



Trade Practices Amendment (Small Business Protection) Bill 2007

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Law and Bills Digest Section

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Trade Practices Amendment (Small Business Protection) Bill 2007

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House: House of Representatives

Portfolio: Treasury

Commencement: Royal Assent

Links: The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

Purpose

To allow the Australian Competition and Consumer Commission (ACCC) to bring representative actions on behalf of people damaged by conduct determined to be in breach of the secondary boycott provisions (section 45D and section 45E) in the *Trade Practices Act 1974*.

Background

The reader should note that the Bill essentially replicates a 2002 Bill of the same name. This Digest therefore draws heavily on the Trade Practices Amendment (Small Business Protection) Bill 2002, *Bills Digest*, No. 134 2001–02.

ACCC representative actions

Section 87 of the *Trade Practices Act 1974* (TPA) permits the ACCC to bring a representative action seeking compensation and other remedies on behalf of people who have suffered, or are likely to suffer loss or damage as a result of another person's contravention of specified provisions of the TPA. A person covered by a representative action must consent to ACCC commencing proceedings.

While the ACCC may bring such actions in relation to breaches of the whole of Part IVA (unconscionable conduct), Part IVB (industry codes), Part V and Part VC (consumer protection), a representative action in relation to Part IV (restrictive trade practices) may not be commenced if the matter involves contraventions of the boycott provisions in sections 45D and 45E of the TPA.

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Section 45D prohibits two people from acting in concert to hinder or prevent a third person from supplying goods or services to, or acquiring goods or services from, a fourth person (the target) who is not an employer of the first person or the second person. To breach the section, the conduct must have been engaged in for the purpose, and would likely have the effect, of causing substantial loss or damage to the business of the target. Section 45E prohibits a person making an agreement with a union for the purposes of preventing or hindering trade between that person and a targeted entity.

Previous Bills

This Bill is the fifth occasion that the Government has sought to enable the ACCC to bring representative actions for contraventions of sections 45D and 45E.

The first attempt was in the Trade Practices Amendment (Country of Origin Representations) Bill 1998. A schedule to this Bill sought to empower the ACCC to generally bring representative actions for breaches of Part IV of the TPA. The Bill was debated against the backdrop of the waterfront dispute.¹ At the time the Opposition expressed concern about the ACCC gaining the ability to conduct (retrospective) secondary boycott actions on behalf of businesses against trade unions. In the end, the Senate omitted the representative action provision from the Bill.

During the waterfront dispute, the ACCC sought to overcome its lack of capacity to commence representative actions in relation to section 45D by seeking findings of fact from the Court. At the time the then ACCC Chairman, Professor Fels, stated that the intention was to open ‘open up the possibility’ for importers to pursue the Maritime Union by lowering their evidential burden.²

The Government revived the issue in the Trade Practices Amendment Bill (No.1) 2000. On this occasion the Senate rejected the proposal to allow the ACCC to bring representative actions for all of Part IV and ‘carved out’ actions in relation to sections 45D and 45E. The Government reluctantly accepted the compromise in order to secure the passage of the remainder of the Bill. As a result of these amendments the ACCC can bring representative actions in relation to boycott conduct which substantially lessens competition or affects international trade³ but not where the conduct causes substantial loss or damage to a targeted person.⁴

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1. For further information on the 1998 waterfront dispute the reader is referred to: ‘[Outline of the Waterfront Dispute](#)’, Steve O’Neill, Parliamentary Library, *Current Issues Brief*, 15 1997–98.
 2. Professor Fels, Transcript of Interview on *Business Sunday*, Channel 9, 24 May 1998.
 3. Under sections 45DA and 45DB respectively.
 4. Under section 45D.

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In August 2001, the Government sought to remove the remaining limitation through the Workplace Relations and Other Legislation Amendment (Small Business and Other Measures) Bill 2001. The Bill was not debated before the Parliament was prorogued for the General Election.

The last attempt was the Trade Practices Amendment (Small Business Protection) Bill 2002. Essentially replicating the provisions in the existing Bill, the 2002 Bill was rejected by the Senate on two occasions prior to the last election.

The proposition that the ACCC should have the capacity to initiate representative actions in relation to breaches of Part IV has been endorsed by the Australian Law Reform Commission (ALRC),⁵ the House of Representatives Standing Committee on Industry Science and Technology (the Reid Committee)⁶ and the Joint Select Committee on the Retailing Sector (the Baird Committee).⁷

The ALRC put the case for representative actions in the following terms:

Representative actions remove many of the financial barriers which ordinary people face when seeking to enforce their legal rights, give the courts a more efficient process for dealing with cases involving large numbers of people and help to ensure that laws are enforced more efficiently and more often.⁸

It is important to note, however, that none of these reviews considered the implications of the proposal from an industrial relations perspective. The Reid and Baird Committees recommended the measure in the context of debate about improving small businesses access to a remedy under the misuse of market power provisions in section 46. Furthermore, at the time the ALRC made its recommendation, the equivalent of the current section 45D was located in the *Industrial Relations Act 1988*. Under that legislation, enforcement proceedings in relation to the boycott provisions could not be commenced unless the Australian Industrial Relations Commission (AIRC) first had the opportunity to resolve the matter by conciliation.⁹

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5. Australian Law Reform Commission, *Compliance with the Trade Practices Act 1974*, 1994, p. 46.
 6. House of Representatives Standing Committee on Industry, Science and Technology, *Finding a balance: towards fair trading in Australia*, May 1997, p. 133. While endorsing the proposal to permit representative actions under Part IV of the TPA, the Reid Committee cautioned that the measure would 'marginally improve small business access to justice'.
 7. Joint Select Committee on the Retailing sector, *Fair Market or Market Failure? A Review of the Australian Retailing Sector*, August 1999.
 8. Australian Law Reform Commission, op. cit, p. 45.
 9. B. Creighton and A. Stewart, *Labour Law: An Introduction*, 3rd Edition, 2000, p. 422.

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The question of whether representative actions should be supported inevitably involves an assessment of the merit of the sections 45D and 45E. The proposal in this Bill has been contentious in the past because these provisions are arguably politically sensitive and raise questions about the competition regulator being involved in essentially industrial disputes. However with the current Bill, the debate about sections 45D and 45E has been less contentious in this regard. While the ACTU and the Australian Greens have continued to lobby that the appropriate regulatory regime for trade union activity is the workplace relations regime and not the competition laws, the Australian Labor Party has recently announced that under a Labor government the existing secondary boycott provisions would be retained.¹⁰ Rather than being a great ideological shift, this may be a practical realisation that secondary boycotts are no longer such a significant feature of industrial activity.¹¹

Senate Standing Committee on Economics inquiry into the Bill

The Bill was introduced into the House of Representatives on 15 August 2007 and the provisions of the Bill were referred to the Senate Standing Committee on Economics for inquiry and [report](#) by 5 September 2007. In its report,¹² the Committee argued that the Bill is a logical step in the development of the TPA's protection of small business from illegal secondary boycott activity and therefore recommended that the Bill be passed. The Digest draws on both the Committee report and submissions to the inquiry.

Statistics on the number of actions under sections 45D and 45E

The Senate Committee report into the Bill states that over the past decade, the ACCC has initiated twelve Federal Court proceedings based on sections 45D and 45E of the TPA. 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 a third party. For these eleven cases, the ACCC gained either an injunction or a financial penalty against the union or unions.¹³ Appendix 3 of the report contains further detail on these cases.

The Senate Committee report however further notes that few secondary boycott allegations actually reach the Federal Court. It states:

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10. See below under the heading 'ALP/Australian Greens/Democrats policy position'.
 11. Chris Bowen, Labor spokesperson on competition, has been reported as saying "Secondary boycotts were largely a weapon of the '70s and '80s," in Steven Scott, 'Support for Costello's Bill', *Australian Financial Review*, 30 August 2007, p. 8.
 12. Senate Standing Committee on Economics, Trade Practices Amendment (Small Business Protection) Bill 2007, *Report*, September 2007.
 13. *ibid.*, paragraph 3.2.

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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. 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.¹⁴

Financial implications

The Explanatory Memorandum states that the Bill has no financial implications for the Commonwealth Budget.

Key issues

ACCC resources and representative actions

In his second reading speech, the Hon Peter Costello MP indicated that the focus of the Bill is to provide Australian small business with access to the ACCC's expertise and resources in seeking damages for unlawful secondary boycotts. A key question to be asked therefore, is whether the Bill will be effective in providing this protection for small business.

Professor Frank Zumbo, Associate Professor from the School of Business Law and Taxation, University of New South Wales, in his submission to the Senate Committee inquiry, argued that ACCC representative actions are 'very expensive and cumbersome' and as a result, the Commission has tended not to bring actions in the past. The submission states:

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 reveal 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 [...]¹⁵

Professor Zumbo claimed that given the ACCC's track record 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

14. *ibid.*, paragraph 3.4 quoting correspondence, Mr Brian Cassidy, Chief Executive Officer, ACCC, 30 August 2007.

15. Submission to the Senate Economics Committee, Inquiry into Trade Practices Amendment (Small Business Protection) Bill 2007, No. 20, p. 2.

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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.

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'.¹⁶

The Senate Committee put Professor Zumbo's proposal to Mr Steven of the Council of Small Business Organisations of Australia Ltd (COSBOA). Mr Steven responded in writing stating:

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.¹⁷

The Senate Committee agreed with COSBOA that the most effective remedy for small businesses is through the ACCC. 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.¹⁸

Impact on freedom of speech

The strongest lobby of concern relates to the Bill's possible detrimental impact on freedom of speech.

The Senate Committee inquiry received several submissions from animal welfare organisations¹⁹ 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.²⁰ These animal welfare concerns were triggered by

16. Senate Standing Committee on Economics, *op. cit.*, paragraph 3.9.

17. *ibid.*, paragraph 3.11.

18. *ibid.*, paragraph 3.12.

19. These 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.

20. Senate Standing Committee on Economics, *op. cit.*, paragraph 3.13.

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comments made by the Treasurer, the Hon. Peter Costello in February 2007 when he foreshadowed the Bill's introduction. Mr Costello stated:

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.²¹

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.²²

Several of the animal welfare groups and consumer groups suggested that the Bill should contain a provision exempting public interest campaigning from the section 45D and 45E secondary boycott provisions.

The Committee, while acknowledging the concerns of animal welfare groups, argued that on the basis of the evidence available, these fears were unfounded. The report states:

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.²³

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21. Quoted at paragraph 3.14 of Senate Standing Committee on Economics, Report, op. cit.
 22. Quoted at paragraph 3.14 of Senate Standing Committee on Economics, Report, op. cit.
 22. *ibid.*, paragraph 3.15. The Senate Committee report provides the following background on this case: *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.*
 23. Senate Standing Committee on Economics, op. cit, paragraph 3.25.

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ALP/Australian Democrat/Greens/ policy position Australian Labor Party

As noted above, this Bill is the fifth occasion since 1996 that the Government has sought to enable the ACCC to bring representative actions for contraventions of sections 45D and 45E. On all previous occasions the Australian Labor Party had opposed the legislation, generally taking the view that the secondary boycott provisions in the TPA are an anomaly and that it is more appropriate that they be dealt with in the workplace relations regime.

However, Shadow Minister for Industrial Relations, Julia Gillard, MP, has recently announced that under a Labor government the existing secondary boycott provisions would be retained.²⁴ Labor spokesperson on competition, Chris Bowen, MP, has been reported as saying that while the Bill is of questionable value and would be unlikely to lead to many prosecutions, it is however the logical step once you accept that the secondary boycott provisions should remain in the TPA.²⁵ Labor Senators on the recent Senate Committee inquiry into the Bill also supported the Coalition in recommending that the Bill be passed.

Australian Democrats

The Australian Democrats support the Bill, although in supplementary remarks in the Senate Committee report, Senator Andrew Murray made several recommendations for amendment.

In relation to the possibility of the provisions being used to limit freedom of speech, Senator Andrew Murray was critical of Treasurer Costello's inference that the provisions could be used to stop protest action against mulesing. Senator Murray states:

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.²⁶

In relation to representative action for small business, Senator Murray noted that the wording of the legislation does not reflect the argument that the Bill will benefit small

24. Kevin Rudd and Julia Gillard, Transcript of joint press conference: Parliament House, Canberra: 28 August 2007. Found at:

http://parlinfoweb.aph.gov.au/piweb/TranslateWIPILink.aspx?Folder=pressrel&Criteria=CITATION_ID:7K3O6%3B, Accessed on 11 September 2007.

25. Steven Scott, 'Support for Costello's Bill', *Australian Financial Review*, 30 August 2007, p. 8.

26. Senate Standing Committee on Economics, Trade Practices Amendment, op. cit, p. 16.

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business. As a precaution, the Senator recommended that the Bill be amended so that the representative action be available only for small business and individuals; and that a small business be defined as one with a \$5 million asset base or one that employs less than 20 people.²⁷

Senator Murray also thought that the Bill as it stands will not be of great benefit. Like Professor Frank Zumbo, the Senator argued that it would be of much greater use to extend the jurisdiction of the Federal Magistrates Court to enable it to deal with both actions for breach and damages in relation to secondary boycotts,²⁸ thus providing private litigants an easier and cheaper option.

Australian Greens

The Australian Greens do not support the Bill. Senator Rachel Siewart, in the dissenting report on the Bill, stated:

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.[...] 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.

We also note the comments of the AMWU²⁹ 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.

27. Senate Standing Committee on Economics, Trade Practices Amendment (Small Business Protection) Bill 2007, Report, Supplementary remarks, p. 18.

28. *ibid.*, p.18.

29. Australian Manufacturing Workers' Union.

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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.³⁰

Main provisions

Existing subsection 87(1A) in the TPA empowers the Federal Court to make remedial orders, including compensation orders, for the benefit of people identified in an application made by the ACCC. Subsection 87(1B) deals with the conditions under which the ACCC may make an application to the Court under subsection 87(1A). Currently such applications may not be made on behalf of people who have, or are likely to suffer loss or damage by conduct which breaches sections 45D or 45E.

Item 1 deletes the reference to sections 45D and 45E in paragraph 87(1A)(b). It would enable the Court to make orders in relation to an application brought by the ACCC concerning any conduct in breach of Part IV.

Item 2 deletes the reference to sections 45D and 45E in paragraph 87(1B)(a). It would permit the ACCC to make an application to the Court for an order on behalf one or more people damaged by any conduct in breach of Part IV.

These amendments do not have retrospective effect. The ACCC will only be able to bring a representative action in relation to conduct in breach of sections 45D and 45E that occurs after this legislation has received Royal Assent (**item 3**).

Concluding comments

Representative actions and small business

The title of the Bill and the Minister's second reading speech indicate that the focus of the measure is to protect small business. During previous debates on proposals to enhance the ACCC's power to bring representative actions, the Commission has also committed itself to using such powers to assist the small business sector.

Nevertheless, the Bill contains no definition of small business and does not limit the ACCC to a particular class of business in bringing representative actions. If the Bill is enacted, the ACCC will be empowered to bring representative actions on behalf of any

30. Senate Standing Committee on Economics, Trade Practices Amendment (Small Business Protection) Bill 2007, Dissenting report, p. 21.

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person who has suffered loss or damage as a result of the contravention of sections 45D or 45E. The Australian Council of Trade Unions in its submission to the Senate Committee inquiry argued that the effect of the Bill 'would be to empower the ACCC to use taxpayer funds to pursue a trade union for damages... on behalf of large corporations.'³¹

It has been suggested that if Parliament is concerned that large businesses could potentially benefit from ACCC representative actions, it may consider the option of inserting a definition of 'small business' and restricting the capacity of the ACCC to initiating actions on behalf of such entities. Senator Murray has suggested that the definition could be a business with no more than a \$5 million asset base or alternatively a business with less than 20 employees.³²

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31. Submission to the Senate Economics Committee, Inquiry into Trade Practices Amendment (Small Business Protection) Bill 2007, No. 22, p. 2.
 32. The Australian Bureau of Statistics also defines a small business as one with less than 20 employees. ABS, Australian Industry, 2004-05, (8155.0).

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