

CHAPTER 3

SCHEDULE 3—COLLECTIVE BARGAINING

Introduction

3.1 The *Trade Practices Act 1974* (TPA) places significant constraints on the extent to which a corporation may engage in collective bargaining.

3.2 Section 45 prohibits a corporation from making a contract or arrangement, or arriving at an understanding that contains an exclusionary provision or has the purpose, or would have or be likely to have the effect, of substantially lessening competition. Under section 45A, price-fixing arrangements are deemed to have the purpose, or effect or likely effect, of substantially lessening competition and thus contravene the prohibition in section 45.¹

3.3 Section 51(2)(a) allows trade unions to engage in collective bargaining regarding remuneration, conditions of employment, hours of work or working conditions of employees.

3.4 The ACCC may authorise collective bargaining under sections 88 and 90 where it is satisfied that the public benefit of the bargaining arrangement will outweigh any potential anti-competitive effect.

3.5 The Dawson Review considered that collective bargaining by small businesses could have a pro-competitive effect and said in this regard that:

In some industries a number of competing small businesses must bargain with big business. Individually, the small businesses may lack bargaining power and so may seek to join together and bargain collectively, thereby exercising a degree of countervailing power to that of big business. Collective bargaining at one level may lessen competition but, at another level, provided that the countervailing power is not excessive, it may be in the public interest to enable small business to negotiate more effectively with big business.²

3.6 The Review recommended that a more streamlined, faster and simpler notification process should be available to small businesses to enable them to engage in collective bargaining with big businesses where this would generate a public

1 A limited exception is made in section 45A for joint ventures and joint buying groups although the competition test in section 45 still applies.

2 Committee of Inquiry into the Competition Provisions of the Trade Practices Act 1974, *Review of the competition provisions of the Trade Practices Act*, Commonwealth of Australia, Canberra, 2003, p. 115 at <http://tpareview.treasury.gov.au/content/report.asp>.

benefit. The proposed process, modelled on Section 93 notifications for exclusive dealing, has been adopted by Schedule 3.³

The provisions in Schedule 3

3.7 Schedule 3 will enable a corporation that has, or proposes to engage in, collective bargaining to file a notice with the ACCC setting out particulars of its conduct. Provided the ACCC does not object, the applicant will be protected from the collective bargaining prohibitions in the Act for three years upon the expiry of 14 days (or such longer period as is prescribed in the regulations⁴) from the notification date.

3.8 Specific requirements of notification are that:

- a corporation must have made, or proposes to make, an initial contract with another person or persons (the contracting parties) about the supply or acquisition of goods or services to or from one other person (the target); and
- the corporation reasonably expects to make one or more contracts with the target and reasonably expects the cumulative price for the contract or contracts not to exceed \$3,000,000 (or such other amount as is prescribed in the regulations) in any 12 month period.

3.9 The bill provides that 'the regulations may prescribe different amounts in relation to different industries'.⁵ The Hon. Chris Pearce MP, Parliamentary Secretary to the Treasurer, said of this provision that:

The Government considers there would be a range of businesses suitable for a higher limit. These could include motor vehicle dealers, petrol station owners and some agricultural businesses. The Minister for Small Business and Tourism is developing proposals for the government's consideration in respect of these regulations.⁶

3.10 Notification does not cover the contracting parties for transactions involving more than one target:

If parties wish to seek immunity for a variety of similar arrangements with a variety of targets, the authorisation process with its longer time frame is the appropriate process.⁷

3 Committee of Inquiry into the Competition Provisions of the Trade Practices Act 1974, *Review of the competition provisions of the Trade Practices Act*, Commonwealth of Australia, Canberra, 2003, p. 121 at <http://tpareview.treasury.gov.au/content/report.asp>.

4 The government proposes to set a 28-day period by regulation with a further assessment at the end of 12 months.

5 Proposed subsection 93AB(4).

6 Second Reading Speech, *House Hansard*, 17 February 2005, p. 9.

7 Trade Practices Legislation Amendment Bill (No. 1) 2005, Explanatory Memorandum, the Parliament of the Commonwealth of Australia, House of Representatives, p. 60, para. 5.268.

3.11 The bill provides for a third party, such as an industry body, to give notice on behalf of the small businesses contracting with the target.⁸ The Explanatory Memorandum says in this regard that:

This might be relevant, for example, to rural producers who may wish to bargain through the structure provided by a single industry body.⁹

3.12 However, the bill expressly provides that a notice is not a valid notice if given on behalf of a corporation by 'a trade union; an officer of a trade union; or a person acting on the direction of a trade union'.¹⁰

3.13 The ACCC may issue an objection notice to a notification at any time but must follow certain procedural requirements. To succeed with an objection, the onus is on the ACCC to establish that the collective bargaining arrangement does not, or is unlikely to, generate a public benefit or, alternatively, that the public benefit will not outweigh the detriment arising from the arrangement.¹¹

Matters of interest

3.14 At the Committee's hearing, questions were raised about the extent to which Treasury had consulted on the bill. Treasury representatives advised that the original bill had been through formal consultation processes with the States and Territories under the relevant COAG agreement. Treasury also advised that the States and Territories had been notified of minor amendments inserted in the bill in the form reintroduced following the lapse of the original bill because of the 2004 election. No objections had been received. There had also been some consultation with the ACCC and the Law Council of Australia.

8 Proposed subsection 93AB(7).

9 Trade Practices Legislation Amendment Bill (No. 1) 2005, Explanatory Memorandum, the Parliament of the Commonwealth of Australia, House of Representatives, p. 60, para. 5.268.

10 Proposed subsection 93AB(9).

11 For guidelines on the ACCC's approach, see 'Authorising and notifying collective bargaining' at <http://www.commission.gov.au/content/index.phtml/itemId/522935/fromItemId/314462>.

