# Time for federal action? Newcastle port

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# Time for federal action? Newcastle port

## Introduction

While the infrastructure conversation focusses on major projects more significant issues, including aspects of infrastructure ‘deals’, are given less attention.

Unfortunate consequences of this lopsided discussion are becoming evident at a rapid rate, further eroding the trust of Australians in government. A case in NSW deserves the attention of every Australian; the port privatisations.

A short article at John Menadue’s Pearls and Irritants site outlines the matter: <http://johnmenadue.com/blog/?p=7605>. This article gives more background.

## A newly disclosed deal

Port Botany and Port Kembla were sold together in 2013. Newcastle was sold in 2014.[[1]](#endnote-1)

While there was much noise about the success of the privatisations in terms of revenue to the state, another aspect of the sales that only recently came to light is less positive.[[2]](#endnote-2)

The relevant aspect is in a ‘port commitment’ document. Its terms are said to require Newcastle port to pay around $100 for each container (teu) it handles in excess of an annual cap. The money would be used to compensate the new owners of Port Botany for the effect of competition. The duration of the arrangement is 50 years.[[3]](#endnote-3)

The reported cap on Newcastle is 30,000 containers rising by 6% pa. This is an insignificant number; minimum efficient scale is likely to be more than 5 times this. Prior to the privatisations there were negotiations for a container terminal in Newcastle with a capacity of 1 million teu.[[4]](#endnote-4)

$100 per container is around 10% of the total port cost interface (including road transport) for Botany. At minimum scale and $100 per teu the payment from Newcastle might be over $13 million per annum. The effective penalty is a differential of $200 per teu. The alternative is a large cost penalty of transporting containers from Sydney to Newcastle; $40 per truck in one-way tolls alone.[[5]](#endnote-5)

If the reports of the commitment are correct the effect is to dampen the potential for economic container operations in Newcastle for quite some time, disadvantage the Hunter region and all of northern NSW and add to traffic snarls on already overloaded roads and railways to Sydney, not to mention in Sydney.[[6]](#endnote-6)

It is possible, some might think certain, that Newcastle’s current dominant trade, coal, might diminish at some time during this period. If so not only would Newcastle gain from having opportunities like the container trade, Australia would benefit from better use of one of its major ports and the resultant decentralisation from and decongestion of Sydney.[[7]](#endnote-7)

## Privatisation and the port commitment: possible reasons

This section provides some background to the port and arguments for privatisation and the port commitment.

### 3.1 Newcastle port and containers

The idea of significant container operations at Newcastle has some history. A recent report of the Independent Commission Against Corruption (ICAC), Operation Spicer, provides some background although the period it examined concluded several years prior to the privatisations.[[8]](#endnote-8)

The port and proximate areas are suitable for container operations. The port and channel has significant usable capacity. A large area of portside land is available, which was long used for heavy industry and is served by rail lines and major roads such as the aptly named Industrial Drive. The area is shown in the red outlined area on the map below.



Source: Operation Spicer Report, Independent Commission Against Corruption, August 2016

The port had commenced negotiations with a prospective terminal builder / operator, with the private sector taking 90% of the financial risk, before being directed by the then Labor Treasurer / Minister for Ports to discontinue in 2011.[[9]](#endnote-9)

The Coalition government, taking office in March 2011, also came to oppose a container terminal. A prospective terminal operator informed NSW parliament that government decisions in 2012 and 2013:

“*dictated that a container port not proceed at Newcastle”*.[[10]](#endnote-10)

### 3.2 Stated reasons for the ‘port commitment’

The case against practices of privatisation by Australia’s governments is becoming stronger and clearer to the public, such that there should now be a high onus of proof by proponents to publicly argue and demonstrate benefits in specific cases. The stated reasons for privatisation and deals such as the port commitment are worth examining.[[11]](#endnote-11)

The stated reasons for the commitment for a cap and penalty as part of the privatisations have recently been summarised:

*“…because the majority of container deposits in Botany are delivered to within 40 kilometres, it makes sense for it to be the state’s main container port….. Ms Berejiklian said that “major freight operators do not want multiple ports of stops when they are bringing their goods to New South Wales”.*

*“As a government we have to make some really sound decisions on what the primary use of each port should be to make sure we maximise the opportunities of increasing capacity at all of our ports in relation to our strategy,” she said.”[[12]](#endnote-12)*

The Labor opposition argues that the apparent proximity of container deposits to Botany arises from the paper-work practices of logistics firms.[[13]](#endnote-13)

With respect, both arguments are mistaken. Newcastle would be unable to compete for container deposits that need to be close to Botany even without the cap and penalty. Similarly if major freight operators do not want to stop at multiple ports, they do not have to. There was no proposal to compel containers or freight operators to go to Newcastle.

On the argument presented the best case for the government is that the commitment would have no effect. Which means it is not needed, can be abandoned now, and Botany would have no argument to be compensated.

The worst case is that the commitment does and is intended to have an effect; by disincentives to container deposits which need not be within 40km of Botany, and to freight operators who do not mind making multiple port calls in NSW, or indeed making only one port call at Newcastle. In this case businesses would face direct opportunity costs and there would be a loss of flexibility in logistics and the NSW economy.

The idea that the primary use of ports as ports needs to be decided by *‘we’* (the government) is inconsistent with their privatisation. The very concept of privatisation is that decisions about the use of assets is made by private owners rather than the government. If the government wants to continue to control the business use assets, it should not sell them.

Hopefully government and opposition can come up with better arguments than those presented to date. Explaining the need for privatisation of Newcastle would be a good start.

### 3.3 Recycling assets, a grab for cash?

One argument is that privatisation unlocks cash for governments which can be ‘recycled’ into other infrastructure.

This line has become a popular spiel for privatisation in recent years, even though it is probably an accounting artifice and by confusing sources and destination of funds not sound economics.[[14]](#endnote-14)

Acceptance of the ‘cash’ argument is consistent with commonly suggested motivations for restrictions on competition such as the port commitment; to increase the sale price of a business about to be privatised. In this case the suggestion would be the aim was to increase the sale price of Botany. However, there are problems with the logic of the argument.

Restrictions on competition that increase the sale value of a business would have equally increased its retention value. Also the impacts of restrictions may reduce net state economic activity, activity which should be more important to governments than trading assets.[[15]](#endnote-15)

Consideration of other possible reasons for the sale and port commitment (below) suggests that the strongest motivation was in fact a grab for cash even if that is not a good reason for privatisation.

### 3.4 Views on commercial matters?

One question is whether government advisers had prior views about the commercial merits of a container terminal at Newcastle. It has been reported that advisers considered Botany and then Kembla to be commercially preferable for container expansion than Newcastle.

If so, advisers may have considered it financially best to ‘offload’ the port so as not to be exposed to ‘risks’ of port commercial decisions allowing a container terminal to proceed.

A Treasury document leaked to opponents of a Newcastle container terminal in 2010-11 cast doubts on the viability of a terminal. However, those doubts reportedly could have been dispelled were Newcastle port asked to explain.[[16]](#endnote-16)

In any event, the appropriateness of taking positive action on these doubts while Newcastle was a state owned corporation may be open to question.[[17]](#endnote-17)

Governments and officials do have responsibilities other than for particular ports, for example in relation to state budgets. These wider responsibilities may make it necessary to ration capital and public sector debt, and therefore investment opportunities among government entities.

The impact of government capital constraints can be a reason to privatise an organisation. It is no reason to limit its commercial operations post privatisation.

A belief that Newcastle container operations would not be commercially viable is not a rational ground to impose a post-privatisation penalty on it handling containers; the outcome of ‘no containers’ would be achieved without such a penalty.

In summary, a priori views are a possible reason for privatisation of Newcastle, although in this case they appear to have not been fully informed. They are not a good reason for the port commitment.

### 3.5 Supply chain coordination?

Privatisation of Botany and Kembla was desirable, possibly necessary for reasons pointed out in the national ports strategy.

These are: to stop counterproductive turf wars between bureaucratic fiefdoms who variously owned ports, railways and roads. An aim should have been to harness commercial pressures for better (eventual) coordination in the operation and planning of port, railways and roads in Sydney.[[18]](#endnote-18)

Roads seem to have been a real concern. Just how much is indicated by the view that container growth would lead to congestion. This is echoed by questions even now about how Westconnex will properly connect with Botany. Privatisation of Botany could be seen as a circuit breaker, one step towards bringing road planning into line with other infrastructure planning exercises.[[19]](#endnote-19)

Newcastle, however, was and is a model of excellence in management, planning and supply chain coordination, without turf wars. Experts from all over the world visit Newcastle to learn best practice. Infrastructure Australia’s ports conference held in 2012 was in Newcastle.[[20]](#endnote-20)

Given this, the only ‘coordinating’ benefit from privatisation of Newcastle would have been to remove the stultifying influence of government, such as directives like not to have a container terminal. The idea would be for the invisible hand of the market to replace the visible hand of the government.

Coordination should not have been among the reasons for privatising Newcastle. It also is no reason for the port commitment.

### 3.6 Land side costs?

Costs of road etc. congestion or improvements have been cited as one reason for not proceeding with a container terminal in Newcastle.

The NSW Minister for Ports in response to a question on the Newcastle cap said:

*“We are not running a cargo cult in New South Wales. If the stuff is intended to go into Sydney, it should come to Sydney. We are not going to pay people to clog up the M1 and the rail infrastructure between Newcastle and Sydney. We are not going to pay them, as some sort of inverse cargo cult, to send things up to Newcastle just for them to come back again.” [[21]](#endnote-21)*

The argument is not as straightforward as it seems.

First, Newcastle and northern NSW have substantial populations, hence there are likely to be substantial movements of containers between Botany and Newcastle at present. A container terminal at Newcastle would reduce the need for containers to / from northern NSW, Newcastle and the central coast to move through Sydney.

Second, a concern about additional trucks would arise from *any* significant industrial development in Newcastle, not just a container terminal.

Third, the cause of any problem of truck increased road costs is the current arrangement for road revenues and spending; the failure of government to introduce, or even trial, ‘road reform’. The Sydney-Newcastle corridor would make an ideal location for a trial for road reform, which would deal with any additional trucking caused by industrial development in Newcastle.[[22]](#endnote-22)

In summary, fear of increased land side costs need to be justified case by case. They arise from any industrial development, in any place and are not unique to a container terminal in Newcastle.

Action to deal with concerns about land side costs arising from a container terminal in Newcastle should be justified by consideration of net rather than gross impacts on traffic flows including in Sydney and by reasons to not proceed with road reform. To date there has been no public exposition of these matters.

If such fears are justified there is not only a case for restricting development; there is a case against privatisation.

### 3.7 Competitive neutrality?

The concept of competitive neutrality is that a business should not be (dis)advantaged by reason of its public sector ownership. This is embedded in the Competition Principles Agreement signed by all Australian governments in 1993.[[23]](#endnote-23)

The issue arises in a privatisation when the government retains a business that competes with a business it has just sold. It reflects what is loosely called ‘sovereign risk’.[[24]](#endnote-24)

In the NSW ports privatisations, potential bidders for Botany may have worried that the government could damage their business by *subsidising* a new container facility in Newcastle, a port which was not for sale at that time.

This type of concern is not unique to NSW or to ports. Similar concerns occurred in the proposed sale of the rail freight business National Rail Corporation. National Rail may have faced competition from NSW government owned FreightCorp which was in receipt of subsidies for several traffics. The solution was to combine the sale of both rail businesses.[[25]](#endnote-25)

Competitive neutrality issues arise only for activities of governments and their businesses.

The issue is government involvement in commercial activity; rather than commercial activity per se or the parent government’s involvement in regulatory activity such as approvals.[[26]](#endnote-26)

At the time of the Botany sale, Newcastle port was a state owned corporation. The relevant legislation set certain objectives for Newcastle port including that it operate as a successful business and that it maximise the state’s investment *in Newcastle port*. These objectives are consistent with the port exploring the potential for a container terminal and if commercially viable proceeding with its development. Statements of corporate intent, signed off by the government, were to this effect.[[27]](#endnote-27)

In summary, competitive neutrality may be among the reasons for privatising Newcastle port, preferably together with Botany and Kembla. However, this would only be the case were Newcastle substantially competing with Botany for container traffic.

That is, to the extent this is an argument for privatisation it is an argument against the port commitment.

### 3.8 Botany cap politics?

Port Botany expansion from two to three container terminals was mooted in the early 2000s. Associated with this was a ‘planning cap’ of 3.2million containers. The capacity of the port with three terminals substantially exceeded that cap, however the cap remained in place until the Botany sale process was underway in 2012.[[28]](#endnote-28)

It is possible to speculate there was a political concern; the chance of a container terminal being developed in the short term at another port might have given rise to arguments to retain the Botany cap. There is no public information to confirm this.

In any event this speculative argument loses all force once the Botany cap was lifted.

### 3.9 Probity?

A NSW Treasury response to a parliamentary question in 2014 supposedly linked the Newcastle container terminal proposal to encouragement of corruption:

*“Treasury alleged on 22 August 2014 that the*[*Anglo*](http://www.containerterminalpolicyinnsw.com.au/wp-content/uploads/2016/01/Anglo-Ports-10-February-2015-NSW-Parliament.pdf)*Ports negotiation* (my comment: regarding a container terminal*) involved an attempt by sections of the government “to dictate uneconomic enterprises contrary to market demand [and was an example] of the kind of rent seeking activity likely to encourage influence peddling or corruption’”.[[29]](#endnote-29)*

The Treasury response and this interpretation are hard to understand. Besides suggesting division of opinion within the government they imply sections of the government were ‘dictating’ rather than responding to a proposal for a commercial enterprise.

The interpretation is remarkable for suggesting the response virtually inverted the subject of a previous probity inquiry, the Independent Commission Against Corruption’s Operation Spicer.

Several chapters of that report deal with (successful) attempts in the months preceding the 2011 state election to derail efforts to establish a container terminal via seeking intervention of the Treasurer / Ports Minister to suspend Newcastle port’s negotiations with a proponent.

A particular action, of a NSW parliamentarian handing over a Treasury assessment document to an opponent of the terminal in expectation of later personal gain, was found to constitute serious corruption.

The Operation Spicer report is generally positive on the then prospects of a container terminal, suggesting questions about the container terminal raised in the Treasury document could have been resolved by asking the port; a ‘proper’ action not undertaken by the government.

The report indicates the implied reason for the Labor government suspending negotiations on the container terminal, a proposed coal terminal using the same lands, was expected to create substantial risk for Newcastle port and did not have the support of the coal industry.[[30]](#endnote-30)

That is, the probity questions addressed in the report relate to efforts in 2010 and early 2011 to stop rather than advance a container terminal.

It should be noted that the Operation Spicer report does not comment on issues regarding the container terminal proposal post the 2011 election such as government decisions in 2012, 2013 or surrounding the privatisation.

To summarise, probity considerations seem irrelevant. The availability of probity processes and willingness of authorities such as ICAC to pursue questions about such matters via reports like Operation Spicer undermine any suggestion that the privatisation sale and commitment are either tainted or needed to be undertaken to remove taint. Any concerns about probity matters should be raised with and addressed by anti-corruption processes rather than by non-expert speculation or debate.

## The port commitment: issues

Assuming the reports of the port commitment to be accurate, there are at least four serious issues of principle:

1. Privatisation in which Botany would be compensated for competition from Newcastle;
2. Compensation would be financed by a penalty on Newcastle;
3. The arrangements are long term;
4. The arrangements were not presented to parliament or the public.

The concerns are not about privatisation per se. They are about its practice.

### 4.1 Privatisation, Botany compensated for competition concerns

In 2015 the Australian Competition and Consumer Commission (ACCC) publicly railed at state governments shielding privatised port businesses from the effects of competition. At the time it did not mention the idea of forcing successful competitors to finance such compensation.[[31]](#endnote-31)

The ACCC is concerned with policies that restrict competition by creating disincentives for development.

Competitive neutrality may mitigate against these ACCC concerns when governments retain, subsidise or establish entities that compete with the privatised business eg. other or new ports.

This type of matter was considered in late 2015 by a select Committee of the Victorian Legislative Council for the proposed sale of the Port of Melbourne. It concluded that Victoria’s seeking legislative exemption from ACCC oversight was not warranted due to: the (then) proposed duration of the arrangement (50 years); the potential need for more container capacity during that time; the detail of compensation had yet to be finalised.[[32]](#endnote-32)

In the case of Newcastle, competitive neutrality issues of government subsidised competition against Botany do not arise; Newcastle is in private hands.

The case for compensating or shielding Botany from container competition by Newcastle seems to relate only to inflating the sale price of Botany. These are not strong public policy reasons.

Recently the ACCC’s Chairman virtually recanted previous support for privatisation, citing concerns over practices that inflate sales prices. He called for the competition law to cover government and privatisations. It is hard to disagree with that proposition, although extension to all government activities, such as funding of community service obligations may raise other issues.[[33]](#endnote-33)

### 4.2 Compensation financed by a penalty on Newcastle

The deal to penalise Newcastle on top of, to pay for, compensating Botany if the former commenced a significant container business runs contrary to usual public policy objectives of privatisation.

Other privatisations have included restrictions on competition or apparent favours for newly privatised entities. Examples include FreightCorp which post privatisation was to invest in grain rail freight infrastructure; Melbourne port where the state government is to provide compensation in the event of competition; and Sydney airport which has first right of refusal on a new airport in the Sydney basin.

The case of private provision of motorways in Sydney may seem more in point. Some are reputed to include ‘confidential’ side commitments by the government to not provide public transport alternatives or to close other roads in order to funnel traffic onto a tollway. However, these are differ from the port commitment in that there may have been legitimate competitive neutrality concerns by the private road owner; that government subsidisation of public transport or other roads may undercut its business.[[34]](#endnote-34)

None of these examples involve penalising a party competing in a marketplace via unsubsidised commercial activities. The author is unaware of any significant Australian precedent for the NSW port commitment, and would welcome correction on this point.

The issues about the port commitment therefore seem to go beyond existing questions about privatisations.

### 4.3. Long term arrangements

In some cases, transitional arrangements to deal with competitive neutrality or other privatisation problems may be arguable. Leading examples include employment retention commitments.

The Victorian Select Committee was particularly concerned about the duration of compensation for Port Melbourne, judging that a very long term commitment, as initially proposed, may interfere with the planning and provision for additional necessary capacity. Subsequently, the duration of compensation arrangements for Melbourne were substantially shortened; they are reported to last for only 15 years.[[35]](#endnote-35)

Such concerns should apply to Newcastle. 50 years is a long time for the operation of any disincentive to develop capacity; container operations in Sydney have not yet notched up their 50th anniversary.

### 4.4 Not presented to parliament

The fact that many questions were raised in parliament about the existence and content of the arrangement implies that relevant detail was not publicly available.

The Victorian Select Committee was concerned that the detail of compensation for Melbourne was not available to them at the time of their report. Among their issues was whether the state was incurring a substantial financial exposure without the knowledge of parliament.

Non-disclosure raises broader questions within the debate about the powers and responsibility of executive government. Under Australian state parliamentary arrangements the executive government is supposed to act on behalf of the community through the parliament.

Non-disclosure of activities for other than the most serious reasons eg. national security, especially non-disclosure to parliament, is inconsistent with this principle. However, recently there have been expert suggestions on ways in which even matters touching on national security can and should be disclosed to and satisfactorily dealt with by parliament.[[36]](#endnote-36)

‘Commercial in confidence’ would seem far less important than matters of national security.

The NSW Treasurer was recently reported as claiming ‘commercial in confidence’ reasons for non-disclosure of the port commitment. The basis for the claim is unclear; there seems little in the NSW port commitment document that immediately affects the business of the commercial parties to the extent it should not be disclosed to parliament. Again the author would welcome correction on this.[[37]](#endnote-37)

A claim of ‘commercial in confidence’ by executive government as a reason to not inform parliament of significant arrangements involving the state raises interesting questions. Given that governments initiate the transactions it is likely that they, not commercial parties, also initiate the confidentiality provisions. There is a suspicion, therefore, that a commercial in confidence claim by the government can be self-serving.

It also is hopefully unnecessary. A claim of potential damage to the state’s financial interests from disclosure is hardly a compelling reason to deny state parliament information about arrangements voluntarily entered into by the government; it seems more a reason not to enter the arrangements in the first place. The Victorian approach of a parliamentary inquiry and a debate in parliament about the restrictions seems far preferable.

Particular questions arising of claims of ‘commercial in confidence’ are the effects on accountability and the practical binding of parliament.

One accountability issue is that the NSW commitment was entered into, but not visible, well before 2016. At best government accountability to the people of NSW for this deal has been delayed at least four years.

The government giving statements about the commitment after it was leaked and suggesting it had not done so earlier because of ‘commercial in confidence’ and not in the public domain reasons is not obviously consistent with a view that it should be accountable to the parliament or public about the matter.

In principle each ‘commercial in confidence’ claim should be rigorously tested by an independent party, possibly a court, and certified to parliament. Even if a matter was truly commercial in confidence, the period of withholding information from parliament should end with execution of contract, deeds, arrangements etc. This subject is worthy of a further article.

## Action?

### 5.1 The problem

The above indicates the port commitment deed to be inconsistent with the few arguments for the privatisation of Newcastle port.

There is a case that the port should not have been privatised. There is a compelling case that it should not have been made subject to the port commitment. There is an overwhelming case that the whole matter and all details should have been disclosed to parliament prior to finalisation of the deal.

The most serious immediate problem is the port commitment; the Newcastle container cap and penalty. Any such arrangement needs to be undone. It is unreasonable for a government to restrain the otherwise lawful trade of its former business for 50 years.

The concern is over and above that of shielding Botany for competition. However, the correction of the situation should see the owners of Botany compensated by NSW if they paid over the odds because of this deal. They are not the problem.

There are many other questions arising from the port commitment which go way beyond national competition policy principles (which the deal probably breaches). They are far more important than the matters that led Prime Minister Howard to threaten a Commonwealth takeover of ports.[[38]](#endnote-38)

### 5.2 Inquiries?

Some parties are seeking answers to questions of legality, perhaps in an attempt to have the arrangements overturned in legal action. Others seek an inquiry.[[39]](#endnote-39)

An inquiry is not needed to address the transport and infrastructure problems.

Even less needed are restatements of previous responses to serious questions about decisions such as this.[[40]](#endnote-40)

### 5.3 A NSW answer?

To date the NSW government has seemed reluctant to acknowledge the existence of the substantive matters in the port commitment let alone consider change.

The Premier has apologised generally for the 2011 donations scandal uncovered by Operation Spicer, with a focus on individuals. Similarly the Opposition Leader called for authorities to ‘throw the book’ at an individual named by ICAC.[[41]](#endnote-41)

Yet reported contrition and apologies do not address headlines such as: *‘dirty tricks by developers and politicians to destroy Newcastle box terminal plans’.* Nor do they recognise potential concerns about matters such as democratic accountability and the likelihood that this deal has severely damaged the credibility of privatisation.

### 5.4 Federal action?

The substantial transport and infrastructure matters appear to fall within actual and claimed responsibilities of the Commonwealth.

The Commonwealth has actual responsibilities for corporations and international trade.[[42]](#endnote-42)

All political parties claim to have a Commonwealth cities agenda.

The Government is in favour of privatisation and until recently provided financial incentives for state privatisations. It effectively owns problems such as this. [[43]](#endnote-43)

Memo to Commonwealth agencies, politicians and Government: containers are the central component of international trade; Newcastle is a city; 50 years is a long time; this type of situation destroys public confidence in privatisation and weakens expectations about democratic accountability.

That the problem is in a second tier city means it is an ideal test for the Commonwealth to prove and improve itself.

The Commonwealth can act now. Options include it:

* instituting court action to have the payments declared an excise and therefore illegal;
* legislating to countermand the requirement for payments;
* adding conditions to specific purpose payments to NSW.[[44]](#endnote-44)

J Austen

5 September 2016

##  Notes

1. The three major NSW ports were leased to the private sector for 99 years; this duration is generally considered a sale rather than a lease.

Port Botany and Port Kembla were sold together in mid 2013 because of the plans for future container operations at Kembla. Container operations at Kembla would largely serve the same markets as Botany due to its proximity to industrial areas in west and south west Sydney. Sale price was $5.07billion

Newcastle was sold in April 2014 for $1.75billion.

 [↑](#endnote-ref-1)
2. See: eg. <https://www.lloydslistaustralia.com.au/lla/market-sectors/law-and-regulation/LOCAL-Labor-calls-for-parliamentary-inquiry-into-secret-NSW-port-privatisation-deal-531982.html> and <http://www.theherald.com.au/story/4098379/container-cap-queried/> and <http://www.theherald.com.au/story/4063134/watchdog-says-newcastle-container-cap-a-concern-poll/> and <http://lcit.com.au/status-of-newcastle-container-cap/> and

<http://www.abc.net.au/news/2014-12-17/greens-demand-details-of-secret-deal-to-cap-newcastle-containers/5972208> and

<http://www.theherald.com.au/story/3273275/chief-reveals-container-terminal-on-agenda/>.

The issue relates to cellular container operations, where ships require specialised land side equipment at the port eg. cranes, straddles. In these operations the standard unit for analysis is a 20 foot container (teu); the increasingly common 40 foot container is treated as 2teu. Container exchange refers to the number of teus lifted by cranes. [↑](#endnote-ref-2)
3. Documentation for the relevant aspect of the deal, the ‘port commitment’, is at: <https://cdn.fairfaxregional.com.au/iKQx4aiD4Q7fvCgDvFeGgz/c4faa7cc-efd5-4795-b0cb-ea5c263b7026.pdf>.

The background section of the port commitment document indicates its purpose to be Newcastle port covering the costs of the state’s promises to Botany and Kembla regarding container activities at Newcastle.

The term of the commitment is 50 years.

The document specifies an increase in the cap per annum as the greater of 6% or the growth rate of containers at Botany; given the expectation of an average Botany growth rate of 4.5% in note iv below.

The document does not specify a $100 per container; this is inferred in reports. Rather the document states that compensation relates to the weighted average of various container wharfage charges at Botany.

The use of a weighted average is curious; were Newcastle to develop a container terminal it would have an incentive to focus on container trades that generate the highest wharfage charges for Botany, leading to ‘undercompensation’ and distorting trades.

The charge does not relate to the costs borne by Newcastle port, or the state, or any services provided by others.

Botany wharfage charges are available at: <http://www.nswportsbotany.com.au/assets/General-PDF/Port-Botany-Schedule-of-Port-Charges-effective-1-July-2016.pdf>. These have increased in recent years, hence there is an arithmetic offset against the full effect of an increase in the cap.

The claim of $1million per ship visit does not seem to be consistent with $100 per container; average containers exchanged per ship in Australia is less than 800. See: <https://bitre.gov.au/publications/2015/water_056.aspx> [↑](#endnote-ref-3)
4. The cap of 30,000 containers (teu) is also insignificant in comparison with:

	* the claim about negotiations for a 1 million capacity container terminal at Newcastle for which a planning approval reportedly exists. See: <https://www.lloydslistaustralia.com.au/lla/market-sectors/ports/FREE-LOCAL-No-change-in-Newcastle-port-ownership-%E2%80%93-but-question-of-future-services-remains-up-in-the-air-520768.html>
	* the smallest mainland container terminal (Adelaide) which exchanged 259,000 containers in 2015. See: <https://bitre.gov.au/publications/2015/water_057.aspx>
	* the first full year of containerisation of Sydney (1970), when Sydney handled 175,000 containers. See: <http://www.sydneyports.com.au/__data/assets/pdf_file/0018/1188/Centenary_book_Chapter_4.pdf>
	* forecasts for national growth in the next decade or so Projections are for an additional 12.4million container units to be handled in Australia, over 3 million more in Sydney. See: <http://portsaustralia.com.au/assets/Gary-Dolman-Trends-Forecasts-for-Australian-Container-Ports.pdf>.At the given growth rate, it would take near 30 years for the Newcastle cap to reach the level of container trade in Sydney in 1970. [↑](#endnote-ref-4)
5. Road charges are for the combined toll for M5, M7 and M2; but exclude proposed toll roads Northconnex, Westconnex. Port cost interface index is at: <https://bitre.gov.au/publications/2015/water_057.aspx>. [↑](#endnote-ref-5)
6. While some comments about the commitment and deal seem concerned about the potential movement of containers between Newcastle and Sydney, this already occurs. Containers with contents to / from Newcastle and northern NSW already flow along the Sydney-Newcastle corridor. [↑](#endnote-ref-6)
7. This issue is associated with the debate about the timing of ‘peak coal’ variously expected between now and the mid-21st century. The issue was subject of a 2009 University of Newcastle paper: <https://eclipsenow.wordpress.com/2009/12/20/uni-of-newcastle-peak-coal-2010-2048/>.

More recent commentary suggests an earlier peak at least for China: <https://theconversation.com/ross-garnaut-china-to-reach-peak-coal-for-electricity-by-2015-30868>. [↑](#endnote-ref-7)
8. Some background to the container issues at Newcastle is at Greg Cameron, *Container terminal policy in NSW*, at <http://www.containerterminalpolicyinnsw.com.au/>. Unfortunately there is little consolidated official or government commentary on relevant or recent matters.

The matter of some previous government intervention to slow / prevent a Newcastle container terminal, leading up to the state election in early 2011, is outlined in several chapters of the Independent Commission Against Corruption’s report ‘Operation Spicer’ at: <https://www.icac.nsw.gov.au/documents/investigations/reports/4865-investigation-into-nsw-liberal-party-electoral-funding-for-the-2011-state-election-campaign-and-other-matters-operation-spicer/file>.

The effect of some activities identified in Operation Spicer was to delay or negate the potential for a container terminal in Newcastle while Labor was in government in NSW (2011). The outcome was government advice to Newcastle port corporation, described by the ICAC:

*‘which, at the request of Mr Roozendaal,* (my comment: Treasurer / Ports Minister) *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.’*

To be clear the ICAC did not find that the Labor Treasurer / Ports Minister’s instruction to suspend negotiations on a container terminal was motived by improper purpose:

*‘While Mr Roozendaal’s support for the Buildev* (my comment: coal) *proposal was contrary to the weight of the advice he received, the Commission is not satisfied on the available evidence that he was motivated by any improper purpose.’*

Some of those wishing to delay or stop a container terminal who made donations to Labor also made donations to the Coalition opposition with a view to gaining influence in the likely event it would take office in 2011. Referring to proponents of the coal terminal, who were opposed to a container terminal, the ICAC argues there was a motive of influence but some disappointment with the result. There also were revelations about a (successful) campaign to unseat the Labor local member of state parliament who had been in favour of a container terminal.

It should be noted that the Operation Spicer report was limited to events prior to the 2011 election; it did not discuss the later decisions affecting Newcastle in 2012, 2013 or in the privatisations. [↑](#endnote-ref-8)
9. See: Operation Spicer in note viii above and <https://www.lloydslistaustralia.com.au/lla/market-sectors/ports/Corruption-inquiry-reveals-dirty-tricks-by-developers-and-politicians-to-destroy-Newcastle-box-terminal-plans-534988.html>. [↑](#endnote-ref-9)
10. This comment was made in response to statements in parliament about the possible review of decisions regarding a container terminal proposal:

*“Further the second sentence in the answer “as the container port did not proceed, there is no decision to review” - is erroneous because the Hon M Baird MP, as Treasurer, by decisions of 30 August 2012 and 26 July 2013 dictated that a container port not proceed at Newcastle. There were other decisions on the container port proposal, including by Mr Baird and by Mr E Roozendaal. There were thus several decisions about the container port proposal capable of being reviewed. The second sentence is misleading in allowing the interpretation that the proposal for the container terminal did not proceed because of a supervening event or because the proposal was withdrawn. Anglo Ports did not withdraw the proposal and denies there was any such supervening event.”*

See: <https://www.parliament.nsw.gov.au/committees/DBAssets/InquiryOther/Transcript/6535/Anglo%20Ports%20Statement10215.pdf> [↑](#endnote-ref-10)
11. See: <http://johnmenadue.com/blog/?p=2080> [↑](#endnote-ref-11)
12. <https://logisticsmagazine.com.au/nsw-treasurer-gladys-berejiklian-defends-caps-on-container-ships/> [↑](#endnote-ref-12)
13. See note xii above. [↑](#endnote-ref-13)
14. For example See: p90 <http://infrastructureaustralia.gov.au/policy-publications/publications/files/Australian_Infrastructure_Plan.pdf>.

The idea of government business sales to generate cash is generally mistaken unless private owners can and will do things differently from public sector owners; that the business is more constrained in government ownership than it would be if privately owned.

Businesses provide dividends to owners; a business sale forgoes the net present value of these. This net present value is arithmetically higher while government owns a business due to the public sector having access to funds at less cost (a reason for competitive neutrality rules).

Hence the balance sheet argument to support privatisation is fallacious. The government balance sheet is unchanged by a sale of a business, there is merely a change in asset class values within the government’s balance sheet eg. from fixed assets to cash.

A government’s ability to finance new infrastructure is therefore unchanged by a privatisation, unless the privatisation releases the business from constraints imposed by government such as capital starvation, or interventions such as ‘thou shalt not have a container terminal’. The present case, Newcastle, does not appear to be such an exception.

The above deals with ‘source of funds’. The other important consideration is ‘application of funds’; how the ‘released’ cash in the balance sheet is used.

A rational business decision would be to invest only in those projects where the present value of future net earnings exceeded the interest rate achieved by government lending. In such a case it would make sense to use cash from whatever source, whether privatised business, dividends or borrowings, to fund such projects.

Projects that do not show expected *financial* returns greater than the government lending rate should not be funded by this process; spending the cash generated by privatisation on such projects is not ‘recycling’ but dispersal or destruction of capital. Note the relevant test is financial not economic returns, thus funding road projects by sale of government businesses is not justified by the argument.

The real motive for the ‘recycling capital’ pitch appears to be public relations; initially to explain to governments and the public there is a cost of projects in the hope of focussing attention towards projects which are financially worthwhile. These would be projects for which it is financially worthwhile for the government to sacrifice ownership of another business. Under this reasoning, financially viable projects would be identified in advance of privatisation.

However, it is arguable the idea has been transformed into one in which privatisation is seen as a means of generating cash now for project ideas that are not adequately developed to demonstrate financial viability. If so it is an ideological rather than economic argument, relating to views of the size of the public sector. [↑](#endnote-ref-14)
15. Presumably also the net sale price of all three ports i.e. the increase in the sale price of Botany being greater than the decrease in the sale price of Newcastle.

See for example: <https://theconversation.com/selling-ports-and-other-assets-why-anti-competitive-deals-to-boost-prices-cost-the-public-in-the-end-54343>.

For anti-competitive, see: note xi above.

One circumstance in which restrictions on competition increase the sale price but not the retention value is when those restrictions would be refused by the Australian Competition and Consumer Commission. The Commission claims competition law has jurisdiction only over restrictions on business activities but a privatisation is not such an activity, and the Commission has no power regarding anti-competitive aspects of privatisations. The Commission’s Chair is calling for legislative change to allow coverage of privatisations. See:

This nuance is apparently being explored by some in relation to the Newcastle sale. They ask whether a restriction was set for and operated on Newcastle prior to the privatisation, and if so whether it was authorised etc. by the Commission. See: <http://www.containerterminalpolicyinnsw.com.au/latest-correspondence/> [↑](#endnote-ref-15)
16. See: Operation Spicer in note viii above. [↑](#endnote-ref-16)
17. See note xxvii below. [↑](#endnote-ref-17)
18. The matter of governance (eg. privatisation) and port rail and road coordination is discussed in section 6 of the national ports strategy discussion paper at: <http://infrastructureaustralia.gov.au/policy-publications/publications/files/ports_strategy_background_paper_20_December_2010.pdf>. [↑](#endnote-ref-18)
19. Westconnex: <http://www.smh.com.au/nsw/westconnex-motorway-cost-blows-out-by-14-billion-20151119-gl3isl.html> and <http://www.afr.com/business/infrastructure/infrastructure-summit-2016-westconnex-under-fire-for-poor-process-20160615-gpjej6>. [↑](#endnote-ref-19)
20. <http://www.abc.net.au/news/2012-03-12/newcastle-more-than-just-a-coal-port/3883064>. [↑](#endnote-ref-20)
21. <https://www.lloydslistaustralia.com.au/lla/market-sectors/ports/BREAKING-FREE-LOCAL-Minister-Gay-confirms-existence-of-secret-%E2%80%9Ccross-payments%E2%80%9D-on-future-Newcastle-container-volumes-533196.html>. [↑](#endnote-ref-21)
22. See: road reform at thejadebeagle.com [↑](#endnote-ref-22)
23. See: <http://www.coag.gov.au/node/52>. [↑](#endnote-ref-23)
24. Consequences to business profits for a change in government policies. See eg. Margaret McKenzie, *What is and isn’t a sovereign risk*, at <http://businessnewsroom.deakin.edu.au/articles/what-is-and-isn-t-a-sovereign-risk>. In the case of a proposed container terminal in Newcastle, government decisions to terminate negotiations during the ‘commercial’ stage may have had reputational effects if not also impacts within the broadest definitions of sovereign risk. [↑](#endnote-ref-24)
25. One of the questions arising from a privatisation sale structure is whether acquisition by a particular bidder would impact on competition in a market; a matter for the Australian Competition and Consumers Commission. In the case of National Rail Corporation etc., some bidders gave undertakings to the Commission regarding upstream or downstream businesses eg. trucking and stevedoring. The issue relates to bidders rather than the structure of the sale. [↑](#endnote-ref-25)
26. If relevant approvals are made in open forums, and subject to judicial review, they do not give rise to questions of public sector ownership advantages.

Securing regulatory approvals for a container terminal in Newcastle might be relatively straightforward, indeed it has been claimed that planning approvals already exist. The port and port related activities have long existed and a site at the port, formerly the steelworks, had been earmarked for such activity; in fact the idea of a container terminal had reportedly been mooted by BHP (steel) in 1999 on closure of the steelworks. [↑](#endnote-ref-26)
27. Newcastle port was a statutory state owned corporation with shareholders the Treasurer and Minister for Finance. S.20E of the State Owned Corporation Act (1989) has:

*(1)  The principal objectives of every statutory SOC are:*

*(a)  to be a successful business and, to this end:*

*(i)  to operate at least as efficiently as any comparable businesses, and*

*(ii)  to maximise the net worth of the State’s investment in the SOC, and*

*(b)  to exhibit a sense of social responsibility by having regard to the interests of the community in which it operates, and*

*(c)  where its activities affect the environment, to conduct its operations in compliance with the principles of ecologically sustainable development contained in section 6 (2) of the*[*Protection of the Environment Administration Act 1991*](http://www.legislation.nsw.gov.au/#/view/act/1991/60)*, and*

*(d)  to exhibit a sense of responsibility towards regional development and decentralisation in the way in which it operates*.

Subsections 1a(ii), 1b and 1c are consistent with Newcastle exploring a container operation. The Act did not require Newcastle to consider the impacts of its activities on other government or private organisations such as Port Botany or Roads and Maritime Authority; it was only to consider the net worth of its own organisation. See: <http://www.legislation.nsw.gov.au/#/view/act/1989/134/historical2013-06-03/part3/div2/sec20e>

Statements of Corporate Intent contents are referred to in note viii above. [↑](#endnote-ref-27)
28. See: <http://www.smh.com.au/nsw/transport-cap-threatens-return-on-port-botany-sale-20120613-20am0.html>. [↑](#endnote-ref-28)
29. The relevant question and Treasury response / comment is in the letter at note x above. Also see: <http://lcit.com.au/how-the-nsw-government-contrived-teh-container-shipping-market/>. [↑](#endnote-ref-29)
30. See: note viii above, at p52. [↑](#endnote-ref-30)
31. Australian Competition and Consumer Authority, *Monitoring of container stevedoring report 2014—15*, mentions an increase in Newcastle port charges but not the container cap or penalty arrangement. See: <https://www.accc.gov.au/regulated-infrastructure/waterfront-shipping/monitoring-reporting-for-container-stevedoring>. [↑](#endnote-ref-31)
32. Chapter 4 Parliament of Victoria Legislative Council Port of Melbourne Select Committee*, Inquiry into the proposed lease of the Port of Melbourne*, December 2015. See: <http://www.parliament.vic.gov.au/file_uploads/PMSC_58-01_Text_WEB_9KxbyZMZ.pdf>. [↑](#endnote-ref-32)
33. The ACCC’s Chair’s recent views on privatisation are reported at <http://www.afr.com/news/rod-sims-wants-to-end-government-immunity-from-competition-law-20160729-gqgvoz>.

While these are sensible in relation to substantial government transactions, such as privatisations or large contracts, governments undertake a myriad of lesser sometimes very small, activities such as the funding of community service obligations and grants. It may not be practicable to bring all of these under competition law; there are too many to capture and undue time may be spent by government agencies seeking compliance with or exemption from ACCC oversight. The matter is worth further attention. [↑](#endnote-ref-33)
34. For example see: Demi Chung, *Private provision of transport infrastructure – unveiling the inconvenient truth in New South Wales*, 31st Australasian Transport Research Forum, 2008 at <http://atrf.info/papers/2008/2008_chung.pdf> [↑](#endnote-ref-34)
35. See: <http://www.weeklytimesnow.com.au/news/politics/port-of-melbourne-lease-15year-compensation-offer/news-story/83e75d4b0587e8edbb9fd673416f3a94> and

<http://www.afr.com/business/infrastructure/ports/port-of-melbourne-privatisation-deal-reached-20160308-gne764>. [↑](#endnote-ref-35)
36. See: Paul Barratt, *Would war powers reform really leave national security in the hands of the minority parties,* at <http://johnmenadue.com/blog/?s=war> [↑](#endnote-ref-36)
37. “*In 2015 Mr Searle asked Ms Berejiklian whether there was “any other restriction in the sale of the lease documents” on the Port, to which she replied she was “not aware” and would take the question on notice. On Thursday she said she did not answer because she wasn’t sure if it was commercial in confidence.”* See: <https://logisticsmagazine.com.au/nsw-treasurer-gladys-berejiklian-defends-caps-on-container-ships/>. The above comment was almost a year to the day of Mr Searle’s question. [↑](#endnote-ref-37)
38. Competition Principles Agreement clauses 3e and 4. The port commitment arguably breaches competitive neutrality by putting Botany at an advantage and Newcastle at a disadvantage by continuing characteristics attributable to their previous government ownership via arrangements with government. Were the government not an intermediary, if payments were made directly from Newcastle to Botany, the situation would be different. See: <https://www.coag.gov.au/node/52>.

Prime Minister Howard and ports at: <http://www.smh.com.au/national/howard-denies-tearing-up-ports-agreement-20070819-u5o.html> and

 <http://www.abc.net.au/news/2007-08-18/howard-issues-port-takeover-warning-to-states/643530>. [↑](#endnote-ref-38)
39. See for example: <http://www.containerterminalpolicyinnsw.com.au/latest-correspondence/> [↑](#endnote-ref-39)
40. Examples are questions and answers such as:

	* the existence of a cap? The answer that there is no legislation is self-evident when members of parliament are unaware of the content of the deal see: <http://www.theherald.com.au/story/4098379/container-cap-queried/>
	* the effect of the cap? The answer that Newcastle is not prohibited from handling containers avoids the substance of the question.
	* anti-competitive impacts? The answer that the matter had been presented to the ACCC avoids the central issue; the ACCC lack of jurisdiction to provide a view on the matter. [↑](#endnote-ref-40)
41. See: <https://www.nsw.gov.au/media-releases-premier/operation-spicer>, and <http://www.smh.com.au/nsw/icacs-operation-spicer-report-live-the-findings-revealed-20160829-gr44zl.html> [↑](#endnote-ref-41)
42. Constitution s.51(i) trade, and s.51(xx) corporations. [↑](#endnote-ref-42)
43. The asset recycling fund, although not used for the ports sales, shows the Coalition’s interest and support for privatisations. See: <http://www.afr.com/news/policy/budget/turnbull-government-pockets-leftover-asset-recycling-funds-in-federal-budget-20160427-gog2bg>. [↑](#endnote-ref-43)
44. A court action to declare the deal to involve excises on Newcastle and therefore beyond the power of NSW, might not succeed as there is no NSW legislation on the matter however, legal experts might wish to comment on this as well on the ability of NSW’s executive government to enter the arrangements.

Parliament can legislate with respect to trade or corporations.

Constitution s.96 allows the Parliament to impose *any* condition on state grants. [↑](#endnote-ref-44)