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Bills Digest

No. 134 2001–02

Trade Practices Amendment (Small Business
Protection) Bill 2002

ISSN 1328-8091

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Published by the Department of the Parliamentary Library, 2002

I N F O R M A T I O N A N D R E S E A R C H S E R V I C E S

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No. 134 2001-02

Trade Practices Amendment (Small Business Protection)
Bill 2002

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10 May 2002

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Trade Practices Amendment (Small Business Protection) Bill 2002

Date Introduced: 20 February 2002

House: House of Representatives

Portfolio: Small Business and Tourism

Commencement: On Royal Assent

Purpose

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

Background

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.

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.

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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.

This Bill is the fourth 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. 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, 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 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.¹

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 trade² but not where the conduct causes substantial loss or damage to a targeted person.³

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 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 Commission⁴, the House of Representatives Standing Committee on Industry Science and Technology (the Reid Committee)⁵ and the Joint Select Committee on the Retailing Sector (the Baird Committee).⁶

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.⁷

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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.⁸

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 sections are arguably the most politically sensitive provisions in the TPA. The ACCC was active during the waterfront dispute and has expressed support for the measures contained in this Bill. Nevertheless, it is worth noting that its predecessor, the Trade Practices Commission, took a different view of the value of the competition regulator being involved in essentially industrial disputes. The TPC stated that:

The company damage class of case without substantial lessening of competition is better left to private action.

It would seem desirable to avoid, where competition is not affected, getting involved in an industrial dispute where the ultimate decision as to the continuing or settling of cases may need to be taken by companies on commercial grounds or by the Government on political grounds.⁹

History of Sections 45D and 45E

The Fraser Government

In April 1976 the Fraser Government established the Trade Practices Act Review Committee (known as the Swanson Committee)¹⁰. The Committee's report expressed concern about the lack of protection for traders against secondary boycotts and recommended that the law provide an effective avenue of recourse for affected traders. Secondary boycotts were defined as a situation where employees of one employer place a boycott on the dealings of that employer with another person. The Committee did not express a view on whether this avenue should be provided by the TPA or industrial legislation.¹¹

Responding to the report in 1977, the Government inserted the original section 45D into the TPA prohibiting boycott conduct which had the effect or likely effect of causing either: substantial loss or damage to a targeted person or; a substantial lessening of competition in a market. In introducing the provision, the then Minister for Business and Consumer Affairs (Mr Howard) stated that:

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'boycotts have been used by some trade unions in this country to dictate the business arrangements of independent businessmen. In some instances these boycotts have resulted in higher prices to the consumer. The most common instance of a secondary boycott occurs where a group of employees collectively acts for the purpose of interfering with supply of goods and/or services by their employer to a company.'¹²

Subsection 45D(3) provided for a defence if it could be shown that the dominant purpose of the conduct related to employment matters. In practice this provision was often interpreted narrowly and there were very few cases where a union was able to successfully invoke the defence.¹³

In 1978 section 45D(1A) was inserted which prohibited primary or secondary boycotts which have the purpose or effect of hindering or preventing interstate or international trade and commerce.

In 1980, the Fraser Government introduced section 45E following the Laidley dispute. Leon Laidley Pty Ltd, an independent haulage contractor, distributed bulk fuel and was supplied by Amoco. The employees of Amoco driving Amoco delivery trucks were members of the Transport Workers' Union (TWU). The union argued that Amoco's practice of supplying Laidley denied work to their members. In February 1980 the TWU placed a black ban on Amoco supplying petroleum to Laidley. Amoco, in order to keep its depots open, agreed to TWU demands that Laidley not be supplied.

While Laidley was successful in obtaining an interlocutory injunction against the TWU under section 45D, the Fraser Government was of the view that the TPA needed to be strengthened so that companies did not succumb to union pressure and therefore inserted section 45E.¹⁴ The section prohibited collusive agreements between unions and corporations that hinder the supply or acquisition of goods or services by or from a third party.

The Hawke-Keating Governments

The Labor Party has maintained a long opposition to sections 45D and 45E. While the ALP has expressed disapproval of secondary boycotts, it has argued that they are essentially industrial relations matters that are best resolved through specialist industrial courts or tribunals rather than through competition law or by the competition regulator. It has argued that the focus of regulation should be the resolution of the underlying dispute and that litigation under the TPA may frustrate this outcome.

The Hawke Government attempted to repeal sections 45D and 45E in 1984 however the legislation was defeated in the Senate. Another attempt was made to amend the operations of the sections in 1987 but the proposal was abandoned.

Australia ratified ILO Convention No.87 on Freedom of Association and Protection of the Right to Organise in 1973. During the late 1980s and 1990s the International Labour Organisation's Committee of Experts on the Application of Conventions and

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Recommendations criticised sections 45D and 45E as prohibiting conduct which should be lawful under the convention.¹⁵

In 1993 the Senate Standing Committee on Employment, Education and Training investigated the operation of sections 45D and 45E. The Committee divided along party lines. The ALP/Democrat majority concluded¹⁶, *inter alia*,

- that the use of sections 45D and 45E, as a response to industrial action is unduly harsh, and in conflict with Australia's obligations under ILO conventions on freedom of association;
- the legitimate rights of business to trade in goods and services without interference should be properly secured by trade practices legislation but that sections 45D and 45E, as they then stood, achieved this result at an unacceptable cost with respect to the rights of citizens to take legitimate industrial, protest and other social action; and that
- a mechanism must be available under industrial relations legislation to provide for the speedy resolution of industrial disputes where the primary issue is one of substantial damage to an enterprise as opposed to substantial lessening of competition in the market.

Coalition Senators were of the view that:

- the provisions are a useful device for preventing and settling industrial conflict and are predominantly used by employers as a 'last resort';
- the provisions do not encourage a disregard for the processes of arbitration;
- defences available under section 45D(3) of the TPA are adequate to protect employees' rights;
- the high costs that can be imposed on business, even by relatively short strikes, must be avoided.

Following this report, the Keating Government inserted a new version of section 45D while section 45E was deleted. The effect of the amendment to section 45D was that the prohibition covering secondary boycotts in the TPA was restricted to boycotts involving a substantial lessening of competition. Other boycotts were made subject to the *Industrial Relations Act 1988*. According to one text writer:

‘the basic thrust of these changes was to try to confine the operation of the legislation proscriptions to secondary boycotts in the strict sense of the term and to try to make access to relief condition on first attempting to resolve the matter in dispute through the Industrial Relations Commission.’¹⁷

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The Howard Government

In 1996 the boycott provisions were transferred back to the TPA by the *Workplace Relations and Other Legislation Amendment Act 1996*. The 1996 amendments did more than simply reinsert the version of section 45D that applied before the 1993 amendments. Elements of the former law were broken down into separate sections. The current provisions are summarised below.

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.¹⁸

Section 45DA prohibits two persons from acting in concert to hinder or prevent a third person trading with the target where the purpose or effect or likely effect is to cause a *substantial lessening of competition* in any market where the target supplies goods or services. As with section 45D, to come within the prohibition, the target must not be the employer of the first or second person.¹⁹

Section 45DB prohibits two persons from acting in concert to hinder or prevent a third person (who is not their employer) from engaging in trade or commerce involving the movement of goods between Australia and places outside Australia.²⁰

As noted above, as a result of the amendments enacted last year²¹, the ACCC can already take representative actions where there has been a breach of sections 45DA and 45DB. To date, it has not done so.

Section 45DC provides a mechanism for drawing unions into the scope of section 45D, 45DA and 45DB. Section 45DD provides that a person will not contravene 45D if the dominant purpose of the conduct is substantially related to the terms and conditions of employment in their workplace. Likewise, if the dominant purpose of the boycott is substantially related to environmental or consumer protection and engaging in the conduct is not industrial action, a person will not be guilty of a contravention.

Section 45E prohibits a person making an agreement with a union for the purposes of preventing or hindering trade between that person and another person. In introducing this provision in 1996 the Government stated that the section was:

directed against a situation where a person capitulates in order to avoid loss or damage as a result of threatened industrial action against the target. It complements sections 45D and 45DA, ensuring that the prohibition on secondary boycott action is not weakened by collusion between firms and unions.²²

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Penalties and Enforcement

Under section 76 of the TPA, only bodies corporate may be ordered to pay a pecuniary penalty for a breach of sections 45D, 45DA, 45DB, 45E or 45EA. In the case of section 45DA the maximum penalty that can be imposed is \$10 million. In all other cases it is \$750 000. Injunctions, damages, and other remedies are available under sections 80, 82 and 87 respectively.

The TPA recognises that the desirability of resolving the industrial dispute that underlies boycott conduct may need to be taken into account by the Court. Under section 80AB the Federal Court has the discretion to stay the operation of an injunction against boycott conduct where to do so would facilitate the settlement of a dispute by the AIRC or state industrial tribunals. More broadly, section 87AA states that in exercising its enforcement and remedial powers in relation to boycotts, the Court must take into account action taken or available before the AIRC or a state tribunal. Particular regard is to be had to conciliation proceedings.

Statistics on the Number Actions under Sections 45D and 45E

The Department of Employment, Workplace Relations and Small Business reports that since the commencement of the *Workplace Relations Act 1996* amendments to the TPA in 1997 there have been 13 applications to the Federal Court under sections 45D and/or 45DB. Of these cases, 8 have been settled, 2 have been discontinued and 2 dismissed and in one case²³ a penalty has been imposed. Seven of these matters were brought by the ACCC.²⁴

There appear to have been no proceedings commenced under section 45E.

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.²⁵

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 person who has suffered loss or damage as a result of the contravention of sections 45D or 45E.

If the Parliament is concerned that large businesses could potentially benefit from ACCC representative actions, it may consider the option of inserting a definition 'small business' and restricting the capacity of the ACCC to initiating actions on behalf of such entities. The definition employed by the Australian Bureau of Statistics may be a useful guide. The ABS defines small business as one with less than 20 employees in all industries

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except manufacturing where they have less than 100 employees, and agriculture where they have an estimated value of agricultural operations of between \$22 500 and \$400 000.²⁶

Main Provisions

Existing subsection 87(1A) empowers the 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

Presuming that one endorses the policy underlying sections 45D and 45E, the rationale for facilitating representative actions is compelling as they improve access to justice. In his second reading speech, the Minister cited anecdotal evidence of small firms that have been the victim of union organised secondary boycotts.²⁷ The Bill improves the formal legal protection available to businesses that may have been damaged by boycott conduct but lack the financial resources to initiate private litigation under the TPA. The ACCC is a well-resourced agency with an annual budget in excess of \$73 million. The Commission also has a litigation reserve of \$10 million which it plans to build to \$20 million over the next few years.²⁸

Critics of the legislation may argue however that the benefits of the change for small business have been overstated. The ACCC already has the ability to seek findings of fact which significantly lower the financial burden of litigation for business. Furthermore, the ACCC itself has admitted 'that representative actions are very resource intensive [and that] consequently, the Commission's ability to run many such cases each year is severely

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limited.²⁹ This is borne out by the fact that the ACCC has not brought a representative action in relation to any of the other provisions of Part IV since it gained the power to do so July 2001.

Endnotes

- 1 Professor Fels, Transcript of Interview on Business Sunday, 24 May 1998.
- 2 Under sections 45DA and 45DB respectively.
- 3 Under section 45D.
- 4 Australian Law Reform Commission, *Compliance with the Trade Practices Act 1974*, 1994, p. 46.
- 5 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'.
- 6 Joint Select Committee on the Retailing sector, *Fair Market or Market Failure? A Review of the Australian Retailing Sector*, August 1999.
- 7 Australian Law Reform Commission, *Compliance with the Trade Practices Act 1974*, 1994, p. 45.
- 8 B. Creighton and A. Stewart, *Labour Law: An Introduction*, 3rd Edition, 2000, p. 422.
- 9 Trade Practices Commission quoted in Senate Standing Committee on Employment, Education and Training, 'The operation of sections 45D and 45E of the Trade Practices Act 1974', October 1993, p. 2.
- 10 Trade Practices Act Review Committee: Report to the Minister for Business and Consumer Affairs, Canberra, 1976. Parliamentary Paper No. 228/1976.
- 11 *ibid*, p.86.
- 12 The Hon. John Howard MP, House of Representatives, *Hansard*, 8 December 1976, p. 3533.
- 13 Department of Industrial Relations, Discussion Paper on the Operation of Sections 45D and 45E of the Trade Practices Act 1974, 1993, p. 24.
- 14 Russell Miller, Annotated Trade Practices Act, 15th Edition, Law Book Company 1994, p. 135.
- 15 B. Creighton and A. Stewart, *Labour Law: An Introduction*, 3rd Edition, 2000, p. 417. For more information on compliance with ILO conventions see Senate Standing Committee on Employment, Education and Training, *The operation of section 45D and 45E of the Trade Practices Act 1974*, October 1993 pp. 12-23.
- 16 This summary of the Committee's report is drawn from Bob Bennett, [Bills Digest No.96](#), 1995-96, Workplace Relations and Other Legislation Amendment Bill 1996.

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- 17 B. Creighton and A. Stewart, *Labour Law: An Introduction*, 3rd Edition, 2000, p. 418.
- 18 Similar conduct was captured by section 162 of the *Industrial Relations Act 1998* after the Keating Government's 1993 amendments.
- 19 This sort of conduct was prohibited by paragraph 45D(1)(b) from 1977 to 1994 and by subsection 45D(1) from 1994 to 1997.
- 20 This provision is similar to subsection 45D(1A) which applied between 1977-1994 however that provision also captured interstate trade.
- 21 *Trade Practices Amendment Act 2001*.
- 22 Workplace Relations and Other Legislation Amendment Bill 1996, Explanatory Memorandum, p. 186.
- 23 That case being [Australian Competition & Consumer Commission v The Maritime Union of Australia](#) [2001] FCA 1807 (21 November 2001), where the MUA admitted breaching section 45DB.
- 24 These cases are summarised in the [Workplace Relations Act Monitor](#).
- 25 ACCC, Submission to Senate Economics Legislation Committee, June 1998, p. 4.
- 26 ABS, *Small Business in Australia 1999-2000: Data Report*, ABS Catalogue no.1321, 2001.
- 27 The Hon. Joe Hockey, Second Reading Speech, House of Representatives, *Hansard*, 20 February 2002, p. 352.
- 28 ACCC, Increased Funding for Australian Competition and Consumer Commission, *Media Release*, 22 May 2001.
- 29 ACCC, Submission to the Senate Economics Legislation Committee, June 1998, p. 4.

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