

# Ports Legislation Amendment Act 2017

## Explanatory Memorandum

### Overview

The *Ports Legislation Amendment Act 2014* was passed by Parliament on 8 May 2014 and received Royal Assent on 20 May 2014. It enabled the amalgamation of existing regional port authorities to occur in 2014-15 (Tranche 1).

This *Ports Legislation Amendment Bill 2017* (the Bill) is designed to enable the transfer of nine ports currently regulated under the *Shipping and Pilotage Act 1967* (S&P Act) over to the *Port Authorities Act 1999* (PA Act) (Tranche 2).

The focus of this reform is to enable regional port authorities to assume the Department of Transport's responsibilities at the nominated S&P Act ports (Table 1), bringing all Western Australian (WA) trading ports under a single consistent regulatory regime.

**Table 1.**

| Port authority | Port           | Port Facilities  | Notes   |
|----------------|----------------|------------------|---|
| Mid West       | Carnarvon      | Cape Cuvier      | Will be separated into two ports, because of geographic distance        |
|                |                | Useless Loop     |   |
| Pilbara        | Port Walcott   | Cape Lambert     | Facilities being decommissioned will remain under S&P Act until closed. |
|                | Onslow         | Onslow           |   |
|                |                | Airlie Island    |   |
|                |                | Thevenard Island |   |
|                | Barrow Island  |                  |   |
|                | Varanus Island |                  |   |
| Cape Preston   |                |                  |   |
| Kimberley      | Derby          |                  | Common user port  |
|                | Wyndham        |                  | Common user port  |
|                | Yampi Sound    | Koolan Island    |   |
|                |                | Cockatoo Island  |   |

This Bill will result in a better overall structure for the oversight and governance of WA's ports. Port authorities will become the approval body for pilot's licences and will oversee marine safety and related marine safety plans. The reform is expected to have minimal impact on the day-to-day operations of privately operated facilities at S&P Act ports.

Given the removal of trading ports to port authority jurisdiction, this Bill also includes amendments to enable the S&P Act to focus on boat harbours and miscellaneous minor amendments to introduce consistency across related maritime legislation.

### Port reforms – Benefits

The reform will take advantage of each port authority's extensive port management expertise in dealing with port matters and strategic port planning issues. It will bring a regional focus to port planning. Regional port authorities have greater institutional capability and resources to oversee trading ports. Being regionally based, port authorities have strong connections with customers and industry and will be better able to realise commercial opportunities.

Under the PA Act, port authorities are able to work with private port facility operators to ensure a systematic and comprehensive approach to marine safety. This will lead to better management of increasing vessel visits and marine safety risks. The sharing of learning and expertise between port authorities and private port facility operators will further improve the management, productivity and efficiency of WA ports. The provision of a single regulatory regime for all trading ports will result in reduced regulatory complexity for companies operating at multiple ports.

## **Part 1 – Preliminary**

### **1. Short Title**

When enacted this legislation will be named the *Ports Legislation Amendment Act 2017*.

### **2. Commencement**

This section provides that parts of this Bill will come into operation on the day this Act receives Royal Assent and on the next day, while the rest of the sections come into operation on a day or different days fixed by proclamation, except for a couple of sections which come into operation upon the commencement of other sections.

There is nothing unusual in these commencement provisions and the flexibility provided will enable adequate notice (where necessary) and progressive transfer of ports, particularly State Agreement related ports, following consultation with relevant port customers.

Section 2(c) provides for Part 4 Division 3 to come into operation upon transfer of the Port of Wyndham under section 50(3)(b) as that part will delete provisions relating to the Port of Wyndham that will no longer be required following transfer of the Port of Wyndham to the PA Act.

Section 8 of the *Shipping and Pilotage Amendment Act 2006* will be proclaimed soon, if it has not been already. It will introduce a new section 7B relating to Marine Safety Plans and includes a reference to a “fishing boat harbour”.

Section 57 of this Bill will amend that reference to “boat harbour”, consistent with similar amendments at section 61 of this Bill. Section 2(d) therefore provides that if section 8 of the *Shipping and Pilotage Amendment Act 2006* has been proclaimed, section 57 is to come into operation at the same time as section 61 of this Bill. If not, section 57 is to come into operation immediately after section 8 of the *Shipping and Pilotage Amendment Act 2006* comes into operation.

## **Part 2 – Jetties Act 1926 amended**

### **3. Act amended**

Identifies that the *Jetties Act 1926* (*Jetties Act*) will be amended by Part 2 of this Bill.

### **4. Section 3 amended**

This clause inserts the following definition for the term “port authority” in the *Jetties Act*, to enable differentiation of port authority ports:

**port authority** means a port authority established under the *Port Authorities Act 1999*.

### **5. Section 4 amended**

Section 4 of the *Jetties Act* provides the Governor with power to make regulations for the management, use, maintenance and preservation of jetties, and all matters necessary for the purposes of the *Jetties Act*.

The amended section 4(5) provides for regulations to be made for the preservation, replacement and removal of jetties.

The amended section 4(15) increases the out-dated maximum penalty amount from \$500 to a penalty not exceeding a fine of \$12,000 for any contravention, by act or omission, of any regulation under the *Jetties Act*. All penalty adjustments in this Bill have been considered in light of and based on prevailing penalties under the PA Act and other maritime legislation, to generally achieve consistency.

### **6. Section 5 amended**

The insertion of a reference to section 4(13a) within section 5(1)(d) is to clarify that jetty licence fees prescribed under subsection (13a) apply to private jetties.

Section 5(1)(e) is being deleted because, in terms of section 8 of this Bill, the *Jetties Act* does not apply to jetties in port authority ports.

### **7. Section 6 amended**

The deletion of section 6(1)(a) removes the Governor’s power to authorise the Transport Minister to construct jetties, as the power is included in the functions of the Transport Department at section 5(1) of the *Marine and Harbours Act 1981* (M&H Act).

The insertion of section 6(3) confirms that the Governor’s power at section 6(1)(c) to authorise the Transport Minister to lease, close or remove a public jetty does not affect related powers and operation under the M&H Act.

The heading to section 6 is to be amended from “Construction of jetties” to “Acquisition, lease, closure and removal of jetties” to better reflect the content of the section.

### **8. Section 7AA inserted**

This new section 7AA clarifies that the *Jetties Act*, other than sections 13 and 14, does not apply to jetties in or partly within port authority ports, and that a lease or licence cannot be granted under the *Jetties Act* for a jetty within or partly within a port authority port. This amendment is inserted to avoid doubt and does not affect a port authority’s control over its ports under Section 32 of the PA Act, subject to any Ministerial direction.

## **9. Section 8 amended**

This amendment updates the out-dated penalty amount from \$2,000 to a maximum of \$12,000, as a deterrent to construction of a private jetty without a licence.

## **10. Section 8A amended**

Section 8A provides the Transport Minister with power for removal or sale of unlicensed jetties. The insertion of a definition for “materials” ensures the powers include the removal or sale of related fixtures and fittings.

## **11. Section 9 amended**

This section replaces the penalty amount of \$500 with a penalty not exceeding a fine of \$12,000, for breach of regulations relating to preservation, maintenance and proper management of buoys. It also excludes application of the regulations to buoys controlled by a port authority.

## **12. Section 10 amended**

This section replaces the penalty amount of \$2,000 with a maximum fine of \$12,000, for lighting or placing fires on or near public jetties.

## **13. Section 11 amended**

This section replaces the penalty amount of \$2,000 with a maximum fine of \$12,000, if a vessel, raft, or other thing is fastened to a public buoy, beacon, river or sea mark, fender, or other piling.

## **14. Section 12 amended**

This section replaces the penalty amount of \$500 with a maximum fine of \$12,000 for the owner or negligent master of a vessel, if injury is caused by a vessel to any public jetty or bridge.

## **15. Sections 13 and 14 inserted**

Section 8 of this Bill inserts a new section 7AA which clarifies that the *Jetties Act*, except for the following sections 13 and 14, does not apply to jetties wholly or partly within port authority ports.

### **Section 13**

#### **Transitional provision for Ports Legislation Amendment Act 2017**

Subsection (1) inserts various definitions for use in this section.

Subsection (2) lists the jetty licences (under the *Jetties Act*) currently within existing port authority ports and subclause (3) provides for their continuation and for future extension, variation or renewal.

Subclause (3) provides for a “specified” date to be prescribed in regulations for individual licences listed in the Table. From the “specified” day, the “relevant port authority” listed in the Table will exercise the powers under the licence and the *Jetties Act*, previously exercised by the Transport Minister (or Department).

This will enable the jetty licences listed at subsection (2) to be progressively brought under the regulatory control of port authorities. The regulatory actions will become part

of the port authority's functions and the licensee will be required to comply with directions issued by the port authority (to comply with the PA Act or the port authority's functions). The rights and powers of the licensee are not affected and the licence can only be varied, extended or replaced if requested or agreed by the licensee.

This section does not prejudice the rights or obligations of parties to Government (State) Agreements and the Agreement Minister's written concurrence is required prior to the establishment in regulations of a "specified" date from which a State Agreement related jetty licence (listed at items 1 to 12 of the Table) is to transfer to regulation by a port authority (under the *Jetties Act*)

## **Section 14**

### **Validation of prescribed instruments**

Subsection (1) provides a definition for the term "instrument", used in this section to mean a lease or licence granted under the *Jetties Act* for a jetty situated partly or wholly within a port authority port.

Subsections (2) and (3) provide flexibility for validation of individual leases and licences under the *Jetties Act*, if required, on and from dates specified in regulations. Any validation extends from the commencement dates of the instruments, covers related obligations and liabilities of all parties, and includes validation of actions taken or omissions in reliance upon or in relation to the specified instruments.

## Part 3 – Lights (Navigation Protection) Act 1938 amended

### 16. Act amended

This section identifies that the *Lights (Navigation Protection) Act 1938* (LNP Act) will be amended by Part 3 of this Bill.

### 17. Section 2 amended

This section deletes the definitions of “Port Authority” and “Port or Harbour” and inserts the following new definitions:

- **chief executive officer:** means the chief executive officer of the department.
- **department:** means the department of the Public Service principally assisting the Minister.
- **harbour:** includes a boating harbour declared under the *Shipping and Pilotage Act 1967* section 10(2).
- **port:** includes —
  - (a) a port declared under the *Shipping and Pilotage Act 1967* section 10(1); and
  - (b) a port as defined in the *Port Authorities Act 1999* section 3(1).
- **port manager:** means —
  - (a) in the case of a port under the control of a port authority— that port authority; and
  - (b) in the case of any other port or a harbour — the chief executive officer of the department.

### 18. Section 3 amended

This section replaces the penalty amount of \$200 under subsection (4) and daily penalty of \$10 for every day of non-compliance, with a maximum fine of \$12,000 and a daily penalty of \$600, if there is a failure to comply with a notice served under this section in relation to lights being used, kept, burnt or exhibited, which could conflict with, be mistaken for or adversely affect port or harbour lights.

Note that navigational lights are provided for the safe navigation of vessels and it is important other lights are not allowed to compromise navigational safety.

### 19. Section 4 amended

This section replaces the out-dated penalty amount under subsection (3) of \$100 with a maximum fine of \$5,000, if any owner, occupier or other person attempts to or obstructs, or hinders the port manager or an authorised person who enters premises to rectify lights where a notice served under section 3 has not been complied with.

The heading to section 4 is to be amended from “Port authority may cause requisitions of notice to be carried out” to “Port manager may cause requisitions of notice to be carried out”, to reflect the new term “port manager” which includes a port authority and the CEO of the department, as detailed at section 17(2) of this Bill.

## **20. Section 7 amended**

This section provides power for prosecution of an offence under the LNP Act to be undertaken by an authorised person of a port authority, for port authority ports and by the CEO for any other port or harbour.

## **21. Sections 8 and 9 inserted**

### **Section 8.**

#### **Delegation**

This section provides the CEO the power to delegate in writing to a person, or to a department officer or agent, any power or duty the CEO has under the LNP Act. Once delegated this person cannot further delegate that power or duty. This section does not limit the ability of the CEO to perform a function through an officer of the department or an agent.

### **Section 9.**

#### **Regulations**

This section provides the Governor with power to make regulations prescribing all matters that are required or permitted under the LNP Act. The regulations may provide that contravention of a regulation is an offence and provide for a penalty not exceeding a fine of \$12,000.

## **22. Various references to “port authority” replaced**

This clause provides for references to “port authority” (and related punctuation) to be deleted and replaced with “port manager” in sections 3(1), 4(1), 4(2), 4(3), and 6 of the LNP Act.

## Part 4 – Marine and Harbours Act 1981 amended

### 23. Act amended

This section identifies that the M&H Act will be amended by Part 4 of this Bill.

The M&H Act requires miscellaneous amendments to update penalties, remove references to ports that will no longer be subject to the M&H Act following transfer to port authority regulation, and to clarify the future focus of the Transport Department on management of boat harbours rather than trading ports.

### 24. Section 3 amended

This clause deletes the definition of “Port Authority” and inserts the following definitions:

- **harbour:** includes a boat harbour declared under the *Shipping and Pilotage Act 1967* section 10(2).
- **inspector:** means an inspector designated under the *Western Australian Marine Act 1982* section 117.
- **port:** includes a *Shipping and Pilotage Act 1967* port and a port authority port.
- **port authority:** means a port authority established under the *Port Authorities Act 1999*.

### 25. Section 5 amended

The section provides amendments to and clarification of functions of the department (assisting the Transport Minister), including that the department is able to:

- focus on boat harbours (now that the policy intent is to transfer trading ports to the PA Act, for regulation by port authorities);
- to provide for the commercial development and promotion of harbours and related facilities and services;
- under the new subsection (1A) the department may only undertake port works in relation to a port authority port with the agreement of the port authority that controls that port; and
- preserve, protect, control, manage, operate, and maintain any property vested in or acquired by the Transport Minister for the purposes of the M&H Act.

### 26. Section 5A amended

Section 5A deals with the provision of services by the Transport Department at the ports of Broome and Wyndham. Broome is a port authority port and this amendment therefore removes reference to Broome and changes the heading to reflect the provision of services by the Transport Department at Wyndham only.

### 27. Section 5B amended

This section replaces the penalty amount of \$500 with a maximum fine of \$5,000, if a person commits an offence by destroying, damaging, defacing, obliterating, moving or otherwise interferes with a notice or sign.

### 28. Section 14 amended

This amendment updates terminology in section 14(2) by replacing “trust accounts” with “agency special purpose accounts” to reflect terminology used in section 14(1).



### **29. Section 14A amended**

This amendment removes reference to the port of Broome, which is a port authority port, leaving power for application of interest on overdue accounts at the port of Wyndham only.

### **30. Section 18A amended**

This section amends the infringement notice requirements to align with other maritime legislation, by amending the term “authorised officer” to “authorised person”, including provision for the issue of infringements by an “inspector” in addition to an “authorised person”, and requiring an inspector (the same as for an authorised person) to produce a certificate of authorisation when required to do so by a person to whom an infringement notice has been or is about to be given.

### **31. Section 18B amended**

This section deals with the onus of a motor vehicle owner to identify the driver at the time of an alleged offence. The amendment inserts reference to an “inspector” in addition to an “authorised person” and replaces the definition of “authorised officer” with a definition of “authorised person” to align with other maritime legislation.

### **32. Section 19 amended**

Section 19 provides the Governor with the power to make regulations. The replacement subsection (g) provides for fees and charges to be paid to the Transport Department for any use or services provided within a departmental area, clarifies that fees can be prescribed for the mooring, berthing and storage of vessels, in addition to departmental services and the parking of motor vehicles. This amendment also replaces the penalty amount of \$500 with a maximum fine of \$12,000, for any failure to comply with a regulation.

### **33. Various references to “authorised officer” replaced**

This clause provides for references to “authorised officer” to be deleted and replaced with “authorised person” within sections listed in the Table.

### **34. Section 5A deleted**

Section 26 of this Bill will remove reference to Broome (a port authority port), and focus only on the provision of services by the Transport Department at Wyndham.

Following transfer of the port of Wyndham to the Kimberley Ports Authority (KPA), under section 49(3)(b) of this Bill, section 5A will not be needed and will be deleted at the time of transfer in terms of the commencement clause at section 2(c) of this Bill.

### **35. Section 14A deleted**

Section 14A will no longer be needed and will be deleted following transfer of the Port of Wyndham as indicated at section 34 above.

## **Part 5 – Marine Navigational Aids Act 1973 amended**

### **36. Act amended**

This section identifies that the *Marine Navigational Aids Act 1973* (MNA Act) will be amended by Part 5 of this Bill.

In addition to updating of penalties, the amendments clarify the powers and responsibilities of the Transport Department and port authorities for the provision of safety-related navigational aids within and outside of port authority ports.

### **37. Section 2 amended**

This clause deletes the definition of “Port Authority” and inserts the following definitions, to provide clarity and consistency in relation to the powers of the CEO and Transport Department, and update the definition of a port authority:

- **chief executive officer:** means the chief executive officer of the department (assisting the responsible Minister).
- **port authority:** means a port authority established under the *Port Authorities Act 1999*.

### **38. Section 3 amended**

This amendment effectively inserts a replacement section 3(1) which clarifies that the powers of the chief executive officer and a port authority within this section, relating to installation and remittance of navigational aids, applies to the approaches to a port.

The insertion of a new section 3(1A) provides that the chief executive officer may only establish a navigational aid within a port authority port by agreement with the port authority.

For consistency, the amendment also replaces references to the “department” with “chief executive officer” which is defined as the chief executive officer of the department. Likewise, for consistency, the word “and” is inserted after a couple of subsections.

### **39. Section 3A amended**

This amendment clarifies that fishing boat fees prescribed in regulations are payable to the department for navigational aids provided outside of ports under the control “and management” of port authorities.

### **40. Section 5 amended**

This section replaces the penalty amount of \$200 with a maximum fine of \$12,000, if a person hinders the effective operation or use of a marine navigational aid by doing anything which “causes damage to or interferes with” navigational aids.

### **41. Section 6 to 7 inserted**

The insertion of new sections 6 to 7 provides for establishment of regulations and delegation of powers:

#### **Section 6.**

##### **Delegation**

This section provides the CEO with power to delegate in writing, to a departmental officer, any power or duty the CEO has under the MNA Act. Once delegated this person cannot further delegate that power or duty. The delegation of power does not prevent the CEO from performing a function through an agent or officer of the department.

## **Section 7.**

### **Regulations**

This section provides the Governor with power to make regulations prescribing all matters that are required or permitted under the MNA Act. The regulations may provide for all of the matters specified within subsection (2), including that contravention of a regulation is an offence attracting a penalty of up to a maximum fine of \$12,000 and that a convicted person may be ordered to pay for any damage caused to a marine navigational aid.

## **Part 6 – Ports Authorities Act 1999 amended**

### **42. Act amended**

This section identifies that the PA Act will be amended by Part 6 of this Bill.

The amendments provide for the progressive transfer of the regulation of trading ports by the Transport Department under the S&P Act, to relevant port authorities under the PA Act.

### **43. Section 3 amended**

This section replaces the definition of “vested”, effectively removing the words “in relation to land or other property”. It also inserts a new term “vested land”, meaning vested land, seabed and water.

Subsection (3) amends the definition for the term “port land” to include other land that becomes the property of a port authority under this amendment Act.

### **44. Section 25 amended**

Section 25 of the PA Act details what property is vested in or owned by a port authority, including navigation aids.

Subsection (1) amends section 25 to clarify and only include navigational aids that were in, or used in connection with, a port that became a Schedule 1 port authority port prior to the 2003 amendment, rather than a new port authority port.

Subsection (2) clarifies that port authority property includes property that is vested in, or becomes the property of, the port authority as a result of this amendment Act.

### **45. Section 31 amended**

Section 31 of the PA Act provides that a port authority can use its discretion as to how and when it performs its functions listed at section 30, subject to the PA Act and any direction given to it by the Ports Minister, but without limiting the requirements of the *Environmental Protection Act 1986*.

This amendment clarifies that the discretion applies to functions specified anywhere in the PA Act or other written law, not just section 30.

### **46. Section 40 amended**

Section 40 of the PA Act requires approval of the Ports Minister, with the Treasurer’s concurrence, prior to a port authority entering a contract or arrangement which has a value exceeding an amount prescribed in regulations.

This amendment provides that the prescribed amount is not to be amended without the Treasurer’s concurrence.

### **47. Section 60 amended**

Clause 60(2)(ka) of the PA Act currently requires port authority annual Statements of Corporate Intent to include details of access arrangements put in place for the provision of services within relevant ports or explain any absence of arrangements.

A major function of port authorities under s30(1)(a) is to facilitate trade “within and through” the port. Port authorities are required under Part 5 of the PA Act to annually raise Strategic Development Plans and Statements of Corporate Intent setting out port operational

strategies and development plans. These plans are subject to approval by the Minister for Transport and the Treasurer. Additionally, the Minister has power under s72 to direct a port authority, either generally or in relation to a specific matter.

More importantly, all port authorities now have in place standard provisions for port service providers to seek a licence for the provision of relevant services within a port under their management.

The requirements of clause 60(2)(ka) are therefore repetitive and unnecessary, and are being deleted by this provision.”

#### **48. Section 96 amended**

Section 96 of the PA Act provides a penalty for an offence and requires that no person is to act as a pilot in a port unless “approved as a pilot for the port”.

This amendment clarifies that a person may act as a pilot within a port if approved or issued with a pilotage exemption certificate under the regulations.

#### **49. Section 138 amended**

Section 138 of the PA Act clarifies that specified sections and schedules of the PA Act do not affect the operation of the *Government Agreements Act 1979*, which effectively preserves the rights of parties to relevant State Agreements.

This amendment adds the “affecting provisions” (port transfer provisions) at section 52 of this amendment Act to the listing of specified sections that will not affect the *Government Agreements Act 1979* or relevant State Agreements.

#### **50. Schedule 1 amended**

Schedule 1 of the PA Act provides a list of the State’s port authorities and the ports which they control and manage.

This amendment inserts the names of the ports transferring over to the control of relevant ports authorities.

## 51. Schedule 8 Division 2 inserted

This amendment inserts a new Division 2 at Schedule 8 of the PA Act, which provides for the transfer of control of the S&P Act ports to relevant port authorities.

### Subdivision 1 — Preliminary

#### Clause 52. Terms used

Clause 52(1) defines a number of terms used in Division 2, including:

- **affecting provisions:** which effectively means –
  - (a) the transfer provisions at section 50 of this amendment Act;
  - (b) this Division and transitional regulations; and
  - (c) transitional orders provided for at clause 58 and 59 and schedules referred to in transitional orders.
- **amending Act:** means this *Ports Legislation Amendment Act 2017*.
- **asset:** means any legal or equitable estate or interest (whether present or future, whether vested or contingent and whether personal or assignable) in real or personal property of any description and includes any money, security, chose in action or document.
- **asset of the State:** includes, but is not limited to, property vested in or acquired by the Transport Minister for the purposes of a Marine Act.
- **existing S&P Act port:** in relation to a port named in a Transfer provision, means—
  - (a) in the case of a port named in section 50(1)(a) or (b) (Cape Cuvier or Useless Loop) of this amending Act — the Port of Carnarvon as declared before the transfer time under the *Shipping and Pilotage Act 1967* section 10(1). (The port of Carnarvon is being split into two ports of Cape Cuvier and Useless Loop, because of the extensive geographic separation between the two); or
  - (b) in the case of a port named in any other transfer provision (section 50(2) and (3)) — the port with that name as declared before the transfer time under the *Shipping and Pilotage Act 1967* section 10(1).
- **Government agreement:** means an agreement referred to in paragraph (a) of the definition of Government agreement in the *Government Agreements Act 1979* section 2 and, if the agreement has been varied, means the agreement as varied. (Government agreements include State Agreements).
- **liability:** means any liability, duty or obligation whether actual, contingent or prospective, liquidated or unliquidated, or whether owed alone or jointly or jointly and severally with any other person.
- **liability of the State:** includes, but is not limited to, a liability incurred by the Transport Minister for the purposes of a Marine Act.
- **Marine Act:** means the *Jetties Act 1926*, the *Lights (Navigation Protection) Act 1938*, the *Marine and Harbours Act 1981*, the *Marine Navigational Aids Act 1973* or the *Shipping and Pilotage Act 1967*.
- **port transfer** or **transfer:** in relation to a port, means —

- (a) the placement of the port under the control and management of a port authority by the insertion of the port in column 3 of an item in Schedule 1, through a transfer provision; and
  - (b) the cessation of the existing *Shipping and Pilotage Act 1967* port as a port for the administration and operation of which the Transport Department is responsible by force of clause 56.
- **relevant official:** means —
    - (a) the Registrar of Titles under the *Transfer of Land Act 1893*; or
    - (b) the Registrar of Deeds and Transfers under the *Registration of Deeds Act 1856*; or
    - (c) the Minister administering the *Land Administration Act 1997*; or
    - (d) any other person authorised by a written law to record and give effect to the registration of documents relating to transactions affecting any estate or interest in land or any other property;
  - **renew** an easement, lease or licence includes –
    - (a) the extension of its term; and
    - (b) the replacement of that instrument.
  - **requirement under this Act:** means —
    - (a) a direction given by the Minister under section 72 of the PA Act; or
    - (b) any other obligation under the PA Act.
  - **right:** means any right, power, privilege or immunity whether actual, prospective or contingent.
  - **transfer provision:** means section 50(1)(a) or (b), (2)(a), (b), (c), (d) or (e) or (3)(a), (b) or (c) of this amending Act (each of which place a named S&P Act port under the management of a relevant port authority listed at Schedule 1 of the PA Act).
  - **transfer time:** in relation to a port transfer — means the time at which the relevant transfer provision comes into operation (by proclamation or Ministerial Order in terms of section 2(e) of this amending Act).
  - **transitional order:** means a Ministerial Order under clause 58.
  - **transitional regulations:** has the meaning given in clause 69(1).
  - **Transport CEO:** means the chief executive officer of the Transport Department and includes a delegate of that chief executive officer under a Marine Act.
  - **Transport Department:** means the department of the Public Service principally assisting the Transport Minister in the administration of the Marine Acts.
  - **Transport Minister:** means the Minister administering the Marine Acts and includes—
    - (a) that Minister as a body corporate under the Marine and Harbours Act 1981 section 8; and
    - (b) a delegate of that Minister under a Marine Act.

**52(2):** This clause provides that any reference in this Division to an “agreement, instrument or document” does not include Government or State agreements.

## **Subdivision 2 – Transfer of control and management of some existing ports to port authorities**

Subdivision 2 includes definitions and provisions necessary for the transfer of relevant S&P Act ports to oversight by regional port authorities (under the PA Act).

### **Clause 53 – Terms used**

This clause provides definitions for various terms used in this subdivision, including:

- **Agreement Minister:** means the Minister administering the *Government Agreements Act 1979* (which includes State Agreements).
- **port:** means the port named in a transfer provision.
- **port authority:** means the port authority under the control and management of which a port is placed by a port transfer.

53(2) A reference to **this subdivision** — includes a reference to —

- (a) transitional regulations relating to a port transfer; and
- (b) transitional orders and schedules referred to in transitional orders.

### **Clause 54 – Port transfer: preliminary requirements**

54(1) This clause requires the issue of a Governor's Order under section 24(1) of the PA Act, describing the area or areas of land, water or seabed, or any combination of them, of which the (transferring) port is to consist.

54(2) The area of the port can consist of land, seabed or water, or any combination of them.

54(3) The boundary area in the Order may differ from the previous S&P Act port boundary area. This will be necessary for example if an existing port area is too large, as with the port of Carnarvon being split into the port of Cape Cuvier and the port of Useless Loop.

54(4) The Governor's Order (port boundary description) is to come into operation at the port transfer time.

54(5) The Transport Minister must obtain the written concurrence of the Agreement Minister before a proclamation is issued under section 2(e) of this amending Act, for section 50(1)(a) or (b) or 2(a), (b) or (c) and (e) of this amending Act (which effectively transfer State Agreement related ports to the PA Act).

### **Clause 55 – Port authority to implement and facilitate port transfer**

55(1) This clause provides that, before or after a port transfer, port authorities may do anything that is prescribed by transitional regulations and anything else that may be necessary to implement or facilitate a port transfer.

55(2) Power is also provided for a port authority to do anything prior to transfer of a S&P Act port that it is required to do under a contract or arrangement entered into with the Transport Minister under the M&H Act.

55(3) The functions under this clause are in addition to any other functions the port authority has.



## **Clause 56 – Cessation of responsibility for port**

This clause provides that at the time of transfer of a port, the Transport Minister and Department cease to have administration and operational responsibility for the port under the M&H Act.

## **Clause 57 – Vesting of land, seabed and water in port authority**

57(1) All land, seabed and waters within the port boundary description (issued under clause 54) are vested in the port authority

57(2) The vesting under subclause (1) above is subject to any exclusion specified in a Ministerial Transitional Order (in terms of Clause 60(4) and excludes navigational aids in terms of Clause 62(1)). Navigational aids will be vested selectively by Ministerial Transitional Orders (under Clause 58(2)), as some navigational aids will be retained by the Transport Department and used by adjacent boat harbours.

57(3) Subclause (1) above replaces automatic vesting under Section 25(1) of the PA Act.

## **Clause 58 – Minister may make transitional orders**

58(1) This clause provides power for the Transport Minister to make one or more orders, published in the Gazette, prior to transfer of a port, that:

- (a) specify State assets that are to vest in or become the property of the port authority, in addition to land, water and fixtures vested under clause 57(1);
- (b) specify liabilities of the State that are to become liabilities of the port authority;
- (c) specify property that is not to vest in the port authority under the terms of clause 57(1). This may be required to address situations where Crown land and seabed areas are leased to proponents under State Agreements, by Departments or Ministers other than the Transport Minister or Transport Department. That land will not be vested in a port authority and those leases will remain unchanged. Where necessary, only the waters will become part of the declared port area (for navigational control and marine safety purposes);
- (d) specify any agreement or instrument where the port authority or CEO is to be substituted for the Transport Minister or CEO. This will, for example, enable the transfer of mooring area licences at various ports to the relevant port authority;
- (e) specify any agreement, instrument or document that is to have effect as if references to the State, Transport Minister, Transport Department or CEO were replaced by references to the port authority, CEO or member of staff;
- (f) specify any agreement, instrument or document that is to have effect as if references to other Acts were replaced by references to the PA Act;
- (g) specify any agreement, instrument or document that is to have effect as if references to the (S&P Act) Port of Carnarvon are substituted with references to either of the Ports (of Cape Cuvier or Useless Loop) that are named at section 50(1)(a) and (b) of this amendment Act; and
- (h) specify any (legal/arbitration) proceedings in which the State or Transport Minister is to be replaced as a party by a port authority.

- 58(2) Any asset of the State, such as State-owned navigational aids, may be specified in a transitional order issued under subclause (1)(a) if the Transport Minister considers that the asset relates to the administration or operation of the transferring port, should vest in or become the property of the port authority, and may not otherwise be vested in the port authority under the terms of clause 57(1).
- 58(3) A liability of the State may be specified in a transitional order, and become a liability of a port authority under subclause (1)(b), if the Transport Minister considers that the liability relates to or arose in connection with the administration or operation of the transferring S&P Act port and should become a liability of the port authority.
- 58(4) A transitional order may deal with incidental or supplementary matters, and may clarify or remove doubt as to the operation of this Subdivision 2 in relation to any specified matter or thing.
- 58(5) A transitional order may specify things by reference to a schedule. If the schedule is not published in the Gazette, it must be made available for public inspection.
- 58(6) A thing may be specified in a schedule by describing the class of thing to which it belongs. For example, “all marine navigation aids” within the transferring port boundary.
- 58(7) Before a transitional order is made, the Transport CEO is to consult with the relevant port authority as to the form and content of a transitional order and any related schedule.
- 58(8) The Transport CEO is to also consult with “relevant officials” (as defined at clause 52 of section 51 of this amendment Act) as to the form and content of any schedule specified in a transitional order dealing with the transfer of land (for which they have registration responsibility), prior to a transitional order being made.
- 58(9) The Transport Minister must obtain written concurrence from the Agreement Minister before making a transitional order relating to a port named at section 50(1)(a) or (b), or 50(2)(a),(b),(c) or (e) of this amending Act. The respective ports are Cape Cuvier and Useless Loop (currently comprising the Port of Carnarvon), and the Ports of Barrow Island, Cape Preston, Onslow and Walcott, each of which is used by companies with State Agreements.
- 58(10) The Transport Minister is to arrange delivery of each transitional order to the relevant port authority and each “relevant official”.

#### **Clause 59 – Amending transitional order**

Subclause (1) provides the Transport Minister with power to correct any error or omission in a transitional order or schedule, through an Order published in the Gazette.

Subclause (2) provides power to issue a Ministerial Transitional Order after the port transfer for any matter that could have but was not dealt with prior to the transfer.

Subclauses (3) to (5) provide that if an order is published after a port transfer, it can take effect from the transfer time but cannot adversely affect pre-existing rights or impose liabilities prior to publication, except upon a Minister, the State or its agencies and officers.

Subclause (6) applies the provisions of clauses 58(5) to (10) of this Bill to transitional orders issued under this section (being requirements for listings in schedules, describing of things by classes, consultation requirements, and approval by the Agreement Minister of matters relating to State Agreement ports).

## Clause 60 – Provisions as to assets and liabilities

This clause specifies the legal effect of transitional orders dealing with the transfer of assets and liabilities, together with some related provisions as to the treatment of such transfers.

60(1) Definitions for terms used in this clause include:

- **transferred assets:**
  - (a) assets that vest in, or become the property, of the port authority under subclause (3)(a) below, which is assets specified in a transitional order under clause 58(1)(a); and
  - (b) property vested in the port authority under clause 57(1), which includes all Crown land, seabed, waters and fixtures belonging to the State, that are within the port boundary.
- **transferred liabilities:** in relation to a port transfer, means liabilities that become liabilities of the port authority under subclause (3)(b) below, which is liabilities specified in a transitional order made under clause 58(1)(b).

60(2) This clause applies if a transitional order is made (under clause 58) in relation to a port transfer.

60(3) This clause provides that assets and liabilities specified in a transitional order, (under clauses 58(1)(a) and (b)), transfer at the port transfer time.

60(4) This clause provides that property specified in a transitional order under clause 58(1)(c) will not vest in the port authority under clause 57(1).

60(5) This clause provides that, at the port transfer time, any State right in relation to “transferred assets” or “transferred liabilities” (under respective transitional orders) becomes the right or liability of the port authority.

60(6) This clause provides that from the port transfer time:

- (a) any proceedings or remedy commenced by, or available to or against the State or Transport Minister, in relation to “transferred assets” or “transferred liabilities”, may be commenced by or available to or against the port authority;
- (b) anything commenced before the port transfer time by the State, Transport Minister or Department, in relation to transferred assets or liabilities, may be continued by the port authority; and
- (c) to the extent that it has any effect, anything omitted or done to or in respect of the State, Transport Minister or Department in relation to transferred assets or liabilities, before the port transfer time, is to be taken to have been done or omitted by, to or in respect of the port authority.

60(7) This clause provides that, for the purpose of determining the net profits of a port authority under section 84 of the PA Act, transferred assets are not to be treated as income (in the books of the port authority).

60(8) This clause provides that if, at the port transfer time, any transferring asset or liability is not properly assigned for any reason, the State is to be taken to continue to hold that asset or liability until effectively assigned, and the Transport Department is to take all practicable steps to ensure the asset or liability is effectively assigned to a port authority.

60(9) This clause provides that, despite an asset or liability being taken under subclause 8(a) to be held by the State pending completion of transfer to the port authority, it does not affect any duty imposed by section 90(2) of the PA Act, which requires the Transport Minister and the port authority board to comply with the provisions of sections 81 and 82 of the *Financial Management Act 2006* (FMA). FMA sections 81 and 82 provide that no action is to be taken (or not taken) that prevents Ministerial provision of information to Parliament and if the Transport Minister decides it is appropriate to withhold information, then reasons are to be tabled in Parliament and the Auditor General is to be informed.

60(10) Any previous vesting of a transferred asset ceases to have effect (such as port/Crown land or seabed previously vested in the Transport Minister, for transferring port purposes, under the M&H Act)

### **Clause 61 – Provisions as to agreements and proceedings**

61(1) If a transitional order is made, then from the port transfer time:

- (a) the port authority is substituted for the State or Transport Minister as a party to an agreement or instrument specified in the order under clause 58(1)(d);
- (b) an agreement, instrument or document, specified in the order under clause 58(1)(e), has effect as if references to the port authority, CEO or staff member were substituted for the State, Transport Minister, Department or CEO (however expressed);
- (c) an agreement, instrument or document specified in an order under clause 58(1)(f) has effect as if references to the PA Act or provisions of the PA Act were substituted for references to other Acts, as specified in the order;
- (d) an agreement, instrument or document specified in the order under clause 58(1)(g) has effect as if references to the port were substituted, in terms of the order, for references to the existing S&P Act port; and
- (e) the port authority is substituted for the State or Transport Minister as a party to proceedings specified in the order under clause 58(1)(h).

61(2) If subclause (1)(a) above applies, substituting the port authority in an easement, lease or licence in respect of land that becomes vested in the port authority from the port transfer time, the easement, lease or licence is to be taken from the transfer time to have been granted under the PA Act.

61(3) Subclause (2) above is to have effect even if a lease or licence was granted for more than 50 years, despite the restriction to 50 years at section 28(3) of the PA Act.

### **Clause 62 – Navigational aids**

This clause provides that the vesting provisions of clause 57(1) do not apply to navigational aids. However, navigational aids within or used in connection with a transferring S&P Act port, may be vested in the port authority by a transitional order. This will provide for situations where navigational aids are used by recreational vessels and are to remain in ownership of the State or Transport Department.

### **Clause 63 – Harbour masters and deputy harbour masters**

This clause automatically revokes the appointments of the harbour master and deputy harbour master of the existing S&P Act port immediately before the transfer time.

The Department of Transport's Harbour Master is generally the Harbour Master for all S&P Act ports. However, this clause does not apply to the harbour master or deputy harbour master of the Port of Derby, as those appointments are governed under a port operator agreement (see also clause 66A, below).

Harbour Masters will be appointed at the transferring ports by the port authorities under section 102 of the PA Act.

#### **Clause 64 – Pilotage: existing licences**

Pilotage licences at S&P Act ports are issued by the Transport Department under the S&P Act. At port authority ports, pilotage licences are issued by the port authority under section 96 of the PA Act. Existing pilotage licences at transferring S&P Act ports will automatically transfer to the PA Act, subject to the conditions below.

64(1) Definitions used in this clause include:

- **condition:** includes restriction.
- **controlled area:** an area declared under the S&P Act where pilotage services must be used.

64(2) From the transfer time this clause will automatically transfer existing pilotage licences for the S&P Act port to a pilotage licence under section 96(1) of the PA Act.

64(3) Following transfer, if the port includes an additional "pilotage area" (under section 95(2) of the PA Act), the transferred pilotage licence will only apply to the additional "pilotage area" if the licence previously covered a "controlled area" outside the S&P Act port and that "controlled area" was the same as or within the additional "pilotage area" (of the transferred port under the PA Act).

64(4) The transferred licences are subject to any condition imposed immediately before the transfer time or under the regulations.

64(5) The transferred licences (transitional approval) have effect until the original licence expires, the licence is revoked in writing under section 96(2) of the PA Act, the person is appointed as a pilot for the port under section 96(1) of the PA Act, or in two years from the transfer time, whichever occurs first.

64(6) Clause 70(1) applies in the event of a pilotage licence being revoked by the port authority under section 96(2) of the PA Act. This means that the revocation will not be regarded as a breach of contract or give rise to any right to damages or compensation, in terms of clause 70(1).

64(7) This clause does not apply to a person who is already approved as a pilot for the transferred port under section 96(1) of the PA Act prior to the port transfer, either under the power at clause 55(1) to do anything necessary to facilitate the port transfer or under section 25 of the *Interpretation Act 1984*.

## Clause 65 – Pilotage: existing exemption certificates

65(1) Definitions used in this clause include:

- **condition:** includes restriction.
- **controlled area:** an area declared under the S&P Act where pilotage services must be used.
- **S&P Act Certificate:** means a pilotage exemption certificate issued under the S&P Act.

65(2) to (7) Automatically transfer existing pilotage exemption certificates under the S&P Act to (a transitional certificate under) the port authority's regulations, at the port transfer time. The transitional certificate will apply to any additional pilotage area outside the transferred port, provided the area was within a "controlled area" included in the S&P Act exemption certificate. However, the transferred certificates will be subject to any condition imposed immediately before the transfer time or under the regulations.

As with pilotage licences at clause 64, the transferred exemption certificates will terminate upon the original expiry date, after a two year period, after replacement, or after revocation by the port authority, whichever occurs first, with no rights to damages or compensation if revoked. The clause will not apply if a replacement exemption is issued by the port authority prior to the port transfer (under clause 55(1) of this Bill or section 25 of the *Interpretation Act 1984*).

## Clause 66 – Jetty licences

This clause provides for the transfer of existing jetty licences (issued under the *Jetties Act*), to port authority jurisdiction, with differing provisions for State Agreement-related jetty licences in order to comply with and preserve State Agreement obligations and liabilities.

At S&P Act ports, State Agreement-related jetties typically straddle land that is leased to the State Agreement proponent (for day-to-day port operational purposes), and seabed that is vested in the Transport Department. The seabed is subject to port regulator marine-safety controls, with the port only being declared over the seabed area.

When a State Agreement-related port is transferred to the PA Act, the landside lease will not be transferred. Only the seabed will be declared as part of the port and vested in the port authority. The jetty will therefore remain only partly within the declared "port". The jetty licence will remain under the *Jetties Act*, but will be regulated by the port authority (see Figure 1).

Jetty licences relating to State Agreements are to be individually prescribed in regulations, subject to the approval of the Agreement Minister, and will thereafter be regulated by the port authority as "continued" licences under the *Jetties Act*. The port authority will only have power to vary or renew the licences at the request or agreement of the State Agreement proponent.<sup>1</sup>

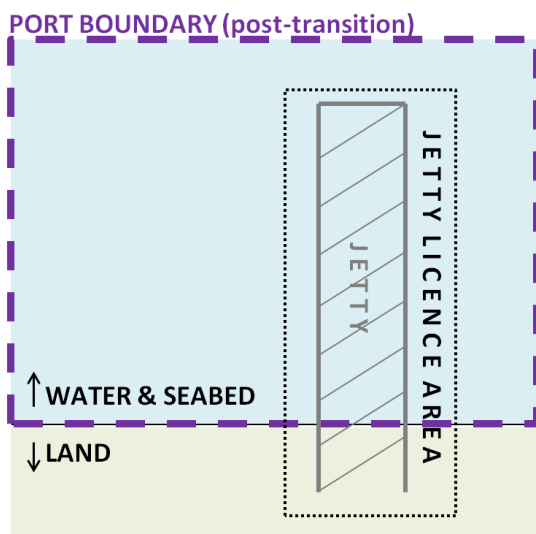
By contrast, jetties at common user ports such as Wyndham and Derby are situated on land and seabed that is declared as the port and vested in the Transport Department. The entire port land and seabed vesting will transfer to the port authority and be declared as a port under the PA Act. As the jetties will be wholly within the new PA Act port areas, relevant jetty licences will be transferred to port authority regulation under the PA Act, as "converted" licences (see Figure 2).

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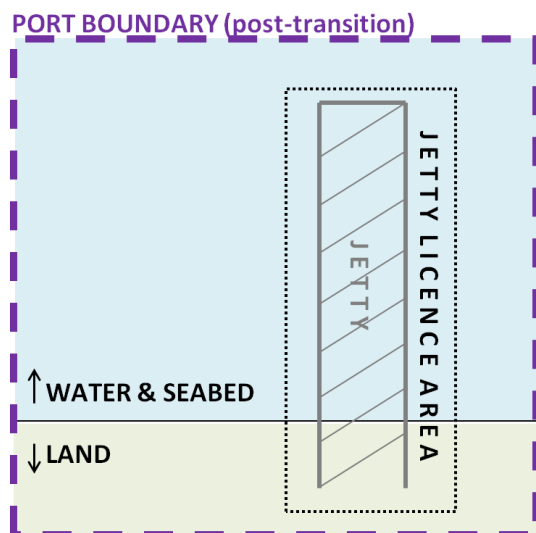
<sup>1</sup> It is, of course, also open to the proponent and the port authority to replace a continued (*Jetties Act*) licence with a PA Act lease/licence, by agreement.

The figures below are simplified diagrams of situations where converted or continued licences would apply.

**Figure 1.** Situation where a Continued Licence will apply



**Figure 2.** Situation where a Converted Licence will apply



66(1) Definitions are provided for terms used in this clause, including:

- **continued licence:** means a jetty licence to which the terms of subclause (9) apply. Effectively this means licences prescribed in regulations under subclause (6), which will include licences issued to State Agreement parties but not “converted licences” (see definition below).
- **converted licence:** means a jetty licence to which subclause (5) applies, being a jetty that is wholly within the transferred port in terms of subclause (2), but excluding any jetty licences within a State Agreement-related port specified at subclause (3), unless provided otherwise in transitional regulations and approved by the Agreement Minister.
- **existing jetty:** means a jetty that was partly or wholly within, or used in connection with, a S&P Act port immediately before a port transfer.
- **jetty:** has the meaning given in the *Jetties Act* section 3 and includes:

- (a) any jetty, pier, wharf, quay, grid, slip, landing place, stage, platform (other than a platform that is a vessel for the purposes of the *Western Australian Marine Act 1982*) or similar structure, whether fixed or floating, erected or placed, wholly or in part, in, on or over any waters; and
  - (b) any ramp which is or which may be used for the purpose of launching or landing a vessel.
- **jetty licence:** means a licence granted under the *Jetties Act*.
  - **licensee:** includes sub-licensee.
- 66(2), (3) & (5) If, immediately before the port transfer time, a jetty wholly within the transferring port was subject to a “jetty licence” (under the *Jetties Act*), other than at a State Agreement-related port nominated at subclause (3), then, at port transfer time:
- (a) the licence ceases to be a licence under the *Jetties Act*;
  - (b) the port authority is substituted for the Transport Minister or CEO as the grantor of the “converted licence”; and
  - (c) from the port transfer time, the “converted licence” is to be taken as having been granted under the PA Act, with any approval needed under the PA Act, even if the licence was granted for more than 50 years.
- 66(3)-(4) Regulations can be raised for jetty licences at State Agreement-related ports to be treated as “converted” licences, but only with the written concurrence of the Agreement Minister.
- 66(6), (7) and (9)(a)-(b) If, immediately before the port transfer time, a jetty licence applied to an “existing jetty”, transitional regulations can apply subclause (9) to the licence. The licence will then continue in force under the *Jetties Act* as a “continued licence”. However, from the port transfer time, any power exercisable by the grantor of the licence, under the *Jetties Act* or under the licence, is to be exercisable by, or in relation to, the port authority.
- 66(8) A “converted licence” (under subclause (5)) cannot be a “continued licence” (under subclause (9)).
- 66(9)(c) After transfer of a port, the port authority may, at the request or with the agreement of the licence holder, renew or vary the “continued licence” under the *Jetties Act*.
- 66(9)(d) This clause extends the functions of a port authority to include actions under this subclause, being the exercise of power under the licence and the *Jetties Act* in relation to “continued licences”.
- 66(10) This clause states that, from the port transfer time, it is to be taken as a condition of a “converted licence” or a “continued licence” that the licensee must comply with any direction given by the port authority to facilitate:
- (a) compliance by the port authority with a requirement under the PA Act; or
  - (b) performance by the port authority of its functions.
- 66(11) Ministerial Transitional Orders may be made to effectively replace references in converted or continued licences to entities, legislation or the port of Carnarvon, or to clarify and deal with supplementary matters.

The S&P Act port of Carnarvon is to be transferred as two separate, smaller ports of Cape Cuvier and Useless Loop, as specified at s 50(1)(a) and (b), and references to the port of Carnarvon in some documentation may therefore require change.



### **Subdivision 3 — General provisions**

Subdivision 3 provides general provisions for the transfer of control and management of the nominated S&P Act ports and port facilities to regional port authorities.

#### **Clause 67 – Registration of documents**

This clause provides that “relevant officials” (defined at clause 52) are to register the effect of the “affecting provisions” (defined at clause 52 and including transitional orders and transfer provisions). For example, registrars will need to register the transfer of land and leases relating to the port transfers.

#### **Clause 68 – Exemption from State taxes**

This clause will exempt port authorities from State taxes being applied to the transfer of control and management of ports from the Transport Department to port authorities under the provisions of this Bill, or to anything done to achieve the requirements of the port transfer provisions.

#### **Clause 69 – Transitional regulations**

- (1) Regulations may prescribe anything to be done by the Transport Minister, Department, CEO, or a port authority to achieve a port transfer or anything necessary to provide for a transitional matter or issue that arises in relation to a port transfer.
- (2) Regulations may provide that specific provisions of any law do not apply, or apply with specific modifications, to any matter. These are standard precautionary provisions for amalgamations and are unlikely to be utilised. Similar provisions were included in the *Ports Legislation Amendment Act 2014* but were not used.
- (3) Regulations relating to a port transfer may specify that they are to take effect prior to gazettal, but not prior to the port transfer time.
- (4) Regulations taking effect prior to gazettal are not to adversely affect the rights of, or impose liabilities on, any person other than the State or an authority of the State.

#### **Clause 70 – Saving**

In addition to the provisions of the *Interpretation Act 1984*, this clause provides safeguards by deeming that the affecting provisions in this Bill do not create any breach of contractual provisions; give rise to any damages, compensation or remedy; void any contract or instrument; or release or allow for the release of any surety.

#### **Clause 71 – Effect of affecting provisions**

This clause provides that, subject to the preservation of State Agreements under clause 74 and mining and petroleum rights under clause 75, the port transfer provisions (“affecting provisions” as defined at clause 52) take effect despite any provisions in the PA Act or any other written law.

#### **Clause 72 – No exclusion of operation of affecting provisions**

This clause provides that the “affecting provisions” (port transfer provisions) also apply to agreements and instruments containing clauses that exclude the application of future legislation.

### **Clause 73 – Effect of continued easements, leases and licences**

73(1), (2) & (3) These subclauses preserve pre-transfer rights by providing that, where an easement, lease or licence is to be taken from the port transfer time as having been granted under the PA Act:

- (a) the pre-transfer rights of the grantee, lessee and licensee are not adversely affected, except by agreement under subclause (3); and
- (b) the port authority may renew or vary the easement, lease or license under the PA Act if requested or agreed by the grantee, lessee or licensee.

73(4) This subclause states that the preservation of rights under subclause (2) does not affect the provisions at clauses 66(9) or (10), which allow a port authority, in order to comply with the PA Act or the port authority's functions, to:

- exercise powers under the *Jetties Act* and continued licences; and
- issue directions in relation to converted or continued jetty licences.

### **Clause 74 – Government agreements not affected**

This clause provides that the rights and obligations of parties to State Agreements are not affected by the “affecting provisions” (port transfer provisions) within this Bill.

### **Clause 75 – Preservation of mining, petroleum and other rights**

This clause preserves mining and petroleum leases, licenses and other rights existing prior to a port transfer time. It also provides that the port transfer provisions do not prevent applications made prior to the port transfer from being dealt with, or affect the manner in which the application is determined. It also preserves any other legal right provided for in transitional regulations.

### **Clause 76 – Transitional provision for Schedule 9**

Schedule 9 currently provides power for additional ports to be placed under the management of existing port authorities through regulations, except for existing S&P Act ports. This exclusion was required to prevent the transfer of State Agreement ports to a PA Act jurisdiction, other than through primary legislation, to safeguard the rights of State Agreement entities.

Now that this Amendment Act adequately provides for the transfer of these State Agreement ports, the exclusion is being removed at section 53 of this Amendment Act. However, the restriction is retained through this clause, until the “transfer provisions” in this Act come into operation through transfer of the S&P Act ports provided for in this Act.

The restriction is achieved by treating the transferring S&P Act port as if it is listed in Schedule 1 as a port authority port, so that it does not qualify as an “unassigned port” for placement under the management of a port authority (until such time as the “transfer provisions” come into operation).

### **52. Schedule 8 amended**

51(1) This subclause adds orders issued under clause 66A(2) to the definition of “affecting provisions” at clause 52(1).

51(2) This subclause inserts provisions relating to the Port of Derby as follows:

**Clause 66A – Port of Derby: special provisions**

The Port of Derby is currently managed by the Shire of Derby/West Kimberley under a management agreement and lease, entered by the Shire with the Transport Minister. The existing arrangements contain a number of provisions that are inconsistent with the PA Act.

Upon transfer of the port from the S&P Act to the PA Act, these contractual arrangements will need to transfer to the port authority. The provisions below enable that transfer and the elimination of inconsistencies with requirements of the PA Act.

- (1) Definitions used in this clause include:
- **amending order** means an order issued under subclause (2);
  - **board** means the board of the Kimberley Ports Authority;
  - **existing arrangement** means the management agreement or the head lease as defined below;
  - **head lease** means the Port of Derby head lease granted by the Transport Minister to the operator (Shire of Derby/West Kimberley) on 16 December 1997, as later affected by a partial surrender;
  - **management agreement** means the Port of Derby management agreement entered into between the Transport Minister and the operator on 16 December 1997;
  - **operator** means the Shire of Derby/West Kimberley;
  - **port** means the Port of Derby;
  - **port authority** means the Kimberley Ports Authority;
  - **transfer time** means the time at which section 50(3)(a) of this amendment Act comes into operation, by addition of the Port of Derby under the Kimberley Ports Authority at Schedule 1 of the PA Act.
- (2) The Transport Minister may make and serve on the port authority and the operator, before the port transfer time, one or more orders amending an existing arrangement (head lease or management agreement) –
- (a) to eliminate inconsistencies between the “existing arrangement” and requirements under the PA Act; or
  - (b) to incorporate provisions that the Transport Minister considers to be consistent with the port authority’s risk, contract and port management practices; or
  - (c) in any other way that the Transport Minister considers necessary or expedient to provide for, implement or facilitate the transfer of the port.
- (3) Subclause (2) above does not prevent the issue of transitional orders by the Transport Minister under clause 58, in relation to the management agreements or head lease.
- (4) At the port transfer time, by force of this subclause, an “existing arrangement” is amended as set out in any related “amending order”.

- (5) Before an amending order is made, the Transport CEO is to consult with the port authority and the Shire as to the form and content of the amending order.
- (6) Clause 59 applies in relation to an amending order as if it were a transitional order published in the gazette on the date served on the operator (Shire) and port authority.
- (7) At the port transfer time, the port authority is substituted for the Transport Minister as a party to the management agreement.
- (8) This subclause clarifies the port authority is to be taken to have sufficient powers under the PA Act to be a party to the management agreement.
- (9) At the port transfer time, by force of this subclause –
  - (a) the port authority is substituted for the Transport Minister as a party to the head lease; and
  - (b) to the extent, if any, to which the head lease is a lease under the *Jetties Act 1926*, it ceases to be a lease under that Act and from the transfer time the head lease is to be taken to have been granted under the PA Act with any approval needed under the PA Act.
- (10) At the Port transfer time, clause 9.1 of the management agreement (dealing with appointment of a Harbour Master) ceases to have effect by force of this subclause, however –
  - (a) from the port transfer time, the person holding the office of harbour master of the port under the management agreement immediately before the transfer time, continues to hold the office under and subject to the PA Act as if appointed under section 102 of the PA Act; and
  - (b) if a replacement harbour master is to be appointed under section 102 while the management agreement continues in force, the appointment may be made by agreement between the port authority and the operator, but in the absence of agreement:
    - i. the board must request the operator provide to the port authority, in writing and within 28 days, a nomination of one or more persons that are competent and suitably qualified to hold the office of harbour master; and
    - ii. subject to subparagraph (iii), if a person or persons are nominated under subparagraph (i), the board must appoint a person so nominated; and
    - iii. if no person is nominated under subparagraph (i) or the board considers, in its sole discretion, that no person so nominated is competent and suitably qualified, the board may appoint any person it considers to be competent and suitably qualified;

and

  - (c) despite anything in the PA Act, a harbour master appointed under paragraph (a) or (b) above is, by force of this clause, an employee of the operator and the operator is responsible for all costs, liabilities and obligations relating to that employment; and
  - (d) if the management agreement expires or is terminated, the appointment under paragraph (a) or (b) is revoked by force of this clause.

- (11) This subclause provides that the provisions at subclause (10) above are to also apply to a deputy harbour master or acting harbour master.
- (12) At the port transfer time, clause 9.2 of the management agreement (which deals with appointment of a pilot) ceases to have effect by force of this subclause, however –
- (a) if a person is to be approved as a pilot for the port under section 96 of the PA Act while the management agreement continues in force –
- i. the board must request the operator provide to the port authority, in writing and within 28 days, a nomination of one or more persons that are competent and suitably qualified for approval as a pilot for the port; and
  - ii. subject to subparagraph (iii), if a person or persons are nominated under subparagraph (i), the board must approve a person so nominated as a pilot for the port; and
  - iii. if no person is nominated under subparagraph (i) or the board considers, that no person nominated is competent and suitably qualified, the board may approve as a pilot for the port, any person it considers to be competent and suitably qualified.
- and
- (b) despite anything in the PA Act, while the management agreement continues in force, a person holding a transitional approval as a pilot for the port under clause 64 above or approved as a pilot for the port in accordance with paragraph (a) above is, by force of this clause, an employee of the operator and the operator is responsible for all costs, liabilities and obligations relating to that employment.
- (13) It is to be taken to be a condition of the existing arrangement that the operator must comply with any direction given by the port authority, to the extent that the direction is given to facilitate –
- (a) compliance by the port authority with a requirement under the PA Act; or
  - (b) performance by the port authority of its functions.
- (14) If, despite any direction under subclause (13), there is an inconsistency between an obligation of the port authority under an “existing arrangement” and a requirement or function under the PA Act, the obligation prevails over the port authority function to the extent of the inconsistency.
- (15) In relation to anything done by or under this clause (for example, in the event of the issue of a direction under subclause (13)), the provisions of clause 70(1) apply, meaning that the action will not be considered a breach of contract or give rise to any right to damages or compensation.**52(3):** This subclause adds clause 66A(9) to the provisions at clause 73(1) of this Bill, which preserve pre-transfer rights unless changes, including renewals, are agreed to by the lessee, licensee or grantee as detailed under clause 73(2).
- 52(4):** This subclause adds clause 66A(13) to the provisions at clause 73(4) of this Bill, which effectively provides that the provisions at clause 73(2) do not limit the provisions at clause 66A(13) which allow the port authority to direct the Derby port operator (in order to comply with the PA Act or the port authority’s functions).

### **53. Schedule 9 amended**

This amendment removes the restriction on placing S&P Act ports under the management of a port authority (except as explained at clause 76 above).

This is achieved by removing the definition of “port” (which excludes an S&P Act port) and inserting a definition for “unassigned port” which means ports not already named at Schedule 1 of the PA Act or placed under the management of a port authority through regulations.

In future, if a S&P Act port (i.e. a boat harbour) grows too large through servicing trading vessels, it could be placed under management of a port authority (for example, if Exmouth continues to expand). This will allow the Transport Department to continue to focus on smaller boat harbours, while port authorities manage trading ports.

Subclause (5) inserts power for the transfer of state property and liabilities (related to unassigned ports) to port authorities through regulations, including vesting of land through regulations rather than through section 25(1) of the PA Act.

## **Part 7 – Shipping and Pilotage Act 1967 amended**

With trading ports transferring to a port authority jurisdiction, the Transport Department will focus on the management of smaller boating harbours.

These amendments replace references to “fishing boat harbours” with references to the more generic “boating harbour”. Provisions for an infringement notice regime are also inserted, to align with infringement requirements in other WA maritime legislation.

### **54. Act amended**

This section identifies that the S&P Act will be amended by Part 7 of this Bill.

### **55. Long title amended**

This amendment replaces the reference to “fishing boat harbours”, in the long title, with a reference to “boat harbours”, to include all smaller boat harbour facilities.

### **56. Section 3 amended**

This clause deletes the definition of “fishing boat harbour” and inserts the following definition:

- **boat harbour:** means any place declared for the time being to be a boat harbour under section 10(2) of the S&P Act.

### **57. Section 7B amended**

Section 8 of the *Shipping and Pilotage Amendment Act 2006* will be proclaimed soon, if not already. It will introduce a new section 7B relating to Marine Safety Plans and includes a reference to a “fishing boat harbour”.

The amendment in this Bill will change that reference to “boat harbour”, consistent with other amendments at section 60 of this Bill.

### **58. Section 9A amended**

This amendment removes reference to “each fishing boat”, replacing it with “each boat”. It also replaces “Fishing boat harbour”, with “Boat harbour” in the title, to better reflect the focus on all boat harbour and mooring fees.

### **59. Section 10 amended**

This section clarifies that a port defined under PA Act section 3(1), is not a port for the purposes of the S&P Act and cannot be declared a port under section 10(1) of the S&P Act.

### **60. Section 12 amended**

Section 12 provides power for the Governor to make regulations prescribing all matters that are necessary or permitted under the S&P Act.

- (1) This amendment replaces a reference to “fishing boat harbours” with “boat harbours” to include all small boat harbour facilities.
- (2) and (3): This amendment replaces “responsible authority” (each occurrence) with “CEO” (of the Transport Department) and deletes the definition of responsible authority.

**61. Various references to “fishing boat harbour” replaced**

This amendment deletes the reference to “fishing boat harbour” and replaces it with “boat harbour” in each of the listed sections of the S&P Act.

**62. Various references to “Department” replaced**

This amendment deletes the reference to “Department” and replaces it with “CEO” in each of the listed sections of the S&P Act.



## **Part 8 – Western Australian Marine Act 1982 amended**

### **63. Act amended**

This section identifies that the *Western Australian Marine Act 1982* will be amended by Part 8 of this Bill.

### **64. Section 118 amended**

Section 118 currently provides for a CEO to issue a certificate of authorisation to each inspector and each authorised person who is not a member of the Police Force.

The new subsection (2) requires that a certificate issued to an inspector is to also specify any functions that the inspector has under other (maritime) legislation by virtue of being an inspector.

### **65. Section 132 amended**

To avoid conflicts of interest, this amendment provides that an infringement notice cannot be withdrawn by the person who issued the notice.