CONCILIATION AND ARBITRATION AMENDMENT BILL (NO. 2) 1984

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 in Public Service Industrial Matters

Purpose

1. To create a legislative mechanism under the Conciliation and Arbitration Act for dealing with disputes involving secondary boycotts following the repeal of sections 45D and 45E of the Trade Practices Act.[1]

2. To simplify the financial accounting and reporting requirements under Part VIIIAA of the Conciliation and Arbitration Act.

Background

1. 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. Until 1977 no Commonwealth Statute contained provisions dealing specifically with secondary boycotts involving trade unions. Firms or individuals the subject of secondary boycott activity had limited rights of action via the common law torts of conspiracy, intimidation, and interference with contractual relations. Following the report of the Swanson Committee[2] the then government inserted section 45D into the Trade Practices Act. That section was broadened in 1978 and again in 1980 when section 45E was also included in the Act.

Under the present legislation persons or organisations (usually trade unions) which engage in secondary boycotts and some forms of primary boycott[3] may be subject to pecuniary penalties (sections 76-77), the granting of an injunction (section 80), and action for damages (section 82) under the Trade Practices Act. At the same time firms or individuals who have suffered damage as a result of boycott activity may pursue their rights at common law.
Following what is now known as the "Laidley Case" the Liberal-National Country Party Government in May 1980 moved to amend both the Trade Practices Act and the Conciliation and Arbitration Act to enable the Conciliation and Arbitration Commission to play a formal part in resolving disputes arising from contraventions or alleged contraventions of section 45D and (the then) proposed section 45E where industrial matters were involved.

Those amendments, which placed the present Division 5A (sections 88DA to 88DH) in the Conciliation and Arbitration Act gives the Commission power to conciliate (88DC) in disputes relating to a contravention, or a threatened, impending or probable contravention of sections 45D or 45E, where the dispute relates, or may relate, to work under a federal award or in which a federally registered union, or an officer or member is involved. The Commission is expressly excluded from exercising its arbitral powers.

Under the present section 88DB, a dispute may be notified to the Conciliation and Arbitration Commission after there has been an application for an injunction under the Trade Practices Act to restrain a contravention of sections 45D and 45E. Either the applicant or the person(s) to be restrained may notify the Commission. Provision also exists for a Minister to notify the Commission of the existence of a dispute to which Division 5A applies. (In this case, there does not have to be a prior application for an injunction).

At the same time as Division 5A was inserted into the Conciliation and Arbitration Act, section 80AA was inserted into the Trade Practices Act. This permits, but does not require, the Federal Court to stay the operation of an injunction granted under section 80 of the Trade Practices Act to restrain secondary boycott activity. A stay may also be ordered where the Court, on the application of a Minister or a party, considers that the stay would be likely to facilitate the settlement of the dispute before the Conciliation and Arbitration Commission under Division 5A, or before a State or Territory tribunal under a 'prescribed provision' of a law of the State or Territory. (It may, however, be noted that no such law has been prescribed for the purposes of section 80AA).

In February 1984 the Government circulated a Discussion Paper and Exposure Draft[4] outlining a series of proposed amendments to the Trade Practices Act and to the Conciliation and Arbitration Act. Public comment was invited and initially interested persons were given until 4 May 1984 to present submissions to the Government.
The Government subsequently announced that it would not be proceeding with amendments to the Trade Practices Act other than those repealing sections 45D and 45E.[5]

2. The proposed amendments to the Financial Accounting and Reporting Requirements under Part VIIIAA of the Conciliation and Arbitration Act are the third set of amendments to Part VIIIAA in the last three sessions of Parliament. The amendments in this case, in part, alter changes to Part VIIIAA which are provided for in the Conciliation and Arbitration Amendment Bill (No. 1) 1984 which is still before the Senate.

Part VIIIAA (sections 158AA to 158AM) of the Conciliation and Arbitration Act 1904 was first enacted in 1977 and proclaimed to apply from 30 December 1980. The Part requires accounts to be kept by organisations registered under the Act, and for those accounts to be audited and copies supplied to the Registrar annually. Prior to its commencement, the Part was amended by the Conciliation and Arbitration Amendment Bill 1980 which permitted branches of an organisation to be treated as separate organisations for the purposes of keeping, publishing and auditing accounts as required by the legislation (section 158AAA). The new Part replaced earlier audit provisions and followed the 1976 Report of the Royal Commission into Alleged Payments to Maritime Unions.[6] Its amendment in 1980 followed consideration of its provisions by a Tripartite Committee of the National Labour Consultative Council and representations to the Government by organisations representing the accounting profession (see Bills Digest for Conciliation and Arbitration Amendment Bill 1980).

The 1980 amendment required, in the case of registered organisations comprising several branches, the branches and the federal organisation to file accounts individually. The 1983 amendment (the Conciliation and Arbitration Amendment Act (No. 2) 1983, section 29) allowed the Registrar to issue a certificate where the organisation's committee of management has management and control of the organisation's assets, including branch assets. In this case, the organisation is permitted to file consolidated accounts and the branches are not required to comply with the requirements of the Part.

Conciliation and Arbitration Amendment Bill (No. 1) 1984 provides for branch accounts to be filed by the registered organisation on behalf of the branch, where the respective accounting periods are the same and the organisation's rules so provide. The new section 158AHA is
worded so that the branch remains liable to file if the organisation does not file within 14 days of presentation to the branch of the accounts. The section allows centralized preparation of accounts even where the existing test of centralised control over branch assets is not met.

Amendments contained in the Conciliation and Arbitration Amendment Bill (No. 2) 1984 will, inter alia, enable organisations or branches of those organisations whose annual incomes do not exceed $10,000, to apply to the Industrial Registrar for a certificate of exemption covering certain of the existing financial and reporting requirements of Part VIIIAA of the Act.

The Government has stated that the proposed amendments have the in principle support of members of the National Labour Consultative Council.[7]

Main Provisions

Clause 3 provides for the repeal of the existing Division 5A of Part III of the Conciliation and Arbitration Act and, the insertion of a new Division 5A. The new Division comprises sections 88DA to 88DN inclusive and will enable the Commission to deal with secondary boycott disputes by conciliation or, where the parties agree, by an arbitral process. The new provisions will not operate by reference to the provisions of any other Act, unlike existing Division 5A which operates in relation to disputes relating to contraventions of section 45D and 45E of the Trade Practices Act.

Proposed section 88DB identifies the types of boycotts which will be able to be dealt with by the Commission. These boycotts are similar to what is covered by existing sections 45D and 45E.

Under new section 88DC a boycott dispute may be notified to the President or the Registrar by a wide variety of persons including any Minister, any organisation of employees whose members are involved in the dispute, and any organisation representing employers involved in the dispute.

Proposed section 88DD outlines the procedures to be followed by the Commission when it is notified of or becomes aware of the existence of a dispute. Specifically 88DD(4) gives the Commission power to deal with non-industrial as well as industrial disputes. However, the Commission may only deal with a non-industrial dispute where it is prepared to certify in writing that its dealing with the dispute is...
likely to produce a cessation of any industrial action, the abandonment of the boycott, or the final settlement of the dispute.

Proposed section 88DD(2) makes it mandatory for the Commission once it has been notified of the existence of a dispute to commence proceedings within 48 hours to determine whether there is in fact a boycott dispute.

Proposed section 88DE obliges the Commission to deal with disputes expeditiously.

Proposed section 88DF enables the Commission to deal with situations where a boycott dispute is intertwined with other industrial matters. Under this section the President may permit a boycott dispute to be dealt with jointly with the related issues.

Under proposed section 88DG the Commission is to be able to engage in a form of arbitration in relation to a boycott dispute. Such arbitration will only take place where all the parties agree to abide by all decisions of the Commission made in the exercise of this arbitral function. Such arbitral powers are only likely to be used to resolve minor "sticking points" in more complex disputes.

Proposed section 88DH sets out the rights of persons to participate in proceedings under the new Division.

Proposed section 88DJ places certain restrictions on applications for, and the enforcement of, injunctions in relation to boycott disputes in the federal jurisdiction. The object of this section is to lessen the likelihood of conciliation proceedings before the Commission being hindered or disrupted by the commencement, or the continuation of, related injunctive proceedings before a court. Under proposed sub-section 88DJ(1), a court is prevented from hearing or granting an application for such an injunction to the extent that the application relates to an action in tort against any person who is, or is likely to be involved in the boycott, where that action in tort concerns an element of the boycott.

The restrictions contained in section 88DJ do not affect the right of an injured party to pursue, or to continue with, an action for damages.

Under proposed sub-section 88DJ(2), the restrictions on injunctions will not apply unless at least the applicant for the injunction or one of the persons against whom it is sought is a corporation or is engaged in
trade or commerce among the States, between Australia and places outside Australia, or within a Territory, between a State and a Territory or between two Territories. For example, a dispute involving a number of sole-traders (unincorporated bodies) not engaged in "interstate trade" and a group environmentalists and a state union would not be subject to the restrictions on access to injunctive relief.

Proposed sub-section 88DJ(3) retains the right of persons to seek injunctive relief for the purpose of preventing personal violence or damage to property.

Restrictions on the right to common law action cease to operate where:

- the Commission issues a section 88DK certificate in which it states that it is satisfied that it is unable to bring about the prompt abandonment of the boycott or the settlement of the dispute;

- where a Full Bench of the Commission is satisfied that the President or member dealing with the dispute under sub-section 88DK(2) is unable to bring about the prompt abandonment of the boycott or the settlement of the dispute and the Commission issues a certificate to that effect;

- the boycott is abandoned; and

- the boycott dispute has been settled.

Under proposed sub-section 88DK the Commission is given power to terminate conciliation proceedings before it by the issuing of a certificate. Once a certificate is issued any restriction on the use of injunctions ends.

Clause 4 provides for a consequential amendment to section 158AHA. Section 158AHA is itself contained in the Conciliation and Arbitration Amendment Bill (No. 1) 1984 which as at 3 October 1984 was still before the Senate. Clause 4 of the Conciliation and Arbitration Amendment Bill (No. 2) 1984 amends sub-section 158AHA(6) by excluding from the definition of "relevant branch" for the purposes of that section a part of an organisation which has obtained a certificate under proposed section 158AN. Such a certificate may be issued where the Industrial Registrar is satisfied that the income of the organisation or branch did not exceed $10,000 or, where, pursuant to sub-section 158AA(2), the financial year for the organisation or branch
is not 12 months, that the income of the organisation or branch did not exceed what the registrar considers to be appropriate in the circumstances.

Clause 5 provides for a new section 158AN to be inserted into the Conciliation and Arbitration Act. This section aims to provide for new and less onerous requirements in relation to the preparation of accounts and the lodging of those accounts by small organisations registered under the Principal Act.

Under new section 158AN an organisation or branch of an organisation may obtain a certificate from the Industrial Registrar which will exempt it from the usual requirements of Part VIIIAA of the Act as to the preparation of accounts, their supply and presentation to members, and the time limits for filing accounts. Instead, an organisation or branches which have obtained an exemption certificate under section 158AN will be required to prepare and present its accounts and other statements in accordance with requirements which will be prescribed under the Conciliation and Arbitration Regulations.

The rights of individual members are protected under sub-section 158AN(5) which obliges the organisation or branch to present copies of the auditor's report (required under section 158AF) as well as the accounts and the statements prepared in accordance with new section 158AN to a meeting of its members. This presentation is to take place between the date of the auditor's report on the financial year subject to the exemption certificate and the end of the succeeding financial year.

Clause 6 provides for the continuation of any outstanding section 45D and 45E proceedings under the existing Division 5A of Part III of the Principal Act where the proceedings were commenced before its repeal under clause 3 of the 1984 Bill. Such proceedings are to continue as if Division 5A had not been repealed.

For further information, if required, contact:

3 October 1984
Economics and Commerce Group
LEGISLATIVE RESEARCH SERVICE
References

1. See separate Bills Digest
3. Section 45D(1A), Trade Practices Act 1974
4. Trade Practices Act Proposals for Change (Green Paper)
5. Joint Statement by the Attorney-General and Minister for Home Affairs and Environment, 12 September 1984