

NOTICE OF FILING

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Details of Filing

Document Lodged: Statement of Claim - Form 17 - Rule 8.06(1)(a)
File Number: NSD862/2019
File Title: MAYFIELD DEVELOPMENT CORPORATION PTY LTD ACN 154 495
048 v NSW PORTS OPERATIONS HOLD CO PTY LTD ACN 163 262
351 & ORS
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF
AUSTRALIA



A handwritten signature in blue ink that reads 'Warwick Soden'.

Dated: 31/05/2019 4:30:33 PM AEST

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 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 17
Rule 8.05(1)(a)

Statement of claim

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

No. NSD of 2019

Mayfield Development Corporation Pty Ltd (ACN 154 495 048)

Applicant

NSW Ports Operations Hold Co Pty Ltd (ACN 163 262 351) and others

Respondents

A. PARTIES

1. The Applicant (**MDC**) is a corporation within the meaning of the *Competition and Consumer Act 2010* (Cth) (**CCA**).
2. The First Respondent (**Hold Co**) is and at all material times was a corporation within the meaning of the CCA.
3. The Second Respondent (**Botany Operator**):
 - (a) is and at all material times was a corporation within the meaning of the CCA; and
 - (b) since 31 May 2013 has been wholly owned by Hold Co.
4. The Third Respondent (**Kembla Operator**):
 - (a) is and at all material times was a corporation within the meaning of the CCA; and
 - (b) since 31 May 2013 has been wholly owned by Hold Co.

Filed on behalf of (name & role of party) Mayfield Development Corporation Pty Ltd, Applicant

Prepared by (name of person/lawyer) Geoff Farnsworth/Partner

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(include state and postcode) MLC Centre, 19 Martin Place, Sydney NSW 2000

B. CARGO HANDLING FACILITIES AT PORT OF NEWCASTLE

Containerised cargo

5. Containerised cargo is cargo packed in standardised shipping containers that can be loaded onto, transported on and unloaded from different modes of transport (road, rail and sea) without the cargo being loaded and unloaded from its container.
6. When containerised cargo is transported by sea it is typically transported on ships that are built and solely used to carry containerised cargo (**Container Ships**).
7. Containerised cargo can be loaded onto and unloaded from Container Ships and moved within a port using:
 - (a) specialised infrastructure and equipment used solely for the purpose of handling containerised cargo, including quay cranes, straddle carriers, rubber tyred gantries and rail mounted gantries (**Container Terminal**); or
 - (b) equipment that is not specialised such as ships' cranes or general wharf cranes.
8. Handling of containerised cargo is more efficient at ports with Container Terminals than ports where the handling occurs using ships' cranes or general wharf cranes.
9. At all material times:
 - (a) the only ports in New South Wales (**NSW**) with channels, harbours and berths capable of accommodating most Container Ships were Port Botany, Port Kembla and Port of Newcastle (**Relevant Ports**);
 - (b) Port Botany was the only port in NSW with Container Terminals and handled most of the containerised cargo that arrived in or departed NSW by sea;
 - (c) Port Kembla:
 - i. predominantly handled bulk cargo (being commodities such as coal and grain that are transported unpackaged in large quantities) and general cargo (being cargo that must be loaded individually such as cars and bulk steel); and
 - ii. handled a small amount of containerised cargo using ships' cranes or general wharf cranes; and
 - (d) Port of Newcastle:
 - i. predominantly handled bulk cargo; and
 - ii. handled a small amount of containerised cargo using ships' cranes or general wharf cranes.

Proposed development of cargo handling facilities at Port of Newcastle

10. On 5 October 2003, the State of NSW (**State**) announced that Port of Newcastle would be developed into a major port for handling containerised cargo once Port Botany had reached its capacity.

Particulars

The announcement was made by the Honourable Bob Carr MP.

11. Newcastle Port Corporation (**NPC**) is and at all material times was a body corporate established under section 6(1) of the *Ports and Maritime Administration Act 1995* (NSW) and responsible for, *inter alia*, managing port facilities at Port of Newcastle.

Particulars

In about July 2014, NPC was amalgamated with statutory corporations responsible for operations at other ports in NSW and is now known as the Port Authority of New South Wales.

12. In November 2009, NPC requested detailed proposals for the development and operation of cargo terminals in an area within Port of Newcastle known as “Mayfield” that would include a Container Terminal with capacity to handle in excess of one million twenty-foot equivalent units (**TEUs**) of containerised cargo per year.

Particulars

The request was in writing in a document titled “Invitation to Submit Detailed Proposal: Mayfield Site”.

13. On about 11 February 2010, a consortium known as Newcastle Stevedores Consortium (**NSC**) submitted a proposal to NPC in response to the request for proposals.

Particulars

As at 11 February 2010, the members of NSC were:

- (i) Anglo Ports Pty Limited, a company that provides project and management advice on port operations, investments, acquisitions and divestments;
- (ii) Grup Maritim TCB SL, a company incorporated in Spain that manages various ports in Spain and other countries;
- (iii) Newcastle Stevedores Pty Ltd, a supplier of stevedore services at Port of Newcastle since about 1997;
- (iv) trustee of the Beesley Family Trust; and
- (v) trustee of the Wavehill Family Trust.

14. On about 5 May 2010, NPC invited NSC (and no other bidder) to engage in further discussions regarding the development and operation of cargo terminals at Mayfield.

Particulars

Letter from Gary Webb, Chief Executive Officer of NPC, to Capt. Richard Setchell of NSC dated 5 May 2010.

15. By 12 April 2011, NPC had:
- (a) endorsed NSC as the preferred proponent for the development a Container Terminal and other port infrastructure at Mayfield; and
 - (b) advised NSC by letter that it wished to start negotiating the terms of leases and project delivery agreements, the execution of which would require approval of NPC's board of directors and the State.
16. On 6 September 2011, the State announced that it intended to privatise Port Botany through a long-term lease.

Particulars

The announcement was made in a speech by the Honourable Mike Baird MP, NSW Treasurer, in the NSW Legislative Assembly.

17. By 24 October 2011, NPC and NSC had completed negotiations of agreements which provided for the development by NSC of a Container Terminal and other port infrastructure at Mayfield (**the proposed project agreements**).

Particulars

The proposed project agreements were documents titled:

- (i) "Project Delivery Agreement";
 - (ii) "Stage 1 Lease – Mayfield Site, Newcastle, NSW";
 - (iii) "Agreement for Leases and Subleases".
18. NPC's Board resolved to seek the approval of the State for NPC to execute the proposed project agreements on about 3 November 2011 and subsequently sought that approval.
19. On about 14 December 2011, NSC incorporated MDC as the entity through which it would develop and operate a Container Terminal and other port infrastructure at Mayfield if the State approved the proposed project agreements.

Scoping and strategy study

20. By 9 December 2011, the State had determined that it would conduct a scoping and strategy study in respect of its proposed lease of Port Botany (**scoping and strategy study**) and would not consider approving the execution by NPC of the proposed project agreements until the scoping and strategy study had concluded.
21. On about 14 December 2011, the State announced that Morgan Stanley had been appointed as the State's financial advisor for the lease of Port Botany and would be responsible for conducting the scoping and strategy study.

Particulars

The announcement was in writing in a media release of the Honourable Mike Baird MP, NSW Treasurer, dated 14 December 2011 titled "Financial Advisor Appointed: Government Forges Ahead with Long-term Lease of Port Botany".

22. Between about 14 December 2011 and mid-2012, Morgan Stanley conducted the scoping and strategy study.
23. By April 2012, the State was aware that the possibility of a competing Container Terminal being developed at Port of Newcastle:
- (a) was a concern to potential bidders for Port Botany; and
 - (b) could negatively affect perceived value to potential bidders.

Particulars

This allegation is based on paragraph 25 of the Statement of Claim in proceeding NSD 2289 of 2018. Particulars will be provided prior to trial. MDC is presently unable to provide further particulars.

24. On 12 June 2012, the State announced that it was undertaking scoping work to review the inclusion of Port Kembla in the Port Botany transaction.

Particulars

The announcement was made by the Honourable Mike Baird MP, NSW Treasurer, and the Honourable Duncan Gay, Ports Minister, dated 12 June 2012, in writing in a document titled "Refinancing of Port Kembla to Boost Funds for Major Infrastructure Projects".

25. By 30 August 2012:

- (a) the State had determined that it would not approve a proposal that involved developing a Container Terminal at Port of Newcastle before the developable container handling capacity at Port Botany and Port Kembla had been developed and was being fully utilised; and
- (b) the State had informed NSC that it would not execute the proposed project agreements negotiated by NSC and NPC.

Particulars

- (i) Letter from the Honourable Mike Baird MP, NSW Treasurer, to Capt. Richard Setchell dated 30 August 2012.
- (ii) Letter from Gary Webb of NPC to Capt. Richard Setchell dated 26 October 2012.

Further particulars may be provided prior to trial.

C. THE PORT COMMITMENT DEEDS

26. On or about 15 March 2013, the State proposed to enter into deeds known as "Port Commitment Deeds" with whichever bidder for the leases of Port Botany and Port Kembla was the successful bidder.

Particulars

On 15 March 2013, the NSW Treasury and/or Morgan Stanley on behalf of the State made available to bidders in an online data room the following documents:

- (i) draft Port Commitment Deeds for each of Port Botany and Port Kembla, which contained clauses 3 and 6(b) described in paragraphs 32(b) and 32(c) below; and
- (ii) a memorandum dated 15 March 2013 concerning the development of multi-cargo facilities at Port of Newcastle.

MDC does not presently possess copies of the documents alleged which it believes are in the possession of the State.

27. By April 2013, at least one of the members of NSW Ports Consortium was aware that the draft Port Commitment Deeds would, if executed, provide protection for the successful bidder from the possibility that container volumes could be diverted from Port Botany or Port Kembla should a Container Terminal be developed at Port of Newcastle.

Particulars

Members of the NSW Ports Consortium were IFM Investors (**IFM**), Australian Super, Tawreed Investments Limited and Q Super.

On 27 March 2013, IFM prepared a document titled "Project Cook Investment Review", for the purpose of seeking approval for IFM and its consortium partners to make a bid, by means of the NSW Ports Consortium, for the assets of Port Botany and Port Kembla. In that paper, IFM identified that the provision by the State for "compensation if the container growth at Newcastle exceeds the 'organic' growth projections whilst there is excess capacity at Botany and Kembla" provided "us with additional protection on diversion of container throughput". This document was considered by the IFM Investment Committee on 2 April 2013. MDC does not presently possess the documents alleged.

28. On 12 April 2013:

- (a) the State selected NSW Ports Consortium as the successful bidder for the leases of Port Botany and Port Kembla, and announced that it had made that selection; and

Particulars

The announcement was in writing in a media release issued by the Honourable Mike Baird MP, NSW Treasurer, dated 12 April 2013, titled "NSW government welcomes successful outcome of port transaction".

- (b) the State and relevant State Port Corporations entered into share sale and purchase agreements for each of Port Botany and Port Kembla in favour of the NSW Ports Consortium, with effect from 31 May 2013.

Particulars

The agreements were:

- (i) an agreement titled "Sale and Purchase Agreement – Port Botany" which was entered into by the NSW Treasurer on behalf of the State, Sydney Ports Corporation (**SPC**), Port Botany Lessor Pty Ltd (**Botany Lessor**) and Hold Co, which transferred ownership of the shares in Botany Operator and Port Botany Unit Trust to Hold Co; and
- (ii) an agreement titled "Sale and Purchase Agreement – Port Kembla", which was entered into by the NSW Treasurer on behalf

of the State, Port Kembla Ports Corporation, Port Kembla Lessor Pty Ltd and Hold Co, which transferred ownership of the shares in Kembla Operator and Port Kembla Unit Trust to Hold Co.

MDC does not presently possess copies of the documents alleged.

29. On or about 31 May 2013, the State and relevant State Port Corporations entered into further transactions effecting the privatisation of Port Botany and Port Kembla in favour of the NSW Ports Consortium.

Particulars

The transactions were, in relation to Port Botany:

- (i) a 99 year lease of the port land, buildings and improvements entered into by Botany Lessor and NSW Ports Botany Property Co Pty Ltd as trustee for the NSW Ports Botany Property Trust;
- (ii) a sublease between NSW Ports Botany Property Co Pty Ltd as trustee for the NSW Ports Botany Property Trust and Botany Operator as trustee for the Port Botany Unit Trust, by which Botany Operator was granted use of the port land, buildings and improvements.

The transactions were, in relation to Port Kembla:

- (i) an agreement titled "Sale and Purchase Agreement – Port Botany" which was entered into by the NSW Treasurer on behalf of the State, SPC, Botany Lessor and Hold Co, which transferred ownership of the shares in Botany Operator and Port Botany Unit Trust to Hold Co; and
- (ii) a sublease between NSW Ports Kembla Property Co Pty Ltd as trustee for the NSW Ports Kembla Property Trust and Kembla Operators as trustee for the Port Kembla Unit Trust, by which Kembla Operator was granted use of the port land, buildings and improvements.

MDC does not presently possess copies of the documents alleged which it believes are in the possession of the State.

30. As a result of the transactions alleged in paragraphs 28(b) and 29:

- (a) the land on which each of Port Botany and Port Kembla is situated was leased for 99 years to NSW Ports Botany Property Co Pty Ltd and NSW Ports Kembla Property Co Pty Ltd respectively (each a subsidiary of NSW Ports Pty Ltd), with sub-leases in favour of Botany Operator and Kembla Operator respectively to conduct the port operations; and
- (b) Botany Operator and Kembla Operator became owned by Hold Co.

31. On 31 May 2013, the State entered into the two Port Commitment Deeds, relating to Port Botany and Port Kembla respectively.

Particulars

The two deeds were:

- (i) a written document titled "Port Commitment Deed – Port Botany", which was entered into by the NSW Treasurer on behalf of the State, Botany Operator as trustee for Port Botany Unit Trust, NSW Ports Botany Property Co Pty Ltd as trustee for NSW Ports Botany Property Trust and Hold Co (**Port Botany PCD**); and
- (ii) a written document titled "Port Commitment Deed – Port Kembla", which was entered into by the NSW Treasurer on behalf of the State, Kembla Operator as trustee for Port Kembla Unit Trust, NSW Ports Kembla Property Co Pty Ltd as trustee for NSW Ports Kembla Property Trust and Hold Co (**Port Kembla PCD**).

MDC does not presently possess copies of the documents alleged.

32. Each Port Commitment Deed contained inter alia the following terms:

- (a) clause 2 provided that each Port Commitment Deed would operate for a term of 50 years;
- (b) clause 3 required the State to pay compensation to Botany Operator and Kembla Operator respectively if the following conditions were satisfied for two consecutive financial years:
 - i. at least one of Port Botany and Port Kembla is not at "full capacity" (as defined) in relation to the import and export of containers;
 - ii. the volume of containers imported or exported through Port of Newcastle exceeds a threshold of 30,000 TEU per annum (plus natural growth) (**Threshold**); and
 - iii. Botany Operator (as trustee for Port Botany Unit Trust) or Kembla Operator (as trustee for Port Kembla Unit Trust) (as the case may be)

demonstrates to the reasonable satisfaction of the State that the container traffic through Port of Newcastle in excess of the Threshold has caused a reduction in containers imported or exported through Port Botany or Port Kembla (as applicable) (**Compensation Provisions**);

(c) clause 6(b) provided that Botany Operator or Kembla Operator could not make a claim under the Compensation Provisions if they, or an associated corporation, trust or person within the meaning of clause 1.1 of each of the Port Botany PCD and Port Kembla PCD:

- i. developed or commenced development of container handling capacity at Port of Newcastle;
- ii. operated, managed or leased the whole or any material part of Port of Newcastle; or
- iii. operated any material container handling capacity at Port of Newcastle.

33. 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 applicable) on port users multiplied by the volume of container traffic through Port of Newcastle that exceeds the Threshold (measured in TEU).

34. Since 31 May 2013, the arrangements alleged in paragraphs 28(b) and 29 and 31 to 33 have continued to be in place.

D. PRIVATISATION OF PORT OF NEWCASTLE

35. On 5 November 2013, the State announced that it would proceed with a long-term lease of Port of Newcastle.

Particulars

The announcement was in writing in a media release issued by the Honourable Mike Baird MP, NSW Treasurer, and the Honourable Duncan Gray MLC, Minister for Roads and Ports, dated 5 November 2013, titled “Green light for Newcastle makeover – NSW government to proceed with long-term lease of Newcastle port”.

36. On about 18 November 2013, the State invited expressions of interest for leases of the land and assets of Port of Newcastle.

37. In about December 2013, the State communicated to potential bidders for the land and assets of Port of Newcastle that the financial obligations of the State under the Port Botany and Port Kembla PCDs would be passed to the successful bidder for Port of Newcastle.

Particulars

The communication was in writing and contained on pages 172 and 173 of the document titled “Port of Newcastle Information Memorandum” provided by the State (through its advisors, Morgan Stanley) to potential bidders for Port of Newcastle in about December 2013. The Information Memorandum was provided to potential bidders by way of a data room to which potential bidders were given access.

MDC does not presently possess a copy of the document alleged which it believes is in the possession of the State.

38. On 30 April 2014, the State announced that it had agreed to lease Port of Newcastle to a consortium comprising Hastings Fund Management and China Merchants (together, **Port of Newcastle Consortium**).

Particulars

The announcement was in writing in a media release issued by the Honourable Mike Baird MP, Premier of NSW, dated 30 April 2014, titled “Transforming Newcastle: port lease secures funds for revitalisation”.

39. On about 30 May 2014, the State and relevant State Port Corporations entered into transaction effecting the privatisation of Port of Newcastle in favour of Port of Newcastle Consortium.

Particulars

The transactions included:

- (i) an agreement titled “Sale and Purchase Agreement” which was entered into by the NSW Treasurer on behalf of the State, NPC and Port of Newcastle Investments Pty Ltd (**PNI**) which transferred ownership of the shares in Port of Newcastle Operations Pty Ltd (**PON Operations**) and the Port of Newcastle Unit Trust to PNI;
- (ii) a 98 year lease of the port land, buildings and improvements between Newcastle Lessor and Port of Newcastle Investments (Property) Pty Ltd (**PNIP**) as trustee for Port of Newcastle Investments (Property) Trust; and
- (iii) a sublease between PNIP as trustee for Port of Newcastle Investments (Property) Trust and PON Operations as trustee for Port of Newcastle Unit Trust, which granted PON Operations use of the port land, buildings and improvements.

MDC does not presently possess copies of the documents alleged which it believes are in the possession of the State.

40. On 30 May 2014, the State entered into a deed (the **Newcastle Deed**) with, amongst others, PON Operations.

Particulars

The deed was a written document titled "Port Commitment Deed – Port of Newcastle", entered into by the NSW Treasurer on behalf of the State, PON Operations as trustee for Port of Newcastle Unit Trust, PNIP as trustee for Port of Newcastle Investments (Property) Trust and PNI.

MDC does not presently possess a copy of the document alleged which it believes is in the possession of the State.

41. Clause 3 of the Newcastle Deed required PON Operations to reimburse the State for any payments the State was required to make to Botany Operator or Kembla Operator under the Compensation Provisions.
42. Since 30 May 2014, the arrangements alleged in paragraphs 39 to 41 have continued to be in place.

E. THE RELEVANT MARKET

43. At all material times, when containerised cargo was shipped into or from a port in NSW:
- (a) shipping lines transported the containerised cargo by sea to or from the port;
 - (b) stevedores provided services at the port such as loading and unloading the containerised cargo onto or from ships, trains or trucks and moving containerised cargo within the port;
 - (c) land transport operators transported the containerised cargo to or from the port by rail or road
- (together, **Container Services**).
44. The demand for each of the Container Services referred to in paragraph 43 increased (or decreased) when the demand for each other Container Service increased (or decreased).
45. At all material times there was demand within NSW for the services of:
- (a) making available to shipping lines shipping channels and berths for use by when transporting containerised cargo to or from a port;

- (b) making available to stevedores land and cargo handling facilities at ports for use when loading and unloading containerised cargo, storing containerised cargo and moving containerised cargo within a port;
 - (c) making available to land transport operators land and facilities at ports for use when delivering containerised cargo to and collecting containerised cargo from ports
- (together, **Container Port Services**).

Particulars

The demand was derived from the demand for Container Services, which was in turn derived from the demand for the transport by sea of containerised cargo into and from NSW.

- 46. At all material times, the operators of Port Botany, Port Kembla and Port of Newcastle were suppliers or potential suppliers of Container Port Services to shipping lines, stevedores and land transport operators.
- 47. There is and has at all relevant times been a market for the supply of Container Port Services in NSW (**Relevant Market**).

Particulars

The matters referred to in paragraphs 43 to 46 are repeated.

Further particulars may be provided following the service of the MDC's expert evidence.

- 48. At all material times Container Port Services supplied at the Relevant Ports were generally not substitutable or otherwise competitive with Container Port Services supplied at Port of Melbourne or Port of Brisbane.
- 49. At all relevant times prior to 31 May 2013, the operator of Port Botany faced competitive constraint from the prospect that the operator of Port Kembla and/or Port of Newcastle could materially increase supply of Container Port Services in the Relevant Market, including by the development and use of a Container Terminal at Port Kembla and/or Port of Newcastle.

F. LIKELY EFFECT OF THE COMPENSATION PROVISIONS

- 50. As at 31 May 2013, in the future with either or both of the Compensation Provisions, it was likely that:
 - (a) Botany Operator and/or Kembla Operator would be entitled to receive payments in accordance with the terms of the Compensation Provisions if the conditions identified in paragraph 32(b) were satisfied;

- (b) the State would refuse any proposal for the development of the Mayfield site by MDC (or any other entity) that included a Container Terminal;
- (c) following privatisation of Port of Newcastle, the State would ensure that the lessee of Port of Newcastle would be required to reimburse the State for any liability incurred by the State under either or both of the Compensation Provisions;
- (d) by reason of the matters referred to in paragraphs 50(a) to 50(c):
 - i. a Container Terminal would not be developed at Port of Newcastle; and
 - ii. there would be no material or only a limited increase in:
 - 1. the capacity of Port of Newcastle to handle containerised cargo;
 - 2. the volume of containerised cargo handled at Port of Newcastle;
 - or
 - 3. the efficiency of containerised cargo handling at Port of Newcastle.

51. On 31 May 2013, in the future without either or both of the Compensation Provisions it was likely that:

- (a) Botany Operator and/or Kembla Operator would not be entitled to receive payments in accordance with the terms of the Compensation Provisions;
- (b) the State would approve NPC executing agreements substantively similar to the proposed project agreements, NPC and MDC would subsequently execute the approved agreements and MDC would develop and operate cargo handling facilities at Mayfield (including a Container Terminal) in accordance with the executed agreements;
- (c) in the alternative to paragraph 51(b), following privatisation of Port of Newcastle:
 - i. the lessee of Port of Newcastle would not be required to reimburse the State in accordance with the Compensation Provisions;
 - ii. the lessee of Port of Newcastle and MDC would enter into agreements for the development and operation by MDC of cargo handling facilities at Mayfield (including a Container Terminal); and
 - iii. MDC would develop and operate cargo handling facilities at Mayfield (including a Container Terminal);
- (d) by reason of the matters referred to in paragraphs 51(a) and 51(b), alternatively paragraphs 51(a) and 51(c):

- i. a Container Terminal would be developed at Port of Newcastle; and
- ii. there would be a substantial increase in:
 - 1. the capacity of Port of Newcastle to handle containerised cargo;
 - 2. the volume of containerised cargo handled at Port of Newcastle; and
 - 3. the efficiency of containerised cargo handling at Port of Newcastle.

52. By reason of the matters referred to in paragraphs 50 and 51 above, the Compensation Provisions were likely to have the effect of substantially lessening competition in the Relevant Market.

G. PURPOSE OF THE COMPENSATION PROVISIONS

53. Further or alternatively, the Compensation Provisions had the purpose of substantially lessening competition in the Relevant Market.

Particulars

The Purpose of the Compensation Provisions is to be inferred from the matters referred to in paragraphs 23, 25, 26, 27, 32, 33, 37, 41, 50 and 51 above.

Further particulars may be provided prior to trial.

H. CONTRAVENTIONS

54. In the premises:

(a) Hold Co and Botany Operator each contravened s. 45(2)(a)(ii) of the CCA as in effect on 31 May 2013 by making the Port Botany PCD, containing the Port Botany Compensation Provision, being a provision which had the purpose, or would have or be likely to have the effect, of substantially lessening competition in the Relevant Market; and

(b) Hold Co and Kembla Operator each contravened s. 45(2)(a)(ii) of the CCA as in effect on 31 May 2013 by making the Port Kembla PCD, containing the Port Kembla Compensation Provision, being a provision which had the purpose, or would have or be likely to have the effect, of substantially lessening competition in the Relevant Market.

55. Hold Co, Botany Operator and Kembla Operator have since 31 May 2013 been related bodies corporate and MDC relies on s. 45(4)(b) of the CCA.

I. LOSS OR DAMAGE

56. The contraventions referred to in paragraph 54 caused MDC to suffer loss or damage.

Particulars

- (i) If not for the contraventions referred to in paragraph 54, after 31 May 2013 MDC would have developed and operated cargo handling facilities at the Mayfield site (including a Container Terminal).
- (ii) The amount of MDC's loss or damage is equal to the value of the opportunity to develop and operate cargo handling facilities at Mayfield (including a Container Terminal). Further particulars will be provided following the service of MDC's expert evidence.
- (iii) In the alternative to (i) and (ii):
 - a. if not for the contraventions referred to in paragraph 54, MDC would have had the valuable commercial chance of developing and operating cargo handling facilities at the Mayfield site (including a Container Terminal); and
 - b. the amount of MDC's loss or damage is equal to the value of that commercial chance.

Date: 31 May 2019




Signed by Geoffrey Eric Farnsworth
Lawyer for the Applicant

This pleading was prepared by Martin Scott QC and Andrew Barraclough.

Certificate of lawyer

I Geoff Farnsworth certify to the Court that, in relation to the statement of claim 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: 31 May 2019



Signed by Geoffrey Eric Farnsworth
Lawyer for the Applicant

Schedule

Federal Court of Australia

No. NSD of 2019

District Registry: New South Wales

Division: General

Respondents

Second Respondent: Port Botany Operations Pty Ltd (ACN 161 204 342)

Third Respondent: Port Kembla Operations Pty Ltd (ACN 161 246 582)

Date: 31 May 2019