



ACCC appeals in NSW Ports competition case

27 July 2021

The ACCC has lodged an appeal against the Federal Court’s decision to dismiss the ACCC’s proceedings against NSW Ports Operations Hold Co Pty Ltd and its subsidiaries Port Botany Operations Pty Ltd and Port Kembla Operations Pty Ltd (together, NSW Ports).

On 29 June 2021, the Court found that competition laws did not apply to NSW Ports when it entered into certain agreements, known as the Port Commitment Deeds, because NSW Ports had ‘derivative crown immunity’. The Court also found that compensation provisions in the Port Commitment Deeds did not have an anti-competitive purpose or effect.

“We are appealing from this decision because we consider that the purpose and likely effect of the compensation provisions entered into at the time the State of NSW privatised the Ports of Botany and Kembla was anti-competitive,” ACCC Chair Rod Sims said.

“Agreements entered into when existing State-owned monopoly businesses are being privatised, which seek to maximise profit from the sale by protecting that monopoly from competition in the future, are inherently anti-competitive.”

“We remain concerned that the Port Commitment Deeds will effectively hinder or prevent the development of a competing container terminal at the Port of Newcastle for 50 years. This is a matter of significance for the Australian economy,” Mr Sims said.

The Port Commitment Deeds, which were entered into as part of the privatisation of Port Botany and Port Kembla by the NSW Government in May 2013, for a term of 50 years, oblige the State of NSW to compensate the operators of Port Botany and Port Kembla if container traffic at the Port of Newcastle is above a specified cap.

Another 50-year deed, signed in May 2014 when the Port of Newcastle was privatised, requires the Port of Newcastle to reimburse the State of NSW for any compensation paid to operators of Port Botany and Port Kembla under the Botany and Kembla Port Commitment Deeds. This reimbursement would significantly increase the cost of moving a container at the Port of Newcastle.

The ACCC argued that the Botany and Kembla Port Commitment Deeds had an anti-competitive purpose and likely effect because they were intended, and were likely, to hinder or prevent the development of a competing container terminal at the Port of Newcastle.

“We will argue that the Court made an error in finding that the Port Commitment Deeds didn’t have an anti-competitive purpose, even though the Court found that the purpose of the Deeds was to secure a higher sale price for the State from selling the existing monopoly of Port Botany, and ensure that NSW Ports would retain the full value of that monopoly,” Mr Sims said.

The Court found that the 50-year term of the Port Commitment Deeds was not relevant when assessing whether they have an anti-competitive effect, because the development of a container terminal at the Port of Newcastle was “fanciful” or a “speculative possibility” when the agreements were made.

“The ACCC’s case is that there was always a meaningful possibility that some time over the 50-year period a container terminal would be developed at the Port of Newcastle, if not for the compensation provisions. These provisions in the Port Commitment Deeds increased the barriers to the development of such a terminal, and this is anti-competitive,” Mr Sims said.

The Court also found that, at the time the compensation provisions were agreed, it was speculative whether there would be a future change in State policy to favour the development of a container terminal at the Port of Newcastle, and took this into account in finding that the provisions were not likely to have the effect of substantially lessening competition.

“State governments, and their policies, change regularly and are likely to change during the 50-year term of the Port Commitment Deeds,” Mr Sims said.

“We will submit that there was a meaningful prospect that there would be a change in State policy to favour the development of a container terminal at the Port of Newcastle at some time in the future.”

The ACCC is also appealing from the Court’s decision that the prohibition on agreements with an anti-competitive purpose or effect did not apply to the State of NSW and NSW Ports making the Port Commitment Deeds, on the basis of Crown immunity and derivative Crown immunity.

The ACCC is challenging the Court’s finding that the competition law did not apply because the State was not carrying on a business when it entered into the Port Commitment Deeds, as well as the findings made by the Court that NSW Ports benefited from derivative Crown immunity.

Background

Crown immunity protects state governments from the operation of competition laws when they are not carrying on a business. When this immunity extends to parties that contract with state governments in certain limited circumstances, it is known as ‘derivate crown immunity’.

In [December 2018](#), the ACCC instituted proceedings against NSW Ports. In 2019, NSW Ports made a cross claim against the State of New South Wales and the Port of Newcastle entities, joining them to the ACCC’s proceedings.

NSW Ports operates Port Botany and Port Kembla under 99-year leases from the State of NSW.

The compensation to be paid by the State of New South Wales under the Port Commitment Deeds to the operators of Port Botany and Port Kembla is equivalent to the wharfage fee the port operators would receive if they handled the containers.

Container traffic at the Port of Newcastle has not yet exceeded the specified cap, and therefore to date no payments have been made by the State of New South Wales under the 2013 Port Commitment Deeds.

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