

The International Comparative Legal Guide to: Dominance 2009

A practical insight to cross-border dominance regulation



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1 Legislation

1.1 Please set out the basic elements of the offence(s) under your relevant laws?

Section 46(1) of the *Trade Practices Act 1974* (Cth) (**TPA**) prohibits a corporation with a substantial degree of power in a market, to take advantage of that power in that or any other market for the purpose of:

- 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;
- preventing the entry of a person in that or any other market; or
- deterring or preventing a person from engaging in competitive conduct in that or any other market.

Section 46(1) requires not merely the co-existence of substantial market power, taking advantage of the substantial market power and one of the above proscribed purpose, but a connection between these three elements (*Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* [2001] HCA 13).

There is also a specific provision which prohibits predatory pricing (s 46(1AA), TPA). For more details on the predatory pricing prohibition, see question 4.3 below.

As set out above, s 46 of the TPA adopts a “substantial degree of power in a market” threshold instead of a “dominance” threshold. The former threshold is meant to be a lower threshold than the latter.

Notes:

- Following on from the fact that the TPA does not use the “abuse of dominance” standard, but rather the “take advantage of substantial market power” standard, we have assumed that all questions relate to the latter standard instead, and we have answered the questions accordingly.
- All section references in this document refer to provisions of the TPA.

1.2 What is the underlying purpose of the competition legislation that applies to the conduct of dominant undertakings?

The objective of s 46 is to promote competition rather than the interests of particular persons or corporations (*Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* (1989) 83 ALR 577). This is in line with the overall objective of the TPA, which is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection (s 2).

1.3 Does the legislation also apply to public bodies?

Yes, but only in so far as those public bodies are “carrying on a business” (ss 2A- 2BA). The term “carrying on a business” refers generally to commercial activities which are engaged in on a continuous and repetitive basis (*Hope v Bathurst City Council* (1980) 144 CLR 1). The TPA also applies to businesses not carried on for profit (s 4).

Certain activities undertaken by public bodies are excluded from the application of the TPA, including: (a) imposing or collecting taxes, levies or fees for licences; (b) granting, refusing to grant, revoking, suspending or varying licences; and (c) transactions between persons acting for the same public body (s 2C).

An example of how the TPA applies to public bodies lies in the case of *NT Power Generation Pty Ltd v Power and Water Authority* [2004] HCA 48. The Power And Water Authority (**PAWA**) was the sole supplier of electricity transmission and distribution infrastructure in the Northern Territory. NT Power Generation Pty Ltd (**NT Power**) alleged that PAWA had taken advantage of its substantial market power for an anticompetitive purpose by refusing NT Power access to its electricity transmission and distribution infrastructure. The High Court held that PAWA was carrying on a business in its generation and supply of electricity - therefore it was not excluded from the application of s 46. The High Court also held that PAWA did take advantage of its substantial market power for the anticompetitive purpose of deterring or preventing NT Power from participating in the market for the supply of electricity along PAWA’s infrastructure until an access regime had been introduced.

As mentioned above the TPA applies to public bodies (as well as other entities) only in so far as they are carrying on a business. Consequently, all activities and conduct which fall outside of this “carrying on a business” ambit will possess “immunity” or will be excluded from the application of the TPA. Until recently, it had been held that corporations trading with public bodies (where the public bodies’ conduct was not in the course of carrying on a business), are immune from the TPA. This was known as “derivative immunity”. However, the recent case of *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* (2007) 237 ALR 512 has cast significant doubts over the “automatic” application of or presumption of derivative immunity applying to persons who have dealings with the Crown. Specifically, the High Court held that just because the TPA does not bind public bodies (except where they are carrying on a business), does not require as a corollary that it does not bind persons having dealings with those public bodies. Those persons will therefore not have the presumption of derivative immunity.

1.4 Does the legislation apply to: (i) unilateral conduct of a non-dominant firm whereby such a firm seeks to acquire a position of dominance; (ii) collectively dominant undertakings; and (iii) dominant buyers as well as suppliers?

(i) S 46 does not apply expressly to unilateral conduct of a corporation or firm without substantial market power but which seeks to acquire a position of substantial market power. However, mergers or acquisitions which would have the effect or likely to have the effect of substantially lessening competition in a market are prohibited by s 50, and it is to this extent which unilateral conduct of a firm seeking to acquire a position of substantial market power may be caught. However, corporations who seek to undertake conduct which amounts to predation strategies could be caught so long as all the elements of s 46 are fulfilled.

However, it is noteworthy that, in September 2008, the government proposed to introduce the concept of “creeping acquisitions” to the TPA, which will have an impact on unilateral conduct of a corporation without existing substantial market power but may be seeking to acquire substantial market power. Specifically, the government is intending to prohibit: (a) a series of acquisitions by individual corporations, which, when considered individually may not substantially lessen competition (the existing mergers and acquisition test). However, over time, this series of acquisitions may collectively raise competition concerns; and (b) corporations with existing substantial market power from enhancing their market power through one (or more) acquisitions which individually do not substantially lessen competition. This means that on the one hand, corporations without existing substantial market power may be prevented from acquiring substantial market power through a series of acquisitions which are examined collectively. On the other hand, corporations with existing substantial market power may be prohibited from participating in acquisitions which “enhance” their market power. The government is currently still consulting on this issue.

(ii) Yes, s 46 acknowledges that more than 1 corporation may have a substantial degree of power in a market (s 46(3D)).

(iii) Yes, s 46 applies to both buyers and suppliers with a substantial degree of power in a market (s 46(3)(b)). For an example of a case where a wholesale supplier of bread products was successfully charged with offending s 46, see *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd* (No. 4) [2008] FCA 21.

1.5 Are there sector-specific regulations which apply to unilateral conduct and how do these relate to the general prohibition of abuse of dominance?

The competition provisions in the TPA, including s 46, apply across all sectors. The telecommunications sector, however, is the only sector which has been subject to a “stricter” version of s 46.

Pursuant to s 151AJ(2), a carrier or carriage service provider engages in anti-competitive conduct if the carrier or carriage service provider:

- has a substantial degree of power in the telecommunications market; and
- either:
 - takes advantage of that power in that or any other market with the effect or likely effect, of substantially lessening competition in that or any other telecommunications market; or
 - takes advantage of that power in that or any other market, and engages in other conduct on one or more occasions, with the combined effect, or likely combined

effect, of substantially lessening competition in that or any other telecommunications market.

S 151AJ(2) is “stricter” than s 46 because it does not incorporate the subjective element (i.e. that conduct must be for one of three proscribed anti-competitive purposes) of the latter (see question 1.1 above).

2 Dominance

2.1 How is dominance, or your equivalent concept, defined under national law?

Section 46 does not incorporate the concept of “dominance”, rather the concept of “substantial degree of power in a market” is used.

Market power is an economic concept. It measures the degree to which a corporation may act in a manner which is free from constraint by competitors in that market for a sustained period. Note that a corporation may possess “substantial” market power even though it does not have substantial control of the market and does not have absolute freedom from constraint by the conduct of competitors, suppliers or customers (s 46(3C)). The term “substantial” is intended to signify “large or weighty” or “considerable, solid or big” but less than the degree of market power required to “control” a market (*Explanatory Memorandum to the Trade Practices Legislation Amendment Bill 1992*).

In determining whether a corporation has a “substantial” degree of power in a relevant market, the following (non-exhaustive) factors will be taken into account:

- the extent to which the conduct of the corporation is constrained by the conduct of competitors (s 46(3)(a));
- the extent to which the conduct of the corporation is constrained by its suppliers or the acquirers of goods or services in the relevant market (s 46(3)(b));
- the ability of the corporation to raise prices above the supply cost without its competitors taking away customers in due time (*Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* (1989) 83 ALR 577);
- the extent to which other suppliers in the market have excess capacity. If there is excess capacity in the market, a firm will lose sales if it increases price and therefore is less likely to enjoy market power (*Boral Besser Masonry Ltd v Australian Competition and Consumer Commission* [2003] HCA 5);
- the market share of the corporation;
- the existence of vertical integration; and
- barriers to entry in the relevant market.

None of the factors above alone are determinative of the degree of market power possessed by a corporation.

2.2 How is dominance established / proven and what type of evidence is used?

See question 2.1 above for a list of factors which will be taken into consideration when determining if a corporation has a substantial degree of power in a relevant market.

Contraventions of s 46 are established through court hearings and these involve a presentation of evidence through witnesses and through business records. The types of evidence which courts may admit for the purposes of court hearings include: (a) evidence from market participants (i.e. customers, competitors and suppliers); (b) internal business records (including business and strategic plans); (c) business data (including price and cost data); (d) economic expert opinion evidence (including econometric analysis); and (e)

survey evidence (though broadly less weight has been put on this type of evidence).

2.3 How is the relevant market established to assess market power?

The relevant market is established by a process of market definition. The concept of the market is defined as the area of close competition or field of rivalry. It is through the framework of market definition that the degree of market power possessed by industry players in the market is analysed.

Substitution is the key to market definition. There are two types of substitution: demand-side substitution (customer switching) and supply-side substitution (supplier switching). Market definition begins by selecting a good or service supplied by the corporation in question (in a particular geographic area) and incrementally broadening the market to include the next closest substitute until all close substitutes for the initial good or service is included (taking into consideration both demand-side and supply side substitution).

Too narrow a description of the market will create the appearance of more market power than actually exists and too broad a description will create the appearance of less market power than actually exists (*Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* (1989) 83 ALR 577).

The term “market” in the TPA is defined as a market in Australia and includes goods or services that are substitutable for, or otherwise competitive with, the goods or services under analysis (s 4E).

The ACCC also uses the Hypothetical Monopolist Test (HMT) as a tool in market definition. According to the HMT, the relevant market is the smallest product group (and geographic area) such that a hypothetical monopolist controlling that product group (in that geographical area) could profitably sustain a small but significant and non-transitory increase in price (SSNIP). See *Australian Competition and Consumer Commission v Australian Medical Association Western Australia Branch Inc and Others* [2003] 199 ALR 423 as an example of a case where the court used the HMT as a tool in market definition (although this case was not a s 46 case but rather a price fixing case).

2.4 Is a safe harbour provided for low market shares and/or is there a presumption of dominance for high market shares? If so, what are the relevant market share thresholds?

No, it is not.

2.5 How is dominance assessed in relation to after-markets?

An after market is a market for a secondary product, that is, a product which is purchased only as a result of buying a primary product. The primary product and the secondary product are complementary.

S 46 will be assessed in the same way in the after market or secondary product market, as it is analysed in the primary product market. If a corporation, which possesses a substantial degree of market power in the primary product market, tries to use or “leverage” its substantial market power into a secondary product market for an anticompetitive purpose, then such conduct will contravene s 46.

Note that s 46 prohibits a corporation with a substantial degree of power in a market from taking advantage of that power in that or “any other market” for an anticompetitive purpose. The phrase “any other market” could be used to catch conduct in secondary

product markets or in any other product market (not related to the primary product market).

However, if a firm does not possess substantial market power in the primary market, it is unlikely to have substantial market power in the secondary market. A corollary is that the Australian courts are unlikely to find corporation-specific after markets.

3 Abuse

3.1 How is abuse defined? Is there a general standard? Is there a closed list of abuses?

S 46 does not use the concept of “abuse”; rather the concept of “taking advantage of” is used instead.

An examination of whether a corporation is “taking advantage of” its market power is simply an examination of whether a corporation is “using” its market power for one of the above proscribed purposes. The term “take advantage” in this context requires an examination as to whether the corporation is able (by reason of its market power) to engage more readily or effectively in conduct directed to one of the proscribed purposes above (*Explanatory Memorandum to the Trade Practices Revision Bill* 1986). Further, the “taking advantage of” concept is an objective one and does not introduce any notion of predatory intent or morality (*Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* (1989) 83 ALR 577).

In determining whether a corporation has taken advantage of its substantial degree of power in a market, a court will have regard to the following (non-exhaustive) factors (s 46(6A)):

- whether the conduct was materially facilitated by the corporation’s substantial degree of power in the market;
- whether the corporation engaged in the conduct in reliance on its substantial degree of power in the market;
- whether it is likely that the corporation would have engaged in the conduct if it did not have a substantial degree of power in the market; and
- whether the conduct is otherwise related to the corporation’s substantial degree of power in the market.

A distinction has also been drawn between conduct which involves a “use” of market power (in the sense of actual reliance on market power) and on conduct which is directed at merely protecting market power. The latter conduct may not amount to taking advantage of market power (*Rural Press Ltd and Others v Australian Competition and Consumer Commission* [2003] HCA 75).

No, there isn’t a closed list of abuses.

3.2 What connection must be demonstrated between dominance and the abuse?

First, as mentioned above, there must be a causal connection between the conduct engaged in by the corporation and the market power possessed by the corporation. In other words, if the respondent could have engaged in the conduct without possessing substantial market power, then the respondent did not rely on the market power to give effect to the conduct and the requisite causal connection between the conduct and the market power is absent (*Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* [2001] HCA 13).

Second, there must be a connection between the taking advantage of a substantial degree of market power and a proscribed purpose, in order for a contravention of s 46(1) to be made out. In other words, the corporation undertaking the conduct (which amounts to the taking advantage of a substantial degree of market power) must have undertaken the conduct with one of the proscribed purposes in mind.

The purpose of a corporation may be inferred from the conduct of the corporation and from the relevant circumstances (s 46(7)). The following points must be noted in respect of the concept of purpose:

- the relevant purpose is the subjective purpose of the persons involved (*Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* (1989) 83 ALR 577);
- it is not necessary to show that the proscribed purpose was the only purpose for the relevant conduct, provided it was a substantial purpose (s 4F); and
- a corporation does not have to achieve its purpose in order to contravene s 46 as it is the purpose and not its fulfilment that completes the contravention of s 46 (*Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* [2008] FCAFC 141).

3.3 Does certain conduct benefit from a safe harbour?

No, there are no safe harbours either within the TPA or in the guidelines.

3.4 Are certain types of conduct considered *per se* illegal, without a need to demonstrate actual negative effects on competition?

No, there are not.

3.5 Can the unilateral conduct of a non-dominant firm be abusive, e.g. does your national law provide for special obligations where a particular customer is in a relationship of dependency?

No, it cannot.

4 Types of Abuse

4.1 Does the definition of abuse include both exclusionary and exploitative conduct?

Exploitative conduct (which we understand, broadly refers to conduct amounting to excessive pricing) would only contravene s 46 if all the elements of s 46 were made out. For further details on whether excessive pricing could constitute a contravention of s 46, see question 4.2.

Exclusionary conduct could contravene s 46 (provided all the elements of s 46 were made out) and/or s 47 of the TPA. Section 47 prohibits exclusive dealing which has the purpose, effect or likely effect of substantially lessening competition. See the decision of *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* [2008] FCAFC 141 where Baxter Healthcare Pty Ltd (**Baxter**) was found to contravene both s 46 and s 47 (see question 4.11 for a brief summary of the case).

4.2 To what extent is excessive pricing considered to be abusive?

Excessive pricing or the taking of monopoly profits may constitute a “taking advantage of a substantial degree of market power” but this of itself is not sufficient to make out a contravention - rather, this conduct has to be tied to one of the 3 proscribed purposes in s 46 for a contravention to be made out (*ASX Operations Pty Ltd v Pont Data Australia Pty Ltd* [1990] ALR 513). It follows that the mere charging of excessively high prices is not likely to be caught by s 46.

Predatory Pricing

4.3 Is there a price/cost test for evaluating predatory pricing? If so, what is the relevant measure of cost?

Section 46(1) may apply to conduct amounting to predatory pricing. However, there is also a specific provision directed at predatory pricing behaviour (s 46(1AA)). This provision was introduced because it was perceived that the thresholds in s 46(1) were “too high” or that it was too difficult to commence predatory pricing cases pursuant to s 46(1).

Pursuant to s 46(1AA), a corporation that has a substantial share of a market must not supply, or offer to supply, goods or services for a sustained period at a price that is less than the relevant cost to the corporation of supplying such goods or services, for the purpose of:

- 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;
- preventing the entry of a person into that or any other market; or
- deterring or preventing a person from engaging in competitive conduct in that or any other market.

There are two important differences between s 46(1AA) and s 46(1). First, the former applies to corporations with a substantial share of a market rather than substantial degree of market power. Second, the former does not contain a “taking advantage” element. These two differences are meant to make s 46(1AA) a much easier contravention to prove for plaintiffs, compared to s 46(1). So even though predatory pricing may also be caught by s 46(1), it is envisaged that plaintiffs would prefer to rely on s 46(1AA) instead for such claims.

There is a price/cost test for evaluating predatory pricing. As mentioned above, s 46(1AA) states that the relevant measure of cost is “the price that is less than relevant cost”. There is nothing else in the TPA which specifies the relevant measure of cost. In general, pricing below total cost is unlikely to contravene s 46(1AA). In practice, there is some precedent for using avoidable cost or variable cost as being the relevant measure of cost (*Australian Competition and Consumer Commission v Boral Ltd* (1999) FCA 1318).

4.4 To what extent is recoupment relevant to the evaluation of predatory pricing?

There is a specific provision which addresses the issue of recoupment (s 46(1AAA)). This provision states that if a corporation supplies goods or services for a sustained period at a price that is less than the relevant cost to the corporation of supplying the goods or services, the corporation may contravene s 46(1) even if the corporation cannot, and might not ever be able to, recoup losses incurred by supplying the goods or services. In other words, s 46(1AAA) indicates that a corporation might still contravene s 46(1) even if the corporation proves that it cannot or might not be able to recoup losses in respect of specified goods or services.

Recoupment, therefore, will not be an essential factor or a necessary pre-condition in a court’s analysis of whether a corporation has engaged in anti-competitive predatory pricing behaviour (*Boral Besser Masonry Ltd v Australian Competition and Consumer Commission* [2003] HCA 5). More specifically, being unable to recoup losses would not be a sufficient defence for proving that a corporation has not taken advantage of its substantial market power. However, recoupment will remain a relevant factor in a s 46 analysis, not withstanding s 46(1AAA).

4.5 Is there a specific abuse of margin squeezing?

No, not in the TPA. Conduct amounting to a margin squeeze may contravene s 46, provided all the elements of that provision are made out.

Rebates

4.6 Does the law distinguish between different categories of rebates? Are there certain legal presumptions that apply to particular types of rebates?

No, the law does not distinguish between different categories of rebates and neither is there certain legal presumptions that apply to particular types of rebates.

Rebates will fall for consideration under s 46, and depending on the structure of the rebate, it is possible that it may offend either s 46 (if all the elements of the provision are made out) or s 47 (which would prohibit rebates if these amount to exclusive dealing with the purpose, effect or likely effect of substantially lessening competition in a relevant market).

4.7 Does the law recognise a “meeting competition” defence?

A “meeting competition” defence is where a corporation with a substantial degree of market power undertakes a certain conduct with the purpose of protecting its legitimate commercial interests as opposed to a proscribed anti-competitive purpose. There is no explicit mention of the phrase “meeting competition” defence in the TPA. However, there have been cases where a successful “legitimate or business objective justification” was successfully played out, though the degree to which defendants may rely on this justification is still uncertain (see question 7.1 for two examples of cases where this justification was used).

Refusal to Deal

4.8 In what circumstances is a refusal to deal considered abusive and is there a concept of an “essential facility” under your national law?

Refusal to deal

A refusal to deal is considered a contravention of s 46(1) only if all the elements are made out (i.e. corporation has a substantial degree of market power and takes advantage of that power for a proscribed purpose).

Broadly, conduct amounting to a refusal to deal by a supplier who also competes with its downstream distributors is at a higher risk of contravening s 46, compared to conduct amounting to a refusal to deal by a supplier who does not compete with its downstream distributors.

The two leading cases which considered the concept of “refusal to deal” are: (a) *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* (1989) 83 ALR 577; and (b) *Melway Publishing Pty Ltd v Robert Hicks Ltd* [2001] HCA 13.

In the Queensland Wire case, The Broken Hill Proprietary Co Ltd (BHP) refused to sell “Y-bar” (a steel product) to Queensland Wire Industries Pty Ltd (QWI), except at an unrealistically high price. BHP was found to have a substantial degree of market power in the steel and steel products market. The allegation was that BHP desired to prevent QWI from manufacturing and selling star picket fencing posts (produced from Y-bar) in competition with the

Australian Wire Industries Pty Ltd (AWI). AWI was a wholly owned subsidiary of BHP. QWI was successful in its s 46(1) claim against BHP.

In the Melway case, Melway Publishing Pty Ltd (Melway) was found to have a substantial degree of market power in the wholesale and retail market for street directories in Melbourne. The allegation was that Melway’s conduct amounted to taking advantage of power for the proscribed purpose of preventing Robert Hicks Pty Ltd (Robert Hicks), an ex-wholesale distributor of Melway’s street directories, from engaging in competitive conduct in the market for street directories in Melbourne. This application failed because it was held that Melway was merely trying to maintain its distribution system (which it created before it possessed a substantial degree of market power) by terminating Robert Hicks as a wholesale distributor. It was also held that it was not the purpose of s 46 to dictate to corporations how they wish to choose their distributors. The court found that in this case, the causal connection between market power and the refusal or termination was not established.

Essential facility

Yes, there is a concept of an “essential facility” in Australia. Part IIIA of the TPA establishes a generic regime designed to enable corporations to gain access to essential facility services where these are needed to enable corporations to compete in another dependent market. The essential services covered under Part IIIA of the TPA include the electricity transmission services, gas pipeline services, ports, airports and rail services. Services only come under Part IIIA of the TPA if they are “declared” by the designated Minister. Where a service has been declared, access to that service must be provided on terms agreed between the party providing the service and the party seeking access to it, or, where no agreement has been reached, on terms determined by the ACCC. Further, Part XIC of the TPA governs an industry specific access regime in relation to telecommunications services.

4.9 Is a distinction drawn between termination of supply and *de novo* refusal of supply?

There is no legal distinction between termination of supply and *de novo* refusal of supply. However, in practice, we think that conduct amounting to termination of supply bears a greater risk of a court finding that a s 46 contravention has occurred, compared to conduct amounting to *de novo* refusal of supply. Both types of conduct will only be caught by s 46 if all the elements of s 46 are made out.

See question 4.8 above which outlines a case where there was an alleged refusal of supply for an anti-competitive purpose and another case where there was an alleged termination of supply for an anti-competitive purpose.

4.10 Is a distinction drawn between a refusal to supply involving intellectual property rights and other refusal to deal cases?

Exemptions in respect of intellectual property rights are available in relation to the anti-competitive agreements and exclusive dealing provisions (s 45 and s 47); however these exemptions are not available in relation to s 46.

Conducting amounting to a refusal to licence intellectual property rights will be tested against the tests set out in s 46(1), just like other conduct amounting to a refusal to supply.

In *Re Australasian Performing Right Association Limited v Ceridale Pty Ltd* [1990] FCA 516, the refusal to licence copyrighted works was not seen as conduct undertaken for a proscribed anti-competitive purpose (pursuant to s 46). Rather, the court held that

Australasian Performing Right Association Limited was merely trying to prevent unauthorised use of the copyrighted works.

Tying and Bundling

4.11 Does the law distinguish between different forms of tying and bundling?

Conduct amounting to tying and bundling will contravene s 46(1) provided all the elements set out in the provision are made out. The law does not distinguish between different forms of tying and bundling.

In the recent case of *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* [2008] FCAFC 141, Baxter Healthcare Pty Ltd (**Baxter**) had a monopoly in Australia for sterile fluids but faced competition in relation to supply of peritoneal dialysis (**PD**) fluids. In response to tender requests from various State and Territory purchasing authorities (**SPAs**), Baxter: (a) made offers to supply sterile fluids and PD fluids at an item-by-item “cherry pick” prices (which were high); and (b) made offers for the same items bundled at significantly lower prices on an exclusive sole supply basis. The bundled prices were approximately 25% less than the item-by-item prices. The allegation was that both (a) and (b) were in contravention of ss 46 and 47. The court found that Baxter had breached s 46 in relation to all bundled tenders. In finding that Baxter had taken advantage of its substantial market power in relation to sterile fluids, the fact that the item-by-item prices were so much higher than the bundled prices (and that Baxter did not regard them as “serious”) were influential factors. The court concluded that Baxter’s conduct had the purpose of deterring or preventing competitors in the PD fluids market from engaging in competitive conduct. The court rejected Baxter’s argument that its purpose was merely to seek to win as much business as possible.

4.12 Does the law adopt a form or effects-based approach? Are there any tests which are used to determine legality?

Other than the provision on predatory pricing (s 46(1AA)) (which adopts a more “form” than effects-based approach), s 46 does not adopt either a strictly form or effects-based approach. Section 46 does not set out specific forms of conduct which are prohibited, rather it adopts a more purpose-based approach.

4.13 In what circumstances would bundling and tying be objectively justified?

Conduct amounting to bundling, tying and even full-line forcing may not always be anti-competitive because these may generate production or distribution efficiencies which result in cost savings or increased quality. It may be possible to use efficiencies to defend allegations of a breach of s 46.

Discrimination

4.14 Does the mere fact that parties are being treated differently render such conduct abusive or otherwise unlawful in Australia or does the law require demonstration of actual or likely anti-competitive effects?

No, the mere fact that parties are being treated differently in itself will not render such conduct illegal in respect of s 46. However, we note that the 1986 Explanatory Memorandum accompanying the Trade Practices Revision Act 1986 (Cth) lists price discrimination

as an example of conduct that may breach s 46. All elements of s 46 need to be made out before conduct (including price discrimination) will be taken to have contravened s 46.

S 46 does not require the demonstration of actual or likely anti-competitive effects. All that is needed to contravene s 46 is that a corporation with a substantial degree of power in a market takes advantage of that power for one of the proscribed purposes.

Other Abuses

4.15 Are there examples where systemic abuses of administrative or regulatory processes and/or aggressive litigation strategies have been characterised as abusive?

No, there have been no decided cases which have considered this issue.

4.16 Are there any examples where a misuse of the standard setting process has been characterised as abusive?

No, there have been no decided cases which have considered this issue.

4.17 Please provide brief details of other noteworthy abuses not covered above.

Most of the noteworthy s 46 cases and issues have been addressed above.

5 Public Enforcement

5.1 Which authorities enforce the legislation against abuse of dominance? What is the role of sector-specific regulators?

Australia’s competition law regime embraces a judicial enforcement model. The ACCC investigates into alleged anti-competitive conduct (including alleged breaches of s 46) and may only resolve alleged instances of anti-competitive conduct administratively (by entering into voluntary undertakings or commitments with alleged contravenors - see s 87B). The ACCC does not have the power to make determinations of contravention, nor does it have the power to issue civil sanctions or remedies. The ACCC may commence proceedings in the courts and only the courts may make determinations of contraventions and order civil sanctions and remedies.

The role of sector-specific regulators (such as the Australian Energy Regulator) is to assist in *ex-ante* regulation.

5.2 What investigatory powers do the enforcement authorities have?

The ACCC possesses extensive investigatory powers, including:

- the power to obtain information, documents and evidence from a person, provided the ACCC has a “reason to believe” that that person is capable from furnishing information relating to a matter which constitutes or may constitute, a contravention of the competition law (s 155(1));
- the power to require a person from appearing before the ACCC to give oral evidence under oath, provided the ACCC has a “reason to believe” that the person is capable of furnishing information relating to a matter which constitutes or may constitute, a contravention of the competition law (s 155(3A)); and

- the power to enter, search and seize material (either with consent or pursuant to a warrant) in specified premises, if there are “reasonable grounds for suspecting” that there may be evidential material on the premises (Part XIX).

Failure to comply with the ACCC’s investigative powers will result in fines or imprisonment.

5.3 What are the basic procedural steps between the opening of an investigation and the imposition of sanctions? What are the timescales?

There are two main ways which the ACCC will commence an investigation into a s 46 matter: (a) through third party complaints; and (b) through conducting general inquiries of its own into particular sectors.

The ACCC will then undertake a series of actions to gather information in relation to the alleged contravention of s 46, including by: (a) conducting formal interviews of the alleged offenders; (b) issuing informal requests for information from the alleged offenders and market participants; and (c) issuing formal requests for information from the alleged offenders (s 155).

After gathering sufficient information about an alleged s 46 contravention, the ACCC will then decide if it wants to resolve the matter administratively (e.g. through the accepting of court-enforceable undertakings given by the alleged offenders - see s 87B) or to commence proceedings in court against the alleged offenders.

The ACCC must institute a proceeding in the courts for recovery on behalf of the Commonwealth of a pecuniary penalty within 6 years after the contravention (s 77(2)). However, there are no timescales or limits on the investigation process. In practice, the investigation process may take months. At the conclusion of an investigation, the ACCC may (but is not obliged to) inform the parties under investigation that the investigation has been discontinued.

5.4 What are the sanctions and remedies that may be imposed in an abuse of dominance case? Do these include structural remedies?

The ACCC may apply to a court for a range of remedies and orders, including:

- pecuniary penalties (s 76);
- injunctions (s 80); and
- damages (s 82).

Structural remedies (divestitures) may only be imposed in relation to anti-competitive mergers (s 50) and not in s 46 cases (s 81). There is some debate in relation to whether the injunction remedy listed above is broad enough to cover structural remedies. However, this has never been tested in court.

In relation to pecuniary penalties, for corporations, the maximum fine which a court can order is the greatest of:

- A\$10 million;
- if the court can determine the value of the benefit that the corporation and related corporations have obtained directly or indirectly and that is reasonably attributable to the act or omission - 3 times the value of that benefit; or
- if the court cannot determine that benefit, 10% of the annual turnover of the corporation during the period of 12 months ending at the end of the month in which the act or omission occurred.

For individuals, the maximum fine is not to exceed A\$500,000.

The largest fine ever imposed in relation to an s 46 case was A\$8

million (*Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd* (no 4) [2006] FCA 21).

5.5 Can abusive conduct amount to a criminal offence?

No. There are currently no criminal sanctions in relation to competition offences. However, criminal sanctions are likely to be enacted shortly in respect of cartel offences. These proposed criminal cartel provisions are currently before the Parliament for consideration.

5.6 How often is the legislation enforced in practice?

The ACCC does enforce s 46 and has brought cases before the courts. However, the number of cases brought before the courts have not been large.

6 Private Enforcement

6.1 Can the legislation be enforced in private actions before your national courts?

Yes, the TPA allows for stand-alone private rights of actions to be brought against corporations or persons who have engaged in a contravention s 46. Third parties have access to a range of remedies including injunctions (s 80) and damages (s 82).

6.2 To what extent is interim relief available?

The ACCC may apply to the courts for an interim injunction pending determination of a courts determination on a s 46 matter (s 80(2)). The court may grant this interim injunction only when in the court’s opinion, “it is desirable to do so”.

6.3 To what extent are private damages available and can punitive damages be awarded?

The relevant provision states that a person who suffers loss or damage by contraventions of s 46 may recover the amount of loss or damage by action against the offender or any person involved in the offence (s 82(1)). In light of the way the provision is phrased, only compensatory damages and not punitive damages are available to private litigants.

6.4 How frequent are private enforcement actions before your national courts?

There have been occasional private enforcement cases before the courts, however the number of private enforcement cases brought before the courts have not been large.

7 Defences

7.1 What defences are available to a firm accused of abusing its dominant position and to what extent are efficiencies taken into account?

There are no statutory defences in relation to s 46.

However, it should be noted that persons who aid, abet, induced or conspired with others to effect s 46 contraventions may also have

taken to be in contravention of s 46 (s 75B) (aid and abet offence). There is a statutory defence to this aid and abet offence. In broad terms, the statutory defence states that a defendant who is charged with the aid and abet offence may rely on the following defences: (a) reasonable mistake; (b) reasonable reliance on third party information; (c) that the act or default of the defendant was an accident or a cause beyond the defendant's control and that the defendant took reasonable precautions and exercised due diligence (s 85). The defendant bears the legal burden in proving these defences.

Efficiencies or "legitimate or objective business justifications" have been taken into account in s 46 cases. The extent to which such justifications have been taken into account have varied.

In the *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* [2001] HCA 13 case, the High Court took into consideration Melway Publishing Pty Ltd's (**Melway**) legitimate business justifications behind terminating the Robert Hicks Pty Ltd distribution agreement. This factor was an important factor which contributed to the court's conclusion that Melway had not taken advantage of its market power by terminating the distribution agreement because it would have done so even if it did not possess market power.



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Luke is a Partner and heads the Competition and Regulation Group. He is recognised as a leading lawyer in competition/antitrust by Chambers Global and was named in the Best Lawyers List 2008 and 2009 for competition and regulatory. Luke has provided advice in relation to telecommunications, gas, electricity, water, airports and rail regulation in Australia. His experience includes the conduct and oversight of major trade practices litigation involving price fixing, misuse of market power, mergers and joint venture arrangements. He has also conducted competition matters in the manufacturing, retail and general services industries. Prior to joining Gilbert + Tobin, Luke was General Counsel and Head of the Enforcement / Compliance Division at the Australian Competition and Consumer Commission.

In *Boral Besser Masonry Ltd (now Boral Masonry Ltd) v Australian Competition and Consumer Commission* [2003] HCA 5, some weight was given to the suggestion that if impugned conduct had a business rationale, then this was "a factor" against a finding that the conduct constitutes of a taking advantage of market power. Specifically, if a corporation with no substantial degree of market power would engage in certain conduct as a matter of commercial judgment, it would ordinary follow that a corporation with market power which engages in the same conduct was not taking advantage of its power.

8 Recent Developments

8.1 Please provide brief details of significant recent or imminent developments not covered by the above in relation to Australia.

The most recent high-profile s 46 case is *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* [2008] FCAFC 141 (described briefly in question 4.11).



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Gilbert + Tobin is widely recognised as one of Australia's leading advisers in competition law and regulation. Our Competition and Regulation Group has been retained to provide ongoing strategic and operational competition and regulatory advice to clients across the retailing, telecommunications, media and publishing, financial services, energy and utilities, gaming, resources and transport, construction, manufacturing and services sectors.

Gilbert + Tobin also coordinates a range of cross-border competition matters, including cross-border merger filings and responses to global cartel investigations. Gilbert + Tobin and its Hong Kong affiliate firm, Arculli Fong & Ng, have been retained as Consultants to the Hong Kong Government (since 2007) on the implementation of a cross-sector-competition law for Hong Kong. In 2009, Gilbert + Tobin launched Antitrustasia.com, an online Asia Pacific competition law portal. This "one stop shop" for Asia Pacific competition laws was developed in collaboration with leading practitioners in over 20 Asia Pacific jurisdictions.