

Management Issues

Funding

- 2.1 In relation to the budgetary situation of the ACCC, the Chief Executive Officer Mr Brian Cassidy noted that in the previous financial year (2002-03) the Commission had an operating deficit of \$10.2 million, whereas estimates this year indicate that the operating deficit will be over \$8 million as a result of numerous factors, including the AGL case¹ which cost over \$2 ½ million.
- 2.2 In analysing the expenditure that led to last year's budgetary outcome, the ACCC commented that it was primarily due to an overrun on litigation expenses of \$9 million. Furthermore it advised that the blow-out in litigation costs would also likely be repeated this financial year.
- We are looking at an overrun on our litigation expenses this financial year of about the same order of magnitude – about \$8 million or so.²
- 2.3 The Chairman, Mr Samuel, stated that the reasons behind this increase in litigation costs are several, including litigation becoming progressively more expensive in addition to 'big business' becoming more willing over recent years to fight the Commission in the courts.

¹ This case involved a bid by AGL to buy a stake in the Victorian Loy Yang power station. The ACCC contested this move by arguing that it breached the Trade Practices Act by substantially lessening competition. The Federal Court in deciding this matter, ruled on December 19 2003 that AGL's intended purchase did not breach the Act.

² *Official Hansard*, 5 March 2004, Melbourne, p. 25.

The complexity of cases was also cited as a factor behind this cost increase, as such matters often require expensive solutions, an example being seen with cases involving an 'international dimension' as these often require the ACCC to 'send people offshore to obtain evidence – witness statements and so forth'.³

- 2.4 The Commission stated that in the event of it not receiving an increase in funding levels, it will examine the option of rationalising its discretionary activities, including enforcement actions. However, it did emphasise that many of its functions are not discretionary in nature and as such will not be able to be cut back, an example of these compulsory activities being the assessing of mergers. The Chairman in qualifying this approach did however stress that regardless of what occurs, the Commission will not in any way be reluctant to enforce the law via litigation.

We are absolutely determined that the sharp point of the pyramid I talked of before is enforcement and we would without any hesitation litigate if we think that that is the means of bringing about proper behaviour and correcting misbehaviour.⁴

- 2.5 In respect to the rationalisation of discretionary activities such as enforcement actions, the Committee made the observation that this approach coupled with the increased willingness of big business to challenge the ACCC in the courts could have significant implications in terms of the ACCC's capacity to litigate if it is not adequately budgeted.⁵ The Committee also expressed concern about big business utilising litigation against the Commission in order to drain the ACCC budget and as such reduce the capacity of the Commission to take legal action.

When you are dealing with a situation where bigger businesses are keener to take you on and in effect trying to dry you up in relation to litigation action, if you [have] not been budgeted to actually deal with that then there are real implications for your operation at that pointy end.⁶

- 2.6 This concern relating to funding may explain recent media reports that the ACCC asked Telstra's rival internet service providers if they

³ *Official Hansard*, 5 March 2004, Melbourne, p. 27.

⁴ *Official Hansard*, 5 March 2004, Melbourne, p. 26.

⁵ *Official Hansard*, 5 March 2004, Melbourne, p. 26.

⁶ *Official Hansard*, 5 March 2004, Melbourne, p. 26.

‘would contribute to court costs in the event of court action’⁷ following Telstra’s recent wholesale and retail pricing changes to its broadband internet service.

- 2.7 Finally, in response to a Committee query relating to costs in those cases where the ACCC successfully litigates an action, the Chairman noted that these funds are directed to consolidated revenue. Mr Samuel stated that he felt that this approach is not entirely ideal as it forces the Commission to shoulder the heavy burden of costs on an already stretched budget even when it successfully contests a case.

I do understand that of course we are budgeted to undertake a certain range of enforcement and other activities each year and we should not get the windfall of costs, but it certainly goes against the grain when you win a case and you have spent several million dollars to bring about a win and then you suddenly find that it doesn’t matter if you get costs because it goes to consolidated revenue.⁸

- 2.8 The 2004/2005 Federal Budget has increased funding for the ACCC by an extra \$47million over four years, including \$10 million to the Commission’s litigation contingency fund. The Committee expects that rising litigation costs will continue to be expressly considered by government in future budgets.

ACCC and ASIC jurisdictional matters

- 2.9 In March 2003, as a result of the Wallis inquiry, financial services were removed from the ACCC’s consumer protection jurisdiction and transferred to the Australian Securities and Investments Commission (ASIC). Following this shift there has been considerable debate as to whether it has led to more effective regulation in this area. In response to commentary from the Committee that this transfer of credit powers to ASIC has led to increased confusion as to which agency is actually responsible for this area, Mr Samuel responded by asserting that whilst confusion has occurred it is largely due to the fact that this jurisdictional handover has only recently occurred.

The confusion between the two regulators is probably more at the margin than at the core, but there is some confusion,

⁷ AAP, Canberra Times, Saturday 20 March 2004, p.12.

⁸ *Official Hansard*, 5 March 2004, Melbourne, p. 26.

particularly transitory confusion resulting from changes that were instituted last year.⁹

2.10 In tackling the issue of jurisdictional confusion between both agencies, Mr Samuel commented that the ACCC was in the process of remedying this situation with ASIC via the use of a number of strategies, including:

- senior management meetings between both agencies in order to deal with this cooperation issue at a 'high level';
- regular meetings and discussions at the working level between ASIC and officers of the ACCC;
- joint exercises, as seen with the issue of surcharging for using credit cards as both organisations issued a joint publication and 'undertook a joint education program'; and
- the establishment of specific arrangements whereby the ACCC can refer complaints that it receives over to ASIC through dedicated arrangements that ASIC has set up.

2.11 In spite of attempts to combat confusion and a lack of cohesion between both agencies, it was noted that there are still a number of areas where greater attention is required. One such area is property investment seminars (page 15 also refers) as it has considerable jurisdiction overlaps between both agencies.

the way the property investment seminars are advertised is probably [ACCC] jurisdiction and what is said in the seminars is probably ASIC's jurisdiction. Unconscionable conduct in consumer financial transactions is exclusively ASIC's jurisdiction and unconscionable conduct in business financial transactions is a shared jurisdiction.¹⁰

2.12 The Governor of the Reserve Bank of Australia (RBA), Mr Ian Macfarlane, had previously advised this Committee in relation to this matter that:

I think there is a regulatory gap there. It is clearly a problem if there is one group of people who are holding seminars on how to invest your money who are regulated – the financial planners – and there is another group who are doing almost exactly the same thing, although doing it within the one asset

⁹ *Official Hansard*, 5 March 2004, Melbourne, p. 14.

¹⁰ *Official Hansard*, 5 March 2004, Melbourne, p. 14.

class, which is property, who are unregulated. So I think there is a need to extend the capacity for ASIC to do that.¹¹

- 2.13 The Committee will continue to pursue this issue with all relevant agencies to ensure that the practices described by the RBA and the ACCC are properly scrutinised.

Recommendation 1

The Committee recommends that the Government investigate bringing investment property advisors under a similar regulatory regime as financial planners.

¹¹ *Official Hansard*, 6 June 2003, Melbourne, p. 55 and 59.