

Chapter 3

Issues relating to the bill

3.1 This chapter looks at three issues of concern raised by the bill. The first relates to conflicting evidence on the need for, and appropriateness of, the bill's provisions. The second concerns the impost of representative action on the Australian Competition and Consumer Commission's (ACCC) time and resources, and the proposal to allow lower courts to hear private parties on section 45D cases. The third issue relates to claims that the bill will curb protest groups'—and citizens'—rights of free speech if the ACCC is given power to represent businesses whose products and services have been harmed as a result of these groups' activities.

Background—section 45D prosecutions and complaints

3.2 Over the past decade, the ACCC has initiated twelve Federal Court proceedings based on section 45D of the *Trade Practices Act 1974* (TPA Act). Appendix 3 lists these cases and their outcomes. All cases bar one involved allegations that a union—or a company acting in concert with a union—had hindered or prevented the supply of goods or services by third party.¹ For these eleven cases, the ACCC gained either an injunction or a financial penalty against the union or unions.

3.3 As Chapter 2 outlined, the bill makes no change to the substance of sections 45D and 45E other than to enable the ACCC to take representative action on behalf of companies found to have been damaged by secondary boycott action. In determining which representative actions to undertake, the ACCC will have regard to the capacity of small businesses to understand and pay for legal action in the Federal Court. Based on past prosecutions, the bill will enable the ACCC to represent those businesses in the Federal Court that have been adversely affected by a union's picketing action.

3.4 It is important to note, however, that few secondary boycott allegations reach the Federal Court. In the period 1 July 2004 to 30 June 2007, the ACCC received a total of 36 complaints on secondary boycott matters. In only two of these was there sufficient evidence to undertake litigation in the Federal Court.² In 14 of the 36 complaints, the ACCC found there was insufficient evidence; in 10 of the complaints, it found there had been no breach of the TPA.³

1 The exception was *ACCC v Knight and Ross* where the Commission alleged secondary boycott action by Adelaide cardio thoracic surgeons for hindering or preventing another surgeon from providing services at a private hospital. See Appendix 3.

2 *ACCC v CFMEU and Ors* (see Appendix 3). *ACCC v Bovis Lend Lease & CFMEU*. The Federal Court hearing for this case commenced on 3 September 2007.

3 Correspondence, Mr Brian Cassidy, Chief Executive Officer, ACCC, 30 August 2007.

Conflicting views on the bill—COSBOA and the ACTU

3.5 The committee received submissions and took evidence from the Council of Small Business Organisations of Australia Ltd (COSBOA) and the Australian Council of Trade Unions (ACTU). COSBOA supported the legislation. Chief Executive Officer, Mr Tony Steven, told the committee that 'time and effort inhibits small businesses, plus they often have a lack of expertise in this area to defend themselves'. He argued that the ACCC's help is important to overcome this lack of resources and that it is vital that small business is educated about what the ACCC can do on their behalf.⁴ Nonetheless, COSBOA noted that small business still has to provide the ACCC with the necessary paperwork to successfully pursue its case.⁵

3.6 The ACTU opposes the bill on four grounds. First and most fundamentally, it objects to the inclusion of sections 45D and 45E in the TPA. It continues to argue that these provisions are a matter for the industrial relations arbiter—the Australian Industrial Relations Commission (AIRC)—and should not be included in competition law.⁶ Second and closely related, the ACTU argues that the existing legislative framework is adequate. The amended Workplace Relations Act provides remedies and penalties for secondary boycotts which are effectively enforced through the AIRC, while the TPA also has powerful deterrents against anti-competitive behaviour.⁷ The ACTU claims that the bill would empower the ACCC to pursue trade unions and other community organisations 'even where the person allegedly affected by the activity has chosen not to sue'.⁸ Third, the ACTU argues that the bill is not about protecting small business. It contains no definition of small business and does not limit the ACCC to a particular class of business in bringing representative actions.⁹ Its effect 'would be to empower the ACCC to use taxpayer funds to pursue a trade union for damages...on behalf of large corporations'.¹⁰ Fourth, the ACTU claims there has been no evidence presented justifying the bill. It notes that the original recommendation to introduce representative actions arose in a 1994 report by the Australian Law Reform

4 Mr Tony Steven, Chief Executive Officer, Council of Small Business Organisations of Australia Ltd, *Committee Hansard*, 28 August 2007, p. 51.

5 Council of Small Business Organisations of Australia Ltd, *Submission 19*, p. 1.

6 This is now a point of policy difference between the ACTU and the Australian Labor Party. See the comments of Ms Sharan Burrow, President, Australian Council of Trade Unions, *Committee Hansard*, 28 August 2007, p. 61.

7 See the comments of Ms Cath Bowtell, Senior Industrial Officer, Australian Council of Trade Unions, *Committee Hansard*, 28 August 2007, p. 54.

8 Australian Council of Trade Unions, *Submission 22*, p. 2.

9 The ACTU made this argument in its submission with reference to Senator Stephen Conroy's comments in the parliamentary debate on the 2002 legislation. See Senator Stephen Conroy, Trade Practices Amendment (Small Business Protection) Bill 2002 [No. 2], Second Reading, *Senate Hansard*, 3 March 2002.

10 Australian Council of Trade Unions, *Submission 22*, p. 2. Ms Sharan Burrow, President, Australian Council of Trade Unions, *Committee Hansard*, 28 August 2007, p. 56.

Commission, which did not address the implications for the industrial relations framework.¹¹

3.7 The committee considered but disagreed with the ACTU's assessment of the situation. As noted in paragraph 3.2, over the past decade the ACCC has successfully prosecuted unions in various secondary boycott cases under sections 45D and 45E of the TPA. Clearly, these parts of competition law have played an important role over and above industrial relations legislation. The committee believes it is reasonable that the businesses that suffer from illegal secondary boycott action should be entitled to appropriate compensation from the same entity that has brought this action—the ACCC. The ACCC will assess which businesses it believes are most in need of representative action, and this will be those entities that do not have the knowledge or money to pursue their own damages—small businesses. In this context, the committee also highlights COSBOA's support for the bill on the basis that it protects small business against the actions of big business.¹²

Representative actions through the Federal Magistrates Court

3.8 The committee received a submission arguing that ACCC representative actions are 'very expensive and cumbersome' and as a result, the Commission has tended not to bring these actions in the past. It claimed that it is unlikely that the bill will lead the ACCC to bring representative actions in relation to secondary boycotts. The bill would therefore be of no benefit to consumers, small businesses and farmers. The issue is one of scarce public money to fund private litigation, rather than the presence of a law that enables the Commission to bring this representative action.¹³

3.9 Accordingly, the submission suggested broadening legal access for parties claiming damages from secondary boycotts. Currently, private losses can only be recovered through the Federal Court under section 83 of the TPA. The submission claimed that the cost of private parties recovering their losses would be reduced if the Act was amended to allow access to the Federal Magistrates Court. It emphasised that this would be a simple legislative change to section 86(1A) and would empower small businesses to recover losses 'in a timely and cost effective manner'. Moreover, it argued that:

Self-help and self-empowerment must surely be encouraged and facilitated wherever possible and must surely be preferable to a situation where parties

11 Australian Council of Trade Unions, *Submission 22*, p. 2. Ms Sharan Burrow, President, Australian Council of Trade Unions, *Committee Hansard*, 28 August 2007, p. 55.

12 *Committee Hansard*, 28 August 2007, p. 58.

13 Associate Professor Frank Zumbo, School of Business Law and Taxation, University of New South Wales, *Submission 21*, p. 1.

are left to rely on a public agency like the ACCC with scarce public funds to try and recover private losses.¹⁴

3.10 This proposal was put to Mr Steven of COSBOA. He told the committee that the resource problem would remain even if private parties had access to the Federal Magistrates Court. Small business would continue to need lawyers to represent or advise them, and given the complexity of the legislation, they would be 'much better represented' by the ACCC.¹⁵ In its submission to the inquiry, COSBOA stressed that the ACCC is 'probably the best ally small business can have' well trained and experienced staff.¹⁶

3.11 Senator Murray suggested to Mr Steven that Associate Professor Zumbo's proposal might be an option available to small business in addition to the ACCC's resources.¹⁷ Mr Steven later responded in writing:

COSBOA feels the ACCC should be given the right to take representative action in respect of Section 45 (D) and (E) and then also be strongly encouraged to be much more proactive. Plus we feel the Federal Magistrates Court option could be available to private litigants as an easier and cheaper option in order to ensure justice.¹⁸

3.12 The committee notes that the focus of this bill is to provide small business with access to the ACCC's expertise and resources in seeking damages for unlawful secondary boycotts. Moreover, the committee understands that Associate Professor Zumbo's proposal was to ensure that private parties had broader court access, not access to the ACCC. The committee agrees with COSBOA that the most effective remedy for small businesses is through the ACCC.¹⁹ From the committee's perspective, the key issue is that the ACCC's representative resources will stretch further than those of small business, regardless of the court before which the matter is heard.

The bill and concerns about freedom of speech

3.13 Most of the evidence the committee received on the bill did not relate to the established section 45D and 45E legal context of unions' physical blocking of supply

14 Associate Professor Frank Zumbo, School of Business Law and Taxation, University of New South Wales, *Submission 21*, p. 2.

15 Mr Tony Steven, Chief Executive Officer, Council of Small Business Organisations of Australia Ltd, *Committee Hansard*, 28 August 2007, p. 51.

16 Council of Small Business Organisations of Australia Ltd, *Submission 19*, p. 1.

17 Mr Tony Steven, Chief Executive Officer, Council of Small Business Organisations of Australia Ltd, *Committee Hansard*, 28 August 2007, p. 52.

18 Mr Tony Steven, Correspondence, 30 August 2007.

19 Mr Tony Steven, Chief Executive Officer, Council of Small Business Organisations of Australia Ltd, *Committee Hansard*, 28 August 2007, p. 52.

or services to a company by third parties. Rather, the committee received several submissions from animal welfare organisations expressing concern that the bill's measures would enable the ACCC to bring legal action against citizens and interest groups lobbying against the production and sale of products and services. These submitters included the Management Committee of Animal Liberal Incorporated South Australia, Voiceless, the New South Wales Young Lawyers Animal Rights Committee, the Consumer Action Law Centre, the Wilderness Society, the Australian Wildlife Protection Council Incorporated and Animal Liberation ACT.²⁰

3.14 The animal welfare context was established in comments made by the Treasurer the Hon. Peter Costello's in February 2007 upon foreshadowing the bill's introduction. Mr Costello told reporters:

The Government is going to amend the Trade Practices Act so that the Australian Competition and Consumer Commission can take representative actions – that it can take an action on behalf of all Australian farmers if somebody tries to boycott their wool. An example of this has recently been the group which is trying to organise a boycott of Australian wool because it is protesting about mulesing. That of course would affect all Australian farmers. We are going to amend the law so that the ACCC can bring legal action on behalf of all Australian farmers against those that are trying to boycott their wool and boycott their wool on these spurious grounds. Mulesing is something that is done because otherwise sheep could suffer flystrike which would be more painful, which would be more exploitative, and to empower the ACCC to look after Australia's farmers against these groups is a benefit to all wool growers in Australia.²¹

3.15 The Treasurer's comments were in reference to the US-based People for the Ethical Treatment of Animals (PETA), which had campaigned for international clothing companies to ban the use of Australian wool over the practice of mulesing.²² In 2005, the not-for-profit company Australian Wool Innovation (AWI) filed a lawsuit in the Federal Court against PETA. AWI insisted it would continue its case unless PETA agreed to stop the boycotting campaign. In June 2007, the parties reached a compromise. The Australian wool industry won a commitment from PETA to stop its protest until 31 December 2010; the industry agreed to invest in developing genetic alternatives to mulesing with a view to phasing out the practice by the end of 2010.²³ The committee understands that AWI has been reluctant to release details of the legal costs incurred in this action and believes it should do so.

20 See Appendix 1.

21 The Hon. Peter Costello MP, *Doorstop Interview*, Duxton Hotel, Perth, 22 February 2007. The practice of mulesing refers to cutting skin from a sheep's behind to prevent maggot infestation.

22 See 'Inside the Wool Industry', *People for the Ethical Treatment of Animals*, http://www.peta.org/mc/factsheet_display.asp?ID=55 (accessed 3 September 2007).

23 'Australian wool wins historic agreement with PETA on mulesing', *Wool is best*, 30 June 2007 http://www.woolisbest.com/latest_news/2007/woolWins300607.htm (accessed 3 September 2007).

3.16 Subsection 45DD(3) of the TPA currently exempts conduct from section 45D whose dominant purpose 'is substantially related to environmental protection or consumer protection'.²⁴ Conduct relating to animal rights is not mentioned. The submitters from animal welfare organisations argued that the bill poses a threat to those who voice legitimate animal rights concerns. For example, the NSW Young Lawyers Animal Rights Committee wrote:

It is clear from public statements made by Mr Peter Costello MP that the Bill is targeted particularly at animal protection groups. The effect of the amendments would be to empower the Australian Competition and Consumer Commission (ACCC) to bring taxpayer funded legal actions against such groups when they seek to educate the public about animal welfare issues. The Committee is of the view that it is inappropriate for the ACCC to institute such proceedings and that the amendments would have a chilling effect on free speech in Australia.²⁵

3.17 Several of these groups recommended that the bill contain a provision exempting public interest campaigning from the section 45D and 45E secondary boycott provisions. The Australian Wildlife Protection Council, the Wilderness Society, Voiceless and Animal Liberation ACT all suggested an amendment to section 45DD(3)(a) that boycotts for ethical or moral purposes.²⁶ Voiceless stated that:

...any expansion in enforcement powers under the Act will increase the risk of litigation against animal protection organisations, unless s45DD is amended to provide a right to conduct a secondary boycott in the interests of animals'.²⁷

3.18 Mr Scott Rogers, a Senior Adviser in the Treasury's Competition and Consumer Policy Division, told the committee that 'it is a matter for government to decide to what extent particular matters are exempt from the substantive provisions'.²⁸

3.19 There does appear to be some confusion as to whether animal rights activists and other advocacy groups could currently be prosecuted under section 45D of the TPA. To test this proposition, Senator Andrew Murray put the following example to Treasury during the committee's public hearing:

Imagine an abortion clinic, which is a small business, with right to lifers protesting outside and acting in concert to hinder or prevent the supply or acquisition of services by that small business. Let me put my prejudices on

24 *Trade Practices Act 1974*

25 NSW Young Lawyers, *Submission 18*, p. 1.

26 Australian Wildlife Protection Council, *Submission 15*, p. 2; The Wilderness Society, *Submission 14*, p. 2; Voiceless, *Submission 10*, p. 4; Animal Liberation ACT, *Submission 21*, p. 3.

27 Voiceless, *Submission 10*, p. 4.

28 Mr Scott Rogers, Senior Advisor, Competition and Consumer Policy Division, Department of the Treasury, *Committee Hansard*, 28 August 2007, p. 63.

the record. I think they should have the right to protest—in the same way as I think people who are for abortion should have the right to protest. That is their right. That is a specific example where, in theory, they could fall into this legislation already, because section 45D already exists, but, in theory, the ACCC could take representative action in that case. What comment do you have with respect to that scenario?²⁹

3.20 Mr Rogers responded:

To the extent that there is any right of action rising in relation to enforcement action by the ACCC—or, indeed, a representative action should the bill proceed—the bill essentially makes no difference to whether that right of action has accrued or not.³⁰

3.21 Senator Bernardi also pursued this context:

Following up on what Senator Murray said, there is a very significant difference between protesting and expressing some disquiet if we go to protesters outside an abortion clinic—or outside any business that they do not like—actually physically preventing people or a third party from doing business with that business itself. There is nothing to prevent protests and there is nothing to prevent people expressing their personal viewpoint, is there?³¹

3.22 Mr Rogers responded: 'I think it would be stretching it to say that a protest reached a level of conduct required to actually amount to a boycott'.³²

3.23 By extension, it appears that animal rights groups campaigning against the mulesing of sheep could not be prosecuted under section 45D provided the court found that the protestors were not hindering or preventing the acquisition of goods. It is important to note that section 45D, which the bill does not amend, has not been the basis for a single prosecution of an animal rights campaigner (see Appendix 3). The committee emphasises that the only change the bill makes is to section 87 of the TPA enabling the ACCC to take representative action in section 45D and 45E cases.

Conclusion

3.24 The committee considers the bill is a logical step in the development of the Trade Practices Act's protection of small business from illegal secondary boycott activity. The ACCC, as the body responsible for prosecuting unions and companies for secondary boycott activities under the provisions of section 45D and 45E, should

29 Senator Andrew Murray, *Committee Hansard*, 28 August 2007, p. 62.

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

31 Senator Cory Bernardi, *Committee Hansard*, 28 August 2007, p. 63.

32 Mr Scott Rogers, Senior Advisor, Competition and Consumer Policy Division, Department of the Treasury, *Committee Hansard*, 28 August 2007, p. 63.

also be able to represent those businesses that have incurred unlawful damages. These businesses will be small businesses, which the ACCC recognises are often underresourced and without the legal knowledge to represent themselves. The committee does not believe it is necessary at this stage to extend court access for section 45D litigants to the Federal Magistrates Court. The immediate need is for small businesses to have access to the resources and expertise of the ACCC in seeking compensation for damages before the Federal Court.

3.25 The committee acknowledges the concerns of animal welfare groups, however on the basis of the evidence available, believes that these fears are unfounded. The bill is solely concerned with empowering the ACCC to take representative action on behalf of parties who have sustained damages from a secondary boycott. Unless animal rights groups—or other advocacy groups not specifically exempted in the legislation—directly hinder or prevent the supply of goods or services, their right to lawfully protest remains fully protected.

Recommendation 1

The committee recommends that the bill be passed.

A handwritten signature in blue ink, appearing to read 'Michael Ronaldson', is written over a light grey rectangular background.

Senator the Hon. Michael Ronaldson

Chair