

Senate Standing Committee on Economics

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Budget Estimates

31 May – 2 June 2011

Question No: BET 122
Topic: Predatory pricing
Hansard Page: Written

Senator Bushby asked:

1. Do you think the current powers to deal with predatory pricing under s46(1) and s46(1AA) and related sections of the Competition and Consumer Act are adequate?
2. How many complaints of predatory pricing have been received by the ACCC in 2010-11?
 - a. How many have been investigated by ACCC?
 - b. How many have warranted a case being brought by the ACCC?
 - c. How many convictions in the last year have the ACCC?
3. What are the main impediments in prosecutions for predatory pricing?
4. Before a prosecution, what is the internal process in the ACCC of determining whether a firm is engaging in predatory pricing "for the purpose of eliminating or substantially damaging a competitor"? (contained in s46(1) CCA).
5. How does the ACCC assess whether a firm holds a 'substantial market power' in a market?
6. Have the ACCC been successful in securing convictions or penalties in any cases under s46(1AA) of the CCA('Birdsville amendment')? If not, why not?
7. Did the ACCC investigate Coles or Woolworths under s46 or any related subsection of the Competition and Consumer Act?
 - a. If so, what is the status of those investigations?
 - b. Coles and Woolworths have repeatedly said their \$1 per litre milk is not below the cost price for the item. What powers does the ACCC have to verify these claims?
 - c. Is the ACCC supportive of greater investigative powers to verify the claims that a firm with substantial market power is not, for an extended period of time, selling a good under their cost price?

Answer:

1. Yes. Following amendments in recent years, at this time the ACCC believes it is well placed to consider allegations of misuse of market power including claims of predatory pricing.
2. In financial year 2010—2011 the ACCC received 276 complaints of alleged predatory pricing. This represents a spike in complaints compared with past periods, which reflects a number of complaints in relation to one particular matter.
 - a. Of those 276 complaints, 57 were subject to further assessment, of which 13 progressed to an initial investigation phase, and five to an in-depth investigation phase.
 - b. The ACCC did not institute any proceedings for alleged predatory pricing in financial year 2010—2011.
 - c. The ACCC did not conclude any proceedings for alleged predatory pricing in financial year 2010—2011.
3. It is important to acknowledge that in the majority of cases, discounting of price is pro-competitive and of benefit to consumers. The various prohibitions seek to distinguish between competitive pricing practices and those instances that may be anti-competitive, having regard to the market power or share of the business in question and identifying whether pricing is below cost and engaged in for an anti-competitive purpose.

The ACCC has previously noted that establishing a business' purpose is often a matter requiring considerable investigation.

4. As with all matters the ACCC investigates, consideration as to whether the relevant elements of a prohibition are met relies on the evidence obtained in each particular matter. While evidence of 'purpose' may be established through documents produced by the trader in question (and obtained in the course of the investigation) it may also be ascertained by reference to witness accounts of conversations; evidence adduced by examination of representatives of the trader; or, as envisaged by section 46(7) implied in all the circumstances.

As with any ACCC investigation, the ACCC has available a number of investigative tools including compulsory evidence gathering powers. Investigations may be informed by both legal and economic advice.

5. Whether or not a business is regarded as having a substantial degree of market power depends on the circumstances. The court will take into account the extent to which the activities of the business in its market are constrained by the conduct of its competitors or potential competitors, or by the behaviour of those to whom it supplies or those who supply it.
6. The ACCC has not taken any proceedings under section 46(1AA) since its introduction in September 2007.

The absence of proceedings reflects the position that matters investigated by the ACCC have not established likely contraventions. In this regard, it is worth repeating that the section only applies to conduct engaged in for an anti-competitive purpose.

The ACCC notes that it was successful in proceedings that involved allegations of predatory pricing under section 46 against Cabcharge Australia Limited in September 2010.

7. The ACCC has on a number of occasions, most recently at the Budget Estimates hearings on 31 May 2011, publicly indicated that it is examining the discounting of milk by supermarkets.
 - a. The ACCC has been in communication with dairy processors, national dairy farmer industry body and supermarket retailers and has received significant amounts of information and documents. The ACCC is analysing this information.
 - b. As with any ACCC investigation, the ACCC has available a number of investigative tools including compulsory evidence gathering powers.
 - c. The ACCC has available a number of investigative powers including compulsory powers to require information, documents or attendance at examination. The ACCC may also apply to a court for a search warrant. At this time, the ACCC does not consider further powers to investigate alleged contraventions of sections 46 or 46(1AA) are required.