

THE BUILDING AND CONSTRUCTION INDUSTRY IMPROVEMENT ACT 2005 A UNION PERSPECTIVE PAPER BY RITA MALLIA 17 MAY 2006 FOR SEMINAR ORGANISED BY VINCENT LAWYERS ABOUT INDUSTRIAL REATIONS INS THE BUILDING AND CONSTRUCTION INDUSTRY

INTRODUCTION

Thank you for the opportunity to address you today in relation to the trade union perspective on the, we'd say, misnamed *Building and Construction Improvement Act 2005* ("the BCII Act").

I also don't propose to go through the sections of the Act in great detail. You have your own legal advisors to do this for you. I am also anticipating that I might be in the minority on some of the issues I raise in my paper.

I would like to focus on what the CFMEU considers will be some of the consequences of the Howard Government's approach to this industry for workers, their representatives and the industry.

From the perspective of the Trade Union movement, and especially the Construction Forestry Mining and Energy Union, this type of very draconian legislation is unnecessary and represents nothing more than the continued to attack by the Howard Government on Trade Unions particularly in the building industry. This may sound like a political speech, but we believe that what is driving the initiatives of this Government is not a desire to "reform" the industry, but pure ideology, an ideology that does not see a place for organised labour in this industry. Thus it is difficult, if not impossible, to divorce political considerations from the debate. The introduction of the Work Choices legislation further highlights the Government's anti-union, anti-worker agenda.

The economic performance of the industry has been shown, contrary to the claims made by the Howard Government, to be of a high standard. In a report by Dr Phillip Toner of the Employment Studies Centre at the Newcastle Business School at the University of Newcastle it was concluded that:

"On the basis of data from the Bureau of Statistics and research undertaken by the Cole Royal Commission into the Building and Construction Industry it is evident that the productivity performance of the Australian Construction Industry is at or close to international best practice".¹

In NSW the industry has performed well. Time after time projects are delivered on time and within budget and there have been a number of very large infrastructure projects from the Olympics building, to the Cross City Tunnel.

Moreover, the CFMEU and other building unions have negotiated decent wages and conditions for their members, particularly in capital cities where the cost of living in real terms continues to rise.

THE NATURE OF THE LEGISLATIVE ATTACK

The changes to the law in the industry represents an attack on building workers and their unions.

The Cole Royal Commission

¹ Toner P, "An Evaluation of Economic Analysis of the Building and Construction Sector", Employment Studies Centre, Newcastle Business School, Faculty of Business and Law the University of Newcastle, Australia, p12.

This started in the building industry with the \$66 million dollar Cole Royal Commission into the building and construction industry. The Union movement had already been under attack in the mining and maritime sectors.

The terms of reference were so skewed that there was almost an exclusive focus on industrial relations issues and trade union activity. The Royal Commission commenced with a premise that all union officials were law breakers and thugs. This was reflected in the comments of Nigel Hadgkiss, who as the head of the Building Industry Taskforce, at a 2004 Senate Committee described the building unions as the perpetrators of organised crime. We reject this entirely. It was “good business” pitted against “bad unions”. 91% of all the evidence presented was of an anti-worker or anti union character. It was very difficult for any of the Union witnesses to be heard about the problems we experience in the industry. The findings of the Royal Commission reflected this focus. Despite hundreds of findings of so called “illegality” and a secret “Volume 23” that was suggested to have contained evidence of more serious activity worthy of prosecution there was only ever one prosecution that came out of it all.

There was no interest in dealing with some of the systemic problems, such as occupational health and safety issue, tax evasion, immigration rorts or the imbalance between builders and subcontractors as a result of the subcontract nature of the industry.

The Building Industry Taskforce

As a result of Cole’s recommendations, the Commonwealth Government established the Building Industry Taskforce, the predecessor of the Australian Building and Construction Commissioner (“the ABCC”) and its inspectors.

It is undeniable that the attention of the Taskforce and now the ABCC, is focused on conduct of the building unions and their officials. In checking the website of both organisations, of some 31 cases listed as being before the courts, 24 cases represent proceedings against union officials, delegates or workers. Even the cases that are brought against employers involve union related issues such as the payment of strike pay or circumstances arising from the negotiation of union enterprise bargaining agreements.

There is no activity by ABCC into the failure of employers to meet their obligations under the Act or enterprise agreements, the use of illegal immigrants, the collapse of phoenix companies leaving unpaid workers and subcontractors. The focus is very much on the Unions. We consider this deliberate on the part of the ABCC and the Government. In two of the cases brought by the taskforce against union officials in NSW, the Taskforce attempted to have the Right of Entry permits of three officials revoked. In both cases the Union successfully defended the action. In both cases evidence was presented of the serious safety breaches that existed on the sites which necessitated the presence of the officials on site. The Australian Industrial Registrar in both cases was satisfied that the officials involved were exercising their rights, not under Federal legislation, but NSW Occupational Health and Safety legislation. Yet, the Building Industry Taskforce did nothing about the safety concerns that were being raised on those jobs, but instead sought to use its extensive resources to attempt to take away the right of entry permits of union officials doing their jobs.

A huge amount of taxpayer’s money, money that could no doubt be utilised in other areas, has been expended to support its agenda. Originally \$6.5 million dollars was allocated to fund the operations of the Building Industry Taskforce, then a further \$6.9 million. In 2003-2004 this was increased to \$8.9

million. In the 2004-2005 budget the allocation for the implementation of the Cole recommendations was a massive \$136 million, which included \$96.1 million for the establishment of the ABCC.

We also had the *Workplace Relation Amendment (Codifying Contempt Act)* 2004 which beefed up the investigatory and coercive powers of the of the Secretary of the Department of Employment and Workplace Relations conferring coercive investigatory powers the like of which have never been seen in the industrial relations context. These provisions have been reproduced in the BCII Act. I will have more to say about this aspect a bit later.

The other very powerful tool in dictating to the industry what the Government considers appropriate standards is the National Code of Practice. The Commonwealth Government has used the Code and Commonwealth Government expenditure to bend the industry to its will. It has meant, for example, that many enterprise agreements that were entered into under the *Workplace Relations Act*, between the parties, have had to be re-written in part otherwise companies would be excluded from tendering for Commonwealth Government work. A company must comply with the Code, even when doing private sector work. This is an abuse of Commonwealth power and amounts to economic coercion on the part of the State.

This brings us to *the Building Industry Improvement Act* 2005 (“the “BCII Act”) which after initial rejection by the Senate was reintroduced into Parliament in 2005 and given Royal Assent on 12 September 2005.

The legislation seeks to comprehensively control, in a very heavy handed way, the conduct of building industry participants particularly in relation to unlawful industrial action. A breach of the Act can result in large fines and damages and in some circumstances imprisonment.

The definition of what is a “building industry participant”, as you no doubt have heard today, is exceedingly broad and does not only capture builders, subcontractors and their employees and union and employer representatives, but potentially anyone that does business with anyone who does “building work”. What is “building work” is also very broadly defined in Section 5 of the BCII Act to capture construction, alteration, demolition, extensions and repairs, and all the possible manifestations of building work from site clearing to site restoration and landscaping.

THE EFFECT OF THESE CHANGES ON WORKERS, UNIONS & OTHERS

Industry Specific Legislation that is Retrospective in Nature

Whilst the Union does not object to industry specific legislation as such, we do object to this type of legislation which is about breaking the influence of strong building industry unions. The industry, particularly employees, are also placed in the position where they have to comply with this legislation as we well as the *Workplace Relations Act* 1996, as amended by the WorkChoice legislation. The *Workplace Relations Act* 1996, also contains new provisions dealing with industrial action and the like, the provisions are slightly different in part to those in the BCII Act, which makes compliance even more difficult and potentially fraught with trouble if you get it wrong.

A further indication of the insidious nature of the legislation is that the legislation had retrospective effect to 3 March 2005, that is, conduct that was not unlawful between 3 March 2005 to September 2005 could be rendered unlawful by virtue of the legislation.

Civil Liberties Implications

The legislation is draconian and severely impacts on employees, unions and employers, alike in terms of their civil liberties. I know that in 2006 it can be unfashionable to talk about civil and democratic rights in an era obsessed with terrorism and the like. However, the impact on individual civil rights is something that we should be concerned about and not ignored. The State should not be given excessive powers over individuals without even having a serious debate about the needs for such laws and the appropriateness of them. There was no real debate about the need for the BCII Act or any real case made for the need for such powers.

As I mentioned earlier the Government passed the amendment to the *Workplace Relations Act 1996* with the *Workplace Relation Amendment (Codifying Contempt Act) 2004*. The Government gave the Director General of the Department of Employment and Workplace Relations (“DEWR”) extensive powers to compel individuals to give information or to produce documents. In its internal Policy and Guidelines Material in relation to the implementation of these powers it was also stated that surveillance could be undertaken by the use of concealed tape recording and video equipment.²

The Federal Court, in dealing with the issuing of a notice to produce documents under these powers observed that legislation which allowed such “*roving enquiries*” were “*foreign to workplace relations of civilised societies, a distinct from undemocratic and authoritarian states*”.³

Under Chapter 7, Part 2, Division 1, s52 of the BCII Act, the ABCC is given extensive powers to compel the provision of documents and information to the ABCC. The Commissioner can, by notice, require a person and or company to give information, to produce documents or to attend at a time and place of the Commissioner’s choosing for interrogation. If a person fails, upon receiving such a notice, to give the required information, produce the required documentation, attend to answer the questions, take an oath or make an affirmation, or the person fails to answer the questions as required, the penalty is imprisonment for six months. None of the potential offences which the ABCC is charged with investigating even carry this sort of penalty.

This is unprecedented in Australia in industrial relations law, probably the world. Not even the NSW police have this sort of power when investigating the most heinous crimes, outside the recently promulgated anti-terror laws. The ABCC is not even investigating crimes but industrial issues which are characterised as “civil”, not criminal, in nature. The worst criminal has the right to silence and the right not to incriminate either themselves or others. This is not the case for “building industry participants” the subject of investigation, or who are considered to have information relating to an investigation under the BCII Act.

Whilst there is some protection from the information being admissible as evidence in a prosecution against the person (s53) this is of a very limited nature and it certainly does not immune a person from being prosecuted on the basis of the information provided. Worse, it will put individuals in the position where they will have to give up their mates or union representatives, or employers give up their employees, or employees give up their bosses or risk a possible criminal conviction and gaol time.

² Roberts T, “*Into the Industrial Dark Ages, Civil liberties Implications of the Federal Government’s Industrial Laws for the Australian Construction Industry*”, 2005, p2-3.

³ *Thorson v Pine* [2004] FCA 1316 (12 October 2004), per Marshall J, para 40.

Such an impact is directly opposite to one of the so called objects of the Act, Section, 3(2)(c) to “ensure respect for the rights of building industry participants” .

Further the broad definition of industrial action and the excessive penalties provided for in the BCII Act, a matter I will speak of shortly, also negatively impact on building workers and the building unions’ legitimate rights to protest, rights that all other workers in Australia have, even with the changes under WorkChoices. Workers may also find themselves exposed to penalty even if they are reacting to unsafe work practises.

Industrial Action and Disputation

The BCII Act adopts a definition of unlawful industrial action that is extremely broad and includes not only action which has traditionally been considered industrial action, such as strikes, but also refers to such concepts as constitutionally connected and industrially motivated industrial action.

Employers might think that having such a broad catch all definition and a coercive approach is a good thing. However, such an approach does not promote industrial harmony. What the legislation does is to set in stark opposition workers and their unions against employer and vice versa. We have already seen many examples where employers are taking a very aggressive approach to workers and union representatives, where in the past that was not the case. We have seen examples of this even where the conduct that is being undertaken is wholly legal such as the investigation by an authorised employee representative under the *Occupational Health and Safety Act 2000* (NSW).

Some employers feel empowered by the legislation and in using these laws to disempower their employees and to attack their unions. Some are taking an aggressive approach because they feel they can under the new laws. Some employers however, feel they have to take an antagonistic approach because they are being advised to do so by ABCC inspectors and others or because they are being told, or because they perceive from what they are being told, that if they do not deal with workers and unions in an aggressive way they will themselves face being in breach of the law. There have been some absurd outcomes, such as the docking of workers pay when taking 15 minutes to take up a collection for the family of a fellow deceased worker.

Litigation by the ABCC of unions, employees, delegates and the fostering of fear of prosecution breeds antagonism between the different industrial players. This is not conducive to industrial harmony, or positive economic outcomes for the industry going forward.

Couple this with the attack on the Australian Industrial Relations Commission and other traditional dispute resolution mechanisms under WorkChoices, and it can only mean the real causes of disputation will not be addressed and resolved, and there will be an increase disputation not less.

The CFMEU will continue to represent its members’ interests, particularly in the area of workplace safety.

Heavy Penalties Fines and Damages

Breaches of the BCII Act also attract excessive monetary and other penalties. For examples building industry participants face fines of up to \$110 000, unlimited damages and injunctions.

Even where employers want to get on with things, the ABCC can pursue legal remedies and tie up employers, workers and the union in costly litigation

So much for one of the other objects of the Act, which is to provide improved workplace relations, and improving the bargaining framework to encourage genuine bargaining. From where we sit, the Act attempts to grant power that goes all one way and will do anything but.

INDUSTRY COOPERATION

It is our opinion that special legislation of this kind in the building and construction industry is overkill. The Government would be better off letting the industry get on with building, rather than establishing an environment of legalism, antagonism and red tape.

Such an approach to the industry also belies the largely cooperative approach taken about many issues in the building industry by stakeholders. This is particularly the case in NSW.

Everyday of the week, employers, workers and union officials interact. From time to time there might be an industrial dispute, but by and large hundreds of issues such as workplace safety, underpayment of wages and conditions and worker grievances are dealt with in a cooperative manner. There is no denying that sometimes negotiations are robust but issues, are in the majority of cases, resolved between the parties.

The Construction Forestry Mining and Energy Union also represents building workers on many forums, such as the WorkCover Industry Reference Group, the Occupational Health and Safety and Workers Compensation Advisory Council and many other occupational health and safety and industrial relations forums and bodies. These bodies have on them employer representatives from the MBA and other groups. The members on such bodies have worked together to improve safety and conditions in the industry.

The Master Builders Association and the CFMEU have been proactive around the issue of the rehabilitation of injured worker, through their not-for profit service, MEND Rehabilitation Services. This high quality service is about providing employees and employers with assistance in the event of a workplace injury. In terms of assistance to injured workers it has achieved excellent return to work results where other rehabilitation companies and insurers have failed. MEND also provides assistance to employers on proactive approaches to injury prevention such as in the area of manual handling and assistance with their worker compensation premiums.

The Master Builders Association and the CFMEU cooperate in relation to industry training through COMET Training. COMET is providing much needed skills training for new entrants as well as experienced building workers alike. There has been much said about the skills shortage in this country, yet it is not the Government that has taken steps to address this issue in a substantive way, but the industry itself. Some of the money ploughed into paying lawyers to prosecute us could be better spent meeting the needs of the industry in training and skills development.

There are many other examples where Unions and employers have worked together to make the industry a better one. The anti-vendor tax campaign springs to mind, which saw the NSW Government reverse its position on vendor tax. The BCII Act over time will no doubt erode such cooperation.

THE ISSUES THAT NEED TO BE ADDRESSED

There are many real and legitimate issues which we feel the Government fails to address.

There is a significant skill shortage in the industry. We are told that people cannot get skilled tradespeople. Instead of putting resources into encouraging employers to taking on apprentices and skills improvement, this Government's priority in education is to destroy student unionism.

The industry in NSW is experiencing a downturn in work at present. I do not see the Government implementing initiatives to make investment in the industry in NSW more attractive. The boom bust cycle of the industry continues. The recent increase in interest rates probably will not help this.

Many of our subcontractor members, of which some of you may be, constantly complain about the difficulties of getting paid by builders.

The cut throat competition in the industry, promoted by the builders, which encourages the evasion of workers compensation premiums and payroll tax, continues to be a problem. In recent times we have also seen the increased use of illegal immigrants and guest workers, which drives down, not only the cost of labour, but also means that subcontractors who want to provide decent pay and conditions to their employees are pulled into the race to the bottom.

Very little has been done to reduce the high level of bankruptcy and phoenixing in the industry.

And close to the hearts of all unions, the number of workers who continue to die in accidents in the building industry remains, in our view too high.

In a report *Safely Building New South Wales*, published by the WorkCover Authority of New South Wales in 2001, which was compiled by the Occupational Health & Safety Best Practice Initiative Unit of WorkCover New South Wales, another example of cooperation between building unions, employers and WorkCover, it was identified that some of the impediments to better OHS include:

- Commercial pressures – that is, contractors tendering for jobs at the cheapest possible price winning the work. Such contractors tend to pay scant regard to occupational health & safety in the workplace and profit margins are improved by cutting corners in safety.
- Inconsistent contractor and subcontractor standards;
- Lack of expertise amongst supervisors
- Unrealistic programming of projects by contractors
- Subcontractor reluctance to invest in training
- Low levels of trained trade workers
- Low literacy and language skills
- Size of the project

The CFMEU NSW agrees that such matters continue to operate collectively to compromise safety on construction sites. These are issues worthy of attention.

In his report Dr Toner, who I mentioned earlier, concluded that:

“Other research indicates that the most important factors in promoting competitiveness in the construction industry relate to lifting the level of consultation between management and labour;

*improving OH&S; ensuring sufficient supply of skilled labour and regular upgrading of skills and improving the technical skills of project management especially with respect to improving the coordination of materials and labour and exploiting new technologies in terms of new products and construction processes”.*⁴

There is nothing in the BCII Act that addresses in anyway any of these issues.

The type of resources ploughed into policing the BCII Act would be far better spent assisting the industry meet its obligations in OHS to ensure that workers get home at the end of the working day.

CONCLUSION

Thus it is our view that far from stabilising the industry, the big stick approach taken by Government will ultimately have the opposite effect. It is not conducive to long term good industrial relations, which can only be of detriment not only to workers and unions but also to employers and the industry as a whole.

⁴ Toner P, opp cit, p12.