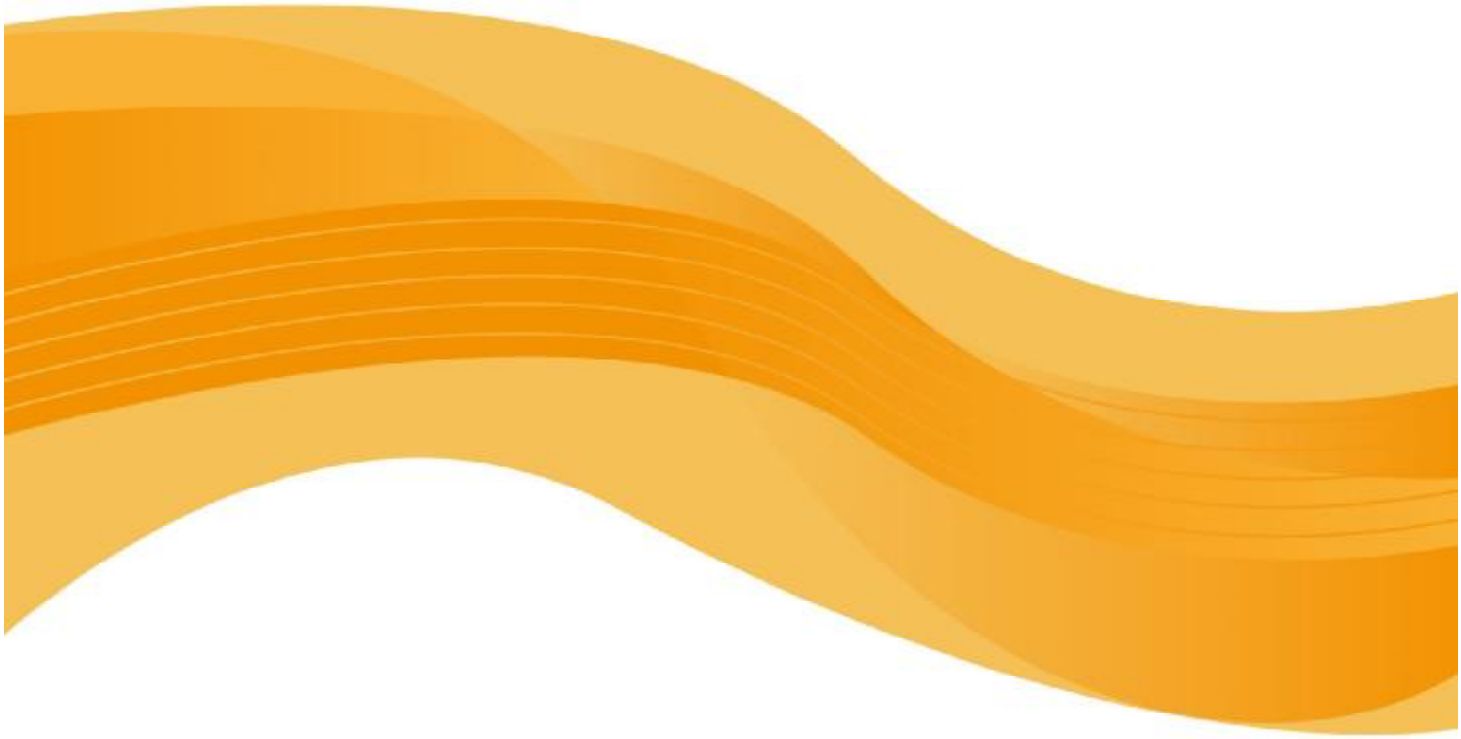
Competition Policy Review:

ACTU Response to the Draft Report

November 2014



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The ACTU is the peak body for Australian unions, comprising of 46 affiliated unions. Altogether, we represent almost two million working Australians and their families. We thank the Panel for the opportunity to respond to its draft report dated September 2014.

In our submission to the Panel in June 2014, we made observations concerning numerous aspects of the operation of competition policy and the *Competition and Consumer Act*. We remain committed to the views we expressed in that submission and in the consultations we participated in during the Panel's deliberative processes. It is unfortunate that in its Draft Report the Panel has chosen not to engage with the issues and evidence we highlighted.

This response to the Panel's draft report is confined to the draft recommendations the Panel has made concerning s.45-45DB of the *Competition and Consumer Act* (hereafter, "the Secondary Boycott provisions") and sections 45E-EA thereof (hereafter "the Trading Restrictions provisions").

ORIGIN OF SECONDARY BOYCOTT AND TRADING RESTRICTIONS PROVISIONS

Secondary Boycott provisions

We are concerned that the Panel's discussion of the Secondary Boycott provisions provides an insufficient insight into the policy development processes that led to their inclusion in the law. We consider that the statement in the Panel's report that: "Prohibitions on secondary boycotts have been a central feature of the scheme of the CCA since its early years"[1] fails to acknowledge that those provisions were in fact a bolt on addition to the Trade Practices Act by the government of the day to create rights for the State to intervene in industrial contests independently of the wishes of the industrial participants.

Further we regard the Panel's positive endorsement of the Swanson Committee's policy rationale[2] for the insertion of the Secondary Boycott provisions as lacking the rigour required of a "root and branch" review.

Firstly, the Swanson Committee did not in fact recommend the insertion of the Secondary Boycott provisions. It recommended that there be some deliberative processes accessible by traders affected by Secondary Boycotts:

> 10.14 The situation which has been the subject of most concern is the secondary boycott, where employees of one employer place a boycott upon the dealings of that employer with another person. Numerous examples were mentioned in submissions to us, but the examples most frequently cited were boycotts by bread delivery drivers against retail outlets which were selling cut-price bread and boycotts by petrol tanker drivers against service stations advertising cut-price petrol.
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> 10.15 The Committee understands that, in those cases, employees decided among themselves to boycott one or more traders or potential traders because the employees claim if they do not do so the operation of the competitive process usually through price competition, will place their jobs in jeopardy. They seek to implement that boycott without having to justify it to anyone as being in the public interest.
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> 10.16 In this regard, we have elsewhere stated our view that no section of the community should be entitled to be the judge in its own cause on matters directly aimed at interfering with the competitive process between firms. We make no exceptions to that position. If an organisation or group of persons for its own reasons deliberately interferes with the competitive process, then the community is entitled to have those reasons scrutinised by a body independent of the persons engaged in the dispute. If that independent body finds

[1] At page 49
[2] At page 242

> those reasons inadequate, the community is entitled to require that the position be remedied.
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> 10.17 In the usual case, secondary boycotts do not involve a dispute between an employer and employees which could be brought by either party before the Australian Conciliation and Arbitration Commission under the Conciliation and Arbitration Act. In any event the employer may not choose to bring the matter before the relevant body, even if he wished to do so, for fear of widening the "dispute" and having his whole operations shut down. Moreover, without any collusion at all with his employees, he may himself find his own position in sympathy with his employees because their actions relieve him from the pressures of his customers for him to make concessions to them on price. Thus it is quite unrealistic to expect that the employer will, as a matter of course, bring secondary boycotts before the body.
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> 10.18 But the trader at whom the employees' actions are aimed is deprived of his ability or his liberty to trade in such manner as he sees fit, and the community suffers, without anyone (the trader himself or consumers) being able to raise the matter in a forum impartial as between all the persons involved or affected. There are some common law actions in tort which might, in theory, be available but these are in most cases dead-letters in practice.
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> 10.19 In these circumstances we recommend that the law provide an effective avenue of recourse for the trader directly affected, by allowing him access to an independent deliberative body. That some procedures for solving the matter should be available was something on which submissions of interested parties were virtually unanimous.
>
> 10.20 We make no recommendation as to whether these procedures for recourse should be established under the Trade Practices Act or the Conciliation and Arbitration Act. The submissions were divided as to which approach was preferable. However, we believe the trader who is the object of the employees' action should not simply have the choice of toeing the line or suffering substantial damage or in some cases going out of business. He too is entitled to have his "day in court". (emphasis added)

As the above illustrates, the Swanson Committee report was the immediate *precursor* to the enactment of the Secondary Boycott provisions in their initial form, but it was *not* the body responsible for their formulation.

Secondly, there were clear shortcomings in the Swanson Committee's reasoning and it should not be forgotten that the Swanson Committee was comprised entirely of persons representing business interests. The *Trade Practices Act* 1974 contained, at the time of the Swanson Committee inquiry, no Secondary Boycott provisions. Rather it contained positive and broad exemptions with respect to employment agreements and the conduct of employees and their organisations. In reference to these exemptions, the Swanson Committee said:

> 10.9 The *Trade Practices Act* 1965 provided that in determining whether an agreement was examinable under that Act regard was not to be had to any provision of the agreement relating to the remuneration, conditions of employment, hours of work or working conditions of employees. This exception applied equally to employees and employers and their organisations.
>
> 10.10 The *Trade Practices Act* 1974, in paragraph 51(2)(a), continues the exception of the 1965 Act but also provides an exception which goes further, in relation to employees and their organisations only, by excepting:
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> - any act done by employees not being an act done in the course of the carrying on of a business of the employer of these employees;
>
> - any act done by an organisation of employees not being done in the course of the carrying on of a business of that organisation.
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> The reasons for this extension to the exception by the 1974 Act are obscure, certainly to the Committee[3]. (emphasis added)

That the rationale for the extension, in a Bill introduced in 1974, was obscure to the Committee is rather at odds with its observation and hence awareness that:

> "10.22 Some submissions were concerned in case any proposed reduction in the scope of the exemption would infringe Australia's obligations under relevant International Labour Organisation Conventions, to allow employees freedom to organise and form trade unions. The relevant Conventions seem to be No. 87—Freedom of Association and Protection of the Right to Organise, 1949, and No. 98—Right to Organise and Collective Bargaining, 1949. Australia ratified both Conventions on 28 February 1973. [4](emphasis added).

Clearly, the Swanson Committee paid little regard to, or fundamentally misunderstood, the nature of the international obligations that Australia had so recently assumed. This is borne out by its derisive observation, which we have highlighted in the extract at page 3 above, that:

> 10.15 The Committee understands that, in those cases, employees decided among themselves to boycott one or more traders or potential traders because the employees claim if they do not do so the operation of the competitive process usually through price competition, will place their jobs in jeopardy. They seek to implement that boycott without having to justify it to anyone as being in the public interest. (emphasis added).

[3] At pages 84-85
[4] At page 86.

The reality is that the "public interest" judgement was made by Australia's conscious and willing assumption of its international obligations. It is to be recalled that in our initial submission to the Panel, we informed the Panel that the International Labour Organisation has, in reports concerning Australia's compliance with Convention No. 87, repeatedly requested the Australian Government to review the Secondary Boycott Provisions "…with a view to bringing them into full conformity with the Convention"[5].

Quite apart from the considerations relating to our international obligations, the Panel ought to be aware that when the then government sought to introduce the expanded exemptions referred to in the Swanson report, it faced some opposition in the Senate. In negativing an amendment moved by the then opposition to remove the exemption, the Attorney General (then Senator Murphy) said:

> The Government will vote against this amendment if it is persisted with. The reason for that is that we have had in this country for a very long time a set of laws in the Conciliation and Arbitration Act. Since 1904 it has existed in various forms. That legislation provides a code for dealing with the restrictive practices to which the honourable senator has referred. For some 70 years we have had laws about restrictive trade practices of trade unions and of organisations of employers. It would be very foolish to put in this legislation provisions which dealt in some different way with the restrictive practices of trade unions and of employer organistaions and of the members of those organisations which are dealt with in some detail in the Conciliation and Arbitration Act. That is why one would not even endeavour to touch upon this topic…
>
> ..Senator Wright should appreciated how foolish it would be to endeavour to deal with this kind of restrictive practices- and they are restrictive practices, whether of employers or employees organisations – other than in the context of the legislation which deals with this kind of practice, that is the Conciliation and Arbitration Act. In the United States, as Senator Wright has indicated, in the Norris-La Guardia Acts the same approach was taken. It is very unwise, if fact one might say, it is very foolish, to start to tamper, in laws dealing with business practices, with industrial laws.…What is contained in this clause very sensible worded. If Senator Wright examines the paragraph that he is seeking to delete hew will see that it contains this specific reference:
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> > *'…not being an act done in the course of the carrying on of a business of the employer of those employees or of a business of that organisation.'*
>
> If a trade union gets into some kind of a business activity, it is subject in its business activity, in the same way as any other corporation, to the provisions of this legislation…When one is dealing with business practices, surely it is wise to keep to what one is dealing with." (emphasis added)[6]

[5] Report of the Committee of Experts on the Application of Conventions and Recommendations, International Labour Office Geneva, 2012, ISBN 978-92-2-124488-2. At page 60.
[6] Senate Hansard, 14 August 1974, at page 946-947.

The Honourable Attorney's comments are immediately pertinent to the matter of *Australian Industry Group v Fair Work Australia*[7] referred to in the Panel's report and in some of the submissions to it, and reveal why the Court in that matter essentially found it was being asked by the Applicant in that matter to "fit a square peg into a round hole".

The most beneficial and rational view that could be taken of the Swanson Committee era, in light of its deficiencies, is that it pointed toward a desire for there to be a deliberative process available to traders who where prejudiced by Secondary Boycott activity, which would provide remedies to those traders if the actions of the workers and their organisations that were the cause of their harm were found to be motivated by business interests rather than industrial interests. [Some, but not all, of those elements were reflected in the re-formulation of the provisions under the Keating Government, which saw them relocated in the *Industrial Relations Act*, subject to compulsory conciliation in the Commission prior to enforcement and included explicit authorisation of "peaceful picketing"[8].]

The record shows that the Government of the day responded to the Swanson Committee's recommendations not by adopting them but by creating an enforceable legal right to penalties, injunctions and compensation in a Court (and a Court alone), a right which could be pursued not only by the affected trader, but also at the instigation of the Trade Practices Commission, the Attorney General, or any other person[9]. It also removed the expanded exemption in respect of conduct of employees and employer organisations. Far from being a "free market" exercise, these reforms paved the way for the government, contrary to its international obligations, to be an agitator and market participant to contain the sphere of activity of organised labour.

Trading Restrictions provisions

The Panel's report fails to appreciate the clear historical linkage between the Trading Restrictions provisions and the Secondary Boycott provisions which preceded them. In our submission, both sets of provisions are the poison fruit of flawed policy development.

[7] [2012] FCAFC 108
[8] See *Industrial Relations Act* 1988 (1993-1996), Division 7 of Part VI.
[9] Combined effect of section 45D , 77, 80 & 82 of the *Trade Practices Act* 1974 as amended by the *Trade Practices Amendment* Act 1977

Whilst the Secondary Boycott provisions were introduced in 1977, the Trading Restrictions provisions were first enacted in 1980, in direct response to first major "test" of the Secondary Boycott provisions, being a dispute involving the Transport Workers Union and fuel distributors Amoco and Leon Laidley Pty Ltd. The nature and development of that dispute was reasonably contemporaneously recounted by labour law academic Breen Creighton, as follows:

> "The union claimed that its members who were employed by the major oil distributors (in this case Amoco) should have the exclusive right to make fuel deliveries within the Sydney metropolitan area. Laidely argued that he, as an "independent " should have the right to make deliveries to a station within the metropolitan area in which he had a financial interest. Members of the union employed by Amoco took industrial action with a view to persuading their employer not to supply fuel to Laidely. Amoco then informed Laidely that they were unable to supply oil "because of a *force mujeure* situation created by the union." Laidely then sought and obtained an interim injunction on the basis of alleged breaches of section 45D by the N.S.W. branch of the union and its members and officials. This led to further industrial action in N.S.W. and in Victoria, which in turn led to widespread fuel shortages throughout the Eastern States. The unions and the oil companies eventually reached a settlement following discussions held under the auspices of the President of the Commonwealth Conciliation and Arbitration Commission, Sir John Moore. Laidely was not a party to these discussions. The terms of the settlement were meant to be confidential, but it was widely reported that they included an agreement that Amoco would no longer supply oil to Laidely. The Government felt that this ran counter to the philosophy embodied in section 45D,and tried to persuade Sir John Moore to re-open the matter. Eventually he agreed to hear submissions from the Commonwealth as to why the issue should be re-opened and having done so he ruled that it would not be appropriate to accede to the Commonwealth's request.
>
> He did however agree to hear further representations from various interested parties with a view to securing a longer term solution to the dispute. These discussions duly produced a settlement whereby *(inter alia)* fuel supplies to Laidely were resumed, and he agreed to drop his action under section 45D.
>
> That was not the end of the matter however. In May 1980 the Government introduced a series of amendments to both the Trade Practices Act and the Commonwealth Conciliation and Arbitration Act which were intended to ensure that a Laidely situation would be handled differently in the future."[10] (footnotes omitted)

Clearly, the Trading Restriction provisions introduced by section 45E would have rendered unlawful the interim resolution procured by the Conciliation and Arbitration Commission in *Amoco.* We digress for a moment to point out that it should not be lost on the Panel that both the interim and final resolution the dispute were only achieved under the auspices of that Commission.

[10] Creighton, B. "Secondary Boycotts under attack – The Australian experience", Modern Law Review, 44:5, September 1981, 489 at 496.

In this manner, section 45E (and, ultimately, section 45EA) are correctly seen as offshoots of the Secondary Boycott provisions and the flawed policy that underlies them – any arrangement that secured a secondary boycott by a union was to be outlawed.

RESPONSE TO DRAFT RECOMMENDATIONS 31-33

Given the above analysis, it should be apparent that the ACTU is strongly of the view that sections 45D-45EA have no place in the law of Australia or any country that has assumed the international obligations that we have chosen to assume. Our particular comments in relation to the specific draft recommendations are as follows.

Draft Recommendation 31

Putting our primary objection to one side for a moment, if (or even irrespective of whether) the Secondary Boycott provisions are to be retained, we have no difficulty with the ACCC reporting on the number of complaints, investigations and resolutions of the matters in relation to which it has jurisdiction. Our concern is that this should be a uniform prescription in relation to all matters that the ACCC has jurisdiction over. Absent that, it would not be possible to make any meaningful comparative statement about the extent to which any type of complaint was prevalent.

Draft Recommendation 32

The Federal Court of Australia has developed as the pre-eminent court for the resolution of substantial industrial litigation.

Although it shares its jurisdiction under the *Fair Work Act* with a number of State courts, the reality in practice is that the majority of significant industrial proceedings are initiated in that Court, including proceedings in which matters arising under the *Competition and Consumer Act* and the *Building and Construction Industry Improvement Act* have been pursued in conjunction with claims made under the *Fair Work Act.* As the Panel would be aware, once the primary jurisdiction of the Federal Court is activated, its accrued/associated jurisdiction enables it to determine any common law claims between the parties contested in the same proceeding[11].

Parties seeking to commence industrial proceedings in State courts are subject to the limits in the *Fair Work Act* as to which Courts are excluded from exercising jurisdiction, as well as the jurisdictional limits inherent to Courts at different levels in the Court hierarchy in respect of any associated common law claims. In many cases, access to unlimited relief is only available in the State Supreme Courts, which have no jurisdiction over *Fair Work Act* matters and no jurisdiction over the Secondary

[11] *Federal Court of Australia Act* 1976, s. 32, s.22.

Boycott and Trading Restraint provisions. The unlimited relief available (i.e. the absence of caps on damages) applicable to State Supreme Courts may make them attractive to parties wishing to bring industrial tort claims.

However, the Federal Court has unlimited jurisdiction in respect of all statutory industrial *and* associated common law claims. It remains appropriate that the Federal Court be the Court that has the capacity to determine all contested matters in a given proceeding. If jurisdiction were given to the State Supreme Courts to determine matters arising under the Secondary Boycott and Trading Restraint provisions, it would remain impossible, absent further legislative amendment which is beyond the scope of the Panel's remit, for those Courts to determine the other statutory claims relevant to the overall dispute between the parties (such as the claims arising under the *Fair Work Act*[12]). This would lead to increased cost and multitude of proceedings. We therefore do not support the recommendation.

Draft Recommendation 33

Leaving aside our fundamental objections voiced herein, once the connection between the Secondary Boycott and the Trading Restriction provisions is understood, it becomes apparent that there is no basis to remove the limitation in the Trading Restriction provisions that they only apply to restrictions affecting persons with whom the an employer has been accustomed, or is under an obligation to deal with.

The Trading Restriction provisions were clearly aimed at preventing a union from entering into arrangement with a trader to change that trader's behaviour in support of the union's boycott. They were not aimed in a broad sense at prohibiting exclusionary provisions in agreements between employers and employees. To say that they now should be would be a radical departure from even the earliest iterations of the relevant legislation[13] (not to mention the international obligations referred to above and in our earlier submission).

In Australia there has been some contention as to the extent of matters in relation to which unions and employers should be permitted to agree upon, or have determined, under the auspices of the federal industrial relations system. What has never been in contention is the fact that such agreed or imposed conditions, once entered into in the relevant instrument, limit competition at a workplace, within an enterprise, or across an industry sector in relation to the subject matters with which they deal. For constitutional reasons, the outer limit was initially regarded as "matters which pertain

[12] *Jurisdiction of Courts (Cross-Vesting) Act* 1987 s. 4(4)(a)-(b)
[13] See for example Section 35 (5) of the *Restrictive Trade Practices Act.*

to the relations between employees and their employers" and matters reasonably incidental thereto. This has been held to be wide enough to encompass matters such as, *inter alia*, ensuring that contractors are engaged on conditions no less favourable that those the instrument prescribes for employees[14], the provision of leave to workers to attend union training[15], salary packaging[16] and superannuation[17]. Since the constitutional footprint of the federal industrial relations system commenced its expansion in the 1990's to rely on the Corporations Power, the expression "matters which pertain to the relations between employees and their employers" as a limiter of instrument content was retained not of necessity but of choice (which again is a matter which has drawn some commentary from the ILO[18]). The content limitation in the *Fair Work Act* has been expanded upon previous iterations and currently stands as follows:

> 172. Making an enterprise agreement
> Enterprise agreements may be made about permitted matters
>
> (1) An agreement (an enterprise agreement) that is about one or more of the following matters (the permitted matters) may be made in accordance with this Part:
>
> (a) matters pertaining to the relationship between an employer that will be covered by the agreement and that employer's employees who will be covered by the agreement;
>
> (b) matters pertaining to the relationship between the employer or employers, and the employee organisation or employee organisations, that will be covered by the agreement;
>
> (c) deductions from wages for any purpose authorised by an employee who will be covered by the agreement;
>
> (d) how the agreement will operate.

The Government's policy is clear that it intends to make no changes to the scope of the content limitation in the current term of Government[19]. Whilst it is not as expansive as our international obligations may require[20], it clearly encompasses subject matters that might otherwise fall within the purview of the Trading Restrictions, for example the supply of uniforms and equipment that meet certain

[14] *R v. Moore* [1978] HCA 1
[15] *Re Municipal Officers (Queensland) Consolidated Award 1975* (1983) 290 CAR 181
[16] *Re Australian Nursing Federation & Ors* PR956575, 18/3/2005.
[17] *Re Manufacturing Grocers' Employees Federation of Australia: Ex parte Australian Chamber of Manufacturers* [1986] HCA 23.
[18] ILO Committee on Freedom of Association, Report No. 357, June 2010, Case No. 2698 at [227].
[19] Liberal Party of Australia, "The Coalition's Policy to Improve the Fair Work Laws", May 2013 at page 11.
[20] See Note 18 above.

specifications (which in practice could mean only a small number of suppliers would be eligible), the payment of amounts into superannuation funds or worker entitlement schemes, or the purchasing of particular training for the benefit of employees covered by the agreement. Negotiation and agreement making in relation to such matters is, and must remain, legitimate.

We have put the case strongly that the Trading Restrictions provisions ought to be repealed and we hold firm to that view for the reasons expressed. The second order position we adopt is a variation of that proposed in the last bullet point to the Panels recommendation: Sections 45E, 45EA and 51(2)(a) should be amended to exempt the bargaining, making and approval of enterprise agreements or proposed enterprise agreements.

Finally, we point out that the logical consequence of doing the reverse, that is, to expressly include enterprise agreements within the purview of the Trading Restrictions provisions, would bring about curious results which are contrary to fundamental principles of freedom of association which Australia is bound to observe. An employer could make decisions unilaterally or, as is accepted good Human Resource Practice, in consultation and concurrence with its workforce, about matters otherwise within the purview of the Trading Restriction Provisions (such as who to buy protective equipment from). Such "contracts, arrangements or understandings" would be legitimate, if *and only if*, the workforce concerned was non-unionised or chose not to exercise their right to be represented in those discussions by their union. The trigger point for characterising the arrangement or understanding as unlawful would not be its content or effect, but rather whether the persons who concurred with its making included a union or union representatives. We would fiercely contest such an outcome, in all forums available to us.

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