

Senate Economics Committee

**Inquiry into the Provisions of the  
*Trade Practices Amendment  
(Small Business Protection) Bill  
2007***

**Submission  
By**

**Associate Professor  
Frank Zumbo**

**School of Business Law and Taxation  
University of New South Wales**

**August 2007**

---

This submission deals with the *Trade Practices Amendment (Small Business Protection) Bill 2007*. In doing so, the submission will outline why the Bill is an inefficient and ineffective way of dealing with the very real problems faced by small businesses and others private parties in seeking to recover any loss or damage they may suffer as a result of a breach of the competition provisions of the *Trade Practices Act*.

From the outset, it must be clearly noted that the Bill does not create any new offences under the *Trade Practices Act*. In this regard, the Bill does not operate to prohibit secondary boycotts as these are already prohibited under the *Trades Practices Act*. The Bill does no more than to seek to provide for the *theoretical* possibility that the ACCC may consider bringing a representative action on behalf of those private parties who may have suffered loss or damage from breaches of the secondary boycott provisions of the *Trade Practices Act*. In practice, however, the ACCC almost never brings representative actions. A search of trade practices cases reveals that less than a handful of representative actions have been taken by the ACCC and none of the cases found relate to breaches of the competition law provisions of the *Trade Practices Act*.

ACCC representative actions are very expensive and cumbersome to run, and because they involve the use of public money to fund what is essentially private litigation on behalf of private individuals or entities, the ACCC has shown considerable reluctance to bring representative actions, especially given the imperative to use scarce litigation money carefully and effectively. Indeed, given that the ACCC has budgetary constraints on its litigation funds, any money it may use on a representative action to recover any private losses is money that the ACCC cannot use elsewhere to bring legal action to stop anti-competitive conduct or other breaches of the *Trade Practices Act*. The ACCC does not have unlimited litigation funds and, as a result, it needs to prioritize the use of those funds. In practice, therefore, the ACCC very rarely brings representative actions and has only done so in what appears to be less than a handful of cases none of which relate to the competition provisions of the *Trade Practices Act*.

This lack of ACCC representative actions in relation to breaches of the competition provisions of the *Trade Practices Act* is especially noteworthy as the secondary boycott provisions are part of those competition provisions and a lack of ACCC representative actions in relation to breaches of the competition provisions provides very valuable insights regarding this Bill. Thus, if the ACCC has been unable or not in a position to bring representative actions for other breaches of the competition provisions of the *Trade Practices Act*, then the question that needs to be asked is what evidence is available that the ACCC will in fact bring representative actions in relation to secondary boycotts as provided for in this Bill. This is a very important question on the basis that if there has been a lack of ACCC representative actions for other breaches of the competition provisions of the *Trade Practices Act*, then that represents very compelling evidence that there will be a similar lack of ACCC representative actions in relation to secondary boycotts.

In other words, the ACCC will, except in quite exceptional circumstances, find it extremely difficult to justify the use of scarce public money to fund the recover of private losses by private parties as would be the case with ACCC representative actions. This is particularly so as these private parties are already able to bring their own legal proceedings to recover their private losses from breaches of the competition and other provisions of the *Trade Practices Act*. Private parties can already rely on s 83 findings of fact from a successful ACCC prosecution to commence action in the Federal Court to recover their private losses. While such Federal Court actions may be expensive to run, this cost issue could easily be addressed by amending the *Trade Practices Act* to allow private parties to access the Federal Magistrates Court to recover losses from breaches of the competition provisions of the *Trade Practices Act*. Currently, private parties such as consumers, small businesses and farmers are not able to access the Federal Magistrates Court in relation to breaches of the competition provisions of the *Trade Practices Act*.

Amending the *Trade Practices Act* to allow private parties to access the Federal Magistrates Court to recover losses from breaches of the competition provisions of the *Trade Practices Act* would be of much more practical benefit to consumers, small business and farmers in seeking to recover their losses from anti-competitive conduct than would ever be the case under this Bill. In fact, consumers, small business and farmers would get no benefit from the Bill if the ACCC did not bring any representative actions in relation to secondary boycotts. Thus, unlike the proposal in this Bill, amending the *Trade Practices Act* to give private parties access to the Federal Magistrates Court to recover losses from breaches of the competition provisions of the *Trade Practices Act* would be a very efficient and effective way to allow consumers, small business and farmers to recover any losses from anti-competitive conduct.

Allowing consumers, small businesses, farmers and other affected parties access to the Federal Magistrates Court to recover any losses from anti-competitive conduct would empower these parties to recover those losses in a timely and cost effective manner in contrast to trying to rely on the ACCC to bring representative actions or to try and secure ACCC agreement to pursue a representative action. Self-help and self-empowerment must surely be encouraged and facilitated wherever possible and must surely be preferable to a situation where parties are left to rely on a public agency like the ACCC with scarce public funds to try and recover private losses. Importantly, allowing access to the Federal Magistrates Court for breaches of the competition provisions of the *Trade Practices Act* would require only a very minor amendment to s 86(1A) of the *Trade Practices Act* and I would urge the Committee to consider making such a recommendation in the best interests of consumers, small businesses, farmers and other parties that may suffer losses from anti-competitive conduct.