

Train driven through rights

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Treasurer Wayne Swan has added his own voice in support of a High Court decision requiring BHP Billiton to provide rival iron ore miner Fortescue Metals Group with access to its Pilbara rail lines. This is contrary to the position the Australian Labor Party took to the last election and constitutes a staging post in a 15-year march through private property rights.

These rights are the key to ensuring efficiency in private enterprise economies. They embody owners' abilities to do what they please with their property, and to exclude others from access to it.

This exclusivity provides the incentive to save and invest in an asset. It allows an owner flexibility to use his assets without having to negotiate and seek permission. Private property rights also prevent free riding, where users avoid paying the full costs, which is endemic in socialised systems.

If these decisions on the Pilbara railways were to apply to assets in general, then many would be cheering them as sounding the death knell of the capitalist system. Owners' sole rights to use their property would be substituted by the state requiring that it be shared and setting the fee for such sharing.

The basis for the decision goes back to the 1993 Hilmer report on national competition policy. Though paving the way for reform in opening up government monopolies, or "essential facilities", to competition, Hilmer also brought non-government within the net. Recognising this could deter private investment, Hilmer excluded "production processes" from within the scope of monopoly assets that must be made available to all parties. This recognised that new production facilities could always be built to challenge a monopoly. The subsequent legislation was Part IIIA of the Trade Practices Act.

The Pilbara case has some way to go before BHP is forced to allow Fortescue and others to use its rail lines. Further challenges to the High Court and the Trade Practices Tribunal will follow but, if finally allowed to stand, the government's approach sets a precedent with enormous implications.

Applying the case to a car assembly line, which is itself a transport facility, we have the equivalent of a rival car manufacturer seeking access to the Toyota plant. Such an application would be ruled out only because that facility is defined as a manufacturing plant. But this is an arbitrary distinction and, indeed, the National

Competition Council has argued that the exemption for manufacturing facilities should be revisited.

Even with that exemption, there are many areas of business that appear to be caught up in the socialisation net that the High Court decision reveals. These include other rail lines such as BHP's own Hay Point coal line in Queensland. This is integrated with BHP's mining and port facilities and as such has demonstrated advantages over the open access regimes in other rail-port systems. Also in the net are gas pipelines and facilities such as private hospitals, theatres or sports stadiums.

Above all the decision has implications for telecom facilities. In this respect, it confirms the wisdom of Telstra in refusing to build its fibre optic network without assurances that it would not be subject to Australian Competition and Consumer Commission regulatory seizure.

The fact is that Australia's definition of an essential facility under the Trade Practices Act is too wide. The US, for example, does not allow access to be required just because it is "uneconomical" to

develop another facility. The present legal framework is the outcome of faulty analyses on the part of policymakers anxious to ensure access to facilities is not restricted by excessive business rivalry.

But this has created a new form of investment risk. Firms will now be uncertain whether their facilities are to be opened to rival businesses on terms determined by a regulatory agency. And they will have an incentive to hold off making investment decisions, hoping that a rival will move first and incur the risk of failure.

The adverse situation was created by government legislation. It will require legislation to restore the encouragement to investment brought by private property rights.

Now, more than ever, we need to avoid measures that create additional investment risks that will hamper private provision of infrastructure.

The Treasurer and his advisers are yet to recognise the magnitude of the deterrence to investment they have created.

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- > [July](#)
- > [June](#)
- > [May](#)
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- > [March](#)
- > [February](#)
- > [January](#)

[2013](#)

- > [December](#)
- > [November](#)
- > [October](#)
- > [September](#)
- > [August](#)
- > [July](#)
- > [June](#)
- > [May](#)
- > [April](#)
- > [March](#)
- > [February](#)
- > [January](#)

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- > [December](#)
- > [November](#)
- > [October](#)
- > [September](#)
- > [August](#)

- > [July](#)
- > [June](#)
- > [May](#)
- > [April](#)
- > [March](#)
- > [February](#)
- > [January](#)

- [2011](#)
- [2010](#)
- [2009](#)
- [2008](#)
- [2007](#)
- [2006](#)
- [2005](#)
- [2004](#)
- [2003](#)
- [2002](#)
- [2001](#)
- [2000](#)
- [1999](#)
- [1998](#)
- [1997](#)
- [1996](#)

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- [Events](#)
- [Publications](#)
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