NT Power Generation Pty Ltd v Power & Water Authority & Anor [2004] HCA 48

By Ian Pike

Introduction

The High Court has, once again, considered the scope of the provisions of the *Trade Practices Act 1974* (Cth) ('the Act') in its recent decision in *NT Power Generation Pty Limited v Power & Water Authority & Anor* [2004] HCA 48, which was handed down on 6 October 2004.

The case essentially considered two aspects of the Trade Practices Act. First, the breadth of s2B, which determines the extent to which the Act applies to the Crown in right of a state or territory, insofar as it carries on a business. This aspect of the High Court's decision is likely to be the most significant - the High Court has potentially significantly expanded the scope of the Act in its application to state and territory businesses.

The second aspect considered by the High Court was s46 of the Trade Practices Act. The decision in this regard more likely turns on its facts, although the result was noted by Kirby J in dissent to be inconsistent with other recent decisions of the High Court, suggesting that, at least in his Honour's opinion, the section is not being consistently applied.

Overview of the facts

The relevant facts can be briefly stated.

The respondent, Power & Water Authority ('PAWA' or 'Power and Water') is a vertically integrated electricity enterprise, wholly owned by the Northern Territory Government. It generates electricity or purchases electricity generated by others, transports that electricity from generation sites to distribution points via transmission equipment, and then transports it from distribution points to customers via distribution equipment, and charges those customers.

The appellant, NT Power Generation Pty Limited ('NT Power'), generates electrical power at a plant which it owns. It decided 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, which infrastructure is owned by Power and Water.

NT Power requested that Power & Water supply the electricity transmission and distribution infrastructure services needed for its plan to sell electricity to consumers in competition with PAWA. Though there were no safety, technical or other problems preventing it from acceding to that request, on 26 August 1998, PAWA rejected it. Thereafter, Power and Water maintained that stand.

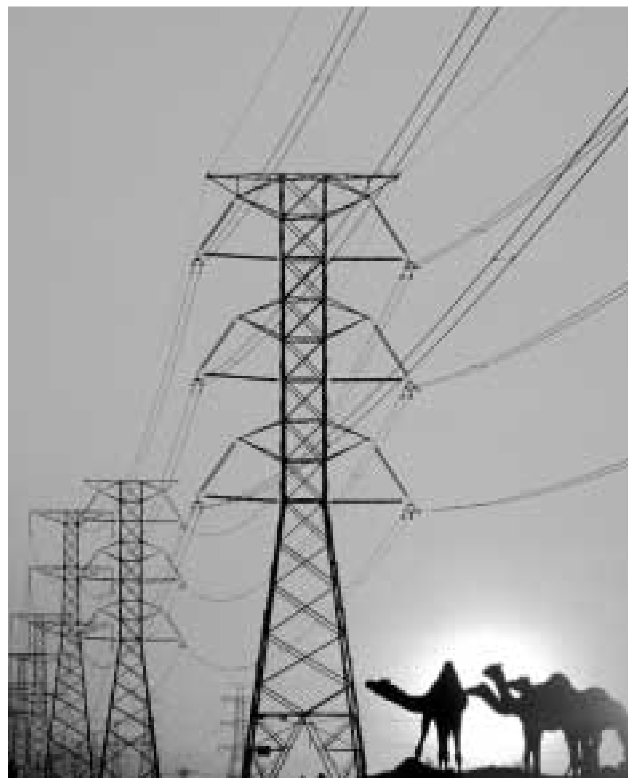
NT Power commenced proceedings in the Federal Court of Australia, against Power and Water, challenging its refusal to supply. At first instance, Mansfield J found in favour of PAWA, on the basis that the Trade Practices Act did not apply to it. His Honour held that if it did apply, PAWA would have contravened s46. NT Power then appealed to the full court of the Federal Court. The appeal was dismissed, by majority. Lee J and Branson J held that the Act did not apply to Power and Water. Finkelstein J dissented. Branson J and Finkelstein J also agreed with the conclusion of Mansfield J that, if the Trade Practices Act did apply to PAWA, it had contravened s46 of the Act. Lee J disagreed.

NT Power then appealed to the High Court. By a majority (McHugh ACJ, Gummow, Callinan and Heydon JJ) with Kirby J dissenting, the High Court upheld NT Power's appeal. The majority held that the Act did apply to Power and Water, and that it had contravened s46 in refusing to supply NT Power.

The appeal considered a number of matters. This note focuses on only two of those matters - the High Court's consideration of the scope of s2B of the Trade Practices Act, and its reasons as to why Power and Water's conduct contravened s46.

Section 2B of the Trade Practices Act

Section 2B of the Trade Practices Act was introduced by the *Competition Policy Reform Act 1995* (Cth), which arose out of the Hilmer Committee in the early 1990s. Prior to them, state and territory government businesses were not subject to the Act. The Hilmer Committee concluded that government businesses should not enjoy any advantages when competing with other businesses, insofar as the Act applies.



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Section 2B(1) provides, relevantly, that Part IV binds 'the Crown in right of each of the states, of the Northern Territory and of the Australian Capital Territory, so far as the Crown carries on a business, either directly or by an authority of the state or territory'.

Both Mansfield J, and the majority of the full court, accepted various arguments advanced by Power and Water that it was not relevantly carrying on a business within the meaning of s2B. Those arguments centred on the fact that PAWA did not provide any access to its infrastructure to anyone. The business that was being carried on by PAWA was the retail sale of electricity to end consumers, which was a different business to the wholesale supply of access to its infrastructure. In this latter respect, it was not carrying on a business. In so construing s2B, the majority of the High Court held that Mansfield J and the majority of the full court of the Federal Court had approached the question too narrowly.

The High Court held that s2B applied for a number of reasons, some factual and some legal.

The majority judgment held, in effect, that s2B of the Act should be given a liberal and broad construction, because it was clearly the crucial provision in attaining the goals of the Hilmer Committee, namely to ensure that it applied to businesses conducted by the governments of the states and territories to the same extent as it did to those conducted by the Commonwealth.

The majority rejected Power and Water's submission that the conduct that is said to breach the Act must, itself, be part of the actual business engaged in. The majority held that whilst conduct, if it is to fall within s2B, must be engaged in in the course of PAWA carrying on a business, the conduct need not itself be the actual business engaged in (see [67]). In the present case, Power and Water's use of its infrastructure assets was a part of its carrying on of the business, whether or not it was in a market for their acquisition, sale or hire.

At [64], the majority judgment stated:

> PAWA used, as part of the means of conducting that business [being the retail sale of electricity], its transmission and distribution infrastructure services to transmit and distribute electricity generated or bought by it to consumers. PAWA made a decision, according to the courts below, not to use or permit the use of its transmission and distribution infrastructure services for the transmission and distribution of electricity generated by a competitor or potential competitor, namely NT Power, to customers, because of the negative impact that this would have in the short term on its business of selling electricity to consumers. That was conduct which advanced the business. It was conduct 'so far as' PAWA carried on a business.

In other words, because the conduct of refusing to supply was conduct which advanced the retail business which Power and Water was clearly undertaking, the refusal conduct was conduct '*so far as*' it carried on a business.

The dissenting judgment of Kirby J is quite short. Kirby J does not explicitly address the construction of s2B although, implicitly, it would appear that his Honour was of the view that the Act did not apply to PAWA's conduct, which was, in effect, a governmental decision concerning the use of the infrastructure of a public agency based on governmental reasons (see [202] of the judgment of Kirby J).

Section 46 of the Trade Practices Act

PAWA advanced a number of arguments in the High Court as to why its conduct, if the Act applied, did not contravene s46. Each argument was rejected by the High Court. It is not proposed, in this note, to canvass all of those arguments, but rather to focus on the major ones.

Power and Water contended that there was no market for, in effect, the wholesale supply of access to its infrastructure - termed either the electricity infrastructure market, or an electricity carriage market, because it had not previously supplied access to anyone, i.e. there had not been any transactions in the market contended for. The High Court rejected this argument. The High Court held that, because the issue was not clearly pleaded in its defence, it was not permissible for PAWA to rely on this argument in the High Court. In any event, the High Court followed the earlier remarks of some members of the High Court in *Queensland Wire Industries Pty Limited v Broken Hill Proprietary Co Limited* (1989) 167 CLR 177, where the High Court rejected an argument that there was no relevant market, because there had not been any earlier transactions.

Power and Water contended that it had no relevant market power because, by virtue of s46(4)(c) of the Act, a reference to power is a reference to power in a market as a supplier in that market, and because PAWA had not previously provided access to its infrastructure, it was not relevantly a '*supplier*'. The High Court rejected this argument. Again, it was held that it was not pleaded, and therefore could not be raised on appeal. Further, as a matter of construction of the Act, it was not correct, because if it was, it would mean that a corporation which never supplied, and always refused, would not be a '*supplier*' and would therefore not be subject to s46.

Power and Water contended that it was not taking advantage of any market power, but only taking advantage of its proprietary rights, as owner of its infrastructure. The High Court rejected this argument, on two bases. First, because on the facts, 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, and the absence of other suppliers, that PAWA could in a commercial sense withhold access to its

infrastructure (see [124] of the judgment). Second, 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 s46 (see [125] of the judgment).

PAWA submitted that, on a purposive construction, s46 of the Trade Practices Act should be read so as to negate the existence of a proscribed purpose in the short-term, if there exists a longer term, pro-competitive purpose. The High Court rejected this argument as imposing an impermissible gloss on s46. The High Court held (at [137]) that:

> s46 does not permit the drawing of a distinction between short-term anti-competitive purposes (here keeping NT Power out of the market) and long-term pro-competitive objectives (establishment of an access regime), and does not permit the former to be nullified or excused by the latter.

The High Court summed up the position, in this respect, as follows (at [138]):

> Paternalistic control from a monopolist is antithetical to competition, and a construction of s46 which permitted it, even if only in the short-term, is inconsistent with the structure of the section in the legislation as a whole.

The dissenting judgment of Kirby J is, as set out above, quite short. His Honour held (at [203]):

> It is one thing, under [s46], 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 s46 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 prevents that other corporation from misuse of its power to prevent the entry of the other into the market. Trade practices laws in Australia, and anti-trust laws in the United States (from which the basic notions of our law derive), have not been interpreted to impose on an owner of private property a duty to make that owner's property available to a competitor.

Kirby J concluded his judgment by comparing the outcome of the present case with other recent decisions of the High Court on s46 which, unlike the present case which involved governmental obligations, concerned the ability of a private corporation to withhold access (at [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 time to do the same thing when the corporation concerned was private, successfully defending its market power against smaller private would-be competitors.

Conclusion

The High Court has clarified the circumstances in which the Trade Practices Act will apply to state and territory governments. In doing so, it has likely significantly expanded the application of the Act.

The High Court's decision in relation to the s46 aspects of the case, is likely to be confined purely to the facts of the case, rather than being regarded as statements of general principle. Indeed, it is difficult to discern any statements of general principle from the majority judgment. Rather, the judgment takes the form of responding to, and defeating, all of the arguments thrown up by PAWA. The lack of any statements of general principle from the majority make it difficult to determine whether there is, as Kirby J suggests at the end of his judgment, a tension between the result in the present case, and that in earlier decisions, where private corporations have been found not to have contravened s46.

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