

Senate Standing Committee on Economics

ANSWERS TO QUESTIONS ON NOTICE

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10 – 11 February 2010

Question: aet 72

Topic: Predatory Pricing

Hansard Page: Written

Senator EGGLESTON asked:

1. What is the definition of predatory pricing?
2. How many cases of predatory pricing have been successfully prosecuted over the past 12 months?
3. What is the difference between price leadership and predatory pricing?
4. How many investigations into Coles and Woolworths have taken place in the past 12 months?
5. How many investigations into Coles and Woolworths in the past 12 months have resulted in prosecutions? How many of those prosecutions were successful?
6. Does the Chairman believe that discounts of 66 and 83 per cent below the wholesale industry price constituted predatory pricing?
7. What is the Commission's view on the coordination of pricing promotions from Coles and Woolworths?
8. Is the Chairman aware of Franchise Entertainment Group, franchisor of 750 Blockbuster and Video Ezy stores nationally? Is the Chairman aware of the Group's representation to the ACCC calling for an inquiry into the Coles and Woolworths promotional pricing on latest release DVDs?
9. How many representations from MPs, Senators and small business owners has the ACCC received calling for an investigation on Coles and Woolworths latest release DVD promotions?
10. Do you agree with the Group's claims that it is impossible for small businesses to compete with discounts on the industry wholesale price of up to 83 per cent?

Answer:

1. Allegations of predatory pricing can be considered under both sections 46(1) and 46(1AA) of the *Trade Practices Act 1974* (TPA).

Whether concerns arise under section 46(1) of the TPA will depend on a number of factors, including:

- the relevant market definition and whether a retailer possess a substantial degree of power in that market; and

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- whether any substantial power is being taken advantage for a proscribed anti-competitive purpose.

Whether concerns arise under section 46(1AA) of the TPA will depend on a number of factors, including:

- the relevant market definition – which will depend on the field of rivalry for the particular good or service;
 - whether the supply of the relevant good or service was for a sustained period and at a price less than the relevant costs in supplying such a good or service. It should be noted that the cost of supply of those alleged to have engaged in predatory pricing is what is relevant to s.46(1AA) rather than the cost of supply of the complainants; and
 - whether there was the requisite anti-competitive purpose to eliminate or substantially damage a competitor, prevent the entry of a competitor into a market or deterring or preventing others from engaging in competitive conduct.
2. On 24 June 2009 the ACCC commenced proceedings against Cabcharge Pty Ltd and others alleging misuse of market power, including allegations of predatory pricing occurring prior to the introduction of section 46(1AA). This matter remains before the court.
- During the past 12 months no other predatory pricing cases were instituted or decisions received from the court.
3. Price leadership is a general economic term used to refer to pricing behaviour of a dominant firm.
- Price leadership is not of itself likely to raise TPA concerns unless the pricing behaviour satisfies the elements of the prohibition against predatory pricing (outlined in response to question 1 above) or is undertaken in contravention of other TPA provisions prohibiting anticompetitive agreements.
4. The ACCC's practice is that it does not comment on its investigations or who it may or may not be investigating.
5. The ACCC has not commenced proceedings against either Coles or Woolworths in the past 12 months.
6. Whether or not price discounting raises concerns under the TPA must be considered against the TPA prohibitions, including those in sections 46(1) and 46(1AA) outlined in response to question 1 above.
7. Without commenting on any specific matters, the TPA prohibits contracts, arrangements or understandings between competitors that contain a cartel provision. The TPA also prohibits those agreements that have the purpose or have the effect of substantially lessening competition.

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In the absence of an agreement in which one or more of the parties is under an obligation to the others to act in a certain way, similar pricing behaviour or similar marketing strategies are unlikely to raise concerns under the TPA.

A unilateral decision to price in a particular manner is unlikely to raise concerns unless it satisfies the misuse of market power or predatory pricing provisions outlined in question 1 above

8. The ACCC is aware of Franchise Entertainment Group and requests for the ACCC to investigate the promotional pricing of new release DVDs by Coles and Woolworths.
9. The ACCC has received 12 letters from Members of Parliament and Senators (2 of which were received from the same Member of Parliament) and 110 representations (including by letter and phone) from small business owners which are primarily franchisee video store owners.
10. Whether or not the level of price discounting raises concerns under the TPA must be considered against the TPA prohibitions.