Majority Report

1.1 On 16 March 2005 the Senate referred to this committee the provision of the Building and Construction Industry Improvement and the Building and Construction Industry Improvement (Consequential and Transitional) Bill 2005.

Background to the bill

1.2 This bill replicates part of the bill of the same title introduced in 2003, and which lapsed when the Parliament was prorogued for the 2004 elections. It was introduced in the House of Representatives on 9 March 2005 by the Minister, Hon Kevin Andrews MP. The Minister cited the findings of the Cole Royal Commission as identifying the sources of industrial problems in the building and construction industry.

1.3 The immediate spur to this legislation was the actions of unions, particularly in Victoria, in threatening industrial action aimed at coercing employers to sign enterprise agreements before the current round of enterprise agreements expired. These threats occurred during 2004, but since the election, and with the likelihood of the Senate passing Government bills after 1 July 2005, increased union pressure for favourable agreements was considered likely.[1] Such industrial action would be unlikely to be protected under current provisions of the Workplace Relations Act. The committee notes that the legislation provides for retrospective effect from 9 March 2005, the date of the bill's introduction. The Government's announcement about this retrospectivity attracted some attention at the time, a point to be noted in regard to comment about retrospectivity during this inquiry.

1.4 The Government has expressed its concern that should unions be successful in reaching new agreements with employers, they may be passed on to parties further down the contractual chain without there taking place any genuine negotiation.[2] The widespread use of pattern bargaining in the industry would probably encourage this development.

1.5 There remains an element of doubt about this, and it is possible that existing remedies are insufficient to support employers who resist union pressure.[3] The Government notes the decision of the Federal Court in the *Emwest* decision[4], in which it held that a union may take industrial action during the course of a certified

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1 See article 'Andrews targets building deals', Mark Scully, *Australian Financial Review*, 26 April 2005, p.7

2 Department of Employment and Workplace Relations (DEWR), *Submission 4*, para.9

3 Explanatory Memorandum, para 9, p.3

4 *Emwest Products Pty Ltd v Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union* [2002] FCA 61 (6 February 2002).

agreement in relation to a matter not included in the agreement. The provisions of the bill which strengthen the position of employers are set out below.

1.6 The Government has announced its intention of reintroducing bills covering the residue of matters included in the 2003 bill, and the committee understands this will occur in the second half of 2005.

Key provisions of the bill

Definition of building work

1.7 The committee majority notes the wide definition given to building work, which is to include fit-out, restoration, repair and demolition, and prefabrication of made-to-order components of buildings. Regulations are to define particular activities, as circumstances require.

Definition of industrial action

1.8 Chapter 6 of the bill makes certain forms of industrial action in the industry unlawful, and provides for easier legal remedies against unlawful action. In contrast to provisions in the Workplace Relations Act, which relate only to Commonwealth law, the definition of building industrial action in this bill includes action taken in violation of state and territory laws. The definition of 'industrial dispute' is broadened. On the contentious matter of health and safety, which is often a pretext for unrelated industrial action, the onus is placed on the employee to prove that industrial action was based on reasonable concern about risk of injury or ill-health.

1.9 The bill introduces a statutory concept of 'unlawful industrial action' in the industry. This is defined as 'all constitutionally-connected, industrially motivated building industrial action that is not excluded action', as defined in clause 72. An unlawful industrial action would include a demarcation dispute between unions. It would also include industrial action taken before the nominal expiry date of a certified agreement. This clause is drafted so as to override the Federal Court's decision in the *Emwest* case.

Penalties and enforcement

1.10 Civil penalties for unlawful industrial action are provided, and these have been considerably increased. Unions taking unlawful industrial action can be fine up to $110 000. The bill also increases penalties for contravention of the 'strike-pay' provisions of the Workplace Relations Act, where employees make payments for the support of workers on strike. The maximum penalty is increased from $33 000 to $110 000.

1.11 Courts may order compensation to be paid to anyone suffering damage as a result of unlawful action. Third parties - those not directly involved in a dispute but suffering damage nonetheless - may also be compensated. The bill also widens the scope of possible offenders to include those who aid and abet, or advise, or conspire

with those more directly involved in unlawful action, and those who have some knowledge of the action.

Consideration of evidence

1.12 The committee received 11 submissions. It held a public hearing on 4 May at which it heard from the Department of Employment and Workplace Relations, six union or industry organisations, and from one individual witness. The list of submissions and witnesses are in appendices to this report. Questions and discussions ranged across all aspects of the legislation and beyond, to the hypothetical matters likely to be included in the substantial amendments to the bill in the shape of new chapters covering industrial relations matters related to the building and construction industry. This committee revisited a number of key issues dealt with in 2003-04 by the references committee on the 2003 bill.

1.13 The bill received strong support from employer organisations whose members provided them with up-to-date information on recent and continued union campaigns aimed at creating instability in the industry in the lead-up to new agreement negotiations. This softening-up strategy has long been endured, but can no longer be tolerated. While the Australian Industry Group has some reservations about some clauses in the bill, it gave unequivocal support to the Government in its endeavours to legislate for peace and stability in the industry. Commentary and analysis of the main issues considered by the committee, and as represented by Government senators, are set out below.

The definition of the 'building industry'

1.14 There was concern expressed by both the Australian Industry Group (AiG) and the Communications Electrical and Plumbing Union (CEPU) about the wide scope of the definition of the 'building industry'. The perspective of each of these organisations was different, but their objections ran on parallel lines. The AiG was concerned that the broad-based definition favoured by the Government would result in a campaign by general manufacturing workers engaged in construction-related to the building industry, such as manufacturers of bathroom fittings, doors or lifts, to have included in enterprise agreements benefits currently restricted to mainstream building workers.[5] This flow-on through the metals industry and other industries would affect the profitability of general manufacturing.

1.15 The CEPU saw the proposed definition as depriving workers of rights they might enjoy as non-building workers, should the original provisions of the 2003 bill be enacted any time after July 2005. It argued that it was inappropriate for electricians working for railway infrastructure authorities to be classed as working in the construction industry.[6]

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5 AiG, *Submission 9*, p.3

6 Mr Lindsay Benfell, CEPU, *Committee Hansard,* 4 May 2005, p.9

1.16 DEWR officers explained to the committee that the Government had noted the objections to the definition of building work by some employer organisations, but considered their fears to be overstated.

> .. I think it is overstating it to say that, if you fall within the definition of building industry work, you are for all purposes part of the building and construction industry. The bill does say that if you are performing that sort of work then the prohibitions that the bill applies to conduct relating to building industry work apply to you. It does not mean that, if you are a truck driver who sometimes delivers to building sites, that for all purposes you are part of the building and construction industry. It just means that if you engage in industrial action associated with work associated with the building industry then the prohibitions that this bill imposes will apply to you.[7]

1.17 The committee was also told that the bill provides a mechanism for regulating out certain classes of work that might be captured inadvertently by this legislation. If the Government believed that that was not appropriate to the objectives of the legislation it would be possible to make a regulation which excised them from the coverage of the bill.[8]

1.18 The committee noted that there was less concern about the definition of 'unlawful industrial action'.

1.19 Government party senators support policy and the substance of clauses in the bill relating to these matters.

Retrospectivity

1.20 A number of submissions and witnesses commented on the retrospective operation of the bill in regard to unlawful industrial actions after the date of the introduction of the bill: 9 March 2005.

1.21 Union submissions pointed to the fact that few unions or individuals would be aware of this clause in the bill, and the implications for those unaware that they would even be covered by the scope of the definition of 'building work' would be doubly severe. Government senators agree that retrospectivity should be carefully considered before its provision in legislation, and used sparingly. There will be circumstances that warrant its use in this legislation, particularly in light of the record of some unions in engaging in provocatively illegal behaviour. The committee majority believes that retrospective prosecutions would not be lightly undertaken, and that it is inconceivable that advantage would be taken of it to launch indiscriminate prosecutions.

1.22 There was some discussion at the hearings for this inquiry as to the incidence of retrospective legislation over recent parliaments. According to research by DEWR,

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7 Mr James Smythe, Chief Counsel, DEWR, *Committee Hansard*, 4 May 2005, p.56

8 ibid., p.58

at the request of Senator Murray, the incidence of retrospective legislation, which for agreed purposes excludes those cases which are remedial, which are benign, or which deal with tax laws, has been relatively constant. The response from DEWR to Senator Murray's question is at Appendix Z of this report. It is beyond the scope of this report to comment on the comparative significance of the retrospectivity provided for in this bill. While giving a customary caution about retrospectivity, the Senate Scrutiny of Bills Committee recognises that the extent which retrospectivity can be justified, or otherwise, is in each instance a matter for the Senate to determine.[9]

Pre-emptive negotiations of enterprise agreements

1.23 This issue was the *raison d'etre* of the bill. The committee heard much conflicting evidence of the extent to which this practice was occurring. The ACTU told the committee that the current round of negotiations involving the CFMEU, intended to role over current agreements was lawful and likely to result in improved stability in the industry.[10] This, Government party senators note, is the union whose Victorian branch secretary, as reported in *The Age* on 13 October 2004, promised that employers had a choice: they could negotiate industry-wide (pattern bargaining) agreements in 2005 in a 'peaceful climate' or, by following the Government's urgings, in a climate of 'crippling disputes'.[11] This comment was punctuated by language of the kind which deliberately scorns the decencies of civilised discourse. Government party senators note this language of class warfare: the proclamation of an image of thuggery and contempt. It highlights the need for a cultural change in the industry.

1.24 The most compelling recent evidence of the practice of disruption was presented by an official of the Queensland branch of Master Builders Australia, who described the tactics employed by the state branch of the CFMEU, known in that state as the Builders Labourers Federation. In an attempt to conduct a state-wide campaign for early re-negotiation, the union has orchestrated a series of threatened stop-work meetings over issues like annual leave, Saturday work rosters and variations to nine-day working week rosters. Sporadic stop-work meetings were held, and there have been frequent site meetings, all of then contrary to enterprise agreements and therefore illegal. The unions have not reported to prolonged strikes, as these would breach the relevant provisions of the WRA. What industrial action has taken place has been highly disruptive.

1.25 The MBA submission included a large amount of evidence of union intimidation, particularly in Western Australia, Victoria and Queensland. There has been no diminution in the level of industrial action. Unions in the building and construction industry are responsible for about 30 per cent of the total workdays lost around the country, even though the industry employs only about 8 per cent of the

9 Senate Standing Committee on the Scrutiny of Bills*, Alert Digest*, No.3, 2005, p.7

10 Mr Richard Marles, ACTU, *Committee Hansard,* 4 May 2005, p.19

11 MBA, *Submission 5*, footnote to p.13

total workforce.[12] A high proportion of these disputes appear to be related to the negotiation of enterprise agreements. Details are in the following table.

Construction Industry Working Days Lost 2000-2004 (thousands)

Year to December	National Total	Construction Industry	Construction as a percentage of total
2000	469.1	108.8	23.2
2001	393.1	120.7	30.7
2002	259.1	101.6	39.2
2003	439.5	123.3	28.1
2004	379.8	120.1	31.6

Source: ABS Cat No 6321.0.55.001, December quarter 2004, released 17 March 2005.[13]

1.26 One of many instances of this was described by the Australian Industry Group to the committee at its public hearing. It was related how the AMWU in Victoria attempted to pattern bargain for an enterprise agreement during the last bargaining round. The AMWU

> sent out an identical notice initiating bargaining periods right throughout the industry to 1,000 companies. They then had a statewide stoppage on the same day at the same time and sent out the same protected action notice throughout the whole industry. That is just an industry wide stoppage misrepresented as a stoppage about enterprise bargaining. We pursued that matter in the industrial commission with the use of a QC before Justice Munro. There were a lot of issues. But within the space of two or three days, which was the only time we had to organise that hearing, there was evidence of a large number of workplaces that had not even started bargaining, they had no idea where this notice came from or why it was there. The employer went to the employees and said, 'We have just had a notice saying you're going to go on strike. What does this mean?' The employees said, 'We did not even know we were going on strike. We know nothing about it.' So it just a misrepresentation of industrial action rights that were put into the act in 1993-94 for enterprise bargaining, and it is a misrepresentation to use that for industry bargaining.[14]

1.27 Government party senators take the view that such union practices as have been described in the submissions to this inquiry are intolerable in a modern industrial

12 Master Builders Australia, *Submission 5*, p.3

13 Provided in *Submission 5*, Master Builders Australia

14 Mr Stephen Smith, AiG, *Committee Hansard,* 4 May 2005, p.6

society. Harassment and intimidation have no place in modern industrial relations. Whether such practices are a cause or an outcome of an industry beset by obsolete practices is academic. Government party senators believe that strong intervention is needed at the point where most of the damage occurs. At some point an archaic work culture must be reformed. The civilising of workplace relations is the place to start.

Conclusion

1.28 At the heart of this legislation lies the Government's determination to deal with coercion by unions to achieve their ends in defiance of the Workplace Relations Act. During the public hearing for this inquiry, members of the legislation committee traversed old ground with questions and responses on allegations of union intimidation, having dealt extensively with this matter during the reference committee's inquiry into the findings of the Cole Royal Commission and the provisions of the Building and Construction Industry Improvement Bill 2003.

1.29 The committee majority is concerned about false perceptions of so-called Government 'union-bashing' legislation, and the failure of the Government's critics to recognise cause and effect. If building union leadership in all states was more effective through being exercised more intelligently, and if in all circumstances this leadership showed more respect for the law, the culture of the industry would be sufficiently vibrant and responsible not to require such targeted legislation as is currently before the Senate.

1.30 As was revealed in the hearings held by the references committee inquiry into the 2003 bill, the behaviour of both the Western Australian and Victorian branches of the CFMEU is characterised by a confrontational culture which sees industrial relations as a theatre of class warfare. The committee notes that as a consequence building costs in Perth and Melbourne are significantly higher than in other cities. The economic and social benefits likely to flow from the reform of the building industry will be quickly apparent, and will result in benefit to the whole nation. This bill is but one step in promoting this advance.

Recommendation

The committee majority commends this bill to the Senate and urges that it be passed without amendment.

Senator Judith Troeth
Chair