How to Use this Script:
These sample exam answers are based on problems done in past years. Since these answers were written, the law has changed and the subject may have changed. Additionally, the student may have made some mistakes in their answer, despite their good mark.

Therefore DO NOT use this script by copying or simplifying part of it directly for use in your exam or to supplement your summary. If you do so YOUR MARK WILL PROBABLY END UP BEING WORSE! The LSS is providing this script to give you an idea as to the depth of analysis required in exams and examples of possible structures and hence to provide direction for your own learning.

Please do not use these for any other purpose, otherwise you are putting your academic future at risk.

This paper is provided solely for use by ANU Law Students. This paper may not be redistributed, resold, republished, uploaded, posted or transmitted in any manner.
Q1
ACCC and B may have causes of action against ARCB, ARE, Eweless (E), Ramsgate (R) and their directors for conduct associated with denying a licence to M, and E &R’s arrangement as to voting [✓].

1. Against ARCB?
ARCB is an authority of the Commonwealth as it was established under “the Act”: s 4(a). [✓].
The TPA applies to R insofar as it is carrying on a business including indirectly through an authority of the Cth: s2A(1), however ARCB is excepted under s2C(1)(b) which states that refusing a licence is not “carrying on a business”, thus excluding application of 2A.
∴ No action against ARCB. [✓✓]

2. Against ARE?
Unclear whether ARE is an “authority” of the R, since it is not established as a statutory corporation and it is unclear whether a state or territory has a controlling interest, but unlikely since there are 20,000 other shareholders, and one single State or territory would have to hold 50% in order for it to be an authority of the R – but “all” S&Ts and 20,000 others do: [✓].
∴ Even if it was an authority – ARE is carrying on a business in selling wool and recommending licences is arguably associated with the commercial activity, therefore 2B would bind ARE: NT Power. [✓]
Most likely ARE would be considered a regular trading corporation, thus a “corporation” bound by the Act: s 4(1), [✓] since it mostly sells rice overseas and merely recommends, not grants, licences. [✓]

Possible Action: s46?
ARE will contravene s 46 if it is established that ARE is a corporation with a substantial degree of power in a market (“SDMP”) that took advantage of that power for a proscribed purpose: s46(1). ACCC & B would argue its refusal to recommend M was such conduct. [✓]

1. Does ARE have SDMP?
“Power” is a reference to market power: s46(4)(a) in a market for goods or services: s46(4)(b). Must identify a relevant market to identify ARE’s degree of MP, a purposive exercise: Qld Wire. Market is an area of close competition [✓]: Re QCMA, consisting of a relevant good and other goods substitutable for or otherwise competitive with it: s4E, and refers to a market in Australia. One market where ARE appears to have power is the market in Australia for Rice to be exported overseas.

Product Dimension:
Rice is a fairly unique product. Must consider whether if a hypothetical monopolist supplier instituted a small but non-transitory price increase whether customers would switch away OR competitors would switch to the market. [✓].
Rice has no “close” substitutes: *Boral*, given its function and end use in a wide range and its status as a basic and fairly essential foodstuff. There may be supply-side substitutes (producers switching to other grain) but further information would be needed. Barriers to entry arguably high as rice is difficult to produce, an important factor: *QCMA* as *X*-elasticity of supply may be low, further given the export licencing requirements – high barriers!

**Geographic Dimension**
We are concerned with a market in Australia for rice to export – probable that rice to be exported is made Australia-wide as it is easy good to transport and thus expanding size of market/practical field of rivalry: *Aust Meat Holdings*.

**Functional Dimension**
Production [✓] of rice for export – does not appear to be reason to expand functional dimension to other levels – unless power in retail level can constrain SSNIP – unlikely as it is a basic product with constant demand.

.: Market: In Australia for Rice to be Exported.

**SDMP?**
Market power is the ability to engage in discretionary behaviour: *Re QCMA*, unconstrained by market pressures: *Melway*, most notably the ability to give less and charge more: *Re QCMA*. ARE appears to have MP in that it enjoys a (fading) monopoly in selling rice overseas[✓], although info is needed as to the degree that the monopoly has faded as per Parliament’s intention. Barriers to entry are high, given licencing requirements, and difficulty of growing rice, limiting ability of potential new entrants to constrain ARE’s MP: *QCMA*. ARE also has MP flowing from ability to recommend licences to ARCB. This does not appear to be a legislative granted power (*CF Plume, Stirling Harbour*) as it is in its Constitution. Further *NT Power* suggested that there is no dichotomy between MP and power source in a statute. Thus arguable ARE had power as it could influence granting of licences, thus the entry of competitors in the market.

**Taking Advantage?**
Must be a causal connection between ARE’s MP and the conduct. ARE’s power arising from its monopoly position is not the cause of ARE’s conduct: in a competitive market, ARE still would have denied the recommendation – thus failing the counterfactual test. But if ARE’s power is characterised as its ability to recommend licences, a non-regulatory power [✓] it was clearly using this power in its conduct in denying M’s rec: a direct exercise – if it didn’t have the power to recommend, couldn’t act in the way – but depends on Court accepting this as market power, not just use of regulatory power (indirectly), since ARE is not in a market to “supply” licences recommendations. Cannot infer backwards from purpose: *Melway*.

**Proscribed Purpose?**
Difficult to establish as we need to ascertain ARE’s subjective purpose, but this can be inferred: s46(7). Harold’s statement that he wants M to stop in the Africa/Vic market cannot be imputed to ARE as H is merely a shareholder.
∴ Would need evidence that ARE wanted to eliminate M: 46(1)(a) or prevent entry into the market: s46(1)(b) or deter competitive conduct.
Arguable that ARE are trying to secure revenue position as principal exporter thus used power to exclude M who would’ve been a competitor, similar to NT power.
[✓]
**Against R & E**
s 46 claim as above – but even weaker market power argument as mere shareholders in ARE – would need to know if they actually had overwhelming power to influence ARE’s decision not to recommend – unclear on facts.
There is a possible horizontal arrangement between R E, ACCC can seek that Cth DPP prosecute under Pt IV Div 1 for criminal offences: s44ZZRF/G, and can institute civil penalty proceedings.
[✓] B/M can seek injunctive relief and damages based on contravention of Pt IV Div 1. Both B & ACCC can proceed under Pt IV Div 2.
**Pt IV Div 1**
Creates offences for making a contract arrangement or understanding that contains cartel provision: s44ZZRF: crim/s44ZZRJ: civil penalty), and for giving effect to a cartel provision: s44ZZRG: criminal / s44ZZRK (civil).
**Is there a CAU?**
Must be a meeting of minds and assumptions of obligation – Leahy. Rumour of “agreement”. This suggests they did assume obligations ∴. Arrangement/understanding, involving meeting of minds. [✓]
**Is there a cartel provision?**
Cartel provision defined in s44ZZRD: s4. Must satisfy comp and purpose or purpose/effect condition: s44ZZRD(1). This fails the purpose condition as it does not restrict R & E’s supply of any goods or eservices UNLESS their vote can be considered a service: s 44ZZRD(3)(a)(iii). Even if it is a service, E &R would only satisfy the competition condition re: supply of rice, not supply of the vote for ARE to recommend licence, thus failing s44ZZRD(4)(h) – not competing to give votes!
∴ No breach of Pt IV Div 1.
**Pt IV Div 2**
Same reasoning as above why it is not a breach of s45(2)(a)(i)/s45(2)(b)(i) which create prohibition for CAU w exclusionary provision, as wouldn’t satisfy competitor element in s4D(1)(a) definition of exclusionary provisions.
But: breach of s45(2)(a)(ii) for making CAU that has provision with purpose of SLC and giving effect to CAU with provision that has purpose of SLC: s45(2)(b)(ii).
CAU established above: arrangement.
SLC
The arrangement has likely effect of SLC and purpose of SLC in:
→ market for Aus rice to export – since the denial of licence appears to be R &E’s purpose (even if not achieved/achievable: *Universal Music*)
**With**: As discussed, market has high barriers to entry – future with conduct involves elimination of successful competitor M. [✓]
**Without**: If M involved, could take ARE’s share, could at least constrain ARE’s MP – MP being antithesis to competition.

(incomplete)

Possible purpose of SLC in a market in Victoria, as per Harold’s statement, by trying to eliminate competitor who would have constrained.
Director’s ancilliary liable: s75B.