Senate Standing Committee on Economics

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Additional Estimates 2012

15 – 17 February 2012

Question: **AET 101 - 105**

Topic: **Predatory Pricing – Petrol Station Operators**

Hansard Page: **Written**

Senator WILLIAMS asked:

101. At what level of discount over what period of time will fuel discounts by Coles and/or Woolworths be considered a breach of the Act?

102. The number of retail sites that independents operate is down 9.3% since 2008-09. In Australia, the operation of petrol retail sites can be separated into five categories – refiner-marketer, supermarket, independent retailer, franchisees or commission agent. When defining an independent retailer the ACCC includes businesses operated by distributors, independent retail chains and other independents. It is a concern that the independent category was the only one to suffer a decline in numbers during the three year period.

    What do you believe are the contributing factors in this rapid decline and to what extent has the supermarket shopper documents added to this decline?

103. Major supermarkets hold 21.2% of retail sites and a massive 45% of the volume of petrol sold. Predatory pricing occurs when a company holds a substantial market share.

    With 45% of all retail volume, do the supermarket chains meet this criteria?

104. What is the reason the ACCC does not recognise this as substantial market share under section 46(1AA) of the Competition and Consumer Act 2010?

105. Supermarkets have used predatory behaviour to substantially damage or eliminate independents as a competitor in the retail fruit market. During the period of time that the supermarket operators have used fuel pricing as a predatory tactic, the number of service stations operated by independents has fallen 9.3%. This clearly suggests that as a tactic to eliminate competition the petrol discount works to the long term damage of the independent service station owner. As time has shown there has been elimination of competition in the petroleum industry this will harm consumers.

    Why is it that the ACCC has not conducted an investigation of this under section 46 (1AA)?

Answer:

101. Section 46(1) of the *Competition and Consumer Act 2010* (the CCA) prohibits the misuse of market power by corporations. It provides that a corporation with a substantial degree of market power shall not take advantage of that power for the purpose of:

    - substantially damaging or eliminating a competitor;
    - preventing the entry of a person in a market; or
    - preventing or deterring a person from engaging in competitive conduct in a market.

    Section 46(1AAA) provides that a corporation may contravene section 46(1) if it supplies goods or services for a sustained period at a price that is less than the relevant cost to that corporation of supplying the goods or services, even if the corporation cannot, and might not ever be able to recoup losses incurred by supplying the goods or service.

    Section 46(1AA) prohibits a form of predatory pricing. 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 any of the anti-competitive purposes (the same as outlined above).

    Whether conduct will raise concerns under the CCA will depend on the circumstances of each case. The ACCC is on record as stating that it will consider developments in the sector as they arise, including changes in the extent of the impact of shopper docket arrangements and their effect on competition.

    The ACCC is considering the competition and consumer protection issues that may arise from shopper docket discounts and specifically those above 4.0 cents per litre offered more often and for longer periods. The ACCC is working with industry representative groups to gather information.

    The ACCC continues to assess these matters carefully and extensively taking account of market information and engaging with market participants. The ACCC expects to conclude its assessment in 2012.

102. The percentage change of 9.3 per cent in the number of independent retail sites appears to have been derived from a comparison of table 3.13 in the 2009 ACCC Petrol Monitoring Report with table 3.9 in the 2011 report. These tables provide data on shares of retail sites by types of operators among monitored companies. The reduction of 9.3 per cent is a reduction in the share of sites among monitored companies, not in the number of sites operated by independent retailers.

    As it is intended to be representative rather than a precise count, the data in the monitoring reports understates the total number of independent retailers in the Australian petrol market. Data published in the monitoring reports relate to monitored companies, that is, the four refiner-marketers, four independent wholesalers (three with retail operations), two supermarkets and two specialist independent retailers. As outlined in the report, the ACCC's monitoring program does not include all wholesalers and all retailers. Comparisons over time of data on retail sites is further complicated by changes in site category classification reported by the monitored companies.

The degree to which the data understates the number of independent retailers could change from year to year. This is because the supply arrangements can change over time. For example a small independent retailer that ceased purchasing its petrol from one of the monitored companies would no longer be captured by the ACCC's data collection process.

Table 3.8 of the 2011 monitoring report shows the shares among the monitored companies of petrol sales by branded sites. From 2002-03 to 2010-11, large independent retail chains increased their share of petrol sales among monitored companies from 6 per cent to 17 per cent. The increase from to 2009-10 to 2010-11 was affected by Mobil's sale of its retail sites to independent retail chains, though there had been an underlying increasing trend since 2005-06. After an initial increase in the years following entry into the market, supermarkets' share of sales among monitored firms since 2005-06 has remained steady at around 45 per cent.

Changes in composition and volume shares in the fuel sector are influenced by a number of factors.

103. The ACCC's consideration of these matters is necessarily through the prism of the CCA, the relevant provisions of which set out in the response to Question 101. The definition of what constitutes the relevant market and whether certain market shares would be considered to be substantial needs to be assessed in the circumstances of each case. While it is ultimately a matter for the Courts to determine, the ACCC considers that the major supermarket chains have a substantial market share in a number of fuel retail markets.

104. Contrary to the premise of the question, and as per the preceding responses, the ACCC considers that the major supermarket chains do enjoy a substantial market share in a number of fuel retail markets. The holding of such market share is of course only one element of the provision and does not in itself suggest illegal conduct. As stated above, the ACCC continues to assess these matters carefully and extensively, taking account of market information and engaging with market participants.

105. Whether conduct will raise concerns under the CCA will depend on the circumstances of each case. The ACCC is on record as stating that it will consider developments in the sector as they arise, including changes in the extent of the impact of shopper docket arrangements and their effect on competition.

As referred to above the ACCC is considering the competition and consumer protection issues that may arise from shopper docket discounts and specifically those above 4.0 cents per litre offered more often and for longer periods. Industry representative groups are assisting the ACCC to gather information.

The ACCC continues to assess these matters carefully and extensively, taking account of market information and engaging with market participants.