

Senate Economics Legislation Committee

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Supplementary Budget Estimates 1 - 2 November 2006

Question: sbt 11 (ACCC)

Topic: Auto Masters Australia Pty Ltd and Bruness Pty Ltd

Hansard Page: Written

Senator WEBBER asked:

- (1) In answers to Questions on Notice from the Budget round of Estimates this year in response to my question regarding any deficiencies in the Trade Practices Act arising out of the case of Automasters Australia Pty Ltd and Bruness Pty Ltd; the ACCC indicated that the matter simply outlined the complexity of the legal principles involved. If that is the case and the legal principles involved are so complex how does the ACCC believe that the law could be simplified?
- (2) In response to the question about the number of complaints received by the ACCC each year, the answer indicated that over 50,000 complaints are received annually. In the year 2005-06 there were 427 allegations of unconscionable conduct received which was a 34.5% increase from 2004-05. What does the ACCC believe is the reason for the increased number of complaints?
- (3) The ACCC indicated that in 2005-06 only 15 new cases were commenced down from 31 cases in 2004-05. Given that there are over 50,000 cases received each year – how does the ACCC account for the high number of allegations as compared to the low rate of cases being prosecuted?
- (4) Can you explain why if the number of unconscionable conduct allegations has increased – the number of cases commenced in 2005-06 have decreased?
- (5) Is the legal advice that you claimed you used to make a decision not to take enforcement action against Automasters Australia Pty Ltd available to be released to the Committee?
- (6) Did that legal advice state that there was no case to prosecute or that the likelihood of a successful prosecution was not high?
- (7) When was that legal advice sought?
- (8) Can you outline for the Committee the timeframe of the ACCC's intervention in the matter between Bruness Pty Ltd and Automasters Australia Pty Ltd; from the initial complaint of Bruness Pty Ltd until the ACCC decided not to pursue the matter before the courts?
- (9) When during the investigation of the matter undertaken by the ACCC was legal advice sought?
- (10) Was advice sought on more than one occasion?

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- (11) Did the ACCC monitor the legal action between Automasters and Bruness Pty Ltd while it was ongoing?
- (12) What analysis was undertaken by the ACCC of the matter before it was included in the Guide?
- (13) Could the ACCC outline why the acknowledgement of the Bruness Ltd legal action is now described as a commercial decision on the part of Mr Coombes when previous answers to Mr Coombes have stated that it was a private decision. Can you explain the difference between a commercial and private decision and whether the ACCC has different procedures for commercial as opposed to a private decision?

Answer:

1. Policy responsibility for the *Trade Practices Act 1974* (TPA) rests with the Department of the Treasury. It is not appropriate for the Australian Competition and Consumer Commission (ACCC) to comment on possible legislative amendments.
2. The figures previously provided were incorrect. Four hundred and twenty seven (427) unconscionable conduct allegations were received by the ACCC Infocentre in 2004-05 (not in 2005-06 as previously advised). In 2005-06 the number fell to 322.
3. As indicated in the response provided in June 2006 (in answer to questions 5 and 6) the ACCC will consider a range of factors in determining whether to proceed to litigation. Each matter is considered on a case by case basis, and as a result the amount of litigation commenced by the ACCC each year will vary. Not all of the matters included within the complaints received by the ACCC will fall under the jurisdiction of the Trade Practices Act 1974 and may be required to be referred to a more appropriate agency. Other matters are able to be fully resolved by prompt administrative action or by court enforceable undertaking. Investigation of the complaint may not necessarily result in the allegations being able to be proved with evidence which meets the requirements of the courts.
4. As outlined in response to question 2 above, these figures contained a discrepancy and in fact the number of complaints has decreased. As noted in the response to question 3 above, the determination of whether a matter should proceed to litigation involves the assessment of a number of factors, and there may not necessarily be a correlation between numbers of complaints and numbers of cases commenced in court.
5. The ACCC is prepared to make available to the Committee the legal advice relied upon in making its decision not to take enforcement action against Auto Masters Australia. The following advices are attached:
 - advice of Mr N. McKerracher QC dated 26 October 1999. This advice was requested on 6 October 1999 and a copy was provided to Mr Coombes on 9 November 1999.The advice concludes:

"there is an arguable case for contravention of section 51AC of the Act although, on present indications, I do not consider it to be particularly strong. The strength of the

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case may possibly increase on provision of additional information." (refer to paragraph 78).[**Attachment 1**]

- memorandum from Mr N. McKerracher QC dated 22 November 1999. This memorandum followed a meeting between ACCC staff, the ACCC's legal representatives [the Australian Government Solicitor (AGS)], counsel, Mr Coombes and his legal advisers on 19 November 1999.

The memorandum states:

"I suggested that it would be most inappropriate to proceed with the case without first having obtained a deal more evidence in order to evaluate its strengths."

"... providing the allegations that were made in the conference were capable of being substantiated and proven, then the case for unconscionable conduct against Auto Masters is much stronger. Whether the allegations can be substantiated remains to be seen." [**Attachment 2**]

Following extensive investigations the ACCC concluded that the prospects of bringing successful proceedings were slim.

6. Refer to answer to question 5.
7. Refer to answer to question 5.
8. The timeframes of ACCC involvement in a matter between Bruness and Auto Masters until the ACCC decided not to pursue the matter are set out below.

Dates	Action
1 September 1998	Mr Coombes initial telephone complaint
18 December 1998	ACCC advised Mr Coombes that on the basis of information available, a contravention of the TPA could not be substantiated
Throughout 1999	Further contacts between Mr Coombes and the ACCC.
10 October 1999	ACCC brief Mr McKerracher QC
29 October 1999	ACCC received McKerracher QC advice
19 November 1999	Conference attended by Mr McKerracher QC, AGS , ACCC, Mr Coombes and his legal advisers
December 1999 – September 2000	Further ACCC investigations into conduct by Auto Masters towards various franchisees including Bruness Pty Ltd.
20 September 2000	ACCC advised Mr Coombes that: "Following an exhaustive assessment of all the material provided by you and others staff of the Perth office concluded that the prospects of a successful action by the Commission under section 51AC of the Act were slim. Further, as there was no evidence of ongoing conduct that breached the Act staff were of the view that the matter was not suitable for Commission intervention."

9. Refer to answers to questions 5, 6 and 7.

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10. Yes. Refer to answers to questions 5, 6 and 7.
11. No. However, it is noted that Mr Coombes requested that the ACCC intervene in the Full Court of the Supreme Court of Western Australia proceedings of *Auto Masters Australia Pty Ltd v. Bruness Pty Ltd & David Ian Coombes*. The ACCC initially decided to seek to intervene as amicus curiae (friend of the Court) to assist the Court by making submissions on the interpretation of s51AC. However, when Auto Masters amended its grounds of appeal to include only the issue of the amount of damages, the ACCC decided that intervention was not warranted.
12. The reasons for decision of relevant court cases were examined.
13. No distinction was intended.