



# HIGH COURT OF AUSTRALIA

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### Details of Filing

File Number: S122/2025  
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### Important Information

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IN THE HIGH COURT OF AUSTRALIA  
SYDNEY REGISTRY

BETWEEN:

**MAYFIELD DEVELOPMENT CORPORATION PTY LTD**

**ACN 154 495 048**

Applicant

and

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**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**

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**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 FOURTH RESPONDENT**

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## PART I INTERNET PUBLICATION

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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

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### A DEED OF RELEASE (NOTICE OF CONTENTION GROUND 1)

- 2 The release in cl 4.1 of the Deed of Release entered into on 24 December 2013 by the Appellant, Anglo Ports, Grup Maritim TCB, SL, NPC and the State (**Deed**) (**State's BFM 4**) is very broad: **SS [15]-[22]**. The text and context indicates that, in agreeing the release, the parties were attempting to achieve finality and to prevent the State from being burdened by any future dispute with the Appellant in relation to the "Release Matters": **SS [23]-[24]**.
- 10 3 On the proper construction of the Deed, and properly characterising the Appellant's Federal Court proceeding at first instance, that proceeding falls within the terms of the release in cl 4.1: **SS [25]-[36], State's BFM 9-11**.
- 3.1. If the Appellant's claim succeeds, s 4L of the *Competition and Consumer Act 2010* (Cth) (**CCA**) requires that the compensation provisions be severed from the Port Commitment Deeds, to which the State is a party. That operation of s 4L requires a legal proceeding in which a court is invited to find that entry into the Port Commitment Deeds contravened the CCA. In substance, that involves a "Claim" (a "suit" or "action") against the State in respect of the validity of its existing contracts: **SS [26]-[27]**.
- 20 3.2. Because the proceeding imperils the State's rights in that way, the State is (and must be) a respondent. The State was a necessary party to the ACCC proceeding: *Australian Competition and Consumer Commission v NSW Ports Operations Hold Co Pty Ltd (No 2)* [2021] FCA 1040 at [5]-[9] (**JBA V15 T49**). That reasoning applies equally to this claim and again points to this being a "Claim" against the State: **SS [27], [29]-[30]**. It is incorrect to suggest that the State is a party to the proceeding as the result of its own election: (**ABFM 7-15**) and cf **Reply [19]**.
- 3.3. The joinder of the State means that the "Claim" is brought against the State, both in substance and expressly. It is a "Claim" in relation to the "Release Matters" brought against a "Releasor" within the meaning of cl 4.1: **SS [34]**.
- 30 4 The court below was wrong to hold otherwise and the Appellant's argument supporting that result is unpersuasive.

- 4.1. It does not matter that the Appellant did not initially include the State as a respondent: **SS [30]**.
- 4.2. The submission that the State has only been joined to afford it procedural fairness reinforces that the State is a necessary party and that the proceeding against the First to Third Respondents (**NSW Ports**) is necessarily a Claim against the State. If the State filed a submitting appearance, it would still be a party and there would still be a Claim against it: cf **Reply [19]**.
- 4.3. The fact that s 4L of the CCA operates automatically if the Appellant succeeds does not mean it affects the State's rights and interests any less. The compensation provisions would not be invalidated without a proceeding of this kind: **SS [28]**.
- 4.4. It is likewise irrelevant that NSW Ports is not identified as a "Releasee" in the Deed: **SS [32]-[33]**.
- 4.5. Clause 4.4 of the Deed provides that the release is a complete defence to any Claim against the State. The State's rights under the Deed can only be vindicated by dismissing the proceedings: **SS [36]**.

## **B "DERIVATIVE CROWN IMMUNITY"**

- 5 This case is resolved by applying the principle of statutory construction set out at [62] of *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* (2007) 232 CLR 1 (**JBA V9 T15**): that is, since the CCA does not bind the Crown in right of the State when it is not carrying on a business (s 2B), then, save to the extent to which a contrary intention appears, the Act will not be read to divest the Crown of proprietary, contractual or other legal rights or interests: **SS [49]**.
- 6 The CCA does not manifest such a "contrary intention: **SS [51]-[59]**.
- 6.1. To hold otherwise would be in tension with authority of this Court: **SS [52]**.
- *Baxter* (2007) 232 CLR 1 at 40 (**JBA V9 T15**); *NT Power Generation Pty Ltd v Power and Water Authority* (2004) 219 CLR 90 (**JBA V10 T26**).
- 6.2. The generally expressed objects in s 2 of the CCA are given effect through a carefully delineated scheme which expressly limits the application of certain provisions to the State, the Commonwealth, and local government (ss 2A-2BA): **SS [54]**. That does not point to a relevant contrary intention.

6.3. The same point applies to the general words of ss 45(2) (“a corporation”) and 45DA(1) (“a person”). Indeed, to rely on general words of that nature to discern a contrary intention would leave no room for the application of the principle of statutory construction recognised in *Baxter*: **SS [53]**.

6.4. Section 51 is addressed to a subject matter which is broader than and different to that addressed by the principle of statutory construction recognised in *Baxter*. Correctly understood, it operates assuming contravention and does not intersect with a case in which derivative Crown immunity operates, because there is nothing to authorise: **SS [56]**.

10     7     Application of the relevant provisions of the CCA to NSW Ports in this context would be, in legal effect, an application of the CCA to the Crown, contrary to the intention of the CCA: **SS [60]-[74]**.

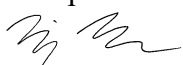
7.1. The *Ports Assets (Authorised Transactions) Act 2012* (NSW) (**PAAT Act**) (**JBA V4 T5**) is a special regime designed to facilitate a significant transaction. It conferred on the Treasurer the right to effect the privatisation of the ports assets as he saw fit, and to direct the form of the transaction to which he would agree. These are legal rights of the requisite character: **SS [63]-[67]**.

20     7.2. The rights conferred by the PAAT Act are not equivalent to the freedom of contract. They are rights conferred by statute, distinct from a general law freedom: **SS [70]-[71]**.

8     *Baxter* does not require a different result: **SS [72]-[73]**.

8.1. The Court in *Baxter* rejected an interpretation of the CCA which would have amounted to an extremely broad and general immunity for private parties in their dealings with State entities. Its statements must be understood in that context: **SS [58]-[59], [72]**.

30     8.2. The State’s argument in this case is far more modest. Acceptance of that argument does not mean that the CCA does not bind any corporation contracting with the Crown. The relevant legal interest is sourced in a particular statute dealing with a particular, once-off transaction. Other cases will fall to be determined against particular legal regimes and the rights they create.



**Craig Lenehan**

**Hannah Ryan**

**Dated:** 4 December 2025

