Competition Policy Review 2014

Submission By
Hon. John Lloyd PSM

Chair, Fair Work Building Industry Inspectorate Advisory Board
Red Tape Commissioner, Victoria

June 2014

Submission To Competition Policy Review 2014

A. This submission is prepared with the intention of addressing some of the Review's comprehensive terms of reference. The topics covered reflect concerns about competition, more particularly persistent anti-competitive conduct and regulator behaviour, which have come to my attention.

B. The three broad issues that I address are:

- Secondary boycotts;
- Restrictions on engaging contractors and labour hire; and
- Red tape.

Secondary Boycotts

1. Secondary boycotts are a tactic deployed by unions, particularly in the building and construction industry.

2. The *Competition and Consumer Act 2010* (the CC Act) provisions to penalise contraventions and deter secondary boycotts have failed.

3. Unions in building and construction exercise significant industrial and commercial power. They are willing to use this power to advance their influence and their industrial agenda. They have no hesitation in taking extreme actions that in other industries would not be tolerated.

4. The principal contracting firms and sub-contractors who are prepared to resist extreme union tactics are in the minority. Resistance involves the risk of jeopardising even the most profitable business.

5. The secondary boycott provisions of the CC Act and its predecessor statute were welcomed by people concerned about industrial thuggery. Secondary boycotts inflict considerable financial damage on targeted firms and also harm Australia's reputation for fair commercial dealings.

6. The provisions were introduced into the *Trade Practices Act 1974* in 1977. This placement was welcomed because it involved substantial penalties, markedly higher than the penalties in industrial legislation. The initial impact was salutary and the threat of instigating secondary boycott action would often persuade the unions to reconsider their tactics. The prospect of substantial fines was the motivating factor.

7. It is unfortunate that over time the impact of the secondary boycott provisions has diminished. The cases taken against secondary boycotts are few. The regulator, the Trade Practices Commission and now the Australian Competition and Consumer Commission (ACCC) is viewed as being unwilling to enforce the secondary boycott provisions because

workplace relations issues are inevitably involved.

8. Other factors may contribute to the ACCC's reluctance to enforce the laws. It could be the challenge of matching resources to work priorities, the expense involved in mounting a prosecution, the difficulty of obtaining evidence or the lack of ongoing commercial damage when the background industrial dispute is settled. Whatever the reason the general attitude amongst many affected companies is that it is of no use to approach the ACCC over a secondary boycott.

9. The outcome is that in 2014 the secondary boycott provisions are judged to be essentially ineffectual.

10. This was highlighted by the ACCC's recent response to well publicised conduct targeting Boral. Boral supplied cement to the Emporium building site in the Melbourne CBD. The Emporium site was under the control of Grocon. Grocon was involved in a protracted and bitter dispute with the building unions in 2013. Boral indicated that other contractors in Melbourne then commenced refusing to accept its cement supplies. The alleged reason given by the contracting companies was pressure from building unions upset that Boral had supplied cement to the Emporium site. Boral took a strong public stand against the action and media articles recounted the details of phone calls from various companies explaining the reasons for the cement supply cancellations.

11. The ACCC investigated the events and concluded that there was insufficient evidence to commence proceedings. It mentioned that witnesses were reluctant to provide adequate evidence. The ACCC declined to state why it chose not to invoke its compulsory examination power to obtain more reliable evidence from reluctant witnesses. Boral appeared to have gathered considerable detail about the events to assist any investigation.

12. The belief that the ACCC and the CC Act secondary boycott provisions are ineffectual is reinforced by such developments.

13. Secondary boycotts instigated by trade unions in building and construction are frequent and flagrant. Other companies, smaller than Boral, were also subjected to boycott action in Melbourne following the Grocon dispute. What confidence would they have in approaching the ACCC?

14. The Cole Royal Commission was alive to these enforcement problems. Its 2003 report recommended that the Australian Building and Construction Commission (ABCC) be given the power to investigate and enforce secondary boycott provisions affecting building and construction industry participants.

15. I support this recommendation. During my time as ABCC Commissioner I found the ACCC to be mostly disinterested in engaging actively to reduce unlawful secondary boycott conduct in building and construction.

16. The power for the ABCC should be enshrined in its enabling legislation. The drafting of the necessary legislation should ensure that secondary boycotts designed to disrupt the supply of materials to building and construction industry participants are covered. This assumes legislation currently before the Parliament to re-establish the ABCC passes the Parliament.

Recommendation: The ABCC, when re-established, be given to power to enforce the secondary boycott provisions of the *Competition and Consumer Act 2010*. This to be given effect by inserting counterpart provisions in the ABCC statute. The ABCC power to be limited to secondary boycotts affecting building and construction industry participants, including entities engaged in the supply of materials to the industry participants.

Restrictions on Engaging Contractors and Labour Hire

17. Restrictions on the ability of contractors to freely compete for work contracts have proliferated as a feature of workplace relations agreements and contracting practices. A significant reason for this is the limitations on the reach of the CC Act.

18. Section 51(2)(a) of the CC Act exempts from Part IV of the Act, except from its secondary boycott provisions, "contracts, arrangements or understandings relating to remuneration, conditions of employment, hours of work and working conditions of employees." The exemption reflects a long-held notion that workplace relations are best regulated by employment, rather than commercial, law.

19. The use of contract and labour hire arrangements in Australia has grown significantly over the last 20-30 years. It is an inevitable consequence an increasingly sophisticated economy characterised by more complex goods and services, technological innovation and outsourcing of specialised support. In addition, many people embrace the personal freedom and opportunities of working as contractors and labour hire staff.

20. Trade unions typically oppose the spread of new modes of work which are perceived to threaten their already declining membership base. They promote notions of insecure employment that ignore the inevitable changes occurring in the economy and the make-up of our workforce.

21. The union opposition to independent contracting and labour hire is promulgated through highly restrictive industrial agreement provisions. In addition, arrangements with compliant employers and their representative bodies that operate outside industrial agreements reinforce restrictions on free and fair contracting and labour hire. The effect of these agreements and arrangements is to restrict competition amongst contracting firms. Contracting firms with innovative labour practices are denied access to work contracts. Many have to submit to the anti-competitive conditions to survive.

22. The union agenda is basically to remove labour price and practices from the contract competing space. Unions aim to discourage the use of contracting and labour hire. The union tactic is to negotiate a variety of clauses in industrial agreements restricting the use of contractors and labour hire. It is common that the restrictive clauses are incompatible with the industrial agreements and arrangements that the tendering contractor has negotiated with its staff. Compliant employers to protect their market position are willing to accept rigid and anti-competitive agreements. The cost to competition, jobs and productivity in Australia is immense.

23. Examples of provisions and practices that unions and employers adopt include:
    a. the company to engage only contractors whose employees are covered by a union endorsed agreement;
    b. the contractor's employees are to be paid wages and conditions that are equal to or greater than those applying to the company's employees;
    c. the company to provide a list to the union of the contractor firms it proposes to use. The name of firms and their industrial agreement to be provided to the union;
    d. the company provides a list to the union of the contractor firms it has used;
    e. the union to be consulted by the company before it engages a contractor;
    f. a maximum ratio of contract employees to ongoing staff;
    g. limit the period for which contract staff may be engaged;
    h. a project agreement establishes the pay and conditions standards that are to apply to a building or construction project. The project agreement displaces any industrial agreement or arrangement that a sub-contractor may have with its employees.

24. Such provisions are generally acceptable under workplace relations law because they have been found to pertain to the relationship between an employer and its employees. This is curious because the provisions affect the relationship between the employer and contractor firms. Often the impact on the remuneration of contractors and their staff is considerable, even though they are not covered by the industrial agreement. The effect of the provisions on the staff of the employer is usually limited and remote. Contractor provisions are rarely used to displace ongoing employees

25. A finding that a restrictive contractor condition does not satisfy workplace relations law does not necessarily mean it will not be implemented. A side deed or an arrangement outside an approved industrial agreement is simply entered into. This may be documented or alternatively a more private and disguised arrangement is adopted.

26. These types of provisions are inherently anti-competitive. They are designed to restrict access to a tightly defined choice of contractors whose employment practices are acceptable to the unions. Contractors who do not acquiesce to the unions' agenda are denied an opportunity to bid for work.

27. Labour costs often account for a significant part of many contracts for service. The restrictive contract conditions in industrial agreements are not only anti-competitive but also add to the costs of the employer. The application of such conditions for any length of time will inevitably deny access to the more innovative and efficient practices found amongst a broader range of contracting parties.

28. It can be argued that the principal employer does not have to agree to such terms. Some of the more resilient or large employers will not accept restrictive conditions. But they are the exception in many industries with a trade union presence such as construction, manufacturing, warehousing and transport to name a few.

Recommendation: The *Competition and Consumer Act 2010* be amended to make unlawful the practice of imposing restrictions on the use of contracting and labour hire services through industrial agreements and associated arrangements. The exemption provided in S51(2)(a) should be qualified along the following lines: " The exemption does not apply to a contract, arrangement, understanding or industrial agreement between an employer, union and employees that restricts dealings or lessens competition through limiting the employer's capacity to engage contractors and labour hire firms."

Red Tape

29. Excessive red tape is often anti-competitive. Red tape in many industries has become so oppressive that it is a serious disincentive against new competitors entering an industry, growing their enterprise or diversifying. This is partly caused by poor laws, regulations, rules and guidelines. Also, it is caused by the administrative practices of many regulators.

30. I highlight some of the causes of anti-competitive red tape supported by a few examples. I encounter examples every day. Oppressive red tape has become a serious issue with the potential to damage the competitive fabric of the Australian economy.

31. **Retesting**. Retesting and imposing controls not applied overseas on the use of products is a common expensive regulatory practice. It is on occasions imposed in a manner that lessens competition.

32. **Case 1**. A Victorian firm imported geosynthetic products from Germany. The product was accredited by the German regulator to satisfy rigorous EU standards. The product had to be retested in Australia before it would be accepted for use by VicRoads. The importer considered that the Victorian tests involved samples that were much too frequent than was necessary. In addition, there was a concern that a testing laboratory had links to an Australian competitor of the importing firm.

33. **Case 2**. Vehicle air-conditioning refrigerant is subject to strict use controls in Australia. Mechanics have to be licenced to work with the refrigerant. The licensing course concentrates on the environmental risks of the refrigerant rather than safe work procedures. Technological advances mean the refrigerant is safer to use compared to when the regulations were passed. In the USA the refrigerant can be purchased off the shelf. No licencing applies to its use in the USA.

34. **Case 3**. A firm in the USA has developed a lubricant for conveyor belts. It is more efficient and less costly than existing products. The USA manufacturer decided against introducing the product into Australia because of the cost and time delays involved in our chemicals approval processes. The lubricant is used in New Zealand and other economies that have stronger recognition of the accreditation systems of other countries.

35. **Commonwealth Regulator Cost and Remoteness**. Commonwealth regulators, like state regulators, are seen as applying red tape in a manner that lessens competition. In some cases new Commonwealth, state and territory entities are created ostensibly to enhance national consistency. These bodies sometimes prove to merely add another layer of regulation with limited impact on national consistency. Additional layers of red tape frequently lessen competition by discouraging new entrants, stifling innovation and compromising productivity

36. **Case 1**. A freeway upgrade was planned for the Princes Highway in Gippsland. Local civil contractors were hopeful of gaining access to work on the project as sub-contractors. The

work was anticipated to last for at least 12 months. The project was part funded by the Commonwealth. This meant accreditation by the Federal Safety Commissioner (FSC) was required to work on the project.

37. FSC accreditation now costs the contractor $50,000 – 100,000. The accreditation application forms run to 50-100 pages. The local contractors could not afford such expense. The head contractor company bought its regular sub-contractors from Melbourne. These contractors were FSC accredited. At least some motels in Gippsland may have benefited.

38. I was involved in the introduction of the legislation that established the FSC. The original intent was not to introduce a process that was anti-competitive for small to medium sized contractors.

39. **Case 2.** AustRoads is a hybrid agency that brings together road authorities from the Australian states and territories and New Zealand. The Commonwealth is also represented on the AustRoads Board. Its creation was intended to improve national cohesion in road management practices.

40. A producer of road barriers and guards in regional Victoria was accustomed to a product approval process administered by VicRoads and its state counterparts.

41. The introduction of AustRoads has the portents of an unmitigated disaster for Australian firms supplying road product. An AustRoads product approval panel formed of state agencies now assesses products. An AustRoads assessment endorsing use of the product has limited practical effect. The producer still has to obtain approval from each state roads authority to use the product in the particular state. The extra layer of approval is exacerbated by poor performance. The approval process is cumbersome and slow. The regional firm has seven products awaiting assessment, some for a period of two years. Enquiries about progress with product assessment sometimes took six months to receive a response.

42. Overseas firms with broader market penetration have a greater capacity to accommodate the protracted Australian process compared to the Victorian regional producer who supplied the Australian market. The AustRoads initiative has had the effect of making it more difficult for local firms to bring product to market.

43. **Multiple Regulators**. In 2014 the commencement of most development projects is subject to the approval of multiple regulators. It seems virtually impossible to bring some coordination amongst the regulators to the project approval process. A compelling example of this problem is seeking approval to open a quarry.

44. Melbourne has been fortunate in having an ample supply of rock close to the city. This has been a comparative benefit for the development of infrastructure. However, in recent years multiple state, federal and local government regulators are now involved in the approval process. It now takes at best 5-6 years to obtain approval for a quarry. A recent quarry in

the Geelong region took 13 years to obtain approval. Costs, especially holding costs are substantial. As a result it is very difficult for new firms to enter the quarry industry.

45. The regulators that can be encountered on such a project include those covering: native vegetation, environment, cultural heritage, construction, utilities such a telecommunications, gas, electricity and water, road authorities and local councils overseeing planning permits. Coordination amongst the regulators is minimal. Commonwealth, state and local government agencies are involved. Numerous detailed applications and reports are generated. Consultants pour over the project plans. Changes to plans demanded by one agency are often contrary to the conditions stipulated by another agency. Companies complain that regulators call for multiple consultant reports. Companies consider that repetitive consultant reports are requested until an answer that satisfies the regulator is produced.

46. **Poor Administration**. Poor, insensitive and officious administration of regulations, rules and guidelines occurs daily. When encountered in the approval processes the competitive environment can be directly affected as new entrants withdraw. Poor administration at later stages often has the effect of stifling innovation and new investment.

47. **Case 1**. A hotel licence stipulated the operation of a VCR recording system for the venue's security equipment. The hotel upgraded to a digital system which offered clearer pictures and better retention features. The hotel was threatened with a licence infringement because it had changed the video system. The regulator's attitude does little to encourage innovation to become more efficient and competitive.

48. **Case 2**. Many tenders still mandate hard copy documents. Regional contractors complain that this can place them at a competitive disadvantage. A regional contractor may have a Melbourne agent. But often the complexity of the tender, the time period and the number of documents to be submitted make it difficult to lodge though the agent. A trip to Melbourne is then required or a tender application may be foregone because of the inconvenience and cost. In December 2013, of 12 Victorian tenders closing on a particular day, 9 required hard copy lodgement.

49. **Case 3**. A market garden firm introduced the new technology of driverless tractors. The tractors move at slower that walking pace and are designed with multiple safety features such as automatic stoppers and alarms. Workers are located on the back of the tractor. No person has to work or walk in front of the tractor. No accident with the machinery has been recorded. The purpose of introducing the tractors was to improve the productivity and competitiveness of the enterprise.

50. The OHS regulator nominated the tractors for an award at one property. The firm owned another property in another region. At this property the OHS regulator imposed a prohibition notice on the same tractors. Obviously, the firm was confused and had to engage in a protracted process to have the prohibition notice lifted.

51. A message was sent to the industry to be very cautious about investing in productivity enhancing technology.

52. **Entities with Unusual Structures and Altered Accountability**. A disproportionate number of complaints are received about agencies that are given a regulatory role yet are created under special arrangements with reduced or no accountability to Parliament or a Minister. The evidence suggests that such entities are at risk of pursuing their own agendas that can become divorced from their original purpose. It transpires that in the absence of parliamentary oversight and the associated requirements for accountability and transparency they may adopt practices that have anti-competitive impacts.

53. **Case 1**. Standards Australia is an independent, not-for-profit organisation recognised by the Australian Government as the peak non-government standards organisation. It is charged to meet Australia's need for contemporary, internationally aligned standards. It claims to lead a respected and unbiased standards development process; a claim not shared by many who engage with it.

54. Standards Australia also asserts that compliance with Australian standards is normally voluntary. In practice the so called voluntary standards are usually relied upon in legal proceedings contesting issues like registration, licences and equipment safety. Contracts containing provisions mandating compliance with a design, quality or performance approved by Standards Australia are exempt from the restraint of trade provisions of the CC Act.

55. Standards Australia relies on experienced volunteers to contribute to its technical committees. Many firms complain that the committees reflect a volunteer perspective. They are not up to date with the latest technology and product improvements both in Australia and overseas. Attempts to inject more contemporary considerations into the standards setting are often resisted. Firms claim the inflexible and unresponsive Standards Australia processes place them at a competitive disadvantage, especially against overseas competitors. The firms also argue that engaging with Standards Australia and its technical committees can become a prohibitively costly process

56. SAI Global, a private ASX listed firm, distributes Australian standards produced by Standards Australia. A regular complaint from many areas of business is the heavy charges levied to access the standards. Businesses are mindful of their exposure if they fail to comply with the Australian standard. At the same time, their need to access the standard is often most infrequent.

57. For example, a recent new playgrounds standard has a retail price of $641. The price although high may be tolerable for professionals such as equipment manufacturers and architects, builders and surveyors with a speciality in playground construction. However, the price is prohibitive for a children's care provider who wants to check that its equipment is compliant.

58. The annual subscription for National Construction Code is $2,255 and for the Building Code of Australia $2,056. The codes are regularly amended and loose leaf subscription services do not apply.

59. Legislation and regulations of all Australian parliaments are now available over the internet for free. A principle has developed that if a law imposes compliance obligations on citizens and organisations then there is a responsibility for the Government to provide access to the law or regulation without charge. This is a fair principle. Competition would be facilitated if this policy principle was extended to the standards promulgated by Standards Australia.

60. **Case 2.** Firms in the manufacturing sector in Victoria can be aggressively pursued to contribute to a construction industry long service leave fund. The strategy to rope in the manufacturing firms is based on the pretext that some of their employees work in the building and construction industry. The firms can be caught even if their employees' engagement with construction is intermittent and the firm's main purpose is manufacturing and not construction. The entity that applies this policy is a public company that administers the long service leave scheme. It is afforded this role by a state Act.

61. Manufacturing firms complain that once captured by the long service leave scheme they have to make payments for several past years. The past service covered can include employees that have left the firm and received payments in accordance with long service leave entitlements of an agreement, award or statute. Industry associations and businesses complain that the actions of the company can financially cripple firms that are targeted.

62. **Cost Recovery**. Cost recovery is widely deployed for many inspection and accreditation activities. Industries are generally prepared to endorse cost recovery so long as it is reasonable.

63. Care has to be exercised to ensure that the costs recovered are based on fair and reasonable attribution. Costs such as head office kitchen appliances and stationery have been included in some cases. Also, there is a concomitant obligation on the regulator to be transparent about the costs it is recovering.

64. In some industries cost recovery imposts appear to be excessive. The higher the fees the harder it is for new entrants to start up a viable business and deepen competition. Parts of the Victorian fishing industry are to be levied cost recovery that will increase fees by 600 percent over three years.

65. **Conclusion**. Oppressive red tape is crushing business innovation and competition. It is harming Australia's international competitiveness. Some firms identify the costs of regulation as a reason to relocate overseas or not to invest in Australia.

66. The ever increasing array and complexity of regulations cause many firms to take the risk of ignoring their regulatory obligations. They proceed with an investment or activity because complying with the regulations is too costly or involves too much delay. Those with a more

responsible attitude to red tape compliance can be placed at a competitive disadvantage.

67. Most small businesses are conscientious about meeting their red tape obligations. Many attend to their paperwork in the evening after work. I believe that many will be unable to comply with all their red tape obligations no matter how assiduous they are in attempting to do so.

68. The Victorian Government has a deliberate policy to remove unnecessary red tape and reduce its anti-competitive impacts. The office of Red Tape Commissioner has been created to inject the views of business directly into the red tape reduction process. The process is proving effective, but much works remains to be done.

4 June 2014