

Federal Court of Australia
District Registry: New South Wales
Division: General

No: NSD862/2019



MAYFIELD DEVELOPMENT CORPORATION PTY LTD ACN 154 495 048
Applicant

NSW PORT OPERATIONS HOLD CO PTY LTD ACN 163 262 351 and others named in the
schedule
Respondents

ORDER

JUDGE: JUSTICE JAGOT

DATE OF ORDER: 26 May 2020

WHERE MADE: Sydney

THE COURT ORDERS BY CONSENT THAT:

1. The stay of the proceeding be varied such that:
 - a. the Applicant be permitted to file and serve the Amended Originating Application in the form annexed to its Interlocutory Application filed on 18 May 2020 and the Amended Statement of Claim in the form annexed to these orders; and
 - b. for avoidance of doubt, the Respondents not be obliged until further order to take any step in relation to the Amended Originating Application or Amended Statement of Claim, including without limitation any application to strike out, disallow, or otherwise oppose the Applicant being permitted to rely upon the Amended Originating Application or Amended Statement of Claim, and the Respondents have liberty to take any such steps a reasonable time after the stay is lifted.
2. The Applicant's interlocutory application filed on 18 May 2020 otherwise be dismissed.
3. The Applicant pay the costs of the Respondents and Interested Persons forthwith, which may be taxed if not agreed.

Date that entry is stamped: 26 May 2020

A handwritten signature in blue ink that reads 'Sia Lagos'.

Registrar

Annexure



Form 17
Rule 8.05(1)(a)

Amended Statement of claim

Federal Court of Australia
District Registry: New South Wales
Division: General

No. NSD862 of 2019

Mayfield Development Corporation Pty Ltd (ACN 154 495 048)

Applicant

NSW Ports Operations Hold Co Pty Ltd (ACN 163 262 351) and others

Respondents

A. PARTIES

1. The Applicant (**MDC**) is a corporation within the meaning of the *Competition and Consumer Act 2010* (Cth) (**CCA**).
2. The First Respondent (**Hold Co**) is and at all material times was a corporation within the meaning of the CCA.
3. The Second Respondent (**Botany Operator**):
 - (a) is and at all material times was a corporation within the meaning of the CCA; and
 - (b) since 31 May 2013 has been wholly owned by Hold Co.
4. The Third Respondent (**Kembla Operator**):
 - (a) is and at all material times was a corporation within the meaning of the CCA; and
 - (b) since 31 May 2013 has been wholly owned by Hold Co.

Filed on behalf of the Applicant

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B. CARGO HANDLING FACILITIES AT PORT OF NEWCASTLE

Containerised cargo

5. Containerised cargo is cargo packed in standardised shipping containers that can be loaded onto, transported on and unloaded from different modes of transport (road, rail and sea) without the cargo being loaded and unloaded from its container.
6. When containerised cargoes, or empty containers, (together, **containers**) ~~is~~ are transported by sea ~~it is~~ they are typically transported on ships that are built and ~~solely~~ used to carry containerised cargo (**Container Ships**).
7. Containerised cargo can be loaded onto and unloaded from Container Ships and moved within a port using:
 - (a) specialised infrastructure and equipment used solely for the purpose of handling containerised cargo, including quay cranes, straddle carriers, rubber tyred gantries and rail mounted gantries (**Container Terminal**); or
 - (b) equipment that is not specialised such as ships' cranes or general wharf cranes.
8. Handling of containerised cargo ~~is~~ more efficient at ports with Container Terminals than ports where the handling occurs using ships' cranes or general (i.e., multi-purpose) wharf cranes.
9. At all material times:
 - (a) the only ports in New South Wales (**NSW**) with channels, harbours and berths capable of accommodating most Container Ships were Port Botany, Port Kembla and Port of Newcastle (**Relevant Ports**);
 - (b) Port Botany was the only port in NSW with Container Terminals and handled most of the containerised cargo that arrived in or departed NSW by sea;
 - (c) Port Kembla:
 - i. predominantly handled bulk cargo (being commodities such as coal and grain that are transported unpackaged in large quantities) and general cargo (being cargo that must be loaded individually such as cars and bulk steel); and
 - ii. handled a small amount of containerised cargo using ships' cranes or general wharf cranes; and
 - (d) Port of Newcastle:
 - i. predominantly handled bulk cargo; and
 - ii. handled a small amount of containerised cargo using ships' cranes or



general wharf cranes.

Proposed development of cargo handling facilities at Port of Newcastle

10. On 5 October 2003, the State of NSW (**State**) announced that Port of Newcastle would be developed into a major port for handling containerised cargo once Port Botany had reached its capacity.

Particulars

The announcement was made by the Honourable Bob Carr MP.

11. Newcastle Port Corporation (**NPC**) is and at all material times was a body corporate established under section 6(1) of the *Ports and Maritime Administration Act 1995* (NSW) and responsible for, *inter alia*, managing port facilities at Port of Newcastle.

Particulars

In about July 2014, NPC was amalgamated with statutory corporations responsible for operations at other ports in NSW and is now known as the Port Authority of New South Wales.

12. In November 2009, NPC requested detailed proposals for the development and operation of cargo terminals in an area within Port of Newcastle known as “Mayfield” that would include a Container Terminal with capacity to handle in excess of one million twenty-foot equivalent units (**TEUs**) of containerised cargo per year.

Particulars

The request was in writing in a document titled “Invitation to Submit Detailed Proposal: Mayfield Site”.

13. On about 11 February 2010, a consortium known as Newcastle Stevedores Consortium (**NSC**) submitted a proposal to NPC in response to the request for proposals.

Particulars

As at 11 February 2010, the members of NSC were:

- (i) Anglo Ports Pty Limited, a company that provides project and management advice on port operations, investments, acquisitions and divestments;
- (ii) Grup Maritim TCB SL, a company incorporated in Spain that manages various ports in Spain and other countries;
- (iii) Newcastle Stevedores Pty Ltd, a supplier of stevedore services at Port of Newcastle since about 1997;
- (iv) trustee of the Beesley Family Trust; and



(v) trustee of the Wavehill Family Trust.

14. On about 5 May 2010, NPC invited NSC (and no other bidder) to engage in further discussions regarding the development and operation of cargo terminals at Mayfield.

Particulars

Letter from Gary Webb, Chief Executive Officer of NPC, to Capt. Richard Setchell of NSC dated 5 May 2010.

15. By 12 April 2011, NPC had:
- (a) endorsed NSC as the preferred proponent for the development a Container Terminal and other port infrastructure at Mayfield; and
 - (b) advised NSC by letter that it wished to start negotiating the terms of leases and project delivery agreements, the execution of which would require approval of NPC's board of directors and the State.
16. On 6 September 2011, the State announced that it intended to privatise Port Botany through a long-term lease.

Particulars

The announcement was made in a speech by the Honourable Mike Baird MP, NSW Treasurer, in the NSW Legislative Assembly.

17. By 24 October 2011, NPC and NSC had completed negotiations of agreements which provided for the development by NSC of a Container Terminal and other port infrastructure at Mayfield (**the proposed project agreements**).

Particulars

The proposed project agreements were documents titled:

- (i) "Project Delivery Agreement";
 - (ii) "Stage 1 Lease – Mayfield Site, Newcastle, NSW";
 - (iii) "Agreement for Leases and Subleases".
18. NPC's Board resolved to seek the approval of the State for NPC to execute the proposed project agreements on about 3 November 2011 and subsequently sought that approval.
19. On about 14 December 2011, NSC incorporated MDC as the entity through which it would develop and operate a Container Terminal and other port infrastructure at Mayfield if the State approved the proposed project agreements.



Scoping and strategy study

20. By 9 December 2011, the State had determined that it would conduct a scoping and strategy study in respect of its proposed lease of Port Botany (**scoping and strategy study**) and would not consider approving the execution by NPC of the proposed project agreements until the scoping and strategy study had concluded.
21. On about 14 December 2011, the State announced that Morgan Stanley had been appointed as the State's financial advisor for the lease of Port Botany and would be responsible for conducting the scoping and strategy study.

Particulars

The announcement was in writing in a media release of the Honourable Mike Baird MP, NSW Treasurer, dated 14 December 2011 titled "Financial Advisor Appointed: Government Forges Ahead with Long-term Lease of Port Botany".

22. Between about 14 December 2011 and ~~mid-~~October 2012, Morgan Stanley conducted the scoping and strategy study.
23. By April 2012, the State was aware that the possibility of a competing Container Terminal being developed at Port of Newcastle:
 - (a) was a concern to potential bidders for Port Botany; and
 - (b) could negatively affect perceived value to potential bidders.

Particulars

This allegation is based on paragraph 25 of the Statement of Claim in proceeding NSD 2289 of 2018. Particulars will be provided prior to trial. MDC is presently unable to provide further particulars.

24. On 12 June 2012, the State announced that it was undertaking scoping work to review the inclusion of Port Kembla in the Port Botany transaction.

Particulars

The announcement was made by the Honourable Mike Baird MP, NSW Treasurer, and the Honourable Duncan Gay, Ports Minister, dated 12 June 2012, in writing in a document titled "Refinancing of Port Kembla to Boost Funds for Major Infrastructure Projects".

24A. On 27 July 2012, the State announced its decision to lease Port Botany and Port Kembla through a public tender process.



24B. Until November 2012, the number of TEUs that could be imported and exported at Port Botany was limited to 3.2 million TEU's pa (**Botany TEU limit**) by reason of planning controls imposed by or under the Environmental Planning and Assessment Act 1979 (NSW).

24C. On 26 November 2012 the State removed the Botany TEU limit: section 32 of the Ports Assets (Authorised Transactions) Amendment Act 2012.

24D. An effect of the State removing the Botany TEU limit was to extend beyond 50 years the period before which Port of Botany would reach the limit of its capacity to accommodate further increases in the import and export of containers.

24E. The scoping and strategy study was completed in or about the week beginning 21 October 2012.

25. By ~~30 August~~ 26 October 2012:

- (a) the State had determined that, if the arrangements proposed in the scoping and strategy study for the privatisation of Port Botany and Port Kembla were implemented, it would not approve a proposal that involved developing a Container Terminal at Port of Newcastle before the developable container handling capacity at Port Botany and Port Kembla had been developed and was being fully utilised; and
- (b) the State had informed NSC that it NPC would not receive State approval to execute the proposed project agreements negotiated by, and agreed as between, NSC and NPC because the proposal included a Container Terminal;
- (c) the NPC had informed NSC of the matters in paragraph (b); and
- (d) the State and NPC had each informed NSC that negotiations for NSC to construct port facilities at Newcastle were otherwise acceptable.

Particulars

- (i) Letter from the Honourable Mike Baird MP, NSW Treasurer, to Capt. Richard Setchell dated 30 August 2012.
- (ii) Letter from Gary Webb of NPC to Capt. Richard Setchell dated 26 October 2012.

Further particulars may be provided prior to trial.



C. THE PORT COMMITMENT DEEDS

26. On or about 15 March 2013, the State proposed to enter into deeds known as “Port Commitment Deeds” with whichever bidder for the leases of Port Botany and Port Kembla was the successful bidder.

Particulars

On 15 March 2013, the NSW Treasury and/or Morgan Stanley on behalf of the State made available to bidders in an online data room the following documents:

- (i) draft Port Commitment Deeds for each of Port Botany and Port Kembla, which contained clauses 3 and 6(b) described in paragraphs 32(b) and 32(c) below; and
- (ii) a memorandum dated 15 March 2013 concerning the development of multi-cargo facilities at Port of Newcastle.

MDC does not presently possess copies of the documents alleged which it believes are in the possession of the State.

27. By April 2013, ~~at least one of the members of NSW Ports Consortium~~ each of Hold Co, Botany Operator and Kembla Operator knew ~~was aware~~ that the draft Port Commitment Deeds would, if executed, provide protection for the successful bidder from the possibility that container volumes could be diverted from Port Botany or Port Kembla should a Container Terminal be developed at Port of Newcastle.

Particulars

Members of the NSW Ports Consortium were IFM Investors (**IFM**), Australian Super, Tawreed Investments Limited and Q Super.

Hold Co is and was at all material times an associated entity of members of the NSW Ports Consortium.

On 27 March 2013, IFM prepared a document titled “Project Cook Investment Review”, for the purpose of seeking approval for IFM and its consortium partners to make a bid, by means of the NSW Ports Consortium, for the assets of Port Botany and Port Kembla. In that paper, IFM identified that the provision by the State for “compensation if the container growth at Newcastle exceeds the ‘organic’ growth projections whilst there is excess capacity at Botany and Kembla” provided “us with additional protection on diversion of container throughput”. This document was considered by the IFM Investment Committee on 2 April 2013. MDC does not presently possess the documents alleged.



28. On 12 April 2013:

- (a) the State selected NSW Ports Consortium as the successful bidder for the leases of Port Botany and Port Kembla, and announced that it had made that selection;

and

Particulars

The announcement was in writing in a media release issued by the Honourable Mike Baird MP, NSW Treasurer, dated 12 April 2013, titled “NSW government welcomes successful outcome of port transaction”.

- (b) the State and relevant State Port Corporations entered into share sale and purchase agreements for each of Port Botany and Port Kembla in favour of the NSW Ports Consortium, with effect from 31 May 2013.

Particulars

The agreements were:

- (i) an agreement titled “Sale and Purchase Agreement – Port Botany” which was entered into by the NSW Treasurer on behalf of the State, Sydney Ports Corporation (**SPC**), Port Botany Lessor Pty Ltd (**Botany Lessor**) and Hold Co, which transferred ownership of the shares in Botany Operator and Port Botany Unit Trust to Hold Co; and
- (ii) an agreement titled “Sale and Purchase Agreement – Port Kembla”, which was entered into by the NSW Treasurer on behalf of the State, Port Kembla Ports Corporation, Port Kembla Lessor Pty Ltd (**Kembla Lessor**) and Hold Co, which transferred ownership of the shares in Kembla Operator and Port Kembla Unit Trust to Hold Co.

MDC does not presently possess copies of the documents alleged.

29. On or about 31 May 2013, the State and relevant State Port Corporations entered into further transactions effecting the privatisation of Port Botany and Port Kembla in favour of the NSW Ports Consortium.

Particulars

The transactions were, in relation to Port Botany:

- (i) a 99 year lease of the port land, buildings and improvements entered into by Botany Lessor and NSW Ports Botany Property Co Pty Ltd as trustee for the NSW Ports Botany Property Trust;



- (ii) a sublease between NSW Ports Botany Property Co Pty Ltd as trustee for the NSW Ports Botany Property Trust and Botany Operator as trustee for the Port Botany Unit Trust, by which Botany Operator was granted use of the port land, buildings and improvements.

The transactions were, in relation to Port Kembla:

- (i) ~~an agreement titled "Sale and Purchase Agreement – Port Botany" which was entered into by the NSW Treasurer on behalf of the State, SPC, Botany Lessor and Hold Co, which transferred ownership of the shares in Botany Operator and Port Botany Unit Trust to Hold Co~~ a 99 year lease of the port land, buildings and improvements entered into by Kembla Lessor and NSW Ports Kembla Property Co Pty Ltd as trustee for the NSW Ports Kembla Property Trust; and
- (ii) a sublease between NSW Ports Kembla Property Co Pty Ltd as trustee for the NSW Ports Kembla Property Trust and Kembla Operators as trustee for the Port Kembla Unit Trust, by which Kembla Operator was granted use of the port land, buildings and improvements.

MDC does not presently possess copies of the documents alleged which it believes are in the possession of the State.

30. As a result of the transactions alleged in paragraphs 28(b) and 29:

- (a) the land on which each of Port Botany and Port Kembla is situated was leased for 99 years to NSW Ports Botany Property Co Pty Ltd and NSW Ports Kembla Property Co Pty Ltd respectively (each a subsidiary of NSW Ports Pty Ltd), with sub-leases in favour of Botany Operator and Kembla Operator respectively to conduct the port operations; and
- (b) Botany Operator and Kembla Operator became owned by Hold Co.

31. On 31 May 2013, the State entered into the two Port Commitment Deeds, relating to Port Botany and Port Kembla respectively.

Particulars

The two deeds were:

- (i) a written document titled "Port Commitment Deed – Port Botany", which was entered into by the NSW Treasurer on behalf of the State,

Botany Operator as trustee for Port Botany Unit Trust, NSW Ports Botany Property Co Pty Ltd as trustee for NSW Ports Botany Property Trust and Hold Co (**Port Botany PCD**); and



- (ii) a written document titled “Port Commitment Deed – Port Kembla”, which was entered into by the NSW Treasurer on behalf of the State, Kembla Operator as trustee for Port Kembla Unit Trust, NSW Ports Kembla Property Co Pty Ltd as trustee for NSW Ports Kembla Property Trust and Hold Co (**Port Kembla PCD**).

MDC does not presently possess copies of the documents alleged.

32. Each Port Commitment Deed contained inter alia the following terms:

- (a) clause 2 provided that each Port Commitment Deed would operate for a term of 50 years;
- (b) clause 3 required the State to pay compensation to Botany Operator and Kembla Operator respectively if the following conditions were satisfied for two consecutive financial years:
 - i. at least one of Port Botany and Port Kembla is not at “full capacity” (as defined) in relation to the import and export of containers;
 - ii. the volume of containers imported or exported through Port of Newcastle exceeds a threshold of 30,000 TEU per annum (plus natural growth) (**Threshold**); and
 - iii. Botany Operator (as trustee for Port Botany Unit Trust) or Kembla Operator (as trustee for Port Kembla Unit Trust) (as the case may be) demonstrates to the reasonable satisfaction of the State that the container traffic through Port of Newcastle in excess of the Threshold has caused a reduction in containers imported or exported through Port Botany or Port Kembla (as applicable) (**Compensation Provisions**);
- (c) clause 6(b) provided that Botany Operator or Kembla Operator could not make a claim under the Compensation Provisions if they, or an associated corporation, trust or person within the meaning of clause 1.1 of each of the Port Botany PCD and Port Kembla PCD:
 - i. developed or commenced development of container handling capacity at Port of Newcastle;
 - ii. operated, managed or leased the whole or any material part of Port of Newcastle; or
 - iii. operated any material container handling capacity at Port of Newcastle.



33. The amount of compensation payable by the State under the Compensation Provisions is calculated as the weighted average wharfage charge per TEU imposed by Botany Operator or Kembla Operator (as applicable) on port users multiplied by the volume of container traffic through Port of Newcastle that exceeds the Threshold (measured in TEU).
34. Since 31 May 2013, the arrangements alleged in paragraphs 28(b) and 29 and 31 to 33 have continued to be in place.

34A. At and immediately before execution of the Port Commitment Deeds, the State and Hold Co, Botany Operator and Kembla Operator arrived at an understanding (the **Understanding**), provisions of which included, in addition to the terms of the Port Commitment Deeds:

- (a) the relevant port operator at the Port of Newcastle would be obliged to reimburse the State for the amount the State became liable to pay pursuant to the Compensation Provisions, if the volume of containers imported and exported through the Port of Newcastle did engage the Compensation Provisions;
- (b) the State would not approve an agreement, for the construction of port facilities at Newcastle, with a proponent who would not comply with the State's requirements to reimburse the State for the full amount the State became liable to pay pursuant to the Compensation Provisions.

Particulars for inference of Understanding

- (i) The Port Commitment Deeds expressly referred to Port of Newcastle as the source of competition in the Relevant Market and calculated the Compensation by reference to the number of TEUs imported and exported at the Port of Newcastle: c 3.
- (ii) Hold Co, Botany Operator and Kembla Operator each knew that the State would not allow liabilities associated with the lease arrangements for Port Kembla and Port Botany to remain with the taxpayer:
- A. The Treasurer, Mr Baird, was reported having said so in an ABC News article dated 18 October 2012.
- B. The only reasonable inference open was that the State would protect itself and taxpayers from liability under the Compensation Provisions by means of a reimbursement provision.
- (iii) The proposal for a reimbursement provision, to be imposed at the Port of Newcastle, was included in negotiations between the State and Hold Co,



having been raised by one of the bidders for the lease of Port Botany.

- (iv) Each of Hold Co, Botany Operator and Kembla Operator agreed to keep the Compensation Provisions secret, partly because they implied the need for a reimbursement provision: cl 8 Port Commitment Deed.
- (v) In those premises, each of Hold Co, Botany Operator and Kembla Operator arrived at an understanding with the State that the State would limit the capacity of any operator at Port of Newcastle to compete with them in that market, by refusing to lease to any operator not willing to agree a reimbursement provision.
- (vi) The applicant relies upon the facts alleged in paragraphs 24A, 24B and 27 to 33 above.

Further particulars may be provided after discovery.

34B. The State, Hold Co, Botany Operator and Kembla Operator continued to have the Understanding until after 30 May 2014.

D. PRIVATISATION OF PORT OF NEWCASTLE

34C. On 6 August 2013, as a consequence of the facts alleged in paragraphs 31 to 33 above, further or alternatively of the Understanding, the State informed MDC that:

- (a) the Compensation Provisions were in place;
- (b) Development by MDC could not include use of dedicated container handling infrastructure;
- (c) a reimbursement provision would be required in any agreement between NSC and NPC to the effect that NSC would be obliged to reimburse the State for any amount that the State became liable to pay pursuant to the Compensation Provisions, if the volume of containers imported and exported by NSC through the Port of Newcastle engaged the Compensation Provisions;
- (d) no such reimbursement provision would be required if the relevant proponent at Port of Newcastle was, or was an associate of, the lessor of Port Botany or Port Kembla; and
- (e) final agreements between NPC and MDC had to be in place by 1 November 2013 in order to accommodate the timeframe for the proposed privatisation of Newcastle Port.

Particulars

The information was provided at a meeting on 6 August 2013 by representative



of the State to representatives of MDC, including by the production of a document entitled “Transaction Parameters”.

34D. By 12 September 2013, MDC and NPC had agreed in principle a Project Delivery Agreement and Lease Term Sheets, which provided for, among other things, construction of a common-user berth with 2 general wharfcranes.

Particulars

The agreement was contained in an email dated 12 September 2013 from Peter Francis, General Manager of Port development NPC, to Capt. Setchell on behalf of MDC. The email enclosed a “final” Project Delivery Agreement and a “final” lease terms sheet.

34E. The 2 general wharf cranes proposed for the common-user berth would be capable of importing and exporting substantial volumes of containers.

35. On 5 November 2013, the State announced that it would proceed with a long-term lease of Port of Newcastle.

Particulars

The announcement was in writing in a media release issued by the Honourable Mike Baird MP, NSW Treasurer, and the Honourable Duncan Gray MLC, Minister for Roads and Ports, dated 5 November 2013, titled “Green light for Newcastle makeover – NSW government to proceed with long-term lease of Newcastle port”.

35A. In the period 6 August 2013 to 8 November 2013, in communications with State representatives, MDC representatives repeatedly objected to the Transaction Parameters including in respect of the application of the Transaction Parameters to a non-container terminal port.

Particulars

- (a) In an email dated 11 October 2013, MDC:
- (i) objected that the constraints to be imposed on MDC were not being imposed on any other stevedore at Newcastle Port; and
 - (ii) submitted that the constraints were detrimental to the State’s long-term goals for Newcastle, Hunter and northern NSW.



- (b) In a meeting on 14 October 2013, MDC told officers of NPC that it considered the Port Commitment Deeds to be:
- (i) illegal,
 - (ii) “anti-competitive”,
 - (iii) not properly considered, and
 - (iv) a departure from good faith.
- (c) In a meeting on 18 October 2013, MDC informed the State that:
- (i) MDC disputed the legality of the Port Commitment Deeds arising from its anti-competitive nature;
 - (ii) the definition of “container” was too broad for its objective;
 - (iii) the arrangement should not be secret;
 - (iv) the arrangement was unfair to MDC; and
 - (v) the constraints to be imposed on MDC were not being imposed on any other stevedore at Newcastle.
- (d) In a meeting on 19 October 2013, MDC alleged that Morgan Stanley were acting in a conflict of interests, by acting in respect of the lease of Newcastle Port after advising on the leases of Ports Botany and Kembla.

Further particulars may be supplied before trial.

35B. On 8 November 2013, the State determined to refuse approval of MDC and NPC entering into binding agreements to reflect the proposed project agreements and determined to advise NPC to cease negotiations with MDC.

Particulars

The determination was expressed in a letter dated 8 November 2013 from the Hon. Mike Baird NSW Treasurer, on behalf of the State to Capt. R Setchell on behalf of MDC.

35C. In the premises, by its conduct alleged in paragraph 35B above the State gave effect to the Understanding.

35D. Hold Co, Botany Operator and Kembla Operator each was involved in the State’s conduct alleged in paragraphs 35B and 35D.

Particulars of Involvement

- (a) Hold Co, Botany Operator and Kembla Operator each knew, at the time of execution of the Port Commitment Deeds, that the State would not allow liabilities associated with the lease arrangements for Port Kembla and Port Botany to remain



with the taxpayer:

- A. The Treasurer, Mr Baird, was reported having said so in an ABC News article dated 18 October 2012.
- B. The most reasonable inference open to each was that the State would protect itself and taxpayers from liability under the Compensation Provisions.
- (b) The proposal for a reimbursement provision, to be imposed at the Port of Newcastle, was included within negotiations between the State and Hold Co, having been raised by one of the bidders for the lease of Port Botany.
- (c) The Port Commitment Deeds expressly referred to Port of Newcastle as the source of competition in the Relevant Market and calculated the Compensation by reference to the number of TEUs imported and exported at the Port of Newcastle: c 3.
- (d) Each of Hold Co, Botany Operator and Kembla Operator agreed to keep the Compensation Provisions secret: cl 8 Port Commitment Deed.
- (e) In those premises, each of Hold Co, Botany Operator and Kembla Operator knew that the State was likely to limit the capacity of any operator at Port of Newcastle to compete with them in that market.
- (f) In those premises, each of Hold Co, Botany Operator and Kembla Operator executed the Port Commitment Deeds by which they obtained protection from otherwise likely competition from the Port of Newcastle for Container Port Services.
- (g) Hold Co, to the knowledge of Botany Operator and Kembla Operator paid or promised to pay money to the State for, among other things, the State's promise of the Compensation Provisions to protect them from the effects of competition in the market from the Port of Newcastle for Container Port Services, which protection the State would accomplish by a reimbursement provision.

The applicant also relies upon the facts alleged in paragraphs 24A, 24B and 27 to 33 above.

- 36. On about 18 November 2013, the State invited expressions of interest for leases of the land and assets of Port of Newcastle.



37. In about December 2013, the State communicated to potential bidders for the land and assets of Port of Newcastle that the financial obligations of the State under the Port Botany and Port Kembla PCDs would be passed to the successful bidder for Port of Newcastle.

Particulars

The communication was in writing and contained on pages 172 and 173 of the document titled "Port of Newcastle Information Memorandum" provided by the State (through its advisors, Morgan Stanley) to potential bidders for Port of Newcastle in about December 2013. The Information Memorandum was provided to potential bidders by way of a data room to which potential bidders were given access.

MDC does not presently possess a copy of the document alleged which it believes is in the possession of the State.

38. On 30 April 2014, the State announced that it had agreed to lease Port of Newcastle to a consortium comprising Hastings Fund Management and China Merchants (together, **Port of Newcastle Consortium**).

Particulars

The announcement was in writing in a media release issued by the Honourable Mike Baird MP, Premier of NSW, dated 30 April 2014, titled "Transforming Newcastle: port lease secures funds for revitalisation".

39. On about 30 May 2014, the State and relevant State Port Corporations entered into transaction effecting the privatisation of Port of Newcastle in favour of Port of Newcastle Consortium.

Particulars

The transactions included:

- (i) an agreement titled "Sale and Purchase Agreement" which was entered into by the NSW Treasurer on behalf of the State, NPC and Port of Newcastle Investments Pty Ltd (**PNIP**) which transferred ownership of the shares in Port of Newcastle Operations Pty Ltd (**PON Operations**) and the Port of Newcastle Unit Trust to PNIP;
- (ii) a 98 year lease of the port land, buildings and improvements between Newcastle Lessor and Port of Newcastle Investments (Property) Pty Ltd (**PNIP**) as trustee for Port of Newcastle Investments (Property) Trust; and



- (iii) a sublease between PNIP as trustee for Port of Newcastle Investments (Property) Trust and PON Operations as trustee for Port of Newcastle Unit Trust, which granted PON Operations use of the port land, buildings and improvements.

MDC does not presently possess copies of the documents alleged which it believes are in the possession of the State.

40. On 30 May 2014, the State entered into a deed (the **Newcastle Deed**) with, amongst others, PON Operations.

Particulars

The deed was a written document titled "Port Commitment Deed – Port of Newcastle", entered into by the NSW Treasurer on behalf of the State, PON Operations as trustee for Port of Newcastle Unit Trust, PNIP as trustee for Port of Newcastle Investments (Property) Trust and PNI.

MDC does not presently possess a copy of the document alleged which it believes is in the possession of the State.

41. Clause 3 of the Newcastle Deed required PON Operations to reimburse the State for any payments the State was required to make to Botany Operator or Kembla Operator under the Compensation Provisions.
42. Since 30 May 2014, the arrangements alleged in paragraphs 39 to 41 have continued to be in place.

E. THE RELEVANT MARKET

43. At all material times, when containerised cargo was shipped into or from a port in NSW:
- (a) shipping lines transported the containerised cargo by sea to or from the port;
 - (b) stevedores provided services at the port such as loading and unloading the containerised cargo onto or from ships, trains or trucks and moving containerised cargo within the ports;
 - (c) land transport operators transported the containerised cargo to or from the port by rail or road (together, **Container Services**).
44. The demand for each of the Container Services referred to in paragraph 43 increased (or decreased) when the demand for each other Container Service increased (or decreased).



45. At all material times there was demand within NSW for the services of:

- (a) making available to shipping lines shipping channels and berths for use by ~~when~~ transporting containerised cargo to or from a port;
- (b) making available to stevedores land and cargo handling facilities at ports for use when loading and unloading containers ~~used cargo~~, storing containers ~~used cargo~~ and moving containers ~~used cargo~~ within a port;
- (c) making available to land transport operators land and facilities at ports for use when delivering containers ~~used cargo~~ to and collecting containers ~~used cargo~~ from ports

(together, **Container Port Services**).

Particulars

The demand was derived from the demand for Container Services, which was in turn derived from the demand for the transport by sea of containerised cargo into and from NSW.

- 46. At all material times, the operators of Port Botany, Port Kembla and Port of Newcastle were suppliers or potential suppliers of Container Port Services to shipping lines, stevedores and land transport operators.
- 47. There is and has at all relevant times been a market for the supply of Container Port Services in NSW (**Relevant Market**).

Particulars

The matters referred to in paragraphs 43 to 46 are repeated.

Further particulars may be provided following the service of the MDC's expert evidence.

- 48. At all material times Container Port Services supplied at the Relevant Ports were generally not substitutable or otherwise competitive with Container Port Services supplied at Port of Melbourne or Port of Brisbane.
- 49. At all relevant times prior to 31 May 2013, the operator of Port Botany faced competitive constraint from the prospect that the operator of Port Kembla and/or Port of Newcastle could materially increase supply of Container Port Services in the Relevant Market, including by the development and use of a Container Terminal at Port Kembla and/or Port of Newcastle.



F. LIKELY EFFECT OF THE COMPENSATION PROVISIONS ~~and UNDERSTANDING~~

50. As at 31 May 2013, in the future with ~~either or both of the Compensation Provisions,~~
further or alternatively with the Understanding, it was likely that, for at least 50 years:

- (a) Botany Operator and/or Kembla Operator would be entitled to receive payments in accordance with the terms of the Compensation Provisions if the conditions identified in paragraph 32(b) were satisfied;
- (b) the State would refuse any proposal for the development of the Mayfield site by MDC (or any other entity) that included use of a Container Terminal or of other infrastructure with a capability for importing and exporting sufficient volumes of containers to engage the Compensation Provisions;
- (c) ~~following privatisation of Port of Newcastle,~~ the State would ensure that the any lessee of Port of Newcastle would be required to reimburse the State for any liability incurred by the State under either or both of the Compensation Provisions;
- (d) by reason of the matters referred to in paragraphs 50(a) to 50(c):
 - i. a Container Terminal and other infrastructure capable of importing and exporting sufficient volumes of containers to engage the Compensation Provisions would not be developed at Port of Newcastle; and
 - ii. there would be no material or only a limited increase in:
 - 1. the capacity of Port of Newcastle to handle containerised cargo;
 - 2. the volume of containerised cargo handled at Port of Newcastle; or
 - 3. the efficiency of containerised cargo handling at Port of Newcastle.

51. On 31 May 2013, in the future without ~~either or both of the Compensation Provisions,~~
further or alternatively without the Understanding, it was likely that:

- (a) Botany Operator and/or Kembla Operator would not be entitled to receive payments in accordance with the terms of the Compensation Provisions;
- (b) the State would approve NPC executing agreements substantively similar to the proposed project agreements, NPC and MDC would subsequently execute the approved agreements and MDC would develop and operate cargo handling facilities at Mayfield (including a Container Terminal) in accordance with the executed agreements;
- (c) in the alternative to paragraph 51(b), ~~following privatisation of Port of Newcastle:~~
 - i. ~~the no operator at or~~ lessee of Port of Newcastle would ~~not~~ be required to reimburse the State in accordance with the Compensation Provisions;



- ii. ~~the lessee of Port of Newcastle NPC~~ and MDC would enter into agreements for the development and operation by MDC of cargo handling facilities at Mayfield (including a Container Terminal); and
- iii. MDC would develop and operate cargo handling facilities at Mayfield (including a Container Terminal);

(d) by reason of the matters referred to in paragraphs 51(a) and 51(b), alternatively paragraphs 51(a) and 51(c):

- i. a Container Terminal would be developed at Port of Newcastle; and
- ii. there would be a substantial increase in:
 1. the capacity of Port of Newcastle to handle containerised cargo;
 2. the volume of containerised cargo handled at Port of Newcastle; and
 3. the efficiency of containerised cargo handling at Port of Newcastle.

52. By reason of the matters referred to in paragraphs 50 and 51 above, the Compensation Provisions, further or alternatively the Understanding, were likely to have the effect of substantially lessening competition in the Relevant Market.

G. PURPOSE OF THE COMPENSATION PROVISIONS and UNDERSTANDING

53. Further or alternatively, the Compensation Provisions and the Understanding each had the purpose of substantially lessening competition in the Relevant Market for at least 50 years.

Particulars

The Purpose of the Compensation Provisions is to be inferred from the matters referred to in paragraphs 23, 24A, 24B, 25, 26, 27, 32, 33, 34A, 34E, 37, 41, 50 and 51 above.

The Purpose of the Understanding is to be inferred from the matters referred to in paragraphs 23, 24A, 24B, 25, 26, 27, 32, 33, 34A, 34E, 37, 41, 50 and 51 above.

Further particulars may be provided prior to trial.

H. CONTRAVENTIONS

54. In the premises:

- (a) Hold Co and Botany Operator each contravened s. 45(2)(a)(ii) of the CCA as in effect on 31 May 2013 by making the Port Botany PCD, containing the Port

Botany Compensation Provision, being a provision which had the purpose, or would have or be likely to have the effect, of substantially lessening competition in the Relevant Market.;



- (b) Hold Co and Kembla Operator each contravened s. 45(2)(a)(ii) of the CCA as in effect on 31 May 2013 by making the Port Kembla PCD, containing the Port Kembla Compensation Provision, being a provision which had the purpose, or would have or be likely to have the effect, of substantially lessening competition in the Relevant Market.
- (c) Hold Co, Botany Operator and Kembla Operator each contravened s. 45(2)(a)(ii) of the CCA as in effect on 31 May 2013 by arriving at the Understanding, containing a provision which had the purpose, or would have or be likely to have the effect, of substantially lessening competition in the Relevant Market.
- (d) Hold Co, Botany Operator and Kembla Operator each contravened s. 45(2)(b)(ii) of the CCA as in effect on 31 May 2013 by being involved in the State's giving effect to a provision of the Understanding, which provision had the purpose, or would have or be likely to have the effect, of substantially lessening competition in the Relevant Market.
- (e) Hold Co, Botany Operator and Kembla Operator each contravened s. 45DA(1) of the CCA by engaging, in concert with the State, in the action of executing the Compensation Provisions, further or alternatively in the action of arriving at the Understanding, which hindered or prevented MDC supplying Container Port Services to shippers at the Port of Newcastle and thereby caused substantial damage to the business of MDC.

55. Hold Co, Botany Operator and Kembla Operator have since 31 May 2013 been related bodies corporate and MDC relies on s. 45(4)(b) of the CCA.

I. LOSS OR DAMAGE

56. The contraventions referred to in paragraph 54 caused MDC to suffer loss or damage.

Particulars

If not for the contraventions referred to in paragraph 54, after 31 May 2013 MDC would have developed and operated for 50 years cargo handling facilities at the Mayfield site (including a Container Terminal alternatively other infrastructure capable of importing and exporting substantial volumes of containers).



- (i) The amount of MDC's loss or damage is equal to the value of the opportunity to develop and operate for 50 years cargo handling facilities at Mayfield (including a Container Terminal alternatively other infrastructure capable of importing and exporting substantial volumes of containers). Further particulars will be provided following the service of MDC's expert evidence.
- (ii) In the alternative to (i) and (ii):
- a. if not for the contraventions referred to in paragraph 54, MDC would have had the valuable commercial chance of developing and operating for 50 years cargo handling facilities at the Mayfield site (including a Container Terminal alternatively other infrastructure capable of importing and exporting substantial volumes of containers);
and
 - b. the amount of MDC's loss or damage is equal to the value of that commercial chance.

Date:

Signed by ...

Lawyer for the Applicant

This pleading was prepared by



Certificate of lawyer

Icertify to the Court that, in relation to the statement of claim filed on behalf of the Applicant, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date:

Signed by
Lawyer for the Applicant



Federal Court of Australia
of 2019
District Registry: New South
Wales Division: General

No. NSD862

Respondents

Second Respondent: Port Botany Operations Pty Ltd (ACN 161
204 342)
Third Respondent: Port Kembla Operations Pty Ltd (ACN 161
246 582)

Date:



Schedule

No: NSD862/2019

Federal Court of Australia

District Registry: New South Wales

Division: General

| | |
|-------------------|---|
| Interested Person | PORT OF NEWCASTLE OPERATIONS PTY LIMITED |
| Interested Person | AUSTRALIAN COMPETITION AND CONSUMER COMMISSION |
| Second Respondent | PORT BOTANY OPERATIONS PTY LTD ACN 161 204 342 |
| Third Respondent | PORT KEMBLA OPERATIONS PTY LTD ACN 161 246 582 |