

Compensation doubt threatens Port Botany container monopoly

Three years into its 99-year lease of Port Botany, NSW Ports is under financial challenge as more doubts arise about the lawfulness of its vital but secret compensation deal with the NSW government, writes GREG CAMERON*.

HAVING paid \$5.1 billion for the port including Port Kembla, NSW Ports was promised compensation by the NSW government for loss of business from development of a container terminal at the Port of Newcastle.

Port Botany is the only container port in NSW and maintains its monopoly status despite a competing container terminal being proposed for the former BHP Newcastle steelworks for 20 years.

But doubt is mounting about the lawfulness and enforceability of the compensation arrangement as NSW Treasurer Gladys Berejiklian evades more parliamentary questions on the matter. More than 100 questions have been asked in state parliament since October 2014.

Compensation is payable to NSW Ports when an annual "cap on numbers" at the Port of Newcastle is exceeded. "Cap on numbers" was the phrase used by Minister for Roads, Maritime and Freight Duncan Gay to describe the compensation arrangement to parliament on October 17 2013.

Mr Gay told parliament the government saw no need to put any funds in place to pay compensation.

Paying NSW Ports would be self-funding by charging Port of Newcastle Investments, the port's lessee, a fee on container movements in excess of this cap.

The government refuses to deny charging Port of Newcastle Investments a fee.

On August 31, 2015, Mr Gay was asked:



Photo: Sydney Ports Corporation

The Hon. SOPHIE COT-SIS: In terms of the cap on containers, are any fees paid if the number of containers through Newcastle exceeds a set amount?

The Hon. DUNCAN GAY: Not that I am aware of.

The Hon. SOPHIE COT-SIS: You are not aware of that?

The Hon. DUNCAN GAY: You asked me whether there was a cap in Newcastle and I said there is not. Now you are asking me whether there is a fee paid if they go beyond a certain number. General cargo containers are part of what happens in Newcastle. My understanding is that within the general cargo that needs to go to Newcastle that is fine.

Charging the port lessee a fee – presumed to be \$100 per container – makes development of a container terminal at the Port of Newcastle economically unviable. No container movements above the

cap means no fee and no compensation payment.

But these arrangements are secret to prevent them being examined for lawfulness and enforceability.

A fee on container movements at the Port of Newcastle would likely breach the anti-competition provisions of Section 45 of the Commonwealth *Competition and Consumer Act 2010* (CCA).

Last month, state member for Newcastle Tim Crakanthorp asked Ms Berejiklian: "What is the cap on numbers at the Port of Newcastle?" Ms Berejiklian replied that this question had been previously asked and answered.

But this specific question had not been previously asked.

In September 2015, Ms Berejiklian was asked: "Has the NSW government imposed any restrictions on the movement of containers through the Port of Newcastle?"

Ms Berejiklian answered:

"There is no legislated cap on the number of containers that can travel through the Port of Newcastle."

The "cap on numbers" disclosed by Mr Gay applies to a financial restriction on container movements at the Port of Newcastle. Therefore, the government applied a restriction.

Mr Gay told parliament in October 2013 that the "cap on numbers" will not be extended until Port Botany reaches capacity and a container terminal is built at Port Kembla and it, too, reaches capacity.

However, Ms Berejiklian informed parliament on September 29, 2015 that Port of Newcastle Investments could develop a container terminal "if it wished to do so".

Ms Berejiklian's answer is inconsistent with there being a financial restriction on the number of containers that can travel through the port. It also means the government has quietly abandoned its policy of

there being no container terminal at Newcastle until a container terminal at Port Kembla reaches capacity.

Mr Crakanthorp asked Ms Berejiklian: "When did the *Competition and Consumer Act 2010* stop applying to the government in respect to the operation of the Port of Newcastle?"

Ms Berejiklian answered: "The operation of the Port of Newcastle is the responsibility of the private sector lessee, Port of Newcastle Investments."

This answer was not relevant to the question.

The CCA applied to the NSW government in respect of Newcastle Port Corporation (NPC). The CCA stopped applying to the government in respect of NPC on a specific date. When Mr Gay disclosed the "cap on numbers" in October 2013, the CCA applied to the government.

Mr Crakanthorp asked Ms Berejiklian: "Do the Port Com-

mitment Deeds include a fee on container throughput at Newcastle Port under certain specified conditions?"

The Port Commitment Deed for Port Botany includes confidential leasing arrangements. Port Botany was leased on April 12, 2013. Presumably, this deed contains terms for NSW Ports being paid compensation.

However, Ms Berejiklian's answer was: "There is no legislated cap on the number of containers that can travel through the Port of Newcastle."

This answer must be viewed in the context of the "cap on numbers" and any associated fee.

The ACCC is responsible for enforcing the CCA. However, the ACCC is not taking any enforcement action on the ports' leasing arrangements. Since the CCA applied to the NSW government in respect of NPC's business, the ACCC is able to advise when the CCA stopped applying.

The ACCC also refuses to disclose what it understands the "cap on numbers" to mean.

The ACCC entered into a confidentiality agreement with the NSW government that seemingly prevents it from doing its job.

Once the NSW government discloses details of its "cap on numbers" at the Port of Newcastle, the ACCC will be in a position to explain its decision to take no enforcement action.

Were it not for NSW government interference in a tender conducted by NPC in 2010, a one million per year capacity container terminal would be operating today at the Port of Newcastle.

NSW Ports would be obliged to take legal action against the NSW government to defend its compensation agreement.

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Letter to the editor: The port of Melbourne ship size restriction is costing all Australian exporters

MR GALBRAITH'S article "Urgent need for Melbourne to address port capacity issues" correctly points out that larger vessels increase port capacity. Larger ships allow an operator to use quay cranes more intensely, improve quayline efficiency and add to the port's value.

Indeed, it was the value added by ship upscaling that drove the \$700 million dredging program. While the dredging was necessary, the deepening

by itself catered only for the shorter vessels in the world fleet. The entrance to Swanson Dock limits ships to 300 metres in length; consequently, constrains upscaling.

What the deepening achieved was lift only one of the two constraints and shift the restriction from ship depth to ship length.

With Webb Dock, Melbourne has an opportunity to overcome this length constraint and to allow the

more cost-efficient ships to service our exporters. It would be a pity if the new owner maintained the regulation banning the 321-metres (8,000 teu) ships from using Webb Dock.

It is understandable that the port corporation wished to avoid complaints from the Swanson Dock operators that the new owner would enjoy a competitive advantage. Port users, however, have a stake in this and continuing this regulation means

that users paying for channel deepening through levies are denied the full benefit of their investment.

Lifting the regulation would offer Webb Dock a competitive advantage; more importantly, it benefits port users by potentially lowering shipping costs. Moreover, it improves quayline efficiency, enhances capacity and consequently adds value. And the benefit stretches beyond Victoria.

The Melbourne restriction hobbles

ship upscaling in Sydney and Brisbane, as larger container ships need to call at all three ports. The 300-metre ship size restriction in Melbourne is as much a national issue as it is a Victorian one.

It is time that the Productivity Commission and the ACCC become involved to support all cargo owners.

David Bayne
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