

A. Objectives of unilateral conduct laws

1. With regard to your jurisdictions' unilateral conduct rules – eg. rules concerning the prohibition of abuse of dominance or monopolisation – please state the objectives of these rules (eg. consumer welfare, efficiency, protecting the competitive process), and identify the source from the following, as applicable:

- a. Constitution
- b. Statutes
- c. Regulations
- d. Agency enforcement policy (eg. guidelines, speeches)
- e. Case law
- f. Other (please specify)

The Australian Constitution

Under the Australian Constitution, the Commonwealth Government may only make laws with respect to the heads of power listed in section 51 of the Constitution. There is no head of power specifically relating to competition or monopolisation, and consequently, the Commonwealth's competition legislation, the *Trade Practices Act 1974*, was enacted in reliance on the following:

- the trade and commerce power (section 51(i));
- the postal, telegraphic and telephonic power (section 51(v));
- the corporations power (section 51(xx)).

The Trade Practices Act 1974

The *Trade Practices Act 1974 (TPA)* is Australia's national competition and consumer protection legislation. The purpose of the legislation is stated in section 2 of the TPA, which provides that:

The object of this Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.

In order to achieve the objective set out in section 2, the TPA contains a range of provisions that prohibit anti-competitive and unconscionable conduct and promote consumer protection.

The TPA's prohibitions against anti-competitive conduct are contained within Part IV of the Act. The prohibitions cover specific types of conduct that are likely to damage competitive and fair market mechanisms, including:

- Anti-competitive contracts, arrangements or understandings;
- Misuse of market power;
- Exclusive dealing arrangements;
- Resale price maintenance;
- Collective boycotts;

- Mergers/acquisitions that are likely to result in a substantial lessening of competition.

The Competition Code

As a consequence of the limitations of the Australian Constitution, the provisions of the TPA generally apply to the activities of corporations, but not to the activities of unincorporated entities. However, in 1995, the Australian Federal, State and Territory governments agreed to a National Competition Policy (NCP), the purpose of which is to promote competition within all Australian sectors. As part of the NCP reforms, the operation of Part IV of the TPA was extended to all businesses within Australia. This was achieved through the adoption of the Competition Code by the State and Territory legislatures. The term “Competition Code” refers to:

- a. The Schedule version of Part IV of the TPA, which replicates the provisions of Part IV, but refers to “persons” rather than “corporations”;
- b. The remaining provisions of the TPA (except sections 2A, 5, 6 and 172), so far as they would relate to the Schedule version if the Schedule version were substituted for Part IV;
- c. The regulations under the TPA, so far as they relate to any provision covered by paragraph (a) or (b) above.

As a result of the adoption of the Competition Code by the State and Territory legislatures, the restrictive trade practices provisions of the TPA have an economy-wide application.

Misuse of market power under Australian law

Misuse of market power is prohibited under section 46 of the TPA, which states that:

- (1) 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.

Section 46, which is underpinned by the TPA’s general objective as defined in section 2, is designed to address the situation where a corporation with substantial market power uses that power to damage a competitor or potential competitor and thereby damages the process of competition. While section 46 is focussed on market conduct directed at competitors or potential competitors, it is not about protecting those competitors as an end in itself. Although section 46 does provide a degree of protection to firms from abuses of market power, it is important not to confuse the protection of competition with the protection of individual competitors.

Judicial consideration of section 46

The High Court of Australia (the highest court in the Australian judicial system) has considered section 46 of the TPA on several occasions. Relevant cases include:

- *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd*¹
- *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd*²
- *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission*³
- *Rural Press Ltd v Australian Competition and Consumer Commission*⁴

Some judicial statements regarding the purpose of section 46 of the TPA are provided below:

- In *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd*, Mason CJ and Wilson J stated that:

[T]he object of s 46 is to protect the interests of consumers, the operation of the section being predicated on the assumption that competition is a means to that end. 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. Competitors almost always try to “injure” each other in this way. This competition has never been a tort ... and these injuries are an inevitable consequence of the competition s 46 is designed to foster.⁵

In the same case, Deane J stated that:

[T]he essential notions with which s 46 is concerned and the objective which the section is designed to achieve are economic and not moral ones. The notions are those of markets, market power, competitors in a market and competition. The objective is the protection and advancement of a competitive environment and competitive conduct ...⁶

- In *Melway Publishing v Robert Hicks*, Gleeson CJ, Gummow, Hayne and Callinan JJ stated that:

Section 46 aims to promote competition, not the private interests of particular persons or corporations.⁷

- In *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission*, McHugh J stated the following:

Section 2 of the Act declares that its object “is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection”. The Parliament has determined that it is in the interests of consumers that firms be required to compete because competition results in lower prices, better goods and services and increased efficiency. In *Queensland Wire*, Mason CJ and Wilson J said that the object of s 46 — the protection of consumer interests — is to be achieved through the promotion of competition, even though competition by its nature is deliberate and ruthless and competitors injure each other by seeking to take sales from one another. A rational business firm seeks to maximise

¹ (1989) 83 ALR 577.

² (2001) 178 ALR 253.

³ (2003) 195 ALR 609.

⁴ (2003) 203 ALR 217.

⁵ (1989) 83 ALR 577 at 585.

⁶ *Ibid* at 587.

⁷ (2001) 178 ALR 253 at 258.

profit and to increase its share of the market. However, the very nature of such conduct is detrimental to other competitors in the market and may cause some of those competitors to leave the market.⁸

Other statements regarding the objective of Part IV and section 46 of the TPA

The Second Reading Speech for the *Trade Practices Revision Bill 1986* contains the following statement in relation to section 46:

A competitive economy requires an appropriate mix of efficient businesses, both large and small. Whilst large enterprises may frequently have advantages of economies of scale, there are many occasions when large size does not of itself mean greater efficiency. However, a large enterprise may be able to exercise enormous market power, either as buyer or seller, to the detriment of its competitors and the competitive process. Accordingly an effective provision controlling misuse of market power is most important to ensure that small businesses are given a measure of protection from the predatory actions of powerful competitors.

The Dawson Committee, which conducted a review into the competition provisions of the TPA in 2002-3, expressed the following views about Part IV of the TPA:

Part IV seeks to prevent conduct that may lessen competition, not to protect less competitive businesses. The distinction is an important one. However, some of the submissions made to the Committee in support of changes to Part IV appear to conflate these two objectives.⁹

...

[C]oncentrated markets should attract scrutiny to ensure that competition is maintained, but the purpose of the competition provisions of the Act is to promote and protect the competitive process rather than to protect individual competitors. The competition provisions should not be seen as a device to achieve social outcomes unrelated to the encouragement of competition. As a matter of policy those outcomes may be regarded as desirable, but the policy will not be competition policy. Nor should the competition provisions seek the preservation of particular businesses or of a particular class of business that is unable to withstand competitive forces or may fail for other reasons. Those are matters which may legitimately be the subject of an industry policy, but that is not a policy which is to be found in the competition provisions in Part IV of the Act.¹⁰

2. Are non-competition influences (such as promotion of industrial policy or distributive welfare) incorporated in these objectives? Please describe any such influences.

The provisions of Part IV of the TPA are designed to promote competition and fair trading, and are not underpinned by non-competition influences. It should be noted, however, that the ACCC may authorise anti-competitive conduct if it is satisfied that the benefit to the public from the conduct outweighs the anti-competitive detriments arising from the conduct.¹¹ Non-competition influences may be considered by the ACCC in deciding whether or not to grant authorisation. Importantly though, the

⁸ (2003) 195 ALR 609 at 663.

⁹ Dawson Committee, *Review of the Competition Provisions of the Trade Practices Act*, January 2003, page 29.

¹⁰ *Ibid*, pages 36-37.

¹¹ *Trade Practices Act 1974*, section 88.

ACCC does not have the power to authorise conduct that may breach section 46 of the TPA.

3. If there are multiple objectives, how are these balanced and reconciled?

Part IV of the TPA is designed to promote competition and fair trading. Section 46 achieves both of these objectives by protecting smaller and more vulnerable firms from larger rival firms that engage in conduct designed to lessen competition. Therefore, the competition and fair trading objectives are consistent with one another, and do not need to be balanced or reconciled in the context of section 46 of the TPA.

4. How has your jurisdiction balanced the risks associated with over-deterrence (detering efficient, pro-competitive conduct as a result of excessive intervention) with the risks associated with under-deterrence (permitting anti-competitive conduct as a result of too little enforcement) in choosing its objectives for unilateral conduct rules? Is this choice affected by the nature of your economy?

In formulating section 46 of the TPA, an attempt has been made to balance the risks associated with over-deterrence against the risks associated with under-deterrence. As noted above, section 46 prohibits firms with substantial market power from taking advantage of that power for one of three proscribed **purposes** – substantially damaging a competitor, preventing a person from entering the market, or deterring competitive conduct. Section 46 does not, however, proscribe conduct by reference to the **effect** that it may have on competition. In this way, “purpose” is used as a means to distinguish between pro-competitive and anti-competitive conduct.

In response to suggestions that an effects test be introduced into section 46, the Dawson Committee made the following statement:

Not only would the introduction of an effects test alter the character of section 46, but it would also render purpose ineffective as a means of distinguishing between legitimate (pro-competitive) and illegitimate (anti-competitive) behaviour. The section is aimed against anti-competitive monopolistic practices, not competition, even aggressive competition. The distinction is sometimes a difficult one, but it is one that section 46 seeks to maintain and in doing so seeks to balance the risk of deterring efficient market conduct against the risk of allowing conduct that would damage competition and reduce efficiency.¹²

...

The introduction of an effects test would be likely to extend the application of section 46 to legitimate business conduct and discourage competition.¹³

It should also be noted that section 46 does not:

- Prohibit monopoly or market power per se;
- Prohibit corporations from acquiring a position of monopoly or substantial market power by normal commercial means;

¹² Dawson Committee, *Review of the Competition Provisions of the Trade Practices Act*, January 2003, page 80.

¹³ *Ibid*, page 81.

- Prohibit corporations from taking actions which “injure” competitors.

Therefore, section 46 is designed to allow efficient, pro-competitive conduct to occur, while prohibiting actions that are designed to decrease the level of competition in the marketplace.

5. With regard to exemptions or exceptions to your laws specific to unilateral conduct (for example, for regulated sectors, government entities, purchasers, or exercise of intellectual property rights), please identify the exemption or exception and explain whether and how its goals differ from the objectives of your general unilateral conduct law and how the jurisdiction balances or reconciles these factors.

As mentioned previously, the Australian Federal, State and Territory governments agreed to a National Competition Policy (NCP) in 1995. The purpose of the NCP is to promote and enhance competition within all Australian sectors.

The NCP is underpinned by three intergovernmental agreements – the Competition Principles Agreement¹⁴, the Conduct Code Agreement¹⁵ and the Agreement to Implement the National Competition Policy and Related Reforms¹⁶. These agreements address several key areas, including:

- The extension of the scope of the TPA to unincorporated businesses and State and Territory government businesses.
- The restructure of public sector monopolies.
- The review of all legislation which restricts competition.
- The provision of third party access to nationally significant infrastructure.

While the NCP reflects Australia’s commitment to the promotion of competition, Australia also recognises that competition may not always be in the best interests of the public. Consequently, there are some specific exceptions regarding the provisions of Part IV of the TPA.

Section 51(1) of the TPA provides an exemption for conduct that is specifically authorised or approved by a Commonwealth or State Act, or a Territory law, or any

¹⁴ The Competition Principles Agreement:

- Sets out obligations relating to prices oversight of State and Territory government business enterprises, competitive neutrality, structural reform of public monopolies and legislation review and reform.
- Applies the reforms to local government.
- Sets out a non-exhaustive list of public interest factors that governments should consider when assessing the costs and benefits of a particular policy or course of action.
- Establishes a third party access regime in relation to essential/significant infrastructure.

¹⁵ The Conduct Code Agreement:

- Commits the State and Territory governments to extending the TPA’s prohibitions against anti-competitive to all businesses within Australia.

¹⁶ The Agreement to Implement the National Competition Policy and Related Reforms:

- Sets out reform obligations relating to national markets in electricity and gas, water reform and national road transport regulations.

regulation made under any such Act.¹⁷ In this context, it is important to note that for legislation which maintains or establishes a restriction on competition, it is necessary to show that the benefits to the community outweigh the costs, and that the objectives of the legislation can only be achieved by restricting competition. This analysis generally forms part of the Regulation Impact Statement (RIS) process, which is undertaken in the course of policy development in order to achieve ‘best practice’ regulatory design and implementation in Australia.

Section 51 of the TPA also provides exemptions in relation to:

- Industrial agreements relating to conditions of employment.
- A provision of a contract for the sale of a business or shares in a corporation solely for the protection of the purchaser in respect of the goodwill of the business.
- Compliance with standards prepared or approved by Standards Australia International Limited.
- Partnership agreements between individuals.
- Export agreements (if full particulars are notified to the ACCC within 14 days of being made).
- Consumer boycotts.
- Certain arrangements relating to patents, copyrights, trade marks or designs.

An additional exception in relation to Part IV is provided by section 88 of the TPA, which allows the ACCC to grant authorisations for anti-competitive conduct on public interest grounds. Authorisations are generally granted for a specific time period, and may be subject to conditions imposed by the ACCC. Authorisations may not be granted in relation to section 46 of the TPA.

6. If the objectives of, or exemptions or exceptions to, your unilateral conduct rules are influenced by the nature of your economy (eg. small, transition, or recently-liberalized), please explain.

The Australian economy is relatively small, and a number of its sectors are characterised by significant levels of market concentration. As a consequence, the TPA’s prohibitions against misuse of market power are particularly important for ensuring that competition exists within Australian markets.¹⁸

7. If the objectives of, or exemptions or exceptions to, your unilateral conduct rules have been substantially reviewed or revised, please describe any changes and the reason.

Section 46

Since the TPA was enacted in 1974, section 46 has been reviewed and amended on numerous occasions. This is discussed in detail in the answer to Question 9, Part A.

¹⁷ ACCC is required under section 171 of the TPA to report annually to Parliament on the use and effect of these exceptions.

¹⁸ A statement to this effect is included in the Dawson Committee’s report (*Review of the Competition Provisions of the Trade Practices Act*, January 2003).

Section 51

Section 51 of the TPA has been amended on several occasions. Significant changes were made following the adoption of the National Competition Policy, in order to restrict the scope of section 51(1). For example:

- Section 51(1) was amended in 1995 to provide that conduct engaged in pursuant to Commonwealth, State or Territory legislation is only exempt from the operation of Part IV of the TPA if it is specified in, and specifically authorised by, the relevant piece of legislation.
- Section 51(1C) was inserted into the TPA in 1995 to provide some specific limitations on the operation of section 51(1). Section 51(1C) provides, amongst other things, that:
 - In order for something to be regarded as “specifically authorised” for the purposes of section 51(1), the authorising provision must specifically refer to the TPA.
 - Regulations referred to in section 51(1) do not provide an exemption in respect of anti-competitive conduct if the conduct occurs more than 2 years after the regulations come into operation.

8. Are there institutional features (eg. the possibility for a ministry to overrule competition agency decisions or the requirement the competition agency consult with other governmental agencies) that affect your agency’s ability to achieve the objectives of the unilateral conduct rules? If so, please explain.

There are no institutional features that affect the ACCC’s ability to achieve the objectives of Australia’s unilateral conduct rules.

The ACCC is an independent statutory authority with a Chairman, a Deputy Chair, five full-time Commissioners, two ex-officio members and a Chief Executive Officer. Appointments to the ACCC involve participation by Commonwealth, State and Territory governments.

The ACCC members are collectively referred to as “the Commission”, and they meet regularly, usually weekly, in order to make decisions on matters investigated by ACCC staff. All decisions to institute proceedings for breach of the TPA are made by the Commission, but it is the responsibility of the Australian courts to determine whether the TPA has been breached in any given case. The Commission does not have the power to determine whether a breach of the TPA has occurred.

The Commission’s decisions cannot be overruled by the Minister, and the Commission is not required to consult with other government agencies in making its decisions.

9. Please describe any difficulties that your jurisdiction has experienced with its objectives for unilateral conduct rules. Based on your experience, what, if any,

suggestions (including selection of other objectives) would you have for your or other jurisdictions, and why?

Australia has not experienced difficulties with the objectives underlying section 46 of the TPA. However, section 46 has been analysed, reviewed and amended on a number of occasions, in order to ensure that the words of the provision are sufficient to achieve its objectives. Some of the more important reviews and amendments are discussed below.

The Swanson Committee

In its original form, section 46 did not contain the phrase “for the purpose of”. In 1976, the Swanson Committee observed that it was unclear whether section 46 was directed at the purpose, or the effects, of the relevant conduct. As a result, section 46 was amended in 1977, and its operation was confined to conduct engaged in for a proscribed purpose.

1984 Green Paper – The Trade Practices Act: Proposals for change

In its original form, section 46 was headed “Monopolisation”, and it prohibited conduct engaged in by “a corporation in a position substantially to control a market”. In 1984, the authors of a Green Paper entitled *The Trade Practices Act: Proposals for Change* questioned the effectiveness of section 46, arguing that the requirement for a corporation to be “in a position substantially to control a market” was too rigorous, and that it only applied to several powerful corporations within Australia¹⁹. In 1986, section 46 was amended in order to apply to corporations with a “substantial degree of power in a market”. In addition, the heading of section 46 was changed from “Monopolisation” to “Misuse of Market Power”. These amendments were designed to lower the threshold for the application of section 46.

The Dawson Committee

The operation of section 46 was recently analysed by the Dawson Committee, which conducted a review into the competition provisions of the TPA, and reported to the Federal Government in January 2003.²⁰ In relation to section 46, the Committee focussed on the question of whether an effects test should be introduced into the provision. The Committee ultimately concluded that no amendment should be made to section 46, stating that the introduction of an effects test would have a detrimental impact upon normal competitive behaviour.

In February 2003, one month after the Dawson Committee reported to the Federal Government, the High Court of Australia handed down its decision in *Boral Besser Masonry Pty Ltd v Australian Competition and Consumer Commission*²¹. The ACCC argued that Boral had breached section 46 by engaging in predatory pricing, but the High Court ultimately concluded that Boral had not contravened the TPA’s prohibition against misuse of market power.

¹⁹ G JEvans, R Willis and B Cohen, *The Trade Practices Act: Proposals for change*, February 1984.

²⁰ Dawson Committee, *Review of the Competition Provisions of the Trade Practices Act*, January 2003.

²¹ (2003) 195 ALR 609.

Following the decision in *Boral*, the Chairman of the Dawson Committee (Sir Daryl Dawson) reconsidered the Committee's report. Despite the concerns raised about the implications of the *Boral* case, Sir Dawson reaffirmed the Committee's recommendations in relation to section 46.

The Senate Economics References Committee

In March 2004, the Senate Economic References Committee released a report entitled *The effectiveness of the Trade Practices Act 1974 in protecting small business*. The report contains a review of the prohibition against misuse of market power, with the decision in *Boral* forming a "significant backdrop" to the inquiry.

The Majority Report of the Committee ultimately concluded that section 46 should be amended in several respects in order to clarify its operation in light of the decision in *Boral*. The recommendations made in the Majority Report regarding section 46 are as follows²²:

Recommendation 1

The Committee recommends that the Act be amended to state that the threshold of 'a substantial degree of power in a market' is lower than the former threshold of substantial control; and to include a declaratory provision outlining matters to be considered by the courts for the purposes of determining whether a company has a substantial degree of power in a market.

Recommendation 2

The Committee recommends that the Act be amended to include a declaratory provision outlining the elements of 'take advantage' for the purposes of s.46(1).

Recommendation 3

The Committee recommends that the Act be amended to provide that, without limiting the generality of s.46, in determining whether a corporation has breached s.46, the courts may have regard to:

- the capacity of the corporation to sell a good or service below its variable cost.

The Committee recommends that the Act be amended to state that:

- where the form of proscribed behaviour alleged under s.46(1) is predatory pricing, it is not necessary to demonstrate a capacity to subsequently recoup the losses experienced as a result of that predatory pricing strategy.

Recommendation 4

The Committee recommends that s.46 of the Act be amended to state that, in determining whether or not a corporation has a substantial degree of power in a market for the purpose of s.46(1), the court may have regard to whether the corporation has substantial financial power.

'Financial power' should be defined in terms of access to financial, technical and business resources.

²² See: Senate Economic References Committee, *The effectiveness of the Trade Practices Act 1974 in protecting small business*, March 2004, pages 7-28.

Recommendation 5

The Committee recommends that s.46 be amended to state that a corporation which has a substantial degree of power in a market shall not take advantage of that power, in that or any other market, for any proscribed purpose in relation to that or any other market.

Recommendation 6

The Committee recommends that s.46 be amended to clarify that a company may be considered to have obtained a substantial degree of market power by virtue of its ability to act in concert (whether as a result of a formal agreement or understanding, or otherwise) with another company.

The Government Senators' Report in relation to the inquiry contains the following statements regarding section 46:

1. Government Senators are persuaded that there is a clear case for legislative reform of s.46 of the *Trade Practices Act 1974*. In particular, they are of the view that recent judicial decisions, in particular the decision of the High Court in *ACCC v Boral*, have narrowed the already limited operation of s.46, and thereby restricted to an undesirable degree its capacity to deal with anticompetitive conduct, in particular the difficult issue of 'predatory pricing'. Therefore, Government Senators agree that it is desirable to reform the section to ensure that the Act achieves its core objective of promoting competition.
2. Government Senators accept that the purpose of s.46 is to protect competition, not competitors. It is not the purpose of the Act, nor would it be good policy, to protect any particular section of the economy, or to create artificial distortions in markets by sustaining uncompetitive firms. In fact, to do so would defeat the very object of the Act. The Act promotes competition by protecting markets from anticompetitive conduct, not by protecting uncompetitive firms.
3. Nevertheless, it is axiomatic that unless there are competitors there will be no competition. By the very fact of prohibiting anticompetitive conduct, and thereby protecting competition, the operation of the Act has the effect of giving protection to genuine competitors. If the Act works effectively to achieve its objective of protecting markets from anticompetitive conduct, the consequence of its successful operation will be to protect firms which but for that anticompetitive conduct would be competitive.²³

In response to the recommendations that section 46 be amended, the Australian Government has said that²⁴:

- To assist the courts in their assessment of predatory pricing cases, section 46 should be amended:
 - To ensure that the courts may consider below cost pricing when determining whether a corporation has misused its market power. Costs are to be measured in a manner determined by the courts in each case and below cost pricing is not to be legally essential to a finding that a corporation has breached section 46.
 - So that a court may consider whether a corporation has a reasonable prospect or expectation of recoupment as a relevant factor when assessing whether a corporation has misused its market

²³ Ibid, page 81.

²⁴ See: *Australian Government Response to the Senate Inquiry into the Effectiveness of the Trade Practices Act 1974 in Protecting Small Business*.

power. Although a reasonable prospect of recoupment is not to be legally essential to a finding that a corporation has breached section 46, it often provides a good test of whether price-cutting is predatory.

- Section 46 should proscribe the leveraging of substantial market power from one market into another (ie. section 46 should be amended to state that a corporation which has a substantial degree of power in a market shall not take advantage of that power, in that or any other market, for any proscribed purpose in relation to that or any other market).
- Section 46 should be amended so that, in assessing whether a corporation has 'a substantial degree of power in a market', a court may take account of any market power the corporation has that results from contracts, arrangements or understandings with others.

Section 46 has not yet been amended to incorporate these changes.

B. Assessment of Dominance/Substantial Market Power

- 1. Please provide a brief description of single-firm dominance/substantial market power as defined in the provisions of your jurisdiction’s general competition law, relevant agency policy statements (eg. guidelines, speeches) and/or case law that pertain to unilateral conduct. As appropriate, please also explain whether and how your agency categorises different levels of dominance/substantial market power (eg. “super dominance”).**

“Substantial market power” under Australian law

As discussed in Part A, misuse of market power is prohibited under section 46 of the TPA, which provides that:

- (1) 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.

A “substantial degree of power in a market” is not defined in the TPA, but section 46(3) does provide that:

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.

The following judicial statements have been made in relation to “a substantial degree of power”:

- *Eastern Express Pty Ltd v General Newspapers Pty Ltd*²⁵:

For a corporation to have a substantial degree of market power it must have a considerable or large degree of such power. The difficulty lies, not in defining the word “substantial”, but in applying the concept of a substantial degree of market power to the circumstances of each case and in identifying whether the requisite degree of market power exists. This is a relative concept.²⁶

²⁵ (1992) 106 ALR 297.

²⁶ Ibid at 317.

- *Universal Music Australia Pty Ltd v Australian Competition and Consumer Commission*²⁷:

[I]t is necessary for a court considering a case brought under s 46 of the Act to determine, as a threshold point, whether the relevant corporation has a substantial degree of power in the relevant market. This requires attention to the whole of the evidence relating to the market and the conduct of its participants. It is not legitimate for a court to base a finding of substantial market power simply upon incidents of abuse of power in that market. Almost all participants in a market have a degree of power, which may on occasions be abused. The power of the abuser may or may not be substantial, within the meaning of s 46(1).²⁸

The following judicial statements have been made in relation to “market power”:

- *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd*²⁹:

Market power can be defined as the ability of a firm to raise prices above the supply cost without rivals taking away customers in due time, supply cost being the minimum cost an efficient firm would incur in producing the product ...³⁰

The term “market power” is ordinarily taken to be a reference to the power to raise price by restricting output in a sustainable manner. ... But market power has aspects other than influence upon the market price. It may be manifested by practices directed at excluding competition such as exclusive dealing, tying arrangements, predatory pricing or refusing to deal. ... The ability to engage persistently in these practices may be as indicative of market power as the ability to influence prices.³¹

- *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd*³²:

... market power means capacity to behave in a certain way (which might include setting prices, granting or refusing supply, arranging systems of distribution), persistently, free from the constraints of competition.³³

- *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission*³⁴:

The essence of power is the absence of constraint. Market power in a supplier is absence of constraint from the conduct of competitors or customers. This is reflected in the terms of s 46(3). Matters of degree are involved, but when a question of the degree of market power enjoyed by a supplier arises, the statute directs attention to the extent to which the conduct of the firm is constrained by the conduct of its competitors or its customers.³⁵

...

Power in a supplier ordinarily means the ability to put prices up, not down. But if a market is not competitive, and a firm puts prices down, seeking to eliminate a potential rival, in the

²⁷ (2003) 201 ALR 636.

²⁸ Ibid at 669.

²⁹ (1989) 83 ALR 577.

³⁰ Ibid at 583.

³¹ Ibid at 591.

³² (2001) 178 ALR 253.

³³ Ibid at 269.

³⁴ (2003) 195 ALR 609.

³⁵ Ibid at 632.

expectation that it will thereafter be in a position to raise prices without competitive constraint, its ability to act in that manner may reflect the existence of market power.³⁶

...

The concept of “market power” in s 46 shows that the section is not concerned with a one-second snapshot of economic activity. Market power can only be determined by examining what a firm is capable of doing over a reasonable period. Whether a firm has market power – whether it has the ability to act unconstrained by competition, whether it can raise prices above competitive levels – requires an examination of the existing structure and the likely structure of the market if competitors are removed or prices rise to supra-competitive levels.³⁷

As discussed in Question 9 of Part A, concerns were expressed regarding the majority judgments in *Boral*, because they appear to indicate that an absolute freedom from constraint must be established in order to show that a corporation has a “substantial degree of power”. Following *Boral*, the Full Federal Court in *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd*³⁸ applied a threshold test for “substantial degree of power” in a manner that appears consistent with the intention of the lower application threshold from the 1986 amendments. As Heerey and Sackville JJ observed in *Safeway*:

The argument in the present case proceeded on the basis that the amended version of s 46(1) is intended to lower the threshold test. In any event, it is clear that s 46(1) of the Act is not concerned only with a pure monopsony or a near monopsony.³⁹

Categorising different levels of “substantial market power”

The ACCC does not categorise different levels of “substantial market power”.

2. Under your general competition law governing unilateral conduct, at which stage(s) can your competition agency intervene against potentially abusive unilateral conduct?

- If dominance/substantial market power is present? **no**
- Acquisition of dominance/substantial market power? **yes**
- Creation of dominance/substantial market power? **no**
- Attempt to acquire dominance/substantial market power? **yes**
- Attempt to create dominance/substantial market power? **no**

Why did Australia choose these stages?

As discussed previously, the object of the TPA is to enhance the welfare of Australians through the promotion of competition and fair trading and the provision for consumer protection. Consequently, the TPA is drafted so as to prohibit anti-competitive conduct by corporations with substantial market power, rather than prohibiting the creation of substantial market power by normal commercial means. Section 50 of the TPA does, however, prohibit acquisitions that have or are likely to have the effect of substantially lessening competition. Therefore, the ACCC may

³⁶ Ibid at 635.

³⁷ Ibid at 672-673.

³⁸ (2003) 198 ALR 657.

³⁹ Ibid at 716.

intervene where there is an acquisition of substantial market power if the acquisition involves a breach of section 50.

3. Does your law contain or do you use a market share threshold at which you presume single-firm dominance/substantial market power and/or as a “safe harbour”?

The TPA does not contain, and the ACCC does not use, a market share threshold at which the presence or absence of substantial market power is presumed. Rather, the ACCC assesses whether a firm has substantial market power on a case-by-case basis, and takes a range of factors into account when doing so. A case in point involves the proceedings brought against Universal Music and Warner Music by the ACCC⁴⁰. In this matter, the ACCC argued that both corporations had a substantial degree of power in the wholesale market for recorded music in Australia, even though each company had a market share of less than 20%. At first instance, Hill J agreed with the ACCC, stating that:

In my view, depending upon context, it is possible that a particular record company or companies could have a degree of market power, notwithstanding that it or they each had less than 30% of market share.

...

While I accept that the question of market power is one of degree, there must come some point where the absence of market share does impact on the question of market power. I would find that it does at the 3% share level, whatever the situation may be at the level of around 15%.

...

Ultimately, as I have already indicated, I think the question of market power is not in an industry such as the present (it does differ from the normal case of industries with differentiated products, such as particular ranges of refrigerators) solely to be determined by market share. It is relevant to consider not merely the fact that there are differentiated products, albeit with sometimes a short lifetime in the charts, but also the commercial need for retailers, big and small to be able to access for sale to customers the whole catalogue of a record company, chart or non-chart, depending on the retailer's degree of specialisation and the music genre that the retailer sells.⁴¹

The Full Federal Court overturned Hill J's judgment in light of the decision in *Boral*. This is because when Hill J made his assessment as to whether Universal and Warner had a substantial degree of market power, he took their impugned conduct into account. This approach (ie. assessing a corporation's degree of market power by making reference to their impugned conduct) is inconsistent with the reasoning in *Boral*, where the majority judgments held that the question of whether a corporation has substantial market power is distinct from the question of whether the corporation abused their market power. As McHugh J stated in *Boral*:

⁴⁰ *Australian Competition and Consumer Commission v Universal Music Australia Pty Ltd* (2001) 201 ALR 502 (at first instance); *Universal Music Australia Pty Ltd v Australian Competition and Consumer Commission* (2003) 201 ALR 636 (on appeal to the Full Federal Court).

⁴¹ *Australian Competition and Consumer Commission v Universal Music Australia Pty Ltd* (2001) 201 ALR 502 at 587-588.

Section 46 of the Act poses four issues for determination. First, the court must identify the relevant market in which the conduct occurred. Second, the court must determine whether the alleged offender had a substantial degree of market power. Third, the court must determine whether the alleged offender has taken advantage of that market power. Finally, the alleged offender must have engaged in the conduct for one of the proscribed purposes. This is the way in which s 46 is structured, and that is the way courts should apply it.⁴²

While the Full Federal Court overturned Hill J's decision in *Universal Music*, the Court did not directly challenge Hill J's statements regarding the relationship between market share and market power. Furthermore, the Full Federal Court endorsed the notion that "the concept of substantiality underlying s 46 of the Act is a relative one".

4. Does your competition law enable the competition agency to intervene against unilateral conduct at a level below the dominance/substantial market power threshold?

No.

Under section 46, the ACCC may only intervene in matters where a corporation has a substantial degree of power in a market, and the corporation takes advantage of this market power for a proscribed purpose.

5. Does your jurisdiction's analysis of dominance/substantial market power first require that a relevant product and geographic market be defined?

Yes.

In practice, the ACCC will often define a relevant product and geographic market when first analysing a misuse of market power case. However, the ACCC is not required to do so as a matter of law.

6. Which of the following criteria do you use for the assessment of single-firm dominance/substantial market power?

- | | |
|--|------------|
| • Market share of the firm and its competitors? | yes |
| • Market position and market behaviour of competitors? | yes |
| • Durability of market power? | yes |
| • Barriers to entry or expansion? | yes |
| • Economies of scale and scope/network effects? | yes |
| • Buyer power? | yes |
| • Access to upstream markets/vertical integration? | yes |
| • Access to essential facilities? | yes |
| • Market maturity/vitality? | yes |
| • Financial resources of the firm and its competitors? | no |
| • Profits of the firm? | no |
| • High prices (at absolute or comparative level)? | yes |

⁴² *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission* (2003) 195 ALR 609 at 663-664.

7. Of the criteria that you use to assess single-firm dominance/substantial market power, which are the most important?

When determining whether a corporation has substantial market power, the ACCC makes its assessment on a case-by-case basis, and considers a wide range of factors. The importance of each criterion to the assessment of market power differs depending on the particular case under investigation.

8. Please explain how your authority evaluates each of the criteria that you use, and also how it weighs the different factors.

See response to Question 7, Part B.

The ACCC makes its assessment of substantial market power on a case-by-case basis, and does not have a fixed method for weighing up the different factors involved in its assessment.

9. How do you evaluate the competitive significance, if any, of intellectual property rights (patents, trademarks, copyrights, etc.) in assessing dominance/substantial market power?

The ACCC is able to take intellectual property rights in to consideration in assessing whether a corporation has substantial market power. Intellectual property rights are also relevant in determining the purpose of a corporation's conduct.

While section 51(3) excludes certain intellectual property arrangements from the operation of most of the provisions of Part IV, the prohibition against misuse of market power applies to all intellectual property arrangements.

Is intellectual property presumed to create dominance/substantial market power in your jurisdiction?

No.

10. Does the assessment of dominance/substantial market power differ in a small or isolated economy from the assessment in a large or integrated economy? For example, might dominance in small markets be presumed at lower (or higher) levels of market share than in other jurisdictions? Do free trade agreements alter the assessment of dominance/substantial market power? If so, please explain why. [NB: Jurisdictions that do not consider themselves "small" economies are welcome to skip this question.]

Australia is a relatively small economy with close economic ties to New Zealand. In recognition of this fact, section 46A was introduced into the TPA on 1 July 1990, in order to extend the prohibition against misuse of market power to companies involved in trans-Tasman trade. Section 46A provides that:

- (2) A corporation that has a substantial degree of market power in a trans-Tasman market must 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 an impact market; or
- (b) preventing the entry of a person into an impact market; or
- (c) deterring or preventing a person from engaging in competitive conduct in an impact market.

“Impact market” is defined in section 46A(1) to mean a market in Australia that is not a market exclusively for services.

“Trans-Tasman market” is defined in section 46A(1) to mean a market in Australia, New Zealand or Australia and New Zealand for goods or services.

Complementary legislation has been enacted in New Zealand (see section 36A of the *Commerce Act 1986*).

11. Please explain briefly the link between the definition and assessment of dominance/substantial market power in your jurisdiction and the objectives of your unilateral conduct laws.

There is no direct link between the definition and assessment of substantial market power, and the objectives of Australia’s unilateral conduct laws. However, the courts will apply and interpret section 46 with reference to the objective underlying the TPA. As McHugh J observed in the *Boral* case:

When a court applies the provisions of s 46 it must do so with the legislative object of the section in mind. While conduct must be examined by its effect on the competitive process, it is the flow-on result that is the key – the effect on consumers, not the effect on other competitors. Competition policy suggests that it is only when consumers will suffer as a result of the practices of a business firm that s 46 is likely to require courts to intervene and deal with the conduct of that firm.⁴³

Gaudron, Gummow and Hayne JJ made a similar comment in *Boral*, stating that:

The provisions of Pt IV are to be interpreted in accordance with the subject, scope and purpose of the legislation, in particular the object stated in s 2 of enhancing the welfare of Australians through the promotion of competition.⁴⁴

⁴³ *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission* (2003) 195 ALR 609 at 663.

⁴⁴ *Ibid* at 640.

C. State-created monopolies

I. State-created monopolies

1. What are the main sectors of your country in which state-created monopolies exist? Please describe important sector examples, including whether these monopolies are state-owned, state-controlled, state-enabled or facilitated, recently liberalised, regional monopolies, etc.

Australia's Federal, State and Territory governments agreed to a National Competition Policy in 1995. The purpose of the NCP is to enhance competition within all Australian sectors in accordance with the recommendations of the Hilmer Committee (the Independent Committee of Inquiry into a National Competition Policy for Australia).

One of the key areas dealt with under Australia's NCP is the structural reform of public monopolies. This issue is specifically addressed in the Competition Principles Agreement (CPA), which is one of the three intergovernmental agreements underpinning the NCP. While the CPA does not require governments to privatise their business activities, it does require them to conduct a transparent review process before introducing competition into a market traditionally supplied by a public monopoly, and before privatising a public monopoly. In addition, the CPA requires governments to remove industry regulation functions from public monopolies before introducing competition into the relevant sectors.

The CPA also requires the Commonwealth, State and Territory governments to review and reform all legislation that restricts competition, unless it can be demonstrated that the restriction on competition is in the public interest. In this context, relevant "public interest" factors include ecologically sustainable development, social welfare, occupational health and safety, economic and regional development, and the interests of consumers generally.

In addition to reviewing and reforming their anti-competitive legislation, Australian governments are required to justify the introduction of any new legislation which results in a restriction on competition. The Regulation Impact Statement (RIS), which is generally prepared as part of the policy development process, is designed "to ensure that regulation achieves its objectives in the most effective and efficient way". For potentially anti-competitive legislation, the RIS should establish that the benefits to the community from the legislation outweigh the costs, and that the government's objective can be achieved only by restricting competition.

Despite the adoption of the NCP by the Commonwealth, State and Territory governments, public monopolies continue to exist within some Australian sectors. For example:

- Australia has several state-owned/state-enabled single export desks, which are responsible for marketing commodities such as rice, wheat, barley and sugar.
- Australia Post is a state-owned corporation which provides a range of reserved (monopoly) and competing services to Australian consumers.

- Public transport services are provided by state-owned corporations in some Australian states.
- A number of major Australian airports were previously owned and operated by the Federal Airports Corporation (FAC), a company owned by the Commonwealth government. Twenty-two of the FAC's airports have recently been privatised.

2. Please discuss the objectives behind the creation and/or perpetuation of state-created monopolies by providing specific examples from your jurisdiction. If the rationale for retaining the state-created monopoly was challenged (for example as a condition of membership in an international organisation or to join an economic alliance or regional trade agreement) or has changed over time, please explain.

The objective behind the creation of many of Australia's public monopolies, including the natural monopolies, is to ensure that Australian citizens have access to important/essential services. Australia Post provides a good example in relation to the objectives underlying state-created monopolies in Australia.

Australia Post

Australia Post is the government-owned provider of postal services in Australia. Australia Post was corporatised in 1989, and has an independent board and a commercial character.

Australia Post is required to meet three general obligations imposed by the *Australian Postal Corporation Act 1989*. These obligations are:

1. Australia Post must, as far as is practicable, perform its functions in a manner consistent with sound commercial practice.
2. Australia Post is required to meet certain community service obligations (which are outlined below).
3. Australia Post must perform its functions in a way consistent with general government policy and any directions given by the Minister.

Community service obligations

Australia Post has an obligation to supply a letter service. The purpose of the letter service is to, by physical means, carry letters within Australia and between Australia and outside Australia. Australia Post must, for letters that are standard postal articles, make the letter service available at a single uniform rate of postage for carriage within Australia. Australia Post must also ensure that:

- The letter service is reasonably accessible to all people on an equitable basis, wherever they reside, or carry on business.
- The performance standards of the letter service reasonably meet the social, industrial and commercial needs of the Australia community.

In recognition of its community service obligations, Australia Post has been granted a general monopoly – although this is limited by a number of exceptions – in the carriage and delivery of letters within Australia, whether the letters originated within or outside Australia. The services generally referred to as “reserved services” extend to:

- The collection, within Australia, of letters for delivery within Australia.
- The delivery of letters within Australia.

Australia Post also has the exclusive right to issue postage stamps within Australia.

3. Are there any legal or practical restrictions or difficulties faced by your competition agency in antitrust enforcement against state-created monopolies? If yes, please provide details and/or sample cases, for example:

- *Legal restrictions/scope of application: Is there a “state action defence” (ie. competition law does not apply to state entities or state acts) or any special exemptions/exceptions for the state-created monopolies from the general antitrust law in your jurisdiction?*

Australian competition law binds the Federal, State and Territory governments, but only insofar as they carry on a business (either directly or through a government authority). Any government activity that is not conducted in the course of a business is immune from the operation of the TPA. This is referred to as Crown immunity.

When a government authority with Crown immunity enters into a contract with a private party, the private party is entitled to “derivative Crown immunity”, and is not subject to the TPA. Proceedings brought by the ACCC against Baxter Healthcare for breach of sections 46 and 47 of the TPA were recently dismissed because of the doctrine of derivative Crown immunity.⁴⁵

- *Practical restrictions/difficulties: Please describe any practical restrictions that you have faced or may face in antitrust enforcement against state-created monopolies, such as instruction that your agency may receive from the government, political pressure, or overcoming vested interests.*

As discussed previously, the ACCC is an independent statutory authority. The Commission’s decisions cannot be overruled by the Minister, and the Commission is not required to consult with other government agencies in making its decisions.

4. How does the assessment of dominance/substantial market power of state-created monopolies differ from other dominance/substantial market power cases?

The assessment of substantial market power in relation to state-created monopolies does not differ from the assessment of substantial market power in other cases.

⁴⁵ *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* [2006] FCAFC 128.

II. Privatisation and Liberalisation Process and the Advocacy Role of Competition Agencies

5. Please briefly describe the ongoing or past privatisation and liberalisation process in your country. Is there a specific legal framework for the privatisation in your country (eg. a specific privatisation law)?

See response to Question 1, Part C.

6. What are the objectives of your government in the privatisation and liberalisation of state-created monopolies (for example, raising competition/consumer welfare, maximising revenue from the sale, etc)?

In the context of Australia's microeconomic and competition policy reforms, the objectives underlying the privatisation of Australia's state-created monopolies are economic efficiency and the promotion of competition.

7. Is competition law applicable to privatisation transactions (eg. approval of interested bidders or the successful bidder under its merger control power)?

Australian competition law is applicable to privatisation transactions.

8. Please summarise the advocacy role of your agency in the privatization and liberalisation of state-created monopolies, including as applicable:

- *What are the legal instruments used by your agency for that purpose? To what extent are other government entities obliged or encouraged to seek the competition agency's opinion on or approval of privatisation and/or liberalisation proposals?*
- *To what extent does the advocacy role of your agency have impact on privatisation and liberalisation? Please provide examples of successes or failures if available.*

The ACCC does not have an advocacy role in relation to the privatisation and liberalisation of state-created monopolies.

Section 50 of the TPA prohibits acquisitions that have the effect, or are likely to have the effect, of substantially lessening competition in a market. Section 50 applies to the acquisition of a public monopoly by a private party.