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When should private property rights give way to the public interest?

By

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Introduction

Since *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* (1989) 167 CLR 177 it has been recognised that corporations with substantial market power are subject to special responsibilities and restraints that corporations without market power are not. In *NT Power Generation Pty Ltd v Power and Water Authority* (2004) 219 CLR 90 McHugh A-CJ, Gummow, Callinan and Heydon JJ in their joint reasons stated (at [76]), that s 46 of the *Competition and Consumer Act 2012* (Cth) (CCA) can operate not only to prevent firms with substantial market power from doing prohibited things, but also compel them positively to do things they do not want to do. Their Honours also stated (at [126]) that the proposition that a private property owner who declines to permit competitors to use the property is immune from s 46 is "intrinsically unsound". However, the circumstances in which a firm with substantial power must accommodate competitors, and private property rights give way to the public interest are uncertain.

In the context of s 2 of the *Sherman Act 1890* (US) Judge Posner noted in *Olympia Equipment Leasing v Western Union Telegraph* 797 F. 2d 370 (7th Cir. 1986) that "it is clear that a firm with lawful monopoly power has no general duty to help its competitors…" (at 375). However, the Supreme Court, in *Aspen Skiing Co. v Aspen Highlands Skiing Corp.,* 472 US 585 (1985) appears to have recognised some sort of duty to continue an existing business relationship with a competitor, in the absence of any efficiency-related reason for terminating the relationship.

The purpose of this Note is to consider recent developments in two areas of the CCA where the law requires private property rights to give way to the public interest. First, is relation to s 46 of the CCA two recent cases shed light on the circumstances in which s 46 of the CCA can be used to compel a firm with substantial market power to accommodate a competitor and allow the competitor to make use of private property rights in the public interest.

Secondly, on 12 February 2014 the Minister for Small Business, the Hon Bruce Billson, released the Productivity Commission's Final Report, on the National Access Regime in Pt IIIA of the CCA (National Access Regime, Inquiry Report no. 66, Canberra). The Report recommends that Pt IIIA be retained but makes a number of suggestions for its reform, some of which will be briefly considered.

Section 46: recent cases

In the first case, *ACCC v Cabcharge Australia Ltd* (2010) ATPR 42-331, s 46 was relied upon to force Cabcharge to accommodate a competitor, Travel Tab, by allowing Travel Tab to process Cabcharge cards on Travel Tab terminals.

There were two relevant markets: first, the market for non-cash instruments for paying taxi fares, including Cabcharge cards (the Instruments market); and secondly, electronic payment systems market, including both manual and electronic payment processing systems, for processing the non-cash instruments (the Processing market). Cabcharge supplied both manual and electronic payment systems to taxi operators and drivers for processing taxi non-cash instruments. The manual system used dockets and cheque-like vouchers supplied by Cabcharge which were processed through credit card imprinters The electronic system used EFTPOS terminals supplied by Cabcharge. Its terminals were used in approximately 95 per cent of taxis, giving it substantial market power in the Processing market.

Travel Tab was one of Cabcharge's competitors. The company supplied electronic payment processing systems, but not manual processing systems. It provided EFTPOS equipment to taxi drivers and imposed a 10 per cent service fee. In 2005, Mr Kesley, the manager of Travel Tab wrote to Cabcharge requesting permission to process Cabcharge Cards. Cabcharge's company secretary, Ms Doyle, wrote back to Travel Tab requesting information from it including confidential information. Ms Doyle's correspondence was held to be a constructive refusal to deal in the sense that Cabcharge was indifferent to whether or not Mr Kesley provided the information requested and Cabcharge was simply putting him off.

In 2008, Mr Kesley again wrote to Ms Doyle requesting permission to process Cabcharge cards, and the request was again refused, Ms Doyle stating that "[i]t

would not be practical of benefit to Cabcharge or taxi customers to engage in further discussion".

In 2009, the ACCC commenced proceedings in the Federal Court against Cabcharge. In 2010 Finkelstein J approved the settlement of the action between the ACCC and Cabcharge declaring that by refusing to allow a competing supplier of terminals to process Cabcharge cards, Cabcharge took advantage of its substantial power in the Instruments market to protect its position in the Processing market, contrary to s 46(1) of the CCA. Travel Tab's terminals were capable of processing the information stored on the Cabcharge card. The purpose of the refusal was to ensure that Cabcharge's processing system was the only system that processed Cabcharge cards electronically. Pecuniary penalties totalling $11 million were imposed in respect of the two refusals to deal with Travel Tab.

The Cabcharge case was not fully argued. It was settled on the basis of an agreed statement of facts with Cabcharge admitting liability. As regards the source of Cabcharge's market power in the Instruments market Finkelstein J stated (at [14]-[15]):

> "A significant reason for Cabcharge's market power in the Instruments Market was its dominance in the Processing Market. It was important for Cabcharge's competitors to have their taxi specific non-cash instruments accepted in as many taxis as possible; otherwise the usefulness of the instruments would be greatly diminished. By virtue of Cabcharge's overwhelming market share in the Processing Market, it was critical for Cabcharge's competitors to be able to have their instruments accepted and processed by Cabcharge's payment processing systems. Cabcharge's payment processing systems did not, however, accept any competitors' instruments and consequently the vast majority of taxis did not accept non-cash instruments provided by Cabcharge's competitors.
>
> Thus a person wishing to enter the Instruments Market would have to simultaneously enter the Processing Market. This represented a significant barrier to entry, given the significant sunk costs of entering the Processing Market. In addition, competitors would have needed to simultaneously convince consumers to accept their instruments and taxi drivers, operators and networks to adopt their payment processing systems.

It appears that Cabcharge's financial resources generated in the Processing market were used to heighten a barrier to entry with rivals in the Instruments market being forced to enter the Processing market simultaneously, resulting in a structural change to the market and (possibly) conferring market power on Cabcharge.

With respect to the "taking advantage" element of s 46(1), Finkelstein J held (at [32]):

> "By refusing to allow Travel Tab/MPos to process Cabcharge instruments, Cabcharge took advantage of the substantial degree of power it had in the Processing and Instruments Markets. Cabcharge's refusals were for the purpose of preventing Travel Tab/MPos from processing Cabcharge instruments electronically and resulted in Cabcharge's payment processing system remaining the only system that processed Cabcharge's instruments electronically. Cabcharge would not and could not have engaged in this conduct if it were constrained by actual or potential competitors in the Processing and Instruments Markets."

Under competitive conditions, that is if there were other competitors, Cabcharge would have developed the appropriate interfaces that would allow Travel Tab to process Cabcharge cards on Travel Tab terminals. Otherwise it would risk losing business to those competitors. This was an application of the counterfactual test of the "taking advantage" element adopted by Mason CJ and Wilson J in *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* (1989) 167 CLR 177 at 192., that: "[i]f BHP lacked market power –in other words, if it were operating in a competitive market – it is highly unlikely that it would stand by, without any effort to compete, and allow the appellant to secure the supply of Y-bar from a competitor".

Cabcharge did not put forward any legitimate business justification for its refusal to deal with Travel Tab and allow it to process Cabcharge cards on its terminals. Finkelstein J observed (at [31]):

> "With respect to both refusals, Cabcharge acknowledges that although there would have been time and costs involved in developing appropriate interfaces, there was no technical reason that would prevent any electronic taxi-specific payment product from being processed by any EFTPOS terminal as long as that taxi-specific instrument and the relevant

EFTPOS terminals complied with all relevant banking/financial industry protocols, including security protocols."

The refusals were not intended to enhance economic efficiency, but were intended to exclude a rival. Consumer welfare would have been enhanced by allowing a greater number of taxi payment products to be processed by a greater number of terminals.

In the second case, *ACCC v Ticketek Pty Ltd,* (2011) ATPR 42-385, Ticketek was forced to accommodate a competitor, Lasttix, by allowing it to use Ticketek's website to sell Lasttix's discounted tickets to the same live entertainment events for which Ticketek was promoting and selling tickets.

This case was also settled on the basis of an agreed statement of facts. Ticketek admitted that it had substantial market power in the ticketing related services market during the relevant period. During the relevant period Ticketek held approximately 75 exclusive ticketing service agreements with venue operators and promoters around Australia for terms which ranged between three to five years. The venues included many of the major sporting, arena and concert venues, theatres and events in Australia. The existence of these exclusive agreements allowed Ticketek to prevent its competitors from providing ticketing related services at the venues covered by them. During the relevant period Ticketek's approximate market share was 45 per cent calculated by the number of total tickets sold by Ticketek as a percentage of the total number of tickets sold for live entertainment events across Australia.

Ticketek supplied many of its ticketing related services under ticketing service agreements using a system designed, owned and developed by Ticketek called "Softix". The Softix Ticketing System allowed for the ticketing of events generally and for the setting up different price type categories of tickets for a particular event. Lasttix was a competitor of Ticketek. The promoters of various live events requested Ticketek to implement in its ticketing system a price type URL. The promoters provided these price type URLs to Lastix. When Ticketek became aware that Lasttix was publishing discounted ticket offers and was linking its website to the price type URLs which Ticketek had implemented for the promoter, Ticketek disabled the relevant price types.

Ticketek admitted that it took advantage of its substantial market power in the ticketing and related services market for the purpose of deterring or preventing Lasttix from engaging in competitive conduct in that market. Ticketek had refused to distribute tickets for Lasttix, a competitor in the market selling discount tickets to live entertainment events, where the Lasttix price was lower than the Ticketek price for the event being promoted.

Bennett J declared that the refusal of the request to implement in its Ticketing System discounted price types to be published by Lasttix contravened s 46(1)(c) and was a taking advantage of Ticketek's market power in the sense that the refusal was materially facilitated by its substantial market power.

Ticketek had made a significant investment in building up a sophisticated Ticketing System with robust technology, such that its website and Softix ticketing system was akin to an essential facility. Lasttix needed access to its private property rights in order to compete with Ticketek in the market for discount tickets to live entertainment events. The refusals were not intended to enhance economic efficiency, but were intended to exclude Lasttix. Consumer welfare and the public interest prevailed over Ticketek's private property rights in its Ticketing System. Pecuniary penalties totalling $2.5 million were imposed on Ticketek.

The circumstances in which s 46 of the CCA can be used to compel a firm with substantial market power to accommodate a competitor have been considered in a number of other cases. In *Dowling v Dalgety Australia Ltd*, (1992) 34 FCR 109), Mr Dowling sought access to the respondents' saleyards which were jointly owned and operated by means of an unincorporated joint venture between three pastoral houses, to conduct auction sales. There was an agreement between the three pastoral houses that no other agents wold be permitted to use the saleyards. Mr Dowling argued that by refusing to allow him to conduct auctions sales on their premises, the respondents had taken advantage of their market power contrary to s 46.

In the circumstances of that case, Lockhart J held that the respondents were not obliged to accommodate Mr Dowling and allow him to make use of their private property rights. His Honour found (at 145):

> "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 were operating in a competitive market (I have assumed for this purpose that they were not). The respondents have not used or taken advantage of market power…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."

Subsequently, in the *NT Power* case, PAWA contended that *Dowling v Dalgety Australia Ltd* is authority for the proposition that the owner of infrastructure assets can decline to consent to the use of their private property rights by others. The High Court majority in the *NT Power* case stated (at [126]):

> "…*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".

In that case the High Court ordered PAWA to accommodate a competitor, NT Power, by taking its electricity, receiving it into PAWA's system and manage its transmission and distribution to enable NT Power to supply customers its customer in Darwin.

The circumstances in which a court is likely to order that services be provided by the owner of property or infrastructure are similar to those under the essential facilities doctrine in the US (see the four part test articulated by the Seventh Circuit in *MCI Communications Corp v AT&T,* 708 F. 2d 1081(7th Cir. 1983) at 1132-33). The requirements that must be proved by an applicant to establish a contravention of s 46 are set out below.

- The respondent must have substantial market power arising from ownership of private property, infrastructure or technology.
- The property must be essential in the sense that the applicant needs access to it in order to compete with the respondent.
- The respondent owner of the property and the applicant must be actual or potential competitors in a market that requires access to services provided by the facility.

- There must be a taking advantage of market power in the sense that by virtue of the respondent's control of the market for the supply of the relevant services, and the absence of other suppliers, the respondent can withhold access to the property, and if the respondent had been operating in a competitive market, it would have been unlikely to stand by and allow a competitor to supply the services.
- The respondent cannot provide a legitimate business justification for the refusal to provide access to the property, for example there is no spare capacity or it is not technically feasible to supply the services.
- In refusing to supply the applicant, the respondent's purpose is to exclude the applicant from a market in which the respondent competes.
- The applicant must be prepared to pay a reasonable price for the services.

Section 46 can be used to compel the owner of intellectual property to grant a licence of it to a competitor if the above requirements are met. In other words, intellectual property itself can be an essential facility. The High Court in the *NT Power* case, (at [125]) explicitly recognised that "intellectual property rights are often a very clear source of market power". The High Court noted in the *NT Power* case (at [85]):

> "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. The fact that s 46 can apply to intellectual property rights, and hence the market power can give, suggest 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…"

The European Court of Justice in the *Magill* case (Joined cases C-241/91 P and C-241/91 P, *RTE and ITP v EC Commission* [1995] ECR 1-743) found that television guides subject to copyright were an essential facility. In that case, three television broadcasters who owned the copyright in their own television guides were forced to accommodate a new entrant to the market for television guides, Magill, by granting a copyright licence to Magill.

In the United States there has been a move away from the essential facilities doctrine because it provides a disincentive for investment in new infrastructure. Scalia J who delivered the opinion of the Supreme Court in *Verizon Communications v Law Offices of Curtis V. Trinko,* (540 US 398 , at [3]) observed:

> "Firms may acquire monopoly power by establishing infrastructure that renders them uniquely suited to serve their customers. Compelling such firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in economically beneficial facilities".

Productivity Commission: Recommendations for the Reform of Pt IIIA

The underlying rationale for having mandatory access regimes such as Pt IIIA and Pt XIC of the CCA was considered by the Productivity Commission in its National Access Regime report..

The *Trade Practices Amendment (National Access Regime) Act 2006* (Cth) inserted a new objects clause. This was intended to increase certainty for investors by requiring decision-makers to have regard to the objects clause. Section 44AA provides that the objects of Pt IIIA are to:

(a) promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets; and

(b) provide a framework and guiding principles to encourage a consistent approach to a access regulation in each industry.

These objects emphasise the need to create appropriate incentives for investment and innovation. The object in s 2 of the CCA is: "to enhance the welfare of Australian through the promotion of competition and fair trading and provision for consumer protection". How does this object sit with the objects clause in s 44AA? How are the conflicting objects of efficient operation and use of infrastructure; the promotion of investment in infrastructure; and the promotion of competition and fair trading to be reconciled by the decision maker? Are they to be considered over the long term or the short term? None of this is made clear. Consumers will benefit in the short term if access is granted

and competition is promoted in dependent markets, but may suffer in the long term if mandating access discourages or delays new investment in infrastructure, or results in the construction of facilities with sub-optimal investment capacity.

The Productivity Commission recommended three important changes to the declaration criteria in s 44G (to be considered by the NCC) and mirrored in s 44H (to be considered by the designated Minister), which limit the scope of Pt IIIA to situations where the benefits of a material increase in competition in the dependent market will outweigh the costs of regulated access.

First, s 44G(2) provides that the NCC cannot recommend declaration of the service unless it is satisfied of all of the following matters:

> (a) that access (or increased access) to the service would promote a material increase in competition in at least one market (whether or not in Australia), other than the market for the service;

In relation to the decision of the Full Federal Court in *Sydney Airport Corporation Ltd v Australian Competition Tribunal* (2006) 155 FCR 124 (French, Finn and Allsop JJ), the Productivity Commission observed *(National Access Regime*, Inquiry Report no. 66, Canberra, 17):

> The decision lowered the hurdle for declaration by requiring a comparison of the state of competition without access (even though access was already provided to Virgin Blue) and the state of competition with access.
>
> The Federal Court's interpretation of criterion (a) in the Virgin Blue case means the potential effect of access regulation on competition is overstated to the extent that any existing access arrangements promote competition in a dependent market. It has been argued that, using the Federal Court's test, access to almost all natural monopoly infrastructure would satisfy criterion (a) — the criterion may be satisfied even where the market power of a service provider is constrained due to the countervailing market power of users, or where the provider has an incentive to provide access.

The Productivity Commission has recommended (*National Access Regime*, Inquiry Report no. 66, Canberra, 17-18.) that criterion (a) be amended to provide that access should not be granted unless regulated access through declaration would promote a material increase in competition in the dependent market :

> The competition test should be amended so that it is only satisfied where access to an infrastructure service on reasonable terms and conditions through declaration (rather than access per se) would promote a material increase in competition in a dependent market. This amendment would confirm the NCC's current interpretation of the criterion by requiring a comparison of the state of competition under the status quo against the state of competition where access is granted on reasonable terms and conditions. This competition test would not be satisfied where there is already effective competition in dependent markets. It would also not be satisfied where access is already granted to all third parties on reasonable terms and conditions, as declaration would not be expected to alter the terms and conditions of access.

Secondly, s 44G(2) provides that the NCC cannot recommend declaration of the service unless it is satisfied of all of the following matters:

> (b) that it would be uneconomical for anyone to develop another facility to provide the service

The Productivity Commission recommended (*National Access Regime*, Inquiry Report no. 66, Canberra, 19) that criterion (b) be amended to incorporate expressly a natural monopoly test:

> Due to the shortcomings associated with the tests previously used to apply criterion (b), criterion (b) should be applied in a different manner than in the past. The Commission's preferred approach to criterion (b) accounts for both the total demand in the market in which the infrastructure service is supplied, and the production costs incurred by infrastructure service providers from coordinating multiple users of infrastructure.
>
> Criterion (b) should be satisfied where total foreseeable market demand for the infrastructure service over the declaration period could be met at

least cost by the facility.

Thirdly, the Productivity Commission recommended (*National Access Regime*, Inquiry Report no. 66, Canberra, 20-21) that criterion (f), the 'public interest criterion', be amended so that it positively requires the public interest to be promoted. Furthermore, it has recommended that:

> Assessments under criterion (f) should specifically include any effects on investment (positive and negative) in markets for infrastructure services and dependent markets, and the administrative and compliance costs that would arise due to declaration. This change would also require criterion (f) to be framed as a test that assesses factors that affect the public interest with and without declaration — comparable to the access–declaration distinction associated with criterion (a) discussed above.

In addition, the Productivity Commission has also recommended that s 44V be amended to clarify the ACCC's power to direct extensions to the facility. Section 44V(2)(d) provides that the ACCC in its determination may require the provider to extend the facility, in the sense of construction to extend the geographical range of the facility. However, s 44W imposes some limitations on the ACCC's power to order extensions. Section 44W (1)(d) provides that the ACCC must not make a determination that would result in a third party becoming the owner (or one of the owners) of any part of the facility, or of extensions of the facility, without the consent of a provider. Section 44W (1)(e) provides that the ACCC must not make a determination that would require the provider to bear some or all of the costs of extending the facility or maintaining extensions of the facility.

In the *Matter of Fortescue Metals Group Limited*, the Tribunal had to consider whether the ACCC's power in s 44V(2)(d) to extend the facility included the power to order an expansion of the facility, in the sense of construction to increase the capacity of an existing facility without increasing its geographical range. The Tribunal concluded ((2010) ACompT 2 at [723]), that the objects of Pt IIIA set out in s 44AA supported a power to order capacity expansions:

> The objective of promoting the efficient investment in infrastructure must be understood in light of Part IIIA's concern with facilities which exhibit natural monopoly characteristics. That is, the only facilities to which the access regime may be applied are those whose output can, or when expanded will, satisfy market demand more efficiently than if provided

> by more than one facility. It would be odd to hold that a facility displays natural monopoly characteristics and, at the same time, deny to the ACCC the power to compel the owner to increase the facility's capacity so that it can in fact satisfy that demand.

The Tribunal held ((2010) ACompT 2 at [730]) that the limitations regarding extensions in s 44W would also apply to expansions.

The Productivity Commission has now recommended (*National Access Regime*, Inquiry Report no. 66, Canberra, 26) that Part IIIA should be amended to confirm that the ACCC's legislative power to direct extensions also encompasses capacity expansions.

Conclusion

The High Court noted in the *NT Power* case (at [85]) that s46 can be used to create access regimes. The High Court also noted (at [86]):

> Finally, there is no contradiction in legislation which contains Pt IIIA and also contains ss 2B and 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 of the somewhat elaborate arbitral, review and appellate procedures provided for in Pt IIIA.

Whether s 46 should be used to create access regimes is a question that should be taken up in the "root and branch" review of the CCA announced by the Prime Minister and the Minister for Small Business on 4 December 2013.

Section 44B of the CCA currently excludes intellectual property from the definition of a service that can be declared under Pt IIIA except to the extent that it is an integral but subsidiary part of a service, so that there is only very limited compulsory access to intellectual property rights under Pt IIIA. There is clearly a role for s 46 to be used to order compulsory licences of intellectual property rights to prevent firms that have acquired market power through new

technologies or otherwise from engaging in prohibited conduct, using their market power to drive smaller players out of business and thereby disadvantaging consumers. However, as the United States Supreme Court noted in *Trinko*, compelling firms that have invested in infrastructure to share it with their competitors may lessen the incentive to invest in economically beneficial facilities.

The Minister for Small Business has announced that the Government will delay responding to the Productivity Commission's Review of Pt IIIA until the outcomes of the root and branch review are known. Economic regulation is more difficult than other forms of regulation, because it consists largely of creating incentives and disincentives for businesses to engage in certain conduct, and there is frequently insufficient economic data available to predict what the costs and benefits of particular policy options will be. At a time when old industries such as car manufacturing are disappearing from the Australian economy, the root and branch review committee will have to take great care that they do not create any additional disincentives for firms to invest in new industries.