



Federal Court of Australia

District Registry: New South Wales

Division: General

No: NSD2289/2018

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

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

ORDER

JUDGE: JUSTICE JAGOT

DATE OF ORDER: 28 February 2020

WHERE MADE: Sydney

BY CONSENT THE COURT ORDERS THAT:

1. Pursuant to rule 20.13 of the *Federal Court Rules 2011* (Cth) (**Rules**):
 - (a) the First to Third Cross-respondents give discovery of the documents in the categories listed in **Annexure 1** to these Orders on or before 25 March 2020;
 - (b) the Fourth Respondent and Fourth Cross-respondent give discovery of the documents in the categories listed in **Annexure 2** to these Orders on or before 25 March 2020; and
 - (c) the Applicant give discovery of the documents in the categories listed in **Annexure 3** to these Orders on or before 25 March 2020.
2. For discovery pursuant to Order 1 of these Orders, rules 20.14(1)(a) and 20.14(2) of the Rules are not to apply.
3. The parties are to give discovery by electronic means in accordance with an Electronic Document Sharing Protocol to be agreed between the parties.



4. Costs are reserved.
5. The parties have liberty to apply.

Date that entry is stamped: 28 February 2020

Sia Lagos
Registrar



Annexure 1

1 All documents (including drafts and underlying documents) provided to or prepared by:

- (a) shareholders;
- (b) directors of the board; or
- (c) Senior Management (as defined in Annexure 4) and their direct reports,

related to any proposal to develop a container terminal at the Port of Newcastle considered by Port of Newcastle Operations Pty Ltd since 16 July 2012, excluding those documents already produced by Port of Newcastle in response to the Subpoena (as defined in Annexure 4).

2 All documents (including drafts and underlying documents) provided to or prepared by:

- (a) shareholders;
- (b) directors of the board; or
- (c) Senior Management (as defined in Annexure 4) and their direct reports,

related to the Port Commitment Deeds (including any references to the Compensation Provisions or the Reimbursement Provision) (as defined in Annexure 4 and howsoever described in the documents).

3 All correspondence or communications, or documents recording or referring to correspondence or communications, with the ACCC or its solicitors regarding:

- (a) any proposal, expression of interest, offer or agreement to develop a container terminal at the Port of Newcastle; or
- (b) the Port Commitment Deeds (including any references to the Compensation Provisions or the Reimbursement Provision) (as defined in Annexure 4 and howsoever described in the documents).

Note in relation to Category 3: for documents created on or after 10 December 2018, the First to Third Cross-Respondents are relieved from compliance with r 20.17(2)(c) of the Rules and are instead to identify any categories of documents for which privilege from production is claimed and the grounds of the privilege.

4 All documents provided to or prepared by:

- (a) shareholders;
- (b) directors of the board; or
- (c) Senior Management (as defined in Annexure 4) and their direct reports,

which relate to, or which record or evidence any consideration by the Port of Newcastle of, any of the Container Terminal Development Factors (as defined in Annexure 4 and howsoever described in the documents) since 30 May 2014.



5 Any documents prepared by or for the Port of Newcastle analysing, recording or relating to limitations on access and egress by certain classes of container ships to or from the Port of Newcastle, including but not limited to works contemplated to allow these ships to access and egress the Port of Newcastle since 1 July 2017.

6 All correspondence, notes of any meetings, telephone calls or discussions between Port of Newcastle representatives or its shareholders and ACCC staff or its solicitors since 1 August 2016, excluding documents that are not related to the Port Commitment Deeds (as defined in Annexure 4), any proposal to develop a container terminal at the Port of Newcastle or the Proceedings (as defined in Annexure 4).

Note in relation to Category 6: for documents created on or after 10 December 2018, the First to Third Cross-Respondents are relieved from compliance with r 20.17(2)(c) of the Rules and are instead to identify any categories of documents for which privilege from production is claimed and the grounds of the privilege.

7 All correspondence or communications, or documents recording or referring to correspondence or communications, with the NSW Treasury or the NSW State Government since 1 April 2013 regarding:

- (a) any proposal, expression of interest, offer or agreement to develop a container terminal at the Port of Newcastle; or
- (b) the Port Commitment Deeds (including the Compensation Provisions or Reimbursement Provision) (as defined in Annexure 4 and howsoever described in the documents).

8 All correspondence or communications with shareholders (including China Merchants Port and China Merchants Group), or documents prepared by or provided to shareholders (including China Merchants Port and China Merchants Group), since 1 January 2018 regarding:

- (a) any proposal, expression of interest, offer or agreement to develop a container terminal at the Port of Newcastle;
- (b) interactions with the ACCC related to the Port Commitment Deeds (as defined in Annexure 4 and howsoever described in the documents);
- (c) the Port Commitment Deeds (including the Compensation Provisions the Reimbursement Provision) (as defined in Annexure 4 and howsoever described in the documents); or
- (d) Container Terminal Development Factors (as defined in Annexure 4 and howsoever described in the documents).

Note in relation to Category 8(b): for documents created on or after 10 December 2018, the First to Third Cross-Respondents are relieved from compliance with r 20.17(2)(c) of the Rules and are instead to identify any categories of documents for which privilege from production is claimed and the grounds of the privilege.

9 A copy of each policy and procedure of the Port of Newcastle for the approval of investment or capital expenditure in the amount of \$20 million or more which applied at any time since 30 May 2014.

10 All documents from 30 May 2014 until 10 December 2018 that refer to:



- (a) development application number 293-08-00 made by Broken Hill Proprietary Company Limited;
- (b) application number 09_0096 made by Newcastle Ports Corporation;
- (c) the consent granted to the development application referred to in paragraph (a); or
- (d) the approval granted to the application referred to in paragraph (b),

insofar as they may affect the quantity of containers that could be handled by the Port of Newcastle.

- 11 All correspondence or communications, or documents recording or referring to correspondence or communications with, shipping lines, freight forwarders, rail network owners, rail network operators, land transport providers, stevedores or potential stevedores or their related parties (including but not limited to DP World, China Merchants Port or China Merchants Group and Mayfield Development Corporation), or beneficial freight owners, in relation to any proposals to develop a container terminal at the Port of Newcastle, including but not limited to any correspondence regarding cessation of negotiations for the development or use of a container terminal at the Port of Newcastle, since 1 June 2016.
- 12 All documents analysing, recording or discussing the potential or estimated costs that would be borne by exporters, importers or other stakeholders to transport containers loaded or unloaded at the Port of Newcastle whose origin or destination is located in the Greater Sydney Area (as defined in Annexure 4) since 1 June 2016.
- 13 All documents created since 30 May 2014 recording analysis undertaken by or for the Port of Newcastle of:
 - (a) requirements for complementary infrastructure to support the development of any container terminal at the Port of Newcastle (including but not limited to intermodal terminals, rail connections and road infrastructure);
 - (b) potential providers of that complementary infrastructure;
 - (c) regulatory, planning or Government approval processes for that complementary infrastructure;
 - (d) funding for that complementary infrastructure; or
 - (e) the policy of the NSW Government to prioritise the utilisation and development of container capacity at Port Botany or Port Kembla before the utilisation and development of container capacity elsewhere in NSW.
- 14 All instructions, assumptions and data given to, and all reports (including drafts) prepared for Port of Newcastle by, any engineering, design, planning, infrastructure, construction or project management firms, including but not limited to WSP (formerly known as Parsons Brinckerhoff) and Aecom, in relation to any proposal to develop a container terminal at the Port of Newcastle since 1 June 2016.
- 15 All documents created since 1 June 2016 containing methodologies, underlying workings or calculations relating to any external studies or reports commissioned by or prepared for the Port of Newcastle (including but not limited to studies by AlphaBeta, Deloitte, Lycopodium, Houston Kemp, Aecom and WSP (formerly known as Parsons Brinckerhoff)) concerning any



container terminal development at the Port of Newcastle, including all documents provided by Port of Newcastle to these consultancies for the purpose of each study or report.

- 16 All documents provided to the board since 30 May 2014 recording annual figures for the volume and content of containers handled at the Port of Newcastle, including but not limited to whether the containers were import or export containers.
- 17 A document that records the actual, and documents that record the potential, volume of both export and import containers handled at the Port of Newcastle without the development of a dedicated container terminal created since 31 May 2014.
- 18 All Documents created during the period 30 May 2014 to 10 December 2018 that refer to the likelihood or not of container volumes being diverted from Port Botany or Port Kembla, to the Port of Newcastle.

Note in relation to Categories 1-18: these categories exclude any documents already produced by Port of Newcastle in response to the Subpoena (as defined in Annexure 4).



Annexure 2

- 1 All correspondence, file notes and documents recording correspondence between the State (or Morgan Stanley) and bidders for the long-term lease of Port Botany and Port Kembla regarding:
 - (a) the development of a container terminal at the Port of Newcastle;
 - (b) the Port Commitment Deeds (as defined in Annexure 4 and howsoever described in the documents); or
 - (c) concerns raised by the bidder with the code name Hobson seeking protection from the State acting in the interests of the development of a new container port that would be in direct competition to either Port Botany and/or Port Kembla.
- 2 All correspondence, file notes and internal documents recording correspondence between the State (or Morgan Stanley) and bidders for the long-term lease of the Port of Newcastle regarding the Port Commitment Deeds (including the Compensation Provisions or the proposed Reimbursement Provision and drafts of these documents) (as defined in Annexure 4 and howsoever described in the documents).
- 3 All documents provided to Mayfield Development Corporation Pty Ltd (**Mayfield**) in relation to any settlement entered into with Mayfield upon ceasing negotiations in relation to the Proposed Mayfield Development (as defined in Annexure 4 and howsoever described in the documents).
- 4 All documents placed into the dataroom during the process for the long-term lease of the Port of Newcastle that relate to development of a container terminal at the Port of Newcastle.
- 5 All documents between 1 April 2012 and 30 May 2014 (inclusive) recording the process by which the Compensation Provisions or the Reimbursement Provision (as defined in Annexure 4 and howsoever described in the documents) were determined, including any drafts of the provisions.
- 6 All documents between 1 April 2012 and 31 May 2013 (inclusive) recording or evidencing the State's (or Morgan Stanley's) consideration of offering compensation to the ultimate lessee of Port Botany and Port Kembla if container capacity was developed at the Port of Newcastle, and all documents recording or evidencing the State's (or Morgan Stanley's) consideration of any alternative arrangements.
- 7 All documents between 1 April 2012 and 30 May 2014 (inclusive) recording or evidencing the State's (or Morgan Stanley's) consideration of the possibility that, if the State privatised the Port of Newcastle, the private operator of the Port of Newcastle could be required to reimburse or otherwise make payments to the State for any compensation payable to the lessee of Port Botany and Port Kembla, and all documents recording or evidencing the State's (or Morgan Stanley's) consideration of any alternative arrangements.
- 8 All draft versions of the Port Commitment Deeds (as defined in Annexure 4 and howsoever described in the documents) submitted by bidders (including any mark-ups) during the process for the long-term lease of Port Botany / Port Kembla and the Port of Newcastle prepared between 15 March 2013 and 30 May 2014 (inclusive).



- 9 Copy of the minutes from the meeting or any other document recording the oral communication on Thursday 25 July 2013 by the Honourable Mike Baird MP, NSW Treasurer and the Honourable Duncan Gay MP, Minister for Roads and Ports to the Newcastle Stevedores Consortium and Newcastle Port Corporation that the State did not support the then current form of the proposal for development of a container terminal.
- 10 Copy of the minutes from the meeting or any other documents recording or evidencing, or tabled in relation to, the meeting between representatives of NSW Treasury, Newcastle Port Corporation and the Newcastle Stevedores Consortium held on or around 6 August 2013.



Annexure 3

- 1 Notes of any meetings between Port of Newcastle representatives (including shareholders) and representatives of the ACCC or its solicitors since 1 August 2016, excluding documents that are not related to the Port Commitment Deeds (as defined in Annexure 4), any proposal to develop a container terminal at the Port of Newcastle or the Proceedings (as defined in Annexure 4).
- 2 All documents recording or referring to correspondence with Port of Newcastle representatives (including shareholders, China Merchants Port and China Merchants Group) since 1 August 2016, excluding documents that are not related to the Port Commitment Deeds (as defined in Annexure 4), any proposal to develop a container terminal at the Port of Newcastle or the Proceedings (as defined in Annexure 4).
- 3 All documents provided to the ACCC by Port of Newcastle or its shareholders (including China Merchants Port and China Merchants Group), excluding documents produced pursuant to the Subpoena (as defined in Annexure 4), regarding:
 - (a) any proposal for the development of a container terminal at the Port of Newcastle;
 - (b) the Port Commitment Deeds (as defined in Annexure 4 and howsoever described in the documents);
 - (c) the Compensation Provisions (as defined in Annexure 4 and howsoever described in the documents);
 - (d) the Reimbursement Provision (as defined in Annexure 4 and howsoever described in the documents); or
 - (e) the Container Terminal Development Factors (as defined in Annexure 4 and howsoever described in the documents).

Note in relation to Categories 1–3: for documents created on or after 10 December 2018, the Applicant is relieved from compliance with r 20.17(2)(c) of the Rules and is instead to identify any categories of documents for which privilege from production is claimed and the grounds of the privilege.



Annexure 4

Definitions

ACCC means the Australian Competition and Consumer Commission, the Applicant.

Compensation Provisions means:

- (a) clause 3 of the Port Botany PCD (as defined below); and
- (b) clause 3 of the Port Kembla PCD (as defined below).

Container Terminal Development Factors as defined in the Further Amended Defence filed 5 December 2019.

Greater Sydney Area means the area classified as such by the Australian Bureau of Statistics.

Port Commitment Deeds means:

- (a) A written document titled 'Port Commitment Deed – Port Botany', which was entered into by the NSW Treasurer for and on behalf of the Crown in right of the State of NSW, Port Botany Operations Pty Limited (as trustee for the Port Botany Unit Trust), NSW Ports Botany Property Co Pty Limited (as trustee for the NSW Ports Botany Property Trust) and NSW Ports Operations Hold Co Pty Limited (as trustee for the NSW Ports Operations Hold Trust) dated 31 May 2013 (**Port Botany PCD**);
- (b) A written document titled 'Port Commitment Deed – Port Kembla', which was entered into by the NSW Treasurer for and on behalf of the Crown in right of the State of NSW, Port Kembla Operations Pty Limited (as Trustee for the Port Kembla Unit Trust), NSW Ports Kembla Property Co Pty Limited (as trustee for the NSW Ports Kembla Property Trust) and NSW Ports Operations Hold Co Pty Limited (as trustee for the NSW Ports Operations Hold Trust) dated 31 May 2013 (**Port Kembla PCD**); and
- (c) A written document titled 'Port Commitment Deed – Port of Newcastle', which was entered into by the NSW Treasurer for and on behalf of the Crown in right of the State of NSW, Port of Newcastle Operations Pty Limited (as trustee for the Port of Newcastle Unit Trust), Port of Newcastle Investments (Property) Pty Limited (as trustee for the Port of Newcastle Investments (Property) Trust) and Port of Newcastle Investments Pty Limited dated 30 May 2014 (**Newcastle PCD**).

Port of Newcastle means the First to Third Cross-respondents.

Proceedings means Federal Court Proceeding No. NSD2289 of /2018.

Proposed Mayfield Development as defined in the State of NSW Defence dated 5 November 2019.

Reimbursement Provision means clause 3 of the Newcastle PCD.

Senior Management means:

- (a) Chief Executive Officer;
- (b) Chief Commercial Officer;
- (c) Chief Financial Officer;



- (d) Executive Manager Corporate Affairs;
- (e) Executive Manager Projects & Infrastructure;
- (f) Executive Manager Corporate Services;
- (g) Executive Manager, Trade and Business Development;
- (h) Executive Manager Marine & Operations; and

any predecessors of the above or other members of the executive leadership team or equivalent since 16 July 2012 of the Port of Newcastle.

State means the Fourth Respondent, being the Crown in right of New South Wales.

Subpoena means the subpoena to produce documents addressed to Port of Newcastle Investments Pty Limited issued in the Proceedings on 31 May 2019.



Schedule

No: NSD2289/2018

Federal Court of Australia
District Registry: New South Wales
Division: General

| | |
|-------------------|--|
| Interested Person | PORT OF NEWCASTLE INVESTMENTS PTY LIMITED |
| Second Respondent | PORT BOTANY OPERATIONS PTY LTD ACN 161 204 342 |
| Third Respondent | PORT KEMBLA OPERATIONS PTY LTD ACN 161 246 582 |
| Fourth Respondent | STATE OF NSW |

CROSS CLAIM

| | |
|-------------------------|--|
| Cross-Claimant | NSW PORTS OPERATIONS HOLD CO PTY LTD ACN 163 262 351 |
| Second Cross-Claimant | PORT BOTANY OPERATIONS PTY LTD ACN 161 204 342 |
| Third Cross-Claimant | PORT KEMBLA OPERATIONS PTY LTD ACN 161 246 582 |
| Cross Respondent | PORT OF NEWCASTLE OPERATIONS PTY LIMITED ACN 165 332 990 |
| Second Cross Respondent | PORT OF NEWCASTLE INVESTMENTS (PROPERTY) PTY LIMITED ACN 169 286 024 |
| Third Cross Respondent | PORT OF NEWCASTLE INVESTMENTS PTY LIMITED ACN 169 132 441 |
| Fourth Cross Respondent | STATE OF NSW |