The Senate

Employment, Workplace Relations and Education Legislation Committee

Provisions of the Building and Construction Industry Improvement Bill 2005 and the Building and Construction Industry Improvement (Consequential and Transitional) Bill 2005

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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

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

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]

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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.

Appendix 1

List of submissions

Sub No:	From:
1	Australian Rail, Tram and Bus Industry Union
2	CEPU
3	Department of Employment and Workplace Relations
4	ACTU
5	Master Builders Australia
6	CFMEU
7	Australian Manufacturing Workers' Union
8	Centre for Employment and Labour Relations Law, University of Melbourne
9	Australian Industry Group
10	Transport Workers' Union of Australia
11	NSW Government

Appendix 2

Hearings and witnesses

Canberra, Wednesday, 4 May 2005

Australian Industry Group
Mr Jim Barrett, *General Manager, Construction*
Mr Stephen Smith, *Director, National Industrial Relations*

Communications Electrical Plumbing Union
Mr Lindsay Benfell, *Senior Industrial Officer*

Transport Workers' Union of Australia
Mr Linton Duffin, *Federal Legal Officer*

Australian Council of Trade Unions
Mr Richard Marles, *Assistant Secretary*
Ms Michelle Bissett, *Industrial Officer*

Dr John Howe, *Centre for Employment and Labour Relations Law, University of Melbourne*

Master Builders Australia
Mr Wilhelm Harnisch, *Chief Executive Officer*
Mr Richard Calver, *National Director, Industrial Relations*
Mr John Crittall, *Construction Director, Queensland branch*

CFMEU
Mr Tom Roberts, *Senior National Legal Officer*

Department of Employment and Workplace Relations
Mr John Kovacic, *Group Manager, Workplace Relations Legal Group*
Mr James Smythe, *Chief Counsel, Workplace Relations Legal Group*
Mr Peter Cully, *Director, Workplace Relations Legal Group*

Appendix 3

Tabled documents

Hearing: Canberra, Wednesday, 4 May 2005

Master Builders Australia

Document titled: Next RDO
Document titled: Know your rights under your EBA
Document titled: 36 Hour Week, No more sacred Saturdays

Appendix 4

Answer to Senator Murray's question regarding retrospectivity

As requested by the Committee, attached is a table setting out Bills that have been commented upon by the Senate Scrutiny of Bills in relation to retrospectivity.

As requested by Senator Murray, the list does not contain any Bills that:

- are purely remedial, in that they fix mistakes or technicalities in earlier Bills;
- are beneficial in their effect; and
- deal with taxation laws.

These categories are essentially the same as those categories where the Committee will not be critical of retrospective legislation, being where:

- apart from the Commonwealth itself they are for the benefit of those they affect
- they do no more than effect a "technical amendment" or correct a "drafting error"
- they implement a tariff measure in respect of which the relevant minister has published a date from which the measure is to apply.

Given the short timeframe in which the document has been prepared, we have relied upon the observations made in the Alerts Digest to make an assessment as to whether the Bill falls into the relevant category. We have not included any Bills where the Committee has simply noted that the Explanatory Memorandum is silent on whether or not there would be an adverse effect from the legislation being retrospective but have instead only included those where the Committee clearly considers that the legislation will have an adverse effect.

As requested by the Committee, also attached is the Department's response to the request relating to volume 23 of the Final Report of the Royal Commission into the Building and Construction Industry.

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Workplace Relations Implementation
Tel: (02) 6121 5286

Senate Employment, Workplace Relations and Education Legislation Committee Inquiry into the Building and Construction Industry Improvement Bill 2005 and Building and Construction Industry Improvement (Consequential and Transitional) Bill 2005

Bills commented on by the Senate Standing Committee for the Scrutiny of Bills in Alert Digests since May 1993 which sought to have retrospective impact, with the exclusions as requested by Senator Murray.

Bill	**Alert Digest**
37th Parliament	
Employment Services Bill 1994	12/94
Health Legislation (Professional Services Review) Amendment Bill 1993	06/93
Migration Legislation Amendment Bill (No.2) 1994	10/94
Migration Legislation Amendment Bill (No.3) 1994	15/94, 1/95
Migration Legislation Amendment Bill (No.4) 1994	15/94
Superannuation Industry (Supervision) Bill 1993	03/93
38th Parliament	
Bankruptcy Legislation Amendment Bill 1996	5/96
Excise Tariff Amendment Bill (No.1) 1997	4/97
Health Insurance Amendment Bill (No.2) 1996	10/96
Industrial Relations Legislation Amendment Bill 1996	1/97
Workplace Relations and Other Legislation Amendment Bill 1996	2/96
39th Parliament	
Migration Amendment (Excision from Migration Zone) Bill 2001	13/01
Migration Legislation Amendment Bill (No.2) 1998	1/99
Proceeds of Crime Bill 2001	14/01

Bill	Alert Digest
40th Parliament	
Border Protection (Validation and Enforcement Powers) Bill 2003	13/01
Criminal Code Amendment (Anti-hoax and Other Measures) Bill 2002	1/02
Criminal Code Amendment (Hizballah) Bill 2003	6/03
Workplace Relations Amendment (Codifying Contempt Offences) Bill 2003	9/04
41st Parliament	
Australian Sports Commission Amendment Bill 2004	1/05
National Security Information (Criminal Proceedings) Amendment (Application) Bill 2005	2/05
Occupational Health and Safety (Commonwealth Employment) Amendment (Promoting Safer Workplaces) Bill 2005	3/05