



HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

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

FOURTH RESPONDENT'S SUBMISSIONS

PART I: FORM OF SUBMISSIONS

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

PART II: STATEMENT OF ISSUES

2. Did the Deed of Release entered into on 24 December 2013 by the Appellant (**Mayfield**), Anglo Ports, Grup Maritim TCB, SL, NPC and the Fourth Respondent (**the State**) preclude Mayfield's proceedings in the Federal Court at first instance?
3. Did Mayfield's participation in *Australian Competition and Consumer Commission v NSW Ports Operation Hold Co Pty Ltd* (2023) 296 FCR 364 (ACCC FC) mean Mayfield's proceedings in the Federal Court at first instance were (a) precluded by an issue estoppel or (b) an abuse of process?

4. Did ss 45 and 45DA of the *Competition and Consumer Act 2010* (Cth) (**CCA**) not bind the First to Third Respondents (**NSW Ports**) as they entered the Port Commitment Deeds with the State, because of the principle of statutory construction called “derivative Crown immunity”?

PART III: NOTICES UNDER S 78B OF THE JUDICIARY ACT

5. The State does not consider that any notice under s 78B of the *Judiciary Act 1903* (Cth) is required.

PART IV: FACTUAL BACKGROUND

Deed of Release

6. On 24 December 2013, Mayfield and the State, among others, executed a Deed of Settlement and Release (**Deed of Release**) (**4RBFM 4**). Mayfield thereby released the State from all claims arising from or in connection with matters defined in the Deed of Release as the “Release Matters”. The Release Matters are a broad set of topics, including the process conducted since 2009 to secure a private sector proponent to develop the Mayfield Site. It is common ground that the subject matter of this proceeding falls within the definition of “Release Matters” (**FC [98]; CAB 104**).

The ACCC proceeding

7. In 2018, the Australian Competition and Consumer Commission (**ACCC**) commenced a proceeding against NSW Ports, alleging (like Mayfield now does) that entry into the Port Commitment Deeds contravened s 45(2)(a)(ii) of the CCA (**ACCC proceeding**) (**SOAF [177]; ABFM 87**). The State was a respondent to the ACCC proceeding.
8. Meanwhile, in May 2019, Mayfield commenced in the Federal Court the proceeding culminating in the present appeal (**SOAF [178]; ABFM 87**) (**Mayfield proceeding**). On 19 August 2019, the Federal Court ordered that the Mayfield proceeding be stayed by consent (**SOAF [181]; ABFM 88**). In March 2020, the Federal Court dismissed an application by Mayfield to lift the stay of the Mayfield proceeding, so that a trial could be held concurrently with the trial in the ACCC proceeding (**SOAF [182]–[184]; ABFM 88–9**).

9. On 29 June 2021, Justice Jagot dismissed the ACCC proceeding: *Australian Competition and Consumer Commission v NSW Ports Operations Hold Co Pty Ltd* [2021] FCA 720 (**ACCC PJ**). Her Honour held that the relevant provisions of the CCA did not apply to NSW Ports' conduct because it had the benefit of derivative Crown immunity. Her Honour also held that, in any event, the compensation provisions did not have the purpose or effect of substantially lessening competition and therefore did not contravene the CCA.
10. The ACCC appealed (**ACCC Appeal**). Mayfield successfully applied to intervene in the appeal (**FC [3]; CAB 80**). It stated it sought leave because its pleading in the Mayfield proceeding largely reflected the ACCC's statement of claim and was designed to engage s 83 of the CCA, and issues including derivative Crown immunity would have a "conclusive impact" on the Mayfield proceedings at trial (**FC [72]–[73]; CAB 97–8**). Mayfield submitted that NSW Ports did not have the benefit of derivative Crown immunity, among other submissions (**4RBFM 16**). After filing its written submissions, Mayfield elected not to press an application to make oral submissions, because "the substantive submissions [Mayfield] seeks to put before the Court have now been fully ventilated" (**FC [75]; CAB 98**). Those submissions were rejected (**ACCC FC [416]–[421]**) and the appeal was dismissed. The Full Court (Allsop CJ, Yates and Beach JJ) agreed with Jagot J's conclusion that the compensation provisions had neither an anti-competitive purpose nor an anti-competitive effect. The Full Court also agreed with her Honour's conclusion that the CCA did not relevantly apply to the State as it was not carrying on a business when it agreed to the compensation provisions. A majority (Allsop CJ and Yates J) agreed with the conclusion on derivative Crown immunity.

The Mayfield proceeding

11. Mayfield's claims in the Mayfield proceeding are encapsulated in a further amended statement of claim filed on 18 July 2023 (**FASOC; 4RBFM 32**). Mayfield's case centres on the compensation provisions in the Port Commitment Deeds, and an additional "Understanding" it alleges NSW Ports reached with the State that the operator of the Port of Newcastle would indemnify the State for any payments made under the compensation provisions (**PJ [2]; CAB 11**). Mayfield alleges that NSW Ports contravened s 45(2)(a)(ii) of the CCA by entering the Port Commitment Deeds and by reaching the Understanding (**FASOC [54](a)–(c)**). It further alleges that NSW Ports

was involved in the State giving effect to the Understanding in contravention of s 45(2)(b)(ii) (FASOC [54](d)), and that NSW Ports acted in concert with the State in contravention of s 45DA by executing the Port Commitment Deeds and arriving at the Understanding (FASOC [54](e)). While Mayfield brings additional claims to the ACCC, they are each premised on the compensation provisions being anti-competitive.

12. Three separate questions were stated for determination in the Mayfield proceeding. One concerned the issue of derivative Crown immunity. Another question was whether Mayfield was precluded, because of an issue estoppel or an abuse of process, from bringing the Mayfield proceeding in light of its intervention in the ACCC Appeal. The third was whether the Deed of Release operates as a complete defence to the claims made by Mayfield in the Mayfield proceeding.
13. The primary judge (McElwaine J) and the Full Court rejected Mayfield's contentions about derivative Crown immunity. The primary judge answered the other two separate questions adversely to the Respondents. Because of the Full Court's agreement with the conclusion of the primary judge on the derivative Crown immunity issue, it considered that the other two issues (which were agitated by notice of contention) did not arise and so were only dealt with briefly (FC [71]; CAB 97). However, the Full Court rejected the Respondents' case on both issues and, accordingly, awarded the Respondents only 60% of their costs in the Full Court (CAB 107).
14. The State has filed a notice of contention in respect of both issues on which the State failed before the Full Court (CAB 147) and a notice of cross-appeal to deal, consequentially, with costs in the Full Court (CAB 150). NSW Ports has filed an equivalent notice of contention and notice of cross-appeal (CAB 141, 144). As they raises threshold issues, it is convenient to address the notices of contention and cross-appeals first.

PART V: ARGUMENT ON NOTICE OF CONTENTION AND CROSS-APPEAL

Ground 1: Deed of Release

15. The Deed of Release involves a release in the widest possible terms, consistent with an intention to bring to an end all aspects of the dispute between Mayfield and the State over the proposal for development of the Mayfield Site. On its proper construction,

Mayfield agreed not to bring a proceeding against the State – including any proceeding to which the State is a necessary respondent and which could affect the State’s legal rights – relating to the “Release Matters”. The Deed is therefore a complete defence to the proceeding, and the Full Court erred in concluding otherwise.

16. The key provision in the Deed of Release is cl 4.1 (**4RBFM 11**):

4.1 The Releasors releases [sic] the Releasees

With effect from the Settlement Date, the Releasors and their shareholders permanently release the Releasees, any Related Body Corporate of them and any present or former agent or employee of the Releasees or any Related Body Corporate of them from any Claims which but for their entry into this deed they currently have or may have against the Releasees arising from or in connection with the Release Matters.

17. The “Releasors” include Mayfield and the “Releasees” include the State (cl 1.1). Clause 4.4 provides that the release in cl 4.1 may be “pleaded in bar and as a complete defence to any Claim” to which it applies.
18. The principles governing the construction of the Deed of Release are well settled. As a commercial contract, the Deed is to be construed objectively by reference to its text, context and purpose. The question is what a reasonable businessperson would have understood its terms to mean. That involves considering the language used, the circumstances addressed by the contract, and the commercial purpose or objects to be secured by the contract.¹
19. **Text.** The starting point is the text. The language chosen by the parties is remarkably broad. The term “Claim” is defined expansively (at cl 1.1). It includes “any” “action”, “suit”, “claim” or “cause of action”, even if the matters giving rise to the claim were not known to the parties at the date of the deed. “Action” and “suit” refer generally to legal proceedings.² “Release Matters” is also defined in the widest possible terms, extending to “any ... matters whatsoever” arising out of the process conducted by Newcastle Port Corporation (**NPC**) since 2009 to secure a private sector proponent to develop the Mayfield Site, and/or arising between the Releasors and the Releasees in

¹ *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Limited* (2015) 256 CLR 104 at [46]-[47] (French CJ, Nettle and Gordon JJ).

² *Minister for Youth & Community Services v Health & Research Association* (1987) 10 NSWLR 543 at 548 (Kirby P) and 560 (McHugh JA).

respect of the Mayfield Site (emphasis added). As noted above, it is uncontroversial that the subject matter of this proceeding falls within the definition of the “Release Matters” (FC [98]; CAB 104).

20. The framing of the release in cl 4.1 amplifies the breadth of those defined terms. The release extends to any Claims “arising from” or “in connection with” the Release Matters. “Arising from” and cognate phrases are usually given a wide meaning.³ “In connection with” is similarly wide, requiring merely some relation between one thing and another, not necessarily a causal relationship.⁴
21. Clause 4.1 refers to Claims “against” the Releasees. “Against” is a general word which may bear a wide range of meanings (PJ [174]; CAB 64). It must therefore take its meaning from the context in which it appears. Here, that context includes the immediate antecedent term “Claim”, and the commercial purpose of the deed.
22. The combined effect of these textual features is a release of the widest possible scope.
23. **Context and purpose.** The Deed of Release must be construed with a view to its commercial purpose.⁵ Like all such deeds, the Deed’s purpose can be said generally to be to settle the dispute between the Releasors and the Releasees, the history of which is laid out in the “Background” section. It was done in a particularly comprehensive way. The sweeping breadth with which the release was drafted indicates that the Deed’s objective purpose was to foreclose the possibility of any future litigation or any kind of dispute between Mayfield and the State (among others) at all connected with the development of the Mayfield Site. The bargain struck was that in exchange for paying the settlement sum the State was promised unambiguous finality and protection from being vexed by any kind of claim in respect of these matters.
24. That purpose is borne out by the other substantive clauses in the Deed of Release. In addition to the release in cl 4.1, the Releasors agreed to indemnify each of the Releasees, their Related Body Corporates, and their current and former employees against all

³ See, eg, *Comcare v PVYW* (2013) 250 CLR 246, [53] (French CJ, Hayne, Crennan and Kiefel JJ), [94] (Bell J), [110]–[111] (Gageler J).

⁴ See, eg, *Grain Growers Ltd v Chief Commissioner of State Revenue (NSW)* (2016) 93 NSWLR 415 at [122]–[123] (Beazley P; Bathurst CJ and Leeming JA agreeing).

⁵ *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640 at [35].

Claims arising from or in connection with the Release Matters (cl 4.2). The Releasors also agreed to execute separate written releases and indemnities in favour of the Releasees' Related Body Corporates and present and former agents and employees and any of their Related Body Corporates of them (cl 4.3). Finally, the parties agreed that the releases could be pleaded in bar and as a complete defence to any Claim to which they applied (cl 4.4, emphasis added). Clearly, every attempt was made in the drafting of the Deed of Release to achieve finality and to prevent the State from being embroiled in any future dispute with Mayfield over the Release Matters.

25. In light of the Deed's language, context and purpose, this proceeding comfortably falls within the ambit of the release in cl 4.1. Three matters warrant emphasis.
26. *First*, if Mayfield succeeds in proving the allegations in the Statement of Claim, the State's legal rights will be directly affected. At the relevant time, s 4L of the CCA provided

4L Severability

If the making of a contract after the commencement of this section contravenes this Act by reason of the inclusion of a particular provision in the contract, then, subject to any order made under section 51ADB or 87, nothing in this Act affects the validity or enforceability of the contract otherwise than in relation to that provision in so far as that provision is severable.

27. Section 4L means that a contractual term whose inclusion contravenes the CCA must be severed.⁶ Mayfield alleges that the inclusion of the compensation provisions in the Port Commitment Deeds meant that NSW Ports contravened the CCA when it made those deeds. If Mayfield succeeds, s 4L therefore requires that the compensation provisions be severed. It follows that Mayfield's success in this proceeding would materially change agreements to which the State is a party, on the premise that the State has entered into agreements with unlawful terms. This effect of s 4L led Jagot J to conclude, correctly, that the State was a necessary party to the ACCC proceeding.⁷ Given the factual and legal bases for its claims for relief, Mayfield cannot maintain and

⁶ *SST Consulting Services Pty Ltd v Rieson* (2006) 225 CLR 516 at [52].

⁷ Her Honour found that the result of the ACCC's success against NSW Ports would be "to change the contractual relationship between NSW Ports and the State": see *Australian Competition and Consumer Commission v NSW Ports Operations Hold Co Pty Ltd (No 2)* [2021] FCA 1040 at [5]-[9].

succeed in its claims against NSW Ports without at the same time prosecuting claims against the State.

28. Contrary to the reasoning at **FC [101]-[102] (CAB 104-105)**, it is immaterial that s 4L would operate as a statutory consequence of orders directed at NSW Ports, and that Mayfield does not itself seek relief under s 4L. Mayfield did not need to seek severance of the Port Commitment Deeds expressly: s 4L operates automatically. The consequence for the State is the same, and that consequence only follows from Mayfield prosecuting this proceeding. In order for s 4L to operate, there must be a proceeding in which a court is invited to find that entry into the Port Commitment Deeds contravened the CCA. Whatever Mayfield's subjective intention, and whether it wishes to engage s 4L or not, is irrelevant. The State purchased freedom from such an attack at the suit of Mayfield. Mayfield has reneged on the promise not to bring claims of this kind. In substance, this is a claim against the State in respect of the validity of its existing contracts.
29. *Secondly*, the State is — and must be — a respondent to the present proceeding. For the same reason that Jagot J found the State was a necessary party to the ACCC proceeding, it is not in dispute that the State is a *necessary* party (not merely a *proper* party: cf **FC [102]; CAB 104–105**)⁸ to this proceeding. The orders sought by Mayfield would directly affect the State's rights and liabilities.⁹ Contrary to the suggestion at **FC [101] (CAB 104)**, the State's joinder was not just because Mayfield once sought declarations implicating it. With or without the claim for declaratory relief, because of the premise that the State's agreements are unlawful and the potential operation of s 4L, it is not possible for Mayfield to bring its case against NSW Ports and imperil the State's contracts without also involving the State. That points to the bringing of a claim against the State. Of course, the consequence is that, as the State has been joined as a necessary respondent, Mayfield's action is now expressly one brought against the State.
30. It is thus beside the point that Mayfield did not join the State at first and only did so when it was pointed out that the State was a necessary party: cf **FC [99] (CAB 104)**. The need to join the State reflects the fact that Mayfield has chosen to pursue claims

⁸ Cf **FC [102] (CAB 104-105)**.

⁹ *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1 at [131].

against NSW Ports which are *necessarily* also claims against the State, and are now being prosecuted together against both. That follows inexorably from an understanding of the substance of the claims. Precluding such claims is at the heart of the release granted under the Deed of Release.

31. *Thirdly*, Mayfield also makes explicit allegations that the State was party to an unlawful “Understanding”. This reinforces that Mayfield’s claim impugns the State’s conduct.
32. It is accurate but irrelevant to observe, as the Full Court did, that only the State, not NSW Ports, is released by the Deed (**FC [99]; CAB 104**). As the State was not concerned with protecting NSW Ports, one would not expect the text of the Deed of Release to address NSW Ports’ position. This is a distraction from the real issue, which is whether this proceeding and the claims it entails fall within the terms of the release granted *to the State*. The fact that this construction of the Deed has advantages for NSW Ports is not relevant. Undoubtedly, it is to NSW Ports’ benefit that the proceeding falls within the terms of the release. But that benefit is a consequence of the Deed of Release’s application in the particular circumstances, not the point of the Deed. It is not the case that the Deed of Release, construed in light of its purpose to benefit *the State*, cannot operate in a way that incidentally benefits NSW Ports. This case is undoubtedly a “Claim against” NSW Ports, but that is irrelevant. The point is that it is (also) a Claim against the State.
33. It is not unusual that a release to the benefit of one potential defendant may extend to bar proceedings against another defendant, even though the latter has not paid for a release. Subject to the operation of statute, if defendants to a claim are jointly liable, then the release of one defendant will also release the others.¹⁰ That is not to suggest that the claims made by Mayfield against NSW Ports are in respect of some form of joint liability with the State: cf **FC [99] (CAB 104)**. But it demonstrates that an agreement reached with one potential defendant, without any involvement of another, can operate to the benefit of the latter. Likewise, Employer A may settle a claim against Employer B for inducing a breach of contract between Employer A and a former

¹⁰ *Baxter v Obacelo Pty Ltd* (2001) 205 CLR 635 at [26] (Gleeson CJ and Callinan J) and *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574 at 608-611 (Gummow J) (joint tortfeasors); *Carr and Purves v Thomas* [2009] NSWCA 208 at [14], *Murray-Oates v Jjadd Pty Ltd* (1999) 76 SASR 38 at [82] and *Walker v Bowry* (1924) 35 CLR 48 (joint debtors).

employee containing a restraint of trade clause. In Employer A's suit against the former employee for an injunction restraining them from working for Employer B, employer B is a necessary party who must be joined to that proceeding.¹¹ But the terms of the deed of release between Employer A and Employer B may preclude that. The result will be that Employer A cannot bring the proceeding, not that the incidental benefit to the employee will strip the release of its effect. The question is always the same: does the release given, properly construed, bar the claim.

34. Returning to the text of the release: plainly this is a legal proceeding, and that is sufficient for it to be a "suit" or "action" and therefore a "Claim". The State is a respondent. If Mayfield succeeds, s 4L will operate to have a real effect on the State's contractual rights and duties. Mayfield's "Claim" is therefore against the State (as well as against NSW Ports), and falls within cl 4.1. The same conclusion is reached by recognising that a necessary step in Mayfield's case is that the State's contracts contain unlawful provisions. Mayfield cannot avoid that conclusion by refraining from seeking relief (including damages) from the State directly.
35. This conclusion is fortified by the purpose of the Deed of Release. The maintenance of this proceeding would cut directly across the achievement of finality for the State. On the Full Court's construction, Mayfield, having received valuable consideration to release the State from all Claims, can nevertheless make a collateral attack on the State, taking aim at its contracts which are intricately related to the Release Matters. And the State, having paid valuable consideration to resolve disputes with Mayfield, can be put to the expense and risk of defending a proceeding brought by Mayfield arising directly out of the Release Matters. That would nullify the benefit for which the State bargained and then paid. Construed objectively, that cannot have been the common intention of the parties to the Deed. A reasonable businessperson would not have understood the releases as meaning that Mayfield could release all claims against the State, then attack the State's contracts by suing its counterparty in proceedings to which the State is a necessary party and which will, if successful, have the same consequence as an overt attack against the State.

¹¹ *Reed Business Information v Seymour* [2010] NSWSC 790 at [72] (Ball J).

36. Given that the proceeding falls within the terms of the release in cl 4.1, the right in cl 4.4 is enlivened. The release may be pleaded as a complete defence to the “Claim”, being the proceeding.

Ground 2: Issue estoppel and abuse of process

37. Mayfield intervened in the ACCC Appeal to protect its interests in the Mayfield proceeding. It made submissions on the issue of derivative Crown immunity. It did so in the context of factual findings which it does not seek to supplement or contradict in the Mayfield proceeding. Its submissions were not accepted. In the Mayfield proceeding, it seeks a second bite of the cherry, making submissions on the same legal question in the same factual context. That is contrary to the principle of finality of litigation and fairness to the Respondents. The Full Court should have found that Mayfield is precluded by an issue estoppel from arguing in the Mayfield proceeding that ss 45 and 45DA(1) of the CCA applied to NSW Ports’ entry into the Port Commitment Deeds or were contravened by reason of the facts and circumstances pleaded in the FASOC or alternatively, that the Mayfield proceeding is an abuse of process.

Issue estoppel

38. The primary judge was correct to reason that whether an issue estoppel arises in respect of an intervenor does not turn on the precise classification of its status, but rather the practical question of the extent of its participation in the proceeding (**PJ [125]; CAB 49**). Whether the nature of the intervention in *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485 is a perfect analogy is therefore beside the point (cf **FC [82]; CAB 100**).
39. The Full Court considered it determinative that Mayfield did not participate in the ACCC proceeding at first instance and thus did not frame the issues in dispute (**FC [83], [85]-[86]; CAB 100-101**). This reasoning fails to recognise that the issue of derivative Crown immunity was raised, and “framed”, by the Respondents. It also fails to recognise that it was a legal question of statutory construction (in contrast to the anterior factual question of whether the State was relevantly carrying on a business, which is not in contest in the Mayfield proceeding). Because of its legal nature, argument on the appeal was not constrained by the factual findings or “framing” of

issues below. It is not relevant that Mayfield had not had the opportunity to define other issues at trial or adduce evidence that might have been relevant to those other issues. There can be no realistic argument that, if Mayfield had participated at first instance in the ACCC proceeding, Mayfield would have been able to shape the derivative Crown immunity issue in some different way. There is no injustice in precluding Mayfield from arguing the same issue again in those circumstances.¹²

40. Nor is it determinative that Mayfield could not have appealed from the decision of the Full Court in the ACCC Appeal: cf **FC [84] (CAB 101)**. The ability to appeal a finding is not a conclusive test for whether it gives rise to an issue estoppel.¹³ There may be many reasons why a party does not or cannot appeal to the High Court. The gateway of special leave is one obstacle. Another is that success on the particular issue may not change the result, making an appeal futile. Thus, an issue estoppel can arise where one party succeeds on alternative bases A and B even though, precisely because they did so, an appeal by the opposing party on issue A would not alter the result. The opposing party cannot avoid an issue estoppel on issue A simply by saying they could not appeal on that issue because the conclusion on issue B was unassailable.¹⁴
41. Mayfield's participation in the ACCC Appeal was sufficiently active to give rise to an issue estoppel. On derivative Crown immunity, no more involvement was necessary or conceivable. It made 15 pages of written submissions, and elected not to make oral submissions in the knowledge that the ACCC would protect its position. Furthermore, the doctrine of issue estoppel is informed by considerations of fairness and finality.¹⁵ The extent of Mayfield's participation was the result of its own forensic choices. There is no unfairness in an estoppel arising in those circumstances.

¹² *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507 at [39] (French CJ, Bell, Gageler and Keane JJ).

¹³ *Re State of Norway's Application [No 2]* [1990] 1 AC 723 at 741–3 (May LJ), 752 (Balcombe LJ), 771–2 (Woolf LJ); *Good Challenger Navegante SA v Metalexportimport SA* [2004] 1 Lloyd's Rep 67 at [73]–[74] (Clarke LJ; Mantell LJ and Rimer J agreeing); *Sun Life Assurance Co of Canada v Lincoln National Life Insurance Co* [2005] 1 Lloyd's Rep 606 at [42]–[43] (Mance LJ; Longmore and Jacob LJ agreeing).

¹⁴ *Commonwealth v Cockatoo Dockyard Pty Ltd* [2006] NSWCA 322 at [209] (Tobias JA; Giles and Santow JJA agreeing).

¹⁵ *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507 at [21], [38] (French CJ, Bell, Gageler and Keane JJ).

Abuse of process

42. If there be no issue estoppel, it is an abuse of process for Mayfield to seek to advance its interests in the ACCC Appeal, then argue the same issue against the same parties as if its intervention never happened. If a litigant can tailor the extent of its intervention to avoid the operation of the issue estoppel principle, taking a tilt at securing a favourable decision while preserving its ability to litigate the identical issue against identical parties in a subsequent proceeding, that would bring the administration of justice into disrepute. The Full Court's decision to the contrary would mean, strangely, that Mayfield's intervention in the ACCC Appeal was entirely consequence-free.
43. Contrary to the tenor of **FC [88]-[93] (FC 102-103)**, the State has never submitted that it is an abuse of process to contend in the High Court that an earlier unfavourable decision of the Full Court of the Federal Court was incorrect, or that Mayfield has somehow disrespected the doctrine of *stare decisis*. The point is that Mayfield could have pursued entirely the same procedural path as it does now – contending in the Full Court that the ACCC FC was “plainly wrong”, and then applying for special leave if unsuccessful – without intervening in the ACCC Appeal. The problem is that it is arguing that a previous Full Court decision *in which it participated* is wrong in respect of an issue *which its submissions addressed*.
44. Another way of saying that Mayfield sought to intervene on the basis that a determination of the ACCC proceedings would set a precedent which would have to be applied is that Mayfield intervened to serve its own interests: **FC [93] (CAB 103)**. It cannot be the case that this came with no risk to those interests.

Orders

45. If either or both of the grounds in the notices of contention succeed, it will follow that it is not necessary for this Court to address the question of derivative Crown immunity and the appeal to this Court must be dismissed, with costs. It will also follow that the award of only 60% of the Respondents' costs by the Full Court was in error and must be set aside. The Court should accordingly order:

1. The appeal be dismissed.

2. The Respondents be granted special leave to cross-appeal and the cross-appeals be allowed.
 3. Order 2 of the judgment of the Full Court given on 3 April 2025 be set aside and, in its place, order that the Appellant pay the Respondents' costs of the appeal to the Full Court.
 4. The Appellant pay the Respondents' costs of the appeal and cross-appeals.
46. If it is necessary for the Court to consider the appeal, the State's submissions are set out below.

PART VI: ARGUMENT ON APPEAL

Principles of derivative Crown immunity

47. This Court has long recognised the existence of what has been come to be known as derivative Crown immunity. The canonical description of the principle is in the reasons of Kitto J in *Wynyard Investments Pty Limited v Commissioner for Railways (NSW)* (1955) 93 CLR 376. His Honour described the principle as operating in “cases in which a statutory 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”.¹⁶ One class of cases in which a provision would be denied such an incidence is where the provision, if applied to a person, would adversely affect some property right or interest of the Crown, legal, equitable or statutory.¹⁷ In order to fall within that class, “it must be found that the application of the relevant provision to the subject who invokes the Crown's immunity would be, in legal effect, an application of it to the Crown.”¹⁸
48. Most recently, this Court embarked on a “reconsideration” of the principle of derivative Crown immunity in *Australian Competition and Consumer Commission v Baxter Pty Ltd* (2007) 232 CLR 1, necessary because of the reconsideration of the principle of Crown immunity in *Bropho v Western Australia* (1990) 171 CLR 1 and changes to the

¹⁶ (1955) 93 CLR 376 at 393 (Kitto J).

¹⁷ (1955) 93 CLR 376 at 394 (Kitto J).

¹⁸ (1955) 93 CLR 376 at 394 (Kitto J).

Trade Practices Act 1974 (Cth) (TPA). In *Baxter*, this Court emphasised that “derivative Crown immunity” is a corollary of the principle of Crown immunity.¹⁹ Both Crown immunity and its corollary are principles of statutory construction.²⁰ The Court urged greater precision about the principle of construction.²¹ That precision was found in the reasons of Kitto J in *Wynyard*, and, in particular, his Honour’s description of the application of a provision “adversely affect[ing] some proprietary right or interest of the Crown, legal equitable or statutory”.²²

49. At [62], the Court articulated the principle of construction to be applied as follows:

since the [TPA] does not bind the Crown in right of a State or Territory when it is not carrying on a business, then, save to the extent to which a contrary intention appears, the Act will not be read so as to divest the Crown of proprietary, contractual or other *legal* rights or interests. Consistently with *Bropho*, such a contrary intention may appear from the language of the Act, and its objects and subject matter as emerging from that language. [original emphasis]

50. This appeal is resolved by applying that principle. For the reasons which follow, the CCA does not manifest the “contrary intention” to divest the Crown of its legal rights or interests, and to find that Part IV of the CCA bound NSW Ports when it entered the Port Commitment Deeds would constitute such a divestment.

The CCA manifests no “contrary intention”

51. In analysing the operation of derivative Crown immunity in respect of the CCA, the starting point is the uncontroversial, but critical, proposition that the CCA is express that it regulates the conduct of the Crown in right of the State only so far as the State is carrying on a business: s 2B. What follows, as this Court identified in *Baxter*, is the presumption that, outside this field, the CCA will not be read so as to divest the Crown of proprietary, contractual or other legal rights or interests. Properly construed, the CCA does not evince any contrary intention. The ACCC’s bold arguments to the contrary are contrary to authority and principle.

¹⁹ (2007) 232 CLR 1 at [58] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

²⁰ (2007) 232 CLR 1 at [58] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

²¹ (2007) 232 CLR 1 at [58] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ)..

²² (2007) 232 CLR 1 at [59]-[60] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

52. This Court has never doubted that derivative Crown immunity operates in respect of Pt IV of the TPA, now the CCA. In *NT Power Generation Pty Ltd v Power and Water Authority* (2004) 219 CLR 90 (decided after *Bropho*), considering an argument about the impact of dealings between two private parties on a Northern Territory Government entity, this Court rejected an invitation to expand the relevant class of cases described by Kitto J in *Wynyard* such that some financial or economic prejudice to the State, without any impairment of its proprietary, contractual or legal rights, would be sufficient to enliven the principle of derivative Crown immunity. Likewise, in *Baxter* the Court rejected an argument that unilateral, pre-contractual conduct of a private corporation dealing with State entities was not subject to the CCA, because such an immunity went “far beyond what is necessary to protect the legal rights of governments, or to prevent a divesting of proprietary, contractual and other legal rights and interests”.²³ In rejecting the expansion of the doctrine beyond the classes of prejudice identified by Kitto J in *Wynyard*, the Court emphasised the correctness of his Honour’s reasons. And in carefully demarcating the boundaries of derivative Crown immunity in respect of Pt IV, the Court has underscored that the principle does apply.
53. Nothing in the text of the CCA suggests the necessary contrary intention. Contrary to the ACCC’s submissions, it is not significant that the relevant prohibitions are expressed to apply, generally, to “a corporation” (s 45(2)) and “a person” (s 45DA(1)): cf ACCC [20]. These prohibitions are not as broad as they appear, given they do not bind the Crown in right of the Commonwealth or the State, or local government bodies, when they do not carry on a business: ss 2A-2BA. In any case, inherent in the concept of an immunity is that, without it, the relevant conduct would be regulated. To find that the prohibitions would need to spell out their exceptions would be to deny any room for the presumption of statutory construction: cf ACCC [20]. The use of general words cannot be sufficient for that would deny the operation of any presumptive immunity.
54. Nor does the statutory context assist. The object in s 2 of the “promotion of competition and fair trading” is not pursued at all costs: the exceptions in ss 2B-2BA make that plain.²⁴ In any event, the approach of both Full Courts, and the argument of the State, does not blunt the CCA’s ability to achieve that object. Contrary to the straw man

²³ (2007) 232 CLR 1 at [64] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

²⁴ ACCC PJ [419] (Jagot J).

erected at ACCC [24], nobody is arguing that ss 45 and 45DA should be construed as not applying *at all* where a private corporation is dealing with government. That extreme position was rejected in *Baxter*. The true position (which Mayfield appears to accept) is that ss 45 and 45DA should be construed as not applying where to do so would divest the State of its legal rights or interests.

55. The legislative history does not improve the ACCC's argument: cf ACCC [25]. Sections 2A and 2B were introduced in pursuit of the policy of "competitive neutrality", which aimed to even the playing field when government-owned businesses were operating commercially.²⁵ That policy does not require that the Crown, when it is *not* carrying on a business, be burdened by anti-trust regulation. The legislative history also discloses that the Commonwealth Parliament has deliberately circumscribed the scope of s 2B and the application of the CCA to the Crown, so that it does not apply to the Crown's activities in privatising assets. In 2015, an expert panel appointed by the federal government to conduct a "root and branch" review of Australia's competition laws and policy recommended expanding s 2B so that the CCA applied to the Crown in right of the State insofar as it undertook activity in trade or commerce.²⁶ The recommendation was designed to capture instances where the Crown participated in markets, but was not carrying on a business.²⁷ This was said to occur "particularly" in the area of procurement,²⁸ which the panel considered included privatisation.²⁹ The Parliament elected not to adopt this recommendation, despite passing legislation substantially amending the CCA to implement other expert panel recommendations.³⁰
56. Nor is the "contrary intention" to be located in s 51: cf ACCC [26]-[27]. Certainly that provision, like the whole of the CCA, is part of the context in which the constructional question posed by the Court in *Baxter* at [62] falls to be answered. But it does not have the decisive effect the ACCC attributes to it, which would mean that s 51 effectively

²⁵ See *NT Power Generation Pty Ltd v Power and Water Authority* (2004) 219 CLR 90 at [20]-[23] (McHugh A-CJ, Gummow, Callinan and Heydon JJ).

²⁶ Competition Policy Review Panel, *Competition Policy Review: Final Report* (Report, Australian Government, March 2015) (**Harper Report**) at 56, 278-282 (Recommendation 24).

²⁷ Harper Report at 278.

²⁸ Harper Report at 278.

²⁹ See, e.g., Harper Report at 8 and 31.

³⁰ See *Competition and Consumer Amendment (Competition Policy Review) Act 2017* (Cth) and *Competition and Consumer Amendment (Misuse of Market Power) Act 2017* (Cth).

excludes the operation of derivative Crown immunity in Part IV. That has never been considered to be the case, even though Part IV of the TPA has included a form of s 51(1) since 1978, with the “emphatic double reference to specificity” introduced in 1995.³¹ Both Jagot J and the Full Court in the ACCC Proceeding were correct to observe that s 51 operates *assuming* contravention, and that where derivative Crown immunity operates there is nothing to authorise under s 51 of the Act.³² In truth, derivative Crown immunity and s 51 deal with different subjects. Moreover, s 51 allows a State Parliament to authorise “anything done in a State”. It is not obviously directed to situations where private corporations deal with the Crown, not carrying on a business, or have some impact on it.³³ A statute conforming to s 51 may authorise conduct between wholly private parties. It may authorise conduct of, or relating to, the State when it is carrying on a business. Its generality means it should not be read as an implied expression of the Commonwealth Parliament’s intention to expand the application of the CCA to divest the Crown of its legal rights or interests, replacing derivative Crown immunity with a different statutory mechanism.

57. The ACCC’s reliance on *Baxter* in aid of its argument that the CCA rebuts the presumption of derivative Crown immunity is misplaced. The *ratio decidendi* was that it was not necessary for *Baxter* to have such a general immunity from the application of the CCA in order to protect State governments’ legal rights and interests.³⁴ This reinforces, rather than undermines, the point that the CCA is not intended to operate so as to divest the State of its legal rights or interests.³⁵ Further, the Court expressly did not decide whether, if (contrary to the primary judge’s findings) the conduct of *Baxter* in making and giving effect to contracts with the State purchasing authorities fell within the prohibitions in ss 46 or 47, those contracts were enforceable.³⁶
58. The Court’s statements in *Baxter* must be understood in the factual context of that case, and the extreme proposition that the Court was rejecting. The primary judge in that case had applied an earlier decision to conclude that ss 46 and 47 did not apply to unilateral,

³¹ (2007) 232 CLR 1 at [21] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

³² ACCC PJ [393]; ACCC FC [402] (Allsop CJ), [427] (Yates J agreeing).

³³ ACCC PJ [420] (Jagot J).

³⁴ (2007) 232 CLR 1 at [64], [70] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

³⁵ ACCC PJ [367] (Jagot J).

³⁶ (2007) 232 CLR 1 at [77] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

pre-contractual conduct of a medical fluids manufacturer and wholesaler in its dealings with State and Territory government entities. That would have amounted to an extremely broad and general immunity for the private party, and that reasoning would likely have extended to any private corporation's pre-contractual dealings with State, Territory or Commonwealth government entities. The Court rejected such an expansive view of derivative Crown immunity.

59. It is only in that context one can properly understand the Court's statements that it would be "remarkable" if a trading corporation enjoyed a "general immunity" in carrying on dealings with a government in the course of its business which the government did not have when carrying on a business itself.³⁷ The Crown does not enjoy any immunity from the CCA when carrying on a business: ss 2A and 2B. The Court was emphasising the oddity of the expansive freedom which the respondents' construction would have given private companies, rather than suggesting that the CCA must bind a corporation dealing with the State just as much as it would bind the Crown when it is carrying on a business. It must be recalled that derivative Crown immunity is a corollary of Crown immunity. The purpose of the derivative Crown immunity is to give effect to, or preserve, the immunity of the Crown. It is not to the point that in some other circumstances, the Crown may *not* be immune. Nor is it to the point that a corporation may be immune when dealing with the Crown but liable when engaging in precisely the same conduct when dealing with private parties. Focus is not on the activities of the corporation per se, but their effect on the State (in circumstances where the Act does not apply to the State). Accordingly, the starting point in construing ss 45 and 45D is not that the CCA must apply to private corporations when they are carrying on a business: cf ACCC [23]. That inverts the presumption.

Applying ss 45 and 45DA to NSW Ports would divest the Crown of a legal right or interest

60. The application of the foregoing principles to the legal and factual context of this case is straightforward. Both the Full Court in the ACCC Proceeding (substantially adopting the reasoning of Jagot J at first instance in the ACCC Proceeding) and the Full Court below were correct to hold that the application of the provisions in Part IV of the CCA to NSW Ports in its entry into the Port Commitment Deeds would divest the State of its

³⁷ (2007) 232 CLR 1 at [64], see also [68] and [74] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

legal rights under the *Port Assets (Authorised Transactions) Act 2012* (NSW) (**PAAT Act**).

61. The starting point is the now uncontroversial position that Part IV did not apply to the State in respect of the Port Commitment Deeds because it was not carrying on a business within the meaning of s 2B.³⁸ It must be borne in mind that derivative Crown immunity is not some freestanding immunity to which NSW Ports might be entitled, or something which exists separately from and independently of the State's immunity under s 2B.³⁹ It gives coherence to the CCA by construing that Act in a manner consistent with the intended Crown immunity. The question is therefore whether the application of the provision (here, s 45) to the subject (here, NSW Ports) is, in legal effect, *an application of it to the Crown*, contrary to the intention of the CCA.⁴⁰ Focus must always be on the question of the effect on the Crown, not the effect on, or incidental benefit to, NSW Ports.
62. Both Full Courts correctly located the legal right or interest which would be divested by the application of the CCA to NSW Ports in the PAAT Act.⁴¹
63. The PAAT Act was introduced to empower the Treasurer, on behalf of the State, to privatise the highly valuable, significant, monopoly assets of Port Botany and Port Kembla ("authorised transactions": s 3).⁴² The Act authorised the transfer of ports assets to the private sector, with the only relevant limitation being that this be by lease not exceeding 99 years: s 4. The proceeds of the privatisation "belong to and are payable directly to the State", and were to be paid into the "Restart NSW Fund": s 5. That Fund has the purpose of improving economic growth and productivity in NSW, and for that purpose to fund major infrastructure projects and other significant infrastructure projects: *Restart NSW Fund Act 2011* (NSW), ss 5 and 6.
64. Under s 6 of the PAAT Act, the Treasurer "has and may exercise all such functions as are necessary or convenient for the purposes of an authorised transaction". Section 7

³⁸ ACCC FC [337] (Allsop CJ), [427] (Yates J), [514] (Beach J); ACCC PJ [355], [360] (Jagot J).

³⁹ ACCC FC [401] (Allsop CJ).

⁴⁰ ACCC FC [401], referring to *Wynyard Investments Pty Limited v Commissioner for Railways (NSW)* (1955) 93 CLR 376 at 394 (Kitto J) (emphasis added); ACCC PJ [355], [360], [362] (Jagot J).

⁴¹ FC [43] (**CAB 91**); ACCC FC [410].

⁴² See ACCC PJ [108], [402] (Jagot J).

provided that an authorised transaction is to be effected as directed by the Treasurer and in any manner considered appropriate by him, with “no limitations” as to the nature of the transactions, or arrangements that can be entered into or used for the purposes of such the transactions. The PAAT Act permitted the Treasurer to establish, or direct the establishment of, transaction companies, which are subject to the Treasurer’s direction and control: ss 9 and 11. The Treasurer was conferred with a range of other powers for the purposes of an authorised transaction, including to make vesting orders (s 19), to order that fixtures be severed (s 20), to give directions to public sector agencies about granting relevant authorisations (including licences, consents, accreditations, and exemptions) to the new operator of the privatised port assets (s 21) and to transfer employees of a “port SOC” for the purposes of an authorised transaction (Part 4). Ordinarily applicable State taxes (s 24) and ordinary conveyancing requirements for contracts for the sale of land (s 28) were displaced. Transactions under the PAAT Act were immunised from attack on grounds of breach of contract, confidence or otherwise (s 29) and compensation was expressly not payable on behalf of the State (s 30).

65. From the breadth of this suite of powers, and the maximally expansive way in which each of them is framed, the intention underlying the PAAT Act is clear. It is to empower fully the Treasurer to carry out the privatisation of Port Botany and Port Kembla in whatever manner he saw fit. That is only emphasised by ss 34 and 35, providing that the Act binds the States, Territories and the Commonwealth, and has extraterritorial operation as far as possible. It is further underscored by the context of the statute’s introduction and the purpose of the transaction. The port assets were “extremely valuable” and “crucial pieces of public State infrastructure”.⁴³ The purpose of the transactions, and accordingly in creating the rights, power and authorities of the PAAT Act, was to serve the public good of the State and the people of NSW, reflected in the directing of the proceeds to the Restart NSW Fund.⁴⁴ The transactions could only happen once, and it was important to maximise the proceeds of the sale.⁴⁵ Accordingly, the notion that the PAAT Act had a “modest object” (ACCC [40]) must be rejected. These contextual matters weigh against a minimalist reading of the effect of the relevant

⁴³ ACCC FC [406] (Allsop CJ); SOAF [73] (**ABFM 49**).

⁴⁴ ACCC FC [406] (Allsop CJ).

⁴⁵ SOAF [74] (**ABFM 49**).

provisions. The number and complexity of directions issued by the Treasurer pursuant to the PAAT Act bely the suggestion that the Act was somehow insignificant.⁴⁶

66. Section 25(2) of the PAAT Act does not result in any different reading: cf ACCC [41]. The ability of the Parliament to specifically provide that the Act prevail over specific legislation does not mean it does not otherwise prevail over legislation not so specified. In any case, it is incorrect to say that the PAAT Act is operating to “exclude” the CCA. What it does is create legal rights and interests which the CCA, properly construed, is not intended to operate to divest from the State.
67. Read in context, there is no doubt that the unequivocal bestowal of all “necessary or convenient” functions on the Treasurer (s 6) and the power to effect a transaction as he directed and in any manner he considered appropriate, without limitation (s 7), are properly characterised as legal rights and interests of the kind described by Kitto J in *Wynyard*. They may be characterised as the right to effect the privatisation of the ports as the Treasurer saw fit, and direct the form of the transaction that he would agree to.⁴⁷ To debate their classification as “rights” or “powers” is beside the point: cf AS [51]; ACCC [36].
68. The application of ss 45 and 45DA to NSW Ports would divest the State of these rights.⁴⁸ The Port Commitment Deeds were executed pursuant to the directions of the Treasurer.⁴⁹ The impugned compensation provisions are provisions “for the purposes of an authorised transaction” as provided for in ss 6 and 7(2) and (3) of the PAAT Act, and the Treasurer considered that in order to maximise the value the State could obtain for the port assets it was necessary or convenient to enter into them.⁵⁰ The application of s 45 of the CCA to the act of making the Port Commitment Deeds would necessarily confine the scope of the statutory powers expressly conferred under the PAAT Act that empowered the Treasurer to enter into those transactions that were considered either necessary or appropriate, and to give effect to the transactions.⁵¹ The imposition of such

⁴⁶ See SOAF [92], [116]-[117] (**ABFM 54-54; 62-67**).

⁴⁷ ACCC FC [412] (Allsop CJ); see also FC [66] (**CAB 96**).

⁴⁸ ACCC PJ [405] (Jagot J).

⁴⁹ SOAF [121] (**ABFM 67-68**).

⁵⁰ SOAF [128] (**ABFM 69-70**).

⁵¹ ACCC PJ [369], [372]; ACCC FC [412] (Allsop CJ).

limitations on the Treasurer's power is contrary to the PAAT Act, which specifically provides that such matters should be without limitation. Similarly, the practical impact of Mayfield's contentions would in this case deprive the Treasurer's directions to enter into the Port Commitment Deeds of any force. That is in substance to deny both the contractual force of the Deed and the executive power to bring that contract about.

69. What was contemplated by the PAAT Act was transactions between the State and a third party. By depriving a third party of the ability to enter into transactions of a particular kind, ss 45 and 45DA would necessarily circumscribe transactions and arrangements that the State might require of a third party in order for the State to be willing to contract.⁵² It is this bilateral nature of the proposed transactions that underlay Jagot J's references to the right or interest of the State to "require" a counterparty to act in particular ways.⁵³ That is not to say that the State could somehow compel a party it was negotiating with to agree to particular terms: cf AS [52]; ACCC [43]. By contending that Part IV prohibited NSW Ports (or indeed any other person) from entering into the Port Commitment Deeds, Mayfield urges an application of the CCA which would deprive the State of any counterparty with whom it could complete the kinds of transactions authorised by the PAAT Act. In very real terms this affects the legal rights of the Crown under the PAAT Act.
70. The rights under the PAAT Act are not to be equated to the general law freedom of the State to contract: cf AS [54].⁵⁴ Even if (which is not the case) the PAAT Act did nothing more than restore the Treasurer's right to deal with the port assets, that right having been abrogated by the *State Owned Corporations Act 1989* (NSW) (**SOC Act**), that would be a statutory right and a legal interest the divestiture of which would call for the application of the principle of statutory construction in *Baxter*. It is for this reason the Full Court did not need to "plumb the depths" of the argument over the construction of the PAAT Act; it was enough that there was "express statutory legislation" conferring capacity upon the Treasurer to enter into contracts to effect the privatisation.⁵⁵

⁵² ACCC PJ [398] (Jagot J).

⁵³ ACCC PJ [404]-[405]; [418]-[419] (Jagot J).

⁵⁴ ACCC PJ J [376]-[377]; [409]-[411] (Jagot J); ACCC FC [405], [408] (Allsop CJ).

⁵⁵ FC [44] (**CAB 91**).

71. But the PAAT Act does not simply undo the SOC Act and return to the general law position. It does something else. The PAAT Act vests power in the Treasurer, not the executive at large.⁵⁶ Further, as Jagot J identified, the Act creates a “*specific* statutory capacity of the Treasurer” (emphasis added) to effect the transfer of *specific* port assets, rather than “some general amorphous ‘right’ or ‘freedom’ of the executive government to enter into contracts of supply”.⁵⁷ The power was accompanied by sweeping powers of vesting and severance, and immunities from liability. The rights under the PAAT Act relate to the transfer of the State’s proprietary rights in the ports by making contracts with private entities. As such, the rights that would be interfered with in this case are not in any way analogous with broad notions of contractual capacity or freedom of contract, let alone equivalent to them.
72. *Baxter* was a very different case.⁵⁸ It concerned unilateral, not bilateral, conduct.⁵⁹ The mooted immunity would more likely have harmed State interests than protected them, making it less likely the Commonwealth Parliament intended the CCA to apply in that fashion. It also concerned ordinary commercial dealings. It is plainly relevant that the impugned transactions in this case are of a very different character, being part of the State’s privatisation of significant assets, entered into by the Treasurer pursuant to statutory power.⁶⁰ That contextual matter influences the characterisation of the prejudice to the State of applying the CCA to the counterparty. It also affects the exercise of construing the CCA: to recognise derivative Crown immunity in this and like instances is not to carve out vast swathes of the economy from federal competition regulation (unlike what was proposed in *Baxter*).⁶¹ The Full Court was right to observe that the ACCC Full Court’s reasons turned on a “much narrower” proposition than that rejected in *Baxter*, and that the ACCC Full Court “identified a legal consequence for the legal rights and interests of the State, namely a restriction upon the manner in which

⁵⁶ ACCC PJ [377] (Jagot J).

⁵⁷ ACCC PJ [376], [378] (Jagot J).

⁵⁸ FC [39] (CAB 90),

⁵⁹ FC [46] (CAB 92).

⁶⁰ ACCC PJ [378]-[379], [421] (Jagot J).

⁶¹ ACCC PJ [412]-[413], [421] (Jagot J).

it could exercise the statutorily conferred authority of the Treasurer to shape the dealing in the port assets in the form of the privatisation.”⁶²

73. It is not necessary to find that the CCA does not bind any corporation contracting with the Crown to conclude that the CCA did not bind NSW Ports in this instance. Nor would that conclusion mean recognising the power of a State Minister to authorise contraventions of federal law: cf AS [62]-[63]; ACCC [42]-[44]. The relevant legal interest is sourced in a particular statute dealing with a particular, once-off transaction. The only third-party conduct falling within the scope of the immunity would be conduct in agreeing the terms of that transaction. It is not relevant that the State Parliament did not choose to legislate to permit NSW Ports to enter the contracts using the mechanism under s 51(1) of the CCA: cf AS [63]; ACCC [42]. The operation of derivative Crown immunity means that exercise would have been entirely unnecessary. Likewise, the reference to s 109 of the Constitution at ACCC [43] overlooks that it is the CCA, not the PAAT Act, which takes the conduct of NSW Ports outside the oversight of Part IV.
74. The application of ss 45 and 45DA to NSW Ports in its entry of the Port Commitment Deeds would divest the NSW Treasurer of the rights and interests conferred by the PAAT Act in circumstances where the CCA does not apply to the State. The CCA evinces no intention to so apply. The appeal must be dismissed.

PART VII: ESTIMATED TIME

75. The State estimates that up to 1.5 hours will be required for oral argument.

Dated: 23 October 2025



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The Fourth Respondent is represented by MinterEllison.

⁶² FC [69] (CAB 97).

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

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

ANNEXURE TO RESPONDENT'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	<i>Competition and Consumer Act 2010 (Cth)</i>	Current	s 4L	Version currently in force	N/A
2	<i>Competition and Consumer Act 2010 (Cth)</i>	Compilation for 12 April 2013 to 28 June 2013	ss 2, 2A, 2B, 2BA, 45, 45DA, 51, 83	Act in force on the date of the entry into the Port Commitment Deeds	31 May 2013
3	<i>Commonwealth Constitution</i>	Current	s 109	Version currently in force	N/A
4	<i>Port Assets (Authorised</i>	Compilation for 27	ss 3, 4, 5, 6, 7, 9, 11, 19,	Act in force on the date of the	31 May 2013

-27-

	<i>Transactions)</i>	November	20, 21, 24,	entry into the Port	
	<i>Act 2012</i>	2012 to 30	25, 28, 29,	Commitment	
	(NSW)	June 2013	30, 34, 35	Deeds	
5	<i>Restart NSW</i>	Compilation	ss 5, 6	Act in force prior	25 November
	<i>Fund Act 2011</i>	for 1		to the	2012
	(NSW)	September		commencement of	
		2011 to 1		the <i>Port Assets</i>	
		December		(<i>Authorised</i>	
		2018		<i>Transactions)</i> <i>Act</i>	
				2012 (NSW) on	
				26 November	
				2012	
6	<i>State Owned</i>	Compilation	N/A	Act in force prior	25 November
	<i>Corporations</i>	for 29		to commencement	2012
	<i>Act 1989</i>	October		of the <i>Port Assets</i>	
	(NSW)	2013 to 25		(<i>Authorised</i>	
		November		<i>Transactions)</i> <i>Act</i>	
		2012		2012 (NSW) on	
				26 November	
				2012	
