



HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S122 of 2025

BETWEEN: **Mayfield Development Corporation Pty Ltd ACN 154 495 048**
Appellant

and

NSW Port Operations. Hold Co Pty Ltd ACN 163 262 351
First Respondent

Port Botany Operations Pty Ltd ACN 161 246 582
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 FIRST TO THIRD RESPONDENTS

PART I INTERNET PUBLICATION

This outline is in a form suitable for publication on the internet.

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

1. **Context.** In concluding a transaction to privatise assets of high policy and economic significance to the State, the Treasurer, exercising powers conferred on him by the *Ports Assets (Authorised Transactions) Act 2012* (NSW) (**PAAT Act**), required NSW Ports to agree to the compensation provisions. The *Competition and Consumer Act 2010* (Cth) (**CCA**) had no application to the State in making the compensation provisions, which was not done in course of carrying on a business. Jagot J and a majority of the Full Federal Court found that the CCA had no application to NSW Ports' conduct as the State's counterparty in making the compensation provisions. Such application would "be in legal effect upon the Crown",¹ in that it "would adversely affect" the Crown's legal rights or interests, being the Treasurer's rights under the PAAT Act to make the compensation provisions in order to maximise the value of the State's significant assets which were, as a matter of transport policy, to be sequenced and not duplicated: **RS [5]-[37]**.
2. **Disapplication of CCA to the Crown.** Section 2B renders Pt IV binding on the State only to the extent the State carries on business. It displaces both the *Bropho* presumption and the cognate presumption associated with *Wynyard Investments* to that limited extent. Application of the CCA to the State, whether directly or by the indirect route of divestiture of rights, is denied by s 2B. That is to manifest a positive intention that there are to be denied those applications of the CCA to corporations which would effect the relevant incidence upon the State: **RS [38]-[46]**.
3. **No manifest contrary intention.** Read consistently with s 2B and relevant extrinsic materials, nothing in ss 2, 45, 45DA or 51 manifests any contrary intention. Section 2B limits the extent to which the legislature has sought to pursue the objects in s 2, and the legislature has rejected recommendations to go further: **RS [47]-[52]**. Sections 45 and 45DA address "any corporation", but within the confines of an Act whose application to corporations is truncated by s 2B, in terms too generic to modify that position: **RS [53]-[54]**. Section 51 is only engaged where there is conduct in need of authorisation, which depends on whether the conduct is regulated by the CCA having regard to s 2B: **RS [55]**.

¹ *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* (2007) 232 CLR 1 at [59], quoting *Wynyard Investments Pty Ltd v Commissioner for Railways (NSW)* (1955) 93 CLR 376 at 393.

4. **Divestment of legal right or interest.** The principle of derivative Crown immunity responds to an “impairment of the existing legal situation” of, “interference, for a legal reason” with, “adverse[] affect” or “incidence in legal effect upon” the Crown.² The requisite effect has been expressed in different ways. Divestment in the strong sense of “stripping” or “taking away” or “deprivation” is not required in order to engage the principle of derivative Crown immunity: **RS [56]-[57]**.
5. **Right or interest divested was not mere freedom to contract.** The plurality in *Baxter* did not find that a capacity or freedom to contract is in all circumstances incapable of constituting a right or interest divestment of which engages the *Wynyard Investments* principles. The right or interest exercised by the Treasurer to make the compensation provisions was not the mere “freedom to contract” analysed in *Baxter*. The executive government of NSW had no (or uncertain) power at common law to privatise assets of high policy and economic significance.³ The Treasurer made the compensation provisions not with a common law power but using the specific statutory grant: **RS [58], [61]**.
6. Further or alternatively, if, and to the extent that, the executive had power at common law to enter into transactions of this kind, and the legal consequence of this Court’s decision in *Baxter* was that provisions like those in issue here made in exercise of that power would have been void by application of Pt IV to NSW Ports’ conduct, the powers conferred by ss 6 and 7 of the PAAT Act were of a different kind and amplitude: they were an express statutory grant of power, to contract on whatever terms the Treasurer considered appropriate, irreducible to the “freedom to contract” analysed in *Baxter* and capable of attracting the protection of the *Wynyard Investments* principles even if the “freedom to contract” in *Baxter* was not: **RS [59]-[63]**.
7. **Legal consequences for State of application of Pt IV to NSW Ports.** Application of Pt IV to NSW Ports’ conduct in making the compensation provisions would be an incidence in legal effect upon the State by impairing the Treasurer’s ability to contract for the sale of assets on terms contrary to the CCA, severing provisions which the Treasurer required NSW Ports to accept: **RS [65]-[71]**.

² *Baxter* [59]-[62]; *NT Power Generation Pty Ltd v Power and Water Authority* (2004) 219 CLR 90, [170]; *Wynyard Investments* at 393-4, 396.

³ Cf *New South Wales v Bardolph* (1934) 52 CLR 455 at 508; *Williams v Commonwealth* (2012) 248 CLR 156, [33] and [74], [139]-[143]; [208]-[212]; [484] and [529].

8. **Issue estoppel.** Issue estoppel and abuse of process respond to the factual and forensic context in which they are said to arise.⁴ In respect of the issue of Crown immunity: (a) there is an identity of legal issue, and factual substratum, between the ACCC appeal proceeding and this proceeding; (b) there is a mutuality of participants between the ACCC appeal proceeding and this proceeding; (c) the determination of the issue was fundamental, in the sense of legally indispensable, to the resolution of the ACCC appeal proceedings.
9. Considerations of finality and fairness support a finding that MDC is estopped in respect of the issue of Crown immunity.⁵ MDC, as intervenor, made “substantive submissions” on four issues of mixed fact and law (**4RBFM, Tab 3.2**); such that its position on Crown immunity was “fully ventilated”: **RS [72]-[77]**. It has never sought to supplement the evidentiary basis of the ACCC appeal proceeding in respect of that issue. MDC had standing to seek special leave to appeal, and could effectively have sought leave: **RS [87]**, *contra* **FFC [84]**, **CAB p. 101**. Persons other than parties may appeal by leave where their interests are sufficiently affected.⁶ Nothing in the structure of the legislation and rules contradicts that.⁷ In order effectively to obtain leave, MDC likely had to be able to overturn the Full Federal Court’s conclusions in respect of Crown immunity and proscribed purpose; but it had addressed on those issues in the Full Federal Court.
10. **Abuse of Process.** If no issue estoppel binds MDC, to permit it to maintain its contentions as to derivative Crown immunity would: (a) be unjustifiably oppressive to the NSW Ports parties, by reason of precisely the same legal issue being litigated, on an identical factual substratum, against the same parties, twice; and (b) bring the administration of justice into disrepute, by reason of that circumstance occurring in a context where “tactical and considered” steps by MDC (**PJ [114]**, **CAB Tab 1, p. 44**) would have produced that outcome: **RS [89]-[93]**. Considerations of finality and fairness do not argue otherwise.
11. **Settlement Deed:** The NSW Ports parties do not seek to supplement their written submissions on this issue.

4 December 2025


Noel Hutley

Ruth Higgins

⁴ *Mayfield Development Corp Pty Ltd v NSW Ports Hold Co Pty Ltd* [2020] FCA 260 at [16]-[18].

⁵ *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507, 516-517, 523-524

⁶ *Cuthbertson v Hobart Corporation* (1921) 30 CLR 16, 23-24, 25; *Commonwealth v CFMEU* (2000) 98 FCR 31, 36-37.

⁷ *Federal Court of Australia Act 1976* s 33(1); *Judiciary Act 1903*s 35A; *High Court Rules 2004* (Cth) r 41.01.