

**Senate Standing Committee on Economics**

**ANSWERS TO QUESTIONS ON NOTICE**

**Treasury Portfolio**

Additional Estimates

13 – 14 February 2013

**Question: AET 131-135**

**Topic: Secondary Boycott/False and Misleading Claims**

**Written: Received from Committee – 22 February 2013**

**Senator RYAN asked:**

131. Is the Commission currently investigating union conduct in relation to ‘campaigns’ against and builders in what is claimed to be industrial action for potential breaches of secondary boycott provisions?
132. If so, how are these inquiries progressing, when does the Commission believe investigations might be concluded and what specific provisions of the Competition and Consumer Law may have been breached?
133. What remedies are available to the Commission and affected parties if breaches of the law are found?
134. Has the Commission investigated whether non-government organisations making claims that are not accurate and cannot be substantiated and seek to influence commerce by impacting consumer decision making or commercial strategy are subject to legal requirements under the CCA to not make ‘false and misleading claims’?
135. Will the Commission seek to test the application of the law as its reach in terms of ‘false and misleading claims’ by NGOs where the claims are intended to have an impact on commerce by way of influencing consumer behaviour and commercial decision making?

**Answer:**

131. No
132. Not applicable
133. A range of remedies are available in relation to the competition provisions of the *Competition and Consumer Act 2010* (CCA) including declarations, injunctions, damages and penalties. In relation to secondary boycott provisions of the CCA, the Courts may impose penalties of up to \$750 000 on a body corporate (including unions) and up to \$500 000 on individuals.

134. The provisions of the Australian Consumer Law within the CCA prohibit misleading or deceptive conduct and false representations when made *in trade or commerce*.

Given the context of the query, it is important to emphasise that a threshold question in considering an allegation of misleading conduct is whether conduct or representations were made ‘in trade or commerce’ being a pre-requisite for jurisdiction.

In general, conduct is more likely to be in trade or commerce in circumstances where:

- the relevant conduct reasonably appears intended to promote the sale of goods or services to actual or potential customers of the maker of the representation

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- a relationship of a trading or commercial character exists between the alleged contravenor and the persons to whom the conduct is directed (or whether the relevant conduct appears intended to give rise to such a relationship)
- the relevant conduct forms part of a process designed to secure approval to a commercial transaction sought to be carried out by the contravenor.

Conduct is less likely to be in trade or commerce in circumstances where:

- the relevant conduct reasonably appears intended to promote, or provide a contribution to, public debate concerning a current or proposed law or government policy, or another issue of general concern to the community,
- the relevant conduct appears to be expressing a view about a particular product or service where there is limited or no direct commercial advantage flowing to the maker of the representation.

In general terms, activities designed to influence consumers that are not of a trading or commercial nature, even where those activities may have a material impact on businesses, are unlikely to be caught under the misleading conduct provisions.

135. The ACCC will assess matters that come to its attention having regard to the application of the provisions of the CCA and its Compliance and Enforcement Policy. These assessments need to be made of a case by case basis.