HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY No. S122 of 2025

BETWEEN:

MAYFIELD DEVELOPMENT CORPORATION PTY LTD ACN 154 495 048

Appellant

and

NSW PORT OPERATIONS HOLD CO PTY LTD ACN 163 262 351

First Respondent

PORT BOTANY OPERATIONS PTY LTD ACN 161 204 342

Second Respondent

PORT KEMBLA OPERATIONS PTY LTD ACN 161 246 582

Third Respondent

STATE OF NEW SOUTH WALES, DEPARTMENT OF ATTORNEY GENERAL AND JUSTICE (CORRECTIVE SERVICES NSW)

Fourth Respondent

APPELLANT'S SUBMISSIONS

Filed on behalf of the Appellant by
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PART I CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

PART II ISSUES PRESENTED BY THE APPEAL

2. This proceeding arises out of the sequelae of the decision of the Fourth Respondent (the **State**) in around 2013 to privatise Port Botany, Port Kembla and the Port of Newcastle. The Appellant (**Mayfield**) contends that it lost the opportunity to develop land at the Port of Newcastle because the State entered into certain agreements (**Port Commitment Deeds** or **PCDs**) with the operators of each of Port Botany and Port Kembla (the First to Third Respondents, **NSW Ports**). Mayfield contends that entry into the PCDs, as well as the arrival at an alleged understanding between the Respondents, was in contravention of ss 45 and 45DA of the *Competition and Consumer Act 2010* (Cth) (**CCA**).

3. Against that factual background, the issue presented by the appeal is whether NSW Ports are entitled to "derivative Crown immunity" in respect of their entry into the PCDs and the alleged understanding,[1] such that ss 45 and 45DA do not apply to their conduct. The resolution of this issue invites consideration of two subsidiary issues.

4. First, what it means for the CCA "to divest" the Crown of "proprietary, contractual or other legal rights or interests", within the meaning of the principle of statutory construction articulated in ***Wynyard Investments*** *Pty Ltd v Commissioner for Railways (NSW)* (1955) 93 CLR 376 at 396 and *ACCC v* ***Baxter*** *Healthcare P/L* (2007) 232 CLR 1 at [62], in the context of the conferral of statutory power on a decision-maker to enter into transactions effecting the privatisation of state assets.

5. Second, whether on a proper construction of the CCA, the power granted by the *Port Assets (Authorised Transactions) Act 2012* (NSW) (**PAAT Act**) to sell state Port assets — which did not engage the exclusion provision in s 51(1) of the CCA — nevertheless immunised the conduct of a private counter-party buying those assets from application of the CCA by reason of "derivative Crown immunity".

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[1] For the purposes of the question of derivative Crown immunity, nothing turns on whether the impugned conduct was the entry into the PCDs or the making of or giving effect to the "understanding" alleged: SOF at [130]: Appellant's Book of Further Materials (**ABFM**) **70.**

PART III SECTION 78B NOTICE

6. Mayfield does not consider that notice under s 78B of the *Judiciary Act 1903* (Cth) is required.

PART IV CITATION

7. The judgment of the Full Court of the Federal Court of Australia is reported as *Mayfield Development Corporation Pty Ltd v NSW Ports Operations Hold Co Pty Ltd* (2025) 308 FCR 153 (Lee, Colvin and Stewart JJ) (**FC**).

8. The judgment of the primary judge has not been reported; its medium neutral citation is *Mayfield Development Corporation Pty Ltd v NSW Ports Operations Hold Co Pty Ltd (No 4)* [2024] FCA 538 (McElwaine J) (**J**).

PART V: RELEVANT FACTS

The privatisation of Port Botany, Port Kembla and the Port of Newcastle

9. Around July 2012, a decision was made by the NSW Government that Port Botany would be developed as the primary container port in NSW and that each of Port Botany, Port Kembla and the Port of Newcastle would be privatised (**J [1], [12] CAB 11, 14**). During the privatisation process, the bidders for the acquisition of Port Botany and Port Kembla intimated that the price they were prepared to pay for the Ports might be discounted if additional container capacity were to be developed at the Port of Newcastle (**J [13] CAB 14**).

10. A decision was taken by the State to address this concern in the form of the PCDs, entered into by the Treasurer on behalf of the State with NSW Ports (**J [13] CAB 14**). The effect of clause 3 of the PCDs (the **Compensation Provisions**) was to require the State to pay compensation if Port Botany or Port Kembla are not at full capacity for the import and export of containers, and container volumes beyond a defined threshold are diverted from Port Botany or Port Kembla to the Port of Newcastle (**J [13] CAB 14**).

The ACCC Proceeding

11. The ACCC subsequently brought a claim in the Federal Court against NSW Ports and the State, contending that the PCDs contravened s 45(2)(a)(ii) of the CCA: see *Australian Competition and Consumer Commission v NSW Ports Operations Hold Co Pty Ltd* [2021] FCA 720 (Jagot J) (***ACCC v NSW Ports (Trial)***); *Australian Competition and Consumer*

Commission v NSW Ports Operations Hold Co Pty Ltd (2023) 296 FCR 364 (Allsop CJ and Yates J, Beach J dissenting) (***ACCC v NSW Ports (Appeal)***).

12. The ACCC's claim failed both at trial and on appeal for reasons including that NSW Ports was entitled to derivative Crown immunity such that s 45 of the CCA did not apply to its conduct in respect of entry into the PCDs (but also on various other issues, including purpose, effect and likely effect).

Mayfield's Proceeding

13. Mayfield's proceeding (which differs in material respects from the ACCC Proceeding) was stayed pending the resolution of the ACCC Proceeding. Upon its resurrection, Mayfield's position remained that derivative Crown immunity did not apply to the conduct of NSW Ports, and that it would seek to persuade a Full Court that *ACCC v NSW Ports (Appeal)* was plainly wrong, or failing that endeavour, seek to appeal to this Court. Against this background, the case managing judge determined that the matter should proceed by way of a question raising the issue of derivative Crown immunity for separate determination. The parties agreed a statement of the agreed facts necessary to resolve the question of derivative Crown immunity, as well as two other separate questions raised by the Respondents (on which Mayfield was wholly successful at trial and on appeal, and which form the basis of the Respondents' notices of contention in this appeal, which will be dealt with in reply).

14. The relevant separate question for Mayfield's notice of appeal was "… is 'derivative Crown immunity', pleaded at paragraphs [57]-[92] of NSW Ports' Defence and [57]-[89] of the State's Defence, a complete answer to the applicant's claims made in the FASOC?".[2]

15. The trial judge (McElwaine J) accepted Mayfield's concession that he was bound by the decision of *ACCC v NSW Ports (Appeal)* to answer the separate question "Yes": **J [156] CAB 59**. Before the Full Court, Mayfield contended that the decision of the majority of *ACCC v NSW Ports (Appeal)* was "plainly wrong" (and that Beach J, dissenting, was correct). The Full Court concluded that the reasoning of *ACCC v NSW Ports (Appeal)* "was and still is open on the law" and was not "plainly wrong" (**FC [69] CAB 97**). It is

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[2] Mayfield did not seek to challenge the decision of the earlier Full Court that the State did not make the Compensation Provisions in the course of carrying on a business within the meaning of s 2B of the CCA: see *ACCC v NSW Ports (Appeal)* (2023) 296 FCR 364 at [337]-[338], [514]. It follows that it is common ground in this appeal that the State was entitled to Crown immunity by reason of s 2B of the CCA.

necessary to first highlight the critical features of the reasoning in the ACCC Proceeding, before turning to the Full Court below, and the errors in the approach of each.

The primary judgment in the ACCC Proceeding (Jagot J)

16. At first instance in the ACCC Proceeding, Jagot J concluded that if the CCA applied so that NSW Ports could not make or give effect to the Compensation Provisions, the State would be relevantly "divested" of its capacity under the PAAT Act to enter into the authorised transactions "as the Treasurer considered necessary or convenient".[3] The premise of that reasoning was the conclusion that the Treasurer had been vested with statutory authority to do what was "necessary or convenient to effect the authorised transactions (that is, the transfer of the State's proprietary rights) including by contract".[4] Jagot J found that the "statutory, proprietary and contractual righ[t]" of the Crown which would be adversely affected was the right of the Treasurer to therefore "require" a counterparty to engage in conduct that contravened s 45 of the CCA for the purpose of the authorised transaction.[5]

17. Justice Jagot concluded that s 45 did not apply to NSW Ports to the extent it made the Compensation Provisions and does not apply to the extent it may give effect to the Compensation Provisions in the future.[6]

The majority of the Full Court in the ACCC Proceeding (Allsop CJ and Yates J)

18. The majority approached the issue by asking: "[w]hat was or were the relevant proprietary, legal or equitable or statutory right or rights of the State? And was it, or were they, divested by applying s 45 to NSW Ports in respect of the compensation provisions?".[7] The majority referred to the PAAT Act, and considered that it was enacted for the "purpose of the dealing by the Treasurer with extremely valuable assets and proprietary rights",[8] and that these were not "equivalent to the general capacity or freedom of the Executive to contract".[9]

19. The majority considered that Jagot J was "correct to conclude that there would be a divestiture of such part of the rights and interests (in the relevant legal sense) of the

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3 *ACCC v NSW Ports (Trial)* [2021] FCA 720 at [369].
4 *ACCC v NSW Ports (Trial)* [2021] FCA 720 at [371].
5 *ACCC v NSW Ports (Trial)* [2021] FCA 720 at [418].
6 *ACCC v NSW Ports (Trial)* [2021] FCA 720 at [423].
7 *ACCC v NSW Ports (Appeal)* (2023) 296 FCR 364 at [404].
8 *ACCC v NSW Ports (Appeal)* (2023) 296 FCR 364 at [406].
9 *ACCC v NSW Ports (Appeal)* (2023) 296 FCR 364 at [408].

Treasurer conferred on him by Parliament to effect the transaction".[10] It was considered significant that "[w]ere s 45 to apply, ss 4L and 45 of the Act would sever and make of no effect the [Compensation Provisions] which underpinned the demand by the Treasurer for the highest value for a monopoly asset".[11] The PAAT Act, according to the majority, "entitled the Treasurer to effect the transaction as he chose to direct", and if the legal effect were not as the Treasurer directed because of the severance and unenforceability of the Compensation Provisions, "there was or would have been a divestiture of that right, power, authority and privilege conferred by the PAAT Act".[12]

The minority of the Full Court in the ACCC Proceeding (Beach J)

10 20. Justice Beach considered that the appropriate starting point was the construction of the CCA (**not** the PAAT Act), including s 51.[13] Section 2B(1) should not be construed so as to preclude Part IV from applying to conduct required under State legislation if that legislation did not satisfy the detailed requirements of s 51 of the CCA.[14] Referring to the principle that the CCA should not be read so as to divest the Crown of proprietary, contractual or other legal rights or interests save to the extent it evinces a contrary intention, Beach J concluded that in the case of s 45 that intention is manifest, because s 45 applies to "any corporation".[15]

21. As for the PAAT Act, Beach J construed it as empowering the Treasurer to make any contract he considered expedient with a willing private sector party. It conferred no right
20 to require such a counterparty to accept his terms, let alone require it to engage in conduct that might contravene the CCA.[16] Even if the PAAT Act did do this, Beach J noted that the "executive power to contract and the common law freedom to contract" are not "a legal right or interest being a legally enforceable interest".[17] The very "general language of the PAAT Act" could not be construed as empowering the Treasurer to "sweep aside any legal obstacle that would otherwise prevent a third party from entering an authorised transaction on terms that the Treasurer considered value maximising or convenient".[18] The application of s 45 could not "divest" the Treasurer of a right under the PAAT Act,

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10 *ACCC v NSW Ports (Appeal)* (2023) 296 FCR 364 at [410].
11 *ACCC v NSW Ports (Appeal)* (2023) 296 FCR 364 at [411].
12 *ACCC v NSW Ports (Appeal)* (2023) 296 FCR 364 at [412].
13 *ACCC v NSW Ports (Appeal)* (2023) 296 FCR 364 at [566].
14 *ACCC v NSW Ports (Appeal)* (2023) 296 FCR 364 at [573].
15 *ACCC v NSW Ports (Appeal)* (2023) 296 FCR 364 at [580].
16 *ACCC v NSW Ports (Appeal)* (2023) 296 FCR 364 at [592].
17 *ACCC v NSW Ports (Appeal)* (2023) 296 FCR 364 at [593]-[594].
18 *ACCC v NSW Ports (Appeal)* (2023) 296 FCR 364 at [613].

because there never was a time when NSW Ports' agreement to the Compensation Provisions was lawful and effective to create such a right in the Treasurer of which he could be divested.[19] Justice Beach therefore concluded that derivative Crown immunity was not relevantly engaged.[20]

The decision of the Full Court below

22. The dispute before the Full Court below turned largely on whether, as Mayfield contended, the *ACCC v NSW Ports (Appeal)* had misapplied *Baxter* (2007) 232 CLR 1, and what it meant to "divest the Crown of proprietary, contractual or other *legal* rights or interests" (**FC [20] CAB 84**). The Full Court correctly identified that the so-called legal "consequence" which was identified by Allsop J in the *ACCC v NSW Ports (Appeal)* was "the effect upon the value that might be obtained for the State's asset" (**FC [63] CAB 96**).

23. The Full Court then distinguished this reasoning from that which was disapproved in *Baxter* (at **FC [66] CAB 96**), by "framing" the legal right not as the "freedom of the State to contract on terms of its own choosing" but as the "exercise of the 'legal and statutory rights'" conferred on the Treasurer under the PAAT Act to "direct the form of the privatisation transaction", in a manner "directed to maximizing the value to be obtained from the privatisation of a State asset" (**FC [66] CAB96**). As explained below at [64]-[65], that is a distinction with no difference.

24. The Full Court returned again at **FC [68] CAB 97** to justify the distinction from *Baxter* on the basis the transaction was one by which a "very substantial asset of the State would be privatised". As explained below at [68]-[68], there is no basis in the text or purpose of the CCA to presuppose that privatisation transactions are in some special category of case.

25. The Full Court then concluded at **FC [69] CAB 97** that the "legal consequence" for the "legal rights and interests of the State" comprised the "restriction upon the manner in which it could exercise the statutorily conferred authority of the Treasurer to shape the dealing in the port assets in the form of the privatisation." As explained below at [51]-[56], that conclusion confused at its premise the distinction between a statutorily conferred *freedom or power* to contract and *legal rights or interests*, leading to the erroneous conclusion that what was no more than a restriction on freedom of contract could constitute a relevant "divestment".

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19 *ACCC v NSW Ports (Appeal)* (2023) 296 FCR 364 at [616].
20 *ACCC v NSW Ports (Appeal)* (2023) 296 FCR 364 at [624].

PART VI: ARGUMENT

Relevant law

The CCA

26. The relevant provisions of the CCA for present purposes are as follows (as at 31 May 2013, the date on which the PCDs were entered into).

27. Section 2 of the CCA provided (and continues to provide) that:

> The object of this Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.

28. Section 2B provided:

> (1) The following provisions of this Act bind the Crown in right of each of the States, of the Northern Territory and of the Australian Capital Territory, so far as the Crown carries on a business, either directly or by an authority of the State or Territory:
>
> (a) Part IV;
>
> (b) Part XIB;
>
> (c) the other provisions of this Act so far as they relate to the above provisions.
>
> (2) Nothing in this Act renders the Crown in right of a State or Territory liable to a pecuniary penalty or to be prosecuted for an offence.
>
> (3) The protection in subsection (2) does not apply to an authority of a State or Territory.

29. By s 4 an "authority" in relation to a State or Territory means: (a) a body corporate established for a purpose of the State or the Territory by or under a law of the State or Territory, or (b) an incorporated company in which the State or the Territory, or a body corporate referred to in paragraph (a), has a controlling interest.

30. Section 45, in Div 2, Pt IV of the CCA, included these provisions:

> (2) A corporation shall not:
>
> (a) make a contract or arrangement, or arrive at an understanding, if:
>
> …
>
> (ii) a provision of the proposed contract, arrangement or understanding has the purpose, or would have or be likely

> to have the effect, of substantially lessening competition; or
>
> (b) give effect to a provision of a contract, arrangement or understanding, whether the contract or arrangement was made, or the understanding was arrived at, before or after the commencement of this section, if that provision:
>
> …
>
> (ii) has the purpose, or has or is likely to have the effect, of substantially lessening competition.

31. Section 51 (which is in Part IV) is titled "Exceptions", and included these provisions:

> (1) In deciding whether a person has contravened this Part, the following must be disregarded:
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> …
>
> (b) anything done in a State, if the thing is specified in, and specifically authorised by:
>
> (i) an Act passed by the Parliament of that State; or
>
> (ii) regulations made under such an Act;
>
> …
>
> (1C) The operation of subsection (1) is subject to the following limitations:
>
> (a) in order for something to be regarded as specifically authorised for the purposes of subsection (1), the authorising provision must expressly refer to this Act;
>
> …

The PAAT Act

32. The PAAT Act commenced on 26 November 2012. Section 4 of the PAAT Act authorised the transfer of port assets to the private sector. Section 6 of the Act provided that:

> **6 Treasurer's functions**
>
> The Treasurer has and may exercise all such functions as are necessary or convenient for the purposes of an authorised transaction. The functions conferred on the Treasurer by any other provision of this Act do not limit the Treasurer's functions under this section.

33. Section 7(1) provided that "An authorised transaction is to be effected as directed by the Treasurer and can be effected in any manner considered appropriate by the Treasurer."

34. It is common ground that the PAAT Act does not engage the exception provision in s 51(1) of the CCA, because it does not specifically refer to the CCA as is required by s 51(1C).

"Derivative Crown immunity"

35. The course of the law on derivative Crown immunity travels from the decision of this Court in *Wynyard Investments* (1955) 93 CLR 376, to ***Bradken*** *Consolidated Ltd v Broken Hill Proprietary Co Ltd* (1979) 145 CLR 107 and ***NT Power*** *Generation Pty Ltd v Power and Water Authority* (2004) 219 CLR 90 (via ***Bropho*** *v Western Australia* (1990) 171 CLR 1).

36. It culminates authoritatively (to date) in *Baxter,* which marked a break in the prior stream of authority (cf **FC [21]-[25] CAB 84-86**). *Baxter* did so both in a general sense (recognising that the Court's statement in *Bradken* about Crown immunity "no longer accurately represents the law"[21] following *Bropho*), and its particular emphasis on the changes to the CCA which compelled the revisitation of earlier authority in this specific context.[22]

37. Three critical points emerge from *Baxter.*

38. The first is the Court's emphasis on the fact that derivative Crown immunity is (and is only) a matter of statutory construction, not a free-standing "prerogative power of the Crown to override a statute, or dispense with compliance".[23] It operates as a "general principle of statutory construction" that "save to the extent to which a contrary intention appears, the [CCA] will not be read so as to divest the Crown of proprietary, contractual or other legal rights or interests".[24]

39. The second is the recognition that the framework enacted by the CCA was such that State and Territory governments no longer enjoyed a general immunity from the CCA. Rather acting under s 51(1), State and Territory Parliaments "may legislate to protect governmental interests", but the Commonwealth Parliament had set requirements as to

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21 (2007) 232 CLR 1 at [58].
22 (2007) 232 CLR 1 at [58].
23 (2007) 232 CLR 1 at [40].
24 (2007) 232 CLR 1 at [62].

the "specificity with which they must do that"[25] given the "emphatic double reference to specificity" introduced into s 51 in 1995.[26]

40. The third is the Court's conclusion — in a break from *Bradken* — that the Crown's freedom or capacity to contract is not a legal "interest" which engages the requirement of there being a divestment of legal interests.[27] As the Court explained in *Baxter*, "[t]here is also a risk of confusing governmental, commercial, or even political interests with legal, equitable or statutory rights and interests. From one point of view, it may be in the interests of a government for it, and anyone who deals with it, to have complete freedom to contract, but in reality no one has such freedom."[28]

10 41. In this connexion, the Court recognised that laws to protect competition may operate in ways which constrain freedom of contract, including by way of an "indirect effect upon governments, in their application to people dealing with governments".[29] But the Court returned again to emphasise — recognising that there was no "simple answer" to whether it is to the advantage of executive governments to be constrained by anti-trust law — that because of s 51(xx) of the *Constitution*, this "is a question on which the language of the federal Parliament's legislation is decisive, subject to s 51(1)" of the CCA.[30]

42. The resolution of the central issue in this appeal turns on the proper application of the statements of principle in *Baxter* to the conduct of the State and NSW Ports in this case.

The proper starting point: the CCA

20 43. The proper starting point is the text of the CCA.

44. First, s 45(1) is emphatic: it applies to any "corporation".

45. Second, s 45 applies to the State "so far as [the State] carries on a business", by operation of s 2B(1). Section 2B does not say anything about the application of the CCA to private corporations. As the Court recognised in *Baxter*, nothing in the CCA operates to preclude a differential result on one party to a transaction as compared with another: "many statutes, and the Act in particular, may produce the consequence that making or

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25 (2007) 232 CLR 1 at [64].
26 (2007) 232 CLR 1 at [21].
27 (2007) 232 CLR 1 at [68].
28 (2007) 232 CLR 1 at [60].
29 (2007) 232 CLR 1 at [60].
30 (2007) 232 CLR 1 at [60].

performing a contract is illegal for one party but not for the other".[31] The answer is not to "extend a general immunity to any non-government party negotiating or contracting with the Crown".[32] Rather, in the case of the CCA, the outcome is determined by the "application of the dictated legislative scheme concerning remedies".[33]

46. Third, s 51 of the CCA expressly sets out exceptions by which a State is able to specifically authorise conduct, in an Act of Parliament, so that it is not taken to be in contravention of Part IV. The evident intention of the Commonwealth Parliament is that if State Parliaments wish to authorise conduct that may constitute a restrictive trade practice, they may do so (provided they are "willing to accept the political responsibility of exercising that power with the necessary specificity"[34]). Nothing in the PAAT Act satisfies s 51(1C) so as to engage s 51 of the CCA.

47. The majority in *ACCC v NSW Ports (Appeal)* was therefore wrong to conclude that "[s]ection 51 is not, and cannot be, the basis of an intention in the Act contrary to the operation of the proposition drawn from Kitto J in *Wynyard Investments* and expressed in *Bass, NT Power* and … *Baxter*".[35] That reasoning inverted the proper approach set out in *Baxter,* reintroducing the "flavour of assertion of executive prerogative"[36] by invoking the "doctrine" of derivative Crown immunity before consideration of the statute (as a whole). The error is manifest in the majority's conclusion that "[t]he proper ascertainment of the extent of Crown immunity takes place at an anterior stage to the possible relevance of s 51 of the Act".[37] The task of the Court was to construe the statute and determine whether the contrary intention appeared from the text of the CCA. Section 51, as part of the statute, is not relegated to some point later in the analysis.

48. Thus, the "proper ascertainment of the extent of Crown immunity" is determined by a *construction* of s 51 (along with the other provisions of the CCA), not at some anterior point where the doctrine is applied in the abstract. In circumstances where the PAAT Act does not comply with s 51, it is the text of the CCA that is "decisive".[38] To the extent that

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31 (2007) 232 CLR 1 at [70].
32 (2007) 232 CLR 1 at [60], [68], [70], [73].
33 (2007) 232 CLR 1 at [70].
34 (2007) 232 CLR 1 at [48].
35 (2023) 296 FCR 364 at [402].
36 (2007) 232 CLR 1 at [40].
37 (2023) 296 FCR 364 at [402].
38 (2007) 232 CLR 1 at [60].

the anterior consideration was said to lie in s 2B, that was also an error.[39] Section 2B says nothing about private corporations. If a State wishes to exempt private corporations from Part IV of the CCA, the Commonwealth has stipulated that it may do so in accordance with s 51, and it has imposed a requirement that this must be done with specificity. It follows that a State Parliament cannot do so otherwise, no less can a State Minister do so by merely deciding to enter into an anti-competitive contract or arrangement.[40]

The proper construction of the PAAT Act

49. Critical to the finding of both Full Courts that derivative Crown immunity applied to the conduct at issue was the "statutory power" to enter into the PCDs conferred on the Treasurer by the PAAT Act, which was what both Full Courts considered would be relevantly "divested" if the CCA were to apply to the conduct at issue. Both Full Courts perceived some difference in the relevant interest of the Crown between *Baxter* (which was merely "freedom to contract") and the "right or interest" apparently divested in this case, being the power conferred on the Treasurer under the PAAT Act.

50. Two errors lurk in the shadows of this conclusion.

51. The first error is the conflation of *freedom or power* on the one hand with legal *rights or interests* on the other. Sections 6 and 7 of the PAAT Act use general language to empower the Treasurer to effect an "authorised transaction".[41] As the Explanatory Notes to the Bill which became the PAAT Act make clear, its purpose was to "authorise and facilitate" the transfer of the State's port assets.[42] That is, it conferred statutory *power* on the Treasurer to make a contract considered expedient with a willing private sector party. It did not confer any legal *rights* on the Treasurer.

52. So much is clear from the absence of any correlative duty on the counter-party to accept whatever terms the Treasurer directed: there is *nothing* in either s 6, s 7 or the PAAT Act as a whole which compels or requires a private counterparty to accept the transfer of Port Assets on whatever terms the Treasurer seeks, nor does any provision empower the Treasurer to direct such entities to do so. Indeed, the PAAT Act imposes no duty on NSW Ports to do anything (nor have the Respondents ever contended otherwise).

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39 (2023) 296 FCR 364 at [402].
40 See *Baxter* (2007) 232 CLR 1 at [64].
41 Which was defined in s 3 to mean a "transfer of port assets authorised by Part 2". Section 4 (which is in Part 2) authorises "the transfer of port assets to the private sector or to any public agency".
42 Explanatory Notes, Port Assets (Authorised Transactions) Bill 2012 (NSW) at 1.

53. Thus, for example, had NSW Ports responded to the proposed deal by informing the Treasurer it did not wish to execute the PCDs because it might contravene the CCA, the Treasurer had no "right" under the PAAT Act to require NSW Ports to execute anyway, nor was there any correlative duty imposed on NSW Ports to do so.[43]

54. The second error underlies the first; being a failure to recognise that the power granted to the Treasurer was nothing more (and in point of substance was less) than the freedom to contract, when the PAAT Act is properly construed in its statutory and historical context. Prior to enactment of the PAAT Act, both Ports Botany and Kembla were operated by state-owned corporations which were legally disabled from disposing of their fixed assets or main undertakings without the approval of shareholder Ministers, by operation of ss 20X and 20Y of the *State Owned Corporations Act 1989* (NSW). That is, there was a pre-existing (and complete) statutory limitation on the freedom of the executive government of NSW to contract in respect of the Port Assets.[44] It was therefore necessary for the Parliament to (re)confer on the State executive its freedom to sell those state-owned assets.

55. The Full Court refused to engage with this historical fact, concluding it was not necessary to "plumb the depths" of the parties' competing contentions as to the "way in which the terms of that legislation might properly be viewed for the purposes of the application of the principle of construction as to Crown immunity" (**FC [44] CAB 91-92**). Yet these (relatively shallow) waters were critical to understanding why — in substance — nothing more than freedom to contract was apparently (partly) "divested" in this case. The point was that the PAAT Act did not confer some additional power on the Treasurer beyond the executive freedom to contract — which is part of the ordinary non-executive power of a State government, does not require statutory authorisation, and is capable of statutory abrogation.[45]

56. Here, the freedom of the executive government to contract in respect of the Port Assets *had* been abrogated because the assets were vested in state-owned corporations who were

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43 Indeed, the PAAT Act says nothing about the PCDs or the Compensation Provisions at all, and it commenced on 26 November 2012, well before the Compensation Provisions were proposed to bidders in the draft Port Commitment Deeds, which occurred in March 2013: see SOF at [110], [112] (**ABFM 61**).

44 See also the Explanatory Notes to the Port Assets (Authorised Transactions) Bill 2012 (NSW): "The State's ports assets are currently vested in the Sydney Ports Corporation and the Port Kembla Port Corporation, which are State owned corporations".

45 *New South Wales v Bardolph* (1934) 52 CLR 455 at 508.

legally disabled from selling their assets. In that context, the PAAT Act is a statutory limitation of the freedom of contract, which was enacted in place of even more restrictive prior statutory restraints on the state-owned corporations disposing of the assets. The statutory conferral of the power to contract on the decision-maker (along with the limitations within the statute on that power) certainly meant the Executive regained its previously abrogated freedom to contract. But such a conferral of power does not in the usual course, and did not here, confer on the decision-maker legal "rights" (nor impose correlative duties).

57. It is therefore not correct to reason that because the freedom to contract had been *limited* by the Parliament, there was a relevant "divestment" here (as a basis for distinguishing *Baxter*). The PAAT Act simply gave the Treasurer a power which was *less than* the absolute freedom of contract which would have existed absent statutory intervention.

The correct construction of the CCA and PAAT Act, applied to this case

58. Having regard to these principles, two conclusions follow. The *first* is that, as a matter of statutory construction, the Commonwealth Parliament plainly intended the CCA to regulate conduct of a corporation contracting with a State. Although it was intended that a State legislature could exempt conduct from being subject to the CCA, the way the Parliament determined this should be done is by way of compliance with s 51. The PAAT Act does not comply with s 51. The conduct of NSW Ports in entering into the PCDs and alleged understanding is therefore regulated by the CCA.

59. The *second* is that there would be no "divesture" of a legally enforceable right or interest of the State if s 45 regulated the entry by NSW Ports into the PCDs. The PAAT Act does not purport to confer a *right* on the Treasurer to compel NSW Ports to enter into the PCDs or the PCDs containing anti-competitive provisions. It is an Act which authorised the transfer of the Port Assets: it relevantly says no more than that the Treasurer had the power to sell those assets. That statutory power (which reflects the executive freedom to contract) is not a legally enforceable right that can be divested in the relevant sense.[46] The State (having not accepted the political responsibility contemplated by s 51) was bound to take NSW Ports as it found them: a corporation regulated by the CCA.

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[46] *Baxter* (2007) 232 CLR 1 at [60]; see also [68].

Specific errors in the Full Courts' reasoning

60. There are three specific aspects of the reasoning in the Full Courts which need to be separately addressed.

61. The first is the conclusion of the majority in *ACCC v NSW Ports (Appeal)* that the "PAAT Act … entitled the Treasurer to effect the transaction as he chose to direct" and if the "legal effect" was "not as he directed because of the severance and unenforceability of the compensation provisions" there was or would have been a relevant divesture.[47] On one reading, that is to say no more than the Treasurer's freedom to contract as he wished, empowered by the PAAT Act, would otherwise be restrained by operation of Part IV of the CCA. That is correct, and consistently with *Baxter*, that is not a relevant divesture (for the reasons explained above).

62. However, taken to its extreme, the majority's reasoning in effect seems to assume the Treasurer in fact had a right conferred by the PAAT Act to authorise and require conduct to be engaged in, free from the operation of federal law, which right could not be divested. The potential consequences of that reasoning are startling. For example, if the State were selling an asset in respect of which competition already existed (rather than a monopoly port asset), such a construction would not only permit the Executive to propose a cartel provision (s 45AD); it would also immunise private counterparties from the consequences of making and giving effect to such a provision contrary to Division 1 of Pt IV of the CCA, provided only that the cartel operates to maximise the price of the asset.

63. The provisions of the PAAT Act provide no basis to imply such a power (nor did the Respondents contend it did). To construe the CCA as not intended to apply whenever a State Minister desires that a person be able to act inconsistently with the CCA would render s 51(1) redundant. It would also fall into the error identified in *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334, where this Court observed that the Full Court's view that persons other than the State were entitled to derivative immunity to the extent their acts or omissions were "carried out pursuant to the direction or request of the State of New South Wales", extends beyond the scope of the principle of construction of derivative Crown immunity.[48]

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47 (2023) 296 FCR 364 at [412].
48 (1999) 198 CLR 334 at [42] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

64. The second was the reasoning of both Full Courts that if s 45 were to apply, it would make of "no effect the provisions which underpinned the demand by the Treasurer for the highest value".[49] In point of principle, this involved an impermissible and erroneous extension of the protection from a divestment of legal rights and interests to protection from an effect on the value that might be obtained for the sale of the State's asset. In substance, it is to find a relevant divesture of legal rights and interests because the State might have been able to extract less money from its counterparty if its counterparty was bound by the law. That is a commercial interest of the State, not a legal interest.

65. In point of precedent, it is a conclusion at odds with the decision in *NT Power*, in which the Court rejected a submission that there was an effect on the Territory's legal rights or interests if the clause in issue was not enforceable, because the Government would have to obtain replacement quantities of gas, possibly at a higher price. Notwithstanding this might mean the Government was "worse off" in an "economic sense",[50] derivative Crown immunity did not apply because there was no "legally enforceable interest" of the Territory.[51]

66. Curiously, the Full Court relied on comments in *NT Power* referring to "the Government's enjoyment of a direct consensual relationship between itself and a non-governmental party" (**FC [24] CAB 86**), but concluded that *Baxter* had nothing to say about an effect on rights and interests of that kind (**FC [25] CAB 86**). The Full Court instead distinguished *Baxter* on the basis it was "strongly influenced" by the incongruity in a contention that the CCA did not apply to Baxter's business activities even though it *did* apply to the Crown when it engaged in such conduct in carrying on a business (**FC [38(1)] CAB 89-90**; and see also **FC [46] CAB 92** where the Full Court said, apparently disapprovingly, that Mayfield's case sought to impugn "indirectly" what it could not impugn "directly").

67. That was to ignore the import of the emphasis in *Baxter* that "[i]n order to protect legal rights of the Crown, it is not necessary to deny that entering into or performing a contract could involve a contravention of s 46 … by a non-government party", that "many statutes, and the Act in particular, may produce the consequence that making or performing a contract is illegal for one party but not for the other", and that the answer is not to "extend

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49 (2023) 296 FCR 364 at [411], see also [405]. See also **FC [21] CAB 84-85**, **[63] CAB 96**.
50 (2004) 219 CLR 90 at [172] (McHugh A-CJ, Gummow, Callinan and Heydon JJ).
51 (2004) 219 CLR 90 at [173] (McHugh A-CJ, Gummow, Callinan and Heydon JJ).

a general immunity to any non-government party negotiating or contracting with the Crown".[52] It was also to ignore the *express* recognition in *Baxter* that despite the fact the CCA might have an "indirect effect upon governments in their application to people dealing with governments", that was a policy choice which had been made by the Commonwealth Parliament, subject to the terms of s 51(1).[53] That policy choice is to be respected and given effect in the process of construction; not avoided.

68. The third error was the apparent significance the Full Court ascribed to the fact the PCDs were contracts entered into as part of "privatisation process": see **FC [40] CAB 90, [51] CAB 93**.

69. This fact says nothing one way or another about whether legal rights or interests were relevantly divested. Even if the subject matter of a contract were relevant (which it is not), the privatisation of State infrastructure is a substantial commercial activity with significant effects on the State and national economy. It is at least equally likely, having regard to the object set out in s 2 of the CCA, that the Commonwealth Parliament intended to regulate such transactions. There is certainly nothing in the text or context of the CCA which suggests it did *not.*

70. A related basis for distinction from *Baxter* relied upon by the Full Court was that the State's interest in the ports was "not brought into existence by the relevant dealing as it was in *Baxter*", rather the State was "dealing with its existing rights and interests in the ports" (**FC [45] CAB 92**). Again, in substance, that says no more than that the transaction was one involving privatisation; for the reasons given above, that is not a basis on which some special rule should be applied.

71. But it is telling that *the relevance* of the "dealing" with "existing rights and interests" was said to be that the PCDs were made to "enhance the consideration that might be received for [the Ports]" (**FC [45] CAB 92**). As explained at [64]-[65] above, that is inconsistent in principle with *Baxter* and in application with *NT Power.*

72. The majority in *ACCC v NSW Ports (Appeal)* sought to distinguish *Baxter* by describing the contracts in that case as involving "supplies received and paid for by the State at prices that may have been higher than would have been under unimpaired competitive conditions", and concluding therefore "[t]here was no relevant divesture of a relevant

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52 *Baxter* (2007) 232 CLR 1 at [70].
53 *Baxter* (2007) 232 CLR 1 at [60].

legal right".[54] Rather, there was only the "affectation of contracts", which was of "no substantive consequence to the legal position of the State authorities, and indeed no consequence to the financial position of them".[55] But simply because in *Baxter* the State got less money, and in the present case the State seemingly got more money, does not supply a basis to conclude that in one case there was no divesture, and the other there was. Indeed, it is a matter which bespeaks to the analogy in the circumstances of the two cases; not otherwise.

The Full Courts erred, Beach J was correct

73. For these reasons, it is respectfully submitted that each of the two Full Courts erred in concluding that the conduct of NSW Ports was immune from the application of Part IV of the CCA by reason of "derivative Crown immunity". Justice Beach was correct to conclude that derivative Crown immunity could not be engaged in the circumstances of this case.

PART VII: ORDERS SOUGHT

74. The following orders are sought:

i. Appeal allowed with costs.

ii. Set aside Orders 1 and 2 of the orders of the Full Court made on 3 April 2024, and in lieu therefor it be ordered:

a. The appeal be allowed.

b. The orders made by the primary judge on 3 June 2024 be set aside.

c. Insofar as it concerns the answer to Question (b) of the separate questions, the orders of the primary judge made on 22 May 2024 be set aside, and in lieu thereof, separate question (b) be answered "No".

d. The Respondents pay the Appellant's costs of:

   i. the hearing of the separate questions; and

   ii. the appeal.

e. The matter be remitted to the primary judge for further determination.

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54 (2023) 296 FCR 364 at [413].
55 (2023) 296 FCR 364 at [413].

PART VIII: ESTIMATE OF HOURS

75. Mayfield estimates that 2 hours is required for the presentation of its oral argument.

Dated: 25 September 2025

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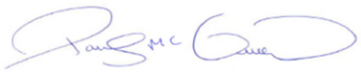

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ANNEXURE TO APPELLANT'S SUBMISSIONS

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date or dates (to what event(s), if any, does this version apply)
1	*Competition and Consumer Act 2010* (Cth)	Compilation for 12 April 2013 to 28 June 2013	ss 2, 2B, 4, 4L, 45, 45DA, 46, 51	Act in force on the date of the entry into the Port Commitment Deeds	31 May 2013
2	*Commonwealth Constitution*	Current	s 51(xx)	Version currently in force (referred to in submissions for illustrative purposes only)	N/A
3	*Port Assets (Authorised Transactions) Act 2012* (NSW)	Compilation for 27 November 2012 to 30 June 2013	ss 4, 6, 7	Act in force on the date of the entry into the Port Commitment Deeds	31 May 2013
4	*State Owned Corporations Act 1989* (NSW)	Compilation for 29 October 2013 to 25 November 2012	ss 20X, 20Y	Act in force prior to commencement of *Port Assets (Authorised Transactions) Act 2012* (NSW) on 26 November 2012	25 November 2012