Dear Rod,

Following our discussion yesterday about evidence of harm to business arising from environmental secondary boycotts you may have seen this article in the AFR today [https://links.streem.com.au/australian-financial-review-afri-20191105-mXN9ZsP8f5?pdf=true](https://links.streem.com.au/australian-financial-review-afri-20191105-mXN9ZsP8f5?pdf=true). It makes the point that we discussed yesterday about the Competition Policy Review Committee’s conclusions in relation to secondary boycotts and environmental activism.

The relevant parts of the Harper review report are on pages 388 and 399 of the report with their conclusion on page 392, these are in Part 4 of the report which is linked here - [http://competitionpolicyreview.gov.au/files/2015/03/Part4_final-report_online.pdf](http://competitionpolicyreview.gov.au/files/2015/03/Part4_final-report_online.pdf).

Some points to note:

- The Harper Review did consider whether there was evidence of harm caused by environmental boycotts.
- They raised the ‘trade and commerce issue’
- They recommended no change to the environmental exemption.
- The panel did say that if in future evidence emerged of ‘compelling evidence that the exemptions for the purpose of environmental and consumer protection (as distinct from public advocacy campaigns) are harming business’, then the exemptions should be reassessed.

Here are some relevant quotes from the discussion on the issues.

“The Panel did not receive compelling evidence of actual secondary boycott activity falling within the environmental and consumer protection exception in the CCA. In the absence of such evidence, the Panel does not see an immediate case for amending the exception. However, if such evidence arises from future boycott activity, the exception should be reassessed.

During Panel consultations, industry representatives appeared to be primarily concerned that environmental groups may damage a supplier in a market through a public advocacy campaign based on false or misleading information.

Submissions also tended to express concerns about public advocacy campaigns or false and misleading information, rather than secondary boycott activity as such. As consumer and environmental protection issues are often the subject of public advocacy, the Panel can understand that some may regard the secondary boycott exceptions as a form of protection of public advocacy in these areas.

**The Panel considers that, although a public advocacy campaign may damage a business, it does so by attempting to influence the behaviour of businesses and consumers. Businesses and consumers are free to make up their own minds about the merits of the campaign.**

A public advocacy campaign is therefore distinct from a secondary boycott—the latter aims not just to influence but also to hinder or prevent the supply or acquisition of goods or services. The Australian Food and Grocery Council acknowledges this:
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It is important to distinguish public advocacy (which should be permitted) from secondary boycott behaviour (which should be prohibited). (DR sub, page 11)

However, a further question arises: if an environmental or consumer organisation advocates against customers purchasing products from a trading business, should the advocacy 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. 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 (for example, tobacco, alcohol and fast food) or social issues (for example, gambling). Consideration of expanding those laws in that context is beyond the Terms of Reference of this Review. We therefore make no recommendation in this regard."

Here is the Panels view and accompanying recommendation:

The Panel’s view
A strong case remains for the prohibition of secondary boycotts, which should be retained in the CCA. A sufficient case has not been made to limit the scope of the secondary boycott prohibitions, nor to broaden the scope of the exception for employment-related matters.

In the absence of compelling evidence that the exceptions for the purposes of environmental and consumer protection (as distinct from public advocacy campaigns) are harming business, the Panel does not see an immediate case for amending them. However, if such evidence arises from future boycott activity, the exceptions should be re-assessed.

Employer groups in building, construction and mining perceive inadequacies in the public enforcement of the secondary boycott provisions of the CCA. Timely and effective enforcement serves as a deterrent to boycott activity and needs to exist both in regulatory culture and capability. The Panel believes that the ACCC should pursue secondary boycott cases with increased vigour, comparable to that which it applies in pursuing other contraventions of competition laws.

The ACCC should record the number of complaints made to it in respect of different parts of the CCA in its annual report, including secondary boycott matters and the number of such matters investigated and resolved in each financial year.

Further, the Panel sees no reason why the maximum pecuniary penalties for breaches of secondary boycott provisions should be lower than those for other breaches of the competition law.

Recommendation 36 — Secondary boycotts
The prohibitions on secondary boycotts in sections 45D-45DE of the CCA should be maintained and effectively enforced.

The ACCC should pursue secondary boycott cases with increased vigour, comparable to that which it applies in pursuing other contraventions of the competition law. It should also publish in its annual report the number of complaints made to it in respect of different parts of the CCA, including secondary boycott conduct and the number of such matters investigated and resolved each year.

The maximum penalty level for secondary boycotts should be the same as that applying to other breaches of the competition law.
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Please let me know if you want to discuss this further or have any further questions. You can come back to me or to Jane who is across these issues.

Kind regards

Marcus

Marcus Bezzi

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The ACCC acknowledges the traditional owners and custodians of Country throughout Australia and recognises their continuing connection to the land, sea and community. We pay our respects to them and their cultures, and to their Elders past, present and future.