

**Submission to "Transport for NSW" from [REDACTED]  
"Freight Policy Reform: Consultation Paper, April 2024"  
May 30 2024**

The NSW government's 11-year-old "Freight and Ports Plan" expired at the end of 2023<sup>1</sup> leaving an unfunded liability of between \$600 million and \$4.3 billion to NSW Ports Pty Ltd.<sup>2</sup>

The government is liable for paying NSW Ports for the number of containers handled at the Port of Newcastle above an annual cap until 2063.

On March 21 2024, Premier Chris Minns informed Parliament the liability was contained in "secret contracts negotiated by the previous Government and not disclosed to the taxpayers of this State".<sup>3</sup>

"As a result of those decisions, New South Wales taxpayers not only forgo the revenue they would have received as owner of those assets but also have an additional liability on top of whatever capital the State missed out on. That is the result of the former Government's privatisation—sell for \$4.3 billion and then owe \$4.3 billion—and it is in addition to privatised assets," Mr Minns said.

The liability was incurred in secret lease contracts with NSW Ports for Port Botany and Port Kembla on May 31 2013. NSW Ports paid \$4.3 billion for the Port Botany lease and \$760 million for the Port Kembla lease.

Treasurer Daniel Mookhey informed Parliament on May 14 2024 the previous government had denied the liability. Mr Mookhey said the government's claim that "no such deal was ever done" was "not true".<sup>4</sup>

The then Labor opposition asked more than 100 questions in Parliament about the liability between October 17 2013 and July 28 2016.<sup>5</sup> The government admitted the liability because it was exposed by the Newcastle Herald on July 29 2016.<sup>6</sup>

"The government has repeatedly denied or disputed the existence of such an agreement, which has been the subject of more than 100 separate questions to parliament over the past two years," the Newcastle Herald reported.

It is impossible that Parliament intended to authorise the secret liability because the government falsely denied incurring it. A trial is proceeding in the Federal Court in relation to the liability's legality under the "Commonwealth Competition and Consumer Act 2010".<sup>7</sup>

Port Botany and Port Kembla were leased to NSW Ports under the "Ports Assets (Authorised Transactions) Act 2012" (PAAT Act). The liability is unlawful under the PAAT Act because it is unauthorised. Consequently, the government is not authorised under the PAAT Act to pay NSW Ports.

The PAAT Act did not include the Port of Newcastle when the liability was incurred on May 31 2013.<sup>8</sup> The PAAT Act was amended to add the Port of Newcastle with effect on July 1 2013. Parliament was not informed about the liability, or that the port was being leased for the purpose of funding a secret liability.

The Port of Newcastle was leased for an unlawful purpose, which makes the lease unlawful. Port of Newcastle Investments Pty Ltd (PON) leased the port for \$1.75 billion on May 30 2014. PON was fully aware of the liability's origin.<sup>9</sup>

## **Container terminal policy**

Container terminal policy was the defining element of the NSW government's 11-year-old "Freight and Ports Plan".

Government container terminal policy between July 27 2012<sup>10</sup> and the end of 2023 was that a container terminal would not be developed at the Port of Newcastle before Port Botany and Port Kembla reached capacity. The state's rail freight infrastructure is primarily designed to service Port Botany.

A container terminal has not been developed at the Port of Newcastle.

The government's container terminal policy was false because a container terminal can be developed at the Port of Newcastle without regard to container capacity at Port Botany and Port Kembla. This position was confirmed in the government's answers to questions in Parliament from October 17 2013 to the present.<sup>11</sup>

During Parliamentary debate on the "Port of Newcastle (Extinguishment of Liability) Act 2022" (EOL Act), in October and November 2022, it was acknowledged that the ports' leasing arrangements served to prevent a container terminal at the Port of Newcastle.

The EOL Act is invalid<sup>12</sup> because the Port of Newcastle was leased for an unlawful purpose under the PAAT Act.

The EOL Act did not retrospectively amend the PAAT Act to authorise the liability.

PON's liability to reimburse the government for the cost of paying NSW Ports was extinguished for \$13 million under the EOL Act on April 5 2024.<sup>13</sup>

## **Reform Program**

The TfNSW "reform program" will "investigate and review the policy settings that apply to different parts of the supply chain".

Reform will not be achieved without recognition that for the last 11 years the government operated under a false container terminal policy. In addition to producing a liability of between \$600 million and \$4.3 billion, this false policy prevented the government from considering the benefits of removing all freight from:

- the existing Sydney rail network;
- the rail corridor between Newcastle and Sydney;
- the rail corridor between Port Kembla and Sydney.

A rail freight line can be built linking the Port of Newcastle with Badgery's Creek and Port Kembla. This line can be funded by replacing trucks with trains for all container transportation between the port and intermodal terminals throughout NSW.

Port Botany is not required as a container port if all NSW containers are railed between the Port of Newcastle and intermodal terminals located in outer western Sydney and regional areas. Regional and interstate freight currently entering and leaving Sydney by road can be railed instead through Sydney intermodal terminals.

Rail passenger services can be increased by taking-over all existing rail freight capacity. Passenger rail serving Sydney, Newcastle and Port Kembla is more profitable than freight.

Significant opportunities will be created for high density housing development in former freight rail corridors if trains replace cars as the primary means of urban transport for these areas.

Port Botany can be profitably re-purposed, such as for airport services.

There will be no need to build the Western Sydney freight line.

The Moorebank intermodal terminal site can be re-purposed with a more profitable land use, such as housing, based on rail transport.

More than 5000 hectares of land in western Sydney are currently used for industrial purposes. Businesses occupying this land will have a significant financial incentive to relocate to regional areas of NSW once their reliance on container trucking through Port Botany is removed.

### **Previous submissions**

The above policy reset has been submitted to the government on a number of previous occasions and in correspondence to relevant ministers, including the Australian government. These representations included the following submissions:

2023: Submission to IPART, "Port of Newcastle Compensation Review", June 19 2023

2019: Submission to the "NSW Legislative Council Public Works Committee Inquiry into the impact of the Port of Newcastle sale arrangements on public works expenditure in New South Wales", January 3 2019

2015: Submission to the Hon M Baird MP, Premier and Minister for Western Sydney, "Moorebank Intermodal Terminal traffic projections", June 21 2015

2014: Submission to the "Select Committee on the Planning Process in Newcastle and the Broader Hunter Region", October 21 2014

2014: Submission to Senator the Hon Matthias Cormann, Minister for Finance, "Comment on Detailed Business Case For the Moorebank Intermodal Terminal", August 14 2014

2013: Submission to the Productivity Commission, "Public Infrastructure Inquiry", December 13 2013

2012: Submission to Transport for NSW, "NSW Long Term Transport Masterplan", April 18 2012

2011: Submission to Commonwealth Department of Environment, "Comment on Draft Moorebank Intermodal Terminal EIS", December 14 2011

### **References**

1. [REDACTED]
2. Hon Chris Minns MP, Premier, Hansard, Legislative Assembly, March 21 2024
3. Hon Chris Minns, March 21 2024
4. Hon Daniel Mookhey MLC, Treasurer, Hansard, Legislative Council, May 14 2024

5. Hansard, see compilation of questions in Parliament relating to ports leasing arrangements at <https://www.containerterminalpolicyinnsw.com.au/government-responses/>
6. Newcastle Herald, online, July 28 2016  
<https://www.newcastleherald.com.au/story/4059508/port-war-botany-protected-against-newcastle-competition/send-us-your-news/>
7. Federal Court, NSW Registry, Mayfield Development Corporation Pty Ltd V NSW Ports Pty Ltd
8. Hon M Baird MP, Treasurer, second reading speech, "Ports Assets (Authorised Transactions) Bill 2012", Hansard, Legislative Assembly, October 17 2012
9. [REDACTED] Submission to IPART, "Port of Newcastle Compensation Review", June 19 2023
10. Hon M Baird MP, Treasurer, Media Release, "Green light given for long term lease of Port Botany and Port Kembla", July 27 2012
11. See Hansard, <https://www.containerterminalpolicyinnsw.com.au/government-responses/>
- [REDACTED]
13. IPART, Media Release, "Port of Newcastle Compensation Payment Valued at \$13 million", April 5 2024

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