



SUBMISSION TO COMPETITION POLICY REVIEW ISSUES PAPER RETENTION OF SECTION 45DD(3) ENVIRONMENTAL EXEMPTION IN SECONDARY BOYCOTT PROVISIONS

June 2014

Introduction

ACF is a national, community-based environmental organisation that has been a leading voice for the environment for nearly 50 years.

Australian Conservation Foundation (“ACF”) wishes to make a targeted submission to the Competition Policy Review Issues Paper commenting only on the existing section 45DD(3) in the Competition and Consumer Act (CCA) regarding secondary boycotts.

The **Competition Policy Review Issues Paper** released by the Australian Government on 14 April 2014 poses the following question on page 33:

“Do the provisions of the Competition and Consumer Act (“CCA”) on secondary boycotts operate effectively, and do they work to further the objectives of the CCA?”

The ACF’s interest in section 45 of the Competition and Consumer Act is focussed on the exemption contained in section 45DD(3). This section provides that a person does not contravene, and is not involved in a contravention of, subsection 45D(1), 45DA(1) or 45DB(1) by engaging in conduct if:

- a) the dominant purpose for which the conduct is engaged in is substantially related to environmental protection or consumer protection; and
- b) engaging in the conduct is not industrial action.

ACF is concerned at recent comments in the media that the Government may be considering removal of the above environmental exemption. ACF is of the view that removal of the exemption to the secondary boycotts provision is inconsistent with the competition and consumer objectives of the CCA, restricts freedom of speech and is against the original purpose of the exemption which was introduced by the Howard government in the late 1990s.

Educating consumers about the environmental impacts of products has for a long time been a role played by conservation and environmental groups in Australia, including ACF. A recent example is ACF’s Sustainable Seafood Assessment program, which through partnership with a team of leading marine scientists provided restaurants and consumers with information that help them to make sustainable seafood choices. There are many significant environmental benefits that have been achieved in Australia’s history via environmental boycotts.

Current Law and background

Put simply section 45D of the Competition and Consumer Act 2010 (Cth) prohibits two or more persons engaging in conduct together, which hinders or prevents a third person supplying goods or services to a fourth person, if one of the purposes for doing so is to cause substantial loss or damage to the business of the fourth person, and the conduct would have or is likely to have that effect.

Importantly in the context of this submission, there is an exemption to this general rule. Section 45DD(3) provides that a person does not contravene the secondary boycott laws if the *dominant* purpose for which the conduct is engaged in is substantially related to environmental protection. The term 'environmental protection' refers to a particular location, thing or habitat in which a particular individual instance or aggregation of flora or fauna or artifice exists and to the preservation of the existence and or characteristics of that environment.¹

It was a Coalition Government that reintroduced secondary boycott provisions into the Trade Practices Act 1974 (TPA) including the s 45DD exception outlined above as part of the *Workplace Relations and Other Legislation Amendment Act 1996* by a Coalition government.

The exception has remained largely unchanged and was seamlessly included into the newer CCA in 2010.

Policy review

The Competition Policy Review is reviewing the secondary boycott provision by looking into whether the provisions of the CCA on secondary boycotts *operate effectively*, and do they work to *further the objectives of the CCA*.

ACF is concerned that the focus of the review into secondary boycotts is aimed at what the parliamentary secretary for agriculture Richard Colbeck described as 'dishonest campaigns.'² At the most basic level, it is argued that corporations in resource based sectors such as forestry and fisheries are held to account by provisions within the CCA, whilst environmental groups are not; that environmental campaigns should be held to the same level of scrutiny for claims made in the market.

What is most concerning are indications that in order to achieve this outcome the government is considering removing the exemption allowing groups to campaign against certain goods and services based on environmental concerns without breaching the prohibition on secondary boycotts altogether.

Argument against removing the exemption

Section 45DD(3) of the CCA states that a person does not contravene the blanket ban on secondary boycotts if the dominant purpose for which the conduct is engaged in is substantially related to environmental protection.

¹ *Rural Export & Trading (WA) Pty Ltd v Hahnheuser* [2008] FCAFC 156

² <http://www.theguardian.com/environment/2014/apr/02/coalition-review-of-consumer-laws-may-ban-environmental-boycotts>

To remove this exception and hence broaden the application of the ban on secondary boycotts is not only a restriction on freedom of speech, it is also in complete contradiction to the purpose for which it was introduced, which subsequently places it in contradiction to the overall object of the CCA.

Original Purpose

The documents and debates concerning the reintroduction of the ban of secondary boycotts and the relevant exceptions make it quite clear that any attempt to remove the s 45DD(3) exception will go against the purpose for which the ban was introduced.

It is clear from documented Senate Debates that the provisions were introduced to make sure that the blunt instrument that is a blanket ban on secondary boycotts is confined to illegitimate industrial action³ and that the exclusions were intended to provide clear guidance that consumer issues were not intended to be restrained by boycott actions.⁴

Furthermore, as stated both in the Senate Debates⁵ and confirmed by judicial interpretation of the relevant provisions⁶, the lack of definition of what is to be considered 'environmental protection' has left the exception intentionally broad, further reinforcing the intention of the ban on secondary boycotts to only regulate and prevent illegal industrial action and not to protect the interests of big business.

It is not correct to assume that corporations in the resource sectors who are affected by environmental campaigns are innocent third parties, subject to dishonest and deceptive information put forward by environmental organisations. The reality is not so clear cut and as realised by those introducing the provisions in 1996, to assume that these corporations are 'innocent' third parties is naïve.⁷

This demonstrates the understanding by the drafters of the need for an exception to the blanket ban on secondary boycotts, in order to create a fairer and in the case of environmental campaigns a more informed commercial environment.

Freedom of Speech

Removal of the section 45DD(3) would contradict the Government's stand in favour of freedom of speech. As stated recently by Chris Berg (Institute of Public Affairs) "*Consumer boycotts are a completely legitimate way to express political views. Free markets are not just a tool to bring about efficient exchange. They are a dynamic ecosystem of individual preferences about what we want to buy and from whom. And sometimes those preferences involve ethical judgments about corporate values.*" This is a freedom of speech issue and the way we express ourselves in the market place is as much a form of free expression as anything else.

³ Senator Murray, Senate Debates, 1996, p. 5607

⁴ Ibid.

⁵ Ibid.

⁶ *Rural Export and Trading (WA) Pty Ltd v Hahnheuse* [2007] FCA 1535, [60], affirmed by the Full Court on Appeal

⁷ Bill Digest, *Workplace Relations and Other Legislation Amendment Bill 1996*

Some commentators have argued that removal of the exemption is imperative to make advocacy groups accountable for factual inaccuracies as there is currently no way of doing this. This argument, however, is not sustainable. Should environmental groups make deliberately false or misleading statements in their campaigns other laws, such as the tort of injurious falsehood, would protect businesses and provide them with appropriate remedies. It is simply incorrect that the only way in which protection of business can be achieved is by removing the exemption contained in section 45DD.

What removal of the 45DD(3) exemption would mean is that environmental or advocacy groups might not be able to highlight to the public the damaging environmental practices and products of some businesses. It would take away a key protection for freedom of speech in the public interest and it would take away the ability for an individual to express their values in the choices they make through the market.

If one dislikes what a company is doing, that organisation or individual should be able to advocate and debate in the marketplace that the public should stop spending their money in a way that supports the company and its products. This is completely legitimate form of political expression that would be threatened by the removal of the section 45DD(3) exemption.

Unlike in the United States, Australian law does not provide for protections such as the First Amendment⁸ and as stated by the Australian Courts *'the freedom of speech and assembly, including the right to protest, are important democratic freedoms.'*⁹ By removing the exception outlined in s 45DD(3) the Australian Government would severely limit the ability environmental groups to inform consumers as to the detrimental impact of certain goods and services on the environment and even more alarmingly would be depriving their citizens of these important democratic freedoms.

Contravention with the Objects of the CCA

The point of the exemption is to allow for legitimate debate and freedom of expression in educating consumers about the environmental impacts of companies' practices and products. As it is impossible to understand these environmental impacts without information, this is an important role performed by environmental groups to ensure fair and sustainable business practices. This is consistent with other provisions of the CCA that are designed to ensure that companies operate fairly and in accordance with certain standards, and prevent companies obtaining an unfair commercial advantage by making false or misleading representations to consumers.

The aims of the CCA are "to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protections". It is not the aim of the CCA to prevent the environmental impacts of companies' practices and products being scrutinised. Changes to the CCA should therefore be carefully considered on competition and fair trading grounds, and not on the basis of ideology.

⁸ In the US, the right to organise boycotts is protected under the First Amendment to the US Constitution, although there are some statutory limitations. The one that is most relevant in this context is the ban on the use of a secondary boycotts as a weapon of organised labour. This law serves, a purpose much like the ban on secondary boycott provisions within Australia.

⁹ *Gisbourne Garden & Building Supplies Pty Ltd v Australian Workers Union* 1998 [FCA] 1323

Conclusion

Some of the most significant environmental achievements in Australia's history have come via boycotts, or at least the threat of them. For example, when green groups sought to highlight to purchasers the environmental impacts of the forestry practices of companies such as Gunns and Ta Ann, demand for timber products from old-growth forests in Tasmania dropped significantly. The outcome of a sustained campaign lead by Greenpeace exposing the practices of John West tuna was a pledge by Australia's major supermarkets to stock sustainably-sourced tuna. These and many other campaigns involved the individual choosing to express their values in the choices they make through the market, but this freedom of choice would not have been able to be exercised without the provisions of information to the public by environmental groups in the first place. The ability of environmental groups in Australia to perform this role must be protected in the CCA and the freedom of Australians to express their values through purchasing decisions retained.

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