

Senate Economics Legislation Committee

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Additional Estimates, 16 & 17 February 2005

Question: Add 9

Topic: ACCC – Anti-Competitive Behaviour

Hansard Page: Written

Senator Sherry asked:

1. We know that the ACCC has the ability to look into anti-competitive behaviour. What sort of behaviour qualifies as anti-competitive?

2. **The next 3 questions refer to this particular case:**

This independent retailer is just battling to get by – operating mostly at a loss, occasionally breaking even. The price this independent petrol retailer had to charge for their ULP in early February was 105.9 cents per litre. The Shell service station which has been bought by Coles up the road on the same day was selling ULP for 96.9 before the 4 cent shopper docket discount.

2a Would this type of situation warrant a closer look from the ACCC?

2b What advice would this particular retailer have received from the ACCC ‘Infocentre’?

2c Why when this case was brought forward to the ACCC – was the company told the ACCC couldn’t do anything and that they should employ a solicitor before the case had been looked into?

3. *“Protecting certain businesses or any particular sector of the Australian community from fair, vigorous and lawful competition ... is not the ACCC’s mandate.” (shopper docket report)*

3a Am I correct in saying that the ACCC will not or can not protect the rights of small business if for example if they are gobbled up by a big business with huge buying power and the power to cross subsidise across the country and across both petrol and grocery sectors?

3b What does the ACCC do to protect small business?

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- 3c When this service station decides that they can no longer continue to sell petrol at a loss and close down, the town is left with one petrol retailer – a retailer who can pick the price they charge – would the ACCC still be of the opinion that they are promoting competition when they ignore the rights of small retailers?
- 3d How can big business cross-subsidising and undercutting small operators and driving them out of town benefit the consumer in the regional centre?
- 3e The petrol retail industry is rapidly changing does the ACCC foresee the need for further powers to regulate the industry which evolves?

Answer:

1. Part IV of the *Trade Practices Act 1974* (TPA) prohibits anti-competitive conduct including:
- the making of certain contracts or arrangements or the reaching of certain understandings (eg price fixing, primary boycotts and bid rigging);
 - engaging in conduct involving a secondary boycott;
 - abusing market power;
 - exclusive dealing;
 - resale price maintenance; and
 - mergers that result in a substantial lessening of competition in a market.

While the ACCC may identify conduct that it believes is anti-competitive the final arbiter of such conduct is the court. In bringing a matter to court the ACCC must be satisfied that it has sufficient evidence to support its claims.

2. a. This situation would warrant further investigation from the ACCC if there was evidence of a breach of the TPA. For example if there was information that indicated that there was a misuse of market power under section 46 of the TPA, the ACCC would not hesitate in taking action to enforce the competition provisions of the TPA.
2. b. The information provided to the retailer would have depended on the allegations made, the details of which are not available. If the caller had made an allegation of a misuse of market power (section 46) including an allegation of predatory pricing, the normal practice of the Infocentre would be to escalate the call to an ACCC investigator. Infocentre staff are required to escalate all Part IV allegations to an ACCC investigator with matters escalated to the regional office in the State or Territory from which the call originates. Infocentre staff would normally record the details of the complainant if the

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complainant provides those details. It is not unusual for some complainants to decline to provide identifying details.

If the complainant had not alleged any sort of anti-competitive conduct, only that their competitor could sell petrol more cheaply, Infocentre staff would normally explain that the ACCC was unlikely to be able to assist in the matter and that the complainant should consider seeking their own independent legal advice. This advice is generally provided because there may be other commercial reasons for the conduct complained of that may not be concerned with the operation of the TPA.

2. c See answer to part (b) of this question.
3. a. The ACCC will act to protect small business in circumstances where those small businesses are the victims of conduct that contravenes the TPA.

There is one specific provision in the Act, section 50, which enables the Commission to prevent large companies acquiring smaller businesses where that acquisition is likely to result in a substantial lessening of competition in a market.

Section 46 of the TPA prohibits corporations with a substantial degree of market power from taking advantage of that power for a proscribed purpose. To establish a misuse of market power requires proof that a corporation:

- Has a substantial degree of power in a market; and
- That it took advantage of that power; and
- That its purpose in so doing was to:
 - i. eliminate a competitor from a market;
 - ii. prevent the entry of a competitor to a market; or
 - iii. deterring or preventing a person from engaging in competitive conduct in a market.

It is generally not enough to point to the fact that competitors, even small competitors, are being damaged by the actions of a larger, more powerful business in the course of normal business dealings.

The role of the TPA and the ACCC in administering the TPA is fundamentally to enhance the interests of Australian consumers by promoting fair, vigorous lawful competition, whether it be between big, medium and/or small businesses. Protecting certain businesses or any particular sector of the Australian community from fair, vigorous and lawful competition for whatever reason, brings with it corresponding costs to the Australian public.

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3. b. The TPA does not provide a mandate for the protection of any sector of the business community, including small business. However, the ACCC recognises that when it comes to dealing with big business as both a competitor and consumer, small business may often be in a weaker position. For this reason the TPA specifically allows the Commission to authorise conduct which on the surface appears to be inherently anti-competitive, such as allowing small businesses to bargain collectively. Any authorisation granted by the Commission requires that the overall public benefit outweigh the anti-competitive detriment inherent in the conduct.

Generally when it comes to small businesses seeking to collectively bargain with larger business, the ACCC finds these arrangements to be in the public interest because they enable smaller entities to have more effective input and influence on any ultimate contract terms and conditions. The Government has adopted the recommendation of the Dawson Inquiry that a more streamlined notification process be adopted to allow small business to collectively bargain. This process will offer small business a speedier and simpler means for them to come together and improve their bargaining power in a lawful manner.

The TPA specifically states that any small business that is subjected to unconscionable business behaviour or conduct that is anti-competitive is entitled to protection under our competition laws. If the ACCC finds that there is a case to answer the Commission will take on the case and pursue it until it receives a satisfactory outcome, backed if necessary, by court orders or enforceable undertakings.

The ACCC also has a dedicated Small Business Unit which aims to educate small business about their rights and responsibilities under the TPA.

3. c. There has been considerable change in the petroleum industry since the 1970s. Changes in supply and demand have resulted in significant industry rationalisation and this is expected to continue. In the Australian market the number of petrol retailers fell from 20,000 in 1970 to approximately 8,000 in 2003. This trend has also occurred overseas. One of the reasons for this rationalisation is that scale and integration of retail operations are important in the economics of modern petrol retailing. A large integrated retail petroleum outlet may offer consumers in a country town just as good, or if not better, retail petroleum service as two smaller petroleum retailers who may not be competing vigorously in any case.
3. d See answer to 3 (c) above.

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3. e. The ACCC looked extensively at the petroleum industry in the context of the 2004 Shopper Docket report and continues to closely monitor developments in the industry. However, the Commission does not see the need for specific petroleum industry based powers at this time.