UTILITIES COMMISSION
OF THE NORTHERN TERRITORY

2023 Review of the Port Access and Pricing Regime

Draft Report

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

May 2023

The Utilities Commission

The Utilities Commission (Commission) is an independent statutory body established by the *Utilities Commission Act 2000* (UC Act) with defined roles and functions for declared (regulated) industries in the Northern Territory including electricity, water supply and sewerage services industries, and ports. For the ports industry, the Commission's powers and functions are set out in section 6 of the UC Act and Part 11 of the *Ports Management Act 2015*.

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Request for submissions

The Commission invites written submissions on this Draft Report by Friday 30 June 2023.

It is preferred submissions are sent electronically to: utilities.commission@nt.gov.au.

All submissions will be made publicly available on the Commission's website (https://utilicom.nt.gov.au/), except where a submission contains confidential or commercially sensitive information provided on a confidential basis and appropriate notice has been given.

The Commission may also exercise its discretion not to publish any submission based on its content such as submissions containing material that is offensive or defamatory.

Enquiries

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Contents

Abbreviations and acronyms

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

Executive summary

The *Ports Management Act 2015* (PM Act) requires the Commission to complete a second review of the Northern Territory's port access and pricing regime by 15 November 2023 (2023 Review). The purpose of the 2023 Review is to determine:

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

In November 2022, the Commission called for submissions on the port access and pricing regime, releasing an Issues Paper to guide stakeholders' responses. Three stakeholders provided submissions, which the Commission has considered in making its preliminary decisions in relation to the regulatory oversight of port access and pricing. This Draft Report sets out the Commission's draft recommendations and associated reasoning, as summarised below.

Need for ongoing regulatory oversight (Chapter 4)

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

Draft recommendation 1: The Commission recommends continuing regulatory oversight of access to, and pricing of, prescribed services provided by the private port operator and private pilotage operator at the Port of Darwin.

Form of regulatory oversight for access and improvements to be made

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

The Commission assessed the adequacy of the current form of regulatory oversight of access based on DPO's conduct and compliance with current requirements, the information available to port users for negotiations, the effectiveness of dispute resolution mechanisms and the costs and benefits of regulatory oversight. No instances of non-compliance have been reported by DPO and the Commission has received no complaints regarding DPO's compliance with regulatory requirements from other sources. The Commission considers changes to the negotiate/arbitrate model following the initial review of the port access and pricing regime in 2018 (2018 Review) have strengthened the negotiation position of port users, but further improvements could be made.

Draft recommendation 2: The Commission recommends continuing the current form of regulatory oversight for access to prescribed services provided by a private port operator. This regime includes a requirement for a private port operator to have in place, and comply with, an access policy and through the access policy, application of a negotiate/arbitrate model.

Improvements to the negotiate/arbitrate framework (Chapter 6)

The Commission considers there are three shortcomings in the negotiate/arbitrate model. First, a gap exists with access seekers and arbitrators potentially unable to obtain information on how prices were calculated or costs and thus, whether the prices offered are reasonable and consistent with the access and pricing principles. Second, while the private port operator is bound by an arbitral award an access seeker can choose not to be bound. In this instance, the Commission considers there should be a process and countervailing protection for the private port operator. Third, an access policy must specify the port operator's intended approach to sharing costs, but as this is not binding on the access seeker an extra step is required to gain agreement from all parties to a cost sharing approach before matters proceed to arbitration. The Commission considers the mechanism for apportioning the costs of arbitration to be specified in the PM Regulations and the access policy may then reference those requirements.

Draft recommendation 3: The Commission recommends amending the PM Regulations to include provisions under which a port user engaged in access negotiations is given financial information that will enable that port user to assess whether prices are consistent with the access and pricing principles.

Draft recommendation 4: The Commission recommends amending the PM Regulations to provide for the arbitrator to be given the financial information required to assess whether prices are consistent with the access and pricing principles.

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

- a prospective port user (access seeker) who chooses not to enter into a contract on the terms of an arbitral award be required to give written notice to the port operator and the Commission within 14 days of the making of the arbitral award
- an access seeker who has declined to be bound by an arbitral award is precluded for a 12 month period from making the same request for access unless the access seeker obtains consent from the port operator or the Commission
- the parties to an arbitration bear their own costs and the costs of the arbitration are apportioned as determined by the arbitrator or, in the absence of an arbitrator's decision, in equal proportions

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

The Commission's recommendations regarding the form of regulatory oversight for pricing were informed by consideration of DPO's conduct and compliance; information gathered through the Commission's regulatory activities; and the costs and benefits of administering the price and performance monitoring framework including more prescriptive regulation. The current form of regulatory oversight – price monitoring – is the least prescriptive form of oversight, but is also not overly costly in terms of administration or compliance. It provides transparency on pricing and allows for movements in prices and trends in revenue to be assessed and for information, including the Commission's assessments, to be provided to the public.

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

Draft recommendation 6: The Commission recommends continuing the current form of regulatory oversight for pricing of prescribed services provided by a private port operator or private pilotage provider, that is, the recommended form of regulatory oversight should continue to be price monitoring.

Draft recommendation 7: The Commission recommends amending the regime to require a private port operator or private pilotage provider to maintain and provide to the Commission financial accounts for

prescribed services as a whole. A private port operator and private pilotage service provider could prepare a single set of accounts when they are within the group of entities. Guidance about the nature of the accounts and supporting information would be provided under the PM Regulations or through guidelines established by the Commission. The financial accounts would be treated as confidential information and not published by the Commission although high level information from the accounts may be published in the Commission's reports. The Commission would use this information to inform its monitoring of prices and its assessment of whether proposed price changes are reasonable, reflect efficient costs and are consistent with the access and pricing principles.

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

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

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

Services under lease

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

Draft recommendation 9a: The Commission recommends amending the PM Regulations to clarify regulation 12(2) does not apply to services provided by a private port operator under a lease, that is, it does not capture the provision of prescribed services by DPO (as sub-lessee).

Draft recommendation 9b: The Commission recommends amendments to the PM Act or PM Regulations to:

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

Carve outs under sections 124 and 125 of the PM Act

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

Draft recommendation 10: The Commission recommends the port access and pricing regime be amended to prevent an access policy permitting carve-outs from the non-hindering or non-discriminatory obligations in sections 124 and 125 of the PM Act.

Oversight of the classification of services

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

Draft recommendation 11a: The Commission recommends amending the port access and pricing regime to give the Commission regulatory oversight, through the access policy approval process, of the classification of services as standard services.

Draft recommendation 11b: The Commission recommends amending the port access and pricing 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 (reference tariffs).

Power to require independent audits

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

Draft recommendation 12: The Commission recommends amending the port access and pricing regime to give the Commission the power to initiate an independent audit of a port operator's or pilotage provider's compliance with the regime, at the operator's or provider's cost, and for the operator or provider to propose and have approved by the Commission the proposed auditor and terms of reference for the audit.

Non-compliance and enforcement

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

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

The Commission recommends the following changes to address these issues:

Draft recommendation 13a: The Commission recommends the port access and pricing regime be amended to include guidance on the definition of 'material instance of non-compliance'.

Draft recommendation 13b: The Commission recommends inclusion in the PM Act of an express provision for parties to be able to report to the Commission material instances of non-compliance with an access policy and a power for the Commission to investigate third-party reports of non-compliance.

Draft recommendation 13c: The Commission recommends amending section 126 of the PM Act to make enforcement orders for the failure to comply with an access policy or failure to negotiate in good faith.

Measures of service

There are no requirements for the private port operator or private pilotage provider to report on standards of services or performance levels for prescribed services. Visibility and monitoring of these is important as a monopoly provider can reduce service quality (through cost reductions) while maintaining prices and thus, increase profits. The Commission's considers a private port operator and a private pilotage provider should propose and report on measures of service, approved by the Commission. To minimise the additional cost and obligations, a private port operator and a private pilotage provider could leverage off existing performance indicators or other tools used internally to monitor and improve business performance.

Draft recommendation 14a: The Commission recommends amending the port access and pricing regime to include a process for a private port operator and a private pilotage provider to propose, and have approved by the Commission, measures of service.

Draft recommendation 14b: The Commission recommends the port access and pricing regime should require the private port operator and private pilotage provider to either:

- report annually to the Commission on performance against those measures, and for the Commission to then publish an annual report based on that information or
- report directly to the public on performance against those measures.

Improvements in the access policy approval process

Despite amendments following the 2018 Review, the Commission still considers there are deficiencies in what it is permitted to take into account in approving a draft access policy. In particular, the Commission is required to approve a draft access policy if it meets the requirements in regulation 13(2) of the PM Regulations and any matter required by the Minister under section 129 of the PM Act (currently there are none). However, matters specified in regulation 13(2) are functional in nature giving rise to a checklist approach to approving an access policy with little discretion for the Commission to take other matters into account. For example, there is no requirement for the Commission to consider implications for economic efficiency and effective competition (as per the objects of Part 11), the access and pricing principles or more broadly matters under section 6(2) of the UC Act including fair market conduct and reliability and quality of services. The Commission makes the following recommendation to broaden the matters to be taken into consideration when approving (or not) a draft access policy:

Draft recommendation 15: The Commission recommends amending the PM Act to take the following matters into consideration when approving a draft access policy:

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

The Commission seeks feedback on its draft recommendations from stakeholders by Friday 30 June 2023. Stakeholders' comments will be considered in the Commission's preparation of its final report for the 2023 Review, which is due to the Minister no later than 15 November 2023.

1 | Introduction

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

Context to the Draft Report

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

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

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

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

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

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

[1] PM Act, section 117.

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

Issues paper

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

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

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

The Issues Paper was open for submissions for a 12 week period ending on 3 February 2023. A total of three submissions were received from the Association of Mining and Exploration Companies (AMEC), DPO and the Department of Infrastructure, Planning and Logistics (DIPL). The submissions are available on the Commission's website https://utilicom.nt.gov.au/.

Structure of this paper

This Draft Report sets out the regulatory framework for prescribed ports in the Northern Territory and the Commission's draft recommendations and reasoning for maintaining or changing the framework including matters raised in the Issues Paper and stakeholders' views on those matters. The Draft Report is arranged as follows:

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

How to make a submission on the Draft Report

All interested parties (stakeholders) are invited to make submissions on the draft recommendations and matters raised in the Draft Report by Friday 30 June 2023. Stakeholders need only respond to matters relevant to their areas of expertise or interest. The Commission encourages stakeholders to include sufficient explanatory detail in their responses.

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

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

Any questions regarding the Draft Report or the review should be directed to the Commission by email to utilities.commission@nt.gov.au.

Confidentiality

In the interests of transparency, the Commission will make all submissions publicly available on its website, with the exclusion of confidential information. Confidential information may include:

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

Submissions must clearly specify any information that a respondent considers confidential and advise the Commission why they would like the information to be treated as confidential. A version of the submission suitable for publication (that is, with any confidential information removed) should also be submitted to the Commission.

The Commission may also exercise its discretion not to publish any submission based on its content such as submissions containing material that is offensive or defamatory.

Timetable for the review

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

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

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

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

2 | Summary of the port access and pricing regime

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

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

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

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

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

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

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

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

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

Further, Part 3 of the PM Regulations:

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

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

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

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

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

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

Other jurisdictions, such as South Australia[4], have sought to certify their ports regulatory regime under Part IIIA of the *Competition and Consumer Act 2010* (Cth), but the Northern Territory Government has not chosen to take this path. The certification process of the National Competition Council assesses the effectiveness of a ports regulatory regime by applying relevant principles from clause 6 of the Competition Principles Agreement. While the Commission undertook an assessment of the port access and pricing regime against these principles in the 2018 Review, it has not done so in the 2023 Review as the government can seek certification, if it wishes to do so.

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

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

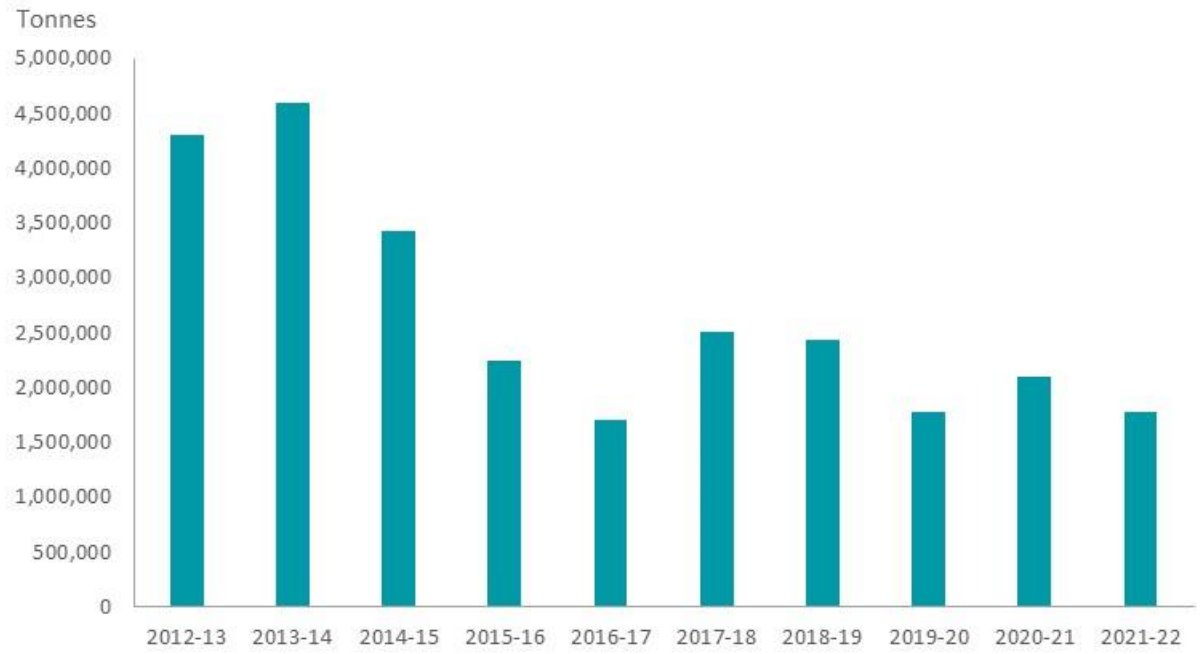
3 | Economic context for the 2023 review

This chapter describes trends in throughput, factors influencing trade and changes in the Northern Territory's ports industry that may affect activity at the Port of Darwin.

Throughput at the Port of Darwin

Prior to lease of the Port of Darwin in 2015, there was a peak in the volume of total trade (exports and imports) in 2013-14, boosted by the construction phase of the Ichthys liquefied natural gas (LNG) project (Figure 1). The annual report of the then port operator (Darwin Port Corporation) indicated that a total of 3,178 trading vessels visited the port, but utilisation of East Arm Wharf was only at 43%.[5]

Figure 1 Port of Darwin, total trade, 2012-13 to 2021-22



Source: Landbridge Darwin Port, Trade & Port Statistics website, total trade, accessed on 18 October 2022 at https://www.darwinport.com.au/trade/total-trade

Since that time, total trade has reduced. Over the period that DPO has operated the Port of Darwin, total trade has ranged between 1.7 million and 2.5 million tonnes per annum. In 2019-20, total trade was affected by a COVID-19 induced downturn and while there was some recovery in throughput in 2020-21, total trade declined again in 2021-22 to about 1.8 million tonnes. This is less than half the level of total trade in 2013-14 of 4.6 million tonnes. While DPO has not published a current utilisation rate for the wharf, at a total of 1,510 trading vessels in 2021-22,[6] there remains substantial spare capacity at the Port of Darwin. This was confirmed in DPO's submission to the Issues Paper for the 2023 Review.

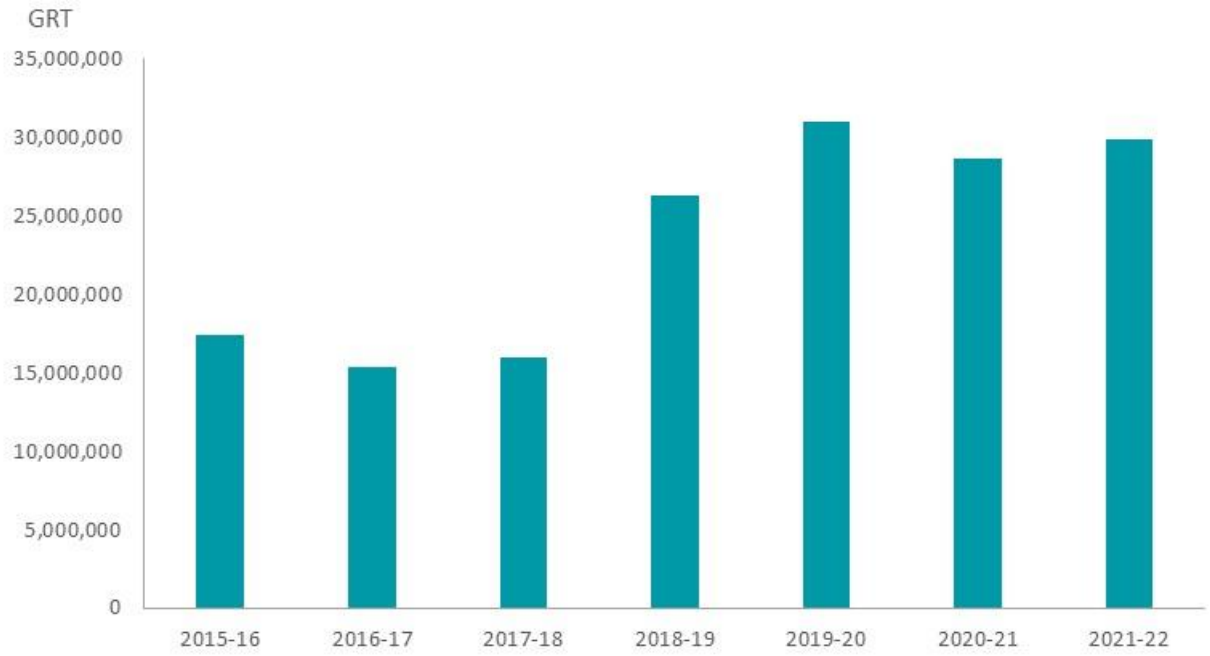
[5] Darwin Port Corporation. Annual Report 2013-14, page 45.

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

Cruise ships typically berth at Fort Hill Wharf and in recent years there has been a substantial downturn in cruise ship visits due to restrictions associated with the COVID-19 pandemic. Only nine cruise ships visited in 2020-21 with this increasing to 36 vessels in 2021-22. Although it is expected there will be a post pandemic recovery, long term trends show cruise ship visits peaking in 2016-17 at 75 vessels, carrying a total of 95,252 passengers and crew.[7] In May 2022, the Northern Territory Government released its Cruise Tourism Strategy 2022-2025, which seeks to facilitate recovery of the sector and identify opportunities to grow cruise tourism through the medium and long term.[8]

There has been a substantial increase in LNG vessel visits, up from 60 in 2017-18 to 166 in 2021-22 as the Ichthys LNG project transitioned to the production phase.[9,10] Consistent with the increase in LNG vessels, gross registered tonnage through the Port of Darwin has risen from 15.9 million tonnes in 2017-18 to 29.9 million tonnes in 2021-22 (Figure 2). LNG vessels utilise pilotage services provided by DPO and incur port dues, but they berth at private facilities at Bladin and Wickham Points servicing the large-scale gas liquefaction terminals based within the Port of Darwin.

Figure 2 Port of Darwin, gross registered tonnage, 2015-16 to 2021-22



Source: Landbridge Darwin Port, Trade & Port Statistics website, total trade, accessed on 18 October 2022 at https://www.darwinport.com.au/trade/total-trade

Revenue trends

Consistent with subdued activity at the Port of Darwin, there has been no sustained growth in revenue from wharfage or berthage over the period from 2015-16 to 2021-22 (Figure 3). Revenue from berthage declined over the period while revenue from wharfage peaked in 2017-18, but has since declined and in 2021-22,

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

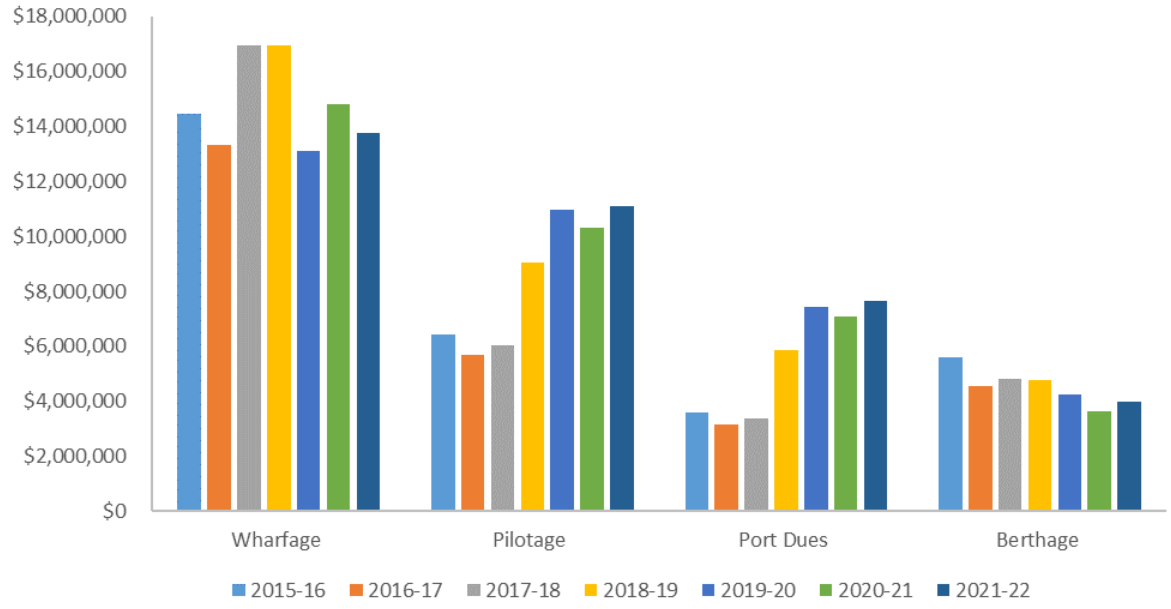
[8] Accessed on 25 May 2022 at https://www.tourismnt.com.au/system/files/uploads/files/2022/cruise-strategy-2022-2025.pdf.

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

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

revenue from wharfage was below that earned in 2015-16. The increase in pilotage and port dues over the period from 2017-18 to 2019-20 reflects the commencement of shipments from the Ichthys LNG processing facility. Growth in pilotage and port dues has since plateaued, consistent with the processing facility reaching full production. Revenue relating to access to port land and the occupation and use of port land (not shown in Figure 3) was minor at less than $1 million in 2021-22.

Figure 3 Revenue by prescribed service, 2015-16 to 2021-22



Future changes impacting on the Northern Territory's ports industry

The Northern Territory Government's 2022-23 Budget indicated a number of mining projects in development or pending final approvals.[11] Similarly, the 2021-2022 Progress and Outlook report by Investment Territory indicates there are 28 projects across a range of sectors worth more than $21 billion anticipated to reach final investment decision in the next three to five years.[12] Submissions from AMEC and DIPL to the Issues Paper for the 2023 Review noted the Northern Territory Government's goal to grow the local economy to $40 billion by 2030 with AMEC stating this would require 10 new operational mines. AMEC advised that to help facilitate this development, port access and pricing would be crucial to ensure production from the mines reach their intended markets. DIPL was of a similar view.

The Commission notes if the proposed projects come to fruition, some may result in an increase in port activity and throughput. Equally, however, the Commission notes some previously proposed projects such as Project Sea Dragon (a prawn farm) and the luxury hotel development at the Darwin Waterfront are no

[11] Northern Territory Government. 2022-23 Budget, Industry Outlook, Map 1. Accessed on 20 May 2022 at https://budget.nt.gov.au/budget-papers/what-is-happening-in-the-territory-economy.

[12] Accessed on 1 March 2023 at https://invest.nt.gov.au/__data/assets/pdf_file/0006/1113792/investment-territory2021-22-progress-and-outlook-report.pdf.

longer progressing as originally planned, and Sun Cable, the company behind the Australia-Asia Power Link Project, entered voluntary administration in early 2023.[13,14,15]

The Commonwealth Government's 2022-23 Budget in May 2022 announced $1.5 billion to build "new port infrastructure such as a wharf, an offloading facility and dredging of the shipping channel".[16] The port infrastructure would be part of a proposed industrial and low emission energy hub at Darwin's Middle Arm. The Commonwealth Government's October 2022-23 Budget reconfirmed its investment in the Middle Arm Sustainable Development Precinct (MASDP), which includes "common use marine infrastructure".[17]

The MASDP project overview[18] indicates the first stage of the project is to obtain necessary environmental approvals with the project timetable indicating a decision is expected in 2025. Subject to approvals, construction of enabling infrastructure is projected to begin in early 2026.

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

Consideration of the MASDP and other major projects

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

The Commission observes that it is not certain that the MASDP project will obtain necessary environmental and other approvals and proposed timelines for construction are dependent on those approvals. The project delivers a development ready industrial precinct, but depends on industry to uptake that land. Therefore, while there may be some impact during construction, the impact on throughput at the Port of Darwin post construction will depend on what industry establishes in the MASDP and how that industry uses the marine infrastructure at the MASDP and prescribed services at the Port of Darwin.

The Commission notes the $1.9 billion investment in the MASDP is of a lesser scale than the Ichthys LNG project, which had an estimated expenditure of $13 billion in the Northern Territory[19] and involved construction of substantive on-shore facilities. Despite this, the Port of Darwin was operating well below capacity. This suggests any uplift in throughput from the MASDP and other projects (even if they are more substantive investments), is likely capable of being accommodated at the Port.

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

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

[15] Sun Cable website. Accessed on 1 March 2023 at https://suncable.energy/sun-cable-enters-voluntary-administration-strong-development-progress-and-portfolio-provides-opportunity-for-refreshed-alignment-between-company-and-investor-objectives/

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

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

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

[19] Northern Territory Government. Budget 2013-14, Northern Territory Economy, page 21. Accessed on 28 February 2023 at https://treasury.nt.gov.au/dtf/financial-management-group/previous-budget-papers.

4 | Need for ongoing regulatory oversight

Draft recommendation 1: The Commission recommends continuing regulatory oversight of access to, and pricing of, prescribed services provided by the private port operator and private pilotage operator at the Port of Darwin.

The Commission's recommendation on whether there is an ongoing need for regulatory oversight of access to and pricing of prescribed services provided by private operators at the Port of Darwin has been informed by its assessment of the existence of market power, constraints on DPO (as the regulated operator of the port and provider of pilotage services) from exercising that power and the costs and benefits of applying the regime. The sections to follow discuss these matters including the Commission's position and reasoning on specific matters.

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

The Commission notes concerns about the lease of the Port of Darwin to a Chinese company continue to be aired in the media and a further national review is to occur.[20] These issues are not relevant to the Commission's review and not a matter of consideration as they do not relate to the extent or exercise of DPO's market power or the need for an access and pricing regulatory regime.

Existence of market power

Background

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

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

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

[20] Gibson J. Darwin Port lease remains under scrutiny as PM's department seeks input from national security agencies. Online ABC news article on 27 January 2023. Accessed on 9 March 2023 at https://www.abc.net.au/news/2023-01-27/darwin-port-lease-review-national-security-agencies-consulted/101879668.

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

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

The Issues Paper for the 2023 Review took the position that the findings from the 2018 Review remained relevant unless there had been changes in the ports market or industry since that time or there were future developments that would substantially change the findings from the 2018 Review.

Submissions

Submissions from DPO and DIPL to the Issues Paper commented on the existence and exercise of market power.

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

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

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

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

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

Commission's position and reasons

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

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

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

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

Evidence of the exercise of market power

Compliance with the access policy and price determination

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

- annual reporting to the Commission on any instances of material non-compliance with DPO's access policy by 30 September each year
- annual reporting on charges and revenue by 30 September each year
- providing notice of changes to or new standard charges to the Commission at least 20 days before the change is to be made and publishing a notice of the proposed change on DPO's website at least 10 days before it is to apply
- consultation with port users on DPO's draft 2022 access policy
- submission of a new draft access policy to the Commission for approval prior to expiry of DPO's existing access policy.

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

Pricing and profits

In terms of pricing, DPO can increase existing prices and establish new pricing structures without seeking Commission approval. It must, however, meet notification timelines, as set out in the Commission's

Prescribed Port Services Price Determination Port of Darwin. As noted above, DPO has provided advice within relevant timeframes.

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

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

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

The Commission takes the position that by specifying price monitoring as the form of price regulation, the Northern Territory Government was satisfied that, at the commencement of the port access and pricing regime, pricing for prescribed services at the Port of Darwin was consistent with the access and pricing principles. As will be discussed in Chapter 7, since the commencement of the lease, DPO's price increases have been in line with the Commission's chosen price benchmark and are comparable to price changes in other Australian ports. The Commission notes, however, that submissions to the Issues Paper expressed concern about the potential for prices to be cost prohibitive to existing and potential port users.

DPO does not maintain audited separate regulatory accounts for prescribed services nor is it obliged under the port access and pricing regime to provide financial information (other than information on revenue) to the Commission. However, at the request of the Commission (in this and the 2018 Review), DPO provided annual financial accounts covering all of its activities (regulated and unregulated) for each financial year from 2015-16 to 2021-22. The information provided does not indicate DPO is generating a profit in excess of that commensurate with the regulatory and commercial risks involved.

Conduct of the port operator and pilotage provider

The Commission has received no complaints regarding non-compliance by DPO. The Commission notes, however, that port users may be reluctant to raise issues if they are concerned it may jeopardise their relationship or negotiating position with DPO, particularly if they have no other option than to use DPO's services. Notwithstanding this, port users are encouraged to approach the Commission if they have concerns regarding potential non-compliance with the port access and pricing regime.

Commission's position and reasons

The Commission considers that while DPO has market power, there is no evidence to suggest DPO is improperly using that power. This is likely to reflect, at least in part, the constraints imposed on DPO under the port access and pricing regime and DPO's compliance with those requirements. The Commission notes concerns by some port users about the level of DPO's prices, but in the absence of information on the underlying cost base and the efficiency of pricing, high prices in and of themselves do not evidence market power being exercised. The concerns do, however, reinforce the need for continued regulatory oversight and are relevant to the form of price regulation that should be applied.

Costs and benefits of regulation

Background

The benefits of access and price regulation are likely to be highest when there is a monopoly service provider as any excess profits will be paid for by users and not reduced by competition. A monopoly

provider's access or pricing behaviour may also limit investment and innovation in upstream or downstream industries, thereby impacting on the growth and productivity of the Northern Territory's economy. For example, a company may not invest in new equipment to reduce costs or increase output if the benefits of the investment could be captured by the monopoly provider increasing its charges.[22]

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

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

Submissions

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

DPO considers current reporting requirements appropriate and does not consider there is any justification for more onerous reporting requirements, which would increase DPO's compliance costs.

Commission's position and reasons

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

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

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

5 | Continue the current form of access regulation

Draft recommendation 2: The Commission recommends continuing the current form of regulatory oversight for access to prescribed services provided by a private port operator. This regime includes a requirement for a private port operator to have in place, and comply with, an access policy and through the access policy, application of a negotiate/arbitrate model.

The Commission's recommendation of whether the form of regulatory oversight of access to prescribed services provided at the Port of Darwin should be changed was informed by assessment of DPO's conduct and compliance with current regulatory requirements, the sufficiency of information for port users for negotiations, the effectiveness of dispute resolution mechanisms and the costs and benefits of the current form of regulatory oversight. The sections to follow discuss these matters including relevant input from stakeholders responding to the Issues Paper for the 2023 Review and the Commission's position and reasoning on specific matters.

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

Current form of regulatory oversight of access

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

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

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

DPO's conduct and compliance with its access policy

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

Stakeholders did not identify any enhancements that needed to be made to the access and pricing regime to ensure DPO complies with its access policy and reports appropriately to the Commission. There were,

however, responses to the Commission's questions regarding the absence of a legislative definition of materiality and non-compliance, and this is discussed further under Chapter 8.

Sufficiency of information for negotiations

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

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

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

Submissions

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

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

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

Commission's position and reasons

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

there are shortcomings in the access policy, access seekers are encouraged to bring the issue to the Commission's attention.

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

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

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

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

Effectiveness of dispute resolution mechanisms

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

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

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

Regulation 13(f) also requires the access policy to set out the powers and duties of the arbitrator, matters which the arbitrator must take into account and disclosure limitations relating to arbitration outcomes. The access policy must include an obligation on the private port operator to provide a copy of the arbitrator's decision to the Commission. The access policy must also provide for the decision of the arbitrator to be treated as an award under the *Commercial Arbitration (National Uniform Legislation) Act 2011* (CA Act), making the decision binding on the private port operator.

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

Submissions

DIPL noted potential port users have an imperative to maintain an effective working relationship with DPO. DIPL suggested a potential increase in DPO's market power, due to increased demand for the services at the Port of Darwin from developing projects, may increase the barriers to notifying or escalating matters when there are difficulties in negotiations. Further, DIPL considers enforcement provisions in the access regulatory framework to be weak. The negotiate/arbitrate framework provides for mediation and arbitration and section 126 of the PM Act provides for a court to make orders when a private port operator or private pilotage provider is (or proposes to) engaging in conduct that prevents or hinders access or unfairly differentiates between port users. DIPL observed enforcing obligations through court processes or arbitration is costly in terms of expense and time and acts as a significant disincentive to potential port users and enhances the opportunity for monopolistic behaviour.

Commission's position and reasons

Beyond the requirement to provide a copy of an arbitrator's decision, there are no reporting requirements that give the Commission visibility on negotiations that have gone to either mediation/conciliation or arbitration. This means there is no information on whether disagreements have arisen between DPO and port users and whether the regime's dispute resolution provisions are facilitating negotiations or resolution where a dispute does arise. The Commission urges affected port users to bring any concerns to its attention.

The Commission considers DIPL's feedback points to a weaknesses of the current form of access regulation with port users wishing to maintain relationships and the cost and time of taking matters to court or arbitration creating potential barriers. While a more prescriptive form of regulatory oversight may reduce or eliminate these barriers, the evidence before the Commission does not warrant a recommendation of more stringent oversight. The Commission notes, however, that recommendations for improvement to the regulatory framework in Chapters 6 and 8 may reduce the likelihood of matters arising that could lead to disputes and associated court action or arbitration.

Costs and benefits of access regulation

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

6 | Recommendations for improvements to the negotiate/arbitrate framework

Draft recommendation 3: The Commission recommends amending the PM Regulations to include provisions under which a port user engaged in access negotiations is given financial information that will enable that port user to assess whether prices are consistent with the access and pricing principles.

Draft recommendation 4: The Commission recommends amending the PM Regulations to provide for the arbitrator to be given the financial information required to assess whether prices are consistent with the access and pricing principles.

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

- a prospective port user (access seeker) who chooses not to enter into a contract on the terms of an arbitral award be required to give written notice to the port operator and the Commission within 14 days of the making of the arbitral award
- an access seeker who has declined to be bound by an arbitral award is precluded for a 12 month period from making the same request for access unless the access seeker obtains consent from the port operator or the Commission
- the parties to an arbitration bear their own costs and the costs of the arbitration are apportioned as determined by the arbitrator or, in the absence of an arbitrator's decision, in equal proportions.

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

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

The following recommendations (in brief) were not adopted:

- the provision of financial information to enable an access seeker to assess whether prices are consistent with the access and pricing principles
- broader application of the CA Act rather than just Part 5, provisions relating to access by the arbitrator to financial information, a constraint in repeat access requests where an access determination was declined, arbitration cost apportionment and matters allowable in and enforcement of an access determination.

Parties to negotiations and arbitration need to have confidence in the processes and the ability of those processes to produce outcomes that are commercially viable, consistent and fair. The Commission notes the amendments adopted have strengthened the negotiate/arbitration model even though there has not been broader application of the CA Act as the Commission recommended.

The following sections revisit the two outstanding recommendations relating to strengthening the negotiate/arbitrate model. The Issues Paper for the 2023 Review asked stakeholders whether they had any further feedback and comments on the outstanding recommendations from the 2018 Review and how that would affect the Commission's previous recommendations for change. Where stakeholders made comments that relate to the two outstanding recommendations, these are included in the discussion to follow.

Provision of financial information to support negotiations and arbitration

Despite the improvements to the negotiate/arbitrate framework following the 2018 Review, the Commission considers the information advantage still remains skewed toward the private port operator as there are no specific requirements to provide financial information to access seekers and arbitrators. The Commission notes the PM Regulations were amended to include the requirement for an access policy to contain a commitment that the private port operator will (on request) give information on the availability of a prescribed service and the terms and conditions of access if that information is reasonably required by the access seeker to make an access request (regulation 13(2)(ab)). The amendment does not, however, refer to the provision of information on costs or the calculation of prices, which the Commission considers would support effective and well-informed negotiations.

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

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

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

The Commission considers there continues to be a gap with access seekers and arbitrators potentially unable to obtain information on how prices were calculated or how prices compare to costs and as a result, whether the prices offered are reasonable and consistent with the access and pricing principles. This is pertinent given stakeholder feedback indicates concern that DPO's pricing may be unduly high or inefficient (as will be discussed in Chapter 7). The ability to request financial information in relation to an access request may improve transparency and allay stakeholders' concerns about a private port operator's (or pilotage provider's) the price setting behaviour.

Process and outcomes from arbitration

The Commission remains of the view that it is a weakness of the ports access regime that the arbitration process is not contained within the PM Act or PM Regulations. Rather, regulation 13(2)(f) requires the arbitration process to be set out by the private port operator in its access policy. This creates the risk that threat of arbitration is weakened and the access policy either does not sufficiently deal with matters or matters are constructed in a way that is more favourable to the port operator. Furthermore, since the access policy is only binding on the port operator, there is uncertainty regarding the enforceability of matters such as the attribution of costs and decisions by the arbitrator.

A stronger approach would be to amend the PM Act (or PM Regulations) to provide for a party to an access dispute to refer the dispute to arbitration under the CA Act (in its entirety, not just Part 5). This would be supplemented by other provisions in the PM Act or PM Regulations covering procedural matters where an approach specific to the port access and pricing regime is desired, for example, appointment of the arbitrator, the provision of information and matters to be taken into account in making an arbitral award.

Enforcement of access determinations

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

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

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

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

Costs of arbitration

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

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

7 | Recommendations for improvements to price regulation

Draft recommendation 6: The Commission recommends continuing the current form of regulatory oversight for pricing of prescribed services provided by a private port operator or private pilotage provider, that is, the recommended form of regulatory oversight should continue to be price monitoring.

Draft recommendation 7: The Commission recommends amending the regime to require a private port operator or private pilotage provider to maintain and provide to the Commission financial accounts for prescribed services as a whole. A private port operator and private pilotage service provider could prepare a single set of accounts when they are within the group of entities. Guidance about the nature of the accounts and supporting information would be provided under the PM Regulations or through guidelines established by the Commission. The financial accounts would be treated as confidential information and not published by the Commission although high level information from the accounts may be published in the Commission's reports. The Commission would use this information to inform its monitoring of prices and its assessment of whether proposed price changes are reasonable, reflect efficient costs and are consistent with the access and pricing principles.

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

This chapter begins with a description of the current regulatory framework then addresses the matters considered by the Commission in making its recommendations. It includes discussion of stakeholder responses to questions in the Issues Paper for the 2023 Review and the Commission's decisions and reasoning on specific matters.

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

Current form of regulatory oversight for pricing

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

- notify the Commission of changes in standard charges for prescribed services including providing reasoning for the change and in the case of new charges, further explanatory information
- publish standard charges and changes in those charges and
- annual reporting which may include the requirement to provide information on any fixed charge or other agreements[23] negotiated during the reporting year.

For the Port of Darwin, the Commission monitors the change in prices for prescribed services using the annual change in the national consumer price index (CPI) as the benchmark.[24] In assessing the change, the Commission also considers other information including advice from DPO on differences between the change

[23] As allowed for under section 110 of the PM Act and regulation 18 of the PM Regulations.

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

in prices and change in national CPI. Each year since 2019, the Commission has published a price monitoring report providing information on trends in standard charges and revenue. Information from these reports is reproduced in subsequent sections of this chapter.

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

The access and pricing principles also state the access pricing regime should provide incentives to reduce costs or otherwise improve productivity. However, as price monitoring is specified as the form of regulatory oversight for pricing[25], there is no ability for the Commission to apply incentives to achieve these ends nor does price monitoring require DPO to demonstrate what measures it takes to reduce costs or improve productivity.

DPO's compliance with the price determination

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

Analysis of price movements, revenue and negotiated agreements

Price changes

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

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

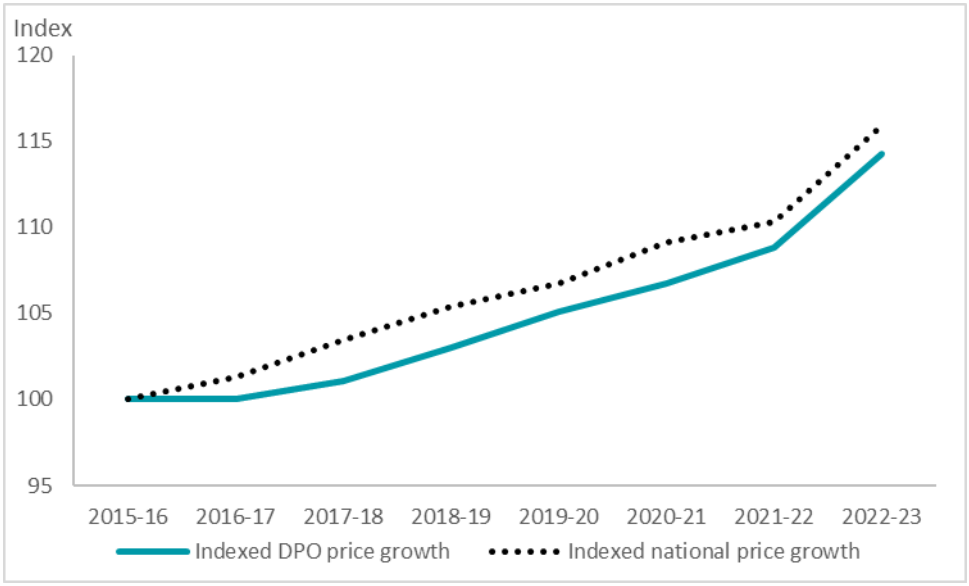
Year	DPO price increase	National CPI increase	Difference
	%	%	ppts[1]
2016-17	Unchanged	1.3	-1.3
2017-18	1.1	2.1	-1.0
2018-19	1.9	1.9	0.0
2019-20	2.0	1.3	0.7
2020-21	1.6	2.2	-0.6
2021-22	2.0	1.1	0.9
2022-23	5.0	5.1	-0.1

[1] ppts – percentage points

[25] PM Regulations, regulation 16(2)(a)

Apart from the absence of a price increase in 2016-17, DPO's price increases have generally been within a similar band as national CPI. That is, DPO's annual price increases have been within 1.1% and 2.2%, except in 2022-23 when they rose to around 5%. Between 2016-17 and 2022-23, DPO's prices increased by 14.3% compared with a 15.9% increase in national CPI resulting in DPO's prices following a similar trajectory as CPI, but from a lower base due to the absence of a change in prices between 2015-16 and 2016-17 (Error! Not a valid bookmark self-reference.).

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



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

Price movements at interstate ports

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

Table 3 Price increases at Port of Darwin and interstate ports

Port	Price increase 2016-17 to 2022-23
	%
Port of Darwin	14.3
Flinders Port (South Australia)	16.7 – 29.3
Fremantle Port (Western Australia)	13.2 – 17.1
Townsville Port (Queensland)	13.0
Port of Melbourne (Victoria)	Limited to CPI – 14.5

Source: Commission staff calculations based on published tariffs

The Commission will not undertake a full price benchmarking study in this review, noting there is now more information on DPO's pricing patterns and these can be compared to price increases at other ports. Table 3 shows the increase in prices at the Port of Darwin falls within the range of price increases at other interstate ports. This suggests that if a benchmarking exercise were to be conducted, the results would be largely similar. That is, total port call costs at the Port of Darwin would not be the most expensive among comparator ports.

The Commission notes a major limitation of a price benchmarking study is that it provides no information on relative costs and return on investment. It would be simplistic to assume that high prices at a port reflect avoidable inefficiencies or excess profits. Variation in costs will arise from differences in each port's characteristics (e.g., location and infrastructure), volume of throughput (scale of operations) and the range and types of cargo and associated handling equipment.[26]

Negotiated agreements

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

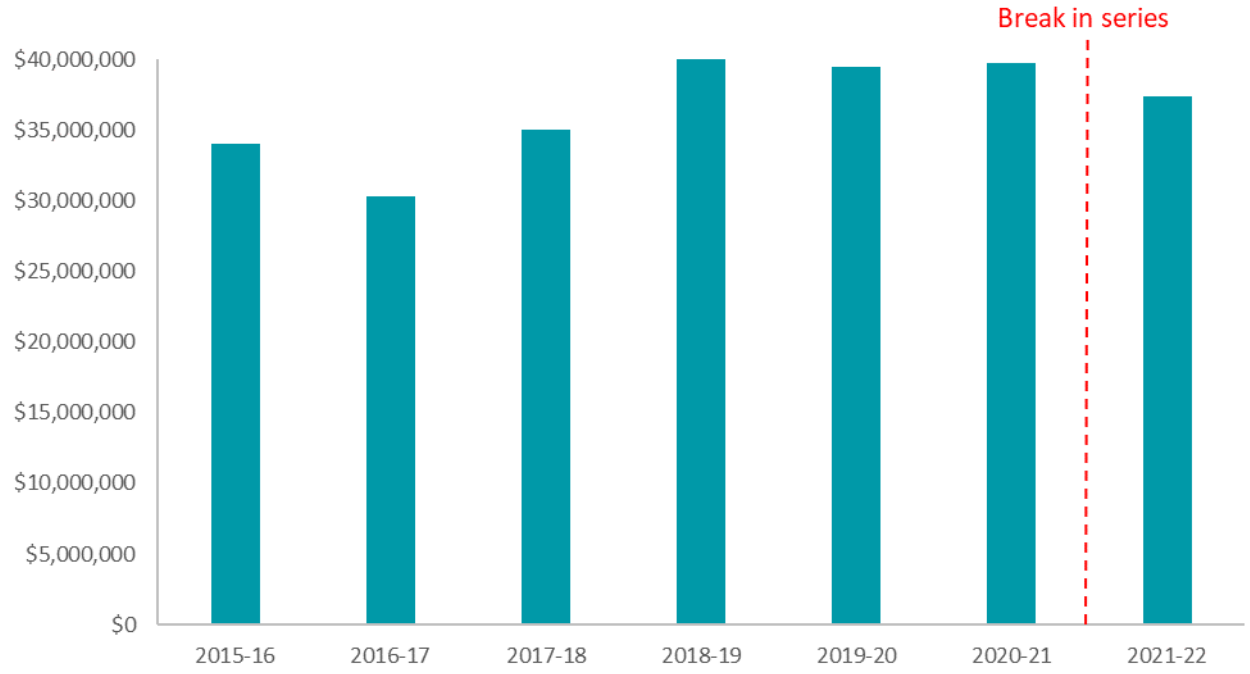
Revenue

Figure 5 shows total revenue reported by DPO over the period from 2015-16 to 2021-22. Total revenue for prescribed services was $37.4 million in 2021-22. While this appears lower than revenue in the three preceding years, the data is not directly comparable. In 2021-22, DPO reclassified and removed revenue generated from the sublease of port land as this is not a prescribed service. Revenue in prior years includes revenue from this source (where received).

Trends in revenue from major prescribed service sources (wharfage, pilotage, port dues and berthage) are shown in Chapter 4. As discussed in that chapter, revenue from pilotage and port dues grew during 2018-19 and 2019-20 and has now plateaued. Combined, they accounted for half of DPO's revenue from prescribed services in 2021-22 (Table 4). The growth in revenue from these sources has, however, been offset by declines in revenue from other sources, leading to little growth in total revenue over the period from 2018-19 to 2021-22 regardless of whether or not revenue from the sublease of port land is included.

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

Figure 5 Total revenue for prescribed services, 2015-16 to 2021-22



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

Table 4 Contribution to total revenue by revenue source, 2021-22

Prescribed service	Proportion of revenue 2021-22
Wharfage	37%
Pilotage	30%
Port dues	20%
Berthage	11%
Land related services	2%

Submissions

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

AMEC pointed to comments from the (then) Chair of the Australian Competition and Consumer Commission in 2016. The Chair's comments were critical of the use of price monitoring considering "it does not amount to any form of regulation" and will not constrain monopoly pricing at ports.[27] As noted in the previous chapter, AMEC also supported the Commission's recommendation regarding the provision of financial information to access seekers to enable assessment of whether prices are consistent with the access and pricing principles.

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

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

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

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

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

DIPL was critical of the information in Figure 3 of the Issues Paper on total revenue (Figure 5 in this report), considering the revenue from 2015-16 to 2022-21 requires recalculation or re-reporting to demonstrate comparative revenue levels. DIPL also expressed concern that there was an increase in pilotage revenue between 2017 and 2022 (refer Figure 3 in this report) on decreasing freight volumes (refer Figure 1 on total trade in this report).

The Commission's position and reasoning

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

As noted by DIPL, the Commission considers there should be greater regulatory oversight of what is classified as "standard services". Further commentary, including feedback from DIPL and the Commission's position, are discussed in Chapter 8 in the section discussing the oversight of the classification of services.

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

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

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

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

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

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

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

DIPL's reference to "hidden" charges appears to refer to charges for non-prescribed services. Where such charges are tied to charging for prescribed services (that is, they cannot be avoided) and are unreasonable in their nature and extent, the Commission would welcome advice from stakeholders (as part of the review process or more directly) evidencing such charges and the barriers they create for access seekers and port users.

Provision of financial accounts

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

$25.2 million, but net profit after tax was not provided. DPO's more recent Year in Review publications (2019-20 and 2020-21) do not provide any financial information.

The port access and pricing regime does not provide for the Commission to receive financial records specifically relating to prescribed services. Instead, the Commission must rely on general information gathering powers under the UC Act.[28] What the Commission receives in response to its request depends on how DPO structures its financial accounting arrangements. To date, financial information received by the Commission is not specific to prescribed services. The Commission's analysis of revenue in the financial reports indicates a substantive proportion of DPO's total revenue comes from non-prescribed services and other sources, meaning the available financial information, particularly in relation to costs and profits, is of limited value.

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

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

Noting, however, that the establishment and provision of separate financial accounts for each prescribed service could be costly for a private port operator, the Commission's recommendation in the 2018 Review was for the keeping of separate financial accounts for prescribed services as a whole with the following to be provided to the Commission each year:

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

These would be prepared using normal and accepted Australian accounting standards. The private port operator or private pilotage provider would be required to identify which accounting standard(s) it relied on in preparing the accounts and the accounts would ideally be audited, or alternatively, could include a responsibility statement signed by the Chief Executive Officer (CEO). If a port operator and pilotage provider are within the same group of entities (as is the case with DPO), only a single set of accounts would need to be kept and provided to the Commission. As trust arrangements are in place with regards to the provision of prescribed services at the Port of Darwin, the accounts would need to extend to all of the entities (including trusts) providing or relevant to the provision of prescribed services.

To clarify, the Commission did not intend for the accounts to calculate regulatory asset values for the assets used to provide prescribed services. Nor would costs be required to be allocated to each separate prescribed service although the Commission notes this is less than ideal given earlier commentary on the efficiency of pricing. Notwithstanding this, information on the whole of DPO's operations relating to prescribed services would enable the Commission to draw some conclusions on the risk of potential misuse of market power. However, the Commission considers it unusual for DPO not to have some separation in its systems and accounting to enable information to be provided to management on the relative performance

[28] UC Act, section 25.

on the different types of services it provides. As such, there could potentially be more detailed financial information that could be provided for regulatory purposes.

The Commission notes the absence of financial reporting has also been identified as a weakness of the South Australian ports access regime. Similar to the Commission, the Essential Services Commission of South Australia's final report for stage one of its review of the ports access regime and price determination has recommended the current price monitoring scheme be complemented by a financial performance monitoring scheme.[29] The proposed financial monitoring is in respect of prescribed services and excludes financial information on non-prescribed services.

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

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

Other forms of price regulation

AMEC raised concerns to the Commission on the transparency and efficiency of prices at the Port of Darwin in the 2018 Review and again as part of the Commission's consultation on the 2022-25 Prescribed Port Services Price Determination Port of Darwin and DPO's draft access policy 2022. AMEC represents mineral explorers, emerging miners, producers and other businesses, with 34 member companies actively working in the Northern Territory in 2022.

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

AMEC has also advocated for the introduction of an efficiency dividend model. An efficiency dividend is an annual funding reduction used by governments including the Northern Territory Government[30], to reduce agency budgets in anticipation of efficiencies being found. According to the Commonwealth Department of Finance, an efficiency dividend provides a financial incentive to continually seek new or more efficient ways of undertaking ongoing government business and demonstrates public service efficiencies resulting from improvements in management and administrative practices. AMEC considers the efficiency dividend to be a simple, predictable and administratively effective tool, which would incentivise DPO to pursue more efficient operations.

Submissions

The Issues Paper for the 2023 Review noted the form of price regulation would need to be changed by the Northern Territory Government in order to implement AMEC's suggestions. The Issues Paper asked stakeholders what would be the benefits and costs of applying an efficiency dividend or other tools to

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

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

incentivise DPO to undertake efficient investments and operation of prescribed services. Responses to the question were received from AMEC and DPO.

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

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

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

The Commission's position and reasoning

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

Maximum duration of price determinations

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

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

Submissions

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

The Commission's position and reasoning

The Commission considers enabling price determinations to be in effect for a longer period to be a low risk option for reducing the regulatory administrative burden. This would offset in some part, the increased burden associated with expanding the price monitoring framework to include performance monitoring.

8 | Other changes to the regulatory framework

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

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

Pilotage services

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

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

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

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

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

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

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

Services under lease

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

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

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

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

Draft recommendation 9a: The Commission recommends amending the PM Regulations to clarify regulation 12(2) does not apply to services provided by a private port operator under a lease, that is, it does not capture the provision of prescribed services by DPO (as sub-lessee).

Draft recommendation 9b: The Commission recommends amendments to the PM Act or PM Regulations to:

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

Carve outs under sections 124 and 125 of the PM Act

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

These restrictions are particularly important where a vertically integrated provider (e.g., a port operator who also has businesses in up or downstream markets) may provide access to its own businesses or associated businesses on more favourable terms. The Commission notes the lease for the Port of Darwin contains a

restriction on DPO from becoming an integrated operator without the consent of government. This provides an additional constraint and thus protection for port users. The Commission notes conditions in the port lease are outside the regime regulated by the Commission and are matters for the Northern Territory Government to enforce.

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

The Commission notes DPO has included a clause in its access policy (clause 1.3) that expressly states nothing in the access policy is intended to require or permit DPO to engage in conduct in breach of sections 124(1) or 125(1) of the PM Act. This means the issue is not presently a problem in relation to DPO's access policy, but the vulnerability remains in the absence of modifications to the port access and pricing regime to ensure there is an appropriate level of regulatory oversight before carve outs can be included in an access policy.

The Commission considers this weakness should be remedied to ensure there is not the potential for an access policy to negate intended protections for port users. This could be achieved through amendments to section 125 and 124 or, alternatively, requiring the Commission to have regard to those sections when approving a draft access policy.

Draft recommendation 10: The Commission recommends the port access and pricing regime be amended to prevent an access policy permitting carve-outs from the non-hindering or non-discriminatory obligations in sections 124 and 125 of the PM Act.

Oversight of the classification of services

Under the current port access and pricing regime, DPO determines what constitutes a standard prescribed service, and the terms and standard charges applying to those services. Where a port user requires a non-standard service including prescribed services to which standard terms do not apply or where a variation to the standard terms or pricing for a prescribed service is required, DPO and the port user negotiate the terms and price for those services and enter into a negotiated agreement.

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

The Commission also proposed it be given the ability to determine a third category of services, termed reference services, which are a sub-set of non-standard services where indicative terms (reference terms) would be published in the access policy. The price determination could also require indicative prices (reference tariffs) to be published for those services. This recommendation stemmed from a lack of clarity and certainty about prices and terms of access for exporting dry bulk minerals from the Port of Darwin. Instead, prospective users must request indicative pricing from DPO (and this is still the case under DPO's current Schedule of Port Charges[31]).

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

Submissions

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

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

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

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

The Commission's position and reasoning

The mining industry accounted for 19.9% of the Northern Territory's gross state product in 2020-21 with mineral production likely to be boosted by a number of new projects.[32] Given the importance of the industry, there would be benefit in providing mineral producers with more certainty about access and pricing for port services, where feasible.

This could be facilitated through the recommendations from the 2018 Review that the Commission be given regulatory oversight, through the access policy approval process, of the classification of services as standard services and for the regime to give the Commission the power to approve reference services proposed by a private port operator and for the port operator to publish indicative tariffs for those services. The publication of reference tariffs for bulk dry minerals is not unique with other ports issuing such tariffs (the final report for the 2018 Review pointed to reference tariffs provided by the Port of Townsville). The Commission notes, however, that reference tariffs do not remove the need for access seekers to negotiate actual prices (and access).

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

While granting the Commission greater oversight may result in more information for prospective port users, it will increase the regulatory burden. In particular, the Commission does not have detailed expertise or knowledge of the port industry and is likely to require independent expertise to assist in its decisions on what (or whether) particular services or equipment (as exampled by DIPL's suggested inclusions) should be standard or non-standard services. Further, there may be valid reasons for exclusion of particular services or equipment from standard services and increased regulatory oversight should not be considered to equate to classification of more services as standard (or application of standard terms and conditions to more services).

[32] Northern Territory Government. Budget 2022 Industry Outlook, Mining and manufacturing. Accessed 10 June 2022 at https://budget.nt.gov.au/industry-outlook/mining-and-manufacturing.

Draft recommendation 11a: The Commission recommends amending the port access and pricing regime to give the Commission regulatory oversight, through the access policy approval process, of the classification of services as standard services.

Draft recommendation 11b: The Commission recommends amending the port access and pricing 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 (reference tariffs).

Port lease and other binding obligations

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

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

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

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

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

Power to require independent audits

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

Accordingly, the Commission considers the port access and pricing regime should be amended to include provisions which enable the Commission to require a private port operator or private pilotage provider to

engage an independent auditor, at the operator's or provider's cost, to audit the operator's or provider's compliance with the requirements of the PM Act and PM Regulations in relation to access and pricing. Additionally, provision should be made for the Commission to approve the proposed auditor (to ensure they are independent) and terms of reference for the audit (ensure its scope is appropriate).

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

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

The Commission notes that it considers the current risk of non-compliance by DPO to be low and therefore, at the moment, the Commission is unlikely to have any reason to request DPO to undertake an independent audit. However, without such a power, the Commission considers there is a major deficiency in the compliance provisions of the port access and pricing regime.

Draft recommendation 12: The Commission recommends amending the port access and pricing regime to give the Commission the power to initiate an independent audit of a port operator's or pilotage provider's compliance with the regime, at the operator's or provider's cost, and for the operator or provider to propose and have approved by the Commission the proposed auditor and terms of reference for the audit.

Non-compliance and enforcement

Definition of material instance of non-compliance

Section 130 of the PM Act, requires a private port operator to report to the Commission, by 30 September each year, on any material instance of non-compliance with the port operator's access policy in the immediately preceding financial year. Section 121 requires the Commission, in turn, to make an annual report to the Minister, by 1 December each year, on any material instances of non-compliance. This includes material non-compliance against the price determination. The Minister must table the Commission's report within seven sitting days[33], and once tabled, the report is also published on the Commission's website.

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

- affect a significant number of port users; or
- have an adverse financial impact on one or more port users; or
- adversely affect access to prescribed services by one or more port users; or

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

- significantly compromise, or be likely to significantly compromise, the private port operator's ability to provide one or more prescribed services.

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

The Commission notes its definition may capture non-compliance that some may see as less significant, but it is the Commission's view that any non-compliance is of concern. The Commission's definition is, however, a guide and if contested, the PM Act would prevail with the terms remaining open to interpretation by a court. Accordingly, the Commission remains of the view that this uncertainty should be resolved through inclusion in legislation of a definition for a 'material instance of non-compliance'.

Reporting of material non-compliance

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

The Issues Paper for the 2023 Review asked whether there are any barriers faced by port users in notifying the Commission of instances of non-compliance. AMEC responded to this question stating further clarification was needed to remove any potential barriers that port users feel may stop them from notifying the Commission. Noting there may be a reluctance by some parties to come forward to the Commission with complaints (as discussed in Chapter 4), the Commission considers it is important there is clear authority under legislation for third parties to report potential non-compliance to the Commission.

Penalties for non-compliance

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

DPO's submission advised although there was not a specific penalty, a breach of its access policy or the PM Act would be a breach of its lease, which may have adverse consequences, as well as the threat of more stringent regulation. The Commission notes while there may be consequences associated with a breach of the lease, the penalties and their application lacks transparency and independent and impartial adjudication.

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

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

Draft recommendation 13a: The Commission recommends the port access and pricing regime be amended to include guidance on the definition of 'material instance of non-compliance'.

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

Draft recommendation 13b: The Commission recommends inclusion in the PM Act of an express provision for parties to be able to report to the Commission material instances of non-compliance with an access policy and a power for the Commission to investigate third-party reports of non-compliance.

Draft recommendation 13c: The Commission recommends amending section 126 of the PM Act to make enforcement orders for the failure to comply with an access policy or failure to negotiate in good faith.

Measures of service

There remains a gap in the port access and pricing regime with no requirements for the private port operator or private pilotage provider to report on standards of services or performance levels for prescribed services. This is of concern as a monopoly provider can reduce service quality (through cost reductions) while maintaining prices thereby increasing profits. The Commission's final report for the 2018 Review exampled performance reporting requirements such as service quality indicators reported to the Essential Services Commission (Victoria) by the Port of Melbourne Corporation and regulated operators under the Wheat Terminal Code being required to publish performance indicators, which are monitored by the Australian Competition and Consumer Commission.

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

An alternative would be for DPO to voluntarily report on an agreed set of performance indicators, with such a model being implemented in 2020 in Victoria in relation to the landside container supply chain at the Port of Melbourne[34]. The Commission notes DPO publishes trade and port statistics on its website and an annual A Year in Review report, but the statistics provided are focussed on volumetric throughput rather than service performance. The website and publication could, however, provide an avenue for providing information on customer satisfaction and performance related measures. This would provide transparency without the need for additional regulation. It also aligns with views expressed in DIPL's submission that stakeholder perception and satisfaction and quality of service are valuable to measure (in addition to monitoring prices) as these are essential for the growth of trade at a port.

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

Draft recommendation 14a: The Commission recommends amending the port access and pricing regime to include a process for a private port operator and a private pilotage provider to propose, and have approved by the Commission, measures of service.

Draft recommendation 14b: The Commission recommends the port access and pricing regime should require the private port operator and private pilotage provider to either:

- report annually to the Commission on performance against those measures, and for the Commission to then publish an annual report based on that information or
- report directly to the public on performance against those measures.

Improvements to the access policy approval process

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

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

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

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

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

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

Draft recommendation 15: The Commission recommends amending the PM Act to take the following matters into consideration when approving a draft access policy:

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

Appendix A: About the Port of Darwin

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

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

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

Figure 6 Port of Darwin

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

Appendix B: Recommended changes and outcomes from the 2018 Review

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

Table 5 Recommended changes and outcomes from the 2018 Review

Issue and associated recommendations	Outcome
Prescribed services provided under lease	
6h. The Commission recommends amending the PM Regulations to clarify regulation 12(2) does not apply to services provided by a private port operator under a lease. 6i. The Commission recommends amendments to: • the PM Act to require the Commission's approval of any lease granted by a private port operator resulting in services that would otherwise be prescribed services being provided by a person who is not a private port operator • the PM Regulations to set out the approval framework and to allow approval to be subject to conditions determined by the Commission.	No amendments to PM Act or PM Regulations address these matters
Private pilotage provider	
6j. The Commission recommends applying sections 124 and 125 of the PM Act and the price monitoring regime to prescribed services provided by a private pilotage service provider. This should cover: • the application of the UC Act in the same manner it applies to a private port operator • section 123 reviews by the Commission and the powers of the minister to change the form of price regulation under the regime • the making of a price determination by the Commission and the obligations to provide information about charges to the Commission in accordance with the price determination • obligations to maintain separate financial accounts • related provisions dealing with audit and information to be provided to the Commission.	Implemented through changes to the PM Act and PM Regulations, noting the recommendation to require separate financial accounts for prescribed services (7f) has not been implemented
Carve outs under sections 124 and 125 of PM Act	
7d. The Commission recommends sections 124 and 125 of the PM Act be amended to prevent carve outs through a port operator's access policy that reduce the protections offered by these sections unless approved by the Commission in the access policy approval process. An alternative is to provide for the Commission to have regard to sections 124 and 125 when approving a draft access policy of a private port operator.	No amendments to PM Act or PM Regulations address this matter

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

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

• a power for the Commission to investigate third-party reports of material instances of non-compliance with an access policy • a power in section 126 of the PM Act for a court to make enforcement orders for failure to comply with an access policy and failure to negotiate in good faith • a requirement on the CEO of a private port operator or other officer approved by the Commission to certify the information it submits to the Commission is accurate • a power for the Commission to initiate an independent audit of a port operator's compliance with the regime	
Measures of service 7y. The Commission recommends amending the regime to include a process for a private port operator to propose, and have approved by the Commission, measures of service and to require a private port operator to report to the Commission on performance against those measures of service. 7z. The Commission recommends the regime should require it to publish an annual report on a port operator's performance against the measures of service.	No amendments to PM Act or PM Regulations address these matters
Improvements to access policy approval process 8b. The Commission recommends amending section 127(2) of the PM Act to include an obligation on a port operator to consult with port users on an initial access policy. 8d. The Commission recommends amending the PM Act to allow the Commission to take the following matters into consideration when approving a draft access policy: • the matters in section 6(2) of the UC Act • the object of part 11 • the principle that access to prescribed services should be on reasonable terms • the access and pricing principles specified in section 133 • provisions in a port lease applicable to access to prescribed services • any other matters the Commission considers relevant 8f. The Commission recommends amending section 127 of the PM Act to allow the Commission to determine the approval time for the draft access policy. 8j. The Commission recommends amending regulation 15 to include an obligation for a port operator to publish and provide to the Commission, the findings of a review of its access policy. 8k. The Commission recommends amending the PM Act and the PM Regulations to require a private port operator to submit a revised draft access policy for approval by a date specified in the access policy (and each approved revised policy). 8l. The Commission recommends amending section 127 to provide an approved access policy remains in place until it is replaced with an approved revised access policy.	Amendments to PM Act give effect to 8b No amendments to PM Act or PM Regulations address 8d Amendments to PM Act address 8f by allowing for a 60 day extension of the approval time for a draft access policy No amendments to PM Act or PM Regulations address 8j Amendments to PM Act address 8k by requiring submission of new draft access policy before expiry of current access policy Amendments to PM Act give effect to 8l

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