HERBERT SMITH FREEHILLS

SHIPWRECKED IN THE FEDERAL COURT: ACCC SUFFERS COMPREHENSIVE LOSS AGAINST NSW PORTS

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Legal Briefings – By **Liza Carver, Merryn Quayle, Gila Segall and Jennifer Catterson**

The Federal Court has handed down its decision in *Australian Competition and Consumer Commission v NSW Ports Operations Hold Co Pty Ltd* [2021] FCA 720, rejecting the ACCC's case that the NSW State Government's port privatisation process contravened the *Competition and Consumer Act 2010* (**CCA**). Even if there was conduct that might amount to a breach of the CCA, the Court found that those provisions did not apply to the conduct of the State of NSW or the successful bidder, NSW Ports. The State was protected by Crown immunity and NSW Ports was protected by "derivative crown immunity". In any event the Court found no purpose, effect or likely effect of substantially lessening competition. The decision has important implications for how private companies engage with the State in the course of a privatisation. The ACCC has appealed the decision to the Full Federal Court.

Our key takeaways are:

- how the State structures a privatisation is critical to whether immunity is available and its scope;

- the Court applied standard Crown immunity considerations to a novel fact situation. Previously, Crown immunity has not been considered in this type of privatisation structure and it was relevant that the privatisation was effected by a statutory mechanism;

- immunity does not always extend to a private party contracting with the State where the State is immune from the operation of the CCA. The question will always be fact specific;

- the protection granted by derivative crown immunity is limited and precise, and will not extend to collusion between private entities participating in a State bidding process;

- the question of immunity turns on whether a legal right of the State will be divested if the CCA is applied to the private party contracting with the State;

- the question is then one of statutory interpretation: whether the text, purpose and context of the relevant legislation (the PAAT Act, discussed below) and the CCA evinces an intention that the CCA should apply to circumstances where a legal right of the State will be divested by its application.

BACKGROUND FACTS

In 2013, the State of NSW (the **State**), as part of its privatisation of Port Botany and Port Kembla, entered into deeds with NSW Ports (**Port Commitment Deeds**) in which the State agreed, for a period of 50 years, to pay compensation to NSW Ports if container cargo through the Port of Newcastle exceeded 30,000 TEUs[1] per annum and diverted container cargo away from either Port Botany or Port Kembla (**Compensation Provisions**).

The ACCC alleged that the Compensation Provisions, had the purpose, effect or likely effect, of substantially lessening competition.

Almost all container cargo to and from NSW passes through Port Botany. Port Kembla and Port of Newcastle are primarily bulk ports, and handle a small number of containers using existing, non-specialised infrastructure. Since 2001, the Port of Newcastle has held a development approval for a container terminal which could handle up to 350,000 TEUs per year.

Around 2009, due to regional considerations about the surrounding port areas, the Labor government imposed a cap limiting Port Botany's capacity to a maximum of 3.2 million TEUs per year. The limit was well below Port Botany's estimated practical capacity limit of 7 million TEUs per annum, which was not expected to be exhausted until at least 2030. In this context, and indeed from as early as 2006, various State governments were considering the ideal location for development of the next container port, including at Port of Newcastle (with Port Botany estimated to reach its 3.2 million TEUs capacity limit by 2017).

Over time, and as a result of government reviews and shifting policy, Port Kembla became seen as the more logical location for the next container terminal, including because of its proximity to the Moorebank Intermodal Terminal and greater Sydney (most containers were destined for within 40km of Sydney). Following a government review of its ports assets, it became apparent that in order to maximise the efficient use of public and private infrastructure investment, the artificial cap on Port Botany should be removed. This happened in the *Ports Assets (Authorised Transactions) Act 2012* (NSW) (the **PAAT Act**), which was also the primary piece of legislation which effected the privatisation of Port Botany, Port Kembla and Port of Newcastle.

Following the announcement of its intention to privatise Port Botany in 2011, the material before the Court established that the possibility of the development of an additional container terminal at Port Kembla or Port of Newcastle was material to potential bidders and would likely result in entities discounting their bids to account for such risks. In order to maximise the value the State could obtain from the assets, the State proposed the Compensation Provisions to bidders as part of the transaction documents, which the Court held effectively required the successful bidder, NSW Ports, to agree to the Compensation Provisions.

The Federal Court dismissed the ACCC's case against NSW Ports (and all cross-claims) and found the State and NSW Ports had the benefit of Crown immunity and derivative Crown immunity (respectively), and therefore Part IV of the CCA did not (and does not) apply to their conduct making the Compensation Provisions, as well as future conduct to the extent they may give effect to the Compensation Provisions. The Court went on to consider whether the ACCC's case was made out despite its conclusions on Crown immunity. It found that the Compensation Provisions did not contravene s 45 of the CCA.

The sections below cover each of the issues considered by the Court in further detail.

CROWN IMMUNITY

HOW THE STATE STRUCTURES A PRIVATISATION IS CRITICAL FOR DETERMINING THE EXISTENCE AND SCOPE OF ANY DERIVATIVE CROWN IMMUNITY THAT MAY EXTEND TO A PRIVATE COMPANY CONTRACTING WITH THE STATE. IMMUNITY DOES NOT AUTOMATICALLY APPLY, AND IT WILL ALWAYS TURN ON THE SPECIFIC STATUTORY REGIME AND FACTS OF THE PARTICULAR CASE.

The State is only bound by the CCA so far as it carries on a business. If it is not carrying on a business, then it will not be subject to the CCA.

The first question before the Court was whether the State entering into agreements containing the Compensation Provisions occurred in the course of the State's business activities. The Court found that this conduct did not occur in the course of the State carrying on a business. Rather, it related to the privatisation of the ports which occurred as a matter of government policy. Although the State was carrying on a business of operating the ports through state owned corporations, the Court considered that the Compensation Provisions did not serve the purpose of carrying on those businesses, but rather served the purpose of ensuring that bidders did not discount their bids on account of the risk that the State policy might change so that the State could maximise the value it obtained from the privatisation.

Because of the conclusion that the CCA did not apply to the State, the Court had to consider whether the immunity extended to NSW Ports.

This turned on whether applying the CCA to NSW Ports in respect to the Compensation Provisions would adversely affect a legal right of the State. This required identification of the relevant legal right. The Court rejected the notion that the relevant legal right was the State's ability to contract freely. Rather, the Court's focus was on the specific statutory right conferred by the PAAT Act; *"[the] 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 Court considered the fact that the Treasurer's ability to effect the transaction was specifically enabled by legislation and distinguished this case from previous cases where derivate Crown immunity was not found to exist.

The Court found that the application of s 45 of the CCA to the Compensation Provisions would divest partly this legal right of the State. This is because it would impact on the Treasurer's ability to enter into the authorised transactions as the Treasurer considered necessary or convenient. Relevant to this was the purpose of the provisions, being that the Treasurer considered that in order to maximise the value the State could obtain for the assets, it was necessary or convenient to enter into the Compensation Provisions. The provisions were a form of insurance for the other party to deal with an issue of sovereign risk.

While the Court found that derivate immunity extended to NSW Ports, it made clear that:

- immunity does not automatically extend to a private party contracting with the State where the State is immune from the operation of the CCA; and
- any immunity is unlikely to extend to colluding between private entities for the purposes of tendering for the assets.

Although the Court found that derivative crown immunity protected NSW Ports from the application of the CCA, it went on to consider the ACCC's claim against NSW Ports, in the event that it was wrong about its immunity findings.

PURPOSE OF THE COMPENSATION PROVISIONS

MAXIMISING THE SALE PRICE AND PROTECTING THE VALUE OF WHAT YOU BUY CANNOT BE DIRECTLY EQUATED WITH AN ANTI-COMPETITIVE PURPOSE SUCH AS PREVENTING COMPETITIVE ENTRY.

The Court found that the State's motive for the Compensation Provisions was profit maximisation purpose which the State of NSW intended, and not preventing or hindering the establishment and operation of a container terminal at the Port of Newcastle. The ACCC has indicted this finding is a key ground of its appeal and has important implications for substantial lessening of competition purpose cases generally.

Rather, the State wanted to maximise the sale price, i.e. it wanted to ensure that it could get full value for the sale of the existing monopoly by agreeing to indemnify the successful bidder for the risk that the extent of the existing monopoly might be reduced because of a container terminal at the Port of Newcastle. To put it another way, the State's purpose was to ensure that bidders did not discount their bids because of the risk of the establishment of a container terminal at the Port of Newcastle. Similarly, the purpose of NSW Ports, as the successful bidder, was to ensure that it retained the full extent of the existing monopoly of Port Botany in respect of container port services in NSW.

The Court rejected the ACCC's argument that NSW Ports was paying a price that reflected the ability to charge users monopoly prices because it found that the prices charged were not monopoly prices and, in the future, there was always the prospect of regulation of prices after privatisation.

EFFECT OR LIKELY EFFECT OF THE COMPENSATION PROVISIONS

FROM THE TIME THE ARTIFICIAL CAP ON THE VOLUME AT PORT BOTANY WAS LIFTED, THE PROSPECT OF A CONTAINER TERMINAL BEING DEVELOPED AT THE PORT OF NEWCASTLE WAS NOT A REALISTIC POSSIBILITY; IT WAS "FANCIFUL".

The most damning comments in the judgment are reserved for the case that the ACCC ran that the Compensation Provisions had some possible impact on the competitive process. In essence, the Court found that even if the Compensation Provisions did not exist, there was no reasonable prospect of a container terminal at the Port of Newcastle ever being viable while there was capacity at Port Botany. Therefore the existence of the provisions did not change this outcome.

Once the State changed its policy to remove the cap on the volumes at Port Botany (for reasons which were sound policy reasons and in any event outside the scope of the Competition and Consumer Act), Port Botany would have capacity for a considerable period of time. In addition, the Port of Newcastle failed to show that there was any reasonable prospect of a container terminal at the Port of Newcastle being viable.

The Court considered whether, but for the Compensation Provisions, the Port of Newcastle would have been the next logical container port. The Court found that, even without the Compensation Provisions, the prospect of Port of Newcastle "in the reasonably foreseeable future developing a container terminal at the Port of Newcastle while Port Botany has capacity is fanciful, far-fetched, infinitesimal or trivial" at [592].

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1. Twenty-Foot Equivalent Unit, i.e. one container, the conventional measure used in the shipping industry to measure the capacity of container ships and port container terminals.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

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