

SENATE STANDING COMMITTEE ON ECONOMICS QUESTION
(Supplementary Budget Estimates 20 October – 21 October)

Question: SBT 186

Topic: Supreme court decision involving NAB

Senator Xenophon asked:

Senator XENOPHON—I think Mr Drake probably would have been able to cop it if it was across the whole state, but it was just for those three supermarkets in his area. Perhaps the commission could get back to me in relation to that. The final line of questioning I have relates to a recent Supreme Court of New South Wales decision which I have been contacted on which involved Inak, Kay and Canli against the NAB. That was a case involving borrowings of about \$1 million in 2003 from the NAB. There were conditions fixed for that loan. The allegation in the Supreme Court was that there were issues of default interest and whether the parties were misled by the bank. The New South Wales Supreme Court recently found that the NAB was in breach of its contract, saying it was involved in false, misleading and deceptive conduct, according to the wording of the judgment as I understand it, and there was an award of \$280,000 in damages. As I understand it, the parties wrote to the ACCC asking what it would be doing about this in the context of a finding of false, misleading and deceptive conduct, and they received a response that the commission was not able to take this matter further. What are the protocols when there has been a Supreme Court decision saying that a bank has engaged in false, misleading and deceptive conduct? I would have thought that, itself, would have alerted the ACCC to a potential action against the bank.

Mr Cassidy—There are two issues. Firstly, there is a double jeopardy point—

Senator XENOPHON—Is there, though? Does double jeopardy apply in a case such as this? Is there a formal issue of double jeopardy?

Mr Cassidy—I think there is, though I would need to look to the lawyers. Let me go to the second point, which will not have me looking to lawyers. The jurisdiction for that would actually be ASIC, because it would be a financial transaction—a potentially misleading and deceptive conduct in a financial transaction. It would be ASIC—there is a carve-up so that we do not deal with consumer protection in relation to financial matters.

Senator XENOPHON—So they should have sought advice or assistance from ASIC in that case?

Mr Cassidy—That is correct. I just go back to my first point—I am not sure how much comfort they would get from ASIC given there is a court-based outcome.

Senator XENOPHON—In terms of general principals, if there is a finding in a court of a potential breach of the Trade Practices Act, for instance, and there has been a determination made or damages awarded, so there is a civil remedy, are you saying that will preclude the ACCC from being involved in cases where the parties may have got remedy in damages, for instance, but there are other issues in terms of the behaviour of the entity that has been found to have breached, for instance, the Trade Practices Act?

Mr Bezzi—If the same relief is being sought as was sought in relation to the same conduct, it is very unlikely that we would also be able to seek relief. If there was a difference in the conduct or if we were not covering the same area as was dealt with in the earlier proceedings then there may well be some scope for us to take something on.

Senator XENOPHON—I do not want to labour this point because I know there are a lot of other questions to come, but if there is an issue where there is a civil remedy in terms of damages but there has been a breach of the act which indicates perhaps a systemic issue on the part of the entity that has breached the act then isn't there a clear distinction between in a criminal prosecution if you like and a civil remedy that has been sought by individual parties in the civil courts?

Mr Bezzi—This is not an easy area to give you a quick response on. If you are talking criminal prosecutions then whether or not to launch a criminal prosecution is a matter for the DPP. They will look at whether it is in the public interest to do so. If there has been a finding by a court and relief given then that would be a factor that is taken into account in deciding whether or not there is a need to then take on a criminal prosecution. That is not something we would make a decision about.

Senator XENOPHON—Sure, and I appreciate what you have said about the complexity of this. Could I get something on notice from you in terms of: what are the protocols and criteria for determining whether you go further?

Mr Cassidy—You referred to systemic behaviour. I do not want to comment on a specific case—

Senator XENOPHON—I am not suggesting it is a systemic in this case.

Senate Standing Committee on Economics

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Supplementary Budget Estimates

20 – 21 October 2010

Mr Cassidy—Let me say that in this sort of situation if there were indications that the behaviour had been going on for a while, and it may be behaviour by other entities as well, then we would not necessarily launch E 10 Senate Thursday, 21 October 2010

ECONOMICS

our own case to seek remedy. Nonetheless it is something that we may well take on in terms of keeping an eye or a watch on—

Senator XENOPHON—In due course, could you provide the committee with something on that. I think it is an interesting area about where do you intervene?

Mr Cassidy—We will take that on notice.

Mr Samuel—I think it is also worth noting that, until April this year, the launching by the ACCC of a separate action in respect of what has already been declared, for example, by another court to be misleading and deceptive conduct would have little consequence in terms of remedy because of course a civil action has never permitted the award of penalties by the court. So the most that the ACCC could achieve would be a similar declaration of misleading and deceptive conduct, an injunction that it should not occur in the future and maybe some corrective advertising and a compliance program to be installed in the corporation concerned. But the obtaining of a remedy of either further restitution in terms of damages and/or a penalty would not be available.

Senator XENOPHON—Compliance could be important though. If you could take that on notice, that would be appreciated.

Answer:

As outlined by Mr Cassidy, concerns about possible misrepresentations by banks to their customers relates to financial services and is likely to fall within the jurisdiction of *the Australian Securities and Investments Commission Act 2001*, which is administered by the Australian Securities and Investments Commission. This point is determinative of the matters the subject of the question.

More generally, the ACCC's *Compliance and Enforcement Policy* outlines the factors the ACCC considers when deciding whether to become involved in a particular matter. Among other factors, the ACCC will have regard to whether the matters involve conduct of significant public interest or concern or conduct that results in significant consumer detriment. This policy also acknowledges that parties have private rights of action under the legislation and that certain matters may be better suited to private litigation. Indeed it is not uncommon for private proceedings to include allegations of contraventions of the *Trade Practices Act 1974* (TPA) and there should be no expectation that the ACCC would as a matter of course become involved in each of those matters in the event of civil findings. Again, the ACCC would have regard to its *Compliance and Enforcement Policy* in determining whether conduct the subject of successful private action supported further interest from the ACCC. As Mr Cassidy and Mr Samuel noted, among other things, the ACCC would have regard to the extent to which the additional remedies would be available beyond those obtained in the private proceedings.

Relevant to the question, is the capacity for the ACCC to intervene in private proceedings themselves. The ACCC's position in relation to intervening in private proceedings brought under the TPA is outlined in the policy *ACCC intervention in private proceedings* which sets out the criteria the ACCC will consider when deciding whether to seek to intervene.

Beyond these broad policy considerations, whether or not the ACCC decides to become involved in a matter or seeks to intervene in proceedings will very much depend on the facts of a matter.

Senate Standing Committee on Economics

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Supplementary Budget Estimates

20 – 21 October 2010

Both the *Compliance and Enforcement Policy* and the *ACCC intervention in private proceedings* policy document are available from the ACCC's website (www.accc.gov.au).