

Senate Standing Committee on Economics

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Budget Estimates

1 June – 3 June 2010

Question: BET 240

Topic: s 87B Enforceable Undertakings

Hansard Page: Written

Senator BUSHBY and EGGLESTON asked:

1. Please indicate and expand upon the adequacy of current tools, need for new tools, renovation of law or changes in enforcement approach.
2. What mechanisms do the ACCC have in place for monitoring compliance with s 87B enforceable undertakings?
3. Does the ACCC has any concerns with the compliance levels regarding s 87B enforceable undertakings?
4. Is the ACCC seeking or inviting the payment of charitable donations as part of s 87B enforceable undertaking provided by a company in breach of the Trade Practices Act?
5. On what basis is the ACCC seeking or inviting the payment of charitable donations as part of s 87B enforceable undertakings?

** Senator Eggleston also submitted this question to the committee in writing on 8 June 2010.*

Answer:

1. In the context of section 87B of the *Trade Practices Act 1974*, Senator Bushby has asked as to the adequacy of current tools, the need for new tools, renovation of law or changes in enforcement approach.

The ACCC is satisfied with the flexibility provided by section 87B in terms of providing means of resolving matters outside of litigation but maintaining enforceability. Related to the monitoring of compliance with section 87B undertakings noted in the subsequent responses below, the ACCC has raised the prospect of amendments providing for compulsory information gathering tools to be made available to investigate possible non-compliance with section 87B undertakings.

More generally, the ACCC notes the additional investigative tools and remedies recently introduced arising from the first tranche of the Australian Consumer Law reforms. These tools and remedies will complement the suite of tools available to the ACCC for enforcing the Trade Practices Act.

2. Following the acceptance of a section 87B undertaking, the ACCC requires that its implementation and effectiveness be monitored. Monitoring will generally be

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the responsibility of the company/business concerned.

The ACCC also has a Compliance Monitoring Unit that has the specific function of monitoring a company's compliance with every requirement of a section 87B undertaking. To assist in monitoring compliance, the ACCC has, as a standard practice, sought the inclusion of provisions requiring relevant information to be made available to it:

- § periodically—for example, a periodic audit of compliance with the undertaking
- § in specified circumstances—for example, where there is an event of default, information relating to that default (such as the reasons for it), or
- § upon the ACCC's request.

The Compliance Monitoring Unit refers any identified or suspected breaches or failings to fulfil the terms of a section 87B undertaking to ACCC investigations staff for action.

Section 87B provides that the court, if it is satisfied that a person has breached a term of the undertaking, may make all or any of the following orders:

- § an order directing compliance with the undertaking
- § an order for the party to pay an amount up to the amount of any financial benefit that can be reasonably attributed to the breach
- § any order the court considers appropriate to compensate any other person who has suffered loss or damage as a result of the breach
- § any other order that the court considers appropriate.

The ACCC has commenced Federal Court of Australia proceedings several times in recent years in response to breaches of section 87B undertakings.

3. The ACCC's experience is that the majority of businesses who provide undertakings pursuant to section 87B of the Trade Practices Act appreciate the importance of compliance and make efforts to so comply.
- 4/5. From time to time, the ACCC has sought, or been offered, the inclusion of payments or otherwise to charity in resolution of matters within or ancillary to section 87B undertakings. For example, section 87B undertakings accepted in 2010 have included the donation of canned food by H.J. Heinz Company Australia Limited and a financial donation to a children's hospital by Woolworths Limited.

The appropriateness of such remedies will depend on all the circumstances. For example, in matters where a party may have obtained financial gain from a course

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of conduct, but where compensation to affected parties has difficulties, a donation to charity may be an appropriate remedy.