Secondary boycott actions under the Competition and Consumer Act 2010

Robert McClelland

The Australian Competition and Consumer Commission has indicated that it intends to become more active in the area of industrial disputes by re-activating the use of secondary boycott actions. While there have been some notable cases where damages and substantial penalties have been imposed on trade unions that have engaged in secondary boycotts, these proceedings are highly complex and involve substantial evidentiary hurdles.

INTRODUCTION

The Australian Competition and Consumer Commission (ACCC) has indicated that it intends to become more active in the area of industrial disputes by re-activating the use of secondary boycott actions.[1] The boycott provisions are now contained in the *Competition and Consumer Act 2010* (Cth) (CCA), with the provision of greatest significance being s 45D. Although there has been a minor change in wording and arrangement of the legislation, it is in substance a re-enactment of the former Pt IV of the original *Trade Practices Act 1974* (Cth) (TPA). While rarely used, there have been some notable cases where damages and substantial penalties have been imposed on trade unions that have engaged in secondary boycotts.[2] However, these proceedings are highly complex and involve substantial evidentiary hurdles.

PROHIBITED CONDUCT

Section 45D prohibits conduct by a person "in concert" with a second person from engaging in conduct that "hinders or prevents" a third person supplying goods or services to a fourth person. The section also prevents a third person acquiring goods or services from a fourth person where the conduct is "engaged in for the purpose" and would "have or be likely to have the effect of causing substantial loss or damage" to the business of the fourth person. The section specifically excludes the situation where the fourth person is the employer of the first person or the second person.

"Person"

The use of the word "person" rather than "employee" means that companies, individuals who are not employees (such as union officials and unemployed persons) and many unions, may be caught within the ambit of s 45D. Section 45DC(5) is a provision that was specifically made for proceedings to be taken against an organisation which is not "a body corporate". In those circumstances, proceedings are taken against an officer of the organisation as a representative of the organisation's members.

"In concert"

The phrase "in concert" has a very broad definition. The CCA dictionary refers to the agreement of two or more persons in a design, plan or enterprise. Under s 45D acting "in concert" involves knowing conduct that is the result of communication between the parties and not simply simultaneous actions

[1] Sims R, *Looking Forward to 2014*, Speech delivered to Committee for Economic Development of Australia Conference (Sydney, 21 February 2014).

[2] In *ACCC v Maritime Union of Australia* (2001) 114 FCR 472; [2001] FCA 1549, the Federal Court ordered the Maritime Union of Australia (MUA) to pay $150,000 in penalties and $60,000 in costs for unlawful boycotts, coercion and harassment when it was found to have engaged in picketing three ships and delayed their departures. See *ACCC v Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union* [2004] FCA 517 where the Australian Manufacturing Workers Union (AMWU), Australian Workers Union (AWU) and Electrical Trade Union (ETU) were fined $100,000 and put on four-year good behaviour bonds for picketing in breach of s 45D of the *Competition and Consumer Act 2010* (Cth) at the Patricia Baleen gas-processing plant in East Gippsland, Victoria. See also *ACCC v The Construction, Forestry, Mining and Energy Union* [2006] FCA 1730 where the Federal Court ordered the CFMEU to pay $115,000 in penalties and costs for breaching the secondary boycott provisions when picketing was found to have delayed a concrete pour at a construction site in Perth in 2004.

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occurring spontaneously.[3] The notion of acting in concert also involves some contemporaneity.[4] This requirement of contemporaneous conduct does not mean that the acts constituting the relevant conduct must coincide precisely in time, although, temporal relationship must be sufficiently close to be consistent with the notion of "in concert".[5] Particular difficulties arise when the conduct allegedly in concert is engaged in separate locations and at different times.[6]

"In concert" evidentiary considerations

In *Springdale Comfort Pty Ltd v Electrical Trades Union of Workers (WA Branch) Perth* [1986] ATPR 40-694, an application for injunctive relief was dismissed because the applicant had not established that the respondents had acted in concert. In that case, the applicant was unable to establish any communication between the ETU and one of its members about enforcing a picket line around the applicant's construction site. Rather, the member, who was an employee of the State Energy Commission, indicated that he did not perform work on the site because it was a long-standing policy of his union, the ETU, not to cross a picket-line. On the other hand, in *Concrete Constructions Pty Ltd v Plumbers and Gasfitters Employees Union* [1987] ATPR 40-766 bans imposed by the union against independent contractors, contemporaneously but at separate industrial sites, were held to have established "acting in concert" with their union because of the close temporal connection between the imposition of the bans at the separate sites. Of significance was the fact that the decision of the federal executive to impose the bans had been communicated to members in the union's official magazine.

In *AMIEU v Meat and Allied Trades Federation of Australia* [1991] ATPR 41-151 (*AMIEU* case), Gray J held that there must be some evidence of communication between the parties as to their proposed course of action and the acceptance of the obligations to undertake that conduct by at least one party.[7] Justice Gray held that while there may have been arrangements or understandings between employees of each of the respective employers who were targeted and their union, there was no evidence that the individual employees in the various workplaces had acted in concert with each other. Interestingly, his Honour commented that the case may have been determined against the union if the rules of the AMIEU had imposed an obligation on the part of members to obey a directive by the union to undertake strike action.

Conduct which "hinders" or "prevents" supply or acquisition

The words "supply", "acquire", "goods" and "services" are all defined in s 4 of the CCA; however, the concepts of "hindering" and "preventing" were not defined by the Act. Authorities relating to these concepts were analysed by the Full Court of the Federal Court of Australia in the *Australian Builders' Labourers' Federation Union of Workers (Western Australia Branch) v J-Corp Pty Ltd* (1993) 42 FCR 452. In their joint-judgment Lockhart and Gummow JJ held (at 459) that:

> The conduct hindering or preventing supply or acquisition to which the section refers can be engaged in by threat and verbal intimidation as well as physical interference with the actual activities.[8]

Their Honours concluded "hinder" should be construed "in the general sense of in any way affecting *to an appreciable extent* the ease of the usual way of supplying the articles [or services]".[9] Justice Spender agreed with the joint-judgment of Lockhart and Gummow JJ. His Honour added,

[3] See, eg, *Tillmans Butcheries Pty Ltd v The Australasian Meat Industry Employees Union* [1979] ATPR 40-138; *Epitoma Pty Ltd v AMIEU [No 2]* (1984) 2 FCR 439.

[4] See *AMIEU v Mudginberri Station Pty Ltd* (1985) 27 AILR 393.

[5] See *Flower Davies Wemco Pty Ltd v ABLF (WA Branch*) [1987] ATPR 40-757 at 90; *J-Corp Pty Ltd v ABLF (WA Branch)* (1992) 111 ALR 502; *National Union of Workers v Davids Distribution Pty Ltd* [1998] FCA 1530.

[6] Such a situation was considered by the Federal Court in *AMIEU v MATFA* [1991] ATPR 41-151.

[7] His Honour relied upon authorities including *Trade Practices Commission v David Jones (Australia) Pty Ltd* (1986) 13 FCR 446; *L Grollo & Co Pty Ltd v Nu-Statt Decorations Pty Ltd* [1978] ATPR 40-086; *Trade Practices Commission v TNT Management Pty Ltd* (1985) 6 FCR 1.

[8] Their Honours were making reference to *Australian Broadcasting Commission v Parish* (1980) 43 FLR 129 at 153 (Deane J).

[9] *ABLF (WA Branch) v J-Corp Pty Ltd* (1993) 42 FCR 452 at 459 (emphasis added). Their Honours also analysed British authorities and applied the reasoning of Mason CJ in *Devonish v Jewel Food Stores Pty Ltd* (1991) 172 CLR 32.

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however, that the conduct to hinder and prevent "has to be assessed in the context of all the circumstances" and the mere act of picketing may not necessarily constitute an act of hindering or preventing supply or acquisition if it is undertaken in a peaceful and non-threatening way.[10] Finally on this point, it should be noted that the protected industrial action provisions of the *Fair Work Act 2009* (Cth) (FWA)[11] do do not extend to unlawful picketing[12] or conduct that generally amounts to a secondary boycott.[13]

Concept of "purpose"

The authorities relating to the concept of "purpose" were considered by French J in *J-Corp Pty Ltd v ABLF (WA Branch)* (1992) 111 ALR 502. His Honour's useful summary was as follows (at 536-537):

> The "purpose" … is the "operative subjective purpose of those engaging in the relevant conduct 'in concert'". It is identified "by reference to the real reason or reasons for, or the real purpose or purposes of the conduct and to what was in truth the object in the minds of the relevant persons when they engaged in the conduct in concert" … The relevant purpose may not be the ultimate purpose for which the participants acted in concert … "the party applying the pressure may have the purpose proscribed by s 45D(1) notwithstanding that this purpose is a means to a greater end".[14]

The removal of the qualification of "immediate and substantial" as previously contained in s 162(2)(d) of the *Industrial Relations Act 1993* (Cth) and the exclusion of the "substantial purpose or reason" in s 4F(2) of the CCA indicates that purpose, as contemplated by s 45D(2), need not be the only purpose of the conduct, nor even a substantial purpose.[15]

In *Wribass Pty Ltd v Swallow* [1979] ATPR 40-101, the AMIEU imposed a ban upon the supplying of meat to the plaintiff company. In that case, Smithers J adopted an objective test in determining "that the purpose of the ban and the cutting off of the plaintiff's supplies was to cause sufficient loss and damage to the plaintiff's business to compel it to comply with the demands of the union". Significantly in that case, there was evidence that the union branch secretary acknowledged that the ban would "make things uncomfortable for the plaintiff".[16]

In *Utah Development Co v Seaman's Union of Australia [No 2]* (1977) 17 ALR 15, the respondent, the SUA, imposed bans on ships exporting the plaintiff company's coal by preventing a tug company from supplying services to the plaintiff. The union gave evidence that the ultimate goal or aim of the ban was to crew the plaintiff company's ships with Australian seamen. The union's case was that they did not have the proscribed harmful purpose; rather they only had a "protective purpose" to protect their members' jobs. Justice Keely rejected the defence finding that while that may have been the unions' ultimate purpose, by failing to testify, the respondent union failed to establish that there was no other purpose.

In *Tillmans Butcheries Pty Ltd v AMIEU* [1979] ATPR 40-138, the AMIEU and its officers imposed a black ban on the supply of meat to Tillmans from abattoirs at which its union members

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[10] For a useful discussion of picketing, see Creighton WD, Ford WJ and Mitchell RJ, *Labor Law: Text and Materials* (2nd ed, Law Book Co, 1993) pp 1245-1266. For a discussion as to when the line between appropriate and inappropriate conduct is crossed, see *Ralan St Leonards Pty Ltd v CFMEU* [2014] FCA 431; *Cahill v CFMEU (No 2)* (2008) 170 FCR 357; [2008] FCA 1292. In that context "sporadic outbreaks of quite unacceptable behaviour" may not necessarily mean that the conduct offends s 45D of the *Competition and Consumer Act 2010* (Cth).

[11] *Fair Work Act 2009* (Cth), Ch 3, Pt 3-3, Div 2.

[12] *Davids Distribution Pty Ltd v NUW* (1999) 91 FCR 463; [1999] FCA 1108. See also *Recall Information Management Pty Ltd v NUW* [2013] FCA 161.

[13] *Broad Construction Services (WA) Pty Ltd v CFMEU* [2005] FCA 613, referring to *FH Transport Pty Ltd v Transport Workers Union of Australia* (1997) 75 FCR 480.

[14] References to authorities omitted. While the conclusion of his Honour, in respect to the relevant facts, was overturned on appeal, his Honour's analysis of those relevant authorities was not.

[15] *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing & Allied Services Union of Australia v ACCC* (2007) 162 FCR 466; [2007] FCAFC 132. See *Jewel Food Stores Pty Ltd v Amalgamated Milk Vendors Association Inc* (1990) 24 FCR 127; *Tillmans Butcheries Pty Ltd v AMIEU* [1979] ATPR 40-138.

[16] *Wribass Pty Ltd v Swallow* [1979] ATPR 40-101 at 18,007.

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worked. The stated purpose was to achieve unionisation of Tillmans' employees. On the facts, the Full Court of the Federal Court inferred that "the respondents knew that the only pressure which would be effective against Tillmans was the prospect or actuality of loss or damage".[17]

In *Concrete Constructions (NSW) Pty Ltd v Australian Building Construction Employees' and Building Labourers' Federation* [1988] ATPR 40-900, the plaintiff took action against the union as a result of repeated entries by union representatives on their building sites in order to distribute pamphlets. While Morling J adopted the accepted test as being the "operative subjective purpose of the conduct" and found that there was a legitimate industrial purpose to the conduct of the union officials, his Honour also determined that there was a second purpose, namely that of causing loss and damage to the plaintiff's business.

Establishing prohibited purpose

A plaintiff company can face severe difficulties in adducing all necessary evidence to establish prohibited purpose. In *GTS Freight Management Pty Ltd v TWU* (1990) 32 AILR 225, the employer failed to establish that the conduct of the union's officers could be imputed to the union itself. While there was evidence against individual union officials, the necessary requirement of acting in concert was not established. In that case, the mere fact that the union did not intervene to prevent the conduct by its officers did not establish that the union had a proscribed purpose.

Similarly, in *ABLF (WA Branch) v J-Corp Pty Ltd* the applicant failed to challenge the evidence of the secretary of the respondent organisation that a picket line was "established simply to protest and inform people about J-Corp's refusal of right of entry to union representatives".[18] The failure to test that evidence was crucial in the Full Court's decsion to uphold the appeal in favour of the union.[19]

On the other hand, in recognising that the best evidence was from a witness, Sackville J in *Farah (Australia) Pty Ltd v National Union of Workers (New South Wales Branch)* [1997] FCA 935, held that while there was "no direct evidence of any of the former [dismissed] employees stating their 'real reasons' for maintaining the picket, there is evidence that, on more than one occasion, entry to or aggress from the applicant's premises has been blocked, albeit temporarily, by the former employees then participating in the picket line". In other words, picketing that is undertaken in an aggressive and obstructive manner may itself be evidence of the prohibited purpose.

In *Recall Information Management Pty Ltd v NUW* [2013] FCA 161, Barker J held that the mere presence of people wearing clothes with insignia of the Australian Manufacturing Workers Union did not establish that the union was involved in the impugned conduct.

In the *AMIEU* case, Gray J specifically rejected an argument that the requirements of the proscribed purpose could be satisfied merely "if any one of the persons acting in concert has the relevant purpose". His Honour said the "section requires that all of the relevant persons [joined as respondents] engage in conduct in concert, with the relevant purpose and the relevant effect or likely effect".[20]

Conduct likely to cause "substantial loss or damage"

In *ABLF (WA Branch) v J-Corp*, the majority agreed with the reasoning of Bowen CJ, with whom Evatt J agreed in *Tillmans* case, that the word "substantial" means "more than trivial or minimal". Justice Deane in *Tillmans* remarked that "likely" is not synonymous with "more likely than not" but there must be a "real chance or possibility". It was noted in *Building Workers' Industrial Union v Odco Pty Ltd* [1991] ATPR 41-092 that, the event stipulated by s 45D, is not the incurring of actual loss or damage, but the likelihood that the relevant conduct would have that effect.

[17] *Tillmans Butcheries Pty Ltd v AMIEU* [1979] ATPR 40-138 at 18,494 (Bowen CJ); see also 18,501-18,502 (Deane J).

[18] *ABLF (WA Branch) v J-Corp Pty Ltd* (1993) 42 FCR 452 at 465.

[19] The joint-judgment referred to the case of *Stapleton v The Queen* (1952) 86 CLR 358 at 365.

[20] *AMIEU v MATFA* [1991] ATPR 41-151 at 53,144.

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Involvement and liability of employee organisations

Section 45DC of the CAA prescribes a reverse onus of proof for organisations when two or more persons each of whom is a member or officer of the same organisation engage in conduct in concert with one another. The organisation is required to prove that it was not engaged in that conduct, nor did it have the purposes for which those participants engaged in that conduct. Whereas the original s 45D(5) of the TPA required an organisation to take "all reasonable steps to prevent the participants from engaging in that conduct", s 45DC does not require an organisation to actively attempt to prevent the conduct but merely to prove that it was not involved in the conduct.

Situations in which boycotts are permitted

Section 45DD permits boycott conduct where the dominant purpose of the conduct relates to employment matters. That is where "the dominant purpose … is substantially related to the remuneration, conditions of employment, hours of work or working conditions of that person or of another person employed by an employer of that person". In the *GTS Freight Management* case, Von Doussa J held that, in considering the defence, it was necessary to look at the ultimate purpose of the conduct. To decide otherwise, his Honour determined, would render the defence "nugatory in most, if not all, cases". In his Honour's view, the legislature intended to exclude from penalty "conduct which is genuinely engaged in pursuit of improvement in the terms and conditions of employment" for employees "who are pursuing specific concessions from the employer as to the terms and conditions of employment of the employees".[21]

Role of industrial tribunals

Section 80AB of the CCA enables a party to apply to the Federal Court to stay the operation of an injunction pending the outcome of proceedings before an industrial tribunal. In *Flower Davies Wemco v ABLF (WA Branch)* [1987] ATPR 40-757, French J held that the then s 80AA of the TPA did not apply to a case where the court was considering whether or not to grant an injunction as opposed to when an injunction had been granted.[22] However, s 80AB requires an injunction to have been granted as a precondition to the section having effect, and s 87AA of the CCA enables the Federal Court to have regard to whether or not proceedings have been commenced "before an industrial authority" in considering whether or not to grant relief under s 45D.

Conduct of section 45D proceedings

The great advantage of s 45D proceedings from a business point of view is that it is relatively easy for a plaintiff to obtain an interim injunction. Injunctions can be granted pursuant to s 80(1) and interim injunctions may be granted under s 80(2). The tests applied for determining whether to grant interlocutory relief are well known: first, that there is a serious question to be tried; and secondly, that the balance of convenience favours the granting of an injunction.[23] However, while the test is relatively straightforward, obtaining an interim injunction is certainly not an inevitability, particularly if applications are inadequately prepared. Specifically, it has been determined that in order to obtain an interim injunction, there must be at least some evidence going to each of the elements making up a cause of action under s 45D.[24] Moreover, in order to obtain an interim injunction each element of the infringement of s 45D relied upon, must be properly pleaded.[25]

[21] In so deciding, his Honour departed from earlier reasoning such as that contained in *Wribass Pty Ltd v Swallow* [1979] ATPR 40-101 and followed the reasoning of Gray J in *Epitoma Pty Ltd v AMIEU [No 2]* (1984) 3 FCR 55. See also *Qantas Airways Ltd v TWU* [2011] FCA 470.

[22] See also *Ravensthorpe Nickel Operations Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2005] AIRC 1090.

[23] See, eg, *American Cyanamid Co v Ethicon Ltd (No 1)* [1975] AC 396 and applied in *Castlemaine Tooheys Ltd v South Australia* (1986) 161 CLR 148. See more recently *Laing O'Rourke Australia Pty Ltd v CFMEU* [2013] FCA 133.

[24] *Springdale Comfort v ETU* (1986) 14 IR 265.

[25] *Charlie Carter Pty Ltd v Shop, Distributive and Allied Employees' Association of Western Australia* (1987) 13 FCR 413.

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An applicant in s 45D proceedings may well have difficulty in obtaining sufficient information to enable it to properly plead its case. Accordingly, there is often considerable argument in s 45D cases regarding to processes of discovery and interrogation.[26] Further, the privilege against self-incrimination may be claimed by individual respondents with respect to the processes of discovery or interrogatories.[27] This privilege is not, however, available to corporate entities.[28]

Scope of orders

Even if a plaintiff succeeds in establishing that injunctive relief is appropriate there will remain a significant issue as to the scope of any order. The importance of careful formulation of an appropriate order was stressed by Von Doussa J in the *GTS Freight Management* case. In that case, the court held that uncertainty of the wording of the order alleged to have been breached meant that no breach was found to have occurred.

Damages and enforcement

Section 82 of the CCA makes provision for the recovery of damages as a result of boycott conduct. Perhaps the most famous case involving damages was the *Mudginberri Station Pty Ltd v AMIEU* (1985) 61 ALR 280.[29] Further, when a remedy has been ordered against a union, failure to comply with the order may result in the union being fined for contempt of court.[30] The *Mudginberri* case is instructive in terms of the court's power to punish for contempt and potentially criminal contempt.[31]

Conclusion

Section 45D of the CCA is a significant coercive weapon in the area of industrial disputation. However, it would be overly simplistic for those who would seek to rely on s 45D to assume that it will achieve a direct hit in all cases. While s 45D will inevitably receive attention during intense industrial campaigns, the reality is that the proceedings are extremely complex and require careful preparation. Further, it is unlikely that applications will be successful where the subject conduct is genuinely an industrial dispute having a direct, as opposed to a remote, bearing on the terms and conditions of employment of the actual workers involved in the boycott conduct.

The Hon Robert McClelland is a legal practitioner of over 30 years experience specialising in industrial laws and he is a Visiting Fellow at the University of New South Wales. Robert is a former Federal Member for Barton (NSW). He has served in a range of shadow portfolios including workplace relations and was the Federal Attorney-General from 2007 to 2011.

[26] A useful discussion as to when a subpoena will be set aside as being oppressive or "fishing" is contained in *Master Builders' Association (NSW) v PGEU (No 1)* (1987) 20 IR 387.

[27] See *Navair Pty Ltd v TWU* [1981] ATPR 40-194.

[28] The privilege against self incrimination provides that: "In civil and criminal cases, a person is not obliged to answer any question or produce any document if the answer or the document would have a tendency to expose that person either directly or indirectly, to a criminal conviction, the imposition of a penalty or the forfeiture of an estate." See McNicol SB, *Law of Privilege* (Law Book Co, 1992) p 136.

[29] See the subsequent appeal *AMIEU v Mudginberri Station Pty Ltd* (1985) 9 FCR 425. See also cases referred to in n 2.

[30] See *Federal Court of Australia Act 1976* (Cth), s 31. See also *Bovis Lend Lease Pty Ltd v CFMEU (No 2)* [2009] FCA 650.

[31] See also *Concrete Constructions Pty Ltd v PGEU* (1987) 29 AILR 200; *PGEU v John Holland Constructions Pty Ltd* (1988) 30 AILR 145.

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