

Senate Economics Legislation Committee

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Budget Estimates 30 May – 1 June 2006

Question: bet 30 (ACCC)

Topic: Guide on Unconscionable Conduct

Hansard Page: Written

Senator WEBBER asked:

- (1) The following questions relate to the purchase of executive coaching and/or other Can you outline for the Committee whether you believe there are any deficiencies in Section 51AC of the Trade Practices Act?
- (2) Can you explain to the Committee whether any of the matters arising out of Automasters Australia Pty Ltd v Bruness Pty Ltd & Anor[2002] WASC 286 suggest that there are deficiencies in the Act?
- (3) Can you explain to the Committee the process by which the ACCC decided to include the cases that it did in its “Guide to Unconscionable Conduct”?
- (4) How many complaints does the ACCC receive each year?
- (5) How many cases are followed through to litigation?
- (6) What factors does the ACCC take into account when determining whether or not to proceed to litigation?
- (7) Now I understand that when the original complaint was made to the ACCC from Bruness Ltd that independent legal advice sought by the ACCC showed that there was little prospect of a successful action under Section 51, is that correct?
- (8) Given that the case was successfully argued by the plaintiff in the Western Australian Supreme Court does that not suggest that Section 51 should indeed be strengthened to ensure more successful litigation outcomes?
- (9) Does the ACCC accept that the use of the case in the “Guide to Unconscionable Conduct” puts the defendant in a difficult situation?
- (10) In a case where an individual seeks redress under the law without the support of the ACCC and is successful after being advised by the ACCC that there is little likelihood of success and then to have the case referenced in your publication would seem to be a case where the ACCC has taken advantage of the situation?

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- (11) Did you have to seek any approval from the parties involved to reference the case in your “Guide to Unconscionable Conduct”?
- (12) Was any attempt made by the ACCC to inform the defendant before the publication that the ACCC would be using the case in the Guide?
- (13) If not why not?
- (14) Do you accept that the use of the case after the defendant has sought to finance the legal process out of his own resources and is now facing severe financial difficulties is something that the ACCC should have considered before including the case in the Guide?
- (15) Does the ACCC accept that including the case in your Guide should have included some form of acknowledgement that the defendant took this action without the support of the ACCC and that there is no reference to the costs involved?
- (16) Does the use of the case in the Guide suggest to other people in a similar situation that the ACCC would support their actions to seek legal redress under the Act?
- (17) Has the ACCC supported any similar cases since the publication of the Guide?
- (18) If so have any of these cases been successful?
- (19) Does the ACCC agree that the publication of the Guide on Unconscionable Conduct was specifically for the purpose of providing business operators of clear examples of what should not happen?
- (20) Although there is an argument that the successful outcome of the case, does not mean that the ACCC should have behaved differently while the case was proceeding through the courts, does the ACCC accept that there are moral reasons why the defendant has some claim on the ACCC for its support now?
- (21) Has the ACCC received any representations from the defendant since the Guide was published?
- (22) Has the ACCC communicated with the defendant since the Guide appeared?

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Answer:

- (1) The Australian Competition and Consumer Commission (ACCC) does not have direct carriage of legislative policy matters concerning the Trade Practices Act 1974 (TPA). That is a matter for the Department of the Treasury.
- (2) *Automasters Australia Pty Ltd v Bruness Pty Ltd & Anor* provides useful judicial comments on the operation of section 51AC of the TPA, especially the approach the courts are likely to take to the matter of 'good faith' in commercial dealings. The case reveals the complexity of the legal principles involved rather than any deficiencies in section 51AC.
- (3) The aim of the *Guide to Unconscionable Conduct* (the guide) was to help businesses understand the development and application of the statutory prohibition of unconscionable conduct, so that they may better understand how to avoid treating other businesses and consumers unconscionably; as well as being able to recognise situations in which they themselves might be subjected to unconscionable conduct. Examples were included to help explain the principles of statutory unconscionability by showing how in both private and ACCC proceedings the Courts have applied the law to actual commercial situations.

The case summaries included in the guide were chosen because they illustrate one or more points of law. They are based on reported decisions of Federal, State and Territory courts, which are available to the general public.

- (4) The ACCC receives in excess of 50,000 complaints and inquiries annually. In the financial year 2005/06 the ACCC Infocentre responded to 52,644 complaints and inquires via telephone calls (53 417 in 2004-05) and received 7,374 via email (7,678 in 2004-05). In 2005-06, 427 allegations of unconscionable conduct were received by the Infocentre (317 in 2004-05).
- (5) The number of proceedings commenced by the ACCC fluctuates from year to year. In the 16 years from the 1990-91 financial year, the figure has varied from a low of 4 to a maximum of 41. On average, the ACCC commences about 21 cases per year. In 2005-06 the ACCC commenced 15 new cases (31 in 2004-05).
- (6) In determining whether to proceed to litigation, the ACCC will consider a range of factors including :
 - whether the remedies available through successful court action will contribute to the ACCC's objective of improving overall compliance with the TPA;
 - the strength of the evidence available to the ACCC; and
 - the circumstances surrounding the alleged contravention.

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Prior to commencing litigation the ACCC must comply with the Commonwealth Attorney-General's Legal Services Directions, including the requirement to have legal advice that there are reasonable grounds for commencing the proposed litigation.

- (7) Yes.
- (8) The ACCC does not comment on the appropriateness of legislative amendment. This is a policy matter for Government. However, it is noted that court outcomes will vary from the legal advice that one or other of the parties to the proceeding may have received.
- (9) No. Publications such as the guide are intended to educate businesses and consumers about their rights and obligations under the law. Refer to the answer to question 3.
- (10) No. The ACCC does not agree with this contention.
- (11) No, all the cases referenced in the guide are a matter of public record. Therefore, it was not necessary to seek approval from the parties involved.
- (12) No.
- (13) As stated in the answer to question 11, all cases referred to in the guide are a matter of public record. The examples included in the guide are simply summaries of reported judgements.
- (14) No.
- (15) No. It is noted that reference in the guide to the full name of the case indicates that the proceedings were private proceedings and not commenced by the ACCC.
- (16) No. Refer to the answer to question 3 as to the purpose of publications such as the Guide. Such publications do not indicate that the ACCC will take enforcement action in relation to all allegations of conduct similar to those described in the publication.

The ACCC is not obliged to pursue every matter that is brought to its attention where there may be a contravention of the TPA. As a regulatory agency, the ACCC must have discretion to utilise its resources in the way it believes will most effectively achieve its enforcement and compliance objectives. It is noted that the majority of litigation under the TPA is conducted by private parties.

- (17) No.

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(18) Not applicable.

(19) Refer to the answer to question 3.

The application of the law will vary according to the specific circumstances of each case. It is virtually impossible to draw hard and fast 'rules' from decided unconscionability cases that will apply to all situations. The guide highlights the kinds of conduct which may risk breaching the TPA, and how businesses may recognise and avoid such conduct.

(20) No. The ACCC made a decision, in good faith and based on legal advice, not to take enforcement action in relation to complaints made about the conduct of Automasters Australia Pty Ltd. The conduct of the ACCC in exercising this discretion has been reviewed internally and by the Commonwealth Ombudsman and has been found to be not deficient. While the ACCC understands that the pursuit of legal redress by Bruness Pty Ltd and Mr Coombes has taken many years and come at a significant cost, this was a commercial decision for which the ACCC cannot be held responsible.

(21) Yes.

(22) Yes.