

2023 Review of the Port Access and Pricing Regime – Issues Paper

Submission from the Department of Infrastructure,
Planning and Logistics

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Contact details	Tracey Lines, 08 8936 5678, tracey.lines@nt.gov.au
Approved by	Louise McCormick
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Acronyms	Full form
DIPL	Department of Infrastructure, Planning and Logistics
DPO	Darwin Port Operations
MASDP	Middle Arm Sustainable Development Precinct
NT	Northern Territory
PM Act	<i>Ports Management Act (NT)</i>
PM Regulations	Ports Management Regulations (NT)

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1. Introduction

The Department of Infrastructure, Planning and Logistics (DIPL) makes this submission to the Utilities Commission of the Northern Territory in response to the 2023 Review of the Port Access and Pricing Regime – Issues Paper (the Review).

The Northern Territory Government has affirmed its goal of creating 35,000 new jobs and building a \$40 billion economy in the Territory by 2030, representing an ambitious 4% to 5% annual economic growth. Logistics and supply chains have been identified as a key enabler to support economic and industry growth and development.¹ Port of Darwin is an integral component of the Northern Territory supply chain, being both the Northern Territory's only port connected to the rail network and Australia's closest shipping port to Asia.

This context demonstrates the significance of the issues raised in the Utilities Commission's Review, specifically:

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

The Port of Darwin plays a significant role in the Northern Territory's growth agenda. As such, DIPL considers that the regulatory oversight of access to, and pricing of, prescribed port services is essential. Equally, the efficiency of the prescribed services at the Port of Darwin can be an inhibitor to economic growth due to the increased cost of conducting business. Given the natural monopoly position of the Port of Darwin and the lack of economic competition due to distances to other Australian Ports, Port of Darwin has the potential to negatively affect economic growth if access, pricing and efficiency are cost prohibitive to existing and potential port customers.

2. Relationship to the Port of Darwin

Under the Administration Orders and in relation to the Port of Darwin, DIPL is responsible for:

- Functions of the Regional Harbour Master;
- Managing the Darwin Port Agreement; and
- Working with potential private sector projects to secure investment in the Northern Territory and subsequently economic growth.

¹ Territory Economic Reconstruction Commission: [Territory Economic Reconstruction Commission final report \(nt.gov.au\)](https://www.nt.gov.au/terec/reports/terec-final-report)

3. Priorities

The objective of this DIPL submission to this Review is twofold:

- Ensuring the Port of Darwin operates in a manner which is conducive to trade growth and facilitates development of projects trading internationally seeking to operate within the Northern Territory and its broader catchment area; and
- Capturing the economic growth opportunity which exists due to being Australia's closest shipping port to Asia for the benefit of industry, the economy, the population and communities across the Northern Territory.

Stakeholder perception is essential to trade growth of ports with Port of Darwin no exception. Port stakeholders include shipping lines, port users (such as operating mines), potential port users (such as developing mines) and supply chain partners including stevedores, rail operators and road transport operators.

Stakeholder satisfaction, and quality of service, are a result of a complex interplay of a number of interrelated factors, quality of port infrastructure, availability of services, responsiveness and more. The complexity of these factors demonstrates that monitoring price levels against CPI increases is an incomplete form of regulatory oversight.

A more holistic form of regulatory oversight would include measures of stakeholder perception and satisfaction across a broad range of stakeholders and a broad range of measures.

To be effective, any consideration of costs needs to:

- Consider total costs to port users including potentially hidden or excluded costs such as warehousing and storage, ship loading and unloading, insurance and development costs; and
- Benchmark costs of specific cargoes against competitor and comparison ports.

4. Responses to the Issues Paper

This section addresses specific issues and items raised in the Utilities Commission's Issues Paper.

4.1. Existence of Market Power

The Port of Darwin has a position of substantial market power in the NT and Northern Australia more broadly due to a lack of competition (it enjoys a natural monopoly in the market) and few appropriate substitutes for the services it provides. This market power does not diminish in relation to trade volumes.

The Port of Darwin is a critical component in both supply chains for existing and developing projects across the Northern Territory and also in the growth and expansion of the Northern Territory economy.

4.2. Changes in the ports market

The Middle Arm Sustainable Development Precinct (MASDP) and associated commitment of equity of \$1.5 billion by the Australian Government is a well-developed project with recognition by Infrastructure Australia as nationally significant. MASDP aims to capitalise on the Territory's access to resources and grow value-adding manufacturing jobs that support sustainable economic growth. The precinct is being master planned with an industrial circular ecology approach with a focus on low emission manufacturing including hydrogen, minerals processing, carbon capture and storage and advanced manufacturing. The

\$1.5 billion of equity from the Australian Government will provide common user marine infrastructure including a modular offloading facility, dredging of a shipping channel and a hard stand.

MASDP will not create competition in the industries which rely on Port of Darwin such as containerised freight, motor vehicle imports, live cattle exports, dry bulk export minerals and the cruise ship industry. DIPL strongly asserts that development of MASDP will not reduce the market power of Port of Darwin. Users and potential users of Port of Darwin will not have the ability to substitute access to international markets via MASDP instead of Port of Darwin. Conversely, the development and operation of MASDP will rely on Port of Darwin for import and export of many varied components and commodities.

4.3. Port capacity

Port capacity is much more than a calculation of vessel numbers and wharf utilisation. Capacity is also a factor of storage and warehousing, cranaage, ship loading facilities such as pipelines and / or conveyors, interface between rail and port, crewing and personnel, operational efficiency and more.

Assuming a reduction in trade volumes equates to spare capacity and reduces a port's ability to exercise market power omits the vast evidence base pointing to the need for port productivity and infrastructure investment including the recent Productivity Commission report into Australia's Maritime Logistics System highlighting the need for higher national productivity. Relatively low volumes of trade via Darwin over recent years does not mean existing or potential exporters or importers have the option of a viable alternative or competitor port. Efficiency of cargo handling, and measures such as container dwell time and vessel turnaround time, are examples of measures of port effectiveness and essential to the consideration of berth utilisation and customer service expectations.

Figure 1 in the Issues Paper reflects DIPL's view of total trade volumes handled at Port of Darwin from 2012/13 to 2021/22. To put these volumes into perspective, these trade volumes need to be mapped and benchmarked in comparison to competitor ports including Adelaide, Perth and Esperance and other capital city ports including Brisbane, Sydney and Melbourne.

DIPL has undertaken extensive work forecasting freight demand from developing projects across the Northern Territory. Consolidated demand from these projects require significant increases in freight capacity throughout the supply chain. Similarly the Australian Government's commitment of \$440 million to a network of regional logistics hubs throughout the Northern Territory will increase capacity of the supply chain which will also increase demand for capacity at the Port of Darwin.

Question 1: What changes (recent or future) in the ports sector may substantially affect competition or alter the market power of DPO?

Question 2: What prescribed services (or services that are currently not prescribed) may be affected by these changes and how would it potentially change the need for regulatory oversight?

A total of \$1.9 billion equity investment from the Australian Government will unlock significantly higher volumes of freight reliant on the Port of Darwin. This will have the effect of increasing the market power of DPO and is likely to require continued and potentially more extensive regulatory oversight of access and pricing.

One example is that the equity investment of \$1.5 billion in MASDP will be used in the construction of common user infrastructure (specialist product wharves and modular offloading facilities for manufacturing and dredging of the shipping channel) in the precinct. This construction is in part reliant on materials imported through DPO. This situation not only increases the market power of DPO but also results in public investment subject to DPO market powers.

4.4. Compliance and conduct of DPO

Question 3: Do current reporting requirements give sufficient reassurance and visibility of compliance with the access and pricing regime and visibility?

Given the pending \$1.9 billion equity investment from the Australian Government and the vast number of private sector investments seeking to utilise Darwin Port will unlock significantly higher volumes of freight reliant on the Port of Darwin and potentially have the effect of increasing the market power of DPO, DIPL is of the view that, in line with the Utilities Commission 2018 Ports Access and Pricing Review Final Report, there are several areas in which the regime as established through the PM Act and PM Regulations, will benefit from change.

DIPL is of the view that the amendments to the PM Act and the PM Regulations to ensure the regime is effective, fit for purpose and transparently and efficiently meeting the needs of ports users and its legislative objectives, could include:

- Current arrangements exempting prescribed services under a lease from the regime. All prescribed services whether under a lease or not should be subject to the regime;

The existing negotiate/arbitrate regime currently omits:

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

DIPL is of the view that these are important provisions to be included in the negotiate/arbitrate regime.

Question 4: What changes (recent or future) in the ports sector could mitigate DPO's ability to exercise market power in setting prices for prescribed services?

Port of Darwin is subject to a Pilotage Services Contract which includes a 10 year exclusivity period from the lease commencement date. This period of exclusivity expires within the term relevant to this Review. As pilotage is a prescribed service, this consideration will need to be specifically addressed by the Utilities Commission in the context of exercising market power. Work undertaken by the Utilities Commission will be an important consideration in this decision.

4.5. Costs and benefits of regulation

DIPL asserts that the benefits to protections for port users are of the highest priority, given:

- the extent of market power held by Port of Darwin;
- the significant growth in freight volumes forecast; and
- the number of developing projects across the Northern Territory which highlight the supply chain as the main, or one of the main, risks to the project's success.

To minimise the costs of regulation, and in line with findings of the Utilities Commission 2018 Ports Access and Pricing Review Final Report DIPL considers separate financial accounts for the prescribed services are required for price monitoring regime and section 123 reviews to be transparent, accurate and cost effective.

To further minimise the costs of regulation and increase ease of doing business, DIPL is of the view that increasing the services that are considered "standard" as set out in schedule 1 of the Access Policy will result in a streamlined process for a broader range of use of port facilities at the Port of Darwin, in effect

remedying an identified weakness in the regime². This will increase the range of services subject to standards of reasonable, accepted market practice, rather than individual, bespoke negotiation and limit operational impacts of market power.

The existing services considered “standard” under the Access Policy include:

Wharfage and Berthage

1. The provision of access by vessels to the shipping channels and waters of the Port.
2. The provision of access for vessels to berth at:
 - (a) East Arm Wharf - Berths 1 to 4; and
 - (b) Fort Hill Wharf - East Berth and West Berth.

Equipment and Facilities

3. The provision of access to mobile or moveable loading or unloading equipment owned or operated by the Port Operator but excluding:
 - (a) the rail mounted dry bulk ship loader on East Arm Wharf Berth 2; and
 - (b) the train unloading facility, dumping facility, stockpile areas, dump station, conveyor systems and related equipment and facilities.
4. The provision of access to ablution facilities owned or leased by the Port Operator.

Entry of Persons and Vehicles

5. The provision of access by persons or vehicles to land within the Port on which Facilities are located where access is reasonably necessary in connection with the provision of access to items 1 to 4 above.

Pilotage

6. 6 The provision of pilotage services within the Port

DIPL is of the view that “standard” services should include:

- Use of the rail mounted dry bulk ship loader on East Arm Wharf Berth 2;
- The train unloading facility, dumping facility, stockpile areas, dump station, conveyor systems and related equipment and facilities;
- And any other port operations considered accepted market practice in Australia.

Increasing the breadth of operations considered “standard” would also complement other important aspects of the PM Act including **Section 125: Unfairly differentiating:**

1. **In negotiating arrangements to provide access to any prescribed service, or a change to any such arrangement, a private port operator or private pilotage provider 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.**

DIPL is of the view that Section 125 requires strengthening. In isolation Section 125(1) is important, however in effect when accompanied by the Access Policy is weakened and reduces competition.

² Utilities Commission 2018 Ports Access and Pricing Review Final Report, Item 7.4

Further, **Section 126: Enforcement of obligations** requires review. As it currently stands, enforcing of obligations requiring court processes or arbitration, is financially and time wise costly and acts as a significant disincentive to potential port users and enhances the opportunity for monopolistic behaviour.

Question 5: What major changes (recent or future) in the ports sector may alter the balance between the benefits and costs of the port access and pricing regime?

The significant number of potential port users in stages of development across the Northern Territory significantly alters the balance between the benefits and costs of the port access and pricing regime. Refer to item 2.19 above. Similarly the end of the exclusivity period of the pilotage contract significantly alters the balance between the benefits and costs of the port access and pricing regime. Refer to Question 4 above.

4.6. Compliance with the Access Policy

Question 8: Are there any barriers faced by port users in notifying the Commission of instances of non-compliance? If yes, what are they?

Any potential port user has an imperative to maintain an effective working relationship with negotiating parties. Increased market power also increases barriers to notifying or escalating difficulties in negotiations.

4.7. Sufficiency of information for port users

The extent of the information available is essential, particularly when identifying potentially hidden or excluded costs such as warehousing and storage, ship loading and unloading, insurance and development costs.

In line with findings of the Utilities Commission 2018 Ports Access and Pricing Review Final Report, DIPL considers it would be of significant benefit to industry for DPO to be required to publish pricing tariffs for dry bulk mineral exports at the Port of Darwin. DIPL also notes that the Commission strongly encouraged DPO to voluntarily publish more information for port users about the terms for exporting dry bulk minerals in the 2018 Review but this has not been implemented.

This point further reinforces DIPL's view that increasing the services that are considered "standard" as set out in schedule 1 of the Access Policy will result in a streamlined process for a broader range of use of port facilities at the Port of Darwin, in effect remedying an identified weakness in the regime. Standard services should encompass standard pricing but also standard conditions and requirements such as insurance.

4.8. Access and pricing principles

DIPL notes the Utilities Commission position that an efficiency review is beyond the Commission's powers and the intention to not undertake a full benchmarking study in this review. DIPL would like to explore this further in view of:

- the Utilities Commission assertion that in 2017 Port of Darwin costs were the most expensive amongst comparator ports for motor vehicle imports and cruise ship visits in part due to the relatively high pilotage costs for large vessels;
- Figure 4 of the Issues Paper showing an increase of pilotage from approximately \$6 million per annum in 2017 to approximately \$11 million per annum in 2022 on decreasing freight volumes (Figure 1); and

- The 10 year period of exclusivity of pilotage coming to an end during the term relevant to this review;

DIPL is of the view that a thorough and independent benchmarking review will be required prior to a decision being reached over pilotage operations beyond the exclusivity term.

In Figure 3, the break in series renders the information reported in Figure 3 ineffectual for the 2012/22 year. If revenue from sublease of port land is now not to be included, the revenue from years 2015/16 to 2020/21 is required to be re-calculated or re-reported to demonstrate comparative revenue levels.

In Figure 4, an increase of pilotage from approximately \$6 million per annum in 2017 to approximately \$11 million per annum in 2022 on decreasing freight volumes (Figure 1) is potentially of concern.

4.9. Oversight of the classification of services

Port of Darwin's schedule of port charges as at 1 July 2022 lists the price for bulk minerals as POA despite the Commissions' 2018 Review recommendation for the Port of Darwin to consider voluntarily publishing more information for port users about the terms and prices for exporting dry bulk minerals.

DIPL is of the view that DPO should publish the price for bulk minerals including the specification of what loading method is utilised; e.g. a published rate for export of bulk minerals utilising the dry bulk shiploader and a separate published rate for export of bulk minerals not utilising the dry bulk shiploader or other mechanism, infrastructure or assets.