

Senate Economics Legislation Committee

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

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Department/Agency: ACCC
Question: AET 48
Topic: Risk Averse
Reference: Hansard page no. 140 - 25 February 2015
Senator: Dastyari, Sam

Question:

Senator DASTYARI: I am very conscious of the time. I am wondering if you are able to take this broader issue—because I do not think we are giving enough justice to the issue, no pun intended—on notice. If you are able, in the light of day, for the committee—I know there are so many pressures on your time and on your teams' time—to expand a bit on the broader issue. Again, if it was not something that was really covered in the Harper submission that you made, could you explore with us ways in which this access to justice issue is something that can be addressed?

Mr Sims: I am happy to do that. Could I just add that every indication we have is that the Harper review will be wrestling with this issue. It is an issue that is very much front of their mind. I do not know where they are going to get, but I know they are giving it a lot of thought.

Answer:

The ACCC's primary responsibility is the administration and enforcement of the *Competition and Consumer Act 2010* (CCA). The CCA establishes the ACCC as a public law enforcement agency responsible for enhancing the welfare of Australians by promoting competition and fair trading by business and providing for the protection of consumers in their dealings with business. The ACCC's role is to focus on those circumstances that will, or have the potential to, harm the competitive process or result in widespread consumer detriment. As such, the ACCC only becomes involved in resolving individual consumer or small business disputes to the extent they fall within the *ACCC Compliance & Enforcement Policy*.

The CCA does not provide the ACCC with dispute resolution functions. The ACCC works closely with dispute resolution services at Ombudsman offices, state and territory fair trading agencies and Small Business Commissioners to identify emerging trends and take action as required. The ACCC will refer matters to those agencies that facilitate dispute resolution services.

The ACCC has a close working relationship with the Australian Small Business Commissioner (SBC), the State SBCs and the Office of the Franchising Mediation Advisor (OFMA) and regularly refers small businesses to their services. Similarly, the ACCC also actively refers small businesses to appropriate bodies, including alternative dispute resolution (ADR) schemes, where their matters do not fall within its jurisdiction and may be more effectively dealt with under the various mediation services provided by different state and federal governments. The ACCC understands that an ADR scheme may be most appropriate for a small business where it is important for the small business to maintain an ongoing relationship with the larger business in question.

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Where appropriate, the ACCC also encourages and assists genuine voluntary compliance initiatives by individual businesses and industry wide sectors, including the establishment of individual trader compliance programs to sector-wide initiatives, including industry charters and voluntary codes of conduct. One recent example is the Food and Grocery Code, which includes dispute resolution processes aimed at resolving disputes without litigation.

On a broader level, the ACCC will take action where it considers the action will raise awareness of certain types of issues and deter traders from engaging in that conduct, and ultimately prevent particular breaches from taking place. The recent litigation against Coles is an example of how ACCC action can benefit small businesses through public enforcement rather than resolving individual private disputes.¹ In June 2014, the Federal Court found that claims made by Coles that its 'Cuisine Royal' and 'Coles Bakery' bread was 'Baked Today, Sold Today' and 'Freshly Baked In-Store' were false, misleading and deceptive. These bread products were partially baked and frozen off site by a supplier, transported and 'finished' at in-store bakeries within Coles supermarkets. The ACCC was concerned with this conduct because of the detrimental impact it had on competitors of Coles, including small businesses. Misleading credence claims have the potential to adversely impact the competitive process.

The ACCC also gives enforcement priority to matters that demonstrate one or more priority factors such as conduct resulting in substantial small business detriment and conduct in concentrated markets which impacts on small business. In addition to those matters that demonstrate the factors above, in 2015 the ACCC is also prioritising work on the disruption of scams that rely on building deceptive relationships and which cause severe and widespread consumer or small business detriment.

When possible the ACCC seeks redress for businesses that have suffered detriment. For example in the recent Coles case the ACCC, by utilising a combination of litigation and court enforceable undertakings, was successful in ensuring that Coles provided redress to relevant businesses through an established scheme under which an external arbitrator, Mr Jeff Kennett, will determine what payments should be made.

The ACCC notes that it does not have a role or resources like other regulators in the running of test cases. For example, the Australian Tax Office receives funding to run test cases and provides funding for small businesses to run test case litigation.

Finally, the ACCC notes and is considering ways to address Recommendation 53 of the Competition Policy Review Panel's Final Report regarding the ACCC's role in better linking small business to dispute resolution services.

¹ *ACCC v Coles Supermarkets Australia Pty Limited* [2014] FCA 634.