

Chapter 2

The bill

2.1 The Trade Practices Amendment (Small Business Protection) Bill 2007 amends section 87 of the *Trade Practices Act 1974* to allow the Australian Competition and Consumer Commission (ACCC) to seek compensation for damages on behalf of parties affected by unlawful secondary boycotts. At present the ACCC is unable to bring representative actions against those found guilty of these boycotts. If passed, the bill will ensure that compensation for parties affected by secondary boycotts is a matter for the ACCC under the provisions of the TPA. The EM explains that the bill will thereby achieve consistency in the application of the remedies and enforcement provisions of the Act.¹

2.2 Sections 45D and 45E of the TPA prohibit secondary boycotts. Section 45D prohibits two or more persons from acting in concert to hinder or prevent the supply or acquisition of goods or services by a person or company (the target of the boycott). In 2003, for example, the ACCC instituted legal proceedings in the Federal Court against the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (AMWU), the Australian Workers Union and the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia. The ACCC successfully alleged that the unions had contravened section 45D by maintaining a picket at the entrance to a construction site which prevented construction workers and vehicles delivering materials from entering the site.² Section 45E prohibits a person from making an agreement with a trade union for the purpose of preventing or hindering the supply or acquisition of goods or services between that person and the target of the boycott.

2.3 Sections 45D and 45E of the TPA are the only form of anti-competitive conduct in Part IV of the TPA for which the ACCC does not currently have powers to provide remedies for people suffering loss or damage.³ The Trade Practices Amendment Bill (No. 1) 2000 exempted these sections. Opposition Senators argued that the sections did not relate to competition policy and had no place in the Act.

1 Explanatory Memorandum (EM), p. 3.

2 Australian Consumer and Competition Commission, 'ACCC institutes proceedings alleging breach of secondary boycott provisions', *Media Release*, 3 May 2004, <http://www.accc.gov.au/content/index.phtml/itemId/347312> (accessed 20 August 2007). Australian Consumer and Competition Commission, '\$300,000 penalties for secondary boycott', *Media Release*, 3 May 2004, <http://www.accc.gov.au/content/index.phtml/itemId/524789> (accessed 20 August 2007).

3 The Hon. Peter Costello MP, Second Reading Speech, *House of Representatives Hansard*, 15 August 2007.

2.4 The Government disagrees. In the Second Reading Speech, the Treasurer the Hon. Peter Costello, told Parliament:

...this is a matter of competition policy, because trade is adversely affected in the market affected by an unlawful boycott. Secondary boycotts can have a significant impact on our economy...As the provisions are part of the Trade Practices Act, it makes sense to allow the ACCC to have consistent enforcement powers across all the provisions in Part IV.⁴

2.5 The EM noted that the government accepted a 'carve-out' of sections 45D and 45E from the Trade Practices Amendment Bill (No. 1) 2000 to enable the passage of the other provisions of the bill.⁵

2.6 If passed, the Trade Practices Amendment (Small Business Protection) Bill 2007 will enable the ACCC to represent small businesses in seeking damages from successful secondary boycott prosecutions. It will be a matter for the Commission to determine which representative actions it takes on. One of its considerations is the resources available to those affected to bring their own action. As the Treasurer noted:

...small businesses operating on tight margins and with limited cash flows find it difficult to bear both the cost of the secondary boycott and the burden of initiating legal proceedings.⁶

2.7 The ACCC may only bring representative actions for contraventions of section 45D and 45E in relation to conduct that occurs on or after the commencement of the bill.⁷

4 The Hon. Peter Costello MP, Second Reading Speech, *House of Representatives Hansard*, 15 August 2007.

5 Explanatory Memorandum (EM), p. 4.

6 The Hon. Peter Costello MP, Second Reading Speech, *House of Representatives Hansard*, 15 August 2007.

7 Mr Scott Rogers, Senior Advisor, Competition and Consumer Policy Division, Department of the Treasury, Committee Hansard, 28 August 2007, p. 62.