# NEWCASTLE CONTAINER TERMINAL RESTRICTION – FEDERAL COURT JULY 2021

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## 1. Introduction

This is an article about an aspect of the Federal Court’s rejection of a challenge to penalties for Newcastle port were it to handle shipping containers.

Since 2016, beagle articles have drawn attention to a (initially secret) scheme imposed on Newcastle port by the NSW Government which appeared to effectively scotch any chance of it having a container terminal. One effect is to hamstring attempts by the world’s largest coal port to diversify and deal with global (climate) policy realities.[[1]](#footnote-1)

The scheme requires Newcastle Port to pay a penalty to compensate Port Botany were containers moved through such a terminal.

The scheme directly relates to international container trade, corporations and competition policy. It indirectly relates to international trade in coal. As such, the issues arising extend to Commonwealth interests. Yet despite repeated calls, the Federal Government and Opposition failed to do anything about the scheme.[[2]](#footnote-2)

In 2018, the Australian Competition and Consumers Commission, instituted proceedings against NSW ports alleging a breach of the *Competition and Consumer Act’s (2010)* anti-competitive laws.[[3]](#footnote-3)

At end June 2021, the Federal Court rejected the Commission’s case. In late July 2021, the Commission launched an appeal against the decision.

Five years earlier, the beagle identified some background to, and policy aspects of, the question of a container terminal at Newcastle. This included: reference to a corruption investigation – Operation Spicer – into, among other things, activities to prevent such a terminal prior to 2011; claimed rationales for the penalty-compensation scheme; NSW government efforts to keep it secret.[[4]](#footnote-4)

This article looks at some of the Court’s policy related pronouncements, in particular its inference that prevention of a container terminal in Newcastle is justified.

Section 2 sets out the Federal Court’s decision.

Section 3 outlines the Court’s reasons.

Section 4 discusses some policy aspects of those reasons.

Section 5 draws some conclusions from the above.

As ever, corrections and comments are welcome.

## 2. Decision

The Federal Court, Justice Jagot, decided the case. Reasons given were to the effect the case failed because of Crown immunity.[[5]](#footnote-5)

To explain, the scheme was included in the Coalition (Baird) Government’s privatisations of Port Botany (2013) and Newcastle (2014). The current Premier was then Treasurer. For some time, she gave the impression – including in Parliament - there was no such scheme.[[6]](#footnote-6)

The scheme was in two parts. First, the buyers of Port Botany would be compensated were more than a certain small number of containers moved through Newcastle. Second, the buyers of Newcastle would make payments to fund the compensation.

The shroud of secrecy over the scheme was lifted in 2016 by articles in the Newcastle Herald. The Government then admitted there was such an scheme. More extensive background to it, and the given rationale, is at <https://www.thejadebeagle.com/time-for-federal-action-newcastle-port.html>.[[7]](#footnote-7)

In 2018, the Australian Competition and Consumers Commission instituted proceedings against NSW ports in the Federal Court. It alleged a breach of the *Competition and Consumer Act’s (2010)* anti-competitive laws. It sought financial penalties for, and an injunction against the use of, the penalty-compensation scheme.

The Court’s decision, in mid-2021, held the privatisations and the associated scheme were not business activities but part of NSW policy. As the *Competition and Consumer Act (2010)* applies only to business activities, not to policy, the scheme was ‘immune’.

## 3. More than a decision

### 3.0 Outline

If the Court limited its statement of reasons to immunity, the decision would have disappointed some. There may have been argument about how what everyone regarded as a ‘transaction’ - in which Government sought to maximise revenue and shift business risk – was not a business activity.

Whatever the outcome of that argument, it would have had little policy consequence apart from putting the Newcastle issue squarely with politicians – who caused and need to fix the problem.

However, her honour went to some length to rubbish the prospects of a container terminal in Newcastle. The reason appears to be a ‘need’ to overcome acceptance that the scheme did protect Port Botany from competition. Her honour cited NSW Ports putting it:

*‘arrangements entered into with the Government to protect NSW Ports from potential future competing container activity in Newcastle has been reviewed and it provides a clear and secure protection’.[[8]](#footnote-8)*

Her opinion of those prospects can be distilled into three basic propositions:

1. a container terminal at Newcastle is contrary to NSW Government policy;
2. that policy is justified;
3. in any event, a container terminal at Newcastle is not viable.

From these propositions, the Court drew further inferences including to the effect the penalty-compensation scheme did not have anti-competitive purpose or effect.

This article is primarily interested in (2); justification of a policy against a Newcastle container terminal. A debate about whether a terminal is viable is for others.

For completeness, the next sections outline an understanding of the Court’s reasons on all three propositions.

### 3.1 NSW policy

Regarding (1), her honour’s reasoning was:

* the relevant policy is: Botany’s container capacity should be used up first, then Port Kembla’s before a terminal be established at Newcastle;
* nobody would try to establish a container terminal at Newcastle against that policy;
* however, if they did, the Government would prevent its establishment;
* mechanisms of prevention include refusal to give planning approval;
* in any event, establishment requires Government support which would not be forthcoming;
* the policy is independent of the privatisation penalty-compensation scheme;
* hence, abandoning the scheme would not remove the constraint on establishing a terminal.3.2

### 3.2 Policy justification

Regarding (2), justification of policy, the Court reasoned:

* Port Botany has very substantial excess capacity at present;
* substantial Government sums have been invested in Port Botany;
* the vast majority of containers through Botany are destined within 40km of the port;
* that movement does not cause traffic congestion;
* major investment in land transport infrastructure would be needed for a terminal elsewhere;
* the policy has been in place since 2012, and was part of the basis of bids for the ports;
* nothing since has undermined the correctness of the policy.

### 3.3 Terminal viability

Regarding (3), her honour reasoned:

* after several years of work, there is no credible business case for a terminal at Newcastle;
* actions of Newcastle terminal supporters are consistent with seeking to change policy rather than just establishing a terminal;
* attempts to attract containers to Newcastle from Botany would be largely unsuccessful due to the dominance of land transport and storage in total costs and due to responses from Botany;
* shipping lines will not make calls at Newcastle and Botany; hence Newcastle would need to attract ships from Botany.

### 3.4 Further inferences

From this reasoning the Court concluded were there a container terminal in Newcastle it would attract trade from Botany. But because a terminal in Newcastle is not a possibility, anything to reduce the prospect of it happening could not be anti-competitive.

Her honour further ventured that Government policy has not changed from the time bids were made for Botany and Newcastle. Indeed, from mid-2012. Given that she inferred:

* the purpose of compensation to Botany was not to hinder competition – and therefore a terminal – at Newcastle;
* rather it was for the Government to obtain the full sale value of Port Botany as a monopoly;
* the purpose of the penalty on Newcastle was not to hinder competition, or a terminal at Newcastle, but to fund the compensation scheme;
* the actions of Newcastle port are consistent with seeking rights to a market it has not paid for.

## 4. Discussion

The Court’s reasoning beyond Crown indemnity – in 3 above - is problematic. In relation to policy matters - 3.2 - some of it appears wrong.

In particular, the analysis of port privatisations and land transport issues included errors. Whether such mistakes were material to the decision is not of interest here. Rather the interest is in establishing a sound basis for policy.

### 4.1. Port privatisations

Issues regarding the Court’s analysis of the penalty-compensation scheme of the privatisations include: policy creep; inconsistency of Government actions with its supposed views; purpose of the scheme; its concealment.

#### 4.1.1 Creeping anti-competitiveness

Evidence cited by the Court demonstrates policy creep during the privatisation.

The Botany-sale-revenue issue initially raised by Treasury’s advisers, and Botany bidders, was the possibility of the Government sponsoring or developing a terminal competing with Port Botany.[[9]](#footnote-9)

However, the Treasury Steering Committee considered options to address a broader scope - Government supporting a terminal.

A briefing note to the Treasurer expanded the scope again adding ‘*competing developments at Newcastle*’ without reference to Government involvement in those developments.

Its recommendations reinforced that expanded scope, referring to *‘State sanctioned Newcastle developments that are inconsistent with current policy which Bidders are ‘buying’ today’.*[[10]](#footnote-10)

The scheme adopted in the privatisation went beyond providing ‘comfort’ about – was not limited by – Government sponsorship, development or even sanction of a terminal at Newcastle. It went to all circumstances of the fact of a competing terminal. It offered to lock-in a Treasury interpretation of ports policy that went considerably beyond bidders’ concerns and usual Government roles - opposition to a terminal at Newcastle irrespective of the Government’s role in it.

Curiously, while the policy ‘bought’ was the responsibility of the Transport portfolio, it appears Transport for NSW were not aware of its interpretation by Treasury – implying, among other things, the portfolio was not on the Steering Committee.[[11]](#footnote-11)

#### 4.1.2 Inconsistency Government views and actions

Bidders for Port Botany considered the prospect of a Newcastle terminal a sufficient competitive threat to reduce bids unless there was substantial compensation if competition eventuated.

The Government claimed it had a different opinion: Botany did not face such a threat of competition because there was no prospect of a terminal in Newcastle. Nonetheless, the Government arranged for compensation of Botany were such a terminal constructed. It later arranged for Newcastle port to fund any compensation.

The only way the Government’s actions could be consistent with its claimed opinion is: it could not persuade parties who put their own money at risk that a terminal at Newcastle would not be built. If so, the Government thought a Newcastle terminal:

* is not financially viable – and assumed it knows more about container terminal operations, economics and financing than those bidding for a business (Port Botany) reliant on such terminals; or
* would be prevented by Government regulation.

Bidders for Botany saw and acted as if a Government-developed terminal at Newcastle could be a direct competitor. The Government went further acting as if any terminal in Newcastle could compete. The proposition Government actions were not anti-competitive resolves to a claim its views conflicted with its actions – and with the words and actions of bidders who, being market participants, held more knowledge of relevant matters.

Even were the Government’s ‘no potential for competition’ claim believed at the time of the transaction in 2013, the differences between Government and (former) bidder views would have narrowed subsequently.

Up to the present, Government behaviour continues to be inconsistent with believing Newcastle could not compete with Botany. The Government has ardently defended mechanisms to artificially prevent competition.

#### 4.1.3 Purpose of penalty-compensation

The Court said the purpose of the compensation provisions was to prevent reduction of revenue from the Botany sale rather than protect Botany from competition. To do so it drew a difference between that purpose and the Government’s motive – to maximise profit.[[12]](#footnote-12)

That does not make sense.

For a start, it may not have been necessary to go to the lengths of compensating bidders for any competition from Newcastle, as their concern was a terminal developed by the Government. This suggests Government or bureaucratic motives beyond profit maximisation.

More basically, the threat to Botany sale revenue arose from the threat to Botany of competition from Newcastle. The threat of competition was perceived notwithstanding existing NSW policy and regulatory potential. The only way to prevent reduction of the Botany sale revenue was to reduce the threat of competition by new mechanisms.

The fact of an offer of compensation to Botany bidders proves Government intent to protect Botany from the effect of competition by mechanisms extending beyond its existing policy.

The offer further implies an assessment that compensation was at most equal to the otherwise expected reduction in sale revenue. The (change in) revenue from the Botany sale could cover compensation. Nonetheless, the Government had a financial incentive to restrict competition to avoid paying compensation - at least until Newcastle was sold on condition it foots any compensation bill.

As the Government was concerned with the sale revenue from the Botany privatisation it also would have been concerned with sale revenue from the Newcastle privatisation.

The penalty provisions - for Newcastle to fund any compensation for Botany - must have reduced revenue from the Newcastle sale.

In ‘theory’ that reduced revenue from the Newcastle sale would equal the revenue ‘increase’ from the Botany sale. Such equivalence implies only two possible Government purposes for the penalty on Newcastle. The first, financial gain, arises only if the Government was arbitraging different perceptions of potential competition by bidders in different privatisations.

The other possible purpose of the penalty on Newcastle would be concealment of Government’s offer of compensation to Botany. Without the penalty, compensation payments – and possibly even the offer of compensation - may have been revealed via State budget outlays or by the Audit Office e.g. review of contingent liabilities. Such a purpose is further advanced by the penalty creating a disincentive for Newcastle to do things that would trigger compensation.

#### 4.1.3 Concealment of the penalty-compensation scheme

The fact of the Government hiding – including via clandestine sale provisions - the penalty-compensation scheme demonstrates a purpose of avoiding criticism.

The Court found the Government could, but did not, impose a direct restriction on Newcastle containers. The implication is the Government looked for something to maximise revenue from Botany not as likely to be detected as either Budget outlays or a direct restriction on Newcastle.

A direct restriction on Newcastle containers would be immediately apparent to the public and demonstrate Government involvement in curtailing competition. The inference: Government preference for a different mechanism to support Botany sale revenue hinged on avoiding exposure to public criticism.

The Government’s boasting of sale revenue means it was not afraid of public criticism about that.

The conclusion to be drawn: the Government was afraid the public would find out it had created a scheme to be ashamed of. That shame would arise from acting against establishment of a container terminal in Newcastle and/or engagement in anti-competitive practices.

Members of the previous Labor Government had been criticised and subject to investigations for stymieing a container terminal in Newcastle.

The Independent Commission Against Corruption investigated the leaking of confidential documents to undermine the case for a terminal.

It also investigated a 2011 Treasurer decision to not permit (then) Newcastle Ports Corporation to conclude ‘commercial negotiations’ and a ‘final contract’ with a private consortium to establish the terminal. Other parties had approached the Treasurer and politicians seeking the relevant site for a coal loader.[[13]](#footnote-13)

The Court did not mention the circumstances surrounding that investigation. Its comments that the Labor administration had pursued a use-Botany-capacity-first policy should be considered in that light.

The Court’s finding that pre-existing policy would prevent a terminal at Newcastle does not sit well with the Government’s desire to keep secret the penalty-compensation scheme. The reason: such a pre-existing policy would be publicly known. The apparent incongruity is resolvable if the Government’s desire for secrecy was motivated by belief the scheme was anti-competitive.

### 4.2 Land transport and policy

#### 4.2.0 Court views

The Court’s consideration of land transport constraints on Botany extended to three out of 1,634 paragraphs. The significance of such constraints was dismissed in two paragraphs:

*‘Port Botany’s ultimate capacity may be constrained by (amongst other things) traffic congestion issues, but the issue has never been and is not of great significance…..*

*that Port Botany is located within an area of traffic congestion was and is not particularly significant to any investigation of the viability of developing a container terminal at the Port of Newcastle. It was and is more in the nature of advocacy issue for PON.’* [[14]](#footnote-14)

The paragraphs cited three ‘facts’ as relevant: any such constraint did not prevent the 3.2million teu cap being lifted; Botany is not the main contributor to congestion; the ports owner doesn’t think landside constraints limit capacity.

The Court misinterpreted each of these three ‘facts’. The cap was installed, and lifted, as a political matter related to local dislike of trucks rather than relating to port-land transport capacity. Botany’s contribution to congestion is likely significant but, more importantly, it is beside the point of the impact of congestion on port costs. The port owner’s comments are likely motivated by self-interest, appear to reflect outdated information, presumably relate to short term matters and will likely prove wrong in the medium term.

It is therefore necessary to pay more attention to the land transport issues.

#### 4.2.1 Dubious parentage

The Court said the cornerstone of policy is: Port Botany-capacity-should- be-exhausted-first before Government considered a terminal at another port. It suggested such a policy was, and is, justified.

Her honour said the policy was initiated in mid-2012 with support from, or origins in, Transport for NSW and Treasury. The policy is strategic in nature.

Previous articles identified the idiocy of some transport strategic directions developed by the Transport and Treasury portfolios at that time. These include Sydney Metro and the separation of urban rail assets from operations.

Also noteworthy is Transport Minister Berejiklian’s 2012 opposition to another international trade etc. facility - an airport at Badgery’s Creek.[[15]](#footnote-15)

Ports and freight policy suffered similar basic flaws. The National Land Transport Network – agreed by NSW and Commonwealth Governments – was supposed to link ‘key’ locations. In 2012 it bypassed Newcastle, did not extend to Wollongong or Port Kembla, and ended at the Strathfield Golf Club rather than Sydney’s main rail terminal at Chullora.[[16]](#footnote-16)

In 2011-13, the former - non-corporate - Infrastructure Australia completed a Council of Australian Governments’ request for a National Ports Strategy (below) and the Transport Ministerial Council’s request for a national freight plan. These requests were in apparent frustration at the inability of States – including NSW - and the Commonwealth Department to develop reasonable plans for major freight facilities.[[17]](#footnote-17)

Against that backdrop, there is substantial doubt about strategic transport decisions by NSW Transport and Treasury portfolios around 2012. It is hardly an endorsement of a use-Botany-capacity-first policy to observe it was developed by the same portfolios at that time. Rather such an observation invites close scrutiny of the supposed facts and reasons underpinning the policy.

The need for such scrutiny is emphasised by an evident misunderstanding by those portfolios of their role. The central idea of privatisation of ports is to end the portfolios influence over port operations and directions. This fact seems to have escaped Departments and Ministers who seek to control ports from the policy grave.[[18]](#footnote-18)

Moreover, the policy involves a misnomer that appears to have distracted many, including the Court, from the pivotal issue: that Botany’s capacity is and will be limited by land transport and storage chain, rather than matters at or near the port precinct.

#### 4.2.2 National Ports strategy.

The National Ports Strategy was cited by the Court. There are two essential points of that Strategy.[[19]](#footnote-19)

First, policy should treat ports as a function, not a precinct. Policy should have regard to channel, road and rail approaches to the precinct, and storage-cargo (dis) assembly areas away from the port. Significantly, for capital cities, over time such areas are likely to move further away from port precincts, lengthening land transport routes, transit times and lowering delivery reliability.

Second, those functions conflict with, and are not welcome by, other activities such as residences. The conflict in major urban areas should be minimised by identifying places – including road and rail routes - for major freight tasks. Importantly, to the extent port and ‘background’ road and rail traffic is allowed to mix, port capacity will be limited.

Among the practical implications: the functional capacity of a container port in a central city area will be limited by land transport within the metropolis, rather than by its hypothetical precinct capacity.

Port Botany illustrates the principles and arguably was among the motivations for such a Strategy.

#### 4.2.3 Botany and the cap

Botany was subject to a container cap of – not permitted to handle more than - 3.2million teu. The cap was removed after the third terminal was constructed. However, the latent capacity of the port prior to construction of that terminal may have exceeded the cap.

The cap related to political problems arising from land transport and storage outside the port boundary – truck movements in suburbs near Botany. The third terminal provided a political opportunity – rather than a transport reason – to change the cap.[[20]](#footnote-20)

The salient capacity - rather than political - issue is the capacity of the land transport system.

Prior to 2012, plans for duplication of the M5 were ‘based’ on the 3.2million cap.

However, the port claimed its capacity to be very substantially more. Such divergence, visible to the Commonwealth when NSW sought funds for the M5 duplication, contributed to arguments that a Ports Strategy be developed at the national level.[[21]](#footnote-21)

Indeed, the divergence offered a compelling reason for privatisation of Botany – ongoing inability of NSW agencies to develop a rational land (freight) transport plan among themselves.

#### 4.2.4 Rail share

The Court noted a terminal operating at Newcastle would reduce the number of containers railed to Botany. It noted a claim that would reduce the percentage of Botany railed containers below the State’s target – and in that respect it is contrary to NSW policy.

Such a claim is not necessarily (arithmetically) true and misunderstands the purpose of the target. The purpose of the rail target is to reduce the number of trucks on roads approaching Botany.

At present, the % of containers railed to Botany is well below the target. It is questionable whether the target has ever been achieved. Over time, the target has reduced – it is now 28%. In the early 2000’s a 40% ‘target’ or ambition was publicly announced as part of community consultation for the port’s expansion and construction of a third terminal. That indicates concerns about port capacity being effectively limited by road constraints.[[22]](#footnote-22)

### 4.3 Traffic congestion

#### 4.3.1 The trucks are just 2% of traffic argument

The Court repeated assertions: trucks movements to/from the port do not cause traffic congestion; only 2% of M5 East traffic is related to Botany. Those assertions misrepresent transport issues.

Claims of trucks adding to congestion and reducing amenity often arise from concerns of communities near affected roads. The claims are not limited to Port Botany – similar claims are made in relation to Port Melbourne.[[23]](#footnote-23)

The claims – and counter-claims - can be politically charged. For policy purposes, it is necessary to carefully assess them.

For Botany and the M5, the 2% figure is dubious. The inference of trucks not contributing to congestion on relevant roads is wrong.

Congestion, and other adverse effects of road use, extend beyond the M5 and occur throughout the Botany area and neighbouring suburbs.

The provenance of the 2% figure, not given in the judgement, is not easily discernible.

Higher figures – 7% to 15% - for all trucks, not just those from Botany, are cited in the Government’s 2013 Freight and Ports Strategy.[[24]](#footnote-24)

A 2% figure was mentioned in the (earlier) 2004 Environmental Impact Statement for Botany’s third terminal. The Statement considered a number of roads in the area, but not the M5. It said:

*‘Although the port is perceived as a major generator of traffic, it would only generate less than 2% of total (morning) peak hourly traffic flows at the subregional level by 2021’.[[25]](#footnote-25)*

The relevant Technical Appendix referred to an even lower figure, 1%. The Appendix said the performance of the road network was set to deteriorate, and this would impact on the port:

*‘The forecast deterioration in the road system’s level of service is not caused by the new terminal, as port traffic represents a very minor proportion of total traffic. Most of the increased traffic is caused by private vehicle travel associated with the Airport, Green Square and general background traffic growth. The capacity constraints on the road network, although not caused by port traffic, would impact on the efficiency of road-based transport to and from the port.*’[[26]](#footnote-26)

After noting (port) trucks carrying dangerous goods are prohibited in the M5 and airport-runway tunnels, the Appendix provided estimates of truck movements for 2021 based trucks carrying 60% of 3.2 million teu port throughput, and very substantial increases in backloading and hours of operation. Background traffic was held at 2016 levels because of limitations in Departmental transport models. The results on these minimal- trucking assumptions were: truck numbers would increase from 6,300 to 14,000 per day, and road network performance would suffer.

The Appendix argued for policies to give road priority to port traffic. Although this was also later suggested by the former Infrastructure Australia, it has not occurred.

The Appendix was compiled in 2002, a year after the opening of the M5 East.

A 2004 submission to the Productivity Commission by the NSW Freight Infrastructure Advisory Board was less sanguine about the implications of and for Sydney congestion of Botany’s expansion. It referred to an ‘*explosion*’ in truck movements unless many more containers were on rail. Its diagram (below) illustrated a near doubling of truck numbers by 2021 even if rail carried 40% of Botany containers.[[27]](#footnote-27)

**Freight Infrastructure Advisory Board diagram**



By 2009 – far sooner than expected - it was apparent the M5 capacity was being exhausted, with adverse effects on trucks and the port. The NSW Government sought Commonwealth funds for M5 expansion arguing port trucks were the ‘*key component of the truck movement in the* (M5 East) *tunnel’*. The submission to the Commonwealth had trucks comprising 8% of that traffic.[[28]](#footnote-28)

Around that time, a technical report for the Roads and Traffic Authority identified constraints relevant to port trucks including an 8% grade on the (western) Kingsgrove tunnel exit.[[29]](#footnote-29)

The technical report said the nominal capacity of the tunnels were 4,400 passenger car units per hour. However, actual capacity was substantially lower: by 10% eastbound; by 25% westbound. The differences in part reflecting port traffic:

*‘The difference is attributable to the steeper up grade and higher proportion of laden trucks in the west bound direction resulting in a heavy truck to passenger car unit equivalent of 6. For the eastbound tunnel the equivalence is 3.’[[30]](#footnote-30)*

This indicates the 2% figure is misleading – as people driving the route would observe. Any figure like 2% seems to refer to vehicle counts. However, vehicle types also affect traffic congestion.

Simplistically, if 2% of the M5 vehicles were trucks, and trucks had passenger car unit equivalents of 6, they would use at least 12% of its westbound tunnel road space. It is likely they would use more because of dynamic effects such as motorists being cautious of driving behind, or alongside trucks. Increases in truck sizes since the time of the report would also increase their use of road space.

Given road congestion is non-linear, 12% use of road-space on a heavily used corridor is likely to very substantially contribute to congestion.[[31]](#footnote-31)

#### 4.3.2 Mixed traffic and the ‘freight and ports plans’

Traffic congestion affects port-function capacity, and freight costs, irrespective of its cause. Trucks get ‘caught in traffic’ whether or not they create traffic jams.

Rapid utilisation of road capacity by mixed car-truck traffic and adverse effects of congestion on freight costs were among reasons the former Infrastructure Australia recommended investigation of:

*‘dedicated road freight infrastructure…… between capital city ports and intermodal terminal/freight cluster sites’*.[[32]](#footnote-32)

NSW, however, did not explore this option. Its policy of requiring mixed traffic-roads persists.

A 2014 report for the Commonwealth’s Bureau of Infrastructure, Transport and Regional Economics recognised substantial congestion issues, going beyond actual and virtual truck queues at the port precinct, impacting Botany capacity:

*‘The effectiveness and efficiency of the surrounding land infrastructure connections to the port will have a significant bearing on the ultimate throughput capable of being serviced by Port Botany.’[[33]](#footnote-33)*

There is little subsequent public information on the road impacts on Port Botany’s capacity, including on the effects of road improvements and increased background traffic.

NSW transport and planning documents focus very heavily on movement of people with freight apparently an after-thought.[[34]](#footnote-34)

NSW has produced port and freight ‘plan’ documents. These have asserted a rail target of 20% of Botany containers, or 28% by 2021, presumably because of road traffic concerns. However, these targets have not been met.[[35]](#footnote-35)

There are ‘summary business cases’ for various road projects including for the Sydney Gateway to connect Kingsford Smith Airport and Port Botany to the M5 and M4 tunnels. [[36]](#footnote-36)

There also are summary assessments of business cases, for example by the new Infrastructure Australia for WestConnex, which include an M5 expansion. However, these are unreliable.[[37]](#footnote-37)

While the many references to Port Botany suggests awareness that road transport remains a critical issue, none provided any information or forecast of the effect of trucks on congestion. Nor did they provide estimates of the effect of congestion on trucking, Botany and container freight costs. That these documents include vague and ambiguous route plans, without data, suggests they aim at promoting rather than contributing to policy, and at assuaging local communities affected by trucks.

Significantly, the NSW 2013 Ports and Freight Strategy admitted policy – including use-Botany-capacity-first - had been developed in ignorance of the contribution of freight to Sydney-road congestion, and the impact of that congestion on freight. While it called for identification of relevant costs, the 2018 update did not provide any indication of progress on that front.[[38]](#footnote-38)

In 2019, a Parliamentary Committee referred to the lack of proper information on the topic:

*‘contradictory evidence ….. On the one hand, Port of Newcastle argues that a container terminal at Newcastle will decrease pressure on the Sydney transport network and therefore reduce the need for planned infrastructure investments in Sydney. On the other hand, the Government argues that the majority of these transport infrastructure investments in Sydney are not focussed on freight and are mainly about addressing population growth and delivering economic benefits.*’[[39]](#footnote-39)

While it is possible to reconcile both sentiments – Newcastle’s decreasing of pressure on Sydney’s transport network is unlikely to defer metropolitan ‘infrastructure investments’ – the statement is important for three reasons.

First it indicates the primary problem is Botany facing, rather than causing, traffic congestion.

Second, it implies the use-Botany-first policy was developed in the absence of data on the issue – or at least data the Government made available to Parliament.

Third, it apparently conflicts with the Court’s finding of ‘*enormous investment*’ by the State and Commonwealth to support Botany supply chains since 2013.

Instead, the NSW Government told Parliament that at least its transport investments were mainly for other purposes and not even focussed on freight, let alone port freight.[[40]](#footnote-40)

### 4.4 Port Botany’s catchment

#### 4.4.1 The 80% of cargo within 40km claim

The Court cited a belief the vast bulk of containers presently transiting Botany are destined within 40km of the port. As is the case with the 2% of trucks claim, its relevance and accuracy are in doubt.

Apocryphal stories have early estimates of x% of containers within y% of port distorted by data referring to the location of freight forwarders’ administrative offices rather than warehouses etc.

Provenance of the 80% within 40 km includes a NSW Freight Infrastructure Advisory Board (2005) submission to the Productivity Commission. This shows the 40km boundary to be ‘as the crow flies’ rather than by road or by rail. 85% of port containers were said to be within this area. It said:

*‘No longer are the industries relevant to Port Botany – warehousing, container storage and handling – concentrated around Botany and Alexandria. New industrial and warehousing activities have fanned out across Sydney, attaching themselves to new arterial roads like the M4, M5 and the soon to be completed M7.’* [[41]](#footnote-41)

This was consistent with the Appendix to the Environmental Impact Statement for the port expansion which recognised freight activity is shifting further away from the port:

‘*the western and south western areas (including Blacktown, Liverpool and Fairfield) are expected to increase in importance due to new land releases and their proximity to transport improvements such as the Western Sydney Orbital. The proportion of port throughput that travels to/from these outer suburbs is expected to increase from 55% to 65% by 2021.*’[[42]](#footnote-42)

By 2016, the demographic centre of Sydney was near Parramatta, itself 40km by road from the port and well to the east of the M7. Given the growth of Sydney, this may move further west.

With that background, continuation of the 80% within a crow flying 40km over the past two decades would be surprising. It would be most surprising into the future.

The Court itself cited information from Transport for NSW that seemingly contradicted the 40km claim, putting just over half – rather than 80% - of containers in that ring:

*‘more than 57% of containers imported into NSW are delivered to locations with 40 km of Port Botany and around 70% of containers are delivered to locations within 60 km of that port.’*[[43]](#footnote-43)

The latter distance, 60km as the crow flies, is half that between Botany and Newcastle.

#### 4.4.2 Actual distances and the road network

Actual road distances from Botany vary from how the ‘crow flies’. For example, as the crow flies Campbelltown and Horsley Park are within 40km of the port but more than 50km by road. [[44]](#footnote-44)

There is a conspicuous gap in the NSW (and national) freight and ports strategy’s key freight routes.

A 20km arterial road segment between Botany and the Pacific Motorway – from the M4 at Strathfield to the M2 - is excluded. Even after WestConnex and the Sydney Gateway are completed, this gap will remain. The designated freight route adds an extra 40km – and an extra $72 - to trips between Newcastle and Port Botany.[[45]](#footnote-45)

These factors undermine the analytical utility of claims such as 80% within 40km. A trip of 40km on congested roads creates higher financial and social costs than a 40km trip on an uncongested route.

Given competition in the trucking sector, a better proxy of implications of distance/time remoteness from port is trucking cost. The Bureau of Transport etc. Economics put the June 2020 land transport – road – cost per teu in Sydney to be higher than every other port in Australia: $480, around half of all port related costs. Costs in much smaller cities are substantially less – Adelaide by $100, Perth (Fremantle) by $60.[[46]](#footnote-46)

Since that report, costs of trucking between Botany and Newcastle have increased by $45.50 due to tolls on new motorways. There will be additional toll costs once WestConnex is completed.[[47]](#footnote-47)

#### 4.4.3 Competition law or policy analysis?

The matter of distances from ports – ‘port catchments’ – received considerable attention from the Court. The Court preferred specific calculations and assessments by ‘experts’ over more general reports such as by Deloitte. That is understandable in Court processes deciding questions about specific, contemporaneous effects on competition.

However, such an approach does not translate to policy. The reason: the location of (dis)assembly areas reflect ports as functions – including precinct sites, land transport distance and ease, and warehousing factors including truck access, land costs and opening/closing hours.

As Deloitte pointed out, aspects in ‘origins/destinations’ of containers include truck staging points, location of freight forwarder’s customs clearances, initial deposit of container and unpacking. In short, (dis)assembly areas are mobile in the medium term.[[48]](#footnote-48)

For policy and strategic planning, generalisations – such as made by Deloitte – are necessary. Hence, it would be premature to conclude the Court ‘experts’ made a convincing case that current policy is correct and sustainable.

Once circularity – cargo through Botany is moved near Botany – is ignored, the policy question re Newcastle is seen as: can cargo move through lower cost pathways via Newcastle than via Botany?

The issue is not whether containerised goods destined for western Sydney will move through Newcastle, but whether containers for Newcastle should be required to move through Botany.

The issues for Port Kembla differ from Newcastle because it has a smaller local population and is closer to south western Sydney. Kembla is likely to be an overflow for Sydney containers. The principal question there is coordination, including of land use and transport routes in the Sydney basin. The bundled sale of Botany and Kembla recognised this.[[49]](#footnote-49)

Hence the Court’s inference that Newcastle and Kembla may compete to be the next NSW container port misunderstands the potential functionalities of those ports.[[50]](#footnote-50)

Assessment of policy issues should have regard to matters raised by Deloitte, and include consideration of urban traffic, including direction of ‘background’ peak flows. If the best that can be said for the NSW policy is that most containers are currently addressed within the inner-middle Sydney basin, the conclusion to be drawn is that policy has not been competently established.

Given that inherent circularity - of Botany containers going through Botany - the only way in which Newcastle could address the Court’s reasoning would be to sign-up potential container customers.

### 4.5 Infrastructure Australia assessment?

The Court commented that the NSW approach to the policy of use-Botany-capacity-first is similar to the approach used by Infrastructure Australia to approve funding for project proposals – using the example of Maldon-Dombarton.

That was misguided.

Infrastructure Australia does not approve funding, but merely makes recommendations as to whether proposals have merit.

Infrastructure Australia’s stated assessment framework – for assessing whether proposals should be recommended - involves the proponent demonstrating proposals have been developed in four stages: problem identification; options analysis; business case development; post-completion review.[[51]](#footnote-51)

In the case of the use-Botany-capacity-first policy, there is yet to be any demonstration NSW has undertaken any of these stages. In fact, indications are to the contrary.

For Infrastructure Australia’s framework, it is insufficient to say State development is a problem. Rather, problems identified by the State in other proposals – and by Infrastructure Australia - include Sydney traffic congestion along corridors needed for trucks from Botany.

Sydney has consistently had the highest actual and forecast (2031) congestion costs of all Australian urban areas. In that respect using-Botany-capacity-first is part of a problem rather than an answer.[[52]](#footnote-52)

There is not any demonstration of identification or assessment of options to deal with whatever problem use-Botany-capacity-first is supposed to address. Necessary evidence would include road traffic analysis, and port catchment analysis. Ideally, it would include general equilibrium modelling of alternatives including container tasks undertaken outside the metropolitan area.[[53]](#footnote-53)

There is not any demonstration of a business case for the use-Botany-capacity-first policy. Such a business case would need to identify the economic – including non-financial – costs, and State outlays for infrastructure, including roads. It would need to demonstrate costs were less than benefits.

There has not been any ex-post review of the policy.

Infrastructure Australia’s assessment framework is conceptually similar to the National Ports Strategy. At present, a use-Botany-capacity-first policy would not be accepted under either.[[54]](#footnote-54)

The choice of the ‘new’ Infrastructure Australia’s assessment of Maldon-Dombarton as an attempt to illustrate the merit of the NSW approach to the policy was particularly inapposite.

That proposal was unique in the ‘proponent’ claiming it lacked economic merit, which arguably was based on on-going prejudice. Infrastructure Australia took an equally unique step of recommending against the proposal - because of the proponent’s perverse claims – instead of its normal approach of remaining silent on projects it does not support.[[55]](#footnote-55)

When that bizarre context is considered, the Court’s claims the situation demonstrated

*‘Infrastructure Australia’s method of assessing the public interest for infrastructure investment reflects the approach the State applied to develop its policy in 2012 about port sequencing’*

is as extraordinary as it may be correct. Both approaches are wrong.

### 4.6 Implications for Botany capacity

The above indicates the relevant unaddressed policy issue is not Botany’s precinct capacity, but the available capacity of the infrastructure outside the port boundary needed for its supply chain. That is the reason Botany bidders were so interested in NSW’s road and rail infrastructure plans. That is also the reason so much attention is paid to those issues rather than terminal capacity.

The amount of traffic generated by Botany does impinges on road capacity. However, the main issue is ‘background’ traffic and the increasing remoteness of the port from other freight precincts.

NSW’s approach has roads needed for the port being heavily used by parties outside the port’s influence. This includes some of the major road commuting routes in Australia where ‘background’ demand growth has greatly exceeded the forecasts on which NSW policy and plans were based.

Claims that most containers transiting Botany stay within 40km of the port, even if remaining true 16 years after being made, are unlikely to remain true into the future. That was the principal reason for bundling Port Kembla with Botany for privatisation – an overflow for Botany’s Sydney bound goods.

Presently, with off-peak traffic the effective road transit midpoint between the two ports is around the Minto-Campbelltown area in south west Sydney. In peak hours it is likely near Moorebank. Among the implications: were port facilities in a competitive market, it is likely a container terminal would be established at Port Kembla before precinct capacity at Botany is fully utilised. The reason is: background traffic and the movement of freight warehousing precincts from Botany will make Kembla a lower cost pathway to Sydney industrial areas, for increasing container flows. Whether that remains the case if Botany is shielded from face competition is another question.[[56]](#footnote-56)

### 4.7 Other implications

The magnitude of the issues arising from the co-location of Botany freight routes with very large ‘background’ traffic flows is hinted at by the Government’s delay in progressing, and separation from the WestConnex project, the $2.6 billion ‘Sydney Gateway’ connecting port, airport and motorway. Interestingly, that proposal has not been forwarded to Infrastructure Australia for assessment.

NSW policy is not to allow road infrastructure dedicated to port or freight tasks. However, the Court appeared to interpret this as meaning that the Government would need to pay for any road improvements needed for a Newcastle terminal. That is mistaken as it ignores toll roads and the possibility of dedicated freight infrastructure – such as provided at Botany for the third terminal.

Road infrastructure for the length of Botany supply chains has not been, and probably never will be, designed to optimise heavy freight – illustrated by the western M5 tunnel exit. Policy therefore renders the efficiency of Botany supply chains highly vulnerable to increases in ‘background’ traffic.

Even if it was accepted that Botany precinct capacity is the key factor for NSW ports policy – and prevention of a terminal at Newcastle – it does not follow that such a policy was ever justifiable. Land transport matters, particularly in the light of background traffic, should be considered.

## 5. Conclusions

The Court’s decision hinged on Crown immunity.

However, her honour went further and rubbished prospects of a Newcastle container terminal. That included expressions such as the prospect of a terminal rests on ‘mere speculative hopes’, is ‘far-fetched and fanciful’, and ‘not a real chance or real possibility’.

Even were the substance of those comments correct – if there is no prospect of a terminal at Newcastle - the utility of such robust comments, in a case determined on another point, is open to question.

The point of the rubbishing was to support an argument the Newcastle penalty-Botany compensation scheme was not anti-competitive because there is no potential for competition.

Her honour went beyond that to ascribe a purpose to the scheme – to support revenue from the sale of Botany. However, the Court seemingly overlooked that purpose could only be achieved – Botany revenue would only be maximised - if the scheme was anti-competitive. It also overlooked that Government claims to the contrary conflicted with Government actions, and the actions of sale bidders. Further it ignored the clandestine nature of the scheme and attempts by the Government to distance itself from, and deny, its reality.

The principal reason given by the Court for saying there is no prospect of a terminal at Newcastle was: NSW Government policy.

Her honour went beyond that to reflect on the logic and merit of the policy, which was put as: Botany-capacity-should-be-exhausted before a terminal elsewhere could be considered. That reflection on policy overlooked pivotal matters. First, there can be no assumption of policy competence. It was developed at the same time and place as: disastrous transport policy mistakes; a grossly mis-specified Sydney freight network; the Transport Minister openly advocated against another international facility – a second Sydney airport.

The policy appears to be without foundation. It runs contrary to decisions to privatise ports, which aimed to reduce Government influence on port activities rather than restrict them from the grave.

It ignores that Botany’s capacity is limited by the roads its supply chains share with Sydney’s major traffic flows. It is not apparently based on any estimation of those limits. As is the case for other policies developed at the same time, its explanation is in the form of promotional material, much of which cannot be taken seriously.

Two arguments apparently distracted the Court from this reality.

The first was a claim Botany related trucks do not cause congestion. Apart from being wrong, it is beside the point. The claim relates to local politics not policy. The policy issue is whether Botany trucks will be so affected by congestion as to limit port capacity. Information in the public domain, and the Government’s insistence that all roads must carry cars and trucks, suggests that will be the case.

The second was that most cargo transiting Botany stays relatively close to Botany. Ignoring the inherent circularity, it is irrelevant to cargo destined for Newcastle and further north because that is a matter of catchment and cost – including traffic congestion and road tolls - rather than mere ‘crow flies’ distances.

While the competition question may be whether or not cargo will go to Newcastle port, the policy issue is different – whether there is a case to prevent that occurring.

That matter needs to be assessed at the general level, not by ‘expert’ speculation about commercial outcomes. The assessment of expert evidence is of no assistance to the policy issue.

The general level includes identification of catchments and relevant roads. In the case of Botany-Newcastle, the identification of roads – and a major gap in the freight route in the centre of the metropolitan area - provides further evidence of the incompetence of NSW ports and freight policy at least at the time the use-Botany-capacity-first policy took shape.

The Court equated the aims and approach of the policy with an assessment by Infrastructure Australia. However, the policy would fail every part of the assessment process outlined by Infrastructure Australia. There is not any demonstration the policy: identifies or relates to a problem; was developed after considering options; is supported by a business case; has been reviewed.

Further, the Court did not apparently appreciate the particular Infrastructure Australia assessment it referred to was a unique and bizarre example of a ‘proponent’ – the NSW Government - wishing to have a freight infrastructure proposal publicly rejected.

The NSW Government’s ports policy, and defence of the penalty-compensation scheme, bears similarities to its policies for Sydney Metro and the Transport Asset Holding Entity. The explanations of each take the form of public-relations propaganda. They appear to grasp for an acceptable explanation of prior decisions inexplicable on public policy grounds.

The Court is constrained by the evidence placed before it. Some of the evidence it cited appeared to mislead it. This article is based on the Court’s interpretations rather than that evidence which has not been reviewed.

This article did not assess the correctness of the Court’s decision – which was based on Crown immunity. However, it does cast doubt on the Court’s speculations that went beyond that reason.

August 2021

1. <https://johnmenadue.com/john-menadue-newcastle-port-another-botched-privatisation-a-repost-from-5-september-2016/> [↑](#footnote-ref-1)
2. <https://www.thejadebeagle.com/election-2019.html>

   [↑](#footnote-ref-2)
3. <https://www.accc.gov.au/media-release/accc-takes-action-against-nsw-ports> [↑](#footnote-ref-3)
4. <https://www.thejadebeagle.com/time-for-federal-action-newcastle-port.html> [↑](#footnote-ref-4)
5. <https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2021/2021fca0720> [↑](#footnote-ref-5)
6. <https://www.thejadebeagle.com/update-on-a-sell-out.html>

   <https://www.thejadebeagle.com/time-for-federal-action-newcastle-port.html> [↑](#footnote-ref-6)
7. <https://www.newcastleherald.com.au/story/5405057/secret-nsw-port-deal-costs-consumers-alp/>

   [↑](#footnote-ref-7)
8. Judgement para 160. [↑](#footnote-ref-8)
9. Judgement paras 121, 123. [↑](#footnote-ref-9)
10. Judgement para 131. [↑](#footnote-ref-10)
11. Judgement para 140. [↑](#footnote-ref-11)
12. Judgement para 927. [↑](#footnote-ref-12)
13. <https://www.containerterminalpolicyinnsw.com.au/jodi-mckays-moment-of-truth-at-icac/>

    *‘Sometime before 15 February 2011,* (Treasurer) *Mr Roozendaal instructed that a further letter be sent to the NPC* (Newcastle Port Corporation) *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 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.’*

    <https://www.icac.nsw.gov.au/investigations/past-investigations/2016/nsw-public-officials-and-members-of-parliament-operation-spicer> [↑](#footnote-ref-13)
14. Judgement paras 1160-1163. [↑](#footnote-ref-14)
15. <https://www.thejadebeagle.com/sydney-metro.html>

    <https://www.thejadebeagle.com/policy-spad.html>

    <https://www.thejadebeagle.com/badgerys-creek.html> [↑](#footnote-ref-15)
16. <https://www.thejadebeagle.com/freight-chainsaw.html> [↑](#footnote-ref-16)
17. ‘*Infrastructure Australia was formed as a Commonwealth statutory authority – advisory council in 2007. Between 2010 and 2013 it developed national plans for ports, freight and urban transport, consistent with legislation tasking it to advise the Commonwealth on nationally significant infrastructure. Following election of the Coalition Government in 2014, its organisation was changed to a Commonwealth quasi-corporation, with a governing rather than advisory ‘board’. Also in 2014, the High Court in Williams (No.2) contradicted an assumption behind Infrastructure Australia’s legislation – holding that national significance does not confer Commonwealth jurisdiction nor an ability for the Commonwealth to provide funds.’* The newer Infrastructure Australia has not commented on the previous plans nor recognised the implications of the Williams (No.2) case: Some background is at <https://www.thejadebeagle.com/audit.html>, <https://www.thejadebeagle.com/governance.html>, <https://www.thejadebeagle.com/williams-case.html>

    <https://www.infrastructureaustralia.gov.au/publications/national-ports-strategy-2011>

    <https://www.infrastructureaustralia.gov.au/sites/default/files/2019-06/national_land_freight_strategy_update_2012.pdf> [↑](#footnote-ref-17)
18. Discussed in <https://www.thejadebeagle.com/time-for-federal-action-newcastle-port.html> [↑](#footnote-ref-18)
19. <https://www.infrastructureaustralia.gov.au/sites/default/files/2019-06/ports_strategy_background_paper_20_December_2010.pdf> [↑](#footnote-ref-19)
20. <https://www.nswports.com.au/sites/default/files/Uploads/Port-Botany-NLG-Meeting-No-18-Minutes.pdf>

    [Lynda Newnam - Transport for NSW - NSW Government, https://www.transport.nsw.gov.au › documents](Lynda Newnam - Transport for NSW - NSW Government,  https://www.transport.nsw.gov.au › documents)

    25 Mar 2018. This document also identifies numerous inconsistent ‘official’ claims about Port Botany forecasts and intentions – the implication: there is no authoritative source of data or advice. [↑](#footnote-ref-20)
21. <http://ecotransit.org.au/ets/files/NSW_IA_M5-Expansion/M5-Expansion_Minimum-Info-Req_2009-01-20_Part-1.pdf> [↑](#footnote-ref-21)
22. Present rail share is 17.6%: <https://www.nswports.com.au/rail><https://www.pc.gov.au/inquiries/completed/freight/submissions/new_south_wales_government__including_attachments_a,_b_and_c/sub050attachment3.pdf> [↑](#footnote-ref-22)
23. <https://www.theage.com.au/national/victoria/tripling-of-truck-traffic-leaves-ombudsman-asking-government-for-answers-20210603-p57xn4.html> [↑](#footnote-ref-23)
24. Figure 8, <https://www.containerterminalpolicyinnsw.com.au/wp-content/uploads/2016/01/NSW-Freight-and-Ports-Strategy-November-2013.pdf> [↑](#footnote-ref-24)
25. <https://www.nswports.com.au/sites/default/files/Uploads/Port-Botany-Expansion-EIS-Ch-21-Traffic-Transportation.pdf> [↑](#footnote-ref-25)
26. <https://www.nswports.com.au/port-botany-expansion-environmental-impact-statement>

    <https://www.nswports.com.au/sites/default/files/Uploads/Port-Botany-Expansion-EIS-Appendix-P-Traffic-Transportation-Vol-I-III.pdf> [↑](#footnote-ref-26)
27. <https://www.pc.gov.au/inquiries/completed/freight/submissions/new_south_wales_government__including_attachments_a,_b_and_c/sub050attachment3.pdf> [↑](#footnote-ref-27)
28. <http://ecotransit.org.au/ets/files/NSW_IA_M5-Expansion/M5-Expansion_Minimum-Info-Req_2009-01-20_Part-1.pdf> [↑](#footnote-ref-28)
29. <https://www.containerterminalpolicyinnsw.com.au/wp-content/uploads/2016/01/RTA-M5-Expansion-Modelling-Report-RTA-5-May-2009.pdf> [↑](#footnote-ref-29)
30. Passenger car (space) equivalent units are used to represent the impact of a large vehicle on a road by expressing it as the number of equivalent passenger vehicles: <https://www.atap.gov.au/parameter-values/road-transport/5-vehicle-operating-cost-voc-models> [↑](#footnote-ref-30)
31. See e.g. [https://www.bitre.gov.au/sites/default/files/wp\_015.pdf.](https://www.bitre.gov.au/sites/default/files/wp_015.pdf.%20%20) Figure 4.1. [↑](#footnote-ref-31)
32. *‘The proposed national ports strategy suggested dedicated freight infrastructure to overcome the problem of freight being crowded out on some route segments. It recommended that this be investigated by the Bureau of Infrastructure Transport and Regional Economics. This issue is being explored in the United States as part of its freight research program and there are examples of dedicated freight infrastructure in Australia and other countries’*

    <https://www.infrastructureaustralia.gov.au/sites/default/files/2019-06/NLFS_220211.pdf> [↑](#footnote-ref-32)
33. <https://www.bitre.gov.au/sites/default/files/2019-11/cr_001%20%282%29.pdf>.

    Actual and virtual truck queues at the port were subject to an earlier review by the Independent Pricing and Regulatory Tribunal (2007-08) <https://www.ipart.nsw.gov.au/sites/default/files/documents/final_report_-_reforming_port_botanys_links_with_inland_transport_-_march_2008.pdf>

    [↑](#footnote-ref-33)
34. For example: <https://future.transport.nsw.gov.au/plans/greater-sydney-services-and-infrastructure-plan/future-networks> [↑](#footnote-ref-34)
35. <https://www.transport.nsw.gov.au/projects/strategy/nsw-freight-and-ports-plan> [↑](#footnote-ref-35)
36. <https://www.containerterminalpolicyinnsw.com.au/wp-content/uploads/2016/01/NSW-Freight-and-Ports-Strategy-November-2013.pdf>

    <https://www.infrastructure.nsw.gov.au/media/2154/sydney-gateway-program_final-business-case-summary.pdf>

    <https://www.transport.nsw.gov.au/projects/strategy/nsw-freight-and-ports-plan>

    <https://www.infrastructureaustralia.gov.au/sites/default/files/2019-06/Final_WestConnex_Project_Evaluation_Summary.pdf> [↑](#footnote-ref-36)
37. <https://www.thejadebeagle.com/urbans-admonition.html> [↑](#footnote-ref-37)
38. *‘While there is a general acknowledgement that congestion is a problem in the Sydney metropolitan area, especially during peak hours, the specific contribution of freight transport to this congestion is unknown. There is also little available data which quantifies the impact of congestion on freight efficiency and emissions.’*

    <https://www.containerterminalpolicyinnsw.com.au/wp-content/uploads/2016/01/NSW-Freight-and-Ports-Strategy-November-2013.pdf>

    <https://future.transport.nsw.gov.au/plans/nsw-freight-and-ports-plan-2018-2023> [↑](#footnote-ref-38)
39. <https://www.parliament.nsw.gov.au/lcdocs/inquiries/2516/Final%20version%20of%20report%20-%2025%20February%202019.pdf> [↑](#footnote-ref-39)
40. Judgement para 1594: *‘over the past seven or so years, the NSW and Commonwealth governments, as well as the private sector, has focused investments into supporting the Port Botany as NSW’s existing container port and Port Kembla as its next container port as provided for by the State policy’*. [↑](#footnote-ref-40)
41. <https://www.pc.gov.au/inquiries/completed/freight/submissions/new_south_wales_government__including_attachments_a,_b_and_c/sub050attachment3.pdf> [↑](#footnote-ref-41)
42. <https://www.nswports.com.au/sites/default/files/Uploads/Port-Botany-Expansion-EIS-Appendix-P-Traffic-Transportation-Vol-I-III.pdf> [↑](#footnote-ref-42)
43. Judgement para 715. [↑](#footnote-ref-43)
44. <http://www.bom.gov.au/products/IDR714.loop.shtml> [↑](#footnote-ref-44)
45. <https://www.transport.nsw.gov.au/projects/strategy/nsw-freight-and-ports-plan>: figure 9 <https://spatial.infrastructure.gov.au/portal/apps/webappviewer/index.html?id=9690eb423b4f446485781ea8a61851d2>

    Extra tolls on new M4, M7 and M2. <https://roads-waterways.transport.nsw.gov.au/sydney-motorways/toll-charges/index.html> [↑](#footnote-ref-45)
46. <https://www.bitre.gov.au/publications/2021/waterline-66>

    [↑](#footnote-ref-46)
47. Assuming trucks use the direct arterial road route from Strathfield to the M2, rather than motorway west to Eastern Creek, then east to NorthConnex. The cost is due to new tolls: WestConnex (July 202) and NorthConnex (October 2020) – although to some extent these could be offset by operational savings. <https://roads-waterways.transport.nsw.gov.au/sydney-motorways/toll-charges/index.html> [↑](#footnote-ref-47)
48. <https://www2.deloitte.com/au/en/pages/economics/articles/port-newcastle-nsw-container-port-policy.html> [↑](#footnote-ref-48)
49. The NSW designated freight network also directly connects Kembla to Botany – figures 9 and 16 in <https://www.transport.nsw.gov.au/projects/strategy/nsw-freight-and-ports-plan> [↑](#footnote-ref-49)
50. Judgement para 486. [↑](#footnote-ref-50)
51. <https://www.infrastructureaustralia.gov.au/publications/assessment-framework> [↑](#footnote-ref-51)
52. <https://www.infrastructureaustralia.gov.au/sites/default/files/2019-06/australian-infrastructure-audit-volume-1.pdf>

    <https://www.infrastructureaustralia.gov.au/publications/nsw-westconnex>

    <https://www.infrastructureaustralia.gov.au/projects/westconnex-2016> [↑](#footnote-ref-52)
53. An example of such modelling is in <https://nieir.com.au/wp-content/uploads/2020/07/Fast%20Train%20Project%20Macro%20Economic%20Assessment%20July%202020.pdf> [↑](#footnote-ref-53)
54. <https://www.infrastructureaustralia.gov.au/sites/default/files/2019-06/COAG_National_Ports_Strategy.pdf> [↑](#footnote-ref-54)
55. <https://www.thejadebeagle.com/the-dog-that-didnt-bark.html> [↑](#footnote-ref-55)
56. In a non-competitive market, a monopolist restricts volume or quality of supply to increase prices and profits. An implication is: were the owners of Botany artificially shielded from competition, a container terminal at Port Kembla may be delayed beyond the socially optimal time. [↑](#footnote-ref-56)