

**INQUIRY INTO IMPACT OF PORT OF NEWCASTLE SALE
ARRANGEMENTS ON PUBLIC WORKS EXPENDITURE IN
NEW SOUTH WALES**

Organisation: Australian Competition and Consumer Commission
Date Received: 30 January 2019

EXECUTIVE OFFICE



30 January 2019

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The Hon Robert Brown, MLC
Chair
Public Works Committee
Legislative Council
Parliament House
Macquarie Street
Sydney NSW 2000

Dear Mr Brown

Impact of Port of Newcastle sale arrangements on public works expenditure in New South Wales

Thank you for the correspondence on 17 January 2019 inviting the ACCC to give evidence at a public hearing for the inquiry into the impact of Port of Newcastle sale arrangements on public works expenditure in New South Wales.

As the Committee is aware, the ACCC has instituted proceedings in the Federal Court against NSW Ports Operations Hold Co Pty Ltd. We have attached our Originating Application (**Attachment A**) and Concise Statement (**Attachment B**) to this letter. The ACCC is comfortable if the Committee chooses to publish these documents alongside other submissions on its website.

In the context of ongoing litigation, the ACCC has decided to decline the invitation to appear before the inquiry. We trust that the attached documents will assist the committee to understand the ACCC's concerns.

Should you or your office wish to discuss this further, please contact me by phone on _____ or by email at _____.

Yours sincerely

Lisa Knight
Director
Parliamentary and Government Liaison

NOTICE OF FILING AND HEARING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 10/12/2018 9:01:54 AM AEDT and has been accepted for filing under the Court's Rules. Filing and hearing details follow and important additional information about these are set out below.

Filing and Hearing Details

Document Lodged:	Originating Application - Form 15 - Rule 8.01(1)
File Number:	NSD2289/2018
File Title:	AUSTRALIAN COMPETITION & CONSUMER COMMISSION v NSW PORTS OPERATIONS HOLD CO PTY LTD ACN 163 262 351 & ORS
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA
Reason for Listing:	First Case Management Hearing
Time and date for hearing:	20/12/2018, 9:30 AM
Place:	Court Room 18A, Level 17, Law Courts Building 184 Phillip Street Queens Square, Sydney



Dated: 10/12/2018 12:25:33 PM AEDT

Registrar

Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The Reason for Listing shown above is descriptive and does not limit the issues that might be dealt with, or the orders that might be made, at the hearing.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.

Form 15
Rules 8.01(1), 8.04(1)



ORIGINATING APPLICATION

**FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: NEW SOUTH WALES
DIVISION: GENERAL**

NO NSD OF 2018

**AUSTRALIAN COMPETITION AND CONSUMER
COMMISSION**

Applicant

**NSW PORTS OPERATIONS HOLD CO PTY LTD
ACN 163 262 351**

and others named in the Schedule
Respondents

To the Respondents

The Applicant applies for the relief set out in this application.

The Court will hear this application, or make orders for the conduct of the proceeding, at the time and place stated below. If you or your lawyer do not attend, then the Court may make orders in your absence.

You must file a notice of address for service (Form 10) in the Registry before attending Court or taking any other steps in the proceeding.

TIME AND DATE FOR HEARING:

PLACE: Owen Dixon Commonwealth Law Courts Building
305 Williams Street
Melbourne VIC 3000

The Court ordered that the time for serving this application be abridged to:

Date:

.....
Signed by an officer acting with
the authority of the District Registrar

Filed on behalf of the Applicant, Australian Competition and Consumer
Commission

Prepared by: Glenn Owbridge
AGS lawyer within the meaning of s 551 of the *Judiciary Act 1903*

Address for Service:
The Australian Government Solicitor,
Level 34, 600 Bourke St, Melbourne, VIC 3000

File ref: 18002316

Telephone:
Lawyer's Email:

Facsimile:
DX 50 Melbourne



DETAILS OF CLAIM

On the grounds stated in the concise statement the Applicant claims:

DECLARATION

1. A declaration that, in or about May 2013, the respondents made contracts with the State of New South Wales (**Port Commitment Deeds**), each of which in clause 3 contained a provision that required the State to compensate:
 - (a) the second respondent, being the operator of Port Botany; or
 - (b) the third respondent, being the operator of Port Kembla,if container traffic at the Port of Newcastle exceeded a specified cap and reduced container traffic at Port Botany or Port Kembla, and which provisions:
 - (c) had the purpose; and
 - (d) had or were likely to have the effect,of substantially lessening competition in the market for the supply of port services for container cargo in New South Wales, and thereby contravened s 45(2)(a)(ii) of the *Competition and Consumer Act 2010 (CCA)* as in effect in May 2013.

ORDERS

2. An order that each of the respondents, and their respective servants, agents, successors and assignees, be restrained from enforcing or otherwise giving effect to clause 3 of the Port Commitment Deeds.
3. An order that each of the respondents pay a pecuniary penalty in such sum as the Court considers appropriate in respect of the contraventions referred to in paragraph 1.
4. Costs.

APPLICANT'S ADDRESS

The Applicant's address for service is:

Australian Government Solicitor,
Level 34, 600 Bourke St, Melbourne, VIC 3000

Email:

The Australian Government Solicitor's telephone, facsimile, and document exchange numbers are:

Tel:



Fax:

DX 50 Melbourne

SERVICE ON THE RESPONDENTS

It is intended to serve this application on all Respondents.

Date: 10 December 2018

Glenn Owbridge
AGS lawyer
for and on behalf of the Australian Government Solicitor
Lawyer for the Applicant



Schedule

FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: NEW SOUTH WALES
Division: General

No NSD of 2018

Respondents

Second Respondent

Port Botany Operations Pty Ltd
ACN 161 204 342

Third Respondent

Port Kembla Operations Pty Ltd
ACN 161 246 582

Date: 10 December 2018

NOTICE OF FILING

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Details of Filing

Document Lodged:	Concise Statement
File Number:	NSD2289/2018
File Title:	AUSTRALIAN COMPETITION & CONSUMER COMMISSION v NSW PORTS OPERATIONS HOLD CO PTY LTD ACN 163 262 351 & ORS
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



Dated: 10/12/2018 12:25:36 PM AEDT

Registrar

Important Information

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NCF1

CONCISE STATEMENT

**FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: NEW SOUTH WALES
DIVISION: GENERAL**

NO NSD OF 2018

**AUSTRALIAN COMPETITION AND CONSUMER
COMMISSION**

Applicant

**NSW PORTS OPERATIONS HOLD CO PTY LTD
ACN 163 262 351**

and others named in the Schedule
Respondents

A. IMPORTANT FACTS GIVING RISE TO THE CLAIM

1. These proceedings concern certain provisions in two contracts, entered into in connection with the privatisation of Port Botany and Port Kembla in May 2013, which the ACCC alleges had the purpose and had or would be likely to have the effect of substantially lessening competition in the market for the supply of port services for container cargo in New South Wales (**NSW**).
2. Port Botany and Port Kembla were acquired by a consortium (the **NSW Ports Consortium**) which included NSW Ports Pty Ltd (**NSW Ports**) and the first respondent, NSW Ports Operations Hold Co Pty Ltd (**Hold Co**). The contracts at issue are Port Commitment Deeds made between the State of NSW (the **State**) and Hold Co and its wholly owned subsidiaries, the second and third respondents (**Botany Operator** and **Kembla Operator**). Clause 3 of each deed contained a provision under which the State agreed, for a term of 50 years, to pay compensation to those port operators if container cargo through the Port of Newcastle exceeded a specified cap and diverted container cargo away from Port Botany or Port Kembla respectively.
3. The substantial majority of all shipping cargo originating from, or bound for, NSW passes through Port Botany (located in southern Sydney), Port Kembla (located in Wollongong) or the Port of Newcastle. This includes bulk and general cargo, and container cargo. Containers are, in the main, transported on purpose built ships.

Filed on behalf of the Applicant, Australian Competition and
Consumer Commission

File ref: 18002316

Prepared by: Glenn Owbridge
AGS lawyer within the meaning of s 551 of the *Judiciary Act*
1903

Address for Service:
The Australian Government Solicitor,
Level 34, 600 Bourke St, Melbourne, VIC 3000

Telephone:
Lawyer's Email:

Facsimile:
DX 50 Melbourne

4. Port Botany is the primary container port in NSW. It has the only dedicated facilities with specialised infrastructure for the efficient loading and unloading of container ships, as well as facilities for the transfer of the containers to and from land transport (**container terminal**). As a result, the vast majority of container cargo to and from NSW passes through Port Botany. At the time Port Botany was privatised in 2013, it handled approximately 2 million 20 foot container equivalent units (**TEUs**) per year. In the 2017/2018 financial year, it handled approximately 2.7 million TEUs.
5. Port Kembla is primarily a bulk port (which includes a large motor vehicle import hub, a grain export terminal and coal export facilities) and has handled approximately 1,600 TEUs per year since it was privatised. The Port of Newcastle is also primarily a bulk port (exporting coal as well as other commodities) and has handled approximately 10,000 TEUs per year since it was privatised.
6. The Port of Newcastle and Port Kembla do not have container terminals but are able to load and unload containers by using ships' cranes or general wharf cranes. This is materially less efficient than a container terminal.
7. The Port of Newcastle has a suitable harbour and available contiguous land for the construction of a container terminal. Since 2001, the Port of Newcastle has held development approval for a container terminal to handle up to 350,000 TEU per year. From at least 2009, the operator of the Port of Newcastle has taken steps to pursue development of a container terminal to better utilise its port assets.

Privatisation of Ports Botany and Kembla

8. Immediately prior to their privatisation, Port Botany and Port Kembla were operated respectively by Botany Operator and Kembla Operator, which were then owned by statutory corporations.
9. In July 2012, the State announced its intention to privatise Port Botany and Port Kembla and subsequently invited bids for those ports. In preparing for the privatisation of the ports, the State had identified that a competing container terminal at the Port of Newcastle may negatively affect the value of bids for Port Botany and Port Kembla. During the bidding process, a bidder requested the State to provide assurance that a container terminal would not be developed at the Port of Newcastle. In the final suite of transaction documents released to bidders, the State proposed to enter into Port Commitment Deeds with the successful bidder, for a term of 50 years.
10. On 31 May 2013, the State and relevant statutory corporations entered into transactions with the NSW Ports Consortium effecting the privatisation. As a result of those transactions:

- (a) the land on which each of the ports is situated was leased for 99 years to subsidiaries of NSW Ports, with sub-leases to Botany Operator and Kembla Operator respectively to conduct the port operations;
 - (b) Botany Operator and Kembla Operator became subsidiaries of Hold Co; and
 - (c) the State entered into a Port Commitment Deed with each of Botany Operator and Kembla Operator (and Hold Co was a party to both Deeds).
11. Clause 3 of the Port Commitment Deeds required the State to pay compensation to Botany Operator and Kembla Operator (**Compensation Provisions**) if the following conditions were satisfied for two consecutive financial years:
- (a) Port Botany or Port Kembla is not at 'full capacity' (as defined in the Botany and Kembla Deeds) for import and export of containers;
 - (b) the volume of containers imported or exported through the Port of Newcastle exceeds 30,000 TEU per annum (plus natural growth) (**PON Threshold**); and
 - (c) Botany Operator or Kembla Operator demonstrates to the reasonable satisfaction of the State that the container traffic through the Port of Newcastle exceeding the PON Threshold has caused a reduction in containers imported or exported through Port Botany or Port Kembla (as applicable).
12. The amount of compensation payable by the State under the Compensation Provisions is calculated as the weighted average wharfage charge per TEU imposed by Botany Operator or Kembla Operator (as the case may be) on port users multiplied by the volume of container traffic through the Port of Newcastle that exceeds the PON Threshold.
13. The Compensation Provisions had one or more of the following purposes, and/or had or were likely to have one or more of the following effects:
- (a) substantially lessening the competitive constraint on Botany Operator and Kembla Operator arising from supply or potential supply of port services for container cargo by the Port of Newcastle by reason of their rights to compensation for loss of container traffic under the Compensation Provisions;
 - (b) causing the State to procure that the Port of Newcastle would not materially increase its ability or capacity to compete in the supply of port services for container cargo in NSW (including by developing a container terminal) for so long as the Port of Newcastle was owned directly or indirectly by the State; and

- (c) in connection with the privatisation of the Port of Newcastle (then in contemplation) causing the State to impose on any acquirer of the Port of Newcastle an obligation to reimburse the State for any payments the State was required to make under the Compensation Provisions, consequently preventing or hindering the owner of the Port of Newcastle developing a container terminal and thereby substantially lessening the competitive constraint on Botany Operator and Kembla Operator.

Privatisation of the Port of Newcastle

14. In June 2013, the State announced its intention to privatise the Port of Newcastle and subsequently invited bids. Prior to its privatisation the Port of Newcastle was owned and operated by State owned statutory corporations. On 30 May 2014, the State and relevant statutory corporations entered into transactions to privatise the Port of Newcastle with the Port of Newcastle Consortium. As a result of those transactions, the land on which the port is situated was leased for 98 years to a subsidiary of the Port of Newcastle Consortium, with sub-leases in favour of Port of Newcastle Operations Pty Ltd (**PON Operations**) to conduct the port operations, and PON Operations was acquired by the Port of Newcastle Consortium.
15. As a consequence of making the Port Commitment Deeds which included the Compensation Provisions, the State required the successful bidder in the Port of Newcastle privatisation to enter into a deed imposing an obligation on the successful bidder to reimburse the State for any payments the State was required to make under the Compensation Provisions.
16. As a result, on 30 May 2014 the State entered into a deed with the Port of Newcastle Consortium parties including PON Operations. Under clause 3 of that deed, PON Operations is obliged to reimburse the State for any payments the State is required to make under the Compensation Provisions (**Reimbursement Provision**).
17. The likely effect of the Reimbursement Provision was and is to make it uneconomical to develop a container terminal at the Port of Newcastle for the 50 year term of the deed. As such, the Reimbursement Provision is a barrier to the expansion of the supply of port services for container cargo in NSW.
18. But for the Reimbursement Provision, the Port of Newcastle Consortium would be likely to build a container terminal at the Port of Newcastle to compete with Port Botany and, in the longer term, with Port Kembla in the supply of port services for container cargo in NSW. In the absence of a competing container terminal at the Port of Newcastle, the

NSW Ports Consortium will remain the only major supplier of port services for container cargo in NSW.

B. THE RELIEF SOUGHT FROM THE COURT

19. The ACCC seeks the relief set out in the Originating Application comprising declarations under s 23 of the *Federal Court of Australia Act 1976*; injunctions under s 80 of the *Competition and Consumer Act 2010 (CCA)*; pecuniary penalties under s 76 of the CCA; and costs.

C. PRIMARY LEGAL GROUNDS FOR THE RELIEF SOUGHT

20. As a consequence of the matters contained in paragraphs 13, 15, 17 and 18, the ACCC alleges that:
- (a) the Compensation Provisions had the purpose and effect and/or were and are likely to have the effect, of substantially lessening competition in the market for the supply of port services for container cargo in NSW;
 - (b) by making the Port Commitment Deeds containing the Compensation Provisions, Hold Co, Botany Operator and Kembla Operator each contravened s45(2)(a)(ii) of the CCA as in effect in May 2013; and
 - (c) if Hold Co, Botany Operator or Kembla Operator were, in the future, to give effect to the Compensation Provisions, they would contravene s 45(1)(b) of the CCA as currently in effect.
21. Hold Co, Botany Operator and Kembla Operator are related bodies corporate and the ACCC relies on s 45(4)(b) of the CCA.

D. THE ALLEGED HARM SUFFERED

22. The Compensation Provisions and Reimbursement Provision are likely to have prevented or hindered the development of a container terminal at the Port of Newcastle. This has prevented or delayed shipping companies, importers and exporters and ultimately consumers in NSW and other Australian consumers, from benefiting from competition for port services for container cargo in NSW.

This concise statement was prepared by Glenn Owbridge and settled by Michael Borsky QC.

CERTIFICATE OF LAWYER

I Glenn Owbridge certify to the Court that, in relation to the concise statement filed on behalf of the Applicant, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: 10 December 2018

Glenn Owbridge
AGS lawyer
for and on behalf of the Australian Government Solicitor
Solicitor for the Applicant

Schedule

FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: NEW SOUTH WALES
Division: General

No NSD of 2018

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Second Respondent

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Third Respondent

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