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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

TRADE PRACTICES AMENDMENT (SMALL BUSINESS PROTECTION)
BILL 2007

EXPLANATORY MEMORANDUM

(Circulated by the authority of the
Treasurer, the Hon Peter Costello MP)

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General outline and financial impact

TRADE PRACTICES AMENDMENT (SMALL BUSINESS PROTECTION) BILL 2007

OUTLINE

The Bill proposes amendments to Section 87 of the *Trade Practices Act 1974* (the Act) to enable the Australian Competition and Consumer Commission (ACCC) to bring representative actions in respect of contraventions of Sections 45D and 45E of the Act.

FINANCIAL IMPACT STATEMENT

The Bill has no financial impact on the Commonwealth Budget.

Chapter 1

Regulation Impact Statement

Secondary Boycotts — Representative Actions by Australian Competition and Consumer Commission

Problem

1.1 The problems addressed by this Bill are achieving consistency in the application of the remedies and enforcement provisions of the *Trade Practices Act 1974* (the Act) and improving persons access to remedies under the Act which, in turn, is to deter breaches of the Act.

1.2 On average, the ACCC received around 12 complaints each financial year in relation to sections 45D and 45E between 2004-2005 and 2006-2007. There may be more businesses, affected by unlawful secondary boycotts, who do not lodge their complaints with the ACCC. Therefore, the exact number of persons affected by secondary boycotts is unknown.

Current Situation

1.3 At present, subsections 87(1A) and 87(1B) of the Act allow the Australian Consumer and Competition Commission (ACCC) to take representative court actions in relation to all contraventions of Part IV (restrictive trade practices) other than the secondary boycott provisions (sections 45D and 45E). That is, the ACCC cannot take action on behalf of persons who have suffered or are likely to suffer loss or damage due to breaches of sections 45D and 45E.

1.4 A secondary boycott consists of persons that are indirectly boycotting another person, preventing third parties from dealing with that person. Sections 45D and 45E deal with two types of secondary boycotts.

1.5 Section 45D prohibits two or more persons from acting in concert to hinder or prevent a third person from supplying or acquiring goods or services from a fourth person if the purpose or likely effect of the conduct is to cause substantial loss or damage to the business of the fourth person. In this situation, the fourth person is the target of the boycott.

1.6 Section 45E prohibits a person from making an agreement with a trade union for the purpose of preventing or hindering the supply or

acquisition of goods or services between that person and the target of the boycott.

1.7 Sections 45D and 45E were excluded from the operation of subsections 87(1A) and 87(1B) as a result of the Senate debate on the Trade Practices Amendment Bill (No.1) 2000. The Trade Practices Amendment Bill (No.1) 2000, as introduced, allowed the ACCC to take representative action in relation to all breaches of Part IV. However, sections 45D and 45E were carved-out of that Bill. Essentially, the opposition believed that sections 45D and 45E did not relate to competition policy and should not be contained within the Act in the first place. Therefore, it did not support the provisions being treated in the same manner as all other restrictive trade practices provisions within Part IV of the Act.

1.8 The Government, on the other hand, believes that sections 45D and 45E are matters of competition policy. Specifically, competition is adversely affected in the market in which the person, impacted by the secondary boycott conduct, operates. Therefore, the Government believes that sections 45D and 45E should not be treated differently to any other provisions within Part IV. The Government accepted a carve-out of sections 45D and 45E from the Trade Practices Amendment Bill (No.1) 2000 to enable the passage of the rest of the provisions contained within that bill. The Government now wants to fulfil the full intent of the Trade Practices Amendment Bill (No.1) 2000 by allowing the ACCC to take representative action in relation to all breaches of Part IV, including secondary boycotts.

1.9 The Government's amendments do not create a new cause of action. Sections 45D and 45E already prohibit unlawful secondary boycotts. The Government's amendments enable persons affected by unlawful secondary boycotts, to access the same procedural mechanisms (including representative actions) available to persons affected by all other provisions of Part IV.

1.10 The ACCC seeks to achieve compliance by business with the provisions of the Act through a number of means, including informing business and consumers about the rights and obligations created by the Act, detecting possible contraventions of the Act, and addressing them through administrative settlements and litigation. If the ACCC decides that court action is warranted, it considers a number of issues to determine whether it will bring a representative action including the number of persons affected, the damage each person has suffered, the resources available to those affected to bring their own action and the likelihood that the action will succeed.

1.11 Representative actions can remove many of the barriers which ordinary people face when seeking to enforce their legal rights and give the courts a more efficient process for dealing with cases involving large numbers of people. Small businesses, in particular, often do not have either the time or resources to commence legal action.

Objective

1.12 The objective of the proposed amendments is to achieve consistency in the application of the remedies and enforcement provisions of the Act and improve people's access to remedies under the Act which, in turn, is to deter breaches of the Act.

Options

Option 1 — No Action

1.13 This option would involve no change to the current regulatory regime.

Option 2 — Education campaign

1.14 This option would involve the Government undertaking an education campaign directed at informing businesses about their legal rights and remedies under the Act in case they suffer loss or damage as a result of secondary boycott conduct.

Option 3 — Mediation

1.15 This option would involve a trained mediator helping the parties to a dispute to reach agreement by assisting them to identify the issues in dispute and to develop a mutually acceptable solution.

Option 4 — Legislative Amendments

1.16 This option would involve legislative amendments to subsections 87(1A) and 87(1B) of the Act to allow the ACCC to take representative court actions in relation to all contraventions of Part IV, including sections 45D and 45E.

Impact analysis (costs and benefits) of each of the options

1.17 Groups likely to be affected by the proposed regulatory amendments include business, persons undertaking unlawful secondary boycotts, consumers, the ACCC and the courts.

Option 1 — No action

1.18 Unlawful secondary boycotts are not addressed under industrial relations legislation. Under the Act, the ACCC will continue to be able to prosecute illegal conduct under sections 45D and 45E of the Act; however penalties will be limited to pecuniary penalties, injunctions and associated orders. The ACCC will not be able to bring action on behalf of persons, including small businesses, affected by secondary boycotts.

1.19 Persons, who do not have the time or resources to commence legal action, will be less able to recover loss or damages they have suffered as a result of the unlawful secondary boycott conduct. It is also less efficient and more costly for groups of small businesses, affected by the unlawful secondary boycott conduct, to commence legal action individually to seek compensation for any loss or damages suffered. A group of small businesses could commence a private class action to seek compensation for their losses which would be more efficient and the costs could be shared. Nevertheless, private litigants bear the costs of the legal action and they need to have the financial means to commence and sustain a legal action. There will be inconsistencies in the administration of the Act as the ACCC will be allowed to take representative action in relation to all breaches of Part IV except for sections 45D and 45E.

Option 2 — Education campaign

1.20 A person affected by unlawful secondary boycotts who is aware of their legal rights as a result of an education campaign may be able to negotiate a more beneficial outcome where there is a contravention of the Act.

1.21 There would be significant costs for the Government associated in conducting an education campaign. The costs would depend on the scale and scope of such a campaign; however it is anticipated that the campaign would need to be Australia wide and cover all business sectors. Business and consumers may benefit from an increased awareness of legal rights and remedies. However, small businesses are difficult to target as part of an education campaign. Most small businesses are only likely to seek the relevant information when they are affected by a secondary boycott. Further, an education campaign is unlikely to address the costs involved in Option 1. Persons who suffer loss or damage as result of unlawful secondary boycotts, and who are unable to commence legal action, will not be able to seek redress for that loss or damage. Inefficiencies in the application of the Act and inconsistencies in the administration of the Act by the ACCC will remain.

Option 3 — Mediation

1.22 Mediation is usually voluntary and can be a quick and inexpensive mechanism for resolving disputes. It can help parties avoid litigation or expedite settlement if litigation has commenced. Most small claims courts and tribunals use mediation as the initial step when dealing with complaints. Mediation is also available through community justice centres and private dispute resolution services.

1.23 Mediation will only be effective where the parties involved have the authority to settle and be bound by any outcome. Therefore, in a secondary boycott, all parties to the dispute will need to participate in mediation and be willing to resolve the dispute. Without the willingness of all parties to the dispute, a person who is impacted by the secondary boycott conduct and is unable to commence legal action, will not be able to seek redress for loss or damages suffered.

1.24 Inefficiencies in the application of the Act and inconsistencies in the administration of the Act by the ACCC will remain. Mediation may not assist persons, suffering loss or damages as a result of the unlawful secondary boycott conduct, who seek immediate injunctive relief from that conduct. That is, they will continue to suffer loss or a damage until the mediation is successful.

Option 4 — Legislative Amendments

1.25 Legislative amendments would enable the ACCC to take action on behalf of persons who have suffered loss or damages as a result of unlawful secondary boycotts. This would increase people's access to redress under the Act. In some circumstances, it could also be more efficient for the ACCC to take action on behalf of a group of small businesses, affected by the unlawful secondary boycott conduct, rather than for each business to commence individual legal action to seek compensation for any loss or damages suffered. There will be increased consistency in the administration of the Act as the ACCC will be allowed to take representative action in relation to all breaches of Part IV, including sections 45D and 45E. The requirement to compensate persons suffering loss or damages as a result of the unlawful secondary boycott conduct is also likely to act as a deterrent for persons engaging in that conduct. This would improve compliance with the Act.

Consultation

1.26 The proposed legislative amendments have their origins in the original bill, Trade Practices Amendment Bill (No.1) 2000, which sought to allow the ACCC to take representative action in relation to all breaches

of Part IV. The amendments proposed by that bill were subject to broad consultation and there was public support for the changes. The *Australian Law Reform Commission Report No 68: Compliance with the Trade Practices Act 1974* and the report by the Joint Select Committee on the Retailing Sector, *Fair Market or Market Failure* supported the reforms. The cost of taking legal action as being a substantial impediment to business (particularly small business) and consumers accessing appropriate legal remedies under the Act was well-documented as part of this consultation process. Allowing the ACCC to take representative action on behalf of persons who have suffered as a result of a breach of the Act would assist persons facing prohibitive legal costs.

1.27 The Government informed the public of its intention to amend the Act in its 2004 election policy 'Flexibility and Productivity in the Workplace: the Key to Jobs'. A joint Media Release, on 22 February 2007, by the Minister for Small Business and Tourism and the Treasurer confirmed the introduction of the proposed amendments. In addition, the Treasurer referred to the Government's proposed reforms in his speech at the Pastoralists and Graziers Association of Western Australia Centenary Convention in February 2007. The Minister for Small Business and Tourism informed peak small business groups of the Government's proposed amendments, at the March 2007 National Small Business Forum.

1.28 The Office of Small Business, the Department of Prime Minister and Cabinet, the Department of Employment and Workplace Relations and the ACCC have been consulted on the proposed changes.

Conclusion and recommended option

1.29 If there is no action, the ACCC will continue to be limited in the remedies it is able to seek in relation to unlawful secondary boycotts. Persons, who do not have the time or resources to commence legal action, may be less able to recover loss or damages they have suffered as a result of the unlawful secondary boycott conduct. The potential inefficiencies created through each person, affected by the secondary boycott conduct, commencing individual legal action to seek compensation for any loss or damages suffered will remain. There will be inconsistencies in the administration of the Act as the ACCC will not be allowed to take representative action in relation to sections 45D and 45E of the Act but can do so for all other contraventions of Part IV.

1.30 An education campaign may inform individuals of their legal rights however; it will be a costly task for the Government and will not address the problems of persons obtaining redress under the Act and inconsistencies and inefficiencies in the administration of the Act.

Similarly, because of its voluntary nature, mediation may not address the current problems.

1.31 The preferred option is to amend the Act to allow the ACCC to bring representative actions in respect of contraventions of sections 45D and 45E of the Act. It will achieve consistency in the application of the remedies and enforcement provisions of the Act and improve people's access to remedies under the Act which, in turn, is to deter breaches of the Act.

Implementation and review

1.32 Implementation of the preferred option will occur through this Bill. The Act is subject to continuing evaluation and assessment by the Treasury to ensure its continued effectiveness.

Chapter 2

Notes on Clauses

Clause 1 — Short title

2.1 This is a formal provision specifying the short title of the Act.

Clause 2 — Commencement

2.2 Clause 2 specifies that the Act is to commence on the day on which it receives Royal Assent.

Clause 3 — Schedule

2.3 Clause 3 specifies that the *Trade Practices Act 1974* is amended as set out in the Schedule.

Schedule 1

Item 1 — Paragraph 87(1A)(b)

2.4 This item removes the words ‘(other than section 45D or 45E)’ from Paragraph 87(1A)(b) of the *Trade Practices Act 1974* (the Act). The effect of this change is to enable the Australian Consumer and Competition Commission (ACCC) to seek orders from the Federal Court on behalf of one or more persons who have suffered, or are likely to suffer, loss or damage by conduct of another person where the conduct engaged in is in contravention of sections 45D or 45E.

2.5 This change removes the current limitation in section 87(1A)(b) of the Act, under which the ACCC is able to seek such orders for all contraventions of Part IV of the Act other than sections 45D or 45E.

Item 2 — Paragraph 87(1B)(a)

2.6 This item would remove the words ‘(other than section 45D or 45E)’ from Paragraph 87(1B)(a) of the Act, which prescribes the conditions the ACCC must satisfy before they may commence a representative action on behalf of a person or persons who have suffered

loss or damage, or are likely to suffer loss or damage, as a result of conduct in contravention of the Act.

2.7 This change would allow the ACCC to initiate representative actions in respect of breaches of sections 45D and 45E. The ACCC may currently initiate such representative actions in relation to all contraventions of Part IV of the Act, other than sections 45D and 45E.

Item 3 – Application

2.8 Item 3 makes it clear that the ACCC may only bring actions for compensation or representative actions for contraventions of Sections 45D and 45E in relation to conduct that occurred on or after the commencement of the amendment.