

Senate Standing Committee on Economics

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Supplementary Estimates 22-23 October 2008

Question: aet 22

Topic: Cartel Conduct

Hansard Page: Written

Senator FIERRAVANTI-WELLS asked:

1. In the Assistant Treasurer's second reading speech for the Cartel Conduct and Other Measures Bill 2008, he refers to the former government ignoring *"fifteen separate warnings from the ACCC on the need for reforms that would see jail terms introduced for company executives who are involved in cartel conduct."*

- (a) Please provide details of each of these warnings, including the date and the circumstances of each of the said warnings, who gave each of the warnings? Did they involve advice as to how the Trade Practices Act should be amended?
- (b) Were they given publicly or privately and what form did they take?
- (c) When were they made, in particular before or after the civil prosecution of Visy for breaches of the Trade Practices Act?
- (d) What section of the Trade Practices Act empowered the ACCC and Mr Samuel as its Chairman to give such warnings to the government of the day?
- (e) Do you believe that Mr Samuel's actions and that of the ACCC in respect of the public campaign to criminalise cartel behaviour reflected adversely on the ACCC's decision not to prosecute Amcor or its officers for the same alleged breaches of the Trade Practices Act as Visy?

2. In the previous Senate Estimates I asked the following question on notice:

"Pursuant to what legislative powers is the Chairman of the ACCC undertaking a public campaign to criminalise cartel behaviour?"

The response was as follows:

"The ACCC has a statutory function of providing information to the public pursuant to section 28 of the Act"

Where in section 28 does it makes reference to and /or specifically empowers and requires the Chairman and the ACCC to run public campaigns to lobby for

Senate Standing Committee on Economics

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Supplementary Estimates 22-23 October 2008

the criminalisation of certain behaviour as a way of providing information to the public?

3. As a matter of public policy, is it considered vital that the ACCC abides by its own assurances or representations made to those organisations and individuals with which it litigates?
4. ASIC's recent decision to ask the Supreme Court to postpone civil proceedings against former Australian Wheat Board executives because of the prospect of criminal action which seems to highlight the difficulty for regulators of having both civil and criminal powers. How does the ACCC propose to deal with such issues if it is successful in its public campaign to incorporate criminal sanctions in the Trade Practices Act?
5. I note that the recent air freight cartel for which Qantas was fined \$20 million involved a large number of airlines in many jurisdictions, many of which already have criminal sanctions for cartel behaviour. Considering that criminal sanctions failed to act as a deterrent and did not stop that cartel, why does that the ACCC need criminal sanctions in Australia?
6. What actions are being undertaken by the ACCC to ensure that small retail operators are not being exploited by large shopping centre corporations?
7. In relation to Section 51AC of the Trade Practices Act relating to retail leasing:
 - (f) How many unconscionable conduct complaints has the ACCC received in relation to retail leasing since the last Estimates hearing?
 - (g) How many unconscionable conduct complaints has the ACCC received in relation to retail leasing during each of the financial years 2006-2007 and 2007-08?
 - (h) How many of the complaints referred to in (a) and (b) above been investigated in depth?
8. Has the ACCC taken any unconscionable conduct cases involving retail leasing to Court in this financial year and in each of 2006-2007 and 2007-2008?

Answer:

1.
 - (a) and (b) On 13 November 2007 the then Shadow Assistant Treasurer and Shadow Minister for Revenue and Competition Policy released a press release regarding the criminalisation of cartel conduct. The 15 warnings referred to are out in this release.
 - (c) On 21 December 2005 proceedings were instituted in the Federal Court, Melbourne, against Visy Industries Holdings Pty Ltd, Visy Industries Australia Pty Ltd and Visy Board Pty Ltd. Proceedings have also been taken against Mr Richard Pratt, chairman of the Visy Group, Mr Harry Debney,

Senate Standing Committee on Economics

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Supplementary Estimates 22-23 October 2008

the chief executive officer of the Visy Group, and Mr Rod Carroll, the former general manager of Visy Board, for allegedly being knowingly concerned in or party to the contravening conduct by the Visy respondents.

- (d) The ACCC considers that as part of administering the *Trade Practices Act 1974* (the Act) it has a role in commenting on matters relating to the enforcement of the law it administers. Section 28 of the Act.
- (e) No. Amcor received immunity from prosecution in accordance with the ACCC's then policy, *Leniency Policy for Cartel Conduct*, because they were the first to report to the ACCC their involvement in the cartel with Visy.
2. The ACCC considers that section 28 of the Act entitled *Functions of the Commission in relation to dissemination of information, law report and research* is broad in its application.
 3. In circumstances where the ACCC gives assurances or makes representations to parties, it considers such assurances and representations important and itself bound to that position.
 4. The ACCC considers that the existence of parallel civil and criminal provisions will enable a proportionate response in all the circumstances.

The conduct of legal proceedings is supervised by the courts. Such supervision is provided for by amendments to section 76B of the Act which is explained in the Explanatory Memorandum to the *Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008*:

3.31 Further, proceedings for a pecuniary penalty order against a person for a Part IV contravention are stayed if criminal proceedings are started or have already been started for an offence, and the offence is constituted by conduct that is substantially the same as the conduct alleged to constitute the contravention. The pecuniary penalty proceedings will be able to be resumed if the person is not convicted of the offence.

5. The ACCC considers that criminal sanctions will provide more of a deterrent than pecuniary penalties alone.
6. The ACCC considers and reviews such complaints to determine whether allegations can be substantiated.

The ACCC currently has proceedings in the Federal Court against Dukemaster Pty Ltd in which the ACCC has raised concerns about unconscionable conduct in shopping centre leasing.

The ACCC has worked with franchisees to encourage greater understanding of their obligations under their leases. This work has included the development of publications such as *Being smart about your new franchise: checklist before you*

Senate Standing Committee on Economics

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Supplementary Estimates 22-23 October 2008

*sign a lease agreement and the fact sheet *Being smart about your new franchise and your retail lease.**

More generally, unconscionable conduct against small business (as prohibited by section 51AC of the TPA) is an identified focus area for the ACCC's small business and outreach program. As part of this program, the ACCC recently ran an online survey to ascertain small business understanding of, and needs relating to, unconscionable conduct, including those concerns related to retail tenancy negotiations. The results of that survey will be used to inform the development of future educative efforts on this topic

7.
 - (a) Six between 1/10/08 and 30/03/09
 - (b) Eleven in the 2006/07 financial year. Sixteen in the 2007/08 financial year
 - (c) One.
8. Yes one. On 3 October 2008 the ACCC announced that it had instituted proceedings in the Federal Court, Melbourne against Dukemaster Pty Ltd and its general manager, Ms Patricia Wong for alleged misleading, deceptive and unconscionable conduct and making false representations in contravention of the Trade Practices Act 1974.

Dukemaster is the landlord of a retail shopping centre called the Paramount Retail Centre located in Melbourne. The ACCC alleges Dukemaster engaged in unconscionable conduct by taking unfair advantage of its stronger bargaining position, exerting undue pressure and using unfair tactics against certain tenants in connection with their leases. The ACCC also alleges Dukemaster represented to certain tenants that it believed rental it proposed was very reasonable and below the market value when in fact it had no such belief. The ACCC alleges Dukemaster did not have a reasonable basis for making this representation. The ACCC alleges Ms Wong was knowingly concerned in and party to Dukemaster's alleged contraventions of the Act. The ACCC's proceeding involves a representative action seeking compensation for certain tenants who are alleged to have suffered loss and damage as a result of Dukemaster's and Ms Wong's conduct. The ACCC is also seeking declarations, injunctions, compliance and disclosure orders and an order that Dukemaster and Ms Wong pay the ACCC's costs of the proceeding