



Committee Secretary  
Senate Economics Committee  
Department of the Senate  
PO Box 6100  
Parliament House  
Canberra ACT 2600  
Australia

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

Thank you for the opportunity to make a submission to the above inquiry.

The Wilderness Society is one of Australia's largest environmental organisations and has a particular interest in litigation against community organisations because we were sued in December 2004 by Tasmanian logging giant, Gunns Ltd. In its original form, that law suit alleged that The Wilderness Society had unlawfully lobbied Gunns' Japanese customers and pressured them to boycott the company's products. We always claimed that this was a gross misrepresentation of our conduct, and we were sceptical of the claims of losses alleged in the suit.

Gunns have now dropped the claims against us in relation to the Japanese customers, but having to defend those claims for two years was expensive, stressful and not conducive to free public debate. As Sir William Deane noted in his High Court judgment in the landmark *Theophanous* case,

potential civil liability in damages and costs is likely to represent a much more effective curtailment of the freedom of political communication and discussion than the possibility of conviction of most of the many criminal offences which are punishable by a pecuniary penalty. (*Theophanous v Herald and Weekly Times Limited* [1994] HCA 46 at par 19).

Justice Deane was referring to defamation law, but the same is true of any law suit. The chilling effect of litigation on public debate is widely acknowledged and 25 jurisdictions in the United States have some form of law to protect free speech against the strategic use of litigation against public participation.

The Gunns law suit was not brought under the *Trade Practices Act*, but we are aware of a number of cases under that Act which we believe impinge on the community's right to public participation. This is a right which should be protected in Australian law. If the changes proposed in the Trade Practices Amendment (Small Business Protection) Bill

**Dr Greg Ogle**  
**Legal Coordinator**  
**THE WILDERNESS SOCIETY INC.**  
PO Box 188, Civic Square ACT 2608  
Email: [greg.ogle@wilderness.org.au](mailto:greg.ogle@wilderness.org.au) Webpage: <http://www.wilderness.org.au>

2007 mean that there will be more law suits against individuals and community groups exercising their democratic rights to protest, then that would be a great concern.

Attached to this letter is a media release from the animal welfare organisation, Voiceless, and an article by media commentator, David Marr, both of which raise serious concerns about the impact of the proposed changes to the *Trade Practices Act* on free speech and the right to protest. Without endorsing all the comment in those two publications, The Wilderness Society shares their concern that the right to free speech and public participation should be protected.

We are also aware that s45DD(3)(a) of the *Trade Practices Act* provides that the secondary boycott provisions of the act do not apply to conduct whose dominant purpose is environmental protection or consumer protection. We support this provision as necessary to protect the community's rights to agitate these important issues. However, we see the scope of the exemptions in 45DD(3)(a) as being too narrow.

While we understand the government's imperative to protect small business interests, we believe that **if the current bill is passed, then the exemptions in s45DD(3)(a) should be widened to include conduct in relation to the protection of animals, the status of women, indigenous people or other disadvantaged groups.**

Such an amendment would provide business with protection against commercially motivated actions while also ensuring that the community's rights to take political action are protected.

We remind the Committee that boycotts are in themselves an act of consumer choice and have played a major part in many historic social reforms from the end of race segregation in southern states of the USA (the Montgomery Bus Boycott) to the end of apartheid in South Africa (the Gleneagles Agreement on sporting contacts).

When it is considered that Mrs Kate Carnell, as the Liberal Chief Minister for the ACT in 1995 supported the boycott of French products (ACT Legislative Assembly, *Hansard* 20 June 1995 pg 793) because of French nuclear testing, Family First's Senator Stephen Fielding called for a boycott of McDonalds to support Australian produce growers (ABC Radio, 25 August 2005) and the Greens and Labor have historically supported a range a boycotts, it is clear that consumer boycotts are not a tool of any particular side of politics but are part of normal political practice in a democracy.

We believe that the recommendation in bold above strikes an appropriate balance between the protection of small business and the vital rights of the community.

Yours,



Dr Greg Ogle  
Legal Coordinator



2 paddington st, paddington nsw 2021 australia  
t +612 9357 0723 f +612 9357 0711  
info@voiceless.org.au www.voiceless.org.au  
ACN 108 494 631

## **New law set to bludgeon freedom of speech and ethical choice**

**PR07/07**

**20 August 2007**

Australian taxpayers may be forced to foot the bill for legal action taken against those that speak out against animal suffering and other public interest matters, under legislation introduced to Parliament late last week.

The proposed amendments to the Trade Practices Act which slipped through under the guise of small business reforms, empower Australia's peak consumer protection body, the Australian Competition and Consumer Commission (ACCC), to take representative action against groups that call for consumers not to buy products on ethical grounds.

Earlier this year, the Federal Treasurer, the Hon. Peter Costello MP, foreshadowed the changes, saying they were aimed at protecting Australian farmers who may be targeted by animal protection groups that call for boycotts. However groups that stand to be affected by the Bill, such as the leading animal protection group Voiceless, the fund for animals, view the new law as a misuse of legislative power and say that it may have a chilling effect on freedom of speech.

Voiceless's director, Brian Sherman AM, said today: "It is extremely worrying that in a liberal democratic society like ours, non-profit organisations can no longer feel safe from prosecution, when engaging in awareness-raising campaigns. Staggering numbers of animals in Australia today are enduring institutionalised suffering in factory farms. For example:

- Most female pregnant pigs are continuously artificially inseminated and kept in stalls which don't allow them to turn around for a large part of their reproductive cycle.
- Over 13 million battery hens spend their life standing on wire bars in cages. They never live to feel the earth under their feet and barely have room to flap their wings.
- More than half a billion animals are churned down the Australian factory farming assembly line every year with little regard for their suffering.

Australians have the right to be informed about these issues and to exercise their consumer choices accordingly. This new law appears to be a political exercise designed to reinforce the relationship that the Australian Government has with rural industries, at the expense of animal welfare and the public interest".

Expanding on the legal implications of the Bill, Voiceless's corporate counsel, Katrina Sharman said: "Under current law, the ACCC is able to investigate and prosecute organisations that seek to hinder or prevent the supply of goods to or from a company but it cannot bring representative actions or seek compensation on behalf of small businesses. This Bill is concerning because the ACCC is intended to be Australia's independent consumer protection watchdog. Under this new law, community groups who seek to educate the public about ethical issues such as the suffering of animals, may be reluctant to speak out, or may be deterred from doing so because of the need to first obtain costly legal advice.

This means that the ACCC, rather than acting as an agency that enhances consumer protection, may actually be wielded as a political weapon to prevent the flow of information to consumers and to stifle public debate.”

The Bill has been referred to the Senate Economics Committee for inquiry and Report next month.

**Media Contact:** Katy Wood, 0408 603 605 or (02) 9357 0743 or Michael Young, 0432 169 147

Voiceless is a non profit Australian organisation established in 2004 by father and daughter team Brian Sherman AM and Ondine Sherman.

Voiceless promotes respect and compassion for animals, increases awareness of the conditions in which they live, and takes action to protect animals from suffering.

For further information please visit [www.voiceless.org.au](http://www.voiceless.org.au)

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## Free speech? Not while we're on sheep's back

David Marr  
August 23, 2007

No price is too high to pay to protect the Aussie woolgrower. With marked contempt for the effect it would have on freewheeling public debate, Peter Costello has introduced a little bill to clobber campaigners against the bloody business of mulesing sheep. But not only them: his strategy will snare anyone calling for customer boycotts.

So if you're asking Australians not to buy lipstick tested on caged rabbits, rugs woven by Pakistani slaves or suits made with mulesed wool, then pray your boycott calls don't succeed, for the Australian Competition and Consumer Commission is about to be given the power to sue you out of the water if they do.

Gagging public debate with such threats has been an old ambition of the Howard Government.

Not that Canberra talks in such terms. Introducing the Trade Practices Amendment (Small Business Protection) Bill 2007 last week, Costello reaffirmed his Government's "commitment to stand up for small business against thuggery and intimidation. It is vital, both for our economy and our way of life."

But Costello's bill is designed to protect businesses of any size - all the way up to BHP Billiton - not by outlawing intimidation, but by punishing persuasion.

Hurt a business simply by arguing that it's ethically repugnant to buy its products and the commission will be able to step in and sue to recover the company's lost profits. It's quite a service.

No free-speech defence is immediately available. You won't be able to go to court to plead the pros and cons of open-range chooks or gentler methods than mulesing to save sheep from fly strike.

The new law will catch lone campaigners, community groups, NGOs, lobby groups and even the media - anyone whose campaign for what the law calls a "secondary boycott" actually hits the mark and causes financial pain.

"Secondary boycotts can have a significant impact on our economy," Costello told Parliament. "They disrupt trade, they reduce output and they inhibit competition. It is important that we provide a strong disincentive for those people who would target, intimidate and bully small business by applying a secondary boycott to that business."

Costello put the proposal back on the table in February this year as the big-business woolgrowers of Australia faced a \$10 million debacle. Their efforts to sue the mighty American star-backed anti-mulesing lobby People for the Ethical Treatment of Animals (PETA) were coming badly unstuck. The Treasurer was signalling that next time the ACCC would pick up the tab.

And the effect on free speech? None at all, Costello assured journalists in February.

"Martina Navratilova and Pink will still be able to attack Australian wool as they do, ignorantly ... There is no law that is going to stop ignorant commentary, but there will be a law which will allow the ACCC to

stand up for Australian farmers where they suffer from a boycott."

That the woolgrowers' case collapsed largely because they couldn't prove PETA had done them any financial harm didn't deter the Treasurer. And perhaps the legal advisers for Navratilova and Pink might caution their clients before travelling to Australia if their anti-mulesing efforts ever prove successful...

The growers walked away from the PETA case in July - though they have still to settle with the penniless Animal Liberation NSW - and Costello produced the legislation a few weeks later. Labor is considering its position on the bill. The Greens' Bob Brown sees it as a direct attack on free speech: "They've found a mechanism for curbing debate they don't like."

The commission doesn't give the impression it's hot to trot once the bill becomes law. The commission has never used the power it already has to prosecute groups who agitate for customer boycotts. That section of the Trade Practices Act has been largely dormant - not least because the fines are small by the ACCC's standards: up to \$500,000 for individuals and \$750,000 for companies.

But the financial pain to be inflicted by Costello's amendments will theoretically be endless - as much as a business can prove it has lost because of a customer boycott. And only two kinds of campaigns are exempted: those "substantially related" to environmental protection or consumer protection. Everything else is caught.

Graeme McEwen, chairman of the 90-member Barristers Animal Welfare Panel of the Victorian Bar, says: "The bill will unquestionably curtail free speech for indigenous groups, women's rights groups, and plainly animal welfare groups, which are the particular target of the bill. Why would such a public interest body wish to face the ACCC with all the power and financial clout of the state in a costly proceeding in the Federal Court?"

The Melbourne barristers are considering a High Court appeal to test the new law. The tug of war between secondary boycotts and rights of free speech was settled in the US by the Supreme Court 25 years ago, observed McEwen. "They decided in favour of free speech."

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