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27 August, 2007

Mr P. Hallahan
Committee Secretary
Senate Economics Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600
Australia
Email: economics.sen@aph.gov.au

Dear Mr Hallahan,

Re: **Trade Practices Amendment (Small Business Protection) Bill 2007**

The ACTU welcomes the opportunity to make a submission to this Inquiry. As we understand it this Bill will empower the Australian Competition and Consumer Commission (ACCC) to bring representative actions on behalf of persons who have suffered, or are likely to suffer, loss or damage as a result of activity that is in breach of the secondary boycott provisions under Sections 45D and 45E of the Trade Practices Act 1974. This proposal has been rejected by the Parliament on numerous occasions, most recently in 2003.

The ACTU opposes the Bill on the following grounds:

(1) We believe there is a role for representative actions in a range of areas of law to ensure the enforcement of legitimate legal rights and remedies on behalf of persons for whom legal action is otherwise inaccessible. Representative actions overcome the financial barriers which ordinary people face when seeking to enforce their legitimate legal rights. However, the ACTU has long opposed s.45D-s.45E of the Trade Practices Act. Given our view that these provisions should be repealed, we do not support the creation of new avenues for redressing inappropriate laws.

To be clear, the ACTU view is that 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.

(2) The WRA provides remedies where industrial action by employees or trade union activity prevents or hinders a third party from supplying or acquiring goods and services from another person. In the period since this proposal was last rejected by the Parliament the Workplace Relations Act has been amended to enhance the powers of the AIRC to prevent industrial action that has, or is likely to have an affect on a third party, and the penalties for breach have been increased. The AIRC has wide powers and enforcement capacity. We expand on this point below. To the extent that a case is made for regulation of industrial or union action beyond that currently in the WRA, it should be enacted by amending the WRA.

(3) Putting to one side our opposition to s45D-s45E of the TPA, empowering the ACCC to seek damages will have no additional effect on behaviour. The civil penalties under the Trade Practices Act are a powerful deterrant to unlawful behaviour. Empowering the ACCC to pursue damages will simply enable the regulator to pursue trade unions and other community organistaions engaged in protest activity, even where the person allegedly affected by the activity has chosen not to sue.

(4) No evidence has been presented justifying the Bill. The recommendation to introduce representative actions arose in a report Australian Law Reform Commission from 1994.[1] That report did not address the industrial relations implications of the introduction of representative actions.

(5) While the title of the Bill, and the Explanatory Memorandum suggests that the Bill is directed at representative actions on behalf of small businesses that cannot otherwise fund litigation, this is completely misleading. The Bill is not concerned with small business, and its effect would be to empower the ACCC to use taxpayer funds to pursue a trade union for damages where its members have withheld their labour, on behalf of large corporations. As Senator Conroy noted in debate upon an identical proposal in 2003:

> *The deceptive title of this bill tries to suggest that its contents are focused on protecting small business. This allows the government to wax lyrical on small business and to disguise the true nature of this bill. In truth, the changes presented by this bill are not aimed at small business. The bill contains no definition of small business and does not limit the ACCC to a particular class of business in bringing representative actions. It is quite Orwellian in the way it has been designed. You give it a*

[1] Australian Law Reform Commission 1994. ALRC 68. Compliance With The Trade Practices Act 1974

heading and you call it `small business protection', then you do not actually talk about small business, define small business and confine the bill to small business. It is an Orwellian proposal.[2]

2005 amendments to the WRA

Since this proposal was last rejected by the Parliament the regime governing industrial action has been significantly amended.

The ACTU is on record as opposing the amendments to the *Workplace Relations Act 1996* made by the *Workplace Relations Amendment (WorkChoices) Act 2005.* Nonetheless the Committee should be aware that the WRA now contains a number of provisions ensure that industrial action that is harming a third party will not continue, and which reinforce our view that s45D and 45E of the Trade Practices Act should be repealed. These include:

- Section 496 which requires that, where unprotected action is being organised, threatened, impending or probable, or is happening, the Commission must make an order that the industrial action stop or not occur. Applications for orders may be made by any person likely to be affected, and orders, or if not interim orders, must be made within 48 hours. A breach of an AIRC order can result in 12 months jail. (WRA s 814(3)).

- Section 436 which provides that engaging in industrial action in relation to a proposed collective agreement is not protected action if it is to support or advance claims to include prohibited content in the agreement. Note that prohibited content includes any action taken in support of a workplace agreement that restricts the engagement of independent contractors and requirements relating to the conditions of their engagement; or restricts the engagement of labour hire workers, or imposes requirements relating to the conditions of their engagement, imposed on an entity or person for whom the labour hire worker performs work under a contract with a labour hire agency.

- Section 438 which provides that industrial action is not protected action if:

  (a) it is engaged in concert with one or more persons who are not protected persons for the industrial action; or
  (b) it is organised other than solely by one or more protected persons for the industrial action.

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2 Trade Practices Amendment (Small Business Protection) Bill 2002 [No. 2] Second Reading Senate Hansard 3 March 2002

- Section 433 which provides that, upon the application of either the Minister, or a third party directly affected by the industrial action (other than a negotiating party) the AIRC must suspend the bargaining period (and hence render any ongoing action unprotected), if the AIRC considers that the action is threatening to cause significant harm to any person (other than a negotiating party), and it would not otherwise be contrary to the public interest. The Commission may have regard to:

  - the extent to which the person is particularly vulnerable to the effects of the action;
  - the extent to which the action threatens to:

    (i) damage the ongoing viability of a business carried on by the person; or

    (ii) disrupt the supply of goods or services to a business carried on by the person; or

    (iii) reduce the person's capacity to fulfil a contractual obligation; or

    (iv) cause other economic loss to the person.

Conclusion

The ACTU calls on the Committee to recommend that the Bill be rejected. We are available to appear before the Committee should you have any questions regarding this submission.

Yours sincerely,

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