

SUBMISSION

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INTRODUCTION

This submission specifically addresses *Competition and Consumer Act 2010*, Section 45DD (3)(a).

This subclause exempts actions otherwise prohibited elsewhere in the act relating to secondary boycotts and boycotts affecting international trade if “the dominant purpose for which the conduct is engaged in is substantially related to environmental protection or consumer protection.”

BACKGROUND

As the review committee is aware, Section 45D of the Trade Practices Act was formulated in 1977.

The Fraser Government inserted 45D to prohibit conduct which had the effect of causing “substantial loss or damage to a targeted person or; a substantial lessening of competition in a market.” At the introduction of the provision, the then Minister for Business and Consumer Affairs (Mr Howard) stated that:

“boycotts have been used by some trade unions in this country to dictate the business arrangements of independent businessmen. In some instances these boycotts have resulted in higher prices to the consumer. The most common instance of a secondary boycott occurs where a group of employees collectively acts for the purpose of interfering with supply of goods and/or services by their employer to a company.”¹

In 1996, the boycott provisions were transferred back to the TPA by the Workplace Relations and Other Legislation Amendment Act 1996. To secure passage of amendments relating to secondary boycotts, the Howard Government and the Australian Democrats negotiated the insertion of the exemptions identified in Section 45DD(3)(a).

It is noteworthy that former Senator Bob Brown of the Australian Greens stated that these exemptions should be expanded to include ‘protection of human rights or social justice, peace or Aboriginal rights’² but a proposed amendment to this effect was not accepted by the Senate.

¹ The Hon. John Howard MP, House of Representatives, Hansard, 8 December 1976, p. 3533.

² The Hon Robert Brown MP, Senate, Hansard, 19 November 1996, p5661

RESPONSE TO QUESTIONS

Key question:

Are the current competition laws working effectively to promote competitive markets, given increasing globalisation, changing market and social structures, and technological change?

In response to this question, this submission argues that Section 45DD(3)(a) is not working effectively to promote competitive markets given the various social and economic changes that have occurred over the past two decades.

Groups whose ‘dominant purpose’ is ‘environmental protection’ are now large and sophisticated organisations that have offices in numerous countries, staff numbering in the thousands, and can draw on significant resources and funding from both private and public funds.

By way of example, the World Wide Fund for Nature’s US and international arms alone had an operating budget of around USD 466 million in 2013.³ Greenpeace’s budget in 2011 was USD323 million; it has more than 2,500 staff and 15,000 volunteers.⁴ The local arms of these organisations in Australia are well-funded, draw on considerable international resources, and run sophisticated campaigns.

Access to such resources has resulted in increasingly sophisticated advocacy campaigns that are aimed not merely at encouraging consumer-level protest and political advocacy against specific businesses or industries that it considers objectionable, but also protests against businesses that supply or purchase from these industries, from financiers to wholesale customers.

The sophistication of these campaigns has been demonstrated in actions by groups such as Greenpeace and WWF in their endorsement of particular sustainability certifications for commodities and products.

For example, Greenpeace and WWF endorse a standard for forest products known as the Forest Stewardship Council (FSC) certification. Both organisations assisted in developing and funding FSC;⁵ WWF is currently a member of FSC’s Board of Directors⁶. Both organisations encourage the boycott of companies that do not use this form of certification or employ alternative forest certification methods and services. Both organisations endorse similar standards for other commodities including beef and fish products. Further, both organisations demand that third parties cease dealing with companies that do not follow the FSC standard.

There are organisational and commercial ties between the WWF, the FSC governing body and other commercial entities. For example, WWF recommends boycotts against non-FSC certified products

³ WWF Inc (2013). Financial Statements and Independent Auditor’s Report. Year ended June 2013.
<https://www.worldwildlife.org/about/financials>

⁴ Greenpeace (2013). Financial Report for the Year ended June 2013.
<http://www.greenpeace.org/international/Global/international/publications/greenpeace/2013/GPI-AnnualReport2012.pdf>

⁵ Timothy Synnot (2005). Some notes on the early years of FSC. Accessed at: ic.fsc.org/download.notes-on-the-early-years-of-fsc.a-798.pdf

⁶ See: <https://ic.fsc.org/board-of-directors.210.htm>

and non-FSC companies⁷, while simultaneously promoting FSC companies.⁸ In concert with this, WWF has entered into commercial licensing arrangements with an FSC-endorsed company (Kimberly Clark Australia), and also provides FSC's governing body with funding from these arrangements.⁹

Under any other circumstances, this would be considered anti-competitive behaviour. If WWF's 'dominant purpose' was found to be anything other than the environment -- human rights, for example -- it would breach the Act.

The above example demonstrates that there are multiple purposes at work involving multiple organisations. The dominant purpose may be "environmental protection" for one group, but for others the purpose could be commercial or, potentially, primarily aimed at enhancing the reputation or fundraising capacity of the group organising a boycott.

There are further complications. Australian companies exporting forest products to international markets were subjected to boycott campaigns because they were not FSC companies.¹⁰ Under any other circumstances, these campaigns would be considered breaches of s. 45DB.

This submission argues that at the time the s. 45DD(3)(a) compromise was reached, the changes brought about by *globalisation, changing market and social structures, and technological change* that have provided the grounds for current-day sophisticated environmental campaigning could not have been envisioned. Moreover, any revised policy settings put in place as a result of this Review must anticipate future developments in the sophistication of campaigning methods.

Question:

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

In response to this question, this submission argues that the provisions on secondary boycotts do not operate effectively and they do not further the objectives of the CCA.

The operation of s.45DD(3)(a) is vague. The deficiencies of the exemption provided by this subclause have been described in *Rural Export & Trading (WA) P/L v Hahnheuser (2008)*.¹¹

In this case, an animal rights activist had contaminated the feed given to sheep with pork products in order to prevent their live export to Halal markets in the Middle East.

The case concerned s.45DB, which prohibits secondary boycotts related to international trade. In this case, the Federal Court at first instance ruled that the dominant purpose of the activist's conduct was 'environmental protection'.

⁷ WWF (2014). Advisory to Buyers and Investors of Sinar Mas Group/Asia Pulp & Paper.

<http://www.wwf.or.id/en/?33582/Advisory-to-Buyers-and-Investors-of--Sinar-Mas-GroupAsia-Pulp--Paper>

⁸ WWF (2012). Love Your Forests.

http://www.wwf.org.au/our_work/saving_the_natural_world/forests/love_your_forests/

⁹ FSC Australia (2013). Board Meeting Minutes, August 2013. <http://au.fsc.org/download.august-2013-fsc-australia-board-meeting.332.htm>

¹⁰ The Wilderness Society and Rainforest Action Network (2008). Tasmania's Forests and Japanese Woodchips

¹¹ Federal Court Of Australia. *Rural Export & Trading (W A) Pty Ltd v Hahnheuser* [2008] FCAFC 156

This decision was reversed on appeal. The full bench of the Federal Court noted that the Act did not define 'environmental protection' -- and that any exemptions for such a dominant purpose were also not defined. This final ruling clarified but did not resolve this situation that it described as a "syllogism". This lack of resolution of key issues remains a feature of the current s.45DD(3)(a).

Similarly, in 2007, a campaign was launched to promote a secondary boycott against an Australian company (Woolworths Ltd) for its wholesale purchases of paper products from two Indonesian companies (Asia Pulp and Paper, and Asia Pacific Resources International Ltd).

The organisation (Wake Up Woolworths) stated that these boycotts were for environmental purposes.¹² The organisation was established by the former Secretary of the Pulp and Paper Workers' Branch of the Construction, Forestry, Mining and Energy Union (CFMEU) and Assistant National Secretary of the CFMEU's Forestry and Furnishing Products Division.¹³ The campaign activity was paid for by the CFMEU.¹⁴

Both the Australian paper manufacturing industry¹⁵ and CFMEU¹⁶ had indicated publicly that they saw imported paper from Indonesia as a commercial threat, particularly wholesale purchases of paper by supermarket chains for 'private label' marketing.

Neither the CFMEU nor the Australian industry were able to undertake a secondary boycott, unless the 'dominant purpose' of the organisation conducting the boycott was environmental protection. It appears that 'Wake Up Woolworths' was established in order to take advantage of the exemptions under s.45DD(3)(a).

This submission therefore argues that the poor definitions in the Act

- **dissuade affected parties from taking action;**
- **provide scope for groups whose dominant purpose is not environmental protection, but political advocacy or commercial benefit, to diminish competition and therefore hinder the objectives of the Act.**

There is therefore a clear argument for the Act to be amended to ensure application of a public interest test that weighs all considerations -- economic, social and environmental -- without conferring a blanket exception for the latter of these considerations. An existing test of "benefit to the public" can potentially be applied to secondary boycotts and boycotts affecting international

¹² Wake Up Woolworths (2008). Waking Up Woolworths. Accessed at: <http://www.docstoc.com/docs/34681911/The-Wake-Up-Woolworths-campaign-is-funded-primarily-by-the-Pulp>

¹³ AIRC (2008), Organisations: CFMEU. Australian Industrial Relations Commission. Accessed from <http://www.e-airc.gov.au/105n/rules>

¹⁴ 'Woolies under fire over pulp products' in *The Age*, June 5, 2008. Accessed at: <http://www.theage.com.au/business/woolies-under-fire-over-pulp-products-20080604-2lx4.html>

¹⁵ Australian Customs Service (2008). Trade Measures Branch Statement Of Essential Facts Report No. 138. Toilet Paper Exported From The People's Republic Of China And The Republic Of Indonesia. 3 November 2008

¹⁶ CFMEU (2007), *The Issue With Tissue*. Construction, Forestry, Mining and Energy Union Pulp and Paper Workers' Branch. Melbourne, Australia. Accessed from <http://www.cfmeu.net.au/multiversions/2582/FileName/TheIssueWithTissue.pdf>



trade by virtue of ss.88(7) and 90(8) of the Act but this does not occur in practice because of the effect of the s.45DD(3)(a) exemption.

This submission recommends that the following actions take place to promote the objectives of the Act:

- **s.45DD(3)(a) is removed completely; and/or**
- **Processes of authorisation of actions are rendered effective. This could involve application of mechanisms which require the relevant authority (in this case the Australian Competition and Consumer Commission, or potentially the Australian Competition Tribunal by way of review) to undertake “benefit to the public” evaluation prior to authorisation of secondary boycotts.**