



THIRTY-NINTH PARLIAMENT

REPORT 33

**STANDING COMMITTEE ON LEGISLATION
PILBARA PORT ASSETS (DISPOSAL) BILL 2015**

Presented by Hon Robyn McSweeney MLC (Chair)

August 2016

STANDING COMMITTEE ON LEGISLATION

Date first appointed:

17 August 2005

Terms of Reference:

The following is an extract from Schedule 1 of the Legislative Council Standing Orders:

‘4. Legislation Committee

- 4.1 A *Legislation Committee* is established.
- 4.2 The Committee consists of 5 Members.
- 4.3 The functions of the Committee are to consider and report on any Bill referred by the Council.
- 4.4 Unless otherwise ordered, any amendment recommended by the Committee must be consistent with the policy of a Bill.’

Members as at the time of this inquiry:

Hon Robyn McSweeney MLC (Chair)

Hon Ken Travers MLC (Deputy Chair) (substituted in place of Hon Sally Talbot MLC)

Hon Donna Faragher (until 6 April 2016)

Hon Ken Baston MLC (from 6 April 2016)

Hon Dave Grills MLC

Hon Robin Chapple MLC (substituted in place of Hon Lynn MacLaren MLC)

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EXECUTIVE SUMMARY, FINDINGS AND RECOMMENDATIONS

EXECUTIVE SUMMARY

- 1 On 22 March 2016, the Legislative Council referred the Pilbara Port Assets (Disposal) Bill 2015 (Bill) to the Standing Committee on Legislation (Committee) for report by 17 May 2016. The motion of reference included the power to inquire into and report on the policy of the Bill.
- 2 The Legislative Council subsequently granted an extension of the time until 25 August 2016 for the Committee to report on the Bill.
- 3 The Utah Point Bulk Handling Facility (Utah Point) at Port Hedland is a multi-user export facility which is owned and managed by the Pilbara Ports Authority. Utah Point has been operational since 2010 and its throughput has expanded since its construction. Utah Point is the world's largest bulk export port, consisting mostly of iron ore exports. The facility was originally constructed to facilitate the business of junior miners; many of whom are still users of the port today.
- 4 The intention of the Bill is to privatise Utah Point by granting a long term lease over the facility and its associated assets (as outlined in the Bill) to the successful bidder (referred to as '*disposal*' or '*divestment*' in this report).
- 5 The stated policy of the Bill includes the minimisation of financial risks and liabilities for the State through maximising the proceeds of the disposal of Utah Point, while facilitating the continued efficient and reliable operation of the facility. The Treasurer has stated that the disposal of Utah Point is '*an important element of the government's fiscal management strategy.*'
- 6 The Committee has not been able to obtain conclusive information relating to various aspects of the disposal, including the retention value to be ascribed to the asset (that is, the estimated value of retaining a State asset compared with the amount obtained from disposing of the asset) and the details of the future access and pricing regime at the port, including port charges. The Committee notes that these are important elements of the transaction and should be clarified prior to the disposal.
- 7 The Committee has also identified specific clauses in the Bill which should be amended or clarified for the Legislative Council's information.
- 8 The Committee recommends that the Bill be amended according to its recommendations in this report.

FINDINGS AND RECOMMENDATIONS

9 Findings and Recommendations are grouped as they appear in the text at the page number indicated:

Page 4

Recommendation 1: The Committee recommends that, in the future, the Government should allow sufficient time in its legislative schedule for comprehensive Parliamentary scrutiny of legislation.

Page 15

Recommendation 2: The Committee recommends that the Treasurer make relevant documents relating to the retention value of Utah Point Bulk Handling Facility public after the completion of the divestment and that these documents be tabled in both Houses of Parliament at that time.

Minority Recommendation 1:

A minority of the Committee comprising Hon Ken Travers MLC and Hon Robin Chapple MLC recommends that:

the Bill be amended to ensure that all documents relating to the retention value of Utah Point Bulk Handling Facility be made public after the completion of the divestment and that these documents be tabled in both Houses of Parliament at that time.

Page 19

Recommendation 3: The Committee recommends that, during the Committee of the Whole stage of the Pilbara Port Assets (Disposal) Bill 2015, the Treasurer clarify if it is the intended outcome that the future owner of Utah Point Bulk Handling Facility not be required to comply with section 30(2)(aa) of the *Port Authorities Act 1999*, or if this is an unintended consequence.

If it is an unintended consequence, the Committee recommends that the Treasurer explain how he intends to address this outcome.

Page 20

Recommendation 4: The Committee recommends that, during the Committee of the Whole stage of the Pilbara Port Assets (Disposal) Bill 2015, the Treasurer clarify if it is the intended outcome that clause 18 of the Pilbara Port Assets (Disposal) Bill 2015 provides that the Pilbara Ports Authority will not contravene the *Port Authorities Act 1999* if it does or omits to do anything in good faith in compliance with a direction given by the Minister in clause 18(1) of the Bill, or if this an unintended consequence.

If it is an unintended consequence, the Committee recommends that the Treasurer explain how he intends to address this outcome.

Page 20

Recommendation 5: The Committee recommends that the Treasurer give a commitment to the House that the sale of the Utah Point Bulk Handling Facility will not prevent the planning and development of new port facilities to facilitate expansion of iron ore shipments or new resources being exported through the port.

Page 27

Finding 1: The Committee finds that the Utah Point Bulk Handling Facility's primary role is to facilitate and develop the junior mining industry in Western Australia and this role should continue, notwithstanding the divestment of the facility as proposed by the Pilbara Port Assets (Disposal) Bill 2015.

Page 27

Finding 2: The Committee finds that there are currently insufficient protections for junior miners in the proposed access regime under the Pilbara Port Assets (Disposal) Bill 2015.

Page 27

Recommendation 6: The Committee recommends that the Pilbara Port Assets (Disposal) Bill 2015 be amended to improve access to the Utah Point Bulk Handling Facility for junior miners at all times in the future.

Page 30

Recommendation 7: The Committee recommends that the 'negotiate-arbitrate' model proposed by the Pilbara Port Asset (Disposal) Bill 2015 be extended to apply to prices to access the facility.

Minority Recommendation 2:

A minority of the Committee comprising Hon Ken Travers MLC and Hon Robin Chapple MLC recommends that:

the Pilbara Port Asset (Disposal) Bill 2015 be amended to include the access and pricing arrangements within the legislation.

Page 36

Finding 3: The Committee finds that the sale of Utah Point Bulk Handling Facility may limit the Government's ability to take policy initiatives, such as the \$2.50 discount, to assist junior miners to adapt to challenging market conditions in the future.

Page 40

Finding 4: The Committee finds that the Pilbara Port Assets (Disposal) Bill 2015 is drafted as a skeletal bill based on template legislation, with much of the detail of the bill's operation left to subsidiary legislation.

Page 48

Finding 5: The Committee finds that, despite the Government's stated policy to limit the lease of Utah Point Bulk Handling Facility to 50 years with no option to renew, clause 12 of the Pilbara Port Assets (Disposal) Bill 2015 still provides for a 99 year lease with the option to renew the lease after the end of that period.

Page 49

Recommendation 8: The Committee recommends that, during the Committee of the Whole stage of the Pilbara Port Assets (Disposal) Bill 2015, the Treasurer amend clause 12 of the Pilbara Port Asset (Disposal) Bill 2015 to reflect the Government's intention to limit the lease of Utah Point Bulk Handling Facility to 50 years with no option to renew.

Page 49

Recommendation 9: The Committee recommends that, during the Committee of the Whole stage of the Pilbara Port Assets (Disposal) Bill 2015, the Treasurer amend clause 12 of the Pilbara Port Assets (Disposal) Bill 2015 to provide that the lease period be extended by regulation, with regulations not to come into effect until the time for disallowance in the Legislative Council has passed.

Page 51

Finding 6: The Committee finds that clause 18 of the Pilbara Port Assets (Disposal) Bill 2015 may override legal obligations that have been imposed through the Parliamentary law-making process.

Page 51

Recommendation 10: The Committee recommends that, during the Committee of the Whole stage of the Pilbara Port Assets (Disposal) Bill 2015, the Treasurer explain how section 30(1)(a) of the *Port Authorities Act 1999*, which provides for the facilitation of trade through a port, will be protected and maintained in light of the potential for clause 18 of the Pilbara Port Asset (Disposal) Bill 2015 to override the obligations in the *Port Authorities Act 1999*.

Page 53

Finding 7: The Committee finds that the process outlined in clause 20(3) of the Pilbara Port Assets (Disposal) Bill 2015 avoids the scrutiny of the Parliament by providing that the contents of the transfer order may be set out in schedules which are not published in the *Government Gazette*, nor tabled in either House of Parliament.

Page 53

Recommendation 11: The Committee recommends that, during the Committee of the Whole stage of the Pilbara Port Assets (Disposal) Bill 2015, the Treasurer amend clause 20(3) of the bill to require that any schedules drafted pursuant to clause 20(3) be tabled in both Houses of Parliament.

Page 55

Recommendation 12: The Committee recommends that, during the Committee of the Whole stage of the Pilbara Port Assets (Disposal) Bill 2015, the Treasurer provide an assurance that any regulations made pursuant to clause 34 of the Pilbara Port Asset (Disposal) Bill 2015 will be tabled in Parliament and will be subject to disallowance in the Legislative Council.

Page 56

Finding 8: The Committee finds that clause 35 of the Bill is a Henry VIII clause and does not subject the regulations made to any effective Parliamentary scrutiny but instead purports to override primary legislation with insufficient clarity or intent.

Page 56

Recommendation 13: The Committee recommends that, during the Committee of the Whole stage of the Pilbara Port Assets (Disposal) Bill 2015, the Treasurer amend clause 35 of the bill to remove the Henry VIII clause.

Page 58

Recommendation 14: The Committee recommends that clause 38(2) of the Pilbara Port Asset (Disposal) Bill 2015 be amended to remove the words '*despite any law or rule to the contrary.*'

Page 61

Finding 9: The Committee finds that clause 42 of the Pilbara Port Asset (Disposal) Bill 2015 could have an adverse effect on existing rights that arise under statute and contract.

Page 62

Finding 10: The Committee finds that clause 43 of the Pilbara Port Assets (Disposal) Bill 2015 provides that no compensation is payable if the State breaches or displaces existing rights under statute or contract.

Page 62

Recommendation 15: The Committee recommends that, during the Committee of the Whole stage of the Pilbara Port Assets (Disposal) Bill 2015, the Treasurer explain why all of the subclauses in clause 43(1) of the Pilbara Port Assets (Disposal) Bill 2015 are necessary and the intent behind each subclause.

Page 63

Recommendation 16: The Committee recommends that clause 43 of the Pilbara Port Assets (Disposal) Bill 2015 be amended to ensure that compensation is payable if an existing right under statute or contract is displaced or breached.

Page 64

Finding 11: The Committee finds that clause 45 of the Pilbara Port Assets (Disposal) Bill 2015 has retrospective effect, but that retrospectivity will be limited back to the date on which the divestment is effected by clause 10 of the Bill.

Minority Finding 1:

A minority of the Committee comprising Hon Ken Travers MLC and Hon Robin Chapple MLC finds that:

clause 45 of the Pilbara Port Assets (Disposal) Bill offends Fundamental Legislative Principle 7.

Page 64

Recommendation 17: The Committee recommends that the Treasurer ensures that draft regulations be tabled in the Parliament in accordance with the previous commitments given by the Government.

Minority Recommendation 3:

A minority of the Committee comprising Hon Ken Travers MLC and Hon Robin Chapple

MLC recommends that:

the provisions that allow retrospective operation of regulations made pursuant to clause 45 of the Pilbara Port Assets (Disposal) Bill 2015 be deleted from the Bill.

Page 66

Finding 12: The Committee finds that the proposed access regime in clause 46 of the Pilbara Port Assets (Disposal) Bill 2015 does not sufficiently subject the delegated legislation to Parliamentary scrutiny.

CHAPTER 1

INTRODUCTION

REFERENCE AND PROCEDURE

1.1 On 22 March 2016, the Legislative Council referred the Pilbara Port Assets (Disposal) Bill 2015 (Bill) to the Standing Committee on Legislation (Committee) for inquiry and report. The order of reference states that:

(1) That Order of the Day No 20, the Pilbara Port Assets (Disposal) Bill 2015, be discharged and referred to the Standing Committee on Legislation for consideration and report by no later than 17 May 2016.

(2) That the committee has the power to inquire into and report on the policy of the bill.¹

1.2 The Committee called for submissions by:

- inviting written submissions from 22 stakeholders directly
- advertising the inquiry in *The West Australian* newspaper on 2 April 2016
- advertising the inquiry in the *Pilbara News* and the *Port Hedland North West Telegraph* on 13 April 2016
- publicising the inquiry and public hearings through Legislative Council social media accounts.

1.3 The Committee received eight submissions and held four hearings over three days. Details of stakeholders invited to make a submission, submissions received and witnesses who appeared before the Committee are attached at **Appendix 1**.

1.4 On 10 May 2016, the Legislative Council extended the Committee's reporting timeframe for the inquiry to 25 August 2016.²

1.5 On 1 August 2016, the Committee travelled to Port Hedland to view the Utah Point Bulk Handling Facility (Utah Point).

¹ Hon Jacqui Boyde MLC, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 2 March 2016, p 1476.

² Western Australia, Legislative Council, Standing Committee on Legislation, Report 32, *Pilbara Port Assets (Disposal) Bill 2015 – Extension of Time*, 10 May 2016.

- 1.6 Submissions and documents related to hearings are available at the Committee's website: www.parliament.wa.gov.au/leg.
- 1.7 The Committee thanks all those who provided a submission to the inquiry or provided evidence at a hearing or as supplementary information.

Consideration by the Legislative Council

- 1.8 The Bill was referred to the Committee prior to the Legislative Council adopting the Second Reading Speech, therefore the policy behind the Bill has not yet been agreed upon.
- 1.9 The following issues were raised during discussion on the Bill upon its introduction into the Legislative Council:
- What are the benefits of the sale to Western Australians and how will this be measured?
 - What are the benefits of the sale to industry in Western Australia and how will this be measured?
 - What are the safeguards in place to ensure third party access to Utah Point (specifically, junior miners) after the sale and how will this be guaranteed into the future?
 - What are the regulatory arrangements in place for the sale of Utah Point? Will these be tabled in the Legislative Council (including draft versions)?
 - What consultation has occurred with users of Utah Point (if any) and what further consultation will take place during and after the disposal process?
 - Will the State be liable for any repairs or maintenance of Utah Road that may occur after the disposal due to the historical link to Utah Point?
 - Once the proceeds of the sale are used to pay down the \$170 million owing on the price of the asset, what will happen to the revenue from the sale? Will it return to the State?
 - What would the financial return to the State be if the asset were not disposed of?
- 1.10 The Committee's inquiry has explored the issues raised above and this report presents its findings and recommendations for the benefit of the Legislative Council.

Committee approach

1.11 The Committee's terms of reference for legislative inquiries are very broad and the Committee is not constrained by any specific powers in the Legislative Council Standing Orders. The Committee's approach to this inquiry was to focus on the following issues in its consideration of the Bill:

- policy considerations related to the Bill, including the benefit to Western Australia of the disposal proposed in the Bill
- legal issues, including whether the clauses in the Bill are sufficiently certain and clear in their operation and delegation of power.

1.12 The Committee's scrutiny of the Bill has included an assessment as to whether it is consistent with fundamental legislative scrutiny principles. Whilst not mandated, the Committee has used fundamental legislative scrutiny principles as a framework for scrutinising bills since 2004. A list of the fundamental legislative scrutiny principles are attached to this report at **Appendix 2**.

1.13 The Committee has been advised by the Department of Treasury that the timeframe for the disposal of Utah Point has been adversely affected by the Committee's scrutiny of the Bill:

Delay in the passage of legislation to beyond June 2016 will prevent the transaction from being completed in 2016 and subject to the length of the delay, may in turn result in the commencement of the transaction process being deferred until after the 2017 State Government election.

Such a delay would result in the following:

- *no transaction proceeds in the forward estimates to the 2016–17 financial year;*
- *transaction completion likely delayed until late 2017;*
- *the need to incur substantial additional advisory costs for significant rework through the first half of 2017 across all work streams including financial, economic, environmental, engineering, and legal prior to re-establishing the sale process. An update of these reports would be required to ensure current information is presented to the market and to enable the State to consider its risk positions and warranties provided;*

- *heightened uncertainty in relation to the State's ability to complete the divestment, which may lead to lower transaction proceeds;*
- *negative impact on other asset sales flagged by the State in the recent 2016–17 Budget; and*
- *perception from external parties (including credit rating agencies) that the State is not able to deliver on its fiscal reform program.*³

1.14 The Committee notes that Parliamentary scrutiny is an essential part of the legislative process in this State and the Committee's inquiry will assist the Legislative Council in its consideration of the Bill. The Executive must allow sufficient time in its legislative schedule for comprehensive Parliamentary scrutiny of legislation. The Committee is of the view that the Parliamentary process must be taken into account and anticipated from the outset, rather than being treated as an after-thought when the Government sets its timetable for legislation.

1.15 Further, the Committee has heard evidence that the regulations associated with the Bill have not yet been drafted (see paragraphs 3.103 and 3.106) and would not have been finalised at the time that the Committee was originally due to report.

Recommendation 1: The Committee recommends that, in the future, the Government should allow sufficient time in its legislative schedule for comprehensive Parliamentary scrutiny of legislation.

³ Michael Barnes, Department of Treasury, Letter, 24 May 2016, pp 1-2.

CHAPTER 2

CONTEXT AND POLICY OF THE BILL

BACKGROUND TO THE BILL

History of the Utah Bulk Handling facility

- 2.1 The Bill proposes the divestment of Utah Point through a long-term lease of the land and infrastructure at the site.
- 2.2 Utah Point is a multi-user bulk handling facility at Port Hedland used for exporting iron ore, which is owned and managed by the Pilbara Ports Authority.⁴ Construction of Utah Point commenced in March 2009 and the facility was completed in September 2010. Utah Point's intended capacity was to be 18 million tonnes per annum, with the ability to receive vessels up to 120 000 tonnes deadweight.⁵

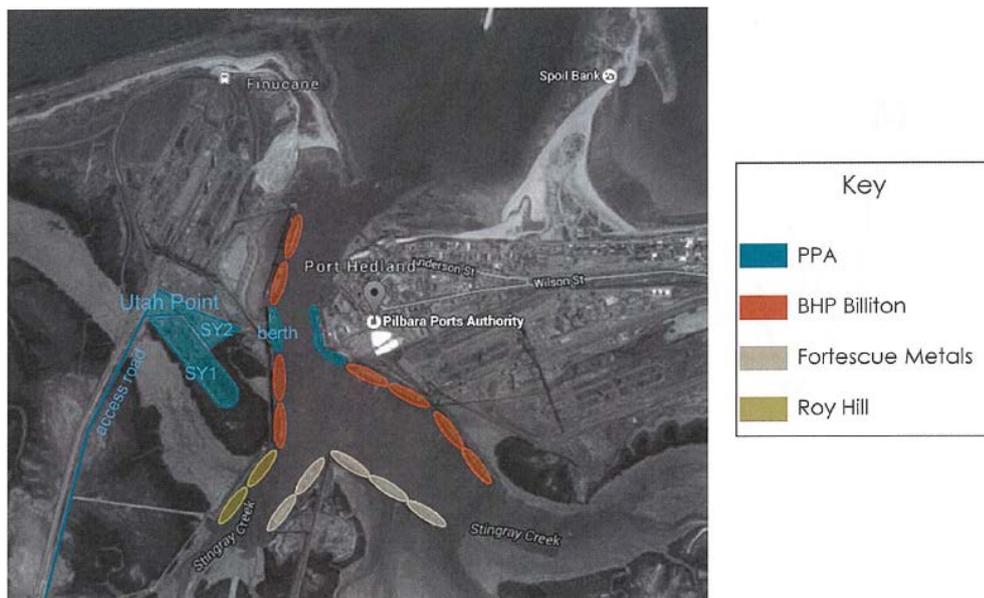


Figure 1. Map of Port Hedland and Utah Point facilities [Source: HoustonKemp. April 2016]

- 2.3 The Minister at the time said that the original intent of Utah Point was to facilitate the business of junior miners to 'break into the iron ore export market for the first time.'⁶

⁴ See paragraph 2.48 for further detail on the port of Port Hedland.

⁵ Hon Simon O'Brien MLC, Minister for Transport, *Port Hedland's new Utah Bulk Loading Facility opened*, Media Statement, Perth, 26 October 2010.

⁶ *ibid.*

There are other berths nearby in Port Hedland which are owned by larger companies (see **Figure 1**), but the Utah Point facility is currently used by junior miners only.⁷

- 2.4 The Committee notes the comments of the former Minister for Transport, Hon Simon O'Brien MLC, who opened Utah Point, during the consideration of the Bill in the Legislative Council:

*The Utah Point facility was aimed fairly and squarely at providing common user access to those who had, in effect, been squeezed out in the context of the port's massive expansion. Big new players such as Fortescue Metals Group coming on line were all putting a lot of pressure on the capacity of the port ... There was a genuine need for iron ore juniors, as they are often called, to have access to facilities at the port because the port was similarly constrained by those who had already occupied and built their own facilities that worked to exclude the involvement of others.*⁸

- 2.5 The construction of Utah Point at Port Hedland was also intended to address environmental issues in the area, such as emissions and the impact of dust and noise from industry.⁹

Policy of the Bill

- 2.6 The Bill was first introduced into the Legislative Assembly on 25 November 2015 by the Treasurer, Hon Mike Nahan MLA. At the time, the Treasurer advised that:

*The long-term lease of the Utah Point bulk handling facility ... is being prepared by the government; with a divestment to proceed only when it is demonstrated to be in the interests of Western Australian taxpayers.*¹⁰

- 2.7 The Government's objectives, as stated in the Treasurer's Second Reading Speech, are to:

- facilitate the continued efficient and reliable operation of the facility

⁷ See paragraph 2.66 for further discussion on junior miners.

⁸ Hon Simon O'Brien MLC, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 22 March 2016, p 1470.

⁹ Environmental Protection Authority, *EPA Report 1311 – EPA advice on Utah Point Berth Project Stage B EPA Bulletin 2 – Dust and Noise in Port Hedland*, 12 January 2009. Available at: <http://www.epa.wa.gov.au/NEWS/MEDIASTMENTS/Pages/2849_EPAREport1311-EPAadviceonUtahPointBerthP.aspx>. Viewed 24 June 2016.

¹⁰ Hon Dr Mike Nahan MLA, Treasurer, Western Australia, Legislative Assembly, *Parliamentary Debates (Hansard)*, 25 November 2015, p 8903.

- maximise transaction proceeds and the financial return for the State, while minimising residual financial risks and liabilities
- facilitate private sector provision of infrastructure for the future and contribute to the State's economic growth
- drive efficiencies through the introduction of private sector disciplines
- ensure that the operating models for the remaining business of the Pilbara Ports Authority are financially sustainable.¹¹

2.8 The Committee notes the tension between facilitating the continued efficient operation of the facility and the objective of maximising the transaction proceeds. The Committee further observes that there is no reference to facilitating the trade of junior miners in the objectives of the sale (as per the requirements set out in the *Pilbara Ports Authority Act 1999*: see paragraph 2.51). The Government's policy is for:

*preferential treatment for junior miners, but if at the end of the process ... there is no junior miner available to take up capacity, then that capacity is available to non-junior miners ...*¹²

2.9 The Bill is the first step in the process for disposing of Utah Point, the sale of which, according to the Government, will be completed '*by the end of the third quarter of this year [2016]*.'¹³

2.10 The Asset Sales unit within the Department of Treasury (Treasury) is currently undertaking '*detailed due diligence*' for the sale of Utah Point with Rothschild Australia Ltd/Deloitte Australia. According to Treasury, the recommendations that arise from this review will be provided to the Government before taking the asset to market.¹⁴

2.11 The disposal of Utah Point will be through the granting of a lease, so that the ownership of the port will remain with the State, which will retain the right to compulsorily acquire the lease in the future (referred to as 'step-in' rights: see paragraph 3.39). Assets to be disposed of include:

¹¹ *ibid.*

¹² Richard Mann, Executive Director, Strategic Projects and Asset Sales, Department of Treasury, *Transcript of Evidence*, 3 May 2016, p 10.

¹³ Hon Dr Mike Nahan MLA, Treasurer, Western Australia, Legislative Assembly, *Parliamentary Debates (Hansard)*, 24 February 2016, p 749. See also paragraph 1.13.

¹⁴ Department of Treasury, Strategic Projects and Asset Sales, *Utah Point*. Available at: <<http://www.treasury.wa.gov.au/Asset-Sales/Utah-Point/>>. Viewed 12.04.2016.

*all landside assets owned by the Pilbara Ports Authority at Utah Point, including the wharf and mooring system, shiploader, conveyor, which will be sold, and two stockyards, which are leased to users ... The transaction will include exclusive use of the berth pocket and Utah Point, BHF [Bulk Handling Facility] land, and C-class port allocation of up to 23 million tonnes per annum in line with the capacity determined by the Pilbara Ports Authority.*¹⁵

2.12 The facilities which are subject to disposal have been included diagrammatically as a Schedule to the Bill, to further clarify the limits of the proposed divestment.¹⁶ The Treasurer also confirmed that the sale only includes assets owned by the Pilbara Ports Authority (PPA), not those belonging to Qube Ports or Bulk.¹⁷

2.13 The Treasurer explained the disposal (in the form of a lease) process as follows:

*The land ... will be a lease for 50 years. We will set up another entity, to which we will transfer all the non-land assets. We will sell shares in that subsidiary to the purchaser, and we will also have operations. We will have a port services agreement with the operator. That is how we deal with differentiating between leases to land, and the non-land assets that are transferred.*¹⁸

2.14 Treasury has clarified that the lease transaction will involve PPA establishing a new corporate entity, known as TerminalCo (as trustee of TerminalCo Trust, also to be created by PPA). The shares in TerminalCo will be sold to the successful bidder and the lease over Utah Point will be granted, either through a separate corporate entity that the bidder creates or directly to TerminalCo.¹⁹

2.15 The Committee notes that the details of the leasing arrangements will be contained in two documents: the Terminal Lease and the Terminal Operating Deed, which are still in draft form (see paragraph 3.29, **Appendix 3** and **Appendix 4**).

2.16 The Government's rationale behind the disposal of Utah Point was initially referred to in the Second Reading Speech in the Legislative Assembly as '*an important element of the government's fiscal management strategy*' and that this strategy '*reflects the*

¹⁵ Hon Dr Mike Nahan MLA, Treasurer, Western Australia, Legislative Assembly, *Parliamentary Debates (Hansard)*, 24 February 2016, pp 762-763.

¹⁶ See paragraph 3.112 and refer to Schedule 1 to the Bill.

¹⁷ Hon Dr Mike Nahan MLA, Treasurer, Western Australia, Legislative Assembly, *Parliamentary Debates (Hansard)*, 24 February 2016, pp 764-767.

¹⁸ *ibid.*

¹⁹ Michael Barnes, Department of Treasury, Letter, 21 June 2016, p 4.

*view that governments are better placed to ensure fair access and pricing of these infrastructure assets rather than to own and operate them.*²⁰

Department of Treasury—Asset Sales Program

2.17 Treasury's Strategic Projects and Asset Sales program is responsible for the planning and delivery of major projects that '*are considered to be of significant importance to the State*' and the sale of Government assets.²¹ The Committee notes that Strategic Projects and Asset Sales identifies key considerations in the development of project plans as including '*social and industry impact, value for money, timeliness and sustainability.*'²²

2.18 The Bill has been repeatedly referred to as 'template legislation' and the form and content of the Bill is consistent with the sale of other State-owned assets, including:

- the sale of the Dampier to Bunbury Natural Gas Pipeline, which was effected by the *Dampier to Bunbury Pipeline Act 1997*
- the privatisation of AlintaGas, which was effected by the *Gas Corporation (Business Disposal) Act 1999*
- the disposal of the State rail freight business, which was effected by the *Rail Freight System Act 2000*
- the sale of the assets and operations of the Perth Market Authority, which was effected by the *Perth Market (Disposal) Act 2015*.²³

2.19 The Committee has been advised by Treasury that, given the transaction's completion is '*likely delayed until late 2017*', Treasury will incur '*substantial additional advisory costs for significant rework through the first half of 2017.*'²⁴

2.20 These advisory costs were referred to during the Standing Committee on Estimates and Financial Operation's 2016-17 Budget Estimates hearings:

*The total project budgets are \$9.9 million for Utah Point ... Our budgeted costs for the full cost of the sale include advisers as well as internal resources.*²⁵

²⁰ Hon Dr Mike Nahan MLA, Treasurer, Western Australia, Legislative Assembly, *Parliamentary Debates (Hansard)*, 24 February 2016, p 770.

²¹ Department of Treasury, Strategic Projects, *Strategic Projects and Asset Sales*. Available at: <http://www.treasury.wa.gov.au/Strategic_Projects/>. Viewed 26.04.2016.

²² *ibid.*

²³ Submission 4 from Department of Treasury, 26 April 2016, p 22.

²⁴ Michael Barnes, Department of Treasury, Letter, 24 May 2016, p 2.

Western Australian economic outlook

- 2.21 Treasury has advised that Western Australia's current credit rating has been variously rated as 'AA+ (*negative outlook*)' and 'Aa2 (*stable outlook*) [downgraded from Aa1]'²⁶ by various credit rating agencies. According to the credit rating agency, Moody's Investor Service:

The drop in the price of iron ore and the sluggish performance in state taxes have led to declines in revenue, and, absent corresponding expenditure measures, budget deficits are widening significantly. As a result, the state's debt burden is rising to a level that is higher than that of its peers ...

A stable outlook has been assigned to the ratings because of ... expectations that Western Australia's policy response will strengthen if its fiscal performance deteriorates well beyond what is projected ...

The state is also planning a series of asset sales that – while one-off in nature – could ease the expected accumulation in debt.²⁷

- 2.22 According to Treasury, one of the main factors behind the State's weakening finances has been declining commodity prices.²⁸ Mining accounted for 26 per cent of Western Australia's gross state product in 2014-15 (including a 10 per cent rise in volume), but the industry's value fell 23 per cent during that same period to \$63.6 billion.²⁹
- 2.23 Of the major commodities that are mined in Western Australia, iron ore is by far the State's most lucrative market: in 2015, iron ore accounted for 55 per cent (741 million tonnes, worth \$49.8 billion) of the value of Western Australia's minerals and petroleum sales.³⁰ In comparison, iron ore sales accounted for 61 per cent of the total value of minerals and petroleum sales (worth \$73.7 billion) in the previous year: a decrease of just over 32 per cent.³¹ Notwithstanding the decline, the Committee notes

²⁵ Richard Mann, Executive Director, Strategic Projects and Asset Sales, Department of Treasury, *Transcript of Evidence*, 13 June 2016, p 4.

²⁶ Submission 4 from Department of Treasury, 26 April 2016, p 17.

²⁷ Moody's Investor Services, Global Credit Research, *Rating Action: Moody's downgrades Western Australia's rating to Aa2 from Aa1; changes outlook to stable*, Sydney, 8 February 2016.

²⁸ Combined with '*a contracting domestic economy and a record low share of GST*': Submission 4 from Department of Treasury, 26 April 2016, p 13.

²⁹ Western Australia, Department of State Development, *Western Australia Economic Profile*, April 2016, p 1.

³⁰ *ibid.*, p 4.

³¹ Western Australia, Department of State Development, *Western Australia Economic Profile*, December 2014, p 5.

that production has increased significantly as major construction projects have been completed.³²

2.24 The Committee notes that, in reality, the price of iron ore is returning to long term historical averages. The recent increases in commodity prices over the past decade followed a period from the late 1980s to the early 2000s when prices were '*unusually low by historical standards.*'³³ The volatility of the resources market and longer term fluctuations in price are not unexpected; in fact, '*mining booms are not new to Australia.*'³⁴

Benefits of the disposal

2.25 Despite the '*current uncertainty in relation to iron ore*', Treasury claimed the following benefits of disposing of Utah Point '*as part of a longer-term strategic supply chain integration strategy*':

- *monetisation of past capital investment and future dividends*
- *retirement of debt and consequent reduction in interest expense*
- *removing State financial obligations and risks associated with the future ...*
- *redeployment of proceeds to other income producing assets*
- *capital market development*
- *balancing private sector innovation with public sector regulatory oversight*
- *facilitation of trade and continued receipt of royalty payments*
- *assisting the State in delivering its infrastructure priorities.*³⁵

2.26 The Committee notes that the benefits referred to above are more general in nature and do not necessarily contain specifics of the benefits of Utah Point being disposed of by the Bill. The Committee has heard conflicting evidence regarding the benefits of

³² Western Australian Government, *2015-16 Budget Fact Sheet: Iron Ore Royalty Revenue*. Available at: <<http://static.ourstatebudget.wa.gov.au/15-16/factsheets/ironore.pdf>>. Viewed 30 June 2016.

³³ E Connolly and D Orsmond, 'The Mining Industry: From Bust to Boom', *Reserve Bank of Australia: Research Discussion Paper*, RDP 2011-08, p 3.

³⁴ *ibid.*, p 47.

³⁵ Submission 4 from Department of Treasury, 26 April 2016, p 15.

the disposal, including the valuation of Utah Point and which value is the most appropriate.

- 2.27 The Committee notes that ‘retention value’ is not defined in the Bill and important details relating to the asset’s valuation have not yet been finalised by Treasury. Further, the Committee notes the Treasurer’s statement that the divestment of Utah Point will proceed ‘*only when it is demonstrated to be in the interests of Western Australian taxpayers.*’³⁶ The Committee has so far not received evidence to conclude that the disposal of Utah Point will necessarily benefit Western Australian taxpayers.

Retention value of the asset

- 2.28 The Committee notes that one of the reasons given for the disposal of Utah Point is that ‘*the Government believes that potential bidders are likely to offer an amount to secure a long term lease of the facility which exceeds the value of Utah Point BHF if the State continues to hold the asset.*’³⁷ The retention value of the asset is therefore the value to the State if it were to retain the asset (see paragraph 2.33).
- 2.29 With regard to the value of retaining the facility, the Committee notes that there are a range of assumptions that need to be made by the Government regarding the value of Utah Point and the short and long term benefits of the disposal. The Committee acknowledges the Government’s desire to maximise the short term return to the State, but notes that the disposal of Utah Point may not necessarily be the best long term financial outcome for Western Australia.
- 2.30 According to the Australian Competition and Consumer Commission (ACCC), privatisation of public assets should not be focused on ‘*maximising sale proceeds to the detriment of the economy over time.*’³⁸ Rod Sims, Chairman of the ACCC, has recently publicly stated that he ‘*now believed “people in the street” who oppose privatisation because it raises prices ... based on recent port sales in NSW.*’³⁹ The ACCC is also concerned that ‘*state and federal governments were ... structuring sales to maximise proceeds at the expense of competition.*’⁴⁰

³⁶ See paragraph 2.6.

³⁷ Submission 4 from Department of Treasury, 26 April 2016, p 16.

³⁸ L Keen, ‘Privatisation price monitoring “useless”’, *Australian Financial Review*, 6 June 2016, p 7.

³⁹ B Potter, ‘ACCC boss: privatisation lifting prices’, *Australian Financial Review*, 27 July 2016, p 1. The article also notes that: ‘*the ports of Botany and Kembla had been privatised together to limit competition ... and “the same debate” was being waged over the Port of Fremantle, where the WA government wants to give the buyer a right of first refusal over a future outer harbour port.*’

⁴⁰ *ibid.*

- 2.31 The Committee has experienced difficulties in identifying the exact retention value for Utah Point which will form the basis of the divestment transaction. According to Treasury's original submission to the inquiry:

Retention value includes an analysis of returns foregone by Government as a result of the Transaction compared with the anticipated Transaction proceeds.⁴¹

- 2.32 At the Committee's hearing with Treasury, the Committee explored the asset's retention value and how it would be calculated:

Hon KEN TRAVERS: ... in broad terms, how will you calculate the retention value? I assume that one simple way is current charges at full tonnage of 23 million tonnes per year for the life of the lease of 50 years, with a net present value attached to it. That would be your maximum retention value—am I right?

Mr Mann: Yes, essentially, with due regard to various forecasts et cetera.

Hon KEN TRAVERS: But that is the absolute maximum. I assume your retention value will be done on a business-as-usual basis; it will not be done on any future charging regime. It will be purely on a business as usual—that is what you have told us in other committees.

Mr Mann: Yes.

Hon KEN TRAVERS: So you will not be making an assessment about what might be charged; you will be doing it on the current charging regime, which would include the 250—

Mr Mann: The assessment of the most likely scenario if the asset was to be retained in state hands.

Hon KEN TRAVERS: You have previously described that as business as usual. That would be the current contractual charging regimes with the rise-and-fall contracts; a maximum tonnage of 23 million tonnes a year?

Mr Mann: With regard to forecasts, volumes—

⁴¹ Submission 4 from Department of Treasury, 26 April, p 11.

Hon KEN TRAVERS: *That is what I was going to come to. That is your starting point; then you have to factor in some sort of risk analysis to what you believe to be the risk.*

Mr Mann: *Correct ...*

*The short answer is that the retention value will reflect that business-as-usual scenario where the asset is retained in state hands, so it must include reasonable assumptions around pricing structure and forecast volumes and a discount rate which is recognising the risk that the state would be taking, again with a view to existing contractual arrangements.*⁴²

2.33 Treasury subsequently clarified that:

*it is well established practice for the State to benchmark market bids received against a retention value of the asset assuming the asset is retained in State hands ('Retention Value'). Typically, the sale only proceeds if the price offered by the market is higher than the Retention Value threshold in dollar terms and also offers other qualitative benefits to the State in terms of risk transferred to the private sector.*⁴³

2.34 The Committee further queried how the retention value amount was reached and has been advised that Treasury commissioned Ernst and Young to undertake a 'preliminary scoping study' in March 2014 and that PPA commissioned Torridon Partners in February 2014 to substantiate an estimated sale value range for Utah Point.⁴⁴ Treasury has advised that both reports are 'strictly confidential' and are 'based on historical information ... where iron ore prices were substantially higher.'⁴⁵

2.35 Treasury has advised the Committee that the transaction to dispose of Utah Point will only proceed if the following criteria are met:

- *acceptance of the access and pricing regime including the preferential treatment of junior miners;*
- *facilitation of trade through Utah Point BHF;*

⁴² Hon Ken Travers MLC, Deputy Chair and Richard Mann, Executive Director, Strategic Projects and Asset Sales, Department of Treasury, *Transcript of Evidence*, 3 May 2016, p 19.

⁴³ Michael Barnes, Department of Treasury, Letter, 24 May 2016, p 5.

⁴⁴ *ibid.*, p 19.

⁴⁵ *ibid.*

- *meeting of transaction objectives;*
- *retention value being exceeded by the transaction proceeds.*⁴⁶

2.36 In light of the evidence above, the Committee is concerned that the Government does not intend to publicly release any information relating to the retention value of Utah Point, nor will it be tabled in the Parliament. Treasury has advised that:

*Disclosing the base discount rate is not market standard practice as any disclosure has the potential to impact on proceeds received by the State.*⁴⁷

2.37 The Committee is concerned that the Parliament is essentially being asked to endorse the divestment of the facility (by passing the Bill) without having all relevant information disclosed to it. The decision to dispose of Utah Point will therefore ultimately be made by the Executive at a future date, possibly based on different information.

2.38 The Committee's view is that by releasing the retention value information for the divestment of the facility once the sale is completed will ensure that the transaction is (and is seen to be) completed in good faith and for the benefit of Western Australians. Releasing the methodology used to calculate the final retention value would also provide an effective means of scrutiny and oversight to affected parties and increase transparency.

Recommendation 2: The Committee recommends that the Treasurer make relevant documents relating to the retention value of Utah Point Bulk Handling Facility public after the completion of the divestment and that these documents be tabled in both Houses of Parliament at that time.

Minority Recommendation 1:

A minority of the Committee comprising Hon Ken Travers MLC and Hon Robin Chapple MLC recommends that:

the Bill be amended to ensure that all documents relating to the retention value of Utah Point Bulk Handling Facility be made public after the completion of the divestment and that these documents be tabled in both Houses of Parliament at that time.

⁴⁶ Michael Barnes, Department of Treasury, Letter, 24 May 2016, p 22.

⁴⁷ *ibid.*, p 6.

Timeline for the disposal

- 2.39 The Committee has heard that the potential divestment of Utah Point was first raised several years ago, but the Pilbara Ports Authority needed time to prepare the asset for disposal:

The CHAIR: When did the government make it clear to Pilbara Ports that it wanted to sell Utah? How long ago was that?

Mr Johnston: In my recollection, it was first mentioned under Minister Buswell. At the time, the chairman said to the minister that if that was going to be the position, we needed time to fix the facility, sort out the environmental aspects—the engineering aspects that we have sorted out. I suppose it must have come back around 12 or 18 months ago; I cannot remember exactly.⁴⁸

- 2.40 The Committee notes that Treasury, in a media release, claimed that market soundings conducted earlier in 2016 identified potential bidders for Utah Point from Australia, Singapore, Japan, Hong Kong and China.⁴⁹
- 2.41 Treasury has advised the Committee that the next key milestone in the disposal of Utah Point is now the passing of the Bill in the Legislative Council: ‘*once the Bill has passed, the Lease execution stage will commence.*’⁵⁰
- 2.42 The Committee notes that the sale of Utah Point has been under consideration by Government for a number of years and again refers to **Recommendation 1** in this report.

Commonwealth Asset Recycling Initiative

- 2.43 During debate on the Bill in the Legislative Council, Hon Peter Katsambanis MLC referred to the federal government’s ‘*privatisation bonus*’ relating to the disposal of major infrastructure projects where ‘*it [Commonwealth Government] says to the States, “You free up the cash tied up in your existing infrastructure and we’ll give you a bonus.”*’⁵¹

⁴⁸ Hon Robyn McSweeney MLC, Chair and Roger Johnston, Chief Executive Officer, Pilbara Ports Authority, *Transcript of Evidence*, 18 May 2016, p 6.

⁴⁹ Western Australia, Department of Treasury, *Utah Point sparks global interest*, May 2016. Available at: < <http://www.treasury.wa.gov.au/Site-content/Asset-Sales/Utah-Point/Updates/Utah-Point-sparks-global-interest/>>. Viewed 16 June 2016.

⁵⁰ Submission 4 from Department of Treasury, 26 April 2016, p 11.

⁵¹ Hon Peter Katsambanis MLC, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 22 March 2016, p 1464.

- 2.44 The Asset Recycling Initiative was a program in which the Commonwealth Government offered financial incentives to the States and Territories to ‘*privatise mature government-owned assets and reinvest the returns into new, productivity-enhancing infrastructure.*’⁵² The Commonwealth’s incentive payments of 15 per cent of the sale price of privatised assets to State and Territory governments were provided on the condition that the proceeds of the sales be reinvested in new assets, including public transport.
- 2.45 The program, which commenced in mid-2014, was due to close in mid-2019. The Committee notes that unallocated funds from the Asset Recycling Initiative have now been returned to the budget for use on other policy priorities, which has effectively ended the program from 30 June 2016.⁵³
- 2.46 The Committee notes that, even if the initiative were still in place, the disposal of Utah Point would have been unlikely to have been eligible for the incentive payment, as the Government has stated that the proceeds of the divestment were to be used to pay down debt rather than reinvest in new assets or infrastructure.

PILBARA PORTS AUTHORITY

- 2.47 PPA operates as a Western Australian Government trading enterprise, with the ability to make a profit pursuant to its statutory powers in the *Port Authorities Act 1999* (PA Act). On 1 July 2014, Port Hedland Port Authority amalgamated with Dampier Port Authority to form PPA.⁵⁴
- 2.48 The Port of Port Hedland is Australia’s largest export port by annual throughput and the largest bulk minerals port in the world. The main export commodity at Port Hedland is iron ore (98 per cent), with other minerals making up the rest of the port’s export operations (including manganese 0.43 per cent, salt 0.62 per cent and ‘*other*’ at 0.15 per cent).⁵⁵

⁵² Commonwealth Government, Department of Infrastructure and Regional Development, *The Asset Recycling Initiative*, October 2015. Available at: <http://investment.infrastructure.gov.au/publications/reports/pdf/factsheets2014/Factsheet_The_Asset_Recycling_Initiative_October_2015.pdf>. Viewed 14 April 2016.

⁵³ Commonwealth Government, Budget 2016-17, *Budget Paper No. 2*, Part 2: Expense Measures. Available at: http://www.budget.gov.au/2016-17/content/bp2/html/bp2_expense-22.htm. Viewed 26.05.2016.

⁵⁴ *Ports Legislation Amendment Act 2014*. PPA encompasses the Port of Ashburton, Port of Dampier and the port of Port Hedland.

⁵⁵ Pilbara Ports Authority, *Port Profile: Port Hedland*. Available at: <<https://www.pilbaraports.com.au/Port-of-Port-Hedland>>. Viewed 6 July 2016.

- 2.49 Prior to the creation of PPA, the port of Port Hedland was managed by Port Hedland Port Authority. Port Hedland port has 19 operational berths, four of which are public, including Utah Point, known as the ‘PH4 Berth.’⁵⁶
- 2.50 PPA lists its primary objectives as ‘trade facilitation,’ ‘sustainability’ and ‘business excellence,’⁵⁷ which are statutory duties that it must uphold pursuant to the PA Act.
- 2.51 The Committee notes the operation of section 30 of the PA Act, particularly the interaction between paragraphs (1)(a) and (2)(aa):

(1) The functions of a port authority are —

(a) to facilitate trade within and through the port and plan for future growth and development of the port; and

(b) to undertake or arrange for activities that will encourage and facilitate the development of trade and commerce generally for the economic benefit of the State through the use of the port and related facilities; and

(c) to control business and other activities in the port or in connection with the operation of the port; and

(d) to be responsible for the safe and efficient operation of the port; and

(e) to be responsible for maintaining port property; and

(fa) to be responsible for port security; and

(f) to protect the environment of the port and minimise the impact of port operations on that environment.

(2) It is also a function of a port authority —

(a) to do things that its board determines to be conducive or incidental to the performance of a function referred to in subsection (1); or

⁵⁶ BHP Billiton owns and operates eight berths at Port Hedland, Fortescue Metals Group owns and operates five berths and two are owned and operated by Roy Hill Infrastructure Pty Ltd: Pilbara Ports Authority, *Port Handbook: Port of Port Hedland*, 2016, p 34. Available at: <<https://www.pilbaraports.com.au/PilbaraPortsAuthority/media/Documents/PORT%20HEDLAND/Port%20Operations/Permits%20and%20Procedures/Port-of-Port-Hedland-Port-Handbook-2016-web.pdf>>. Viewed 6 July 2016.

⁵⁷ *ibid.*

(aa) to use or exploit its fixed assets for profit so long as the proper performance of its functions under subsection (1) is not affected; or

(b) to do things that it is authorised to do by any other written law. [Committee emphasis added]

- 2.52 The Committee has heard evidence that the successful bidder for Utah Point will not be required to comply with section 30 of the PA Act:

Hon Ken TRAVERS: Will the purchaser [of Utah Point] be required to comply with section 30(2)(aa) of the Port Authorities Act?

Mr Mann: I would have thought not, no ...

Hon Ken TRAVERS: Section 30(1)(a) says that ports are there to facilitate trade, and Utah Point has definitely done that—it has generated not just trade but lots of revenue to the state over [the] last five years. Then section 30(2)(aa) says you can make a profit but it cannot be at the exclusion of section 30(1)(a), which says that it should be about trade facilitation—so they can make profit. So are we excluding that section in effect for Utah Point?

Mr Mann: Yes; that obligation under the ports act will not be an obligation for the lessee.⁵⁸

- 2.53 In light of the evidence above, the Committee is concerned that the future owner of Utah Point may prioritise profit over the facilitation of trade. This seems to be in contravention of the requirement under the PA Act.

Recommendation 3: The Committee recommends that, during the Committee of the Whole stage of the Pilbara Port Assets (Disposal) Bill 2015, the Treasurer clarify if it is the intended outcome that the future owner of Utah Point Bulk Handling Facility not be required to comply with section 30(2)(aa) of the *Port Authorities Act 1999*, or if this is an unintended consequence.

If it is an unintended consequence, the Committee recommends that the Treasurer explain how he intends to address this outcome.

- 2.54 Clause 18 of the Bill (discussed at paragraph 3.49) provides that the ‘Authority ... does not contravene the Port Authorities Act by reason of anything done or omitted in

⁵⁸ Hon Ken Travers MLC, Deputy Chair and Richard Mann, Executive Director, Strategic Projects and Asset Sales, Department of Treasury, *Transcript of Evidence*, 3 May 2016, p 13.

good faith in compliance with a direction given under subsection (1).' The Committee notes that clause 18 may affect the integrity of the PA Act as the Minister may direct PPA to grant a lease over Utah Point which is in contravention of its duty to facilitate trade, but that conduct will not be in breach of the PA Act.

Recommendation 4: The Committee recommends that, during the Committee of the Whole stage of the Pilbara Port Assets (Disposal) Bill 2015, the Treasurer clarify if it is the intended outcome that clause 18 of the Pilbara Port Assets (Disposal) Bill 2015 provides that the Pilbara Ports Authority will not contravene the *Port Authorities Act 1999* if it does or omits to do anything in good faith in compliance with a direction given by the Minister in clause 18(1) of the Bill, or if this an unintended consequence.

If it is an unintended consequence, the Committee recommends that the Treasurer explain how he intends to address this outcome.

- 2.55 Treasury has advised that the primary objective of Utah Point's initial development (to support junior miners) *'has been achieved.'*⁵⁹ The Committee's view is that the concept of developing junior miners is an ongoing task which clearly falls within the parameters of section 30(1)(a) of the PA Act: *'to plan for future growth and development of the port.'*

Recommendation 5: The Committee recommends that the Treasurer give a commitment to the House that the sale of the Utah Point Bulk Handling Facility will not prevent the planning and development of new port facilities to facilitate expansion of iron ore shipments or new resources being exported through the port.

UTAH POINT BULK HANDLING FACILITY

Cost of the facility and foundation user contributions

- 2.56 The Committee notes that the capital value of Utah Point is one of the key factors that must be identified in order to determine the most effective pricing regime for the facility. The pricing regime must factor in the initial cost of the facility, the level of risk associated with the asset and what reasonable rate of return could be expected for that facility.
- 2.57 The Committee has heard differing estimates of the cost of Utah Point and of the various contributions made to the project by stakeholders. At a hearing with PPA, the Committee discussed the cost of the facility as follows:

⁵⁹ Submission 4 from Department of Treasury, 26 April 2016, p 7.

The CHAIR: *What is your valuation of the Utah Point facilities now and how did you come to that figure?*

Mr Sarandopoulos: *The cost of the asset is presented in a paper—\$314.5 million.*

Hon KEN TRAVERS: *That is the cost of the asset, but is that what you currently value it at?*

Hon ROBIN CHAPPLE: *You said asset value of \$305 million.*

Hon KEN TRAVERS: *That was the cost of building the asset, but what do you currently hold the value of that asset as?*

Mr Sarandopoulos: *We have the written-down value in our books at over—say 30 June 2015, it was \$233 million.*

The CHAIR: *So that is what you value it at now?*

Mr Sarandopoulos: *That is the written-down value of the assets; it is not a valuation per se in the sense of a market value or an independent assessment of value, but a written-down value—just to be clear on that.*

Hon KEN TRAVERS: *Is that figure of \$233 million simply the original \$305 million less the depreciation for the four years since it opened?*

Mr Sarandopoulos: *Correct.*⁶⁰

- 2.58 The Committee has also heard from the current users of Utah Point that there are ‘*only three differences of opinion*’ on the financial status and performance of the facility, which includes the appropriate capital base of Utah Point.⁶¹ The Association of Mining and Exploration Companies (AMEC) submits that:

AMEC and the Users [Atlas Iron Limited, Mineral Resources and Consolidated Minerals Pty Ltd] agree that the total construction cost for the UPBHF [Utah Point] was \$315 million. However, it is clear from information disclosed through the Standing Committee process

⁶⁰ Hon Robyn McSweeney MLC, Chair, Hon Ken Travers MLC, Deputy Chair, Hon Robin Chapple MLC, Member, Standing Committee on Legislation and Nicholas Sarandopoulos, General Manager, Finance and ICT, Pilbara Ports Authority, *Transcript of Evidence*, 18 May 2016, p 4.

⁶¹ Simon Bennison, Association of Mining and Exploration Companies, Letter, 27 June 2016. AMEC also refers to the following points of difference in this letter: ‘*Appropriate Target Rate of Return for Utah Point*’ and ‘*Appropriate allocation of overall PPA Overhead to Utah Point.*’

that PPA only funded \$235 million. The balance of \$79 million was funded by a \$70 million non-refundable contribution from BHP Billiton and a \$9 million non-refundable contribution from Atlas Iron ...

AMEC and the Users have used a Capital Base of \$235 million (as depreciated) in its Return on Assets on the UPBHF and discounted cash flow analysis and submits this is the correct and more appropriate Capital Base to be used to determine the real Return on Assets.⁶²

- 2.59 The Committee has further heard that the initial cost of the facility was funded through loan arrangements, contractual prepayments with users and an amount related to a throughput allocation under another agreement. PPA advised that funding for the construction of Utah Point comprised of debt and user contributions as set out in **Figure 2**:

FUNDING COMPONENT	\$ MILLIONS
WATC Loan	193.7
Junior Contributions	50.8
BHP Billiton Contribution	70.0
Total	314.5

Figure 2. Utah Point Funding Model [Pilbara Ports Authority, 26 April 2016]

- 2.60 User contributions took the form of prepaid revenue and the original facility agreements executed with Utah Point users provided that these ‘prepayments would be repaid by writing down the balance of each user’s prepayment as facility fees were incurred.’⁶³ This practice occurred until all the prepayments were fully repaid. The Committee notes that the stage at which each user repaid their initial contribution varied (see **Figure 3**).

PROPONENT	ATLAS IRON		AUROX	PMI		CML	MOLY	MESA	
	Interest Bearing	Non-Interest Bearing	Interest Bearing	Interest Bearing	Non-Interest Bearing	Interest Bearing	Non-Interest Bearing	Interest Bearing	Non-Interest Bearing
Opening Balance (\$ Millions)	15.0	7.8	14.0	4.0	2.4	4.3	2.0	1.0	0.3
Repaid	Oct-13	Sep-14	Jan-13	May-12	Feb-12	Feb-13	Feb-12	Nov-15	Nov-15

Figure 3. Utah Point User Contributions – Utah Point User Prepayment Summary [Pilbara Ports Authority, 26 April 2016]

⁶² Simon Bennison, Association of Mining and Exploration Companies, Letter, 27 June 2016, pp 3-4. The Committee notes that PPA disputes the \$9 million contribution: Roger Johnston, Pilbara Ports Authority, Letter, 7 June 2016, p 5.

⁶³ Submission 7 from Pilbara Ports Authority, 26 April 2016, p 13.

2.61 Apart from the \$50.8 million contribution from users, the Committee notes that BHP Billiton contributed an amount of \$70 million to the construction of the facility. The \$70 million has been variously referred to throughout this inquiry as a ‘contribution’⁶⁴, an ‘allocation’⁶⁵ and a ‘gift.’⁶⁶ **Figure 4** is a diagrammatic representation of the construction cost and asset base for Utah Point.

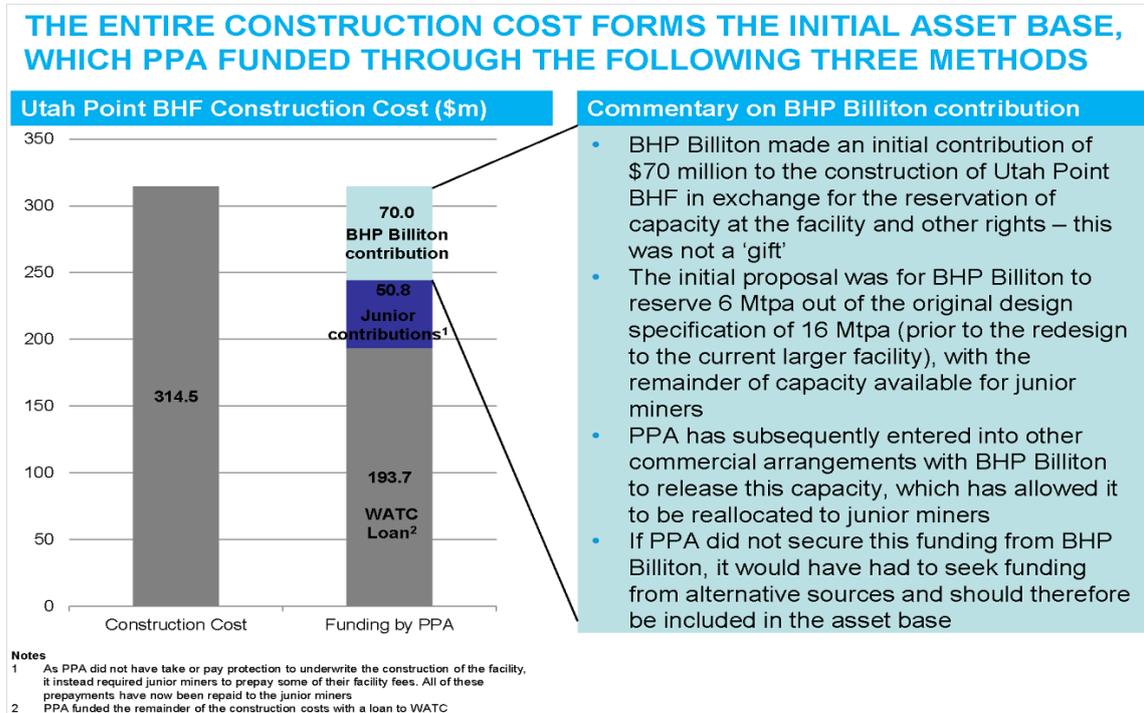


Figure 4. Construction cost and asset base [Source: Department of Treasury, 31 May 2016]

2.62 The Committee notes that the \$70 million amount from BHP Billiton, which has been taken into account by PPA and Treasury in calculating the retention value of Utah Point, is part of a separate commercial agreement which is not related to the disposal of Utah Point.

Impact on junior miners in Western Australia

What is a junior miner?

2.63 Treasury defines a junior miner as being ‘an entity that is not a major miner (BHP Billiton, Rio Tinto, Fortescue Metals Group, Roy Hill, Vale, or a related entity of any

⁶⁴ Roger Johnston, Chief Executive Officer, Pilbara Ports Authority, *Transcript of Evidence*, 18 May 2016, p 6.

⁶⁵ *ibid.*

⁶⁶ Chris Ellison, Managing Director, Mineral Resources Limited, *Transcript of Evidence*, 13 May 2016, p 4 (various references throughout transcript from other witnesses).

of those or any associate of those)⁶⁷ and more commonly features the following attributes:

- *higher costs of production and/or weaker balance sheets;*
- *lacking ownership or control of vertically integrated logistics and supply chain infrastructure (from the mine site to the port);*
- *produce smaller volumes of iron ore (as compared to major miners);*
- *use shared infrastructure with other miners; and*
- *not a party to a State Agreement.*⁶⁸

2.64 This ‘*definition by exclusion*’ is preferred so as to avoid the risk of ‘*excluding a bona fide access seeker*’ and to permit the Minister to ‘*prescribe other entities which reach the size of a “major” miner.*’⁶⁹

2.65 The Committee also requested advice from the industry body, AMEC, regarding its definition of a junior miner. AMEC was ‘*unaware of any specific definition of the term in any other Australian or global jurisdiction.*’⁷⁰

2.66 The original users of Utah Point, known as the ‘*foundation users*’, included the following junior miners based in Western Australia:

- Atlas Iron Limited: the single largest user of Utah Point (along with its subsidiaries) and contributor of \$23 million towards the construction of the facility⁷¹
- Consolidated Minerals Limited: has currently suspended its manganese operations, but was involved in the initial funding of Utah Point⁷²

⁶⁷ Submission 4 from Department of Treasury, 26 April 2016, p 67.

⁶⁸ Submission 4 from Department of Treasury, 26 April 2016, p 2.

⁶⁹ Michael Barnes, Department of Treasury, Letter, 31 May 2016, p 1.

⁷⁰ Simon Bennison, Association of Mining and Exploration Companies, Letter, 2 June 2016.

⁷¹ Atlas also contributed a further \$14 million on behalf of Aurox Resources Limited and \$9 million of extra funding ‘*for no recourse*’: Submission 5 from Atlas Iron Limited, 26 April 2016, p 5.

⁷² Submission 2 from Consolidated Minerals Limited, 26 April 2016, p 2.

- Mineral Resources Limited: ships manganese and chromite through Utah Point; acquired three of the other foundation users of Utah Point (Process Minerals International, Mesa Minerals and Moly Metals).⁷³

Concerns raised by the current users of Utah Point

2.67 The Committee notes the following key concerns from the users of Utah Point, as evidenced in the submissions received:

- existing and future Utah Point users must be part of the Utah Point sales process and be able to provide input on the terms and conditions attaching to the sale of Utah Point
- the sale terms and conditions must protect the future of the junior mining industry in the northwest of Western Australia
- the following three key terms must be included in the sale terms and conditions:
 1. Utah Point must remain exclusively reserved for junior miners with no ability for the operator to grant access to non-junior miners
 2. the existing users of Utah Point must have input on the sale terms and conditions as well as the regulations that will apply to the operator post-privatisation to protect against unaffordable increases in (or introduction of new) port charges
 3. the \$2.50 cost relief package (that was) due to expire on 30 June 2016 must become a permanent component of the Utah Point pricing structure for all users and form part of the sale terms and conditions to be adhered to by the operator post-privatisation of Utah Point.⁷⁴

2.68 Representatives of the junior miners expressed concern that the divestment of Utah Point would affect their capacity to remain viable against major miners in the port:

***Hon KEN TRAVERS:** I think you were here for the Treasury session that we had the other day. Certainly one of the concerns I have had*

⁷³ HoustonKemp Economists, *Economic review of prices at Utah Point: A report for the Public Utilities Office*, April 2016, pp 8-9. A redacted version of this document is available on the Committee's website.

⁷⁴ Submission 1 from Association of Mining and Exploration Companies, 22 April 2016, pp 3-4. Submissions received from Atlas Iron, Consolidated Minerals Limited and Mineral Resources all contained the same key concerns as the AMEC submission.

with the bill is the issue around they say, “But juniors get preference in access to the port and therefore that is the protection for juniors over others coming in.” Do you agree with that? ...

Mr Ellison: *If you go and buy the port with us as users, it is worth X. If you get a couple of majors using it with a 20-year or 15-year or 10-year take-or-pay contract, it is probably worth fourX.*

Hon KEN TRAVERS: *So the pricing and access regime outlined by Treasury, will they protect you or is it still likely that a potential operator will wait until they can get a major in?*

Mr Short: *In response to that, Mr Travers, page 32 of the Treasury submission indicates ... that if the parties cannot agree terms, there is the ability for a party to enter into binding arbitration to determine the terms of access other than price.*

Mr Flanagan: *So if the juniors cannot afford it, they will sell it to someone who can ...*

Mr Muller: *The port was developed to facilitate the export of resources by juniors. Treasury assert in their submission that that objective has been met. Our view is it is eternal. It is not a finite objective.⁷⁵*

2.69 The Committee explored this further and queried:

The CHAIR: *... what does it [the Government] have to do to make it very clear that it [Utah Point] is for the minor players?*

Mr Ellison: *They need to write into the sale agreement that it is only for the juniors.⁷⁶*

2.70 The Committee notes that Treasury has advised that ‘*the original allocation of 6Mtpa of capacity to BHP Billiton indicates that Utah Point BHF has never been intended to be an exclusive junior miner berth.*’⁷⁷ In light of the evidence that the Committee has heard and statements made by the former Minister for Transport when Utah Point first

⁷⁵ Hon Ken Travers MLC, Deputy Chair, Chris Ellison, Managing Director, Mineral Resources Ltd, Graham Short, National Policy Manager, Association of Mining and Exploration Companies Inc, David Flanagan, Managing Director, Atlas Iron, Paul Muller, Managing Director, Consolidated Minerals Pty Ltd, *Transcript of Evidence*, 13 May 2016, p 13.

⁷⁶ Hon Robyn McSweeney MLC, Chair and Chris Ellison, Managing Director, Mineral Resources Ltd, *Transcript of Evidence*, 13 May 2016, p 16.

⁷⁷ Michael Barnes, Department of Treasury, Letter, 31 May 2016, p 11.

began operations, the Committee supports the view that Utah Point was built for the benefit of junior miners.

- 2.71 Further, there appear to be no restrictions on a major mining company being the successful bidder for the Utah Point lease:

The CHAIR: So when it does go up for sale, is there anything to stop Fortescue or BHP or any of the major players from actually purchasing that lease?

Mr Mann: There are no express restrictions on any bidders, no.

The CHAIR: There are no restrictions?

*Mr Mann: No.*⁷⁸

- 2.72 The Committee's view is that the primary role of Utah Point has historically been to encourage the development of junior miners in Western Australia and that this role is ongoing and should be maintained.

Finding 1: The Committee finds that the Utah Point Bulk Handling Facility's primary role is to facilitate and develop the junior mining industry in Western Australia and this role should continue, notwithstanding the divestment of the facility as proposed by the Pilbara Port Assets (Disposal) Bill 2015.

Finding 2: The Committee finds that there are currently insufficient protections for junior miners in the proposed access regime under the Pilbara Port Assets (Disposal) Bill 2015.

Recommendation 6: The Committee recommends that the Pilbara Port Assets (Disposal) Bill 2015 be amended to improve access to the Utah Point Bulk Handling Facility for junior miners at all times in the future.

- 2.73 The Committee has also heard that the current users of Utah Point are concerned at the fees and charges that may be imposed after the sale of the facility:

[We] would like there to be a clear regime on how much the users are charged, and if that is based on the return of assets, plus 10 or eight or 12 per cent, I think the port should be given that clear direction ...

⁷⁸ Hon Robyn McSweeney MLC, Chair and Richard Mann, Executive Director, Strategic Projects and Asset Sales, Department of Treasury, *Transcript of Evidence*, 3 May 2016, p 13.

[We] simply want to make sure that the charges going forward cannot be changed or manipulated as has been done on almost every other port where it can get to the balance sheet of the juniors and it can destroy a company. So quite simply put, if there is going to be a change to the cost of using the facility going forward, that cost should be adjusted into the rates.⁷⁹

- 2.74 Junior miner representatives also referred to the uncertainty surrounding the proposed pricing and access regime and how existing rates will be calculated after the divestment of Utah Point given the ‘scant detail in that access regime.’⁸⁰
- 2.75 The Committee notes that the current pricing regime will be used as a benchmark to set future pricing regimes at Utah Point. The evidence presented to the Committee would suggest that the discount currently applied will not be applied in the future.

Australian Competition and Consumer Commission view on privatisation of public assets

- 2.76 The Committee has heard the ACCC’s views on market structure and regulatory regimes for facilitating competition when disposing of State-owned assets, that:

*the privatisation of government owned assets, if implemented appropriately, can be an effective way to promote efficient outcomes in the interests of users and the wider community.*⁸¹

- 2.77 The ACCC notes that economic efficiency benefits will only be realised where there is ‘strong potential for competition’ or where there is ‘sufficient regulatory oversight’ in place as part of the privatisation process. The ACCC has expressed its concern to the Committee that:

*without the credible threat of regulatory intervention and/or independent binding arbitration, monitoring alone is unlikely to be an effective deterrent against monopoly pricing.*⁸²

- 2.78 The ACCC has provided the Committee with detailed information relating to the disposal of Utah Point, which the Committee has considered as part of this inquiry.⁸³

⁷⁹ Chris Ellison, Managing Director, Mineral Resources Ltd, *Transcript of Evidence*, 13 May 2016, pp 11-12.

⁸⁰ David Flanagan, Managing Director, Atlas Iron Limited, *Transcript of Evidence*, 13 May 2016, p 28.

⁸¹ Rod Sims, Australian Competition and Consumer Commission, Letter, 15 August 2016, p 2.

⁸² *ibid.*, p 5.

⁸³ See **Appendix 6** for the full text of the ACCC’s letter.

- The ACCC *‘supports the implementation of a negotiate-arbitrate model regarding non-price terms of access.’* However, recourse to independent and binding arbitration should be extended to include pricing, as *‘price is a key term of access.’*
- Where the sale of an asset is likely to confer enduring market power, the ACCC supports legislative restrictions on vertical integration, which may include excluding certain parties from bidding for the asset during the privatisation process. In the case of the Utah Point disposal, the ACCC’s view is that *‘the result of such restrictions would be consistent with the current market structure.’*
- Without sufficient regulatory arrangements being in place during the disposal, the ACCC warns that *‘the privatised owner will have the incentive and ability to use its market power to raise prices above efficient levels and/or reduce service quality.’*
- Obligations for the new owner to negotiate in good faith, to not unreasonably discriminate and to not hinder access to Utah Point are noted by the ACCC as *‘a good starting point.’* The ACCC also notes that, *‘to be more effective, the proposed negotiate-arbitrate model should include recourse to binding independent dispute resolution for both price and non-price terms.’* The price monitoring proposed at Utah Point is described as a *‘useful starting point.’*
- The ACCC is of the view that access and pricing arrangements should be included upfront, either in legislation or in regulations, for reasons of transparency and that *‘private contractual arrangements between the lessor and lessee of an asset are not an effective way of regulating price or access.’*

2.79 The ACCC identifies the following key features of an effective *‘publish-negotiate-arbitrate’* regime for disposing of public assets:

- *a requirement that the access provider publish its standard terms and conditions (including price) for regulated services*
- *a robust negotiation framework to facilitate negotiations between access providers and access seekers over the standard terms, conditions and prices*
- *recourse to arbitration by an independent economic regulator in the event that negotiations fail.*⁸⁴

⁸⁴

Rod Sims, Australian Competition and Consumer Commission, Letter, 15 August 2016, p 4.

2.80 The Committee notes that the ACCC has identified some areas of concern with the disposal of Utah Point, as proposed in the Bill. The Committee is of the view that the Bill can be improved by the recommendations outlined in this report.

Recommendation 7: The Committee recommends that the ‘negotiate-arbitrate’ model proposed by the Pilbara Port Asset (Disposal) Bill 2015 be extended to apply to prices to access the facility.

Minority Recommendation 2:

A minority of the Committee comprising Hon Ken Travers MLC and Hon Robin Chapple MLC recommends that:

the Pilbara Port Asset (Disposal) Bill 2015 be amended to include the access and pricing arrangements within the legislation.

Productivity Commission report into Public Infrastructure

2.81 The Productivity Commission conducted an inquiry into public infrastructure in 2013 upon referral by the Commonwealth Treasurer, to investigate:

- the costs, competitiveness and productivity in the provision of nationally significant economic infrastructure
- ways to reduce infrastructure construction costs and address barriers to private sector financing, including assessing the role and efficacy of alternative infrastructure funding and financing mechanisms
- recommendations for the mechanisms and operating principles that may be applied to overcome these barriers.⁸⁵

2.82 The Committee notes that the Productivity Commission recommended that privatisation should be subject to appropriate processes to ensure that the public interest is protected through structural separation, regulation, sale conditions and community service obligations.⁸⁶

Facility charges at Utah Point

2.83 The Committee notes that there appears to be tension between the Government and users of the facility regarding the most effective method of calculating charges that

⁸⁵ Australian Government, Productivity Commission, Report 71, *Public Infrastructure*, 27 May 2014, p v.

⁸⁶ *ibid.*, p 41.

will be imposed at Utah Point after the disposal and the calculations for these charges. AMEC has submitted to the Committee that there is a '*genuine basis for material reduction in Utah Point pricing*' and that:

*charges for Utah Point should be permanently reduced to within the range of \$1.80/t - \$1.84/t and adjusted up and down to reflect actual changes in operational cost reasonably incurred.*⁸⁷

2.84 Treasury responded to the Committee that:

*junior miners negotiated with PPA to put in place the current charges [at Utah Point] and that PPA negotiated the charges taking into account all of its responsibilities under the Port Authorities Act 1999. AMEC calculates the cost of operating Utah Point BHF costs to be \$1.70 per tonne based on FY17 costs ... Treasury strongly refutes AMEC's calculations, and notes that the cost of operating Utah Point BHF, calculated by AMEC, does not take into account all the costs borne by PPA in the running of Utah Point BHF.*⁸⁸

2.85 The Committee has also been advised that:

*the State is supportive of offering lower charges to users in exchange for a lower risk to PPA on volumes as it results in a risk adjusted return to PPA with a natural sacrifice of revenue in exchange for lower risk taken on volumes ... Should users be willing to introduce more conventional 'take or pay' qualities to the contracts, it is understood that PPA's intention would be to continue implementing the above approach by reducing charges that take into account the revised risk profile.*⁸⁹

2.86 The Committee has not been able to obtain conclusive figures regarding the cost of running Utah Point because of the difference in figures between Treasury and AMEC discussed above (see **Figure 5**).

⁸⁷ Tabled by Association of Mining and Exploration Companies during hearing held 13 May 2016, p 13.

⁸⁸ Michael Barnes, Department of Treasury, Letter, 31 May 2016, p 23.

⁸⁹ *ibid.*, Attachment 2.

(a) Recalculated Utah Point BHF Profit & Loss						
Utah Point \$'000						
Financial Year ended 30 June						
		2012	2013	2014	2015	2016
		\$'000	\$'000	\$'000	\$'000	\$'000
Date Source	Note		PPA	PPA	PPA	Forecast
PPA Utah Point Disclosed Revenue			76,916	140,869	146,243	113,577
Pilotage			(1,709)	(2,533)	(2,901)	(3,147)
Tonnage			(1,861)	(3,242)	(3,263)	(3,731)
Port Improvement Rate			-	(1,911)	(2,280)	(2,523)
Security			(278)	(416)	(427)	(499)
Revenue per AMEC			73,068	132,767	137,372	103,679
Adjustments to AMEC Revenue						
Exclude Operational revenue	A		(220)	(530)	(323)	(1,213)
Revised Revenue			72,848	132,237	137,049	102,466
Operations						
Operations			(6,018)	(5,873)	(4,900)	(7,587)
Utilities			(5,616)	(6,262)	(7,528)	(8,960)
Staff Housing			(2,232)	(2,438)	(2,460)	(1,863)
Maintenance			(14,112)	(20,123)	(25,192)	(14,345)
Overhead			(3,000)	(3,000)	(3,000)	(3,000)
Operating Costs Per AMEC			(30,978)	(37,696)	(43,080)	(35,755)
Adjustments to AMEC Operating Costs						
Include Overheads as reported by PPA	B		(9,878)	(11,435)	(9,645)	(11,081)
Revised Operating Costs			(40,856)	(49,131)	(52,725)	(46,836)
EBITDA per AMEC			42,090	95,071	94,292	67,924
AMEC EBITDA%			57.6%	71.6%	68.6%	65.5%
Revised EBITDA			31,992	83,106	84,324	55,630
Revised EBITDA %			43.9%	62.8%	61.5%	54.3%
Less depreciation	C		(14,839)	(14,963)	(15,092)	(14,984)
EBIT per AMEC			27,251	80,108	79,200	52,940
AMEC EBIT %			37.3%	60.3%	57.7%	51.1%
Adjustments to AMEC Calculations						
Include depreciation as incurred by PPA	C		-	-	-	-
Revised EBIT			17,153	68,143	69,232	40,646
Revised EBIT %			23.5%	51.5%	50.5%	39.7%

Notes

- Source: AMEC addendum to the Western Australian Legislative Council Standing Committee on Legislation and PPA disclosures from FY13 to FY16 March YTD
- AMEC has based the FY16 numbers on adjusted PPA figures presented in the PPA submission for Utah Point BHF for YTD Match 16. The full year figures have been calculated by multiplying 12/9. For the purposes of showing adjustments, Treasury have taken a similar approach but have used the financial information presented in the PPA submission.
- A number of adjustments have been made to AMEC calculations to use financial information as disclosed by PPA and ensure only revenue lines directly attributable to Utah Point are included:
 - (A) Non Operational revenue relates to other functions which are undertaken by PPA and as such needs to be excluded. This amount deducted is as per the PPA submission
 - (B) Adjustment to include full overheads attributable to Utah Point BHF as disclosed in PPA submission
 - (C) No Adjustment is required for depreciation here as AMEC have used the depreciation charge per the PPA Submission. Noting FY16 is an estimate. For the ROA calculation below, a different depreciation charge is used.

Figure 5. Recalculated RoA for Utah Point BHF [Source: Department of Treasury, 31 May 2016]

2.87 The Committee also notes that there is uncertainty as to when the debts owed by PPA on Utah Point will be paid back:

Hon KEN TRAVERS: ... There must be a point in the foreseeable future where you have actually achieved the throughput for costs, and you would be able to reduce the charges, and yet the pricing

mechanism that is proposed is that the current pricing regime, with the \$2.50 put back in, continues forever and a day.

...

Mr Sarandopoulos: ... we are two financial years away. We expect that point—should it be constant prices and throughput, et cetera, based on various assumptions, that could be as early as 2017–18, but if you look at some of the scenarios and modelling that have come through, based on future projected volumes from AME, that might be a lot further out ... it only takes one event to occur to effectively knock that out well past 2019–20.⁹⁰

2.88 The Committee notes the following paragraphs in the Treasury submission:

If throughput were to meet previous forecasts of around 20 million tonnes a year or further increase, the PPA would recover its investment early in the life of the assets and would earn a substantial excess rate of return. In these circumstances a substantial reduction in charges could be warranted within the next few years.⁹¹

2.89 The Committee is therefore concerned that a new purchaser will need to recover their investment in the asset and that this could lead to higher charges for users in the future.

The \$2.50 discount

2.90 During this inquiry, the Committee has learned that the majority of the multi-user agreements (between current users of the port and PPA) were signed between April and May 2013.⁹² These contracts included provisions for the adjustment of facility charges ('*rise and fall formula*') and related to the following charges for the use of Utah Point:

- towage: for the services provided by tug boats
- pilotage: for the piloting of vessels, to be adjusted according to the size of ship
- vessel security: a levy based on gross registered tonnes
- tonnage: a charge per vessel based on the gross registered tonnes

⁹⁰ Hon Ken Travers MLC, Deputy Chair, Standing Committee on Legislation and Nicholas Sarandopoulos, Chief Financial Officer, Pilbara Ports Authority, *Transcript of Evidence*, 18 May 2016, pp 11-12.

⁹¹ Submission 4 from Department of Treasury, 26 April 2016, p 53.

⁹² *ibid.*, p 51.

- port improvement rate: an amount allocated to a fund to finance future works at the port.⁹³
- 2.91 In recognition of ‘*challenging market conditions*’, a number of ‘*short term benefits*’, including a \$2.50 per tonne discount on facility charges, were implemented from 1 July 2015. Other benefits included a deferral of road haulage fees until 30 June 2016, a freeze on Utah Point charges until 30 June 2017 and relief of 50 per cent of royalties for up to 12 months while the iron ore price remained below an average of \$90 per tonne (to be repaid by December 2017).⁹⁴
- 2.92 According to Treasury:
- the State implemented the discount and other concessions to Junior Miners despite the independent finding that PPA has not been overcharging at Utah Point BHF.*⁹⁵
- 2.93 The \$2.50 per tonne discount applied to the existing contracts related only to volumes of iron ore exported through Stockyard 1 at Utah Point. As a result of a request from Atlas Iron Limited, a \$1.73 per tonne discount was also applied for exports through Stockyard 2. The discount would cease if the price of iron ore rose above \$90 per tonne (and would reduce to \$1.25 per tonne between \$80-\$90 per tonne).⁹⁶
- 2.94 As the discount was only available for iron ore exports, manganese producer Consolidated Minerals was not eligible for the discount.⁹⁷ Consolidated Minerals suspended its operations with effect from 2 February 2016 as a result of the drop in price for manganese exports.
- 2.95 The Committee heard evidence that the abolition of the \$2.50 discount will result in an additional \$20 million for the next financial year (and further increases in revenue) following:

Hon KEN TRAVERS: *In the budget papers, it shows that in 2015–16, you estimate that from income tax, local government rates and dividends, your contribution to government will be \$152.7 million, but for the 2016–17 year, that is going to increase to \$173 million, so about a \$20 million jump, and then in the two years after that, \$184 million and \$182 million, so, again, another \$10 million jump on top of that. What is the driver of those increases?*

⁹³ Submission 4 from Department of Treasury, 26 April 2016, p 52.

⁹⁴ *ibid.*, p 58.

⁹⁵ *ibid.*, p 54.

⁹⁶ *ibid.*, p 59.

⁹⁷ Submission 2 from Consolidated Minerals Pty Ltd, 26 April 2016, p 2.

Mr Sarandopoulos: For next financial year, at 1 July, we have a discount coming off for PPA.

Hon KEN TRAVERS: And that is the sole reason you will get the additional \$20 million.

*Mr Sarandopoulos: That is the single biggest driver.*⁹⁸

- 2.96 AMEC advised the Committee that it was concerned that the abolition of the discount would adversely affect users at Utah Point:

*Under instruction from Treasury, PPA proposed to charge the users \$6.42/tonne to use Utah Point from 1 July 2016. This will generate fee revenue of \$136 million on the current 21.3Mtpa exported over the UPBHF. Given prevailing iron ore prices, it is possible that Atlas and MRL [Mineral Resources Limited] will be forced to cease exporting if the UPBHF charges remain at \$6.42/tonne.*⁹⁹

- 2.97 The Committee notes that the Government only recently renewed the \$2.50 per tonne discount for the users of Utah Point for another year from July 2016 and extended the discount to also apply to Consolidated Minerals' manganese exports.¹⁰⁰

- 2.98 Treasury has advised that the current user agreements at Utah Point are not conventional take or pay contracts, but rather 'soft' commitments by junior miners:

The elements of a conventional 'take or pay' contract are as follows:

- *obligation to pay charges linked to a significant proportion of allocated capacity;*
- *obligation to pay charges backed by creditworthy entities or guarantees;*
- *appropriate level of revenue is received by the facility operator from recovery of charges; and*
- *application of take or pay or level of commitment is not linked to commodity prices.*

⁹⁸ Hon Ken Travers MLC, Deputy Chair, Standing Committee on Legislation and Nicholas Sarandopoulos, Chief Financial Officer, Pilbara Ports Authority, *Transcript of Evidence*, 18 May 2016, p 12.

⁹⁹ Simon Bennison, Association of Mining and Exploration Companies, Letter, 27 June 2016.

¹⁰⁰ Hon Bill Marmion MLA, Minister for State Development, Western Australia, Legislative Assembly, *Parliamentary Debates (Hansard)*, 28 June 2016, p 4.

The term 'take or pay' has been loosely applied by the junior miners and does not refer to the conventional 'take or pay' elements noted above.¹⁰¹

Finding 3: The Committee finds that the sale of Utah Point Bulk Handling Facility may limit the Government's ability to take policy initiatives, such as the \$2.50 discount, to assist junior miners to adapt to challenging market conditions in the future.

Proposed pricing and access regime

2.99 Treasury has advised that details of the access and pricing of Utah Point after the disposal process is completed will be implemented through a '*negotiate and arbitrate*' model for access, with price monitoring to protect current and future users of the facility.¹⁰² The Economic Regulation Authority will oversee the regime, with the possibility of State intervention if particular events trigger the State to step in.¹⁰³

2.100 The Committee notes that the Bill does not contain the details of this pricing and access regime: these will be set out in regulations made under clause 46 of the Bill (see paragraph 3.102). The Treasurer has stated that these regulations will be tabled, in draft form, in the Parliament '*at the same time as we go to the data room.*'¹⁰⁴ Treasury has advised that:

The pricing instrument [in the regulations] will not monitor regulated charges. It will set the standard for the Economic Regulation Authority (ERA) to monitor regulated charges against.

The regulations will set out the pricing principles. These are principles which the ERA must comply with when making a price instrument ... a price instrument must:

- *use monitoring of the price levels of a regulated service as the form of price regulation; and*
- *specify the base on which, or the standard against which, the ERA must monitor price levels.¹⁰⁵*

¹⁰¹ Michael Barnes, Department of Treasury, Letter, 31 May 2016, Attachment 1, p 3.

¹⁰² Submission 4 from Department of Treasury, 26 April 2016, p 4.

¹⁰³ *ibid.*, p 4.

¹⁰⁴ Hon Dr Mike Nahan MLA, Treasurer, Western Australia, Legislative Assembly, *Parliamentary Debates (Hansard)*, 24 February 2016, p 810.

¹⁰⁵ Michael Barnes, Department of Treasury, Letter, 24 May 2016, p 3.

2.101 The Committee also notes that the pricing regime will not guarantee that users of Utah Point cannot be forced into take or pay contracts, but will operate instead to merely monitor the prices as set by the lessee. The Committee has concerns about the operation of the pricing regime:

***Hon KEN TRAVERS:** So unless you had some provision that excluded take-or-pay contracts in your pricing regime, are you not by that admitting that you are potentially pricing the juniors out of the operations of Utah Point? ... Without anything that requires the purchaser to offer a price that does not include take or pay, does not that potentially exclude ... all of the juniors from the ongoing operation and allow someone else to come in and enter into a long-term agreement on a take-or-pay basis that then locks them out of Utah Point forever and a day?*

***Mr Mann:** Yes, except that we have expressly excluded preferential commercial deals for a non-junior as being part of a consideration as to whether the lessee should be allowed to negotiate with a non-junior; and, prior to that being invoked, if a junior is available to take up capacity, then the lessee must negotiate with that junior.*

***Hon KEN TRAVERS:** And take up capacity at the price that has been offered.*

***Mr Mann:** Then, further to that, if that junior is then unable to take up that capacity, that then triggers a review by the regulator that would clearly focus on price, which may in turn trigger a recommendation to the minister for a different form of regulation, which again is one of the reasons why we have proposed that the pricing regime be prescribed in regulations to provide the flexibility to deal with exactly that eventuality ...*

***Hon KEN TRAVERS:** If the purchaser says, “We are going to skit out well in advance; we are not going to have any loss; we will set the price at this time; we want take-or-pay contracts”, they can go through the negotiation knowing that when the juniors say they cannot come in at that price, it just flips over and there is a senior [major miner] waiting to come in and take the contract.¹⁰⁶*

¹⁰⁶ Hon Ken Travers MLC, Deputy Chair, Standing Committee on Legislation and Richard Mann, Executive Director, Strategic Projects and Asset Sales, Department of Treasury, *Transcript of Evidence*, 3 May 2016, pp 12-13.

2.102 The Committee heard evidence in May 2016 that drafting of the access and pricing regulations by Parliamentary Counsel's Office had not commenced and that drafting instructions were currently being finalised.¹⁰⁷

¹⁰⁷ Michael Barnes, Department of Treasury, Letter, 2 May 2016.

CHAPTER 3

CLAUSES IN THE BILL

OVERVIEW OF THE BILL

3.1 The Bill contains 47 clauses in six parts and one Schedule which consists of a diagram. According to the Explanatory Memorandum, the Bill broadly provides for:

the disposal of all or part of certain assets and liabilities of the Pilbara Ports Authority and associated assets;

controls and limitations on the parameters of the disposal; and

*post-sale transitional arrangements and regulatory matters.*¹⁰⁸

3.2 All clauses in the Bill will commence on the day after it receives Royal Assent, according to clause 2 of the Bill.

3.3 The Committee notes that the Treasurer has repeatedly referred to the Bill as being ‘template legislation’ for the disposal of Government assets.¹⁰⁹ There are significant similarities with the wording of the recently enacted *Perth Market (Disposal) Act 2015* (PMDA). Many key definitions and substantive provisions (such as the provisions which enable and give effect to the disposal of Utah Point) are worded identically to corresponding sections in the PMDA, which the Committee has noted throughout this chapter.

3.4 Treasury has advised that the form and content of the Bill is generally consistent with previous legislation which dealt with State-owned asset sales, including:

- the sale of the Dampier to Bunbury Natural Gas Pipeline, which was effected by the *Dampier to Bunbury Pipeline Act 1997*
- the privatisation of AlintaGas, which was effected by the *Gas Corporation (Business Disposal) Act 1999*
- the disposal of the State rail freight business, which was effected by the *Rail Freight System Act 2000*

¹⁰⁸ Pilbara Port Assets (Disposal) Bill 2015, *Explanatory Memorandum*, Legislative Council, p 1.

¹⁰⁹ Hon Dr Mike Nahan MLA, Treasurer, Western Australia, Legislative Assembly, *Parliamentary Debates (Hansard)*, 24 February 2016, pp 732, 751-52.

- the sale of the assets and operations of the Perth Market Authority, which was effected by the *Perth Market (Disposal) Act 2015*.¹¹⁰
- 3.5 The Committee acknowledges the benefits that template legislation may create for the Executive, but notes that all bills should be appropriate to the matter contained therein and should consider the experience of previous legislation dealing with similar issues.
- 3.6 The Committee notes that much of the evidence that it has received from the current users of Utah Point has centred on the policy decision to dispose of the Utah Point facility and the current conditions at the facility, rather than specific concerns related to the clauses in the Bill. The Committee has made findings in this chapter regarding the Bill's main clauses and any legal issues that have arisen during the Committee's scrutiny of the Bill.¹¹¹

Finding 4: The Committee finds that the Pilbara Port Assets (Disposal) Bill 2015 is drafted as a skeletal bill based on template legislation, with much of the detail of the bill's operation left to subsidiary legislation.

PART 1—PRELIMINARY MATTERS

Clause 3—Terms used

- 3.7 The Committee notes that '*asset*' is defined broadly in the Bill to include all kinds of real or personal property (amongst other things) as well as the contractual right that arises as a result of section 23(2) of the Bill.¹¹²
- 3.8 The definitions of '*corporate vehicle*', '*dispose of*', '*disposer*', '*liability*', '*transferee*', '*transfer order*' and '*transfer time*' are identical to those used in the PMDA, which indicates the template nature of this legislation. The definition of '*dispose of*' is drafted so as to include the sale of the asset, leasing or licensing of the asset and the creation and assignment of an interest in the asset.
- 3.9 '*Utah Point Bulk Handling Facility*' is defined with reference to the colour diagram in Schedule 1 to the Bill. Treasury has confirmed that the non-property assets that will be transferred to the successful bidder for the Utah Point will include the existing customer contracts (with users of the port), operating systems for ship loading and mooring facilities, mobile loading equipment and the environmental lease to operate

¹¹⁰ Submission 4 from Department of Treasury, 26 April 2016, p 22.

¹¹¹ The Committee has not included a detailed analysis of clauses 1 and 2 of the Bill in this report, as these two clauses contain the short title of the Bill and commencement information.

¹¹² Section 23(2) refers to any internal commercial arrangements that will be specified in the transfer order: the transferee is able to derive the benefit of these as a result of the transfer order.

the facility. Assets owned by third parties, such as Qube Ports and Bulk and users of the facility (Atlas Iron Limited) will not form part of the disposal package.¹¹³

3.10 The term ‘*port asset*’ is worded very broadly but uses very specific and carefully drafted language. ‘*Port asset*’ is specified to mean the whole or part of:

- any business carried on by the Authority or any asset or liability owned by the Authority
- any business carried out on the Authority’s behalf or any asset or liability owned or managed by an associated agency or corporate vehicle on the Authority’s behalf by an associated agency or corporate vehicle
- any business or any asset or liability owned or managed on behalf of the State by a corporate vehicle,

but only to the extent that the business/assets/liabilities above relates to or comprises Utah Point or is associated with Utah Point in the Minister’s opinion.

3.11 The additional reference to Utah Point in the definition was inserted by the Treasurer (see paragraph 3.111).

Clause 4—Associated assets and associated agencies

3.12 Clause 4(1) of the Bill defines an ‘*associated State asset*’ as an asset or liability that is owned by the State, but not owned or managed by a statutory corporation and ‘*in the Minister’s opinion*’ is associated with a port asset.

3.13 The Committee observes that clause 4(2) is similar in its definition of ‘*associated SC asset*’, which is an asset owned by, or managed on behalf of the State by, a statutory corporation that the Minister decides (‘*in his opinion*’) is associated with a port asset.

3.14 Treasury advised that clause 4 of the Bill provides for:

a degree of flexibility in that there is potential through the divestment process that associated assets—for example, adjoining land parcels and other adjoining pieces or assets—might be required to be bundled up into the sale. To allow for that flexibility, that provision is contained within the bill. The exact definition of “assets” is ultimately defined by the minister by order. That order, when it is issued, will

¹¹³ Michael Barnes, Department of Treasury, Letter, 21 June 2016, p 1.

*contain a precise listing of the final scope of the assets as ultimately forming the final divestment package.*¹¹⁴

- 3.15 The Committee is concerned that this flexibility may lead to uncertainty and insufficient clarity regarding the assets being disposed of by the Bill. The Committee explored this possibility at a hearing with Treasury:

Hon ROBIN CHAPPLE: *There is significant land to the south of the area that is not defined at the moment—it is called port authority land at the moment. If that is expanded to create a new laydown area, would that be included in this asset sale?*

Mr Mann: *It is not our expectation that there will be any material change to the area as defined in the schedule to the bill.*

Hon ROBIN CHAPPLE: *You say it is not expected. If the area was enlarged, does that then get caught by the provisions of the bill?*

...

Ms Gregory: *It would not be included in the transfer order that we are about to make because the land is not included in the package ... If the land is not currently included in the lease package then it will not be listed in the transfer order to be made by the minister. So, if the question is will the lease area be subsequently expanded after the divestment process, that would not be covered by this bill but would be governed by the terms of the lease agreement, should that allow such an expansion.*

Hon ROBIN CHAPPLE: *Then that expansion would be a state asset not an asset ...*

Ms Gregory: *Correct. It is not part of the transfer order process.*¹¹⁵

Clause 5—Purposes of section 10 disposal

- 3.16 Clause 10 defines the purposes of the section 10 disposal (see paragraph 3.20) broadly, to include:

- the effecting or facilitating of the disposal

¹¹⁴ Richard Mann, Executive Director, Strategic Projects and Asset Sales, Department of Treasury, *Transcript of Evidence*, 3 May 2016, p 3.

¹¹⁵ Hon Robin Chapple MLC, Member, Standing Committee on Legislation, Richard Mann, Executive Director, Strategic Projects and Asset Sales, Department of Treasury and Felicity Gregory, Senior Assistant State Solicitor, State Solicitor's Office, *Transcript of Evidence*, 3 May 2016, p 4.

- any purpose that is ancillary or incidental to, or consequential on, the disposal.

3.17 The Committee has examined this clause and observes that it is again identical to the PMDA and appears to be worded in such a broad manner as to emphasise flexibility in the template legislation over the particular aspects of the disposal of Utah Point.

PART 2—ENABLING DISPOSAL

Clause 9—Disposal of port assets and associated assets authorised

3.18 Clause 9 is to be read in conjunction with clause 10 of the Bill to authorise the disposal of Utah Point assets (and the various other defined assets) by providing that an asset may be disposed of if the disposal is authorised under clause 10.

3.19 The circular wording in clauses 9(1) and 9(2) is identical to that used in the PMDA, but two additional clauses have been inserted which authorise the disposal of associated State assets and associated SC (statutory corporation) assets.

Clause 10—Minister may order disposal of port assets or associated assets

3.20 Clause 10 of the Bill outlines the substantive power that the Minister will use to dispose of (all or part of) the assets of Utah Point (referred to throughout the rest of the Bill and this report as a ‘*section 10 disposal*’). Clause 10(1) provides that the Minister has the power to direct the disposal of Utah Point by order published in the *Government Gazette*, which also includes the power to vary or revoke the order before it takes effect.

3.21 State Solicitor’s Office has described clause 10 as the ‘*trigger for the rest of the bill to come into effect.*’¹¹⁶

3.22 The Committee notes that the gazettal of the Minister’s order under clause 10 does not provide for any Parliamentary scrutiny: for example, by tabling the order in Parliament or through referral to the Joint Standing Committee on Delegated Legislation.

3.23 All five subclauses in the clause are template clauses based on section 9 of the PMDA, apart from the wording of clause 10(2), with additional words as highlighted below:

An order made under subsection (1) may be in general terms and need not include any details about how the disposal is to be effected or specific details about the assets the subject of the disposal.
[Committee underlining added]

¹¹⁶ Felicity Gregory, Senior Assistant State Solicitor, State Solicitor’s Office, *Transcript of Evidence*, 3 May 2016, p 4.

- 3.24 Treasury has advised the Committee that the additional words included in clause 10(2) ‘ensures that a clause 10(1) order does not need to list each specific asset and liability, nor specific details of those assets and liabilities.’¹¹⁷ This amendment was included because:

*the assets and liabilities involved in the divestment of Utah Point BHF are more complex than those disposed of pursuant to the PM Act [Perth Market (Disposal) Act 2015]. In the context of that additional complexity, it was considered prudent to amplify the concept of “general terms” by setting out that specific details about the assets are not required ... those specific details are intended to be set out in a clause 20 transfer order.*¹¹⁸

- 3.25 The Committee notes the difficulty in providing for Parliamentary oversight of the final decision to dispose of the asset and recognises that, once the bill is passed, this is a decision of the Executive. However, the Committee is of the opinion that there needs to be transparency about the decision to ensure that it is in the best interests of the State. This could be achieved by ensuring that calculations and assumptions regarding retention value are made public after the sale has been completed.

Clause 11—Effecting disposal

- 3.26 The Committee notes that clause 11 of the Bill is worded in very broad terms, such that there are no limitations on the nature of any transaction or arrangement for the purposes of a section 10 disposal. According to the Explanatory Memorandum to the Bill, this clause ‘provides flexibility for the potential arrangements and transactions that may be entered into’ for the disposal.¹¹⁹ The Committee has also heard evidence that, again, the clause is:

*a fairly standard provision in WA legislation which gives flexibility to the state to use the most appropriate corporate structure determined after the due diligence process has been completed.*¹²⁰

- 3.27 Clause 11(4) provides that, if a corporate vehicle (as defined in clause 3 of the Bill¹²¹) is used for the purposes of effecting the section 10 disposal, the Under Treasurer must ensure that the company is created.

¹¹⁷ Michael Barnes, Department of Treasury, Letter, 21 June 2016, p 2.

¹¹⁸ *ibid.*

¹¹⁹ Pilbara Port Assets (Disposal) Bill 2015, *Explanatory Memorandum*, Legislative Council, p 3.

¹²⁰ Felicity Gregory, Senior Assistant State Solicitor, State Solicitor’s Office, *Transcript of Evidence*, 3 May 2016, p 5.

- 3.28 Clause 11(5) further provides that the Minister or the Treasurer may own and dispose of shares in the company on behalf of the State of Western Australia (as per the definition in clause 3 of the Bill). The Treasurer has stated that:

Dr MD NAHAN: We have no intention of using this [clause 11(5)]; it is just a broad-based provision. The lease and the sale of the shares will be effectively stapled together, and if the non-land assets are sold, there will be a requirement for them to be handed back in a specified condition if the purchaser breaches the terms of the agreement. The condition and definition of those non-land assets will be determined at the time of the handover ...

Mr PC TINLEY: I want to be really clear for the purpose of the record ... Is the Treasurer guaranteeing that two legal entities and three separate asset classes cannot be sold separately to separate interests in the future without the agreement of the State?

*Dr MD NAHAN: Yes.*¹²²

- 3.29 The Committee has been advised that the disposal of Utah Point will be undertaken by establishing two new corporate entities, wholly owned by PPA: TerminalCo and the TerminalCo Trust (see **Figure 6**).

¹²¹ The definition is reproduced here: *corporate vehicle* means — (a) a company created for the purposes of this Act each security in which is held by the Minister or the Treasurer on behalf of the State; or (b) a subsidiary under the Corporations Act 2001 (Commonwealth) of a company referred to in paragraph (a); or (c) a subsidiary under the Port Authorities Act 1999 of the Authority; or (d) a subsidiary of a subsidiary mentioned in paragraph (b) or (c).

¹²² Hon Dr Mike Nahan MLA, Treasurer & Mr Peter Tinley MLA, Member for Willagee, Western Australia, Legislative Assembly, *Parliamentary Debates (Hansard)*, 24 February 2016, p 770.

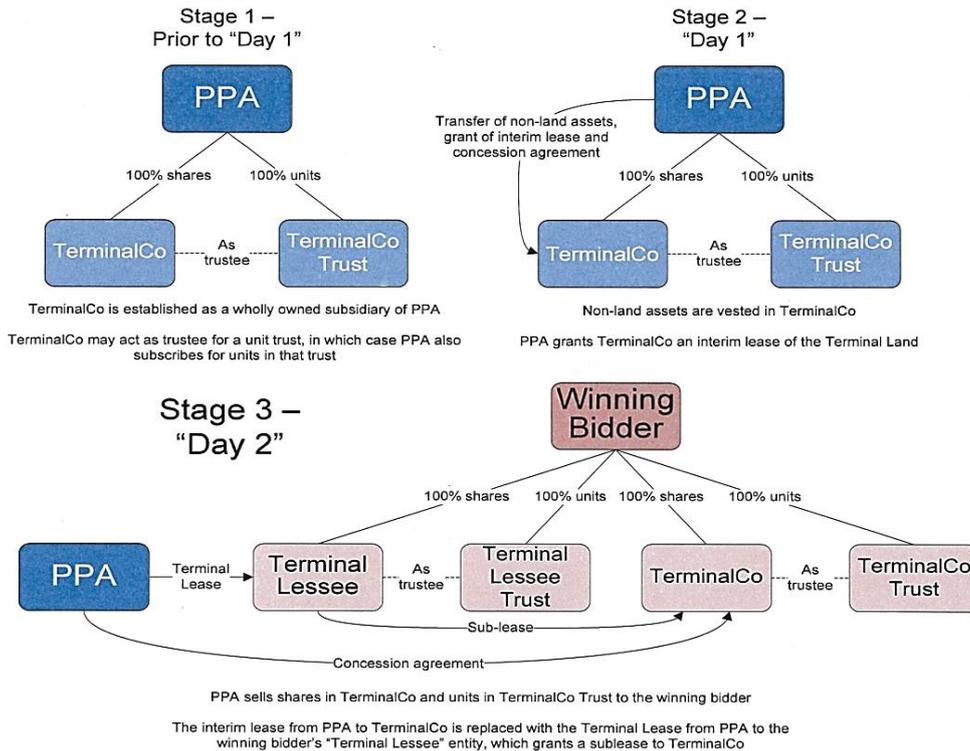


Figure 6. Proposed structure of TerminalCo entities [Department of Treasury, 26 April 2016]

3.30 The Committee notes that the process will involve:

the State establishing a new special purpose company as a long-term operator of the port land and improvements (TerminalCo), and acquiring certain non-land operating assets and contracts from PPA. For additional flexibility, the State proposes to establish TerminalCo as trustee of a unit trust (Terminal Trust). The shares in TerminalCo and units in Terminal Trust will be sold to the private sector when the Terminal Lease is granted.¹²³

3.31 Treasury has further advised that the final structure (‘Stage 3’ in **Figure 6**) presumes that bidders will propose the terminal lease to be granted to a separate corporate entity (‘Terminal Lessee’ in **Figure 6**), with a sublease then granted to TerminalCo. The successful bidder will establish and introduce the Terminal Lessee and Terminal Lessee Trust, not PPA.¹²⁴

3.32 The Committee notes that Utah Point will continue to be vested in PPA, whilst the future lessee of the facility will only be responsible for the management of the leased area.

¹²³ Michael Barnes, Department of Treasury, Letter, 31 May 2016, p 2.

¹²⁴ *ibid.*, p 4.

Clause 12—Disposal of land

3.33 This clause provides that the disposal of the land at Utah Point can only be completed via a leasehold interest or licence for period not exceeding 99 years. The intent of the clause is to prevent ownership of land being transferred to a private entity, as only a licence or an interest in land no greater than a leasehold may be granted.¹²⁵

3.34 The Committee notes that clause 12(5) defines a ‘*further period*’ which may be used to calculate the total length of the lease as:

The period of any further interest in the land, or further licence in respect of the land, that may be granted whether under —

(a) an option to renew the interest or licence; or

(b) an option to renew any further interest or licence,

or otherwise.

3.35 Clause 12(6) of the Bill overrides the operation of sections 28(3) and (4) of the PA Act, which provides that:

(1) The period for which a lease or licence of vested land is granted cannot exceed 50 years.

(2) For the purposes of this section and any prescribed criteria, the period for which an easement, lease or licence is granted includes any period for which the easement, lease or licence is renewable pursuant to an option to renew.

3.36 During the consideration of this clause in the Legislative Assembly, the issue of the length of the lease was discussed, specifically that: ‘*even though the government has said it wants a 50-year lease, the legislation provides for a 99-year lease.*’¹²⁶ According to the Treasurer:

The Port Authorities Act 1999 limits leases to 50 years. Leases may exist, as referred to in section 28(4) of the Port Authorities Act 1999, that are for a period of less than 50 years. Clause 12(6) of the Pilbara

¹²⁵ Explanatory Memorandum, p 4.

¹²⁶ Mr Ben Wyatt MLA, Member for Victoria Park, Western Australia, Legislative Assembly, *Parliamentary Debates (Hansard)*, 24 February 2016, p 798.

*Port Assets (Disposal) Bill 2015 will overcome the limitations in the Port Authorities Act and allow us to go beyond 50 years.*¹²⁷

- 3.37 The Committee was initially advised that the Government has made a policy decision to limit the lease of Utah Point to a fixed period of 50 years, with no option to renew and that *'draft transaction documents do not include any option provisions.'*¹²⁸ However, subsequent advice to the Committee also suggests that the Bill *'has been drafted to allow flexibility to the State if, during engagement with bidders, significant value is identified from an option to renew or by extending the lease period.'*¹²⁹
- 3.38 The key terms of the Terminal Lease are summarised at **Appendix 3**. Treasury has advised that many of the key terms for the transaction will be included in another document, the *'Terminal Operating Deed'*, which is still in draft form and awaiting input from PPA. Key terms of the Terminal Operating Deed are summarised at **Appendix 4**.
- 3.39 Treasury has advised the Committee that the State has 'step-in' rights to remedy a breach of the Terminal Lease or the Terminal Operating Deed. This would include a right to terminate the lease in certain circumstances: *'a failure to pay the costs of remedying a breach would (if the amount is above threshold) give PPA a termination right.'*¹³⁰
- 3.40 The Committee observes that the policy decision to limit the terms of the lease may be changed without requiring an amendment to the Bill, therefore Parliament must consider the merits to the State of the lease arrangement as set out in the Bill: that is, for a period up to 99 years and with an option to renew being included.

Finding 5: The Committee finds that, despite the Government's stated policy to limit the lease of Utah Point Bulk Handling Facility to 50 years with no option to renew, clause 12 of the Pilbara Port Assets (Disposal) Bill 2015 still provides for a 99 year lease with the option to renew the lease after the end of that period.

¹²⁷ Dr Mike Nahan MLA, Treasurer, Western Australia, Legislative Assembly, *Parliamentary Debates (Hansard)*, 24 February 2016, p 799.

¹²⁸ Michael Barnes, Department of Treasury, Letter, 24 May 2016, p 22 and Michael Barnes, Department of Treasury, Letter, 21 June 2016, p 6.

¹²⁹ Michael Barnes, Department of Treasury, Letter, 21 June 2016, p 6.

¹³⁰ *ibid.*, p 7.

Recommendation 8: The Committee recommends that, during the Committee of the Whole stage of the *Pilbara Port Assets (Disposal) Bill 2015*, the Treasurer amend clause 12 of the *Pilbara Port Asset (Disposal) Bill 2015* to reflect the Government's intention to limit the lease of Utah Point Bulk Handling Facility to 50 years with no option to renew.

Recommendation 9: The Committee recommends that, during the Committee of the Whole stage of the *Pilbara Port Assets (Disposal) Bill 2015*, the Treasurer amend clause 12 of the *Pilbara Port Assets (Disposal) Bill 2015* to provide that the lease period be extended by regulation, with regulations not to come into effect until the time for disallowance in the Legislative Council has passed.

Clause 13—Land subject to unregistered leases with terms exceeding 5 years

- 3.41 The Committee notes that clause 13 provides protection for prior unregistered leases and agreements for lease, despite the operation of section 68 of the *Transfer of Land Act 1893*.¹³¹
- 3.42 The Committee has not heard evidence that this clause will apply to any current users of Utah Point but notes that clause 13 is identical to the template clause in the PMDA.

Clauses 14 to 17—Functions and powers of relevant parties

- 3.43 Clause 14 describes the Minister's functions and powers as being all those that are '*necessary or convenient for the purposes of the Act*' and includes the power to acquire land. The wording used ('*necessary or convenient*') is similar to the very broad wording often used to create the head of power in a statute to make delegated legislation.
- 3.44 Clause 15 contains the powers given to PPA, which are all described using the same language as clause 14 and refers to '*necessary or convenient*' powers, but only for the purposes of the disposal of a port asset under the Act, including the power to acquire land.
- 3.45 Clause 16 provides that an associated agency has powers that may be necessary or convenient to dispose of an associated SC asset, also including the power to acquire land (see paragraph 3.13).
- 3.46 Clause 17 outlines the '*necessary or convenient*' powers of corporate vehicles, which includes the power to acquire land and the power to create subsidiaries.

¹³¹ Section 68 'Estate of registered proprietor paramount' provides that interests that are registered and noted on a certificate of title will generally take precedence over unregistered interests.

3.47 The Committee notes that clauses 14, 15 and 17 are identical to sections contained in the PMDA but clause 16 is unique to the Bill.

Clause 18—Directions by Minister

3.48 Clause 18 outlines the directions that the Minister may give to PPA or associated agencies and corporate vehicles in relation to a section 10 disposal. The directions are mandatory and the party(ies) in question must comply with the direction. The Committee notes that clause 18 is based on corresponding section 20 of the PMDA, but with the following key differences:

- the Minister may give directions to an associated agency. Treasury has advised that *‘the disposal of Utah Point BHF requires greater flexibility, with the potential to include State assets and assets of statutory corporations (other than port authorities), which are, in the Minister’s opinion, associated with “port assets” of the PPA’*¹³²
- the party given the direction under clause 18 does not contravene the PA Act or the *Western Australian Land Authority Act 1992* for anything done or omitted in good faith in compliance with that direction
- clause 18(4) provides that a direction given under the clause may override the requirements of the PA Act and the *Western Australian Land Authority Act 1992* if expressly set out in the direction.

3.49 The Committee has significant concerns regarding clause 18 insofar as it permits *‘anything done or omitted to be done in good faith’* to contravene two acts of Parliament: the PA Act and the *Western Australian Land Authority Act 1992*. Treasury has confirmed that this is the purpose of clause 18 and has provided the following examples where clause 18 would be invoked:

for example, it is a function of a port authority under section 30(2)(aa) of the Port Authorities Act 1999 to use or exploit its fixed assets for profit, so long as proper performance of its functions under section 30(1) is not affected. Similarly, section 34 of that Act requires the PPA to (subject to the terms of that section) act in accordance with prudent commercial principles and endeavour to make a profit. In complying with a direction under clause 18 to, for example, execute transaction documents which transfer fixed assets from the PPA to a third party purchaser with the proceeds of that transfer to be paid to the State, the PPA could be in contravention of section 30(2)(aa) and section 34. Clause 18 seeks to address this ...

¹³²

Michael Barnes, Department of Treasury, Letter, 21 June 2016, p 9.

*section 19 of the Western Australian Land Authority Act 1992 requires LandCorp to endeavour to achieve or surpass its financial targets and ensure projects have an internal rate of return greater than the minimum rate of return. In complying with a direction under clause 18 to, for example, transfer land to a port authority for no or minimal consideration, for the purposes of amalgamation of land for a disposal, LandCorp could be in contravention of section 19. Clause 18 seeks to address potential inconsistency.*¹³³

- 3.50 The Committee observes that there is an inherent conflict created by clause 18 between directions that may be given by the Minister pursuant to that clause and obligations created under the PA Act and the *Western Australian Land Authority Act 1992*. The Committee also notes the interaction of this clause with clauses 42 and 43 (see paragraph 3.87).

Finding 6: The Committee finds that clause 18 of the Pilbara Port Assets (Disposal) Bill 2015 may override legal obligations that have been imposed through the Parliamentary law-making process.

Recommendation 10: The Committee recommends that, during the Committee of the Whole stage of the Pilbara Port Assets (Disposal) Bill 2015, the Treasurer explain how section 30(1)(a) of the *Port Authorities Act 1999*, which provides for the facilitation of trade through a port, will be protected and maintained in light of the potential for clause 18 of the Pilbara Port Asset (Disposal) Bill 2015 to override the obligations in the *Port Authorities Act 1999*.

- 3.51 The Committee also notes that the clause also displaces the general operation of the *Corporations Act 2001* (Cth) for the purposes of section 5G of that Commonwealth statute.¹³⁴

Clause 19—Regulations about corporate vehicles and trusts

- 3.52 The Committee notes that clause 19 creates a head of power for regulations to be made which make provision for the constitution, trust deed or other constituent document for the purposes of a section 10 disposal. Regulations may also declare that

¹³³ Michael Barnes, Department of Treasury, Letter, 21 June 2016, pp 9-10.

¹³⁴ Section 5G of the *Corporations Act 2001* provides that, if a State provision is declared in State legislation to be (for example, there are also other classes) a '*Corporations legislation displacement provision for the purposes of this section*', then the Act will not apply and therefore conduct which would normally contravene the Commonwealth Act will impose a liability/prohibition for that conduct.

section 5F of the *Corporations Act 2001* (Cth) will not apply to any regulations made under clause 19(1).¹³⁵

- 3.53 Whilst the Committee acknowledges the flexibility and convenience that is provided to the Executive when matters of substance are left to delegated legislation, the Committee's position with regard to the increasing reliance on regulations is clear.¹³⁶
- 3.54 In this case, the Committee is of the view that it is appropriate to make regulations about administrative matters relating to the constitution of any corporate vehicle or trust that is created for the purposes of the Bill.

PART 3—IMPLEMENTING DISPOSAL

Clause 20—Minister may make transfer orders

- 3.55 The Committee notes that, whilst clause 10 of the Bill is the 'trigger' for the transfer process, clause 20 outlines the content of the transfer order. The Minister 'may' specify all or any of the following information in the transfer order, which is published in the *Government Gazette*:
- the time at which the transfer will occur
 - any asset or liability that will be transferred
 - references to the transferor in any specified proceedings, agreements or instruments which will be substituted for references to the transferee.
- 3.56 A transfer order made under clause 20 may instead include these details in schedules to the transfer order, which will not be published in the *Government Gazette*, but will be available for public inspection at specified times at a specified place.
- 3.57 The Committee also notes that the Bill does not provide that schedules drafted pursuant to clause 20(3) of the Bill will be tabled in Parliament. Parliament would only be made aware of the existence and content of any schedules in the same way as the general public.

¹³⁵ Section 5F of the *Corporations Act 2001* (Cth) provides that, amongst other things, a State or Territory law may declare a matter to be an excluded matter for the purposes of the Commonwealth act, such that none of the provisions of the *Corporations Act 2001* (Cth) will apply.

¹³⁶ See the following recent Standing Committee on Legislation reports: Report 31, *Mining Legislation Amendment Bill 2015*, 10 May 2016; Report 22, *Workforce Reform Bill 2013*, 10 March 2014; Report 26, *Taxation Legislation Amendment Bill 2014*, 20 November 2014.

Finding 7: The Committee finds that the process outlined in clause 20(3) of the Pilbara Port Assets (Disposal) Bill 2015 avoids the scrutiny of the Parliament by providing that the contents of the transfer order may be set out in schedules which are not published in the *Government Gazette*, nor tabled in either House of Parliament.

Recommendation 11: The Committee recommends that, during the Committee of the Whole stage of the Pilbara Port Assets (Disposal) Bill 2015, the Treasurer amend clause 20(3) of the bill to require that any schedules drafted pursuant to clause 20(3) be tabled in both Houses of Parliament.

3.58 The Committee notes that subclause 20(7) makes it a legislative requirement for the Minister to consult with each ‘*relevant official*’ before making a transfer order with a schedule as described above for the purpose of ‘*facilitating the recording and registration*’ of the documents.

Clause 27—Authorised disclosure of information

3.59 Division 2 of the Bill (which contains clauses 27–29) refers to the disclosure of information related to a section 10 disposal and who may disclose it with or without punishment.

3.60 Clause 27 of the Bill creates an exemption for a disclosure of information that would otherwise breach a contract or a statutory duty if the information is disclosed for the purposes of a section 10 disposal.¹³⁷ The Committee notes that only the parties to the disposal or persons acting under their authority are protected by this clause.

3.61 Clause 28 authorises the Auditor General’s disclosure of any information in his possession or control that relates to the section 10 disposal, but only if it relates to the disposal. The Auditor General has a role in relation to the auditing of a port authority according to section 91 and Schedule 5 of the PA Act, which requires the financial reports of a port authority to be audited by the Auditor General on a yearly basis.¹³⁸

3.62 The Committee notes that clause 28 of the Bill refers to section 46(2) of the *Auditor General’s Act 2006*, which provides that the Auditor General or any of his staff:

¹³⁷ Clause 27(1)(b) refers to Schedule 3 of the *Port Authorities Act 1999*, Schedule 1A of the *Western Australian Land Authority Act 1992* and section 5 of the *Statutory Corporation (Liability of Directors) Act 1996*.

¹³⁸ The Committee also notes the operation of *Port Authorities Act 1999*, Schedule 5, Division 3, Subdivision 2, clause 17: ‘*The Auditor General — (a) has a right of access at all reasonable times to the books of the port authority; and (b) may require any officer to give the Auditor General information, explanations or other assistance for the purposes of the audit or review.*’

must preserve confidentiality with respect to all matters that come to the person's knowledge in the course of employment or duties under this Act or another written law and must not communicate any information as to matters of that kind to any person, except as may be required in connection with —

(a) the administration of this Act or that other written law; or

(b) any proceedings under this Act, that other written law or The Criminal Code.

Penalty: a fine of \$50 000.

- 3.63 The Committee further notes that clause 29 of the Bill outlines the offences related to the unauthorised disclosure of information, which '*is intended to prevent potential purchasers and their advisers from improperly disclosing the information they receive as part of the disposal due diligence process.*'¹³⁹
- 3.64 The offences of breaching the duty not to disclose or an actual disclosure carry penalties of \$200 000, which are identical to those same offences under the PMDA.

PART 4—PROVISIONS RELATING TO CORPORATE VEHICLES

Clause 34—Acquirer's powers and duties

- 3.65 Clause 34 provides that, '*to the extent prescribed by the regulations*', the party who acquires the port asset (the acquirer) has the same powers, duties, rights and obligations that the disposer (either the Authority, an associated agency or corporate vehicle) would have had if the disposal had not occurred.
- 3.66 The Committee notes that there is potential for regulations to be prescribed pursuant to clause 34 of the Bill which may reduce the obligations of the acquiring party (compared to those of the Authority). Such obligations could include routine maintenance of assets or any obligations or responsibilities relating to users of Utah Point. The Committee notes that uncertainty exists because this will be achieved by delegated legislation, which may or may not be subject to disallowance in the Parliament.

¹³⁹

Pilbara Port Assets (Disposal) Bill 2015, *Explanatory Memorandum*, Legislative Council, p 9.

Recommendation 12: The Committee recommends that, during the Committee of the Whole stage of the Pilbara Port Assets (Disposal) Bill 2015, the Treasurer provide an assurance that any regulations made pursuant to clause 34 of the Pilbara Port Asset (Disposal) Bill 2015 will be tabled in Parliament and will be subject to disallowance in the Legislative Council.

Clause 35—Application of written laws to acquirer

3.67 Clause 35 provides that any applicable written law which applies to the disposer (as defined in clause 3 of the Bill) is taken to apply to the acquirer of Utah Point. Clause 35(1) defines ‘*applicable written law*’ as:

a written law (other than this Act) that applies to or in relation to, or refers to, the disposer; and ... includes a written law that, by operation of this section, applies to or in relation to, or refers to, the disposer.

3.68 The Committee notes that clause 35 is similar in effect to clause 34 in that it provides that legislation (as defined in the clause) will apply to the acquirer ‘*to the extent prescribed by the regulations*’ and ‘*with the changes that are prescribed by the regulations or are otherwise necessary or convenient for the purposes of this Part.*’

3.69 Treasury has advised that clause 35 ‘*it is not the intent for the regulations to amend the primary legislation ... it is intended that the application of primary legislation be extended*’ and that this is a ‘*usual provision in legislation for the purposes of a divestment.*’¹⁴⁰ The Committee notes the following examples that were provided to illustrate this intention:

- *an Act or Regulations which apply to the PPA are to be taken to apply to the PPA subsidiary to the extent of the PPA subsidiary’s interest in the relevant assets; or*
- *an Act or Regulations which refer to the PPA are to be taken to apply to the PPA subsidiary but with prescribed changes required to reflect the nature of the PPA subsidiary or its interest in the asset.*¹⁴¹

¹⁴⁰ Michael Barnes, Department of Treasury, Letter, 21 June 2016, p 12.

¹⁴¹ *ibid.*, p 11.

3.70 Despite the explanation given, the Committee is of the view that clause 35 is a Henry VIII clause: extending the application of primary legislation by regulation is, fundamentally, amending the application of that primary legislation.¹⁴²

3.71 The Committee is concerned at the use of Henry VIII clauses in bills generally and reiterates the comment that it has previously expressed:

*The House generally considers Henry VIII clauses objectionable, only passing such clauses when they have a cogent justification and are limited in scope and longevity or, on limited occasions, provide a mechanism for increased Parliamentary scrutiny of the subsidiary legislation made under them.*¹⁴³

3.72 The Committee further notes the following specific concerns regarding clause 35:

- the primary legislation (called ‘*applicable written law*’ in the clause) that the regulations will override are not specified in clause 35
- the regulations that are made have the power to dictate the extent to which the applicable written laws will apply and will prescribe any changes to the applicable written laws that may be ‘*necessary or convenient*’ for the purposes of the Bill.

3.73 The Committee is concerned at the lack of Parliamentary oversight and the imprecise language used in clause 35 to override primary legislation.

Finding 8: The Committee finds that clause 35 of the Bill is a Henry VIII clause and does not subject the regulations made to any effective Parliamentary scrutiny but instead purports to override primary legislation with insufficient clarity or intent.

Recommendation 13: The Committee recommends that, during the Committee of the Whole stage of the Pilbara Port Assets (Disposal) Bill 2015, the Treasurer amend clause 35 of the bill to remove the Henry VIII clause.

¹⁴² A Henry VIII clause is a clause in primary legislation that authorises the making of subsidiary legislation by an entity other than Parliament (such as, the Executive) that overrides or alters the application of primary legislation that has been made by Parliament.

¹⁴³ Western Australia, Legislative Council, Standing Committee on Legislation, Report 19, *Revenue Laws Amendment Bill 2012*, 12 September 2012, pp 3-4 and Appendix 1. The Committee has also recently discussed the use of Henry VIII clauses in legislation in its Report 22, *Workforce Reform Bill 2013*, 10 March 2014.

PART 5—PROVISIONS RELATING TO LEASES AND LICENCES**Clause 38—Effect of provisions of port facilities instrument**

- 3.74 The Committee notes that clause 38 operates in conjunction with the other clauses in Part 5 to establish the framework for dealing with leases or licences that may be entered into for the purposes of a section 10 disposal. Part 5 includes clauses 36, 37, 39 and 40 of the Bill.
- 3.75 Clause 36 of the Bill defines a ‘*port facilities instrument*’ as a lease or licence in respect of port facilities that is entered into for the purposes of the section 10 disposal, or one which the Minister designates as such for the purpose of clause 37 of the Bill.
- 3.76 Clause 37 of the Bill provides that the Minister may, by order, designate a lease or licence as a port facilities licence, the lessee or licensee (or their associate) as a port facilities instrument holder, or an agreement or arrangement as being entered into in connection with a port facilities instrument for the purposes of clause 38 of the Bill. The Minister’s order must be published in the *Government Gazette*, but the Committee notes that there is no further provision for Parliamentary scrutiny in clause 37.
- 3.77 Clause 38 specifies that a port facilities instrument, as introduced in the previous two clauses in the Bill, will have effect ‘*despite any law or rule to the contrary*’, specifically if the instrument contains provisions dealing with the following matters:
- payment of any amount by way of premium, rent or other moneys and the retention of any such amount by the lessor, licensor or the State
 - non-refundability of any payment made on account of rent, premium, option fee, outgoings, security deposit or otherwise
 - amounts payable in consequence of breach or early termination of the port facilities instrument
 - continuance of the port facilities instrument and the lessee or licensee’s obligations under the port facilities instrument despite the occurrence of unintended or unforeseen circumstances
 - circumstances or conditions of termination of the port facilities instrument
 - re-entry or forfeiture right that the lessor, licensor or the State have in respect of the port facilities instrument.
- 3.78 The Committee is concerned that clause 38 provides that the port facilities instrument has the power to override ‘*any rule or law*’ that may relate to the six matters above. A

port facilities instrument is a contractual document (lease or licence) which is not subject to any kind of Parliamentary scrutiny process, yet will take priority over legislation which has been passed by the Parliament. The Parliament does not have any role in the scrutiny of the content or classification of the port facilities instruments.

- 3.79 The Committee recognises that the Government needs to have capacity to re-enter the facility and forfeit or terminate the contract in certain circumstances, but is concerned at an agreement or arrangement being able to override an existing rule or law.

Recommendation 14: The Committee recommends that clause 38(2) of the Pilbara Port Asset (Disposal) Bill 2015 be amended to remove the words ‘*despite any law or rule to the contrary.*’

Clause 39—References to port authority may include other entities

- 3.80 Clause 39(2) of the Bill provides that regulations may provide that a reference to a port authority in an ‘*affected written law*’ is to be taken to be or to include a reference to the holder of the port facilities instrument (see clause 38, above). The Committee observes that the intention of clause 39 appears to be to ensure that the holder of a port facilities instrument may take on the same powers and obligations as the port authority in those specified statutes.

- 3.81 The ‘*affected written laws*’ in clause 39(2) are defined in clause 39(1). There are eight statutes and one instrument of delegated legislation in that clause:

- *Emergency Management Act 2005*
- *Marine Navigational Aids Act 1973*
- *Jetties Act 1926*
- *Pollution of Waters by Oil and Noxious Substances Act 1987*
- *Lights (Navigation Protection) Act 1938 Port Authorities Act 1999*
- *Marine and Harbours Act 1981*
- *Shipping and Pilotage Act 1967*
- regulations made under the *Dangerous Goods Safety Act 2004*

- 3.82 The Committee has heard that legal advice identified those statutes and the regulations as ‘*key pieces of existing legislation that apply to the operation of the Pilbara port and would need to be considered as part of a divestment of Utah Point.*’¹⁴⁴

PART 6—MISCELLANEOUS MATTERS

Clause 41—Exemption from State tax

- 3.83 The Committee notes that clause 41 is template legislation and is identical to section 36 of the PMDA. Clause 41 provides an exemption from State tax¹⁴⁵ being payable for anything done in relation to the disposal of the asset (including implementing the disposal) or ‘*to give effect to, or for a purpose connected with or arising out of giving effect to*’ the disposal or its implementation.
- 3.84 The Committee has heard that clause 41(5) provides ‘*flexibility for the Minister to render an exemption inapplicable*’, resulting in duties and State taxes becoming payable.¹⁴⁶ The Committee has also been advised that bidders will:

*take into account any State taxes that become payable to effect an acquisition (such as stamp duty) and factor that into their bid price. From the State’s perspective, it should be indifferent to receiving a bid price plus an amount of duty, or a higher price that is in aggregate the same amount ... it is likely that bidders will be asked to bid a “stamp duty inclusive price” in respect of the transaction. The quantum of duty can then be determined subsequently as an adjustment to the purchase price.*¹⁴⁷

- 3.85 The Committee notes that Treasury has advised that:

The approach of requesting bids on a stamp duty inclusive basis is intended to ensure that this is treated as a normal commercial transaction as well as de-risking the transaction from a bidder’s perspective by providing an opportunity to deduct duty from taxable income depending on the bidder’s tax circumstances ...

¹⁴⁴ Felicity Gregory, Senior Assistant State Solicitor, State Solicitor’s Office and Richard Mann, Executive Director, Strategic Projects and Asset Sales, Department of Treasury, *Transcript of Evidence*, 3 May 2016, p 6.

¹⁴⁵ Defined as duty chargeable under the *Duties Act 2008* and any other tax, duty, fee, levy or charge under a law of Western Australia.

¹⁴⁶ Michael Barnes, Department of Treasury, Letter, 21 June 2016, p 12.

¹⁴⁷ *ibid.*

The exemption afforded by clause 41 is directed at internal (within the State and prior to divestment) restructuring that is expected to occur prior to transacting with the successful bidder.

The ability to subject the divestment transaction to duty payable provides flexibility to accommodate bidder preferences for tax treatment should their circumstances determine more favourable outcomes would be achieved thereby enhancing transaction value. Impact on user charges and retention value analysis are unrelated to the reasons underpinning the inclusion of clause 41.¹⁴⁸

3.86 The Committee notes that it is important to recognise that this is likely to inflate the purchase price, relevant to a purchase that included stamp duty. It is therefore important that, when calculating the retention value, an allowance is made for the value of the stamp duty that would have applied if this was conducted as a normal transaction.

Clause 42—Effect of this Act on existing rights and obligations

3.87 Clause 42 of the Bill provides that the operation of the Bill, including any acts or omissions done for the purposes of the Bill, is not to be regarded as:

- a breach of confidence or any other civil wrong
- a breach of contract or instrument, including any provision that deals with transfer of assets, rights or liabilities
- requiring any act to be done under a (different) contract, or causing or permitting the termination or exercise of rights, or giving rise to a remedy or right under a contract, or being a default of a contract or causing a contract to be void or unenforceable
- subject to clauses 32(3)¹⁴⁹ and (4)¹⁵⁰, releasing or allowing to be released, any surety or other obligee from the whole or part of an obligation.

3.88 Clause 42(2) clarifies that the clause does not limit clause 44 (see paragraph 3.95).

¹⁴⁸ Michael Barnes, Department of Treasury, Letter, 21 June 2016, pp 12-13.

¹⁴⁹ Clause 32(3): ‘If the performance of the obligations was guaranteed by the State, the agreement may also provide for— (a) the release by the State of any security held by the State in connection with the guarantee; or (b) the release of a person from an undertaking that the person gave to the State in relation to any security described in paragraph (a).

¹⁵⁰ Clause 32(4): ‘The Treasurer may authorise the payment of money to discharge an obligation that the State has taken over under subsection (2), whether by termination the obligation or otherwise.’

- 3.89 The Committee notes that clause 42 is, again, template legislation that is identical to the PMDA. The Committee notes that despite the significant differences between the disposal of these two State assets, the Bill frequently draws from the PMDA.
- 3.90 The Committee is concerned that clause 42 purports to override existing rights and obligations which arise under statute and contract. Treasury has advised that:

It is usual in divestments undertaken pursuant to legislation to authorise the actions and omissions required to undertake the transaction ...

An example of where clause 42 would be used is in relation to an agreement between the PPA and a third party which contains a clause providing that, if PPA seeks to assign the asset which is the subject of the agreement, then the prior consent of that third party must be obtained. Clause 42 is intended to override such an assignment clause. Another example relevant to clause 42 is in relation to an agreement between the PPA and a third party which prohibits the PPA from assigning an asset, and a breach of that provision would allow the third party to terminate the agreement and sue for damages. Clause 42 is intended to override the prohibition, default and termination rights.¹⁵¹

Finding 9: The Committee finds that clause 42 of the Pilbara Port Asset (Disposal) Bill 2015 could have an adverse effect on existing rights that arise under statute and contract.

Clause 43—No compensation payable

- 3.91 The Committee notes that, similarly to clause 42, this clause is template legislation that is identical to corresponding sections in the PMDA. Clause 43 follows on from clause 42 by providing that no compensation will be payable by or on behalf of the State:
- because of the enactment or operation of the Bill or any consequences thereof
 - because of any statement or conduct made relating to the enactment of the Bill
 - in connection with the disposal of a port asset or associated asset.

¹⁵¹ Michael Barnes, Department of Treasury, Letter, 21 June 2016, pp 13-14.

- 3.92 The exemption from paying compensation does not apply to amounts payable as a result of agreements that have been entered into in order to carry out a section 10 disposal and does not affect any existing government agreements.
- 3.93 The Committee is concerned at the interaction between clause 42, which purports to override existing rights and obligations and clause 43, which then provides that no compensation will be payable for anything done that may be related to the Bill's operation. The Committee has been advised that:

This clause [clause 43] is an extension to the concepts in clause 42, to ensure that compensation is not payable by or on behalf of the State as a result of the transaction, except to the extent that it is payable under an agreement entered into for the purposes of a section 10 disposal. It is a more modern formulation of clause 42 and has been implemented in a number of recent asset sales ...

An example of where clause 43 would be used is in relation to an agreement between the PPA and a third party which is assigned to the private sector terminal operator. The third party could claim that the rights and obligations of PPA under the agreement were personal to PPA and could not be assigned and could seek compensation. Clause 43 is intended to override such compensation rights.¹⁵²

- 3.94 The Committee is concerned that, where existing rights and obligations are being displaced for the purposes of carrying out the divestment in the Bill, no compensation will be paid by the State.

Finding 10: The Committee finds that clause 43 of the Pilbara Port Assets (Disposal) Bill 2015 provides that no compensation is payable if the State breaches or displaces existing rights under statute or contract.

Recommendation 15: The Committee recommends that, during the Committee of the Whole stage of the Pilbara Port Assets (Disposal) Bill 2015, the Treasurer explain why all of the subclauses in clause 43(1) of the Pilbara Port Assets (Disposal) Bill 2015 are necessary and the intent behind each subclause.

¹⁵² For example, section 39 of the PMDA, section 30 of the *Port Assets (Authorised Transactions Act 2012)* (NSW), section 31 of the *Port of Darwin Act 2015* (NT) and section 58 of the *Delivering Victorian Infrastructure (Port of Melbourne Lease Transaction) Act 2016* (Vic): Michael Barnes, Department of Treasury, Letter, 21 June 2016, p 13.

Recommendation 16: The Committee recommends that clause 43 of the Pilbara Port Assets (Disposal) Bill 2015 be amended to ensure that compensation is payable if an existing right under statute or contract is displaced or breached.

Clause 44—Government agreements not affected

3.95 This clause provides that the Bill does not prejudice or affect any right or obligation of a party to a Government agreement and that the operation of the *Government Agreements Act 1979* is not limited or otherwise affected by the Bill.

3.96 Clause 44 defines ‘Government agreement’ as an agreement referred to in paragraph (a) of the definition of Government agreement in the *Government Agreements Act 1979* section 2:

an agreement scheduled to, incorporated in, or appearing in, an Act the administration of which is for the time being committed by the Governor to, or approved by the Governor to be placed under the control of, the Minister, and any other agreement scheduled to, incorporated in, or appearing in, an Act and declared by proclamation to be a Government agreement for the purposes of this Act ...

3.97 As indicated by the Treasurer, there are at least two agreements that this clause is referring to: the *Iron Ore (Mount Newman) Agreement Act 1964* and the *Iron Ore (Mount Goldsworthy) Agreement Act 1964*.¹⁵³ There are ‘others that existed, but the assets in question that are affected have been transferred to those two.’¹⁵⁴

Clause 45—Regulations for purposes of, or consequential on, section 10 disposals

3.98 The Committee observes that clause 45 permits the making of regulations for the purposes of a section 10 disposal, as well as for Parts 2, 3, 4 and 5 of the Bill (the body of the Bill). Clause 45(2) provides that any regulations made under the clause may be expressed to take effect before they are published in the *Government Gazette*, but no earlier than after the section 10 disposal is itself published in the *Government Gazette*.

3.99 To the extent that any regulations take effect prior to being gazetted, clause 45(4) provides that the rights of a person (other than the State or the parties to the section 10 disposal) are protected from any prejudicial operation or liability imposed by the regulations.

¹⁵³ Hon Dr Mike Nahan MLA, Treasurer, Western Australia, Legislative Assembly, *Parliamentary Debates (Hansard)*, 24 February 2016, p 809.

¹⁵⁴ *ibid.*

3.100 The Committee has been advised that ‘*this is a usual provision for the purpose of a divestment*’ and that the situation may arise during the divestment process where a variation to the terms of the divestment is made which requires a change to existing or new regulations for the purposes of the section 10 disposal:

*Clause 45 allows the State to rectify this issue, by applying the change retrospectively. However, the impact of that retrospective effect can only be prejudicial to, or impose liabilities on, the persons directly involved, being the State, the disposer and the acquirer.*¹⁵⁵

3.101 The Committee finds that this clause effectively limits the retrospective operation of the regulations made pursuant to clause 45 of the Bill. The Committee remains concerned, however, that the regulations are not subject to Parliamentary scrutiny and have not been made available to the Parliament at the same time as the Bill.

Finding 11: The Committee finds that clause 45 of the Pilbara Port Assets (Disposal) Bill 2015 has retrospective effect, but that retrospectivity will be limited back to the date on which the divestment is effected by clause 10 of the Bill.

Minority Finding 1:

A minority of the Committee comprising Hon Ken Travers MLC and Hon Robin Chapple MLC finds that:

clause 45 of the Pilbara Port Assets (Disposal) Bill offends Fundamental Legislative Principle 7.

Recommendation 17: The Committee recommends that the Treasurer ensures that draft regulations be tabled in the Parliament in accordance with the previous commitments given by the Government.

Minority Recommendation 3:

A minority of the Committee comprising Hon Ken Travers MLC and Hon Robin Chapple MLC recommends that:

the provisions that allow retrospective operation of regulations made pursuant to clause 45 of the Pilbara Port Assets (Disposal) Bill 2015 be deleted from the Bill.

¹⁵⁵

Michael Barnes, Department of Treasury, Letter, 21 June 2016, p 14.

Clause 46—Regulations for purposes of providing access to services

- 3.102 Clause 46 enables regulations to be made that provide for pricing or access arrangements (or both) to be made, with 18 specific matters outlined in clause 46(3)(a) through to (p). The Committee is concerned that this clause does not provide details to the Parliament of the access and pricing regime, the regulator, nor the conditions or penalties applicable under the regime.
- 3.103 The Committee notes that the Treasurer has advised that detailed draft regulations will be tabled in the Parliament ‘*at the same time as we go to the data room.*’¹⁵⁶

The data room

- 3.104 The Committee has been advised that the ‘*data room*’ is an ‘*on-line electronic repository*’ containing information that will enable bidders to properly understand the assets and liabilities associated with the proposed transaction.¹⁵⁷ The data room will be restricted to approved bidders and only after entering into confidentiality agreements with the State; ‘*significant penalties*’ will apply for breaches of confidentiality by the relevant parties.¹⁵⁸
- 3.105 The Committee notes that the data room will not be opened until the ‘*Binding Bid Stage*’ of the transaction.

Proposed regulatory regime set out in clause 46

- 3.106 A document outlining the key features of the proposed regulatory regime was tabled in the Legislative Assembly on 24 February 2016 and is attached to this report as **Appendix 5**. The Treasurer stated at the time that the next stage (the draft regulations) may not occur until July.¹⁵⁹
- 3.107 Clause 46 includes definitions of ‘*access arrangement*’, ‘*price*’, ‘*service*’ and ‘*service provider*’, and provides that the regulations may cover access to a service or the price regulation of a service or both. The clause also details what the regulations may do, including setting terms and conditions for access to a service and other rights and responsibilities of the parties to an access arrangement: clauses 46(3)(a) through (p). The clause also authorises a fine to be prescribed in the regulations for an offence against the regulations of \$100 000, with a daily penalty of \$20 000 to be imposed.

¹⁵⁶ Hon Dr Mike Nahan MLA, Treasurer, Western Australia, Legislative Assembly, *Parliamentary Debates (Hansard)*, 24 February 2016, p 810.

¹⁵⁷ Michael Barnes, Department of Treasury, Letter, 21 June 2016, p 14.

¹⁵⁸ *ibid.*, p 15.

¹⁵⁹ Hon Dr Mike Nahan MLA, Treasurer, Western Australia, Legislative Assembly, *Parliamentary Debates (Hansard)*, 24 February 2016, p 810.

3.108 An access arrangement made under clause 46(3) is not delegated legislation for the purpose of the *Interpretation Act 1984* and is therefore not subject to scrutiny by the Joint Standing Committee on Delegated Legislation.

Finding 12: The Committee finds that the proposed access regime in clause 46 of the Pilbara Port Assets (Disposal) Bill 2015 does not sufficiently subject the delegated legislation to Parliamentary scrutiny.

Clause 47—Regulations

3.109 Clause 47 of the Bill contains the general regulation-making power for matters which are ‘*required or permitted to be prescribed*’ or ‘*necessary or convenient to be prescribed*’ for the Bill. The Committee notes, again, the Treasurer’s comments that draft regulations will be tabled in the Parliament when the transaction reaches the ‘*data room*’ stage.

3.110 The Committee takes no issue with clause 47, apart from noting that any draft regulations prepared pursuant to the Bill will not be tabled in the Parliament until after the passage of the Bill.

SCHEDULE 1—UTAH POINT BULK HANDLING FACILITY

3.111 The key components of the Utah Point facility which are included in Schedule 1 to the Bill are:

- the PPA berth known as ‘Berth 4’
- the PPA stockyards known as ‘Stockyard 1’ and ‘Stockyard 2.’¹⁶⁰

3.112 The diagram included in Schedule 1 is not an exhaustive representation of the assets which will be included in the disposal, as the definition of ‘*associated asset*’ and ‘*associated SC asset*’ in clause 4 (see paragraph 3.12) expand the definition of the assets.

3.113 Treasury has advised that reason for this is to ‘*continue to allow some flexibility to include or exclude assets*’ from the disposal and logistic issues surrounding the representation of a three dimensional facility in Western Australian legislation.¹⁶¹

¹⁶⁰ Submission 4 from Department of Treasury, 26 April 2016, p 23.

¹⁶¹ *ibid.*

CHAPTER 4

CONCLUSION

- 4.1 The Committee has considered the policy and clauses of the Bill against its terms of reference and with consideration given to the Fundamental Legislative Principles set out in **Appendix 2**.
- 4.2 The Committee has heard evidence regarding the potential effects of the Bill on the current users of Utah Point and the uncertainty surrounding the pricing and access regime which will be imposed on the facility after the asset is divested.
- 4.3 The Committee acknowledges the Treasurer's comments that the divestment of Utah Point will only proceed when it has been demonstrated to be in the interests of Western Australian taxpayers. The Committee has heard differing views from witnesses as to the benefits that will flow to the State from the disposal, but notes the views of the ACCC that '*privatisation almost always provides an opportunity to maintain or create a competitive market structure for the future.*'¹⁶²
- 4.4 The Committee also acknowledges that the disposal of Utah Point may impact upon the junior miners who use the facility and that this is an important issue when considering the benefit to Western Australians in disposing of the asset.
- 4.5 The Committee believes that the amendments proposed in this report, if adopted, will improve the Bill.
- 4.6 The Committee does not have a unanimous view to passing this legislation, however, it has worked diligently and cooperatively to finish this report, which highlights issues that the House can take into consideration when debating the sale of Utah Point.
- 4.7 The majority of the Committee comprising Hon Robyn McSweeney MLC, Hon Ken Baston MLC and Hon Dave Grills MLC support the Pilbara Port Assets (Disposal) Bill 2015. Finding 1 and 2, together with Recommendation 6, refer to junior miners in the State of Western Australia having continued access to Utah Point if the House agrees with the passage of the Bill to sell the Utah Point Bulk Handling Facility. The Committee supports Finding 1, 2 and Recommendation 6, which are:

***Finding 1:** The Committee finds that the Utah Point Bulk Handling Facility's primary role is to facilitate and develop the junior mining industry in Western Australia and this role should continue,*

¹⁶²

Rod Sims, Australian Consumer and Competition Commission, Letter, 15 August 2016, p 2.

notwithstanding the divestment of the facility as proposed by the Pilbara Port Assets (Disposal) Bill 2015.

Finding 2: *The Committee finds that there are currently insufficient protections for junior miners in the proposed access regime under the Pilbara Port Assets (Disposal) Bill 2015.*

Recommendation 6: *The Committee recommends that the Pilbara Port Assets (Disposal) Bill 2015 be amended to improve access to the Utah Point Bulk Handling Facility for junior miners at all times in the future.*

Minority Conclusion:

A minority of the Committee comprising Hon Ken Travers MLC and Hon Robin Chapple MLC is of the view that:

The Government has failed to provide sufficient evidence that the sale of Utah Point facility will meet the objectives outlined in paragraph 2.7, or the proposed benefit from the disposal outlined in paragraph 2.25.

We note that a number of the previous privatisations using similar template legislation (see paragraph 2.18) have had negative impacts for the Western Australian economy.

Further, the sale as currently proposed, will have significant negative consequences for junior miners and the jobs they create in Western Australia.

We therefore do not support the passage of the Bill.



Hon Robyn McSweeney MLC

Chair

25 August 2016

APPENDIX 1

STAKEHOLDERS, SUBMISSIONS AND HEARINGS

STAKEHOLDERS INVITED TO MAKE A SUBMISSION

The Committee wrote to the following stakeholders and invited them to make a submission to this inquiry:

- 1 Association of Mining and Exploration Companies
- 2 Chamber of Minerals and Energy of Western Australia
- 3 Dampier Salt Limited c/o Rio Tinto
- 4 Sandfire Resources NL
- 5 Newcrest Mining Limited
- 6 Roy Hill Mining
- 7 BC Iron Limited
- 8 Department of Mines and Petroleum
- 9 Department of Regional Development
- 10 Department of Transport
- 11 Department of Treasury
- 12 Pilbara Ports Authority
- 13 Town of Port Hedland
- 14 BHP Billiton
- 15 Fortescue Metal Group Ltd
- 16 Atlas Iron
- 17 Consolidated Minerals
- 18 Mineral Resources Limited/Process Minerals International Pty Ltd
- 19 Aditya Birla Minerals, Birla Nifty

SUBMISSIONS RECEIVED

The Committee received the following submissions:

- 1 Association of Mining and Exploration Companies
- 2 Consolidated Minerals
- 3 Brockman Mining Limited
- 4 Department of Treasury
- 5 Atlas Iron Limited
- 6 Dampier Salt Limited (Rio Tinto)
- 7 Pilbara Ports Authority
- 8 Mineral Resources Limited

PUBLIC HEARINGS

The Committee held the following public hearings:

4 May 2016

Department of Treasury, State Solicitors Office and Deloitte Touche Tohmatsu

Mr Richard Mann, Executive Director, Strategic Projects and Asset Sales, Department of Treasury

Mr John Tasovac, Project Director, Utah Point Asset Sale, Department of Treasury

Ms Felicity Gregory, Senior Assistant State Solicitor, State Solicitors Office

Mr Peter John Andrew Luke Parsons, Partner, Major Capital Projects and Transactions, Deloitte Touche Tohmatsu

13 May 2016

Association of Mining and Exploration Companies, Atlas Iron, Consolidated Minerals and Mineral Resources

Mr Graham Short, National Policy Manger, Association of Mining and Exploration Companies

Mr David Flanagan, Managing Director, Atlas Iron

Mr Jeremy Sinclair, Chief Operating Officer, Atlas Iron

Mr Mark Hancock, Chief Financial Officer and Chief Commercial Officer, Atlas Iron

Mr Paul Muller, Managing Director, Consolidated Minerals

Mr Chris Ellison, Managing Director, Mineral Resources Limited

Mr Simon Rushton, Commercial Manager, Mineral Resources Limited

Mr Nigel Land, General Manager, Finance, Mineral Resources Limited

Brockman Mining Limited

Mr Colin Paterson, Chief Executive Officer and Executive Director

18 May 2016

Pilbara Ports Authority

Mr Roger Johnston, Chief Executive Officer

Mr Nicholas Sarandopoulos, General Manager, Finance and ICT

APPENDIX 2

FUNDAMENTAL LEGISLATIVE SCRUTINY PRINCIPLES

Does the Bill have sufficient regard to the rights and liberties of individuals?

1. Are rights, freedoms or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review?
2. Is the Bill consistent with principles of natural justice?
3. Does the Bill allow the delegation of administrative power only in appropriate cases and to appropriate persons?
4. Does the Bill reverse the onus of proof in criminal proceedings without adequate justification?
5. Does the Bill confer power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer?
6. Does the Bill provide appropriate protection against self-incrimination?
7. Does the Bill adversely affect rights and liberties, or impose obligations, retrospectively?
8. Does the Bill confer immunity from proceeding or prosecution without adequate justification?
9. Does the Bill provide for the compulsory acquisition of property only with fair compensation?
10. Does the Bill have sufficient regard to Aboriginal tradition and Island custom?
11. Is the Bill unambiguous and drafted in a sufficiently clear and precise way?

Does the Bill have sufficient regard to the institution of Parliament?

12. Does the Bill allow the delegation of legislative power only in appropriate cases and to appropriate persons?
13. Does the Bill sufficiently subject the exercise of a proposed delegated legislative power (instrument) to the scrutiny of the Legislative Council?
14. Does the Bill allow or authorise the amendment of an Act only by another Act?
15. Does the Bill affect parliamentary privilege in any manner?
16. In relation to uniform legislation where the interaction between state and federal powers is concerned: Does the scheme provide for the conduct of Commonwealth and State reviews and if so, are they tabled in State Parliament?

APPENDIX 3

KEY TERMS OF THE TERMINAL LEASE

- The Terminal Lease will operate as a concurrent lease. This means that the Terminal Lease will be granted to Terminal Lessee subject to the existing leases and other existing occupancy rights granted by PPA to third parties, with the Terminal Lessee assuming the rights of the landlord under those existing lessees and tenants in place of PPA. The exceptions are the Harriet Point Lease which has been granted pursuant to the *Iron Ore (Mount Goldsworthy Agreement) Act 1964* and the Under Harbour Tunnel BHP Billiton Lease which has been granted pursuant to the *Iron Ore (Mount Newman) Agreement Act 1964*. The Terminal Lease will not be granted over the area the subject of the Harriet Point Lease or the Under Harbour Tunnel BHPB Lease.
- Terminal Lessee will be required to pay costs associated with the leased area as if it were the freehold owner of the leased area. Such costs include rates, taxes and utility costs.
- Terminal Lessee is only permitted to use the leased area for the operation of the Utah Point BHF and the provision of the infrastructure and services. The Terminal Lease will contain specific prohibited activities on the leased area.
- PPA will be responsible for all existing contamination on the lease area and Terminal Lessee will be responsible for all pollution and contamination that occurs during the term of the Terminal Lease.
- Any assets constructed, altered or added to the leased area by Terminal Lessee will become the property of PPA. PPA will also have the option to acquire (for nominal consideration) other assets of Terminal Lessee when the Terminal Lease ends. These provisions have been included to enable PPA to ensure the continued operation of the Utah Point BHF when the Terminal Lease ends.
- Similar to the provision referred to above, if Terminal Lessee acquires a freehold or leasehold interest in any other land that is used in connection with the Utah Point BHF, PPA will have the right to acquire that interest so that the relevant land can continue to be used in connection with the Utah Point BHF when the Terminal Lease ends. If PPA acquires the interest during the term of the Terminal Lease, it will be required to leaseback the relevant land to Terminal Lessee.
- Terminal Lessee will be restricted from granting security interests over its interest in the Terminal Lease and other interests associated with the Utah Point BHF other than in certain circumstances. It is expected that the successful bidder will procure debt finance to assist in financing the transaction. Terminal Lessee will be permitted to grant security interests to the providers of the debt finance subject to satisfying the specified conditions.
- The Terminal Lease will detail the events which, if they occur (and are not cured) will permit PPA to terminate the Terminal Lease.
- The Terminal Lease will include restrictions on the ability of Terminal Lessee to deal with its interests in the Terminal Lease.

[Source: Department of Treasury, 21 June 2016]

APPENDIX 4

KEY TERMS OF THE TERMINAL OPERATING DEED

- TerminalCo will be granted an allocation of capacity and must honour the terms of the existing customer contracts.
- TerminalCo must prepare a Terminal Development Plan, which sets out TerminalCo's strategy for the development and use of the Utah Point BHF during the term of the Terminal Lease. The Terminal Development Plan must be updated periodically. Any development that TerminalCo carries out must be consistent with the Terminal Development Plan. Bidders will be obliged to submit a development plan with their bids, which will become the initial plan for the purposes of the Terminal Operating Deed.
- TerminalCo must comply with all applicable laws, and must prepare (as necessary) and comply with, its own and PPA's plans in respect of Port and Terminal safety, Maritime Safety and the handling of dangerous goods.
- TerminalCo must take out and maintain prescribed insurance policies in respect of the Utah Point BHF. These policies will, as necessary, name PPA and the Terminal Lessee as insured parties.
- The Terminal Operating Deed will include restrictions on the ability of TerminalCo to deal with its interests in the Terminal Operating Deed.
- If the Terminal Lease is terminated, PPA may also terminate the Terminal Operating Deed.
- Financiers will also be able to take security over the Terminal Operating Deed.

[Source: Department of Treasury, 21 June 2016]

APPENDIX 5

KEY FEATURES OF THE PROPOSED UTAH POINT BULK HANDLING FACILITY REGIME

Key features of the proposed Utah Point Bulk Handling Facility regime

General obligations

1. Subject to usual exceptions for efficient operation of the port, the terminal operator must not engage in conduct which unreasonably prevents or hinders a person from accessing services provided by means of port facilities under the terminal operator's ownership or control.
2. Terminal operator must not unfairly differentiate between users in a way that has a material adverse effect on the ability of one or more of the users to compete with other users by imposing different terms and conditions (including in relation to price) upon users of port services. The exceptions to this obligation are:
 - (a) if the different terms reflect the cost or risk of providing access to the user or potential user which is higher than the cost or risk of providing access to other applicants or users; or
 - (b) if the different terms are reasonably justified because of the different circumstances relating to access to the service which are applicable to the terminal operator or the relevant port user(s).

Access

3. The terminal operator must publish on its website information as to how an access seeker may make an access request and the information required. The terminal operator must also provide specified information on request.
4. If the parties cannot agree terms there is the ability for a party to enter into binding arbitration to determine the terms of access other than price.
5. The terminal operator may only initially negotiate with junior miners for capacity at the terminal. A junior miner will be defined as being an entity that is not a major miner (BHPB, Rio Tinto, FMG, Roy Hill or any entity specified by the Minister, a related entity of any of those or any associate of those).
6. If more than one junior miner is seeking access then the terminal operator will deal with the access seekers on a "first come first served" basis provided that the junior miner can demonstrate that it has the requisite financial and technical ability. That is, the access request is a bona fide request.
7. If the terminal operator cannot come to terms with the junior miner within a 6 month period, which may be extended, or there are no junior miners seeking access then the terminal operator may apply to the ERA for approval to negotiate with a non junior miner. The regulations will specify the matters the ERA must take into account in determining whether to grant approval including the price offered to the junior miner.
8. Terminal operator must publish a capacity management policy and has rights to resume capacity where a user is not using capacity and cannot provide a legitimate reason why it is not using capacity. This is to prevent a non junior miner hoarding capacity. The right to resume capacity will be set out in the capacity management policy and terminal operator will be required by the regime to comply with the capacity management policy.
9. The terminal operator must provide an annual compliance report to the regulator setting out details of access seeker requests including the timeframes involved, any requests it refused and the reasons why it refused the requests.
10. The regulator must publish an annual report on access to the terminal. It will publish the report with the report on pricing (see below). The regulator will review the regime every three years initially then every 5 years and make a recommendation to the Minister as to whether a different form of access regulation is required. If the regulator considers the terminal operator has engaged in conduct which unreasonably prevents or hinders a person from accessing services, the regulator may conduct a review of the regime and make a recommendation to the Minister that a different form of access regulation is required. The Minister may amend the regime at any time.

Pricing

11. The proposed pricing regime is intended to apply only to those charges where the terminal operator is the only service provider offering that service (regulated service) or there are otherwise concerns that the terminal operator has market power and may misuse it. Services subject to the pricing regime may be removed or included by the Minister.
12. The initial pricing regime will be a price monitoring regime which will be overseen by an independent regulator. The pricing regime will be set out in regulations. The regulations will require that the regulator must:
 - (a) use monitoring of the price levels of a regulated service as the form of price regulation; and
 - (b) specify the basis on which, or the standard against which, the regulator intends to monitor price levels.
13. The regulator may also impose reporting requirements on the terminal operator.
14. It is expected that current port prices (before any discount is applied) will be the initial baseline. The regulator will monitor price levels of a regulated service against the specified basis to determine whether or not any price or price increase is reasonable and adequately justified and not just a consequence of a misuse of market power. The regulator will use the current port charges (and the revenue and volume which underpin those charges) as a baseline but may also choose to use other methods such as CPI, CPI + 1.5%, comparable port charges, building block methodology or other benchmarks.
15. The regulator must publish an annual report on pricing of regulated services. The regulator will review the regime every three years initially then every 5 years and make a recommendation to the Minister as to whether a different form of price regulation is required.
16. The regulator may also review the regime and make a recommendation to the Minister that a different form of price regulation is required where:
 - (a) the regulator considers the terminal operator has charged a price for a service that the regulator considers to be inconsistent with a price determination the regulator may conduct a review of the regime;
 - (b) if a junior miner which used the facility ceases to use the facility; or
 - (c) the lease or port services agreement is amended.

The Minister may amend the regime at any time.

Matters the regime does not apply to

17. The regime will not apply to existing contracts, any excluded services (such as services that are subject to third party competition) and it will not apply to arrangements the subject of a State Agreement. Where the regime applies, parties are free to contract at whatever terms they agree but the provisions of the regime cannot be excluded by contract.

APPENDIX 6
AUSTRALIAN COMPETITION AND CONSUMER COMMISSION
LETTER, 15 AUGUST 2016

EXECUTIVE OFFICE



15 August 2016

The Hon. Ken Travers MLC
Deputy Chair
Standing Committee on Legislation
Parliament House
GPO Box A11
PERTH WA 6837

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Dear Mr Travers

Pilbara Port Assets (Disposal) Bill 2015

Thank you for your letter dated 23 June 2016 inviting the Australian Competition and Consumer Commission (ACCC) to comment on the proposed regulatory regime surrounding the *Pilbara Port Assets (Disposal) Bill 2015 (the Bill)* and the disposal of the Utah Point Bulk Handling Facility (**Utah Point BHF**) at Port Hedland in Western Australia (**WA**).

The ACCC is pleased to provide its views to assist the Standing Committee on Legislation's (**the Committee's**) inquiry on this matter. As you would likely be aware, the ACCC has been advocating directly to governments and publicly for competition and regulatory issues to be appropriately considered and addressed upfront during the process of privatising government assets. Doing so provides both the potential owner and users of the asset a level of certainty regarding the transaction and how the asset will be regulated into the future and drives efficient outcomes for the long-term interests of Australians.

The attached document sets out the ACCC's views on market structure and regulatory regimes for facilitating pro-competitive arrangements in such asset sales, which the ACCC considers are relevant to the Utah Point BHF. These views have been developed based on the information attached to your letter as well as submissions and other documentation published on the Committee's website.

If you would like to discuss this letter or any issues contained in the attached document, please contact Matthew Schroder, General Manager Infrastructure & Transport - Access & Pricing Branch on (03) 9290 6924 or at matthew.schroder@acc.gov.au.

Yours sincerely

Rod Sims
Chairman

ACCC comments on market structure and regulatory regime that are relevant for the Utah Point BHF

The ACCC considers that the privatisation of government owned assets, if implemented appropriately, can be an effective way to promote efficient outcomes in the interests of users and the wider community.

The economic efficiency benefits will, however, only be realised where there is strong potential for competition or where, in the absence of competition due to monopoly or near monopoly characteristics, there are appropriate structural reforms and/or sufficient regulatory oversight put in place as part of the privatisation process.

In the ACCC's experience, three particular problems can arise where competition and regulatory issues are not properly considered and addressed as part of the privatisation process:

- a) worsening or entrenching a market structure that is not sufficiently competitive, or could yield considerable benefits if it was made more competitive;
- b) selling a monopoly or near monopoly asset to a bidder with existing or potential upstream or downstream interests, without ensuring that appropriate access arrangements will exist; and
- c) selling monopoly or near monopoly assets without sufficient controls on pricing.

Regarding the proposed regulatory arrangements for the Utah Point BHF, the ACCC supports the implementation of a negotiate-arbitrate model regarding non-price terms of access. However, the ACCC considers that to be a more effective regulatory regime, recourse to independent and binding arbitration should be extended to include pricing as price is a key term of access. The ACCC would also prefer for the potential for vertical integration (both at the time of the sale and in the future) to be addressed upfront.

The following sections set out the ACCC's more detailed views on key competition and regulatory issues relevant to the proposed sale of the Utah Point BHF, namely:

- market structure; and
- economic regulation of monopoly or near monopoly infrastructure.

In forming these views the ACCC notes it has reviewed the WA Department of Treasury's submission to the Committee (dated 26 April 2016), which sets out details on what is likely to be included in the Regulations for the Utah Point BHF. However, it should also be noted that the majority of the details on the proposed access and pricing arrangements for this privatisation are to be set out in Regulations, which the ACCC has not seen.

Accordingly, the views in this document should not be taken as a complete and final view on the adequacy of the proposed regime. The ACCC would certainly be happy to engage with the WA government on the specific details of the Regulations when they become available.

Market structure

As privatisation will often drive future market structures, the ACCC considers that privatisation almost always provides an opportunity to maintain or create a competitive market structure for the future. Even if a purchaser of a privatised asset has no upstream or downstream interests at the time of sale, the sale may provide them with incentives to vertically integrate into related markets at a later time.

Importantly, if the privatised owner is or becomes vertically integrated, it will have an incentive to discriminate in favour of its own related entities. In the ACCC's view, behavioural arrangements, such as ring-fencing obligations, to address vertical integration concerns cannot replace full structural separation. This is because the privatised owner and its related entity may seek to circumvent the obligations in order to maximise their combined profit by, for example, allocating shared costs and revenues in ways that advantages its competitive services even within the constraints of an accounting separation regime. Further, compliance with information sharing restrictions and equivalent access obligations can be difficult to monitor and enforce because, in the absence of sufficient transparency about the services the privatised owner provides its related entity, a regulator or competitor may not be able to determine whether equivalent access is being provided.

While the ACCC cautions against imposing unnecessary restrictions on firms' ability to participate in markets, where the sale of an asset is likely to confer enduring market power, the ACCC sees benefit in legislative restrictions on vertical integration. This may involve the exclusion of certain parties who operate up and/or downstream from bidding for the asset during the privatisation process, and the imposition of limits on the vertical integration interests the lessee may have in the future.

In the case of the Utah Point BHF, the ACCC notes that the result of such restrictions would be consistent with the current market structure as the Pilbara Ports Authority does not compete in the upstream (mining) or downstream (export) markets. In this regard the ACCC notes the Victorian Government's decision to restrict stevedores from bidding for the long-term lease of the Port of Melbourne.

Economic regulation

The Utah Point BHF provides an important service for miners and exporters in the Pilbara region. Without sufficient regulatory arrangements being put in place during the privatisation process, the privatised owner will have the incentive and ability to use its market power to raise prices above efficient levels and/or reduce service quality.

The ACCC notes that the appropriate form of economic regulation and the mechanism used to implement the arrangements is not a 'one size fits all' exercise and depends on the type of market and the nature of the competition concerns relevant to the circumstances.

There is a range of possible regulatory tools, including:

- monitoring and information gathering which, although not price regulation, can be a useful tool to provide information to governments, regulators and the wider community about the transitional impact of deregulation and other reforms on price levels in particular industries;
- negotiation and arbitration in relation to price and non-price terms, such as where access is required to a monopoly service in order to compete in an upstream or downstream market; and
- ex-ante (upfront) determination of terms and conditions including price, such as where access is required to a monopoly service, or case-by-case negotiation is impractical.

The ACCC has previously expressed its preference for access and pricing arrangements around monopoly infrastructure to, at a minimum, be based on a publish-negotiate-arbitrate framework.¹ The key features of an effective publish-negotiate-arbitrate regime are:

¹ ACCC, *How did the light handed regulation of monopolies become no regulation?*, Speech by ACCC Chairman Rod Sims, 29 October 2015, <http://www.accc.gov.au/speech/how-did-the-light-handed-regulation-of-monopolies-become-no-regulation>.

- a requirement that the access provider publish its standard terms and conditions (including price) for regulated services;
- a robust negotiation framework to facilitate negotiations between access providers and access seekers over the standard terms, conditions and prices; and
- recourse to arbitration by an independent economic regulator in the event that negotiations fail.

Importantly, such a framework allows for commercial negotiations to take place. In doing so the framework also provides access seekers with a degree of leverage when dealing with the monopoly infrastructure owner/operator through the threat of referring a dispute over prices or other terms of access to binding independent dispute resolution.

Access

The ACCC notes that there are proposed to be overarching obligations on the privatised owner of the Utah Point BHF to negotiate in good faith, to not unreasonably discriminate between users and to not hinder access. The ACCC considers that such obligations are a good starting point and support the general aims of an effective access regime. As previously noted, however, it would be important that these obligations were sufficiently strong in the event that the privatised owner is, or is able to become vertically integrated into upstream or downstream markets.

In relation to the more specific access arrangements for the Utah Point BHF, the ACCC notes the proposal for a publish-negotiate-arbitrate framework, which includes:

- publication obligations requiring the terminal operator to publish and comply with an access policy, capacity management policy as well as a capacity resumption policy to ensure that capacity does not go unutilised; and
- the ability for users to enter into commercial negotiations for access, with recourse to independent and binding arbitration on non-price terms if negotiations fail.

The ACCC welcomes these arrangements. The ACCC also notes that the proposed regulatory regime allows for reviews of the access arrangements by the Regulator and for the relevant Minister to amend the arrangements on access.

The ACCC notes, however, that price is a key term of access. Accordingly, the ACCC is of the view that to be more effective the proposed negotiate-arbitrate model should include recourse to binding independent dispute resolution for both price and non-price terms. In the case of the currently proposed access arrangements for the Utah Point BHF, this would simply mean an extension of the existing proposal to also allow for independent and binding dispute resolution in relation to prices.

Prices

The ACCC notes that the proposed pricing regime for the Utah Point BHF is price monitoring against a specified benchmark (such as the Consumer Price (CPI) Index). The ACCC notes that the proposal also includes scope for reviews by the Regulator and subsequent amendment to the pricing regime by the relevant Minister.

As a general observation, the ACCC notes that appropriate starting price levels are an important consideration in any such benchmarking exercise, particularly the extent to which starting prices reflect efficient costs. A further point of note is that even where starting prices are set at efficient levels, increasing prices in line with a benchmark such as the CPI does not necessarily mean that prices will continue to reflect efficient costs over time. For example, increasing volumes could mean that the average cost of providing services may

actually decrease over time while, at the same time, revenues increase due to both higher volumes and prices. This could essentially result in an increasing gap between costs and revenues and (potentially) monopoly rents.

For the above reasons as well as a general lack of strict enforcement, the ACCC has previously expressed strong concerns regarding the effectiveness of price monitoring to constrain monopoly pricing. While price monitoring is used in some industries to provide additional transparency, without the credible threat of regulatory intervention and/or independent binding arbitration, monitoring alone is unlikely to be an effective deterrent against monopoly pricing.

That is not to say that the ACCC considers that price monitoring as proposed for the Utah Point BHF would not be useful. The ACCC recognises that the proposed price monitoring arrangements, together with the ability for reviews and amendments to the pricing regime, may provide some constraint on pricing and would, at the very least, increase transparency around pricing practices. However, the extent of the constraint would ultimately depend on the timeliness and propensity for change to the regime if concerns are raised, as well as the ongoing appropriateness of the pricing benchmarks. The ACCC also notes that allowing for change of the pricing regime may create a level of uncertainty around the extent and nature of price regulation for both the private owner and the users.

As discussed above, the ACCC's view is that extending the existing proposal for recourse to independent and binding arbitration to include prices would provide a credible constraint on monopoly pricing while still allowing users to commercially negotiate access terms. Indeed, the price monitoring as proposed for the Utah Point BHF would provide a useful starting point for such negotiations.

In the ACCC's view, a negotiate-arbitrate model would provide an effective incentive to deter monopoly pricing. This is also consistent with the ACCC's preference for negotiate-arbitrate models in the absence of a comprehensive ex-ante pricing regime.

Enforcement of regulatory arrangements

Appropriate compliance monitoring and enforcement tools need to be available in relation to the regulatory arrangements, including for both price and non-price aspects.

The ACCC notes that the proposed enforcement tools for the Utah Point BHF will be a combination of oversight by the Regulator, self-regulation and the State through the lease agreement. As a general principle, the ACCC is of the view that access and pricing arrangements, including enforcement options by the Regulator, should be included upfront either in legislation or regulations, which provides transparency around the arrangements.

The ACCC considers that, in the absence of recourse to independent and binding dispute resolution for access seekers, private contractual arrangements between the lessor and lessee of an asset are not an effective way of regulating price or access. This is because any such regulation by contract would require the lessor to be prepared to dedicate sufficient resources to ensure the objectives of the arrangements are met. Further, a contract can be varied at any time with the consent of the parties, and any breaches of the contract may be waived or insufficiently enforced.

As noted above, the ACCC's view is that there should be available recourse to independent and binding arbitration in relation to both price and non-price terms of access. Such an arbitration mechanism would strengthen the discipline on pricing, while the proposed price monitoring arrangements and suite of enforcement tools would provide additional pricing oversight.