



HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

NO. S 122/2025

BETWEEN:

MAYFIELD DEVELOPMENT CORPORATION PTY LTD ACN 154 495 048

Appellant

and

10 **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

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

Fourth Respondent

**SUBMISSIONS OF THE AUSTRALIAN COMPETITION AND CONSUMER
COMMISSION (SEEKING LEAVE TO INTERVENE)**

PART I — CERTIFICATION

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

PARTS II AND III — INTERVENTION

2 The Australian Competition and Consumer Commission (the ACCC) applies for leave to
intervene in support of the appellant.¹ The ACCC has a substantial interest² in the proper
30 construction of Pt IV of the *Competition and Consumer Act 2010* (Cth) (CCA) as the

¹ Pursuant to this Court's inherent jurisdiction and s 87CA of the *Competition and Consumer Act 2010* (Cth), which provides that the ACCC may, with leave of the Court, intervene in any proceeding instituted under the CCA. These submissions constitute that application: *High Court Rules 2004* (Cth), r 42.08A.

² *Bluescope Steel (AIS) Pty Ltd v Australian Workers' Union* (2019) 270 FCR 359 at [200] (Allsop CJ, Collier and Rangiah JJ) (and the authorities cited therein).

regulator responsible for the administration and enforcement of the CCA.³ Indeed, as is addressed at [5] to [7] below, the ACCC has previously alleged that the transactions that are now before the Court contravened the CCA. Further, the extent to which private corporations that contract with an Executive government are subject to competitive conduct regulatory provisions under the CCA is a question of public importance,⁴ and the ACCC's intervention would "assist [the Court] to reach [the] correct determination"⁵ of that question. That intervention would not give rise to undue cost or delay.⁶

PART IV — ISSUES PRESENTED BY THE APPEAL

3 The ACCC contends that there are two main issues, which should be addressed in order:

- 10 3.1 Does Pt IV of the CCA, construed in context, evince an intention to bind private corporations that contract with the Executive government of a State even when the CCA does not relevantly bind that State (because it is not carrying on a business), whether or not a consequence of private corporations being so bound would be to divest the State of a proprietary, contractual or other legal right or interest?
- 20 3.2 If not, would the application of ss 45 and 45DA of the CCA to the Port Commitment Deeds (**PCDs**) entered into by the State with the first to third respondents (collectively **NSW Ports**) 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 by reason of the principle of statutory construction explained in *ACCC v Baxter Healthcare Pty Ltd*⁷ and known as derivative Crown immunity?

PART V — ARGUMENT

A SUMMARY

4 If granted leave to intervene, in summary the ACCC will submit as follows:

- 4.1 Properly construed, subject to any action taken by a State Parliament under s 51(1) of the CCA, ss 45 and 45DA apply to the conduct of private corporations that

³ See CCA ss 4(1), 6A. The ACCC may obtain and has obtained various forms of relief, including injunctive relief, in relation to contraventions of Pt IV of the CCA, in which ss 45 and 45DA are located: CCA, ss 80, 87.

⁴ *Northern Land Council v Quall* (2020) 271 CLR 394 at [18] (Kiefel CJ, Gageler and Keane JJ).

⁵ *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 248 CLR 37 (*Roadshow Films*) at [6] (the Court).

⁶ *Roadshow Films* (2011) 248 CLR 37 at [4] (the Court).

⁷ (2007) 232 CLR 1.

contract with a State even where those provisions do not apply to the State because it is not carrying on a business. That is so whether or not the application of those provisions to such corporations would divest the State of proprietary, contractual or other legal rights or interests.

4.2 In the alternative, if ss 45 and 45DA of the CCA are properly construed as not applying to the conduct of private corporations if in that application they would divest the State of proprietary, contractual or other legal rights or interests:

4.2.1 in this context the phrase “proprietary, contractual or other legal rights or interests” does not include the capacity to enter into a contract;

10 4.2.2 ss 6 and 7 of the PAAT Act empowered the Treasurer of NSW to enter into certain transactions in relation to the port assets of the State unencumbered by the *State Owned Corporations Act 1989* (NSW) (**SOC Act**), but did not confer a right or power upon the Treasurer to direct or require a private corporation to contract with the State on any particular terms, let alone on terms that required that corporation to contravene the CCA;

20 4.2.3 as the PAAT Act did not relevantly confer anything greater than a capacity to enter into a contract upon such terms as could lawfully be agreed, it did not confer a legal right or interest that was divested by the application of ss 45 and 45DA of the CCA to NSW Ports. Accordingly, NSW Ports did not benefit from derivative Crown immunity with respect to those provisions.

B BACKGROUND

5 These proceedings arise out of separate proceedings instituted by the ACCC in December 2018 alleging that compensation provisions in two PCDs entered into by the State of NSW and NSW Ports in the course of the privatisation of Port Botany had the purpose and/or likely effect of substantially lessening competition, contrary to s 45(2)(a)(ii) and s 45(2)(b) of the CCA.⁸

6 The primary judge (Jagot J) dismissed the ACCC’s application. Her Honour relevantly held that s 45 of the CCA did not apply to the State’s entry into the PCDs because under s 2B of the CCA the Crown in right of NSW was only bound by the CCA when carrying

⁸ *Australian Competition and Consumer Commission v NSW Ports Operations Hold Co Pty Ltd* [2021] FCA 720 (ACCC PJ) at [1].

on a business, and the privatisation of Port Botany and Port Kembla was not done in the course of operating a business.⁹ Her Honour further relevantly held that s 45 did not apply to NSW Ports in making and giving effect to the compensation provisions in the PCDs because that would divest the State of NSW of a “legal right” under the PAAT Act to effect the port privatisation transactions in the manner it saw fit, including the right of the Treasurer to require the counterparty to engage in conduct that contravened s 45 of the CCA.¹⁰

7 A Full Court of the Federal Court dismissed an appeal from her Honour’s decision.¹¹ The
 10 entire Court held that her Honour was correct to hold that the entry by NSW into the
 PCDs did not occur in the course of the State carrying on a business.¹² Chief Justice
 Allsop, with whom Yates J agreed, further held that s 45 could not apply to the
 compensation provisions in the PCDs because, if it did, ss 4L and 45 would apply to sever
 and render the compensation provisions unenforceable, and the consequence would be a
 divestiture of the “legal and statutory rights of the Treasurer to direct a framework of
 rights and obligations of the parties to underpin the maximum value to be obtained on the
 hypothesis of a monopoly”.¹³ Justice Beach, in dissent, held that, properly construed in
 light of *Baxter*, s 45 did apply to NSW Ports when contracting with the State of NSW.¹⁴
 His Honour further held that, in any event, the power conferred by the PAAT Act was no
 more than a power to contract, which was not a relevant legal right or interest, and that
 20 even if it was a power to require a counterparty to enter into a contract in contravention
 of the CCA, this was not a legal right or interest.¹⁵

8 While the ACCC trial was on foot, the appellant in this case (**Mayfield**) commenced a
 proceeding against NSW Ports seeking damages for the lost opportunity to develop a
 portion of the Port of Newcastle for use as a container facility as a result of alleged
 contraventions by NSW Ports of ss 45(2)(a)(ii), 45(2)(b)(ii) and 45DA(1) of the CCA.
 Following judgment in the ACCC Appeal, the primary judge in this proceeding

⁹ ACCC PJ [2021] FCA 720 at [350], [354].

¹⁰ ACCC PJ [2021] FCA 720 at [355]-[423], in particular [369], [395]-[396], [402]-[406], [418]-[419], [423].

¹¹ *Australian Competition and Consumer Commission v NSW Ports Operations Hold Co Pty Ltd* (2023) 296 FCR 364 (ACCC FC) at [9] (Allsop CJ), [427] (Yates J), [721] (Beach J).

¹² ACCC FC (2023) 296 FCR 364 at [337]-[338] (Allsop CJ), [427] (Yates J), [514] (Beach J).

¹³ ACCC FC (2023) 296 FCR 364 at [412]; see generally [386]-[415] (Allsop CJ), [427] (Yates J).

¹⁴ ACCC FC (2023) 296 FCR 364 at [566]-[584].

¹⁵ ACCC FC (2023) 296 FCR 364 at [586]-[616], in particular [592]-[595] (Beach J).

(McElwaine J) delivered judgment on separate questions agreed between Mayfield and NSW Ports, which relevantly included whether the applicant was able to argue that ss 45 and 45DA(1) of the CCA apply or were contravened, or whether NSW Ports had a complete defence to that claim on the basis that derivative Crown immunity applied to them.¹⁶ His Honour held that he was bound to follow the decision in the ACCC Appeal and therefore that derivative immunity was a complete answer to Mayfield's claims.¹⁷

- 9 The Full Court (Lee, Colvin and Stewart JJ) dismissed an appeal,¹⁸ unanimously holding that the reasoning of the Full Court in the ACCC Appeal in relation to derivative Crown immunity had not been demonstrated by Mayfield to have been plainly wrong.¹⁹

10 C PROPER CONSTRUCTION OF THE CCA

(a) Principles of construction to be applied

- 10 The principle of Crown immunity is a presumption that a statute will not bind an Executive government unless a contrary intention appears from the statute.²⁰ "The strength of the presumption has varied through time."²¹ In early cases such as *Wynyard Investments Pty Ltd v Commissioner for Railways (NSW)*²² and *Bradken Consolidated Ltd v Broken Hill Pty Co Ltd*,²³ the principle was treated as "an inflexible principle which, in the absence of express reference to the Crown, precludes a statute from binding the Crown unless a test of 'necessary implication', which 'is not easily satisfied', is applied and satisfied".²⁴

¹⁶ *Mayfield Development Corporation Pty Ltd v NSW Ports Operations Hold Co Pty Ltd (No 4)* [2024] FCA 538 (PJ) at [10] (McElwaine J) (CAB 13).

¹⁷ PJ at [11], [156] (CAB 13-14, 59).

¹⁸ *Mayfield Development Corporation Pty Ltd v NSW Port Operations Hold Co Pty Ltd* [2025] FCAFC 43 (FC) at [9] (CAB 81).

¹⁹ FC at [68]-[70] (CAB 97).

²⁰ *Baxter* (2007) 232 CLR 1 at [41]-[42] (plurality), quoting *Bropho v Western Australia* (1990) 171 CLR 1 at 23-24 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ), 28 (Brennan J). See also *Federal Commissioner of Taxation v Tomaras* (2018) 265 CLR 434 at [2] (Kiefel CJ and Keane J), [18] (Gageler J), [52]-[54] (Gordon J), [104]-[109] (Edelman J); *Chief Executive Officer, Aboriginal Areas Protection Authority v Director of National Parks* (2024) 98 ALJR 655 (*Gunlom Falls*) at [11] (Gageler CJ and Beech-Jones J), [41] (Gordon and Gleeson JJ).

²¹ *Tomaras* (2018) 265 CLR 434 at [18] (Gageler J); see also [104]-[107] (Edelman J). See also *Gunlom Falls* (2024) 98 ALJR 655 at [11] (Gageler CJ and Beech-Jones J), quoting *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 445 (Dawson, Toohey and Gaudron JJ).

²² (1955) 93 CLR 376 at 393-394 (Kitto J).

²³ (1979) 145 CLR 107.

²⁴ *Bropho* (1990) 171 CLR 1 at 16.

11 *Bropho*²⁵ substantially reduced the strength of the presumption of Crown immunity and emphasised that it was a principle of statutory construction and not a prerogative power to override or dispense with compliance with a statute. Chief Justice Mason and Deane, Dawson, Toohey, Gaudron and McHugh JJ stated that, while there may have been “convincing reasons” for previous broad articulation of Crown immunity for “so long as ‘the Crown’ encompassed little more than the Sovereign, his or her direct representatives and the basic organs of government”,²⁶ those considerations:²⁷

10 ... are largely inapplicable to conditions in this country where the activities of the executive government reach into almost all aspects of commercial, industrial and developmental endeavour and where it is a commonplace for governmental commercial, industrial and developmental instrumentalities and their servants and agents ... to compete and have commercial dealings on the same basis as private enterprise.

12 Their Honours went on to state that, going forward, the principle of Crown immunity, where applied in relation to legislative provisions governing general commercial and developmental activities, “will represent little more than the starting point of the ascertainment of the relevant legislative intent”, and that the true intent of the statute must be determined as a question of statutory construction.²⁸ Justice Brennan agreed, stating that the application of the principle of construction required consideration of “the terms of the statute, its subject matter, the nature of the mischief to be redressed, the general purpose and effect of the statute, and the nature of the activities of the Executive Government which would be affected if the Crown is bound”.²⁹

20

13 Some laws that do not apply to the Executive government by reason of the presumption of Crown immunity may nevertheless “have an indirect effect upon governments, in their application to people dealing with governments”.³⁰ As a result, it is a corollary³¹ of the principle of Crown immunity, which is referred to as “derivative Crown immunity”, that if an Act does not bind an Executive government in particular circumstances then it may not apply to people dealing with that government if, in that application, it would “divest

²⁵ (1990) 171 CLR 1; see also *Baxter* (2007) 232 CLR 1 at [52], [58] (plurality); *Gunlom Falls* (2024) 98 ALJR 655 at [11] (Gageler CJ and Beech-Jones J), quoting *Re Residential Tenancies* (1997) 190 CLR 410 at 445 (Dawson, Toohey and Gaudron JJ).

²⁶ *Bropho* (1990) 171 CLR 1 at 18.

²⁷ *Bropho* (1990) 171 CLR 1 at 19.

²⁸ *Bropho* (1990) 171 CLR 1 at 23 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

²⁹ *Bropho* (1990) 171 CLR 1 at 28.

³⁰ *Baxter* (2007) 232 CLR 1 at [60] (plurality).

³¹ *Baxter* (2007) 232 CLR 1 at [58]-[59] (plurality).

the Crown of proprietary, contractual or other *legal* rights or interests”.³² Like Crown immunity itself, derivative Crown immunity is a presumption of statutory interpretation which is rebutted if a contrary intention appears.³³ “Consistently with *Bropho*, such a contrary intention may appear from the language of the Act, and its object and subject matter”.³⁴

14 The corollary of a strong principle of Crown immunity was a similarly strong principle of derivative Crown immunity.³⁵ *Bropho* having weakened the former, a corresponding reduction in the strength of the latter was inevitable. As a result, considerable caution is required in applying pre-*Bropho* authorities concerning derivative Crown immunity,
10 including *Wynyard* and *Bradken*, because their starting point did not reflect the *Bropho* approach to Crown immunity.

15 The consequences of *Bropho* for derivative Crown immunity were given effect in *Baxter*, which emphasised that derivative Crown immunity is simply a principle of statutory construction and that it should not be treated as a form of executive prerogative to override or dispense with compliance with a statute.³⁶ *Baxter* concerned whether a manufacturer and wholesaler of medical fluids and equipment, which had a substantial degree of market power, was subject to ss 46 and 47 of the *Trade Practices Act 1974* (Cth) (TPA) in dealing with State purchasing authorities, in circumstances where the State itself was not subject to the TPA. Chief Justice Gleeson and Gummow, Hayne, Heydon and Crennan JJ (the
20 **plurality**) said that, “[b]ecause of its power to make laws with respect to trading corporations, [this] is a question on which the language of the federal Parliament’s legislation is decisive”.³⁷ The plurality reasoned that to hold that ss 46 and 47 of the TPA had no application to a corporation that was carrying on dealings with a government in the course of its business would mean that the corporation “enjoyed a general immunity not available to the government when the government was carrying on business itself”.³⁸ That would be “impossible to reconcile” with the objects in s 2 of the TPA and “would

³² *Baxter* (2007) 232 CLR 1 at [62] (plurality) (original emphasis).

³³ *Baxter* (2007) 232 CLR 1 at [58] (plurality).

³⁴ *Baxter* (2007) 232 CLR 1 at [62] (plurality).

³⁵ See *Wynyard* (1955) 93 CLR 376 at 393-394 (Kitto J).

³⁶ *Baxter* (2007) 232 CLR 1 at [40], [58] (plurality).

³⁷ *Baxter* (2007) 232 CLR 1 at [60] (plurality) (emphasis in original).

³⁸ *Baxter* (2007) 232 CLR 1 at [64] (plurality).

go far beyond what is necessary to protect the legal rights of governments, or to prevent a divestiture of proprietary, contractual or other legal rights and interests”.³⁹ While State and Territory Parliaments could legislate under s 51(1) to protect government interests, the specificity with which that was required to be done underscored the importance of the legislative objects in s 2 of the CCA.⁴⁰

- 16 The plurality rejected the argument, which had been accepted by the primary judge (Allsop J) and the Full Court, that the relief sought against corporate entities dealing with the State denied the State the right, power and capacity to enter into a contract of the kind that it wished.⁴¹ The TPA could not be read as “giving the executive government (as
10 distinct from a Parliament acting under s 51(1)) ... a freedom not enjoyed when the government itself is carrying on a business, from any impact of laws enacted for the promotion of competition and fair trading in the public interest”.⁴² It was even more unlikely that “that freedom extends to all persons dealing with the executive government”.⁴³
- 17 The plurality held that “[i]n order to protect legal rights of the Crown, it is not necessary to deny that entering into or performing a contract could involve a contravention of s 46 or s 47 by a non-government party”, because “many statutes, and the Act in particular, may produce the consequence that making or performing a contract is illegal for one party but not for the other”.⁴⁴ The outcome in such cases was determined by the remedial
20 scheme under the TPA, and was not “dictated by a general conclusion that, in order to preserve the Crown’s immunity, it is necessary also to extend a general immunity to any non-government party negotiating or contracting with the Crown”.⁴⁵ For that reason, as a matter of construction of the TPA, it was “wrong to conclude that it operates to preserve unfettered the contractual capacities of the Crown, to the extent of withholding the

³⁹ *Baxter* (2007) 232 CLR 1 at [64] (plurality).

⁴⁰ *Baxter* (2007) 232 CLR 1 at [64] (plurality). See also [21].

⁴¹ *Baxter* (2007) 232 CLR 1 at [67] (plurality).

⁴² *Baxter* (2007) 232 CLR 1 at [68] (plurality). See also [74].

⁴³ *Baxter* (2007) 232 CLR 1 at [68] (plurality).

⁴⁴ *Baxter* (2007) 232 CLR 1 at [70] (plurality).

⁴⁵ *Baxter* (2007) 232 CLR 1 at [70] (plurality), referring back to [44]. See also [76].

application of the Act from conduct by non-government parties in response to an invitation to tender”.⁴⁶

(b) The CCA evinces an intention to exclude derivative Crown immunity

18 Following *Baxter*, the proper starting point is to construe the CCA, in order to ascertain whether it evinces the contrary intention necessary to rebut the presumption of derivative Crown immunity. The ACCC submits that it does. That contrary intention appears “from the language of the Act, and its objects and subject matter”.⁴⁷ The text of the CCA, when construed in context (including in light of the objects in s 2),⁴⁸ requires the conclusion that, except where a State Parliament has relevantly legislated under s 51(1), the CCA
10 binds corporations that contract with a State government. As there is no dispute that the PAAT Act did not enliven s 51(1), the terms of that Act, and the occasion for its enactment, are irrelevant at this stage of the analysis.

19 If that submission is accepted, then it is unnecessary for the Court to determine whether the operation of the CCA with respect to NSW Ports would divest the State of any proprietary, contractual or other legal rights or interests. That is because, the presumption of derivative Crown immunity having been rebutted, it is irrelevant whether it would otherwise have applied in the circumstances of this case.

20 **Text.** The operative provisions are s 45(2)(a)(ii) of the CCA as in effect on 31 May 2013, s 45(2)(b)(ii) and s 45DA(1) of the CCA between 31 May 2013 and 5 November 2017,
20 and ss 45(1)(b) and 45DA(1) of the CCA in their current form. Those provisions apply, in terms, to any corporation. There is no exception for corporations when contracting with an Executive government. Instead, the plain and ordinary meaning of those provisions is to prohibit any corporation from entering into contractual provisions or understandings that have the relevant purpose or likely effect of substantially lessening competition.⁴⁹

⁴⁶ *Baxter* (2007) 232 CLR 1 at [73] (plurality).

⁴⁷ *Baxter* (2007) 232 CLR 1 at [62] (plurality).

⁴⁸ See eg, *ENT19 v Minister for Home Affairs* (2023) 278 CLR 75 at [87] (Gordon, Edelman, Steward and Gleeson JJ); *R v Jacobs Group (Australia) Pty Ltd* (2023) 280 CLR 170 at [23] (Kiefel CJ, Gageler, Gordon, Steward, Gleeson and Jagot JJ).

⁴⁹ PJ at [2], [15]–[17] (McElwaine J) (CAB 11, 15–16).

- 21 Sections 2A and 2B provide that the CCA binds the Crown in the right of the Commonwealth insofar as the Crown carries on a business (s 2A), and the Crown in the right of the States and Territories insofar as the Crown carries on a business (s 2B). Those express statements of legislative intent to bind the Crown were introduced as part of a legislative response that was directed towards ensuring that “the prohibitions against anti-competitive conduct can be applied to all businesses in Australia”.⁵⁰
- 22 **Statutory context.** There is nothing in the broader context of the CCA which indicates that, notwithstanding the textual breadth of ss 45 and 45DA, Parliament did not intend those provisions to bind corporations when they contract with Executive governments.
- 10 23 Section 2B does not reveal any such intention, because it does not say anything about the application of the CCA to private corporations.⁵¹ Indeed, in light of the fact that ss 2A and 2B ensure that the CCA applies to Executive governments in so far as they carry on a business, the starting point in construing ss 45 and 45D must be that the CCA will also apply to private corporations when they are *carrying on a business* (even when they are transacting with an Executive government). Were it otherwise, those corporations would “enjoy[] a general immunity not available to the government when the government was carrying on a business”.⁵² Such a result “would be remarkable”.⁵³ As the plurality in *Baxter* observed, one “unacceptable consequence” of such a conclusion is that a corporation could, in dealing with the Crown, engage in precisely the injurious conduct towards the Crown which the Act sought to prohibit. The plurality indicated that a construction with that consequence could not be seriously entertained.⁵⁴ Although in the present case the State sought to benefit from the alleged anti-competitive conduct, there is nothing in s 2B to suggest that the CCA has a differential operation that turns on whether the State does or does not obtain a benefit from the relevant anti-competitive conduct (as opposed to whether the State is acting in the course of carrying on a business).
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⁵⁰ Australia, House of Representatives, *Parliamentary Debates* (Hansard), 30 June 1995, 2794. See also *NT Power Generation Pty Ltd v Power and Water Authority* (2004) 219 CLR 90 at [66] (McHugh A-CJ, Gummow, Callinan and Heydon JJ).

⁵¹ ACCC FC at [575] (Beach J).

⁵² *Baxter* (2007) 232 CLR 1 at [64] (plurality).

⁵³ *Baxter* (2007) 232 CLR 1 at [64] (plurality).

⁵⁴ *Baxter* (2007) 232 CLR 1 at [65] (plurality).

- 24 Such a construction would also be inconsistent with the purpose of the CCA. Section 2 states that the object of the CCA is “to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection”. Given the size and scope of government purchases, to construe ss 45 and 45DA as not applying where a private corporation was dealing with government would mean that the stated object of the CCA would not be achieved in a significant segment of the economy.⁵⁵ As the plurality observed in *Baxter*, such a construction would “impose[] a very extensive qualification upon the Act’s object of promoting competition and fair trading in the public interest”, that being “a qualification strikingly at odds with the way the Act deals with governments when they themselves carry on a business”.⁵⁶
- 10
- 25 The significance of this contextual point is confirmed by the legislative history, including the report of the Independent Committee of Inquiry appointed by the Prime Minister in 1992 to report on a national approach to competition policy.⁵⁷ That report acted as a catalyst for the legislative amendments to the TPA introduced by the *Competition Policy Reform Act 1995* (Cth), and stated that government business should not enjoy any advantages when competing with other businesses and recommended that the TPA should apply to State and Territory businesses to the same extent that it applied to Commonwealth businesses.⁵⁸ That resulted in the insertion of s 2B into the TPA.⁵⁹
- 26 As the plurality recognised in *Baxter*,⁶⁰ s 51(1) of the CCA is a critical aspect of the broader statutory context which supports construing ss 45 and 45DA(1) as applying to corporations carrying on a business even in circumstances where those corporations are dealing with an Executive government that is not itself relevantly bound by the CCA. That provision empowers State and Territory Parliaments to exempt conduct in a State or Territory from Pt IV of the CCA. Relevantly, s 51(1)(b) provides that, in deciding whether a person has contravened Pt IV, anything done in a State, if the thing is specified in, and
- 20

⁵⁵ *Baxter* (2007) 232 CLR 1 at [74] (plurality), endorsing observations of the Full Federal Court below in *Baxter* (2006) 153 FCR 574 at [102] (the Court).

⁵⁶ *Baxter* (2007) 232 CLR 1 at [74] (plurality).

⁵⁷ Australia, Independent Committee of Inquiry, *National Competition Policy: Report by the Independent Committee of Inquiry* (1993) (**Hilmer report**).

⁵⁸ *Hilmer Report*, p xxvii; see also p 343.

⁵⁹ See the discussion of the legislative history in *NT Power* (2004) 219 CLR 90 at [21]-[27] (McHugh A-CJ, Gummow, Callinan and Heydon JJ).

⁶⁰ *Baxter* (2007) 232 CLR 1 at [64] (plurality).

specially authorised by State legislation or regulations, must be disregarded.⁶¹ It therefore allows State Parliaments (as opposed to State Executive governments) a measure of freedom in protecting State interests that they consider to be threatened by federal competition law, “provided ... they are willing to accept the political responsibility of exercising that power with the necessary specificity”.⁶² The legislative emphasis in s 51 on the specificity with which that must be done “draws attention to the importance attached to the pursuit of the object declared in s 2”.⁶³ If State legislation does not satisfy the detailed requirements of s 51, then there is no footing within the CCA to roll back its operation, with the consequence that such State legislation is subject to the CCA.⁶⁴

10 27 It is not the case “[t]hat proper ascertainment of the extent of Crown immunity takes place at an anterior stage to the possible relevance of s 51 of the Act”.⁶⁵ That reasoning “manifests a failure to engage in properly construing the CCA to determine whether the CCA intends to exclude the operation of derivative Crown immunity in the first place”.⁶⁶ All aspects of text and context must be considered. The Full Court’s reasoning in ACCC FC assumes that it is possible to determine whether derivative Crown immunity applies without reference to s 51 and, if it does, to disregard s 51 because it “operates assuming contravention”.⁶⁷ That is erroneous because it purports to answer the question whether derivative Crown immunity applies without considering part of the statutory context that informs that answer. In particular, s 2B cannot properly be construed in isolation from
20 s 51. Section 51 is significant because it provides a mechanism whereby a State Parliament, if it does not wish Pt IV of the CCA to apply to the State itself when it is conducting a business, or to private corporations with whom the State deals, can achieve that result. The existence of that mechanism makes it more likely that the Commonwealth Parliament intended Pt IV to bind the States when carrying on a business and private companies that deal with them (whether or not the State is carrying on business) in all cases where that mechanism has not been used. Not only does that construction follow

⁶¹ The operation of s 51(1) is subject to a number of limitations in s 51(1C), including that authorisation under subsection (1) requires the authorising provision to expressly refer to the CCA.

⁶² *Baxter* (2007) 232 CLR 1 at [48] (plurality).

⁶³ *Baxter* (2007) 232 CLR 1 at [64] (plurality).

⁶⁴ *Baxter* (2007) 232 CLR 1 at [64], [68] (plurality).

⁶⁵ ACCC FC at [402] (Allsop CJ, Yates J agreeing).

⁶⁶ ACCC FC at [574]-[575] (Beach J, dissenting).

⁶⁷ ACCC FC at [402] (Allsop CJ, Yates J agreeing).

naturally from the text of the CCA, but it is apt to produce much greater clarity as to when the CCA applies than would be the case if that question were left to be resolved applying the presumption of derivative Crown immunity.

28 The factual distinctions between *Baxter* and the present case that were identified by the Full Court below (i.e. that the application of the CCA to NSW Ports would have impacted the State of NSW more significantly than in *Baxter*, and that it was the State who was the instigator of the contravening conduct, whereas in *Baxter* it was the corporate counterparty)⁶⁸ have no real bearing on the proper construction of the CCA.⁶⁹ To the extent that these factual differences are relevant at all, they are matters that might have
10 (but did not) cause the NSW State Parliament to exempt conduct from the application of the CCA under s 51(1).

29 **Conclusion.** Sections 45 and 45DA are properly construed as having broad and general application not just to private corporations, but also to Executive governments when carrying on business. Subject to action taken by State Parliaments to exempt conduct from the operation of the CCA under s 51(1), ss 45 and 45DA should not be construed as having less application to a private corporation that is carrying on business than they would have to a State when doing so. To construe those provisions in that way would be inconsistent with the objects of the CCA, and with the reasoning in *Baxter*. For those reasons, “the language of the Act, and its objects and subject matter” evince the contrary
20 intention necessary to displace the presumption of derivative Crown immunity,⁷⁰ such that the relevant provisions bind corporations that are dealing with an Executive government even if that would divest that government of a legal right or interest.

30 It follows that the CCA applies to persons in the position of NSW Ports who deal with the NSW Executive government, notwithstanding that it was not carrying on a business and so was not itself relevantly bound by the CCA. That is so whether or not the application of the CCA to NSW Ports results in the divestment of any legal right or interest of the State of NSW. The ACCC’s primary submission is therefore that it is not necessary for the Court to determine whether any such divestment occurred.

⁶⁸ FC at [40], [41] and [46] (the Court) (CAB 90-91, 92).

⁶⁹ cf FC at [38]-[47] (the Court) (CAB 89-92).

⁷⁰ *Baxter* (2007) 232 CLR 1 at [62] (plurality).

D NO DIVESTMENT OF A LEGAL RIGHT OR INTEREST

31 In the alternative, for the reasons that follow, the ACCC submits that the application of ss 45 and 45DA to NSW Ports did not divest the State of NSW of a legal right or interest.

(a) Meaning of divestment of a legal right or interest

32 In *Bass v Permanent Trustee Co Ltd*,⁷¹ Gleeson CJ and Gaudron, McHugh, Gummow, Hayne and Callinan JJ described derivative Crown immunity as “the common law rule that a statute is not to be construed as divesting the Crown of its property, rights, interests or prerogatives in the absence of express words or necessary implication to that effect”.

10 33 In *NT Power*,⁷² McHugh A-CJ, Gummow, Callinan and Heydon JJ, immediately after setting out the statement from *Bass* just quoted, said that “the better view is that the principle applies to proprietary, contractual and other legal rights and interests and not otherwise”. Their Honours expressly rejected the proposition that the presumption applies in circumstances going “beyond prejudice to property rights, legal rights, legal interests or legal prerogatives”, and refused to apply the presumption where the application of a statute to a private party would cause the Crown to suffer purely financial consequences without divesting any legally enforceable interest of the Crown.⁷³

20 34 In *Baxter*, the plurality said that the principle of derivative Crown immunity was confined to “proprietary, contractual or other *legal* rights or interests”;⁷⁴ that “[g]eneral references to unspecified forms of prejudice to interests of the Crown in a context such as this are unhelpful”;⁷⁵ and that it was important not to confuse “legal, equitable, or statutory rights and interests” with “governmental, commercial or even political interests”.⁷⁶ Critically for present purposes, *Baxter* establishes that the Crown’s capacity to contract is not a legal “interest” or “right” which engages the relevant presumption (that capacity being more accurately described as a “freedom”).⁷⁷ While “[f]rom one point of view, it may be in the

⁷¹ (1999) 198 CLR 334 at [42].

⁷² (2004) 219 CLR 90 at [170].

⁷³ *NT Power* (2004) 219 CLR 90 at [173]-[181].

⁷⁴ *Baxter* (2007) 232 CLR 1 at [62] (plurality) (original emphasis).

⁷⁵ *Baxter* (2007) 232 CLR 1 at [60] (plurality).

⁷⁶ *Baxter* (2007) 232 CLR 1 at [60] (plurality).

⁷⁷ *Baxter* (2007) 232 CLR 1 at [60] (plurality).

interests of a government for it, and anyone who deals with it, to have complete freedom to contract ... in reality no one has such freedom”.⁷⁸

- 35 In light of those statements, it is apparent that the plurality’s quotation in *Baxter* of a passage from Kitto J’s (dissenting) judgment in *Wynyard* was not endorsing any wider view. The relevant passage is as follows:⁷⁹

The object in view 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.

- 10 36 Immediately after citing that passage, the plurality in *Baxter* emphasised the need for “concentration on legal consequences”.⁸⁰ That suggests that their Honours quoted the passage from *Wynyard* for its emphasis on interference *for a legal reason* with a right or interest of the Crown. It was not quoted to endorse the taxonomy at the end of the passage, as is evident from the fact that it would be entirely inconsistent with the analysis both before and after the quotation of *Wynyard* to treat an interference with a “power” or “purpose belonging or appertaining to the Crown” as sufficient to attract derivative Crown immunity. The point, as is confirmed in the paragraph immediately following the quotation, was to emphasise that derivative Crown immunity is relevant only if an Act would “divest the Crown of proprietary, contractual or other *legal* rights or interests” (original emphasis).⁸¹ That focus is consistent with the general narrowing since *Bropho* of the presumptions concerning both Crown immunity and derivative Crown immunity.
- 20
- 37 Nor does the quotation in *Baxter* of that passage from *Wynyard* support a conclusion that “divest”, which was the word preferred by the Court in *Bass*, *NT Power*⁸² and *Baxter* when defining the principle to be applied,⁸³ is used other than in accordance with its

⁷⁸ *Baxter* (2007) 232 CLR 1 at [60] (plurality).

⁷⁹ *Baxter* (2007) 232 CLR 1 at [61] (plurality), quoting *Wynyard* (1955) 93 CLR 376 at 396.

⁸⁰ *Baxter* (2007) 232 CLR 1 at [62] (plurality).

⁸¹ *Baxter* (2007) 232 CLR 1 at [62] (plurality). cf the repeated (and erroneous) use of the wider *Wynyard* formula referring to “rights, interests, powers, authorities, privilege, immunity or purpose” in ACCC FC at [405]-[408] and [412] (Allsop CJ, Yates J agreeing), which following *Baxter* at [62] does not reflect the “relevant legal sense” of the “rights and interests” the divestment of which will (subject to contrary intention) attract derivative Crown immunity.

⁸² (2004) 219 CLR 90 at [170] (McHugh A-CJ, Gummow, Callinan and Heydon JJ).

⁸³ *Baxter* (2007) 232 CLR 1 at [62] (plurality).

ordinary meaning of a “stripping”, or “deprivation” or “taking away”.⁸⁴ Specifically, that word should not be read as including things that merely “adversely affect” or “interfere with” a legal right or interest.⁸⁵ Those expressions do not fall within any meaning of the word “divest”. To rely on language drawn from pre-*Bropho* authorities (including *Wynyard*) to broaden derivative Crown immunity would run counter to the Court’s evident intent to narrow that immunity in *Baxter*.

(b) The PAAT Act

38 The provisions that were held in the courts below to confer the legal right that would be
 10 divested by the CCA, thereby attracting the presumption of derivative Crown immunity,
 were ss 4 to 7 of the PAAT Act.⁸⁶ Section 4 authorised “the transfer of port assets to the
 private sector or to any public sector agency”. Section 5 provided for the proceeds of the
 transfer to be paid into a specific fund established under the *Restart NSW Fund Act 2011*
 (NSW). Section 6 provided that:

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

39 Section 7(1) provided that “[a]n authorised transaction is to be effected as directed by the
 Treasurer and can be effected in any manner considered appropriate by the Treasurer”.

40 The purpose of these provisions is made plain by the Explanatory Note that accompanied
 20 the PAAT Act. Prior to the passage of the PAAT Act, the State’s port assets were vested
 in state owned corporations.⁸⁷ Such corporations are subject to ss 20X and 20Y of the
 SOC Act, which impose substantial limitations on the disposal of assets by State owned
 corporations. The Explanatory Note explained that the object of the PAAT Act was to
 “authorise and facilitate the transfer to the private sector of the State’s ports assets at Port
 Botany and Port Kembla”.⁸⁸ Consistently with that object, the PAAT Act comprises

⁸⁴ See *Macquarie Dictionary* (MacMillan, 2025), defn of “divest”, it 2 (“to strip or deprive of anything; dispossess”), it 3 (“Law. To take away or alienate (property, etc.)”); *Oxford English Dictionary* (Oxford, 2025), defn of “divest”, it 2.a (“To strip (a person or thing) of possessions, rights, or attributes”), it 4 (“Law. To take away (property, etc., vested in a person); to alienate, convey away”).

⁸⁵ cf FC at [21]-[25] (the Court) (CAB 84-86).

⁸⁶ FC at [43] (the Court) (CAB 91).

⁸⁷ Explanatory Note, Port Assets (Authorised Transactions) Bill 2012, p 1.

⁸⁸ Explanatory Note, Port Assets (Authorised Transactions) Bill 2012, p 1.

seven parts, all of which concern functional matters relating to that authorisation and transfer: Pt 1 provides for preliminary matters; Pt 2 defines authorised transactions; Pt 3 provides for means to facilitate authorised transactions; Pt 4 provides for the transfer of staff; Pt 5 provided for arrangements for transfer of assets and functions; Pt 6 provides for the operation of other laws; and Pt 7 provides for miscellaneous matters. No part of the PAAT Act speaks of the maximisation of the value of the port assets, or makes any reference to the economic, commercial or financial interests of the State of NSW. Thus, both the extrinsic materials and the structure and content of the PAAT Act demonstrate that the PAAT Act had the modest object of removing the constraints that would otherwise have applied to the transfer of the port assets under the SOC Act and providing for functional and logistical matters relating to the sale of the ports.

41 The PAAT Act is not properly construed as sweeping away every other State law that may be relevant to the sale of the ports, let alone any Commonwealth law. Section 25 of the PAAT Act, which appears in Pt 6, addresses the general relationship of the PAAT Act with other State legislation. Section 25(1) provides that the PAAT Act will override the SOC Act, and any provision of the constitution of a statutory state-owned corporation (SOC) or a subsidiary of a statutory SOC. However, s 25(2) provides that the PAAT Act will otherwise only prevail where other State legislation is prescribed by regulations as an “inconsistent provision” for the purposes of s 25. Subject to the making of such regulations, the PAAT Act was therefore plainly intended to operate within the context of State law. It would be remarkable if the PAAT Act had, by reason of the presumption of derivative Crown immunity, a greater effect in excluding federal law than it expressly has upon State law. In fact, however, there is nothing in the PAAT Act that suggests that it was intended to operate other than subject to federal law, including the CCA.

42 Further, as mentioned in [26]-[29] above, if the Parliament of NSW had intended to authorise the purchaser of the ports to be entitled to conclude contracts with the State of NSW that would otherwise have been prohibited by Pt IV of the CCA, it could readily have achieved that result by specifically authorising that conduct in the PAAT Act.⁸⁹ The State Parliament not having adopted the mechanism that Commonwealth law expressly made available to achieve this result, derivative Crown immunity (which is simply a

⁸⁹ CCA s 51(1C).

presumption of interpretation) should not be held to support an interpretation of the CCA that would in effect *imply* a different means by which the State *Executive* could achieve a result that by the express terms of the CCA is available only to a State *Parliament* (and, even then, only by enacting a law of some specificity).

43 Instead, the PAAT Act should be construed, in accordance with the ordinary meaning of its terms, as relevantly doing no more than conferring statutory power on the Treasurer to make a contract with a willing party that is otherwise lawfully able to enter that contract. It did not confer a right to direct or require a private sector party to contract with it on any particular terms, let alone on terms that required that party to contravene the CCA.⁹⁰ Indeed, had the Parliament of NSW purported to enact a provision conferring upon the Treasurer of NSW a power to require private parties to contravene the CCA (without doing so in accordance with s 51 of the CCA), that provision would have been invalid under s 109 of the Constitution on the ground that it would have altered, impaired or detracted from the operation of the CCA. The principle of derivative Crown immunity is not an indirect means to avoid the operation of s 109, or to introduce uncertainty in ascertaining the application of the CCA to private corporations in the conduct of their businesses, simply because those businesses are dealing with a State in circumstances where the State is not itself conducting a business.

44 As the PAAT Act did not purport to, and could not, without reliance on s 51(1) of the CCA, validly confer upon the Treasurer of NSW the power to dispense with compliance with the CCA, the State of NSW had no legal right or interest to deal with private parties in the conduct of their businesses on the basis that those parties were free from their ordinary obligations under the CCA. The application of the CCA to NSW Ports therefore could not divest the State of any such right or interest.⁹¹ Under ss 6 and 7 of the PAAT Act, the Treasurer was free to make such contracts as he was able to agree with NSW Ports, but that freedom did not extend to relieving them of their obligations under the CCA (even if that would have increased the economic value that the State could extract from the sale of the ports).⁹² The contrary conclusion is irreconcilable with *Baxter*,⁹³

⁹⁰ cf ACCC PJ [2021] FCA 720 at [396], [402], [406], [418]-[419], [423]; ACCC FC at [409], [412] (Allsop CJ, Yates J agreeing).

⁹¹ cf ACCC FC at [412] (Allsop CJ, Yates J agreeing).

⁹² See ACCC FC at [589]-[592] (Beach J).

⁹³ cf FC at [42]-[46] (the Court) (CAB 91-92).

which specifically concluded that derivative Crown immunity does not protect the freedom of the Crown to contract on any terms it likes,⁹⁴ and that the CCA “may produce the consequence that making or performing a contract is illegal for one party but not for the other”.⁹⁵

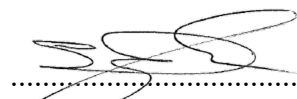
45 If, contrary to the above, the maximisation of the economic value from the sale of the ports is thought to be relevant, it is worth noting that the increase in value sought to be achieved by the PCDs was not some inherent value of an existing State proprietary interest, but an increase that was obtained by the State shielding the purchaser from the risk of competition by effectively agreeing either not to develop a potential competitor (the Port of Newcastle) or to pay compensation to NSW Ports “if container volumes beyond a defined threshold are diverted from Port Botany or Port Kembla to the Port of Newcastle”.⁹⁶ To prohibit private parties from entering into or giving effect to agreements of that kind is not to divest an existing legal right or interest of the State, even if such agreements could have increased the value of a proprietary interest of the State.⁹⁷

46 Finally, even if the power in ss 6 and 7 could be characterised as a special power to *deal* with State assets, that would not relevantly distinguish that power from the general executive freedom to contract, because that freedom *includes* a power to enter into contracts in relation to state assets (including the power to sell those assets). The fact of the power being conferred by a statute does not change its essential nature, and nor does it result in the power being properly characterised as a legal right or interest.

PART VI — ESTIMATE OF TIME

47 The ACCC estimates that it will require up to 1 hour for oral submissions.

Dated: 9 October 2025



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⁹⁴ As, indeed, Allsop CJ recognised in ACCC FC at [399]. See *Baxter* (2007) 232 CLR 1 at [68].

⁹⁵ *Baxter* (2007) 232 CLR 1 at [70] (plurality).

⁹⁶ ACCC PJ [2021] FCA 720 at [146].

⁹⁷ cf FC at [45], [53], [60] (the Court) (CAB 95). See ACCC FC at [583] (Beach J, dissenting).

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 THE JOINT SUBMISSIONS OF THE ACCC

Pursuant to *Practice Direction No 1 of 2024*, the ACCC sets out below a list of the constitutional provisions, statutes and statutory instruments referred to in these submissions.

10

No.	Description	Version	Provision	Reason for providing this version	Applicable date or dates (to what event(s), if any, does this version apply)
<i>Constitutional provisions</i>					
1.	<i>Commonwealth Constitution</i>	Current	s 109	Version currently in force (referred to in submissions for illustrative purposes only)	N/A
<i>Commonwealth statutory provisions</i>					
2.	<i>Competition and Consumer Act 2010 (Cth)</i>	Compilation for 12 April 2013 to 28	ss 2, 2A, 2B, 4L, 45, 51	Compilation in force from the date of entry into the PCDs until	31 May 2013 to 6 November

		June 2013		amendments made by <i>Competition and Consumer Amendment (Competition Policy Review) Act 2017</i> came into force on 6 November 2017	2017
		Current (C159)	ss 45, 45DA, 87CA	Version currently in force. Sections 45 and 45DA unchanged since amendments made by <i>Competition and Consumer Amendment (Competition Policy Review) Act 2017</i>	Relevant provisions applied from 6 November 2017
3.	<i>Trade Practices Act 1974 (Cth)</i>	Compilation for 2 March 2001 to 4 June 2001	ss 2, 2B, 46, 47	Act in force on the dates of entry into 3 of the 5 relevant agreements in Baxter . Relevant provisions unchanged from versions in force on the dates of entry into the first two relevant agreements (with the exception of s 2B)	17 April 2001, 1 May 2001, 2 May 2001
4.	<i>Competition Policy Reform Act 1995 (Cth)</i>	Current and only version	N/A	For illustrative purposes only	N/A
State statutory provisions					
5.	<i>Port Assets (Authorised Transactions) Act 2012 (NSW)</i>	Compilation for 27 November 2012 to 30 June 2013	ss 4, 5, 6, 7, 25	Act in force on the date of the entry into the Port Commitment Deeds	31 May 2013
6.	<i>State Owned Corporations Act 1989 (NSW)</i>	Compilation for 29 October 2013 to 25 November 2012	ss 20X and 20Y	Act in force prior to commencement of Port Assets (Authorised Transactions) Act 2012 (NSW) on 26 November 2012	25 November 2012
7.	<i>Restart NSW Fund Act 2011 (NSW)</i>	Compilation for 1 September 2011 to 30	s 5 (establishes the Restart NSW Fund	Act in force on the date of the entry into the Port Commitment Deeds	31 May 2013

		November 2018	referred to in s 5 of the PAAT Act)		
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