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Legal briefing

Number 73 | 3 November 2004

Determining whether government agencies are subject to the Trade Practices Act

The High Court has allowed an appeal that will assist government departments, agencies and authorities to decide whether their activities could involve carrying on a business and are subject to the provisions of the *Trade Practices Act 1974* (Cth) (TPA).

In *NT Power Generation Pty Ltd v Power and Water Authority* [2004] HCA 48, 6 October 2004, the High Court considered s 46 of the TPA (misuse of market power) in the context of dealings between a government-owned power company and a potential competitor. The Court has clarified the scope of s 2B of the TPA introduced in 1995, in the context of the introduction of National Competition Policy. That section abolished Crown immunity defences by applying the TPA to state and territory governments and their agencies 'so far as' they carry on a business.

The majority justices in the High Court (McHugh ACJ, Gummow, Callinan and Heydon JJ) upheld the s 46 claim against Power and Water Authority (PAWA). They held that PAWA's refusal to enable NT Power Generation Pty Ltd (NT Power) to distribute and sell electricity using its transmission and distribution network was a misuse of power in the market for the supply of services for the transport of electricity along PAWA's infrastructure and in the electricity supply/sale market in the Northern Territory [63].

Kirby J in dissent dismissed the s 46 claim. He did not regard the conduct engaged in as involving a 'taking advantage of' for a purpose which contravened the Act as it arose for 'governmental reasons' [202]. He also did not accept that the conduct was anti-competitive within s 46 [203].

The majority judgment deals with:

— The phrase 'carrying on a business' in s 2B of the TPA. This was construed broadly. The Court considered that s 2B required an answer to the question 'what business was PAWA carrying on?' So far as PAWA was carrying on that business, s 46 applied to it [70].

— Whether Gasgo, a wholly owned subsidiary of PAWA was 'the Crown'. The majority concluded that Gasgo was not. The reasoning on that issue is likely to be of broader interest to the Commonwealth and Commonwealth authorities because legislative obligations may not apply or may be different if the entity concerned is not 'the Crown' [161–165].

— The scope of 'derivative Crown immunity'. That is, the extension of Crown immunity to third parties who are dealing with the Crown.

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The majority concluded that this immunity applies when application of a law would cause some impairment to proprietary, contractual and other legal rights and interests of the government and not otherwise [170]. Prejudice to the financial, economic or commercial interests of the Crown alone would be insufficient to give rise to immunity [170–173].

The ACCC and the Attorneys-General for New South Wales, Western Australia and South Australia intervened in the proceedings because of the wide impact expected of a High Court determination on the issues relating to the scope of the application of the TPA to activities of government entities and 'Crown immunity'.

The facts

NT Power, generated electricity at a plant which was built to supply a mine in the Northern Territory. It wished to sell power to consumers within the Northern Territory. It could not sell power without access to the existing electricity transmission and distribution infrastructure in and around Darwin and Katherine. That infrastructure was owned by PAWA.

PAWA is a body corporate constituted under s 4 of the *Power and Water Authority Act* (NT), and is subject to the directions of the Minister for Essential Services for the Northern Territory (under s 16 of that Act).

NT Power requested that PAWA supply the electricity transmission and distribution infrastructure services needed for its plan to sell electricity to consumers in competition with PAWA. PAWA rejected the request. NT Power sought to obtain gas to power its power station. Gasgo had a long-term contract with local NT gas suppliers (the Mereenie suppliers) which gave it the right to purchase Mereenie gas before it was offered to others. NT Power asked Gasgo for an undertaking that it would not use this right to stop NT Power being supplied with gas. Gasgo refused to give the undertaking.

The majority found that PAWA was carrying on a very substantial business.

The orders

In summary:

— the High Court allowed the appeal from the Full Court of the Federal Court;

— the orders of the Full Federal Court made on 2 October 2002 were set aside; and

— the matter was remitted to Mansfield J, the judge at first instance, for determination of the claim against the second respondent and consideration of the quantum of damages, costs of the trial, and the form of other relief.

The section 2B issue

The majority found one matter was not controversial – PAWA was carrying on a very substantial business [52]. The Court found there were many references in PAWA's internal documents revealing that its officers perceived it to be carrying on a business. This was also found in the content of PAWA's 1998 Annual Report.

The annual report used words and phrases such as 'core business', 'commercialisation', 'commercial services' and 'in a commercial manner' [53], [54].

The Court found that these statements in the annual report amounted to 'informal admissions', and that, as they were made in a document produced under a statutory duty, were of the 'utmost solemnity' [55].

Carrying on a business – the correct construction of section 2B

The construction of s 2B proposed by PAWA was that it was not 'carrying on a business' in denying access to its infrastructure. The majority stated [67]:

> PAWA proceeded on an erroneous construction of s 2B. It may be accepted that the conduct proscribed by the Act, if it is to fall within s 2B, must be engaged in in the course of PAWA carrying on a business. But the conduct need not itself be the actual business engaged in. ... But where such an authority 'carries on a business' this removes the governmental obstacle to curial examination of its conduct in order to see whether s 46 has been contravened.

Businesses often operate across the boundaries of separate markets.

The majority continued [68]:

> The Act is seeking to advance the broad goal of promoting competition. Certain provisions of the Act, particularly Pt IV, necessarily turn to a significant degree on expressions which are not precise or formally exact. One example is "market": there can be overlapping markets with blurred limits and disagreements between bona fide and reasonable experts about their definition, as in this case. Other examples are "substantial", "competition", "arrangement", "understanding", "purpose" and "reason" (which need only be a "substantial" purpose or reason: s 4F). It is not appropriate to subject the application of this type of legislation to a process of anatomising, filleting and dissecting in the fashion advocated by PAWA.

Examining the meaning of the term 'business', the Court stated [69]:

> Nothing in the Act limits the meaning of "business" by reference to the criteria for market definition. Businesses often operate across the boundaries of separate markets. PAWA's use of its infrastructure assets was a part of its carrying on of a business, whether or not it was in a market for their acquisition, sale or hire. ... Further, s 2A, which uses substantially the same language as s 2B, applies the Act as a whole to Commonwealth businesses.

The majority held that the conduct of PAWA in denying access to its infrastructure, simply in order to protect its revenue position, was conduct designed to secure PAWA's position as part of its carrying on of a business [72].

Section 46 can interfere with property rights and be an alternative access regime

In the context of discussing whether s 46 is an alternative access regime to that found in Pt IIIA of the Act, the Court rejected an argument that s 46 should not be permitted to interfere with property rights [85]:

PAWA's use of infrastructure assets was a part of its carrying on of a business.

> ... Lee J, who was of the opinion that s 46 'does not purport to interfere with the due exercise of rights of property per se', gave various examples of the supposed inability of one competitor to obtain access to the real or personal property of another. However, private traders could be obliged to supply goods or services against their will before s 2B was enacted, provided the preconditions to s 46 liability were satisfied. Lee J accepted that this was so for intellectual property rights ... The fact that s 46 can apply to intellectual property rights, and hence to the market power which they can give, suggests that it can apply to the use of market power derived from other property rights not specifically mentioned in the Act.

> It follows that, provided the notoriously difficult task of satisfying the criteria of liability can be carried out, s 46 can be used to create access regimes, and that s 2B is not to be read down as if it could not.

PAWA's refusal to supply did not involve the granting, refusing to grant, revoking, suspending or varying of licences within s 2C(1)(b) of the TPA

PAWA would have a defence to an allegation of contravention of s 46 if it could demonstrate that its conduct was within the scope of s 2C (activities that are not business) and specifically s 2C(1)(b) of the TPA. The majority found that PAWA would fail for two reasons [100], [101]:

— Section 2C(1)(b) only applies to the mere doing of the acts relating to licences. If the only basis on which PAWA had been said to carry on a business was that it entered into agreements with persons whom it then appointed as licensees to generate, store, reticulate and sell electricity within the meaning of s 25(1) of the Electricity Act, it would fall within the exception in s 2C(1)(b). But PAWA was said to carry on a business for other, quite different reasons. Hence, it is irrelevant whether PAWA's refusal to make infrastructure services available to NT Power was a refusal to grant a licence.

— A 'licence' in s 2C(3) means a licence that 'allows the licensee to supply goods or services'. In discussing the definition of 'licence' the majority stated that [102]:

> NT Power had been authorised or allowed to supply goods (namely electricity) by the licence of 26 June 1998. If NT Power had not received that licence, s 27(1) of the Electricity Act would have made it unlawful for NT Power to supply electricity; however, with the licence it was entirely lawful for it to do so, since the licence gave it an excuse or authority to do so. NT Power's difficulty thereafter was not that it was not *allowed* to supply electricity. Rather its difficulty was that it *could not* supply it. It could not take advantage of its pre-existing licence to supply electricity unless PAWA provided it with transmission and distribution services that only PAWA could provide.

In conclusion, the majority said that PAWA could not rely on s 2C(1)(b), as PAWA's carrying on of a business did not rest only on the grant of licences and the permission NT Power sought from PAWA was not a permission to sell goods or services [103].

PAWA's carrying on of a business did not rest only on the grant of licences and the permission NT Power sought from PAWA was not a permission to sell goods or services.

Contravention of section 46

Was there an electricity infrastructure market or an electricity carriage market?

NT Power's allegation that these two markets existed was put in issue by PAWA. However, PAWA admitted the existence of the electricity transmission market and the electricity distribution market.

PAWA's submission that there could not be a market for electricity infrastructure and electricity carriage, because there had not been any transactions in those markets was not accepted by the majority. The majority affirmed the High Court's decision in *Queensland Wire* (1989) 167 CLR 177 in this regard, and further stated that there was 'the potential' for dealings in transmission and distribution services [109], [110].

The majority also rejected PAWA's contention that the absence of a direction from the Minister for Essential Services under s 16 of the PAWA Act precluded the existence of a market [111]. The majority held that markets cannot appear and disappear at the whim of a minister.

Section 46(4)(c) and market power

PAWA submitted that it could not breach s 46 as it lacked market power. The majority also rejected this point. They stated [114]:

> PAWA's conduct can be analysed as taking advantage of market power in the market for the sale of electricity which arose from its control of the infrastructure for the purpose of injuring NT Power in that market.

When considering s 46(4)(c), the majority stated that the reference in the section to 'conduct', could not assist in the construction of s 46(1), which is focused on the 'power' of the defendant [115]. The majority also stated that the reference to 'power' in s 46(4)(c) does not require that a corporation be an active supplier to have market power.

Taking advantage of proprietary rights, not market power?

PAWA submitted that it was entitled, as owner of the infrastructure assets, to decline to consent to the use of them by others. In considering and distinguishing *Dowling v Dalgety Australia Ltd* (1992) 34 FCR 109, the majority stated at [124]:

> ...PAWA did take advantage of market power, because it was only by virtue of its control of the market or markets for the supply of services for the transport of electricity along its infrastructure, including its transmission and distribution network, and the absence of other suppliers, that PAWA could in a commercial sense withhold access to its infrastructure; if PAWA had been operating in a competitive market for the supply of access services, it would be very unlikely that it would have been able to stand by and allow a competitor to supply access services.

and at [125]

> Further, to suggest that there is a distinction between taking advantage of market power and taking advantage of property rights is to suggest a false dichotomy, which lacks any basis in the language of s 46. As already discussed, property rights can be a source of market power attracting liability under s 46 and intellectual property rights are often a very clear source of market power.

... property rights can be a source of market power attracting liability under s 46.

Conclusions on section 46

The majority found that a direction had not been given by the minister that NT Power be refused access to the PAWA infrastructure [127]–[132]. The majority stated that [153]:

> [D]espite the fact that PAWA did not supply access to its infrastructure to others, that there were transmission/distribution markets and that PAWA had a substantial degree of power in them; that the Minister did not give any s 16 direction to refuse NT Power access on 26 August 1998; that even if he had, that does not prevent a finding that PAWA took advantage of its market power for proscribed purposes; that the trial judge did not err in applying s 46 to the facts he found; and that any adverse consequences caused by the application of s 46 to PAWA are not reasons for adopting a narrower construction of the section.

Section 46 and Gasgo

Gasgo's role in the trial

Gasgo is a company in which PAWA beneficially holds all the issued shares. The major issue at the trial for Gasgo was whether it was a part of the NT Government and therefore an 'emanation of the Crown' or entitled to 'derivative Crown immunity'.

Is Gasgo part of the NT Government?

In examining whether Gasgo was an 'emanation of the Crown' [161]–[165], the majority looked towards the articles of Gasgo, and commented that 'it is unsatisfactory that an inquiry into whether a corporation is 'an emanation of the Crown' should have to be undertaken in such circumstances where its status does not depend on any specific statute.' They further said that [164]:

> Although acquired specifically for the purpose of entering the Mereenie Agreement and others like it, Gasgo was a trading corporation. Its articles of association took the form, apparently, of standard trading company articles. Its shares were owned by PAWA. It sold gas to NT Gas, the largest shareholder in which was AGL Pipelines (NT) Pty Ltd. NT Gas, which constructed and has a lease over the relevant gas pipeline from its owners, a bank consortium, in turn sold gas to PAWA. ... The interpolation of non-governmental entities in this contractual and physical chain of supply undermines the characterisation of the trading corporation Gasgo as part of the Northern Territory Government. There is nothing to suggest that the directors of Gasgo do not have the usual duties and functions of directors.

Is Gasgo protected by 'derivative Crown immunity'?

In considering whether its refusal to permit NT Power to source gas from the Mereenie suppliers was protected by 'derivative Crown immunity', the majority referred to *Wynyard* Inves*tments Pty Ltd v Commissioner for Railways (NSW)* (1955) 93 CLR 376 and *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd* (1979) 145 CLR 107 at 137. These cases had dealt with the various classes of derivative Crown immunity and its scope. The class of derivative immunity involved in this matter arises when a provision, if applied to a particular individual or corporation, would adversely affect a proprietary right or interest or legal, equitable or statutory interest of the Crown. In considering this class of immunity, the majority stated [170]:

> The object, to adapt what was said by Kitto J [in *Wynyard*], is to ascertain whether the application of s 46 to Gasgo "would be, for a legal reason, an interference with some right, interest, power, authority, privilege, immunity or purpose belonging or pertaining" to the Government. More recently, this Court said that the interference to be looked for is a "divesting" of "property, rights, interests or prerogatives" belonging to the government.

The Court refused to extend the law regarding derivative Crown immunity to cover financial interests of the Crown.

The majority found that no proprietary right or interest or contractual right or prerogative of the NT Government would be affected, for neither PAWA nor any other part of the NT Government have any such rights, interests or prerogatives as against the Mereenie suppliers under the Mereenie agreement [172]. Gasgo acknowledged that no legally enforceable right was prejudiced, and that the prejudice arising from the application of the TPA was financial [173]. The Court refused to extend the law regarding derivative Crown immunity to cover such interests [173].

The majority concluded that since Gasgo was not part of the NT Government, and since it could not claim derivative Crown immunity before 19 August 1994, its reliance on cl 2.26 of the Mereenie agreement was open to scrutiny under s 46 of the TPA [190].

Kirby J's dissenting judgment

'Take advantage' and 'purpose'

In Kirby J's view, the appeal should have been dismissed. He approached the case as a 'comparatively simple one' which 'turns essentially on the statutory notions of 'take advantage of' and 'purpose' [202].

Kirby J did not accept that it was not open to the governmental authorities in the Northern Territory, and the first respondent, acting under the territory legislation, to delay the immediate commencement of a regime affording unimpeded access to the first respondent's electricity supply infrastructure [202]. He stated that [202]:

> [T]his was a governmental decision concerning the use of the infrastructure of a public agency based on governmental reasons. It was informed by governmental conclusions about the gradual implementation of a new competition policy in public business-type authorities and the use of publicly funded resources for overall public benefit. It was not a purely commercial or business decision attracting the operation of the TPA.

Kirby J went on to state [203]:

> Even more importantly, I do not accept that the conduct of the appellant was anti-competitive within s 46 of the TPA. It is one thing, under that section, to redress the misuse of market power, including by the use of the resources and the property of a corporation to the marketing disadvantage of a would-be competitor. But s 46 of the TPA does not give the would-be competitor the right to demand and use, as its own, the property of another corporation. It merely prevents that other corporation from misuse of *its* power to prevent the entry of the other into the market.

In considering the United States Supreme Court authority of *Verizon Communications Inc v Law Offices of Curtis V Trinko, LLP* 72 USLW 4114 at 4119 (2004), which held that the US Sherman Act did not give judges *carte blanche* to insist that a monopolist alter its way of doing business whenever some other approach might yield greater competition, Kirby J stated [204]:

> No doubt others will contrast the energetic deployment of trade practices law in the circumstances of this case, affecting a governmental corporation having governmental obligations to the public welfare, with the repeated refusal of this Court in recent times to do the same thing where the corporation concerned was private, successfully defending its market power against smaller private would-be competitors.

It was not a purely commercial or business decision attracting the operation of the TPA. Kirby J

Text of the decision is available at <http://www.austlii.edu.au/au/cases/cth/high_ct/2004/48.html>

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ISSN 1448-4803
Approved Postage PP 233744/00042