

LEGISLATIVE COUNCIL

DELIVERING VICTORIAN INFRASTRUCTURE (PORT OF MELBOURNE LEASE TRANSACTION) BILL 2015

(Amendments and New Clauses to be proposed in Committee by Mr JENNINGS in substitution for the Amendments and New Clauses previously circulated)

1. Clause 11, lines 24 to 32, omit all words and expressions on these lines and insert—
  - "( ) For the purposes of subsection (1)(b) and (c), the specified period is—
    - (a) 50 years; or
    - (b) if the Premier makes an order under subsection (3), the period determined under that order."
2. Clause 11, page 11, line 2, omit "(2)(a)" and insert "(2)(b)".
3. Clause 11, page 11, lines 8 and 9, omit all words and expressions on these lines.
4. Clause 11, page 11, line 12, omit "(6)" and insert "(5)".
5. Clause 15, line 12, after "infrastructure" insert "(including regional infrastructure)".
6. Clause 15, after line 12 insert—
  - "(iii) rail infrastructure projects for improving rail access, including any rail infrastructure project for improving access identified as an option in a Rail Access Strategy prepared under Part 6C of the **Port Management Act 1995**; and"
7. Clause 15, after line 17 insert—
  - "( ) The amounts authorised by the Treasurer to be paid out of the Victorian Transport Fund to fund the cost of all or any part of the development of regional infrastructure projects must equate to, in aggregate, at least 10% of the net transaction proceeds.
  - ( ) In addition, the amounts authorised by the Treasurer to be paid out of the Victorian Transport Fund under subsection (1)(a) must, in any relevant period, include amounts to fund the cost of all or any part of the development of regional infrastructure projects that equate to, in aggregate, at least 10% of the amounts so authorised.
  - ( ) However, subsection (3) ceases to apply when amounts authorised by the Treasurer to be paid out of the Victorian Transport Fund to fund the cost of all or any part of the development of regional infrastructure projects equate to, in aggregate, 10% of the net transaction proceeds."
8. Clause 15, line 26, omit "deliver." and insert "deliver;".

9. Clause 15, after line 26 insert—

*"net transaction proceeds* means the transaction proceeds paid into the Victorian Transport Fund under section 12(3) less any deductions made from the transaction proceeds under section 12(4);

*regional*, in relation to infrastructure, means a geographic area of Victoria that is within a municipal district of a Council or an alpine resort within the meaning of the **Alpine Resorts Act 1983** that is defined as *rural or regional Victoria* under the **Regional Development Victoria Act 2002**;

*relevant period* means any of the following—

- (a) the period of 4 years commencing on 1 July after the first lease or licence of land comprising port assets is granted to a private sector entity under section 11;
- (b) each 4 years commencing on each subsequent 1 July."

#### NEW CLAUSES

10. Insert the following Division heading and clauses to follow clause 59—

### **"Division 2—Compensation payments under authorised transaction related agreements or deeds**

#### **Subdivision 1—Preliminary**

##### **AA Definitions**

In this Division—

*anchorage* has the same meaning as in the **Port Management Act 1995**;

*capacity expansion proposal* means a proposal for a port or terminal capacity expansion;

*Commission* means the Essential Services Commission established under the **Essential Services Commission Act 2001**;

*Dedicated Channels* has the meaning given by section 45 of the **Port Management Act 1995**;

*ESC Minister* means the Minister administering Part 2 of the **Essential Services Commission Act 2001**;

*existing port or terminal capacity* means—

- (a) infrastructure at the port of Melbourne, as at the commencement of this section, used to handle international containers; and
- (b) infrastructure constructed at the port of Melbourne to handle international containers as part of the development declared in the nomination order under the **Project Development and Construction Management Act**

1994, dated 4 September 2012 and published in the Government Gazette on 7 September 2012;

*handling*, in relation to a container, includes loading, unloading, transporting or storing;

*least cost capacity expansion principles Order* means an Order made under section 72;

*Port Growth Regime payment provision* has the meaning given by section 61;

*Port Growth Regime waiver provision* has the meaning given by section 62;

*port lessee* means a lessee under a port of Melbourne lease;

*port of Melbourne land* has the same meaning as in the **Port Management Act 1995**;

*port of Melbourne lease* has the same meaning as in section 59;

*port of Melbourne operator* has the same meaning as in the **Port Management Act 1995**;

*port or terminal capacity expansion* means an expansion in the capacity of infrastructure, or development of new infrastructure, at the port of Melbourne to handle international containers;

*Ports Minister* means the Minister administering Part 6B of the **Port Management Act 1995**;

*provision of channels* has the same meaning as in the **Port Management Act 1995**;

*relevant services* means any of the following—

- (a) the provision of channels (except anchorages) for use by shipping in port of Melbourne waters, including the Shared Channels used by vessels bound either for the port of Melbourne or for the port of Geelong and the Dedicated Channels used by vessels bound for the port of Melbourne;
- (b) the provision of berths, buoys or dolphins in connection with the berthing of vessels in the port of Melbourne;
- (c) the provision of short-term storage or cargo marshalling facilities in connection with the loading or unloading of vessels at berths, buoys or dolphins in the port of Melbourne;
- (d) the provision of access to, or allowing the use of, places or infrastructure (including wharves, slipways, gangways, roads and rail infrastructure) on port of Melbourne land for the provision of services to port users;

### **Examples**

Tanker, wharf and water inspection services, and security services, are kinds of services that are provided to port users on port of Melbourne land.

*Shared Channels* has the same meaning as in section 45 of the **Port Management Act 1995**;

*State sponsored port* has the same meaning as in section 49R of the **Port Management Act 1995**;

*vessel* has the same meaning as in the **Marine Safety Act 2010**.

### **BB Meaning of *Port Growth Regime payment provision***

- (1) A *Port Growth Regime payment provision* is a provision that—
- (a) is contained in an agreement or deed connected with an authorised transaction; and
  - (b) requires a public sector entity to make a payment (including a payment of damages or a lump sum) to an entity specified in subsection (2)—
    - (i) in relation to, or because of, or calculated by reference to the handling of international containers at a port in Victoria other than the port of Melbourne; or
    - (ii) in relation to, or because of, or calculated by reference to a factor that is a proxy for the handling of international containers at a port in Victoria other than the port of Melbourne; or
    - (iii) in relation to the development, or an announcement by the State of the proposed development, of international container facilities at a port in Victoria other than the Port of Melbourne.

#### **Note**

A public sector entity includes the State—see section 3.

- (2) For the purposes of subsection (1), a specified entity is—
- (a) the port of Melbourne operator; or
  - (b) an associated entity of the port of Melbourne operator; or
  - (c) any other person but only to the extent that the person receives the payment for the benefit of the port of Melbourne operator or an associated entity of the port of Melbourne operator.

### **CC Meaning of *Port Growth Regime waiver provision***

- (1) A *Port Growth Regime waiver provision* is a provision that—
- (a) is contained in an agreement or deed connected with an authorised transaction; and

- (b) requires a public sector entity to waive a right to receive a payment, or forgo a payment, that would be otherwise payable to that entity by an entity specified in subsection (2)—
  - (i) in relation to, or because of, or calculated by reference to the handling of international containers at a port in Victoria other than the port of Melbourne; or
  - (ii) in relation to, or because of, or calculated by reference to a factor that is a proxy for the handling of international containers at a port in Victoria other than the port of Melbourne; or
  - (iii) in relation to the development, or an announcement by the State of the proposed development, of international container facilities at a port in Victoria other than the Port of Melbourne.

**Note**

A public sector entity includes the State—see section 3.

- (2) For the purposes of subsection (1), a specified entity is—
  - (a) the port of Melbourne operator; or
  - (b) an associated entity of the port of Melbourne operator.

**DD Relevant legislation for the purposes of the Essential Services Commission Act 2001**

This Division is relevant legislation for the purposes of the **Essential Services Commission Act 2001**.

**EE Ministerial guidelines about capacity expansion proposals**

- (1) The Ports Minister may issue guidelines about the form and content of a capacity expansion proposal.
- (2) The guidelines must be published in the Government Gazette and made available for inspection free of charge at the office of the Ports Minister.

**Subdivision 2—Restriction on compensation payments**

**FF Compensation not payable or capped in certain cases**

- (1) This section applies despite anything to the contrary in a Port Growth Regime payment provision or Port Growth Regime waiver provision or under any rule of, or principle of, law.
- (2) A public sector entity must not make any payment under a Port Growth Regime payment provision, or waive a right to receive a payment, or forgo a payment, that would be otherwise payable to it under a Port Growth Regime waiver provision, in respect of any period unless—
  - (a) international containers are handled at a port in Victoria other than the port of Melbourne during the period—

- (i) commencing on the commencement of this section; and
    - (ii) ending on the day that is 15 years after the day on which the first lease or licence of land comprising port assets is granted to a private sector entity under section 11; and
  - (b) the Port Growth Regime payment provision or Port Growth Regime waiver provision is expressed to apply to, or to be in respect of, the handling of international containers at a port in Victoria other than the port of Melbourne during the period referred to in paragraph (a).
- (3) In addition but subject to subsection (4), a public sector entity must not make a payment under a Port Growth Regime payment provision, or waive a right to receive a payment, or forgo a payment, that would be otherwise payable to it under a Port Growth Regime waiver provision, other than in respect of—
- (a) existing port or terminal capacity; or
  - (b) a port or terminal capacity expansion the proposal for which has been approved under section 66 or certified under section 68.
- (4) A public sector entity must not pay any amount in respect of any payment under a Port Growth Regime payment provision, or waive the right to any amount, or forgo any amount, that would be otherwise payable to it under a Port Growth Regime waiver provision, as permitted under subsection (2) or (3), the values of which, in aggregate, exceed the capped amount.
- (5) A public sector entity is not to be regarded as breaching or being in default of, or repudiating or terminating, an agreement or deed connected with an authorised transaction by relying on this section and—
- (a) not making a payment under a Port Growth Regime payment provision; or
  - (b) not waiving the right to any amount, or forgoing any amount, that would be otherwise payable to it under a Port Growth Regime waiver provision.
- (6) To avoid doubt, subsection (4) does not affect any obligation a public sector entity has to make a payment of an amount under a Port Growth Regime payment provision, or waive the right to any amount, or forgo any amount, that would be otherwise payable to it under a Port Growth Regime waiver provision, if the value of any amounts in aggregate, are less than or equal to the capped amount.
- (7) In this section—
- capped amount*** means—
- (a) for the first financial year in respect of which the first payment under a Port Growth Regime payment provision

is due, or the first financial year in respect of which the right to the payment of an amount has been waived, or a payment has been forgone, under a Port Growth Regime waiver provision, as permitted under subsection (2) or (3)—the amount equating to 15% of all revenue earned by the port of Melbourne operator by providing relevant services in the financial year immediately preceding that year; and

- (b) for each subsequent financial year, the amount determined in accordance with the following formula—

$$A = \frac{B}{C} \times D$$

where—

**A** is the capped amount for the financial year;

**B** is the CPI number published for the quarter ending immediately before 1 July of the financial year;

**C** is the CPI number published for the quarter ending immediately before 1 July of the previous financial year;

**D** is—

- (a) for the first financial year after the financial year to which paragraph (a) applies, the capped amount referred to in that paragraph; and
- (b) for each subsequent financial year, the amount determined in accordance with this formula for the previous financial year;

**CPI number** means the Consumer Price Index (All Groups Index Number weighted average of eight capital cities) published by the Australian Bureau of Statistics (or any other index published in substitution for that index).

### **Subdivision 3—Approval of capacity expansion proposals by Minister**

#### **GG Approval of material increases in capacity for the handling of international containers at the port of Melbourne**

- (1) Subject to this section, a port lessee or the port of Melbourne operator (a *proponent*) may submit a capacity expansion proposal to the Ports Minister.
- (2) A capacity expansion proposal that is submitted under subsection (1) must only be for a material port or terminal capacity expansion.
- (3) A capacity expansion proposal cannot be submitted under subsection (1) for a port or terminal capacity expansion in respect of which works have commenced.

- (4) If there are guidelines in effect under section 64 in respect of the form and content of a capacity expansion proposal, the proponent must submit a capacity expansion proposal under subsection (1) that accords with the guidelines.
- (5) On receiving a capacity expansion proposal, the Ports Minister may approve or refuse to approve the proposal.
- (6) The Ports Minister must make a decision under subsection (5) within 6 months after receiving the capacity expansion proposal.
- (7) The Ports Minister must—
  - (a) notify, in writing, the proponent of the Minister's decision under subsection (5) and give the proponent the Minister's written reasons for the decision; and
  - (b) as soon as practicable after that, publish—
    - (i) notice of the making of a decision under subsection (5) in the Government Gazette and on the Department's Internet site; and
    - (ii) a decision under subsection (5) (including the reasons for the decision) on the Department's Internet site.
- (8) An approval of a capacity expansion proposal under this section is not to be regarded as—
  - (a) authorising or approving, or not authorising or approving, works for the port or terminal capacity expansion to which the proposal relates; or
  - (b) requiring any person to commence works for a port or terminal capacity expansion to which the proposal relates.

**Subdivision 4—Certification of capacity expansion proposals by Commission**

**HH Application**

This Subdivision applies if the Ports Minister—

- (a) refuses to approve a capacity expansion proposal under section 66; or
- (b) fails to make a decision under that section within the time required by that section.

**II Application for certification**

- (1) The person who submitted the capacity expansion proposal to the Ports Minister (the *applicant*) may, within 3 months after the Ports Minister has refused to approve the proposal, apply to the Commission for it to certify the proposal.
- (2) An application must attach a copy of the capacity expansion proposal.



- (3) If there are guidelines in effect under section 64 in respect of the form and content of a capacity expansion proposal, the capacity expansion proposal that the applicant attaches to the application must accord with the guidelines.

#### **JJ Decision on certification by Commission**

- (1) Subject to this section, the Commission must not later than 3 months after receiving an application under section 68 decide whether to certify the proposal.
- (2) In deciding whether to certify a capacity expansion proposal, the Commission must apply the principles specified in the least cost capacity expansion principles Order.
- (3) If the Commission is satisfied that the capacity expansion proposal is the least cost means of expanding the capacity of infrastructure, or developing new infrastructure, to handle international containers at a port in Port Phillip Bay or Western Port Bay, the Commission must certify the proposal.
- (4) Section 35(1) to (3) and (5) of the **Essential Services Commission Act 2001** applies to a decision of the Commission under this section as if the decision were a determination to which section 35 applies.
- (5) The Commission must also give a copy of its decision to the Ports Minister.
- (6) A decision to certify a capacity expansion proposal under this section is not to be regarded as—
  - (a) authorising or approving, or not authorising or approving, works for the port or terminal capacity expansion to which the proposal relates; or
  - (b) requiring any person to commence works for a port or terminal capacity expansion to which the proposal relates.
- (7) The Commission is not subject to the direction or control of the ESC Minister in respect of any decision it makes under this section.

#### **KK Inquiries for the purposes of decisions on certification**

- (1) For the purpose of making a decision under section 69, the Commission must conduct and complete an inquiry into the capacity expansion proposal.
- (2) Before commencing an inquiry, the Commission must notify the Ports Minister that it will be conducting an inquiry under this section.
- (3) Part 4 and section 43 (other than subsections (4)(a) and (6)(b) of that section) of the **Essential Services Commission Act 2001** apply to an inquiry under this section.

**LL Draft report to be provided to applicant**

The Commission must—

- (a) provide a draft of a report on an inquiry under this Subdivision to the applicant; and
- (b) give the applicant an opportunity to make a written submission to the Commission on that draft report before the Commission makes its decision under section 69.

**Subdivision 5—Least cost capacity expansion principles Order**

**MM Least cost capacity expansion principles Order**

The Governor in Council, by Order published in the Government Gazette, may specify principles for the purposes of Subdivision 4.

**NN When a least cost capacity expansion principles Order takes effect**

A least cost capacity expansion principles Order takes effect—

- (a) on the day the Order is published in the Government Gazette; or
- (b) if a later day is specified in the Order, on that day.

**OO Limitation on amending or revoking a least cost capacity expansion principles Order**

A least cost capacity expansion principles Order cannot be amended or revoked except in accordance with this Subdivision.

**PP Circumstances in which a least cost capacity expansion principles Order may be amended**

Subject to section 76, a least cost capacity expansion principles Order may only be amended with the agreement of the port lessee.

**QQ Circumstances in which a least cost capacity expansion principles Order may be wholly revoked**

A least cost capacity expansion principles Order may be wholly revoked by an Order made under section 72—

- (a) if the port lessee agrees to the revocation; or
- (b) after the first lease of land comprising port assets granted to a private sector entity under section 11 ends."

- 11. Clause 69, omit this clause.
- 12. Clause 83, page 66, lines 22 to 24, omit "**upfront licence fee for a period instead of annual licence fees for that period**" and insert "**a one-off upfront licence fee for a period of up to 15 years instead of annual fees for that period**".
- 13. Clause 83, page 66, lines 26 to 28, omit "a period commencing on or after 1 July 2016 during which the port licence will be in force" and insert "a period of up to 15 years ending on or before 1 July 2032".

14. Clause 83, page 66, line 32, after "period" insert "in which the port licence will be in force".
15. Clause 89, line 10, before "The" insert "(1)".
16. Clause 89, after line 15 insert—
  - "(b) to protect the interests of users of prescribed services by ensuring that prescribed prices are fair and reasonable whilst having regard to the level of competition in, and efficiency of, the regulated industry; and".
17. Clause 89, line 16, omit "(b)" and insert "(c)".
18. Clause 89, line 22, omit "(c)" and insert "(d)".
19. Clause 89, line 27, omit "ports." and insert "ports; and".
20. Clause 89, after line 27 insert—
  - "(e) to eliminate resource allocation distortions by prohibiting a State sponsored port operator from providing a relevant service at a price lower than the competitively neutral price for that service.
  - (2) In this section, *competitively neutral price*, *State sponsored port operator* and *relevant services* each have the meaning given to them by section 49R."
21. Heading to clause 92, omit "**and 2B**" and insert "**to 2D**".
22. Clause 92, page 89, line 11, after "**regime**" insert "**for port of Melbourne operator**".
23. Clause 92, page 90, line 12, omit 'appropriate.'" and insert "appropriate.".
24. Clause 92, page 90, after line 12 insert—

**"Division 2C—Complaints in relation to provision of prescribed services**

**49Q Person provided prescribed services may complain to ESC in relation to the provision of such services**

- (1) This section applies if a person who is provided prescribed services considers that the provider of those services has not, in providing the services, complied with the Pricing Order which applies to those services.
- (2) The person may complain to the Commission about the non-compliance with the Pricing Order.
- (3) On receiving a complaint under subsection (2), the Commission may investigate the complaint.

- (4) In investigating the complaint, the Commission may have regard to any matter raised or considered in—
- (a) the Commission's most recent final published report; and
  - (b) any application to the Supreme Court under section 49P.

**Note**

The Commission must also have regard to the objectives of this Part and the objectives under section 8 of the **Essential Services Commission Act 2001** when investigating a complaint—see section 48A.

- (5) The Commission must inform the person of the outcome of its investigation of the person's complaint.
- (6) If the Commission considers that the issues raised in the complaint have not been considered or dealt with under a Pricing Order or Division 2A or 2B, the Commission may refer the complaint to the ESC Minister.

## **Division 2D—Competitive neutrality pricing**

### **Subdivision 1—Preliminary**

#### **49R Definitions**

In this Division—

***accrual building block methodology***—see section 49S;

***competitively neutral price***, for a relevant service, means the price, determined through the application of the competitively neutral pricing principles, that is the lower of—

- (a) the price which is likely to enable the recovery of the efficient costs attributable to any State cost contribution and any private cost contribution in providing the relevant service; and
- (b) the price at which the port of Melbourne operator provides a service that is economically substitutable for the relevant service, having regard to any material differences between the quality or scope of the relevant service and the quality or scope of the economically substitutable service;

***competitively neutral pricing principles*** means the principles specified in an Order under section 49ZC;

***handling***, in relation to a container, includes loading, unloading, transporting or storing;

***private cost contribution*** means the amount of any capital invested by a private sector entity in, or expenses incurred by a private sector entity in operating, a State sponsored port;

***private sector entity*** has the same meaning as in the **Delivering Victorian Infrastructure (Port of Melbourne Lease Transaction) Act 2016**;

***relevant service*** means any of the following services provided at a State sponsored port for the purpose of enabling the handling, at that port, of containers that are being transported from, or are to be transported to, a destination outside of Australia—

- (a) the provision of channels used by vessels to access the State sponsored port;
- (b) the provision of berths, buoys or dolphins in connection with the berthing of vessels carrying container cargoes in the State sponsored port;
- (c) the provision of short term storage or cargo marshalling facilities in connection with the loading or unloading of vessels carrying container cargoes at berths, buoys or dolphins in the State sponsored port;
- (d) a service that is prescribed;

***State cost contribution*** means an amount reflecting the net competitive advantage conferred on or given to a State sponsored port operator and includes—

- (a) an exemption from a requirement to pay a State tax or charge; and
- (b) an exemption under a law of the State; and
- (c) an explicit or implicit guarantee of debt executed or otherwise given by the State or by a Minister on behalf of the State; and
- (d) a concessional interest rate on a loan given by a public sector entity; and
- (e) an exemption from a requirement to account for depreciation expenses; and
- (f) an exemption from a requirement to earn a commercial rate of return on assets; and
- (g) a matter or thing referred to in section 49T(2);

***State sponsored port***—see section 49T;

***State sponsored port operator*** means an operator of a State sponsored port.

**49S Meaning of *accrual building block methodology***

- (1) An *accrual building block methodology* is a methodology that—
- (a) provides for an allowance to recover—
    - (i) a return on assets used by a State sponsored port operator to provide relevant services (the *capital base of a State sponsored port operator*); and
    - (ii) a return of the capital base of a State sponsored port operator through depreciation; and
    - (iii) the forecast efficient operating expenditure that would be incurred by a State sponsored port operator acting prudently in the provision of relevant services; and
  - (b) requires that—
    - (i) an initial capital base of a State sponsored port operator be established utilising the depreciated optimised replacement cost approach; and
    - (ii) the value of that capital base be updated on an annual basis by applying a roll forward principle that takes the opening value at the start of a financial year, adds in capital expenditure when incurred or to be incurred and deducts an amount for the return of capital; and
    - (iii) the value of any assets transferred from a public sector entity to a private sector entity that form part of a private cost contribution for a State sponsored port be included in the capital base of a State sponsored port operator of that port at a value calculated using the depreciated optimised replacement cost approach; and
  - (c) requires costs incurred by a State sponsored port operator be allocated between different types of relevant services, and other services (if any), on the basis that—
    - (i) costs that are directly attributable to a service are to be allocated to that service; and
    - (ii) costs that are not directly attributable to a service are to be allocated on the basis of the expected revenue share of that service to expected total services revenue; and
  - (d) provides for the establishment of an aggregate revenue requirement that provides a State sponsored port operator with a reasonable opportunity to recover the allowances referred to in subsection (1)(a); and
  - (e) requires the aggregate revenue requirement to be used to establish the prices for relevant services that, if paid, would provide a State sponsored port operator a reasonable opportunity to recover its aggregate revenue requirement.

- (2) For the purposes of subsection (1)(a)(i), an ***accrual building block methodology*** must provide for the recovery of a return on assets to be determined—
  - (a) by reference to that which would be required by a benchmark efficient entity providing services with a similar degree of risk and
  - (b) using an appropriate method that distinguishes between the cost of equity and debt so that a weighted average cost of capital can be derived.
- (3) An ***accrual building block methodology*** must not, for the purposes of subsection (1)(c), allow for the inclusion, in the capital base of a State sponsored port operator, of any value attributable to rail, road or other landside infrastructure at a place that is outside a State sponsored port operated by that operator.

**49T Meaning of *State sponsored port***

- (1) A ***State sponsored port*** is a port located in Port Phillip Bay (other than the port of Melbourne) or in Western Port Bay—
  - (a) the main purpose of which is to handle international containers and at which containers may be handled; and
  - (b) to which a matter or thing set out in subsection (2) applies.
- (2) The following are matters or things which apply for the purposes of subsection (1)—
  - (a) the port has been partially or fully constructed or is being operated by—
    - (i) a public sector entity; or
    - (ii) a private sector entity using financial support in the form of a grant from a public sector entity;
  - (b) any equity funding for construction of the port has been or is provided by or on behalf of a public sector entity on materially better terms than would be available to the operator of that port from a private sector entity;
  - (c) any debt funding for the construction of the port has been or is provided by or on behalf of a public sector entity on materially better terms than would be available to the operator of that port from a private sector entity;
  - (d) a public sector entity provides financial support or a financial concession in respect of the port that has the effect of materially reducing the cost of capital for or operating costs of the port (including the operating costs of users of the port) and that support or concession or a similar support or concession is not available to the port of Melbourne operator;

- (e) a public sector entity provides financial support or a financial concession in respect of the costs of the transport of containers to or from the port that has the effect of materially reducing the operating costs of the transport of containers to or from the port and that support or concession, or a similar support or concession, is not available in respect of the transport of containers to or from the port of Melbourne;
- (f) a public sector entity provides financial support or a financial concession to users of or tenants at or prospective users of or tenants at the port such that their cost of being or becoming a user or tenant of the port is materially reduced and that support or concession, or a similar support or concession, is not available to users of or tenants at or prospective users of or tenants at the port of Melbourne.

#### **49U Application**

- (1) This Division applies on and after the day on which the first lease of land comprising port assets is granted to a private sector entity under section 11 of the **Delivering Victorian Infrastructure (Port of Melbourne Lease Transaction) Act 2016**.
- (2) This Division ceases to apply on the day on which the lease referred to in subsection (1) ends.

#### **Note**

The Pricing Order made under Division 2, the ongoing monitoring regime under Division 2A and the transitional enforcement regime under Division 2B apply to the port of Melbourne operator.

#### **Subdivision 2—Competitive neutrality pricing obligations**

#### **49V State sponsored port operator must provide services at not less than competitively neutral prices**

- (1) A State sponsored port operator must not provide a relevant service at a price that is lower than the competitively neutral price for the relevant service.
- (2) For the purposes of complying with subsection (1), a State sponsored port operator must apply the competitively neutral pricing principles.

#### **49W State sponsored port operator must publish relevant service prices**

A State sponsored port operator must on or before 31 May every year (the *publication date*)—

- (a) publish all prices for every relevant service it will provide in the financial year after the publication date; and
- (b) give a copy of those prices to the Commission.



**49X State sponsored port operator must keep records of relevant service prices**

- (1) A State sponsored port operator must keep records (including financial and business records) relating to the prices for relevant services the operator provides in accordance with guidelines prepared under subsection (3).
- (2) A State sponsored port operator must keep records (including financial and business records) relating to the prices for relevant services the operator provides in a manner that is consistent with guidelines prepared under subsection (3).
- (3) The Commission must prepare guidelines for the purposes of subsection (1) and (2).

**Subdivision 3—Investigation and enforcement of competitive neutrality pricing obligations**

**49Y Commission may be requested to inquire into relevant service prices**

- (1) This section applies if the ESC Minister or the port of Melbourne operator is of the view that a State sponsored port operator is providing, or is likely to provide, a relevant service at a price lower than the competitively neutral price for that service.
- (2) The ESC Minister or the port of Melbourne operator may request the Commission to conduct an inquiry into the price for the relevant service.
- (3) Before making a request, the ESC Minister must consult with the Minister.
- (4) A request must—
  - (a) be in writing; and
  - (b) set out the grounds on which the ESC Minister or port of Melbourne operator requests the Commission to investigate the price for the relevant service; and
  - (c) include any relevant information or evidence in support of the grounds.

**49Z Commission may conduct inquiry into relevant service prices**

- (1) The Commission must, no later than 3 months after receiving a request under section 49Y—
  - (a) conduct and complete an inquiry into the subject matter of the request; and
  - (b) prepare a final report on the inquiry.
- (2) In the case of a request under section 49Y from the port of Melbourne operator, the Commission may refuse to act under subsection (1) if the Commission is of the view that the request—

- (a) is frivolous; or
  - (b) is vexatious; or
  - (c) is without substance; or
  - (d) has been made in bad faith.
- (3) Part 4, and sections 42 to 46, of the **Essential Services Commission Act 2001** apply in respect of an inquiry under this section.
- (4) A final report on an inquiry under this section must include—
- (a) the Commission's findings as to whether the State sponsored port operator has been providing, or is likely to provide, a relevant service at a price lower than the competitively neutral price for that service; and
  - (b) the Commission's reasons for those findings.

**49ZA Commission may determine minimum competitively neutral price for relevant service**

- (1) This section applies if the Commission in a final report on an inquiry under section 49Z finds that the State sponsored port operator has been providing, or is likely to provide, a relevant service at a price lower than the competitively neutral price for that service.
- (2) The Commission may make a determination that specifies the minimum competitively neutral price for the provision of the relevant service.
- (3) In addition, a determination must specify a period (not exceeding 5 years from the date the determination takes effect) during which the minimum competitively neutral price will apply to the provision of the relevant service.
- (4) Section 35(1) to (3) and (5) of the **Essential Services Commission Act 2001** applies to a determination of the Commission under this section as if the determination under this section were a determination under section 35 of that Act.

**49ZB Enforcement of Commission determinations**

If the Supreme Court is satisfied, on the application of the ESC Minister or the port of Melbourne operator, that a State sponsored port operator has engaged, is engaging, or is proposing to engage in conduct that constitutes a contravention of a determination under section 49ZA, the Court may make all or any of the following orders—

- (a) if the applicant is the ESC Minister—
  - (i) an order granting an injunction on such terms as the Court thinks appropriate—
    - (A) restraining the State sponsored port operator from engaging in the conduct; or

- (B) if the conduct involves refusing or failing to do something, requiring the provider to do that thing;
- (ii) an order directing the State sponsored port operator to pay to the State an amount up to the amount of any financial benefit that the operator has obtained directly or indirectly and that is reasonably attributable to the contravention;
- (iii) an order directing the provider to compensate any other person who has suffered loss or damage as a result of the contravention;
- (b) if the applicant is the port of Melbourne operator, an order granting an injunction on such terms as the Court thinks appropriate—
  - (i) restraining the State sponsored port operator from engaging in the conduct; or
  - (ii) if the conduct involves refusing or failing to do something, requiring the provider to do that thing;
- (c) in all cases, any other order that the Court thinks appropriate.

**Subdivision 4—Competitively neutral pricing principles Order**

**49ZC Competitively neutral pricing principles Order**

- (1) The Governor in Council, by Order published in the Government Gazette, may specify principles for the purposes of this Division.
- (2) An Order under this section—
  - (a) must set out principles that provide for the determination of a competitively neutral price for the provision of a relevant service through the application of an accrual building block methodology; and
  - (b) may specify other principles (which may include methodologies or procedures), that are not inconsistent with paragraph (a), for the determination of a competitively neutral price for the provision of a relevant service; and
  - (c) may include any other matter or thing ancillary to, or not inconsistent with, a matter or thing referred to in paragraph (a) or (b).

**49ZD General powers in relation competitively neutral pricing principles Order**

An Order under section 49ZC may—

- (a) confer functions and powers on, or leave any matter to be decided by, the Commission; and
- (b) be of general or limited application; and
- (c) differ according to differences in time, place or circumstances.

**49ZE When a competitively neutral pricing principles Order takes effect**

An Order under section 49ZC takes effect—

- (a) on the day the Order is published in the Government Gazette;  
or
- (b) if a later day is specified in the Order, on that day.

**49ZF Limitation on amending or revoking a competitively neutral pricing principles Order**

An Order under section 49ZC cannot be amended or revoked except in accordance with this Subdivision.

**49ZG Circumstances in which a competitively neutral pricing principles Order may be amended**

Subject to section 49ZH, an Order under section 49ZC may only be amended with the agreement of the port of Melbourne operator.

**49ZH Circumstances in which a competitively neutral pricing principles Order may be wholly revoked**

A Order under section 49ZC may be wholly revoked by an Order made under that section—

- (a) if the port of Melbourne operator agrees to the revocation; or
- (b) after the first lease of land comprising port assets granted to a private sector entity under section 11 of the **Delivering Victorian Infrastructure (Port of Melbourne Lease Transaction) Act 2016** ends."

NEW CLAUSE

25. Insert the following New Clause to follow clause 93—

**RR New section 53 substituted**

For section 53 of the **Port Management Act 1995** substitute—

**"53 Conduct of inquiries**

- (1) The Commission must, not later than 6 months after the end of an inquiry period—
  - (a) conduct and complete an inquiry into the following matters—
    - (i) whether a port lessee or the port of Melbourne operator has power in the relevant market that it may exercise in relation to the process for the setting or reviewing of rents or associated payments (however described) payable by a tenant under an applicable lease;
    - (ii) whether a port lessee or the port of Melbourne operator has exercised that power in a way that has

the effect of causing material detriment to the long term interests of Victorian consumers (a *misuse of market power*); and

- (b) if and only if the Commission finds that there has been a misuse of market power, make recommendations to the ESC Minister about whether the provision of access to port of Melbourne land by means of an applicable lease should be subject to economic regulation, and, if so, the form of the economic regulation.
- (2) For the purposes of subsection (1)(b), the form of economic regulation may include a form of price regulation.
  - (3) Without limiting subsection (1), in conducting an inquiry under this section the Commission must have regard to—
    - (a) the processes used to establish or review rents or associated payments (however described) payable by a tenant under an applicable lease; and
    - (b) a port lessee's or the port of Melbourne operator's compliance with any processes for setting and reviewing rents or associated payments (however described) payable by a tenant under an applicable lease required under—
      - (i) a port of Melbourne lease; or
      - (ii) any agreement or arrangement entered into by the port lessee or the port of Melbourne operator in connection with a port of Melbourne lease; and
    - (c) the extent to which any rents or associated payments (however described) paid by a tenant under an applicable lease may be passed through by the tenant to users of services provided by the tenant, to those users' customers, and ultimately to Victorian consumers.
  - (4) An inquiry under this section must be conducted in accordance with Part 5 of the **Essential Services Commission Act 2001** but section 40 of that Act does not apply in respect of that inquiry.

- (5) In this section—

*applicable lease* means a sublease, or a sublease of a sublease, of leased port of Melbourne land granted by a port lessee (other than to the port of Melbourne operator) or by the port of Melbourne operator;

*inquiry period* means any of the following—

- (a) the period of 3 years commencing on the day on which the first lease of land comprising port assets is granted to a private sector entity under section 11 of

the **Delivering Victorian Infrastructure (Port of Melbourne Lease Transaction) Act 2016**;

- (b) the period of 5 years commencing on the day after the day on which the period referred to in paragraph (a) ends;
- (c) a period of 5 years commencing on the day after the day on which a previous 5 year period ends;

*port lessee* means a lessee under a port of Melbourne lease;

*port of Melbourne lease* has the same meaning as in section 59 of the **Delivering Victorian Infrastructure (Port of Melbourne Lease Transaction) Act 2016**;

*relevant market* means the market for access to leased port of Melbourne land by means of an applicable lease.".

- 26. Clause 94, omit this clause.
- 27. Clause 109, page 105, line 30, omit "Port" and insert "port".

#### NEW CLAUSE

- 28. Insert the following New Clause to follow clause 139—

**SS New Part 6C inserted**

After Part 6B of the **Port Management Act 1995** insert—

**"Part 6C—Port of Melbourne Rail Access Strategy**

**91O Definitions**

In this Part—

*direction* means a direction given under section 91U or 91V;

*guidelines* means guidelines made under section 91T;

*Port Development Strategy* has the same meaning as in Part 6B;

*port rail shuttle*—see section 91P;

*private sector entity* has the same meaning as in the **Delivering Victorian Infrastructure (Port of Melbourne Lease Transaction) Act 2016**;

*Rail Access Strategy*—see section 91Q.

**91P Meaning of *port rail shuttle***

A *port rail shuttle* is a rail intermodal facility in, or in the vicinity of, the port of Melbourne that is connected to rail terminals outside the port, the purpose of which is to increase rail freight movements into and out of the port in order—

- (a) to provide an alternative to the movement of freight into and out of the port by means of road transport; and
- (b) to reduce traffic congestion on roads in and around the port caused by the movement of freight into and out of the port by means of road transport.

### **91Q Rail Access Strategy**

- (1) The port of Melbourne operator must prepare a strategy (a ***Rail Access Strategy***) in accordance with this Part.
- (2) The port of Melbourne operator must prepare—
  - (a) the first Rail Access Strategy within 3 years after the first lease of land comprising port assets is granted to a private sector entity under section 11 of the **Delivering Victorian Infrastructure (Port of Melbourne Lease Transaction) Act 2016**; and
  - (b) every other Rail Access Strategy at the same time as it prepares a Port Development Strategy under Part 6B.
- (3) The port of Melbourne operator must prepare and submit a Rail Access Strategy to the Minister.
- (4) A Rail Access Strategy must set out—
  - (a) options for rail infrastructure projects for improving rail access for the movement of freight into and out of the port of Melbourne; and
  - (b) a commercial assessment of each identified option that—
    - (i) in the case of the first Rail Access Strategy prepared under this Part, includes—
      - (A) projections of trade through the port of Melbourne; and
      - (B) current and projected transport infrastructure requirements for land and water in the port of Melbourne; and
    - (ii) in the case of every other Rail Access Strategy prepared under this Part, is consistent with the applicable Port Development Strategy for the port of Melbourne; and
    - (iii) in all cases, includes any other matter specified in the guidelines; and
  - (c) the implementation timing for each identified option.
- (5) One of the options set out in the first Rail Access Strategy must be the development of a port rail shuttle.
- (6) Every rail infrastructure project identified as an option set out in a Rail Access Strategy must be capable of being

implemented within 5 years after it has been submitted to the Minister in accordance with this section.

- (7) If there are guidelines in effect in respect of the form and content of a Rail Access Strategy, and the method and process for preparation of a Rail Access Strategy, the port of Melbourne operator must prepare and submit a Rail Access Strategy to the Minister in accordance with the guidelines.

**91R Rail infrastructure project options in Rail Access Strategy are major infrastructure projects for the purposes of the Infrastructure Victoria Act 2015**

A rail infrastructure project identified as an option in a Rail Access Strategy is a major infrastructure project for the purposes of section 44 of the **Infrastructure Victoria Act 2015**.

**91S Consultation**

- (1) In preparing a Rail Access Strategy, the port of Melbourne operator must consult with—
- (a) port of Melbourne users; and
  - (b) owners and tenants of port of Melbourne land; and
  - (c) licensees at the port of Melbourne; and
  - (d) persons who wish to design, construct or operate rail infrastructure at the port of Melbourne; and
  - (e) persons who wish to provide rail freight services at the port of Melbourne; and
  - (f) relevant government agencies; and
  - (g) any stakeholders specified in guidelines.
- (2) If there are guidelines in effect that set out a process for consultation with the persons and entities listed in subsection (1), the port of Melbourne operator must, in preparing a Rail Access Strategy, consult with those persons and entities in accordance with the guidelines.

**91T Guidelines**

- (1) The Minister may issue guidelines about any one or more of the following matters in relation to a Rail Access Strategy—
- (a) the form;
  - (b) the content;
  - (c) the method and process for preparation;
  - (d) processes for consultation;
  - (e) stakeholders for the purposes of section 91S(1)(g);
  - (f) publication and availability.



- (2) The guidelines must be published in the Government Gazette and made available for inspection free of charge at the office of the Minister.

**91U Ministerial directions if port of Melbourne operator fails to prepare and submit a Rail Access Strategy**

- (1) This section applies if the port of Melbourne operator fails to prepare and submit a Rail Access Strategy in accordance with section 91Q.
- (2) The Minister, by written notice given to the port of Melbourne operator, may direct the operator to prepare and submit a Rail Access Strategy to the Minister by the date specified in the direction.
- (3) The date specified in a direction under subsection (2) must be at least 3 months after the date of the direction.
- (4) The port of Melbourne operator must comply with a direction given to it under subsection (2).

Penalty: 240 penalty units.

**91V Ministerial directions if Rail Access Strategy is non-compliant**

- (1) This section applies if the Minister is of the opinion that a Rail Access Strategy submitted by the port of Melbourne operator—
  - (a) has not been prepared in accordance with the guidelines, if any; or
  - (b) does not set out the matters required to be set out under section 91Q.
- (2) The Minister, by written notice given to the port of Melbourne operator, may direct the operator to amend and resubmit the Rail Access Strategy to the Minister by the date specified in the direction.
- (3) The date specified in a direction under subsection (2) must be at least 3 months after the date of the direction.
- (4) The port of Melbourne operator must comply with a direction given to it under subsection (2).

Penalty: 240 penalty units."

29. Clause 153, line 26, omit 'decision—".' and insert "decision; or".

30. Clause 153, after line 26 insert—

- (f) a decision of the Commission under section 69 of the **Delivering Victorian Infrastructure (Port of Melbourne Lease Transaction) Act 2016**; or
- (g) a determination of the Commission under section 49ZA of the **Port Management Act 1995**—".'.

31. Clause 153, page 136, line 17, omit 'circumstances.'" and insert "circumstances;".
32. Clause 153, page 136, after line 17 insert—
- '(f) under subsection (1)(f) is that the decision—
    - (i) was not made in accordance with the law; or
    - (ii) is unreasonable having regard to all the relevant circumstances;
  - (g) under subsection (1)(g) is that the decision—
    - (i) was not made in accordance with the law; or
    - (ii) is unreasonable having regard to all the relevant circumstances.'".
33. Clause 153, page 136, line 33, omit 'made.'" and insert "made; or".
34. Clause 153, page 136, after line 33 insert—
- '(e) in the case of an appeal under subsection (1)(f), within 21 working days after the decision is made; or
  - (f) in the case of an appeal under subsection (1)(g), within 21 working days after the determination is made.'".
35. Clause 153, page 137, line 12, omit 'determined.'" and insert "determined."
36. Clause 153, page 137, after line 12 insert—
- '(9) If a person lodges an appeal under subsection (1)(f), the decision of the Commission under section 69 of the **Delivering Victorian Infrastructure (Port of Melbourne Lease Transaction) Act 2016** continues in effect until the appeal is determined.
  - (10) If a person lodges an appeal under subsection (1)(g), the determination of the Commission under section 49ZA of the **Port Management Act 1995** continues in effect until the appeal is determined.'".
37. Clause 154, page 138, line 15, omit 'panel.'" and insert "panel; and".
38. Clause 154, page 138, after line 15 insert—
- '(g) in the case of an appeal under section 55(1)(f), may in granting the appeal—
    - (i) affirm the decision of the Commission under section 69 of the **Delivering Victorian Infrastructure (Port of Melbourne Lease Transaction) Act 2016**; or
    - (ii) vary the decision; or
    - (iii) set aside the decision and remit it to the Commission for amendment of the decision in accordance with the decision and recommendations (if any) of the appeal panel; and
  - (h) in the case of an appeal under section 55(1)(g), may in granting the appeal—

- (i) affirm the determination of the Commission under section 49ZA of the **Port Management Act 1995**; or
- (ii) vary the determination; or
- (iii) set aside the determination and remit it to the Commission for amendment of the determination in accordance with the decision and recommendations (if any) of the appeal panel.".'.

- 39. Clause 154, page 138, line 18, omit "or 55(1)(e)" and insert ", 55(1)(e), 55(1)(f) or 55(1)(g)".
- 40. Clause 160, line 17, omit "160" and insert "177".
- 41. Schedule 1, line 2, omit "Section 162" and insert "Section 179".