



Western Australia

Pilbara Port Assets (Disposal) Act 2016

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No. 52 of 2016

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Pilbara Port Assets (Disposal) Act 2016

Contents

Part 1 — Preliminary matters

1.	Short title	2
2.	Commencement	2
3.	Terms used	2
4.	Associated assets and associated agencies	6
5.	Purposes of section 10 disposal	6
6.	Things on land	6
7.	Severance of things on land	6
8.	Act binds Crown	7

Part 2 — Enabling disposal

9.	Disposal of port assets and associated assets authorised	8
10.	Minister may order disposal of port assets or associated assets	8
11.	Effecting disposal	9
12.	Disposal of land	9
13.	Land subject to unregistered leases with terms exceeding 5 years	11
14.	Functions and powers of Minister	11
15.	Functions and powers of Authority	11
16.	Functions and powers of associated agencies	11
17.	Functions and powers of corporate vehicles	11
18.	Directions by Minister	12
19.	Regulations about corporate vehicles and trusts	12

Part 3 — Implementing disposal		
Division 1 — Transfer orders		
20.	Minister may make transfer orders	14
21.	Consequences of transfer orders	15
22.	Completion of transactions for this Division	16
23.	Effect of arrangements internal to transferors	16
24.	Delivery and access to records	17
25.	Registration of documents	17
26.	Correction of errors in transfer orders	18
Division 2 — Disclosure of information		
27.	Authorised disclosure of information	19
28.	Auditor General may disclose information	20
29.	Offence of disclosing information	20
Division 3 — Other matters		
30.	Application of proceeds of disposal	21
31.	Provision by State of indemnities and guarantees	21
32.	Takeover by State of certain obligations	22
Part 4 — Provisions relating to corporate vehicles		
33.	Application of this Part	23
34.	Acquirer's powers and duties	23
35.	Application of written laws to acquirer	23
Part 5 — Provisions relating to leases and licences		
36.	Term used: port facilities instrument	24
37.	Minister may designate certain matters	24
38.	Effect of provisions of port facilities instrument	25
39.	References to port authority may include other entities	26
40.	Making and registration of certain lease variations	27
Part 6 — Miscellaneous matters		
41.	Exemption from State tax	29
42.	Effect of this Act on existing rights and obligations	30
43.	No compensation payable	30
44.	Government agreements not affected	31

45.	Regulations for purposes of, or consequential on, section 10 disposals	31
46.	Regulations for purposes of providing access to services	32
47.	Preservation of rights to future access	35
48.	Regulations	36

**Schedule 1 — Utah Point Bulk
Handling Facility**

Defined terms



Western Australia

Pilbara Port Assets (Disposal) Act 2016

No. 52 of 2016

An Act to provide for the disposal of the whole or part of certain businesses carried on by, or all or any of certain assets or liabilities owned or managed by, the Pilbara Ports Authority, and for related purposes.

[Assented to 13 December 2016.]

The Parliament of Western Australia enacts as follows:

Part 1 — Preliminary matters

1. Short title

This is the *Pilbara Port Assets (Disposal) Act 2016*.

2. Commencement

This Act comes into operation on the day after the day on which it receives the Royal Assent.

3. Terms used

In this Act, unless the contrary intention appears —

acquirer means the entity to which a port asset or associated asset is disposed of for the purposes of a section 10 disposal;

asset means property of any kind whether tangible, intangible, real or personal and includes (without limitation) —

- (a) any chose in action, goodwill, right, interest or claim of any kind, whether arising from, accruing under, created or evidenced by or the subject of an instrument or otherwise and whether liquidated or unliquidated or actual, contingent or prospective; and
- (b) a contractual right that is to be regarded as arising because of section 23(2);

Authority means the Pilbara Ports Authority under the *Port Authorities Act 1999*;

associated agency has the meaning given in section 4(3);

associated asset means an associated State asset or an associated SC asset;

associated SC asset has the meaning given in section 4(2);

associated State asset has the meaning given in section 4(1);

company means a company registered under the *Corporations Act 2001* (Commonwealth);

corporate vehicle means —

- (a) a company created for the purposes of this Act each security in which is held by the Minister or the Treasurer on behalf of the State; or
- (b) a subsidiary under the *Corporations Act 2001* (Commonwealth) of a company referred to in paragraph (a); or
- (c) a subsidiary under the *Port Authorities Act 1999* of the Authority; or
- (d) a subsidiary of a subsidiary mentioned in paragraph (b) or (c);

dispose of, in relation to a port asset or associated asset, includes —

- (a) to sell the port asset or associated asset; and
- (b) to grant a lease or licence in respect of the port asset or associated asset; and
- (c) to create and assign an interest in the port asset or associated asset;

disposer means the entity from which a port asset or associated asset is disposed of for the purposes of a section 10 disposal;

lease includes a concurrent lease, a sublease or a concurrent sublease;

liability —

- (a) means any liability, duty or obligation —
 - (i) whether liquidated or unliquidated or actual, contingent or prospective; or
 - (ii) whether owed alone or jointly or jointly and severally with any other person;and
- (b) includes a contractual liability that is to be regarded as arising because of section 23(2);

port asset means —

- (a) the whole or any part of a business carried on by, or any asset or liability owned or managed by, the Authority; or
- (b) the whole or any part of a business carried on by, or any asset or liability owned by or managed on behalf of the Authority, an associated agency, a corporate vehicle or the State by, a corporate vehicle,

to the extent to which the business, asset or liability relates to or comprises the Utah Point Bulk Handling Facility or is owned or managed by the Authority and is, in the Minister's opinion, associated with the Utah Point Bulk Handling Facility;

port authority means a port authority under the *Port Authorities Act 1999* section 3(1);

private entity means a person other than any of the following —

- (a) a port authority;
- (b) a statutory corporation;
- (c) a corporate vehicle;
- (d) the State;

port facility means —

- (a) a port asset or associated asset disposed of under this Act; or
- (b) an asset that was a port asset or associated asset before it was disposed of under this Act; or
- (c) anything prescribed by the regulations to be a port facility for the purposes of the provision in which the term is used;

purposes, of a section 10 disposal, has the meaning given in section 5;

regulations means regulations made under section 48;

right means any right, power, privilege or immunity whether actual, contingent or prospective but, in relation to a transfer order, does not include any privilege or immunity enjoyed as an

agent of the Crown except insofar as it relates to anything done or omitted to be done before the transfer time;

section 10 disposal means a disposal for which an order is in force under section 10;

statutory corporation means —

- (a) a Minister or chief executive officer who is constituted, or continued in existence, as a body corporate under an Act; or
- (b) any other body corporate, other than a port authority, that is constituted, or continued in existence, under an Act;

transferee, in relation to a transfer order, has the meaning given in section 20(1)(b);

transferor, in relation to a transfer order, has the meaning given in section 20(1)(b);

transfer order means a transfer order made under section 20 as amended under that section or corrected under section 26;

transfer time, in relation to a transfer order, means the time specified under section 20(1)(a) in the transfer order;

Utah Point Bulk Handling Facility means —

- (a) the Authority berth known as berth 4 (shown for information coloured red and marked as “PH 4” on the map in Schedule 1); and
- (b) the Authority stockyards known as stockyard 1 (shown for information coloured red and marked as “Stockyards” on the map in Schedule 1); and
- (c) the Authority stockyards known as stockyard 2 (shown for information coloured red and marked as “Atlas Stockyard 2” on the map in Schedule 1).

4. Associated assets and associated agencies

- (1) An associated State asset is any asset or liability that —
 - (a) is owned by the State but is not owned or managed by a statutory corporation; and
 - (b) is, in the Minister’s opinion, associated with a port asset.
- (2) An associated SC asset is any asset or liability that —
 - (a) is owned by, or managed on behalf of the State by, a statutory corporation; and
 - (b) is, in the Minister’s opinion, associated with a port asset.
- (3) An associated agency is a statutory corporation that owns or manages an associated SC asset.

5. Purposes of section 10 disposal

The purposes of a section 10 disposal include the following —

- (a) the purpose of effecting or facilitating the section 10 disposal;
- (b) any purpose ancillary or incidental to, or consequential on, the section 10 disposal.

6. Things on land

A reference in this Act to a thing that is on land is to be taken to be a reference to a thing that is on, in, over or under the land.

7. Severance of things on land

- (1) The Minister may, by order in writing for the purposes of a section 10 disposal, direct that a specified thing that is on land and is capable of being disposed of is not part of the land, regardless of whether it is in the nature of a fixture.
- (2) The effect of the order is that, for the purposes of a section 10 disposal, the thing —
 - (a) is taken to be severed from the land; and

- (b) is capable of being assigned as personal property separately from the land; and
 - (c) is capable of being removed from the land by, or with the authority of, the owner of the land.
- (3) The severance of a thing from land under this section does not affect the right of the thing to be situated on that land.
- (4) The Minister may vary or revoke an order made under subsection (1).

8. Act binds Crown

This Act binds the State and, so far as the legislative power of the State permits, the Crown in all its other capacities.

Part 2 — Enabling disposal

9. Disposal of port assets and associated assets authorised

- (1) A port asset owned or managed by the Authority may be disposed of, whether by the Authority or the State, if the disposal is authorised by an order made under section 10.
- (2) A port asset owned or managed by a corporate vehicle may be disposed of, whether by the corporate vehicle or the State, if the disposal is authorised by an order made under section 10.
- (3) An associated State asset may be disposed of by the State if the disposal is authorised by an order made under section 10.
- (4) An associated SC asset may be disposed of, whether by the associated agency or the State, if the disposal is authorised by an order made under section 10.

10. Minister may order disposal of port assets or associated assets

- (1) The Minister may, by order published in the *Gazette* —
 - (a) direct the disposal of all or specified port assets or all or specified associated assets; or
 - (b) vary or revoke an order made under paragraph (a), or under this paragraph, at any time before effect is given to the order.
- (2) An order made under subsection (1) may be in general terms and need not include any details about how the disposal is to be effected or specific details about the assets the subject of the disposal.
- (3) If the Minister is not the Treasurer, the Minister cannot make an order under subsection (1) without the Treasurer's approval.
- (4) If the Minister is not the Minister administering the *Port Authorities Act 1999*, the Minister cannot make an order under subsection (1) without the Minister's approval.

- (5) An order made under subsection (1) takes effect —
 - (a) on the day after the day on which the order is published in the *Gazette*; or
 - (b) if a later day is specified in the order — on that day.

11. Effecting disposal

- (1) Subject to section 12, there are no limitations on the nature of any transaction or arrangement that can be entered into for the purposes of a section 10 disposal.
- (2) An express provision of this Act authorising the establishment of a particular kind of legal entity for the purposes of a section 10 disposal does not limit the kinds of legal entity that can be used for those purposes.
- (3) One or more corporate vehicles or one or more trusts can be used for the purposes of a section 10 disposal.
- (4) If a company mentioned in paragraph (a) of the definition of *corporate vehicle* in section 3 is to be used for the purposes of a section 10 disposal by the State, the Under Treasurer must ensure that the necessary steps are taken on behalf of the State to create the company.
- (5) The Minister or the Treasurer can —
 - (a) receive on behalf of the State an allotment and issue of, or otherwise acquire on behalf of the State, securities in the company; and
 - (b) hold, and dispose of, on behalf of the State any securities in the company so acquired by the person.
- (6) The Minister may enter into on behalf of the State any agreement for the purposes of a section 10 disposal.

12. Disposal of land

- (1) The following land can be disposed of under this Act —
 - (a) Crown land;

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- (b) freehold land owned by the Authority, an associated agency, a corporate vehicle or the State.
- (2) Land referred to in subsection (1) can only be disposed of under this Act to a private entity by granting to the private entity —
 - (a) an interest in the land that is no greater than a leasehold interest for a period not exceeding 99 years; or
 - (b) a licence in respect of the land for a period not exceeding 99 years.
- (3) The securities in a corporate vehicle can only be disposed of under this Act to a private entity if the corporate vehicle holds —
 - (a) an interest in the land referred to in subsection (1) that is no greater than a leasehold interest for a period not exceeding 99 years; or
 - (b) a licence in respect of the land referred to in subsection (1) for a period not exceeding 99 years.
- (4) In calculating, for subsection (2) or (3), the period for which an interest in land or licence in respect of land (the ***interest or licence***) is granted or is held, any further period is to be included.
- (5) In subsection (4) —
further period means the period of any further interest in the land, or further licence in respect of the land, that may be granted whether under —
 - (a) an option to renew the interest or licence; or
 - (b) an option to renew any further interest or licence, or otherwise.
- (6) This section applies despite the *Port Authorities Act 1999* section 28(3) and (4).

13. Land subject to unregistered leases with terms exceeding 5 years

Despite the *Transfer of Land Act 1893* section 68, land disposed of under this Act is subject to any prior unregistered lease or agreement for lease or for letting for a term exceeding 5 years to a tenant in actual possession even though the lease or agreement may not be specially notified as an encumbrance on the certificate of title or registered instrument for the land.

14. Functions and powers of Minister

The Minister has all of the functions and powers that are necessary or convenient for the purposes of this Act, including the power to acquire land.

15. Functions and powers of Authority

The Authority has all of the functions and powers that are necessary or convenient for the purposes of the disposal of a port asset under this Act, including the power to acquire land.

16. Functions and powers of associated agencies

An associated agency has all of the functions and powers that are necessary or convenient for the purposes of the disposal of an associated SC asset under this Act, including the power to acquire land.

17. Functions and powers of corporate vehicles

A corporate vehicle has all of the functions and powers that are necessary or convenient for the purposes of the disposal of a port asset under this Act, including —

- (a) the power to acquire land; and
- (b) the power to create subsidiaries.

18. Directions by Minister

- (1) The Minister may, for the purposes of a section 10 disposal, give a written direction to the Authority, an associated agency or a corporate vehicle.
- (2) The Authority, an associated agency or a corporate vehicle must comply with a direction given to it under subsection (1).
- (3) The Authority, an associated agency or a corporate vehicle, or a director or officer of the Authority, an associated agency or a corporate vehicle, is not liable for, and does not contravene the *Port Authorities Act 1999* or the *Western Australian Land Authority Act 1992* by reason of, anything done or omitted to be done in good faith in compliance with, or purported compliance with, a direction given under subsection (1).
- (4) Unless a direction given under subsection (1) specifies otherwise, nothing in the direction or this section affects any requirement under the *Port Authorities Act 1999* or the *Western Australian Land Authority Act 1992* for the approval of a Minister to be obtained in relation to any matter.
- (5) This section is declared to be a Corporations legislation displacement provision for the purposes of the *Corporations Act 2001* (Commonwealth) section 5G in relation to the Corporations legislation generally.

19. Regulations about corporate vehicles and trusts

- (1) Regulations may make provision about the constitution, trust deed or another constituent document of a corporate vehicle or trust that is to be used for the purposes of a section 10 disposal.
- (2) Regulations may declare a matter dealt with, provided for, done or occurring under regulations referred to in subsection (1) to be an excluded matter for the purposes of the *Corporations Act 2001* (Commonwealth) section 5F in relation to —
 - (a) the whole of the Corporations legislation; or

- (b) a specified provision of that legislation; or
- (c) that legislation other than a specified provision; or
- (d) that legislation other than to a specified extent.

Part 3 — Implementing disposal

Division 1 — Transfer orders

20. Minister may make transfer orders

- (1) For the purposes of a section 10 disposal, the Minister may, by order published in the *Gazette* (a **transfer order**), specify all or any of the following —
 - (a) a time (which must be after the day on which the order is published in the *Gazette*) that is the transfer time under the transfer order;
 - (b) any asset or liability that, by operation of section 21, is to be transferred from the Authority, an associated agency, a corporate vehicle or the State as specified in the order (the **transferor**) to the Authority, a corporate vehicle or a private entity as specified in the order (the **transferee**);
 - (c) proceedings in which, by operation of section 21, the transferee is to be substituted for the transferor as a party;
 - (d) any agreement or instrument relating to anything transferred that, by operation of section 21, is to have effect as if, unless otherwise expressly specified in the order, references to the transferee were substituted for references to the transferor in the agreement or instrument.
- (2) If the transfer time is specified by reference to when a thing is done, the Minister must ensure that notice of the time when the thing is done is published in the *Gazette*.
- (3) A transfer order may specify persons or things by reference to schedules that —
 - (a) need not be published in the *Gazette*; but

- (b) must be available for public inspection on business days at the place and between the times specified in the transfer order for 6 months after the day on which the transfer order is published in the *Gazette*.
- (4) For subsection (3)(b), a business day is a day other than a Saturday, Sunday or public holiday.
- (5) A person or thing specified in a schedule for a transfer order is to be taken to be specified in the transfer order.
- (6) A person or thing may be specified in a transfer order by describing the person or thing as a member of a class.
- (7) Before a transfer order is made specifying anything by reference to a schedule, the Minister must consult each relevant official to whom a copy of the schedule must be given under section 25(2) about the form and content of the schedule for the purpose of facilitating the recording and registration of instruments or documents as required by section 25(3)(b).
- (8) The Minister may, by order published in the *Gazette*, amend a transfer order or a schedule for a transfer order, but only —
 - (a) before the transfer time; and
 - (b) with the consent of the transferee.

21. Consequences of transfer orders

- (1) In this section —
specified means specified in the transfer order.
- (2) A transfer order has effect at the transfer time as follows —
 - (a) a specified asset is, by operation of this section and without the need for any conveyance, transfer, assignment or assurance or any prior notice or further act, transferred to the transferee and becomes an asset of the transferee;

- (b) a specified liability is, by operation of this section and without the need for any prior notice or further act, transferred to and becomes a liability of the transferee;
- (c) the transferee is, by operation of this section, substituted for the transferor as a party to any specified proceedings;
- (d) a specified agreement or instrument has effect, by operation of this section, as if (unless otherwise specified) a reference to the transferee were substituted for a reference to the transferor in the agreement or instrument;
- (e) any proceedings or remedy that might have been commenced by, or available against or to, the transferor in relation to an asset or liability transferred by paragraph (a) or (b) may be commenced by, or are available against or to, the transferee;
- (f) anything relating to an asset or liability transferred by paragraph (a) or (b) that was done or omitted to be done by, to or in respect of the transferor before the transfer and is of any effect is to be taken to have been done or omitted by, to or in respect of the transferee.

22. Completion of transactions for this Division

If a transfer order cannot to any extent have the effect sought to be achieved by this Division (whether because a matter is governed otherwise than by a law of this State or for any other reason), the Minister and the transferor must each take all practicable steps to achieve that effect as soon as possible after the transfer time.

23. Effect of arrangements internal to transferors

- (1) An instrument that provides for arrangements between different parts of the transferor's business or undertaking may be specified in a transfer order as if it created contractual rights and liabilities.

- (2) An instrument specified as described in subsection (1) is to be regarded as if its provisions were contractual provisions between different legal entities.
- (3) A contractual right or liability that is to be regarded as arising because of subsection (2) is transferable under this Division.

24. Delivery and access to records

- (1) In this section —
record includes a register, minute, receipt, book of account or other document (however compiled, recorded or stored);
relevant record, in relation to a transfer order, means a record relating to any asset, liability, agreement, instrument or proceedings specified under section 20(1) in the transfer order.
- (2) The Minister may give the transferor under a transfer order a direction (whether in the transfer order or otherwise in writing) as to which relevant records, or classes of relevant records, in the possession or control of the transferor must be delivered to or shared with, or be able to be accessed by, the transferee under the transfer order.
- (3) The transferor must deliver to or share with the transferee, or enable the transferee to have access to, relevant records in accordance with the direction.
- (4) The transferor and transferee must make arrangements for the delivery or sharing of, or access to, relevant records in accordance with the direction.
- (5) This section is declared to be a Corporations legislation displacement provision for the purposes of the *Corporations Act 2001* (Commonwealth) section 5G in relation to the Corporations legislation generally.

25. Registration of documents

- (1) In this section —

relevant official means any of the following —

- (a) the Registrar of Titles under the *Transfer of Land Act 1893*;
 - (b) the Registrar of Deeds and Transfers under the *Registration of Deeds Act 1856*;
 - (c) the Minister administering the *Land Administration Act 1997*;
 - (d) any other person authorised by a written law to record and give effect to the registration of instruments or documents relating to transactions affecting any estate or interest in land or any other property.
- (2) The Minister must ensure that a copy of each of the following instruments is given to each relevant official —
- (a) a transfer order and any schedule for it;
 - (b) any order made under section 20(8) amending a transfer order or any schedule for it;
 - (c) any order made under section 26(1) correcting a transfer order or any schedule for it;
 - (d) any notice published under section 20(2) in respect of the transfer time in relation to a transfer order.
- (3) A relevant official must —
- (a) take notice of this Division, a transfer order and any other instrument relating to a transfer order that is referred to in subsection (2); and
 - (b) record and register in the appropriate manner the instruments or documents necessary to show the effect of this Division and a transfer order.

26. Correction of errors in transfer orders

- (1) The Minister may, by order published in the *Gazette*, make any provision that is necessary to correct any error in a transfer order or a schedule for a transfer order.

- (2) An order made under subsection (1) may be expressed to take effect on and after the transfer time.
- (3) To the extent that a provision of an order made under subsection (1) takes effect before the order is published in the *Gazette*, section 21 does not, as a result of that provision, operate so as —
 - (a) to affect in a manner prejudicial to any person (other than the State, the transferor or transferee, or a Minister, officer or agency of the State) the rights of that person existing before publication; or
 - (b) to impose liabilities on any person (other than the State, the transferor or transferee, or a Minister, officer or agency of the State) in respect of anything done or omitted to be done before publication.

Division 2 — Disclosure of information

27. Authorised disclosure of information

- (1) A disclosure of information that is authorised under this section is not to be regarded as —
 - (a) a breach of contract or confidence or any other civil wrong; or
 - (b) a breach of duty under any of the following —
 - (i) the *Port Authorities Act 1999* Schedule 3;
 - (ii) the *Western Australian Land Authority Act 1992* Schedule 1A;
 - (iii) the *Statutory Corporations (Liability of Directors) Act 1996* section 5;or
 - (c) a breach of, or an offence under, a provision of a written law that prohibits or restricts the disclosure of information.

- (2) For subsection (1), a disclosure of information is authorised if it is made for the purposes of a section 10 disposal by —
 - (a) the Government or the Authority, an associated agency or a corporate vehicle; or
 - (b) a person acting with the authority of a body referred to in paragraph (a).
- (3) For subsection (2), a disclosure of information made for the purposes of a section 10 disposal includes a disclosure of information whenever made if the disclosure is or was made for the purposes of a potential section 10 disposal.

28. Auditor General may disclose information

Despite the *Auditor General Act 2006* section 46(2), the Auditor General may, for the purposes of a section 10 disposal, disclose to any person, or provide any person with access to, information in the possession or under the control of the Auditor General.

29. Offence of disclosing information

- (1) Subsection (2) applies to a person (a *bound recipient*) who —
 - (a) obtains information connected with a section 10 disposal, whether through a disclosure authorised by section 27 or otherwise; and
 - (b) has agreed or is otherwise under a duty not to disclose the information to others.
- (2) A bound recipient commits an offence if the bound recipient breaches the agreement or duty referred to in subsection (1)(b).
Penalty for this subsection: a fine of \$200 000.
- (3) A person who obtains information connected with a section 10 disposal from or through a bound recipient commits an offence if, without lawful excuse, the person discloses the information in a way that would have resulted in a breach of the agreement or duty referred to in subsection (1)(b) if the disclosure had been made by the bound recipient.

Penalty for this subsection: a fine of \$200 000.

- (4) For subsections (1)(a) and (3), information connected with a section 10 disposal includes information whenever obtained if the information is or was connected with a potential section 10 disposal.

Division 3 — Other matters

30. Application of proceeds of disposal

The proceeds of a section 10 disposal must be applied by paying them to the Treasurer or as the Treasurer directs otherwise.

31. Provision by State of indemnities and guarantees

- (1) The Treasurer may, in the name and on behalf of the State, give an indemnity or guarantee in respect of a matter related to —
- (a) a section 10 disposal; or
 - (b) the action (whether under a transfer order or otherwise) by which anything is disposed of in connection with a section 10 disposal.
- (2) The Treasurer may, in the name and on behalf of the State, give to any person who is or has been a director or officer of the Authority, associated agency or corporate vehicle an indemnity against any liability determined by the Treasurer (including any civil liability under the *Corporations Act 2001* (Commonwealth)), whether or not the liability relates to a matter referred to in subsection (1).
- (3) Any money payable under an indemnity or guarantee given under this section must be paid by the Treasurer.
- (4) Payments made under subsection (3) are charged to the Consolidated Account, which this subsection appropriates accordingly.

32. Takeover by State of certain obligations

- (1) This section applies in relation to an obligation (whether contingent or otherwise) of the Authority, an associated agency or a corporate vehicle.
- (2) The Treasurer may, in the name and on behalf of the State, agree to take over an obligation in connection with a section 10 disposal.
- (3) If the performance of the obligation was guaranteed by the State, the agreement may also provide for —
 - (a) the release by the State of any security held by the State in connection with the guarantee; or
 - (b) the release of a person from an undertaking that the person gave to the State in relation to any security described in paragraph (a).
- (4) The Treasurer may authorise the payment of money to discharge an obligation that the State has taken over under subsection (2), whether by terminating the obligation or otherwise.
- (5) Payments authorised under subsection (4) are charged to the Consolidated Account, which this section appropriates accordingly.

Part 4 — Provisions relating to corporate vehicles

33. Application of this Part

This Part applies if, for the purposes of a section 10 disposal, a port asset or associated SC asset is disposed of (whether under a transfer order or otherwise) from the Authority, an associated agency or a corporate vehicle (the *disposer*) to a corporate vehicle (the *acquirer*).

34. Acquirer's powers and duties

To the extent prescribed by the regulations, the acquirer has the powers, duties, rights and obligations in respect of the port asset or associated SC asset that the disposer would have had if the disposal had not occurred.

35. Application of written laws to acquirer

- (1) In this section —
applicable written law —
 - (a) means a written law (other than this Act) that applies to or in relation to, or refers to, the disposer; and
 - (b) includes a written law that, by operation of this section, applies to or in relation to, or refers to, the disposer.
- (2) An applicable written law is to be taken to apply to or in relation to, or to refer to, the acquirer —
 - (a) to the extent prescribed by the regulations; and
 - (b) with the changes that are prescribed by the regulations or are otherwise necessary or convenient for the purposes of this Part.
- (3) Without limiting subsection (2), the regulations may provide that a reference in an applicable written law to the disposer that relates to the port asset or associated SC asset before the disposal occurred is to be taken to include a reference to the acquirer.

Part 5 — Provisions relating to leases and licences

36. Term used: port facilities instrument

In this Part —

port facilities instrument means —

- (a) a lease or licence in respect of port facilities entered into for the purposes of a section 10 disposal; or
- (b) a lease or licence designated under section 37(2)(a) as a port facilities instrument for the purposes of the section in which the term is used,

and includes that lease or licence as varied from time to time.

37. Minister may designate certain matters

(1) In this section —

associate, in relation to a lessee or licensee under a port facilities instrument, means —

- (a) a related body corporate; and
- (b) a trust, joint venture or partnership where the interest of the lessee or licensee or of a related body corporate in the trust, joint venture or partnership entitles the lessee or licensee or the related body corporate to —
 - (i) control the composition of the governing body of the trust, joint venture or partnership; or
 - (ii) cast, or control the casting of, more than one half of the maximum number of votes that might be cast at a general meeting of the trust, joint venture or partnership; or
 - (iii) control the business affairs of the trust, joint venture or partnership;

related body corporate means a body corporate that is related to the lessee or licensee by virtue of the *Corporations Act 2001* (Commonwealth) section 50.

- (2) The Minister may by order —
 - (a) designate a lease or licence as a port facilities instrument for the purposes of section 38 or 39, as the case requires;
 - (b) designate the lessee or licensee under a port facilities instrument, or an associate of the lessee or licensee under a port facilities instrument, as a port facilities instrument holder for the purposes of section 39;
 - (c) designate an agreement or arrangement as an agreement or arrangement entered into in connection with a port facilities instrument for the purposes of section 38.
- (3) The Minister may by order vary or revoke an order made under subsection (2).
- (4) An order under this section must be published in the *Gazette*.

38. Effect of provisions of port facilities instrument

- (1) In this section —
 - lessee or licensee* mean the lessee or licensee under the relevant port facilities instrument;
 - lessor or licensor* mean the lessor or licensor under the relevant port facilities instrument;
 - related arrangement*, in relation to a port facilities instrument, means an agreement or arrangement designated under section 37(2)(c) as an agreement or arrangement entered into in connection with the instrument and includes that agreement or arrangement as varied from time to time.
- (2) The provisions of a port facilities instrument, or of any related arrangement, dealing with the following matters have effect according to their terms despite any law or rule to the contrary —
 - (a) the payment of any amount by way of premium, rent or other moneys under the port facilities instrument or

- related arrangement and the retention of any such amount by the lessor or licensor or the State;
- (b) the non-refundability of any payment made on account of rent, premium, option fee, outgoings, security deposit or otherwise;
 - (c) the amount payable by the lessee or licensee in consequence of a breach or early termination of the port facilities instrument;
 - (d) the continuance of the port facilities instrument or related arrangement and the obligations that the lessee or licensee has under the port facilities instrument or related arrangement, including payment of rent and other moneys, despite the occurrence of unintended or unforeseen circumstances;
 - (e) the circumstances or conditions under which the port facilities instrument may be terminated by a party to the instrument;
 - (f) the right of re-entry or forfeiture that the lessor or licensor or the State has in respect of the port facilities instrument.

39. References to port authority may include other entities

- (1) In this section —

affected written law means —

- (a) regulations under the *Dangerous Goods Safety Act 2004*;
- (b) the *Emergency Management Act 2005*;
- (c) the *Jetties Act 1926*;
- (d) the *Lights (Navigation Protection) Act 1938*;
- (e) the *Marine and Harbours Act 1981*;
- (f) the *Marine Navigational Aids Act 1973*;

- (g) the *Pollution of Waters by Oil and Noxious Substances Act 1987*;
- (h) the *Port Authorities Act 1999*;
- (i) the *Shipping and Pilotage Act 1967*;

port facilities instrument holder means a person designated by order under section 37(2)(b);

specified means specified in the regulations.

- (2) The regulations may provide that a reference to a port authority in a provision of an affected written law that is prescribed in the regulations —
 - (a) is to be taken to be a reference to a specified port facilities instrument holder in lieu of a specified port authority; or
 - (b) is to be taken to include a reference to a specified port facilities instrument holder.

40. Making and registration of certain lease variations

- (1) In this section —

relevant official has the meaning given in section 25(1).
- (2) If —
 - (a) before a section 10 disposal took place an agreement to lease existed between the Authority, the State or an associated agency and another entity (the **third party**) in relation to land; and
 - (b) for the purposes of the section 10 disposal the land was disposed of by way of a lease (the **acquirer's lease**) recorded and registered by a relevant official under a written law; and
 - (c) the acquirer subsequently surrendered the land in order that a lease of the land could be granted to the third party in accordance with the agreement to lease,

the acquirer's lease may be varied to reinclude the land, creating a concurrent lease over the land.

- (3) If the Minister certifies in writing —
- (a) that the matters set out in subsection (2)(a), (b) and (c) occurred; and
 - (b) that the acquirer's lease has been varied under subsection (2),

a relevant official may record and register the variation of the acquirer's lease.

Part 6 — Miscellaneous matters

41. Exemption from State tax

(1) In this section —

State tax includes —

- (a) duty chargeable under the *Duties Act 2008*; and
- (b) any other tax, duty, fee, levy or charge under a law of the State.

(2) State tax is not payable in relation to —

- (a) anything that occurs by operation of either or both of Parts 2 and 3; or
- (b) anything done (including a transaction entered into or an instrument or document of any kind made, executed, lodged or given) under, to give effect to, or for a purpose connected with or arising out of giving effect to, either or both of Parts 2 and 3.

(3) The Minister may, at the request of the transferor or transferee under a transfer order, certify in writing that —

- (a) a specified thing occurred by operation of either or both of Parts 2 and 3; or
- (b) a specified thing was done under, to give effect to, or for a purpose connected with or arising out of giving effect to, either or both of Parts 2 and 3.

(4) For all purposes and in all proceedings, a certificate under subsection (3) is sufficient evidence of the matters it certifies unless the contrary is shown.

(5) The exemption under subsection (2) does not apply in relation to a thing that occurs or is done if the Minister directs (whether in a transfer order or otherwise in writing) that it does not apply in relation to the thing.

42. Effect of this Act on existing rights and obligations

- (1) The operation of this Act, including anything done or omitted to be done under or for the purposes of this Act, is not to be regarded as —
- (a) being a breach of confidence or any other civil wrong; or
 - (b) being a breach of a contract or instrument, including (without limitation) a provision prohibiting, restricting or regulating the assignment or transfer of assets, rights or liabilities; or
 - (c) requiring any act to be done under a contract or instrument; or
 - (d) giving rise to a right or remedy of a party to a contract or instrument, or causing or permitting the termination of, or exercise of rights under, a contract or instrument; or
 - (e) being an event of default under a contract or instrument; or
 - (f) causing a contract or instrument to be void or otherwise unenforceable; or
 - (g) subject to section 32(3) and (4), releasing, or allowing the release of, any surety or other obligee from the whole or part of an obligation.
- (2) This section does not limit section 44.

43. No compensation payable

- (1) No compensation is payable by or on behalf of the State —
- (a) because of the enactment or operation of this Act or for the consequences of its enactment or operation; or
 - (b) because of any statement or conduct relating to the enactment of this Act; or

- (c) in connection with the disposal under this Act of a port asset or associated asset.
- (2) Subsection (1) does not apply in relation to —
 - (a) any consideration payable under an agreement entered into for the purposes of a section 10 disposal; or
 - (b) any compensation payable in connection with the performance of an obligation arising under an agreement entered into for the purposes of a section 10 disposal.
- (3) This section does not limit section 44.

44. Government agreements not affected

- (1) In this section —

Government agreement means an agreement referred to in paragraph (a) of the definition of **Government agreement** in the *Government Agreements Act 1979* section 2 and, if the agreement has been varied, means the agreement as varied.
- (2) This Act does not prejudice or in any way affect any right or obligation of a party to a Government agreement.
- (3) The operation of the *Government Agreements Act 1979* in relation to this Act is not limited or otherwise affected by this Act.
- (4) This section does not limit section 27.

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

- (1) In this section —

publication day, for regulations referred to in subsection (2), means the day on which those regulations are published in the *Gazette*;

the State includes a Minister, officer or agency of the State.
- (2) Regulations may provide for —

- (a) matters for which it is necessary or convenient to make provision for the purposes of a section 10 disposal; or
 - (b) matters that it is necessary or convenient to deal with as a consequence of anything contained in, or anything done under, Part 2, 3, 4 or 5.
- (3) Regulations referred to in subsection (2) may be expressed to take effect before publication day for those regulations but after the day on which the order made under section 10(1)(a) for the section 10 disposal is published in the *Gazette*.
- (4) To the extent that regulations referred to in subsection (2) take effect before publication day for those regulations, the regulations do not operate —
- (a) to affect in a manner prejudicial to any person (other than the State or the disposer or acquirer under the section 10 disposal) the rights of that person existing before publication day for those regulations; or
 - (b) to impose liabilities on any person (other than the State or the disposer or acquirer under the section 10 disposal) in respect of anything done or omitted to be done before publication day for those regulations.

46. Regulations for purposes of providing access to services

- (1) In this section —

access arrangement, for a service, means an instrument approved under subsection (3)(b) in respect of the service and includes the instrument as amended or replaced under subsection (3)(c);

price regulation of a service includes the setting of pricing principles, or prices, for access to the service and the monitoring of prices for access to the service;

regulator means the person prescribed by the regulations to be the regulator in respect of access to services;

service means —

- (a) a port or other service provided by means of a port facility; or
- (b) a service ancillary or incidental to a port or other service referred to in paragraph (a);

service provider of a service means the person who owns, controls or operates the port facility —

- (a) by means of which the service is provided; or
 - (b) by means of which a service to which the service is ancillary or supplemental is provided.
- (2) Regulations may provide for access to a service, or price regulation of a service, or both.
- (3) Without limiting subsection (2), the regulations may do any or all of the following —
- (a) require the service provider of a service to lodge with the regulator an instrument setting out —
 - (i) the terms and conditions on which access to the service is to be provided; or
 - (ii) arrangements for price regulation of the service; or
 - (iii) the terms and conditions on which access to the service is to be provided and arrangements for price regulation of the service;
 - (b) provide for a process for the approval by the regulator of an instrument referred to in paragraph (a), including the matters to be taken into account by the regulator when deciding whether or not to approve the instrument;
 - (c) provide for a process for the approval by the regulator of any amendment or replacement of an instrument referred to in paragraph (a), including the matters to be taken into account by the regulator when deciding whether or not to approve the amendment or replacement;

- (d) provide for the production of information by the service provider of a service to enable persons to understand the elements of an access arrangement for the service;
- (e) set out, or provide for an instrument referred to in paragraph (a) to set out, duties and requirements in relation to the provision of a service that are to be complied with by the service provider of the service;
- (f) set out the obligations of the service provider of a service in respect of the segregation of the functions and business of providing the service from the service provider's other functions and businesses and enable the regulator to add to, or waive any of, those obligations;
- (g) make provision in relation to services between bodies corporate that are related to each other by virtue of the *Corporations Act 2001* (Commonwealth) section 50;
- (h) provide for the arbitration of disputes between a service provider of a service and a person who is proposing to access, or is accessing, the service under an access arrangement, including the establishment of a panel of arbitrators and appointment of arbitrators by the regulator;
- (i) provide that a provision of the regulations that imposes an obligation on a person is a civil penalty provision;
- (j) prescribe, for a contravention of a civil penalty provision, the amounts that may, in accordance with the regulations, be demanded from or imposed on a person who contravenes a civil penalty provision, being —
 - (i) an amount not exceeding \$500 000; and
 - (ii) an additional amount not exceeding \$20 000 for each day or part of a day that the contravention continues;
- (k) provide for the demand for payment of an amount prescribed under paragraph (j) and the enforcement of that demand;

- (l) provide for and regulate the taking of proceedings in respect of alleged contraventions of provisions of the regulations, provide for the orders that can be made and other sanctions that can be imposed in those proceedings and provide for the enforcement of those orders and sanctions;
 - (m) provide for the manner in which an amount received by way of civil penalty is to be dealt with and applied;
 - (n) prescribe, for an offence under the regulations, a fine not exceeding \$100 000, with or without an additional fine not exceeding \$20 000 for each day or part of a day that the offence continues;
 - (o) provide for the review by a person specified in the regulations of a decision made under the regulations;
 - (p) confer functions on the Minister, the Economic Regulation Authority under the *Economic Regulation Authority Act 2003* or any other person.
- (4) An access arrangement is not subsidiary legislation for the purposes of the *Interpretation Act 1984*.

47. Preservation of rights to future access

- (1) In this section —

access means access to a service;

access capacity means the capacity to provide services of the person who owns, controls or operates a port facility;

eligibility request for access means a request for access that would not, if granted, result in the proportion of the access capacity taken up by protected users exceeding 50%;

prescribed period for a request for access means 180 days, or such other period as is specified in regulations, after the day on which the request is made;

prescribed user means a person specified in regulations as a user or potential user of a service;

s. 48

protected user means a user or potential user of a service other than a prescribed user;

service has the meaning given in section 46(1).

- (2) It is a condition of the operation of a port facility that, subject to subsection (3), 50% of the access capacity must be reserved for protected users.
- (3) Despite subsection (2) if a request for access made by a prescribed user would, if granted, result in the proportion of the access capacity taken up by prescribed users exceeding 50%, the request may be granted as long as it is granted on terms that would not prevent a protected user who subsequently makes an eligible request for access from being provided with access within the prescribed period or at a later time agreed to by the protected user.

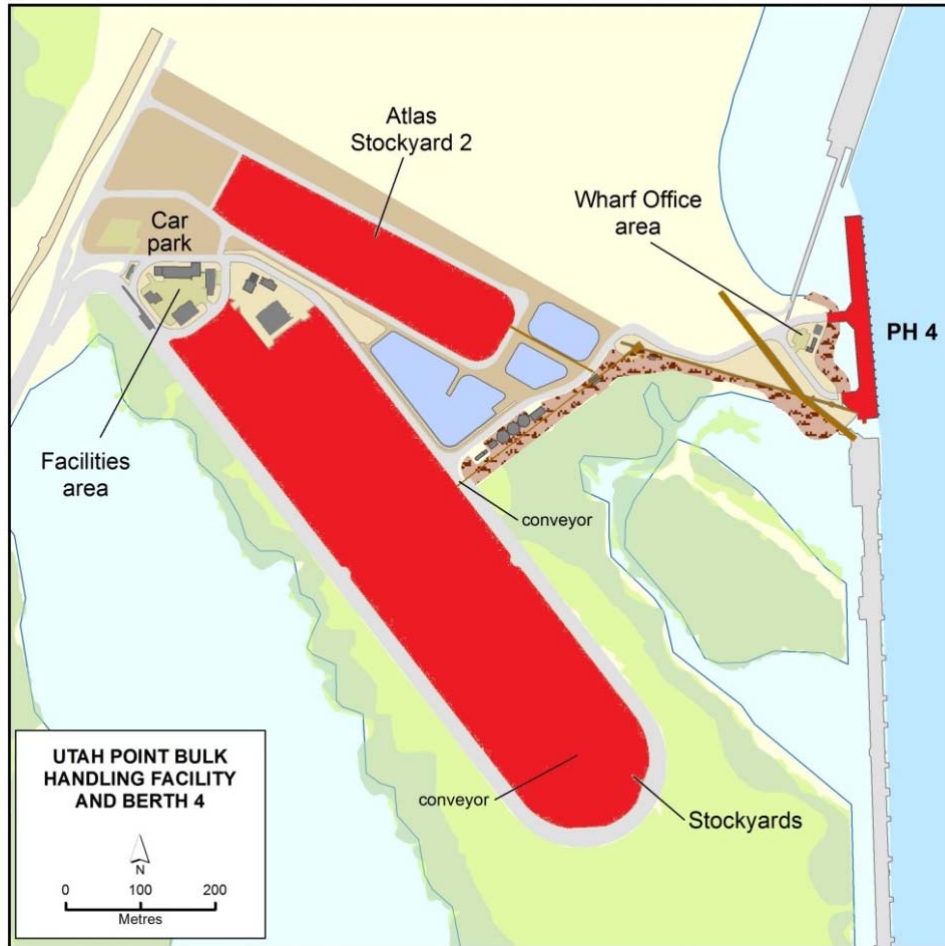
48. Regulations

The Governor may make regulations prescribing matters —

- (a) required or permitted to be prescribed by this Act; or
- (b) necessary or convenient to be prescribed for giving effect to this Act.

Schedule 1 — Utah Point Bulk Handling Facility

[s. 3]



Defined terms

*[This is a list of terms defined and the provisions where they are defined.
The list is not part of the law.]*

Defined term	Provision(s)
access	47(1)
access arrangement	46(1)
access capacity	47(1)
acquirer	3, 33
acquirer's lease	40(2)
affected written law	39(1)
applicable written law	35(1)
asset	3
associate	37(1)
associated agency	3
associated asset	3
associated SC asset	3
associated State asset	3
Authority	3
bound recipient	29(1)
company	3
corporate vehicle	3
dispose of	3
disposer	3, 33
eligibility request for access	47(1)
further period	12(5)
Government agreement	44(1)
interest or licence	12(4)
lease	3
lessee or licensee	38(1)
lessor or licensor	38(1)
liability	3
port asset	3
port authority	3
port facilities instrument	36
port facilities instrument holder	39(1)
port facility	3
prescribed period	47(1)
prescribed user	47(1)
price regulation	46(1)
private entity	3
protected user	47(1)
publication day	45(1)
purposes	3
record	24(1)

regulations.....	3
regulator	46(1)
related arrangement.....	38(1)
related body corporate	37(1)
relevant official	25(1), 40(1)
relevant record	24(1)
right.....	3
section 10 disposal.....	3
service	46(1), 47(1)
service provider.....	46(1)
specified	21(1), 39(1)
State tax	41(1)
statutory corporation	3
the State	45(1)
third party.....	40(2)
transfer order.....	3, 20(1)
transfer time	3
transferee.....	3, 20(1)
transferor.....	3, 20(1)