

HIGH COURT OF AUSTRALIA

GAGELER CJ,
GORDON, EDELMAN, GLEESON AND BEECH-JONES JJ

MAYFIELD DEVELOPMENT CORPORATION
PTY LTD

APPELLANT

AND

NSW PORT OPERATIONS HOLD CO PTY LTD
& ORS

RESPONDENTS

*Mayfield Development Corporation Pty Ltd v NSW Port Operations Hold
Co Pty Ltd*

[2026] HCA 12

Date of Hearing: 4 December 2025

Date of Judgment: 6 May 2026

S122/2025

ORDER

- 1. Appeal allowed with costs.*
- 2. Cross-appeals dismissed with costs.*
- 3. The orders made by the Full Court of the Federal Court of Australia on 3 April 2025 be set aside and, in their place, it be ordered that:*
 - 1. The appeal be allowed.*
 - 2. The orders made by the Federal Court of Australia on 3 June 2024 be set aside.*
 - 3. In relation to the answer to question (b) of the separate questions, the orders made by the Federal Court of Australia on 22 May 2024 be set aside and, in its place, the answer to question (b) be "No".*

2.

4. *The respondents pay the appellant's costs of the hearing of the separate questions and the appeal.*
5. *The matter be remitted to the primary judge for further determination.*

On appeal from the Federal Court of Australia

Representation

B W Walker SC with P McQueen and C E Bannan for the appellant (instructed by K&L Gates)

N C Hutley SC and R C A Higgins SC with B K Lim SC and T M Rogan for the first to third respondents (instructed by Gilbert + Tobin)

C L Lenehan SC with H D Ryan for the fourth respondent (instructed by MinterEllison)

S P Donaghue KC, Solicitor-General of the Commonwealth, with D Y Thistlewaite for the Australian Competition and Consumer Commission, intervening (instructed by Australian Government Solicitor)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Mayfield Development Corporation Pty Ltd v NSW Port Operations Hold Co Pty Ltd

Statutes – Construction – Derivative Crown immunity – Where State of New South Wales ("State") agreed Port Commitment Deeds ("PCDs") with first to third respondents ("NSW Ports") – Where PCDs required State to compensate NSW Ports if certain ports were not at full capacity and certain volume of containers diverted to other port – Where appellant alleged NSW Ports' entry into PCDs breached ss 45 and 45DA(1) of *Competition and Consumer Act 2010* (Cth) ("CCA") – Whether ss 45 and 45DA(1) of CCA bound NSW Ports despite presumption of derivative Crown immunity.

Equity – Estoppel – Abuse of process – Where Australian Competition and Consumer Commission previously brought similar proceedings against NSW Ports ("ACCC Proceedings") – Where ACCC Proceedings dismissed – Where appellant intervened in ACCC Proceedings on limited basis – Whether appellant estopped from bringing these proceedings – Whether these proceedings constituted abuse of process.

Contract – Deed of release – Where appellant executed deed of release in favour of State – Where NSW Ports not mentioned in or party to deed – Whether deed of release barred claim against NSW Ports.

Words and phrases – "abuse of process", "capacity to contract", "Crown immunity", "deed of release", "derivative Crown immunity", "estoppel", "freedom to contract", "impairment of legal relations", "issue estoppel", "legal rights or interests", "presumption of legislative intention".

Competition and Consumer Act 2010 (Cth), ss 2A, 2B, 2C, 45, 45DA, 51
Ports Assets (Authorised Transactions) Act 2012 (NSW), ss 7, 25, Pt 2

1 GAGELER CJ. In a proceeding in the original jurisdiction of the Federal Court of Australia, Mayfield Development Corporation Pty Ltd ("Mayfield") claims that NSW Port Operations Hold Co Pty Ltd, Port Botany Operations Pty Ltd and Port Kembla Operations Pty Ltd (together "Port Operations") contravened ss 45 and 45DA of the *Competition and Consumer Act 2010* (Cth) ("the CCA") by entering into certain "Port Commitment Deeds" ("the PCDs") containing certain "compensation provisions", and reaching a cognate arrangement or understanding, with the State of New South Wales ("the State"). There is no dispute that Port Operations entered into the PCDs containing the compensation provisions in 2013 as a condition for completion of the sale to and purchase by Port Operations of "ports assets" in "authorised transactions" under the *Ports Assets (Authorised Transactions) Act 2012* (NSW) ("the PAAT Act").

2 This appeal concerns the correctness of answers given by the primary judge (McElwaine J)¹ and affirmed on appeal by the Full Court of the Federal Court (Lee, Colvin and Stewart JJ)² to three separate questions stated for determination in the proceeding. The separate questions were stated against the background of an earlier proceeding in the original jurisdiction of the Federal Court which culminated in the decision of a differently constituted Full Court (Allsop CJ, Yates and Beach JJ) in *Australian Competition and Consumer Commission v NSW Ports Operations Hold Co Pty Ltd* ("*ACCC v NSW Ports*").³ The Full Court in that earlier decision rejected a materially identical claim of contravention of s 45 of the CCA brought by the Australian Competition and Consumer Commission ("the ACCC") against Port Operations in respect of essentially the same conduct.

3 For the reasons explained by Gordon, Gleeson and Beech-Jones JJ, I consider the answers given by the primary judge and affirmed by the Full Court to two of the questions indubitably correct. Mayfield is not precluded from pursuing its claim in the proceeding by reason of its limited participation in the earlier proceeding. Nor is the proceeding barred by the terms of a deed of release entered into by Mayfield and the State.

4 The remaining question was framed to ask whether "derivative Crown immunity" is "a complete answer" to Mayfield's claim that Port Operations contravened ss 45 and 45DA of the CCA. Properly regarding itself as constrained to follow the reasoning of the majority in *ACCC v NSW Ports*, absent "compelling

1 *Mayfield Development Corporation Pty Ltd v NSW Ports Operations Hold Co Pty Ltd* [No 4] [2024] FCA 538.

2 *Mayfield Development Corporation Pty Ltd v NSW Ports Operations Hold Co Pty Ltd* (2025) 308 FCR 153.

3 (2023) 296 FCR 364.

reasons" for considering that reasoning to have been wrong,⁴ the Full Court unanimously affirmed the answer to that remaining separate question to be "Yes". Together with Gordon, Gleeson and Beech-Jones JJ, I am of the opinion that the correct answer is "No".

5 The reasoning of the majority in *ACCC v NSW Ports*, comprising that of Allsop CJ with whom Yates J expressed agreement, aligned in critical respects with that of Jagot J who had been the primary judge in that earlier proceeding.⁵ In deference to that reasoning, I express my own reasons for disagreeing with it.

6 For reasons to be explained, I consider Allsop CJ to have been correct in his identification and expression of the underlying principle of statutory construction and in his treatment of that principle as applicable to the construction of s 45 of the CCA to limit the scope of its application. My disagreement with his Honour's reasoning is confined to a disagreement about whether application of the principle to the construction of s 45 of the CCA (and by parity of reasoning s 45DA) rendered the section inapplicable to conduct engaged in by Port Operations for the purpose of entering into and giving effect to authorised transactions under the PAAT Act.⁶ My opinion is that it was not.

Identifying the applicable principle of statutory construction and framing the requisite statutory inquiry

7 The expression "derivative Crown immunity" seems to have entered curial discourse as a result of its having been used in a pleading considered and found wanting in *NT Power Generation Pty Ltd v Power and Water Authority*.⁷ A variation of the expression appeared again in an argument considered and rejected in *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd*.⁸

4 *Mayfield Development Corporation Pty Ltd v NSW Ports Operations Hold Co Pty Ltd* (2025) 308 FCR 153 at 162 [39], 167 [69]. See *Hill v Zuda Pty Ltd* (2022) 275 CLR 24 at 35 [25].

5 *Australian Competition and Consumer Commission v NSW Ports Operations Hold Co Pty Ltd* [2021] FCA 720 at [355]-[406].

6 *Australian Competition and Consumer Commission v NSW Ports Operations Hold Co Pty Ltd* (2023) 296 FCR 364 at 469-472 [404]-[415].

7 (2004) 219 CLR 90 at 151 [166].

8 (2007) 232 CLR 1 at 12 [1].

8 Three cumulative aspects of the consistent response of this Court to the use
of the expression in *NT Power* and in *Baxter* are appropriately recalled.

9 First, since *Bropho v Western Australia*,⁹ "Crown immunity" has properly
been understood as a principle of statutory construction.¹⁰ The principle is that the
Crown (meaning the body politic of the Commonwealth or of a State or Territory,
and encompassing an agent or instrumentality of the executive government of such
a body politic¹¹) "is not bound by statute unless a contrary intention can be
discerned from all the relevant circumstances".¹²

10 Second, for the Crown to be "bound" by a statute within the meaning of that
principle of statutory construction is for the statute to "impair[]" the "existing legal
situation" of the Crown.¹³ A statute might impair the existing legal situation of the
Crown not only by imposing a legal liability or legal constraint on the Crown but
also by "divesting" the Crown of a legal right or interest.¹⁴ Conformably with the
underlying notion of "impairment", as the Full Court noted in the decision under
appeal, the notion of "divestiture" in this context is that of diminution or material
adverse alteration.¹⁵

11 Third, the expression "derivative Crown immunity" is at best an inadequate
description of the legal consequence of a statute properly construed not to bind the
Crown having no application to impose a legal liability or legal constraint on a

9 (1990) 171 CLR 1.

10 *NT Power Generation Pty Ltd v Power and Water Authority* (2004) 219 CLR 90 at
151 [166], 152 [169]; *Australian Competition and Consumer Commission v Baxter
Healthcare Pty Ltd* (2007) 232 CLR 1 at 27 [40].

11 See *Chief Executive Officer, Aboriginal Areas Protection Authority v Director of
National Parks* (2024) 281 CLR 525 at 534-535 [9]-[12].

12 *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd*
(2007) 232 CLR 1 at 28 [42], quoting *Bropho v Western Australia* (1990) 171 CLR
1 at 28.

13 *NT Power Generation Pty Ltd v Power and Water Authority* (2004) 219 CLR 90 at
152 [170], quoting *Wynyard Investments Pty Ltd v Commissioner for Railways
(NSW)* (1955) 93 CLR 376 at 393.

14 *NT Power Generation Pty Ltd v Power and Water Authority* (2004) 219 CLR 90 at
152 [170]; *Australian Competition and Consumer Commission v Baxter Healthcare
Pty Ltd* (2007) 232 CLR 1 at 35 [62].

15 See *Mayfield Development Corporation Pty Ltd v NSW Ports Operations Hold Co
Pty Ltd* (2025) 308 FCR 153 at 158 [22].

person other than the Crown if and to the extent that the imposition of that liability or constraint on that person would operate to divest the Crown of a legal right or interest.¹⁶ The description is inadequate in that the legal consequence to which it refers is neither "derivative" nor an "immunity". The legal consequence to which it refers is rather a "corollary"¹⁷ – a working out – of the principle of statutory construction.

12 Before *NT Power* and *Baxter*, the CCA in an earlier form¹⁸ had been construed in *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd*¹⁹ not to bind the Crown in right of a State. A majority of the Court in *Baxter* noted that the *Bradken* construction was "reinforced in so far as the Crown was not carrying on a business" by the subsequent insertion of s 2B.²⁰

13 *Bradken* had also illustrated that an outworking of that construction of the CCA not to bind the Crown was to render ss 45 and 47 inapplicable to constrain conduct of non-government parties in circumstances where application of those provisions to constrain that conduct would have divested the Crown of proprietary and contractual rights.²¹ In light of *Bradken*, and consistently with the majority's analysis in *NT Power*,²² the majority in *Baxter* identified the applicable principle of construction to have been that "since the [CCA] does not bind the Crown ... when it is not carrying on a business, then, save to the extent to which a contrary intention appears, the [CCA] will not be read so as to divest the Crown of ... legal rights or interests".²³

16 *NT Power Generation Pty Ltd v Power and Water Authority* (2004) 219 CLR 90 at 152 [170]; *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* (2007) 232 CLR 1 at 35 [62].

17 *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* (2007) 232 CLR 1 at 34 [58].

18 *Trade Practices Act 1974* (Cth), renamed by item 2 of Sch 5 to the *Trade Practices Amendment (Australian Consumer Law) Act (No 2) 2010* (Cth). The term "CCA" is used in these reasons also to refer to the legislation in this earlier form.

19 (1979) 145 CLR 107.

20 *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* (2007) 232 CLR 1 at 28 [43].

21 See *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 354 [41]-[42].

22 (2004) 219 CLR 90 at 152 [170].

23 (2007) 232 CLR 1 at 35 [62] (emphasis omitted).

14 Application of that principle of construction led in *Baxter* to the "real question" for determination in that case having been identified as the "extent" to which "the reach" of ss 46 and 47 of the CCA was "modified by the operation of the principle of construction".²⁴ The ultimate holding in *Baxter* was that the principle did not preclude application of those sections to the conduct of the non-government party impugned in that case. That was not because the context of the CCA was seen to manifest an intention contrary to the operation of the principle. Rather, it was because the principle operating on the construction of the sections was held not to have been engaged. The principle was held not to have been engaged because, as with the application of s 46 to the conduct of non-government parties impugned in *NT Power*,²⁵ the application of ss 46 and 47 to the conduct of the non-government party impugned in *Baxter* did not operate to divest the Crown of any legal right or interest.²⁶

15 There having been no relevant change to the CCA since *Baxter*, and there being no material difference for the purpose of the principle of construction articulated in *Baxter* between the operative provisions in Pt IV of the CCA (in particular between ss 46 and 47 on the one hand and ss 45 and 45DA on the other hand), the principle of construction identified in *Baxter* must be recognised as continuing to govern the construction and application of those provisions.

16 The argument of the ACCC intervening in the present case that the CCA "evinces an intention to exclude derivative Crown immunity", with the result that ss 45 and 45DA are to be construed to manifest an intention to apply in accordance with their terms even if their application would divest the Crown of a legal right or interest, must be rejected because it is inconsistent with the dispositive reasoning in each of *Baxter* and *NT Power*.

17 To the extent that the ACCC seeks contextual support for its argument from ss 2 and 51 of the CCA, it is appropriate to note that s 2 was inserted and s 51(1) was amended to take its current form at the same time as s 2B was inserted.²⁷ Neither s 2 nor s 51 is in terms directed to the principle of construction earlier identified in *Bradken* and subsequently held in *Baxter* to have been affirmed by s 2B and neither can coherently be treated as having had the hitherto unrevealed

24 *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* (2007) 232 CLR 1 at 36 [66]; see also at 36 [64]-[65].

25 (2004) 219 CLR 90 at 152-159 [170]-[190].

26 (2007) 232 CLR 1 at 35 [60], 37 [68].

27 *Competition Policy Reform Act 1995* (Cth).

purpose or collateral effect of displacing the principle which s 2B contemporaneously affirmed.

18 Sections 2A, 2B and 2C demonstrate by their very presence that pursuit of the object identified in s 2 of the CCA is not incompatible with provisions of the CCA having a differential operation in their application to alter the legal situation of the bodies politic of the Commonwealth, States and Territories.

19 Section 51 of the CCA, which existed in its original form at the time of *Bradken*, is directed to the determination of whether Pt IV has been contravened. In relevantly providing in s 51(1)(b) that "anything done in a State" that is "specified in, and specifically authorised by ... an Act passed by the Parliament of that State" is to be "disregarded" in determining whether a person has contravened Pt IV, the section "operates distributively over each of the ultimate facts (being acts or things) which together might otherwise constitute a contravention".²⁸ The section is not directed to the logically anterior question of the construction of Pt IV.

20 In *ACCC v NSW Ports*, Allsop CJ recognised the principle of construction identified in *Baxter* to govern the construction of Pt IV of the CCA and thereby to limit the application of s 45.²⁹ His Honour further recognised the inquiry posited by that construction to be into whether application of the section to the impugned conduct of Port Operations would result in divestiture of a legal right or interest of the State, identifying the two subsidiary questions on which the outcome of the posited inquiry turned as: what was the relevant legal right or interest of the State; and would that right or interest of the State be divested by the application of the section to the impugned conduct of Port Operations?³⁰

21 In so construing Pt IV of the CCA, and in so framing the inquiry required to determine whether s 45 (and by parity of reasoning s 45DA) applied to the impugned conduct of Port Operations, Allsop CJ was in my opinion correct.

Undertaking the requisite statutory inquiry

22 Having framed the requisite inquiry in *ACCC v NSW Ports*, Allsop CJ turned to the undertaking of that inquiry.

23 His Honour identified the relevant legal right or interest of the State as a statutory right conferred on the Treasurer as representative of the State by the

28 *Re Ku-ring-gai Co-operative Building Society (No 12) Ltd* (1978) 22 ALR 621 at 635.

29 (2023) 296 FCR 364 at 468 [401]-[402].

30 (2023) 296 FCR 364 at 469 [404].

PAAT Act to "effect" an authorised transaction "as he chose to direct".³¹ His Honour in that respect emphasised the need for the PAAT Act to be construed purposively as a whole by reference to its subject-matter and legislative history, and referred compendiously to ss 4, 5, 6, 7, 9, 11, 34, 35 and 36.³² His formulation of the relevant statutory right nevertheless drew on the specific language of s 7 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" and that "[t]here are no limitations as to the nature of the transactions or arrangements that can be entered into or used for the purposes of an authorised transaction".

24 The gist of his Honour's reasoning to the conclusion that application of s 45 of the CCA to the impugned conduct of Port Operations would divest the State of the statutory right conferred on the Treasurer as representative of the State by the PAAT Act was contained in the proposition that "[i]f the legal effect of the transaction was not as [the Treasurer] directed because of the severance and unenforceability of the compensation provisions by way of ss 4L and 45 of the [CCA], there was or would have been a divestiture of that [statutory] right".³³

25 The essential difficulty with this reasoning was pointed out by Beach J in dissent in *ACCC v NSW Ports*.³⁴ The difficulty is that such statutory right as might be conferred on the Treasurer by the PAAT Act to "effect" an authorised transaction "as he chose to direct" could be divested by the application of s 45 of the CCA to conduct engaged in by Port Operations through the operation of s 4L of the CCA only if that statutory right could extend to dispensing with or exempting a non-State party to an authorised transaction from compliance with s 45 of the CCA. It could not.

26 Leaving aside the obvious constitutional difficulty of a State law purporting to dispense with or exempt from compliance with a Commonwealth law, the essential difficulty lies in construing s 7 of the PAAT Act (whether alone or in combination with other provisions of the PAAT Act) as conferring any entitlement on the Treasurer to effect an authorised transaction otherwise than on terms to which a non-State party to the transaction agrees. Whether a non-State party to an authorised transaction is lawfully able to agree or give effect to a term of an authorised transaction considered appropriate by the Treasurer lies beyond the scope of the section.

31 (2023) 296 FCR 364 at 471 [412].

32 (2023) 296 FCR 364 at 469-471 [405]-[412].

33 (2023) 296 FCR 364 at 471 [412].

34 (2023) 296 FCR 364 at 494 [589], [592], 498 [620].

27 This limitation on the scope of the statutory right conferred on the Treasurer as representative of the State by the PAAT Act reflects the incapacity of an executive government of an Australian body politic by contract or otherwise to dispense with compliance with the law, which is a "general constitutional principle"³⁵ that is "fundamental to our law"³⁶ and which is therefore not to be taken to be departed from by statute in the absence of a "clear expression of an unmistakable and unambiguous [legislative] intention".³⁷ Not only is a clear expression of an unmistakable and unambiguous legislative intention to exempt a non-State party to an authorised transaction from compliance with the general law which governs the conduct of that party absent from the PAAT Act, but s 25(2) of the PAAT Act indicates a legislative intention for the relationship between the PAAT Act and other State legislation of general application to be determined by regulations made under s 39 of the PAAT Act.

28 To the inquiry correctly posited, as to whether the application of s 45 or s 45DA to conduct engaged in by Port Operations for the purpose of entering into and giving effect to authorised transactions under the PAAT Act would result in divestiture of a legal right or interest of the State, the correct answer is that it would not.

Disposition

29 I agree with the orders proposed by Gordon, Gleeson and Beech-Jones JJ.

35 *Port of Portland Pty Ltd v Victoria* (2010) 242 CLR 348 at 359 [13], quoting *Cam and Sons Pty Ltd v Ramsay* (1960) 104 CLR 247 at 258.

36 *A v Hayden* (1984) 156 CLR 532 at 580.

37 *Coco v The Queen* (1994) 179 CLR 427 at 437.

30 GORDON, GLEESON AND BEECH-JONES JJ. The appellant ("Mayfield") says that it lost the opportunity to develop land at the Port of Newcastle ("the Mayfield Site") for use as a container facility because, in 2013, the State of New South Wales ("the State"), the fourth respondent, in privatising Port Botany and Port Kembla, agreed to Port Commitment Deeds ("PCDs") with the first to third respondents ("NSW Ports").³⁸ Clause 3 of the PCDs included terms that would require the State to pay compensation to NSW Ports if, in two consecutive financial years, Port Botany or Port Kembla were not at full capacity for the import and export of containers, and container volumes beyond a defined threshold were diverted from Port Botany or Port Kembla to the Port of Newcastle ("the compensation provisions").

31 In this proceeding, Mayfield claimed (collectively, "the Mayfield Claims") that:

- (1) NSW Ports breached s 45(2)(a)(ii) of the *Competition and Consumer Act 2010* (Cth) ("the CCA") by entering into the PCDs containing the compensation provisions, which had the purpose or likely effect of substantially lessening competition in the market for the supply of port services for container cargo in the State;
- (2) NSW Ports also breached ss 45(2)(a)(ii) and 45(2)(b)(ii) by reaching and being involved in the State's giving effect to a provision of an understanding with the State that the operator of the Port of Newcastle would indemnify the State for any payments made under the compensation provisions; and
- (3) NSW Ports acted in concert with the State in contravention of s 45DA(1) of the CCA by executing the PCDs and arriving at the understanding, which hindered or prevented Mayfield from supplying container port services at the Port of Newcastle and thereby caused substantial damage to Mayfield's business.

32 In an earlier proceeding, the Australian Competition and Consumer Commission ("the ACCC") had brought a similar claim against NSW Ports, which was confined to an alleged contravention of ss 45(2)(a)(ii) and 45(2)(b) by reason of its entry into and giving effect to the PCDs ("the ACCC Proceeding").³⁹ That claim failed in the Federal Court of Australia at first instance and on appeal

38 The first to third respondents comprise NSW Port Operations Hold Co Pty Ltd, Port Botany Operations Pty Ltd and Port Kembla Operations Pty Ltd.

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

for reasons that included a determination that, on the proper construction of the CCA, by reason of derivative Crown immunity, s 45 of the CCA did not apply to the conduct of NSW Ports in respect of its entry into the PCDs.⁴⁰ Mayfield was given leave to intervene in the appeal in the ACCC Proceeding ("the ACCC Appeal").⁴¹ Mayfield filed written submissions but did not otherwise participate in the ACCC Appeal.

33 In this proceeding, in addition to denying the alleged contraventions of the CCA, NSW Ports and the State again advanced derivative Crown immunity in answer to the Mayfield Claims. NSW Ports and the State also alleged that the issue of derivative Crown immunity did not need to be determined because (1) a deed of release between, relevantly, Mayfield and the State ("the Deed of Release") bars Mayfield from bringing the proceeding; (2) alternatively, Mayfield is estopped from bringing the proceeding because of its active participation as an intervener in the ACCC Proceeding brought against NSW Ports in respect of the same issues; and (3) alternatively, and for broadly similar reasons, this proceeding is an abuse of process. The State was joined as a party to this proceeding on the basis that the success of the Mayfield Claims would mean that relevant parts of the PCDs would be severed by s 4L of the CCA.

34 Three separate questions were stated for determination in this proceeding, namely:

"(a) By reason of [Mayfield's] intervention in [the ACCC Appeal], is [Mayfield] precluded (by principles of *res judicata*, estoppel, abuse of process or similar) from contending in these proceedings that ss 45 and 45DA(1) of the [CCA] apply to the entry into the [PCDs] by [NSW Ports] ...?

...

(b) If [Mayfield] is not estopped or otherwise precluded from arguing that ss 45 and 45DA(1) of [the] CCA apply or were contravened,

40 *ACCC PJ* [2021] FCA 720 at [9], upheld on appeal in *Australian Competition and Consumer Commission v NSW Ports Operations Hold Co Pty Ltd* ("ACCC Appeal") (2023) 296 FCR 364 at 464-472 [386]-[415], 473 [427].

41 *ACCC Appeal* (2023) 296 FCR 364 at 472 [416].

11.

is 'derivative Crown immunity' ... a complete answer to the [Mayfield Claims]?

...

- (c) Does the Deed of Release entered into on 24 December 2013, by [Mayfield], Anglo Ports, Grup Maritim TCB, SL, [Newcastle Port Corporation] and the State, and payment being made upon settlement on that date in accordance with its terms, operate as a release, bar and[/]or complete defence to, or otherwise preclude, the claims made by [Mayfield] in this proceeding?"

35 The primary judge determined that (a) Mayfield's intervention in the ACCC Appeal did not preclude it from advancing this proceeding; (b) his Honour was bound to follow the decision of the majority of the Full Court of the Federal Court of Australia in the ACCC Appeal⁴² holding that derivative Crown immunity was a complete answer to the Mayfield Claims; and (c) the Deed of Release did not preclude the Mayfield Claims. The primary judge thus answered the stated questions: (a) "No"; (b) "Yes"; and (c) "No" and dismissed the proceeding with costs.

36 Mayfield's appeal to the Full Federal Court in relation to the primary judge's answer to question (b) about derivative Crown immunity was dismissed. In light of that answer, it was unnecessary for the Full Federal Court to decide the contentions of NSW Ports and the State that the primary judge had erred in answering the other two questions adversely to them but, had they been necessary to decide, the Full Federal Court would not have upheld their contentions. The Full Federal Court ordered that Mayfield should pay 60 per cent of the respondents' costs of the appeal.

37 The issue presented by Mayfield's appeal in this Court is whether, by operation of the presumption of derivative Crown immunity, ss 45 and 45DA do not apply to the impugned conduct of NSW Ports. Both NSW Ports and the State, by notices of contention, seek to maintain the contentions that Mayfield is barred or estopped from bringing this proceeding and that this proceeding is otherwise an abuse of process. NSW Ports and the State also cross-appeal against the Full Federal Court's costs orders, contending that they should have received all of their costs. The ACCC was granted leave to intervene in support of Mayfield.

42 *ACCC Appeal* (2023) 296 FCR 364 at 464-472 [386]-[415], 473 [427], cf 487-498 [533]-[625].

38 For the following reasons, each of the respondents' contentions should be rejected. Mayfield is not barred or estopped from bringing this proceeding, nor is the proceeding an abuse of process. The Full Federal Court erred in concluding that ss 45 and 45DA(1) of the CCA did not bind NSW Ports in its dealings with the State. The appeal should therefore be allowed with costs and the consequential orders sought by Mayfield should be made.

39 These reasons will set out the background to the appeal, then address the notices of contention, before determining the issue of derivative Crown immunity.

Background

40 The majority of shipping cargo including bulk and container cargo from or bound for NSW passes through Port Botany, Port Kembla or the Port of Newcastle. Port Botany is the principal port in NSW and the only port in NSW with container terminals. Port Kembla is primarily a bulk and vehicle port, and the Port of Newcastle is primarily a bulk port.

41 In September 2011, the NSW Government announced that it would privatise Port Botany by way of a 99-year lease and, in doing so, would ensure that key public interest outcomes were protected. At the time, Port Botany was operated by Sydney Ports Corporation, which was constituted under the *Ports and Maritime Administration Act 1995* (NSW). Sydney Ports Corporation, as a "State owned corporation" ("SOC") within the meaning of s 3(1) and Sch 5 of the *State Owned Corporations Act 1989* (NSW) ("the SOC Act"), was legally disabled from disposing of its fixed assets or main undertakings without the approval of shareholder Ministers.⁴³

42 On 27 July 2012, the Treasurer and Minister for Roads and Ports announced that the NSW Government would proceed with the long-term lease of both Port Botany and Port Kembla. On 31 July 2012, the Treasurer notified Newcastle Ports Consortium that the State would support the development of a multi-use cargo facility at the Port of Newcastle, but not a container terminal. By late 2012, it had been decided that Port Botany would remain the State's primary container port, and that Port Kembla would meet any additional demand for container handling facilities created when Port Botany reached capacity. In November 2012, the Parliament of NSW passed the *Ports Assets (Authorised Transactions) Act 2012* (NSW) ("the PAAT Act"). That Act, among other things, authorises the transfer by the State of a specific class of assets identified in

43 SOC Act, ss 20X and 20Y.

the PAAT Act, namely the three State-owned ports – Port Botany, Port Kembla and the Port of Newcastle.⁴⁴

43 During the privatisation process, some bidders for the acquisition of Port Botany and Port Kembla intimated that the price they were prepared to pay for Port Botany and Port Kembla might be discounted if additional container capacity were to be developed at the Port of Newcastle. The State decided to address that concern in the PCDs, which were entered into by the Treasurer on behalf of the State with the successful bidder, NSW Ports, on 31 May 2013. The PCDs have a term of 50 years. They include the compensation provisions, the effect of which is to require the State to pay compensation to NSW Ports if container volumes through the Port of Newcastle exceed a specified cap and divert container cargo away from Port Botany or Port Kembla.

44 In December 2018, the ACCC Proceeding was instituted alleging that the compensation provisions in the PCDs entered into and given effect by the State and NSW Ports in the course of the privatisation of Port Botany and Port Kembla had the purpose and/or likely effect of substantially lessening competition, contrary to ss 45(2)(a)(ii) and 45(2)(b) of the CCA.⁴⁵ The primary judge 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 the State was only bound by Pt IV of the CCA when carrying on a business and the privatisation of Port Botany and Port Kembla did not occur in the course of operating a business.⁴⁶ 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 its operation would divest the State of a "legal right" under the PAAT Act to effect the port privatisation in the manner the Treasurer saw fit, including the right of the Treasurer to require the counterparty to engage in conduct that would otherwise contravene s 45 of the CCA.⁴⁷

44 As enacted, the PAAT Act only applied to Port Botany and Port Kembla. It was amended in 2013 to apply to the Port of Newcastle: *Ports Assets (Authorised Transactions) Amendment Act 2013* (NSW).

45 *ACCC PJ* [2021] FCA 720 at [1].

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

47 *ACCC PJ* [2021] FCA 720 at [355]-[423], especially at [369], [395]-[396], [402]-[406], [418]-[419], [423].

45 The Full Federal Court dismissed an appeal from her Honour's decision.⁴⁸ The Court held that her Honour was correct to hold that the entry by the State into the PCDs did not occur in the course of the State carrying on a business.⁴⁹ Allsop CJ (with whom Yates J agreed) held that s 45 of the CCA could not apply to the compensation provisions in the PCDs because, if it did, ss 4L and 45 of the CCA would apply to sever and render the compensation provisions unenforceable and the consequence would be a divestiture of "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".⁵⁰ Beach J, in dissent, held that, properly construed in light of this Court's decision in *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd*,⁵¹ s 45 of the CCA applied to NSW Ports when contracting with the State.⁵² Beach J relevantly held that 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, even if it was a power to require a counterparty to engage in conduct that would otherwise contravene the CCA, this was not a legal right or interest.⁵³

46 While the ACCC Proceeding was on foot, Mayfield commenced this proceeding, seeking damages against NSW Ports. Following judgment in the ACCC Appeal, the primary judge in this proceeding delivered judgment on the separate questions, holding that he was bound to follow the majority decision in the ACCC Appeal as to the question of derivative Crown immunity. The Full Federal Court dismissed Mayfield's appeal, unanimously holding that Mayfield had not demonstrated the reasoning of the majority in the ACCC Appeal in relation to derivative Crown immunity to have been plainly wrong.

Notices of contention

47 NSW Ports and the State, by notices of contention in this Court, argued that the issue of derivative Crown immunity need not be addressed, relying on three

48 *ACCC Appeal* (2023) 296 FCR 364 at 368 [9], 473 [427], 512 [721].

49 *ACCC Appeal* (2023) 296 FCR 364 at 451 [337]-[338], 473 [427], 484 [514].

50 *ACCC Appeal* (2023) 296 FCR 364 at 471 [412]; see also 464-472 [386]-[415], 473 [427].

51 (2007) 232 CLR 1.

52 *ACCC Appeal* (2023) 296 FCR 364 at 490-498 [566]-[624].

53 *ACCC Appeal* (2023) 296 FCR 364 at 493-497 [586]-[616], especially at 494-495 [592]-[595].

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grounds: (1) the Deed of Release between, relevantly, Mayfield and the State bars Mayfield from bringing the proceeding; (2) alternatively, Mayfield is estopped from bringing the proceeding by its participation in the ACCC Proceeding; (3) alternatively, and for broadly similar reasons, the proceeding is an abuse of process. Those contentions must be rejected.

Deed of Release does not apply

48 On 24 December 2013, Mayfield, Newcastle Port Corporation and the State, among others, executed the Deed of Release in which Mayfield was a "Releasor" and the State and Newcastle Port Corporation were "Releasees".

49 By cl 4.1 of the Deed of Release, Mayfield (as a Releasor) released the State (as a Releasee) from all "Claims" which Mayfield had or may have had "against" the State arising from or in connection with the "Release Matters", defined broadly to include, in substance, any matters arising between Mayfield and the State in respect of the Mayfield Site. Clause 4.4 provides that the release in cl 4.1 can be "pleaded in bar and as a complete defence" to any claim to which it applies. The question is: does cl 4.1 of the Deed of Release, properly construed, bar any or all of the Mayfield Claims. The answer is "no".

50 It is uncontentioned that this proceeding concerns "Release Matters". It is also clear that this proceeding and the Mayfield Claims constitute a "Claim" or "Claims" as defined in that they are each an "action, suit, cause of action ..." etc. However, neither this proceeding nor the Mayfield Claims is a "Claim" which Mayfield has or may have "against" the State as the plain words of cl 4.1 require.

51 The release in cl 4.1 was given by Mayfield in favour of the State, not in favour of NSW Ports. Contrary to the submissions of the State, there is no basis to contend that the release applies to "any proceeding to which the State is a necessary respondent and which could affect the State's legal rights". That construction distorts cl 4.1. On its face, the release was intended to, and does, foreclose, relevantly, the possibility of Mayfield making any future claims against the State connected with the development of the Mayfield Site. Like the text of cl 4.1, that purpose gives central importance to the existence of a claim against the State.

52 The release does not and cannot apply to this proceeding because this proceeding involves claims by Mayfield against NSW Ports, not against the State. It is against NSW Ports that Mayfield seeks relief. While Mayfield initially sought declarations implicating the State, Mayfield was granted leave to amend its claim to remove each claim for declaratory relief. As counsel for Mayfield explained before the primary judge, the basis for removing the claims for declaratory relief was "to make it clear that no claim is made against the State".

53 The fact that the State's conduct might be impugned, by virtue of it being party to an unlawful "understanding", in this proceeding does not amount to a claim against the State. There is not a legal claim against a person every time their conduct is incidentally criticised in court proceedings. Nor does the fact that the State is a party to the proceeding mean the proceeding involves a claim against the State. The State is a party because its interests may be affected by the potential application of s 4L of the CCA to any findings of contravention that might be made. If s 4L is engaged by any success that Mayfield may have in this proceeding then s 4L will operate of its own accord to sever the impugned provisions of the PCDs.⁵⁴ Therefore, Mayfield's success in the proceeding would have automatic consequences for the State, by reason of it being a party to the PCDs.

54 However, the fact that, by reason of s 4L of the CCA, Mayfield's success may have consequences for the State does not somehow transform the proceeding into a claim "against" the State. If the preconditions to engaging s 4L of the CCA are established,⁵⁵ then its consequences are mandatory. It operates without any court order invoking it,⁵⁶ although a court may resolve a dispute about whether it has been engaged and the scope of its application. If s 4L is engaged by the findings made in this proceeding, s 4L has consequences for the State, just as it would have consequences for any party to a contract affected by s 4L. Even so, it does not follow that Mayfield is claiming relief against the State or otherwise making a claim against the State.

No issue estoppel

55 Issue estoppel is a common law doctrine informed by considerations of finality and fairness.⁵⁷ Issue estoppel precludes "the raising in a subsequent proceeding of an ultimate issue of fact or law which was necessarily resolved as a step in reaching the determination made" in a prior judgment.⁵⁸ A judicial determination directly involving an issue of fact or law disposes once and for all of the issue, so that it cannot afterwards be raised between the same parties.⁵⁹

54 *SST Consulting Services Pty Ltd v Rieson* (2006) 225 CLR 516 at 533 [52].

55 See *SST Consulting Services* (2006) 225 CLR 516 at 527 [32].

56 cf CCA, s 87(2), (3); see *SST Consulting Services* (2006) 225 CLR 516 at 527 [33].

57 *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507 at 516 [21].

58 *Tomlinson* (2015) 256 CLR 507 at 517 [22].

59 *Blair v Curran* (1939) 62 CLR 464 at 531, cited in *Tomlinson* (2015) 256 CLR 507 at 517 [22]; *Clayton v Bant* (2020) 272 CLR 1 at 20 [51].

The justice of binding a person to the outcome of a prior proceeding is that, by virtue of their participation in that proceeding, "the person has already had an opportunity to present evidence and arguments".⁶⁰

56 An issue estoppel may arise in respect of a party that was an intervener in the previous proceeding.⁶¹ Whether issue estoppel arises in respect of an intervener turns on the extent of their participation in the previous proceeding. As the primary judge explained, "[t]he justice of binding a person by issue estoppel is active participation in the conduct of a proceeding". Or, put in different terms, an issue estoppel can arise against an intervener that "has had a fair and full opportunity to contest the issue".⁶² The rationale for the requirement of fair and full participation was explained by this Court in *Tomlinson v Ramsey Food Processing Pty Ltd*:⁶³

"It would be quite unjust for ... a person to be precluded from asserting what the person claims to be the truth if the person did not have an opportunity to exercise control over the presentation of evidence and the making of arguments in the earlier proceeding and if the potential detriment to the person from creating such an estoppel was not fairly taken into account in the decision to make or defend the claim in the earlier proceeding or in the conduct of the earlier proceeding."

57 Mayfield is not estopped from litigating the derivative Crown immunity issue in this proceeding by reason of its prior intervention in the ACCC Appeal. Mayfield did not have a fair and full opportunity to contest that issue in the ACCC Appeal. First, Mayfield's participation as an intervener in the ACCC Appeal was constrained. Under the *Federal Court Rules 2011* (Cth), "[t]he role of the intervener is solely to assist the Court in resolving the issues raised by the parties".⁶⁴ In other words, the intervener's role is in the nature of an *amicus curiae*. Mayfield's limited role as intervener under the *Federal Court Rules* was very different to the kind of intervention discussed by this Court in *Australian Securities Commission v Marlborough Gold Mines Ltd*⁶⁵ where, under the relevant

60 *Tomlinson* (2015) 256 CLR 507 at 523 [39].

61 See *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485 at 505.

62 *Tebbutt v Haynes* [1981] 2 All ER 238 at 244; see also 242.

63 *Tomlinson* (2015) 256 CLR 507 at 524 [39].

64 Rule 36.32, Note 1.

65 (1993) 177 CLR 485 at 505.

statute, the Commission could exercise a right to intervene whereupon it was "deemed to be a party".

58 Second, Mayfield was granted leave to intervene in the ACCC Appeal on terms limited to filing 15 pages of written submissions in that appeal. Mayfield made no oral submissions and did not otherwise participate in the appeal. Mayfield did not participate in the trial.

59 Third, the fact that Mayfield relied in this proceeding on the same critical facts and claims as those in the ACCC Proceeding is not determinative. Mayfield could not⁶⁶ and "did not have an opportunity to exercise control over the presentation of evidence"⁶⁷ or the shaping of the issues in the trial of the ACCC Proceeding. Mayfield intervened in the ACCC Appeal taking the facts and issues from the trial of the ACCC Proceeding as it found them.

60 Finally, there is no basis to contend that, because Mayfield considered its submissions to be "fully ventilated" and elected not to make oral submissions, it had a fair and full opportunity to participate actively in the ACCC Proceeding. As has been explained, Mayfield was constrained as an intervener. Its conduct was consistent with those constraints. For all of those reasons, that cannot be said to be "active participation" by Mayfield.

61 Mayfield's intervention in the ACCC Appeal also did not confer on it any other rights or privileges. Mayfield could not determine or influence the decision by the ACCC not to seek special leave to appeal and there was no realistic possibility that it could have sought special leave itself. It did not have standing to challenge the order dismissing the ACCC Appeal on the factual determinations of the Full Federal Court. It was bound by that order only as a matter of precedent and in the same way that all other persons are affected by a precedent established by an intermediate court of appeal; Mayfield was not otherwise affected by that order. It is difficult to accept that, in circumstances where Mayfield could not have sought special leave to appeal from the orders made by the Full Federal Court in the ACCC Appeal, Mayfield cannot raise the derivative Crown immunity issue in its own proceeding, since that would leave Mayfield with no avenue to challenge that aspect of the decision in the ACCC Appeal, which would thereby leave Mayfield even more "bound" by the decision than if it had been a party to the ACCC Proceeding. This would not be a fair outcome. Moreover, no liabilities were attached to Mayfield's intervention, save that the costs of the intervention

66 See *Federal Court Rules*, r 36.32(2)(b).

67 *Tomlinson* (2015) 256 CLR 507 at 524 [39].

were reserved, underscoring the limited nature of Mayfield's participation in the ACCC Appeal.

62 For those reasons, Mayfield is not estopped in this proceeding from raising the derivative Crown immunity issue merely by its limited role as intervener in the ACCC Appeal.

Proceeding not an abuse of process

63 Although the doctrine of abuse of process is informed, in part, by similar considerations of finality and fairness as issue estoppel, it is "inherently broader and more flexible than estoppel".⁶⁸ As Mason CJ said in *Rogers v The Queen*: "there are two aspects to abuse of process: first, the aspect of vexation, oppression and unfairness to the other party to the litigation and, secondly, the fact that the matter complained of will bring the administration of justice into disrepute".⁶⁹

64 The legal process of a court may be abused where the intention is to "litigate anew a case which has already been disposed of by earlier proceedings", where to do so causes manifest unfairness to a party or would otherwise bring the administration of justice into disrepute.⁷⁰ "[M]aking a claim or raising an issue which was made or raised and determined in an earlier proceeding, or which ought reasonably to have been made or raised for determination in that earlier proceeding, can constitute an abuse of process even where the earlier proceeding might not have given rise to an estoppel".⁷¹ Similarly, "making such a claim or raising such an issue can constitute an abuse of process", even "where the party seeking to make the claim or to raise the issue in the later proceeding was neither a party to that earlier proceeding, nor the privy of a party to that earlier proceeding, and therefore could not be precluded by an estoppel".⁷²

65 It is not an abuse of process for Mayfield to raise the issue of derivative Crown immunity in this proceeding, in circumstances where Mayfield had raised the issue in the ACCC Appeal in its role as intervener. Mayfield had a submission to advance in the ACCC Appeal on derivative Crown immunity that was useful

68 *Tomlinson* (2015) 256 CLR 507 at 518-519 [24]-[25].

69 (1994) 181 CLR 251 at 256.

70 *O'Shane v Harbour Radio Pty Ltd* (2013) 85 NSWLR 698 at 722-723 [99]-[102].

71 *Tomlinson* (2015) 256 CLR 507 at 519 [26].

72 *Tomlinson* (2015) 256 CLR 507 at 519 [26].

and different from the submissions of the parties.⁷³ Mayfield's participation in the ACCC Appeal was, however, limited. Its intervention recognised that the determination of the derivative Crown immunity issue in the appeal would set a binding precedent. Mayfield's conduct of this proceeding is consistent with that position. Mayfield is entitled to advance a reasonable case challenging the existing state of the law. By doing what it is perfectly entitled to do, it cannot be said that Mayfield's conduct brings the administration of justice into disrepute. To prevent Mayfield for all time from raising the issue of derivative Crown immunity in its own separate proceeding would undermine, rather than promote, the administration of justice.

66 There is also no oppression of or unfairness to NSW Ports or the State. First, the scheme of the CCA is such that a respondent is at the risk of relitigating the same or substantially similar issues where, as here, the ACCC brings proceedings for contravening conduct which also causes damage to other persons.⁷⁴ Second, NSW Ports and the State contributed to Mayfield bringing this proceeding after the ACCC Proceeding. Mayfield applied to lift a stay on this proceeding so that this proceeding could be heard concurrently with the ACCC Proceeding. That application was successfully opposed by NSW Ports and the State.⁷⁵ NSW Ports' opposition was on the basis that it would be unfair for it to have to defend each proceeding in parallel.⁷⁶ It is unclear why it is now the case that a consecutive hearing of this proceeding could amount to an abuse of process.

Derivative Crown immunity

Crown immunity

67 The principle of Crown immunity is a presumption of statutory interpretation that a statute will not bind the Crown unless a contrary intention appears from the statute.⁷⁷ In *Bropho v Western Australia*, the plurality of this

73 See *Federal Court Rules*, r 36.32(2)(a).

74 See, eg, CCA, s 83.

75 *Mayfield Development Corporation Pty Ltd v NSW Ports Operations Hold Co Pty Ltd* [2020] FCA 260.

76 *Mayfield Development Corporation Pty Ltd v NSW Ports Operations Hold Co Pty Ltd* [2020] FCA 260 at [16(5)].

77 *Baxter* (2007) 232 CLR 1 at 27-28 [41]-[42], quoting *Bropho v Western Australia* (1990) 171 CLR 1 at 23-24, 28. See also *Federal Commissioner of Taxation v*

Court rejected a "stringent and rigid test" for identifying such a contrary intention,⁷⁸ emphasising that it is a "general principle of statutory construction, not some prerogative power of the Crown to override a statute, or dispense with compliance".⁷⁹

68 As the plurality explained in *Bropho*, the strength of the presumption "will depend upon the circumstances, including the content and purpose of the particular provision and the identity of the entity in respect of which" the question arises.⁸⁰ So, for example, in *Bropho*, which concerned the application of general provisions for the protection of Aboriginal places and objects to employees of a governmental corporation engaged in commercial and developmental activities, the principle of Crown immunity was said to represent "little more than the starting point of the ascertainment of the relevant legislative intent".⁸¹ Brennan J 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".⁸²

Derivative Crown immunity

69 It is a corollary of the presumption of Crown immunity, known as derivative Crown immunity, that "a statutory provision not binding on the Crown must be denied an incidence upon a subject of the Crown because that incidence would be

Tomaras (2018) 265 CLR 434 at 439-440 [2], 443-444 [18], 451-453 [52]-[54], 468-470 [104]-[109]; *Chief Executive Officer, Aboriginal Areas Protection Authority v Director of National Parks ("Gunlom Falls")* (2024) 281 CLR 525 at 534-535 [11], 543 [41].

78 (1990) 171 CLR 1 at 22.

79 *Baxter* (2007) 232 CLR 1 at 27 [40], citing *Bropho* (1990) 171 CLR 1 at 15. See also *Gunlom Falls* (2024) 281 CLR 525 at 534-535 [11], 543 [42].

80 *Bropho* (1990) 171 CLR 1 at 23. See also *Baxter* (2007) 232 CLR 1 at 27 [41].

81 *Bropho* (1990) 171 CLR 1 at 23. See also *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 445.

82 *Bropho* (1990) 171 CLR 1 at 28.

in legal effect upon the Crown".⁸³ Like Crown immunity, derivative Crown immunity is a presumption of statutory interpretation that may be rebutted by a contrary intention.⁸⁴ Such a contrary intention "may appear from the language of the Act, and its objects and subject matter as emerging from that language".⁸⁵ Like the presumption that a statute does not bind the Crown, derivative Crown immunity should not be treated as a "prerogative power of the Crown to override a statute, or dispense with compliance".⁸⁶

70 In *Wynyard Investments Pty Ltd v Commissioner for Railways (NSW)*, Kitto J identified three "broad classes" of cases where derivative Crown immunity applies: first, "cases where a provision, if applied to a particular individual or corporation, would adversely affect the exercise of an authority which [they possess] or it possesses as a servant or agent of the Crown to perform some function so that in law it is performed by the Crown itself"; second, "cases in which a provision, if applied to a particular individual or corporation, would adversely affect some proprietary right or interest of the Crown, legal equitable or statutory"; and third, "an anomalous class of cases where a provision creating a liability by reference to the ownership or occupation of property would, in its application in respect of certain kinds of property, impose a burden upon the performance of functions which, though not performed by servants or agents of the Crown, are looked upon by the law as performed for the Crown".⁸⁷

71 This proceeding concerns the second kind of case. Kitto J explained that, to fall within any of the classes of case identified, "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".⁸⁸ "Whatever features of a case are relied upon as bearing upon the claim to the benefit of the Crown's immunity ... must always be looked at ... 'with due regard to the nature of the immunity or privilege of the Crown which is claimed, so that

83 *Wynyard Investments Pty Ltd v Commissioner for Railways (NSW)* (1955) 93 CLR 376 at 393. See also *Baxter* (2007) 232 CLR 1 at 34-35 [58]-[59].

84 *Baxter* (2007) 232 CLR 1 at 34 [58].

85 *Baxter* (2007) 232 CLR 1 at 35-36 [62].

86 *Baxter* (2007) 232 CLR 1 at 27 [40], 34 [58].

87 (1955) 93 CLR 376 at 393-394.

88 *Wynyard* (1955) 93 CLR 376 at 394.

attention may be directed to what is relevant to the particular enquiry which is being made".⁸⁹

72 As Kitto J explained in *Wynyard*, "[t]he 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".⁹⁰ The scope of the principle and, in particular, the kinds of interest which might attract the operation of the presumption have been refined in subsequent cases.

73 In *Bass v Permanent Trustee Co Ltd*, a majority of this Court 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".⁹¹ In *NT Power Generation Pty Ltd v Power and Water Authority*, immediately after setting out that statement from *Bass*, four Justices said that "[t]he better view is that the principle [of derivative Crown immunity] applies to proprietary, contractual and other legal rights and interests and not otherwise".⁹² Their Honours thus expressly rejected the proposition that the presumption applies to circumstances going "beyond prejudice to property rights, legal rights, legal interests or legal prerogatives",⁹³ notwithstanding that it had been said to extend to "arrangements or understandings" by Mason and Jacobs JJ in *Bradken Consolidated Ltd v Broken Hill Pty Co Ltd*.⁹⁴ The majority in *NT Power* declined 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.⁹⁵

89 *Wynyard* (1955) 93 CLR 376 at 395, quoting *Victorian Railways Commissioners v Herbert* [1949] VLR 211 at 213-214.

90 (1955) 93 CLR 376 at 396.

91 (1999) 198 CLR 334 at 354 [42].

92 (2004) 219 CLR 90 at 152 [170].

93 *NT Power* (2004) 219 CLR 90 at 154 [174].

94 (1979) 145 CLR 107 at 137.

95 (2004) 219 CLR 90 at 153-156 [173]-[181].

74 In *Baxter*, the plurality remarked on "[t]he need for concentration on legal consequences", before affirming that, where it operates, the principle of derivative Crown immunity is relevant only if an Act would "divest the Crown of proprietary, contractual or other *legal* rights or interests".⁹⁶ Their Honours also referred to "protect[ing] the legal rights of governments"⁹⁷ but no issue arises in this case as to whether there is any difference between preventing a divestment of legal rights and protecting such rights. The plurality had earlier explained that it was important not to confuse "legal, equitable or statutory rights and interests" with "governmental, commercial, or even political interests".⁹⁸ Significantly, the plurality held in *Baxter* that the Crown's capacity to contract is not a legal right or interest which engages the presumption, that capacity being in the nature of a freedom rather than a right.⁹⁹ As the plurality said, while "[f]rom one point of view, it may be in the 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".¹⁰⁰

75 Thus the *Baxter* formulation of the principle of derivative Crown immunity – that it is relevant only if an Act would "divest the Crown of proprietary, contractual or other *legal* rights or interests"¹⁰¹ – is narrower than the *Wynyard* formulation. Unlike the *Wynyard* formulation, it does not refer to a "right, interest, power, authority, privilege, immunity or purpose".

CCA

76 This proceeding concerns whether the principle of derivative Crown immunity applies in the context of a Commonwealth law – the CCA – in favour of the Crown in right of the State. The question is whether the CCA may be said to evince a contrary intention to displace the presumption against the relevant provisions of the CCA applying to divest the State of a relevant legal right or interest. Because of the Commonwealth Parliament's power to make laws with respect to trading corporations, this "is a question on which the language of

96 (2007) 232 CLR 1 at 35 [62] (emphasis in original).

97 *Baxter* (2007) 232 CLR 1 at 36 [64], 37 [70].

98 *Baxter* (2007) 232 CLR 1 at 35 [60].

99 (2007) 232 CLR 1 at 35 [60].

100 *Baxter* (2007) 232 CLR 1 at 35 [60].

101 Emphasis in original.

25.

the federal Parliament's legislation is decisive".¹⁰² The proper starting point in the analysis is therefore to construe the CCA.

77 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".¹⁰³ The relevant provisions are in Pt IV, headed "Restrictive trade practices" – ss 45(2)(a)(ii) and 45(2)(b)(ii) as in effect on 31 May 2013, and s 45DA(1) as in effect between 31 May 2013 and 5 November 2017.

78 Section 45 is headed "Contracts, arrangements or understandings that restrict dealings or affect competition". As at 31 May 2013, s 45(2) of the CCA relevantly provided as follows:

"(2) A corporation shall not:

(a) make a contract or arrangement, or arrive at an understanding, if:

...

(ii) a provision of the proposed contract, arrangement or understanding has the purpose, or would have or be likely to have the effect, of substantially lessening competition; or

(b) give effect to a provision of a contract, arrangement or understanding, whether the contract or arrangement was made, or the understanding was arrived at, before or after the commencement of this section, if that provision:

...

(ii) has the purpose, or has or is likely to have the effect, of substantially lessening competition."

79 Section 45(2) applied, in terms, to any corporation. The plain and ordinary meaning of the provision was to prohibit any corporation from entering into or giving effect to contractual provisions or understandings that have the relevant purpose or likely effect of substantially lessening competition.

102 *Baxter* (2007) 232 CLR 1 at 35 [60].

103 CCA, s 2.

80 Section 45DA is headed "Secondary boycotts for the purpose of causing substantial lessening of competition". Between 31 May 2013 and 5 November 2017, s 45DA relevantly provided:¹⁰⁴

- "(1) In the circumstances specified in subsection (3), a person must not, in concert with a second person, engage in conduct:
- (a) that hinders or prevents:
 - (i) a third person supplying goods or services to a fourth person (who is not an employer of the first person or the second person); or
 - (ii) a third person acquiring goods or services from a fourth person (who is not an employer of the first person or the second person); and
 - (b) that is engaged in for the purpose, and would have or be likely to have the effect, of causing a substantial lessening of competition in any market in which the fourth person supplies or acquires goods or services.
- ...
- (3) Subsection (1) applies if:
- (a) the third person or the fourth person is a corporation, or both of them are corporations; and
 - (b) the conduct would have or be likely to have the effect of causing substantial loss or damage to the business of one of those persons who is a corporation."

81 Sections 2A and 2B of the CCA relevantly have the effect that Pt IV of the CCA binds the Crown in right of the Commonwealth so far as the Crown carries on a business, directly or by an authority of the Commonwealth,¹⁰⁵ and the Crown in right of each of the States and Territories so far as the Crown

104 In its current form, s 45DA(1) is in relevantly similar terms. The *Competition and Consumer Amendment (Competition Policy Review) Act 2017* (Cth) amended Note 1 to s 45DA(1) in a manner not presently material.

105 CCA, s 2A(1).

carries on a business, directly or by an authority of the State or Territory.¹⁰⁶ Those provisions 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".¹⁰⁷

82 Section 51(1) of the CCA relevantly empowers State and Territory Parliaments to exempt conduct in a State or Territory from Pt IV of the CCA. Section 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 specifically authorised by, State legislation or regulations) must be disregarded.¹⁰⁸

83 Finally, the effect of s 4L of the CCA has already been adverted to. It relevantly provides that, if the making of a contract after the commencement of s 4L contravenes the CCA "by reason of the inclusion of a particular provision in the contract, then, ... nothing in [the CCA] affects the validity or enforceability of the contract otherwise than in relation to that provision in so far as that provision is severable".

CCA applies to corporations dealing with the Crown in exercising its contractual capacity

84 As has been explained, by s 2B of the CCA, Pt IV does bind the Crown in right of a State when it is carrying on a business. In that manner, s 2B directly addresses the question whether the State is bound by Pt IV: it is bound when it is carrying on a business; conversely, it is not bound when it is not carrying on a business.¹⁰⁹ In that context, it was common ground that Pt IV of the CCA, including ss 45 and 45DA, did not apply to the State in formulating the State policy with respect to the privatisation of Port Botany and Port Kembla.

85 It does not necessarily follow, however, that ss 45 and 45DA of the CCA did not bind NSW Ports, the counterparty to the PCDs. Derivative Crown immunity may devolve upon those who deal with the Crown, but it does not necessarily mean that in all circumstances where the Crown is not bound by

106 CCA, s 2B(1)(a).

107 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 30 June 1995 at 2794. See also *NT Power* (2004) 219 CLR 90 at 116 [66].

108 Section 51(1) is subject to a number of limitations in s 51(1C), including that the authorisation by statute or regulation under s 51(1) requires the authorising provision to expressly refer to the CCA: s 51(1C)(a).

109 *Baxter* (2007) 232 CLR 1 at 28 [43].

a statute those who deal or contract with the Crown are also not bound. So much is apparent from the outcome in *Baxter*, in which ss 46 and 47 of the *Trade Practices Act 1974* (Cth) ("the TPA") were held not to apply to State purchasing authorities but to apply to the manufacturer and wholesaler of medical fluids and equipment with which they dealt.¹¹⁰

86 Rather, whether ss 45 and 45DA bound NSW Ports is to be answered by reference to the principle of construction identified: since, by s 2B, the CCA 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 CCA "will not be read so as to divest the Crown of proprietary, contractual or other *legal* rights or interests".¹¹¹

87 It is instructive to examine how the plurality dealt with materially similar provisions in *Baxter*. In *Baxter*, the plurality rejected the broad proposition that ss 46 and 47 of the TPA had no application to any conduct of corporations dealing with the Crown in the exercise of the Crown's contractual capacity by reason of the presumption of derivative Crown immunity.¹¹² The plurality rejected that proposition for a number of reasons.

88 First, to hold that ss 46 and 47 of the TPA did not apply to a corporation that was carrying on dealings with a government in the course of its business would involve the "remarkable" conclusion that the corporation "enjoyed a general immunity not available to the government when the government was carrying on business itself".¹¹³ That outcome would be "impossible to reconcile" with the object of the TPA declared in s 2¹¹⁴ and "would go 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".¹¹⁵ While State and Territory Parliaments could legislate under s 51(1) to protect government interests,¹¹⁶ the specificity with which that was required to be done underscored the importance

110 (2007) 232 CLR 1 at 13-14 [4]-[9], 30 [49], 39-40 [76].

111 *Baxter* (2007) 232 CLR 1 at 35 [62] (emphasis in original).

112 (2007) 232 CLR 1 at 36 [64].

113 *Baxter* (2007) 232 CLR 1 at 36 [64].

114 In identical terms to s 2 of the CCA.

115 *Baxter* (2007) 232 CLR 1 at 36 [64].

116 In the same terms as s 51(1) of the CCA.

of the legislative object declared in s 2.¹¹⁷ As the plurality had earlier observed, "if State Parliaments see State interests to be threatened by competition law, they have the power of exemption given by s 51(1) of the [TPA], provided ... they are willing to accept the political responsibility of exercising that power".¹¹⁸ A general immunity on the part of corporations dealing with the Crown would also entail the "unacceptable" consequence that a corporation dealing with the Crown could expose the Crown to anti-competitive conduct, over the protests of the Crown, to the Crown's detriment.¹¹⁹

89 Second, the question was thus the *extent* to which the reach of ss 46 and 47 of the TPA, and the provisions relating to remedies, in their potential application to the counterparty's conduct, was modified by the operation of derivative Crown immunity.¹²⁰ The submission that the provisions would not apply to the extent that they denied the Crown "the right, power and capacity that it had and has to enter a contract of such kind as it wishes" was rejected as "impossible to reconcile with the purpose and subject matter of the [TPA]".¹²¹ As the plurality then explained, it "is one thing to read the [TPA] so as not to divest the Crown of legal rights", but "another thing altogether to read the [TPA] as giving an executive government (as distinct from a Parliament acting under s 51(1) [of the TPA]), including all its servants and agents, a freedom not enjoyed when the government itself is carrying on business, from any impact" of anti-trust regulation.¹²²

90 Third, to protect the legal rights of the Crown it was not necessary to deny that entry into a contract with the Crown by a non-government party could involve a contravention of ss 46 and 47 of the TPA. It was not inconsistent with the TPA that the entry by one party into a bilateral transaction is unlawful even while it is lawful for the other party.¹²³ The result was not necessarily general

117 *Baxter* (2007) 232 CLR 1 at 36 [64]; see also 19-20 [21].

118 *Baxter* (2007) 232 CLR 1 at 30 [48].

119 *Baxter* (2007) 232 CLR 1 at 36 [65].

120 *Baxter* (2007) 232 CLR 1 at 36 [66].

121 *Baxter* (2007) 232 CLR 1 at 36-37 [67]-[68].

122 *Baxter* (2007) 232 CLR 1 at 37 [68].

123 *Baxter* (2007) 232 CLR 1 at 37 [70]; see also 28 [44].

unenforceability of the contract. Rather, the outcome was determined by the detailed legislative scheme concerning remedies, including s 4L of the TPA.¹²⁴

91 Fourth, the construction urged by the manufacturer in *Baxter* would have imposed "a very extensive qualification upon the [TPA's] object of promoting competition and fair trading in the public interest", which is "strikingly at odds with the way the [TPA] deals with governments when they themselves carry on a business".¹²⁵

92 In *Baxter*, the impugned conduct of the manufacturer was unilateral.¹²⁶ However, the result in *Baxter* did not turn on the characterisation of the conduct as unilateral. As the plurality observed, "the terms of the [TPA] cover (although they are not limited to) conduct that includes making or giving effect to contracts", and "some of the contraventions alleged but not found against the [manufacturer] were of that kind".¹²⁷

93 In this Court, there was no challenge to the correctness of the outcome or the plurality's reasoning in *Baxter*. The same reasoning applies with equal force to the question whether Pt IV of the CCA bound NSW Ports as a corporation dealing with the State in the exercise of its capacity to contract. None of the considerations identified by the plurality is determinative but, taken together, they tend against the conclusion that a corporation dealing with the State might be said to be immune from the operation of Pt IV wherever the State's freedom to contract is adversely affected or interfered with.

94 The determinative issue is therefore whether the application of ss 45 and 45DA of the CCA to NSW Ports would divest the State of some legal right or interest – not being merely the freedom to contract – so that *Baxter* may be distinguished. If it would not divest any relevant legal right or interest, then ss 45 and 45DA bound NSW Ports. The question then is whether the PAAT Act conferred any relevant legal right or interest on the State. The answer is "no".

124 *Baxter* (2007) 232 CLR 1 at 37 [70]. See *SST Consulting Services* (2006) 225 CLR 516. Section 4L of the TPA was in relevantly similar terms to s 4L of the CCA.

125 (2007) 232 CLR 1 at 39 [74].

126 (2007) 232 CLR 1 at 23-24 [30]-[32].

127 *Baxter* (2007) 232 CLR 1 at 28 [44].

PAAT Act conferred no legal right or interest

95 The PAAT Act, among other things, provides for the "restructuring of arrangements for the operation and regulation of certain ports assets of the State".¹²⁸ Part 2 of the PAAT Act relevantly authorises the transfer of ports assets to the private sector, subject to certain limitations.¹²⁹ A transfer authorised by Pt 2 is defined as an "authorised transaction".¹³⁰ Authorised transactions are facilitated by the Treasurer having and being able to exercise all functions necessary or convenient for the purposes of an authorised transaction.¹³¹ Section 7 provides that an authorised transaction "is to be effected as directed by the Treasurer and can be effected in any manner considered appropriate by the Treasurer",¹³² with "no limitations as to the nature of the transactions or arrangements that can be entered into or used for the purposes of" an authorised transaction.¹³³ For the purposes of an authorised transaction, the PAAT Act provides, among other things, for the possibility of the creation of a SOC,¹³⁴ as well as the possibility of the establishment of transaction companies in a number of ways.¹³⁵

96 Section 7 confers no more than an authority and capacity to contract. Importantly, neither s 7 nor any other provision of the PAAT Act requires a counterparty to an authorised transaction to accept a transfer on whatever terms the Treasurer chooses, let alone terms that would otherwise contravene provisions of the CCA. That the capacity to contract is required to be exercised against the background of other State laws, subject to exceptions, is apparent from the terms of s 25. It provides that none of the provisions of the SOC Act and no provision of the constitution of a statutory SOC or a subsidiary of a statutory SOC operates "to prevent, restrict or otherwise limit the carrying out of a transaction arrangement or the exercise of a function for the purposes of an authorised

128 PAAT Act, long title.

129 PAAT Act, s 4(1).

130 PAAT Act, s 3 definition of "authorised transaction".

131 PAAT Act, s 6.

132 PAAT Act, s 7(1).

133 PAAT Act, s 7(2).

134 PAAT Act, ss 8, 10, 11.

135 PAAT Act, ss 9, 10, 11.

transaction",¹³⁶ and that the provisions of the PAAT Act will prevail over other State legislation that is prescribed by the regulations as an inconsistent provision for the purposes of the section.¹³⁷ There is no need to state that the capacity is to be exercised against the background of Commonwealth law by reason of s 109 of the *Constitution*. Section 29 protects things done under the PAAT Act from certain kinds of civil liability but does not authorise what would otherwise constitute a contravention of the CCA.

97 In essence, the PAAT Act confers on the Treasurer the freedom, liberty or capacity to propose terms to third parties and to effect an authorised transaction if such terms can be agreed. That freedom or capacity is not relevantly distinguishable from the general freedom, liberty or capacity to contract that the plurality in *Baxter* held was insufficient to constitute a relevant right or interest sufficient to engage the principle of derivative Crown immunity.¹³⁸ That the Treasurer is empowered to execute the authorised transactions in a particular manner does not transform the nature of the capacity, liberty or freedom that the Treasurer is exercising. The value and significance of the particular assets in question are also not to the point.

98 The character of the "rights" conferred by the PAAT Act as being only in the nature of the general capacity to contract is confirmed by reference to the purposes of the PAAT Act. At least one purpose of the PAAT Act was to authorise the Treasurer to deal with the State's ports assets notwithstanding the restrictions on such dealings imposed by the SOC Act. Prior to the passage of the PAAT Act, the State's ports assets were vested in SOCs.¹³⁹ Such corporations are subject to ss 20X and 20Y of the SOC Act, which impose substantial limitations on the disposal of assets by SOCs. 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".¹⁴⁰ The PAAT Act was intended to remove the constraints that would otherwise have applied to the transfer of the ports assets under the SOC Act and to provide for

136 PAAT Act, s 25(1).

137 PAAT Act, s 25(2).

138 (2007) 232 CLR 1 at 35 [60], 37 [68].

139 New South Wales, *Ports Assets (Authorised Transactions) Bill 2012*, Explanatory Note at 1.

140 New South Wales, *Ports Assets (Authorised Transactions) Bill 2012*, Explanatory Note at 1.

functional and logistical matters relating to the ports' sale. That purpose is confirmed by s 25(1) of the PAAT Act, which provides that the PAAT Act will override the SOC Act, and any provision of the constitution of a statutory SOC or its subsidiary.

99 It may be accepted that the PAAT Act might also have been intended to remove any doubt as to the authority of the Treasurer to enter into the authorised transactions. The Executive Government of a State has undoubted capacity to make a contract "in the ordinary course of administering a recognized part of the government of the State".¹⁴¹ Whether that capacity extends to the making of contracts for the privatisation of significant State assets is unnecessary to resolve for the purposes of this proceeding. What is important is that, whether or not statutory authority was required to effect the transactions, the nature of the freedom, liberty or capacity conferred by the PAAT Act was essentially the same as that considered in *Baxter*.

100 Given the characterisation of the rights conferred by the PAAT Act as tantamount to the general freedom of the Executive to contract, there is no basis to distinguish the rights or interests here identified from those in *Baxter*. As a result, ss 45 and 45DA bound NSW Ports in its dealings with the State.

ACCC's broader submission

101 Given the conclusion reached, consistent with this Court's jurisprudence, it is both unnecessary and inappropriate to address the ACCC's contention that the text of the CCA, when construed in context (including in light of its object in s 2), requires the conclusion that, except where a State Parliament has relevantly legislated under s 51(1), the CCA binds corporations that contract with a State government and that the presumption of derivative Crown immunity is wholly rebutted.

¹⁴¹ *New South Wales v Bardolph* (1934) 52 CLR 455 at 508. See also *Williams v The Commonwealth* (2012) 248 CLR 156 at 191 [33], 211 [74], 233-234 [139]-[143], 255-257 [208]-[212], 342 [484], 354 [529].

Conclusion and orders

102 For those reasons, the appeal should be allowed, and the cross-appeals should be dismissed with costs. The orders made by the Full Federal Court on 3 April 2025 should be set aside and, in their place, it should be ordered that:

1. The appeal be allowed.
2. The orders made by the Federal Court of Australia on 3 June 2024 be set aside.
3. In relation to the answer to question (b) of the separate questions, the orders made by the Federal Court of Australia on 22 May 2024 be set aside and, in its place, the answer to question (b) be "No".
4. The respondents pay the appellant's costs of the hearing of the separate questions and the appeal.
5. The matter be remitted to the primary judge for further determination.

EDELMAN J.

Introduction

103 Voltaire said of the Holy Roman Empire that it was not holy, not Roman, and not an empire.¹⁴² The "derivative Crown immunity" at the centre of this appeal is not derivative, not an immunity, and not concerned with a single Crown. The principal question on this appeal, like in all cases in which a defence to breach of a statutory law is said to be "Crown immunity" or "derivative Crown immunity", should simply be whether the statutory law was intended by Parliament to affect a body politic.

104 The historical approach to that question of statutory interpretation involved a strong presumption that a law would not apply to circumstances where "the Crown and its property" are "prejudicially affected".¹⁴³ This presumption was deployed to require great clarity before a law would be applied to adversely affect legal relations (impose duties or liabilities upon, or impair rights, privileges, powers, or immunities) of a body politic, including in the actions of its Executive officers or agents. That anomalous presumption, inconsistent with Diceyan precepts of equality, was substantially weakened in Australia for legislation enacted after 20 June 1990.¹⁴⁴ The legislation in question on this appeal was enacted in 1974¹⁴⁵—renamed as the *Competition and Consumer Act 2010* (Cth) ("the CCA")—and, although that legislation was amended after 20 June 1990, the relevant amendments were premised upon the continued application of the stronger form of the presumption.

105 The circumstances for the application of the presumption in this case concern the duties imposed upon the first to third respondents (collectively "NSW Ports") by ss 45 and 45DA of the CCA. Duties provided for in those sections were said to have been contravened by NSW Ports relevantly by provisions in deeds called Port Commitment Deeds ("PCDs") with the fourth respondent, the State of New South Wales ("the State"), concerning the privatisation of Port Botany, Port Kembla and the Port of Newcastle. Those provisions required the State to pay compensation to the operators of Port Botany and Port Kembla in certain

142 Voltaire, *Essay sur l'histoire générale, et sur les moeurs et l'esprit des nations* (1761), vol 2, ch 66 at 239: "Ce Corps qui s'appellait, & qui s'appelle encor, le saint Empire Romain, n'était en aucune manière, ni saint, ni Romain, ni Empire".

143 *Wirral Estates Ltd v Shaw* [1932] 2 KB 247 at 263. See also *Perry v Eames* [1891] 1 Ch 658 at 669-670.

144 *Bropho v Western Australia* (1990) 171 CLR 1.

145 *Trade Practices Act 1974* (Cth).

circumstances including where those two privatised ports were not at full capacity for import and export of containers and container volumes beyond a threshold had been diverted from those two ports to the Port of Newcastle.

106 Since the State was not acting in the course of carrying on a business within s 2B of the CCA, the presumption has the effect that the State was not subject to the duties in ss 45 and 45DA of the CCA. But ss 45 and 45DA apply to the corporations collectively described as NSW Ports. Those corporations are not the State,¹⁴⁶ and the application of ss 45 and 45DA to NSW Ports does not adversely affect any of the legal relations of the State. The State remains at liberty to enter and act upon any consensual dealing (a contractual agreement, or an arrangement, or an understanding¹⁴⁷) which contains provisions contrary to ss 45 and 45DA, even if NSW Ports are not at such liberty, and even if the consequences of entry into such an agreement with NSW Ports is that those provisions would be invalid and either they would be severed or the agreement would be invalid. The contrary conclusion of the Full Court of the Federal Court of Australia was wrong. The appeal must be allowed.

Background and anterior issues

107 The background and legislative provisions are set out in detail in the reasons of Gordon, Gleeson and Beech-Jones JJ. NSW Ports entered PCDs with the State, and allegedly reached an understanding with the State, which were alleged to have been in contravention of the CCA. Two proceedings were commenced in the Federal Court of Australia against NSW Ports. The first was by the Australian Competition and Consumer Commission ("the ACCC"). The second was by Mayfield Development Corporation Pty Ltd ("Mayfield"). Mayfield's proceeding was stayed pending determination of the ACCC proceeding. Mayfield was granted leave to intervene in an appeal in the ACCC proceeding.

108 In the ACCC proceeding, NSW Ports succeeded in relation to "derivative Crown immunity" at first instance (Jagot J) and on appeal (Allsop CJ, Yates J agreeing; Beach J dissenting). In the subsequent Mayfield proceeding, a separate question was posed which asked whether "derivative Crown immunity" of NSW Ports was a complete answer to Mayfield's claims. The primary judge (McElwaine J) followed the majority of the Full Court of the Federal Court in the ACCC proceeding, as he was bound to do. On appeal, a differently constituted Full Court (Lee, Colvin and Stewart JJ) held that the majority in the appeal in the ACCC proceeding was not plainly wrong or, in more appropriate language, that there was

146 *Mayfield Development Corporation Pty Ltd v NSW Ports Operations Hold Co Pty Ltd* (2025) 308 FCR 153 at 165 [52].

147 *Australian Competition and Consumer Commission v J Hutchinson Pty Ltd* (2025) 99 ALJR 695 at 708 [54]; 422 ALR 236 at 251.

no compelling reason to depart from the decision of the majority in the ACCC appeal.¹⁴⁸ This appeal is from that decision. And in this appeal, the ACCC was granted leave to intervene in this Court.

109 The basis for the findings of "derivative Crown immunity" was essentially that otherwise the application of the CCA to NSW Ports would have the effect of removing the capacity of the State to enter those transactions under the *Ports Assets (Authorised Transactions) Act 2012* (NSW) ("the PAAT Act").¹⁴⁹ Subject to various limitations, the PAAT Act authorises "the transfer of ports assets to the private sector or to any public sector agency".¹⁵⁰ Section 6 of the PAAT Act provides that the Treasurer of the State "has and may exercise all such functions as are necessary or convenient for the purposes of an authorised transaction". Section 7(1) of the PAAT Act provides 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", and s 7(2) provides that "[t]here are no limitations as to the nature of the transactions or arrangements that can be entered into or used for the purposes of an authorised transaction".

110 Separately from the issue of "derivative Crown immunity", in notices of contention filed by NSW Ports and the State in this Court, anterior contentions were raised concerning whether the appellant, Mayfield, is precluded from raising this central issue or bringing this proceeding. For the reasons given by Gordon, Gleeson and Beech-Jones JJ, the anterior contentions must be dismissed. Mayfield is not precluded from bringing this proceeding by rules of issue estoppel or abuse of process, and the deed of settlement and release between Mayfield, the State, and others provided no complete defence or bar to the Mayfield proceeding. Although the anterior issues were expressed in terms that appeared to include *res judicata* and cause of action (claim) estoppel, those doctrines were not relied upon before the primary judge by NSW Ports and the State in a separate question raised in the Mayfield proceeding.¹⁵¹ Even putting aside other difficulties,¹⁵² in circumstances

148 *Hill v Zuda Pty Ltd* (2022) 275 CLR 24 at 34-35 [25]. See *Lendlease Corporation Ltd v Pallas* (2025) 99 ALJR 834 at 863-865 [114]-[118]; 423 ALR 23 at 58-60.

149 *Mayfield Development Corporation Pty Ltd v NSW Ports Operations Hold Co Pty Ltd* (2025) 308 FCR 153 at 166-167 [64], quoting *Australian Competition and Consumer Commission v NSW Ports Operations Hold Co Pty Ltd* (2023) 296 FCR 364 at 471 [412].

150 PAAT Act, s 4(1).

151 *Mayfield Development Corporation Pty Ltd v NSW Ports Operations Hold Co Pty Ltd [No 4]* [2024] FCA 538 at [46]-[47].

152 See *Zavarco plc v Nasir* [2025] AC 738.

where Mayfield was only an intervener in the appeal in the ACCC proceeding,¹⁵³ there could be no merger of Mayfield's rights into the judgment in the ACCC proceeding or any claim estoppel against Mayfield.¹⁵⁴

"Derivative Crown immunity"

Misnomer

111 The subject of the "immunity" in this appeal is commonly described by the use of the metaphor of a Crown. That description, although often harmless, is imprecise and a "defective conception".¹⁵⁵ The metaphor is sometimes used to mean only the Executive Government of a body politic such as a State or Territory of Australia or the Commonwealth of Australia. In other cases, it is used to describe "those rights, privileges or immunities identified with the royal prerogative".¹⁵⁶ In other cases the metaphor is used to mean the body politic of a State or Territory or the Commonwealth in its capacity as the holder of rights. In the case of "Crown immunity" and "derivative Crown immunity", the metaphor extends to all three usages.

112 As to the "immunity" of the Crown, a person who has an immunity has a freedom from another's power to alter the person's legal rights.¹⁵⁷ By contrast, a person who has a privilege has a special freedom from another's right in particular circumstances.¹⁵⁸ A person with a privilege to do something is, for particular reasons, not subject to the duty owed by others not to do that thing. Historically, some references to a "Crown immunity" might have been better understood as references to a privilege of members of the Executive of a body politic. In other words, the reference to a "Crown immunity" has been used to mean that the Executive of a body politic had a freedom from a statutory duty not to act (or to

153 *Australian Competition and Consumer Commission v NSW Ports Operations Hold Co Pty Ltd* (2023) 296 FCR 364.

154 *Clayton v Bant* (2020) 272 CLR 1 at 25 [66]-[67].

155 *Sue v Hill* (1999) 199 CLR 462 at 498 [84], citing Cobbett, "'The Crown' as Representing 'the State'" (1903) 1 *The Commonwealth Law Review* 23 at 30.

156 *The Commonwealth v Western Australia (Mining Act Case)* (1999) 196 CLR 392 at 430 [106].

157 Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913) 23 *Yale Law Journal* 16 at 55.

158 *Western Australia v Manado* (2020) 270 CLR 81 at 114-115 [83]-[84].

act) in a particular way.¹⁵⁹ But some of the historical, and contrived, reasons for the privilege, such as the asserted difficulty of the "Crown" imposing a fine upon itself for some unlawful action,¹⁶⁰ may have contributed to the view that members of the Executive of a body politic were subject to a duty and merely immune from liability for breach.

113 The "derivative Crown immunity" of a person is not "derived" from the "immunity or privilege of the Crown":¹⁶¹ "the immunity of the Crown can never inure for the benefit of a subject".¹⁶² The mistake arises from the colloquial description of a person being "immune" whenever the person's action is justified or the person is not subject to a duty in particular circumstances.¹⁶³ Stripped of the nomenclature of "derivative" and "immunity", the issue is simply one of a presumption that legislation does not apply where its operation would impair the legal relations of a body politic. As the State rightly submitted, the "canonical description" of the "derivative Crown immunity" is that of Kitto J in *Wynyard Investments Pty Ltd v Commissioner for Railways (NSW)*,¹⁶⁴ who referred to "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".

The true nature of (misnamed) "derivative Crown immunity"

114 In *Wynyard*,¹⁶⁵ as endorsed in *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd*,¹⁶⁶ a taxonomy was provided of the

159 *Wirral Estates Ltd v Shaw* [1932] 2 KB 247 at 259-260.

160 See, for instance, *Cain v Doyle* (1946) 72 CLR 409 at 418, 424. Compare *Chief Executive Officer, Aboriginal Areas Protection Authority v Director of National Parks* (2024) 281 CLR 525 at 581-582 [157].

161 *Wynyard Investments Pty Ltd v Commissioner for Railways (NSW)* (1955) 93 CLR 376 at 395, quoting *Victorian Railways Commissioners v Herbert* [1949] VLR 211 at 213-214.

162 *Wynyard Investments Pty Ltd v Commissioner for Railways (NSW)* (1955) 93 CLR 376 at 395.

163 See also *Queensland v Stradford (a pseudonym)* (2025) 99 ALJR 396; 421 ALR 376.

164 (1955) 93 CLR 376 at 393.

165 (1955) 93 CLR 376 at 393-394.

166 (2007) 232 CLR 1 at 34-35 [59].

classes of case of the "derivative Crown immunity" in which a law might be denied an application upon a private person to ensure that particular rights, privileges, powers, or immunities of a body politic are not affected by that law. The main category of these cases concerned a strong presumption that "it is the duty of the Courts so to construe the Acts that the Crown and its property are in no way prejudicially affected by them".¹⁶⁷ This strong presumption was described in *Wynyard* and *Baxter* as concerned with statutory provisions that would "adversely affect some proprietary right or interest of the Crown, legal[,] equitable or statutory" if applied.

115 This presumption is a narrower but stronger form of the general presumption that legislation does not adversely affect rights and freedoms,¹⁶⁸ which is a presumption that applies generally with variable force depending upon the nature of the rights and freedoms and the extent to which they are affected.¹⁶⁹ It is a narrower form of that presumption because it applies only to the proprietary rights and interests of a body politic. It is a stronger form of the presumption because it applies even where legislation is plainly intended to have an adverse effect upon proprietary rights or interests generally.

116 Dicey's principle of equality was concerned with the equal treatment of all persons under the law without "exemption of officials or others from the duty of obedience to the law".¹⁷⁰ That principle is particularly evocative when dealing with natural persons. But it is a principle that should apply also to artificial legal persons, including bodies corporate and bodies politic. If there is no substantial and relevant difference between conduct that is performed by a natural person, body corporate, or body politic then all should be treated by the law in the same way. Statutory provisions reflect this principle of equality as a principle of interpretation of legislation and of the development of the common law.¹⁷¹ It is a principle that seeks to provide for equality, as far as possible,¹⁷² between

167 *Wirral Estates Ltd v Shaw* [1932] 2 KB 247 at 263. See also *Perry v Eames* [1891] 1 Ch 658 at 669-670; *Clark v Downes* [1931] All ER Rep 157 at 160.

168 *Coco v The Queen* (1994) 179 CLR 427 at 437.

169 *Mann v Paterson Constructions Pty Ltd* (2019) 267 CLR 560 at 623 [159]; *Stephens v The Queen* (2022) 273 CLR 635 at 653 [34]; *Hurt v The King* (2024) 281 CLR 286 at 325 [106].

170 Dicey, *Lectures Introductory to the Study of the Law of the Constitution* (1885) at 215; see also at 177-178.

171 *Judiciary Act 1903* (Cth), s 64; *Crown Proceedings Act 1988* (NSW), s 5(2).

172 *Austral Pacific Group Ltd (In liq) v Airservices Australia* (2000) 203 CLR 136 at 144 [16].

Commonwealth and State bodies politic (among themselves), and between them and subjects, as between subject and subject.¹⁷³

117 The presumptions of "Crown immunity" and "derivative Crown immunity" are anomalous reversals of the Diceyan precept of equality. They are presumptions that legislation will not impair the legal relations (rights, privileges, powers, and immunities) of a body politic or impose duties or liabilities on a body politic. In so far as those presumptions were based upon reasonable expectations as to the meaning of legislation,¹⁷⁴ it is hard to see how they can be justified at all anymore. Although, as will be seen, their force has been generally weakened, and although they apply with different force in different circumstances,¹⁷⁵ the time may come when it will be necessary to consider whether the remaining operation of those presumptions should be abolished, at least prospectively.

Bradken, NT Power Generation and Baxter and "derivative Crown immunity" in the CCA

118 In *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd*¹⁷⁶ it was held that the predecessor legislation to the CCA¹⁷⁷ did not bind a body politic of a State. That conclusion was reached in part by application of what was then understood to be a strong presumption that legislation would not bind any body politic unless there were express words or there was a necessary intention to do so.¹⁷⁸ Nevertheless, Mason and Jacobs JJ referred to s 2A of that legislation, which broadly provided that the Act bound the body politic of the Commonwealth in so far as that body politic carried on a business. Mason and Jacobs JJ added:¹⁷⁹

173 See also *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30 at 63-64 [76].

174 *Stephens v The Queen* (2022) 273 CLR 635 at 653 [34].

175 *Bropho v Western Australia* (1990) 171 CLR 1 at 23-24. See *Cain v Doyle* (1946) 72 CLR 409; *Chief Executive Officer, Aboriginal Areas Protection Authority v Director of National Parks* (2024) 281 CLR 525 at 588-590 [177]-[180], 594-599 [189]-[204].

176 (1979) 145 CLR 107.

177 *Trade Practices Act 1974* (Cth).

178 *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd* (1979) 145 CLR 107 at 123, 129, 135, 140.

179 *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd* (1979) 145 CLR 107 at 136.

"Even if there were no presumption of an intention not to bind the Crown in right of a State but likewise no presumption of an intention to bind that Crown, so that it was necessary to examine the particular nature of the provisions made by the statute, the expression of an intention to bind the Crown in right of the Commonwealth and the absence of a like expression in respect of the Crown in right of the States would as a matter of construction lead to the conclusion that the Crown in right of the States was not intended to be bound."

119 After *Bradken*, a large step was taken by this Court in *Bropho v Western Australia*.¹⁸⁰ The decision in *Bropho* rejected the strong form of that presumption but, as the presumption was a matter of practice not precedent, this Court confined the rejection of the strong form of the presumption to prospective legislation only, so as not to "overturn the settled construction of particular existing legislation".¹⁸¹ In any event, as six members of this Court later reiterated, developing the point made by Mason and Jacobs JJ, the maxim *expressio unius est exclusio alterius* (an ordinary language convention that the express mention of something might reveal an intention to exclude a broader denotation) meant that the express provision in s 2A of the predecessor legislation to the CCA had the effect that, although a body politic would otherwise have been a "person" within the relevant provision,¹⁸² the body politic of the Commonwealth was bound only in so far as it carried on a business.¹⁸³

120 In 1995, five years after *Bropho*, the Commonwealth Parliament enacted ss 2B and 2C of the predecessor legislation to the CCA, which broadly, and relevantly, provided that Part IV of the Act bound the bodies politic of States and Territories when carrying on a business. Those sections were directed towards ensuring that "the prohibitions against anti-competitive conduct can be applied to all businesses in Australia".¹⁸⁴ The States and Territories were therefore intended to be placed in broadly the same position as the Commonwealth.¹⁸⁵ There is no

180 (1990) 171 CLR 1.

181 (1990) 171 CLR 1 at 22. See *Chief Executive Officer, Aboriginal Areas Protection Authority v Director of National Parks* (2024) 281 CLR 525 at 580-581 [154].

182 See, now, *Acts Interpretation Act 1901* (Cth), s 2C(1).

183 *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 348-349 [22].

184 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 30 June 1995 at 2794.

185 *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 349 [24].

basis to find any intention otherwise to change the operation of the presumption of "Crown immunity" as it had been articulated in *Bradken*.

121 In light of the retrospective preservation by *Bropho* of the strong form of presumptions of "Crown immunity" and "derivative Crown immunity", the issue arose in 2004, again in relation to the predecessor legislation to the CCA, concerning the application of laws to persons in a manner that affected the interests of the Northern Territory. In *NT Power Generation Pty Ltd v Power and Water Authority*,¹⁸⁶ a party called Gasgo Pty Ltd, which was not acting as the Northern Territory (ie was not an "emanation" of the Territory)¹⁸⁷ and was not found to have entered any relevant agreement or understanding with the Northern Territory,¹⁸⁸ argued that if s 46 of the predecessor legislation to the CCA applied to prevent it from exercising a pre-emptive contractual right to purchase gas, then s 46 would adversely affect the security of the gas supply of the Northern Territory.¹⁸⁹

122 Although describing the issue as one of "derivative Crown immunity", the four members of this Court in the majority in *NT Power Generation* explained that "[a] more accurate way of putting the issue" was "to ask whether s 46 ... caused 'some impairment of the existing legal situation of the Northern Territory Government in this case'".¹⁹⁰ Their Honours held that the only interest of the body politic of the Northern Territory that was affected was a financial interest, and it was not established that there was any basis to extend the "immunity beyond any point the Australian authorities have so far reached" to financial interests generally.¹⁹¹

123 In legal terms, the asserted effect of s 46 was not merely to affect the finances of the body politic of the Northern Territory but also to impair the liberty of action of the body politic of the Northern Territory, through the Executive Government of the Northern Territory, in relation to its gas supply. By treating that liberty of action as not falling within "derivative Crown immunity", the majority of this Court effectively confined the legal relations to which that legislative

186 (2004) 219 CLR 90.

187 (2004) 219 CLR 90 at 150-151 [164]-[165].

188 (2004) 219 CLR 90 at 152-153 [171].

189 (2004) 219 CLR 90 at 147 [158].

190 (2004) 219 CLR 90 at 152 [170], quoting *Wynyard Investments Pty Ltd v Commissioner for Railways (NSW)* (1955) 93 CLR 376 at 393.

191 *NT Power Generation Pty Ltd v Power and Water Authority* (2004) 219 CLR 90 at 153-154 [173].

presumption would apply, at least where the liberty of the body politic was indirectly affected rather than directly affected.

124 The same approach was taken by this Court in *Baxter*. The issue in that case was whether a manufacturer of medical products was bound by ss 46 and 47 of the predecessor legislation to the CCA in its entry into contracts with State and Territory purchasing authorities which were not operating in the course of carrying on a business. The joint judgment described the relevant presumption as being that "since the [legislation which is now the CCA] 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 [legislation which is now the CCA] will not be read so as to divest the Crown of proprietary, contractual or other *legal* rights or interests".¹⁹²

125 The joint judgment considered that the State and Territory purchasing authorities were not bound by ss 46 and 47 and therefore were at liberty to enter contracts that would otherwise have contravened those provisions.¹⁹³ But the presumption did not insulate from liability any person who entered such a contract with the State and Territory purchasing authorities. It was insufficient that such liability would, as a matter merely of effect or consequence, reduce or impair the extent to which contracts entered by a State or Territory would have valid legal effect. The legal relations of the State were unaffected. As the joint judgment in this Court said:¹⁹⁴

"There were references in the argument for the respondents to the 'right' of States to enter into contracts, where what was in contemplation would be described more accurately as a freedom. There is also a risk of confusing governmental, commercial, or even political interests with legal, equitable or statutory rights and interests. From one point of view, it may be in the interests of a government for it, and anyone who deals with it, to have complete freedom to contract, but in reality no one has such freedom."

This appeal

126 The relevant sections of the CCA are ss 45 and 45DA, which proscribe particular conduct and terms of particular consensual dealings (contractual

192 *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* (2007) 232 CLR 1 at 35 [62] (emphasis in original).

193 *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* (2007) 232 CLR 1 at 30 [49], 39-40 [76].

194 *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* (2007) 232 CLR 1 at 35 [60].

agreements, arrangements, or understandings) by "a corporation" and "a person". The State is not "a corporation" but, as a body politic, it is "a person".¹⁹⁵ Nevertheless, the prospective-only effect of the change in force of the presumption in *Bropho* is such that the "Crown immunity" of the State, while it is not carrying on a business, prevents s 45DA being binding on the State. The State is not prohibited from conduct, including entry into transactions, that would otherwise contravene s 45DA. The agreement to the compensation provisions in the PCDs was not a contravention by the State.

127 The application of "Crown immunity" (described in the even more problematic language of "derivative Crown immunity") was sought to be confined on this appeal by two different submissions. The first, broad, submission was made by the ACCC. The ACCC argued that, subject to s 51(1) of the CCA, ss 45 and 45DA evince an intention to exclude "derivative Crown immunity". The ACCC relied heavily upon the exception in s 51(1) as supporting this Parliamentary intention. Section 51(1) requires that various matters be disregarded "[i]n deciding whether a person has contravened [Pt IV of the CCA]". In relation to States, and in broad terms, those matters include anything done for which specification and specific authorisation are made and given by an Act of a State Parliament, or regulations under such an Act, which expressly refer to the CCA.¹⁹⁶

128 The Full Court in this proceeding followed the reasoning of Allsop CJ, that s 51(1) of the CCA was a provision by which a Parliament may authorise particular conduct that would otherwise contravene provisions of Pt IV of the CCA and therefore s 51(1) was a provision which assumed contravention, requiring the proper ascertainment of Crown immunity as an anterior issue.¹⁹⁷ Of course, the issues of "Crown immunity" and "derivative Crown immunity" are matters of interpretation which cannot proceed by ignoring s 51, which is part of the context in which that interpretation occurs. The point being made by Allsop CJ was that, since s 51(1) was intended to confer a general power upon Parliaments to make specific exemptions from the operation of many of the provisions of Pt IV of the CCA, s 51 says little about the scope of operation of the provisions from which it is conferred upon Parliaments a power of exemption.

195 *Interpretation Act 1987* (NSW), Sch 4 (definition of "person"). See also *Crown Proceedings Act 1988* (NSW), s 5(1).

196 CCA, ss 51(1)(b), 51(1C).

197 *Mayfield Development Corporation Pty Ltd v NSW Ports Operations Hold Co Pty Ltd* (2025) 308 FCR 153 at 165-166 [56]-[58], including a quote from *Australian Competition and Consumer Commission v NSW Ports Operations Hold Co Pty Ltd* (2023) 296 FCR 364 at 468 [402].

129 The point made by Allsop CJ is further reinforced by the fact that the broad outline of s 51 has been present in Part IV since the inception of the predecessor legislation to the CCA in 1974,¹⁹⁸ at a time when a strong presumption of "Crown immunity" prevailed and before ss 2B and 2C had been introduced. Since the relevant provisions of Pt IV of the CCA existed before the decision in *Bropho*, and since the amendments in ss 2B and 2C were based upon an assumption of the earlier prevailing position, the prospective-only effect of *Bropho* in changing the force of the presumption precludes a conclusion that the Commonwealth Parliament intended generally to abolish "Crown immunity" or "derivative Crown immunity". Indeed, the premise of the line of decisions from *Bradken* to *Baxter* is that the Commonwealth Parliament did not.

130 The second, narrow, submission was made by Mayfield (and supported by the ACCC). Mayfield pointed to the history of the presumption of "derivative Crown immunity" and submitted, in effect, that the presumption should apply only to circumstances where a legal relation of the body politic is impaired. In other words, the presumption of legislative intention described above, that the "Crown and its property are in no way prejudicially affected", should not be understood literally. Rather, it should be applied only to laws which would adversely affect the legal relations of the body politic (its rights, privileges, powers, and immunities) or impose legal duties or liabilities on the body politic. That submission should be accepted. It is, in effect, the approach that was taken in *NT Power Generation* and in *Baxter*.

131 The contrary reasoning of Allsop CJ in the ACCC proceeding, which was adopted by the Full Court in this proceeding,¹⁹⁹ was that NSW Ports were not bound by ss 45 and 45DA because the operation of those sections upon NSW Ports could result in the "impairment of the existing legal situation of the Executive or Crown". That impairment would arise because the binding effect of the CCA on NSW Ports in respect of any contractual provision which breached ss 45 and 45DA would otherwise be that any provision of the PCDs which contravened those sections would be severed from the PCDs.²⁰⁰

132 Allsop CJ was, with respect, correct that the effect of ss 45 and 45DA of the CCA upon NSW Ports was to cause the impairment of the existing legal situation of the body politic of the State in that such contravening provisions of the

198 *Trade Practices Act 1974* (Cth), s 51(1).

199 *Mayfield Development Corporation Pty Ltd v NSW Ports Operations Hold Co Pty Ltd* (2025) 308 FCR 153 at 166-167 [64], quoting *Australian Competition and Consumer Commission v NSW Ports Operations Hold Co Pty Ltd* (2023) 296 FCR 364 at 471 [412].

200 CCA, s 4L.

47.

PCDs would be invalid. But any such impairment was a consequential effect of the operation of ss 45 and 45DA on NSW Ports. It did not arise from any impairment of a legal relation of the State. The State itself remained at liberty to enter the PCDs.

Conclusion

133

The appeal should be allowed. The consequence of allowing the appeal is that the cross-appeals by NSW Ports and the State from the costs orders in the Full Court are inutile and must be dismissed. Orders should be made as proposed by Gordon, Gleeson and Beech-Jones JJ.