

Senate Standing Committee on Economics

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Supplementary Budget Estimates

20-21 November 2013

Question: SBT 929 -949

Topic: Supermarkets and Competition

Written: 28 November 2013

Senator WONG asked:

929. Since the ACCC publicised its intention to investigate anti-competitive behaviour in the supermarket sector earlier this year, how would you characterise the reaction of supermarkets and suppliers? (i.e. pricing behaviour, arrangements between suppliers and customer, attitudes to the ACCC?)
930. How much of its resources does the ACCC direct towards publicising its role and its intention to pursue specific regulatory priorities?
931. Has this allocation of resources increased or decreased significantly in recent years?
932. If so, can you give an idea of the magnitude of the change?
933. Are complaints from growers and manufacturers who supply the two major supermarkets still a priority area for the ACCC?
934. What share of the Australian grocery market do Coles and Woolworths together comprise?
935. Can you provide an update on the ACCC's assessment of whether copycat packaging constitutes a misuse of market power?
936. What are some of the difficulties in proving that unconscionable behaviour is taking place in this sector?
937. In the course of investigating the relationship between major supermarkets and suppliers, has the ACCC exercised its legal power to compel any parties to provide information?
938. What kind of proof does the ACCC typically look to rely on to prove allegations of unconscionable behaviour?
939. Is the ACCC satisfied that the provisions defining unconscionable conduct are sufficiently broad to embrace anti-competitive behaviour in the supermarket industry?
940. Can you describe any strategies being put in place to anticipate future challenges in regulating the supermarket industry?
941. Do you share the views of the Master Grocers Association that meeting the challenges of regulating anti-competitive behaviour in our current supermarket industry might require changes to the *Competition and Consumer Act 2010*.
942. If not, why?
943. Have any Ministers or members of the current government contacted the ACCC to discuss the introduction of a Mandatory Supermarket Industry Code?

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944. In October this year, the ACCC announced a delay in its decision about taking legal action against the big supermarkets. Can you give some details about what has caused this delay?
945. Can you give an idea of the number of suppliers the ACCC is working with in investigating the possibility that the big supermarkets have been acting illegally?
946. Are you confident that a decision will be able to be made by March 2014, as suggested when the delay was announced?
947. Have any Ministers or members of the government sought a briefing from the ACCC on the likelihood that it will be able to take legal action against the big supermarkets?
948. Have any Ministers or members of the government contacted the ACCC to discuss the altered timeline of this decision?
949. Outside of regulatory influences on the conduct of the two major supermarkets, is the ACCC investigating other strategies to encourage competition in the grocery sector?

Answers

929. The ACCC notes the developments of the proposed Food and Grocery Prescribed Code of Conduct which have involved the major supermarket chains. It is otherwise difficult for the ACCC to comment on changes in behaviour while it continues to investigate matters before it.

930, 931 and 932.

The ACCC reviews its compliance and enforcement priorities on an annual basis. The priorities are published online in the *Compliance and Enforcement Policy* and are regularly referred to in communication including speeches and correspondence. These activities are spread across a range of resources including media and outreach activities, and in this regard it is difficult to comment specifically on the allocation of resources, but it is fair to say that the ACCC has put an increasing emphasis on setting and communicating its priorities.

933. The ACCC continues to prioritise competition and consumer matters in concentrated sectors including supermarkets. This includes ongoing investigations in matters raised by suppliers.

934. The *Grocery Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries*, July 2008 found that Coles and Woolworths had between 40 and 50 per cent of the packaged grocery market (p. 41). The Commission's current inquiries are seeking to clarify the current situation.

935. The alleged misuse of a supplier's intellectual property by a retail supermarket may form part of the ACCC's current investigation and as such it cannot provide any comment at this time.

936. The ACCC faces a number of challenges including the breadth and number of suppliers involved, the complexity of dealings between supermarkets and suppliers, and the reluctance of suppliers to assist the ACCC given ongoing relationships with supermarkets.

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937. Throughout this investigation the ACCC has made extensive use of its statutory information gathering powers, (i.e. its s.155 powers) to compel parties to provide information and documentation to the ACCC. In some cases, parties have also been compelled to provide oral evidence at an examination conducted by the ACCC.
938. The allegations raised with the ACCC, and subsequently illuminated in the ACCC's investigations to date, include allegations of some conduct that does not conform to acceptable business practice and may be unconscionable. Such conduct, which is not necessarily identical across suppliers, product lines or even supermarkets, includes:
- Persistent demands for additional payments from suppliers, above and beyond that negotiated in their terms of trade;
 - The imposition on suppliers of penalties that did not form part of any negotiated terms of trade, and which apparently do not relate to actual costs incurred by the major supermarket chains as a result of the conduct which has led to the penalty being imposed;
 - Threats to remove products from supermarket shelves or otherwise disadvantage suppliers if claims for extra payments or penalties are not paid; and
 - Failure to pay prices agreed with suppliers.

The ACCC must prove this behaviour by oral evidence from suppliers and extensive documentary evidence and analysis.

939. The draft terms of reference of the "Root and Branch" review of competition policy and law require the review panel to consider whether the protections against unfair and unconscionable conduct, provide an adequate mechanism to encourage reasonable business dealings across the economy—particularly in relation to small business. When the Review is underway the ACCC will put its views forward.

In relation to the ACCC's current supermarket supplier investigations, the ACCC's Chairman, Mr Rod Sims commented during a speech at the Australian Food and Grocery Council's industry forum in Canberra on 30 October 2013 that, "we see the supermarket issues capable of being dealt with under the *Competition and Consumer Act*, and we do not see use of the Act as excessive regulation." It will however be up to the courts to determine whether the provisions in the *Competition and Consumer Act 2010* (the Act) have been breached.

940. It is understood that Coles, Woolworths and the Australian Food and Grocery Council have agreed upon the final text of an industry code of conduct for those supplying to supermarkets (the Code). These parties have asked the Minister to prescribe the Code as a voluntary prescribed code under the Act. Once a firm agrees to be bound by a voluntary prescribed code, a breach of its provisions is a breach of the Act.

If the Code is prescribed under the Act it would immediately apply to all new agreements and to existing agreements after 12 months. It is understood that consultation will commence in 2014 on whether the Code should be prescribed.

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941-942. This is a policy matter for government to determine and may be considered as part of the proposed "Root and Branch" review of competition policy and law.

943. No

944. The ACCC remains on track to conclude the investigation phase of key aspects of the investigations into treatment of suppliers by the end of 2013. This will place the ACCC in the position to make a final assessment, obtain further necessary legal advice and form a view one way or the other on the action we may take on those aspects around the end of the first quarter of 2014.

While these timeframes are longer than initially hoped for, they reflect the complexity and breadth of investigations and the challenges associated with gathering evidence while being conscious of the ongoing business relationship witnesses have with the supermarket chains.

945. Approximately 50 suppliers.

946. Yes.

947. No. During the course of regular briefings on ACCC activities and issues, the ACCC will provide updates to its relevant portfolio Ministers.

948. No. During the course of regular briefings on ACCC activities and issues, the ACCC will provide updates to its relevant portfolio Ministers.

949. The ACCC continues to assess a variety of matters that touch on competition in the grocery sector through the various provisions of the Act.