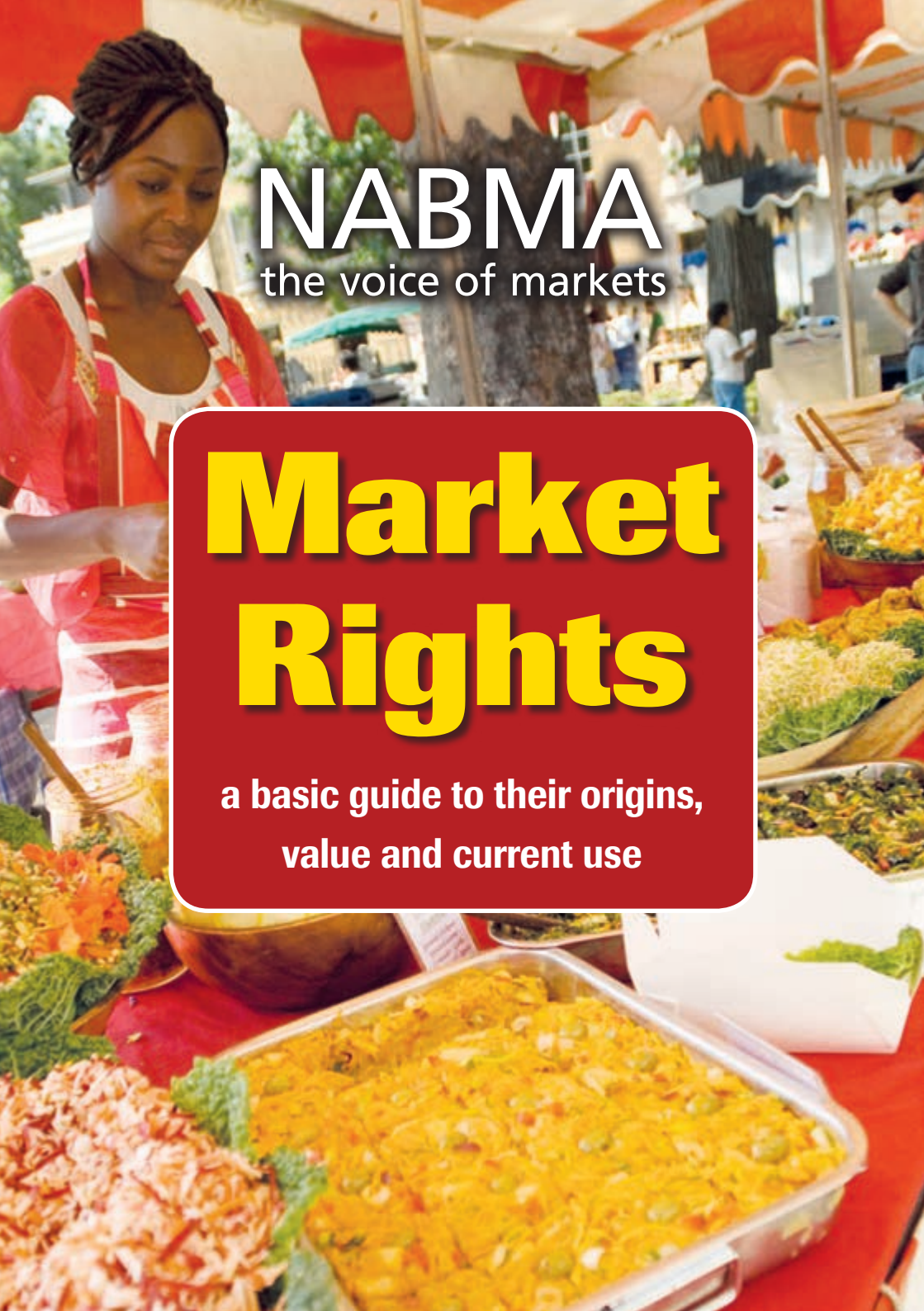

NABMA

the voice of markets

Market Rights

a basic guide to their origins, value and current use

Introduction

Market rights have existed for many hundreds of years. They provide an opportunity for controlling other markets, often described as rival markets, which do not enjoy the benefit of market rights. You can only make use of market rights if you currently operate or license a market but it is important to mention that market rights should not be used in an arbitrary or dictatorial way. They should be an important part of a markets policy ensuring that the market offer applicable in a particular area accords with the requirements of that area. This publication provides a basic summary of the main issues relating to market rights and will provide the reader with an appreciation of what needs to be done to maintain the status of these rights.

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What are Market Rights?

The legal term is an incorporeal hereditament but more commonly referred to a franchise which not only authorises a market to be held but gives the owner of the right the ability to prevent other potential market operators from interfering with the franchise. An incorporeal hereditament is a right derived from property and therefore a market franchise can be the subject of sale or lease. In some instances being a very valuable right depending on the scale of the market operation. Many local authorities hold market franchises by virtue of local and public legislation and as a local authority is created by statute it can only do those things which statute empowers. However, there is no reason why, subject to the relevant procedures, a local authority cannot arrange for the discharge of its market franchise by another person or organisation. We are seeing this happen in many places where local authorities are looking at different management arrangements.

What form do market franchises take?

The oldest form of market franchises are normally Royal Charters or Letters Patent. Some markets claim Royal Charters going back one thousand years. Sometimes the market operator might not have the relevant documentary evidence to prove the existence of market rights. However there may be evidence that the market has been held from time immemorial, possibly through a history of the area, and in such circumstances the market is said to have the benefit of market rights by virtue of the legal maxim of prescription. The concept of lost modern grant, where there is evidence that at some time a market franchise right existed, can also be brought forward to argue the existence of market rights. Custom and practice, provided the relevant evidence can be shown, are other ways in which market rights can be established. Legislation is of a more recent origin. In the early 20th century many large towns and cities enacted local legislation relating to various council services and invariably this legislation encompassed elements of markets management. Some of this legislation remains in force today. Currently the public general legislation relating to markets is found in Part III of the Food Act of 1984. This is the modern statutory code relating to markets. It is vitally important, if a market operator wants to assert their market powers, that they are aware of the source of those powers, and can readily provide details. In the case of a local authority it is important to have a resolution setting out the current market arrangements and the powers under which the markets are held. Sometimes it is necessary to combine one or more sources of market franchise rights to provide comprehensive coverage for the market. In a situation, for example, where a Royal Charter gives right to hold a market on a particular day then in order for a market to be held on other days it might be necessary to apply the provisions of Part III of the Food Act of 1984.

Are all market franchise rights of equal value?

Given the diverse nature of market franchise rights it is important to assess whether they are all of equal value. It was felt for many years that Royal Charters had supremacy over other market franchise rights but in the case of East Lindsey District Council v Hamilton (1984), it was accepted by the Court of Appeal that a market created under legislation enjoys all the same benefits as a market created under Royal Charter unless there is some specific provision within the legislation to the contrary. The only significant restriction is found in Section 50 (3) of Part III of the Food Act 1984 which states, inter alia, that "a local authority shall not be regarded as enjoying any rights, powers or privileges within another local authority's area by reason only of the fact they maintain within their own area a market which has been established (under Section 50) for an earlier enactment". These provisions, are of limited application, but might arise, for example, in a situation where a District Council and a Parish Council, operating in the same administrative area, both seek to establish markets under the Provisions of Section 50 of Part III of the Food Act 1984.

What is the six and two-third miles rule?

This rule is at the heart of the law relating to market rights. The six and two-third miles requirement goes back to the Middle Ages when it was regarded that a reasonable day's journey consists of twenty miles with the day being divided into three parts. The first part in the morning to be given to going to the market; the second part to be given to buying and selling and the third part is left for returning home. The six and two-third miles are measured in a straight line (Newcastle-Upon-Tyne City Council v Noble 1991). Additionally the six and two-third miles rule is not limited to local authority boundaries (Halton Borough Council v Cawley 1985). The six and two thirds extends from the boundary of the market operated under the market rights but the distance can be extended by licensing a further market to be held (Leeds City Council v Watkins & Whiteley 2003).

How are market rights viewed?

There has been a considerable amount of opposition to the continued existence of market rights. Members of the judiciary have called for their repeal on occasions referring to "archaic" rules which have no place in current law. In the early 1990s the Government included provisions in the Deregulation and Contracting Out Bill to remove market franchise rights from local authorities. However NABMA secured the removal of the provisions from the Bill. Subsequently there was a further attack on market franchise rights through a number of cases which sought to argue that such rights were in contravention of European legislation. The most recent of these cases, where the issues were explored in some detail, was Leeds City Council v Watkins & Whiteley (2003). In that case, as in all the others, the European arguments were rejected. Following the Leeds case the European dimension came under further review as a result of the European Services Directive 2006/213. The Government argued that it was necessary to examine various legislations, including Part III of the Food Act 1984, to ensure that they were compliant with the Directive. While NABMA accepts that the Directive has implications for market trading, it does not accept that the Directive is relevant to market rights. However, in order to avoid further conflict on the exercise of market franchise rights, NABMA urges its members to operate against the background of a markets policy which sets out the position on markets, the process for applying to hold a market, and criteria against which a decision will be made.

What do market rights control?

Essentially market rights can extend to any rival market. This means a market held within the six and two-third miles protection area which does not enjoy the benefit of its own market rights. A rival market is defined in basic terms as a "concourse of buyers and sellers" (Downshire v O'Brien 1887) and this description applies to Car Boot Sales, Farmers' Markets, Table Top Sales, French / Italian Markets, Christmas Markets, Antique Fayres, and other Specialist Markets. While some market activities will obviously fall under the scope of market rights others might need further investigation before a final decision is made. Sometimes it might be argued that the event is only open to members and that the public are not admitted. On other occasions it might be argued that the security of tenure given to traders means that the event is outside the normal definition of a market. It might also be argued that the goods being sold are not goods that are normally obtained from a regular market. It is important that proper enquiries are carried out to be clear about the status of the rival market.

What do you need to demonstrate?

The normal rule is that a regular market is automatically entitled to protection if a rival market is held on the same day (Stoke-on-Trent City Council v J Wass Limited 1989). Where a rival market is held on a different day then it is necessary to demonstrate anticipated loss or actual loss if the matter goes to a full trial (Leicester City Council v Maby 1972). It is also important, where action is to be taken, that there is no undue delay. The normal relief for action against a rival market is an injunction but this is a discretionary remedy and if there has been undue delay in taking action then there is a prospect that the application will be refused. Having regard to what was mentioned earlier about the European dimension NABMA is of the view that its members cannot rely solely on the automatic relief in respect of rival markets. It is necessary to support the existence of market franchise rights with a regulatory procedure (Leeds City Council v Watkins & Whiteley 2003) and this regulatory procedure should be encompassed within a market policy setting out the way in which the markets offer is to be delivered and using a licensing policy to deal with the balance, frequency and quality of market events in the area. By acting in this way, the owner of the market rights is seen to be adopting a reasoned and measured approach to the holding of other markets.

Does a markets policy have to apply to all rival markets?

Rival markets come in different shapes and sizes. Some are organised for charitable purposes and others are commercial in nature. Different procedures can be adopted in respect of different market events. It may be appropriate to apply a "light touch" policy to small scale charitable events. Indeed such events may be outside the scope of any markets policy. Larger commercial events may merit further scrutiny and a more structured approach. However, it is important that all market activities are covered by the policy. If, therefore, a local authority holds markets and another department or partner of the local authority wants to organise market events, then that department or partner should be under the same scrutiny as a private individual or organisation seeking to establish a rival market. It was made clear in the Leeds case that the standards applied to rival markets outside the control of Leeds Council are entitled to rely on the Council to apply the same standards to their own market events. In terms of charging a fee for the grant of the market licence, this is a matter for the market franchise owner. Some operate on a negotiated fee while others provide a fee per pitch / stall.

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