

Maritime Union of Australia

Submission to

Legislative Assembly of the Northern Territory

Port of Darwin Select Committee

11 March 2015

This response has been prepared and submitted
on the basis that it is a public document.

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1. Introduction

- 1.1. The Maritime Union of Australia (MUA) represents over 15,000 workers in the shipping, stevedoring, port services, offshore oil and gas and diving sectors of the Australian maritime industry.
- 1.2. Members of the MUA work in a range of occupations across all facets of the maritime sector including on coastal cargo vessels (dry bulk cargo, liquid bulk cargo, refrigerated cargo, project cargo, container cargo, general cargo) as well as passenger vessels, towage vessels, salvage vessels, dredges, ferries, cruise ships, recreational dive tourism vessels and in stevedoring and ports. MUA members work on LNG tankers engaged in international Liquefied Natural Gas (LNG) transportation. In the offshore oil and gas industry, MUA members work in a variety of occupations on vessels which support offshore oil and gas exploration.
- 1.3. In ports, MUA members work directly for port authorities across Australia, including as safety officers, pollution control and oil spill response officers, emergency response personnel, dredging crew, pilot boat crew, and in vessel traffic control. MUA members also work in port services which are often sub-contracted, for example, tug boats, lines and mooring services (although these services are also provided by some port authorities), and in container and bulk and general stevedoring.
- 1.4. The MUA is a member of the International Transport Workers Federation (ITF) which is the peak global union federation for over 700 unions representing over 4.5 million transport and logistics workers worldwide.
- 1.5. On the MUA's initiative, the ITF provided \$150,000 in funding for the Darwin East Arm Port Seafarers Centre, which was opened by Chief Minister Adam Giles in April 2013. It provides recreation facilities for seafarers visiting the Port and other maritime workers.¹
- 1.6. In the Northern Territory, the MUA represents 528 members. These members work in the Port of Darwin as stevedores and port workers, in coastal shipping delivering essential goods to regional communities, in the offshore oil industry, as divers and on inshore workboats.
- 1.7. Approximately 70 MUA members work directly in the Port of Darwin, performing functions such as maintenance of port facilities, administration, safety management, pilotage, cargo services, services to ships (providing water for example), cargo and ship security, vessel traffic control, and operating small cranes for fishing boats. Almost all of these workers are employed by the Darwin Port Corporation. Currently five of these workers are being transferred to the Department of Transport and the Department of Lands and Planning in preparation for the sale of the port.

¹ Adam Giles, Media Release, New Seafarers Centre Opens, 4 April 2013.

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2. Summary and Recommendations

2.1. The MUA is opposed to the long-term lease or sale of the Port of Darwin. Based on the situation in other Australian ports, we are concerned that the result of such a transaction will be:

- Large increases in the expense of shipping essential goods to NT coastal communities, which is done from the Port of Darwin. The Port has already significantly increased fees in February 2015, which is frequently done before privatisation to increase the revenue stream and sale price. Increased rental fees may follow.
- Increased port fees and rental charges may put significant pressure on shipping companies, stevedores and logistics companies. These fees may be passed on to all Territorians and increase our already high cost of living.
- No guarantee of access to wharves in the event of an emergency, such as flooding and wash-out of road and rail connections to Darwin.
- A loss of consistent revenue for the Territory government from Port operations.
- Loss of the Port's current good structures for consultation with its workforce and more broadly.
- Loss of public control over decisions about port development, and the possibility of the Port directors being investment fund managers with no connection to the Territory.

- Loss of Port jobs.
- 2.2. The privatisation of all other major ports in Australia (South Australian ports – Flinders Ports, Brisbane, Port Botany, Port Kembla and Newcastle) has involved a long-term lease of 98 or 99 years, rather than an outright sale. The experiences of port privatisation we outline in this submission have all occurred in long-term lease situations.
 - 2.3. Other cases of port privatisation in Australia have resulted in the loss of millions of dollars of public revenue, community interest agreements in some cases not being adhered to, and a loss of jobs in ports. In Brisbane, 84 jobs of 31% of the workforce were lost in 3 years, despite the port being very profitable.
 - 2.4. In some privatised ports, fees for both shipping and stevedoring companies have increased significantly. Such fees increased can have flow-on effects in terms of the labour relations behaviour of the port users faced with increased and often unanticipated costs. There is the possibility for this to impact safety practices, bargaining behaviour, and processes for managing technological change. Stevedoring and shipping companies may also attempt to passing on increases to importers and exporters. If so, there is likely to be an effect on both consumers and the competitiveness of exports. The cost of living in the Northern Territory is already very high. Territorians cannot afford this risk.
 - 2.5. The experience in other ports privatised through a long-term lease shows that in some cases the decision-making boards of port authorities, which also have a regulatory function, have been significantly narrowed or abolished. The boards of the new ownership entity only represent companies or investment funds that have invested in the privatised port. This submission demonstrates some of the problems that have arisen from this situation. We note that a public port authority has been retained despite the privatisation of the NSW ports of Port Botany, Newcastle, and Sydney, and we support this position. However, this is not the case in Brisbane and with Flinders Ports in South Australia.
 - 2.6. The Port of Darwin currently has a good consultative structure that involves port users, maritime workers, and the broader community. Unfortunately, this is not our experience of the governance of other ports privatised through long-term lease.
 - 2.7. The Australian Competition and Consumer Commission (ACCC) has warned that existing price monitoring structures and contractual attempts to address access and pricing issues for privatised ports are not sufficient. Moreover, if problems emerge, the main tool available in current Australian competition legislation is a de-merger, which cannot be applied to monopoly infrastructure like a port. In other words, while the ACCC can order a company to de-merge, a physical entity like a port cannot be dealt with in the same way.
 - 2.8. Further, the ACCC warns that there should be no presumption that regulation applying to a port at the time of sale will be “fit for purpose” once the asset is sold. Therefore, proper and fully considered regulation to address post-sale pricing and access issues must be in place before any port transaction (See ACCC discussion of these issues reproduced in Annex 3).²

² ACCC, *Container Terminal Stevedoring Monitoring Report no.16*, October 2014, p.18-23.

- 2.9. The *Port of Darwin Act 2014* transfers powers and responsibilities wholesale to the new private entity and gives the Chief Minister virtually unlimited powers to arrange the new entity as he sees fit, including exemption from other laws
- 2.10. Ports must balance the needs of many different and frequently opposing interests: the broader public, taxpayers, recreational harbour users, importers, exporters, truck companies, rail companies, shipping lines, stevedoring and logistics companies, and the port workforce. Wharves may be used for anything from groceries supplying isolated island communities to construction materials for multi-billion dollar oil and gas developments. Future port developments are expensive, and must reflect both developments in the Australian economy and developments in the global economy and trade patterns. Port boards and governance structures must reflect these different interests and be capable of making decisions in the broader public interest.
- 2.11. We are concerned about the Chief Minister relying on advice from consultants Flagstaff Partners in making decisions about the Port of Darwin, while so-far refusing to release their report on the Port of Darwin. The leadership of Flagstaff are connected to the controversial and now-failed and East-West link in Victoria. Flagstaff are also advising the Victorian government on the privatisation of the Port of Melbourne, which was criticised by Melbourne port users in March 2015 for leading to the increase port rents of stevedores by 800%. Flagstaff is dominated by bankers and accountants from ANZ, Deutsche Bank, KPMG, and Ernst and Young. These types of companies profit directly from privatisations: Reuters predicted in February that upcoming Australian privatisations could generate a \$1 billion 'bonanza' in bank fees.³ A Senate Committee recently heard that banks, accountants and consultant fees make up at least 5-6% of the value of Australian asset privatisations.⁴
- 2.12. The Port of Darwin Select Committee has not given the public enough time to properly consider and make submissions on these significant issues. The Terms of Reference for this inquiry do not make reference to the Ports Management Act 2014, which is the Act that will shape the Port of Darwin into the future.
- 2.13. The government claims that private investment is necessary for the future expansion of the port. Yet Infrastructure Australia has rated the 'Darwin East Arm Port Expansion' as highly-rated 'Threshold Project' in the category of 'Competitive International Gateways'. It is one of only five projects in this category, at least two of which have already been funded by the federal government. This option should be further pursued.⁵ Commonwealth funding would

³ Sharon Klyne, European banks beef up for Australia infrastructure sale bonanza, Reuters, 4 February, 2015.

⁴ Senate Economics References Committee, Privatisation of state and territory assets and recycling of the proceeds into new infrastructure, 18 February 2015, Proof Committee Hansard, p. 4 and p.10.

⁵ Infrastructure Australia, *Infrastructure Priority List Update – December 2013*. The 'Darwin East Arm Port Expansion' is allocated \$336 million and given a 'benefit cost ratio' of 2.2, meaning that the Infrastructure Australia has calculated that for every \$1 invested by the Commonwealth there would be a \$2.20 economic return. This gives the project a decent chance of being funded.

spread the cost of investment across all Australian taxpayers, instead of it being raised primarily from revenue from Darwin port users.

2.14. The MUA is not opposed to not-for-profit superannuation funds investing in ports. Little consideration has been given, to date, for the possibility of not-for-profit superannuation fund investments in ports which retain majority public ownership. Such alternatives to the current models are explored in this submission.

This submission recommends:

Recommendation 1: The Port of Darwin is an essential piece of infrastructure that is relied on by thousands of people in Darwin and communities along the northern coast of Australia. It must not be sold or leased to private interests.

Recommendation 2: That the Flagstaff Partners report into the Port of Darwin be immediately released, so that the public may properly ‘consider the case for bringing private sector funding to develop the port’, as the Committee’s terms of reference ask.

Recommendation 3: That the Northern Territory Government release the ‘review’ that resulted in very significant increases to port tariffs in February 2015.

Recommendation 4: That the Committee carefully examine the justification for the February 2015 Port Tariff increase, and seek the views of shipping companies on as to impact on shipping through the Port.

Recommendation 5: That the Committee seek the views from stevedoring and other port service providers on the impact on their operations if the Port seeks significant rental increases. For example, some rental fees in Brisbane doubled after privatisation (see later in submission). The stevedore DP World recently revealed that it is facing an 800% increase in rental fees paid to the Port of Melbourne as it prepares for privatisation.⁶ Flagstaff Partners is also advising the Victorian government on the Port of Melbourne’s privatisation process, so the NT government may be receiving similar advice.

Recommendation 6: The Committee should investigate if Flagstaff Partners recommended the Port of Darwin fee increase.

Question 1: What bodies did the Committee meet with on its visits to Adelaide, Brisbane and Portland in March 2015? What consideration was given to the views of different port stakeholders?

Recommendation 7: The Committee must be fully aware that a 99-year lease is effectively the same as privatisation and is the model used in other privatised ports in Australia.

⁶ Jenny Wiggins and Matthew Dunckley, Stevedore DP World hit with 800 per cent rent increase as Port of Melbourne sale looms, *Sydney Morning Herald*, 3 March 2015. Jenny Wiggins, Shippers to ditch Melbourne if port hikes rent 800%, *Sydney Morning Herald*, 4 March 2015.

Recommendation 8: the Committee should be aware that the fact of private ownership does not necessarily equate to increased investment in port facilities.

Recommendation 9: If the Territory wishes to raise funds for investment in the port, a long term lease is not the only way to do this. There appears to be significant political support at the Commonwealth level for an investment into the Port of Darwin of approximately \$336 million. The Committee should investigate the support that exists at a Commonwealth level for the Infrastructure Australia and the *Pivot North* recommendations for the Commonwealth to invest in the Port of Darwin.

Recommendation 10: Evidence and costings of the feasibility of using the Port of Darwin to ship freight to Southern states must be released and subject to public scrutiny. The possibility for inland infrastructure to actually support such movements must be closely scrutinised.

Recommendation 11: Minimum maintenance and service levels should apply equally to all port users. Port users and workforce must be able to have input into port developments.

Recommendation 12: There are options for raising private funds while still maintaining public control of the Port. The MUA supports investment in port infrastructure by not-for-profit super funds. One option is for the Government to invite private investment in the Port in the form of a specific purpose bond - a Darwin Port Infrastructure Bond. A second option is for the government to retain 51% ownership of the Port with a joint board. The joint venture partners would simply operate the port commercially and share the profits, according to normal commercial joint venture arrangements. In both cases, we would support the investment being structured so that industry super funds had first option on bonds or in joint investments. Further details are contained in our submission.

Recommendation 13: There must be provisions in the Ports Management Act 2014 for access to Port wharves for essential and emergency services.

Recommendation 14: It appears that the Ports Management Act 2014 treats price regulation for all port users equally, whether they are providing groceries and building supplies to the Tiwi Islands or supplying multinational oil and gas project construction. Given the very substantial February 2015 increase in Port fees, and the possibility of future increases, the Committee must inquire into whether increases in port fees are already affect or will have a future effect on shipments of essential goods to communities along the along the coast of the NT. It must be evaluated whether such increases will have a disproportionate effect on coastal Aboriginal communities.

Recommendation 15: In particular, the new fee of \$2,000 per ship call could have a disproportionate impact on ships carrying smaller and lower-value cargos, such as those supplying remote communities. It does not appear that there is any exemption from this charge for smaller

vessels. Because it is charged per visit rather than per cargo volume, it also creates an incentive for a less regular service to remote communities.⁷

Recommendation 16: The Committee should examine the potential for increased port fees and rental costs being charged by private port owners (or public owners in preparation for privatisation) to be passed on to Northern Territory consumers in terms of the cost paid for imported goods, which is of concern given the already-high cost of goods in the Territory.

Recommendation 17: The Committee should also examine whether increased port fees and rent are likely to increase the cost of exports and what impact this may have on the competitiveness of exports from Darwin.

Recommendation 18: The power to review, set and charge port fees should be left with a public body, as is the case with Port Botany and Sydney,⁸ for Port Kembla in relation to pilotage fees and operations requiring safety permits,⁹ and for Newcastle in relation to pilotage fees.¹⁰ The draft Ports Management Act 2014 should be amended to require this.

Recommendation 19: The Northern Territory must publish a cost benefit analysis which considers forgone expected revenues against the expenditure of the asset sale proceeds. This analysis must be evaluated against the accounting procedures and potential distortions outlined in the February 2015 Senate submission by Professor Bob Walker and Dr. Betty Con Walker.¹¹

Recommendation 20: Forecasts about future trade through the Port of Darwin on which any future port transaction is based must be published and subject to independent scrutiny.

Recommendation 21: Port authorities must be able to balance competing interests of port users and the broader community and be able to make decisions in the public interest. Port boards must be structured to reflect this critical role. Members of the port workforce and unions must have the opportunity to participate in port committees.

Recommendation 22: The current committee structure within the Darwin Port Corporation must be retained or improved in the course of any port transaction. This should be reflected in the Ports Management Act 2014.

⁷ Darwin Port Corporation, Schedule of Port Charges as at 1 February 2015.

⁸ *Sydney Ports Corporation Schedule of Port Charges effective 1 July 2014*. The port was privatised on a 99-year lease in May 2013.

⁹ Port Authority of NSW Port Kembla, *Schedule of Port Charges, Prices effective 1 January 2014*. The port was privatised on a 99-year lease in May 2013.

¹⁰ See www.portofnewcastle.com.au/Commercial-Opportunities/Pricing.aspx and Newcastle Port Corporation, *Schedule of Port Pricing, Effective from 1 July 2014*. The Port of Newcastle was privatised on a 98-year lease in May 2014.

¹¹ Emeritus Professor Bob Walker and Dr. Betty Con Walker, Submission to Inquiry into privatisation of state and territory assets and new infrastructure, February 2015.

Recommendation 23: Section 99 of the proposed Ports Management Act 2014 gives the regional harbourmaster the authority to place navigation aids on Aboriginal land without consultation and without a permit to enter Aboriginal land. This must be amended to require consultation and a permit. Navigation aids can be designed in many different ways, and on Aboriginal land navigational aids must be designed in consultation with the proper Aboriginal authorities with responsibility for that place. The Committee must also ask relevant Land Councils to review this legislation to ensure that there are no other problems with it.

Recommendation 24: That the Committee closely examine the ACCC's examination of the problems in recent port privatisation and regulation.

Recommendation 25: that the Committee carefully investigate how it was possible for the Port of Brisbane to apparently disregard the conditions for public access and community facilities specified in the Purchase Agreement. This is critical to evaluating future safeguards in such transactions.

Recommendation 26: That provisions be included in the Ports Management Act 2014 to safeguard the Seafarers' Welfare Centre and any other community provisions that could be affected by the transaction. The Act must also provide a broader duty of care to other ports users and the port community and enforceable Community Service Obligations (enforceable by imposition of financial penalties).

Recommendation 27: A proper Inquiry must be held into the Ports Management Act 2014. It was an error not to refer to this Act in the Terms of Reference for this Committee, particularly because the Act is very detailed and may shape the structure of the Port of Darwin long into the future.

Recommendation 28: The Ports Management Act 2014 should be amended to provide for a public Port Corporation to be retained, and to deliver port services.

Recommendation 29: We ask that the Committee investigate and then explain to the public the implications of the following section of the Port of Darwin Act 2014:

29 Excluded matter for Corporations Act 2001

Any act or omission of the Chief Minister under this Act is declared to be an excluded matter for the purposes of section 5F of the Corporations Act 2001 in relation to Chapter 2D of that Act.

Recommendation 30: We believe that the form of any transaction involving the Darwin Port Corporation must be determined in an open and transparent manner, and specified in the Port of Darwin Act 2014. This would require amendment of Section 7 of the Port of Darwin Act 2014, which currently says:

(3) There are no limitations on the nature of the entities that can be used, or on the kind of transaction arrangements that can be entered into, for the purposes of an authorised transaction.

(4) Port assets can be transferred for the purposes of an authorised transaction in any manner.

Recommendation 31: Many safeguards could be implemented. Section 14 of this submission makes detailed suggestions to improve transparency, proper regulatory, governance and consultative arrangements, and improved reporting requirements.

Recommendation 32: There are many alternatives to the current model of privatisation. So far governments have not explored the use of not-for profit superannuation fund investments into publically owned infrastructure. These are explored in Section 15.

3. Port of Darwin: Privatisation Process and Transparency

- 3.1 The current government does not have an electoral mandate to privatise the Port of Darwin. Since the government announced it was appointing Flagstaff Partners to advise them on future port investment in February 2014, there has been a lack of public information and public debate. No business case or cost-benefit assessment has been released.
- 3.2 We are pleased that this Select Committee has been appointed and is holding this inquiry. Yet the government has already written legislation, proceeded to get Expressions of Interest from potential buyers and to transfer employees and sections of the Port Corporation to other sections of government in preparation for the sale. We are concerned that this consultation process is merely a token exercise.
- 3.3 On 26 November 2014, Chief Minister Giles announced in a statement that Flagstaff Partners report was complete, and it found 'that the Port has plenty of room for expansion' and that 'a long term lease or other options would provide significant investment into the Port'.¹² After inquiries, we were informed by a spokesperson in the Chief Minister's office that the report is 'commercial in confidence'. We have written to the Minister requesting a copy.
- 3.4 On 9 December 2014, Darwin Port Corporation announced that as a result of a Northern Territory Government 'review,' very significant increases in port fees were introduced. This included:
- a new fee of \$2,000 per ship call,
 - an increase of 15% to daily berthage rates, and
 - a 30% increase in wharfage rates for general cargo, containerised cargo, and livestock.¹³
- These three types of fees could all apply to a single ship's cargo, resulting in an enormous overall increase.
- 3.5 These port tariff increases should be viewed in the context of a record \$17 million profit for the Port Corporation in 2013-14, overall revenue exceeding the Port's target by 11%, and berthage revenue up 29% - all before these increases were introduced.¹⁴ It is unfortunately common practice for governments to hike up port fees before ports are sold in the hope of demonstrating a larger revenue stream that will attract a higher price for the port.
- 3.6 ANL, an international shipping company, has described the increases as 'a joke'.¹⁵

¹² Adam Giles, Media Release, Growing Territory Trade with Asia, 26 November 2014.

¹³ Darwin Port Corporation, New Port Tariffs – February 2015, 9 December 2014.

¹⁴ Darwin Port Corporation, 2014 Annual Report, p.4

¹⁵ Lloyd's List Daily Commercial News, John Lines says Darwin's port charges are a joke, 11 December 2014. Darwin port to roll out a \$2k berthage charge, 10 December 2014.

- 3.7 The Government began to take Registrations of Interest from prospective buyers in early 2015.
- 3.8 On 29 December 2014, the Port Corporation announced that it was transferring the Frances Bay Mooring Basin and associated wharves to the Department of Lands and Planning, and that this transfer would be effective as of 1 January 2015.
- 3.9 In February 2015, the MUA was notified that some Darwin Port Corporation employees were being transferred to the Department of Transport and the Department of Lands, Planning, and Environment in preparation for the sale of the port.
- 3.10 This Inquiry was not announced until 18 February 2015, and just over two weeks was given to the public to prepare submissions. This has prevented the MUA from seeking independent expert advice on the claims that the government is making in relation to the Port and the development of its future infrastructure. The Terms of Reference of the Inquiry asks the Committee to 'consider the case for bringing private sector funding to develop the port'. It is very difficult to comment on this point unless the report that forms the basis of this case is publically released.
- 3.11 We observed on the Committee's website that it has conducted visits to the privatised ports of Adelaide, Brisbane and Portland in March 2015. It appears from the press releases that the Committee only spoke to the privatised port corporation itself, and not to other port stakeholders, including stevedoring companies, shipping companies, or unions representing the port workforce.

Recommendation 2: That the Flagstaff Partners report into the Port of Darwin be immediately released, so that the public may properly 'consider the case for bringing private sector funding to develop the port', as the Committee's terms of reference ask.

Recommendation 3: That the Northern Territory Government release the 'review' that resulted in very significant increases to port tariffs in February 2015.

Recommendation 4: That the Committee carefully examine the justification for the February 2015 Port Tariff increase, and seek the views of shipping companies on as to impact on shipping through the Port.

Recommendation 5: That the Committee seek the views from stevedoring and other port service providers on the impact on their operations if the Port seeks significant rental increases. For example, some rental fees in Brisbane doubled after privatisation (see later in submission). The stevedore DP World recently revealed that it is facing an 800% increase in rental fees paid to the

Port of Melbourne as it prepares for privatisation.¹⁶ Flagstaff Partners is also advising the Victorian government on the Port of Melbourne's privatisation process, so the NT government may be receiving similar advice.

Recommendation 6: The Committee should investigate if Flagstaff Partners recommended the Port of Darwin fee increase.

Question 1: What bodies did the Committee meet with on its visits to Adelaide, Brisbane and Portland in March 2015? What consideration was given to the views of different port stakeholders?

4. The implications of a 99-year lease: Privatisation by another name

- 4.1 Chief Minister Adam Giles has repeatedly claimed that he would not 'sell' the Port of Darwin, but only 'lease' it, or come to some other arrangement.¹⁷
- 4.2 It must be noted that all other major privatised ports in Australia (South Australian ports – Flinders Ports, Brisbane, Port Botany, Port Kembla and Newcastle) are on a 98- or 99-year lease. Under this model, the port *is* effectively privatised. Fees from ship visits and from the rental of port land are collected by the private entity and this revenue is used to pay for port services and port developments. Strategic decisions about how this money should be invested in developing the port are made by the Directors, who are usually representatives of the investors in the port – not local maritime experts or port users. Considerable profit accrues to the private entity collecting these fees and delivering these services, but it is the decision of the private entity about whether it should siphon off these profits, or reinvest them in the port.
- 4.3 The remainder of this submission explores what has occurred in ports privatised under this long-term lease model, the unique challenges that the Port of Darwin would face in such a situation, the ACCC's detailed recommendations on the proper regulatory structure for privatised ports, and the possible alternatives.

Recommendation 7: The Committee must be fully aware that a 99-year lease is effectively the same as privatisation and is the model used in other privatised ports in Australia.

¹⁶ Jenny Wiggins and Matthew Dunckley, *Stevedore DP World hit with 800 per cent rent increase as Port of Melbourne sale looms*, *Sydney Morning Herald*, 3 March 2015. Jenny Wiggins, *Shippers to ditch Melbourne if port hikes rent 800%*, *Sydney Morning Herald*, 4 March 2015.

¹⁷ For example: 'To be clear, we are not looking at selling the Port but we are interested in possible leasing options for key pieces of infrastructure.' Northern Territory Government, *A More Competitive Darwin Port*, 7 October 2014.

5. Privatisation for port expansion?

- 5.1 Chief Minister Adam Giles has repeatedly claimed that privatisation and private investment is necessary to expand the port.
- 5.2 Yet the Chief Minister betrays a fundamental misunderstanding of how this process currently works in Australian ports in a Government statement release in October 2014. In that statement, he describes the investments by Qube and Patrick into new cranes and ASCO into the new Marine Supply Base as examples of the kinds of new investment that a buyer of the Port Corporation could undertake. However, it normal process for stevedoring companies or supply base operators to invest in their own stevedoring equipment, particularly new cranes, or the establishment of a new port concession. However, this is a separate matter from the ownership of the port, who is effectively their landlord. Stevedoring companies buy new cranes and new port terminal concessions are established in publically owned ports and in privately owned ports.
- 5.3 Infrastructure Australia has rated the 'Darwin East Arm Port Expansion' as a highly-rated 'Threshold Project' in the category of 'Competitive International Gateways'. It is one of only five projects in this category, at least two of which have already been funded by the federal government. The 'Darwin East Arm Port Expansion' is allocated \$336 million and given a 'benefit cost ratio' of 2.2, meaning that the Infrastructure Australia has calculated that for every \$1 invested by the Commonwealth there would be \$2.20 in economic return. This gives the project a decent chance of being funded, if the Territory pursues the outstanding issues identified by Infrastructure Australia.¹⁸
- 5.4 The amount of Commonwealth funding recommended by Infrastructure Australia for the Port of Darwin is in line with what has been suggested by the Chief Minister as necessary for the upgrade of the port. The *Pivot North: Inquiry into the development of Northern Australia: Final Report* (September 2014) records requirements for the Port of Darwin as follows:

Darwin Harbour Upgrade and New Port—scoping is needed for expanded shipping facilities at East Arm Wharf, a new port at Middle Arm, and rail extension to a further new port at Glyde Point. Cost estimates are \$350 million for a new bulk berth, \$15 million for a hardstand area and refrigerated containers, with \$12 million for a new container crane. These upgrades would support growth in the oil, gas and mining industries and facilitate freight movements throughout Asia.⁴³ A fuel bunkering facility with new cruise berths would support tourism.⁴⁴

¹⁸ Infrastructure Australia, *Infrastructure Priority List Update – December 2013*.

The footnotes to this section reference the source of these statements as:

43 Mr Gary Nairn, Northern Territory Planning Commission, *Committee Hansard*, Darwin, 20 May 2014, p. 19; Hon. Adam Giles MLA, Northern Territory Government, *Committee Hansard*, Darwin, 20 May 2014, pp. 9, 10.

44 Tourism and Transport Forum, *Submission 237*, p. 5.

5.5 The *Pivot North: Inquiry into the development of Northern Australia: Final Report* (September 2014) included the following recommendation:

Recommendation 27: The Committee recommends that the Australian Government identify key ports and commit to funding their upgrade, subject to relative benefit assessment by Infrastructure Australia. Projects to consider may include:

- Darwin;
- Karumba; and
- Wyndham

5.5 Chief Minister Giles has suggested that private ownership of the Port of Darwin could facilitate the expansion of the port and connected infrastructure to the extent that imports to southern states could come through Darwin and travel to southern states by road or rail. He suggests that ‘the goal of this government is to make the Port of Darwin a cost effective alternative to southern ports which are becoming congested and have serious transport and logistics issues.’¹⁹

5.6 We believe that such statements need to be treated with scepticism until the potential is backed up with firm evidence – which so far has not been offered. For one thing, shipping is a far cheaper way to transport goods per tonne-kilometre than road or rail, particularly when they are containerised (as in consumer or most agricultural goods) or in bulk (as in mining and other resources).²⁰ The other challenge is the regular wet season that the fact that this does from time to time cut off both road and rail infrastructure between the Port of Darwin and other states (such as in the 2012 Edith River washout). The reliability of current inland infrastructure needs to be carefully considered, and considerable investment may be needed – on a scale that would dwarf any investment in the port.

5.7 Currently, the privatised Port of Brisbane is seeking to develop rail connections from the port into south-east Queensland, which would then connect to Melbourne. However, the Port has had to seek support from both the State and Federal government for this plan.²¹ When government support is required for such an enormous undertaking, requiring significant integrated planning, it is unclear why privatising the Port would facilitate such an outcome.

¹⁹ Adam Giles, Second Reading Speech, *Port of Darwin Bill 2014*.

²⁰ Brooks et al. Understanding mode choice decisions: A study of Australian freight shippers, October 2011.

²¹ Port of Brisbane, Port of Brisbane Pty Ltd welcomes Federal and State commitment to rail, 28 August 2013.

5.8 There is no guarantee that private ownership will result in significant investment. Table 1 shows no significant upward valuation of the Port of Brisbane’s assets after privatisation. The valuation of ‘property plant and equipment’ would in fact have declined significantly, except that in 2013-14 the Port changed its accounting policy in relation to the dredging fleet to ‘fair value’, which resulted in a \$10.7 million increase to the book value of the fleet.²²

Table 1: Value of Port of Brisbane assets in property, plant and equipment and in general port operating rights.

	Immediately after privatisation²³	FY 2013-14²⁴
	FY 2010-11	
Non-Current assets: Property, plant and equipment	\$51.8 million	\$52 million
Non-Current assets: Channel – right to charge	\$652.8 million	\$655.8 million

5.5 Flinders Ports does have a better record of investing in port infrastructure. However, the logic of privatisation does mean that this investment appears to have been made in an unbalanced way that disadvantages other port users. Flinders Ports appears to be using the significant profit it generates (Annex 1) to expand into stevedoring and logistics functions, and into potentially owning other ports. It is currently bidding for the lease for the Port of Darwin. In 2010, Flinders Ports established a bulk stevedoring and logistics company Flinders Logistics. This company is currently tendering for contracts against established stevedoring companies Patrick and Qube. It recently won a contract from Qube in Port Pirie. While Flinders Logistics does have industry-standard enterprise agreements and does not appear to be using these circumstances to reduce the wages and conditions of workers, changes in contracts can create significant instability and potential job losses for workers.

5.6 In 2012, Flinders Ports gained full control of the Flinders Adelaide Container Terminal by purchasing the remaining 60% share from DP World, who previously managed the terminal. This is the only container terminal in South Australia.

5.6 One result of the expansion of Flinders Ports into stevedoring is that it is effectively both a landlord and a competitor to Patrick and Qube.

5.7 The ACCC warns against such a outcome in ports, see Annex 3.

²² Port of Brisbane Pty Ltd, *Special Purpose Financial Report for the year ended 30 June 2014* (filed with ASIC), p.12.

²³ Port of Brisbane Pty Ltd, *Special Purpose Financial Report for the period from 21 May 2010 to 30 June 2011* (filed with ASIC), p. 6.

²⁴ Port of Brisbane Pty Ltd, *Special Purpose Financial Report for the year ended 30 June 2014* (filed with ASIC), p.7.

- 5.8 It appears to MUA members in South Australia that Flinders Ports focuses its capital investments on areas in which it owns and operates, and neglects those areas of the port that it rents to companies which are now its competitors. It is noticeable that both the amenities and wharf area rented by Patrick and Qube in the Port of Adelaide are in a much worse state of repair than those areas in which Flinders Ports operates stevedoring companies.
- 5.9 There are other options for raising private funds while still maintaining public control of the Port.
- 5.10 One option is for the Government could invite private investment in the Port in the form of a specific purpose bond - a Darwin Port Infrastructure Bond. In this case, we would support the principal bond purchaser/private partner be the industry super funds. This could be organised through a collective vehicle, a specific purpose consortium or a single large fund. Such bonds could provide a reasonable rate of return over a long time horizon (e.g. 30 years), with the rate of return guaranteed by Government but based on a due diligence assessment of the port's long term profitability.
- 5.11 A second option is for the government to retain 51% ownership of the Port with a joint board. The joint venture partners would simply operate the port commercially and share the profits, according to normal commercial joint venture arrangements. In this case, we would support the tender being designed to give industry super funds first right to be the private partner.

Recommendation 8: the Committee should be aware that the fact of private ownership does not necessary equate to increased investment in port facilities.

Recommendation 9: If the Territory wishes to raise funds for investment in the port, a long term lease is not the only way to do this. There appears to be significant political support at the Commonwealth level for an investment into the Port of Darwin of approximately \$336 million. The Committee should investigate the support that exists at a Commonwealth level for the Infrastructure Australia and the *Pivot North* recommendations for the Commonwealth to invest in the Port of Darwin.

Recommendation 10: Evidence and costings of the feasibility of using the Port of Darwin to ship freight to Southern states must be released and subject to public scrutiny. The possibility for inland infrastructure to actually support such movements must be closely scrutinised.

Recommendation 11: Minimum maintenance and service levels should apply equally to all port users. Port users and workforce must be able to have input into port developments.

Recommendation 12: There are options for raising private funds while still maintaining public control of the Port. The MUA supports investment in port infrastructure by not-for-profit super funds. One option is for the Government could invite private investment in the Port in the form of a specific purpose bond - a Darwin Port Infrastructure Bond. A second option is for the government to retain 51% ownership of the Port with a joint board. The joint venture partners would simply operate the port commercially and share the profits, according to normal commercial joint venture

arrangements. In both cases, we would support the investment being structured so that industry super funds had first option on bonds or in joint investments.

6 The Port of Darwin, NT consumers and NT coastal communities

- 6.1 The Port of Darwin plays a unique role in the regional economy, it provides critical services to Darwin and regional areas, and keeps remote communities supplied with essential goods. We are very concerned about the impact that privatisation could have in this situation.
- 6.2 The port allows supplies to be delivered to Darwin even when road and rail connections are cut off due to extreme weather.
- 6.3 During floods, road and rail services to Darwin can be cut off. This happened in the 2012 Edith River washout. During such events, the Port of Darwin is critical for the import of supplies for the whole city and region.
- 6.4 Due to an oil and gas boom and iron ore exports, the Port of Darwin is currently extremely busy. East Arm wharf is the only wharf large enough to accommodate a container ship importing supplies. However, this wharf is also heavily used by the oil, gas, and iron ore industry.
- 6.5 In an emergency, the Port needs to be able to direct the use of East Arm wharf in the public interest. It is possible that this could delay other non-essential commercial shipments (for example, iron ore exports). The public must be confident that the Port Corporation is willing to uphold the public interest and allow access for ships carrying essential and potentially life-saving goods, and not be beholden to private interests who may be willing to pay a higher price in the event of an emergency.
- 6.6 In such an environment, monopolies can quickly arise and are known to take advantage of difficult situations. We understand that in the wake of the 2012 Edith River wash out, freight companies raised prices significantly.²⁵ We believe that privatising the port would increase the likelihood for such monopolistic behaviour that is not in the public interest.
- 6.7 The Port of Darwin also hosts the region's main fuel import terminal. As a typical MR-size fuel tanker carries the equivalent of 1,000 road trucks worth of fuel, it is impossible to replace a shipment with road trucks. Access to this terminal must also be maintained in the public interest.
- 6.8 The Port of Darwin currently supplies essential goods to communities along the NT coast, and as far as Queensland and West Australia. Some of these communities, such as the Tiwi Islands, do not have road access. Communities that do have road access are frequently cut off for three months or longer during the wet season. Access to wharf space for the supply of

²⁵ Betts, Alyssa "Freight costs to soar after train crash" *NT News*. 4 January 2012.

these communities must be maintained. We are concerned that in a for-profit environment, the needs of oil, gas and iron ore companies would be priorities over low-margin but essential community supplies.

- 6.9 The substantial fee increases for ships using the Port of Darwin will have different effects on different port users. Port users range from ships carrying essential groceries and building materials to remote coastal communities, to those carrying out construction for multinational oil and gas companies.
- 6.10 It should be noted that consumer prices in Darwin are 27.67% higher than in Sydney. Grocery prices in Darwin are 34.37% higher than in Sydney.²⁶ Average fuel prices for the months of February 2015 (petrol, diesel and LPG) are higher than in any other capital city.²⁷ The Territory government explains on its website that “the comparatively small population in the Northern Territory and vast freight distances do mean higher prices for many grocery lines and produce in some instances”.²⁸ Prices outside of Darwin are even higher.
- 6.11 In this context, the significant increases in port fees and rental costs in some privatised ports should be cause for concern, as should the February 2015 port tariff increases in the Port of Darwin. The proposed Ports Management Act 2014 gives a private port operator the power to set port fees, with the Utilities Commission monitoring prices and stepping in where necessary. This is much less stringent regulation than applies, for example, in South Australia, where the South Australia Essential Services Commission sets port fees. It is also a more liberal approach than has been taken in NSW, where the public entity the Port Corporation of NSW and its port-specific bodies in Sydney, Port Botany and Port Kembla sets and collects port fees from ships (NSW Ports, the private entity which has a 99-year lease of the port, primarily collects port rent rather than fees from ships).
- 6.12 Given that the Port of Darwin is far more isolated and more likely to be relied on in emergency situations and for essential goods than Sydney, Port Kembla or Adelaide, stronger regulation should apply. The MUA recommends that in case of any port transaction, the power to set prices should only be held by a public entity.

Recommendation 13: There must be provisions in the Ports Management Act 2014 for access to Port wharves for essential and emergency services.

Recommendation 14: It appears that the Ports Management Act 2014 treats price regulation for all port users equally, whether they are providing groceries and building supplies to the Tiwi Islands or supplying multinational oil and gas project construction. Given the very substantial February 2015 increase in Port fees, and the possibility of future increases, the Committee must inquire into whether increases in port fees are already affect or will have a future effect on shipments of

²⁶ See website www.numbeo.com.

²⁷ See website motormouth.com.au/news/mediadata.aspx

²⁸ Northern Territory Government, www.australiasnorthernterritory.com.au/Living/Pages/housing-cost-living.aspx

essential goods to communities along the coast of the NT. It must be evaluated whether such increases will have a disproportionate effect on coastal Aboriginal communities.

Recommendation 15: In particular, the new fee of \$2,000 per ship call could have a disproportionate impact on ships carrying smaller and lower-value cargos, such as those supplying remote communities. It does not appear that there is any exemption from this charge for smaller vessels. Because it is charged per visit rather than per cargo volume, it also creates an incentive for a less regular service to remote communities.²⁹

Recommendation 16: The Committee should examine the potential for increased port fees and rental costs being charged by private port owners (or public owners in preparation for privatisation) to be passed on to Northern Territory consumers in terms of the cost paid for imported goods, which is of concern given the already-high cost of goods in the Territory.

Recommendation 17: The Committee should also examine whether increased port fees and rent are likely to increase the cost of exports and what impact this may have on the competitiveness of exports from Darwin.

Recommendation 18: The power to review, set and charge port fees should be left with a public body, as is the case with Port Botany and Sydney,³⁰ for Port Kembla in relation to pilotage fees and operations requiring safety permits,³¹ and for Newcastle in relation to pilotage fees.³² The draft Ports Management Act 2014 should be amended to require this.

7 Increased fees at privatised ports

7.1 Annex 2 provides a detailed case study of the Port of Brisbane, where a requirement for increases in port fees and rental appear to have been built into the structure of the new private entity. Due to the new 99-year lease, port operating costs increased 412% in a single year. The Port subsequently raised fees to ships, rental fees to logistics and stevedoring companies, cut costs, and cut jobs. The Port is now very profitable, delivering a \$71.8 million profit and a \$25 million dividend on revenue of \$319 million.

7.2 The Australian Competition and Consumer Commission (ACCC) monitors container terminal stevedoring and publishes an annual report.³³ As part of this report, it publishes cost indexes for the stevedoring companies, divided into labour costs, equipment costs, and property

²⁹ Darwin Port Corporation, Schedule of Port Charges as at 1 February 2015.

³⁰ *Sydney Ports Corporation Schedule of Port Charges effective 1 July 2014*. The port was privatised on a 99-year lease in May 2013.

³¹ Port Authority of NSW Port Kembla, *Schedule of Port Charges, Prices effective 1 January 2014*. The port was privatised on a 99-year lease in May 2013.

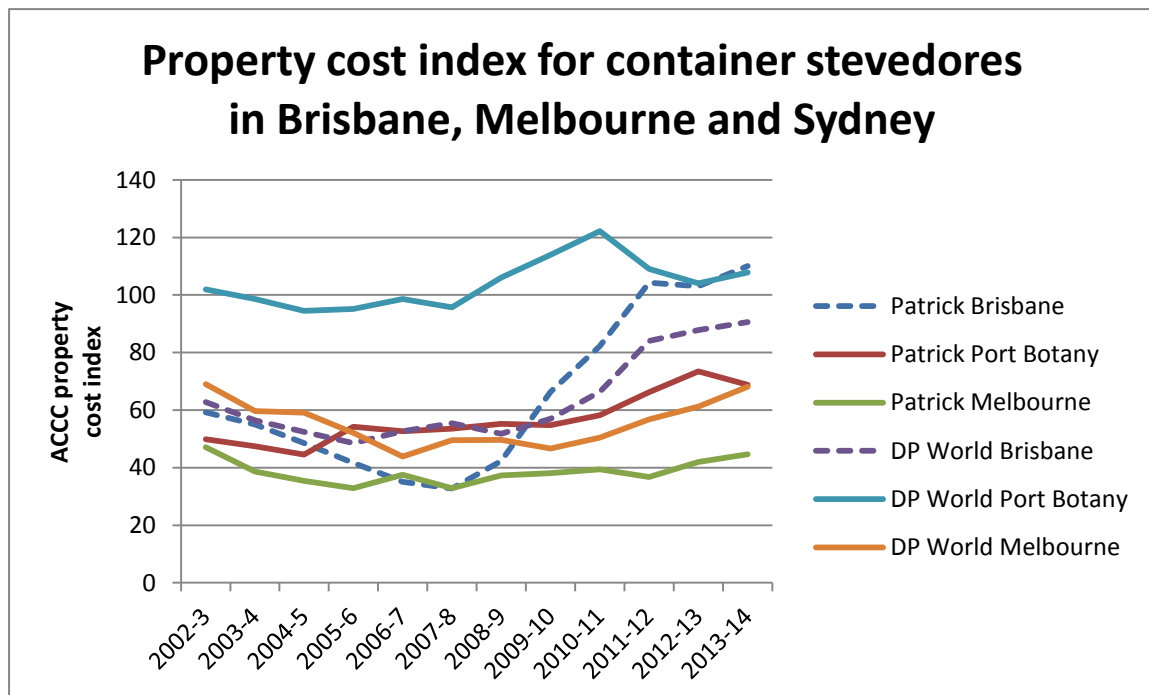
³² See www.portofnewcastle.com.au/Commercial-Opportunities/Pricing.aspx and Newcastle Port Corporation, *Schedule of Port Pricing, Effective from 1 July 2014*. The Port of Newcastle was privatised on a 98-year lease in May 2014.

³³ Named the *Container Terminal stevedoring monitoring report*, available on the ACCC website.

costs. It is our understanding that property costs are mainly composed of rental fees paid to port authorities.

7.3 We have plotted the ACCC’s ‘total property cost index’ for the Patrick and DP World container terminals in Brisbane, Sydney and Melbourne in Figure 1. Both Brisbane terminals are marked in dashed lines. These two terminals pay rent to the Port of Brisbane, which was privatised through a 99-year lease in 2010. From 2009-10, property costs for both container terminals in Brisbane increase significantly (although the timing of rent increases is likely to depend on the expiry date of leases). It is too early to evaluate the effects of privatisation on Port Botany from this data.

Figure 1: Total property cost index for container stevedores in Brisbane, Melbourne and Sydney.



Source: ACCC, *Container Terminal stevedoring monitoring report no.16*, October 2014. Appendix C: Company trends in cost components, p. 67-72.

7.4 Shipping companies and organisations such as Maersk and Shipping Australia have made complaints about the increasing port fees in privatised ports, and about consolidation among companies owning different Australian ports.³⁴

7.5 Stevedoring and logistics companies and organisations including Qube, Asciano, DP World, AAT and the Freight and Trade Alliance have raised concerns about the impact of port privatisation on rents for stevedoring and logistics companies.³⁵

³⁴ Michael Bleby and Jenny Wiggins, Port sales slammed: Privatisation: NSW exporters will suffer in the long term: Maersk, *The Australian Financial Review*, Wednesday 2 July, 2014. Jemma Castle, NSW ports and Brisbane have owners-in-common, *Lloyds List Daily Commercial News*, 19 April 2013.

8 Loss of Territory revenue

- 8.1 Given that the Port of Brisbane Corporation paid its shareholders, the Queensland Government, \$519.8 million dollars in dividends in the two years before it was privatised, we suggest that the \$2.1 billion received for a 99-year lease of the Port was not a good deal at all. Likewise, the price of \$186 million for a 99-year lease for Flinders Ports compares rather poorly to the \$47 million that Flinders Ports generated in net profit and dividends in 2013-14 alone.
- 8.2 There are many known accounting practices which make the privatisation of a state asset look more financially rewarding. These practices are reviewed in a recent Senate submission by Professor Bob Walker and Dr. Betty Con Walker.³⁶

Recommendation 19: The Northern Territory must publish a cost benefit analysis which considers forgone expected revenues against the expenditure of the asset sale proceeds. This analysis must be evaluated against the accounting procedures and potential distortions outlined in the February 2015 Senate submission by Professor Bob Walker and Dr. Betty Con Walker.³⁷

9 Port planning and governance

- 9.1 Historically, most Australian ports have been publically owned by arms-length Port Authorities governed by state or Territory legislation. Port Authorities provide services such as pilotage, vessel traffic control, safety, oil spill control, emergency response, and port maintenance such as wharf maintenance, dredging and land reclamation, as well as planning future port developments. Port Authorities charge fees to visiting ships for these services. In most cases, particularly in larger ports, port authorities act as a landlord, and lease land to stevedoring and other port services companies.
- 9.2 Port infrastructure must be carefully planned to connect with land-side infrastructure, either rail or road. Poor planning of port infrastructure and connections can result in significant bottlenecks in the import and export of goods and raw materials.

³⁵ Michael Bleby and Jenny Wiggins, Port sales slammed: Privatisation: NSW exporters will suffer in the long term: Maersk, *The Australian Financial Review*, Wednesday 2 July, 2014. Jemma Castle, DP World's Brisbane surcharge increase 'not about rent', *Lloyds List Daily Commercial News*, 27 March 2013. Jemma Castle, A superfund future for Botany and Kembla, 26 June, 2013. AAT, Tariff review, 29 April 2010, <http://www.aat.auz.biz/News/AAT%20Pricing%20Notification%20290410.pdf>.

³⁶ Emeritus Professor Bob Walker and Dr. Betty Con Walker, Submission to Inquiry into privatisation of state and territory assets and new infrastructure, February 2015.

³⁷ Emeritus Professor Bob Walker and Dr. Betty Con Walker, Submission to Inquiry into privatisation of state and territory assets and new infrastructure, February 2015.

- 9.3 Port Authorities play a critical role in balancing the needs of importers, exporters, stevedoring and shipping companies, the public interest in harbour land and sea areas, and the regional area they serve. They play a critical role in long-term planning and construction of port infrastructure specific to the future needs of the port and the state, and the types of ships and commodities the port handles and is expected to handle in the future. This infrastructure requires significant investment.
- 9.4 If port authorities and governments had not had the foresight and capacity to make significant investments in ports, the Australian economy would have been significantly constrained. Significant public funds were invested in the construction of these ports, which in turn provided an essential service to the economy and significant government revenue.
- 9.5 The Darwin Port Corporation current has good levels of participation and consultation. Members of the port workforce and the MUA participate in the Safety Committee, which includes the port's elected Health and Safety Representatives (HSRs) from each designated work group. This committee also sends an HSR the port Health, Safety, Environment and Security Committee. The MUA also participates in the Port's Joint Consultative Committee, which includes Port management and MUA and AMWU representatives, and the Port Welfare Committee, which is primarily concerned with the Seafarers' Centre and the welfare of visiting seafarers.³⁸
- 9.6 It is the experience of MUA branches that their ability to participate in the governance of privatised ports is significantly less. In both the Port of Brisbane and Flinders Ports, the only port committee that the MUA has a place on is the Maritime Security Committee. These committees were enacted in the mid-2000s as a result of changes to maritime security procedures in ports.
- 9.7 Port users, including shipping lines and stevedoring companies, were previously represented on port boards of directors. On some occasions, unions also had representatives on boards. In privatised ports, directors tend to be exclusively representatives of investment funds who own the ports.
- 9.8 Potentially, this can make for a limited degree of maritime experience on port boards, with decision making about the port focus more towards immediate return on investments, rather than the long-term thinking that established and developed port facilities in the first place.
- 9.9 Another result of the dominance of port boards by investment funds rather than port users and community representatives has been a rapid turnover of board members. New company directors were appointed for the privatised Port of Brisbane on 30 November 2010. Since that time, 13 separate forms to change company directors have been filed with ASIC. There are currently a total of six Directors for the Port of Brisbane, including the Company Secretary. Of these six, three have been appointed since December 2013. Only two are part of the original Directors appointed on November 30, 2010. Carleen Fitzsimon is the fourth Company

³⁸ Darwin Port Corporation, 2014 Annual Report, p. 83-90.

Secretary since November 2010.³⁹ None of the current Directors served as directors of the previous Port of Brisbane Corporation Ltd.⁴⁰

- 9.10 The fragmentation of ports into different private owners will significantly preclude opportunities for integrated national planning of freight and logistics transport, especially for shipping to connect ports.
- 9.11 A focus on trying to obtain a high sale value for ports can encourage over-optimistic assessments of future trade through ports and the required infrastructure investment in ports. Such over-optimistic assessments can increase the potential sale price of ports.
- 9.12 In turn, a high sale value can increase the pressure on private ports to cut jobs and port services and public amenities, particularly if the port is relying on forecasts which are not accurate.
- 9.13 Annex 1 indicates the different structures used in port privatisations. The private Flinders Ports and Port of Brisbane operate all port services and collect all port fees. Port fees charged in South Australia are set and regulated by the Essential Services Commission of South Australia, and state legislation and a monitoring panel monitor the container terminal.
- 9.14 However, in NSW, the Port Authority of NSW is a public entity with branches in each port, essentially made up of parts of the previous public port authorities. In Sydney and Port Botany, the Port Authority of NSW collect all port fees⁴¹ and provide all port services, including pilot cutters, emergency response, fire-fighting, oil spill response, pollution control officers, security and patrol officers, and passenger ship services. In Newcastle, the private Port of Newcastle collect fees and operates the port dredge and other services. The public Port Authority of NSW carries out pilotage and oil spill control. In Port Kembla the public Port Authority of NSW carries out pilotage, safety monitoring of ships, and vessel traffic control.
- 9.15 We note that the Ports Management Act 2014 gives the regional harbourmaster the authority to place navigation aids on Aboriginal land without consultation and without a permit to enter Aboriginal land. This provision must be amended.

Recommendation 20: Forecasts about future trade through the Port of Darwin on which any future port transaction is based must be published and subject to independent scrutiny.

Recommendation 21: Port authorities must be able to balance competing interests of port users and the broader community and be able to make decisions in the public interest. Port boards must be structured to reflect this critical role. Members of the port workforce and unions must have the opportunity to participate in port committees.

³⁹ ASIC Historical Company Extract, Port of Brisbane Pty Ltd. 11 February 2015.

⁴⁰ Port of Brisbane Corporation Limited, *Annual Financial Report for the year ended 30 June 2010*.

⁴¹ See *Sydney Ports Corporation Schedule of Port Charges effective 1 July 2014*.

Recommendation 22: The current committee structure within the Darwin Port Corporation must be retained or improved in the course of any port transaction. This should be reflected in the Ports Management Act 2014.

Recommendation 23: Section 99 of the proposed Ports Management Act 2014 gives the regional harbourmaster the authority to place navigation aids on Aboriginal land without consultation and without a permit to enter Aboriginal land. This must be amended to require consultation and a permit. Navigation aids can be designed in many different ways, and on Aboriginal land navigational aids must be designed in consultation with the proper Aboriginal authorities with responsibility for that place. The Committee must also ask relevant Land Councils to review this legislation to ensure that there are no other problems with it.

10 ACCC's recommendations for regulation of privatised ports

10.1 The ACCC has made detailed recommendations about problems that it has observed at privatised ports. These are included in Annex 3.

Recommendation 24: That the Committee closely examine the ACCC's examination of the problems in recent port privatisation and regulation

11 Jobs at privatised ports

11.1 A three-year moratorium on job cuts was agreed as part of the long-term lease signed for the Port of Brisbane. After this three year period was over, significant job cuts and outsourcing were undertaken. Table 2 in Annex 2 shows a significant reduction in the Port of Brisbane workforce as reported to ASIC, from 268 workers to 184 – a decline of 84 jobs or 31% of the workforce. These are only the workers directly employed by the port and does not include the stevedoring workforce.⁴² These numbers are sourced from the Port's ASIC filings, and also reflect the MUA's experience in the Port, where a significant number of Port employees are MUA members.

11.2 Job losses have taken place through workers leaving and not being replaced. Maintenance work was contracted out. The port's land reclamation area, where dredge spoils and soil for the expansion of the Port beyond Berths 12-13 are managed, was shut down for a period. These workers have now been replaced with workers who have been contracted out. Jobs have been lost in administration, maintenance, reclamation, procurement (of stores & equipment), catering, and in other ancillary areas.

11.3 In Port Botany, one immediate impact of the new long-term lease has been felt in the recently-expanded Bulk Liquid Berths. The public entity Sydney Ports previously operated

⁴² From ASIC Form 388 filed with financial statements and reports. Question 2 c) asks 'How many employees are employed by the large proprietary company and the entities that it controls?'

these berths. When the Bulk Liquid Berths were transferred to the private entity NSW Ports, the decision was made to contract-out the operation of the Bulk Liquid Berths. The company chosen by NSW Ports was OPEC Systems, an anti-union company whose workers are employed on much worse terms and conditions than the workers who previously operated the Bulk Liquid Berth. The MUA is currently attempting to improve the situation of these workers.

- 11.4 These job losses have taken place despite the ports being very profitable and paying substantial dividends to their owners (Annex 1). Therefore, there has been significant financial gain by port owners at the expense of the port workforce.

12 Impact of privatisation on community facilities

- 12.1 The Darwin Port Corporation has transferred Stokes Hill wharf and the Frances Basin to other government departments or corporations. However, the Port Corporation has historically played a role in supporting public events, such as the commemoration of the bombing of Darwin and the Borella ride. We understand that the Port Corporation and any potential private entity will also continue to operate the Seafarers' Welfare Centre. The Port Corporation also has a general responsibility to the public who use the harbour and live and work in the surrounding community.
- 12.2 There is a concerning example of a lack of consultation with communities and a loss of public amenities which do not generate a profit in the Port of Brisbane following the 99-year lease. The 2013-14 Port of Brisbane annual report contains the following statement:

Provisions – Community Facilities

The purchase agreements for PBPL under the 99-year lease, consistent with the public access provided at the Commencement Date, must allow the general public access to the existing public facilities within the Port Area, including the Visitors Centre, Observation Cafe, Shorebird Roost and adjoining car park. A provision has been made for the operating costs of these community facilities.

Management undertook a review of the provision during the year and it was determined the provision was surplus to the net present value of future cash flows. Subsequently the provision was reduced by \$3,478,000 which was taken to the profit and loss account.⁴³

- 12.3 It appears that the savings of \$3.5 million referred to above was included in the profit that port owners accrued in 2013-14.

⁴³ Port of Brisbane Pty Ltd, *Special Purpose Financial Report for the year ended 30 June 2014* (filed with ASIC), p.11.

12.4 The original “Visitors Centre, Observation Cafe, Shorebird Roost and adjoining car park” are visible in the red circle in Figure 2 below.

Figure 2: Community facilities which the Port of Brisbane was required to operate according to the 99-year purchase agreement of the Port, comprising the Visitors Centre and Observation Cafe overlooking the large pond at the top of the red circle, the adjoining car park and picnic facilities, and the Shorebird Roost across the road.



Source: Google Maps, viewed on 12 February 2015.

12.5 Despite the fact that the Port of Brisbane freely admits that it is a requirement in the purchase provisions of the Port for that it maintain public access and public amenity to the areas listed above, the following has taken place during FY2013-14:

- The Visitor’s Centre buildings overlooking the lake and bird habitat, which provided educational services about the port and maritime trade to school children and other members of the public, have been removed.
- The Cafe in the Visitors Centre was a quality restaurant with full catering services. It overlooked the lake, birds and harbour. Most of the catering staff have been laid off and the cafe has been moved to the Port Administration Building. It is now a cafe serving light snacks with considerably reduced services.
- The picnic area next to the Visitors Centre has been removed.
- The land which accommodated the Visitors Centre and Cafe has been bulldozed, fenced off, and has been paved right up to the pond for the purpose of storing new cars being delivered to the port.
- The new car storage area generates additional revenue for the Port of Brisbane (see *Port of Brisbane Schedule of Port Charges as at 1 July 2014*).

12.6 The original Visitors Centre area was a Brisbane destination. It is still listed as such on the Visit Brisbane website, described as ‘picturesque’ and ‘with abundant bird life’, and where you could ‘learn about the operations of a working port’.⁴⁴ The building itself won a High Commendation for Sustainable Architecture and a High Commendation for Commercial Building Architecture from the Australian Institute of Architects in 2002.⁴⁵

Figure 3: Photo of the former Visitors Centre and lake still available on the Visit Brisbane tourist website. The site has now been bulldozed and turned into a carpark by the privatised Port of Brisbane despite community objections.



12.7 The MUA are not aware of any public consultation about these changes. The Port of Brisbane freely admit that the changes were made after ‘Management undertook a review’ for which the only criteria appears to be ‘the net present value of future cash flows’ (see 12.1 above).

12.8 An online petition against the demolition of the Visitors Centre organised by the Bulimba Creek Catchment Area Committee attracted 2,659 signatures.⁴⁶

⁴⁴ Port of Brisbane Visitors Centre, at www.visitbrisbane.com.au/brisbane/things-to-do/tours-and-transport/port-of-brisbane-visitors-centre?sc_lang=en-au, accessed 12 February 2015.

⁴⁵ See http://dynamic.architecture.com.au/awards_search?option=showaward&entryno=20024414, accessed 12 February 2015.

⁴⁶ Petitioning Port of Brisbane Pty Ltd: Request - Port of Brisbane - Save an iconic lake at Fisherman's Island, QLD. At www.change.org/p/port-of-brisbane-pty-ltd-request-port-of-brisbane-save-an-iconic-lake-at-fisherman-s-island-qld#share, accessed 12 February 2015.

12.9 The former site of the Visitors Centre is shown in Figure 4 and Figure 5. The area is now paved right to the pond and a new fence has been installed across the former public access road. A visitors centre and cafe are now located in the high rise main administration building, in a much less amenable area of the Port, as indicated in Figure 6.

Figure 4: Former public access road to the former Visitors Centre.



Figure 5: View of the former Visitors Centre site, showing paving right to the water's edge.

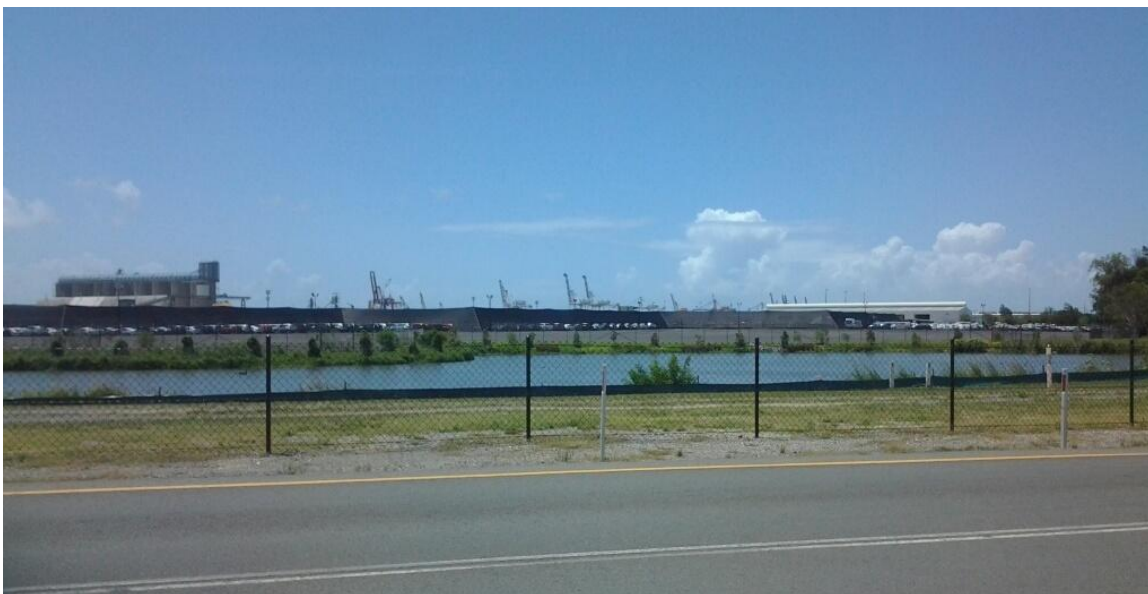


Figure 6: Port of Brisbane administration building, site of the re-located Visitors Centre and cafe.



Recommendation 25: that the Committee carefully investigate how it was possible for the Port of Brisbane to apparently disregard the conditions for public access and community facilities specified in the Purchase Agreement. This is critical to evaluating future safeguards in such transactions.

Recommendation 26: That provisions be included in the Ports Management Act 2014 to safeguard the Seafarers' Welfare Centre and any other community provisions that could be affected by the transaction. The Act must also provide a broader duty of care to other ports users and the port community and enforceable Community Service Obligations (enforceable by imposition of financial penalties).

13 Comments on the Acts

13.1 We were surprised by the sweeping powers given to the Chief Minister in the Port of Darwin Act 2014. We are also surprised that the Ports Management Act 2014 was not included in the Terms of Reference for this inquiry.

13.2 While the Port of Darwin Act 2014 appears to give the minister unlimited powers to deal with the Darwin Port Corporation as he sees fit, the Ports Management Act 2014 makes a number of assumptions about the structure of the privatised Port of Darwin. For one, it assumes that pilotage services are privatised with the Port, and it precludes the Port Botany and Sydney model of retaining a public port corporation that collects fees and delivers port services.

Recommendation 27: A proper Inquiry must be held into the Ports Management Act 2014. It was an error not to refer to this Act in the Terms of Reference for this Committee, particularly because the Act is very detailed and may shape the structure of the Port long into the future.

Recommendation 28: The Ports Management Act 2014 should be amended to provide for a public Port Corporation to be retained, and to deliver port services.

Recommendation 29: We ask that the Committee investigate and then explain to the public the implications of the following section of the Port of Darwin Act 2014:

29 Excluded matter for Corporations Act 2001

Any act or omission of the Chief Minister under this Act is declared to be an excluded matter for the purposes of section 5F of the Corporations Act 2001 in relation to Chapter 2D of that Act.

Recommendation 30: We believe that the form of any transaction involving the Darwin Port Corporation must be determined in an open and transparent manner, and specified in the Port of Darwin Act 2014. This would require amendment of Section 7 of the Port of Darwin Act 2014, which currently says:

(3) There are no limitations on the nature of the entities that can be used, or on the kind of transaction arrangements that can be entered into, for the purposes of an authorised transaction.

(4) Port assets can be transferred for the purposes of an authorised transaction in any manner.

14 Safeguards for port transactions

14.1 It must first be carefully determined whether the sale or lease of a public asset is in the long-term interests of the public. The MUA opposes privatisation on the basis that it is not. There are a number of safeguards that Governments could use to improve the structure of tenders and obligations on successful bidders.

14.2 Firstly, by increasing transparency of the tender process. Tender documents, including all economic and financial data should be publicly available at no cost, as should the details of bidder's and all non commercial-in-confidence details of their tenders. In addition, tenderers should not be prohibited from conferring with third parties. In fact third party discussions should be encouraged, even required. Tenderers should be required to include in their tenders, the third party discussions or consultations they have undertaken.

14.3 Second, by imposition of unambiguous Community Service Obligations to apply to the successful bidder. Government tenders should include transparent and specific Community

Service Obligations (CSOs) that the successful bidder will be bound to implement. To guard against backsliding by a successful bidder, the CSO should be made enforceable by, inter alia, imposition of clear and substantial financial penalties for non compliance. The CSO should include a public complaints procedure.

- 14.4 Thirdly, by adoption of consistent and stringent regulatory arrangements. There should be a clear separation and clarification, post sale or lease, of the regulatory arrangements to apply for the future and clear identification of what aspects of the privatised entity is being regulated. In the case of port leases/sales, the pre-existing port corporation that managed the port asset on behalf of its Government shareholders, is also the regulator. There appears to have been too little attention has been paid to the powers and functions of the post sale/lease regulatory arrangements. We propose that COAG, in a transparent consultation with stakeholders, existing regulators and the ACCC, develop a set of best practice regulator guidelines for implementation by the States/Territories.
- 14.5 Fourth by establishment of transparent and appropriate governance arrangements for the privatised operating entity. Government tenders should require a commitment on bidders that if successful, they will operate the privatised entity under a formal governance structure that provides for representation from (i) the users (or their representative organisation) of the services that the entity provides; (ii) the government representing consumers/citizens; and (ii) the workforce (or their representative organisation/s).
- 14.6 In addition to the appropriate representation on formal governance arrangements, Government should require successful bidders to commit to establish consultative bodies to advise the formal governance body (usually a board). These consultative bodies should provide for consultation with key stakeholders. In the case of port sales/leases, this would include stakeholders such a service providers e.g. stevedoring and pilotage operators, users e.g. ship, truck and train owners/operators, representatives from the workforce, regulatory agencies such as economic, transport and WHS regulators.
- 14.7 Fifth, by improved reporting requirements. Successful bidders should be required to provide and publish detailed annual reports covering:
- Financial information (current year and previous to show trends) including:
 - Revenue sources and how they correspond to port operations
 - Profit and loss
 - Dividends paid
 - Return on capital
 - Return on investment
 - Capital investment information
 - Employment, disaggregated to permanent and non permanent
 - Outsourced/contracted functions including commissioned research and associated employment involved,
 - Schedules of fees and charges
 - Governance information – Directors and consultative bodies (composition, meetings/attendance, issues)
 - Performance and productivity measures

15 Alternatives for funding infrastructure development

- 15.1 The current period is characterised by an abundance of capital and capital sources to complement taxpayer (Government) capital sources to finance infrastructure assets. The MUA is an advocate for increased utilisation of not-for-profit (NFP) superannuation and pension fund investment in infrastructure, under the right funding model that delivers both a community and national interest benefit while at the same time delivering secure returns on that investment for the benefit of those NFP superannuation fund members.
- 15.2 The key challenge for Governments, where they have a clear mandate to invite private capital participation in the ownership structure of public assets, is to offer the best options to the institutional investor market, including the NFP industry super funds, to attract capital (i) to partner Governments in building/renovating existing public infrastructure assets that Governments wish to retain in public ownership; (ii) to purchase/lease former Government infrastructure assets that Governments wish to privatise; and (iii) to construct/operate new infrastructure assets under private or joint venture (PPP) arrangements.
- 15.3 So far, Governments have focussed primarily on functions (ii) and (iii) and have not done this very well. Invariably, sale/lease privatisations have not been appropriately structured at the tender stage. In our view, the market offer process needs to include a tailor-made or specific purpose element, (probably involving a superannuation fund select tender offer) to attract pension fund investment and/or debt financing, and to ensure transaction costs (bid costs and commissions/fees) are minimised. Governments are yet to effectively find a satisfactory solution to the risk/reward balance for greenfield projects where commencement of the income stream can be deferred. Function 1 is completely immature in Australia, and is likely to remain so while the public bond rate is falling, which ironically is coinciding with a period where there is depletion of public finances, thereby heightening the need for private finance to support Government infrastructure priorities.
- 15.4 The MUA believes that this dilemma for Governments will not be solved until there is wider public acceptance of the distortion and inherent volatility in capital markets and therefore public acceptance of the need for Governments to intervene in capital markets to incentivise investment into productive, transformative and employment generation activity, like key port infrastructure, principally through a new approach to industry policy, which requires supportive economic and social infrastructure to function effectively.
- 15.5 Under such a model, facilitated by the safeguards we outline in section 14, the ownership and financing of nationally significant assets that that are currently giving rise to considerable community anxiety, could be more effectively addressed.

Annex 1: Major privatised ports in Australia – summary of ownership and financial position.

Port Year privatised and structure	New entity	Sale price	Value of assets FY 2013-14	Revenue FY 2013-14	Profit before tax, depreciation, amortisation and finance costs	Dividends to shareholders	Margin before tax, depreciation, amortisation and finance
<p>Port of Adelaide, Port Lincoln, Wallaroo Port Pirie, Port Giles, Klein Point, Thevenard⁴⁷</p> <p>2001: Acquisition of port infrastructure, 99-year land lease and port operating license.</p> <p>Flinders Ports carries out all port services.</p>	<p>Flinders Ports</p> <p><i>Shareholders</i></p> <p>Infrastructure Capital Group (investment trust): 29%</p> <p>Motor Trades Association of Australia Super Fund: 21%</p> <p>EquipSuper: 19%</p> <p>State Super NSW: 17%</p> <p>Statewide Super: 14%</p>	\$186 million (2001)	\$695.7 million	\$212.1 million	\$97.8 million	\$22 million	46%
<p>Brisbane⁴⁸</p> <p>30 Nov 2010: all equipment and machinery, dredging fleet, all employees of the Port of Brisbane Corp, Port operating rights, on a 99-year lease.</p> <p>Port of Brisbane deliver all port services</p>	<p>Port of Brisbane Pty Ltd</p> <p><i>Q Port Holdings consortium:</i>⁴⁹</p> <p>IFM Investors (combined super funds): 27%</p> <p>QIC: 27%</p> <p>Caisse de dépôt et placement du Québec: 27%</p> <p>Abu Dhabi Investment Authority: 20%</p>	\$2.1 billion (2010)	\$983.6 million	\$319 million	\$108.3 million	\$25.2 million	34%

⁴⁷ Flinders Port Holdings Pty Ltd, *Copy of Financial Statements and Reports for the year ending 30 June 2014.*

⁴⁸ From www.portbris.com.au and from Port of Brisbane Pty Ltd, *Special Purpose Financial Report for the year ended 30 June 2014.*

⁴⁹ Global Infrastructure Partners, a New York based private equity fund, initially held a 27% share which they originally purchased for \$575 million in 2010. They sold this stake for about \$1 billion in November 2013 to the Canadian pension fund Caisse de dépôt et placement du Québec.

<p>Port Botany Port Kembla</p> <p>May 2013: 99 year lease</p> <p>Most port services are delivered by the public entity the Port Authority of NSW, which also collects port fees.</p> <p>Harbour Master, pilotage, navigation, dangerous goods and emergency services are delivered by the public entity the Port Authority of NSW, as well as operating cruise terminals in Port Jackson and ongoing development of Glebe Island. Port Authority of NSW collects fees for those services.</p> <p>NSW Ports collects all other port related fees.</p>	<p>NSW Ports Consortium</p> <p>IFM Investors (combined super funds): 45% 35% (combined)</p> <ul style="list-style-type: none"> - Australian Super - CBUS - HESTA - HOSTPLUS <p>Abu Dhabi Investment Authority: 19%</p>	<p>\$5.07 billion</p> <p>Port Botany: \$4.31 billion</p> <p>Port Kembla: \$760 million</p>					
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<p>Newcastle</p> <p>30 May 2014: 98-year lease.</p> <p>Port of Newcastle: dredge, port officers.</p> <p>Port Authority of NSW (public): pilotage and spill control.</p> <p>Port of Newcastle collects most fees. Port Authority of NSW collects pilotage fees.</p>	<p>Port of Newcastle Investments</p> <p>Infrastructure Fund (managed by Hastings/Westpac): 50% China Merchants: 50%</p>	<p>\$1.75 billion</p>					
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Annex 2: Case study: Port of Brisbane finances post-privatisation

- 1 We have undertaken a detailed comparison of the finances of the Port of Brisbane from before the time it was privatised. Since privatisation, and there has been a negative impact on public services and amenities delivered by the port, there have been a significant number of job losses. The port's owners are also making very high levels of profit.
- 2 In
- 3 Table 1, we compare financial reports for the Port of Brisbane before and after privatisation.
- 4 Before privatisation, dividends were paid to shareholders (the state of Queensland) to the amount of \$410.9 million in 2009 and \$108.9 million in 2010.⁵⁰ This is in addition to the \$232 million profit for the Port Corporation identified below for FY2010.
- 5 In 2009-10, \$404 million in Port of Brisbane Corporation assets were transferred to other public entities. This meant that the new Port of Brisbane Pty Ltd began operation with a lower revenue.
 - 5.1.
- 6 Table 2 shows that two significant operating expenses were added to the new port operating company: 'Operating Lease from Port of Brisbane Corporation Limited' (only in the first year) and 'Operating Lease from QPH Property Trust' (continuing in subsequent years). The addition of these two items as a result of privatisation raised operating expenses for the port from \$31.1 million to \$159.3 million – a 412% increase in a single year. The result was that the previously very profitable public corporation made a slight loss as a private company in FY2010-11.

⁵⁰ Port of Brisbane Corporation Limited, *Annual Financial Report for the year ended 30 June 2010*, p.6. Note that the report is marked on the front cover 'This is the best copy that can be obtained as the original is of a poor quality'. Although the financial tables are mostly legible, many of the notes to the tables are illegible.

Table 1: Port of Brisbane Pty Ltd historical value of assets, number of workers, revenue, profit before and after tax, depreciation, amortisation and finance costs, margin, and return on capital.

	Before privatisation FY 2009-10⁵¹	Immediately after privatisation FY 2010-11⁵²	FY 2013-14⁵³
Value of assets	\$1.276 billion ⁵⁴	\$865.5 million	\$983.6 million
Number of workers	Not specified	268	184
Revenue	\$420.3 million	\$209.1 million	\$319 million
Profit before tax, depreciation, amortisation and finance costs	\$354.1 million	\$11 million	\$108.3 million
Profit after tax, depreciation, amortisation and finance costs	\$232.3 million	Loss: \$6.3 million	\$71.8 million
Margin before tax (Profit/Revenue)	84%	5%	34%
Return on capital before tax	28%	-	11%

⁵¹Port of Brisbane Corporation Limited, *Annual Financial Report for the year ended 30 June 2010*.

⁵² Port of Brisbane Pty Ltd, *Special Purpose Financial Report for the period from 21 May 2010 to 30 June 2011* (filed with ASIC).

⁵³ Port of Brisbane Pty Ltd, *Special Purpose Financial Report for the year ended 30 June 2014* (filed with ASIC).

⁵⁴ Note that: 'During 2009-10 PBC transferred net assets totaling \$404.2 million to various state entities under transfer notices issued under the *Infrastructure Investment (Asset restructure and disposal) Act 2009*'. Port of Brisbane Corporation Limited, *Annual Financial Report for the year ended 30 June 2010*, p.6.

Table 2: Operations expense for the Port of Brisbane, before and after privatisation.

	Before privatisation FY 2009-10⁵⁵	Immediately after privatisation⁵⁶ FY 2010-11	FY 2013-14⁵⁷
Primary operations expense	\$31.1 million	\$32.8 million	\$32.2 million
Operating Lease from Port of Brisbane Corporation Limited	-	\$67.3 million	-
Operating Lease from QPH Property Trust	-	\$59.2 million	\$155.5 million ⁵⁸
Total operations expense	\$31.1 million	\$159.3 million	\$181.4 million

- 7 Table 2 and 3 demonstrate that very significant cost-cutting measures and increases to port revenue were structured into the privatisation of the port in order to make up the 412% increase in operating expenses.
- 8 The consequence was that significant increases were made to the fees charged to ships and rental fees charged to stevedores and other companies renting port land and facilities. Total port revenue increased by \$110 million from 2010-11 to 2013-14 (53% - Table 1).
- 5.2.
- 9 Table 3 outlines the increased charges to ships, showing at least a 53% increase in revenue from these fees between 2008-9 and 2013-14. Some of these increases are due to increased trade. However, we are doubtful that all of the increases can be attributed to increased trade.
- 10 Details of the fees charged to ships are laid out in the Port of Brisbane *Schedule of Port Charges as at 1 July 2014*. There are also fees listed in the Schedule which we are unclear where they are accounted for, such as Security Charges.

⁵⁵ Port of Brisbane Corporation Limited, *Annual Financial Report for the year ended 30 June 2010*.

⁵⁶ Port of Brisbane Pty Ltd, *Special Purpose Financial Report for the period from 21 May 2010 to 30 June 2011* (filed with ASIC).

⁵⁷ Port of Brisbane Pty Ltd, *Special Purpose Financial Report for the year ended 30 June 2014* (filed with ASIC).

⁵⁸ Note that \$6.2 million is deducted from this figure for 'Capitalised internal development costs and costs incurred for QPH Property Trust'.

Table 3: Increase in Port of Brisbane revenue collected from ships between 2008-9 to 2013-14. Details of these charges are laid out in the Port of Brisbane *Schedule of Port Charges as at 1 July 2014*.

	Before privatisation FY 2008-9⁵⁹	Before privatisation FY 2009-10⁶⁰	Immediately after privatisation⁶¹ FY 2010-11	FY 2013-14⁶²	% increase since 2008-9
Harbour and river dues	\$49.9 million	\$54.2 million	\$57.8 million	\$72.6 million	45%
Wharfage	\$34.5 million	\$36.9 million	\$40.4 million	\$49.8 million	44%
Port access charge	-	-	-	\$7.1 million	Not previously listed
Trade revenue (from ships)	\$84.5 million	\$91.2 million	\$98.1 million	\$129.5 million	53%

11 Details of the increased rental fees charged by the Port of Brisbane are outlined in Table 4. In particular, rental fees collected by the Port have increase by 111% between 2008-9 and 2013-14. Revenue collected from dredging services has also increased by 44%.

⁵⁹Port of Brisbane Corporation Limited, *Annual Financial Report for the year ended 30 June 2010*.

⁶⁰Port of Brisbane Corporation Limited, *Annual Financial Report for the year ended 30 June 2010*.

⁶¹ Port of Brisbane Pty Ltd, *Special Purpose Financial Report for the period from 21 May 2010 to 30 June 2011*.

⁶² Port of Brisbane Pty Ltd, *Special Purpose Financial Report for the year ended 30 June 2014* (filed with ASIC).

Table 4: Increased rental and other service fees charged by the Port of Brisbane to stevedores and other users of Port land, wharves, and dredging services.

	Before privatisation FY 2008-9 ⁶³	Before privatisation FY 2009-10 ⁶⁴	Immediately after privatisation ⁶⁵ FY 2010-11	FY 2013-14 ⁶⁶	% increase since 2008-9
Rental	\$66.5 million	\$86.6 million	\$82.5 million	\$140.2 million	111%
Services - dredging	\$16 million	\$14 million	\$14 million	\$23 million	44%
Services - other	\$11.5 million	\$13.2 million	\$14 million	\$15.5 million	35%

12 Table 6 shows the majors areas of revenue increase for the Port of Brisbane.

Table 5: Areas of increased revenue for the Port of Brisbane after privatisation.

Areas of increased revenue	Change from FY 2010-11 to FY 2013-14
Fees from ships (Table 3)	\$31.4 million
Rental charges (Table 4)	\$57.7 million
Services – dredging (Table 4)	\$9 million
Services – other (Table 4)	\$1.5 million
Unknown	\$10.4 million
Total (Table 1)	\$110 million

⁶³Port of Brisbane Corporation Limited, *Annual Financial Report for the year ended 30 June 2010*. Note that the numbers in this column of the report are particularly difficult to read. We have made our best effort and cross-checked through adding up the column total, however, there may be small errors.

⁶⁴Port of Brisbane Corporation Limited, *Annual Financial Report for the year ended 30 June 2010*.

⁶⁵ Port of Brisbane Pty Ltd, *Special Purpose Financial Report for the period from 21 May 2010 to 30 June 2011* (filed with ASIC).

⁶⁶ Port of Brisbane Pty Ltd, *Special Purpose Financial Report for the year ended 30 June 2014* (filed with ASIC).

Annex 3: ACCC Container Stevedoring Monitoring Report no.16

1.5.2 The impact of port privatisations

There has been a trend towards the privatisation of port assets. This trend continues with the Victorian Government's decision to offer a medium-term lease for the operation of Australia's largest container port, the Port of Melbourne.⁶⁵

Three of the remaining four monitored mainland container ports in Australia have been privatised to date – Port Botany, Port of Brisbane and Port of Adelaide. The Port of Fremantle remains government owned. These container ports are subject to different levels of price regulation and monitoring:

- The Port of Melbourne is subject to limited price monitoring by the Essential Services Commission of Victoria. The monitoring applies to certain prescribed services specified under the *Port Management Act 1995 (Vic)*.⁶⁶
- The Port of Adelaide, operated by Flinders Ports Pty Ltd, is subject to pricing and access regulation by the Essential Services Commission of South Australia (ESCOSA). ESCOSA is authorised to monitor prices and make price determinations relating to essential maritime services.⁶⁷
- In NSW, a price monitoring regime has been established. It includes a requirement by the lessee to publish port service charges and give notice of any proposed change to charges. The regime applies to Port Botany and Port Kembla.⁶⁸

⁶³ Agreement references: AG2012/4588, AG2012/4210, AG2012/5721, AG2012/5838, AG2012/5273.

⁶⁴ Ports Australia Chief Executive, David Anderson quoted in *The Australian*, <http://www.theaustralian.com.au/national-affairs/wharf-reforms-will-cut-costs/story-fn59niix-1226945044265>, 6 June 2014.

⁶⁵ State Government of Victoria 2014, Media Release, '*Coalition Government confirms plans to lease the Port of Melbourne*', 5 May 2014.

⁶⁶ Refer section 46 and section 55 *Port Management Act 1995 (Vic)* for details of prescribed services at the Port of Melbourne that are subject to monitoring by the Essential Services Commission of Victoria.

⁶⁷ Essential Services Commission of South Australia, <http://www.escosa.sa.gov.au/ports-overview.aspx>.

⁶⁸ Part 6 *Ports and Maritime Administration Act 1995 (NSW)* No 13.

- In Queensland, there is currently no specific prices oversight regime applying to the Port of Brisbane.⁶⁹
- The prices charged by the Port of Fremantle are subject to oversight by the shareholder Minister.⁷⁰

Privatisations to promote efficiency

As a general principle, the ACCC considers that privatisation may increase the efficiency of many businesses, consistent with the overall goals of competition policy. Through competition for capital, private ownership improves a firm's productivity incentive. Privately owned firms have greater incentive and ability to be cost efficient and innovative compared to government owned enterprises. The ACCC considers that governments should not retain ownership of business enterprises unless there is a clearly stated public policy for doing so, and government ownership is the best way to meet this goal.

However, a key concern identified by the National Competition Policy (Hilmer) Review in 1993 was that privatisation may be driven primarily by budgetary goals, at a cost to competition. For example, public monopolies or near monopolies are likely to attract premiums on sale if the rights to operate these assets are not sold in a way that maximises competition. The need to consider competition when privatising a monopoly was recognised in the Competition Principles Agreement⁷¹ which included the requirement that:

4(c) Before a Party introduces competition to a market traditionally supplied by a public monopoly, and before a Party privatises a public monopoly, it will undertake a review into: ...

2. the merits of separating any natural monopoly elements from potentially competitive elements of the public monopoly;

3. the merits of separating potentially competitive elements of the public monopoly; ...

7. the price and service regulations to be applied to the industry.

Experience with government privatisations over recent decades has shown that acting in accordance with these principles promotes competitive outcomes. However, there are concerning signs that, increasingly, Australian governments are privatising assets with a view to maximising the proceeds of sale at the expense of competition.

In addition to considering issues of market structure, governments should consider what, if any, regulatory settings should apply to monopoly assets when privatised. Governments should avoid the temptation to attempt to maximise sale revenue by privatising without appropriate price and access regulation in place. While this may attract a financial benefit upfront, loss of competition effectively imposes a tax on future generations of Australians.

The ACCC has concerns that, at times, governments are not establishing appropriate access mechanisms prior to the sale of such assets, instead relying on contractual arrangements with the successful bidder. These issues are discussed further below.

⁶⁹ However, the Queensland Competition Authority has potential power to monitor prices and report to the Queensland government (under section 10 of the *Queensland Competition Authority Act 1997* (Qld), <https://www.legislation.qld.gov.au/LEGISLTN/CURRENT/Q/QldCompAuthA97.pdf>).

⁷⁰ *Port Authorities Act 1999* (WA).

⁷¹ The Council of Australian Governments' (COAG) Competition Principles Agreement covered: oversight of government business enterprises; competitive neutrality; structural reform of public monopolies; legislation review; access to services provided by means of significant infrastructure facilities; application of the principles to local government; and the operation of the National Competition Council. The Competition Principles Agreement is accessible at <https://www.coag.gov.au/node/52>.

Port privatisations should be carried out with a view to maximising competition, not meeting budgetary goals

The ACCC is aware of concerns voiced by port users regarding assets being privatised in the absence of appropriate access and pricing mechanisms.

For example, Qube's Managing Director, Maurice James, recently raised concerns about the rising costs of port use, and in particular a concern that rental costs at the Port of Melbourne would increase following privatisation. Qube warned that governments' eagerness to sell ports to the highest bidder to maximise sale proceeds could hurt Australia's international competitiveness if the new owners are allowed to push up rents, which may then be passed along the supply chain to importers and exporters.⁷²

Asciano's Managing Director and CEO, John Mullen, has also raised concerns about port privatisations, and in particular the lack of regulatory controls imposed on port operators as part of the sale process, and the likelihood of resulting price increases for port users.⁷³ Asciano further noted:

While as a stevedore we can often pass [price rises] on to customers so we do not feel all the impact ourselves, in effect this becomes an additional tax on the nation's importers and exporters.

It could be argued that the quick financial gain taken by a government upon privatisation risks being offset over time by an increasing lack of competitiveness for Australia's manufacturers and exporters, and higher costs for the consumer.⁷⁴

Leases to operate ports may fetch high prices when sold by governments if bidders anticipate the ability to earn monopoly profits from the asset and recover the price paid from port users, or favour downstream businesses.

In April 2013, the NSW Government announced that the 99-year lease of Port Botany and Port Kembla had been awarded to the NSW Ports Consortium for \$5.07 billion. This was quoted as a figure 25 times earnings.⁷⁵ Further, in November 2013, Canadian pension fund CDPQ purchased a 26.7 per cent stake in the Port of Brisbane from Global Infrastructure Partners (GIP).⁷⁶ The price paid was reportedly about \$1.4 billion, representing a multiple of roughly 27 times earnings.⁷⁷ GIP reportedly paid about \$575 million for the stake less than three years earlier.⁷⁸ These recent sales demonstrate the prices private investors are willing to pay to acquire Australian port assets.

The ACCC considers that, if monopoly port related infrastructure is privatised without appropriate regulatory mechanisms in place, this could impede competition in container stevedoring and/or related markets, and/or lead to greater costs for container stevedores and other port users.

⁷² Australian Financial Review, 'Qube queries Port of Melbourne', 11 September 2014.

⁷³ Australian Financial Review, 'Take care with privatisation: Asciano's Mullen', http://www.afr.com/p/business/sunday/take_care_with_privatisation_asciano_DrwpPLfOUNZymnczYFHZ8O, 10 November 2013.

⁷⁴ The Australian, 'Asciano sounds alarm on price rises after asset sales', <http://www.theaustralian.com.au/business/asciano-sounds-alarm-on-price-rises-after-asset-sales/story-e6frg8zx-1228909489624?nk=e87fb6ea0ca33aca71b7557801d51a05>, 8 May 2014.

⁷⁵ NSW Ports, 'NSW Ports acquires long-term leases for Port Botany and Port Kembla', <http://www.nswports.com.au/news/article/nsw-ports-acquires-long-term-leases-for-port-botany-and-port-kembla>.

⁷⁶ Reuters, 'Canada's Caisse to buy 26.7 percent of Port of Brisbane', <http://ca.reuters.com/article/businessNews/idCABRE9AR0SE20131128>, 28 November 2014.

⁷⁷ Sydney Morning Herald, 'Mega-funds spark a ports boom', <http://www.smh.com.au/business/megafunds-spark-a-ports-boom-20140306-34a7y.html>, 7 March 2014.

⁷⁸ The Australian, 'IFM in bid to control port with \$900m deal', 28 September 2013.

Principles for ensuring competition and efficiency are promoted through privatisation

There are two key principles that governments should have regard to when privatising assets. These principles, in relation to port sales, are:

(1) The structure and/or conditions of the sale should promote competition

The ACCC considers that the sale of port assets should promote competition where possible, for example by separating rather than integrating potentially competitive facilities and avoiding anti-competitive provisions from agreements with successful bidders.

For instance, once Port Botany and the Port of Newcastle were privatised, it was reported that:

The government has confirmed it leased Botany with a clause that prevented Newcastle from competing against it with a container terminal. And the Newcastle lease is believed to contain a similar undertaking.⁷⁹

The ACCC notes that Port Kembla has been identified by the NSW Government as the location for the development of a future container terminal to augment the capacity of Port Botany when required,⁸⁰ and notes that the NSW Government considers that:

Port Kembla is naturally placed to accommodate Sydney's future container growth when Port Botany reaches capacity, due to its proximity to Sydney as well as existing and planned transport links, including several intermodal facilities planned for south-west Sydney...

Importing containers through the Port of Newcastle is less attractive than importing them through Port Botany or Port Kembla due to the landside transport infrastructure upgrades that would be required and the port's distance from Sydney's logistics centres, which are located primarily in the Botany industrial area and in south-west and western Sydney.⁸¹

While there may be legitimate reasons why a government would want to plan for port development, for example, given the significant investments in road and rail connections required to support a container port, any sale conditions designed to boost asset sale prices by reducing potential competitive pressures on the asset operator would be of concern to the ACCC.

The ACCC encourages early engagement from State governments on any competition issues that may arise in relation to the proposed sale structures or sale conditions for any monopoly or near monopoly assets, including any restrictions on competition proposed in the arrangements. Such restrictions may be unlawful and could be unenforceable.

(2) Governments must consider the need for up-front economic regulation of monopoly or near monopoly assets

Major container ports are generally monopoly or near monopoly assets, so their public or private operators tend to have market power.⁸² Privatisation of such assets transfers this market power to private hands.

Regulation is likely to be required where there is only one port in a particular market or the operator of a port operates in, or may enter, a downstream market. This may involve the regulation of third party access to a monopoly service which is needed by businesses to compete in upstream or downstream markets. Access regulation may be based on a negotiate-arbitrate model, where this is appropriate, rather than *ex ante* price regulation.

⁷⁹ Newcastle Herald, 'Interesting times for container terminal plans', May 11 2014.

⁸⁰ State of New South Wales 2013, *NSW Freight and Ports Strategy*, p. 117.

⁸¹ The Hon. Duncan Gay, then Minister for Roads and Ports, Legislative Council debate following Second Reading Speech for the *Ports Assets (Authorised Transactions) Bill* 2012.

⁸² Port managers will likely have a commercial incentive to encourage trade as they collect charges from shipping lines. Port managers may therefore be somewhat constrained in the level of charges they set to the degree that these reduce trade volumes.

When governments are contemplating the privatisation of monopoly or near monopoly port-related assets, this is a timely opportunity to assess and, if necessary, alter the applicable regulatory framework. There should be no presumption that any regulation applying at that time will be 'fit for purpose' once the asset is sold.

When privatising monopoly or near monopoly assets, regulatory arrangements should be determined before the sale, to provide greater regulatory certainty to the purchaser. Governments must also carefully consider the form of regulation that is appropriate. A price monitoring regime may be favoured by a government seeking to maximise the sale price. However, in the ACCC's experience, price monitoring does not provide an effective constraint on the exercise of market power, including monopoly pricing.

Where access regulation is appropriate, the ACCC considers that competition issues, including in relation to pricing, are best addressed through Part IIIA of the CCA – the primary legislative provisions governing Australia's National Access Regime.

Where potential competition issues arising from the privatisation of monopoly assets have not been dealt with up-front by governments, complications can arise while the ACCC is assessing proposed acquisitions of the assets under section 50 of the CCA. Section 50 prohibits acquisitions of assets or shares that would have the effect, or be likely to have the effect, of substantially lessening competition in a market. The ACCC is responsible for enforcing section 50 of the CCA.

A particular bidder for assets might raise competition issues because they hold an interest in competing assets (i.e. horizontal aggregation) and/or businesses at other levels of the supply chain (i.e. vertical integration). For instance, vertical integration will result where the long-term lease of a port is sold to a container stevedore or a shipping line. Vertically integrated port operators may have an incentive to favour their related businesses when providing port services, to the detriment of other port users and competitors.

If the ACCC forms the view that a proposed acquisition is likely to contravene section 50, merger remedies may be available to deal with those concerns. Such remedies could involve the divestment of other assets owned by the bidder or, particularly where there is vertical integration, a behavioural undertaking from the acquirer pursuant to section 87B of the CCA requiring it to provide third parties with access to the monopoly or near monopoly assets on non-discriminatory terms.

However, the ACCC considers that reliance on merger remedies is generally an inadequate means of dealing with complex issues of access to monopoly or near monopoly infrastructure. In contrast to regulated access regimes under Part IIIA, it is uncertain whether arrangements in section 87B undertakings can be effectively reviewed, amended or renewed. In addition, using merger remedies to address competition concerns relating to long-term leases of infrastructure would generally involve long-term behavioural undertakings which are not preferred by the ACCC due to the inherent risks in terms of ensuring their effectiveness and compliance with the remedy over such a long time horizon.

It is important to note that merger remedies do not extend to addressing competition issues that arise from the monopoly characteristics of infrastructure regardless of who owns it. In other words, where privatisation represents a bare transfer of a monopoly asset from the public sector to the private sector, the acquisition in and of itself is not likely to lead to a substantial lessening of competition in a market under section 50, and therefore merger remedies would not be available. A further limitation of the use of a section 87B merger remedy is that once accepted, it is uncertain whether it will continue to meet its objectives over its longer term or address future competition issues such as a non-integrated purchaser at the time of sale vertically integrating into related markets at a later time and discriminating against upstream or downstream rivals. Merger remedies can only address competition concerns arising from an acquisition by a particular bidder. This is why governments must ensure that appropriate regulation exists before monopoly or near monopoly assets are offered for sale.

While governments have often sought to address pricing and access issues through contracts, the ACCC considers it insufficient to rely on such arrangements to address potential competition concerns arising from privatisation. This is primarily because a contract can be varied at any time and any breaches of the contract may be waived or insufficiently enforced. Significantly, the ACCC, as Australia's national competition regulator, cannot enforce the contract despite the fact that non-compliance can have significant negative effects on competition.