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INQUIRY INTO IMPACT OF PORT OF NEWCASTLE SALE ARRANGEMENTS ON PUBLIC WORKS EXPENDITURE IN NEW SOUTH WALES

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SUBMISSION TO THE NSW LEGISLATIVE COUNCIL PUBLIC WORKS COMMITTEE INQUIRY INTO THE IMPACT OF THE PORT OF NEWCASTLE SALE ARRANGEMENTS ON PUBLIC WORKS EXPENDITURE IN NEW SOUTH WALES

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Summary

Lease agreements for Port Botany, Port Kembla and the Port of Newcastle are invalid.

The financial interests of NSW taxpayers, and the super funds which own 80 per cent of "NSW Ports" and 50 per cent of "Port of Newcastle Investments" (PONI), can be protected and enhanced by the two companies agreeing with the NSW government to build a rail freight bypass of Sydney – from the Port of Newcastle to Badgery's Creek and Port Kembla – paid for by railing containers from the Port of Newcastle backed-up by Port Kembla.

Why the leases are invalid

In 2009, Newcastle Port Corporation[1] (NPC), a statutory state-owned corporation, sought tenders for the development of a container terminal[2] at the Port of Newcastle with minimum capacity of one million TEUs a year. Newcastle Stevedores Consortium (NSC) was selected in 2010 as "preferred proponent". Term Sheets were agreed before the March 2011 state election. In 2012, NPC requested NSW government approval to enter into a contract to lease the port's container terminal site to NSC for development of a container terminal.

The government decided in July 2012[3] to privatise Port Botany and Port Kembla by offering 99-year leases. The government gave a confidential commitment to bidders[4] for the leases that payment would be made to the lessee if container traffic at the Port of Newcastle was above a minimal specified cap. The government committed to paying compensation for containers handled at the Port of Newcastle equivalent to the wharfage fee that the lessee would receive if the containers were handled at Port Botany.

"The Australian Financial Review"[5] estimated the fee to be $150 - $200 per TEU in April 2018. The government is contractually committed to pay the fee to NSW Ports until 2063. A container terminal at the Port of Newcastle handling one million TEUs a year for 40 years will require the government to pay NSW Ports around $6 billion. The ports were privatised for $5.1 billion.

The government concealed its decision to make the payment when the legislation authorising the ports to be privatised – the "Ports Assets (Authorised Transactions) Act 2012" – was being debated in October and November 2012. The act did not enable the use of government consolidated revenue[6] to make the promised payment. An explicit commitment was given by the government that Port Botany and Port Kembla would be privatised only if the sale price exceeded the retention value[7] for the assets. Without the commitment to pay compensation, the sale proceeds may have been less than the retention value.

The government required a source of funds that would remain confidential. It decided to change the confidential Term Sheets with NSC[8] by requiring reimbursement for any compensation paid to the winning bidder for Port Botany and Port Kembla, if NSC's container traffic at the Port of Newcastle was above the minimal specified cap.

NSW Ports won the bidding[9] to lease Port Botany and Port Kembla[10] in May 2013. The government fulfilled its commitment to make payment in respect of container traffic at the Port of Newcastle, by entering into agreements with NSW Ports called "Port Commitment Deeds" (PCDs). The government changed the Term Sheets with NSC to provide the necessary funds, as it planned.

The government did not publicly disclose[11] that a contractual commitment had been made to pay NSW Ports and that its source of funds was NSC.

The government maintained its negotiation with NSC[12] because it needed to fix the long-term use of the container terminal site under a legally binding contract. If the government was not negotiating to lease the site to NSC, any future government could adopt a different policy. But by negotiating to lease the site to NSC, the government was able to demonstrate to NSW Ports that the future use of the site was being controlled, because the Term Sheets were a legally binding agreement with NSC while the parties were negotiating.

The ACCC[13] took no enforcement action[14] because of government policy[15] announced on July 27 2012.

NPC required Cabinet approval[16] in order to be able to lease the container terminal site to NSC. The procedure required NPC to first obtain approval from NSW Treasury. NSW Treasury was also the Department responsible for privatising the ports. It was NSW Treasury which took the decision to require NSC to provide the funds to pay NSW Ports under the PCDs.

NSW Treasury could not recommend to Cabinet a contract based on the Term Sheets, because the requirement for NSC to reimburse the government was likely to be illegal under the "Commonwealth Competition and Consumer Act 2010" (Competition Act).

When the government terminated the negotiation and the Term Sheets with NSC in November 2013, it immediately announced its decision to privatise the Port of Newcastle. The government did not disclose that the port would be privatised with a condition that the lessee reimbursed the government for any compensation the government paid to NSW Ports if container traffic at the port was above the minimal specified cap. By privatising the port, the government was able to charge the fee outside the operation of the Competition Act. The reason is that when a government is privatising an asset, it is exempt from the Competition Act in respect of that particular asset.

Cancelling the Term Sheets left the government without a source of funds to meet its contractual commitments to NSW Ports under the PCDs. It decided to privatise the Port of Newcastle[17] for the purpose of providing the necessary funds. PONI won the bidding to lease the port in May 2014.

PONI was required to reimburse the government for any compensation the government paid to NSW Ports if container traffic at the port was above the minimal specified cap.

In December 2018, the "Australian Competition and Consumer Commission" (ACCC) announced it had commenced an action in the Federal Court[18] against NSW Ports, alleging that NSW Ports had acted illegally in May 2013 by entering into the PCDs. The

ACCC is also alleging that it is illegal under the Competition Act for PONI to be the government's source of funds for paying NSW Ports under the PCDs.

The government privatised the Port of Newcastle because it required a source of funds outside the operation of the Competition Act to fulfil its contractual commitments to NSW Ports. The ACCC is taking no action against the government, because the port has been privatised.

If it was illegal under the Competition Act for NSC to be the government's source of funds to meet its contractual commitments to pay NSW Ports under the PCDs in May 2013, this means the government had no authority to enter into the PCDs in the first instance. In any event, NSW Ports allowed the PCD provisions to exist, thus limiting competition.

The government privatised the Port of Newcastle because it was in breach of its contractual commitment to NSW Ports unless it had a source of funds to pay NSW Ports.

The Port of Newcastle privatisation agreement is invalid because the "Ports Assets (Authorised Transactions) Act 2012" and the "Ports Assets (Authorised Transactions) Amendment Act 2013" did not authorise the port to be privatised for the purpose of providing the government with funds to pay NSW Ports.

Lease agreements for Port Botany, Port Kembla and the Port of Newcastle are invalid.

Rail freight by-pass of Sydney

The abject failure of public policy, including by the lessees and those who advised them, can be rectified.

As a result of the flawed ports privatisation program, the parties failed to consider the costs and benefits to the state of railing 100 per cent of containers, which is accomplished by establishing a container terminal at the Port of Newcastle. Container freight would pay for privately funding, building and operating a rail freight bypass of Sydney between Newcastle, Badgery's Creek and Port Kembla.

The compelling benefits of a rail-based freight transport strategy were provided in the "Deloitte Access Economics" report "The True Value of Rail[19], in June 2011.

A container terminal established at Port Kembla would be able to operate interchangeably with the Port of Newcastle.

Intermodal terminals would be established along the rail freight line to maximise logistics efficiency. Intermodal terminals established in regional areas would enable long term planning of the state's future development based on rail transportation of containerised goods.

NSW and Australia are strategically vulnerable to the Port Botany monopoly, should a catastrophic event close the approach channels[20]. Establishment of the Port of Newcastle and Port Kembla as major container handling centres reduces the risk exposure.

<u>WestConnex</u>

Currently, around 85% of Port Botany's containers are trucked. There are one million container truck movements a year through Port Botany. By 2040, there will be six million container truck movements a year[21] – five million if the Moorebank Intermodal Terminal operates at full capacity.

A container truck carrying a full container in the M5 East west-bound tunnel is the equivalent of six passenger cars. A container truck carrying an empty container in the east-bound M5 East tunnel is the equivalent of three passenger cars. Unless WestConnex is built, there is no road capacity to handle the predicted increase in container truck movements through Port Botany.

However, it is necessary to connect WestConnex to Port Botany. This significant cost can be avoided if all containers are railed from the Port of Newcastle, with back-up from Port Kembla.

Moorebank Intermodal Terminal

There would be no intermodal terminal at Moorebank because the existing rail freight capacity would be used for passenger services.

Port Botany would be closed as a container port after capacity was developed at Newcastle and Port Kembla; and the rail freight bypass was completed. While this work was underway, Moorebank intermodal would be cancelled and Botany freight would be railed via Glenfield to intermodal terminals at Badgery's Creek or Eastern Creek, once built.

Increased rail passenger capacity

Removing freight from Sydney's existing rail network would enable the capacity to be used for passenger services. Likewise removing freight from the existing rail lines between Newcastle and Sydney, and Port Kembla and Sydney, would allow the capacity to be used for passenger services. The economic value of converting rail freight capacity to passenger capacity is examined in "The True Value of Rail"[22].

Northern Sydney Freight Corridor

The $1 billion "Northern Sydney Freight Corridor Stage One" will reach capacity by 2026. Stages 2 and 3 – to create the equivalent of a dedicated freight line between Newcastle and Strathfield – will cost at least $5 billion. This cost would be saved by building a rail freight bypass that would also have capacity to carry freight that would otherwise be trucked into Sydney, not only from the north but also from the south and west.

Maldon-Dombarton freight line

The cost of the Maldon-Dombarton freight line – connecting Port Kembla to the main southern line and extending to Badgery's Creek and the Port of Newcastle – would be met by railing containers after Port Botany was closed.

Western Sydney Freight Line

There would be no need to build the $1 billion Western Sydney Freight Line, between Chullora and Eastern Creek.

Port Botany Rail Freight Line

There would be no need to spend $400 million upgrading the Port Botany rail freight line.

Hawkesbury River bridge

A second rail bridge would be built over the Hawkesbury River as part of the rail freight bypass.

Sydney Airport

Removing container ships from Port Botany would enable the short parallel runway at Sydney airport to be extended from 2600 metres to 4000 metres.

Regional economic development

Rail-based access to a container terminal is a prerequisite for regional economic development because 95% of world trade in goods is conducted using containers. Linked container terminals at the Port of Newcastle and Port Kembla would enable Sydney firms to profitably relocate to regional areas to take advantage of under-utilised regional infrastructure.

The way forward

The government, NSW Ports and PONI are able to collaborate in planning a rail freight bypass of Sydney. Their alternative is to undertake significant legal action over their collective mistake of making invalid lease agreements, to the detriment of the people of NSW.

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