Senate Standing Committee on Economics

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Budget Estimates

1 June – 3 June 2010

Question: BET 113

Topic: OECD Competition Test

Hansard Page: E68-69 (03/06/2010)

Senator JOYCE asked:

Senator JOYCE—In your study of the OECD, did you make a comparative analysis between their threshold test for the instigation of an action and the Australian threshold test for the instigation of an action?

Mr Deitz—Sorry, the review—

Senator JOYCE—The threshold test—the substantial lessening of competition test being one of them.

Mr Deitz—The review was conducted by the OECD competition committee secretariat. Australia was subjected to a peer review process during that review, but we did not run that process.

Senator JOYCE—Did the report specify encumbrances to the initiation of an action in Australia as opposed to the initiation of a similar action in, say, the US?

Mr Deitz—Which encumbrances?

Senator JOYCE—The substantial lessening of competition test is one threshold that is incredibly hard to prove. In fact, I do not think they have ever proved it. I am talking about an Australian encumbrance that stops the progression of cases and therefore impedes the trade practices law—although it may be glamorously portrayed, it is muted in its effect.

Mr Deitz—I would have to take on notice any of those kinds of concerns, but I would observe that the substantial lessening of competition test is used quite broadly. It is not just an Australian test. It is used throughout our region and in the US and Canada, for example. I do not recall that review commenting negatively in any sense on the use of the phrase 'substantial lessening of competition'.

Senator JOYCE—Hasn't it been the interpretation since the Boral case that, before you can instigate an action, you have to prove that a competitor has the capacity to raise prices without losing customers?

Mr Deitz—To raise prices without losing customers would require you to be an absolute monopolist—

Senator JOYCE—A monopsonist.

Mr Deitz—with an elastic demand curve, and such a scenario does not exist. The competition law has a far broader application than that.

Senator JOYCE—Does it? Since Boral? Are you sure of that?

Mr Deitz—If you want me to come back to you on notice, I am happy to confirm that. But I would also note that there are specific subsections of section 46 which say it does not require absolute freedom from constraint. There is a specific section which deals with that.

Senator JOYCE—Could you inform me of the cases that have been successfully prosecuted since Boral?

Mr Deitz—Safeway is one case which, I believe, was handed down after Boral. There would be others, but I would have to take that on notice.

Senator JOYCE—Was that a successful prosecution?

Mr Deitz—Yes.

Senator JOYCE—How many others do you know of?

Mr Deitz—I would have to take that on notice. I do not have that information in front of me.

Senator JOYCE—When was the Boral decision?

Mr Deitz—I believe it was in 2003.

Senator JOYCE—How many successful cases do you reckon there have been since 2003?

Mr Deitz—Again, I would have to take that on notice.

Senator JOYCE—Would you be surprised if it was three or four?

Mr Deitz—Again, I would have to take that on notice.

Senator JOYCE—The OECD also saw merit in encouraging more private enforcement of competition laws. Is that something Treasury is considering at the moment?

Mr Deitz—As we said, the government is considering the OECD review. It has put out a response to that. I do not have that in front of me and I cannot recall the details.

Answer:

Treasury understands that the Australian Competition and Consumer Commission (ACCC) has commenced three proceedings alleging a breach of section 46 of the *Trade Practices Act 1974* (TPA) since the High Court's *Boral Besser Masonry Ltd* decision in 2003.

- One of those matters was settled with remedies in relation to other alleged contraventions and the section 46 allegations discontinued.

- The remaining two matters involving allegations against *Cement Australia Pty Ltd* and *Cabcharge Pty Ltd* remain before the Court.

Treasury understands that, at the time of the Boral decision the ACCC had six ongoing proceedings involving section 46 which have now been finalised or remain ongoing.

- In December 2003, in *Rural Press v ACCC* the Full Federal Court found that a contravention of section **46** could not be sustained as it found that Rural Press and Bridge Printing would have acted in the same manner without substantial market power. The High Court upheld the Full Federal Court's findings in relation to section **46**.

- In August 2003, the Full Federal Court held that *Universal Music Australia Pty Ltd* had not breached section 46.

- In 2004, in relation to *Fila Sports Oceania Pty Ltd*, the Federal court concluded that the section 46 contraventions were blatant and had extended over a substantial period causing major damage to several businesses.

- In 2005, *Eurong Beach Resort Limited* was found to have misused its market power for the purpose of eliminating or substantially damaging a competitor.

- In 2006, in *ACCC v Australian Safeway Stores Pty Ltd and Anor* the Full Federal Court held that Safeway had misused its market power in a number of instances.

- In 2008, the ACCC succeeded in the Full Federal Court in securing a judgement against *Baxter Healthcare Pty Ltd* in relation to breaches of section 46 in the sterile fluids market. This case is ongoing.

Treasury understands that, since 2003 there has been at least four section 46 cases brought by private litigants.

- In *Austrac Operations Pty Ltd v State of New South Wales* (2003), the Federal Court held that FreightCorp did not have a power to increase prices, or to impose terms, or to reduce supply within the meaning of section 46(1).

- In *Seven Network Limited v News Limited (2003)* the Federal Court concluded that Foxtel did not take advantage of its power in the retail pay television market in any of the ways alleged by Seven.

- In *NT Power Generation Pty Ltd v Power and Water Authority (2004)* the High Court held that section 46 was contravened. The company's decision to refuse access to infrastructure had the purpose of excluding NT Power from the market.

- In *Pacific National (ACT) Ltd v Queensland Rail Ltd (2006)* the Federal Court did not find a breach of section 46.