Australian Institute of Employment Rights

THE PERTH 107: THE RIGHT TO STRIKE CONTEST

A background report by Chris White

Date: September, 2006

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Introduction: Provoking Building Unionists

The unprecedented prosecution of 107 construction workers for striking on the Perth-Mandurah railway project by the Australian Building and Construction Commission (ABCC) raises key issues in the IR debate. This prosecution of individual employees commenced on the 29th August in the Federal Court, with nationwide solidarity rallies protesting against the government's politically motivated attack on Australian unionists.

The ABCC seeks to enforce the new *Building and Construction Industry Improvement Act* 2005 (*BCII Act*). One of the key purposes of the *BCII Act* is the removal of an employee's right to strike. By penalising individual workers, in this case members of the CFMEU, the Act allows for the destruction of the union and its primary aim of representing workers. The formerly legitimate building union bargaining practice of industrial action is now unlawful, denying workers the right to strike.

The ABCC alleges that from February 24 to March 3 this year, 107 employees breached the new *BCII Act* offence of taking "unlawful industrial action", while 82 of those workers also breached an Australian Industrial Relations Commission (AIRC) order. The workers walked off the job over the sacking of CFMEU shop steward Peter Ballard and are now facing individual fines of up to $28 600 if the ABCC is successful in its prosecution. The CFMEU scheduled several meetings urging employees to return to work immediately, but they continually refused, finally returning to work on March 8. Ballard and the company Leighton-Kumagai Joint Venture, LKJV, reached a settlement for his unfair dismissal which he donated to charity, as he did not want the company's "blood money."

Contractor LKJV required workers on the 1.6 billion railway project to work 56 hours a week plus overtime and the troubled project saw many workplace grievances. The employer had earlier obtained an AIRC order over a series of work protests and 'go slows' over continuing grievances and OHS, as well as the 'blu flu' tactic (when all members call in sick). The WA Supreme Court then enforced this order by banning all industrial action (except OHS). The contractor is seeking $200 000 a day in damages from the CFMEU.

CFMEU delegate Mal Peters told Workers On-Line (issue 315): "It's like World War Two over here. The guys are shell shocked but they are standing together. It's been a non-stop campaign of intimidation. One safety rep went away on holiday and found he had been replaced when he got back. A tunneler who raised a safety issue was moved out of the tunnel to the far end of the job. They sacked another good bloke who stood up for his mates, Charlie Isaac, and then they sacked [shop steward] Peter [Ballard] when the new laws came in. I have already had two written warnings and I know they are after me but somebody has to stand up and tell the truth."

Peters said workers were shattered when ABCC agents started delivering writs to homes: "They thought they had weeded out all the staunch guys but nobody is going to put up with this, not in Australia. Blokes are really arcing up. When we went back to work, months ago, Leightons promised not to pursue legal action and they haven't. These writs, and the threats to people's homes, are the government's doing" (Workers On-Line 319).

Peters toured Australia criticising the prosecutions while on annual leave and was sacked on his return for "operational reasons".

The prosecution of these workers and unionists is an attempt by the Howard Government to bolster its law and order campaign against 'militant' unionists, ensuring the fight against penal powers remains central in the IR contest. As ACTU President Sharan Burrow said, "these members are at the forefront of the most punitive set of IR laws anywhere in the democratic world".

The CFMEU national secretary, John Sutton, said the charges "should be of concern to all Australians who care about democratic rights. This is not a case of workers taking industrial action, being docked pay or even about the employer attempting to recover for economic loss. It is about the Howard Government launching prosecutions that could see ordinary working Australian families lose their homes as punishment for standing up for their rights" (*Workplace Express,* 6th July 2006).

One of the 107, father of four John Pes, said he was having difficulty meeting his financial commitments without a fine to add to his troubles. But he said he had no regrets about taking strike action and had done what he believed was right. Pes said he had thought the issue was long past, having left his job on the Perth railway project more than three months ago.

"At the end of the day, your beliefs are what you have. Some things that you do have consequences and we just have to fight on." He said, "Lock me up. I won't pay fines for striking."

Although these prosecutions came as a surprise, they are a sign of things to come. The Commissioner of the ABCC had earlier told the HR Nicholls Society that the Commission is using its full legal powers and will continue to be active.

Background

On the very first sitting day after winning Senate control, the Howard Government put in place its anti-union agenda, rushing through the *BCII Act*. Workplace Relations Minister Kevin Andrews said the legislation was "clarifying the regulation of industrial action". In reality, this disingenuous rationalisation hides a politically motivated strategy to legally suppress strikes.

A new key regulatory feature of the BCII Act makes building union conduct that was formerly legitimate industrial action now “unlawful”. Penalties formerly were not used and the dispute settled by agreement with the union. The Act unfairly targets building and construction workers and, together with *WorkChoices*, is a direct provocation for building unions. It is a retrograde, repressive industrial relations strategy.

Earlier in 2001, then Workplace Relations Minister Tony Abbott used the Cole Royal Commission into the Building and Construction Industry to target building unions (White 2006). The Commission’s processes were later exposed as the exact opposite of a court’s – an upside-down world where the Minister’s guilty verdict against building unions comes first and the trial follows (Marr 2003).

The original *Building and Construction Industry Improvement Bill*, introduced following the Cole Commission, was defeated by the Senate in 2004. At the time, Abbott said the ABCC would be “a cop on the beat” to ensure “the rule of law applies on building sites”. But a Parliamentary Library reports (O’Neil 2003, Prince 2005) later stated: “the [legislation] shifts regulatory emphasis from tolerance towards repression.”

The 2005 Act has provided the ABCC with excessive powers to investigate unionists about “unlawful industrial action” and new penal sanctions that outlaw the right to strike, eroding building workers’ civil rights. The Freedom of Association Committee of the International Labour Organisation (ILO) in 2005 found the *BCII Act* breaches ILO Conventions guaranteeing workers rights’ for collective bargaining and union freedom of association.

The Act is essentially a ‘command and control’ model, quite far from a smart regulatory system. Together with *WorkChoices*, this combined liability of severe limitations on industrial action is a penal power regime designed to assist the government’s extremist anti-union agenda.

Legal strategy

The Howard Government failed to destroy the Maritime Union of Australia during the 1998 Waterfront dispute. This time, the government has devised a legal attack strategy instead of a direct confrontation with 'militant' unions. This strategy required specific industry legislation to make legitimate union building conduct unlawful as well as state policing of unions and tougher penal sanctions (Ross 2005).

Previous industry practice involved union and employer project agreements, multi-contractor agreements and pattern bargaining. High unionism delivered good wages and conditions, while the unions' fighting tradition of short stoppages against unfairnesses in a difficult work environment was tolerated. Under the former law, the AIRC could settle disputes and underlying grievances, with some discretion to sallow strikes if they were not illegitimate.

Unlawful industrial action

The new offence of "unlawful industrial action" prohibits a worker or union from engaging in such action. "Building industrial action" covers all forms of strike action, including:

- stop work meetings;
- short or lengthier stoppages;
- any bans, limitations or restrictions "on the performance of building work, or on acceptance of or offering for building work";
- sympathy and solidarity strikes;
- go slows;
- attending political protest meetings;
- stay aways (blue flu); and

- “the performance of building work in a manner different from that in which it is customarily performed, or the adoption of a practice in relation to building work, the result of which is a restriction or limitation on, or a delay in, the performance of the work”.

The new legislation is wide in its scope and its prohibition of industrial action is complex, prescriptive and applicable to many workers (including within other industries) and types of strike action. It is designed to outlaw what was formerly legitimate union organising and collective bargaining.

Higher penalties and sanctions

Unlawful industrial action can be stopped by a court injunction. Fines are increased to $110 000 for unions and $22 000 for individuals.

Under former labour law, few provisions made industrial action itself attract a penalty. The AIRC used its discretion to assess on industrial relations merits all issues and settle any dispute. Court orders can now be made to pay substantial (uncapped) compensation to *any* “persons affected” by the industrial action. By definition, strikes affect other businesses, so this provision can have dire consequences for unions. The sequestration of union assets and de-registration of unions for failing to satisfy a judgement debt are also available. Prohibition with penalty on “strike-pay” stops employers from making and employees from accepting payments, irrespective of the merits of the dispute.

More restrictions

Construction Project Agreements throughout the world provide practical management guidelines, certainty and stability and protect building workers entitlements. They have

now been made unenforceable by the BCII Act for industrial standards agreed to by project corporations, the contractors and sub-contractors and unions across the construction site, disallowing what the parties actually agree to.

Building unions are also prohibited from organising any action that coerces an employer. For example, an organiser must not threaten to organise with intent to coerce the contractor to employ, as was often the practice, an experienced union delegate as a building employee or as a union OHS delegate to enforce safety. (The Federal Court has already fined the CFMEU under this provision.) An employer is not to be subject to coercion to make superannuation payments to a particular fund, despite the strong support for industry superannuation funds.

New provisions do not allow a head contractor to refuse work to a sub-contractor because the sub-contractor's workers are covered by a non-union agreement or the subcontractor does not have an agreement with a particular union.

A new provision reverses the earlier law and makes unions responsible for the conduct of a union member and deems his or her conduct to be that of the union, unless the union official "has taken reasonable steps to prevent the action".

'Inappropriate' industrial action made 'unlawful'

In the Howard decade, the downward trend of strikes continued, with fewest disputes and days lost for 45 years. Despite a higher percentage of strikes in the building and construction industry, their targeting with heftier fines is in stark contrast with the industrial relations reality.

Dabscheck's (2004) Senate Inquiry submission noted the overall minimal trend: "ABS Data 1981-2002 found that, on average, each building worker spent 0.481 of a day, each year, on strike. Alternatively, 99.76% of total working time was devoted to activities

other than industrial disputes." There is thus no "endemic lawlessness", as suggested by Minister Andrews. The government had no evidence that legitimate building union strikes were a problem requiring strategy of suppression.

After the Cole Royal Commission, Minister Andrews labelled all forms of organised industrial protest as "inappropriate behaviour" and "unlawful". But the number of "inappropriate union incidents" in the Cole findings was not extensive nor at such dangerous levels warranting severe restrictions on collective bargaining and the right to strike.

The alleged "inappropriateness" involved stoppages of a few hours, mainly for grievances with site working conditions. Disputes occurred about managerial policy, poor work conditions, roster complaints, retrenchments, safety issues and amenities and the non-payment of wages, entitlements, superannuation, redundancy and workers' compensation. Alleged union breaches of dispute settling clauses featured, but where strike action was in response to employer breach. What seemed like minor infringements of organisers not following the process for right of entry were listed. Cole did not countenance that there are two sides to a dispute.

The causes of strikes are often complex and strikes are usually regrettable, but not always reprehensible. Unions are not always to blame. Strikes may be necessary as a defence against oppression or for self-respect and dignity at work. They may be provoked or occur due to employer inaction over grievances. Strikes may be protest demonstrations with the purpose of gaining the employer's attention and mobilisation over injustices. They are inevitable in a capitalist economy.

None of this was recognised by the Cole Commission. Dabscheck (2003) likened Cole's approach to Orwell's *1984* "doublethink", meaning the power of holding two contradictory beliefs in one's mind simultaneously, and accepting both of them.

Doublethink involves the forgetting of any fact that has become inconvenient, and then, when it becomes necessary again, drawing it back from oblivion for just so long as it is needed. This denies the existence of objective reality (and all the while taking account of that reality which one denies).

Dabscheck insightfully dissects Cole's reasoning. "Behaviour which is not 'unlawful', or to be more specific, which is lawful, can be deemed 'inappropriate'. Legislative changes can be recommended which will transform that which is 'inappropriate' into that which is 'unlawful'. Through the interplay of 'unlawful' and 'inappropriate' in the Royal Commission, the vice of doublethink is played out. That which is lawful is unlawful."

Cole found "inappropriate union behaviour" to be made unlawful, while he found little "inappropriate employer behaviour". He gave only minor attention to evidence of building employers, global construction corporations, contractors, sub-contractors, phoenix companies, developers and finance capital not paying workers' legal entitlements, evading tax and breaching OHS standards.

Cole's conclusion against "unwanted" intrusion by third party unions is doublethink in an industry where the rank and file are the union. Cole ignored the proven AIRC ability to solve disputes and favoured a system of courts issuing injunctions to halt strikes and back the interests of employers. The ancient common law master and servant doctrines, where strikes are unlawful by very definition as civil wrongs under torts law, has informed the perception of standard building union bargaining as unlawful behaviour.

The *BCII Act* together with *WorkChoices*

The 2006 *WorkChoices* legislation has received considerable criticism for shifting more power to corporate interests. A key feature is that the combined restrictions on the right to strike are almost to the point of suppression of strikes (Briggs 2005b, Stewart 2005, Peetz 2005-6, McCrystal 2006, White 2005d).

WorkChoices outlaws union pattern bargaining strikes. For building unions, where industry or pattern bargaining has a 150-year history and has been supported by many employers and contractors, this is a severe restriction. Banning pattern bargaining flies in the face of the industrial relations reality where there is always a mixture of enterprise and industry bargaining (ACIRRT 2002). The ILO has criticised the outlawing of pattern bargaining. Building industry bargaining has contributed to productivity, more so than individual bargaining with Australian Workplace Agreements (AWAs).

Building union strike action during enterprise bargaining is supposedly still protected from statutory and common law sanctions. This limited right to strike is even more severely constrained by compulsory ballots for lawful industrial action under *WorkChoices* with its detailed 45 pages that allow employer challenge on "technicalities". Rapidly changing dynamics on building sites means any delays for industrial action are not practicable and can only assist the employers' tactics. Protected industrial action is now restricted to a very narrow category of "acceptable conduct", but not impossible. Meanwhile, employers retain their legal right to lockout with no ballot requirement; a most unbalanced scheme, the worst in the OECD world.

Furthermore, protected action can lose its protection, with more provisions for suspension and termination of the bargaining period by the AIRC in *WorkChoices*.

Severely restricting protected action and providing legal mechanisms to stop it is far removed from the traditional industrial relations systems allowing hard union bargaining and accommodating protected industrial action. Any industrial action outside of *WorkChoices*' narrow protected action is unlawful.

Proscription of strikes during the term of the agreement

The *BCII Act* prohibits all industrial action during an agreement. Employers can make changes adverse to workers during the term of the agreement, but it is illegal for unions to respond with industrial action. This section overrides previous Federal Court decisions interpreting the *Workplace Relations Act* 1996. The Act prevented a union from taking protected action only when claims were for matters not dealt with in the Agreement, and the Federal Court agreed.

O'Neil (2004) has observed that "the notion that industrial issues are closed for the life of a particular agreement is at odds with the fact that businesses are at liberty to significantly restructure the business during the course of the agreement, which will be responded to by claims from employees and their organisations."

Ewing (2004) has argued that the right to strike, as a human right, should not be so prohibited. Total prohibition of strikes during the agreement is also questionable in international labour law. The ILO allows a civic right to strike in political protest during the agreement (White 2005a).

Further limitations

Building industrial action is not protected action when it involves "extraneous participants", making lawful strike action even more difficult. Whether with other unions who have not technically complied with the process requirements or inadvertently with non-unionists, industrial action is unlawful. Non-member participation in any strike renders all of it unlawful. Union and non-union members who take action together are not protected. This is most unfair.

Under *WorkChoices*, a new penal power exists where the AIRC is compelled to halt any industrial action that is not protected industrial action. There is no AIRC discretion on the merits or fairness of a dispute.

Furthermore, building corporations engaged in new projects are now accessing under *WorkChoices* the controversial provision that allows employers with greenfield employer agreements to fix wages and conditions in agreement with themselves and not with employees and unions. Restrictions on union right of entry are also tightened under *WorkChoices*, a continuous source of union conflict in the building industry.

WorkChoices has also deleted the limited immunity that required employers to attempt to settle a dispute in the AIRC for 72 hours before taking action in the common law courts. The common law tort weapon against strikes can result in damages, such as the $6.48 million in the earlier Pilots dispute. Kumagai-Leighton has a common law action against the CFMEU for damages, that is yet to be determined.

There is no doubt that all of these provisions, together with the *BCII Act*, allow the right to strike to be severely restricted.

Enforcing the new legal norms: the ABCC

The government established the ABCC to overcome the reluctance of many employers to sue or prosecute unions and employees. This unique form of implementing executive power enables the Government to police any industrial action labelled as unlawful. The ABCC acts irrespective of the employers who are able to wash their hands of the prosecutions or where HRM managers are frustrated by employee anger against the ABCC.

The ABCC has unprecedented and extensive coercive powers. Central to these are the powers to interrogate workers and union officials suspected of engaging in unlawful industrial action. The ABCC can also get an injunction to stop unlawful industrial action by applying to the AIRC or Federal Court and employers can be prosecuted for not reporting unlawful industrial action.

Many ABCC inspectors have been recruited from crime investigation agencies but they have little industrial relations experience. During an investigation, they can enforce a penalty of imprisonment for 6 months against any worker summonsed to attend for questioning who does not answer questions, obstructs an investigation or fails to hand over documents. Inspectors can also enter premises and interview any person who might have information relevant to compliance purposes.

The ABCC is thus coercively acting against building unionists without checks and balances or any semblance on industrial fair play. The 2005 ILO Freedom of Association Committee criticised the *BCII Act,* saying:

- investigatory powers are given to the ABCC with no safeguards against interference in trade union activities;
- the ABCC has the power to interview any person for compliance purposes, that is to say, in the absence of any suspected breach of the law;
- there is no possibility of lodging an appeal before the courts against the ABCC's notices'
- there is no consideration for the need to ensure that penalties are proportional to the offence committed and serious sanctions can be incurred by failing to comply with a notice by the ABCC to give information or produce documents.

The ABCC is the political state apparatus pushing the government's IR agenda and interfering between building employers and their workforce. The ABCC does not address the merits of each instance of industrial action, nor play a role in settling disputes. Employers and unions are forcibly involved in legal proceedings that do nothing to resolve the workplace conflict. The ABCC compliance role inflames industrial relations, provoking disputes and causing protest action.

The combined impact of penalties, large fines and high lawyers' fees and costs are very heavy-handed sanctions against strike action, but history shows these often create more

problems than they solve. Legal suppression of strikes has not always worked (Hutson 1986, Waters 1982).

Undermining civil liberties

The common law privilege against self-incrimination and the right to silence is an important legal and civil right that is removed by the *BCII Act* (Roberts 2005). Workers involved in union stop work meetings have been faced with a harsh choice: answer the ABCC questions or face six months jail! Murderers have more rights.

To be subject to questioning, building workers need to have done nothing wrong. CFMEU newspaper advertisements warned of penal sanctions underway: “In what country can you be interrogated about a routine union meeting, and jailed if you don’t comply?” The worker can have a lawyer attend, but this is no help, as witnesses cannot avoid answering questions on the basis they will incriminate themselves or breach other laws.

Revelations by Greens Senator Rachel Siewert documented ABCC Inspector intimidation on innocent family members at home. Workers’ complaints include this Workers Online report, telling how the ABCC

> Threatened a single mum with prison in a bid to get her to rat on workmates who protested over safety standards. Brodene Wardley, a crane driver and safety rep at Roche Mining was sent a warning she would be gaoled if she did not front the ABCC and answer questions about a day and a half safety stoppage. Workers took action when a bus taking them to the mine almost into a train.

> Wardley said she could not speak about details of the hearing or the incident but said the process had been intimidating.
>
> "For me it was a very scary thing, I couldn't understand why I was being called up. I'm just a working mum, I'm not political, I'm just doing a job on site which I was elected to do… to take care to the OHS aspects the job."
>
> Wardley said though she would "absolutely" not back down over speaking up about safety, the Howard Government's laws intimidated people out of OHS roles.
>
> "Someone needs to do it or someone's going to die," she said. One person is killed every week on average in the construction industry.

ABCC inspectors have consequently been tagged as industrial secret police by the unions. Intimidation by building secret police has no counterpart in the democratic world and these coercive powers go further than those of the police and, arguably, ASIO.

Lawyer Rob Stary said: "It frightens me these secrecy provisions are in the legislation. They only occur in a few other circumstances, in ASIO anti-terrorism investigations and in the Australian Crime Commission when they're looking at underworld killings, or serious drug importation, or corrupt police." (See also Ewin Hannan in *The Australian* July 15 2006 *"Careful, they might call you"*.)

The ALP has similarly argued that building workers have "rights" inferior to the limited rights for suspected terrorists.

This denial of civil liberties is an excess of state power against the individual building worker or building union official. But there is more at stake than building workers if such basic human rights can be legislated against with the government's Senate majority. This is an abuse of the rule of law and signs of a Police State.

ACTU Secretary Greg Combet said the defence of the 107 rail construction workers is critical to the union campaign against the Howard Government's IR laws and that any fines imposed will not be paid. Expressions of solidarity have come from unions in the Philippines, Germany, Canada, America and New Zealand. These workers have an undying belief that if they had not stood their ground, all workers in Australia would be vulnerable to the most vicious attack on workers rights ever seen in Australia.

More Ministerial powers

The Workplace Minister has more extensive powers to regulate the industry and target unions.

He can direct the ABCC Commissioner (except for individual cases), thus questioning political independence. Most significantly, the ABCC has been enforcing compliance with the Minister's Building Code of Practice since 2005.

Companies tendering for an Australian government-funded construction project have to comply with the Code, the content of which is the government's IR agenda. This is without any initial agreement by the employers or unions. Failure to comply with the Building Code incurs a penalty of $11 000 for a body corporate and $2200 for others.

These provisions enforce the financial power of the government on building contracts to coerce any contractor who may want to choose to agree and work in cooperation with unions.

The ILO Freedom of Association Committee 2005 noted the wide-ranging powers of the ABCC to investigate violations of the Code such as the following:

- must not contain a provision that restricts the type of agreement that can be offered to, or requested;
- must not contain a requirement that an employer will renegotiate a future industrial instrument with a union;
- must not contain provisions for particular terms and conditions, including the making of an over-award payment, with regard to a group apprenticeship scheme or similar provider;
- if it provides for a site allowance, the amount must be specified in an industrial instrument certified under the WRA or otherwise approved under relevant state legislation;
- must not include a provision requiring the employment of a non-working shop steward or job delegate, or other person;
- must not include a provision requiring an employer to apply union logos, mottos or other indicia to company-supplied property or equipment, including clothing;
- in case they contain dispute settlement provisions, they must allow an employee to have freedom of choice in deciding whether to be represented and, if so, by whom
- must not contain selection criteria for redundancy that ignore the employers' operational requirement, such as "last on, first off" clauses
- must not contain a provision that restricts an employer's short- or long-term labour requirements, nor provisions that stipulate the terms and conditions for the labour of any person not a party to the industrial instrument. Accordingly, an industrial instrument must not include provisions that require an employer to consult or seek the approval of a union over the number, source, type (e.g. casual, contract) or payment of labour required by the employer
- must not preclude the employer from making "all-in payments" (ie. payments (on an hourly, daily or weekly basis) in lieu of payment for all or some entitlement

specifically provided for by legislation or awards, such as annual leave or overtime.

This is an extraordinary politically motivated intervention into collective bargaining. It outlaws traditional union supportive provisions formerly agreed to by employers.

There is great government pressure vetting union and employer agreements to be compliant with these provisions. This gives the government enormous power to enforce their IR agenda. Yet the government 'spin' is that the industrial parties are free to reach workplace agreements.

In *WorkChoices*, the same content is "prohibited content' and industrial action is not protected if "prohibited content" is sought. This includes unions seeking agreement to encourage unionism in side-deeds, memoranda, or common law contracts separate from the collective bargaining agreement process.

Safety?

Union safety campaigns are made much more difficult. In an industry with 50 deaths each year, the priority for the health and safety and lives of workers should prevail over management prerogative.

The *BCII Act* definition of "building industrial action" excludes action by an employee based on a "reasonable concern… about an imminent risk to his or her health or safety, provided the employee did not unreasonably fail to comply with a direction to perform other work that was safe for the employee to perform."

The Act adds: "Whenever a person seeks to rely on the definition of building industrial action that person has the burden of proving that [this] applies."

This is a narrowing of the OHS exclusion. The onus shifts to the employee to prove a reasonable concern about safety. No evidence for this reversal is given. This is inconsistent with the common and statute law right to refuse to comply with an instruction from an employer that exposes them to unreasonable danger of injury or disease. This right to strike entitlement to be paid for OHS action is more restricted in this hazardous industry than in other workplaces. There is a real concern that the lives and the safety of workers are at greater risk, so unions will keep protesting with industrial action against unsafe work, as they feel deeply about the shattered lives of deceased building workers' families.

The best enforcers of OHS standards, the union worker safety reps trained for prevention and compliance, are excluded. The building industry can apply OHS strategies, but to be effective they have to be with union commitment and agreement as has been past practice.

WorkChoices further prohibits union training schemes and paid OHS training leave from being established in workplace agreements.

Green bans outlawed

One outcome of the crackdown on 'unlawful industrial action' is that the *BCII Act* outlaws socially responsible union campaigns, such as the world-leading environmental green bans (Thomas 1973, Mallory 2005).

With community support, green bans have been acknowledged for protecting the environment and for socially responsible building and construction development. Socially responsible industrial action allows unions to substitute a conscious social decision for a market determination. With 'unlawful industrial action', supporting union green bans has become very risky.

Novitz (2003:60) shows how international labour law justifies green bans as a legitimate right to strike. Political strike protests against the outlawing of green bans are an important civic freedom of political communication in a democracy. The ILO considers the political protest a permissible strike (White 2005a).

Juridification and corporatisation

The *BCII Act* is not, as the spin suggests, ‘deregulatory’, but in fact over-regulation. The ABCC is the political state interfering in the construction labour market. This is entirely different from the up until now legitimate role of unions in enforcing workers’ entitlements and the AIRC in assisting the reaching of agreements.

The *BCII Act* is more adversarial, litigious and subject to costly legal challenge on technicalities. The ABCC and its predecessor, the Building Industry Taskforce, spent over $2 million on legal services between July 1 2005 and May 8 2006. The Commission has recruited 100 of a planned 155 staff, with 90 inspectors.

The ABCC model displays the characteristics of corporatisation. McCallum (2005) has warned of industrial relations systems based on the Australian Constitution’s corporations power, as here with the *BCII Act* and with *WorkChoices*. He argues that the interests of the corporations prevail over those of the workforce. Labour law increasingly becomes subject to corporate law.

Howe (2005) stresses the need for balance in labour law of policies and interests, where collectivity and fairness have a role with productivity. He argues for cooperative and democratic models for a voice for workers, to enhance trust and cooperativeness, which can lead to productivity; and that best practice is project alliances with the unions.

Webb (2001) gives details of how the Olympic Games was a collaborative model where government, unions and employers planned together to achieve a world class socially and environmentally responsible outcome.

The political campaign

Apart from the government's anti-union ideology, there is a perceived electoral advantage. The 'party political wedge' is to link the opposition with the 'unlawfulness'.

The case against the 107 may well go into 2007, and the Liberal tactics for the election year go like this: Take perceptions that Beazley is a weak or indecisive leader or the captive of a powerful interest group like the trade union movement. Mix those perceptions with images of thuggish "unlawful" unionists. Add a few facts about the influence the trade unions exert over the ALP policy process and pre-elections and point out that union membership has been declining steadily over the past decade. Create a firm impression in the eyes of voters that Beazley won't stand up to the union movement and hopefully inflict serious political damage.

Productivity in the industry

One of the Howard Government's key justifications for *BCII Act* asserted increased productivity. The new regime is designed to assist powerful corporations increase profits, but is not necessarily a good model to improve productivity.

Dabscheck, one again, shows 'doublethink' interacting with 'productivity'. Cole commissioned two Economic Reports that warned, "tackling industrial disputes is not a panacea for improving productivity" and that Australia's building and construction industry productivity is rated highly by international comparisons.

Cole acknowledged this and "then indulg[ed] in the lawyer's trick of finding an alternative term for productivity, and using this distinction to deny the evidence of research that he in fact commissioned."

Cole said: "The studies do not show that the industry is operating efficiently," but, as Dabscheck points out, efficiency and productivity are synonyms not antonyms.

ILO: the Act breaches fundamental workers' rights

The ICTUR (2004) Senate submission argued the *BCII Act* fell well short of ILO standards and the ILO itself has found the Act in breach of its standards.

As reported by *Workplace Express* (21/11/2005) the ILO has upheld an ACTU complaint that the *BCII Act* breaches ILO Conventions 87 and 98 on freedom of association and collective bargaining.

The ILO Governing Body endorsed recommendations from its Committee on Freedom of Association asking the Howard Government to amend the laws. ACTU president Sharan Burrow, who is a member of the ILO Governing Body, welcomed the decision as a vindication of union objections.

The ILO Report's detailed findings requested the Government take action:

- to modify sections so as to ensure that any reference to "unlawful industrial action" in the building and construction industry is in conformity with freedom of association principles;
- to take measures to adjust sections so as to eliminate any excessive impediments, penalties and sanctions against industrial action in the building and construction industry;

- that the determination of the bargaining level is left to the discretion of the parties and is not imposed by law, by decision of the administrative authority or the case law of the administrative labour authority;
- to promoting collective bargaining as provided in Convention No. 98, ratified by Australia. In particular… to amend the provisions of the Building Code and the Guidelines so as to ensure that they are in conformity with freedom of association principles. …to ensure that there are no financial penalties, or incentives linked to provisions that contain undue restrictions of freedom of association and collective bargaining;
- to introduce sufficient safeguards so as to ensure that the functioning of the ABC Commissioner and inspectors does not lead to interference in the internal affairs of trade unions and, in particular, requests the Government to introduce provisions on the possibility of lodging an appeal before the courts against the ABCC's notices prior to the handing over of documents. As for the penalty of six months' imprisonment for failure to comply with a notice by the ABCC to produce documents or give information, the Committee recalls that penalties should be proportional to the gravity of the offence and requests the Government to consider amending this provision.

Minister Andrews refused to take up the ILO Committee's findings.

Conclusion

It is not often that a US Republican President can be cited:

"The right of workers to leave their jobs is a test of freedom. Hitler suppressed strikes. Stalin suppressed strikes. But each also suppressed freedom. There are some things worse than strikes, much worse than strikes – one of them is the loss of freedom."

- President Eisenhower.

Former Labor Minister Clyde Cameron 1970 continued: “Eisenhower was correct in pointing out that the hallmark of the Police State is the loss of the right to strike. A worker’s right to strike is surely a basic human right. The right to withdraw labour is the one thing that distinguishes a free worker from the slave. This is a fundamental freedom.”

The suppression of strikes is not compatible with principles of democratic freedoms. As stated earlier, there are no strike waves, even in the building industry. Yet the *BCII Act* is an unprecedented disciplinary intrusion by the state into the workplace. Employers who love power have new authoritarian weapons to suppress workplace conflict, rather than settling the injustices by agreement.

One conclusion is that the strike suppression is ideological, fuelled by the New Right and the HR Nicholls Society (Evans 2002), as well as powerful building corporations and their political associations, the MBA (Harnisch 2003).

This is revenge for the 1960’s, when the penal powers and bans clauses were defeated by mass strikes over the jailing of union secretary O’Shea (Hutson 1983) and became “dead letters” (Creighton and Stewart 2005: 537-41).

It is not possible to discuss here all the periods of strike suppression, dating back to the 18th and 19th century. But they developed a politics from governments that has exercised a considerable hegemony over the years.

The ideology is that strikes can be ended or prevented by the state’s and employers’ vigorous use of repressive labour law sanctions.

Waters (1982) identifies this belief: “Paradoxically, a key factor in producing strikes in Australia is the belief that they can be eliminated.” He argues that strikes are inevitable in a system with the contractual employment of productive labour, where employers and

employees at times do not have common interests, and that strikes are created by workplace conflict over the authority system of production and as a "structural antagonism between capital and labour".

Hyman (1972) has analysed strikes as a "challenge to managerial authority" and inherent in a capitalist economy. Kelly (1998) advocates mobilisation theory in industrial relations with the focus on injustice in the workplace and worker mobilisation against grievances that can involve industrial action. Interestingly, this can be used, as here, to show the mobilisation of building and construction employer associations for their interests to combat the unions. This is a specific form of employer authoritarianism.

Much of the 20th century industrial relations systems at least were based on the pluralist basis tolerating the legitimacy of the industrial action challenging management and establishing systems of control by successfully negotiating agreements over the issues.

Cole's conservative common law background did not accept this pluralist basis. He viewed the strength of union militancy as so 'inappropriate' that he in effect urged it be criminalized. This has taken labour law back to the 18th century and the UK *Combination Acts* of 1799-1800, where workers combining were 'criminals', which led to the Toll Puddle Martyrs and other resistance.

Despite the suppression of strikes throughout Australian history, workers still organised, often led by the building unions. Organised building unions have survived periods of outlaw before. Ross (2004) reminds us that Labor governments de-registered the Builders Labourers' Federation under former penal powers. Crosby (2005) shows unions are rebuilding. Winning a strike shows the power of organised labour, more so with a shortage of skilled labour, as in some building sectors.

Despite some setbacks for the unions, there is a settling in a war of attrition. But more intensified disputes defying penal sanctions cannot be ruled out. Building unions have a militant history leading political protests against government policies. Sutton's response

is, “Class War. It’s on.” A CFMEU theme is “it’s a rich man’s country yet, when workers can be jailed for striking.” Whether organising against these new penal powers and whether the labour movement generates enough solidarity to succeed is yet to be played out. These unions should have the ILO right for political protest strikes to defend their interests. Building unions stared down the ABCC threats to fine workers attending the half a million strong ACTU rallies in 2005 and 2006.

Historically, unions have taken protest industrial action to defend the right to strike. The right to strike as a human right has been fought for as an essential workers’ freedom. Freedom from forced labour and freedom from master and servant relationships are long held views. Union freedom of association with the strike as an essential means for collective bargaining to defend and promote the social and economic interests of working people and their families are contemporary demands. Often it relates to freedom of speech and as a civil freedom in a democratic system.

Australians do not want to go back to the penal days of masters and servants, or wage slaves with forced labour, or disciplining or fining workers on strike. The ACTU’s Fair Go at Work and Collective Bargaining policy includes the right to strike without penalties – the legal right to strike. This would be one right in any Charter of Employment Rights. *September 2006*

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