Australian industrial laws and freedom of political expression

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Discussion Paper 34/06 (November 2006)

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The views expressed are the authors and do not necessarily reflect those of the Democratic Audit of Australia.

> *"If keeping down wages in some cases, by law, was a national good; if the degradation of the whole body of the working people by law was desirable; if perpetuating discord between masters and workmen was useful; if litigation was a benefit; if living in perpetual violation of law was a proper state for workmen and their employers to be placed in, then the laws against combinations of workmen were good laws, for to all these did they tend."*
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> From *"Observations on Huskisson's Speech",* by F.P (Francis Place) (1825), p. 21 (Quoted from Graham Wallas, *"The Life of Francis Place"* (1898), pp. 199-200.)

The most important thing about political protests in Australia is also perhaps the one thing about them that we take for granted more than anything else. This obvious, almost implicit democratic principle is that when we peacefully exercise basic political rights in this country we can do so without fear of serious repercussions or reprisals, particularly from the state.

When thousands of Australian trade unionists take part in the ACTU's 'National Day of Action' on 30 November 2006, the workplace implications of the Howard Government's industrial laws will justifiably be the focus of attention. The question of how the demonstration itself fits in to the broader scheme of Australian democracy will be an ancillary one. But the punitive nature of these laws guarantees that the wider political implications are inseparable from the immediate industrial effects. This is so because these laws have a direct impact on the forms of political expression available to us and because we can no longer assume that this particular form of political action will go unpunished by government.

Most workers who take part in the ACTU protest will do so knowing that they face some serious risks. At the very least, where their absence has not been authorised by their employer, the legislation requires that employers penalise them by deducting four hours pay from their wages, even if the stoppage were to last for only 10

minutes.[1] By 30th November some employees may also be subject to Commission or court orders restraining any stoppage of work. The possibility of fines for breach of those orders is a very real one. The maximum penalty that can be imposed has increased tenfold in recent years. These are all serious disincentives.

However the most extreme of these laws are those applying to workers in the construction industry. Separate legislation for that industry outlaws virtually all forms of industrial action or workplace dissent. That includes industrial action taken to protest against the changes themselves.

The *Building and Construction Industry Improvement Act* 2005 [the 2005 Act] came into effect on 12 September 2005, shortly after the Howard Government gained control of the Senate. The key feature of the 2005 Act is the introduction of a statutory concept of *'unlawful industrial action'*[2] and a streamlined mechanism to penalise that action heavily wherever it occurs. It also created a new federal government agency known as the Australian Building and Construction Commissioner [ABCC] which is charged with enforcing these laws. The ABCC is invested with sweeping coercive powers to conduct its investigations. It also has the capacity to bring court action in its own right, irrespective of the views of the parties to the employment relationship.

A wide range of industrial action is caught by the 2005 Act and made potentially unlawful. Strikes are covered (failure to attend for building work/restriction on the performance of work). So too are 'sickies', deliberate lateness, slowness or any other practice that delays work. In fact, virtually any deviation from normal patterns of work – anything that involves '*the performance of work in a manner different from that in which it is customarily performed*'[3] – has the potential to infringe these laws.

Once it can be shown the action is *'constitutionally connected'* (which can mean anything adversely affecting an incorporated employer in the building industry) and *'industrially motivated'* (where the purpose of the action includes disrupting the

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[1] Section 507 *Workplace Relations Act* 1996 (Cth).
[2] Section 37 – 2005 Act.
[3] Section 36 – 2005 Act. Action authorised in advance and in writing by employers and 'protected action' under the *Workplace Relations Act* 1996 in pursuit of a collective agreement, is excluded.

performance of work, advancing claims against an employer or advancing the industrial objectives of a trade union) the conduct is unlawful and heavy financial penalties apply.[4] Unlike Work Choices where penalties ordinarily flow only after breach of a Commission order that specified conduct not occur, the 2005 Act has no 'early warning' system. There are no second chances here – if the action taken is *'unlawful industrial action'* liability will follow.

Not even action over health and safety concerns is immune. For example, unless the safety risk is 'imminent', restrictions or delays over safety issues will be unlawful.[5] The onus of proving that a risk is imminent rests with the employees.[6] This forces workers to balance a workplace health and safety risk against the prospect of being fined for not working.

In other words, because the 2005 Act renders virtually all forms of industrial action unlawful, industrial action in pursuit of broader industrial, economic or political objectives beyond those that can be included in a workplace agreement, is now expressly prohibited by statute and can result in sanctions against those involved.

Building workers stopping work to attend the 30th November protest rally therefore face a real risk of not only a mandatory 4 hour deduction of pay but serious fines and unlimited compensatory orders (effectively, damages). Unions organising that action also face serious consequences, including maximum fines of $110 000. Written material encouraging the participation of building workers may also be unlawful on the basis that it involves 'counselling', 'procuring' or being 'knowingly concerned in' a contravention committed by those who stop work to attend the rally.[7] There is even a provision in the 2005 Act which 'deems' the conduct of certain individuals to be that of the unions themselves, broadening the scope of union liability beyond that which exists at common law.[8]

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[4] Fines can range up to $110,000 for a trade union and $22,000 for individual workers. Compensatory orders and injunctions can also follow – s 49 and see also s 39.
[5] Section 36(1)(g) – 2005 Act.
[6] Section 36(2) – 2005 Act.
[7] Section 48(2) – 2005 Act.
[8] Section 69 – 2005 Act.

Of course industrial action has never enjoyed immunity from legal consequences simply because it was undertaken for political purposes.[9] The difference these days is that it is the government, not the employers, who are using these legal weapons – and using them not to recover for its own economic loss but to silence political criticism.

In November 2005 the ABCC issued a direct warning to Australian building unions that participation in these kinds of protests could lead to prosecutions, massive fines and damages. A marginally more subtle warning came in May 2006 when the ABCC declared the actions of a union organiser and a workplace delegate 'unlawful' because, according to its 'findings', a twenty minute meeting to collect money for the widow of a worker crushed to death on a building site had been organised for ulterior purposes, namely to '*advance the industrial objectives of the CFMEU in regard to the workplace reforms of the Australian Government*' and '*to gain publicity for the CFMEU's views about the workplace relations laws.*' These laws are now being used to re-shape industrial relations and to browbeat and suppress organised political opposition.

The 'Work Choices' laws and the 2005 Act are the most far-reaching set of industrial changes ever seen at a federal level. The effects will be felt in the workplace by millions of people. In any democracy when change occurs on this scale, dissent is to be expected. Inconvenience, even economic loss is the price we all pay to live in a society that does not punish people for responding with protest when their interests are directly threatened. These laws strike a critical blow at the right of workers and their unions to defend their most basic interests through industrial action.[10] Without that right, the very notion of freedom of association is effectively nullified.

The Howard Government's industrial laws have changed the relationship between Australian citizens and the state. Although there will be no water cannon at the MCG

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[9] See for example *Communications, Electrical Energy Information Postal Plumbing and Allied Services Union v. Commissioner Laing of the Australian Industrial Relations Commission* (1998) 86 IR 142.

[10] In its 2005 Report criticising the building industry legislation, the ILO's Committee on Freedom of Association emphasized that the right to strike *'is one of the essential means through which workers and their organizations may promote and defend their economic and social interests.'* Case No. 2326 338th Report of the Committee on Freedom of Association, 294th Session of the Governing Body of the ILO November, 2005 at paragraph 446.

on 30 November, our assumption that Australians would never be pursued and punished for their political actions by the apparatus of a vindictive state, will have been doused, well and truly, by then.