



**LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY**

**Port of Darwin Select Committee**

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# **PORT OF DARWIN LEASE MODEL**

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## Chair's Preface

The Port of Darwin is critical infrastructure for the Northern Territory. It is a major conduit for our goods and fuel and the primary means by which our agricultural and mining products get to market. As the Territory grows, the capacity of the port will also need to grow. The efficiency of the port affects us all, in the prices we pay for goods and the competitiveness of our exports. To serve the Territory through efficient operation and ready capacity for developing markets, the port needs money to develop its infrastructure and management able to deliver efficient services and prepare the port for developing opportunities.

The Port of Darwin Select Committee has examined the Government's proposal to achieve this objective through leasing the port. This follows practice world-wide and throughout Australia where governments have transferred ports to private operators to promote trade and development. However, ports perform both public and private functions, and always require managing both public and private interest to get the best outcome. It was apparent from the Committee's visits to a number of ports that each port is different, serving different markets, having a different geography and having a different economic environment. There are also many ways of managing different aspects of a port, which is typified by the Port of Fremantle, which has some berths owned and operated by the Port Authority, some berths privately owned and operated, and various multi-party arrangements for others. There is no single best way to structure ports, but ownership, management and regulation must suit the local circumstances.

In looking at enhancing the lease model for the Port of Darwin, the first priorities of the Committee were safety and the environment. The Port manages large volumes of dangerous goods and moves very large pieces of equipment. This is inherently dangerous work, so safe management is paramount. The Committee has made recommendation to improve consultation on and enforcement of port safety plans.

The second major theme for the Committee was economic regulation. The Port of Darwin has an effective monopoly on a range of services, so protecting against monopoly pricing and ensuring fair access to its services is essential. Recent evaluations of Australia's ports have noted the importance of promoting effective competition in port services, and the long term economic harm that can arise from privatisation arrangements that limit competition. Even companies interested in bidding for the port highlighted the need to control monopoly pricing and ensure access. Port regulation is still a developing art in Australia. The 'light touch' preferred by port operators has not always benefitted users, and the ACCC has concluded that price monitoring does not provide an effective constraint on monopoly pricing. Accordingly the Ports Management Bill includes a strong pricing and access regime, which will need to be adequately implemented.

One point of concern to the Committee was that this regulatory regime only applied to the port operator. Third party service providers, such as the owner of a bulk loader, can also have an effective monopoly over critical infrastructure for a business. The

Committee would therefore like to see the pricing and access regulation extended to third party operators.

Another point of concern raised by witnesses and port studies was the anti-competitive potential of vertical integration. The Committee therefore recommends that the port operator can only be issued with a stevedoring licence if the independent regulator certifies that this will not harm competition, and that the Government consider any other limitations that may be required on the port operator owning other upstream or downstream businesses.

Consultation is an area that requires further work. There are many users of the port who will be affected by the proposed changes and it is important that the Government speaks to them to ensure that it has adequately considered the implications of the changes and to enable businesses to have increased understanding of what is proposed so that they can plan accordingly.

A key element of the Government's proposal is finding a private partner with a compatible vision for the development of the port. A clear risk to such an approach is maintaining consistency of vision over the 99 years of the lease. The lease terms are where the Government can require that particular services be provided to a required standard. It is therefore vital that there is adequate consultation and development of the lease terms regarding the potential for future transfers of the lease and minimum standards for services. An agreement that needs to last up to 99 years requires expert drafting and rigorous independent review rather than optimism.

The Committee also made recommendations regarding ensuring the fair treatment of workers and having appropriate control and review of foreign investment.

The overall theme of the Committees findings was that in considering a lease for 99 years, it is essential that long-term thinking guides the Government's decisions. While there is a clear immediate benefit in getting a higher price for leasing the port, this must not come at the expense of long-term economic gains.

The Committee would like to thank those who made submissions to the inquiry and appeared before it to give evidence. It also thanks the ports that welcomed it and explained their operations. I would also like to thank my fellow Committee Members who, despite having a range of perspectives and working within a very tight timeframe, worked cooperatively to identify the key issues with the proposed leasing of the Port of Darwin and made constructive recommendations on how it could be enhanced.



**Mr Nathan Barrett MLA**

**Chair**

## Committee Members

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	<b>Parliamentary Position:</b>	Deputy Chairman of Committees
	<b>Committee Membership</b>	
	<b>Standing:</b>	Public Accounts, Estimates & Government Owned Corporations Scrutiny, House, Legal & Constitutional Affairs, Subordinate Legislation & Publications
	<b>Select:</b>	Port of Darwin, Fuel Price Disclosure Bill Scrutiny, 'Ice'
	<b>Sessional:</b>	Northern Territory's Energy Future
	<b>Chair:</b>	Port of Darwin, Legal & Constitutional Affairs, Subordinate Legislation & Publications, 'Ice'
	<b>Mrs Lia FINOCCHIARO MLA</b> Member for Drysdale	
	<b>Party:</b>	Country Liberals
	<b>Parliamentary Position:</b>	Government Whip
	<b>Committee Membership</b>	
	<b>Standing:</b>	Legal & Constitutional Affairs, Subordinate Legislation & Publications, Public Accounts, Estimates & Government Owned Corporations Scrutiny, House, Privileges
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<b>Deputy Chair:</b>	Port of Darwin	
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	<b>Mr Gerry WOOD MLA</b> Member for Nelson	
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## **Acknowledgments**

The Committee acknowledges the individuals and organisations that provided written submissions or oral evidence and attended public hearings. The Committee also acknowledges the work of the Parliamentary Library Service for their research assistance.



## Acronyms and Abbreviations

ACBPS	Australian Customs and Border Protection Service
ACCC	Australian Competition and Consumer Commission
ADB	Asian Development Bank
BOT	Build, Operate, Transfer
BOOT	Build, Own, Operate, Transfer
CCNT	Chamber of Commerce Northern Territory
COAG	Council of Australian Governments
Commission	Utilities Commission of the Northern Territory
DPC	Darwin Port Corporation
ESCOSA	Essential Services Commission of SA
GTE	Government Trading Enterprise
IA	Infrastructure Australia
IMF	International Monetary Fund
MUA	Maritime Union of Australia
NTC	National Transport Commission
NTUC	Northern Territory Utilities Commission
NTLEA	Northern Territory Livestock Exporters Association
OECD	Organisation for Economic Co-Operation and Development
PPI	Private Participation in Infrastructure
Regulator	Utilities Commission of the Northern Territory
Steering Committee	Port of Darwin Project Steering Committee
UNCTAD	United Nations Conference on Trade and Development

## Terms of Reference

The Legislative Assembly resolved on 18 February 2015 that:

1. A Select Committee on the Port of Darwin be appointed.
2. The Committee shall inquire into and report on the Port of Darwin lease model proposed in the Port of Darwin Bill 2014 (serial 111) and recommend options to enhance the model to ensure that the chosen partner:
  - a. has a vision for growth and development of the port which is aligned to that of the NT Government;
  - b. is required to charge realistic and competitive pricing that promotes business and economic development; and
  - c. has work practices and processes which represent international best practice in the areas of safety, environmental and operational efficiency.
3. In consideration of these matters, the Committee should:
  - a. consider the case for bringing private sector funding to develop the Port;
  - b. consider best practice models for maintaining positive government/private sector partnering in lease arrangements;
  - c. consider existing Northern Territory public/private partnerships;
  - d. balance the commercial drivers for a private operator against NT Government objectives from a long-term lease to the private sector;
  - e. consider the structure, duration and timing of proposed lease agreements, including how the lease terms can be structured to provide the necessary certainty to any potential operator while retaining the Government's ability to consider the operator's performance; and
  - f. consider mechanisms for the NT Government to receive ongoing financial returns over the duration of the lease while continuing to motivate the private sector partner to continue to invest in and grow business through the Port.
4. The Committee's membership shall comprise Mr Barrett, Mrs Lia Finocchiaro, Mr Gunner and Mr Wood, and Mr Barrett shall be the Chair.
5. The Committee may elect a Deputy Chair of the Committee, who may act as the Chair when the Chair is absent from a meeting or there is no Chair of the Committee.
6. A quorum of the Committee shall be two members of the Committee.
7. The Committee is to report by 27 April 2015.
8. The provisions of this resolution, insofar as they are inconsistent with the Standing Orders, have effect notwithstanding anything contained in the Standing Orders.

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## Recommendations

### Recommendation 1

The Committee recommends that the Ports Management Bill be amended to require the port authority to consult with all persons directly affected by port operations in the preparation of its port safety plans.

### Recommendation 2

The Committee recommends that the Ports Management Bill be amended to include offences for failing to comply with a port safety plan and that the maximum penalties for these offences be no less than those for failure to comply with a work safety duty under the *Work Health and Safety (National Uniform Legislation) Act*.

### Recommendation 3

The Committee recommends that the Ports Management Bill be amended so that port safety plans also cover risks reasonably likely to cause serious damage to the environment.

### Recommendation 4

The Committee recommends that:

- a) the Government remain vigilant against monopoly pricing and ensure the adequate enforcement of the access and pricing provisions of the Ports Management Bill, including ongoing consultation with port users regarding the adequacy of the regulations made under the Bill; and
- b) the Ports Management Bill be amended to require the Regulator to report annually to the Assembly on compliance with the Bill's access and pricing principles.

### Recommendation 5

The Committee recommends that:

- a) the Ports Management Bill be amended to apply its access and pricing provisions to prescribed services provided by third party operators; and
- b) the Government give further consideration to how best to ensure fair pricing and access behaviour by third party operators at ports.

### Recommendation 6

The Committee recommends that the Ports Management Bill be amended to provide an alternative mechanism to taking legal action for resolving access and pricing disputes.

### Recommendation 7

The Committee recommends that:

- a) the Ports Management Bill be amended so that the Minister may not issue or renew a stevedoring licence to a port operator or a related entity of a port operator unless the Regulator certifies that to do so will not lessen competition in upstream and downstream markets; and
- b) the Government consider other limitations on a port operator and its related entities owning businesses that may reduce competition in upstream and downstream markets.

### **Recommendation 8**

The Committee recommends that, prior to entering any lease arrangements, the Government implement a community information and stakeholder consultation strategy to:

- a) identify further improvements to the leasing proposal, including:
  - i) what parts of the harbour should be included or excluded from the lease; and
  - ii) how competition could be improved; and
- b) communicate what is being proposed so affected businesses can plan accordingly.

### **Recommendation 9**

The Committee recommends that terms be included in any lease of the port that protect the Government's ability to deny consent to any future transfer of the lease to a lessee that does not share the Government's vision for the development of the port.

### **Recommendation 10**

The Committee recommends that, prior to entering any lease agreement, the Government consult with port users to identify any minimum service requirements or development needs that, in the public interest, should be set in the lease of the port.

### **Recommendation 11**

The Committee recommends that any proposed lease be subject to rigorous independent, highly-qualified expert review in addition to being drafted by highly-qualified experts.

### **Recommendation 12**

The Committee recommends that the Ports Management Bill be amended to require public reporting of the general terms and ongoing performance of port operating agreements, subject to any requirements for commercial confidentiality.

### **Recommendation 13**

The Committee recommends that port workers approaching retirement be given options other than continuing under their enterprise agreement with any new port operator in the case where circumstances would create a material disadvantage to their retirement planning.

**Recommendation 14**

The Committee recommends that the Assembly not amend the requirement in the Port of Darwin Bill that a lease for the port not exceed 99 years.

**Recommendation 15**

The Committee recommends that in the case of foreign investment in a lease over the Port of Darwin:

- a) a component of the lease be kept in the control of an Australian entity; and
- b) the Government consult with the Foreign Investment Review Board and the Department of Defence regarding security or strategic risks that a proposed partner may present.

**Recommendation 16**

The Committee recommends that the Government maintains priority on maximising the long-term economic benefits for the Northern Territory when making any decisions around the terms or timing of any lease for the Port of Darwin.

**Recommendation 17**

The Committee recommends that the headings of clauses 41 and 42 of the Ports Management Bill be amended to more accurately reflect the provisions of the clauses.

**Recommendation 18**

The Committee recommends that the Government provides a formal response to the Committee's recommendations by the June 2015 sittings of the Assembly.

# 1 Introduction

## Establishment of the Committee

- 1.1 On 27 November 2014, the Ports Management Bill 2014 (Serial 110) and the Port of Darwin Bill 2014 (Serial 111) were introduced in the Legislative Assembly. In moving that the bills be read a second time, the Chief Minister, Hon Adam Giles MLA, noted that:

The Northern Territory will not achieve its stated goals of driving economic and social development without unlocking its vast potential by investing in key enabling and economic infrastructure. However, the Northern Territory is geographically large, with a small and dispersed population base. We therefore have limited ability to fund our infrastructure needs from our own resources. Private investment and partnership is critical to delivering the long-term infrastructure requirements of the Northern Territory.<sup>1</sup>

- 1.2 The Chief Minister further noted that the Port of Darwin was operating at approximately 43% capacity. Given the anticipated growth in naval vessel visits, an increase in Darwin based oil and gas industries, expansion in the livestock trade following the recent commissioning of AACo's Livingstone abattoir, and the changing dynamics of the Northern Territory's economy, it was anticipated that the port will reach full capacity (which is 65%) within the next two years.<sup>2</sup>

- 1.3 The Port of Darwin Bill aims to facilitate the long-term lease of the port to a private operator for a term no greater than 99 years, with freehold title of port land retained by the Government. The Ports Management Bill provides the regulatory framework for the management and control of all designated ports within the Northern Territory by amalgamating relevant provisions of the existing *Darwin Port Corporation Act* and the *Marine Act*. As noted by the Chief Minister:

Together these bills deliver on the Government's commitment to implement an improved regime for designated ports in the Northern Territory, and to facilitate a commercially efficient Port of Darwin which will expand and grow in line with the Northern Territory economy.<sup>3</sup>

- 1.4 This inquiry considers the extent to which the lease model proposed in the Port of Darwin Bill exemplifies best practice in government/private sector partnering and identifies options regarding the structure, duration and timing of proposed

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<sup>1</sup> Hon Adam Giles, MLA, (Chief Minister), Ports Management Bill (Serial 110), Port of Darwin Bill (Serial 111), Second Reading Speech, Parliamentary Record No. 16, 27 November 2014, viewed 18 February 2015, <http://notes.nt.gov.au/lant/hansard/hansard12.nsf/WebFullTextTranscript/D00F2288D508C53269257DD400151CD7?opendocument>

<sup>2</sup> Hon Adam Giles, MLA, (Chief Minister), *Motion: Establishment of a Select Committee on the Port of Darwin*, Hansard, Full Text Transcript, 18 February 2015, viewed 19 February 2015, <http://notes.nt.gov.au/lant/hansard/hansardd.nsf/WebFullTextTranscript/C18ED3F9146C78A669257DF00041B528?opendocument>

<sup>3</sup> Hon Adam Giles, MLA, (Chief Minister), Ports Management Bill (Serial 110), Port of Darwin Bill (Serial 111), Second Reading Speech

lease agreements that have the capacity to enhance the model. In doing so, it necessarily considers the appropriateness of associated regulatory provisions as detailed in the Ports Management Bill.

### ***Conduct of the inquiry***

- 1.5 At its first meeting on 18 February 2015, the Committee called for submissions to be received by 6 March 2015. The call for submissions was advertised on the Assembly's website and in the NT News. The Committee also directly contacted a number of key stakeholders to advise them of the call for submissions.
- 1.6 The Committee received six submissions, listed at Appendix 1. As noted in Appendix 2, over the course of the inquiry the Committee held a private briefing with Flagstaff Partners and Minter Ellison Lawyers; conducted site visits to the ports of Brisbane, Adelaide, Portland, Albany, Geraldton, Fremantle and Darwin; and held two public hearings in Darwin with a total of 11 organisations appearing.

## 2 The Need for Change

### Global context

2.1 In today's liberalised trading economy, the impetus for port reform in both developing and industrialised countries is being driven by the following underlying factors:

- the need to restructure port operations to deal with external factors that affect port viability, including national competition for global markets, changes in port and transport technology, and increased competition among ports;
- the acknowledged financial and operational benefits of private participation in infrastructure development and service delivery; and
- the diversification and globalization of investors and operators in the port industry.<sup>4</sup>

**Table 1: Matrix of Reform Objectives and Associated Strategies<sup>5</sup>**

Contractual Agreements Objectives	Improve Operational Efficiency	Accelerate Traffic Growth	Attract Private Investment	Reduce Operating Subsidies	Reduce Government Deficits	Reduce Downsize Government	Depoliticise Labor and Management	Promote Public Ownership
Franchises	**	***	.	.	**	**	.	.
Subcontract Labor and Management Contracts	***	.	.	**		**	**	
Equipment Leasing	**	**	**	.			.	
Capital Leases	**	**	**	**	**	**	**	
Open Competition	***	**	**	**		**	***	.
Wholly-owned Subsidiaries	.			**		.	**	
Concessions	**	***	***	***	**	***	***	.
Long-term Leases	**	***	**	***	**	**	***	.
Sale of Major Assets	**	.	.	.	***	.	***	
Joint Ventures	**	**	**	**		.	**	.
Minority Equity Partners	**	.	**				**	.
Special Purpose Companies	**		**	**			**	.
Port Privatization	***	**	***	***	***			
Unrestricted Private Ports	.	***	***			**	.	**
Publicly-traded Stock Company	**	**	***	**	***	**	***	***

\*\*\* = Direct and Potentially Significant Impact; \*\* = Direct Impact; . = Indirect Impact

2.2 While specific reform objectives for individual ports will necessarily differ according to considerations such as location, size, import/export potential etc.,

<sup>4</sup> Holman Fenwick Willan, *Global Investment in Ports and Terminals*, Holman Fenwick Willan LLP, London, 2011, p. 2; World Bank, *Framework for Port Reform: Module 1 Port Reform Toolkit, Second Edition*, World Bank, Washington DC, 20017, p. 5

<sup>5</sup> Asian Development Bank, *Developing Best Practices for Promoting Private Sector Investment in Infrastructure: Ports*, Asian Development Bank, Manilla, 2000, p. 35



Table 1 provides an overview of the most frequently cited reasons for pursuing port reform and the range of strategies that can be employed to achieve such.

## Port infrastructure

2.3 Given that “more than 90 percent of the world’s trade in volume – and about 50 to 70 percent of its value – is carried by sea”<sup>6</sup>, ports and related land-side logistics play a crucial role in the advancement of local and national economies by facilitating intermodal transportation of freight and the efficiency of global supply chains.<sup>7</sup> As noted by Infrastructure Australia:

As a maritime nation, Australia’s ports are an important gateway for goods and for our defence. Consequently, ports and associated infrastructure are of the utmost economic and social importance to Australia.<sup>8</sup>

2.4 Over the past decades, the maritime industry has undergone a significant degree of technological innovation in response to the development of an increasingly integrated global economy and the emergence of more free trade agreements. In turn, this has increased the demand for ports that can accommodate the latest generation vessels, and terminals that have the capacity and facilities to cater for the associated growth in volume of multi-purpose, container, liquid and solid bulk cargo.<sup>9</sup> With global GDP anticipated to double between 2010 and 2030, the Organisation for Economic Co-operation and Development (OECD) notes that “maritime container traffic could increase by more than 6% p.a. [and] port handling of maritime containers worldwide could quadruple by 2030.”<sup>10</sup>

2.5 As highlighted in the United Nations Conference on Trade and Development’s (UNCTAD) 2014 *Review of Maritime Transport*, one of the major challenges facing ports today is the need to ‘future proof’ infrastructure, operations and logistics chains to maintain their competitiveness and “cater for the needs of future developments not yet conceived.”<sup>11</sup> Moreover, as the OECD points out, ensuring that the necessary infrastructure is available at the time required is

<sup>6</sup> C. Bert Kruck and Marc Juhel, ‘Ever Evolving Seaports: From containers to concessions, changes ahead’, in *Handshake: Air and Sea PPP’s*, International Finance Corporation quarterly journal on public-private partnerships, Issue 6, July 2012, p. 10

<sup>7</sup> Geoffrey Aerts., et.al., ‘Public-private Partnerships for the Provision of Port Infrastructure: An Explorative Multi-Actor Perspective on Critical Success Factors’, in *the Asian Journal of Shipping and Logistics*, vol. 30, No. 3, December 2014, p. 275

<sup>8</sup> Infrastructure Australia, *National Ports Strategy*, Australian Government, Sydney, NSW, 2011, p. 6

<sup>9</sup> See for example, James, J. Corbett, and James Winebrake, ‘The impacts of Globalisation on International Maritime Transport Activity: Past trends and future perspectives’, paper presented to the Organisation for Economic Co-operation and Development and International Transport Forum’s *Global Forum on Transport and Environment in a Globalising World*, Mexico, 10-12 November 2008, pp. 4-10; Beatrice Tovar, et.al., ‘Organization and regulation of the port industry: Europe and Spain’, in P. Cota-Millán., (ed.), *Essays on Microeconomics and Industrial Organization, Second Edition*, Springer Verlag, Berlin, Heidelberg, 2004, p.189; and Holman Fenwick Willan, *Global Investment in Ports and Terminals*, Holman Fenwick Willan LLP, London, 2011, pp. 2-8

<sup>10</sup> Organisation for Economic Cooperation and Development (OECD), *Strategic Transport Infrastructure Needs to 2030: Main Findings*, OECD, Paris, 2011, p. 9

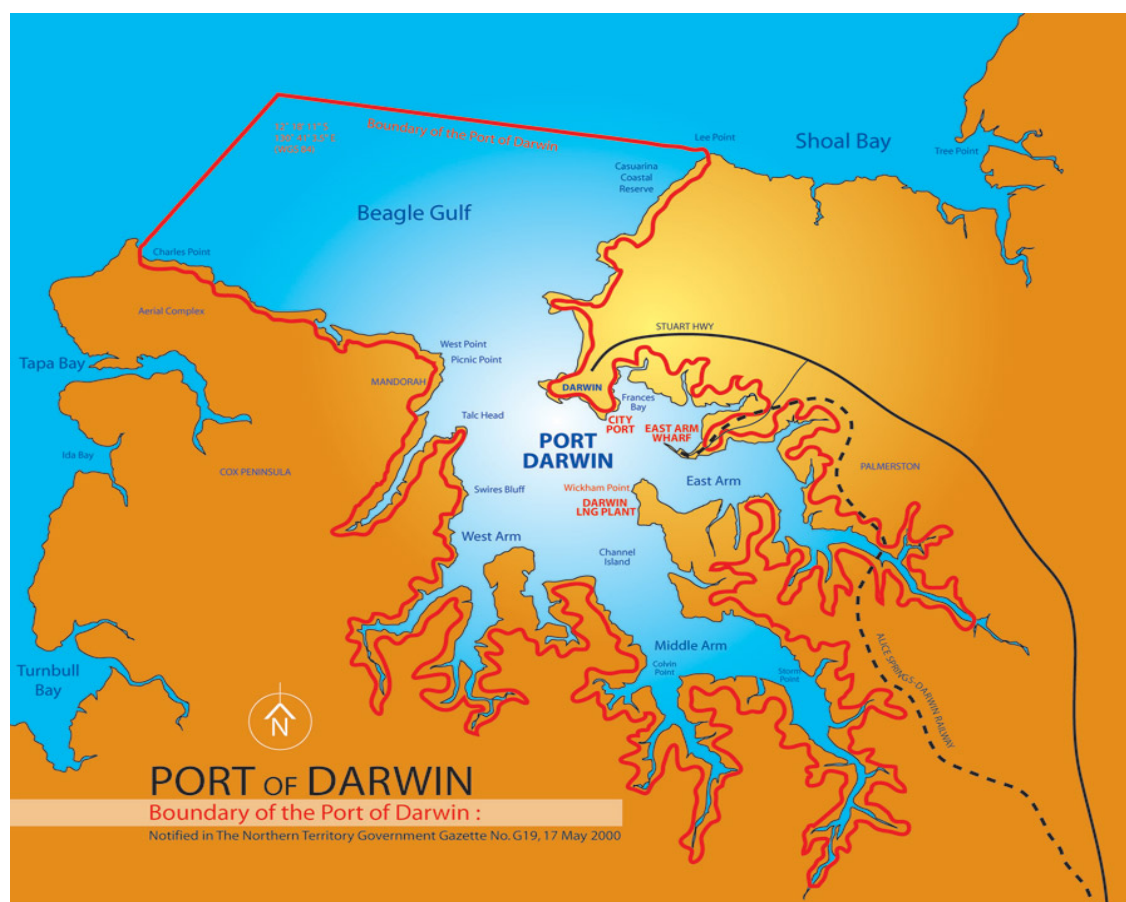
<sup>11</sup> United Nations Conference on Trade and Development, *Review of Maritime Transport 2014*, United Nations, Geneva, 2014, pp. 69-70

contingent upon appropriate forward planning and access to assured funding sources.<sup>12</sup>

### Port of Darwin

2.6 The Port of Darwin is a multi-user, mixed cargo and marine services port facilitating livestock exports, dry bulk imports and exports, offshore oil and gas support vessels, petroleum imports, container trade, cruise ship and naval vessel visits. As shown in Figure 1, consisting of a number of facilities within the Darwin Harbour area, the port's main commercial facilities are located at the end of the Adelaide to Darwin railway line at the East Arm Wharf precinct; making it a significant transport and logistics centre for the Territory.

Figure 1: Port of Darwin<sup>13</sup>



2.7 In accordance with the *National Ports Strategy*, in 2010 the Darwin Port Corporation developed the *East Arm Wharf Facilities Masterplan 2030: Land Use Strategy*. As the blueprint for the development of the East Arm Wharf and adjacent strategic land and sea areas, the plan incorporates a staged development approach designed to:

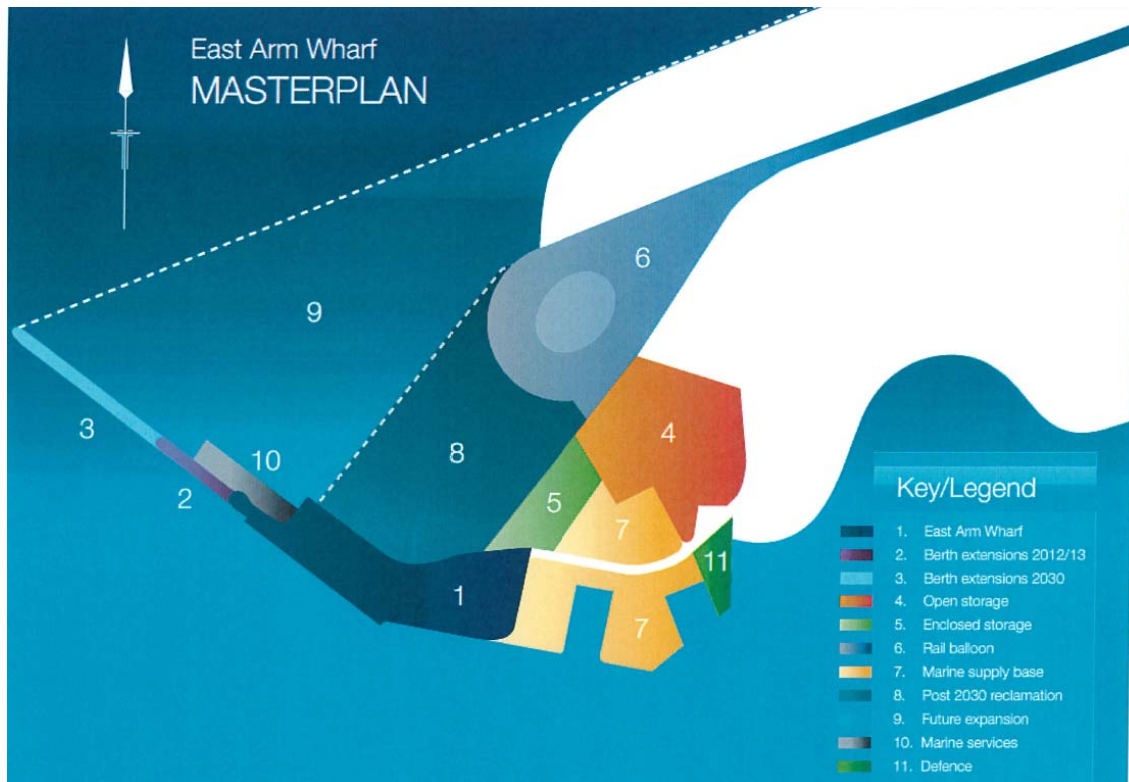
<sup>12</sup> OECD, *Strategic Transport Infrastructure Needs to 2030*, p. 12

<sup>13</sup> Darwin Port Corporation, *Maps*, viewed 4 March 2015, <http://www.darwinport.nt.gov.au/maps>

Realise facilities at East Arm Wharf that will place the Territory at the competitive export edge and ultimately realise the Territory's vision – Port of Darwin: *Australia's Northern Gateway of Choice*.<sup>14</sup>

- 2.8 Developed to accommodate projected trade and vessel demands through East Arm Wharf, and facilitate trade growth, the plan (Figure 2) incorporates a range of projects from land reclamation for dry bulk stockpiles, a rail balloon loop and additional rail dump station, to berth extensions.<sup>15</sup>

**Figure 2: East Arm Wharf: Master Plan**<sup>16</sup>



- 2.9 While welcoming the development of the master plan, Engineers Australia expressed its concern that although it provides a vision and development intentions it does not incorporate costed, staged development plans:

Additional information needs to be provided on capacity constraints and criteria for capital/investment decision-making to instil confidence in potential port users of the future facilities, and to rail and other elements of the supply chains.<sup>17</sup>

<sup>14</sup> Darwin Port Corporation, *East Arm Wharf Facilities: Masterplan 2030*, Land Use Strategy, Darwin Port Corporation, Darwin, NT, 2010, p. 2

<sup>15</sup> Darwin Port Corporation, *East Arm Wharf Facilities: Masterplan 2030*, p. 4

<sup>16</sup> Darwin Port Corporation, *East Arm Wharf Facilities: Masterplan 2030*, p. 4

<sup>17</sup> Engineers Australia, *Infrastructure Report Card 2010 Northern Territory*, Engineers Australia, Barton, ACT, November 2010, p. 38 and Engineers Australia, *Analysing Australia's Infrastructure Trends 2013: What has changed since the 2010 Infrastructure Report Card?*, Engineers Australia, Barton, ACT, January 2013, p. 36

- 2.10 Moreover, in the absence of assured funding sources to implement proposed developments, the ability to provide port infrastructure in line with demand is a matter of some concern:

The port is one element of a supply chain, with other elements being rail and mines. The entire chain needs to be optimised to maximise transport efficiency. Ideally, the development of additional capacity should be delivered when it is required, rather than building excess capacity years in advance of when it is needed, or creating additional capacity well after it is required. Ensuring that the port expands in line with demand is challenging due to the number of parties involved in the supply chains and the fact that export demand increases faster than infrastructure can be delivered.<sup>18</sup>

- 2.11 Prior to the recent downturn in the resources sector the port was operating at approximately 43% capacity. Key stakeholders highlighted a number of areas where the port's facilities and capacity could be enhanced to improve efficiency. For example, Warwick Sommer: General Manager Commercial and Business Development, Asciano Group, advised that:

As it stands at the moment, to connect rail inbound bulk commodities to a vessel there is a stockpiling operation followed by trucking into a dump station. So, investment that would, in a more efficient way, connect a stockpile with a conveyed solution, or something to that effect, is a logical expansion to improve that type of facility.<sup>19</sup>

- 2.12 The need for more sophisticated, efficient bulk handling methods was also noted by Qube.<sup>20</sup> The Northern Territory Livestock Exporters Association (NTLEA), one of the port's largest customers, advised the Committee that consideration needed to be given to investing in more efficient and effective loading facilities.<sup>21</sup>

- 2.13 Stephen Crisp: Freight and Logistics Manager, Australian Agricultural Company Ltd, noted that the absence of a dedicated container berth, or some other system to prioritise berthing of container vessels, can mean waiting times of four or five days, or even longer, for cargo to be loaded, which is problematic for customers wanting to ship perishable goods:

The other major restriction there is the number of reefer plugs – power points for our refrigerated containers. At the moment there is a bank of 50 available, but apparently they are not all to international standards, so they have to use adaptors. Obviously, the first upgrade is to have the proper plugs for international containers available for the 50 plugs that are in the main bank. Apparently there are another 25 plugs spread throughout the port, and I can envisage that if we have to wait a long period between vessels we could easily go over the 50. We would have to start searching around and using the other 20-odd plugs that are based there.<sup>22</sup>

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<sup>18</sup> Engineers Australia, *Infrastructure Report Card 2010 Australia*, Engineers Australia, Barton, ACT, November 2010, p. 38

<sup>19</sup> Committee Transcript, 31 March 2015, p. 3

<sup>20</sup> Committee Transcript, 1 April 2015, p. 53

<sup>21</sup> Committee Transcript, 1 April 2015, p.59; Northern Territory Livestock Exporters Association, Submission No. 1, p. 2

<sup>22</sup> Committee Transcript, 1 April 2015, p. 24

2.14 Congestion due to insufficient berth space was also noted as an issue of concern by the NTLEA, the NT Chamber of Commerce and, to a lesser extent, Vopak.<sup>23</sup> For the Australian Customs and Border Protection Service (ACBPS), the Committee heard that introduction of the *Cape Class* vessels had highlighted the lack of berthing options in Darwin. While noting that the East Arm Wharf has the necessary facilities for crew changeovers, bunkering and provisioning to occur, ACBPS noted that it cannot be used by *Cape Class* vessels as it is only suited to slab sided merchant ships:

The reliability of access to berths at Darwin Naval Base for the *Cape Class* and ACV *Thaiyak* is a known risk for ACBPS platforms. The berth at Fort Hill Wharf may not be viable due to workplace health and safety risks associated with access through the large tidal range, which also apply to the outer berth at Stokes Hill Wharf. The only other viable berthing option available at the moment is to conduct crew changes at anchor. This carries significant cost as well as risks to safe handover, schedule and the in-service support work programme.<sup>24</sup>

2.15 Given that major projects such as INPEX tend to consume a considerable amount of hardstand space, Terry O'Conner: CEO, Darwin Port Corporation, advised the Committee that in order to stay ahead of the demand curve, land reclamation was the port's most immediate concern along with additional reefer connection points. The Committee also heard that an upturn in mining activity would likely require the development of more quay lines.<sup>25</sup>

2.16 It was further noted that accommodating an increase in trade needed to take into account the lead times involved in the development of port infrastructure:

For something like hard stand and reclamation of land you are looking at three-and-a-half years to four years from the time that you commit to the time you have something ready to go...In relation to quay line, that is a multi-million dollar question literally, because you would see a requirement to mobilise things like dredges into dredge berth pockets, bringing in specialist equipment etc. Your environment approvals to go through that process probably have a lead time of 12 to 18 months. So you are looking at least another three years to put something there.

When we start dealing with major producers such as phosphate, for example, we need to start looking at three years. We know that rolling stock for the railway line is an 18 month lead time. Locomotives for the railway are 18 months to two years. Those are the types of time lines we work with. For us to be ready tomorrow, we need something well advanced and well developed.<sup>26</sup>

2.17 A number of stakeholders noted that significant investment would also be required in road and rail upgrades if the port was to reach its full potential. For example, as Tony Eggington Interim Executive Officer, NTLEA, pointed out:

It is easy to get animals there, if we have a good set of bitumen roads through our production sectors that lead to Darwin and they are 365 days a year with no problems – the Barkly Highway goes out at odd times. We

<sup>23</sup> Committee Transcript, 1 April 2015

<sup>24</sup> Australian Customs and Border Protection Service, Submission No. 2, p. 4

<sup>25</sup> Committee Transcript, 31 March 2015, p. 13

<sup>26</sup> Committee Transcript, 31 March 2015, pp. 13-14

need to invest in our main roads to ensure stock can flow through to the port.<sup>27</sup>

2.18 From an investment perspective, Thomas Angliss, Director of Property: Asciano Group, advised the Committee that:

Typically in ports around the country there is an infrastructure responsibility for roads and rail, those types of infrastructure outside the port gate that can have an impact on the value that can be created with the port or the efficiency of the port. Certainty provided by government in relation to how the roads will be developed or maintained, and similarly rail is an important concept for value when it comes to the privatisation or lease of the port going forward.<sup>28</sup>

## Objects of the proposal

2.19 Strengthening the economy through the development of infrastructure in areas such as energy, communications, transport, aviation and ports is a key platform in the Government's *Framing the Future* policy.<sup>29</sup> Reflecting this priority, the Government's objectives of reforming the Port of Darwin are:

- A partnership with a private operator which has a vision for growth and development of the port which is aligned with that of the NT Government
- Access to new private sector capital into the Northern Territory economy
- Opportunity to realise the value inherent in an NT Government asset to allow capital to be channelled into new productivity and growth enhancing infrastructure<sup>30</sup>

2.20 As highlighted in the submission from the Port of Darwin Project Steering Committee (Steering Committee), given that private public partnerships have been successfully employed in the Northern Territory as a means of leveraging private capital, operating experience and expertise, the:

decision was made to test private sector interest in partnering with NT Government to operate the Port of Darwin.<sup>31</sup>

The Steering Committee further notes that:

With the right private sector partner, the Port of Darwin could become a major distribution hub into the rapidly expanding Asian market. Australian bulk ore and containerised goods could be transported into and shipped out of the Port of Darwin, rather than being transported out of already congested southern ports. Conversely, the ever increasing levels of containerised freight from the Asian countries could be shipped to Darwin and distributed throughout the nation.<sup>32</sup>

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<sup>27</sup> Committee Transcript, 1 April 2015, p. 68

<sup>28</sup> Committee Transcript, 31 March 2015, p. 4

<sup>29</sup> Northern Territory Government, *Framing the Future*, Northern Territory Government, Darwin, NT, March 2013, p. 5

<sup>30</sup> Port of Darwin Project Steering Committee, Northern Territory Government, Submission No. 4, 2015, p 1

<sup>31</sup> Port of Darwin Project Steering Committee, Submission No. 4, p. 1

<sup>32</sup> Port of Darwin Project Steering Committee, Submission No. 4, p. 1

2.21 Overall, the Committee found that key stakeholders were generally supportive of the objects of the proposal. However, the associated ‘optimism bias’<sup>33</sup> regarding the port’s potential, particularly in the short to medium term, and the absence of a publicly available cost-benefit analysis was noted. As highlighted by the Productivity Commission:

Properly conducted cost-benefit studies of large projects, and their disclosure to the public, is an important starting point for...improving the transparency of decision making.<sup>34</sup>

While the Chair of the Steering Committee, Gary Barnes, alluded to a range of potential import and export markets, no evidence was provided to the Committee detailing anticipated timeframes or substantiating market viability.<sup>35</sup>

2.22 For example, in relation to live cattle exports the Steering Committee advised the Committee that:

We know the Asians...are very keen on working with the Territory to increase the number of live cattle exported from two million to three million.<sup>36</sup>

Acknowledging that live cattle exports to Indonesia and Vietnam (the country’s two largest markets) have increased significantly in recent years, based on currently available data as outlined below, this would appear to be a somewhat ambitious, long-term target.

2.23 With throughput of 540,775 head of cattle in 2014, Darwin is the country’s largest live cattle export port, accounting for approximately 41% of the national total. Indonesia is Australia’s largest market, taking 624,749 head or 55% of the National total, including dairy cattle, in the 2013-14 fiscal year, followed by Vietnam which took 131,367.<sup>37</sup> NTLEA advised the Committee that subject to the necessary upgrades in “berthing (space and accessibility), the rate and methodology of loading livestock and fodder (efficiency), [and] heavy vehicle access”, reaching their target of 1 million head by 2025 was achievable.<sup>38</sup>

2.24 Similarly, the viability of the Government’s goal to “make the Port of Darwin a cost effective alternative to southern ports which are becoming congested and have serious transport logistic issues”<sup>39</sup> was brought into question. As highlighted in the submission from the Maritime Union of Australia (MUA), and confirmed by DPC during the Committee’s site visit to the Port of Darwin, “shipping is a far cheaper way to transport goods per tonne-kilometre than road

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<sup>33</sup> Productivity Commission, *Public Infrastructure*, Inquiry Report, No.71, Australian Government, Canberra, 2014, p.100: *Optimism Bias: A demonstrated, systematic, tendency for project appraisers to be overly optimistic...appraisers tend to overstate benefits, and understate timings and costs, both capital and operational.*

<sup>34</sup> Productivity Commission, *Public Infrastructure*, Inquiry Report, p. 9

<sup>35</sup> Committee Transcript, 31 March 2015

<sup>36</sup> Committee Transcript, 31 March 2015, p.16

<sup>37</sup> Meat and Livestock Australia, *Live Export Statistics*, LiveLink, March 2015, pp. 1-2; see also LiveCorp, *Live Exports*, viewed 4 April 2015, <https://www.live.corp.com.au/cattle-statistics>

<sup>38</sup> Northern Territory Livestock Exporters Association, Submission No. 1, p. 2

<sup>39</sup> Hon Adam Giles, Chief Minister, *Ports Management Bill (Serial 110)*, *Port of Darwin Bill (Serial 111)*,

or rail, particularly when they are containerised”<sup>40</sup> Moreover, apart from the significant level of investment in port infrastructure and container handling equipment that would be required, a commensurate level of investment would also be needed for associated intrastate landside infrastructure.<sup>41</sup>

2.25 Lack of consultation regarding the proposal was also raised. The Committee was concerned to learn that, in many instances, key stakeholders had not been formally consulted or approached by the Government prior to being invited to appear before the Committee. Recognising the potential benefits of the proposal, it was evident that they were keen to participate in its development.<sup>42</sup> As Warwick Sommer: General Manager Commercial and Business Development, Asciano Group, noted, in addition to considering the needs of potential stakeholders and those looking to develop opportunities, the Government also needs to consider the:

group of existing port users and making sure that they have a sense of comfort as to what this proposal may deliver – so no massive disruption in tenure nor any immediate concerns about large rate increases or the like.<sup>43</sup>

2.26 Similarly, the Productivity Commission’s 2014 inquiry report into Public Infrastructure recommends that:

Privatisation should be subject to appropriate processes to ensure that the public interest is protected<sup>44</sup>

If undertaken appropriately, it is in the public interest to privatise...major ports. The transition to privatisation involves a range of activities, including effective communication with the community, that require careful management and leadership.<sup>45</sup>

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<sup>40</sup> Maritime Union of Australia, Submission 3, p. 16

<sup>41</sup> Committee Transcript, 1 April 2015, pp. 9

<sup>42</sup> Committee Transcript, 1 April 2015

<sup>43</sup> Committee Transcript, 31 March 2015

<sup>44</sup> Productivity Commission, *Public Infrastructure*, Inquiry Report, p. 41

<sup>45</sup> Productivity Commission, *Public Infrastructure*, Inquiry Report, p. 89



### 3 Models of Port Management

3.1 Compared to other public-private institutions, ports incorporate an extremely diverse range of activities and service categories; many of which are highly specialised. Representing a mix of public and private interests, port functions can be broadly classified as:

- Regulatory functions – providing marine services (e.g. harbour control, pilotage) and emergency pollution response, maintaining maritime safety and promoting general efficiency of the port.
- Landowner functions – providing port planning and development, navigational aids, breakwaters, entrance channels and maintaining basic port infrastructure such as wharves and berths.
- Operator functions – providing cargo-handling services and other value-adding functions such as warehousing, storage and towage.<sup>46</sup>

3.2 While regulatory functions are generally regarded as a public interest concern, landowner functions incorporate a mix of public and private interests, and operator functions are primarily private interests. Furthermore, ports:

generate direct economic benefits (private goods) through their operations, as well as additional indirect benefits (public goods) in the form of trade enhancement, second order increases in production volumes, and collateral increases in trade-related services.<sup>47</sup>

3.3 Given the above, defining the roles for and boundaries between the public and private sectors is widely acknowledged as a complex, challenging and often contentious aspect of the port industry since it ultimately determines the structure of port management and port development policy.<sup>48</sup>

3.4 Four main port management structures have emerged over time: public service ports, tool or operating ports, landlord ports and private service ports. While public service and tool ports focus on the realisation of public interests, landlord ports have a mixed character and aim to strike a balance between public (port authority) and private (port industry) interests. Fully privatised ports focus on private (shareholder) interests and, with the exception of the United Kingdom and New Zealand, tend to be limited to private sector ports such as those established by the mining industry.<sup>49</sup> Table 2, below, provides an overview of prevailing service providers for each port management model.

3.5 While all of these port models have strengths and weaknesses, the landlord port is considered to be the most appropriate institutional structure for promoting private sector involvement in public port operations and investment, and is now the dominant management model in the world's larger and medium-sized

<sup>46</sup> Connie, Chen., *Australia's New Dawn – Port Privatisation*, Holman Fenwick Willan LLP, London, 2013, p. 2

<sup>47</sup> World Bank, *Alternative Port Management Structures and Ownership Models: Module 3 Port Reform Toolkit, Second Edition*, World Bank, Washington DC, 2007, p. 73

<sup>48</sup> World Bank, *Alternative Port Management Structures and Ownership Models*, pp. 73-5

<sup>49</sup> World Bank, *Alternative Port Management Structures and Ownership Models*, pp. 81-84

ports.<sup>50</sup> As the Asian Development Bank (ADB) points out, the landlord port structure accommodates different forms of public-private partnerships while recognizing that the only fixed responsibility of the public port is the ownership of the site:

This structure provides a broad framework in which the private sector can replace the public sector in the provision of services to the vessel and its cargo. It allows the public sector to retain ownership of the land and infrastructure and to continue regulating their use, while sharing responsibility for capital investment... Its popularity is based on the effectiveness of this framework for increasing operational efficiency, providing flexibility in the structure of the tripartite relationship between government, labour, and private management and promoting client-oriented management. It allows a port to improve the quality of its service through a process of evolution, which can accommodate the changes in trade, shipping and regional political structures.<sup>51</sup>

**Table 2: Prevailing Service Providers – Port Management Models<sup>52</sup>**

Model	Port administration	Nautical management	Nautical infrastructure	Port infrastructure	Superstructure (equipment)	Superstructure (buildings)	Cargo handling activities	Pilotage	Towage	Mooring services	Dredging	Other functions
Public service port	pu	pu	pu	pu	pu	pu	pu	pu	pu	pu	pu	pu
								pr	pr	pr	pr	pr
Tool port	pu	pu	pu	pu	pu	pu	pr	pu	pu	pu	pu	pu
								pr	pr	pr	pr	pr
Landlord port	pu	pu	pu	pu	pr	pr	pr	pu	pu	pu	pu	pu
								pr	pr	pr	pr	pr
Private sector port	pr	pu	pr	pr	pr	pr	pr	pu	pr	pr	pu	pu
								pr			pr	pr

3.6 As the Committee found during its port visits, various permutations of the landlord port model are evident in Australia, reflecting both the unique characteristics of individual ports and the markets they serve, and differing views as to how best balance public and private interests.

3.7 For example, in Western Australia, as is the case with the Port of Darwin, although the private sector is responsible for a range of port operations and developments, port authorities remain responsible for regulatory and landowner functions. At the other end of the public/private spectrum, regulatory, landlord and operator functions at the Port of Portland and the ports of South Australia

<sup>50</sup> Ivana, Katsarova, *Liberalisation of EU port services: issues and consequences for dock workers*, Library Briefing, European Parliament, Brussels, 20 March 2013, pp. 1-6; François-Marc, Turpin, *PPP in Ports, Landlord Port Model*, Egis International, Tbilisi, Georgia, 2013, pp. 8-14; World Bank, *Alternative Port Management Structures and Ownership Models*, pp. 81-3; Asian Development Bank, *Developing Best Practices for Promoting Private Sector Investment in Infrastructure: Ports*, p. 20; Connie, Chen., *Australia's New Dawn: Port Privatisation*, Holman Fenwick Willan LLP, London, November 2013, pp. 1-3;

<sup>51</sup> Asian Development Bank, *Developing Best Practices for Promoting Private Sector Investment in Infrastructure*, p. ix

<sup>52</sup> World Bank, *Alternative Port Management Structures and Ownership Models*, p. 129

are provided entirely by the private sector.<sup>53</sup> Between these two extremes is the landlord model favoured by NSW where landowner and operator functions are provided by the private sector, but regulatory functions have been retained by the port authority.<sup>54</sup>

## Public private partnerships

3.8 Due to the strategic importance of ports, comprehensive privatisation (sale of land and assets) is generally not considered to be a desirable or viable option. However, as indicated above, the landlord model is characterised by varying degrees of privatisation achieved through public private partnerships (PPPs).

3.9 Concessions, including lease contracts, concession contracts and BOT (Build, Operate and Transfer) schemes, are the primary means of introducing private sector participation and investment in the port sector. The World Bank defines a port concession as:

a contract in which a government transfers operating rights to private enterprise, which then engages in an activity contingent on government approval and subject to the terms of the contract... Concessions, by permitting governments to retain ultimate ownership of the port land and responsibility for licensing port operations and construction activities, further permit governments to safeguard public interests. At the same time, they relieve governments of substantial operational risks and financial burdens.<sup>55</sup>

3.10 As the Committee heard, concessions in publicly operated ports include contracting out services such as stevedoring, mooring and towage to specialist private providers, lease arrangements over land, facilities and equipment, through to BOT (build, operate, transfer) schemes such as the dedicated bulk liquids berth at Kwinana in Western Australia or the Marine Supply Base in Darwin.<sup>56</sup> However, as the Port of Albany noted, attracting private sector investment in multi-use parts of the port's operation, or port development projects such as land reclamation where returns on investment may not be realised for a number of years, is problematic.<sup>57</sup>

3.11 With respect to the Port of Darwin, the Committee heard that achieving the significant levels of private sector capital required to address the infrastructure

<sup>53</sup> See Port of Darwin Select Committee media releases regarding port site visits available at [http://www.nt.gov.au/lant/parliamentary-business/committees/pod/Media\\_Releases.shtml](http://www.nt.gov.au/lant/parliamentary-business/committees/pod/Media_Releases.shtml);

<sup>54</sup> Dr Martyn Taylor, *Privatisation of Port of Melbourne, Australia*, Norton Rose Fullbright, July 18 2014, viewed 20 February 2015, <https://www.linkedin.com/pulse/20140718112802-70880697-privatisation-of-port-of-melbourne-australia>

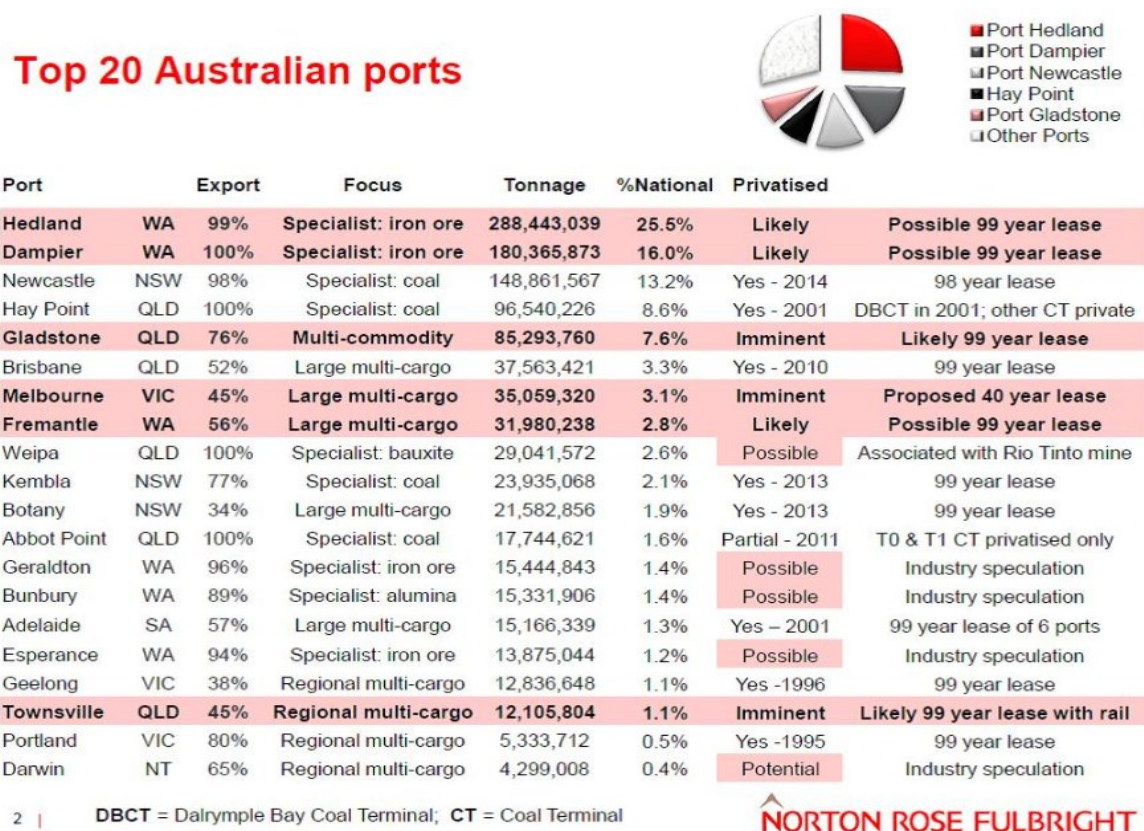
<sup>55</sup> World Bank, *Alternative Port Management Structures and Ownership Models*, pp. 111-12

<sup>56</sup> Port of Darwin Select Committee, *Media Release: Visits to WA Ports*, Legislative Assembly of the Northern Territory, Darwin, NT, 20 March 2015, [http://www.nt.gov.au/lant/parliamentary-business/committees/pod/Media\\_Releases.shtml](http://www.nt.gov.au/lant/parliamentary-business/committees/pod/Media_Releases.shtml); Port of Darwin Project Steering Committee, Submission No. 4, 2015, pp. 6-8; InvestNT, *Investment Opportunity: Port of Darwin*, Northern Territory Government, October 2014, p. 1

<sup>57</sup> Port of Darwin Select Committee, *Media Release: Visits to Port of Albany*, Legislative Assembly of the Northern Territory, Darwin, NT, 17 March 2015, [http://www.nt.gov.au/lant/parliamentary-business/committees/pod/Media\\_Releases.shtml](http://www.nt.gov.au/lant/parliamentary-business/committees/pod/Media_Releases.shtml)

challenges the DPC is unable to meet “will only be able to be sourced price competitively if the private sector has an interest and stake in operations.”<sup>58</sup> The \$1.2 billion Darwin to Tarcoola Railway Project, developed in partnership with the Commonwealth and South Australian Governments and FreightLink under a Build-Own-Operate-Transfer scheme with an associated 50 year operating lease, is a case in point.<sup>59</sup>

**Figure 3: Status of Port Privatisation in Australia<sup>60</sup>**



3.12 Since the late 1990s, partial privatisation of public ports, through long-term leaseholds over port land and associated assets, has become increasingly common in Australia as governments follow the international trend of reducing their involvement in port operations and infrastructure provision and seek to improve port performance and efficiency through private sector operators. Moreover, given the rapid growth in the maritime commodity sector, ports represent an attractive potential asset for global fund managers and sovereign

<sup>58</sup> Port of Darwin Project Steering Committee, Submission No. 4, 2015, p. 8

<sup>59</sup> Port of Darwin Project Steering Committee, Submission No. 4, 2015, p. 5

<sup>60</sup> Dr Martyn Taylor, *Privatisation of Port of Melbourne, Australia*, Norton Rose Fullbright, July 18 2014, viewed 20 February 2015, <https://www.linkedin.com/pulse/20140718112802-70880697-privatisation-of-port-of-melbourne-australia> Note: Following the recent Queensland election, the Premier announced that the proposed privatisation of Gladstone and Townsville ports will not proceed.

wealth funds with long-term lease deals enabling attractive returns on investment.<sup>61</sup>

- 3.13 As illustrated in Figure 3 above, over the past ten years, eight of Australia's top 20 ports have been partially privatised under long-term leases, and a number of others are currently considering similar arrangements.

### **Proposed lease model for the Port of Darwin**

- 3.14 Following is an overview of the main components of the proposed lease model for the Port of Darwin. Specific issues and concerns raised by key stakeholders and recommendations for how the model might be enhanced are addressed in Chapters 5 and 6 respectively.

#### ***Legislative framework***

- 3.15 As detailed in the submission from the Steering Committee, based on a review of recent Australian precedents, it is proposed that the Government enter into a long-term lease over defined port assets with a private sector bidder. The successful bidder will also purchase a "special purpose corporate entity which has been established to operate the port within defined operational and geographical parameters."<sup>62</sup> The government will manage compliance with the conditions contained within the port lease through the Department of Lands, Planning and the Environment.<sup>63</sup>
- 3.16 The Port of Darwin Bill (Serial 110) provides the legislative mechanism to effect this transaction:

The Bill authorises and facilitates the transfer of certain assets, rights and liabilities relating to, or connected with, the Port of Darwin to a private investor, subject to the restriction that the land comprising port assets may be leased to a private sector entity for a term of no longer than 99 years, but must remain in the ownership of the Northern Territory.<sup>64</sup>

- 3.17 The Ports Management Bill (Serial 111) provides the regulatory framework for a privately operated Port of Darwin. As outlined by the Chief Minister, Hon Adam Giles, MLA:

Ports in the Northern Territory are currently regulated through a number of different legislative regimes...the Ports Management Bill will, for the first time, provide a regulatory framework for the management and control of all designated ports within the Northern Territory. It amalgamates the relevant provisions of the *Darwin Port Corporation Act* and the *Marine Act* to form a

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<sup>61</sup> Holman Fenwick Willan, *Global Investment in Ports and Terminals*, Holman Fenwick Willan LLP, London, 2011, p. 2; A., Ledovskikh, *Capacity constraints provide tailwinds for port privatisation*, media release, 11 November 2014, IBISWorld, viewed 20 February 2015, <http://media.ibisworld.com.au/2014/11/11/capacity-constraints-provide-tailwinds-port-privatisation/>

<sup>62</sup> Port of Darwin Project Steering Committee, Submission No. 4, 2015, p. 12

<sup>63</sup> Hon Adam Giles, MLA, (Chief Minister), Ports Management Bill (Serial 110), Port of Darwin Bill (Serial 111), Second Reading Speech

<sup>64</sup> Port of Darwin Bill 2014 (Serial No. 111) – Explanatory Statement, p. 1

cohesive, improved and streamlined regulatory regime for designated ports into one single piece of overarching legislation.<sup>65</sup>

3.18 The main provisions of the Ports Management Bill, indicating responsible officer – Regional Harbourmaster, Port Operator, Minister and Statutory Independent Regulator – are summarised in Table 3 below.

**Table 3: Allocation of Responsibility under Ports Management Bill**

<b>Regional Harbourmaster</b>	<b>Port Operator</b>	<b>Minister</b>	<b>Independent Regulator</b>
		Declaration of designated ports including boundaries of water and land	
	Appoint port management officers and port enforcement officers	Appoint port operators Appoint regional harbourmaster	
Promulgation of depths and under keel clearances	Dredging Hydrographic surveys		
<b>SAFETY PLANS</b>			
Issue directions and guidelines for port safety plans.	Prepare draft port safety plan identifying safety risks of port and how they are to be managed.		
Approve port safety plans prepared by port operator	Implement and comply with port safety plan following approval from regional harbourmaster		
Require compliance audits of safety plans	Comply with audit requirements		
<b>PORT OPERATIONS</b>			
	Issue directions re manner in which vessels enter, depart, unload cargo, take ballast, water or fuel, or passengers disembark		
Removal of wrecks non-commercial vessels	Removal of wrecks of commercial vessels		

<sup>65</sup> Hon Adam Giles, MLA, (Chief Minister), Ports Management Bill (Serial 110), Port of Darwin Bill (Serial 111), Second Reading Speech

<b>Regional Harbourmaster</b>	<b>Port Operator</b>	<b>Minister</b>	<b>Independent Regulator</b>
	Notify regional harbourmaster of vessels carrying dangerous goods		
Close waters of the port not impacting on commercial vessels	Close all or part of the waters of the port		
Control erection of structures in or on the water			
	Issue/enforce port notice to control activities or conduct within port for the purpose of maintaining or improving safe, secure or efficient operation.		
Publish reports and statements based on information provided by port operator on reportable matters	Report contraventions of port notices to regional harbourmaster on a six monthly basis		
<b>STEVEDORE LICENSING</b>			
		Approve, grant, renew, cancel stevedore licences	
<b>PILOTAGE</b>			
Pilotage authority for any pilotage area within a designated port		Declare an area of NT waters to be a pilotage area	
Make technical and safety standards for pilotage and provision of pilotage services		Appoint regional harbourmaster as pilotage authority for any area within a designated port	
Approve, renew, suspend, cancel pilotage licences and exemption certificates		Appoint pilotage service providers for pilotage areas	
<b>NAVIGATIONAL AIDS</b>			
Approval in writing authorising port operator actions re navigational aids	Establish, maintain, operate, alter or remove navigational aids within the port that may affect the safety or convenience of marine navigation within the port.		



Regional Harbourmaster	Port Operator	Minister	Independent Regulator
<b>PRICING</b>			
	Fix charges in respect of use by a vessel of the waters of the port and /or facilities of the port owned by, leased /licensed to, or operated/ maintained by port operator	Fix charges in respect of use by a vessel of the waters of the port and /or facilities of the port owned by, leased /licensed to, or operated/ maintained by the Minister or another public sector entity	Publish reports and statements based on information about the charges fixed in relation to prescribed services Authorised to make regulations regarding port pricing
			Authorised to make price determinations consistent with regulations and 'access and pricing principles'
<b>ACCESS</b>			
	<p>Prepare draft access policy and implement and comply with policy following approval of regulator</p> <p>Report on annual basis on any material instance on non-compliance</p>	<p>Minister may, by Gazette notice, require that an access policy deal with a matter specified in the notice</p> <p>Table report of review prepared by Regulator in the Assembly within 7 days of receipt</p>	<p>Prepare/issue guidelines re matters to be dealt with in access policies and approve draft access policy prepared by port operator</p> <p>Prepare/issue guidelines regarding access reporting requirements.</p> <p>Conduct review and report to Minister on operation of Part 11: Port Access and Pricing 3 years from commencement of part and each successive 5 year period thereafter</p>
<p><b>Step in rights:</b> may be exercised by the regional harbourmaster in the event of:</p> <ul style="list-style-type: none"> <li>• an emergency; or</li> <li>• in order to avert or minimise a threat of actual or potential death, or serious injury to any person; or</li> <li>• actual or potential loss of, or serious damage to, property; or</li> <li>• actual or potential harm to the environment.</li> </ul> <p>Under such circumstances the regional harbourmaster may direct a port operator to exercise a relevant function in the manner, and within the period, specified in the direction; and if the port operator fails to comply, exercise the relevant function that the port operator failed to exercise.</p>			

### **Port operator functions**

3.19 The regulatory regime established under the Ports Management Bill provides for private operators of designated ports to have day-to-day control of port operations, while ensuring the Northern Territory retains a number of residual



regulatory and operational functions relating to the protection of public interest considerations.

3.20 The principal functions of the Port operator, therefore, are to:

- establish, manage, maintain and operate facilities and services that promote its safe and efficient operation; and
- facilitate and use best endeavours to increase the volume of trade through the designated port.<sup>66</sup>

Port operators will be responsible for the appointment of port management and port enforcement officers to undertake the various roles identified within the Ports Management Bill.<sup>67</sup>

3.21 As highlighted in the submission from the Steering Committee, the Ports Management Bill seeks to:

balance risks inherent in a public/private partnership model with the desire to allow the private sector to manage the asset in a manner which delivers on its commercial objectives and therefore increases asset efficiency and productivity.<sup>68</sup>

3.22 Part 10 of the Ports Management Bill provides that the operator of a designated port may, by way of written notice published on the port operator's website, fix port authority charges, in respect of the use by a vessel, for waters of the designated port, and port facilities owned by, leased or licensed to, or operated or maintained by, the port operator. In doing so, the port operator is required to set charges in accordance with the 'access and pricing principles' and any price determinations made by the Utilities Commission as the statutory, independent Regulator.<sup>69</sup>

### ***Regulatory framework***

3.23 As noted previously, given the strategic nature of ports it is usual that, as a minimum, government retains regulatory oversight of public interest concerns such as maritime safety, protection of the environment, pilotage, port access and pricing. Following is an overview of the provisions in the Ports Management Bill regarding these matters.

### **Maritime Safety**

3.24 While the port operator will be responsible for the day-to-day safe management of the port, regulatory oversight will be provided by a Regional Harbourmaster. The position of Regional Harbourmaster must be filled by a public employee appointed by the responsible Minister. The position will be located in the

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<sup>66</sup> Hon Adam Giles, MLA, (Chief Minister), Ports Management Bill (Serial 110), Port of Darwin Bill (Serial 111), Second Reading Speech

<sup>67</sup> Hon Adam Giles, MLA, (Chief Minister), Ports Management Bill (Serial 110), Port of Darwin Bill (Serial 111), Second Reading Speech

<sup>68</sup> Port of Darwin Project Steering Committee, Submission No. 4, p. 8

<sup>69</sup> Ports Management Bill, Part 10

Department of Transport as the agency responsible for shipping and maritime industries.<sup>70</sup>

3.25 The primary responsibilities of the Regional Harbourmaster include:

- setting technical and safety standards for pilotage and the provision of pilotage services;
- promulgation of depths and under keel clearances;
- being the pilotage authority for the port and responsible for licensing pilots
- issuing guidelines for, approving and auditing port safety management plans;
- approving the closure of waters for community events that do not affect commercial vessel operation; and
- exercising step-in rights in the event of an emergency including: direction and control of vessels within the port; pilotage; movement, handling and storage of dangerous goods; approval and management of maritime navigational aids; clearances of wrecks and removal of vessels; and closure of the port and relevant waters as required. WorkSafe NT will continue to regulate dangerous goods issues on land at ports.<sup>71</sup>

### **Environmental Safety**

3.26 The NT Environmental Protection Authority will continue to regulate environmental issues at all ports in the Northern Territory.<sup>72</sup>

### **Pilotage**

3.27 The Minister will continue to be responsible for the declaration of pilotage areas and appointment of pilotage authorities for other pilotage areas. While the Minister will be responsible for appointing pilotage service providers for a pilotage area, issuing or renewing pilotage licences and pilotage exemption certificates will be undertaken by the pilotage authority. At the request of the pilotage authority, the Minister may appoint a person to inquire into pilot misconduct. The Civil and Administrative Tribunal is empowered to review subsequent decisions if required.<sup>73</sup>

### **Port Access and Pricing**

3.28 Part 11 of the Ports Management Bill sets out the regulatory regime for port access and pricing as it applies to “prescribed services provided by a port

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<sup>70</sup> Ports Management Bill, ss 19-21

<sup>71</sup> Ports Management Bill

<sup>72</sup> Hon Adam Giles, MLA, (Chief Minister), Ports Management Bill (Serial 110), Port of Darwin Bill (Serial 111), Second Reading Speech

<sup>73</sup> Ports Management Bill, ss 63-92

operator of a designated port that is not a public sector entity.”<sup>74</sup> The object of this Part is to:

Promote the economically efficient operation of, use of and investment in major port facilities in the Territory by which services are provided so as to promote effective competition in upstream and downstream markets.<sup>75</sup>

3.29 Section 119 provides for independent regulatory oversight of access and pricing by the Utilities Commission of the NT (the Regulator), through the application of the *Utilities Commission Act*. The principal role of the Regulator will be to:

- issue guidelines to port operators regarding development of port access policies and annual reporting requirements;
- monitor port operator compliance with port access policies and associated reporting requirements – the port operator will have a legislative obligation not to prevent or unreasonably hinder access to port services or unfairly discriminate between port users; and
- monitor port operator compliance with ‘access and pricing principles’.
- exercise step-in rights and regulate prices where there is evidence of inappropriate behaviour.<sup>76</sup>

3.30 The ‘access and pricing principles’ provide that:

- (a) the price of access to a prescribed service should be set so as to:
  - (i) generate expected revenue from the service that is at least sufficient to meet the efficient costs of providing access to it; and
  - (ii) include a return on investment commensurate with the regulatory and commercial risks involved.
- (b) price structures should:
  - (i) allow multi-part pricing and price discrimination when it aids efficiency; and
  - (ii) not allow a vertically integrated provider of access to services to set terms and conditions that discriminate in favour of its downstream operations, except to the extent that the cost of providing access to others is higher.
- (c) access pricing regimes should provide incentives to reduce costs or otherwise improve productivity.<sup>77</sup>

3.31 It is further noted that the Regulator is required to review and report to the Minister on the operation of the access and pricing provisions of Part 11 of the Ports Management Bill, and any associated regulations, within the last year of each review period – the 3 year period starting on the commencement of the Part, and each successive 5 year period thereafter.<sup>78</sup> The purpose of the review is to determine the need for:

<sup>74</sup> Ports Management Bill, s 118

<sup>75</sup> Ports Management Bill, s 117

<sup>76</sup> Ports Management Bill, Part 11

<sup>77</sup> Ports Management Bill, s 132

<sup>78</sup> Ports Management Bill, s 122

- ongoing regulatory oversight of access to, and pricing of, prescribed services provided by private port operators;
- a change to the form of regulatory oversight, and if so, how; and
- amendments to this Part or any associated regulations made for it and the nature of such amendments.

In conducting the review, the Regulator must consult with the private port operator, and the Minister must table a copy of a report on a review in the Legislative Assembly within 7 sitting days of receipt.<sup>79</sup>

### ***Declaration of designated ports***

3.32 As noted previously, the Ports Management Bill relates to the operation of designated ports. While it is proposed that the first designated port will be the Port of Darwin, the Ports Management Bill provides for other ports in the Northern Territory to be designated over time, thereby bringing them within a uniform port regulatory regime. As noted in Table 3 above, the Minister is responsible for the declaration of designated ports, and declaration of the boundaries of the area of water and land constituting a designated port.<sup>80</sup>

3.33 While not specifically related to the Committee's Terms of Reference, Teras Australia Pty Ltd contacted the Committee to register its concerns regarding the potential impact of the regulatory regime, as provided for in the Ports Management Bill, should the Minister declare Port Melville, or other privately operated ports, to be a designated port at some point in the future.<sup>81</sup>

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<sup>79</sup> Ports Management Bill, s 122

<sup>80</sup> Ports Management Bill, ss 6-7

<sup>81</sup> Teras Australia Pty Ltd, Submission No. 5

## 4 The Case for Private Sector Involvement

### Background

4.1 As highlighted in the National Commission of Audit's 2014 report, *Towards Responsible Government*, there is significant capital locked up in commercial or semi-commercial government owned bodies that "could be put to better use if private ownership is suitable."<sup>82</sup> Similarly, in reference to private sector involvement in ports, the Australian Competition and Consumer Commission (ACCC) notes that, consistent with the overall goals of the National Competition Policy:

Governments should not retain ownership of business enterprises unless there is a clearly stated public policy for doing so, and government ownership is the best way to meet this goal.<sup>83</sup>

4.2 In May 2014, all States and Territories entered into a five year National Partnership Agreement on Asset Recycling with the Commonwealth. The objective of the agreement being to "unlock funds from existing State-owned assets to invest in additional infrastructure", thereby facilitating the following outcomes:

- (a) reduced funding constraints for additional infrastructure investment;
- (b) increased economic activity, employment and improved living standards; and
- (c) enhanced productive capacity of the economy.<sup>84</sup>

4.3 The findings of the Productivity Commission's 2014 inquiry into Public Infrastructure are of particular relevance to this inquiry. The Committee notes that the report recommended that, subject to appropriate processes to ensure that the public interest is protected, "State and Territory Governments should privatise their government-owned...major ports."<sup>85</sup> Noting that this recommendation is a matter for State and Territory Governments, in responding to the report the Australian Government expressed its 'in principle' support for the privatisation of 'mature' public infrastructure assets where this "results in greater economic efficiency and improved services for the community."<sup>86</sup>

4.4 While the Productivity Commission is of the view that it is in the public interest to privatise public infrastructure businesses such as ports, it acknowledged that:

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<sup>82</sup> National Commission of Audit, *Towards Responsible Government*, Phase One, Australian Government, Canberra, 2014, p. 220

<sup>83</sup> Australian Competition and Consumer Commission, *Container stevedoring monitoring report no. 16*, Australian Government, Canberra, October 2014, p. 19

<sup>84</sup> Council of Australian Governments, *National Partnership Agreement on Asset Recycling*, Australian Government, Canberra, 2014, pp. 2-3

<sup>85</sup> Productivity Commission, *Public Infrastructure*, Inquiry Report, No.71, Australian Government, Canberra, 2014, p.p. 41

<sup>86</sup> Department of Infrastructure and Regional Development, *Australian Government Response: Productivity Commission Inquiry Report into Public Infrastructure*, Australian Government, Canberra, 2014, pp. 9-10

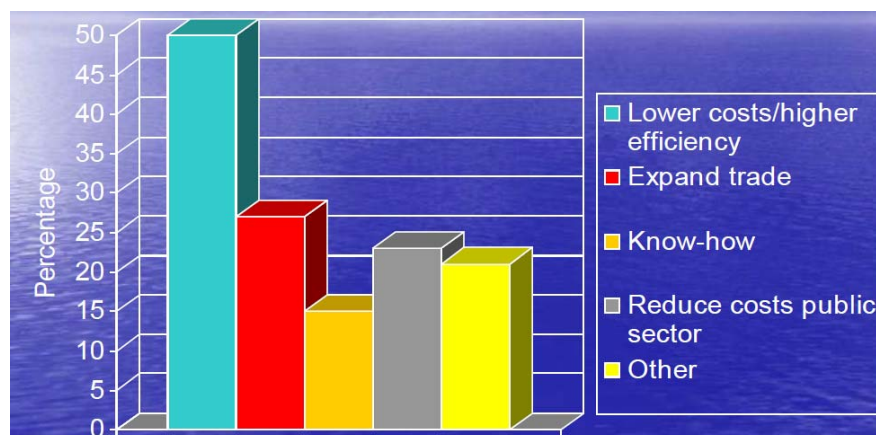
Realising the benefits from increased private sector involvement depends on being able to align the incentives of firms and individuals with the public interest. Given the varying prevalence of market failures across sectors, this is not always possible and so there should be no presumption that a higher level of private involvement is necessarily better.<sup>87</sup>

4.5 Furthermore, in commenting on Australia’s experience with privatisation to date, the Productivity Commission points out that:

As in many countries, Australia’s experience with privatisation has been mixed. A key lesson is that the structure of the industry and relevant markets should be well defined prior to any privatisation, and the method chosen to privatise assets should be designed to maximise net benefits to the community. Practices designed to reach inflated sale prices are rarely successful, can disadvantage further efforts at privatisation and lead to an overall net cost to the community over the long-term. Above all, privatisation should be undertaken not for its own sake, but to achieve a more efficient outcome for the community at large.<sup>88</sup>

4.6 According to various surveys conducted by the World Bank, increased port efficiency is the most frequently cited reason for pursuing private sector involvement in ports.<sup>89</sup> As illustrated in Figure 4 below, expanding trade, harnessing the experience and expertise of the private sector, and reducing demand on the public sector budget are also important considerations. Other reasons cited include: depoliticizing the public port administration, reducing bureaucracy, eliminating restrictive labour practices, and development of a more client-oriented approach.<sup>90</sup>

**Figure 4: Objectives to bring in the private sector<sup>91</sup>**



4.7 As indicated in Figure 5, on the basis of data collated from numerous case studies worldwide, private sector involvement in the ports industry facilitates access to investment capital and commercial management expertise, improves

<sup>87</sup> Productivity Commission, *Public Infrastructure*, Inquiry Report, p. 64

<sup>88</sup> Productivity Commission, *Public Infrastructure*, Inquiry Report, pp. 63-64

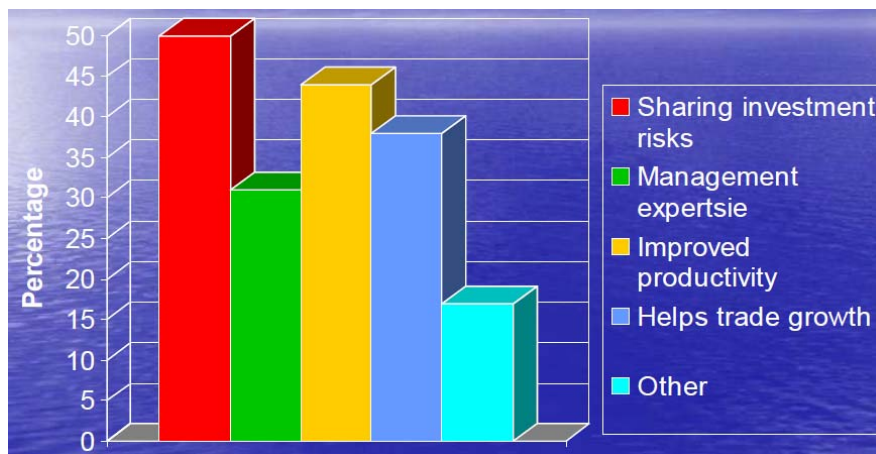
<sup>89</sup> Marc H. Juhel., *Management Models and Public/Private Partnerships in the Port Sector*, World Bank, Washington DC, 2010, p. 11

<sup>90</sup> World Bank, *Alternative Port Management Structures and Ownership Models*, p. 99 & pp. 107-8

<sup>91</sup> Marc H. Juhel., *Management Models and Public/Private Partnerships in the Port Sector*, p. 12

productivity through efficient allocation of resources, and enhances trade development.

**Figure 5: Main advantages of private sector involvement in ports<sup>92</sup>**



4.8 Recognising the critical role of the Port of Darwin to the economic development of the Territory, Stuart Kenny: Vice President of the NT Chamber of Commerce (CCNT) advised the Committee that:

It is vital that any reforms to the port seek to maximise the efficiency and operation of the port and also aim to secure the sustainable investment in the long-term future of the port for all Territorians, particularly for Northern Territory business.<sup>93</sup>

## Access to investment

4.9 As the Committee learnt through its site visits and hearings, developing, upgrading and maintaining port-based and associated land-side infrastructure is capital intensive. The OECD predicts that US\$630 billion will be required in port infrastructure investment globally between 2015 and 2030 if the sector is to keep pace with technological advancements and the anticipated growth in maritime trade.<sup>94</sup> Moreover, as the Productivity Commission points out:

Underinvestment in infrastructure can have significant economic and social effects. For example, bottlenecks and congestion increase costs for businesses using the services delivered by infrastructure, directly reducing productivity growth.<sup>95</sup>

4.10 However, securing public sector funding at levels consistent with strategic transport infrastructure needs has become increasingly difficult in recent times as governments seek to reduce public budget deficits by limiting their involvement in areas that are not considered to be core government business.<sup>96</sup>

<sup>92</sup> Marc H. Juhel., *Management Models and Public/Private Partnerships in the Port Sector*, p. 12

<sup>93</sup> Committee Transcript, 1 April 2015, p. 79

<sup>94</sup> OECD, *Strategic Transport Infrastructure Needs to 2030*, p.10

<sup>95</sup> Productivity Commission, *Public Infrastructure*, Inquiry Report, p. 65

<sup>96</sup> Chamber of Commerce Northern Territory, Tabled Paper: Committee Hearing, 1 April 2015, p. 2; see also Committee Transcript, 1 April 2015, pp. 79-80 and Port of Darwin Project Steering Committee, Submission No. 4, 2015, p. 12; OECD, *Strategic Transport Infrastructure Needs to 2030*, pp. 13-14

The Committee heard that the size of the NT's economy further constrains the Government's capacity to raise the capital required for major infrastructure projects.<sup>97</sup> The financial and management challenges facing infrastructure authorities in smaller jurisdictions was also highlighted by Engineers Australia in their 2013 analysis of Australia's infrastructure trends.<sup>98</sup>

- 4.11 In 2009-10 and again in 2010-11 the Northern Territory Government sought \$336 million in Commonwealth funding to expand the East Arm Wharf facilities to accommodate future growth. While neither bid was successful, Infrastructure Australia did, nevertheless, acknowledge the need for additional capacity at the port, noting that the initiative addressed a nationally significant problem.<sup>99</sup> However, as stated on its website:

Infrastructure Australia is not persuaded that public investment in port or airport capacity is currently justified, since it is clear that, given the right governance and market framework, the private sector is ready and willing to invest.<sup>100</sup>

- 4.12 More recently, in response to the Productivity Commission's report of inquiry into Public Infrastructure, the Australian Government noted that it supported the Commission's recommendation that:

Australian Government funding or other forms of financial assistance (including incentive payments under Commonwealth-State agreements) for public infrastructure that is provided to State and Territory and Local Governments....should only be provided where there is evidence of a demonstrable net public benefit from the project that would otherwise not be obtainable without Australian Government support.<sup>101</sup>

Notably, all of the privately operated ports the Committee visited advised that obtaining finance was not a challenge, with there being a range of institutions willing to lend more than they would choose to borrow.

- 4.13 Ian Kew: Chief Executive Officer, Northern Territory Airports Pty Ltd, noted that since the privatisation of Australia's airports, which share many similarities with ports, capital investment has increased significantly. For example, over the past 14 years the Committee heard that \$370 million has been invested into infrastructure projects at the Darwin Airport.<sup>102</sup> Similarly, the Committee was advised that the Darwin to Tarcoola Railway project, with economic benefits to the Territory projected to reach \$548 million over the next seven years, "would never have been delivered without leveraging private investment."<sup>103</sup>

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<sup>97</sup> Port of Darwin Project Steering Committee, Submission No. 4, 2015, p. 12

<sup>98</sup> Engineers Australia, *Analysing Australia's Infrastructure Trends 2013: What has changed since the 2010 Infrastructure Report Card?*, Engineers Australia, Barton, ACT, January 2013, p. 35

<sup>99</sup> Infrastructure Australia, '2010-2011 Project Assessment Brief: Port of Darwin Expansion', Australian Government, 17 February 2011, viewed 4 March 2015, [http://www.infrastructureaustralia.gov.au/coag/files/2012/Brief\\_Darwin\\_Port\\_2011.pdf](http://www.infrastructureaustralia.gov.au/coag/files/2012/Brief_Darwin_Port_2011.pdf)

<sup>100</sup> Infrastructure Australia, *International Gateways*, Australian Government, 18 September 2012, viewed 18 March 2015, <http://www.infrastructureaustralia.gov.au/gateways/>

<sup>101</sup> Productivity Commission, *Public Infrastructure*, Inquiry Report, p. 40

<sup>102</sup> Committee Transcript, 1 April 2015, pp. 90-91

<sup>103</sup> Port of Darwin Project Steering Committee, Submission No. 4, 2015, p. 6



4.14 As a result of microeconomic reform policies, the widespread adoption of market principles, and the impact of the Global Financial Crisis, the OECD notes that “in many countries, private sector financing has proved important in helping deliver the equity and debt financing needed to make infrastructure projects operational.”<sup>104</sup> With private investment in container, dry bulk, liquid bulk and multi-purpose terminals totalling US\$38 billion in the decade to 2010<sup>105</sup>, private participation in infrastructure (PPI) is increasingly recognised as:

a vital part of port development in today’s liberalised trading environment. PPI projects help to provide the financial support and expertise that many ports might need for their commercial and social objectives...and for the investor they can provide the opportunity to profit from rapid growth in international trade.<sup>106</sup>

4.15 Given the above, the submission from the Steering Committee argues that:

The Northern Territory must be prepared to test and investigate alternative forms of infrastructure funding and financing, including private investment. This is critical if we want to be in a position to meet the infrastructure requirements of the future and be well positioned to seize economic opportunities as they arise.<sup>107</sup>

## Commercial management

4.16 The productivity gains that can be achieved through the application of commercial management and decision making principles are well documented. ADB is of the view that the transfer of management functions to the private sector has proven to be the most successful aspect of port privatisation, particularly in the areas of operations and marketing.<sup>108</sup> The enthusiasm for private sector participation in ports has been driven primarily by the failure of public port operators to meet the following objectives:

- To provide services which are efficient and cost-reflective from the port users’ perspective.
- To respond to changes in cargo-handling technologies.
- To respond to the changing requirements of the port users.
- To provide choices of services and foster competition.
- To make timely capital investment to improve efficiency and expand capacity.
- To generate the funds needed to finance investments.
- To enforce labour discipline in the face of strong trade unions.<sup>109</sup>

<sup>104</sup> OECD, *Strategic Transport Infrastructure Needs to 2030*, p.14

<sup>105</sup> Holman Fenwick Willan, *Global Investment in Ports and Terminals*, Holman Fenwick Willan LLP, London, 2011, pp. 4-5

<sup>106</sup> Holman Fenwick Willan, *Global Investment in Ports and Terminals*, p. 2

<sup>107</sup> Port of Darwin Project Steering Committee, Submission No. 4, 2015, p. 12

<sup>108</sup> Asian Development Bank, *Developing Best Practices for Promoting Private Sector Investment in Infrastructure: Ports*, p. 66

<sup>109</sup> Asian Development Bank, *Developing Best Practices for Promoting Private Sector Investment in Infrastructure: Ports*, p. 19

4.17 The Committee was struck by the customer service focus of the privately operated Port of Portland and its emphasis on understanding the needs of its potential business clients. Its costs were largely fixed so profitability depended on keeping cargo moving across the wharf. At the same time, it faced competition in most of its markets, so it needed to be responsive to maintain and grow its business.

4.18 The corporatisation of public port authorities was an attempt to address the aforementioned shortfalls and improve the efficiency of the port administration and operations through the introduction of a business-like environment. Although effective to an extent, government owned corporations still tend to be constrained by bureaucratic processes that are not conducive to the efficient operation of commercial activities:

Public ports frequently lack professional management and senior positions are often filled through a political selection process. Furthermore, there is a layer of bureaucracy separating those responsible for operations from those who manage the port. In contrast, private operations have very thin management structures with clear assignment of responsibility and accountability.<sup>110</sup>

4.19 The Committee notes that the difference in management in public and private ports it visited was a structural rather than a personnel issue, with the majority of the senior managers the Committee met at the privatised ports having previously worked at the port pre-privatisation. This difference was illustrated by the response of ports to the Committee's requests to visit. The private ports instantly welcomed the Committee's requests, whereas the public ports, while welcoming, could not agree to a visit until it had been approved. This delay was entirely appropriate given the political implications of the Committee's visit, but displays the additional complexity involved in having to have regard to public policy impacts that comes with public ownership.

## **Efficient allocation of resources**

4.20 In many respects, efficient allocation of resources is a product of commercial management practices. The ACCC considers that, as a general principle:

Privatisation may increase the efficiency of many businesses...Through competition for capital, private ownership improves a firm's productivity incentive. Privately owned firms have greater incentive and ability to be cost efficient and innovative compared to government owned enterprises.<sup>111</sup>

4.21 The Productivity Commission points out that the profit motive of government trading enterprises (GTEs) is fundamentally different to that of their private sector counterparts:

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<sup>110</sup> Asian Development Bank, *Developing Best Practices for Promoting Private Sector Investment in Infrastructure: Ports*, p. 66

<sup>111</sup> Australian Competition and Consumer Commission, *Container Stevedoring Monitoring Report*, p.19

GTEs have no threat of takeover and the board and executives are relatively well protected compared to those in the private sector. These factors result in the incentives for efficiency not being as strong as for private firms, and in general capital is not as efficiently deployed. In addition, the role played by the government as owner inevitably has an influence, which can work against efficient investment. For example, governments have been known to extract 'special' dividends, which can compromise long-term investment by the GTE, or try to influence GTE decision making for political gain.<sup>112</sup>

4.22 As Engineers Australia has previously noted in respect of the Port of Darwin, the low profitability of many government owned enterprises often arises from the lack of a commercial pricing methodology that ensures long-term commercial viability. This in turn impacts on the organisation's capacity to fund or access funding for infrastructure projects. Similarly, government owned enterprises are less likely to have asset management systems in place to guide the acquisition, operation, maintenance, renewal and disposal of assets.<sup>113</sup>

4.23 As highlighted by the Productivity Commission, and noted by Engineers Australia in relation to port infrastructure in the Territory, basic maintenance of publicly owned and operated infrastructure is routinely neglected and inevitably leads to "higher than necessary costs and demands for additional infrastructure ahead of optimal requirements."<sup>114</sup> Furthermore, it is evident that the public sector, both in Australia and internationally, fails to fully exploit opportunities to operate existing infrastructure more efficiently, leading to more expensive and less sustainable infrastructure solutions:

It is often easier for government to increase the amount of productive assets than to increase the productivity of existing assets, whereas the private sector maximises productivity and utilisation of existing assets in preference to investing in new capacity.<sup>115</sup>

4.24 Given the aforementioned factors, there has been a steady increase in private participation in port operations around the world as:

governments and lending agencies have come to acknowledge that private sector participation can be a powerful force for enhancing the performance of port assets... National and regional seaports are realizing that they cannot compete effectively without the efficiencies offered by private operators and, equally importantly, without access to capital provided by private investors.<sup>116</sup>

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<sup>112</sup> Productivity Commission, *Public Infrastructure*, Inquiry Report, pp. 86-7

<sup>113</sup> Engineers Australia, *Infrastructure Report Card 2010 Northern Territory*, p. 37; see also Committee Transcript, 31 March 2015, p. 24

<sup>114</sup> Productivity Commission, *Public Infrastructure*, Inquiry Report, p. 83; Engineers Australia, *Infrastructure Report Card 2010 Northern Territory*, p. 39

<sup>115</sup> Asian Development Bank, *Developing Best Practices for Promoting Private Sector Investment in Infrastructure: Ports*, p. 40; Productivity Commission, *Public Infrastructure*, Inquiry Report, p. 83

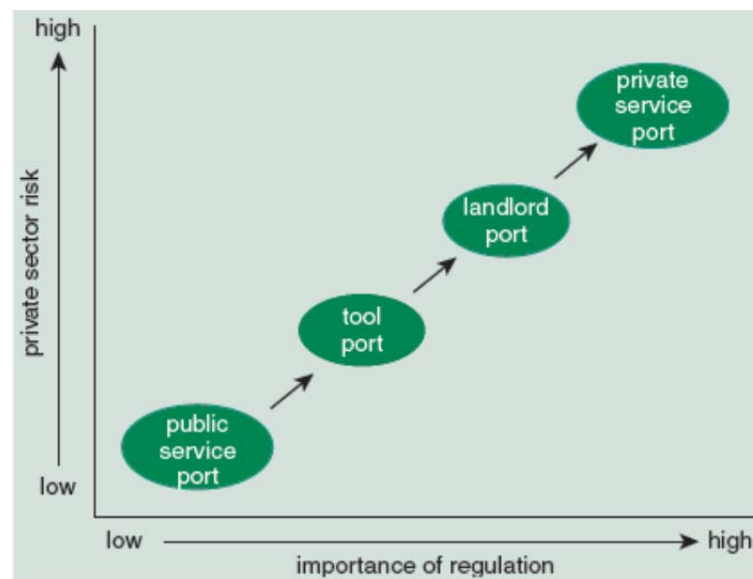
<sup>116</sup> World Bank, *Framework for Port Reform: Module 1 Port Reform Toolkit*, p. 6

## 5 The Risks of Private Sector Involvement

### Introductory comments

5.1 As highlighted in the submission from the Steering Committee, “a transition from public operation to private operation is not without risk.”<sup>117</sup> Figure 6 illustrates how the four port management and operations models discussed in Chapter 3 array themselves on scales measuring private sector risk and the need for independent government oversight.

**Figure 6: The Public-Private Balance of Risk and Regulation**<sup>118</sup>



5.2 Importantly, although generally referred to as landlord ports, the public-private balance of risk and regulation associated with ports that have been partially privatised by way of long-term lease arrangements, as is currently proposed for the Port of Darwin, is more closely aligned to that of a private service port than a landlord port.

5.3 While noting that privatisation can “unlock potential benefits when implemented appropriately”<sup>119</sup>, the ACCC is of the view that:

Benefits from privatisation will be maximised where there is strong potential for competition or where, in the absence of competition due to monopoly or near monopoly characteristics, there is sufficient regulatory oversight to ensure that competition in upstream or downstream markets is not hindered.<sup>120</sup>

<sup>117</sup> Port of Darwin Project Steering Committee, Submission No. 4, p. 8

<sup>118</sup> World Bank, *Framework for Port Reform*, p.15

<sup>119</sup> Australian Competition and Consumer Commission, *Privatisation of State and Territory Assets and New Infrastructure*, Submission to the Senate Economics References Committee, Australian Government, Canberra, January 2015, p. 3

<sup>120</sup> Australian Competition and Consumer Commission, *Privatisation of State and Territory Assets and New Infrastructure*, p.4

- 5.4 Reflecting the primary concerns of witnesses, as discussed below, the ACCC further notes that:

Without an adequate regulatory regime (covering access and/or pricing) monopoly infrastructure service providers would be capable of earning monopoly profits or foreclosing competition. Benefits would therefore flow to investors, at the expense of users of the asset and, ultimately, end consumers. Inadequate economic regulation can also dampen investment in markets that depend on access to the monopoly asset, thereby denying at least some of the benefits the community could obtain from greater competition.<sup>121</sup>

## Pricing

- 5.5 In light of the recent experiences of port users at the Port of Brisbane where charges have risen significantly post privatisation<sup>122</sup>, the main concern raised with the Committee regarding the proposed lease model for the Port of Darwin was price rises. There were two aspects of this concern. The first was that a private operator would set pricing on a purely commercial basis. The second was that a private operator would use its market power to set prices on a monopoly basis.

### Commercial rates

- 5.6 A private operator will require a reasonable return on investment to ensure its long-term commercial viability and will set its charges accordingly. Commercial rates can promote efficiency as it encourages use of resources, including land, equipment and labour, where they will give the best return. However, as discussed in Chapter 4, public ports do not generally run on a fully commercial basis as their government owners bring public policy factors into strategic decision making. Thus, for most of the Port of Darwin's history, it has been subsidised by the Government and charged less than commercial rates to help foster the economy.
- 5.7 A recent review of the port's financial performance found that based on the current pricing structure, DPC is substantially under recovering its operating costs and does not generate an acceptable return on assets.<sup>123</sup> In December 2014 the DPC subsequently announced that a number of new tariff changes would come into effect on 1<sup>st</sup> February 2015 and apply to vessels berthing and loading cargo at East Arm Wharf, Fort Hill Wharf and Stokes Hill Wharf:

To ensure that the Corporation fully recovers its operating costs and generates sufficient revenue to provide Government with an acceptable

<sup>121</sup> Australian Competition and Consumer Commission, *Privatisation of State and Territory Assets and New Infrastructure*, p.4

<sup>122</sup> Maritime Union of Australia, Submission No. 3, pp. 21-2; Connie, Chen., *Australia's New Dawn – Port Privatisation*, p. 2

<sup>123</sup> Darwin Port Corporation, *New Port Tariffs – February 2015*, 9 December 2014, viewed 2 April 2015, <http://www.darwinport.nt.gov.au/news/new-port-tariffs-%E2%80%93-february-2015>

return on its assets, the Government has approved the following changes in the port tariffs:

- introduction of a fixed berthage charge of \$2,000 per call (ex GST)
- 15% increase to the daily berthage tariff from the current \$0.2545 to \$0.2926 per GRT per day (ex GST);
- 30% increase in wharfage rates for general cargo, livestock and containerised cargo.<sup>124</sup>

5.8 Amongst port users that gave evidence there was a general acceptance that charging commercial rates was appropriate in today's economy. However, in light of the recent price rises, many expressed their concern regarding the impact further increases as a result of privatisation may have on the viability of their businesses and the potential impact on consumers. As Jared Chng: Chief Financial Officer, Vopak Australia pointed out:

A lot of our concern would be the cost factor, along with other participants I have heard so far...Some of it we can charge to our customers, who are oil retailers, and in turn to protect their margins they would have to increase the petroleum prices. Some of it we have to bear, so that eats into our margins...We just had a rental review of our land lease rates and we had a 40% to 50% increase in our original land lease rates. So this is quite a big increase, it is a big component that we have to bear in terms of our margins.<sup>125</sup>

5.9 In relation to the potential for post privatisation rent increases, such as those experienced at the Port of Brisbane, the Steering Committee advised that they did not anticipate a similar situation would occur in Darwin since it was their understanding that the increases in Brisbane were largely attributable to an undervaluing of land prior to the privatisation process.<sup>126</sup> Given that recent lease negotiations associated with the Port of Darwin have been based on the Valuer-General NT's 2014 valuation of port land assets, the Committee heard that the Government was confident that commercial rates were now being charged.<sup>127</sup>

5.10 Nevertheless, as Asciano pointed out in their response to the *Competition Policy Review* draft report:

Rental charges have been significantly increased in the years prior to privatisation, thus maximising the sale price. For example, in the three years prior to privatisation rents increased at the Brisbane container terminal by 128%. Further charging increases post port privatisation have occurred. More charging increases are likely given the high prices paid for the ports and the return on investment requirements of the port operators. For example, the successful bidders for Port Botany and Port Kembla paid 25 times EBITDA for these ports. This implies a return with current profitability of 4% which is significantly below the required rate of return of the owners. Thus profitability will need to increase and one of the key

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<sup>124</sup> Darwin Port Corporation, *New Port Tariffs – February 2015*

<sup>125</sup> Committee Transcript, 1 April 2015, p. 28

<sup>126</sup> Committee Transcript, 31 March 2015, p. 25

<sup>127</sup> Committee Transcript, 31 March 2015, p. 26

levers to influence profitability for a monopolist is to raise existing prices or commence charging of new prices.<sup>128</sup>

### **Monopoly rates**

5.11 Monopoly rates is a well-established risk of privately operated ports. A private operator has an incentive to not merely make a reasonable return but to make as large a return as is possible. Consequently:

rental prices and other port costs and charges tend to increase under the new private owners. This is not surprising given that the immediate goal of the private sector is to generate revenue in return for its investors.<sup>129</sup>

5.12 It was clear from the Committee's discussions with private port operators that they felt they were subject to a range of price controls. On the one hand, there were basic market pressures that drove them to take care of their customers as it was not in their interest for their customers to use alternative transport where possible or to cease operating. At the Port of Adelaide for example, which went under a 99 year lease 13 years ago, the Committee heard that prices have stayed largely in line with CPI.

5.13 As Warwick Sommer: General Manager Commercial and Business Development, Asciano Group also pointed out:

any port that keeps increasing the prices, whether it be state owned or privatised, will ultimately see some of the trade components fall off because it will become too expensive for the users...The threat, when you push too hard on price is competitiveness of the port becomes an issue. At the end of the day the stevedoring aspect, yes we do not want to see prices go up because ultimately the supply chain bears that somehow. There is a point of duress reached if price keeps going up.<sup>130</sup>

On the other hand, the threat of price regulation through the *Competition and Consumer Act* or State regulatory regimes was noted as a strong disincentive against grossly excessive pricing.

5.14 However, it was also clear from talking to port users that some considered that they were charged in excess of a fair rate. The Committee notes that the ACCC has expressed concerns that ports have been enjoying a very high rate of return over extended periods that are consistent with monopoly pricing and has the view that price monitoring has failed to adequately control pricing in ports:

Leases to operate ports may fetch high prices when sold by governments if bidders anticipate the ability to earn monopoly profits from the asset and recover the price paid from port users, or favour downstream businesses.<sup>131</sup>

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<sup>128</sup> Asciano, *Competition Policy Review: Response to the Draft Report*, November 2014, Australian Government, viewed 13 April 2015, <http://competitionpolicyreview.gov.au/draft-report/non-confidential-submissions/>, pp. 16-17

<sup>129</sup> Connie, Chen., *Australia's New Dawn – Port Privatisation*, p. 2

<sup>130</sup> Committee Transcript, 31 March 2015, p. 9

<sup>131</sup> Australian Competition and Consumer Commission, *Container Stevedoring Monitoring Report No. 16*, Commonwealth of Australian, Canberra, ACT, October 2014, p. 20

A price monitoring regime may be favoured by a government seeking to maximise the sale price. However, in the ACCC's experience, price monitoring does not provide an effective constraint on the exercise of market power, including monopoly pricing.<sup>132</sup>

- 5.15 The Committee was convinced that port operators do find that market forces and the threat of regulation puts a limit on their capacity to increase prices, but also considers that that limit is higher than what would be imposed in a fully competitive market. Stephen Crisp: Freight and Logistics Manager, Australian Agricultural Company Ltd, noted that this is not necessarily problematic:

as long as the cost structures do not outstrip CPI by a certain amount...We operate a business and believe in free trade, but when you are in charge of a monopoly there becomes a concern that they can do whatever they want. We would definitely be in favour of monitoring and some relationship to CPI if nothing more appropriate can be found.<sup>133</sup>

- 5.16 The Committee also noted that pricing pressures were felt differently by different industries. For high value, low volume products, where port costs were insignificant compared to the value of the product, port fees were of marginal concern to the port user. These users were more concerned with service levels than price. However, for low value, high volume products price was a major concern. Port fees made up a significant proportion of these industries' costs so increases greatly impacted the profitability of the business.

## Access

- 5.17 A number of witnesses voiced their concerns regarding the potential for anti-competitive behaviour in the form of vertical integration. For example, the Committee heard that since privatisation, Flinders Ports had progressively expanded into stevedoring and logistics functions resulting in significant conflict of interest issues:

One result of the expansion of Flinders Ports into stevedoring is that it is effectively both a landlord and a competitor to Patrick and Qube...It appears to MUA members in South Australia that Flinders Ports focuses its capital investments on areas in which it owns and operates, and neglects those areas of the port that it rents to companies which are now its competitors. It is noticeable that both the amenities and wharf area rented by Patrick and Qube are in a much worse state of repair than those areas in which Flinders Ports operates stevedoring companies.<sup>134</sup>

- 5.18 Given the attention this issue has received from the ACCC of late, it is concerning to note that the Ports Management Bill does not address this matter. While cautioning against the imposition of unnecessary restrictions, in order to protect against integration issues that could raise concerns in the future, the ACCC recommends that:

Where the sale of an asset is likely to confer enduring market power, governments should carefully consider at the beginning of a privatisation

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<sup>132</sup> Australian Competition and Consumer Commission, *Container Stevedoring Monitoring Report*, p. 22

<sup>133</sup> Committee Transcript, 1 April 2015, p.27

<sup>134</sup> Maritime Union of Australia, Submission No. 3, pp. 17-18



process whether legislative restrictions on vertical integration might be warranted.<sup>135</sup>

5.19 Moreover, the following comments from the ACCC are of particular relevance given the 99 year lease model proposed for the Port of Darwin:

There should be no presumption that any regulation applying at that time will remain 'fit for purpose' once the asset is sold. In particular, governments should carefully consider the incentives any purchaser will have – even if it has no interests upstream or downstream at the time of sale – to vertically integrate into related markets at a later time. Regulatory settings that apply to monopoly assets when privatised may therefore need to be adaptable to possible changes to industry structure...By leveraging such market power into otherwise competitive parts of the supply chain or related industries, a private firm's conduct in such circumstances may provide poor outcomes for competition and efficiency. The legislative and regulatory arrangements that apply to such firms are likely to be important factors in determining the nature and scope of competition in the affected markets for many years into the future.<sup>136</sup>

5.20 Ensuring the model incorporates a dispute resolution mechanism was also considered important. Where access regulation is appropriate, the ACCC notes that competition issues, including those relating to pricing, "are best addressed through Part IIIA of the *Competition and Consumer Act* – the primary legislative provisions governing Australia's National Access Regime"<sup>137</sup> – and recently called on governments to consider giving the ACCC, as the regulator, authority to intervene in access and pricing disputes.<sup>138</sup>

## Safety and the environment

5.21 Under the Ports Management Bill, the regulatory roles and functions of the current harbourmaster are divided between the regional harbourmaster and the port operator. Given the critical maritime safety and environmental protection role the harbourmaster performs, concerns were raised regarding the potential conflict of interest the proposed division presents.<sup>139</sup> As highlighted in Chapter 3, given the public interest nature of regulatory functions, these are rarely privatised:

To do so would raise a conflict of interest between the public interest (safety, environment and equal treatment under the law) and private interest from the port industry. For example, since port time of ships is an important cost and operational factor, the harbourmaster will always be under pressure to grant preferential treatment to shipping lines. Impartial and consistent application of operational safety measures for ships carrying

<sup>135</sup> Australian Competition and Consumer Commission, *Privatisation of State and Territory Assets and New Infrastructure*, p.4

<sup>136</sup> Australian Competition and Consumer Commission, *Reinvigorating Australia's Competition Policy*, Submission to the Competition Policy Review, Australian Government, Canberra, June 2014, p. 38

<sup>137</sup> Australian Competition and Consumer Commission, *Container Stevedoring Monitoring Report*, p. 22;

<sup>138</sup> Jenny Wiggins, *Container ports need regulation to prevent soaring rents: ACCC chief Rod Sims*, Australian Financial Review, 16 March 2015, viewed 17 March 2015,

<http://www.afr.com/business/infrastructure/ports/container-ports-need-regulation-to-prevent-soaring-rents-acc-chief-rod-sims-20150315-143kz4>

<sup>139</sup> Committee Transcript, 1 April 2015

dangerous or environmentally sensitive goods...is essential to the safe functioning of any port. The harbourmaster, therefore, should not function within a purely commercial environment, but must have freedom of action to carry out public tasks in an unimpeded and unbiased manner.<sup>140</sup>

5.22 Consequently, as is evident in North America, Europe and elsewhere in Australia, the optimal model when privatising ports has been found to be one where:

the private sector participates in the landowner and operator functions and the port authorities retain the regulatory functions. This is consistent with the privatisation model adopted by the Queensland government for the Port of Brisbane, as well as Port Botany and Port Kembla by the NSW Government.<sup>141</sup>

5.23 With regards to the latter, the NSW Port Authority has retained responsibility for the management of navigation, security and operational safety needs of commercial shipping, and provides the emergency response and clean-up for maritime incidents such as oil and fuel spills in relation to shipping for both private and public ports<sup>142</sup> However, at the other end of the spectrum, the Committee notes that in the seven South Australian ports operated by private operator Flinders Ports, these functions are performed by private sector employees.<sup>143</sup>

5.24 As discussed in Chapter 6, irrespective of which model is used, ensuring that the provisions of the Ports Management Bill acknowledge the potential for conflicts of interest and adequately safeguard the public interest is of particular concern to the Committee.

## Maximising Government income

5.25 Privatising an income generating asset raises questions regarding whether the Territory would be better off by keeping the income stream the asset produces. On the one hand, there is the concern that:

If income generating assets are sold ... and the proceeds are used to fund non-income generating assets ... the reduction in long-term income will make it harder to raise the revenue necessary to sustainably fund additional infrastructure and public services in the future.<sup>144</sup>

On the other hand, as the Productivity Commission points out:

If the purchaser is able to operate the enterprise more productively, the price they pay would reflect some of that gain. The State Government would then receive a premium over the (capitalised) revenue stream that

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<sup>140</sup> World Bank, *Alternative Port Management Structures and Ownership Models*, Module 3, pp. 125-6

<sup>141</sup> Connie, Chen., *Australia's New Dawn – Port Privatisation*, p. 2

<sup>142</sup> NSW Port Authority, Homepage, viewed 21 April 2015, <http://www.portauthoritiesnsw.com.au/>; see also, Maritime Union of Australia, Questions on Notice to Legislative Assembly of the Northern Territory Port of Darwin Select Committee, 15 April 2015, p. 5

<sup>143</sup> Flinders Ports, viewed 18 March 2015, <http://www.flindersports.com.au/>

<sup>144</sup> Senate Economics References Committee, *Privatisation of state and territory assets and new infrastructure*, Commonwealth of Australia, Canberra, March 2015, p. 11

would have vested with the government, if the asset stayed in public hands.<sup>145</sup>

5.26 With regards to the Port of Darwin, while successive NT Governments have invested significantly in capacity building infrastructure, the port is not yet fully mature and is unlikely to reach its potential for a number of years.<sup>146</sup> Consequently, given that it is likely that some of this investment may not be captured in the upfront bid price of the long-term lease arrangement the Steering Committee advised that:

The NT Government has publicly stated that it will seek to capture some of this value in port assets through a revenue sharing arrangement and has been investigating revenue sharing mechanisms which could come into operation once a long-term lease is secured.<sup>147</sup>

5.27 Under Treasurer, Jodie Ryan, further noted that:

We would like to see, as the capacity increases to the point where if we had continued ownership of the port we would have got that revenue capacity without increasing infrastructure investment, a share in that revenue. If it goes beyond that point, and the new operator has to invest substantially more to increase their revenue yet again they get that revenue all to themselves, we do not share in that...If we choose to then invest early or make a different investment decision than a normal operator would, again we can share in some of the upside from that...It may seem like it is a low point to be selling the port, but we are also trying to capture that future benefit. We will leave it to the bidders to put in how they think they can do that, and that will be part of our assessment.<sup>148</sup>

5.28 The Committee endorses this aim of ensuring that the Territory receives a future return on its investment while maintaining incentives for investment by a private partner. Achieving this will require rigour in the assessment and development of any lease, as further discussed in Chapter 6.

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<sup>145</sup> Productivity Commission, *Public Infrastructure*, Inquiry Report, p. 263

<sup>146</sup> Committee Transcript, 31 March 2015, p. 28

<sup>147</sup> Steering Committee, Submission No 4, p. 14

<sup>148</sup> Committee Transcript, 31 March 2015, pp. 28-9

## 6 Enhancing the Port of Darwin Lease Model

### Safety

6.1 Safety of those working on and accessing the port and those on and around the harbour is of paramount concern to the Committee. The Committee also notes that the activities of the port, which involve moving very large items and equipment and a range of dangerous goods, are inherently dangerous, so safety must be actively pursued to be achieved. The Committee also notes pursuing safety comes at a cost, so conflicts can easily arise between profit and safety. Safety therefore requires scrutiny and enforcement by an independent agency.

6.2 The Minister described marine safety regulation under the Ports Management Bill as follows:

the roles and functions of the current harbourmaster will be divided between the port operator, being responsible for the day-to-day safe management of the port, and the Department of Transport, as the agency responsible for the shipping and maritime industries. The Department of Transport will retain the position of regional harbourmaster. The regional harbourmaster must be a public employee and be appointed by the minister to be the regional harbourmaster for a designated port. The regional harbourmaster has a number of roles and functions under the Ports Management Bill, including:

- setting technical and safety standards for pilotage and the provision of pilotage
- promulgating depths and under keel
- issuing guidelines for the preparation of port safety management plans and approval and audit of such
- being a pilotage authority for the port. As such, the regional harbourmaster will license pilots and will have the powers to direct and step in during times of emergency
- exercising step-in rights because of an emergency, or in order to avert a threat of death or serious injury to any person, or loss or serious damage to property, or actual or potential harm to the environment. The regional harbourmaster has step-in rights for the following relevant functions:
  - direction and control of vessels within the port
  - pilotage
  - movement, handling and storage of dangerous goods
  - approval and management of maritime navigational aids
  - clearances of wrecks and removal of vessels
  - closure of the port and relevant waters

- approval of closure of waters for events not affecting commercial vessel operation, for example, the Beer Can Regatta, fireworks displays and sporting events.<sup>149</sup>
- 6.3 Worksafe NT will continue to regulate dangerous goods and port operators will be responsible for management of dangerous goods on vessels, with the regional harbourmaster having direction and step-in rights. Worksafe NT and the Australian Maritime Safety Authority will continue to investigate and prosecute worker safety issues at ports.<sup>150</sup>
- 6.4 The port operator must annually submit a port safety plan to the regional harbourmaster for approval and must implement the port safety plan. The regional harbourmaster is able to require the port operator to ensure that a compliance audit is conducted and report submitted. The person who conducts the audit must be approved by the regional harbourmaster but is paid for by, and contracted to, the port operator.
- 6.5 The port operator is responsible for the day to day safe operation of the port.<sup>151</sup> While the regional harbourmaster maintains a regulatory role, it is the port operator that directs and controls vessel movements and manages port related operations. While the regional harbourmaster has step-in rights to control emergency situations, its capacity to effectively exercise these without experience in running port operations will be limited. The conduct of the port operator, the effectiveness of its safety plan and its compliance with that plan is therefore vital for the safe operation of the port and safety of the harbour and its surrounds.
- 6.6 The MUA, while welcoming the requirement for a port safety plan, was:
- concerned that the requirements for the Plan ... do not sufficiently reflect the duties that the Port has as a 'person conducting a business or undertaking' (PCBU) under the NT *Work Health and Safety (National Uniform Legislation Act...*
- Under [that Act] a PCBU has a duty to consult, cooperate and coordinate activities with other duty holders (s46). It also has a duty to consult 'with workers who carry out work for the business or undertaking who are, or are likely to be, directly affected by a matter relating to work health or safety' (s47).<sup>152</sup>
- 6.7 The Committee considers that consultation with port users and workers would be a necessary part of preparing a port safety plan. It is essential that those interacting with the port have the opportunity to raise issues for consideration in a safety plan as the port operator may not be aware of all the safety implications of port related activities. While the regional harbourmaster may issue guidelines

<sup>149</sup> Hon Adam Giles, Chief Minister, Ports Management Bill (Serial 110), Port of Darwin Bill (Serial 111), Second Reading Speech

<sup>150</sup> Hon Adam Giles, Chief Minister, Ports Management Bill (Serial 110), Port of Darwin Bill (Serial 111), Second Reading Speech

<sup>151</sup> Hon Adam Giles, Chief Minister, Ports Management Bill (Serial 110), Port of Darwin Bill (Serial 111), Second Reading Speech

<sup>152</sup> Maritime Union of Australia, Questions on Notice, pp. 8-9

regarding consultation, the Committee considers that an adequate level of consultation should be required by the Bill.

### **Recommendation 1**

**The Committee recommends that the Ports Management Bill be amended to require the port authority to consult with all persons directly affected by port operations in the preparation of its port safety plans.**

6.8 The port operator is required to implement its port safety plan with the maximum penalty for failing to do so being 200 penalty units, which currently equates to \$29,800 for an individual or \$149,000 for a body corporate.

6.9 Given the potential gravity of failure to comply with its port safety plan, and the potential for safety to conflict with profit, the Committee questions whether the Bill provides an adequate penalty for failure to comply with a port safety plan. The importance of ensuring that plans are complied with is illustrated by the *Report of the Montara Commission of Inquiry*, which found that the Montara oil disaster would have been averted if the approved control plans had been followed:

Well control practices approved by the delegate of the Designated Authority (DA), the Northern Territory Department of Resources (the NT DoR), most likely would have been sufficient to prevent the Blowout if PTTEPAA had adhered to them and to its own Well Construction Standards.<sup>153</sup>

6.10 By contrast, the Committee notes that the maximum penalty under the *Work Health and Safety (National Uniform Legislation) Act* for a body corporate for failing to comply with a work health and safety duty is \$500,000, or \$1,500,000, if the failure exposes a person to risk of serious injury, or \$3,000,000 if the failure recklessly exposes a person to a risk of serious injury.<sup>154</sup>

6.11 The Committee considers that there should be penalties for failure to comply with a port safety plan that are no less than those for failure to comply with a work health and safety duty and that the Ports Management Bill should be amended accordingly.

### **Recommendation 2**

**The Committee recommends that the Ports Management Bill be amended to include offences for failing to comply with a port safety plan and that the maximum penalties for these offences be no less than those for failure to comply with a work safety duty under the *Work Health and Safety (National Uniform Legislation) Act*.**

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<sup>153</sup> David Borthwick, *Report of the Montara Commission of Inquiry*, Australian Government, Canberra, June 2010, p. 6

<sup>154</sup> *Work Health and Safety (National Uniform Legislation) Act*, ss 31-33

## Environment

- 6.12 The proposed regulatory regime for ports does not directly address environmental issues and these will continue to be regulated by the Environmental Protection Authority. However, actual or potential harm to the environment is a reportable incident under the Ports Management Bill and the port operator is empowered to monitor and respond to environmental issues, the regional harbourmaster may step in to avert harm to the environment and the Minister may revoke declaration of an entity as a port operator if it has materially compromised the safety of the environment.
- 6.13 The historical environmental performance of the Port of Darwin has not been strong, and was singled out as an area for improvement in Engineers Australia's *Northern Territory Infrastructure Report Card 2010*.<sup>155</sup> The Committee also contrasted the open stockpiles of the Port of Darwin with the negative pressure storerooms and containerised ore loading it encountered at some other ports.
- 6.14 The Committee considers that the port operator should give similar consideration to controlling environmental risks as it does to safety risks. The Ports Management Bill requires port safety plans to cover "safety hazards and risks associated with the operation of the port that are reasonably likely to cause death or serious injury to any person or loss of, or serious damage to, property".<sup>156</sup> The Committee considers that similar plans should be prepared managing risks to the environment.

### Recommendation 3

**The Committee recommends that the Ports Management Bill be amended so that port safety plans also cover risks reasonably likely to cause serious damage to the environment.**

## Price

- 6.15 As discussed in Chapter 5, the potential for monopoly pricing is a major problem with ports, and the Committee is concerned to see that it is appropriately dealt with in any lease arrangements.
- 6.16 The regulation of privatised ports in Australia does not yet appear to be fully mature. Getting the approach right is difficult. The ideal is no regulation and an effective competitive market. The recent trend has been towards a 'light touch' approach, where the market is subject to a threat of regulation if prices become clearly excessive, and to price monitoring. While this has been accepted by port operators, some port users consider that it is not working effectively. It is also noted that over the same period there has been increased movement from subsidised to commercial pricing, and that not all price increases are unfair. However, analysis from the ACCC states that port operators have enjoyed a

<sup>155</sup> Engineers Australia, *Infrastructure Report Card 2010 Northern Territory*, p. 37

<sup>156</sup> Ports Management Bill, Clause 28(1)(a)

sustained return in excess of what would be expected in a competitive market.<sup>157</sup>

6.17 Adequate controls on pricing was also a consistent theme raised by port users who spoke to the Committee. The comments from Stephen Crisp: Freight and Logistics Manager, Australian Agricultural Company Ltd were typical of the views expressed:

We operate a business and believe in free trade, but when you are in charge of a monopoly there becomes a concern that they can do whatever they want. We would definitely be in favour of monitoring and some relationship to CPI if nothing more appropriate can be found.<sup>158</sup>

6.18 The Ports Management Bill proposes a regime that enables price regulation. As the Minister's second reading speech says:

Given that the port operator has the power to set port prices, government will undertake a price monitoring role, with the Utilities Commission as the independent statutory regulator. Where there is evidence of inappropriate pricing behaviour, the government has the capacity to step in to regulate prices. The approach is considered to deliver an appropriate balance between commercial certainty for an investor and a level of independent pricing, oversight and scrutiny.<sup>159</sup>

6.19 Under the Ports Management Bill, the Utilities Commission has regulatory powers over prescribed services provided by a port operator and the prices charged for those services, including requiring information from a port operator about pricing, publishing reports and statements about pricing, and making price determinations consistent with the access and pricing principles and regulations.<sup>160</sup> The access and pricing principles state that:

- (a) the price of access to a prescribed service should be set so as to:
  - (i) generate expected revenue from the service that is at least sufficient to meet the efficient costs of providing access to it; and
  - (ii) include a return on investment commensurate with the regulatory and commercial risks involved...<sup>161</sup>

6.20 Regulations may also specify a form of price regulation for prescribed services, including:

- (a) monitoring the price levels of a specified prescribed service;
- (b) requiring private port operators to comply with pricing policies or principles;
- (c) fixing the price of a prescribed service or the rate of increase or decrease in such a price;

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<sup>157</sup> Professor Ian Harper, et.al., *Competition Policy Review: Final Report*, Australian Government, Canberra, March 2015, p. 207; Australian Competition and Consumer Commission, *Container Stevedoring Monitoring Report*, p. ix

<sup>158</sup> Committee Transcript, 1 April 2015, p. 27

<sup>159</sup> Hon Adam Giles, MLA, (Chief Minister), Ports Management Bill (Serial 110), Port of Darwin Bill (Serial 111), Second Reading Speech

<sup>160</sup> Ports Management Bill, see Clauses 120, 131 and 135

<sup>161</sup> Ports Management Bill, Clause 132



- (d) fixing a maximum price for a specified prescribed service;
- (e) fixing a maximum revenue in relation to a specified prescribed service;
- (f) applying an average price cap to a basket of prescribed services;
- (g) revenue yield control;
- (h) any other form of economic regulation used by an independent regulatory body.<sup>162</sup>

6.21 While the Ports Management Bill provides a strong framework for managing monopoly pricing, its implementation depends on the prescription of services and the regulations specifying the forms of price regulation. The Committee is concerned that too light a touch on price regulation will allow monopoly pricing, which would amount to a tax on all Territorians as any excess charges are passed on to businesses and consumers.

#### **Recommendation 4**

**The Committee recommends that:**

- a) the Government remain vigilant against monopoly pricing and ensure the adequate enforcement of the access and pricing provisions of the Ports Management Bill, including ongoing consultation with port users regarding the adequacy of the regulations made under the Bill; and**
- b) the Ports Management Bill be amended to require the Regulator to report annually to the Assembly on compliance with the Bill's access and pricing principles.**

6.22 The Committee notes that the pricing controls for prescribed services under the Ports Management Bill only applies to services provided by a port operator.

6.23 Monopoly pricing and access issues can arise in a range of port services, and not only those provided by a port operator. For example, loading facilities operated by a third party at a port may have an effective monopoly on loading a particular product within a region. That third party may therefore be able to impose grossly excessive prices on, or deny access to, a business which has no viable alternative means of moving its product.

#### **Recommendation 5**

**The Committee recommends that:**

- a) the Ports Management Bill be amended to apply its access and pricing provisions to prescribed services provided by third party operators; and**
- b) the Government give further consideration to how best to ensure fair pricing and access behaviour by third party operators at ports.**

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<sup>162</sup> Ports Management Bill, Clause 133

## Access

- 6.24 Ensuring rights to fair access to the Port of Darwin is vital for the development of the Northern Territory economy. The Ports Management Bill accordingly prohibits a port operator from engaging in conduct for the purpose of preventing or hindering the access of a user or potential user of the port to a prescribed service<sup>163</sup> and from unfairly differentiating between port users.<sup>164</sup> The port operator must also have an access policy approved by the Regulator.
- 6.25 The access requirements may be enforced by a court of competent jurisdiction. The Committee notes, however, the enforcement through the courts can be expensive, time consuming, and ineffective for many disputes. The Committee therefore considers that the Bill should provide a dispute resolution mechanism as an alternative to legal action. As pricing is an essential element of access, the dispute resolution mechanism should also cover pricing.

### Recommendation 6

**The Committee recommends that the Ports Management Bill be amended to provide an alternative mechanism to taking legal action for resolving access and pricing disputes.**

## *Vertical integration*

- 6.26 Vertical integration of the port operator into upstream or downstream markets was seen as a risk to effective competition by a number of port users.
- 6.27 In its submission to the Harper Competition Review, Asciano stated:

Any degree of vertical integration will provide the privatised monopolist Port Operator with the ability to leverage its power in the markets in which it has a monopoly (port access and port services) into vertically related competitive markets such as stevedoring, terminal operation, rail operations and rail haulage. Whether it has the incentive to leverage this power will depend on the degree of integration and relevant competitive dynamics.

The privatized Port Operator could have both the ability and the incentive to engage in competition distorting discriminatory behaviour towards third party stevedores. Ways in which this could occur include (but are not limited to) the Port Operator:

- reducing the quality of certain services provided to non-affiliated port users such as stevedores;
- refusing to grant long-term leases of terminals to unaffiliated stevedores, which will have the effect of stevedores becoming unwilling to invest sufficiently in capital to provide a more efficient service for its customers as they cannot secure long-term leases;
- making port planning decisions such as relocating existing lessees who have made significant investments in their leased terminals to less favourable locations within the port in order to benefit its own

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<sup>163</sup> Ports Management Bill, Clause 123

<sup>164</sup> Ports Management Bill, Clause 124

downstream port services business and cause substantial disruption to the unaffiliated lessee. In this situation, the existing lessee may be able to seek compensation for any loss which it suffers as a result of the relocation. However, it is doubtful that the compensation would cover the full extent of the loss;

- providing access on less favourable/discriminatory terms and conditions (ie by restricting the quay length/yard space allocated to third party users);
- denying requests by non-affiliated stevedores for additional access to port capacity or giving priority to its own downstream business if such additional capacity is available;
- charging discriminatory fees to unaffiliated stevedores;
- margin squeezing downstream competitors by increasing the costs borne by those companies through rent and other charges and setting prices for its own stevedoring operations that an efficient downstream competitor could not match;
- investing in the port in a way that favours its own operations, such as by reducing investment in common infrastructure;
- using confidential information on downstream competitors operations, which it obtains through the terms of the leases which stevedores have at the port or under statutory mechanisms. For example, some Patrick leases require compliance with operational benchmarks such as truck turnaround times and provision of certain resource levels which the monopolist Port Operator reviews. Such information could be used to the advantage of the Port Operator's own affiliated downstream.<sup>165</sup>

#### 6.28 Similar views were expressed by Qube at the Committee's hearing:

The first two ports to be privatised were South Australian ports then Geelong. We would not advocate the port be privatised in that manner. For your benefit, those two ports are fairly anti-competitive. The reason we say that is the port operator and port owner are pretty much the same thing. I appreciate that puts us in a difficult position and we will get to that, but what we are seeing is some anti – well I will not say 'anti' but bundling of services whereby if you control the entire supply chain then you are able to bundle services which preclude other people, or you can manipulate pricing to preclude other investors or operators from operating in those ports.<sup>166</sup>

#### 6.29 Asciano's recommended solution of this problem at the national level was to regulate private ports so that:

any expansion (via whatever means) into competitive stevedoring or other port services by the Port Operator requires prior notification to the ACCC and, if required, prior ACCC approval. The ACCC would assess whether there would likely be a reduction in competition as a result of the expansion. The Port Operator would be unable to proceed until ACCC approval had been obtained.<sup>167</sup>

<sup>165</sup> Asciano, *Submission to the Competition Policy Review Issues Paper*, June 2014, pp. 13-14.

<sup>166</sup> Committee Transcript, 1 April 2015, pp. 53-4.

<sup>167</sup> Asciano, *Submission to the Competition Policy Review Issues Paper*, p. 16.

6.30 In the absence of such national regulation, the Committee recommends the introduction of an equivalent Territory level scheme.

### **Recommendation 7**

**The Committee recommends that:**

- a) the Ports Management Bill be amended so that the Minister may not issue or renew a stevedoring licence to a port operator or a related entity of a port operator unless the Regulator certifies that to do so will not lessen competition in upstream and downstream markets; and**
- b) the Government consider other limitations on a port operator and its related entities owning businesses that may reduce competition in upstream and downstream markets.**

## **Consultation**

6.31 Leasing the Port of Darwin and creating a new regulatory regime for ports in the Territory may have a significant impact on many businesses. Such changes may also involve a range of unintended consequences and unanticipated complexities that would be apparent to those who operate within the system. Widespread consultation is therefore required to minimise the risks of such major changes.

6.32 A number of stakeholders informed the Committee that its inquiry was the first time they had been asked to comment on the proposal and were concerned that particular issues be adequately considered. For example, the Northern Territory Livestock Exporters Association were concerned that they had not been consulted on the proposal and were wanting to be more involved in decision-making around the port with a view to removing bottlenecks and furthering their target of getting one million head of cattle over the port per year by 2025.<sup>168</sup>

6.33 Similarly, Bhagwan Marine noted:

We are very interested in this process, it certainly has the potential to impact our business significantly, either positively or negatively, it depends on the outcome of this transaction...Our key concern is that right now you are dealing with a fairly non-competitive environment in harbour services. We see the transition from potentially a public entity managing the port to a private one as being an opportunity or a threat. The opportunity for businesses like ours is that we see increased competition and the ability to expand what we do in the harbour, and the ability to reduce the costs of what we do in the harbour. We see a potential threat if it is done the wrong way, and that is to move the non-competitive environment from being a place where it is managed in public hands to a place where it is managed in private hands.<sup>169</sup>

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<sup>168</sup> Committee Transcript, 1 April 2025, pp. 59-71

<sup>169</sup> Committee Transcript, 1 April 2015, p. 35

6.34 Issues noted by Bhagwan where the leasing of the port could have a positive or negative impact included:

- The port operator charging a commercial (instead of the current subsidised) price for moorings would make it viable for Bhagwan to rent out its excess capacity, so long as Bhagwan was not charged excessive fees on the moorings it put in;
- Whether there will be alternative, reliable loading points in the harbour to East Arm (which is relatively expensive and subject to competing priorities) to load small amounts of cargo to take to worksites, and what will happen to existing facilities such as Fisherman's Wharf;
- What opportunities will exist to house equipment, particularly vessels;
- What opportunities will exist for further private jetty development within the harbour;
- Will harbour use fees disadvantage competitors of the port operator in the provision of services in the harbour;
- Will the port operator have unfair competitive advantages in the provision of on-harbour services, such as the maintenance of navigational aids;
- Would the port operator have a conflict of interest in the performance of regulatory functions, such as whether to allow pilot exemptions for experienced masters; and
- Will there be fair competition in stevedoring services across the wharves.<sup>170</sup>

6.35 It is important that these and other issues that port and harbour users will have are adequately addressed prior to committing to a proposal. Key issues that the Committee identified from such concerns were:

- Ensuring fair competition in all markets for all port users, including ensuring that market power or the performance of regulatory functions does not unfairly advantage any competitor; and
- The need for integrated planning to adequately allow for all harbour users, and the range of uses of the harbour, to be considered when determining what should be included in the proposed lease.

6.36 The Committee also notes the need for the Government to adequately communicate its proposal to allay any unwarranted fears and remove any unwarranted uncertainty among port users and those running businesses on the harbour.

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<sup>170</sup> Committee Transcript, 1 April 2015, pp. 34-49

### **Recommendation 8**

**The Committee recommends that, prior to entering any lease arrangements, the Government implement a community information and stakeholder consultation strategy to:**

- a) identify further improvements to the leasing proposal, including:**
  - i) what parts of the harbour should be included or excluded from the lease; and**
  - ii) how competition could be improved; and**
- b) communicate what is being proposed so affected businesses can plan accordingly.**

### **Maintaining control of the vision**

6.37 The Steering Committee has put a strong emphasis on ensuring that any lessee of the port has a business model that is consistent with the Government's plans for development. If successful, this should prove a highly effective means of promoting development and getting the most of the port. Nevertheless, care will be required to ensure there are sufficient controls to ensure ongoing consistency of vision without inefficiently impairing the lessee's capacity to manage the port.

6.38 The risk of the Government's and the port operator's visions diverging over 99 years are significant, as those visions will inevitably change over that period. Any system meant to last for that period will need to be able to accommodate those changes and maintain a sufficient level of Government control for it to be able to achieve public interest requirements.

6.39 In this regard, the experience of Western Australia's privatisation of the freight rail network is pertinent. Aspects of the Western Australian Government's 2000 vision for the privatised network were frustrated by the on-selling of lease assets, inadequate contractual provisions, and lack of public accountability. The Western Australian Legislative Assembly's Economics and Industry Standing Committee described events as follows:

The government's aim in selling Westrail's freight business and leasing the infrastructure was clear and well-intentioned, particularly its express wish to dispose of the business on a vertically integrated basis. The lease document, in particular, establishes that the revenue from related entities of the lessee must be accounted for in determining the economic or uneconomic status of less viable lines. Not only did this acknowledge that some lines were less viable, but demonstrated the accepted need, and means, to keep them operating.

Unfortunately, though, the lease instrument, the regulatory regime and the Public Transport Authority's (PTA's) management of the lease has not allowed the government's vision to be realised. The lease instrument did not give the government any rights in the on-selling of the above rail business, a situation which led to the loss of the vertically integrated business arrangement. The Railways (Access) Code 2000 (WA), which confers oversight and regulatory functions on the Economic Regulation Authority (ERA), aims to facilitate negotiations between the lessee and

access seekers. However, the Code does not allow the ERA a role in setting access prices. The application by CBH Group in December 2013 is the first access proposal relating to the freight rail network to trigger the formal involvement of the ERA in considering the lessee's floor and ceiling prices. In seeking access to the freight rail network, Karara Mining found the Code to be ineffective and negotiated directly with Brookfield Rail. As part of this process, and at Brookfield Rail's request, Karara Mining agreed that the Code could not be applied for the duration of their 15-year agreement. It seems that the Code is not as effective as it might be and, in some circumstances, may actually jeopardise development.

Throughout its role as the public authority responsible for managing the lease and ensuring the lessee was meeting its lease obligations, the PTA has taken a 'light touch' approach to provide the lessee with quiet use and enjoyment of the below rail infrastructure. This approach has proven to be less than effective in ensuring the condition of the lines and the entire freight rail network remain at a standard that could be reasonably expected under the terms and intent of the lease.

When combined, these factors have resulted in a situation where certain lines have been placed into a new category or standard called 'care and maintenance'. Based on the government's agreement to lease variations to date, it is a matter of serious concern that other line sections may be similarly placed into care and maintenance.<sup>171</sup>

6.40 The Western Australian Auditor-General also noted that the contractual provisions failed to stand up to the passage of time:

The lease contains 'fit for purpose' performance standards that are intended to ensure the network remains in the condition required by the State and by users of the network. There are a number of possible interpretations of 'fit for purpose' as used in the lease. Based on internal legal advice, PTA has interpreted the lease so that the only usable standards are the Initial Performance Standards, set at year 2000 levels. This is a substantial reduction of the 'fit for purpose' obligation, as it does not include the requirement to meet the needs of rail users or reflect changes in rail technology. This increases the risk of a gap emerging between the required standards and the needs of rail users, and the risk that at the end of the lease in 2049 the network will be required to be in essentially the same condition it was in 2000.<sup>172</sup>

6.41 The Auditor-General also noted that the management of the contract was constrained by the limited amount of information that was publicly available:

Limited information is available to Parliament and the public regarding the lease of the network or its condition. The lease and its variations have not been tabled in Parliament, and no regulatory agency reports publicly on the condition of the network or its use. The 2005 track condition report was tabled in Parliament, but the 2010 track condition report has not been made publicly available. PTA's capacity to report on the condition of the network or its use is restricted by the type of information it deems necessary to obtain from the lessee in order to manage the contract. In our view PTA's capacity to hold the lessee to account would be better served if it had a

<sup>171</sup> Western Australia Legislative Assembly Economics and Industry Standing Committee, *The Management of Western Australia's Freight Rail Network*, Report No. 3, Legislative Assembly, Parliament of Western Australian, Perth, October 2014, Chairman's Foreword

<sup>172</sup> Western Australian Auditor General's Report, *Management of the Rail Freight Network Lease: Twelve Years Down the Track*, Office of the Auditor General, Perth, January 2013, p 9

more comprehensive understanding of the work done and condition of the network<sup>173</sup>

6.42 This experience and concerns raised by witnesses highlighted for the Committee the need to ensure that adequate consideration is given to:

- The implications of, and any need to control, the on-selling of the lease, port assets or operations;
- Requiring the port operator to develop or maintain particular services, or to allow others to maintain particular services;
- Ensuring adequate rigour in the preparation of contracts; and
- Ensuring adequate public accountability regarding contractual terms and performance.

### ***On-selling assets, operations or lease***

6.43 Given the recognised importance of any port operator sharing the Government's vision for development of the port, the Government needs to maintain control over who the lessee is.

6.44 Transfers of leases for major infrastructure are relatively common, with the 50 year lease of the Darwin to Tarcoola railway being on its second lessee. It may be anticipated that over 99 years any lessee of the Port may wish to transfer the lease, and that the Government could not unreasonably withhold its consent to such a transfer.

6.45 To ensure the lease is not transferred to a lessee with a vision incompatible with that of the Government, the Committee considers that terms should be included in the lease indicating that consent will only be given to a transfer of the lease on similar conditions to the original transfer.

### **Recommendation 9**

**The Committee recommends that terms be included in any lease of the port that protect the Government's ability to deny consent to any future transfer of the lease to a lessee that does not share the Government's vision for the development of the port.**

6.46 As already described, it is common for ports to provide sub-leases or concessions for the provision of single or multi-user services. This can both greatly increase competition, if more than one entity is able to provide a service, but can also transfer a monopoly if it is only viable to have one provider of that service. As recommended above, the Committee considers that the pricing and access provisions of the Ports Management Bill should be extended to third party operators of prescribed services.

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<sup>173</sup> Western Australian Auditor General's Report, *Management of the Rail Freight Network Lease*, p 9



### ***Developing and maintaining services***

6.47 The Ports Management Bill provides for port operating agreements between the Government and the port operator that may require the port operator to:

- Meet specified standards in the performance of functions;
- Develop the port, or cause it to be developed, in a specified manner; or
- Give information of a specified kind to the Minister or an entity specified by the Minister.

These port operating agreements can include payment and penalty provisions.

6.48 Port operating agreements provide an ongoing mechanism by which the Government can ensure that certain services are provided by the port. However, the terms on which such services will be provided would need to be negotiated with the port operator. In such negotiations, there would be a high likelihood that the port operator could price as a monopoly provider. Thus, while port operating agreements allow flexibility in future, the Government is likely to get better outcomes by fixing any such agreements in the initial lease.

6.49 While it may be anticipated that most services will be provided on a purely commercial basis, it is important that regard is had to any minimum service requirements that need to be maintained in the public interest.

#### **Recommendation 10**

**The Committee recommends that, prior to entering any lease agreement, the Government consult with port users to identify any minimum service requirements or development needs that, in the public interest, should be set in the lease of the port.**

### ***Contractual rigour***

6.50 A 99 year lease requires significant work to not only effectively enforce current requirements but also to effectively anticipate how to allow for future requirements. Such an agreement can have a long-lasting impact on the Northern Territory's economy and should be subject to intense expert review.

#### **Recommendation 11**

**The Committee recommends that any proposed lease be subject to rigorous independent, highly-qualified expert review in addition to being drafted by highly-qualified experts.**

### ***Public accountability***

6.51 Port operating agreements under the Ports Management Bill are the means by which the Government can make the port operator implement public policy apart from the port operator's commercial interests. The public therefore has an interest in both knowing the terms of such agreements and how they are being performed. Failure to have adequate public accountability for port operating

agreements can promote poor performance and also allow poor contract management by the relevant Government Agency.

### **Recommendation 12**

**The Committee recommends that the Ports Management Bill be amended to require public reporting of the general terms and ongoing performance of port operating agreements, subject to any requirements for commercial confidentiality.**

## **Workers' protection**

6.52 The Committee was concerned about what would happen to Darwin Port Corporation employees if the Port was leased. The Commissioner for Public Employment explained:

There has obviously been a lot of discussion about the employees, and there is always a certain bit of nervousness about employees when they are involved in a situation where there is potentially a transfer of business. In relation to existing employees at the port, the way in which the arrangement will be made is that a new provider, if there is a new provider, will be required to take on the existing employees. They will be offered employment with the new provider and the terms and conditions of their enterprise bargaining agreement remain in force for the length of that enterprise bargaining agreement. However, that does not preclude a new operator negotiating a new enterprise bargaining agreement with the consent of the majority of the employees at that time.

There have been discussions and a number of meetings with employees, and obviously there will be situations that come down to case by case. I know Terry has been pretty proactive in that space. We have oversight of the employees because they are public servants technically. That is what we are following through.<sup>174</sup>

6.53 The Committee understands that the current enterprise bargaining agreement expires 30 June 2018.<sup>175</sup>

6.54 The Committee also asked about superannuation entitlements:

Mr ALLEN: The super question is an interesting one. We experienced this with the transfer of business with the buses. It comes down to each person's individual circumstances. If an employee is in a situation where they are in the existing defined benefits scheme, the NTPASS scheme, then what we did in the bus situation and will do in the port situation is give them access to financial advice. Because every individual is different you cannot give a blanket around that. So we allow them to have a discussion with our financial adviser, get some advice, then come back and have another conversation. They cannot stay in the scheme if they transfer over into the new business.

Mr GUNNER: They definitely cannot stay in the scheme?

Mr ALLEN: They cannot stay in the scheme.

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<sup>174</sup> Committee Transcript, 31 March 2015, pp 19-20

<sup>175</sup> Office for the Commissioner of Public Employment, *Darwin Port Corporation (Northern Territory Public Sector) 2014-2018 Enterprise Agreement*, viewed 23 April 2015, [http://www.ocpe.nt.gov.au/\\_data/assets/pdf\\_file/0003/53355/Darwin\\_Port\\_Corp\\_Agreement.pdf](http://www.ocpe.nt.gov.au/_data/assets/pdf_file/0003/53355/Darwin_Port_Corp_Agreement.pdf)

Mr GUNNER: So that would be of concern to some ...

Mr ALLEN: That is why we need to have those provisions. From my recollection, the people in the bus situation found it was not an impediment financially into the future for them to come out of that scheme and go into a new scheme. Obviously, an individual needs to make that decision based on their circumstances. That is the process of providing the advice.<sup>176</sup>

6.55 These conditions fall short of the position of the MUA, which considers that:

Port workers must be given a guarantee that wages and conditions for Darwin Port Corporation workers will be maintained in the event of any transition, and jobs must be maintained for at least 4 years.<sup>177</sup>

6.56 The Committee considers it essential that workers be treated fairly. It understands that their conditions of employment will continue under their current enterprise agreement until its expiry and then a new agreement will need to be negotiated under the *Fair Work Act*.

6.57 The Committee anticipates that there may be instances, such as long-term workers close to retirement, where involuntarily moving from the public sector could create an unfair disadvantage. The Committee considers that options such as transfer to other employment in the public sector or redundancies should be available in circumstances where it would create an unfair disadvantage not to do so.

### Recommendation 13

**The Committee recommends that port workers approaching retirement be given options other than continuing under their enterprise agreement with any new port operator in the case where circumstances would create a material disadvantage to their retirement planning.**

## Term of Lease

6.58 In seeking development and growth for the long-term, it is apparent that any lease needs to allow for the recovery of investment over the long-term.

6.59 As the Steering Committee point out in their submission, the term of the lease is “a key issue from both an investor and a jurisdictional perspective.”<sup>178</sup> Recent precedents in Australia (see Figure 3, Chapter 3), have favoured lease terms of 99 years. The rationale being that longer lease periods provide more of an incentive for the operator to “invest in and manage the asset with a long-term view to driving efficiency and increase productivity”<sup>179</sup> At the same time they provide sufficient time for operators to recover their investment. The Steering Committee further notes that a longer lease term “maximises value for the Territory of a lease arrangement”<sup>180</sup>

<sup>176</sup> Committee Transcript, 31 March 2015, pp 19-20

<sup>177</sup> Maritime Union of Australia, Questions on Notice, p 7

<sup>178</sup> Port of Darwin Project Steering Committee, Submission No. 4, p. 13

<sup>179</sup> Port of Darwin Project Steering Committee, Submission No. 4, p. 13

<sup>180</sup> Port of Darwin Project Steering Committee, Submission No. 4, p. 13

- 6.60 In settling on a preferred lease term of 99 years, the Steering Committee advised that 50 years was the minimum lease period required for an operator to access the tax benefits which make a lease transaction attractive.
- 6.61 When visiting a range of ports, it was apparent to the Committee that a long lease term was vital to not only enable the port operator to have a long-term investment perspective, but to also enable the port operator to offer long-term leases or concessions to port service providers who might have an interesting in developing a service on the port. It was also apparent that a shorter lease with an option to extend was only of value if the investor had certainty over the option, in which case the lessor gains no advantage over the shorter period.
- 6.62 Issues will arise in any lease of ensuring adequate performance and maintenance towards the end of lease term, where the lessee may have limited reward for further investment. This is an issue that requires careful attention both when drafting the terms of the lease and when managing the lease to ensure performance. However, the problem is only exacerbated by shortening the lease period.
- 6.63 A long lease such as 99 years has the advantage of having a similar investment profile as a sale due to the security of tenure it provides, while allowing the Government control over the key strategic issues of ensuring the land continues to be used as a port and step-in rights if the port operator fails to provide the necessary services.
- 6.64 The length of the lease will ultimately be negotiated in light of whatever proposals are made, but the Committee sees no advantage in the Assembly requiring that any lease be for a period less than 99 years.

#### **Recommendation 14**

**The Committee recommends that the Assembly not amend the requirement in the Port of Darwin Bill that a lease for the port not exceed 99 years.**

### **Foreign Ownership**

- 6.65 Another issue raised with the Committee was the strategic implications if the port was controlled by a foreign company. While there were clearly gains to be had through foreign investment, questions were raised regarding whether foreign control could affect the strategic or security interests of Australia:

Mr WOOD: Would your committee recommend it could be owned wholly by a foreign company?

Mr BARNES: The consultants we have on board who you have already met, Flagstaff Partners, would answer that question by saying you would want to see the value proposition in its entirety. What money is put on the table, what plans for strategic immediate infrastructure provision are put there, what commitment to partnering – the Northern Territory has a long history of doing very effective partnering with private sector companies.

You only have to look at what happened with the rail corridor, with Genesee & Wyoming and the companies that have owned that. The

partnership with Northern Territory governments of both persuasions and with the bureaucrats on behalf of the government being actively involved means that if you get the right partner you can really do great things.

Mr WOOD: The rail has competition with roads and shipping. The port is specific. There is no competition for this port. It is the one and only port in the north. I am not saying foreign companies should not invest, but should they have the majority ownership in our port?

Mr BARNES: We would put that before the government of the day. Clearly there will be bids from consortia that are wholly Australian financially backed. There will be some bids where the majority of the backing may come from overseas interests, and there will be some consortia coming forward through this process where the money that supports the bid will be from both Australian and overseas interests. As a committee we would put all those bids on the table and let the government of the day look at those competing bids.

6.66 Australian Customs noted that while it did not have a direct issue with foreign ownership, it would raise questions for security risk assessment:

Mr CHAIR: Would customs have issues with foreign ownership?

Ms DUFFY: Not directly; it is more to do with who would be in control of the facility. Does that make sense?

Mr CHAIR: In what way? To what end?

Ms DUFFY: I think it is a reality that we do use services from port suppliers that have foreign ownership and also have foreign nationals in their employment. I guess it is more to say that if we had an issue of – if there was a security arrangement within the contract of services provided, what level of security are you providing. There would be a risk assessment as to how much additional security I might invest as well when vessels are moored alongside. We are probably a little flexible there but it starts to come to a risk assessment of that. If the service can only provide up to this level, then we might have to put in additional services ourselves to maintain the security we might need at different times.<sup>181</sup>

6.67 The Committee notes that there may be significant benefits from foreign investment in the port, and from linking in with foreign partners to help bring in trade to the port. It nevertheless also notes the strategic position of the Port of Darwin and considers that no investment should occur that threatens the strategic or security interests of Australia. The Committee therefore considers that the Government should consult with the Foreign Investment Review Board and the Department of Defence on any risks that a proposed partner might present.

**Recommendation 15**

**The Committee recommends that in the case of foreign investment in a lease over the Port of Darwin:**

- a) **a component of the lease be kept in the control of an Australian entity; and**

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<sup>181</sup> Committee Transcript, 1 April 2015, pp 77-8

- b) the Government consult with the Foreign Investment Review Board and the Department of Defence regarding security or strategic risks that a proposed partner may present.**

## **Long-term thinking for long-term leases**

6.68 The Committee notes that any leasing of the Port of Darwin is foremost an economic matter. While Budget considerations such as maximising the price for any lease are very important, the greatest gains for the Territory are to be achieved through maximising the potential for such critical infrastructure.

### **Recommendation 16**

**The Committee recommends that the Government maintains priority on maximising the long-term economic benefits for the Northern Territory when making any decisions around the terms or timing of any lease for the Port of Darwin.**

## **Drafting issues**

6.69 The Committee notes that the headings of clauses 41 and 42 of the Ports Management Bill are misleading as they refer to wrecks causing damage to commercial or non-commercial vessels, while the clauses provide for wrecks of commercial or non-commercial vessels respectively causing damage to any vessel.

### **Recommendation 17**

**The Committee recommends that the headings of clauses 41 and 42 of the Ports Management Bill be amended to more accurately reflect the provisions of the clauses.**

## **Government response**

### **Recommendation 18**

**The Committee recommends that the Government provides a formal response to the Committee's recommendations by the June 2015 sittings of the Assembly.**

## Appendix 1: Submissions Received

1. Northern Territory Livestock Exporters Association
2. Australian Customs and Border Protection Service
3. Maritime Union of Australia
4. Port of Darwin Project Steering Committee – Northern Territory Government
5. Teras Australia Pty Ltd

**Note:** Copies of submissions are available at:

<http://www.nt.gov.au/lant/parliamentary-business/committees/pod/Submissions.shtml>

## **Appendix 2: Briefings, Hearings and Site Visits**

### ***Private Briefing – Darwin, 26 February 2015***

- Flagstaff Partners
- Minter Ellison Lawyers

### ***Site Visits***

- Port of Brisbane: 2 March 2015
- Port of Adelaide: 3 March 2015
- Port of Portland: 4 March 2015
- Port of Albany: 17 March 2015
- Port of Geraldton: 18 March 2015
- Port of Fremantle: 19 March 2015
- Port of Darwin: 31 March 2015

### ***Public Hearings – Darwin, 31 March 2015***

- Asciano - Patrick Stevedoring
- Port of Darwin Project Steering Committee – Northern Territory Government

### ***Public Hearings – Darwin, 1 April 2015***

- Maritime Union of Australia
- Australian Agricultural Company Ltd
- Vopak
- Bhagwan Marine
- Qube
- Northern Territory Livestock Exporters Association
- Genesee and Wyoming Australia Pty Ltd
- NT Chamber of Commerce

**Note:** Copies of hearing transcripts are available at:

<http://www.nt.gov.au/lant/parliamentary-business/committees/pod/Submissions.shtml>



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