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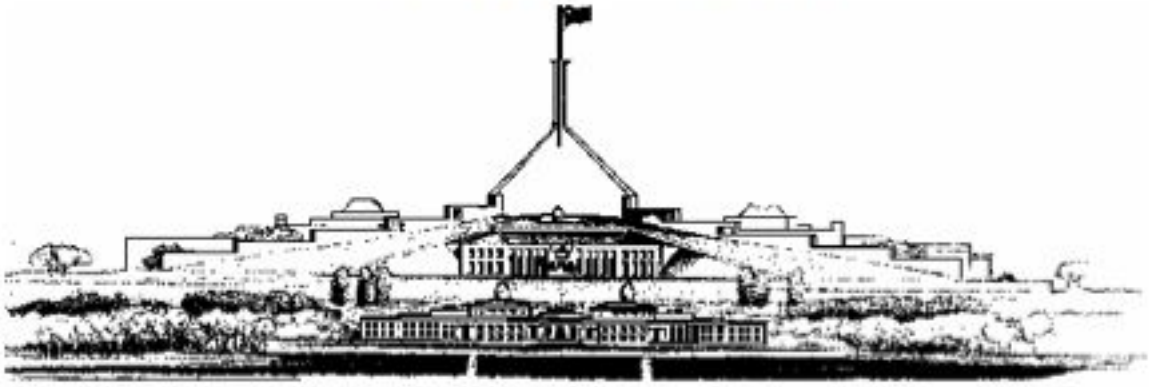

THE SENATE

BUILDING AND CONSTRUCTION INDUSTRY IMPROVEMENT BILL 2005

BUILDING AND CONSTRUCTION INDUSTRY IMPROVEMENT (CONSEQUENTIAL AND TRANSITIONAL) BILL 2005

Second Reading

SPEECH

Thursday, 18 August 2005

BY AUTHORITY OF THE SENATE

SPEECH

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Questioner		**Responder**	
Speaker	Murray, Sen Andrew	**Question No.**	

Senator MURRAY (Western Australia) (1.07 pm)—Today marks the legislative beginning of the coalition's ideological triumph on workplace relations, possible because they now have the Senate numbers. If you are a Queenslander who did not give your first or second preference to John Cherry, this is the effect. I use the word 'ideology' deliberately, in the sense that it represents a belief system, a manner of thinking of the conservative class. In responding to ideology or belief driven legislation, a legislator has to ask basic questions: does the proposed law improve society and improve the economy? Is it fair and just? Does it advance the rule of law?

Workplace law in Australia is born of passion and belief. It has been forged on the anvil of the Australian demand for a fair go. To date, Australian workplace law has consciously responded to the social demand that the mark of a civilised First World country is the advancement of our living standards, that wealth creation is not incompatible with good working conditions. I have been astonished that some conservatives have been condemning the fact that our minimum wage is 58 per cent relative to the average wage, in contrast to the United Kingdom and the United States, for instance, where it is about one-third. We should be proud of the fact that our poor are less poor than the poor in the United Kingdom and the United States. I have been equally amazed at the coalition hauling out Germany and New Zealand as examples: the former as an example of overregulation and no reform in workplace law and the latter given coalition praise for greater inequality, resulting from a lowering of workplace standards. Why do they not look at the Scandinavian countries instead? Those countries are wealthier on average measures than we are, with greater regulation than we have and with lower long-term unemployment.

Our present industrial relations system is not broken. It makes a very positive contribution to Australia's economy and society. Australia now has lower unemployment, lower interest rates, higher productivity, higher real wages and very significantly lower levels of industrial disputation than it did in the past. No economic case has been made for changing this system radically—and it is going to be very difficult to construct one—but the social case for the damage is extremely possible.

I have spent the past nine years—or nine-plus years now—working hard to find a balance between the ideologies and allegiances of the Liberal and Labor parties. The Democrats are not beholden to the unions or to business, but we do respect both. I was the Democrat portfolio holder responsible for negotiating on the coalition's extensive 1996 amendments to Labor's Industrial Relations Act 1993, creating the Workplace Relations Act 1996. I always refer to Labor's brave 1993 act as the first wave—brave because it broke with a tradition and introduced far better productivity and flexibility measures. I always refer to the coalition's 1996 act as the second wave in that process. The Democrats put 176 amendments to that coalition 1996 bill before passing it. Those amendments kept that bill economically effective but made it socially acceptable, and the reason the sky did not fall in at that time was that we did that. Most importantly, we made that bill fairer and much more balanced. The result of our moderation of coalition proposals is that Australia has been performing very well.

Many hundreds of pages—perhaps over 1,000—of workplace relations law have been passed, in 18 separate workplace relations bills, since the Howard government first came to office. You will find that, of the 18 workplace relations bills passed since the Howard government came into power, the Democrats have negotiated the passage of 12 of them—two-thirds—after amendment. Of those 18 bills, one bill was passed by the coalition and Labor and opposed by the Democrats; five bills were passed by all parties; and 12 bills were passed by the coalition and the Democrats after amendment and opposed by Labor.

The coalition have poured out the propaganda of Senate obstruction, dutifully repeated by the media. Two years ago, as far back as 8 October 2003, I asked the Manager of Government Business in the Senate, in a question on notice, whether he was aware of the following statement made by the Minister for Small Business and Tourism, Mr Hockey, in a *Meet the Press* interview aired on 14 September 2003:

> What I do know is the Labor Party and the Democrats are holding up a vast amount of legislation that the Government has put in place in the Senate.

I asked: 'Does the minister accept the *Australian Concise Oxford Dictionary's* definition of 'vast' as 'immense, huge, very great'?' I also asked: 'Can the minister: (a) provide a list for the Senate of any bill that could conceivably be regarded as being held up, as described by Mr Hockey; and (b) give his reasons for making that judgment?' They have not answered the question. They cannot answer the question because it requires fact, not assertion. Two years later their non-reply exposes the rhetoric and propaganda for what it was.

We Democrats have rejected bad legislation, such as the coalition's attempt to allow employers to dismiss workers unfairly. I remind you that, out of 10 million employees in Australia, the total number of unfair dismissal applications, both state and federal, is 15,000-plus and that unfair dismissal applications under federal law have dropped by 60 per cent, whilst employment has risen by 1.6 million. So the facts stand in the way of the argument that they have been putting. However, in the spirit of continuous improvement, the Democrats have supported workplace bills with amendments and many coalition initiatives and in the process have consulted with unions, industry, governments and experts along the way.

Today that ends, and instead we will see the government pass the first of what we think are ideologically driven bills. They will be untroubled by the Democrats, who no longer hold the balance of power. The value of us holding the balance of power is that we have never been tied to a particular set of people in the community. We have never had a 'just say no' or oppositionist attitude, and that has been the value of our balanced and moderate approach. The Building and Construction Industry Improvement Bill 2005 and the Building and Construction Industry Improvement (Consequential and Transitional) Bill 2005 were originally short bills that replicated 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 government last week added to these bills by moving a very large number of amendments, which will establish the Australian Building and Construction Commission and the attendant powers that it will have. As the parliament knows, the Democrats made a comprehensive contribution to the Senate Employment, Workplace Relations and Education References Committee report, *Beyond Cole—The future of the construction industry: confrontation or co-operation?*, which amongst other things examined the 2003 bills. In that report the Democrats made the following supplementary remarks:

> 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.
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> … … …
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> 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?
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> … … …
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> 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.
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> … … …
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> [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.

So the Democrats opposed the 2003 legislation outright. Our belief was that those bills could not be salvaged or amended. For this we were applauded by some unions but were damned by some industry groups. Australia as a whole probably never even noticed.

However, we could not ignore our obligations to address problems identified in the Senate inquiry. Through the Workplace Relations Amendment (Codifying Contempt) Bill 2003, passed in 2004, we supported a threefold

increase of key penalty provisions across all industries. The government had sought a tenfold increase. We also supported a limited increase in the powers of the Building Industry Taskforce as an interim measure until a national industrial relations regulator could be developed. Note that we support a national industrial relations regulator; we do not support an industry specific regulator. Those interested can refer to my speech on 22 June 2005 to the disallowance motion on building industry guidelines for more information on our position. It is notable that in that debate we and the coalition were opposed by Labor and the Greens. For our position on that bill we were damned by the CFMEU and the ACTU for supporting increased powers, and again damned by some industry groups for not going far enough. Once again, Australia as a whole probably never even noticed.

And here we are today—the Democrats, Labor and the Greens—all powerless to oppose the very provisions we all previously publicly opposed. Despite the new laws, the circumstances in the building and construction industry have not changed much since the previous Senate inquiry. They have not changed much because the regulators, the enforcers, are not on the case. If they were on the case and the law were applied we would not have the problems that the government think need to be addressed by legislative change. The weakness in our system is not law; it is enforcement and regulation. The government need to address those but they will not. If anything, except for Western Australia, where a peculiar sickness is apparent, there appears to have been less disputation. By the way, when I say the government should address those matters but they will not, do not think this bill will cure them. Remember what the Royal Commission said: the problems are in criminal law, tax law and state law as well as in workplace relations law.

The Democrats position on disputation is that it is part of the bargaining process. But we do not support breaches of the law and we do not support the sort of behaviour that we have seen in Western Australia, where a peculiar sickness is apparent in the way in which health and safety issues are being used as an excuse for workplace confrontation. But overall we should remember—and this is the point that was made by Senator Wong—that mostly unions address workplace health and safety measures on a practical and necessary basis. Overall in Australia there is not that much disputation, although as I have said it is a bit higher in Western Australia at present. The Democrats position on the appropriateness of reforms to BCI practices remains. We continue to argue that the problems in this and other industries would be far better addressed by the enforcement of existing law and the creation of a well-resourced independent national workplace relations regulator. The establishment of the industry specific regulator proposed in this bill has major weaknesses, not least that it sets up different rights and obligations for citizens who work in one part of one industry.

It is also in complete contrast to other sectors, where the national interest is paralleled by national laws with a national regulator, such as finance, where there is APRA and the Reserve Bank; Corporations Law, where there is ASIC; competition law, where there is the ACCC; and tax, where there is the ATO. The evidence we get is that by and large the Workplace Relations Act is sound. I could easily take another 20 minutes to argue the case against the government's proposed IR changes to the current act, but that would be sidetracking and I should probably save it for another day. The problem in key industries, as we see it, is that good IR law is often poorly enforced.

I will, however, repeat arguments I have made before that are apposite. What we currently have are fragmented, dispersed and therefore ineffective federal and state departmental inspectorates, including the Employment Advocate, task forces and other bodies. They need to be swept up into a single independent statutory authority—and note the word 'independent'. Competition law, tax law, finance law and Corporations Law each have their own national regulator, and employment law should too. The unions need help in making sure that entitlements are paid, that wages and conditions are observed, and that health and safety are looked after. Unions and employers need help to ensure that people do not defy court and commission orders and other principles. The employers need help with regulators on call when faced with unreasonable or thuggish people perverting the law's intent.

The Industrial Relations Commission has limitations as to what it can do. It is primarily a conciliator and arbitrator. It cannot be present in workplaces. The police are the wrong agents to use for what are essentially civil matters. The police do not like to get involved. They also lack knowledge and training in industrial relations law, which is often complicated further because both a state and federal system operates in the same workplace. As everyone knows, the Democrats support a unitary system, subject of course to state agreement. The OEA is underresourced and has limited powers and scope. What a national regulator would look like would obviously require wide consultation and examination. Importantly, the regulator would have to be independent, act as an even-handed enforcer on both the employer and the union sides and have the ability to investigate and work side by side with other national regulators like ASIC, the ATO and the ACCC. In our view, the establishment of an industry specific regulator is flawed and a waste of resources, and we will not be supporting those provisions.

There are several elements of these bills that we believe the government have a responsibility to amend. The first is the definition of 'building and construction industry'. If the government are going to impose draconian legislation on an industry because they claim that that industry has problems, they should at the very least get the definition right so as to not draw in others. Concerns were raised both by unions, such as the CEPU and the TWU, and industry groups, such as AiG, that the definition was too broad and would capture large segments of the manufacturing and services industries within the coverage of the bills. AiG argue that the bills' very broad definition of building work could lead to construction industry terms and conditions flowing into other industry sectors, such as the fabrication and supply of building materials and products, which in turn would drive up the cost of construction through higher input costs. The Democrats will be moving an amendment to narrow the definition of 'building and construction industry'.

The other element that should be amended relates to the retrospective nature of the bills. As noted in my minority report to these bills, there are four main types of retrospectivity, the first being practical and necessary, the next two being positive and the last being negative. It is often practical or necessary for some new 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. There are two elements of retrospectivity that the Democrats have concerns about. The first is that 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 and means at the relevant time, subject to the court's interpretation. The second area is that retrospective legislation brings uncertainty to the environment in which the community and business operate.

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 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. So we are disappointed that the government insists on pursuing this provision, and we will be moving an amendment to remove it. We are particularly disappointed that the party that bears 'liberal' in its name should pursue such a course of action. It is contrary to the Liberal Party tradition and it is contrary to the small L liberal philosophy which is well established in the Anglo-Celtic circles from which our law is largely driven.