



17 November 2014

Competition Policy Review
The Treasury
Langton Crescent
Parkes ACT 2600

Executive summary of AFPA submission

The Australian Forest Products Association (AFPA) welcomes the opportunity to provide comment on the Competition Policy Review draft report.

AFPA is the peak national body for Australia's forest, wood and paper products industry. We represent the industry's interests to governments, the general public and other stakeholders on matters relating to the sustainable development and use of Australia's forest, wood and paper products.

AFPA supports the principles of fair and transparent competition in the Australian economy to promote long term economic growth and innovation amongst industries and businesses.

AFPA also supports the rights of groups and individuals to protest and publically debate issues which are important to them.

However, AFPA is concerned that there are two overlapping provisions in the *Competition and Consumer Act 2010 (CCA)* that are leading to adverse competition outcomes for some parts of the Australian forest, wood and paper products industry.

The first is the provision which, for obvious reason, forbids misleading or deceptive information and conduct (i.e. section 18 of the CCA). The second is the provision which allows an exemption from this clearly defined principle when it comes to secondary boycotts for two specifically named groups of commentators; consumer and environmental organisations.

In regard to the issue of environmental exception to the secondary boycott prohibition, AFPA was pleased to note recognition in the National Competition Policy Review Draft Report (pages 50-51). It stated:

A number of submissions raised the issue of the environmental and consumer exception to the secondary boycott prohibition.

During consultations undertaken by the Panel, it appeared that the primary concern expressed by industry representatives is that environmental groups may damage a supplier in a market through a public campaign targeting the supplier that may be based on false or misleading information.

A question might arise whether a public campaign undertaken by an environmental or consumer organisation against a trading business, advocating that customers ought not purchase products from the business, should be subject to the laws prohibiting false, misleading and deceptive conduct. Presently, those laws only apply insofar as a person is engaged in trade or commerce.

However, expanding the laws concerning false, misleading or deceptive conduct to organisations involved in public advocacy campaigns directed at trading businesses raises complex issues. Many public advocacy campaigns directed at trading businesses concern health issues (e.g. tobacco, alcohol and fast food) or social issues (e.g. gambling). Consideration of the expansion of those laws in that context is beyond the Terms of Reference of the Review.

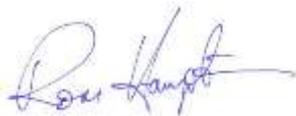
*On the other hand, where an environmental or consumer group takes action that directly impedes the lawful commercial activity of others (as distinct from merely exercising free speech), a question arises whether that activity should be encompassed by the secondary boycott prohibition. **The Panel invites further comment on this issue.***

For the reasons outlined in AFPA's earlier submission on the National Competition Policy Review Issues Paper and detailed further below, AFPA supports the principle that laws prohibiting false, misleading and deceptive conduct must be applied to all those who engage directly with trading businesses – including consumer and environmental groups.

AFPA is aware that given the extent of this problem and seriousness of this issue to specific companies and businesses, there are likely to be a number of related confidential submissions on this issue.

Further queries about this submission can be directed to AFPA on (02) 6285 3833.

Yours sincerely



Ross Hampton
Chief Executive Officer



SUBMISSION ON THE COMPETITION POLICY REVIEW

DRAFT REPORT

17 November 2014

Introduction

The Australian Forest Products Association (AFPA) welcomes the opportunity to provide comment on the Competition Policy Review.

AFPA is the peak national body for Australia's forest, wood and paper products industry. We represent the industry's interests to governments, the general public and other stakeholders on matters relating to the sustainable development and use of Australia's forest, wood and paper products. The forest industries support around 200 000 direct and indirect jobs nationally with a gross value of turnover of around \$22 billion.

AFPA supports the principles of fair and transparent competition within the Australian economy in order to promote long term economic growth and innovation amongst industries and businesses.

AFPA also supports the rights of groups and individuals to protest and publically debate issues which are important to them.

However, AFPA is concerned that there are two overlapping provisions in the *Competition and Consumer Act 2010* (CCA) that are leading to material damage and adverse competition outcomes for some parts of the Australian forest, wood and paper products industry.

The first is the provision which, for obvious reason, forbids misleading or deceptive information as part of conducting trade and commerce (i.e. section 18 of the CCA). The second is the provision which allows an exemption from this clearly defined principle when it comes to secondary boycotts for two specifically named groups of commentators; consumer and environmental organisations.

Over recent years the native forest wood and paper products sector has experienced market interference by increasingly sophisticated environmental activist groups and individuals. These activities are taking advantage of a loophole in the secondary boycott provisions. These provisions essentially prohibit secondary boycotts, which involve action by two or more parties acting in concert, which hinder or prevent a third party such as a potential customer or supplier, from dealing or doing business with a target (sections 45D-45DB). However, section 45DD provides an unqualified exemption for certain people from the secondary boycott provisions such as if the *'Dominant purpose of conduct relates to environmental protection or consumer protection.'*

This loophole is inconsistent with the intention of the CCA and is open to abuse and unethical behaviour by some environmental activist groups and individuals that can undertake secondary boycotts with suppliers, customers and/or financiers to the domestic native forest wood and paper products industry.

The forest, wood and paper products industry in Australia recognises the positive role that many environmental non-government organisations (ENGOS) play in promoting good environmental outcomes, such as curbing trade in illegally logged imported products. However the industry has been concerned about the behaviour of some environmental activist groups with regard to the promulgation of false and misleading information about the domestic native forest wood products industry. Some environmental activist groups have released factually misleading information that is then used as part of secondary boycotts which deliberately causes substantial loss or damage to Australian businesses.

The forest products industry is highly regulated with Australian sustainable forest management practices recognised as world's best standard. The comprehensiveness of environmental management laws and voluntary certification policies for sustainable forest management that apply to both public and private forest land in Australia is well documented¹.

However, actions by some environmental activist groups can undermine both specific companies and the markets for native forest wood and paper products by the dissemination of misleading information through both social and mainstream media and direct contact with customers both domestically and overseas. Industry remains concerned, and the public should be equally concerned, about the regulatory framework for ethical standards of public disclosure and market activity by some environmental activist groups.

¹ Montreal Process Implementation Group for Australia (2014). Criterion 7: Legal, institutional and economic framework for forest conservation and sustainable forest management. *Australia's State of the Forests Report 2013, five yearly report*, Canberra.

The availability of digital and social media allows the message of environmental activist groups to propagate widely before a business has any meaningful chance to respond to or address the concerns raised (whether true or not). At this point it is often too late for the business to undo the damage caused by the secondary boycott, resulting in an overall weakening of the market.

In addition to the unavailability of a cause of action for the secondary boycott, businesses face a difficult hurdle to show that the actions of environmental activist groups satisfy the trade and commerce requirement necessary to establish a breach of section 18 of the CCA by engaging in misleading or deceptive conduct. This combination of factors leads to a lack of recourse for business and allows some environmental activist groups to operate with impunity.

These important reforms could be achieved by repealing the special exemption for secondary boycotts for environmental protection (section 45DD).

An alternative approach would be to remove the overarching exemption and then allow for case by case applications for exemptions. This procedure already works well in the context of exclusive dealing and would be well suited to striking a balance between legitimate protest mechanisms and competition aims. The Australian Competition and Consumer Commission (ACCC) could assess the bona fides and merits of the application for an exemption and assess this against the potential damage to the market and competition.

Importantly, requiring applications for exemptions would not place an undue burden on environmental activist groups. This is because in the current context, secondary boycotts are used as a coordinated tactic by some highly sophisticated environmental activist groups with complex legal and commercial structures.

In regard to the issue of environmental exception to the secondary boycott prohibition, AFPA was pleased to note recognition in the National Competition Policy Review Draft Report (pages 50-51). It stated:

A number of submissions raised the issue of the environmental and consumer exception to the secondary boycott prohibition.

During consultations undertaken by the Panel, it appeared that the primary concern expressed by industry representatives is that environmental groups may damage a supplier in a market through a public campaign targeting the supplier that may be based on false or misleading information.

A question might arise whether a public campaign undertaken by an environmental or consumer organisation against a trading business, advocating that customers ought not purchase products from the business, should be subject

to the laws prohibiting false, misleading and deceptive conduct. Presently, those laws only apply insofar as a person is engaged in trade or commerce.

However, expanding the laws concerning false, misleading or deceptive conduct to organisations involved in public advocacy campaigns directed at trading businesses raises complex issues. Many public advocacy campaigns directed at trading businesses concern health issues (e.g. tobacco, alcohol and fast food) or social issues (e.g. gambling). Consideration of the expansion of those laws in that context is beyond the Terms of Reference of the Review.

*On the other hand, where an environmental or consumer group takes action that directly impedes the lawful commercial activity of others (as distinct from merely exercising free speech), a question arises whether that activity should be encompassed by the secondary boycott prohibition. **The Panel invites further comment on this issue.***

AFPA supports the principle that laws prohibiting false, misleading and deceptive conduct must be applied to all those who engage directly with trading businesses – including consumer and environmental groups.

Conclusion

AFPA supports the principles of fair and transparent competition within the Australian economy in order to promote long term economic growth and innovation amongst industries and businesses.

AFPA also supports the rights of groups and individuals to protest and publically debate issues which are important to them.

However, AFPA is concerned that there are two overlapping provisions in the *Competition and Consumer Act 2010* (CCA) that are leading to material damage and adverse competition outcomes for some parts of the Australian forest, wood and paper products industry.

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AFPA supports the principle that laws prohibiting false, misleading and deceptive conduct must be applied to all those who engage directly with trading businesses – including consumer and environmental groups.