Justice & International Mission
Uniting Church in Australia
SYNOD OF VICTORIA AND TASMANIA

130 Little Collins Street
Melbourne Victoria
Australia, 3000
Telephone: +61-3-9251 5271
Facsimile: +61-3-9251 5241
jim@victas.uca.org.au

Competition Policy Review Secretariat
The Treasury
Langton Crescent
PARKES, ACT, 2600

Submission by the Justice and International Mission Unit, Synod of Victoria and Tasmania, Uniting Church in Australia to the Competition Policy Review

June 2014

The Justice and International Mission Unit, Synod of Victoria and Tasmania, Uniting Church in Australia, welcomes this opportunity to make submission to the Competition Policy Review. However, we are deeply disappointed that we were excluded from the ability to attend the consultations by the Review so far. We requested to attend the consultation in Melbourne on 21 May and were informed we could not do until someone got back to us. No one from the Review team got back to us, making us deeply concerned about the openness of the Review.

The Unit is concerned at the ideological frame of the Competition Policy Review, which seems to be framed primarily to the positives of competition, and appears to play down the need for strong government regulation to ensure where competition is fostered it results in positive outcomes. The review defines competition as:

> *Competition is the process by which rival businesses strive to maximize their profits by developing and offering desirable goods and services to consumers on the most favourable terms.*

However, the desire to maximize profit can provide an incentive for a range of undesirable behaviours by businesses, which require strong regulation and enforcement to mitigate. In our work the desire to maximize profit can drive the following behaviours:

- Allowing illegal labour conditions in product supply chains, including forced labour, human trafficking, worst forms of child labour and slavery. We have found such abuses are not uncommon even in the supply chains of large Australian retailers.
- The desire to squeeze down the wages and conditions for the employees of the business, with a net outcome of growing inequality, as more wealth flows to the owners of the business and less of wealth generated by the business is shared with its employees.
- Unethical marketing activities to persuade consumers a product or service is more than it is or in some other way persuade them to pay more for the good or service than they would in the absence of the unethical marketing.
- Tax avoidance and tax evasion to maximize profit at the expense of having to contribute to the communities in which the goods and services are produced or sold.
- Bribery, fraud and other criminal activities that seek to increase profit.
- The promotion and sale of products that are known by the business to be harmful to their consumers, such as asbestos and cigarettes.

- Unsustainable environmental destruction, as businesses seek to promote consumption of products that are not needed, or may even harm consumers, and results in levels of consumption that are not ecologically sustainable.
- An unwillingness to deal with any pollution generated by the business activity, shifting the costs of the pollution onto the communities impacted by the pollution.

Involvement in the above harmful activities is not restricted to businesses in competitive markets. They can also occur in businesses that hold a monopoly position or in government run enterprises. However, competition can provide further incentives to engage in harmful or criminal behaviour (or be reckless about criminal behaviour being in a supply chain), as businesses may find themselves under additional pressure to survive. Further, businesses can feel pressure to adopt unethical or harmful behaviour if they are having to compete against businesses that have already gained an advantage by adopting such behaviour.

Thus for competition to contribute to the greater good of a society, it must be conducted under strict government regulation and strong enforcement against the range of criminal and harmful temptations for businesses to enter into that are listed above. Efficiency and productivity need to be measured within the frame of activities that are not criminal or harmful. It is not a net good if the increased profits to business are built on the basis of harm and suffering inflicted on others. Even at the non-criminal end of undesirable outcomes, an employee who finds their real income reducing over time due to the downward wage pressure created by competition may find their net standard of living declining even if the goods and services they need are cheaper because of competition. The concern in competition ideology is that such a person is blamed for their worsening situation, regardless of the lack of power or opportunity the person may have to change their situation.

The Christian faith is built on tenants that seek the well-being of all people, and thus is highly critical of competition built on selfish greed, where some people end up with far more than they need while others live in poverty or lack the basic necessities of life. The fundamental tenant of the Christian faith, “to love the Lord your God with all your heart, soul and mind and love your neighbour as yourself” assumes a model of relationships and community. This idea is further underscored by the actions of the early Christian community as outlined in the book of Acts:

> *32 Now the whole group of those who believed were of one heart and soul, and no one claimed private ownership of any possessions, but everything they owned was held in common. 33 … There was not a needy person among them, for as many as owned lands or houses sold them and brought the proceeds of what was sold. 35 They laid it at the apostles’ feet, and it was distributed to each as any had need. 36 Acts 4:32-36*

The Christian faith recognizes the well-being of people and communities consists of far more than an abundance of material possessions. In The parable of the rich fool, Jesus says, “Take care! Be on your guard against all kinds of greed; for one’s life does not consist in the abundance of possessions.” Again in 1Timothy 6, “those who want to be rich fall into temptation and are trapped by many senseless and harmful desires that plunge people into ruin and destruction. For the love of money is a root of all kinds of evil”.

The Synod of Victoria and Tasmania, at its meetings of the approximate 400 representatives of congregations and presbyteries, has over a period of time expressed opposition to the privatization of some services.

In 1993 the Synod meeting opposed the privatization of prisons in Victoria:

93.4.3.3 The Synod resolved:
That the Victorian Government be advised that this Synod opposed any moves to introduce privately owned and operated prisons into Victoria.

In 1994 the Synod meeting expressed concern about the impact of privatization of water and electricity assets:

94.5.1.1 The Synod resolved:
In the light of moves by the Victorian Government to privatise public utilities, to:
(a) request the Commission for Mission to develop responses to the broader issue of privatisation and in particular, its impact on financially vulnerable members of the community; and
(b) make strong representations to the Victorian Government that access to affordable water and fuel is a basic human right in Victorian society.

In 1995 the Synod meeting opposed further privatization of electricity, water and gas supplies in Victoria:

95.6.9.7 The Synod resolved:
(a) To express the Synod's opposition to further privatisation of Victoria's electricity, water and gas industries, because it does not believe it enhances community co-operation and equitable access to these essential services, and to advise the Victorian Government accordingly.
(b) To request the Victorian and Australian Governments and opposition parties to each provide a clear statement on its policy position on the privatisation of public utilities.
(c) To request the Synod Commission for Mission to continue to provide means by which Uniting Church members may be informed on and involved in debate on the issue of privatisation, including the sponsoring of a forum presenting a wide spectrum of opinion.

In 1995 the Synod meeting also expressed caution at the adoption of the National Competition Policy:

95.6.9.6 The Synod resolved:
To communicate a note of caution to the Australian Government about adopting the National Competition Policy as detailed in the "Hilmer Report" because of the need to balance economic, social and environmental goals.

In 1998 the Synod meeting expressed opposition to the privatization of water utilities in Victoria:

98.5.8.1 The Synod resolved:
To express to the Victorian government its opposition to the possible privatisation of water supply in Victoria, and:
(a) To request the Commission for Mission to undertake detailed research on the privatisation of water supply, including research into the experiences of other states in Australia and authorities overseas, with a view to informing the church, the wider community and the government of the known and potential consequences of the privatisation of water supply and paying particular regard to the theological, health and social aspects of the availability of clean safe water;
(b) To request the government of Victoria to maintain the integrity of Victorian water catchment areas, so as to ensure the continued provision of water of excellent quality;

(c) To request state and federal governments to continue research and development programs in the problems of salination in rural areas of Victoria and the nation.

In 1988 the meeting of the National Assembly, of Uniting Church representatives from across Australia, passed a resolution which in part expressed concern about privatization because of its possible negative impacts and it also expressed concern about policies that fostered maximization of profit at the expense of the vulnerable in the community:

(d) To request the Australian Government and State governments to adopt social justice policies and strategies which:

(i) ensure the protection, development and equitable distribution of Australia's true wealth, giving serious consideration to the issues raised in the report "Economic Justice the Equitable Distribution of Genuine Wealth";

(ii) discourage business development and government programs which maximize profits at the expense of such wealth;

(iii) recognize that privatisation is not simple a matter of current budgetary decisions, but an issue of government responsibility for ensuring accessible services and equitable distribution of and access to wealth, and involving serious questions about the role of government in influencing the shape of Australian society;

(iv) reform the taxation system in ways which will ensure that taxation becomes a means of redistributing income and wealth so that all people gain a more equitable share, and so that those on lower incomes do not bear a disproportionate percentage of the taxation burden.

The World Council of Churches has said, "Motivated at core, by greed – that is: a thirst for maximum private returns in the shortest possible time – the neo-liberal model has pushed our world closer to the brink of financial and ecological breakdown. "

The concerns about unrestrained competition and greed are not restrained to the churches and other religious traditions. British psychologist Oliver James asserts that there is a correlation between the increasing nature of affluenza and the resulting increase in material inequality: the more unequal a society, the greater the unhappiness of its citizens.[1] Various studies measuring happiness have found that money only contributes to our happiness up to a point and then flattens out. No matter how much more we consume, we can't make ourselves happier.[2]

William Davies[3] writing about the limits of neoliberalism says,

For several years, we have operated with a cultural and moral worldview which finds value only in 'winners'. Our cities must be 'world-leading' to matter. Universities must be 'excellent', or else they dwindle. This is a philosophy which condemns the majority of spaces, people and organizations to the status of 'losers'. It also seems entirely unable to live up to its own meritocratic ideal any longer. The discovery that, if you cut a 'winner' enough slack, eventually they'll try to close down the game once and for all, should throw our obsession with competitiveness into question. And then we

[1] James, Oliver (2007). *Affluenza: How to Be Successful and Stay Sane*. Vermilion. ISBN 978-0-09-190011-3, quoted on http://en.wikipedia.org/wiki/Affluenza#cite_note-2

[2] Hamilton, C. and Denniss, R, *Affluenza*: *When too much is never enough*, Allen and Unwin, 2005, p.64.

[3] Assistant Professor at the Centre for Interdisciplinary Methodologies, University of Warwick (until March 2014) and Senior Lecturer at Goldsmiths, University of London (from 7th April 2014).

can consider how else to find value in things, other than their being 'better' than something else.[4]

What should be the priorities for a competition policy reform agenda to ensure that efficient businesses, large or small, can compete effectively and drive growth in productivity and living standards?

The priorities of growth in productivity and living standards can be at odds with each other. The priority of competition policy should be to try and ensure that growth in productivity does not come at the expense of the living standards of the less well-off.

Further reform is also needed in competition policy to make it easier for businesses to work together to combat criminal activity. In our work with businesses they have been restricted from freely meeting together in Australia to discuss how they can work together to combat the risks of slavery, human trafficking, forced labour and worst forms of child labour. The ACCC has confirmed that such meetings require expensive and time consuming applications to the ACCC for special permission to hold such meetings. Fortunately, the Federal Attorney General's Department is currently arranging for the establishment of a working group that will allow a small number of businesses to meet to discuss measures to combat these serious criminal activities.[5] The ACCC will attend the meeting.

Is there a need for further competition-related reform in infrastructure sectors with a history of heavy government involvement (such as the water, energy and transport sectors)?

The privatization of electricity in Australia has been subject to significant debate. In a review by Professor John Quiggin of the School of Economics at the University of Queensland, he raised concerns that the privatization of electricity had led to:[6]

- A rise in customer dissatisfaction has risen markedly since the national energy market (NEM), profoundly for privatised States, where complaints to the relevant energy ombudsmen have grown from 500 per year to over 50,000;
- A decline in reliability across a wide range of measures in Victoria, notwithstanding increased 'physical audits' and expensive financial 'market incentive' programs;
- Efficient investment has not occurred, as the pricing mechanisms have not delivered coherent signals for optimal investment;
- Diversion of resources away from operational functions to management and marketing, resulting in higher costs and poorer service;
- The NEM and privatisation have reduced real labour productivity, as employment and training of tradespeople have been reduced and the numbers of less productive managerial and sales staff have exploded.
- However, the private owners of price-regulated distribution assets have been the greatest beneficiaries as their investments have outperformed almost all investment classes, by making post-tax real rates of returns close to 10% annually since 2006.
- In privatised States, customers' bills include the cost of almost 10% per annum interest on the corporate owners' debt on the electricity assets. This compares to government borrowing costs of closer to 3%.

Professor Quiggin has argued that privatisation, corporatisation and the creation of electricity markets have resulted in a dramatic increase in prices. 'Consumer choice' has meant the

[4] http://blogs.lse.ac.uk/politicsandpolicy/archives/41937#comment-306112
[5] Correspondence from The Hon Michael Keenan, Minister of Justice, to the Justice and International Mission Unit, MJ-SB2014/0042, 20 March 2014.
[6] John Quiggin, 'Electricity Privatisation in Australia: A Record of Failure', February 2014, p. 5.

removal of the secure low-cost supply consumers previously enjoyed, and its replacement with a bewildering array of offers, all at costs inflated by the huge expansion in marketing and managerial costs.[7]

Professor Quiggin also concluded that while competitive electricity markets broadly similar to the Australian National Electricity Market have been established in a number of countries, none have delivered on their initial promise of competitive energy markets delivering stable supply at low cost. Most have experienced market manipulation, sometimes leading to a total meltdown of the system, as in California. Markets have performed particularly poorly in generating incentives for new investment and in dealing with the challenges posed by climate change, including renewable energy and energy efficiency initiatives.[8]

Thus further privatization of the electricity sector should be approached with significant caution, to ensure there are real benefits to parties other than the private owners.

Similarly, there is much research literature raising concerns about the impact of privatisation of water.[9] Some of the research globally has shown private companies do not show greater efficiency than public sector operations.[10] Water privatisation has been repeatedly associated with problems caused by the private sector's prioritisation of commercial considerations over social objectives. The risks of these problems with water privatisation are observed under different regulatory frameworks in developed, transition and developing countries.[11]

The argument is put that public sector management of water resources possesses the advantage that, unlike the private sector, the public sector is not subject to the profit maximisation imperative. This gives public sector management the flexibility to maximise the reinvestment of resources into the system for the achievement of social objectives such as the expansion of service coverage. It also allows public operators to strengthen transparency and accountability through the adoption of advanced forms of democratization and public participation. It is argued this level of responsiveness to civil society is far less likely to be found under private operations, because private companies seek to only maximise profits and maximise shareholder remuneration.[12]

Can more competitive outcomes in the human services sector enhance both Australia's productivity and the quality of human services delivered to Australian citizens?

The Unit is concerned that it should not be assumed that more private providers in the provisions of human services will lead to better outcomes for members of the community. There are plenty of studies to demonstrate that private providers and competitive markets do not always deliver better outcomes.

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[7] John Quiggin, 'Electricity Privatisation in Australia: A Record of Failure', February 2014, p. 39.
[8] John Quiggin, 'Electricity Privatisation in Australia: A Record of Failure', February 2014, p. 22.
[9] Emanuele Lobina and David Hall, 'Water Privatisation and Remunicipalisation: International Lessons for Jakarta', Public Services International Research Unit, November 2013.
[10] Hall, D., and Lobina, E., 'Water Privatization', in Arestis, P., and Sawyer, M. (eds.) 'Critical Essays on the Privatization Experience', International Papers in Political Economy Series, Basingstoke and New York: Palgrave Macmillan, 2009, pp. 75-120
[11] Lobina, E., 'Remediable institutional alignment and water service reform: Beyond rational choice', in *International Journal of Water Governance*, 1(1/2), (2013), pp. 109-132.
[12] Lobina, E., and Hall, D., 'Public Water Supplies', in Warf, B. (ed.) *Encyclopedia of Geography*, Thousand Oaks: SAGE Publications, Vol. 5, 2010, pp. 2315-2319.

An Australian review of literature on privatisation and corporatisation (Centre for Clinical Governance Research in Health, 2007) in the period 1980-2007 found that the assumption that privatisation of health services will ensure private sector efficiency is questioned on many levels. Privatisation can lead to poorer quality services, loss of nursing jobs in the public sector, reduced access to services for poorer patients and weaker trust relationships between doctors and patients.[13]

A review (Rosenau & Linder, 2003) that looked at 20 years of research comparing for-profit and non-profit health providers, in the United States, showed that overall non-profit hospitals show better results on cost than for-profit providers.[14]

Two studies of German hospitals both showed that public hospitals in the studies were more efficient than private or non-profits.[15]

Privatisation of health services in other countries has seen health workers experience a deterioration in pay and working conditions.[16] Reductions in salaries of health workers in some jurisdictions as a result of privatisation, has not only reduced the status but also the integrity of health workers because they have to find alternative sources of income. This might be through a second job in the private sector or by introducing informal payments for health care.[17]

Studies on the privatisation of health services have found that it often leads to reduced funding for health care at local level. The reduction in funding then leads to adoption of user fees and informal payments. Self-management of hospitals often introduces income generation through user fees and co-payments.[18]

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[13] Centre for Clinical Governance Research in Health (2007) 'The privatisation and corporatisation of hospitals – a review of the citation and abstracts in the literature' University of New South Wales, May 2007, quoted in
Jane Lethbridge, 'A parallel approach to analysis of costs/benefits and efficiency changes resulting from privatisation of health services', Public Services International Research Unit (PSIRU), University of Greenwich, www.psiru.org, September 2011, p. 7.

[14] Rosenau P.V. & Linder S.H. (2003) 'Two decades of research comparing for-profit and nonprofit health provider performance in the United States', Social Science Quarterly **84(2):** 219-229, quoted in Jane Lethbridge, 'A parallel approach to analysis of costs/benefits and efficiency changes resulting from privatisation of health services', Public Services International Research Unit (PSIRU), University of Greenwich, www.psiru.org, September 2011, p. 7.

[15] Jane Lethbridge, 'A parallel approach to analysis of costs/benefits and efficiency changes resulting from privatisation of health services', Public Services International Research Unit (PSIRU), University of Greenwich, www.psiru.org, September 2011, p. 7.

[16] Jane Lethbridge, 'A parallel approach to analysis of costs/benefits and efficiency changes resulting from privatisation of health services', Public Services International Research Unit (PSIRU), University of Greenwich, www.psiru.org, September 2011, p. 35.

[17] Jane Lethbridge, 'A parallel approach to analysis of costs/benefits and efficiency changes resulting from privatisation of health services', Public Services International Research Unit (PSIRU), University of Greenwich, www.psiru.org, September 2011, p. 17.

[18] Jane Lethbridge, 'A parallel approach to analysis of costs/benefits and efficiency changes resulting from privatisation of health services', Public Services International Research Unit (PSIRU), University of Greenwich, www.psiru.org, September 2011, p. 17.

Informal payments in the health care system have been found to influence whether low income service users can access health care service. Further, informal payments/user fees results in increases in the proportion of household expenditure spent on health care.[19]

Studies have also found violence at work is a symptom of a health care system with reduced resources.[20]

Evidence drawn from large scale surveys, as part of UK National Health Service initiatives to grade hospitals, did not provide any positive evidence to support the outsourcing of facilities management as delivering better outcomes to patients.[21]

Research of privatised clinical services in the UK showed that 'choice' did not benefit low income and less well educated groups.[22]

From 2004, 'out of hours' doctor services were outsourced in the UK. Primary care trusts, who took over control of the 'out of hours' service, were often unaware of their responsibilities, did not commission effectively and did not fulfil tasks of monitoring and regulation. Research showed that commercial providers often used inadequate vetting procedures for vetting and for inducting new GPs, leading to criticisms of the standards of services. Providers of 'out of hours' services often failed to collect adequate information collected to properly measure access to 'out of hours' services, which was crucial for assessing patient care. Outsourcing of 'out of hours' services led to cost-cutting and an uneven quality of service across England.[23]

Independent Sector Treatment Centres (ISTCs) were introduced in the UK, as part of the National Health Service (NHS) Plan, to help to reduce waiting lists. ISTCs contributed to the creation of a health care market, using private providers, in the NHS. However, ISTCs were set up quickly, with favourable terms for private companies, which has meant that companies were paid for operations even where there were not enough patients. National Audit Office investigations found that ISTCs failed to collect adequate information, which has made it difficult to assess the quality of patient care. The impact of ISTCs on local health innovation has been limited. Existing evidence shows that ISTCs did not reduce waiting lists significantly.[24]

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[19] Jane Lethbridge, 'A parallel approach to analysis of costs/benefits and efficiency changes resulting from privatisation of health services', Public Services International Research Unit (PSIRU), University of Greenwich, www.psiru.org, September 2011, p. 23.
[20] Jane Lethbridge, 'A parallel approach to analysis of costs/benefits and efficiency changes resulting from privatisation of health services', Public Services International Research Unit (PSIRU), University of Greenwich, www.psiru.org, September 2011, p. 32.
[21] Jane Lethbridge, 'Empty Promises: The impact of outsourcing on the delivery of NHS services', An independent report, commissioned by UNISON (the public service union), Public Services International Research Unit, University of Greenwich, February 2012, p. 16.
[22] Jane Lethbridge, 'Empty Promises: The impact of outsourcing on the delivery of NHS services', An independent report, commissioned by UNISON (the public service union), Public Services International Research Unit, University of Greenwich, February 2012, p. 23.
[23] Jane Lethbridge, 'Empty Promises: The impact of outsourcing on the delivery of NHS services', An independent report, commissioned by UNISON (the public service union), Public Services International Research Unit, University of Greenwich, February 2012, p. 18.
[24] Jane Lethbridge, 'Empty Promises: The impact of outsourcing on the delivery of NHS services', An independent report, commissioned by UNISON (the public service union), Public Services International Research Unit, University of Greenwich, February 2012, p. 21.

Review of the experience of contracting out of cleaning services in health care facilities in the UK found that it affected the way that cleaners worked with other groups in hospitals, reducing teamwork, which impacted on patient care. In-house cleaning contractors are more likely to be integrated with infection control teams than external contractors. In many hospitals, contract cleaning specifications, whether for in-house or external contractor, were not reviewed regularly and did not keep up with changes in the hospital environment. Contracting out of cleaning services led to problems of recruitment and retention due to low wages, for both in-house or external contractors, because of pressure to reduce costs. The experience of contracting of cleaning services has led devolved governments in Scotland, Wales and Northern Ireland to abandon contracting-out of cleaning.[25]

Do the provisions of the CCA on secondary boycotts operate effectively, and do they work to further the objectives of the CCA?
Based on the attached 2007 legal advice from Clayton Utz in response to proposed changes to the then *Trade Practices Act 1974,* it is our view that the existing secondary boycott provisions impinge unnecessarily on the right to freedom of speech when it comes to being able to make public comment on companies engaged in illegal activities or human rights abuses. We urge that the *Competition and Consumer Act* be amended to ensure members of the public and organisations are permitted to encourage others in the community to express concerns to companies that are involved in criminal activity or human rights abuses, in addition to the existing protections for activities that are conducted for environmental protection or consumer protection.

While we understand the need to protect businesses from activities such a blockades and physical or verbal intimidation, we oppose a blanket approach that makes all campaigning activities targeting businesses illegal, including requesting others to write letters to the business, sign a petition to the company, sign and send postcards to the company urging them to correct their behaviour or organising a peaceful protest targeting the company.

As we understand the current *Competition and Consumer Act* based on the attached legal advice, if we request our members to write letters or send postcards to a company urging the company to take corrective action where they may be associated with serious criminal activity, our activity may be illegal. Such cases regularly arise where companies are sourcing goods produced with slavery, forced labour, debt bondage and human trafficking in their production. While involvement in these criminal activities is usually due to a failure to adequately monitor and supervise their supply chain, mobilising supporters to urge the company to take steps to ensure these criminal activities are not present in their supply chain, may be illegal under the secondary boycott provisions of the *Competition and Consumer Act*. The use of Australian law in this way is additionally frustrating when the Australian Government fails to take action in relation to the company being recklessly associated with these criminal activities. It may also apply to companies involved in such offences such as bribery and tax evasion.

We believe that Australians should have the freedom of speech to encourage companies to higher ethical behaviour and to ensure their supply chains and business activities are free of criminal behaviour. This extends to criminal behaviour related to environmental activities, such as direct violation of environmental laws, as well as offences such as bribery, money laundering and tax evasion that are common, for example, in illegal logging activities. We

[25] Jane Lethbridge, 'Empty Promises: The impact of outsourcing on the delivery of NHS services', An independent report, commissioned by UNISON (the public service union), Public Services International Research Unit, University of Greenwich, February 2012, p. 15.

urge that the secondary boycott provisions of the *Competition and Consumer Act* be amended to allow for legitimate freedom of speech with regards to addressing illegal and unethical activities by some businesses.

Australia is a States Party to the *International Covenant on Civil and Political Rights,* and through Article 19 the Australian Government committed to upholding the right of people to freedom of speech within certain safeguards:

1. *Everyone shall have the right to hold opinions without interference.*
2. *Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media or his choice.*
3. *The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:*
   (a) For respect of the rights or reputations of others;
   (b) For the protection of national security or of public order (ordre public), or of public health or morals.

We believe the current secondary boycott provisions are at odds with the above human rights obligations.

Dr Mark Zirnsak
Director
Justice and International Mission Unit
Phone: +61-3-9251 5265
E-mail: mark.zirnsak@victas.uca.org.au

CLAYTON UTZ

Sydney Melbourne Brisbane Perth Canberra Darwin

Clayton Utz
Lawyers
Level 18
333 Collins Street
Melbourne VIC 3000
Australia

DX 38451
333 Collins VIC

T +61 3 9286 6000
F +61 3 9629 8488
www.claytonutz.com

14 September 2007

Dr Mark Zirnsak
Director, Justice and International Mission Unit
Synod of Victoria and Tasmania
Uniting Church in Australia
130 Little Collins Street
MELBOURNE VICTORIA 3000

Our reference: 12206/14538/80064356

Dear Mark

Implications of the *Trade Practices Amendment (Small Business Protection) Bill 2007* for the Justice and International Mission Unit

We refer to our meeting on 27 August 2007, in which you asked us to provide advice regarding the likely legal and practical effects of the *Trade Practices Amendment (Small Business Protection) Bill 2007* (Cth) ("**Bill**") for the Uniting Church and, in particular, its Justice and International Mission Unit.

1. **Executive Summary**

We understand that the Uniting Church, through its Justice and International Mission Unit, undertakes a range of lobbying actions. In relation to such actions, our conclusions on the effects of the Bill and the secondary boycott provisions of the *Trade Practices Act 1974* (Cth) ("**TPA**") are as follows:

(a) This is an uncertain and complex area of law. There is no definitive answer as to whether a social justice entity (such as the Uniting Church) undertaking lobbying activities would be held to be in contravention of the secondary boycott provisions. In our view, there is a risk that the Uniting Church, by undertaking certain of the activities described to us, may be found to be in breach. While a lot will depend on the specific circumstances of each individual case, we do note that some actions present higher risk than others:

(i) some actions, such as writing letters to particular companies and to media outlets, and acquiring information without any further conditions or agreements, are likely to present minimal risk of contravening the secondary boycotts provisions;

(ii) there is a higher risk that actions, such as jointly taking actions with other groups, picketing companies or publishing and circulating brochures, shopping guides and other publications, may be in breach. The Uniting Church may minimise this risk by considering the strength of wording used in its publications and ensuring that protests outside a company's premises are not physically intimidating nor, in any way, preventing people from entering the site and are done merely for the purpose of providing information;

(b) Should such actions be found to breach the secondary boycott provisions, the Uniting Church may plead that their actions fall within a number of exemptions from Part IV of the TPA. However, again, there is little guidance on the application of these exemptions to social justice entities. Should the courts construe these exemptions narrowly, there is a risk that the exemptions will be found not to apply to the Uniting Church.

Finally, we have outlined a number of possible amendments to the Bill or TPA which aim to address the uncertainties faced by the Uniting Church in relation to whether its lobbying activities contravene the secondary boycott provisions.

2. Relevant Background

The Bill proposes to amend the TPA to enable the ACCC to bring representative actions in respect of contraventions of sections 45D and 45E of the TPA. The change will bring the secondary boycott provisions into line with other provisions under Parts IV, IVA, IVB, V and VC of the TPA, which currently allow the ACCC to bring a representative action for breach of those provisions. The Bill is currently before Parliament.

It is worth noting that this legislation does not remove the right for individual action. Parties claiming to be the targets of a secondary boycott may take action, without relying on the ACCC.

We understand that the Uniting Church, through its Justice and International Mission Unit, aims to engage with and educate others about issues of social justice. You have instructed us that, in pursuit of this aim, the Uniting Church may undertake the following types of conduct:

(a) writing letters to particular companies and organisations;

(b) writing and submitting to media outlets opinion pieces and letters to the editor;

(c) publishing and circulating brochures regarding certain issues;

(d) publishing and circulating shopping guides;

(e) acquiring information from a range of sources, including trade unions;

(f) gathering and protesting outside the premises of particular companies; and

(g) undertaking certain actions in concert with other groups (eg Oxfam), such as jointly circulating information relating to unfair practices, attracting media attention against specific parties and companies;

(collectively referred to in this advice as the "**Actions**").

You have asked whether the Bill will limit such actions by the Uniting Church, thereby limiting your effectiveness in campaigning and lobbying certain companies and entities to change their practices.

3. **Secondary Boycott Provisions**

Section 45D of the TPA provides:

> *"(1) In the circumstances specified in subsection (3) or (4), a person must not, in concert with a second person, engage in conduct:*
>
> *(a) that hinders or prevents:*
>
> *(i) a third person supplying goods or services to a fourth person (who is not an employer of the first person or the second person); or*
>
> *(ii) a third person acquiring goods or services from a fourth person (who is not an employer of the first person or the second person); and*
>
> *(b) that is engaged in for the purpose, and would have or be likely to have the effect, of causing substantial loss or damage to the business of the fourth person.*
>
> *(2) A person is taken to engage in conduct for a purpose mentioned in subsection (1) if the person engages in the conduct for purposes that include that purpose".*
>
> *(3) Subsection (1) applies if the fourth person is a corporation.*
>
> *(4) Subsection (1) also applies if:*
>
> *(a) the third person is a corporation and the fourth person is not a corporation; and*
>
> *(b) the conduct would have or be likely to have the effect of causing substantial loss or damage to the business of the third person."*

Section 45E of the TPA prohibits a person from making an agreement with a trade union for the purpose of preventing or hindering the supply or acquisition of goods or services between that person and the target of the boycott.

Historically, the actions which have been taken by the ACCC under ss.45D or 45E have been against unions or companies acting in concert with unions[1]. Therefore, it can be seen that historically these provisions of the TPA have not been used against consumer or other public interest activists in respect of peaceful protests.

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[1] For example, refer to *ACCC v The Maritime Union of Australia* [2001] FCA 1807, *ACCC v AMWU, AWU and CEPU* [2004] FCA 517, *ACCC v Showmen's Guild of Australasia* [2005] FCA 1234, *ACCC v Construction, Forestry, Mining and Energy Union* [2006] FCA 1730, *ACCC v Edison Mission Operations and Maintenance Loy Yang Pty Ltd* [2006] FCA 853.

However, there are two recent events which have raised questions as to whether this will remain the case in the future. The first is that the ACCC recently took action under s.45D in a matter which did not involve a union. The matter was *ACCC v Knight*[2] but the proceeding was settled on the basis of consent orders. The respondent had admitted breaches of s.45 of the TPA which made it unnecessary for the Court to consider the operation of s.45D of the TPA.

The second recent event was a statement made by the Treasurer the Honorable Peter Costello in February 2007 to reporters as follows:

> "The Government is going to amend the Trade Practices Act so that the Australian Competition and Consumer Commission can take representative actions – that it can take an action on behalf of Australian farmers if somebody tries to boycott their wool. An example of this has recently been the group which is trying to organise a boycott of Australian wool because it is protesting about mulesing. That of course would affect all Australian farmers. We are going to amend the law so that the ACCC can bring legal action on behalf of all Australian farmers against those that are trying to boycott their wool and boycott their wool on these spurious grounds. Mulesing is something that is done because otherwise sheep could suffer and to empower the ACCC to look after Australia's farmers against these groups is a benefit to all wool growers in Australia."[3]

4. Activities by the Uniting Church

Section 45D contains a number of elements, each of which must be satisfied before the Uniting Church's Actions could be found to be in contravention of s.45D of the TPA. Those are:

(a) A person must not "in concert" with a second person;

(b) Engage in conduct that "hinders or prevents";

(c) A third person supplying goods or services to a fourth person or a third person acquiring goods or services from a fourth person; and

(d) The purpose, and the effect or likely effect would be to cause substantial loss or damage to the fourth person.

We have discussed each of these elements of the offence below.

4.1 Acting "In Concert"

Section 45D will not be breached unless the actions in question were performed "in concert with a second person". Neither the Bill nor the TPA define the meaning of "person". However, section 22(a) of the *Acts Interpretation Act* 1901 (Cth) provides:

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[2] [2007] FCA 1011

[3] The Hon. Peter Costello MP, *Doorstop Interview,* Duxton Hotel, Perth 22 February 2007.

> "... 'persons' and 'party' shall include a body politic or corporate as well as an individual."

The meaning of "acting in concert" was considered in *Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees' Union Anor* (1979) 27 ALR 367 ("*Tillmanns*") where Bowen CJ said:

> "Acting in concert involves knowing conduct, the result of communication between the parties and not simply simultaneous actions occurring spontaneously."[4]

The court in *Australian Builders' Labourers' Federated Union of Workers (WA Branch) v J-Corp Pty Ltd*[5] ("*J-Corp*") commented that it involves "contemporaneity and community of purpose". In light of your instructions in relation to how, and with whom, you carry out the Actions, we have outlined below several situations which may constitute "acting in concert".

(a) The Uniting Church undertaking joint actions with other groups, including other NGOs; or

(b) The Uniting Church acting on the basis of information gained from another source, such as a trade union. It is unclear whether this would constitute "acting in concert". It is likely to depend on the circumstances, particularly whether each party had an expectation or understanding that the other would act in a particular way in exchange for the information. However, if the union merely provides information and the Uniting Church makes a completely independent decision about what to do with that information then it would seem to us to be unlikely that a Court would find that the Uniting Church and the union had acted "in concert" in those particular circumstances.

One of the difficult issues which arises is whether two persons employed by the Uniting Church (or otherwise associated through the Uniting Church) could act "in concert". We note that a number of cases have found that trade unions may act in concert with its own members. For example, in *Tillmanns*, the union (first person) and four members of that union (second persons) were found to have acted in concert with each other. The members included the president, secretary and two organisers of the Union. We also note that s.45DD of the TPA contains some "Notes" which indicate that in respect of "environmental organisations" and "consumer organisations" each of its members is considered a "person" who may be subject to the prohibitions in s.45D. There is no definitions in the TPA in respect of "environmental organisation" or "consumer organisation".

Consequently, it must be said that there is a risk that the Uniting Church (first person) may be found to be acting in concert with an employee or parishioner (second person).

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[4] 27 ALR 367 at 368.

[5] (1993) 114 ALR 551.

4.2 **"Hinders or Prevents"**

There are a number of Australian cases which have considered the scope of the phrase "hinders or prevents" in s.45D of the TPA. Unfortunately, there is no clear view about the scope of the phrase and different judges have formed different conclusions. However, it can be said that there does seem to be a tendency to adopt a broad scope of at least the phrase "hinder". Some of the relevant Australian decisions are as follows:

(a) The term "*prevents*" suggests a total cessation of dealings between the third person and the target[6];

(b) The term "*hinders*" has been found to mean "in any way affecting to an appreciable extent the ease of the usual way of supply of goods or services"[7]; and

(c) We note that "to prevent or hinder" can involve conduct engaged in by threat or verbal intimidation, and not just physical interference[8]. Such intimidation may be explicit or implicit[9]. However, there are overseas decisions which would support the drawing of a distinction between conduct which would amount to obstruction, molestation or intimidation of persons entering or leaving the premises and conduct where the object is merely the communication of information[10].

In terms of the Actions, we are of the view that:

(a) it is unlikely that any of the Actions would be interpreted as "preventing" the supply of goods or services;

(b) writing letters to particular companies and organisations is unlikely to constitute hindering as clearly there is no conduct which could result in "hindering or preventing" of the company supplying products;

(c) writing and submitting articles to media outlets is unlikely to constitute hindering;

(d) acquiring information, by itself, is unlikely to constitute hindering;

(e) there is a risk that publishing and circulating brochures, shopping guides and other publications may constitute hindering. This may depend on the strength of words used. For example, it is best to avoid terms such as "stop buying from company x"; wording such as "please consider your purchases" is less likely to be considered as "hindering"; and

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[6] *Australian Wool Innovation Ltd v Newkirk* (2005) ATPR 42-05 3 at 34

[7] *Australian Builders' Labourers' Federated Union of Workers (WA Branch) v J-Corp Pty Ltd* (1993) 114 ALR 551

[8] *Australian Broadcasting Corporation v Parish* (1980) 43 FLR 129; 29 ALR 228

[9] *Australian Builders' Labourers' Federated Union of Workers (WA Branch) v J-Corp Pty Ltd* (1993) 114 ALR 551

[10] *Hubbard v Pitt* [1976] QB 142, particularly at 172-173.

(f) there is a risk that picketing particular companies will constitute hindering. Several cases have examined whether the use of picket lines constitute "hindering". Physically obstructing other people from entering the premises or issuing explicit requests or directions is likely to breach s.45D. The courts have also found that implied pressure not to cross the line may constitute hindering. The courts have flagged the need to look at the surrounding circumstances to determine what would reasonably have been conveyed to those who saw or heard the action. However, the Courts have indicated that implied pressure may be corrected by the use of an express disclaimer or advice that the line can be crossed.

4.3 Engaged in for the Purpose and has the Effect of causing Substantial Loss or Damage

Whether any specific action taken by the Uniting Church will have the "purpose" and also the "effect" of causing substantial loss or damage to the business will, of course, depend upon the specific circumstances of each individual case.

However, it can be said that the Courts will require that the conduct is specifically undertaken for the purpose of causing the substantial loss or damage. In the *J-Corp* decision the secretary of the Builders' Labourers' Federated Union ("**BLF**") authorised the establishment of a picket line outside the construction site of J-Corp because the union was unhappy with J-Corp's policy of engaging independent contractors rather than using employees. The secretary of the BLF issued instructions that those participating in the line were not to physically stop anyone from crossing the line or explicitly direct or request anyone not to cross the line. There was evidence that a number of suppliers declined to enter the site whilst the picket was in place. The Court found that the picket line did in fact "hinder or prevent" J-Corp from supplying services to a fourth party but found that the real purpose of the BLF's conduct was to protest against and embarrass the Government and J-Corp and not to cause substantial loss or damage.

Therefore, in our view, if the Uniting Church were to have a small protest outside of a company's premises which was not physically intimidating nor, in any way, preventing people from entering the site and was done so merely for the purpose of providing information then there may not be a breach of s.45D of the TPA. However, we must note that even in those circumstances there may be some risk that a Court will find a breach of the TPA because of all of the uncertainties outlined above.

5. Exemptions in the TPA

There are a number of exemptions, which excuse certain conduct that would otherwise be in breach of the secondary boycott provisions. However, we note that the onus in establishing the applicability of any exemption would lie with the Uniting Church.

5.1 Section 45DD of the TPA

Section 45DD outlines three main exemptions: consumer protection, environmental protection and industrial action. These are discussed in detail below.

Section 45DD relevantly provides:

> *"(3) 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".

The term "consumer protection" itself is not defined in the TPA . There are no cases which have considered the meaning of the phrase "consumer protection" in s.45DD of the TPA.

Taking the individual terms one at a time, "consumer" is defined in s.4B as a person who has acquired goods or services priced at or below $40,000 or, where the price exceeds $40,000, where the goods or services were of a kind ordinarily acquired for personal, domestic or household use or consumption. This definition is primarily relevant to Part V Division 2 of the TPA. It is unclear whether this definition applies to the rest of the TPA.

'Protection' is not defined in the TPA or Bill. According to the New Shorter Oxford English Dictionary (1993), 4th Edition, 'protect' means :

"Defend or guard against injury or danger; shield from attack or assault; support, assist, give esp. legal immunity or exemption to; keep safe, take care of; extend patronage to."

It could be argued that information and disclosure are a key aspect of consumer protection. This is obvious where the lack of information makes consumers financially vulnerable. For example, stringent labelling laws exist to, among other things, ensure consumers are aware of what they are purchasing. Yet, the argument may apply more widely - that protecting consumers includes providing them with information that may influence how they exercise their purchasing choices. For example, information that a company or organisation is engaging in a particular practice may influence choices. Consumers appear to be increasingly concerned with the ethics of product creation. Many consumers would not wish to buy a product produced by child slave labour, if appraised of that fact beforehand. The Uniting Church could argue that their Actions are protecting consumers by making them aware of something that otherwise they would not have known about, to their disadvantage.

Whilst this exemption may be available to the Uniting Church, there is a significant risk that a Court would adopt a narrow view and argue that the mere provision of information to consumers in respect of social justice issues is not conduct which is engaged in for the purposes of protecting consumers.

Furthermore, we note the Uniting Church's wide aim of 'promoting social justice'. Even if the courts adopt a wide view of "consumer protection", actions taken by the Uniting Church in particular circumstances may be motivated by other social justice aims, rather than 'consumer protection'. For this exemption to be available, each of the Uniting Church's Actions must be for the dominant purpose of consumer protection.

5.2 Section 51 of the TPA

Section 51 contains general exemptions which apply in relation to Part IV of the Act. Section 51 (2A) provides:

> *"In determining whether a contravention of a provision of this Part other than section 48 has been committed, regard shall not be had to any acts done, otherwise than in the course of trade or commerce, in concert by ultimate users or consumers of goods or services against the suppliers of those goods or services."*

While the Explanatory Memorandum is silent on the issue, it would seem that the policy behind this section is to allow consumers who would otherwise have negligible power, to gain strength by uniting and thereafter take action against a supplier of goods or services. While no cases specifically address the issue of whether consumer lobbying groups are included in s 51(2A), such an underlying policy would suggest that such groups be included. However, we note that whilst this exemption may be available to the Uniting Church, there is a risk that a Court would adopt a narrow view and argue that the section allows only individual consumers to unite and that any actions by lobbying or action groups should be considered in respect of s.45DD.

However, it is worth noting that even should this exemption apply, it applies only to conduct which would otherwise be in contravention of Part IV. It does not excuse behaviours which contravene Part V, such as misleading or deceptive conduct committed, or misleading statements made, in connection, for example, with a boycott.

6. Consequences

Were the ACCC to raise an issue with the Uniting Church about its social justice activities, it is unlikely that the ACCC would immediately proceed with litigation. They are likely to issue a warning notice on the first occasion, in which they will point out the breach and ask for undertakings from the Uniting Church to ensure the behaviour is not repeated.

However, if litigation occurs and the Uniting Church is found to have breached s.45D, it will be liable for pecuniary penalties of up to $750,000. Individuals involved in the secondary boycott will be liable for up to $500,000. Damages, injunction and other remedies may also be imposed.

It is worth noting that this legislation simply gives the ACCC the right to take representative action. It does not remove the right for individual action. The Uniting Church may still be sued by parties claiming to be the targets of a secondary boycott.

7. Recommended Legislative Amendments

You have asked us to consider possible legislative amendments to the Bill or TPA which will remedy, or at least minimise, the risks faced by the Uniting Church in relation to the Bill and s.45D of the TPA. We outline below some possible amendments.

(a) Making representative actions for ss. 45D and 45E of the TPA available only to "small business" and individuals

This amendment is intended to address your concern that large businesses, which would be hesitant for reasons of adverse publicity to take action against social justice entities in their own name, will use the ACCC to prevent protests by consumer and social justice organisations. Senator Andrew Murray, in his Supplementary Remarks to the Report on the Bill by the Senate Standing Committee on Economics, recommended that "small business" be defined as one with a $5 million asset base or one that employs less than 20 people.

(b) **Inserting into s.45DD of the TPA a definition of "consumer protection"**

This amendment is intended to address the uncertainty about what the concept "consumer protection" actually encompasses. The Uniting Church may wish to recommend a wide definition, which encompasses public information campaigns and boycotts. That is, providing consumers with information that may influence how they exercise their purchasing choices, such as information relating to how products are produced, should be caught by the definition of consumer protection.

(c) **Amending s.45DD(3)(a), to introduce a broader range of matters exempt from s.45D of the TPA**

This amendment is intended to address the uncertainty of whether the Uniting Church's actions will be caught by the consumer protection exemption and to ensure that the protection extends to actions which are for the dominant purpose of promoting other social justice aims, rather than specifically for consumer protection. The Uniting Church may recommend adding into s45DD(3)(a) a wide additional category which is exempt from s.45D, such as "human rights" or "other public interest matters". Alternatively, the amendment could specify particular categories, such as the protection of animal rights, women's rights, indigenous rights or the rights of other disadvantaged groups. In addition, the Uniting Church may wish to recommend an amendment or legislative note which specifies that s.45D is not intended to inhibit freedom of expression or association.

(d) **Amending the Legislative Note immediately below s. 45DD(3)(b) of the TPA**

The Uniting Church may wish to recommend amending the legislative Note located immediately below s.45DD(3)(b), which specifies that each member of an environmental or consumer organisation may be considered a person. Pursuant to this note, each member may be a person with which the organisation may act in concert. Parts 1(b) and 2(b) of the Note could be changed to state that members of the organisations specified in s.45DD(3)(b) are not persons. While an organisation acting jointly with other organisations or persons may be considered to be acting in concert, it would not be possible for the organisations specified in s.45DD(3)(a) to be acting in concert with its members.

If the Uniting Church recommends this option, we would suggest that it is made in conjunction with one of the above options. This is because, by itself, this amendment will not fully address your concerns.

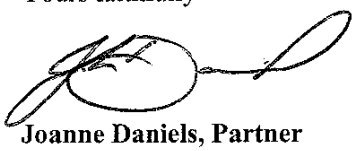
(e) **Amending s.51(2A) of the TPA**

This amendment is intended to address the uncertainty of whether consumer lobby groups are included in this exemption. The Uniting Church may wish to recommend an amendment which specifically includes consumer groups and groups providing consumers with information relevant to purchasing decisions in the exemption offered by s.51(2A). We would also recommend that a definition of "consumer group" be inserted to indicate that it encompasses public information campaigns and boycotts.

14 September 2007
Dr Mark Zirnsak, Uniting Church in Australia

Please do not hesitate to contact us if you would like to discuss these issues.

Yours faithfully



Joanne Daniels, Partner
+61 3 9286 6967
jdaniels@claytonutz.com

Contact: Nicole Smith, Solicitor
+61 3 9286 6375
nsmith@claytonutz.com