Chapter Two

Opposition Senators' Report

2.1 All three bills are simply designed to restrict legitimate union activity. They do nothing to help resolve the basis of industrial disputes and disagreements between industrial parties.

2.2 Employees, and the unions that represent them, take industrial action when there is a disagreement with the employer about an issue that cannot be resolved – they reach an impasse. Seeking to impose even greater penalties on industrial action that results from frustration with such an impasse does not resolve the underlying issue.

2.3 These bills are extremely one-sided and strongly skewed in favour of penalising unions and assisting employers. They do not help to maintain a balanced Australian industrial relations system. The current system is already overly skewed in favour of employers, places substantial restrictions on the taking of industrial action, and has been condemned by an International Labour Organisation finding.

2.4 The potential effect of the combination of these bills was highlighted by the SDA, who noted that it would be possible to be tried for a criminal breach and then subsequently for a civil breach for the same act[1]. DEWR admitted this[2].

2.5 The evidence of witnesses supported the fact that there are already existing remedies in the WRA that deal with industrial action, contempt and breaches of court and commission orders. In the very rare occasions that actions are brought in respect of breaches of Court or Commission orders, penalties have been imposed and paid.

2.6 There was no evidence presented to support the contention that these reforms are necessary or desirable.

2.7 For these reasons, we strongly recommend to the Senate that all three bills must be opposed.

Evidence of existing prevalence of non-compliance

2.8 There was no evidence presented to the Committee to support the view that the incidence of industrial action or non-compliance with court or tribunal orders has increased, or is so prevalent that systematic changes are required to deal with these issues.

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

[2] Mr James Smythe, DEWR, *Hansard*, Canberra, 22 October 2003, p. 24.

2.9 In fact, the opposite was found to be the case. Industrial disputation rates are falling and the very few allegations of non-compliance raised were found to be, in many cases, insignificant or unproven.

2.10 ABS statistics show a trend of declining industrial disputation in Australia[3].

2.11 A government press release of December 2002 listed 22 union breaches of court and tribunal orders as justification for the need for these extreme and punitive bills.

2.12 However, these breaches spanned over a period of four years, and the evidence of the ACTU was that many of these breaches were trivial, or of such short duration that the relevant disputes were resolved before any further enforcement action was required or taken[4]. The AMWU gave evidence that in the majority of those cases, no finding of a breach was ever made[5], and most of these matters were resolved by negotiation[6] . The AMWU also noted that on the reasoning of the recent *Emwest* decision about disputes during the life of an agreement, many of these 22 matters could have been classified as protected action and, therefore, are not legitimate examples of lawlessness[7].

2.13 The Government and the Ai Group have also suggested that these bills are required to address bargaining disputes, such as those in the automotive and manufacturing industries this year. In fact, this example was the only industrial disruption referred to by the Ai Group when questioned by Senator Tierney[8].

2.14 This ignores the fact that this type of bargaining and disputation takes place in the legitimate context of bargaining for a new collective agreement. Within this context, the taking of industrial action is legally protected by the current law, and would, therefore, not be affected by these bills.

2.15 Ai Group also gave evidence that out of 700 enterprise bargaining negotiations that took place in the past year, only four involved alleged non-compliance that led to applications to suspend or terminate the relevant bargaining period. On Ai Group's own admission, even these four instances were within the period of legitimate re-negotiation of a certified agreement[9] .

2.16 It is absurd to suggest that the prevalence of lawful, protected industrial action justifies punitive new laws aimed at unprotected, unlawful industrial action.

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[3] Submission 11, ACTU, p. 7.

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

[5] Mr Glenn Thompson, AMWU, *Hansard*, Canberra, 22 October 2003, p. 16.

[6] Ibid., p. 17.

[7] Ibid., p. 17.

[8] Mr Peter Nolan, Ai Group, *Hansard*, Canberra, 22 October 2003, p. 12.

[9] Ibid, p. 15.

Codifying Contempt

2.17 There are already provisions in the WR Act that penalise breaches of the relevant provisions of the Act, so it is difficult to see why a specific disobedience contempt provision is needed [10]. Section 299 in the current Act specifically covers contempt-like offences.

2.18 The only material concern raised by the Ai Group about the current provisions related to delays in enforcing orders by taking matters to Court[11]. However, the amendments will not resolve this concern.

2.19 The government failed to acknowledge or address the issue raised by the ACTU, that section 299 in the WR Act is similar to corresponding provisions in the Administrative Appeals Tribunal (AAT) Act, and that the government has not signaled any desire to change the AAT Act.[12]

2.20 'Disobedience' contempt, of the kind proposed in the bill, is not recommended by the Australian Law Reform Commission report that the Government relies on in proposing these changes[13]. It is inappropriate that new prohibitions on giving false evidence do not appear to be restricted to sworn evidence[14].

2.21 Imprisonment is not appropriate as the primary remedy for the taking of industrial action[15].

2.22 Although the ACTU agreed that in principle the updating of penalties as part of this bill 'is not the major problem'[16], the level of the existing penalties is also hardly a significant problem given that section 299 has never been used.

2.23 Labor Senators are most persuaded by the absence of any evidence that section 299 has ever been used. As a result, it is impossible to assert that section 299 is not working effectively and needs to be amended.

Compliance with Court and Tribunal Orders

2.24 The three main areas of concern in relation to this bill are:

- the one-sided nature of the bill;

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[10] Submission 11, ACTU, p. 23

[11] Mr Nolan, Ai Group, *Hansard*, p. 11.

[12] Submission 11, ACTU, p. 20.

[13] Ibid., p. 22.

[14] Ms Rubinstein, ACTU, *Hansard*, p. 3.

[15] See submission 11, ACTU, p. 5 (ILO Standards); Mr John Ryan, SDA, Hansard, Canberra, 22 October 2003, p. 17-18 (cultural changing from jailing unionists).

[16] Ms Rubinstein, ACTU, *Hansard*, p. 6.

- that the 5 year automatic disqualification from office of union officials and employees is unreasonably punitive; and

- that the Minister's capacity to continue legal action against union officials once disputes are resolved will create greater conflict.

2.25 This bill is even more draconian and punitive than similar provisions in the Government's *Workplace Relations Amendment (Registered Organisations) Bill 2001*, which was not passed by the Senate.

One-sided

2.26 Although the bill applies to all registered organisations, including employer organisations, it is clearly aimed at unions as employer organisations do not engage in industrial action.

2.27 This is supported by Ai Group evidence:

> I would have to say that we have not initiated industrial action organisationally…[17]

2.28 The one-sided nature of the bill is exacerbated by the fact that these provisions do not affect individual employers who may engage in industrial action such as lockouts, even though the Ai Group gave evidence that their members would have conducted 'over a dozen' lockouts so far in the 2003[18].

2.29 The department also admitted that although the Bill technically applies to all registered organisations, it is aimed at unions and employees:

> Senator Campbell: So essentially, these disqualification offences are targeted at union officials or union employees?
>
> Mr Bennett: I think that is a fair description, yes[19].

Unreasonably punitive

2.30 The effect of this bill is that union employees and officials would be automatically disqualified from holding union office for a period of 5 years, if they are subject to a pecuniary penalty of any amount for any breach of any direction or order of the Commission or Court.

2.31 This is an unreasonably punitive proposal.

2.32 Similar automatic disqualification provisions in the corporations law apply only to serious criminal conduct[20], and there is no equivalent capacity in corporations

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[17] Mr Nolan, Ai Group, *Hansard*, p. 9.

[18] Ibid., p. 10.

[19] Mr Bob Bennett, DEWR, *Hansard*, Canberra, 22 October 2003, p. 34.

law for the Minister to bring such actions. DEWR admitted that disqualification from holding office for civil offences under the Corporations Act is not automatic[21].

2.33 Automatic disqualification of a union official can only be reduced or set aside on application to the Federal Court – a costly and time-consuming process. DEWR admitted that it did not know and 'have not tried to work out' what the estimated cost of such applications or proceedings would be[22].

Minister's intervention

2.34 This bill increases the capacity of the Minister to continue proceedings against a union or its officials or employees after a dispute is resolved. This is of concern as it could inflame or prolong disputes. This concern is acknowledged by the Ai Group, who gave evidence that their:

> …preference is that matters be resolved between the parties at the enterprise level…once the matters are resolved at the enterprise level… that is preferably where it should finish[23].

Improved remedies for unprotected action

2.35 There was no evidence presented to the committee that would justify the changes to section 127 and related provisions proposed in this bill.

2.36 The Government is trying for the third time to change section 127 to make it harder to take industrial action. Two previous attempts did not pass the Senate, and we see no reason to change our view now, particularly given that this bill contains provisions that are even more unbalanced than previous proposals.

2.37 Similar provisions in the government's Workplace Relations Amendment (More Jobs, Better Pay) Bill 1999 explicitly applied to lockouts as well as strikes. This bill is silent on the issue of lockouts. Neither the 1999 Bill nor the Workplace Relations Amendment Bill 2000 version of these provisions, sought to impose a biased new set of criteria for the Commission to consider in making interim orders.

2.38 The weight of the evidence presented to the committee does not in any way support the case for legislative change in respect of the handling of section 127 applications. In fact, evidence suggests that the system is working well.

2.39 For example, despite their submission supporting this bill, the Ai Group's evidence supports the view that changes of the magnitude proposed by this bill are not required:

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[20] Submission 11, ACTU, p. 13.

[21] Mr Bennett, DEWR, *Hansard*, p. 31.

[22] Mr Smythe, DEWR, *Hansard*, p. 31.

[23] Mr Nolan, Ai Group, *Hansard*, p. 10.

> It is our view that, by and large, the provisions of section 127 of the act are quite effective…[24]

Timely remedy

2.40 The addition of words 'within 48 hours' are unlikely to enhance quick resolution of these matters, as section 127 applications already have to be listed 'as soon as practicable'[25] . It was undisputed that over 85 percent of section 127 matters are already listed within 4 days[26] .

2.41 There are a number of reasons why section 127 orders may not be listed immediately or may never reach the decision stage. Many section 127 applications are not pursued for the simple reason that disputes are resolved very quickly and do not require further action by the Commission[27] .

2.42 Although the Ai Group's submission suggested that there had been some instances of delay by the Commission in respect of section 127 applications[28], the Ai Group was unable to provide any specific examples of such delays, or any aggregate statistics. The Ai Group mentioned 'four matters' where delays were experienced but was unable to provide information about the extent of any delays, the effects of any such delays, or the names of the workplaces involved[29]. The vagueness of this evidence must count against it being considered with any weight whatsoever.

2.43 DEWR only provided one example of a case in which the timing of a decision in respect of a section 127 order was of concern[30]. It provided no statistical evidence that there was a systemic problem in respect of the Commission's handling of section 127 applications. To the contrary, in its submission it noted that:

> The Commission has generally been responsive and prompt in dealing with section 127 applications[31]

2.44 Further, if the Government is concerned about inefficiencies in the handling of section 127 applications, it could assist the Commission with improved resources or other administrative action. However, DEWR admitted that it was not aware of any non-legislative action proposed or taken by the Government to assist the Commission to deal with section 127 applications[32].

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[24] Mr Nolan, Ai Group, *Hansard*, p. 13.

[25] Submission 11, ACTU, p. 25.

[26] Ms Rubinstein, ACTU, *Hansard*, p. 4.

[27] Ibid., p. 4.

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

[29] Mr Nolan, Ai Group, *Hansard*, p. 12-13.

[30] Submission 8, DEWR, p. 24.

[31] Ibid., p. 24.

[32] Mr Smythe, DEWR, *Hansard*, p. 33.

Unbalanced criteria

2.45 Similar provisions to those in this bill have been tried before by this Government, and they have failed in the Senate because they were unbalanced and unwarranted.

2.46 However, this bill contains one key innovation – it blatantly seeks to corrupt the impartiality of the Australian Industrial Relations Commission – by requiring that the Commission skew its consideration of section 127 matters in favour of employers.

2.47 The bill would constrain the discretion of the Commission by inserting new considerations for the determination of section 127 applications, which are so one-sided that they would effectively require the Commission to be biased towards employers.

2.48 Imposing a requirement of bias on an impartial umpire can only be designed to damage the reputation of that body and its standing in the community, and must be vigorously opposed.

Interim orders

2.49 The Commission already can and does make interim orders[33]. DEWR agreed that interim orders can be made, but not clearly enough for the Government to be entirely satisfied.[34]

Conclusion

2.50 These bills are blatantly unbalanced and, if passed, would further erode the rights of working Australians and the unions that represent them.

2.51 The evidence presented to the committee shows that these bills will not assist in the efficient operation of our industrial relations system, and that these bills are instead likely to increase the risk of ongoing conflict. There are many reforms to the Workplace Relations Act that could assist with the resolution of industrial disputes, but none of them are contained in these three bills.

Therefore, Opposition Senators strongly recommend that the three bills be rejected.

Senator George Campbell

[33] Submission 11, ACTU, p. 26.

[34] Submission 8, DEWR, p. 29-30.