

Senate Economics Legislation Committee

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Supplementary Budget Estimates 1 - 2 November 2006

Question: sbt 43 (ACCC)

Topic: Compliance of companies with ACCC undertakings

Hansard Page: E73

Senator LUDWIG asked:

Then I will not ask any further questions. Are there other examples of where companies have not fully complied with undertakings to the ACCC in the last 12 or 18 months?

Mr Samuel—Certainly over the past three years there have been instances where undertakings have not been complied with in accordance with their letter. In some instances, it is related to divestitures that have not been able to be completed within the time period that has been required under the undertaking. Where it is appropriate, fair and reasonable to do so, we will accommodate circumstances that have been beyond the control of the parties in dealing with those matters. But I would have to say to you that we are adopting a much less flexible attitude to those sorts of delays. We are taking a view that, if parties say to us at the point of time of a merger, ‘We believe that we can undertake a divestiture within a given time frame and we accept that if we cannot undertake it within that time frame then the matter will go to an independently managed fire sale,’ then the parties know exactly what they are doing up front, and we ought to stick with those obligations. I would have to say to you that there is a less receptive mood at the commission towards accepting variations of undertakings in those circumstances.

Senator LUDWIG—Could you take on notice, unless you have the figures here, to provide an indication of how many companies have been required over the last three years to make undertakings to the ACCC that have remained unfulfilled, or have not been complied with fully—

Mr Samuel—I will take that on notice.

Senator LUDWIG—Could you also take on notice to provide the number that you have sought to institute actions against. I will not ask whether you are going to consider instituting actions. That would be a matter that you would have to decide.

Mr Grimwade—To clarify that question: are you talking about merger undertakings only?

Senator LUDWIG—No, the wider ambit of undertakings. You can indicate what the nature of the undertaking is without going to a page. If there is a way of describing whether it is a merger undertaking or another undertaking that would be appreciated.

Mr Samuel—There have been instances, as you may have read, where we have actually taken proceedings for contempt of court against parties that have breached undertakings and then failed to comply with court orders to comply with the undertakings. Contempt of court, as you will appreciate, is a very serious charge indeed that can result in jail being imposed.

Senator LUDWIG—Perhaps you could indicate that as well. It would be helpful to understand the process. Do you chase companies to ensure that they have complied with the undertaking?

Mr Samuel—Yes.

Senator LUDWIG—Do you spend resources—time, money and effort?

Mr Samuel—Yes.

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Mr Cassidy—We have a fairly standard practice where we build into undertakings some sort of monitoring process, quite often by an independent auditor or monitor of some description who will give us regular reports, say, every six months or every 12 months, of whether in their view the undertaking has been complied with. We actively monitor those reports as they come in. If we get any reports of instances where it seems that an undertaking is not being complied with then we follow it up accordingly. I concede this is a criticism that was made in the late nineties or early 2000 that perhaps we were not as active as we should have been in following up on undertakings. But we have since put in place a much more active monitoring regime. In recent years, we have built that into the undertakings that we accept to make sure that we are able to follow up when an undertaking looks as if it is not being complied with.

Senator LUDWIG—In that answer that you provide are you able to say whether, in circumstances where a company cannot meet the requirement and it says, for argument's sake, 'I can't find a buyer for the particular asset,' which is the undertaking you have required them to meet, is it frustrated at that point? What do you do?

Mr Samuel—No, it is certainly not. It is amazing how the concentration of the prospective vendor is brought to a peak when you indicate that it may be possible to find a buyer at \$1, under a fire sale. I think we are adopting a much tougher attitude to completion of these sorts of transactions, and that is providing a lot less attitude. It is simply not satisfactory for businesses to provide formal, court-enforceable documents— undertakings to us—and then to turn around at the end of one month, six months, 12 months, or whatever the period might be, and say, 'Look, we haven't been able to find a buyer.' Well, you will find a buyer at \$1.

Senator LUDWIG—Has that happened to date?

Mr Samuel—The fire sale provisions are, and have been, invoked and they do tend to focus concentration fairly quickly.

Senator LUDWIG—Perhaps in the response you can provide that detail as well. I was concerned as to whether, with respect to the frustration where a buyer cannot find the sale of an asset, they effectively create a situation where your enforceable undertaking becomes unenforceable and therefore the company, so to speak, does not have any compliance regime upon them.

Mr Samuel—You can make it difficult to find a buyer if you set a price that is too high or you make yourself unavailable to negotiate or you set terms and conditions that are too onerous.

Senator LUDWIG—There are many ways you can avoid it.

Mr Samuel—Yes. But, as I say, a fire sale provision that puts it in the hands of an independent agent to sell, with the reserve price being \$1, generally tends to focus concentration fairly quickly.

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- (1) How many companies have been required over the last three years to make undertakings to the ACCC that have remained unfulfilled or have not been complied with fully?
- (2) The number of undertakings that the ACCC has sought to institute actions against (*in the last 3 years*)?
- (3) An indication of the number of undertakings that you have undertaken proceedings for contempt of court against parties that have breached undertakings and then failed to comply with the court orders to comply with the undertakings (*in the last 3 years*)?
- (4) What is the process of ensuring compliance with undertakings (do you chase up companies to ensure that they have complied)?
- (5) Please provide more detail on the use of fire sale provisions in undertakings and when they have been triggered (*in the last three years*)?

Answer:

- (1) Section 87B undertakings are offered by companies, the Australian Competition and Consumer Commission (the ACCC) cannot require them. Over the past three years the ACCC has accepted a total of 201 undertakings. These undertakings are disclosed on the ACCC website, www.accc.gov.au and are reported in the ACCC's annual reports. This number includes undertakings accepted in relation to merger matters and undertakings accepted to resolve ACCC enforcement actions.

In the mergers area, three undertakings have not been fulfilled or fully complied with over the period, of which two (Alinta/Dampier to Bunbury Natural Gas Pipeline and DCA Group Limited) are public.

In the enforcement area, twenty-two undertakings were not fully complied with during the period. In three of these cases compliance with one or more of the terms became impossible, impracticable or would have been ineffective. Two of these three matters were resolved by variations to the undertakings and in the other a variation is being negotiated.

In two further cases there was non-compliance with obligations to take corrective action without a reasonable excuse. In one of these two cases, the company ultimately complied following threats of court action by the ACCC. The other matter is still under consideration by the ACCC.

In the remaining 17 instances the non-compliance related to terms of the undertaking imposing an obligation to maintain an ongoing compliance program. In these cases the non-compliance involved failure to implement

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compliance program measures within the time frames set out in the undertaking, or failure to fully implement the required procedures. Ten of these seventeen matters were subsequently resolved by the company responding to ACCC's concerns and the other seven matters are still under consideration by the ACCC.

- (2) In the mergers area, one court action has been instituted for an alleged breach of an undertaking (Alinta/Dampier to Bunbury Natural Gas Pipeline). As at 15 December 2006, this matter is currently before the Federal Court.

There have been no court actions following enforcement or compliance s.87B undertakings in the 2004-2006 period.

- (3) There have been no contempt actions following mergers or enforcement s.87B undertakings in the 2004-2006 period. However, the ACCC has instituted seven contempt of court cases for non-compliance with either undertakings to the court or orders of the court. As at 15 December 2006, six have been dealt with, one awaits judgment.
- (4) In Mergers, structural rather than behavioural undertakings are preferred by the ACCC. Amongst other advantages, this eliminates the need for continued monitoring. Undertakings accepted in relation to mergers may contain measures to ensure compliance and transparency such as the undertakings being available on the ACCC website; market participants and interested parties being informed directly of the undertakings; undertakings structured to give preference to the purpose and objectives over literal interpretation; the merged entity being required to report regularly or on request as to the progress and implementation of the undertakings; review by independent auditors/monitors; independent oversight of required divestiture; and/or ACCC approval of potential purchasers.

In the case of Enforcement, s.87B undertakings are followed up by the investigating case officer to confirm compliance, with the exception of undertakings to institute and audit compliance programs, which are followed by the Compliance Strategies Branch. Dependent on the type of compliance program, companies may have to report to the ACCC on their compliance, or publish corrective notices, which are easily checked. If the ACCC believes an undertaking has not been complied with it will raise its concerns with the company then consider if further action is required.

When administering compliance programs, the ACCC sets benchmarks and timelines which need to be achieved and assesses whether or not these have been met. The ACCC's project management database provides automatic reminders of when obligations fall due and, if overdue, the ACCC contacts the company and/or its compliance advisor/reviewer. This has proved successful in facilitating compliance. If a company fails to comply, the matter is generally referred for enforcement action.

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- (5) 'Fire sale' provisions (which apply to merger s.87B undertakings) are included in almost all divestiture s.87B undertakings. The fire sale provisions have been invoked twice in the past three years, one of which is public: DCA/MIA acquisition (radiology). It resulted in the sale of three clinics, after an extension of the fire sale period (allowed in the undertaking).