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Competition Policy Review Secretariat
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Submission by the Justice and International Mission Unit, Synod of y Victoria and Tasmania, Uniting Church in Australia to the y Competition Policy Review Draft Report y November 2014 y

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 Draft Report. This submission offers further comments on the issues of secondary boycotts and an alternative mechanism that businesses might be able to use to stifle concerns being publicly raised about businesses being involved in significant human rights abuses, criminal activity, environmental destruction and activities harmful to consumer welfare.

The submission also makes comment on the Panel's views about possible reductions in the regulation of the supply of alcohol.

Secondary Boycotts and stifling Community Organisations y

We welcome that the Panel has rejected the lobbying by certain business groups to increase the use of the secondary boycott provisions as a sword against non-government organisations, especially environmental groups. However, we are disappointed the panel has also rejected the request we made that the secondary boycott provisions of 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.

As noted in our previous submission, while we understand the need to protect businesses from activities such as 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 legal advice provided by Clayton Utz, 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. This deterrent to raising issues of criminal activity in a supply chain will undoubtedly be an issue for discussion in the Minister for Justice established working group to look at possible actions to address slavery, human trafficking and forced labour in supply chains.”

The Panel in its draft report makes the point “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.” This ignores the complexity that often arises. Criminal activity may be present in a company’s supply chain, especially when a company is sourcing particular products from overseas, but the activity does not get prosecuted in the source jurisdiction. This can be for a variety of reasons from a lack of resources to detect and prosecute the offence, to a lack of will to investigate or carry out a prosecution, to bribes paid to prevent any law enforcement action. ”

For example, Global Witness has continued to carry out investigations into alleged corruption in the Malaysian state of Sarawak. For over thirty years, Sarawak has been governed by Chief Minister Abdul Taib Mahmud, who controls all land classification, forestry and plantation licenses in the state. Under his tenure, Sarawak has experienced some of the most intense rates of logging seen anywhere in the world. The state now has less than five per cent of its forests left in a pristine condition, unaffected by logging or plantations and continues to export more tropical logs than South America and Africa combined. Global Witness managed to use hidden camera footage to reveal the instruments used by the ruling Taib family and its lawyers to skirt Malaysia’s laws and taxes. The footage allegedly shows how they make huge profits at the expense of indigenous people, and hide their dirty money in Singapore. To see the footage and more details go to <http://www.globalwitness.org/insideshadowstate/index.html>. Former Chief Minister Taib remains the subject of a graft probe by the Malaysian Anti-Corruption Commission (MACC). So Australian importers sourcing timber and agricultural products that have come from Sarawak may have products produced through criminal activity in their supply chain. So if an NGO publicly raises concern about such a risk, ordinary Australians might shy away from purchasing the products of the Australian company in question if they are not satisfied the company has taken effective action to ensure the products they are selling are free of criminal activity. At a superficial level the Australian company is engaged in “lawful commercial activity” as no prosecution is ever likely in Sarawak, but at another level if the products in question have been produced with criminal activity being involved then they meet the definition of proceeds of crime under the *UN Convention Against Corruption* and the *UN – Convention against Transnational Organised Crime*. Both Article 2 of UNTOC and Article 2 of UNCAC defines “Proceeds of Crime” as “any property derived from or obtained, directly or indirectly, through the commission of an offence”. ”

Or take the example of cotton production in Uzbekistan, where the government of Uzbekistan organises the mass use of forced labour in the cotton production. In the assessment of the US Administration “Government-compelled forced labor of men, women, and children remains endemic during the annual cotton harvest.”¹ Further:² ”

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¹ US Department of State, “Trafficking in Persons Report, June 2014”, p. 404. ”

² US Department of State, “Trafficking in Persons Report, June 2014”, pp. 404-405. ”

There were reports that some children aged 15 to 17 faced expulsion from school for refusing to pick cotton. There were additional reports that some government employees may have faced termination, and business owners faced financial pressure to require employees to pick cotton or pay for others to replace them in the fields. There were reports of injuries and deaths connected to the 2013 cotton harvest; for instance, a man was beaten by a government official and died the next day of a heart attack, a farmer committed suicide after a government official threatened him with imprisonment for not meeting a government-imposed quota, and a child died of electrocution after accidentally touching a live wire as she participated in the cotton harvest. –

They also confirm.³

Government compelled forced labour occurred during the cotton harvest, when authorities applied varying amounts of pressure on many governmental institutions, businesses, and educational institutions to organize college and lyceum students (15- to 18-year-old students completing the last three years of their secondary education), teachers, medical workers, government personnel, military personnel, and nonworking segments of the population to pick cotton in many parts of the country. –

Forced labour is a criminal offence under s270.6 of the Australian *Criminal Code Act 1995*. – So again, goods produced with forced labour are proceeds of crime. Uzbekistan is the world's sixth largest producer of cotton, and the fifth largest exporter. Bangladesh and China are the main importers of Uzbek cotton, accounting for an estimated 70% of exports. The cotton is turned into other products, such as clothes and fabric, with much of it then exported to consumer countries like Australia. Thus, unless they take action to try and exclude Uzbekistan cotton from their supply chain, Australian companies importing cotton products risk trading in goods that have been produced with the use of forced labour in Uzbekistan, and by definition are proceeds of crime. NGOs who raise this concern publicly may result in some Australian consumers favouring the purchase of products from companies that are taking steps to exclude Uzbekistan cotton from their supply chain over those that are reckless in the products they are willing to import. ”

Being able to raise issues of likely criminal activity in supply chains is important, even for the sake of fair competition. Where law enforcement is unable to address criminal activity in a supply chain it can often provide an unfair advantage to the businesses that have the criminal activity in their supply chain, usually through a lower cost of production or tax evasion. This is a distortion that was recently publicly acknowledged by Parliamentary Secretary to the Minister for Agriculture, Senator Richard Colbeck:⁴

“We have recent evidence showing timber entered Australia that had been harvested from a national park in South-East Asia. With illegal log production estimated to cost between US\$19-29 per cubic meter compared to legal log production of an estimated US\$63-76 per cubic meter – it is clear legitimate importers cannot compete with illegally sourced timber.” –

Senator Colbeck stated the Coalition Government was opposed to illegal logging as:⁵ “It creates unfair competition for Australian importers and domestic producers and can undercut domestic market prices.” ”

³ US Department of State, “Trafficking in Persons Report, June 2014”, p. 405. ”

⁴ http://www.richardcolbeck.com.au/home_page_sub_articles/our_plan_to_combat_illegal_logging ”

⁵ http://www.richardcolbeck.com.au/home_page_sub_articles/our_plan_to_combat_illegal_logging ”

Allowing NGOs to raise concerns about illegal activity in a supply chain provides an important defence of fair competition where law enforcement is unable to take effective action against the criminal activity. It provides an incentive for companies to ensure their entire supply chain is operating within the law. While it is possible for an NGO to sometimes get it wrong, a mechanism that allows a company to take legal action against an NGO for raising concerns about criminal or highly unethical activity will be open to abuse by businesses and will undoubtedly be used to try and stifle the legitimate activities of NGOs. This is highly likely where a business is deliberately or recklessly benefiting from criminal activity in its supply chain and wishes to stifle any public critique of its activities.”

We have direct experience of this from other jurisdictions where laws permit action against NGOs, their employees and contractors. For example, in the case of Andy Hall, a British national in Thailand, who has done work for us investigating the widespread illegal labour practices involving migrant workers, including human trafficking and forced labour. Mr Hall also does projects for other non-government organisations. In 2012 he did some work for a Finnish organisation, Finnwatch, and investigated a pineapple processing factory Natural Fruit. Natural Fruit has launched multiple criminal and civil prosecutions against Mr Hall since February 2013 as a result of his contribution to a Finnwatch report published in 2013, as Thai law allows businesses to pursue such legal action. The report revealed alleged serious human rights violations at Natural Fruit's pineapple juice production facilities in violation of Thai law. Natural Fruit supplies product into Australia. However, extensive investigation by the Synod Justice and International Mission Unit, including the use of a private investigator, has not been able to establish who the Australian buyer is.”

On 29 October 2014 the Prakanong Court in Bangkok dismissed the defamation charge brought against Mr Hall. During the trial, the court heard a former worker of Natural Fruit testify that the factory was hiring under aged children and paid unlawfully low salaries to its workers.”

The case verdict, concerning an interview Mr Hall gave to Al Jazeera on his criminal prosecutions, is just the first of four cases filed against Mr Hall by Natural Fruit. The second case, a US\$10 million civil defamation case, began on 30 October at Nakhon Pathom Court. The third case, Computer Crimes Act and Criminal Defamation Charges, proceeded on 17 November at the Southern Bangkok Criminal Court. Dates for a fourth US\$4 million civil case have not yet been confirmed.”

The Australian Minister for Foreign Affairs, The Hon Julie Bishop, has publicly disclosed that the Australian Government has raised the case with the Thai Government and the Australian Embassy sent a staff member to Mr Hall's first trial, demonstrating the Australian Government's interest in the case.”

The US Department of State concluded use of defamation laws to prosecute individuals for researching and reporting on human trafficking may have discouraged efforts to combat human trafficking. They pointed out that four UN special rapporteurs expressed concerns that the ongoing prosecution against Mr Hall may have had the effect of silencing other human rights advocates, and that the Thai Government did not adequately address the underlying allegations of violations in the report in question.⁶

The case has cost Mr Hall tens of thousands of dollars to defend himself, much of it provided by donations from human rights organisations across the globe. So even where a legal

⁶ US Department of State, 'Trafficking in Persons Report', 2014, p. 376.”

mechanism only provides for civil sanctions, businesses will be able to misuse the mechanism to consume limited NGO resources in having to fight off civil litigation. In our experience, it is not uncommon for businesses to claim they are being subjected to campaigns based on false and misleading information even when they are willfully benefiting from criminal activity in their supply chain. ”

We again 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 highly 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 of 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. ”

Alcohol Restrictions y

Under Chapter 13, it is suggested by the Panel that: ”

Trading hours restrictions and restrictions preventing supermarkets from selling liquor – are also an impediment to competition. –

While this statement may be true, it does not take into account the effectiveness of trading hour restrictions in reducing alcohol related harm which should be balanced against the desire to increase competition. In December 2013 the Australian College of Emergency Medicine surveyed hospital emergency wards at 2 am on a Saturday and found one in seven beds was taken by people as a direct result of alcohol abuse. Alcohol is responsible for 430 hospital admissions and 15 deaths per day.⁷”

The World Health Organisation “*Global status report on alcohol and health 2014*” examined what are the most effective ways to reduce alcohol related harm. They found taxing alcoholic products, restricting the availability of alcohol and implementing bans on alcohol advertising are the most cost effective ways of reducing the harm caused by alcohol. ”

The experience of Newcastle in NSW demonstrates the public benefit that can be gained in reducing alcohol related harm through the restriction of trading hours. In July 2007 the NSW Police Force lodged a complaint with the NSW Liquor Administration Board against four Newcastle liquor outlets on the grounds they were causing “undue disturbance of the quiet and good order of the neighbourhood”. This complaint was made against a backdrop of ”

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⁷ C. Gao, R. Ogeil, and B. Lloyd, ‘Alcohol’s burden of disease in Australia’, FARE and VicHealth in collaboration with Turning Point, 2014. ”

considerable community dissatisfaction with high levels of alcohol-related violence in and around the Newcastle central business district. In November of that year, the police added a further 11 liquor outlets in Newcastle to the complaint. ”

On 21 March 2008, the Liquor Administration Board required 14 of the outlets to not allow any new patrons to enter their premises after 1 am, but patrons already in the venue could stay and keep drinking. Eleven of the venues were required to shut at 3 am and three at 2:30 am. Licensees were required to ensure that a supervisor was on the premise from 11 pm until closing with the sole purpose of monitoring responsible service of alcohol. From 10 pm there was to be no sale of shots, no sale of mixed drinks with more than 30 ml of alcohol, no sale of ready mixed drinks stronger than 5% alcohol and no sale of more than four drinks to any patron at one time. The sale of alcohol had to finish 30 minutes before the venue closed. ”

Analysis of the impact of these restrictions found there were approximately 133 less alcohol related assaults in Newcastle in the year following the restrictions.⁸ It was found 83 of these were related to the hotels on which the restrictions were placed. In the four years prior to the restrictions on the liquor outlets 17% of all non-domestic violence assaults occurred between 3 am and 6 am. In the year following the imposition of the restrictions, the proportion of such assaults that occurred between 3 am and 6 am dropped to 6%. There was a slight increase in alcohol related assaults earlier in the night, but the net impact was still an overall reduction in the number of alcohol related assaults. ”

Professor of Public Health, Kypros Kypri, at the University of Newcastle had work published in early 2014 that found the impact of the Newcastle measures in reducing alcohol related violence has been sustained for five years, since their introduction in 2008. The Newcastle measures are estimated to have prevented around 800 assaults in the six years since they were put in place. They reduced the assault rate by about one in three. ”

The findings about earlier closing times in Newcastle match findings about the impact of earlier closing times of liquor outlets in Norway, which also reduced alcohol related violence. The Norway experience was that in eight cities where trading hours were extended, there was an average 20% increase in assaults per additional hour of trading. Conversely, in 15 cities where hours were restricted, there was an average 20% decrease in assaults per hour of restriction. ”

A 2002 study found that bars in Perth that were permitted to trade for an extra one or two hours after midnight doubled the rate of late-night violent incidents reported to the police. ”

The recent requirement in the Sydney Central Business District that liquor outlets must close by 3 am saw ambulance officers report the number of assault victims they're treating has dropped by about a third. ”

Research evidence across jurisdictions demonstrates that increases in the number of outlets that sell packaged liquor, either through supermarkets and other off-licenses, is associated with increased rates of chronic disease, risky drinking and domestic violence.⁹ Research in Victoria in 2011 found a 10% increase in off-licence liquor outlets is associated with a 3.3% ”

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⁸ Craig James et al., 'The impact of restricted alcohol availability on alcohol-related violence in Newcastle, NSW', *Crime and Justice Bulletin*, **137**, November 2009. ”

⁹ Michael Livingston, 'A longitudinal analysis of alcohol outlet density and Assault', *Alcoholism: Clinical and Experimental Research* **32(6)**, 2011, 1074-1079. ”

increase in domestic violence.¹⁰ US researchers¹¹ examining the relationship between the number of liquor outlets and assaults in Philadelphia, found the more liquor outlets there were in an area the greater the number of assaults. What was new about this work was the other factors the researchers took into account. They looked at high accessibility due to public transport and if there was the presence of other 'risky' retailers, such as 'cheque-cashing stores and pawn shops, but found there was no detectable association. "

Packaged liquor outlets (such as supermarkets selling alcohol) were found to increase the number of assaults more than on-premise outlets (such as bars, pubs, clubs and restaurants). However, the researchers stated that not all packaged outlets were equally as bad. It depended on how they were run. The researchers stated "our findings suggest that alcohol outlets not only attract crime but likely generate crime that otherwise would not occur."

Given the significant levels of existing harm caused by the liberal supply of alcohol in the community, the global evidence of what has been shown to work in reducing alcohol related harm, the Justice and International Mission Unit recommends that governments across Australia continue to regulate the supply and marketing of alcohol that prioritises a reduction in alcohol related harm over the ability of those manufacturing and selling alcohol to further increase their profits through reduced restrictions on supply on marketing."

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¹⁰ Michael Livingston, 'A longitudinal analysis of alcohol outlet density and domestic violence', *Addiction* **106(5)**, 2011, 919-915.

Grubestic et al., 'Alcohol Outlet Density and Violence: the Role of Risky Retailers and Alcohol-Related Expenditures', *Alcohol and Alcoholism*-**48(5)**, 2013, 613-619.