possible through the mutual agreement of the Territory Government and DPO of the lease being amended throughout the life of the lease. Further, the lease sits outside the regime regulated by the commission. If there were to be a breach of the restrictive clauses contained in the lease by DPO, it would be very difficult for the port user to seek enforcement of an obligation between the lessor and lessee of the port.

59 Landbridge Darwin Port, Submission to the Utilities Commission 2018 Ports Access and Pricing Review Issues Paper, April 2018, page 5, 7 and 13.

5.5 Evidence of the exercise of market power

5.5.1 Compliance with the Access Policy and Price Determination

DPO has several reporting obligations to the commission under the regime. Since the commencement of the regime, DPO met all requirements and also provided additional details or information to assist the commission with performing its regulatory functions.

On September 30 each year, DPO must report to the commission on any instances of material noncompliance with its Access Policy for the preceding financial year.[60] For 2015-16 and 2016-17, an Access Policy was not in place for the reporting periods. DPO is not due to report on the 2017-18 financial year until September this year. As a result and to date, the commission is not aware of any material instances of noncompliance by DPO with its Access Policy.

The commission also monitors and reports to the minister each year about any material instances of noncompliance by DPO with the Price Determination.[61] Since the commencement of the determination in February 2016, the commission is not aware of any material instances of noncompliance. Note, the commission has no powers to audit compliance by DPO with its Access Policy or the Price Determination. The commission is reliant on self-reporting by DPO, perhaps supplemented by reports or complaints from port users.

5.5.2 Stability of prices

As discussed in Chapter 3, since the commencement of the regime, DPO changed its standard charges for prescribed services once. The price benchmarking report found the charges for prescribed services for the Port of Darwin are generally comparable to similar services in other Australian ports.[62]

However, for stability of prices to be indicative of DPO not exercising its market power, the commission needs to know that prices before the port was leased to a private port operator were efficient. To make this assessment, an extensive investigation would need to be completed, similar to the process required for a full price determination. This process is not recommended or available to the commission at this time.

5.5.3 Excessive profits

The commission has examined the financial accounts of DPO for 2015-16 and 2016-17. From the information provided to the commission, there is nothing to indicate that DPO is generating excessive profits for the current review period. However, DPO does not currently maintain separate audited accounts for the prescribed services so the commission is unable to complete a comprehensive analysis to reach a conclusive view on the level of profits being obtained from the provision of those services.

60 Section 130 of the *Ports Management Act*.
61 Section 121(2) of the *Ports Management Act*.
62 GHD Advisory, Darwin Port Price Benchmarking Study 2017, 25 January 2018, page 20.

5.5.4 Conduct of the port operator

In general, the commission agrees with the submission of DPO that overall it has been able to satisfactorily meet the needs of port users.[63] However, during the consultation process two issues were raised regarding the conduct of DPO. The first is in relation to adequate information and certainty for dry bulk commodity export pricing and the second was regarding the introduction of a new charge for a prescribed service.

Port users indicated they have experienced some difficulties in gaining adequate information about charges for dry bulk mineral exports during the development stage of their projects. Currently, this service is non-standard and therefore, the charge is not required to be published by DPO. The commission accepts it is critical for port users to have a high degree of certainty of access and pricing for use of port infrastructure to achieve bankable project solutions.[64] This is essential for projects to progress beyond the development phase into the production phase.

The commission believes the difficulties experienced by port users in this situation could potentially be resolved by DPO providing more specific details about pricing for dry bulk commodity exports, as it is required to do for standard services. Issues, findings and recommendations about access to meaningful information, information asymmetry and the importance of information for an effective negotiate/arbitrate model are discussed in more detail in Chapter 7.

Concerns have been raised about the introduction of the new Bladin Channel port dues levy and that it is an exercise of DPO's market power. The new levy commenced on 1 August 2017 and affects vessels larger than 20 000 GT accessing the Bladin Channel. The levy will impact INPEX's customers and as there are no alternatives available they cannot avoid this charge.

DPO advised the commission the purpose of the new levy is to provide a recovery mechanism for investment in pilotage, harbour control and management facilities to support the safe management of large vessel traffic that will increase with the commencement of the production stage of the INPEX project. The commission was satisfied the new charge was not inconsistent with the Price Determination.[65]

Under the current regime, the commission's role is limited to price monitoring in regards to price regulation. Price monitoring is not designed to assess individual charges but rather, overall changes in prices and ensuring transparency of charges. DPO has wide scope to set individual charges. However, at a minimum individual charges should be between the cost of providing the service as a standalone service and at least cover the variable cost of providing the service. Therefore, the most important indicator of the exercise of market power is the overall profitability of the port. The commission is of the view that access to information on profitability and pricing methodologies could alleviate stakeholders' concerns, which is discussed further in Chapter 7.

63 Landbridge Darwin Port, Submission to the Utilities Commission 2018 Ports Access and Pricing Review Issues Paper, April 2018, page 4.

64 Verdant Minerals, Submission on the Review of the Northern Territory Ports Access and Pricing Regime – Issues Paper, 28 March 2018, page 1.

65 Utilities Commission of the Northern Territory, 2017 Port of Darwin Comparative Report, 13 December 2017, page 6.

Draft findings

5.a) Taking into consideration the current market the commission has formed the view that DPO has substantial market power and the potential to exercise that market power. This is based on:

- limited competition for the provision of prescribed services
- a lack of substitutes for prescribed services
- the existence of high barriers to entry for potential competitors
- limited countervailing market power for most or all current port users
- the balancing of commercial incentives
- the limitations of port users relying on the additional constraints in the lease.

5.b) Based on the limited time the regime has been in force and the limited information currently available to the commission, it has formed the view that for the current review period, there is no evidence of DPO exercising its market power regarding prescribed services. This conclusion is based on:

- no reports of instances of material noncompliance with DPO's Access Policy
- no reports of instances of material noncompliance with the Price Determination
- no indication DPO is generating excessive profits
- the overall conduct of DPO.

6 Ongoing need for regulatory oversight

6.1 Is ongoing regulation needed?

The first requirement of section 123 of the PM Act is for the commission to determine whether there is an ongoing need for regulatory oversight regarding access and pricing for prescribed services provided by a private port operator.[66] While the commission has found no evidence of the actual exercise of market power by DPO, the potential does exist at present. This suggests there is an ongoing need for regulatory oversight.

In light of this conclusion, it is necessary for the commission to consider:

- if there are any recent or possible future changes to the market, that may affect DPO's market power or ability to exercise market power
- whether there is a net benefit to ongoing regulation, as discussed below.

6.1.1 Changes in the market

Recent and future market changes can affect competition and the potential for market power to be exercised and therefore the ongoing need for access and price regulation. The commission has considered matters that may impact the port industry such as:

- potential new ports or rail lines
- changes to regulation in the live export industry
- the commencement of new international flight routes.

Overall, the outlook for future major project activity is subdued in the Territory, reflecting the transition of the INPEX project from the construction phase to production.[67]

It is expected the production stage of the INPEX project will commence in the second half of 2018. As a result, port activity will increase with the following additional vessels accessing the port:

- about five LNG carriers every two weeks
- about one LPG carrier every 10 days
- about one condensate carrier every three weeks
- one platform support vessel every four days
- two additional large tugs permanently based in the Port of Darwin.

It is estimated this will substantially increase revenue for DPO by about $14.5 million per year (based on peak production).

While the Territory was not in the top performing economies for the April 2018 quarter in terms of overall economic performance, it remained in first position for economic growth and ranked second for construction work done.[68] Exports are predicted to be a key driver of economic growth for the next five years and expected to be supported by

66 Section 123(2)(a) of the *Ports Management Act*.
67 Northern Territory Government: Department of Treasury and Finance. 2017. The Territory Economic Review (December 2017), page 1.
68 Northern Territory Government: Department of Treasury and Finance. 2018. CommSec State of the States: April 2018.

international goods exports, which are forecast to strengthen to an average growth rate of 18.5 per cent.[69]

In addition, there are several other projects proposed for the Territory in the next five years. These include the construction of a ship lift facility, Darwin luxury hotel development, Project Sea Dragon (prawn farm) and eight new mining projects (gold, rare earths, salt, copper, zinc, silver, lead and phosphate).[70] The commission understands if they go ahead, these projects are substantial and will noticeably increase port activity, capacity and throughput.

The commission is not aware of any recent or future changes that would impose material competitive constraints on the provision of prescribed services by DPO.

These findings are consistent with the submission of the port operator. DPO indicated, in its view, there have been no material changes to the relevant markets to suggest a change to the level of competition since the commencement of the regulatory regime. DPO has also indicated it is not aware of any other changes likely to occur in the immediate future.[71]

Other stakeholders who commented on this issue emphasised that expected increases in port activity and throughput will have an impact on port access and capacity for port users, and supported ongoing regulation.

In summary, port activity, capacity, throughput and revenue are all expected to increase but they will not alter the market power of DPO or the potential for it to be exercised.

6.1.2 Costs and benefits of regulation

Australia's major ports are national and international trade facilitators. Ports and associated infrastructure play a critical part in the markets and economies surrounding them. They are essential to the productivity and economic growth of Australia.72 However, ports and the services they provide have a tendency to be natural monopolies. Economic regulation of monopoly infrastructure seeks to protect, strengthen and supplement competitive market processes to improve the efficiency of the economy and increase the interests of Australians.[73]

In general the benefits of access and price regulation are more likely to outweigh the costs where there is a monopoly provider of the infrastructure.[74] This is because any monopoly pricing will ultimately be paid for by users and consumers. Monopoly pricing would also damage the productivity of the Territory's economy, including growth, competitiveness and living standards. The potential for monopoly pricing to damage the Territory's economy is reflected in the UC Act, which directs the commission to have regard to the need to prevent misuse of monopoly or market power when performing its functions.[75]

69 Northern Territory Government: Department of Treasury and Finance. Deloitte Access Economics: March Quarter 2018, page 1.
70 Industry Capability Network (ICN). 2018. "Northern Territory Projects – Committed Projects." Accessed May 18, 2018.
71 Landbridge Darwin Port, Submission to the Utilities Commission 2018 Ports Access and Pricing Review Issues Paper, April 2018, page 3.
72 Australian Government: Infrastructure Australia. 2011. National Ports Strategy, pages 5 and 6.
73 Harper, I., Anderson, P., McCluskey & S., O'Bryan, M., Competition Policy Review: Final Report, March 2015, page 470.
74 Australian Government: Productivity Commission. 2013. National Access Regime: Inquiry Report no. 66, page 71.
75 Section 6(2)(b) of the *Utilities Commission Act*.

Regulation of monopoly services can provide a level of certainty and transparency, which increases investment and competition in dependent (upstream or downstream) markets.[76] Appropriate economic regulation encourages competition by providing efficiency benefits and aligning operations and investments across supply chains associated with the monopoly asset or infrastructure. This helps improve national, state and territory productivity, benefiting those in the supply chain, as well as consumers and the broader community.[77] The potential benefits arising from economic regulation are reflected in the UC Act, which directs the commission to have regard to the need to promote economic efficiency and to ensure consumers benefit from competition and efficiency when performing its functions.[78]

The benefit of regulation needs to outweigh the costs. Regulation restricts certain activities and imposes administrative and compliance costs on regulated infrastructure operators [79] which may contribute to resource misallocation in regulated industries. The regulator and the government also incur costs in giving effect to the regulatory regime.

DPO has expressed concerns that further intervention in the market may result in unintended consequences, or impose an administrative or compliance burden on DPO that is disproportionate to any purported benefit.[80]

The commission is of the opinion that the benefits of regulation afforded by the regime outweigh the costs. This is due to the ongoing need for regulatory oversight resulting from the potential for monopoly power to be exercised by DPO. The commission will have regard to the costs of regulation when considering the appropriate form of regulation and potential changes to regulatory obligations in Chapter 7.

Draft findings

6.a) The commission is of the opinion that there are no recent or expected future changes that will materially impact market power of DPO or the potential for it to be exercised for the foreseeable future. This matter will be further considered at the commission's next scheduled review of the regime, due in 2023.

6.b) It is the commission's finding that there is an ongoing need for regulatory oversight for prescribed services provided by DPO and the benefits of an access and pricing regulatory regime outweigh the costs.

Draft recommendation

6.c) The commission recommends continuing regulatory oversight of prescribed services for designated ports in the Territory.

6.2 What services should be regulated?

The commission has found there is an ongoing need for regulatory oversight and a net benefit to regulation of the prescribed services at the Port of Darwin. It is therefore necessary to review which services should be subject to economic regulation.

76 Australian Government: Productivity Commission. 2013. National Access Regime: Inquiry Report no. 66, pages 42 and 43.
77 Australian Competition and Consumer Commission, Privatisation of State and Territory Assets and New Infrastructure: Submission to the Senate Economics References Committee, 29 January 2015, page 4.
78 Section 6(2)(d) and (e) *Utilities Commission Act*.
79 Australian Government: Productivity Commission. 2013. National Access Regime: Inquiry Report no. 66, pages 42 and 43.
80 Landbridge Darwin Port, Submission to the Utilities Commission 2018 Ports Access and Pricing Review Issues Paper, April 2018, page 6.

Prescribed services cover access for vessels, loading and unloading of vessels, berthing, pilotage and entry of persons and vehicles to land on which port facilities are located.[81] The regulations exclude a number of services, such as towage, bunkering, waste removal, and the supply of electricity and water.[82]

In the Issues Paper, the commission asked whether it was necessary to regulate all of the current prescribed services and whether some could be removed or more should be added to the regime. Overall, most stakeholders agree that the list of prescribed services in Regulation 12(1) is appropriate and should continue as is.

DPO has submitted that as there is no evidence of it exercising market power, it is not necessary to regulate any of the prescribed services.[83] The commission has considered this point but concludes the ongoing need for regulatory oversight of prescribed services is warranted due to the continuing potential for market power to be exerted and having regard to the need to prevent misuse of monopoly power.

DPO goes on to acknowledge the current prescribed services are appropriate when taking into account the types of services that could be susceptible to exploitation if a monopoly service provider sought to exercise its market power and no further additions are required.[84]

In regards to services that should be prescribed, the MUA indicated a preference for rents and similar charges to be included.[85] Where rents and other charges constitute a charge for 'allowing entry of persons and vehicles to any land on which port facilities are located' under Regulation 12(1)(e), the charges are regulated as charges for prescribed services. DPO indicated it adheres to the requirements of the Access Policy when considering a request for a lease and will constitute a non-standard service for the purpose of the Access Policy.[86]

It is likely DPO faces greater competition for rental services than the current prescribed services due to the greater availability of substitutes outside of the port area, and there is no evidence of DPO exercising market power in regards to this issue. The commission considers that for this review period, it is not necessary to change the prescribed services to address the regulation of rents and similar charges as a separate category.

The MUA suggested bunkering, waste removal and the supply of electricity and water should be included as prescribed services.[87] These services are currently specifically excluded from the list of prescribed services to be covered by the regime.[88] Svitzer Australia also commented that these services should be included to prevent the bundling of prescribed services with non-prescribed services by DPO.[89] The commission is not aware

81 Regulation 12(1) of the Ports Management Regulations.
82 Regulation 12(3) of the Ports Management Regulations.
83 Landbridge Darwin Port, Submission to the Utilities Commission 2018 Ports Access and Pricing Review Issues Paper, April 2018, page 7.
84 Landbridge Darwin Port, Submission to the Utilities Commission 2018 Ports Access and Pricing Review Issues Paper, April 2018, pages 7 and 8.
85 Maritime Union of Australia, Submission Ports Access and Pricing Review NT Utilities Commission, 6 April 2018, pages 17 and 18.
86 Landbridge Darwin Port, Submission to the Utilities Commission 2018 Ports Access and Pricing Review Issues Paper, April 2018, page 7.
87 Maritime Union of Australia, Submission Ports Access and Pricing Review NT Utilities Commission, 6 April 2018, pages 17 and 18.
88 Regulation 12(3) of the Ports Management Regulations.
89 Svitzer Australia Pty Ltd, Submission on the Issues Paper 2018 Ports Access and Pricing Review, 5 April 2018, page 1.

of any specific instances where bundling has occurred. Further, the commission does not think it is appropriate to regulate these services as competition for the provision of these services exists within the market or, as is the case with water and electricity, are already regulated.

The MUA has stated towage operators should be licensed in the same way stevedores are. As is the arrangement for licensing of stevedores and pilots, the commission is of the view this issue is outside the scope of the regime and the review.[90]

6.3 Exemption of services provided under lease

The regime excludes services provided under a lease granted by a port operator and so places them outside the regime.[91] This is the current arrangement for the MSB, a dedicated oil and gas support facility located within the Port of Darwin.

The MSB is located in East Arm Wharf and is made up of three marine berths with water, fuel, chemical and drilling mud connections, hard stand, lay-down areas, warehousing, waste management facilities, storage capacity and office space. The facility has the capacity to service more than 1000 vessels each year with a twelve-hour turnaround. It is operated by ASCO Australia Pty Ltd under a concession agreement for fifteen years, with an option to extend for an additional five years based on performance. The agreement commenced in June 2014 and incorporates:

- minimum performance requirements for efficient and effective operations
- incentives to grow the business and maximise revenues.[92]

The agreement for the MSB was entered into before the Port of Darwin was leased, and the subsequent commencement of a private port operator and introduction of the access and pricing regime. The commission understands it was the Territory Government's express intention to exclude the MSB from regulatory oversight when the port was leased, and this was achieved through the inclusion of Regulation 12(2). As a result, it is outside the commission's powers to review or make recommendations about services supplied at the MSB.

Nonetheless, as the MSB provides vital services to port users, lack of regulatory oversight of the facility continues to be an ongoing serious concern for stakeholders. The commission suggests that once the current agreement for the MSB expires, regulatory oversight for the prescribed services provided at the MBS may be appropriate.

Regulation 12(2) applies to all leases granted by a private port operator, not just the MSB lease. For this reason, it provides an ongoing mechanism for services that would otherwise be prescribed services to be excluded from the regime. The commission considers this to be an unintended consequence of the clause, which undermines the integrity of the regime. Several port users have expressed similar concerns. It is also unclear how the carve-out would operate in practice if there is an access dispute, if the lease is subject to the Access Policy but services provided under it are not. This uncertainty may add to the cost and risk of access disputes.

90 Part 6 of the *Ports Management Act* covers Stevedore licences and Part 8 (Division 4) covers Pilots Licences.
91 Regulation 12(2) of the Ports Management Regulations.
92 Northern Territory Government: Port of Darwin Project Steering Committee. 2015. Submission to the Port of Darwin Select Committee, page 7.

Regulation 12(2) potentially stops the current regime from meeting clause 6(3)(a) of the CPA and the criteria for certification as an effective access regime.

DPO explained that while the effect of the regulation is to place service subject to the lease outside the scope of the regime, there are other aspects DPO must adhere to when granting these types of leases, such as the Access Policy and the restrictions contained in the original port lease.[93] The commission has considered these points and although they do place additional restrictions on DPO when granting leases, they do not go far enough to correct the unintended consequence of regulation 12(2).

In their submissions on the Issues Paper, the common suggestion from port users was the regime should not provide the potential for DPO to move prescribed services outside the reach of regulatory oversight.

The MUA commented that where services are leased out, minimum standards should be included. Chapter 7 discusses the issue of standards of service. The MUA gave examples as to how the chain of responsibility and responsible contracting could be incorporated into leasing arrangements[94], which primarily relate to safety and working conditions and are outside the scope of this review.

6.4 Transport access regimes in the Northern Territory

Many port users require access to various modes of transport to import or export their product. For example, mineral exporters use the Tarcoola-Darwin railway to move bulk commodity to the Port of Darwin for shipment overseas. As mentioned earlier, the Tarcoola-Darwin railway is subject to a third-party access regime, for which the Essential Services Commission of South Australia (ESCOSA) is the regulator.[95] In its review of the intrastate rail access regimes in 2015, ESCOSA considered the merits of amalgamating similarly operating transport regimes that existed in South Australia, such as rail and ports.[96]

ESCOSA found the primary benefit would be the reduced need for market participants to navigate different regulatory regimes when transporting goods. However, it was concluded it was difficult to predict whether this approach would result in a net benefit. At the time, the South Australian Department of Planning, Transport and Infrastructure supported an examination of the potential for amalgamation of the regimes, which may be considered as part of a broader transport policy review sometime in the future.[97] It is the commission's understanding that to date, the South Australian Government has not published any reports on this matter.

The commission encourages a consistent approach to transport access regulation that reduces the complexity, burden and costs associated with regulation for port operators and port users. It may be beneficial for the Territory Government to consider what opportunities exist for greater integration of transport infrastructure access regimes in the Territory.

93 Landbridge Darwin Port, Submission to the Utilities Commission 2018 Ports Access and Pricing Review Issues Paper, April 2018, pages 6 and 7.
94 Maritime Union of Australia, Submission Ports Access and Pricing Review NT Utilities Commission, 6 April 2018, pages 16 and 17.
95 Clause 5 of the AustralAsia Railway (Third Party Access) Code which is a scheduled of the *AustralAsia Railway (Third Party Access) Act 1999* (SA and NT).
96 Essential Services Commission of South Australia, Rail Access Regime Review, Final Report, 2015.
97 Essential Services Commission of South Australia, 2017 Ports Access and Pricing Review, Final Report, September 2017, pages 42 and 43.

Draft findings

6.d) The commission considers the list of prescribed services in Regulation 12(1) remains appropriate at this time.

6.e) The commission believes the regime should not provide the potential for a port operator to move prescribed services outside the reach of the regulatory regime.

6.f) The commission considers prescribed services provided at the MSB should fall within the scope of the regime on expiry of the current lease.

Draft recommendations

6.g) The commission recommends amendments to the regulations to restrict the application of Regulation 12(2) to leases entered into before a date specified in the regulations (such as the date on which the commission's Final Report is released) and provide for Regulation 12(2) to expire on a specified date, such as the date coinciding with the end of the current concession term for the MSB.

6.h) The commission recommends that once the current agreement in place for the MSB expires, access and price regulation under the regime should apply to the facility in the same way it applies to other services provided by DPO. The change recommended in the previous paragraph would achieve this outcome.

7 Changes to the form of oversight

7.1 Should the current form of regulatory oversight continue?

The commission has found there is an ongoing need for regulatory oversight for prescribed services. Therefore, the commission must now consider whether there is a need to change the form of regulatory oversight for access or pricing and if so, how.

In the context of a port such as the Port of Darwin, effective regulatory oversight is essential to achieving the outcomes in section 6(2) of the UC Act and the object of part 11 of the PM Act.

The form of regulatory oversight needs to be effective and fit for purpose, with adequate constraints for controlling the potential for the exercise of market power by DPO. At the same time, the benefits from the regulatory oversight must be greater than the costs imposed by regulation.

If a regime is ineffective there is the risk that access to port services is denied or is made available on conditions not fair or reasonable to port users. Monopoly pricing may occur, leading to over recovery of efficient costs and excessive profits being generated by the port operator. The outcome will not be economically efficient and therefore not in the long-term interests of consumers. Efficient port services are important in order to promote competition in upstream and downstream markets.

The commission has assessed whether the current form of regulatory oversight is effective and fit for purpose, and if any additional constraints are required. In doing so, it has considered whether the current negotiate/arbitrate model and price monitoring are suitable, including potential shortcomings, as detailed below.

7.1.1 Negotiate/arbitrate access model supported by price monitoring

As noted in Chapter 1 of this report, the current regime relies on a negotiate/arbitrate access model, supported by price monitoring. The strength of this model is it allows commercial negotiations to occur, while providing port users with some leverage when dealing with the operator of monopoly infrastructure. This is achieved through transparent pricing, which provides a basis for negotiations, with the intrinsic threat of binding independent dispute resolution if negotiations are not successful.

The model is flexible as it can be applied to both access and pricing. It specifically targets the area where agreement cannot be reached, thereby reducing the need for additional regulatory intervention. The model imposes low costs, yet provides a strong incentive for parties to negotiate in a productive and successful manner.

Looking at other regimes across Australia, negotiate/arbitrate models are the common form of regulation for transport services. For example, the regimes in place for the Tarcoola-Darwin railway, South Australian ports, the Wheat Terminal Code and the Dalrymple Bay Coal Terminal all rely on negotiation and arbitration. There are some variations but these relate to the obligations in place to support informed negotiations and effective arbitration, rather than the model itself.

The clause 6 principles favour an informed negotiate/arbitrate model, which seeks to ensure an access regime provides incentive for parties to achieve agreement through commercial negotiations. The principles provide for an independent arbitration mechanism to complement and encourage genuine negotiations.[98]

Under the current regime, the negotiate/arbitrate model is set out in the regulations as requirements that must be included in the Access Policy in order for the commission to approve it.[99] The PM Act makes no reference to negotiation or arbitration. The commission considers this to be a weakness of the regime, particularly given the commission's limited power to review and amend the Access Policy. This contrasts with some other access regimes (for example the South Australian ports regime), where the key principles for negotiation and arbitration are specified very clearly in the legislation.

Further, for the negotiate/arbitrate model to be effective, it must be informed by adequate information. This means that during the negotiation and decision-making process, potential port users need to have access to information to inform the negotiations and understand whether the terms offered by the port operator are reasonable. It sets an environment for effective and balanced negotiations to take place and successful outcomes to be attained.

Price monitoring under the regime plays a role in informing negotiations by requiring DPO to publish its standard charges for prescribed services. The regulations limit the information provided, since the port operator cannot be required to publish a charge for a non-standard or negotiated charge. An effective price monitoring regime where the regulator has sufficient powers to assess and report on the efficiency of prices can also provide a check on the exercise of market power, particularly if there is a credible threat of stronger future regulation.

The PM Act authorises the commission to make a price determination relating to the charges fixed by a private port operator to provide prescribed services. [100] The regulations specify that the commission must use price monitoring as the form of price regulation as well as stipulate the basis or standard on which price levels will be monitored.[101] The Price Determination must also be consistent with the pricing principles set out in section 133 of the PM Act.[102] In general, the Price Determination places obligations on a port operator to publish standard charges for prescribed services and to advise the commission of any changes to those charges. It also sets out the matters that a port operator must report on to the commission each year, such as revenue and volumes for prescribed services.[103]

In 2016 the commission published the current Price Determination for the Port of Darwin. As a price determination cannot have effect for more than three years, it will expire in February 2019.[104] The commission will commence a review of the current Price Determination, including public consultation in the coming months. Stakeholders will be kept up to date about the Price Determination review process, with relevant information published on the commission's website.

98 National Competition Council. 2017. Certification of State and Territory Regimes: A Guide to Certification under Part IIIA of the *Competition and Consumer Act 2010* (Cth), pages 28 and 30.
99 Regulation 13(2) of the Ports Management Regulations.
100 Section 132 of the *Ports Management Act*.
101 Regulation 16(2)(a) and (b) of the Ports Management Regulations.
102 Section 132(2)(b) of the *Ports Management Act*.
103 Regulation 16(2)(e) of the Ports Management Regulations and clause 10(b) and (c) of the Price Determination.
104 Section 132(4) of the *Ports Management Act*.

There are limitations to price monitoring. It is a tool to support the negotiate/arbitrate model but on its own is unlikely to adequately address market power held by a monopoly infrastructure operator. Port users also made this point in the submissions on the Issues Paper.

When price monitoring is the only pricing methodology available to the regulator it can limit the effectiveness of the regime by restricting access to the necessary information required to assess pricing outcomes. It provides information about prices but does not give users information to assess whether those prices are reasonable or efficient – such as how they were calculated or how they compare to costs. Therefore, on its own it is not sufficient to enable users to undertake informed negotiations.

Restrictions in the PM Act and regulations also limit the effectiveness of price monitoring as a tool for the commission to determine whether prices are consistent with the access and pricing principles. As discussed later in this chapter, the commission currently does not have access to the necessary information to make such an assessment. The commission also has limited powers to take action if price monitoring reveals that prices are inconsistent with the access and pricing principles or otherwise indicate the exercise of market power by DPO.

DPO expressed the view that there is no compelling rationale for changing the regime to allow the commission to use other forms of price regulation.[105] However, in general port users have indicated other forms of price regulation would be beneficial where price monitoring is insufficient.

The commission has formed the view that while the negotiate/arbitrate model supported by price monitoring may not be sufficient in all circumstances, there are no grounds for the form of regulatory oversight of access or pricing to be changed at this time. Nonetheless, the commission considers areas of the regime that require improvement in order for it to be effective and fit for purpose (as discussed in the next section).

Draft findings

7.a) It is the commission's view at the present time that there is no need to change the form of regulatory oversight for access for prescribed services.

7.b) The commission has found there are weaknesses in the way the current negotiate/arbitrate model is established due to the key requirements for negotiation and arbitration not being contained in the PM Act, but instead listed as criteria for approving the Access Policy.

7.c) It is also the commission's view at the present time that there is no need to change the form of regulatory oversight for prices for prescribed services.

7.d) The commission has formed the opinion that improvements are required to the regime so adequate information is made available to port users and the commission.

Draft recommendations

7.e) It is the commission's recommendation an effective, well-informed negotiate/arbitrate model should continue as the form of regulatory oversight for access to prescribed services for the next review period.

105 Landbridge Darwin Port. 2018. Submission to the Utilities Commission: 2018 Ports Access and Pricing Review Issues Paper, page 9.

7.f) It is recommended the requirements for a negotiate/arbitrate model be specified in the PM Act rather than set out as criteria in the regulations for the approval of the Access Policy.

7.g) The commission recommends at this time that price monitoring continues as the form of price regulation for prescribed services.

7.h) It is recommended the regime is amended so more information is provided to users and the commission to support the effective operation of the regime, including the commission having access to the necessary information to assess whether prices are consistent with the access and pricing principles.

7.2 What obligations are necessary to ensure an effective and well-informed negotiate/arbitrate model?

The commission has concluded there is an ongoing need for access and price regulation for designated ports in the Territory and until the matter is reviewed again, the form of both access and price regulation does not need to be changed. In short, it is recommended the current negotiate/arbitrate model supported by price monitoring should continue.

However, through the review process the commission identified a number of areas of the regime that warrant improvement and amendment to make sure it is functioning properly, is effective, fit for purpose and able to better meet the legislative objectives. Improvements to the current regime are necessary to ensure it is capable of constraining market power, consistent with other best practice port access and pricing regimes, and promotes the efficient operation and use of, and investment in port facilities to promote effective competition in upstream and downstream markets.

To achieve this, all elements of the negotiate/arbitrate model need to be operating well and working together. There must be sufficient information available to the port user to inform an equitable, robust and transparent negotiation process. There also needs to be access to credible and effective arbitration.

The improvements needed to accomplish this for the current regime are discussed below and relate to:

- the threat of stronger regulatory intervention
- the obligations not to hinder access or unfairly differentiate between port users
- access to meaningful information
- safeguards to fundamental aspects of the negotiate/arbitrate process
- compliance and enforcement mechanisms
- standards of service.

Therefore, in answering the final component of the questions posed at section 123 of the PM Act, the commission concluded that amendments be made to part 11 of the PM Act and regulations. The nature of these amendments are discussed in more detail below.

7.2.1 Threat of stronger regulatory intervention

Light-handed approaches to regulation, such as the regime that is the subject of this review, are not effective unless they afford an effective check on the exercise of market

power. This is usually done through the threat of more intrusive forms of regulation being imposed in the event a port operator misuses its market power.

As mentioned earlier, the regulations require the commission to use price monitoring as the form of regulation for pricing.[106] The commission found at this time that the form of price regulation does not need to be altered and price monitoring should continue. However, if in the future the commission finds that price monitoring is an inadequate form of regulatory oversight in addressing the exercise of market power by DPO, it does not have the power to implement an alternative form of regulation. Instead, the ability to amend the regime and change the form of price regulation rests with the Administrator, on the advice of the minister.[107]

The minister must certify the changes are consistent with a written recommendation made by the commission to the minister.[108] The legislation does not specify what circumstances must precede the commission making a written recommendation to the minister, other than requirements for consultation. The PM Act appears to allow the commission to make such a recommendation at any time, independent of the five-yearly review process, provided the commission first undertakes public consultation and consults with DPO. The commission's powers in this area should be clarified.

The commission notes the regime has been in place for only a relatively short time and there is no evidence to date of DPO exercising its market power. The commission accepts DPO's submission of the threat of stronger regulation being imposed already exists in the regime. The commission notes this level of threat of stronger regulation lies between two extremes, one requiring Parliament to pass amending legislation and the other requiring the regulator to change the form.

As an example of the latter situation, for the provision of essential maritime services in South Australia, the legislation allows ESCOSA to make a price determination. A price determination may regulate prices, conditions relating to prices or price-fixing factors in any manner ESCOSA considers appropriate, ranging from price monitoring to price fixing. In Queensland, through the access undertaking review and approval process, various forms of price regulation can be implemented under the Dalrymple Bay Coal Terminal regime.

If DPO did exercise its market power in the future and the current regime proved ineffective to constrain that market power, the negative impacts to port users, stakeholders, dependent markets and the economy has the potential to be severe. If this were to happen, the commission would seek to use its existing powers to conduct a review in order to consider making a recommendation to the minister that the form of regulatory oversight be changed.

Draft finding

7.i) In the event market power is exercised by the port operator such that price monitoring becomes insufficient as the form of price regulation, the commission would seek to deal with the matter using its existing legislative powers, with the aim of making a recommendation to the minister about a stronger form of regulation.

106 Regulation 16(2)(a) of the Ports Management Regulations.
107 Section 134(1) of the *Ports Management Act*.
108 Section 134(3) of the *Ports Management Act*.

Draft recommendation

7.j) At the present time, the commission does not recommend any legislative amendment to strengthen its powers regarding the establishment of a different form of price regulation.

7.2.2 Obligation to not hinder access or unfairly differentiate

In the Issues Paper, the commission raised the question about whether the regime's approach to addressing the potential for the exercise of market power is sufficient, given the possibility a port operator may expand its business operations into upstream or downstream markets. This question is important as vertically integrated service providers have the power to hinder port users' access to prescribed services by unfairly providing favourable term of access to an associated business.[109]

It was Government's intention that the regime would impose an obligation on DPO to not unreasonably hinder access to port services or unfairly discriminate between port users.[110] These restrictions were included in the regime and are set out in sections 124 and 125 of the PM Act.

However, both sections are subject to carve-outs through DPO's Access Policy. In the case of hindering, the restriction does not apply where an act is done in accordance with the DPO's Access Policy. In regards to differential treatment, the restriction does not apply where DPO is expressly permitted to do so by the Access Policy. This weakens the protections and may allow DPO to prioritise its business interests at the expense of port users.

Further, the legislation does not specify whether the commission should take the hindering access and unfairly differentiate provisions into account when approving the Access Policy.

It should be noted, DPO has included a clause in its Access Policy 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.[111]

In regards to other comparable ports in Australia, the South Australian ports regime, the Wheat Terminal Code, the Dalrymple Bay Coal Terminal regime and the regime for the Port of Newcastle all contain provisions to prevent a port operator from engaging in behavior that hinders access or unfairly differentiates. Only the Dalrymple Bay Coal Terminal regime allows carve-outs to the obligations where the act is done in accordance with an access code or approved access undertaking, but this is balanced by a comprehensive approval framework.

Further, when assessing the current Territory regime against the clause 6 principles, the potential for the DPO's Access Policy to permit carve-outs to the non-hindering and non-discrimination obligations appear to be inconsistent with clause 6(4)(m).

109 National Competition Council. 2017. Certification of State and Territory Regimes: A Guide to Certification under Part IIIA of the *Competition and Consumer Act 2010* (Cth), page 43.

110 Giles, Adam. 2014. "Second Reading Speech: Ports Management Bill." Northern Territory Parliament.

111 Clause 1.3 of the Access Policy.

A number of port users expressed concern that the carve-outs undermine important protections for ports user against the potential exercise of market power by DPO.[112] The commission supports this view, although it notes this is a potential issue with the regime and not a problem with DPO's current Access Policy.

As noted in Chapter 5, the port lease contains a restriction on DPO from becoming an integrated operator without the consent of the Government. This provides additional constraints on DPO and protection for port users regarding vertical integration and issues of hindering access and unfair differentiation. However, this constraint/protection is outside the regime regulated by the commission and if DPO breaches the constraint, the commission has no authority to enforce it.

DPO's Access Policy must include details of the approach and factors it will take into account in allowing access to the port and when scheduling vessels.[113] These are known as priority or queueing principles, which play a significant role in supporting the obligation on a port operator to not unreasonably hinder access to port services or unfairly differentiate between port users. However, there is no legislative basis for the commission to consider the merits of a port operator's priority principles and whether they are effective.

In the Issues Paper, the commission asked whether it would be beneficial for the commission to have the power to consider the merits of a port operator's priority/queueing policy and how it operates in practice. In regards to the comparable regimes across Australia, three do not expressly deal with queueing, while one has the potential to but the power is yet to be implemented. Only the Wheat Terminal Code deals with priority and capacity reservations.

The submissions also reflect this position, with those stakeholders that commented on the matter preferring the commission not to have a role in assessing the merits and effectiveness of DPO's priority principles. The commission accepts the submissions of stakeholders on this point.

Draft findings

7.k) While not an issue in the current Access Policy, the commission considers the potential for a port operator's Access Policy to permit carve-outs to the non-hindering and non-discrimination obligations in sections 124 and 125 of the PM Act with inadequate regulatory oversight negates intended protections for port users.

7.l) The commission found it is not necessary at this time for it to have a role in considering the merits of a port operator's priority principles and whether it is effective.

Draft recommendations

7.m) It is recommended 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 regulator in the access policy approval process.

112 Submissions on the Issues Paper from ConocoPhillips and its stakeholders. 2018. Submission to the Utilities Commission: 2018 Ports Access and Pricing Review Issues Paper, page 3, Svitzer Australia Pty Ltd. 2018. Submission to the Utilities Commission: 2018 Ports Access and Pricing Review Issues Paper, page 3 and Maritime Union of Australia. 2018. Submission to the Utilities Commission: 2018 Ports Access and Pricing Review Issues Paper, page 20.

113 Regulation 13(2)(a) of the Ports Management Regulations.

7.n) It is also recommended section 127 of the PM Act and Regulation 13(2) be amended to ensure the commission can have regard to sections 124 and 125 when approving a draft access policy of a port operator.

7.2.3 Access to meaningful information

For competitive markets to work or for a negotiate/arbitrate model for monopoly infrastructure to be effective there needs to be information symmetry. This means during the negotiation and decision making process, access seekers need to have access to relevant information in order to make informed decisions. This sets an environment for balanced negotiations to take place that are more likely to result in efficient outcomes.

Users cannot tell if the prices they are being offered are reasonable if they have no information about how they were calculated or how they compare to costs. One party has the potential to exploit the information advantage at the expense of the other party. In short, the overall outcome of unequal access to relevant information is the balance of power during the negotiation process is skewed, prices become distorted and the optimal allocation of resources fails.[114]

Under the current PM Act and regulations, port users do not have rights to access information to explain how prices are determined. Further, their rights to access information under the Access Policy are limited due to the very wide exceptions available to DPO in clause 6.4(d). There are similar potential problems for the arbitrator. The arbitrator's rights set out in the Access Policy are also vastly restricted due to the very broad exceptions under clause 7.8(c). For example, these exceptions include the lack of requirement to provide commercially sensitive information (which is likely to cover most cost information) or information not ordinarily and freely available to DPO, such as separate accounts for the prescribed services, which currently do not exist.

The commission concludes there is a material risk of users being unable to access sufficient information for informed negotiations and the arbitrator being unable to obtain sufficient information to make an efficient decision. Further, access to information is required by access seekers in regards to making a decision to go to arbitration, and a lack of access to information materially increases the risk of proceeding to arbitration. These risks undermine the effectiveness of the negotiate/arbitrate regime.

Financial records and separate accounts

An effective access regime should provide all relevant parties (such as users, the arbitrator and the regulator) with access to relevant financial information necessary to properly assess and make informed decisions regarding access and pricing for prescribed services. It is important operators of regulated infrastructure are able to provide financial information that concentrates exclusively on the parts of the business regulated by the regime.

Information on profit, cost and investment is needed for the commission to determine if price increases are warranted and not a reflection of DPO exercising market power. Users will need similar information to assess whether the prices being charged are efficient. An arbitrator will also require this information if called on to set a price during dispute resolution. Separate accounts help address the potential for anti-competitive behaviour

114 Australian Government: Productivity Commission. 2013. National Access Regime: Inquiry Report no. 66, page 72.

such as using cross-subsidies between regulated and non-regulated services as a way of disguising monopoly pricing.[115]

The Territory regime does not include powers for users, the arbitrator or the commission to obtain information from DPO about profit, cost and investment levels. There is no requirement under the regime for DPO to keep separate accounts for prescribed services. The commission has general information-gathering powers under the UC Act to access information.[116] However, this power is only effective if the information exists.

For example, as part of the review the commission made a request to the DPO to produce financial records and separate accounts so the commission could assess whether the level of profits generated by DPO for the provision of prescribed services was appropriate. As DPO does not currently keep separate accounts for the prescribed services, it was unable to produce the information.

Users and the arbitrator are similarly unlikely to have any powers to obtain this information. A user's right to obtain information under the Access Policy does not apply if the information is not 'ordinarily and freely available' to DPO. Assuming it is possible for additional information to be obtained during the arbitration process, it is likely to be costly and complex to derive information needed for the arbitrator to make an informed decision.

DPO was able and willing to provide the commission with access to audited special purpose financial statements, which were sufficient for the purpose of the assessment for this review period.[117] However, the commission is concerned that as the port develops, as throughput and volumes increase, the special purpose accounts will not be sufficient for assessing profits for the prescribed services for the next review period. Additionally, this information would not be sufficient to allow a user to assess the appropriateness of a proposed price or for an arbitrator to set an efficient price for a prescribed service.

This is because the special purpose accounts are for the total business and as the business grows, it becomes more difficult to separate and identify accurately the information that relates only to the prescribed services. Additionally, as profits rise, so too does the opportunity for the business operator to cross-subsidise the competitive side of the business with the regulated parts of the business. Maintaining separate accounts for the regulated portion of the business alleviates these problems.

The current arrangements for the Territory regime are inconsistent with the normal practice of other regimes in Australia. All but one of the comparable regimes has a requirement for keeping separate accounts for regulated services and providing these to the regulator.

Further, in Queensland, under the Dalrymple Bay Coal Terminal regime, there is an additional requirement for separate accounts being published in certain circumstances. For South Australian ports, ESCOSA issues guidelines for the preparation and maintenance of accounts and records. In summary, the guidelines require that substance prevails over form, the information provided is verifiable, an officer of the port operator takes responsibility for the information and the accounts are audited using an approved auditor.

115 National Competition Council. 2017. Certification of State and Territory Regimes: A Guide to Certification under Part IIIA of the *Competition and Consumer Act 2010* (Cth), page 44.

116 Section 25 of the *Utilities Commission Act*.

117 According to the Access Policy, DPO provides the prescribed services in its capacity as trustee for the Darwin Port Manager Trust (ABN 60 269 541 845). Pilotage services are provided by Darwin Port Pilotage Pty Ltd in its capacity as trustee for the Darwin Port Pilotage Trust (ABN 98 744 318 229) who has been appointed as the pilotage services provider under section 85 of the PM Act.

The clause 6 principles are also clear on the importance of financial records and separate accounts, and the role they play in ensuring access and pricing regimes are effective. In its current form, the Territory regime would probably not meet the requirements of the CPA.[118]

DPO has submitted that access to financial records and separate accounts relates to a more onerous level of price monitoring and information gathering than was contemplated by the current light-handed approach.[119] The commission acknowledges there would be an increase in the administrative and regulatory burden for DPO to implement separate accounting arrangements for prescribed services. However, in this respect the commission considers the benefits of effective levels of disclosure of information are at least proportionate to the costs and this requirement is consistent with many other light-handed negotiate/arbitrate regimes. Without adequate access to meaningful information, a light-handed regime runs a high risk of becoming ineffective.[120]

DPO suggests separate accounts are more relevant to entities with significant other, non-regulated (but related) businesses that operate alongside the regulated asset or facility. The commission accepts that DPO is not a vertically integrated entity and is restricted from becoming an integrated operator by the terms of the port lease.[121]

However, the commission is not suggesting ring fencing arrangements are required to separate the regulated business activities from the competitive areas. What is necessary is the ability for the regulator to assess the financial accounts of DPO to ensure:

- monopoly profits are not being generated
- monopoly profits for prescribed services are not being used to cross-subsidise the areas of the business that face competition.

It is the commission's view that once the business of the port grows, it will not be able to make this assessment using the accounting information of the full business of DPO.

From the submissions made on the Issues Paper, there is support from port users and stakeholders for a requirement for DPO to maintain separate accounts and the commission to have access to those accounts. [122]

The commission also supports improved access to financial information for the arbitrator and port users. As discussed, under the current regime and due to exceptions in the Access Policy, port users have very limited rights to access information. As users are unable to access sufficient information, they will not be able to undertake informed negotiations and the costs and risks of arbitration are increased. As a result, the effectiveness of the negotiate/arbitrate regime is eroded.

118 Clause 6(4)(n) and (o) and of the Certified Principles Agreement.
119 Landbridge Darwin Port. 2018. Submission to the Utilities Commission: 2018 Ports Access and Pricing Review Issues Paper, page 13.
120 Sims, Rod. 2016. "Ports: What measure of regulation." ACCC conference speaker, October 20, 2016.
121 Landbridge Darwin Port. 2018. Submission to the Utilities Commission: 2018 Ports Access and Pricing Review Issues Paper, page 13.
122 Submissions on Issues Paper ConocoPhillips and its stakeholders. 2018. Submission to the Utilities Commission: 2018 Ports Access and Pricing Review Issues Paper, page 7 and Maritime Union of Australia. 2018. Submission to the Utilities Commission: 2018 Ports Access and Pricing Review Issues Paper, page 22.

Draft findings

7.o) The commission is of the view that a private port operator should maintain separate accounts for the prescribed services. The regime should specifically allow the commission to obtain information from a port operator about profit, cost and investment.

7.p) The commission found the port users have very limited rights to access financial information under the regime. The rights they do have are heavily restricted by exceptions in the Access Policy. This undermines the negotiate/arbitrate process.

Draft recommendations

7.q) The commission recommends the Territory regime be amended to include an obligation on a private port operator to maintain separate accounts for the prescribed services. The legislation should also be amended to include a power for the commission to obtain information from a port operator to enable the commission to analyse its profits.

7.r) It is recommended the rights of the arbitrator and port users to require the provision of financial information are strengthened, including moving the rights from the Access Policy to the regulations.

Negotiated agreements

At present DPO is required to publish its standard charges for prescribed services on its website.[123] It is also required to publish the standard rate for other charges set for, or in respect of, the use of port facilities of the Port of Darwin.[124]

The obligation to publish prices only applies to standard charges and the port operator cannot be required to publish a negotiated charge.[125] The terms 'standard charge' and 'negotiated charge' are not defined in the regulations. DPO publishes its charges for a service for which standard terms apply, as set out in schedule 1 of the Access Policy.

Under the Access Policy, if a port user requests a service to which standard terms do not apply, DPO and the potential port user negotiate the terms and price for the service and enter into a negotiated agreement.[126] The commission accepts the port operator and port users need scope to negotiate and different terms may apply even for broadly similar services.

As required by the regulations, the Access Policy requires DPO to give access to any prescribed service (whether standard or non-standard) on reasonable terms.[127] DPO must advise the commission of the number of negotiated agreements entered into and the terms of those agreements as part of its annual reporting obligations under the regime.[128] Since the commencement of the regime, DPO have entered into 12 negotiated agreements. To date, no issues have been raised by port users regarding these negotiated agreements.

DPO is due to report to the commission on 30 September this year and will provide the commission with any negotiated agreements entered into for the preceding financial year.

123 Regulation 16(2)(ii)(A) of the Ports Management Regulations and clause 7(a)(i) of the Price Determination.
124 Regulation 16(2)(ii)(B) of the Ports Management Regulations and clause 7(a)(ii) of the Price Determination.
125 Regulation 16(2)(d) of the Ports Management Regulations.
126 Regulation 18 of the Ports Management Regulations.
127 Regulation 13(2)(c) of the Ports Management Regulations.
128 Regulation 16(2)(f) of the Ports Management Regulations and clause 10(e) of the Price Determination.

The commission will review the negotiated agreements and invites feedback from port users about the negotiated agreement process.

Reference tariffs

As mentioned above, there are a number of services to which the standard terms do not apply and the pricing is not visible. This includes pricing for wharfage for dry bulk minerals, which is provided to potential customers on application.

Verdant Minerals advised the price provided on application for wharfage for dry bulk minerals is too generic to meet its project development needs. This is problematic for emerging mineral producers as during the development stage of their project, they need a high degree of certainty about access and pricing for port services in order to obtain financial support.[129]

In addition, the Access Policy expects the emerging producer seeking access to prescribed services to meet certain prudential requirements before DPO will enter into negotiations. The prudential standard requires the applicant to demonstrate, among other things that it has a sufficient capital base and assets of value to meet the actual or potential liabilities under an access agreement,[130] not merely any liabilities that may arise during the application process. This is difficult for emerging producers to achieve as they have limited capital until they secure finance. To raise financial backing for the project, the emerging producer needs certainty about pricing. As a result, the Access Policy may be unworkable for a potential port user.

Without greater certainty and clarity regarding pricing for dry bulk minerals and reasonable terms for access, potential projects may not proceed. As a result, the economically efficient operation of the port facilities will be negatively impacted, with flow-on effects for competition in dependent markets. This would also reduce the overall economic activity of the Territory.

The infrastructure at the Port of Darwin is well established to facilitate this type of export commodity. For example, at its peak in 2013-14, more than 2.8 million tonnes of dry bulk was exported through the port.[131] Future dry bulk mineral export projects are valuable to DPO, which has stated it is actively seeking to increase demand for its services and overall throughput for the port. However, the commission is concerned that a lack of clarity and certainty about prices and the terms of access for exporting dry bulk minerals has the potential to undermine this goal. The commission believes these problems could be solved by DPO classifying wharfage for dry bulk minerals as standard services and publishing reference tariffs.

In all of the other comparable ports across Australia, tariffs for export of dry bulk minerals are treated as standard and published.[132] This is known as a reference tariff and the commission supports this approach. As part of the review, the commission asked DPO to provide information about whether it would be possible for it to publish a reference tariff for dry bulk mineral exports.

129 Verdant Minerals. 2018. Submission to the Utilities Commission: 2018 Ports Access and Pricing Review Issues Paper, page 1.
130 Access Policy, paragraph 6.3 and definition of Prudential Requirements, paragraph (b).
131 Minerals Council of Australia: Northern Territory Division. 2016. Agenda for Growth: Northern Territory Mining Industry, page 5.
132 GHD Advisory. 2017. Darwin Port Price Benchmarking Study 2017, page 10.

DPO has advised that due to the different needs across the different types of dry bulk minerals, it would not be practical or reasonable to impose a 'one size fits all' approach. The commission accepts it is not pragmatic to provide a single price for all dry bulk mineral exported but believes the approach taken in other comparable ports is attainable. For example, in the Port of Townsville (which shares similarities with the Port of Darwin) reference tariffs are provided for a number of different dry bulk minerals such as coke and coal, iron ore and manganite, metal concentrates, zinc ferrites, as well as a category covering those not specified (other). This takes into account the different requirements and costs associated when dealing with diverse dry bulk minerals.

The approach taken by other comparable ports demonstrates the wharfage charge for dry bulk mineral exports at the Port of Darwin is capable of being treated as a standard service. This would mean the standard terms and conditions would be published under the Access Policy in addition to a reference tariff. In doing so, it would provide clarity and certainty regarding access and pricing for dry bulk mineral exports to potential port users.

However, under the current regime DPO determines what constitutes a standard service in its Access Policy and the commission has no power to direct a particular service be included. This is compounded by the fact the commission is limited in what it can take into account when considering whether to approve or not approve an Access Policy and its lack of power to require changes to be made to an Access Policy, once approved. As a result, the regime does not give the commission the power to do anything about the Access Policy failing to respond to changes at the port, the changing needs of the markets served by the port or issues with the Access Policy in practice that emerge over time.

Draft findings

7.s) The commission found the current classification of dry bulk minerals as a non-standard charge is creating uncertainty and ambiguity for potential port users.

7.t) Consistent with other comparable ports across Australia, the commission formed the view that reference tariffs and associated standard terms for dry bulk mineral exports at the Port of Darwin are capable of being determined and published by DPO.

7.u) The commission believes its lack of oversight of the process that determines what services are the subject of published standard terms is not consistent with the objects of the regime and enhanced regulatory oversight and transparency for port users are necessary to achieve these objects.

Draft recommendations

7.v) The commission recommends the regulations be amended to require the port operator to publish reference tariffs and associated standard terms in the Access Policy for dry bulk mineral exports.

7.w) It is recommended the regime be amended to provide the commission with greater regulatory oversight of the process for determining what services must be the subject of published standard terms. It is also recommended the regime be amended to allow the commission to take standard services into account when considering whether to approve an Access Policy and a mechanism be included for the regulator to initiate and approve changes to the Access Policy over time.

7.3 Negotiation

As discussed previously, the regime is founded on a negotiate/arbitrate model, supported by price monitoring. It is based on allowing parties to try to reach mutually beneficial agreements through well-informed commercial negotiations.[133] As DPO has the potential to exercise market power in regards to the prescribed port services, it is important adequate obligations are in place within the regime to support and balance the negotiation process with the potential port user.

The review has examined the processes contained within the regime that support effective negotiation, and the commission has found a number of shortfalls. Specifically, the current regime does not contain the following aspects essential for effective negotiation:

- an obligation to negotiate prior to an access dispute being raised
- an obligation to do so in good faith
- or a clear negotiation process.

The clause 6 principles include requirements for negotiation frameworks.[134] In its current form the regime would not satisfy these standards.

When gauging practices in other comparable regimes across Australia, a good example is the Queensland *Competition Authority Act*, which sets out obligations for the conduct of negotiations for access regarding the Dalrymple Bay Coal Terminal. These include an obligation to negotiate in good faith, for the access provider to make all reasonable efforts to try to satisfy the reasonable requirements of the access seeker and to provide information to the access seeker.

Draft finding

7.x) The commission finds important elements of the negotiation process have been omitted from the regime. These include:

- an obligation to negotiate prior to a dispute being raised
- an obligation to do so in good faith
- a clear negotiation process to be followed.

Draft recommendation

7.y) It is recommended the regime includes:

- an obligation to negotiate prior to a dispute being raised
- an obligation to do so in good faith
- a clear negotiation process to be followed.

7.4 Arbitration

Following on from negotiation, for a negotiate/arbitrate model to operate successfully, recourse to independent binding arbitration needs to be a realistic and credible threat that is capable of constraining the market power of a port operator and encouraging the parties to negotiate in good faith. Access to arbitration promotes authentic negotiations between the port operator and the port user. Parties to arbitration must have confidence

133 Clause 6(4)(a)(c) of the Competition Principles Agreement.
134 Clause 6(4)(a)-(c), (e)-(i), (m)-(o) of the Competition Principles Agreement.

in the quality of the process and the ability to produce outcomes commercially viable and consistent.[135]

In conducting the review, the commission has identified some issues with the arbitration process that may challenge the effectiveness of the regime. To begin with, at present the arbitration process is not contained within the legislation but instead is required by the regulations to be included in DPO's Access Policy.[136]

Most of the comparable regimes in other jurisdictions have used legislation or regulations as the governing framework for the negotiate/arbitrate regime. The Territory regime relies on a port operator's Access Policy, which is subject to limited regulatory oversight in both its development and operation.

DPO's submission states there is no pressing need to move the requirement for the arbitration process to legislation and transferring the arbitration process to a statutory instrument separate from the rest of the Access Policy may create confusion.[137] The commission does not accept there will be confusion.

Of the port users who made submissions on this issue, two supported leaving things as they are, while two maintain arbitration is too important to be left in the Access Policy.

The regime has been in existence for less than three years and the arbitration provisions are yet to be tested. However, the commission considers arbitration as an essential component of an effective access and pricing regime and should be safeguarded. At a minimum, arbitration provisions should be included in the regulations and should stand alone from the Access Policy. The current arrangement, where the arbitration provisions are contained in the regulations as criteria for the approval of the Access Policy, is too far removed from regulatory oversight and not usual practice.

If a dispute does arise between DPO and a port user under the Access Policy, the dispute can be referred to an arbitrator for resolution. However, the legislation does not address the matters that must be taken into account by an arbitrator when making a determination. Consequently, DPO is left to define those matters in its Access Policy, potentially including factors that may protect its own interests at the expense of the port user.

DPO commented that as there have been no disputes under the regime and it is premature to consider making any legislative change.[138] Two port users showed a preference for the legislation to specify the matters the arbitrator should take into account.[139]

In the regimes for South Australian ports, the Dalrymple Bay Coal Terminal and the Port of Newcastle the legislation specifies the matters to be taken into account by the arbitrator. These include (but are not limited to) the objects of the regime, the legitimate business interests of the service provider, the public interest, the interests of people with rights to use the service, the direct costs of providing access, the operation and technical requirements, the pricing principles and the economically efficient operation of the facility.

135 National Competition Council. 2017. Certification of State and Territory Regimes: A Guide to Certification under Part IIIA of the *Competition and Consumer Act 2010* (Cth), pages 30 and 31.

136 Regulation 13(2)(f) of the Ports Management Regulations.

137 Landbridge Darwin Port. 2018. Submission to the Utilities Commission: 2018 Ports Access and Pricing Review Issues Paper, page 9.

138 Landbridge Darwin Port. 2018. Submission to the Utilities Commission: 2018 Ports Access and Pricing Review Issues Paper, page 12.

139 ConocoPhillips and its stakeholders. 2018. Submission to the Utilities Commission: 2018 Ports Access and Pricing Review Issues Paper and Maritime Union of Australia. 2018. Submission to the Utilities Commission: 2018 Ports Access and Pricing Review Issues Paper.

As arbitration is a fundamental element of the underpinning framework of the regime, the commission supports the inclusion of matters to be taken into consideration by the arbitrator in the regime. This is also consistent with the requirements of the clause 6 principles.[140]

7.4.1 Conflict between the Access Policy and other agreements

As part of the leasing arrangement for the Port of Darwin, DPO has entered into a lease and a number of other transaction documents and agreements with the Territory Government. Some of these documents are available to the public (for example, the lease of the port), while others are confidential. The legislation does not provide any guidance on how to resolve a potential conflict between the Access Policy and these other documents that DPO is required to adhere to.

In the South Australian ports regime, as well as the regimes for the Dalrymple Bay Coal Terminal and the Port of Newcastle, guidance is offered on how to manage conflicts between the access regime and the other commitments of the port operator. For instance, in South Australia when an arbitrator is making an award it needs to consider the interests of all persons holding contracts for use of any relevant port facility and the firm and binding contractual obligations of the operator already using a relevant port facility. In Queensland, in approving an access undertaking, the regulator must have regard to the legitimate business interests of the operator of the service that is protected.

DPO explains it would not be appropriate for the regime to include guidance on how to resolve a conflict between the Access Policy and other agreements to which it is bound, as this would likely increase the regulatory burden and cost to DPO in providing the prescribed services.

Port users have expressed the view the regime should take precedence and DPO should not be able to use its obligations under other (confidential) agreements as a reason for not complying with the Access Policy.

Consistent with the approaches in other jurisdictions, the commission thinks the regime should provide guidance on resolving conflicts between the Access Policy and other agreements.

Further, the commission presently has no visibility of the decisions made by the arbitrator regarding disputes under the regime. The same gaps exist for port users who are not privy to the dispute.

This compounds problems with information asymmetry between the port operator and users. By providing arbitration decisions to the commission, there is greater transparency and certainty about the likely approach of the arbitrator for future disputes. This may encourage parties to settle disputes on their own, without the need for arbitration.[141] The commission supports this view.

Draft findings

7.z) The commission finds arbitration an essential component of an effective access and pricing regime and should be included in the regime rather than the Access Policy.

140 Clause 6(4)(i) of the Competition Principles Agreement.

141 National Competition Council. 2017. Certification of State and Territory Regimes: A Guide to Certification under Part IIIA of the *Competition and Consumer Act 2010* (Cth), page 32.

7.aa) The commission finds at present the regime should stipulate the matters to be taken into consideration by the arbitrator in the dispute resolution process.

7.ab) The commission finds at present there is uncertainty as to how conflicts between the Access Policy and other agreements relating to the prescribed services should be resolved.

7.ac) The commission believes it would be beneficial for arbitration decisions to be provided to the commission.

Draft recommendations

7.ad) The commission recommends the provisions relating to arbitration are expressly specified in the regime, rather than the regulations requiring the Access Policy to contain provisions about arbitration in order for it to be approved.

7.ae) The commission recommends amendments be made to the regulations to include the matters to be taken into account by the arbitrator in the dispute resolution process.

7.af) The commission recommends the regulations be amended to provide guidance on resolving conflicts between the Access Policy and other agreements regarding prescribed services for the port.

7.ag) The commission recommends the regulations be amended to include an obligation that arbitration decisions are provided to the commission.

7.5 Compliance and enforcement

In order for the objectives of regulation to be achieved, it is essential compliance with the regulatory regime is monitored and noncompliance is managed and responded to accordingly.[142] It is generally accepted that regulators need a range of response options proportionate to the risks created by noncompliance with a regulatory regime.[143] Response options should address the breach as well as encourage future compliance.

The compliance and enforcement mechanisms of the current regime are based on:

- annual self-reporting by DPO to the commission about any material instances of noncompliance with the Access Policy[144]
- the commission's report to the minister about any material instances of noncompliance by DPO with the Access Policy or the Price Determination, which is tabled in Parliament.[145]

In addition, the Reporting Guidelines require DPO to certify it has an adequate compliance framework in place that enables it to properly identify, record and rectify any material instances of noncompliance with the Access Policy. [146]

In identifying issues with the regime, the commission is dealing with potential problems and not a current lack of compliance or performance by DPO.

As a result of the review, the commission has identified various aspects absent from the regime, including:

142 Australian National Audit Office. 2014. Administering Regulation: Achieving the right balance, page 9.
143 Australian National Audit Office. 2014. Administering Regulation: Achieving the right balance, page 45.
144 Section 130 of the *Ports Management Act*.
145 Section 121 of the *Ports Management Act*.
146 Clause 3.2.1 of the Utilities Commission of the Northern Territory, Port of Darwin Reporting Guidelines, 28 March 2018.

- a definition of 'material instance of noncompliance'
- a mechanism for other parties such as port users and industry stakeholders to report to the commission about any breaches of material instances of noncompliance
- a function for the commission to investigate material breaches with the Access Policy
- penalties for failing to report on material instances of noncompliance with its Access Policy
- a requirement for a port operator to have its records independently audited prior to submitting to the commission
- where there are concerns about a port operator's compliance with the regime, the power for the commission to initiate an independent audit.

First, the legislation does not define the term 'material instance of noncompliance'. This is of significant importance to the regime as DPO and commission both have obligations to report on material instances of noncompliance with the Access Policy and the Price Determination.

As a result, the assessment of what constitutes a material instance of noncompliance is open to interpretation.[147] The commission has attempted to rectify this in its Reporting Guidelines by outlining what constitutes 'noncompliance' and 'material instance'[148] but in practice it is up to DPO to determine.

The commission believes to ensure clarity and certainty of what constitutes a material instance of noncompliance, it would be beneficial for the term to be defined by the regime.

Regarding a process for other parties such as port users and industry stakeholders to report to the commission about any breaches of material instances of noncompliance, port users indicated a preference for this to be included. DPO highlighted there is nothing preventing port users from notifying the commission of any suspected material breaches. This is correct, but when considering a potential investigatory power of the commission (as discussed in the next paragraph), the express right for other parties to report suspected material breaches becomes important.

In other states in Australia, all other comparable regimes provide the relevant regulator with some level of investigatory power. Being able to investigate reports of material breaches is a fundamental aspect of compliance and enforcement of regulatory regimes.

The same can be said for penalties for material breaches of noncompliance with the Access Policy. Regulation is passive without consequences for noncompliance. In other regimes, various type of penalties have been incorporated and this process is advocated by the commission.

Regarding the obligation for information to be audited and the commission be able to initiate an independent audit of DPO's compliance with the regime, several port users support this approach. This is because independent auditing offers accountability, reliability and assurance for the regulator, port users, investors and all industry stakeholders. If compliance by the regulated industry is the goal, then it is fundamental that the regulatory regime provides the regulator with the capability to verify compliance.

147 INPEX, 2017. Feedback on Draft Access Policy Rev C, Standard Terms and Reporting Guidelines.
148 Utilities Commission of the Northern Territory, Port of Darwin Reporting Guidelines, 28 March 2018, clauses 2.1 and 2.2.

In response to this point, DPO reiterates the regime is intended to be light-handed. However, a light-handed approach should not be perfunctory. Information, through credible record keeping and reporting practices is required to understand whether the regime is working and is fit for purpose. A light-handed approach does not imply noncompliance by regulated industries should be tolerated or regulatory regimes should not be enforced. Strategies regarding compliance and enforcement should aim to achieve the highest levels of compliance from regulated industries, while keeping the costs and burden as low as practical.

The requirement for a port operator to have its records independently audited prior to submitting to the commission has the potential to be an expensive exercise. The same outcome may be achieved through less costly means, by instead requiring the Chief Executive Officer of a private port operator to certify the information it submits to the commission is accurate.

In the Issues Paper, the commission raised the question whether DPO should report to the commission on broader information such as the access sought, provided, refused or the time it takes for negotiations. DPO has provided feedback that these additional reporting requirements would incur considerable expense in staff time and systems costs.[149]

There was strong support from port users for DPO to report on broader matters regarding the Access Policy to ensure transparent and equitable access. It was also suggested key performance indicators could be used to monitor performance.[150] This is similar to the approach taken for the Dalrymple Bay Coal Terminal, the Wheat Terminal Code and the South Australian ports regime.

The commission believes that on broader matters would be of valuable assistance in monitoring compliance and the overall effectiveness of the regime. However, it is also noted that to date, there have been no reports of material instances of noncompliance with the Access Policy. As the commission makes a number of other recommendations to improve compliance and enforcement mechanisms under the regime, on balance it is accepted these broader types of reporting obligations may unnecessarily increase the administrative and regulatory burden on DPO.

Draft finding

7.ah) The commission finds a number of important elements are absent from the current regime that are necessary for effective compliance and enforcement.

Draft recommendation

7.ai) It is recommended the regime is amended to include:

- a definition of 'material instance of noncompliance'
- an express provision for other parties to be able to report on material instances of noncompliance with the Access Policy to the regulator
- a power for the regulator to investigate material instances of noncompliance with the regime reported by a port operator and other parties

149 Landbridge Darwin Port. 2018. Submission to the Utilities Commission: 2018 Ports Access and Pricing Review Issues Paper, page 12.

150 ConocoPhillips and its stakeholders. 2018. Submission to the Utilities Commission: 2018 Ports Access and Pricing Review Issues Paper, page 7.

- penalties to be imposed on a port operator for material instances of noncompliance with the Access Policy
- a requirement on the Chief Executive Officer of a private port operator to certify that 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.

7.6 Standards of service

Indicators of the quality of regulated services provided by a port operator are an important measure of the effectiveness of regulatory oversight. This is because a port operator has the potential to exercise market power by reducing the quality of the services it provides to port users. This reduces its costs and in turn, provides a port operator with the opportunity to generate excessive profits.

At present, the current regime for the Territory does not require DPO to report on standards of service or performance levels for prescribed services. This is not consistent with the approach taken in the other comparable regimes across Australia.

For example, for South Australian ports ESCOSA may develop and issue standards regarding a maritime service, which the port operator must report against. Regulated operators under the Wheat Terminal Code have to publish performance indicators that the ACCC monitors. The Essential Services Commission of Victoria assesses service quality indicators for the Port of Melbourne Corporation by measuring:

- the portion of container vessels visiting the port that are draught constrained
- the number of container ships delayed due to a berth not being available.

The port operator also reports customer satisfaction information to the regulator.[151]

In its submission to the Issues Paper, DPO does not support the commission being able to specify or insist on a commitment to service standards for the prescribed services. It states the regime already imposes a number of substantive obligations on it regarding how prescribed services must be delivered.[152]

The commission accepts that DPO has a commercial incentive to provide superior service for all port users in order to encourage greater use and throughput of the port.[153] As discussed in Chapter 5, the commission believes DPO also has an incentive to increase its profits. This can be achieved by reducing the quality of service, without affecting actual demand for the port or the services it provides.

The commission understands DPO already conducts customer satisfaction surveys. As an experienced corporate entity, it would be expected that DPO would also have the capacity to use key performance indicators (or similar tools) to measure and improve its business performance.

151 Essential Services Commission of Victoria, Review of the Victorian Ports Regulation: Final Report, June 2014, pages 58 and 59.
152 Landbridge Darwin Port, Submission to the Utilities Commission 2018 Ports Access and Pricing Review Issues Paper, April 2018, page 13.
153 Landbridge Darwin Port, Submission to the Utilities Commission 2018 Ports Access and Pricing Review Issues Paper, April 2018, page 14.

Of the submissions received from port users, some were neutral on this topic and some were in favour of the commission being able to specify or insist on a commitment of service standards by DPO.

The commission does not seek to impose minimum standards for all of the prescribed services delivered by DPO. Instead, it recommends a requirement to report on performance against certain specified standards to be used as an indicator that DPO is not generating excessive profits through sacrificing quality of service. To minimise the administrative burden on DPO, the commission advocates using measures such as the customer satisfaction survey or key performance indicators.

Draft finding

7.aj) The commission has found there is a gap in the regime regarding reporting on and monitoring the standard of service or performance levels provided by a port operator for prescribed services.

Draft recommendations

7.ak) The commission recommends amendments to the regime to include a process for the commission to determine the standards of service or performance levels against which reporting will be required and a requirement of a port operator to report to the commission on those standards of service or performance levels.

7.al) It is recommended the commission reports annually to the minister on a port operator's standards of service or performance levels.

8 Other issues

8.1 Improving the Access Policy approval process

One of the regulatory functions of the commission is to approve an access policy as submitted by a port operator. In March 2016, the operator of the Port of Darwin submitted a draft Access Policy to the commission. Following a lengthy consultation period, the Access Policy was approved on 30 June 2017.

This identified a number of problems with the approval process under the current regime. While most of these challenges were overcome for the existing Access Policy, there still may be problems in the future. This is because if another port is bought into the regime by declaration, the same approval process would apply. Also, the current regime could potentially be used as a template to regulate other infrastructure or services in the Territory, therefore it is prudent to correct the existing problems.

8.1.1 Consultation on the initial Access Policy

Currently, there is no requirement for a port operator to consult with port users during the approval process for the initial draft Access Policy. However, consultation is required if a port operator proposes to amend an approved Access Policy.

The commission thinks this omission is a drafting oversight. Amending the legislation to include an obligation to consult on initial access policies is strongly supported by the stakeholders who commented on this issue.

Draft finding

8.a) The commission has formed the opinion the regime should include an obligation for a port operator to consult with port users on an initial draft Access Policy.

Draft recommendation

8.b) The commission recommends section 127(2) of the PM Act is amended to include an obligation on a port operator to consult with port users on an initial access policy.

8.1.2 Decision-making Framework for approving the Access Policy

Based on the current legislation and interpretation, when considering a draft Access Policy the commission has limited discretion to require changes to the draft and can only take into account the matters in section 127 of the PM Act and Regulation 13(2).

The commission believes this undermines the regime by restricting it from taking relevant factors into account when deciding to approve (or not approve) a draft Access Policy. For example, the commission cannot have regard to comments from port users, best industry practice standards, the object of part 11 of the PM Act or matters outlined in section 6(2) of the UC Act.

Consistent with support from stakeholders, a better approach is to adopt the process undertaken for the Dalrymple Coal Bay Terminal. Under this regime, the regulator must regard a number of principles when approving an access undertaking. These include the object of the part, the interests of the public, port users and access seekers, pricing principles and any other matter it considers relevant.

Draft finding

8.c) The commission finds the decision-making framework for approving a draft Access Policy prevents the commission from taking relevant matters into account.

Draft recommendation

8.d) The commission recommends amending section 127(4) of the PM Act to allow the commission to take relevant matters (such as the pricing principles, interests of the public, port users and access seekers) into consideration when approving a draft Access Policy. Alternatively, part 11 of the PM Act could be amended to prescribe the matters the commission can take into account when performing all of its functions under the regime (including approving a draft Access Policy).

8.1.3 Extending the time for the commission to approve a draft Access Policy

The commission must approve a draft Access Policy that meets the requirements of section 127(2) of the PM Act. The matters that must be included in an Access Policy in order for it to be approved are set out in Regulation 13(2). When the commission receives a draft Access Policy, it has 60 days to notify a port operator whether or not it is approved.[154]

During the approval process, the commission reviewed the draft Access Policy and identified matters it considered needed to be changed for it to meet the requirements of regulation 13(2). The commission discussed these matters with DPO.

As the matters raised were more complex than first anticipated by both parties, it took longer than expected for the draft Access Policy to be finalised. As discussions were constructive and the process was progressing, the commission did not want to be forced to issue a formal notice not approving the draft Access Policy under section 127(3)(b) of the PM Act, once the 60 days expired.

To avoid this outcome, the commission and DPO agreed the most suitable solution would be for DPO to submit an amended draft Access Policy just prior to the 60-day time limit expiring in accordance with section 127(6) of the PM Act. The agreed interpretation between the parties was the 60-day time limit for approval would re-start. However, the commission believes this solution is not ideal and the legislation should provide clear procedures for extending the time limit, when warranted.

Draft finding

8.e) The commission finds the existing approval process for the draft Access Policy is limiting. It does not take into account the possibility of more time being needed for the commission and a port operator to engage and resolve matters concerning what must be contained in the draft Access Policy in order for it to be approved.

Draft recommendation

8.f) The commission recommends amending section 127(3) of the PM Act to allow the commission to extend the approval time for the draft Access Policy beyond 60 days, in certain circumstances.

154 Section 127(3)(a) and (b) of the *Ports Management Act*.

8.1.4 Amending the Access Policy

DPO is required to review the Access Policy within five years of it being approved. There is no obligation on DPO to report on the outcome of the review or to revise the Access Policy if found necessary. Further, the commission has no power to require amendments to the Access Policy if it becomes out of date or ineffective. Ultimately, this means the current Access Policy could be in force indefinitely. This challenges the effectiveness of the regime as it limits transparency and provides no safeguards if the Access Policy becomes unable to meet its purpose.

The commission is concerned that following a review of the Access Policy the findings are not required to be made available to the regulator or port users. As discussed earlier, a lack of transparency cultivates information asymmetry and undermines a well-informed and effective negotiation process. Most of the port users who commented on this issue are of similar opinion.

Regarding whether DPO should be required to revise the Access Policy, this can be considered with the question of whether the regulator should be able to require amendments be made to the Access Policy.

DPO is of the opinion the intention of the regulations is that the decision to amend the Access Policy is at the discretion of DPO and a clear process is in place for review and amendment.

However, comments from port users indicate there are circumstances where an obligation to amend is warranted. For example, when there have been changes to relevant Commonwealth or Territory legislation (especially the PM Act and regulations), there is material change to the market and clauses within the Access Policy become unworkable or the Access Policy becomes ineffective. The commission supports these comments.

DPO is of the opinion that if there was an ability for the commission to require changes to the Access Policy then it should be restricted to narrow circumstances and subject to appropriate review and appeal rights for the affected operator. In the event of disagreement, there would need to be mechanisms in place so the operations of the port are not disturbed pending the disagreement being resolved.

Additionally, the regime is lacking a provision requiring an Access Policy be in place at all times. If the initial (current) Access Policy should expire or cease to be valid, there is no means under which it can be replaced. The commission considers this to be an unintended drafting oversight requiring amendment. Submissions from port users support an Access Policy to be in place at all times.

Draft findings

8.g) The commission finds, in the interest of transparency and information symmetry, a port operator should publish the findings of a review of its Access Policy and give the regulator a copy of the findings.

8.h) The commission finds there should be an obligation on a port operator to amend the Access Policy in certain specified circumstances that could result in the Access Policy ceasing to meet the requirements of the Act or regulations, or be consistent with the object of part 11 of the Act (for example when there have been amendments to relevant Commonwealth or Territory legislation or there is a material change to the market).

8.i) The commission believes, following the initial approval of a port operator's Access Policy, an Access Policy should be in place at all times. Should the current Access Policy expire or cease to be valid, a mechanism is needed to ensure it can be replaced.

Draft recommendations

8.j) The commission recommends amending Regulation 15 to include an obligation for a port operator to publish the findings of a review of an Access Policy and provide the regulator with a copy of the findings, and submit a revised access policy that addresses the findings for approval.

8.k) The commission recommends amending section 127 of the PM Act to include an obligation of a port operator to amend its Access Policy in certain specified circumstances that could result in the Access Policy ceasing to meet the requirements of the Act or regulations, or be consistent with the object of part 11 of the Act (for example, when there have been amendments to relevant Commonwealth or Territory legislation or there is a material change to the market).

8.l) It is recommended section 127(2) be amended to include a mechanism for the Access Policy to be replaced should it expire or cease to be valid.

8.2 Additional issues in submissions

8.2.1 Reporting guidelines

In its submission DPO provided commentary about the Draft Reporting Guidelines published by the commission in May 2017. DPO considered the Draft Reporting Guidelines were meant to clarify DPO's obligations under section 130 of the PM Act regarding its annual report to the commission on material instance of noncompliance with its Access Policy. It is DPO's view the Draft Reporting Guidelines initially included a number of requirements that exceeded the legislative intent of section 130 of the PM Act.

DPO has previously provided the commission with feedback on the Draft Reporting Guidelines, which included the concerns outlined above. The commission has taken DPO's feedback into account and made the appropriate changes, which are reflected in the final version of the Reporting Guidelines.

The commission has since issued the final version of the Reporting Guidelines, which come into force on 2 May 2018 following publication in the Northern Territory Government Gazette.

8.2.2 Adjustment to definitions

In its submission, DPO outlined the current definition of 'designated port' in the PM Act is unintentionally too broad.

Designated port is defined under the PM Act to mean the Port of Darwin. The Port of Darwin is defined in the PM Act as reference to the area of water and land within the boundaries of any gazettal notice by the relevant minister. Therefore, the port in this case is the subject of boundaries declared by Government gazette on 1 July 2015.

It is DPO's view this series of definitions leads to a drafting error as the port lease does not cover the whole area that constitutes the 'designated port'. The consequence is DPO does not have the appropriate authority to undertake services across all areas falling within the

boundaries of the 'designated port'. DPO recommends the definition of 'designated port' be reviewed and subsequently amended to align with the actual operations of the port.[155]

Draft recommendation

8.m) The commission recommends, in light of the issues raised by DPO, the application of 'designated port' for the purposes of the ports access and pricing regime is reviewed by Government and the PM Act amended if necessary.

155 Landbridge Darwin Port, Submission to the Utilities Commission 2018 Ports Access and Pricing Review Issues Paper, April 2018, page 7.

9 Draft findings and draft recommendations

Section 123(1) of the PM Act sets out the requirement that the commission must periodically conduct and complete a review of the operation of the access and pricing regime. The review assesses the need for and effectiveness of the port access and pricing regime, and whether any changes are recommended by the commission.

In conducting the review, the legislation requires the commission to specifically consider the following four questions:

- is there an ongoing need for regulatory oversight of access to and pricing of prescribed services provided by a port operator
- is there a need to change the form of regulatory oversight of access and if so, how
- is there a need to change the form of regulatory oversight of prices and if so, how
- should amendments be made to part 11 of the PM Act or the regulations and if so, the nature of those amendments.

9.1 Summary of main findings

The commission's analysis for this review has been guided by the object of the port access and pricing regime, which is 'to promote the economically efficient operation of, use of and investment in major port facilities in the Territory by which services are provided, so as to promote effective competition in upstream and downstream markets'. The commission's approach has also taken into account other relevant aspects of the PM Act including the access and pricing principles, and factors under the UC Act the commission must have regard to when performing its functions.

The findings and recommendations in this Draft Report have been informed by a range of considerations including stakeholder submissions and an analysis of the regime against the clause 6 principles. The commission considers, in combination with other measures, the clause 6 principles are an appropriate tool for assessing the access and pricing regime for the purpose of this review. In doing so, the commission formed the view that the current Northern Territory ports access and pricing regime does not meet the clause 6 principles and it is unlikely it would receive recommendation for certification as an effective access regime from the NCC.

The commission has assessed the market and concludes DPO does have substantial market power and the potential to exercise this market power exists, and is likely to continue. However, no evidence was provided to the commission of DPO exercising its market power for the current review period. The commission also formed the opinion the benefits of an access and pricing regulatory regime outweigh the costs.

For these reasons, at least for the next review period, the commission has reached the following decisions regarding the ports access and pricing regime as applied to the Port of Darwin:

Is there an ongoing need for regulatory oversight of access to and pricing of prescribed services provided by a port operator?

Yes – the commission has found there is an ongoing need for access and price regulation for the port.

Is there a need to change the form of regulatory oversight of access and if so, how?

No – the commission has formed the view a negotiate/arbitrate approach for access regulation should continue.

Is there a need to change the form of regulatory oversight of prices and if so, how?

No – the commission believes price monitoring as the form of price regulation should continue.

Should amendments be made to part 11 of the PM Act or the regulations and if so, what is the nature of those amendments?

Yes – notwithstanding the commission's answers to the questions above. Throughout the review the commission identified various deficiencies in the current regime that warrant amendment to part 11 of the PM Act or regulations to better meet the legislative objectives and ensure the regime in its present form is effective and fit for purpose.

The nature of the recommended changes are discussed in full detail in chapters 6, 7 and 8. In particular, Chapter 6 discusses the exemption of services under lease. Chapter 7 examines the obligations the commission considers necessary to ensure an effective and well-informed negotiate/arbitrate regime and effective price monitoring. Chapter 8 outlines the problems identified through the Access Policy approval process and the improvements needed to ensure this process operates properly. Chapter 8 also discusses additional issues raised in the stakeholder submissions on the Issues Paper. Appendix E lists all of the commission's draft findings and draft recommendations, the majority of which relate to proposals to ensure the current regime is effective and fit for purpose.

The commission seeks feedback from port stakeholders on the draft findings and draft recommendations contained in this report, which will inform the commission's Final Report for the review of the ports access and pricing regime.

The commission acknowledges any subsequent amendments to the regime following the commission's findings and recommendations are solely a matter for consideration and decision by Government and Parliament.

Appendices

Appendix A: List of port stakeholders contacted throughout the review of the regime

Darwin Port Operations Pty Ltd

Arafura Resources (Nolans Project)

Association of Mining and Exploration Companies

Australasian Railway Association

Australian Competition and Consumer Commission

Australian Cruise Association

Australian Federation of International Forwarders

Australian Ilmenite Resources Pty Ltd

Australian Logistics Council

Australian Maritime Officers Union

Australian Petroleum Production and Exploration Association

Barge Express

Bhagwan Marine

Chamber of Commerce NT

ConocoPhillips Australia

Core Exploration

Department of Business, Trade and Innovation

Department of Infrastructure, Planning and LogisticsDepartment of the Chief Minister

Department of Treasury and Finance

DOF Subsea

Infrastructure Australia

Infrastructure Partnerships Australia

INPEX Australia

KGL (Jervois Project)

Maritime Industry Australia Limited

Maritime Union of Australia (NT Branch)

Minerals Council of Australia

Minister for Infrastructure, Planning and Logistics

National Competition Council

National Transport Commission

Northern Territory Cattlemen's Association

Northern Territory Livestock Export Association

OM Manganese Limited (Bootu Creek)

Ports Australia

Regional Harbourmaster Darwin

Royal Vopak

Sea Swift

Shipping Australia

Shorelands

Svitzer Australia

Tellus Holdings (Chandler Project)

TNG Limited (Mt Peak Project)

Tourism and Transport Forum

Tourism NT

Verdant Minerals (Ammaroo Phosphate Project)

Ward Keller Lawyers

Appendix B: Summary of restrictive clauses in the lease for the Port of Darwin

This document provides an overview of the lease and sublease for the Port of Darwin put in place on privatisation of the Port of Darwin in 20151. The lease documents are available from the Lands Titles Office (lease numbers 859663 and 859664).

Background

In November 2015, the Northern Territory Government privatised the operation of the Port of Darwin. As part of the suite of privatisation documents, the Territory Government issued a 99-year lease of the Port of Darwin to Landbridge Port Pty Ltd (Landbridge) as trustee for the Landbridge Trust who in turn sublet the leased area to Darwin Port Operations Pty Ltd (DPO) as trustee for the Darwin Port Manager Trust.

In this summary, 'port lease' is used to refer to the lease to Landbridge and 'port sublease' is used to refer to the sublease to DPO. The port lease and port sublease are referred to collectively in this summary as the 'lease documents'.

Under the port lease, any of the obligations of Landbridge may be satisfied by Landbridge procuring the relevant action is undertaken by DPO on its behalf. The port sublease specifically requires that DPO complies with the port lease (excluding provisions regarding the payment of rent and other money) as if DPO were the lessee under the port lease.

The lease documents are 'port operating agreements' for the purposes of the *Ports Management Act 2015* (NT) (PM Act) and the provisions in the PM Act applicable to port operating agreements apply to the lease documents.

Areas, assets and services covered by the lease documents

The area within the Port of Darwin covered by the lease documents (the leased area) is described in the port lease.

Some obligations under the lease documents relate to the 'total concession area', which covers a broader area including the leased area, any area the subject of a channel access easement and railway corridor land.

Other key terms in the lease are:

- core port infrastructure, which refers to facilities for use in connection with the operation of the port, including berths, boat harbours, and cargo handling facilities
- port services, which means services connected with the operation of the port including monitoring and management of the movement of vessels, vehicles, goods and people at the port, services in relation to core port infrastructure, management monitoring or administration of the use of and access to core port infrastructure and security services.

1 This summary is for general information purposes only. Any person requiring information about the lease documents for any other purpose should refer to the terms of those instruments and should seek appropriate legal or other professional advice.

General provisions in the lease documents

Sections 4 and 5 below deal with the provisions in the lease documents likely to be of most relevance to port users. This section provides an overview of the other general provisions in the lease documents.

The substantive provisions in the lease documents commence with the key commercial terms. These include the area covered by the lease documents, the duration of the lease and (in the case of the port lease) the rent payable to the Territory Government. This group of provisions extends to matters such as the lessee's right to quiet enjoyment and the lessor's right of access, and also deal with the leases in the leased area that exist concurrently with the lease documents.

DPO's right to quiet enjoyment of the leased area is subject to:

- the rights of existing port tenants
- the Territory Government's and Landbridge's rights to entry
- obligations to allow access to port regulators, emergency services, Territory agencies and Commonwealth agencies for security.

A second group of provisions deals with the state of the leased area. These cover the condition of the port and the land at the commencement of the lease, native title, heritage issues and the obligations with respect to the environment including clean-up of contamination and pollution, and environmental indemnities. Related to these are the insurance obligations in the lease documents.

A third group of provisions deal with matters that may arise during the term of the lease documents, such as assignment or change in control, the grant of security interests, dispute resolution, the consequences of force majeure and remedies for noncompliance with lease documents.

The port lease deals with changes to the areas of land used for the port by providing for sale of new areas acquired by the lessees or related entities to the Territory Government and leaseback.

Port stewardship and development

General port stewardship obligations are in clause 7 of the port lease and clause 6 of the port sublease.

In the port lease, Landbridge acknowledges the Territory Government's objective in granting the port lease was for the port be managed, operated, maintained and developed to be a major seaborne trade gateway for the Northern Territory. This objective is carried through to the port sublease.

Under the lease, Landbridge must (and through the sublease, DPO must):

- manage, operate and maintain the port in accordance with good operating practice (as defined in the lease documents)
- ensure the port is capable providing access to trade within the Territory, interstate and international shipping
- ensure the port is no less capable of providing access to the port for trade within the Territory and interstate rail and road transport than is usual at the commencement date

- provide for access to the port by all safety and security vessels employed in the service of a Territory agency and by vessels employed in the service of defence
- use reasonable endeavours to contribute to the ongoing improvement of productivity and efficiency in the port and port-related supply chains and cooperate with relevant industry bodies to the extent reasonably required to achieve the port objective
- make access to any roads within the leased area available to adjoining landowners for access to their land, public utility provides, port regulators, tenants and other occupiers of the leased area, and port users using core port infrastructure.

The total concession area may only be used in connection with the operation of the port and the provision of core port infrastructure and port services, except with the prior approval of the Territory Government. Landbridge and DPO cannot do anything inconsistent with the efficient use, management or operation of:

- core port infrastructure
- the future development of the total concession area in accordance with the law, the Port Development Plan or the lease documents
- achieving the port objective.

Prohibited uses or developments include use for a casino, hotel, hospital, for residential and recreational purposes, commercial parking, office development or retail shopping facilities for non port-related uses and as a wind farm.

Provisions dealing with port development are principally in clause 27 of the port lease, which apply to DPO through the port sublease. At the written request of Landbridge, DPO must report to Landbridge details of any development proposals in respect of the leased area. Landbridge (and DPO, through the port sublease) must ensure any development to the port is consistent with the current Port Development Plan. The port lease indicates the content of the Port Development Plan itself is governed by the Port Operating Deed.

Landbridge (and DPO, through the port sublease) must, to the extent it is feasible to do so:

- develop the leased area and develop or facilitate the development of core port infrastructure, including any necessary dredging activity, as necessary to cater for anticipated future growth in and demand for core port infrastructure
- provide quality and efficiency standards reasonably expected of a major port in Australia
- comply with good operating practice and all applicable laws and government requirements, and consistent with the port objective.

Grant of right to use or occupy land to a third party

When granting a third-party user a right to use or occupy the port for the purpose of providing services to third parties, and subject to some exceptions, Landbridge and DPO must each ensure the third-party user has a contractual obligation to offer access to those services to third parties on reasonable commercial terms. At the Territory Government's request, Landbridge and DPO must use reasonable endeavours to enforce these obligations.

This framework does not extend to an obligation to include a provision that would require the user to share facilities established for its own use or to alter current services

or facilities, or prevent users from applying a different charge to different users for the provision of the same service.

No integrated operator without Territory Government consent

Landbridge and DPO, and any entity either of them controls, cannot become an integrated operator without the consent of the Territory Government. An integrated operator means, in broad terms, an entity that has a material influencing interest in a business providing users of the port, at the port, any of a list of specified services. The list includes stevedoring, road transport/logistics, marine transport and rail transport services.

Appendix C: Comparison of approaches to access and price regulation in Australia

As part of the review of the ports access and pricing regime for the Northern Territory, the Utilities Commission has considered current practice in other jurisdictions to inform its approach to the issues raised in the Issues Paper. The following information covers five ports and, for each, responds to a list of questions derived from the Issues Paper [1].

Port and access regime summary

South Australia

Key terms

- *Commercial Arbitration Act 2011* (SA) (CAA)
- Essential Services Commission of South Australia (Commission)
- *Maritime Services (Access) Act 2000* (SA) (MSA)
- *Essential Services Commission Act 2002* (SA) (ESCA)

Overview

The South Australian regime applies at proclaimed ports in South Australia, currently Port Adelaide, Port Giles, Wallaroo, Port Pirie, Port Lincoln and Thevenard. It is established under the MSA and proclamations and regulations made under that Act, the ESCA and the CAA.

Three types of service are covered by the regime: (1) regulated services (to which the access regime applies), (2) essential maritime services (to which general price regulation applies) and (3) pilotage services (subject to price monitoring).

The Commission makes pricing determinations, issues standards and guidelines, aids conciliations and administers the access regime in line with the object and purpose of the MSA.

The current pricing determination of the Commission applies price monitoring, supported by Guidelines issued by the Commission about the provision of information to access seekers and the collection of data by the Commission. Access is provided under a negotiate/arbitrate model, with arbitration conducted by an independent arbitrator.

Wheat Terminal Code

Key terms

- *Competition and Consumer Act 2010* (Cth) (CAA)
- Part IVB of the CCA (Part IVB)
- Port Terminal Access (Bulk Wheat) Code of Conduct, which is Schedule 1 to the Regulation (Code)
- Competition and Consumer (Industry Code – Port Terminal Access) Bulk Wheat

1 The commentary in the table reflects the position at 1 June 2018. It is in summary form and detail including qualifications or exceptions have been omitted in order to keep the material to manageable length and relevant to the Issues Paper. If seeking to rely on the operation of a provision or regime, the terms of the legislation or other instrument should be consulted.

Regulation 2014 (Cth) SI No. 136 of 2014 (Regulation)

Overview

This regime applies to port terminal service providers which (in summary) means those who provide a service by means of a ship loader at port that is capable of handling bulk wheat. It is established under Parr IVB of the CCA, the Regulation and the Code.

The Code is a mandatory code of conduct under Part IVB of the CCA and replaced the system of approved access undertakings under Part IIIA of the CCA. The ACCC monitors and enforces Code compliance.

The Department of Agriculture and Water Resources is currently reviewing the Regulation and Code, as required by the Regulation.

Dalrymple Bay Coal Terminal (DBCT)

Key terms

- 2016 access undertaking for the DBCT (approved in 2017) (2016 access undertaking)
- Queensland Competition Authority (Authority)
- Queensland *Competition Authority Act 1997* (Qld) (QCAA)

Overview

Access to services at DBCT is regulated under the Queensland access regime comprising the QCAA and an access undertaking for DBCT approved under the QCAA.

DBCT is a common user coal export terminal. It has been leased to a private port operator (DBCTM) for 50 years, with an option to renew for a further 49 years. The services provided at DBCT are declared services for the purpose of Part 5 of the QCAA and the Authority has exercised its powers under the QCAA to require DBCTM to submit an access undertaking for approval under that Part. The first access undertaking was approved in 2010 and replaced in 2017 after a lengthy approval process. The Authority has initiated the process for a 2021 replacement.

Under the QCAA, an access undertaking sets out details of the terms on which an owner or operator of a declared service undertakes to provide access. The QCAA specifies three matters that must be dealt with in the access undertaking and lists other matters that may be included. The QCAA sets out the matters the QCA must have regard to when deciding whether to approve a draft access undertaking; these give the QCA considerable discretion in what it requires in the access undertaking, allowing it to consider (among other things) the interests of the owner, of access seekers and the public interest and requiring it to consider the pricing principles in the QCAA.

The QCAA contains principles governing the negotiation of access agreements and arbitration of access disputes by the QCA, resulting in an access determination. The QCA must not make an access determination that is inconsistent with an approved access undertaking. Under the QCAA, the parties to the dispute can agree to use a different process to determine their access dispute. However, in the case of DBCT, the approved access undertaking allows the parties to the access dispute to agree to appoint an expert but if that is not agreed, arbitration under the QCAA applies.

Port of Newcastle

Key terms

- *Independent Pricing and Regulatory Tribunal Act 1992* (NSW) (IPART Act)
- *Competition and Consumer Act 2010* (Cth) (CCA)
- Part IIIA of the CCA (Part IIIA)
- *Ports and Maritime Administration Act 1995* (NSW) (PMAA)
- National Competition Council (NCC)

Overview

Access to the Port of Newcastle is currently regulated under Part IIIA of the CCA and the PMAA.

The port is one of the largest coal export ports in the world and is operated by the Port of Newcastle Operations Pty Ltd (PNO) under a 98-year lease.

In May 2014, the joint venture parents of PNO, Hastings Funds Management and China Merchants Group entered into a long term lease arrangement with the State of NSW for the port assets, including the shipping channels. In May 2015, Glencore Coal Pty Ltd applied to the NCC for a declaration under Part IIIA in respect of the Port of Newcastle to enable access and use of the shipping channels and berths. The NCC's recommendation, and the Minister's decision, was not to declare the service. However, the Australian Competition Tribunal overturned this decision and declared the shipping channel services. In the course of its findings, the Tribunal considered the PMAA and the Lease from the State of New South Wales and found that neither obliged PNO to provide access to the services to all users of the port. In light of these circumstances, the Tribunal found that access to the service would promote a material increase in competition. The Tribunal, satisfied of each of the matters specified in s 44H(4)(a)-(f) of the CCA, decided to declare the service. PNO appealed the Tribunal's decision to the Full Court of the Federal Court. The Court refused the appeal and upheld the Tribunal's decision. PNO sought leave to appeal in the High Court, however, leave was refused.

As a consequence, access to and use of shipping channels and berths at the Port of Newcastle are declared services for the purposes of Part IIIA. The services will continue to be declared until the declaration expires or is revoked.

In 2016, an access dispute relating to the Port of Newcastle was referred to the ACCC for determination using the arbitration regime in Part IIIA. This appears to have been on hold while the appeal process was under way, but according to press reports, the arbitration is to take place in the coming months.

Port of Melbourne

Key terms

- *Essential Services Commission Act 2001* (Vic) (ESC Act)
- Provider of Prescribed Services (Ports) Licence – Melbourne Port Corporation (Licence)
- *Port Management Act 1995* (Vic) (PMA)
- Pricing Order, issued by the Governor in Council pursuant to s 49A of the PMA (Pricing Order)

- Essential Services Commission (ESC)

Overview

Access to the Port of Melbourne is principally regulated under the PMA, the ESC Act and the Pricing Order, issued by the Governor in Council pursuant to s 49A of the PMA.

The Port of Melbourne is Australasia's largest maritime hub for containerised, automotive and general cargo. Prior to the leasing of its commercial operations, the port of Melbourne was operated by the Port of Melbourne Corporation, a statutory authority established by the Victorian Government in 2003.

In 2016, the Victorian Parliament passed legislation enabling the port's commercial operations to be leased to a private operator for 50 years. The port land remains in state ownership. The functions of the Port of Melbourne Corporation were divided across two entities, the port licence holder (a private entity which assumes responsibility for the leased commercial operations) and the Victorian Ports Corporation Melbourne (a statutory authority responsible for marine safety and regulatory functions and the operation of Station Pier).

Under the access regime, the port licence holder's pricing and provision of prescribed services are subject to the Pricing Order. The port licence holder's setting of rents for Port of Melbourne land (i.e. non-prescribed services) are not currently regulated but the regime includes a mechanism to apply regulation if there is a misuse of market power.

Question 1: Vertical integration (issue 1): What measures does the regime include to address the risk of vertical integration (prohibited activities, ring fencing, non-discrimination obligations, etc)?

South Australia

Under the MSA, a person must not prevent or hinder a person who is entitled to a maritime service from access to that service.

The pricing principles allow multi-part pricing and price discrimination and include a principle that access prices should not allow a vertically integrated operator to set terms and conditions that would discriminate in favour of its downstream operations, except to the extent that the cost of providing access to others would be higher.

The regime as a whole can be seen as a response to the potential exercise of market power. In 2017, the Commission completed its most recent review of the access regime and recommended the regime continue. The recommendation reflects the Commission's findings that both port operators subject to the regime continue to have the potential to exercise market power, that the regime continues to be the most appropriate option to achieve the desired regulatory outcome at least cost and that there would be no net benefit falling back on regulation under Part IIIA of the CCA.

Wheat Terminal Code

According to the Explanatory Statement issued with the Regulation, the Code itself is a response to concerns about vertical integration.

Under the Code, non-exempt service providers are subject to prohibitions on:

- discriminating in favour of an associated entity; or
- engaging in conduct to prevent or hinder access to port terminal services.

Regulatory oversight is required for any port loading protocol that allocates capacity more than 6 months out.

No pricing principles are specified.

The ACCC's submission to the current review of the Code (see question 2) refers to the justification for the Code in the Explanatory Statement and indicates that it supports retaining the Code in light of ongoing concerns about the state of the market. The Department's interim report was issued in April 2018 and indicates that concerns about potential monopolistic behaviour continue.[2]

DBCT

For DBCT, measures are contained in both the QCAA and the access undertaking. The provisions in the QCAA cover unfairly differentiating and preventing or hindering access. The latter includes where the access provider provides access to itself or its related body corporate on more favourable terms than it does a competitor of the access provider, an assessment made with regard both to charges and the nature and quality of the service provided.

The pricing principles allow multi-part pricing and price discrimination when it aids efficiency and include a principle that access prices should not allow a vertically integrated operator to set terms and conditions that would discriminate in favour of its downstream operations, except to the extent that the cost of providing access to other operators would be higher.

In the 2016 access undertaking, Chapter 9 provides for ring fencing as well as an undertaking not to engage in conduct for the purpose of preventing or hindering access or unfairly differentiating etc.

Port of Newcastle

A no-hindering obligation in the CCA applies only where an access determination has been made: "the provider or a user of a service to which a third party has access under a determination, or a body corporate related to the provider or a user of the service, must not engage in conduct for the purpose of preventing or hindering the third party's access to the service under the determination".

A price monitoring regime in the PMAA is said to have as its purpose "the economically efficient operation of, use of and investment in major port facilities in the State by monitoring the prices port operators charge users of those facilities, so as to promote a competitive commercial environment in port operations".

Port of Melbourne

Prescribed services: The current Pricing Order provides for some mechanisms to address the risk of vertical integration through non-discrimination obligations:

2 Interim report of the review of the Competition and Consumer (Industry Code — Port Terminal Access (Bulk Wheat)) Regulation 2014, Wheat Port Code Review Task Force of the Department of Agriculture and Water Resources (Interim Report), page vii.

- Tariff discrimination is only permitted if the differences are consistent with the objectives set out in section 48 of the PMA and clauses 2.1.3, 2.2.1 and 2.3.1 of the Pricing Order.
- For channels shared between the port of Melbourne and other ports, no discrimination between port users on the basis of port or berth is permitted.

Non-prescribed services: The ESC is required to conduct and complete a review of the rents payable under the applicable lease every 5 years. If the ESC finds that there has been a misuse of market power, they may make a recommendation to the ESC Minister about whether the leasing activities should be subject to economic regulation.

Question 2: Impact of the regime (issue 2 and issue 9): What measures allow for assessment of the costs and benefits of the regime (such as review) and the adoption of alternative approaches over time?

South Australia

Price regulation: The maximum term for a price determination made by the Commission is 5 years from the date on which the determination takes effect. An existing price determination may be varied or revoked by a subsequent price determination.

The decision to extend the price monitoring regime rests with the Commission.

Access regulation: The access regime is in Part 3 of the MSA. Part 3 expires at the end of a prescribed period. Prescribed periods must end every 5 years.

The Commission must, within the last year of each prescribed period, conduct a review of the industries subject to the access regime to determine whether the access regime should continue to apply. The operation of Part 3 may continue (ie not expire) if:

- the Commission has recommended that it should continue; and
- a regulation has been made extending the period of its operation accordingly.

Wheat Terminal Code

A review by the Minister must start before the end of 3 years after commencement of the Regulation and Code. The review must "identify opportunities to ensure well managed deregulation to free and open competition in the Australian wheat export market, while maintaining Australia's international reputation for quality and reliability. In particular, the review must consider whether there are appropriate alternative mechanisms to achieve this outcome."

The Department commenced a review of the Code in 2017.[3] The Department's interim report indicates that no strong evidence or arguments have been put forward indicating the need for substantive amendment.[4]

DBCT

The access framework is embedded in the QCAA and not subject to a review mechanism.

3 Review of the Competition and Consumer (Industry Code — Port Terminal Access) Bulk Wheat) Regulation 2014, Issues Paper issued by the Wheat Port Code Review Task Force of the Department of Agriculture and Water Resources, September 2017 (Issues Paper).

4 Interim Report, page vi.

A decision to declare a service (and so bring it within the scope of the regime) is time limited and expires unless renewed by the Minister on the recommendation of the Authority.

The access undertakings themselves are subject to regular review by the Authority.

Port of Newcastle

The application of Part IIIA to the Port of Newcastle ceases if the declaration is revoked or when it expires in July 2031.

Part IIIA of the CCA has been the subject of an inquiry by the Productivity Commission (ending October 2013) and the Harper review (which reported in March 2015) as a consequence of which the declaration criteria were amended in 2017.

The NCC gives a report to the Minister each year, which is presented to Parliament, about (in summary) the operation and effectiveness of Part IIIA.

The ACCC must publish reports about arbitrations under Part IIIA.

Port of Melbourne

Pricing order: The ESC must conduct a public inquiry into the service provider's compliance with the Pricing Order every 5 years. The ESC is required to report to the Minister and the inquiry must be conducted in accordance with Part 5 of the ESC Act. The ESC must provide a draft report on the inquiry to the provider of prescribed services and give the provider an opportunity to make a written submission on the draft report. As a result of this inquiry, the ESC Minister may make a re-regulation recommendation.

Rents: The ESC must also conduct an inquiry in relation to the rents or associated payments (however described) payable by a tenant under an applicable lease every 5 years. The inquiry is required to be conducted in accordance with Part 5 of the ESC Act (but s 40 does not apply).

Services: The process by which the ESC would exercise its power (either of its own initiative or at the request of the Minister) to determine "standards and conditions of service" is not clear.

Question 3. Scope of the regime (issue 1): What is the framework for changing the scope over time?

South Australia

The regime applies in relation to proclaimed ports. The Governor (in effect the executive arm of government) can proclaim one or more of the ports listed in the MSA or prescribed by regulation to be capable of being made subject to the MSA.

Once a port is proclaimed, a further proclamation is needed to specify the regulated services at the port. This allows flexibility to declare only some services at specified locations within a port to be subject to the regime, rather than the whole port.

Wheat Terminal Code

Ministerial review of operation of the Regulation may lead to changes to the Code. A further regulation would need to be made to effect this change.

DBCT

New services can be declared by the Minister over time, applying the criteria in the QCAA that must be satisfied in order for a service to be declared.

Once a service is declared, it will remain declared unless revoked or it expires. A declaration expires unless the declaration is renewed.

The process for revoking or renewing a declaration requires the Authority to make a recommendation to the Minister. The decision is made by the Minister. In making its recommendations, the Authority must consult, including with the owner of the service. The decision to recommend an extension or declaration is made by reference to the access criteria.

Port of Newcastle

The Port of Newcastle is governed by the National Access Regime by virtue of the declaration made under s 44H of the CCA. A declaration continues in operation until its expiry date, unless it is earlier revoked. The declaration of services at the Port of Newcastle will expire on 7 July 2031.

The Minister may revoke a declaration, but may only do so if the NCC first makes a recommendation that the declaration be revoked and having regard to the objects of the CCA.

The PMAA allows regulations to be made about specified matters to promote the economically efficient operation of, use of and investment in land-based port facilities and port-related supply chain facilities. The power has not been exercised in relation to the Port of Newcastle.

Port of Melbourne

The Governor in Council may make a regulation specifying additional prescribed services. The process for this to occur is not prescribed.

The PMA limits the power to amend or revoke a Pricing Order. For example, protected provisions cannot be revoked or amended.

Question 4: Regulated services (issues 1 and 4): What services are covered by the regime and what is expressly excluded?

South Australia

There are three categories of service, which overlap: (1) regulated services (subject to access regulation), (2) essential maritime services (subject to price regulation) and (3) pilotage services (subject to price monitoring only).

Regulated services are maritime services provided at a proclaimed port and that are declared by proclamation to be regulated services.

The term 'maritime services' refers to services of any of the following kinds provided on a commercial basis at a proclaimed port:

- providing or allowing for access of vessels;

- a pilotage service facilitating access;
- providing berths for vessels;
- providing port facilities for loading or unloading vessels;
- providing for the storage of goods; and
- providing access to land in connection with the provision of services of any of the kinds mentioned above.

The following are expressly excluded: a towage service for facilitating access; a bunkering service; a service for the provisioning of vessels (including the supply of electricity and water); and a service for the removal of waste from vessels.

Essential maritime services are maritime services consisting of:

- providing or allowing for access of vessels to a proclaimed port; or
- providing port facilities for loading or unloading vessels at a proclaimed port; or
- providing berths for vessels at a proclaimed port.

Wheat Terminal Code

The Code applies to port terminal services being (in summary) a service provided by means of a ship loader that is at a port and capable of handling bulk wheat. This includes an intake/receiver facility, a grain storage facility, a weighing facility and a shipping belt, in each case when situated at the port, associated with the ship loader and capable of handling bulk wheat.

DBCT

The DBCT declaration states that the declared service is "the handling of coal at Dalrymple Bay Coal Terminal by the terminal operator".

Dalrymple Bay Coal Terminal is defined as the port infrastructure located at the port of Hay Point owned by Ports Corporation of Queensland or the State, or a successor or assign of Ports Corporation of Queensland or the State, and known as Dalrymple Bay Coal Terminal and includes the following which form part of the terminal—

- loading and unloading equipment;
- stacking, reclaiming, conveying and other handling equipment;
- wharfs and piers;
- deep water berths; and
- ship loaders.

The term 'handling of coal' is defined to include unloading, storing, reclaiming and loading.

Port of Newcastle

The regulated services under Part IIIA are those that have been declared.

The declaration for Newcastle applies to:

> *'[t]he provision of the right to access and use the shipping channels (including berths next to wharves as part of the channels), by virtue of which vessels may enter a Port precinct and load and unload at relevant terminals and then depart the Port precinct.'*

Port of Melbourne

Prescribed services include:

- the provision of channels for use by shipping on port of Melbourne waters;
- the provision of berths, buoys or dolphins in connection with the berthing of vessels;
- the provision of short-term storage or cargo marshalling facilities;
- the provision of access to, or allowing use of, places or infrastructure on port of Melbourne land for the provision of services to port users; and
- any other service prescribed by the regulations.

The following are not prescribed services:

- granting of a lease or sublease by the port operator pursuant to which a person is permitted to provide any of the following services:
  - container or automotive terminal or stevedoring operations;
  - dry-bulk, liquid-bulk or break-bulk terminal or stevedoring operations;
  - an activity or operations specified in the regulations; and
- the previously mentioned services if they are provided by the Victorian Ports Corporation.

Question 5: Exemptions (issues 1 and 3): What exemptions are available and what is the process for gaining exemption?

South Australia

There is no express exemptions regime. The Minister has implicit power to exclude services from the access regime at a proclaimed port since a service provided at a specific location (such as a particular berth) needs to be the subject of a proclamation to be included in the regime. Similarly, a service at a particular location or an entire port can be removed from the regime by proclamation.

The regime currently applies different levels of regulation to different services, as explained elsewhere in this table. In its recent review of the regime, the Commission recommended aligning the services in the access regime and pricing regime. It also recommended revisiting the scope of ports infrastructure included in the regimes.

Wheat Terminal Code

Exemptions from Parts 3 to 6 of the Code may be granted by the Minister for grain producer cooperatives.

The ACCC may grant exemptions having regard to matters specified in the Code.

DBCT

There is no exemptions framework in the QCAA, only those services which are not declared under the QCAA or activities that cannot be declared as they are excluded from the meaning of 'service', such as the supply of goods or the use of intellectual property.

Under the QCAA, use of the arbitration mechanism to resolve an access dispute is not mandatory and the parties may agree to use another process. However, the DBCT access undertaking requires the Authority to be the arbitrator unless the parties agree to use an expert and as DBCT must comply with the undertaking, it appears the option to use a different arbitrator is excluded for DBCT.

Port of Newcastle

There is no exemptions regime under Part IIIA, given the declare/regulate structure.

State Governments or access seekers can take services outside the scope of the declaration mechanism by implementing other access arrangements that satisfy the requirements of Part IIIA.

Port of Melbourne

There is no express exemptions regime, only those services which are not prescribed services.

Leases are excluded from regulation under the Pricing Order. However, they are subject to review and may be subject to price regulation if there is found to be a misuse of market power.

Question 6: Form of price regulation (issue 5): What form of price regulation is used? If others are permitted by the regime, what is the process for change?

South Australia

Only price monitoring applies to pilotage services. That is embedded in the MSA.

For the provision of essential maritime services, the MSA authorises the Commission to make a price determination under the ESCA.

Under the ESCA, a price determination may regulate prices, conditions relating to prices or price-fixing factors in any manner the Commission considers appropriate. A non-exhaustive list is included in the ESCA and ranges from fixing prices to price monitoring.

Each determination has a maximum term of 5 years.

The Minister or a regulated entity to which a price determination applies may apply to the Commission for a review of the price determination. After considering the results of the review, the Commission may confirm, vary or substitute the price determination or decision. Appeal to the Administrative and Disciplinary Division of the District Court is available.

Wheat Terminal Code

Price monitoring is used.

All port terminal service providers (including those who are exempt) must publish current standard terms and reference prices and must maintain records of prices charged.

DBCT

The form of price regulation is not prescribed in the QCAA but the governing principle are:

- the Authority must apply the pricing principles in making access determinations and

approving access undertakings, and

- an access undertaking for a service owned or operated by a 'related access provider' must include a provision preventing the related access provider recovering, through the price of access to the service, costs that are not reasonably attributable to the provision of the service.

DBCT's 2016 access undertaking contains prescriptive pricing arrangements, set by reference to an annual revenue requirement for the facility and a tariff structure. Calculations are set out in Schedule C to the access undertaking.

Access undertakings are subject to periodic review and approval by the Authority. Through that process, other forms of price regulation could be implemented.

Port of Newcastle

Part 6 of the PMAA is a price monitoring scheme. Its objective is stated to be "to promote the economically efficient operation of, use of and investment in major port facilities in the State by monitoring the prices port operators charge users of those facilities, so as to promote a competitive commercial environment in port operations".

The port operator must publish a list of its service charges. Rents and amounts payable under a lease and negotiated charges are not service charges for the purposes of this publication obligation.

The port operator must give notice of any changes, including to the Minister.

The port operator must report annually to the Minister including revenue from the service charges. The Minister has a qualified power to required information about charges.

The Minister can publish reports and make statements about port charges.

The PMAA allows for regulations to be made under which the Minister can regulate certain supply chain charges. This power has not been exercised.

The arbitration framework in Part IIIA of the CCA may apply to the pricing of services. In making any determination, the ACCC is required to apply the pricing principles in the CCA applicable to determinations.

Port of Melbourne

In relation to prescribed services,

- the Port Licence Holder (PLH) sets prices
- the PLH must comply with the Pricing Order. The Pricing Order imposes a prescriptive regime as to the pricing of prescribed services. The PLH must demonstrate compliance and consult port users
- the ESC monitors compliance with Pricing Order
- under the current Pricing Order, prices can be "rebalanced" subject to ESC approval
- there are 5-yearly compliance reviews by ESC coupled with the possibility of re-regulation of prices by the ESC Minister.

In relation to non-prescribed services:

- the PLH sets rents for tenants (no pricing requirements)
- the ESC periodically reviews market power of PLH

- price regulation can be imposed if the ESC identifies a misuse of market power.

Question 7: Form of access regulation (issues 6, 8, 9, 10): What is the governance framework for determining the framework for negotiation and determination of terms and conditions of access (eg an arbitrate/negotiate regime), taking into account how it is proposed, consultation requirements, approval, review and modification?

South Australia

The form of the regime is determined by the legislature since the negotiate/arbitrate regime is set out in the MSA and is supplemented by the application of the CAA to the extent it may operate consistently with the MSA.

The services covered by the access regime can change through proclamation. The Commission must conduct a review of the ongoing need for the access regime every 5 years. As part of the review, the Commission must consult. If the Commission recommends the access regime should continue, regulations need to be made for the regime to be extended.

Wheat Terminal Code

The CCA allows industry codes to be prescribed by regulation and to be declared by regulation to be mandatory. The negotiate/arbitrate regime is set out in the Code which in turn forms part of the regulation declaring it to be mandatory.

The Code itself provides for review by the Minister, as part of which the Minister has been conducting consultation.

The Code contains few provisions about the conduct of the arbitration other than a provision dealing with costs and obligations to keep records (to assist the ACCC with monitoring). Due to the operation of the commercial arbitration legislation, arbitration is most likely subject to the commercial arbitration legislation of the jurisdiction in which the port is situated.

DBCT

The QCAA sets out the process for nominating a service as a "declared service". Once a service is declared (by the Minister on advice from the QCA), the QCA can regulate.

The access regime for the DBCT is established under the 2016 access undertaking (approved by the Authority applying criteria in the QCAA), supplemented by the QCAA (the responsibility of the legislature).

The QCAA sets out obligations with respect to the conduct of negotiations about access. These include an obligation to negotiate in good faith, not to unfairly differentiate, for the access provider to make all reasonable efforts to try to satisfy the reasonable requirements of the access seeker and to provide information to the access seeker.

The 2016 access undertaking contains a detailed process to be followed to enable access seekers to obtain access. If agreement cannot be reached, then (unless the access seeker

and DBCTM management agree to refer the dispute to an expert) the access determination process in the QCAA applies.

In the case of an access dispute, the Authority acts as arbitrator, applying principles in the QCAA, and procedural powers established by the QCAA. It cannot make an access determination inconsistent with the 2016 access undertaking.

Port of Newcastle

ort services at Port of Newcastle are currently declared services and so subject to Part IIIA, which provides for arbitration of access disputes. The declaration was made on the application of a port user. See question 8 for the declaration criteria.

The services will cease to be declared services and the framework for access will change if the declaration is revoked by the Minister on the recommendation of the NCC. The NCC can only recommend revocation of the declaration if it is satisfied that:

- the state access regime is approved by the Minister on the recommendation of the NCC as an effective State-based access regime
- the port operator provides an access undertaking that is approved by the ACCC
- or the NCC is satisfied that at least one of the criteria for declaration no longer applies to the service.

It follows that, notwithstanding the declaration, options are available to change the basis for access regulation at Newcastle.

- The NSW Government could take steps that would provide the grounds for the declaration to be revoked through the implementation of an effective state-based access regime.
- Alternatively, the service provider could offer a voluntary access undertaking for review by the ACCC.

Port of Melbourne

The default position appears to be that services should be provided on standard tariffs and standard terms and conditions.

Prescribed services are subject to price regulation. The 2017/18 list of tariffs (listed by the port operator) indicates that the services are provided on the standards terms and conditions published by the port operator. There is nothing in the legislation providing for the negotiation and determination of the terms and conditions of access. There is, however, scope to negotiate the provision of services on terms and conditions different from those in the Reference Tariff Schedule provided that:

- the port operator has first offered to provide the services to the Port User in accordance with the Reference Tariff Schedule
- the contracted terms comply with the principles set out in clauses 2.1.1, 2.1.2, 2.1.3 and 2.3.1 of the Pricing Order.

Prescribed services are also subject to the threat of re-regulation under s 49L of the PMA. Refer to question 2 above.

Non-prescribed services, being leasing services, are not subject to any specific regulation in relation to the rents payable. If the ESC finds that there has been a misuse of market

power it may recommend to the Minister that access to Port of Melbourne by means of an applicable lease should be subject to economic regulation.

Question 8: Form of access regulation (issues 6, 8, 9, 10): What principles must be applied by the decision maker when determining the framework for negotiation and determination of terms and conditions of access?

South Australia

The regime created under the MSA appears to have been designed to satisfy the CPA clause 6 principles.

The Commission's review of the access arrangements requires public consultation. The MSA does not specify any matters to be considered as part of the review.

In its 2017 review, drawing on the legislative framework, the Commission indicated that it sought to address the following two questions:

- Does the structure of the market create the potential for the providers of the relevant services to exercise market power?
- Based on the conduct and performance of those providers, is there evidence of market power being exercised?

The Commission indicated that the evidence it considered for the second of these questions included:

- submissions from stakeholders
- the legislative provisions and objectives of the MSA and the ESCA
- current and emerging industry conditions, including an assessment of the potential to exercise market power
- other evidence relating to the effectiveness of the regimes
- benchmarking of port charges in other Australian jurisdictions and the Commission's annual Ports Price Monitoring Reports
- the profitability of Flinders Ports
- State and National policy developments
- the Commission's Better Regulation Framework, which it described as outcome-focused and intended to promote effective consumer protection at the least regulatory cost.

Wheat Terminal Code

The negotiate/arbitrate regime is embedded in the Regulation and sits under the mandatory code arrangements in Part IVB of the CCA.

The mandatory code framework seems to have been chosen as a mid-point between the Part IIIA access undertaking framework and no access framework at all (other than the prospect of the service being declared under Part IIIA).

The framework is subject to review. The principles that the Minister must have regard to in the review process include:

- the effectiveness of, and level of competition existing under, current arrangements for the transport, storage and distribution of wheat in contributing to a sustainable supply chain from farm gate to export load port
- the availability and transparency of relevant market information to participants in the export supply chain
- the promotion of the economically efficient operation of, use of and investment in port terminal facilities
- whether there is ongoing justification to continue the operation of the code over and above what is provided under Part IIIA of the CCA.

DBCT

The access regime created under the QCAA appears to have been designed to satisfy the clause 6 CPA principles.

The decision to declare a service must be made having regard to the following principles (in summary) that:

- access would promote a material increase in competition in at least one market
- the facility used to provide the service could meet the total foreseeable demand in the market at the least cost compared to any two or more facilities
- the facility for the service is significant, having regard to its size or its importance to the Queensland economy
- that access (or increased access) to the service, would promote the public interest, with these specified to include the effect that declaring the service would have on investment in facilities and markets that depend on access to the service and the administrative and compliance costs if the service is declared.

The QCAA sets out the principles which the Authority must have regard to when approving an access undertaking. These cover:

- the object of Part 5 (to promote the economically efficient operation of, use of and investment in, significant infrastructure by which services are provided, with the effect of promoting effective competition in upstream and downstream markets)
- the legitimate business interests of the owner or operator of the service
- if the owner and operator of the service are different entities, the legitimate business interests of the operator of the service are protected[5]
- the public interest, including the public interest in having competition in markets (whether or not in Australia)
- the interests of persons who may seek access to the service, including whether adequate provision has been made for compensation if the rights of users of the service are adversely affected
- the effect of excluding existing assets for pricing purposes
- the pricing principles in the QCAA
- any other issues the Authority considers relevant.[6]

5 Note: Wording from the QCAA.
6 Refer to question 13 below for more detail.

Port of Newcastle

The Minister cannot declare a service unless the Minister is satisfied of all the declaration criteria, which (in summary, following the 2017 amendments) are that:

- access would promote a material increase in competition in at least one market
- the facility used to provide the service could meet the total foreseeable demand in the market at the least cost compared to any two or more facilities
- the facility is of national significance
- access to the service, on reasonable terms and conditions, as a result of a declaration would promote the public interest.

The grounds for revocation include where there is an effective access regime. In making a determination of whether a regime is an effective access regime, the Minister must consider:

- the relevant principles of the Competition Principles Agreement (clause 6)
- the objects of Part IIIA.[7]

The grounds for revocation include where the ACCC has accepted a voluntary access undertaking. The ACCC must having regard to:

- the objects of Part IIIA (see above)
- the pricing principles in the CCA
- the legitimate business interests of the provider
- the public interest
- the interests of access seekers
- whether the undertaking is in accordance with an access code that applies to the service.

The Commission must not accept the undertaking if there is an effective access regime in force.

The Part IIIA access undertaking guidelines issued by the ACCC specify the requirements for an access undertaking, including examples of the types of provisions that applicants might consider including in order to have the undertaking accepted. This includes provisions for negotiation and dispute resolution, pricing, capacity allocation and management, user engagement and measures to address vertical integration concerns and compliance.

The ACCC indicates in the guidelines that it may undertake industry consultation as part of its decision-making process.

Port of Melbourne

The framework for the regulation of port services is in Part 3 of the PMA. In exercising any of its powers in relation to the Port of Melbourne, the ESC is required to have regard to the objectives of Part 3. The objectives are (in summary):

- to promote efficient use of an investment in the provision of prescribed services for the long-term interests of users and Victorian consumers

7 The objects of Part IIIA are to promote the economically efficient operation of, use of and investment in infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets, and provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.

- to protect the interests of users by ensuring prices and fair and reasonable
- to allow providers a reasonable opportunity to recover the efficient costs of providing prescribed services
- to facilitate and promote competition.

Sections 49L (re-regulation recommendation) and 53 (rent review) of the PMA provide a framework for more prescriptive regulation of prescribed and non-prescribed services respectively.

The considerations for a re-regulation recommendation are:

- whether a re-regulation recommendation is in the public interest
- the objectives of Part 3.

The consideration for rent review is whether the port lessee or the Port of Melbourne operator has exercised its power in a way that has the effect of causing detriment to the long term interests of Victorian consumers.

Question 9: Information for access seekers (issue 6): What information does the regime require service providers to publish or make available to access seekers in negotiation?

South Australia

The operator and any interested third parties must negotiate with an access seeker in good faith and on the basis that the access seeker's reasonable requirements are to be accommodated as far as practicable.

Upon request by an access seeker, the port operator must provide information reasonably requested about:

- the extent to which the regulated operator's port facilities subject to the access regime are currently being utilised
- technical requirements that have to be complied with by persons for whom the operator provides regulated services
- the rules with which the intending proponent would be required to comply
- the information about the price of regulated services provided by the operator that is required to be provided under guidelines issued by the Commission.

The port operator may charge the access seeker a reasonable charge for the supply of this information.

The Commission has made a guideline to supplement the requirements of the MSA, which requires the port operator to publish a price information kit.[8]

Wheat Terminal Code

All port terminal service providers must publish standard terms and reference prices. These can be different for different seasons or periods of time.

8 Refer to Ports Industry Guideline No.1, Access Price Information.

All port terminal service providers must publish a loading statement each day and its policies and procedures for managing demand for port terminal services.

An exporter can request information held by the service provider for the purposes of negotiating the terms of an access agreement. Subject to certain exemptions, the service provider must provide the information within 20 business days.

A non-exempt service provider must publish a port loading protocol, including its capacity allocation system and statements of available capacity, published annually for a 12 month period and updated weekly.

The Code states that a port terminal service provider and an exporter must at all times deal with each other in good faith. This would extend to negotiation.

DBCT

The QCAA requires the parties to negotiate in good faith. The access provider must make all reasonable efforts to try to satisfy the access seeker's reasonable requirement. It must provide:

- information about the price at which the access provider provides the service, including the way in which the price is calculated
- information about the costs of providing the service, including the capital, operation and maintenance costs
- information about the value of the access provider's assets, including the way in which the value is calculated
- an estimate of the spare capacity of the service, including the way in which the spare capacity is calculated
- a diagram or map of the facility used to provide the service
- information about the operation of the facility
- information about the safety system for the facility
- if the authority makes a determination in an arbitration about access to the service under division 5, subdivision 3—information about the determination.

The 2016 access undertaking contains detailed information for an access seeker about the negotiation process and pricing and the standard form of access agreement.

Port of Newcastle

In relation to declared services, there are no requirements for the provision of information.

In relation to a Part IIIA access undertaking, the negotiation and dispute resolution provisions in the undertaking are expected to specify the information to be shared in the negotiation.

Port of Melbourne

Users have access to the information about tariffs required to be published by the Pricing Order. The Port of Melbourne publishes standard terms and conditions on its website.

Question 10: Certification (issue 7): Is the regime certified or otherwise subject to assessment against the clause 6 CPA principles?

South Australia

The regime was certified on 9 May 2011. The decision is to be in force for a period of 10 years.

Wheat Terminal Code

The regime is not subject to assessment against the clause 6 CPA principles. The principles against which it must be reviewed by the Minister after 3 years and (if retained) in the 6 year review are set out in the Regulation.

DBCT

The DBCT access regime was certified 11 July 2011, for a period of 10 years.

Port of Newcastle

The decision to declare the service was assessed against the declaration criteria in Part IIIA (in the terms that applied before the 2017 amendments to the CCA). There has been no assessment against the clause 6 CPA principles.

Port of Melbourne

The port access regime has not received certification as an effective access regime in accordance with the clause 6 CPA principles.

Question 11: Principles governing access regime (issue 11): How are conflicts between the access regime and other commitments of the port operator resolved?

South Australia

The arbitrator, when making an award, is required to take into account the interests of all persons holding contracts for use of any relevant port facility and the firm and binding contractual obligations of the operator or other persons (or both) already using any relevant port facility.

The arbitrator may only make an award that varies the rights of other customers of the regulated operator under existing contracts or awards if those customers will continue to be able to meet their reasonably anticipated requirements and the terms of the award provide appropriate compensation for loss or damage (if any) suffered by those customers as a result of the variation of their rights.

The arbitrator may only make an award that forces a regulated operator to extend, or permit the extension of, the port facilities under the operator's control if:

- the extension is technically and economically feasible and consistent with the safe and reliable operation of the facilities

- the operator's legitimate business interests in the port facilities are protected
- the terms on which the service is to be provided to the proponent take into account the costs and the economic benefits to the parties of the extension.

Wheat Terminal Code

Not addressed expressly.

DBCT

In approving an access undertaking, the Authority must have regard to (among other things):

- the legitimate business interests of the owner or operator of the service
- if the owner and operator of the service are different entities — the legitimate business interests of the operator of the service are protected[9]
- the interests of persons who may seek access to the service, including whether adequate provision has been made for compensation if the rights of users of the service are adversely affected
- any other issues the Authority considers relevant.

In making an access determination, the Authority is restricted from reducing the amount of the service able to be obtained by an access provider at least (in summary) to the extent of its reasonably anticipated requirements at the time the access dispute notice was given and, in some circumstances, subject to compensation.

The matters to be considered by the Authority in making an access determination include:

- the legitimate business interests of persons who have, or may acquire, rights to use the service
- the access provider's legitimate business interests and investment in the facility
- the operational and technical requirements necessary for the safe and reliable operation of the facility.

DBCT is subject to a long term lease. The QCAA does not expressly require consideration of the requirements of that lease in making an access determination.

Port of Newcastle

In relation to the decision to declare the service, third party commitments are not expressly relevant. However, these might be encompassed within one or more of the declaration criteria such as the "public interest".

In relation to making a determination, the ACCC is required to consider other commitments of the port operator by taking the following matters into account:

- the legitimate business interests of the port operator
- the interests of all persons who have rights to use the service.

The ACCC must not make a determination that would have the effect of:

- preventing an existing user from obtaining a sufficient amount of a service to be able to meet its reasonably anticipated requirements

9 Wording from the QCAA.

- preventing a person from obtaining, by the exercise of a pre-notification right, a sufficient amount of the service to be able to meet its actual requirements
- or depriving a person of a protected contractual right.

Port of Melbourne

The Pricing Order requires some costs to be determined by reference to what a prudent service provider would incur. The Pricing Order deems actions reasonably required to comply with obligations under the Port Concession Deed or Transaction Arrangement to be prudent for this purpose.

Question 12: Service standards (issue 16): Who is responsible for setting and monitoring the service standards for regulated services?

South Australia

The Commission may develop, issue and revise standards to be complied with in the provision of a maritime service.

A standard does not have the force of law unless it is promulgated as a regulation.

The Commission may also make codes or rules relating to the conduct or operations of a regulated industry or regulated entities under the ESCA.

In making a pricing determination, the ESCA requires the Commission to take into account and clearly articulate any trade-off between costs and service standards.

The Commission requires reporting by the port operator against service standards – refer to question 17 below.

Wheat Terminal Code

Regulated port operators have to publish performance indicators under clause 29 of the Code, which specifies the six categories of data to be published.

The ACCC has taken on the monitoring role.

The Code states that a port terminal service provider and an exporter must at all times deal with each other in good faith.

DBCT

In making an access determination, the Authority must have regard to "the quality of the service" among other factors.

The list of matters that may be included in an access undertaking includes: "Information to be given to the authority about compliance for the undertaking and performance indicators stated in the undertaking".

In the 2016 access undertaking, the service description includes a requirement for the provision of the services to be carried out with due skill, care and diligence in accordance with the undertaking, the Terminal Regulations, Good Operating and Maintenance Practice and all applicable laws. The requirements are also in the standard access agreement (Schedule B to the access undertaking).

Under the 2016 access undertaking, DBCTM must publicly report on indicators relating to service quality listed in the undertaking. The Authority can review and amend the list from time to time.

Port of Newcastle

The PMAA allows the Minister to make regulations about specified matters to promote the economically efficient operation of, use of and investment in land-based port facilities and port-related supply chain facilities. The specified matters include the provision of information to monitor performance and setting mandatory standards in connection with the operation or provision of land-based port facilities and services or facilities and services of the port-related supply chain, including (without limitation) mandatory standards relating to any of the following:

- performance in the delivery and use of services
- access to facilities and services
- handling capacity of facilities and services
- co-ordination of the delivery of services in the port-related supply chain.

The power has not been exercised.

Port of Melbourne

The ESC has power to determine the standards and conditions of service and supply in respect of prescribed services of its own motion and may monitor and report on compliance.

The ESC Minister may request the Commission to exercise its powers to determine the standards and conditions of service and supply and the ESC must comply within the timeframe specified in the request.

To date, the Minister has not requested the ESC to develop standards and conditions of service and supply nor has the ESC exercised its power to determine such standards.

Question 13: Principles governing access disputes (issue 13): Where does the regime specify the matters that must be taken into account by the arbitrator – legislation, regulations, other?

South Australia

The matters for the arbitrator to take into account when determining access disputes are set out in the MSA and are:

- 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 economic value to the operator of any additional investment that the proponent or the operator has agreed to undertake

- 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
- the pricing principles specified in the MSA.

Wheat Terminal Code

No principles are specified in the Code for the determination of the terms of access if there is an access dispute.

The following provisions in the Code may be relevant in an arbitration, depending on the nature of the dispute.

The Code states that a port terminal service provider and an exporter must at all times deal with each other in good faith.

Non-exempt port service providers are subject to the no-hindering and non-discrimination obligations.

The Code allows a non-exempt service provider to refuse to offer access when eligibility criteria are not met.

Port terminal service providers must publish standard terms and reference tariffs.

Standard terms must include a dispute resolution mechanism. Variations to standard terms only apply if the access agreement clearly and unambiguously allows for variations to apply.

The access agreement must incorporate the service provider's port loading protocols as in force from time to time under Part IV of the Code. It must not purport to restrict a party from disclosing information to the ACCC and may require a party to retain records in addition to those mentioned in Part 6 of the Code.

DBCT

The QCAA specifies the matters to be taken into account by the Authority in its capacity as arbitrator. In making an access determination, the Authority is also subject to restrictions relating to reducing the amount of service available to be provided from the facility, transfer of ownership without the owner's consent or payment of the costs relating to an extension of the facility.

The principles applicable to an access determination are:

- the object of Part 5 (set out in question 8 above)
- the access provider's legitimate business interests and investment in the facility
- the legitimate business interests of persons who have, or may acquire, rights to use the service
- the public interest, including the benefit to the public in having competitive markets
- the value of the service to the access seeker; or a class of access seekers or users

- the direct costs to the access provider of providing access to the service, including any costs of extending the facility, but not costs associated with losses arising from increased competition
- the economic value to the access provider of any extensions to, or other additional investment in, the facility that the access provider or access seeker has undertaken or agreed to undertake
- the quality of the service
- the operational and technical requirements necessary for the safe and reliable operation of the facility
- the economically efficient operation of the facility
- the effect of excluding existing assets for pricing purposes
- the pricing principles mentioned in the QCAA.

The Authority may take into account any other matters relating to these matters it considers are appropriate.

Port of Newcastle

Under the CCA, the ACCC must take the following matters into account when making determinations of access disputes:

- the objects of Part IIIA (see question 8 above)
- the legitimate business interests of the provider
- the public interest
- the interests of people with rights to use the service
- the direct costs of providing access
- the value of extensions to the provider
- the value of interconnections to the provider
- the operation and technical requirements
- the economically efficient operation of the facility
- the pricing principles specified in s 44ZZCA.

Port of Melbourne

There is no current framework for the determination of the terms and conditions of access.

The 2018 version of the Reference Tariff Schedule (ie the version published since privatisation) contains reference to four sets of standard terms.

The Pricing Order requires the port operator to offer the Prescribed Services in accordance with the Reference Tariff Schedule. The Pricing Order allows for the supply of services on "terms and conditions that differ from those in the Reference Tariff Schedule" but only if the port operator has offered the Prescribed Services in accordance with the Reference Tariff Schedule.

Question 14: Queuing policy (issue 12): Where does the regime specify the principles used to determine capacity constraints (queuing policy) – legislation, regulations, other?

South Australia

The regime does not expressly deal with queuing.

Wheat Terminal Code

Provisions in the Code deal with priorities and capacity reservation. All service providers must publish a loading statement for each business day, and a statement setting out the provider's policies and procedures for managing demand for its port terminal services including the nomination and the acceptance of ships to be loaded.

Regulated service providers must publish the port loading protocol which sets out the capacity allocation system for the port terminal facility. Any port loading protocol that allocates capacity more than 6 months out requires approval from the ACCC.

DBCT

The QCAA does not expressly deal with queuing. The matters that may be included in an access undertaking include "details of … how the spare capacity of the service is to be worked out".

The 2016 access undertaking provides for the formation of a "Queue" where there are two or more current Access Applications and insufficient capacity to meet them. The access undertaking also allows for a place in the Queue to be lost in some circumstances.

The Terminal Regulations (published by DBCTM) include a provision dealing with the order of loading of vessels, annual forecasts, vessel loading schedule, etc. The access undertaking contains the arrangements for making amendment to the Terminal Regulations.

Port of Newcastle

The PMAA provides that regulations may be made with regard to control of capacity, however, no such regulations have been implemented.

In relation to a declared service, the ACCC is restricted from making access determinations that would restrict existing users or persons exercising a pre-notification right from obtaining sufficient amounts of the service or would deprive any person of a protected contractual right.

In relation to a Part IIIA access undertaking, the guidelines provide that for an appropriate access undertaking to be approved by the ACCC it should contain provisions regarding capacity allocation and management.

Port of Melbourne

The regime does not deal with queuing.

Question 15: Hindering access and unfairly differentiating (issue 12): How are these principles implemented and what exceptions apply?

South Australia

Hindering access is prohibited by the MSA without exception.

The pricing principles include the principle that access prices should allow multi-part pricing and price discrimination when it aids efficiency and the principle that access prices should not allow a vertically integrated operator to set terms and conditions that would discriminate in favour of its downstream operations, except to the extent that the cost of providing access to others would be higher.

The MSA provides for the terms of access determined by arbitration to be "fair and reasonable".

Wheat Terminal Code

There are prohibitions in the Code applicable to non-exempt service providers on:

- discriminating in favour of an associated entity
- engaging in conduct to prevent or hinder access to Port Terminal Services.

DBCT

These principles are implemented through the QCAA and the 2016 access undertaking.

In general, the obligations in the QCAA not to unfairly differentiate do not prevent the access provider treating access seekers differently where reasonably justified because of different circumstances or where expressly required or permitted by (among other things) an approved access undertaking or an access determination. However, the provisions do not authorise an access provider to engage in conduct for the purpose of preventing or hindering a user's access to the declared service or proposing a price for access to a declared service that is inconsistent with the pricing principles.

In general, the no-hindering obligations are subject to a carve-out for (among other things) an act done in accordance with an access code or approved access undertaking for the declared service.

Port of Newcastle

Providers of declared services to which an access seeker has rights under an ACCC determination are subject to a prohibition against preventing or hindering access to those services under Part IIIA.

Port of Melbourne

Tariff discrimination is only permitted if the differences are consistent with the objectives set out in section 48 of the PMA and clauses 2.1.3, 2.2.1 and 2.3.1 of the Pricing Order.

For channels shared between the Port of Melbourne and other ports, no discrimination between port users on the basis of port or berth is permitted.

Terms and conditions different to those in the tariff schedule can be agreed with a port user, but only if the port user has first been offered access on the terms in the tariff schedule.

Question 16: Hindering access and unfairly differentiating (issue 12): If there are exceptions, how are these decided and monitored?

South Australia

There are no exceptions to the hindering access prohibition.

Price discrimination is permitted where it aids efficiency and discriminatory terms are permitted based on cost differences.

Wheat Terminal Code

Exemptions can be created by contract for the "withdrawal or suspension of services".

Standard terms (which may include these sorts of provisions) must be published and negotiated terms are subject to dispute resolution through mediation or arbitration, if it is a regulated port.

DBCT

To the extent that the prohibitions are subject to carve-outs for acts expressly required or permitted by an access undertaking or an access determination, the Authority has oversight over those exceptions due to its role in approving access undertakings and making access determinations.

In relation to hindering access, the QCAA permits the Authority to investigate and request information as to the regulated entity's compliance with the no-hindering obligation.

Port of Newcastle

There are no exceptions.

Port of Melbourne

The port operator may discriminate between Prescribed Services Tariffs for different users provided that the tariffs are consistent with the objectives set out in section 48 of the PMA and clauses 2.1.3, 2.2.1 and 2.3.1 of the Pricing Order.

These exceptions are monitored by the ESC through the provision of the following information from the port operator:

- Reference Tariff Schedule
- Changes to Prescribed Service Tariffs
- Tariff Compliance Statements.

Question 17: Accounting and other records (issue 15): Is the service provider required to keep separate accounts or other records for the regulated services and to what standard?

South Australia

Under the Act, regulated operators must keep their accounts and records relating to the provision of regulated services separately from accounts and records related to other aspects of their business.

If regulated services are provided at different ports, separate accounts must be kept for each port.

The Commission has issued guidelines for the preparation and maintenance of accounts and records.[10] The guidelines require, among other things, that: substance prevail over form; information is verifiable; someone take responsibility for the use of the information; and the regulated operator undertake audits of its regulatory accounts, using an approved auditor.

A regulated operator must on request make the accounts and records available for inspection by the Commission.

Wheat Terminal Code

There is no requirement to keep separate accounts.

The service provider must:

- retain copies of access agreements including documents evidencing variations to access agreements
- keep records about disputes
- record information about services acquired by exporters for each shipping window including the name of the exporter, the price, any rebates paid, the amount of bulk wheat to be exported, any reason why the service acquired was not wholly used and any compensation paid to the exporter by the provider.

These records must be kept for six years.

DBCT

The QCAA requires the access provider for a declared service to keep, in a form approved by the Authority, accounting records for the service separately from accounting records relating to other operations of the access provider.

The Authority has power to direct that the accounting records be published, if in the public interest and not likely to damage the access provider's commercial activities.

Under the QCAA, the access provider must comply with a "cost allocation manual". The cost allocation manual will either be prepared by the access provider or if that is not done or is inadequate, by the Authority. The access provider must keep its books of account and other records necessary to comply with the cost allocation manual in the manner required by the manual.

10 Ports Industry Guideline No 2, Regulatory Accounts.

Under the 2016 access undertaking, DBCTM must provide regulatory accounts annually to the Authority and each access holder (including asset values and costs).

Port of Newcastle

The PMAA provides that the port operator must report charges to the Minister each year. The operator must keep separate accounts for each separate charge.

Port of Melbourne

The provider of prescribed services must keep financial and business records and provide them to the ESC.

There is a requirement that the records are separate from the financial and business records for other activities. That is, the provider must keep financial and business records:

- in respect of the provision of channels for use by shipping that are separate from financial and business records for other prescribed services
- in respect of prescribed services that are separate from any financial and business records for other aspects of any business conducted by the provider of prescribed services.

Records must be prepared and maintained in accordance with the guidelines made by the Commission. It is an offence to fail to comply with the requirement to maintain records.

The Commission has discretion to determine what constitutes sufficient supporting information that it requires to be satisfied that the port licence holder has complied with the Pricing Order. Details of the reporting obligations of the port operator are set out in the ESC Statement of Regulatory Approach.

The Licence sets out that the provider must maintain information and records as required by the ESC and must provide such information as the ESC may from time to time require.

Question 18: Monitoring (issues 14 and 15): How is regime compliance monitored – self reporting, self-certification, regulatory audits and reports, other?

South Australia

The Guidelines issued in relation to reporting extend to operational performance reporting, with a list of performance indicators to report against and reporting frequency.

The Guidelines do not extend to reporting against the access regime (for example, number of access requests, time to negotiate etc).

The Commission may participate in arbitration proceedings under the MSA. If it does so, it may call evidence and make representations on the questions subject to the arbitration.

Wheat Terminal Code

The ACCC is responsible for monitoring compliance using its general powers under the CCA.

The ACCC publishes an Annual Bulk Wheat Ports Monitoring Report. The most recent report for the 2016-2017 financial year was published in December 2017.

DBCT

Under the 2016 access undertaking, DBCTM must:

- provide regulatory accounts annually to the Authority and each access holder (including asset values and costs)
- publicly report annually against a list of performance indicators in the access undertaking, which go to access requests, response times, disputes, complaints etc.
- publicly report annually against a list of service quality indicators.

Port of Newcastle

Part 6 of the PMAA sets out a price monitoring scheme which applies to the Port of Newcastle.

The port operator must publish a list of service charges and provide notice of any increase in services charges.

The port operator must report charges to the Minister annually.

Port of Melbourne

Self-Reporting: The following information must be provided to the ESC:

- Reference Tariff Schedule
- changes to Prescribed Service Tariffs
- Tariff Compliance Statement.

The Tariff Compliance Statement must explain how Prescribed Service Tariffs for the upcoming financial year comply with the Pricing Order. The Pricing Order requires the port licence holder to demonstrate how it has consulted with port users in relation to the pricing of prescribed services.

Non-standard pricing and contracts: The port operator must provide to the ESC copies of non-standard contracts.

Monitoring by the ESC: The ESC is responsible for monitoring and reporting on the Port of Melbourne's compliance with the Pricing Order, however it is not required to approve or reject the port licence holder's Tariff Compliance Statements.

Periodic Compliance Inquiries: Tariff compliance statements inform the ESC's inquiries into the port licence holder's compliance with the Pricing Order, which must be conducted every five years.

General Inquiry (rent review): The ESC must conduct an inquiry into whether there has been a misuse of market power in the setting of rents every 5 years.

Question 19: Investigation (issue 15): What investigative powers does the regulator have in relation to the access regime?

South Australia

The Commission has the power, by written notice, to require a person to give the Commission information that the Commission reasonably requires for the performance of its functions.

The Commission has the power, after consultation with the Minister, to conduct an inquiry if the Commission considers an inquiry is necessary or desirable for the purpose of carrying out its functions. A Minister may also refer a matter directly to the Commission for inquiry.

Wheat Terminal Code

The ACCC's power to investigate is in Division 5 of Part IVB.

The ACCC can issue notices requiring information to be produced to it. This is supported by the obligations in the Code to maintain records.

DBCT

The Authority has broad powers to investigate breaches of access undertakings and to require information generally as to compliance.

The Authority can require information to be given to it to find out whether the access provider is:

- complying with the obligation not to prevent or hinder access
- engaging in conduct to prevent or hinder access
- or complying with an access undertaking.

Port of Newcastle

Under the PMAA price monitoring regime, the Minister has power to require further information in respect of service charges and may publish reports and statements about the service charges. The PMAA does not expressly provide for investigation as part of the price monitoring regime. It would appear that the Minister could refer pricing to IPART for investigation.

Part IIIA does not include a framework for the ACCC to initiate compliance investigations (and in any event, a declaration does not of itself give rise to obligations).

To the extent the ACCC can require information, this occurs only in the context of an arbitration. In relation to access determinations, the ACCC has the power to summon a person to appear before the ACCC to give evidence and to produce documents for the purpose of arbitrating the access dispute. Failure to attend as a witness or to produce a document required by the summons is an offence with a penalty of 6 months imprisonment.

Port of Melbourne

Investigation of User Complaints: Complaints can be made by users if they consider the port licence holder has not complied with the Pricing Order. The ESC has discretion to investigate complaints.

Collection of Information by the ESC: The ESC has a general power to obtain information and documents that it considers necessary for the purpose of performing its functions or exercising its power. The ESC can require a person that it has reason to believe has any relevant information or document to provide that information or document. The ESC can require such a person to appear before it for the purposes of obtaining the information or documents. Failure to comply with a request for information or documents or knowingly giving the ESC information that is false or misleading is an offence.

A regulated entity must provide information relating to the regulated entity requested by the ESC in the manner and form specified in the notice.

Question 20: Enforcement (issue 13): How is regime enforced – contractual remedies, statutory remedies, administrative penalties, compliance undertakings, court-imposed sanctions, other?

South Australia

Pricing Regulation: The Commission may issue a warning notice to a person who they suspect is guilty of a contravention of a pricing determination. A warning notice notifies the person that they will be prosecuted for the contravention unless the person takes action to rectify the contravention (where that is possible) or gives the Commission an assurance that the person will avoid such a contravention in the future.

The Commission or Minister may also apply to the District Court for an injunction against a person that has engaged or proposes to engage in conduct that constitutes or would constitute a contravention of a pricing determination.

Access Regulation: The arbitrator must make an award within the period of 6 months from the date on which the dispute is referred to arbitration. An award is enforceable as if it were a contract between the parties to the award. Injunctive and compensatory remedies can be applied for in the Supreme Court if the award is not complied with.

Wheat Terminal Code

The following enforcement options are available for a contravention of any provision in an applicable industry code:

- injunctions
- damages
- remedial orders
- public warning notices
- court orders to redress damage suffered by non-parties
- court orders to pay pecuniary penalties.

The CCA also allows provisions in a prescribed industry code to be designated as civil penalty provisions. Infringement notices may be issued for an alleged contravention of a civil penalty provision only as an alternative to Court-ordered pecuniary penalties. Regulations may also attach pecuniary penalties up to 300 penalty units to civil penalty provisions.

At this time, no provisions in the Code have been designated. The ACCC has recommended that be done as part of its submission to the current review of the regime. The Department's Interim Report indicates that it considers this recommendation reasonable.[11]

DBCT

Access determinations may be enforced under Division 8 of Part 5 of the QCAA, which provides for court orders including injunctions and compensation, orders to prohibit hindering access and unfair differentiation and orders to enforce an approved access undertaking (including directions to comply and directions to compensate).

Port of Newcastle

Division 7 of the CCA provides for enforcement and remedies for breach of Part IIIA of the CCA.

Enforcement of determination: A party to a determination can apply to the Federal Court if it believes that another party to the determination has engaged, is engaging, or is proposing to engage in conduct that constitutes a contravention of the determination.

Enforcement of prohibition on hindering access: Any person can apply to the Federal Court if it believes that another person has engaged or, is engaging in conduct in contravention of the prohibition of hindering access. The Court may make the following orders:

- an order granting an injunction on such terms as the court thinks appropriate, restraining the other party from engaging in the conduct, or if the conduct involves refusing or failing to do something, requiring the other party to do that thing
- an order directing the other party to compensate the applicant for loss or damage suffered as a result of the contravention
- or any other order that the court thinks appropriate.

Port of Melbourne

Enforcement of the Pricing Order:

- The ESC Minister may give a show cause notice to the non-complying provider. After receiving a written submission in response, the ESC Minister may request further information from the provider.
- After the giving of a show cause notice to a provider of prescribed services, the ESC Minister must decide whether to make a re-regulation recommendation. If this were to occur, the ESC would be required to set prescribed service prices through a determination made in accordance with Part 3 of the ESC Act.
- The ESC Minister may accept a written undertaking in relation to the service provider's non-compliance with a Pricing Order. If the service provider fails to comply with this undertaking, ESC Minister can apply to the Supreme Court for relief.

11 Interim Report, page 45

- Port users may submit complaints to the ESC if they consider the port licence holder has not complied with the Pricing Order. The ESC can refer complaints to the ESC Minister if it considers the issues raised are not dealt with under the Pricing Order or the PMA.

Enforcement of Pricing Order during Pricing Order transition period:

- If a provider of prescribed services has engaged, is engaging, or is proposing to engage in conduct that constitutes a contravention of an enforceable provision, the ESC Minister may apply to Supreme Court for relief.

Penalties under the PMA:

- Failure to comply with requirement to keep records is an offence.
- Provision of prescribed services without a licence is prohibited.

Appendix D: Assessment of the current regime against clause 6 of the Competition Principles Agreement

Introduction

This appendix assesses the regime for access to private ports in the Northern Territory against the principles in clause 6 of the Competition Principles Agreement (CPA)[1]. It has been prepared having regard to the Guide to Certification of State and Territory Regimes published by the National Competition Council (NCC Guide)[2].

Scope of this assessment

An access regime for private ports in the Northern Territory is established under the *Ports Management Act* (NT) (PMA), Ports Management Regulations (PMR), *Utilities Commission Act* (NT) (UC Act) and the *Commercial Arbitration (National Uniform Legislation) Act 2011* (NT) (*Commercial Arbitration Act*). As applied to the Port of Darwin, the access regime includes the Price Determination[3] made by the Utilities Commission and the Access Policy[4] made by the port operator for the Port of Darwin and approved by the commission.

A preliminary question is whether an assessment against the clause 6 principles should take into account only the generic Territory regime or should extend to the regime as applied to the Port of Darwin. The assessment in this appendix considers both, consistent with the approach of the NCC under which it assesses an access regime "as a whole, recognising that there will often be significant interdependencies between one aspect of a regime and another"[5]. The NCC also notes the following three principles in its Guide[6]:

- the Council and the Commonwealth minister have considerable flexibility in applying the clause 6 principles, since under the *Competition and Consumer Act 2010* (Cth), each clause 6 principle is to be treated as a guideline rather than a binding rule[7]
- access regimes may contain additional matters as long as they are not inconsistent with the clause 6 principles
- a jurisdiction need only take a reasonable approach to incorporating the principles in clauses 6(4) and (5) and there may be a range of approaches.

1 Defined in section 4 of the *Competition and Consumer Act 2010* (Cth) (**CCA**).
2 National Competition Council, *Certification of State and Territory Access Regimes, A guide to Certification under Part IIIA of the Competition and Consumer Act 2010 (Cth)*, December 2017, Version 6.
3 2015 – 2018 Prescribed Port Services Price Determination, Port of Darwin, Final Determination 16 February 2016.
4 Access Policy of Darwin Port Operations Pty Ltd (ACN 603 472 788) (Port Operator) Approved by the Utilities Commission of the Northern Territory on 30 June 2017.
5 Paragraph 3.3.
6 Paragraph 3.3.
7 Section 44DA.

Assessment of the regime

Clause 6(3)(a): The regime should apply to services provided by means of significant infrastructure facilities where it would not be economically feasible to duplicate the facility

Assessment: The principles in clause 6(3)(a) are largely met. A certification issue may arise out of the port operator's ability to exclude services from the regime by granting a lease.

The NCC Guide indicates that to satisfy this principle, it is necessary to define the services covered by the regime.[8]

The Territory regime defines the services to which the regime applies in section 118 of the PMA and regulation 12(1) of the PMR.

The NCC Guide indicates it is necessary to demonstrate the regime applies to services only in the circumstances described in clauses 6(3)(a)(i) and (ii), relating to significant infrastructure that cannot be economically duplicated where access is necessary in order to permit effective competition in an upstream or downstream (or related) market.[9]

The commission considers this requirement is met in relation to the Port of Darwin. The regime provides for this to be kept under review over time, as the commission has an obligation to review the need for regulation on a regular basis (PMA section 123).

The NCC Guide observes the exclusion of a service from the access regime may raise certification issues if the omission poses a barrier to access, for example, if the excluded service is integral to accessing the services covered by the regime.[10]

The Territory regime expressly excludes any service provided under a lease granted by the private port operator (regulation 12(2)). It also excludes towage, bunkering, provisioning and waste removal (regulation 12(3)).

In the case of the Port of Darwin, the effect of regulation 12(2) is to exclude the Marine Supply Base. Although port users have concerns about the exclusion of the Marine Supply Base from the scope of the access regime, it appears, based on information available at this time, that the exclusion does not create a barrier to access to other services that are within the scope of the regime.

Regulation 12(2) potentially gives the port operator scope to limit the application of the regime by granting new leases. The regime does not address the risk this could occur in a way that poses a barrier to access to services within the scope of the regime.

The NCC Guide indicates in its view, clause 6.3(a)(iii) requires a consideration of the cost of the safe provision of access and the appropriateness of any safety regulation.

The Territory regime does not deal with safety expressly. It is implicitly covered by the requirement for the port operator to give a commitment to provide access on reasonable terms (regulation 13(2)(c)).

As applied to the Port of Darwin, the Access Policy includes safety as a relevant consideration through the feasibility test in the Access Policy.

8 Paragraph 4.2
9 Paragraph 4.9
10 Paragraph 4.7

Clause 6(4)(a) to (c): Right to negotiate and enforcement of that right, covering (a) access to be on agreed terms wherever possible (b) a right for persons to negotiate access and (c) an enforcement process for any right to negotiate

Assessment: The principles in clauses 6(4)(a) to (c) are not satisfied. The Territory regime does not expressly establish the right to negotiate before an access dispute is notified, nor does it include obligations to provide information to inform negotiations. As applied at the Port of Darwin, information is provided to the access seeker to assist in making an access request and when a feasibility study is conducted. The Access Policy includes an obligation to negotiate where non-standard access is sought. The negotiation obligation is not enforceable by the commission in any meaningful sense.

The principles in 6(4)(a) to (c) cover negotiation without recourse to the access regime, the creation of a right to negotiate where agreement cannot be reached and the need for an enforcement process for the right to negotiate. The NCC Guide observes clauses 6.4(b) and (c) "recognise that regulatory measures can provide an incentive to reach commercially agreed outcomes"[11] and indicates it considers "that for an access regime to encourage efficient access outcomes, it must incorporate regulatory processes that are transparent and consultative and are undertaken by a regulatory body that is independent and has the resources it needs to be effective"[12].

Regulation 13(2) refers to an obligation to negotiate in good faith, but only once there is an access dispute.[13]

The generic Territory regime does not contain an express right to negotiate prior to there being an access dispute or (with the exception of section 125(1) of the PMA)[14], a framework for negotiation nor are these required to be included in an access policy under Regulation 13(2).

As implemented for the Port of Darwin, the Access Policy requires the port operator and the access seeker to negotiate where non-standard access is sought.

Enforcement of the Access Policy is through a combination of the obligation not to hinder access (PMA section 124(1)), the obligation to comply with the access policy (PMA section 127(12)) and the compliance reporting regime (PMA section 130). These do not provide a meaningful enforcement process for the obligation to negotiate in the Access Policy, as required by clause 6(4)(c).

The NCC Guide observes in some circumstances, access seekers may have insufficient information and bargaining power to negotiate with large service providers and an effective access regime should appropriately address information asymmetries[15]. It makes similar observations in the context of its discussion about clause 6(4)(e)[16].

The generic Territory regime has no process for giving an access seeker access to information to assist negotiations prior to the dispute stage (Regulation 13(2)(h) and (i)).

11 Paragraph 5.1.
12 Paragraph 5.3.
13 The NCC Guide deals with the negotiation framework principally in the context of principle 6(4)(e) – paragraph 5.6.
14 Section 125(1) of the PMA prohibits the port operator from unfairly differentiating between port users in negotiating arrangements to provide access to prescribed services, in a way that has a material adverse effect on the ability of one or more of the port users to compete with other port users.
15 Paragraph 5.2.
16 Paragraph 5.7.

As implemented for the Port of Darwin, the Access Policy provides for the port operator to give an access seeker information reasonably required to make an access application, excluding information the port operator considers (acting reasonably) is commercially sensitive in relation to its own operations[17]. If a feasibility study is conducted, the Access Policy provides for the access seeker to be given the feasibility study and information about estimated costs for non-standard access, which is not otherwise feasible within the meaning of the Access Policy[18]. The Access Policy does not include any further requirements for access to information during the negotiation phase. It provides for access to information in the dispute stage if the request is made within 10 business days of the dispute notice being given. The disclosing party is not required to disclose information that the disclosing party considers (acting reasonably) is commercially sensitive in relation to its own operations.[19]

Clause 6(4)(d): Any right to negotiate access should include a date after which the right would lapse unless reviewed and subsequently extended

Assessment: This principle is satisfied.

According to the NCC Guide, clause 6(4)(d) is intended to ensure there is a periodic review of the need for access regulation to apply to a particular service.[20] The Territory regime includes this requirement in the PMA at section 123.

Clause 6(4)(e): The service provider must use all reasonable endeavours to accommodate the requirements of a person seeking access

Assessment: This principle is satisfied in part. The NCC Guide indicates the principle extends to matters such as access to information for negotiations and a timeframe for responses. These matters are not addressed by the generic Territory regime. The Access Policy addresses these matters in part.

The NCC Guide indicates the obligation in principle 6(4)(e) need not be stated explicitly but may be incorporated through general provisions that have the same effect.[21] The guide indicates these general provisions may relate to "information disclosure, availability (for negotiation) and response times"[22]. According to the guide, they include:[23]

- "obligations on the service provider to:
- provide access seekers with written information on spare capacity and indicative access terms and conditions, including sufficient information for access seekers to understand the derivation of access prices or tariffs
- respond to access requests and negotiate terms and conditions within a reasonable timeframe
- provide a written explanation as to why a particular request for access cannot be accommodated, including likely prospects for future access
- or use all reasonable endeavours to accommodate a person's request for access to spare capacity".

17 Paragraph 6.4.
18 Paragraph 6.7.
19 Paragraph 7.8.
20 Paragraph 5.4.
21 Paragraph 5.6.
22 Paragraph 5.6.
23 Paragraph 5.6.

The first of these matters covers access to information required to inform negotiations. As noted in the context of the principles in clauses 6(4)(a) to (c), the generic Territory regime has no process for access to information prior to the dispute stage. As implemented for the Port of Darwin, the Access Policy provides for access to information prior to making an access request or when an access dispute has been notified, excluding in each case information that the port operator considers (acting reasonably) is commercially sensitive in relation to its own operations. The Access Policy also provides for the access seeker to have access to a feasibility study (if conducted) and related information.

The second matter mentioned by the NCC Guide covers responses to access requests and the time frames for negotiation. As implemented for the Port of Darwin, the Access Policy addresses these matters.

The third and fourth matters mentioned by the NCC Guide relate to the nature of the access sought. In the case of the Territory regime, this is loosely addressed by regulations 13(2)(c) and (d) relating to the commitment to provide access on reasonable terms and the basis for providing access if there is insufficient capacity. As implemented for the Port of Darwin in the Access Policy, the feasibility study process in the Access Policy provides a framework for seeking non-standard access and assessing what steps can be taken to provide the access sought, where it would not otherwise be feasible.

Clause 6(4)(f): Access to a service for persons seeking access need not be on exactly the same terms and conditions

Assessment: This principle is satisfied.

The Territory regime and the Access Policy allow for non-standard terms and conditions to be negotiated.

The NCC Guide refers in this context to the need to prohibit unfair discrimination (principles 6(5)(b)(ii) and (iii)) and hindering access (principle 6(4)(m)).[24] The incorporation of these principles is considered below.

Clause 6(4)(g): Where there is an access dispute, the parties should be required to appoint and fund an independent body to resolve the dispute

Assessment: This principle is satisfied insofar as there is a requirement for the appointment of an independent arbitrator. The Territory regime does not include measures to achieve credible and consistent outcomes.

The NCC Guide indicates that principle 6(4)(g) refers to the need for[25]:

- an independent arbitration mechanism to complement and encourage genuine negotiations
- the arbitration framework to be designed to produce credible and consistent outcomes, which for the NCC Guide encompasses matter such as information gathering powers, being bound by regulatory determinations, allowing the arbitrator to have access to the regulator in an advisory role and allowing the arbitrator to determine the process.

The generic Territory regime requires the access policy of a port operator to provide for an access dispute to be referred to arbitration by an independent arbitrator appointed by the parties to the dispute and for the arbitration to be conducted in accordance with part 5

24 Paragraph 5.9.
25 Paragraph 5.10.

of the *Commercial Arbitration Act* (Regulation 13(2)(f)). This satisfies the independence requirement, enhances credibility and gives the arbitrator some information gathering powers and power over the process.

Regulation 13(2)(f)(vii) requires the access policy to include a requirement for the arbitrator to take into account the access and pricing principles in section 133 of the PMA. Otherwise, the Territory regime does not include any features to support consistent outcomes. For example, it does not specify any non-price matters that must be taken into account by an arbitrator in determining an access dispute, it does not require determinations to be published or provided to the commission and does not contain other measures mentioned by the NCC Guide.

Clause 6(4)(h): The decision of the arbitrator should bind the parties but rights of appeal should be preserved

Assessment: This principle is satisfied, save that to be consistent with the NCC Guide's approach to this principle, the PMR should specify (or provide for an access policy to specify) that an access seeker may decline to enter into an access agreement on the terms determined by an arbitrator.

Regulation 13(2)(f)(ix) requires the decision of the arbitrator to be treated as an award under the *Commercial Arbitration Act*.

The NCC indicates clause 6(4)(h) is generally satisfied by setting a time in which the arbitrator's decision is to be reflected in a contract between the parties but an access seeker can decide not to be bound by the arbitrator's ruling. The generic regime does not reflect this principle. As implemented for the Port of Darwin, the Access Policy allows an access seeker to decline to enter into an access agreement on the terms determined by the arbitrator.

Clause 6(4)(i): Principles for dispute resolution, in summary accounting for the interests of the facility owner and existing facility users, the costs of providing access to the extent necessary and efficiency objectives and the benefits of competitive markets.

Assessment: This principle is not satisfied in the generic Territory regime except insofar as it can be successfully argued the requirement to commit to the provision of access on reasonable terms incorporates a consideration of all the principles in clause 6(4)(i). As implemented for the Port of Darwin, principles similar to those in clause 6(4)(i) are taken into account by the arbitrator, as well as other matters.

The NCC Guide provide a detailed review of the factors in clause 6.4(i) and indicates other matters may be taken into account, to the extent those matters are not inconsistent with clause 6(4)(i).[26]

The generic Territory regime requires the arbitrator to take into account the access and pricing principles.[27] It is however silent on the matters in CPA clause 6.4(i). This allows the port operator to specify in its access policy the matters to be taken into account in the arbitration.

26 Paragraph 5.21.
27 Regulation 13(2)(f)(vii).

As implemented for the Port of Darwin in the Access Policy, principles similar to those in clause 6(4)(i) but expressed in a different form are to be taken into account by the arbitrator, along with other matters set out in the Access Policy[28].

Clause 6(4)(j): The owner may be required to extend or to permit extension of the facility used to provide a service if necessary, subject to qualifications in the clause

Assessment: This principle is satisfied.

The Territory regime contemplates an access policy must set out the basis on which the port operator will determine access to a prescribed service that is the subject of an access request if the demand for access from port users exceeds the capacity to provide access (Regulation 13(2)(d)).

The relevant provision does not expressly refer to extension of the facilities at the port although, that is a possible interpretation of Regulation 13(2)(d).

As implemented for the Port of Darwin, the Access Policy includes a framework for the port operator to assess and provide pricing for facility extensions.[29]

Clause 6(4)(k): If there has been a material change in circumstances, the parties should be able to apply for a revocation or modification of the access arrangement that was made at the conclusion of the dispute resolution process

Assessment: Applying the NCC Guide's interpretation, the clause 6(4)(k) principle is satisfied.

The NCC Guide indicates an appropriate way in which to address a material change of circumstances may be for the parties to identify in the contract any factors that would warrant the contract being reopened in the future.[30]

The Territory regime and the Access Policy do not deal expressly with reopening of contracts but this principle is most likely covered by the requirement in the PMR that the port operator must commit in its access policy to providing access on reasonable terms.

Clause 6(4)(l): Compensation for impeding the existing right of a person to use a facility

Assessment: The principle is satisfied.

The NCC Guide indicates an access regime does not need to allow a dispute resolution body to impede existing rights but if it does so, must consider and determine compensation.

The Territory regime does not expressly allow for the dispute resolution body to impede existing rights. As implemented for the Port of Darwin under the Access Policy, access that would breach an existing contractual right is not 'feasible'[31] within the meaning of the Access Policy but the port operator must provide information about what steps could be

28 Clause 1.2 (objectives); clause 4.1 (meaning of reasonable terms); clause 7.7(matters to be taken into account).
29 Clauses 6.6 and 6.7.
30 Paragraph 5.65.
31 Clause 4.2(e)

taken for it to be feasible.[32] This would seem to allow scope for payment of compensation. The port operator has power to grant exclusive access if specified conditions are met.[33]

Clause 6(4)(m): The owner or user of a service shall not engage in conduct for the purpose of hindering access to service by another person

Assessment: This principle is satisfied in part. The no-hindering provision in the PMA does not apply to port users (as the principle requires it to do) and can be subject to a carve-out in the access policy without regulatory oversight.

The principle in clause 6(4)(m) applies both to existing users and facility owners.

Sections 124(1) and 125(1) of the PMA prohibit (respectively) conduct by the port operator for the purpose of preventing or hindering the access of a user or potential user and, in access negotiations, unfairly differentiating between port users. The section does not extend to port users.

The prohibition in section 124(1) is subject to a carve-out for an act done in accordance with the operator's access policy. Section 125(1) is also subject to exceptions created by the operator's access policy. However, the provisions under which the commission approves an access policy do not expressly take into account the potential for the access policy to detract from the operation of the prohibitions in sections 124 and 125.

As implemented for the Port of Darwin, the Access Policy expressly states nothing in the Access Policy is intended to require or permit the port operator to engage in conduct in breach of sections 124(1) or 125(1) of the PMA.[34]

Clause 6(4)(n): Separate accounting arrangements should be required for the elements of a business that are covered by the access regime

Assessment: The clause 6(4)(n) principle is not satisfied.

The Territory regime does not provide for separate accounts and records for prescribed services.

The NCC Guide indicates in some industries, ring fencing arrangements may also be appropriate.[35] There is no power in the generic Territory regime for the commission to impose ring fencing.

Clause 6(4)(o): The dispute resolution body or relevant authority should have access to financial statements and other accounting information pertaining to a service

Assessment: This principle is not satisfied. An arbitrator may be able to access financial information by exercising powers under the *Arbitration Act*, but the financial information may not be available in a form that pertains to the service since there is no obligation to prepare separate accounts and records for prescribed services.

Under the Territory regime, through the operation of the *Arbitration Act*, there are circumstances in which the dispute resolution body may be able to require the provision of

32 Clause 6.6.
33 Clause 5.6.
34 Clause 1.3.
35 Paragraph 5.75.

information in addition to any information exchanged in negotiation and provided to the arbitrator in the course of the arbitration.[36]

The commission has information gathering powers under section 25 of the UC Act and section 131 of the PMA and may require information about revenues under regulation 16(2)(e). However there is no separate requirement in the regime for the port operator to keep separate accounts and records about prescribed services or have these audited.

Clause 6(4)(p) and 6(2): jurisdictional issues

Assessment: The jurisdictional issues in clauses 6(4)(p) and 6(2) of the CPA are not relevant to the Territory regime for the foreseeable future and are not relevant to the Port of Darwin.

Clause 6(5)(a) and the objects of Part IIIA

This principle is satisfied but in an incomplete manner.

The NCC Guide indicates this clause requires that an effective access regime incorporates an objects clause consistent with the requirements of clause 6(5)(a).[37]

The Territory regime sets out the objective of the port access and pricing regime at section 117 of the PMA in a manner consistent with clause 6(5)(a). Section 122 requires regulations made for part 11 of the PMA to promote the object of the part. The generic Territory regime does not expressly require or permit the object to be taken into account by the commission when deciding whether to approve a draft access policy.

As implemented for the Port of Darwin, the objective in section 117 is among the objectives for the Access Policy,[38] which must in turn be taken into account in deciding whether access terms are reasonable.[39]

Clause 6(5)(b): Regulated access prices should be set to generate revenue that is at least sufficient to meet the efficient costs etc

Assessment: The pricing principles are incorporated in the Territory regime, but lack an effective regulatory enforcement mechanism due to the constraints on the commission's powers to use a pricing methodology other than price monitoring and its access to information to assess price outcomes.

The NCC Guide indicates[40] its consideration of pricing issues will focus on whether the price/revenue and underpinning costs identification and assessment principles in the regime reflect accepted methodologies, the clause 6(4)(i) principles and the clause 6(5)(b) principles where applicable.

The Territory regime implements the pricing principles in clause 6(5)(b) by restating them in section 133 of the PMA, requiring a price determination under section 132(1)

36 Section 26 of the Commercial Arbitration Act allows the arbitrator to appoint an expert and require information to be given to the expert. Section 25 allows the arbitrator to make a decision based on evidence before it, if the party has failed to produce documentary evidence.
37 Paragraph 6.1.
38 Clause 1.2.
39 Clause 4.1(b).
40 Paragraph 5.22.

to be consistent with the access and pricing principles in section 133[41] and by requiring an arbitrator to take those pricing principles into account in making an arbitration determination (Regulation 13(3)). As implemented for the Port of Darwin, the Access Policy also sets out the access and pricing principles[42] and lists them as matters to be taken into account in the decision of the arbitrator.[43]

A price determination under section 132(1) must also be consistent with the regulations. Under Regulation 16(1), the commission must also have regard to additional factors but these factors are not of themselves inconsistent with the clause 6(5)(b) principles.

The NCC Guide indicates[44] its consideration of pricing issues (that is, whether clause 6(5)(b) is satisfied) will also focus on whether mechanisms are in place to ensure pricing outcomes reflect these principles over time.

In relation to this second area of focus, there is doubt the Territory regime satisfies clause 6(5)(b), since the commission is limited to using price monitoring as the form of price regulation (Regulation 16(2)). In addition, the commission does not have access to information in a form it could use to assess pricing outcomes against these principles.

Clause 6(5)(c): Merits review

Assessment: The NCC Guide confirms that clause 6(5)(c) does not require an access regime be provided for merits review.

The NCC Guide considers that clause 6(5)(c) does not require an access regime to provide for merits review; however clause 6(5) contemplates where merits review is provided, the review will generally be limited the information submitted to the original decision-maker.

The PMA does not provide for merits review of the commission's decisions to approve (or not) an access policy under section 127.

Part 6 of the UC Act provided for review by the Supreme Court of certain matters, which would appear to include a price determination made under section 6 of the UC Act and section 132 of the PMA. Part 6 of the UC Act limits the information the Court may have regard to in the manner contemplated by the opening words of clause 6(5)(c). While on its face it does not include the qualifications in subparagraphs (i) to (iii) of that clause, the principle is met in substance since it appears to be directed at ensuring information is not withheld from the commission and then produced to the Court at the appeal stage.

The *Commercial Arbitration Act* allows appeals against arbitration awards (section 34A) but does not expressly include the limitations in clause 6(5)(c).

41 The price determination is made under the UC Act which also sets out factors to have regard to in section 21(2). This section is subject to the requirement of the PMA and Regulations.
42 Clause 5.5; see also clause 7.7.
43 Clause 7.7.
44 Paragraph 5.22.

Annex: Competition Principles Agreement clauses 6(2) to 6(5).

6(2) The regime to be established by Commonwealth legislation is not intended to cover a service provided by means of a facility where the state or territory party in whose jurisdiction the facility is situated has in place an access regime which covers the facility and conforms to the principles set out in this clause unless:

a) the Council determines the regime is ineffective having regard to the influence of the facility beyond the jurisdictional boundary of the state or territory; or

b) substantial difficulties arise from the facility being situated in more than one jurisdiction.

6(3) For a state or territory access regime to conform to the principles set out in this clause, it should:

a) apply to services provided by means of significant infrastructure facilities where:

i. it would not be economically feasible to duplicate the facility

ii. access to the service is necessary in order to permit effective competition in a downstream or upstream market

iii. the safe use of the facility by the person seeking access can be ensured at an economically feasible cost and, if there is a safety requirement, appropriate regulatory arrangements exist

b) reasonably incorporate each of the principles referred to in subclause (4) and (except for an access regime for: electricity or gas that is developed in accordance with the Australian Energy Market Agreement; or the Tarcoola to Darwin railway) subclause (5).

There may be a range of approaches available to a state or territory party to incorporate each principle. Provided the approach adopted in a state or territory access regime represents a reasonable approach to the incorporation of a principle in subclause (4) or (5), the regime can be taken to have reasonably incorporated that principle for the purposes of paragraph (b).

6(3A) In assessing whether a state or territory access regime is an effective access regime under the *Trade Practices Act 1974*, the assessing body:

a) should, as required by the *Trade Practices Act 1974*, and subject to section 44DA, not consider any matters other than the relevant principles in this agreement. Matters which should not be considered include the outcome of any arbitration or any decision made under the access regime

b) should recognise that, as provided by subsection 44DA(2) of the *Trade Practices Act 1974*, an access regime may contain other matters not inconsistent with the relevant principles in this agreement.

6(4) A state or territory access regime should incorporate the following principles:

a) Wherever possible third-party access to a service provided by means of a facility should be on the basis of terms and conditions agreed between the owner of the facility and the person seeking access.

b) Where such agreement cannot be reached, governments should establish a right for persons to negotiate access to a service provided by means of a facility.

c) Any right to negotiate access should provide for an enforcement process.

d) Any right to negotiate access should include a date after which the right would lapse unless reviewed and subsequently extended, however, existing contractual rights and obligations should not be automatically revoked.

e) The owner of a facility used to provide a service should use all reasonable endeavours to accommodate the requirements of persons seeking access.

f) Access to a service for persons seeking access need not be on exactly the same terms and conditions.

g) Where the owner and a person seeking access cannot agree on terms and conditions for access to the service, they should be required to appoint and fund an independent body to resolve the dispute, if they have not already done so.

h) The decisions of the dispute resolution body should bind the parties; however, rights of appeal under existing legislative provisions should be preserved.

i) In deciding on the terms and conditions for access, the dispute resolution body should take into account:

    i. the owner's legitimate business interests and investment in the facility

    ii. the costs to the owner of providing access, including any costs of extending the facility but not costs associated with losses arising from increased competition in upstream or downstream markets

    iii. the economic value to the owner of any additional investment that the person seeking access or the owner has agreed to undertake

    iv. the interests of all persons holding contracts for use of the facility

    v. firm and binding contractual obligations of the owner or other persons (or both) already using the facility

    vi. the operational and technical requirements necessary for the safe and reliable operation of the facility

    vii. the economically efficient operation of the facility

    viii. the benefit to the public from having competitive markets.

j) The owner may be required to extend or to permit extension of the facility used to provide a service if necessary but this would be subject to:

    i. such extension being technically and economically feasible and consistent with the safe and reliable operation of the facility

    ii. the owner's legitimate business interests in the facility being protected

    iii. the terms of access for the third party taking into account the costs borne by the parties for the extension and the economic benefits to the parties resulting from the extension.

k) If there has been a material change in circumstances, the parties should be able to apply for a revocation or modification of the access arrangement that was made at the conclusion of the dispute resolution process.

l) The dispute resolution body should only impede the existing right of a person to use a facility where the dispute resolution body has considered whether there is a case for compensation of that person and, if appropriate, determined such compensation.

m) The owner or user of a service shall not engage in conduct for the purpose of hindering access to that service by another person.

n) Separate accounting arrangements should be required for the elements of a business which are covered by the access regime.

o) The dispute resolution body, or relevant authority where provided for under specific legislation, should have access to financial statements and other accounting information pertaining to a service.

p) Where more than one state or territory access regime applies to a service, those regimes should be consistent and, by means of vested jurisdiction or other cooperative legislative scheme, provide for a single process for persons to seek access to the service, a single body to resolve disputes about any aspect of access and a single forum for enforcement of access arrangements.

6(5) A state, territory or Commonwealth access regime (except for an access regime for: electricity or gas that is developed in accordance with the Australian Energy Market Agreement; or the Tarcoola to Darwin railway) should incorporate the following principles:

a) Objects clauses that promote the economically efficient use of, operation and investment in, significant infrastructure thereby promoting effective competition in upstream or downstream markets.

b) Regulated access prices should be set so as to:

i. generate expected revenue for a regulated service or services that is at least sufficient to meet the efficient costs of providing access to the regulated service or services and include a return on investment commensurate with the regulatory and commercial risks involved

ii. allow multi-part pricing and price discrimination when it aids efficiency

iii. not allow a vertically integrated access provider to set terms and conditions that discriminate in favour of its downstream operations, except to the extent the cost of providing access to other operators is higher

iv. provide incentives to reduce costs or otherwise improve productivity.

c) Where merits review of decisions is provided, the review will be limited to the information submitted to the original decision-maker except the review body:

i. may request new information where it considers it would be assisted by the introduction of such information

ii. may allow new information where it considers it could not have reasonably been made available to the original decision-maker

iii. should have regard to the policies and guidelines of the original decision-maker (if any) relevant to the decision under review.

Appendix E: List of draft findings and draft recommendations

	Draft finding	Draft recommendation
Chapter 4: Competition Principles Agreement		
4.a	The commission's view is the clause 6 principles are an appropriate tool for assessing the access and pricing regime for the purpose of the review.	
4.b	The commission has formed the opinion that the current Northern Territory ports access and pricing regime does not satisfy the clause 6 principles.	
Chapter 5: Market power		
5.a	Taking into consideration the current market the commission has formed the view that DPO has substantial market power and the potential to exercise that market power. This is based on: • limited competition for the provision of prescribed services • a lack of substitutes for prescribed services • the existence of high barriers to entry for potential competitors • limited countervailing market power for most or all current port users • the balancing of commercial incentives • the limitations of port users relying on the additional constraints in the lease.	
5.b	Based on the limited time the regime has been in force and the limited information currently available to the commission, it has formed the view that for the current review period, there is no evidence of DPO exercising its market power regarding prescribed services. This conclusion is based on: • no reports of instances of material noncompliance with DPO's Access Policy • no reports of instances of material noncompliance with the Price Determination • no indication DPO is generating excessive profits • the overall conduct of DPO.	
Chapter 6: Ongoing need for regulatory oversight		
6.a	The commission is of the opinion that there are no recent or expected future changes that will materially impact market power of DPO or the potential for it to be exercised for the foreseeable future. This matter will be further considered at the commission's next scheduled review of the regime, due in 2023.	

continued

	Draft finding		Draft recommendation
6.b	It is the commission's finding that there is an ongoing need for regulatory oversight for prescribed services provided by DPO and the benefits of an access and pricing regulatory regime outweigh the costs.		
		6.c	The commission recommends continuing regulatory oversight of prescribed services for designated ports in the Territory.
6.d	The commission considers the list of prescribed services in Regulation 12(1) remains appropriate at this time.		
6.e	The commission believes the regime should not provide the potential for a port operator to move prescribed services outside the reach of the regulatory regime.		
6.f	The commission considers prescribed services provided at the MSB should fall within the scope of the regime on expiry of the current lease.		
		6.g	The commission recommends amendments to the regulations to restrict the application of Regulation 12(2) to leases entered into before a date specified in the regulations (such as the date on which the commission's Final Report is released) and provide for Regulation 12(2) to expire on a specified date, such as the date coinciding with the end of the current concession term for the MSB.
		6.h	The commission recommends that once the current agreement in place for the MSB expires, access and price regulation under the regime should apply to the facility in the same way it applies to other services provided by DPO. The change recommended in the previous paragraph would achieve this outcome.
Chapter 7: Changes to the form of oversight			
Should the current form of regulatory oversight continue?			
7.a	It is the commission's view at the present time that there is no need to change the form of regulatory oversight for access for prescribed services.	7.e	It is the commission's recommendation an effective, well-informed negotiate/arbitrate model should continue as the form of regulatory oversight for access to prescribed services for the next review period.
7.b	The commission has found there are weaknesses in the way the current negotiate/arbitrate model is established due to the key requirements for negotiation and arbitration not being contained in the PM Act, but instead listed as criteria for approving the Access Policy.	7.f	It is recommended the requirements for a negotiate/arbitrate model be specified in the PM Act rather than set out as criteria in the regulations for the approval of the Access Policy.
7.c	It is also the commission's view at the present time that there is no need to change the form of regulatory oversight for prices for prescribed services.	7.g	The commission recommends at this time that price monitoring continues as the form of price regulation for prescribed services.

continued

	Draft finding		Draft recommendation
7.d	The commission has formed the opinion that improvements are required to the regime so adequate information is made available to port users and the commission.	7.h	It is recommended the regime is amended so more information is provided to users and the commission to support the effective operation of the regime, including the commission having access to the necessary information to assess whether prices are consistent with the access and pricing principles.
What obligations are necessary to ensure an effective and well-informed negotiate/arbitrate model?			
7.i	In the event market power is exercised by the port operator such that price monitoring becomes insufficient as the form of price regulation, the commission would seek to deal with the matter using its existing legislative powers, with the aim of making a recommendation to the minister about a stronger form of regulation.	7.j	At the present time, the commission does not recommend any legislative amendment to strengthen its powers regarding the establishment of a different form of price regulation.
7.k	While not an issue in the current Access Policy, the commission considers the potential for a port operator's Access Policy to permit carve-outs to the non-hindering and non-discrimination obligations in sections 124 and 125 of the PM Act with inadequate regulatory oversight negates intended protections for port users.	7.m	It is recommended 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 regulator in the access policy approval process.
		7.n	It is also recommended section 127 of the PM Act and Regulation 13(2) be amended to ensure the commission can have regard to sections 124 and 125 when approving a draft access policy of a port operator.
7.l	The commission found it is not necessary at this time for it to have a role in considering the merits of a port operator's priority principles and whether it is effective.		
Access to meaningful information			
7.o	The commission is of the view that a private port operator should maintain separate accounts for the prescribed services. The regime should specifically allow the commission to obtain information from a port operator about profit, cost and investment.	7.q	The commission recommends the Territory regime be amended to include an obligation on a private port operator to maintain separate accounts for the prescribed services. The legislation should also be amended to include a power for the commission to obtain information from a port operator to enable the commission to analyse its profits.
7.p	The commission found the port users have very limited rights to access financial information under the regime. The rights they do have are heavily restricted by exceptions in the Access Policy. This undermines the negotiate/arbitrate process.	7.r	It is recommended the rights of the arbitrator and port users to require the provision of financial information are strengthened, including moving the rights from the Access Policy to the regulations.
7.s	The commission found the current classification of dry bulk minerals as a non-standard charge is creating uncertainty and ambiguity for potential port users.		

continued

	Draft finding		Draft recommendation
7.t	Consistent with other comparable ports across Australia, the commission formed the view that reference tariffs and associated standard terms for dry bulk mineral exports at the Port of Darwin are capable of being determined and published by DPO.	7.v	The commission recommends the regulations be amended to require the port operator to publish reference tariffs and associated standard terms in the Access Policy for dry bulk mineral exports.
7.u	The commission believes its lack of oversight of the process that determines what services are the subject of published standard terms is not consistent with the objects of the regime and enhanced regulatory oversight and transparency for port users are necessary to achieve these objects.	7.w	It is recommended the regime be amended to provide the commission with greater regulatory oversight of the process for determining what services must be the subject of published standard terms. It is also recommended the regime be amended to allow the commission to take standard services into account when considering whether to approve an Access Policy and a mechanism be included for the regulator to initiate and approve changes to the Access Policy over time.
Negotiation			
7.x	The commission finds important elements of the negotiation process have been omitted from the regime. These include: • an obligation to negotiate prior to a dispute being raised • an obligation to do so in good faith • a clear negotiation process to be followed.	7.y	It is recommended the regime includes: • an obligation to negotiate prior to a dispute being raised • an obligation to do so in good faith • a clear negotiation process to be followed.
Arbitration			
7.z	The commission finds arbitration an essential component of an effective access and pricing regime and should be included in the regime rather than the Access Policy.	7.ad	The commission recommends the provisions relating to arbitration are expressly specified in the regime, rather than the regulations requiring the Access Policy to contain provisions about arbitration in order for it to be approved.
7.aa	The commission finds at present the regime should stipulate the matters to be taken into consideration by the arbitrator in the dispute resolution process.	7.ae	The commission recommends amendments be made to the regulations to include the matters to be taken into account by the arbitrator in the dispute resolution process.
7.ab	The commission finds at present there is uncertainty as to how conflicts between the Access Policy and other agreements relating to the prescribed services should be resolved.	7.af	The commission recommends the regulations be amended to provide guidance on resolving conflicts between the Access Policy and other agreements regarding prescribed services for the port.
7.ac	The commission believes it would be beneficial for arbitration decisions to be provided to the commission.	7.ag	The commission recommends the regulations be amended to include an obligation that arbitration decisions are provided to the commission.

continued

	Draft finding		Draft recommendation
Compliance and enforcement			
7.ah	The commission finds a number of important elements are absent from the current regime that are necessary for effective compliance and enforcement.	7.ai	It is recommended the regime is amended to include: • a definition of 'material instance of noncompliance' • an express provision for other parties to be able to report on material instances of noncompliance with the Access Policy to the regulator • a power for the regulator to investigate material instances of noncompliance with the regime reported by a port operator and other parties • penalties to be imposed on a port operator for material instances of noncompliance with the Access Policy • a requirement on the Chief Executive Officer of a private port operator to certify that 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.
Standards of service			
7.aj	The commission has found there is a gap in the regime regarding reporting on and monitoring the standard of service or performance levels provided by a port operator for prescribed services.	7.ak	The commission recommends amendments to the regime to include a process for the commission to determine the standards of service or performance levels against which reporting will be required and a requirement of a port operator to report to the commission on those standards of service or performance levels.
		7.al	It is recommended the commission reports annually to the minister on a port operator's standards of service or performance levels.
Chapter 8: Other issues			
Improving the Access Policy aproval process			
8.a	The commission has formed the opinion the regime should include an obligation for a port operator to consult with port users on an initial draft Access Policy.	8.b	The commission recommends section 127(2) of the PM Act is amended to include an obligation on a port operator to consult with port users on an initial access policy.
8.c	The commission finds the decision-making framework for approving a draft Access Policy prevents the commission from taking relevant matters into account.	8.d	The commission recommends amending section 127(4) of the PM Act to allow the commission to take relevant matters (such as the pricing principles, interests of the public, port users and access seekers) into consideration when approving a draft Access Policy. Alternatively, part 11 of the PM Act could be amended to prescribe the matters the commission can take into account when performing all of its functions under the regime (including approving a draft Access Policy).

continued

	Draft finding		Draft recommendation
8.e	The commission finds the existing approval process for the draft Access Policy is limiting. It does not take into account the possibility of more time being needed for the commission and a port operator to engage and resolve matters concerning what must be contained in the draft Access Policy in order for it to be approved.	8.f	The commission recommends amending section 127(3) of the PM Act to allow the commission to extend the approval time for the draft Access Policy beyond 60 days, in certain circumstances.
8.g	The commission finds, in the interest of transparency and information symmetry, a port operator should publish the findings of a review of its Access Policy and give the regulator a copy of the findings.	8.j	The commission recommends amending Regulation 15 to include an obligation for a port operator to publish the findings of a review of an Access Policy and provide the regulator with a copy of the findings, and submit a revised access policy that addresses the findings for approval.
8.h	The commission finds there should be an obligation on a port operator to amend the Access Policy in certain specified circumstances that could result in the Access Policy ceasing to meet the requirements of the Act or regulations, or be consistent with the object of part 11 of the Act (for example when there have been amendments to relevant Commonwealth or Territory legislation or there is a material change to the market).	8.k	The commission recommends amending section 127 of the PM Act to include an obligation of a port operator to amend its Access Policy in certain specified circumstances that could result in the Access Policy ceasing to meet the requirements of the Act or regulations, or be consistent with the object of part 11 of the Act (for example, when there have been amendments to relevant Commonwealth or Territory legislation or there is a material change to the market).
8.i	The commission believes, following the initial approval of a port operator's Access Policy, an Access Policy should be in place at all times. Should the current Access Policy expire or cease to be valid, a mechanism is needed to ensure it can be replaced.	8.l	It is recommended section 127(2) be amended to include a mechanism for the Access Policy to be replaced should it expire or cease to be valid.
Additional issues in submissions			
		8.m	The commission recommends, in light of the issues raised by DPO, the application of 'designated port' for the purposes of the ports access and pricing regime is reviewed by Government and the PM Act amended if necessary.

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