

Senate Standing Committee on Economics

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Additional Estimates, 10-11 February 2010

Question aet 73

Topic: Predatory Pricing – Legislation

Hansard Page: Written

Senator EGGLESTON asked:

1. Is the current TPA legislation for predatory pricing robust enough?

Answer:

Section 46 of the TPA deals with misuse of market power, including predatory pricing. Under s 46 (1);

a corporation that has a substantial degree of power in a market shall not take advantage of that power in that or any other market for the purpose of –

(a) eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market;

(b) preventing the entry of a person into that or any other market; or

(c) deterring or preventing a person from engaging in competitive conduct in that or any other market.

The predatory pricing provisions were amended in 2007 with the introduction of s 46 (1AA), the so-called Birdsville Amendment. It provides that;

a corporation that has a substantial share of a market must not supply, or offer to supply, goods or services for a sustained period at a price that is less than the relevant cost to the corporation of supplying such goods or services, for the purpose of [(a), (b) or (c) above].

Section 46 (1AA) intends to capture corporations that may not necessarily be caught by the general s 46 prohibition. Under s 46 (1AA) a corporation must have a ‘substantial share of the market’ rather than ‘market power’.

The Government has recently strengthened these provisions by providing clarity as to what may constitute ‘taking advantage of market power’. Under s 46(1AAA) it is now possible to breach the section even if it cannot be shown that the firm, after engaging in the conduct, can recoup the losses.

The TPA in general attempts to strike a balance between preventing anti-competitive conduct and allowing as vigorous competitive behaviour as possible among firms.