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Mr John Feil
Executive Director
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By email

Dear John

Victorian Owner Drivers and Forestry Contractors Bill

We refer to your telephone conversation with Bob Baxt of this office and our earlier conversations with Mr Alan Johnson.

We act for the Victorian Association of Forest Industries (**VAFI**), the peak industry body for Victoria's native hardwood timber industry.

We have been asked to write to you concerning the *Victorian Owner Drivers and Forestry Contractors Bill* 2005 (the **Bill**) which was given its second reading in the Victorian Legislative Assembly on 21 April 2005.

Our client is concerned that the Bill contains provisions that will restrict competition in the markets for the harvesting and transport of forest products. VAFI members who hire harvesting and haulage contractors are directly affected by these provisions.

In the face of these restrictions on competition, our client is also concerned about the process available in Victoria to ensure compliance with clause 5 of the Competition Principles Agreement (**CPA**).

In bringing these matters to the NCC's attention we are aware of the NCC's limited role in respect of the issues of concern to our client. Nevertheless, we consider that there are issues relating to the Victorian processes for ensuring compliance with clause 5 of the CPA that are within the ambit of the NCC's role.

1 The Bill – a flawed statutory scheme

The primary area of our client's concern relates to the provisions in clauses 27-30 of the Bill, which confer very broad discretionary powers on the Minister to implement by regulation codes setting 'standards of conduct and practice' in relation to the engagement of harvesting and haulage contractors. In

recommending any such code of practice, the Minister is only require to consult with the Forest Industry Council (**FIC**). The FIC, which will be established by clauses 58-60 of the Bill, will have 4 out of 9 voting members appointed by unions/contractors and only 2 appointed by hirers.

The Bill also envisages joint negotiation of contract terms. Thus clause 25 mandates that, in the negotiations for harvesting and haulage contracts, hirers must participate in joint negotiations where a contractor or group of contractors has appointed a negotiating agent. Clause 26 has a similar operation where a hirer appoints a negotiating agent.

A diagram illustrating these key elements of the statutory scheme is attached to this letter.

VAFI does not object, in principle, to the concept of a Code of Practice operating in the industry or with negotiations taking place collectively. These activities are common and where competition concerns may arise are subject to the normal operation of the *Trade Practices Act* 1974 (**TPA**). Anticompetitive aspects of the Code of Practice and joint negotiations can currently be authorised b y the ACCC on public benefit grounds under the TPA. We note that in the Federal Government's proposed amendments to the TPA more streamlined notification procedures will be available to exempt beneficial collective bargaining arrangements from the TPA provisions.

But the scheme codified in the Bill is quite different and exposes a substantial concern that an anticompetitive process will result in significant costs to the community that are not outweighed by the benefits.

In VAFI's submission, there are structural deficiencies in the proposed scheme that are weighted strongly in favour of particular interests and apparently calculated to interfere with competitive processes. In particular, VAFI is very concerned that the proposed statutory scheme:

(a) unnecessarily interferes with (indeed, distorts) the normal negotiating process in a manner that is not necessary to secure the objectives of the legislation, in that:

- it goes beyond merely providing a balance of competing interests by the use of collective negotiations;
- the joint negotiation is not true negotiation as unions can utilise Code arrangements to secure anything not achieved in negotiation in the form of a Code 'standard';
- the mere threat of utilising the Code arrangement, with its unrepresentative consultative body, will itself impact on the negotiations;

(b) could prevent needed industry reform of work practices in an industry that faces increasing cost pressures;

(c) carries the strong potential to entrench inefficiency and add costs to hirers and thereby undermine competitiveness in product markets; and

(d) provides blanket TPA exemptions (and therefore removes ACCC scrutiny) to a broad discretionary process that could lead to potentially detrimental 'standards' which cannot be scrutinised on competition principles.

2 The Competition Principles Agreement

In our submission VAFI's experiences in respect of the Bill, expose flaws in the Victorian 'gatekeeper' process established to ensure compliance with the terms of clause 5(5) of the CPA.

By clause 5(5) of the CPA the Victorian Government agreed that proposals for new legislation that restrict competition will be accompanied by evidence that the legislation is consistent with the principles in clause 5(1) of the CPA. That is, legislation should not restrict competition unless it can be demonstrated that:

- the benefits of the restriction to the community as a whole outweigh the costs; and
- the objectives of the legislation can only be achieved by restricting competition.

The cost benefit analysis in clause 5(1) is aimed at limiting the practice of anticompetitive regulation being passed without cost benefit analysis being undertaken. In our submission, without a process to ensure rigour in that analysis, the intention of the CPA is seriously undermined. What ought to operate as a 'gatekeeper' may simply serve to let through what ought to be stopped.

The Victorian Competition and Efficiency Commission (**VCEC**) was established in July 2004 as a 'gatekeeper' for new legislation. Under VCEC's procedures the Victorian Government is required to prepare and submit to VCEC a Business Impact Assessment (**BIA**) if the responsible Minister determines that the proposed legislation has potentially significant effects for business and or competition in Victoria[1]. VCEC assesses the adequacy of the BIA. If VCEC raises any concerns these must be addressed by the Minister or a copy of the VCEC report must be submitted to Cabinet with the proposed legislation.

There has, currently, been no transparency in any BIA which has (presumably) been prepared in respect of the Bill. We have been informed by VCEC that in Victoria BIAs are regarded as Cabinet-in-Confidence documents and are only made available to the public with the agreement of the Premier, Treasurer and responsible Minister. Accordingly, we do not know:

- if a BIA was submitted to VCEC;
- if a BIA was submitted, whether VCEC raised any concerns about the BIA;
- if VCEC raised any such concerns, whether the Minister addressed those concerns;
- whether a copy of a VCEC report was submitted to Cabinet with the Bill.

Indeed we do not even know whether any cost benefit analysis has been undertaken at all or if it has what degree of rigour was applied.

This makes it extremely difficult for anyone whose interests are adversely affected by proposed legislation to have any degree of comfort that the required cost benefit analysis has been properly undertaken.

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[1] The Minister can seem an exemption from the Premier from the requirement to prepare a BIA but this will only be granted in exceptional circumstances.

The situation is heightened with the statutory scheme within the Bill which has the potential to produce effects in practice which are not readily apparent on the face of the legislation. Without proper analysis of the scheme the detriment may not be immediately apparent in a proposed structure that on its face appears to include:

- industry consultation;
- ministerial consideration; and ultimately
- the need to establish any Code by regulation (and thus subject to Subordinated Legislation requirements).

But the likelihood of real detriment emerges as the structural deficiencies such as those outlined above are analysed.

A factor that further reinforces our client's grievance with the Victorian 'gatekeeper' process is that neither VAFI nor its members were invited by government, VCEC or anyone else to make any submission or, indeed, provide any comment at all in respect of the issues relevant to the application of the cost benefit principles in clause 5(1). VAFI is concerned that this means that a key segment of the community that is likely to be affected by the Bill has not been consulted or had its views taken into consideration.

A 'gatekeeper' process that merely hears the views of those promoting legislation without seeking input from those most directly affected is, in our submission, inherently unable to ensure the necessary rigour is being applied.

In our submission clause 5 of the CPA should be applied with appropriate rigour. Moreover, the 'gatekeeper' process should be calculated to ensure that the intentions of the CPA are likely to be realised. But a process that:

- is shrouded in secrecy;
- fails to incorporate even the most basic consultation with input from the range of interests affected by the regulation;
- provides no scope for aggrieved citizens to understand the 'evidence' that must accompany new legislation that restrict competition,

carries a real risk of merely operating as a rubber stamp (despite the best efforts of VCEC Commissioners and staff).

VAFI has raised these concerns directly with VCEC in writing and in a very informative meeting with VCEC Commissioner Robert Kerr and Assistant Director Stephen Corden. VAFI appreciated the opportunity to voice its concerns and the open manner in which those concerns were received. But the fact remains that the VCEC process, with its inherent lack of transparency and absence of meaningful consultation, provides VAFI with no basis on which it can be confident that this anticompetitive legislation has been scrutinised in the manner required by clause 5 of the CPA.

In those circumstances we informed VCEC that we considered that it may be appropriate for us to raise our concerns with the NCC in its capacity of adviser to the Federal Treasurer as to the operation of the States' gatekeeper processes and on competition payments under the National Competition policy.

We submit that our client's experiences in respect of the Bill highlight matters that are relevant to the NCC's limited role in respect of the ability of the Victorian

'gatekeeper' process to ensure that unnecessary anticompetitive regulation does not 'pass through the gate'.

Our client would welcome the opportunity to discuss its concerns about the VCEC processes with the NCC. To that end we would be grateful if you would let us know a convenient time.

Yours faithfully
Freehills

Chris Jose

Partner

STATUTORY SCHEME OF CONTRACTORS BILL