

The Senate

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Standing Committee on Economics

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Trade Practices Amendment (Small Business  
Protection) Bill 2007 [Provisions]

September 2007

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# Senate Standing Committee on Economics

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# Chapter 1

## Introduction

### Background

1.1 The Trade Practices Amendment (Small Business Protection) Bill 2007 was introduced into the House of Representatives on 15 August 2007 and into the Senate the following day. The bill was referred to the Senate Standing Committee on Economics for report by 5 September 2007.

### Conduct of the inquiry

1.3 The committee advertised the inquiry in the *Australian* newspaper on 21 June 2007 and invited written submissions by 24 August 2007. Details of the inquiry were placed on the committee's website. The committee also wrote to a number of organisations and stakeholder groups inviting written submissions.

1.4 The committee received 22 submissions. These are listed in Appendix 1. A public hearing was held in Adelaide on 28 July 2007, at which Treasury gave evidence by teleconference. Witnesses who presented evidence at this hearing are listed in Appendix 2.

1.5 The committee thanks those who participated in this inquiry.



## 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.<sup>1</sup>

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.<sup>2</sup> 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.<sup>3</sup> 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.

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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.<sup>4</sup>

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.<sup>5</sup>

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.<sup>6</sup>

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.<sup>7</sup>

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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.

## 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.<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup>

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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.<sup>4</sup> Nonetheless, COSBOA noted that small business still has to provide the ACCC with the necessary paperwork to successfully pursue its case.<sup>5</sup>

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.<sup>6</sup> 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.<sup>7</sup> 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'.<sup>8</sup> 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.<sup>9</sup> Its effect 'would be to empower the ACCC to use taxpayer funds to pursue a trade union for damages...on behalf of large corporations'.<sup>10</sup> 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

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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.<sup>11</sup>

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.<sup>12</sup>

### **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.<sup>13</sup>

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

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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.<sup>14</sup>

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.<sup>15</sup> 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.<sup>16</sup>

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.<sup>17</sup> 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.<sup>18</sup>

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.<sup>19</sup> 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

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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.<sup>20</sup>

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.<sup>21</sup>

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.<sup>22</sup> 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.<sup>23</sup> 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.

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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](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](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'.<sup>24</sup> 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.<sup>25</sup>

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.<sup>26</sup> 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'.<sup>27</sup>

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'.<sup>28</sup>

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

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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?<sup>29</sup>

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.<sup>30</sup>

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?<sup>31</sup>

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'.<sup>32</sup>

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

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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, consisting of a large, sweeping initial 'M' followed by a series of connected loops and a final horizontal stroke ending in a small dot.

Senator the Hon. Michael Ronaldson

Chair

**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.....

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,<sup>1</sup> 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

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<sup>1</sup> 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 2007* are 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<sup>2</sup> and Baird<sup>3</sup> 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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<sup>2</sup> House of Representatives Standing Committee on Industry, Science and technology, *Finding a balance: towards fair trading in Australia*, May 1997, p. 133.

<sup>3</sup> 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.<sup>4</sup> 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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<sup>4</sup> 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**

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.

We feel there is a case for both.

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.

The submission by Frank Zumbo has the right idea but does not split the two issues.

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.<sup>5</sup>

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.<sup>6</sup>

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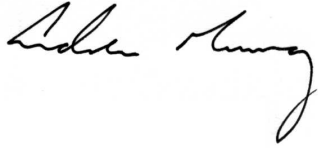
<sup>5</sup> Tony Steven, CEO Council of Small Business of Australia, *Correspondence*, 30 August 2007.

<sup>6</sup> 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.

A handwritten signature in black ink, appearing to read "Andrew Murray". The signature is written in a cursive style with a large, sweeping flourish at the end.

**Senator Andrew Murray**  
**Australian Democrats**  
**Senator for Western Australia**

## Dissenting Report by The Australian Greens

The Australian Greens do not support this Bill. We oppose the secondary boycott provisions in the *Trade Practices Act* and as such cannot support the creation of new means for persons to access redress for breaches of those provisions.

We understand that the proposed amendments do not amend the cause of action under sections 45D and 45E of the *Trade Practices Act* but rather facilitate the ACCC taking action on behalf of affected persons for injury caused by a breach of those provisions. In general, we support representative actions, however, we do not believe it is the proper role of the ACCC to take action of the nature facilitated by the proposed amendments.

The *Trade Practices Act* and the ACCC are primarily concerned with consumer protection and competition law. The secondary boycott provisions in the Act are an anomaly and are primarily aimed at the activities of trade unions and their members. We agree with the ACTU when they say that:

the appropriate regulatory regime for trade union activity is the workplace relations regime, not the competition laws. The Australian Industrial Relations Commission (AIRC) is the appropriate specialist regulator. Importantly its approach to industrial disputation has traditionally involved resolution of the underlying dispute whilst preserving the ongoing relationship between industrial parties.<sup>1</sup>

We also note the comments of the AMWU that that the International Labor Organisation has found the secondary boycott provisions inconsistent with Australia's obligations in relation to freedom of association. The AMWU also notes that the Senate has on numerous occasions in the past refused to pass Bills that have sought to enable the ACCC to pursue representative actions for contravention of section 45D and 45E.<sup>2</sup>

We do not believe it is the proper or appropriate role of the ACCC to be able to bring representative action for breaches of the section 45D or 45E.

It is even more worrying for the Greens that the Treasurer advocates for these amendments citing the activities of animal welfare activists. The explicitly stated intention on the part of the Treasurer that these provisions should be used against citizen activists protesting what they believe to be unethical or immoral practices is of great concern.

We note the numerous submissions received by the Committee from activists worried about the effect of this Bill on their legitimate rights of protest. We have a great deal of sympathy for their views.

In his submission, Associate Professor Frank Zumbo highlights another concerning aspect to this Bill. Professor Zumbo submits that the ACCC rarely undertakes representative action given they are very expensive and cumbersome to run and "because they involve the use of

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<sup>1</sup> Submission of ACTU, *Submission 22*, p. 2.

<sup>2</sup> Submission of AMWU, *Submission 13*.

public money to fund what is essentially private litigation on behalf of private individuals or entities.”<sup>3</sup> In his view the ACCC would be even more unlikely to take on representative actions for breaches of section 45D or 45E. Given it is unlikely these amendments will be utilised by the ACCC, their main objective seems to be intimidating citizen activists into not protesting or organising campaigns which may affect a business.

It is this aspect of the Bill the Greens find particularly objectionable. Business interests must be able to exist in a robust democracy. Citizens exercising their rights of freedom of speech and freedom of association should not be able to be pursued by the Government on behalf of business.

We note the comments of Animal Liberation ACT:

There is no public good being furthered by this legislation. It is the job of the ACCC to ensure that the market is not corrupted by unscrupulous business practices. In doing that the whole community benefits, we enjoy a fair market place where all have the potential to benefit based on the merit of what they have to offer, a worthy use of public money for a public good. It is not the job of the ACCC to stymie public debate with the threat of a law suit....One ought to be able to take a stand on any particular issue without fear that public money will be used to silence them. ...If anyone acts tortiously towards another we have a legal system and a range of remedies that individual can use if they believe they have been wronged. This is appropriate and reasonable; using public monies to trample the rights of sections of the community is not.<sup>4</sup>

The Government argues the Bill is to benefit small business, however, it is important to recognise that the proposed amendments in the Bill in no way limit the application of the provisions to small business, however defined. Again we believe this failure for the Bill to reflect the Government’s rhetoric indicates its primary purpose is intimidation of citizens wishing to exercise their democratic rights. It is extraordinary to even consider the possibility of the ACCC taking legal action on behalf of multi-million dollar businesses against citizens protesting on moral grounds, yet that is what this Bill contemplates.

We support, in general, the protection of small businesses from anti-competitive behaviour. However, the secondary boycott provisions do not relate in our view to anti-competitive behaviour but rather are an infringement on the democratic rights of citizens to freedom of speech and freedom of association.

We note the suggestion to restrict the proposed amendments to small business. We do not support that approach given our position on section 45D and 45E expressed above. We also note the suggestions for an amendment to the secondary boycott provisions, specifically section 45DD, to provide for a clear broader exemption for public interest campaigning.<sup>5</sup> While such an amendment would improve on the current situation it does not address our primary concern with the secondary boycott provisions and the Australian Greens will be opposing the Bill in its current form.

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<sup>3</sup> Submission of Associate Professor Frank Zumbo, *Submission 20*, p. 2.

<sup>4</sup> Submission by Animal Liberation ACT, *Submission 21*, p. 2.

<sup>5</sup> See Submission by Consumer Action Law Center, *Submission 12*, and Submission by Animal Liberation ACT, *Submission 21*.

**Senator Rachel Siewert**  
**Australian Greens**  
**Senator for Western Australia**



# APPENDIX 1

## Submissions Received

<b>Submission Number</b>	<b>Submitter</b>
1	Ms Naomi Henry
2	Mr Richard Bulmer
3	Ms Julie Jordan
4	Mark Berriman
5	Ms Amber Hedcock
6	Ms Sharon Hutchings
7	Ms Pam Ahern
8	Mr Thomas Morley
9	Management Committee of Animal Liberation Inc. SA
10	Voiceless
11	NSW Young Lawyers Animal Rights Committee
12	Consumer Action Law Centre
13	Australian Manufacturing Workers' Union (AMWU)
14	The Wilderness Society
15	Australian Wildlife Protection Council Inc.
16	Ms Pamela Fioretti
17	Ms Patricia Abbott
18	NSW Young Lawyers
19	Council of Small Business Organisations of Australia Ltd. (COSBOA)
20	Associate Professor Frank Zumbo
21	Animal Liberation ACT
22	Australian Council of Trade Unions (ACTU)
23	Mrs W Parsons
24	Voiceless

## **Additional Information Received**

- Response to the Chair for Public Hearing held in Adelaide on 28 August 2007 from Mr Tony Steven, Chief Executive Officer of Council of Small Business of Australia (COSBOA)

## **APPENDIX 2**

### **Public Hearing and Witnesses**

**TUESDAY, 28 JULY 2007 - ADELAIDE**

BOWTELL, Ms Cath, Senior Industrial Officer  
Australian Council of Trade Unions

BURROW, Ms Sharan, President  
Australian Council of Trade Unions

LIN, Ms Cheryl, Policy Analyst  
Department of the Treasury

ROGERS, Mr Scott, Senior Adviser, Competition and Consumer Policy Division  
Department of the Treasury

STEVEN, Mr Tony, Chief Executive Officer  
Council of Small Business Organisations of Australia Ltd





## **APPENDIX 3**

### **ACCC court cases on sections 45D & 45E, 1997 - 2007**

- Correspondence from Mr Brian Cassidy, Chief Executive Officer, Australian Competition Consumer Commission to Mr Peter Hallahan, Secretary, Senate Standing Committee on Economics, 30 August 2007.

<b>Case/Matter</b>	<b>Other Party</b>	<b>Section</b>	<b>Breach</b>	<b>Outcome</b>	<b>Media release</b>	<b>Filing Date</b>	<b>Conclusion</b>
<u>ACCC v TWU</u>	Transport Worker's Union of Australia (QLD Branch)	45D 45E	Secondary boycott conduct against a number of smaller companies in Qld, which had not entered into enterprise bargaining arrangements with TWU.	Consent orders, injunctions, compliance program, and contribution to ACCC's costs.	MR 102/97	22.08.97	13.08.98
<u>ACCC v TWU</u>	Transport Worker's Union of Australia (QLD Branch)	45D 45E	Secondary boycott conduct against transport companies whose drivers were not financial members of the TWU.	Consent orders, injunctions, compliance program, and contribution to ACCC's costs.	MR 167/97	12.12.97	13.08.98
<u>ACCC v CFMEU</u>	Construction Forestry Mining and Energy Union	45D	CFMEU hindering Collie Crane Hire and other crane hire businesses within WA from supplying services to C because C refused to sign its employees and sub-contractors to an EBA put forward by CFMEU.	Consent orders including undertakings and \$15,000 towards ACCC's costs. CFMEU also agreed to pay \$29,087.89 to ACCC on behalf of Western Portables by way of reimbursement of costs incurred by Western Portables.	MR 115/99 MR 170/97	15.12.97	02.07.99
<u>ACCC v CEPU</u>	<u>Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia</u>	45D	Number of contraventions of secondary boycott provisions of TPA, occurring between 11/97 and 2/98.	Consent orders gained restraining union from engaging in secondary boycott to exclude contractors from fire protection industry.	MR 049/98 MR 188/98	18.03.98	13.10.98
<u>ACCC v MUA</u>	Maritime Union of Australia	45D 45E	MUA acting in concert with International Transport Workers Federation– International Boycott Action	Patrick's to pay \$7.5m compensation and MUA gave undertakings for 2 years.	MR 166/98	22.05.98	03.09.98
<u>BLF (QLD Branch)</u>	Builders Labourers Federation (QLD Branch)	45D 45E	BLF agreed to restrict access to a building site for Quality Concrete Constructions.	87B undertaking accepted that the conduct of that type would not continue, that those who assisted the ACCC would not be discriminated against & that BLF will implement a TPCP.	MR 120/00	N/A	17.05.00

Case/Matter	Other Party	Section	Breach	Outcome	Media release	Filing Date	Conclusion
<u>ACCC v AMWU &amp; AWU &amp; CEPU and Ors</u>	1. Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union2. Australian Workers' Union3. Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia	45D	Secondary boycott: maintenance of a picket at the construction site of the Patricia Baleen gas plant (Victoria) obstructing construction workers and vehicles delivering materials from entering.	Consent orders: Declarations; Injunctions; Other orders - Each Respondent to implement compliance program and publicise the orders. Penalties (\$100,000 for each respondent.	MR101/03 MR 075/04	16.05.03	30.04.04
<u>ACCC v Showmen's Guild of Australasia &amp; Ors</u>	Showmen's Guild of Australasia; Lewis Osborne; James Marshall; Marshall Amusements Pty Ltd; Peter Short; Spy Amusements Pty Ltd; George Pink, Aaron Pink, Broderick Pavier, Doreen Brown, and Yvonne Seymour.	45D 45E	On three occasions the Showmen's Guild, certain individual members and their affiliated corporations agreed not to supply amusement services to the independent organisers of the amusement areas of those events.	Declarations as to breach of section 45, injunctions for a period of 5 years, costs and court enforceable undertaking.	MR 014/04 MR 100/06	19.02.04	10.05.06
<u>ACCC v CFMEU and Ors</u>	1. Construction Forestry Mining & Energy Union (CFMEU)	45D 45E	Alleged secondary boycott - Canberra building industry. It is alleged that in April 2003 BLL wrongly terminated the supply	In litigation Federal Court	MR 192/06	23.08.06	Ongoing - hearing September 07

Case/Matter	Other Party	Section	Breach	Outcome	Media release	Filing Date	Conclusion
	2. BLL		contract between BLL and Bemmar after reaching and arrangement or understanding with the CFMEU, in breach of section 45E.				
<u>ACCC v Edison Mission Operation &amp; Maintenance Loy Yang Pty Ltd</u>	1. Edison Mission Operation & Maintenance 2 Loy Yang Pty Ltd	45D 45E	In August 2001 Edison Mission Yang Pty Ltd allegedly entered into an agreement with the CEPU to allow only employees who are governed by the NECCIA to work at the Long Yang B Power station and are with the CEPU. Stopped acquiring services from DJN Electrical as a result.	In rejecting the union appeal, the Full Federal Court upheld the penalty of \$125 000 imposed by the trial judge noting that: "had the matter been open to us to review... we would observe the penalty was at the lower end of the range for behaviour of the kind in which the CEPU engaged.	MR 023/05 MR 032/07 MR 222/07	07.02.05	17.08.07
<u>ACCC v CFMEU and Ors</u>	1. Construction Forestry Mining & Energy Union (CFMEU) 2. Construction Forestry Mining and Energy Union of Workers (CFMEUW) 3. Mr Joseph McDonald 4. Mr Michael Buchan 5. Mr Michael Powell	45D(1) 45E	secondary boycott: hindering or preventing the supply of goods or services by third parties to Doric Constructions Pty Ltd at the then Holiday Inn construction site in Burswood, Western Australia	Consent orders: 1st R \$50 000 penalty, implement a trade practices compliance program, publish a notice to members detailing the substance of the court orders; 2nd R \$50 000 penalty, implement a trade practices compliance program	MR 288/05 MR 305/06	24.11.05	12.12.06
<u>ACCC v Knight and Ross</u>	1. John Lincoln Knight 2. Iain Kenneth Ross	45D	Alleged secondary boycott by Adelaide cardio thoracic surgeons hindering or preventing another surgeon from providing services at a private hospital.	Court outcome did not include findings of breach of s45D.	MR 028/07	05.02.07	05.07.07

**Correspondence from Mr Brian Cassidy, Chief Executive Officer, Australian Competition Consumer Commission to Mr Peter Hallahan, Secretary, Senate Standing Committee on Economics, 30 August 2007.**