

The logo features a red circle on the left containing the lowercase letters 'abl' in white. To the right of the circle, the word 'transcript' is written in a large, black, serif font. Below 'transcript', the text 'Transcript of speech by Professor Allan Fels AO at the Employment & Industrial Relations lunch seminar' is written in a smaller, bold, black, sans-serif font. At the bottom of this section, the date '25 May 2005' is written in a red, sans-serif font. A thin black line extends from the bottom of the red circle, passing behind the text.

I am happy to be speaking as an Arnold Bloch Leibler consultant.

Competition policy and industrial relations policies have headed in opposite directions for over one hundred years. Competition policy has sought to strike down anticompetitive arrangements in product markets. Industrial relations policy has encouraged collective bargaining and union monopoly.

Should this continue? Or should the same principles and laws apply to labour markets as to other markets? Should the *Trade Practices Act* apply to trade unions?

In my talk today I will begin first by discussing this general issue.

Second, I will discuss how the *Trade Practices Act* actually applies to labour and to unions in Australia today.

The third part of my speech will look at recent developments in the *Trade Practices Act* and the ACCC more generally.

Following that, I would be happy to take questions.

Regarding the general issue, there are three ways of treating workers and unions under competition law. The first is to exempt them completely from the Act. No one really supports this, not even unions. Where unions are directly involved in taking part in or aiding and abetting anticompetitive product market behaviour, for example should they take part in or take steps to facilitate a product market cartel, they should be and are covered by the Act.

The second approach is that unions and employees should be exempt from the *Trade Practices Act* for normal collective bargaining and trade union activities, but to focus on where exactly the boundary line is drawn. In Australia the battleground has been in regard to secondary boycotts. It is quite difficult to define secondary boycotts very precisely – the Act spills a lot of ink on this – but essentially a secondary boycott occurs when, in the course of a dispute between two parties, say a group of employees and their employer, those employees put pressure on another group of employees to put pressure on their boss. For example, in the simplest case, if there is a dispute between retail employees and retailers the employees ask the transport workers not to deliver products to the retailer unless that retailer succumbs to their demands. One argument is that secondary boycotts are simply forms of industrial relations activity and they should be covered by industrial relations legislation only. The counter argument distinguishes secondary boycotts from normal industrial relations matters, which concern the relationship between employers and employees. Secondary boycotts, however, involve innocent third parties.

Quite apart from questions concerning unions, there are other trade practices law issues concerning where the boundary line is to be drawn. Some people claim that if unions are exempt so they should be. Doctors ask if the unions are exempt from the Act why shouldn't the AMA be exempt? Farmers and many people in small business say the same. They claim that they can only have bargaining power if they are allowed to collectively bargain.

Whatever the rights and wrongs of their argument, the law draws a basic distinction between professions, farmers, small business on the one hand, and employees on the other. The former groups have chosen to operate as businesses. They may be incorporated. They certainly are not employees. The exemption only applies to persons with the status of employee. If you choose to organise yourself as a business, as a self-employed person or as a company rather than as an employee then you don't get an exemption under the *Trade Practices Act*.

There is continual pressure for exemption by these categories of self-employed. The AMA persuaded the Government recently to hold an inquiry in to whether doctors should be exempt from the Act. Fortunately the inquiry recommended against this. Farmers are continually seeking exemption.

The latest development is that following the Dawson report, which faced great pressure from small business, farmers and others for exemptions from the Act, it was decided that collective bargaining could be allowed in certain circumstances by the ACCC (with the right of appeal to the Australian Competition Tribunal) if it was not against the public interest. Some authorisations had already been granted under the Act and the path to allowance will be easier following the Government's enactment of the Dawson recommendations after 1 July.

Already we have a very interesting case. The chicken growers want the right to be able to talk about prices with one another and with chicken processors. They also want the right to collectively boycott or go on strike against the processors without breaching the Act. The growers say that the right to collectively bargain is meaningless unless they can then act collectively by means of a strike. Others say that this goes too far in opening the floodgates.

The third view is that the Act should apply in full to employees and trade unions. Why should labour markets be treated any differently than other markets? Aren't unions powerful monopolies? And to turn the earlier argument around if the Act is being applied these days to the AMA, why not to the MUA?

The counter arguments to this are that industrial relations is quite different. It involves individuals, not companies. They are liable to exploitation. In particular, individuals on their own are liable to exploitation and should be allowed to form unions.

Another type of view is that if you want to reform the labour market and make it more competitive and efficient the answer is not to start by applying the *Trade Practices Act*. The source of most union power is industrial relations laws. The way to free up the labour market is to weaken or abolish most of the industrial relations laws. After that you might consider applying to the *Trade Practices Act* to anything that remains. But the priority of those who favour labour market reform is to dismantle the industrial relations laws. I have, however, heard a number of prominent Coalition supporters of labour market deregulation say that they still prefer to have the ACCC involved than the Industrial Relations Commission. They would actually put the application of the Act to the labour market high up on their list of priorities, probably higher than changes to the *Industrial Relations Act* because they distrust the industrial relations institutions around Australia both at national and state level.

Another point is that if you look at it carefully the *Trade Practices Act* is quite poorly written and structured if one is to use it in relation to collective bargaining. The Act in its present wording and format does not easily fit labour market behaviour.

Another point is that workers have a basic right – the right of freedom of association, which is recognised internationally, even I think in international treaties such as the ILO Treaty. One way for liberals to reconcile the conflict between right of association and the need to avoid anticompetitive harm is to support company unions. In this way workers within a company can band together. There would be no scope for cooperation between company unions in the same sector and there would be no scope for industry unions nor skilled or craft unions which cut across a range of sectors. This matter was much debated by Chicago economists half a century ago.

You might say that it's academic to discuss whether the *Trade Practices Act* should apply in full to labour market behaviour. I don't think so for three reasons:

- the issue will slowly come on to the agenda over the next decade.
- the debate about this question is important background on current issues e.g. about where the line should be drawn in regard to the labour exemption under the *Trade Practices Act*.
- third, it's a little known but important fact that some five years ago the Howard Government made a submission – an unsuccessful one – to the National Competition Council's review of anticompetitive legislation that the labour exemption from the *Trade Practices Act* should be heavily cut back. I doubt that it should be regarded as being off the agenda of the Howard Government now that it has Senate control.

So much for general considerations.

Let me now turn to the actual application of the *Trade Practices Act* to industrial relations matters. The *Trade Practices Act* does not apply to practices in labour markets such as collective bargaining because Section 51 (2) says that in determining whether there has been a contravention of the Act, apart from secondary boycott and retail price maintenance provisions of the Act, regard shall not be had to anything done where it relates to the remuneration, conditions of employment, hours of work or working conditions of employees.

This exemption applies to employees, not to trade unions as such. Some members of trade unions are not employees, but are independent contractors. The exemption does not cover their activities. Independent contractors, for example independent contractor members of the Transport Workers Union, have sought authorisation from the Commission in relation to collective bargaining and some other forms of behaviour and in some cases this has been granted, in other cases it has not. Fashions have waxed and waned somewhat on this on the part of the Commission and the part of the Australian Competition Tribunal.

Regarding secondary boycotts, Section 45 D was inserted in to the *Trade Practices Act* in 1977 when the Prime Minister, John Howard was Minister for Business and Consumer Affairs and it followed the report of the Swanson Committee. The original law has been something extended. The most important extension was by the Coalition Government in 1996. Particularly important was the insertion of Section 45DB. This prohibited certain kinds of primary boycotts. That is to say certain kinds of strikes where international trade was involved. I won't go in to all the complexities but this was a crucial piece of law when the MUA Waterfront dispute arose in 1998. What seems to have happened was that in 1996 the Government managed to get Section 45DB past asleep at the wheel Democrats who otherwise blocked some of the industrial relations changes whilst permitting others.

The Labor Party seems to be against secondary boycotts being part of the Trade Practices. They see them as part of industrial relations law. However, Labor took eight years in the Hawke Government time to soften the secondary boycott provisions. When it did so it is interesting to note that Labour drew a distinction between secondary boycotts, which lessened competition and secondary boycotts which causes damage to an employer without necessarily harming competition. This is indeed one of the paradoxes of Section 45D and E and F. You might think that if the Act is to apply to labour markets then it might apply in a softer fashion than it does to product markets. For the most part in product markets behaviour is only prohibited if it is likely damage competition. Often behaviour that looks rather repugnant survives under the Act because even though it may harm competitors it does not harm competition. The key test under Sections 45D, E and F, however, is simply whether it harms individual employers. The competition test is only an alternative.

In 1993 Labour retained the prohibition on secondary boycotts that damage competition in the *Trade Practices Act* while transferring other parts of secondary boycotts to the Industrial Relations Commission. This, however, was repealed by the present Government in 1996. It's fair to say that the present Government has always been very open about its views on secondary boycotts and it has always very explicitly been part of its policy platform, so one can't criticise it for having enacted this set of laws. I do think, however, that there is quite a lot of hypocrisy on the part of the Business Council in continually arguing that competition law should only apply where there is harm to competition not competitors but supporting Sections 45D, E and F. This seems quite inconsistent.

Regarding the enforcement of the secondary boycott provisions, in the 1970s and 80s it was thought impossible to apply the Act in practise to unions. There would be a national strike. There would be no petrol or no bread. How things have changed. After the Coalition Government enacted its secondary boycott laws in 1996 in strengthened form, the ACCC cautiously applied the laws in a number of cases concerning the Transport Workers Union, the CFMEU and the CEPU but the big challenge came during the Waterfront dispute. It took the MUA to court and eventually got an injunction and also the MUA had to pay damages (although in the event the damages were actually paid by Patricks via the MUA). Patricks wanted to settle the whole thing. This was the first time, as far as I know, that an injunction had been obtained and applied against the MUA. Even more significantly, a couple of years later the ACCC took the MUA to court and had an injunction and fines applied. As far as I know this is the first time the MUA had been fined ever. How the world has changed. This would have been unthinkable twenty years ago.

Looking ahead I think the conclusions are that the main action in deregulating labour markets will be with a loosening of the Industrial Relations laws rather than changes to the *Trade Practices Act*. It is true that the Government failed to through some changes to its secondary boycott laws in 1996 and it can't be ruled out that they may come back now that they have Senate control. Also, they may have a long-term agenda of slightly softening the exemptions under the Act.

Also, I think that there may be fewer secondary boycotts around these days because with the amalgamation of unions there is less scope for secondary boycotts.

Finally, let me briefly refer to important developments under the *Trade Practices Act*. The ACCC, boosted by some additional funding in the Budget, is pursuing a vigorous campaign against cartels. Graeme Samuel says that there is something like thirty cartels, which are the subject of serious investigation at the present time.

The ACCC is also educating everyone about the leniency policy introduced in June 2003 in my time. Basically under this policy the first member of a cartel to own up and tell the ACCC gets off while its competitors pay. Leniency policy has worked quite effectively in the Untied States to cause many secret cartels to break up.

The next development is that the Government has agreed that for hardcore collusion there will be jail sentences for executives. This will bring us into line with the United States, Canada, the United Kingdom, Japan and Korea. The legalisation is being drawn up but we don't know the details at this stage. Criminal sanctions will have a powerful deterrent effect on cartel behaviour but it will not eliminate it as US experience shows. The temptation for cartel behaviour are too great. Sanctions against individual executives have also been strengthened.

The Government is also proceeding with the Dawson report recommendations. The most important, apart from the criminal sanctions, relate to mergers. At present if a firm is found by the ACCC to have entered in to a proposed anticompetitive conduct merger and the ACCC says it will block it, it can take many, many months or years before there is a court decision. Dawson has now proposed a formal process of looking at mergers under this part of the Act under which the whole matter will be dealt with in expedited fashion with the Australian Competition Tribunal having the final say.

Even more potentially important is that there will be a quite different approach to merger authorisation, at least in terms of process. Up until now anyone wanting any authorisation including a merger authorisation has to apply in advance to the ACCC, its decisions can be appealed to the Australian Competition Tribunal (there is no time limit on the Tribunal unlike the ACCC) and so decisions can take a very long time. Instead of, however, simply putting a time limit on the Tribunal, Dawson recommended and the Government accepted that, in regard to merger authorisation applications business should apply directly to the Tribunal bypassing the ACCC and the Tribunal would have a limited period of time to make its decision. The ACCC can still appear as a kind of friend of the court but I think its position in regard to merger authorisation is weakened. And the change have a more dramatic impact that expected judging from the recent judgement of the Australian Competition Tribunal that it regarded the proposed merger of the Qantas and Air New Zealand as having only minor anticompetitive effects in a small part of the market, and its willingness to authorise this. Of course that won't occur in practise because the New Zealanders are opposed. But it is a sign of the fact there could be a substantial liberalisation of the Act in this regard.

Another important change from Dawson is, as I mentioned earlier, that steps have been taken that will facilitate collective bargaining by small businesses.

There are a few other changes in the wind. There are signs that the Commonwealth and the ACCC want to hand back quite a number of consumer protection matters to the States. I don't detect any likely early moves by the Government to strengthen the position of the small business under the *Trade Practices Act* but these pressures build up from time to time and we may see more of that over the next couple of years.

Regarding regulation of utilities, we are all awaiting the report of the Prime Minister's Committee on infrastructure bottle-necks. This may make some recommendations to liberalise regulation.

Thank you.