Date Introduced: 13 September 1984  
House: House of Representatives  
Presented by: Hon. Ralph Willis, M.P., Minister for Employment and Industrial Relations and Minister Assisting the Prime Minister for Public Service and Industrial Matters

Short Digest of Bill

Purpose

The Bill was introduced in conjunction with the Conciliation and Arbitration Amendment Bill (No. 2) 1984[1] for the purpose of repealing sections 45D and 45E of the Trade Practices Act 1974. The new legislation provides a mechanism whereby the Conciliation and Arbitration Commission may settle secondary boycott disputes.

Background

A boycott arises when one or more persons refuse to deal with another. A secondary boycott occurs when one group of people causes another group to refuse to deal with the target of the boycott.

Sections 45D and 45E prohibit secondary boycotts generally whilst some primary boycotts affecting inter-state and overseas trade fall within the scope of 45D.

For conduct to be caught by either section 45D or 45E it must have the effect of causing substantial loss or damage to the target of the boycott or a substantial lessening of competition in a relevant market. Such conduct will only be subject to the Act if it is engaged in for the purpose of harming the target's business or in order to lessen competition.

The Trade Practices Commission presently may, under section 88 of the Trade Practices Act, authorise conduct covered by sections 45D and 45E. The Commission however may only grant an authorisation in respect of such proposed conduct unless it is satisfied, in all the circumstances, that the proposed arrangement or the proposed conduct would result, or be likely to result, in such a benefit to the public that any proposed contract or arrangement should be
allowed to be made, or the proposed conduct should be allowed to take place.[2]

There is also an exemption under sub-section 45D(3), which, in broad terms, provides that 45D does not apply where the dominant purpose of the secondary boycott is substantially related to remuneration, conditions of employment, hours of work or the termination of employment. However, the wording of the Act is such that this exemption has been narrowly interpreted by the courts, and in practice, trade unions find it difficult to rely on it.[3]

For there to be a breach of 45E the conduct engaged in must be deliberately designed to hinder or prevent the supply of goods or services. Unlike 45D, section 45E contains no exemption provision relating to industrial issues but exempts arrangements etc. where the 'target' is a party or consents in writing.

Sections 45D and 45E have their origin in a recommendation of the 1976 Trade Practices Act Review Committee (the Swanson Committee), one of whose terms of reference was "to give particular attention to the application of the Act to anti-competitive conduct by employees, and employer or employee organisations".

The Swanson Committee recommended that:

"... the law provide [should] an effective avenue of recourse for the trader directly affected, by allowing him access to an independent deliberative body".[4]

The Committee's Report specifically noted however that the Committee wished to make no recommendation "as to whether these procedures should be established under the Trade Practices Act or the Conciliation and Arbitration Act".[5]

In 1977 the Trade Practices Act was amended to insert section 45D. This section outlawed certain forms of secondary boycott. At the same time bodies engaging in secondary boycott activity covered by the Act became liable to be dealt with under sections 76-77, 80 and 82 of the Trade Practices Act. These sections in turn provided for the imposition of pecuniary penalties, the resort to injunctive relief and claims for damages.

The scope of the section was broadened in 1978.

In March 1980 the Transport Workers Union and Amoco Aust. Ltd. made an alleged agreement to stop supplying Leon Laidley Pty. Ltd. with petroleum. This followed a secondary
boycott of Leon Laidley Pty. Ltd. by the TWU and a subsequent injunction granted against the TWU by the Federal Court.

Partly in response to difficulties encountered in trying to resolve the "Laidley Dispute" the Trade Practices Act was amended in June 1980 to give the Conciliation and Arbitration Commission a formal role in the resolution of disputes involving secondary boycott activity. Such specific legislation was deemed necessary because, in the usual case, secondary boycotts do not involve a dispute between an employer and employee which could be brought before the Conciliation and Arbitration Commission under the provisions of the Conciliation and Arbitration Act. Complementary legislation inserted Division 5A (sections 88DA to 88DH) into the Conciliation and Arbitration Act.[6]

The 1980 amendments to the Trade Practices Act also saw the inclusion of section 45E into the Act. Basically that section prohibits a contract, arrangement or understanding between a union and another person which may prevent or hinder the supply of goods or services to a third person, or their acquisition from that third person. It applies where either the second person or the third person is a corporation (thus ensuring the section's constitutional validity), and where the second person is accustomed or under an obligation to supply or to acquire the goods or services.


The present legislation deals only with proposed changes to the law governing secondary boycotts. It has been announced[7] that other changes to the Trade Practices Act will not be introduced in the current session of Parliament.

Main Provisions

Clause 3 makes a number of consequential amendments to section 6 of the Principal Act which flow from the repeal of sections 45D and 45E. Paragraph 3(a) incorporates into paragraph 6(2)(g) of the Principal Act (referring to the extended operation of the Act) a reference to new sub-section 96(3B) (non-corporation engaging in Resale Price Maintenance) to make clear that new sub-section 96(3A) operates independently of sub-section 96(3B). This drafting
device is necessary because of continuing doubts surrounding the ability of the Commonwealth to rely on the "cumulative" rather than the "distributive" use of a number of constitutional heads of power.[8] The formula used ensures that those provisions of the Principal Act which relate to non-corporations engaging in Resale Price Maintenance (RPM) can be severed from those relating to corporations.

Clause 4 provides for the repeal of sections 45D and 45E. Sub-clause 4(2) prohibits the institution of proceedings for contraventions of the two repealed sections after commencement of the legislation. However, proceedings already instituted remain unaffected.

Clause 5 makes it clear that agreements resulting from the settlement of industrial disputes pursuant to Division 5A of the Conciliation and Arbitration Act 1904 by the Conciliation and Arbitration Commission, which relate to marketing and pricing practices will remain subject to the Principal Act. Thus, although the Act will not per se cover industrial agreements created through proceedings before the Conciliation and Arbitration Commission designed to settle disputes involving secondary boycotts, the Trade Practices Act will prevent unions and corporations from entering into or enforcing collusive marketing agreements and pricing schemes.

Clause 6 makes a series of consequential amendments stemming from the repeal of sections 45D and 45E. Sub-clause 6(2) provides that pecuniary penalties cannot be awarded against corporations or persons (unions, their members and officials) who contravene the new RPM provisions of the Act.

Clause 7 provides for the repeal of section 80AA of the Principal Act. As a transitional provision, the clause enables the staying of any pending injunctions as if the repealed sections were still in force.

Clauses 8 and 9 specify that damages under section 82 or ancillary orders under section 87 are not to be available in respect of the new RPM measures.

Clauses 10 and 11 remove references to authorisation procedures which will become redundant following the repeal of sections 45D and 45E.

Clause 12 extends the reach of the present RPM provisions so as to cover non-suppliers (unions) as well as suppliers. New sub-section 96(3C) enlarges the scope of the Principal Act by specifying two additional types of conduct as constituting RPM, namely where a person makes it known
that he or she will hinder or prevent the flow of goods, or where he or she engages in that conduct, to bring about RPM.

The new provisions are in a similar format to the existing RPM provisions. Adoption of separate sub-sections for where the principal is a corporation, and where the principal is not a corporation (but the target is), aims at achieving the widest coverage within constitutional limitations.

As indicated earlier, although re-sale price maintenance activities by non-suppliers will be subject to injunction such activities will not attract claims for damages or give rise to proceedings for pecuniary penalties.

For further information, if required, contact:

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References

1. See separate Bills Digest.
5. Ibid., para. 10.20.