SECTION 45D: SECONDARY BOYCOTTS IN SO MANY WORDS

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Section 45D does not seek to inhibit trade union collusion with the corporate sector to diminish the level of competition in Australian markets. The section attempts to regulate the conduct of industrial disputation. Of all of the sections of the Trade Practices Act 1974 (Cth.) it is the most controversial.

In its present form s. 45D(1), the linchpin of the section, provides as follows:

> (1) Subject to this section, a person shall not, in concert with a second person, engage in conduct that hinders or prevents the supply of goods or services by a third person to a fourth person (not being an employer of the first-mentioned person), or the acquisition of goods or services by a third person from a fourth person (not being an employer of the first-mentioned person), where —
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> (a) the third person is, and the fourth person is not, a corporation and —
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> (i) the conduct would have or be likely to have the effect of causing —
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> (A) substantial loss or damage to the business of the third person or of a body corporate that is related to that person; or
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> (B) a substantial lessening of competition in any market in which the third person or a body corporate that is related to that person supplies or acquires goods or services; and
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> (ii) the conduct is engaged in for the purpose, and would have or be likely to have the effect, of causing —
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> (A) substantial loss or damage to the business of the fourth person; or
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> (B) a substantial lessening of competition in any market in which the fourth person acquires goods or services; or
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> (b) the fourth person is a corporation and the conduct is engaged in for the purpose, and would have or be likely to have the effect, of causing —
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> (i) substantial loss or damage to the business of the fourth

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person or of a body corporate that is related to that person; or

(ii) a substantial lessening of competition in any market in which the fourth person or a body corporate that is related to that person supplies or acquires goods or services.

S. 45D(1) is an extremely difficult provision to construe. By the use of conjunctives and disjunctives the draftsman has created a provision which has a multiform operation. Each element mentioned in the subsection may be combined with other elements, each combination being severable from the others. On its face the subsection creates no fewer than twelve different offences, or twenty-four, if an offence which involves a related body corporate is regarded as different from an offence which involves the corporation to which the relationship exists. The number of offences is further increased if one treats separately each of the four classes of corporation included in the definition of corporation in s. 4(1) and each of the classes of body corporate deemed to be related to each other by s. 4A(5).

Three points are immediately apparent:

1. Whereas every[1] other provision of Part IV directs its command to corporations,[2] s. 45D(1) directs its command to persons. "Person" is not defined by the Act. In consequence the word bears the meaning attributed to it by s. 22(a) of the Acts Interpretation Act 1901 (Cth.) which provides that "person" shall include a body politic or corporate as well as an individual. Any lingering doubt that "person" when used in the Act includes bodies corporate is removed by s. 4(5) which provides that express references in the Act to corporations shall not be taken to imply that references to persons do not also include references to persons who are not natural persons. It follows that any union which is a body corporate is subject to s. 45D(1) equally with individual unionists and union officials.

A union registered under the Conciliation and Arbitration Act 1904 (Cth.) has been held to possess full corporate status,[3] and parity of reasoning requires that unions registered under the industrial arbitration statutes in Queensland,[4] South Australia[5] and Western Australia[6] be similarly treated. Such unions may contravene s. 45D(1). The status of a union registered under the Trade Union Act, 1881[7] (N.S.W.) is a more difficult question but the balance of authority favours the view that such a

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[1] The exception is s. 48. In *Commissioner of Trade Practices* v. *Caltex* (1974) 4 A.L.R. 133 s. 48 was challenged on that ground. Smithers, J. found it unnecessary to resolve the point.

[2] Each of ss. 45, 46, 47 and 49 is given an additional operation by s. 6. In its additional operation each section directs a command to natural persons.

[3] See ss. 136 and 146 and *Williams* v. *Hursey* (1959) 103 C.L.R. 30 at 52 *per* Fullagar, J. (with whom Dixon, C.J. and Kitto, J. concurred, Menzies and Taylor, JJ. not adverting to the question).

[4] Industrial Conciliation and Arbitration Act, 1961-1982 (Qld.) s. 69 is the provision to the same effect as ss. 136 and 146 of the Commonwealth Act.

[5] Industrial Conciliation and Arbitration Act, 1972 (S.A.), s. 138 is the provision to the same effect.

[6] Industrial Arbitration Act, 1979 (W.A.) s. 60 is the provision to the same effect.

[7] Registration under the Industrial Arbitration Act, 1940 (N.S.W.) is conditional on registration under the Trade Union Act 1881 but adds nothing to the effect of the earlier registration.

union is a "person" for the purposes of s. 45D(1).[8] There is nothing in the language of the legislation to suggest that unions registered under the trade union statutes in Victoria,[9] Tasmania[10] and Western Australia[11] should be differently treated. The Trade Union Act, 1915 (Qld.) was of course repealed by s. 4(2) of The Industrial Conciliation and Arbitration Act, 1961 (Qld.). However the continuity of the identity of any trade union registered under the repealed Act is expressly preserved.[12] In *Allingham* v. *Australian Workers' Union*[13] Wanstall, A.C.J. held that such a union was a separate legal entity, with a personality of its own, and distinct from its members at any particular time. The authorities bearing on trade unions registered under the Trade Union Act, 1881 (N.S.W.) compel acceptance of the view that such a union is a "person" for the purposes of s. 45D(1) and may be a party principal to a contravention.

Since employers are inevitably natural persons or corporations they too are subject to s. 45D(1); e.g., where a group of retailers withdraw their custom from a wholesaler until such time as he ceases to supply a maverick retailer or the maverick conforms to the accepted practices of the industry. A corporate employer within the definition of "corporation" at s. 4(1) is of course subject also to the other sections of Part IV: e.g. in the example given any member of the group which is a "corporation" will contravene s. 47(1) if the conduct is anticompetitive in the sense outlined at s. 47(10) and contravene s. 45(2)(a)(1) and (2)(b)(i) if it is not.[14] S. 45D(7) provides that nothing in the section affects the operation of any other provision of Part IV.

II. Whilst s. 45D(1) addresses its command indifferently to all persons it confines the protection which it confers to corporations. By s. 4(1) "corporation" is defined to mean a body corporate that —

(a) is a foreign corporation;
(b) is a trading corporation formed within the limits of Australia or is a financial corporation so formed;
(c) is incorporated in a Territory; or
(d) is the holding company of a body corporate of a kind referred to in paragraph (a), (b) or (c).

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[8] *Transport Workers Union of Australia and Others* v. *Leon Laidley Pty. Ltd.* (1980) 28 A.L.R. 589 at 602 *per* Deane, J. and the cases there cited.

[9] Trade Unions Act, 1958 (Vic.).

[10] Trade Unions Act, 1889 (Tas.).

[11] Trade Union Act, 1902 (W.A.).

[12] Industrial Conciliation and Arbitration Act, 1960 to 1982 (Qld.), s. 4(6).

[13] [1972] Qd. R. 218 at 241-242. His Honour was fortified in his decision by the consideration that s. 4(6) of the Industrial Conciliation and Arbitration Act, by providing that the repeal of The Trade Union Act shall not affect "the continuity of the identity of any such trade union . . .", recognizes that such a union has an identity, and by the consideration that s. 26 of The Industrial Arbitration Act of 1916 provided for the registration of any trade union registered under The Trade Union Act of 1915, not for the registration of the members thereof, and so recognized that such a union had identity. That last consideration may be applied to the Trade Union Act 1902-1924 (W.A.) in consequence of the wording of s. 16(1) of the Industrial Arbitration Act 1912-1968 (W.A.).

[14] See s. 45(6). If one of the group is a corporation the others will be liable as accessories, see s. 76 (pecuniary penalties) and ss. 75A and 82 (damages).

The statutory definitions of "foreign corporation", "financial corporation" and "trading corporation" attribute to each of those expressions its meaning in s. 51 (xx) and include within "foreign corporation" a body corporate that is incorporated in an external Territory and within "financial corporation" certain bodies corporate that carry on the business of banking or insurance. If one puts aside paragraph (c) which is based on s. 122 of the Constitution, it is apparent that in its primary operation[15] s. 45D(1) relies on s. 51(xx) of the Constitution for validity.[16]

It is not possible to assert either that s. 45D(1) is valid or that it is invalid. The practice of the High Court is to interpret the Constitution case by case deciding only so much as is necessary to decide the case in hand. *Actors and Announcers Equity Association of Australia and Others* v. *Fontana Films Pty. Ltd.*[17] establishes the validity of s. 45D(1)(b)(i) in its application to "trading corporations". That provision operates directly to confer a right or privilege on "trading corporations" which is not conferred upon the public at large. "Trading corporations" are granted protection against conduct:

(a) which is engaged in for the purpose of causing substantial loss or damage to the business of the "trading corporation" (or a substantial lessening of competition in any market in which the "trading corporation" supplies or acquires goods or services);
(b) which would have the effect of causing substantial loss or damage to the business of the "trading corporation" (or of causing a substantial lessening of competition in any market in which the "trading corporation" supplies or acquires goods or services), or which would be likely to do so;
(c) which hinders or prevents the supply of services by a third person to the "trading corporation" (or the acquisition of goods or services by a third person from the "trading corporation"); and
(d) which is engaged in concert with a second person.

No doubt a measure of protection is conferred upon the third person (who need not be a corporation) but only when the protection of the third person's trading activities is incidental to the protection of the trading activities of a "trading corporation" — that being the primary object of the provision. No doubt the "business" of a "trading corporation" includes the non-trading business of a "trading corporation" "[b]ut here the word 'business' is tied to the opening words of s. 45D(1). Those words confine the operation of the prohibition to conduct that hinders or prevents trading activities, that is, the supply or acquisition of goods or services. Con-

[15] I.e., its operation apart from s. 6.

[16] The extension of the definition of "financial corporation" to include "a body corporate that carries on as its sole or principal business the business of banking (other than State banking not extending beyond the limits of the State concerned) or insurance (other than State insurance not extending beyond the limits of the State concerned)" is attributable to apprehension that such corporations are withdrawn from s. 51(xx) by the Commonwealth's special grant of banking (s. 51(xiii)) and insurance (s. 51(xiv)) power. See *Bank of New South Wales* v. *The Commonwealth* (1948) 76 C.L.R. 1 at 184 *per* Latham, C.J., 204 *per* Latham, C.J., 256 *per* Rich and Williams, JJ., and 304 *per* Starke, J.; *Strickland* v. *Rocla Concrete Pipes Pty. Ltd.* (1971) 124 C.L.R. 468 at 507-508 *per* Menzies, J.

[17] (1982) 56 A.L.J.R. 366.

sequently, when the provision refers to loss or damage to "the business" of the fourth person, it is speaking of loss or damage to that business consequent upon, or attributable to, conduct which hinders or prevents the corporation's trading activities".[18] Even if the narrow view be adopted that the legislative power vested by s. 51(xx) is restricted to legislation which affects trading corporations in their trading activities, s. 41(1)(b)(i) is within power:

> The most indirect operation of par. (1)(b)(i) is in respect of conduct which hinders (rather than prevents) the supply of goods or services to or from a corporation where the conduct is engaged in for the purpose and has the likely effect (rather than the actual effect) of causing substantial loss or damage to the business of the corporation. But such an operation still involves a direct legal operation upon corporations. Quite apart from the fact that the flow of goods or services to or from a corporation is hindered, there is in addition a likelihood that the business of the corporation will be substantially damaged. Even if the hindering of the flow of goods or services did not give rise to a direct legal operation, a point which may not readily be conceded, the likelihood of the effect of substantial damage to the business of the corporation would in itself give rise to such an operation. It matters not that the operation on a corporation is preventive or prospective rather than punitive or retrospective.[19]

However although the operation of each of the provisions of s. 45D(1) has a relationship with corporations in the defined sense the degree of the relationship varies. For example, s. 45D(1)(a)(i)(A) grants "trading corporations" protection against conduct:

(a) which has or is likely to have the effect of causing substantial loss or damage to the business of a "trading corporation";
(b) which hinders or prevents the supply of goods or services by the "trading corporation" to a fourth person who is not a corporation or the acquisition of goods or services by the "trading corporation" from a fourth person who is not a corporation;
(c) which has or is likely to have the effect of causing substantial loss or damage to the business of the fourth person (who is not a corporation); and
(d) which is engaged in in concert with a second person.

It is very much more difficult to regard the protection conferred on the fourth person (who may not be a corporation) by s. 45(1)(d)(i)(A) as incidental to a primary object of protecting the trading activities of the "trading corporation" than to reach that conclusion in relation to s. 45D(1)(b)(i). If "financial corporation" is substituted for "trading corporation" the provision operates to protect the non-financial business of a "financial corporation" from damage attributable to conduct which hinders

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[18] *Id.* 379 *per* Mason, J.
[19] *Id.* 381 *per* Mason, J.

or prevents the acquisition or supply of goods by the "financial corporation", i.e. its trading activities. To determine the validity of s. 45D(1)(i)(A) the High Court will be required to examine the extent to which the nature of a corporation referred to at s. 51(xx) must be significant as an element in the nature or character of the law which relates to it, if the law is to be valid.[20] One may confidently say only that *Actors and Announcers Equity Association of Australia and Others* v. *Fontana Films Pty. Ltd.*[21] gives no cause for any optimism whatever that any part of s. 45D(1) is likely to be held beyond power in its application to "trading corporations", "financial corporations" and "foreign corporations". Whilst Stephen,[22] Mason[23] and Aickin,[24] JJ. were all of the view that the subsection is invalid in its application to holding companies of "trading corporations", "financial corporations", "foreign corporations" and bodies corporate incorporated in a Territory (i.e., the bodies corporate described at paragraph (d) of the definition of "corporation" at s. 4(1)) and that the extension of the protection conferred to a body corporate which is "related" (see, s. 4A) to a "trading corporation", "financial corporation", "foreign corporation" or a body corporate incorporated in a Territory is beyond power, the Court also recognized that because the subsection is severable in its several operations any invalidity in respect of one operation could not affect the validity of the subsection in another operation.[25]

III. The provision is redolent with uncertainty and doubt. The words "concert", "likely" and "substantial" are nowhere defined. Each is ambiguous. Each is calculated to conceal a lack of precision. Used in conjunction with "purpose" they create difficulties of interpretation which are more appropriate to a maze than to a legislative provision imposing quasi-criminal liability for activities which many earnest and quite reputable union officials have long regarded as wholly legitimate. It is to those difficulties of interpretation that I now turn.

Concert

One may readily call to mind situations in which no reasonable man would hesitate to say that conduct had been engaged in in concert. For example, if the employees in the wholesale section of an abattoir impose a black ban on a retail butcher and implement the ban by declining to slaughter his beasts, the conclusion is inescapable that each of those employees has in concert with the others engaged in conduct preventing the supply of slaughtering services by the abattoir (the third person) to the retail butcher (the fourth person).

In the example given each of the employees has communicated with

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[20] *Cf.* the observations of Gibbs, C.J., *id.* 370. See now *Commonwealth* v *Tasmania* (1983) 57 A.L.J.R. 450 at 499 *per* Mason, J.; at 509 *per* Murphy, J.; at 549 *per* Deane, J.; *contra* Gibbs, C.J. at 483.

[21] *Ibid.*

[22] *Id.* 375.

[23] *Id.* 382.

[24] Aickin, J. concurred with Mason, J.

[25] *Supra* n. 17 at 369 *per* Gibbs, C.J. (with whom Wilson, J. agreed); at 375 *per* Stephen, J.; at 377 *per* Mason, J. (with whom Aickin, J. concurred), at 383 *per* Murphy, J.

each of the others. Each of the employees has created an expectation in the mind of each of the others that he will act in a particular way. Each of the employees has incurred a moral obligation to each of the others to act in that particular way. The employees have made an arrangement or arrived at an understanding within the meaning of those terms at s. 45(2)(a)[26] to act in a particular way, they have given effect to that arrangement or understanding within the meaning of that phrase at s. 45(2)(b).[27]

S. 45D(1) does not provide, as it might have done, that a person shall not give effect to an arrangement made or an understanding arrived at with a second person to engage in conduct that hinders or prevents the supply of goods or services by a third person to a fourth person (not being an employer of the first-mentioned person), or the acquisition of goods or services by a third person from a fourth person (not being an employer of the first-mentioned person), where the fair inference is that some other meaning was intended.

Donald and Heydon say of the phrase "in concert", "in ordinary speech it suggests the agreement of two persons to a particular plan", and argue that it does not cover "consciously parallel behaviour falling short of an arrangement".[28] Two arguments are advanced in support of that view.

The first argument advanced is that, "in the light of the reaction against imposing liability on simple actors in s. 45D(1), it would be odd that the liability of D1, acting independently of D2, should depend on whether D2, of whom it may know nothing, also acts".[29] So it would, but that is not a case in which D1 has consciously engaged in parallel behaviour. D1 will engage in consciously parallel behaviour where D1 acts with the knowledge that D2 is also acting. There is nothing odd in the conclusion that in such a case D1 is within the reach of s. 45D(1). The subsection does not penalise concerted conduct. It directs its command to the first person and imposes liability on a first person who acts in concert with a second person. The liability of the first person is clearly not conditional on the liability of the second person for whilst an employee of the fourth person may be a second person he may not be a first person.

Any assumption that the plaintiff must prove not only that the first person engaged in conduct in concert with the second person but also that the second person engaged in conduct in concert with the first person is no more than an assumption. There is every justification for assuming that the subsection does not reach wholly unilateral conduct and that acting in concert involves knowing conduct the result of communication (direct or indirect) between the parties. That indeed was the view propounded by Bowen, C.J. in *Tillmans Butcheries Pty. Ltd.* v. *Australasian Meat Industry*

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[26] *Trade Practices Commission* v. *Nicholas Enterprises Pty. Ltd. (No. 2)* (1979) 26 A.L.R. 609 at 629.

[27] By s. 4(1) "give effect to" in relation to a provision of a contract, arrangement or understanding includes do an act or thing in pursuance of or in accordance with or enforce or purport to enforce".

[28] *Trade Practices Law* (1978 Volume One) at para. 10.2.2.

[29] *Ibid.*

Employees Union and Others[30] where His Honour said, "acting in concert involves knowing conduct, the result of communication between the parties and not simply simultaneous action occurring spontaneously". But there is no justification for requiring proof of a plan between the parties as well as communication between them. Taperell, Vermeesch and Harland[31] give the following example, ". . . if a bread carter knew that a plan was being implemented by a number of other bread carters to boycott retailers selling cut-price bread and, without communicating his decision to do so to any of the other bread carters, he refused deliveries to the same retailers, he would almost certainly be judged to have acted 'in concert' with the others". In such a case there is a plan but the proposed defendant is not a party to it; neither has he made an arrangement or arrived at an understanding with the other bread carters within the meaning of those terms at s. 45(2)(a). Clearly there is no mutual commitment.[32] Even if one adopts the broad view that one may have an understanding between two or more persons restricted to the conduct which one of them will pursue without any element of mutual obligation in so far as the other party or parties to the understanding are concerned,[33] there is no understanding to which the proposed defendant is a party, because in the absence of any communication from the proposed defendant and the other bread carters there cannot be said to be any consensus whatever between them as to the conduct which even one of them will pursue.[34] Yet as a matter of language it seems perfectly appropriate to say that the proposed defendant has engaged in conduct in concert with the other bread carters.

One hastens to add that Taperell, Vermeesch and Harland[35] do not adopt that broad view. The learned authors take the view that a person engages in conduct in concert with a second person where, knowing that a course of action is contemplated and invited by the second person, he participates in that course of action. In the example given it is because it would "probably be true to say" that the proposed defendant "was expressly or impliedly, invited to participate in the plan and by his conduct signified his adherence to it" that the learned authors conclude that the proposed defendant has engaged in conduct in concert with the other bread carters.

The writer begs to differ. If indeed the fair inference is that the proposed defendant was invited to participate in the plan and by his conduct signified his adherence to it, it seems reasonable to conclude that he and the other bread carters have made an arrangement or arrived at an understanding within the meaning of s. 45(2)(a).[36] It was established by *Carlill* v. *Carbolic Smoke Ball Co. Ltd.*[37] that "if the person making the offer, ex-

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[30] (1979) 27 A.L.R. 367.

[31] *Trade Practices and Consumer Protection* (2nd ed. 1978) at para. 5109.

[32] *Supra* n. 26 at 629 *per* Fisher, J.

[33] *Morphett Arm Hotel Pty. Ltd.* v. *Trade Practices Commission* (1980) 30 A.L.R. 88 at 91 *per* Bowen, C.J., Brennan and Deane, JJ.

[34] *Trade Practices Commission* v. *Email Ltd.* (1980) 31 A.L.R. 53 at 56 *per* Lockhart, J.

[35] *Op. cit. supra* n. 31 at para. 5109.

[36] Notwithstanding that there is no element of mutual obligation.

[37] [1893] 1 Q.B. 256 at 269 *per* Bowen, L.J.

pressly or impliedly intimates in his offer that it will be sufficient to act on the proposal without communicating acceptance of it to himself, performance of the condition is a sufficient acceptance without notification", provided of course that performance of the condition is in response to the offer.[38] If that proposition be valid in relation to a "contract", it should be valid in relation to the informal arrangements denoted by "arrangement" and "understanding". The Legislature might so easily have provided that a first person shall not give effect to an arrangement made or an understanding arrived at with a second person to engage in conduct that hinders or prevents etc. the use of different language must have been intended to convey a different meaning. Taperell, Vermeesch and Harland[39] observe "The notion of 'concert' probably differs little, if at all, from the element of consensus or meeting of minds which gives rise to an arrangement or understanding". For the reasons given above that is, with respect, the least likely meaning of "concert". The elements of invitation and signification of adherence are clearly crucial to a finding that one of the other bread carters has engaged in conduct in concert with the proposed defendant. But such a finding is not essential to a finding that the proposed defendant has engaged in conduct in concert with one of the other bread carters. On that issue (the crucial issue) it is submitted that proof of unsolicited, voluntary participation is sufficient.

It is a (superficial) weakness in the broad construction contended for that the acquisition of knowledge will bring within the subsection conduct which in its inception was spontaneous, and therefore innocent. If, for example, each of two retailers, acting independently, informs a wholesaler that he is withdrawing his custom until such time as the wholesaler ceases to supply a maverick retailer or the maverick accepts customs of the industry, neither of the retailers can be held to have acted in concert with the other. If, however, one of those retailers were to continue his boycott after becoming aware of the other's conduct he would, on the construction urged, come within the reach of the subsection. Given the capacity of such knowledge to firm up a wavering resolve, why should not the Legislature be presumed to have intended to reach such conduct? If an understanding between the retailers had subsequently developed each of them would be liable for contravention of s. 45(2)(a)(1) and (2)(b)(i) even if his conduct did not succeed in hindering the supply of goods by the wholesaler (the third person) to the maverick (the fourth person), did not and was not likely to cause substantial loss or damage to the business of the maverick, did not and was not likely to substantially lessen competition in any market, and was not engaged in for the purpose of causing substantial loss or damage to the maverick or for the purpose of substantially lessening competition. The Legislature may well be supposed to have intended also that the maverick should have a remedy where the supply of goods to the maverick is hindered by conduct which, for example, is engaged in for the purpose of causing

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[38] *The Crown* v. *Clarke* (1927) 40 C.L.R. 227.
[39] *Op. cit. supra* n. 31 at para. 5109.

substantial loss or damage to his business, and which, for example, does have the effect of causing substantial loss or damage to his business; notwithstanding that the conduct is not done in pursuance of an "agreement or understanding" and is no more than consciously parallel conduct.

The second argument which Donald and Heydon advance for rejecting the contention that s. 45D(1) covers consciously parallel behaviour is that:

> Section 45D(3) and (4) refer to persons who contravene or *are involved in* a contravention of the section. "Involved in" is not defined for the purposes of Part IV, but it is for the purposes of Part VI, and the meaning is no doubt the same. Section 75B says that a reference to a person involved in a contravention shall be read as a reference to (a) aiding, abetting, counselling or procuring it; (b) inducing it; (c) being knowingly concerned in or party to it; (d) conspiring with others to effect it. All these notions suggest communication and planning. Since those who contravene are contrasted with those involved in a contravention, a contravenor must achieve at least the standard necessary for one involved in a contravention. Hence acting in concert involves at least knowing conduct, which is the result of communication and planning.[40]

It is submitted that the purpose of s. 75B is to impose liability. Read with s. 82[41] it enables a person who has suffered loss or damage by conduct of another person that was done in contravention of a provision of Part IV (e.g. s. 45D(1)) to recover the amount of the loss or damage by action against a person who has not himself contravened a provision of Part IV (e.g. s. 45D(1)) if he (a) has aided, abetted, counselled or procured the contravention, (b) has induced, whether by threats or promises or otherwise, the contravention, (c) has been in any way, directly or indirectly, knowingly concerned in, or a party to, the contravention, or (d) has conspired with others to effect the contravention. It is no part of the function of s. 75B to remove from the category of contravenors persons who are otherwise within it. After all, if s. 75B(c) really removes from the category of contravenors all of those who have been in any way directly or indirectly knowingly concerned in or a party to the contravention, no one would be left. S. 82, which requires proof that some person has done an act in contravention of Part IV, would never operate. That cannot have been the intention of the Legislature.

The history[42] and terms of s. 82 suggest that the intention of the Legislature was to enable a person injured by a contravention of Part IV to recover damages from persons who were significantly connected with the commission of the "offence" but whose conduct could not be said to be a

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[40] *Op. cit. supra* n. 28 at para. 10.2.2.

[41] See also s. 87(1).

[42] S. 75B was inserted by Act No. 81 of 1977. S. 82 was cast in its present form by the same Act. In its earlier form it permitted recovery only from the person whose contravention caused the loss or damage.

cause of the injury. It is quite correct to say that if s. 75B(c) is ignored only those who communicate and plan are characterised as "persons involved in a contravention". It does not follow that "a contravenor must achieve at least the standard necessary for one involved in a contravention".[43] A contravenor as such is liable only for loss or damage which he has caused. A person involved in a contravention is liable for loss or damage caused by the contravenor. S. 75B defines the relationship which must be shown to exist between a person and a contravention before he may be made liable for loss or damage which he did not cause. S. 45D(3) provides a defence for a person shown to stand in such a relationship with a contravention. S. 45D(4) limits the effect of such a defence. Nothing is said by any one of those provisions upon the matter of who may contravene Part IV (in the case of s. 75B) or s. 45D(1) (in the case of s. 45D(3) and (4)). And, of course, s. 75B(c) cannot be ignored. That provision bases liability on knowledge, not planning. It is fatal to the argument that since those involved in a contravention are those who communicate and plan, those who contravene must communicate and plan also. It is equally fatal to the argument that contravenors and those involved in a contravention are contrasted. For s. 75B(c) enables a contravenor whose conduct has not caused the loss or damage complained of to be treated as a person involved in a contravention for the purposes of an action for damages under s. 82.

In the premises ss. 45D(3) and (4) and 75B give no support to Donald and Heydon's[44] conclusion that "hence acting in concert involves at least knowing conduct, which is *the result of communication and planning*": a conclusion which contrasts rather starkly with Bowen, C.J.'s observation[45] that "Acting in concert involves knowing conduct, *the result of communication* between the parties and not simply simultaneous action occurring spontaneously".

In truth the most formidable argument for insisting upon proof of an agreement or plan is a policy argument on which Donald and Heydon do not rely. Any practitioner who succeeds in leading sufficient admissible evidence to prove that the defendant engaged in conduct in the knowledge that a second person was also engaging in conduct will be quite pleased with himself. To permit the defendant to evade liability by entering the witness box and swearing that whilst he knew of the second person's conduct and was influenced by it, he gave the second person no undertaking that he would engage in conduct and received no undertaking that the second person would act, is to impose an horrendous burden on he who cross-examines. To insist on proof of a plan is to emasculate the section.

However the beneficiary of such a policy will not be the trade unionist insisting on an inalienable right to engage in the conduct which s. 45D(1) proscribes. The reality of union politics is that any official named

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[43] *Op. cit. supra* n. 28.
[44] *Ibid.* Emphasis added.
[45] *Supra* n. 30 at 373. Emphasis added.

as a defendant will be compelled to proclaim to all who will listen that he has taken an active role in organizing and implementing the boycott. For example, the report of *Utah Development Co.* v. *The Seamen's Union of Australia*[46] shows that in cross-examination the defendant Elliot denied that he was "fully behind the men" and asserted "I am right up with them" and agreed that he was "in the forefront of the fight". To insist on proof of a plan will benefit only defendants in proceedings arising out of trade and not industrial boycotts, i.e. employers, and exacerbate union dissatisfaction with s. 45D(1).

The common law conspiracy cases treated trade unions quite inequitably. Like private enterprise corporations trade unions must act by and through natural persons. But whereas a servant bona fide going about an employer's business will not be held to have conspired with him,[47] a subordinate union official complying with the orders of his superior will be held to have conspired with him if he is shown to have appreciated what he was about.[48] Directors at a board meeting may not conspire with each other or the company.[49] A union, whether incorporated[50] or unincorporated,[51] may be a party principal to a conspiracy with its members and officials. Whether the same approach is applicable to the notion of engaging in conduct "in concert" is a matter of speculation, though it is to be noticed that in *Industrial Enterprises Pty. Ltd. and Others* v. *Federated Storemen and Packers Union of Australia and Others*[52] the union was held to have acted in concert with its President and certain of its members. However, s. 84(2) will introduce a measure of equity. S. 84(2) provides not that the conduct of directors, servants and agents is deemed to be the conduct of the body corporate but that their conduct is deemed to have been engaged in *also* by the body corporate.[53] There is no justification for reading inequity into the Act by way of a policy based construction of "concert".

Purpose

Whether or not the fourth person is a corporation, conduct will contravene s. 45D(1) only where it is engaged in for the purpose of causing substantial loss or damage to the business of the fourth person or for the purpose of substantially lessening competition in any market in which the fourth person supplies or acquires goods or services.

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[46] (1977) 17 A.L.R. 15 at 24.

[47] *Crofter Hand Woven Harris Tweed Co. Ltd.* v. *Veitch* [1942] A.C. 435 at 468 *per* Lord Wright. Neither could he be made liable for inducing his employer to breach a contract with a third party, *Said* v. *Butt* [1920] 2 K.B. 497 at 506 *per* McCardie, J.

[48] *Id.* 441 *per* Lord Simon; *Morgan* v. *Fry* [1968] 1 Q.B. 521 at 548 *per* Widgery, J.

[49] *De Jetley Marks* v. *Greenwood* [1936] 1 All E.R. 863 at 872 *per* Lord Porter. Neither may a company which merely acts through its directors be described as combining with them, *O'Brien* v. *Dawson* (1942) 66 C.L.R. 18.

[50] *Williams* v. *Hursey* (1959) 103 C.L.R. 30 at 81 *per* Fullagar, J. and at 129 *per* Menzies, J.

[51] *Egan* v. *Barrier Branch of the Amalgamated Miners' Association* (1917) 17 S.R. (N.S.W.) 243.

[52] (1979) 2 A.T.P.R. 17, 970 at 17, 987.

[53] The possibility that a director of a manufacturer who informs a wholesaler that supply is suspended until the wholesaler ceases to supply a fourth person, may be held to contravene s. 45D(1) by engaging in conduct in concert with his own company is, of course, a little startling.

At common law, where a cause of action is based upon an alleged combination or conspiracy, it is not sufficient to show that the result or even the intention of the defendants' actions was to injure the plaintiff in his trade or business. It is necessary to show that the parties to the alleged conspiracy were impelled to combine and to act by a desire to harm the plaintiff, and that this was the sole, the true, or the dominating, or the main purpose of their conspiracy.[54] If the real purpose of the defendants' combination was to protect or promote a legitimate interest of the defendants no wrong was committed and no action will lie although damage to the plaintiff ensues. In *McKernan* v. *Fraser* Dixon, J. (as he then was) put the matter thus:

> To adopt a course which necessarily interferes with the plaintiff in the exercise of his calling, and thus injures him, is not enough. Nor is it enough that this result should be intended if the motive which actuates the defendants is not the desire to inflict injury but that of compelling the plaintiff to act in a way required for the advancement or for the defence of the defendants' trade or vocational interests.[55]

S. 45D(2) repudiates that approach absolutely. A person may be held to have engaged in conduct for the purpose of causing substantial loss or damage to the business of a fourth person though that was neither the sole purpose[56] nor the dominant purpose nor even a substantial purpose of his conduct. It is sufficient that he has engaged in the conduct for purposes that include the purpose of causing substantial loss or damage to the business of the fourth person. The observations of Bowen, C.J. in *Tillmanns Butcheries Pty. Ltd.* v. *Australasian Meat Industry Employees Union and Others* may usefully be reproduced:

> The proscribed purpose may be difficult to prove as an independent matter especially where the dominant purpose of the ban is to extend union membership or further union interests. Nevertheless, the fact that a union and its members acting together have a union purpose does not necessarily exclude the possibility that they had, also, the purpose of causing substantial loss or damage to the business of a corporation. The statement of Evatt, J. in *McKernan* v. *Fraser* (1931) 46 C.L.R. 343 is apposite. His Honour in that case (at p. 403) said: "Sir Godfrey Lushington said, in special reference to combined action against employers or non-unionists on the part of unionists that to ask the question whether they acted to defend their own trade interests or to injure their economic adversary for the time being, is equivalent to asking of a soldier who shoots to kill in battle, whether he does so for the purpose of injuring his enemy or of defending his country. The

[54] *McKernan* v. *Fraser* (1931) 46 C.L.R. 343 at 362 *per* Dixon, J.

[55] *Ibid.*

[56] On an application for an interlocutory injunction an affidavit asserting that the defendant's purpose was, e.g. to register a protest against the practices of the fourth person, and denying a s. 45D(1) purpose in the very terms of the sub-section, will not be construed as a denial that the defendant's conduct had more purposes than one, and that a proscribed purpose was one of those purposes: *supra* n. 46 at 23.

analogy is sound because combined strike action is usually undertaken for the purpose both of causing harm to the employers and for the improvement or maintenance of the standards of unionists.[57]

The crucial question is whether purpose may be assessed objectively.

It is not an infrequently applied fiction of the law that a person intends the natural consequences of his acts. Some support for the application of that approach to the determination of purpose in the context of s. 45D(1) is to be found in the decision of Smithers, J. in *Wribass Pty. Ltd.* v. *Swallow and Others.*[58] His Honour there said:

> . . . under s. 45D(1) the issue is not whether persons combined for a particular purpose but whether particular conduct was engaged in for a specified purpose, albeit that it was engaged in by persons acting in concert with each other. In s. 45D(1) the impropriety which is proscribed is engaging in conduct that hinders or prevents the supply or acquisition of goods and services where that conduct is engaged in for the specified purpose and doing so in concert with another person. The critical and specified purpose is the purpose for which the conduct itself is engaged in. Similarly in s. 45D(3) the dominant purpose therein specified is not the dominant purpose for which the participants may act in concert, but that limited purpose for which the conduct which hinders or prevents the supply or acquisition of goods and services is engaged in.

It is difficult to appreciate how the purpose of conduct (as distinct from the purpose of the person who engages in the conduct) may be determined otherwise than objectively.

There is however no reason to suppose that the meaning of "purpose" at para. (a)(ii) differs from its meaning at para. (b), and with the utmost respect to His Honour para. (b) does not strike at hindering conduct which is engaged in for the specified purpose. The subsection strikes at hindering conduct which has a proscribed purpose, e.g. causing substantial loss or damage to the business of a fourth person, *and* which has or is likely to have a proscribed effect, e.g. causing substantial loss or damage to the business of a fourth person. To proceed on the view that conduct is engaged for the purpose of causing substantial loss or damage to the business of a fourth person where such damage is a necessary or foreseeable effect of the conduct is to deprive that formulation of all effect.

It is submitted that the purpose referred to is the subjective purpose of the defendant. It is submitted also that the preponderance of judicial opinion favours that view.[59]

In *Nauru Local Government Council* v. *Australian Shipping Officers*

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[57] *Supra* n. 30 at 324.

[58] (1979) 2 A.T.P.R. 17, 998 at 18,005-18,006.

[59] See, especially, *supra* n. 30 at 383 *per* Deane, J.; *Leon Laidley Pty. Ltd.* v. *Transport Workers Union of Australia and Others* (1980) 28 A.L.R. 129 at 141 *per* Lockhart, J.

Association and Others,[60] for example, Northrop, J. declined to find that the applicant had shown a probability of success at trial in the face of oral testimony by the acting union secretary that, "The question whether the company lost money or did not lose money did not enter into calculation on it". Relief was refused notwithstanding that the conduct engaged in had the effect and if continued was likely to have the continued effect of causing substantial loss or damage to the applicant. In *Leon Laidley Pty. Ltd.* v. *Transport Workers Union of Australia and Others*[61] Lockhart, J. declined to find it was a purpose of the defendants to cause a substantial lessening of competition in the market in which Leon Laidley Pty. Ltd. supplied bulk fuel, notwithstanding that such a diminution might be the effect or the likely effect of the conduct in question.

In each of those cases (as will ordinarily be the case) injunctive relief was sought against a number of defendants and (as will ordinarily be the case) the litigation was conducted on the basis that the defendants had a common purpose. Consistently with the view propounded in relation to the meaning of "in concert", it is submitted that if it became an issue the relevant purpose is not the purpose of the combination but the purpose of the defendant in engaging in the conduct which is alleged to have brought him within the subsection. The observations of Smithers, J. cited above support that view.[62]

To insist that the purpose alleged against the defendants must be shown to exist[63] and to be real[64] does not deny cogency to evidence that, for example, substantial damage to the fourth person's business, is the natural and probable consequence of the defendant's conduct. And more often than not the defendant will advert to the damage his conduct inflicts on the fourth person's business if for no other reason than that as a matter of prudence the fourth person's legal advisors will ensure that the defendant is apprised of the injury before proceedings are instituted. Where it is shown (a) that substantial loss or damage to the fourth person's business is a foreseeable and likely consequence of the defendant's conduct, (b) that the defendant has adverted to the impact of the conduct on the fourth person's business, and (c) that the defendant's ultimate purpose is to cause the fourth person to act in a particular way, it is very easy to draw the inference that the defendant regards the prospect or actuality of loss or damage as an

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[60] (1978) 2 A.T.P.R. 17, 844 at 17, 848-17, 849. The case seems to be one in which the defendants persuaded the Court that their ultimate union purpose so dominated their minds as to shut out any other purpose, see especially pp. 17, 850-17, 851. To establish such a defence on an interlocutory application is a considerable triumph in advocacy. The Courts have stressed that "... the fact that a union and its members acting together have a union purpose does not necessarily exclude the possibility that they had, also, the purpose of causing substantial loss or damage to the business of a corporation": *Tillmanns Butcheries Pty. Ltd.* v. *Australasian Meat Industry Employees Union supra* n. 30 at 374 *per* Bowen, C.J., cited with approval in *Leon Laidley Pty. Ltd.* v. *Transport Workers Union of Australia and Others supra* n. 59 at 139 *per* Lockhart, J.

[61] *Supra* n. 61 at 141. Of course, Lockhart, J. had already decided to grant interlocutory relief on other grounds.

[62] The practitioner who settled the defendants' affidavits in *Utah Development Co.* v. *The Seamen's Union of Australia, supra* n. 46 at 21-22, appears to have adopted the same view.

[63] *Supra* n. 30 at 374 *per* Bowen, C.J.

[64] *Id.* 383 *per* Deane, J.

effective pressure on the fourth person. In such cases it is open to the Court to draw the further inference that to cause that loss or damage was one of the defendant's purposes.[65] It is no answer to such a case that the defendant hoped that the fourth person would avoid a regrettable measure of damage or loss by agreeing to the defendant's demand as soon as the boycott was instituted.[66]

In practice the issue whether a defendant's purpose is to be assessed subjectively or objectively is likely to assume significance only where a defence is raised under s. 45D(3).

S. 45D(3) reinstates (in a truncated form) the common law defence (or justification) of predominate legitimate purpose swept away by s. 45D(2). The subsection provides that a person shall not be taken to contravene or to be involved in a contravention of s. 45D(1) by engaging in conduct where —

(a) the dominant purpose for which the conduct is engaged in is substantially related to —

(i) 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; or

(ii) an employer of that person having terminated, or taken action to terminate, the employment of that person or of another person employed by that employer.

The defence is personal. A person with a good s. 45D(3) defence does not by association cleanse the conduct of those who engage in conduct in concert with him. S. 45D(4) provides that the application of s. 45D(1) in relation to a person in respect of his engaging in conduct in concert with another person is not affected by reason that sub-section (3) operates to preclude the other person from being taken to contravene, or to be involved in a contravention of, s. 45D(1) in respect of that conduct.[67] However s. 45D(3)(b) enables unions and union officials who engage in conduct in concert with the employees of a particular employer and no other persons[68] to claim protection where their dominant purpose is a dominant purpose which would confer protection on those employees.[69]

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[65] See, e.g., *supra* n. 52 and *supra* n. 30.

[66] *Id.* 17, 989 *per* Lockhart, J. and 384 *per* Deane, J. respectively.

[67] The language of the provision is more than a little peculiar. It suggests that the draftsman had it in mind that the effect of s. 45D(1) was either that a first person could be held liable only where the second person had contravened the subsection also or that only a first person and a second person with a common purpose may be held to act in concert. For reasons given neither proposition is valid.

[68] An employee may claim protection under s. 45D(3)(a) though he engaged in conduct with a person other than a fellow employee, union or union official.

[69] So far as is relevant s. 45D(3) provides: A person shall not be taken to contravene or to be involved in a contravention of s. 45D(1) by engaging in conduct where: (b) in the case of conduct engaged in by the following persons in concert with each other (and not in concert with any other person), that is to say:

(i) an organization or organizations of employees, or an officer or officers of such an organization, or both such an organization or organizations and such an officer or officers; and

(ii) an employee, or two or more employees who are employed by the one employer,

the dominant purpose for which the conduct is engaged in is substantially related to:

(iii) the remuneration, conditions of employment, hours of work or working conditions of the employee, or of any of the employees, referred to in sub-paragraph (ii); or

(iv) the employer of the employee, or of the employees, referred to in sub-paragraph (ii) having terminated, or taken action to terminate, the employment of any of his employees.

The defence is also limited. At common law the scope of the legitimate purpose defence has been broadened to include such purposes as the establishment of a closed shop[70] the maintenance of a collective bargaining agreement,[71] the defence of rights conferred by law (e.g. a right to preference),[72] the maintenance of majority rule,[73] and the imposition of sanctions on unionists who have breached valid rules of the union.[74] Under s. 45D(3) the matters to which the dominant purpose of the conduct must be related are limited to (a) remuneration, (b) conditions of work, (c) hours of work, (d) working conditions, and (e) termination of employment. The terms of s. 45D(3)(a)(i) and (b)(ii) contemplate that the persons to whose remuneration, conditions of employment, hours of work or working conditions the dominant purpose of the conduct must relate are all persons actually employed by the same employer. The inference is that the dominant purpose must relate to the remuneration and conditions of those employees in their current employment. It may be that where the fourth person's method of doing business, e.g. trading on Saturday, can be shown to imperil the existing hours of work of the third person's employees, e.g. by making likely an attempt by the third person to vary the existing agreed hours of work to include Saturday work, conduct engaged in by the employees of the third person with the dominant purpose of forcing the fourth person to change his method of business, e.g. by abandoning Saturday trading, can fairly be said to be engaged in for a purpose substantially related to their hours of work.[75] But conduct engaged in for the purpose of forcing an employer (the third person) to change his method of business, e.g. a ban on handling goods to be carried by an independent carrier (the fourth person), in order that in the employment of his existing employees on their existing terms of employment the employer will be required to offer more overtime work or more of the better paid classes of work to those employees, is not conduct engaged in for a purpose related to the conditions of work of those employees.[76] Indeed it is doubtful if conduct engaged in for the purpose of inducing an employer (the third person) to change his method of doing business, e.g. by abandoning the use of independent contractors (the fourth persons) and utilising employees, is protected even where the consequence would be a beneficial alteration in the employment of his existing em-

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[70] *Supra* n. 47.

[71] *Corbett* v. *Canadian National Printing Trade Union* [1943] 4 D.L.R. 441.

[72] *Supra* n. 50.

[73] *Ibid.* The rule adopted must of course be within the competence of the majority.

[74] A combination to injure a man in his trade as a means of satisfying a grudge is unlawful; see generally *Quinn* v. *Leathem* [1901] A.C. 295, *Giblan* v. *Amalgamated Labourers Union* [1903] 2 K.B. 600 and *Huntley* v. *Thornton* [1957] 1 W.L.R. 321.

[75] *Supra* n. 58 at 18,007-18,008. His Honour also held that if the employee's current terms of employment are fixed solely by an award giving the employer the right to require Saturday work, the defence will not be available because the fourth person's method of doing business does not make likely any change in the employee's existing conditions, *ibid.* Contrast *Re Bridge, Wharf and Pier Construction Award – State* (1948) 33 Q.I.G. 2058 where starting and finishing times fixed by agreement, acquiescence or appointment of the employer were held to be "the fixed or recognized times of starting or leaving off work" within the meaning of what is now s. 14(1)(c) of The Industrial Conciliation and Arbitration Act, 1961-1982 (Qld.) equally with award fixed starting and finishing times.

[76] *Ascot Cartage Contractors Pty. Ltd.* v. *Transport Workers Union of Australia and Others* (1978) 32 F.L.R. 148 at 154.

ployees.[77] The language of the provision suggests that its objective is to protect only conduct directed at the preservation or improvement of the conditions of employment under the employee's current engagement. Further the words "that person" and "another person" suggest that the defence is confined to conduct whose purpose is directed to the conditions of employment offered by one person, and has no application where employees of different employers act in concert for a purpose related to the remuneration, hours, conditions of employment or working conditions of them all.[78] S 45D(3)(b) would clearly be inapplicable in such a situation.

The circumstance that the defence is personal, the use of the words "purpose for which the conduct is engaged in" rather than the words "purpose of the conduct engaged in", and the difficulty of branding one purpose as dominant where objectively viewed the conduct has more than one purpose, all suggest that the Court is required to look into the defendant's mind. Clearly the relationship between the dominant purpose and the defendant's conditions of employment must be assessed objectively. The manifest objective of the requirement of a substantial relationship is to permit weeding of fanciful defences. As Smithers, J. said in *Wibrass Pty. Ltd.* v. *Swallow and Others*:

> The legislature having put its hand to the protection of traders from conduct that hinders or prevents the supply to or acquisition by them of goods and services but withholding that protection in cases where the conduct is substantially related to the hours and conditions of employment of the participants could not be thought in the absence of clear expression to that effect to intend to withhold it where the participants believed no matter how unreasonably or irrationally, that to engage in that conduct in concert with each other was so related.[79]

Equally clearly the Court cannot be bound by the defendant's assessment of which of his purposes was his dominant purpose. The requirement of a substantial relationship will be defeated if a defendant is permitted to nominate as his dominant purpose an ultimate objective which bears such a relationship to his conditions of employment and that assessment is treated as conclusive though his conduct is incapable of achieving his goal.[80] But the purposes scrutinised must, it is submitted, be purposes present to the defendant's mind. There can be no justification for allowing a person who has engaged in forbidden conduct to raise a defence of legitimate industrial purpose when in fact he had no such purpose in view.

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[77] *Ibid.* In *Leon Laidley Pty. Ltd.* v. *Transport Workers Union of Australia and Others*, *supra* n. 59, 589 at 595 , Bowen, C.J. doubted whether conduct engaged in for the purpose of protecting the quantum of work, or the employment itself, was protected. It was on that point that Sweeny, J. dissented.

[78] *Cf. supra* n. 76. Some further support for the proposition may be derived from the circumstance that s. 45D(3)(a)(ii) relates to conduct related to the circumstances of an individual.

[79] *Supra* n. 58 at 18,006.

[80] The situation in *Wibrass Pty. Ltd.* v. *Swallow and Others*, *supra* n. 58. Smithers, J. rejected the claim that the defendants' ultimate motivation, preservation of their work-free Saturday, was their dominant purpose, because at best their conduct could do no more than bring to an end the Saturday trading of a fourth person whose activities did not in fact imperil the defendants' work-free Saturday.

The extension of the defence to those involved in a contravention is understandable but more than a little difficult to construe. The only sections of the Act which impose liability on persons involved in a contravention as such are ss. 82 (damages) and 87 (compensatory orders). However the persons defined[81] to be persons involved in a contravention for the purposes of ss. 82 and 87 correspond with the persons on whom liability is imposed by ss. 76 (pecuniary penalties) and 80 (injunctions). In the absence of any definition of the phrase for the purposes of s. 45D(3), it is unclear whether the availability of the defence is to vary with the remedy sought.

It is submitted that the preferable view is that whatever the remedy sought the defence is available to any person who (a) has aided, abetted, counselled or procured the contravention, (b) has induced, whether by threats or promises or otherwise, the contravention, (c) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention, or (d) has conspired with others to effect the contravention. S. 45D does not impose criminal liability[82] but the pecuniary penalties which may be imposed under s. 76 exceed the fines which may be imposed[83] for offences against the Act. It is reasonable to construe the section in much the same way as a provision imposing criminal liability.[84] It would be passing strange if the express exclusion of employees of the fourth person from the category of "first persons" operated to deprive any such employee directly involved in a contravention of a defence which would have been available to him, if he could have been proceeded against as a contravenor. The phrase "engage in conduct" is so widely defined[85] that any person who aids, abets, counsels, procures, induces or conspires with a contravenor will engage in conduct in concert with him and will fail to contravene s. 45D(1) only if his conduct is not a cause of the prevention or hinderance of the supply or acquisition of goods or services; e.g. the employees in the retail section of the abattoir in *Wibrass Pty. Ltd.* v. *Swallow and Others*[86] who "played the role of persons concurring in, counselling and encouraging"[87] the con-

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[81] By s. 75B.

[82] S. 78.

[83] See s. 79.

[84] Compare *Trade Practices Commission* v. *Legion Cabs (Trading) Co-op. Society Ltd.* (1978) 2 A.T.P.R. 17, 899 at 17, 905 where Franki, J. so construed s. 47.

[85] S. 4(2).

[86] *Supra* n. 58.

[87] *Id.* 18,008. A counsellor is not necessarily a person involved in a contravention. He may be a contravenor. In *Industrial Enterprises Pty. Ltd.* v. *Federated Storemen and Packers Union of Australia and Others*, *supra* n. 52, the Secretary of the Queensland Branch of the Association of Architects, Engineers, Surveyors and Draughtsmen of Australia, having failed to persuade the fourth person to recommend to certain of its employees that they should join the union, sought the assistance of the Trades and Labor Council. At a meeting called by that body and attended by the representatives (including the said Secretary) of ten unions including The Federated Storemen and Packers Union of Employees of Australia (Queensland Branch), it was decided that the latter union should impose a ban on the provision of certain services to the fourth person by certain third persons. The Secretary of the A.A.E.S.D.A. cast his vote in favour of that resolution. The Federated Storemen and Packers Union of Employees of Australia (Queensland Branch) implemented the ban. The task of co-ordinating and policing the ban was entrusted to and carried out by its President. Lockhart, J. held that the Secretary of the A.A.E.S.D.A., the Federated Storemen and Packers Union of Employees of Australia (Queensland Branch), the President of that union, those of its members who had implemented the ban by declining to provide labour, and the other unions represented at the meeting which imposed the ban, had in concert with one another engaged in conduct which hindered the supply of goods and services to the fourth person.

travention of s. 45D(1) by the employees in the wholesale section of the abattoir, but who did not and could not participate in the implementation of the ban on the supply of slaughtering services to the retail butcher (the fourth person). There is no obvious purpose to be achieved by denying a defence to a counsellor who has offered no more than encouragement and support, whilst granting the defence to a counsellor who has taken such an active part in the promotion of a boycott or in supervising its implementation that his conduct can be said to be a cause of the disruption to the supply or acquisition of the goods or services.[88] There is force in the argument that a fourth person injured by forbidden conduct should be entitled to an order requiring cessation of the conduct (i.e. injunctive relief) however pure the motive of those involved in the boycott,[89] but the argument applies with equal force to contravenors. Contravenors are free to raise a s. 45D(3) defence in proceedings for injunctive relief.[90] Accessories should not be differently treated.

The further difficulty is whether in the case of a person involved in a contravention one is to have regard to his dominant purpose, or the dominant purpose of the contravenor and its relationship to the contravenor's conditions of employment. There is force in the argument that the purity of the contravenor's purpose should confer no benefit on an accessory with a different objective in view. There is equal force in the argument that an accessory should not be liable if the contravenor is not liable. Regrettably the language of s. 45D(3) is amenable to either construction.

Likely

The one matter that is clear is that the meaning of "likely" is wholly uncertain. The word can mean more likely than not. It can equally well mean foreseeable. It can be used to distinguish a real chance from a possibility. It can be used to distinguish a material from a remote risk. When used in a phrase descriptive of conduct it may be equivalent to "prone". In the context of s. 45D(1) it is unlikely that "likely" means more likely than not because conduct which is more likely than not to have one of the specified effects appears to fall within the phrase "would have the effect". The reference to conduct which "would be likely to have" a specified effect is clearly intended to broaden the scope of the subsection. However to attempt to identify the precise degree or likelihood, being a degree of likelihood less than a fifty per cent chance, which the reference to "would be likely to have" is meant to convey, is to attempt an impossible task. The range of remedies that contravention of the subsection attracts renders hazardous any attempt to draw inferences from the presumed purpose of the

[88] E.g., as in *ibid.*

[89] The range of remedies available for breach of the provisions of Part IV makes the construction of those provisions inordinately difficult.

[90] The court will refuse interlocutory relief only where the defence is so clearly established as to destroy the applicants *prima facie* case: *Leon Laidley Pty. Ltd.* v. *Transport Workers Union of Australia and Others*, *supra* n. 59 at 595 *per* Bowen, C.J. and at 602 *per* Dean, J.

Legislature. It is reasonable to grant injunctive relief to avert a real risk. It is very much less reasonable to impose a pecuniary penalty where it is not probable that the defendant's conduct will cause a specified effect.[91] There is of course the additional problem that "foreseeable", "prone", "real chance" and "material risk" are themselves terms redolent with uncertainties. In *Tillmanns Butcheries Pty. Ltd.* v. *Australasian Meat Industry Employees' Union*, where on the evidence a specified effect was "likely" whatever meaning was adopted, Dean, J. said:

> The conclusion which I have reached is that, in the context of s. 45D(1), the preferable view is that the word "likely" is not synonymous with "more likely than not" and that if relevant conduct is engaged in for the purposes of causing loss or damage to the business of the relevant corporation, it will suffice, for the purposes of the sub-section, if that conduct is, in the circumstances, such that there is a real chance or possibility that it will, if pursued, cause such loss or damage. Whether or not such conduct is likely (in that sense) to have that effect is a question to be determined by reference to well-established standards of what could reasonably be expected to be the consequence of the relevant conduct in the circumstances. In determining the answer to that question, it will be relevant that the persons engaging in the conduct did so with the purpose of causing such loss or damage.[92]

That passage should certainly induce those who advise potential defendants to counsel a measure of restraint.

A fourth person who seeks to recover the amount of the loss of damage done to his business by conduct which contravenes s. 45D(1) must of course prove that he sustained actual loss or damage.[93] However a final and not merely an interlocutory injunction may be granted and a pecuniary penalty may be imposed on proof that the conduct engaged in was likely to cause substantial loss or damage to his business. The language of the sub-section permits proof of contravention to be based either on evidence of the actuality of damage (or diminution in competition) or on evidence of the likelihood of damage (or diminution in competition).[94] No little embarrassment will be caused where, the proceedings being instituted after the boycott has run its course, it is shown that conduct likely to have a specified effect did not in fact have that effect. One suggestion is that the Court should not disregard the lesson of the event in determining the likely effect of the conduct.[95]

Substantial

The loss or damage or (as the case may be) the lessening of competition must be "substantial". The word "substantial" is quantitatively

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[91] *Cf.* the comments in the text to which footnotes 84 and 89 attach.
[92] *Supra* n. 30 at 382.
[93] S. 82.
[94] *Supra* n. 30.
[95] *Id.* 381-382 *per* Deane, J.

imprecise. It could mean "considerable".[96] It could equally well mean "more than trivial or minimal". It could be used in a relative sense or to indicate an absolute significance, size or quantity. It may or may not have the same content as its derivative "substantially" in s. 45D(3).

The cases have yet to resolve the riddle. *Tillmanns Butcheries Pty. Ltd.* v. *Australasian Meat Industry Employees Union and Others*[97] contributes some element of certainty by establishing that the word is used in a relative sense. It follows that where the defendant's conduct is alleged to have the effect or likely effect of causing substantial loss or damage to the business of a fourth person, the Court will require to know something of the circumstances of the fourth person's business, in order that it may arrive at a conclusion whether the loss or damage in question should be regarded as substantial in relation to that business.[98] If indeed one is concerned with the defendant's subjective purpose, it should in strictness be necessary to show also that the defendant knows enough about the fourth person's business to have formed a purpose of inflicting substantial loss or damage. In fact, the Court has not been prepared to distinguish between the purposive infliction of harm by a defendant who intends to cause substantial loss or damage, and the purposive infliction of harm by a defendant who is indifferent or reckless whether the loss or damage proves substantial and intends to cause such harm as is necessary to make the fourth person "cave in".[99]

Enforcement and Remedies

Pecuniary Penalties

Contravention of s. 45D(1) is not a criminal offence.[100] A person who contravenes s. 45D(1) is however liable to a pecuniary penalty.[101] The maximum pecuniary penalty which may be imposed is five times the maximum fine which may be imposed for a criminal offence.[102] Further, whereas s. 79 limits the fine which may be imposed for a number of offences of the same nature occurring at or about the same time, no such statutory limitation applies to the pecuniary penalty which may be imposed under s. 76. S. 76(3) imposes a limited restriction. If a person's conduct constitutes a contravention of two or more provisions of Part IV only one pecuniary penalty may be imposed. Whether conduct which contravenes

[96] *Cf. Pasler* v. *Grindling* [1948] A.C. 291 at 316-317 *per* Viscount Simon.

[97] *Supra* n. 30 at 374-375 *per* Bowen, C.J.; Deane, J., at 382 indicated, without deciding, a preference for the meaning "real or of substance and not insubstantial or nominal".

[98] *Ibid.* The case illustrates also the difficulty involved in assessing the loss or damage the conduct would have caused had it not been interrupted by an interlocutory injunction. Relevant factors include the availability of alternative supplies, the loss or damage inflicted prior to the grant of the interlocutory injunction, and the proposed duration of the boycott.

[99] *Industrial Enterprises Pty. Ltd. and Others* v. *Federated Storemen and Packers Union of Australia*, *supra* n. 52 (interlocutory injunction); *Leon Laidley Pty. Ltd.* v. *Transport Workers Union of Australia and Others*, *supra* n. 59 (interlocutory injunction). The point was not argued on appeal. *Tillmanns Butcheries Pty. Ltd.* v. *Australasian Meat Industry Employees Union and Others*, *supra* n. 30 (final injunction).

[100] S. 78.

[101] S. 76.

[102] Contrast s. 76 and s. 79.

both s. 45D(1) and s. 45D(1A) contravenes more than one provision of Part IV is something of a nice point. However, in *Trade Practices Commission* v. *Simpson Pope*[103] Franki, J. extended the operation of s. 76(3), and held that as a matter of policy a single act which fell within more than one clause of s. 96(3) should be treated as a single breach of s. 48 for the purposes of fixing a penalty. The same policy considerations will apply to conduct which contravenes both s. 45D(1) and s. 45D(1A). Whether a group of employees and union officials who at or about the same time but by different acts implement boycotts aimed at a number of fourth persons may be similarly treated is a matter of grave doubt, contrast the words "any similar conduct" at s. 76(1) with the words "the same conduct" at s. 76(2).

Natural persons are granted immunity by s. 76(2). Proceedings for a pecuniary penalty may be instituted against natural persons only where a union of employees which lacks corporate status engages in conduct in concert with its members or officers in contravention of s. 45D(1) or (1A). In such a case representative proceedings may be instituted against an officer or officers of the union. Any penalty imposed is enforceable only against the property of the union.[104]

Proceedings may be instituted only by the Minister or the Trade Practices Commission.[105] Under present arrangements the relevant Minister is the Minister for Business and Consumer Affairs. The circumstance that his advisers are quite different to those who advise the Minister for Industrial Relations may have much to do with the insertion of s. 45D in the Trade Practices Act 1974 (Cth.) rather than the Conciliation and Arbitration Act 1904 (Cth.). Proceedings must be instituted within six years after the contravention.[106]

Injunctions

Whereas only the Minister and the Trade Practices Commission may institute proceedings for the recovery of a pecuniary penalty, an injunction may be granted on the application of the Minister, the Trade Practices Commission or any other person.[107] The most likely private applicant is of course a fourth person[108] whose business or competitive position is adversely affected by the contravention. However the applicant need not be a person whose rights are affected by the conduct to be restrained or who is entitled to damages under s. 82.[109] The Legislature has chosen to rely on the discretionary nature of the remedy and the Court's inherent jurisdiction to

[103] (1980) 30 A.L.R. 544.

[104] See s. 45D(6)(c).

[105] S. 77(2). In *Refrigerated Express Lines (A/asia) Pty. Ltd.* v. *Australian Meat and Livestock Corp. and Others* (1979) 2 A.T.P.R. 18,484 at 18,489 Deane, J. held that penalties pursuant to s. 76 can only be imposed in proceedings by the Minister or the Commission commenced pursuant to s. 77.

[106] S. 77(2).

[107] S. 80(1).

[108] Or a third person whose business is adversely affected and who may not negotiate himself out of trouble without contravening s. 45E.

[109] "Any person" means what it says and would, for example, include an employer organization incorporated by registration under the Conciliation and Arbitration Act 1904 or comparable State legislation. See the text to which footnotes 3-6 attach.

stay proceedings which are oppressive, vexatious or an abuse of the process of the Court, rather than to confer protection by the limitation of *locus standi.*[110]

The Court is empowered to grant a perpetual or permanent injunction if it is satisfied that the respondent has engaged or is likely to engage in conduct of the kind described at paras (d) to (i) of s. 80(1). Where the respondent has engaged in such conduct the injunction may be granted whether or not it appears to the Court that the person intends to engage again, or to continue to engage, in conduct of that kind.[111] Where the respondent is found to be likely to engage in conduct of the kind described at paras. (d) to (i) the injunction may be granted whether or not the person has previously engaged in conduct of that kind and whether or not there is imminent danger of substantial damage to any person if he does engage in the conduct.[112]

The requirement that the injunction restrain conduct referred to at paras. (d) to (i) of s. 80(1) restricts the form of the order that may be made. Lawful conduct may not be restrained. Conduct will contravene s. 45D(1) only where it is engaged in concert and with the proscribed purpose and has or is likely to have the proscribed effect and a s. 45D(3) defence is unavailable. The order must incorporate reference to each of those "soft" elements. For example, the injunction granted in *Tillmanns Butcheries Pty. Ltd.* v. *Australasian Meat Industry Employees Union and Others* restrained the respondent from :

> . . . imposing, giving effect to, or enforcing any ban on the slaughtering of livestock for Tillmanns at the abattoirs of Canberra Abattoir Pty. Ltd. at Canberra or of Conkey & Son Ltd. at Cootamundra or the delivery of meat by such abattoirs to Tillmanns where any such ban has the purpose and would have or be likely to have the effect of causing substantial loss or damage to the business of Tillmanns of a wholesale and retail butcher at Canberra or Queanbeyan unless such ban has as its dominant purpose one of the purposes referred to in subsection 45D(3) of the Act.[113]

It was said in *Thompson Publications (Australia) Pty. Ltd.* v. *Trade Practices Commission and Others*:

> There is, of course, much to be said for the view that it is desirable that particular conduct proscribed by an injunction should be described in precise and readily understandable terms and not by reference to the vague and generalized expressions that are frequently unavoidable in the legislative description of classes of conduct. There may well be much to be said for the view that as a matter of legislative policy, in-

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[110] See *Phelps* v. *Western Mining Corporation Ltd.* (1978) 20 A.L.R. 183, at 187-188 *per* Bowen, C.J. and at 190 *per* Deane, J.

[111] S. 80(4).

[112] S. 80(5).

[113] *Supra* n. 30 at 377.

junctive relief to be effective as a weapon for enforcing the provisions of the Act should, in a case where breach of the Act has been clearly established, not be qualified by references to purposes and motives which needed to be established before the initial breach could be found to have been committed. Whether or not that be so is, however, a matter for Parliament. This Court is concerned only to discern the legislative intent in the actual words the Parliament has seen fit to enact.[114]

Drafting is not such an acute problem in the case of interlocutory injunctions. A defendant may be restrained by an injunction cast in absolute terms, e.g. from imposing and implementing any ban upon the loading, delivery or other handling of meat or meat products ordered by the fourth person from the third person.[115] The purpose of an interlocutory order is, after all, to grant urgent relief, not to sternly warn the defendant that henceforth continuation of his conduct places him at risk not only of a final injunction but of contempt proceedings as well.[116] If a strong *prima facie* case is made out and no substantial injustice to the defendant is shown to be likely to result from an order in absolute terms, it is preferable to restrain a person from engaging in conduct which may be lawful rather than to frame an order in terms which raise the very issue to be decided at the final hearing.[117] If because of a change in the defendant's purpose or the likely effect of engaging in the conduct enjoined the conduct would no longer constitute a contravention of s. 45D(1), the defendant may seek the dissolution or modificaton of the injunction.

Adherence to the view that s. 80 does not authorise the grant of a mandatory injunction has resulted in orders requiring positive conduct being formulated in negative terms, see e.g. *Utah Development Co.* v. *Seaman's Union of Australia*[118] where certain of the respondents were enjoined from withholding their labour. Under the general law orders which are positive in substance are positive in form. The proposition that only prohibitory injunctions may be issued rests on the decision of Aicken, J. in *Trade Practices Commission* v. *Tooth & Co. Ltd.*[119] It is amply justified if s. 80 is read in isolation. It is very difficult to sustain if the terms of s. 4(2) are substituted for the words "engaging in conduct". *Trade Practices Commission* v. *Tooth & Co. Ltd.*[120] was a very special case. The issue argued was whether the operation of s. 47(1) and (9)(a) when read with ss. 76, 77 and 80 in relation to the renewal of a lease amounted to an acquisition of

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[114] (1979) 27 A.L.R. 551 at 570 *per* Deane and Fisher, JJ.
[115] *Supra* n. 58 at 18,013.
[116] *World Series Cricket Pty. Ltd.* v. *Parish* (1977) 16 A.L.R. 181 at 191-192 *per* Bowen, C.J.
[117] *Victorian Egg Marketing Board* v. *Parkwood Eggs Pty. Ltd.* (1978) 20 A.L.R. 129 at 149 *per* Brennan, J. It is submitted that the order made in *Industrial Enterprises Pty. Ltd. and Others* v. *Federated Storemen and Packers Union of Australia and Others* (1979) *supra* n. 52 at 17,997-17,998, which restrained conduct that hindered or prevented the supply of services by third persons to the fourth person "in contravention of s. 45D of the Trade Practices Act 1974", is an unsatisfactory precedent and should not be followed.
[118] *Supra* n. 46 at 29-31.
[119] (1979) 142 C.L.R. 397 at 443.
[120] *Id.* 397.

property otherwise than on just terms. Injunctive relief had not been sought and had not been granted. The construction of s. 80 arose as a sidewind. The impact of ss. 22 and 23 of The Federal Court of Australia Act 1976 (Cth.) was not considered. It is of some significance that Mason, J., having held that s. 47(1) and (9)(a) did not impose a positive obligation to grant a lease which might be enforced by a mandatory injunction, went on to say:

> In general, the legal effect of a statute which makes unlawful a refusal to do an act and subjects that refusal to a penalty and a remedy by way of injunction is to impose an obligation to perform that act, so far at least as its performance is within the capability of the actor.[121]

The likelihood is that the Federal Court will insist on a power to issue injunctive orders couched in positive language.[122] That will not effect overly much the form of final injunctions directed at future conduct. Because of the need to refer to purpose and effect, negative language will continue to be both more elegant and more economical. Interlocutory orders intended to terminate boycotts already in operation will however be more condensed, see e.g. *Newcastle Rugby Union Club Ltd.* v. *Morris and The Federated Liquor and Allied Industries Employees Union of Australia, New South Wales Branch*[123] where the respondents were ordered to remove all restrictions on the sale and delivery of beer to the Newcastle Rugby Union Club Limited.

The Court is authorized to grant an interlocutory injunction where in the opinion of the Court it is desirable to do so.[124] In ordinary circumstances the Court will conclude that it is desirable to grant an interlocutory injunction if the applicant establishes a real and significant chance of ultimate success and that the balance of convenience favours the grant of the order.[125] Given that the defendants may always re-impose their boycott if at the final hearing it is found to be lawful, the balance of convenience will normally favour preservation of the applicant's business and the *status quo* pending that hearing. Whether it is a ground for dissolution of the injunction that the applicant has been dilatory about bringing the matter on for final hearing has yet to be determined.

S. 80 nowhere expressly provides that an interlocutory injunction may be granted whether or not it appears to the Court that the defendant intends to engage again, or to continue to engage, or has previously engaged, in the conduct to be restrained. S. 80(4) provides that interlocutory relief may issue whether or not it appears to the Court that the person intends to engage again, or to continue to engage, in conduct of the kind to be

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[121] *Id.* 431.

[122] *Cf. Health Insurance Commissioners* v. *Hospitals Contribution Fund of Australia* (1981) 36 A.L.R. 204 at 208 *per* Bowen, C.J. See however *Mundine* v. *Layton Taylor Promotions* (1981) 51 F.L.R. 73 at 77 where Ellicott, J. inclined to the view that mandatory orders might be made only under s. 80A.

[123] Unreported otherwise than at C.C.H. Trade Practices Reporter Volume 1, at 414-794, reference .40.

[124] S. 80(2) refers to "an interim injunction" but has been treated as authority to grant interlocutory injunctions, see e.g. *supra* n. 116 and *supra* n. 117.

[125] For a more detailed discussion, see Hall, D.R., "Injunctive Relief: Aspects of Section 80". *Proceedings Univ. of Qld. Law Sch. Symp., Federal Courts and Trade Practices* 1980, at 54 to 71.

restrained. S. 80(5) provides that interlocutory relief may issue whether or not the person has previously engaged in conduct of the kind to be restrained and whether or not there is an imminent danger of substantial damage to any person if he does (the latter relaxation cannot apply to proceedings based on s. 45D(1)(i)(a) and (ii)(A) or s. 45D(1)(b)(i)). S. 80(4) may and should be construed to require that the applicant show a prima facie case of previous breach and s. 80(5) to require a prima facie case of likely future breach. It may be doubted whether it is incidental to s. 51(xx) to provide for the grant of interlocutory restraining orders against persons who are named as defendants, but against whom no case is made that they have contravened or are likely to contravene the substantive provisions of the Act. In any event, if one moves from the grant of power to its exercise, it is clear that the court will insist on proof that the defendant has engaged in, or has threatened to engage in, conduct itemised at s. 80(1)[126]

For completeness one should add that whilst an injunction granted under s. 80 will restrain only those whom it purports to restrain, it will not necessarily bind all of those whom it purports to restrain. For example, the order made in *Tillmanns Butcheries Pty. Ltd.* v. *Australasian Meat Industry Employees Union*[127] restrained the Union, its servants and agents. Since the servants and agents of the Union were not defendants they could not be restrained. Only in the case of proceedings against a union which is not a corporate body may an order be made against persons who are not parties to the proceedings.[128] The reference to servants and agents is no more than a reminder to those persons that any third person who knowingly assists a person restrained in the breach of the order is himself liable to be dealt with for contempt.[129]

A related issue is whether the Court should exercise its discretion against the applicant where the boycott will be continued or re-imposed by persons who are not defendants. In *Industrial Enterprises Pty. Ltd. and Others* v. *Federated Storemen and Packers Union of Australia and Others*[130] Lockhart, J. rejected an argument that a restraining order would be hollow because other unions would impose a ban preventing the supply of goods or services to the fourth person. His Honour said:

> There is nothing in the evidence to reliably suggest that the other two unions are imposing or contemplating the imposition of their own

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[126] *Supra* n. 117 at 150 *per* Brennan, J.

[127] *Supra* n. 30.

[128] S. 45D(6)(c)(i) deems the proceedings to be proceedings against all persons who were members of the union at the time when the conduct was engaged in, a turn of phrase which may limit the provision to proceedings for an injunction based on an actual (not a likely) contravention of the Act.

[129] *Marenjo* v. *Daily Sketch* [1948] 1 All E.R. 406. A party to the proceedings who has been restrained is of course bound by the order if he has notice of it whether it has been formally served on him or not. *Eliot* v. *Appleton* (1923) Tas. L.R. 20.

[130] (1979) 2 A.T.P.R. 17,970, at 17,997. The point was not taken that the workmen whose withdrawal of services was the *causa causans* of the impediment to supply were not joined as defendants: perhaps because, on the evidence, the method by which black bans were imposed on the Brisbane wharves required the active participation of the defendants if the workmen's withdrawal of services was to continue.

bans. The contention of the respondents fails for this and another reason, namely that this Court will not withhold injunctive relief to prevent the continuance of a "black ban", and thus restrain a contravention of s. 45D, on the ground that some organisation, not a party to the proceedings, may itself impose its own "black ban" on the same or other goods of the applicants.

His Honour was right. The injunction is one of the primary remedies under the Act. It would be inappropriate to deny relief against a defendant likely to contravene or be involved in a contravention of the Act, because some other person or group of persons might lawfully engage in conduct yielding the same result. Neither is it appropriate for the Court to speculate on the likelihood of others unlawfully engaging in conduct producing the same result. The Court should assume that the Act will be obeyed. The more difficult case is the situation in which it is established that others will disobey the law and that the restraining order will be ineffective, in the sense that though obeyed it will not give the applicant the relief which he seeks. Confronted with that situation in *Nauru Local Government Council* v. *Australian Shipping Officers Association and Others*[131] Northrop, J. said:

> The conduct preventing the supply of stevedoring services is the conduct of employees of Australport. Those employees are not parties to this action. The order sought, if made, and if observed, would not necessarily result in the stevedoring services being provided to the plaintiff. It is undesirable that the Court make interim orders that will not, on their face, be effective to bring about the result sought by the person seeking the interim order. Accordingly, I would refuse the order as sought in its amended form.[132]

That solution may not be correct. To require that all persons engaged in a boycott be joined before injunctive relief may be had, is to impose an impossible burden and to deny the injunction is proper role as a principal remedy under the Act. However, given that the issue is one which has bedevilled the grant and efficiency of return to work orders under industrial arbitration legislation, the amendment of s. 45D(6)(c)(i) so as to make applicable to members of unions which are bodies corporate the rule applicable to members of unincorporated trade unions would be appropriate.

Conciliation

The ordinary courts have become increasingly reluctant to grant injunctive relief to an applicant who has not exhausted his remedies in the specialist industrial tribunals. For example, in *Harry M. Miller Attractions Pty. Ltd.* v. *Actors and Announcers Equity Association of Australia*[133] Street, J.

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[131] (1978) 27 A.L.R. 535 at 544.

[132] It is tolerably clear that if the plaintiff had made out a *prima facie* case and had not been conducting an illegal business Northrop, J. would have been prepared to grant an interlocutory injunction if the order could be formulated so as not on its face to be ineffective.

[133] [1970] 1 N.S.W.R. 614 at 615. The Commonwealth Act referred to is the Conciliation and Arbitration Act 1904.

said: "In the ordinary course of resolving an industrial dispute such as this, the parties should be left to pursue their remedies before the Commission set up under the Commonwealth Act". Predictably enough, those briefed to act for respondents in proceedings for injunctive relief arising out of a prospective or actual secondary boycott urged the same approach upon the Federal Court. In *Industrial Enterprises Pty. Ltd. and Others* v. *Federated Storemen and Packers Union of Australia* the argument was soundly trounced. Lockhart, J. observed:

> It cannot be an answer to an applicant for injunctive relief under the Act, who is otherwise entitled to relief, to say that, because an industrial dispute, which may concern substantially the same facts, is to be heard by a Commissioner under the Conciliation and Arbitration Act 1904, the applicant is to be refused relief. I reject this notion completely. One does not know whether the facts before this court which may come before the Commissioner are the same or substantially the same, whether the issues have anything in common, whether the parties are or will be the same, when the Commissioner will hear the matter or what the result of the hearing will be? These are but some of the matters which must lead to the rejection of the contention of the respondents. But there are more substantial reasons than these, one being the Act specifically prohibits conduct such as that mentioned in s. 45D and provides its own remedies for dealing with it, including the power to grant injunctions under s. 80. . . .
>
> In the present case, not to hear the application for interlocutory injunctions or, having heard it, not to grant relief merely because a dispute is soon to be heard by another tribunal under another Act of Parliament, which may involve substantially the same facts, would be a serious failure by this court to exercise its jurisdiction and would cause grave injustice to the applicants.[134]

Strong language indeed. His Honour did leave some scope for the argument saying, "This is not to say that there may not be circumstances where it would be proper for this court, in the exercise of its discretion, to await the result of proceedings under the Conciliation and Arbitration Act 1904 (Cth.) before embarking on the hearing of proceedings under the Act". If the door was still ajar it was closed by Acts No.s 73 and 90 of 1980.

By Act No. 90 of 1980 Division 5A was added to Part III of the Conciliation and Arbitration Act 1904 (Cth.). Division 5A applies in relation to a dispute relating to a contravention, or a threatened, impending or probable contravention, of section 45D, or of section 45E, of the Trade Practices Act 1974 (Cth.), being a dispute —

(a) that relates, or may relate, to work done or to be done under an award; or

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[134] *Supra* n. 52. The dispute had been notified to the Australian Conciliation and Arbitration Commission but the Commission had not determined whether there was an industrial dispute, who were the parties and what were the matters in dispute.

(b) in which an organization of employees registered pursuant to the Act, or a member or officer of such an organization, is involved.[135]

The Commission is empowered to settle such disputes by conciliation.[136] To do so it may exercise its powers under Division 1 of Part III as if references to industrial disputes were references to disputes in relation to which Division 5A applies.[137] The Commission's powers vest so soon as the President becomes aware of the existence of such a dispute.[138] Once the President is aware of such a dispute the source of his knowledge is irrelevant.[139] Like every other member of the Commission the President is, of course, obliged to keep himself acquainted with industrial affairs.[140] However to facilitate acquisition of knowledge, any Minister who becomes aware of the existence of a dispute which is or may be a dispute in relation to which Division 5A applies, is authorised to notify the President or the Registrar accordingly. Further any person who as applicant or respondent is a party to proceedings for injunctive relief based on the operation of s. 80 upon s. 45D, may notify the President or the Registrar accordingly.[141]

The conciliation itself must be conducted by the President or by another Presidential Member.[142] The parties to the proceedings are defined to be:

(a) any organization of employees in connection with the employment of any of whose members the dispute has arisen;
(b) employers of such employees;
(c) organizations of which any such employers are members;
(d) if the dispute relates to conduct in relation to the supply of goods or services to, or the acquisition of goods or services from, a person (in Division 5A referred to as an "affected person") and that person is not already a party — that person;
(e) any Minister who notifies the Commission that he wishes to become a party; and
(f) such other persons as the Commission, by order, specifies.[143]

The Registrar is required to give notice of the proceedings to every person who is an affected person, to every person who is a party within paras. (e)

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[135] S. 88DA. "Relate" and its derivatives are so overly used that the section verges on gobblygook. Indeed the drafwx may have succeeded in failing to hit his mark. It is scarcely likely that he intended to confine the operation of Division 5A to situations in which there is a dispute relating to a contravention (actual, threatened, impending or probable) of s. 45D which satisfied also one or other of the elements at (a) and (b). In all probability "relating to" where it first appears was intended to mean "involving directly or indirectly". The use of "involved" at para. (b) and the difficulty of giving "relate" and its derivatives different meanings at different places in the same section may well frustrate such a construction, though the section is clearly drawn to discourage jurisdictional argument.

[136] S. 88DC(1).

[137] S. 88DF(1) and (2)(a).

[138] S. 88DC(1).

[139] S. 88DC(1)(c).

[140] S. 19.

[141] Ss. 88DB(1) and 88DC(1)(a) and (b).

[142] S. 88D.

[143] S. 88DE(1).

and (f) above, and to such other persons as the relevant Presidential member directs.[144]

Division 5A does not add to the powers of the Commission. It detracts from the Commission's powers. It is true that the Commission is given power to settle disputes which do not extend beyond the limits of one State and which do not have as their subject one of the industrial matters listed at s. 4(1).[145] But the Commission is restricted to conciliation. It may not arbitrate and it may not make an award.[146] Though only a certified agreement is enforceable as if it were an award,[147] the Commission may not certify any settlement reached.[148] Even the Commission's power to conciliate may be exercised only with the consent of the Minister administering Part IV of the Trade Practices Act 1974 (Cth.) or the Trade Practices Commission, if the Minister or the Trade Practices Commission is a party to a proceeding which is pending before the Federal Court in relation to the contravention of s. 45D involved in the dispute.[149] And the restrictions apply even where the Commission would otherwise have jurisdiction under the general provisions of the Conciliation and Arbitration Act 1904 (Cth.).[150]

Act No. 73 of 1980 amended the Trade Practices Act 1974 (Cth.) by adding s. 80AA.

S. 80AA(1) provides that nothing in Division 5A of Part III of the Conciliation and Arbitration Act 1904 (Cth.) prevents the Federal Court from granting an injunction pursuant to s. 80. The subsection goes on to "vest" the Court with a discretion to stay the operation of an injunction, if it considers that to do so would be likely to facilitate the settlement of the dispute by conciliation and that in all the circumstances it would be just to do so. The discretion to order that the operation of an injunction be stayed arises only where (a) the injunction has been granted, (b) a proceeding under Division 5A of Part III of the Conciliation and Arbitration Act 1904 (Cth.) is pending, and (c) the conduct relates to the supply of goods or services to, or the acquisition of goods or services from, a person who is or becomes a party[151] to the conciliation proceedings.

Notwithstanding its form s. 80AA does not vest a discretion at all. It can scarcely be doubted that the Federal Court has an inherent power to stay the operation of an injunction. The real purpose of s. 80AA is to limit the scope of the Court's discretion and to control its exercise. To persuade the Court that it would be just to stay the operation of a final (or interlocutory)[152] injunction granted on proof (or a prima facie case) of the ac-

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[144] S. 88DE(3).
[145] S. 88DF and the definition of "industrial dispute" at s. 4(1).
[146] Ss. 88DC(3) and 88DF(1).
[147] Ss. 28(3) and (4).
[148] S. 88DF(1).
[149] S. 88DC(2). The proceedings need not be proceedings for injunctive relief.
[150] S. 88DC(3).
[151] Given that s. 88DE(1)(d) defines such a person to be a party the inference is that s. 88AA(1)(c) requires that he must in fact be or become a party to the proceedings.
[152] S. 80AA(6).

tuality or likelihood of substantial loss or damage to the business of the fourth person (or the fourth person *and* the third person), against the will of the person (or persons) whose business is affected and notwithstanding that in consequence the boycott will be resumed, will be a formidable task. Neither is it easy to show that a stay would be likely to facilitate the settlement of the dispute by conciliation, for conciliation is often a detailed protracted process raising unexpected factors.[153]

S. 80AA does not expressly negative the Federal Court's discretion to withhold injunctive relief because conciliation is pending or available, but it is unlikely that a respondent will convince the Court to apply different principles at that procedural stage. The likelihood is that if the elements of s. 80AA are satisfied, rather than withhold relief the Court will grant the injunction and order that its operation be stayed.

S. 80AA does not provide that nothing in the industrial relations legislation of the various States prevents the Federal Court from granting an injunction pursuant to s. 80. Such a provision is not necessary. No State legislature can prevent the grant of an injunction under a valid Commonwealth law. S. 80AA(1) does provide that the Federal Court may order that an injunction be stayed if a proceeding is pending before "a court, tribunal or authority of a State or Territory exercising powers under a prescribed provision of a law of that State or Territory", and the other elements of s. 80AA(1) are satisfied. S. 88AA(4) provides that the regulations shall not prescribe a provision of a law of a State or Territory for the purposes of the section unless the Governor-General is satisfied that the powers of the relevant court, tribunal or authority under that provision are equivalent to the powers of the Australian Conciliation and Arbitration Commission under section 88DC of the Conciliation and Arbitration Act 1904 (Cth.). In consequence a stay on the ground that proceedings are pending in a State industrial tribunal will be available only if the State tribunal has been shorn of its power to arbitrate and to give legal effect to a settlement. It is unlikely that the Federal Court would be prepared to withhold injunctive relief because redress was available in a State tribunal exercising jurisdiction under a law which was not a prescribed law.

S. 80AA says nothing about the grant of injunctive relief where relief is sought from a State Court on the ground that a conspiracy is unlawful because the method selected involves contravention of S. 45D.[154] A State Court may well follow the decision in *Harry M. Miller Attractions Pty. Ltd.* v. *Actors and Announcers Equity Association of Australia.*[155]

Damages

The value of the cause of action that s. 82(1) confers on those who suf-

[153] *Cf. Fontana Films Ltd.* v. *Actors and Announcers Equity Association of Australia and Others* [1981] Current Review C3, at 18 *per* McGregor, J. It may be that if the application for a stay is made by "a Minister" rather than the respondent, a broader policy approach might be taken.

[154] *Cf. Bunny Industries* v. *Jones and Others* (1979) T.P.C. 561 where the method alleged involved breach of s. 46.

[155] *Supra* n. 133 at 615.

fer loss or damage by conduct done in contravention of s. 45D is diminished by the difficulty of quantifying the amount of that loss or damage.[156] For example, in *Tillmanns Butcheries Pty. Ltd.* v. *Australasian Meat Industry Employees Union and Others*[157] the plaintiff, Tillmanns Butcheries Pty. Ltd., established that during the period from 9 December 1977, when the ban was imposed at Canberra Abattoir, to 20 December 1977, when the proceedings were commenced and an interim injunction obtained, it was conducting a retail and wholesale business in two shops selling meat and smallgoods and was dependent for its supply upon meat slaughtered at Canberra Abattoir. On the evidence this supply was interrupted in two ways; first, it had 32 live cattle awaiting slaughter and the proper conclusion from the evidence was that the slaughter of these cattle was hindered or prevented by the ban at least until 28 December 1977; second, it had 20 head of cattle and 17 pigs which had been slaughtered and were held by Canberra Abattoir in its chiller. The proper conclusion from the evidence was that supply of this meat from the chiller was hindered or prevented by the ban for upwards of a week until Canberra Abattoir obtained agreement from the Union representative to its release to avoid further deterioration. There was evidence Tillmanns was operating its stores turning over stock, depositing its gross receipts in its bank and paying its bills. There was evidence that the amount of gross receipts deposited was down in comparison with the corresponding period a year before. There was no evidence about other possible factors which might have affected the figures for those respective periods. In the absence of such evidence the trial judge (St. John, J.) held that there was no evidence of actual loss or damage within the meaning of s. 45D.[158] No attack was made on that finding on appeal. Tillmanns abandoned the claim for damages.

Granted that the difficulty of assessing damages does not warrant their denial,[159] the problem of establishing what profits were lost (particularly where the contravention of s. 45D impedes a new venture) and the costs potentially involved in resolving for others the problems of remoteness and mitigation[160] under s. 82, serve as substantial deterrents to those who would otherwise be plaintiffs.

Individual trade unionists whose life savings might otherwise be imperilled by an award of damages are granted a measure of protection by s. 45D(6). Where an organization of employees which is a body corporate engages in conduct in concert with members or officers of the organization, any loss or damage suffered by a person as a result of the conduct is deemed to have been caused by the conduct of the organization. No action under s. 82 to recover the amount of the loss or damage may be brought against

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[156] The terms of s. 82 are discussed at that part of the text to which footnotes 41 and 42 relate.

[157] *Supra* n. 30. See also *Wibrass Pty. Ltd.* v. *Swallow and Others, supra* n. 58 at 18,012.

[158] (1978) 2 A.T.P.R. 17,967 at 17,969.

[159] *Ansett Transport Industries (Operations) Pty. Ltd.* v. *Halton and Others* (1979) 25 A.L.R. 639 at 654 *per* Aickin, J.

[160] Discussed at C.C.H. Trade Practices Reporter, Vol. 1 at 918-505.

any of the members or officers of the organization.[161] Where an organization of employees which is not a body corporate engages in conduct in concert with its members or officers, any loss or damage suffered by a person as a result of the conduct is deemed to have been caused by the conduct of the organization. Any damages awarded may be enforced only against the assets of the organization.[162]

In its original form s. 45D(6) granted members and officers a comparable measure of protection where the union was deemed to have engaged in conduct in concert with them. However the deeming provisions of s. 45D(5) were held invalid in *Actors and Announcers Equity Association of Australia* v. *Fontana Films Pty. Ltd.*[163] To the extent that it had an operation consequential on subsection (5), subsection (6) was held invalid also. It is an unfortunate consequence of that decision that s. 45D now imposes a heavier burden on ordinary unionists than was (presumably) intended.

An action under s. 82 must be commenced within three years.[164].

Extended Operation

Additional Operation Under s. 6

The purpose of s. 6 is to give the provisions of the Trade Practices Act 1974 (Cth.) an operation which can be supported not merely by reference to the corporations power, but by reference also to the powers contained in ss. 51(i) and 122 together with the Commonwealth Legislature's implied power to regulate the supply of goods or services to the Commonwealth, its authorities and instrumentalities. The section gives to s. 45D two different applications: first, an application in accordance with its terms; second, an application in accordance with s. 6(2). S. 45D has by force of the section the effect it would have if s. 45D (other than subsection (1A)) were by express provision confined in its operation to engaging in conduct to the extent to which the conduct takes place in the course of or in relation to:

(i) trade or commerce between Australia and places outside Australia;
(ii) trade or commerce among the States;
(iii) trade or commerce within a Territory, between a State and a Territory or between two Territories; or
(iv) the supply of goods or services to the Commonwealth or an authority or instrumentality of the Commonwealth;

and s. 45D(1)(a) were omitted and in paragraph (b) the words "the fourth person is a corporation and" were omitted and the reference to a corporation included a reference to a person not being a corporation.

To date only the additional operation s. 45D would have if confined to conduct to the extent to which it takes place in the course of or in relation to

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[161] S. 45D(6)(a) and (b).
[162] S. 45D(6)(a) and (c)(v). Only representative proceedings may be taken against the officers and members, s. 45D(6)(c)(i).
[163] *Supra* n. 17.
[164] S. 82(2).

trade or commerce between Australia and places outside Australia has been tested. In *The Seamen's Union of Australia and Others* v. *Utah Development Company and Others*[165] it was held that at least to that extent the legislative scheme was valid.

Subsection (1A) – Primary Boycotts

S. 45D(1A) relies on ss. 51(i) and 122 of the Constitution for its validity. It was added by Act No. 207 of 1978, an Act which was assented to and which commenced one week after judgment was delivered in *The Seamen's Union of Australia and Others* v. *Utah Development Company and Others.*[166] Whereas in that aspect of its operation held valid in *The Seamen's Union of Australia and Others* v. *Utah Development Company and Others*[167] s. 45D(1) is designed to prohibit conduct carried out by persons in combination in the course of or in relation to overseas trade for the purpose of causing substantial injury to the business of another, s. 45D(1A) is designed to prohibit conduct engaged in by persons in combination which has or is likely to have and is intended to have an impact on the attempts of another to engage in a relevant form of trade or commerce. S. 45D(1A) provides:

> Subject to this section, a person shall not, in concert with another person, engage in conduct for the purpose, and having or likely to have the effect, of preventing or substantially hindering a third person (not being an employer of the first-mentioned person) from engaging in trade or commerce:
>
> (a) between Australia and places outside Australia;
> (b) among the States; or
> (c) within a Territory, between a State and a Territory or between two Territories.

S. 45D(1A), like s. 45D(1), refrains from conscripting persons into service for the purpose of facilitating overseas, inter-state or Territory trade and commerce. An employee is free to refuse employment or to leave his employment whatever the impact of his conduct on a relevant aspect of trade or commerce. Only if he refuses to work in concert with another and with the purpose of hindering or preventing a third person from engaging in a specified aspect of trade or commerce does the actual or likely consequence of his conduct become a matter of significance. The reasoning in *The Seamen's Union of Australia and Others* v. *Utah Development Company and Others*[168] and *Redfern* v. *Dunlop Rubber Australia Ltd.*[169] is incompatible with any argument which denies validity to s. 45D(1A) (a) and (b). The validity of s. 45D(1A)(c) is generally considered to be beyond question.[170]

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[165] (1978) 144 C.L.R. 120.
[166] *Ibid.*
[167] *Ibid.*
[168] *Ibid.*
[169] (1964) 110 C.L.R. 194.
[170] *Cf.* Taperell, Vermeesch and Harland, *Trade Practices and Consumer Protection* (2nd ed. 1978) at para. 220.

The most substantial difference between s. 45D(1) and s. 45D(1A) is that whereas under subsection (1) the defendant's conduct must be shown to have been engaged in for the purpose and to have or be likely to have the effect of causing:

(i) substantial loss or damage to the business of the fourth person; or

(ii) a substantial lessening of competition in any market in which the fourth person supplies or acquires goods or services,

under subsection (1A) there need not even be a fourth person in view. It is sufficient that the defendant has engaged in conduct which has the purpose and the actual or likely effect of preventing or substantially hindering a third person from engaging in trade or commerce as described at paras. (a) to (c). Normal "strike" situations are covered. A union official who organizes a withdrawal of labour or a "go-slow" strike will be liable though his conduct is intended to affect and does affect the employer alone.[171] Nowithstanding the availability of the defence of dominant and legitimate industrial purpose,[172] the use of subsection (1A) is likely to be even more provocative to the trade union movement than the use of subsection (1).

Business interests too may reasonably be apprehensive about its scope. A group of Australian Capital Territory retailers contemplating withdrawal of their custom from a wholesaler who has dealt directly with the public, must now have regard to s. 45D(1A) as well as s. 45(2). Such a boycott will be unlawful if substantially anti-competitive,[173] or if the retailers or any two of them are competitors,[174] or if its purpose and likely effect is to prevent or substantially hinder the wholesaler's participation in trade or commerce within the Territory.[175] If a Sydney-based supplier sells the whole of its stock of an otherwise unavailable chemical to a Sydney glass manufacturer, knowing that a Darwin-based paint manufacturer needs that chemical to continue production, the literature relevant to the meaning of "purpose" will be of some interest to him. A motor vehicle manufacturer proposing to terminate the franchise of a Canberra dealer and appoint a replacement may require advice on the doctrine of causation. A manufacturer of carbonated beverages who leases display refrigerators on terms restricting their use to his own product is now at risk even where his conduct is not anti-competitive.[176]

The businessman who is otherwise immunised against breach of the Act is given some protection by subsection (1B)[177] which provides as follows:

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[171] The employees will not be liable for contravention of subsection (1A) but will be liable under s. 76(1)(e), s. 80(1)(h) and ss. 75B(c) and 82.

[172] S. 45D(3)(b).

[173] S. 45(2)(a)(ii) and (b)(ii).

[174] S. 45(2)(a)(i) and (b)(i) and s. 4D.

[175] S. 45D(1A).

[176] *Cf.* s. 47(1), (2)(d) and (10).

[177] Added by Act No. 207 of 1978.

In a proceeding under this Act in relation to a contravention of sub-section (1A), it is a defence if the defendant proves:

(a) that the conduct concerned is the subject of an authorization in force under section 88;

(aa) that a notice in respect of the conduct has been duly given to the Commission under sub-section 93(1) and the Commission has not given a notice in respect of the conduct under sub-section 93(3); or

(b) that the dominant purpose for which the defendant engaged in the conduct concerned was to preserve or further a business carried on by him.

It is no part of the purpose of para. (a) to confer protection on a defendant who has been granted an authorization to engage in conduct to which subsection (1A) would or might apply. A person who has sought and been granted such an authorization is fully protected by s. 88(7). The purpose of para. (a) is to confer protection on a defendant who has applied for and been granted an authorization to engage in conduct which would or might contravene some other provision of the Act, but which is subsequently alleged to contravene s. 45D(1A) also. Similarly, para. (aa) is intended to protect a defendant who has notified the Trade Practices Commission that he proposes to engage in conduct of a kind referred to in s. 47(2), (3), (4), (5), (8)(a), 8(b), 9(a), 9(b) or 9(c) and is subsequently confronted with a claim that he has contravened s. 45D(1A).[178]

The purpose of para. (b) is to permit the businessman to substitute the defence of selfishness for the defence of legitimate industrial purpose. It is likely to be the cause of some pique. Compared with subsection (3) it is expressed in language of some width. Further, whilst a union and its officials are stripped[179] of the defence of dominant and legitimate industrial purpose if they permit a union organizer[180] to participate in a boycott, no similar restraint is placed upon the businessman.

The last of the provisions added by Act No. 207 of 1978, i.e. subsection (1C) is calculated to mislead. Its principal purpose is to ensure that subsection (1B)(b) benefits only a defendant who really does have the dominant purpose of preserving or furthering his own business. It is a parallel provision to subsection (4). However it is capable of being misconstrued to mean that only a person named in an authorization may take advantage of subsection (1B)(a). Given that para. (a) refers to conduct the

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[178] If the defendant is also in contravention of s. 45(2), s. 45D(1B) will not protect him, see s. 45D(7). S. 93(7)(b) will protect him only if his conduct would otherwise have *breached* s. 47(1), see s. 45(6).

[179] S. 45D(3)(b)(i) and (ii).

[180] Where the organizer is a union employee. If the organizer is an official the defence will be available. The difficulty of distinguishing the two categories is well illustrated by *Re Amalgamated Engineering Union (Australian Section)* (1962) 3 F.L.R. 63 where a divisional organizer was held to be an "officer" and *Cameron* v. *Australian Workers' Union* (1959) 2 F.L.R. 45 (organizer) and *Re Australian Workers' Union of Employees, Queensland* (1962) 50 Q.G.I.G. 184 (temporary organizer) where the position was held not to be an office. The cases provide a detailed and useful analysis of relevant factors.

subject of an authorization and that an authorization may be granted though some parties to the transaction are unknown,[181] the better view is that subsection (1C) denies defendants the benefit of para. (a) only where they are denied the benefit of the authorization. Since the benefit of a notification is personal, only a defendant who gave the notification may raise para. (aa).[182]

Section 45E – Employers Who Will Not Fight

A particularly effective way of hindering or preventing the supply or acquisition of goods or services by a third person to or from a fourth person is to persuade the third person to refrain from dealing with the fourth person. Where the third person's refusal to deal is procured by the exercise of industrial pressure, e.g. where the employees of a wholesaler withdraw their labour until their employer discontinues supplies to a retailer, those involved will be liable for contravention of s. 45D(1) if the elements of purpose and actual or likely effect are proved against them. Indeed "conduct" is defined so widely that any person who in concert with another person negotiates an arrangement pursuant to which the third person is to abstain from further trade with a fourth person will contravene s. 45D(1), if the other elements be present. However in neither case will the third person be liable.[183] There is no legitimate basis for concluding that a third person may also be a first or a second person. Additionally, in the example first given and if threats be used in the second example, the inference that it was a real purpose of the third person to cause a substantial loss or damage to the business of the fourth person or to cause a substantial lessening of competition will not reasonably be open. Yet no effective injunctive relief may be had if the third person cannot be enjoined. Any attempt to recover the amount of losses incurred after the third person withdrew from further dealings is beset with problems of causation. Additionally, where the third person's collaboration is procured by one man acting alone, e.g. a key worker or a union secretary, no person at all will be liable. It is to that situation that s. 45E is directed.

The core of s. 45E is to be found in subsection (1) which provides:

> Subject to this section, a person who has been accustomed, or is under an obligation, to supply goods or services to, or to acquire goods or services from, a second person shall not make a contract or arrangement, or arrive at an understanding, with a third person (being an organization of employees, an officer of such an organization, or

[181] Ss. 88(14) and (15).

[182] S. 45(6) pursues the same policy.

[183] The third person may be in breach of s. 45(2)(a)(ii) and (b)(ii). Private litigants do not ordinarily attempt to establish an actual or likely effect of substantially lessening competition, an effect which may not flow even if the fourth person is wholly displaced from the market in which he would otherwise have met the third person; *Austfield Pty. Ltd.* v. *Leyland Motor Corporation of Australia Ltd.* (1977) 14 A.L.R. 449, reversed on appeal (1977) 14 A.L.R. 457, a case where the third and fourth persons were competitors, arose under the pre-1st July 1977 s. 45 which required only proof of an arrangement in restraint of trade and a significant effect on competition between one of the parties to the arrangement and other persons.

another person acting for or on behalf of such an organization or officer) if the proposed contract, arrangement or understanding contains a provision that:

(a) has the purpose of preventing or hindering the first-mentioned person from supplying or continuing to supply any such goods or services to the second person or, as the case may be, from acquiring or continuing to acquire any such goods or services from the second person;

(b) has the purpose of preventing or hindering the first-mentioned person from supplying or continuing to supply any such goods or services to the second person except subject to a condition (not being a condition to which the supply of such goods or services by the first-mentioned person to the second person has previously been subject by reason of a provision of a contract existing between those persons) as to the persons to whom, as to the manner in which, or as to the terms on which, the second person may supply any goods or services; or

(c) has the purpose of preventing or hindering the first-mentioned person from acquiring or continuing to acquire any such goods or services from the second person except subject to a condition (not being a condition to which the acquisition of such goods or services by the first-mentioned person from the second person has previously been subject by reason of a contract existing between those persons) as to the persons to whom, as to the manner in which, or as to the terms on which, the second person may supply any goods or services.

Unlike s. 45D(1) the subsection does not on its face rely on s. 51(xx) of the Constitution for its validity. That is not a matter of substance. Subsection (3) provides that subsection (1) applies only where the first mentioned person or the second person mentioned or both is or are corporations.[184]

Unlike s. 45D(1) and 1(A) the subsection distinguishes on its face between employees and employers. That is a matter of substance. An agreement between a union and a wholesaler under which supplies are to be withheld from a retailer until he dismisses a non-unionist is caught. An agreement between a wholesaler and a retailer under which supplies are to be withheld from another retailer until he dismisses a part-time union official is not caught. An agreement between a wholesaler and a union that a retailer will not be supplied until he undertakes not to sell at a discount is caught. The same arrangement between a wholesaler and a trade association is not caught. An agreement between a union and retailers requiring the retailers to withhold custom from a wholesaler until the wholesaler agrees not to use contractors to deliver his goods is caught. An agreement between owner-drivers and retailers requiring the retailers to withhold custom from a

[184] S. 45E has an additional operation under s. 6.

wholesaler until he agrees to use contractors to deliver his goods is not caught.

The subsection resembles s. 45D(1A) rather than s. 45D(1) in that it is not necessary to show that the arrangement was made or the understanding arrived at for the purpose of causing substantial loss or damage to the business of any person or of causing a substantial diminution in competition. The subsection differs from s. 45D(1A) in that it requires proof of a purpose of preventing or hindering, not proof of a purpose and effect or likely effect of preventing or substantially hindering. The absence of a dominant and legitimate purpose defence, the omission to insist on proof of both purpose and effect, and the circumstance that the purpose referred to is the purpose of a provision rather than the purpose for which the arrangement was made or the understanding arrived at, all suggest that the subsection differs from s. 45D(1) and (1A) in requiring proof of an objective purpose. The most obvious departure from s. 45D(1) and (1A), of course, is that the subsection strikes at arrangements and understandings, not at conduct engaged in in concert.[185]

The operation of s. 45E itself is extended by subsections (5) and (7) which deem a person to have been accustomed to supply or acquire goods or services to or from a second person if, *inter alia*, he has supplied to or acquired from the second person within the last three months or more recently than anyone else. Subsections (6) and (8) impose some limits. Subsection (9) extends the prohibition to giving effect to contracts, arrangements and understandings within subsection (1) but made or arrived at before s. 45E commenced on the 29th of May 1980. And like the other provisions of Part IV, s. 45E has an additional operation under s. 6.

Subsection (2) makes some concession to those who seek to resolve industrial problems by out of court settlement. It provides that subsection (1) does not apply in relation to a contract, arrangement or understanding that is in writing, if the second person mentioned in that sub-section is a party to the contract, arrangement or understanding or has consented in writing to the contract or arrangement being made or the understanding being arrived at. The settlement need not be in writing if made before 29th May 1980.[186]

Authorization

S. 88(7) authorizes the Trade Practices Commission (not the Conciliation and Arbitration Commission) to grant a person and any other person acting in concert with him authorization to engage in conduct to which s. 45D would or might apply. While such an authorization remains in force s. 45D does not apply in relation to the engaging in that conduct by the applicant and any person acting in concert with him. S. 88(7A) makes com-

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[185] Given the subject matter of the section it is likely that the terms "arrangement" and "understanding" will be interpreted to cover "agreements" imposing moral obligations on the non-union party only, see text to which footnotes 32 to 36 attach.

[186] S. 45E(10).

parable provision in respect of conduct to which s. 45E would or might apply. S. 90(8)(a)(ii) largely withdraws the concession granted by s. 88(7) and (7A). It provides that the Commission is not to grant an authorization unless it is satisfied in all the circumstances that the proposed provision or the proposed conduct would result, or be likely to result, in such a benefit to the public that the proposed contract or arrangement should be allowed to be made, the proposed understanding should be allowed to be arrived at, or the proposed conduct should be allowed to take place, as the case may be. The subject matter of ss. 88(7) and (7A) and 90(8)(a)(ii) will inhibit enthusiastic application of the dictum, "The Commission is not prepared to prejudice the position of the wholesalers, by giving legal warrant, even temporarily, to the situation which excludes them from a significant part of their trade".[187] Exclusion from an area of trade and commerce is the gist of any boycott. However the Commission has so consistently refused to see public benefit in boycotts which seek to give private persons control over the supply of goods or services by others, that it is unlikely that applicants will satisfy the requirements of s. 90(8)(a)(ii).[188] The zeal of potential applicants will be further chilled by the Commission's reluctance to make judgments about alleged public benefits which are a matter of vocational and political disputation.[189] The fact is that s. 90(8)(a)(ii) imposes an impossible burden on the Commission. To apply the normal rule that authorization should be granted only to permit conduct which will make a contribution to business efficiency which more than compensates for the derogation from the public good flowing from the restriction on competition,[190] would be to apply a test which is wholly inappropriate to conduct within the mainstream operation of ss. 45D and 45E. To attempt to weigh adverse economic effects against benefits of a qualitatively different nature is to attempt an impossible task save, of course, where the Commonwealth Government is prepared to indicate a view.[191] In this context that view is likely to be unfavourable to a union applicant.

Forecast for the Future

No satisfactory policy basis for s. 45D has yet been formulated.

The terms of reference of the Trade Practices Act Review Committee appointed in April 1976 to examine certain aspects of the operation of the Trade Practices Act 1974 (Cth.) included "the application of the Act to anti-competitive conduct by employees, and employee or employer organizations". In its report to the Minister, the Review Committee castigated certain unions for participation in anti-competitive boycotts, lamented that much of the anti-competitive behaviour fell outside existing legislative controls and went on to observe that:

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[187] *Application of Total Australia Ltd.* (1975) 1 T.P.C.D.D. [205]. One suspects that lying behind that application was an agreement which would now fall within s. 45E.

[188] *Application of A.C.T. Medical Association* (1975) 1 T.P.C.D.D. [175]; *Application of Total Australia Ltd. supra* n. 187.

[189] See, e.g., *Application of A.C.T. Medical Association, supra* n. 188.

[190] See Statement of General Principles (1978) A.T.P.R. (Com) 16,989-9, para. 6.

[191] See, e.g., *Application of John Fairfax and Sons Ltd.* (1980) A.T.P.R. (Com) 16, 416 at para. 37.

> . . . 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.[192]

Of course the fact was, as the Committee acknowledged, that the industrial torts of conspiracy, intimidation and inducing breach of contract were alive and well. In fact the trader's remedies had been augmented by the development of a remedy for the intentional infliction of economic loss. True it was that the remedies were "in most cases dead-letters in practice" (as the Committee put it),[193] but that was probably because traders took the view that to pursue remedies which would not resolve the underlying cause of the dispute would contribute little to the maintenance of a stable industrial environment. If the Committee had investigated the reluctance of traders to revoke the common law remedies, it may well have concluded that any statutory remedy would founder also. As it was, the Committee recommended that "the law provide an effective avenue of recourse for the trader directly affected by allowing him access to an independent deliberative body".[194] In June 1977 the Government of the day acted on that advice.

Questionable though its origins may have been, prior to the premature election of March 1983 s. 45D seemed to have a secure place in Australian law. There is a measure of force in the argument that if entrepreneurs are to be restrained from competition-limiting conduct, so also should there be a limit on the right of organized labour to engage in anti-competitive practices. To the extent that s. 45D goes beyond that, it may be supported by not wholly rhetorical arguments about the need to protect small business, and the need to constrain the untrammelled exercise of power by unions that have grown too large and ascendant. And without being unduly cynical, the risk that s. 45D might exacerbate an industrial dispute may not have been unwelcome to any one who subscribes to the view that one is most likely to hold political office if one divides the community.

All of that may well have changed. The new Australian Government is (at least currently) wedded to consensus. It has its origins in a union movement which has consistently condemned the legislation. As well it might. The secondary boycott is the one industrial pressure tactic which enables the active participants to remain at work and receive their wages. The accepted wisdom is that industrial disputation is an electoral liability to the Australian Labour Party. The portents of change are omnipresent. But only the Legislature may abrogate or vary the terms of the section. The Government controls only one House. Consensus may well require innovative change rather than simple repeal.

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[192] Report of the Trade Practices Act Review Committee to The Minister for Business and Consumer Affairs, 1976, Australian Government Publishing Service, at paras. 10.18 and 10.19.

[193] *Id.* at para. 10.18.

[194] *Id.* at para. 10.19.