The Senate

Employment, Workplace Relations and Education Legislation Committee

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

Provisions of the Workplace Relations Amendment (Codifying Contempt Offences) Bill 2003

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

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Secretariat

Senate Employment, Workplace Relations and Education
Legislation Committee Secretariat
The Senate
Parliament House
Canberra ACT 2600
Phone: 02 6277 3520
Fax: 02 6277 5706
E-mail: eet.sen@aph.gov.au
Internet: www.aph.gov.au/senate_employment

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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…
>
> 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.
>
> …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.

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.

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:
>
> … 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.

Appendix 1

List of submissions

No.	Submission from:
1	Australian Chamber of Commerce and Industry
2	Australian Liquor, Hospitality and Miscellaneous Workers Union
3	Shop Distributive and Allied Employees' Association
4	Mr Albert Littler (CFMEU)
5	CPSU
6	CFMEU (Construction and General Division)
7, 7A	Australian Industry Group
8	Commonwealth Department of Employment and Workplace Relations
9	International Centre for Trade Union Rights
10	Australian Manufacturing Workers' Union
11	ACTU

Appendix 2

Hearings and Witnesses

Canberra – Wednesday, 22 October 2003

Australian Council of Trade Unions
Ms Linda Rubinstein, Senior Industrial Officer

Australian Industry Group
Mr Peter Nolan, Director – Workplace Relations (Victoria)

Shop Distributive and Allied Employees' Association
Mr John Ryan, National Industrial Officer

Australian Manufacturing Workers' Union
Mr Glenn Thompson, Assistant National Secretary – Metals Division

Department of Employment and Workplace Relations
Mr James Smythe, Chief Counsel, Workplace Policy and Legal Group
Mr Bob Bennett, Acting Assistant Secretary, Legal Policy Branch 1, Workplace Relations Legal Group
Ms Diane Merryfull, Assistant Secretary, Legal Policy Branch 2, Workplace Relations Legal Group
Ms Natalie James, Workplace Relations Legal Group

Attorney-General's Department
Mr Geoff McDonald, Assistant Secretary, Criminal Law Branch, Criminal Justice and Security Division

Appendix 3

Tabled Documents and Additional Information

Public Hearing – Canberra, Wednesday, 22 October 2003

Tabled documents:

Date	From:
22 October 2003	**Department of Employment and Workplace Relations** Examples of non-compliance with Australian Industrial Relations Commission Orders

Additional Information

Date	From:
22 October 2003	**Department of Employment and Workplace Relations** Webpage from Australian Securities & Investments Commission: 02/376 ASIC annual report 2001-02: Tackling ethics and governance http://www.asic.gov.au

Answers to Questions on Notice

Date	From:
29 October 2003	**Australian Industry Group** Mr Peter Nolan, Director, Workplace Relations
29 October 2003	**Department of Employment and Workplace Relations**