



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

10 and

NSW PORTS 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

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

FIRST TO THIRD RESPONDENTS' SUBMISSIONS

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Part I: Certification

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

Part II: Issues

2. Does Pt IV of the *Competition and Consumer Act 2010* (Cth) (**CCA**) apply to corporations, where that incidence would be in legal effect upon the conduct of the Crown in right of the State of NSW which was not conduct in the course of carrying on a business?
3. Would application of Pt IV of the CCA to the First, Second and Third Respondents' (**NSW Ports**) conduct in making the Compensation Provisions divest the State of proprietary, contractual or other legal rights or interests conferred by the *Port Assets (Authorised Transactions) Act 2012* (NSW) (**PAAT Act**), such that NSW Ports are not relevantly bound by ss 45 and 45DA of the CCA by reason of the principle of statutory construction described as "derivative" Crown immunity and explained in *ACCC v Baxter Healthcare Pty Ltd* (2007) 232 CLR 1?

Part III: Notice of constitutional matter

4. Notice under s 78B of the *Judiciary Act 1903* (Cth) is not required.

Part IV: Relevant Facts

A Privatisation of Port Botany

5. In September 2011, the NSW Government announced that it would privatise Port Botany by way of a 99-year lease, and in doing so would ensure that key public interest outcomes were protected: Statement of Agreed Facts (**SF**) [32]; Appellant's Book of Further Material (**ABFM**) 24.
6. At the time, Port Botany (the only port in NSW with dedicated container terminals) was operated by Sydney Ports Corporation (**SPC**), constituted under the *Ports and Maritime Administration Act 1995* (NSW) (**PAMA Act**). SPC was a State-owned corporation (**SOC**) within the meaning of s 3(1) and Sch 5 of the *State Owned Corporations Act 1989* (NSW) (**SOC Act**). SOC's were by ss 20X and 20Y of the SOC Act legally disabled from disposing of their fixed assets or main undertakings without the approval of shareholder Ministers: SF [8]; ABFM 18.
7. On 27 July 2012, the Treasurer and Minister for Roads and Ports announced that the NSW Government would proceed with the long-term lease of both Port Botany and Port Kembla. The announcement said that, in relation to the "development of intermodal terminals across South and West Sydney, the Government's freight strategy to be released

later in 2012 would seek to develop Port Kembla as the logical next long term tranche of container capacity after Port Botany”: SF [59]; **ABFM 42**. Consistent with the State policy as crystallised by July 2012, the Treasurer notified Newcastle Ports Consortium (NPC) on 31 July 2012 that it would support the development of a multi-use cargo facility at the Port of Newcastle, but not a container terminal: SF [63]; **ABFM 44**.

8. In October 2012, NSW Parliament passed the PAAT Act, authorising the transfer by the State of a specific class of assets, namely three State-owned ports identified in the PAAT Act. These assets are of high policy and economic significance to the State: SF [73]; **ABFM 49**. Privatisation of Port Botany and Port Kembla under the PAAT Act could only happen once: SF [74]; **ABFM 49**.
9. The decision to privatise the port assets was not a decision made by SPC or Port Kembla Ports Corporation, or one in which they had any involvement. The decision was made by the Executive Government to implement government policy. The privatisations could not be effected under the SOC Act or the PAMA Act, which regulated the SOC's in their conduct of the business of operating the ports. The privatisations could only be effected under the provisions of the PAAT Act, which had nothing to do with the SOC's in their conduct of the business of operating their respective ports. The SOC's were not parties to the Port Botany or Port Kembla Port Commitment Deeds (PCDs): SF [75]; **ABFM 49**.
10. The PAAT Act vests functions in the Treasurer, a Minister of the Crown, and not the executive at large. The NSW Treasurer was given all functions necessary and convenient for the purposes of a transfer of port assets authorised under the PAAT Act, the proceeds of which were payable to the State and to be paid into the Restart NSW Fund (ss 5 and 6). An authorised transaction was to be effected as directed by the Treasurer in any manner the Treasurer considered appropriate (s 7): SF [79]; **ABFM 50**. The rights vested in the Treasurer by the PAAT Act to effect an authorised transaction required a counterparty to which the port assets may be transferred, and the PAAT Act expressly contemplated that the counterparty may be a private entity: SF [81]; **ABFM 50**.
11. In October 2012, the NSW Government advised NPC that it did not approve the development of a container terminal at the Port of Newcastle, but did not object to the concept of a container terminal at the Port of Newcastle once Port Botany and Port Kembla were fully developed and at container-handling capacity: SF [82], [82A]; **ABFM 50-51**. The policy of sequential, rather than duplicative, container capacity cohered with

the need for vast publicly-funded road, rail and other infrastructure to connect container ports to landside logistics: SF [39], [41], [54], [57]-[58]; **ABFM 25, 39, 41-42.**

12. By December 2012, four final bidders were selected for the Port Botany and Port Kembla leases: SF [90]; **ABFM 53.** In February 2013, one bidder (badged Hobson, which was not the NSW Ports consortium) wrote to NSW Treasury in respect of the draft transaction documents, identifying “fundamental” issues, including compensation if State policy changed to favour the Port of Newcastle over Port Kembla as the location of the second NSW container terminal when Port Botany reached capacity: SF [93]; **ABFM 55.**
- 10 13. On 28 February 2013, the Steering Committee in NSW Treasury considered that ongoing discussions between the Government and NPC would need to be disclosed to bidders and that bidders, other than Hobson, may also seek compensation for any Government-sponsored container terminal at Newcastle that may be established in the future: SF [94]; **ABFM 55.** In March 2013, Morgan Stanley (advising NSW Treasury on the privatisation process) advised that, if the State supported some development at Newcastle, its options included providing compensation for container volumes at Newcastle that exceed a reasonable projection of organic growth: SF [102]; **ABFM 58.**
- 20 14. Morgan Stanley then advised NSW Treasury that it must disclose to bidders the current status of Newcastle (that the State would be able to call for container developments at Newcastle, under the proposed lease for the Port of Newcastle) and should “[p]rovide a regime to bidders to mitigate impacts of State-sanctioned Newcastle developments that are inconsistent with current policy which Bidders are ‘buying’ today”: SF [105]; **ABFM 59-60.** The Treasurer agreed with the recommendations and was comfortable with the proposed PCDs and Compensation Provisions: SF [107]; **ABFM 60.**
15. The regime developed into the Compensation Provisions in the two PCDs entered into by the State of New South Wales and the First and Second Respondents (**the Port Botany PCD**) and the State and the First and Third Respondents (**the Port Kembla PCD**): SF [106]; **ABFM 60.**
- 30 16. On 31 May 2013, as a condition of completion of the sale and purchase agreements, the Port Botany PCD and the Port Kembla PCD were executed pursuant to directions of the Treasurer. Each was executed by the Treasurer for and on behalf of the State and different NSW Ports entities: SF [121]; **ABFM 67-68.** None of the SOCs was a party, nor did they have any role in the preparation of the PCDs: SF [122]; **ABFM 68.**

17. Clause 3 of each PCD contains the Compensation Provisions. The effect of the Compensation Provisions is that, unless Port Botany or Port Kembla are both at Full Capacity (as defined by cl 3.1), the Botany Operator and Kembla Operator (subject to specified pre-conditions) are to be compensated by the State if container volumes beyond a defined threshold are diverted from Port Botany or Port Kembla to the Port of Newcastle: SF [124]; **ABFM 68**. Compensation is not payable unless the Botany and Kembla operators can demonstrate that they did everything they reasonably could to prevent the diversion of volumes.¹
 18. On 10 December 2018, the ACCC commenced the **ACCC Proceeding** in the Federal Court, alleging that NSW Ports contravened s 45(2)(a)(ii) of the CCA. The ACCC sought declarations and pecuniary penalties and injunctions under ss 76 and 80 of the CCA: SF [177]; **ABFM 87**.
 19. On 31 May 2019, the Appellant (**MDC**) commenced the **MDC Proceeding**, seeking declarations that NSW Ports contravened s 45(2)(a)(ii) of the CCA and seeking damages under s 82 of the CCA: J [17]; Core Appeal Book (**CAB**) 15-16; SF [178], [186]-[187]; **ABFM 87-89**. MDC amended its claim to seek additional declarations about s 45DA of the CCA: J [28]; **CAB 18**.
- B ACCC Proceedings**
20. In dismissing the ACCC Proceeding, Jagot J held that s 45 did not apply to NSW Ports' conduct in making or giving effect to the Compensation Provisions because such application would, contrary to s 2B of the CCA, effect an incidence upon the legal rights of the State, otherwise than in the course of any business carried on by it: (**Ports-J**), [423].
 21. Her Honour structured the enquiry in this way. *First*, did the CCA apply to the conduct of the State in making the Compensation Provisions? *Secondly*, if the CCA did not apply to the State's conduct, would the application of the CCA to NSW Ports' conduct "involve the legal incidence of those provisions falling upon the State so as to divest the State of a legal right" (Ports-J [362], [380])? *Thirdly*, if the application of the CCA to the State's counterparty would effect such an incidence, does the CCA evince a statutory intention that its provisions should so extend (Ports-J [362], [380], [407])?

¹ *ACCC v NSW Ports Operations Hold Co Pty Ltd* [2020] FCA 720 (**Ports-J**).

22. As to the first question, Jagot J held (as is common ground here)² that the CCA did not apply to the State's conduct in making the CCA. The making of the Compensation Provisions was not engaged in in the course of carrying on a business: Ports-J [342]-[343]. Sections 20X and 20Y of the SOC Act disabled the SOC's from disposing of their fixed assets or investments or main undertakings without approval of the voting shareholders; being different Ministers from the portfolio Minister who had some power to direct the SOC's functions, indicating a legislative intention to remove from the purview of the business carried on by a SOC, the sale or disposition of that business: Ports-J [343]. The Compensation Provisions were in fact proposed by the State and entered into by the State through the Treasurer. The SOC's were not involved, nor was the portfolio Minister in any immediate sense: Ports-J [342].
23. The privatisation transactions were one-off and were given specific statutory backing by the PAAT Act, quite apart from the carrying on of any business, and only once a privatisation policy was being pursued by government. The PAAT Act authorised the transfer of port assets to the private sector, and conferred on the Treasurer "all such functions as are necessary or convenient for the purposes of an authorised transaction". It permitted a transaction "to be effected as directed by the Treasurer and can be effected in any manner considered appropriate by the Treasurer" (ss 6 and 7(1)), and provided that there are "no limitations as to the nature of the transactions or arrangements that can be entered into or used for the purposes of an authorised transaction" (s 7(2)). These provisions authorised the Treasurer to stipulate the terms on which the assets would be offered to bidders and which were essential to any transaction. It is an agreed fact that the Treasurer "required" NSW Ports to agree to the Compensation Provisions: SF [112(a)]; **ABFM 61**. That fact reflects Jagot J's findings (Ports-J at [404]) and was essential to MDC obtaining a separate question in advance of any trial.
24. As to the second question, Jagot J held that application of the CCA to the conduct of NSW Ports in making the Compensation Provisions *would* involve legal incidence of those provisions falling upon the State so as divest the state of a legal right or interest: Ports-J [406]. The relevant right or interest was the State's statutory, proprietary and contractual rights to effect the specific authorised transactions identified in the PAAT Act, which included the Compensation Provision: Ports-J [417]. The rights included those conferred

² Appellant's Submissions (AS) [3] (n 1); [14] (n 2).

by the PAAT Act, but were “not ... statutory rights alone”: Ports-J [411]. There were also proprietary and contractual rights, involving the disposition of interests in land and other assets, embodied in contracts to which the State was a party, which the relief claimed in the proceeding would adversely affect: Ports-J [411].

25. Jagot J held that application of s 45 to the conduct of NSW Ports in making or giving effect to the Compensation Provisions would divest the State of its capacity under the PAAT Act to enter into the authorised transaction as the Treasurer considered necessary or convenient: Ports-J [369]. This specific statutory authorisation, conferred on a particular Minister in relation to particular assets, distinguished the case from those involving the general freedom to contract, such as *Baxter*: Ports-J [376]-[380].
26. As to the third question, Jagot J held that the CCA did not manifest an intention to bind a corporation where that application would effect a legal incidence upon the State: Ports-J [418]. Sections 2, 45 and 51 did not manifest an intention that s 45 should operate to divest the State of its statutory, proprietary and contractual rights to effect an authorised transaction under the PAAT Act, including the right of the Treasurer to require the counterparty to engage in conduct that contravenes s 45 of the CCA for the purpose of the authorised transaction: Ports-J [418].
27. In the context of s 2B, s 2 of the CCA was not determinative. That is, the object of enhancing the welfare of Australians through the promotion of competition is not pursued by the CCA at any cost. Insofar as the Crown is concerned, the object is pursued only so far as the Crown is carrying on a business: Ports-J [419].
28. Section 51 was also to be read in the context of the CCA as a whole. It was “difficult to conclude that ss 2, 45 and 51 of the CCA indicate a legislative intention that s 45 of the CCA should apply to a corporation in the position of the counter-party under the PAAT Act, when the effect of that would be to apply s 45 to the State so as to divest the State of legal rights when the State is not itself carrying on a business, apparently contrary to the terms of s 2B”: Ports-J [420].
29. Jagot J further found that the Compensation Provision contained in the Port Botany PCD did not have an effect, likely effect, or purpose of substantially lessening competition: Ports-J [1582]-[1611]. There was no real chance of a container terminal being built at the Port of Newcastle at any time prior to fully developed capacity at the Port Botany and Port Kembla being reached: Ports-J [1585], [1592], [1598].

C ACCC Appeal

30. The ACCC Appeal challenged Jagot J's findings on derivative Crown immunity and as to contravention of s 45. The Full Court dismissed the ACCC Appeal (ACCC FC).³ On derivative Crown immunity, Allsop CJ and Yates J held that it was available to NSW Ports: ACCC FC [386]-[415]. Beach J held to the contrary: ACCC FC [616].
31. Allsop CJ and Yates J, at ACCC FC [401], identified the question as being whether the application of the provision to the subject would be, in effect, an application of it to the Crown to divest it of proprietary, contractual or other legal rights or interests or part of them. If the answer to that question is 'yes', such that "there is an application of the provision to the Crown were the subject to be bound by the provision", then one asks whether "the putatively applying statute can be seen as not intended to bind the Crown". If the statute can be seen as not intended to bind the Crown, then the subject is not bound.
32. Allsop CJ and Yates J concluded that application of the CCA to NSW Ports would effect an application of s 45 to the Crown. Their Honours considered that Jagot J had been correct to conclude that there would be a divestiture of such part of the rights and interests (in the relevant legal sense) of the Treasurer conferred on him by Parliament under the PAAT Act to effect the privatisation transaction as he had directed after he concluded that the Compensation Provisions were necessary or convenient for the purposes of the authorised transactions, including the purpose of raising the full value of funds from the proceeds of those transactions: ACCC FC [410].
33. The PAAT Act in terms entitled the Treasurer to effect the transaction as he chose to direct. If the legal effect of the transaction was not as he directed because of the severance and unenforceability of the Compensation Provisions by operation of ss 4L and 45 of the CCA, there would be a divestiture of that right, power, authority or privilege conferred by the PAAT Act. In that sense, s 45 in its operation on the subject (NSW Ports) would mean the impairment of the existing legal situation of the Crown and the incidence of the provision on the subject would be in legal effect upon the Crown: ACCC FC [412].
34. Their Honours concluded that the CCA did not manifest any intention that the Act should apply (contrary to the presumption stated by Kitto J in *Wynyard Investments Pty Ltd v Commissioner for Railways (NSW)* (1955) 93 CLR 376, as explained by the High Court most recently in *Baxter*) to the Crown through its application to its subject NSW Ports:

³ *ACCC v NSW Ports Operations Hold Co Pty Ltd (No 2)* [2023] FCAFC 37 (ACCC FC).

ACCC FC [402]-[403]. No such intention could be discerned in s 51 (ACCC FC [402]-[403], [414]) or in s 45 (ACCC FC [415]).

35. Beach J considered that s 45, together with the object in s 2, manifest an intention that the CCA should be read to divest the Crown of proprietary, contractual or other legal rights or interests: ACCC FC [580], [582]. Beach J further considered that the rights, powers and functions conferred on the Treasurer by the PAAT Act were not distinguishable from the “general freedom to contract” and were not “capable of engaging the principle of derivative Crown immunity”: ACCC FC [594]-[596], [611]. On that basis, His Honour considered that “on the proper construction of the CCA, the NSW Ports consortium was prohibited from making the compensation provisions”, such that “there never was a vested legal right in the Treasurer to make or impose the compensation provisions” and thus no divestment by application of s 45 to NSW Ports’ conduct: ACCC FC [615]-[616].

D MDC Proceedings

36. In the MDC Proceedings, MDC alleges that, by making the Compensation Provisions and/or a cognate arrangement or understanding, NSW Ports contravened ss 45 and/or 45DA(1) of the CCA, and is liable in damages to MDC for the loss of opportunity to develop a container terminal at Newcastle. Delivering judgment on separate questions stated for determination after resolution of the ACCC Appeal, McElwaine J rejected defences to the MDC Proceeding of issue estoppel and abuse of process raised by NSW Ports, but held he was bound to follow the ACCC FC majority such that derivative Crown immunity was a complete answer to MDC’s claims: J [11], [156]; **CAB 13-14, 59**.
37. The MDC Full Court held that the majority’s reasoning in the ACCC FC had not been shown to be plainly wrong (FC [69]; **CAB 97**), and dismissed appeals against McElwaine J’s rejection of NSW Ports’ estoppel and abuse of process defences (FC [94]; **CAB 103**).

Part V: Argument

A Construction of the CCA

(a) Section 2B disapplies Pt IV to conduct of corporations where application would affect Crown immunity

38. There is a presumption of construction, of varying strength depending on the circumstances, that a statute is inapplicable to the Crown, including government instrumentalities or agents acting in the course of their duties.⁴ As a corollary, “a statutory

⁴ *Bropho v Western Australia* (1990) 171 CLR 1, 15, 19, 22.

provision not binding on the Crown must be denied an incidence upon a subject of the Crown because that incidence would be in legal effect upon the Crown”, including where application of a provision to a corporation “would adversely affect some proprietary right or interest of the Crown, legal equitable or statutory”.⁵

39. The *Bropho* presumption is displaced by the CCA only to a limited extent. Pt IV binds a State only “so far as the Crown carries on a business either directly or by an authority of the State or territory”: s 2B. Beyond that limited extent of application, there must operate the cognate presumption against application to corporations, where that would have the effect of applying Pt IV to the State beyond what s 2B permits.
- 10 40. The limiting words, “so far as”, require that the impugned conduct itself be engaged in, “in the course of carrying on the business”.⁶ The purpose of s 2B was to ensure that a State, like the Commonwealth under s 2A, would “in its commercial activities, be subject to the same regime as corporations”.⁷ Otherwise, the State is not bound by the CCA.⁸ It is common ground that, in making the Compensation Provisions (or in making or giving effect to any cognate understanding), the State was not carrying on business.⁹ The CCA therefore did not apply to the State’s conduct in making the Compensation Provisions.¹⁰
41. Once it is recognised that the State enjoyed an area of immunity from the application of s 45 by operation of s 2B, the question is whether the application of s 45 to NSW Ports in the manner for which MDC contends would apply to the State within that area of immunity by adversely affecting the State’s legal rights. Any such operation is denied by s 2B itself (in the absence of any contrary statutory intention), because that operation would apply the CCA to the State otherwise than “so far as” the State carries on business.
- 20 42. Contrary to Appellant’s Submissions (AS) [48] (and Intervener’s Submissions (IS) [23], following Beach J at ACCC FC [569]) it is not correct that s 2B “says nothing about the application of Part IV to private corporations”. On the contrary, by stipulating that Part IV does not bind the Crown in relation to the State’s relevant conduct, s 2B (as Beach J acknowledged) engages the principle of derivative Crown immunity in relation to that

⁵ *Baxter* [59], quoting *Wynyard Investments* 393.

⁶ *JS McMillan Pty Ltd v Commonwealth* (1997) 77 FCR 337 at 356; *NT Power Generation Pty Ltd v Power and Water Authority* (2004) 219 CLR 90, [74].

⁷ *NT Power* [66].

⁸ *Baxter* [43].

⁹ AS [14] (n 2); AS [3] (n 1).

¹⁰ CCA s 2B; *Baxter* [43].

conduct. By operating to enjoin application of Pt IV to the State's conduct, s 2B in tandem with the *Bropho* principle and its corollary, has the further effect that any application of the CCA (including of Pt IV to a corporation) which would effect an incidence upon the State is *also* enjoined, save to the extent that any contrary intention can be discerned.

- 10 43. If the operation or “incidence” of s 45 on a subject of the Crown “would be in legal effect upon the Crown”, that operation or incidence on the subject is – by virtue of that collateral encroachment on the Crown's immunity – denied. Section 2B does nothing directly to modify the operation of ss 45 or 45DA upon NSW Ports. But it is a corollary of the effect of s 2B in preserving Crown immunity in respect of the impugned conduct (by stipulating that conduct not in the course of a business lies beyond the reach of s 45) that s 45 must be denied an operation upon a subject of the Crown including a corporation “[if] that incidence would be in legal effect upon the Crown” in the area of immunity s 2B creates.¹¹
- 20 44. None of this is to suggest that NSW Ports benefits from any immunity. It is rather a matter of implementing the immunity which s 2B affords the State.¹² Properly understood, the only question is the true extent of *the Crown's* immunity from the operation of the relevant statute.¹³ The task is “to ascertain whether the Crown has such an interest in that which would be interfered with if the provision in question were held to bind the corporation that the interference would be, for a legal reason, an interference with some right, interest, power, authority, privilege, immunity or purpose belonging or appertaining to the Crown”.¹⁴ Depending on whether there is the requisite interference by application of the statute to a subject, that subject will or will not enjoy an exemption from the operation of the statute, for the relevant conduct. But this is collateral to the Crown's conduct remaining unimpeached – or, more specifically, to the requirement imposed by s 2B and the *Bropho* principle that the Crown's legal rights not be (by virtue of the application of a statute to a subject) adversely affected.
45. It may be accepted that, in certain circumstances, the CCA may apply “to private corporations when they are carrying on a business (even when they are transacting with an Executive Government)”: cf IS [23]; AS [45]. There is no categorical exemption of the conduct of private firms acting as counterparts to government of the kind that was

¹¹ *Wynyard Investments* 393-394, 396; *Baxter* [59], [61].

¹² *Ports-J* [419].

¹³ *ACCC FC* [401].

¹⁴ *Wynyard Investments* 396; *Baxter* [61].

granted by Allsop J at first instance in *Bradken* and claimed by the unsuccessful respondents in *Baxter*. The negative implication of s 2B, however, is that the CCA does not bind the State where *it is not* carrying on business. That entails that it does not apply in any way, including to the conduct of private corporations, if that would be in legal effect *an incidence upon the State* otherwise than in carrying on a business.

46. That position may be displaced if a contrary intention can be discerned. But the starting point in the exercise of seeking to discern a contrary intention must be the operation of the provision which fixes the extent of the CCA's operation and engages the presumption of derivative Crown immunity to begin with – namely, s 2B.

10 **(b) No contrary intention manifest in ss 2, 45, 51 of the CCA**

47. It is not legitimate to construe the CCA, and certainly not its application provisions, from an “*a priori* assumption” about the extent to which the express object in s 2 of the CCA is pursued.¹⁵ The question of construction is always “how far” the legislature has decided to pursue the statutory objects or purposes; rarely is a statutory object pursued to the fullest imaginable extent or at all costs.¹⁶

48. Section 2A (applying the CCA to Commonwealth Government “so far as” it carries on business) was enacted for the express purpose of ensuring that the Commonwealth Government in its commercial activities should be subject to the same competition laws as corporations.¹⁷ One of the goals of s 2B, responding to the *National Competition Policy: Report by the Independent Committee of Inquiry* of 1993 (**Hilmer Report**), was to ensure that the legislation applied to businesses conducted by the Governments of the States and Territories to the same extent as it did to those conducted by the Commonwealth.¹⁸ Which commercial activities of governments were to be made subject to the conduct rules, however, was carefully circumscribed: in each case the legislature made the condition of application of the competition law to government that government was “carrying on business”. By enacting ss 2A and 2B in the terms that it did, the legislature clarified and reinforced that the CCA did *not* apply to government when *not*
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¹⁵ *Minister for Employment and Workplace Relations v Gribbles Radiology Pty Ltd* (2005) 222 CLR 194, 208 [21] (Gleeson CJ, Hayne, Callinan and Heydon JJ); *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378, 390 [26] (French CJ and Hayne J).

¹⁶ *CFMEU v Mammoet* (2013) 248 CLR 619, [40]-[41] (Crennan, Kiefel, Bell, Gageler and Keane JJ).

¹⁷ *NT Power* [66].

¹⁸ *NT Power* [66].

carrying on business.¹⁹ Carrying on a business connotes more than mere trade or commerce; signifies “a course of conduct involving the performance of a succession of acts and not simply the effecting of one solitary transaction”²⁰ and activities “undertaken in a commercial enterprise or as a going concern”.²¹

49. Both the Hilmer Report, and later the *Competition Policy Review: Final Report* of 2015 (**Harper Review**) recognised the narrow cast of this application of competition law to governments (by the limitation “so far as” governments carry on business, in ss 2A and 2B) and proposed that the legislature should expand the scope of the application of the CCA: to government “in so far as the Crown in question carries on a business or engages in commercial activity in competition (actual or potential) with other businesses”;²² or by replacing the criterion of “carrying on business” with language applying the CCA to conduct of Commonwealth and State Governments that is “in trade or commerce”.²³ The legislature did not act upon either recommendation.
- 10
50. Where the legislature did accept the Hilmer Report’s recommendation to enact s 2B, moreover, it did so in circumstances where the Hilmer Report specifically addressed and negated concerns raised in submissions that, by doing so, the legislature would be impeding State Governments’ abilities to generate revenue from monopoly assets. “[N]othing in the competitive conduct rules will over-ride regulatory restrictions on competition or oblige governments to permit competition where there is currently none” (emphasis added).²⁴ “[N]othing in the proposed general conduct rules affects the creation of statutory monopolies, the charging of excessive prices or other pricing arrangements determined by regulatory (as opposed to collusive or other anti-competitive) processes”.²⁵
- 20
- These categorical statements, combined with the fact that the legislature stopped short of enacting all those measures which the authors of the Hilmer Report recommended within these constraints, necessarily inform the construction of s 2B.

¹⁹ *Baxter* [43].

²⁰ *JS McMillan* at 354; *Smith v Capewell* (1979) 142 CLR 509, 517 (Gibbs J); *Hope v Bathurst City Council* (1980) 144 CLR 1, 8-9 (Mason J).

²¹ *Murphy v Victoria* (2013) 313 ALR 546, [46]-[47].

²² Prof Frederick G Hilmer et al, *National Competition Policy: Report by the Independent Committee of Inquiry* (25 August 1993) 121 recommendation 5.7.

²³ Ian Harper et al, *Competition Policy Review: Final Report* (6 March 2015) 56.

²⁴ Prof Frederick G Hilmer et al, *National Competition Policy: Report by the Independent Committee of Inquiry* (25 August 1993) 129.

²⁵ Prof Frederick G Hilmer et al, *National Competition Policy: Report by the Independent Committee of Inquiry* (25 August 1993) 132.

51. Moreover, the enactment of s 2B by the *Competition Policy Reform Act 1995* (Cth) was underpinned by three intergovernmental agreements,²⁶ one of which specifically addressed the “structural reform of public monopolies” by making clear that “[e]ach Party is free to determine its own agenda for the reform of public monopolies”.²⁷ While the same agreement provided for a Party to “undertake a review” before it “privatises a public monopoly”, it is clear that the intergovernmental agreement was to leave States “free to determine their own agendas” for privatising public monopolies. It distinctly did not seek to regulate that nascent process of privatisation by the conduct rules agreed in the cognate, but distinct, Conduct Code Agreement. Contrary to AS [69], the context of s 2B indicates that the legislature did not intend s 2B to result in competition regulation of the privatisation of monopoly assets by State Governments.
52. Section 2B thus marks out the limits of the legislature’s pursuit of the objects in s 2 in relation to government and is specifically directed to the question of “how far” to pursue the objects. It would be erroneous to look beyond those provisions governing extent to enlarge the construction of the CCA on account of its generally stated purpose. Section 2B indicates that Parliament intended to pursue the stated object of the CCA in a specifically tailored way, carefully negotiated with the States and evidently balancing a range of other objectives. Contrary to IS [24], there can be no recourse to s 2 to discern an intention contrary to, or displacing the presumption raised by, s 2B.
53. For similar reasons, and contrary to AS [45] and IS [20], ss 45 and 45DA do not evince any intention contrary to the disapplication of the CCA to corporations where that application would interfere with government’s activities not constituting carrying on business. Those provisions address “any corporation”, but do so within the confines of an Act whose application to the conduct of those corporations is limited by s 2B – by the disapplication of the CCA to the conduct of States not in course of carrying on business, and by the principle of derivative Crown immunity that enters as the corollary of the State’s immunity, enjoining application of the CCA to the State through its counterpart, save where the legislature has specified otherwise.
54. In this context, the general language of ss 45 and 45DA is powerless to modify the curtailment of the CCA’s operation effected by s 2B. Express language to bind those

²⁶ Conduct Code Agreement, Competition Principles Agreement, and Agreement to Implement the National Competition Policy and Related Reforms, all of 11 April 1995.

²⁷ Competition Principles Agreement, 11 April 1995, cl 4(1).

corporations to whom application of the CCA would affect the State, and alter the effect of s 2B, would have been necessary to achieve the result for which MDC and the ACCC contend.

55. Contrary to IS [26]-[27] and AS [46]-[48], s 51 of the CCA does not support any different conclusion. Section 51(1) is a wide mechanism for State Parliaments to authorise contravening conduct (including conduct of private parties having nothing to do with government businesses). It does not speak to the reach of the CCA in defining what conduct is contravening conduct requiring authorisation. In its application to any specific factual scenario, as the ACCC Full Court correctly observed, s 2B poses a question logically anterior to s 51(1).²⁸ That is not somehow to read the CCA otherwise than as a whole. It is to recognise that there is no need for a State to engage s 51(1) to authorise conduct (such as entry into the PCDs) to which the CCA does not apply because of s 2B.

B Divestment of Legal Right or Interest

(a) Meaning of divestment of legal right or interest

56. The principle of derivative Crown immunity responds to an “impairment of the existing legal situation” of, “interference, for a legal reason” with, “adverse[] affect” or “incidence in legal effect upon” the Crown.²⁹ The requisite effect has been expressed in different ways. Divestment in the strong sense of “stripping” or “taking away” or “deprivation” is not required in order to engage the principle of derivative Crown immunity: cf IS [37].

57. Contrary to IS [37], “[d]ivest” was not “the word preferred by the Court in *Bass*, *NT Power* and *Baxter* in defining the principle to be applied”. Except in *Bass*, which primarily concerned Crown immunity (not its corollary), use of the word “divest” was short-hand for Kitto J’s long-form descriptions of the requisite effect, in each case quoted repeatedly and extensively with approval. Far from indicating any preference for a narrow concept of “divest[ment]”, these passages prefer Kitto J’s wider perspective. The use of “divest” in *Baxter* makes this especially clear: the plurality resorted to the term “divest” only after quoting Kitto J’s formulations,³⁰ and without any disapproval or qualification. The ACCC’s approach would have the dictionary meaning of one word used at the end of almost two reported pages defoliate the exegesis that precedes it. This should be rejected.

²⁸ ACCC FC [401]; MDCFC [57], [64]-[66]; CAB 94, 96.

²⁹ *Baxter* [59]-[62]; *NT Power* [170]; *Wynyard Investments* 393-4, 396.

³⁰ *Baxter* [59], [61].

58. What must be “divested” in the sense of “impaired”, “interfered with” or “in legal effect an incidence upon” the Crown is “some right, interest, power, authority, privilege, immunity or purpose belonging or appertaining to” the Crown. *Baxter* holds that the “freedom” to “enter into contracts” which the State may enjoy is not a “right, interest, power, authority, privilege, immunity or purpose belonging or appertaining to” the Crown, interference with which would engage the corollary to the principle of Crown immunity.³¹ That conclusion does not assist the Appellant and Intervener here, because (contrary to AS [54]-[57] and IS [44], following Beach J at ACCC FC [595]) the Treasurer’s position as created by the PAAT Act was not equivalent or reducible to the “freedom of the Crown in right of a State or Territory to make any kind of contract it wished” which was in issued in *Baxter*.³²
59. The State’s immune conduct here was not in exercise of a general freedom to contract, but was rather done pursuant to specific statutory powers, not enjoyed by, or shared with, subjects. The basis upon which NSW Ports asserts the Crown’s immunity is therefore not merely that there was “negotiating or contracting with the Crown” (cf *Baxter* [68]). It is rather that, if Part IV applies to NSW Ports’ conduct in making the Compensation Provisions, that application would interfere with the State’s exercise of specific statutory powers and proprietary interests.
60. The legal interests of the State in issue involve a power to contract for the sale of specific assets of “high policy and economic significance to the State”.³³ As AS [51] and IS [43] acknowledge, the PAAT Act “empowered” and “conferred statutory power on” the Treasurer to sell these assets. This was not (contrary to AS [54]-[57] and IS [40], [46]) simply a matter of removing a fetter to a generalised freedom to contract which the Treasurer would have enjoyed, but for prior statutory intervention. The power to make the Compensation Provisions, and to “require” them as terms of the transaction, was one which the Treasurer enjoyed only by virtue of a specific legislative enactment.
61. The submissions of the Appellant and Intervener presuppose that, but for the enactment of the PAAT Act and the prior legislative restrictions which the PAAT Act is said to have loosened, the Treasurer had power or capacity to dispose of the port assets: AS [55]; IS [46]. No contention to that effect has been raised or determined in the ACCC Proceeding

³¹ *Baxter* [60], [68].

³² *Baxter* [68].

³³ SF [73]; **ABFM 49**.

or appeal or in the MDC proceeding thus far. Whether, under the general law, the executive government has power without specific legislative authorisation to make contracts for the privatisation of assets of “high policy and economic significance to the State”³⁴ is not settled.³⁵ No question whether that presupposition is correct or maintainable arises for determination by this Court, including because of the agreed fact that the Treasurer “required” NSW Ports to agree to the Compensation Provisions: SF [112(a)]; **ABFM 61**. That was a practical requirement imposed in the exercise of the statutory powers, not as an incident of any general freedom to contract.

- 10 62. Further, and in any event, the PAAT Act did not merely permit or empower the Treasurer to sell the specified assets, reinstating or extending a freedom to contract in relation to specific assets otherwise outside the remit of that capacity. Instead, the PAAT Act granted the Treasurer specific powers augmenting any capacity to enter into authorised transactions which the executive government may otherwise have enjoyed, enacting that the Treasurer “has and may exercise all such functions as are necessary or convenient for the purposes of an authorised transaction”: s 6. The PAAT Act thereby gave the Treasurer plenary power to conclude an authorised transaction.
- 20 63. This statutory grant coupled with authority to exercise “such functions as are necessary or convenient for the purposes of an authorised transaction” plainly exceeded any “freedom to make any kind of contract it wished” which the executive government could have enjoyed by mere absence of legislative constraint. This statutory grant cannot be characterised as merely negating or retiring restrictions which had applied to the SOCs, because none of the restrictions which had applied to the SOCs applied to the Treasurer.
64. Contrary to AS [62] and IS [43], this construction does not involve reading the PAAT Act as conferring “a right to direct or require a private sector party to contract with it on any particular terms” (IS [43]), a power “to authorise and require conduct to be engaged in, free from the operation of federal law” (AS [62]) (or, for that matter, “a prerogative power of the Crown to somehow dispense with compliance, such that the CCA would simply cede to the purported State statutory power”: FC [579]). As the plurality in *Baxter*

³⁴ SF [73]; **ABFM 49**.

³⁵ *New South Wales v Bardolph* (1934) 52 CLR 455, 508; *Williams v Commonwealth* (2012) 248 CLR 156, [33] and [74]; [139]-[143]; [208]-[212]; [484] and [529]; N Seddon, *Government Contracts* (7th ed) [2.6] and [2.17]-[2.19].

made clear, the extent to which corporations dealing with executive government are to be unfettered by laws which promote competition is a question for *federal* Parliament, in respect of which “the language of federal Parliament’s language is decisive”.³⁶ That the CCA does not apply to NSW Ports’ conduct in making the Compensation Provisions with the State is an effect of s 2B, not of the PAAT Act.

(b) Legal consequences for State of application of Pt IV to NSW Ports

65. Applying Pt IV to NSW Ports’ conduct in making the Compensation Provisions would adversely affect the State to the requisite extent and degree – whether the threshold is incidence, impairment, interference or divestment in the dictionary sense.
- 10 66. The “need for concentration upon legal consequences” (*Baxter* [62]) includes concentration upon the *remedies* available under the CCA and claimed by the ACCC in a proceeding. If Pt IV applied to NSW Ports making the Compensation Provisions, and if contravention were established, then s 4L would sever the Compensation Provisions: ACCC FC [411]; FC [63]; **CAB 96**. That would “sever and make of no effect the provisions which underpinned the demand by the Treasurer for the highest value for a monopoly asset operating and anticipated to operate under current government policies, both as to exhaustion of Port Botany’s capacity and port sequencing”: ACCC FC [411]; FC [63]; **CAB 96**. That legal consequence of the application of Pt IV to NSW Ports’ conduct in making the Compensation Provisions would adversely affect the State’s
- 20 relevant rights and interests.
67. *First*, application of Pt IV of the CCA to NSW Ports’ conduct would impair the discharge of the Treasurer’s statutory functions under ss 6 and 7 of the PAAT Act. By giving the Treasurer power to deal with the port assets, otherwise than in the course of carrying on a business, the PAAT Act (operating in the circumstances created by s 2B of the CCA) gave the Treasurer power to contract on terms which would involve the other party to the transaction (having regard to the terms of the contract alone) contravening the CCA (cf Ports-J [396]). The PAAT Act did not authorise contravention of the CCA, or empower the Treasurer to dispense with compliance with the CCA. But it did confer power on the Treasurer to contract on terms contrary to the CCA.
- 30 68. In exercise of that power, the Treasurer required NSW Ports to agree to the Compensation Provisions: Ports-J [404]; SF [112(a)]; **ABFM 61**. Because of s 2B, in the circumstance

³⁶ *Baxter* [60].

that the making of the Compensation Provisions was not in the course of the State carrying on a business, the CCA does not apply to the Treasurer's conduct in requiring that of NSW Ports, or in making the Compensation Provisions for the State. Having regard to that factual situation, application of s 45 to NSW Ports in this case would involve a divestment of the Treasurer's specific right (enacted by the PAAT Act) to contract on terms that would putatively involve the other party contravening the CCA.

69. Contrary to AS [64]-[65], the divestiture of these legal rights cannot be equated with prejudice to some general commercial interest of the State. The divestiture of the specific rights conferred by the PAAT Act compromised the State's ability to maximise the value of its assets. That consequence does not of itself attract the principle of derivative Crown immunity, for the reasons given in *Baxter* at [60] and *NT Power* at [172]. But its cause – being the divestiture of legal rights granted to the Treasurer, which application of Part IV to its counterpart would truncate – does.
70. *Secondly*, severance of the Compensation Provisions would divest the State of contractual rights (as distinct from any authority to contract or freedom to contract). In *Baxter*, which concerned unilateral, pre-contractual conduct, the High Court did not resolve the question of how the CCA applies in respect of bilateral contracts between the State and a private counterparty: *Baxter* [70], [77]. Where, as a matter of fact, an impugned contractual provision was sought (indeed, required) by the State (and not by the private party) the statutory severance of that provision should be held to be a divestment of the State's legal rights that is beyond the application of the CCA limited by s 2B.
71. *Thirdly*, application of Pt IV to NSW Ports' conduct would divest the State of at least part of its proprietary interests in the port assets. Application of the CCA to private counterparties including NSW Ports would impede the Treasurer's ability to negotiate the disposition of the State's interests in its large and valuable assets in a value-maximising way, including by taking steps to preserve those assets' monopoly status consistent with the policy of sequential development of port capacity and associated landside infrastructure. Any erosion of the State's ability to maximise the value of privatised assets amounts to more than commercial inconvenience or adversity. To the extent that application of the CCA prevents the State from preserving the monopoly status of a privatised utility in the hands of its private owner, the State's proprietary interests in that asset or the capital value of it is diminished. This is a divestment to which the principle of derivative Crown immunity responds.

Part VI: Notice of Contention

A Further Procedural Background

72. On 5 August 2019, MDC agreed to stay its proceeding on the basis that there were to be “determined” in the ACCC Proceeding “threshold issues” in relation to the MDC Proceeding: J [18], [20]; **CAB 16**. Nearly six months later, MDC changed its position and applied to lift the stay of the MDC Proceeding so that a trial could be held concurrently with the ACCC Proceeding: J [20]; **CAB 16**. Jagot J refused that relief on the basis that its grant would prejudice the respondents by vacation of fixed hearing dates, and noted that MDC had “by its own conduct ensured that [the MDC Proceeding] was not able to be heard concurrently with the ACCC Proceeding”: J [22], [152]; **CAB 16-17, 58**.
73. On 29 June 2021, the Court made orders dismissing the ACCC Proceeding: J [29]; **CAB 18**. On 27 July 2021, the ACCC commenced the **ACCC Appeal**: J [29]-[30]; **CAB 19**. On 25 October 2021, MDC filed an interlocutory application seeking leave to intervene in the ACCC Appeal, on the basis that the resolution of issues of fact and law in the ACCC Appeal would have a “conclusive impact” on the MDC Proceeding at trial: J [31]-[32]; **CAB 19**.
74. In seeking leave to intervene, MDC asserted that it would make useful and different contributions to the ACCC Appeal in relation to whether derivative Crown immunity is available to NSW Ports as a defence in the ACCC Appeal and MDC Proceeding: J [32]; **CAB 19**. MDC gave no indication at this time that it would seek or accept limits to its intervention before the Full Court.
75. On 9 December 2021, MDC filed an outline of the submissions it sought to make in the ACCC Appeal: J [34]-[36]; **CAB 19-20**. It submitted that its interests in the MDC Proceeding “are likely to be affected ‘substantially’ by the outcome of the appeal”: J [35]; **CAB 20**. On 10 December 2021, MDC gained access to the opening and closing written submissions filed by the parties in the ACCC Trial: J [36]; **CAB 20**.
76. On 15 February 2022, after reviewing the filed submissions, MDC told the Court and the parties that “the substantive submissions MDC seeks to put before the Court have now been fully ventilated” and limited its application for leave to a grant of leave to intervene by filing the written submissions it had served: J [37]; **CAB 20-21**. This was a “tactical and considered” step by MDC (J [114]; **CAB 44**). MDC “could have sought leave to intervene on a broader basis” (J [127]; **CAB 49-50**) and “chose not to engage more actively” with the ACCC Appeal: J [117]; **CAB 47**. All the facts that MDC now says are

necessary to determine its position as to derivative Crown immunity were facts before the ACCC FC.

77. On 16 February 2022, at MDC's request, the Court made orders granting leave to MDC to intervene in the ACCC Appeal on condition (proposed by MDC) that its intervention be limited to the written submission MDC had filed on 9 December 2021: J [39]; **CAB 21**. On 23 February 2023, the Court made orders dismissing the ACCC's appeal against the decision in the ACCC Proceeding: J [40] **CAB 21**. The Court specifically dealt with and rejected MDC's submissions: J [42]; **CAB 25-26**; ACCC FC [417]-[421].

B Issue Estoppel

- 10 78. The decisions the subject of the notice of contention involve the application of legal standards for which there can be only one right answer. None of the decisions involves the exercise of a discretion.³⁷
79. A judicial determination directly involving an issue of fact or law disposes once and for all of the issue, so that it cannot afterward be raised between the same parties or their privies.³⁸ The doctrine of issue estoppel applies both to parties and intervenors.³⁹ The justice of binding a person to the outcome of prior proceedings is that, by virtue of their participation in those proceedings "the person has already had an opportunity to present evidence and arguments".⁴⁰
- 20 80. MDC, as intervenor in the ACCC Appeal, had an opportunity to present such evidence and arguments as it saw fit on the issue of derivative Crown immunity, in its application to the impugned conduct of NSW Ports. In that circumstance, MDC is bound by the same issue estoppel that would operate against it if it had been a party.
81. The primary judge and the Full Court avoided that conclusion by characterising MDC's participation in the ACCC Appeal as limited: J [84], [117], [125]-[131]; **CAB 37, 47, 49-51**; FC [86]; **CAB 101**. This was an error. MDC's participation in the ACCC Appeal cannot be characterised as limited. MDC reached a state of satisfaction that "the substantive submissions MDC seeks to put before the Court have now been fully

³⁷ *Certain Lloyds Underwriters v Kathy Giannopoulos* [2009] NSWCA 56, [1], [91]-[97]; *C G Maloney Pty Ltd v Noon* [2011] NSWCA 397, [70]-[71]. The applicable standard of review is that stated in *Warren v Coombes* (1979) 142 CLR 531, 551.

³⁸ *Blair v Curran* (1939) 62 CLR 464, 531; *Tomlinson v Ramsay Food Processing Pty Ltd* (2015) 256 CLR 507, [22]; *Clayton v Bant* (2020) 272 CLR 1, [51].

³⁹ *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485, 505.

⁴⁰ *Tomlinson* [39].

ventilated”: J [37]; **CAB 20-21**. That is not limited participation in a proceeding. It is participation to the fullest extent that it would be rational for any person as party or intervenor or otherwise to participate in legal proceedings.

82. Further or alternatively, such limits as applied to MDC’s participation were limits of its own making. MDC moved to intervene in the ACCC Appeal. It sought and obtained access to the parties’ submissions in the ACCC Appeal and satisfied itself that the issues affecting its interests had been “fully ventilated”. MDC then proposed and obtained orders that it be granted leave to intervene on the basis that such intervention be limited to those written submissions. Limiting its application for leave to intervene in this way was “the forensic decision of MDC alone”: J [127]; CAB 49-50. MDC “could have sought to intervene on a broader basis” (J [127]; **CAB 50**) but decided not to do so: J [114]; **CAB 44**. MDC “chose not to engage more actively” with the ACCC Appeal: J [117]; **CAB 47**.
83. McElwaine J reasoned (and the Full Court implicitly agreed) that these “tactical and considered decisions” can “hardly be described as active participation” and “were taken for the purpose of limiting the participation” of MDC in the ACCC Appeal: J [114]; **CAB 44**; FC [86]; **CAB 101**. The opposite is true. The fact that MDC’s involvement in the ACCC Appeal was so decisively shaped by its own forensic decisions underlines the extent and scope of the opportunity it was afforded. For intervenors, as for parties, participation may be as much a matter of inaction as activity.
84. But for MDC’s intervention in the ACCC Appeal, no issue estoppel could have arisen: J [128]; **CAB 50**.⁴¹ At most, the statement and application of legal principles of derivative Crown immunity to the similar facts of the ACCC Proceeding and ACCC Appeal could have affected determination of the same issues in the MDC Proceeding, by operation of stare decisis. That precedential effect would have remained subject to MDC’s right to challenge the Full Court’s decision as incorrect – in the way it now seeks to.
85. By intervening in the ACCC Appeal, MDC moved to bind NSW Ports to the outcome of the Full Court’s determination of the derivative Crown immunity issue, with a finality which the doctrine of precedent alone could not effect. But for that intervention, the course of action MDC now pursues (of seeking to challenge the Full Court’s conclusions on derivative Crown immunity as incorrect) remained open to it. The effect of MDC’s

⁴¹ *Watt v Ahsan* [2008] 1 AC 696, 708.

intervention was (or would have been, had its position on derivative Crown immunity prevailed) to deprive NSW Ports of that latitude.

86. In that context, the purpose of MDC's intervention can only have been to seek to bind NSW Ports to the outcome of the Full Court's determination of the derivative Crown immunity issue, and thereby to prevent NSW Ports from relitigating that issue in the MDC Proceedings, putting any favourable outcome obtained by MDC from the Full Court beyond contest in the MDC Proceeding. In this respect, the evidence of MDC's former solicitor Ms Banton, in seeking to justify intervention was self-fulfilling: the "conclusive impact" of the Full Court's determination of the ACCC Appeal was not the reason for MDC's intervention, but its purpose.

87. The Full Court was wrong at FC [82]-[83] (**CAB 100**) to emphasise that interveners under current Federal Court practice "are limited to providing assistance to the Court". That stipulation is made in a note to r 36.32 of the *Federal Court Rules 2011*.⁴² The subsequent note makes clear that the Court may grant the intervener "rights, privileges and liabilities (including liabilities for costs), determined by the Court".⁴³ Nothing about this procedural context relevantly "confined" MDC's participation in the ACCC Appeal. The procedural context accordingly provides no basis (contrary to FC [82]; **CAB 100**) to distinguish or disapply what the High Court said in *Marlborough Gold Mines* by reference to Spencer Bower and Turner *The Doctrine of Res Judicata* (2nd ed): cf FC [80]; **CAB 100**. The current rules permit a person to "intervene[] and take part in proceedings" and to "insist on being" accorded the rights, privileges and liabilities of a party.

88. Contrary to FC [84]-[85] (**CAB 101**), comparisons with the position which might apply in respect of an intervenor at first instance in different appeal scenarios in assessing MDC's position do not assist. Under the current Federal Court practice, the extent to which an intervenor enjoys the benefits and assumes the burdens of a party depends on the nature, extent and circumstances of that intervention. While MDC did not participate in the trial of the ACCC Proceedings, this was not for want of opportunity to do so. MDC consented to a stay of its proceedings at a time when concurrent hearing of the MDC and ACCC Proceedings remained possible, choosing to enable "threshold issues" in its proceeding to be determined by the ACCC Proceeding: J [18], [20]; **CAB 16**. In any event

⁴² *Federal Court Rules 2011* (Cth) r 36.32 note 1. Cf O 6 r 17 and O 52, r 14AA in *Federal Court Rules 1979* (Cth); *Forestry Tasmania v Brown (No 2)* (2007) 159 FCR 467, [6]-[7].

⁴³ *Federal Court Rules 2011* (Cth) r 36.32 note 2.

(and contrary to FC [83]; **CAB 100-101**), MDC's non-participation in the trial of the ACCC Proceedings in no way limited or diminished its ability to advance its position on derivative Crown immunity before the ACCC Full Court: all factual matters it now relies upon in respect of derivative Crown immunity were available to it in the Full Court, and MDC participated in the Full Court proceedings to the point where it was satisfied that its position had been "fully ventilated".

C Abuse of Process

89. Abuse of process "is inherently broader and more flexible than estoppel".⁴⁴ It may operate to justify a permanent stay on the basis of prior proceedings even against a person who was not party to, or on the basis of inaction or inertia by a party (or, it follows, an intervenor) in earlier proceedings: *Tomlinson* [26]. Applying principles of abuse of process requires attention to the whole context in which the impugned claim is brought. Here, those circumstances include not only the ACCC Appeal but also the ACCC Proceeding and MDC's conduct of the MDC Proceeding in relation to the ACCC Proceeding: J [143]; **CAB 56**.
90. Viewed in the wider context of its conduct of the MDC Proceeding in relation to the ACCC Proceeding and the ACCC Appeal, MDC's intervention in the ACCC Appeal emerges more clearly still as an attempt by MDC to bind NSW Ports to a determination favourable to MDC of the issues common to its proceeding.
91. MDC made an early decision to allow the ACCC to fight its corner on threshold issues common to both claims including derivative Crown immunity. Had it left that position undisturbed, there could be no preclusion defence to its challenge to the correctness of the law as found by the Full Court in the ACCC Appeal. Likewise, nothing would have prevented NSW Ports from taking the converse position in the MDC Proceeding, had the Full Court's determination in the ACCC Appeal gone against it.
92. As described above, MDC sought to lift the stay granted by Jagot J and secure concurrent hearing of its proceeding with the ACCC Proceeding. That attempt came too late for a concurrent hearing of the ACCC Proceeding and the MDC Proceeding to be achievable. MDC therefore failed to secure orders lifting the stay of the MDC Proceeding, which remained in abeyance pending the outcome of the ACCC Trial. By its own conduct, MDC

⁴⁴ *Tomlinson* [25]; *Sea Culture International Pty Ltd v Scoles* (1991) 32 FCR 275, 279.

ensured that the MDC Proceeding was not able to be heard concurrently with the ACCC Proceeding and ACCC Appeal: J [152]; **CAB 58**.

93. In this context, on the assumed footing for this limb of the argument that no issue estoppel applies, and whether by design or accident, MDC's intervention in the ACCC Appeal has the following character. MDC took part in the contest over derivative Crown immunity, in its application to the facts common to the MDC Proceeding and the ACCC Appeal, to the point of satisfaction that, in its own words, its position has been "fully ventilated", and with the purpose and likely effect of binding NSW Ports to the outcome of that contest. MDC sought and obtained orders limiting its intervention to reliance on its written submissions. By doing so, MDC remained free of any estoppel binding it to the outcome of the contest it intervened in, securing the benefit of that intervention (namely, to bind NSW Ports to the outcome of the contest, where otherwise that outcome would have precedential value only) without bearing the burden of being bound itself. MDC now seeks to contest the same issue afresh – to challenge the existing state of the law, to the same facts, as between the same parties, twice. To permit MDC to proceed in this way would bring the administration of justice into disrepute.

D Deed of Release

94. Paragraph 35A of MDC's Further Amended Statement of Claim filed on 18 July 2023 alleges that in October 2013, about two months before entering into the Release, it told the State that it "disputed the legality of the Port Commitment Deeds arising from its anti-competitive nature": see First to Third Respondents' Book of Further Material. MDC's allegations of illegality based on the competition law were therefore clearly in contemplation when it settled its dispute.
95. The issue raised by Question (c) below was whether MDC can nonetheless proceed against NSW Ports without also proceeding against the State contrary to the Release. It is impossible for the proceeding to be maintained, given the Release in favour of the State.
96. *First*, the State is a necessary party to the proceeding: *ACCC v NSW Ports Operations Hold Co Pty Ltd (No 2)* [2021] FCA 1040 at [6]-[9] (Jagot J). *Secondly*, and more fundamentally, the relief claimed against NSW Ports would engage the operation of s 4L of the CCA. As explained in *SST Consulting Services Pty Limited v Rieson* (2006) 225 CLR 516, at [52], s 4L "requires rather than permits the severance of offending provisions". Thus, if MDC were to succeed in establishing that the entry into the PCDs by NSW Ports contravened s 45 of the CCA, it would follow that the impugned provisions

of those PCDs would be severed by operation of s 4L. As the primary judge recognised at J [169] (**CAB 63**), that operation of s 4L is not a matter for MDC's election. The Court could not fashion relief solely against NSW Ports and avoid impact upon the State. Nor could the State, merely by raising a plea in bar based on the Release, alter the legal operation of s 4L. The relief claimed against NSW Ports necessarily and unavoidably entails an impact on the State's contractual rights which MDC has released and for which MDC has been compensated.

Part VII: Estimate of time

- 10 97. MDC and the ACCC have estimated a combined 3 hours. They should be confined to 2.25 hours in total including any reply and, on that basis, NSW Ports estimates that its oral submissions would occupy approximately 1.25-1.5 hours so that the Respondents' submissions are also 2.25 hours in total.

Dated: 23 October 2025



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ANNEXURE TO NSW PORTS' SUBMISSIONS

Pursuant to Practice Direction No 1 of 2024 NSW Ports sets out below a list of the statutes and provisions referred to in its submissions.

No.	Description	Version	Provisions	Reason for providing this version	Applicable date or dates (to what event(s), if any, does this version apply)
1.	<i>Competition and Consumer Act 2010</i> (Cth)	Compilation for 12 April 2013 to 28 June 2013	ss 2, 2A, 2B, 4, 4L, 45, 45DA, 51	Act in force on the date of the entry into the Port Commitment Deeds	31 May 2013
2.	<i>Port Assets (Authorised Transactions) Act 2012</i> (NSW)	Compilation for 27 November 2012 to 30 June 2013	ss 3, 4, 5, 6, 7	Act in force on the date of the entry into the Port Commitment Deeds	31 May 2013
3.	<i>Ports and Maritime Administration Act 1995</i> (NSW)	Compilation for 1 February 2011 to 31 October 2011	s 8	Act in force on the date NSW Government announced that it would privatise Port Botany	September 2011
4.	<i>State Owned Corporations Act 1989</i> (NSW)	Compilation for 29 October 2013 to 25 November 2012	ss 20X, 20Y	Act in force prior to commencement of <i>Port Assets (Authorised Transactions) Act 2012</i> (NSW) on 26 November 2012	25 November 2012