

House Standing Committee on Economics

ANSWERS TO QUESTIONS ON NOTICE

Australian Competition and Consumer Commission annual report 2014-15

2015 - 2016

Department/Agency: Australian Competition and Consumer Commission

Question: 1

Topic: Substantial degree of market power

Reference: 24 February 2016

Question:

Mr CRAIG KELLY: There has been no case where the ACCC has been to court to determine that either a Woolworths or Coles have had a substantial degree of market power?

Mr Sims: I do not have the world's greatest history on these matters; I am not a lifelong competition person. We could take that on notice. We have certainly found that they have had substantial market power in particular local markets. I do not think we have ever had to address the question in a market like Melbourne, Sydney, Canberra or Brisbane. I do not think that has come before the court. We will take that on notice, if we could, and come back to you.

Answer:

There has been no case that the ACCC has taken against Woolworths Limited or Coles Supermarkets Australia Pty Ltd in relation to allegations of misuse of market power.

However, in January 2006, the Full Federal Court imposed penalties totalling \$8.9 million against Australian Safeway Stores Pty Ltd (a subsidiary of Woolworths Limited) for fixing the price of bread and misusing its market power in a number of instances. The allegations of misuse of market power concerned the supply of bread by Tip Top, Buttercup and Sunicrust Bakeries to retailers who discounted the price of bread. The ACCC alleged that Safeway took action against each of the bread manufacturers to induce them, or attempt to induce them, to take action to have the discounting ceased.

It was alleged that Safeway refused to accept further supplies of bread from a baker where the baker was supplying retailers who were discounting the price of bread. The space normally occupied by the affected baker was filled with another baker's product. The ACCC alleged that Safeway recommenced purchasing bread from the manufacturer concerned once the discounter ceased discounting.

The ACCC has taken a number of cases against Coles and Woolworths in recent years. These include the following:

- ACCC v Woolworths Ltd [2016] FCA 44 (product safety matter).
- ACCC v Coles Supermarkets Australia Pty Ltd [2015] FCA 330 ('baked today' matter).
- ACCC v Colgate-Palmolive Pty Ltd [2015] FCA 1520 (Woolworths fourth respondent) (laundry cartel matter).
- ACCC v Coles Supermarkets Australia Pty Ltd [2014] FCA 1405 (suppliers matter).
- ACCC v Coles Group Limited [2014] FCA 363; ACCC v Woolworths Limited [2014] FCA 364 (shopper dockets matter).

- ACCC v Informed Sources (Australia) Pty Ltd & Ors (Woolworths and Eureka Operations Pty Ltd trading as Coles Express) FCA Victorian Registry.
- ACCC v Woolworths Limited, FCA New South Wales Registry ('Mind the Gap' matter).
- ACCC v Liquorland (Australia) Pty Ltd [2006] FCA 826 (Woolworths Limited second respondent in the matter).

Additionally, in relation to enforcement and compliance action taken by the ACCC in 2009 Coles Group Limited and Woolworths Limited agreed to phase out restrictive lease provisions, with ALDI Foods Pty Ltd, Franklins Pty Ltd, SPAR Australia Limited, Australian United Retailers Limited (trading as Foodworks) with Metcash Limited agreeing in February 2010.

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Question: 2

Topic: Leasing arrangements

Reference: 24 February 2016

Question:

Mr ALEXANDER: I use a term in my own language of 'constructive extortion.' I think there is a similar relationship with the actions of major malls and the businesses who lease shop sites. They seem to be not just renting square meterage—which you would think is a clean thing: you might get a discount if you have a larger number of square metres or pay a premium for a certain location in a mall. It seems that rents are being set by profitability. On the renewal of leases, there seems to be an estimation of how much it would cost to relocate and so another premium is charged. They are stuck between a rock and a very hard place. That seems to be another situation that I would call 'constructive extortion.' Having lived in the US and being aware of their RICO Act, I often wondered with businesses like Westfield, that operate in Australia and the US, whether their leasing arrangements were identical. I have wondered whether their leasing arrangements here in Australia would pass muster in the US. Do you have any knowledge of that?

Mr Sims: I do not have knowledge of that direct comparison. I am not aware of the US leasing laws. I do not know whether Nigel is? No. We might have to come back to you on that.

Answer:

It is our understanding that the *Racketeer Influenced and Corrupt Organizations Act* in the United States provides a legal framework for actions undertaken arising from activities conducted by criminal organisations.

The ACCC has no knowledge of whether global leasing businesses operating in Australia and outside Australia have identical leasing arrangements. The ACCC also has no knowledge of leasing arrangements in the United States.

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Question: 3

Topic: Competition laws in other countries

Reference: 24 February 2016

Question:

Mr CRAIG KELLY: Also, there are provisions in competition laws in other countries, such as the US Robinson-Patman act, that do not apply in Australia.

Mr Sims: I have heard that, but when we have checked it, we do not believe that it says what some people think it says. We do not believe that there is any law that caps market share.

Mr CRAIG KELLY: I am not talking about market share; I am talking about competition laws in general. I am talking about the US Robinson-Patman act; there is no equivalent provision in Australia.

Mr Sims: To be honest, I have to say that I am not aware of what that is. My colleagues are not looking as if they do. I will have to get back to you on that.

Answer:

It is the ACCC's understanding that the US *Robinson-Patman Act 1936* prohibits price discrimination on the sale of like goods.

Under the *Competition and Consumer Act 2010 (CCA)*, price discrimination is no longer prohibited. However, in appropriate circumstances, price discrimination may contravene the misuse of market provisions in the CCA.

The ACCC notes that the recent Harper Review did not recommend a specific prohibition on price discrimination. The Harper Review also noted that attempts to prohibit international price discrimination should not be introduced into the CCA on account of significant implementation and enforcement complexities and the risk of negative unintended consequences.

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Question: 4

Topic: Diesel market

Reference: 24 February 2016

Question:

Mr ALEXANDER: I love you too. The price of diesel in Australia is higher than petrol. In other markets it is lower than petrol. We are having an enormous growth in diesel powered cars. In the next generation, there will be an enormous growth of diesel-electric vehicles that will use very small amounts of fuel. Why is diesel more expensive in Australia than it is in other countries in comparison to petrol?

Mr Sims: I am not sure that I have a very good answer to that but I will have a shot. First of all, just on diesel, I think it is going to be interesting to see the fallout from the VW scandal and what effect that has on diesel. That trend may reverse. I do not know, I am not an expert in this area but I just make that observation. Your point is in comparison with other countries and I am afraid I do not have a good answer to that. But, diesel prices have not come down as far because there is a slower turnover of diesel and so that lag effect actually does have a bigger effect on the price. The diesel market has got different forces underpinning it but I do not have a good answer to that. We might get back to you on that.

Answer:

Based on the latest available Organisation for Economic Co-operation and Development (OECD) data of international petrol and diesel retail prices (*Australian Petroleum Statistics, December 2015*), the average retail price of diesel in the December quarter 2015 was lower than the average price of petrol in most countries. In Australia, the average price of diesel was higher than the average price of petrol.

Generally, if tax is excluded from petrol and diesel prices, there are many more countries with higher diesel prices than petrol prices. In Australia, petrol and diesel attract the same excise (currently 39.5 cents per litre), whereas in many other countries, diesel attracts a lower rate of tax than petrol, which effects the final pump price. For example, in New Zealand, which has a much higher petrol price than diesel, tax on petrol is around Australian 86 cents per litre compared with tax of around Australian 15 cents per litre on diesel.

The relative difference between retail diesel prices and petrol prices will vary across countries because of different supply and demand factors in diesel and petrol markets in each country.

For example, in many European countries there are more diesel passenger vehicles than petrol vehicles and therefore the diesel price may be lower than the petrol price due to a larger and more competitive diesel market. In Australia, petrol passenger vehicles outnumber diesel vehicles so many service stations use a cheaper price of petrol to get consumers into their retail outlets to buy higher margin convenience products such as snacks and drinks.