HIGH COURT OF AUSTRALIA

McHUGH ACJ,
GUMMOW, KIRBY, CALLINAN AND HEYDON JJ

NT POWER GENERATION PTY LTD APPELLANT

AND

POWER AND WATER AUTHORITY & ANOR RESPONDENTS

NT Power Generation Pty Ltd v Power and Water Authority [2004] HCA 48
6 October 2004
D13/2003

ORDER

1. *The appeal is allowed.*

2. *The orders of the Full Federal Court made on 2 October 2002 are set aside.*

3. *In lieu of the orders of the Full Federal Court made on 2 October 2002:*

   (a) the appeal to the Full Federal Court is allowed; and

   (b) the respondents are to pay the costs of the appeal to the Full Federal Court.

4. *The respondents are to pay the costs of the appeal to this Court.*

5. *The matter is remitted to Mansfield J 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.*

On appeal from the Federal Court of Australia

Representation:

A J L Bannon SC with A A Henskens for the appellant (instructed by Colin Biggers and Paisley)

B C Oslington QC with L G Foster SC and A I Tonking for the respondents (instructed by Noonans Lawyers)

Interveners:

R J Meadows QC, Solicitor-General for the State of Western Australia with R M Mitchell intervening on behalf of the Attorney-General for the State of Western Australia (instructed by Crown Solicitor for the State of Western Australia)

C J Kourakis QC, Solicitor-General for the State of South Australia with G F Cox intervening on behalf of the Attorney-General for the State of South Australia (instructed by Crown Solicitor for the State of South Australia)

N J Williams SC with L McCallum intervening on behalf of the Australian Competition and Consumer Commission (instructed by Australian Government Solicitor)

S J Gageler SC with N L Sharp intervening on behalf of the Attorney-General for the State of New South Wales (instructed by Crown Solicitor for the State of New South Wales)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

NT Power Generation Pty Ltd v Power and Water Authority

Trade practices – Market definition – Substantial degree of market power – Where statutory authority had a monopoly in the markets for electricity transmission and distribution services and for electricity supply – Where authority owned the transmission and distribution infrastructure – Where no transactions occurred in the transmission and distribution services market – Whether authority's control of the infrastructure gave it market power in both markets – *Trade Practices Act* 1974 (Cth), ss 46(1), 46(4)(c).

Trade practices – Misuse of market power – Taking advantage of market power – Proscribed purpose – Whether statutory authority's refusal of access to its infrastructure involved taking advantage of its market power or only of its proprietary rights – Whether refusal was due to a "direction" from the Minister – whether Minister's purpose in giving direction meant authority's refusal was not for a proscribed purpose – Whether authority's regulatory role meant refusal was not for a proscribed purpose – *Trade Practices Act* 1974 (Cth), s 46(1) – *Power and Water Authority Act* (NT), s 16.

Crown – Immunity – Crown in right of the Northern Territory – Carrying on a business under the *Trade Practices Act* 1974 (Cth) – Exceptions – Where statutory authority had a monopoly in the markets for electricity transmission and distribution services and for electricity supply – Where authority owned the transmission and distribution infrastructure – Whether authority's exclusive use of the infrastructure was part of carrying on a business – Whether refusal of access to infrastructure was merely refusal of a "licence" and thus not part of carrying on a business – *Trade Practices Act* 1974 (Cth), ss 2B, 2C(1)(b).

Crown – Immunity – Crown in right of the Northern Territory – "Emanation of the Crown" – Where statutory authority established by the Territory Government was the sole beneficial owner of a trading corporation – Where corporation incorporated under general enactment for the incorporation of companies rather than specific statute – Where corporation acquired for specific Government purpose – Whether corporation was an "emanation of the Crown".

Crown – Immunity – Crown in right of the Northern Territory – "Derivative Crown immunity" – Where statutory authority established by the Territory Government was the sole beneficial owner of a trading corporation – Where corporation entered into contracts with third parties – Where financial interests of the Government potentially prejudiced by preventing enforcement of those contracts under the *Trade Practices Act* 1974 (Cth) – Where no legal or

proprietary interests of the Government affected – Whether corporation could claim "derivative Crown immunity".

Practice and procedure – Pleadings – Where points made in original pleadings but not relied on and no evidence called at trial – Whether points can be taken on appeal.

Words and phrases – "carries on a business", "market power", "take advantage of", "derivative Crown immunity", "emanation of the Crown", "direction", "licence".

Competition Policy Reform Act 1995 (Cth), s 89.
Competition Policy Reform (Northern Territory) Act (NT), ss 14, 15.
Power and Water Authority Act (NT), s 16.
Trade Practices Act 1974 (Cth), ss 2B(1), 2C(1)(b), 4, 46(1), 46(4)(c), Schedule, Pt 1, cl 46.

1 McHUGH ACJ, GUMMOW, CALLINAN AND HEYDON JJ. The appellant, NT Power Generation Pty Ltd ("NT Power"), generated electrical power at a plant which it owned. 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. That infrastructure was owned by the first respondent, Power and Water Authority ("PAWA").

2 PAWA, a body corporate constituted under s 4 of the *Power and Water Authority Act* (NT)[1] ("the PAWA Act"), was subject to the directions of the Minister for Essential Services for the Northern Territory (s 16). It operated a vertically integrated electricity enterprise. It generated electricity or purchased electricity generated by others; it transported that electricity from generation sites to distribution points via transmission equipment; it then transported it from distribution points to the customers via distribution equipment, and charged the customers. 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. Though there was no safety, technical or other problem preventing PAWA from acceding to that request, on 26 August 1998 PAWA rejected it. Thereafter PAWA maintained that stand.

3 While the field of legal controversy arising from that rejection was broader in the courts below, in this appeal three principal questions arise about the construction and application of the *Trade Practices Act* 1974 (Cth) ("the Act") and related legislation.

4 The first question is whether s 2B, which creates an exception to the immunity that PAWA (as an emanation of the Northern Territory Government) would otherwise enjoy from s 46 of the Act so far as PAWA "carries on a business", applied to PAWA's conduct[2]. The second question is whether,

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1 Now the *Power and Water Corporation Act* (NT) (amended by Act No 70 of 2001).

2 Sections 2B and 2C were inserted with effect from 21 July 1996 by s 81 of the *Competition Policy Reform Act* 1995 (Cth). Section 2B(1) relevantly provides:

> "The following provisions of this Act bind 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:
>
> (a) Part IV; …

(Footnote continues on next page)

assuming that the Act did apply to PAWA's conduct, PAWA's rejection of NT Power's request contravened s 46 of the Act[3].

5 At trial, the Federal Court of Australia (Mansfield J) answered the first question favourably to PAWA[4]. It therefore dismissed NT Power's application for relief. Though it was not strictly necessary for him to deal with the second question, he adopted the helpful course of doing so, and reached conclusions favourable to NT Power[5].

(c) the other provisions of this Act so far as they relate to the above provisions."

Section 46 is in Part IV. "Authority" in relation to a State or Territory is defined in s 4(1) as meaning:

"(a) a body corporate established for a purpose of the State or the Territory by or under a law of the State or Territory; or

(b) an incorporated company in which the State or the Territory, or a body corporate referred to in paragraph (a), has a controlling interest."

3 Section 46(1) provides:

"A corporation that has a substantial degree of power in a market shall not take advantage of that power for the purpose of:

(a) eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market;

(b) preventing the entry of a person into that or any other market; or

(c) deterring or preventing a person from engaging in competitive conduct in that or any other market."

4 *NT Power Generation Pty Ltd v Power and Water Authority* (2001) 184 ALR 481 at 544-549 [281]-[303].

5 *NT Power Generation Pty Ltd v Power and Water Authority* (2001) 184 ALR 481 at 552-568 [314]-[376].

6 In the Full Court of the Federal Court of Australia, Lee and Branson JJ agreed with the trial judge on the first question[6], and Finkelstein J dissented[7]. Hence the appeal was dismissed. Though it was unnecessary for the Full Court to answer the second question, they followed the trial judge's lead in addressing it: Branson and Finkelstein JJ agreed with the trial judge's conclusions[8], while Lee J disagreed[9].

7 The third question arising in this appeal relates to certain conduct of the second respondent, Gasgo Pty Ltd ("Gasgo"), a wholly owned subsidiary of PAWA. The trial judge held that the Act did not apply to it[10]; hence he did not determine whether it had contravened s 46[11]. Lee and Branson JJ agreed with the trial judge[12]; Finkelstein J disagreed[13].

8 The ensuing reasons establish that the contentions of the appellant are correct, and that the appeal should be allowed against both respondents.

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6 *NT Power Generation Pty Ltd v Power and Water Authority* (2002) 122 FCR 399 at 403-405 [6]-[14] per Lee J, 414-422 [60]-[96] per Branson J.

7 *NT Power Generation Pty Ltd v Power and Water Authority* (2002) 122 FCR 399 at 430-435 [124]-[141].

8 *NT Power Generation Pty Ltd v Power and Water Authority* (2002) 122 FCR 399 at 425-426 [109]-[111] per Branson J, 436-452 [142]-[186] per Finkelstein J.

9 *NT Power Generation Pty Ltd v Power and Water Authority* (2002) 122 FCR 399 at 405-407 [15]-[27].

10 *NT Power Generation Pty Ltd v Power and Water Authority* (2001) 184 ALR 481 at 549-551 [304]-[312].

11 *NT Power Generation Pty Ltd v Power and Water Authority* (2001) 184 ALR 481 at 568 [377].

12 *NT Power Generation Pty Ltd v Power and Water Authority* (2002) 122 FCR 399 at 407 [29] per Lee J, 423-425 [101]-[107] per Branson J.

13 *NT Power Generation Pty Ltd v Power and Water Authority* (2002) 122 FCR 399 at 453 [188].

9 In view of the number and complexity of the controversies in the appeal, it is desirable to set out the order in which they will be examined.

10 It is proposed, first, to summarise the statutory background and then the factual circumstances of the dispute, before turning to the question of whether PAWA was carrying on a business within the meaning of s 2B. That question involves consideration of the reasoning of the courts below, of what PAWA's business activities were, of how the trial was conducted in relation to that issue, and of the correct construction of s 2B. It also involves an analysis of whether PAWA's refusal of NT Power's request fell within an exception to s 2B created by s 2C(1)(b).

11 It is then necessary to deal with numerous arguments advanced by PAWA against the conclusion that it contravened s 46, namely that there was no relevant market because of a want of transactions; that it had no market power because of s 46(4)(c); that it did not take advantage of its market power, because it took advantage only of its proprietary rights, or because it only did what the Minister for Essential Services directed it to do under s 16 of the PAWA Act; and that the trial judge wrongly inferred an exercise of market power from PAWA's purpose, confused the effect of PAWA's conduct with its purpose, confused the existence of market power and its exercise, and made incorrect, and failed to make correct, assumptions in analysing whether PAWA took advantage of market power.

12 Finally, it is proposed to consider whether Gasgo was part of the Northern Territory Government, and whether it was in any event able to rely on what was called "derivative Crown immunity".

13 The reasons are organised as follows:

The statutory background

14 The first three federal enactments to deal with restrictive trade practices in this country – the *Australian Industries Preservation Act* 1906 (Cth), the *Trade Practices Act* 1965 (Cth) and the *Restrictive Trade Practices Act* 1971 (Cth) – did not bind the Commonwealth or the State governments[14]. Nor did the Act when it was enacted in its initial form in 1974.

15 However, in April 1976, the Minister for Business and Consumer Affairs set up a Committee, known as the Swanson Committee, to review the operation and effect of the Act. It considered that the Commonwealth Government should be prepared to accept for itself, in relation to its commercial activities, restrictions which it placed on others. Hence the Committee recommended that

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14 See in particular s 6 of each of the 1965 and 1971 Acts, which had no equivalent in the 1906 Act.

the Commonwealth Government and its instrumentalities, which engaged in commercial activities, should be bound by the Act to the same extent as a corporation. It also stated that while it was desirable for the Act to apply to State Governments and their instrumentalities in the same fashion, the manner in which that object was to be achieved should be worked out by consultation between the Commonwealth and State Governments[15].

16 As a result, s 2A was enacted in 1977[16]. Section 2A(1) provided:

> "Subject to this section, this Act (other than Part X) binds the Crown in right of the Commonwealth in so far as the Crown in right of the Commonwealth carries on a business, either directly or by an authority of the Commonwealth."

Section 2A(1) has remained substantially in that form ever since[17]. Section 4(1) was amended by defining "authority of the Commonwealth" to mean:

> "(a) a body corporate established for a purpose of the Commonwealth by or under a law of the Commonwealth or a law of a Territory; or
>
> (b) an incorporated company in which the Commonwealth, or a body corporate referred to in paragraph (a), has a controlling interest".

That has not changed since.

17 In 1979, this Court decided that the Act did not "bind the Crown in right of a State" because of the rule of interpretation that legislation does not bind the Crown in any right unless there are express words or a necessary implication to that effect, and there were none[18].

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15 Australia, Trade Practices Act Review Committee, *Report to the Minister for Business and Consumer Affairs*, (1976) at 87 [10.25]-[10.26] ("*Swanson Report*").

16 By s 4 of the *Trade Practices Amendment Act* 1977 (Cth).

17 The only differences between the present form of s 2A(1) and its 1977 form are that after "section" there now appear the words "and sections 44E and 95D" and the words "(other than Part X)" have been omitted.

18 *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd* (1979) 145 CLR 107 at 123 per Gibbs ACJ; similar language was used by Stephen J at 129 and by Mason and Jacobs JJ at 136. At 140 Murphy J dissented on the ground that,

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18 In 1987, the Full Court of the Federal Court of Australia employed similar reasoning to conclude that the Act did not bind "the Crown in right of the Northern Territory"[19].

19 In 1990, this Court, in *Bropho v Western Australia*[20], subjected the rule of interpretation relied on in *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd*[21] to critical analysis. It concluded that a search for legislative intent that the general words of statutes should bind the Crown should be conducted without the restrictive limitations of the traditional rule. It did not, however, overrule *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd* as an authority on the Act[22]. One of the reasons given for the relaxation of the traditional approach has several points of present relevance[23]:

> "[T]he historical considerations which gave rise to a presumption that the legislature would not have intended that a statute bind the Crown are largely inapplicable to conditions in this country where the activities of the executive government reach into almost all aspects of commercial, industrial and developmental endeavour and where it is a commonplace for governmental commercial, industrial and developmental instrumentalities and their servants and agents, which are covered by the shield of the Crown either by reason of their character as such or by reason of specific statutory provision to that effect, to compete and have commercial dealings on the same basis as private enterprise."

20 In 1991, all Australian governments agreed to examine a national approach to competition policy. In 1992, they agreed on the need for a national

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inter alia, that rule of interpretation only applied, in the case of Commonwealth Acts, to the Commonwealth Government.

19 *Burgundy Royale Investments Pty Ltd v Westpac Banking Corporation* (1987) 18 FCR 212 at 215.

20 (1990) 171 CLR 1.

21 (1979) 145 CLR 107.

22 *Bropho v Western Australia* (1990) 171 CLR 1 at 22.

23 *Bropho v Western Australia* (1990) 171 CLR 1 at 19 per Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ.

competition policy, and the Prime Minister appointed a committee, which became known as the Hilmer Committee, to inquire into that subject.

21 In 1993, the Committee reported[24]. The *Hilmer Report* stated that government businesses should not enjoy any advantages when competing with other businesses. It recommended, among other things, that the Act should apply to State and Territory businesses to the same extent that it applied to Commonwealth businesses[25]. It also recommended that this be done by amendment of the Act (with or without referral of State legislative power under s 51(xxxvii) of the Constitution) or by the enactment of State and Territory legislation in the same terms as Pt IV of the Act[26]. It recommended that there should be a statutory regime to permit access to "essential facilities"[27]. Relevantly, the report stated that "competition in electricity generation … requires access to transmission grids"[28], and used this as an example to illustrate the power of a vertically-integrated organisation with a monopoly of an "essential facility" to inhibit the access of competitors. The report noted[29]:

> "[A] business that owned an electricity transmission grid and was also participating in the electricity generation market could restrict access to the grid to prevent or limit competition in the generation market."

22 On 25 February 1994, the Council of Australian Governments agreed "to the principles of competition policy articulated in the [*Hilmer Report*]"[30].

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24 Australia, Independent Committee of Inquiry, *National Competition Policy: Report by the Independent Committee of Inquiry*, (1993) ("*Hilmer Report*").

25 *Hilmer Report* at xxvii, where there is an allusion to the passage in *Bropho v Western Australia* (1990) 171 CLR 1 at 19 quoted above; see also 343.

26 *Hilmer Report* at 343, 344-347.

27 *Hilmer Report* at 266-267.

28 *Hilmer Report* at 240.

29 *Hilmer Report* at 241.

30 See the preamble to the Conduct Code Agreement: note 31 below.

23 On 11 April 1995, the Council of Australian Governments entered into three Agreements[31].

24 The first was the Conduct Code Agreement. By it, the Governments agreed to extend Pt IV of the Act to all "persons" within the legislative competence of their jurisdictions (an expression which includes local and State government agencies) that carried on a business. The extension was to be effected by applying the "Competition Code text" to all persons within the legislative competence of each State and Territory through complementary enactments (cll 5(1) and (2)). The central element in the Competition Code text was the "Schedule version" of Pt IV of the Act. However, the complementary enactments did not adopt the methods of securing constitutional validity which Pt IV of the Act itself employed, namely reliance in its primary operation on s 51(xx) of the Constitution and reliance, in its additional operation, by virtue of s 6(2) of the Act, on other heads of constitutional power, principally s 51(i) and s 122 of the Constitution. Rather, the new legislation operated directly on "persons", not "corporations", adopting the solution which was the second preference of the Hilmer Committee[32].

25 The second Agreement was the Competition Principles Agreement. By cl 6(1), it was agreed that the Commonwealth would put forward legislation to establish a "regime for third party access to services provided by means of significant infrastructure facilities". By cl 5(1), the parties agreed to review and reform legislation which restricted competition, unless its benefits to the community outweighed its costs, and the objectives of the legislation could only be achieved by restricting competition. They also agreed, by cl 5(3), to develop a timetable by June 1996 for the review and reform of legislation by 2000.

26 The third Agreement was the Agreement to Implement the National Competition Policy and Related Reforms. This made provision for payments by the Commonwealth to States and Territories that made satisfactory progress towards the implementation of the reforms set out in the other two agreements.

27 As a result of these Agreements, s 2B, s 2C (which created some exceptions to s 2B), Pt IIIA (which created a regime for access to essential

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31 These are conveniently set out in *Australian Trade Practices Legislation: Consolidated to 3 July 2002* (CCH Australia Ltd), 18th ed (2002) at 821-842.

32 *Hilmer Report* at 344-346, 347. The Committee's first preference was for a referral of powers from the States and Territories to the Commonwealth.

facilities), and ss 150A and 150C (which incorporated the Schedule version of Pt IV of the Act) were all introduced into the Act by the *Competition Policy Reform Act* 1995 (Cth) ("the Reform Act").

28 The *Competition Policy Reform (Northern Territory) Act* (NT) ("the Competition Act") was then enacted. It provided that the Competition Code (including the Schedule version of Pt IV of the Act) applied as a law of the Territory (s 5(1)). Sections 14 and 15 were, for the Territory, to similar effect as ss 2B and 2C of the Act. Clause 46 of the Schedule version of Pt IV of the Act was in the same terms as s 46 of the Act, save that in lieu of references to "corporation" in the Act there appeared references to "person".

29 Sometimes, analysis in the courts below proceeded as if the relevant legislation were the Act; sometimes it proceeded as if the relevant legislation were the Competition Act and Competition Code. Neither side contended that it made any relevant difference which applied. PAWA, in particular, appeared content to have the case determined as though the Act applied, which must mean either that it abandoned its pleaded denial that it was a trading corporation, or that it accepted that the conduct took place in trade and commerce within the Northern Territory within the meaning of s 6(2)(b)(iii) of the Act. In general, analysis will proceed by reference to the provisions of the Act.

The factual circumstances

30 Before 1978, electricity was supplied in the Northern Territory by the Commonwealth Department of Works and Housing. After the advent of self-government on 1 July 1978, the Commonwealth's electricity assets were vested in the Northern Territory[33] and the Northern Territory Electricity Commission ("NTEC") took over the function of electricity supply[34]. In 1987, by s 4(2)(d) of the PAWA Act, PAWA succeeded NTEC.

31 PAWA conducted a vertically integrated enterprise. First, PAWA had generation facilities. It generated electricity at several stations in the Northern Territory which it either owned or controlled through contracts. It also purchased electricity generated by other persons, who conducted mining operations and made their surplus power available. One of these persons was NT Power.

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33 *Northern Territory (Self-Government) Act* 1978 (Cth), s 69.

34 *Electricity Commission Ordinance* (NT), s 13. This enactment subsequently became the *Electricity Act* (NT) referred to below at [92].

32 In addition, PAWA had transmission facilities. It carried power of 33 kV and above through the 529 kilometres of power transmission lines which it owned. The only other power transmission line in the Northern Territory, 300 kilometres in length (known as "the 132 kV line") linked Darwin and Katherine. The 132 kV line was owned by a company related to NT Power and leased to another company related to NT Power, namely NT Power Transmission Pty Ltd ("NT Transmission"). NT Transmission used the 132 kV line to transmit electricity to and from PAWA under a series of agreements pursuant to which PAWA bought electricity from that company at certain supply points and sold it to that company at certain re-delivery points. NT Transmission was authorised to sell electricity to customers other than PAWA at certain points along the 132 kV line on certain conditions, but not to customers within 50 kilometres of Darwin, 20 kilometres of Katherine or 5 kilometres of Pine Creek.

33 PAWA also owned distribution facilities – low voltage electricity lines, substations and transformers. These operated as a distribution network, eventually leading into the meter box of each individual consumer.

34 In 1996, Pegasus Gold Australia Pty Ltd ("Pegasus"), the then operator of the Mt Todd Gold Mine ("the Mt Todd Mine"), contracted with NT Power for the operation and maintenance of a gas-fired power station at that mine ("the Mt Todd PS"). In September 1996, PAWA licensed NT Power to sell electricity to Pegasus. That electricity was either generated by NT Power at the Mt Todd PS or purchased from PAWA. PAWA agreed to buy surplus electricity generated at the Mt Todd PS from NT Power as it required it. The Mt Todd Mine was approximately 20 kilometres east of the Edith River Substation on the 132 kV line, and two 22 kV lines owned by NT Power ran between the Edith River Substation and the Mt Todd Substation, adjacent to the Mt Todd PS.

35 In November 1997, Pegasus ceased to operate the Mt Todd Mine, and it fell dormant until a new owner assumed control in July-August 1999.

36 For NT Power this created a problem and an opportunity. The problem was that it would have much more surplus power available from the Mt Todd PS. The opportunity was that it became entitled to acquire the Mt Todd PS from Pegasus. NT Power decided to solve the problem by selling the electricity it generated at the Mt Todd PS to the general public, including commercial users of electricity in Darwin and Katherine, in competition with PAWA. To that end, NT Power decided to acquire the Mt Todd PS in January 1998, and did so on 3 April 1998.

37 For the previous three years, the Northern Territory had been endeavouring to implement the obligations arising from its adherence, at the meeting of the Council of Australian Governments on 25 February 1994, to the principles of competition policy articulated in the *Hilmer Report*, and its entry into the Agreements of 11 April 1995. After it carried out the first of these obligations by enacting the Competition Act, it became apparent that there were various aspects of the Northern Territory's obligations which affected PAWA.

38 One of these related to Pt IIIA of the Act. By cl 6(2) of the Competition Principles Agreement, it was agreed that the regime for access then contemplated, and which was in due course established by Pt IIIA, was "not intended to cover a service provided by means of a facility where the … Territory Party in whose jurisdiction the facility is situated has in place an access regime which covers the facility and conforms to the principles set out in this clause". These principles were stated in cl 6(4) of the Competition Principles Agreement and broadly corresponded to those underlying Pt IIIA of the Act. Clause 6(2) was reflected in the Act in provisions which excluded the operation of Pt IIIA in respect of an "effective access regime". Thus an effective access regime is "a regime for access to a service or a proposed service" (s 44M(1)) which either the relevant Commonwealth Minister (s 44H(5) and s 44N(1)) or the National Competition Council ("the Council") (s 44G(3)) has decided is "effective" in the light of the principles set out in the Competition Principles Agreement.

39 After some indecision, in October 1997 a PAWA officer was allocated to work full-time on evaluating and recommending a regime for access to PAWA's infrastructure. Around that time, Mr Gardner took up office as Chief Executive Officer of PAWA. He formed the view that PAWA had serious operational deficiencies which inhibited its ability to compete with any other supplier of electricity to consumers in the Darwin-Katherine area. He prepared an operational assessment supporting that view in December 1997, which assessment was submitted to Cabinet for its meeting on 5 March 1998. Cabinet decided that a major review of PAWA should be undertaken. This was announced in the Treasurer's Budget Speech on 28 April 1998, which said that one aspect would be "the development of access regimes in accordance with National Competition Policy requirements"[35].

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35 Northern Territory, Legislative Assembly, *Parliamentary Debates* (Hansard), 28 April 1998 at 1085.

40 On 26 June 1998, PAWA granted NT Power a licence to sell to any person in the Northern Territory electricity generated by it at the Mt Todd PS[36].

41 Before that date, NT Power had made plain to PAWA its desire for access to PAWA's infrastructure so as to supply electricity to consumers in the Darwin-Katherine area, and they had communicated with each other about this extensively[37].

42 This led Cabinet, on 29 June 1998, to approve the making of a "Scoping Study" by a consortium comprising Merrill Lynch International (Australia) Limited ("Merrill Lynch") and Fay Richwhite Australia Limited ("Fay Richwhite"), so as to enable PAWA to respond to NT Power's desire for infrastructure access. Consideration of the question within PAWA, and in dealings between PAWA and NT Power on the one hand and PAWA and the Government on the other, continued for the next two months.

43 On 17 August 1998, the solicitors for NT Power wrote a letter to PAWA, asking that the charges for NT Power's use of the infrastructure be settled speedily, and seeking a response within seven days. They sent a copy to the Australian Competition and Consumer Commission. The question of what response should be sent led to a few days of intensive dealings between officers of PAWA, PAWA's solicitors, Merrill Lynch, the Treasurer and the Minister for Essential Services. On 26 August 1998, a letter from PAWA's solicitors, approved by the Treasurer and the Minister, denied that any access had been agreed and said that the issue was the subject of a policy review by PAWA and the Government.

44 The trial judge found that the letter of 26 August 1998 brought to an end the discussions about the terms upon which NT Power might be granted access to PAWA's infrastructure. It meant that NT Power was not to be granted access to

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36 The trial judge rejected NT Power's argument that that licence contained an implied term about access to infrastructure: *NT Power Generation Pty Ltd v Power and Water Authority* (2001) 184 ALR 481 at 568-575 [378]-[398]. The judges of the Full Federal Court who addressed the issue agreed: *NT Power Generation Pty Ltd v Power and Water Authority* (2002) 122 FCR 399 at 422-423 [97]-[100] per Branson J, 452-453 [187] per Finkelstein J. The argument was not pursued in this Court.

37 For example, by letters of or meetings on 10 February 1998, 16 March 1998, 25 May 1998, 28 May 1998, 4 June 1998, and 24 June 1998.

PAWA's infrastructure at that time or until, and under the terms of, the access regime introduced on 1 April 2000; and that PAWA would not indicate to NT Power the terms upon which PAWA would grant access to its infrastructure, at least until the access regime was disclosed[38].

45 No further progress was made, and these proceedings commenced on 12 March 1999. The access regime for electricity supply referred to by the trial judge was approved by Cabinet on 14 September 1999 and enacted in 2000 by the *Electricity Networks (Third Party Access) Act* (NT) and related legislation. On 30 November 1999, the Chief Minister applied to the National Competition Council pursuant to s 44M of the Act for a recommendation that the access regime was an effective regime. That had not been determined by the time of the trial judge's decision on 3 April 2001.

The s 2B issue: the reasoning of the courts below

46 The courts below found, and in this Court it was common ground, that PAWA was a body corporate established for the purposes of the Northern Territory under the PAWA Act, and hence was an "authority of the … Territory" under s 2B(1)[39].

47 The courts below accepted various arguments advanced by PAWA that PAWA was not relevantly carrying on a business within the meaning of s 2B. Those arguments centred on the fact that it did not provide any access to its infrastructure to anyone.

48 The trial judge said that PAWA's use of its assets for the purpose of conducting the business of generating and selling electricity "is not in respect of the carrying on of business by PAWA in the provision of access to its infrastructure, but is for the fulfilment of PAWA's function of planning and coordinating the generation and supply of electricity in the Northern Territory:

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38 *NT Power Generation Pty Ltd v Power and Water Authority* (2001) 184 ALR 481 at 516-517 [153].

39 *NT Power Generation Pty Ltd v Power and Water Authority* (2001) 184 ALR 481 at 540-541 [267]-[268], 544 [283]; *NT Power Generation Pty Ltd v Power and Water Authority* (2002) 122 FCR 399 at 403 [4] per Lee J, 416 [67], 419 [81] per Branson J, 430-431 [124]-[127] per Finkelstein J.

see s 14(1)(b) and (d) of the PAWA Act"[40]. He applied to s 2B a construction which he said had been adopted by Emmett J for s 2A in *J S McMillan Pty Ltd v Commonwealth*[41]. Emmett J rejected the view that once it is accepted that the relevant government is carrying on a business, the Act applies to all conduct connected in some way with that business. He said that the expression "insofar as the Commonwealth carries on a business" indicated "that the Commonwealth is to be bound only where the conduct complained of is engaged in, in the course of carrying on the business"[42].

49 The reasoning of the majority of the Full Federal Court was similar to that of the trial judge[43] but they also held that the non-applicability of s 2B was

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40 *NT Power Generation Pty Ltd v Power and Water Authority* (2001) 184 ALR 481 at 548 [299]. Section 14(1) provided:

> "The functions of the Authority are, in relation to electricity –
>
> (a) to supply electricity within or outside of the Territory;
>
> (b) to plan and co-ordinate the generation and supply of electricity for the Territory or elsewhere;
>
> (c) to promote the safe use of electricity;
>
> (d) to control the supply of electricity;
>
> …
>
> (h) to advise the Minister on all matters concerning electricity;
>
> (j) to evaluate the present and future needs of the Territory or any place outside of the Territory in respect of fuel, energy and power for the purpose of generating electricity …"

41 (1997) 77 FCR 337 at 356.

42 (1997) 7 FCR 337 at 356. The trial judge quoted Emmett J and agreed with his reasons: *NT Power Generation Pty Ltd v Power and Water Authority* (2001) 184 ALR 481 at 547 [294]-[295].

43 Branson J did at one point suggest that it was necessary to demonstrate that "the totality of PAWA's enterprise constitutes the carrying on of a business": *NT Power Generation Pty Ltd v Power and Water Authority* (2002) 122 FCR 399 at 421 [89]. However, PAWA did not support that proposition on the appeal to this Court.

supported by *Dowling v Dalgety Australia Ltd*[44]. Lockhart J there held that the owners of private yards for the auction of livestock were not obliged to make them available to a person desiring to trade in the yards as a livestock auctioneer, because they were not in the business of granting licences or leases of the yards but in the business of providing livestock selling services. Their exclusion of the applicant was held to be lawful, according to the majority's reading of Lockhart J's reasoning, because they took advantage of their proprietary rights, and not their market power[45]. Hence, to use Branson J's words, ss 2A and 2B[46]:

> "disclose no intention … to require the Crown … to engage in a business activity; rather they are concerned with the standards of conduct which are to be observed if the Crown does choose to engage in a business activity. In this case, the Crown through PAWA has not chosen to undertake the commercial activity of providing access to its infrastructure to others; rather it decided not to carry on a business of providing access to its infrastructure. I am not able to discern a legislative intention that where the Crown makes such a choice it can nonetheless be forced, in effect, to carry on that business."

50 Branson J also advanced other arguments for her conclusion, and these are considered below.

51 Finkelstein J disagreed. He held that the Act did not only apply to an authority where the challenged conduct itself amounts to carrying on a business; it applied to conduct engaged in during the course of a business as well. In his view, if the operation of s 2B and s 13 were restricted so that the legislation only applied to conduct which was itself the carrying on of a business, the legislative object of putting government business on the same footing as private enterprise would not be achieved[47]:

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44 (1992) 34 FCR 109 at 145-146.

45 *NT Power Generation Pty Ltd v Power and Water Authority* (2002) 122 FCR 399 at 404-405 [9]-[12] per Lee J, 421 [90] per Branson J.

46 *NT Power Generation Pty Ltd v Power and Water Authority* (2002) 122 FCR 399 at 421 [91].

47 *NT Power Generation Pty Ltd v Power and Water Authority* (2002) 122 FCR 399 at 435 [138].

> "Private corporations that are regulated by the Competition Code, and [the Act] (upon which the Code is modelled), are caught by their provisions if they engage in anti-competitive conduct in the course of carrying on their commercial activities, not because that conduct is itself an aspect of their respective businesses. Moreover, a good deal of the activities that are caught by the antitrust provisions could not be characterised as being of a trading or commercial character. So it should be with the Crown. In my opinion, if conduct by the Crown is engaged in during the course of carrying on a business, that is sufficient to bring it under the Code's umbrella."

The s 2B issue: PAWA's business activities

52 One matter is not controversial. PAWA was carrying on a very substantial business. The trial judge found that PAWA used its infrastructure "as part of the means of conducting the business of generating and supplying electricity"[48]. There are many references in PAWA's internal documents revealing that its officers perceived it to be carrying on a business. This can also be seen in its 1998 Annual Report ("the Report"), which was being prepared as the decision to refuse access was being made and then adhered to.

53 The Report was presented to the Minister for Essential Services in accordance with s 28(1) of the *Public Sector Employment and Management Act* (NT). Section 28(4) imposed an obligation on the Minister to make it public by laying a copy of it before the Legislative Assembly within six sitting days of receipt. The Report spoke of PAWA's "core business", of the fact that it was undergoing "commercialisation", of its "commercial functions", and of "its Vision" ("[t]o thrive in the competitive north Australia utility services market"). The Report stated: "Like all business, [PAWA] needs to generate a return on the very significant amount of capital invested", and spoke of the need for efficiency and cost-effectiveness. The Report discussed indicators like the rate of return on assets and the debt to capital ratio. In many respects, the language of the Report and the form of the accounts correspond with those in any non-governmental trading corporation. This is scarcely surprising in view of PAWA's duty, under s 17(1) of the PAWA Act, to act "in a commercial manner". PAWA had sales

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48 *NT Power Generation Pty Ltd v Power and Water Authority* (2001) 184 ALR 481 at 549 [302]. See also *NT Power Generation Pty Ltd v Power and Water Authority* (2002) 122 FCR 399 at 403 [7] per Lee J, at 420-421 [87], [89] per Branson J.

revenue in the year to 30 June 1998 of $253,181,000, of which power sales accounted for $206,272,000.

54 More specifically, the Report referred to the transmission and distribution facilities, which PAWA now contends are outside the scope of any business activity, as "business products" and it referred to the use of those facilities as "electricity transmission services" and "commercial services". The Report described PAWA's entire operation as a "business" having a "power" segment, with "upstream (generation …) and downstream (transmission, distribution and reticulation networks, and retail) components".

55 These are admissions. Technically they are "informal" admissions, but, having been made pursuant to statutory duties and in a document which there was a statutory duty to make public, they are of the utmost solemnity. The admissions in relation to the transmission and distribution facilities, in particular, are totally inconsistent with the case on the application of s 2B which PAWA propounded in this litigation.

Carrying on a business in a market: PAWA's argument on the conduct of the trial

56 In this Court, PAWA's first contention in defence of the proposition that it was not relevantly carrying on a business rested on NT Power's conduct of the trial. PAWA asserted that the only case against it was that it took advantage of its power in one market (the market for the supply of electricity infrastructure services) in order to prevent NT Power from competing in a different market (the market for the sale of electricity to consumers). The first market was one in which there had been no transactions, and one in which PAWA had never supplied or acquired goods or services. PAWA used the infrastructure only to carry its own electricity – electricity which it had either generated itself or bought from persons like NT Power. NT Power met this contention by saying that it had never abandoned a plea that PAWA had market power in the market for the sale of electricity to consumers (which was derived from its control of electricity infrastructure services), and took advantage of that market power for the purpose of injuring NT Power in the market for the sale of electricity to consumers.

57 This controversy between the parties was treated by them as being significant mainly in relation to the role of s 46(4)(c) in assessing whether s 46 was contravened[49], but it is also relevant to s 2A.

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49 See [104]-[115] below.

58 *The wide pleaded case was not abandoned.* The first difficulty with PAWA's contention is that the case pleaded by NT Power was indeed wide. After the trial began, the pleadings were amended to accommodate all possible findings that might flow from disagreements on market definition, which had emerged between the experts called by the parties. Thereafter pars 4 and 4A of NT Power's Further Amended Statement of Claim ("the Statement of Claim") alleged the following markets:

> "4. At all material times there existed in the Northern Territory, markets:
>
> (a) for the supply of electricity to persons in the Northern Territory ('the Electricity Supply Market');
>
> (b) for the supply of the service of the use of electricity transmission and distribution infrastructure located in the Northern Territory to persons intending to generate and sell electricity to other persons in the Northern Territory ('the Electricity Infrastructure Market').
>
> 4A. Alternatively, at all material times there existed in the Northern Territory markets:
>
> (a) for the generation of electricity ('the Electricity Generation Market'); and
>
> (b) for the transmission of electricity ('the Electricity Transmission Market'); and
>
> (c) for the distribution of electricity ('the Electricity Distribution Market'); or
>
> (d) alternatively to (b) and (c) for the transmission and distribution of electricity ('the Electricity Carriage Market'); and
>
> (e) for the sale of electricity ('the Electricity Sale Market')."

In the respondents' Second Further Amended Defence ("the Defence"), par 4(b) was denied and par 4A(d) was not admitted, but the other allegations were admitted. Paragraph 23 of the Statement of Claim alleged that PAWA had refused access to "the Existing Infrastructure" (defined in par 9 as "substantially the whole of the electricity transmission and distribution infrastructure located in

the Northern Territory"). Among the particularised refusals was the letter of 26 August 1998. Paragraph 24 alleged:

> "The conduct of [PAWA] referred to in paragraph 23 was engaged [in] and is continuing to be engaged in by it:
>
> (a) in the exercise of its market power:
>
> (i) in the Electricity Supply Market; and/or
>
> (ii) in the Electricity Infrastructure Market;
>
> (iii) in the Electricity Transmission Market and the Electricity Distribution Market; or, alternatively
>
> (iv) in the Electricity Carriage Market; or, alternatively
>
> (v) in the Electricity Sale Market;
>
> (b) for the purpose, or alternatively for purposes which included the substantial purpose, of:
>
> (i) preventing the entry of [NT Power] into the Electricity Supply Market or, alternatively, the Electricity Sale Market in contravention of s.46(1)(b) of [the Act] and/or s.46(1)(b) of the Competition Code text as that term is defined in s.4 of [the Competition Act] (the 'Competition Code');
>
> (ii) deterring, or alternatively preventing [NT Power] from engaging in competitive conduct in the Electricity Supply Market or, alternatively, the Electricity Sale Market in contravention of s.46(1)(c) of [the Act] and/or s.46(1)(c) of the Competition Code, namely selling electricity to persons in the Northern Territory in accordance with the Licence in competition with [PAWA]."

Sub-paragraphs 24(a)(i) and (v) alleged a taking advantage of power in markets in which, if they existed, PAWA unquestionably carried on business in competition with others. But PAWA argued that it was only the conduct alleged in sub-pars 24(a)(ii) and (iii), together with similar allegations in par 25, which was in issue. In oral argument, PAWA said: "The case was not conducted or approached on the basis that advantage was taken of market power in the sale market or the generation market".

59 That proposition, which PAWA regarded as crucial, has not been established.

60 The following matters are agreed, either expressly or tacitly.

(a) The newer allegations in the Statement of Claim, which are indicated by the underlining in the quotations above, were made on 18 August 1999, 15 days after the trial commenced. Those allegations were never withdrawn.

(b) The trial proceeded on the basis that any party was at liberty to call evidence on any issue on the pleadings.

(c) The parties treated the Electricity Sale Market as being the same as the Electricity Supply Market, and the existence of both markets was admitted.

(d) In his final address, counsel for NT Power made submissions supporting a taking advantage of power in the Electricity Transmission Market, the Electricity Distribution Market, or, alternatively, the Electricity Carriage Market. He did not address a submission in support of the allegation in sub-par 24(a)(v) of the Statement of Claim – a taking advantage of power in the Electricity Sale Market.

61 However, since PAWA had not lost any chance, before the evidence closed, of calling evidence "which by any possibility could have prevented the point from succeeding"[50], the point can be taken now. In this Court, PAWA initially asserted, but then abandoned, a complaint of prejudice arising from a loss of opportunity to call evidence; it complained only of the difficulty of addressing the "issue on our feet with time constraints". In written submissions filed two months after the oral hearing, the primary prejudice which PAWA identified lay in its supposed inability to deal in written submissions with the argument whether it was possible that PAWA could derive market power in one market from power in another, and to refer to authorities on that subject. That is not prejudice in view of the opportunity to provide, and the actual provision of, those written submissions after the conclusion of the oral argument. The authorities which prevent points being raised in ultimate or intermediate courts of appeal do not prevent them being raised if those points remained open at the trial. PAWA also relied on the fact that this Court does not have the views of the trial

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50 *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418 at 438 per Latham CJ, Williams and Fullagar JJ.

judge on the point, but it was pleaded, evidence was called on it, and related questions were sufficiently fully considered to prevent the unavailability of the trial judge's views being a disabling handicap. Further, though the objection raised now by PAWA (that it was not carrying on business in the transmission and distribution markets) appears to have attracted the trial judge and was presumably argued before him, it was not pleaded by PAWA. A party who has not pleaded, but later raises, a particular factual barrier cannot criticise a second party for seeking to overcome that factual barrier by relying in an appellate court on matters pleaded by that second party which were not abandoned at trial and which are supported by evidence called at trial.

62 NT Power therefore contends that the question is whether PAWA's conduct can be characterised as taking advantage of its power in the Electricity Sale Market, in which it unquestionably carried on business within the meaning of s 2B, for the purpose of injuring NT Power either in the Electricity Supply Market or the Electricity Sale Market. It is a question which is open in this Court, since it does not turn on any assessment of testimonial credibility.

63 The trial judge found that PAWA had power in the markets concerned with transmission and distribution[51]. There was no challenge to or disagreement with that finding in the Full Federal Court, and there was no challenge to it in this Court. PAWA also had power in the Electricity Supply Market: PAWA admitted that there were substantial barriers to entry to, and that it had a substantial degree of market power in, the Electricity Supply Market. It followed from this admission and the agreement of the parties not to distinguish between the Electricity Supply Market and the Electricity Sale Market that PAWA had a substantial degree of power in the Electricity Sale Market, despite PAWA's denial of that allegation in the pleadings. That conclusion was supported by NT Power's expert. The power in both classes of market – the transmission/distribution markets, and the Electricity Supply Market/Electricity Sale Market – derived in part from PAWA's ownership of infrastructure: the trial judge found that it "constitutes a natural monopoly", and there was no "credible threat of entry" by another competitor[52]. That ownership operated as a barrier to

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51 *NT Power Generation Pty Ltd v Power and Water Authority* (2001) 184 ALR 481 at 561 [353].

52 *NT Power Generation Pty Ltd v Power and Water Authority* (2001) 184 ALR 481 at 560 [351]. This was assisted by PAWA's vertical integration. See *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* (1988) 167 CLR 177 at 190 where Mason CJ and Wilson J said: "power companies usually own distribution systems. This enables them to discriminate in pricing

(Footnote continues on next page)

entry in both classes of market and was hence a source of market power in both as well. PAWA took advantage of its market power, not only in the transmission/distribution markets, but also in the Electricity Supply Market/Electricity Sale Market, for the purpose of injuring NT Power in the latter markets. There is an unconvincing artificiality in PAWA's distinction between exercising market power in the former markets and exercising it in the latter, when the critical fact underlying both types of market power was PAWA's control of the infrastructure.

Carrying on a business in a market: refusal of access in order to protect PAWA's retail business

64 However, let it be assumed that the contention that PAWA advanced is in fact sound. On that assumption, the proceedings below were decided on the basis that the actual case had narrowed considerably from that pleaded to one in which PAWA took advantage of its power in the transmission/distribution markets in which it faced no competition and made no sales[53] for the purpose of injuring NT Power in the market for the sale of electricity to consumers. Even on that assumption, PAWA's conduct went beyond a mere taking advantage of its market power in the transmission/distribution markets in which it faced no competition and conducted no sales. PAWA's conduct involved taking advantage of its market power in those markets for the purpose of achieving results in another. The results PAWA desired in the market or markets for the sale of electricity to consumers (the Electricity Supply Market and the Electricity Sale Market) were results that advantaged its position in that market or those markets, in which PAWA does not dispute that it conducted much business. PAWA used, as part of the means of conducting that business, 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.

… ." See also *United States v United Shoe Machinery Corp* 110 F Supp 295 at 346 (D Mass, 1953).

53 PAWA's argument that there were no such "markets" because of a lack of sales is rejected below at [104]-[110].

Carrying on a business in a market: the correct construction of s 2B

65 Even if, contrary to what has just been said, PAWA's last contention is correct, it was carrying on a business within the meaning of s 2B on its correct construction.

66 *The legislative context.* While the word "business" in any particular context takes its meaning from that context[54], normally it is a "wide and general" word[55]. Its meaning in the Act is widened by s 4(1), since "business" includes "a business not carried on for profit". The legislation as a whole is remedial; s 2 provides that the object of the Act is "to enhance the welfare of Australians through the promotion of competition …". The purpose of introducing s 2A, as explained by the Swanson Committee and noted above, was to ensure that the Commonwealth Government should, in its commercial activities, be subject to the same regime as corporations[56]. One of the goals of the legislation recommended by the *Hilmer Report* was to ensure that the legislation 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[57]. The Second Reading Speech delivered in the House of Representatives when the Reform Act was introduced as a Bill stated that it and the three Agreements of 11 April 1995 represented "a complete response to the recommendations of the Hilmer committee"[58]. It was said that the amendments to the Act, taken with State and Territory application legislation, ensured that "the prohibitions against anti-competitive conduct can be applied to all businesses in Australia"[59]. It was

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54 *Re Australian Industrial Relations Commission; Ex parte Australian Transport Officers Federation* (1990) 171 CLR 216 at 226 per Mason CJ, Gaudron and McHugh JJ.

55 *Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd* (1982) 150 CLR 169 at 184 per Gibbs CJ.

56 *Swanson Report* at 87 [10.25].

57 *Hilmer Report* at xxvii and 343.

58 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 30 June 1995 at 2796.

59 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 30 June 1995 at 2794.

further said that one of the main features of the Bill was that it "extends the operation of [the Pt IV] competitive conduct rules to currently exempt businesses"[60]. Section 2B was clearly a crucial provision in attaining these goals.

67 *The flaws in PAWA's approach.* 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. Had s 2B not been enacted, the conduct alleged against PAWA would not be examinable under the legislation because PAWA is an authority of the Territory – part of the "Crown in right … of the Northern Territory", ie the Northern Territory Government[61]. 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. PAWA would reverse the process and invert the correct approach: according to PAWA, it is necessary to examine specific conduct, and only when a particular contravention is found is it then relevant to examine whether that contravention can be described as carrying on a business.

68 The Act is seeking to advance the broad goal of promoting competition. Certain provisions of the Act, particularly in 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[62] 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.

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60 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 30 June 1995 at 2797-2798.

61 Section 5 of the *Northern Territory (Self-Government) Act* 1978 (Cth) states: "The Northern Territory of Australia is hereby established as a body politic under the Crown by the name of the Northern Territory of Australia."

62 *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* (1989) 167 CLR 177 at 196 per Deane J.

69 Another flaw in PAWA's contention that its failure to supply the service of access to its infrastructure meant that it was not carrying on a business is that it substitutes the question of defining markets for the question of whether a business is being carried on. It was crucial to the trial judge's reasoning that PAWA was not trading or attempting to trade in the service of providing access to its infrastructure, and was not engaged in the business of acquiring infrastructure assets[63]. It was crucial to Branson J's reasoning that "PAWA does not compete with others either to obtain the use of infrastructure or to provide access to its infrastructure to third parties. It is not in the commercial marketplace in relation to its infrastructure"[64]. This recourse to ideas of rivalry in the acquisition or provision of services, of "competition" and of "market places", suggests a search for goods or services that were "substitutable for, or otherwise competitive with" each other – that is, a search for the existence of markets as defined in s 4E of the Act[65]. However, the words "market" and "business" have distinct meanings. 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. In 1998, the provisions applied by s 2B to State and Territorial government businesses were limited to Pts IV, XIB and related provisions. Part XIB, like Pt IV itself, deals with much conduct that is not related to market definition. Further, s 2A, which uses substantially the same language as s 2B, applies the Act as a whole to Commonwealth businesses. Thus, the immense range of provisions that relate to consumer protection (Pts IVA, IVB, V, VA and VC) apply to Commonwealth Government businesses, quite independently of any market issues.

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63 *NT Power Generation Pty Ltd v Power and Water Authority* (2001) 184 ALR 481 at 547-549 [298]-[299], [302].

64 *NT Power Generation Pty Ltd v Power and Water Authority* (2002) 122 FCR 399 at 421 [90].

65 Section 4E provides:

> "For the purposes of this Act, unless the contrary intention appears, *market* means a market in Australia and, when used in relation to any goods or services, includes a market for those goods or services and other goods or services that are substitutable for, or otherwise competitive with, the first-mentioned goods or services."

70 All these considerations militate against any approach to the question of "carrying on a business" by reference to competition in a market. That in turn renders it irrelevant whether PAWA was competing in acquiring infrastructure assets or was active in seeking to supply infrastructure services. The only question is: what business was PAWA carrying on? So far as it was carrying on a business, s 46 applied to it.

71 Further, as Finkelstein J pointed out[66], PAWA's construction, in treating as crucial its non-supply of access to its infrastructure, detracts from the legislative goal of securing equivalent treatment of non-government and government businesses. Private businesses which refuse absolutely to provide goods or services desired by others, even if they are competitors, can in some circumstances fall within the language of s 46[67]. A construction of s 2B which prevents the same outcome for government businesses that do so is unconvincing. It would permit a government business to remain immune from the legislation so long as it were consistently anti-competitive in denying infrastructure access; and indeed to remain immune on the first occasion when it permitted access, even if it did so on a discriminatory basis. After that point it would be "carrying on a business" and therefore caught by the Act, but only then. The statutory language does not suggest that this anomaly was contemplated.

72 In short, PAWA's denial of access to its infrastructure to NT Power, for no reason of want of capacity or technical difficulty or safety, but simply in order to protect its revenue position in relation to electricity sales, was conduct designed to secure PAWA's position as part of its carrying on of a business.

73 *Authorities relied on by PAWA.* The authorities relied on in support of PAWA's construction do not in fact support it.

74 The first authority, *J S McMillan Pty Ltd v Commonwealth*[68], a decision of Emmett J, held that the fact that the Australian Government Printing Service carried on a publishing business did not mean that the Commonwealth, in conducting a sale of that business, was carrying on a business. The officers

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66 *NT Power Generation Pty Ltd v Power and Water Authority* (2002) 122 FCR 399 at 435 [138], quoted above at [51].

67 *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* (1989) 167 CLR 177.

68 (1997) 77 FCR 337.

engaged in the sale had nothing to do with the day-to-day operations of the enterprise; the Commonwealth did not conduct any business of selling assets[69]. The reading by PAWA of Emmett J's judgment as based on grounds narrow enough to exclude PAWA from the Act is not convincing. Emmett J required the "conduct complained of" to be "engaged in, in the course of carrying on the business"[70]. Those words apply to PAWA: in the course of carrying on the business of supplying retail customers, and for the purpose of preventing short-term competition in that business from NT Power, it denied NT Power access to its infrastructure services.

75 Next, the reliance by PAWA on *Dowling v Dalgety Australia Ltd*[71] is misplaced in relation to s 2B. No governmental body was involved in the case, and Lockhart J was not considering the construction of s 2A (or s 2B, which did not then exist). Whether or not Lockhart J's reasoning assists PAWA in its denial of a contravention of s 46, a matter considered below, it cannot cast light on an issue not considered by him.

76 *Compelling the Crown to carry on a business.* Branson J denied that ss 2A and 2B, in conjunction with s 46, could be read as requiring the Crown to engage in a business activity[72]. However, s 46 and other provisions can operate not only to prevent non-governmental traders from doing prohibited things, but also to compel them positively to do things they do not want to do[73]. If non-governmental traders are in this position, and governmental traders are to be treated equivalently, there is nothing surprising in a conclusion that the latter may be compelled to engage in business activities when they do not wish to.

77 *Constitutional complexities?* Branson J said that nothing in s 2B suggested that it was intended to have a different application in respect of the Northern Territory and the Australian Capital Territory from that which it had in respect of the States. Her Honour then stated that there were "significant

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69 (1997) 77 FCR 337 at 356-357.

70 (1997) 77 FCR 337 at 356.

71 (1992) 34 FCR 109 at 145-146.

72 *NT Power Generation Pty Ltd v Power and Water Authority* (2002) 122 FCR 399 at 421 [91].

73 *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* (1989) 167 CLR 177.

constitutional complexities associated with a law of the Commonwealth which purports to interfere with the property rights of a State"[74]. She implicitly suggested that these difficulties must compel a narrower reading of s 2B than would otherwise be the case.

78 However, in this Court, no notices under s 78B of the *Judiciary Act* 1903 (Cth) were thought necessary, least of all by PAWA. None of the three States which intervened by leave raised any constitutional point. No difficulties of the kind indicated by Branson J can arise in relation to NT Power's claim under the Competition Act, for it is a law of the Northern Territory interfering (if it does interfere) with the property rights of an authority of the Northern Territory. Nor, by parity of reasoning, can any difficulty of that kind arise in relation to the State legislation that corresponds to the Competition Act. Any constitutional difficulties that may exist in relation to s 2B of the Act are thus immaterial.

79 *Granting access to Crown infrastructure: problems of remedy.* Branson J said that s 2B should not be read so widely as to introduce an access regime via s 46, because to do so would cause "significant difficulties" to arise in relation to the framing of orders "to grant access to Crown infrastructure"[75]. Her Honour stated that these were difficulties over and above the difficulties which exist anyway in s 46 cases "when attempting to frame orders that require a party to behave as it would in a competitive market where in fact there is no such market by which to determine this behaviour"[76]. There certainly could be difficulties in relation to injunctions "to grant access to Crown infrastructure". However, they are not, in s 46 cases, unique to situations involving governments or governmental authorities[77]. If the difficulties in relation to injunctions are insuperable, they may prevent injunctions from being granted but they do not prevent other relief.

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74 *NT Power Generation Pty Ltd v Power and Water Authority* (2002) 122 FCR 399 at 421-422 [92].

75 *NT Power Generation Pty Ltd v Power and Water Authority* (2002) 122 FCR 399 at 422 [93].

76 *NT Power Generation Pty Ltd v Power and Water Authority* (2002) 122 FCR 399 at 422 [94].

77 See *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (2001) 205 CLR 1 at 25-26 [59]-[60] per Gleeson CJ, Gummow, Hayne and Callinan JJ.

80 *Section 46 as an alternative access regime.* Branson J pointed out that s 44E provides that Pt IIIA binds the Crown in right of the Commonwealth, the States and the Territories without any limitation with respect to the carrying on of a business. She also pointed out that s 2B was introduced into the Act by the same statute as introduced Pt IIIA (that is, the Reform Act)[78]:

> "In this regard [Pt IIIA] gives effect to the Competition Principles Agreement … In my view, no legislative intention may in the circumstances be discerned that s 2B, together with Pt IV, should provide an alternative means to the complex process established by Pt IIIA by which, provided that no other effective access regime is in place, access to State or Territory infrastructure may in certain circumstances be obtained – at least where the Crown is not already in the business of providing access to that infrastructure."

81 There are several answers to this reliance on the availability of access under Pt IIIA as a reason for construing s 2B so as to prevent an alternative access regime arising under s 46.

82 First, the structure of the Act indicates the opposite because s 44ZZNA provides that Pt IIIA is to have no effect on the operation of Pt IV.

83 Secondly, the point would not answer NT Power's alternative cause of action under the Competition Act, which has no provisions similar to Pt IIIA.

84 Thirdly, if there is a disharmony between the existence of Pt IIIA as a means of access, and a construction of s 2B that enables s 46 to be used as a means of access, that disharmony would weigh against s 46 being used to create an access regime even if the Crown were already in the business of providing access to infrastructure. Yet it is accepted in the passage just quoted that s 2B does not prevent s 46 applying in those circumstances.

85 Indeed, the supposed disharmony would weigh against s 46 being used to create an access regime of any kind, and 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"[79],

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78 *NT Power Generation Pty Ltd v Power and Water Authority* (2002) 122 FCR 399 at 422 [95].

79 *NT Power Generation Pty Ltd v Power and Water Authority* (2002) 122 FCR 399 at 404 [10].

gave various examples of the supposed inability of one competitor to obtain access to the real or personal property of another[80]. 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[81]. Lee J accepted that this was so for intellectual property rights[82]. The exclusion by s 51 of various types of conduct from Pt IV is limited in relation to intellectual property rights. In deciding whether Pt IV has been contravened, anything specified in, or specifically authorised by, a Commonwealth Act must be disregarded – but not an Act relating to patents, trademarks, designs or copyrights: s 51(1)(a). A contravention of a provision of Pt IV is not to be taken to have been committed by various licences and other contracts, arrangements or understandings relating to patents, registered designs, copyright and other rights, and trademarks – but this does not apply to ss 46, 46A and 48: s 51(3). The legislative scheme contemplates that whether the conduct is refusal to supply intellectual property, or the supply of it on particular conditions, s 46 can be attracted[83]. 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.

86 Finally, there is no contradiction in legislation which contains Pt IIIA and also contains s 2B and s 46. It is possible to imagine circumstances similar to those of the present case in which PAWA would not be vulnerable to a s 46 challenge, but would eventually have to provide access, either under an effective access regime devised by the Northern Territory or under a regime developed pursuant to Pt IIIA. Further, in cases where there is a contravention of s 46, it is possible that curial relief, sought speedily, might be obtained before completion

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80 *NT Power Generation Pty Ltd v Power and Water Authority* (2002) 122 FCR 399 at 404-405 [10]-[12].

81 *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* (1989) 167 CLR 177.

82 *NT Power Generation Pty Ltd v Power and Water Authority* (2002) 122 FCR 399 at 404 [10] last sentence ("necessarily").

83 Examples of how this could arise under the 1974 form of s 46 are given by Gummow, "Abuse of Monopoly: Industrial Property and Trade Practices Control", (1976) 7 *Sydney Law Review* 339 at 345-348.

of the somewhat elaborate arbitral, review and appellate procedures provided for in Pt IIIA.

87 *Argument advanced by Western Australia.* The Solicitor-General for Western Australia supported PAWA's submission that it was not carrying on a business because it did not supply access to its infrastructure by reference to *Bass v Permanent Trustee Co Ltd*[84]. He said it showed that activities "engaged in solely for traditional governmental purposes" stood outside the term "businesses"[85]. The passage relied upon was dealing with a question entirely different from the present – that of accessorial liability. In any event, it does not support PAWA's construction, since PAWA's conduct in this case was not "engaged in solely for traditional governmental purposes"[86].

88 *Conclusion on s 2B.* The reasons set out above have rejected PAWA's contentions that NT Power's conduct at the trial prevents it from relying on the pleadings; have concluded that even if NT Power cannot rely on the pleadings, the conduct of PAWA that is alleged to have contravened s 46 was in the course of carrying on a business; and have rejected PAWA's proposed construction of s 2B. The result is that it is open to the Court to consider whether PAWA's refusal of access to NT Power contained in the letter of 26 August 1998 contravened s 46.

Was PAWA's refusal to supply transmission and distribution services within s 2C(1)(b)?

89 Before considering s 46, however, it is necessary to examine the trial judge's reasoning on s 2C(1)(b), PAWA's criticism of it, and the weaknesses in PAWA's construction of s 2C(1)(b).

90 *The trial judge's reasoning.* Section 2C(1)(b) relevantly provides:

> "For the purposes of sections 2A and 2B, the following do not amount to carrying on a business:
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> …

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84 (1999) 198 CLR 334.

85 (1999) 198 CLR 334 at 349 [23] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.

86 See below at [133]-[150].

(b) granting, refusing to grant, revoking, suspending or varying licences (whether or not they are subject to conditions) …"

Section 2C(3) defines "licence" as meaning "a licence that allows the licensee to supply goods or services". The trial judge held that the refusal of access did not fall within s 2C(1)(b). The Full Court majority did not deal with the matter.

91 PAWA contends that the word "licence" in its ordinary meaning is broad – a permission or consent – and that it should be given that broad meaning in s 2C(1)(b). Hence, refusal of access was refusal of a licence.

92 The trial judge held that the licence granted on 26 June 1998 under s 25 of the *Electricity Act* (NT) ("the Electricity Act") was a licence as defined in s 2C(3)[87]. That licence permitted NT Power to sell goods, namely electricity, which s 27(1) of that Act would not otherwise have permitted it to sell[88].

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87 *NT Power Generation Pty Ltd v Power and Water Authority* (2001) 184 ALR 481 at 545 [289]. The Electricity Act was repealed by the *Electricity Reform Act* (NT). At the relevant time, s 25 of the Electricity Act provided in part:

"(1) The Authority may appoint a person who is a party to an agreement with the Authority as a licensee to generate, store, reticulate and sell electricity for use in an area.

(2) A licensee may sell electricity in accordance with the terms of his agreement with the Authority."

88 *NT Power Generation Pty Ltd v Power and Water Authority* (2001) 184 ALR 481 at 570 [383]. Section 27 provided in part:

"(1) Subject to this Act, a person shall not sell electricity.

Penalty: $2,000.

…

(3) A licensee may sell electricity subject to the terms of the agreement entered into between him and the Authority."

Section 29(1) provided:

"A person shall not -

(Footnote continues on next page)

However, the PAWA officers responsible for granting the licence did not perceive any grounds on which PAWA could refuse it. They saw its grant as irrelevant to the question whether NT Power would be able to supply any electricity. For them, the question of granting the licence was clearly distinct from the question of allowing access to infrastructure[89]. The trial judge held that while NT Power needed the consent of PAWA to provide transmission and distribution services to NT Power, that was not a "licence" within the meaning of s 2C(1)(b)[90]:

> "Although the expressions 'licence' and 'consent' may be interchangeable in certain circumstances (see for example the definition of 'licence' in the *Macquarie Concise Dictionary*, 1988, p 555 and the discussion of Sheppard, Spender and Gummow JJ on the significance of the wording in s 2(1) of the Copyright Act 1912 (Cth) in *Computermate Products (Aust) Pty Ltd v Ozi-soft Pty Ltd*[91]), in my view the term 'licence' in s 2C(1)(b) … carries the sense of a formal authorisation by a public authority to sell goods or services. … [T]he expression in its context conveys something more than 'consent'. Section 2C(1)(b) is expressed in terms applicable to formal regulatory processes, including the reference to granting, revoking and suspending licences. The wide meaning of 'licence' for which PAWA contends is one which does not lie readily with those processes. That wide meaning would also, in the case of 'government' businesses, apply to many if not most routine decisions or processes in the operations of those businesses so as to substantially water

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> (a) use, consume, waste or divert electricity generated by the Authority or a licensee; or
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> (b) use any electrical installation, equipment, apparatus or thing owned by the Authority or a licensee,
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> except with the consent of the Authority or a licensee.
>
> Penalty: $1,000."

89 *NT Power Generation Pty Ltd v Power and Water Authority* (2001) 184 ALR 481 at 502-503 [90], 504 [98], 569 [381].

90 *NT Power Generation Pty Ltd v Power and Water Authority* (2001) 184 ALR 481 at 545 [289].

91 (1988) 83 ALR 492 at 494-495.

down the apparent scope of s 2B. The regulatory functions of PAWA in the licensing of persons to generate, store, reticulate and sell electricity is provided in s 25 of the Electricity Act."

93 *PAWA's criticisms of the trial judge.* PAWA claimed, first, that though the trial judge eventually arrived at a narrow statutory meaning, he recognised that the word "licence" is of wide import. In fact, he did not. Though he said that the expressions "licence" and "consent" may be interchangeable in certain circumstances, and referred to a case in the very different field of the copyright owner who licenses importation of infringing copies, he concentrated on the terms of s 2C(1)(b) in their context. Further, in its ordinary meaning the word "licence" is not of particularly wide import. The *Oxford English Dictionary*[92] gives various meanings, only two of which are relevant to the present context. One is:

> "2. a. A formal, usually a printed or written permission from a constituted authority to do something, *e.g.* to marry, to print or publish a book, to preach, to carry on some trade, etc.; a permit. …
>
> b. The document embodying such a permission. …"

The other is:

> "1. a. Liberty (to do something), leave, permission. Now somewhat *rare*."

The Macquarie Dictionary[93] does not give the latter meaning, but includes the following:

> "1. formal permission or leave to do or not to do something.
>
> 2. formal permission from a constituted authority to do something, as to carry on some business or profession, to be released from gaol for part of one's sentence under specific restrictions, etc.
>
> 3. a certificate of such permission; an official permit.
>
> 4. freedom of action, speech, thought, etc., permitted or conceded. …"

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92 2nd ed (1989), vol 3 at 890.

93 (1981) at 1013.

94 It is unlikely that s 2C(1)(b) bears meaning 1.a. in the *Oxford English Dictionary* or meaning 4 in the *Macquarie Dictionary*. The first is rare. The second is inappropriate. And the definition in s 2C(3) commences with the words "a licence", suggesting something narrower and more formal than "leave" or "freedom" or something which has been "permitted or conceded".

95 Secondly, PAWA submitted that it was wrong to narrow the definition of "licence" in s 2C(1)(b) on the ground that a wider meaning would limit s 2B. However, the background to the enactment of s 2B and equivalent provisions in the States and Territories suggests that s 2B was not intended to be narrow in meaning, which in turn suggests that the exceptions to s 2B in s 2C were not intended to have the effect of giving it a narrow meaning. While it may not be fatal to a suggested construction that it has that effect, it is a reason for examining it critically.

96 Thirdly, PAWA submitted:

> "If Parliament intended to restrict the meaning of '*licence*' with reference to the formality attaching to its grant, or with reference to requirements going beyond the consent or permission given by the licence, it would have done so, and it would have spelt out the formality which was required, and it would have spelt out the matters beyond consent which were required."

The trial judge did not say that the licence required "matters beyond consent": he merely said that the word conveys the need for some formality in the expression of that consent. That some formality is called for is indicated by the word "a" before "licence" in the definition, as noted above. It is also indicated by the use of the words "granting" and "suspending" in s 2C(1)(b). This language is more apt for formal licences than for informal consents. However, there is force in the contention that since neither s 2C(1)(b) nor s 2C(3) defines the degree of formality, the construction found by the trial judge has an unattractive degree of uncertainty.

97 Fourthly, PAWA contended that, if greater formality were required, NT Power needed its consent to the use of PAWA's infrastructure, not only because PAWA owned it but also because s 29(1)(b) of the Electricity Act made it an offence to use it without PAWA's consent[94]. PAWA argued that, as the trial judge recognised, complex technical, pricing and backup power issues would

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94 See note 88 above.

have to be resolved before PAWA could be expected to consent. PAWA submitted:

> "The statutory requirement for PAWA as regulator to give its consent before the infrastructure can lawfully be used satisfies any need for formality, and the complex issues to be determined as a condition of any consent shows that something more than mere consent was required."

However, the trial judge saw s 29(1) consent as different from PAWA's consent to NT Power using its infrastructure to transport electricity. He said[95]:

> "[Section 29(1)] contemplates that PAWA may consent to the use of its infrastructure, but … it appears … more to be a provision directed to prevent tampering with any part of PAWA's infrastructure than with the wider question of general access to PAWA's infrastructure."

He also said[96]:

> "[I]n my judgment s 29 is concerned with protecting PAWA or a licensee from misuse of its infrastructure or misappropriation or misuse of electricity (for which s 29(1)(a) provides). Section 29 creates an offence for such conduct, and fixes a penalty. The consent for which it provides is no doubt intended to encompass a variety of circumstances in which PAWA or a licensee might wish to permit persons to have access to infrastructure, such as repair or maintenance, measurement, upgrading and the like. It is also of significance that it protects both PAWA and licensees, and provides for PAWA or a licensee to give the consent contemplated."

That approach is sound. It is also difficult to see how the reference to consent in s 29(1)(b) of the Electricity Act can cast light on the meaning of "licence" in s 2C(1)(b) of the Act. In any event, s 29(1)(b) consent was not necessary. NT Power did not want to use any "electrical installation" or "equipment" owned by PAWA: it was not seeking any physical access by its employees to PAWA's assets. NT Power only wanted PAWA to take electricity from it, receive it into its system, and manage its transmission and distribution.

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95 *NT Power Generation Pty Ltd v Power and Water Authority* (2001) 184 ALR 481 at 548 [300].

96 *NT Power Generation Pty Ltd v Power and Water Authority* (2001) 184 ALR 481 at 555 [326].

98 It is true that the style in which PAWA conducted negotiations up to 26 August 1998 makes it difficult to infer precisely what form any favourable response to NT Power's request would have taken. But the complexity of the issues under discussion between the parties made it likely that it would have been sufficiently detailed to meet any requirement of formality.

99 *Fundamental flaws in PAWA's argument.* However, PAWA would fail on the s 2C issue, even if all its contentions just considered were sound. This is so for two reasons.

100 First, s 2C(1)(b) provides only that the mere doing of the enumerated acts in relation to licences does not amount to carrying on a business. Similarly, the other paragraphs of s 2C(1) provide that carrying on a business is not to be found in merely imposing or collecting taxes, levies or fees for licences (s 2C(1)(a)), or merely carrying out an intra-governmental transaction (s 2C(1)(c)), or merely compulsorily acquiring primary products (s 2C(1)(d)). It is not alleged that PAWA was carrying on a business merely because it granted, revoked, suspended or varied 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.

101 Secondly, a fundamental difficulty in PAWA's position is that the definition of "licence" in s 2C(3) requires that it "allows the licensee to supply goods or services". The trial judge accordingly construed "licence" as an "authorisation … to sell goods or services"[97]. It is common for the word "licence" to be used in the sense employed by Latham CJ in *Federal Commissioner of Taxation v United Aircraft Corporation*[98]:

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97 *NT Power Generation Pty Ltd v Power and Water Authority* (2001) 184 ALR 481 at 545 [289].

98 (1943) 68 CLR 525 at 533. See also *Reid v Moreland Timber Co Pty Ltd* (1946) 73 CLR 1 at 5 per Latham CJ; *Banks v Transport Regulation Board (Vic)* (1968) 119 CLR 222 at 230 per Barwick CJ.

> "A licence provides an excuse for an act which would otherwise be unlawful as, for example, an entry upon a person's land, or the infringement of a patent or copyright. It is an authority to do something which would otherwise be wrongful or illegal or inoperative."

In Latham CJ's examples, the illegality that a licence prevents is the infringement of some private right, whether it is created by the common law or by enactment. But in other areas, the illegality is a wrong against the State. It is found in conduct without a licence, contrary to an enactment – carrying on some profession (like medicine or law), or some trade or business (like selling liquor or drugs, or erecting buildings, or dealing in second-hand goods), or some pastime (like shooting, fishing, owning a pet or, in former times, watching television), or some common activity (like driving). The licence referred to in s 2C(1)(b) is of this latter kind.

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. What NT Power was seeking from PAWA up to and after 26 August 1998 was not a permission to sell electricity which, if not granted, would cause NT Power to act unlawfully. It was seeking the services that only PAWA could supply.

103 *Conclusion on s 2C(1)(b).* It follows that even if PAWA's criticisms of the trial judge's reasoning are sound, it cannot rely on s 2C(1)(b): 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 s 46: did PAWA take advantage of market power for a prohibited purpose?

104 *Was there an Electricity Infrastructure Market or an Electricity Carriage Market?* It is now necessary to turn to the many arguments which PAWA advanced against the contention that it had taken advantage of market power for purposes proscribed by s 46(1). The first of them was that there was no relevant market because of the absence of transactions in the Electricity Infrastructure Market or the Electricity Carriage Market. This argument rested on the supposed

fact that PAWA had never sought to supply any goods or services in those markets, since it only used the infrastructure for its own purposes and had not granted access to others. Further, PAWA submitted that it lacked capacity to engage in transactions without a direction from the Minister under s 16 of the PAWA Act, and this it never had.

105 While NT Power's allegation that these two markets existed was put in issue by PAWA[99], two other markets were admitted – the Electricity Transmission Market and the Electricity Distribution Market. PAWA's economist favoured those two markets; NT Power's economist favoured the two markets put in issue[100]. The trial judge said that it was not necessary to choose between these opinions, since resolution of the dispute made no difference to the outcome[101]:

> "Whichever view is adopted, … the power of PAWA in the market or markets is the same and the conduct in which it engaged in relation to the market or markets is the same. In addition, the reason or reasons why it engaged in that conduct is the same. There is no evidence to suggest that PAWA treated the question of access to its infrastructure differently in relation to what [PAWA's economist] called its transmission assets from the way in which it treated the question of access to the assets which [PAWA's economist] described as its distribution assets."

106 In the light of that statement, if the "no transaction" point were good, it would mean that there was no Electricity Transmission Market and no Electricity Distribution Market either. Yet PAWA saw no difficulty in admitting those markets, despite the absence of transactions in them.

107 The Defence put the markets alleged in issue to the limited extent indicated[102], but did not plead that they were not markets because of an absence of transactions in them. There was a duty to do so, since the point, if not specifically pleaded, might have taken NT Power by surprise: Federal Court

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99 At [58] above.

100 *NT Power Generation Pty Ltd v Power and Water Authority* (2001) 184 ALR 481 at 546 [291].

101 *NT Power Generation Pty Ltd v Power and Water Authority* (2001) 184 ALR 481 at 558 [337].

102 At [58] above.

Rules, O 11 r 10(b). Indeed, NT Power argued in this Court, in written submissions filed before oral argument was conducted, that it was taken by surprise:

> "In the light of the defence, there was no occasion to explore with either expert the impact on their opinions of any alleged absence of transactions or the significance on that question of the fact that, on any view, NT Transmission provided transmission services to PAWA along the 132 kV line. Further, in the light of the pleading admission and the evidence of the experts there was no occasion to explore by way of evidence the extent to which one could conclude that there were transactions in the Territory involving the provision of distribution services along distribution lines owned by [persons] other than PAWA (eg the 22 kV lines connecting the Mt Todd PS). The previously unforeshadowed 'formal' submission in final address after the conclusion of the evidence that there was no relevant market because of an absence of transactions was objected to then and now as outside the pleading."

Those submissions were not contradicted by PAWA in its submissions. It follows that PAWA ought not to be allowed to rely on the submission under consideration.

108 Further, PAWA's contention that there were no transactions at all in any Electricity Infrastructure Market or Electricity Carriage Market is incorrect. This is because of the events referred to in the above quotation – what were, in substance, transmission services were provided to PAWA along the 132 kV line by NT Transmission after a process of purchase and resale. The trial judge found[103]:

> "NT Transmission uses the 132 kV line to transmit electricity to and from PAWA under a series of electricity sale and purchase agreements. PAWA purchases from, and sells to, NT Transmission electricity at supply points and redelivery points along the 132 kV line."

109 Even if, contrary to the last point, there were no infrastructure transactions at all, there was the potential for them, and, according to three justices of this

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103 *NT Power Generation Pty Ltd v Power and Water Authority* (2001) 184 ALR 481 at 493 [44].

Court in *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd*, in the words of Deane J[104]:

> "[A] market can exist if there be the potential for close competition even though none in fact exists. A market will continue to exist even though dealings in it be temporarily dormant or suspended … [and even if] there is no supplier of, nor trade in, … goods at a given time – because, for example, one party is unwilling to enter any transaction at the price or on the conditions set by the other."

As Toohey J said[105]:

> "It would be a curious consequence if the offering by B.H.P. of a limited supply of [a particular steel product known as] Y-bar established a market for that product but the withholding of supply altogether meant that there was no market."

110 Here, there was the potential for dealings in transmission and distribution services: NT Power was willing to acquire them, and during the months of communications up to 26 August 1998, PAWA abstained from refusing to supply them. PAWA submitted that the observations of the three justices in the *Queensland Wire* case were only dicta, because the case turned not on a Y-bar market but on a wider steel products market in which there were many transactions. PAWA also submitted that the dicta should not be followed. Even if they are dicta, it would be wrong not to follow them without much fuller argument on the point in a case with a less unsatisfactory procedural background.

111 PAWA's contention that the absence of any direction from the Minister for Essential Services under s 16 of the PAWA Act precluded the existence of a market is invalid. Markets cannot appear and disappear at the whim of the Minister for Essential Services. In any event, PAWA could trade as it wished until a contrary ministerial direction was received.

112 *Section 46(4)(c) and market power.* PAWA next submitted that it had not contravened s 46 because it lacked market power in the Electricity Infrastructure Market and the Electricity Carriage Market[106]. It said that it lacked that power

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104 (1989) 167 CLR 177 at 196; see also Dawson J at 200.

105 *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* (1989) 167 CLR 177 at 211-212.

106 Section 46(1) is set out at note 3 above. The balance of s 46 relevantly provides:

(Footnote continues on next page)

because s 46(4)(c) required it to have that power as "a supplier" of goods or services in that market, and it did not in fact supply any goods or services. PAWA's power was said to derive only from "its position as regulator and its ownership of the infrastructure". Apart from the terms of s 46(4)(c), PAWA relied on *Verizon Communications Inc v Law Offices of Curtis V Trinko, LLP*[107].

113 If this s 46(4)(c) point were to be relied on, it should have been pleaded. It was not. Nor was it taken at the trial, or in the Full Court, or in the Notice of Contention. It was first taken in submissions in this Court. The trial judge found, as indicated above, that it did not matter whether there was an Electricity Infrastructure Market or an Electricity Carriage Market, or whether there were instead an Electricity Distribution Market and an Electricity Transmission Market. The trial judge in his analysis referred to[108]:

> "(3) In determining for the purposes of this section the degree of power that a body corporate or bodies corporate has or have in a market, the Court shall have regard to the extent to which the conduct of the body corporate or of any of those bodies corporate in that market is constrained by the conduct of:
>
> (a) competitors, or potential competitors, of the body corporate or of any of those bodies corporate in that market; or
>
> (b) persons to whom or from whom the body corporate or any of those bodies corporate supplies or acquires goods or services in that market.
>
> (4) In this section:
>
> (a) a reference to power is a reference to market power;
>
> (b) a reference to a market is a reference to a market for goods or services; and
>
> (c) a reference to power in relation to, or to conduct in, a market is a reference to power, or to conduct, in that market either as a supplier or as an acquirer of goods or services in that market."

107 72 USLW 4114 (2004).

108 *NT Power Generation Pty Ltd v Power and Water Authority* (2001) 184 ALR 481 at 558 [339].

> "the market or markets for supply of services for the transport of electricity along PAWA's infrastructure, including its transmission and distribution network, as 'the market'."

For reasons which are unchallengeable, and unchallenged save on the s 46(4)(c) point and other limited points, the trial judge concluded that PAWA had a substantial degree of power in the "market"[109]. In these circumstances, the s 46(4)(c) point cannot be raised now.

114 However, even if it is open to PAWA to raise the s 46(4)(c) point, the point can be bypassed because, for reasons given above[110], 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. There is no doubt that PAWA supplied electricity in the market for the sale of electricity, and had market power in it.

115 In any event, the point is unsound. First, s 46(4)(c), in its reference to "conduct", cannot assist in the construction of s 46(1), which is focussed on the "power" of the defendant. The word "conduct" is rather the focus of s 46(3) which deals with the capacity of the conduct of others to constrain the conduct of the defendant. PAWA argued that "conduct" ought to be construed generally to cover the behaviour described in s 46(1), but this gives no weight to the contrast between "power" in s 46(1) and "conduct" in s 46(3). Secondly, in its reference to "power", s 46(4)(c) does not require that a corporation be an active supplier to have market power. It simply identifies the character or capacity in which the corporation has whatever market power it has. It provides that the relevant power is supplier power or acquirer power – not the power which large financial institutions have, for example. If s 46(4)(c) had the meaning alleged by PAWA, s 46 would cease to operate in what is generally regarded as one of its primary fields of operation – refusal by a corporation to supply goods or services. A corporation which at all times refused to supply never was an active supplier, and a corporation which once supplied but then refused to supply has ceased to be an active supplier. But the fact that it never was, or ceased to be, an active supplier does not prevent it having market power.

116 That conclusion derives some support from the legislative history.

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109 *NT Power Generation Pty Ltd v Power and Water Authority* (2001) 184 ALR 481 at 561 [353].

110 At [62]-[63].

117 In 1974, s 46(1) provided:

> "A corporation that is in a position substantially to control a market for goods or services shall not take advantage of the power in relation to that market that it has by virtue of being in that position –
>
> (a) to eliminate or substantially to damage a competitor in that market or in another market;
>
> (b) to prevent the entry of a person into that market or into another market; or
>
> (c) to deter or prevent a person from engaging in competitive behaviour in that market or in another market."

There was no equivalent to s 46(4).

118 In 1977, s 46 was amended[111], and thereafter s 46(1) took the following form:

> "A corporation that is in a position substantially to control a market for goods or services shall not take advantage of the power in relation to that market that it has by virtue of being in that position for the purpose of [the results described in pars (a)-(c) of s 46(1) in its 1974 form]."

A new s 46(4) was also introduced:

> "A reference in this section to substantially controlling a market for goods or services shall be construed as a reference to substantially controlling such a market either as a supplier or as an acquirer of goods or services in that market."

The change to s 46(1) was recommended by the Swanson Committee so as to make it plain that the prohibition depended on the existence of one of the

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111 By s 25 of the *Trade Practices Amendment Act* 1977 (Cth).

particular purposes[112]. The Swanson Committee did not recommend the new s 46(4). Nothing was said about it in the Minister's Second Reading Speech[113].

119 In 1986, s 46 was amended and, inter alia, sub-ss (1)-(4) assumed their present form[114]. The Explanatory Memorandum stated that the amendments were "designed to lower the threshold test for determining whether the section is applicable"[115]. The definition of power in relation to or conduct in a market in s 46(4)(c) corresponds mutatis mutandis with the definition of controlling a market for goods or services in the 1977 form of s 46(4). The Explanatory Memorandum said nothing about it. The 1977 form of s 46(4) made it plain that it was directed to the character of participation in the market. It would be strange if in the course of enacting amendments designed to lower the threshold test, Parliament increased it in one respect by re-enacting s 46(4) as the new s 46(4)(c) with a focus different from its former focus on the character of participation in the market.

120 If, contrary to the foregoing, the point could be taken now and had merit, it would not avail PAWA, because its conduct can also be analysed as the taking advantage of market power which, for reasons given above, existed in the Electricity Sale Market. In that market PAWA made very many sales.

121 It was not entirely clear whether PAWA was relying on *Verizon Communications Inc v Law Offices of Curtis V Trinko, LLP* as an aid to the construction of s 46(4)(c) or as an aid to the construction of s 46 generally. In either event, it is not an authority which compels or influences the result in this case. Section 46 is in different terms from §2 of the Sherman Act 1890[116]. Section 2 is backed by the sanction of imprisonment; s 46 is not. Section 2 requires "the willful acquisition or maintenance" of monopoly power[117] – a test

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112 *Swanson Report* at 40 [6.9].

113 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 8 December 1976 at 3531-3534.

114 By s 17 of the *Trade Practices Revision Act* 1986 (Cth).

115 Australia, House of Representatives, Explanatory Memorandum to the Trade Practices Revision Bill 1986 (Cth) at [35].

116 I5 USC §2 (2001).

117 72 USLW 4114 at 4116 (2004), citing *United States v Grinnell Corp* 384 US 563 at 570-571 (1966).

which is entirely different from and stricter than that in s 46[118]. *Verizon's* case was decided on factual circumstances arising in an industry – telephonic communications – which was subject to intense federal regulation; in particular, as the United States Supreme Court said, the regulating legislation had "extensive provision for access" and this made it "unnecessary to impose a judicial doctrine of forced access"[119]. Part IIIA of the Act cannot be treated as a rough analogue of the United States legislative regime permitting access because of the radically different position flowing from the preservation by s 44ZZNA of the independent operation of s 46.

122 *Taking advantage of proprietary rights, not market power?* PAWA's next argument was that its conduct was to be characterised, not as taking advantage of market power, but only as taking advantage of its proprietary rights.

123 PAWA contended that it was entitled, as owner of the infrastructure assets, to decline to consent to the use of them by others. That overstates the matter: PAWA was not asked to deliver its assets into the hands of NT Power's employees but merely to receive and transmit, via its infrastructure, electricity generated by NT Power. PAWA relied on the following passage in *Dowling v Dalgety Australia Ltd*, in which the owners of saleyards declined to permit the applicant auctioneer to conduct livestock sales at the saleyards[120]:

> "[T]he ownership of the land upon which the Goondiwindi Saleyards are erected and the rights which flow from that ownership and from membership of the Association are rights which may themselves give rise to or cause a degree of market power to come into existence. But the conduct of the respondents in choosing to exercise their rights the way they did could not be said to be conduct that they would be unlikely to engage in or could not afford for commercial reasons to engage in, if they

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118 Some of the difficulties in relying on §2 cases have been described in *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* (1987) 17 FCR 211 at 220-222 per Bowen CJ, Morling and Gummow JJ and *Eastern Express Pty Ltd v General Newspapers Pty Ltd* (1992) 35 FCR 43 at 70-72 per Lockhart and Gummow JJ; cf *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission* (2003) 77 ALJR 623 at 646-647 [160] per Gaudron, Gummow and Hayne JJ; 195 ALR 609 at 640.

119 72 USLW 4114 at 4117 (2004). The legislative regime is analysed at 4116.

120 (1992) 34 FCR 109 at 145-146.

> were operating in a competitive market (I have assumed for this purpose that they are not). The respondents have not used or taken advantage of market power. The respondents are not in the business of granting licences or leases of saleyards. They are in the business of providing livestock selling services. … They have declined to make available to Mr Dowling a valuable asset of theirs to advantage him as a competitor. In my opinion, they have not taken advantage of their market power for a substantial purpose of deterring or preventing Mr Dowling from engaging in competitive conduct in the relevant market."

124 When that passage is read in context, it does not support PAWA. The case is distinguishable. In *Dowling's* case, none of the respondents had a substantial degree of power in the market, because there were no significant entry barriers, and the conduct of each respondent was constrained by its competitors and customers[121]. In the present case, as already noted, the trial judge found that PAWA did have a substantial degree of power in the market[122]. However, on the contrary assumption that the respondents in *Dowling's* case were not operating in a competitive market, and on the assumption that their proprietary rights were capable of creating market power, Lockhart J reached two conclusions. The first was that the respondents were not acting for any substantial purpose which was proscribed[123]. The second was reached in the passage quoted above – that the conduct of the respondents was not conduct that they would be unlikely to engage in, or could not afford for commercial reasons to engage in, had the market been competitive, and hence that they were not taking advantage of market power. But, in the present case, 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[124].

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121 *Dowling v Dalgety Australia Ltd* (1992) 34 FCR 109 at 141-142.

122 *NT Power Generation Pty Ltd v Power and Water Authority* (2001) 184 ALR 481 at 561 [353].

123 *Dowling v Dalgety Australia Ltd* (1992) 34 FCR 109 at 143.

124 *NT Power Generation Pty Ltd v Power and Water Authority* (2001) 184 ALR 481 at 563 [357].

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[125] and intellectual property rights are often a very clear source of market power.

126 In short, *Dowling v Dalgety Australia Ltd* is not authority for any general proposition that a property owner who declines to permit competitors to use the property is immune from s 46. That proposition is, in any event, intrinsically unsound.

127 *Was a direction given under s 16 of the PAWA Act?* PAWA's next submission was directed against two propositions: that it had taken advantage of market power and that it had a prohibited purpose. The submission rested on the contention that the Minister for Essential Services had given it a direction under s 16 of the PAWA Act[126]. The trial judge found that the Minister had given a s 16 direction[127]; Finkelstein J found that he had not[128].

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125 See [85] above.

126 Section 5 provided:

> "The Authority shall consist of the Chief Executive Officer".

Section 6(1) provided:

> "The powers and functions of the Authority under this or any other Act shall be exercised and performed by the Chief Executive Officer."

Section 16 provided:

> "The Authority, in the exercising of its powers and the performance of its functions, is subject to the directions of the Minister."

127 *NT Power Generation Pty Ltd v Power and Water Authority* (2001) 184 ALR 481 at 562 [355].

128 *NT Power Generation Pty Ltd v Power and Water Authority* (2002) 122 FCR 399 at 445 [168].

128 When the letter of demand from NT Power's solicitors dated 17 August 1998 was received by the Chief Executive Officer of PAWA, a copy was sent to the Minister for Essential Services. The solicitor for PAWA, Mr Noonan, was asked to consider what the response of the Northern Territory Government should be. Mr Noonan advised, by letter of 20 August 1998, that PAWA had no legal obligation to provide access to its network; although challenges were possible, no legal proceeding was likely to succeed in the short term. The letter concluded:

> "We advise that you have the following options:-
>
> (a) authorise us to send the attached reply to [NT Power's] solicitors, or
>
> (b) advise the PAWA Minister to direct PAWA not to enter into any arrangements pending the Scoping Study report concerning, inter alia, third party access to PAWA's network.
>
> On balance, option (a) is recommended if the political imperatives prevent option (b)."

The advice in option (b) was probably advice to issue a s 16 direction. The draft letter referred to in option (a) did not refer to any s 16 direction.

129 On 21 August 1998, Mr Gardner, Chief Executive Officer of PAWA, and Mr Henry, Acting Under Treasurer, sent what Finkelstein J called a "briefing note" to the Minister for Essential Services and the Treasurer. The briefing note had three annexures – a letter of 20 August 1998 from Merrill Lynch and Fay Richwhite advising that a decision not be taken; Mr Noonan's letter of 20 August 1998; and his draft reply to the letter sent on 17 August 1998 by the solicitors for NT Power. The briefing note began:

> "It is recommended that you:-
>
> (a) agree that PAWA should defer the establishment of access arrangements … until the outcome of the PAWA Review [ie the "Scoping Study"] is decided by Cabinet, but continue the technical background work to develop an appropriate access regime for the Territory; and
>
> (b) agree that James Noonan and Associates, acting as legal advisers to [the] Government in the PAWA Review, be authorised to respond to the legal representative of [NT Power], in accordance with the attached draft response."

The draft response was that which Mr Noonan had attached as part of option (a) at the end of his 20 August 1998 letter. There was space at the end of the 21 August 1998 briefing note to indicate whether the Minister and the Treasurer agreed or disagreed with the recommendation. They agreed.

130 The trial judge held that though the acceptance of recommendation (a) was not expressed as a s 16 direction, it "had that status"[129]:

> "There is no other procedure established under the PAWA Act by which the minister could control the operations of PAWA. As a matter of practice, as the communications between PAWA and the minister demonstrate, the procedure of a minute from the chief executive officer and his response by endorsement on that minute was the normal means by which the minister (where he considered it appropriate) gave directions under s 16 of the PAWA Act. There is no evidence to indicate any other means by which directions under s 16 were given."

131 Finkelstein J disagreed. He said that the recommendation was to adopt Mr Noonan's first and preferred option – to send the letter he had drafted. He denied the trial judge's statement that communications between the Minister and PAWA in the form of the briefing note were the normal means by which s 16 directions were given. He accepted that briefing notes were a means by which the Minister made known his views as to how the powers and functions of PAWA should be exercised[130]:

> "But that is a far cry from giving a direction which, if ignored, could be enforced by action brought in the name of the Attorney-General and could result in the removal from office of the Chief Executive [Officer]. In the ordinary course of events it would be very unusual for a minister to make use of a power such as s 16, if his or her wishes could be put into effect by less coercive steps. The judge seems to have been of opinion that whenever the Minister desired to have PAWA act in accordance with his wishes, a direction to that effect was given. That opinion is not supported by the evidence. In any event, past practices are not always a reliable guide to future conduct, as this case demonstrates. For whatever may

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129 *NT Power Generation Pty Ltd v Power and Water Authority* (2001) 184 ALR 481 at 562 [355].

130 *NT Power Generation Pty Ltd v Power and Water Authority* (2002) 122 FCR 399 at 445 [168].

> have been the position in the past, the Minister did not intend to give a direction under s 16, having accepted the advice of Mr Noonan that a different course should be followed."

The reference in the last sentence is to the fact that Mr Noonan recommended option (a) (sending Mr Noonan's draft letter) if the political imperatives prevented option (b) (advising the Minister to give a s 16 direction).

132 PAWA has not demonstrated error in the reasoning of Finkelstein J. PAWA took this Court to some oral evidence of Mr Gardner in an endeavour to counter Finkelstein J's conclusion that the Minister's desire to have PAWA act as he wished was not always conveyed by direction. That oral evidence was vague, was undermined by other evidence, and, in any event, did not falsify Finkelstein J's conclusion. The PAWA Act does not stipulate that s 16 "directions" are to take any particular form, and the Court was not taken to any other legislation which did. Even if Mr Gardner's evidence establishes that he thought he had received a s 16 direction in August 1998, that does not prove that he did. Everything depends on the terms of the briefing note: no other possible "direction" was relied on. But it is not possible to infer from the briefing note that any direction was given. The acceptance of the recommendation in the briefing note was too vague to amount to a s 16 direction. It did not refer to s 16, yet citation of the source of power could be a crucial matter in the event of later political or forensic controversy about whether any directions had been given or obeyed – for Mr Gardner had a duty to obey them[131]. It did not speak in the language of command or mandate or instruction – it did not direct.

133 *If a s 16 direction had been given, was s 46 contravened?* PAWA submitted that if (contrary to the conclusion just arrived at) the acceptance of the recommendation in the briefing note was a s 16 direction, it could not be said that PAWA had taken advantage of its market power, because the Minister had directed the refusal of access. PAWA further submitted that its conduct was therefore not for a proscribed purpose, but rather for the purpose of complying with the Minister's direction. PAWA additionally submitted that if the Minister's purpose was relevant, that purpose was establishing an access regime in fulfilment of the Northern Territory's obligations under the Competition

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131 Section 22(1) of the *Public Sector Employment and Management Act* (NT) provided:

> "… the Chief Executive Officer is subject to the direction of the appropriate Minister."

Principles Agreement in the belief that to provide earlier access would disadvantage consumers and damage competition.

134 None of these contentions succeeded before the trial judge, Branson J or Finkelstein J.

135 Although, as PAWA conceded in argument, there was no legal impediment to Mr Gardner deciding the question of access for himself, the trial judge accepted Mr Gardner's evidence that the question of access was ultimately for the Northern Territory Government[132].

136 Even if PAWA received a s 16 direction from the Minister and acted in accordance with it, in deciding what PAWA did, it is necessary to look at the conduct and the mental state of both the Minister and the Chief Executive Officer. What PAWA did in response to a direction of the Minister was conduct of PAWA, and the Minister's accompanying mental state was PAWA's mental state. That would be so, even if a s 16 direction came without any solicitation by or warning to the Chief Executive Officer of PAWA. It is so a fortiori where, as here, the Chief Executive Officer and the Acting Under Treasurer solicited the approval of the recommendation which PAWA said constitutes the s 16 direction.

137 The trial judge found that the mental state of those who advised the Minister to recommend as he did, and of the Minister himself[133], was to deter or prevent NT Power from participating in the transmission or distribution markets and in the Electricity Supply Market (in which it was likely that its prices would undercut PAWA's) until the Northern Territory introduced an access regime. For that conclusion there was ample evidence. The conclusion was not affected by the fact that the reason why the Minister and his advisers reached this mental state was the desire, by establishing an access regime providing effective competition[134], to encourage genuine and efficient competition in the medium to

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132 *NT Power Generation Pty Ltd v Power and Water Authority* (2001) 184 ALR 481 at 514 [139].

133 *NT Power Generation Pty Ltd v Power and Water Authority* (2001) 184 ALR 481 at 565-566 [367], [369].

134 *NT Power Generation Pty Ltd v Power and Water Authority* (2001) 184 ALR 481 at 566 [368].

long term[135]. PAWA submitted that, on a purposive construction, s 46 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 trial judge rightly held that this was an impermissible gloss on s 46[136]. Section 46 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. Nor is it relevant that, in PAWA's submission, entry by NT Power might cause such losses to PAWA that it would cease to subsidise services to remote communities. If authorisation were available for s 46 conduct, reasoning of that kind might be relevant in an application to the Australian Competition and Consumer Commission for authorisation under s 88, at least so far as the purposes were likely to mature into effects generating public benefits. But, subject to the operation of s 46(6)[137], s 88 does not make authorisation available for s 46 conduct, and in any event authorisation is not a matter for the courts. In fact, the "relatively short-term" character of the anti-competitive purposes was far from being de minimis: it took the Northern Territory until 1 April 2000 to introduce its access regime, that access regime provided for only staggered and limited access to the infrastructure, and, so far as the evidence goes, the access regime has not yet been declared an effective access regime. The alternative route of a Pt IIIA access regime can thus take years, even with the best will of all persons participating.

138 The legislation does not contemplate that immunity from s 46 can be found in a desire to bring about what the Under Treasurer called "sensible competition"[138]. In truth, that expression is a reference to the process by which

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135 *NT Power Generation Pty Ltd v Power and Water Authority* (2001) 184 ALR 481 at 567 [373].

136 *NT Power Generation Pty Ltd v Power and Water Authority* (2001) 184 ALR 481 at 567-568 [375].

137 Section 46(6) provides:

> "This section does not prevent a corporation from engaging in conduct that does not constitute a contravention of any of the following sections, namely, sections 45, 45B, 47 and 50, by reason that an authorization is in force or by reason of the operation of section 93."

138 *NT Power Generation Pty Ltd v Power and Water Authority* (2001) 184 ALR 481 at 566 [370].

an inefficient monopolist sought to give itself time to reorganise its affairs by obstructing emerging competition. "Competition by its very nature is deliberate and ruthless. Competitors jockey for sales, the more effective competitors injuring the less effective by taking sales away."[139] Competition is also dynamic. It tends to create conditions of constant turbulence. It generates instability. These circumstances trigger the emulation and striving which produce competitive benefits. Paternalistic control from a monopolist is antithetical to competition, and a construction of s 46 which permitted it, even if only in the short term, is inconsistent with the structure of the section and the legislation as a whole.

139 *Erroneous inference from purpose to exercise of market power?* At this point, PAWA's submissions appeared to visit upon the trial judge a list of errors made in other cases construing s 46. These contentions all fail. The first of them was that the trial judge's conclusion was vitiated by the error of inferring too readily an exercise of market power from a proscribed purpose[140]. That is not so. The findings of the trial judge on market power[141], and on exercise of that power[142], were arrived at earlier than, and quite independently of, his findings about purpose[143]. So, incidentally, were those of Finkelstein J[144].

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139 *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* (1989) 167 CLR 177 at 191 per Mason CJ and Wilson J. See also *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission* (2003) 77 ALJR 623 at 646-647 [160] per Gaudron, Gummow and Hayne JJ; 195 ALR 609 at 640.

140 *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (2001) 205 CLR 1 at 18-19 [31] per Gleeson CJ, Gummow, Hayne and Callinan JJ; *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission* (2003) 77 ALJR 623 at 651 [181], 653 [194]-[195] per Gaudron, Gummow and Hayne JJ; 195 ALR 609 at 645, 648-649.

141 *NT Power Generation Pty Ltd v Power and Water Authority* (2001) 184 ALR 481 at 561 [353].

142 *NT Power Generation Pty Ltd v Power and Water Authority* (2001) 184 ALR 481 at 562-563 [357].

143 *NT Power Generation Pty Ltd v Power and Water Authority* (2001) 184 ALR 481 at 565-568 [366]-[375].

144 *NT Power Generation Pty Ltd v Power and Water Authority* (2002) 122 FCR 399 at 450-451 [180] (taking advantage), 451-452 [184]-[186] (purpose).

140 *Confusion between purpose and effect?* PAWA next submitted that the trial judge failed to appreciate that s 46 is not concerned with the effect of conduct but with the purpose of it. This error was said to lie in passages culminating in the statement that a substantial purpose of PAWA was to deter or prevent NT Power from participating in the market or markets for the supply of services for the transport of electricity along PAWA's infrastructure or the Electricity Supply Market until an access regime had been introduced, and that that "was the particular means by which the ultimate desired end was, in part, to be achieved"[145]. PAWA submitted that the exclusion of NT Power was not the means for achieving long-term competition through an access regime but merely an incidental effect of it.

141 This submission has two flaws. First, it directly contradicts PAWA's submission at the trial, which was that its "purpose in refusing access to its infrastructure … was to enhance competition, and … the refusal of access was a means to that end "[146]. Secondly, it ignores the trial judge's findings that PAWA was of the view that[147]:

> "greater competitive advantages would be achieved by delaying NT Power's access to the electricity supply market by declining to provide it with services in the market until an access regime [was] introduced … [E]arly, and therefore preferential, access to NT Power would or could disadvantage consumers in the electricity supply market as they might enter supply contracts with NT Power at prices above those which might be negotiated in circumstances where there was competitive tendering in a 'level playing field'. The 'level playing field', and therefore the ideal competition environment, would only be reached when PAWA had had a sufficient time to restructure to overcome its inefficiencies and when the tariff structure had been revised to avoid cross-subsidisation. Early access granted to NT Power would, in addition, further disadvantage PAWA because NT Power might 'cherry pick' the larger consumers leaving

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145 *NT Power Generation Pty Ltd v Power and Water Authority* (2001) 184 ALR 481 at 567 [375].

146 *NT Power Generation Pty Ltd v Power and Water Authority* (2001) 184 ALR 481 at 567 [371].

147 *NT Power Generation Pty Ltd v Power and Water Authority* (2001) 184 ALR 481 at 566 [368].

PAWA with its inefficient cost structure but with diminished revenue and the ongoing obligation of servicing the smaller customers and those in remote localities. In other words, it would have to supply that segment of the electricity supply market which required greater expense to service."

142 *Confusion between existence of market power and exercise of market power*. PAWA further criticised the trial judge for making a connection too readily between the existence of market power and its exercise, and for thereby ignoring or rejecting alternative sources of power. The alternative sources of power to which PAWA referred were its statutory powers in carrying out its "regulatory function", and its statutory duty to comply with s 16 directions from a Minister in the Northern Territory Government (which was under a duty imposed by the Competition Principles Agreement to carry out structural reform of its monopolies). But all the trial judge did was to point out that if there had been other suppliers of infrastructure services it would not have been possible for PAWA to withhold access to its infrastructure, and it would not have done so[148]. This criticism creates too sharp a bifurcation, for which there is little support in the PAWA Act, between PAWA's "commercial role" and its "regulatory" role. While, on the one hand, the trial judge found that PAWA desired to delay access so as to enable a more effective competition regime to be introduced in the future, that was not only because of concern about consumer interests: PAWA was conscious of its own competitive inefficiencies, the risk to its revenues of allowing access and the consequential risk of suffering losses, and the risk that granting early access would reduce its sale value on privatisation[149]. Its regulatory powers could be used to help its commercial position; the weaknesses and strengths of its commercial position could affect the success with which it used its regulatory powers[150]. The trial judge's conclusion that PAWA could not have used its regulatory powers under s 16 if it had faced competition in the transmission and distribution services markets, has not been shown to be wrong. PAWA contended that the distinction advanced between its regulatory and commercial roles was well-recognised by authority[151]. It is not necessary to

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148 *NT Power Generation Pty Ltd v Power and Water Authority* (2001) 184 ALR 481 at 562-563 [357].

149 *NT Power Generation Pty Ltd v Power and Water Authority* (2001) 184 ALR 481 at 563 [357], 564 [360], 565-566 [366]-[369].

150 *NT Power Generation Pty Ltd v Power and Water Authority* (2001) 184 ALR 481 at 562 [356].

151 *Plume v Federal Airports Corporation* (1997) ATPR ¶41-589 at 44,132 per O'Loughlin J; *Stirling Harbour Services Pty Ltd v Bunbury Port Authority*

(Footnote continues on next page)

examine the correctness on their facts of the authorities on which PAWA relied; the suggested distinction in its application to the present facts does not assist PAWA.

143 *Failure to make correct assumptions about a competitive market.* Finally, PAWA contended that the trial judge erred in finding that it took advantage of its market power because, had there been other suppliers of infrastructure services, it would not have been possible for PAWA to withhold access to its infrastructure. PAWA contended that the trial judge did not attempt to consider whether PAWA could have refused access to its infrastructure had it lacked market power. On the other hand, PAWA criticised Finkelstein J for making assumptions about what would happen in a competitive market, one of which was that there was "at least one other firm with similar infrastructure" to that of PAWA. This assumption was said to take "the analysis beyond the realms of reality".

144 Finally, PAWA drew attention to the following statement in *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd*[152]:

> "To ask how a firm would behave if it lacked a substantial degree of power in a market, for the purpose of making a judgment as to whether it is taking advantage of its market power, involves a process of economic analysis which, if it can be undertaken with sufficient cogency, is consistent with the purpose of s 46. But the cogency of the analysis may depend upon the assumptions that are thought to be required by s 46."

145 That statement does not say that unrealistic assumptions may not be made. The assumption on which the reasoning of four members of the Court in *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd*[153] proceeded – that BHP lacked market power and was operating in a competitive market – was highly unrealistic, but no later case has held that it was wrong to make it. The statement in *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* was only urging the need for cogent analysis on the basis of the assumptions, and

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(2000) ATPR ¶41-752 at 40,734 [124] per French J; aff'd *Stirling Harbour Services Pty Ltd v Bunbury Port Authority* (2000) ATPR ¶41-783 at 41,277 [72] per Burchett and Hely JJ.

152 (2001) 205 CLR 1 at 23-24 [52] per Gleeson CJ, Gummow, Hayne and Callinan JJ.

153 (1989) 167 CLR 177 at 192 per Mason CJ and Wilson J, 202 per Dawson J; see also at 216 per Toohey J.

the reasoning that follows the quoted passage demonstrates that cogent analysis did not, in that case, support a conclusion that advantage had been taken of market power.

146 PAWA also asked why, if Finkelstein J were prepared to assume another firm with infrastructure competing with PAWA's, it should not also be supposed that the Government would use its regulatory powers to exclude NT Power? One answer is: "Because the Government had ample powers to adopt the course proposed in 1998, but it chose not to do so." And, whether the assumption that there was competing infrastructure is retained or removed, the use of "regulatory powers" simply to vindicate the self-interest – even the short-term self-interest – of the regulator, would be likely to create unacceptable political risks, a possibility which Mr Noonan foresaw in his advice of 20 August 1998.

147 If PAWA's criticisms were sound, it would be very difficult ever to demonstrate that a firm, whose monopoly power depends on infrastructure which it is, in practice, very difficult to duplicate, had taken advantage of the market power which its control of that infrastructure gave it. It can be necessary, in assessing what would happen in competitive conditions, to make assumptions which are not only contrary to the present fact of uncompetitive conditions, but which would be unlikely to be realised if the monopolist were left free to operate as it wished. But s 46 and other provisions of Pt IV were introduced in order to stop monopolists being entirely free to act as they wish. If the difficulties in making assumptions were to prevent them from being made, possessors of market power that was hard to erode would be shielded from the Act. That would defeat its purpose.

148 If, as PAWA urges, the assumption that an alternative infrastructure was available is not made, the most realistic assumption to be made about a market in which PAWA would not have a substantial degree of power is a market in which PAWA was subject to a legislatively created duty to give immediate access. On that assumption, PAWA would not have refused access, which demonstrates that in the actual world of 1998 it took advantage of market power, since it was only the assumed legislation that forestalled the existence of market power.

149 Finkelstein J also adopted[154] what he saw as an alternative approach – that of Deane J (Dawson J concurring) in *Queensland Wire Industries Pty Ltd v*

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154 *NT Power Generation Pty Ltd v Power and Water Authority* (2002) 122 FCR 399 at 450-451 [180].

Broken Hill Proprietary Co Ltd[155]. In *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* that approach was described without disapproval in the following way[156]:

> "Deane J saw the case as one in which the identification of the purpose for which BHP was refusing to supply QWI led directly to the conclusion that BHP was taking advantage of its market power. That was because the nature of the purpose was such that, in the circumstances of that case, it could not have been achieved by the conduct impugned (a refusal to supply) had it not been for the existence of the market power. In a competitive market, a refusal to supply QWI with Y-bar would not have prevented QWI from becoming a manufacturer or wholesaler of star pickets. QWI could have obtained supplies from some other manufacturer of Y-bar. It was only BHP's market power which meant that its refusal to supply was capable of achieving what was found to be its purpose."

150 That reasoning is applicable here. PAWA's decision to refuse access to infrastructure had the purpose of excluding NT Power from the market, and that purpose could not have been achieved by its refusal of access to infrastructure had it not been for PAWA's market power. It was a decision, said the trial judge, "made in the appreciation of the existence of that market power, and of the capacity to exercise that market power to decline access to its infrastructure"[157]. PAWA did not direct any argument against that part of Finkelstein J's reasoning, and it is sound.

151 *Alternatives available to the Northern Territory Government.* At times in argument before this Court there were suggestions that it was wrong that the Act should have a deleterious impact on PAWA's activities. PAWA had a duty to ensure electricity supply to the whole of the Territory, and it was not concerned merely with making a profit. In contrast, NT Power might have been able to deal only with the customers who were easiest to service. If NT Power succeeded, it might leave PAWA with undue costs burdens and an insufficient revenue stream in relation to supply of electricity to remote areas.

152 Considerations of this kind do not demonstrate an absurd or harsh result compelling a construction of the legislation different from that which would

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155 (1989) 167 CLR 177 at 197-198.

156 (2001) 205 CLR 1 at 17 [28] per Gleeson CJ, Gummow, Hayne and Callinan JJ.

157 *NT Power Generation Pty Ltd v Power and Water Authority* (2001) 184 ALR 481 at 563 [357].

otherwise be arrived at. If the Northern Territory Government had wanted to preserve PAWA's immunity from s 46 of the Act, or cl 46 of the Competition Code, it had ample means of doing so. Provided the conditions referred to in ss 51(1C)(a) and (e) of the Act were complied with, and provided the Commonwealth did not prevent this course by regulations under s 51(1C)(f), it could have enacted legislation pursuant to s 51(1)(d) of the Act[158]. That legislation could also have effected a specific partial repeal of cl 51. And it was open to the Northern Territory Government to seek to introduce an effective access regime much faster than it actually did.

153 *Conclusions on s 46.* Consideration of PAWA's arguments has led to the conclusions, despite 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

154 It is now necessary to turn to the case against the second respondent, Gasgo. The nature of the case and the trial judge's reasoning will be set out, before considering whether Gasgo is part of the Northern Territory Government, and whether Gasgo's conduct is protected by "derivative Crown immunity".

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158 Section 51(1)(d) of the Act provides:

> "In deciding whether a person has contravened this Part, the following must be disregarded:
>
> …
>
> (d) anything done in the Northern Territory, if the thing is specified in, and specifically authorised by:
>
> (i) an enactment as defined in section 4 of the *Northern Territory (Self-Government) Act 1978*; or
>
> (ii) regulations made under such an enactment …"

155 *Gasgo's role in the trial.* Gas is the cheapest fuel for generating electricity in the Northern Territory. Gasgo is a company in which PAWA beneficially holds all the issued shares. It has entered a long-term gas purchase contract ("the Mereenie Agreement") with certain suppliers ("the Mereenie Suppliers"). It has habitually sold the gas supplied to NT Gas Pty Ltd ("NT Gas"), which on-sells to PAWA. Clause 2.26 of the Mereenie Agreement gives Gasgo a pre-emptive right in relation to the sale of gas by the suppliers to customers other than Gasgo, at the price offered to the third party. NT Power required gas from the suppliers for its generator, and requested that Gasgo give an undertaking that it would not insist on its pre-emptive rights. Gasgo declined to give that undertaking, and NT Power contends that that is a breach of s 46.

156 At the trial, Gasgo argued three points.

157 First, it argued, and the trial judge denied, that it was "entitled to Crown immunity as an emanation of the Crown"[159].

158 Secondly, Gasgo argued, and the trial judge agreed, that it was entitled to "derivative Crown immunity", because the interests of the Northern Territory would be prejudiced by the application to Gasgo of s 46. The prejudice claimed was "financial prejudice", namely that if Gasgo could not exercise the pre-emptive right in cl 2.26, there would be a consequential need for it or PAWA to seek additional supplies of gas in a competitive market where those supplies might be constrained by available reserves of deliverable quantities[160]. The trial judge said that the relief sought against Gasgo included an order that it forego its cl 2.26 right of pre-emption, and the effect of that order "would be to dismantle the security of gas supply which the Northern Territory Government procured through NTEC and [Gasgo] in 1985"[161]. The trial judge held that the relief sought against Gasgo[162]:

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159 *NT Power Generation Pty Ltd v Power and Water Authority* (2001) 184 ALR 481 at 541 [272].

160 *NT Power Generation Pty Ltd v Power and Water Authority* (2001) 184 ALR 481 at 542 [274].

161 *NT Power Generation Pty Ltd v Power and Water Authority* (2001) 184 ALR 481 at 543 [277].

162 *NT Power Generation Pty Ltd v Power and Water Authority* (2001) 184 ALR 481 at 543 [277].

> "would … have the effect of exposing PAWA, and indirectly the Northern Territory Government, to having to renegotiate through [Gasgo] for supplies of gas beyond those presently contracted even though … its demand for gas is increasing as the electricity usage in the Northern Territory increases. The value to the Northern Territory Government of PAWA's securing through [Gasgo] the benefit of clause 2.26 … would be lost."

159 The third issue before the trial judge concerned s 89(2) of the Reform Act, which provides:

> "Existing contracts, and things done to give effect to existing contracts, are to be disregarded to the same extent that they would have been disregarded if the amendments made by Division 1 of this Part … had not been made."

Section 89(5) defines "existing contract" as meaning "a contract that was made before the cut-off date", which is 19 August 1994. The Mereenie Agreement was made in 1985, well before the cut-off date. Among the amendments in Pt 5 Div 1 of the Reform Act was the insertion of s 2B. The trial judge concluded that if the amendment inserting s 2B had not been made, the relief sought by NT Power would have prejudiced PAWA, an instrumentality of the Crown, so that cl 2.26, and things done to give effect to it, were to be disregarded in ascertaining whether the Act had been contravened[163].

160 A majority of the Full Federal Court reached the same conclusion for reasons which need not be set out.[164]

161 *Is Gasgo part of the Northern Territory Government?* The first key question is whether Gasgo is bound by s 46 on the ground that it is, as par 45A of the Defence alleges, "an emanation of the Crown in right of the Northern Territory". Gasgo relied on the fact that PAWA was its sole beneficial owner; that article 44a of its articles of association provides that a general meeting could be called at any time by the "Northern Territory of Australia or any agency thereof or by any shareholder who holds any share on behalf of the Territory or

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163 *NT Power Generation Pty Ltd v Power and Water Authority* (2001) 184 ALR 481 at 551 [311].

164 *NT Power Generation Pty Ltd v Power and Water Authority* (2002) 122 FCR 399 at 407 [29] per Lee J, 423-425 [101]-[107] per Branson J.

any agency thereof"; and that article 69 provided that the Minister of Mines and Energy had the power to appoint or remove any person as director without the necessity of a general meeting. Gasgo pointed to the fact that, on 27 June 1985, Cabinet directed NTEC to acquire Gasgo; and that on the same day it approved entry by Gasgo into the Mereenie Agreement. Gasgo noted that its payment obligations under the Mereenie Agreement were unconditionally guaranteed by the Northern Territory Government. Further, on 28 June 1985 a director of Gasgo wrote the following letter to the NTEC:

> "I acknowledge that although … [NTEC] is not a party to the Gas Purchase Agreements, Gasgo has the benefit of certain rights under the Gas Purchase Agreements on behalf of and for the benefit of NTEC, including in the event of a default by the Producers in their obligation to supply gas to Gasgo.
>
> On behalf of Gasgo, I acknowledge in the event that any of the said rights [become] exercisable, Gasgo will exercise those rights only in consultation with NTEC and if NTEC so requests at any time, Gasgo will forthwith exercise those rights for and on behalf of NTEC."

162 The Court was not taken to any of Gasgo's articles other than the two mentioned above, and only a handful of the articles are in evidence. 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. However, it seems from those articles which are in evidence that they were composed by taking a standard form of company articles and adding in article 44a and part of article 69. Since Gasgo bore the burden of establishing whatever factual matters were necessary to make good its claim to immunity, this evidentiary deficiency must damage its case.

163 Another unsatisfactory aspect of the question whether Gasgo is "an emanation of the Crown in right of the Northern Territory" is the way the issue is framed. To some extent the terms of the question flow from the language of s 2B. However, the use of the expression "the Crown" to refer to the government

has been much criticised[165]. So has the expression "emanation of the Crown"[166]. Preference has been given to the use of the expression "the Crown as executive"[167]. In this context, the expression "the Crown" is used in the third of the senses discussed by three members of this Court in *Sue v Hill*[168]:

> "Thirdly, the term 'the Crown' identifies what Lord Penzance … called 'the Government'[169], being the executive as distinct from the legislative branch of government, represented by the Ministry and the administrative bureaucracy which attends to its business."

And, as this Court has recently pointed out, the language of the question is "inappropriate and potentially misleading when the issue is whether the legislation of one polity in the federation applies to another"[170]. This Court also said[171]:

> "Where the legislative provisions in question are concerned with the regulation of the conduct of persons or individuals, it will often be more appropriate to ask whether it was intended that they should regulate the conduct of the members, servants and agents of the executive government of the polity concerned, rather than whether they bind the Crown in one or other of its capacities."

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165 *"The Mersey Docks and Harbour Board" Trustees v Cameron* (1865) 11 HLC 443 at 508 per Lord Cranworth [11 ER 1405 at 1430]; *Town Investments Ltd v Department of the Environment* [1978] AC 359 at 381 per Lord Diplock, 400 per Lord Simon of Glaisdale.

166 *International Railway Co v Niagara Parks Commission* [1941] AC 328 at 342-343 per Luxmoore LJ; *Bank voor Handel en Scheepvaart NV v Slatford* [1953] 1 QB 248 at 284 per Sir Raymond Evershed MR.

167 *M v Home Office* [1994] 1 AC 377 at 395 per Lord Templeman.

168 (1999) 199 CLR 462 at 499 [87] per Gleeson CJ, Gummow and Hayne JJ.

169 *Dixon v London Small Arms Co Ltd* (1876) 1 App Cas 632 at 651.

170 *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 347 [17] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.

171 *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 347 [18] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.

This approach corresponds with what this Court, as long ago as 1904, called "the modern sense of the rule", namely that "the Executive Government of the State is not bound by Statute unless that intention is apparent"[172]. And it corresponds with the statement of Kitto J five decades later that the "Crown normally means the Sovereign considered as the central government of the Commonwealth or a State"[173].

164 Can Gasgo then be characterised as part of the Government of the Northern Territory? 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 ("AGL"). 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. It was not suggested that either AGL or NT Gas could be regarded as "emanations of the Crown" or parts of the Northern Territory Government. This is damaging to Gasgo's reliance on the orchestration by the Northern Territory Government in June 1985 of arrangements to obtain "security of gas supply … through NTEC and [Gasgo]"[174]. It negates an inference which might otherwise be available. 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. There is nothing to suggest that the directors are under any duty to obey directions from PAWA or the Northern Territory Government, any more than directors of non-governmental companies are under any duty to obey directions from members of those companies. No doubt a failure to respond to indications of the Northern Territory Government's desires might lead to the removal of directors, whether by the Minister or by a meeting of shareholders, but the same is true of ordinary companies: directors tend to respond to expressions of shareholder will well before shareholders' meetings are called to remove the directors. The giving of

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172 *Roberts v Ahern* (1904) 1 CLR 406 at 418 per Griffith CJ, Barton and O'Connor JJ.

173 *Wynyard Investments Pty Ltd v Commissioner for Railways (NSW)* (1955) 93 CLR 376 at 393 per Kitto J.

174 *NT Power Generation Pty Ltd v Power and Water Authority* (2001) 184 ALR 481 at 543 [277].

guarantees by the Northern Territory Government is not an indication of an intention that Gasgo should have the immunities of the executive government from legislation, and nor is the agreement of Gasgo to exercise certain rights in consultation with NTEC.

165 Finally, as the trial judge pointed out, the utilisation of a body corporate incorporated under a general enactment for the incorporation of companies as the party contracting with the Mereenie Suppliers, rather than a body established by a particular statute, does not reveal an intention on the part of the Northern Territory Government that that body corporate should have its immunities[175]. Gasgo submitted that there is no reason why a body corporate established under a general enactment of that kind should be treated any differently from one established under its own statute. In some circumstances that may be true, save that it becomes harder to identify the necessary intention where a general enactment is relied on. It is not possible to find sufficient evidence of it here.

166 *Is Gasgo protected by "derivative Crown immunity"?* The next issue is whether, at the time the Mereenie Agreement was entered into, Gasgo had "derivative Crown immunity". That expression is employed in par 45A(l) of the Defence. What appears to be involved is an extension of what, before *Bropho v Western Australia*[176], was a rule of statutory construction that legislative provisions worded in general terms are prima facie inapplicable to the Crown.

167 Denning LJ was of the view that this "immunity" could only be claimed by those "having Crown status"[177]. He would, however, have allowed for the class of case identified by Blackburn J in *"The Mersey Docks and Harbour Board" Trustees v Cameron*[178]. Kitto J in *Wynyard Investments Pty Ltd v Commissioner for Railways (NSW)* later identified this as[179]:

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175 *NT Power Generation Pty Ltd v Power and Water Authority* (2001) 184 ALR 481 at 542 [272].

176 (1990) 171 CLR 1 at 15 per Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ.

177 *Bank voor Handel en Scheepvaart NV v Slatford* [1953] 1 QB 248 at 293-294; the Court of Appeal's decision was reversed in *Bank voor Handel en Scheepvaart NV v Administrator of Hungarian Property* [1954] AC 584; cf Hogg and Monahan, *Liability of the Crown*, 3rd ed (2000) at 320.

178 (1865) 11 HLC 443 at 465 [11 ER 1405 at 1413].

179 (1955) 93 CLR 376 at 394.

> "an anomalous class of cases where a provision creating a liability by reference to the ownership or occupation of property would, in its application in respect of certain kinds of property, impose a burden upon the performance of functions which, though not performed by servants or agents of the Crown, are looked upon by the law as performed for the Crown".

168 In *Wynyard Investments Pty Ltd v Commissioner for Railways (NSW)*, Kitto J also identified another two classes of case. The first involves cases where[180]:

> "a provision, if applied to a particular individual or corporation, would adversely affect the exercise of an authority which he or it possesses as a servant or agent of the Crown to perform some function so that in law it is performed by the Crown itself".

The second class consists of cases[181]:

> "in which a provision, if applied to a particular individual or corporation, would adversely affect some proprietary right or interest of the Crown, legal equitable or statutory".

169 Gasgo sought to bring itself within that last category, but, as will appear, this would require the expansion of the ambit of that category. Such an expansion would be at odds with what, since *Bropho v Western Australia*, is the eclipse of the rule of statutory construction rendering general terms prima facie inapplicable to the Crown itself.

170 A more accurate way of putting the issue which Gasgo raises accords with what was said by Kitto J in *Wynyard Investments Pty Ltd v Commissioner for Railways (NSW)*. This is to ask whether s 46, in preventing enforcement of a clause in a contract between two parties, neither of whom is the Government, caused "some impairment of the existing legal situation of" the Northern Territory Government in this case[182]. The object, to adapt what was said by

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180 (1955) 93 CLR 376 at 394.

181 (1955) 93 CLR 376 at 394.

182 *Wynyard Investments Pty Ltd v Commissioner for Railways (NSW)* (1955) 93 CLR 376 at 393 per Kitto J.

Kitto J, 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 appertaining" to the Government[183]. More recently, this Court said that the interference to be looked for is a "divesting" of "property, rights, interests or prerogatives"[184] belonging to the Government. The better view is that the principle applies to proprietary, contractual and other legal rights and interests and not otherwise, notwithstanding that it has been said to extend to "arrangements or understandings"[185]. That phrase was used by Mason and Jacobs JJ in *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd*[186] but, as appears below, requires further consideration.

171 Gasgo advanced two arguments. The first was that "Gasgo's participation in the series of agreements entered into in 1985 was at the express direction of and on behalf of the Northern Territory Government and is clearly a part of an arrangement or understanding of the Northern Territory Government in the sense spoken of in" *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd* by Mason and Jacobs JJ. What Mason and Jacobs JJ were speaking of in that case was an allegation of a "contract, arrangement or understanding" contrary to s 45 of the Act, pursuant to which a BHP company was to finance the building of a railway line by the Commissioner of Railways for Queensland (part of the Queensland Government) on the condition that equipment be purchased exclusively from BHP. The "contract, arrangement or understanding" of which Mason and Jacobs JJ spoke was different from anything arising in the present circumstances, because one of the parties to it was the Government[187]. Gasgo is not part of the Northern Territory Government. If the words of Mason and

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183 *Wynyard Investments Pty Ltd v Commissioner for Railways (NSW)* (1955) 93 CLR 376 at 396.

184 *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 354 [42] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.

185 *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd* (1979) 145 CLR 107 at 137 per Mason and Jacobs JJ; see also *Bank voor Handel en Scheepvaart NV v Administrator of Hungarian Property* [1954] AC 584 at 621, 624 per Lord Reid, 629 per Lord Tucker, 632 per Lord Asquith of Bishopstone.

186 (1979) 145 CLR 107 at 137.

187 (1979) 145 CLR 107 at 137: "The Commissioner … is an agent authority or instrumentality of the Crown stated by his incorporating statute to represent the Crown."

Jacobs JJ were to be applicable here, it would be necessary to show a contract, arrangement or understanding to which not just Gasgo, but also PAWA or some other part of the Northern Territory Government, was a party. In the present case, there was only one contract between Gasgo and the Mereenie Suppliers; another contract between Gasgo and NT Gas; and contracts between NT Gas and PAWA. The only part of the Government involved was PAWA. Whatever the understandings between PAWA and Gasgo, the trial judge made no finding that there were any understandings between PAWA (or any other part of the Northern Territory Government) on the one hand and the Mereenie Suppliers on the other. Indeed, his judgment does not suggest that the argument under consideration was put.

172 The second argument advanced was that which the trial judge accepted[188], namely that the Government would be prejudiced if cl 2.26 were not enforceable. The prejudice found by the trial judge was that to the extent that gas bought by third parties could not be acquired by Gasgo, less would be sold to NT Gas and thence to PAWA. Gasgo would have to seek to enter further negotiations for replacement quantities. If it failed, or succeeded only by paying a higher price, PAWA would be worse off. But it would be worse off only in an indirect economic sense. No proprietary right or interest or contractual right or prerogative of the Northern Territory Government would be affected, for neither PAWA nor any other part of the Northern Territory Government have any such rights, interests or prerogatives as against the Mereenie Suppliers under the Mereenie Agreement.

173 Gasgo frankly acknowledged that no legally enforceable interest of the Northern Territory Government was prejudiced, and that its only prejudice was financial. It bluntly invited this Court to extend the law. It submitted that "the consequences of being denied contractual rights or property rights are more often than not financial consequences. If that is so, what reason in logic is there for confining the prejudice to prejudices arising out of interference with contractual or property rights?" In strict logic, there may be no reason. But there is a standard distinction in many fields of law between the financial consequences of breaches of a person's legal rights, and the financial consequences that flow to a person independently of any breach of that person's legal rights. And the law allows wider recovery for financial losses flowing from injuries to a plaintiff's body, and injuries to land or chattels which a plaintiff owns, than it does for pure financial loss, unless that loss is the result of a broken contract. Where, contract apart, the law allows recovery of pure financial loss, it does so more freely for

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188 Above at [158].

intentionally caused financial loss than negligently caused financial loss. Gasgo did not explain what precise test it advocated, why it should be adopted, or how it would fit in with the concerns underlying these principles. Gasgo did not explain why, if it could claim immunity from s 46, many non-governmental entities would not gain immunity from statutory obligations as long as it could be shown that there was some financial impact on the Government's position. Nor did it explain how that reliance could be reconciled with the intent of the statutes imposing those obligations. What is clear is that to apply "derivative Crown immunity" in favour of Gasgo would extend that immunity beyond any point the Australian authorities have so far reached. Gasgo did not advance any argument of sufficient merit to justify that extension.

174 Some phrases in *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd* were relied on to support an extensive construction, going well beyond prejudice to property rights, legal rights, legal interests or legal prerogatives[189]. But those words cannot be read as extending beyond the solution of the problem before the Court. The actual decision was only that where it was alleged that the Commissioner of Railways had entered into a contract, arrangement or understanding with BHP contrary to ss 45 or 47 of the Act, and where the Commissioner was not bound by ss 45 or 47, the Act could not apply to BHP either. That was because application of the Act would affect the Government's enjoyment of a direct consensual relationship between itself and a non-governmental party.

175 If PAWA had entered into a contract with the Mereenie Suppliers, it would have fallen within the four corners of the decision in *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd*. But PAWA was not a party to the Mereenie Agreement, and although PAWA is part of the Northern Territory Government, Gasgo is not. The factual circumstances are very different from those dealt with in *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd*, and so is the problem for decision. That problem can only be answered favourably to Gasgo if Gasgo's request that the law be extended is acceded to. No satisfactory basis for acceding to it was advanced, and it should not be acceded to.

176 The Solicitor-General for South Australia advanced an argument which was more specific than Gasgo's. He argued that among the relevant interests which could give rise to immunity were the interests which the Government has

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189 eg (1979) 145 CLR 107 at 124 per Gibbs ACJ ("prejudicial to the interests of the Crown" and "which would affect prejudicially the interests of the Crown").

in contracts other than those to which it is a party. He argued that if a statute affected one party's contractual rights in a manner which compromised that party's capacity to fulfil its obligations under another contract with the Government, an interest of the Government had been affected. The facts here would actually require the principle to be extended even beyond that submission: it would require the principle to be that if a statute affected the contractual rights of one non-governmental party (Gasgo) against other non-governmental parties (the Mereenie Suppliers) in a manner which compromised Gasgo's capacity to fulfil its obligations under a second contract with a non-governmental party (NT Gas) so as to compromise that latter party's capacity to supply gas to the government (PAWA), an interest of the government had been affected.

177 The Solicitor-General for South Australia relied on *In re Telephone Apparatus Manufacturers' Application*[190]. The circumstances considered in that case are indeed the closest to the circumstances contemplated by the Solicitor-General's argument, though they are narrower than the circumstances of the present case. The case concerned two agreements.

178 The first was the "Crown agreement". Eight manufacturers of telephone apparatus promised to supply apparatus in accordance with orders placed by the Postmaster-General (cl 2), and to establish a committee which was to appoint a secretary (cl 3(1)). The Postmaster-General was not to be concerned with the constitution of the committee (cl 3(2)). Clause 4(1) provided that the Postmaster-General was to notify the secretary of any orders which he or she proposed to place, and the committee was within fourteen days to inform the Postmaster-General of the contractors with which each of the orders was to be placed. If the committee did not so inform the Postmaster-General, the Postmaster-General was at liberty to place each order with whichever contractor he or she wished.

179 The second agreement was the Telephone Apparatus Manufacturers' agreement ("the TAM agreement"). It provided for the allocation of orders received by the Postmaster-General under the Crown agreement by unanimous decision of the committee; failing that, orders were to be allocated according to the quota standing of the members, on the basis that the business was to be divided in equal shares.

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190 [1963] 1 WLR 463; [1963] 2 All ER 302. The Court of Appeal proceeding was an appeal from the decision of Wilberforce J in *In re Telephone Apparatus Manufacturers' Application* [1962] 1 WLR 596; [1962] 2 All ER 207.

180 The English Court of Appeal held that if there were a duty to register the TAM agreement under the *Restrictive Trade Practices Act* 1956 (UK), s 6(1)(c), there would be a risk of a declaration by the Restrictive Practices Court that the TAM agreement was against the public interest. The legislation was held not to apply to the TAM agreement because that would have damaged the interests of the Crown. The decision can be viewed as proceeding on two alternative bases – a wide one and a narrow one.

181 The first, wide, basis for the decision treated the two agreements as distinct: the striking down of the TAM agreement would make the Crown agreement almost wholly ineffective and deprive the Postmaster-General of the services of the committee. This first basis is questionable. Willmer LJ said that the Postmaster-General's "interests" would be prejudicially affected by the invalidity of the TAM agreement[191], and Upjohn LJ said that the Crown's "rights and interests" would be prejudiced[192]. But the interests were only commercial interests: the *legal* position of the Postmaster-General was unimpaired. Harman LJ said that to interfere with the TAM agreement was "to frustrate in whole or in part the Crown agreement, and thus to interfere with the freedom of contract of the Crown"[193]. That "freedom" was not a legal right: the Crown and the manufacturers could have included within the Crown agreement any term of the TAM agreement they wished, but they chose not to.

182 However, all three judges mentioned a second, narrower, basis for their decision. Willmer LJ said that the agreements were "necessarily complementary", and though in separate documents, were not "really severable" but "hopelessly mixed up together"[194]. Harman LJ said that the agreements were "complementary" and "intimately connected"[195]. Upjohn LJ said that they were "complementary and must be read together"; and from the point of view of the contractors they constituted "one agreement"[196].

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191 [1963] 1 WLR 463 at 474-475; [1963] 2 All ER 302 at 308.

192 [1963] 1 WLR 463 at 482; [1963] 2 All ER 302 at 313.

193 [1963] 1 WLR 463 at 477; [1963] 2 All ER 302 at 310.

194 [1963] 1 WLR 463 at 474; [1963] 2 All ER 302 at 308.

195 [1963] 1 WLR 463 at 477; [1963] 2 All ER 302 at 310.

196 [1963] 1 WLR 463 at 482; [1963] 2 All ER 302 at 313.

183 It is this narrow basis which should be treated by Australian courts as the true ground of the decision. There was not one agreement to which the Crown was a party and another to which it was not a party, but one composite agreement to which it was a party. So viewed, the decision is not unlike the actual decision in *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd*. However, as indicated above, that second ground for the decision is inapplicable here: it is not possible to analyse the transactions relating to the Mereenie Agreement as comprising a single, composite agreement.

184 The Solicitor-General for South Australia submitted that *In re Telephone Apparatus Manufacturers' Application* was accepted in *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd*, referred to in *Bass v Permanent Trustee Co Ltd*, and had not been doubted. But the crucial question is whether there is a decision of this Court which depends on the application of the reasoning underlying the first basis for the decision. In *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd*, Gibbs ACJ said of *In re Telephone Apparatus Manufacturers' Application* only that the case before him was "a stronger one"[197]. Stephen J said that the Act would not apply directly to the Commissioner "but [would] also not apply so as to prejudice its interests when in contractual relationship with parties to whom the Act clearly applies or when otherwise interested in transactions affecting those parties (*In re Telephone Apparatus Manufacturers' Application*)"[198]. That is an approving reference to the case in its wider application, but one not necessary for the decision in *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd* itself. Mason and Jacobs JJ said that in accordance with such authorities as *In re Telephone Apparatus Manufacturers' Application*, "the absence of an intention to bind the Crown in right of Queensland will not only exonerate it from the direct application of the statutory provisions but will also exonerate from the application of those provisions the contracts arrangements or understandings made by that Crown and the other parties thereto as well"[199]. The language of Mason and Jacobs JJ is adapted to the facts before them, and not to the facts of *In re Telephone Apparatus Manufacturers' Application*. Murphy J said that *In re Telephone Apparatus Manufacturers' Application* did not persuade him to accept the

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197 (1979) 145 CLR 107 at 124.

198 (1979) 145 CLR 107 at 129 (footnote omitted).

199 (1979) 145 CLR 107 at 138.

contention that even if the Act bound the Commissioner, ss 45 and 47 were not applicable to the contract, arrangement or understanding before him[200].

185 Thus, apart from Stephen J, no justice in *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd* approved the reasoning underlying the broad basis of *In re Telephone Apparatus Manufacturers' Application*. Also, and for several reasons, any approval was obiter. The issue in *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd* was much narrower than the issue in *In re Telephone Apparatus Manufacturers' Application*. The latter case was only relied on in argument for the proposition underlying its narrow basis, namely that the immunity enjoyed by the Crown "extends to contracts arrangements or understandings made by the Crown with others"[201]. Its correctness was not argued by the parties, was not examined critically by the Court, and was not crucial to the outcome.

186 This Court in *Bass v Permanent Trustee Co Ltd*[202] quoted Stephen J's words set out above, but did not specifically consider their correctness because, for various reasons, it was unnecessary to do so[203].

187 Since the narrow basis of *In re Telephone Apparatus Manufacturers' Application* is not applicable here, since no decision of this Court depends on the application of the reasoning underlying the wider basis, since the correctness of that reasoning has not been demonstrated, and since it would have to be extended a further stage to apply to the present circumstances, the case does not assist Gasgo.

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200 (1979) 145 CLR 107 at 140.

201 (1979) 145 CLR 107 at 109.

202 (1999) 198 CLR 334 at 354 [41] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.

203 (1999) 198 CLR 334 at 354 [41] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ. *In re Telephone Apparatus Manufacturers' Application* was assumed, without contrary argument, to be correct in *F Sharkey & Co Pty Ltd v Fisher (No 2)* (1980) 33 ALR 184 at 192 per Sheppard J and *Woodlands v Permanent Trustee Co Ltd* (1996) 68 FCR 213 at 229-231 per Wilcox, Burchett and Olney JJ.

188 In *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd*, there was mention[204], without disapproval, of New Zealand cases[205] in which it was held that regulations requiring building contractors to obtain a permit before commencing work pursuant to a contract with the Government, and to be carried out on the Government's land, did not apply because of their impact on the Government. The outcome in these cases is capable of explanation as falling within the decision in *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd*: the statutory provisions had a direct impact on the Government's contractual rights. There is a more borderline case of a contract to which the Crown was not a party but under which the work was to be carried out on Crown land and paid for by the Crown[206], but, again, the reference to this case without disapproval was not crucial to the reasoning in *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd*.

189 It follows that if s 2B had not been enacted, and the Mereenie Agreement were considered in the light of the law as it stood before 19 August 1994, there is no reason why s 46 would not have operated on the Agreement: it would not have been disregarded, and s 89(2) of the Reform Act has no application favourable to Gasgo[207].

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204 (1979) 145 CLR 107 at 124 per Gibbs ACJ.

205 *Doyle v Edwards* (1898) 16 NZLR 572; *Lower Hutt City v Attorney-General* [1965] NZLR 65 at 75 per North P, 77-78 per Turner J, 81 per Hutchison J.

206 *Wellington City Corporation v Victoria University of Wellington* [1975] 2 NZLR 301 at 305 per Cooke J.

207 The Solicitor-General for South Australia advanced an argument based on the following words of the trial judge: "Gasgo on 28 June 1985 acknowledged … that it had the benefit of the several agreements 'for and on behalf of and for the benefit of' NTEC": *NT Power Generation Pty Ltd v Power and Water Authority* (2001) 184 ALR 481 at 541 [270]. The argument was that the Government had an interest in Gasgo's contracts that would be protected from s 46. Gasgo did not plead or contend that the Government had any interest in the contract. Whether the letter of 28 June 1985 created in favour of NTEC or PAWA any contractual, trust or other equitable interest in the contract would turn on factual investigations not carried out at the trial, and the argument is thus not open for consideration. It should also be noted that it was not argued that to enforce cl 2.26 after the cut-off date – 19 August 1994 – is not to "give effect to" the 1985 contract.

190 *Conclusion.* It follows that since Gasgo is not part of the Northern Territory Government, and since it could not claim "derivative Crown immunity" before 19 August 1994, its reliance on cl 2.26 of the Mereenie Agreement is open to scrutiny under s 46, and the proceedings must be returned to the trial judge for NT Power's allegations on this issue to be tried, together with a consideration of what, if any, remedies should be granted to NT Power in relation to the conduct of PAWA.

The filing of written submissions after oral argument

191 In the course of oral argument, on 10 March 2004, PAWA was given leave to file written submissions on certain questions[208]. PAWA did not avail itself of that leave for so long a period as two months: on 10 May 2004 a document was filed partly dealing with those questions and partly dealing with a matter in relation to which leave had not been granted. NT Power responded by a document dated 26 May 2004 on both points.

192 This is unsatisfactory. It is impermissible to file further submissions without leave[209], and this cannot be evaded by adding on to submissions filed with leave other material for which leave should have been obtained. The further submissions have contended that the Court should have no regard to two documents referred to near the end of NT Power's oral argument, and said that PAWA had no opportunity to deal with them. In fact, after NT Power's argument closed, counsel for PAWA advanced, as of right, a short oral submission, but did not seek leave to file any submission stating what the written submissions have since said. The documents in question have not been relied on in the reasoning set out above, but not for the reasons given in PAWA's written submissions.

Orders

193 On the assumption that NT Power's arguments have succeeded in substance, as they have, the only remaining issue between the parties was whether this Court should determine the costs of the trial. Since NT Power, though it ought to have won on all s 46 issues at trial, did lose on one issue relating to an implied contractual term which it has not pursued in this Court, the

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208 Those discussed at [56]-[63] and [104]-[113] above.

209 *Carr v Finance Corp of Australia Ltd (No 1)* (1981) 147 CLR 246 at 258; *Eastman v Director of Public Prosecutions (ACT)* (2003) 214 CLR 318 at 329-330 [27]-[31], 368 [143].

submission of PAWA and Gasgo that the matter should be remitted to the trial judge is correct. PAWA and Gasgo did not resist an order that they pay the costs, not only in this Court but in the Full Federal Court.

194 The following orders should be made:

1. The appeal is allowed.

2. The orders of the Full Federal Court made on 2 October 2002 are set aside.

3. In lieu of the orders of the Full Federal Court made on 2 October 2002:

   (a) the appeal to the Full Federal Court is allowed;

   (b) the respondents are to pay the costs of the appeal to the Full Federal Court.

4. The respondents are to pay the costs of the appeal to this Court.

5. The matter is remitted to Mansfield J 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.

195 KIRBY J. The appellant had a generator for the production of electricity. The first respondent, a statutory authority, created by the legislature of the Northern Territory of Australia, had legal functions to generate, distribute, supply and sell electricity throughout the Territory. Under its Act[210], the first respondent had to perform its duties in accordance with any directions given to it by the relevant Minister.

196 *The facts and statutory context*: The appellant from time to time sold electricity, manufactured by its generator, to the first respondent for use in the first respondent's grid. Pursuant to a series of electricity sale and purchase agreements, the first respondent bought the appellant's electricity at various supply points along the appellant's electricity transmission line[211]. It was not sold by the appellant direct to the first respondent's customers. With the exception of one 300 kilometre section of high-voltage transmission line running between Darwin and Katherine, the network of high-voltage wires used to distribute, supply and sell electricity in the Territory was owned by the first respondent.

197 The first respondent refused a request by the appellant to allow it to use the first respondent's infrastructure and equipment to supply its electricity to selected consumers in the Darwin–Katherine area. The appellant wished to do so and considered that it could do so at a price cheaper than that charged by the first respondent. By law, the first respondent was responsible for the supply of electricity to the Territory. Inferentially, its price structure took into account, at least in a general way, the increasing costs of supplying electricity everywhere in the Territory and its duty to supply the product to remote consumers as well as those in the more populous areas of Darwin and Katherine. The first respondent was concerned that the appellant was seeking to use its facilities to "cherrypick" electricity consumers in Darwin and Katherine and that it was trying to do so before the first respondent had put in place an effective and proper arrangement for the effective "privatisation" of its business undertaking[212], as part of the announced policy of the Territory Government.

198 The Territory had, in fact, become generally committed to the policy of "privatisation" of governmental authorities engaged in business activities, such as

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210 *Power and Water Authority Act* (NT) ("the Act"), s 16.

211 *NT Power Generation Pty Ltd v Power and Water Authority* (2001) 184 ALR 481 at 493 [44].

212 A final decision to privatise the first respondent had not been made by the Government. However, it was acknowledged by the Minister for Essential Services that if full privatisation did not ultimately occur, the first respondent would have to "become more competitive" within the market.

the first respondent. This policy followed the *Hilmer Report*[213] and a number of inter-governmental agreements between the Commonwealth, State and Territory governments designed to implement its main recommendations. In the Territory, those agreements were followed by legislation, by Ministerial protestations of commitment to competition policy, as well as by the annual report of the first respondent containing general statements to like effect. However, the Territory officials and the first respondent were concerned, when the appellant's request to use the first respondent's electricity distribution facilities was received, that the system of general "privatisation" should be eased into effect, including in respect of the first respondent. That concern led to a minute by officials to the Minister suggesting how this should be done.

199 A question arises whether the Minister, in responding to this minute, gave a "direction" under the Act and whether this could bind the first respondent in the face of legislation binding on the Minister, the Government of the Territory and the first respondent, including s 46 of the *Trade Practices Act* 1974 (Cth) ("TPA") (see *Waters v Public Transport Corporation*[214]). I do not stay finally to resolve that contested point. However it may be, the first respondent refused to allow the appellant to use its infrastructure to supply electricity to the domestic electricity market in the Darwin–Katherine area.

200 *The decisions of the Federal Court*: The appellant brought proceedings in the Federal Court of Australia against the first respondent claiming that the first respondent's refusal amounted to a breach of s 46(1) of the TPA and/or cl 46(1) of the Schedule version of Pt IV of the Competition Code, which, under s 5(1) of the *Competition Policy Reform (Northern Territory) Act* (NT), applied as a law of the Territory. Specifically, the appellant complained that the first respondent had a substantial degree of power in one or more of the markets for electricity supply, infrastructure, transmission and distribution, and, by use of its infrastructure, had "take[n] advantage" of that power for the "purpose" of preventing the entry of a person, namely the appellant, into that or "any other market" (see TPA, s 46(1)(b)). The "other market" alleged was the market for the supply and sale of electricity, including to consumers in the Darwin–Katherine area, which the appellant wished to enter.

201 The primary judge in the Federal Court (Mansfield J) rejected the appellant's claim[215]. His judgment was upheld by a majority in the Full Court of

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213 Australia, Independent Committee of Inquiry, *National Competition Policy: Report by the Independent Committee of Inquiry*, (1993) ("*Hilmer Report*").

214 (1991) 173 CLR 349.

215 *NT Power* (2001) 184 ALR 481.

the Federal Court[216] (Lee and Branson JJ; Finkelstein J dissenting). Now, by special leave, the appellant has appealed to this Court.

202 *"Take advantage" and "purpose" in this case*: In my view, the appeal should be dismissed. As I approach the case, it is a comparatively simple one. It turns essentially on the statutory notions of "take advantage of" and "purpose" appearing in s 46(1) of the TPA. I do 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. As such, this 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. It had a clear governmental and a lawful political context which was both open to the Territory Government and its instrumentality, and understandable in the circumstances. It was probably the subject of a Ministerial "direction" under Territory law. But even if it was not, it was an available regulatory decision in the use of the electricity infrastructure of the Territory at the time the appellant demanded access to the first respondent's electricity distribution infrastructure.

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[217]. Trade practices laws in Australia, and antitrust 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. As the Supreme Court of the United States said of the Sherman Act in January 2004 in *Verizon Communications Inc v Law Offices of Curtis V Trinko, LLP*[218]:

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216 *NT Power Generation Pty Ltd v Power and Water Authority* (2002) 122 FCR 399.

217 See *Dowling v Dalgety Australia Ltd* (1992) 34 FCR 109 at 144-145.

218 72 USLW 4114 at 4119 (2004).

> "The Sherman Act is indeed the 'Magna Carta of free enterprise', *United States v Topco Associates, Inc*[219], but it does not give judges *carte blanche* to insist that a monopolist alter its way of doing business whenever some other approach might yield greater competition."

204 If the first respondent had granted the appellant access to its infrastructure for the distribution and sale of electricity to some consumers it would doubtless have yielded a degree of greater competition in the Darwin–Katherine consumer market. However, just as the Supreme Court of the United States concluded that the complaint failed, so in my view does the complaint of the present appellant. And for essentially the same reasons. 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[220].

Order

205 The appeal should be dismissed with costs.

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219 405 US 596 at 610 (1972).

220 *Rural Press Ltd v Australian Competition and Consumer Commission* (2003) 78 ALJR 274 at 302 [138]; 203 ALR 217 at 256 and cases there cited. See also Zumbo, "The High Court's Rural Press decision: the end of s 46 as a deterrent against abuses of market power?", (2004) *Trade Practices Law Journal* 126 at 128.