# Chapter 2

# Opposition Senators' Report

## Introduction

2.1 The introduction into Parliament of the Building and Construction Industry Improvement Bill 2005 is in its way a part response to the reference committee's report *Beyond Cole*, tabled in June 2004. The actual response is long-delayed, but the Opposition party senators see the bill as pursuing a blinkered course of policy toward a very distant but ever elusive goal of a union-free building and construction industry.

2.2 The Government's 'vision' for the building and construction industry is one of 'command and control'. That is, what the Government refers to as the 'proper balance' in workplace relations will see a workforce disciplined by individual workplace agreements, and therefore a 'flexible' resource for an increasingly efficient and prosperous industry. Before this nirvana is reached, however, there are some matters of the real world to be dealt with, and this bill is but the first of a number of bills to provide for conditions which will transform the culture of the industry. As the majority report sets out in detail, the Building and Construction Industry Improvement Bill 2005 is far more limited in its scope than the original bill which was the subject of the Senate inquiry. But the policy underpinnings are the same, as are the assumptions which underlie these. The bill makes a bold demand on the power of legislation to alter practices and behaviour, characteristic of the building and construction industry, which have been operating for well over a century.

2.3 As described in the majority report, the genesis of this legislation is the fear that the unions involved in building and construction will make last-ditch attempts to secure for their workers favourable employment conditions in advance of legislation likely to pass the Senate post-July 2005, which will eventually see these conditions greatly diminished. The bill broadens the scope of what may be defined as 'industrial action' and provides for penalties to be imposed for new breaches of the Workplace Relations Act, and for increased penalties on current offences. All of this is to operate retrospectively to 9 March 2005.

2.4 In the view of Opposition senators, this is a bill which arises from groundless fears the Government has of the need to deal with a sudden rush of union militancy. The Government alone remains convinced of the credibility of the findings of the Cole Royal Commission and remains both alert and alarmed. The introduction of the Building and Construction Industry Improvement Bill 2005 is unlikely to affect the operations of the industry or, it is to be hoped, the exercise of rights of any of its participants, including unions, but the Government presumably believes it necessary to maintain its legislative offensive. The Opposition finds class warfare legislation disgraceful, even if its effect is minimal, and deplores the misuse of Parliament in its making.

## Pre-emptive negotiation of enterprise agreements

2.5 The Government has claimed that a flurry of union activity has signalled a pre-emptive campaign to bring forward negotiations for new enterprise agreements. It appears that only the Government has been 'spooked' by these reports, but for the Government perception becomes reality, and provides the imperative for action. 'Reality' as is more commonly understood, is less dramatic. As the submission from the Rail, Tram and Bus Industry Union points out:

> There has been no evidence provided by the Federal Government that unions in the building and construction industry and, in particular, the CFMEU in Victoria, is or has engaged in unlawful industrial action in any discussions it may be having with employers to re-negotiate the current certified agreements. Nowhere in the second reading speech or anywhere else that we are aware of does the Minister go beyond accusation and allegation into hard and fast evidence.[1]

2.6 The ACTU reminded he committee that this Government was highly interventionist in the field of industrial relations, and far from supporting the notion of a 'smaller the better profile for government, it had taken a highly regulatory approach. This included concocting legislation to favour one of the parties involved in negotiations.[2] Industrial relations, it appears is far too important to be left to the interested parties involved, to negotiate their way around agreements and disputes. The ACTU sees value in early negotiations of agreements.

> Right now, the CFMEU are engaging in negotiations to try and arrive at enterprise agreements which will roll over existing agreements for another three years. That is a completely legitimate thing to do; there is no evidence that that is being done in an unlawful way. In fact, if they are successful in doing that—and the indications are that they will be—it will add stability and security to the construction industry. But what it will also do is place those employers and those workers in settled industrial relations which will go far beyond August of this year, at which time this government will introduce into this parliament what in our view would be a radical set of industrial laws, the essence of which is inciting and encouraging employers to exploit their work force.[3]

2.7 The ACTU acknowledged that it was likely that the Government 'could not bear' the thought that there may be some employees who may in some measure be protected against any 'onslaught' the Government may launch in the near future to further regulate and restrict the bargaining rights of employees and their unions.[4]

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1 Rail, Tram and Bus Industry Union, *Submission 1*, para.17

2 Mr Richard Marles, ACTU, *Committee Hansard*, 4 May 2005, p.20

3 Mr Richard Marles, op.cit, p.19

4 ibid.

2.8 Master Builders Australia (Queensland Branch) gave evidence to the committee describing recent attempts by the state branch of the CFMEU (known as the Builders Labourers' Federation in Queensland) to open negotiations for the next enterprise bargaining agreement. The current agreement expires in October 2005. It was readily conceded by the Queensland MBA that unions were within their rights in attempting to bring about early discussion on future enterprise agreements. Opposition senators also note that in the course of displays of union organisation, including 'stunts' about nine-day fortnights, 'sacred Saturdays' and a rush of annual leave applications, no offences were actually committed. Opposition senators agree that there must be agreement between parties as to when these negotiations begin, and they note the undertaking of the Queensland MBA that this will occur no later than three months before the end of the current agreement.

2.9 In the absence of evidence from the BLF, Opposition senators are restrained from rushing to judgement on this matter. They recognise that there appears to be a deterioration in relations between employers and unions in Queensland since the references committee visited Brisbane in February 2004 to hear evidence on the predecessor of this bill. The committee, or its individual members, heard both on and off the record of the amicable relationship which then existed.

2.10 Opposition senators do not place responsibility for this development on the majority of employers. There is considerable hard-nosed industry appreciation of the vital role of unions in the organising of labour hire and associated arrangements. The lean operations of large construction firms depend upon strong working relations with union organisers, although the Government shows no sign of having been informed of this.

2.11 Opposition senators believe it likely that previous good relations have, in a number of places, been undermined by a campaign of union vilification which has been part of the Government's policy of marginalising unions. This has been accompanied by notice given that unions will play little part in future processes to secure and preserve employee conditions. Unions are being placed under considerable pressure, and the consequence is not an intimidated union movement, but an assertive movement, and, perhaps, unfortunately for good industrial relations, showing some volatility in the face of determined attempts by the Government to ensure its future impotence. Unions have little choice but to respond to this provocation if they value their principles and acknowledge their historical and continuing role. The Government has ensured that its warnings of union militancy have become a self-fulfilling prophesy.

## Issues of definition

2.12 The broadest possible definitions for 'building work' and 'unlawful industrial action' are essential for the extension of the Government's drive for a new workplace culture across the whole workforce. The opposition of unions to this ambit definition has been made obvious. It is summed up most eloquently in the submission from the Rail, Tram and Bus Industry Union. Most of its members work under a federal award,

and even those who do not, mainly Queensland Rail employees will now be included within this legislation under the 'excluded action definition in clause 72. A major relevant federal award is the Railways Traffic, Permanent Way and Signalling Wages Staff Award 2003. As the submission states:

> Members involved in infrastructure maintenance work include fettlers, track repair machine operators, gang protectors, track inspectors and gangers. It would come as a great surprise to them to suddenly discover that, by Federal Government fiat, they have been deemed, at least for the purposes of the BCII 2005, to perform building work as building workers as part of the building and construction industry. They would quite rightly respond that their work does not include building or construction work. The cynical distortion and/or manipulation of the English language by the Federal Government to enlarge the catchment area for the application of this legislation can hardly do the credibility of the process of government any good.

2.13 Opposition senators note that the Australian Industry Group opposes the broad definition of 'building work' because it fears a flow-on of what it sees as generous building industry working conditions into the manufacturing sector. Normally, it would be expected that the Government would react sympathetically to this line of argument. The AiG has given no hint as to its speculations on why this advice from the country's peak industrial body should be rejected. There can be no other reason than the Government's expectation of advantage in quarantining a large sector of the workforce in an industrial relations regime in which the influence of trade unions is reduced to the point of being negligible. The fears of the AiG should be allayed.

2.14 The truth of this is only just apparent from advice given by DEWR.

> The definition is deliberately broad to ensure that application of the bill extends to the conduct of building workers, employers and organisations. The definition is appropriate to bring about the structural and cultural change the industry requires.[5]

2.15 That is, the Government will have the power that it needs to chase the rabbits down every hole. To claim that this power will be sufficient to 'reform' the whole industry is a very big claim, and counters the view that this has only benign effect.

2.16 Opposition senators reject as ingenuous the suggestion from DEWR that these are ambit powers. They are powers which the Government will use to the full, and the only limitations on their use will be a recognition, at some point in the future, of unforeseen consequences resulting in a breakdown in industry productivity and profitability.

2.17 There are so many anomalies which result from the broad definition of the building industry that protracted litigation will be necessary to sort matters out. The Government appears determined to create massive problems for itself and for building

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5 Mr John Kovacic, DEWR, *Committee Hansard*, p.52

industries and beyond through its insistence on this drafting. Committee senators believe that in its focus on short-term political objectives, and its obsessively punitive intentions toward the building unions, it is oblivious to the unforeseen and dangerous consequences of imprudent legislation.

***Overriding state laws***

2.18 Opposition senators also believe that the issue of the 'excluded action' definition is worthy of note. The bill takes up a recommendation of the Cole Royal Commission that industrial action protected under state and territory legislation will not be 'excluded action' for the purposes of this bill. That is, such action will be illegal. The ACTU pointed to the difficulties that may result from this clause relating to the 'tortured boundary' between Commonwealth and state laws. Small businesses would find themselves in trouble if they strayed into disputes with 'constitutional corporations' even as a result of a knock-on effect. The ACTU asked the question:

> …even if you assume that it is a valid exercise of power under the corporations power, how on earth does a small employer in the construction industry—and small employers are far and away the majority of employers in that industry—work their way through the myriad of laws and find out whether or not in any particular circumstance they are covered by state of federal law? It is perhaps impossible to imagine putting such employers and workers in a more complex legal situation.[6]

2.19 There are likely to be serious problems arising from a piecemeal exclusion of state laws from the national industrial relations regime. Opposition senators are opposed to this measure.

## Retrospectivity

2.20 The Opposition has serious concerns about the retrospectivity contained in this legislation, both in regard to the backdating of the effect of the bill to 9 March 2005, and to increased penalties. The Senate Scrutiny of Bills Committee noted in Alert Digest No 2 of 2005 that under Chapter 6 of the bill:

> industrial action which is currently lawful, or which currently falls within the definition of 'protected action', may be rendered unlawful by the bill and those taking part in such action retrospectively subjected to the 'sanctions and greater penalties' in the bill.

This committee heard rather forced attempts by officers of the Department of Employment and Workplace Relations to argue that retrospective legislation is 'not uncommon', and claiming that in each of the previous four parliaments there were over 100 bills with retrospective effect noted in reports of the Senate Standing Committee for the Scrutiny of Bills. But as noted by Senator Murray at the hearing, the overwhelming majority of these retrospective provisions have either a beneficial

6 Mr Richard Marles, ACTU, *Committee Hansard*, 4 May 2005, p.20

affect, make technical amendments, or relate to taxation measures. At the hearing, DEWR officers noted four bills 'that imposed penalties retrospectively'. The Scrutiny of Bills Committee made adverse comments in relation to those bills and restated its opposition to the retrospective imposition of criminal sanctions.

In the case of the Criminal Code Amendment (Anti-Hoax and Other Measures) Bill 2002, the Scrutiny of Bills Committee wrote to the Attorney-General expressing the view that retrospectively declaring something to be a crime would establish an unfortunate and undesirable precedent.[7] The Scrutiny of Bills Committee reiterated 'its concern at the use of retrospectivity in the creation of criminal offences' and sought an assurance from the Attorney-General that the provisions 'will not be used as a precedent for the retrospective creation of criminal offences in other circumstances.' The Attorney provided that assurance.[8]

Opposition senators are not persuaded that retrospectivity is any way mitigated by vigorous publicity by the Government. Retrospectivity is a legislative provision of last resort, a provision restricted to policy of national significance to do with security or criminal law: matters on which there can be agreement across the Parliament.

## Pattern bargaining revisited

2.21 The Government party senators' report has ignored the several references that were made in submissions and at the public hearing to the issue of pattern bargaining. It is the case that this bill does not deal explicitly with the issue but it can never be far away from any matter to do with enterprise bargaining. This report will deal with some of the evidence heard.

2.22 The continued ambivalence of the Australian Industry Group to the issue of pattern bargaining has been noted by the Opposition because it is considered to be far more representative of employer opinion than the views expressed by other employer organisations. AiG membership is considered likely to be rather more pragmatic in its approach because it represents industry art the 'top end'. Such firms are more accustomed to working with unions than are smaller businesses. AiG is selective in its support for pattern bargaining, but it expressed support for a policy that would allow pattern bargaining, while banning industrial action in support of pattern bargaining. It was firm in its recommendation that project agreement provisions were necessary. [9]

2.23 As previous reports from Opposition senators on this committee have pointed out, there is fairly strong evidence of support for pattern bargaining among employers. The CEPU provide the committee with up-to-date evidence of this.

> In relation to employers and whether they do or do not prefer pattern bargaining, we find in the electrical industry that they almost universally

7 *Fourth Report of 2002*, pp 158–9

8 ibid., pp.159-160

9 Mr Stephen Smith, AiG, *Committee Hansard*, p.5

> want pattern agreements, for the sorts of reasons you indicated. The main problem, they say, is that if there is no common level of payment achieved by a pattern agreement then it is very difficult for them to tender for work, not knowing what wage structures they are competing against. For example, yesterday I had a meeting with Spotless Asset Services, who maintain government buildings like this. They were concerned; they wanted to start negotiations early for the agreement that expires later this year to ensure that they are on par with their competitors, because it is a very competitive industry out there. We normally negotiate with the National Electrical Contractors in each state in relation to the industry. They prefer and do enter into agreements with us to provide for pattern agreements, because their members—that is, the members of the association—demand that they do so.[10]

2.24 Pragmatism and flexibility have become casualties of the excessively legalistic approach taken by the Government in the field of industrial relations. Opposition senators will not be surprised to see at some future time the Building Industry Taskforce launching a joint prosecution against an employer and a union for their collusion in coming to an agreement outside the narrow and prescribed path ordained by legislation.

## Conclusion

2.25 Opposition senators regard this legislation as obsessively punitive and opportunistic. Its genesis is Government concern about union actions taken in accordance with the Workplace Relations Act. The powers it purports to give employers in order to create 'balance' in enterprise bargaining processes are already provided for under current legislation. Yet it is setting up an extraordinary legislative platform which the Government intends to use to limit the scope of union activity across the whole of the industrial workforce. It is no consolation to Opposition senators that this grand scheme will eventually fail. The law can be perverted only so far before it becomes dysfunctional and manifestly at odds with the public good. The cost of this discovery will be felt first by employees, and soon after by employers and their shareholders and bankers.

### Recommendation

Opposition members of the committee urge that the Senate reject this bill.

Senator Gavin Marshall
Deputy Chair

10 Mr Lindsay Benfell, CEPU, *Committee Hansard*, p.14