

[Act 1995 No 13]



New South Wales

Ports Corporatisation and Waterways Management Bill 1995

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The objects of this Bill are as follows:

- (a) to establish 3 commercial port corporations as statutory State owned corporations, within the context of the *State Owned Corporations Act 1989* (which will own and operate the State's commercial port facilities in the major ports),
 - (b) to confer on the Minister the waterways management and other marine safety functions of the Maritime Services Board (MSB) under the existing marine legislation and to empower the Minister to delegate those functions,
 - (c) to establish the Waterways Authority (which will exercise those waterways management functions),
 - (d) to authorise the Port Corporations to carry out certain port safety functions in accordance with an operating licence issued by the Governor,
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- (e) to continue existing port charges (but to provide for a port cargo access charge for all commercial shipping instead of wharfage charges for cargo at private wharves and certain other charges at the State's wharves),
- (f) to establish the Marine Ministerial Holding Corporation (which will have the title to non-port related land and wetlands and certain port-related land of the MSB),
- (g) to consolidate the provisions of the existing marine legislation relating to certain port-related marine matters, such as pilotage and harbour masters,
- (h) to abolish the MSB and its subsidiaries and transfer their assets, rights and liabilities to the Port Corporations, the Ministerial Corporation, the Waterways Authority and others,
- (i) to repeal certain existing marine legislation (such as the *Marine Administration Act 1989* and the *Marine Port Charges Act 1989*) and to make consequential amendments to other Acts.

Note. The Bill has been prepared on the basis that it will not commence until after the commencement of the State Owned Corporations Amendment Bill 1995.

Outline of provisions

Part 1 Preliminary

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be proclaimed.

Clause 3 defines expressions used in the proposed Act. *Marine legislation* means this Act, the *Maritime Services Act 1935*, the *Marine Pollution Act 1987*, the *Commercial Vessels Act 1979*, the *Navigation Act 1901* and certain other Acts (including regulations and other instruments made under those Acts). The *MSB* means the Maritime Services Board and an *MSB subsidiary* means any MSB subsidiary ports authority or the MSB Waterways Authority. *Port Corporation* means Newcastle Port Corporation, Port Kembla Port Corporation or Sydney Ports Corporation (each of which is established as a statutory State owned corporation by the proposed Act).

Clause 4 defines *vessel* for the purposes of the proposed Act.

Clause 5 dissolves the MSB and each of its subsidiaries. The clause gives effect to Schedule 1 (containing provisions relating to the transfer of MSB assets etc) and Schedule 2 (containing provisions relating to the transfer of former MSB staff other than senior executives).

Part 2 Port Corporations

Division 1 Establishment of Port Corporations as statutory State owned corporations

Clause 6 establishes Newcastle Port Corporation as a statutory State owned corporation under the *State Owned Corporations Act 1989* (the “SOC Act”).

Clause 7 establishes Port Kembla Port Corporation as a statutory State owned corporation under the SOC Act.

Clause 8 establishes Sydney Ports Corporation as a statutory State owned corporation under the SOC Act.

Division 2 Objectives and functions of Port Corporations

Clause 9 provides that the principal objects of each Port Corporation are:

- (a) to be a successful business and, to this end:
- to operate at least as efficiently as any comparable businesses, and
 - to maximise the net worth of the State’s investment in the Port Corporation, and
 - to exhibit a sense of social responsibility by having regard to the interests of the community in which it operates and by endeavouring to accommodate these when able to do so, and
- (b) to promote and facilitate trade through its port facilities, and
- (c) to ensure that its port safety functions under the marine legislation are carried out properly.

Clause 10 provides that the principal functions of each Port Corporation are:

- (a) to establish, manage and operate port facilities and services in its ports, and
- (b) to exercise the port safety functions for which it is licensed in accordance with its operating licence under Division 3.

A Port Corporation may also conduct any business that it considers will further its objectives (whether or not related to those principal functions).

Division 3 Operating licence for port safety functions of Port Corporations

Clause 11 defines certain functions of the Minister as port safety functions. These include navigation aids, vessel traffic control, pilotage, dredging and maintenance of navigation channels, emergency environment protection services and marine accident investigations.

Clause 12 provides for the exercise of port safety functions by Port Corporations. The functions are to be determined by the Minister and are to be exercised in accordance with an operating licence issued by the Governor.

Clause 13 enables the Governor to revoke or restrict an operating licence if the Port Corporation does not meet specified performance standards for services under the licence.

Clause 14 provides that the operating licence is to require the Port Corporation to pay a fee for the licence to fund marine regulatory functions. The licence may also provide for the Port Corporation to fix and collect navigation service charges payable by shipowners under Part 5 and for the remittance of part of that amount to the Minister.

Clause 15 makes miscellaneous provisions with respect to the operating licence, including provision for a maximum renewable term of 5 years for a licence.

Division 4 Transfer of assets, rights and liabilities

Clause 16 enables the Minister to direct that certain assets, rights and liabilities of the MSB or any MSB subsidiary be transferred to the relevant Port Corporation. The relevant Port Corporation is:

- (a) in the case of the port of Newcastle—the Newcastle Port Corporation, and
- (b) in the case of Port Kembla—the Port Kembla Port Corporation, and
- (c) in the case of Sydney Harbour and Botany Bay—the Sydney Ports Corporation.

Clause 17 provides that assets, rights and liabilities transferred to or acquired by a Port Corporation in relation to its port safety functions may be reclaimed by the Minister.

Division 5 Miscellaneous

Clause 18 provides for the election of the staff director of the board of directors of each Port Corporation by the employees of the Port Corporation. The clause displaces the standard provisions in the SOC Act under which the staff director is selected by a panel of employee and employer representatives.

Clause 19 has the effect of prohibiting any land transferred to a Port Corporation under the proposed Act from being sold or disposed of without the prior written approval of the voting shareholders.

Clause 20 defines the foundation charter of a Port Corporation for the purposes of the SOC Act.

Clause 21 ensures that the Minister is consulted on appointments by the Governor of directors of a Port Corporation and on the statement of corporate intent of a Port Corporation.

Clause 22 gives words and expressions used in this Part the same meaning as they have in the SOC Act.

Part 3 Marine safety and other functions of Minister

Division 1 Marine safety and other marine legislation functions

Clause 23 provides that the Minister has the functions conferred or imposed on the Minister by or under the marine legislation. The remaining functions of the MSB under that legislation are to be transferred to the Minister by amendments to that legislation contained in Schedule 4.

Clause 24 provides that the Minister has general responsibility for marine safety (including the safe operation of recreational and commercial vessels, the safety of navigation in ports and other navigable waters and the protection of the environment in connection with the use of vessels in coastal waters and ports). The Minister will be able to discharge that responsibility through the Port Corporations (by operating licences) and through the Waterways Authority or Departmental staff (by delegation).

Clause 25 sets out particular marine safety functions of the Minister. These include providing or arranging for the provision of marine safety services (such as pilotage, navigation aids and vessel traffic control), the investigation of marine accidents and incidents and the provision of emergency environment protection services.

Clause 26 provides that the Minister is responsible for the commercial port facilities at trading ports not managed by a Port Corporation, such as Yamba and Eden.

Clause 27 allows the Minister to delegate his or her functions and provides for sub-delegation.

Clause 28 allows the Minister to enter into contracts for the supply of services required for the purpose of exercising the Minister's functions.

Division 2 Marine Ministerial Holding Corporation

Clause 29 constitutes the Marine Ministerial Holding Corporation as a statutory body representing the Crown.

Clause 30 provides that the affairs of the Ministerial Corporation are to be managed and controlled by the Minister.

Clause 31 provides for the functions of the Ministerial Corporation. In addition to any functions conferred or imposed on it by or under the marine legislation or any other legislation, the Ministerial Corporation is to hold and dispose of assets, rights and liabilities transferred to it and to carry on activities or business relating to those assets, rights and liabilities. The clause enables the Minister to exercise his or her functions under the proposed Act and the other marine legislation in the name of the Ministerial Corporation.

Clause 32 provides that the remaining assets, rights and liabilities of the MSB and each MSB subsidiary (that is, those that are not transferred, by direction of the Minister, to a Port Corporation, the Waterways Authority or to another person on behalf of the State) are transferred to the Ministerial Corporation.

Clause 33 provides that the Ministerial Corporation may acquire land by agreement or by compulsory process in accordance with the *Land Acquisition (Just Terms Compensation) Act 1991*. Such land may be transferred to a Port Corporation in certain circumstances. The provision also deals with the application of the *Public Works Act 1912* to land acquired by the Ministerial Corporation.

Clause 34 deals with the seal of the Ministerial Corporation.

Part 4 Waterways Authority

Division 1 Constitution and management of Waterways Authority

Clause 35 constitutes the Waterways Authority as a statutory body representing the Crown.

Clause 36 provides for the appointment of the Chief Executive of the Waterways Authority by the Governor. It also allows the Minister to appoint an acting Chief Executive during the illness or absence of the Chief Executive.

Clause 37 provides for the management and control of the affairs of the Waterways Authority by the Chief Executive.

Clause 38 provides that the Waterways Authority is, in the exercise of its functions, subject to the control and direction of the Minister.

Clause 39 requires the Waterways Authority to prepare a corporate plan for each financial year and to exercise its functions, as far as practicable, in accordance with that plan.

Clause 40 provides for the employment of staff by the Waterways Authority and allows the Authority to arrange for the use of the services and facilities of Government agencies and to engage consultants.

Division 2 Functions of Waterways Authority

Clause 41 provides that the Waterways Authority has the functions conferred or imposed on it by law and, in particular, such of the Minister's waterways and other functions as are delegated to it. The provision also gives the Authority general powers in connection with the exercise of its functions.

Division 3 Financial and other provisions relating to Waterways Authority

Clause 42 establishes a fund to be called the Waterways Fund and provides for the payment into the Fund of money received by the Waterways Authority that is not required to be paid into the Consolidated Fund, penalties recovered for offences against the marine legislation and certain other money. It also provides for payments from the Fund.

Clause 43 allows the Waterways Authority to invest money in the Waterways Fund.

Clause 44 provides for the financial year of the Waterways Authority.

Clause 45 allows the Minister to direct that certain assets, rights and liabilities of the Ministerial Corporation (or the MSB or any MSB subsidiary) be transferred to the Waterways Authority or that certain assets, rights and liabilities of the Waterways Authority be transferred to the Ministerial Corporation.

Clause 46 deals with the seal of the Waterways Authority.

Part 5 Port charges

Division 1 Preliminary

Clause 47 defines expressions used in the proposed Part. Relevant port authority generally refers to the appropriate Port Corporation (in relation to commercial port charges and certain navigation service charges), the Minister (in relation to port cargo access charges, minor ports charges and certain other charges) or a private pilotage contractor (in relation to pilotage charges for services provided under contract). Designated port (in which most of the charges are payable) refers to a list of the major trading ports. The clause allows the regulations to add any port to, or omit any port from, the list of designated ports.

Clause 48 explains the meaning of owner of a vessel or cargo.

Division 2 Navigation service charges

Clause 49 provides that the Division applies to vessels in designated ports for which pilotage in the port is compulsory or which are declared by the regulations to be liable for navigation service charges.

Clause 50 provides that a navigation service charge is payable in respect of the general use by a vessel of a designated port and its infrastructure, apart from services for which pilotage or port cargo access charges are made and apart from the use of land-based port facilities. The charge is payable on each entry by the vessel into a designated port and is calculated by reference to the gross tonnage of the vessel. The navigation service charge is payable by the owner of the vessel concerned.

Clause 51 provides for the fixing of navigation service charges by the relevant port authority. Port Corporations may only fix the charges with the approval of the Minister and in accordance with their operating licence.

Division 3 Pilotage charges

Clause 52 provides that the Division applies to vessels in, approaching or leaving pilotage ports.

Clause 53 provides that a pilotage charge is payable in respect of a vessel on each occasion that it enters, leaves or moves within a pilotage port under the pilotage of a pilot (in accordance with Part 6). Pilotage charges are also

payable for any deferral of pilotage and may be calculated by reference to the gross tonnage of the vessel concerned. The owner of the vessel concerned is liable for the pilotage charge.

Clause 54 allows the relevant port authority to fix pilotage charges. Port Corporations or contractors may only fix the charges with the approval of the Minister and in accordance with their operating licence or contract.

Division 4 Port cargo access charges

Clause 55 provides that the Division applies to vessels and their cargo in designated ports.

Clause 56 provides for the levying of a port cargo access charge in respect of port access for cargo at the interface between the vessel and land-based facilities for the purpose of stevedoring operations (whether at facilities of a Port Corporation or privately-owned facilities). The charge is to be calculated by reference to the quantity of cargo loaded or unloaded and is payable by the owner of the loaded or unloaded cargo. The charge replaces the charge on cargo transferred on privately-owned facilities and the component for access in the wharfage charge at MSB facilities.

Clause 57 allows the Minister to fix port cargo access charges under the Division.

Division 5 Site occupation charges and wharfage charges

Clause 58 provides that the Division applies to vessels and their passengers and cargo in designated ports (other than at privately-owned wharves).

Clause 59 explains the meaning of site for the purposes of the Division. A site is an area designated by the Minister and defined on a map kept at the office of the Minister. The Minister may designate an area as a site only if it is owned or operated by a relevant port authority and it consists of an area of water surrounding or adjacent to a wharf, buoy or dolphin and the whole or part of the area of a wharf or dolphin.

Clause 60 provides for the levying of a site occupation charge for the occupation of all or part of a site. The charge is to be calculated by reference to the amount of time during which the site or part of it is reserved or occupied and is payable by the person whom the relevant port authority recognises as the occupier of the site or part.

Clause 61 provides for the levying of a wharfage charge in respect of availability of a site at which stevedoring operations may be carried out. The charge is to be calculated by reference to the quantity of cargo loaded or unloaded and is payable by the owner of the loaded or unloaded cargo.

Clause 62 allows the relevant port authority to fix charges under the Division. Port Corporations may only fix the charges with the approval of the Minister.

Clause 63 provides for the phasing out of statutory-based charges payable under the Division by a relevant port authority, with charges ceasing to be payable on a day or days to be appointed by proclamation. After the statutory-based charges are phased out, ordinary commercial arrangements may be made for charging for the use of land-based port facilities.

Division 6 Berthing charges

Clause 64 provides that the Division applies to vessels in designated ports that are berthed at wharves, buoys or dolphins owned or operated by the Minister.

Clause 65 provides that a berthing charge is payable in respect of the berthing of a vessel if the vessel is a lighter or has a gross tonnage of less than that prescribed by the regulations. The charge is payable by the owner of the vessel.

Clause 66 allows the Minister to fix berthing charges.

Division 7 Agreements in respect of charges

Clause 67 allows the relevant port authority (with the approval of the Minister) to enter into an agreement with a person liable to pay any kind of charge under the proposed Part, providing for the fixing of the amount of any charge payable by the person and for other matters in relation to charges. Such an agreement may displace any determination made by the relevant port authority in relation to charges.

Division 8 Miscellaneous

Clause 68 provides that charges are payable on demand by the relevant port authority (as a debt due to the port authority) and allows agents to be appointed for the purposes of collection.

Clause 69 provides that payments made to the Minister of port cargo access charges and other charges are to be paid into the Consolidated Fund.

Clause 70 provides that interest is payable on charges that are unpaid. The interest is payable at a rate determined by the relevant port authority, subject to a maximum rate (determined by reference to commercial rates of interest).

Clause 71 allows the relevant port authority to require a security deposit (in such form and amount as the authority requires) to be lodged with the authority, as security for the payment of charges that have been or may be incurred under the proposed Part. The port authority may appropriate that deposit or the proceeds of that deposit to meet the liabilities of the depositor under the proposed Part that are unpaid after becoming due.

Clause 72 allows the relevant port authority to withdraw the provision of services or facilities to a person if the person fails to comply with any lawful requirements of the authority in relation to those services and facilities.

Clause 73 makes the current owner of, and any agent for, a vessel liable for any unpaid charges in respect of the vessel.

Clause 74 allows the relevant port authority to waive or refund the whole or any part of a charge with the approval of the Minister.

Clause 75 provides that proposed Part does not apply in respect of vessels belonging to the Defence Force of Australia or their passengers or cargo (except by agreement).

Clause 76 allows regulations to be made for or with respect to charges under the proposed Part.

Part 6 Pilotage

Clause 77 defines expressions used in the proposed Part. The pilotage ports continue to be the existing trading ports in which pilotage is compulsory. The pilotage service provider will be the Port Corporation (under an operating licence), a contractor (under a continuation of the present arrangements) or the Minister (for the minor ports).

Clause 78 makes pilotage compulsory in every pilotage port and makes it an offence to enter, leave or move within a pilotage port without taking on the pilot assigned by the pilotage service provider for the port. The clause and the other provisions of the proposed Part generally continue existing provisions relating to pilotage that are contained in the *Pilotage Act 1971* (that Act is to be amended to restrict its operation to the licensing of pilots and certification of masters exempt from pilotage).

Clause 79 exempts certain vessels from compulsory pilotage (for example, a vessel whose master has a pilotage exemption certificate or a certificate of local knowledge, a recreational vessel or a vessel less than 30 metres in length).

Clause 80 makes it an offence for a person to act as a pilot in a pilotage port unless the person is assigned by the pilotage service provider for the port.

Clause 81 continues the existing provision in the *Pilotage Act 1971* that allows pilotage services (that are not carried out by a Port Corporation) to be carried out by a contractor after a public tender process.

Clause 82 deals with the deferral of pilotage generally.

Clause 83 enables a pilot to defer pilotage for safety reasons.

Clause 84 provides that the master of a vessel is required to assist the pilot.

Clause 85 provides that the master of the vessel is not relieved of responsibility for the navigation of the vessel because the vessel is under pilotage.

Clause 86 continues the existing provisions that the master and owner of a vessel under compulsory pilotage are liable for loss or damage caused by the vessel and the State, pilots, pilotage service providers and others are not liable for any loss or damage that is attributable to the negligence of a pilot.

Clause 87 makes it an offence for a pilot to wilfully endanger a vessel or its crew.

Clause 88 applies the proposed Part to pilotage that is not compulsory but is carried out at the request of the owner of a vessel

Clause 89 enables regulations to be made with respect to pilotage.

Part 7 Harbour masters

Clause 90 defines port (in which harbour masters may exercise their functions) to include any specially defined area of navigable waters.

Clause 91 provides for the appointment of harbour masters by the Minister from the staff of the Minister's Department or the staff of a Port Corporation.

Clause 92 enables the appointment of persons to assist harbour masters.

Clause 93 provides that harbour masters have the functions conferred by this Part and the other marine legislation, subject to any restriction imposed by the regulations or directions of the Minister.

Clause 94 continues the existing powers of harbour masters relating to the control of the movements and securing of vessels within ports.

Clause 95 confers power on a harbour master to direct that dangerous vessels (namely, those in imminent danger of sinking and obstructing the port or of causing serious damage to property) are not to enter the port or to leave the port.

Clause 96 enables the harbour master to carry out a direction that is not complied with and for the recovery of the expenses of doing so.

Clause 97 makes it an offence to fail to comply with a direction of the harbour master.

Clause 98 provides for the issue of identity cards to harbour masters.

Clause 99 protects harbour masters from personal liability.

Part 8 Legal proceedings

Clause 100 authorises the issue of penalty notices for offences against the proposed Act or other marine legislation.

Clause 101 provides that proceedings for offences against the proposed Act or the regulations are to be taken before a Local Court constituted by a Magistrate sitting alone.

Clause 102 allows those proceedings to be taken within 2 years instead of 6 months.

Clause 103 allows anyone to bring those proceedings.

Clause 104 deals with offences committed by corporations.

Part 9 Miscellaneous

Clause 105 empowers the making of regulations to define the boundaries of ports and other areas of water for the purposes of the marine legislation.

Clause 106 provides that the proposed Act binds the Crown.

Clause 107 allows the Ministerial Corporation, the Waterways Authority and any Department of the Minister to combine their financial and annual reports.

Clause 108 provides for the service of documents on the Ministerial Corporation or the Waterways Authority.

Clause 109 enables the Ministerial Corporation and the Waterways Authority to recover as a debt any charge, money or fee due to it, or to waive payment or refund any such charge, money or fee.

Clause 110 empowers the making of regulations for the purposes of the proposed Act.

Clause 111 gives effect to Schedule 3 which repeals certain existing marine legislation (including the *Marine Administration Act 1989*, the *Marine Port Charges Act 1989* and the *Sydney Harbour Trust Act 1900*).

Clause 112 gives effect to Schedule 4 (which contains consequential and other amendments to other Acts).

Clause 113 gives effect to Schedule 5 (which contains savings, transitional and other provisions).

Clause 114 provides for the review of the operation of the proposed Act by the Minister 5 years after the date of assent to the Act.

Schedule 1 contains provisions relating to the transfer of assets, rights and liabilities of the MSB and its subsidiaries under the proposed Act.

Schedule 2 contains provisions relating to the transfer of former MSB staff (other than senior executives). The former staff may be transferred to a Port Corporation or the Waterways Authority. Remaining staff are entitled to a position in the Public Service and are to be appointed to the Department responsible to the Minister. The Schedule maintains existing employment entitlements on transfer and, in particular, provides for the continuation of the existing enterprise agreements applying to the MSB, the recognition of previous service with the MSB for all purposes, the maintenance of existing rates of pay on transfer, and provisions for staff mobility of former MSB staff among the new employers.

Schedule 3 sets out the Acts and regulations repealed by the proposed Act.

Schedule 4 contains consequential and other amendments to other Acts, including amendments to existing marine legislation to remove references to the MSB and to replace them with references to the Minister.

Schedule 5 contains savings, transitional and other provisions. In particular, the Schedule provides that the directors of the MSB and each MSB subsidiary, and senior executive staff members of the MSB, cease to hold their positions on the dissolution of the MSB and MSB subsidiaries. The Schedule also contains special provisions concerning MSB land in Sydney Harbour and other provisions consequent on the dissolution of the MSB.