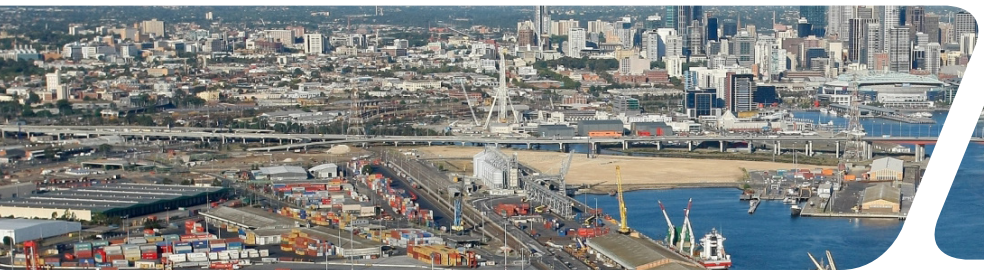
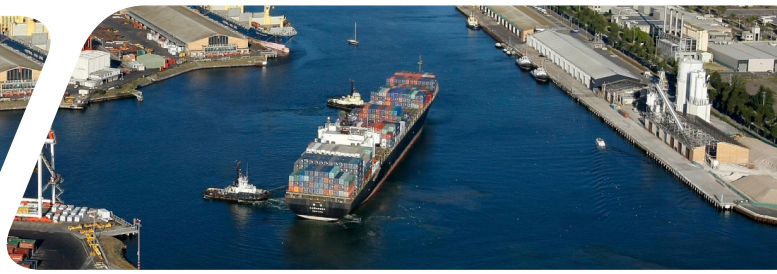
AUSTRALIAN LOGISTICS COUNCIL

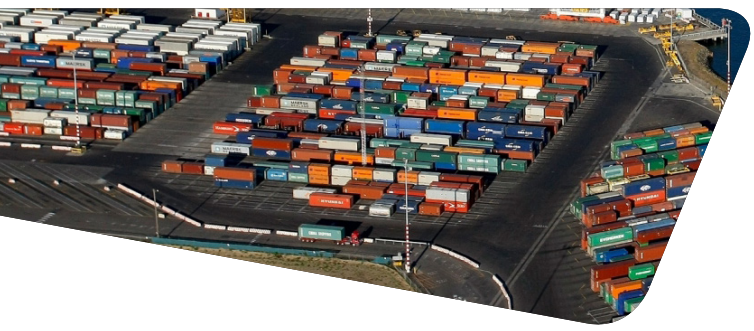
SEPTEMBER 2015

ALC SUBMISSION

TO THE PORT OF MELBOURNE SELECT COMMITTEE ON THE DELIVERING VICTORIAN INFRASTRUCTURE (PORT OF MELBOURNE LEASE TRANSACTION) BILL 2015.







THIS SUBMISSION HAS BEEN PREPARED WITH THE
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SUMMARY OF ALC POSITION

The Australian Logistics Council (*ALC*) believes the *Delivering Victorian Infrastructure (Port of Melbourne Lease Transaction) Bill 2015* (*the Bill*) should be passed, with the following amendments:

1. The Bill should be amended so that a Port Development Strategy (that a Port Operator must publish every five years) includes the steps the Operator is taking to ensure the efficient operation of the freight chain moving goods to the port.
2. Clause 69 of the Bill should be deleted so as to remove the statutory impediment to the ACCC reviewing agreements relating to leasing of relevant port assets.
3. Subclause 90(2) of the Bill should be deleted. The granting of leases and subleases for the services currently listed in subclause 90(2) (generally, the grant of a lease by the Port Operator to stevedores) should be regarded as a prescribed service and so become eligible to receive the benefit of the economic regulation provisions contained in the Bill.
4. The need for a political decision inherent in only permitting access to a pricing order through an Order-in-Council should be removed. Instead, the legislation should be amended so parties with sufficient interest should be able to apply as-of-right to the Essential Services Commission for the making of a pricing order to deal with any disputes relating to prices charged for the provision of 'prescribed services'.
5. Alternatively, to protect the interests of parties leasing space from the Port Operator, the Bill should be amended such that the Essential Services Commission should be asked to regularly monitor movements in rents (based on land values) against a set of guidelines such as general movements in industrial property values, comparable with other capital city ports.
6. A provision similar to paragraph 8(a) of the Restart NSW Fund Act 2011 should be inserted into provisions relating to the payments out of the Victorian Transport Fund contained in Division 2 of Part 2 of the Bill, so investments in infrastructure should only be made on the advice of Infrastructure Victoria.

ALC also believes:

1. The bidding process should require bidding parties to specify how they would, as the Port Operator, develop and improve the utilisation and efficiency of current and future infrastructure. This should comprise specific plans for infrastructure to be developed as part of the Port Capacity Project. Bidding parties should also be required to specify how they would enable industry to develop and achieve more efficient links to Intermodal Terminals, including the development of Port Rail Shuttle, providing for a substantial proportion of freight to be transported to and from the port by rail within a designated timeframe. The future Port Operator should also be required to effectively implement these arrangements commencing with its first master plan for the port.
2. In the absence of a national review by Infrastructure Australia of the nation's port needs, the issue of a second container port for the State should be analysed by Infrastructure Victoria, as proposed by the Government.

ALC SUBMISSION TO THE PORT OF MELBOURNE SELECT COMMITTEE

The Australian Logistics Council (*ALC*) welcomes the opportunity to make a submission to this Committee, which is considering the *Delivering Victorian Infrastructure* (*Port of Melbourne Lease Transaction*) *Bill 2015* (*the Bill*).

General ALC Position

ALC supports asset recycling as a means to unlock capital for investment in the new logistics infrastructure to meet Australia's increasing freight task.

In summary, ALC believes that when considering a particular transaction, parties should consider:

» whether the proposed sale will promote competition and efficiency; and

» whether the asset should be the subject of economic regulation (and how much), so as to permit the efficient use of the asset to the benefit of the Australian community as a whole.

ALC members support granting the proposed lease, but make the following comments.

Port viability and lease length

As Australia's largest container port, the Port of Melbourne has a major influence over the efficiency of Victoria's freight supply chains.

It is vital that a future private port operator provides leadership and certainty for the freight and logistics industry through the development and implementation of infrastructure plans for the port that enable improvements in freight supply chain capacity and efficiency for the benefit of freight customers.

Businesses require a commercial return on assets that is measured in decades and not just over a few years to justify the expenditure of millions of dollars in complex and expensive infrastructure.

ALC understands the port has capacity until approximately 2035-2040.

Based on this, it follows that both the private port operator and other port users (including stevedores providing port services as well as other freight chain participants who locate assets near the port to facilitate the movement of cargo) should be able to invest in assets with confidence such that a reasonable commercial return on assets is able to be realised over an appropriate timeframe.

Given the nature of the asset, it is appropriate for the lease to be granted for a 50 year period fixed by the legislation[1], although it is incumbent on the Government to set out the reasons why regulations can be made to extend the life of the lease by an additional 20 years[2].

If this is accepted, it is therefore important to maximise the efficient use of the Port of Melbourne.

This includes the efficient use of appropriate road and rail infrastructure linking the port with key freight generating areas.

Unfortunately, the Bill can be characterised as being 'framework' legislation, with much of the detail contained in commercial agreements outside of legislation. One can only surmise what obligations the Government will impose on the port operator.

Industry participants should be able to confidently plan how to utilise port facilities through the publication of information in a document that must be published by law.

1 The period fixed by paragraph 11(2)(a).

2 The effect of paragraph 11(2)(b) and subclause 11(5).

It follows the bidding process should require the Port Operator to be required to publish a planning document setting out how the Operator proposes contributing to the utilisation and efficiency of current and future infrastructure, including:

- **the infrastructure to be developed as part of the Port Capacity Project;**
- **projected Intermodal terminals including the Metropolitan Freight Terminal; and**
- **the projected Metropolitan Port Rail Shuttle.**

ALC notes the Port Operator is required to develop a port development strategy every five years[3] in much the same way as NSW Ports is publishing a Master Plan for Port Botany[4].

This will also allow port users to be sure that the port operator is handling in a sensitive nature the responsibility of operating what is in effect a monopoly asset.

As an example, Bass Strait trade makes up roughly 20 per cent of the total number of TEUs handled by the Port of Melbourne (approx. 500,000 TEU out of 2.5 million per anum). This means that the Bass Strait trade makes up a considerable amount of the total trade for the Port of Melbourne.

The location of the Bass Strait trade with an international port supports Tasmanian exporters to easily and cheaply have their goods transferred to an international stevedore.

Co-locating the Bass Strait trade with the international port ensures the most efficient use of land based infrastructure (the roads, rail and warehousing that has had significant capital sunk into it by government and industry). The suppliers and receivers of goods for Tasmania have set up their warehousing etc in the best location to serve the needs of all of their customers; mainland and Tasmanian.

If Bass Strait trade was to be moved, this would require land-bridging and/or new warehousing for Tasmanian goods which in turn would have a material impact on the costs of goods in Tasmania and the competitiveness of Tasmanian produced goods on the mainland and for export.

Those relying on the Bass Strait trade must have some certainty that the continued capacity to gain efficient access to the Port of Melbourne is retained.

Other ALC members report that rail freight services are currently under-utilised.

The lessee of Port Botany, NSW Ports, in conjunction with initiatives from Transport for NSW's Cargo Movement Coordinator is performing a key leadership role to increase the utilisation of rail to and from Port Botany by:

- setting a clear target or targets for the increased utilisation of rail freight;
- providing incentives to stevedores to increase containers onto rail freight, which are linked to improving the throughput efficiency of the port through the leasing arrangements;
- ensuring that the efficiency gains are extended throughout the supply chain with road freight integrated into port shuttle or other port-rail links; and
- coordinating industry stakeholders to identify and develop priorities for infrastructure as part of the NSW Ports 30 Year Master Plan process.

This is an example of where the lessee, with Government assistance, is driving freight chain efficiencies.

The Bill should be amended so that a Port Development Strategy must include steps the Port Operator is taking to ensure the efficient operation of the freight chain moving goods to the port.[5]

3 Through the amendment of section 91K of the ***Port Management Act 1995*** made by clauses 138 and 139 of the Bill

4 See: www.nswports.com.au/ceo-announcement/article/nsw-ports-long-term-master-plan-30-year-plan

5 This would require the Bill to make a further amendment to subsection 91K(2) of the ***Port Management Act 1985***, probably in clause 139.

A second Victorian port

Given the residual capacity of the Port of Melbourne, there appears no immediate need to develop a second Victorian port.

In its recent submission to Infrastructure Australia's National Infrastructure Audit, ALC expressed concern that as Australian ports are privatised, lessees will operate the assets in a manner that maximises the value of their investments which may mean the overall port needs of the Australian economy are overlooked.

ALC has therefore recommended in its response to the Audit that Infrastructure Australia conduct a review to establish Australia's port needs over the next 30 years.

In the absence of such a national review, the issue of a second container port for the State should be analysed by Infrastructure Victoria, as currently proposed by the Government.

This review should consider all elements of the review including not only whether a second port is necessary, but also issues such as the adequacy of the mechanisms to be used to efficiently preserve land near any possible new port for both land-based access points as well as other ancillary uses such as warehousing, industrial use etc, so that the land can be purchased on terms usually applicable to land zoned as 'commercial' rather than as 'residential'.

Economic Regulation

ALC has expressed public concerns in relation to reported rents being asked of current port users, following comments made by members at the ALC Annual Forum held in March 2015.

ALC also notes that as recently as **4 September 2015**, the Chairman of the ACCC said:

> *Private owners will usually operate assets more efficiently and at lower cost than government owners. It follows that privatisation should benefit the economy.*
>
> *With most governments facing fiscal challenges, however, there is a temptation to privatise to maximise proceeds. This is fine if there is a competitive market, or there are sound regulatory arrangements in place.*
>
> *With many infrastructure assets these requirements are not in place.*
>
> *Some of Australia's key infrastructure assets, including significant ports and railways, are likely to be privatised in the coming years. The value of the assets to be sold is likely to be high and governments have begun announcing projects they will invest in as a result of the profits generated from these privatisations.*
>
> *This creates a strong incentive for governments to structure their privatisation processes in a manner that maximises the sale price they receive. In order to maximise sale prices, governments will have little incentive to closely examine whether the market structure and regulatory arrangements that will apply post-privatisation are conducive to competition and appropriate outcomes.*
>
> *But the immediate financial benefit comes at a cost of an effective 'tax' on future generations.*

6 Rod Sims Competition Key to Restoring Australia's Productivity Speech to Infrastructure Partnership Australia speech 4 September 2015: www.accc.gov.au/speech/competition-key-to-restoring-australia%E2%80%99s-productivity

For example, while privatising two potentially competing assets as a package may increase the sale price (as compared to selling the assets to separate owners) this increased sale price would be received at the expense of competition. In the longer term, a less competitive market structure will lead to higher priced and lower quality goods and services for consumers.

We are also concerned about the selling of monopoly or near monopoly assets without appropriate access and/or pricing controls, such as Part IIIA undertakings or robust State or Territory access regimes. When privatised, such assets will result in the transfer of market power to private hands.

Without appropriate pricing and access mechanisms in place prior to the sale, there is a strong likelihood that under non-government ownership users of privatised infrastructure will face higher prices and restricted access.

In the ACCC's experience, the access undertaking provisions of Part IIIA of the Competition and Consumer Act 2010 (Cth) are effective in facilitating efficient use of, and investment in, infrastructure and competition in related markets. The level of regulation can be tailored to the level of market power held by the acquirer or operator – but importantly, would include a negotiate/arbitrate mechanism for dispute resolution.

Infrastructure assets have been sold in past years with anti competitive market structures and gaps or poor regulatory frameworks. This will damage Australia's future economic performance.

Let us not add further to the problem with our future asset sales.[6]

There are a number of indicators that can lead to the conclusion the Bill is designed to increase the value of the lease rather than the efficient operation of the Port.

These include:

» vesting the management of the navigation channels into the new Victorian Ports Corporation (Melbourne)[7];

» excluding ACCC oversight through authorising for the purposes of the Competition Code any *primary agreement* made for the purpose of the relevant transaction– a term which includes in the definition *any* agreement connected with an authorised transaction for the transfer of port assets[8]; and

» providing that a lease or sublease provided by the Port Operator to a person operating container terminal or stevedoring operations, automotive terminal or stevedoring operations, dry-bulk terminal or stevedoring operations liquid-bulk terminal or stevedoring operations or break-bulk terminal or stevedoring operations is not considered to be a 'prescribed service' for the purposes of the *Essential Services Commission Act 2001*[9]; and so therefore

» unlike the provision of shipping channels and provision of berths and buoys, rental charges are not eligible to receive the advantage of a pricing order.

ALC finally notes the Essential Services Commission has recently stated that the current Port of Melbourne Corporation has substantial market power because of the lack of viable substitutes, lack of counter-veiling power held by customers and high barriers to entry.[10]

It follows that the economic regulation contained in the Bill should be as comprehensive as possible.

7 By clause 74. The Port of Melbourne Corporation is renamed the Victorian Ports Corporation (Melbourne) by clause 160 of the Bill

8 Clause 69 generally, and more specifically the definition of primary agreement contained in subclause 69(3).

9 Clause 90 of the Bill

10 Essential Services Corporation (2014) *Review of Victorian Ports*

The Committee may therefore wish to consider whether the economic regulation for the Port is sufficient to ensure that ***all*** port users are protected against a private entity extracting monopoly rents from port users, or otherwise charging users amounts to provide 'gold plated assets' thereby undermining supply chain efficiency.

As the Harper Competition Review observed, Part IIIA of the *Competition and Consumer Act* is a 'backstop' supporting many industry-specific access regimes.[11]

It is therefore important the Committee is confident the economic regulation contained in the Bill is sufficient to protect all port users.

Given the views of ALC members, it would appear the Bill should be amended in the following manner:

1. **Clause 69 of the Bill should be deleted so as to remove the statutory impediment to the ACCC reviewing agreements relating to leasing of relevant port assets.**
2. **Subclause 90(2) of the Bill should be deleted. The granting of leases and subleases for the services currently listed in subclause 90(2) (generally, the grant of a lease by the Port Operator to stevedores) should be regarded as a prescribed service and so become eligible to receive the benefit of the economic regulation provisions contained in the Bill.**
3. **The need for a political decision inherent in only permitting access to a pricing order through an Order-in-Council should be removed. Instead, the legislation should be amended so parties with sufficient interest should be able to apply as-of-right to the Essential Services Commission for the making of a pricing order to deal with any disputes relating to prices charged for the provision of 'prescribed services'.**
4. **Alternatively, to protect the interests of parties leasing space from the Port Operator, the Bill should be amended such that the Essential Services Commission should be asked to regularly monitor movements in rents (based on land values) against a set of guidelines such as general movements in industrial property values, comparable with other capital city ports.**[12]

Even if these amendments are not made, ALC notes that the Essential Services Commission has a key role in ensuring that the Port of Melbourne will continue to operate in an economically efficient manner. The Committee may wish to ensure the Commission has the technical capacity to discharge the functions that are proposed (or may be imposed) on it.

11 Harper et al *Competition Policy Review Final Report* (2015): 73

12 Stevedores would have the advantage of a Pricing Order for the monitoring of price levels if the granting of a lease by the Port Operator to a stevedore was something that could be covered by a Pricing Order – see the proposed paragraph 49A(3)(a) of the *Port Management Act 1995* prepared to be made by clause 91 of the Bill. However, this function is not covered.

The Victorian Transport Fund

ALC believes the proceeds from the port's long term lease, outside of funds expended under the Level Crossing Removal Program (a concept that requires further definition), should be prioritised to productivity-enhancing infrastructure projects, including rail and road infrastructure linked to the Port of Melbourne.

ALC notes the Victorian Transport Fund created by Division 2 of Part 2 of the Bill is broadly similar to the Restart NSW Fund.

However there is one key difference.

Section 8 of the *Restart NSW Fund 2011* reads:

> **8 Payments out of Restart NSW Fund**
>
> There is payable from the Fund:
>
> **a) any money approved by the Minister on the recommendation of Infrastructure NSW to fund all or any part of the cost of any project that the Minister is satisfied promotes a purpose of the Fund, and**
>
> b) any money required to meet administrative expenses related to the Fund, and
>
> c) any money directed or authorised to be paid from the Fund by or under this or any other Act or law. (emphasis added)

It would appear that Infrastructure Victoria may not be able to provide advice on any proposed expenditure from the fund, unless the Minister asked for it under section 44 of the *Infrastructure Victoria Act 2015*.

ALC passionately believes that the benefits of asset recycling must be invested into infrastructure that provides the productivity benefits that will increase the welfare of all Victorians.

ALC believes that a provision similar to paragraph 8(a) of the Restart NSW Fund Act should be inserted into provisions relating to the payments out of the Victorian Transport Fund contained in Division 2 of Part 2 of the Bill, so investments in infrastructure should only be made on the advice of Infrastructure Victoria.

This will provide industry with the confidence that the funds locked up in mature assets will be used in the most economically efficient manner, thus improving the welfare of all Victorians.

Australian Logistics Council
September 2015

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- Ian Murray AM, March 2012
- Paul Little AO, February 2011
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