

Submission on the Competition Policy Review Issues Paper, 14 April 2014

20 June 2014

The Australian Network of Environmental Defender's Offices (**ANEDO**) consists of nine independently constituted and managed community environmental law centres located in each State and Territory of Australia.

Each EDO is dedicated to protecting the environment in the public interest. EDOs provide legal representation and advice, take an active role in environmental law reform and policy formulation, and offer a significant education program designed to facilitate public participation in environmental decision making.

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Introduction

1. ANEDO welcomes the opportunity to provide comment on the Competition Policy Review Issues Paper dated 14 April 2014. This submission responds only to that part of the Issues Paper relating to *Secondary Boycotts* (para 5.27-5.28). Namely:

Do the provisions of the CCA on secondary boycotts operate effectively, and do they work to further the objectives of the CCA?

2. Exemptions to the secondary boycotts provisions set out in s45D are contained in section 45DD. In this submission ANEDO focuses on s45DD(3) which 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.

3. ANEDO is concerned that the exemption relating to environmental and consumer protection remains intact. Removal or dilution of the exemption would be inconsistent with the objectives of the CCA, it would go against the intention of the legislature when it originally enacted the exemption and it would limit the right to freedom of expression.

Objects of the *Competition and Consumer Act 2010* (Cth)

4. The Object of the *Competition and Consumer Act 2010* (Cth) (CCA) is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.¹
5. The Terms of Reference for the Competition Policy Review Panel includes inquiry into appropriate reforms to improve the Australian economy and the welfare of Australians by identifying and removing impediments to competition that are not in the long-term interest of consumers or the public interest and to make recommendations aimed at ensuring Australia's competition regulation and policy meet international best practice.
6. The intention of Australian competition law is to ensure markets are not only competitive, but they adhere to the standards set in the regulatory framework the operation of which is essential for fair business practices. It is not the intention of the CCA to allow competitors in the market place to wrongly influence and/or mislead consumers. ANEDO is of the opinion that section 45DD of the CCA contributes to the maintenance of these standards and operates to further the objectives of the CCA. The removal of s45DD would risk those corporations or entities who seek to mislead consumers to be able to do so virtually unchecked. Consumer protection is at the heart of the objectives of the CCA making transparency and accountability an essential feature of the regulations which are designed to protect the public interest and the long term interest of consumers.

¹ *Competition and Consumer Act 2010* (Cth), s2.

History of s 45DD

7. Section 45DD fulfils what appears to be the clear intention of the legislature. It is relevant therefore to describe briefly the debate surrounding s45D and the s45DD exemption when initially introduced by the Howard Government as part of the *Workplace Relations and Other Legislation Amendment Bill 1996* (Cth).
8. Section 45D was introduced into the *Trade Practices Act 1974* (TPA) in 1977 as a result of a report from the Swanson Committee² established to review the TPA and give attention to the application of the TPA in respect of anti-competitive conduct by employees and employee or employer organisations. Section 45D makes it an offence to engage in conduct or secondary boycotts for the purpose of causing substantial loss or damage to the business of a party.
9. Section 45D was a far-reaching provision with no exceptions other than for conduct substantially related to remuneration, conditions of employment, hours of work or working conditions. The exemptions in s45DD were introduced due to concerns for the potential consequences of s 45D and that its use as a 'blunt instrument' be made available only in respect to illegitimate, industrial action.³ The concerns aired during the Senate Debate are equally applicable today, in particular, warnings relating to the potential of s45D to make it unlawful for individuals or communities to take part in boycotting activities if they are going to affect a party's ability to make a profit. Importantly, s45D impeded any individual or organisation from publicly objecting to the distribution of goods including those that were produced unethically or via environmentally destructive practices.⁴
10. The Senate Debate identified that s 45D could be effectively used as a 'SLAPP suit'⁵ by corporations, regardless of their ethics, against parties involved in protests not related to the workplace if the protests impinged upon the competitive nature of a commercial organisation. In particular, s 45D prevented concerned individuals and community groups from using protest action for environmental and consumer protection causes.⁶
11. The s 45DD exemptions overrode the 'draconian restriction' embodied in the secondary boycott provisions should it be used to threaten environmental protesters or consumer lobbyists with injunctions, contempt of court and civil damages and to restrain the right to peaceful protest.⁷
12. ANEDO is concerned that the removal of the exemptions from the prohibition of secondary boycotts would go against the original intention of the legislature and further risks s45D being used for strategic litigation similar in nature to SLAPP.

2 Swanson Report 1976: <http://www.australiancompetitionlaw.org/reports/1976swanson.html>

³ Senator Campbell, Senate Debate, *Workplace Relations and Other Legislation Amendment Bill 1996*, Hansard, 19 November 1996, p 5607.

⁴ Ibid, Senator Brown, Hansard, p 4017.

⁵ Ibid; Strategic Lawsuit Against Public Participation; Pring, George W.; Canan, Penelope (1996). *SLAPPs: Getting Sued for Speaking Out*. Temple University Press. pp. 8–9. ISBN 0-375-75258-7.

⁶ Above n 4, p 5663.

⁷ Senator Murray, Second Reading Speech in respect of the *Workplace Relations and Other Legislation Amendment Bill 1996*, Hansard, 16 October 1996, p 4244.

Freedom of expression

13. It is in the broader public interest to maintain s45DD in its current form as it furthers the Objects of the CCA by serving the public interest and welfare of Australians by allowing the important public right of free speech and access to information that might otherwise be suppressed. Restriction of information inhibits informed consumer choice being an ultimate barrier to consumer protection. Australian legislation does not operate extra-territorially to regulate corporate activity and in these circumstances, informed debate and education of consumers is an essential element of fair trading and provision for consumer protection.
14. While the right to freedom of opinion and expression is not explicit in our Constitution it is clear there is an implied freedom of political communication and the ability of the Commonwealth to legislate against that implied freedom is limited.⁸
15. State legislation enacted specifically to protect and encourage participation in public debate and matters of public interest includes the *Protection of Public Participation Act 2008* (ACT). This Act also aims to discourage litigation that interferes with engagement in public participation. It was brought in response to the rise of lawsuits intended to silence and intimidate activists, activist organisations, investigative journalists or any outspoken individual or group on matters of public interest.⁹
16. Although the ACT is the only jurisdiction in Australia with anti-SLAPP legislation other States have proposed similar draft legislation with the objective to protect and encourage public participation and protect and promote human rights such as the right to freedom of expression.¹⁰
17. A withdrawal of the s 45DD provision would be a step backwards in the protection of public participation which is currently in line with international standards. The removal or dilution of the circumstances in which boycotts are permitted would remove an important safeguard installed with the purpose of protecting behaviour that is engaged for the *dominant purpose* of environmental protection or consumer protection issues.
18. The Full Court of the Federal Court has considered the operation of s45DD(3)(a)¹¹ and took a relatively narrow approach to the definition of "environmental protection" (at [20] and following). The Court noted the environment will ordinarily be a particular location, thing or habitat in which a particular individual instance or aggregation of flora or fauna or artifice exists; the protection of such would be to preserve the existence and characteristics of that particular location, thing or habitat (at [24]). Their Honours noted the appropriate safeguards that are built into s45DD(3) namely, to invoke the exemption a person must establish the existence of an objective state of fact consisting of an environment and that the dominant purpose of the defendant's actions is for the protection of that

⁸ *Nationwide News Pty Ltd v Wills and Australian Capital Television Pty Ltd v Commonwealth* (ACTV) 177 CLR 1; see also Articles 19 & 20 of the [International Covenant on Civil and Political Rights \(ICCPR\)](#).

⁹ Dr Foskey, Legislative Assembly for the ACT: 2005 Week 8 Hansard (29 June) Page 2412.

¹⁰ In South Australia, a draft Bill entitled *Protection of Public Participation Act 2001* (SA) was proposed by the Environmental Defenders Office SA; in Victoria draft legislation was proposed by the *Public Interest Clearing House* (PILCH).

¹¹ *Rural Export & Trading (WA) Pty Ltd v Hahnheuser* [2008] FCAFC 156

existing environmental matrix (at [27] – [28]). The onus of proof is upon the defendant who seeks to invoke the exemption (at [38] – [42]).

19. A recent judgement of the High Court of Australia considered the Constitutional validity of provisions in a State Act which attempted to burden the freedom of political communication.¹² ANEDO submits this decision ought to be taken into account before any amendments are made to s45DD.
20. In short, the Court found that legislation which affects freedom may nevertheless be valid, however in determining whether the legislation in question falls foul of the freedom, two questions posed in the judgement of *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 must be answered:
 1. Is there a burden upon the freedom to political communication?; and
 2. Is the provision reasonably adapted and appropriate or proportionate, to serve a legitimate end in a manner which is compatible with the maintenance of the prescribed system of representative government?
21. In addressing the first question as to whether there has been a burden upon the freedom the Court found it is important to bear in mind that the freedom or right to political communication is not a personal right (at [35]), rather the question is whether the legislation affects political communication generally; a central question being: *how does the impugned law affect the freedom?* (at [36]).
22. The Court found that the efficacy of representative government depends upon free communication between all persons and groups in the community (at [28]). ANEDO submits that where the effect of a provision is to restrict interested groups in publicly expressing a viewpoint, it is appropriate to view it as a burden upon the freedom of political communication.
23. Section 45D is exceptionally far reaching. It casts a wide net that can restrict “conduct” (which may include communication or otherwise) and without any exceptions, the type of conduct that may be prevented by the provision would appear to include political protest including communication concerning the practices of organisations trading in Australia.
24. The answer to the second question required examination of a legitimate statutory purpose for the provision in question. In the *Unions* case the Court could not deduce how the purpose of the provision was connected to the wider purposes of the Act or how those legitimate purposes were furthered by the operation and effect of the provision. The Court declared the provision invalid.
25. As described above, the Object of the CCA is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection. Without the s45DD exceptions, arguably s 45D does not align with the Objects of the CCA. Using the test in *Unions*, it cannot be said that s45D is reasonably appropriate and proportionate to serving the legitimate purpose of the CCA. Section 45D acts to prevent “conduct” so as to capture and prevent an indiscriminately large range of activity inimical to the business interests of a party. Without s45DD, the effect of s45D has the potential to prevent a raft of activity, including the free flow of information, political or otherwise, that promotes the transparency and accountability of organisations trading in

¹² *Unions NSW v State of NSW* [2013] HCA 58

Australia, if such communication or activities would have the effect of causing substantial loss or damage to a business.

26. The judgement in *Unions* established the far-reaching scope of the right to political freedom in the Australian Constitution. It is clearly arguable that s45D, without exemptions, would fall foul of the implied right to freedom of political communication confirmed in the judgements of *Lange* and *Unions*.