Chapter One

Majority Report

1.1 The three bills propose to amend the *Workplace Relations Act 1996* (WR Act) by:

- Codifying the current generic criminal contempt offence provision in relation to the Australian Industrial Relations Commission (the Commission); adding a new offence of giving false evidence to the Commission; and, increasing the penalty provisions of the WR Act.

- Providing the Minister for Employment and Workplace Relations (the minister) with the ability to seek financial penalties for non-compliance with Commission and Federal Court orders; and, providing automatic disqualification from office of officials and employees of registered organisations who are so fined.

- Seeking to encourage the Commission to hear and determine applications to stop or prevent strikes in a timelier manner.

1.2 These bills reinforce the Government's determination to have a fully functional industrial relations system by ensuring that the integrity of the Commission is maintained. Damage to Australian industry results from activities which are not only illegal but which are intended to hold the Commission in contempt. There have been a number of instances, particularly in Victoria where unions have sought to defy court and Commission orders and not paid fines. These bills will ensure that unions and employer organisations that disregard the law in the industrial relations system are penalised appropriately.

The inquiry process

1.3 The compliance bill and codifying contempt offences bills were introduced into the House of Representatives on 13 February 2003 and 26 June 2003, respectively. The Senate referred the provisions of the bills to the committee on 14 and 20 August 2003, respectively.

1.4 The Improved Remedies for Unprotected Action bill was introduced to the House of Representatives on 26 June 2002. The Senate referred the bill to the committee on 17 September 2003.

1.5 The committee received 11 submissions and conducted a public hearing in Canberra on 22 October 2003. In preparing this report the committee has drawn on evidence it received at that hearing and from the submissions received. Lists of submissions and witnesses are found in appendices to this report.

Codifying Contempt Offences

1.6 This bill repeals the catch-all contempt of court clause of the Act and specifies other criminal offences. The criminal offences include contravening an order of the Commission, publishing a false allegation of misconduct affecting the Commission, inducing another person to give false evidence to the Commission and giving false evidence to the Commission. It also increases penalties for Part XI offences including intimidation or prejudicing another person assisting the Commission, failure to appear or cooperate with the Commission, offences relating to the application for and conduct of secret ballots, and employment agencies making agreements on behalf of employers on terms that do not meet the minimum legal requirements.[1]

1.7 In his second reading speech of 26 June 2003 the then Minister for Employment and Workplace Relations stated:

> The Commonwealth has a duty to the Australian people and nation to ensure that its laws are upheld, in this case when unlawful industrial action threatens business performance, international competitiveness, and jobs. It also has a duty to protect the integrity of the Australian Industrial Relations Commission and its procedures.
>
> …the Commonwealth will take a much more active role in instigating legal action and pursuing penalties against people and organisations that fail to comply with Federal Court or Industrial Relations Commission orders. The government will make full use of existing laws to seek penalties where there is strong evidence that a person or organisation has defied orders and it is in the public interest to take legal action.[2]

1.8 Union concerns about the bill focused on two main aspects – the changes to contempt offences and the increased penalties to be applied to these offences. Unions, such as the Liquor, Hospitality and Miscellaneous Workers' Union (LHMWU) argue that the current WR Act, through section 299(1)(e), already provide adequate protection against contempt thus the codifying contempt offences bill is unnecessary.[3] Likewise the Shop Distributive and Allied Employees' Association (SDA) noted that there is currently 'no problem' with the current contempt provisions and as such there is no justification for making the changes proposed in this bill.[4]

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[1] *Workplace Relations Amendment (Codifying Contempt Offences) Bill 2003*, Explanatory Memorandum, p.8.

[2] Mr Tony Abbott, former Minister for Employment and Workplace Relations, Second Reading Speech, *Workplace Relations Amendment (Codifying Contempt Offences) Bill 2002*, 26 June 2003.

[3] Submission 2, LHMWU, p. 2.

[4] Submission 3, SDA, p. 3.

1.9 The committee majority notes that the Australian Chamber of Commerce and Industry (ACCI) supports the proposed amendments in this bill.[5]

1.10 The Australian Industry Group (Ai Group) also supports the bill. In its submission the Ai Group notes that a strong and respected Court and Commission are essential components of Australia's workplace relations system. If parties disregard Commission or Federal Court orders the objectives of the Workplace Relations Act will not be achieved[6] and disruption will damage industry.

1.11 The Department of Employment and Workplace Relations (DEWR) notes in its submission that catch all provisions such as those in section 299(1)(e), which the bill will repeal, are common in Commonwealth and State and Territory government legislation. However, importantly, DEWR gave evidence that the government considered that the amendments are necessary in order to make legal obligations clearer and more specific, in line with government policy[7]. DEWR argues that there are difficulties with catch all contempt provisions as:

> These catch all contempt provisions rely on importing common law contempt as it applies to courts of record and applying it to the various commissions and tribunals. The CCO Bill's codification of the generic criminal contempt offence provisions implements the approach recommended by the ALRC [Australian Law Reform Commission] that "deemed" contempt provisions like current paragraph 299(1)(e) should be replaced with specific statutory offences that identify contemptuous conduct.[8]

1.12 The committee majority notes the difficulty in apply 'deemed contempt' provisions to tribunals and believes that the new provisions will more clearer articulate contempt of tribunal provisions for parties involved in Commission activities.

1.13 In relation to penalties, ACCI supports the new penalties proposed in the bill, stating that the increased level of financial penalties are consistent with the penalties provided for in previous amendments to the WR Act for the Registration and Accountability of Organisations[9]. ACCI notes that the bill is not breaking new ground but simply codifying what is already understood and expected to be contempt. Additionally, these offences are drawn from the current body of common law dealing with contempt. In summary ACCI considers:

> Given that these proposed offences do not break new ground the real issue for consideration is whether they should be codified. There seems to be

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[5] Submission 1, ACCI, p. 11.

[6] Submission 7, Ai Group, p. 5.

[7] Submission 8, DEWR, p. 18.

[8] Ibid., p. 19.

[9] Submission 1, ACCI, p. 10.

> good reason to do so. The offences referred to in the Bill are arguably at least as serious as the offences already codified in s299. It is anomalous that some are codified but other equally obvious forms of contempt are not. Codification would give clearer direction to parties and persons in knowing what their rights and obligations are[10]…

1.14 The LHMWU is concerned that the proposed penalty increases exceed the penalties provided under other Commonwealth legislation. In its submission the LHMWU stated:

> The codified offences and accompanying penalties are in addition to other contempt offences and penalties provided for in the Crimes Act and the Criminal Code, which will continue to apply.[11]

1.15 A concern about cumulative penalties was also expressed at the public hearing by the SDA:

> The structure of these bills provides for up to three specific penalties to be imposed for a single offence…in trade practices matters cumulative penalties can apply and they specifically endorse the approach that there can be, and it is proper to have a concept of criminal and civil penalties being imposed for the same offence. In an industrial relations environment, it is very clear that this is the most draconian form of dealing with breaches of orders of the court or of the tribunal:[12]

1.16 On the other hand, DEWR indicated that the proposed penalties are within the range of penalties for similar offences that apply in other Commonwealth legislation, and that:

> They reflect the seriousness of the conduct and enable a court to impose an appropriate penalty that is proportionate to the conduct that has occurred in each case. Maximum penalties are only imposed by courts for offences which are of the most serious kind.[13]

1.17 DEWR in its submission stated that the proposed bill:

> …reflects the Government's policy that the Rule of Law should prevail and that the processes and orders of the Courts and Commission should be respected. In particular, this Bill will enhance certainty about, and accessibility of, the criminal law that operates to protect the integrity of the Commissions proceedings. It will also amend the applicable maximum

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[10] Submission 1, ACCI, p. 9.

[11] Submission 2, LHMWU, p. 2 -3.

[12] Mr John Ryan, SDA, *Hansard*, Canberra, 22 October 2003, p. 18.

[13] Submission 8, DEWR, p. 19

> penalties consistent with Commonwealth criminal law policy for offences of this kind.[14]

1.18 The Ai Group supports the provisions of the bill, including the update of penalty provisions.[15]

1.19 The committee majority supports the provisions that seek to codify contempt of court and tribunal offences in this bill. The main concerns arise from their view that the measures in the codifying bill are unnecessary. Tightening the contempt provisions, particularly ensuring that Commission orders are obeyed, is central to having a fully functional industrial relations system. The committee majority also considers that the penalties proposed in this bill are fair and proportionate to the nature of the offences being undertaken. The committee majority notes that the penalties are similar to those in other Commonwealth legislation.

Compliance with Court and Tribunal Orders

1.20 In his second reading speech of 13 February 2003 the then Minister for Employment and Workplace Relations stated that the proposed bill would:

> …amend the principal act to provide more effective sanctions against those who flout the authority of the Australian Industrial Relations Commission and the Federal Court…
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> The bill will establish duties on officers and employees of registered organisations to comply with orders and directions of the Australian Industrial Relations Commission and Federal Court. Where those duties are breached, the minister can seek orders from the Federal Court that financial penalties be imposed. Where court orders are breached, these new powers do not affect the existing powers of the court to deal with contraventions of its orders and directions.[16]

1.21 This bill will amend Schedule 1B of the WR Act to provide duties to officers and employees of registered organisations in relation to orders or directions of the Federal Court or the Commission, ensure the disqualification from holding office in register organisations of persons whom certain prescribed pecuniary penalty orders have been imposed, allow the Federal Court to order that a register organisation recover compensation from an officer or employee as a consequence of a breach of a civil penalty provision by that person where the organisation took reasonable steps to prevent the actions, and make various consequential amendments.[17]

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[14] Submission 8, DEWR, p. 11.

[15] Submission 7, Ai Group, p. 12-13.

[16] Mr Tony Abbott, Second Reading Speech, *Workplace Relations Amendment (Compliance with Court and Tribunal Orders) Bill 2003*, 13 February 2003

[17] *Workplace Relations Amendment (Compliance with Court and Tribunal Orders) Bill 2003*, Explanatory Memorandum, p. 2.

1.22 The Ai Group, the ACCI and DEWR in their submissions all support the proposition that:

> …a minority of unions and union officials currently display a lack of respect for, and a lack of compliance with, Commission and Court orders[18]…

1.23 Unions, such as the CPSU, stated that there is a lack of evidence of non-compliance[19], arguing that as there is little evidence of non-compliance with orders there is no need for further legislative amendments.

1.24 The DEWR, in evidence, indicated that although a minority of registered organisations disobey Commission and court order, this was not satisfactory and that all registered organisations should comply because it is the law. DEWR stated at the hearing that:

> But the issue is that, at the point the commission makes an order, it is a legal requirement – it is the law – that you must comply with it. So it seems to beg the question: why at a later stage, when the court made an injunction, is it then complied with? The point is that it is an obligation under law to comply with it the moment the commission makes a section 127 order.[20]

1.25 ACCI and others noted in their submissions that the law must be upheld otherwise the integrity of the workplace relations system, including the integrity of the Federal Court and Commission, were in jeopardy:

> An effective regulatory system requiring mandatory compliance requires effective deterrents and penalties on those who adopt a stance of optional compliance. Given that there is some evidence of non-compliance or optional compliance, it is proper and prudent for the Act to be amended for the purposes outlined.[21]

1.26 The Ai Group also supports the bill and notes that it is consistent with the approach adopted under Schedule 1B of the WR Act relating to registered organisations.[22]

1.27 DEWR, at the hearing, rebutted criticism of the compliance bill stating:

> …The Workplace Relations Act expressly requires a person bound by a section 127 order of the commission to comply with that order. To not comply breaches the law. The assertions seem to acknowledge that, at least in some cases, some parties consider the commission's orders are not sufficiently serious to be complied with and that only the Federal Court

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[18] Submission 7, Ai Group, p. 6.

[19] Submission 5, CPSU, p. 2.

[20] Mr James Smythe, DEWR, *Hansard*, Canberra, 22 October 2003, p. 27.

[21] Submission 1, ACCI, p. 5.

[22] See Submission 7, Ai Group, p. 8.

> orders should be taken seriously. Trivial or short-term instance of non-compliance can cause enormous damage to a business or an industry.[23]

1.28 Unions were concerned that the proposed bill allows officer holder and employees of registered organisations to be disqualified from holding office for a period of up to five (5) years, if they are fined by the Federal Court as non-comply with a court or Commission order. There was also some concern about ministerial involvement in pursing officials of registered organisations that were fined.

1.29 The committee majority notes this concern but considers that officials of registered organisations who disobey Court or Commission orders should be punished through both a financial penalty and disqualification from office. It is known that more militant union leaders have been known to make a career out of militancy rather than responsible leadership. They bring unions into public disrepute and do not truly represent union rank and file.

1.30 The ACTU, among other organisations stated that disqualification from office was 'automatic' and does not apply to other legislation. The ACTU's concerns about disqualification include that the disqualification may occur for minor technical matters.[24]

1.31 DEWR assured the committee that disqualification only occurred for serious acts:

> ….Disqualification is limited to a breach of the duties imposed by the proposed part 3 of chapter 9, requiring an officer or employee not to contravene orders or directions of the commission or the Federal Court. Disqualification can only occur for breach of these duties where the Federal Court, in its discretion, considers that the conduct warrants the imposition of a pecuniary penalty. The proposed disqualification provisions will not apply to breaches of other civil penalty provisions under section 306(1), such as those relating to record keeping and reporting, other than where an order is made to enforce lodgement and that order itself is ignored.
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> …The proposed provisions require deliberate and knowing involvement in the contravention. The contravention in each case requires an element of intent to be present and proved[25]….

1.32 The Ai Group, although it supports the bill, expressed concern about necessity of continuing to take legal action once a dispute was settled.[26]

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[23] Mr Smythe, DEWR, *Hansard*, p. 23.

[24] Ms Linda Rubinstein, ACTU, *Hansard*, Canberra, 22 October 2003, p. 3.

[25] Mr Smythe, DEWR, *Hansard*, p. 24.

[26] Mr Peter Alfred Nolan, Ai Group, *Hansard*, Canberra, 22 October 2003, p. 9.

1.33 DEWR assured the committee that the disqualification period mirrors provisions in the WR Act and that appeal provisions are available against disqualification as outlined below:

> The disqualification period does not take effect for 28 days to enable an organisation to reorganise its affairs and to allow an affected officer time to lodge an appeal against the disqualification. The role given to the minister under the bill reflects his overarching responsibility for maintaining the integrity and effectiveness of the workplace relations system and protecting the public interest[27]…

1.34 DEWR also pointed out that the disqualification principles are the same as those provided under section 215 of the WR Act and are similar to provisions in the New South Wales Industrial Relations Act 1996.[28]

1.35 ACCI in its submission supports the proposed disqualification penalty and indicates that disqualification from office is a strong practical sanction.[29]

1.36 Further, ACCI supports the provisions of the bill, but indicates in its submission that two amendments could be made to enable the Senate to endorse the bill - by limiting automatic disqualification to certain types of non-compliance or by providing for a general discretion to order disqualification.[30]

1.37 The committee majority supports the bill. It finds that although there are provisions within the current WR Act that address compliance, these provisions need to be strengthened to ensure that serial non-compliers of Court and Commission orders can be dealt with effectively. Non-compliance jeopardises the integrity of the workplace relations system. The committee majority also found that the penalties proposed under this bill are necessary given the on-going non-compliance by some unions, particularly in the construction and manufacturing industries.

Improved Remedies for Unprotected Action

1.38 Section 127 of the WR Act allows the Commission to make orders to stop or prevent industrial action. The main amendments to section 127: require the Commission to hear and determine applications within 48 hours, where possible, provide the Commission with a specific power to issue an interim order at its discretion, and provide 'factors' to consider when making an interim order.

1.39 The then Minister for Employment and Industrial Relations his second reading speech stated:

> The proposed amendments will require the commission to deal with section 127 applications within 48 hours of their lodgement, if at all practicable. If

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[27] Mr Smythe, DEWR, *Hansard*, p. 24.

[28] Mr Bob Bennett, DEWR, *Hansard*, Canberra, 22 October 2003, p. 30.

[29] Submission 1, ACCI, p. 6.

[30] Ibid., p. 7.

> an application for an order cannot be determined in 48 hours, the commission will have the discretion to issue an interim order to stop or prevent industrial action. The commission in exercising its discretion, will have to consider factors…[31].

1.40 The committee notes that the WR Act currently provides for the Commission to hear and determine applications for section 127 'as quickly as practicable' (s.127(3)). The committee also notes that section 127(7) provides the court with the ability to order interim injunction pending determination of an application[32]. The committee majority also notes that similar provisions have been proposed in earlier bills, Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999 and the Workplace Relations Amendment Bill 2000.

1.41 However, the committee notes the difference between this bill and those proposed earlier. This bill will require the Commission to hear and determine applications in 48 hours. Additionally the Commission is given the discretion to determine whether an interim order is required. But, if it determines that an interim order is required it will have guiding 'factors' to consider in making an interim order. It may also use its discretion in considering other factors.

1.42 In opposing this bill, the main objection of unions is that there is no evidence of an increased level of protected or unprotected industrial action that would warrant supporting the bill[33]. The ACTU argues that increasing pressure to deal with interim orders more efficiently may lead to other applications being delayed. The ACTU then reversed its opinion of the actions of the Commission dealing expeditiously with industrial actions by stating:

> …An examination of cases before the AIRC dealing with industrial action shows a significant number which might have been avoided if the employees had felt confident that the AIRC could deal with their concerns swiftly and decisively.[34]

1.43 The Ai Group supports the bill and points out in its submission:

> Industrial action can be extremely damaging for employers and employees. Applications for orders under s.127 of the Act are invariably made in circumstances where a party is alleging that the industrial action which is happening, threatened, impending or probable, is unlawful. When applications are made under s.127 of the Act, it is essential that the AIRC act quickly and decisively.
>
> The issuing of s.127 orders by the Commission is discretionary and, on occasion, delays have been experience in having applications heard. Delays have also occurred, on occasions, in decisions being issued by the

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[31] Mr Tony Abbott, former Minister Employment and Workplace Relations, Second Reading Speech, *Workplace Relations Amendment (Improved Remedies for Unprotected Action) Bill 2002*, 26 June 2002.

[32] Attorney-General's Department, *Workplace Relations Act*, Reprint 5, 2003, p. 122-123.

[33] Submission 10, ACTU, p. 25-26

[34] Ibid., p. 26.

> Commission. Such delays can be very costly, particularly when further delays of several days are typically experienced in having s.127 orders, which are breached, enforced by the Federal Court.[35]

1.44 DEWR provided in evidence the government view that the proposed amendments in relation to the Commission hearing and determining applications within 48 hours will formalise already established processes within the Commission.[36] DEWR notes in its submission that most applications for section 127 orders are dealt with promptly, with 85 per cent being listed for hearing within four days of an order being made. However, DEWR acknowledges that the Commission is unable to resolve all applications prior to industrial action starting or before action causes damage to industry and the economy.[37]

1.45 Unions are opposed to changing the provision in relation to interim orders because they consider that the Commission already has this power.[38]

1.46 In relation to interim orders, DEWR indicated in its submission that there is currently no express power for the Commission to make interim section 127 orders[39]. The proposed amendments would explicitly give the Commission this power. It will also clarify the nature of an interim order, which DEWR states in its submission is envisaged to be a "stop gap" mechanism pending a final decision by the Commission.[40]

1.47 The committee majority supports giving the Commission greater power to deal with orders in an expeditious manner, acknowledging the disruptive nature of unprotected industrial action and the damage it causes industry. The committee majority supports giving the Commission the explicit power to make interim orders given the confusion over this measure and the questioning by some unions of the power of the Commission to do so.

Conclusion

1.48 The committee majority **recommends** that these bills be passed without amendment.

John Tierney
Chair

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[35] Submission 7A, Ai Group, p. 2.

[36] Submission 8, DEWR, p. 21.

[37] Ibid., p. 24.

[38] Submission 5, CPSU, p. 4.

[39] Submission 8, DEWR, p. 21.

[40] Ibid., p. 29-30.