

Senate Economics Legislation Committee

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Supplementary Budget Estimates 1 - 2 November 2006

Question: sbt 115 (ACCC)

Topic: Section 155 notices

Hansard Page: Written

Senator CONROY asked:

1. How many notices has the ACCC issued to telecommunications companies under Section 155 of the Trade Practices Act?
Please provide details of notices issued by the ACCC
2. Does the ACCC have explicit internal rules or principles governing when it will issue a notice under section 155 of the Trade Practices Act?
3. Does the ACCC have explicit internal rules or principles governing the form that a section 155 notice should take? Has the ACCC considered the implementation of a staged approach to section 155 information requests eg making high level initial requests followed by more detailed and specific requests if justified by the information provided in response to the initial request?
4. Is the ACCC aware of Telstra's claims that section 155 information requests 'routinely cost in the range of \$150,000 to \$250,000'?
5. Does the ACCC take the cost burden of section 155 notices for industry into account when deciding whether to issue a notice?
6. Does the ACCC undertake an explicit cost benefit analysis of whether to issue a section 155 notice that takes into account the impact of the notice on a party?
7. Does the ACCC have any explicit internal rules or principles governing how it should assess and evaluate the costs and benefits of imposing a section 155 notice?

Response

1. The ACCC can use its formal information gathering powers in relation to telecommunications companies in a variety of circumstances. This includes when investigating matters that constitute or may constitute contraventions of Pt IV, IVA, V and/or XIB of the *Trade Practices Act 1974* (TPA) as well as matters involving performing functions and exercising powers conferred on the ACCC by or under the *Telecommunications Act 1997*, the *Telecommunications (Consumer Protection and Service Standards) Act 1999* and Pts XIB and XIC

Senate Economics Legislation Committee

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Supplementary Budget Estimates 1 - 2 November 2006

of the TPA. The ACCC can issue notices pursuant to s.155 of the TPA to telecommunications companies in their capacity as:

- potential contraveners of the TPA;
- potential witnesses to or persons affected by potential contraventions of the TPA; and
- potential holders of information about the provision of telecommunications services to others, such as call charge records and subscriber details. These materials can relate to a variety of matters and investigations, including cartel and criminal investigations.

The very detailed information sought by the Honourable Senator's question in relation to all s.155 notices issued in all circumstances to telecommunications companies in all capacities since 1997 is not readily available in consolidated form and it would be a major task to collect and assemble it.

ACCC records show that from 1 July 2003 until 30 June 2006 (in the financial years ending 30 June 2004, 2005 and 2006) the ACCC issued a total of 1,211 notices pursuant to s.155 of the TPA.

Of these, 62 notices were issued to telecommunications companies as part of investigations relating to Pt XIB of the TPA. In the same period, 7 notices were issued to persons associated with telecommunications companies as part of investigations relating to Pt XIB of the TPA. One notice was issued as part of a Part XIB investigation to an individual who was not associated with a telecommunications company.

In the period 1 July 2006 until 31 December 2006, 5 notices were issued to telecommunications companies as part of investigations relating to Pt XIB of the TPA and 1 notice was issued to an individual associated with a telecommunications company as part of a Pt XIB investigation.

In relation to the 67 s.155 notices issued to telecommunications companies as part of investigations of alleged contraventions of Pt XIB of the TPA in the period 1 July 2003 to 31 December 2006:

- 34 were s.155(1)(a) notices
- 33 were s.155(1)(b) notices

In relation to the 9 s.155 notices issued to individuals as part of investigations of alleged contraventions of Part XIB of the TPA in the period 1 July 2003 to 31 December 2006:

- 1 was a s.155(1)(b) notice
- 8 were s.155(1)(c) notices

2. Yes.

Senate Economics Legislation Committee

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Supplementary Budget Estimates 1 - 2 November 2006

3. Yes.
4. The ACCC is aware that in its Submission to the Taskforce on Reducing the Regulatory Burden on Business of 25 November 2005, Telstra has made this assertion.
5. Yes
6. Yes. Prior to issuing any s.155 notice, the Commission, Chairperson or Deputy Chairperson considers whether it is satisfied that the burden of the proposed notice on the addressee is disproportionate to the value of the requested information to the ACCC's investigation. In addition, the Commission, Chairperson or Deputy Chairperson considers whether it is satisfied that the return date on the notice provides the addressee with a sufficient period in which to undertake the necessary activities and to seek legal advice.

The ACCC publication "Section 155 of the Trade Practices Act" explains that:

The Commission is required to, and will, have regard to the effect the exercise of the power has on the recipient, including the burden it imposes on the recipient. However, the mere fact that a notice may pose a substantial burden does not invalidate it provided the Commission has given it and the benefit to be derived from obtaining that information consideration and provided it is reasonable in the circumstances to seek the information requested.¹

The full bench of the Federal Court has also considered the issue of cost vs. benefit, concluding that provided the notice is issued in good faith and not for a collateral purpose, it is not unreasonable merely because it imposes a substantial burden or cost. In particular, the ACCC is guided by the decision in *Pyneboard Pty Ltd v TPC*:²

It is only if the harshness, oppressiveness or unreasonableness of a requirement in a s.155 notice is, in all the circumstances, such as to warrant the conclusion that the requirement could not have been imposed in good faith or could only have been imposed to achieve a collateral purpose or without regard to the burden which it would impose upon the recipient, that harshness, oppressiveness or unreasonableness will result in invalidity.

7. Yes, see above

¹ ACCC, *Section 155 of the Trade Practices Act*, October 2000, p. 9.

² *Pyneboard Pty Ltd v TPC* (1982) 39 ALR 565.