Report to the Western Australian Parliament on the Operation and Effectiveness of the Port Authorities Act 1999

Submitted by

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MINISTER FOR TRANSPORT

Prepared by the Department for Planning and Infrastructure

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1.0 Executive Summary

The port authorities are part of a sector of the economy known as Government Trading Enterprises or GTEs. Although, they are government owned entities, the port authorities operate as separate body corporates, each with their own board of directors, appointed by the responsible Minister. The port authorities' principle activities are the provision and maintenance of port infrastructure, the facilitation of trade through the port and in some cases the direct provision of port services. They undertake these tasks on a commercial basis by recovering their costs, making and reinvesting their modest profits in the port authority, to enhance their ongoing sustainability.

Port authorities are governed in accordance with the *Port Authorities Act 1999* (the Act). This is an Act about port authorities, their functions, the areas that they are to control and manage, the way in which they are to operate and related matters. Prior to 1999, each port authority had its own governing Act and the introduction of these Acts ranged from the year 1902 to 1985.

The new Act modernised port governance and brought all port authorities under one Act. It also enshrined in statute that one of the principle roles of port authorities was to facilitate trade through the ports, with this being undertaken in a commercial and efficient manner. The Act also incorporated aspects of the National Competition Policy reforms introduced in the mid 1990s and was modelled on the then recently introduced Acts for the State's corporatised water and electricity agencies.

Section 144 of the Act requires the responsible Minister, to undertake a review of the operation and effectiveness of the Act, after five years of its commencement. A report, based on the review, is required to be tabled before both Houses of Parliament.

A Steering Committee was commissioned to conduct a review of the Act. The Steering Committee undertook a comprehensive review of the provisions of the Act, in the process also taking consideration of 19 submissions from port authorities, state and local government agencies and port users (including port user associations). The submissions covered 104 issues. Each was given full consideration by the Steering Committee, albeit not all were within the review's terms of reference. Those issues outside the terms of reference comprised policy rather than legislative issues (relating to dividend, tax and borrowing levels) and others relating to environmental matters, which are covered under environmental legislation. The Steering Committee itself also raised a further 9 issues for consideration.

This report presents the Steering Committee's recommendations which I have endorsed, and also details the review methodology, the Steering Committee's deliberations and a current assessment of the performance and effectiveness of the Act.

The Steering Committee's deliberations occurred and concluded prior to the issues arising at Esperance. Consequently, the Steering Committee has made no recommendations with respect to the lead and nickel contamination issues at Esperance. It is considered inappropriate to reopen the review, but any amendments resulting from the Esperance experience and related enquiry can be addressed as a separate matter and possibly merged with any amendments from this review during drafting by Parliamentary Counsel, should that prove to be practical from a timing perspective.

The Act has been the subject of minor amendment, as a consequence of the introduction of the *Planning and Development Act 2005* and the *Financial Management Act 2006*, during the review period. The Steering Committee has considered the relevance of respondents' submissions with respect to the latest amendments to the Act and those pending at the time.

The Act was also amended in 2003, to place within the Act, a number of provisions previously covered in regulations, in response to recommendations made by a Legislative Council Steering Committee.

Since the introduction of the Act into legislation on 14 August 1999, it has and continues to function well. The Act has been held up as a prime example of effective State legislation and this is reflected by the limited number of submissions to the review.

The Steering Committee found no significant deficiency within the Act. A total of eleven recommendations have been made which require amendments to the Act. These amendments, essentially to improve clarity, commercial administration and operations, will be submitted for consideration by Cabinet at the earliest opportunity.

I present this report to the House in terms of the requirements of section 144 of the Act.

SIMON O'BRIEN MLC
MINISTER FOR TRANSPORT

2.0 List of Abbreviations Used in this Report

AMSA	Australian Marine Safety Authority
BCC	Bunbury City Council
CEO	Chief Executive Officer
COAG	Council of Australian Governments
CSO	Community Service Obligation
Dampier PA	Dampier Port Authority
DoE	Department of Environment
DoIR	Department of Industry and Resources
DPC	Department of Premier and Cabinet
DPI	Department for Planning and Infrastructure
DTF	Department of Treasury and Finance
Fremantle PA	Fremantle Port Authority (trading as Fremantle Ports)
GPUG	Geraldton Port Users Group Inc
GTE	Government Trading Enterprise
MEPU	Marine Environment Protection Unit
OSCP	Oil Spill Contingency Plans
Port Hedland PA	Port Hedland Port Authority
SAL	Shipping Australia Ltd
SCI	Statement of Corporate Intent
SDP	Strategic Development Plan
WAPC	Western Australian Planning Commission
WATC	Western Australian Treasury Corporation
WASFC	Western Australian Sea Freight Council

3.0 Terms of Reference

The review's terms of reference were to consider the operation and effectiveness of the Act.

Some respondents raised policy matters relating to Government's ownership of the ports, or port management issues, that did not relate to the operation and effectiveness of the Act. It was outside the scope of this review for the Steering Committee to make recommendations on such issues.

4.0 Membership of the Steering Committee

Chair

John Morris
Manager - Maritime Policy
Department for Planning and Infrastructure

Members

Bryant Roberts
Director - Regional Passenger Transport & Maritime Policy
Department for Planning and Infrastructure

Bob Pearce
Chairman
Port Operations Task Force

Alec Meyer
General Manager - Commercial Operations
Fremantle Ports

Gary Crockford
Chief Executive Officer
Bunbury Port Authority

Chris Payne
Assistant Director - Agency Resources
Department of Treasury and Finance

Peter West
Chairman
Dampier Port Authority

Katerina Businoska
Principal Policy Adviser - Ports and Rail Freight
Office of the Minister for Planning and Infrastructure

Colin Stewart
Chief Executive Officer
Esperance Port Authority

5.0 Introduction

The Act became effective on 14 August 1999. It was amended in 2003 to place within the Act proper, a number of provisions previously covered in regulations, in response to recommendations made by a Legislative Council Steering Committee. Otherwise the Act has been the subject of minor amendments, including more recently as a consequence of the introduction of the *Planning and Development Act 2005* and the *Financial Management Act 2006*.

The previous Minister established a Steering Committee in December 2005, chaired by the Department for Planning and Infrastructure (DPI) and comprising representatives from DPI, the Department of Treasury and Finance (DTF), the Port Operations Task Force, the Minister's Office and four representatives from Port Authority Boards and management, to oversee a review of the Act in accordance with Section 144. The Steering Committee was charged with preparing a report on the review, for the Minister's consideration. Throughout the conduct of the review and the preparation of its report, the Steering Committee was assisted by staff from the Maritime Policy Unit of DPI.

The submission period was open for six weeks from 10 February to 24 March 2006 inclusive. The Steering Committee undertook the following actions to inform key stakeholders and encourage the lodgement of submissions.

- Publication of newspaper advertisements in the West Australian on February 10 and March 2, 2006, and Lloyds List Daily Commercial News (national publication) on February 23 and March 9, 2006;
- A direct mail out to 689 key stakeholders within the State and nationally, identified by the port authorities and DPI; and
- Provision of background information via the internet on the websites of the Department for Planning and Infrastructure, and the Office of Citizens and Civics within the Department of the Premier and Cabinet.

A copy of one of the press advertisements is provided in Appendix 1. A copy of the Background Paper referred to in the press advertisements to assist potential respondents is provided in Appendix 2.

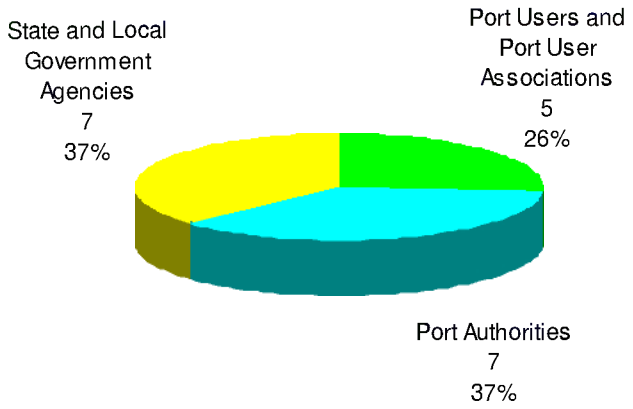
In accordance with the invitation to make submissions to the review, where the respondent requested that its name and/or submission remain confidential, the Steering Committee has abided by not disclosing this information in this report.

The Steering Committee received 19 separate, external responses to the review, compared to the direct mail out of almost 700 letters to key stakeholders in the State and nationally. Of these, three responses did not address the operation and effectiveness of the Act in accordance with the review's terms of reference. The 104 issues raised by the respondents covered a wide variety of matters for consideration by the Steering Committee, albeit not all were within the review's terms of reference. The number and proportion of responses by respondent category is shown in Figure 1.

Apart from these submissions, the Steering Committee itself also raised 9 matters for consideration as part of the review. Despite making the general public aware of the review by placement of

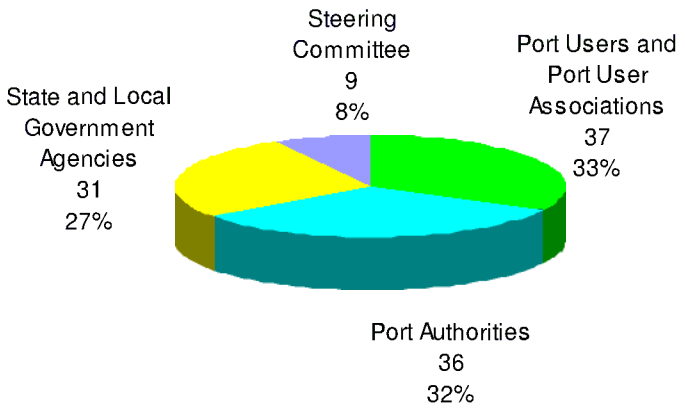
advertisements in the West Australian Newspaper and the Office of Citizens and Civics web site, unfortunately, but not surprisingly, no submissions were received from the general public.

Figure 1. The Number and Proportion of Responses to the Review by Respondent Category



The number and proportion of issues raised by respondent category is shown in Figure 2.

Figure 2. The Number and Proportion of Issues Considered by the Steering Committee by Respondent Category



Port Users and Port User Associations commented mainly on:-

- The level of taxes and dividends paid by port authorities to Government, which are policy issues and outside the terms of reference of this review;
- The necessity for port authorities to consult with port users to ensure future port development was consistent with port user requirements;

- The diversity in the structure of port charges across the port authorities;
- The potential for political interference in a port authority's functions and operations to the detriment of port users, and
- The adverse impact of heritage legislation on efficient port operations.

Submissions received from the port authorities focussed on:-

- A port authority's protection from potential liability arising from its undertaking of port operations, including where port services have been contracted out to third parties;
- Port functions and powers;
- Exemptions from application to State legislation particularly on matters of port development; and
- The adverse impact of heritage legislation on efficient port operations.

Submissions from state and local government agencies were mostly concerned with:-

- The role of government and the extent to which port authorities might be subject to the application of whole of government policies;
- Port authorities incorporating, applying and reporting on their performance with respect to sustainability principles;
- Increasing port authority accountability with respect to environmental matters;
- Port authority commercial and non-commercial objectives and how these were reconciled; and
- Port development and the extent to which development might be subject to review and approval by State planning and environmental agencies.

The Steering Committee considered each of the 113 issues raised by respondents and the extent to which these could or should be dealt with by legislative amendment. Upon analysis it became clear that many of the issues raised related to either matters of Government policy for determination by Government as the owner of the ports, or matters for the consideration of port management, and as such did not fall within the review's terms of reference which was, "to consider the operation and effectiveness of the Act."

The Steering Committee's recommendations are detailed in Section 6 and the Steering Committee's deliberations of the issues raised by respondents are detailed in Section 7 to this report. The Steering Committee's recommendations and decisions are presented in blue type and boxed text.

6.0 Recommendations

This Section of the report details the Steering Committee's recommendations for amendments to the *Port Authorities Act 1999*, resulting from its review of the Act. The recommendations are presented in blue type and boxed text.

To assist in understanding the purpose and effect of the recommendations, the basis for the original inclusion of the relevant section or clause in the Act is provided. References are also included linking the recommendations to the Steering Committee's deliberations of the matters within Section 7 of this report.

6.1 Interests in Vested Land and Transactions Requiring Ministerial Approval

Section 28 empowers a port authority to grant an easement, licence or lease for a term up to 50 years (including any permitted extensions), after first gaining the approval of the Minister. The Minister's approval is not required if certain prescribed criteria are met. Current regulations provide that the Minister's approval is not required for easement, leases and licences of less than five years duration.

Section 40 provides that a port authority must obtain the approval of the Minister with concurrence from the Treasurer before it or a subsidiary enters into any transaction where a port authority's liability exceeds the prescribed amount. Current regulations stipulate the prescribed amount as being 20% or more of a port authority's total fixed assets, as presented in the last audit of its financial statements.

Port authorities have management responsibility for Crown land vested in the port authority. Their role includes managing the prime and often limited land, necessary for future strategic development of the port as well as the current needs of port users and businesses servicing the maritime and shipping sector.

As GTEs, the port authorities operate within the commercial sector and are required to be responsive to changes in the economy and market place and the needs of port users and potential customers. An outcome of the interaction between a port authority and the market can take the form of contracts, agreements, leases and licences. The intent of Section 40 is to protect port authorities from potentially adverse financial outcomes flowing from these agreements.

However, port authorities are experiencing delays non existent in the private sector, before being able to formally execute such arrangements. The delays have lead to renegotiation and cost shifting by proponents, resulting in missed opportunities to secure the best financial return for the port authority.

Cognizant of the accountability requirement to ensure that any contracts, agreements, leases and licences captured by Section 28 and 40 of the Act are consistent with Government policy and for the future benefit of the port, the Steering Committee has recommended that port authorities be afforded the ability to enter into contracts, conditional upon Ministerial approval. This will enable signatories to be locked into an agreement in a timely manner with no possibility of cost shifting or renegotiation, whilst still giving the Minister full control.

Recommendation 1

The Steering Committee recommends that the Act be amended to allow port authorities to enter into contracts (Section 40), and easements, leases or licences in respect of vested land (Section 28), subject to the instruments being conditional upon Ministerial approval being (subsequently) obtained.

Reference: Sections 7.9 and 7.22

6.2 Application of the Planning and Development Act 2005

In general terms it is a requirement of Section 136 of the *Planning and Development Act 2005*, that any lease or licence for the use or occupation of land for any term exceeding twenty years requires the approval of the Western Australian Planning Commission (WAPC) where such land is not dealt with as a lot or lots.

The application of this section raises some ambiguity relating to the port authorities' leasing powers. Potentially it could restrict the capacity of the port authorities to lease land and maximise the revenue from this source. Its application is also contrary to the intent of the Act which was to provide the port authorities with greater rather than less commercial freedom.

Recommendation 2

The Steering Committee recommends the insertion of a new subclause Section 28(6) into the Act, to negate the need for a port authority to get the approval of the Western Australian Planning Commission under Section 136 of the *Planning and Development Act 2005*, to any lease or licences entered into by the port authority.

Reference: Section 7.7.3

6.3 Application of the Heritage of Western Australia Act 1990

Section 29 provides for the Minister to have the final decision on any dispute arising over port land between a port authority and any department, instrumentality or agency of the State.

The benefits of preserving the State's heritage for future generations of Western Australians is recognised. However, heritage listings should consider the State's Sustainability Strategy and not impose unnecessary economic, social and environmental costs on port authorities. The heritage process can hinder the port authorities' ability to operate commercially, as required by the Act, for the longer term benefit of the port and its users.

Recommendation 3

The Steering Committee recommends the insertion of a new provision (Section 29A) into the Act so that the responsible Minister's concurrence is required to any application of the *Heritage of Western Australia Act 1990* that impedes the operational needs or commercial considerations of a port authority and the relevant port.

Reference: Section 7.7.4

6.4 Port Functions

Section 30 details the prime functions and responsibilities of a port authority which are facilitation of trade through the port, controlling activities in or associated with the operation of the port, the safety and efficiency of the port's operations and maintenance of port property.

Over recent years the issue of port security has received greater prominence by both Government and port authority management. The Steering Committee recognised that although the function of port security is predominantly addressed by Commonwealth security laws, there is benefit to enhance and broaden the description of port authority functions detailed at Section 30 of the Act by including reference to security.

Recommendation 4

The Steering Committee recommends the Act be amended to incorporate a definition of the term 'security' and to include security within the scope of a port authority's functions.

Reference: Section 7.14

The significant contribution that ports provide in the movement of trade and consequently, the economic prosperity of the State should not be underestimated. For the State to effectively participate in the world economy and to remain internationally competitive, it is of paramount importance that ports be able to operate and function 24 hours a day and seven days a week.

Recommendation 5

The Steering Committee recommends the Act be amended to incorporate a 24 hour day, 7 day a week functional requirement for the port authorities.

Reference: Section 7.11

6.5 Hedging Transactions

Section 87 provides that a port authority may (for the purpose of managing, limiting or reducing perceived risks or costs), in connection with the exercise of its borrowing powers under Section 85, enter into a wide range of hedging transactions, futures contracts and other transactions.

Capital expenditure incurred by port authorities can be significant, particularly in the development of new berths, the dredging of channels and land reclamation, with pricing often based on a foreign currency. To better protect themselves from adverse movements in foreign currency exchange rates, port authorities should additionally be permitted to undertake foreign currency hedging of capital expenditure in consultation with the Western Australian Treasury Corporation (WATC).

Recommendation 6

The Steering Committee recommends the Act be amended so that Section 87 allows port authorities to identify, measure, consider and manage foreign exchange risks, subject to consultation with the Western Australian Treasury Corporation prior to undertaking any hedging activity and monitoring any resultant ongoing foreign exchange risk.

Reference: Section 7.33

6.6 Pilotage Charges

Section 97 provides for compulsory pilotage in ports, except where regulations provide otherwise. A vessel must only be moved within a port under the control of an approved pilot. The State and a port authority are not liable for any loss or damage that may result from a vessel being moved whilst not under the control of an approved pilot. Charges for pilotage services at the port authority ports are detailed in Part 3, Division 5 of the *Port Authorities Regulations 2001* (the Regulations).

Section 100 provides that neither the State, port authority, approved pilot or employer is personally liable for any damage resulting from an act or omission in the navigation of a vessel by an approved pilot.

The charges set for the provision of pilotage services reflect the cost to the port authorities of providing the service plus a small profit margin. Apart from the labour costs, pilotage costs also include the maintenance or hire of a pilot boat and/or helicopter (at the port of Port Hedland) as well as stand-by costs 24 hours a day, seven days per week.

Pilotage fees are required under Section 96 to be prescribed in regulation, unless pilotage services are provided under licence. Changes in pilotage charges or the structure of pilotage fees require the approval of the Minister, regulatory amendments drafted by the Parliamentary Counsels Office, approval of the Governor in Executive Council and publication by the Government Printer in the Government Gazette. Any increase in pilotage costs is borne by the port authority until the new charges are gazetted. By contrast, charges for other port services such as wharfage, berthage, tonnage, mooring and stevedoring are not prescribed in regulation. To enable the port authorities to efficiently respond to changes in the market, it is proposed that pilotage charges be removed from prescription in regulation.

However, the removal of pilotage charges from the regulations could potentially have consequences in terms of the nature of the relationship between the port authorities and port users who utilise pilotage services and this in turn could give rise to potential contractual liabilities on behalf of port authorities, for the conduct of compulsory pilots. These potential liabilities could be overcome by the amendment of the immunity and indemnity provisions in the Act or by the insertion of a new immunity provision into the Act.

Recommendation 7

The Steering Committee recommends the Act be amended so that pilotage fees and charges be removed from prescription in regulation. This requires deletion of Section 96 (7)(a) and amendment to strengthen Section 100 of the Act (in respect of port authority immunity).

Reference: Section 7.38

6.7 Strengthening of Immunity and Protection from Liability

Section 113 provides for the owner or master of a vessel to be answerable for damages to any port facility or property. The damages recoverable are to be based on the actual cost of repairing or replacing the damaged facility (without taking into account betterment or depreciation) and should take into account any economic loss suffered by the port authority.

In the process of the review, the Steering Committee had regard to cases in South Australia (2000) and New South Wales (2002), where vessels under pilotage collided with and caused structural damage to berths and other port infrastructure and the resulting legal claims pursued by the respective shipowners. While both claims and subsequent appeals were unsuccessful, the removal of pilotage charges from regulation could result in contractual relationships between the port authority and shipowner. It is therefore considered beneficial to strengthen a port authority's immunity in this regard.

Recommendation 8

The Steering Committee recommends that the Act be amended so that Section 113 strengthens a port authority's immunity from any contractual claim by shipowners against the port authority.

Reference: Section 7.40

Sections 114B to 114E inclusive, were inserted in December 2003 to replace regulations existing at the time. Port authorities being wholly government owned, provide essential infrastructure and services for the benefit of the State community. The immunities, indemnities and limitations of liability are provided in order to protect the port authorities in the public interest, by preserving the long term viability of port facilities and protecting the substantial investment of public money in port infrastructure.

Section 114B, *Immunity from liability for damage to vessels*, provides a port authority protection from liability for any loss or damage caused to a vessel in port. This includes damage resulting from

the Master of a vessel complying with a direction given in good faith by a harbour master or a staff member of the port authority. Additionally, a port authority will not be liable for damage that results from a defect in mooring, anchorage or berth, or other infrastructure provided by the port authority. Users of port facilities have recourse to insurance for any loss incurred.

Section 114C, *Immunity from liability for damaged goods*, protects a port authority from liability for any loss or damage caused to goods loaded or unloaded from a vessel by a person other than the port authority. The port authority is not liable for any loss or damage caused to any such goods, by virtue of attempting to provide temporary cover or protection for the goods. The handling of goods is generally undertaken by private enterprise stevedores who should be the primary target of any claims for compensation and who have recourse to insurance. Similarly, Section 114D, *Immunity from liability for delay in delivery of goods*, protects a port authority from liability for any loss resulting from or relating to a delay in the delivery of goods loaded or unloaded from a vessel in the port.

Section 114E relates to the, *Immunity from liability for certain events and actions*. Under Section 114E (1), a port authority will not be liable for any loss or damage resulting from an event outside the control of the port authority. The immunity relates to matters excluded by most contracts of insurance, such as an act of God, an act of war, etc. The situation is akin to private enterprise offering some services on a without liability/recourse basis.

Section 12 of the Act, enables the Minister to delegate power to a port authority to respond to a spill of oil or noxious liquid substance outside of port waters but within State waters. Where the Minister so delegates, under Section 114E (2), a port authority will not be liable for loss or damage resulting from any action taken or caused by the port authority when responding to such spills. This was a new provision at the time, necessary to enable port authorities to act on behalf of the Minister outside of port waters. In the absence of an indemnity, the port authorities would be expected to take a commercial decision (in terms of their legislated duty to act in a commercial manner) and not incur the liability by acting for the Minister. In this instance the port authorities are acting as the agent of the Minister, who still retains any liability for actions of the port authorities.

In the process of the review, the Steering Committee was made aware of situations where port users and potential port customers have sought to have a port authority "contract out" of its statutory immunities. Statutory immunities are provided for port authorities in the public interest, that is, in order to safeguard the Government and the interest of tax payers and it is therefore inappropriate for individual port authorities to contract out of relevant immunities.

Recommendation 9

The Steering Committee recommends that Section 114 be amended to prevent the port authorities from overriding the provisions of the Act via contracts, particularly with respect to immunities, indemnities or limitations of liability.

Reference: Section 7.42.3

Port authorities are largely restricted in their supply of land required for port purposes. It is the task of port authority management to generate the most optimal use of the land having regard to future port development. In this regard port authority management also gives consideration to the location

and operations of port users and normally requires lease agreements to incorporate a clause where the lessee convents amongst other things not to cause a nuisance or pollution that would adversely impact other port users and the normal operations of the port.

Despite these efforts, the potential exists for customer versus customer issues and product versus product problems arising with the port authority being held liable, for example, in the cross contamination of products. For this reason it is proposed to strengthen the port authorities' immunity and limitation of liability by the insertion of a new provision in the Act.

Recommendation 10

The Steering Committee recommends the insertion of a new provision (Section 114F) into the Act to protect port authorities from the type of claims arising from a conflict between the activities of different port users within a port or the uses made by different port users of facilities within a port.

Reference: Section 7.42.4

6.8 Dampier Port Authority Quorum

Schedule 6 - Division 1 details provisions unique to Dampier Port Authority (Dampier PA). These provisions relate to existing State Agreements and critically affect the establishment, board membership structure and statutory operation of the port authority. It contains special provisions for the membership and operation of the Dampier PA Board, duties of companies and joint venturers and pilotage service agreements. It makes provision for all rights and obligations, contained in the specified State Agreements prior to inception of the Act, to be maintained.

Currently Schedule 6, Clause 1.7 requires one of the two State Agreement company/joint venture representatives to be present in order for a quorum to be properly constituted. This clause prevents the Dampier PA convening a Board meeting of any sort without at least one of the State Agreement company representatives being in attendance. The Dampier PA has the capacity to have a seven member board and the removal of this quorum requirement will bring the Dampier PA into line with that of Port Hedland Port Authority where the number of directors equal to at least half the number of directors in office constitutes a quorum with no requirement for one of the State Agreement company representatives to be present for a quorum to exist.

Recommendation 11

The Steering Committee recommends the Act be amended to remove from Clause 1.7 of Schedule 6 – Division 1, the need that either of the company or joint venturer appointees be present and that instead the number of directors equal to at least half the number of directors in office constitute a quorum for Dampier PA Board meetings.

Reference: Section 7.55

7.0 Issues Considered by the Steering Committee

References to the Act, and Regulations, as identified in this section, are to the *Port Authorities Act 1999* and the *Port Authorities Regulations 2001* respectively, unless otherwise stated. The Steering Committee's determinations are presented in blue type and boxed text.

7.1 State Owned Companies Act

The Department of Premier and Cabinet (DPC) suggested the Act be retained as the umbrella legislative structure for the port authorities unless and until replaced by a State Owned Companies Act.

The Steering Committee acknowledged the DPC's comment. The Steering Committee has not contemplated any change in this regard.

7.2 Latest Commercial Initiatives

The commercial elements within the Act were modeled on those contained in the *Electricity Corporation Act 1994* and the *Water Corporation Act 1995* existing at the time of the Act's development. The Steering Committee, sought legal advice with regard to commercial initiatives that may have been incorporated into other legislation since this time that required insertion in the Act.

The Steering Committee noted the legal advice that no new commercial initiatives had been incorporated into the Acts of other commercialised agencies that necessitated consideration as part of this review.

7.3 Definitions

7.3.1 Major initiative

Independent legal advice provided to the Fremantle Port Authority (Fremantle PA) suggested that in the interest of providing certainty, the Act should include a definition of the term, "major initiative" as it relates to Section 43.

The Steering Committee determined that the term, major initiative, was deliberately kept flexible otherwise it would inhibit port authority discretion and resolved that the proposal is not supported.

7.3.2 Licence

Under the provisions of Section 35(4) of the Act, a port authority is obliged to obtain the Minister's approval before it issues a licence giving a person an exclusive right to provide port services of a particular kind. Independent legal advice forwarded to Fremantle PA suggested that because the word *"licence"* is not defined in the Act it may therefore be subject to interpretation.

The Steering Committee determined that in Section 35(4) of the Act "licence" refers to a licence regime for port services and it was of the view that the insertion of a definition for "licence" was not required.

7.4 Governance

It was suggested that the Act should encompass and recognise the role of the Government as the ports' owner in the overall structure of a port authority's governance arrangements.

The Steering Committee believes there is sufficient recognition of this fact within the Act including dividend and borrowing controls, strategic control via Statements of Corporate Intent (SCI) and Strategic Development Plans (SDPs) and provisions for Ministerial directions.

DPC noted that there was no provision in the Act directly providing for the application of general government and whole-of-government policies or administrative instructions to port authorities. It considered that as state-owned companies utilising public resources, port authorities should comply with whole-of-government policies in the same way as all other government agencies. It considered the application of such polices by means of negotiation through the SCI and SDP or by ministerial direction, which must be in writing and must be tabled in both houses of Parliament, as too cumbersome.

The DPC advised, in the absence of a State Owned Companies Act, to give effect to whole-of-government policies across state-owned companies, consideration could be given to adopting a provision in the Act similar to section 28 of the *Commonwealth Authorities and Companies Act 1997*, in order to give effect to the application of whole-of-government policies to port authorities.

The Steering Committee was of the view that the *Commonwealth Authorities and Companies Act 1997*, was the only Act providing the responsible Minister with power to instruct Board members / directors. Boards have a responsibility to focus on commercial pursuits and not get caught up in administrative red-tape. Hence, the Act enables the Minister to issue a direction in writing to a Board and that direction is to be tabled in Parliament (Sections 71 and 72). Port authority boards themselves determine what instructions to accept knowing they are subject to the *Statutory Corporations (Liability of Director's) Act 1996*. In any event, the Minister has and does communicate frequently with port authority Boards.

The amendment proposed by the DPC was considered unnecessary, would introduce undue complexity and would de-commercialise the port authorities by requiring compliance with policies governing all central government agencies.

7.5 Consultation with Port Users and the Composition of Port Authority Boards

Shipping Australia Ltd (SAL) suggested that the Act be amended to incorporate a provision requiring port authorities to consult with port users so as to better promote and market the port and also to ensure correct decisions are made with respect to the development of appropriate future port infrastructure.

The Steering Committee considered that this was a matter of policy for the Government as the owner and for port authority management to determine and was not relevant to the review of the Act under its terms of reference.

The Geraldton Port Users Group Inc (GPUG), noted there was no current requirement within the Act for port authority management to consult with importers, exporters and key service providers (i.e. port users). It suggested that Section 7 of the Act be amended so that one member of the board is to be a port user and that the following definitions also be inserted,

> "Port user shall be an executive member of an Importer, Exporter or Ship Owners Representative-Agent regularly trading through the port and being a member of a Port Users Group or Port Users Liaison Group recognised in the port.
>
> Port Users Group or Port Users Liaison Group shall comprise Importers, Exporters, Ship Owners Representatives-Agent and all service providers including terminal operators, stevedores, towage operators, labour providers."

The Steering Committee was of the opinion that the Minister's discretion to select and appoint persons to a port authority board should be based on a persons' potential application of their knowledge and expertise to the commercial management of a port authority. It believes this aspect should not be fettered by requiring that a potential board member be a representative of any particular group, including a port user group.

By comparison, the DPC noted that Section 7 of the Act is sufficiently general in its provision for the selection and appointment of board members. It accords with the benchmark set by the Auditor General in the 1998 report Public Sector Boards, which recommended that legislation governing the establishment of boards 'should ensure that membership is on the basis of relevant expertise and experience rather than on representational basis.' This helps to ensure that sectoral interests in the boardroom do not override the principal objectives of port authorities. The DPC considered Section 7 did not warrant any amendment.

The Steering Committee noted the DPC's comment that it recommended no change to the existing provision regarding the appointment of port authority board members.

7.6 Conflict of Interest and Voting by Interested Directors

A view was expressed that, the Act needs to be clearer regarding the accountability and monitoring arrangements of port authority boards. It was suggested that Section 11, *Conflict of Interest*, should be reviewed to address the potential conflict of interest of directors who are both an employee of the private firm using the port facilities on a commercial basis and a board member. Schedule 2 Clause 8, *Voting by Interested Directors*, should also be expanded to include a clause on board members who may have a "commercial interest" in the matters being voted on.

The Steering Committee considered that since the introduction of the Act, board members have been diligent in declaring their interests under Section 12 *Disclosure of Material Personal Interests*. The Steering Committee considered the term "material personal interest" to mean the same as "commercial interest" and that the *Statutory Corporations (Liability of Directors) Act 1996* would apply to board members, negating any need to amend the Act.

7.7 References to Other State Legislation

7.7.1 Powers of Ports under Port Authorities Act to Prevail over other Legislation

Independent legal advice obtained by Fremantle PA considered that the powers and rights of a port authority under the Act should prevail and therefore the Act should be amended to state that where there is any dispute between the Act and any other legislation, the Minister charged with the Act's interpretation of that legislation should prevail.

The Steering Committee resolved that the proposal is not supported.

7.7.2 Land resumption powers of the *Land Administration Act 1997*

In general terms, the property of a port authority includes Crown land vested in the port, (including seabed and shores), navigation aids, improvements on vested land acquired on the termination of leases and any real or personal property acquired by a port authority or vested in the port authority by the Governor. Under Section 26 of the Act, the Governor may order the withdrawal of such property and the port authority is entitled to compensation for the depreciated value of any improvements thereon.

Independent legal advice received by Fremantle PA suggested that a port authority may not be adequately compensated if land removed from the port authority was intended for the future operations of the port and therefore any resumption provisions described in the *Land Administration Act 1997* should not apply.

The Steering Committee considered there was no basis for supporting such a proposal.

7.7.3 *Town Planning and Development Act 1928 and Local Government Act 1995*

A port authority requested that the review consider resolving the uncertainty between the interaction of the Act and town planning legislation and schemes. The port authority obtained the following legal opinion on this matter.

Section 38 of the Act provides an exemption from town planning controls for some land uses and development on land within a Port:

For the purposes of port works and port facilities —

(a) section 32 of the *Town Planning and Development Act 1928* (now Section 6 of the *Planning and Development Act 2005*); and
(b) section 373(3) of the *Local Government (Miscellaneous Provisions) Act 1960,*
apply to a port authority as if it were an agency of the Crown in right of the State.

The effect of this provision is that, to the extent that development on port land can be properly characterised as 'port works' or 'port facilities', and to the extent that it is being carried out by a 'port authority' or its lessee, the development will be exempt from planning approval requirements.

The legal opinion suggested the existing definitions of 'port works' and 'port facilities' are deficient to the extent that it has the potential to adversely affect a port authority's ability to regulate land uses within the port efficiently and equitably. The situation could be further complicated through application of local government regional schemes.

The legal advice proposed that the uncertainty could be resolved by way of a simple amendment to Section 38 of the Act, expanding it to include all land uses within the port. The effect of the proposed amendment would not allow port authorities unlimited power to allow any land uses on port land and that developments on port land would still need to be consistent with the purpose, design and intent of any relevant town planning scheme and need to consult with responsible authorities.

The Steering Committee resolved that a port authority's compliance with the Section 32 of the *Town Planning and Development Act 1928* (now Section 6 of the *Planning and Development Act 2005*) and Section 373 of the *Local Government (Miscellaneous Provisions) Act 1960* remain unchanged.

In general terms, Section 20 of the former *Town Planning and Development Act 1928*, required that any lease or licence for the use or occupation of land for any term exceeding ten years required the approval of the Western Australian Planning Commission (WAPC) where such land is not dealt with as a lot or lots. Independent legal advice received by Fremantle PA suggested the Act should be amended so that there is no obligation on port authorities to seek WAPC approval to a lease or licence granted by a port authority. Port Hedland PA similarly agreed with this proposal.

Since the preparation of this advice, the *Town Planning and Development Act 1928* has been replaced with the *Planning and Development Act 2005* and the relevant provision is now Section 136. Under the new provisions, WAPC approval is required for leases or licences of a term exceeding twenty years.

The Steering Committee agreed with the proposal to remove the WAPC's approval from any lease or licence entered into by a port authority of any duration. The Steering Committee resolved that a new subclause (6) be inserted into the Act at Section 28 to the effect that, "a port authority is not required to get the approval of the WAPC under Section 136 of the *Planning and Development Act 2005* to any lease or licences entered into by the port authority.

The suggestion was made that the Act and the *Local Government Act 1995* be amended so that there is no obligation for either a port authority, or a port authority's lessees or licensees, to seek a

building licence (provided that the port authority confirms the nature and structure of the constructed building).

The Steering Committee considered there was no basis for supporting such a proposal.

7.7.4 *Heritage of Western Australia Act 1990*

Fremantle PA believes the Act needs to be amended to address the adverse commercial impact caused by heritage decisions that are made with insufficient knowledge of the broader implications for a port.

Under the *Heritage of Western Australia Act 1990* part of the Inner Harbour of the Port of Fremantle (the west end of Victoria Quay) is interim listed on the State Register of Heritage Places. This listing covers both land and harbour waters. This means that all development, as defined in the *Town Planning and Development Act 1928* (since replaced by the *Planning and Development Act 2005*), must be referred to the Heritage Council of WA prior to any works proceeding. Examples of the type of works include: dredging, maintaining berths, repairing sea walls and internal office fit outs. This referral process can often take in excess of 4-6 weeks. With Heritage Council of WA officers often making site inspections, there is the potential for these approval times to be extended for regional ports.

It is the view of Fremantle PA, that the imposition of Heritage listings under existing legislation are performed without regard to the adverse impacts on economic, social and environmental costs borne by the agency. It is also considered that such decisions are inconsistent with the principles underlying the State's Sustainability Strategy and the intent for the port authorities to operate commercially under the Act.

The Steering Committee resolved that it supported Fremantle PA's claim that heritage issues should not over-ride or hinder a port authority's operations.

The Western Australian Sea Freight Council (WASFC) raised heritage issues (similar to that of Fremantle PA). Specifically, the Council suggested that :

- ports should retain their role as primary decision-making authorities within port areas;
- waters and seabeds within port authority boundaries should be specifically excluded from heritage legislation;
- ports should be given the opportunity to develop heritage plans on a precinct basis that precludes the need for further referral to the heritage authorities once approved; and
- port authorities should be excluded from local government heritage processes.

The Steering Committee considered that most of the issues raised by the WASFC were matters that needed to be addressed through the *Heritage of Western Australia Act 1990* and that this should be progressed. However, it considered that legal advice be sought with regard to inserting amendments into the Act excising a port authority's water and seabed from heritage legislation and excluding heritage listed areas from a port area/boundary.

The legal opinion indicated that:

- it was legally possible for the Act to be amended so as to exclude areas of the port authority from the operation of the *Heritage of WA Act 1990*; and that
- the Governor could amend the descriptions of the port so as to exclude any heritage listed areas by orders published in the Government Gazette.

However, it was considered that whether or not either of the above options should be implemented is a policy decision (on both sides) and not a matter of law.

The Steering Committee was of the view that heritage legislation was not required to take into account commercial operations of agencies (including ports) and that the maintenance of heritage was not part of a port's main functions. Port authorities were confined to operating within a limited space and they required the ability to modernise their operations and implement new practices and technology for commercial purposes. It considered the benefits to commercial operations from excising heritage sections of a port as questionable. The Steering Committee accepted that Commonwealth heritage legislation would prevail.

At the Steering Committee's request, Fremantle PA's lawyers drafted the following proposed amendment for insertion into the Act.

> "(a) The Minister in whom responsibility for administration of the *Heritage of Western Australia Act* 1990 is vested, must not:
>
> (i) direct the Heritage Council of Western Australia to enter on the Register of Heritage Places under Division 2 of Part 5 of the *Heritage of Western Australia Act* 1990 any land, water or seabed comprised within a port area; or
>
> (ii) make a Conservation Order under section 59 of the *Heritage of Western Australia Act* 1990,
>
> without the approval of the Minister, which following consultation with the Minister in whom responsibility for administration of the *Heritage of Western Australia Act 1990* is vested, the Minister must give unless the Minister considers that the entering of the relevant place on the Register of Heritage Places or the making of a Conservation Order, as the case may be, would impede the operational needs or commercial considerations of the port authority in which that place is vested.
>
> (b) The Heritage Council of Western Australia must not cause an entry relating to any land, water or seabed comprised within a port area to be entered in the Register of Heritage Places on an interim basis under section 50 of the *Heritage of Western Australia Act* 1990 without the consent of the Minister in whom responsibility for administration of the *Heritage of Western Australia Act* 1990 is vested, who must not give that consent without the approval of the Minister to be given or withheld in the same manner as prescribed in section 29A(a) "

The Steering Committee sought legal opinion with respect to the above draft amendment.

The legal opinion indicated that there appeared to be no difficulties with the draft amendment and there was agreement with Fremantle PA's legal advice that it would be more appropriate if the amendment were placed in the *Heritage of Western Australia Act 1990* rather than the *Port Authorities Act 1999*.

The Steering Committee concurred with the legal advice that an amendment limiting the application of the *Heritage of Western Australia Act 1990* on the ports would be best inserted within the *Heritage of Western Australia Act 1990* itself, however, it believed there would be no motivation on the part of the Heritage Council to give effect to this.

The Steering Committee resolved to recommend that the Act should be amended to include a provision requiring the Minister's concurrence where there is an impediment to a port authority's operational needs or commercial considerations as a result of the application of the *Heritage of Western Australia Act 1990*.

7.7.5 *Environmental Protection Act 1986* (Control of the port)

Fremantle PA submitted advice received from its lawyers in response to the Environmental Protection Authority's proposal to licence Fremantle PA for the purposes of the *Environmental Protection Act 1986* on the basis that 'exclusive control' provided for in Section 32 of the Act also meant that a port had 'exclusive responsibility' for any damage to, and subsequent restoration of, the environment within a port.

By comparison, the legal advice received by Fremantle PA suggested that the environmental control and requisite legislative powers and functions reside with the Environmental Protection Authority. The view was that total control does not mean total responsibility within the port. The suggestion was made that perhaps, "…exclusive control of the port,' be amended to "…control of port activities".

The Steering Committee noted the historic reasons for Section 32 of the Act by which it was to be understood that the powers and responsibilities of the Harbour Master at the former Department of Harbours and Lights did not cut across the powers and responsibilities of a Harbour Master of a port authority. After considerable debate at the time, the provision was subsequently retained in the Act in 1999, however, it did not override other legislation such as the *Environmental Protection Act 1986*.

The Steering Committee resolved that the legal opinion forwarded to Fremantle PA had no impact on the earlier decision to retain Section 32.

7.8 Interrelationship with Local Government

The Bunbury City Council (BCC) was of the view that under the provisions of the (then applicable) *Town Planning and Development Act 1928* and the *Local Government Miscellaneous Provisions Act 1960*, local government had limited involvement in the assessment of port facilities for both planning and licensing of buildings within port areas.

By way of background, the Port of Bunbury is the only statutory port located within a regional town planning development area. Consequently, the Bunbury Port Authority is subject to relevant local government structure/development planning requirements as prescribed by the BCC. This forms the basis for the observations expressed by the BCC.

The BCC considered that all port authorities should prepare a Structure Plan for consideration by the respective local government and approval by the Western Australian Planning Commission (WAPC) – or where a Region Scheme is in place, that a specific Policy Statement and Plan be developed for consideration and approval by the WAPC.

The Steering Committee believed there was merit in port authorities developing something like a Master Plan. However, Structure Plans and Regional Schemes were matters dealt with in Planning Legislation and it was not appropriate to incorporate these in the Act.

The BCC was of the opinion that any Strategic Plan, Structure Plan or Region Scheme Policy Statement relating to the port should be referred to the Environmental Protection Authority (EPA) for assessment on the basis of cumulative impacts and that the relevant port authority be licensed accordingly.

The Steering Committee considered that this observation is already facilitated by recent amendments to Section 38 of the *Environmental Protection Act 1986*, through which structure plans can be submitted and considered on a cumulative basis. The Steering Committee was aware that the Department of Environment (DoE) was reviewing its legislation at the time.

BCC believed all works within a port (public space or other) be required to submit a development application for assessment and consideration by DPI and the WAPC in accordance with an approved plan.

The Steering Committee considered that this suggestion was inappropriate and that a better definition of port works was required. The definition could be, “anything directly related to or necessary for the movement of trade through the port.” Alternatively, at a higher level, the definition could be, “any act undertaken to facilitate trade through the port.”

Other alternatives were to add a new definition for “port purposes” – incidental or ancillary to the port or, for a port to incorporate within its boundary an industrial estate (e.g. Kemerton). This would make economic sense (eliminating the double handling of goods/products) but may be socially unacceptable. The Steering Committee had reference to a DPI working paper entitled, "WAPC Metropolitan Region Scheme text", in which the term *'permitted development'* was defined as (inter alia), works on land reserved for port installations for the purpose of or connection with a port. Further consideration of the definition of port works is also detailed in Section 7.7.3 of this report.

The BCC observed that any building works (public space or other) require to have submitted a building licence application with relevant fees to the relevant local government or the Department of Housing and Works and if approved that all information plans and value of works be recorded in the relevant local government register of approved building licences.

The Steering Committee is of the view that the BCC is seeking a legal basis for it to oversee the construction of any building works within a port authority port. Previously as agents of the Crown, port authorities were not required to seek a building licence from local government authorities. Section 38 of the Act maintains the status quo by exempting port authorities from Section 32 of the then *Town Planning Act 1928* (now replaced by Section 6 of the *Planning and Development Act 2005*) and Section 373 of the *Local Government (Miscellaneous Provisions) Act 1960*. Section 38 of the Act, however, requires a port authority to comply with the Building Code of Australia and to consult with local government before and during construction to ensure the code is applied. Any disputes are referred to the Minister. The Steering Committee was of the opinion that the Minister would expect a port authority to seek local government approval for non-port works and that is a requirement of Section 38.

The Steering Committee also considered that the Act made it clear that buildings constructed by a port authority would comply with the building code of Australia. The nature of the code was to prescribe standards and neither developers or Councils have authority to treat the code in a discretionary manner. Therefore, there was no need for a port authority to get a building licence from local authorities or for agents of local authorities to certify that a building developed by a port authority complied with the code.

7.9 Easements, Leases and Licences of Vested Land

Independent legal advice forwarded to Fremantle PA suggested that if a port authority is to be fully empowered in conducting its operations, the obligation on a port authority to obtain the Minister's approval to a lease of vested land for a period in excess of 5 years to be deleted.

The Steering Committee resolved that a change to the Act was not required as the lease/licence approval threshold/term is prescribed in the *Port Authorities Regulations 2001*.

With respect to Section 28 of the Act relating to creating and dealing with interests in vested land, the Port Hedland PA commented that:-

- the limitation of a lease or licence to 50 years is unnecessary;
- the wording of Section 18 for the *Land Administration Act 1997* means that it remains necessary for (port authority) CEO approval to a subletting, mortgage or charge of a lease; and
- allowing a port authority to enter into a lease subject to the Minister's approval is preferable to the current arrangement.

The Steering Committee resolved to recommend an amendment that port authorities be allowed to enter into easements, leases or licences in respect of vested land (section 28), subject to the instruments being conditional upon Ministerial approval being (subsequently) obtained.

The Steering Committee considered that in view of the pace of technological and economic progress the 50-year maximum duration for a lease was arguably too long and did not need to be further extended.

7.10 Functions and Powers

It was suggested that Part 4 of the Act be reviewed to clarify port authority objectives, in particular the commercial responsibilities, to determine which of these have precedence should a conflict arise, and that port authority functions be clearly defined to identify commercial and non-commercial objectives.

The Steering Committee is of the opinion that it is incorrect to view each of a port authority's functions and objectives as having equal value at any point in time. It believes port authority Boards are clear as to their respective objectives and these flow from the functions of the port as specified in the Act. Objectives will be different at each port at any point in time and priorities cannot be specified in the Act. The commercial responsibility of a port is clear and the remaining comments relate to matters of policy.

7.11 24 Hour/7 Day Operation

The significant contribution that ports play in the movement of trade and consequently, the economic prosperity of the State should not be underestimated. For the State to effectively participate in the world economy and to remain internationally competitive, it is of paramount importance that ports are able to operate and function 24 hours a day and seven days a week. A port authority that is operating a port responsibly and in accordance with its legal obligations should be protected against claims in nuisance, (i.e. things such as noise, dust, odour, or light spill caused by port operations impacting on the neighbouring community) that could otherwise result in operational restrictions or even closure. The view is that this aspect needs to be strengthened within the Act.

The Steering Committee concurred with the views expressed above. It considered that communities living in suburbs surrounding a port, need to accept and be tolerant of port operations, and the secondary effects such as traffic and the movement of freight. Although ultimately, if any action for nuisance and an associated claim for damages took place, these would need to be assessed by the Courts and the Courts may require a port authority to amend its operations to reduce or eliminate the nuisance.

The Steering Committee resolved that a 24 hour /7day functional requirement for port operations be inserted in the Act.

7.12 Liability for Nuisance

The Steering Committee sought legal opinion as to whether an action in nuisance could be brought against a port authority in Western Australia for the impact that such things as noise, dust, odour, or light spill caused by port operations could have on the neighbouring community.

The Steering Committee considered the legal advice that in general there would exist sufficient common law defence that there can be no action for nuisance where a port authority is operating in a manner so authorised and in the process, minimising the impact of any nuisance. However, this does not mean that this defence can apply in respect to all damage and where a port is not operating correctly or has not taken all necessary action to limit any resulting nuisance.

The Steering Committee resolved that no further action was required in this regard as the matter is appropriately covered under common law obligations.

7.13 Buffer Zones and Port Authority Power to Acquire Land

Shipping Australia Ltd (SAL), suggested an amendment to the Act was required to ensure port authorities were providing for and maintaining adequate buffer zones that were not accessible to future property development.

The Steering Committee considered that port buffer zones were a matter of policy for the government as the owner and for port authority management to determine and that this was not relevant to the review of the Act under its terms of reference.

Similarly, a port authority expressed concern regarding its perceived inability under the Act to compulsory acquire freehold land as a buffer zone for the purposes of protecting the port's future strategic operational and developmental needs. It requested clear powers within the Act for this purpose, similar to those available to LandCorp under Section 20 of the *Western Australian Land Authority Act 1992*.

The Steering Committee considered that the current arrangements for the port authorities follow an established process whereby an application is made to the Minister for Lands supported by a clear demonstration that the resumption of land is required for port purposes. The decision making process is at arms length from the port authority, it reduces the potential for conflict of interest and allows independent consideration of related issues such as environmental and community concerns. The Steering Committee did not support the need for change in this regard.

7.14 Security

The Act had been developed prior to the international terrorist events which have since spawned the introduction of international, foreign and national security legislation. Independent legal opinion received by Fremantle PA suggested that the function of security should be incorporated into the description of port functions at Section 30 of the Act. In this regard the Steering Committee acknowledged that following the introduction of the *Commonwealth Maritime Transport Security and Offshore Facilities Act 2003*, security was now an important function for a port authority.

The Commonwealth legislation imposes security obligations on Fremantle PA as a port operator and port facility operator. Consequently it was further suggested in legal opinion received by Fremantle PA, that the Act be amended so that the description of the port area under the Act be brought into line with the 'security regulated port boundary' under the Commonwealth legislation. In this regard the Steering Committee noted that these were two separate concepts, created for different purposes.

The Commonwealth legislation intends to apply to specific port facilities at the interface between the ship and the berth/wharf area. It is aimed at creating 'sterile' areas so that when ships are in port, unauthorised persons are prohibited from being in the vicinity and having untrammeled access to shipping and wharf activities undertaken in support of the ship's visit to the port. Consequently, it is not uncommon for the Commonwealth's security regulated port area to represent only a fraction of the port area declared under State legislation and there is no nexus between the two.

Although the matter of port security is predominantly covered by Commonwealth security laws, the Steering Committee resolved to incorporate maritime security into the description to enhance and broaden port authority functions at Section 30 of the Act.

The Steering Committee resolved that it was neither necessary nor appropriate for the port area as defined under the Act to be brought into line with the security regulated port area as defined under Commonwealth legislation. Invariably the security regulated port area is, in most instances, much smaller than the defined port area and the two are distinct concepts created for different purposes. Hence the Steering Committee determined that this part of the proposal is not supported.

7.15 Pollution Response

The DPI Marine Environment Protection Unit (MEPU) supports Section 30(1)(f) of the Act, relating to protecting the environment of the port and minimising the impact of port activities on that environment. However, it considers the provision should be extended to specifically include reference to the preparedness of port authorities to respond to pollution of the marine environment.

The Steering Committee resolved that the matters raised above by the DPI MEPU did not represent issues that came under the review's terms of reference. It considered that this was a policy matter and not a legal issue relevant to the review of the Act, or otherwise was covered or needed to be addressed through the *Pollution of Waters by Oil and Noxious Substances Act 1987* or the *Environmental Protection Act 1986*.

7.16 The Minister's Ability to Direct a Port Authority

The GPUG observed that the following Sections of the Act;-

- 31. *Port authorities can act at their own discretion*;
- 32. *Control of the port*; and
- 33. *Duty to act in accordance with policy instruments*;

should be amended so as to limit or remove the Minister's ability to give direction to a port authority, so as to eliminate interference (whether politically motivated or not) in port operations.

The Steering Committee considered that there has been no evidence of any such Ministerial direction causing any operational problem at any of the State's port authorities since the introduction of the Act in 1999. In any event, the Minister, representing the Government as the ports' owner has every right to issue directions and this capacity needs to be retained.

7.17 Objects and Principles

The DPC advised that the Act does not include a set of Objects and Principles, which outline the main objectives of the Act and the standards to which the Act is to adhere. An example can be found in the *Children and Community Services Act 2004* (Sections 6-10). The DPC considered these provisions assist in the reduction of ambiguity in the interpretation of an Act, and help to give a clearer indication to agencies of the outcomes intended to be achieved. This is particularly the case where there are a number of objectives, and where balancing of potentially competing outcomes may be required, for example delivery of commercial objectives, promotion of social outcomes such as regional development, and maintenance of proper environmental standards. The DPC suggested that consideration be given to the inclusion of a set of Objects and Principles in the *Port Authorities Act 1999.*

The Steering Committee considered that page 1 of the Act appropriately summarised what the Act is concerned with, namely: port authorities, the areas that they are to control and manage, the way in which they are to operate, and related matters. It was of the opinion that nothing was to be gained by the inclusion of a set of objects and principles.

The outcomes expected of a port authority are captured by the list of functions which appear at Section 30 and its duty to act on commercial principles (Section 34) and its duty to act in accordance with policy instruments (Section 33). The latter states that a port authority is to perform its functions in accordance with its Strategic Development Plan and its Statement of Corporate Intent. These clauses and instruments together provide an exceptionally clear indication of the outcomes intended to be achieved.

7.18 Trade Facilitation versus Profit

The Department of Industry and Resources (DoIR) has extensive interaction with port authorities, particularly with respect to planning and developing major resource projects. Its experience has highlighted what it perceives are some difficulties experienced by port authorities in balancing the often conflicting roles of facilitating the development of trade and being commercially focused.

DoIR believes the Act, in its current format;

- does not induce port authorities to undertake infrastructure investment that would promote trade facilitation where this investment is uncommercial to a port authority in the short term; and
- by focussing on being commercial (i.e. profit focussed) the port authorities are not optimally fulfilling their trade facilitation role.

The Steering Committee considered that DoIR misunderstood the intention of the Act and the basis of commercialisation. The Act requires the port authorities to act commercially and achieve a rate of return. Facilitating trade should not be subsidised by port authorities or existing port users, nor is it the intention for port authorities to be risk takers. Such project investment should be considered by Government.

The Steering Committee agreed with the intent for port authorities to be able to respond to non-commercial initiatives but that it was a matter for Government policy implementation (e.g. lowering

a port authority's rate of return requirement and/or providing funding as part of a community service obligation) in accordance with prevailing policy. The Steering Committee resolved that the Act should not be amended so as to enable a port authority to act non-commercially.

7.19 Balanced Outcomes

The DPC noted that Section 34 of the Act stipulates that port authorities, in carrying out their functions, are to act in accordance with prudent commercial principles, and to endeavour to make a profit. It considered this to be inconsistent with other statutes which have established similar bodies. The *Western Australian Treasury Corporation Act 1986* and the *Western Australian Land Authority Act 1992* do not contain equivalent provisions stipulating the duty to make a profit.

While the previous *Electricity Corporation Act 1994* (replaced by the *Electricity Corporations Act 2005*) and *Water Corporation Act 1995* contain an overriding profit objective, it is arguable that these are fully corporatised GTEs carrying out activities in an open and competitive market, whereas the ports are not intended to compete with each other in a commercial manner and only compete as a substitute for alternative transport forms in an indirect way.

The DPC considered that Section 34 of the Act, *Duty to Act on Commercial Principles,* is also inconsistent with the Government's sustainability policy which promotes commitment to ensuring that economic goals do not outweigh social and environmental outcomes.

Although Section 33 *Duty to Act in Accordance with Policy Instruments*, can prevail over Section 34 where there are inconsistencies, policy instruments (i.e. SDPs and SCIs) are negotiable. The fact that SDPs must contain environmental management plans does not prevent environmental protection and social advancement from being subject to negotiation or outweighed by the drive for profit. The moderating influence of SDPs and SCIs is acknowledged, however the Act should include strengthened provisions to ensure that social and environmental outcomes are balanced with economic outcomes.

The DPC proposed that the Act should not allow the duty to make a profit to subordinate other equally important principles, such as environmental protection, regional development and social advancement, but rather should require that these principles be balanced in a commercially prudent way.

The Steering Committee acknowledged that there should be some balance. However, it considered that the DPC's recommendation was already sufficiently addressed through the application of Sections 33 and 34 of the Act.

Under Section 33, port authorities are required to act in accordance with their respective SDPs and SCIs. These can incorporate matters pertaining to environmental management and community service obligation (CSO) support of non-commercial activities. Although Section 34 requires a port authority to act commercially in the performance of its functions, Section 34 (2) states;

"If there is any conflict or inconsistency between the duty imposed by subsection (1) and the duty imposed by section 33, the duty imposed by section 33 prevails."

7.20 Power to Levy Fees and Charges

On the matter of the power of ports to levy fees and charges, it was suggested that Section 37 *Power to Levy Fees and Charges* and Part 8 of the Act *Port Charges*, should be amended to incorporate the independent oversight of port prices. This would enable a port to maintain a port's commercial interest whilst simultaneously ensuring the public interest and that any abuse of market power is minimised. It was recommended that ports be subject to a report on prices as per Part 5 Division 2 of the *Economic Regulation Authority Act 2003*.

The Steering Committee considered this view to be the reverse of the Council of Australian Governments' (COAG) position supporting light handed regulation and only where necessary and furthermore, that it is arguably based on the false presumption that the State's port authorities are monopolies. The Steering Committee was of the opinion that any independent regulation of port authority pricing would need to be legislated within a different Act to the *Port Authorities Act 1999*.

7.21 Ministerial Consultation

The GPUG was of the view that Section 40 *Transactions that Require Ministerial Approval* and Section 43 *Minister to be Consulted on Major Initiatives* of the Act, both be incorporated into other provisions (i.e. Sections 30 and 35) so that these matters are considered only once, at the same time as other planning and budgetary approvals.

The Steering Committee believed there was no evidence of any problem arising from having to seek Ministerial approval of transactions the subject of Section 40 at any of the State's port authorities since the introduction of the Act. In any event, Section 40 provides strategic control over larger transactions, which may arise at any time and it would not be in the best commercial interests of a port authority to have the approval of such transactions deferred to the next annual planning and budgetary cycle process.

In respect of the application of Section 43, the Steering Committee considered that it is incorrect to link this provision with the port SCI/SDP process. Major initiatives can occur at any time and hence the provision aims to ensure the Minister is informed about issues that were unforeseen by port authorities at the time of submitting their annual SCI/SDP as part of the budget cycle process.

7.22 Contracts Conditional Upon Ministerial Approval

An overview was provided of Section 40 indicating that the Treasurer's concurrence and Minister's approval were required prior to the execution (signing) of any contract or agreement where the value of that contract was equal to or greater than 20% of the written down value of a port authority's consolidated fixed assets (refer Port Authorities Regulation 118). Port Hedland PA concurred with the independent legal advice forwarded to Fremantle PA which proposed to amend Section 40 to the effect that;

> "Port authorities may enter into contracts that are conditional upon Ministerial approval to the relevant transaction being obtained under Section 40(1) of this Act."

The Steering Committee supports the intent of Section 40 to protect port authorities from potentially adverse financial outcomes, however, it was also recognised that the length of time to obtain the Minister's approval and Treasurer's concurrence (if applicable) to such contracts could impede a port authority's ability to act in its best commercial interest. The proposal to allow port authorities to enter into contracts that are conditional upon Ministerial approval, ensures signatories can be locked into an agreement with no possibility of cost shifting or renegotiation, whilst retaining full Ministerial control.

The Steering Committee agreed to recommend changes to allow Port Authorities to enter into contracts (Section 40), subject to the instruments being conditional upon Ministerial approval being (subsequently) obtained.

7.23 Strategic Development Plan

The GPUG questioned the effectiveness of the port authority SDPs and the application of some of the relevant provisions, notably Sections 49 to 57 of the Act. It correctly identified a SDP as a rolling five year plan but queried the requirement for these to be re-submitted and re-approved by the Minister each year. Consequently, the GPUG believes that port management only has certainty over its plan for the first year and that this element of certainty is non-existent for subsequent years of the plan. The GPUG believes this can result in port management being exposed to changes in priorities of the Minister and a change in Minister or government and that such a situation is difficult particularly where long lead times exist for the implementation of capital works.

In an attempt to provide port management with stability and to reduce the risk of politically motivated interference, the GPUG suggested that once a 5 year plan (i.e. SDP) is approved it should remain so. Only changes and the fifth year would then need to be considered for approval in the following year's planning and budgetary cycle.

The GPUG noted that Section 53(3) of the Act allows the Minister to give a unilateral directive requiring the port to change its proposed plan. It suggests that any dispute on technical matters be referred to an independent expert. It also noted that Section 56(2) and (3) allows the Minister to direct that changes be made to a strategic plan outside of the annual review process and that Section 57 requires the Treasurer's concurrence of the SDP each year and where there are changes made to the SDP. The GPUG considered that this only introduced additional uncertainty and that both Sections be removed. It was of the view that the Act be amended to require the port authority to consult with port users and potential port users prior to formulating its strategic development plan. Ideally the user groups should be able to review the draft plan and make formal submissions to the port authority and the Minister if required.

In response, the Steering Committee considered that the content of the SDP represents a port authority's and the Government's best attempts to plan for the future. The current planning process links into the Government's budget process and the Expenditure Review Committee's approval of a four year capital works program. Under this arrangement it is expected that out-year plans are subject to change but also that unforeseen new expenditure in the short term is the subject of Cabinet submissions.

On the application of Section 53(3), the Steering Committee believes the GPUG recommendation stems from a misunderstanding of accountability. As the owner of the port, it is the State/Minister's prerogative to determine what, if any, further advice is required and the existing right should not be fettered. Similarly, in respect of the GPUG comments on Section 56(2) and (3), the Steering Committee is of the opinion that as the owner's representative, the Minister's ability to give directions to a port authority Board cannot be removed or fettered.

7.24 Statement of Corporate Intent

The GPUG reviewed Sections 59 to 66 relating to port authority SCIs. It was of the opinion that currently there is nothing in the Act preventing, approvals obtained within a port authority's SDP being subsequently reversed upon consideration of its SCI.

The GPUG considered that the provisions should be amended so that once a SDP has been approved then the SCI should also be commensurately approved if no material changes are identified. This would avoid any possible reasons for non-agreement between the Minister and the port authority Board. It suggested that the term material also required definition in both physical and material terms.

The GPUG also considered that Section 66, which relates to the Minister obtaining the Treasurer's concurrence to a SCI, requires further clarification in respect of the process covering any objection by the Treasurer.

In the Act, provisions relating to the SDP appear before provisions relating to the SCI. However, as part of the planning and budgetary process the GPUG assert that, a review of the SCI be undertaken followed by an analysis of the SDP, including an examination of how the SCI has fitted into the SDP.

The Steering Committee believes the proponent was not fully aware of the planning and budgetary process and has established no evidence of any problems associated with obtaining the Treasurer's concurrence to a port's SCI or the reversal of earlier approvals.

7.25 Submission of Statements of Corporate Intent and Strategic Development Plans

The DTF indicated that under the impending Financial Management Act, port authority Statements of Corporate Intent (SCI) and Strategic Development Plans (SDPs) would be required to be submitted at the same time as the annual budgets of other agencies. The Act should be amended to indicate that financial statement information maintained by the port authorities and administered by DTF, should at all times reflect current approved numbers.

At the time of considering this matter, the Steering Committee noted that the introduction of the impending Financial Management Act will assist DTF's central budgetary requirements but that the imposition of an earlier submission date brings the planning and budgetary cycle too far forward for the port authorities. This may result in the budgetary information being less accurate and overlooks the fact that port authority boards usually meet once a month which could cause some difficulty in

meeting a prescribed deadline. Nevertheless, the Steering Committee resolved that Sections 49 and 58 of the Act should be amended to reflect a date of 1 December for the submission of SDPs and SCIs applicable to the next financial year. However, the need for this amendment has since been overtaken, as indicated below.

Since the Steering Committee's consideration of this matter, the *Financial Management Act 2006* (replacing the *Financial and Administration Audit Act 1985*) was gazetted on 1 February 2007, and as a result there have been minor consequential amendments to the *Port Authorities Act 1999*. Previously, a port authority was required to have submitted its SCI and SDP not later than 3 months before the start of the next financial year. New provisions have been added whereby the Minister, with the concurrence of the Treasurer can set a fixed date for the submission of a port authority's SCI and SDP. A comparison of the previous and new provisions are provided in Appendix 7 to this report. Commencing with 2008-09 SCIs and related SDPs, the submission date has since been set at 14 December annually.

7.26 Sustainability Code of Practice

The DPC advised that the *Sustainability Code of Practice for Government Agencies* (the Code), issued in September 2004, requires agencies to:

> Where relevant, incorporate sustainability principles and practices into legislation as it is reviewed, drafted or amended.

The Code outlines several methods by which sustainability principles can be applied in legislation. These include embedding a requirement to facilitate sustainability in the functions of a statutory authority as outlined in its constituent legislation, and addressing sustainability issues in instruments such as corporate plans or guidelines.

The following amendments could be considered:

In relation to Section 51, an additional paragraph following Subsection 51(1)(a), along the following lines:

> (1) A strategic development plan must set out –
>
> a. ……
>
> b. the port authority's response to sustainability principles, specifically the implications on environmental protection, social advancement, and economic prosperity of proposed long-term objectives.

In relation to Section 30, an additional subsection following subsection 30(1), along the following lines:

> In performing the functions referred to in subsection (1), particularly (1)(a), (b), (e) and (f), a port authority is required to address sustainability, as contained in the strategic development plan prepared under Section 51.

The Steering Committee was of the opinion that the Government's current sustainability policies were already being addressed by the port authorities in their Strategic Development Plans (SDPs) as required under Section 51 of the Act. Section 51(2)(b) allows the Minister and a port authority board to consider and agree to any other matters to be included within a port authority's SDP. Therefore the amendment recommended by the DPC is not required.

7.27 Environmental Management Plan

The Marine Environment Protection Unit (MEPU) of DPI suggested that, to ensure that marine pollution matters are fully considered, the environmental management plans that are to be included in a port authority's strategic development plan under Section 51(1)(b) of the Act, should be referred to the MEPU for review and comment before being sent to the Minister for consideration. Currently, there is no requirement for port authorities to liaise with the MEPU when preparing an environmental management plan. The MEPU recommends that a system be developed and implemented to allow for the review of marine pollution issues within port authority administered ports.

The Department of Environment (DoE) proposed the introduction of an environmental management plan involving the port authority, the DoE, port stakeholders and the local community.

The Steering Committee noted that other issues raised by the DoE in its submission such as ballast, oil spills, dredging and new works are addressed under separate environmental legislation.

The Steering Committee considered that it also needs to be recognised that ports are not created for environmental purposes and the development and operation of any port will result in some damage to the environment. The primary purpose of a port was to facilitate the movement of trade but in so doing a port authority needed to minimise, as far as practicable, the impact of its activities on the environment.

The Steering Committee resolved that:

- it supports the concept of port management discussions with DoE but that environmental management plans are high level documents with insufficient detail for DoE/EPA consideration (as is the case with Structure Plans);
- as part of good corporate governance, port authorities should cooperate with DoE; and
- DoE should regulate environmental matters within its legislation as the *Port Authorities Act 1999*, was not the appropriate vehicle for dealing with environmental provisions.

7.28 Annual Report

The MEPU is of the opinion that Section 69(1)(f) of the Act which requires a port authority to include in its annual report a summary of the performance of the port authority in relation to its function under Section 30(1)(f), be reworded to include a reference to performance in relation to protection of the environment and minimisation of impacts on the environment rather than just a reference to the relevant clause number. This will require the identification of performance indicators associated with environmental management plans.

The Steering Committee resolved that the matters raised above by the DPI MEPU did not represent issues that came under the review's terms of reference. The requirement to report is currently in the Act, whereas the setting of performance indicators was considered to be a policy matter and not a legal issue relevant to the review of the *Port Authorities Act 1999*, or otherwise would be covered or needed to be addressed through the *Pollution of Waters by Oil and Noxious Substances Act 1987* or the *Environmental Protection Act 1986*.

The GPUG were of the opinion that annual reports prepared by the port authorities do not provide a clear and transparent insight into the financial state of individual ports or of their economic efficiency. The GPUG suggested that Section 69 of the Act be amended to have port authorities adopt segmentation and full transparency of their accounts. As an example the accounts should be required to clearly identify;

- Income derived from specific commodities such as grain, minerals, iron ore, concentrates, fertiliser, other dry bulk products, petroleum products, other bulk liquids, general cargo, livestock, containers and the like;
- Separate income from berth hire and pilotage; and
- Special levies such as the Geraldton Port Enhancement Project (PEP) charge of $1.50-$2 per tonne.

Also, expenses similarly must be fully transparent and broken down to include for example;

- Pilotage;
- Navigation expenses;
- Berth maintenance; and
- Cargo related R&M (repairs and maintenance).

The Steering Committee did not support this recommendation. It considered that port authorities are required to and do comply with existing Australian Accounting Standards. In previous advice to a port authority, the Auditor General had agreed that the operations of a port represented one segment and that further segmentation was not required.

7.29 Protection From Liability

Objection was raised by the GPUG to Section 78(1)(B) of the Act. The GPUG was of the opinion that the provision exempts the port authorities and staff from any liability for having carried out a direction given by the Minister under Sections 53(3), 56(2), 62(3), 65(2), 72(1) or 84(3).

It believed that it could be interpreted that the Minister could for example direct the port authority to stop loading a specific cargo. The port authority is bound to comply and the port user would have no recourse. Consequently, the GPUG suggested this section be repealed.

The Steering Committee considered if this section, which provides an indemnity for complying with Ministerial directions under the Act were to be repealed, port authorities would not be able to retain staff (to operate a port) for fear of possible litigation by port users.

7.30 Dividends and Tax Equivalent Payments

Shipping Australia Ltd (SAL), made a general comment with respect to the level of taxes paid by the southern ports over the past five years and the need for Government to reinvest those funds in port infrastructure so as to support future growth in trade.

In respect to Section 84 of the Act, dealing with the recommendation and payment of dividends, the GPUG noted there was no upper limit set on the proportion of after tax net profit that could be determined as a dividend. Also, irrespective of the application of any formula referred to by the provision, the amount payable as a dividend could be determined at the discretion of the Minister and Treasurer.

The GPUG suggested that the port authority must be entitled to retain increased working capital for the ongoing maintenance of existing facilities and more importantly to fund the approved strategic plan. Capital expenditure of a significant amount is required at all ports. Also, the Act must be amended to reduce the total taxes paid by port authorities.

The GPUG argued that port authorities should be seen to pay payroll tax and stamp duty but there is an equal argument that they should be exempt from, land tax, local government rates and equivalents, income tax equivalents, dividends, efficiency dividends, and the emergency services levy. These taxes should be replaced with a single port tax based on a realistic agreed percentage of net operating profit. It would be totally unacceptable and counter productive to contemplate any increase in the quantum of taxation as that will simply increase port charges, further aggravating the competitiveness of port charges which in turn will lead to increased freight charges.

It is at the same time the responsibility of the port authorities to provide a schedule of charges on importers, exporters and ship owner/operators that are competitive with services offered by similar ports. At the moment there is a significant variance in port charges levied on port users.

The Steering Committee considered the suggestions made by the SAL and GPUG to be related to Government policy and not specific to the terms of reference for the review (i.e. examining the operation and effectiveness of the Act). Government policy required that the Act comply with National Competition Policy and that GTEs be subject to a tax regime equivalent to that imposed on private businesses.

7.31 Capital Expenditure Limits

Port Hedland PA was of the view that expenditure limits determined by Government, constrain a port authority's ability to initiate capital works projects and hinders its ability to facilitate trade.

The Steering Committee resolved that the expenditure limits applying to capital works projects was a policy issue for determination by the Government as the port owner and not relevant to the review of the Act.

7.32 Borrowing Limits

The GPUG suggested that Section 86 required amendment to ensure the prescribed borrowing limit will not be reduced below the level applicable to cover existing loans. Alternatively, legal advice received by Fremantle PA suggested that as the Fremantle PA is, in general principle, a self funding agency, the limit on borrowings should be removed.

The Steering Committee resolved that Government, as the owner, is entitled to have strategic control of port authorities. Neither proposal was supported.

7.33 Hedging Transactions

The DTF suggested that Section 87 should be reviewed to consider the adequacy of existing hedging powers and that the requirements of Treasurer's Instruction 826 be used as a model of best practice.

The Steering Committee concurs that presently the Act appears to allow the hedging of borrowings but not capital expenditure undertaken in foreign currency. It is likely that some ports have already undertaken foreign currency hedging not specified or provided for in the Act but on the advice of Western Australian Treasury Corporation (WATC).

The Steering Committee resolved to recommend extension of the Section 87 power to allow port authorities to identify, measure, consider and manage foreign exchange risks subject to:

- consultation with WATC prior to undertaking any hedging activity; and
- monitoring any resultant ongoing foreign exchange risk.

7.34 Annual Financial Target

The GPUG noted that the setting of annual financial targets for a port authority under Section 92 of the Act, was in addition to the content of a port's SCI and SDP. It believed that there was no requirement for financial targets to be consistent with either the SCI or SDP. Consequently it suggested that Section 92 requires amendment to identify the criteria relating to service delivery such as port capacity, availability and efficiency in determining an annual target.

The Steering Committee believes the GPUG was unaware of the process whereby the setting of financial targets precedes the submission of a port's SCI/SDP and that the target is part of the annual planning and budgetary process, being incorporated into a port authority's SCI and SDP.

7.35 Navigation Aids

SAL queried why Section 93 of the Act states that, "a port authority *may* – provide navigational aids for the port". SAL believes this should be amended so that a port authority *must* provide navigational aids.

The Steering Committee established that all navigation aids (navaids) might not be provided by a port authority. Navaids may be provided by private companies or the Australian Marine Safety Authority (AMSA). It is however, incumbent on a port authority to provide for safe navigation within a port and navigation aids do exist. Section 93 is an enabling power, giving a port authority the right to erect navigation aids within the port and to alter the position and characteristics of a navigation aid. The Steering Committee believes that SAL has misunderstood the intention of this section.

7.36 Pilotage Services

The GPUG considered that Section 96 needs to be reworded to ensure that the port authorities employ or contract sufficient pilots to ensure 24 hour availability of at least one pilot qualified to assist the largest size of ship that regularly berths at the port.

The Steering Committee sought advice from the DPI Marine Safety Section and was of the opinion it would be inappropriate to be too prescriptive in this regard. It considered that an essential feature of the Act required that it have global application for all the State's ports and be long lasting. For example, Broome is a 24 hour port and pilots are provided at call. Being too prescriptive or adding qualifications makes the Act less powerful. Similarly, inserting terms such as "adequate" may be ambiguous and the matter could be referred to the Courts for resolution.

The Steering Committee was of the view that there would not have been many instances apart from the one time identified by the GPUG where a ship was delayed due to the unavailability of a pilot qualified to service the size of vessel in question. It considered that the Act was clear in making port authorities responsible for providing pilotage services and the proposal by the GPUG is not supported.

7.37 Pilotage Exemption Certificates

SAL was of the view that the Act incorporates a provision within Section 96 of the Act for a master of a ship to obtain a pilotage exemption certificate.

In fact, Section 97 of the Act allows port authorities to provide exemptions from regulations. The Steering Committee believes this matter is already addressed as each port authority has its own procedures under regulations prescribing the conditions under which pilotage exemption certificates may be granted.

7.38 Removing Pilotage Fees from Regulation

The Steering Committee gave consideration to removing pilotage fees from port authority regulation on the basis of eliminating central government administration from an inherently commercial aspect of port authority operations.

Legal advice indicated that removing pilotage charges from the Regulations was feasible although it could potentially change the nature of the relationship between the port authorities and the port users who utilise pilotage services by giving rise to potential contractual liabilities on behalf of the port authorities for the conduct of compulsory pilots as argued by the shipowner in the *SA Fortius* case. This could be overcome by the amendment of the immunity and indemnity provisions of the Act or the insertion of a new immunity provision into the Act.

The Steering Committee resolved to recommend that pilotage fees and charges be removed from prescription in regulation. This requires deletion of Section 96(7)(a) and amendment to strengthen (in respect of immunity) Section 100 of the Act.

7.39 Harbour Master

On the matter of the appointment of a Harbour Master, the GPUG observed that Section 102 of the Act required amendment to ensure that a port authority Chief Executive Officer (CEO) was competent and suitably qualified for the role if appointed as Harbour Master. It suggested that Section 102 of the Act be reworded as follows:-

(1) In this section — "eligible person" means —
  (a) the CEO who is competent and suitably qualified;
  (b) a member of staff who is competent and suitably qualified; or
  (c) any other person who is competent and suitably qualified.
(2) The board of a port authority is to appoint an eligible person as the harbour master of the port.
(3) The board of a port authority may appoint an eligible person as the deputy harbour master of the port.
(4) Subject to subsection (5), the deputy harbour master may perform the functions of the harbour master if the harbour master is absent from the port or on leave, or unable for any other reason to perform those functions.
(5) The board of a port authority may appoint an eligible person to act in the office of harbour master of the port if the harbour master is, or is expected to be, absent from the port, or on leave, or unable for any other reason to perform the functions of the office.
(6) If there is no person appointed under subsection (2), (3) or (5) who is able to perform the functions of the harbour master, those functions may be performed by a person determined by the board of the port authority to be competent and suitably qualified;
(7) The harbour master may, in writing, delegate any of his or her functions, other than this power of delegation, to a member of staff who is competent and suitably qualified;

Independent legal advice received by Fremantle PA also expressed concern that a person without effective maritime experience could be appointed Harbour Master. It also considered on the basis of good corporate governance, that the role and duties of the CEO and the Harbour Master should be

separated. Therefore it proposed that a port authority CEO be removed as a person who could be appointed to the position of Harbour Master.

The Steering Committee considered that a person appointed by a port authority Board to assume the duties of a Harbour Master must, and under the Act is required to, be competent. However, the Steering Committee considered that the primary role of ports is to facilitate trade and a port had to have a Harbour Master to remain open and functional. Hence temporary appointment of the CEO may sometimes be necessary and the proposal is not supported.

7.40 Statutory Indemnity

The Steering Committee considered whether the statutory indemnity in favour of the port authorities under Section 113 of the Act (supported by Port Hedland PA) required to be strengthened in light of the suggestion that perhaps the damage caused by certain products, plant, machinery or infrastructure is not covered by the indemnity.

Furthermore, the Steering Committee had regard to cases in South Australia (2000) and New South Wales (2002), where vessels under pilotage collided with and caused structural damage to berths and other port infrastructure and the resulting legal claims pursued by the respective shipowners. While both claims and subsequent appeals were unsuccessful, the removal of pilotage charges from regulation could result in contractual relationships between the port authority and shipowner. It is therefore considered beneficial to strengthen a port authority's immunity in this regard.

The Steering Committee resolved to recommend amendment to the Act to strengthen a port authority's immunity from any contractual claim by shipowners against the port authority.

7.41 Marine Safety Plans

The MEPU suggested that Section 114 of the Act relating to marine safety plans should describe a requirement for ports to prepare oil spill contingency plans (OSCPs). The MEPU considered OSCPs should be aligned with WestPlan and reviewed by the MEPU before being considered by the Minister. Training to ensure preparedness to respond to oil spills and regular update of OSCP should also be required under this section.

The Steering Committee resolved that this matter was not within the review's terms of reference. It was considered the matter was one of policy and not a legal issue relevant to the review of the Act, or otherwise was covered or needed to be addressed through the *Pollution of Waters by Oil and Noxious Substances Act 1987* or the *Environmental Protection Act 1986*.

7.42 Port Authority Immunity from Liability

7.42.1 Immunity from Liability for Damaged Goods

The GPUG was of the view that Section 114C *Immunity from liability for damaged goods*, should be amended due to its ambiguity. If it is to be understood from the current wording of the Section that if

during loading, the ship loader dumps a quantity of cargo into the sea, not only is the port user unable to claim compensation but the port user can be held liable for damages. If this is what the provision is intended to mean, it relieves the port authority from any obligation to provide an efficient service and should be removed. If there is an alternative meaning then the wording must be amended to clearly specify what is intended.

The Steering Committee considered an amendment to Section 114C is not required as the indemnity does not cover damage to goods loaded/unloaded by the port authority.

7.42.2 Immunity from Liability for Delay in Delivery of Goods

The GPUG observed that under Section 114D *Immunity from liability for delay in delivery of goods*, a port authority which contracts to load or unload cargo is not liable for any delay in loading or unloading ships. This provision operates to relieve the port authority that is contracted to load or discharge cargo of its obligation to provide an efficient service and should be removed. For example, if the port authority ship loader/unloader breaks down or there is excessive congestion at the port, caused by such a break down, then the GPUG believes the port authority which contracts to load or unload cargo should be liable for the cost of delays.

The Steering Committee is of the opinion that a port authority undertakes to provide the best possible service with the resources available. Anything could happen anywhere within a port that could adversely impact on the port's ability to sustain its services. Any requirement for a port authority to accept this additional risk could result in higher fees imposed on port users, which is not in the public interest.

7.42.3 Contracting Out

Port authorities have the power under Section 35(2)(f) of the Act to engage third parties (i.e. companies) to provide and undertake certain port services for the benefit of port users. These arrangements are normally effected by a contract. It has become an increasing experience for the port authorities that companies are, or are trying to contract out of any of the powers, immunities, indemnities or limitations of liability that have been granted to port authorities.

Legal opinion obtained by the Fremantle PA (to which the Port Hedland PA subsequently concurred) suggested the insertion of a new clause at the end of Section 35 to the Act, along the following lines:

> "Nothing in any contract, lease, licence, easement or other arrangement entered into by a port authority can limit or otherwise affect any power, immunity, defence, indemnity or limitation of liability that is given to a port authority under this Act".

In response to a request from the Steering Committee to provide examples where a port user intending to enter into any contract, lease or licence with the port has sought to reduce, limit, negate or offset the powers, immunities, defences or limitations of liability provided to a port authority in the Act, Fremantle PA's legal advice:

- also recommended that the Act make it clear that Section 114D overrode any contracts and other arrangements that a port authority entered into; and

- it referred to earlier advice in which it recommended the insertion of a new Section 114F along the following lines,

  "A port authority is not liable for any loss or damage that is caused by or relates to the acts or omissions of any port user and a port authority is under no duty to protect the property of any port user against the activities of another port user."

Examples where a company has attempted to contract out of the powers, immunities, indemnities or limitations of liability that have been granted to port authorities are provided below.

Dampier PA was involved in lengthy and complicated contract negotiations with a company in relation to services provision and infrastructure construction to support the company's proposed plant and export operations. During the negotiations, the company insisted upon Dampier PA agreeing to limit its liability to $100,000,000 regardless of the circumstances or the seriousness of its breach or conduct.

Dampier PA indicated this request was contrary to Section 113 of the Act which provides the Dampier PA with unlimited indemnity recourse (including unlimited recourse for economic loss) in circumstances where anything was damaged by the company's vessel. This position that the Dampier PA could not "contract out" of its indemnity rights was not acceptable to the company although it never gave any reasons for its views in this regard. Instead, the company maintained a negotiation position along the lines that the limitation cap should be placed in the Dampier PA contracts and if the Dampier PA could ever show that its indemnity rights under Section 113 of the Act overrode the limitation, then so be it.

As this project was of importance to the State and the Dampier PA, the Dampier PA continued to incur further legal costs in pursuing an appropriate outcome and the company's unexpected withdrawal cost the Dampier PA $100,000.

A similar position to that above arose in the Fremantle PA's negotiations with a company in regard to the terms of an indemnity from the Fremantle PA, in favour of the company, for inclusion in the company's long term services agreement with the Fremantle PA. Essentially, the company, refused to accept that the Fremantle PA could not "contract out" of its statutory immunities under the Act and, did not provide any reasons for its position on this issue.

The Fremantle PA was prepared to give a limited indemnity that was qualified, so as to expressly preserve all of its statutory immunities, defences and indemnity rights under the Act. However, the company took a similar position to that cited in relation to Dampier PA, and asserted that the Fremantle PA indemnity should not be written with any qualifications and if the Fremantle PA could ever show that any of its statutory immunities or defences overrode the contractual indemnity then the Fremantle PA would be relieved from liability. Essentially, the company, asserted that the Fremantle PA would have to go to Court in order to try and obtain any benefits under the immunities and defences offered under the Act.

The result was a pressure driven, negotiated compromise whereby the Fremantle PA indemnity clause was written in a way that expressly preserved only two of the Fremantle PA 's immunities: the

Section 100 and 111 pilotage and harbour master immunities. This largely unsatisfactory and "*meet you a quarter of the way*" compromise arose as a last resort when the company offered the Fremantle PA an opportunity to pick any two of its immunities and defences to expressly prevail over the indemnity with the rest of the Act's immunities and defences having to remain uncertain as to their application.

In another example which has since been settled, the Fremantle PA considered it had immunity from a claim under section 114D of the Act which says:

> "*A port authority is not liable for any loss caused by or relating to a delay in the delivery of any goods loaded onto or unloaded from any vessel at the port*".

Although it did not give any reasons, the party involved did not accept that Section 114D provided the Fremantle PA with any protection. The Fremantle PA's legal advice is that the claim would have been considerably easier to deal with if the Act made it clear that Section 114D overrode any contracts and other arrangements that a port authority entered into.

The Steering Committee agreed that the Act needed to be strengthened so as not to allow the port authorities and companies to over ride the Act via contracts. It considered that the examples provided by Fremantle PA lawyers justified the recommended amendments to Section 114.

7.42.4 Port Liability for Customer versus Customer Issues

A port authority requested that the review consider protecting port authorities from liability in issues surrounding disputes between customers or disputes arising from different customers using common user facilities. In summation, the legal advice obtained by the port authority concluded that an amendment to the Act would have no positive impact. Its suggestion was that it was preferable for port authorities to address such potential issues within contracts with third parties and to seek insurance for litigation costs and liabilities.

At this time the Steering Committee resolved that the Act did not require amendment to protect a port authority from litigation arising from disputes between customers or disputes arising from different customers using common berth facilities.

Subsequently, the Steering Committee considered independent legal advice received by Fremantle PA (and supported by Port Hedland PA) which suggested the insertion of a new Section 114F as follows:

> "A port authority is not liable for any loss or damage that is caused by or relates to the acts or omissions of any port user and a port authority is under no duty to protect the property of any port user against the activities of another port user."

The Steering Committee was concerned about protecting port authorities from the type of claims arising from a conflict between the activities of different port users within a port, or the uses made by different port users of facilities within a port and sought legal opinion on this matter.

The legal advice received indicated in part that;

- Any such amendment is best inserted in the Act and not the Regulations;
- The proposed draft amendment provided above, is not specific as to identifying the loss or damage and it may not protect a port authority in all situations; and
- The Steering Committee give consideration to the scope of the proposed immunity and type of dispute against which port authorities are seeking protection, as an application against all potential disputes may be inappropriate.

The Steering Committee resolved to recommend the insertion of Section 114F as drafted above and to then let the Parliamentary Counsel's Office test the applicability of the Section.

7.43 Standardisation of Port Charges Across all Port Authorities

The GPUG is of the opinion that Sections 115 to 119 of the Act, relating to port charges, need to be amended so that the type of port charges are standardised across all the State's port authorities although the quantum may vary between ports.

The Steering Committee ascertained that an investigation into the possibility of standardising port charges across all the State's ports had been undertaken previously without a satisfactory outcome. Port charges aim to recover the costs associated in operating a particular port and these costs could differ for numerous reasons including private contributions toward historic port development and different infrastructure needs of port users. In any event, the standardisation of port charges was considered to be a Government policy matter and not relevant to the operation and effectiveness of the Act.

7.44 Liability to Pay Port Charges in Respect of Goods

SAL believe any liability for outstanding port charges in respect of goods, (Section 117 of the Act), carried on a vessel should be the responsibility of the importer/exporter or others but not the vessel owner.

The Steering Committee noted that in cases where the port authority cannot identify the owner or others involved or responsible for the movement of the goods, it may need to seek payment from the shipper on the basis that the shipper may have a better chance of recovering the costs from its client.

7.45 Removal of a Director Without Cause

Notwithstanding the provisions of Section 133 of the Act, the GPUG was of the view that it is unacceptable for a director to be removed "without cause" and that Schedule 2, Section 2, Clause 2 of the Act does not give directors the stability needed to fulfil their duties. It suggested that the Minister must show cause prior to dismissing a board member and that Clause 2 be replaced as follows:-

"The Minister may remove a Director who fails to exercise the director's responsibilities, has a proven conflict of interest, is negligent, acts fraudulently, convicted of a criminal offence or a bankrupt."

The Steering Committee believes that the Minister's right to dismiss a board member should not be fettered. A Minister's decision could be challenged in the public arena if required to show cause for the dismissal. This provision was based on that existing in the *Water Corporations Act 1995* at the time. The Steering Committee considers it sufficient that Section 133 of the Act requires the Minister's reasons to be tabled in Parliament within 14 days of a director's removal.

7.46 Regular Review of the Act

The DPC commented that similar legislation constituting GTEs provides for a recurring review of the Act, for example, 'within six months after every 5th anniversary of the commencement of the Act (e.g. Western Australian Land Authority Act 1992, Section 48).

The DPC recommended that Section 144 of the Act be amended to provide for a rolling review (for example, once every five years) to ensure that the operation and effectiveness of the Act is adequate and current.

The Steering Committee was of the opinion that the current review of the Act has revealed no major problems with the Act that could justify a rolling review of the Act every five years. Frequent reviews would divert resources from other higher priority issues and older Acts in more need of review, and in any event, the Minister has the ability to request a review and determine what the terms of reference should be, at any time.

7.47 Duties and Obligations of Board Members

The GPUG considered that the provision relating to the general duties of a port authority CEO as described in Schedule 3, Division 1, Clause 1, needs to apply to all directors and not just the CEO. It believed that it is illogical for the Act to impose Corporations Act style fiduciary obligations on the CEO, and not impose them on the directors.

The Steering Committee considered that the duties and obligations of board members were adequately covered, by Corporations Act style obligations, under the *Statutory Corporations (Liability of Directors) Act 1996.*

7.48 Compensation to Port Customers

In respect of where the payment of compensation may be ordered, the GPUG believed that Schedule 3, Division 3, Clause 7 should be amended to allow for damages claims by third parties, who are able to take action against the relevant (port authority) officer under clause 3(2).

The Steering Committee believes the respondent has misconstrued the intention of this clause, which relates to the fiduciary arrangement between a port authority and its staff. Port customers are able to seek damages against a port authority under Common Law.

7.49 Livestock Exports

The Western Australian Livestock Exporters' Association (WALEA), requested a review of the current practice to export livestock from the Fremantle Inner Harbour. In summary, its submission sought to have the export of livestock located outside of the Inner Harbour for the reasons of animal welfare, community concern and reaction, confined/restricted land and berth access, environmental considerations, and public access to the monitoring of livestock exports at Fremantle.

The Steering Committee considered that the matters raised by the WALEA did not have regard to the review's terms of reference but rather were an operational and policy matter for Fremantle Port management.

7.50 Treasurer's Power to Make Specific Exemption Orders

It was noted that Schedule 5 Clause 33 of the Act details the authority of the Treasurer to exempt the ports from their reporting/audit obligations. The exemptions that may be issued by the Treasurer include the requirements on the Auditor General to form an opinion and report to the Minister and the powers of the Auditor General to obtain information from the port authorities. Such a provision impacts on the Auditor General's capacity to undertake (and the scope of) an audit.

The issue was raised by the Auditor General's Office in 2003 because it perceived its independence (as an officer of Parliament) was being compromised by the Executive in the Treasurer granting an exemption that would impact on the Auditor General's responsibilities as contained in the former *Financial Administration and Audit Act 1985*. Relevant provisions appear contrary to the principle of the independence of the Auditor General.

Section 340 of the *Corporations Act 2001* provides the Australian Securities and Investments Commission with the discretionary power to exempt companies from any or all of the requirements of Sections 286 to 331AE of that Act. The *Port Authorities Act 1999* includes Sections 340 and 342 'equivalents'. These equivalent provisions give the Treasurer the power to make specific exemption orders relieving directors, the port authority or the Auditor General from any or all of the requirements specified in the legislation in respect of financial records and financial reporting.

The exemptions that may be granted by the Treasurer include the requirements on the Auditor General to form an opinion and report to the Minister and the powers of the Auditor General to obtain information (this includes the obligations imposed on the agency to provide information and assistance). This may impact on the scope of the audit and the Auditor General's capacity to undertake the audit. The options that should be considered in a review of the *Port Authorities Act 1999* are:

1. Seek an undertaking from the Treasurer to consult with the Auditor General before granting an exemption.
2. Modify the powers of the Treasurer to grant exemptions.
3. Remove from the legislation the power of the Treasurer to grant exemptions from the legislative requirements in respect of financial records and financial reporting.

It was recommended that the Act be reviewed to remove the exemption power altogether in respect of the powers or functions of the Auditor General.

The Steering Committee noted that the current Treasurer's exemption powers could affect the independence of the Auditor General, however, the Auditor General becomes aware of the Treasurer's decision which is required to be tabled in Parliament as per Schedule 5 Clause 33(6). The Steering Committee considered that no amendments to the Act were necessary and that sufficient safeguards existed in terms of Corporations Law within Schedule 5 Clause 33A for Parliamentary control of the Treasurer's exemption powers.

7.51 A Matter of Government Policy

A mining company lodged a confidential submission with the Steering Committee and in accordance with the invitation for submissions, the company's name and the specific content of submission are not disclosed in this report. In any event the main issue raised by the company related to the clarification of a Government policy matter and the Steering Committee was not required to make any resolution or recommendation in respect of the Act under the terms of reference to the review.

7.52 State Agreements

Port Hedland PA was of the view that (new) State Agreements are not required where an established port authority already has the infrastructure, capacity and ability to manage development projects and address the needs of industry and third party developers.

The Steering Committee was of the opinion that the developer/proponent should be allowed to negotiate with port management about the provision of land and services and that the Department of Industry and Resources (DoIR) should not direct what facilities are to be provided within a port authority administered port.

The Steering Committee resolved that proponents may need more certainty and each proposal was subject to separate consideration. Port authority control over the port area should not be compromised by inappropriate provisions being inserted into new State Agreements. However, the Steering Committee did not consider that it was practicable to insert provisions in the Act to stop inappropriate provisions being included in future State Agreements.

The Port Hedland PA obtained various legal opinions as to whether or not it is bound by a State Agreement if it is not an agent of the Crown as indicated in Section 5 of the Act. It requested clarity on this issue.

The Steering Committee was of the opinion that there were many old State Agreements in existence and the port authorities remained bound to these and that State Agreements could not be of "nil" value. An example was provided where a State agreement required a port authority to provide a proponent with land for lease. It was considered that the Minister could be made responsible for a resolution to any dispute or that another alternative would be for the Minister to take the issue to Cabinet.

7.53 Signage Within a Port Area

Fremantle PA received independent legal advice which suggested the Act or the Regulations should be amended so that there is no obligation on a port authority to seek approval to signage being installed within the port, either by the port authority or a lessee or licensee of the port authority provided the signage complies with a signage regime developed with the relevant stakeholders. The basis for this proposal is for the port authorities to have sole control over signage within the port and not be subject to local government or other agencies.

Matters pertaining to signage at port authorities are dealt with under the Port Authorities Regulations 2001. The Steering Committee resolved that the proposal is not supported.

7.54 Private Operation of a Public Port

The DPC commented that some industries in Western Australia, including the energy and rail industries, adopt a model that allows private sector organisations to operate their respective facilities under a government license, which brings the organisation and its operations under government regulation. Acacia Prison operates under such a model.

It suggested the Government could license a private sector organisation formed as a company under the *Corporations Act 2001* to operate a port, while still allowing the port to be subject to Government regulations. Clear rules of entry could be a means of facilitating or attracting private sector investment in port infrastructure. It is recommended that consideration be given to the Act being expanded to include a licensing model.

The Steering Committee considered that private port facilities are provided for under other Acts. The *Port Authorities Act 1999*, is an Act for the governance of port authority administered ports only.

7.55 Dampier Port Authority - Quorum

The Act contains specific provisions for Dampier and Port Hedland Port Authorities given these port authorities' rights and obligations under various State Agreements. The Steering Committee gave consideration to remove the requirement that either of the two company and joint venture appointees be present to constitute a quorum. It was considered that this amendment would have no material impact on the proceedings of Dampier PA board meetings.

The Steering Committee resolved to remove Clause 1.7 of Schedule 6 - Division 1 of the Act outright. The effect of this would bring the Dampier PA into line with all the other port authorities whereby the presence of any three directors was sufficient to constitute a quorum in accordance with Schedule 2 – Clause 5 of the Act.

7.56 Discharging Waste Substances on to Wharf or into Waters of Port

Regulation 17 *Discharging waste substances on to wharf or into waters of port prohibited*, specifies that, unless authorised by a member of staff of the port authority, the master of a vessel must not cause or permit any waste water or waste substances of any kind to be discharged from the vessel on to any part of the wharf or into the waters of a port.

The MEPU sought clarification from the Steering Committee as to whether, the Act and its regulations take precedence over the *Pollution of Waters by Oil and Noxious Substances Act 1987* (POWBONS). If not wouldn't POWBONS be a more suitable legislative tool for prosecution for the discharge of oil, oily waste, sewage or garbage?

The discharge of waste within a port is arguably a matter that can effect port authority operations and is therefore covered under port authority regulations. However, the Steering Committee resolved that the matters raised above by the DPI MEPU did not represent issues that came under the review's terms of reference. It was considered that the matters raised were either a policy matter and not a legal issue relevant to the review of the *Port Authorities Act 1999*, or otherwise were covered or needed to be addressed through the *Pollution of Waters by Oil and Noxious Substances Act 1987* or the *Environmental Protection Act 1986*.

8.0 Current Performance and Effectiveness of the Act

The introduction of the Act into legislation on 14 August 1999 was notable in many ways. It:-

- Assimilated seven primary port authority Acts plus associated minor Acts into one primary piece of legislation governing Western Australia's statutory port authorities;
- Modernised port authority legislation that had previously been introduced over the period between 1902 to 1985; and
- Placed in legislation the Government's intention that the function and role of port authorities was to facilitate trade, with this being done in a commercial and efficient manner.

The Act was the product of an exhaustive process involving the collaboration of many key stakeholders. The extent to which the Act has been effective to date can be identified by a number of factors.

Since its introduction, the Act has worked well. The provisions have proved to be robust, evident by the port authorities' ability to respond quickly and efficiently to demands from port customers to cater for increased shipments of trade through the ports. A key indicator of the Act's robustness has been the absence of major amendments being made to the Act since its introduction on 14 August 1999. The amendments to date have been minor, the majority relating to the updating of other State legislation and clarification of terminology or definitions.

Over the first five years of the Act's application, aggregate port authority trade throughput has risen from 191.4 million tonnes to 258.6 million tonnes, (an increase of 35.1%) as shown in Appendix 3.1. Similarly, the value of international trade shipped through the eight port authority ports has risen by 46.5% from $27.6 billion to $40.4 billion. While this increase in trade throughput is a product of economic conditions, it is also reflective of legal capacity and effective port authority management in fulfilling the primary legislated function of port authorities to facilitate trade, in the absence of which, shipping bottle necks and/or sub-optimal capture of trading opportunities could have been expected.

To support and cater for the increased levels of trade being shipped through the State, the port authorities, with Government support, have undertaken a massive capital works program over this period evident from Appendix 3.2. Over the period 2000 to 2005 port authority investment in capital works has increased on average by 38% per annum.

All the port authorities have generally operated profitably with the exception of the Broome Port Authority which is hindered by low trade throughput. The reduced and generally steady return on assets illustrated in Appendix 3.3, is a reflection of increased investment in capital infrastructure by port authorities, together with their intent of reducing port fees and financial returns in accordance with the legislated function of facilitating trade.

A substantial proportion of the port authorities' 2000 to 2005 aggregate capital works program was financed by the port authorities through borrowings. Consequently, between the period 2001 to 2005, the port authorities were required to increase port charges, (or introduce new charges like port improvement dues), that resulted in port charges increasing by 2.9% per annum in real terms.

Consistent with its trade facilitation objectives and the need to remain profitable, the port authorities substantial capital investment was achieved with port charges per tonne of cargo shipped through the ports being 14.85% lower, in real terms in 2004-05 than in 1993-94 (refer Appendix 3.4). This reflects the port authorities' continued commitment to ensuring where ever possible that savings are passed on to port users and consumers.

Port authorities have been subject to recommending a dividend to Government since 1988-89 and the current policy of a 50% payout ratio of net profit after tax has applied since 2000-01. Port authorities were also the subject of efficiency dividends (unrelated to port profit) between 2001-02 and 2004-05. With the introduction of National Competition Policy reforms, the State's port authorities became subject to making taxation equivalent payments from 1996-97. An objective of the reform was to instil the efficient allocation of resources by removing any competitive advantage accruing to GTEs from public ownership. The requirement for port authorities to recommend dividends and pay tax equivalents has continued that objective under the *Port Authorities Act 1999.* Appendix 3.5 illustrates the annual aggregate taxation and dividend payments made by the port authorities over the period 1993-94 to 2004-05.

9.0 Conclusion

The review has revealed that the Act is working well and no major shortcomings in the legislation have been identified. The Steering Committee has made a total of eleven recommendations (at Section 6 of this report) in line with the review's terms of reference and the amendments can be introduced when the earliest opportunity presents itself. The suggested enhancements will improve clarity, commercial administration and operations.

APPENDIX 1

A Press Advertisement
for the Review of the Port Authorities Act 1999

Department for
Planning and Infrastructure
Government of **Western Australia**

Review of Western Australia's Port Authorities Act 1999

The Minister for Planning and Infrastructure has appointed an independent Steering Committee to undertake a statutory review of the Port Authorities Act 1999. As part of this review, submissions are being sought from stakeholders.

The Act applies to the Western Australian State-owned shipping ports at Albany, Broome, Bunbury, Dampier, Esperance, Fremantle, Geraldton and Port Hedland, and its intention is to provide these ports with greater operational responsibility and autonomy while strengthening their accountability to Government and Parliament.

The review will consider the operation and effectiveness of the Act.

Submissions must be received by **5pm (Perth time) on Friday 24 March 2006.**

To access a background paper and links to the legislation, which may assist with your submission visit www.dpi.wa.gov.au/ports, and click on the references to the WA Port Authorities Act Review.

For further information, contact Mr Eddie Grojek at the Department for Planning and Infrastructure on (08) 9216 8822.

Submissions can be sent by e-mail to PortAuthoritiesActReview@dpi.wa.gov.au, fax (08) 9216 8984 or post to:

ATTENTION: Mr Eddie Grojek

Port Authorities Act Review

Department for Planning and Infrastructure

PO Box 402

FREMANTLE WA 6959

A copy of the press advertisement submitted to the West Australian newspaper for publication at page 31 on Friday March 3, 2006 informing readers of the Review of the Western Australian Port Authorities Act 1999.

Similar press advertisements appeared in the West Australian Newspaper, on February 10, 2006 (page 28) and in a major, national shipping, trade and logistics newspaper, the Lloyd's List DCN on February 26, 2006 (page 6) and March 2, 2006 (page 12).

APPENDIX 2

The Background Paper for the Information of Potential Respondents as referred to in the Press Advertisements

Review of *Port Authorities Act 1999*

What the Review is about and how to make a Submission

The Department for Planning and Infrastructure is presently co-ordinating a statutory review of the *Port Authorities Act 1999* (the Act) on behalf of the Minister for Planning and Infrastructure. The Minister has appointed an independent Steering Committee to conduct the review.

The purpose of the review is to assess the current operation and effectiveness of the Act. Changes to the Act may be recommended as a result of the review.

The Act and this review applies only to the following Western Australian State owned ports:

Albany
Broome
Bunbury
Dampier
Esperance
Fremantle
Geraldton
Port Hedland

Your participation in this review is appreciated. Your comments and suggestions are important to the operation and regulation of these ports.

The following information is intended to assist you to provide your input to the review.

What is the *Port Authorities Act 1999* about?

The Port Authorities Act, proclaimed on 14 August 1999, replaced seven pre-existing Port Authority Acts and the Port Functions Act 1993 to create an updated, standardised approach to port authority management.

The Act commercialised port authorities with an intent to better equip them to respond to market forces and thereby facilitate trade. The Act intended that ports be given the freedom to control the day-to-day running of the port, while allowing Government to retain strategic control, including the ability to set performance goals and broad limits for capital expenditure and to control the range of activities undertaken.

APPENDIX 2 (Cont.)

The Background Paper for the Information of Potential Respondents as referred to in the Press Advertisements

Section 144 requires the Minister to carry out a review of the operation and effectiveness of the Act as soon as practicable after the expiry of five years from commencement.

If you would like to look at the Act, you can view it online at www.slp.wa.gov.au/statutes/swans.nsf/AllinOne

Port Authorities Regulations 2001, which are associated with the Act, can be viewed online at www.slp.wa.gov.au/statutes/regs.nsf/AllinOne.

Who is undertaking the review?

The Minister for Planning and Infrastructure is responsible for ensuring that the review takes place and is required to subsequently submit a report to Parliament based on the review.

The review is being conducted on behalf of the Minister by a Steering Committee comprising representatives from the Department for Planning and Infrastructure, Western Australian port authorities, the Port Operations Task Force, the Minister's Office and the Department of Treasury and Finance.

What are the review's terms of reference?

The review's terms of reference are to consider the operation and effectiveness of the Act.

The Steering Committee is to collate all submissions and raise a report for the responsible Minister's consideration, to enable the Minister to report to Parliament under the terms of section 144 of the Act.

Who should participate in the review?

You may wish to participate in the review if you:

- need to use a port authority port for the import and/or export of commodities;
- are a current or potential service provider involved with the facilitation of trade through the State's ports;
- are a representative of a maritime and/or transport industry body or association;
- are a trade union representing maritime and/or transport employees;
- are a representative of the community, business or council residing or located within the proximity of one of the State's ports.

APPENDIX 2 (Cont.)

The Background Paper for the Information of Potential Respondents as referred to in the Press Advertisements

How can you participate in the review?

You can participate in the review by providing your thoughts, ideas and suggestions in relation to any or all of the terms of reference. You will be helping the Minister and Parliament to make decisions about the need for potential changes to the Act.

Remember that your suggestions will carry more weight if you can back them up with relevant facts and examples. You will find some helpful tips for making an effective submission at the end of this paper.

Your submission should clearly show your name, be signed and provide a contact address, phone number or email address in the event the Steering Committee requests clarification with respect to your submission.

Your submission must be received by 5pm (Perth time) on **Friday 24 March 2006.**

By email to: PortAuthoritiesActReview@dpi.wa.gov.au

or

By fax to: (08) 9216 8984

or

By post to: Port Authorities Act Review
Department for Planning and Infrastructure
PO Box 402
FREMANTLE WA 6959

ATTENTION: Mr Eddie Grojek

For any queries regarding the review or if you would like direct contact with the independent review team, please contact Eddie Grojek on (08) 9216 8822 or by email at PortAuthoritiesActReview@dpi.wa.gov.au

APPENDIX 2 (Cont.)

The Background Paper for the Information of Potential Respondents as referred to in the Press Advertisements

Tips on making a submission

Remember that the review will focus on the terms of reference set out in this background paper. If you raise issues outside those terms of reference, these will probably not be taken into account for the purpose of the review.

Your submission does not need to be long or complex. Your opinions, the reasons for them and your suggestions for improvements, or of alternatives, are the most important part.

Jot down the points you want to make and group them under the heading of the term(s) of reference you are addressing.

State clearly and simply your point of view and the reasons for it.

Wherever possible, provide evidence or examples to substantiate your views.

Provide details of the source of any factual data to which you refer, such as a report, article or statistics. This should include, if possible, the name and date of the publication, the author's name and page references saying where the information or article can be located (or provide a copy with your submission).

If your submission is long, summarise the main points at the beginning of the submission.

Important information about your submission

When you lodge your submission, it is important to realise that it becomes a public document. This means that, for the review, your submission can be viewed by others or its contents quoted.

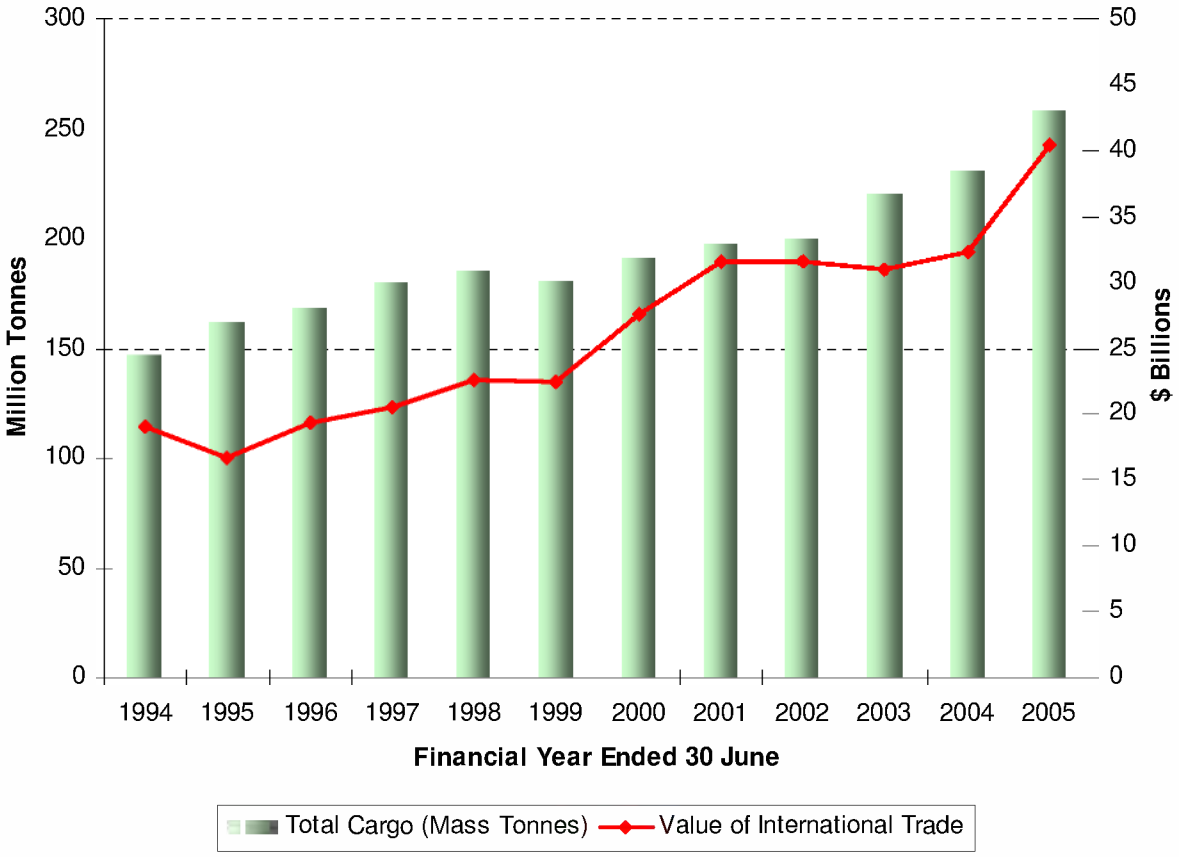
If you do not want your submission to be made public or its contents quoted, please advise the Steering Committee of your wishes in a covering letter with your submission. The Steering Committee will respect your request.

You should be aware, however, that under the *Freedom of Information Act 1992* (WA), the Steering Committee cannot guarantee the confidentiality of your submission.

Your submission should clearly show your name, be signed and provide a contact address, phone number or email address in the event the Steering Committee requests clarification with respect to your submission.

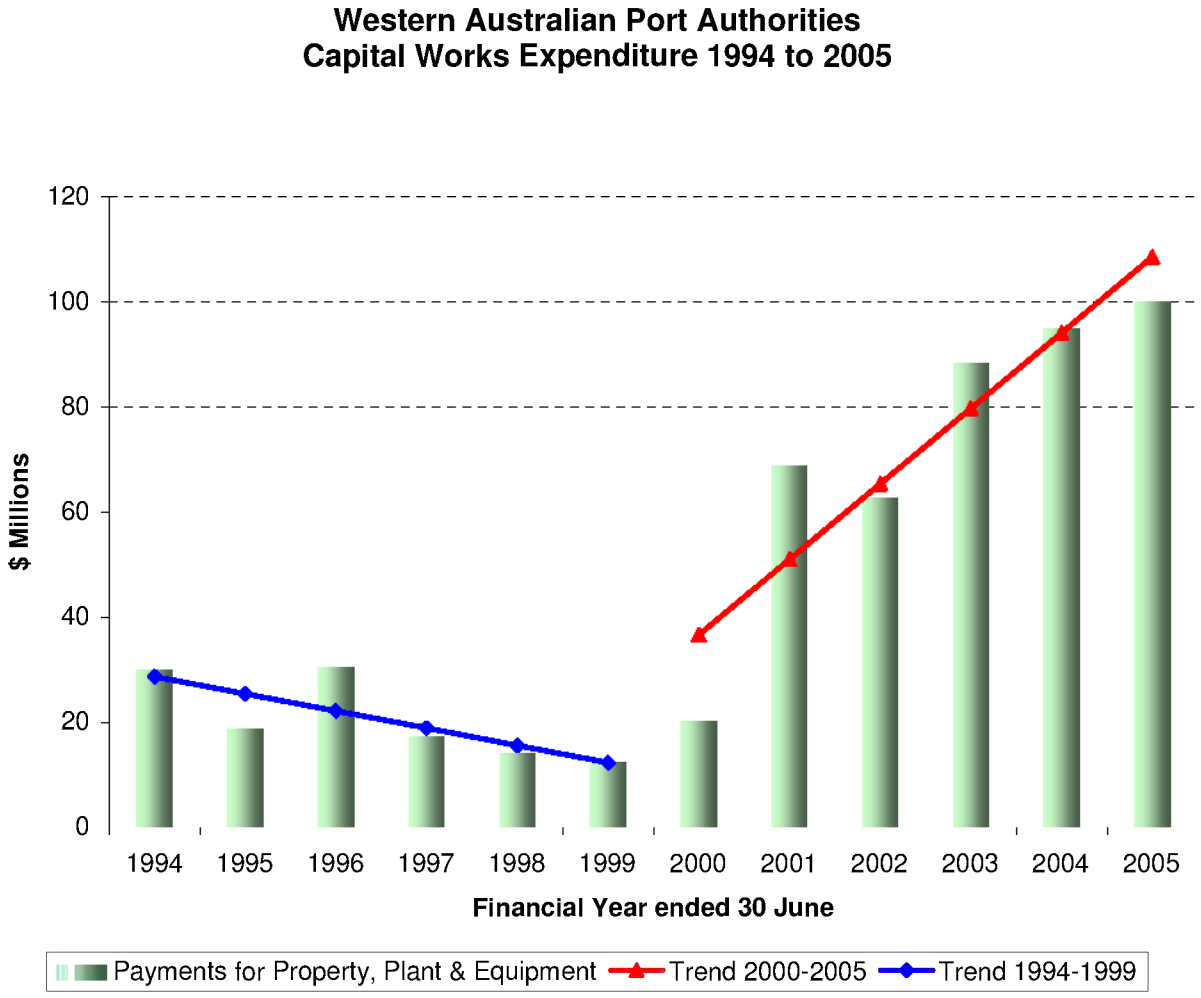
APPENDIX 3.1

Western Australian Port Authorities
Trade Volumes and Value 1994 to 2005



Source: Bureau of Transport and Regional Economics
Note: Values are expressed in historical cost (dollars of the day) terms.

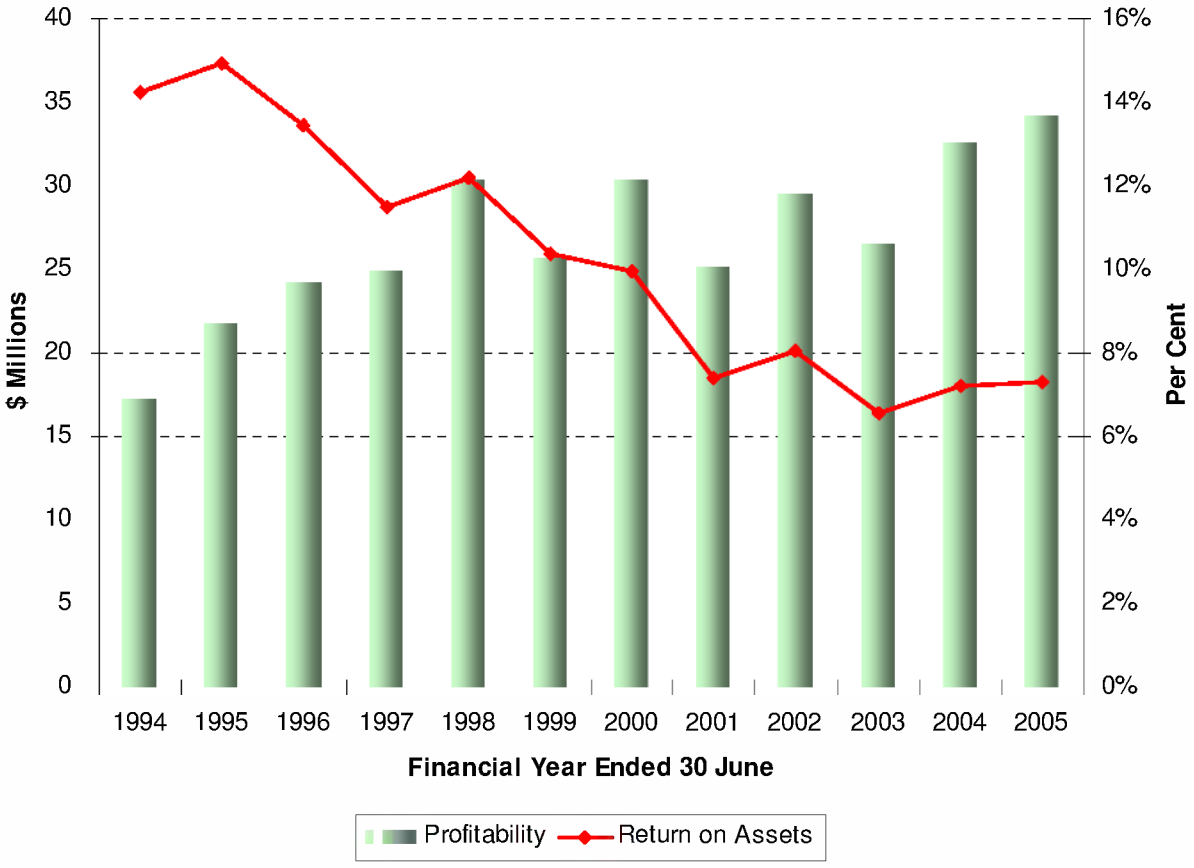
APPENDIX 3.2



Source: Western Australian Port Authority Annual Reports
Note: Values are expressed in historical cost (dollars of the day) terms.

APPENDIX 3.3

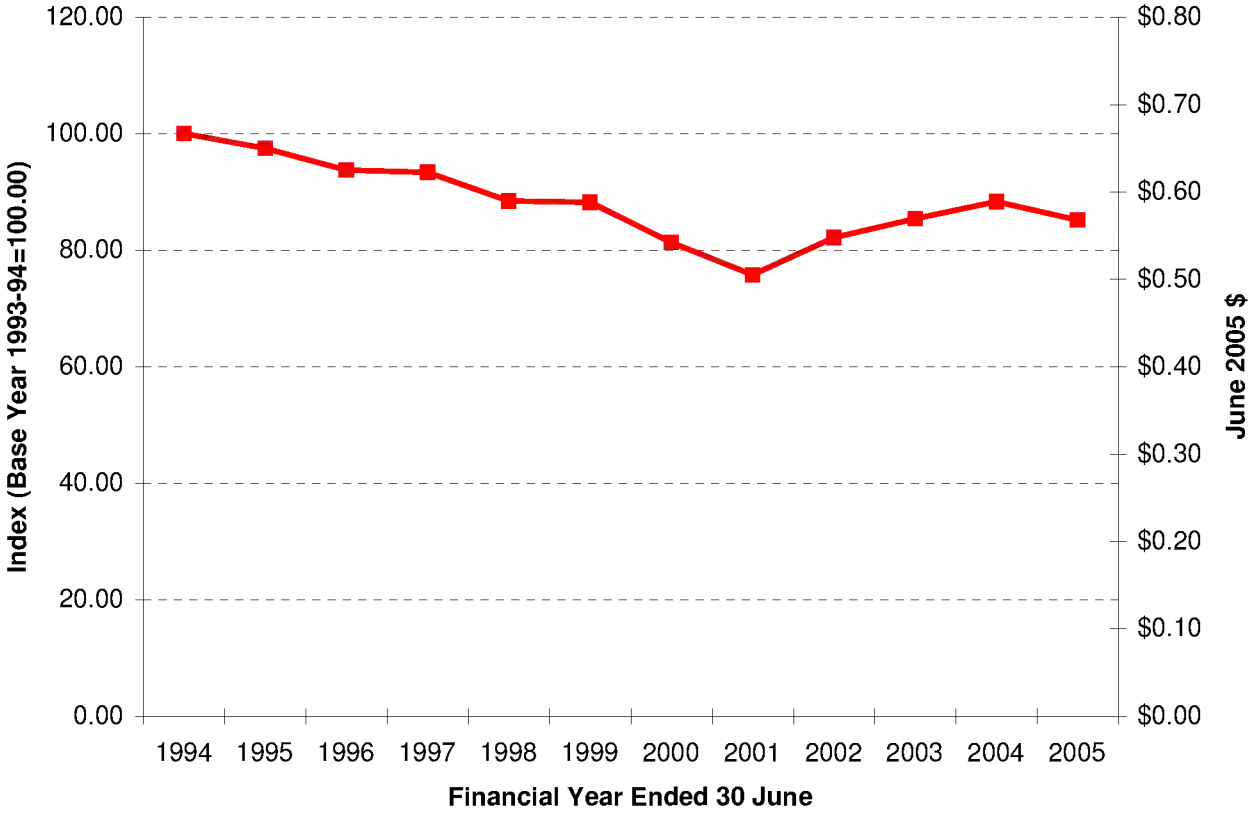
Western Australian Port Authorities
Profitability and Return on Assets 1994 to 2005



Source: Western Australian Port Authority Annual Reports
Note: These measures are expressed in historical cost (dollars of the day) terms.

APPENDIX 3.4

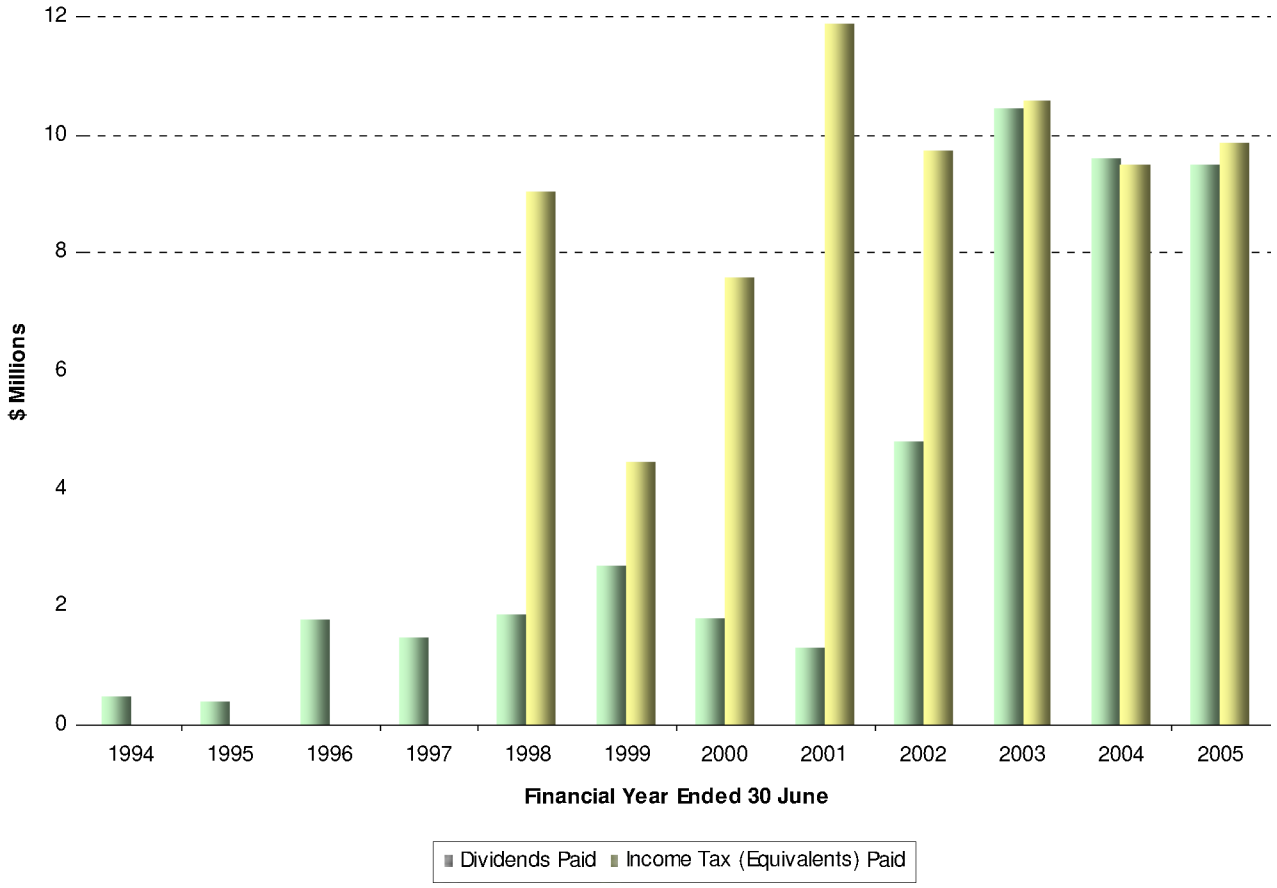
Western Australian Port Authorities
Vessel and Cargo Charges per Tonne of Cargo Throughput 1994 to 2005



Source: Western Australian Port Authority Annual Reports

APPENDIX 3.5

Western Australian Port Authorities
Dividend and Income Tax Payments 1994 to 2005



Source: Western Australian Port Authority Annual Reports
Note: Values are expressed in historical cost (dollars of the day) terms.
Dividends and income tax equivalents are shown in the financial year of payment not in the financial year incurred.

APPENDIX 4

Amendment to the Port Authorities Act 1999 as a result of the introduction of the Financial Management Act 2006 on 1 February 2007

In summary the amendments below allow the Minister to fix a day for the submission of the Draft Strategic Development Plan and the Draft Statement of Corporate Intent.

Prior to proclamation of the Financial Management Act 2006 Section 49 (1) and (2) of the Port Authorities Act 1999 read as follows -

Division 1 — Strategic development plans

49. Draft strategic development plan to be submitted to Minister

(1) The board of a port authority must in each year prepare, and submit to the Minister for the Minister's agreement, a draft strategic development plan for the port authority and any subsidiary.

(2) Each draft strategic development plan is to be submitted not later than 3 months before the start of the next financial year.

There is no change to Section 49(1).

Section 49(2) and (3) now reads as follows —

(2) The Minister may from time to time, with the concurrence of the Treasurer, by written notice to the board of a port authority —
  (a) fix a day in each year by which a draft strategic development plan is to be submitted under subsection (1); or
  (b) cancel a notice given under paragraph (a).

(3) Each draft strategic development plan is to be submitted not later than —
  (a) the day fixed under subsection (2); or
  (b) if there is for the time being no day so fixed —
  3 months before the start of the next financial year.

APPENDIX 4 (Cont.)

Amendment to the Port Authorities Act 1999 as a result of the introduction of the Financial Management Act 2006 on 1 February 2007

Prior to proclamation of the Financial Management Act 2006 Section 58 (1) and (2) of the Port Authorities Act 1999 read as follows -

Division 2 — Statement of corporate intent

58. Draft statement of corporate intent to be submitted to Minister

(1) The board of a port authority must in each year prepare, and submit to the Minister for the Minister's agreement, a draft statement of corporate intent for the port authority and any subsidiary.

(2) Each draft statement of corporate intent is to be submitted not later than 3 months before the start of the next financial year.

There is no change to Section 58(1).

Section 58(2) and (3) now reads as follows -

(2) The Minister may from time to time, with the concurrence of the Treasurer, by written notice to the board of a port authority —
  (a) fix a day in each year by which a draft statement of corporate intent is to be submitted under subsection (1); or
  (b) cancel a notice given under paragraph (a).

(3) Each draft statement of corporate intent is to be submitted not later than —
  (a) the day fixed under subsection (2); or
  (b) if there is for the time being no day so fixed —
  3 months before the start of the next financial year.

* * *