

FREMANTLE PORT ASSETS (DISPOSAL) BILL 2016

EXPLANATORY MEMORANDUM

OVERVIEW

The *Fremantle Port Assets (Disposal) Bill 2016* (the Bill) has been drafted to provide for the disposal of the whole or part of any business carried on by, or all or any of the assets or liabilities owned or managed by, the Fremantle Port Authority, and for related purposes.

The Bill consists of 86 clauses that broadly provide for:

1. authorising the disposal of all or part of the assets and liabilities of the Fremantle Port Authority and associated assets;
2. controls and limitations on the parameters of the disposal;
3. post-sale transitional arrangements and regulatory matters; and
4. provisions relating to the post-divestment operations of the port, including access and pricing, future development of the port and the potential Outer Harbour container terminal development.

The Bill is divided into nine parts as outlined below:

- Part 1 relates to the usual preliminary matters and specifies when clauses 1 and 2, Part 7 and the remainder of the Bill will come into operation.
- Part 2 deals with the authorising powers and related limitations for the disposal, including the limitation that land can only be disposed of under the ensuing *Fremantle Port Assets (Disposal) Act 2016* (the Act) to a private entity if the interest is a licence or an interest in land no greater than a leasehold interest, in either case for a period not exceeding 99 years.
- Part 3 provides for the administrative mechanics of implementing the disposal, including (but not limited to) the making of transfer orders; access to records; registration of documents; disclosure of information; and the payment of proceeds.
- Part 4 relates to specific provisions for the use of corporate vehicles in a disposal, ensuring that relevant laws may, if prescribed by regulations, apply to the operation of the port assets while held in a corporate vehicle which is owned by the Fremantle Port Authority or the State, prior to disposal.
- Part 5 contains provisions relating to leases and licenses, including the designation of port asset leases and lease holders; and provisions relating to the effect of port asset leases. The Part also ensures that the Fremantle Port Authority is relieved of its functions to the extent that the private sector port lessee is carrying out those functions under a port lease or licence.
- Part 6 contains provisions to facilitate the operation of the Port of Fremantle by a private sector operator post divestment, including clauses that reflect provisions of existing State legislation, in particular the *Port Authorities Act 1999*. The provisions contained in this part ensure that the private sector operator is conferred with the rights, either under the provisions of the Bill or under a port services agreement, necessary to operate the port facilities, and also ensures that the Fremantle Port Authority is relieved of its functions to the extent that the private sector operator is carrying out those functions under a designated agreement.
- Part 7 relates to access and pricing and includes provisions relating to the objects of, and exclusions from, the access and pricing regime, the functions and powers of the regulator, provisions in relation to regulated services and regulated charges, obligations on service providers of regulated services, the pricing regime that may be specified through regulations, reviews and reports of the regulator, and enforcement.

- Part 8 relates to the future development of the Port of Fremantle and includes provisions ensuring that the Fremantle Port Authority has the power to enter into an agreement providing the port facility operator with the first opportunity to negotiate to undertake certain developments in the port, and the Fremantle Port Authority has the ability to levy a charge in respect of the costs associated with the development of the Outer Harbour container terminal facilities.
- Part 9 covers a range of miscellaneous matters, including (but not limited to) the optional exemption of the disposal from State taxes; protection of Government agreements and rights and obligations under certain Acts; and regulations for the purposes of disposal of the assets.

CLAUSE NOTES

Outlined below is a brief description of each clause of the *Fremantle Port Assets (Disposal) Bill 2016*.

PART 1 PRELIMINARY MATTERS

Clause 1: Short Title

When enacted, the Bill will be cited as the *Fremantle Port Assets (Disposal) Act 2016*.

Clause 2: Commencement

Provides that clauses 1 and 2 of the Bill come into operation on the day the Act receives Royal Assent, Part 7 of the Bill comes into operation on the day on which the first order to take effect under clause 10(5) takes effect and the remainder of the Act on the day after the Act receives Royal Assent.

Clause 3: Terms Used

Defines the terms used in the Bill.

Clause 4: Associated Assets and Associated Agencies

The Bill relates to the disposal of port assets and associated assets. This clause defines those associated assets and associated agencies.

Clause 4(1) defines the term 'associated State asset'.

Clause 4(2) defines the term 'associated SC asset' (associated statutory corporation asset).

Clause 4(3) defines the term 'associated agency'.

Clause 5: Purposes of Section 10 Disposal

This clause is an inclusive definition and clarifies that a disposal, as well as matters such as facilitating the disposal, or purposes ancillary or consequential on the disposal are all for the purposes of the disposal.

Clause 6: Things on Land

This is a clarification provision that applies to clause 7, regarding the ability to sever things on land which would normally be fixtures from the land for the purposes of a disposal.

Clause 7: Severance of Things on Land

Clause 7(1) allows the Minister responsible for administering the Bill (the Minister) to sever things which would normally be regarded as fixtures, and not personal property, from the land to allow them to be disposed of separately to the land.

Clauses 7(2)(a), (b) and (c) outline the effect of such an order, being to: sever specified things from the land, render such things capable of being assigned separately from the land as personal property or removed from the land by, or with authority of, the owner of the land.

Clause 7(3) provides certainty that severance of a thing from the land does not detract from its right to be on the land.

Clause 7(4) permits the Minister to amend or withdraw the order.

Clause 8: **Act Binds Crown**

Provides that when the Bill is passed, the Act is intended to bind not just the State, but, so far as the State's legislative power permits, the Crown in its other capacities – such as the other States and the Commonwealth.

PART 2 **ENABLING DISPOSAL**

Clause 9: **Disposal of Port Assets and Associated Assets Authorised**

This clause restricts the disposals permitted under the Bill to those which are authorised by a section 10 order, and only those listed in the clause, being: (a) Fremantle Port Authority port assets disposed of by the Fremantle Port Authority or the State; (b) corporate vehicle port assets disposed of by the corporate vehicle or the State; (c) associated State assets disposed of by the State; and (d) associated SC assets disposed of by the relevant associated agency or the State.

Clause 10: **Minister May Order Disposal of Port Assets or Associated Assets**

This clause provides for the formal commencement of a disposal, with the Minister to order the disposal of the assets. A disposal is not authorised under the Bill until the Minister makes an order under clause 10.

Clause 10(1) cites that the Minister may direct the disposal of all or specified port assets or associated assets. Sub-clause (b) permits the Minister to amend or withdraw the order at any time before it is carried out.

Clause 10(2) provides that the order may be expressed in general terms, and details are not required about how the disposal will be carried out or the specific details about the assets to be disposed.

Clause 10(3) states that the Treasurer must approve the order.

Clause 10(4) states that the Minister responsible for administering the *Port Authorities Act 1999* must approve the order.

Clause 10(5) provides that the order must be published in the Gazette, and takes effect the day following publication, or at a later day as specified in the order.

Clause 11: **Effecting Disposal**

Clause 11(1) provides flexibility for the form that a disposal may take, subject to the clause 12 limitations on the disposal of land.

Clause 11(2) clarifies that express provisions relating to particular legal entities do not limit the type of legal entity that can be established to carry out a disposal.

Clause 11(3) states that the types of structures which could be used include one or more corporate vehicles or trusts.

If a company is to be created and owned by the State for a disposal, under clause 11(4) the Under Treasurer must ensure that the company is created.

Clause 11(5) provides that shares in that company can be allotted or issued to, held by and disposed of, on behalf of the State by the Minister or the Treasurer. Once a share disposal to a private entity occurs, the company ceases to fall within paragraph (a) of the definition of a corporate vehicle.

Clause 11(6) empowers the Minister to enter into any agreement, on behalf of the State, for the purposes of a disposal.

Clause 12: **Disposal of Land**

Clause 12 imposes limitations on the nature and term of interests in respect of land that can be transferred to a private third party under the Act. In summary, ownership cannot be transferred to a private entity, only a licence or an interest in land no greater than a leasehold interest may be granted and the period of any such interest may not exceed a period of 99 years.

Clause 12(1) lists the types of land which can be disposed of under this Bill, being Crown land and freehold land owned by the Fremantle Port Authority, an associated agency, corporate vehicle or the State.

Clause 12(2) states that land under clause 12(1) can only be disposed of under the Bill to a private third party if the interest is a licence or an interest in land no greater than a leasehold interest with a period that does not exceed 99 years.

Clause 12(3) ensures the restriction in clause 12(2) still applies so that a corporate vehicle can only enter private entity control if its interests in land disposed of under the Bill are no greater than the specified interests and no longer than 99 years.

Clause 12(4) clarifies the calculation of the 99 years, as including any 'further period' granted, a phrase defined in clause 12(5).

Clause 12(5) defines the phrase 'further period'.

Clause 12(6) ensures that clause 12 applies despite sections 28(3) and (4) of the *Port Authorities Act 1999*. Section 28(3) would otherwise restrict the grant of a lease or licence of vested port land to 50 years (which under section 28(4) includes any renewal period). It is noted that clause 12 does not override the requirement to obtain Ministerial approval under sections 28(1), (2) and (5) of the *Port Authorities Act 1999*.

Clause 13: **Land Subject to Unregistered Leases with Terms Exceeding 5 Years**

Section 68 of the *Transfer of Land Act 1893* relates to estates and interests in land. Clause 13 ensures that any land disposed of under the Bill is subject to any prior unregistered lease or agreement for lease or letting to a tenant in actual possession for a term over 5 years despite section 68 of the *Transfer of Land Act 1893*.

Clause 14: **Development and Building Work**

This clause deals with the historical approvals compliance of building work and developments in the Port of Fremantle.

Clause 14(1) defines the key terms for the purposes of this clause.

Clause 14(2) sets out when clause 14(3) will apply to development or building work, being where the development or work was undertaken at the Port of Fremantle by or on behalf of the State, the Fremantle Port Authority or a statutory corporation prior to the commencement of the section, without the approvals required at the relevant time, provided that the regulations provide that clause 14(3) applies.

Clause 14(3) provides that, in respect of the building work and developments set out in clause 14(2) and the regulations, the relevant historical approval is taken to have been issued.

Clause 15: **Functions and Powers of Minister**

Provides that the Minister has all functions, and has and may exercise all powers, as are necessary or convenient for the purposes of the Bill, including the power to acquire land to facilitate a disposal.

Clause 16: **Functions and Powers of Authority**

Provides that the Fremantle Port Authority has all functions, and has and may exercise all powers, as are necessary or convenient for the purposes of carrying out disposal of a port asset under the Bill, including the power to acquire land to facilitate a disposal.

Clause 17: **Functions and Powers of Associated Agencies**

Provides that an associated agency has all functions, and has and may exercise all powers, as are necessary or convenient for the purposes of carrying out a disposal of an associated SC asset under the Bill, including the power to acquire land to facilitate a disposal.

Clause 18: **Functions and Powers of Corporate Vehicles**

Provides that a corporate vehicle has all such functions, and has and may exercise all such powers, as are necessary or convenient for the purposes of carrying out a disposal of a port asset under the Bill, including the power to acquire land to facilitate a disposal and the power to create subsidiaries.

Clause 19: **Directions by Minister**

This clause empowers the Minister to give directions for the purposes of a section 10 disposal. Furthermore, it provides protection to persons complying in good faith with a Ministerial direction from certain liabilities and from contravention of other laws.

Clause 19(1) empowers the Minister to give directions to the Fremantle Port Authority, an associated agency or corporate vehicle for the purposes of a disposal.

Clause 19(2) requires the Fremantle Port Authority, associated agency or corporate vehicle to comply with a direction given to it by the Minister.

Clause 19(3) protects the Fremantle Port Authority, associated agencies and corporate vehicles, and their directors and officers from liability for anything done or omitted to be done in good faith in compliance with, or purported compliance with a direction under

clause 19(1). In addition, such bodies and persons do not contravene the *Port Authorities Act 1999* or the *Western Australian Land Authority Act 1992* for such acts or omissions.

Clause 19(4) provides that unless the Ministerial direction specifies otherwise, nothing in the direction will affect any requirement under the *Port Authorities Act 1999* or the *Western Australian Land Authority Act 1992* for the approval of a Minister to be obtained in relation to any matter.

Clause 19(5) is necessary to ensure inconsistencies between clause 19 and the Commonwealth Corporations law are resolved. There are provisions in the *Corporations Act 2001* (Commonwealth) which may be inconsistent with clause 19, and directions given under clause 19. Section 5G of the *Corporations Act 2001* (Commonwealth) relates to inconsistencies between Commonwealth and State or Territory laws, and allows the State to declare a law to be a Corporations legislation displacement provision. Accordingly, clause 19(5) declares clause 19 to be a Corporations legislation displacement provision for the purposes of section 5G of the *Corporations Act 2001* (Commonwealth).

Clause 20: **Regulations about Corporate Vehicles and Trusts**

This clause provides that regulations may be made to govern a corporate vehicle or trust used for a disposal.

Clause 20(1) states that if a corporate vehicle or trust is to be used for a disposal, regulations may impose restrictions on the governing documents for the corporate vehicle or trust.

Clause 20(2) is necessary to allow the Corporations law to be dis-applied if the regulations referred to in clause 20(1) place controls on the governing documents. Regulations made under 20(1) may be inconsistent with or contrary to a provision of the Corporations law. If this is the case, the regulations can declare that matter to be an excluded matter for the purposes of section 5F of the *Corporations Act 2001* (Commonwealth).

PART 3 **IMPLEMENTING DISPOSAL**

DIVISION 1 **TRANSFER ORDERS**

Clause 21: **Minister May Make Transfer Orders**

This clause empowers the Minister to make transfer orders which specify the assets (including rights) and liabilities (including obligations) that are to be transferred, the proceedings in which the transferee will be substituted and the agreements or instruments that will be transferred to the transferee. This clause also deals with administrative matters, including the timing of Gazettal, the flexibility to use schedules and the ability to amend transfer orders in certain circumstances.

Clause 21(1) authorises the Minister to make transfer orders, published in the Gazette, in order to effect a disposal. It outlines the content which may be included in a transfer order for the purposes of a section 10 disposal. It allows assets, liabilities, proceedings, agreements and instruments, as well as the person to which they will be transferred, and the time of transfer, to be specified. This clause may be used for both intermediate public entity to public entity transfers (for example, to aggregate assets in a corporate vehicle) and also an ultimate transfer to a private entity.

Clause 21(2) requires the Minister to, where a transfer order is issued contingent on an event, publish notice in the Gazette of that event occurring.

Clause 21(3) recognises that it may not be practical or possible to include all details of a disposal in a transfer order. It authorises the use of schedules to disclose information. It does not require that such schedules be published in the Gazette, but does necessitate these schedules be made available for public inspection for 6 months following publication of the transfer order.

Clause 21(4) specifies that the definition of a business day excludes a Saturday, Sunday and public holiday.

Clause 21(5) and (6) state that persons or things specified in a schedule to a transfer order are taken to be specified in the transfer order itself and allow for persons or things to be specified in a schedule by description as a member of a class.

Clause 21(7) requires that the Minister consult with the officials listed in clause 26 regarding the form and content of the schedule prior to issuing a transfer order for the purpose of facilitating the recording and registration of instruments and documents.

Clause 21(8) permits the Minister to amend a transfer order or schedule only if it is done before the transfer time and with the consent of the transferee.

Clause 22: **Consequences of Transfer Orders**

This clause states that at the transfer time, the assets, liabilities and proceedings specified in the transfer order will be transferred to the transferee.

Clause 22(1) defines the term 'specified' for the purposes of this clause.

Clause 22(2) outlines the consequences that arise as a result of a transfer order. The effect of a transfer order is to bring into effect all the necessary transfers of assets, liabilities and proceedings specified in the transfer order from the transferor to the transferee. The consequences of a transfer order come into effect only from the time that is specified in the transfer order itself.

Clause 23: **Completion of Transactions for this Division**

To the extent that a transfer order cannot have the required effect, the Minister and the transferor are to take all practicable steps to achieve the required effect.

Clause 24: **Effect of Arrangements Internal to Transferors**

There may be arrangements internal to the State, the Fremantle Port Authority, an associated agency or corporate vehicle which, once in the private sphere, are appropriate to be contractual. This provision allows a transfer order to specify such arrangements in order to create contractual rights and liabilities which can then be transferred.

Clause 24(1) states that an instrument providing for arrangements between different parts of the transferor's business may be specified in a transfer order as if it created contractual rights and liabilities.

Clause 24(2) cites that the provisions of an instrument providing for arrangements between different parts of the transferor's business be recognised as contractual provisions between different legal entities.

Clause 24(3) allows for the transfer of the contractual right or liability arising because of clause 24(2).

Clause 25: **Records: Delivery and Access**

This clause provides for the effective delivery of and access to the transferor's records where the Minister considers it appropriate that the records are made available to a transferee. The provision allows for delivery, sharing or access (as appropriate) to allow for continued compliance with the *State Records Act 2000*.

Clause 25(1) defines the term 'record' and phrase 'relevant record'.

Clause 25(2) provides that the Minister may issue a direction to the transferor, outlining the relevant records that must be made available to or shared with the transferee in accordance with the transfer order.

Clause 25(3) requires the transferor to comply with the requirement to deliver, share or give access to records outlined in the direction.

Clause 25(4) states that the transferor and transferee must make the necessary arrangements to enable access to the records specified in the direction.

Clause 25(5) declares clause 25 to be a Corporations legislation displacement provision, as the sharing or delivery of records could otherwise be contrary to the *Corporations Act 2001* (Commonwealth) provisions.

Clause 26: **Registration of Documents**

This clause provides that the Minister must ensure that copies of transfer orders are given to relevant officials, charged under statutes with registering documents. The officials are then to record and register the documents as necessary.

Clause 26(1) defines the term 'relevant official' for the purposes of this clause.

Clause 26(2) outlines the documents that the Minister must provide to relevant officials.

Clause 26(3) requires that relevant officials take notice of the disposal and record and register the documents accordingly.

Clause 27: **Correction of Errors in Transfer Orders**

This clause provides a mechanism to correct errors in a transfer order or schedule to a transfer order, by subsequent order in the Gazette.

Clause 27(1) provides the Minister with the power to issue an order, published in the Gazette, to correct errors in the transfer order or schedule.

Clause 27(2) cites that an order published in the Gazette correcting errors in the transfer order or schedule may be expressed to come into operation on or after the transfer time.

Clause 27(3) ensures that, if an order has effect prior to its publication, until it is published it can only prejudicially affect or impose liabilities on the involved parties (being the State, transferor, transferee, a Minister, officer or agency of the State).

DIVISION 2 DISCLOSURE OF INFORMATION

Clause 28: **Authorised Disclosure of Information**

This clause provides that the disclosure of information authorised under clause 28 is not to be regarded as a breach of contract or confidence or a contravention of the specified written laws.

Clause 28(1) states that a disclosure of information authorised under clause 28 is not to be regarded as a breach of contract or confidence or a contravention of duties under Schedule 3 to the *Port Authorities Act 1999*, Schedule 1A to the *Western Australian Land Authority Act 1992* and section 5 of the *Statutory Corporations (Liability of Directors) Act 1996* or a breach or offence under a written law that prohibits or restricts disclosure of information.

Clause 28(2) authorises the Government, the Fremantle Port Authority, an associated agency, a corporate vehicle or persons acting with the authority of any of those bodies to disclose information for the purposes of a disposal.

Clause 28(3) recognises that it is likely that information will be disclosed prior to the Bill coming into operation. This clause ensures that the authorisations apply regardless of when the person obtained the information (for example, if they obtained it prior to the Bill coming into operation) provided the information is connected with a potential section 10 disposal.

Clause 29: Auditor General May Disclose Information

This clause allows the Auditor General to, for the purposes of a section 10 disposal, disclose or provide access to information in the possession of or under the control of the Auditor General, despite section 46(2) of the *Auditor General Act 2006*.

Clause 30: Offence of Disclosing Information

This clause states that a recipient of information in connection with a disposal commits an offence if they disclose the information in breach of an agreement or duty not to disclose the information. This provision is intended to prevent potential purchasers and their advisers, any anyone else involved in the process, from improperly disclosing the information they receive as part of the disposal process.

Clause 30(1) limits the application of clause 30(2) to 'bound recipients', as defined in the clause.

Clause 30(2) states that a bound recipient commits an offence if they obtain information connected with a section 10 disposal and breach an agreement or duty not to disclose the information to others. The penalty for the offence is a \$200,000 fine as specified in clause 30(2).

Clause 30(3) also makes it an offence for a person who obtains information from a bound recipient who has agreed or is under a duty not to disclose the information, to themselves disclose the information in certain circumstances. The same penalty applies.

Clause 30(4) ensures that the offence provision applies regardless of when the person obtained the information (for example, if they obtained it prior to the Bill coming into operation) provided the information is connected with a potential section 10 disposal. The offence itself is not retrospective, that is the disclosure in breach of a duty or agreement must occur after the clause is in operation.

DIVISION 3 OTHER MATTERS

Clause 31: Application of Proceeds of Disposal

Requires all proceeds from the disposal of assets are to be paid to the Treasurer or as otherwise directed by the Treasurer.

Clause 32: Provision by State of Indemnities and Guarantees

This clause empowers the Treasurer to grant indemnities in respect of matters related to the disposal.

Clause 32(1) empowers the Treasurer, on behalf of the State, to give an indemnity or guarantee in relation to a disposal.

Clause 32(2) specifically empowers the Treasurer, on behalf of the State, to give indemnities against liability to existing and past directors and officers of the Fremantle Port Authority, an associated agency or corporate vehicle.

Clause 32(3) provides that the Treasurer must pay amounts due under any indemnities or guarantees granted on behalf of the State under the clause.

Clause 32(4) states that payments for indemnities or guarantees made by the Treasurer are charged to the Consolidated Account and provides for appropriation of these funds.

Clause 33: Takeover by State of Certain Obligations

This clause allows the Treasurer, on behalf of the State, to take over obligations in connection with a disposal.

Clause 33(1) applies clause 33 to obligations of the Fremantle Port Authority, an associated agency or a corporate vehicle.

Clause 33(2) empowers the Treasurer, on behalf of the State, to take over obligations in connection with a disposal under this Bill.

Clause 33(3) applies where performance of an obligation was guaranteed by the State, allowing the State to release any security it holds, and release persons from undertakings in relation to such guarantees.

Clause 33(4) enables the Treasurer to authorise the payment of money to discharge obligations that are taken over by the State under clause 33(2).

Clause 33(5) states that payments to discharge obligations are charged to the Consolidated Account and provides for appropriation of these funds.

PART 4 PROVISIONS RELATING TO CORPORATE VEHICLES

Clause 34: Application of this Part

This Part applies to intermediate transfers within the State (where the acquirer is a corporate vehicle, a State controlled entity) and is essentially a transitional arrangements provision. If there is a transitional period where a corporate vehicle (rather than, for example, the Fremantle Port Authority or an associated agency) holds an asset, it may be necessary for certain powers, duties and laws that would have applied to the original asset holder to apply to the corporate vehicle. Part 4 addresses this transitional need.

Clause 35: Acquirer's Powers and Duties

To the extent prescribed by regulations, provides a corporate vehicle with the same powers, duties, rights and obligations in respect of the port assets or associated SC assets it acquires as were held by the Fremantle Port Authority, associated agency or corporate vehicle from which it acquired the assets. This ensures the corporate vehicle has appropriate powers in any interim period prior to a disposal to a private entity.

This provision does not apply to associated State assets transferred into a corporate vehicle, as it is not appropriate for a corporate vehicle to have the same powers, duties, rights and obligations as the State.

Clause 36: Application of Written Laws to Acquirer

Clause 36(1) defines the phrase 'applicable written law'.

Clause 36(2) allows the regulations to prescribe that a law that applies to the disposer, applies to or in relation to the acquirer, with or without changes as prescribed by the regulations.

Clause 36(3) allows the regulations to provide that certain references to the Fremantle Port Authority, an associated agency or a corporate vehicle before the disposal occurred are to be taken to include the acquirer.

PART 5 PROVISIONS RELATING TO LEASES AND LICENCES

Clause 37: Term Used: Port Facility Instrument

This clause defines the phrase 'port facility instrument', being a lease or licence designated by the Minister under clause 38(2)(a) or leases or licences of port facilities entered into for the purposes of a disposal.

Clause 38: Minister May Designate Certain Matters

Clause 38(1) defines the phrases 'associate' and 'related body corporate'.

Clause 38(2) provides for the Minister to designate a port facility instrument; a port facility instrument holder; and agreements entered into in connection with a port facility instrument by order published in the Gazette.

Clause 38(3) enables the Minister to vary or revoke an order made under 38(2), which must be published under clause 38(4) in the Gazette.

Clause 39: Effect of Provisions of Port Facility Instrument

This clause applies to port facilities instruments and related arrangements as defined in clause 39(1). It elevates the effect of certain provisions of the instrument and related arrangements above any contrary laws or rules. It is to enable key elements of such instruments to have effect regardless of contrary laws, with those key elements relating to: certain payments; payments for breach or on termination; continued obligations despite unintended or unforeseen circumstances; termination provisions and rights of re-entry and forfeiture. This provision is aimed at preserving the agreed terms of the key provisions, regardless of laws or rules to the contrary.

Clause 40: Functions of Lessee or Licensee and the Authority

Clause 40(1) ensures that the lessee or licensee is able to carry out its functions and exercise the rights it has under law or the port facility instrument despite control and management of the Port of Fremantle being conferred on the Fremantle Port Authority by the *Port Authorities Act 1999*.

Clause 40(2) ensures that the Fremantle Port Authority is not obliged to perform functions under the *Port Authorities Act 1999* if a lessee or licensee is engaged to perform those functions under a port facility instrument.

Clause 41: References to Port Authority May Include Other Entities

Clause 41(1) defines the phrases 'affected written law', 'port facility instrument holder' and 'specified' for the purposes of this clause.

Clause 41(2) enables regulations to be made prescribing that references to a port authority in any of the listed Acts or regulations are to be taken to be references to the specified port instrument holder instead of the Fremantle Port Authority, or to be taken to include the specified port instrument holder.

Clause 42: Making and Registration of Certain Lease Variations

This clause applies where an agreement to lease exists between the Fremantle Port Authority, the State or an associated agency and a third party before a section 10 disposal takes place. It addresses the situation where land the subject of such an agreement is included in a lease to an acquirer under the Bill, and the acquirer then surrenders the land in order for the lease of the land to be granted in accordance with the agreement for lease. The clause provides that, in those circumstances, the acquirer's lease may be varied to re-include that land, creating a concurrent lease over the land. Clause 42(3) provides that a relevant official may record and register the variation if the Minister certifies in writing that certain matters have occurred and the acquirer's lease has been so varied.

PART 6 OPERATION OF PORT FACILITIES

DIVISION 1 PRELIMINARY

Clause 43: Terms Used

Defines the terms 'designated agreement' and 'port facility operator', and sets out the phrase 'port services agreement', defined in clause 45(1).

Clause 44: Part 4 Not Affected

Provides that Part 6 does not in any way affect the operation of the clauses captured under Part 4.

DIVISION 2 PORT SERVICES AGREEMENTS AND DESIGNATED AGREEMENTS

Clause 45: Port Services Agreements

Clause 45(1) defines the phrase 'port services agreement' as an agreement between the Fremantle Port Authority and the lessee of a port facility, and potentially the State, relating to a port facility which may engage the lessee to operate the port facility.

Clause 45(2) clarifies that 45(1) does not in any way limit the matters that may be covered by a port services agreement.

As it is likely that there will be more than one agreement governing the port facility operator's operation of a port facility, clause 45(3) authorises two or more port services agreements to be entered into in relation to a port facility.

Clause 45(4) states that a port services agreement may be entered into before or after a disposal under this Bill.

Clause 45(5) states that a port services agreement has effect according to the terms and conditions outlined in the agreement.

Clause 45(6) provides the flexibility for the terms and conditions referred to in clause 45(5) to be amended if agreed to by the parties to the agreement.

Clause 46: Designation of Port Services Agreements

Clause 46(1) states that the Minister may by order, designate a port services agreement as an agreement for the purposes of this Part.

Clause 46(2) permits the Minister to amend or revoke the order.

Clause 46(3) states that the Treasurer must approve the order.

Clause 46(4) provides that the Minister responsible for administering the *Port Authorities Act 1999* must approve the order.

Clause 46(5) states that the order must be published in the Gazette.

DIVISION 3 FUNCTIONS

Clause 47: Functions of Port Facility Operator and the Authority

Clause 47(1) ensures that a port facility operator is able to carry out its functions and exercise the rights it has under law or a designated port services agreement despite control and management of the Port of Fremantle being conferred on the Fremantle Port Authority by the *Port Authorities Act 1999*.

Clause 47(2) ensures that the Fremantle Port Authority is not obliged to perform functions under the *Port Authorities Act 1999* if a port facility operator is engaged to provide them under a designated port services agreement.

DIVISION 4 OPERATING CHARGES

Clause 48: **Term Used: Operating Charges**
Defines the term 'operating charges'.

Clause 49: **Power to Impose Operating Charges**
Clause 49(1) authorises a port facility operator to levy and collect operating charges subject to the terms of a designated port services agreement and clause 49(2).

Clause 49(2) provides that the access and pricing provisions defined in clause 58 apply to a port improvement rate levied by the port facility operator in the manner specified in clause 49(2)(a), (b) and (c).

Clause 50: **Liability to Pay Port Charges in Respect of Vessels**

Outlines the parties that are liable to pay operating charges in respect of vessels. This provision is equivalent to section 116 of the *Port Authorities Act 1999*.

Clause 51: **Liability to Pay Port Charges in Respect of Goods**

Outlines the parties that are liable to pay operating charges in respect of goods carried on a vessel. This provision is equivalent to section 117 of the *Port Authorities Act 1999*.

Clause 52: **Recovery of Operating Charges by Port Facility Operator**

This clause permits a port facility operator to recover operating charges owing to it in a court of law. This provision is equivalent to section 118 of the *Port Authorities Act 1999*.

Clause 53: **Collectors of Operating Charges**

This clause provides the port facility operator with the ability to authorise a party to collect operating charges on its behalf, as well as the power to withdraw this authorisation. This provision is equivalent to section 119 of the *Port Authorities Act 1999*.

DIVISION 5 PLANNING MATTERS

Clause 54: **Application of Planning Laws**

States that section 38 of the *Port Authorities Act 1999* shall apply in respect of the port facility operated under a designated port services agreement as if the reference to a "port authority" in that section included the port facility operator or any other lessee of the port facility.

DIVISION 6 REGULATIONS FOR THIS PART

Clause 55: **Regulations as to Port Facility Operators and Port Facilities**

Clause 55(1) defines the term 'PA regulations'.

Clause 55(2) provides that regulations may apply regulations in force under the *Port Authorities Act 1999* to a port facility operator and port facility.

Clause 55(3) states that the regulations applied under 55(2) take effect in accordance with any limitations, modifications or extensions that are necessary or prescribed in regulations created under this Bill.

Clause 55(4) provides that regulations created under this Bill may limit, modify or extend the application of regulations in force under the *Port Authorities Act 1999* in relation to a port facility operator and the port facility. The clause also provides that the regulations may provide that regulations in force under the *Port Authorities Act 1999* do not have effect to the extent they are inconsistent with regulations under the Bill in relation to a port facility operator and the port facility.

Clause 56: **Regulations as to Information Gathering**

Permits the creation of regulations under this Bill to provide a port facility operator with the power to obtain prescribed information from prescribed persons for purposes prescribed in the regulations. It also permits regulations to be made for other information purposes, including to authorise the disclosure of that information, ensure that persons are not in breach of confidence for disclosures made in compliance with the regulations and to require disclosure of that information to the State or the Fremantle Port Authority.

Clause 57: **Regulations as to Giving Directions**

Clause 57 includes a further regulation making power to empower a port facility operator to give directions to persons as to their conduct.

PART 7 ACCESS TO AND PRICING OF SERVICES

DIVISION 1 PRELIMINARY

Clause 58: **Terms Used**

Defines, subject to a contrary intention appearing, the terms 'access and pricing provisions', 'access applicant', 'access policy', 'access request', 'pricing', 'regulated charge', 'regulated service', 'regulations', 'regulator', 'relevant port facility', 'service', 'service provider' and 'service user' used for the purposes of this Part.

Clause 59: **Objects of Access and Pricing Provisions**

Clause 59 sets out the objects of the access and pricing provisions.

Clause 60: **Application of Access and Pricing Provisions**

Clause 60(1) defines the term 'foundation contract' for the purposes of the clause.

Clause 60(2) provides that the access and pricing provisions do not apply to services under a foundation contract, including under such contract if extended by the exercise of an option to extend that existed before the section 10 disposal, nor to services or charges for such services, dealt with in or under a Government agreement.

Clause 61: **Functions, Powers and Responsibilities of the Regulator**

Clause 61 sets out the functions, powers and responsibilities of the regulator.

Clause 61(1) provides that the regulator is responsible for administering and enforcing compliance with the access and pricing provisions and reviewing and reporting on matters relating to the access and pricing provisions and other matters as required by this Part or the regulations.

Clause 61(2) provides that the regulator may also have any other functions, powers or responsibilities conferred on the regulator by the regulators.

DIVISION 2 REGULATED SERVICES

Clause 62: Declaration of Regulated Services

Clause 62(1) provides that the Minister may, in accordance with the regulations, declare a service to be a regulated service, or declare a regulated service to no longer be a regulated service.

Clause 62(2) provides that the regulations may provide for the regulator to make a recommendation as to whether a service should be a regulated service, or should no longer be a regulated service.

Clause 63: Information to be Published by Service Provider

Clause 63 provides that the service provider of a regulated service must, in accordance with the regulations, publish the information listed in clauses 63(a), (b) and (c).

Clause 64: Service Provider to have an Access Policy

Clause 64(1) requires a service provider of one or more regulated services to prepare and maintain a policy in accordance with the regulations. Clauses 64(1)(a), (b), (c) and (d) set out that the policy must provide information as to how an access request may be made, specify what information must be provided by the person making an access request, set out the dispute resolution process offered by the service provider in relation to access requests and contain or deal with anything else required by the regulations.

Clause 64(2) provides that the regulations may require that the dispute resolution process offered by the service provider in relation to disputes between the service provider and access applicants provide for arbitration by a panel of arbitrators appointed by the regulator or arbitration in another manner prescribed by the regulations.

Clause 64(3) requires the policy to be published on a website of the service provider and as otherwise required by the regulations.

Clause 65: Request for Information

Clause 65 contemplates that the regulations will prescribe the kind of information that must be provided by a service provider of a regulated service to a person who intends to make an access request.

Clause 65(1) provides that such a person may ask the service provider to make available information of the kind prescribed in the regulations and clause 65(2) provides that the service provider must supply the information, but may require that the person pay a reasonable charge fixed by the service provider for the supply of the information, and the person must pay that charge.

Clause 66: Obligation of Service Provider in Dealing with Access Request

Clause 66(1) requires a service provider receiving an access request to negotiate with the access applicant in good faith and use its best endeavour to provide access to the regulated service on fair commercial terms that meet the requirements of clause 66(1)(a), (b) and (c).

Clause 66(2) provides that, if an access request is refused, the service provider must provide the access applicant with a statement of reasons for the refusal in accordance with the regulations.

DIVISION 3 REGULATED CHARGES

Clause 67: Declaration of Regulated Charges

Clause 67(1) provides the Minister may, in accordance with the regulations, declare a charge payable by a service user or other user of a port facility or the Port to be a regulated charge, or declare a regulated charge to no longer be a regulated charge.

Clause 67(2) provides that the regulations may provide for the regulator to make a recommendation as to whether a charge should be a regulated charge, or should no longer be a regulated charge.

Clause 68: Regulations as to Pricing

Under clause 68(1) the regulations may provide for a pricing regime, being a regime setting out the manner in which pricing will be monitored or regulated, or monitored and regulated.

Without limiting clause 68(1), clause 68(2) sets out what that pricing regime may include or be, including the monitoring of all or part of a regulated charge against a benchmark specified by the regulations, the specification of pricing policies, the specification of pricing principles, the fixing of the level of a regulated charge or the rate of its increase or decrease, the maximum level of a regulated charge or a maximum rate of increase or minimum rate of decrease in that maximum level, provision for amounts to be determined by reference to various factors, the fixing of a maximum revenue or maximum rate of increase or minimum rate of decrease in the maximum revenue in relation to all or part of a regulated service and provision for pricing to achieve a return on or of capital.

DIVISION 4 REVIEWS AND REPORTS BY REGULATOR

Clause 69: Review of Access and Pricing Provisions

Clause 69(1) requires the regulator to carry out five yearly reviews of the operation of the access and pricing provisions to ensure their objects are being achieved.

Clause 69(2) provides that the regulations may specify other purposes for the review and clause 69(3) requires a review to be conducted in accordance with the regulations.

Clause 69(4) requires the regulator to prepare a report based on the review, and give the report to the Minister to be laid before each House of Parliament.

Clause 69(5) provides that, in addition to the five yearly reviews, the regulator may carry out a review of the operation and effectiveness of all or part of the access and pricing provisions at the time, or on the occurrence of an event or existence of circumstances, specified in the regulations.

Clause 69(6) requires the regulations to specify the purpose or purposes of a clause 69(5) review, and clause 69(7) provides that such a review is to be carried out and reported on in accordance with the regulations.

Clause 70: Annual Report

Clause 70 requires the regulator to publish an annual report after the end of each financial year in the manner, and containing the information, specified in the regulations.

DIVISION 5 OTHER OBLIGATIONS OF A SERVICE PROVIDER

Clause 71: Obligation Not to Prevent or Hinder Access

Under clause 71(1) a service provider of a regulated service must not engage in conduct that unreasonably prevents or hinders a person having access to a regulated service.

Clause 71(2) provides that a service provider will not contravene clause 71(1) if the service provider's conduct is as specified in clauses 71(2)(a), (b) or (c).

Clause 72: Obligation Not to Differentiate between Users of Services

Cause 72(1) defines the terms 'differentiate' and 'service user' for the purposes of the clause.

Clause 72(2) requires that the service provider not unfairly discriminate between service users in the provision of access to a regulated service in a way that has a material adverse effect on the ability of service users to compete with other service users.

Clause 72(3) provides that a service provider does not contravene clause 72(2) if the differentiation is due to a higher cost or risk in providing access to a service user as compared to another service user.

Clause 73: Obligation as to Complaints About Access Requests

Clause 73(1) defines the term 'compliant' for the purposes of the clause.

Clause 73(2) provides that a service provider of one or more regulated services must prepare and maintain, in accordance with the regulations, a complaints policy which provides information on how an access applicant may make a complaint, gives details of the dispute resolution process offered in relation to complaints and deals with any other matters required by the regulations.

Clause 73(3) requires a service provider to provide copies of complaints to the regulator, with the regulations to specify the time by which the copy must be provided.

Clause 74: Obligation to Report

Clause 74(1) requires the service provider of a regulated service to submit reports to the regulator in accordance with the regulations.

Clause 74(2) sets out that, in respect of those reports, the regulations may provide for the reporting period, the time and format for submission, the matters to be covered by a report and any other matter relating to reports.

DIVISION 6 OTHER REGULATIONS FOR THIS PART

Clause 75: Regulations as to Enforcement

Clause 75(1) defines the terms 'civil penalty provision' and 'offence' used for the purposes of the clause.

Clause 75(2) sets out the matters that regulations may prescribe and provide in relation to enforcement, civil penalty provisions and offences.

Clause 76: **Regulations as to Other Matters**

Clause 76 sets out that regulations may also confer functions, powers and responsibilities on the Minister, the regulator or any other person, set out obligations of a service provider in relation to segregation of its functions or businesses, make provision in relation to services between related bodies corporate and make provision as to how access requests are made and dealt with, and as to the supply of information, including confidential information, by access applicants.

PART 8 **PROVISIONS AS TO FUTURE DEVELOPMENT OF PORT**

Clause 77: **Terms Used**

Defines the terms 'OHCT development', 'port development', 'port services agreement', 'principal operator' and 'third party' used for the purposes of this Part.

Clause 78: **Application and Effect of Part**

Clause 78(1) states when Part 8 applies, and clause 78(2) ensures that this Part does not limit clause 84 in relation to the protection of the rights of parties to Government agreements and specified Acts.

Clause 79: **Negotiations with Principal Operator as to Undertaking of Port Developments**

Clause 79(1) defines the phrase 'existing Port area' for the purposes of this clause.

Clause 79(2) states that the Fremantle Port Authority may agree in a port services agreement not to undertake or arrange for a third party to undertake a port development in the existing Port area or part of that area unless the Fremantle Port Authority has first, in accordance with the terms of the port services agreement, provided the principal port facility operator with the opportunity to negotiate with the Fremantle Port Authority for the right to undertake the port development.

Clause 80: **Funds for Development of Outer Harbour Container Terminal Facilities**

Clause 80(1) provides that the Fremantle Port Authority's power to levy a port improvement rate under section 37 of the *Port Authorities Act 1999* includes a power to levy such a rate for the purpose of accumulating funds to be applied to the costs of the OHCT development.

Clause 80(2) states that the Fremantle Port Authority must obtain the Minister's approval of the amount of the rate, calculation of the rate and the persons liable to pay, before levying or amending the port improvement rate.

Clause 80(3) states that the Treasurer must approve the matters referred to under clause 80(2).

Clause 80(4) states that the Minister responsible for administering the *Port Authorities Act 1999* must approve the matters referred to under clause 80(2).

Clause 80(5) provides that, if the Fremantle Port Authority is directed by the Minister under section 72(1) of the *Port Authorities Act 1999* to levy or vary a OHCT development rate, the Fremantle Port Authority must comply with clauses 80(2), (3) and (4) in giving effect to the direction.

Clause 80(6) states that regardless of what is said in the *Port Authorities Act 1999*, funds collected as a result of the levying of the OHCT development rate and any interest earned on those funds are to be held in a separate account maintained by the Fremantle Port Authority under section 79 of the *Port Authorities Act 1999*.

Clause 80(7) provides that the funds and interest referred to in 80(6) are not to be included in the calculation of dividends under section 84 of the *Port Authorities Act 1999*.

Clause 80(8) provides that, regardless of what is said in the *Port Authorities Act 1999*, the funds collected and interest are only to be spent for the purposes of the OHCT development and only by making payments in accordance with the terms of clause 80(8)(a), (b) and (c).

Clause 80(8)(a), (b) and (c) set out when the funds collected may be expended, being by or at the direction of the principal operator or third party undertaking the development in accordance with clause 80(8)(a) or 80(8)(b). If the development is not undertaken by the principal operator or a third party, and is instead undertaken by the State or the Fremantle Port Authority, under clause 80(7)(c) the funds and interest may be expended to defray the State's costs incurred in undertaking the OHCT development.

PART 9 MISCELLANEOUS MATTERS

Clause 81: Exemption from State Tax

This clause operates to exempt disposals effected under the Bill from the imposition of duties and other State taxes. It also provides flexibility for the Minister to render an exemption inapplicable including where imposition of a State tax is considered desirable to an acquirer.

Clause 81(1) defines the phrase 'State tax'.

Clause 81(2) exempts anything occurring by operation of Parts 2 and 3 of the Bill, or to give effect to those Parts, from the payment of duty under the *Duties Act 2008* and other State taxes, duties, fees, levies, or charges.

Clause 81(3) provides that the Minister may certify in writing that a specified thing occurred by operation of, or was done to give effect to, Parts 2 and 3.

Clause 81(4) provides that a certificate under sub-clause (3) is adequate for all purposes and in all proceedings.

Clause 81(5) recognises that the State tax exemption may not be desirable in some circumstances. This clause provides the Minister with the flexibility to direct (whether in a transfer order or in writing) that the exemption will not apply to a particular asset or part of a transaction.

Clause 82: Effect of this Act on Existing Rights and Obligations

Clause 82(1) prevents the operation of a provision of the Bill, or anything done for the purposes of the Bill, or not done for the purposes of the Bill, having the listed affects, including being regarded as a breach of contract, giving rise to remedies, requiring acts to be done, giving rise to a termination right or releasing a surety.

Clause 82(2) ensures that clause 82 does not limit clause 84, in relation to the protection of the rights of parties to Government agreements and specified Acts.

Clause 83: No Compensation Payable

Clause 83(1) absolves the State from the payment of compensation as a result of the enactment or operation of the Bill or disposals under the Bill.

Clause 83(2) states that the protection does not apply to amounts payable as consideration under, or as compensation in connection with the performance of an obligation under, agreements entered into in order to carry out a disposal.

Clause 83(3) provides that clause 83 does not limit does not limit clause 84, in relation to the protection of the rights of parties to Government agreements and specified Acts.

Clause 84: **Government Agreements Not Affected**

Clauses 84(1) and (2) provide that the Bill does not prejudice or in any way affect any right or obligation of a party to a Government agreement, nor limit the operation of the *Government Agreements Act 1979* in relation to the Bill.

Clause 84(3) provides that the Bill does not prejudice or in any way affect any right or obligation of a person under the specified Acts.

Clause 84(4) ensures that a disclosure of information authorised under clause 28 is still authorised regardless of whether it affects or prejudices a party to a Government agreement or a person under one of the specified Acts.

Clause 85: **Regulations for Purposes of, or Consequential on, Section 10 Disposals**

This clause allows for regulations to be made for the purposes of section 10 disposals.

Clause 85(1) defines the phrases 'publication day' and 'the State' for the purposes of this clause.

Clause 85(2) provides that regulations can be made for matters that are necessary or convenient for giving effect to a section 10 disposal or to deal with anything contained in or done under Parts 2, 3, 4, 5 or 6 of the Bill.

Clause 85(3) states that while regulations can be expressed to take effect anytime preceding their day of publication, they only take effect on the day following the publication of the section 10 disposal order in the Gazette.

To the extent that regulations take effect before their day of publication, clause 85(4) ensures that, until they are published, they can only prejudicially affect or impose liabilities on the involved parties (being the State, a disposer or acquirer).

Clause 86: **Regulations Generally**

The Governor may make regulations prescribing matters required or permitted by the Act, or necessary or convenient to give effect to the Act.