

# Secondary boycotts in Australia

## History and context

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*Australia has a long history of secondary boycotts, which have been widely used for causes now generally accepted. Expanding laws primarily intended to limit union power to outlaw advocacy campaigns is illiberal, and would require significant changes to the law.*

Discussion paper

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# Summary

In November 2019, Prime Minister Scott Morrison said that he is working with his Attorney-General, Christian Porter, to identify mechanisms that can be used to “outlaw” environmental groups “targeting businesses and firms who provide goods or services to firms they don't like”, what Morrison called “secondary boycotts”.

The Government is yet to announce the details of their plan, but they have said that they are urgently looking into multiple options across portfolios. Porter says they are planning “tranches” of changes. One option is likely to be expanding the laws against secondary boycotts in the *Competition and Consumer Act* (formerly the *Trade Practices Act*), perhaps by removing exceptions for environmental or consumer protection, the general protection for consumer boycotts and/or removing the requirement that a secondary boycott be “in concert” between two parties. The government may instead, or also, introduce new offences separate to the secondary boycott laws.

Minister for Small Business John Howard introduced secondary boycott provisions in the *Trade Practices Act* in 1977. They have been contested ever since. The provisions are in violation of labour conventions that Australia has signed; they are a limitation on the right to strike. Even the term “secondary boycott” is misleading, because the laws prohibit conduct that does not involve a boycott.

Being free to withdraw your custom (in the case of customers) or labour (in the case of workers) would often be considered a fundamental right in a liberal democracy. There are compelling reasons for secondary boycotts to be permitted:

- Sometimes there is no way to reach a perceived wrongdoer except through another party.
- Parties that deal with wrongdoers are not blameless, so it is not unreasonable for them to face consequences for doing so.
- Consumers and workers have a right to deal with whom they want.
- The Australian Constitution has an implied freedom of political communication that may be breached if secondary boycott laws are expanded.
- Secondary boycotts are a useful form of solidarity tactics that allow workers to coordinate, win better conditions and bargain across an industry.
- Australia’s secondary boycott ban does not conform with international conventions that Australia has signed.

Hansard debates show that protecting freedom of conscience was the reason that the environmental and consumer protection exceptions were introduced by the Coalition and Democrats. When the Abbott Government considered removing environmental and

consumer protections in 2013, figures from right-wing think tank the Institute of Public Affairs argued that:

Consumer boycotts - primary or secondary - are a completely legitimate way to express political views.<sup>1</sup>

And:

[A] restriction on secondary boycotts is a restriction on free speech.<sup>2</sup>

Business is divided on the Commonwealth Government's plans to review secondary boycott laws. Innes Willox, CEO of Australian Industry Group, said that the review was "timely", while Peter Strong, CEO of the Council of Small Business Australia, said "We don't have a problem, let's not create one."<sup>3</sup>

The history of secondary boycotts in Australia shows that they have been readily used for causes that are now widely accepted. In 1938, wharf workers tried to stop Australian iron being shipped to Japan for use by the Japanese military. Sir Donald Bradman effectively engaged in a secondary boycott aimed at the South African government when he blocked the 1971–72 Australian cricket tour of South Africa. Many trade unions engaged in secondary boycotts in the 1960s–1980s for the same purpose of stopping apartheid.

As well as limiting free speech and freedom of conscience, further restricting secondary boycotts could have serious unintended consequences, including affecting what industry groups and public commentators say or do.

Because secondary boycott laws are so broad, industry groups might need to be careful in how they respond to a secondary boycott as their response can also fall afoul of the secondary boycott bans. For example, when live animal exports were the subject of a secondary boycott in the 1970s, the livestock peak body encouraged their members to avoid sending livestock to South Australian abattoirs in order to encourage the union to lift the strike. This response, depending on whether it was phrased as a request or an instruction, could itself potentially qualify as a prohibited secondary boycott.

More recently, politicians, commentators and industry groups have called for boycotts:

- Minister Matt Canavan called for a boycott of Westpac after Westpac ruled out financing coal mines in new coal basins (including the Adani Carmichael coal mine);

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<sup>1</sup> Berg (2013) *Freedom of speech means freedom to boycott*, <https://www.abc.net.au/news/2013-09-24/berg-freedom-of-speech-means-freedom-to-boycott/4977410>

<sup>2</sup> Breheny (2014) *A restriction on secondary boycotts is a restriction on free speech*, <https://www.theguardian.com/commentisfree/2014/apr/04/a-restriction-on-secondary-boycotts-is-a-restriction-on-free-speech>

<sup>3</sup> Savva (2019) *In this case doing nothing might be the best option*, The Australian

- George Christensen MP called for a boycott of Ben & Jerry's after they opposed Adani's coal mine;
- Senator Pauline Hanson called for a boycott of halal-certified chocolate;
- Alan Jones called for a boycott of Coles because Coles stopped advertising on his radio show;
- Minister Littleproud called for a boycott of Coles and Aldi for selling \$1/litre milk, which would have the effect of pressuring Aldi to pressure processors to pay farmers more for milk; and
- The Queensland Resources Council said that resources companies would avoid partnering with engineering and procurement partners that were influenced by environmental activists – an attempt by first and second persons to influence how their partners deal with a fourth person.

It is currently unclear how the Commonwealth Government plans to “outlaw” environmental groups targeting businesses that provide goods and services to firms that the groups disagree with. To capture the behaviour that the Prime Minister and Attorney-General have described would likely require a substantial widening of the secondary boycott laws, or the creation of new offences. These changes risk interfering with freedom of speech and conscience, and capturing a very wide range of conduct.

# Introduction

In November 2019, Prime Minister Scott Morrison identified secondary boycotts as a threat to the resources sector, and said he and Attorney-General Christian Porter were investigating how to “outlaw” their use by environmental groups. Porter has since provided more details, including that the government is planning different “tranches” of changes, and suggested that both new offences or changes to the existing secondary boycott laws are being considered.

Secondary boycotts are mostly associated with trade unions, where they are used by workers for various purposes including to win better wages and conditions for their fellow workers or to compel companies to meet community expectations. However, Australia’s secondary boycott laws are so broad that they capture conduct that does not involve any boycott or any industrial action.

Customers exercising their rights to favour one good or service over another, for reasons other than base and immediate self-interest, is a basic expectation in Australia. An example is Victorian and NSW Governments’ steel procurement policies that favour Australian steel.<sup>4</sup> Similarly, “Made in Australia” labels help customers who wish to boycott, or at least consume less of, imported goods.

Existing secondary boycott laws mostly protect consumer boycotts and other boycotts for environmental or consumer protection reasons. They also require that one party does more than merely encourage or advise the other. For this reason, significant changes to the law would be needed to “outlaw” the behaviour by environmental groups that Morrison has identified as an economic threat.

## WHAT ARE SECONDARY BOYCOTTS?

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### Secondary boycotts by workers

Secondary boycotts are primarily and originally associated with the labour movement, in which context they are also called “solidarity action” or “sympathy strikes”. They overlap with the “bans” unions placed on companies for industrial purposes (“black bans”) or to

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<sup>4</sup> Joint Select Committee on the Commonwealth procurement framework (2017) *Buying into our Future*, [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Former\\_Committees/Government\\_Procurement/CommProcurementFramework/Report](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Former_Committees/Government_Procurement/CommProcurementFramework/Report)

encourage the public interest and community expectations to be met (“green bans”).<sup>5</sup> Secondary boycotts allow trade unions to magnify their power and to reach corporations that they did not have direct access to.

The distinctive feature of a secondary boycott is that the ultimate target of the strike action is one step removed from the direct target. The workers expect that applying pressure to, for example, their employer will force their employer to deal differently with the (perceived) wrongdoer.

For example, workers at a retailer may go on strike to encourage their employer to only buy from wholesalers that treat their workers well. Or, if workers for an Australian tug boat company learn that a cargo ship is not employing Australians, they may refuse to follow their employer’s instructions to berth that cargo ship.

## Other secondary boycotts

The term “secondary boycott” has been adapted from its original labour relations meaning to describe environmental, animal rights, human rights and consumer activism where the ultimate target of the activism is one step removed from the direct target.

For example, bank customers who learn that their bank is funding a coal mine may transfer their deposits to a bank that does not fund coal mines. Or, people may stop buying clothes made from Australian wool because they disagree with the use of mulesing in Australian sheep farming.

In practice, most – but not all – environmental, animal rights, human rights and consumer activism is excluded from the existing law on secondary boycotts.

## Australian law regarding secondary boycotts

Several common law remedies are available for those subject to secondary boycotts by workers, including “torts of conspiracy, intimidation, inducing breach of contract and intentionally causing economic loss”.<sup>6</sup>

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<sup>5</sup> Johnson (1977) *Speech - 22 February 1977*, [https://parlinfo.aph.gov.au/parlInfo/genpdf/hansard80/hansardr80/1977-02-22/0060/hansard\\_frag.pdf;fileType%3Dapplication%2Fpdf](https://parlinfo.aph.gov.au/parlInfo/genpdf/hansard80/hansardr80/1977-02-22/0060/hansard_frag.pdf;fileType%3Dapplication%2Fpdf)

<sup>6</sup> Willis (1984) *Conciliation and Arbitration Amendment Bill (No. 2) 1984 - Second Reading Speech*, <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansardr%2F1984-09-13%2F0092%22>; for discussion of the common law as it concerns secondary boycotts, see Davis (1992) *Courts set pace on strike-busting law*, <https://www.afr.com/politics/courts-set-pace-on-strike-busting-law-19920114-k4r1d>; Senate Standing Committee on Employment, Education and Training (1993) *The operation of Sections 45D and 45E of the Trade Practices Act 1974*, <https://nla.gov.au/nla.obj-1827289741/view?partId=nla.obj-1831430869#page/n12/mode/1up>

In practice, however, the term “secondary boycott” is usually used to describe the “restrictive trade practices” prohibited in section 45D of the *Competition and Consumer Act 2010* (Cth) (formerly the *Trade Practices Act*).

These prohibited practices have been referred to as “secondary boycotts” since the sections were introduced in the 1970s, but both parts of the term are misleading in this context. “Secondary” is misleading because the law has historically also covered some *primary* boycotts.<sup>7</sup> “Boycott” is misleading because the laws prohibits certain “conduct”, not certain “boycotts” – strikes, go slows, black bans and picketing are also covered, for example.<sup>8</sup> Placing shredded ham in a feedlot has also qualified as a “secondary boycott”, again with no boycott being called for or implemented.<sup>9</sup>

As such, when the government refers to “secondary boycotts”, it is not clear whether they are talking specifically about the kind of conduct that comes under s 45D, or about the concept of “secondary boycotts” more generally.

The *Competition and Consumer Act 2010* (Cth), ss 45D and 45DA, generally forbids secondary boycotts as “restrictive trade practices”, when two conditions are met:

- A person, in concert with a second person, engages in conduct that hinders or prevents a third person supplying to or acquiring goods and services from a fourth person, where the fourth person is not an employer of the first or second person *and*
- The conduct is engaged in for the purpose, and would have or be likely to have the effect, of causing:
  - substantial loss or damage to the business of the fourth person, *or*
  - a substantial lessening of competition in any market in which the fourth person supplies or acquires goods or services.

A key feature of this definition of a “secondary boycott” is that a person and a second person must be acting “in concert”, which requires more than just one person encouraging or inciting the other. Workers and the trade union that instructs them to strike are the archetypical first and second persons in a secondary boycott. Another example is an activist (first person) whose protest is facilitated by Animal Liberation recording and promotion.

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<sup>7</sup> Davis (1992) *Courts set pace on strike-busting law*

<sup>8</sup> Willis (1977) *Speech - 22 February 1977*,  
[https://parlinfo.aph.gov.au/parlInfo/genpdf/hansard80/hansardr80/1977-02-22/0063/hansard\\_frag.pdf;fileType=application%2Fpdf](https://parlinfo.aph.gov.au/parlInfo/genpdf/hansard80/hansardr80/1977-02-22/0063/hansard_frag.pdf;fileType=application%2Fpdf)

<sup>9</sup> More details in the History appendix. See also *Rural Export & Trading (WA) Pty Ltd v Hahnheuser* (2007), <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2007/1535.html>; Savva (2019) *In this case doing nothing might be the best option*

Secondary boycotts are not prohibited where the dominant purpose is substantially related to environmental protection or consumer protection (s 45DD protections).<sup>10</sup>

Consumer boycotts are also, separately, protected under the Act:

regard shall not be had to any acts done, otherwise than in the course of trade or commerce, in concert by ultimate users or consumers of goods or services against the suppliers of those goods or services.<sup>11</sup>

The *Competition and Consumer Act* also excludes secondary boycotts where the dominant purpose is substantially related to several labour conditions outlined in the Act. These come under the *Fair Work Act* instead.<sup>12</sup>

Because “secondary boycott” has a legal definition that does not necessarily match the popular understanding of a boycott, this report uses “secondary pressure” to describe boycotts and other action that are targeted at a third person in order to influence a fourth person – whether or not they would breach the *Competition and Consumer Act*. “Prohibited secondary boycott” is used to describe conduct that appears to be forbidden under the Act.

## POTENTIAL CHANGES TO THE LAW

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On the 1<sup>st</sup> of November 2019, in an address to the Queensland Resources Council annual lunch, Prime Minister Scott Morrison identified three new threats to the resources sector: disruptive protest, economic sabotage and, “even more worrying”, a “new form of secondary boycotts”:

Environmental groups are targeting businesses and firms who provide goods or services to firms they don't like, especially in the resources sector. ... Some of Australia's largest businesses are now refusing to provide banking, insurance and consulting services to an increasing number of firms who just support through contracted services to the mining sector and the coal sector in particular, which is the nation's second-largest export sector...

Let me assure you, this is not something my government intends to allow to go unchecked. Together with the Attorney-General Christian Porter, we are working to identify a series of mechanisms that can successfully outlaw these indulgent and

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<sup>10</sup> *Competition and Consumer Act 2010* (Cth), secs.45-45DD,  
<https://www.legislation.gov.au/Details/C2019C00264>

<sup>11</sup> *Competition and Consumer Act 2010* (Cth), sec.51(2A)<https://www.legislation.gov.au/Details/C2019C00264>;  
Murray (1997) *Speech - 27 October 1997*,  
<https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=CHAMBER;id=chamber%2Fhansards%2F1997-10-27%2F0020;query=Id%3A%22chamber%2Fhansards%2F1997-10-27%2F0015%22>

<sup>12</sup> Harper, Anderson, McCluskey, & O'Bryan (2015) *Competition Policy Review: Final Report*, pp. 67–68,  
[http://competitionpolicyreview.gov.au/files/2015/03/Competition-policy-review-report\\_online.pdf](http://competitionpolicyreview.gov.au/files/2015/03/Competition-policy-review-report_online.pdf)

selfish practices that threaten the livelihoods of fellow Australians, especially in our rural and regional areas and especially here in Queensland. Now, we will take our time to get this right. We will do the homework and we're doing that right now. But we must protect our economy from this great threat.<sup>13</sup>

The Commonwealth Government had previously announced plans to review the s 45DD exceptions for environmental protection in 2013, in response to market-based campaigns against native forest logging.<sup>14</sup> These plans were dropped after the 2015 Harper review.<sup>15</sup> While information from the government about their current plans is limited, this time they seem to go beyond removing the s 45DD exceptions for environmental protection.

Attorney-General Christian Porter provided more information on the government's current plans for secondary boycotts on the 5<sup>th</sup> of November, saying that he was urgently looking at multiple options, across portfolios, to limit advocacy groups, like Market Forces, that "try and impose their political will on companies across the country through widespread, co-ordinated harassment and threats of boycotts".<sup>16</sup>

By the 20<sup>th</sup> of November, Porter provided some more detail. The planned legal changes are coming in "tranches", with the first tranche "about legitimate damage to a legitimate business". Porter identified two types of behaviour that he said did not come under "legitimate advocacy":

third parties refusing to finance someone who otherwise would lawfully get finance because of the sector that they're working in, or people using online platforms to encourage others to deliberately damage a business because of the sector it is.<sup>17</sup>

The Attorney-General gives as an example of deliberately damaging a business an environmental group encouraging people to call up a company that contracts with Adani and "deliberately try and keep the sales representatives on the company on the phone for as long as possible to do commercial damage to that business".<sup>18</sup>

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<sup>13</sup> Morrison (2019) *Address, 2019 Queensland Resources Council Annual Lunch*, <https://www.pm.gov.au/media/address-2019-queensland-resources-council-annual-lunch>

<sup>14</sup> Denholm (2013) *Companies to get protection from activists' boycotts*, <https://www.theaustralian.com.au/national-affairs/companies-to-get-protection-from-activists-boycotts/news-story/eb4805c2ea3b622d125e20d61ca75a7d>

<sup>15</sup> Harper et al. (2015) *Competition Policy Review: Final Report*, pp. 67–68, 386–392

<sup>16</sup> Grattan (2019) *Attorney-General Christian Porter targets Market Forces in push against environment groups*, <http://theconversation.com/attorney-general-christian-porter-targets-market-forces-in-push-against-environment-groups-126357>

<sup>17</sup> Porter (2019) *Sky News – Tom Connell*, <https://www.attorneygeneral.gov.au/sky-news-tom-connell-20-november-2019>

<sup>18</sup> Porter (2019) *Sky News – Tom Connell*

By contrast, Porter said that Resources Minister Matt Canavan’s calls for Queenslanders to boycott Westpac would not “necessarily” be prohibited under the first tranche of changes.<sup>19</sup>

It is still not clear how these legal changes are intended to be implemented. The Attorney-General identified the secondary boycott exception for environmental concerns as “a rather arcane exception”, which suggests that they are looking at changing the secondary boycott laws themselves. However, he also gave as a case study the Government’s new offences around damaging agricultural businesses, which suggests they are considering new offences.<sup>20</sup>

Significant changes to the existing law of secondary boycotts, and/or new offences, would be required to outlaw the “boycotts” that environmental groups have called for. Amendments to the *Competition and Consumer Act* that the government might be considering include:

- Removing the environmental protection exception from s 45DD.
- Removing the consumer protection exception from s 45DD.
- Removing the requirement in s 45D that first and second persons must act “in concert”, so that encouraging or inciting another is sufficient.
- Removing the consumer boycott exception (s 51(2A)).

The government may also be planning to introduce wholly new offences, on a similar model to the new offences around damaging agricultural businesses.

## Advocacy in secondary boycott laws

To qualify as a prohibited secondary boycott, conduct must involve two people acting “in concert”. The courts have found that one person *encouraging* or even *inciting* another to do something does not qualify as “in concert”.

The Federal Court came to this conclusion in 1991 in the *Re AMIEU v Meat and Allied Trades Federation of Australia* case because the alternative was that:

Newspaper journalists and editors, politicians, and any other persons who exercise their right of free speech by advocating strikes would be held to have acted in concert with those who acted on their advice and took strike action.<sup>21</sup>

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<sup>19</sup> Porter (2019) *Sky News – Tom Connell*

<sup>20</sup> Porter (2019) *Sky News – Tom Connell*

<sup>21</sup> *Re AMIEU v Meat and Allied Trades Federation of Australia* (1991), <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/1991/524.html>

In this case, workers at sheds owned by different companies “declined to work” on different days. The union advocated for the strike, but workers at each shed voted on whether to strike; if a majority did not vote in favour of striking, it didn’t happen.<sup>22</sup>

*Re AMIEU v Meat and Allied Trades Federation of Australia* remains instrumental for interpreting the secondary boycotts laws.<sup>23</sup> The court interpreted “in concert” narrowly, and not extending to “advising, requesting, encouraging or inciting” another. The court did say that an organisation may be acting “in concert” with its members if the members were “obliged to comply” with the organisation’s directives.<sup>24</sup>

This is significant for the government’s current plans to expand secondary boycott laws. Although Porter has identified the s 45DD environmental protection exception as “arcane”, removing it would not necessarily affect environmental groups, like Market Forces, that apply pressure to banks, contractors and other companies. These groups do not issue directives or oblige members to comply with them. They merely advise or encourage the public.

If the government does want to limit environmental groups, it may have to remove the “in concert” requirement of s 45D, or introduce new offences.

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<sup>22</sup> *Re AMIEU v Meat and Allied Trades Federation of Australia* (1991)<http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/1991/524.html>

<sup>23</sup> Note that the laws were repealed and then restored in somewhat different form since the decision. However, the term “in concert” remains key to both. See for example O’Dea & McClelland (2014) *Secondary boycott actions under the Competition and Consumer Act 2010*, <http://www.mondaq.com/australia/x/334700/Cartels+Monopolies/Secondary+boycott+actions+under+the+Competition+and+Consumer+Act+2010>

<sup>24</sup> *Re AMIEU v Meat and Allied Trades Federation of Australia* (1991)<http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/1991/524.html>

# Examples

There are numerous historic examples of secondary boycotts and other secondary pressure in Australia. Politicians, media commentators and Coalition ministers are among those who have called for boycotts, including secondary pressure, in the past few years.

More details for many of these examples are given in the History appendix.

## HISTORIC SECONDARY BOYCOTTS

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Australian unions, consumers and other groups have called for and implemented many secondary boycotts and other secondary pressure.

- In 1938–1939, dock workers refused to load pig iron that was going to supply the Japanese military effort in the invasion of China. Then Attorney-General Robert Menzies received the nickname “Pig-Iron Bob” from his handling of the secondary boycott.
- Between 1945 and 1949, dock workers boycotted the “Black Armada” of Dutch vessels that were suspected of carrying materials intended to suppress the Indonesian independence movement.
- In the early 1970s, the Builders Labourers Federation in Sydney used green bans to protect public spaces, stop houses from being demolished for freeways or high-rises and preserve heritage buildings.<sup>25</sup>
- In the 1970s, the two most common secondary boycotts were union campaigns against cut-price bread and cut-price petrol.
- In the 1970s and 1980s, the meat industry union used secondary boycotts to push for an agreed ratio of sheep slaughtered in Australia vs those exported live.
- The industry response to the live export boycotts was to call for producers to avoid South Australian abattoirs in order to pressure the union – which had to be worded carefully to avoid qualifying as a prohibited secondary boycott itself.
- In the late 1970s, dock workers refused to berth certain ships that were not staffed by Australians.
- Dock workers in the 1990s acted against “ships of shame” that exploited and underpaid their workers, and on imports of rainforest timber harvested from Sarawak.
- In 2007, PETA called for a boycott of Australian wool products over mulesing practices.

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<sup>25</sup> Burgmann & Burgmann (2011) *Green Bans movement*,  
[https://dictionaryofsydney.org/entry/green\\_bans\\_movement](https://dictionaryofsydney.org/entry/green_bans_movement)

- In the late 2010s, the CFMEU imposed a secondary boycott on Boral as part of its dispute with Grocon.
- Walk Free, the anti-slavery foundation founded by Andrew Forrest, protests fashion companies that buy cotton from farms that use exploited labour, to encourage them to change suppliers.

## SECONDARY BOYCOTTS AND OTHER PRESSURE AGAINST APARTHEID

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take whatever action is necessary as an act of conscience to obstruct the tour.

– ACTU, regarding the South African Springboks tour of Australia in 1971<sup>26</sup>

The 1960s to 1980s saw extensive union, sporting and other boycotts of South African teams, companies and products – in order to apply pressure to the government of South Africa to end apartheid.

- The Seamen’s Union of Australia (SUA) and the Waterside Workers Federation embargoed South African ships and the SUA was “at the forefront of implementing the United Nations arms embargo”. Shipping unions also took industrial action against ships trading with South Africa. The SUA wrote: “Seamen in Australia believe the government of South Africa is guilty of a crime against humanity when it treats the original inhabitants of Africa as second class human beings and therefore Australian seamen have waged a guerrilla campaign against shipping trade with South Africa”.<sup>27</sup>
- Transport union members, especially Qantas staff, refused to carry the Springboks.<sup>28</sup> The Fraser Government offered to use the Air Force to transport them.<sup>29</sup>
- Liquor, Hospitality and Miscellaneous Workers Union members “made life difficult and uncomfortable in hotels for both players and travellers with the Springbok tour team”.<sup>30</sup>
- In 1977, the Media, Entertainment and Arts Alliance protested Kerry Packer’s “rebel cricket tour”.<sup>31</sup>
- Seven Wallabies players refused to join the 1970 rugby tour, making it the last time that Australian teams played South African teams for over 20 years.<sup>32</sup>

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<sup>26</sup> McDonald & Jennings (2016) *Australian Unions and the fight against Apartheid*, <https://www.moadoph.gov.au/blog/australian-unions-and-the-fight-against-apartheid>

<sup>27</sup> Limb (2008) *The Road to Democracy in South Africa - Vol. 3*, pp. 929, 968, Unisa Press; McDonald & Jennings (2016) *Australian Unions and the fight against Apartheid*

<sup>28</sup> McDonald & Jennings (2016) *Australian Unions and the fight against Apartheid*

<sup>29</sup> Limb (2008) *The Road to Democracy in South Africa - Vol. 3*, p. 921

<sup>30</sup> McDonald & Jennings (2016) *Australian Unions and the fight against Apartheid*

<sup>31</sup> McDonald & Jennings (2016) *Australian Unions and the fight against Apartheid*

<sup>32</sup> McDonald & Jennings (2016) *Australian Unions and the fight against Apartheid*

- In Queensland, there was a general strike in 1971 to protest the Bjelke-Petersen Government's declaring of a state of emergency to protect rugby games.<sup>33</sup>
- Chair of the Australian Cricket Board Don Bradman cancelled the 1972 cricket tour of South Africa, saying: "We will not play them [South Africa] until they choose a team on a non-racist basis".<sup>34</sup>
- In 1979, Prime Minister Malcolm Fraser cancelled the 1979 Wallabies tour of South Africa.<sup>35</sup>

Archbishop Desmond Tutu wrote in 2014 that the boycott tactics that worked in South Africa against apartheid should now be used against the fossil fuel industry.<sup>36</sup>

## BOYCOTTS ON BEHALF OF FOSSIL FUEL COMPANIES

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Campaigns from environmental groups for Australians to avoid commercial partners that work with fossil fuel companies have affected the resources industry.

Earlier this year, the Queensland Resources Council CEO, Ian Macfarlane, said that resources companies would avoid partnering with engineering and procurement partners that responded to environmental activists:

Resources companies simply can't be expected to partner with fair-weather friends or businesses who let activists call the shots.

If businesses cave to pressure from anti-coal activists, it's hard to see how resources companies can have confidence in them to work on any other type of resources project.

You either back the resources industry, or you don't.<sup>37</sup>

Coalition ministers and MPs have encouraged consumer boycotts, including secondary pressure, in response to decisions made by companies to avoid or criticise fossil fuel industries.

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<sup>33</sup> Limb (2008) *The Road to Democracy in South Africa - Vol. 3*, pp. 922–923

<sup>34</sup> Limb (2008) *The Road to Democracy in South Africa - Vol. 3*, p. 924; McDonald & Jennings (2016) *Australian Unions and the fight against Apartheid*; Bradman had some misgivings about the decision, in part because it affected white cricketers who had opposed apartheid. For more discussion, see Dunstan & Heenan (2014) *Shattering the Bradman myth*, <https://thenewdaily.com.au/sport/cricket/2014/01/28/shattering-bradman-myth/>; Perry (2008) *The Don's finest declaration*, <https://www.theage.com.au/sport/cricket/the-dons-finest-declaration-20080823-ge7c73.html>

<sup>35</sup> Limb (2008) *The Road to Democracy in South Africa - Vol. 3*, pp. 928–929

<sup>36</sup> Tutu (2014) *We need an apartheid-style boycott to save the planet*, <https://www.theguardian.com/commentisfree/2014/apr/10/divest-fossil-fuels-climate-change-keystone-xl>

<sup>37</sup> QRC (2019) *Resources industry partners prioritise reliability*, <https://www.qrc.org.au/media-releases/resources-industry-partners-prioritise-reliability/>

George Christensen called for a boycott of Ben & Jerry's ice cream after they opposed Adani's coal mine.<sup>38</sup>

After Westpac ruled out financing Adani's coal mine or other coal mines in new coal basins in 2017, Minister Matt Canavan said:

I can only conclude from this decision by Westpac that they are seeking to revert to their original name as the Bank of New South Wales, as they are turning their back on Queensland as a result of this decision.

May I suggest those Queenslanders seeking a home loan or a bank deposit or some such in the next few months might want to back a bank that is backing the interests of Queenslanders. ... I would encourage Queenslanders in particular, but all Australians with an interest in developing our nation, in developing the north, to back those financial institutions that do back those priorities."<sup>39</sup>

## OTHER BOYCOTTS

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In 2017, One Nation senator Pauline Hanson called for a boycott of halal-certified chocolate, including Cadburys.<sup>40</sup>

In 2017, former tennis player and Christian pastor Margaret Court said she was boycotting Qantas "where possible" because of the airline's support for same-sex marriage.<sup>41</sup>

Minister David Littleproud has called for customers to boycott Coles and Aldi for selling milk at \$1 a litre. Aldi has said that since it purchased milk from processors, it relies on processors to pay a sustainable price to farmers. In other words, a boycott of Aldi is

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<sup>38</sup> Butler (2017) *George Christensen Is Boycotting Ben & Jerry's Ice Cream*, [https://www.huffingtonpost.com.au/2017/03/23/george-christensen-is-boycotting-ben-and-jerrys-ice-cream\\_a\\_22009516/](https://www.huffingtonpost.com.au/2017/03/23/george-christensen-is-boycotting-ben-and-jerrys-ice-cream_a_22009516/)

<sup>39</sup> Canavan (2017) *Today I want to make some comments on Westpac's decision not to lend to coal mines in new basins, new coal basins in Australia ...*, [http://www.mattcanavan.com.au/subjects\\_-\\_westpac\\_s\\_decision\\_not\\_to\\_invest\\_in\\_new\\_coal\\_basins\\_australian\\_domestic\\_gas\\_security\\_developing\\_northern\\_australia\\_northern\\_australia\\_infrastructure\\_facility](http://www.mattcanavan.com.au/subjects_-_westpac_s_decision_not_to_invest_in_new_coal_basins_australian_domestic_gas_security_developing_northern_australia_northern_australia_infrastructure_facility); Robertson (2017) *Big four banks distance themselves from Adani coalmine as Westpac rules out loan*, <https://www.theguardian.com/environment/2017/apr/28/big-four-banks-all-refuse-to-fund-adani-coalmine-after-westpac-rules-out-loan>; Thomsen (2017) *A federal minister just called Westpac "unAustralian" for its new climate change policy*, <https://www.businessinsider.com.au/a-federal-minister-just-called-westpac-unaustralian-for-its-new-climate-change-policy-2017-4>

<sup>40</sup> Shine & Dunlevie (2017) *Pauline Hanson's Easter egg boycott call "irresponsible", union says*, <https://www.abc.net.au/news/2017-04-12/union-slams-hanson-call-for-easter-egg-boycott/8439504>

<sup>41</sup> AAP (2017) *Margaret Court vows to stop flying Qantas over marriage equality stance*, <https://www.theguardian.com/australia-news/2017/may/25/margaret-court-vows-to-stop-flying-qantas-over-marriage-equality-stance>

secondary, in an attempt to influence how processors deal with farmers.<sup>42</sup> Professor Graeme Orr has discussed whether the Coles boycott would also be a secondary boycott.<sup>43</sup>

In 2019, supporters of Israel Folau called for a boycott of Rugby Australia, Qantas, Jetstar, Emirates, Land Rover and ASICS.<sup>44</sup>

In 2019, Alan Jones called on his listeners to boycott former advertiser Coles after Coles stopped advertising on Jones' 2GB radio show.<sup>45</sup>

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<sup>42</sup> SBS News (2019) *Minister calls for boycott over cheap milk*, <https://www.sbs.com.au/news/minister-calls-for-boycott-over-cheap-milk>

<sup>43</sup> Secombe (2019) *Activism and secondary boycotts*, <https://www.thesaturdaypaper.com.au/news/politics/2019/11/09/activism-and-secondary-boycotts/15732180009057>

<sup>44</sup> Careem (2019) *Folau backers call for boycott of rugby, Qantas in wake of anti-gay post*, <https://www.scmp.com/sport/rugby/fifteens/article/3006493/israel-folau-supporters-call-boycott-rugby-and-qantas-after>; Orchard (2019) *Support Israel Folau by boycotting Rugby Australia & Qantas*, <https://www.change.org/p/don-t-watch-anymore-australian-rugby-union-games-and-don-t-fly-qantas-jetstar-or-emirates>

<sup>45</sup> Elmas (2019) *The gloves are off: Coles attracts both love and wrath as Alan Jones calls for boycott*, <https://www.smartcompany.com.au/industries/retail/coles-alan-jones-boycott/>

# The case for secondary boycotts

Secondary boycotts, where permitted by law, allow workers and other people to influence how business is conducted, and hold companies to account when they breach community expectations. The alternative is for wholesalers and primary producers to be insulated from community expectations in a way that retailers and service providers are not. Withdrawing labour or custom could be perceived as an expression of the rights to free expression, free association and free commerce, and to some extent are protected under the Constitution and in international conventions that Australia is a signatory to.

## NO WAY TO REACH PERCEIVED WRONGDOER EXCEPT THROUGH ANOTHER PARTY

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The secondary boycott is distinguished because the target of the boycott is not the direct perpetrator of the perceived wrongdoing. However, they have a relationship with the perceived wrongdoer that could be used to change or at least penalise the perceived wrongdoer's behaviour.

Often, a boycotter has no way of reaching the target directly. For example, a wholesaler may have no public-facing interaction with consumers. Alternatively, a small union may rely on solidarity action by other unions in linked sectors to wield enough influence in an industrial dispute.

Similarly, under the prohibition on secondary boycotts, companies can escape industrial action by outsourcing work to other companies – creating a perverse incentive for more outsourcing and less direct control over supply chains.<sup>46</sup>

## DEALING WITH WRONGDOERS IS NOT BLAMELESS

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The Australian Forest Products Association say changing the law could “help protect innocent businesses from being targeted by environmental activists even though these companies are simply going about their business”.<sup>47</sup>

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<sup>46</sup> Patty, Towell, & Kenny (2018) *Unions call for change to secondary boycott laws*, <https://www.smh.com.au/business/workplace/unions-call-for-change-to-secondary-boycott-laws-20180518-p4zg4s.html>

<sup>47</sup> Australian Forest Products Association (2019) *Time is right to reform secondary boycott law to stop environmental activists*, <https://ausfpa.com.au/media-releases/time-is-right-to-reform-secondary-boycott-law-to-stop-environmental-activists/>

But is it morally blameless to do business with a company that is doing wrong? As Richard Glover points out, sometimes secondary pressure avoids the “boycotter” being personally entangled with the wrongdoer.<sup>48</sup> For example, a person who deposits money with a bank that lends to a coal mine faces the possibility that it would be their (albeit fungible) money that is lent to the coal mine.

## CONSUMERS AND WORKERS HAVE A RIGHT TO DEAL WITH WHOM THEY WANT

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Business Council CEO Jennifer Westacott says that “we’ve got to look at examining [secondary boycotts] and what we can do to minimise this”, saying “Companies, of course, have choices about where they invest and choices about how they respond to these things, but it’s very difficult when you’re under this unrelenting intimidation by many activists”.<sup>49</sup>

But what about the choice of customers about where *they* invest, and how they respond to companies doing business with wrongdoers? Customers should be able to exercise their choice to avoid companies that trade with companies that are not in alignment with their values.

## CONSTITUTION’S IMPLIED FREEDOM OF POLITICAL COMMUNICATION

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Academics Graeme Orr and George Williams have suggested that consumer boycotts – secondary or otherwise – may be protected by the implied freedom of political communication in the Australian Constitution.<sup>50</sup>

When secondary boycotts provisions were restored to the *Trade Practices Act* in 1996, those supporting the laws dismissed concerns that they could extend to consumer boycotts – in

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<sup>48</sup> Glover (2019) *Scott Morrison’s attack on boycotts is no stand for liberty*, <https://www.washingtonpost.com/opinions/2019/11/04/scott-morrison-attack-boycotts-is-no-stand-liberty/>

<sup>49</sup> Stayner (2019) *Scott Morrison’s crackdown on “indulgent” climate boycotts is dividing public opinion*, <https://www.sbs.com.au/news/scott-morrison-s-crackdown-on-indulgent-climate-boycotts-is-dividing-public-opinion>

<sup>50</sup> Crowe (2019) *Albanese warns on free speech over Morrison plan for protests*, <https://www.smh.com.au/politics/federal/albanese-warns-on-free-speech-over-morrison-plan-for-protests-20191103-p536z1.html>; Karp (2019) *Coalition warned outlawing climate boycotts could breach constitution*, <https://www.theguardian.com/world/2019/nov/05/coalition-warned-outlawing-climate-boycotts-could-breach-constitution>

part because such a move would, they thought, run afoul of the implied freedom of political communication.<sup>51</sup>

## SOLIDARITY TACTICS ARE IMPORTANT FOR WORKERS' CONDITIONS

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Secondary boycotts allow workers to magnify their power in an industrial dispute, allowing them to win better conditions. Workers can use secondary boycotts, where legal, to coordinate and apply pressure as a group – just as companies use industry bodies and peak groups to coordinate and apply pressure.<sup>52</sup>

Andrew Dettmer of the AMWU made a related point that secondary boycott laws make it difficult for unions to bargain across industry.<sup>53</sup>

## SECONDARY BOYCOTT BAN DOES NOT CONFORM WITH INTERNATIONAL CONVENTION

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As a signatory to the *Freedom of Association and Protection of the Right to Organise Convention*, Australia is expected to honour the right to strike. The International Labour Organisation has requested that Australia review its secondary boycott provisions “with a view to bringing them into full conformity with the Convention”.<sup>54</sup> Professor Andrew Stewart says:

The ILO for the past 20 to 30 years has told governments of both political persuasions that we are in breach of international labour standards.<sup>55</sup>

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<sup>51</sup> Murray (1996) *Speech - 19 November 1996*, p. 199,

<https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=yes;db=CHAMBER;id=chamber%2Fhansards%2F1996-11->

[19%2F0121;orderBy=customrank;page=0;query=%22Amendment%20164%22%20Date%3A01%2F01%2F1996%20%3E%3E%2031%2F12%2F1997%20Dataset%3Ajournals,journalshistorical,orderofbusiness,hansards,hansards80,hansardsIndex,notices,websds,senators,practces,orderss,websenguide,procbull,broadcastSen;rec=2;resCount=Default](https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=yes;db=CHAMBER;id=chamber%2Fhansards%2F1996-11-19%2F0121;orderBy=customrank;page=0;query=%22Amendment%20164%22%20Date%3A01%2F01%2F1996%20%3E%3E%2031%2F12%2F1997%20Dataset%3Ajournals,journalshistorical,orderofbusiness,hansards,hansards80,hansardsIndex,notices,websds,senators,practces,orderss,websenguide,procbull,broadcastSen;rec=2;resCount=Default)

<sup>52</sup> Burns (2010) *Secondary Strikes Are Primary to Labor's Revival*,

<https://www.labornotes.org/2010/11/secondary-strikes-are-primary-labor%E2%80%99s-revival>

<sup>53</sup> Patty et al. (2018) *Unions call for change to secondary boycott laws*

<sup>54</sup> ILO (2017) *Observation (CEACR) - adopted 2016, published 106th ILC session (2017)*,

[http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100\\_COMMENT\\_ID:3298569](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100_COMMENT_ID:3298569)

<sup>55</sup> Long (2017) *Have right to strike laws gone too far?*, <https://www.abc.net.au/news/2017-03-21/have-the-right-to-strike-laws-gone-too-far/8370980>

# Conclusion

In Australia, politicians, peak industry bodies and commentators have called for boycotts as readily as unionists and environmentalists have – including, in some cases, secondary boycotts. Many of Australia’s historic secondary boycotts have been directed at causes that are now universally supported, like the end of apartheid in South Africa and not providing steel for the Japanese war effort in World War 2.

When secondary boycott laws were initially introduced in the 1970s, the two most commonly-identified secondary boycotts were union campaigns against under-priced bread and petrol; now it is government ministers who have been campaigning against under-priced milk.

Australia’s existing secondary boycott laws are out of line with our commitment to international labour conventions; they breach the right to strike that all workers have. To make secondary boycott laws even harsher would limit customers from exercising their conscience in the marketplace, encourage companies to outsource to other companies, and allow wholesalers and primary producers to violate the social licence with limited consequences.

# Appendix: History

Through Australian history, governments have limited the power of unions to engage in secondary boycotts under a variety of laws, with the earliest appearing in the *Commonwealth Conciliation and Arbitration Act 1904*. However, secondary boycotts did not always have a conventional employee–employer dynamic that could be brought before arbitration. In other cases, the employer’s incentives aligned with its employees against its customers (for example, when employees pushed for bread or petrol prices to remain high).<sup>56</sup>

In 1937, the ACTU called for a ban on Japanese goods, endorsed by the Waterside Workers’ Federation. In 1938, the Lyons Government banned the export of iron ore to Japan – but still allowed the export of 300,000 tonnes of pig iron. Incensed by the Rape of Nanking in 1937–1938, and worried that, unchecked, Japanese aggression would reach Australia, the dock workers at Port Kembla resolved to not load pig iron on a ship, the *Dalfram*, headed to Japan.<sup>57</sup>

Robert Menzies, then Attorney-General, said that only the government should decide Australian foreign policy. Menzies’ nickname “Pig Iron Bob” originates from his handling of the dispute. Menzies threatened workers with provisions under the *Transport Workers Act*, which could cause them to lose their jobs, and they eventually returned to work in January 1940 – but the remaining 277,000 tonnes of pig iron exports were cancelled, and the *Transport Workers Act* was subsequently repealed without being used again.<sup>58</sup>

Australian wharf workers boycotted “the Black Armada”: Dutch vessels in 1945–1949 that were suspected of carrying materials intended to be used to suppress the Indonesian independence movement.

In the early 1970s, green bans were used to great effect by the Builders Labourers Federation (BLF) until it was deregistered. By some estimates, the union held up \$3 billion in building construction in 1974 dollars.<sup>59</sup>

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<sup>56</sup> Trade Practices Act Review Committee (1976) *Report to the Minister for Business and Consumer Affairs*, pp. 85–86, <https://www.australiancompetitionlaw.org/reports/pdf/swanson1976.pdf>

<sup>57</sup> Chalmers, Vincent, & Wanna (2011) *Inside the Canberra Press Gallery: Life in the Wedding Cake of Old Parliament House*, pp. 37–39; Roach (1993) *Menzies and pig iron for Japan*, <https://www.labourhistory.org.au/hummer/vol-2-no-2/pig-iron/>

<sup>58</sup> Chalmers et al. (2011) *Inside the Canberra Press Gallery: Life in the Wedding Cake of Old Parliament House*, pp. 37–39; Roach (1993) *Menzies and pig iron for Japan*

<sup>59</sup> Wright (1974) *Speech - 14 August 1974*, [https://parlinfo.aph.gov.au/parlInfo/genpdf/hansard80/hansards80/1974-08-14/0039/hansard\\_frag.pdf;fileType=application%2Fpdf](https://parlinfo.aph.gov.au/parlInfo/genpdf/hansard80/hansards80/1974-08-14/0039/hansard_frag.pdf;fileType=application%2Fpdf)

In 1976, the Swanson Report on the *Trade Practices Act* recommended that additional provisions against secondary boycotts be introduced. The committee found that the two most common secondary boycotts were:

boycotts by bread delivery drivers against retail outlets which were selling cut-price bread and boycotts by petrol tanker drivers against service stations advertising cut-price petrol.<sup>60</sup>

At the time, bread and petrol delivery drivers were concerned that price competition sparked by low-price retailers would ultimately undermine employment in their industries.<sup>61</sup>

The secondary boycott provisions were added to the *Trade Practices Act 1974* in 1977, as s 45D. In the second reading speech in December 1976, then Minister for Small Business John Howard identified the legislation as targeted at employees, and was ambivalent as to whether the provisions should instead appear in the *Conciliation and Arbitration Act* – which would affect how secondary boycott disputes were resolved.<sup>62</sup>

By May 1977, a Trade Practices Amendment Bill had been proposed that expanded secondary boycotts from employees to people, with an exception for “purely consumer boycotts”.<sup>63</sup> The secondary boycott provisions were colloquially known as the “Howard amendments”.<sup>64</sup> There were also provisions introduced in the *Conciliation and Arbitration Act* for conciliation in the Conciliation and Arbitration Commission – once an injunction under the *Trade Practices Act* had been granted by the Federal Court.<sup>65</sup>

During the 1970s, the Australasian Meat Industry Employees’ Union (AMIEU) had tried to ensure that most sheep for export would be slaughtered in Australia, instead of exported live. In 1977–1978, the AMIEU imposed a “ban” (secondary boycott) on some livestock

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<sup>60</sup> Trade Practices Act Review Committee (1976) *Report to the Minister for Business and Consumer Affairs*, pp. 85–86

<sup>61</sup> Davis (1992) *Courts set pace on strike-busting law*; Trade Practices Act Review Committee (1976) *Report to the Minister for Business and Consumer Affairs*, p. 85

<sup>62</sup> Howard (1976) *Trade Practices Amendment Bill 1977 - Second Reading*, [https://parlinfo.aph.gov.au/parlInfo/genpdf/hansard80/hansardr80/1976-12-08/0103/hansard\\_frag.pdf;fileType=application%2Fpdf](https://parlinfo.aph.gov.au/parlInfo/genpdf/hansard80/hansardr80/1976-12-08/0103/hansard_frag.pdf;fileType=application%2Fpdf)

<sup>63</sup> Howard (1977) *Trade Practices Amendment Bill 1977 - Second Reading II*, [https://parlinfo.aph.gov.au/parlInfo/genpdf/hansard80/hansardr80/1977-05-03/0062/hansard\\_frag.pdf;fileType=application%2Fpdf](https://parlinfo.aph.gov.au/parlInfo/genpdf/hansard80/hansardr80/1977-05-03/0062/hansard_frag.pdf;fileType=application%2Fpdf)

<sup>64</sup> Parer (1992) *Speech - 12 October 1992*, <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansards%2F1992-10-12%2F0082%22>

<sup>65</sup> Willis (1984) *Conciliation and Arbitration Amendment Bill (No. 2) 1984 - Second Reading Speech*

shipments from some ports. Exporters successfully sought interim injunctions under the new s 45D of the *Trade Practices Act* against pickets.<sup>66</sup>

Ironically, the response to the ban by livestock peak body the Combined Livestock Committee had to be carefully worded to avoid triggering secondary boycott provisions itself, since the committee (first party) advised primary producers (second party) to not send livestock to South Australian abattoirs (third party) in order to put pressure on AMIEU (fourth party). Farmers also protested the AMIEU ban by driving a 4,000-strong motorcade of cars and trucks into Adelaide to bring the city to “a virtual standstill”.<sup>67</sup>

The *Advertiser* talked about the protest flatteringly:

The farmers who rallied from far and wide to converge on Adelaide yesterday made their point in no uncertain terms. It was unfortunate, perhaps, that they chose so disruptive a means of doing so. They managed nevertheless to get across a message that would have struck a responsive chord not only in city dwellers here but in other people throughout Australia.

... Despite the widespread traffic jams, yesterday's demonstration was no less impressive for the restraint shown by its leaders. The appeal was to reason rather than emotion: it was emphasised, in particular, that violence towards the pickets who have several times frustrated efforts to load the sheep for export should be avoided.<sup>68</sup>

Another early case was *Utah Development Co, Australian Mutual Provident Society and Utah Mining Australia v The Seamen's Union of Australia* (1977). Utah Development Co extracted coal in Central Queensland, and exported it using vessels owned by Utah Transport Incorporated, Orco Orange Corporation and Orco Green Corporation. These vessels were not staffed by Australians. The Seamen's Union prevented a tug company from berthing the ships, in order to put pressure on Utah Transport Incorporated and the two Orco corporations to hire Australians.<sup>69</sup>

In 1980, Transport Workers Union workers went on strike at Amoco work sites in NSW. The TWU wanted Amoco to stop supplying metropolitan fuel distributors and instead do the supplying itself, since Amoco drivers were unionised – something that was not necessarily

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<sup>66</sup> Trebeck (n.d.) *No Ticket, No Start---No More!: The Industrial Significance of the 1978 Live Sheep Export Dispute*, <http://archive.hrnicholls.com.au/archives/vol6/vol6-7.php>

<sup>67</sup> Trebeck (n.d.) *No Ticket, No Start---No More!: The Industrial Significance of the 1978 Live Sheep Export Dispute*

<sup>68</sup> Trebeck (n.d.) *No Ticket, No Start---No More!: The Industrial Significance of the 1978 Live Sheep Export Dispute*

<sup>69</sup> *Utah Development Co & Ors v The Seamen's Union of Australia & Ors* (1977); O'Dea & McClelland (2014) *Secondary boycott actions under the Competition and Consumer Act 2010*; Parer (1992) *Speech - 12 October 1992*

true for other drivers. An interim injunction was granted by the Federal Court; the case also went to arbitration before the Australian Conciliation and Arbitration Commission.<sup>70</sup>

The Hawke government made attempts to repeal s 45D, for example in 1984, and have secondary boycott provisions instead come exclusively under the *Conciliation and Arbitration Act*. This would have removed the statutory legal remedy for secondary boycotts and removed the significant damages and penalties in the *Trade Practices Act*, instead putting the focus on conciliation and arbitration. Common law remedies would have mostly remained.<sup>71</sup> The amendments were blocked by the Australian Democrats in the Senate.

The first case under the laws to proceed to payment of damages was the Mudginberri dispute in the mid-1980s,<sup>72</sup> where Commonwealth meat inspectors refused to cross a picket line – forcing beef from Mudginberri to be sold domestically instead of into the more lucrative export market.

By the early 1990s, the “secondary boycott” laws were also being used in “situations that the ordinary person would think of as a primary boycott”, based on a narrow definition of “purpose”, the ability to “juggle” the parties to fit the four-person structure of s 45D, and the ease of securing an interim injunction, which breaks the strike.<sup>73</sup>

Secondary boycotts were considered by the 1993 National Competition Policy review (the “Hilmer report”), which investigated anti-competitive conduct and market behaviour, especially in terms of the *Trade Practices Act*. The Hilmer report recommended no change in the laws but noted that the provisions were being concurrently considered by a Senate committee.<sup>74</sup>

That Senate committee, split on partisan lines with a Labor–Democrats majority, found that s 45D was unduly harsh and breached Australia’s ILO obligations, the right to withdraw

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<sup>70</sup> *Re Leon Laidely v Transport Workers Union of Australia & Ors* (1980), <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/1980/15.html>; Durack (1980) *Speech - 19 March 1980*, Hansard

<sup>71</sup> Willis (1984) *Conciliation and Arbitration Amendment Bill (No. 2) 1984 - Second Reading Speech*; for discussion of the common law as it concerns secondary boycotts, see Davis (1992) *Courts set pace on strike-busting law*; Senate Standing Committee on Employment, Education and Training (1993) *The operation of Sections 45D and 45E of the Trade Practices Act 1974*

<sup>72</sup> Romeyn (2008) *The need for further reform of the law relating to industrial action*, [https://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/rp/RP0708/08rp33#\\_ftnref53](https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/RP0708/08rp33#_ftnref53)

<sup>73</sup> Davis (1992) *Courts set pace on strike-busting law*

<sup>74</sup> Hilmer (1993) *National Competition Policy*, pp. 42–46, <http://ncp.ncc.gov.au/docs/National%20Competition%20Policy%20Review%20report,%20The%20Hilmer%20Report,%20August%201993.pdf>

labour should be enshrined in legislation and then any qualifications articulated and that industrial disputes should be dealt with under industrial relations legislation.<sup>75</sup>

In 1993, the government succeeded in passing the *Industrial Relations Reform Act 1993* (Cth), which moved the secondary boycott provisions (for “loss and damage”) to the *Industrial Relations Act*. The consequences of this move include that conciliation was required before litigation could take place, disputes were considered under the industrial arbitration system rather than the courts, and that the laws targeted industrial secondary boycotts rather than other secondary boycotts like consumer boycotts. Secondary boycotts to lessen competition remained covered by the *Trade Practices Act*, although with some details changed.<sup>76</sup>

In 1996, Howard introduced legislation that would restore the secondary boycott (for “loss and damage”) restrictions to the *Trade Practices Act 1974*, again as s 45D.<sup>77</sup>

Senator Bob Brown joined the Labor Opposition in opposing the changes, pointing out that it would affect port bans on rainforest timbers from Sarawak, action by the maritime union against “ships of shame” under flags of convenience that underpay their crews, blocking uranium ships from leaving or entering harbour, etc.<sup>78</sup>

Following complaints from Labor and Bob Brown, the Coalition moved amendments (jointly with the Democrats) to protect consumer and environmental secondary boycotts by introducing s 45DD. At the time, Senator Murray identified what issues he believed would be covered by the amendments:

It would, in my view, extend to environmental issues affecting indigenous people, such as the protection of sacred sites. It would extend to urban environment issues and pollution issues. It would extend to environment issues such as preservation of historic buildings. It should and will be interpreted very broadly. It would include boycotts in relation to nuclear issues and the impact they could have on the environment. It would extend to the protection of living things in other countries, such as South-East Asian rainforests.

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<sup>75</sup> Senate Standing Committee on Employment, Education and Training (1993) *The operation of Sections 45D and 45E of the Trade Practices Act 1974*

<sup>76</sup> Brereton (1993) *Industrial Relations Reform Bill 1993 - Second Reading*, <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2F1993-10-28%2F0083%22>

<sup>77</sup> Romeyn (2008) *The need for further reform of the law relating to industrial action*

<sup>78</sup> Brown (1996) *Speech - 19 November 1996*, <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansards%2F1996-11-19%2F0118%22>; (1996) *Speech - 19 November 1996 II*, <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansards%2F1996-11-19%2F0116%22>

Similarly, consumer protection will be given a wide interpretation by the courts.<sup>79</sup>

After the laws passed, Brown proposed an amendment in 1997 that would expand the protected conduct to also include protection of human rights, promotion of peace and land rights.<sup>80</sup> The amendment did not pass.

In 2007, Peter Costello proposed giving the ACCC the power to seek compensation for companies targeted by boycotts, against the people who called for the boycott. He pointed to a call from PETA to boycott Australian wool over mulesing practices as an example of the kind of boycotts he was targeting.<sup>81</sup> As well as targeting Australian wool itself, PETA has targeted clothing companies that use Australian wool.<sup>82</sup>

Seemingly the most recent case involving activism is *Rural Export & Trading (WA) v Hahnheuser*, which ran between 2007 and 2009. The applicants regarded the proceedings as a “test case” for s 45D, including the “environmental protection” provision.

The case concerned Ralph Hahnheuser, an animal rights activist, and others in Animal Liberation, after Hahnheuser in 2003 attempted to sabotage live exports to the Middle East by contaminating the sheep’s feed with pork (with the intention of making the sheep not halal for consumption by Muslims).

The case is a good demonstration of how the “secondary boycott” laws extend well beyond boycotts. In this case, the “conduct” was placing shredded ham in a feedlot and publicising what he had done; no boycott was involved or required.

In 2007, the trial Federal Court judge found that animals rights action came under “environmental protection”.<sup>83</sup> On appeal, the full court in 2008 found that environmental

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<sup>79</sup> Murray (1996) *Speech II - 19 November 1996*,

<https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=yes;orderBy=customrank;page=0;query=%22secondary%20boycott%22%20%22consumer%20protection%22%20Date%3A01%2F01%2F1996%20%3E%3E%2031%2F12%2F1997%20Dataset%3Ajournals,journalshistorical,orderofbusiness,hansards,hansards80,hansardsIndex,notices,websds,senators,practces,orderss,websenguide,procbull,broadcastSen;rec=4;resCount=Default>

<sup>80</sup> Brown (1997) *Speech - 27 October 1997*,

<https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansards%2F1997-10-27%2F0015%22>

<sup>81</sup> Irvine (2007) *Costello aims to make protesters pay for boycotts*, <https://www.smh.com.au/national/costello-aims-to-make-protesters-pay-for-boycotts-20070223-gdpj7n.html>

<sup>82</sup> PETA (2012) *Uniqlo: Stop Buying Wool From Mulesed Sheep!*, <https://www.peta.org.au/news/uniqlo-stop-buying-wool-from-mulesed-sheep/>; Sydney Morning Herald (2004) *Benetton hits back at sheep mulesing protest*, <https://www.smh.com.au/business/benetton-hits-back-at-sheep-mulesing-protest-20041217-gdkbua.html>; (2004) *Australian wool boycotted after cruelty claim*, <https://www.smh.com.au/business/australian-wool-boycotted-after-cruelty-claim-20041223-gdkde4.html>

<sup>83</sup> *Rural Export & Trading (WA) Pty Ltd v Hahnheuser* (2007) <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2007/1535.html>; Savva (2019) *In this case doing nothing might be the best option*

protection is broadly defined (including for example the urban environment) but does not go so far as to include animal rights by themselves. Animals are part of the environment, but that does not mean that protecting animals necessarily protects the environment.<sup>84</sup>

Note that the “in concert” element of a secondary boycott was made out in the *Hahnheuser* case because one or more people were involved in filming and publicising Hahnheuser’s sabotage, without which the protest would have been pointless.<sup>85</sup>

The *Trade Practices Act* was replaced by the *Competition and Consumer Act* in 2010, but the secondary boycott provisions remained.

In 2013, the Abbott Government proposed scrapping the s 45DD exceptions for environmental or consumer protection. Figures associated with the Institute of Public Affairs were critical of the move,<sup>86</sup> with Chris Berg (then Research Fellow at the IPA) saying that:

Consumer boycotts - primary or secondary - are a completely legitimate way to express political views. Free markets aren't just a tool to bring about efficient exchange. They are a dynamic ecosystem of individual preferences about what we want to buy and from whom.<sup>87</sup>

The next year, Simon Breheny, then also of the IPA, argued that “Secondary boycott restrictions should be abandoned wholesale”. He said:

Advocating for or against a particular company’s practices is an important part of that equation. This advocacy is at the heart of the intersection of political and economic freedoms. Secondary boycotts are merely the legitimate extension of this

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<sup>84</sup> *Rural Export & Trading (WA) Pty Ltd v Hahnheuser* (2008), <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCAFC/2008/156.html>

<sup>85</sup> *Rural Export & Trading (WA) Pty Ltd v Hahnheuser* (2007) <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2007/1535.html>; Savva (2019) *In this case doing nothing might be the best option*

<sup>86</sup> It should be noted that other IPA figures have taken alternative views. See for example Peter Costello writing in 1985, John Hyde describing the “dry” position on s 45D and two examples from the current decade. There is also a discussion of secondary boycotts in the 2019 “Coal is Good” podcast episode: Berg & Hargreaves (2019) *Ep 36: Coal is Good*, sec. 19:54, <https://ipa.org.au/ipa-today/ep-36-coal-is-good>; Costello (1985) *Unleashing the Unions: Tying up Management*, pp. 20–22, [https://ipa.org.au/wp-content/uploads/archive/1211158775\\_document\\_review1985\\_vol.39no.1.pdf](https://ipa.org.au/wp-content/uploads/archive/1211158775_document_review1985_vol.39no.1.pdf); Hannaford (2015) *Unions in Labor: A handbrake on reform*, pp. 22–23, [https://ipa.org.au/wp-content/uploads/archive/14Jul15-PHJReport-Unions\\_in\\_labor\\_a\\_handbrake\\_on\\_reform.pdf](https://ipa.org.au/wp-content/uploads/archive/14Jul15-PHJReport-Unions_in_labor_a_handbrake_on_reform.pdf); Hyde (2002) *Dry*, p. 182, [https://ipa.org.au/wp-content/uploads/archive/2002hyde\\_dry.pdf](https://ipa.org.au/wp-content/uploads/archive/2002hyde_dry.pdf); Wilson (2011) *An unsustainable economic transformation*, p. 25, [https://ipa.org.au/wp-content/uploads/archive/1320645719\\_document\\_111107\\_-\\_paper\\_-\\_an\\_unsustainable\\_economic\\_transformation\\_-\\_final.pdf](https://ipa.org.au/wp-content/uploads/archive/1320645719_document_111107_-_paper_-_an_unsustainable_economic_transformation_-_final.pdf)

<sup>87</sup> Berg (2013) *Freedom of speech means freedom to boycott*

important idea. And as such, a restriction on secondary boycotts is a restriction on free speech.<sup>88</sup>

The 2015 Harper review concluded that the secondary boycott provisions should be maintained (neither tightened nor relaxed, except in terms of the maximum penalty level), but more vigorously enforced. The panel “did not receive compelling evidence of actual secondary boycott activity falling within the environmental and consumer protection exemption in the CCA”.<sup>89</sup>

In the late 2010s, the CFMEU paid millions in fines and penalties, including for its secondary boycott of concrete company Boral. The CFMEU’s dispute was with Grocon; the union demanded that Boral stop supplying Grocon.<sup>90</sup>

A recent example of secondary pressure is the anti-slavery Walk Free Foundation’s campaigns against companies with exploited labour in their supply chains. The foundation has targeted Nintendo over their use of “conflict minerals” potentially mined by slave labour, as well as clothing companies that buy cotton from farms that use exploited labour.<sup>91</sup> Walk Free was founded by miner Andrew Forrest and his daughter Grace.

There have been mixed responses from business to Morrison’s 2019 announcement that he planned to change secondary boycott laws. Innes Willox, CEO of Australian Industry Group, said that the review was “timely”, while Peter Strong, CEO of the Council of Small Business Australia, said “We don’t have a problem, let’s not create one.”<sup>92</sup>

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<sup>88</sup> Breheny (2014) *A restriction on secondary boycotts is a restriction on free speech*

<sup>89</sup> Harper et al. (2015) *Competition Policy Review: Final Report*, pp. 67–68, 386–392

<sup>90</sup> Patty et al. (2018) *Unions call for change to secondary boycott laws*

<sup>91</sup> Campbell (2013) *Anti-slavery campaign targets Nintendo for protest day*, <https://www.polygon.com/2013/6/19/4446046/anti-slavery-campaign-targets-nintendo-for-protest-day>; Sydney Morning Herald (2019) *Loud environmental protests are a great Australian tradition*, <https://www.smh.com.au/environment/climate-change/loud-environmental-protests-are-a-great-australian-tradition-20191107-p538gu.html>; (2019) *Public advocacy should not be a crime*, <https://www.theage.com.au/politics/federal/public-advocacy-should-not-be-a-crime-20191107-p538im.html>

<sup>92</sup> Savva (2019) *In this case doing nothing might be the best option*