

QUESTIONS FROM THE PRODUCTIVITY COMMISSION ON ANTI-COMPETITIVE CONDUCT REGULATION AND THE TELECOMMUNICATIONS INDUSTRY

- 1. Confirm the date of commencement of Part XIB and the amendments bringing in the Part A and Part B competition notices.**

Part XIB was inserted into the *Trade Practices Act 1974* (TP Act) by the *Trade Practices Amendment (Telecommunications) Act 1997*. Part XIB commenced on 30 April 1997.

The *Telecommunications Legislation Amendment Act 1999* amended Part XIB by separating the 'gate keeper' and 'evidentiary' roles of the competition notice (ie Part A and Part B competition notices). These amendments commenced on 5 July 1999.

- 2. What, if any, Part XIB investigations are currently under way?**

See Confidential Supplement (attached)

- 3. What, if any, Part XIB investigations have been commenced since the 1999 amendments came into effect?**

See Confidential Supplement (attached)

- 4. What Part XIB investigations, other than Internet Peering, Commercial Churn, and those listed in Table 3 of the ACCC's submission of August 2000, have been undertaken since Part XIB came into effect in 1997?**

See Confidential Supplement (attached)

- 5. Have any of the Part XIB investigations been undertaken at the initiative of the ACCC, ie without an initial complaint from a telecommunications market participant?**

The process of our investigations and evidence gathering may bring to light conduct requiring assessment in terms of breaches of the Act. For example:

- Gathering of information for Record Keeping Rules (RKR's);
- Filed information including non-standard tariff filings; and
- Market monitoring in light of overseas developments in the telecommunications industry.

Also, matters have been investigated on the basis of informal complaints arising from the course of discussions with market participants.

6. Have all Part XIB investigations been concerned with section 151AJ (2) (ie have any been concerned with section 151AJ (3))?

Matters have been assessed in relation to both 151AJ(2) and 151AJ(3).

7. Since Part XIB came into effect in 1997, have there been any investigations under section 46 of Part IV in regard to the telecommunications industry? If so, provide details.

It ought to be noted that the investigation and evidence gathering process in nearly all instances commences from an analysis of what competition issues or consumer protection issues appear to arise in relation to the conduct complained of or identified. Accordingly, the investigation process is “inclusive” in relation to what sections of the Act are potentially being breached- and nearly all Part XI investigations would also include an assessment of issues in the context of Part IV.

An example of an investigation that undertaken specifically under section 46 would be the investigation into the conduct of Melbourne IT Ltd in relation to its dealing with auDA in delaying the introduction of a competition model in respect of the authority to issue names in the .au domain space.

8. Please amplify the reasoning in the paragraph under the heading ‘substantive law’ in section 5.5 of the ACCC’s submission. (For example, given the Queensland Wire case where section 46 was successfully used where there had been a failure to do a positive act, ie to supply Y-bar, why is section 46 considered deficient?)

Underlying both Parts IV and XIB of the TP Act is the objective of facilitating effective competition in the interests of achieving economic efficiency and thus community welfare.¹ Sections 46 and 151AJ(2) of the TP Act are essentially aimed at the same conduct. That is, preventing a firm from engaging in conduct which is facilitated by the firm’s market power and which hinders the competitive process.² However, s 46 requires an examination of the purpose³ of the use of market power whereas s 151AJ(2) focuses on the effect of that use of market power on competition.

¹ Aust, Independent Committee of Inquiry, *National Competition Policy* (August 1993) (Hilmer Report) 6.

² I.e. the existence of market pressures that prevent a firm from ‘giving less and charging more’.

³ The proscribed purpose must be a substantial purpose or reason for the conduct but need not be the sole purpose: *Trade Practices Act 1974* s 4F(2). See *Mark Lyons Pty Ltd v Bursill Sportsgear Pty Ltd* (1987) 75 ALR 581.

The forensic process of establishing purpose and effect is different. In order to satisfy the purpose test, it is necessary to prove the state of mind of an officer of a body corporate.⁴ In order to satisfy the effects test, it is necessary to provide evidence on the impact of the conduct on the market place.

The effects test is by no means easy to prove (in contrast to per se offences such as price-fixing). A court is required to look at the relevant market, assess the extent to which there would have been competition in the market but for the conduct and determine whether the lessening, preventing or hindering⁵ of competition is substantial. However, in the absence of a 'smoking gun', it is generally easier to prove effect than intent as a firm can obscure its intent.

The difficulty of proving purpose was recognised by the Blunt Committee⁶ and, in 1986, section 46 was amended by addressing the mode of proof.⁷ Subsection 46(7) permits purpose to be inferred from the conduct of the corporation or any other person or from other relevant circumstances (although it is unclear whether purpose is to be ascertained subjectively or objectively).⁸

Consequently, in *Queensland Wire Industries Pty Ltd v The Broken Hill Pty Co Ltd*,⁹ the High Court was able to infer a proscribed purpose from the evidence that BHP had not offered any business justification for its refusal to supply Y-bar to Queensland Wire and that this refusal was inconsistent with its normal selling policy in relation to its other products.¹⁰ However, as Deane J also noted, even without s 46(7), it was apparent from BHP's internal documents and its dealings with QWI that its purpose had been to prevent QWI from competing in the market for star pickets.¹¹

4 Subs. 84(1) of the *Trade Practices Act* provides that, to establish a state of mind of a body corporate relevant to conduct under s 46, it is sufficient to show that 'a director, servant or agent of the body corporate, by whom the conduct was engaged in within the scope of the person's actual or apparent authority, had that state of mind'. Subs. 84(5) provides that a reference to 'the state of mind of a person' in s 84 includes a reference to the purpose of the person.

5 See s 4G.

6 Aust, Trade Practices Consultative Review Committee, *Small Business and the Trade Practices Act* (December 1979) (Blunt Committee) Vol 1 para 9.21 & 9.22.

7 *Trade Practices Revision Bill 1986* Explanatory Memorandum p 10.

8 In *General Newspapers Pty Ltd v Telstra Corporation* (1993) ATPR 41-274, the Full Federal Court considered that the ultimate test is objective (at 41,697). Cf *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd* (1991) 27 FCR 460, 474; *Eastern Express Pty Limited v General Newspapers Pty Limited* (1992) ATPR 41-167, 40,303. See Stewart I, 'The Economics and Law of Section 46 of the Trade Practices Act' (April 1998) 26(2) *Australian Business Law Review* 111, 126; Shafron PJ, 'QWI v BHP: A Flash in the Section 46 Pan?' (January 1998) 72(1) *Australian Law Journal* 53, 55; Griggs L, 'Misuse of Market Power' (October 1997) 71(10) *The Law Institute Journal* 51, 54.

9 (1989) ATPR 40-925.

10 *Queensland Wire Industries Pty Ltd v The Broken Hill Pty Co Ltd* (1989) ATPR 40-925, 50,011 & 50,014. See Nagarajan V, 'The Regulation of Competition by Section 46 of the Trade Practices Act 1974' (1993-94) 1 *Competition and Consumer Law Journal* 127, 131; Hanks F and Williams PL, 'Implications of the Decision of the High Court in *Queensland Wire*' (1990) 17(3) *Melbourne University Law Review* 437, 446.

11 At 50,022.

Since the High Court's decision in QWI in 1989, the Federal Court has decided only three reported cases in which the Trade Practices Commission (TPC) or the ACCC has alleged a contravention of s 46. In two of the cases, the application succeeded (although the contraventions were conceded): TPC v Carlton & United Breweries Ltd;¹² and TPC v CSR Ltd.¹³ In the other case, the application was dismissed: ACCC v Boral Ltd.¹⁴ In Boral, Heerey J found that there was evidence to indicate that Boral Besser Masonry Ltd (BBM) did act with one or more of the proscribed purposes but that BBM did not have a substantial degree of market power. The ACCC has appealed the decision.¹⁵ One case is currently before the High Court: Melway Publishing Pty Ltd v Robert Hicks Pty Ltd No. M1 of 2000 (the ACCC was granted leave to intervene). Three cases are currently before the Federal Court: ACCC v Safeway Stores Pty Ltd;¹⁶ ACCC v Universal Music;¹⁷ and ACCC v Rural Press Ltd.¹⁸

A frequent argument against section 46 is that intent, while relevant to the penalty, is irrelevant to the objective of the section¹⁹ and that section 46 litigation

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- 12 (1990) ATPR 41-037. CUB admitted that it had contravened s 46(1)(c) and agreed that the Court should order CUB to pay a pecuniary penalty to be determined by the Court. See Corones S, 'Anti-competitive Conduct in Telecommunications' (April 1998) 26(2) *Australian Business Law Review* 151, 155.
 - 13 (1991) ATPR 41-076. CSR admitted the pleaded contraventions. Consent orders were also obtained in the following unreported cases: *ACCC v Commonwealth Bureau of Meteorology* (Aust, Australian Competition and Consumer Commission, *Weather Court Case Settled* (Press Release, 21 May 1997)); *ACCC v Darwin Radio Taxi Co-operative Limited* (Aust, Australian Competition and Consumer Commission, *Darwin Radio Taxi's Rules Declared Anti-Competitive* (Press Release, 4 June 1997)), *ACCC v Garden City Cabs Co-op* (Aust, Australian Competition and Consumer Commission, *Garden City Cabs Withdraws Anti-Double Shifting Rule* (Press Release, 8 October 1997)). The court accepted joint submissions in *ACCC v W.D. & H.O Wills (Aust) Ltd*: (Aust, Australian Competition and Consumer Commission, *Major Cigarette Manufacturer Admits Attempted Price Fix* (Press Release, 23 February 1998)) and *ACCC v Foamlite (Australia) Pty Ltd & Vita Pacific Limited*: (Aust, Australian Competition and Consumer Commission, *\$1.15 Million Penalties, Costs for Qld Foam Price Fix Market Share* (Press Release, 27 November 1998)). In *TPC v Pioneer Concrete (Qld) Pty Ltd*, the TPC alleged that Pioneer had breached s 46. The primary Judge struck out paragraphs of the TPC's statement of claim. The Full Court allowed the TPC's appeal: *TPC v Pioneer Concrete (Qld) Pty Ltd* (1994) ATPR 41-345. The case subsequently settled.
 - 14 (1999) ATPR 41-715.
 - 15 The hearing ended on 10 February 2000 and is awaiting judgement.
 - 16 Victorian District Registry VG 762 of 1997. The trial ended on 20 October 1999 and is awaiting judgement. In *ACCC v Australian Safeway Stores Pty Ltd* (1997) ATPR 41-562 one of the respondents, George Weston Foods Limited admitted contravening ss 45 and 48 and Goldberg J determined the pecuniary penalty.
 - 17 Aust, Australian Competition and Consumer Commission, *ACCC Institutes Against Record Companies* (Press Release, 3 September 1999).
 - 18 Aust, Australian Competition and Consumer Commission, *ACCC Alleges Market Sharing Agreement Between Regional Newspapers Result of Misuse of Market Power* (Press Release, 16 July 1999). The matter has been heard and is awaiting judgement.
 - 19 See Hardy SJ, 'Misuse of Market Power – Purpose or Effect?' (June 1997) 5 *Trade Practices Law Journal* 114, 117; O'Bryan M, 'Section 46: Law or Economics?' (August 1993) 1(1) *Competition and Consumer Law Journal* 64, 81; Areeda PE and Hovenkamp H, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* (1996) Vol III Revised Edition para 601; Smith R and Round D, 'A Strategic Behaviour Approach to Evaluating Competitive Conduct' (1998) 5(1) *Agenda* 25, 26; McMahon K, 'Predatory Pricing under Section 46 of the

continues to focus on impressions of 'immoral' or 'reprehensible' business behaviour rather than the efficiency of the conduct.²⁰ An effects test was incorporated in Part XIB in recognition that 'damage can be inflicted on competition regardless of the purpose motivating that behaviour'.²¹ Reliance on a purpose test alone was considered to risk 'a focus on the perceived morality of the conduct rather than its economic effect'.²²

In the ACCC's experience (in relation to other sections of Part IV as well as section 46), it is particularly difficult for a court to infer intent where a firm's conduct substantially lessens competition but the firm has not been 'jockeying for sales' or otherwise engaged in a positive act to 'injure' its competitors.

Consequently, section 46 will, in some cases, fail to capture monopolistic conduct. The text book example is of a public enterprise that does not have a profit-maximising motive and consequently prices below costs with the unintended effect of destroying or deterring new entrants. However, a more realistic example is the commercial churn case where, amongst other things, Telstra failed to replace an inefficient manual customer transfer process with an efficient automated process. The ACCC obtained evidence from Telstra's competitors of the impact of Telstra's conduct on the market. However, on the basis of the evidence available to the ACCC at that time, it would not have been possible for the ACCC to prove intent. Similarly, in the internet peering matter, evidence of effect was more readily obtainable than evidence of Telstra's state of mind.

The ACCC has previously argued that the limitations of section 46 are of concern where the Government's objective is to introduce effective competition into markets traditionally supplied by vertically-integrated public monopolies.²³ This is due to the scope for the incumbent to engage in, and obscure, monopolistic conduct; the significance of the industry as a business input and essential community service; and the impact of the conduct on developing competition. In relation to the telecommunications industry, the Government considered that total reliance on Part IV to constrain anti-competitive behaviour might prove

Trade Practices Act and the Decision in *Eastern Express v General Newspapers* – Part I' (1993) 1 *Trade Practices Law Journal* 75, 80; Officer RR, *The Swanson Committee Report: Monopolization, Price Discrimination, Merger and the Termination of Franchises: A Critique* (Paper presented at Seminar on the Swanson Report of the Trade Practices Act, Monash University Faculty of Law, 9 October 1976) 2-3.

- 20 O'Bryan M, 'Section 46: Law or Economics?' (August 1993) 1(1) *Competition and Consumer Law Journal* 64, 84. See also Prince P, 'Queensland Wire and Efficiency – What Can Australia Learn from US and New Zealand Refusal to Deal Cases' (1998) 5 (3) *Competition and Consumer Law Journal* 237, 238; McMahon K, 'Refusals to Supply by Corporations With Substantial Market Power' (1994) 22 *Australian Business Law Review* 7; Steinwall R, 'The Use of Cost Based Tests and the Test of Recoupment by Australian Courts in Predatory Pricing Cases: Some Further Insights from the Recent Federal Court Decision in *Boral Ltd*' (1999) 7 *Competition and Consumer Law Journal* 140, 152.
- 21 Commonwealth, *Parliamentary Debates (Trade Practices Amendment (Telecommunications) Bill 1996 Second Reading Speech)*, Senate, 25 February 1997, 895 (Senator Campbell, Parliamentary Secretary to the Treasurer).
- 22 *Trade Practices Amendment (Telecommunications) Bill 1996 Explanatory Memorandum* p 10.
- 23 Aust, Trade Practices Commission, *Submission to the National Competition Policy Review* (April 1993) xix, 26-27.

ineffective due to Telstra's market power and scope to engage in anti-competitive conduct and the fast pace of change in the industry. The need for an expeditious mechanism to address anti-competitive conduct was affirmed by the Government in 1998 and 1999.²⁴

It is argued that the disadvantage of the effects test is that it does not distinguish between vigorous competitive activity by a firm (where such conduct has the ancillary effect of lessening competition); and conduct by a firm which prevents the competitive process from operating effectively with no offsetting efficiency benefits. However, the ACCC considers that competitive conduct will not be caught due to the 'market power' and 'take advantage' tests²⁵ and that further protection is provided by the exemption process in Part XIB.

9. Similarly, please amplify the reasoning used by the ACCC when deciding the choice between Part XIB and Part XIC to pursue a matter. (The third paragraph under section 5.7 of the ACCC's submission suggests that Part XIB is less effective when the preferred outcome is an order requiring a positive act — is this in conflict with the paragraph cited in question 8?)

Section 5.5 of the ACCC's August 2000 submission considers the differences between Parts IV and XIB of the TP Act. The section discusses the type of conduct that is likely to escape the operation of section 46 but come under section 151AJ(2). As discussed above, although section 46 incorporates a purpose test, it is possible to infer purpose from conduct. However, it is particularly difficult to infer purpose in the absence of an 'aggressive' or 'positive act'.

Section 5.7 of the ACCC's August 2000 submission outlines the circumstances where the ACCC considers that Part XIB or XIC will be most effective (see also section 7.2 of the ACCC's November 2000 submission). In particular, the outcomes available under Part XIB and XIC are different. Although Part XIB contains additional administrative steps (the issuing of competition notices), Parts IV and XIB are both based on a judicial enforcement model in that the Parts prescribe general rules of conduct which are enforced by the courts.²⁶ In contrast, Part XIC is an administrative model where the executive determines the terms and conditions of access.

Courts will restrain a person from committing or repeating a particular act but judges are understandably reluctant (and are not well placed) to order a person to do a 'positive act' such as providing access at a particular price or replacing inefficient technology. A court is unlikely to set out a clear standard of required conduct as opposed to merely prohibiting the conduct that was the subject of the

²⁴ See sections 1 and 5.4 of the ACCC's August 2000 submission.

²⁵ Hardy SJ, 'Misuse of Market Power – Purpose or Effect?' (June 1997) 5(2) *Trade Practices Law Journal* 114. See also Colvin C, *Without Purpose or Effect: A Different Proposal to Amend Section 46* (Paper presented at the Trade Practices: Emerging Issues Workshop, Brisbane, 13-15 August 1999) 3.

²⁶ See section 1.5.1 of the ACCC's August 2000 submission.

proceedings. Indeed, this is the reason why the Hilmer Committee recommended an access regime.

Consequently, the outcome sought by the ACCC will be one factor relevant to the ACCC's decision as to whether to use Part XIB and XIC (in the same way that a matter could be addressed under Part IIIA, Part IV and/or a s 87B undertaking). If an order to stop certain conduct and provide compensation is sufficient, then Part XIB may be appropriate. However, if the preferred outcome is a 'positive act' then Part XIC may be the preferable 'regulatory tool'. For example, as stated in section 5.7 of the ACCC's August 2000 submission, pricing issues that may constitute a constructive refusal to supply have been solely addressed under Part XIC rather than Part XIB.

In summary, in section 5.5 of the ACCC's August 2000 submission, 'positive act' is used to distinguish between the situations where a court, in absence of direct evidence, may be prepared to infer intent. In section 5.7 of the ACCC's August 2000 submission, 'positive act' is used to distinguish between the types of outcomes that may be obtained under Part XIB and XIC which in turn is relevant to the decision as to which is the appropriate 'regulatory tool' for a particular matter.