



JAMES POINT PTY LTD

ABN 87 077 624 956

PO Box 6154,

East Perth, Western Australia 6004

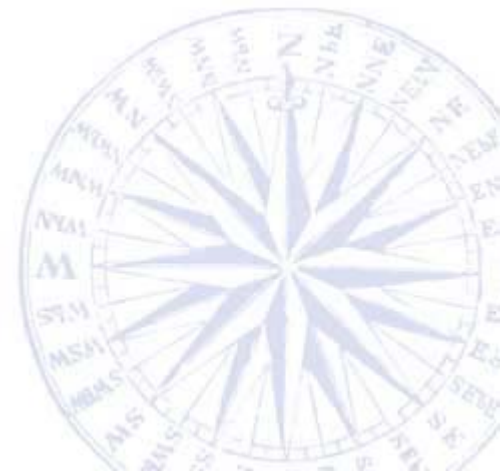
Telephone: +61 8 9202 1770

Facsimile: +61 8 9202 1607

SUBMISSION TO THE
COAG REVIEW OF WESTERN AUSTRALIAN
PORTS

James Point Pty Ltd

8 August 2008



CONTENTS

	Page
1.0 Introduction	3
2.0 Comments on the Conduct of the Review	4
2.1 Basis for the Review	
2.2 The Review Process	
2.3 Scope of the Review	
2.4 James Point Port Proposals	
3.0 Discussion Point 3: Do Planning Processes at the Ports of Fremantle, Esperance or Port Hedland Facilitate the Entry of New Suppliers of Port and Port Related Infrastructure Facility Services?	14
4.0 Discussion Point 5: Does the Charter of the Ports of Fremantle, Esperance and Port Hedland Provide Adequate Guidance to Seek a Commercial Return While Not Exploiting Monopoly Powers?	17



1.0 INTRODUCTION

This submission has been prepared by James Point Pty Ltd (JPPL) in response to the Issues Paper “COAG Review of Western Australian Ports” prepared by The Allen Consulting Group for the Department for Planning and Infrastructure.

As a potential supplier of port and port related infrastructure facility services in the Port of Fremantle JPPL has a strong interest in the issues raised in the Review.

The submission provides comment on a number of aspects of the Review itself including its terms of reference and its scope.

The submission also responds to the invitation for stakeholders to comment on the specific discussion points raised in the Issues Paper – Points 3 and 5 are addressed in the submission.

As part of our response further information is provided on the scope and status of the James Point Port proposals to assist the Review in its deliberations.



2.0 COMMENTS ON THE CONDUCT OF THE REVIEW

2.1 Basis for the Review

The Competition and Infrastructure Reform Agreement (CIRA) signed by the Council of Australian Governments in 2006 extended the ambit of competition principles to ports. The parties agreed to apply certain principles to port regulation and to take action to ensure the principles applied in their jurisdictions.

Underpinning the CIRA is the view that effective competition in the provision of port infrastructure and port related services will promote better outcomes for port users and the community generally. Competition provides incentives to reduce port costs and improve service standards thereby delivering benefits to shippers and flow-on benefits to industry and consumers. Conversely, limiting or restricting competition in the ports area either by regulation or by other informal means is not likely to be in the public interest.

JPPL supports this view and sees scope for increased competition in this critical area of industry infrastructure provision.

By their nature ports generally have considerable market power which raises the question of whether the current level of economic regulation is appropriate. JPPL would make the point that fostering effective competition reduces the need for regulatory intervention. Other benefits from competition from privately provided port infrastructure and related services include less public debt (with the ability to apply the borrowings saved to other essential infrastructure in say health or education) and reduced risk for governments.

At one level the Review can be seen merely as a compliance exercise to meet the specific CIRA requirement for a review of “the regulation of ports and port authority, handling and storage facility operations at significant ports” to ensure that it is consistent with the CIRA principles. A more expansive view having regard to the underpinning philosophy of the CIRA is for the Review to look at the current level of competition within and between ports and at opportunities to foster greater competition.



The Review should consider the extent to which there are opportunities and mechanisms to foster increased competition in the provision of port infrastructure and related services in WA, recognising the benefits from this competition, including a reduced need for regulation.

2.2 The Review Process

The overall process being followed in the Review generally reflects good practice and JPPL appreciates the opportunity for stakeholders to provide input. However, two aspects of the Review process raise concerns.

First, it is vital that stakeholders have adequate opportunity to provide considered responses to both the Issues Paper and the Draft Report. The three weeks provided in relation to the Issues Paper does not seem adequate in this regard and a further opportunity for stakeholder input should be provided. Similarly, a longer period of time for the preparation of stakeholder responses to the Draft Report should be allowed.

The Review should invite key stakeholders such as JPPL to make oral presentations to the review to elaborate on their submissions and answer questions. The Draft Report should be made available to stakeholders for comment for at least five weeks.

Second, the composition of the Review steering committee invites criticism in terms of conflicts of interest. Comparable reviews in other jurisdictions have not included port authorities in the management of the reviews, presumably on the grounds that these bodies are the subject of the review and their involvement could compromise the impartiality of the review.

The Review should consider whether it would be more appropriate for Fremantle Ports to be a respondent to the Review rather than a representative of Fremantle Ports being a member of the Review steering committee.



2.3 Scope of the Review

The CIRA nominates “Major capital city ports and port facilities at these ports” as candidates for review. However, for the Port of Fremantle the Review excludes through its terms of reference existing “facilities with exports of less than 1 million tonnes per annum, such as the Kwinana Bulk Jetty and the Kwinana Bulk Terminal”. In relation to future facilities, the Review includes the Fremantle Ports proposed Outer Harbour developments but excludes the proposed James Point facilities on the grounds that “this port would be independent of the existing Port of Fremantle Outer Harbour”.

The CIRA, which is the origin of the Review, deals with industry infrastructure generally and is not limited to port infrastructure used for export purposes. For this reason comparable port regulation reviews in other jurisdictions have not attempted to deal separately with port facilities used for exports or imports. Similarly, the limit of 1 million tonnes per annum used in the Review terms of reference has no apparent connection with the CIRA. Accordingly, there seems to be no justification in terms of competition principles for the exclusion of “facilities with exports of less than 1 million tonnes per annum”.

This exclusion has the effect of removing from the Review’s purview a significant element of the current supply of port and related infrastructure services at the Port of Fremantle. This is also an element which is experiencing some strain in meeting demand. The Kwinana Bulk Jetty and the Kwinana Bulk Terminal are significant facilities carrying substantial trade and currently account for 13% of total port throughput. The commodities exchanged include significant industry inputs such as clinker for the cement industry.

It is in this area of multi-user/multi-product bulk berths that the adequacy of the supply of port infrastructure at Fremantle has become an issue in recent years. This shortage has manifest as interruptions to supply, significant demurrage costs and loss of specific trades. This leads to the question of whether the lack of competition in the supply of this form of port infrastructure has contributed to the apparent shortages – a question which should be of some interest to the Review.

Given the focus of the Review on the supply of port and related infrastructure services and the potential for new sources of supply to



meet demand, it would seem desirable to include these particular facilities in the Review.

Inclusion would also provide an opportunity for the Review to examine one aspect of vertical integration, an area of particular interest to the Review. As Fremantle Ports provides stevedoring services at these facilities the *potential* for anti-competitive behaviour exists.

With regard to the proposed James Point facilities, from a legal perspective these will operate as a “port within a port”. In this sense and as the Issues Paper states “this port would be independent of the existing Port of Fremantle Outer Harbour”. However, from an economic perspective the facilities would comprise a significant component of the supply of port and related infrastructure services for the capital city port.

The potential development of the James Point facilities has a significant bearing on some of the issues before the Review. The proposals provide a key example of how new suppliers can contribute to meeting demand. The existence of an Operating Agreement with the WA Government for the development repudiates the notion that Fremantle Ports should remain the monopoly supplier of multi-user/multi-product berths. The development also has the potential to provide relief from the current shortage of bulk berths in the Outer Harbour and in its second stage, to provide capacity to meet increasing container trade. (And in both cases, a more competitive market would emerge.)

Finally, the area to be occupied by the James Point facilities currently comprises part of the Outer Harbour and its planned development should be considered in the context of Fremantle Ports planned developments for the Outer Harbour.

The Review should reconsider the exclusion of both current and proposed facilities in the Outer Harbour, specifically the Kwinana Bulk Jetty, the Kwinana Bulk Terminal and the James Point Port.



2.3 James Point Port Proposals

The Issues Paper provides an incomplete and insufficient description of the infrastructure investments proposed by JPPL when it states that:

“The James Point Pty Ltd port would consist of a reclaimed land-backed cargo wharf ... immediately north of the existing bulk handling jetties owned by Fremantle Ports ...”

This statement refers only to Stage 1 of the JPPL proposals and no information is presented regarding Stage 2, which proposes an international container facility further south at James Point itself. A more complete account of the scope and status of James Point Stage 1 and Stage 2 is provided below in order to assist the Review. JPPL would be pleased to provide any further information required either at the oral presentation previously suggested or through other means.

Overview of James Point Proposals

JPPL was formed to respond to an expression of interest/request for proposals process initiated by the State Government in 1997. The process concluded in December 2000 when an Operating Agreement was executed between the State of Western Australia acting through the Minister for Lands, the Minister for Transport and JPPL. Under the Operating Agreement JPPL agreed to construct, own and operate a port at James Point, near Kwinana and to provide port services at the port.

The State has a number of defined obligations under the Agreement including to “facilitate the obtaining of all required approvals”. The State is also responsible for the provision of road and rail access to the port.

The Directors of JPPL remain fully committed to implementing the proposals, obtaining all the necessary approvals to do so, and collaborating fully with Government at all times.



The Operating Agreement envisaged an overall concept for several stages, in which:

- Stage 1 will comprise a bulk and general cargo facility (at a site just north of the Kwinana Bulk Terminal); and
- Stage 2 will comprise an international container facility (at a site a little to the south of the Kwinana Bulk Terminal and immediately north of the landmark known as James Point which is just to the north of the BP Refinery).

Subsequent stages were only envisaged in very general terms.

Both Stage 1 and Stage 2 facilities involve reclamation of the seabed.

Stage 1 Approvals and Timing

The Scope of the facilities included in Stage 1 has been described in the Issues Paper. It involves reclamation of 14 hectares of seabed, and the construction of 875 metres of common user bulk and general berths. The total cost of reclamation and berth construction will be privately funded.

With regard to environmental approvals, the Issues Paper refers only to EPA recommendations in 2002. The Minister for the Environment has in fact approved the implementation of the proposal (subject to a range of conditions) but the necessary amendment to the Metropolitan Region Scheme (MRS) has yet to be finalised owing to the potential impact of the Fremantle Ports' proposals for *Kwinana Quay*: the "island port" option may require road and rail access over part of the JPPL Stage 1 footprint and the footprint of the alternative "land-backed" option would overlap the JPPL Stage 1 footprint.

This has created further critical delays in the implementation of Stage 1, which has significant potential to provide relief to the current shortage of bulk berths in the Outer Harbour and to generate exports which otherwise could not sustain significant demurrage costs and remain internationally competitive (the issue of the adequacy of supply of berths is raised in Section 2.3 above on the scope of the Review).



There are some important aspects regarding the environmental approval of Stage 1 that merit elaboration for the Review's consideration of planning processes. The timelines for Stage 1 have been as follows:

April 2001	<i>Public Environmental Review</i> released for public comment
November 2002	Environmental Protection Authority releases <i>Bulletin 1076</i> with advice to Minister for the Environment, recommending approval subject to conditions
December 2002	End of Appeal Period
November 2003	Minister for the Environment determines appeals, and seeks more advice from the Environmental Protection Authority (regarding the enforceability and specificity of the recommended environmental conditions) by February 2004
June 2004	Environmental Protection Authority releases <i>Bulletin 1141</i> containing its further advice to the Minister for the Environment
July 2004	End of Appeal Period
September 2004	JPPL responds to public comments
November 2004	Minister for the Environment announces approval subject to conditions
April 2005	Department of Environment and Conservation issues <i>Licence</i> with conditions

The total elapsed time from the release of the *Public Environmental Review* to the Minister's approval was 43 months, a significant period for even the most complex of projects and a period which is relevant to the issue of whether planning processes are facilitating new entrants.



The timelines for the necessary amendment to the Metropolitan Region Scheme have been as follows:

May 2001	WA Planning Commission presents its <i>Metropolitan Region Scheme Amendment Report</i> to the Minister for Planning and Infrastructure, requesting consent to advertise
May 2001	Minister declines request at that time
March 2005	<i>Metropolitan Region Scheme Amendment No. 1035/33</i> report released for public comment
December 2005	Hearings conducted by the WA Planning Commission
July 2007	Minister advises that the MRS Amendment will be delayed a further two years, to allow Fremantle Ports' two options for new facilities in the Outer Harbour (<i>Kwinana Quay</i>) to complete the statutory processes
Current	Finalisation by WA Planning Commission deferred a <i>minimum</i> of eighteen months and potentially much longer

With regard to the WAPC and the MRS amendment, the Issues Paper states that the WAPC "would not consider" the required amendment to the MRS for Stage 1 to proceed. In fact, as the above chronology shows, the WAPC began considering the amendment in 2001 and initiated its public process in 2005. In JPPL's view it would be more accurate to state that the WAPC "did not finalise" the required MRS amendment - JPPL understands that the WAPC had in fact concluded its deliberations immediately prior to it being advised of the decision by Fremantle Ports to proceed with the statutory approval process for the two options in its *Kwinana Quay* development.

Once the MRS amendment has been finalised, JPPL expects to have Stage 1 operational within two years.



Stage 2 Scope, Approvals and Timing

Stage 2 has not been described in the Issues Paper and JPPL wishes to provide the following summary information.

Stage 2 would be located at the southern end of Cockburn Sound, immediately north of James Point (which in turn is immediately north of the BP Refinery). JPPL proposes to reclaim approximately 100 hectares of seabed (most of which is currently under only 3-4 metres of water) and to construct approximately 1.3 km of berths (either three container berths and one general purpose berth, or four container berths). It is probable that two container berths would be constructed in the first instance, with an annual throughput capacity of 1.4 million TEUs or greater.

The total cost of reclamation and berth construction will be privately funded.

As with Stage 1, road connections (linking to Anketell Road) and dual gauge rail connections to the State and national networks (which are close by) will be the responsibility of the State under the Operating Agreement.

It is important to note that the privately-funded JPPL Stage 2 is a direct competitor to Fremantle Ports' publicly-funded *Kwinana Quay* proposal which has two options under consideration. As container throughput continues to grow, each of the three proposals is intended to cater for the "overflow" of container operations at the Inner Harbour when it (and/or its related road and rail linkages) reaches capacity. Only one such new facility is required: either JPPL's proposal or one of the Fremantle Ports options.

JPPL is currently undertaking extensive technical and environmental studies for Stage 2. Advice has already been received that the hazards and risks associated with the proposal do not present any obstacles at the proposed location. Wave hindcasting and berth operability studies have been undertaken and are currently being used to finalise the proposed design of the facility.



Work is well advanced on the preparation of an *Environmental Scoping Document* (which is an initial public phase in the preparation of an *Environmental Review and Management Program* required by the EPA). In due course, an amendment to the Metropolitan Region Scheme will be required and a formal request for this process to begin was made in August 2005. These approval processes are expected to take approximately two years and it would be a further two years before the first two berths could become operational.



3.0 DISCUSSION POINT 3: Do Planning Processes at the Ports of Fremantle, Esperance or Port Hedland Facilitate the Entry of New Suppliers of Port and Port Related Infrastructure Facility Services?

The question posed in this discussion point relates directly to Clause 4.2(a) of the CIRA where the parties have agreed that planning processes should facilitate the entry of new suppliers of port and related infrastructure services.

The use of the term *facilitate* is significant as this means the entry of new suppliers should be made easy or less difficult or more easily achieved. It follows that port planning processes should do more than *not obstruct* the entry of new suppliers in order to comply with the CIRA.

As a new supplier JPPL is well placed to comment on whether this is the case in relation to planning at the Port of Fremantle.

It is the experience of JPPL that planning processes have not facilitated the entry of a new supplier.

Planning by Fremantle Ports has focused almost exclusively on planning for facilities that it will own and operate. There has been little dialogue and collaborative planning with potential new suppliers such as JPPL with the result that the footprint of Fremantle Ports proposed new facilities in the Outer Harbour overlaps the James Point footprint.

This outcome is consistent with Fremantle Ports seeking to maximize use of its existing facilities and to remain the monopoly supplier of multi-use/ multi-user facilities in the port.

While the Issues Paper asks for evidence to substantiate claims of lack of facilitation, a more productive approach is for the Review to consider whether port authority legislation and charters have due regard to the benefits of competition between port infrastructure and service providers. More specifically, do they provide sufficient grounds to **cause** port authorities to facilitate through their planning activities the entry of new suppliers?



The current legislative and regulatory framework for port authorities contains a mixture of public interest objectives (e.g. trade facilitation) and commercial objectives (e.g. operate profitably) and would seem to **allow** the authorities to plan on a basis which does not focus exclusively on their own assets and their commercial interests.

An example of planning on this basis is the study undertaken by Worley Pty Ltd for the Port Hedland Port Authority titled *Port Hedland Port Authority Planning Study Phase 2 Report (Report 302/00394/2 18 Aug 2003)*. This study examined the future pattern of development in the port without pre-empting the ownership of particular facilities and was intended in part to provide a guide for proposals from the private sector.

However, given their commercial orientation the natural tendency for port authorities will be to give most prominence in their planning to developing their own business assets to meet future demand. This incentive structure for the authorities would seem to fall short of the entry facilitation role for port planning prescribed in the CIRA.

The Review should consider whether port authority legislation and charters provide sufficient incentive to cause port authorities to facilitate the entry of new suppliers through their planning.

An alternative or adjunct to amended port charters could be to provide for a greater role or an oversight role in port planning for planning bodies that do not have the conflicts of interest likely to be experienced by port authorities. As the planning of future port development is a key role for port authorities it would not be sensible to dilute their role to the extent that they were no longer responsible for the activity. However, exercise of this responsibility could be guided by directions, approvals or input from planning bodies with purely public interest objectives. The Department for Planning and Infrastructure would seem to be such a body.

There are other reasons for the direct involvement of an overarching planning body in port planning. First, the transport linkages to the hinterland which lie beyond the port boundary are critical to the successful operation of a port and planning for these will not be the port authority's responsibility. Second, there are likely to be overarching planning policies and strategies that are relevant to the development of the port and with which port planning needs to align.



The Review should consider the extent to which port planning undertaken by port authorities should be directed or guided by other planning bodies such as the Department for Planning and Infrastructure.



4.0 DISCUSSION POINT 5: Does the Charter of the Ports of Fremantle, Esperance and Port Hedland Provide Adequate Guidance to Seek a Commercial Return While Not Exploiting Monopoly Powers?

As the Issues Paper points out “the misuse of monopoly power typically refers to limited access to services and/or charging prices in excess of prices that would be sustainable in a competitive market”. These issues of access and pricing are important aspects of the supply of port and related infrastructure services. In recognition of this importance they have been addressed in the James Point Operating Agreement as detailed below.

However, monopoly power can extend into other areas of activity such as port planning as discussed under Discussion Point 3. Accordingly, it is important that the review take a broad perspective when considering any requirement of port authorities not to exploit monopoly power.

The Operating Agreement details the third party access arrangements which will apply to all developments by JPPL. In brief:

- Under clause 5.19.1 JPPL is required to grant access

“to third parties who wish to provide services to Port users subject to such third parties complying with Port operating criteria and procedures (including the requirements of reliability and continuity of service) and the obtaining of all relevant licences and approvals”

- Under clause 5.19.2 JPPL must also

“ensure that third parties have appropriate access to the Port Area as necessary for the purpose of import/export of all commodities the Port is capable of handling and are not prevented from obtaining Port Services from a third party provider who complies with the requirements in clause 5.19.1”

- Clause 5.20 also makes provision, subject to certain procedures, for JPPL to enter into



“fixed period contracts for the exclusive provision of Port Services”

JPPL remains fully committed to these provisions.

The Operating Agreement also details the port pricing arrangements which will apply to all developments by JPPL. In brief:

- Under clause 13.3 the Department for Planning and Infrastructure

“reserves the right to instigate pricing arrangements in the event that it is reasonably satisfied that a competitive market does not exist for the provision of one or more Port Service(s) at the Port and that the Operator is charging users of that Port Service(s) unfair Port Charges. The Operator shall have the right to make representations ... and any dispute regarding the amount charged or to be charged will be determined by referring it to the Australian Consumer and Competition Council or such other Government Agency existing at the time the dispute arises which is responsible for such matters.”

JPPL remains fully committed to these provisions.

As the Issues Paper notes, the Port Authorities Act does not address access to ports and its provisions would not preclude monopoly pricing by port authorities of individual port services. The latter point could be important not only to port users but also to other future providers of port infrastructure who may need to purchase some services from a port authority.

Having noted that its Operating Agreement deals with access and pricing matters, JPPL remains undecided as to whether there needs to be specific provisions in port authority charters to deal with the exercise of monopoly powers in these areas. However, JPPL would reiterate the point that more effective competition will reduce the scope for the exercise of market power by port authorities.

The Review should consider potential restrictions on the exploitation of port authority monopoly powers across all areas of activity and not just access and pricing. The Review should also consider the scope for increased competition to obviate the need for such restrictions.

