**JOHN AUSTEN: Newcastle Port – judicial over-reach?**

*The Federal Court’s rejection of a case against penalties facing Newcastle Port seemed to misunderstand transport policy matters.*

Since 2016, [posts](#_top) in Pearls and Irritations have drawn attention to a secret NSW Government scheme to hinder Newcastle port’s wish for a container terminal. One effect is to seemingly hamstring attempts by the world’s largest coal port to diversify and deal with global (climate) policy realities. <https://johnmenadue.com/john-menadue-newcastle-port-another-botched-privatisation-a-repost-from-5-september-2016/>

The scheme has Newcastle Port paying a penalty to compensate privately owned Port Botany for every container moved through such a terminal. Somehow a call by Botany bidders for assurance the Government wouldn’t develop its own terminal at Newcastle morphed into penalties for any terminal – including a privately funded one.

The Federal Government and Opposition failed to do anything about this trade impediment. Without those politicians pulling their weight, in 2018 the Australian Competition and Consumers Commission instituted proceedings alleging a breach of the Competition Act’s anti-competitive laws.

The [Federal Court](#_top) – Justice Jagot – ruled against the Commission. <https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2021/2021fca0720>

The decision hinged on Crown immunity. To explain, the scheme was secretly included in the privatisations of Port Botany (2013) and Newcastle (2014). The Court said privatisations are not business activities. As the Competition Act applies only to business activities the deal was ‘immune’.

This article is not interested in that. Rather, it is interested in the Court’s further musings: the scheme is not anti-competitive; a container terminal at Newcastle is ‘fanciful’.

**Anti-competitive?**

The Court argued the scheme sought to maximise revenue from the sale of Botany, rather than stifle competition.

I don’t understand that. The only way to maximise revenue from the Botany sale was to restrict potential competition.

Further, the Botany bidders – themselves container port experts – and the Government consistently act as if Newcastle has the potential to compete without some such scheme.

The Court seemed to give more weight to the Government’s latest excuses than to logic and observed actions.

**Fanciful?**

This comment was part the Court’s reasoning to overcome the fact a container terminal in Newcastle would attract trade from Botany. The Court said because it could never happen, anything to reduce the prospect of it happening could not be anti-competitive. One reason it supposedly could never happen is a Government policy.

The policy: Botany’s container capacity is to be exhausted before another terminal in NSW is built.

Why the Government should keep such a policy post privatisation – which is intended to remove Government influence on port business – escapes me.

Nonetheless, there is a fatal flaw – which the Court failed to appreciate: Botany’s capacity, like ports in many metropolises, is limited by [road traffic](#_top) outside the port precinct – not by terminals or berths. <https://www.bitre.gov.au/sites/default/files/2019-11/cr_001%20%282%29.pdf>

That was the point of the [National Ports Strategy](#_top) – cited by the Court. In that, Governments agreed policy should treat ports as a function not a place. The difference: the former requires planning for land transport to the port, of which Botany was an example of what to avoid. <https://www.infrastructureaustralia.gov.au/sites/default/files/2019-06/COAG_National_Ports_Strategy.pdf>

The Court underestimated Botany’s – and Sydney’s - land transport problems.

It cited a claim only 2% of traffic on the M5 east relates to Botany. Drivers on the M5 – and elsewhere - would think that an understatement, as evidently does the Government e.g., the [Sydney gateway](#_top) project. <https://www.infrastructure.nsw.gov.au/media/2154/sydney-gateway-program_final-business-case-summary.pdf>

The reason: 2% (probably) refers to truck numbers rather than the effect of trucks on traffic. Those trucks likely use over 12% of space on that, and other, roads. In heavy traffic that greatly adds to [congestion](#_top). <https://www.containerterminalpolicyinnsw.com.au/wp-content/uploads/2016/01/RTA-M5-Expansion-Modelling-Report-RTA-5-May-2009.pdf>

More to the point, the relevant issue is the converse – the impact of congestion on trucks. Botany is, and will remain, amid some of the heaviest road traffic in Australia.

The effect is compounded by distances port trucks travel. The Court accepted a claim 80% of Botany’s containers end up within 40km of the port. Apart from inherent circularity, data problems, ignoring a lower - 57% - figure from Transport for NSW, the distance being as the crow flies, and it seemingly being negated by Sydney’s freight precincts moving west since first made (2005) etc. - it is not a proxy for freight costs, which of course, would include time lost due to congestion.

More recent, and relevant, data shows average port trucking costs in Sydney [higher](#_top) than elsewhere in Australia - half of all export-import container costs - $20 per teu more than Melbourne, $100 more than Adelaide. That was prior to opening of – and substantial new truck tolls on – WestConnex and NorthConnex. <https://www.bitre.gov.au/publications/2021/waterline-66>

**Strategic mess**

Like at the national level, strategic freight policy in NSW is a [mess](#_top). It fails to understand basics like: freight follows least cost pathways. <https://johnmenadue.com/john-austen-australian-freight-policy-where-is-my-chainsaw-part-1-of-2/>

The picture the Government presents for the Botany-first policy: preventing a Newcastle terminal avoids a queue of trucks carrying containers over 150km to western Sydney. This was put to, but not accepted by, a [Parliamentary Inquiry](#_top) in 2019. <https://www.parliament.nsw.gov.au/lcdocs/inquiries/2516/Final%20version%20of%20report%20-%2025%20February%202019.pdf>

The reality: with a Newcastle terminal many container trucks running between Botany and Newcastle via central Sydney would be redeployed to carry cargo from Newcastle to the Hunter and northern regions.

The present run through central Sydney is exacerbated by lack of a sensible [designated](#_top) freight route. The route designated by the Government adds over 40km – and several expensive tolls - to a truck trip between Botany and Newcastle. The gap in the freight network will remain after WestConnex is completed. So much for NSW ‘strategy’. <https://spatial.infrastructure.gov.au/portal/apps/webappviewer/index.html?id=9690eb423b4f446485781ea8a61851d2>

There is no public information capable of supporting an anti-Newcastle policy, and plenty of public information suggesting such policy is wrong. The Parliamentary inquiry (above) said it was given contradictory information on the key land transport issue – hardly an endorsement of the policy or data on which it is supposedly based.

**Policy sustainability?**

The Court mused the policy was developed along lines sought by Infrastructure Australia’s project assessments. That is not so. Assessments require demonstration of: problems; options; a business case; ex post review. There has not been any demonstration of any of these.

The Court also argued the policy is likely to continue as it has been operating for some years. That may be so. However, more significant was the Court noting it originated in 2012 - the same time NSW embarked on other strategic transport stupidities: Sydney Metro; Transport Asset Holding [Entity](#_top); opposition to Badgerys Creek airport. <https://johnmenadue.com/nsw-rail-policy-more-than-cooking-the-books/>

It appears the Court thought the NSW Government has a role in ascertaining the financial merit - or supporting construction - of a Newcastle terminal. Such thinking is wrong. The Government’s role, if any, is merely project regulatory approval. As such approval is not the same as initiation of a project, Government opinions about viability should be discarded.

Hence NSW policy against a Newcastle terminal can only have one aim. Bidders for Botany believed without that aim a terminal at Newcastle may go-ahead because of Sydney’s landside constraints.

The aim? To shield Botany from potential competition from Newcastle by an opaque non-regulatory method.

**Conclusion**

The Court’s discussion beyond Crown immunity - of a Newcastle container terminal - could be read as being needless and misunderstanding basic issues.

Little wonder it attracted [criticism](#_top). <https://www.newcastleherald.com.au/story/7349037/judge-demolishes-newcastles-container-case-in-460-page-federal-court-verdict/>

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