



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

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

OUTLINE OF ORAL SUBMISSIONS OF THE ACCC (INTERVENING)

PART I INTERNET PUBLICATION

1. This outline of oral submissions is in a form suitable for publication on the internet.

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

Derivative Crown immunity is a presumption of statutory construction (IS [10]-[17])

2. Derivative Crown immunity is no more than a presumption of statutory construction (AS [38], IS [13], R1-3S [38], R4S [48]). The strength of that presumption has waned commensurately with the weakening over time of the presumption from which it is derived, being the presumption that general terms in a statute do not bind the Executive government (IS [14]): *Bropho v Western Australia* (1990) 171 CLR 1 (**Vol 9, Tab 20**) at 23-24; *NT Power Generation Pty Ltd v Power and Water Authority* (2004) 219 CLR 90 (**Vol 9, Tab 26**) at [169] (McHugh A-CJ, Gummow, Callinan and Heydon JJ); *CEO, Aboriginal Areas Protection Authority v Director of National Parks* (2024) 98 ALJR 655

(**Vol 12, Tab 37**). Following its reconsideration in *ACCC v Baxter Healthcare Pty Ltd* (2007) 232 CLR 1 (**Vol 9, Tab 15**) at [58] (plurality), derivative Crown immunity is no more than a weak presumption, which provides a starting point in construing ss 2, 2B, 45, 45DA and 51(1) of the *Competition and Consumer Act 2010* (Cth) (**CCA**).

3. In *Baxter*, this Court examined and rejected arguments that closely resemble those now advanced by the respondents. Specifically, *Baxter* contradicts the respondents' attempt to equate a limitation on the contractual terms to which a non-government party can lawfully agree with a divestment of legal rights of the Executive itself. It does so by emphasising that the CCA can have differential operation as between the Executive and those contracting with it, with the consequence 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" (at [70]). *Baxter* also emphasises the significance of ss 2 and 51(1) in determining whether the CCA is properly construed as intending to allow a corporation to engage in anti-competitive conduct in certain (vaguely defined) dealings with the Executive, notwithstanding the unqualified text of ss 45 and 45DA: *Baxter* (2007) 232 CLR 1 (**Vol 9, Tab 15**) at [1], [38]-[40], [44], [48]-[49], [58]-[62], [64]-[76] (plurality).

The CCA evinces an intention to displace the presumption of derivative Crown immunity (IS [18]-[30])

4. The text, context and subject matter of the CCA support construing ss 45 and 45DA as applying to corporations in all of their activities, even when they are dealing with a State in circumstances where the State itself is not bound by the CCA and where that will indirectly constrain the contractual terms to which the State can secure agreement.
5. Section 2B(1) of the CCA was enacted to expand the operation of the CCA so that it would apply to States and Territories when they are carrying on a business (IS [21]). It says nothing about the application of the CCA to corporations that are otherwise bound by the CCA, even if the application of the CCA to those corporations has indirect consequences for a State or Territory: *Baxter* (2007) 232 CLR 1 (**Vol 9, Tab 15**) at [70]; *ACCC v NSW Ports Operations Hold Co Pty Ltd* (2023) 296 FCR 364 (**ACCC FC**) (**Vol 12, Tab 35**) at [583]-[584] (Beach J, in dissent).
6. The legislative history of s 2B does not suggest otherwise. The recommendations in the Hilmer Report (**Vol 17, Tab 61**) and the 2015 Harper Review (**Vol 17, Tab 62**) to expand the application of the CCA to include Executive governments where they "engage in commercial activity in competition with other businesses" or undertake activities

“in trade or commerce” concerned the circumstances in which Executive governments themselves should be bound by the CCA. The fact that those recommendations were not implemented says nothing about whether the CCA evinces an intention to exclude derivative Crown immunity (cf R1-3S [49], R4S [55]).

7. The objects set out in s 2 of the CCA point strongly against the respondents’ construction (cf RS1-3 [52], RS4 [54]). The respondents’ attempt to downplay the significance of those objects is contrary to the prominent place that consideration of those objects played in the analysis in both *Baxter* (2007) 232 CLR 1 (**Vol 9, Tab 15**) at [15], [48], [64] and [74] (plurality) and *NT Power* (2004) 219 CLR 90 (**Vol 9, Tab 26**) at [66] (McHugh A-CJ, Gummow, Callinan and Heydon JJ).
8. Section 51(1) of the CCA likewise strongly supports the conclusion that the CCA evinces an intention to exclude derivative Crown immunity: *Baxter* (2007) 232 CLR 1 (**Vol 9, Tab 15**) at [48], [60], [64], [68], [73] (plurality); *ACCC FC* (2023) 296 FCR 364 (**Vol 12, Tab 35**) at [571]-[575] (Beach J, in dissent). It is an express mechanism by which the Commonwealth Parliament has left it open to State and Territory Parliaments to roll back the operation of Pt IV of the CCA to the extent that they consider that appropriate in relation to anything done in a State or Territory. Its legislative history demonstrates its central role in defining the coverage of Pt IV. As such, it is an error to dismiss s 51(1) as giving rise to a question that is relevant only after a conclusion has been reached concerning the operation of derivative Crown immunity (cf *ACCC FC* (2023) 296 FCR 364 (**Vol 12, Tab 35**) at [402] (Allsop CJ, Yates J agreeing); FC [57] CAB 94; R1-3S [55]). Further, the specificity required by s 51(1) points against the Commonwealth Parliament having intended there to be an alternative parallel and less precise route (ie derivative Crown immunity) by which State or Territory governments – merely by seeking to agree to contracts containing anti-competitive terms – can create a situation in which corporations need not comply with Pt IV of the CCA.

Dated: 4 December 2025



Stephen Donaghue

Desiree Thistlewaite