

Australian Democrats' Minority Report

The Building and Construction Industry Improvement Bill 2005 and the Building and Construction Industry Improvement (Consequential and Transitional) Bill 2005, are short bills that replicate the enforcement and penalty provisions, and some of the provisions making certain forms of industrial action unlawful, of the very detailed Building and Construction Industry Improvement Bill 2003.

The Democrats made a comprehensive contribution to the Senate Workplace Relations and Employment Reference Committee Report *Beyond Cole - The future of the construction industry: confrontation or co-operation?*, which can be found at http://www.aph.gov.au/Senate/committee/eet_ctte/completed_inquiries/2002-04/building03/report/13dem.pdf. In that Report the Democrats rejected the *Building and Construction Industry Improvement Bill 2003*:

With the exception of targeted action needed in areas such as occupational health and safety and possibly in the area of agreement making with respect to project/site agreements, there was no evidence that convinced us that industry specific legislation was necessary. We did however identify some areas of the law that could be amended, but we saw no reasons why this should not and could not occur across and benefit all industries.

The Democrats strongly support the need for greater compliance with the law and more effective law enforcement. The Royal Commission identified weaknesses in the current mechanisms of enforcing laws of general application, including criminal law, industrial relations law, civil law, tax law and state law. Therefore another question we considered during this inquiry was that if one of the key findings of the Commission was a weakness in current enforcement mechanisms, then how will creating new workplace relations laws solve a problem that has been identified as failure of the market regulators across these fields of law?.....

.....The Democrats support one central proposition behind the Bills, that greater regulation and enforcement of workplace relations law is necessary. We do not support the second central proposition behind the bills, that industry specific legislation and sweeping new WRA provisions are necessary to achieve this aim.

[Because of fundamental philosophical and policy issues] the Building and Construction Industry Improvement Bills will be opposed outright by the Australian Democrats. They cannot be salvaged or amended. The problems in the industry and in other industries would be far better addressed by enforcement of existing law and the creation of a well-resourced independent National Workplace Relations Regulator.¹

1 Employment, Workplace Relations and Education Reference Committee, *Beyond Cole - The future of the construction industry: confrontation or co-operation?*, Democrat Minority Report, p 210-211.

The Democrats did however, through the Workplace Relations Amendment (Codifying Contempt) Bill 2003, support a three-fold increase of key penalty provision across all industry (the Government sought a ten-fold increase); and supported a limited increase in powers of the Building Industry Task Force as an interim measure until a National Industrial Relations Regulator could be developed.

One issue that was raised again at this inquiry (that the Democrats did not deal with explicitly in our previous minority report) is with respect to the definition of Building and Construction Industry. Concerns were raised by both unions (i.e. CEPU/TWU) and industry groups (i.e. AIG) that the definition was too broad and would capture large segments of the manufacturing and services industries within the coverage of the Bill. The Democrats are also concerned about this issue.

The Democrats are concerned that the Bill seeks to put into effect a retrospective definition of unlawful action. There are four main types of retrospectivity, the first being practical and necessary, the next two being positive and the last negative. It is often practical or necessary for some tax law to take effect from the date of announcement, subsequently confirmed by legislation; remedial retrospectivity that corrects mistakes or that is technical is usually beneficial; retrospectivity that is benign or beneficial to individuals or entities should be supported; retrospectivity which is adverse to those affected should generally be opposed.

As a general principle the Democrats do not support the use of retrospective legislation that acts to overturn existing contractual arrangements, makes previously lawful activity unlawful, or that acts to the detriment of individuals or organisations. This is not a party but a cross-party principle. It has long been a Senate and a parliamentary principle not to approve retrospectivity except in instances of fraud, illegality or exceptional circumstances.

There are two elements of retrospectivity that the Democrats believe are important. The first is that there is the element of natural justice, where retrospective legislation offends against the principles of natural justice and trespasses upon the basic tenet of our legal system that those subject to the law are entitled to be treated according to what the law says at the relevant time and according to what the law means at the time, subject to the courts interpretation. The second area is that of uncertainty, where retrospective legislation brings uncertainty to the environment in which the community and business operate.

On a practical note AIG was properly concerned that the very broad definition of the building and construction industry proposed by the Bill would effectively rope-in large segments of the manufacturing and services industries into the more onerous coverage of the Bill, and will (among other things) open them up to the union coverage and conditions that apply in the BCI. Very few employers, employees,

unions or other parties in these industries are likely to be aware that the Bill could cover their operations.²

The Australian Democrats must now work in the clear knowledge that post June 30 2005, the Government will have control of the Senate and will be able to pass any legislation they desire. The Government have made it quite clear that the Building and Construction Industry Improvement Bill 2005 and the Building and Construction Industry Improvement (Consequential and Transitional) Bill 2005 will pass the Senate in August and will be retrospective from its introduction on 9 March 2005.

We consider that until then we must do what we can to address issues of concern.

The circumstances in the building and construction industry have not changed much since the previous Senate inquiry. If anything there appears to have been less disputation.

The Democrats position on the appropriateness of reforms to BCI practices remains – we continue to argue that the problems in the industry and in other industries would be far better addressed by enforcement of existing law, and the creation of a well resourced independent National Workplace Relations Regulator.

With respect to this Bill we will attempt to address our concerns through amendments to the Bill.

Senator Andrew Murray

² AIG, *Submission 9*, p. 2.

