

Senate Economics Legislation Committee

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Additional Estimates

2015 - 2016

Department/Agency: Australian Competition and Consumer Commission

Question: AET 71

Topic: Waterbedding

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Senator: Xenophon, Nick

Question:

Senator XENOPHON: Can I just go to an issue that was referred to in a Senate inquiry—I think, on divestiture laws—some time ago, where one of the witnesses, representing independent grocers or independent retailers, made reference to the whole issue of 'waterbedding'. I think this was around the same time as the discounted bread or superdiscounted bread—and it would apply, I suppose, to discounted milk and other commodities. In short, the person made reference to 'waterbedding', in the sense that, if you are a big enough buyer of goods, not only do you get a volume discount but it is almost as though you get it so cheaply that, in order for the supplier to provide it to the volume buyer at that price, it pushes the price up—the 'waterbed' effect—for the smaller guys, the smaller retailers or the smaller people down the supply chain. I do not necessarily want a direct answer now, but is that something that the ACCC has looked at? I would imagine that there are obviously some legitimate benefits to be obtained from buying goods in bulk. There is a direct, reasonable, commensurate discount which is causally related to the volume that you are purchasing. How do you distinguish between that and a discount that appears to be a function, or almost an abuse, of market power which means that the smaller retailers get squeezed out of the marketplace because some suppliers say, 'We can't afford say no to these people at the price that they want'? It is not a very eloquent question.

Mr Sims: No, I understand, Senator. It gets back to what we often find, and that can just be the use of market power. If you are a big player, you do get things cheaper. If you go into those large shopping centres, the Coles and Woolworths and the big supermarkets have the cheapest rent, and, by definition, to make the project work, the other players pay more rent. It is not against the law.

Senator XENOPHON: This goes beyond that, though. This is not about retail tenancies—

Mr Sims: Sure. I understand, but it is the same point. If you are making biscuits and you have to really sell to a major outlet, then, if they have a stronger bargaining position, they can get a price from you, and you may have to charge others more. But, on its face, if those are the only facts, there is nothing that would breach the Act.

Senator XENOPHON: At the moment, there is no remedy that obviously apparently exists in terms of that waterbedding type of thing?

Mr Sims: Unless any of my colleagues might be able to add to that, I do not think so.

Senator XENOPHON: I am happy for you to take that on notice.

Answer:

The *Competition and Consumer Act 2010* (CCA) prohibits anti-competitive conduct such as misuse of market power and predatory pricing. Section 46(1) prohibits a business with a substantial degree of power in a market from using this power for the purpose of eliminating or substantially damaging a competitor, preventing the entry of a person into a market or

detering or preventing a person from engaging in conduct. Section 46(1AA) prohibits businesses with a substantial share of a market, from selling goods or services for a sustained period at a price below the relevant cost of supply, for an anti-competitive purpose.

The misuse of market power and predatory pricing provisions of the CCA are intended to differentiate anti-competitive behaviour from behaviour which is to be expected in the ordinary course of the competitive process.

The possession of market power is not of itself unlawful. Normal competitive conduct will often include offering discounted prices to seek to attract new customers. Businesses may decide for themselves with whom they wish to deal, which may include where efficiencies can be made for buying and selling goods or services in bulk.

The Australian Competition and Consumer Commission (ACCC) is conscious of and takes into account 'waterbedding' issues in the assessment and investigation of misuse of market power matters and other allegations of anti-competitive conduct. Allegations of misuse of market power, involving waterbedding, in the supermarket sector were examined in detail as part of the ACCC's Grocery Inquiry in 2007. To assess these allegations it was necessary to look at the pricing, discount, rebates and market shares across a wide product range offered by suppliers. The ACCC assessment of misuse of market power does need to consider the conduct in the context of the market, not just a particular product within that market.