

**Submission to IPART from Greg Cameron
Port of Newcastle (Extinguishment of Liability) Act 2022
June 19 2023**

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1. Purpose of submission

IPART's brief is: "Under the "Port of Newcastle (Extinguishment of Liability) Act 2022", IPART is required to determine the value of a one-off compensation payment that can be made by the operator of the Port of Newcastle to the State."

This submission concerns the validity of the "Port of Newcastle (Extinguishment of Liability) Act 2022" (Act).

The Act is based on leasing arrangements for the Port of Newcastle, which are based on leasing arrangements for Port Botany and Port Kembla. These ports were leased to the private sector under the "Ports Assets (Authorised Transactions) Act 2012" (PAAT Act).

For the reasons given in this submission, the leasing arrangements for Port Botany, Port Kembla and the Port of Newcastle are unlawful under the PAAT Act.

The Act is invalid because it is based on unlawful leasing arrangements.

2. Leasing arrangements unlawful

Parliament intentionally did not include the Port of Newcastle in the PAAT Act when Port Botany and Port Kembla were leased to NSW Ports Pty Ltd (NSWP) on May 31 2013. The then Treasurer advised Parliament that "the government has no plans for the transfer of the Port of Newcastle". However, the Treasurer committed the State, under section 6 of the PAAT Act, to leasing the Port of Newcastle to the private sector in confidential transaction deeds for the Port Botany and Port Kembla leases.

Section 6 of the PAAT Act was not applicable to the Port of Newcastle as at May 31 2013. Section 6 is: "The Treasurer has and may exercise all such functions as are necessary or convenient for the purposes of an authorised transaction."

The purpose of leasing the Port of Newcastle to the private sector was to recover the cost of paying NSWP for containers handled at the Port of Newcastle until 2063. It was agreed there would be no payment if NSWP developed a container terminal at the Port of Newcastle, or leased the port, or any material part of it.

The Treasurer and NSW further agreed that Mayfield Development Corporation Pty Ltd (MDC) would be required to reimburse the State for the cost of paying NSW. When Newcastle Port Corporation (NPC), a statutory State-owned corporation, did not enter a contract with MDC for developing the Port of Newcastle container terminal site, the Treasurer announced a decision, on November 5 2013, to lease the Port of Newcastle to the private sector.

The Port of Newcastle was leased to Port of Newcastle Investments Pty Ltd (PON) on May 30 2014 in compliance with the unlawful commitments made to NSW on May 31 2013.

Parliament did not authorise the Treasurer under section 6 of the PAAT Act to lease the Port of Newcastle to the private sector for the purpose of implementing unlawful commitments made to NSW on May 31 2013.

3. Implementation by force

The “Port of Newcastle (Extinguishment of Liability) Act 2022” might be implemented by the Treasurer deciding to “force a commercial deal between the ports”, as disclosed to Parliament on November 10 2022.

LEGISLATIVE COUNCIL 10 NOVEMBER 2022 PORT OF NEWCASTLE (EXTINGUISHMENT OF LIABILITY) Bill 2022

The Hon. JOHN GRAHAM (17:18): ... I am happy that the bill has come before the House in the final days of the 12-year parliamentary term of this Government. The Opposition will advocate and has advocated over recent weeks that there is a better way to do this, and we will refer to that debate. We believe that a better way to facilitate the arrangement is to force a commercial deal between the ports and protect taxpayers' interests. I thank the shadow Treasurer for carefully advocating a view about that and for talking to the boards, his colleagues and a range of parties about a way to do it. The Opposition believes there is some risk to the State's taxpayers in the option that the Government has chosen. Having said that, we will not stand in the way of the bill. We want it to go through the Parliament, and we want to see a container terminal in Newcastle.

A commercial deal cannot be forced in respect of unlawful leasing arrangements.

4. Port of Newcastle not included in PAAT Act

The PAAT Act commenced on November 22 2012. The PAAT Act authorised the Treasurer to lease Port Botany, Port Kembla, and some minor assets, to the private sector, but not the Port of Newcastle.

The Port of Newcastle was intentionally not included in the PAAT Act. The Treasurer also specifically advised Parliament that the government had no plans to lease the Port of Newcastle to the private sector.

LEGISLATIVE ASSEMBLY 17 OCTOBER 2012 PORTS ASSETS (AUTHORISED TRANSACTIONS) BILL 2012

Bill introduced on motion by Mr Mike Baird, read a first time and printed

Second Reading Mr MIKE BAIRD (Manly—Treasurer, and Minister for Industrial Relations) [11.38 a.m.]: I move:

That this bill be now read a second time.

The Government is pleased to introduce the Ports Assets (Authorised Transactions) Bill 2012 to authorise the lease of Port Botany and Port Kembla to the private sector. The bill will enable the long-term lease of these ports and associated port land for a term of no greater than 99 years. The bill also allows for the lease of other port assets, including the Cooks River and Enfield logistics terminals, with some industrial land at Enfield to be sold to the private sector, but it does not include the ports of Yamba or Eden, Sydney Harbour wharves and cruise functions, the Port Botany landslide improvement strategy functions and a range of other maritime roles including the Harbour Master, sea pilots and emergency response obligations and, obviously, the Port of Newcastle.

Mr CLAYTON BARR (Cessnock) [6.25 p.m.]: I oppose the Ports Assets (Authorised Transactions) Bill 2012 as do my colleagues on this side of the Chamber ... I conclude by asking the Treasurer to give the people of the Hunter an assurance that in 2013 we will not see the Ports Assets (Authorised Transactions) Bill 2012 amended to add the Port of Newcastle.

Mr MIKE BAIRD (Manly—Treasurer, and Minister for Industrial Relations) [9.36 p.m.], in reply: I thank the members for Heffron, Maroubra, Cessnock, Wollongong, Lake Macquarie, Keira, Balmain, Barwon, Drummoyn, Penrith and Wakehurst for their contributions to debate on the Ports Assets (Authorised Transactions) Bill 2012 ... In response to a question raised by the member for Cessnock, I advise the House that the Government has no plans for the transfer of the Port of Newcastle.

Parliament did not authorise the Treasurer under the PAAT Act to make commitments for leasing the Port of Newcastle to the private sector, for any purpose, to bidders for the Port Botany and Port Kembla leases in 2013. However, bidders were promised in March 2013 that the State would pay the lessee of Port Botany and Port Kembla for containers handled at the Port of Newcastle and this obligation would be passed to a lessee of the Port of Newcastle.

Bidders were promised there would be no payment if the lessee of Port Botany and Port Kembla developed a container terminal at the Port of Newcastle, or leased the port, or any material part of it. The Treasurer's promises to bidders were not disclosed to the public and Parliament.

5. Section 6 of PAAT Act

Section 6 of the PAAT Act is: "The Treasurer has and may exercise all such functions as are necessary or convenient for the purposes of an authorised transaction."

The Federal Court said in *ACCC V NSW Ports* on June 29 2021 that section 6 provided the Treasurer with "a specific statutory capacity to effect the authorised transactions". The Court said:

376. The real distinguishing features of the present case when compared to *Baxter* include, first and foremost, the fact that the Treasurer's effecting of the authorised transactions was specifically enabled by the provisions of the PAAT Act. This is not some general amorphous "right" or "freedom" of the executive government to enter into contracts of supply. We are dealing with a specific statutory capacity of the Treasurer to effect the authorised transactions, being the transfer of identified port assets in which the State had proprietary rights of ownership, as necessary or convenient and without limitation.

The “authorised transactions” under the PAAT Act as at May 31 2013 specifically did not include the Port of Newcastle. Section 6 of the PAAT Act was not applicable to the Port of Newcastle. The Treasurer had no statutory capacity to make commitments for leasing the Port of Newcastle to the private sector on May 31 2013.

Section 6 was applicable to the Port of Newcastle when the PAAT Act was amended on June 26 2013, to include the Port of Newcastle, subject to a scoping study. However, Parliament was still unaware of the commitments made to NSWP on May 31 2013.

The amended PAAT Act did not retrospectively authorise the commitments for the Port of Newcastle made to NSWP on May 31 2013.

Had the commitments been disclosed to the public and Parliament, the writer would have objected to them.

The commitments were exposed by the Newcastle Herald on July 29 2016.

6. Commitments undisclosed and denied

The wording of section 6 enabled the executive branch to avoid disclosing the commitments to the public and Parliament.

More than 100 Parliamentary “Questions on Notice” were asked by July 2016. The commitments were acknowledged after they were exposed by the Newcastle Herald on July 29 2016. An additional 200 Parliamentary “Questions on Notice” were asked after July 2016 seeking more information.

The executive branch of any Australian government wanting to make legally binding commitments without the public or Parliament knowing about them, can do so by including wording similar to section 6 in legislation introduced into Parliament.

7. Exemption from Competition and Consumer Act 2010

The Federal Court said in *ACCC V NSW Ports* on June 29 2021:

402. The scheme of the PAAT Act thus enables the Treasurer to do what is required to be done for the purposes of an authorised transaction. On this basis, the legislative intention of the NSW Parliament in enacting the PAAT Act may be discerned. The NSW Parliament intended that the statutory rights vested in the Treasurer by the PAAT Act included the Treasurer, for the purposes of an authorised transaction, **requiring** [Court emphasis] the other party to the transaction to engage in conduct that would otherwise contravene the CCA.

The authorised transactions under the PAAT Act as at May 31 2013 did not include the Port of Newcastle. Section 6 of the PAAT Act did not authorise the Treasurer on May 31 2013 to make commitments for the Port of Newcastle that would otherwise contravene the “Competition and Consumer Act 2010” (CCA).

The State was not exempt from the CCA in respect of the Port of Newcastle as at May 31 2013.

8. Bidders’ valuation of leases

NSW Treasury set retention values for the Port Botany and Port Kembla assets in 2012. Parliament was advised by the Treasurer on October 17 2012 that the ports would not be leased to the private sector unless the lease values exceeded the retention values. The retention values have not been publicly disclosed.

LEGISLATIVE ASSEMBLY 17 OCTOBER 2012
PORTS ASSETS (AUTHORISED TRANSACTIONS) BILL 2012

Mr MIKE BAIRD (Manly—Treasurer, and Minister for Industrial Relations) [9.36 p.m.] In response to the points raised by the member for Heffron I advise the House that the bill is designed to maximise the proceeds from the sale and exceed the retention values set for the assets. I say to the House— and I will say this every day before the transaction—that we will not necessarily proceed with this transaction. We will only proceed if we exceed the retention values for the assets.

Bidders were preparing their bids for the Port Botany and Port Kembla leases when Parliament was debating the "Ports Assets (Authorised Transactions) Bill 2012". Seven bids were received in December 2012, after the PAAT Act commenced on November 22 2012.

Three bidders were eliminated in December. Another two bidders later withdrew – one in February 2013, the other in April 2013.

The two final bidders in April 2013 were a consortium led by Hastings Funds Management Pty Ltd (Hastings) and a consortium led by IFM Investors Pty Ltd (IFM). IFM represented the successful bidder, NSWSP.

The December 2012 bids by Hastings and IFM were indicative and non-binding. The Federal Court described what happened next in its *ACCC V NSW Ports* judgement on June 29 2021:

120. By mid-February 2013 one bidder, referred to as Hobson [the Hastings consortium], wrote to the NSW Treasury with comments on the draft transaction documents, identifying "fundamental" issues. One such issue was compensation if State policy changed over time to favour the Port of Newcastle as the location of the second NSW container terminal. Treasury considered this showed Hobson was very risk averse and noted that Treasury "could be aggressive and simply state that they should have pointed this out in their indicative bid as we would not have shortlisted them. Ask them why they misled us in their indicative bid?" At a meeting with Hobson on 22 February 2013 Hobson again raised the issue. The Treasury transaction team subsequently identified Hobson as "a significant way from the State's risk position", "alone on a number of issues", and "the least attractive of the Bidders". Treasury recognised however that a decision would have to be made about the comfort that might be given to bidders around the issue of development of a container terminal at Newcastle, albeit that "the Government's policy is that any container terminal at Newcastle should only be developed once Port Botany and Port Kembla are full, and in the meantime only organic growth should be allowed". This was because once the information in respect of NPC's proposal was disclosed "there may be other bidders that request compensation for a Government sponsored container terminal at Newcastle".

121. In a meeting on 28 February 2013 the Steering Committee established within NSW Treasury considered that the ongoing discussions between Government and NPC would need to be disclosed to bidders and that once disclosed other bidders may also seek compensation for a Government sponsored container terminal at Newcastle. It was noted that a competing container terminal at Newcastle would impact the value of the Port Botany and Port Kembla transaction by [REDACTED]. Existing NSW government policy that such a container terminal would only be permitted once Port Botany and Port Kembla were both full was also noted.

131. The Steering Committee within Treasury briefed the Treasurer on 13 March 2013. Under the heading "Change in Law – Newcastle Container Terminals" the briefing note said:

- Bidder seeking protection from State developing a competing container terminal at Newcastle and/or a limitation on competing developments at Newcastle
- Current status of potential Newcastle development not clear; accordingly disclosure requirements also unclear but needs to be addressed
- Once Government disclosure in data room, all Bidders likely to seek protection or to re-price their bids. [I]f the issue is not addressed, re-pricing of bids creates a potentially material impact on transaction proceeds today, even if Newcastle development does not proceed

This bid price impact may well exceed the value to the State of the Newcastle development.

137. Morgan Stanley undertook some quick modelling of the possible amount of compensation that would be payable based on NSC's [Newcastle Stevedores Consortium Pty Ltd] previous proposal for a container terminal at Newcastle.

This resulted in a present value of \$44.5 million compensation, which was said to be "minimal (even without further mitigants), and well below the amount by which Bidders would be discounting their Botany/Kembla bids". This was sent to Treasury on 15 March 2013.

241. On 16 April 2020 PON considered the success fees that should be paid to its employees, including Mr Carmody, if certain results were achieved including the removal of the Newcastle PCD. A base case outcome recorded that:

PCD is removed by government with a fair payment/contribution from PON (reflecting the low probability ascribed to container terminal operations buy [sic] bidders in 2014).

END OF TRANSCRIPT

Hastings and IFM were promised that the State would pay the lessee of Port Botany and Port Kembla for containers handled at the Port of Newcastle and that the Port of Newcastle would be leased to the private sector for the purpose of passing the State's financial obligation to the Port of Newcastle lessee.

Hastings and IFM agreed with the Treasurer that the State would not pay the Port Botany and Port Kembla lessee if that lessee developed a container terminal at the Port of Newcastle, or leased the port, or any material part of it.

IFM made a winning bid of \$5.07 billion for the Port Botany and Port Kembla leases on April 5 2013. Hastings' losing bid was \$14 million below the IFM bid.

The differences in the amounts of the Hastings' and IFM bids between December 2012 and their final bids in April 2013, were their respective valuations of the amount payable by the State for containers handled at the Port of Newcastle until 2063.

Hastings was the investment manager for Brisbane-based “The Infrastructure Fund” (TIF) until 2017. Acting for TIF, Hastings was the lead partner in the PON consortium that was the successful bidder for the Port of Newcastle lease on May 30 2014. PON remains jointly owned by TIF and China Merchants.

A reasonable person would conclude that Hastings would have decreased its bid for the Port of Newcastle lease in May 2014 by at least the amount that it increased its bid for the Port Botany and Port Kembla leases in May 2013.

In the interests of transparency, the Treasurer, the Hon Daniel Mookhey MLC, can disclose the December 2012 bids by Hastings and IFM together with the retention values Treasury set for the Port Botany and Port Kembla assets in 2012.

9. Decision to lease Port of Newcastle

In the Budget Speech to Parliament delivered on June 18 2013, the then Treasurer announced a decision to lease the Port of Newcastle to the private sector, subject to a scoping study:

Today I can announce the Government intends to proceed to a long-term lease of the Port of Newcastle, the largest coal port in the world, subject to a scoping study. The success of Port Botany and Port Kembla dictates that we act now.

The Treasurer further informed Parliament about a scoping study on June 19 2013:

LEGISLATIVE ASSEMBLY 19 June 2013 PORTS ASSETS (AUTHORISED TRANSACTIONS) AMENDMENT BILL 2013

Mr MIKE BAIRD (Manly—Treasurer, and Minister for Industrial Relations) ... In response to issues raised by members ... as to why no scoping study has been undertaken, as I detailed earlier in my second reading speech, a scoping study will be undertaken ... The results of the scoping study will come back to the Government with all those issues revealed and detailed, and the Government will make a final decision. I reiterate that this transaction is premised on existing legislation and provides the capacity for it to be extended to Newcastle ... The member for Cessnock ran through his own mathematics but I can assure him that the Government has nothing to hide, as he saw in relation to Port Botany and Port Kembla.

In answer to a “Question Without Notice” in the Legislative Council on October 17 2013, the Minister for Roads and Ports said, “we do not envisage that any compensation [for NSW] will need to be put in place”. The Minister did not disclose to Parliament that provision for compensating NSW was already in place. The Minister did not disclose the Treasurer’s commitment to NSW on May 31 2013 to pay NSW for containers handled at the Port of Newcastle and to pass this obligation to a lessee of the Port of Newcastle.

In a media release on October 28 2013, the Treasurer announced that no decision had been made to lease the Port of Newcastle to the private sector:

While we are awaiting the scoping study on the proposed long-term lease of Newcastle Port and no decision has been made, Mr Whitlam’s experience in steering the Port Kembla and Sydney Ports Boards through a successful transaction process will prove to be incredibly valuable, should we proceed.

... Mr Baird reiterated that the scoping study for the proposed port transaction remains on track, with the NSW Government expecting to make a decision by the end of the year.

The public and Parliament were still unaware on October 28 2013 of the Treasurer's commitment to lease the Port of Newcastle to the private sector made to NSW on May 31 2013. This included the agreement with NSW that there would be no payment for containers handled at the Port of Newcastle if NSW developed a container terminal at the Port of Newcastle, or leased the port, or a material part of it.

In the Federal Court judgement *ACCC V NSW Ports* on June 29 2021, the Court said:

1012. The submissions of the State to the effect that no decision was made to privatise the Port of Newcastle until November 2013 assumes that the decision was made immediately before the public announcement of the privatisation. This is incorrect. It ignores the negotiations between NPC and NSC/MDC which the State permitted to run their course, and the fact that in June 2013 the State announced the long-term lease of the Port of Newcastle subject to a scoping study. As I have said, the NSW government would not have made such an announcement unless it intended to privatise the Port of Newcastle and was confident that the scoping study would support privatisation.

The Treasurer made a commitment to NSW on May 31 2013 to "privatise the Port of Newcastle", which was not disclosed to the public and Parliament. The Treasurer was not authorised under section 6 of the PAAT Act to make this commitment. The commitment was unlawful under the PAAT Act. The commitment was not retrospectively authorised when the PAAT Act was amended on June 26 2013 to include the Port of Newcastle, because the commitment remained undisclosed to the public and Parliament.

10. Negotiation with Mayfield Development Corporation

Mayfield Development Corporation Pty Ltd (MDC) was formed on December 14 2011 by Newcastle Stevedores Consortium Pty Ltd (NSC) to develop the Port of Newcastle container terminal site in expectation of NSC concluding a contract with Newcastle Port Corporation (NPC), a statutory State-owned corporation.

NPC had obtained approval in 2009 from the then NSW Labor government to develop a container terminal at the Port of Newcastle with minimum capacity in excess of one million TEUs a year. NPC called for "detailed proposals" in November 2009 and selected NSC as its "preferred proponent" on May 5 2010.

In the *ACCC V NSW Ports* judgement on June 29 2021, the Federal Court said:

256. The ACCC contended that there were 10 key matters of fact, nine of which were principally founded on the documentary evidence (the tenth also depending on the evidence of witnesses which is dealt with separately). It is convenient to record my response to the ACCC's contentions about the 10 key contentions. The contentions are identified below in italics.

262 Second, in at least the period from 2010 to 2013, a private sector consortium was interested in developing a container terminal at the Port of Newcastle.

263 NSC/MDC was selected by NPC as the preferred developer of a container terminal at the Port of Newcastle by May 2010. NPC was permitted to negotiate with NSC/MDC in June 2011 on the basis that it could not bind the State and that State approval to any commercial deal would be required. By October 2011 NPC and NSC/MDC agreed a term sheet and draft contracts for the proposed development. When NSC/MDC sought approval to enter into the agreements the State informed it that development of a container terminal at the Port of Newcastle would be considered in the context of an overarching strategy for port

infrastructure in NSW. As a result, the State would not agree to the development of a container terminal at Port of Newcastle. It would agree only to the development of a multi-use cargo facility. NPC was permitted to negotiate with NSC/MDC on this basis only. By that time, in July 2013, the State was also contemplating the privatisation of the Port of Newcastle. Negotiations between NPC and NSC/MDC continued on the limited basis approved by the State. By November 2013 the Treasurer had directed NPC to cease negotiations altogether.

A commitment to privatise the Port of Newcastle was made to NSW on May 31 2013. The Federal Court might not have fully considered events that occurred between May 2010 and March 2011.

These events were investigated by the "Independent Commission Against Corruption" (ICAC) in May and August 2014. In its report dated August 2016 - "Investigation into NSW Liberal Party electoral funding for the 2011 State election campaign and other matters" - the ICAC said:

ICAC EXTRACT STARTS

Chapter 6: The Newcastle Port Corporation plan for Mayfield

Over time, the NPC developed a "concept plan" for the Mayfield site. The site was to be divided into five "precincts", each with a different purpose. Only one of the precincts was specifically dedicated as a container terminal; although, as the evidence explained, that was the principal purpose for the whole of the site. For this reason, it is convenient to describe the NPC proposal as one for a container terminal.

The reasons for the NPC's decision were explained by Mr Webb [NPC CEO] and included general economic considerations, local issues and features pertinent to the particular site. The Port of Newcastle did not have a container terminal. The development of a container terminal was consistent with the 2003 "Ports Growth Plan", which provided for Newcastle to supplement Port Botany as Port Botany approached its capacity. The NPC had actually entered into a statement of corporate intent signed by the NPC and its shareholder ministers that incorporated this proposal. The location of a container terminal in Newcastle was strategic, as there was no container terminal between Sydney and Brisbane, and existing rail and road facilities meant that a Newcastle-based container terminal was in a desirable position for market purposes. The Mayfield site allowed access for container ships up to 280 metres long. A container terminal would permit an upgrade of the outdated bulk handling facilities of the Port of Newcastle and allow for more grain exports, an area in which the Port of Newcastle was lagging.

There was a question as to whether there was sufficient market demand to drive the need for a container terminal at Newcastle. The NPC had tested this and found that private industry was willing to take on the risk of the development of a container terminal. The NPC plan for a container terminal was designed to minimise the financial risk to the NSW Government. The plan was to let private industry take the site under a long-term lease and to meet construction and administration costs. By these means, 90% of any financial risk was passed to private industry.

The NPC had considered whether or not the Mayfield site should be developed as a coal terminal, but had arrived at the decision that it should not. Among the reasons for the decision were the NPC's knowledge of the Capacity Framework Agreement and the inclusion in that agreement of a plan to build T4. The construction of T4 made it unlikely that there would be sufficient market demand

for the creation of a fifth coal terminal. Another reason was that the NPC had taken legal advice that suggested that, should the Mayfield site be used for the development of a coal terminal, it could jeopardise the Capacity Framework Agreement. Preservation of the Capacity Framework Agreement was important. The Capacity Framework Agreement was regarded as vital. One witness described it as the major achievement of the NSW Labor Government. The legal advice was that, if another coal terminal came on line, it would undermine the rationale behind the Capacity Framework Agreement so that the ACCC would withdraw its support. There was also a concern that, if a fifth coal terminal was approved, other industry players would withdraw from the Capacity Framework Agreement.

To make it clear, when NPC planned a container terminal it was originally allowing for a limited amount of coal to be handled at the Mayfield site. Over time, that altered, so that by mid-2010 it was decided that only "boutique" coal, destined for export to Turkey, would be handled through the site. This amounted to half a million tonnes per annum, which, in the context of the Port of Newcastle, was only a very small amount. Moreover, this coal would not be in bulk, and would be moved in containers.

By late 2010, the NPC had progressed a long way with its proposal for a container terminal on the Mayfield site. The NPC had tested the market by asking for expressions of interest and studying responses. The NPC selected a consortium called the Newcastle Stevedoring Consortium (NSC). The NSC was comprised of Anglo Ports and Grup TCB, large and experienced international groups within the industry, and a local company, Newcastle Stevedores Pty Ltd.

As a statutory state-owned corporation, the NPC was obliged to comply with the NSW Government's "Working with Government Guidelines". Mr Webb explained that, in accordance with the guidelines, the NPC had conducted "direct negotiations" with the NSC. By 2010, the direct negotiations had been completed and the process had moved to the point where the NSC had been identified as the preferred proponent. From this point, the NPC could enter "commercial negotiations" with the NSC with a view to concluding a final contract. This required ministerial approval and the NPC was seeking that permission from Mr Roozendaal.

At the same time that the NPC was seeking to progress its arrangements, Mr Roozendaal was receiving an alternative proposal for the Mayfield site.

Chapter 8: Mr Tripodi and Mr Roozendaal become involved.

Before going further, it is necessary to understand what it was that Buldev sought to achieve in the short, middle and long term. In the short term, Buldev wanted to prevent an announcement by the NPC that it was heading toward a contract with the NSC, its preferred proponent, because that had certain legal consequences that could have damaged Buldev's prospects of having its coal terminal proposal approved. So, in the short term, Buldev needed to prevent Mr Roozendaal from granting permission to the NPC to enter commercial negotiations with the NSC, as such negotiations could lead to a final contract for a container terminal on the Mayfield site. In the middle term, Buldev wanted the viability of its proposal to be preserved. The best means of preserving the position was by the creation of an easement in favour of the Intertrade site, across the Mayfield site and connecting the Intertrade site with the harbour front. In the long term, Buldev wanted to become the preferred proponent itself in relation to the development of the Mayfield site and to enter negotiations with the government for the construction of the fifth coal terminal.

The earliest reported involvement by Mr Tripodi with Buildev and the coal-loader proposal emerges from the evidence of Mr Roozendaal. Mr Roozendaal told the Commission that "sometime between September and October 2010", Mr Tripodi told him that he had been meeting with Buildev. He spoke about the coal-loader proposal. Mr Roozendaal told the Commission that he spoke with Mr Tripodi about the project on a number of occasions and thought that Mr Tripodi was communicating to people at Buildev what he was told by Mr Roozendaal. Mr Roozendaal regarded Mr Tripodi as "advocating for the Buildev proposal".

The second record of an involvement by Mr Tripodi is in Mr Sharpe's note written on 31 October 2010. Under the heading "Strategy", Mr Sharpe noted "Need to brief Joe and Eric so they can take charge of the situation". That note suggests that, as at 31 October 2010, Mr Tripodi and Mr Roozendaal were not only involved, but – at least in the perception of Mr Sharpe – inclined to assist Buildev and its proposal.

It is evident that soon after he became involved, Mr Tripodi obtained the assistance of his friend and former political officer, Mr McNamara. In his submission to the Commission, Mr Tripodi denies it was he who brought in Mr McNamara to assist in the Buildev proposal. The Commission does not accept that submission. Mr McNamara, whose evidence was generally reliable, recounted how he barely knew anyone at Buildev until 2 November 2010 when Mr Tripodi contacted him and asked him to come to his office. When he went to the office, Mr Williams and Mr Sharpe were present. There was a discussion about the fifth coal terminal proposal. Emails exchanged at the time show that Mr McNamara was providing some general advice to Buildev on how to advance its proposal. Among the matters raised by Mr McNamara were "probity issues" because, as Mr McNamara put it, "PWCS and NCIG were never given the opportunity to bid for the [Intertrade] site for the purpose of a coal terminal". A feature of that meeting, on the evidence of Mr McNamara, was that Mr Tripodi and others already knew that Mr McNamara had an appointment to see Mr Roozendaal and Mr Webb on 8 November 2010 – information they were likely to have obtained from Mr Roozendaal. The meeting on 8 November 2010 took place at Mr Roozendaal's office. As well as Mr Roozendaal, Mr Webb and Mr McNamara, Lisa Carver, a lawyer from the law firm Gilbert + Tobin, and Mr Crosby (Mr Roozendaal's ports adviser) were present. Gilbert + Tobin was the law firm that had acted for the NPC on the Capacity Framework Agreement. During that meeting, Ms Carver provided oral legal advice on the consequences of the Buildev proposal on the Capacity Framework Agreement. The advice was that the Buildev proposal jeopardised the Capacity Framework Agreement. The substance of Ms Carver's advice was, on the instruction of Mr Roozendaal, immediately communicated by Mr McNamara to Mr Tripodi.

The next contact of which there is evidence was on 19 November 2010, when Mr Tripodi flew on the Buildev helicopter to meet Mr Sharpe and Mr Williams in Newcastle. There are notes made by Mr Sharpe of that meeting, titled "Joe notes – 19.11.10" (Figure 3, page 50). Although Mr Sharpe was very evasive as to the nature of the notes, the Commission finds that they can be relied on and used as a reasonably accurate record of the actual exchanges that day.

Several points can be made about the notes and what they disclose about Mr Tripodi's involvement. Mr Sharpe recorded "Gary Webb provided legal opinion from Tobins that argues that ACCC agreement would be compromised" and followed by "Both Joe [Tripodi] / Ian [McNamara] say argument put forward are unfounded and believe ACCC agreement allows what we are planning". The reference to "legal opinion from Tobins" is undoubtedly a reference to the oral advice provided by Ms Carver of Gilbert + Tobin and the reference to the "ACCC

agreement" is a reference to the Capacity Framework Agreement. It is plain that Mr Tripodi was disclosing to Mr Sharpe and Mr Williams the content of what Ms Carver had advised. That was NPC's legal advice, and it had been provided to a minister. The advice was protected by client legal privilege.

The notes also make it plain that Mr Tripodi had been discussing the issues with Mr Roozendaal, and that Mr Roozendaal was onside with Builddev's proposal. For example, Mr Sharpe made a further note: "Eric [Roozendaal] fear is Gary [Webb] may go public with a smear campaign on labour [sic] government that is why we will need libs onside to hose down and say government right on this occasion".

As described above, Builddev's short-term ambition was to prevent the NPC from entering into commercial negotiations with the NSC. The last of Mr Sharpe's notes is "[w]hilst progressing our bid / negotiations we need to slow or derail Anglo". The reference to "Anglo" is a reference to the NSC (Anglo Ports being a key member of the consortium), and the reference to slowing or derailing Anglo is a reference to Builddev's short-term objective. In this respect, the fifth note made by Mr Sharpe is particularly important "Joe - going to get Eric to stop Anglo deal going to board this Thursday". The reference to the "Anglo deal" is a reference to the NSC proposal and the reference to the "board" is a reference to the NPC board, which had a meeting scheduled for the following Thursday, 25 November 2010. In other words, Mr Tripodi had agreed with Mr Sharpe and Mr Williams that he would arrange it with Mr Roozendaal so that Builddev's short-term objective was advanced.

Mr Tripodi told the Commission that he could not "specifically" recall that part of the meeting. Mr Tripodi said, "to the best of my recollection", he did not speak to Mr Roozendaal about this issue. However, there was extensive telephone contact between the mobile telephone services of Mr Tripodi and Mr Roozendaal between the time of Mr Tripodi's meeting with Mr Sharpe and Mr Williams on Friday, 19 November 2010, and the following Monday, 22 November 2010. When Mr Roozendaal was asked whether Mr Tripodi urged him to stop the Anglo deal going to the NPC board, he said "I think so, yes". He told the Commission that Mr Tripodi "raised concerns that it would be inappropriate for the NPC to progress the container terminal proposal while the Builddev proposal was being considered". The Commission is satisfied that Mr Tripodi used his position as a member of Parliament to influence Mr Roozendaal to prevent the deal between the NPC and the NSC for construction of a container terminal from progressing by stopping the NPC from entering into commercial negotiations with the NSC.

On Monday, 22 November 2010, Mr Roozendaal acted consistently with the "Joe" undertaking. He requested Mr Webb to provide him with a copy of the NPC board agenda for the meeting on Thursday, 25 November 2010. The Commission finds that Mr Roozendaal did this to ascertain whether the NPC proposed dealing with the NSC arrangements was going before the NPC board at that meeting (it was). There is then evidence that Mr Roozendaal called Mr Webb into his office for a meeting on Wednesday, 24 November 2010, and instructed him that he did not wish the NPC to deal with the NSC proposal "until Treasury had reviewed the process". The minutes of the meeting of the NPC on 25 November 2010 show that, in accordance with the ministerial direction, the issue was deferred. In that respect, Builddev's short-term objective had been secured.

Mr Roozendaal told the Commission that he felt "it would be premature for NPC to move forward on the issue of the container terminal until I'd had proper time to gather further advice from Treasury on both the container terminal proposal and the Intertrade land proposal".

On 8 December 2010, Dominic Schuster of NSW Treasury attended a meeting with Mr Roozendaal. Mr Roozendaal instructed him to undertake a review and prepare a report on that review. To do so, Mr Roozendaal provided Mr Schuster with materials that had come from Buildev. Mr Schuster was also put in contact with Mr Williams and Mr Sharpe. Given that Christmas was approaching and the Treasury report would take some time to produce, Mr Roozendaal had, in effect, made certain that the NPC could not make an agreement with the NSC in the ongoing short term.

Meanwhile, Mr Roozendaal did something that had the effect of securing Buildev's middle-term objective – preservation of the viability of its coal terminal proposal. Sometime before 7 February 2011, Mr Schuster was asked to prepare a draft letter for Mr Roozendaal granting approval for the NPC to commence formal commercial negotiations with the NSC but subject to a condition. The letter read:

In its negotiations, Newcastle Port Corporation should make provision for an easement across the Mayfield site for a coal conveyor. This will provide the option for the development of a coal loading terminal in the event that the Government made such a decision in the future.

The minutes of the NPC board meeting, held on 8 February 2011, recorded the approval for commencing formal commercial negotiations but noted that:

...in those negotiations, Newcastle Port Corporation should make provision for an easement across the Mayfield site for a coal conveyor. It was understood that the Minister was to make announcement to this effect but would not refer to the easement.

There are three points to be made about the proposal to create an easement. The first point is that it is precisely what Buildev wanted and the Commission finds that, in this respect, Mr Roozendaal was aware that he was doing just as Buildev wanted. The proposal to create such an easement should not be brushed aside as merely a precaution to keep options open; the proposed creation of the easement created a burden on the Mayfield site that could have the effect of restricting its use and its attractiveness for use as a container terminal. It is not clear whether the NSC would have been willing to engage in further commercial negotiations once it became aware that the subject land was to be burdened with such an easement.

The second point to be made arising out of Mr Roozendaal's action is that, in effect, the only party who could take a benefit from the creation of such an easement was Buildev. In substance, the proposed easement created access from the Intertrade site to the waterfront. The only beneficiary of this would be the owner or controller of the Intertrade site – that is, Buildev. Buildev already had the contract with the HDC, which the HDC could not escape without paying Buildev damages. If Buildev wanted to on-sell the project on the Intertrade site, it could do so knowing that the value of the site had been enhanced by the creation of the easement.

The third point that arises from the proposal to create an easement comes from the note made in the NPC minutes that indicated the Minister "would not refer to the easement" when making his announcement. In light of all of the other evidence, the Commission infers that Mr Roozendaal did not wish his actions to come to light lest they identify the benefit that he was conferring on Buildev.

In any event, Mr Roozendaal's permission for the NPC to commence commercial negotiations with the NSC was quickly withdrawn. Sometime before 15 February

2011, Mr Roozendaal instructed that a further letter be sent to the NPC directing it not to commence commercial negotiations. The ostensible reason for this was an announcement made on 8 February 2011 by the minister for planning, Tony Kelly, that the public consultation period in respect of the concept plan for the Mayfield site would be extended. Although Mr Roozendaal was advised that the extension of the consultation period did not affect the commencement of commercial negotiations, he directed Mr Schuster to draft a letter for his signature issuing a further instruction to the NPC, directing it not to commence commercial negotiations. Mr Schuster prepared a draft, which, at the request of Mr Roozendaal, had to be re-done to incorporate the following words: "I am advised by NSW Treasury it is not appropriate for Newcastle Port Corporation to progress commercial discussions until the outcome of this consultation process has been considered by Cabinet". This effectively killed off any chance of advancing the container terminal before the NSW state election on 26 March 2011.

ICAC EXTRACT ENDS

11. Action against NSW Ports

MDC continued negotiating with NPC after the March 26 2011 election.

The Treasurer made a commitment to NSWP on May 31 2013 that MDC would be required to "make the State whole" for any cost the State incurred in paying NSWP "due to the activities of MDC in the Port of Newcastle". MDC would be able to develop a container terminal at the Port of Newcastle by accepting the requirement. On August 6 2013, the Treasurer changed the Term Sheets between MDC and NPC to include the requirement.

MDC informed the Treasurer on October 18 2013 it considered the change in the Term Sheets on August 6 2013 to be illegal under the "Competition and Consumer Act 2010" (CCA).

NPC could not continue negotiating with MDC after the Treasurer announced a decision to lease the Port of Newcastle to the private sector.

The Treasurer announced on October 28 2013 that no decision had been made to lease the Port of Newcastle to the private sector. The Treasurer announced a decision on November 5 2013 to lease the Port of Newcastle to the private sector. The Treasurer terminated the negotiation between NPC and MDC on November 8 2013.

These announcements were possible because the public and Parliament were unaware of the Treasurer's commitments for the Port of Newcastle made to NSWP on May 31 2013.

MDC claimed in the Federal Court on May 31 2019 that NSWP contravened the CCA by agreeing to be paid by MDC.

The Court stayed MDC's action against NSWP until the ACCC's prior action against NSWP was finalised, which occurred on February 23 2023. MDC's action against NSWP resumes in the Federal Court on June 22 2023.

MDC's Federal Court action against NSWP requires MDC to prove that NSWP was not exempt from the CCA and acted anti-competitively.

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