Chapter Three

Australian Democrats' Report

1.1 The following minority report deals with three interrelated workplace relations bills:

Workplace Relations Amendment (Improved Remedies for Unprotected Action) Bill 2002;

Workplace Relations Amendment (Codifying Contempt Offences) Bill 2003

Workplace Relations Amendment (Compliance with Court and Tribunal orders) Bill 2003

1.2 Before I address the Bills separately, I will make some remarks.

1.3 The Democrats are committed to negotiating meaningful industrial relations reforms through the Senate. We will consider these three bills before us on their merits.

1.4 The Majority Report notes that the aim of these bills is to reinforce the Government's determination to have a fully functional industrial relations system by ensuring the integrity of the Commission is maintained, and that these Bills will ensure that unions that disregard the law are penalised appropriately.

1.5 Firstly, the Democrats support the Government's aim to ensure the integrity of the Commission is maintained, but we perhaps differ with the government on how best to achieve that.

1.6 The Australian Democrats have a long tradition of supporting the AIRC having an independent discretion to determine industrial relations matters on their merits. Discretion of course is never open-ended, but it has long been our view that wherever possible such discretion is a better guarantor of fairness and flexibility.

1.7 The Democrats also believe that one of the weaknesses of the current system is the lack of powers the AIRC currently has to arbitrate and conciliate disputes. The Democrats argue that the capacity for the AIRC to resolve disputes on its own motion be increased and that resources to the AIRC also be increased to ensure the timely resolution of disputes.

1.8 Secondly, the Democrats believe that the rule of law must apply. If the law is being flouted we support stronger law, but increased powers are only justified where there is sufficient evidence that a real and significant problem exists.

1.9 We are disappointed that the government has failed to provide data and evidence that demonstrates the imperative to undertake all the proposed changes.

Instead the Committee heard evidence that non-compliance on section 127 orders were infrequent, and that action under 299 (1)(e) has never occurred.

Workplace Relations Amendment (Improved Remedies for Unprotected Action) Bill 2002

1.10 The distinction between unprotected and protected action is vital in law and practice. It is a matter of regret that the Department has little data on the scale, extent and nature of industrial disputes under these two heads. It makes it difficult to design appropriate legislative responses to either.

1.11 In principle by its nature unprotected action is deserving of improved legislative remedies to lessen its occurrence.

1.12 The Government argue that this Bill will facilitate speedier access to a remedy in response to unprotected industrial action, by encouraging a decision on a section 127 application within 48 hours.

1.13 The Act already requires that the Commission must hear and determine an application for an order under this section as quickly as practicable.

1.14 We also heard evidence from the Government that "section 127 has generally proved to be an effective mechanism[1] … and that the Government recognises that the majority of section 127 applications are handled reasonably expeditiously, but from time to time there are cases were delays occur'.[2]

1.15 As mentioned in the opening statement, the Democrats support the AIRC having an independent discretion to determine industrial relations matters on their merits, and would argue that on the evidence available to us the AIRC do appear to be dealing with applications as quickly as practicable.

1.16 The Democrats would question whether the problem is one of lack of resources to assist the AIRC to process the applications and make orders.

1.17 The bill also deals with the issue of interim orders. Again the Government's own evidence suggests that the Commission is already able to make interim orders:

> The utility of section 127 orders of an interim nature was recognised in the Coal and Allied case about the dispute at Hunter Valley No. 1 mine in 1997. In that dispute the Commission made an order, which it described as interim, because in it's view it was necessary:
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> … that the Commission should be in a position to determine the issues that arise in this matter free from the pressures and distractions of continuing industrial action.[3]

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[1] Bills Digest, No. 33. 2002-03, p. 4.

[2] Mr James Smythe, DEWR, *Hansard*, Canberra, 22 October 2003, p. 33.

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

1.18 The Democrats' previous position on this matter is worth reiterating:

> It may be appropriate to give the Commission the discretion to issue interim orders if the hearing is likely to be lengthy, balancing the rights of both parties. Such an approach would seem more reasonable than a mandatory 48 hour rule… If it were to be supported, it would need to be amended… to 72 hours using the precedent in section 166A and… qualified by a note indicating that this is an exceptional power that must only be used if the Commission considers that it will likely result in the resolution of the dispute.[4]

1.19 The Democrats must also consider whether to propose to amend the WRA to require all agreements to provide effective dispute resolution mechanisms. These may assist the AIRC to arbitrate disputes as a better guarantee of fairness and flexibility, as opposed to the alternative of litigation and sanctions.

Workplace Relations Amendment (Codifying Contempt Offences) Bill 2003

1.20 This bill aims to codify the generic criminal contempt offence – 299 (1)(e) - provisions to 'ensure that the Commission is properly protected from contempt style behaviour and perjury'.[5]

1.21 Once again, in principle reinforcing the rule of law is very attractive to the Democrats, but given that the Government provided evidence that no action under 299 (1)(e) has ever occurred,[6] the Democrats must question how much real need there is for this amendment.

1.22 We will need to examine the amendments and the Government's justification further.

1.23 With respect to increasing penalties, the Democrats support tougher penalties for those who purposely ignore Commission and court orders, but will need to examine these specific proposed amendments and penalty recommendations with regard to their deterrent effect.

1.24 We note that in response to a question asked by the Chair as to what she considered the problem was with updating the financial penalties, Ms Rubeinstein from the ACTU stated that:

> updating the penalties is not the major problem; it is the changing of the matters to which the penalties apply that is the key issue. [7]

1.25 We also note the concerns raised about the potential for cumulative penalties, where someone could incur a civil penalty and also face criminal contempt penalties.

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[4] Democrat Minority Report, Workplace Relations Amendment Bill 2000.

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

[6] Ms Natalie James, DEWR, *Hansard*, Canberra, 22 October 2003, p.31 and Bills Digest No. 13 2003-04.

[7] Ms Linda Rubinstien, ACTU, *Hansard*, Canberra, 22 October 2003, p. 6.

We note further the proposed new prohibitions on giving false evidence, which the Bills Digest comments on as follows:

> unlike section 35 of the Crimes Act, this offence does not require that the false evidence touch on matter material to the proceeding.[8]

Workplace Relations Amendment (Compliance with Court and Tribunal orders) Bill 2003

1.26 The Bills Digest for this bill highlights some interesting issues in relation to the proposed amendments to provide a mechanism for the Minister to seek financial penalties for non-compliance with orders of the AIRC and Federal Court. The Bills Digest notes that:

> It would appear that the conduct that has inspired these proposals is the refusal of some high profile union officials to comply with Commission orders issued under section 127 of the WR Act to cease industrial action… such orders are already enforceable by the Federal Court under section 127(6) of the WR Act but it would appear that some employers are reluctant to press their rights under this provision.[9]

1.27 The Bills Digest goes on to provide a case study that encapsulates the apparent problem:

> In another case, Justice Merkel, on 29 May 2000, found the Secretaries of the Victorian Australian Manufacturing Worker's Union and Electrical Trades Union both guilty of contempt of court. His Honour found that they had wilfully breached the orders and exacerbated the breach by telling journalists of their intention to defy the orders. The Australian Industry Group, which brought the original action, did not seek to enforce the failure to pay the fine by the AMWU Secretary as the fine of $20,000 would be going into consolidated revenue. The Attorney-General also did not consider it his duty to enforce the fine as it was considered the enforcement of a private right. Justice Merkel noted that a refusal of a duty to enforce could raise the issue of obstructing the course of justice and that if such refusals to enforce continued, then the Courts should make provisions for the enforcement of its own penalty orders for contempt.[10]

1.28 It is clear that a mechanism currently exists to deal with section 127 orders, and that for one reason or another it is not being utilised.

1.29 The Democrats are not convinced this necessarily justifies the involvement of the Minister for Workplace Relations, especially given the proposed provisions of this bill applies to ***any*** order or direction of the Commission or Court, and not just orders for the enforcement of injunctions to prevent strike action[11].

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[8] Bills Digest No. 13, 2003-04, p. 9.

[9] Bills Digest, No. 171, 2001-02, 24 June 2002.

[10] Bills Digest No. 134, 2002-03, p. 3.

[11] Ibid., p. 2.

1.30 Nor do the Democrats think that the Minister for Workplace Relations should have this power to seek financial penalties, rather than the Commonwealth Director of Public Prosecutions (DPP), or as Justice Merkel argued, the Courts. Justice Merkel said the Courts should make provisions for the enforcement of its own penalty orders for contempt.

1.31 We will explore this issue further prior to debating the bill.

1.32 With respect to the proposed disqualification amendments, the Democrats, as previously stated, support tougher penalties for those who purposely ignore Commission and court orders, and therefore will consider these amendments on merit. However we note that several issues were raised in the Bills Digest and through the Senate inquiry that will need to be taken into consideration.

1.33 In comparing the proposed provision with Corporations Law, the Bills Digest notes:

> In the present Bill, contrary to the corporate governance disqualification provisions, applications are brought by the Minister rather than a body equivalent to ASIC, and there is no additional requirement that a court be satisfied that the disqualification is justified. As noted in the Main Provisions section below, the disqualification in the present Bill is automatic but then subject to appeal.[12]

1.34 Associated with concerns raised about the appropriateness of 'automatic' disqualification, was the costs that would be incurred to a union official, for example, of applying to a federal Court not to be disqualified

Senator Andrew Murray

[12] Ibid., p. 4.