

A Submission to the Productivity Commission Regarding

National Competition Policy

from

The Eros Association Inc.



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The Eros Association Inc. is Australia's peak adult industry body and has fulfilled the role of national association since 1992. The current president is David Haines, a former deputy chief censor from 1988 – 1999. The association is incorporated in the ACT.

The association claims approximately 70% of Australia's legitimate adult media businesses as members, including three public companies. The purpose of this brief submission is to inform you of a number of clear breaches of National Competition Policy (NCP) by state governments and the inability of the National Competition Council (NCC) to extract any comment, policy direction or resolution of the matters from these governments.

Background

The Competition Principles Agreement (CPA) (clause 5 (1)) makes clear that *'legislation (including Acts, enactments, ordinances or regulations) should not restrict competition unless it can be demonstrated that: (a) the benefits to the community as a whole outweigh the costs; and (b) the objectives of the legislation can only be achieved by restricting competition'*. The Agreement also provides that all new legislation should meet the principles established in clause 5(1).

The CPA does not provide a list of exempt legislation, nor does it infer that some legislation is more meritorious than others. Further, perusal of the NCC's website provides no evidence of an understanding by the Council Of Australian Governments (CoAG) to excise from coverage under NCP, the consideration of anti-competitive legislation impacting on producers of adult media. Indeed, the NCC's assessment reports appropriately cover a wide range of gambling related and other forms of social regulation.

The Complaint

To date, four of our members have written to the NCC and, when directed by that body, directly to state premiers and the anti-competitive units that they preside over. The issues that they have raised are fair and reasonable and well within the remit of NCP.

The first submission was sent on the 7th Oct 2003 to the NCC by the National Museum of Erotica in Canberra regarding an alarming inconsistency in the Queensland Classification Enforcement Act. The nub of the matter was that the Queensland Government had made it illegal to sell R rated erotic material in a book (called Category One Restricted) while allowing its legal sale from a film, video or DVD. This has created a totally unfair competitive regime in favour of R Rated video distributors and cinema operators, over book publishers. There were no explanations for the situation either in the Explanatory Memorandum to the Act, or in the Second Reading Speech by the Minister. There appears to be no 'harm minimisation' reasons advanced by the government to justify this state of affairs either. The original submission was addressed to the NCC and despite three letters from the complainant to the NCC and a similar number of letters from the NCC to the Queensland government, the latter has consistently refused to respond. The latest correspondence was from NCC Executive Director, John Feil, on the 7th June 2004 – some eight months from the date of the original submission. He stated that, *"The Council raised the matter again with Queensland on 3 June 2004, this time as part of a series of questions in response to Queensland's 2004 annual report on its implementation of National Competition Policy (NCP)."* Clearly, they are unable to respond except in such a way as to embarrass or discredit the government of the day.

From a business perspective this prohibition is unprecedented and totally unjustified. If the state were to ban R rated films, DVDs and videos, there would be a level playing field for all media entertainment businesses and therefore no issue arising. However the Queensland government has made it

clear that they have no plans to do this and that they will continue to hand the electronic adult media industry an unfair advantage (estimated to be hundreds of millions of dollars each year) over adult book and magazine publishers.

From a consumer's point of view the current situation discriminates against people who would rather learn and be entertained by publications rather than films and videos. There are many community programs in place funded by government to encourage people back to reading rather than passively viewing moving images on a screen. These campaigns are based on broadening the education base in the community and also on healthy lifestyle grounds. This prohibition, even on erotic material, flies in the face of this and other commonsense parameters. The Queensland consumer of adult erotic materials has no choice at all in the medium they wish to buy their favourite entertainment. The Queensland government makes them choose video/film and in some instances, even risk a jail sentence if they try to buy the same material in a book. This situation also inflates the prices of R rated erotic videos as the producers of these products realise that they have been given a monopoly in the marketplace.

One of the complainant's marketing plans was to shrink-wrap a book of still photos together with a compilation video of the same R rated photographic material. Under the current law they could face a jail sentence and even confiscation of company assets for including the book of the same material together with the video! The use of jail sentences and confiscation of assets legislation to support a discriminatory business regime is unheard of and cause for major alarm within the Queensland business community.

The second complaint was lodged by the ASX-listed company, Adultshop.com Ltd on 20th January 2004. The issue turned around the fact that the W.A. government passed legislation to amend its Classification Act in early 2003, lifting a prohibition on the sale of all federally classified, Category 2 Restricted publications and thereby coming fully on board the National Classification Scheme for publications. However, they did not lift the prohibition on the sale of the equivalent federally-classified material on film and video (X rated). The adjustment to the Act was clearly in breach of CPA which states that all new legislation should meet the principles established in clause 5(1) and immediately gave adult publishers a benefit over adult video producers estimated by us to be in the vicinity of \$7 million a year.

Essentially, this matter was the Queensland situation in reverse and demonstrated the fact that state governments have abandoned any sense of fair play and business ethic in this market sector.

Adultshop.com was asked by John Feil from the NCC to re send their submission to David Morison in the Competition Policy Unit of WA Treasury. This request was made on 6th January but to date Adultshop.com have not a had a reply.

The other two submissions were sent to the NSW and Victorian Premier's offices by the ASX-listed company Gallery Global Networks and the large

Victorian adult retailer Club X, respectively. The issues were similar to those in W.A. although both the Victorian and NSW Classification Acts had entrenched the long standing favouritism in favour of adult book publishers over film producers, for many years.

The submission to NSW was sent in February 2004 and the Victorian one shortly afterward. In the Gallery Global Networks submission, authored by CEO, Chris Thorpe, it was put to Director General, Roger Wilkins in the NSW Cabinet Office, that:

"NSW shareholders in this company have recently asked a number of questions of management regarding anti-competitive aspects of the NSW Classification Act. These elements are clearly and directly responsible for divesting them of substantial profits that they expected to make from their investments in this company. As CEO, I have an obligation to answer these questions but after studying all aspects of the legislation in question, I am unable to answer their concerns. I therefore request that as the custodians of anti-competitive policy in the state, you provide shareholders of this company with answers to their questions and recommend accordingly to government."

Club X company director, Eric Hill, wrote to the Victorian Premier with his concerns and stated that:

"Our understanding of the National Competition Policy (NCP) was that it was signed and agreed to by the state of Victoria, with the idea that competitive business regimes and a 'level playing field' were ideals that would benefit all Victorians. It is also our understanding that the Victorian government submitted a list of all legislation that could be considered as anti-competitive to the National Competition Commission with a pledge that that legislation would be reviewed within a reasonable period of time. We note that the Victorian Classification Enforcement Act 1996 was not part of that submission."

Both parties received letters signed by the Premier's advisors stating that the issue fell within the remit of the respective Attorneys General, as they were issues to do with 'censorship'. This clearly showed that both Premier's had fundamentally misunderstood or did not want to deal with the issue of unfair competition within the adult media area. This is demonstrated by the fact that neither Attorney General has replied to the criticisms and the issues raised in the submission. Clearly, they do not know how to reply as the issue is not in their portfolio of law and justice.

As the Public Officer of Eros I made three phone calls and sent two faxes to the Victorian Premier's advisor who had signed the letter (Tim Pallas) to try and tell him of our concerns, only to be told that a departmental officer would contact us soon. That was over a month ago and no contact has been made.

The Council Of Australian Governments contracted to undertake certain actions under CPA and in the area of adult media have not met their contractual obligations. Although their recalcitrance in these matters will no doubt be noted by the NCC in its annual reporting and, if a number of other issues arise in a jurisdiction, our particular matters may go some way towards justifying a 'fine' on a state government, this does nothing to address the fact

that ordinary business people and a large body of consumers are unfairly out of pocket and possibly even in jail, as a result of the government's refusal to create a level playing field. We have had some legal advice to suggest that the contractual agreements signed by state governments under the banner of CoAG, may actually be made on behalf of the business and consumer communities in each state as represented by their governments and that individuals who are disadvantaged by some state governments who break with their contractual agreements under NCP may be able to sue for damages. We are pursuing this reading of the 'contract'.

However, the real issue that we would like the Productivity Commission to look at is how to deal with governments who introduce discriminatory regimes which kill the efficiency of domestic markets and substantially lessen gains for Australian consumers. The consumer-base that we are talking about here is much larger than anyone likes to admit. The largest and most comprehensive survey of sexuality in Australia (Sex in Australia: Australian Research Centre in Sex, Health and Society, La Trobe University, 2003) surveyed nearly 20,000 adults about their sexual lives. The researchers found that approximately 25% of Australian adults regularly viewed adult media in one form or another. This backed up a national 1999 Roy Morgan Survey which also found that 25% of respondents were regular consumers of adult media. This puts the market in question at around four million adults – a substantial number whether state governments approve of it or not.

We estimate that the unfair competition advantage from the above scenario runs to some \$250 - \$300 million annually around Australia. Our overseas export potential from the adult industry is also greatly diminished by the unfair competitive regimes imposed by state governments. If the same adult content available to book publishers was legally available to film makers, we estimate that Australia could bring in somewhere in the vicinity of \$20 million of export revenue by the third year, increasing to \$100 million a year within a decade.

We would like the opportunity to expand upon this submission through addressing the Commission in one of the public hearings that are being scheduled.

Robert Swan:
Coordinator and Public Officer

Attachments:
1) Sex In Australia
2) Morgan Poll