

Senate Standing Committee on Economics

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Additional Estimates – 25–26 February 2009

Question: aet 89

Topic: Communication Between Mr Gregson & Mr Martine

Hansard Page: E28-29, E31, E33 (26 February 2009)

Senator BRANDIS asked:

Senator BRANDIS—Please, Mr Samuel, let us not be euphemistic about this. There would not be just difficulties under the Trade Practices Act; that would be the plainest case of a breach of section 45 of the Trade Practices Act on the hypothesis you have just advanced, would it not? It would be a plain case of a breach of section 45?

Mr Cassidy—You are correct. We have been given some fairly general details of what this proposed institution will do and some fairly general guidance. We have not been given specific details as to how it will operate, so we have not been able to say, ‘Yes, well, on the basis of what you have put to us, we either see a problem or we do not see a problem.’

Senator BRANDIS—You have referred to general guidance, Mr Cassidy.

Mr Cassidy—That is right.

Senator BRANDIS—Where has that general guidance come from?

Mr Cassidy—It has basically come from Mr Gregson, who is sitting on my right, and from me.

Senator BRANDIS—Mr Gregson?

Mr Cassidy—Because we were the two who were dealing with Treasury on it.

Senator BRANDIS—I am sorry. Well, Mr Gregson, you are the man within the ACCC who is primarily responsible for looking at this issue, are you?

Mr Gregson—That is correct. I was the person who dealt with Treasury on that matter in January.

Senator BRANDIS—All right. With whom at Treasury did you deal?

Mr Gregson—Mr David Martine.

Senator BRANDIS—Mr Martine. Has a document outlining the proposal or addressing the proposal been given to the ACCC by Treasury?

Mr Gregson—That is right. In January a high level document was provided to us.

Senator BRANDIS—Can we have a copy of that, please?

Mr Gregson—We can take that on notice, but I suspect there may be issues with that.

Senator BRANDIS—Well, you take that on notice, please. Given that Mr Cassidy has addressed this at a level of generality, can you be a little more specific, please, Mr Gregson? What specifically was it that Mr Martine put to you?

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Mr Gregson—Put to me in the sense of the nature of the arrangements or the queries?

Senator BRANDIS—The nature of the arrangement first, please.

Mr Gregson—I might take that on notice. There are issues as to what I can provide in relation to the sensitivities of that.

Senator BRANDIS—All right. Rather than waste time, Mr Gregson, would you just take on notice my general question? I would like full details of what was conveyed by Treasury, by Mr Martine and his other officers, to the ACCC in relation to this matter, either verbally or in the form of a document? You will consider that and we will consider your answer. Mr Samuel, you will see in the article in the *Australian* that Professor Ergas is quoted as saying:

The four major banks who will be shareholders, who otherwise compete for the supply of finance to property developers, will be agreeing on the terms and conditions on which an entity of which they are owners will make loans to property developers.

If it is as Professor Ergas describes, absent an authorisation or an amendment to the act to create a carve-out, how could that be otherwise than anticompetitive behaviour?

Mr Samuel—The difficulty is that we are dealing in generalities at the moment. I notice that Dr Ergas goes on in the article to say:

They are competing in the supply of this service of providing finance to property developers. Because they will continue to compete outside of the structure, and in the structure they then reach agreements about loans that are substitutes for the loans that they provide in the market, that amounts to a price-fixing agreement.

Senator BRANDIS—Well, as you—

Mr Samuel—Just let me finish, Senator. I think, with respect to Dr Ergas, that is probably not an accurate statement about what the commercial property bank will be doing, because he says here, ‘They can reach agreements about loans that are substitutes for the loans that they provide in the market.’ As I understand it, these are not substitutes for loans that the four major banks will provide in the market; they are substitutes for loans that others, that is foreign banks, would otherwise provide.

Senator BRANDIS—It does not matter, Mr Samuel. You and I both know that if competitive parties decide to segregate a market or to enter into a market vacated by other parties that had previously been competitors in the market and they decide to divide up that new sector of the market and reach agreement on price and conditions and so on in relation to that new sector of the market, for the purposes of this exercise the sector vacated by the foreign banks, that still falls foul of section 45. Doesn’t it?

Mr Cassidy—What you are saying is, in essence, correct.

Senator BRANDIS—Thank you.

Mr Cassidy—I think this will be revealed assuming there is no impediment to us providing the material you have asked for on notice.

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Senator BRANDIS—I asked about what particularly was being sought and did not get an answer, and I do not criticise that. Mr Gregson said he would take it on notice.

...

Mr Samuel—I assure you on the advice given, Senator, I do not think you will find that we have crossed any lines on that.

Senator BRANDIS—Well, let us have a look at the email exchange, and I am sure even my sceptical mind might be able to be put at ease.

Answer:

The communications between Mr Martine of Treasury and Mr Gregson of the ACCC are embodied in three e-mails.

On 19 January 2009 Mr Martine sent a short covering e-mail to Mr Gregson attaching a confidential background document. Mr Martine provided the document in the context of seeking the ACCC's assistance in identifying trade practices issues that might arise from the proposal set out in that document.

The document attached to Mr Martine's email was prepared as part of the deliberative process of policy development, including in the decision-making process of Government, and was marked confidential.

On 20 January 2009 Mr Gregson provided an e-mail response identifying the relevant provisions of the *Trade Practices Act 1974* (TPA), (both the per se and substantial lessening of competition provisions of section 45) and the joint venture defences. The response included an outline of the authorisation process and section 51 of the TPA. This email was also part of the deliberative process of policy development, including in the decision-making process of Government, and was marked protected.

In response to a further request, later that day Mr Gregson provided links to publicly available information in relation to section 51 of the TPA by email.