

*Into the  
Industrial Dark Ages –*

**The Civil Liberties Implications of the Federal  
Government's Industrial Laws for the  
Australian Construction Industry**

**Introduction**

In recent times there has been a disturbing growth in the number of government agencies with extensive powers that impinge on some of the basic rights and freedoms of Australian citizens. The extension of ASIO's powers of detention and interrogation in the context of the "war on terrorism" has perhaps attracted most public attention. But not all of these kinds of powers have been conferred in such grave circumstances as the effort to combat terrorism and it seems in many cases there has been little real debate about the necessity and appropriateness of conferring such powers in the first place.

For many years the ACCC has had the power to compel people to answer questions in the course of an investigation into possible breaches of the *Trade Practices Act 1974* where contraventions, if proven, would attract a civil penalty rather than any sanction of the criminal law. Now, for the first time, similar coercive powers have been introduced into Australian industrial law.

In a special Saturday sitting of Parliament before the October 2004 election, and with the concurrence of the Australian Democrats, the Federal Government

passed new industrial laws<sup>1</sup> which have no counterpart anywhere else in the world. Those laws grant extensive interrogation powers to a body known as the Building Industry Taskforce [BIT]. These new powers will be used not just against trade unions but ordinary workers as the BIT goes about its business of investigating everyday industrial issues and disputes.

The Government has also announced special industry-specific legislation for the construction industry that will make all but the most limited forms of industrial action unlawful and will expose trade unions and workers to hefty financial penalties, uncapped orders for compensation and even sequestration of assets.

Both of these changes have wide implications not just in terms of industrial rights, but basic civil rights.

### **The Building Industry Taskforce – Origins and Investigative Powers**

The Building Industry Taskforce (BIT) is a creature of the Howard Government. It arose out of the Cole Royal Commission into the building industry which was set up by the Government in 2001.

Members of the BIT are Commonwealth Government employees, employed within the Department of Employment and Workplace Relations. Most of the BIT “investigators” as well as its Director are former or serving police officers, although generally speaking, their role is to investigate industrial issues not breaches of the criminal law.

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<sup>1</sup> See *Workplace Relations (Codifying Contempt) Bill 2004*

According to their internal Policy and Guidelines Manual which deals with covert recording of conversations, the use of concealed tape recording equipment and video equipment, is allowed in exceptional circumstances *'with approval of the Deputy Director Operations'*.

The BIT is subject to direction from the Minister for Workplace Relations.

No doubt the Government is serious about the work of the BIT. So far it has cost taxpayers over \$15m. The 2004-2005 Budget allocation included an additional \$9m to extend the life of the BIT to 30 June, 2005 and a massive \$96.1m to set up a new agency to take over from the BIT when the Government's new legislation is passed.

Under the laws approved last year, this Government-appointed body will have wide-ranging coercive powers that will allow them to force anyone to answer questions under oath, either in writing or during an interrogation, or to hand over any documents, relating to a "building industry investigation." Failure to comply is a criminal offence attracting penalties of \$3,300 for a first offence and for second/subsequent offences, \$6,600 or 6 months imprisonment.

Until now, the BIT's investigative powers included the capacity to demand the production of documents. In a recent consideration of that power, the Federal Court observed that written notices to produce documents directed to individuals that permitted *"roving inquiries"* were *"foreign to the workplace relations of civilized societies, as distinct from undemocratic and authoritarian states"*.

These new Government-sponsored interrogation sessions are to be conducted in private. According to Guidelines attached to the legislation, your interrogators can direct you not to disclose to anyone (other than your lawyer), what has happened during your interview.

### **Self-Incrimination and the “Right to Silence”**

During these interviews, questions that are asked must be answered even where they might tend to incriminate the interviewee. In the days of the Star Chamber, imprisonment for those who refused to answer was only one option. The others included whipping, clipping off the ears or branding of the face.

The protection against self-incrimination is an important legal and civil right. It is well entrenched as part of the processes of the criminal law. The High Court has described it as ‘*a human right which protects personal freedom, privacy and dignity*’ from the power of the state.<sup>2</sup> Replacing such a right with limitations on the uses to which compulsorily acquired evidence can be put is widely regarded as a poor substitute.

However there is some uncertainty about its application in such matters as civil penalties<sup>3</sup> and there is also ongoing debate about the application of the privilege out of court. In a recent paper, the Australian Law Reform Commission observed:-

*Until the 1980s, judicial authorities held that the privilege was excluded in non-judicial situations. More recently, the courts have held that the privilege is applicable to all situations where information may be compulsorily sought, including administrative tribunals and penalties imposed by administrative agencies with investigative powers. It*

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<sup>2</sup> *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 @ 498

<sup>3</sup> *Refrigerated Express Lines v Australian Meat and Livestock Corporation* (1979) 42 FLR 204.

*is now generally accepted that the privilege is available in non-curial situations, although there remains considerable dissent and it may be overridden by legislation in any event.*<sup>4</sup>

The ALRC went on to recommend that: -

*... the same protections for individuals afforded by the privilege against self-incrimination in criminal matters apply in relation to the imposition of a civil or administrative penalty.*<sup>5</sup>

However, in the case of the legislation extending the BIT's investigative powers, any residual right to refuse to answer questions during investigations on the basis of the protection against self-incrimination has been removed.

This is a disturbing development given the importance of the protection as a civil right and the serious consequences attached to the potential penalties involved.

What makes it worse is the Government's track record of partisanship in industrial disputes and the fact that trade union activity often has a political as well as an industrial element to it. For example, protest action over changes to laws or government policy. These kinds of measures can easily be used as a tool of political repression, especially when, as will shortly be the case, such action will itself be unlawful.

## **The Building and Construction Industry Improvement Bill 2005**

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<sup>4</sup> *"Principled Regulation: Federal Civil and Administrative Penalties In Australia"* ALRC 95 March 2003

<sup>5</sup> *Ibid.*

On 9 March 2005 the Workplace Relations Minister introduced legislation which, like the changes described above, is without precedent in Australian industrial law. He also announced that whenever the Bill was finally passed it would apply retrospectively from the date of its introduction.

The intention of the Bill is clear. It is to identify the limited range of industrial action which is permissible and to render virtual any other form of industrial action [very broadly defined in the Bill], unlawful and punishable by financial penalties and orders for compensation. The types of action that will *not* attract these sanctions are essentially:-

- action authorised in advance and in writing by the employer
- action taken in support of an enterprise agreement [provided it is taken in accordance with the provisions of the Workplace Relations Act] and
- action relating to health and safety issues [the burden of proving the legitimacy of this kind of action will rest on the employees taking the action].

For everything else, the maximum penalties are \$110,000 for unions and \$22,000 for individual workers. That includes any action which is taken to support claims against an employer, to disrupt work or to advance the industrial interests of a trade union. So for example, if it could be shown that a public rally in opposition to the Federal Government's proposed takeover of state industrial laws or the abolition of the National Wage Case was organised by a union and part of its purpose was to advance its industrial objectives, the union and participating workers could face these kinds of penalties.

However, even where employers are not interested in pursuing these kinds of legal remedies, the Government's own Building Industry Taskforce can do so and they can carry out their investigations leading up to any court action using all of the interrogation powers now at their disposal. It does not take a great deal of imagination to see that these changes can be put to very effective use in silencing or bankrupting, political opponents.

### **The Government's Record in the Construction Industry**

Since 2001 the Federal Government has:-

- set up a Government-appointed administrative body<sup>6</sup> with no legal capacity to determine whether anyone has acted unlawfully, whose central findings nonetheless include the public identification of those who were said to have acted "unlawfully" - and more generally, "lawlessness" and a "disregard for the rule of law"
- shown complete disdain for international labour law by refusing to amend legislation that has been consistently ruled to be contrary to international conventions to which Australia is party<sup>7</sup> but rather, has introduced further legislation to compound the problem and deny Australian workers internationally recognised and accepted labour rights.

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<sup>6</sup> Royal Commission into the Building and Construction Industry 2001-2003.

<sup>7</sup> See *Right to Organise and Collective Bargaining Convention No 98* (1949) and *Freedom of Association and Protection of the Right to Organise Convention*, both ratified by Australia in 1973.

- introduced a Federal Government “blacklist” through its National Code of Practice for the Construction Industry whereby parties are “banned” from Government-funded projects unless they implement the Government’s own ideological brand of industrial relations practices, and where entirely arbitrary and discretionary decisions about “compliance” are made by Workplace Relations Departmental officers without any public accountability, a right to be heard or right of review for those affected by such decisions.
- extended the powers of the Government agency the Building Industry Taskforce to allow for compulsory, wide-ranging “secret” interrogation sessions involving ordinary workers over industrial issues and expressly overriding any right to refuse to answer questions in the course of such interrogations.
- announced it will assist employers in the enterprise bargaining process by abandoning the general rule that legislation not have retrospective effect and directing retrospective legislation which includes heavy penalties at unions and employees
- conducted all of the above in the name of re-introducing adherence to the “rule of law” in the construction industry.

## **Conclusion**

In an address to the NSW Law Society in October 2003 former NSW Premier

Neville Wran said:-

*“This lack of respect for the rule of law is perhaps the characteristic – not free trade agreements, not the GST, not interest rates and so on – important as all of them may be – but this lack of respect for the rule of law and due process is perhaps the characteristic that will most readily define the legacy of this Federal Government.”<sup>8</sup>*

Mr. Wran was speaking of the Government’s record on asylum seekers, Guantanamo Bay, the extension of ASIO powers and the gagging of HREOC. The comments can be easily transposed to apply to the Government’s efforts to undermine trade unionism in the construction industry.

One zealous U.S. defender of the ‘rule of law’ concept has written: - *“At some point, the sheer accumulation of penalties and threats in the statute book fundamentally changes the citizen’s relation to the government. Rather than a government of laws, it becomes a government of threats, intimidation and browbeating.”*

No Australian Government has ever gone this far in the industrial arena. Such changes would have been regarded as inconceivable only a matter of years ago. It is hard to imagine that any other country with democratic pretensions would even consider going down this path.

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<sup>8</sup> Quoted in the NSW Law Society Journal December 2003 pg 58.