



Federal Court of Australia

District Registry: New South Wales

Division: General

No: NSD2289/2018

**AUSTRALIAN COMPETITION & CONSUMER COMMISSION** and another/others  
named in the schedule  
Applicant

**NSW PORTS OPERATIONS HOLD CO PTY LTD ACN 163 262 351** and another/others  
named in the schedule  
Respondent

### **ORDER**

**JUDGE:** JUSTICE JAGOT

**DATE OF ORDER:** 15 May 2019

**WHERE MADE:** Sydney

#### **THE COURT ORDERS THAT:**

1. Pending the Court determining the interlocutory application filed on behalf of the State of New South Wales in the proceedings on 12 April 2019 (Interlocutory Application), pursuant to section 37AI of the *Federal Court of Australia Act 1976* (Cth):
  - a. the Value Impact information, the Restricted Access Statement of Claim, Un-redacted Confidential Document 1 and Un-redacted Confidential Document 3 must not be
    - i. filed;
    - ii. tendered; or
    - iii. disclosed for the purposes of the Proceedings, other than to:
      1. the Court;
      2. the Confidentiality Claimant and its external solicitors and barristers and Support Staff of those persons; and



3. the ACCC, its officers, the ACCC's external solicitors and barristers and Support Staff of those persons;
- b. subject to order 1(a), Confidential Documents 1 to 9 and the Confidential Access Statement of Claim must not be:
- i. filed;
  - ii. tendered; or
  - iii. disclosed for the purposes of the Proceedings, other than to:
    1. the Court;
    2. the Confidentiality Claimant and its external solicitors and barristers;
    3. the ACCC and its officers;
    4. the Respondents' officers, directors, partners, members or employees instructing in or assisting with the Proceedings;
    5. external solicitors and barristers retained by the Parties for the purpose of the Proceedings;
    6. independent experts retained by the Parties for the purposes of the Proceedings, with the prior written consent of the Confidentiality Claimant; and
    7. the Support Staff of the persons listed in orders 1(b)(iii)(1) to 1(b)(iii)(6) above.
2. The Confidentiality Claimant shall serve on the ACCC and deliver to the associate of Justice Jagot by no later than 15 May 2019 an affidavit containing two exhibits:
- a. a Restricted Access Exhibit containing an un-redacted copy of each of Confidential Documents 1 to 9, the Port of Newcastle Port Commitment Deed and the Restricted Access Statement of Claim; and



- b. a Confidential Exhibit containing Confidential Documents 1 to 9 and the Confidential Access Statement of Claim,

which affidavit shall be confidential to the persons in order 1(a)(iii) pending determination of the Interlocutory Application.

3. The Confidentiality Claimant shall serve on the Respondents by no later than 15 May 2019 an affidavit containing only the Confidential Exhibit listed in order 2(b), which affidavit shall be confidential to the persons in order 1(b)(iii) pending determination of the Interlocutory Application.
4. The Interlocutory Application be listed for hearing on 22 May 2019.
5. The parties have liberty to apply.

#### **Definitions used in these Orders**

6. The following defined terms apply for the purposes of these Orders:
  - a. **ACCC** means the Australian Competition and Consumer Commission.
  - b. **Confidential Document 1** means the bundle of documents with document number MST.001.003.3652, the first of which is titled *'Treasurer Briefing – Port Botany Scoping and Strategy Study: Indicative Valuation'* dated 5 April 2012, redacted to remove the specific numbers in the Value Impact information.
  - c. **Confidential Document 2** means the document with document number MST.001.002.2407 titled *'Port Botany: Near Term Decisions Requested from the Treasurer / Government'* dated 12 April 2012.
  - d. **Confidential Document 3** means the document with document number MST.001.001.8909 titled *'Steering Committee; Meeting Minutes'* dated 28 February 2013, redacted to remove the specific numbers in the Value Impact information.



- e. **Confidential Document 4** means the document with document number MST.001.08.6425 titled '*Project Pembroke: Bid Version Transaction Documents Strategy and Recommendations*' dated 13 March 2013.
- f. **Confidential Document 5** means the document with document number MST.001.006.1500 titled '*Treasurer Briefing on Key Botany / Kembla Risk Allocation Matters*' dated 13 March 2013.
- g. **Confidential Document 6** means the document with document number MST.001.001.9537 titled '*Steering Committee: Meeting Minutes*' dated 14 March 2013.
- h. **Confidential Document 7** means the document with document number MST.001.005.4711 titled '*Port of Newcastle Information Memorandum*'.
- i. **Confidential Document 8** means the document with document number MST.001.005.9300 being an email with subject line '*Mayfield Transaction Parameters*' dated 5 August 2013.
- j. **Confidential Document 9** means the document with document number MST.001.005.9301 titled '*Mayfield Development Transaction Parameters*' dated 6 August 2013.
- k. **Confidential Access Statement of Claim** means a version of the Restricted Access Statement of Claim redacted to remove the specific numbers in the Value Impact Information, where the information in paragraphs 25.2(a), 25.2(b), 26(b), 26(d) and 26(e) is confidential.
- l. **Confidentiality Claimant** means the State of New South Wales.
- m. **Confidential Exhibit** means an exhibit to the affidavit referred to in paragraph 2b containing Confidential Documents 1 to 9 and the Confidential Access Statement of Claim.
- n. **Interlocutory Application** means determining the interlocutory application filed on behalf of the State of New South Wales in the Proceedings on 12 April 2019.



- o. **Parties** means the ACCC and the Respondents.
- p. **Port of Newcastle Port Commitment Deed** means the deed entered into on 30 May 2014, by the then Treasurer of NSW, the Hon. Andrew Constance MP, Port of Newcastle Operations Pty Limited (as trustee for the Port of Newcastle Unit Trust) Port of Newcastle Investments (Property) Pty Limited as trustee of the Port of Newcastle Investments (Property) Trust and Port of Newcastle Investments Pty Limited.
- q. **Proceedings** means Federal Court Proceedings NSD2289/2018.
- r. **Respondents** means NSW Ports Operations Hold Co Pty Ltd, Port Botany Operations Pty Ltd and Port Kembla Operations Pty Ltd.
- s. **Restricted Access Exhibit** means an exhibit to the affidavit referred to in paragraph 2a containing an un-redacted copy of each of Confidential Documents 1 to 9, the Port of Newcastle Port Commitment Deed and the Restricted Access Statement of Claim.
- t. **Restricted Access Statement of Claim** means an un-redacted version of the Statement of Claim.
- u. **Support Staff** means persons providing administrative assistance and includes secretaries, administrative assistants, IT staff and print room staff.
- v. **Un-redacted Confidential Document 1** means the un-redacted version of Confidential Document 1 which shows the specific numbers in the Value Impact Information.
- w. **Un-redacted Confidential Document 3** means the un-redacted version of Confidential Document 3 which shows the specific numbers in the Value Impact Information.
- x. **Value Impact Information** means the information in the particulars to paragraphs 25.2(a)(ii) and 26(b)(ii) of the draft Statement of Claim provided to



the Confidentiality Claimant by the ACCC on 1 March 2019 and identified as such in Confidential Document 1 and Confidential Document 3.

Date that entry is stamped: 15 May 2019

*Warrick Soden*  
Registrar



**Schedule**

No: NSD2289/2018

Federal Court of Australia

District Registry: New South Wales

Division: General

Interested Person            STATE OF NSW

Second Respondent        PORT BOTANY OPERATIONS PTY LTD ACN 161 204 342

Third Respondent         PORT KEMBLA OPERATIONS PTY LTD ACN 161 246 582