

Senate Standing Committee on Economics

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Additional Estimates 2012

15 – 17 February 2012

Question: AET 106 - 114

Topic: ACCC Act – Supermarkets and Suppliers

Hansard Page: Written

Senator EDWARDS asked:

In reference to a speech made to the Law Institute of Victoria on the 25th of October 2011 where Mr Sims highlighted three areas of focus he will be bringing to the ACCC:

- 1. That the ACCC needs to be more "strategic" in its forward focus.*
- 2. That the ACCC will be steelier in backing its judgement.*
- 3. Following case outcomes: pursue either policy or legislative reviews with government.*

In that context:

106. Is section 46 of the ACC Act failing food growers/manufacturers and beverage in this country?
107. Does Section 46 of the ACC Act provide adequate protections for suppliers (for example food and beverage manufacturers) against retailers using their market power to demand cheaper prices?
108. Have there been any cases brought by suppliers trying to use Section 46 against a retailer?
 - a. If so, which cases?
109. Does section 46 of the ACC Act now only provide recourse for retail trade (the supermarket oligopolists as they are sometimes known) competitors using anti-competitive behaviour and not the suppliers to these retailers?
110. Anecdotal evidence would suggest that food producers and packagers are being marginalised to unprofitable levels while the two supermarkets with a combined market share of 80% drive the retail price of goods down using price discounting, loss leaders and selling goods below cost in order to gain market share, and, in order to do so, not allowing suppliers (manufacturers, farmers, etc) to pass on price increases. What action is being undertaken to review this increasingly problematic market place phenomenon?
111. Recent public comment from the chairman suggests a level of frustration on his part in the lack of participation in food and beverage producers providing the compelling information and evidence required to trigger any investigation into either unconscionable conduct or anti-competitive behaviour by the oligopolists. Have you considered conducting a series of in camera hearings in each capital city of Australia to establish if the anecdotal evidence is supported in reality?
112. One of the issues in bringing sufficient evidence forward to prove alleged unconscionable conduct is the lack of communication between suppliers and

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retailers in writing. Most of the daily negotiations occur verbally. Has the ACCC considered alternative ways to gather non-written evidence?

113. The senate is currently undertaking an inquiry in the foreign investment in Australian agricultural land and the National Interest Test. As part of your new focus on developing strategy and the anecdotal evidence that producers and manufacturers are being taken advantage of due to the concentration of the retail market:
- a. Is it likely that many Australian farmers and food manufacturers will experience serious short term sector asset value decline and be forced to sell by virtue of sustained losses?
 - b. Is it likely that many of these assets may fall into the hands of non-Australian entities or offshore sovereign wealth funds? (I refer to the recent decision of the NZ government stepping in to stop the sale of any further dairy assets to non NZ based entities)
 - c. Is the potential failure of the locally owned agriculture and food manufacturing sector likely to lead to an increase of imported food products?
114. In light of these above issues and in line with the Chairman's stated new focus on review of policy and legislation, does ACCC see the implementation of a National Interest Test within the ACC Act as a way to secure the nation's food supplies and provide a commercial environment in which the sector can sustain itself to maintain those National Interest Test objectives?

Answer:

106. - 107.

Section 46(1) of the *Competition and Consumer Act 2010* (the CCA) prohibits a corporation with a substantial degree of market power from taking advantage of that power to achieve a proscribed anti-competitive purpose. Section 46(1AA) of the CCA prohibits a corporation that has a substantial share of a market from engaging in predatory pricing by supplying a good or service at a price that is less than the relevant cost to that corporation for a sustained period to achieve a proscribed anti-competitive purpose. Whether conduct raises concerns under these provisions will depend on the circumstances in each case.

The ACCC has acknowledged publicly the power of the two major supermarkets and that vertical integration in the supply chain needs close scrutiny to ensure the supermarkets do not misuse their market power under the CCA. The ACCC is currently considering a number of matters that have been raised publicly and privately.

108. The ACCC is not currently aware of any cases brought privately by suppliers to major supermarkets under section 46.

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109. - 112.

Possible breaches of the competition and fair trading provisions of the CCA come to the ACCC's attention by a variety of sources, including complaints from consumers, complaints from competitors or other businesses, self-disclosure, or through the media, parliamentarians or other agencies – including state and territory fair trading authorities. The ACCC encourages businesses and people with concerns over conduct to come forward and report and provide information to support any investigation that arises. While the ACCC may, at some point, need the assistance of witnesses in providing information for external use in a matter, it knows the importance of encouraging matters to be disclosed in a confidential manner. In this regard, the ACCC can take complaints on a confidential or anonymous basis. The ACCC is also experienced in obtaining evidence that may not be document-based and can present such evidence to the court as required, whether it be in the context of an unconscionable conduct allegation or another provision of the CCA.

113. The ACCC appeared at the Senate References Committee on Rural and Regional Affairs and Transport inquiry into the examination of the Foreign Investment Review Board national interest test. In its evidence to the inquiry, the ACCC noted that, when considering both foreign investment proposals and domestic acquisitions, the ACCC applies the test under section 50 of the CCA which confines the ACCC to considering the effect on competition in a relevant market in Australia.

The factors the ACCC considers are set out in section 50(3) of the CCA, commonly referred to as the 'merger factors'. The merger factors cover a broad range of possible competitive constraints faced by a merged firm. The impact on the public interest or national interest in a broader sense of a foreign investment proposal is not a merger factor that goes to determining whether a breach of section 50 is likely.

114. The provisions contained within Part IV of the CCA are designed to prohibit anti-competitive conduct, including misuse of market power, price-fixing and other collusive conduct. The Part IV provisions are principally concerned with protecting the competitive process, not individual competitors and are not designed to protect competitors from rigorous competitive behaviour, nor to force businesses to compete. The principles that are embodied in the Part IV provisions of the CCA are in line with international best practice and can be found in almost every competition regime in the world.

The Government is currently examining the issues relating to food, including food security, through initiatives such as the National Food Plan.