



HIGH COURT OF AUSTRALIA

Public Information Officer

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NT POWER GENERATION PTY LTD v POWER AND WATER AUTHORITY AND GASGO PTY LTD

The High Court of Australia today allowed an appeal by NT Power which alleged that the Northern Territory's Power and Water Authority (PAWA) and its wholly-owned subsidiary Gasgo had engaged in anti-competitive behaviour, contrary to section 46 of the Trade Practices Act (TPA).

In 1996, Pegasus Gold Australia contracted with NT Power to operate Pegasus's gas-powered power station at the Mt Todd gold mine. The following year, Pegasus ceased to operate the mine and NT Power acquired the power station. NT Power wished to sell electricity generated at Mt Todd to the public, including commercial users in Darwin and Katherine. That would have brought NT Power into competition with PAWA which had a monopoly over the retail electricity market. In August 1998 PAWA refused NT Power's request for access to its transmission and distribution infrastructure to convey electricity from Mt Todd to consumers.

NT Power required secure gas supplies for the Mt Todd power station. Gasgo had long-standing agreements with its suppliers under which it enjoyed pre-emptive rights to buy gas offered to other customers. NT Power sought an undertaking from Gasgo that it would not exercise its pre-emptive right but Gasgo refused.

NT Power commenced proceedings in the Federal Court, alleging PAWA and Gasgo were in breach of section 46 of the TPA. That provision only binds the Crown in right of the States and Territories where the Crown carries on a business, either directly or through an authority such as PAWA. Justice John Mansfield held that in refusing access to its infrastructure PAWA was not relevantly carrying on a business, so section 46 did not apply. He held that Gasgo's conduct was also not subject to section 46 because the company enjoyed Crown immunity because the NT Government's interests would be prejudiced if Gasgo was precluded from exercising its pre-emptive rights. The Full Court of the Federal Court, by majority, upheld the decision.

The High Court held that PAWA's conduct was within the course of carrying on a business pursuant to section 2B of the TPA. PAWA denied access to its infrastructure, not because of a lack of capacity or technical difficulty or safety, but simply to protect its electricity sales revenue. The Court held that PAWA's decision to refuse access contravened section 46 of the TPA. Its decision had the purpose of excluding NT Power from the retail market. That purpose could not have been achieved but for its power in the transmission and distribution markets where PAWA faced no competition. The Court held that Gasgo did not derive immunity from the Crown because it was not part of the NT Government. Its conduct was therefore open to scrutiny under section 46.

The Court, by a 4-1 majority, allowed the appeal and ordered that the proceedings be returned to Justice Mansfield to determine the section 46 claim against Gasgo and to decide what remedies should be granted to NT Power in relation to PAWA's conduct.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*