

Senate Standing Committee on Economics

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Budget Estimates, 2 June – 4 June 2009

Question: bet 123

Topic: Cartels

Hansard Page: Written

Senator Xenophon asked:

1. Has the ACCC prepared guidelines on the cartel legislation?
2. What does the ACCC view as serious cartel behaviour?
3. How will the ACCC distinguish between serious cartel behaviour and other less offensive conduct?
4. What preparations has the ACCC undertaken to be ready to launch its first criminal prosecution for cartel behaviour?
5. Does the ACCC have any estimate of how many cartels are operating in Australia at the moment?
6. Is the ACCC concerned that small businesses and consumers may not be able to recover their losses from cartel behaviour?

Answer:

1. Yes. On 14 July 2009 the ACCC released guidelines on the ACCC's approach to cartel investigations following the commencement of the provisions regarding cartel conduct in the *Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009*.

Updates to information provided on the ACCC's website were made on the same day (see www.accc.gov.au/cartels). More generally ACCC guidance on application of the provisions of the *Trade Practices Act 1974* (the Act) have been supplemented with inserts dealing with the cartel amendments

In April 2009 the ACCC reissued its guideline, *Cartels: Deterrence and Detection — a guide for government procurement officers* accommodating the then proposed cartel amendments.

2. The memorandum of understanding between the ACCC and Commonwealth Director of Public Prosecutions (CDPP) sets out a non-exhaustive list of matters which the ACCC will have regard to in deciding whether the conduct is serious and therefore should be referred to the CDPP, namely whether:

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- § the conduct was longstanding or had, or could have had, a significant impact on the market in which the conduct occurred
 - § the conduct caused, or could have caused, significant detriment to the public, or a class of the public, or caused, or could have caused, significant loss or damage to one or more customers of the alleged participants
 - § one or more of the alleged participants has previously been found by a court to have participated in, or has admitted to participating in, cartel conduct either criminal or civil
 - § the value of the affected commerce exceeded or would have exceeded \$1 million within a 12 month period (that is, where the combined value for all cartel participants of the specific line of commerce affected by the cartel would exceed \$1 million within a 12 month period)
 - § in the case of bid rigging, the value of the bid or series of bids exceeded \$1 million within a 12 month period.
3. See answer to question 2.
4. The ACCC has reviewed its operations over recent years with a view to ensuring criminal cartel are effectively prosecuted. ACCC investigators have been provided relevant information in relation to the new provisions both in hard copy, presentations, and training.

The ACCC has established a memorandum of understanding with the CDPP whereby the ACCC would be responsible for investigating, and the CDPP prosecuting, criminal cartel conduct.

The ACCC has also established mechanisms to handle potential applications for immunity for criminal cartel conduct. The ACCC has revised its immunity policy for cartel conduct to reflect the new operating environment and the CDPP has published an annexure to the Prosecution Policy of the Commonwealth detailing how it will handle potential applications for immunity for cartel conduct.

The ACCC has enhanced its capacity to obtain and handle evidence in a manner necessary to maintain a criminal prosecution. In part this reflects the creation of new evidence handling facilities and the provision of training to staff in relation to evidence handling, search warrants, interview of potential suspects and the actual provisions of the Act.

5. The ACCC is actively investigating approximately 10 cartels in-depth as of 1 July 2009. It expects that the number of cartels operating in Australia at any given time will exceed those cartels which come to its attention. That is one reason why the ACCC proactively seeks to destabilise cartels via its immunity policy for cartel conduct.

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6. The ACCC accepts that there are often a number of difficult questions when redress is sought following cartel conduct. This may be the case even where the Court has, following ACCC proceedings, found cartel conduct occurred in a particular sector. That said, the ACCC notes that private litigation to recover loss or damage from cartel conduct is on the rise. Small businesses in particular have shown a capacity to use class action proceedings when seeking to recover alleged losses from cartel conduct.