

OFFICIAL



Port of Melbourne complaints 2021-22

Investigation report

8 July 2022

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Summary of conclusions

Commission conclusions on prudence and efficiency – clause 4.2.1(c) of the Pricing Order

The commission concludes the Port of Melbourne's proposed capital expenditure for the Webb Dock East expansion (including its expected capital expenditure for 2021-22) to be prudent and efficient at the time of our assessment. As such, the commission concludes the Port is currently compliant with clause 4.2.1(c) of the Pricing Order. This is an assessment at a point of time, noting that proposed and actual capex can change in the future.

Commission conclusions on demand forecasts – clauses 8.2 & 8.3 of the Pricing Order

The commission concludes that the Port of Melbourne's demand forecasts for the Webb Dock East expansion for the purposes of preparing and submitting its 2021-22 Tariff Compliance Statement are compliant with clauses 8.2 and 8.3. The commission considers the forecasts are arrived at on a reasonable basis and represent the best estimate possible in the circumstance. The commission also considers that the information used in the forecasts is supported by primary information.

Commission conclusions on consultation with port users – clause 7.1.2(d) of the Pricing Order

The commission concludes that the Port of Melbourne's consultation on the Webb Dock East expansion was non-compliant with clause 7.1.2(d) of the Pricing Order. This is consistent with the finding of non-compliance with clause 7.1.2(d) of the Pricing Order in the commission's inquiry into compliance with the Pricing Order under section 49I of the Port Management Act 1995 (the PM Act).

The commission notes that, in response to the findings of the section 49I PM Act inquiry, the Port of Melbourne has made an enforceable undertaking to the ESC Minister (the Assistant Treasurer), which will result in the Port of Melbourne developing an engagement protocol intended to improve engagement with its stakeholders.

Additional matters referred to the ESC Minister under clause 49Q(6) of the PM Act

The commission will refer the issues raised by the complainants about the adequacy of the regulatory framework for port development planning to the ESC Minister (the Assistant Treasurer) and Minister for Ports and Freight for their consideration. This includes allegations that the Port's 2050 Port Development Strategy did not comply with ministerial guidelines issued under section 91M of the PM Act.

Introduction

In 2016 the Victorian government granted the Lonsdale Consortium a 50-year lease to operate, maintain and develop the port of Melbourne (the port). Management of day-to-day port operations is by the Port of Melbourne (the Port).

The Pricing Order, established under the Port Management Act 1995 (Vic) (the PM Act), sets out the regulatory regime that the Port must adhere to when setting its wharfage charges for customers who use its infrastructure.¹

In September 2021², the commission received two complaints from users of port services, pursuant to section 49Q of the PM Act, that the Port was not compliant with the Pricing Order.³

The complaints

Two separate entities operating within the port allege that the Port has not complied with the Pricing Order provisions, specifically with respect to capital planning associated with the development at Webb Dock East (the Webb Dock East expansion).

The Port intends to spend approximately \$67 million demolishing 'the knuckle' at Webb Dock East and undertake other remedial and upgrade wharf works at Webb Dock East. This will enable the concurrent berthing at Webb Dock East of two ships of at least 337 metres in length overall (LOA), which is presently not possible because the knuckle protrusion stops a second large ship from berthing while another large ship is already berthed. This is said to reduce Webb Dock East to a single berth operation most of the time, limiting capacity at that dock and the overall port capacity, and leading to underutilisation of port assets.

The complainants say that this berth extension is not necessary until at least the early 2030s and that the Webb Dock East expansion was flagged by the Port in its 2050 Port Development Strategy to occur 'by 2035'.⁴

¹ The Pricing Order was published in the Victorian Government Gazette on 24 June 2016. An amendment was made to the Pricing Order on 20 May 2020.

² One of the complaints was initially lodged in August 2021. At the commission's request, this complaint was re-stated to address the relevant sections of the Pricing Order and re-lodged in September 2021.

³ The commission also received a third complaint, however the complainant was not a port user, and therefore does not have standing to make a complaint under section 49Q of the PM Act.

⁴ The Port of Melbourne published the 2050 Port Development Strategy on 6 October 2020.

In essence, the complainants allege that the Port has brought forward the investment timing, and that doing so is not prudent and efficient.

The Port has already commenced construction of the new Webb Dock East and intends to have it operational in financial year 2023.

This report is a version of a confidential internal investigation report the commission has prepared in relation to the complaints, but with various sections removed as they contain confidential and commercially sensitive information.

Investigation threshold assessment

The commission initially sought to establish whether the complainants had standing to apply to the commission for formal investigation of their complaints against the Pricing Order provisions. Appendix A provides a copy of the Pricing Order and Appendix B provides a copy of the amendments to the Pricing Order.

The PM Act at section 49Q establishes the processes for port users to make complaints to the commission. Specifically, section 49Q states:⁵

- (1) This section applies if a person who is provided prescribed services considers that the provider of those services has not, in providing the services, complied with the Pricing Order which applies to those services.
- (2) The person may complain to the Commission about the non-compliance with the Pricing Order.
- (3) On receiving a complaint under subsection (2), the Commission may investigate the complaint.
- (4) In investigating the complaint, the Commission may have regard to any matter raised or considered in—
 - (a) the Commission's most recent final published report; and
 - (b) any application to the Supreme Court under section 49P.

Note

⁵ Port Management Act 1995 (Vic), section 49Q.

The Commission must also have regard to the objectives of this Part and the objectives under section 8 of the Essential Services Commission Act 2001 when investigating a complaint—see section 48A.

- (5) The Commission must inform the person of the outcome of its investigation of the person's complaint.
- (6) If the Commission considers that the issues raised in the complaint have not been considered or dealt with under a Pricing Order or Division 2A or 2B, the Commission may refer the complaint to the ESC Minister.

Section 49(1) of the PM Act sets out that:⁶

- (c) the following are prescribed services—
 - (i) the provision of channels (except anchorages) for use by shipping in port of Melbourne waters, including the Shared Channels used by vessels bound either for the port of Melbourne or for the port of Geelong and the Dedicated Channels used by vessels bound for the port of Melbourne;
 - (ii) the provision of berths, buoys or dolphins in connection with the berthing of vessels in the port of Melbourne;
 - (iii) the provision of short-term storage or cargo marshalling facilities in connection with the loading or unloading of vessels at berths, buoys or dolphins in the port of Melbourne;
 - (iv) the provision of access to, or allowing the use of, places or infrastructure (including wharves, slipways, gangways, roads and rail infrastructure) on port of Melbourne land for the provision of services to port users;

The commission considers that the complainants are provided with prescribed services at the port per sub-clauses (ii), (iii) and (iv) of section 49(1)(c) of the PM Act. This means they have standing to bring complaints under section 49Q of the PM Act, and that the commission may investigate the complaints.

In October 2021, the commission wrote to the two complainants advising that it would investigate their complaints. The commission also published a summary of the complaints and the relevant

⁶ Port Management Act 1995 (Vic), section 49(1)(c).

Pricing Order provisions on its website and provided a copy to each complainant.⁷ Prior to publishing the summary, the complainants agreed this summary properly reflects the scope of their complaints.

The complainants each requested that their complaints remain confidential, however the summary reflects the substance of issues raised by the two complaints.

Additional complaint not investigated

The commission also received a complaint (purporting to be made under section 49Q of the PM Act) from an additional stakeholder in respect of the Webb Dock East expansion.

We advised that stakeholder in September 2021 that the commission would not investigate their complaint because they are not a port user as defined in the PM Act (and therefore did not have standing to submit a complaint under section 49Q of the PM Act), but that their issues would be passed onto the relevant ministers. This was done in a letter to the Assistant Treasurer (copied to the Minister for Ports and Freight) dated 11 October 2021.

We note that the substance of this additional complaint was almost identical to the two complaints that we have investigated.

Scope of the investigation

As set out in our notice of complaints, the complainants alleged that:⁸

- the forecast capital expenditure that the Port indicated it will incur with respect to the Webb Dock East Expansion Project (WDE Expansion) is not prudent and efficient capital expenditure
- the Port's forecasts and estimates of capital expenditure were not arrived at on a reasonable basis, nor are they the best possible in the circumstances
- there was a failure by the Port to genuinely consult with relevant stakeholders about the need for and timing of the WDE Expansion, in relation to its inclusion and mention in the

⁷ Essential Services Commission 2021, Investigation of complaints under section 49Q Port Management Act 1995 (Vic): Allegations of non-compliance by Port of Melbourne with Pricing Order, 21 October. Refer to our website: <https://www.esc.vic.gov.au/transport/port-melbourne/complaints-port-melbourne-pricing-order-compliance>, last accessed 26 May 2022.

⁸ Essential Services Commission 2021, Investigation of complaints under section 49Q Port Management Act 1995 (Vic): Allegations of non-compliance by Port of Melbourne with Pricing Order, 21 October. Refer to our website: <https://www.esc.vic.gov.au/transport/port-melbourne/complaints-port-melbourne-pricing-order-compliance>, last accessed 26 May 2022.

Matters that we investigated

The two key matters we have investigated, and which the complainants claim has resulted in the Port being in breach of the Pricing Order, are:

- Whether the planned investment in (and timing of) the Webb Dock East expansion is prudent and efficient capital expenditure, as required by **clause 4.2.1(c)**, for the purposes of reflecting this forecast capital expenditure in setting prescribed service tariffs for 2021-22, which are set out in the Port's 2021-22 Tariff Compliance Statement.⁹ Related to this question:
 - whether the Port's forecasts and estimates were arrived at on a reasonable basis and represent the best forecasts or estimate possible in the circumstances (**clause 8.2**),
 - whether any extrapolations or inferences are supported by primary supporting information on which the extrapolation or inference is based (**clause 8.3**),
 - whether the Port has had regard to the competition objective specified in **section 48(1)(d) of the PM Act** when deciding to undertake and to include capital expenditure (actual or forecast) related to the Webb Dock East expansion, in the Port's 2021-22 Tariff Compliance Statement (and in particular, whether the Webb Dock East expansion facilitates and promotes competition between ports, between shippers, and between other persons conducting other commercial activities in ports).
- Whether the Port effectively consulted with stakeholders as required by **clause 7.1.2(d)** in relation to its 2021-22 Tariff Compliance Statement, and in particular its proposals to include capital expenditure for the Webb Dock East expansion in the Port's Tariff Compliance Statement for the 2021-22 financial year. This was investigated by the commission in its recent section 49I PM Act inquiry for the 5-year period from 1 July 2016 to 30 June 2021 – however, further consultation by the Port with affected stakeholders occurred beyond the period considered by the inquiry.
 - As such, the commission investigated whether any new information received in relation to this matter, as part of this investigation, changes its assessment and finding in the section 49I PM Act inquiry (that the Port was non-compliant with clause 7.1.2(d) consultation

⁹ The Port has, in its 2021-22 Tariff Compliance Statement, set out its calculation of the 2021-22 Aggregate Revenue Requirement, using the Accrual Building Block Methodology, and included in its closing asset base, forecast capital expenditure of \$28 million associated with the berth extension at Webb Dock East.

requirements when consulting with port users about its Webb Dock East expansion proposals in preparing its 2021-22 Tariff Compliance Statement).

We note that the Port submitted its 2022-23 Tariff Compliance Statement on 31 May 2022. The 2022-23 Tariff Compliance Statement, and the engagement relating to that tariff compliance statement, has not been assessed as part of this investigation.

Matters that fell outside the scope of this investigation

There were a number of statements and claims within the complainants' complaint applications to the commission which were considered out of scope for considering if the Port is non-compliant with the Pricing Order in respect of the Webb Dock East expansion as claimed. There were also matters that have already been assessed by the commission's section 49I inquiry that do not warrant further investigation. The complainants noted that a number of the items may be covered by the section 49I inquiry (which had not yet been completed at the time of the initial complaints).

Compliance with clauses 3.2.5 & 3.2.7

It was alleged that the Port was non-compliant with the requirement to consult with port users prior to making a Tariff Rebalancing Application in December 2020 (clause 3.2.5) and was non-compliant with the requirement to provide sufficient supporting information to enable the commission to verify that the proposed Prescribed Service Tariffs in a Rebalancing Application comply with the Pricing Order (clause 3.2.7).

The commission considered compliance with clauses 3.2.5 & 3.2.7 in the section 49I inquiry. The commission found that any possible non-compliance would be neither significant nor sustained (a prerequisite under section 49I(1)(b) of the PM Act for the commission to make an adverse finding in the inquiry). This is because the Port's Tariff Rebalancing Application in question was withdrawn, meaning that the proposed Prescribed Services Tariffs set out in that Rebalancing Application never took effect on port users.

As this matter was assessed in the section 49I PM Act inquiry, and no new information about this matter has been provided in this complaint investigation, there is no further evidence to suggest that a different conclusion would be made. The commission did not consider there was a need to re-assess this as part of this investigation. In addition, and as this matter was considered in the section 49I PM Act inquiry, the commission considers there is no basis for referring this to the ESC Minister for further consideration.¹⁰

¹⁰ Port Management Act 1995 (Vic), s49Q(6).

Compliance with clause 7.1.2(e)

The complainants alleged the Port is non-compliant with the requirement to explain in its tariff compliance statements how its Prescribed Service Tariffs comply with the Pricing Order (clause 7.1.2(e)).

We assessed compliance with clause 7.1.2(e) in the section 49I inquiry and found the Port to be non-compliant (however that the non-compliance was assessed to not be in a significant or sustained manner). As this matter was assessed in the section 49I inquiry, and no new information about this matter has been provided in this complaint investigation, there is no further evidence to suggest that a different conclusion would be made. The commission did not consider there was a need to re-assess this as part of this investigation. In addition, and as this matter was considered in the section 49I inquiry, the commission considers there is no basis for referring this to the Assistant Treasurer for further consideration.¹¹

Misleading and deceptive conduct

It was alleged that the Port engaged in misleading and deceptive conduct in relation to its representations about the timing of the Webb Dock East expansion in the development and publication of the Port Development Strategy and in lease negotiations with certain port users.

The commission did not investigate whether the Port engaged in misleading and deceptive conduct as this issue falls outside of the scope of the commission's powers under section 49Q of the PM Act.

Adequacy of the regulatory framework for port development planning

The complainants suggested that the current regulatory framework for port development planning was not effective, and that direct oversight of planning and capacity investment decisions was needed. It was suggested that a process should be established that provides for the commission to be directly involved in overseeing the Port's consultations regarding its capital program (e.g. by requiring the Port to undertake a regulatory investment test similar to that which is used in the National Electricity Market, to determine if a major port capital investment should be undertaken, including its timing).

¹¹ Port Management Act 1995 (Vic), s49Q(6).

Considering whether such a test is necessary or required is not within the scope of a section 49Q PM Act investigation. The commission must deal with the regulatory regime in place through the Pricing Order, which was gazetted in June 2016¹² and amended in May 2020.¹³

The Pricing Order does not set out a specific role for the commission, or any other third party, to oversee every Port capital project. There is no guidance set out about applying specific types of tests, such as the regulatory investment test used in Australia's electricity market.

The commission can investigate compliance of specific projects with the Pricing Order during its section 49I PM Act inquiries or in a Tariff Rebalancing Application brought under clause 3.2 of the Pricing Order or when investigating a specific complaint under section 49Q of the PM Act.

The commission will refer the issues raised by the complainants about the adequacy of the regulatory framework for port development planning to the ESC Minister (the Assistant Treasurer) and Minister for Ports and Freight for their consideration.

Compliance with ministerial guidelines

It was alleged that the 2050 Port Development Strategy was not undertaken in compliance with ministerial guidelines issued under section 91M of the PM Act.

The commission did not investigate compliance with ministerial guidelines as it considers this is a matter for the Victorian government.

The commission will refer this matter to the ESC Minister (Assistant Treasurer) and the Minister for Ports and Freight as part of the broader concerns the complainants have raised in relation to adequacy of the regulatory framework for port development planning.

How we have investigated and assessed the complaints

Our process

Meetings

We met with the two complainants, who are port users,¹⁴ to clarify and understand the basis of their complaints.

¹² Victorian Government Gazette Pricing Order s 201, 24 June 2016.

¹³ Victorian Government Gazette Pricing Order s 247, 20 May 2020.

¹⁴ As the complainants have made their complaints confidentially, we have not identified the complainants, nor identified whether or not the complainants are separately described below.

We met with the Port of Melbourne which operates the port of Melbourne, and was the object of the complaints. The Port sets prescribed service tariffs and is responsible for proposing the Webb Dock East expansion, along with all other capital projects within the port geographic boundary.

We met with the three container stevedores operating at the port of Melbourne. This includes Patrick Terminals and DP World Australia (DP World), who are the current stevedores operating at Swanson Dock East & West respectively, and Victoria International Container Terminal (VICT), who is the current Webb Dock East tenant. The three container stevedores are key parties affected by the Port's decision to proceed with capital expenditure to expand the quay line at Webb Dock East.

We met with a shipping line. This was to understand the views of shipping lines on the need for the Webb Dock East expansion, the shipping fleet and future outlook for ships visiting port of Melbourne, and the contracting between shipping lines and stevedores.

We also met with the Port Lessor, which is responsible for overseeing the State's lease of the port to the private port operator. This was to understand the context of the State's obligations imposed on the Port of Melbourne with respect to Webb Dock East capacity under the port lease.

Information requests

The commission issued a section 56 PM Act compulsory information notice on the Port and section 36 Essential Services Commission Act 2001 (the ESC Act) compulsory information notices on Patrick Terminals, DP World and VICT to obtain data, correspondence, board meeting papers, email exchanges and sensitivity analysis regarding the Webb Dock East expansion. This information was received over the period January to March 2022, and included:

- over 350 documents from the Port in response to the compulsory notice issued under section 56 of the PM Act, and
- over 150 documents from the three container stevedores (DP World, Patrick Terminals and VICT) in response to compulsory notices issued under section 36 of the ESC Act.

That information, along with the initial complaints provided by the two complainants, formed the evidence base which the commission reviewed and considered when investigating the complaints.

The commission also considered relevant material obtained, and relevant matters raised and considered, in its section 49I inquiry into Port's compliance with the Pricing Order, and the findings of that inquiry.

The investigation

The commission reviewed and had regard to all the evidence received in response to the information notices and the meetings held with relevant parties, to make its assessment of whether the Webb Dock East expansion:

- was prudent and efficient
- was underpinned by demand forecasts that were reasonable
- was consulted on effectively by the Port with affected users.

The commission engaged FTI Consulting (FTI), who consulted with key stakeholders, and was provided access to the information received under the compulsory information notices, to provide the commission with its expert advice and independent view about these key matters.¹⁵ The commission gave careful consideration to the expert advice provided by FTI in making our own assessment on these matters and arriving at our conclusions.

Since the Port is the person whose interests are affected by the commission's conclusions in this investigation, we provided the Port with a copy of FTI's draft advice on 24 May 2022 for fact checking. We gave the Port 14 days to provide any factual corrections on FTI's draft advice, which were addressed in the final advice provided by FTI to the commission.

FTI's final advice is confidential and has not been provided to the Port. It will also not be made publicly available, as it contains extensive references to confidential or commercially sensitive information provided by the Port in response to a section 56 PM Act notice.¹⁶ We note that the advice does not contain any confidential or commercially sensitive information provided by the complainants or other stakeholders to the investigation, nor does it identify the complainants.

Questions our investigation sought to answer

In assessing the complaints of the Port's non-compliance with the Pricing Order we sought to answer the following key questions in light of the relevant clauses in the Pricing Order with which the complainants claimed the Port was non-compliant, namely:

- Is the Webb Dock East expansion prudent and efficient?
- Are the Port's demand forecasts reasonable?
- Did the Port genuinely consult with port users?

These are set out individually in the sections that follow.

¹⁵ Access to the information received under the notices was provided to FTI on a confidential basis strictly for the purposes of providing its expert advice.

¹⁶ Section 57 of the PM Act prohibits the commission from disclosing information or documents given to it under a section 56 PM Act notice, if at the time it is given, the person giving it states that the information or documents are of a confidential or commercially sensitive nature.

Is the Webb Dock East expansion prudent and efficient?

This chapter sets out our investigation and conclusions on whether the Webb Dock East expansion is prudent and efficient, as required by clause 4.2.1(c) of the Pricing Order. These conclusions were made based on information available to us as at 29 June 2022, before the end of the financial year 2021-22.

Commission conclusions on prudence and efficiency – clause 4.2.1(c) of the Pricing Order

The commission concludes the Port of Melbourne's proposed capital expenditure for the Webb Dock East expansion (including its expected capital expenditure for 2021-22) to be prudent and efficient at the time of our assessment. As such, the commission concludes the Port is currently compliant with clause 4.2.1(c) of the Pricing Order. This is an assessment at a point of time, noting that proposed and actual capex can change in the future.

The complaints

What are the relevant requirements under the Pricing Order?

In setting its prescribed services tariffs (which are then set out in a tariff compliance statement), where the Port proposes to recover capital expenditure through its prescribed services tariffs, the Port must comply with clause 4.2.1(c) of the Pricing Order. This clause 4.2.1(c) states:

Subject to clause 4.2.2 and the increase to the capital base under clause 4.2.9, the capital base applied for the purposes of clause 4.1.1(a) and 4.1.1(b) must be defined, at any particular time, on a roll forward basis, by:

- (c) adding **efficient** capital expenditure when incurred, or to be incurred during that Financial Year, by the Port Licence Holder, **acting prudently**, in the provision of the Prescribed Services (in each instance, deemed to be incurred as at the mid-point of that Financial Year and adjusted by an indexation allowance in accordance with clause 4.6.1(b) for that Financial Year).

What have the complainants claimed?

The complainants allege that the Port has inappropriately brought forward the timing of the Webb Dock East expansion from the early 2030s, to a completion date in 2022-23. The complainants say

Is the Webb Dock East Expansion prudent and efficient?

there is no need for this capex project at this time, given port capacity is allegedly more than sufficient to meet existing and future demand (trade growth) projections, and that any capacity constraints and delays caused by big ships¹⁷ at Webb Dock East could be prevented by improving operational efficiency at Webb Dock East or targeting a different mix of ships.

The complainants accordingly claim that the forecast capital expenditure of \$28 million for the Webb Dock East expansion included in the Port's 2021-22 Tariff Compliance Statement for purposes of setting prescribed service tariffs for the 2021-22 financial year, is not efficient capital when incurred or to be incurred by the Port acting prudently in the provision of prescribed services at the port of Melbourne, and does not therefore comply with the requirements of clause 4.2.1(c) of the Pricing Order.

Matter 1: Is it prudent to restore Webb Dock East to its expected design capacity as a two-berth operation with over 1 million TEU capacity?

FTI's advice

FTI undertook an extensive independent assessment of the prudence of proceeding with the Webb Dock East project at this time. This included examining capacity modelling and analysis, forecasts of demand and vessels, and additional information from stakeholders provided to the investigation.

FTI advises that it is prudent to restore the expected design capacity at Webb Dock East for the following two reasons:

- Firstly, port stewardship obligations in the Port Concession Deed and Port Lease in effect require the Port to address any inefficient use of port infrastructure (which includes the Webb Dock East facility). As such they create an obligation for the Port to address the reduced operational efficiency of Webb Dock East arising from the onset of larger vessels and resulting vessel delays. FTI noted that the Port 'could be in breach of its contractual obligations if it does not address the operational inefficiencies occurring at [Webb Dock East] or does not take steps to accommodate larger vessels reasonably required to meet the trade requirements of the Port.'¹⁸
- Secondly, VICT's operational capacity should be restored consistent with the intended outcomes of the Port Capacity Project. The addition of the third stevedore was intended to provide an additional 1 million TEU and increase competition between stevedores at the port. FTI noted that competition will be adversely affected if VICT is unable to match the ability of the

¹⁷ That is, ships exceeding the port's 'design vessel' (300m length overall x 40m beam x 14m draught).

¹⁸ FTI Consulting 2022, Assessment of the Webb Dock East extension project: Final Report, June, pp.26-27.

other two stevedores to berth two vessels and achieve its design capacity, which is of a similar order to the other terminals.¹⁹

FTI noted that the higher frequency of larger ships had resulted in a reduction in operational efficiency at Webb Dock East, as the terminal was unable to operate as a two-berth facility due to larger ships. FTI noted there have been significant increases in delays in services at Webb Dock East, and the situation will continue with an increasing number of big ships forecast to visit the port.²⁰

Because of this, Webb Dock East is unable to meet its intended design capacity. Publicly available information suggests the Webb Dock East terminal was leased with the expectation that it had a capacity of 1.1 – 1.2m TEU per annum. The advent of big ships has resulted in this capacity being reduced to around 0.8 – 0.9m TEU per annum, meaning the infrastructure is underutilised.

On these grounds, FTI advises that it is prudent for capacity at Webb Dock East to be restored to its original design capacity.²¹

Commission view

We are satisfied that there is clear evidence that VICT has experienced frequent, extended service delays at Webb Dock East since 2020. This is further attested by evidence from two shipping lines provided directly to the Port, alerting that Webb Dock East's capacity is not meeting the demand of their large ship visits, and that the bottleneck is pushing the shipping lines to seek alternative docking destinations (with evidence that at least one shipping line claims to have already bypassed the port of Melbourne for some services due to delays and congestion).

The Port is required to meet a number of obligations under the Port Lease and the Port Concession Deed. These include general port stewardship obligations, which oblige the Port to address any inefficient use of core port infrastructure (including the Webb Dock East terminal).

The commission therefore considers that the Port has obligations under the Port Lease and the Port Concession Deed to address the reduced operational efficiency of Webb Dock East arising from the onset of larger vessels, and that the Webb Dock East expansion is consistent with these obligations.

Therefore, we are of the view that it was prudent that the Port worked with VICT (the Webb Dock East stevedore) to come up with a solution to the capacity constraint faced at the Webb Dock East,

¹⁹ FTI Consulting 2022, Assessment of the Webb Dock East extension project: Final Report, June, pp.29-30.

²⁰ FTI Consulting 2022, Assessment of the Webb Dock East extension project: Final Report, June, p.10.

²¹ FTI Consulting 2022, Assessment of the Webb Dock East extension project: Final Report, June, pp.25-30.

to address the reduced operational efficiency and delays being experienced by Webb Dock East customers.

Our investigation also suggests that VICT likely leased the Webb Dock East terminal based on the expectation that it would be a two-berth operation and that the terminal could achieve an annual capacity of around 1.1 million TEU. This expectation of capacity at Webb Dock East is supported by the Port Capacity Project and documentation provided by the Port Lessor.

It is public knowledge that the intention for introducing a third stevedore at the port was to promote competition between stevedores. We believe that the Webb Dock East expansion supports this goal of promoting competition:

- The Webb Dock East expansion looks to restore Webb Dock East's capacity back to the original design expectation of 1.1 m TEU, therefore ensuring that VICT stays competitive with Swanson Dock stevedores.
- After the berth extension, Webb Dock East will be able to berth two 347 metre vessels or one 367 metre vessel alongside a 337 metre vessel. This new capability brings a different service mix to shipping lines calling at the port, and also pushes the Swanson Dock stevedores to innovate and provide more efficient services at their berths.
- Importantly, we believe the positive changes expected above would increase the operational efficiency of the port overall. Ultimately, this allows the port of Melbourne to stay competitive with other east coast ports.

For these reasons, we consider that it is prudent to restore capacity at Webb Dock East to the original design expectation, to both address underutilisation of Webb Dock East, promote competition between stevedores at the port and increase overall port efficiency.

Competition between stevedores is considered further in Matter 4: 'Did the Port give appropriate consideration to competition issues?' in this chapter below.

The complainants' suggestion that VICT could instead achieve its design capacity by increasing operational efficiency and investment in additional cranes or by contracting a better mix of services as an alternative to the Webb Dock East expansion is considered in Matter 3: 'Did the Port give reasonable consideration to alternative options and choose the most efficient option?' in this chapter below.

Matter 2: Is there sufficient evidence that the Webb Dock East expansion was necessary for imminent capacity planning (i.e. capacity buffer)?

FTI's advice

The Port applies a capacity 'planning factor' (buffer) between total port capacity and throughput of 15 per cent, to inform the Port's decision about when to invest in additional capacity. Based on the average growth rates, development lead times, and monthly variation in trade, FTI advises that a 15 per cent planning buffer is appropriate (and may even be inadequate).²²

FTI noted that the current throughput at the port has reached just below 3 million TEU per annum.²³ While the Port has assessed maximum practical capacity at the port as 3.5 million TEU, FTI noted that the port's current total capacity has been constrained to around 3.1 million TEU, representing a buffer of only 0.1 million TEU (less than the 15 per cent planning factor). Even with yard improvements to the Swanson Dock terminals, the maximum practical capacity would be 3.5 million TEU (close to the 15 per cent planning factor). FTI advises that building additional capacity is prudent, given the forecast for increasing throughput and the range of issues which present a risk to capacity, including supply chain reliability, Swanson Dock West rehabilitation works and Industrial Relations.²⁴

Commission view

By removing the 71 metre 'blockage' at the north of berth 4 and extending the quay line, the Port can help alleviate the congestion problem at Webb Dock East and bring back a reasonable buffer of spare capacity.

The Port and VICT have demonstrated that the existing capacity of VICT is constrained due to the earlier than expected arrival of big ships. The constrained capacity at Webb Dock East leaves the port with a limited capacity buffer. Webb Dock East remaining at a reduced service level could harm the viability of VICT and risk the port's future throughput.

The development of the Webb Dock East expansion is also timely in respect of the Swanson Dock West rehabilitation work due to take place over three calendar years of 2022 to 2024. This work would reduce DP World's available berths from three to two. The Webb Dock East expansion,

²² FTI Consulting 2022, Assessment of the Webb Dock East extension project: Final Report, June, pp. 45-46.

²³ FTI Consulting 2022, Assessment of the Webb Dock East extension project: Final Report, June, p. 43. Annual trade volume excluding Bass Strait container trade, 2019, 2020, and 2022 projected.

²⁴ FTI Consulting 2022, Assessment of the Webb Dock East extension project: Final Report, June, pp.32-33.

proposed to be completed by mid-2023, would provide additional capacity that may assist in mitigating any loss of capacity at Swanson Dock West.

Therefore, we consider that the Webb Dock East expansion is prudent in providing a reasonable port capacity buffer.

We note that there are different views held by the Port, VICT and the other stevedores on VICT's existing capacity and potential capacity after the expansion:

- FTI notes that the complainants used a different measure of capacity (storage capacity) in their analysis of VICT capacity, which FTI suggests was not reasonable for Webb Dock East. FTI advised that Webb Dock East is constrained by berth loading capacity, and therefore, capacity analysis of Webb Dock East should use berth capacity.
- There were also differing views on the appropriate safety gap between ships at Webb Dock East. The analysis of berth capacity from the complainants assumes that the safety gap can be reduced to 20 metres, while the Port and VICT assume the current Harbour Master requirement of 30 metres. These assumptions alter the results of berth capacity analyses. Our view is that it is appropriate for the Port to assume the existing Harbour Master directions on safety gaps (i.e. 30 metres), because that is the current requirement, with nothing to indicate it is likely to change.

Matter 3: Did the Port give reasonable consideration to alternative options and choose the most efficient option?

FTI's advice

FTI advises that the Port's proposed approach for the Webb Dock expansion, with a 71 metre quay extension to the north (plus the southern dolphin), is the most efficient option to increase Webb Dock East's capacity. It also notes that this smaller project would delay the necessity of investing in a new Webb Dock North terminal by a number of years (referencing analysis by the Port's consultants). FTI advises that the Port has conducted thorough investigation of solutions for Webb Dock East's congestion and has evaluated reasonable alternatives.²⁵

FTI notes that the capital intensity of the Webb Dock East expansion (including the full project contingency) is \$68 million/360,000 TEU per year. This results in a capital intensity of around \$190

²⁵ FTI Consulting 2022, Assessment of the Webb Dock East extension project: Final Report, June, p.36.

per TEU per year which is considered very low and makes the project a very attractive investment for additional capacity.²⁶

FTI also noted that additional investment in onshore facilities cannot be justified by VICT with the current constrained capacity.²⁷

Commission view

The evidence provided by the Port demonstrates that it had considered alternative options for the Webb Dock East expansion, including considering the timing of the Webb Dock East expansion and its impact on the timing of the Webb Dock North development. We note that the option selected by the Port was not the preferred option sought by VICT.

In relation to the alternatives to Webb Dock East expansion suggested by the complainants, we do not consider that the Port failed to give appropriate consideration to these alternatives. This is because:

- There were differing views in relation to VICT's productivity levels. We are comfortable with the arguments made by VICT and the Port about VICT's productivity and that it is inefficient to increase capacity by adding cranes while Webb Dock East is operating effectively as a single berth.
- While there may be some truth to the claims that Webb Dock East could operate as a two-berth facility with a better mix of ships and better scheduling, we note that stevedores are limited in their ability to dictate ship sizes calling at their terminal. The shipping lines determine what type of ships to use on trade routes. Therefore, it is difficult for any stevedore to schedule a specific type of ship to arrive in concert with another ship, especially when taking into account weather and other port delays (such as congestion or scheduling changes at other ports of call). We consider that VICT is likely to have limited discretion, or ability, in scheduling ships by particular types and sizes at specific times to eliminate congestion, while the terminal has been reduced to a single-berth operation.

The commission considers that the Port had given reasonable consideration to alternative options, including the options raised by the complainants and by VICT. We consider that the Port has chosen the most efficient and appropriate option, demonstrated by a capital intensity of around \$190 per TEU.

²⁶ FTI Consulting 2022, Assessment of the Webb Dock East extension project: Final Report, June, p.38.

²⁷ FTI Consulting 2022, Assessment of the Webb Dock East extension project: Final Report, June, p.30.

Matter 4: Did the Port give appropriate consideration to competition issues?

What are the relevant requirements under the PM Act?

Part 3 of the PM Act sets out the framework for regulation of port services. Section 48 of the PM Act sets out the objectives of Part 3:

- (1) The objectives of this Part are—
 - (a) to promote efficient use of, and investment in, the provision of prescribed services for the long-term interests of users and Victorian consumers; and
 - (b) to protect the interests of users of prescribed services by ensuring that prescribed prices are fair and reasonable whilst having regard to the level of competition in, and efficiency of, the regulated industry; and
 - (c) to allow a provider of prescribed services a reasonable opportunity to recover the efficient costs of providing prescribed services, including a return commensurate with the risks involved; and
 - (d) to facilitate and promote competition—
 - (i) between ports; and
 - (ii) between shippers; and
 - (iii) between other persons conducting other commercial activities in ports; and
 - (e) to eliminate resource allocation distortions by prohibiting a State sponsored port operator from providing a relevant service at a price lower than the competitively neutral price for that service.

The commission must have regard to these objectives (and the objectives under 8A of the ESC Act) in undertaking its functions, as per section 48A of the PM Act:

In addition to the objectives under section 8 of the Essential Services Commission Act 2001 (but subject to section 5(2) of that Act), the Commission must have regard to the objectives set out in section 48 when performing its functions or exercising its powers in relation to the regulated industry.

There is no direct statutory obligation imposed on the Port to act in accordance with the section 48 PM Act objectives. However, given the commission is required to have regard to these objectives

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in assessing the Port's compliance with the Pricing Order (including for project capex prudence), and that the Port is concerned to act in a way that does not breach the Pricing Order, for all practical purposes, these objectives should act to guide the Port's conduct. Our expectation is therefore that the Port would have regard to these objectives, including the competition objective in section 48(1)(d) of the PM Act, because acting prudently necessarily involves considering competition impacts of a proposed investment (as appropriate for the potential impact or importance of the project).

The complainants allege that the Port has not properly considered the impact that the Webb Dock East expansion will have on competition for stevedoring services at Swanson Dock.

FTI's advice

FTI advised that, based on credible information provided by the Port, the Port has reasonably concluded that there is unlikely to be a detrimental impact on competition of proceeding with the Webb Dock East expansion. Rather there is a strong likelihood that it enhances competition in the stevedoring sector.²⁸ It noted that the introduction of the third stevedore at Webb Dock East was a response to a National Ports Strategy endorsed by the Council of Australian Governments to improve competition at Australian ports.²⁹

Commission view

The Port has considered the impact on competition resulting from the project in making the decision to proceed with the Webb Dock East expansion.

We note that while it is reasonable to conclude that a reduction in competitiveness and market share for one or both Swanson Dock operators is a likely consequence of the Webb Dock East expansion, this does not necessarily imply a reduction in competition in the stevedore market. We did not consider there to be sufficient evidence to suggest significant concern that proceeding with the Webb Dock East expansion would result in the stranding of assets at Swanson Dock and a reduction in competition in the stevedoring market due to the permanent exit of one of the Swanson Dock stevedores.

We consider that the Port had sufficient regard to the competitive impacts of proceeding with the Webb Dock East expansion, to form a reasonable conclusion that the Webb Dock East expansion is unlikely to have a detrimental impact on competition.

²⁸ FTI Consulting 2022, Assessment of the Webb Dock East extension project: Final Report, June, p. 65.

²⁹ FTI Consulting 2022, Assessment of the Webb Dock East extension project: Final Report, June, pp. 60-61.

Matter 5: Did the Port’s engagement with stakeholders develop appropriate inputs for the decision to proceed with a prudent and efficient project?

FTI’s advice

FTI draws on the Port’s technical analysis and other relevant Port documents, which have been informed by a range of bilateral discussions and broader industry consultation, to consider the Port’s engagement with stakeholders in developing inputs into the Webb Dock East expansion.

FTI provided comments on the Port’s engagement activities:

The WDE extension project has been included in various Port of Melbourne consultations and public releases for several years. This has included consultation and documents released as part of the Big Ships Strategy and 2050 Port Development Strategy. In addition to public consultation, the Port of Melbourne has also undertaken a series of one on one meetings with various parties.³⁰

The Port of Melbourne has generally documented the outcomes of various consultation forums and various Port of Melbourne board papers attest to the fact that senior management has continued to update the Board on issues raised in its stakeholder consultation. The Port of Melbourne has sought to respond to some of the issues raised through consultation on the WDE extension, including through the commissioning of additional analysis and forecasting.³¹

Commission view

We consider that the Port’s decisions to invest in capital projects need appropriate inputs to ensure it has due regard to the prudence and efficiency of any investment. We expect some of these decision inputs will need to be informed by its engagement with ports users and other stakeholders as part of robust asset planning and management practices.

In addition, the Port needs to ensure it can meet its obligations under the Port Lease, Port Concession Deed and the PM Act. Although not port users, the Port also needs to consider any feedback from the surrounding communities or other impacted stakeholders and any operational requirements from the Harbour Master.

³⁰ FTI Consulting 2022, Assessment of the Webb Dock East extension project: Final Report, June, p. 68.

³¹ FTI Consulting 2022, Assessment of the Webb Dock East extension project: Final Report, June, p. 76.

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We note that the Port should seek to appropriately inform any engagement participants on the relevant topic(s) so that they can meaningfully contribute to the consultation. The Port does not need to reach agreement with port users and other stakeholders, but it should conscientiously consider any feedback it receives.

The Port's engagement with the three international container stevedores ran from January to April 2021 to review inputs and test assumptions. Early in 2021, the Port's kick-off presentation showed that its consultation purpose was to develop stevedore-specific Container Terminal Capacity Models that would form an input into its 'comprehensive Port Capacity Modelling (PCM) [to] support long-term planning and investment decisions'. We acknowledge that the Port did not commission the PCM work to inform the Port's 2021-22 Tariff Compliance Statement (due by 31 May 2021) or even specifically, the Board's decision to proceed with the Webb Dock East expansion. A draft report on the proposed port-wide capacity model was only completed on 24 August 2021.

Ultimately, the Port's Board's decision to proceed with the Webb Dock East expansion in July 2021 appears to be informed by engagement inputs. These include:

- Port staff engagement with VICT over several years, which informed the final design and construction plan for the Webb Dock East expansion.
- The level of delays experienced by vessels seeking to access the VICT terminal, based on feedback from VICT, industry bodies and shipping lines.
- The Port's dedicated consideration of the competition consequences for the port of Melbourne if the Webb Dock East expansion goes ahead.
- The longer-term stakeholder engagement process undertaken by the Port, including the scope of influence and planning horizon of the various engagement programs that included the Webb Dock East expansion. This includes the feedback from the Port's 2021 Industry Consultation program, where it noted the two Swanson Dock container stevedores are the only stakeholders that do not consider the Webb Dock East expansion is needed in the short-term. Whereas industry representatives, VICT, shipping lines and other industry stakeholders indicated support for the rationale for the project.
- The 2021 development of the PCM to inform the future planning for Webb Dock North. The Port engaged with the three container stevedores on the data inputs and approach for each of their supporting terminal capacity sub-models. The Port considered alternative views expressed by the container stevedores but did not adjust all inputs to match port user feedback. This is because it considered that the adjustments were not appropriate based on credible advice provided to the Port.

On this basis, we consider the Port engaged with relevant stakeholders to collate information necessary to inform its investment decision. The Port is not required to ensure that all port users

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are satisfied with the Port's assumptions, nor that all port users are satisfied that the investment is prudent and efficient. The Port's obligations are to consult effectively and to have regard to the comments provided by port users.³²

Given the commercial pressures on the port supply chain, there is a strong likelihood that some port users or other stakeholders will not support each capital project proposed by the Port.

In the chapter 'Did the Port genuinely consult with port users?', the commission concludes that the Port's consultation on the Webb Dock East expansion for its 2021-22 Tariff Compliance Statement was non-compliant with clause 7.1.2(d) of the Pricing Order.

However, we do not consider that conclusion of non-compliance has any consequential impacts on the conclusion that the Port engaged with relevant stakeholders to collate information necessary to inform its investment decision – and hence our prudence and efficiency assessment under this chapter.

Matter 6: Did the Port have appropriate capital management and governance systems in place, and go through a robust internal process in developing the capital project?

FTI's advice

FTI advised that the Webb Dock East expansion has been subject to extensive planning. It had been identified as a possible project since at least 2016. Preliminary and detailed designs have already been completed. The Port's processes for capital investment have been followed, including due governance and approvals for all stages. The lowest tender was accepted, following detailed evaluation and adjustment for any gaps or inconsistencies with the project specification.³³

Commission view

Based on the evidence submitted, we are satisfied that the Port had followed an intensive and robust process in preparing tender and cost estimates, commissioning a tendering process and finally awarding the project to the best value bidder. For example, quotes received from the bidders were at or below the quote from an independent quantity surveyor and internal cost estimates developed by the Port. Therefore, there appears to be a sound and robust process for developing initial cost estimates, and the Port obtained efficient solutions from competitive tendering arrangements. The Port took time to follow appropriate steps and procedures despite the

³² Pricing Order, clause 7.1.2(d).

³³ FTI Consulting 2022, Assessment of the Webb Dock East extension project: Final Report, June, pp. 37-38.

continued pressure from VICT to approve the project and bring forward construction. This could demonstrate that the Port was following relevant processes in planning and implementing the Webb Dock East expansion to ensure the project was prudent and efficient.

We consider that the Port has acted prudently and ensured that the proposed project costs are efficient, consistent with the Pricing Order.

Our inquiry into the Port's compliance with the Pricing Order under section 49I of the PM Act found that the Port has a robust capital management and governance system in place.³⁴ This applies to all the major capital projects including the Webb Dock East expansion. However, we did note that the Port will need a more robust approach in the future as the Port's capital investment program expands.³⁵

Overall conclusions on the Port's compliance

We consider the Port's proposed capital expenditure for the Webb Dock East expansion (including its expected capital expenditure for 2021-22) to be prudent and efficient at the time of our assessment. As such, we conclude that the Port's forecast capital expenditure for the Webb Dock East expansion, including the forecast amount included in its 2021-22 Tariff Compliance Statement for purposes of setting tariffs for the 2021-22 financial year, is currently compliant with clause 4.2.1(c) of the Pricing Order. This is an assessment at a point of time, noting that proposed and actual capex can change in the future.

As a result, we consider the Port should have the opportunity to recover the efficient costs of the project from port users via prescribed service tariffs as per clause 2.1.1(a), subject to the Port meeting the other requirements of clause 4 of the Pricing Order.

We are aware that the actual spending on the Webb Dock East expansion may exceed what the Port has forecasted, and the Port may seek to recover additional efficient costs. However, assessing efficiency of that actual spending for Pricing Order compliance will occur as part of our next section 49I PM Act pricing order compliance inquiry.

³⁴ Refer to pages V, 91- 96 of the Essential Services Commission 2021, Inquiry into Port of Melbourne compliance with the pricing order 2021 report available on <https://www.esc.vic.gov.au/transport/port-melbourne/port-melbourne-compliance-pricing-regulations/inquiry-port-melbourne-compliance-pricing-order-2021>. last accessed 27 May 2022.

³⁵ Ibid.

Are the Port's demand forecasts reasonable?

This chapter sets out our investigation and conclusions on whether the Port's forecasts and estimates were reasonable, and whether any extrapolation or inference is supported by primary information on this is based, for the purposes of clauses 8.2 and 8.3 of the Pricing Order.

Commission conclusions on demand forecasts – clauses 8.2 & 8.3 of the Pricing Order

The commission concludes that the Port of Melbourne's demand forecasts for the Webb Dock East expansion for the purposes of preparing and submitting its 2021-22 Tariff Compliance Statement are compliant with clauses 8.2 and 8.3. The commission considers the forecasts are arrived at on a reasonable basis and represent the best estimate possible in the circumstance. The commission also considers that the information used in the forecasts is supported by primary information.

The complaints

What are the relevant requirements under the Pricing Order?

The Port is required to satisfy information requirements pertaining to demand forecasts for its prescribed services³⁶ as per clause 8.2 and 8.3 of the pricing order:

8.2 Forecasts and estimates

8.2.1 Information in the nature of an estimate or forecast must be supported by a statement of the basis of the forecast or estimate.

8.2.2 A forecast or estimate:

- (a) must be arrived at on a reasonable basis; and
- (b) must represent the best forecast or estimate possible in the circumstances.

8.3 Inferred or derivative information

8.3.1 Information in the nature of an extrapolation or inference must be supported by the primary information on which the extrapolation or inference is based.

³⁶ Section 49(1)(c) of the Port Management Act 1995 (Vic).

What have the complainants claimed?

The complainants allege that the Port's demand and capacity forecasts are non-compliant with the Pricing Order. The complainants raised several concerns regarding the Port's approval of the Webb Dock East expansion in relation to the Port's demand and capacity forecasts:

- The complainants stated that in the 2050 PDS published on Nov 2019, the Webb Dock East expansion was not identified as a project that was in progress and the demand forecast did not support the delivery of this project in the short term.
- They allege that the Port has exaggerated the degree to which bigger ships are calling at the port and dispute that larger ships (mostly those exceeding 337m LOA and 45m beam) will call in future.
- They are concerned that expanding Webb Dock East now would lead to excess capacity in the port, and strand existing stevedore investments at Swanson Dock.

The Port's decision to invest in the Webb Dock East expansion relied on three considerations, namely;

1. projections of future TEU throughput at the port, which are then compared to port capacity (less a planning 'buffer') to determine when investment is needed
2. appropriateness of the Port's TEU capacity 'buffer' of 15% used in determining a trigger point for investment in additional capacity
3. projections of the ship numbers and fleet composition serving the east coast of Australia, compared to berth capacity (particularly capacity for large ships) at the port and its stevedores.

We have reviewed the Port's consideration of these three matters.

Matter 1: Were the Port's estimates of trade volume growth reasonable?

FTI's advice

One of the Port's rationales for creating spare capacity at Webb Dock East is the ability to cater for future growth in TEU volumes as well as the larger ships expected to carry this trade.

The Port's 2050 Port Development Strategy included a forecast that total container trade volumes would grow by 3.5 per cent per annum over the long term, from 3 million TEU in 2019 to around 8.9 million TEU by 2050.³⁷ A 3.5 per cent growth rate results in the maximum practical TEU capacity of the port being exceeded in 2026. The PDS attributes its 3.5 per cent TEU growth

³⁷ Port of Melbourne, 2050 Port Development Strategy, 2020 edition.

Are the Port's demand forecasts reasonable?

forecasts to a 2018 BIS Oxford Economics report. FTI reviewed the BIS Oxford Economics' 2018 forecasts as part of the commission's section 49I PM Act inquiry, as well as the 2021 BIS Oxford Economics' Port of Melbourne Trade Forecasts. FTI advised that use of the 3.5 per cent import growth rate is appropriate in this context.³⁸ FTI also noted:³⁹

- this forecast is supported by a statement of the basis of the forecast or estimate
- were arrived at on a reasonable basis and
- represented the best forecast or estimate possible in the circumstances.

However, FTI noted that the analysis supporting the Port's decision is based on the 2018 forecast and has not since been updated between that time and July (time of the decision). The most recent BIS Oxford Economics' forecast used in the Port's 2021-22 TCS is on average 3.3 percent lower than the forecast made in 2018. However, using either forecast would result in the port reaching the capacity limit of 3.06 million TEUs in 2024. Therefore, it would not change the timing of the investment.⁴⁰

Commission view

Our review of the complainants' documents supports FTI's advice. Consistent with our finding in the section 49I PM Act inquiry, we consider that the Port's overall TEU growth forecast contained in the PDS is compliant with the Pricing Order.

Matter 2: Is the Port's consideration of timing for the investment based on a reasonable planning buffer?

Use of a planning factor is normal practice when planning infrastructure that has a long lead time for completion. A prudent planning factor should provide a sufficient buffer for a project to be planned, designed, approved, constructed and operationalised before the maximum practical capacity is exceeded.

FTI's advice

The Port applies a 'planning factor' of 10 to 15 per cent of total port capacity (15 per cent being equivalent to approximately 0.4m TEU) to provide a buffer between current demand and anticipated capacity. This informs the Port's decision about when to invest in new capacity to ensure the port is capable of accommodating trade growth when it occurs.

³⁸ FTI Consulting 2022, Assessment of the Webb Dock East extension project: Final Report, June, pp. 43-44.

³⁹ FTI Consulting 2022, Assessment of the Webb Dock East extension project: Final Report, June, p. 44.

⁴⁰ Ibid.

Are the Port's demand forecasts reasonable?

FTI noted that, assuming an average annual growth rate of 3.5 per cent, as stated in the Port Development Strategy, would mean that applying a 15 per cent planning factor would require a lead time for additional investment of four years.⁴¹ Lower growth rates lengthen the lead time required by a 15 per cent planning factor, for example:⁴²

- an annual growth rate of 2.6 per cent would require a lead time of 5.5 years.
- an annual growth rate of 4.8 per cent would require a lead time of three years.

FTI advised that, considering the length of time between identification of need in the Port's own capacity modelling in 2018, and expected final delivery of the extension (2024) it can be seen that a planning factor of 15 per cent and development lead time of 4 years of average growth seems justified.⁴³

The Port's 2020 to 2022 monthly trade statistics show that monthly variation in total TEUs (imports and exports) could be as high as 8.4 per cent above the average monthly TEU volume. So for example, 2021 was a year of 5.1 per cent growth and November 2021 was 8.4 per cent higher than the 2021 average monthly throughput. FTI noted that a high-volume month in a year of high growth could put additional pressure on terminal operations. There are short-term actions which can be used to manage monthly peaks, but it is preferable not to have these in place for long periods of time.⁴⁴

FTI advised that when considering the annual and monthly variability of demand, a planning factor of 15 per cent seems reasonable because it provides at least three years of lead time to deliver capacity investments, and four years' lead time on average.⁴⁵

Commission view

Reviewing the port's annual trade and monthly trade statistics shows the port's annual growth in import TEU has exceeded the forecast annual growth over the last two years. If this trend continues, then the planning buffer at the port would be consumed in two years, and the next investment would be required.

We noted that the Port's latest review of the capacity by an independent consultant indicates stevedores in the port are currently operating at reasonably high levels of productivity based on

⁴¹ $(1+3.5\%)^4=1.15$ to 2 decimal places. The implied lead time provided by a 15% planning buffer can be calculated as $\text{LN}(1+15\%)/\text{LN}(1+\text{growth rate})$.

⁴² FTI Consulting 2022, Assessment of the Webb Dock East extension project: Final Report, June, p. 45.

⁴³ FTI Consulting 2022, Assessment of the Webb Dock East extension project: Final Report, June, pp. 45-46.

⁴⁴ FTI Consulting 2022, Assessment of the Webb Dock East extension project: Final Report, June, p. 46.

⁴⁵ Ibid.

Are the Port's demand forecasts reasonable?

global benchmarks for like operations. Therefore, despite some improvement at operational level at VICT terminal, using the Port's productivity measures, it will not significantly change the timing of the extension. We noted that exceeding the existing maximum capacity can be possible for short periods, however, can result in increased congestion, reduced yard equipment productivity, labour efficiency and possible impact on safety, which eventually increase supply chain cost.

On the basis of FTI's advice and our review of the documents and evidence provided to us, we consider that the Port's adoption of a 10 to 15 per cent planning buffer is reasonable.

Matter 3: Were the Port's assumptions about the need to accommodate "big ships" reasonable?

FTI's advice

The Port has adopted various forecasts at different points of time since the Port Lease. The Port commissioned an independent consultant to model future ship sizes that are likely to call at the port.

FTI noted that the consultant's analysis estimates average ship sizes based on the 2018 and 2019 shipping schedules. It then increases average ship size based on growth in TEUs, limited by physical constraints at the port. This analysis assumes that the number of ships calling at the port is constant and average ship size increases until physical constraints are reached at Swanston Dock and Webb Dock East. As a result, the consultant's forecasts are likely to understate the average ship size compared to a model which predicts the cascade of large ships to the Australian ports.⁴⁶

FTI noted that discussion with a shipping line suggests that Australian demand does not directly influence ship sizes on Australian routes. The schedule of new ships is lumpy and their profile is based on globally networked companies making decisions that optimise their fleet across their various routes. FTI advised that what has emerged as important to planning capacity at the port is not just the average TEUs per vessel, but the maximum (or some high percentile) of vessel dimensions (gross tonnage, beam and LOA) which are expected to regularly call at the port. FTI therefore, considered that the Port's consultant's forecasts are likely to understate the average ship size due to not considering the change of profile of the vessels.⁴⁷

Overall, FTI considered that the consultant's forecasts have been arrived at on a reasonable but simplistic basis. It projects average ship sizes with the number of ship calls unchanged which

⁴⁶ FTI Consulting 2022, Assessment of the Webb Dock East extension project: Final Report, June, pp. 49-50.

⁴⁷ FTI Consulting 2022, Assessment of the Webb Dock East extension project: Final Report, June, pp. 50-52.

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results in TEU demand growth being the sole determinant of growth in ship sizes. In practice, TEU growth is not the sole determinant of ship size and other factors are relevant.⁴⁸

The Port also used an earlier 2016 forecast prepared when the Lonsdale Consortium was bidding for its lease. FTI reviewed the 2016 forecast and noted that it was:⁴⁹

- supported by a detailed explanation of methodology
- derived on a reasonable basis.

FTI noted that the 2016 forecast was likely to be the best estimate possible at the time. However, the subsequent reality has been that the number of large vessel calls significantly exceeded the 2016 estimates due to understating the speed of the cascade, and the scale of new ships being built.⁵⁰

Commission view

The information provided by various parties regarding the Port's capacity modelling was not fully conclusive. Different parties provided different estimates of ship vessel forecasts. We note that:

- Evidence of actual ship fleet data provided shows an increasing trend of larger vessels arriving at the port. About 25 per cent of vessels arriving into the port are larger than the 300m LOA design vessel for the port.
- Shipping lines determine the size of the ships. The other factor determining the size of the ships is the cascading of larger vessels to Australia. Looking at future vessels orders shows new ship orders are predominantly larger ships.
- Despite the Port's capacity modelling being simplistic, adopting a more complex approach would have unlikely changed the outcome of the Webb Dock East expansion decision. In fact, considering the cascading effect in the modelling would have supported the decision to bring forward the Webb Dock East expansion.

The commission considers that the Port's assumptions in relation to 'big ships' are reasonable.

Overall conclusions on the Port's compliance

Overall, the evidence indicates the Port's demand and capacity forecasts for the purposes of preparing and submitting its 2021-22 Tariff Compliance Statement are arrived at on a reasonable basis and represent the best estimate possible in the circumstance, in compliance with clause 8.2

⁴⁸ FTI Consulting 2022, Assessment of the Webb Dock East extension project: Final Report, June, p. 52.

⁴⁹ Ibid.

⁵⁰ FTI Consulting 2022, Assessment of the Webb Dock East extension project: Final Report, June, p. 54.

Are the Port's demand forecasts reasonable?

of the Pricing Order. We also consider the information used in the forecasts is supported by primary information, in compliance with clause 8.3 of the Pricing Order.

Are the Port's demand forecasts reasonable?

Did the Port genuinely consult with port users?

This chapter sets out our investigation and conclusions on whether the Port effectively consulted with and had regard to views from port users, for the purposes of clause 7.1.2(d) of the Pricing Order.

Commission conclusions on consultation with port users – clause 7.1.2(d) of the Pricing Order

The commission concludes that the Port of Melbourne's consultation on the Webb Dock East expansion was non-compliant with clause 7.1.2(d) of the Pricing Order. This is consistent with the finding of non-compliance with clause 7.1.2(d) of the Pricing Order in the commission's inquiry into compliance with the Pricing Order under section 49I of the Port Management Act 1995 (the PM Act).

The commission notes that, in response to the findings of the section 49I PM Act inquiry, the Port of Melbourne has made an enforceable undertaking to the ESC Minister (the Assistant Treasurer), which will result in the Port of Melbourne developing an engagement protocol intended to improve engagement with its stakeholders.

The complaints

What are the relevant requirements under the Pricing Order?

Section 7 of the Pricing Order sets out timing and information requirements for the Port to adhere to when preparing and submitting a tariff compliance statement to the commission. In terms of engagement, clause 7.1.2 requires:

The Tariff Compliance Statement must:

(d) set out the process by which the Port Licence Holder has effectively consulted and had regard to the comments provided by Port Users;

There is a yearly requirement for the Port to include information on its consultation in its tariff compliance statements. By virtue, the Port's consultation can only inform a tariff compliance statement if it occurs prior to 31 May, as required by clause 7.1.1(a) for the following financial

year.⁵¹ Therefore, the Port's consultation to inform its 2021-22 Tariff Compliance Statement would need to have concluded prior to 31 May 2021.

As part of our section 49I PM Act inquiry, we sought legal advice on the interpretation of clause 7.1.2(d). The memorandum of Queen's Counsel advice regarding scope of inquiry states:

the Port cannot demonstrate compliance with clause 7.1.2(d) merely by setting out in a [tariff compliance statement] the process by which the Port says it has effectively consulted and had regard to the comments provided by Port Users; in order to satisfy the requirements of clause 7.1.2(d), the Port must in fact have effectively consulted and had regard to the comments provided by Port Users.⁵²

We consider this interpretation of 7.1.2(d) carries into this complaint investigation – that is, there is an obligation for the Port to effectively consult and have regard to port users' comments in preparing its 2021-22 Tariff Compliance Statement.

We have previously provided guidance to the Port and stakeholders on the Port's consultation requirements under the Pricing Order in our Statement of Regulatory Approach.⁵³ We stated for the 'effectively consulted' element of clause 7.1.2(d) that:

In assessing the port's compliance, we will be guided by the following questions:

- Has the port's form of engagement been tailored to suit the topic on which it seeks to engage?
- Has the port provided port users with appropriate information outlining the purpose, form and the content of the engagement?
- Has the port provided port users with a reasonable opportunity to participate?
- Does the port's engagement program give priority to matters that could have a significant impact on port users?

We must also consider whether the Port has had regard to port users' comments, as per the second element of clause 7.1.2(d).

⁵¹ 7.1.1(a) The Port Licence Holder must provide to the Commission a Tariff Compliance Statement no later than 31 May in each Financial Year.

⁵² Refer to pages 21-22 of the memorandum, available under the resources section of our 2021 section 49I PM Act inquiry website: <https://www.esc.vic.gov.au/transport/port-melbourne/port-melbourne-compliance-pricing-regulations/inquiry-port-melbourne-compliance-pricing-order-2021#toc--scope-of-our-inquiry>, accessed 26 May 2022.

⁵³ Essential Services Commission 2020, Statement of Regulatory Approach – version 2.0, April, p. 15.

Did the Port genuinely consult with port users?

Our assessment of the Port’s compliance with the Pricing Order under this investigation considers the preceding four guiding questions and both elements of clause 7.1.2(d).

What have the complainants claimed?

As set out in our notice of complaints, the complainants allege that:⁵⁴

there was a failure by the Port to genuinely consult with relevant stakeholders about the need for and timing of the WDE expansion, in relation to its inclusion and mention in the Port Development Strategy process, December 2020 Tariff Rebalancing Application or the 2021-22 Tariff Compliance Statement.

We consider the complainants’ concerns with the genuineness of the Port’s consultation will be addressed by our assessment of the Port’s compliance with clause 7.1.2(d) of the Pricing Order.

For context, we have collated some key dates from the three documents mentioned in the above allegation as well as the Webb Dock East expansion decision and public communication dates.

The Port’s document	Activity and date
Draft 2050 Port Development Strategy	November 2019 – public release of draft strategy for consultation
2050 Port Development Strategy	13 October 2020 – public release of the final strategy
Draft Tariff Rebalancing Application	November 2020 – public release of the draft application on 2021-22 tariffs for consultation
December 2020 Tariff Rebalancing Application	23 December 2020 – submitted to the commission proposing 2021-22 tariffs
December 2020 Tariff Rebalancing Application	11 February 2021 – application withdrawn by the Port
2021-22 Tariff Compliance Statement	31 May 2021 – submitted to the commission
Webb Dock East expansion Board approval	6 July 2021 – internal Port decision
Webb Dock East expansion media release	12 August 2021 – public announcement

⁵⁴ Essential Services Commission 2021, Investigation of complaints under section 49Q Port Management Act 1995 (Vic): Allegations of non-compliance by Port of Melbourne with Pricing Order, 21 October. Refer to our website: <https://www.esc.vic.gov.au/transport/port-melbourne/complaints-port-melbourne-pricing-order-compliance>, last accessed 26 May 2022.

Did the Port genuinely consult with port users?

Matter 1: Does any evidence provided for this complaint change our view that the Port did not effectively consult with port users for the inclusion of expenditure on Webb Dock East in the 2021-22 TCS?

Findings from the 2021 section 49I PM Act inquiry

We found that the Port did not demonstrate it effectively consulted or had adequate regard to port user’s comments in preparing its 2020-21 and 2021-22 tariff compliance statements. We also found the Port did not provide a reasonable opportunity for port users to participate in engagement on the Webb Dock East expansion.⁵⁵

Our findings considered the Port’s engagement activities until 31 May 2021, covering the Webb Dock East expansion, the Port Development Strategy and the December 2020 Tariff Rebalancing Application.

Our inquiry noted that we did not review the decision of proceeding with the expansion because it was outside of the scope of the inquiry.

FTI’s advice

In the below table we have aligned FTI’s advice with our four guiding questions that assess the port’s compliance to the Pricing Order.

Guiding question	FTI advice
Has the port’s form of engagement been tailored to suit the topic on which it seeks to engage?	FTI noted “the [Port] has undertaken extensive consultation on the WDE expansion with a range of stakeholders which has incorporated many different consultation activities.”
Has the port provided port users with appropriate information outlining the purpose, form and the content of the engagement?	FTI noted there was a small amount of high-level detail provided. This was due to the fact “much of the [Port’s] consultation has been undertaken as part of broader processes related to the Big Ships Strategy and the Port Development Strategy.” FTI advised “it is reasonable to expect that early consultation on a major project provides the best opportunity for stakeholders to

⁵⁵ Refer to pages IV, 112- 126 of the Essential Services Commission 2021, Inquiry into Port of Melbourne compliance with the pricing order 2021 report available on <https://www.esc.vic.gov.au/transport/port-melbourne/port-melbourne-compliance-pricing-regulations/inquiry-port-melbourne-compliance-pricing-order-2021>. last accessed 27 May 2022.

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understand the justification for a project and to influence the decision. However, in the case of the [Webb Dock East] early consultation documents were high level and vague about the need, scope, timing and funding implications.”

The April 2021 Industry update represented the most comprehensive presentation of detail (regarding the need, scope, timing and funding proposed for the project) of all consultation undertaken prior.

Has the port provided port users with a reasonable opportunity to participate?

FTI noted “the purpose of the [Port’s] engagement on the [Webb Dock East] expansion, and the opportunity for stakeholders to influence the Board’s decision has not always been clear.”

FTI advised “the [Port] needs to ensure that the purpose of consultation on its major projects is clear about the consultation process, the stage at which the project is at and what scope there is for stakeholders to influence the final decision.”

Does the port’s engagement program give priority to matters that could have a significant impact on port users?

FTI noted “early consultation documents were high level and vague about the need, scope, timing and funding implications.”

FTI advised “as a major infrastructure project with significant implications for port users and the general economy, the [Port] needs to develop specific consultation plans for each major project to ensure that its consultation is clear about the purpose of consultation, the stakeholders to be consulted, the information to be shared and the key consultation questions to be addressed.”

Source: FTI Consulting 2022, Assessment of the Webb Dock East extension project: Final Report, June, pp. 74-75.

Commission view

Our assessment against the four guiding questions for ‘effectively consulted’ takes into account our section 49I PM Act inquiry findings, the Port’s 2021 Tariff Compliance Statement, the new evidence provided to this investigation regarding consultation in relation to the Port’s 2021 Tariff Compliance Statement and FTI’s advice in relation to the four guiding questions.

First, we consider the Port did not give priority to the Webb Dock East expansion when consulting on the December 2020 Tariff Rebalancing Application, even though it is a matter of significant impact for port users. New evidence reiterates that the Port largely gave priority to the matter through bilateral discussion with VICT during its earlier consultation phases (i.e. in parallel with its

Did the Port genuinely consult with port users?

Port Development Strategy and December 2020 Tariff Rebalancing Application). It was then only in the first half of 2021 that the Port expanded its consultation with other port users significantly impacted by the project.

Second, we consider the Port did tailor the form of its engagement, by using a variety of industry and stakeholder-specific consultation methods. The new evidence elaborates on the Port's engagement activities, such as various meetings and workshops with a port user or stakeholder groups, online and face-to-face methods, and information provision communications.

Third, we consider the Port did not provide port users with appropriate information, in particular on the purpose and content of its consultation for the Webb Dock East expansion. New evidence reiterates that the Port did not provide adequate information regarding decision making timelines so that port users could provide their comments at a time that could influence the Port's decisions.

We note the following:

- We see that the three container stevedores have a different understanding of the scope and purpose of the Port's Webb Dock East expansion consultation. Two stevedores sought clarity of the timelines under the Port Capacity Model program to understand when and how they could respond on the Webb Dock East expansion. One stevedore appears to consider that the Port's 2021 Industry Consultation for the Webb Dock East expansion is a tick-a-box procedure.
- We also cannot see evidence that the Port has provided one stevedore with the fleet forecast, which the stevedore considers is integral to its understanding of the Port's capacity modelling.
- As we found for our section 49I PM Act inquiry, the Port's rationale presented to port users for the Webb Dock East expansion varied across its engagement programs for the 2050 Port Development Strategy and its December 2020 Tariff Rebalancing Application. For its 2021 Industry Consultation, the Port engaged a consultant to help with its engagement strategy and improved how it presented the purpose and scope in its consultation materials, including clearer justification for the Webb Dock East expansion.

Fourth, we consider the Port did not provide port users with a reasonable opportunity to participate in its consultation on the Webb Dock East expansion. As found in our section 49I PM Act inquiry, although users were involved in the development of the Port Development Strategy several affected port users were consulted using brief statements prior to the Port's decision to work towards the construction of the Webb Dock East expansion. The lack of clarity on the opportunity for stakeholders to influence the Board's decisions is evidenced in the number of requests for information by port users on key engagement dates and process updates. The absence of clear information on the project stage and what scope there is for stakeholders to influence the decision does not allow port users to make informed decisions and therefore denies them a reasonable opportunity to participate.

Did the Port genuinely consult with port users?

We note some of the new evidence reviewed of consultation undertaken up to 31 May 2021 is largely unrelated to the 2021-22 Tariff Compliance Statement, and the Port and stevedores are instead more focussed on a proposed June 2021 decision on whether the Port will proceed with the Webb Dock East expansion and the Port Capacity Model. We can see in the Port's letters to port users that it does provide four to six weeks for them to provide their feedback on the Webb Dock East expansion. However, we also note that during this time the Port declined a number of the information requests from port users.

On the basis of the relevant evidence submitted to this complaint investigation and to our section 49I PM Act inquiry, we conclude that the Port has not effectively consulted on the Webb Dock East expansion to inform its 2021-22 Tariff Compliance Statement.

Matter 2: Does any evidence provided for this complaint change our view on whether the Port had regard to port users' comments for the 2021-22 Tariff Compliance Statement?

Findings from the 2021 section 49I inquiry

We assessed the Port's consultation that informed its 2020-21 and 2021-22 Tariff Compliance Statements as part of our section 49I PM Act inquiry. We reviewed the Port's Industry Consultation activities to directly inform its tariff compliance statements, as well as its engagement on its Big Ships Strategy, Port Development Strategy and rail projects.

We concluded that the Port had not demonstrated it had regard to port users' comments for the 2020-21 and 2021-22 Tariff Compliance Statements.⁵⁶ Our inquiry noted that a decision to proceed with the Webb Dock East expansion, and whether this was informed by consultation, had not occurred in the applicable review period from 1 July 2016 to 30 June 2021.

FTI's advice

FTI provided the following commentary on the 'had regard' element of clause 7.1.2(d):⁵⁷

The purpose of the Port of Melbourne's engagement on the WDE extension, and the opportunity for stakeholders to influence the Board's decision has not always been clear. In particular:

- [...]

⁵⁶ Essential Services Commission 2021, Inquiry into the Port of Melbourne compliance with the pricing order: Final report, 31 December, pp. 119-124.

⁵⁷ FTI Consulting 2022, Assessment of the Webb Dock East extension project: Final Report, June, pp. 74-75.

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- latter stages of consultation, such as the April 2021 Industry Update, continued to seek feedback on the justification for the project even though and the decision was imminent.

FTI also noted that:⁵⁸

The Port of Melbourne has generally documented the outcomes of various consultation forums and various Port of Melbourne board papers attest to the fact that senior management has continued to update the Board on issues raised in its stakeholder consultation. The Port of Melbourne has sought to respond to some of the issues raised through consultation on the WDE extension, including through the commissioning of additional analysis and forecasting.

We note that some of the Port's commissioning of additional analysis was after 31 May 2021.

Commission view

We consider the Port did not sufficiently have regard to port users' comments on the Webb Dock East expansion across its Port Development Strategy and December 2020 Tariff Rebalancing Application and 2021-22 Tariff Compliance Statement.

The new evidence reiterated the information we considered for our inquiry about the Port Development Strategy and Port's rebalancing application, where many port users did not have an opportunity for their feedback to be considered on the Webb Dock East expansion during the Port's 2019 and 2020 consultations.

We note that Port staff did consider and respond to the complainant's views on several occasions in the months preceding 31 May 2021, primarily on inputs and assumptions related to the Port Capacity Model and the Port's rationale for the Webb Dock East expansion.

As reviewed for our inquiry, Port management did discuss the latest views from the complainants with the Board for the purposes of a decision on the 2021-22 tariff compliance statement.

Although outside the scope of this assessment of compliance with 7.1.2(d) of the Pricing Order, we acknowledge that the Port undertook further work to consider port users' comments prior to its Board's decision to proceed with the Webb Dock East expansion. This is discussed in Matter 5 of the chapter 'is the Webb Dock East expansion prudent and efficient?'

Evidence suggests that additional work was done after 31 May 2021 and that the Port seemed to have deferred the Board's final consideration of the Webb Dock East expansion stakeholder

⁵⁸ FTI Consulting 2022, Assessment of the Webb Dock East extension project: Final Report, June, p. 76.

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engagement to a proposed June 2021 decision on whether to proceed with the project (which ultimately took place in July 2021).

Overall conclusions on the Port's compliance

We have not received evidence on the Webb Dock East expansion for this complaint investigation that would cause us to reconsider our findings on the Port's consultation we made under our section 49I PM Act inquiry. As set out in the preceding two matters, we consider that the Port did not effectively consult or have regard to port users' comments on the Webb Dock East expansion for the purposes of its 2021-22 Tariff Compliance Statement.

We conclude that the Port's 2021-22 Tariff Compliance Statement is non-compliant with clause 7.1.2(d) of the Pricing Order.

We note that, in response to the section 49I PM Act inquiry, the Port has given an enforceable voluntary undertaking⁵⁹ to the ESC Minister (the Assistant Treasurer) which seeks to address the commission's findings from the inquiry. The undertaking requires, among other things, that the Port develop and publish, after consultation with the Minister for Ports and Freight, a Pricing Order Engagement Protocol that meets certain criteria – this is intended to improve engagement with port users and other stakeholders, and provide the framework according to which the Port of Melbourne is obliged to undertake all consultations required under or relating to compliance with the Pricing Order.

While not relevant to compliance with 7.1.2(d), we note that we have reviewed the Port's engagement after 31 May 2021 in relation to our consideration of prudence and efficiency. Refer to Matter 5 in chapter 'is the Webb Dock East expansion prudent and efficient?' for more on our consideration of the Port's consultation that formed an input into the Port's Board's 6 July 2021 decision on the Webb Dock East expansion.

We acknowledge that the Port and port users operate in a commercially sensitive environment, and it is not always feasible for parties to share their operational data and other information.

The Port commissioned reports and sourced other information to inform its Webb Dock East expansion that were not shared with port users, even in a redacted form. Similarly, the complainants engaged consultants to provide reports, data and modelling on the project.

We urge port users to try to increase the extent to which they share their issues, insights and information with the Port, and vice versa, to facilitate more informed and effective consultation.

⁵⁹ Port Management Act 1995 (Vic), section 49M read with section 49N. The voluntary undertaking is effective from 20 June 2022 to 30 June 2027 or such earlier time as the Port of Melbourne may withdraw or vary the undertaking with the consent of the ESC Minister.

Did the Port genuinely consult with port users?

However, we recognise the importance of maintaining confidentiality, commercial sensitivity of information, and competition between port users may sometimes constrain these interactions.

Did the Port genuinely consult with port users?

Abbreviations

Insert term	Insert definition
DP World	DP World Australia
CEG	Competition Economists Group
ESC Act	The Essential Services Commission Act 2001(Vic)
FTI	FTI Consulting
LOA	Length overall
PM Act	The Port Management Act 1995 (Vic)
The or the Port	The Port of Melbourne (the entity)
The or the port	The port of Melbourne (the physical port)
TEU	Twenty-foot equivalent unit
WDE expansion (alternatively referred to as WDE extension by some stakeholders)	Webb Dock East berth 4/5 expansion project
VICT	Victoria International Container Terminal

Note: Throughout this report, the terms 'we', 'us' and 'our' refer to the commission.

Appendices

Appendix A – copy of the original Pricing Order dated 24 June 2016

Appendix B – copy of the Amended Pricing Order dated 20 May 2020 (this makes certain amendments made to the original Pricing Order)



Victoria Government Gazette

No. S 201 Friday 24 June 2016
By Authority of Victorian Government Printer

Port Management Act 1995 (Vic.)

PRICING ORDER

The Governor in Council, under section 49A of the **Port Management Act 1995 (Vic.)**, makes the following Order:

1. COMMENCEMENT AND APPLICATION

1.1.1 This Order takes effect on 1 July 2016 (**Commencement Date**).

1.1.2 Pursuant to section 49A(2) of the Act it is declared that:

- (a) Divisions 2A and 2B of Part 3 of the Act together with the provisions of this Order apply to the provision of Prescribed Services; and
- (b) Division 3 of Part 3 of the Act does not apply to the provision of Prescribed Services.

2. PRICING PRINCIPLES: GENERAL

2.1 Prescribed Service Tariffs Pricing Principles

2.1.1 Prescribed Service Tariffs must be set so as:

- (a) to allow the Port Licence Holder a reasonable opportunity to recover the efficient cost of providing all Prescribed Services determined by application of an accrual building block methodology of the type described in clause 4 (**Aggregate Revenue Requirement**); and
- (b) subject to clauses 2.1.1(a), 2.2, 2.3.1 and 3, to allow the Port Licence Holder a reasonable opportunity to recover, for each Prescribed Service Bundle, revenue that:
 - (i) does not exceed an upper bound representing the stand alone cost of providing the Prescribed Service Bundle; and
 - (ii) does not fall below a lower bound representing the avoidable cost of not providing the Prescribed Service Bundle.

2.1.2 The Port Licence Holder may set different Prescribed Service Tariffs for different users of the same or similar Prescribed Service, provided that such differences are consistent with the objectives set out in section 48 of the Act and clauses 2.1.3, 2.2.1 and 2.3.1.

2.1.3 The Port Licence Holder must set the level and structure of Prescribed Service Tariffs having regard to:

- (a) the efficient costs caused by Port Users of the relevant Prescribed Service;
- (b) transaction costs; and
- (c) the extent to which Port Users are able or likely to respond to price signals.

2.1.4 The principle in clause 2.1.1(b) does not apply to the extent that the Port Licence Holder expects to derive revenue from:

- (a) any applicable Initial Prescribed Service Tariff; or
- (b) during the period in which clause 3.1.1 applies, any subsequent increase to any Initial Prescribed Service Tariff (as may be varied from time to time due to the acceptance of a Final Rebalancing Application under clause 3.2.18) that does not exceed the Tariffs Adjustment Limit; or
- (c) in any period in which clause 3.1.1 no longer applies, any subsequent increase to any Initial Prescribed Service Tariff that does not exceed the rate of change in the Aggregate Revenue Requirement over a corresponding period,

that would exceed the stand alone cost of providing the Prescribed Service Bundle.

2.1.5 For the avoidance of doubt, other than as provided in clause 2.1.1(b), or as may be required to comply with the principles in clauses 2.1.2 and 2.1.3, this Order establishes maximum tariffs for Prescribed Services and a Port Licence Holder will not be in breach of this Order if it sets actual tariffs for Prescribed Services at a level that is lower than permitted under clause 2.1.1(a) in any relevant period.

SPECIAL

2.2 Specific Shared Channel Tariffs Pricing Principles

2.2.1 In addition to complying with the principles set out in clauses 2.1, 2.3.1 and 3.1.1, the Port Licence Holder must set Prescribed Service Tariffs for the use of the Shared Channels:

- (a) by application of the same accrual building block methodology and parameters that are utilised in determining Prescribed Service Tariffs for the Dedicated Channels, including without limitation in relation to establishing:
 - (i) an allowance to recover return on the applicable capital base;
 - (ii) an allowance to recover return of the applicable capital base; and
 - (iii) an allowance to recover its forecast of applicable operating expenses, (see clause 4); and
- (b) so as not to otherwise discriminate between Port Users on the basis of port or berth.

2.3 Port of Melbourne Corporation container export pricing decision

2.3.1 Notwithstanding any other provision of this Order, the Port Licence Holder must maintain and comply with the Export Pricing Decision when setting Prescribed Service tariffs for full outbound container wharfrage services.

3. PRICING PRINCIPLES: PRICE SMOOTHING MECHANISM

3.1 Tariffs Adjustment Limit

3.1.1 In addition to complying with clause 2, the Weighted Average Tariff Increase implied by the Prescribed Service Tariffs set by the Port Licence Holder in respect of any Financial Year commencing on or after 1 July 2017 must not exceed the Tariffs Adjustment Limit.

3.2 Rebalancing

3.2.1 Subject to the Commission's acceptance of a Final Rebalancing Application under clause 3.2.18 (or pursuant to an appeal under Part 7 of the **Essential Services Commission Act 2001** (Vic)), the Port Licence Holder may only revise each Prescribed Service Tariff (other than, in the period prior to the start of the 2020 Financial Year, Prescribed Service Tariffs that are subject to the Export Pricing Decision) in respect of a Financial Year by the same percentage adjustment.

3.2.2 The Commission must accept a Final Rebalancing Application under clause 3.2.18 if it is satisfied that the proposed Prescribed Service Tariffs the subject of the Final Rebalancing Application comply with clauses 2, 3.1.1, 4 and 5.

3.2.3 The Port Licence Holder may not introduce a new Prescribed Service Tariff unless the proposed new Prescribed Service Tariff is the subject of a Final Rebalancing Application accepted by the Commission under clause 3.2.18.

Making a Rebalancing Application

3.2.4 Except in relation to Prescribed Service Tariffs that are subject to the Export Pricing Decision, prior to 1 January of any Financial Year commencing on or after 1 July 2017, the Port Licence Holder may make a written application to the Commission which proposes that, subject to compliance with clauses 2, 3.1.1, 4 and 5:

- (a) certain Prescribed Service Tariffs for the upcoming Financial Year be revised by different percentage adjustments;
- (b) that a new Prescribed Service Tariff be introduced; and/or
- (c) that an existing Prescribed Service Tariff be discontinued,

(Rebalancing Application).

3.2.5 Prior to making a Rebalancing Application, the Port Licence Holder must consult Port Users about its proposal to do so and provide a reasonable opportunity for Port Users to express their views to the Port Licence Holder.

- 3.2.6 The Port Licence Holder must utilise a reasonable estimate of the upcoming March CPI for the purpose of calculating the Tariffs Adjustment Limit in a Rebalancing Application submitted prior to the March CPI Release Date.
- 3.2.7 The Rebalancing Application must contain sufficient supporting information to enable the Commission to verify that the proposed Prescribed Service Tariffs comply with clauses 2, 3.1.1, 4 and 5.

Interim Decision by the Commission

- 3.2.8 Subject to compliance with clause 3.2.7, the Commission must notify the Port Licence Holder in writing of either its:
- (a) interim acceptance of the Rebalancing Application; or
 - (b) intention to reject the Rebalancing Application,
- before 1 March of the Financial Year preceding the Financial Year to which the Rebalancing Application relates (**Interim Decision**). If notification has not been given within that timeframe, the Commission shall be deemed to have given its interim acceptance to the Rebalancing Application.
- 3.2.9 Where the Commission has not received sufficient supporting documentation from the Port Licence Holder in accordance with any relevant determination made under clause 9, the timeframe specified in clause 3.2.8 may be extended at the Commission's discretion by any period starting on the day the Commission requests further information from the Port Licence Holder and ending on the day that the Port Licence Holder complies with that request.
- 3.2.10 The Commission must grant interim acceptance to a Rebalancing Application under clause 3.2.8 if it is satisfied that the proposed Prescribed Service Tariffs the subject of the Rebalancing Application comply with clauses 2, 3.1.1, 4 and 5.
- 3.2.11 Where the Commission notifies the Port Licence Holder under clause 3.2.8 of the Commission's intention to reject the Rebalancing Application, the Commission must provide in that notification reasons for its intended rejection.
- 3.2.12 Where the Commission is required to utilise the upcoming March CPI prior to the March CPI Release Date as part of making its Interim Decision, the Commission must adopt a reasonable estimate of the March CPI.

Amended Rebalancing Application

- 3.2.13 Where the Commission notifies the Port Licence Holder under clause 3.2.8 of the Commission's intention to reject the Rebalancing Application, the Port Licence Holder may submit to the Commission an amended Rebalancing Application (**Amended Rebalancing Application**) within thirty (30) days of receipt of that notification.
- 3.2.14 An Amended Rebalancing Application submitted to the Commission under clause 3.2.13 must comply with clause 3.2.7.

Final Rebalancing Application

- 3.2.15 The Port Licence Holder must submit to the Commission an updated version of its Rebalancing Application or Amended Rebalancing Application (as applicable), utilising the actual March CPI released on the March CPI Release Date (**Final Rebalancing Application**), within seven days after the March CPI Release Date.
- 3.2.16 Subject to clause 3.2.17, where the Commission has not received the Final Rebalancing Application within the timeframe specified in clause 3.2.15, the Commission shall be deemed to have finally rejected the Rebalancing Application or Amended Rebalancing Application (as applicable).
- 3.2.17 The deadline in clause 3.2.15 may be extended at the Commission's discretion.

Final decision by the Commission

- 3.2.18 Subject to compliance with clause 3.2.7, the Commission must notify the Port Licence Holder in writing of its final acceptance or rejection of the Final Rebalancing Application within seven days after receiving the Final Rebalancing Application. If notification has not been given within that timeframe, the Commission shall be deemed to have accepted the Final Rebalancing Application.
- 3.2.19 Where the Commission has not received sufficient supporting documentation from the Port Licence Holder in accordance with any relevant determination made under clause 9, the timeframe specified in clause 3.2.18 may be extended at the Commission's discretion by any period starting on the day the Commission requests further information from the Port Licence Holder and ending on the day that the Port Licence Holder complies with that request.
- 3.2.20 Where the Commission notifies the Port Licence Holder under clause 3.2.18 of the Commission's rejection of the Final Rebalancing Application, the Commission must provide in that notification reasons for its rejection.

3.3 Duration of application of clause 3

- 3.3.1 The Port Licence Holder may, no earlier than 30 June in the Financial Year in which the fifteenth anniversary of the Commencement Date falls, make an application to the Commission for a determination that clause 3 ceases to apply.
- 3.3.2 An application under clause 3.3.1 must contain sufficient supporting information to enable the Commission to be satisfied of the matters specified in clause 3.3.3.
- 3.3.3 The Commission must issue a determination that clause 3 ceases to apply if satisfied that the application of the principles in clause 2.1.1 would result in Prescribed Service Tariffs for the Financial Year in which the application is made and the two Financial Years immediately following that are likely to be lower than would be permitted under clause 3.1.1.
- 3.3.4 The Commission must in writing notify the Port Licence Holder of the outcome of an application under clause 3.3.1 within ninety (90) days of receipt of the application.
- 3.3.5 In the absence of a determination by the Commission under clause 3.3.3, clause 3 ceases to apply at the end of the Financial Year in which the twentieth anniversary of the Commencement Date falls.

3.4 Specification of Pricing Order transition period

- 3.4.1 For the purposes of the Act, the 'Pricing order transition period' is the period commencing on the Commencement Date and ending on the date on which, pursuant to clause 3.3, clause 3 ceases to apply.

4. PRICING PRINCIPLES: COST BASE FOR SETTING PRESCRIBED SERVICE TARIFFS**4.1 General – Accrual Building Block Methodology**

- 4.1.1 For the purposes of determining its Aggregate Revenue Requirement, the Port Licence Holder must apply an accrual building block methodology over the Regulatory Period comprising:
- (a) an allowance to recover a return on its capital base, commensurate with that which would be required by a benchmark efficient entity providing services with a similar degree of risk as that which applies to the Port Licence Holder in respect of the provision of the Prescribed Services (see clauses 4.2 and 4.3);
 - (b) an allowance to recover the return of its capital base (see clause 4.4); and
 - (c) an allowance to recover its forecast operating expenses, commensurate with that which would be required by a prudent service provider acting efficiently (see clause 4.5); less
 - (d) an indexation allowance (see clause 4.6).

4.2 Capital Base

- 4.2.1 Subject to clause 4.2.2, the capital base applied for the purposes of clause 4.1.1(a) and 4.1.1(b) must be defined, at any particular time, on a roll forward basis, by:
- (a) taking the value at the commencement of any Financial Year;
 - (b) adding an indexation allowance for that Financial Year in accordance with clause 4.6.1(a);
 - (c) adding efficient capital expenditure when incurred, or to be incurred during that Financial Year, by the Port Licence Holder, acting prudently, in the provision of the Prescribed Services (in each instance, deemed to be incurred as at the mid-point of that Financial Year and adjusted by an indexation allowance in accordance with clause 4.6.1(b) for that Financial Year); and
 - (d) deducting an allowance for the return of capital.
- 4.2.2 The initial capital base is to be determined by applying the asset values specified in clause 4.7.
- 4.2.3 PCP Capital Expenditure is to be added to the capital base in accordance with the principles in clause 4.2.1.
- 4.2.4 The act of completing the Port Capacity Project and the act of undertaking capital works so as to comply with a term of the Port Lease or any other obligation arising under a Transaction Arrangement are to be taken to be prudent acts for the purposes of clause 4.2.1.
- 4.2.5 For the avoidance of doubt, clause 4.2.4 does not preclude an assessment as to whether capital expenditure undertaken so as to comply with a term of the Port Lease or any other obligation under a Transaction Arrangement has been incurred efficiently.
- 4.2.6 For the avoidance of doubt, the capital base of the Port Licence Holder must not include any value attributable to capital contributions made by a Public Sector Entity to assets used to provide Prescribed Services after the date of the completion of the first Authorised Transaction.

4.3 Return on Capital

- 4.3.1 Subject to clause 4.3.2, in determining a rate of return on capital for the purposes of clause 4.1.1(a) the Port Licence Holder must use one or a combination of well accepted approaches that distinguish the cost of equity and debt, and so derive a weighted average cost of capital.
- 4.3.2 The rate of return to be calculated for the purposes of clause 4.1.1(a) must be determined on a pre tax, nominal basis.

4.4 Return of Capital

- 4.4.1 Subject to clauses 4.4.2 and 4.4.3, for the purposes of clauses 4.1.1(b), depreciation must be determined so that each asset or group of assets used to provide the Prescribed Services is depreciated using a straight-line methodology over a period that is:
- (a) no shorter than the reasonable economic life of the relevant asset or the remaining term of the Port Lease (whichever is shorter); and
 - (b) no longer than the remaining term of the Port Lease,
(Depreciation Period); and
 - (c) only once, meaning that the amount by which the asset or group of assets is depreciated over the Depreciation Period does not exceed the value of the asset or group of assets at the time of its or their inclusion in the capital base.
- 4.4.2 The Port Licence Holder may only use an alternative to the straight-line methodology to be applied under clause 4.4.1 if:
- (a) the application of clause 3.1.1 means that the return of capital derived using a straight-line depreciation methodology is not capable of being recovered in the applicable Financial Year; or

- (b) the alternative depreciation methodology is reasonably likely to reduce the variance in the expected annual percentage changes in the level of Prescribed Services Tariffs through to the end of the Port Lease.

4.4.3 The return of capital allowance in any Financial Year must not be below zero.

4.5 Operating Expenses

4.5.1 For the avoidance of doubt, the allowance referred to in clause 4.1.1(c) is to include an amount equal to the Port Licence Fee and any Cost Contribution Amount payable under the Port Concession Deed in respect of the relevant Financial Year in which those expenses are incurred and such amounts are deemed to be commensurate with that which would be required by a prudent service provider acting efficiently.

4.5.2 Actions reasonably required to comply with the obligations of the Port Licence Holder under the Port Concession Deed are taken to be prudent acts for the purposes of clause 4.1.1(c).

4.6 Indexation Allowance

4.6.1 For each relevant Financial Year, the indexation allowance referred to in clause 4.1.1(d) is an amount equal to the sum of:

- (a) for the purposes of clause 4.2.1(b), the percentage change, or forecast percentage change, in the CPI for the relevant Financial Year, multiplied by the value of the capital base at the commencement of the relevant Financial Year; and
- (b) for the purposes of clause 4.2.1(c), one half of the percentage change, or forecast percentage change, in the CPI for the relevant Financial Year, multiplied by the efficient capital expenditure when incurred, or to be incurred during that Financial Year.

4.7 Initial Capital Asset Values

4.7.1 Despite any other clause of this Order, the initial capital asset values to be utilised to provide the Shared Channel Services and the Bundled Services are deemed to be as set out in the table below:

Service	Asset Value (A\$000,000's)	Date
Shared Channel Services	592	1 July 2016
Bundled Services	2,913	1 July 2016
Total	3,505	1 July 2016

4.7.2 For the avoidance of doubt, the initial capital asset values in the table in clause 4.7.1 exclude PCP Capital Expenditure, which is to be added to the capital base in accordance with the principles in clause 4.2.3.

5. COST ALLOCATION PRINCIPLES

5.1 Cost Allocation Principles Objectives

5.1.1 The objective of the Cost Allocation Principles is to provide a transparent and consistent methodology for allocating and monitoring costs for the purpose of setting Prescribed Service Tariffs.

5.2 Principles for allocating costs for the purpose of setting Prescribed Service Tariffs

5.2.1 Costs of the Port Licence Holder must be allocated between Prescribed Services and all other services provided by the Port Licence Holder in a manner consistent with the following cost allocation principles:

- (a) costs that are directly attributable to the provision of the Prescribed Service must be attributed to that Prescribed Service; and

- (b) costs that are not directly attributable to the provision of the Prescribed Service but which are incurred in the course of providing both one or more Prescribed Services and other services must be allocated to the Prescribed Service on the basis of its share of total revenue from all services provided by the Port Licence Holder,

(Cost Allocation Principles).

6. REFERENCE TARIFF SCHEDULE

6.1 Provision/Publication of Reference Tariff Schedule

6.1.1 No later than 31 May in each Financial Year, the Port Licence Holder must:

- (a) publish its Reference Tariff Schedule for the following Financial Year;
- (b) provide the Commission with a copy of its Reference Tariff Schedule for the following Financial Year; and
- (c) provide the Commission with a copy of any contracts with Port Users of the kind described in clause 6.2.1 under which Prescribed Services are to be supplied in the following Financial Year.

6.1.2 The Port Licence Holder will satisfy the publication obligation in clause 6.1.1(a) if it publishes its Reference Tariff Schedule on its website.

6.1.3 The Port Licence Holder must provide its Reference Tariff Schedule, as published under clause 6.1.1(a), in writing to any Port User who requests it, within five (5) Business Days of receiving the request.

6.1.4 The Reference Tariff Schedule must specify:

- (a) the Prescribed Service Tariff for each Prescribed Service offered by the Port Licence Holder; and
- (b) a description of the Prescribed Service to which the Prescribed Service Tariff applies.

6.1.5 Prescribed Service Tariffs that are specified in the Reference Tariff Schedule must:

- (a) not include charges or fees for services that are not Prescribed Services; and
- (b) separately identify the Prescribed Service Tariffs for Shared Channel Services.

6.1.6 The Port Licence Holder must offer to provide Port Users with Prescribed Services in accordance with the Reference Tariff Schedule.

6.1.7 The Port Licence Holder must not require a Port User to acquire services that are not Prescribed Services in order for that Port User to be supplied with Prescribed Services.

6.2 Contracts for Prescribed Services

6.2.1 The Port Licence Holder may enter into a contract with a Port User for the supply of Prescribed Services on terms and conditions that:

- (a) differ from those specified in the Reference Tariff Schedule; or
- (b) do not satisfy the requirements in clause 6.1.5,

but only if:

- (c) the Port Licence Holder has first offered to provide those Prescribed Services to that Port User in accordance with the Reference Tariff Schedule (as required by clause 6.1.6); and
- (d) the contracted terms and conditions comply with the principles set out in clauses 2.1.1, 2.1.2, 2.1.3 and 2.3.1.

6.2.2 For the avoidance of doubt, despite the entry into a contract with a Port User as contemplated by clause 6.2.1:

- (a) the services provided under the contract remain Prescribed Services; and
- (b) revenue from the Prescribed Services provided under all such contracts must be included in the Port Licence Holder's calculation of its Aggregate Revenue Requirement under clause 2.1.1.

6.3 Changes to Prescribed Service Tariffs

6.3.1 During a Financial Year and in addition to the requirements in clause 2.3.1, if the Port Licence Holder seeks to amend its Reference Tariff Schedule in order to charge for a new or additional service as part of a Prescribed Service, or for any other reason, it must:

- (a) notify Port Users and the Commission of its intention to do so by providing its proposed amendments to the Reference Tariff Schedule sixty (60) days prior to its earliest date of effect; and
- (b) provide Port Users and the Commission with thirty (30) days notice of the final version of the amended Reference Tariff Schedule.

6.3.2 For the avoidance of doubt, if the Port Licence Holder amends its Reference Tariff Schedule in accordance with clause 6.3.1, from the date the amendments come into effect:

- (a) the new Reference Tariff Schedule will replace the previous Reference Tariff Schedule; and
- (b) the obligations in clauses 6.1.3 to 6.1.7 and in clause 6.2 will apply in respect of the new Reference Tariff Schedule.

7. TARIFF COMPLIANCE STATEMENT

7.1.1 The Port Licence Holder must provide to the Commission a Tariff Compliance Statement:

- (a) no later than 31 May in each Financial Year; and
- (b) where Prescribed Service Tariffs are to be varied or a new Prescribed Service Tariff is to be introduced, at the same time as it notifies Port Users and the Commission under clause 6.3.1(b).

7.1.2 The Tariff Compliance Statement must:

- (a) set out the Prescribed Service Tariffs for the forthcoming Financial Year (where clause 7.1.1(a) applies) or for the remainder of the Financial Year (where clauses 7.1.1(b) applies);
- (b) provide information detailing the basis by which adjustments to, or introduction of new, Prescribed Service Tariffs have been made, including the cost building blocks that have been applied and the basis on which the rate of return has been determined;
- (c) provide information on all contracts with Port Users of the kind described in clause 6.2.1 and the basis on which they comply with clause 6.2.1;
- (d) set out the process by which the Port Licence Holder has effectively consulted and had regard to the comments provided by Port Users;
- (e) explain how the Prescribed Service Tariffs comply with this Order, including the Pricing Principles and Cost Allocation Principles;
- (f) contain any other sufficient supporting information determined by the Commission under clause 9; and
- (g) comply with the requirements in clause 8.

8. INFORMATION REQUIREMENTS**8.1 Basis on which financial information is to be provided**

8.1.1 Subject to requirements for application of the accrual building block methodology in clause 4, any financial information provided in a Tariff Compliance Statement must specify whether it is denominated in constant or current price terms.

8.2 Forecasts and estimates

8.2.1 Information in the nature of an estimate or forecast must be supported by a statement of the basis of the forecast or estimate.

8.2.2 A forecast or estimate:

- (a) must be arrived at on a reasonable basis; and
- (b) must represent the best forecast or estimate possible in the circumstances.

8.3 Inferred or derivative information

8.3.1 Information in the nature of an extrapolation or inference must be supported by the primary information on which the extrapolation or inference is based.

9. COMMISSION MAY DETERMINE FORM AND CONTENT OF SUPPORTING DOCUMENTATION

9.1.1 The Commission may, from time to time, determine what constitutes ‘sufficient supporting information’ for the purposes of clauses 3.2.7, 3.3.2 and 7.1.2(f).

9.1.2 A determination under clause 9.1.1 may specify the form and content of information to be provided.

9.1.3 A determination under clause 9.1.1 must be published on the Commission’s website.

10. COMMISSION MAY DETERMINE INDICES TO BE USED

10.1.1 If any index or other externally published statistic or set of statistics referred to in this Order ceases to be published, changes in title or is otherwise amended in a material respect, the Commission may determine the appropriate replacement to be used.

11. INITIAL PRESCRIBED SERVICE TARIFFS

11.1.1 The Prescribed Service Tariffs that apply on and from the Commencement Date are those set out in the Schedule to this Order (**Initial Prescribed Service Tariffs**).

11.1.2 In the Initial Financial Year, the Port Licence Holder must not charge an amount for any Prescribed Service other than in accordance with the Schedule to this Order.

11.1.3 Despite any other provision of this Order, the Initial Prescribed Service Tariffs established under clause 11.1.1 are deemed to comply with the Pricing Principles and Cost Allocation Principles in the Initial Financial Year.

12. PROTECTED PROVISIONS

12.1.1 The following clauses of this Order are ‘protected provisions’ for the purposes of the Act:

- (a) clause 4.2.3 (Port Capacity Project);
- (b) clause 4.2.4 (efficient capital expenditure);
- (c) clause 4.4.1 (Depreciation Period);
- (d) clause 4.5.1 (Port Licence Fee); and
- (e) clause 4.7 (initial capital asset values).

13. REGULATORY PERIOD

13.1.1 The Port Licence Holder may determine the period of time over which to apply the Pricing Principles and Cost Allocation Principles (**Regulatory Period**). For the avoidance of doubt, the Port Licence Holder may adopt Regulatory Periods of different lengths over the term of the Port Lease.

14. DEFINITIONS

In this Order:

Act means the **Port Management Act 1995** (Vic.).

Aggregate Revenue Requirement has the meaning set out in clause 2.1.1(a).

Amended Rebalancing Application has the meaning set out in clause 3.2.13.

Annual Licence Fee has the same meaning as in the Act.

Authorised Transaction has the same meaning as in the **Delivering Victorian Infrastructure (Port of Melbourne Lease Transaction) Act 2016** (Vic.).

Bundled Services means the Prescribed Services other than the Shared Channel Services.

Commencement Date has the meaning set out in clause 1.1.1.

Commission means the Essential Services Commission of Victoria established under Part 2 of the **Essential Services Commission Act 2001** (Vic.).

Cost Allocation Principles has the meaning set out in clause 5.2.1.

Cost Contribution Amount means the amounts payable by the Port Licence Holder under clause 27.1 of the Port Concession Deed.

CPI means the Consumer Price Index: All Groups Index Number, weighted average of eight capital cities published by the Australian Bureau of Statistics.

Dedicated Channels has the same meaning as in the Act.

Dedicated Channel Services means the provision of the Dedicated Channels.

Depreciation Period has the meaning set out in clause 4.4.1.

Export Pricing Decision means the decision of the Port of Melbourne Corporation to enhance competitiveness with the Port of Botany and other Australian container ports by:

- (a) reducing Prescribed Service Tariffs for full outbound container wharfage services by 2.5% from the price applicable at the start of the preceding Financial Year, at the start of each of the 2017, 2018, 2019 and 2020 Financial Years; and
- (b) from the start of the 2021 Financial Year and thereafter, setting prices for Prescribed Service Tariffs for full outbound container wharfage services at a percentage discount to the equivalent Prescribed Service Tariffs for full inbound container wharfage services that, expressed as a percentage, is the same or a greater percentage discount than was applicable in the 2020 Financial Year.

Final Rebalancing Application has the meaning given in clause 3.2.15.

Financial Year means a year commencing on 1 July in any calendar year and ending on 30 June of the immediately following calendar year.

Initial Financial Year means the Financial Year in which the Commencement Date occurs.

Initial Prescribed Service Tariffs has the meaning given in clause 11.1.1.

Interim Decision has the meaning given in clause 3.2.8.

March CPI means the CPI for the March quarter.

March CPI Release Date means the date the Australian Bureau of Statistics publishes the March CPI that enables the actual Tariff Adjustment Limit relevant to the Rebalancing Application, Amended Rebalancing Application or Final Rebalancing Application (as applicable) to be calculated.

PCP Capital Expenditure means:

- (a) as at 30 June 2016, A\$637 million; plus
- (b) expenditure on assets and services related to the Port Capacity Project incurred by either the Port of Melbourne Corporation or the Port Licence Holder after 30 June 2016.

PCP Completion means the date on which a final certificate of practical completion has been received by the Port Licence Holder in relation to both the roads and services package and the maritime works package for the Port Capacity Project.

Port Capacity Project means the development declared in the nomination order under the **Project Development and Construction Management Act 1994** (Vic.) dated 4 September 2012 and published in the Government Gazette on 7 September 2012.

Port Concession Deed means the Transaction Arrangement bearing that name.

Port Lease means the document of that name entered into pursuant to authorisation under the **Delivering Victorian Infrastructure (Port of Melbourne Lease Transaction) Act 2016** (Vic.).

Port Licence Fee means the Annual Licence Fee.

Port Licence Holder has the same meaning as in the Act.

Port of Melbourne Waters means any waters which by Order in Council made under section 5(2) of the Act are declared to be port waters of the port of Melbourne.

Port User means a person who requests or receives Prescribed Services.

Prescribed Services has the same meaning as in the Act.

Prescribed Service Bundle means each of the following:

- (a) wharfage services for containerised cargo;
- (b) wharfage services for non-containerised/general cargo;
- (c) wharfage services for motor vehicle cargo;
- (d) wharfage services for liquid bulk cargo;
- (e) wharfage services for dry bulk cargo;
- (f) Shared Channel Services;
- (g) Dedicated Channel Services; and
- (h) any other Prescribed Services, or component or combination thereof, in respect of which the Port Licence Holder introduces new Prescribed Service Tariffs after the Commencement Date and which the Commission determines to be a Prescribed Service Bundle by notice in writing to the Port Licence Holder.

For the avoidance of doubt, each of items (a)–(g) above is a Prescribed Service Bundle. By way of example, ‘wharfage services for containerised cargo’ is a Prescribed Service Bundle and ‘Shared Channel Services’ is another Prescribed Services Bundle.

Prescribed Service Tariffs means the prices charged for the provision of, or in connection with, Prescribed Services.

Pricing Principles means the principles and requirements contained in clauses 2, 2.3.1 and 4.

Public Sector Entity has the same meaning as in the **Delivering Victorian Infrastructure (Port of Melbourne Lease Transaction) Act 2016** (Vic.).

Rebalancing Application has the meaning set out in clause 3.2.4.

Reference Tariff Schedule means a schedule of Prescribed Service Tariffs that contains the information specified in clause 6.1.4.

Regulatory Period has the meaning set out in clause 13.1.1.

Shared Channels has the same meaning as in the Act.

Shared Channel Services means the provision of the Shared Channels.

Shared Channel Tariffs means the prices charged for the provision of Shared Channel Services.

Tariffs Adjustment Limit means the percentage change in CPI between the March quarter immediately preceding the relevant Financial Year and the March quarter in the Financial Year two years preceding the relevant Financial Year.

Tariff Compliance Statement means the statement required to be provided by the Port Licence Holder to the Commission in accordance with clause 7 of this Order.

Transaction Arrangement has the same meaning as in the **Delivering Victorian Infrastructure (Port of Melbourne Lease Transaction) Act 2016**.

Weighted Average Tariff Increase means, in respect of a Financial Year, the expected weighted average rate of increase in the Prescribed Service Tariffs using weightings based on historical revenues derived from the Prescribed Service Tariffs in the most recent Financial Year for which audited data are available or, if there is no historic audited data upon which to calculate the expected weighted average rate of increase on this basis, an alternative estimate of revenue for the purpose of calculating weightings on a basis determined by the Commission.

Dated 21 June 2016

Responsible Minister:
ROBIN SCOTT MP
Minister for Finance

ANDREW ROBINSON
Clerk of the Executive Council

SCHEDULE – INITIAL PRESCRIBED SERVICE TARIFFS#

#Applicable from the Commencement Date

WHARFAGE FEES

Wharfage fees are charged per unit of quantity, volume or weight of cargo for all cargoes, including empty containers, loaded on or discharged from vessels or between vessels in the Port of Melbourne. Transshipment port fee rates are applicable in respect of cargo which is transhipped from the Port within 90 days of being discharged. The appropriate transshipment port fee rate is separately charged on both the inward and outward movements. Beyond 90 days, normal rates apply for both inward and outward cargo movements. Goods must be transhipped in the same cargo carrying unit for the transshipment port fee rates to apply.

	Until 30 June 2017 (inclusive)			From 1 July 2017 ¹		
	GST exclusive	GST	GST inclusive	GST exclusive	GST	GST inclusive
Containerised² – \$ per TEU³						
Full – outward	63.28	6.33	69.61	98.26	9.83	108.09
Full – inward	67.54	6.75	74.29	105.04	10.50	115.54
Full Bass Strait ⁴	70.14	7.01	77.15	70.14	7.01	77.15
Empty (including nested units) ⁵	16.76	1.68	18.44	16.76	1.68	18.44
Empty returns ^{5,6}	33.50	3.35	36.85	33.50	3.35	36.85
Infrastructure Fee⁷ – \$ per TEU³						
Full – outward and inward	37.50	3.75	41.25	–	–	–
Full Bass Strait ⁴	0.00	0.00	0.00	–	–	–
Non-containerised/general – \$ per tonne or cubic metre⁸	2.71	0.27	2.98	2.71	0.27	2.98
Accompanied passenger vehicles – \$ per tonne or cubic metre⁸	1.81	0.18	1.99	1.81	0.18	1.99
Motor vehicles⁹ – \$ per tonne or cubic metre⁸	3.06	0.31	3.37	3.06	0.31	3.37

¹ These prices are subject to escalation in accordance with clause 3 of this Order.

² Tautliners, Tassieliners and Straightliners up to and including 2.9 m in height are charged as containerised. Cargo carrying units in excess of 2.9 m in height are charged as non-containerised cargo.

³ TEU = Twenty-foot equivalent unit (6.1 m). Non-standard length containers are calculated on a pro rata basis.

⁴ Bass Strait cargo is defined as cargo that is loaded/unloaded from a port in Tasmania.

⁵ Except those on dedicated Bass Strait services.

⁶ Cargo carrying unit that only contains reusable packaging or dunnage.

⁷ The infrastructure fee is levied to recover the costs of the Channel Deepening Project.

⁸ Charges are based on the greater of weight or volume of the cargo.

⁹ Motor vehicles include all vehicles new and second-hand primarily designed for the transportation of passengers or goods. It includes special purpose vehicles such as ambulances, fire fighting, police and breakdown vehicles, mobile cranes, road sweepers and concrete mixers.

Motor vehicles exclude:

- (i) all agricultural, earthmoving and construction machinery including tractors, cultivators, harvesters, balers, mowers, rollers, bulldozers, scrapers, excavators and shovel loaders; and
- (ii) accompanied passenger vehicles.

WHARFAGE FEES						
Liquid bulk – \$ per tonne or cubic metre	4.07	0.41	4.48	4.07	0.41	4.48
Dry bulk – \$ per tonne						
Inwards – overseas and coastal ¹⁰	3.25	0.33	3.58	3.25	0.33	3.58
Outwards – overseas and coastal ¹⁰	2.35	0.24	2.59	2.35	0.24	2.59
Transhipment¹¹						
Standard charge	35% of the published rate			–		
<i>Full – outward – \$ per TEU¹²</i>	–			39.87	3.99	43.86
<i>Full – inward – \$ per TEU¹²</i>	–			42.39	4.24	46.63
<i>Other</i>	–			35% of the published rate		
Infrastructure Fee ⁷	For the infrastructure fee the following specific transhipment rule applies: (i) transhipment cargo is charged at 50% of the standard infrastructure rate except where a transhipment includes a Bass Strait movement, then the full infrastructure fee will be charged on the non-Bass Strait movement.				–	

CHANNEL FEES

Channel fees are charged for the provision of channels for use by vessels in Port of Melbourne waters and the provision of associated services. Channel fees are levied once per ship visit on the gross tons (GT) of vessels using the channels or in other manners specified for the provision of channel related services.

	GST exclusive	GST	GST inclusive
Vessels up to and including maximum summer draught¹³ of 12.10 m			
Shared channels – \$ per GT	0.1814	0.0181	0.1995
Dedicated channels – \$ per GT	0.3546	0.0355	0.3901
Vessels exceeding maximum summer draught¹³ of 12.10 m			
Shared channels – \$ per GT	0.1935	0.0194	0.2129
Dedicated channels – \$ per GT	0.4140	0.0414	0.4554
Reduced channel fees are applicable to the following (percentage of full charge)			
Pure car carrier ¹⁴			75%

¹⁰ Coastal cargo is defined as cargo that is loaded/unloaded from an Australian port (including Bass Strait).

¹¹ Transhipment cargo is defined as cargo that is unloaded from one vessel in the port and reloaded for export on another vessel.

¹² This rate is based on the infrastructure fee-inclusive transhipment price that applied until 30 June 2017.

¹³ The maximum summer draught is the vertical distance in metres measured from the lowest point of a ship's hull to the summer load line. The maximum summer draught is as detailed in Lloyds Register or similar.

¹⁴ Applies only to vessels with GT: Dead weight tonnage ratio equal to or greater than 2:1 and which are carrying not less than 70% motor vehicles. Motor vehicles include all vehicles new and second-hand primarily designed for the transportation of passengers or goods. It includes special purpose vehicles such as ambulances, fire fighting, police and breakdown vehicles, mobile cranes, road sweepers and concrete mixers.

Passenger cruise vessel	90%
Coastal liner vessel ¹⁵	60%
Vessels using Dedicated and Geelong channels on the same entry to Port Phillip Bay ¹⁶	75%
Exempt vessels (no channel fee)	
<i>Tugs and barges based in Melbourne</i>	
<i>Tugs and barges based in Geelong are exempt from shared channel fees</i>	
<i>Vessels less than 200 GT</i>	
<i>Royal Australian Navy (RAN) and the approved guests of the RAN, cadet and training vessels</i>	
<i>Other vessels under special circumstances¹⁷</i>	

BERTH HIRE FEES

Berth hire is a time based fee charged for the provision of berths for the purpose of loading or discharging specialised cargo and lay-up or other approved purpose.

Berth hire does not apply to the Royal Australian Navy (RAN) and approved guests of the RAN.

Full charge

The full charge is calculated on total time of the vessel at berth from the first line ashore to last line cast-off. Cost is calculated to the nearest one-tenth of an hour, rounded upwards.

Lay-up charge

Lay-up use includes:

- mooring at a berth for a period greater than four hours before cargo operations;
- mooring at a berth for a period greater than two hours after completion of cargo operations; and
- mooring at a berth by vessels not intending to transfer cargoes.

Use of a berth for lay-up is solely at the discretion of the Port Licence Holder.

Any berth use designated by the Port Licence Holder for lay-up use will be charged at the hourly rate calculated on total time of the vessel at berth from the first line ashore to last line cast-off. Cost will be calculated to the nearest one-tenth of an hour, rounded upwards.

Motor vehicles exclude: (i) all agricultural, earthmoving and construction machinery including tractors, cultivators, harvesters, balers, mowers, rollers, bulldozers, scrapers, excavators and shovel loaders; and (ii) accompanied passenger vehicles.

¹⁵ Applies only to vessels operating as a 'common carrier' with a fixed schedule of greater than two visits per week between Melbourne and at least one fixed interstate destination that is published in advance.

¹⁶ Applies only to Dedicated channel charges.

¹⁷ Subject to the specific approval of the Port Licence Holder in advance.

¹⁸ Cargo operations is defined as the time taken for actual cargo transfer only, at all applicable lay-up berths (excluding Maribyrnong No.1 and Holden Dock).

Concessions

The Port Licence Holder is to consider applications for concessions to these charges in the event that vessels are delayed in unmooring or required to moor early at the request of the Harbour Master.

The Port Licence Holder is also to consider applications to waive full charge berth hire for the time cargo operations did not occur on the gazetted Victorian public holidays of Good Friday, ANZAC Day and Christmas Day.

Concessions are to be calculated to the nearest one-tenth of an hour, rounded upwards.

	GST exclusive	GST	GST inclusive
Full charge – \$ per hour			
Maribyrnong No. 1	351.80	35.18	386.98
Holden Dock	466.20	46.62	512.82
Passenger cruise ships at a berth other than Station Pier ¹⁹	580.00	58.00	638.00
Lay-up charge²⁰ – \$ per hour	123.00	12.30	135.30

WHARF ACCESS FEES

Wharf access is a fee for the provision of facilities at common user areas within the Port of Melbourne for the purpose of loading/unloading dry bulk and breakbulk cargo directly to or from a vehicle. This charge is in lieu of an area hire charge.

Wharf access is charged:

- at 6 Yarraville and F Appleton Dock;
- when breakbulk and/or dry bulk cargo is loaded directly to or from a vehicle; and
- when no area hire charge is applicable.

	GST exclusive	GST	GST inclusive
Cargo – \$ per tonne	0.93	0.09	1.02

¹⁹ To apply only when vessels can not be accommodated at Station Pier.

²⁰ Lay-up charges are applicable at the following berths: 24 Victoria Dock; Holden Dock; Maribyrnong No. 1; 24, 27, 28, 29 & 33 South Wharf; 6 Yarraville and F Appleton Dock.

AREA HIRE FEES

Area hire is a fee charged for the provision of a common user area within the Port of Melbourne for the purpose of storage of cargo discharged from, or to be loaded on to, a vessel.

The area hire charge is calculated on total time from the earlier of the start of storage of export cargo before the arrival of the vessel, or start of storage of import cargo, until the later of the finish of storage of import and/or export cargo.

Area hire charges do not apply on the gazetted Victorian public holidays of Good Friday, ANZAC Day and Christmas Day.

Area hire is charged at double rate for periods of use earlier than three days (72 chargeable hours) before vessel arrival and for periods of use later than three days (72 chargeable hours) after finish of vessel discharge. Cost is calculated to the nearest one-tenth of an hour, rounded upwards.

	GST exclusive	GST	GST inclusive
Area hire – \$ per hour			
Standard rate – 6 Yarraville	69.40	6.94	76.34
Standard rate – F Appleton Dock	45.10	4.51	49.61

TANKER INSPECTION FEES

Tanker inspection charges are fees charged for the necessary or mandatory safety and compliance inspection of tankers berthing at the following facilities:

- Holden Dock;
- Maribyrnong No. 1 (hazardous tankers only); and
- 6 Yarraville (hazardous tankers only).

	GST exclusive	GST	GST inclusive
Inspection – \$ per inspection	700.13	70.01	770.14

OTHER GANGWAY HIRE FEES

Other gangway hire is a charge for the provision of non-passenger gangways to ships.

Hirers are responsible for the transfer of gangways to/from the wharf (if applicable) and the placement of the gangway on and off the vessel. The Master of the vessel is responsible for the proper placement of a gangway, including the installation of a gangway net and all other Australian Maritime Safety Authority requirements. Other gangway hire is applicable at all wharves (special arrangements apply at Maribyrnong No. 1 and 33 South Wharf).

	GST exclusive	GST	GST inclusive
Other gangway hire – \$ per day or part thereof (minimum charge 24 hours)	211.20	21.12	232.32

WHARF INSPECTION FEES

Wharf inspection (if required) is a fee to inspect the wharf before the vessel arrives and after the vessel departs.

	GST exclusive	GST	GST inclusive
Pre-vessel arrival inspection – \$ per each inspection	934.10	93.41	1027.51
Post-vessel departure inspection – \$ per each inspection	934.10	93.41	1027.51

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No. S 247 Wednesday 20 May 2020
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Port Management Act 1995 (Vic)

AMENDMENT OF PRICING ORDER DATED 21 JUNE 2016

Order in Council

The Governor in Council, under section 49A of the **Port Management Act 1995** (Vic), amends the Order in Council dated 21 June 2016 and published in the Government Gazette on 24 June 2016 as follows:

- (a) After clause 2.1.5, insert the following clause –
‘2.1.6 The Port Licence Holder must not recover Rail Asset Costs other than by a Prescribed Service Tariff for ‘Full – inward’ Wharfage Fees.’
- (b) In clause 3.1.1, after ‘In addition to complying with clause 2’, insert ‘, but subject to clause 3.1.2’.
- (c) After clause 3.1.1, insert the following clauses –
‘3.1.2 Clauses 3.1.1 and 3.2.1 do not apply to an amendment to the Prescribed Service Tariff for ‘Full – inward’ Wharfage Fees under clause 6.3.3 or clause 6.3.4.
3.1.3 For the avoidance of doubt, following an amendment to the Prescribed Service Tariff for ‘Full – inward’ Wharfage Fees under clause 6.3.3 or clause 6.3.4, clause 3.1.1 will apply to the Weighted Average Tariff Increase implied by the Prescribed Service Tariffs set by the Port Licence Holder and clause 3.2 will apply to the Prescribed Service Tariff for ‘Full – inward’ Wharfage Fees’.
- (d) In clause 4.2.1, after ‘Subject to clause 4.2.2’ insert ‘and the increase to the capital base under clause 4.2.9’.
- (e) After clause 4.2.6, insert the following clauses –
‘4.2.7 Actions by the Port Licence Holder to:
(a) acquire the Existing Rail Assets; or
(b) undertake capital expenditure reasonably necessary to achieve the Rail Asset Deliverables,
are taken to be prudent acts for the purposes of clause 4.2.1.
4.2.8 For the avoidance of doubt, clause 4.2.7 does not preclude an assessment as to whether capital expenditure undertaken in accordance with clause 4.2.7(b) has been incurred efficiently.
4.2.9 Capital expenditure incurred to acquire the Existing Rail Assets will be deemed for the purposes of this Order to be valued as at 1 January 2020 at A\$21,400,000 and that amount must be added to the capital base at the commencement of the Financial Year following completion of the relevant acquisition without application of the principles in clause 4.2.1(c) to the Existing Rail Assets added to the capital base.
4.2.10 Capital expenditure incurred in accordance with clause 4.2.7(b) is to be added to the capital base in accordance with the principles in clause 4.2.1.’
- (f) After clause 4.5.2, insert the following clauses –
‘4.5.3 Subject to clause 4.5.6, actions taken by the Port Licence Holder to agree with a Designated Port Tenant(s) to excise a Designated Area from a Designated Lease (such that the Designated Areas revert to exclusive possession of the Port Licence Holder) and to utilise those Designated Areas for the purposes of the Project (including without limitation by the entry into an ROL(s) permitting third party use of those Designated Areas) are taken to be prudent acts for the purposes of clause 4.1.1(c).

SPECIAL

4.5.4 Subject to clauses 4.5.5 and 4.5.6, the allowance referred to in clause 4.1.1(c) is, on and from 1 June 2020, to include an amount equal in any Financial Year to the sum of the following amounts:

- (a) the area (in square metres) of each Designated Area multiplied by the prevailing annual rent per square metre (exclusive of outgoings) under the corresponding Designated Lease from which the Designated Area was excised; and
- (b) actual third party outgoings (including without limitation land tax and council rates) incurred by the Port Licence Holder in respect of the Designated Area in relation to a relevant Financial Year that, but for the excision of the Designated Area from the corresponding Designated Lease (pursuant to an act described in clause 4.5.3), would have been recoverable by the Port Licence Holder from the Designated Tenant,

and such sum is deemed to be commensurate with that which would be required by a prudent service provider acting efficiently.

4.5.5 If a Designated Lease is amended, expires or is terminated (and is not renewed, extended or replaced on substantially similar terms) such that it no longer operates as an appropriate benchmark for calculating the amount in clause 4.5.4, then in place of the prevailing annual rent per square metre (exclusive of outgoings) under that Designated Lease, the amount in clause 4.5.4(a) must be calculated for that Designated Area using the weighted average annual rent payable (exclusive of outgoings) per square metre for Unimproved Port Land that is the subject of leases of other Designated Areas between the Port Licence Holder and the remaining Designated Port Tenants in the relevant Financial Year.

4.5.6 If, and to the extent that any part of a Designated Area:

- (a) ceases to be reserved for use, or is not used, for the purpose of the Project or is used for any alternative use by the Port Licence Holder; or
- (b) relates to land on which rail use has been adversely impacted due to a change in use of the surrounding Leased Area (as defined in the Port Lease),

the Designated Area will be reduced to that extent and no allowance referable to that part of a Designated Area must be included in the allowance calculated under clause 4.5.4 or otherwise be deemed to be an amount commensurate with that which would be required by a prudent service provider acting efficiently.’

(g) After clause 6.3.2, insert the following clauses –

‘6.3.3 Subject to clause 6.3.4, the Reference Tariff Schedule for the Financial Year commencing 1 July 2019 is amended to increase the Prescribed Service Tariff for ‘Full – inward’ Wharfage Fees from \$110.77 (GST-exclusive) to \$120.52 (GST-exclusive) on and from the later of 1 June 2020 and the date of gazettal of the amendments to this Order introducing this clause 6.3.3.

6.3.4 If the date of gazettal of the amendments to this Order introducing clause 6.3.3 is on or after 1 July 2020, then clause 6.3.3 will not apply and instead the Reference Tariff Schedule for the Financial Year in which that date of gazettal occurs will be amended on and from the date of gazettal to increase the Prescribed Service Tariff for ‘Full – inward’ Wharfage Fees (as otherwise applying) by an amount equal to \$9.75 (GST-exclusive) increased by the percentage change in CPI (if any) between the March CPI published for 2019 and the March CPI published most recently prior to that date of gazettal of the amendments to this Order.

- 6.3.5 For the avoidance of doubt, clauses 6.3.1 and 6.3.2 apply to the Reference Tariff Schedule as amended by clause 6.3.3 or 6.3.4.’
- (h) In clause 7.1.1(b), after ‘a new Prescribed Service Tariff is to be introduced’ insert ‘(except for the amendment to the Prescribed Service Tariff for ‘Full – inward’ Wharfage Fees under clause 6.3.3 or clause 6.3.4)’.
- (i) After clause 11.1.3, insert the following clause –
‘11.1.4 Despite any other provision of this Order, the Prescribed Service Tariff for ‘Full – inward’ Wharfage Fees applying immediately after the amendment effected by clause 6.3.3 or clause 6.3.4 is deemed to comply with the Pricing Principles and the Cost Allocation Principles in the Financial Year in which that amendment takes effect.’
- (j) For clause 12.1.1, substitute the following:
‘12.1.1 The following clauses of this Order are ‘protected provisions’ for the purposes of the Act:
(a) clause 4.2.3 (Port Capacity Project);
(b) clause 4.2.4 (prudent capital expenditure);
(c) clause 4.2.7 (prudent capital expenditure);
(d) clause 4.2.9 (Existing Rail Assets capital value);
(e) clause 4.4.1 (Depreciation Period);
(f) clause 4.5.1 (Port Licence Fee);
(g) clause 4.5.3 to 4.5.6 (inclusive) (prudent operating expenses);
(h) clause 4.7 (initial capital asset values).’
- (k) In clause 14 –
(i) following the definition of Depreciation Period, insert the following –
‘**Designated Areas** has the same meaning as in clause 1 of the Port Rail Transformation Agreement.
Designated Lease has the same meaning as in clause 1 of the Port Rail Transformation Agreement.
Designated Port Tenants has the same meaning as in clause 1 of the Port Rail Transformation Agreement.
Existing Rail Assets has the same meaning as in clause 1 of the Port Rail Transformation Agreement.’
(ii) following the definition of Port Capacity Project, insert the following –
‘**Project** has the same meaning as in clause 1 of the Port Rail Transformation Agreement.’
(iii) following the definition of Port of Melbourne Waters, insert the following –
‘**Port Rail Transformation Agreement** means the document of that name entered into between The Crown in right of the State of Victoria and the Port Licence Holder amongst others on or about 30 January 2020.’
(iv) following the definition of Public Sector Entity, insert the following –
‘**Rail Asset Costs** has the same meaning as in clause 1 of the Port Rail Transformation Agreement.
Rail Asset Deliverables has the same meaning as in clause 1 of the Port Rail Transformation Agreement.’

- (v) following the definition of Regulatory Period, insert the following –
‘**ROL** has the same meaning as in clause 1 of the Port Rail Transformation Agreement.’.
- (vi) following the definition of Transaction Arrangement, insert the following –
‘**Unimproved Port Land** means land of an equivalent use that is leased to a Designated Port Tenant by the Port Licence Holder, as at the date of calculation, excluding any rental for:
 - (a) buildings or similar structures intended for occupation, hardstand or aprons that are owned or were constructed by or for the Port Licence Holder and leased for use by a Designated Port Tenant on the Designated Area; or
 - (b) any structures or improvements owned by the Designated Port Tenant on the Designated Area.’.

The amendments have effect from the date this Order is published in the Government Gazette.

Dated 19 May 2020

Responsible Minister

HON ROBIN SCOTT MP

Assistant Treasurer

CLAIRE CHISHOLM
Clerk of the Executive Council

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