September 2007

Senate Standing Committee on Economics

Inquiry into Trade Practices Amendment (Small Business Protection) Bill 2007

Supplementary Remarks – Senator Andrew Murray

Secondary boycotts a contentious matter

Provisions relating to secondary boycotts have been part of Australian law under both Labor and Coalition Governments for over 25 years. International jurisdictions (for example, the United States) have very similar provisions in their laws.

Primary boycotts (that is, normal industrial action as part of a dispute) are exempted from the law, unless it affects the movement of goods in and out of Australia.

For the union movement and some members of the community, the secondary boycott provisions of the *Trade Practices Act 1974* (TPA) have long been contentious. 3.6 of the report summarises those opposing arguments well.

In the face of this opposition, the Australian Democrats have remained supporters of section 45D that 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 that is the target of the boycott; and section 45E that prohibits a person from making an agreement with a trade union for the purpose of preventing or hindering the supply or acquisition of goods and services between that person and the target of the boycott.

If an organisation does breach these provisions, innocent third parties can obtain either an injunction to stop the boycott and/or compensation for damage sustained by that party. In addition, if an organisation continues an illegal boycott fines can be imposed upon it.

Protests boycotts and sections 45D and E

The Democrats support the existing exclusions from the purview of the TPA:

- boycotts by consumers or consumer groups;
- boycotts for the purposes of environmental action; and,
- peaceful protesting, including on human rights issues.

These protest actions are all permissible under the law.

Secondary boycotts occur when an organisation (for example, a union or a company) that is in dispute with a second organisation, acts in some way to harm an often unrelated third

party. This can happen where 'sympathy strikes' by other unions against other employers occur in support of a particular union involved in a particular industrial dispute. Secondary boycotts can therefore harm innocent third parties that have done nothing to deserve such treatment.

In 1996, as part of its new Workplace Relations Act, the Government sought to continue the prohibition on secondary boycotts. The Democrats supported that, and negotiated improvements to the Act to ensure that it would operate fairly. Some of the improvements achieved in relation to secondary boycotts were:

- Boycotts by consumers or consumer groups of particular products for any reason (e.g. to protest the human rights stance of a company, or nuclear testing by a country) are excluded from the Act;
- Boycotts for the purposes of environmental protection are exempted from the Act;
- Boycotts about employment-related disputes are exempted from the Trade Practices Act and are dealt with under the Workplace Relations Act;
- Courts must consider whether a dispute could be resolved by the Australian Industrial Relations Commission before making any orders;
- Peaceful protesting is not regarded as boycott activity by the Courts.

At the time, the Australian Greens tried to attack the Democrat improvements to the Act, and made exaggerated and erroneous claims that the law eroded protest rights, but they were wrong. Since their inception no action has been taken under these provisions against any environmental, consumer or human rights group.

New interpretations a danger?

When a bill with similar provisions to the *Trade Practices Amendment (Small Business Protection) Bill* 2007(the Bill) was before the Senate in 2002, I again discussed and again dismissed the possibility that these provisions could be used to stop people protesting about other issues, because such protests would not be regarded as boycott activity by the courts. These would include issues such as protesting about live sheep exports or protesting against logging old growth forests.

The Object of the Act states:

> The object of this Act is to enhance the welfare of Australians through the promotion of competition and fair trading and to make provision for consumer protection.

The purpose of the TPA is clearly to protect competition and consumers; it is not about limiting freedoms of expression or association.

The question is whether new interpretations might constitute a danger. Since 2002 the TPA has been used for some things that some might not have expected. There is the action for misleading and deceptive conduct being brought by Alan Bond against News Limited in relation to an article published in a News Limited paper. The action would traditionally be seen as a defamation action; however it is being taken to test the limits of section 65A of the TPA, which is currently believed to protect media organisations and freelance journalists from liability under the TPA.

That matter has not been decided yet, and the Court's decision on that may give us some indication of the extent to which the TPA can be manipulated to cover matters which were not originally envisaged in the objects of the Act.

This danger of new interpretations is illustrated by a statement by the Treasurer, who, as can be seen below, clearly believes a more expansive view of the TPA can be taken without changing the law at all.

An inflammatory statement

To date the secondary boycott provisions have not in any way stifled environmental, human rights, spiritual, cultural or consumer protest. Rather, they have provided a positive guarantee of the right to protest.

Unfortunately the federal Treasurer decided to upset the applecart. The speech by the Treasurer at the 2007 Pastoralists and Graziers Association of WA Centenary Convention referred to the reforms to the TPA in this Bill.

The part of his speech which of most concern to me was, and I quote:

> Other reforms underway include amendments to enable the ACCC to bring representative actions for breaches of the secondary boycott provisions of the TPA. A secondary boycott involves action by two or more people acting in concert which prevents a third party, such as a potential customer or supplier, from dealing with or doing business with the target. These kinds of boycotts are commonly organised by unions or single issue protest groups. One such campaign has been led by People for the Ethical Treatment of Animals (PETA), who are campaigning for the boycott of Australian wool in protest against mulesing of sheep……
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> You would be aware that the campaign has given rise to legal action by Australian Wool Innovation against a boycott of Australian wool by the PETA. The Government's reforms would enable the ACCC to bring representative actions on behalf of wool growers in cases like this. This would protect Australian farmers from these boycotts.

This statement made me very uneasy. I was and am convinced that this legislation could not be used to prevent legitimate protests of a kind well established historically, on issues that deeply concern our community or sections of it.

Was the Treasurer saying that a future pliant ACCC head, appointed under the Australian patronage system,[1] with funding provided for that specific purpose by a Government, could harass democratic protest with threatened or actual legal action?

I think this example may be reaching a yard too far, but for arguments sake, if, as the Treasurer was saying in that statement, the TPA can be used to stop people protesting about mulesing, then is there any reason to believe it could not be extended to Right to Life

[1] The Coalition Government has rejected dozens of Democrat amendments calling for appointments on merit against set criteria.

protestors running a boycott action against an abortion clinic that is operated as a small business?
Under the federal Treasurer's inference, Right to Life protestors would be inhibiting a small business from conducting its business as well as impacting on consumers who are trying to utilise the services of the abortion clinic.

So, under the federal Treasurer's inference, this legislation could impact on people's right to protest on or boycott businesses engaged in mulesing or abortion.

Perhaps the Treasurer realised he had gone too far. There is no mention in the Treasurer's second reading speech of this use of the legislation to stop protest action against mulesing. However, you have to ask yourself, if the court is looking at extraneous material for interpretative purposes, would they look to his statements in the speech to the Pastoralists & Graziers' Association and accept that the responsible Minister says that this is a use to which Section 45 of the TPA could be put?

Because this matter has now been distorted by the Treasurer's comments, the precautionary principle requires amendments or a legislative note to make it crystal clear that section 45 has not changed in character and does not inhibit people's freedom of expression or association, whether that is by way of boycotting certain products as a form of protest, or physically protesting about them.

Recommendation 1: That an amendment or legislative note be constructed to make it clear that section 45 does not inhibit freedom of expression or association, or the freedom for consumers to protest on issues, or boycott products, whether or not they impact on trade or commerce.

Representative actions

These provisions in the *Trade Practices Amendment (Small Business Protection) Bill* 2007are misnamed 'small business protection'. It would be more appropriate to call this bill, 'ACCC representative actions', because that reflects the actual content of the bill.

The purpose of the bill is to enable the ACCC to bring representative actions on behalf of people damaged by conduct in breach of the sections 45D and 45E, the secondary boycott provisions of the TPA.

There are already restricted provisions in the TPA to take representative action under the *Federal Court of Australia Act*. These two section 45 provisions are presently excluded from the provisions of section 87 of the TPA which allows the ACCC to bring representative actions in respect of contraventions of Part IV of the TPA, which governs these areas. This bill will remove that exclusion.

According to the Explanatory Memorandum the Bill proposes to give small businesses and individuals access to representative action with respect to Section 45. The wording of the bill does not limit itself to just representing small business. As the bill is currently constructed the ACCC could take action against unions on behalf of big business at public cost.

The Australian Law Reform Commission first recommended giving the ACCC the power to take representative action on behalf of people and businesses in 1994. The Reid[2] and Baird[3] Committees supported this measure. Although this is the Coalition's fifth attempt to introduce representative action powers since 1998, with the exception of section 45 the Coalition succeeded with respect to the rest of the Act in 2001.

The Democrats have long supported giving weak parties, such as individuals and small business, better access to justice through the device of representative action. Of course, neither this Bill nor previous bills limited representative action to small business and individuals. As I said earlier, although considered unlikely, both with this Bill and previous bills, their provisions allowed the ACCC to take action against unions at public cost, on behalf of big business.

Business should not look to the Australian Consumer and Competition Commission to initiate or fund actions against unions that do not involve competition issues. The Democrats have previously rejected attempts to change the law to allow the ACCC to do this.

The Democrats had held that if a business wished to take legal action against those undertaking secondary boycotts, then the business should pay for it, not the taxpayer. Since the ACCC's inception and under Mr Fels, it had been the view of the ACCC that business must fund its own actions in this regard.

That may not be as big an issue as some think. As some submissions show, under the TPA the ACCC can pursue representative actions in relation to several other sections of the Act, but as pointed out in several submissions (in particular from Associate Professor Zumbo) the ACCC has shown itself wary of taking representative actions in the past, where it already has the capacity to do so. So on past practice there is perhaps little reason to believe that the ACCC will fully embrace the opportunity to take representative actions as provided in this new bill.

The ACCC's record of actually mounting these actions is extremely limited. The ACCC seldom takes representative actions and often does not seek findings of fact to allow others to use successful ACCC action. It is not a matter of resources but of practical issues. It is questionable therefore whether extending the right to take representative actions to sections 45D and 45E will mean that the ACCC will utilise taxpayers' funds to do just that. History would suggest that it won't.

In the second reading speech the Treasurer stated that ACCC would take into consideration a number of factors in determining whether it would bring a representative action, including whether those affected had sufficient resources to bring actions themselves. He said *"these reforms will be of particular benefit to Australian small businesses that often do not have either the time or resources to commence legal action."*

Although the Treasurer says this, it is not reflected in the wording of the legislation. If the Treasurer was serious about this section just protecting small business then a definition of

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[2] House of Representatives Standing Committee on Industry, Science and technology, *Finding a balance: towards fair trading in Australia,* May 1997, p. 133.

[3] Joint Select Committee on the Retailing sector, *Fair Market or Market Failure? A Review of the Australian Retailing Sector,* August 1999.

small business, or the types of business on whose behalf the ACCC could take action, would be identified in the legislation.

Recommendation 2: This representative action is applicable only for small business and individuals; and, a small business is to be defined as one with a $5 million asset base or one that employs less than 20 people.

The bill will put a small business on a par with larger businesses in terms of access to justice, and that is a virtue of the bill. Having the ACCC represent individuals and small businesses would overcome size and resource constraints, improving effective access to an existing law for the very few - numbering on one hand - who might be expected to take advantage of the new law.

On the grounds of access to justice, there is attraction in the idea of a representative action power but there is little real identified need. I accept that the bill may result in some deterrent effect. Overall the bill is of low policy but high symbolic significance - it is what I would call a high totemic issue for the Coalition Government.

The Federal Magistrates Court

The evidence is that if the ACCC gets the power that is in the Bill small business should really not expect much from it. Of much greater use would be the suggestion proposed in the Senate Small Business TPA report (see below), where action for both the breach and damages should be able to be taken in Federal Magistrates Court.[4] Give the ACCC and private litigants the power to go to the Magistrates Court - and not just in secondary boycotts but all the relevant competition provisions.

In that Senate report the Committee recommended:

> **Recommendation 17**
> The Committee recommends that the jurisdiction of the Federal Magistrates Court be extended to enable it to deal with Misuse of Market Power (s.46 and s.46A where cases rely upon s.83), Contravention of Industry Codes (s. 51AD) and Unconscionable Conduct (Part IVA).

That recommendation was supported by the Government Senators on the Committee, so it is unclear why that recommendation has not been included in this legislation.

Such an amendment would enable small business or individuals to access lower and cheaper courts, which could act in tandem with the provisions for the ACCC to take representative actions.

With regard to the specific question of whether or not both ACCC representative actions and access to the Federal Magistrates Court should be available to small business, the Committee received the following letter from COSBOA:

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[4] The March 2004 Senate Economics Committee Report on *The effectiveness of the Trade Practices Act 1974 in protecting small business*.

> **Response to the Chair of the Senate Inquiry into the Provisions of the Trade Practices Amendment (Small Business Protection) Bill 2007**
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> There are two issues: one being the Bill as tabled giving the ACCC the right to take representative action in these sections, the other being access by private litigants to take action in a lower and cheaper court.
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> We feel there is a case for both.
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> We would not like to see the bill held up but we do see a need for the Parliament to be made aware that the ACCC rarely takes up its option to take representative actions.
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> The submission by Frank Zumbo has the right idea but does not split the two issues.
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> 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.[5]

COSBOA is not the only small business organisation that agrees with this approach. As Associate Professor Frank Zumbo noted in evidence to the Committee in November 2003:

> If you extrapolate that out into a federal magistrates context, where there is an emphasis on alternative dispute resolution such as mediation, we are comforted that there would be a low-cost and user-friendly forum where these players can get together at a minimal cost. In many cases it may not be a technical issue about what 'unconscionable' means that is causing the problem but, rather, a communication breakdown between the parties. That facilitates that, and often you will not see endless appeals in those cases, because the parties are often close in terms of bargaining power or, if they are not, the issues are best dealt with in that forum anyway. These are ongoing relationships. These are contractual relationships where the parties have an interest in continuing their good relations. We believe that that is a great, low-cost forum to deal with these issues expeditiously.[6]

The Committee should have supported the unanimous recommendation of the 2004 Committee. I will therefore repeat that recommendation:

Recommendation 3: That Recommendation 17 of the March 2004 Senate Economics Committee Report extending the jurisdiction of the Federal Magistrates Court, be included in this Bill.

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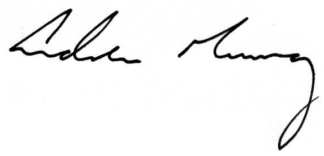
5 Tony Steven, CEO Council of Small Business of Australia, *Correspondence*, 30 August 2007.

6 Associate Professor Frank Zumbo, *Committee Hansard*, 7 November 2003, p. 50.

Conclusion

In conclusion, the Democrats will support this Bill if Recommendations 1 and 2 are acted on.



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