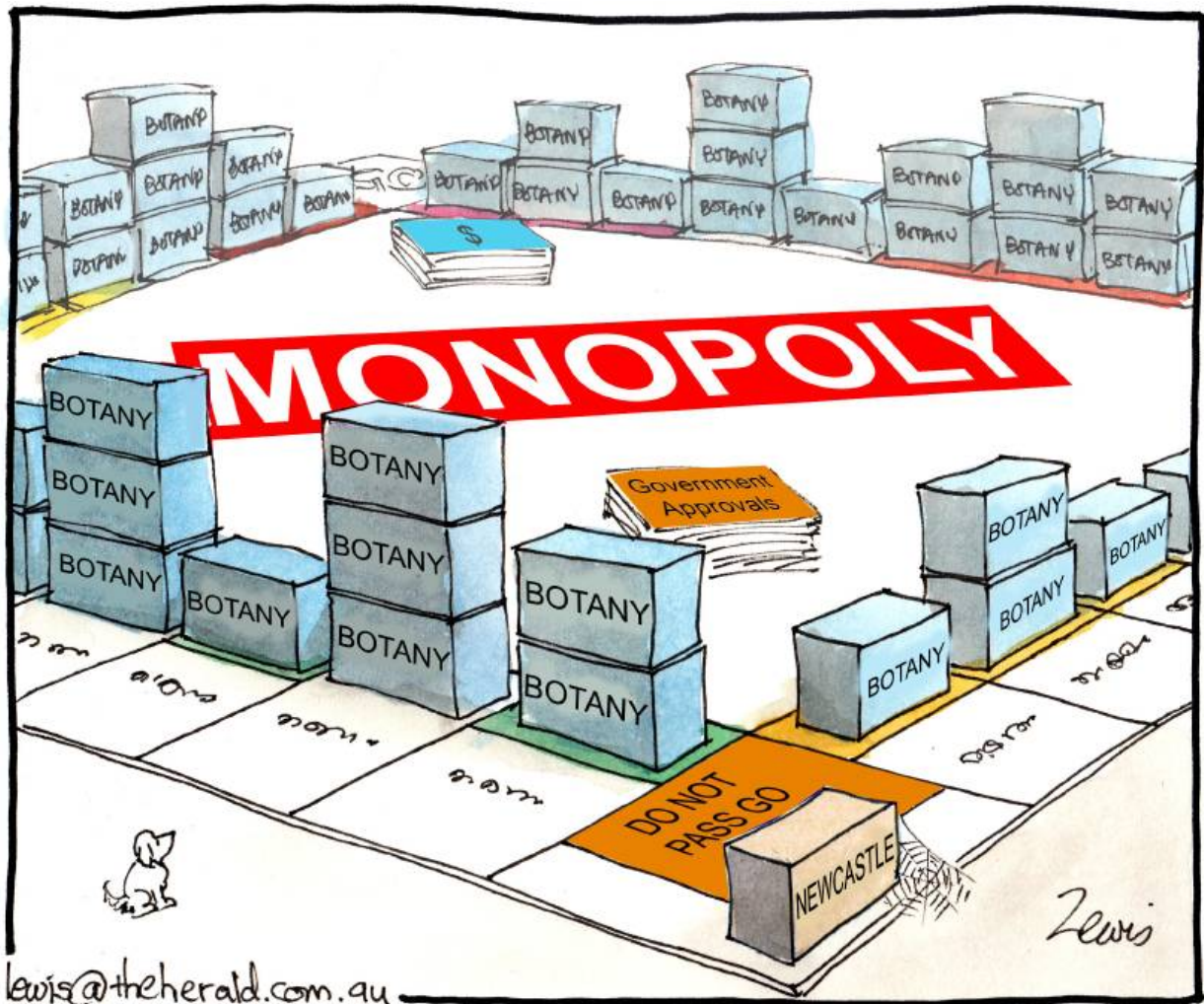


Newcastle Penalty IPART Submission Lynda Newnam 14/7/23*

To: IPART – Ineke Ogilvy and Jono Gawthorne



(Courtesy Newcastle Herald)

Thank you for allowing me to make this submission. I do so as a citizen volunteer who over the past 20 years has sought to understand NSW Freight and Ports Policy. My interest began with the announcement of the Port Botany Expansion in November 2001. Since that time I have participated at the 2004-5 Commission of Inquiry into the Port Botany Expansion, the 2004 NSW Parliament's Inquiry into Ports, IPART's Inquiry into Port Botany Landside, various NSW Transport forums on freight and ports, general forums/inquiries on freight and infrastructure, as well as attending the NSW Upper House when the Port Botany 'Sale' (Enabling Legislation) was passed in November 2012 and more recently both the Lower and Upper Houses to witness the Port of Newcastle Bill passed in November 2022.

In early August 2005 there was a change of leadership at the head of the NSW Government. Bob Carr, the Premier, Andrew Refshauge, Treasurer and Deputy Premier, and Craig Knowles, Minister for Planning resigned from Parliament within about 10 days of each other. They were

replaced with Morris Iemma as Premier, Frank Sartor as Planning Minister and Michael Costa as Treasurer and NSW was declared “open for business”.

In October 2003 the Government’s Ports Growth, announced by Bob Carr, nominated the Port of Newcastle as the next container port in NSW when Port Botany had reached capacity. The Hunter Economic Zone, equivalent to the area between Bondi and Mascot, provided potential warehousing and light industrial capacity. The Ports Growth Plan appeared to align with prevailing sustainability principles i.e. transitioning the Hunter from high carbon emission industries and recognising the limitations of growing a port 9km south of the Sydney CBD, and adjacent Sydney Airport. It would also deliver on an agreement struck when BHP exited.

In May 2005, Commissioner Kevin Cleland handed his report on the Port Botany Expansion to Craig Knowles. On the 13th October 2005 Frank Sartor’s decision to approve the Port Botany Third terminal was released along with the Brereton Report ‘Railing Port Botany Containers’ and Cleland’s Report. The Cleland report had recommended minor expansions of the existing Port terminals, Patrick and P&O/DPW, and against a third terminal. Cleland found that Botany could not be expanded as other ports had been because of its proximity to Sydney Airport and other environmental constraints including limitations of transport corridors, as well as the natural heritage of Botany Bay and amenity value. The Brereton report recommended intermodals – 500,000 TEU capacity for Moorebank and 300,000 for Enfield, as well as others. The Moorebank figure is now at least x3 and Enfield increased to 500,000 regardless of environmental, including human health, impacts. The target of 40% by rail by 2011 was not met – in 2011 it was barely 10% and today around 20%.

It appeared that the new regime had adopted the 4 Cs approach – Coal for Newcastle, Cruise for Sydney, Containers for Botany, Cars for Kembla.

Cruise ambitions along with impacts have played out in Sydney Harbour and Hutchison’s business ally Royal Caribbean have indicated an interest, at least since 2011 (Hawke Inquiry Submission) of a Cruise presence in Botany Bay.

The NSW Government’s appetite for Hunter coal and coal-loaders rather than container terminals, was explained in part at ICAC. I imagine what is recorded is only the ‘tip of the iceberg’.

The Hutchison lease at Port Botany was signed off by Premier Keneally, December 2009. Many years earlier Hutchison had approached the NSW Government about a Third Terminal to complement what they intended at Port Brisbane and Port of Melbourne. They were successful in Brisbane but not Melbourne. Li Ka-shing the head of Hutchisons had previously been part of PPPs with the State Government eg. CCT/LCT.

In 2012 Mike Baird was Treasurer and Duncan Gay was Ports Minister. Richard Wagner from Morgan Stanley, Tim Spencer in NSW Treasury and Brett Himbury were key players in forging

'the deal' that would see Port Botany leased for 99 years in May 2013 to what became NSW Ports. When Duncan Gay spoke at the second reading of the Enabling Bill in November 2012 there was no mention of any penalty against Newcastle. I was in the Gallery with my eldest son, Henry, and there were community representatives from Kembla who were clearly upset that the Port had been included; the announcement came after that of Botany. Greens MLC John Kaye's amendment to keep the public lookout of Molineux Point and a popular fishing structure – the heritage listed Banks Revetment Wall - in public hands was rejected. It appeared that even at this pre-tender stage the terms of the package might be determined. Yet, did the MLCs who voted that day know. I had approached the Shooters and Fishers (before they included Farmers) about the Molineux Amendment, but they voted with the Government. Did Messrs Brown and Borsak know that they were enabling a penalty against Newcastle and what about LNP backbenchers, did they know? Did those MLCs who were opposing the Bill know what it could 'enable'. It was essential to know that Kembla, Enfield and Cook's River Terminal were included, surely any potential barriers to competition would also need to be known.

I didn't know about the Newcastle Penalty until years later. At a logistics forum at University of Sydney I asked the CEO of NSW Ports about it and she said ask the Premier. At that point, the Government had not admitted that it existed. I reflected back to the Upper House debate in November 2012 and thought 'this is democracy – seriously?'

The Port of Newcastle owners knew when they took on the lease that there was a penalty, but this penalty affected a range of stakeholders, not just the asset owners. The people who were fighting to transition the Hunter from coalmines didn't know. The people who were obliged to export their products through Port Botany or Brisbane, they didn't know. How could that be in the 'public interest'?

Last November when I sat in the Legislative Assembly gallery alongside Port of Newcastle staff and watched the passing of Greg Piper's Bill, I reflected on the last 10 years. The impacts of Port Botany operations are well-known, the existing constraints are evident, the impacts of the 'tentacles' are obvious and the public investment to support direct and allied operations and tolerance for negative externalities is extensive.

"Sweating the Asset" was the term quoted to me when I asked why the Port Botany Commission of Inquiry was overruled and it looked as though the same sentiment applied to Hunter coal and Hunter citizens.

Transparency, Accountability, Honesty – as in the 'Truth, Full and Nothing But' - don't appear to be the sort of terms historically associated with Freight and Ports policy. But that doesn't make the situation right and it doesn't mean it shouldn't change.

There are two parts to the compensation journey, and effectively it is now down to establishing an acceptable figure for Port of Newcastle and NSW Ports to agree. NSW Ports

negotiations might include discussions with both Federal and State Governments on Cruise, PBLIS, tolling, Submarines – who would know.

As an ordinary citizen I can only refer to ‘truth points’ and use those to infer the gaps. When I have had the opportunity to question what appear to be key players, I’ve largely drawn blanks. How do we progress to better infrastructure decision-making, let alone ensure democratic principles prevail, if such a lack of public accountability endures?

I note the following on the IPART website:

Although we’re a NSW government agency, we operate independently of the government. When making decisions and recommendations, we focus on:

- *protecting consumers from unreasonable price increases*
- *improving providers’ efficiency and service quality*
- *encouraging competition*
- *protecting the environment*
- *ensuring that regulated service providers remain financially viable.*

My recommendation to IPART is to provide a contextual account of how New South Wales got to this point and add a set of recommendations for Parliament to address the major accountability issues.

*Extension to 19/7/23 was granted by Jono Gawthorne, Principal Analyst

TERMS OF REFERENCE

IPART has been appointed under the *Port of Newcastle (Extinguishment of Liability) Act 2022* (the Act) 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.

Under the Act, this one-off compensation is to be calculated as the amount by which the financial value of the right to operate and lease the assets of the Port of Newcastle for 98 years would have been reduced, in the opinion of a reasonable person at the time the transaction deed was entered into, because of the inclusion of the reimbursement provision in the transaction deed.

If the operator of the Port of Newcastle pays this one-off compensation amount to the State, from that date, they will not be required to reimburse the State for payments made to the operator of Port Botany and Port Kembla under the transaction deeds.

The State and the operator of the Port of Newcastle entered the transaction deed in May 2014. In calculating the one-off compensation payment, IPART can only consider information that would or could have been known in May 2014.

We are seeking submissions from interested parties to help inform our review and assist us in determining the value of the one-off compensation amount that can be paid by the operator of the Port of Newcastle to the State.

You can [make a submission](#) until 30 June 2023.

We value your feedback and look forward to receiving your submission.

All submissions will be disclosed to the State and the operator of the Port of Newcastle

For this review, we are unable to consider confidential submissions. All submissions will be disclosed in full to the State and the operator of the Port of Newcastle. This is the case even if you claim confidentiality over material in your submission. Please consider this before you make a submission to IPART for this review.

Unless you request otherwise, we will publish your name and your submission on our website. This supports our commitment to transparency.

Further information on IPART's submission policy is available here: [IPART submission policy](#).

Background

In 2013 and 2014, the State entered commercial transactions granting long-term leases over the State's port assets to private operators.

The transaction deeds entered in 2013 with the winning bidder for the right to operate the assets of Port Botany and Port Kembla require the State to pay the port operator an amount of money where certain preconditions relating to container traffic at the Port of Newcastle are met.

The transaction deed entered in 2014 with the winning bidder for the right to operate the assets of the Port of Newcastle, requires the operator of the Port of Newcastle to reimburse the State for those payments.

Timeline for the review

IPART was appointed to determine the one-off compensation amount on 2 March 2023. We have 6 months to make a determination, or 9 months if we issue a draft determination to the operator of the Port of Newcastle and the State.