The Utilities Commission of the Northern Territory

2018 Ports Access and Pricing Review

Final Report

November 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 findings and recommendations of the commission arising from the review.

About the Utilities Commission

The Utilities Commission is an independent statutory body established by the *Utilities Comission 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 prevent 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*.

Any questions regarding this Final 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	1 August 2018
Public consultation	August – September 2018
Final Report provided to the minister	15 November 2018

The Final Report is required to be provided 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.

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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 PM Act and regulation 13 of the PM Regulations, and approved by the Utilities Commission on 30 June 2017
AMEC	Association of Mining and Explorations Companies Inc.
CC Act	*Competition and Consumer Act 2010* (Cth)
clause 6 principles	Clause 6 of the Competition Principles Agreement
COAG	Council of Australian Governments
Commercial Arbitration Act	*Commercial Arbitration (National Uniform Legislation) Act* of the Northern Territory
commission	The Utilities Commission of the Northern Territory
Competition Principles Agreement	Competition Principles Agreement, referred to in section 4 of the CC Act
CPA	Competition Principles Agreement
CPI	consumer price index
designated port	The same meaning as given to this term in the PM Act
dispute	An access dispute as defined by the PM Regulations
DCM	The Northern Territory Department of the Chief Minister
DPO	Darwin Port Operations Pty Ltd (ABN 62603 472 788), the private port operator for the Port of Darwin
Draft Report	The 2018 Ports Access and Pricing Review Draft Report published by the Utilities Commission on 1 August 2018
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. It refers to 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 PM 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 CC Act
NCC	National Competition Council as established under Part IIA of the CC Act

Term	Definition
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 PM Regulations or section 110 of the PM Act
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 PM Act
prescribed service	As defined by regulation 12 of the PM Regulations
private port operator	The same meaning as given to this term in the PM 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 PM Act and regulation 16 of the PM Regulations
regime	Part 11 of the PM Act and Part 3 of the PM Regulations
PM Regulations	Ports Management Regulations (NT)
regulator	The Utilities Commission of the Northern Territory, as provided for by section 119(3) of the PM Act and as established under the UC 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 PM Act and Regulation 14 of the PM Regulations
review	The 2018 Ports Access and Pricing Review, required to be conducted by the regulator in accordance with section 123 of the PM Act
review period	As defined by section 123(6) of the PM 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 terms and conditions for standard services, as contained in the Access Policy
UC Act	*Utilities Commission Act* (NT)

Executive summary

The *Ports Management Act* (PM Act) and Ports Management Regulations (PM 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 PM Regulations establish an access and pricing regime for Territory ports. The access regime is 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 (commission) 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 13 November 2015, Darwin Port Pilotage Pty Ltd, as trustee for the Darwin Pilotage Trust, was appointed under section 85(1) of the PM Act to be a pilotage services provider for the Port of Darwin. On 15 November 2015, ownership of DPO was acquired by Landbridge Port Operations 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 three 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 was discussed in the Draft Report, including the commission's draft findings and recommendations.

The Draft Report was released by the commission on 1 August 2018, seeking submissions from all port stakeholders. The commission consulted with stakeholders on the draft findings and draft recommendations and four formal submissions were received. Submissions are available on the commission's website. The commission has considered the submissions received and now delivers its findings and recommendations in this Final Report.

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 at 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) (CC Act).

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 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 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 in constraining the exercise of market power in different market conditions. 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 PM Regulations, will benefit from change. This is based on the commission's practical experience working with the regime since it commenced and feedback from port users. It is also based on an assessment of the regime against access and pricing regimes at other ports and against the minimum requirements for an effective access and pricing regime agreed by governments and set out in the clause 6 principles. Finally, the commission has taken a forward-looking approach. While the regime is still in

its very early stages and market conditions have been such that it has not been tested, the commission has sufficient experience with the regime to identify that change is needed to ensure it is effective and robust over time including as the port develops and market conditions change.

Therefore, the commission's response to section 123 of the PM Act for 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 part 3 of the PM Regulations to ensure the regime is effective, fit for purpose and better meets its legislative objectives. The amendments suggested will ensure the identified deficiencies are addressed, while maintaining the cost effectiveness of the regime.

On this last point, the amendments to the regime recommended by the commission deal with matters such as the exemption from the regime of prescribed services under a lease, obligations the commission considers necessary to ensure an effective and well-informed regime, and improvements to the process for approval of the port operator's access policy. The amendments are entirely consistent with the Territory Government's objective of the regime being light-handed in character and should not be seen as a reaction to the operation or activities of DPO under the current legislation.

This Final Report sets out the commission's findings and recommendations concerning the matters subject of the review, including the reasons that led the commission to each position. Appendix F sets out specific proposed amendments to the PM Act and PM Regulations to implement the commission's recommendations.

The Final Report is required to be delivered to the minister by 15 November 2018. The minister is required to table the Final Report in the Legislative Assembly within seven sitting days of receipt. Once tabled in Parliament, the commission will publish this Final Report on its website.

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 or Draft Report and for engaging with the commission throughout the review. The commission also thanks DPO for engaging constructively with the commission and providing the necessary information to assist in the conduct of the review.

1 Access and pricing regime

1.1 Background

The *Ports Management Act* (PM Act) and Ports Management Regulations (PM 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 PM Regulations set up the access and pricing regime for Territory ports. The regime appoints the commission 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 16 November 2015, ownership of DPO was acquired by Landbridge Port Operations 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.

On 13 November 2015, Darwin Port Pilotage Pty Ltd as trustee for the Darwin Pilotage Trust was appointed under section 85(1) of the Act to be a pilotage services provider for the Port of Darwin.

1.2 Overview of the regime

The object of the regime (part 11) is set out in 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 making of regulations)

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

iii. division 2 also contains provisions to develop 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 PM 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)

4 'Second Reading Speech: Ports Management Bill'. Northern Territory Parliament, page 1. Northern Territory, *Parliamentary Debates*, Legislative Assembly, 27 November 2014, 5693-8 (Adam Giles).

- 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 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 behaviour 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.

Both sections 124(1) and 125(1) are potentially 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 regime applies to prescribed services. These are defined in the PM Regulations as the following services provided by a private port operator at a designated port:

- 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 DPO, with recourse to an arbitration process if a dispute arises that cannot be resolved between the parties. The arbitration framework

5 Sections 3 and 6 of the *Ports Management Act* and 'Second Reading Speech: Ports Management Bill'. Northern Territory, *Parliamentary Debates*, Legislative Assembly, 27 November 2014, 5693-8 (Adam Giles).

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

is specified in the PM Regulations and is one of a set of criteria specified at regulation 13(2) to be applied by the commission in approving DPO's Access Policy. The negotiate/arbitrate regime is therefore ultimately embedded in the Access Policy.

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 gives the commission discretion to adopt any form of price regulation the commission considers appropriate. However, this discretion is negated by the PM Regulations, which 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 promote the object of part 11 by protecting 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 DPO's Access Policy in June 2017
- producing and publishing Reporting Guidelines in March 2018.

All of these processes involved public consultation with port stakeholders. In addition, the commission has reviewed negotiated agreements for the provision of prescribed services provided to the commission by DPO.

The current Price Determination will expire in February 2019. The commission has commenced a review of the current Price Determination, which will include 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 must 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 is whether the regime remains fit for purpose. Specifically, the review considers 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 PM Regulations and, if so, the nature of these amendments.[9]

The outcome of the review is this Final Report, which makes findings and recommendations about these matters. The minister is required to table this 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

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

- not allow a vertically integrated provider of access to services to set terms and 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 UC Act 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]

2.3 Experience with the regime

In carrying out the review, the commission took into account its experience with the regime since commencement, in particular the approval process for DPO's access policy. Through this experience, the commission identified deficiencies in the regime as noted elsewhere in this Final Report.

2.4 Other regimes

In assessing the regime and formulating its recommendations, the commission took into account the approach in other comparable negotiate/arbitrate regimes, including comparative research undertaken on relevant port access and pricing regimes across Australia.

The commission also took into account the access principles specified in clause 6 of the CPA entered into by the Commonwealth, and all state and territory governments in April 1995. For this purpose, the commission assessed the current regime against the clause 6 principles and the criteria for recommendation for certification as an effective regime under the national regime. The relevance of the clause 6 principles is discussed further in Chapter 4.

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*.

2.5 Reference material

In carrying out the review, the commission 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 included:

- 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
- assessment of the financial accounts for DPO for 2015-16 and 2016-17
- evaluation of the relevant clauses in the port lease and sublease.

2.6 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 met with DPO on several occasions to discuss the review and the issues under consideration. DPO 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 and the Draft Report. The commission has taken into account all relevant information provided to it by DPO.

The commission also engaged with numerous port users to discuss their experiences regarding access to 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 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 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.

On 1 August 2018, the commission released the Draft Report, which set out the commission's draft findings and draft recommendations for the review. In brief, the Draft Report recommended ongoing regulatory oversight of access to and pricing of

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

prescribed services provided at the Port of Darwin, and to continue the forms of regulatory oversight for both access (negotiate/arbitrate) and prices (price monitoring). In addition, there were several areas in which amendments could be made to the regime to ensure it better meets its legislative objectives while remaining cost effective.

The commission followed a similar consultation process used for the Issues Paper for the Draft Report. Submissions were received from DPO, the Northern Territory Department of the Chief Minister (DCM), INPEX and the Association of Mining and Exploration Companies Inc. (AMEC). The commission met with these stakeholders to discuss their submissions, which were published on the commission's website on 11 September 2018 (excluding confidential material).

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 trade 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 twice for standard charges for prescribed services. 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) of the Ports Management Regulations and clause 10 of the Price Determination.
19 Landbridge, Media Release, 13 October 2015.

At the same time, DPO introduced a new standard charge for a prescribed service, 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 Ichthys LNG project. The commission understands, at present, the only large vessels expected to use the Bladin Channel are INPEX's customers.

On 1 August 2018, all standard charges for prescribed services (except for port induction fees) increased 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.[20] The following changes to DPO's tariff schedule were also made:

- inclusion of 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 DPO
- 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 has reviewed the changes to the Darwin Port tariff schedule for 2017-18 and 2018-19 and found the changes are not inconsistent with the Price Determination.

Since 2015, DPO has entered into around 25 negotiated agreements for non-standard services, for example, leases and licences for facilities such as warehouses and demountable buildings.[21]

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.

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 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.

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

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

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 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.22

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

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

4 Responses to the Draft Report

4.1 Overview

The commission received four responses to the Draft Report. In general, respondents supported the findings that there is no need to change the current form of access regulation. One respondent did not agree, arguing the regulator should have power to veto new or increased charges.[23] The commission has responded to this submission in Chapter 7.[24]

Responses to the commission's draft recommendations for amendments to the regime were more mixed. This chapter addresses two issues raised in responses to the Draft Report, in particular why the commission considers aspects of the regime be moved to the PM Act and the PM Regulations, and the appropriate assessment framework for the regime.

Chapters 6, 7 and 8 address the responses to other matters in the Draft Report, including the treatment of services provided under a lease and the commission's recommendations relating to the price monitoring regime and other specific proposals for changes to the regime.

In its response, INPEX identified a concern with the regulation of pilotage services, which was not addressed in the Draft Report. This is now addressed in Chapter 6.[25]

DPO's response to the Draft Report identified the risk of inconsistency with existing instruments if any changes are made to the regime. The commission acknowledges this and in Chapter 8 has included recommendations for transitional provisions to address this point.

4.2 Incorporating the access regime in the PM Act or PM Regulations

The Draft Report recommended moving details of the negotiate/arbitrate access regime from the Access Policy into the PM Act or PM Regulations.

Submissions to the Draft Report

AMEC's submission supports this recommendation on the basis the change will increase the certainty and transparency of the regime. DPO's submission indicated DPO considers it unclear why the commission believes it necessary to do so. DCM's submission expressed the view it does not appear necessary to amend the regime insofar as it relates to the negotiate/arbitrate model.[26]

Approach of the commission

This section explains why the commission considers it is necessary to move aspects of the regime currently left to the Access Policy to the PM Act or PM Regulations.

The change will address gaps in the current regime and provide greater certainty about its operation. The arrangements put in place through the PM Act and the PM Regulations

23 INPEX Operations Australia Pty Ltd, submission to the Draft Report, August 2018, page 1.
24 Paragraph 7.1.
25 Paragraph 6.4.
26 Department of the Chief Minister of the Northern Territory Government, submission to the Draft Report, 4 September 2018, page 5.

are silent on matters the commission considers to be key to the effective operation of a negotiate/arbitrate regime. For example, the framework for negotiation prior to an access dispute being notified is not dealt with in the PM Act or the PM Regulations. By way of further example, with the exception of the access and pricing principle, the regime provides no guidance about the matters to be taken into account by an arbitrator when determining an access dispute.

These and other matters referred to in Chapter 7 of this Final Report are important features of a negotiate/arbitrate framework. However, in the current regime, they are not conditions the commission can take into consideration when approving the access policy under the PM Act and regulation 13(2). As a result, if they are included in a draft access policy, they are largely left to the port operator to define. The commission considers this leaves an unacceptable risk the access policy either does not deal with these matters or does so in a way that creates barriers to access and weakens the threat of arbitration. For example, the port operator can frame the provisions in the access policy in a way that creates barriers for access seekers. Examples include no right to negotiate unless the access seeker is able to demonstrate creditworthiness to the standard required for the contract being negotiated (and not just negotiation and investigation costs); threshold tests for negotiation in vague terms or that effectively leave the port operator with a discretion not to negotiate; one-off rights to request information in the negotiation phase; unreasonably short time limits for initiating access disputes; and a list of matters for the arbitrator to take into account in making a determination that prefer the interests of the port operator. These and other provisions in the access policy can increase the costs and risks of any challenge to the terms offered by the port operator and so deter any such challenge being made.

In the commission's experience, these are real risks; the examples above were issues identified by the commission in its consideration of early drafts of DPO's Access Policy. The proposed inclusion of provisions such as these in the draft access policy go some way to explaining the length of time it took to approve the first Access Policy under the regime. Through a process of engagement with DPO, many of the commission's concerns were addressed, but it was a resource-intensive and lengthy process.

These issues are exacerbated by the restricted approval framework for the access policy that gives the regulator a largely 'check box' approval framework, rather than one that allows the commission to consider the substantive effect of a draft access policy so as to ensure it not only contains all the matters listed in the PM Regulations but does so in a way consistent with the objects of part 11.

In the commission's experience, rather than streamlining the process (if that is what it was intended to do) the check box approval process adds time and cost since it leaves room for a port operator to test each element of the negotiate/arbitrate regime through the access policy approval process. In the commission's view, this is neither necessary nor desirable from a policy perspective and not consistent with other negotiate/arbitrate regimes for ports and other regulated infrastructure.

While it is true the Access Policy for the Port of Darwin has now been approved, this policy must be reviewed in time as required by the PM Regulations. Without change to the regime, the same issues may arise through the access policy review process.

It is largely in light of this experience that the commission has recommended moving key elements of the regime to the PM Regulations or PM Act, giving the commission an approval framework consistent with the object of part 11 and the UC Act, and allowing

for regular review. As discussed in the following section, there is sufficient experience and acceptance of negotiate/arbitrate regimes in the Australian context to define a regime in the legislative framework that is both fit for purpose and sufficiently flexible to adapt to different conditions at different ports. The principles on which an effective negotiate/arbitrate regime should be based have been agreed by policy makers and the regime should not allow the port operator to reopen them. The commission's role should be to ensure the effective operation of the regime in practice. Moving the regime towards this approach will enhance transparency, consistency and certainty for the port operator (in the approval process) and for port users, and will provide for a uniform framework if any other port service providers in the Territory are brought in to the scope of the regime. A review process will ensure the regime adapts to changing circumstances over time.

Specific findings and recommendations are in chapters 7 and 8, and Appendix F contains proposals for how the regime could be amended to implement those recommendations. The changes proposed in Appendix F are intended to implement the recommendations in a manner consistent with Regulation 13(2), for example by using commercial arbitration under the *Commercial Arbitration Act* rather than regulator-led arbitration and referencing the access and pricing principles.

4.3 Competition principles agreement and other access regimes

For the Draft Report, the commission found the clause 6 principles were an appropriate tool to assist the commission's assessment of the access and pricing regime for the purpose of the review.[27]

The clause 6 principles was only one of the matters the commission considered. As discussed in Chapter 2, the commission's assessment was informed by a range of matters including the objects of part 11 of the PMA, other relevant provisions of the PMA, the requirements of the UC Act, submissions to the Issues Paper and Draft Report, the commission's experience to date with the regime and the approaches at other ports. While there are differences among the regimes at different ports, this comparison has informed the commission's assessment and its recommendations.

The clause 6 principles are derived from the CPA. The CPA was entered into by the Commonwealth, states and territories (including the Northern Territory) in April 1995 and was modified in April 2007.[28] The CPA is part of the National Competition Policy, which committed the Commonwealth, states and territories 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.[29] This is known as the National Third Party Access Regime (national regime) and is established by part IIIA of the CC Act.

The national regime seeks to promote effective competition in upstream and downstream markets through the promotion of the economically efficient operation, use and investment in infrastructure by which services are provided. It also seeks to encourage a consistent

27 Draft finding 4a.

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

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

approach to access regulation in each industry by providing a framework and guiding principles.[30]

Under the national regime, 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 the state or territory regime applies exclusively to the specific infrastructure services and neither the access undertaking nor the declaration pathways under the national regime are available.[31]

The Territory Government has made a commitment that all territory access regimes for services provided by significant infrastructure facilities would be submitted for certification.[32] 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.[33]

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.[34] 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.

Applications for certification are assessed against clauses 6(2) – 6(5) of the CPA, which set out the types of infrastructure services that may be subject to an access regime, as well as the broad requirements for regulated access.[35] 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 CC Act.[36]

For the Draft Report, the commission 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.[37] Appendix D provides details of the assessment undertaken by the commission. Responses to the

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

31 Section 44F(1)(a) of the *Competition and Consumer Act 2010* (Cth) (a service cannot be declared if it is the subject of an effective access regime); section 44ZZA(3AA) (the Australian Competition and Consumer Commission cannot accept an undertaking if the service is the subject of an effective access regime).

32 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 Council of Australian Governments (COAG) Intergovernmental Agreement on Competition Productivity-Enhancing Reforms by the Chief Minister on 9 December 2016, which is yet to come into force.

33 The decision of the then Treasurer is available on the National Competition Council's website.

34 For more examples of certified state and territory access regimes see the Past Applications Register on the National Competition Council website.

35 *Competition and Consumer Act 2010* (Cth), section 44NA(4) which in turn requires the National Competition Council 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 National Competition Council 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.

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

37 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.

Draft Report did not comment on the assessment in Appendix D and the commission has adopted that assessment for its Final Report.

The commission's review of the approach at other ports in Australia is in Appendix C. DPO's response to the Draft Report notes differences between those ports and the Port of Darwin but the commission did not receive any specific comments on Appendix C. The commission is satisfied the approach at other Australian ports and other negotiate/arbitrate regimes provides a useful reference point for this review, while allowing for differences in scale and port operations.

Submissions to the Draft Report

The commission's findings in the Draft Report in relation to the clause 6 principles were the subject of detailed comment in DCM's and DPO's respective responses to the Draft Report.

DCM's response noted the function of the clause 6 principles is to act as a guide to the Commonwealth Treasurer in making a decision as to whether the statutory access and pricing regime in Part IIIA of the CC Act should be prevented from applying to a service provider by a facility that is the subject of a state or territory access regime. DCM's response indicated the Territory Government, at present, is not concerned about the application of the CCA to the Port.[38] DCM concluded the clause 6 principles have limited relevance to the current review.

The commission acknowledges the clause 6 principles have a specific role to play in the national regime and, at present, the Territory Government has not made an application for certification of the regime under the CC Act. The commission nonetheless considers the clause 6 principles are relevant insofar as they provide a set of minimum standards for assessment of the regime and, together with its review of other negotiate/arbitrate regimes, can guide the commission's recommendations about matters to be incorporated in the PM Act or PM Regulations to ensure the regime is effective.

DPO questioned the role of the clause 6 principles in the current review.[39] DPO's response agrees the clause 6 principles are a helpful comparator for the purposes of analysing the framework and substance of the existing regime, but does not agree it is necessary or desirable to make amendments for the purposes of 'ticking every box'. DPO's response suggested the clause 6 principles had been framed with much more significant infrastructure facilities in mind. DPO's submission gives several reasons why the regime does not precisely mirror the clause 6 principles, including the policy decision to establish a 'light-handed' regulatory framework in relation to the Port of Darwin and the need for a regime that allows DPO sufficient flexibility to develop and grow the facilities and throughput at the port.[40]

Approach of the commission

The commission disagrees with DPO's characterisation of the assessment as a box-ticking exercise. The clause 6 principles provide a flexible principles-based framework for assessing whether a regime is effective and not a prescriptive design. The principles are sufficiently flexible to apply in relation to a range of infrastructure, including the Port of Darwin, and represent a set of minimum standards for an effective light-handed access

38 Department of the Chief Minister, submission to the Draft Report, September 2018, page 4.
39 Landbridge Darwin Port, submission to the Draft Report, August 2018, pages 6 to 7.
40 Landbridge Darwin Port, submission to the Draft Report, August 2018, page 6.

regime. These minimum standards have been accepted by policy makers and reflected in an inter-governmental agreement to which the Territory is a party. It is reasonable for port users to expect, where a need for regulation has been identified, these minimum standards will be met even if the infrastructure is not of a comparable size to some of the largest ports in Australia or serves a smaller market.

DPO's response also asserts that on any measure, the regime is currently effective and fit for purpose. The commission notes responses from users to the Issues Paper and Draft Report indicate there is some dissatisfaction with the regime. In any event, the commission's focus in this review is whether the regime is effective and fit for purpose into the future.

The clause 6 principles have provided a useful best practice guide to the matters that should be considered in assessing whether the current regime meets the requirements for an effective light-handed negotiate/arbitrate and price monitoring regime. However the commission would not have reached different conclusions about the need for change even without regard to the clause 6 principles. As explained in section 4.2, in considering the need for change, the commission has taken into account its own experience of the operation of the regime to date, in particular through the protracted process that ensued in the approval of the Access Policy for DPO, the objects of part 11 of the PMA, comparisons with other light-handed negotiate/arbitrate regulatory regimes and submissions from users.

DCM's submission confirms the Territory Government policy position is for a light-handed approach to port pricing and access regulation comprising price monitoring and open access with a negotiate/arbitrate approach to resolution of disputes.

The commission accepts light-handed regulation is a guiding principle for the regime that influenced the Government's choice to establish a negotiate/arbitrate model, supported by price monitoring. The commission is satisfied its recommendations in this Final Report are consistent with this guiding principle. The ACCC has recently observed:

"A negotiate/arbitrate regime is a light-handed form of regulation. This is because terms and conditions can continue to be determined through commercial negotiation without any external involvement such as that by a regulator. This is in contrast to other forms of regulation where a regulator may be asked to determine the prices upfront and assess whether the provider of the service is operating efficiently and investing prudently."[41]

The regime should also provide an effective constraint on the exercise of monopoly power. This is consistent with the intention of the Territory Government, as explained in its submission to the Territory Government Port of Darwin Project Steering Committee, which confirmed an intention to implement a regime that is "robust and capable of mitigating the inherent risks in the move from a public to privately operated port".[42]

In the context of price monitoring, as discussed elsewhere in this Final Report, whether the regime is effective depends on there being a credible threat of more intrusive regulation over time.

In the case of a negotiate/arbitrate access regime, the effectiveness of the regime depends on whether it promotes successful commercial negotiation and a credible threat of

41 Australian Competition and Consumer Commission, submission to the Productivity Commission Issues Paper for the Inquiry into the Economic Regulation of Airports (September 2018), page 38.

42 Northern Territory Government: Port of Darwin Project Steering Committee, 2015, Submission to the Port of Darwin Select Committee (published at https://parliament.nt.gov.au/committees/previous/port-of-darwin#Report).

intervention in access disputes, in the form of arbitration. Accordingly, in considering what should be included in the PM Act and the PM Regulations to ensure there is an effective negotiate/arbitrate regime, the commission has recommended measures designed to:

- promote effective negotiation, including by ensuring access seekers do not face unreasonable barriers to negotiation, have reasonable certainty about negotiation time frames, and have access to information necessary for effective negotiation and to address information asymmetry
- provide a credible threat of third party intervention in any access dispute, if desired by a party to the dispute, including by ensuring a party to an access dispute does not face unreasonable hurdles before its access dispute can be referred to an arbitrator and has sufficient certainty of the dispute process to justify the risk, including the time and cost to reach a resolution, the principles to be applied in making a determination and (if the determination is adverse) there being no obligation to contract on commercial terms not acceptable to the access seeker.

The commission also accepts, as noted by DPO, the Port of Darwin is a developing port and the access regime needs to allow DPO sufficient flexibility to develop and grow the facilities and throughput for the port.[43]

Flexibility is inherent in the negotiate/arbitrate model. The ACCC has observed:

> *A negotiate/arbitrate regime can also provide flexibility if there is uncertainty regarding the level of market power of the infrastructure provider. In the event that [service providers] do not possess significant market power, then [service providers and access seekers] can continue to commercially negotiate terms and conditions without regulatory interference and the recourse to arbitration will not be used. This minimises the potential for harm from regulatory overreach.*[44]

The commission considers, in the case of the Port of Darwin, a flexible regime would also respond to the changing needs of port users and the development of port infrastructure. The commission considers this principally depends on which elements of the regime are embedded in the legislative framework and which remain in the access policy, and in general:

- the legislation should specify the measures designed to promote effective negotiation and access to arbitration
- the access policy should cover the access application process, feasibility assessments, service classification and information about standard terms and conditions of access.

43 Landbridge Darwin Port, submission to the Issues Paper, April 2018, page 10.

44 Australian Competition and Consumer Commission submission to the Productivity Commission Issues Paper for the Inquiry into the Economic Regulation of Airports (September 2018), page 38.

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 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 needed to consider were whether DPO does have market power and whether there is potential for the exercise of that market power (or evidence of the actual exercise of market power) by DPO.

To achieve this, the commission 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 then examined whether there was 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.

It is worth noting 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

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 is 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 available 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?

Section 5.3 in the Draft Report set out the commission's comments about the market power possessed by the port operator for the Port of Darwin. This Final Report adopts that section, with further commentary in response to submissions on the Draft Report.

a) 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 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 in some instances, while further in distance, it can be less expensive to send cargo south to Adelaide on the Tarcoola-Darwin Railway than 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 break-even

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.

DPO's response to the Draft Report expressed the view that comments regarding the degree of market power possessed by the Port of Darwin may be overstated.[45] According to DPO's submission, DPO faces "substantial competition" for services to businesses in central Australia and in the north-western part of Australia. DPO indicates the competition is from the ports operated by Flinders Ports in South Australia, ports in Wyndham and Broome and road and rail services. According to DPO's submission, DPO competes daily for trade, including cattle exports, bulk mineral imports and exports as well as containers and other commodities. DPO indicates given its remote location, the costs of transport to the Port of Darwin can be a deterrent for customers, and it is aware of customers exploring other options, particularly in relation to dry bulk cargo.[46]

The commission accepts that DPO faces competition at the margins and transport costs to the Port of Darwin may influence decisions about which port to use for export. However, for many port users, transport costs will rule out export through any port other than the Port of Darwin. In addition, as noted in the Draft Report, 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 into using the Port of Darwin. These businesses then become dependent on DPO providing prescribed services. In its submission to the Draft Report, INPEX described the Port of Darwin as a natural monopoly.[47]

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 to residents.[48] 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.

b) 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

45 Landbridge Darwin Port, submission to the Draft Report, August 2018, page 7.
46 Landbridge Darwin Port, submission to the Draft Report, August 2018, page 8.
47 INPEX Operations Australia Pty Ltd, submission to the Draft Report, August 2018, page 1.
48 Maritime Union of Australia, Submission Ports Access and Pricing Review NT Utilities Commission, 6 April 2018, page 6.

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.

DPO's submission to the Draft Report provides what it suggests is a counter-example to the commission's expressed views on barriers to entry, namely increased capabilities at Port Melville. The commission understands Port Melville is a privately owned facility, purpose built to support the wood chipping industry on the Tiwi Islands. The islands and port are not accessible by road or rail, and serviced by light chartered aircraft and a weekly barge service from Darwin. Port Melville offers fuel bunkering and support services for the oil and gas industry, general marine and defence sectors. One of its main focuses is providing services to clients who do not need to go to Darwin. Port Melville is a unique facility in a unique location, which services a niche market segment. While the commission accepts it may offer some marginal competition to the Port of Darwin in relation to fuel bunkering (which is not a prescribed service), this does not affect the commission's conclusions in relation to barriers to entry for the provision of prescribed services.

c) 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 a number of port users at the Port of Darwin are large national and international companies, experienced in negotiating with port operators.[49] DPO has entered into around 25 negotiated agreements for prescribed services with port users since the commencement of the regime. 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

49 Landbridge Darwin Port, submission to the Issues Paper, April 2018, page 4.

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.

a) 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 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 its primary commercial objective is to drive increased use, patronage of, and throughput, at the port.[50]

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 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 increase port throughput or improve the quality of services.

b) Additional constraints

DPO's submissions have referred the commission to obligations contained in the port lease that restrict its behaviour.[51] DCM's submission to the Draft Report has also drawn attention to provisions in the port lease.[52] 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

50 Landbridge Darwin Port, submission to the Draft Report, August 2018, page 18.
51 Landbridge Darwin Port, submission to the Issues Paper, April 2018, page 5, 7 and 13. Landbridge Darwin Port, submission to the Draft Report, August 2018, page 9.
52 Department of the Chief Minister, submission to the Draft Report, September 2018, page 6.

- 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 for the lease to be 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.

5.5 Evidence of the exercise of market power

a) 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 has met all requirements and also provided additional details or information to assist the commission with performing its regulatory functions.

On 30 September each year, DPO must report to the commission on any instances of material non-compliance with its Access Policy for the preceding financial year.[53] For 2015-16 and 2016-17, an Access Policy was not in place for the reporting periods. For 2017-18, DPO reported there were no material instances of non-compliance. As a result and to date, the commission is not aware of any material instances of non-compliance by DPO with its Access Policy.

The commission also monitors and reports to the minister each year about any material instances of non-compliance by DPO with the Price Determination.[54] Since the commencement of the Price Determination in February 2016, the commission is not aware of any material instances of non-compliance. However, the commission notes it 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.

53 Section 130 of the *Ports Management Act*.
54 Section 121(2) of the *Ports Management Act*.

b) Stability of prices

As discussed in Chapter 3, since the commencement of the regime DPO has twice changed its standard charges for prescribed services. 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.[55]

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 nor is it available to the commission at this time.

DCM's submission indicates, at the commencement of the lease, the government took what it terms a line-in-the-sand approach to port prices on the basis the Territory Government and Darwin Port Corporation had, in advance of the lease transaction, undertaken a detailed pricing review with prices based on an efficient capital structure and appropriate weighted average cost of capital and demand assumptions reflective of known and anticipated throughput.[56] The commission is familiar with the use of a line-in-the-sand approach to determine the value of a regulatory asset base (RAB) at a point in time. However, the approach does not assist to determine whether prices are efficient for the purposes of a price monitoring and negotiate/arbitrate regime such as the Territory regime.

c) Excessive profits

The access and pricing principles in part 11 of the PM Act provide for the price of access to a prescribed service to be set to generate expected revenue at least sufficient to meet the efficient costs of providing access to it, and to include a return on investment commensurate with the regulatory and commercial risks involved.

DPO does not currently maintain audited separate regulatory accounts for the prescribed services so the commission is unable to complete the comprehensive analysis that would be required to reach a conclusive view on the level of profits being obtained from the provision of prescribed services.

For the purposes of this review, the commission examined the financial accounts of DPO for 2015-16 and 2016-17. From the information provided to the commission, there is nothing to indicate DPO is generating profits for the current review period in excess of those commensurate with the regulatory and commercial risks involved (as provided for in the access and pricing principles).

d) Conduct of the port operator

In general, the commission agrees with the submission of DPO to the Issues Paper that overall it has been able to satisfactorily meet the needs of port users.[57] However, during the consultation process for this review two issues have been 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 is regarding the introduction of a new charge for a prescribed service.

55 GHD Advisory, Darwin Port Price Benchmarking Study 2017, 25 January 2018, page 20.
56 Department of the Chief Minister, submission to the Draft Report, September 2018, page 3.
57 Landbridge Darwin Port, submission to the Issues Paper, April 2018, page 4.

Some 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.[58] This is essential for projects to progress beyond the development phase into the production phase.

Concerns were raised about the introduction of the new Bladin Channel port dues levy and whether 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.

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 Ichthys LNG project. Issues, findings and recommendations arising from this issue are discussed in more detail in Chapter 7.

Findings

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

- limited competition for the provision of most prescribed services
- a lack of substitutes for most prescribed services
- the existence of high barriers to entry for potential competitors for the provision of prescribed services at the required scale
- limited countervailing market power
- 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, 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 non-compliance with DPO's Access Policy
- no reports of instances of material non-compliance with the Price Determination
- the overall conduct of DPO.

58 Discussions with port users during the review and Verdant Minerals, Submission on the Review of the Northern Territory Ports Access and Pricing Regime – Issues Paper, 28 March 2018, page 1.

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.[59] While the commission 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 was 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.

a) 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 operated Ichthys LNG project from the construction to production phase.[60]

The production phase of the Ichthys LNG project commenced in the third quarter of 2018, with the first LNG cargo departing the Bladin Point terminal on 22 October 2018. As a result, port activity will increase with the following additional vessels accessing the port at peak production:

- 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 have been permanently based in the Port of Darwin for over 12 months in preparation of hydrocarbon export activities commencing from the Bladin Point terminal.

At peak production it is estimated Ichthys-related shipping will substantially increase revenue for DPO by about $14.5 million per year. The project has a life of about 40 years.[61]

59 Section 123(2)(a) of the *Ports Management Act*.
60 Northern Territory Government: Department of Treasury and Finance. 2017. The Territory Economic Review (December 2017), page 1.
61 Information provided by INPEX Operations Australia Pty Ltd, October 2018.

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, the Darwin Luxury Hotel development at the Darwin Waterfront approved by the Development Consent Authority in July 2018,[62] Project Sea Dragon (a prawn farm) and eight new mining projects (gold, rare earths, salt, copper, zinc, silver, lead and phosphate).[63] The commission understands if they go ahead, these projects are substantial and will noticeably increase port activity, capacity and throughput. Media reports indicate Landbridge, the owner of DPO, plans to double the size of the Port of Darwin. [64]

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 to the Issues Paper. 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.

Other stakeholders who commented on this issue emphasised 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.

b) 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.[65] However, ports and the services they provide have a tendency to be natural monopolies.

The benefit of regulation needs to outweigh the costs. Regulation restricts certain activities and imposes administrative and compliance costs on regulated infrastructure operators, which may contribute to resource misallocation in regulated industries.[66] The regulator and the government also incur costs in giving effect to the regulatory regime.

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.[67]

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.[68] This is because any monopoly pricing will ultimately be paid for by users and consumers. Monopoly pricing would also

62 Media statement, Chief Minister of the Northern Territory, 11 July 2018.
63 Industry Capability Network (ICN). 2018. 'Northern Territory Projects' Accessed September 30, 2018.
64 Full speed ahead as Gunner embraces Landbridge projects, Northern Territory News, 30 August 2018, page 4.
65 Australian Government: Infrastructure Australia. 2011. National Ports Strategy, pages 5 and 6.
66 Australian Government: Productivity Commission. 2013. National Access Regime: Inquiry Report no. 66, pages 42 and 43.
67 Harper, I., Anderson, P., McCluskey & S., O'Bryan, M., Competition Policy Review: Final Report, March 2015, page 470.
68 Australian Government: Productivity Commission. 2013. National Access Regime: Inquiry Report no. 66, page 71.

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 regard the need to prevent misuse of monopoly or market power when performing its functions.[69]

Regulation of monopoly services can provide a level of certainty and transparency, which increases investment and competition in dependent (upstream or downstream) markets.[70] 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.[71] The potential benefits arising from economic regulation are reflected in the UC Act, which directs the commission to regard the need to promote economic efficiency and ensure consumers benefit from competition and efficiency when performing its functions.[72]

In its response to the Issues Paper, DPO expressed concerns that further intervention in the market may result in unintended consequences, or impose an administrative or compliance burden on DPO disproportionate to any purported benefit.[73] In its response to the Draft Report, DPO expressed concern about potential increases in operating costs arising from the commission's recommendations for access to information[74] and the up-front and ongoing costs associated with separate accounts.[75]

The commission is of the opinion, as a whole the benefits of regulation afforded by the regime, including the modifications recommended in this Final Report, outweigh the costs. The regime addresses the ongoing need for regulatory oversight resulting from the potential for monopoly power to be exercised by DPO. The regime uses price monitoring and a negotiate/arbitrate model, which are light-handed regulatory approaches requiring limited regulatory intervention. In relation to the provision of information to the commission for compliance monitoring purposes, the commission has taken into account DPO's concerns about costs. In its final recommendations, the commission has recommended approaches drawing on information that should already be readily available to a port operator and not require the port operator to incur disproportionate costs.

Findings

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

6.b) The commission found there is an ongoing need for regulatory oversight for prescribed services provided by DPO, and the benefits of a light-handed access and pricing regulatory regime outweigh the costs.

69 Section 6(2)(b) of the *Utilities Commission Act*.
70 Australian Government: Productivity Commission. 2013. National Access Regime: Inquiry Report no. 66, pages 42 and 43.
71 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.
72 Section 6(2)(d) and (e) *Utilities Commission Act*.
73 Landbridge Darwin Port, submission to the Issues Paper, April 2018, page 6.
74 Landbridge Darwin Port, submission to the Draft Report, August 2018, page 10.
75 Landbridge Darwin Port, submission to the Draft Report, August 2018, page 12.

Recommendation

6.c) The commission recommends continuing regulatory oversight of prescribed services for the Port of Darwin.

6.2 What services should be regulated?

The commission 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.

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.[76] The PM Regulations exclude a number of services, such as towage, bunkering, waste removal, and the supply of electricity and water.[77]

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

In response to the Issues Paper, DPO submitted that as there is no evidence of it exercising market power, it is not necessary to regulate any of the prescribed services.[78] The commission 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 the need to prevent misuse of monopoly power.

DPO nonetheless acknowledged 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, but no further additions to those services were required at the present time.[79]

Regarding services that should be prescribed, the MUA indicated a preference for rents and similar charges to be included.[80] 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 that will constitute a non-standard service for the purpose of the Access Policy.[81]

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 regarding this issue. The commission considers, 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.

76 Regulation 12(1) of the Ports Management Regulations.
77 Regulation 12(3) of the Ports Management Regulations.
78 Landbridge Darwin Port, submission to the Issues Paper, April 2018, page 7.
79 Landbridge Darwin Port, submission to the Issues Paper, April 2018, pages 7 and 8.
80 Maritime Union of Australia, Submission Ports Access and Pricing Review NT Utilities Commission, 6 April 2018, pages 17 and 18.
81 Landbridge Darwin Port, submission to the Issues Paper, April 2018, page 7.

In response to the Issues Paper, the MUA suggested bunkering, waste removal and the supply of electricity and water should be included as prescribed services.[82] These services are currently specifically excluded from the list of prescribed services to be covered by the regime.[83] Svitzer Australia also commented that these services should be included to prevent the bundling of prescribed services with non-prescribed services by DPO.[84] The commission is not aware 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 in the case with water and electricity, are already regulated.

The MUA proposed towage operators should be licensed in the same manner as stevedores. As is the arrangement for licensing of stevedores and pilots, the commission views this issue is also outside the scope of the regime and the review.[85]

Responses to the Draft Report did not discuss the range of services to be treated as prescribed services. For this Final Report, the commission has adopted those findings and recommendations in relation to this issue.

6.3 Exemption of services provided under lease

In the Draft Report, the commission made draft findings and recommendations in relation to the exemption in regulation 12(2), under which the regime excludes services provided under a lease granted by a private port operator, and so places them outside the regime.[86]

Initial concerns about regulation 12(2) arose due to the current arrangement for the MSB, a dedicated oil and gas support facility located within the Port of Darwin.[87] The commission understands it was the Territory Government's expressed intention to exclude the MSB from regulatory oversight when the port was leased. The commission understands regulation 12(2) was included for this purpose. However, part 11 applies only to prescribed services provided by a private port operator[88] and there can only be one port operator for a designated port at any time.[89] As a result, services provided by a lessee of DPO at the MSB are not subject to part 11 even without regulation 12(2) in place and it is outside the commission's powers to review or make recommendations about services supplied at the MSB.

In the Draft Report, the commission noted lack of regulatory oversight of the MSB continues to be an ongoing serious concern for stakeholders and recommended, 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 prescribed services provided by DPO.

82 Maritime Union of Australia, Submission Ports Access and Pricing Review NT Utilities Commission, 6 April 2018, pages 17 and 18.
83 Regulation 12(3) of the Ports Management Regulations.
84 Svitzer Australia Pty Ltd, Submission on the Issues Paper 2018 Ports Access and Pricing Review, 5 April 2018, page 1.
85 Part 6 of the *Ports Management Act* covers stevedore licences and Part 8 (Division 4) covers pilot licences.
86 Regulation 12(2) of the Ports Management Regulations.
87 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 12-hour turnaround. It is operated by ASCO Australia Pty Ltd under a concession agreement for 15 years, with an option to extend for an additional five years based on performance.
88 Section 118 of the *Ports Management Act*.
89 Section 8(2) of the *Ports Management Act*.

Regulation 12(2) applies to all leases granted by a private port operator and so provides an ongoing mechanism for services that would otherwise be prescribed services to be excluded from the regime. In the Draft Report, the commission recommended amendments to the PM Regulations to restrict the application of regulation 12(2) to leases entered into before a date specified in the PM Regulations (such as the date on which the commission's Final Report is released) and to 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.

Three submissions to the Draft Report addressed these recommendations. INPEX confirmed the key issues remaining for INPEX include delivery of prescribed services without regulatory oversight at the MSB and the ability to grant new leases and avoid regulatory oversight. DCM's submission referred to provisions in the port operating arrangements and indicated these provide protections in relation to current and potential sublessees, including providing for a reasonableness test in relation to market rents. In light of this, DCM took the view there is no compelling reason to amend the current application of the regime insofar as it relates to the subleasing of land.

DPO's submission observed the effect of regulation 12(2) is to exclude any services supplied by a private lessee from the definition of prescribed service but "no such lease can be entered into by DPO unless it complies with the requirements of both the Access Policy and the [port lease]" and the 'practical likelihood' of regulation 12(2) being used as a mechanism to avoid the application of the regime is low given the risks to DPO under the port lease.[90]

DPO's submission also identified concerns with the commission's proposal to sunset the operation of regulation 12(2) and have it expire at the end of the MSB lease. DPO's principal concern was compliance with the Access Policy by a sublessee providing prescribed services. DPO proposed an alternative approach under which the port operator would be required to consult with the commission before renewing the MSB lease or otherwise entering into a sublease over a facility or berth where it is proposed the lessee would supply third parties with what would be prescribed services but for the lease.[91]

Commission's revised approach

The commission has considered further its proposed approach to the grant of subleases.

First, the commission considers it would be helpful to clarify regulation 12(2) does not apply to services provided by the private port operator under a lease. That is, the regulation only applies to services provided by a service provider that is not a private port operator. This clarification is required because part 11 only applies where the services are provided by a private port operator and so a possible interpretation of regulation 12(2) is it allows a private port operator to take services outside the regime by providing them under a lease. The commission understands this was not the intended effect of regulation 12(2) and the position should be clarified.

Second, in relation to services provided by a sublessee who is not a private port operator, the commission accepts the port lease imposes obligations on DPO with respect to ongoing access where a sublease is granted, but also notes these provisions are not as extensive as the regime, nor are they directly enforceable by an access seeker or the regulator. The

90 Landbridge Darwin Port, submission to the Draft Report, August 2018, page 9.
91 Landbridge Darwin Port, submission to the Draft Report, August 2018, page 9.

commission also accepts there may be circumstances where a sublease under which the lessee provides services is a desirable outcome.

DPO's submission is constructive in proposing an alternative approach, to allow leases to be considered on a case-by-case basis. However, in light of the concerns of port users in relation to the MSB and given the port lease lies outside the regime, the commission considers it should have closer regulatory oversight than it would have under an obligation to consult. Key amongst these concerns is the limited application of the regime. The regime only regulates services provided by private port operators and the only private port operator for the Port of Darwin is DPO. The effect of regulation 12(2) is that any part or parts of the port leased to any other entity will be placed outside the scope of the regime, notwithstanding the lessee may provide services that are the same as the prescribed services provided by DPO or that DPO may provide what would otherwise be prescribed services to the lessee, under the terms of the lease. Regulation 12(2) therefore leaves the regime open to be undermined through the use of leasing arrangements for the provision of services that would otherwise be regulated as prescribed services.

The commission's final recommendation provides for the commission to approve any lease to which regulation 12(2) applies and prevent the port operator from granting such a lease without consent. The recommendation also provides for the commission to have power to impose conditions on its approval.

6.4 Pilotage services providers

In response to the Draft Report, INPEX indicated a remaining key issue is how the Access Policy currently binds Darwin Port Pilotage Pty Ltd.

Section 85(1) of the PM Act allows the minister to appoint a person to be a pilotage services provider for a pilotage area. The Port of Darwin (or relevant parts) is a pilotage area. The commission understands, on 13 November 2015 the minister appointed Darwin Port Pilotage Pty Ltd as trustee for the Darwin Pilotage Trust to be a pilotage services provider for the Port of Darwin.

The Access Policy is made by DPO as the port operator appointed under section 8 of the PM Act. The Access Policy applies to prescribed services provided by DPO. Under the PM Regulations, prescribed services include "providing, or facilitating the provision of, pilotage services in a pilotage area within the designated port".

In DPO's Access Policy, the standard services include the provision of pilotage services within the port. The Access Policy states pilotage services are provided by Darwin Port Pilotage Pty Ltd as trustee for the Darwin Port Pilotage Trust and that entity will also be the party to a contract for the provision of pilotage services.

The commission is satisfied DPO (as port operator) has committed through the Access Policy to ensuring pilotage services are provided on the standard terms at the published prices and acknowledges DPO takes the view it is up to DPO to ensure Darwin Port Pilotage Pty Ltd complies with the policy. To date, the process appears to be working successfully.

However, the relationship between DPO and Darwin Port Pilotage Pty Ltd as trustee of Darwin Port Pilotage Trust has been raised by port users during consultation for the Access Policy approval process and in response to the Draft Report. Port users have identified that the relationship is uncertain. This uncertainty reflects a gap in the regime since a port operator and a pilotage service provider can be (and currently are) different entities, but

only a private port operator is bound by the access and pricing regime in part 11. While to date the gap has not caused issues in practice, the commission considers it is a weakness of the regime that should be addressed.

The commission considers changes to the regime to address this issue could be made without imposing material new compliance costs on DPO. Options for change include:

- applying to the private pilotage service provider only price monitoring and related record and account keeping obligations, and the obligations in sections 124 and 125 not to hinder access or unfairly differentiate
- applying part 11 directly to pilotage service providers but allowing a pilotage services provider to submit its own access policy or adopt the access policy of the port operator in relation to the provision of pilotage services
- or requiring a private port operator to procure compliance by a pilotage services provider, for example including in the Access Policy an express requirement for DPO to procure the pilotage services provider complies with the Access Policy to the extent it is providing pilotage services in the pilotage area within the port.

The commission considers the first of these options is an appropriate, light-handed and transparent approach that focuses on the pricing of pilotage services and addresses the risk that, over time, DPO and the pilotage services provider do not remain under the same control. DPO has indicated to the commission it favours the third approach but the commission is not satisfied it adequately addresses the gap in the regime.

6.5 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.[92] 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.[93]

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.[94] It is the commission's understanding 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.

92 Clause 5 of the AustralAsia Railway (Third Party Access) Code, which is a schedule of the *AustralAsia Railway (Third Party Access) Act 1999* (SA and NT).
93 Essential Services Commission of South Australia, Rail Access Regime Review, Final Report, 2015.
94 Essential Services Commission of South Australia, 2017 Ports Access and Pricing Review, Final Report, September 2017, pages 42 and 43.

Findings

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

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

6.f) The commission believes the regime should not allow the potential for a lessee of the port operator to provide prescribed services outside the reach of the regulatory regime without the consent of the regulator and the regulator should be able to give consent subject to binding conditions.

6.g) The commission finds there is a gap in the regime since a private port operator and a pilotage service provider can be different entities, but only a private port operator is directly subject to the access and pricing regime in part 11.

Recommendations

6.h) The commission recommends amending the PM Regulations to clarify regulation 12(2) does not apply to services provided by a private port operator under a lease.

6.i) The commission recommends amendments to:

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

6.j) The commission recommends applying sections 124 and 125 of the PM Act and the price monitoring regime to prescribed services provided by a private pilotage service provider. This should cover:

- the application of the *Utilities Commission Act* in the same manner it applies to a private port operator
- section 123 reviews by the commission and the powers of the minister to change the form of price regulation under the regime
- making a price determination by the commission and the obligations to provide information about charges to the commission in accordance with the price determination
- obligations to maintain separate financial accounts
- related provisions dealing with audit and information to be provided to the commission.

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 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 access to port services is denied or 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 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 considered whether the current negotiate/arbitrate model and price monitoring are suitable, including potential shortcomings, as detailed below.

a) Negotiate/arbitrate access model

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 access to information to inform negotiations, coupled with a credible threat of binding independent dispute resolution if negotiations are not successful.

Looking at other regimes across Australia, negotiate/arbitrate models are a 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.

Under the current regime, the negotiate/arbitrate model is established under the PM Regulations by specifying matters that must be included in an access policy in order for the commission to approve it.[95] The PM Act makes no reference to negotiation or arbitration. For the reasons explained in Chapter 4, the commission considers leaving the detail of the negotiate/arbitrate model to be defined in the access policy to be a

95 Regulation 13(2) of the Ports Management Regulations.

weakness of the regime, particularly given the commission's limited power to review and amend an 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 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 achieved.

b) Price monitoring

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.[96] The PM 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.[97] The Price Determination must also be consistent with the pricing principles set out in section 133 of the PM Act.[98] In general, the Price Determination places obligations on a port operator to publish standard charges for prescribed services and 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.[99]

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.[100] The commission has commenced a review of the current Price Determination, which will include public consultation later in the year. Stakeholders will be kept up to date about the Price Determination review process, with relevant information published on the commission's website.

There are limitations to price monitoring. The current price monitoring regime does not provide the commission with information to determine whether prices are consistent with the access and pricing principles. 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.

Price monitoring is a tool to support the negotiate/arbitrate model insofar as it informs negotiations. However, price monitoring does not provide access to the information required by port users to assess whether prices offered in negotiations are reasonable or efficient, such as how they were calculated or how they compare to costs. This information can be provided to port users through the negotiate/arbitrate process.

In the Draft Report, the commission concluded at the present time there is no need to change the form of regulatory oversight of prices for prescribed services and recommended, at this time, price monitoring should continue.

96 Section 132 of the *Ports Management Act*.
97 Regulation 16(2)(a) and (b) of the Ports Management Regulations.
98 Section 132(2)(b) of the *Ports Management Act*.
99 Regulation 16(2)(e) of the Ports Management Regulations and clause 10(b) and (c) of the Price Determination.
100 Section 132(4) of the *Ports Management Act*.

DPO's submission endorsed the commission's conclusion that price monitoring should continue.[101] INPEX by contrast did not agree, commenting a "passive regulatory framework is not appropriate for a natural monopoly" and "the regulator should have as an absolute minimum the power to veto new or increased charges".[102]

The commission assumes the response from INPEX reflects concerns about the introduction of the new Bladin Channel port dues levy. The levy will impact INPEX's customers and, as there are no alternatives available, it cannot avoid this charge.

The commission considers a decision to recommend a more intrusive form of price regulation under the regime would require the commission to, among other things, form a view that the benefits of the change would outweigh the likely costs. At this time, the commission does not have a basis for reaching this conclusion and considers changes are better directed at improving the operation and effectiveness of the price monitoring and negotiate/arbitrate regimes.

Nonetheless, the commission considers there are areas of the price monitoring regime requiring improvement in order for it to be effective and fit for purpose as discussed in this chapter.

c) Threat of stronger regulatory intervention

An effective price monitoring regime can provide a check on the exercise of market power if there is a credible threat of stronger future regulation.

The PM Regulations require the commission to use price monitoring as the form of regulation for pricing.[103] The commission has found at this time the form of price regulation does not need to be altered and price monitoring should continue. However, if in the future the commission finds 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.[104]

The minister must certify the changes are consistent with a written recommendation made by the commission to the minister.[105] The legislation does not specify what circumstances must precede the commission making a written recommendation to the minister, other than requirements for consultation. The commission considers it may do so either in the context of a review under section 123 of the PM Act, or by way of an inquiry under part 7 of the UC Act initiated either by the minister or the commission after consultation with the minister.

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 in response to the Issues Paper that 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.

101 Landbridge Darwin Port, submission to the Draft Report, August 2018, page 5.
102 INPEX Operations Australia Pty Ltd, submission to the Draft Report, August 2018, page 1.
103 Regulation 16(2)(a) of the Ports Management Regulations.
104 Section 134(1) of the *Ports Management Act*.
105 Section 134(3) of the *Ports Management Act*.

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 PM Act and the UC Act allow for the commission to conduct a review in order to consider making a recommendation to the minister that the form of regulatory oversight be changed.

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) 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. In the event market power is exercised by a 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 of a stronger form of regulation.

d) Changes to the regime

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 current negotiate/arbitrate model, supported by price monitoring should continue.

However, as outlined in Chapter 4, through its experience with the regime and the review process the commission has identified various weaknesses in the regime that warrant improvement and amendment to make sure it is functioning properly, 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, 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 obligations not to hinder access or unfairly differentiate between port users
- separate accounts
- service classification and the publication of terms of service

- ensuring an effective 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 has concluded that amendments should be made to the PM Act and PM Regulations. The nature of these amendments is discussed in more detail below.

7.2 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 exercising 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 terms of access to an associated business.[106]

It was the government's intention the regime would impose an obligation on DPO to not unreasonably hinder access to port services or unfairly discriminate between port users.[107] These restrictions are included in the regime and set out in sections 124 and 125 of the PM Act.

However, both sections are subject to potential 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 DPO's Access Policy. Regarding 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.[108]

Regarding 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 behaviour 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.

A number of port users expressed concern the potential for carve outs undermine important protections for port users against the potential exercise of market power by

106 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.
107 'Second Reading Speech: Ports Management Bill.' Northern Territory, Parliamentary Debates, Legislative Assembly, 27 November 2014, 5693-8 (Adam Giles).
108 Clause 1.3 of the Access Policy.

DPO.[109] 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.

In its Draft Report, the commission 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 those sections unless approved by the regulator as part of the access policy approval process. DPO's response to the Draft Report indicates it understood this recommendation to be for removal of the carve outs.[110] To clarify, the commission is not recommending the removal of the carve outs, but only modifications to ensure there is an appropriate level of regulatory oversight before carve outs can be included in an access policy.

Appendix F sets out the commission's proposals for amendments to the PM Act to implement recommendations.

Findings

7.c) 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.

Recommendations

7.d) The commission recommends sections 124 and 125 of the PM Act be amended to prevent carve outs through a port operator's access policy to reduce the protections offered by these sections unless approved by the commission in the access policy approval process. An alternative is for the commission to have regard to sections 124 and 125 when approving a draft access policy of a private port operator.

7.3 Separate accounts

An effective price monitoring regime should provide the regulator with access to financial information necessary to properly monitor and report on pricing for prescribed services. To this end, 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.

109 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.

110 Landbridge Darwin Port, submission to the Draft Report, August 2018, page 14.

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.[111] However, this power is only effective if the information exists.

For example, as part of the review the commission made a request to 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.

DPO was able and willing to provide the commission with access to audited special purpose financial statements. However, the commission is concerned as the port develops and throughput and volumes increase, the special purpose accounts will not be sufficient for price monitoring purposes nor for the purposes of future section 123 reviews.

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 substance to prevail 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.

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. [112] In its current form, the Territory regime would probably not meet the requirements of the CPA.

The commission provided information during the bidding process in mid-2015 for the leasing of the Port of Darwin by the Territory Government indicating it would recommend a compliance audit, and separate accounts and records provisions be included in the legislative framework. It provided the following as an example:

> *The private port operator must keep accounts and records relating to the provision of prescribed services separately from the accounts and records related to other aspects of the business or businesses carried on by the private port operator.*
>
> *The private port operator must, at the request of the commission, make the accounts and records available for inspection by the commission.*
>
> *If requested, the private port operator must provide a summary of its policies and procedures (including any cost allocation methodologies) for ensuring accounts and records associated with provision of prescribed services are separately identified from the accounts and records related to other aspects of the business or businesses carried on by the private port operator.*

111 Section 25 of the *Utilities Commission Act*.
112 Clause 6(4)(n) and (o) and of the Competition Principles Agreement.

In the Draft Report, the commission made two recommendations directed at improving the operation of the price monitoring regime and enabling the commission to better conduct section 123 reviews. These were:

- draft recommendation 7.h, for the provision of more information to 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
- draft recommendation 7.q, for the regime to be amended to include an obligation on a private port operator to maintain separate accounts for the prescribed services and include a power for the commission to obtain information from a port operator to enable the commission to analyse its profits.

Submissions to the Draft Report

The submission from AMEC was supportive while submissions from DPO and DCM questioned the need for change.

AMEC's submission stated "it is positive that the Utilities Commission has recognised the paucity of information available regarding pricing" and indicated industry is "supportive of recommendation 7.h as greater clarity and transparency is needed". AMEC proposed, in implementing recommendation 7.h, the weighted average cost of capital (WACC) for the Port of Darwin should be documented on the basis this information would assist in identifying whether price gouging is occurring and would ensure the economically efficient price is being charged. AMEC acknowledged to calculate a meaningful WACC, the commission would need access to financial statements.[113]

DPO's submission raises several concerns in relation to recommendation 7.h and the other recommendations about improved access to information. DPO's concerns can be summarised as follows:[114]

- DPO identifies uncertainty about the expected outcomes of the recommendations relating to information and, in particular, whether it is proposed to move from assessment of overall changes in pricing and ensuring price transparency to an assessment of individual charges or the efficiency of prices charged
- DPO expresses the view the recommendations contradict other findings and recommendations in the Draft Report
- in relation to accounting separation, DPO argues this measure is far more justified for vertically integrated service providers or larger facilities
- DPO indicates, as information for the preparation of separate regulatory accounts does not already exist, DPO would incur substantial upfront costs to establish those accounts and increased ongoing operating expenses to maintain separate accounting and prepare reports
- DPO considers it is premature to assert there is a material risk that users and the arbitrator will be unable to access sufficient information and in this regard, refers to rights to access information under the Access Policy

113 Association of Mining and Exploration Companies Inc, submission to the Draft Report, September 2018, page 1.

114 Landbridge Darwin Port, submission to the Draft Report, August 2018, pages 10 to 13.

- DPO considers the concerns expressed in the Draft Report about the degree of financial information available to the commission to be overstated as DPO reports to the commission under regulation 16(2)(e) and has provided audited special purpose financial statements relied upon by the commission in reaching its conclusions. DPO also draws attention to financial reports that are publicly available as part of the reporting requirements under the *Corporations Act 2001* (Cth).

DCM's submission contains observations similar to those made by DPO in relation to separate accounts where a port operator is vertically integrated. DCM observed the port lease prohibits DPO from becoming a vertically integrated operator.[115]

DCM's submission also notes ambiguity in the recommendation of DPO being required to provide the commission with sufficiently detailed information to enable the commission and port users to assess profitability. DCM considers the implication of the recommendation is an escalation in regulatory intervention that is not warranted at this time. DCM's particular concern appears to be about imposing the additional costs of accounting separation on the port operator.[116]

Approach of the commission

The commission agrees there is a need to clarify what additional information it proposes should be provided for price monitoring purposes and the outcomes it is seeking to achieve. The commission is also mindful of the concerns raised in submissions about the costs to provide additional information.

The commission considers separate financial accounts should be provided to the commission for prescribed services as a whole and not for each prescribed service. The commission is satisfied the information is not currently available to the commission under the regime, nor is it publicly available through statutory reporting.

The commission considers the PM Act and PM Regulations should give the commission power to make guidelines that contain the requirement to maintain and provide separate financial accounts to the commission. The commission would not publish the accounts but be able to take them into account in performing its functions. The commission considers the PM Act or PM Regulations should provide flexibility to require more detailed information, for example, if there is a substantial new infrastructure development at the port for which more detailed information is required to undertake effective price monitoring.

The commission considers the PM Regulations could provide guidance about the nature of the accounts to be provided in accordance with the commission's guidelines. The accounts would be limited to:

i. balance sheets (showing assets/liabilities/financial position)

ii. income statements or profit and loss statements (showing revenue, expenses and profit)

iii. cash flow statements.

The guidelines would require the financial accounts to be separated according to whether they are for regulated (prescribed services) or non-regulated services and to be prepared in accordance with normal and accepted Australian accounting standards. The port operator

115 Department of the Chief Minister, submission to the Draft Report, September 2018, page 6.
116 Department of the Chief Minister, submission to the Draft Report, September 2018 page 6.

would be required to identify which accounting standard(s) it has relied on in preparing the accounts. The financial accounts would be required to give a true and fair view of the financial position and performance of the private port operator or private pilotage service provider in the provision of prescribed services.

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

The PM Regulations and guidelines would permit the port operator or private pilotage service provider to present a single set of accounts when they are within the group of entities.

The financial accounts should preferably be audited, or alternatively could include a responsibility statement signed by the Chief Executive Officer of the private port operator. The PM Regulations and guidelines would not require the port operator or private pilotage service provider to establish separate regulatory accounts, that is, accounts calculating regulatory asset values for the assets used to provide prescribed services, nor would they require costs and revenues to be allocated to each separate prescribed service.

The commission acknowledges the costs for DPO to prepare and provide separate regulatory accounts cannot be justified at present. However the commission considers the costs of the more limited separate financial accounts recommended above will not be a material additional cost for DPO, bearing in mind this information would already need to be available to DPO in order for it to determine whether its charges comply with the access and pricing principles (as required by the Access Policy).

Separate financial accounts for prescribed services prepared on the basis outlined above are the minimum level of information required by the commission to perform its price monitoring function in relation to prescribed services at the Port of Darwin. The commission acknowledges this form of accounting information has limitations. It will principally assist the commission to monitor the changes in the overall level of prices at the port and make observations about general trends. The information will not allow the commission to assess levels of profit or whether prices and price structures are efficient. The commission's recommendation is therefore consistent with a light-handed approach, and involves less intrusive regulation and lower compliance costs than the approaches adopted in many similar regulatory regimes for ports and other regulated infrastructure.

The commission does not agree the need for separate accounts arises only where there is vertical integration, where a regulated facility is of a particular size or as a response to monopoly pricing. As discussed elsewhere in this Final Report, the commission has found there is an ongoing need for effective price and access regulation at the Port of Darwin and separate financial accounts are intended to contribute to achieving that objective.

Findings

7.e) The commission considers separate financial accounts for the prescribed services are required for the price monitoring regime and section 123 reviews to be effective.

Recommendations

7.f) The commission recommends amending the regime to allow the commission to require a private port operator to maintain and provide to the commission separate financial accounts for prescribed services as a whole in accordance with guidelines published by the commission. The PM Act should include the head of power and the PM Regulations should provide guidance about the nature of the accounts and supporting information the guidelines can require. The accounts should be limited to balance sheet, income or profit and loss statements and cash flow statements prepared in accordance with Australian accounting standards and for the prescribed services as a whole, with supporting information to address issues arising from the trust and related arrangements. The accounts should be required to give a true and fair view of the financial position and performance of the private port operator or private pilotage service provider in the provision of prescribed services. A private port operator and private pilotage service provider should be permitted to prepare a single set of accounts when they are within the group of entities.

7.4 Standard charges and terms

At present DPO is required to publish its standard charges for prescribed services on its website.[117] It is also required to publish the standard rate for other charges set for, or in respect of, the use of port facilities at the Port of Darwin.[118]

The obligation to publish prices only applies to standard charges and the port operator cannot be required to publish a negotiated charge.[119] The terms 'standard charge' and 'negotiated charge' are not defined in the PM Regulations. In practice, DPO has defined a standard charge as a charge for a standard service and has defined a standard service as one to which standard terms apply, as set out in schedule 1 of the Access Policy.

In other words, under the current regime DPO determines what constitutes a standard service and a standard charge with no effective regulatory oversight. The commission considers this to be a weakness in the regime.

The access policy approval process provides an opportunity to consult with port users about what is reasonable, for example, by reference to accepted market practice or available insurance, but this opportunity is lost if the service is not included as a standard service.

In the Draft Report, the commission recommended (at 7.w) the regime be amended to give the commission greater regulatory oversight of the process for determining what services must be the subject of published standard terms. The Draft Report also recommended the regime be amended to allow the commission to take standard services into account when considering whether to approve an Access Policy.

DPO's response was what the commission has in mind in this regard is unclear but in practice and as a commercial matter, DPO, as operator of the port, is in "by far the best position" to determine what should constitute a standard service.[120]

117 Regulation 16(2)(ii)(A) of the Ports Management Regulations and clause 7(a)(i) of the Price Determination.
118 Regulation 16(2)(ii)(B) of the Ports Management Regulations and clause 7(a)(ii) of the Price Determination.
119 Regulation 16(2)(d) of the Ports Management Regulations.
120 Landbridge Darwin Port, submission to the Draft Report, August 2018, page 15.

The commission accepts in general a service provider is best placed to determine what are standard services. However where those services are subject to a regulatory regime under which standard services and non-standard services have significantly different treatment, the commission considers the regime should provide a framework for the port operator's classification to be tested.

In this Final Report, Appendix F contains the commission's detailed proposal for how its recommendations can be implemented.

Findings

7.g) The commission finds the regime should provide for regulatory oversight of the process for classification of standard services including a review mechanism.

Recommendations

7.h) The commission recommends amending the regime to give the commission regulatory oversight, through the access policy approval process, of classifying services as standard services.

7.5 Indicative terms and charges

Under the Access Policy, if a port user requests a non-standard service, a variation to the standard terms or a prescribed 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.[121]

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.[122] Since the commencement of the regime, the commission is aware of DPO entering into around 25 negotiated agreements. To date, no issues have been raised by port users regarding these negotiated agreements.

In short, the Territory regime as implemented through the Access Policy contemplates only two categories of service: standard services on standard terms and charges, or non-standard services on negotiated terms and charges. As required by the PM Regulations, the Access Policy requires DPO to give access to any prescribed service (whether standard or non-standard) on reasonable terms.[123]

Through the consultation process for this review, the commission has identified the potential need for a third category of service for which a private port operator must publish indicative terms and charges. For frequently used services not offered as standard services, publication of indicative terms would allow for consultation on the reasonableness of the terms offered by the port operator. Once published, indicative terms and prices will provide information to port users and promote effective and well-informed negotiations. The commission considers there may be non-standard services for which these benefits outweigh the costs.

This issue has arisen in the context of dry bulk mineral exports. The infrastructure at the Port of Darwin is well established to facilitate the export of dry bulk minerals. For

121 Regulation 18 of the Ports Management Regulations.
122 Regulation 16(2)(f) of the Ports Management Regulations and clause 10(e) of the Price Determination.
123 Regulation 13(2)(c) of the Ports Management Regulations.

example, at its peak in 2013-14, more than 2.8 million tonnes of dry bulk mineral product was exported through the port.[124] 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.

In all of the other comparable ports across Australia, tariffs for the provision of port services specifically associated with the export of dry bulk minerals are treated as standard and are published.[125] This is known as a reference tariff. For example, in the Port of Townsville (which has similarities to the Port of Darwin) reference tariffs are provided for several 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 associated costs when dealing with diverse dry bulk minerals.

In response to the Issues Paper, 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.[126]

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, not merely any liabilities that may arise during the application process.[127] 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.

In the Draft Report, the commission expressed its concerns about the lack of clarity and certainty about prices and the terms of access to prescribed services for exporting dry bulk minerals. The commission recommended changes to the regime to require DPO to publish reference tariffs and associated standard terms in the Access Policy for dry bulk mineral exports.

AMEC's submission supported this recommendation, noting reference tariffs for bulk minerals will assist mining companies as they need to be able to demonstrate certainty of pricing to attain finance.[128]

DPO's submission did not support this recommendation. It stated the concerns identified in the Draft Report related to the experience of one user and its practice of providing prospective users with indicative wharfage pricing has raised no concerns for any other user. DPO stated this is consistent with accepted industry practices and indicated (as it has

124 Minerals Council of Australia: Northern Territory Division. 2016. Agenda for Growth: Northern Territory Mining Industry, page 5.
125 GHD Advisory. 2017. Darwin Port Price Benchmarking Study 2017, page 10.
126 Verdant Minerals. 2018. Submission to the Utilities Commission: 2018 Ports Access and Pricing Review Issues Paper, page 1.
127 Access Policy, paragraph 6.3 and definition of Prudential Requirements, paragraph (b).
128 Association of Mining and Exploration Companies Inc, submission to the Draft Report, September 2018, page 2.

in discussion with the commission in relation to the Issues Paper) it is difficult to determine a one-size-fits-all wharfage rate due to cost variances.[129]

The commission has considered the submissions to the Issues Paper and Draft Report on this issue. The approach taken by other comparable ports demonstrates there may be circumstances in which it would be feasible to publish reference tariffs and reference terms for dry bulk mineral exports at the Port of Darwin. The commission also concludes information about tariffs and terms for non-standard services are valued by specific users, even if only indicative.

The commission has concluded it should have power to identify non-standard services for which indicative terms and, where feasible, indicative charges must be published where this would promote the objectives of the regime and the likely benefits outweigh the costs. This will improve regulatory oversight and build greater flexibility and responsiveness into the regime.

In summary, services would be classified as follows:

- standard services, which (consistent with the current Access Policy) will be services offered on the published standard terms and at the published standard prices
- non-standard services, for which (consistent with the current Access Policy) terms and prices are negotiated
- reference services, which will be a new subset of non-standard services. For this subset, indicative terms would be published in the access policy and the price determination could require indicative prices to be published.

The commission also strongly encourages DPO to consider voluntarily publishing more information for port users about the terms for exporting dry bulk minerals.

Findings

7.i) Through the consultation process for this review, the commission has identified possible benefits in requiring a private port operator to publish indicative terms and, where feasible for the service, indicative charges, and these benefits may outweigh the costs. Consistent with other comparable ports across Australia, the commission has formed the view indicative tariffs and associated terms for dry bulk mineral exports at the Port of Darwin may be capable of being determined and published by DPO but at this time, there is insufficient evidence to make a specific recommendation requiring DPO to publish indicative information for this service. The commission nonetheless strongly encourages DPO to consider voluntarily publishing more information for port users about the terms for exporting dry bulk minerals.

Recommendation

7.j) The commission recommends amending the regime to allow the commission to determine non-standard services for which a private port operator must publish indicative terms in its access policy, and where feasible for the service, indicative charges.

129 Landbridge Darwin Port, submission to the Draft Report, August 2018, pages 14 to 15.

7.6 Negotiation framework

As discussed previously, the regime is founded on a negotiate/arbitrate model, supported by price monitoring. Negotiate/arbitrate regimes are based on allowing parties to try to reach mutually beneficial agreements through well-informed commercial negotiations.[130] As DPO has the potential to exercise market power in the provision of prescribed services, it is important to ensure adequate obligations are in place within the regime to support and balance the negotiation process with the potential port user.

The current regime is largely silent on the negotiation process. As explained in Chapter 4, based on its experience working with the regime through the approval process for the Access Policy, the commission considers this to be a weakness of the regime. This weakness is exacerbated by the narrow range of factors the commission is permitted to take into account when approving a draft access policy. This potentially allows the port operator to omit a predispute negotiation process altogether or seek to incorporate in the access policy a negotiation process that creates barriers to access. An example is provided above in the discussion of dry bulk mineral tariffs, where a prospective user was required to demonstrate it had a sufficient capital base and assets of value to meet the actual or potential liabilities under an access agreement, not merely any liabilities that may arise during the application process. [131] Other examples arose during the approval process for the current Access Policy.[132]

As explained in Chapter 4, in the course of this review the Commission also assessed the negotiation process in the regime against the clause 6 principles and other comparable regimes.

The clause 6 principles include requirements for negotiation frameworks.[133] 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 provisions relating to the information to be provided to the access seeker.

The specific shortfalls in the current regime identified in this review are as follows:

- the omission from the regime of a right to require good faith negotiations prior to an access dispute being raised
- the omission from regulation 13(2) of a requirement for an access policy to contain a framework for negotiation or any provision in the regime that would ensure this is included
- the omission from the regime of a framework to ensure access seekers are provided with the information they need to support effective and well-informed negotiations.

A right to negotiate in good faith prior to an access dispute being raised protects both the access seeker and the service provider. Based on its review of other negotiate/arbitrate regimes and its experience in the approval process for the Access Policy, the commission

130 Clause 6(4)(a)(c) of the Competition Principles Agreement.
131 Access Policy, paragraph 6.3 and definition of Prudential Requirements, paragraph (b).
132 In particular in relation to the feasibility test, both how it was framed and how it was applied.
133 Clause 6(4)(a)-(c), (e)-(i), (m)-(o) of the Competition Principles Agreement.

considers if a right to negotiate in good faith is included, it should be framed so both the service provider and the access seeker face consequences for non-compliance and should not create a barrier to an access seeker pursuing resolution of an access dispute, even if negotiations are ongoing. The commission considers these outcomes can be achieved through specific provisions in the PM Act or PM Regulations. An alternative is to give the regulator broad discretion when approving a draft access policy to require provisions establishing the right to negotiate and the requirement to do so in good faith.

Taking into account the other access regimes considered by the commission and the clause 6 principles, the framework for negotiation should include information about how access requests are made, require the service provider to try to accommodate all reasonable requirements of the access seeker and provide for timely responses to access requests. For the Port of Darwin, these matters are currently addressed in the Access Policy but for the reasons explained in Chapter 4, the commission considers the requirement for these matters could be included expressly in the PM Regulations or by giving the commission broad discretion when approving a draft access policy to require provisions establishing the negotiation framework.

In relation to information, for a negotiate/arbitrate model of monopoly infrastructure to be effective, access seekers need to have access to relevant information in order to make informed decisions and support well informed negotiations. 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 on offer are reasonable and consistent with the access and pricing principles if they have no information about how prices 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.[134]

Under the current PM Act and PM 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 heavily qualified due to the very broad exceptions under clause 7.8(c). For example, these exceptions include the lack of being required 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.

In the Draft Report, the commission concluded 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 regarding making a decision to go to arbitration, and a lack of access to information materially increases the risks associated with proceeding to arbitration. These risks undermine the effectiveness of the negotiate/arbitrate regime.

In its response to the Draft Report, DPO stated it considered the discussion of pricing information being available to users and access seekers combines the role of the Access Policy (regulation of the process for users obtaining access) and price monitoring supported

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

by the Price Determination.[135] The commission disagrees with this analysis. Both price and access monitoring are governed by the same object in part 11. In any event, as explained above, price monitoring does not give the commission access to information required to monitor whether prices are consistent with the access and pricing principles. Instead, this is tested through the negotiate/arbitrate regime, which requires the arbitrator to take these into account (regulation 13(2)(f)(vii)). Information on profit, cost and investment is needed 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.

The commission considers appropriate provisions should be included in the PM Regulations. As an alternative, the commission should be given broad discretion when approving a draft access policy, to require the port operator to describe the information it commits to provide to a potential port user. It will also be important to ensure the rights of an arbitrator to access information under the arbitration legislation are not qualified by the regime.

Findings

7.k) The commission finds important elements of the negotiate/arbitrate regime have been omitted from the regime or left to the port operator to define. These include:

- an obligation to engage in good faith negotiations prior to an access dispute being raised
- provisions designed to promote effective negotiations
- provisions designed to ensure access seekers are provided with the information they need to support effective and well-informed negotiations.

Recommendations

7.l) The commission recommends the regime be amended to include provisions designed to ensure the private port operator and a port user have an obligation to engage in good faith negotiations prior to an access dispute being raised and include provisions to promote effective and well-informed negotiations. This could be achieved with prescriptive provisions or with appropriate changes to regulation 13(2) coupled with a broad discretion for the commission when approving an access policy to ensure the provisions in the access policy are appropriate and fit for purpose.

7.m) The commission recommends amending the PM Act and PM Regulations to include provisions under which a port user engaged in access negotiations is given financial information that will enable the port user to assess whether prices are consistent with the access and pricing principles, to support effective and well-informed negotiations.

7.7 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 capable of constraining the market power of a port operator and encouraging the parties to negotiate in good faith. Access to arbitration promotes effective negotiations between the

135 Landbridge Darwin Port, submission to the Draft Report, August 2018, page 13.

port operator and the port user. Parties to arbitration must have confidence in the quality of the process and its ability to produce outcomes commercially viable and consistent.[136]

In conducting the review, the commission has identified some issues with the arbitration process that may challenge the effectiveness of the regime. As discussed in Chapter 4, a key weakness of the current regime arises when the arbitration process is not contained within the legislation but instead required by the regulations to be included in an access policy.[137]

a) Arbitration process

The Territory regime requires the access policy to provide for arbitration to be conducted under part 5 of the *Commercial Arbitration Act* with other procedural matters specified in the access policy. Based on experience of the Access Policy approval process and given the drafting of the Act, there is potential for an access policy to displace the operation of some provisions in the *Commercial Arbitration Act* defining the scope of the arbitrator's powers. The commission considers the regime should provide for arbitration to take place under the *Commercial Arbitration Act* where possible, supplemented by limited specific provisions in the regime or access policy.

The commission also considers the regime should expressly specify the arbitrator has power to access information to assess whether prices offered by a port operator are consistent with the access and pricing principles.

b) Matters to be taken into account

A second area of concern to the commission in the current regime is the omission of a list of the matters to be taken into account when making an award (access determination). The current regime specifies the access and pricing principles must be taken into account but is otherwise silent. Based on its experience with the approval process for the Access Policy, this opens the way for the port operator to seek to define those matters in a way that is inconsistent with the objects of part 11.

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.

Based on its review of other negotiate/arbitrate regimes and the clause 6 principles,[138] the commission supports the inclusion of matters to be taken into consideration by the arbitrator in the regime.

The list proposed by the commission in Appendix F is broadly consistent with the current Access Policy.

c) Other commitments of the port operator

A third area requiring clarification is how to resolve a potential conflict between the Access Policy and other documents to which DPO is required to adhere. As part of the leasing arrangement for the Port of Darwin, DPO has entered into a lease and various other

136 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.

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

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

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.

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 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 has suggested 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 believes the regime should provide for potential conflicts between an access policy and a port lease to be taken into account when approving the access policy and in general terms by specifying the matters that the arbitrator must have regard to when determining an access dispute, include binding commitments of the port operator.

d) Port user's right to decline arbitrated terms

A fourth area where the regime needs to provide more guidance is the right for a prospective port user not to enter into a contract on the terms of the access determination. Such a right is included in negotiate/arbitrate regimes to ensure the threat of arbitration remains credible since, in the absence of that right, the risks to the access seeker of an adverse arbitration result are disproportionately high. The right can be balanced by protections for the service provider where the prospective port user chooses not to proceed on the basis of the arbitral award.

e) Provision of award to the commission

Under the current regime, the commission has no visibility of the decisions made by the arbitrator regarding disputes under the regime. The same gaps exist for port users not privy to the dispute. This may compound problems with information asymmetry between the port operator and users.

In other negotiate/arbitrate access regimes considered by the commission, there is a range of approaches. The commission considers the provision of arbitration decisions to the commission will promote the effective operation of the regime and made a recommendation to that effect in the Draft Report. DPO's submission indicated it sees no concern with a specific amendment to the PM Regulations to this effect, subject to any necessary protections for confidential information.[139]

139 Landbridge Darwin Port, submission to the Draft Report, August 2018, page 16.

Findings

7.n) The commission finds arbitration an essential component of an effective access and pricing regime and considers the regime should provide for arbitration under the *Commercial Arbitration Act* supplemented by provisions in the PM Act and PM Regulations, rather than leaving the arbitration process to be defined by the port operator in an access policy.

7.o) The commission finds the regime should stipulate the matters to be taken into consideration by the arbitrator in the dispute resolution process and the right of a prospective port user not to enter into a contract on the terms of the access determination and the consequence if it decides not to do so.

7.p) The commission finds at present there is uncertainty as to how conflicts between the Access Policy and other commitments of the port operator to the Territory Government relating to prescribed services should be resolved.

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

Recommendations

7.r) The commission recommends amending the PM Act to provide for reference of access disputes to arbitration under the *Commercial Arbitration Act*, supplemented by provisions in the PM Act or PM Regulations including provisions for:

- the arbitrator to be given financial information required to assess whether prices are consistent with the access and pricing principles
- the right of a prospective port user not to enter into a contract on the terms of the access determination subject to being precluded for a 12-month period from making the same request for access unless it obtains the commission's consent
- parties to bear their own costs, and other costs of the arbitration to be shared or apportioned as determined by the arbitrator
- matters that may be provided for in an access determination
- enforcement of an access determination.

7.s) The commission recommends amending the PM Act to specify the following matters to be taken into account by the arbitrator in the dispute resolution process:

- the object of part 11
- the access and pricing principles in section 133
- the operator's legitimate business interest and investment in the port or port facilities
- the costs to the operator of providing the service (including the costs of any necessary modification to, or extension of, a port facility) but not costs associated with losses arising from increased competition in upstream or downstream markets
- the interests of all persons holding contracts for use of any relevant port facility
- firm and binding contractual obligations of the operator or other persons (or both) already using any relevant port facility

- the operational and technical requirements necessary for the safe and reliable provision of the service
- the economically efficient operation of any relevant port facility
- the benefit to the public from having competitive markets.

7.t) The commission recommends amending the PM Act to provide for the commission to take into account the port lease when approving an access policy.

7.u) The commission recommends amending the PM Act to include an obligation to provide arbitration decisions to the commission.

7.8 Compliance and enforcement

In order for the objectives of regulation to be achieved, it is essential compliance with the regulatory regime is monitored and non-compliance is managed and responded to accordingly.[140] It is generally accepted that regulators need a range of response options proportionate to the risks created by non-compliance with a regulatory regime.[141] 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 non-compliance with the Access Policy[142]
- the commission's report to the minister about any material instances of non-compliance by DPO with the Access Policy or the Price Determination, which is tabled in Parliament.[143]

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 non-compliance with the Access Policy.[144]

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

a) Material instance of non-compliance

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

As a result, the assessment of what constitutes a material instance of non-compliance is open to interpretation.[145] The commission has attempted to rectify this in its Reporting Guidelines by outlining what constitutes 'non-compliance' and 'material instance'[146] but in practice the PM Act prevails and is open to interpretation.

140 Australian National Audit Office. 2014. Administering Regulation: Achieving the right balance, page 9.
141 Australian National Audit Office. 2014. Administering Regulation: Achieving the right balance, page 45.
142 Section 130 of the *Ports Management Act*.
143 Section 121 of the *Ports Management Act*.
144 Clause 3.2.1 of the Utilities Commission of the Northern Territory, Port of Darwin Reporting Guidelines, 28 March 2018.
145 INPEX Operations Australia Pty Ltd, 2017. Feedback on Draft Access Policy Rev C, Standard Terms and Reporting Guidelines.
146 Utilities Commission of the Northern Territory, Port of Darwin Reporting Guidelines, 28 March 2018, clauses 2.1 and 2.2.

The commission believes, to ensure clarity and certainty of what constitutes a material instance of non-compliance, it would be beneficial for the regime to clarify how the term should be interpreted or for the term to be replaced with the term 'material non-compliance' to include patterns of non-compliance and allow consideration of the impact of the non-compliance as a whole.

DPO's response to the Draft Report notes it does not consider a definition is required since it is contained in the guidelines but if one is provided, it should be consistent with the Reporting Guidelines.[147] The commission considers any change can be accommodated through transitional provisions.

b) Investigation of complaints and enforcement

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 non-compliance, 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.[148] This is correct, but when considering a potential investigatory power of the commission, the express right for other parties to report suspected material breaches becomes important. The commission considers a change to allow non-compliance to be reported, would be accompanied by an extension to the provision in the PM Act allowing for investigation of material non-compliance and reporting to the minister.

In its response to the Draft Report, DCM indicated investigatory powers and the ability to levy penalties for breaches or non-compliance were considered as part of the design of the regime.[149] DCM suggested the declaration of the provision of prescribed services by a private port operator as a regulated industry under the UC Act[150] arguably gives the commission monitoring and other powers under the UC Act. It indicates the Territory Government did not intend the commission would have the capacity to levy penalties for breaches, rather they would be matters that would be reported to the Minister for his or her consideration of appropriate actions or sanctions.[151] In its response to the Draft Report, DPO comments, in the absence of any evidence of the existing Regime not achieving the desired compliance, DPO questions what benefit would be achieved by introducing the penalties contemplated by the Draft Report.[152]

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 the Access Policy. Regulation is passive without consequences for non-compliance. In other regimes, various type of penalties have been incorporated.

The regime includes a power for the court to enforce compliance with sections 124(1) and 125(1) by making orders granting injunctions, orders for compensation or any other order the court considers appropriate.[153] The commission considers these powers should

147 Landbridge Darwin Port, submission to the Draft Report, August 2018, page 17.
148 Landbridge Darwin Port, submission to the Draft Report, August 2018, page 17.
149 Department of the Chief Minister, submission to the Draft Report, September 2018, page 6.
150 *Utilities Commission Act*, section 119(1).
151 Department of the Chief Minister, submission to the Draft Report, September 2018, page 7.
152 Landbridge Darwin Port, submission to the Draft Report, August 2018, page 18.
153 PM Act, section 126(2).

extend to failure to comply with an access policy and failure to comply with the obligation to negotiate with an access seeker (which the commission has recommended be included in the PM Act).

c) Audit and certification

Regarding the obligation for information to be audited and the commission being able to initiate an independent audit of DPO's compliance with the regime, several port users supported this approach in response to the Issues Paper. 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 the regulatory regime provides the regulator with the capability to verify compliance.

In response to the Draft Report, DPO indicated its most immediate concern is the additional regulatory burden and cost this would place on an operator such as DPO, and expressed its view the additional "regulatory risks" are not consistent with light-handed regulation.[154]

The commission observes a light-handed approach does not imply non-compliance by regulated industries should be tolerated or regulatory regimes should not be enforced. Nonetheless, 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 practicable.

It is expected a regulated entity would have in place credible compliance programs and record keeping systems. The Board of the entity should expect nothing less. Taking this into account, a low cost measure to promote compliance is a requirement for the Chief Executive Officer or other appropriate officer of a private port operator to certify the information it submits to the commission is accurate.

As to an audit power, the commission accepts that 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 and the commission is not recommending this obligation be imposed on a port operator. However, the commission considers it is consistent with light-handed regulation for an audit power to be available to the regulator, even if it is rarely exercised. In the case of the Territory regime, the audit power should extend to access policy compliance and price determination compliance, including the obligation to maintain separate accounts. The commission notes, where the commission is satisfied the risk of non-compliance is low, the commission is unlikely to have any reason to exercise an audit power. Without such a power, the compliance provisions of the regime are largely ineffective.

The commission also notes it provided information during the bidding process for the Port of Darwin lease in mid-2015 to indicate the commission would recommend a power for the commission to request a compliance audit be included in the regime. The information included the following clause:

> *The commission may, upon reasonable notice to the private port operator, require the private port operator to appoint an independent auditor to undertake an audit of the private port operator's compliance with any of its obligations under the access policy and any request for information in accordance with section 25 of the Utilities Commission Act.*

154 Landbridge Darwin Port, submission to the Draft Report, August 2018, page 17.

The standards or requirements to apply to an audit will be determined by the commission in consultation with the private port operator. The auditor will report in accordance with those standards or requirements.

The licensee will be responsible to pay the costs of undertaking the audit.

In the Issues Paper, the commission questioned 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.[155] For reasons explained in the Draft Report, the commission is not making any recommendations for these measures to be included in the regime.

Finding

7.v) The commission finds several important elements are absent from the current regime that are necessary for effective compliance and enforcement, including:

- a definition of 'material instance of non-compliance'
- a mechanism for other parties to report to the commission about any material instances of non-compliance with an access policy and for the commission to investigate
- an enforcement mechanism for breaches of an approved access policy
- measures to promote record-keeping and reporting by a private port operator in accordance with required standards
- where there are concerns about a port operator's compliance with the regime, the power for the commission to initiate an independent audit.

Recommendation

7.w) The commission recommends amending the regime to include:

- guidance on the definition of 'material instance of non-compliance' that provides for matters to be taking into account including the provision breached, the effect of the breach, where there is a series of breaches, the effect on port users and the timeliness of steps taken to remedy the breach
- an express provision for other parties to be able to report to the commission on material instances of non-compliance with an access policy
- a power for the commission to investigate third-party reports of material instances of non-compliance with an access policy
- a power in section 126 of the PM Act for a court to make enforcement orders for failure to comply with an access policy and failure to negotiate in good faith
- a requirement of the Chief Executive Officer of a private port operator or other officer approved by the commission to certify the information it submits to the commission is accurate
- a power for the commission to initiate an independent audit of a port operator's compliance with the regime.

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

7.9 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.[156]

In its submission to the Issues Paper, DPO did 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.[157]

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.[158] 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.

Of the submissions received from port users in response to the Issues Paper, 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.

In its response to the Draft Report, DPO indicated it did not see any basis for justifying the additional administrative costs and obligations this would impose on a port operator. It did however agree there may be scope to share some aggregated data or results of these with relevant stakeholders on a regular basis.

The commission does not seek to impose minimum standards for prescribed services delivered by DPO. Taking into account DPO's response to the Draft Report, the commission

156 Essential Services Commission of Victoria, Review of the Victorian Ports Regulation: Final Report, June 2014, pages 58 and 59.
157 Landbridge Darwin Port, submission to the Issues Paper, April 2018, page 13.
158 Landbridge Darwin Port, submission to the Issues Paper, April 2018, page 14; Response to Draft Report, September 2018, Page 18.

recommends a requirement to report on performance against service standards proposed by DPO after consultation with port users and approved by the commission, and for the commission to publish an annual report based on this information. This would provide an indicator of general service trends, which will complement information about prices for prescribed services obtained through the price monitoring regime. To minimise the administrative burden on DPO, the commission advocates using measures such as customer satisfaction surveys or key performance indicators or other measures the commission assumes are already recorded for DPO's own use.

Finding

7.x) 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.

Recommendations

7.y) The commission recommends amending the regime to include a process for a private port operator to propose, and have approved by the commission, measures of service and require a private port operator to report to the commission on performance against those measures of service.

7.z) The commission recommends the regime should require it to publish an annual report on a port operator's performance against the measures of service.

7.10 Scheduling and queueing

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.[159] 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 to the Issues Paper 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.

Findings

7.aa) The commission considers 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.

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

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 the same process applies if the Access Policy is amended and if another port is brought into the regime by declaration. 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.

a) 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 believes 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.

Responses to the Draft Report did not address this issue.

Finding

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

Recommendation

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

b) 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, section 127 does not provide for the commission to 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 have regard to various 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.

Responses to the Draft Report did not address this issue.

Finding

8.c) The commission finds the decision-making framework in section 127 of the PM Act for approving a draft access policy prevents the commission from taking relevant matters into account.

Recommendation

8.d) The commission recommends amending the PM Act to allow the commission to take the following matters into consideration when approving a draft Access Policy:

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

c) 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.[160]

During the approval process for DPO's Access Policy, 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 for a more flexible time period.

Responses to the Draft Report did not address this issue.

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

Finding

8.e) The commission finds the existing approval process for a 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.

Recommendation

8.f) The commission recommends amending section 127 of the PM Act to allow the commission to determine the approval time for the draft access policy.

d) Amending the Access Policy

The PM Act specifies a process to be followed if a private port operator wishes to amend the approved Access Policy.[161] This includes consultation with port users and approval by the commission in the same manner as for the initial access policy.

However, under the existing regime, a private port operator cannot be required to amend the access policy if it becomes out of date or ineffective. Although a private port operator is required to review the access policy no later than the end of the period of five years after it was approved there is no obligation on a private port operator to propose changes to the access policy to address issues identified by users. [162] In addition, the PM Regulations only contemplate one review at the end of the five-year period, with no further review after that.

Ultimately, this means the current Access Policy of DPO 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.

Further, a private port operator is not required to report on the outcome of its access policy review. 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 in response to the Issues Paper were of similar opinion.

DPO is of the opinion the intention of the PM Regulations is 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 the Access Policy is warranted, for example, when there have been changes to relevant Commonwealth or Territory legislation (especially the PM Act and PM Regulations), there is a material change to the market and clauses within the Access Policy become unworkable or the Access Policy becomes ineffective. The commission endorses these comments.

In response to the Issues Paper, DPO expressed the view, if there was an ability for the commission to require changes to the Access Policy, 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 port operations were not disturbed pending the disagreement being resolved.

161 *Ports Management Act*, section 127(10).

162 PM Regulation 15(1). The first such review date is 30 June 2022.

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 a drafting oversight requiring amendment. Submissions from port users in response to the Issues Paper support the need for an access policy to be in place at all times.

Responses to the Draft Report did not address this issue. However, the commission has given further thought to the timing and process for review of access policies and considers an approved access policy should specify a date by which the port operator must complete a review and submit a draft revised access policy for approval.

Findings

8.g) The commission finds, in the interests of transparency and information symmetry, a port operator should publish the findings of a review of its access policy and give the commission a copy of the findings.

8.h) The commission finds the regime requires a mechanism to require a port operator to submit a revised draft access policy for approval.

8.i) The commission finds the regime needs a mechanism to ensure, following the initial approval of a port operator's access policy, an access policy is in place at all times.

Recommendations

8.j) The commission recommends amending regulation 15 to include an obligation for a port operator to publish and provide to the commission, the findings of a review of its access policy.

8.k) The commission recommends amending the PM Act and the PM Regulations to require a private port operator to submit a revised draft access policy for approval by a date specified in the access policy (and each approved revised policy).

8.l) The commission recommends amending section 127 to provide that an approved access policy remains in place until it is replaced with an approved revised access policy.

8.2 Additional issues in submissions

In its submissions to the Issues Paper and the Draft Report, DPO outlined its view that 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 provide 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.[163]

163 Landbridge Darwin Port, submission to the Issues Paper, April 2018, page 7.

Finding

8.m) The commission has not made a finding on this issue as it is beyond the scope of this review. There may be policy or practical reasons why the series of definitions have been drafted in the way they have. The commission considers stakeholders, including port users and the harbourmaster, should be consulted before any change is made.

Recommendation

8.n) The commission recommends the government consider whether there is any need to review the definition of 'designated port' for the purposes of the regime and stakeholders including port users and the port harbourmaster be consulted as part of that process.

8.3 Transitional matters

In its response to the Draft Report, DPO noted the need for transitional arrangements in relation to some of the commission's recommendations.

The commission accepts the need for transitional arrangements and anticipates these would include providing a window of time for the commission to publish new guidelines, for DPO to put in place arrangements to comply with new obligations and provide for the existing Access Policy to remain in place until it is reviewed under the new arrangements. The commission does not anticipate there will be any need for grandfathering.

Recommendations

8.o) The commission recommends transitional arrangements be put in place as necessary to provide an appropriate time frame and process for achieving compliance with changes made to the regime.

9 Findings and recommendations

Section 123(1) of the PM Act sets out the requirement of the commission periodically conducting and completing a review of the operation of the access and pricing regime. The review assessed 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 whether:

- there is there an ongoing need for regulatory oversight of access to and pricing of prescribed services provided by a port operator
- there is there a need to change the form of regulatory oversight of access and if so, how
- there is there a need to change the form of regulatory oversight of prices and if so, how
- amendments be made to part 11 of the PM Act or the PM 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, 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 Final Report have been informed by a range of considerations including stakeholder submissions, experience with the regime to date, comparison with other negotiate/arbitrate access regimes and an analysis of the regime against the clause 6 principles.

The commission 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 PM 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 PM 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 and Draft Report. Appendix E lists all of the commission's findings and recommendations, the majority of which relate to proposals to ensure the current regime is effective and fit for purpose. Appendix F sets out specific proposed changes to the PM Act and PM Regulations to implement the recommendations.

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

AGC Ausgroup

Arafura Resources

Argonaut Marine Group

Association of Mining and Exploration Companies Inc.

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 Logistics

Department of Treasury and Finance

DOF Subsea

Infrastructure Australia

Infrastructure Partnerships Australia

INPEX Operations Australia Pty Ltd

KGL

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

NT Port and Marine

OM Manganese Limited

Ports Australia

Regional Harbourmaster Darwin

Royal Vopak

Sea Swift

Shipping Australia

Shorelands

Svitzer Australia

Tellus Holdings

TNG Limited

Tourism and Transport Forum

Tourism NT

Verdant Minerals

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 2015[1]. The lease documents are available from the Northern Territory Lands Titles Office (lease numbers 859663 and 859664). This summary was completed in June 2018.

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 that is 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 deals 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 non-compliance 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 of 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 providers, port regulators, tenants and other occupiers of the leased area, and port users utilising 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, 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 for its review for the 2018 Ports Access and Pricing Regime. The following information covers five ports and, for each, responds to a list of questions derived from the Issues Paper.[2]

Port and access regime summary

South Australia

Key terms

- *Commercial Arbitration Act 2011* (SA) (CAA)
- Essential Services Commission of South Australia
- *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)

2 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.

- 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 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 way of a ship loader at a port 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 Australian Competition and Consumer Commission (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
- *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 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 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 New South Wales (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 NSW and found neither obliged PNO to provide access to the services to all users of the port. In light of these circumstances, the tribunal found 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 that 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 (that is, 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, the regime continues to be the most appropriate option to achieve the desired regulatory outcome at least cost and 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 six 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 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 concerns continue around potential monopolistic behaviour.[3]

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 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.

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 and 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:

- 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.

3 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.

Non-prescribed services: the ESC is required to conduct and complete a review of the rents payable under the applicable lease every five years. If the ESC finds 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 five 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 five 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 (that is, not expire) if:

- the commission has recommended it should continue
- 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 three 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.[4] The department's interim report indicates no strong evidence or arguments have been put forward indicating the need for substantive amendment.[5]

DBCT

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

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.

4 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).

5 Interim Report, page vi.

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, around (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 five 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 five years. The inquiry is required to be conducted in accordance with part 5 of the ESC Act (but section 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 whether 'standards and conditions of service' is unclear.

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 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 section 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 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 and 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 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

- 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
- 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 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 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
- 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:

- providing channels for use by shipping on port of Melbourne waters
- providing berths, buoys or dolphins in connection with the berthing of vessels

- providing short-term storage or cargo marshalling facilities
- providing access to, or allowing use of, places or infrastructure on port of Melbourne land to provide services to port users
- any other service prescribed by the regulations.

Services that are not prescribed include granting 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
- 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 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 that 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 five 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 principles are:

- the authority must apply the pricing principles in making access determinations and approving access undertakings
- 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 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 require 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:

- port licence holder (PLH) sets prices
- 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
- ESC monitors compliance with the Pricing Order
- under the current Pricing Order, prices can be 'rebalanced' subject to ESC approval
- there are five-yearly compliance reviews by ESC coupled with the possibility of re-regulation of prices by the ESC Minister.

In relation to non-prescribed services:

- PLH sets rents for tenants (no pricing requirements)
- 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 (for example, 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 five 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

Port 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:

- 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, 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 (provided by the port operator) indicates the services are provided on the standards terms and conditions published by the port operator. There is nothing in the legislation regarding 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 as long as:

- 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 section 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 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 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 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):

- 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
- access (or increased access) to the service, would promote the public interest, with these specified to include the effect 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 that the authority must have regard to when approving an access undertaking. These cover:

- the object of part 5 (to promote the economically efficient operation and 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[6]
- 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.[7]

6 Wording from the QCAA.
7 Refer to question 13 below for more detail.

Port of Newcastle

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

- 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 CPA (clause 6)
- the objects of part IIIA.[8]

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

- the objects of part IIIA (see above)
- the pricing principles in the CCA
- legitimate business interests of the provider
- public interest
- 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 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 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 (in summary) are to:

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

8 The objects of regulation 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.

- protect the interests of users by ensuring prices are fair and reasonable
- allow providers a reasonable opportunity to recover the efficient costs of providing prescribed services
- 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 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 to be complied with by persons for whom the operator provides regulated services
- rules with which the intending proponent would be required to comply
- information on the price of regulated services provided by the operator 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.[9]

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

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.

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 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 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 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 three years and (if retained) in the six-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
- 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[10]
- 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:

- 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
- 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
- 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

10 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 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
- coordination 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
- 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 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
- 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 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
- legitimate business interests of persons who have, or may acquire, rights to use the service
- 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

- 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
- 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
- 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:

- objects of part IIIA (see question 8 above)
- legitimate business interests of the provider
- public interest
- interests of people with rights to use the service
- direct costs of providing access
- value of extensions to the provider
- value of interconnections to the provider
- operation and technical requirements
- 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 (that is, 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 that sets out the capacity allocation system for the port terminal facility. Any port loading protocol that allocates capacity more than six 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 for regulations that may be made regarding 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 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 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 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 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 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.[11] The guidelines require, among other things, that: substance prevails over form; information is verifiable; someone takes responsibility for the use of the information; and the regulated operator undertakes 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 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 not done or is inadequate, by the authority. The access provider must keep its books of account and other

11 Ports Industry Guideline No 2, Regulatory Accounts.

records necessary to comply with the cost allocation manual in the manner required by the manual.

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 for the records to be 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, separate from financial and business records for other prescribed services
- in respect of prescribed services, 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 required to be satisfied 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 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 2016-17 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 that 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 five 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 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 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 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 six 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 it considers necessary for the purpose of performing its functions or exercising its power. The ESC can require a person 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 false or misleading information 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 six 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 this be done as part of its submission to the current review of the regime. The department's Interim Report indicates it considers this recommendation reasonable.[12]

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 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 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 considers 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 the court considers 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.

12 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 proposing to engage in conduct constituting a contravention of an enforceable provision, the ESC Minister may apply to the 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).[13] It has been prepared having regard to the Guide to Certification of State and Territory Regimes published by the National Competition Council (NCC Guide).[14] The assessment was completed in June 2018.

Scope of this assessment

An access regime for private ports in the Territory is established under the *Ports Management Act* (NT) (PM Act), 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[15] made by the Utilities Commission and the Access Policy[16] 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".[17] The NCC also notes the following three principles in its guide:[18]

- 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[19]
- 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.

13 Defined in section 4 of the *Competition and Consumer Act 2010* (Cth) (CCA).
14 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.
15 2015 – 2018 Prescribed Port Services Price Determination, Port of Darwin, Final Determination, 16 February 2016.
16 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.
17 Paragraph 3.3.
18 Paragraph 3.3.
19 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, to satisfy this principle, it is necessary to define the services covered by the regime.[20]

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.[21]

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 (PM Act 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.[22]

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, the exclusion does not create a barrier to access to other services 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.

20 Paragraph 4.2.
21 Paragraph 4.9.
22 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"[23] 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".[24]

Regulation 13(2) refers to an obligation to negotiate in good faith, but only once there is an access dispute.[25]

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),[26] 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.[27] It makes similar observations in the context of its discussion about clause 6(4)(e).[28]

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)).

23 Paragraph 5.1.
24 Paragraph 5.3.
25 The NCC Guide deals with the negotiation framework principally in the context of principle 6(4)(e) – paragraph 5.6.
26 Section 125(1) of the PM Act 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.
27 Paragraph 5.2.
28 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.[29] 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.[30] 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.[31]

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.[32] The Territory regime includes this requirement in the PM Act 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.[33] The guide indicates these general provisions may relate to "information disclosure, availability (for negotiation) and response times".[34] According to the guide, they include "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".[35]

29 Paragraph 6.4.
30 Paragraph 6.7.
31 Paragraph 7.8.
32 Paragraph 5.4.
33 Paragraph 5.6.
34 Paragraph 5.6.
35 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)).[36] 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 principle 6(4)(g) refers to the need for:

- 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.[37]

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

36 Paragraph 5.9.
37 Paragraph 5.10.

part 5 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 PM Act. 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) 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).[38]

The generic Territory regime requires the arbitrator to take into account the access and pricing principles.[39] 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.

38 Paragraph 5.21.
39 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.[40]

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 it 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.[41]

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 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.[42]

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'[43] within the meaning of the Access Policy but the port operator must provide information about what steps could be

40 Clause 1.2 (objectives); clause 4.1 (meaning of reasonable terms); clause 7.7 (matters to be taken into account).
41 Clauses 6.6 and 6.7.
42 Paragraph 5.65.
43 Clause 4.2(e).

taken for it to be feasible.[44] This would seem to allow scope for payment of compensation. The port operator has power to grant exclusive access if specified conditions are met.[45]

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 PM Act 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.[46]

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.[47] 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 *Commercial 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 *Commercial Arbitration Act*, there are circumstances in which the dispute resolution body may be able to require the provision

44 Clause 6.6.
45 Clause 5.6.
46 Clause 1.3.
47 Paragraph 5.75.

of information in addition to any information exchanged in negotiation and provided to the arbitrator in the course of the arbitration.[48]

The commission has information gathering powers under section 25 of the UC Act and section 131 of the PM Act 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

Assessment: this principle is satisfied but in an incomplete manner.

The NCC Guide indicates this clause requires an effective access regime incorporates an objects clause consistent with the requirements of clause 6(5)(a).[49]

The Territory regime sets out the objective of the port access and pricing regime at section 117 of the PM Act in a manner consistent with clause 6(5)(a). Section 122 requires regulations made for part 11 of the PM Act 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,[50] which must in turn be taken into account in deciding whether access terms are reasonable.[51]

Clause 6(5)(b): regulated access prices should be set to generate revenue 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[52] its consideration of pricing issues will focus on whether the price or 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)

48 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.
49 Paragraph 6.1.
50 Clause 1.2.
51 Clause 4.1(b).
52 Paragraph 5.22.

to be consistent with the access and pricing principles in section 133[53] 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[54] and lists them as matters to be taken into account in the decision of the arbitrator.[55]

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[56] 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 clause 6(5)(c) does not require an access regime be provided for a merits review.

The NCC Guide considers clause 6(5)(c) does not require an access regime to provide for a merits review, however clause 6(5) contemplates where a merits review is provided, the review will generally be limited to information submitted to the original decision-maker.

The PM Act does not provide for a 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 PM Act. 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).

53 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 PM Act and regulations.
54 Clause 5.5; see also clause 7.7.
55 Clause 7.7.
56 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 that 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

b) or 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 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 that should not be considered include the outcome of any arbitration or any decision made under the access regime

b) should recognise, 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 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 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 findings and recommendations

Finding	Recommendation
Chapter 5: Market power	
5.a Taking into consideration the current market, the commission has formed the view DPO has substantial market power and the potential to exercise that market power. This is based on: • limited competition for the provision of most prescribed services • a lack of substitutes for most prescribed services • the existence of high barriers to entry for potential competitors for the provision of prescribed services at the required scale • limited countervailing market power • 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 non-compliance with DPO's Access Policy • no reports of instances of material non-compliance with the Price Determination • the overall conduct of DPO.	
Chapter 6: Ongoing need for regulatory oversight	
6.a The commission is of the opinion 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 The commission found there is an ongoing need for regulatory oversight for prescribed services provided by DPO, and the benefits of a light-handed access and pricing regulatory regime outweigh the costs.	
	6.c The commission recommends continuing regulatory oversight of prescribed services for the Port of Darwin.
6.d The commission considers the list of prescribed services in regulation 12(1) is appropriate at this time.	

continued

Finding	Recommendation
6.e The commission believes the regime should not allow the potential for a private port operator to provide prescribed services outside the reach of the regulatory regime.	
6.f The commission believes the regime should not allow the potential for a lessee of the port operator to provide prescribed services outside the reach of the regulatory regime without the consent of the regulator and the regulator should be able to give that consent subject to binding conditions.	
6.g The commission finds there is a gap in the regime since a private port operator and a pilotage service provider can be different entities, but only a private port operator is directly subject to the access and pricing regime in part 11.	
	6.h The commission recommends amending the PM Regulations to clarify regulation 12(2) does not apply to services provided by a private port operator under a lease.
	6.i The commission recommends amendments to: • the PM Act to require the commission's approval of any lease granted by a private port operator resulting in services that would otherwise be prescribed services being provided by a person who is not a private port operator • the PM Regulations to set out the approval framework and to allow approval to be subject to conditions determined by the commission.
	6.j The commission recommends applying sections 124 and 125 of the PM Act and the price monitoring regime to prescribed services provided by a private pilotage service provider. This should cover: • the application of the *Utilities Commission Act* in the same manner it applies to a private port operator • section 123 reviews by the commission and the powers of the minister to change the form of price regulation under the regime • the making of a price determination by the commission and the obligations to provide information about charges to the commission in accordance with the price determination • obligations to maintain separate financial accounts • related provisions dealing with audit and information to be provided to the commission.
Chapter 7: Changes to the form of oversight	
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.	

continued

Finding	Recommendation
7.b 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. In the event market power is exercised by a 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.c 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.d The commission recommends sections 124 and 125 of the PM Act be amended to prevent carve outs through a port operator's Access Policy that reduce the protections offered by these sections unless approved by the commission in the access policy approval process. An alternative is to provide for the commission to have regard to sections 124 and 125 when approving a draft access policy of a private port operator.
7.e The commission considers separate financial accounts for the prescribed services are required for the price monitoring regime and section 123 reviews to be effective.	7.f The commission recommends amending the regime to allow the commission to require a private port operator to maintain and provide to the commission separate financial accounts for prescribed services as a whole in accordance with guidelines published by the commission. The PM Act should include the head of power and the PM Regulations should provide guidance about the nature of the accounts and supporting information that can be required by the guidelines. The accounts should be limited to balance sheet, income or profit and loss statements and cash flow statements prepared in accordance with Australian accounting standards and for the prescribed services as a whole, with supporting information to address issues arising from the trust and related arrangements. The accounts should be required to give a true and fair view of the financial position and performance of the the private port operator or private pilotage service provider in the provision of prescribed services. A private port operator and private pilotage service provider should be permitted to prepare a single set of accounts when they are within the group of entities.
7.g The commission finds the regime should provide for regulatory oversight of the process for classification of standard services including a review mechanism.	7.h The commission recommends amending the regime to give the commission regulatory oversight, through the access policy approval process, of the classification of services as standard services.

continued

Finding	Recommendation
7.i Through the consultation process for this review, the commission has identified possible benefits in requiring a private port operator to publish indicative terms and, where feasible for the service, indicative charges, and these benefits may outweigh the costs. Consistent with other comparable ports across Australia, the commission has formed the view indicative tariffs and associated terms for dry bulk mineral exports at the Port of Darwin may be capable of being determined and published by DPO but at this time, there is insufficient evidence to make a specific recommendation requiring DPO to publish indicative information for this service. The commission nonetheless strongly encourages DPO to consider publishing on a voluntary basis more information for port users about the terms for exporting dry bulk minerals.	7.j The commission recommends amending the regime to allow the commission to determine non-standard services for which a private port operator must publish indicative terms in its access policy, and where feasible for the service, indicative charges. This would be achieved by requiring an access policy to classify services as standard, non-standard or reference, requiring indicative terms for reference services to be published as part of the access policy, and indicative prices where required by the price determination.
7.k The commission finds important elements of the negotiate/arbitrate regime have been omitted from the regime or left to the port operator to define. These include: • an obligation to engage in good faith negotiations prior to an access dispute being raised • provisions designed to promote effective negotiations • provisions designed to ensure access seekers are provided with the information they need to support effective and well-informed negotiations.	7.l The commission recommends amending to include provisions designed to ensure the private port operator and a port user have an obligation to engage in good faith negotiations prior to an access dispute being raised and to include provisions to promote effective and well-informed negotiations. This could be achieved with prescriptive provisions or with appropriate changes to regulation 13(2) coupled with a broad discretion for the commission when approving an access policy to ensure the provisions in the access policy are appropriate and fit for purpose. 7.m The commission recommends amending the PM Act and PM Regulations to include provisions under which a port user engaged in access negotiations is given financial information that will enable the port user to assess whether prices are consistent with the access and pricing principles, to support effective and well-informed negotiations.

continued

Finding	Recommendation
7.n The commission finds arbitration an essential component of an effective access and pricing regime and considers the regime should provide for arbitration under the *Commercial Arbitration Act*, supplemented by provisions in the PM Act and PM Regulations rather than leaving the arbitration process to be defined by the port operator in an access policy.	
7.o The commission finds the regime should stipulate the matters to be taken into consideration by the arbitrator in the dispute resolution process and the right of a prospective port user not to enter into a contract on the terms of the access determination and the consequence if it decides not to do so.	
7.p The commission finds at present there is uncertainty as to how conflicts between the Access Policy and other commitment of the port operator to the Territory Government relating to the prescribed services should be resolved.	
7.q The commission believes it would be beneficial for arbitration decisions to be provided to the commission.	
	7.r The commission recommends amending the PM Act to provide for reference of access disputes to arbitration under the *Commercial Arbitration Act*, supplemented by provisions in the PM Act or PM Regulations including provisions for: • the arbitrator to be given financial information required to assess whether prices are consistent with the access and pricing principles • the right of a prospective port user not to enter into a contract on the terms of the access determination subject to being precluded for a 12-month period from making the same request for access unless it obtains the commission's consent • parties to bear their own costs, and other costs of the arbitration to be shared or apportioned as determined by the arbitrator • matters that may be provided for in an access determination • enforcement of an access determination.

continued

Finding	Recommendation
	7.s The commission recommends amending the PM Act to specify the following matters to be taken into account by the arbitrator in the dispute resolution process: • the object of part 11 • the access and pricing principles in section 133 • the operator's legitimate business interest and investment in the port or port facilities • the costs to the operator of providing the service (including the costs of any necessary modification to, or extension of, a port facility) but not costs associated with losses arising from increased competition in upstream or downstream markets • the interests of all persons holding contracts for use of any relevant port facility • firm and binding contractual obligations of the operator or other persons (or both) already using any relevant port facility • the operational and technical requirements necessary for the safe and reliable provision of the service • the economically efficient operation of any relevant port facility • the benefit to the public from having competitive markets. 7.t The commission recommends amending the PM Act to provide for the commission to take into account the port lease when approving an access policy. 7.u The commission recommends amending the PM Act to include an obligation to provide arbitration decisions to the commission.

continued

Finding	Recommendation
7.v The commission finds that several important elements are absent from the current regime that are necessary for effective compliance and enforcement, including: • a definition of 'material instance of non-compliance' • a mechanism for other parties to report to the commission about any material instances of non-compliance with an access policy and for the commission to investigate • an enforcement mechanism for breaches of an approved access policy • measures to promote record-keeping and reporting by a private port operator in accordance with required standards • where there are concerns about a port operator's compliance with the regime, the power for the commission to initiate an independent audit.	7.w The commission recommends amending the regime to include: • guidance on the definition of 'material instance of non-compliance' that provides for matters to be taking into account including the provision breached, the effect of the breach, where there is a series of breaches, the effect on port users and the timeliness of steps taken to remedy the breach • an express provision for other parties to be able to report to the commission on material instances of non-compliance with an access policy • a power for the commission to investigate third-party reports of material instances of non-compliance with an access policy • a power in section 126 of the PM Act for a court to make enforcement orders for failure to comply with an access policy and failure to negotiate in good faith • a requirement on the Chief Executive Officer of a private port operator or other officer approved by the commission to certify the information it submits to the commission is accurate • a power for the commission to initiate an independent audit of a port operator's compliance with the regime.
7.x 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.y The commission recommends amending the regime to include a process for a private port operator to propose, and have approved by the commission, measures of service and to require a private port operator to report to the commission on performance against those measures of service. 7.z The commission recommends the regime should require it to publish an annual report on a port operator's performance against the measures of service.
7.aa The commission considers it 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.	

continued

Finding	Recommendation
Chapter 8: Other issues	
Improving the access policy approval process	
8.a The commission finds 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 amending section 127(2) of the PM Act to include an obligation on a port operator to consult with port users on an initial access policy.
8.c The commission finds the decision-making framework in section 127 of the PM Act for approving a draft access policy prevents the commission from taking relevant matters into account.	8.d The commission recommends amending the PM Act to allow the commission to take the following matters into consideration when approving a draft Access Policy: • the matters in section 6(2) of *the Utilities Commission Act* • the object of part 11 • the principle that access to prescribed services should be on reasonable terms • the access and pricing principles specified in section 133 • provisions in a port lease applicable to access to prescribed services • any other matters the commission considers relevant.
8.e The commission finds the existing approval process for a 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 of the PM Act to allow the commission to determine the approval time for the draft access policy.
8.g The commission finds, in the interests of transparency and information symmetry, a port operator should publish the findings of a review of its access policy and give the commission a copy of the findings.	
8.h The commission finds the regime requires a mechanism to require a port operator to submit a revised draft access policy for approval.	
8.i The commission finds the regime needs a mechanism to ensure, following the initial approval of a port operator's access policy, an access policy is in place at all times.	
	8.j The commission recommends amending regulation 15 to include an obligation for a port operator to publish and provide to the commission, the findings of a review of its access policy.
	8.k The commission recommends amending the PM Act and the PM Regulations to require a private port operator to submit a revised draft access policy for approval by a date specified in the access policy (and each approved revised policy).

continued

Finding	Recommendation
	8.l The commission recommends amending section 127 to provide an approved access policy remains in place until it is replaced with an approved revised access policy.
Additional issues in submissions	
8.m The commission has not made a finding on this issue as it is beyond the scope of this review. There may be policy or practical reasons why the series of definitions have been drafted in the way they have. The commission considers stakeholders including port users and the harbourmaster, should be consulted before any change is made.	8.n The commission recommends the government consider whether there is any need to review the definition of 'designated port' for the purposes of the regime and stakeholders including port users and the port harbourmaster be consulted as part of that process.
Transitional matters	
	8.o The commission recommends transitional arrangements be put in place as necessary to provide an appropriate time frame and process for achieving compliance with changes made to the regime.

Appendix F: Proposals for implementing the recommendations in the Final Report

Ref.	Recommendation	PM Act	PM Regulations
6.c	The commission recommends continuing regulatory oversight of prescribed services for the Port of Darwin.	No change required.	No change required.
6.h	The commission recommends amending the PM Regulations to clarify regulation 12(2) does not apply to services provided by a private port operator under a lease.	No change required.	Regulation 12(2) would read (in part) "… any services provided by a lessee under a lease…".
6.i	The commission recommends amendments to: • the PM Act to require the commission's approval of any lease granted by a private port operator resulting in services that would otherwise be prescribed services being provided by a person who is not a private port operator • the PM Regulations to set out the approval framework and to allow approval to be subject to conditions determined by the commission.	A new subsection would be included in section 118 to include a private port operator must not enter into a lease under which another person provides what would otherwise be a prescribed service unless the lease has been approved by the regulator in accordance with the regulations.	Regulation 12 would include a new sub-regulation providing for the regulator to approve a lease, specify approval conditions and revoke the approval if the conditions are not met.

continued

Ref.	Recommendation	PM Act	PM Regulations
6.j	The commission recommends applying sections 124 and 125 of the PM Act and the price monitoring regime to prescribed services provided by a private pilotage service provider. This should cover: • the application of the *Utilities Commission Act* in the same manner it applies to a private port operator • section 123 reviews by the commission and the powers of the minister to change the form of price regulation under the regime • making of a price determination by the commission and the obligations to provide information about charges to the commission in accordance with the price determination • obligations to maintain separate financial accounts • related provisions dealing with audit and information to be provided to the commission.	Section 118 would be amended to provide for part 11 to apply to prescribed services provided by a pilotage service provider in a pilotage area within a designated port that is not a public sector entity. The entity providing the service would be defined as a private pilotage service provider. A new term "private port service provider" would be included to refer to a private port operator or a private pilotage service provider. The new defined term would be used in place of "private port operator" as required to extend the operation of the relevant provisions to a private pilotage service provider or to prescribed services provided by a private pilotage service provider. This applies to: • section 119 (about the application of the UC Act), section 123 (reviews of part 11), section 128(1A) (guidelines), section 131 (information requirements), section 132 (price determinations), section 134 (regulations made for price determinations), section 136 (power of regulator to require information) and section 137 (confidentiality of information provided) • the proposed new provisions dealing with regulatory compliance audits, separate financial accounts and certification of information provided to the regulator.	Regulation 12 would include a new sub-regulation specifying that the provision by a private pilotage service provider of pilotage services in a pilotage area within a designated port (or facilitating the provision of pilotage services) is a service to which Part 11 of the PM Act applies. The reference to private port operator in the following regulations would be replaced with a reference to the private port service provider in regulation 16 (price determinations); regulation 17 (procedures on making a price determination); regulation 18 (power to negotiate charges); and any new regulations made in relation to regulatory compliance audits, separate financial accounts or certification of information provided to the Regulator.
7.d	The commission recommends sections 124 and 125 of the PM Act be amended to prevent carve outs through a port operator's access policy to reduce the protections offered by these sections unless approved by the commission in the access policy approval process. An alternative is for the commission to have regard to sections 124 and 125 when approving a draft access policy of a private port operator.	Sections 124(5)(b) would refer to "an act done in accordance with a provision of the operator's access policy that is approved by the regulator as a provision to which the subsection applies, to the extent of the approval". A similar approach can be adopted in section 125(2)(c). Section 127 would allow the regulator to refuse to approve a provision for the purposes of section 124(5)(b) or 125(2)(c) even if it has approved the access policy.	No change required.

continued

Ref.	Recommendation	PM Act	PM Regulations
7.f	The commission recommends amending the regime to allow the commission to require a private port operator to maintain and provide to the commission separate financial accounts for prescribed services as a whole in accordance with guidelines published by the commission. The PM Act should include the head of power and the PM Regulations should provide guidance about the nature of the accounts and supporting information that the guidelines can require. The accounts should be limited to balance sheet, income or profit and loss statements, and cash flow statements prepared in accordance with Australian accounting standards and for the prescribed services as a whole, with supporting information to address issues arising from the trust and related arrangements. The accounts should be required to give a true and fair view of the financial position and performance of the private port operator or private pilotage service provider in the provision of prescribed services. A private port operator and private pilotage service provider should be permitted to prepare a single set of accounts when they are within the group of entities.	A new provision would be included providing for the private port operator and the private pilotage service provider to maintain separate financial accounts and provide them to the regulator, in accordance with guidelines issued by the regulator (subject to the regulations).	The regulations would outline the separate accounting guidelines may require: • the accounts to extend to all entities (including trusts) providing or relevant to the provision of prescribed services or preparation of separate financial accounts for the prescribed services, including entities within a group of entities related to the private port operator or the private pilotage service provider by ownership, control or other means specified in the guidelines • the provision of supporting information reasonably required by the regulator in connection with preparing separate financial accounts and identifying the related entities. The regulations would ensure, where reasonably required for, the regulator to be satisfied the accounts give a true and fair view of the financial position and performance of the private port operator or private pilotage service provider in the provision of prescribed services, the separate accounting guidelines may require: • the provision of a balance sheet, income or profit and loss statements, and cash flow statements prepared in accordance with Australian accounting standards and information about the accounting standards relied on in preparing the accounts • where the accounts have not been independently audited, certification in accordance with the new certification guidelines • the regulations would specify the guidelines must not require the preparation of separate financial accounts for each separate prescribed service provided by a person at a designated port or the determination of regulatory asset values.

continued

Ref.	Recommendation	PM Act	PM Regulations
7.h	The commission recommends amending the regime to give the commission regulatory oversight, through the access policy approval process, of the classification of services as standard services.	Section 127 would include a new provision allowing regulations to be made about the content of an access policy including: • the classification of prescribed services, which may include standard services and other classifications • the publication of terms for the provision of prescribed services, which may be different for different services or classes of services.	Regulation 13(2) would require an access policy to classify services as standard services, non-standard services or reference services. A definition of each service type would be included. A new regulation would be included to provide for matters to be taken into account when classifying services. Regulations 13(2)(e) would be amended to require the access policy to set out the standard terms on which access to a standard service will be provided.
7.j	The commission recommends amending the regime to allow the commission to determine non-standard services for which a private port operator must publish indicative terms in its access policy and, where feasible for the service, indicative charges.	Section 127 would include a new provision allowing regulations to be made about the content of an access policy including: • the classification of prescribed services, which may include standard services and other classifications • the publication of terms for the provision of prescribed services, which may be different for different services or classes of services.	A new regulation would require a non-standard service to be classified as a reference service where the regulator considers publishing reference terms and reference charges to promote the object of part 11 or the efficient and effective negotiation of access. Before making that determination, the regulator would be required to consult with the private port operator and port users. Regulations 13(2)(e) would be amended to require the access policy to set out the terms on which access to reference services may be provided. Regulations 16(2)(c)(ii)(A), 16(2)(e)(i) and 18 would include a reference to reference charges. The term 'reference charge' would be defined as a charge, or methodology for calculating a charge, used to inform port users about the setting of charges to provide a reference service to which it relates. A new sub-regulation in regulation 16 would require a reference charge to be determined for a reference service where the regulator determines the publication of the reference charge will promote the objects of part 11 of the Act or the efficient and effective negotiation of access.

continued

Ref.	Recommendation	PM Act	PM Regulations
7.l	The commission recommends the regime be amended to include provisions designed to ensure a private port operator and a port user have an obligation to engage in good faith negotiations prior to an access dispute being raised and to include provisions to promote effective and well-informed negotiations. This could be achieved with prescriptive provisions or with appropriate changes to regulation 13(2) coupled with a broad discretion for the commission when approving an access policy to ensure the provisions in the access policy are appropriate and fit for purpose.	A new division would be included after division 2 to deal with access negotiations and access disputes. This would include provisions requiring a private port operator and a port user to negotiate in good faith and requiring the private port operator to make all reasonable efforts to try to satisfy the reasonable requirements of the port user. The division would allow regulations to be made for the provision of information in negotiations and confidentiality of the information. Section 127 would include a new provision allowing regulations to be made about the content of an access policy including: • information to be provided to a port user in connection with an access request • the process for making and responding to an access request • negotiations for access The definition of access request would be moved from the PM Regulations to the PM Act.	Consequential changes would be made to regulation 13(2) to require an access policy to provide information about the process for making an access request including preliminary inquiries and where applicable to the access request: • feasibility investigations and associated costs or how they will be determined (which must be reasonable) • the negotiation process and information to be provided for negotiations including proposed terms and conditions for provision of the prescribed service • if the access request cannot be accommodated due to capacity constraints, the prospects for future access.
7.m	The commission recommends amending the PM Act and PM Regulations to include provisions under which a port user engaged in access negotiations is given financial information to enable the port user to determine whether prices are consistent with the access and pricing principles, to support effective and well-informed negotiations.	The new division in the PM Act would provide for the PM Regulations to specify the information to be provided in access negotiations.	A new regulation would require a private port operator to give a port user engaged in access negotiations information to understand how the price offered by the private port operator has been derived and assess whether it complies with the access and pricing principles. This would include information about: • how the price is calculated • the costs of providing the service including capital, operation and maintenance costs • information about the value of the private port operator's assets used to provide the service.

continued

Ref.	Recommendation	PM Act	PM Regulations
7.r	The commission recommends amending the PM Act to provide for reference of access disputes to arbitration under the *Commercial Arbitration Act* (NT), supplemented by provisions in the PM Act or PM Regulations including provisions for: • the arbitrator to be given financial information required to determine whether prices are consistent with the access and pricing principles • the right of a prospective port user not to enter into a contract on the terms of the access determination subject to being precluded for a 12-month period from making the same request for access unless it obtains the commission's consent • parties to bear their own costs, and other costs of the arbitration to be shared or apportioned as determined by the arbitrator • matters that may be provided for in an access determination • enforcement of an access determination.	The PM Act would set out key matters relating to arbitration, covering: • how a party to an access dispute refers the dispute to arbitration • the application of the *Commercial Arbitration (National Uniform Legislation) Act* (NT) (including provision to confirm the access dispute is taken to be a domestic commercial arbitration for the purposes of this Act) • the parties to the access dispute, covering the port user, the private port operator and any other person joined as a party to the arbitration by the arbitrator • enforcement of the access determination as an award under the *Commercial Arbitration (National Uniform Legislation) Act* (NT) • the process for a port user to exercise its right not to be bound by the determination and precluding the port user from making an access request for the same prescribed service for a specified period unless authorised by the regulator • sharing of the costs of the arbitrator, room hire and similar costs in the proportions determined by the arbitrator (but with the parties to bear their own costs). The PM Act would allow the regulations to make further provision with respect to arbitration of an access dispute, including any matters excluded from arbitration under the PM Act and matters that may be included in an access determination. The PM Act should provide that the reference of an access dispute to arbitration is not be taken to be inconsistent with the duty to negotiate in good faith. The PM Act would also state the parties to an access dispute would be free to agree to another means by which the dispute would be determined. The definition of access dispute would be moved from the PM Regulations to the PM Act.	The PM Regulations would provide for the arbitrator to be given information to understand how the proposed price for the prescribed services has been derived, including the information referred to in relation to recommendation 7.m. The PM Regulation would exclude from arbitration a dispute under an existing access agreement, unless the port user is seeking to add a new service under the agreement. The regulations would allow a port user or the private port operator (with the consent of the port user) to withdraw an access dispute notice and terminate an arbitration. The PM Regulations would allow an access determination to require a private port operator to extend the port subject to: • the extension being 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 being protected • the terms on which the service is to be provided to the port user taking into account the costs and the economic benefits to the parties of the extension. Consequential changes would be made to regulation 13(2). Regulation 13(2)(f) would be amended by removing (f)(i) to (iv) and (vii) to (x) and amending (vi) to refer to arbitration under part 11 of the PM Act and the *Commercial Arbitration (National Uniform Legislation) Act* (NT) (and not just part 5 of this Act). Regulation 13(2)(h) and (i) would be deleted since information provision would be dealt with under the *Commercial Arbitration (National Uniform Legislation) Act* (NT) and the new provisions in the regime dealing with access to financial information.

continued

Ref.	Recommendation	PM Act	PM Regulations
7.s	The commission recommends amending the PM Act to specify the following matters to be taken into account by the arbitrator in the dispute resolution process: the object of part 11 • the access and pricing principles in section 133 • the operator's legitimate business interest and investment in the port or port facilities • costs to the operator of providing the service (including the costs of any necessary modification to, or extension of, a port facility) but not costs associated with losses arising from increased competition in upstream or downstream markets • the interests of all persons holding contracts for use of any relevant port facility • firm and binding contractual obligations of the operator or other persons (or both) already using any relevant port facility • the operational and technical requirements necessary for the safe and reliable provision of the service • the economically efficient operation of any relevant port facility • the benefit to the public from having competitive markets.	A new provision should be included in the PM Act specifying the arbitrator, in making its access determination, must have regard to the matters listed in the recommendation.	No change required.
7.t	The commission recommends amending the PM Act to provide for the commission to take into account the port lease when approving an access policy.	A new subsection would be included in section 127 specifying the matters the regulator may take into account in approving an access policy – see further recommendation at 8.d. One of the matters to be taken into account would be provisions of a port lease applicable to access.	No change required.

continued

Ref.	Recommendation	PM Act	PM Regulations
7.u	The commission recommends amending the PM Act to include an obligation to provide arbitration decisions to the commission.	A provision would be included in the new division proposed in relation to recommendation 7.l requiring the arbitrator to give a copy of an access determination to the regulator within a specified time.	No change required.
7.w	The commission recommends amending the regime to include: • guidance on the definition of 'material instance of non-compliance' that provides for matters to be taken into account including the provision breached, the effect of the breach, where there is a series of breaches, the effect on port users and the timeliness of steps taken to remedy the breach • an express provision for other parties to be able to report to the commission on material instances of non-compliance with an access policy • a power for the commission to investigate third-party reports of material instances of non-compliance with an access policy • a power in section 126 of the PM Act for a court to make enforcement orders for failure to comply with an access policy and failure to negotiate in good faith • a requirement on the Chief Executive Officer of a private port operator or other officer approved by the commission to certify the information it submits to the commission is accurate • a power for the commission to initiate an independent audit of a port operator's compliance with the regime.	Section 130 would be amended to include new subsections dealing with the changes relating to material instances of non-compliance. A new subsection would specify two or more instances of non-compliance may, when taken together, amount to a material instance of non-compliance. A new subsection would specify how to determine whether an instance of non-compliance with an access policy is material, regard may be had to: • the nature and purpose of the relevant provision • the effect of the non-compliance on the private port operator or any port user • if the instance is one of a number of similar instances • if and to what extent the non-compliance was remedied in a timely manner. A new sub-section would provide for a person to notify the regulator of a material instance of non-compliance and the regulator to notify the person making the report if it decides not to investigate or, having investigated, not to take any further action. For investigation, section 131(1)(a) would be amended to include a reference to the new provision in section 130 under which non-compliance can be reported to the regulator and the new provision dealing with compliance audits. For enforcement, section 126(1) would be amended to include a reference to the obligation in section 127 to comply with an access policy and the obligation to negotiate in good faith.	For certification, the PM Regulations would give guidance about what the certification guidelines are intended to contain such as: • the accounting, audit or other standards that must be complied with when preparing the information • the requirement for a statement the information has been prepared in accordance with the standards to be made as a statutory declaration • who may make the statutory declaration.

continued

Ref.	Recommendation	PM Act	PM Regulations
		For certification, a new section would be included allowing for regulations to provide for the certification of information by a director or other officer. For compliance audits, a new provision would be included in the PM Act providing for the regulator to carry out or to require a private port operator or a private pilotage service provider to carry out, regulatory compliance audits. The audits would assess compliance with the access policy, sections 124(1) and 125(1), the provisions relating to the preparation of separate financial accounts and the access and pricing principles. The provision would require the costs of the audit to be borne by the entity concerned. Consequential changes would be made to section 128(1) to allow the regulator to issue guidelines about regulatory compliance audits and the keeping of separate financial accounts. A consequential change would be made to section 128(1A) to refer to sections 124(1), 125(1), 136A and the access and pricing principles.	
7.y	The commission recommends amending the regime to include a process for a private port operator to propose, and have approved by the commission, measures of service and to require a private port operator to report to the commission on performance against those measures of service.	The PM Act would include a new provision allowing regulations to be made specifying the process for the development and publication of measures of service and recording and reporting requirements. The PM Act should specify the measures of service are for guidance only and do not have the force of law.	The PM Regulations would provide for the regulator to initiate this process by giving notice to the private port operator. The private port operator would have time after the notice (for example, six months) to prepare the measures of service for approval. The PM Regulations would require the port operator to publish approved measure of performance on its website and to report against those measures of service to the regulator. The PM Regulations would allow for review of the measures of service, for example at five year intervals.
7.z	The commission recommends the regime should require it to publish an annual report on a port operator's performance against the measures of service.	The PM Act would require the regulator to publish an annual report based on the information provided by the private port operator.	No change required.

continued

Ref.	Recommendation	PM Act	PM Regulations
8.b	The commission recommends amending section 127(2) of the PM Act to include an obligation on a port operator to consult with port users on an initial access policy.	A new subsection 127(1A) would be included requiring the private port operator to consult with port users about its proposal for a draft access policy and give a summary of the comments received during the consultations to the regulator with the draft access policy.	No change required.
8.d	The commission recommends amending the PM Act to allow the commission to take the following matters into consideration when approving a draft access policy: • the matters in section 6(2) of the *Utilities Commission Act* • the object of part 11 • the principle that access to prescribed services should be on reasonable terms • the access and pricing principles specified in section 133 • provisions in a port lease applicable to access to prescribed services • any other matters the commission considers relevant.	A new sub-section would be included in section 127 setting out the matters that the commission must consider when approving a draft access policy. This would replace the approval framework in section 127(3). To ensure an access policy gives effect to the requirement in the PM Regulations and any requirement of the Minister under section 129 (as provided for in section 127(2)), a new subsection should also be provided specifying the regulator must only approve a draft access policy if the regulator is satisfied it meets the requirements of section 127(2). Consequential changes would be made to section 127(11), to delete section 127(11)(b).	No change required.
8.f	The commission recommends amending section 127 of the PM Act to allow the commission to determine the timeframe for approval of a draft access policy.	Section 127(3) would be replaced with a provision requiring the regulator to consider a draft access policy and either approve or refuse to approve it. Where approval is refused, the regulator would give the private port operator a notice explaining why and requiring the port operator to provide an amended draft access policy within the timeframes determined by the regulator.	No change required.
8.j	The commission recommends amending regulation 15 to include an obligation for a private port operator to publish and provide to the commission, the findings of a review of its access policy.	No change required.	A new sub-regulation 15(3) would be included to require the private port operator to publish the findings of the review under sub-regulation (1) and give the regulator a copy of the findings.

continued

Ref.	Recommendation	PM Act	PM Regulations
8.k	The commission recommends amending the PM Act and the PM Regulations to require a private port operator to submit a revised draft access policy for approval by a date specified in the access policy (and each approved revised policy).	Section 127(2) would include a new paragraph (d) requiring an access policy to have a revision date not later than five years after the access policy is approved by the regulator. Section 127(10) would be amended to require the private port operator to submit a revised draft access policy within the 12-month period ending on the revision date.	Regulation 15(1) would be amended to require the private port operator to review its access policy during the period starting 18 months before the revision date and ending 12 months before the revision date. This would leave at least 12 months for submission of the revised draft access policy and be considered and approved by the regulator.
8.l	The commission recommends amending section 127 of the PM Act to ensure an approved access policy remains in place until it is replaced with an approved revised access policy.	Section 127(9) would be amended to ensure, on being approved, an access policy replaces any earlier access policy and remains in effect until a replacement is approved by the regulator.	No change required.
8.n	The commission recommends government consider whether there is any need to review the definition of 'designated port' for the purposes of the regime and stakeholders including port users and the port harbourmaster be consulted as part of that process.	Any proposed changes to be considered by government.	Any proposed changes to be considered by government.
8.o	The commission recommends transitional arrangements be put in place as necessary to provide an appropriate timeframe and process for achieving compliance with changes made to the regime.	Transitional provisions would be included as a schedule to the PM Act, or could be included in the provisions where appropriate. For example, the requirement to obtain the regulator's consent to a lease could apply only to leases granted after the provision comes into effect.	Transitional provisions would be included as a schedule to the regulations, or would be included in the provisions where appropriate.

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