

Port of Melbourne – Market Rent Inquiry 2020

Scope and Process Paper

26 September 2019



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Summary

We will consider possible market power misuse in the Port of Melbourne land rental market

Under section 53 the Port Management Act 1995 (Port Management Act, see Appendix A) our role is to consider whether the Port of Melbourne has:

- market power in relation to the process for setting and reviewing land rents
- exercised market power in a way that causes material detriment to Victorian consumers (a misuse of market power).

If we find there has been a misuse of market power, we are to make recommendations on possible economic regulation to the Assistant Treasurer.

In undertaking our inquiry, we are to consider the:

- processes used to set and review land rents
- Port of Melbourne's compliance with any of these processes
- extent to which the land rents paid are ultimately passed through to Victorian consumers.

In relation to process, we will obtain the standard form contracts and documented procedures for establishing and reviewing rental agreements, including any grievance or dispute settlement procedures that may be in place. While for land rents, we will seek stakeholders' views on how rental charges are passed through and the extent to which the Port of Melbourne's actions might impact their own competitiveness.

This, the first of our market rent inquiries, covers the Port of Melbourne's operations during the period 1 November 2016 to 31 October 2019. We are releasing this scope and process paper ahead of this formal review period, to provide stakeholders with the opportunity to engage with us on our approach to the inquiry.

We will conduct our inquiry in accordance with part 5 of the Essential Services Commission Act 2001 and may collect information or documents as per section 37 (see Appendix B).

A 'negotiate arbitrate' process for tenants to rent land from the Port of Melbourne

As 'port licence holder' and landlord, the Port of Melbourne controls the leasing of land at the port to tenants. Each tenant has a lease that specifies the rent to be paid and the terms under which the land is to be accessed and used. These are set and reviewed according to a process in which both the tenant and the Port of Melbourne either negotiate or refer to an independent party for

determination (should they not be able to negotiate an agreement). This process could be characterised as ‘negotiate arbitrate’.

Our market definition: the market for access to leased Port of Melbourne land

Section 53(5) of the Port Management Act defines the relevant market for our inquiry as ‘...the market for access to leased Port of Melbourne land by means of an applicable lease’.

We will examine the Port of Melbourne’s market power

We will assess whether the Port of Melbourne was able to profitably sustain prices (land rents paid by tenants) above competitive levels during our 2016-19 inquiry period. The main ways in which we will assess its market power may include examining: the existence of barriers to entry; whether tenants’ have any countervailing market power; and the potential for tenants to find substitute land in other ports.

We will assess whether the Port of Melbourne has misused market power or not

If the Port of Melbourne was found to have exercised market power, such as not complying with the process for setting and reviewing rents, it would only be sufficient for the purposes of our inquiry if it was then found to have misused that market power.

A misuse of market power by the Port of Melbourne is conduct that causes material detriment to the long term interests of Victorian consumers. We will assess possible misuse according to whether the Port of Melbourne’s conduct has led to higher prices, reduced access to services (in this case, land) and reduced efficiency.

Inquiry timelines and submitting feedback

This scope and process paper provides the first of several opportunities for us to engage with stakeholders during our inquiry. Once submissions to the scope and process paper have closed, we will release a draft report, hold a public forum, then release our final report.

Table 1.1 gives an indicative timeline for the inquiry.

Our charter of consultation and regulatory practice has further information on the principles that guide our approach to consultation.¹

Table 1.1: Indicative timeline

Activity	Indicative timeline
Release scope and process paper	26 September 2019
Deadline for submissions on scope and process paper	25 October 2019
Release draft report	January 2019
Hold public forum	February 2020
Deadline for submissions on draft report	February 2020
Deliver final report to Minister*	30 April 2020
Release final report [#]	June 2020

* As per section 45(5) and 45(6) of the Essential Services Commission Act 2001, after receiving the final report the Minister must make the report publicly available, within 7 days if Parliament is sitting, or within 30 days if Parliament is not sitting.

[#] As per section 45(7) of the Essential Services Commission Act 2001, the commission must make the final report publicly available after the Minister has received and made the final report publicly available.

Send us your feedback by 25 October 2019

We want to hear your views on the land rental market at the Port of Melbourne. We encourage you to provide written submissions addressing the questions in this paper and any other information you consider relevant to the review. This may include suggestions on our approach and commentary on our understanding of the market.

¹ ESC, Stakeholder Engagement Framework: Charter of Consultation and Regulatory Practice, 2018, available at: <https://www.esc.vic.gov.au/about-us/how-we-regulate/stakeholder-engagement-framework>

While all information is welcome, submissions need only address those questions or issues you feel is relevant to your experience in the land rental market at the Port of Melbourne.

Engage Victoria

We invite written submissions on this paper by **Friday, 25 October 2019** through Engage Victoria. To view our Engage Victoria page and information on how to make a submission, please visit Engage Victoria at:

Website: <https://engage.vic.gov.au/>

E-mail and mail

You may also email your submission to transport@esc.vic.gov.au or send submissions by mail marked:

Attention: Price Monitoring and Regulation Division – Transport
Essential Services Commission
Level 37, 2 Lonsdale Street
Melbourne VIC 3000

Publication of submissions

To promote an open and transparent review process, we will make all submissions publicly available on our website www.esc.vic.gov.au.

We treat all submissions as public information unless the submitter has asked us to treat some or all of a submission as confidential or commercially sensitive. Please clearly specify any information that you **do not** want to be made public.²

Meet and speak with us in person

We plan to schedule some informal drop-in sessions for stakeholders to meet with us and provide your feedback directly, including on a confidential basis.

Should you wish to discuss your views in person, **please feel free to contact us by e-mail at transport@esc.vic.gov.au, or by phone on (+61 3) 9032 1300 or 1300 664 969.**

We are also considering engaging legal consultants for these sessions, should you wish to provide anonymous feedback (i.e. we would not be privy to your identity).

² <https://www.esc.vic.gov.au/about-us/our-submission-policy>

1. Introduction

We are investigating whether the Port of Melbourne has misused any market power it may hold in setting and reviewing its land rents between 1 November 2016 to 30 October 2019.

As the 'port licence holder' and landlord, the Port of Melbourne controls the leasing of land at the port to tenants, who pay rent in exchange for use of the land to conduct their operations.

The terms and structures of the different leases with the Port of Melbourne can vary according to when a lease was established and the type of land it is associated with.

This chapter outlines our role in the market rent inquiry and provides an overview of the main stakeholders in the land rental market at the Port of Melbourne.

1.1. What we have been asked to do

We were provided with several regulatory roles in 2016, when legislation was passed for the Port of Melbourne's commercial operations to be leased to a private operator. This included a role in conducting periodic inquiries into the possible misuse of market power in setting and reviewing land rents at the Port of Melbourne.

Under section 53(1) the Port Management Act 1995 (Port Management Act, see Appendix A) we will consider whether the Port of Melbourne has:

- market power in relation to the process for setting and reviewing land rents
- exercised market power in a way that causes material detriment to the long term interests of Victorian consumers (a misuse of market power).

If we find there has been a misuse of market power, we are required to make recommendations on possible economic regulation to the Assistant Treasurer.

In undertaking our inquiry, as per section 53(3) of the Port Management Act, we are to consider the:

- processes used to set and review land rents
- Port of Melbourne's compliance with any of these processes
- extent to which the land rents paid are ultimately passed through to Victorian consumers.

We will conduct our inquiry in accordance with part 5 of the Essential Services Commission Act 2001 and may collect information or documents as per section 37 (see Appendix B).

In relation to process, we will obtain the standard form contracts and documented procedures for establishing and reviewing rental agreements, including any grievance or dispute settlement

procedures that may be in place. While for land rents, we will seek stakeholders' views on how rental charges are passed through and the extent to which the Port of Melbourne's actions might impact tenants' competitiveness. This means we are taking the long term interests of Victorian consumers in a broader context, rather than simply trying to isolate the impact of the access to land rents on end use consumers.

This is the first of our market rent inquiries and covers the period 1 November 2016 to 31 October 2019.³ Any land rents set or reviewed during this period are relevant to our inquiry. This includes any land rents that relate to contracts entered into before the inquiry period.

We are releasing this scope and process paper ahead of the formal 1 November 2016 to 31 October 2019 review period, to provide stakeholders with the opportunity to engage with us on our approach to the inquiry. We must conduct and complete the inquiry, no later than six months after the review period.

1.2. Who is the port licence holder?

In 2016, the government awarded a 50 year lease for the commercial operations of the port to the Lonsdale Consortium comprising the Future Fund, Queensland Investment Corporation (QIC), Global Infrastructure Partners (GIP) and Ontario Municipal Employees Retirement Scheme (OMERS).

The Lonsdale Consortium commenced operations and became the 'port licence holder' on 1 November 2016. As the port licence holder, it is responsible for:

- operation of wharves and berths (excluding Station Pier and West Finger Pier)
- maintenance and operation of shipping channels
- management of approximately 500 hectares of land (mainly used for commercial purposes).

The port licence holder also holds the functions of the port lessee and the port of Melbourne operator as defined in the Port Management Act. It chose to use the Port of Melbourne name for its operations. We shall therefore refer to the port licence holder, the port lessee and the port of Melbourne operator as the Port of Melbourne for this inquiry.

Although land at the port remains in state ownership, we shall consider the Port of Melbourne to be the 'landlord' for the purposes of this inquiry. As the landlord, it controls the leasing of land at the port to 'tenants', who pay rent in exchange for use of the land to conduct their operations.

For clarity, the Port Management Act makes a distinction between a 'port of Melbourne lease' and an 'applicable lease'. A port of Melbourne lease refers to the 50 year lease granted by the Victorian

³ As per section 53(5) of Port Management Act.

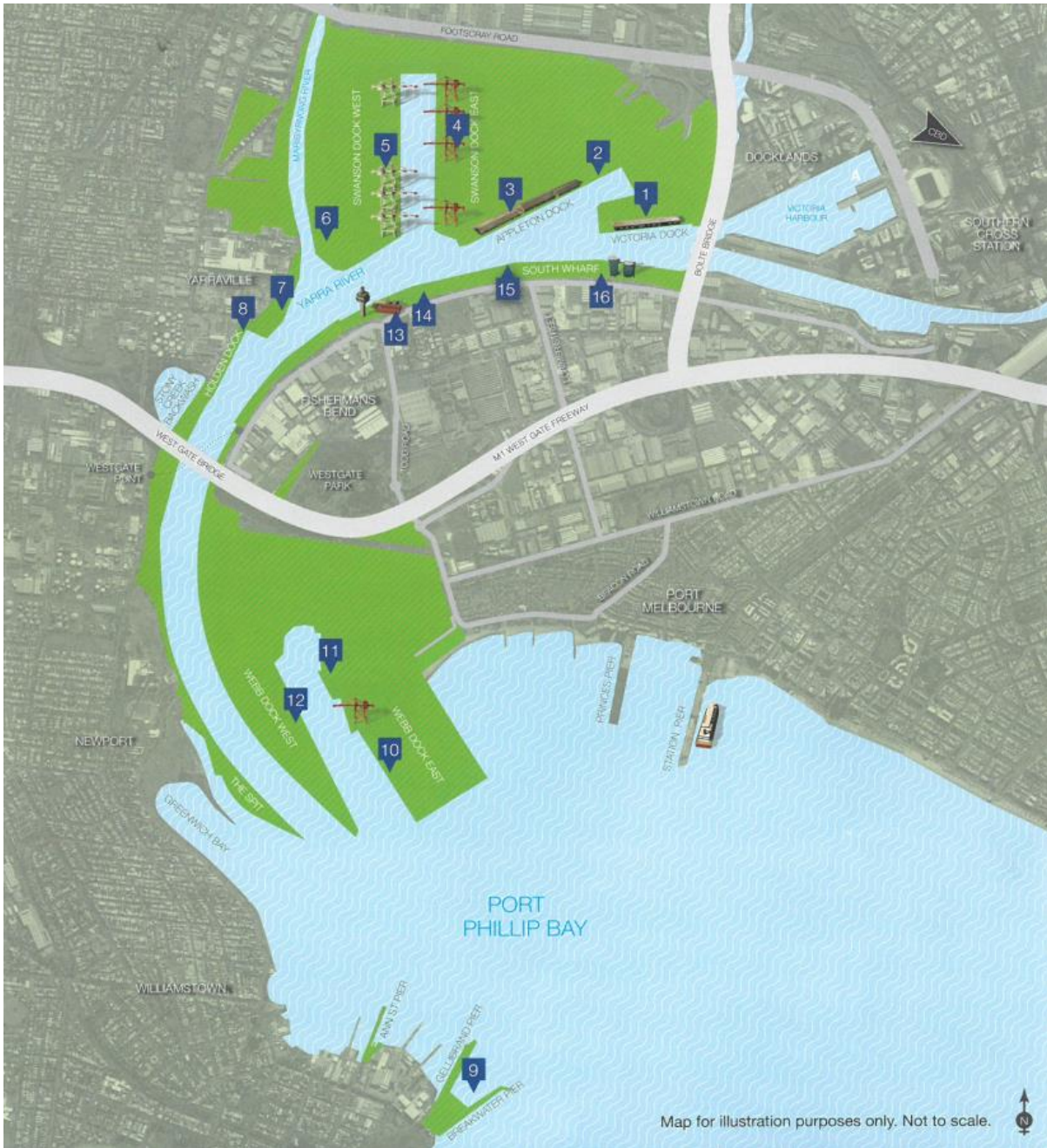
Government to the Lonsdale consortium and an applicable lease is a lease between the Port of Melbourne and a tenant (see Appendix A for the Port Management Act definitions). Our inquiry is limited to applicable leases only. We will not examine the port of Melbourne lease.

While the Port Management Act defines an applicable lease as a sublease (or a sublease of a sublease), we will refer to it as a lease for the purposes of this inquiry.

1.3. Who are the main operators at the Port of Melbourne?

The Port of Melbourne is Australia's largest container, automotive and general cargo port. It is Victoria's only port to handle containers. It also handles a variety of non-containerised cargoes, across its 35 commercial berths, jetties and piers in nine separate port precincts. Figure 1.1 identifies the land (in shaded green) and key precincts (numbered) of the port.

Figure 1.1 Port of Melbourne land and port precincts



1. 24 Victoria Dock	7. 5&6 Yarraville Berth	13. Port Education Centre
2. F Appleton Dock	8. Holden Dock	14. 33 South Wharf
3. B-E Appleton Dock	9. Gellibrand & Breakwater Pier	15. 27-31 South Wharf
4. 1-4 Swanson Dock East	10. 4-5 Webb Dock East	16. 26 South Wharf
5. 1-4 Swanson Dock West	11. 1-2 Webb Dock East	
6. No. 1 Maribyrnong	12. 1-3 Webb Dock West	

Source: Fishermans Bend planning review - Hearing document 332 - Port of Melbourne site visit materials, p. 2

Containers are the main type of cargo to pass through the port, with more than 2.9 million handled in 2017-18. They are handled by one of three terminal operators:

1. Introduction

- DP World Australia – operates Swanson Dock West
- Patrick Container Terminals – operates Swanson Dock East
- Victorian International Container Terminal Limited (VICT) – operates at Webb Dock East.

Motor vehicles also account for a significant share of cargo at the port, with over 350,000 vehicles handled in 2017-18. They are handled by the Melbourne International RoRo & Automotive Terminal (MIRRAT) that operates the specially designed Roll-on/Roll-off (RoRo) terminal at Webb Dock West.

Other terminals or precincts at the port are managed by operators for general cargo and dry and liquid bulk cargo. Some of these terminals are multipurpose and handle a variety of non-containerised pack types and break bulk, while others are specialised and handle dry cargo or bulk liquids.

1.4. How does land rental at the Port of Melbourne work?

Each tenant has a lease with the Port of Melbourne that specifies the rent to be paid and the terms under which the land is to be accessed and used. These are set and reviewed according to a process in which both parties either negotiate or refer to an independent party for determination (should they not be able to negotiate an agreement). This process is outlined further in section 3.1.

The terms and structures of tenants' leases can vary significantly according to when the lease was established and the type of land to which it is associated. The average term of over 120 leases in place with the Port of Melbourne, is 25 years, although some extend to up to 50 years⁴.

The Port of Melbourne derives a share of its total revenue from land rents. This was most recently illustrated in 2015-16, the last year of publicly available accounts, in which rents accounted for 14 per cent of the port's total revenue.⁵

1.5. We presently have no views on the Port of Melbourne's market power or its possible misuse

At this stage, we do not have any views on the possible misuse of market power in setting and reviewing land rents at the Port of Melbourne. We expect our views will form during the course of our inquiry, as we seek stakeholder input with forums such as this scope and process paper.

⁴ Parliament of Victoria (2015), *Inquiry into the proposed lease of the Port of Melbourne*, p.60. While there were reported to have been around 65 leases in place at the time of this inquiry, we understand this number may not have included cases in which a tenant had multiple leases with the Port of Melbourne.

⁵ Port of Melbourne Corporation 2016, *Annual Report 2015-16*, p.69

The purpose of this scope and process paper is to provide stakeholders with the information they need to share their views on the land rental market at the Port of Melbourne. Aside from responding to the questions and issues we raise in chapter 2 and chapter 3, we invite stakeholders to comment on our understanding of the market and welcome suggestions on our approach.

Stakeholder questions

1. Aside from the issues and questions raised in the scope and process paper, is there any other information relevant to the land rental market at the Port of Melbourne, which we should consider in our inquiry?

2. Market power

The Port Management Act defines the relevant market for our inquiry as ‘...the market for access to leased Port of Melbourne land by means of an applicable lease’.

We will examine the Port of Melbourne’s market power. That is, whether it is able to profitably sustain prices above competitive levels or not.

The main ways in which we may assess market power include examining: the existence of barriers to entry; whether tenants’ have any countervailing market power; and the potential for tenants to find substitute land in other ports.

We do not have a view as to whether the Port of Melbourne has market power at this stage of our inquiry.

This chapter presents the different dimensions that could be included in defining the market for our inquiry and considers market power in terms of its meaning and whether it is held by the Port of Melbourne.

At this stage, we do not have any firm views on the issues raised in this chapter. We invite stakeholders to respond to these issues and provide us with any other information which will assist us in understanding market power in the land rental market at the Port of Melbourne.

2.1. Defining the market for our inquiry

In order to assess market power and its possible misuse, it is necessary to first define the market of our inquiry – the land rental market at the Port of Melbourne. Section 53(5) of the Port Management Act 1995 (Port Management Act) defines the relevant market as ‘...the market for access to leased Port of Melbourne land⁶ by means of an applicable lease’.

2.2. What is market power?

Market power can be defined as the ability of a firm to profitably sustain prices above competitive levels⁷. In terms of economic theory, this means a firm is able to raise prices above marginal costs.

⁶ That is, the land which the Port of Melbourne leases to tenants.

⁷ This is based on the following definition, widely used in Australian competition law, from Queensland Wire Industries v Broken Hill Pty Co Ltd [2000] HCA 6:

Market power can be defined as the ability of a firm to raise prices above the supply cost without rivals taking away customers in due time, supply cost being the minimum cost an efficient firm would incur in producing the product.

It must also be able to do this for a sustained period of time, rather than on a temporary or occasional basis.

Market power need not be confined to pricing. This has been observed in Australian competition and consumer case law, in which firms have undertaken practices that exclude competition, such as exclusive dealing, tying arrangements, predatory pricing or refusing to deal.⁸

In most markets, firms will to varying degrees have some form of market power. The Port of Melbourne may have some market power in the different markets in which it operates. This could include the land rental market. As such, we need to establish the extent of the Port of Melbourne's market power, if it has any at all, before we can proceed with questions on whether it has been exercised and misused (as discussed in Chapter 3).

It should also be noted our examination of market power is confined to the land rental market. It does not extend to any other market which the Port of Melbourne or tenants may operate in. However, we acknowledge that decisions in related markets could have an impact on the land rental market.

2.3. How will we assess market power?

There are a range of factors that may contribute to a firm having market power. The main factors likely to be relevant for our inquiry are:

- The existence of barriers to entry – This may include any physical, regulatory or economic constraints that may prevent potential new entrants in to the land rental market.
- Whether countervailing market power exists – This may occur if tenants were able to respond to the exercise of market power.
- The potential for substitution – This may depend on tenants' ability to switch to alternatives, such as utilising land and domestic transport at other Australian ports or other sites.

We will consider any other factors which may indicate the Port of Melbourne has market power in the land rental market. For example, the degree of market concentration, in terms of the number and size of tenants in relation to the landlord, could also be a factor.

No one factor is likely to be a sufficient indicator of market power on its own. However, we should at least be able to establish whether these and any other factors are present. If they are, then taking these factors in combination should enable us to assess the extent of the Port of Melbourne's market power.

⁸ Russell Miller, Miller's 2018: Australian competition and consumer law annotated, p. 398.

Stakeholder questions

2. What factors should / should not be included in our assessment of the Port of Melbourne's market power?

2.4. Does the Port of Melbourne have market power?

As this is the beginning of our inquiry, we do not have a view as to whether the Port of Melbourne has market power in the land rental market or not.

As Australia's largest port, in which tenants can require specific land (typically near the waterside) for highly specialised purposes and may have limited alternatives, it is likely the Port of Melbourne has some market power. But we do not know to what extent.

We expect there could be differences in the degree to which stakeholders might report possible market power. While one group of tenants may view the Port of Melbourne's market power as being trivial, another group could regard it as being significant. Stakeholders' views might be shaped by their relative size and ability to counter. As such, we invite stakeholders to provide us with information on their respective interest in the land rental market at the port. This will assist us in clarifying which sections of the land rental market the Port of Melbourne may have market power, if any.

It should also be noted that even if the Port of Melbourne does have market power, this is not necessarily a cause for concern. However, it will be if the Port of Melbourne is then found to have exercised its market power to the detriment of Victorian consumers, which is the main focus of our inquiry, as discussed in Chapter 3.

Stakeholder questions

3. How is the Port of Melbourne's market power demonstrated, if at all, and in which type of leases is it most evident?
4. Are there any leases, for which the Port of Melbourne does not have market power? (either none, or no more than to a minor or insignificant extent)
5. Are there any tenants who are able to match or respond to the Port of Melbourne's market power? (for example, tenants might have some countervailing power)

3. Process compliance and misuse assessment

We understand parties either negotiate or refer to an independent party for determination in the process for setting and reviewing rents.

An exercise of market power would only be sufficient for the purposes of our inquiry, if it was then found to have been a misuse of market power.

A misuse of market power is conduct by the Port of Melbourne that causes material detriment to Victorian consumers.

We will assess possible misuse, according to whether the Port of Melbourne's conduct has led to higher prices, reduced access to services and reduced efficiency.

Although our focus is on prices, access and efficiency, we welcome stakeholders views on any conduct which might be regarded as a misuse of market power.

This chapter outlines our understanding of the process for setting and reviewing rents. It also examines the meaning of the misuse of market power and how we might assess this in our inquiry.

We welcome stakeholder input to provide information, respond to any questions we might raise and alert us to any points of detail that will clarify our understanding of the possible misuse of market power at the Port of Melbourne.

3.1. What is the process for setting and reviewing rents?

Much of our inquiry is centered around the process that is used to set and review rents at the Port of Melbourne.

From our initial desktop review, it would appear the process for setting and reviewing rents is not well documented in the public domain. This could potentially put some parties who are not able to obtain information on the process at a disadvantage and indicate a potential misuse of market power.

However, the lack of readily available information may not necessarily be a cause for concern, if tenants and prospective tenants are aware of the process and able to easily obtain information that sets out their roles and requirements. We will therefore test how open and transparent the process is with stakeholders.

We understand the process for setting and reviewing the rent of a tenant (or prospective tenant) includes two main stages:

Stage 1 – Negotiation (if the Port of Melbourne and tenant can agree)

- The Port of Melbourne obtains a valuation of the rent that could be obtained for the land a tenant is proposing to lease
- A tenant may also obtain their own valuation of the land they are proposing to lease
- the valuations of the Port of Melbourne and tenant (if they obtain one) are used as the basis for negotiating a commercial agreement between both parties.

Stage 2 – Determination (if the Port of Melbourne and tenant cannot agree)

- Both parties appoint an independent valuer who will make a determination on the rent that the tenant will pay to the Port of Melbourne.
- A valuer from the Australian Property Institute may be appointed, if both parties cannot agree amongst themselves
- The determinations are legally binding on both parties, although there is scope for them to be challenged under common law.

This process, as we understand it, would be characterised as ‘negotiate arbitrate’ where parties negotiate access to (usually) monopoly assets or services and have the fall back of a binding dispute resolution through arbitration or expert.

In regulated markets, negotiate arbitrate has been found to work well when there are relatively few access seekers with similar bargaining power. It has not been so successful when there are large differences in bargaining power between the access seeker and the asset owner or service provider. It is therefore important we ascertain the number of tenants and potential tenants (i.e. the access seekers) and their bargaining power in relation to the Port of Melbourne (i.e. the asset owner). We welcome stakeholders’ views on this, which will assist us in assessing how well the process for setting and reviewing rents is working and whether it assists or constrains the exercise of any market power which the Port of Melbourne may or may not have.

Stakeholder questions

6. How should we assess parties’ ability to bargain in the process for setting and reviewing rents?
7. What factors, if any, should be taken into consideration in assessing the process for setting and reviewing rents?

3.2. Has the Port of Melbourne complied with the process?

We are also required to consider the Port of Melbourne’s compliance with the process for setting and reviewing rents. It is possible the Port of Melbourne may not have adhered to the process,

although there may be legitimate and practical reasons for doing so. We invite stakeholders to provide us with any information in this regard.

8. How has the Port or Melbourne complied / not-complied with the process for setting and reviewing rents? (i.e. what information is there to support the Port of Melbourne's compliance or non-compliance?)

3.3. What does misuse of market power mean?

If non-compliance with the process for setting and reviewing rents were to be found, it could be viewed as the Port of Melbourne exercising market power. This, of itself, would not be sufficient for the purposes of our inquiry. As with any exercise of market power, it would then have to be found to have been a misuse of market power.

According to section 53 of Port Management Act 1995 (Port Management Act) a misuse of market power is where the Port of Melbourne '...has exercised that power in a way that has the effect of causing material detriment to the long term interests of Victorian consumers'. While 'material detriment' is not defined in the legislation, we interpret this to be conduct which leads to higher prices, reduced access to services and reduced efficiency.

Although our focus will be on prices, access and efficiency, we expect there is other conduct which might be regarded as a misuse of market power. We therefore invite stakeholders to provide their own interpretation and emphasis in any misuse they might describe.

Stakeholder questions

9. Should prices, access and efficiency be the Commission's focus in defining the material detriment caused by the misuse of market power?
10. What other factors, if any, should be taken into consideration in defining the material detriment caused by the misuse of market power?

3.4. How will we assess the possible misuse of market power?

Given our focus on prices, access and efficiency, we will assess whether the exercise of market power by the Port of Melbourne has:

- resulted in tenants paying rents that are above market rents (i.e. higher prices)
- prevented prospective tenants from accessing Port or Melbourne land (i.e. reduced access)
- been harmful to the efficiency of tenants' operations (i.e. reduced efficiency).

Assessing higher prices

We may take a sample of the rents currently paid by tenants and examine how they may differ from valuations of market rents. Should we do so, we accept that market valuation is not exact. It is possible there will be legitimate differences in valuations that are made for a particular parcel of land. We therefore do not expect to be able to quantify the differences between a market valuation and the actual rent that is paid with much precision. However, if we find valuations to be generally lower than the rents that are being paid, then it may at least indicate that the Port of Melbourne has exercised market power.

It should also be noted that the sample and the valuations we use will be for indicative purposes only. We will not be singling out the amounts paid and the valuations of any one lease. Nor will we comment on the amount that should have been paid for any one lease.

Assessing reduced access

We may investigate the ways in which tenants have negotiated and secured their leases. We will examine the contracts offered by the Port of Melbourne and how the terms and conditions may differ between tenants. Stakeholder input will be important here because lease and contract information by itself is unlikely to conclusively show the denial of access to Port of Melbourne land.

We will also seek to gauge the Port of Melbourne's approach in its negotiation with tenants and whether it is genuinely open to negotiation on price and contract terms and conditions or whether it simply presents a 'take it or leave it' position.

Assessing reduced efficiency

Our assessment may involve identifying the cost that is caused by misuse and how this impedes the efficiency of tenants' operations. While there is more to efficiency than just the consideration of cost, it is unlikely we will have the time or the scope to pursue this during our inquiry. For example, it is unlikely we would be able to examine how misuse had affected tenants' allocation of resources (that is, the impacts of misuse on tenants' allocative efficiency) or how it affected their use of resources over time (that is, the impacts of misuse on tenants' dynamic efficiency). Nevertheless, identifying the cost that is caused by any misuse will provide the basis for further investigation and recommendations for review and redress.

Our assessment of misuse is not limited to just tenants. We are to assess how any misuse that tenants may experience is then passed on to their suppliers or customers, which may then in turn be passed on to Victorian consumers.

To do this, we will examine the ability of each party to pass on any misuse that they experience. We will attempt to identify the cost of misuse and how this cost is then passed on from tenants to suppliers/customers to Victorian consumers. Aside from cost impacts, we will also seek

stakeholder input to gauge any other way in which misuse is passed on between the different parties.

Stakeholder questions

11. Are there any other ways of assessing the misuse of market power we should include / exclude for our inquiry?

Appendix A – Section 53 and selected definitions of the Port Management Act

53 Conduct of inquiries

- (1) The Commission must, not later than 6 months after the end of an inquiry period—
 - (a) conduct and complete an inquiry into the following matters—
 - (i) whether a port lessee or the port of Melbourne operator has power in the relevant market that it may exercise in relation to the process for the setting or reviewing of rents or associated payments (however described) payable by a tenant under an applicable lease;
 - (ii) whether a port lessee or the port of Melbourne operator has exercised that power in a way that has the effect of causing material detriment to the long term interests of Victorian consumers (a misuse of market power); and
 - (b) if and only if the Commission finds that there has been a misuse of market power, make recommendations to the ESC Minister about whether the provision of access to port of Melbourne land by means of an applicable lease should be subject to economic regulation, and, if so, the form of the economic regulation.
- (2) For the purposes of subsection (1)(b), the form of economic regulation may include a form of price regulation.
- (3) Without limiting subsection (1), in conducting an inquiry under this section the Commission must have regard to—
 - (a) the processes used to establish or review rents or associated payments (however described) payable by a tenant under an applicable lease; and
 - (b) a port lessee's or the port of Melbourne operator's compliance with any processes for setting and reviewing rents or associated payments (however described) payable by a tenant under an applicable lease required under—
 - (i) a port of Melbourne lease; or
 - (ii) any agreement or arrangement entered into by the port lessee or the port of Melbourne operator in connection with a port of Melbourne lease; and
 - (c) the extent to which any rents or associated payments (however described) paid by a tenant under an applicable lease may be passed through by the tenant to users of services provided by the tenant, to those users' customers, and ultimately to Victorian consumers.
- (4) An inquiry under this section must be conducted in accordance with Part 5 of the **Essential Services Commission Act 2001** but section 40 of that Act does not apply in respect of that inquiry.
- (5) In this section—

applicable lease means a sublease, or a sublease of a sublease, of leased port of Melbourne land granted by a port lessee (other than to the port of Melbourne operator) or by the port of Melbourne operator;

inquiry period means any of the following—

- (a) the period of 3 years commencing on the day on which the first lease of land comprising port assets is granted to a private sector entity under section 11 of the **Delivering Victorian Infrastructure (Port of Melbourne Lease Transaction) Act 2016**;
- (b) the period of 5 years commencing on the day after the day on which the period referred to in paragraph (a) ends;
- (c) a period of 5 years commencing on the day after the day on which a previous 5 year period ends;

port lessee means a lessee under a port of Melbourne lease;

port of Melbourne lease has the same meaning as in section 59 of the **Delivering Victorian Infrastructure (Port of Melbourne Lease Transaction) Act 2016**;

relevant market means the market for access to leased port of Melbourne land by means of an applicable lease.

Selected definitions of the Port Management Act

leased port of Melbourne land means port of Melbourne land in respect of which the port of Melbourne operator holds a leasehold interest

port licence holder means the holder of a port licence

port of Melbourne operator means a person declared under section 4A to be the port of Melbourne operator

Appendix B – Section 37 and Part 5 of the Essential Services Commission Act

37 General power to obtain information and documents

- (1) If the Commission considers that it is necessary to do so for the purposes of performing its functions or exercising its powers, the Commission may require a person that the Commission has reason to believe has any relevant information or document to provide that information or document to the Commission.
- (1A) For the purposes of subsection (1), the Commission may require the person to appear before the Commission to provide the information or document.
- (2) A requirement must be made in a written notice specifying—
 - (a) the information or document required; and
 - (b) the period of time within which the requirement must be complied with; and
 - (c) the form in which the information or copy of the document is to be given to the Commission; and
 - (ca) whether or not the person is required to appear before the Commission; and
 - (d) that the requirement is made under this section.
- (3) The notice must include a copy of this Part.
- (4) A person who without lawful excuse fails to comply with any requirement made under this section in a notice given to the person is guilty of an offence.
Penalty: 120 penalty units.
- (5) It is a lawful excuse for the purposes of subsection (4) that compliance may tend to incriminate the person or make the person liable to a penalty for any other offence.
- (6) A person must not, in purported compliance with a requirement, knowingly give the Commission information that is false or misleading.
Penalty: 120 penalty units or imprisonment for 6 months.
- (7) A person must not—
 - (a) threaten, intimidate or coerce another person; or
 - (b) take, threaten to take, incite or be involved in any action that causes another person to suffer any loss, injury or disadvantage—because that other person complied, or intends to comply, with a requirement made under this section.
Penalty: 120 penalty units.
- (8) A person is not liable in any way for any loss, damage or injury suffered by another person because of the giving in good faith of any information or a document to the Commission under this section.

Part 5—Inquiries and reports

40 Inquiry by Commission

The Commission may after consultation with the Minister conduct an inquiry if the Commission considers an inquiry is necessary or desirable for the purpose of carrying out its functions.

41 Minister may refer matter for inquiry

- (1) The Commission must conduct an inquiry into any matter which the Minister by written notice refers to the Commission under this Part.
- (1A) The Minister is responsible for referring any matter to the Commission for an inquiry unless relevant legislation provides that the Minister administering the relevant legislation may refer a matter to the Commission for an inquiry.
- (1B) Before referring a matter to the Commission for an inquiry, the Minister must consult with any Minister who has responsibilities in respect of that matter.
- (2) The written notice must specify the terms of reference for the inquiry.
- (3) The Minister may—
 - (a) specify a period within which a report is to be submitted to the Minister;
 - (b) require the Commission to make a draft report publicly available or available to specified persons or bodies during the inquiry;
 - (c) require the Commission to consider specified matters;
 - (d) give the Commission specific directions in respect of the conduct of the inquiry.
- (4) The Commission must report to the Minister on the results of any inquiry.
- (5) The Minister may amend the terms of reference or extend the period within which a report is to be submitted to the Minister.

41A Minister may limit use of powers under section 37

If any inquiry is to be conducted into a matter that does not relate to a regulated industry, the Minister may give the Commission specific directions in respect of the conduct of the inquiry which limit the use of the powers conferred on the Commission under section 37 in the manner specified in the specific directions.

42 Notice of inquiry

- (1) The Commission must after notifying the Minister publish notice of an inquiry—
 - (a) in the Government Gazette; and
 - (b) in a daily newspaper generally circulating in Victoria; and
 - (c) on the internet.
- (2) The notice must specify—
 - (a) the purpose of the inquiry;
 - (b) the period during which the inquiry is to be held;

- (c) the period within which, and the form in which, members of the public may make submissions, including details of public hearings;
 - (d) the matters that the Commission would like submissions to deal with.
- (2A) The Commission may specify in the notice under subsection (2) that if a submission is not received within the period specified under subsection (2)(c), the Commission may decide not to consider the submission.
- (3) If the inquiry relates to a matter referred to the Commission by the Minister, the notice must include the terms of reference and the matters specified in section 41(3).
 - (4) The Commission must publish a further notice if the Minister amends the terms of reference or extends the period within which the report is to be submitted to the Minister.
 - (5) The Commission must send a copy of any notice published under this section to the relevant regulated entities and any person or body that the Commission considers should be notified.

43 Conduct of inquiry

- (1) Subject to this Act, the Commission may conduct an inquiry in such a manner as the Commission considers appropriate.
- (2) In conducting an inquiry, the Commission is not bound by rules or practice as to evidence but may inform itself in relation to any matter in such manner as the Commission considers appropriate.
- (3) The Commission may receive written submissions or statements.
- (4) The Commission—
 - (a) must hold at least one public hearing; and
 - (b) has a discretion as to whether any person may appear before the Commission in person or be represented by another person.
- (5) The Commission may determine that a hearing or a part of a hearing be held in private if it is satisfied that—
 - (a) it would be in the public interest; or
 - (b) the evidence is of a confidential or commercially-sensitive nature.
- (6) In conducting an inquiry the Commission may—
 - (a) consult with any person that it considers appropriate;
 - (b) hold public seminars and conduct workshops;
 - (c) establish working groups and task forces.

45 Reports

- (1) The Commission must submit a copy of its final report on an inquiry to the Minister.
- (2) If, in the opinion of the Commission, a final report will contain confidential or commercially-sensitive information, the Commission must divide the report into—

- (a) a document containing the confidential or commercially-sensitive information; and
 - (b) another document containing the rest of the report.
- (3) For the purposes of subsection (2), any information that the Commission may disclose under section 38 is not confidential or commercially-sensitive unless an appeal panel states that it is imposing a restriction under section 56(7)(b)(i).
 - (4) If the Commission submits a final report to the Minister in the form required by subsection (2), a reference to the final report in subsections (5), (6) and (7) is to be read as a reference to the document described in subsection (2)(b).
 - (5) The Minister must cause a copy of the final report to be laid before each House of the Parliament within 7 sitting days of the House after receiving the final report.
 - (6) The Minister must, after the final report has been laid before each House of the Parliament, or if the Parliament is not sitting, within 30 days after receiving a final report, ensure that a copy of the final report is available for public inspection.
 - (7) After the Minister has made a final report publicly available, the Commission must ensure that copies are made publicly available.

46 Special reports

- (1) If in the course of an inquiry the Commission considers that there is another matter on which the Commission should report to the Minister, the Commission may do so, in the final report or in a special report.
- (2) If the Commission prepares a special report, subsections (5), (6) and (7) of section 45 apply to the special report as if it were a final report.

Appendix C – List of stakeholder questions

The following is a list of stakeholder questions, drawn from each relevant section of this scope and process paper. These questions are not exhaustive. Rather, it is hoped they provide a starting point for discussion and follow-up during our inquiry.

Is there any other information relevant to our inquiry?

1. Aside from the issues and questions raised in the scope and process paper, is there any other information relevant to the land rental market at the Port of Melbourne, which we should consider in our inquiry?

How will we assess market power?

2. What factors should / should not be included our assessment of the Port of Melbourne's market power?

Does the Port of Melbourne have market power?

3. How is the Port of Melbourne's market power demonstrated, if at all, and in which type of leases is it most evident?
4. Are there any leases, for which the Port of Melbourne does not have market power? (either none, or no more than to a minor or insignificant extent)
5. Are there any tenants who are able to match or respond to the Port of Melbourne's market power? (for example, tenants might have some countervailing power)

What is the process for setting and reviewing rents?

6. How should we assess parties' ability to bargain in the process for setting and reviewing rents?
7. What factors, if any, should be taken into consideration in assessing the process for setting and reviewing rents?

Has the Port of Melbourne complied with the process?

8. How has the Port or Melbourne complied / not-complied with the process for setting and reviewing rents? (i.e. what information is there to support the Port of Melbourne's compliance or non-compliance?)

What does misuse of market power mean?

9. Should prices, access and efficiency be the Commission's primary focus in defining the material detriment caused by the misuse of market power?
10. What other factors, if any, should be taken into consideration in defining the material detriment caused by the misuse of market power?

How will we assess the possible misuse of market power?

11. Are there any other ways of assessing the misuse of market power we should include / exclude in making our assessment?