Constructing Lawful Workplaces

The need to maintain Australia's economic success by retaining a strong industrial action compliance regime.

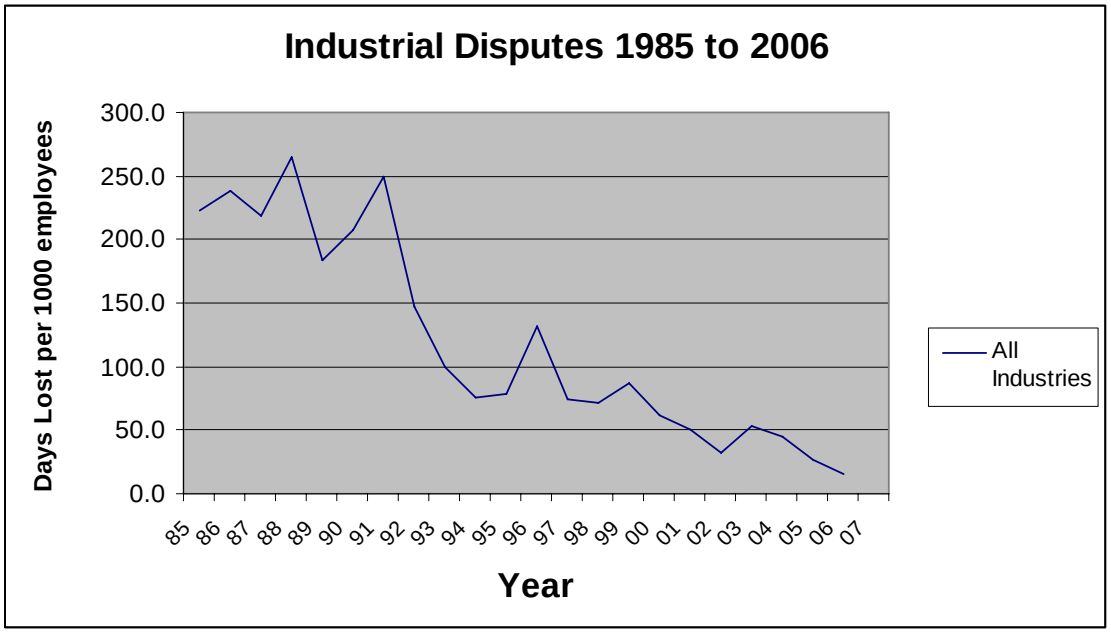
AMMA
2 July 2007

EXECUTIVE SUMMARY

Australia has had an unenviable international reputation of being a strike prone country. This reputation persisted into the early 1990s with industrial action across all industries resulting in more than 100 working days per thousand employees being lost in a single quarter. This was hardly an industrial environment that would attract investor confidence.

Major improvements to the federal legislative compliance regime provided by the *Workplace Relations Act 1996* and the *Trade Practices Act 1974* have delivered significant economic benefits to Australia through an increase in investor confidence – and there are more investment decisions to be made. The economic benefits flow on not just to business and employees but to all Australians.

While this investor confidence has been assisted by the creation of a flexible industrial relations environment, legislative restrictions on the taking of industrial action and a program of education and enforcement in the construction sector have contributed substantially to a favourable outlook on Australia's workplace relations. This is supported also by the fall in disputation levels to record lows, as shown in the chart below:



However, despite an improved industrial relations environment and strong evidence of increased economic prosperity for Australia, there remains an attitude of non-compliance. This has been demonstrated by certain union officials

who have engaged in thuggish and unlawful industrial behaviour, threatening a return to past practices in the event of an ALP victory at the upcoming federal election.

What the persistent, inappropriate and unlawful behaviour of some union officials demonstrates is that Australia must maintain a strong and effective compliance regime to protect businesses and Australia's reputation from the economic damage of unlawful industrial action.

Lessons learnt from past experiences is that a strong and effective compliance regime is one where

- unlawful industrial action is dealt with in a consistent manner and without delay;
- common law remedies are readily available to employers;
- Secondary boycott action is dealt with under the Trade Practices Act 1974;
- the construction and building industry is policed by an authoritative Australian Building and Construction Commissioner; and
- recourse is available to prevent and respond to unauthorised access to the workplace by union officials as it occurs.

And this may not be enough – unions are now using their own members as 'human shields' to prevent employers taking action against them in response to unlawful industrial action or are utilising community pickets to circumvent the application of the law. Groups who 'organise' in this fashion should be held accountable for the damage that they inflict.

The current law strikes an appropriate balance between the right of employees to take industrial action in support of claims for increased conditions and the rights of employers to operate their business. Yet some unions continue to demonstrate a blatant disregard for the operation of the law. The weakening of the current compliance regime would be an open invitation to unions to put at risk our stable and harmonious workplaces and Australia's economic prosperity. This is not in our longer term interest. To water down or remove the current protections against unlawful industrial behaviour would be an act of economic vandalism.

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Introduction

One only needs to glance at historical industrial disputation figures to see the benefit of an effective compliance regime. In 1996, 131.5 working days per one thousand employees were lost across all industries compared to just 14.9 working days per one thousand employees in 2006.[1] A review of the last two decades reveals that industrial disputation peaked to a staggering 104.6 working days per one thousand employees in the December 1992 quarter alone.[2] With the introduction of a strong and effective compliance regime, employees are now eight times more likely to be at work than ten years ago.

The need to federally regulate industrial action and workplace relations generally became apparent as far back as the 1890s when the economically damaging industrial disputes took place. Since that time, various legislative attempts have been made to achieve a balance between employees' right to strike and an employer's right to continuous labour, with varying success. Up until the 1980s, Australia was still considered a strike prone country, with disputes such as the pilots' dispute which has been described as 'one of the worst and most expensive industrial disputes in Australia's history'.[3]

Strikes have plagued the resources sector where international trading reputations are important to the continued success of mining companies. The resources sector, which is forecasted to make a significant contribution to the Australian economy of $116.5 billion in exports in 2007/08[4] and which has relationships with manufacturing, construction, banking and financial, process engineering, property and transport sectors, needs to continue to be internationally competitive. Industrial action that impinges on the ability of an employer to be competitive needs to be limited.

The right to strike was legislated in 1993 and recognising the importance being placed on direct cooperative relationships between employers and employees, a balance needs to be struck between the right to strike and the rights of employers. This balance can be achieved through a strong and effective compliance regime which ensures that the right to strike is not abused.

At a time when there is a prospect that industrial relations regulation in Australia could be changed significantly by a new incoming federal government, it is important that the key components for an effective compliance regime are identified and can continue.

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[1] Australian Bureau of Statistics, *Industrial Disputes*, December 2006, 6321.0.55.001.
[2] Ibid
[3] Alex Paterson, *A Pilots Perspective of the 1989 Australian Pilots Dispute*, 21 December 2005. http://www.vision.net.au/~apaterson/aviation/pd89_introduction.htm site accessed 1 June 2007.
[4] ABARE, *Australian Commodities*, Vol 14, No1, March Quarter 2007, 21. http://www.abareconomics.com/ site accessed 11 June 2007.

This paper will discuss the development of a strong and effective compliance regime in Australia – one which offers employers a choice of responses and remedies to unlawful industrial action and which is timely so as to minimise unnecessary damage. In particular, this paper will review the powers of the Australian Industrial Relations Commission with respect to unprotected industrial action, the accessibility of the common law, secondary boycott action, union right of entry and the special needs of the building and construction sector.

The achievement of a successful balance in respect to industrial action is measured by the level of industrial disputes in Australia, which are now at historically low levels, and in the confidence that local and international investors have in the Australian economy.

Historical Review of the Regulation of Industrial Action in Australia

Industrial action is described as

> action taken by employees or employers in campaigns for wages and conditions and other industrial matters. It can take many forms. Employers can lock out their employees while employees, usually acting through their unions, can go on strike, that is, stop work altogether or impose work bans, go-slows, refusal to work as directed.[5]

In the federal jurisdiction, strikes and lockouts were outlawed in the first enactment of the *Conciliation and Arbitration Act 1904*.[6] The *Conciliation and Arbitration Act 1904* was largely enacted in response to the great industrial disputes of the 1890s[7] and recognised the 'role of the collective organisation of employees'.[8] It was thought that compulsory arbitration would prevent industrial action because disputes could be resolved by an independent arbiter.[9] On the contrary, '[c]ompulsory arbitration did not operate in practice to prevent strikes; rather it influenced strike behaviour, whereby Australia consistently maintained a high incidence of short sharp strikes rather than drawn out industrial conflict.'[10]

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[5] CCH, *Australian Labour Law Reporter*, Industrial Action – A Variable Expression [¶45-500]
[6] *Conciliation and Arbitration Act 1904* (Cth) s 6(1).
[7] The Honourable Kevin Andrews MP, Minister for Employment and Industrial Relations, 'Where to From Here?' *Media Release*, 22 October 2004. http://mediacentre.dewr.gov.au/mediacentre/AllReleases/2004/October/Wheretofromhere.htm (site accessed 8 May 2007).
[8] CCH, *Australian Labour Law Reporter*, Historical Development [¶3-001]
[9] Shae McCrystal, Shifting the Balance of Power in Collective Bargaining: Australian Law, Industrial Action and WorkChoices (2006) *The Economics and Labour Relations Review* 16 (2), 183. http://www.austlii.edu.au/journals/ELRRev/2006/9.html site accessed 28 May 2007.
[10] Breen Creighton and Andrew Stewart (2005) *Labour Law* (4th ed) The Federation Press, Sydney, 538.

This was despite the fact that industrial action was unlawful and attracted 'a wide range of civil penalties or statutory sanctions.'[11] Section 6 of the *Conciliation and Arbitration Act 1904* made provision for fines of up to one thousand pounds for any person or organisation 'on account of any industrial dispute' to 'do anything in the nature of a lock-out or strike'.[12]

The provisions outlawing strikes and lock outs in the *Conciliation and Arbitration Act 1904* were repealed in the 1930s[13] and the insertion of 'bans clauses' in awards to prohibit industrial action became the primary means to sanction unions.[14] 'Bans clauses' prohibited industrial action so that if it was taken, the employer could apply to the Commission for an order compelling compliance with the award and for a penalty for breach.[15] During the 1950s and 1960s, there were heavy fines imposed on unions for breaching 'bans clauses', but unions often refused to pay the fines.[16] During this time, industrial action was also unlawful under common law,[17] giving employers access to 'injunctions and/or damages'[18] yet unions continued to flout any injunctions imposed.[19]

However, despite the fact that taking industrial action was unlawful, industrial action continued to be prevalent in Australia:[20]

- In early 1977, there were several disputes: Pilots' strikes grounded major domestic airlines; mail drivers walked off the job in Melbourne; postal workers and transport unions held a national 24 hour strike and strikes were reported in pubs, the Gas and Fuel Corporation, Telecom and Victoria's High Schools.[21]

- Various 'strikes, stop work meetings, inter-union disputes and every other conceivable action taken by unions to disrupt the workplace'[22] at Hamersley Iron during the 1960s and 1970s resulted in the loss of a million man hours and redirection of Japanese investment to the

[11] Ibid.
[12] Ibid, 538.
[13] CCH, *Australian Labour Law Reporter*, Industrial Action [¶45-552]
[14] Geoffrey Beckman (2005) *Declining Trade Union Membership*, The Evatt Foundation http://evatt.labor.net.au/publications/papers/124.html site accessed 8 May 2007.
[15] Ibid.
[16] Ibid.
[17] Dr Shae McCrystal, 'Striking Distance', *ANU Reporter*, Winter 2006 http://info.anu.edu.au/mac/Newsletters_and_Journals/ANU_Reporter/097PP_2006/_03PP_Winter/_strikes.asp site accessed 8 May 2007.
[18] Stuart Wood (2000) 'The Death of Dollar Sweets', H.R. Nicholls Society. http://www.hrnicholls.com.au/nicholls/nichvo21/wood2000.html (site accessed 30 March 2007).
[19] Above n10, 543.
[20] Above n17.
[21] Tom O'Lincoln (1993) *Years of Rage Social Conflicts in the Fraser Era*, Bookmarks Australia, Melbourne. http://www.anu.educ.an/polsci/marx/intervention/years.html (8 May 2007).
[22] Hon Norman Moore MP, Hansard (WA) Labour Relations Reform Bill 2002, 6. http://www.parliament.wa.gov.au/hansard/hans35.nsf/(ATT)/9534D11C49815F4C48256BB5002A4B72/$file/C36+S1+20020507+p9886b-9900a.pdf (site accessed 8 May 2007)

> Brazilian iron ore industry.[23] In early 1979 Hamersley Iron was subject to industrial action by its employees who wanted a different flavour of ice-cream in the canteen. Over the next two years after the 1979 disputes, Australian iron ore shipments declined.[24] It is claimed that in 1976 alone, 157 different sets of industrial action occurred at Hamersley Iron.[25]

These disputes occurred in a workplace relations environment based on compulsory conciliation and arbitration and the imposition of awards on the parties by the Australian Industrial Relations Commission (the Commission) in settlement of the dispute. It was not until the late 1980s that the direction shifted towards promoting bargaining at an enterprise level under section 155 of the *Industrial Relations Act 1988* and strengthened by amendments in 1992 and then 1993 to include agreements between employers and employees.[26]

In 1993 the Keating government gave unions the freedom to take protected industrial action when bargaining collectively on behalf of their members.[27] This was seen as a 'necessary trade element or trade-off for the introduction of the enterprise bargaining system'.[28] Additional protection in the form of section 166A was also introduced, which obliged employers to wait 72 hours before they could bring an action in tort against a union, 'regardless of whether they were or were not involved in negotiations for an agreement'.[29]

However, given the damage that industrial action can inflict on all parties involved and the wider Australian economy, it was recognised that the right to take industrial action needed to be limited. In his second reading speech for the Industrial Relations Reform Bill 1993 the Honourable L.J Brereton MP stated that

> [T]he development of a more coherent framework for bargaining emphasises the need for a fairer and more effective regime to regulate industrial action and sanctions. A right to take action in the negotiation of agreements, and a distinction between the negotiation phase and the period when the agreement is in force...The commission may terminate a bargaining period on application if it considers a party is not genuinely trying to reach an agreement…The commission may terminate the bargaining period if the industrial action is threatening to endanger the safety, health or welfare of the public or cause significant damage to the Australian economy…Recognising the importance of

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[23] Matthew Stevens, Retiring Rio Boss Slams Rudd IR, *The Australian*, 2 May 2007.
[24] Andrew Robb AO MP, Workplace Relations From Keating to Howard, Address to the Institute of Public Affairs, Melbourne 20 September 2005, 3. http://www.ipa.org.au/files/2005Robb_WorkplaceReformSpeech.pdf (site accessed 8 May 2007)
[25] SEA-US, *The Gulliver CRA Dossier*, 1997. http://www.sea-us.org.au/gulliver/cra.html site accessed 8 May 2007
[26] *Industrial Relations Reform Act 1988* (Cth).
[27] ACCI (2002) The Right to Strike, *ACCI Review,* no 89 July 2002, 1.
[28] Ibid.
[29] Above n10, 573.

> parties abiding by the terms of their agreements, maximum penalties for breaches in this area will be significantly increased.[30]

It is important to note that in 1993, the Keating government also repealed the secondary boycott provisions that operated since 1977 within the *Trade Practices Act 1974*.[31] The secondary boycott provisions 'were re-enacted in a much-modified form'[32] in the *Industrial Relations Act 1988*. This change limited the operation of the prohibitions on secondary boycott action and made relief available only after conciliation of the dispute was first attempted through the Commission.[33]

After its election in 1996, the Howard Government introduced the *Workplace Relations and Other Legislation Amendment Act 1996.* This Act, which reformed enterprise bargaining to include union and non-union collective agreements as well as statutory individual agreements, continued the right to strike provisions with some changes:

- 'bans clauses' could no longer be included in awards;
- prohibition on payment or receipt of payment of strike pay; and
- insertion of a new section 127 to apply generally, not just the public sector.[34]

The secondary boycott provisions were also removed from the industrial relations legislation and returned to the *Trade Practices Act 1974*. This was on the basis that stronger protection against such action could be provided by the *Trade Practices Act 1974*.

In 2005, further reform to the *Workplace Relations Act 1996* was introduced in the form of the *Workplace Relations Amendment (WorkChoices) Act 2005*. This resulted in the introduction of significant changes to industrial action provisions in the *Workplace Relations Act 1996*.

In the explanatory memorandum, the new provisions in respect to industrial action are described as follows:

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[30] The Hon. L.J Brereton MP, *Second Reading Speech*, House of Assembly, Industrial Relations Reform Bill 1993 (Cth), 28 October 1993 http://parlinfoweb.aph.gov.au/piweb/view_document.aspx?id=490786&table=HANSARDR (site accessed 10 May 2007).

[31] Louise Willans Floyd, 'Weipa and the Wharves: Australian Strike Law and its Effect on Trade Union Power,' *University of Tasmania Law Review*, 18 (1) 1999: 65-125, 107. http://search.informit.com.au.ezproxy.flinders.edu.au/fulltext;dn=20002250;res=AGISPT (site accessed 11 May 2007).

[32] ,Above n10, 576.

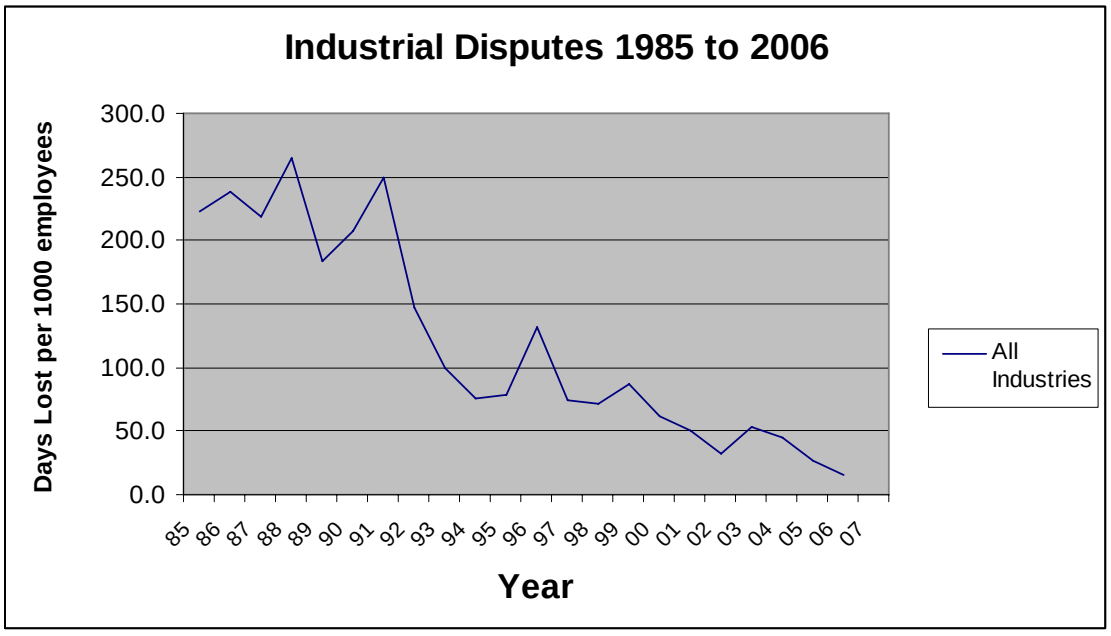
[33] Ibid.

[34] See Australian Government, Explanatory Memorandum Workplace Relations and other Legislation Amendment Act 1996 Schedule 14 Industrial Action, Australian Government, Canberra. http://www.workplace.gov.au/workplace/Category/Legislation/WRAct/SCHEDULE14-INDUSTRIALACTION.htm (site accessed 11 May 2007).

> The major reforms to be implemented by the Bill will…improve regulation of industrial action while protecting the right to take lawful industrial action by requiring the Australian Industrial Relations Commission (AIRC) to determine and [sic] application for an order to stop or prevent unprotected industrial action within 48 hours, requiring secret ballots before protected industrial action, expanding the grounds on which the AIRC can suspend or terminate a bargaining period, and creating a new power for the Minister for Employment and Workplace Relations to suspend or terminate a bargaining period in particular circumstances.[35]

Notably, the amending Act repealed section 127 and replaced it with a new section 496 to reflect the improved regulation and powers of the Commission. It also repealed section 166A.

When the government first introduced its workplace relations reforms in 1996 the then Shadow Minister for Industrial Relations Bob McMullen in a speech to the Australian Industrial Relations Society outlined five criteria by which the *Workplace Relations Act 1996* would be judged.[36] The first of those criteria was whether there would be fewer disputes than under the previous regime. The figure below details the days lost per thousand employees as a result of industrial disputes.[37]



[35] The Parliament of the Commonwealth of Australia, House of Representatives, Workplace Relations Amendment (WorkChoices) Act 2005 *Explanatory Memorandum*, Canberra, 1.
[36] Senator Andrew Murray, Democrats, 'Future Reforms of the Workplace Relations Act' speech to the Australian Mines and Metals Association, 10 September 1999, Perth, 3.
[37] Drawn from Australian Bureau of Statistics, *Industrial Disputes*, March 2007, 6321.0.55.001

The statistics speak for themselves - ten years have passed since McMullen's speech and industrial disputes are at historically low levels. While there has been a steady decline in disputes since the reforms of the early 1990s, Healy of the Flinders University National Institute of Labour Studies states that the industrial disputation statistics 'showed that the decline accelerated under WorkChoices'.[38]

The Commission's Power to Prevent or Stop Industrial Action

The *Workplace Relations Act 1996* provides protection to employers, unions and its members from penalty in respect to industrial action that is taken[39] during the negotiation of a collective agreement.[40] Such action is termed 'protected' action. This protects the rights of employees to take industrial action and balances it with the rights of the employer, thereby respecting the 'cooperative working relationships'[41] that exist in enterprise bargaining.

Industrial action taken during the operation of a workplace agreement or in breach of the legislative rules on industrial action is 'unprotected industrial action'. The principle of unprotected industrial action recognises that the parties have entered into a binding legal agreement on the terms and conditions of employment for a defined period of time – industrial action during the operating period of an agreement offends this principle. Appropriate mechanisms to deal with such action are therefore required.

In light of the historical behaviour of some unions flouting the law in respect to prohibitions against industrial action, strong statutory recourse against such action need to be available to employers. In particular, the Commission needs to be able to exercise its powers with minimal delay and in a manner that gives certainty to the parties involved.

Section 127 in its original form in 1996 gave the Commission the discretion to order that unprotected industrial action cease or not occur. Such an order could be made in respect to industrial action that is 'happening, threatened, impending or probable'.[42] An application under section 127 could be sought by a person who is 'directly affected' or made on the Commission's own motion.[43] Significantly, the wording of section 127 merely stated that the Commission 'may,

[38] Cited in Mark Davis, 'Striking Now a Distant Memory,' *Sydney Morning Herald*, 8 June 2007. 5.
[39] This is subject to the party taking industrial action satisfying the procedural steps required.
[40] *Workplace Relations Act 1996* (Cth) s 435.
[41] Department of Employment and Workplace Relations and Small Business, Submission to the Senate Employment, Workplace Relations, Small Business and Education Legislative Committee, 25 May 2000. http://www.aph.gov.au/senate/committee/EET_CTTE/completed_inquiries/1999-02/wrab2000/submissions/sub34.doc (site accessed 28 May 2007).
[42] *Workplace Relations Act 1996* (Cth) s 127.
[43] *Workplace Relations Act 1996* (Cth) s 127(2).

by order, give directions that the industrial action stop or not occur' [emphasis added].

The 'considerations taken into account by the Commission' in its exercise of discretion under section 127, have 'been many and varied'.[44] Such factors include the 'purpose of the action', 'economic impact', 'public interest', 'history of industrial action', 'the parties conduct' and 'freedom of expression'.[45] The combination means that many matters are analysed by the Commission;[46] the extent to which one matter may be given more importance in the exercise of discretion thus depends on the presiding Commission member.

This discretion caused employers uncertainty with respect to the operation of the section due to the Commission's apparent caution in exercising the discretion. While the Commission might make particular findings of fact that unprotected action is 'happened, threatened, impending or probable,' it may decide not to exercise its discretion to issue on order. In *Coal and Allied Operations Pty Ltd v. Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union and others* Munro J, Harrison SDP and Leary C stated that:

> The scheme of the Act does not in our view clearly imprint the discretion granted by s 127 with any guiding requirement to the effect that any industrial action that is not protected action should be directed to cease. The norms of the system reflected in the Act are not so specific that all unprotected industrial action must be taken to be of itself unjustifiable.[47]

Therefore, despite industrial action clearly being unprotected action as defined in the *Workplace Relations Act 1996*, employers were not always successful in securing an order preventing or stopping the action complained of.

Unnecessary and damaging delays were also a characteristic of section 127 applications. Examples include a 19 day delay between the first hearing and an order being granted in *P&O Ports Limited and the Maritime Union of Australia* and a 28 working day delay in *Hawker de Havilland Ltd and AWU and AMWU*.[48]

Where delay occurs in issuing an order to stop or cease industrial action, that order is essentially rendered ineffective – the damage to the employer having already been done as the action continues unaffected until an order is made.

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[44] Victor Di Felice, 'Stopping or Preventing Industrial Action in Australia', [2000] *Melbourne University Law Review*, 12. http://www.austlii.edu.au/au/journals/MULR/2000/12.html#fnB15 (site accessed 30 March 2007).
[45] Ibid. The purpose of the action is relevant to finding whether industrial action is protected.
[46] Ibid.
[47] Above n9.
[48] *P&O Ports Limited and the Maritime Union of Australia Print S0283* (7 June 1997)*; Hawker de Havilland Ltd and AWU and AMWU* Print R5728 (9 June 1999)

The inconvenience caused to companies and third parties by delay in receiving a section 127 order is highlighted in federal court proceedings involving Western Power employees. On 28 April 1997, Western Power employees took strike action, causing the company to impose power restrictions on 29 April 1997 on industrial, commercial and domestic users.[49] Western Power lodged an application for a section 127 order on 30 April 1997 and a hearing was heard that same day. However, Commissioner Laing did not issue a section 127 order, giving the union until the following morning (1 May 1997) to cease action or otherwise show cause why an order should not be made against it.[50]

Industrial action continued throughout the 1 May 1997 and a second day of hearing took place. An interim order that industrial action cease effective from 3:00 pm that day was issued.[51] Despite the order industrial action continued. An application to the Industrial Relations Court resulted in an interlocutory injunction being issued. This was followed by an additional hearing on 3 May 1997 before Commissioner Laing where Western Power sought further orders against individual workers and another union. Neither application was granted and the matter was adjourned to an off-the-record conference. This was held on 4 May 1997. It was not until the evening of 4 May 1997 that the employees returned to work. Power restrictions affecting residences, commercial and industrial enterprises were in place for a 'full six days'.[52]

The ineffectiveness of section 127 to limit industrial action has been expressed by Dalton as follows:

> "At times" the AIRC was reluctant to issue orders under Section 127 to stop industrial action, often preferring to grant union applications for adjournments and long conciliation sessions, with employers thus coming under pressure to compromise to obtain a return to work.
>
> Even when Section 127 orders were issued, the Federal Court showed a "distinct reluctance" to issue an injunction to enforce them, adopting instead an approach that was overly technical and would drag out proceedings.[53]

Other examples are readily available and highlight the shortcomings of section 127:

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[49] ACCI, Submission to the Inquiry into the Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999, (2000), 68. http://www.acci.asn.au/text_files/submissions/Workplace_Relations_Legislation.pdf (site accessed 28 May 2007).
[50] Ibid.
[51] Ibid, 69.
[52] Ibid.
[53] Richard Dalton, cited in Des Moore, 'Judicial Intervention: The Old Province for Law and Order' address to the Samuel Griffith Society's Thirteenth Conference, 31 August -2 September 2001, Melbourne. http://www.hrnicholls.com.au/Special/MooreSG2002.html (site accessed 30 March 2007).

- In *Patrick Stevedores No 1 Limited and Another v Maritime Union of Australia and Others*, a section 127 order had the effect of moving the dispute from Webb Dock to East Swanson Dock.[54]
- Picketing at Hunter Valley No. 1 mine in the NSW coal fields 'continued for weeks after a section 127 order was issued until an injunction was granted by the NSW Supreme Court.'[55]
- An application for orders by major construction company Grocon Constructors Pty Ltd took in excess of three months to be heard by the Commission despite some 40 separate instances of unlawful industrial action over the 12 month life of a project. Furthermore, the orders issued to address this protracted conduct were of only short duration. Grocon was then required to conduct another hearing to seek further orders to address continuing unlawful conduct[56]

Consequently, the 'ineffectiveness of section 127…is believed to be encouraging the taking of unprotected industrial action and some non-compliance with section 127 orders, and discouraging the seeking of injunction relief in legitimate cases'.[57]

Despite its shortcomings, the policy underpinning the operation of section 127 was sound – it was how it was being implemented that was causing employers significant problems:

> Delays in issuing of section 127 orders (including delays during which complex technical matters are determined), combined with the uncertainty surrounding the issuing of orders, detract from the policy intent to provide a timely remedy for parties affected by unprotected industrial action and may act as a disincentive for use of the provisions. It is also arguable that such delays have affected the potency of section 127 as a deterrent against the taking of unlawful industrial action.[58]

The federal government sought to rectify the shortcomings of section 127 so that the intention of its policy could not be thwarted by introducing the Workplace Relations Amendment Bill 2000 and Workplace Relations Legislation Amendment (More Jobs Better Pay) Bill 1999. However neither of these Bills passed Parliament.

The provisions of the Bills had included removing the discretionary power of the Commission to issue section 127 orders and requiring it to deal with a section

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[54] Above n17.
[55] Ibid.
[56] *Grocon Constructors Pty Ltd* PR944890 AIRC 22 March 2004.
[57] The Parliament of the Commonwealth of Australia, House of Representatives, Workplace Relations Legislation Amendment (More Jobs Better Pay) Bill 1999, Supplementary Regulation Impact Statement, 1999, Australian Government, Canberra. http://www.workplace.gov.au/NR/rdonlyres/F6D3D9F8-B598-4AEE-BB4D-CF33ED3886AB/0/RIS30AugSupplementaryFinal.pdf (site accessed 29 May 2007).
[58] Above n41.

127 application within 48 hours or otherwise issue an interim order to stop or prevent the industrial action.[59] In introducing these new requirements, the explanatory memorandum identified the consequences associated with the delay in obtaining a section 127 order:

- lost production for businesses both directly and indirectly affected by the action;
- delays and/or cost increases in the provision of goods or services to consumers;
- the standing down of employees not directly undertaking action; and
- damage to Australia's trading reputation.[60]

Consequently, up until the introduction of the *Workplace Relations Amendment (WorkChoices) Act 2005* there was no practical remedy available to employers in respect to short-term unprotected industrial action. This meant that there was also little deterrent to the taking of unprotected industrial action.

The *Workplace Relations Amendment (WorkChoices) Act 2006*, which commenced on 26 March 2006, repealed section 127 and replaced it with section 496. Section 496 requires the Commission to make an order that industrial action stop, not occur and not be organised if the action is not protected[61] and is happening, threatened, impending, probable or is being organised. A crucial element of the section is that it dictates that an order *must* be made if not contrary to the public interest, removing the previously held discretion of the Commission.

All applications must also be heard and determined as far as practicable within 48 hours of being lodged.[62] If this is not possible, an interim order to stop and prevent engagement in, and organisation of, the industrial action must be made.[63] This will ensure that harmful action by unions, such as that involving Western Power, is not given any additional advantage by delays in obtaining an order.

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[59] See *Workplace Relations Amendment Act 2000* and above n39.
[60] The Parliament of the Commonwealth of Australia, House of Representatives, Workplace Relations Legislation Amendment (More Jobs Better Pay) Bill 1999, Supplementary Regulation Impact Statement, 1999, Australian Government, Canberra, 64. http://www.workplace.gov.au/NR/rdonlyres/F6D3D9F8-B598-4AEE-BB4D-CF33ED3886AB/0/RIS30AugSupplementaryFinal.pdf (site accessed 29 May 2007).
[61] Industrial action is not protected when taking during the nominal life of an agreement. It is also unprotected if taken without a valid secret ballot, where a party is not genuinely trying to reach an agreement, where an order of the Commission is not being complied with, does not relate to eligible members of the union, relates to a demarcation dispute or is threatening to endanger life, personal safety, health, welfare or to cause significant economic damage. See Part 9, *Workplace Relations Act 1996*.
[62] *Workplace Relations Act 1996* (Cth) s 496(5)
[63] *Workplace Relations Act 1996* (Cth) s 496(6).

In addition, a third party affected by industrial action can bring an application pursuant to section 496(4) of the *Workplace Relations Act 1996.* In circumstances like those present in Western Power where residences, commercial and industrial enterprises were also affected, this means that additional protection has been made available. This was utilised by a contractor on the 'Woodside Project' on the northwest shelf of Western Australia, who was affected by industrial action and obtained an order against the Maritime Union of Australia and its members who were employed by another employer.[64]

Similar to the former section 127, failing to comply with an order under section 496 is a civil offence attracting a penalty[65] and an injunction can also be granted by the Federal Court or Federal Magistrates Court.[66]

An effective compliance regime ensures '"better quality" agreement-making, as parties…more clearly understand that the ability for a union or its members to pursue extra claims during the nominal life of an agreement will be further restricted'.[67] This addresses the anomaly created by the *Emwest*[68] decision, where the Full Court of the Federal Court interpreted the legislation to mean that the 'AMWU was able to take protected action in relation to the issue of redundancy entitlements (which were not included in the agreement) at a workplace covered by an agreement whose nominal term had not expired'.[69]

Common Law Remedies

The common law provides employers with a range of responses to industrial action that inflicts economic loss, known as 'industrial torts.'[70] There are three types of industrial torts that can be taken against another party:[71]

1. interference with contractual relations;
2. intimidation; and

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[64] *Harbour Works Cough Contracting Pty Ltd v Maritime Union of Australia* (C2006/1049) 13/4/06
[65] *Workplace Relations Act 1996* (Cth) s 719(4). The maximum penalty has increased under s 719(4) from $10,000 for a body corporate to $33,000 and $2,000 in other cases to $6,600.
[66] *Workplace Relations Act 1996* (Cth) s 496(12). Sections 494 and 495, which prohibit industrial action taken before the nominal expiry date of a collective agreement or AWA, are civil penalty provisions and allow a Court to impose a pecuniary penalty or injunction to stop the contravention or remedy its effects.
[67] AMMA, Submission to the Senate Employment Workplace Relations, Small Business and Education Committee Inquiry into the Workplace Relations Legislation Amendment (More Jobs Better Pay) Bill 1999, September 1999.
http://www.amma.org.au/home/publications/mb_submissions_wraamend.html (site accessed 29 May 2007).
[68] *Emwest Products Pty Ltd v AMWU* (2002)117 FCR 588.
[69] Above n10, 226.
[70] Although given the name 'industrial torts' they are by no means restricted to industrial matters and apply also to non-industrial conduct.
[71] CCH, Industrial Action: 'Industrial Torts' *Australian Labour Law Reporter* [46-250].

3. conspiracy by unlawful means.

In an industrial tort action, an employer can seek an injunction to restrain a union from commencing or continuing to engage in wrongful conduct.[72] The employer can also seek damages to compensate any loss that has been caused due to the action.[73] The findings and order of injunction by a court can be invaluable in ensuring a return to work, as failure to comply with an order is considered a contempt of court, which attracts fines, imprisonment and possible sequestration of assets.[74]

While many cases do not proceed beyond the issuance of an interlocutory injunction, the potential to recover damages against trade unions at common law is of critical importance to employers.'[75] The benefit of taking an action at common law as compared to proceedings in the Commission is that a Court has the capacity to award damages and injunctions.[76] Thus, the accessibility of common law relief is an effective deterrent to unlawful action taken by unions.

Interference with contractual relations can occur where a person 'causes loss to a party to the contract through deliberate interference with that contract.'[77] An actual breach of the contract does not need to occur, merely interference with the contractual relations.[78]

Interference with contractual relations may take the form of indirect or direct interference.[79] Direct interference results where an employee is persuaded or procured to break or not fulfil his or her contract of employment with the employer.[80] An indirect interference occurs where employees are induced to go on strike in breach of their contract with their employer who is a supplier to another company, causing the supplier to be unable to fulfil its contractual obligations and causing the company economic loss.[81] This is the same as a secondary boycott action. That company can then take an action against the union for indirect interference with contractual obligations.

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[72] Above n10, 539.
[73] Ibid.
[74] Ibid.
[75] Peter Costello, 'Legal Remedies Against Trade Union Conduct in Australia', Chapter Six, *Arbitration in Contempt*, The Proceedings of the Inaugural Seminar of the H R Nicholls Society, Melbourne 28 February-2-March, 1986. http://www.hrnicholls.com.au/nicholls/nichvol1/vol16cha.htm (site accessed 4 June 2007).
[76] Ibid.
[77] Faculty of Law, Monash University, Discussion Paper 18, *The Law Relating to Industrial Action in Australia,* prepared by the Faculty of Law at the Monash University for the Royal Commission into the Building and Construction Industry, November 2002, 11. http://www.royalcombci.gov.au/docs/Discussion%20Paper%2018.pdf (site accessed 4 June 2007).
[78] Ibid.
[79] Ibid; see also above n10, 539.
[80] Ibid.
[81] Ibid, 13.

Importantly, a tort of indirect interference with a contract occurs when a union has used 'unlawful means'. While this can occur when a union induces a breach of an employment contract, it also extends to the 'commission of a crime'.[82] Therefore the scope of the liability is broad.

The tort of intimidation is committed when, for example, a union threatens to take industrial action on behalf of its members that would breach the employment contract, in order to persuade the employer to dismiss a particular employee.[83] In this situation, the dismissed employee has a right of action against the union.[84] It can also arise where industrial action is taken and is accompanied by threats of or actual assault.

The tort of conspiracy is made out when two or more employees act together to place pressure on the employer by going on strike.[85] In order to be successful in its claim, the employer must show that the conspiring employees had an intention to injure the employer by unlawful means.[86]

Dollar Sweets Pty Ltd v Federated Confectioners Association of Australia[87] is one well known case where an employer has successfully prosecuted a union under each industrial tort. In that case, members of the Federated Confectioners Association picketed the premises of Dollar Sweets.[88] Relief was given on the grounds that the union committed a tort of interference with contractual relations, intimidation and that 'they had conspired wilfully to injure Dollar Sweets in its trade'.[89] This was no minor picket – it was 'violent and obstructive' evidenced by the assault on a truck driver attempting to make a delivery to Dollar Sweets.[90]

The damage caused to Dollar Sweets by the industrial action had the potential to be devastating on its continued survival – 'there was a turnabout from profit to loss…due in no small part to the disruption to supplies and consequent loss of sales due to the picket…if the trend was not reversed, Dollar Sweets Ltd would be unable to continue trading'.[91] The employer received $175,000 in that case as part of an out of court settlement.[92]

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[82] Ibid
[83] Ibid.
[84] Ibid.
[85] Ibid, 13.
[86] Ibid. Conspiracy to injure the employer but done so lawfully will only succeed if the sole purpose of the action was to injure the employer. If the purpose was also to improve the terms and conditions of their members' employment, it will be difficult to succeed. Unlawful action is wider and offers more probability of success to employers.
[87] 1986 AILR 29.
[88] CCH, Industrial Action: 'Industrial Torts' *Australian Labour Law Reporter* [46-250.40]
[89] Ibid.
[90] Ibid.
[91] Ibid.
[92] Above n10, 571.

But in *Australian Transport Industries (Operations) Pty Ltd v Australian Federation of Air Pilots*[93] the amount of damages awarded was significantly higher at $6.48 million.[94] In that case, the court found that a directive by the union to its members that they work only between the hours of 9:00 am and 5:00 pm for six days was an interference with contractual relations.[95] The unlawful means in this case was a breach of section 312 of the *Industrial Relations Act 1988*, which prohibited a union bound by an award advising a member to refrain from working in accordance with that award.[96]

A number of causes of action were also taken in respect to the Waterfront Dispute in 1998. In *Patrick Stevedores Operations Pty Ltd and Anor v The Maritime Union of Australia and Others*,[97] two companies were awarded interlocutory injunctions against the MUA based on an interference with the performance of contract, interference with trade and business relations, torts of trespass, nuisance and interference with the quiet and lawful enjoyment of property.[98] In that case, union members picketed the entrance of Patrick's premises, refusing entry to trucks 'by intimidating the drivers through besetting, threats of physical harm and property damage and actual physical harm and property damage'.[99]

Despite the existence of various tort actions that would provide employers with an effective and timely response to unlawful and damaging industrial action, section 166A operated as a barrier to their accessibility.

Section 166A under the *Industrial Relations Act 1988* and retained in the *Workplace Relations Act 1996* prevented an employer from bringing 'an action in tort under the law of a State or Territory' unless the Commission has issued a certificate. [100] This certificate is issued only after

1. the Commission is notified of an intent to bring an action in tort; and
2. it has started the conciliation process to try to stop the conduct and forms the opinion that it is unlikely to be able to stop the conduct promptly; or
3. the Commission decides that it would cause substantial injustice to prevent an action in tort while it is exercising its conciliation powers; or

[93] (1989) 05 ALR 211.
[94] However, the damages award has not been enforced against the defendants..
[95] CCH, Industrial Action: 'Industrial Torts' *Australian Labour Law Reporter* [46-250.40]
[96] Above n77, 12.
[97] (1998) 82 IR 87.
[98] above n77, 16.
[99] Ibid.
[100] Although in *Patrick Stevedores No 1 Pty Ltd v Maritime Union of Australia* (1998) 77 IR 268 at 271, Beach J distinguished an interlocutory injunction from an action in tort, stating that it was seeking the Court use its equitable jurisdiction. This meant that if the party is seeking an interlocutory injunction, section 166A may not have operated to restrict the application.

4. the Commission has not stopped the conduct by the end of 72 hours after the notice was given.[101]

This is a cumbersome process to obtain a certificate in order to take an action in tort against a union, a 'process which has proven inconvenient, and is not equipped to handle shorter bouts of industrial action taking place over a 24 or 48-hour period.'[102] This is because the section essentially 'delay(s) the bringing of an action for 72 hours.'[103] Additionally, unions took to seeking 'anti-suit' orders in the Federal Court, preventing employers 'prior to or immediately following the employer or affected party getting the s166A certificate to enable recourse to the Supreme Court.[104]

It is important to note that the common law of tort does not apply solely to unions. It is a body of law that applies equally to all persons in Australia and therefore, unions should not be immune from a tort by being afforded special privilege.[105] Section 166A has since been removed from the Workplace Relations Act 1996 with the introduction of the 2006 amendments.

Secondary Boycott Action

Secondary boycott provisions came into operation in 1977 (section 45D).[106] The section was introduced to prevent indirect boycotts carried out by employees against traders.[107] The rationale for its inclusion was described by the Swanson Committee as follows:

> We believe the trader who is the object of the employees' action should not simply have the choice of toeing the line or suffering substantial damage or in some cases going out of business. He [sic] too is entitled to have his [sic] day in court.[108]

[101] *Workplace Relations Act 1996* (Cth) s 166A(6).
[102] Allens Arthur Robinson, 'Quick Response to Industrial Action Placed at Risk,' *Focus: Workplace Relations* – October 2002. http://www.aar.com.au/pubs/wr/fowroct02.htm (site accessed 29 May 2007).
[103] Royal Commissioner, The Hon. Terence Cole RFD QC, *Final Report of the Royal Commission into the Building and Construction Industry: Reform – Achieving Cultural Change*, Volume 11, February 2003. http://www.royal combi.gov.au/docs/finalreport/V11CulturalChng_PressFinal.pdf (site accessed 29 May 2007).
[104] Richard Dalton, cited in above n19.
[105] Above n75.
[106] CCH, Australian, 'Industrial Action: Secondary Boycotts', *Australian Labour Law Reporter*, [46-000]
[107] Ibid.
[108] Ibid.

Section 45E was introduced in 1980 to 'prevent arrangements between a union and another party to prevent or hinder the trade of goods and services by the other party to or from a "target"'.[109]

In 1993, the provisions were removed from the *Trade Practices Act 1974* and re-enacted in the *Industrial Relations Act 1988.* The practical effect of this was significant – it meant that if an employer wanted to commence legal action in respect to a secondary boycott, it had to go through the conciliation and arbitration process first. In his second reading speech for the Industrial Relations Reform Bill 1993, which proposed to reinstate the secondary boycott provisions in the *Industrial Relations Act 1988*, the Hon. L.J Brereton stated:

> There will be a requirement for pre-litigation conciliation by the commission where, in relation to an industrial dispute, there is a contravention of the secondary boycott prohibition…This will be for a maximum period of 72 hours.[110]

This procedure was similar to the operation of section 166A, discussed above, which prevented an employer from taking immediate action in the courts to prevent damaging industrial action until 72 hours had passed and conciliation had been attempted first. As with the shortcomings of section 166A, this requirement to proceed through the conciliation and arbitration process first meant that unions could take damaging wildcat action lasting 24 hours without fear of repercussion.

The significance of the removal of secondary boycott provisions from the *Trade Practices Act 1974* is illustrated in the 1995 Weipa dispute, which occurred during the period when the secondary boycott provisions were contained in industrial relations legislation. The Weipa dispute began at the enterprise level with 'indefinite work stoppages' organised by the Construction Forestry Mining and Energy Union (CFMEU) but

> it developed into an industrial dispute involving many forms of industrial action and spread across Australia to involve workers in cities spanning the whole country…workers, in addition to stopping work, were engaged in blockades of the mining area both on land and then at sea…bulk carriers were literally banked up off the Weipa coast, and could not be loaded with the bauxite prepared for export…different unions, not directly involved at Weipa, and sometimes engaged in other industries, such as coal mining and the waterfront, also participated in industrial action in support of the Weipa workers.[111]

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[109] Ibid.
[110] Above n30.
[111] *Coal and Allied Operations Pty Ltd v. Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union and others* cited in above n31, 110-111. http://search.informit.com.au.ezproxy.flinders.edu.au/fulltext;dn=20002250;res=AGISPT (site accessed 11 May 2007).

The stoppages and supporting action occurred over the period of one month and losses to both the economy and business were significant:

> These planned strikes commenced at an estimated cost to the *national economy* of between $100 and $200 million in lost production and export. The cost to CRA was estimated at $3 - $4 million per day.[112]

The secondary boycott provisions in the *Industrial Relations Act 1988* were not used by innocent businesses affected by the secondary boycott action that was taken during this dispute. This, according to Floyd, was because the 'statute had effectively removed the ban on secondary boycotts, which may be regarded as a union's most potent weapon for advancing its claims'.[113] Thus the requirement to proceed through the conciliation and arbitration process and wait out a period of 72 hours was a major impediment to employers that rendered the provisions ineffective.

In January 1997 the Howard Government returned the secondary boycott provisions to the *Trade Practices Act 1974*.[114] Since this time they have proven to be a very 'effective contribution to historically low levels of industrial disputation since the commencement of the *Workplace Relations Act 1996'.*[115] In the quarterly period of September 1996, industrial disputation levels in all industries in Australia were 43 days per thousand employees. In the same quarter of 2006, it was 2.3 days per thousand employees.[116]

The beneficial implications of secondary boycott provisions operating in the *Trade Practice Act 1974* are highlighted in the 1998 Waterfront Dispute. In 1998, those parties not directly involved in the dispute between Patricks and the MUA were protected from secondary boycott action due to the risk of substantial monetary penalty under the *Trade Practices Act 1974.* This meant that despite the dispute occurring, the secondary boycott laws prevented a national shut down of Australia's ports and damage to innocent businesses.[117]

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[112] Above n31, 111.
[113] Ibid, 112.
[114] The provisions were re-enacted in the *Trade Practices Act 1974* as a result of the *Workplace Relations and Other Legislation Amendment Act 1996*. The secondary boycott provisions commenced on 17 January 1997. http://www.workplace.gov.au/workplace/Category/Legislation/WRAct?WhatsHappeningWiththeWorkplaceRelationsAct.htm (site accessed 4 June 2007).
[115] Peter Anderson, ACCI, 'Workplace Relations and the Trade Practices Act: Implications of the ABCC Beyond the Building Industry,' IPA Work Reform Unit, Papers from the IPA Conference: *The Last Frontier: Making Industrial Relations Subject to the Trade Practices Act*, undated. http://www.ipa.org.au/files/anderson.html site (accessed 30 March 2007).
[116] Australian Bureau of Statistics, *Industrial Disputes*, December 2006, 6321.0.55.001
[117] Peter Anderson, ACCI, Trade Practices vs Industrial Relations: Changing Times – Does the balance need revisiting? Address to the Institute of Public Affairs Work Reform Unit Seminar, 28 July 2004. http://www.acci.asn.au/text_files/speeches-transcrips/2004/(2004-07-28)%Trade%20Practics.pdf (site accessed 4 June 2007).

Since its inception, there has been an ongoing struggle between the Coalition and Labor parties in respect to the 'home' of secondary boycott provisions. In the lead up to the 2007 federal election, business remains in a state of uncertainty – the Labor party has not detailed its position with respect to the secondary boycott provisions within the *Trade Practices Act 1974*. However, if history and past practice is any indication, there is a risk that the secondary boycott provisions will be reinserted into the industrial relations legislation.

It is imperative that the secondary boycott provisions remain in the *Trade Practices Act 1974* as they are a deterrent to unlawful behaviour and offer employers a more effective and timely recourse to unlawful action. The unsuitability of the industrial relations legislation as a means to address secondary boycott action is identified succinctly by lawyer and academic Peter Costello (not to be confused with the current federal treasurer):

> If an employer had no right to bring proceedings in a Court and was restricted to conciliation and arbitration before the Commonwealth Commission he [sic] would be deprived of any right to recover compensation for his [sic] loss and to obtain injunctive relief to prevent the loss from continuing. In these circumstances, by reason of financial necessity, most employers would be coerced into giving way at an early stage and thereby "settling the dispute" by complete capitulation.[118]

Union Right of Entry

Unions have commonly used their right of access for purposes other than assisting members with workplace issues. Entry for the purpose of self promotion for internal union elections, political agendas, demarcation disputes, non-member recruitment and simply to cause disruption to the workplace are examples of interventions which impact on the ability of the employer to run its business efficiently.

Right of entry laws together with union coverage rules grant a right and also place limits on unions' access to an employers' premise and the timing and circumstances under which entry may be effected.

Prior to the introduction of WorkChoices, right of entry laws were duplicated in the federal and state jurisdictions. This issue was brought to the forefront in *BCG Contracting v CFMEU*[119] where the CFMEU sought to enter the workplace for discussion purposes under the Western Australian right of entry laws. The employer sought to deny access under the *Workplace Relations Act 1996* on the basis that the employees were covered by Australian Workplace Agreements.

[118] Above n75.
[119] FCA 981 (29 July 2004).

The Federal Court held that right of entry can still be exercised under state legislation even where the employees at the workplace are engaged solely under a federal industrial instrument. This decision made it difficult for employers as it meant that they were required to manage multiple sets of right of entry provisions.

This position has been significantly improved by the 2006 amendments which created a national set of right of entry laws for constitutional corporations. The amendments however did not go far enough as they failed to exclude state right of entry under Occupational Health and Safety laws. Access under State OHS laws has been used as a subterfuge to defeat the Federal right of entry regime.

Nevertheless, the current system has appropriate safeguards in place to ensure that entry to a workplace is not disruptive. The person seeking entry must[120]

- be a fit and proper person
- hold a federal permit
- provide the required level of notice
- provide reasons for entry that are limited to either a) a suspected breach b) for occupational health and safety purposes or c) to hold discussions with employees
- comply with occupational health and safety requirements
- comply with any request to conduct interviews in a particular room or to take a particular route.

The need to have these restrictions in place is illustrated by the behaviour of some union officials. For example, in 2006 WA Branch Assistant State Secretary of the CFMEU Joe McDonald had his Western Australian permit revoked after he was caught climbing on a crane at a Perth worksite.[121]

The ALP has not outlined its policy position in respect to right of entry laws. With some union officials still engaging in threatening and abusive behaviour when attempting to gain entry (see building industry discussion below) any policy position must be appropriately balanced. While it is recognised that employees are entitled to the assistance of the union of which they are a member, the right to enter site must not be unfettered. Employers must be able to refuse entry to officials demonstrating irresponsible, dangerous and abusive behaviour.

[120] *Workplace Relations Act 1996* Part 15.
[121] Elizabeth Gosch, 'Union Chief to Fight Trespass Charges, *The Australian,* 11 April 2007.

ABCC and industrial action in the construction building industry

The building and construction industry[122] became the subject of a Royal Commission inquiry in 2001 in respect of concerns of unlawful and inappropriate conduct in that industry and that the productivity level that was 'less than average for the market sector over the past five years'.[123] The industry was earmarked for reform as it 'depart[ed] from the standards of commercial and industrial conduct exhibited in the rest of the Australian economy.[124]

The building and construction industry is considered 'a crucial driver of economic activity in Australia'.[125] In 2001-02 even though its productivity levels were less than average, it was still a '$40 billion a year industry, accounting for around 5% of Australia's gross domestic product and employed over 700,000 people'.[126] In 2005 it was a $90 billion a year industry and is reported as being the 'backbone of the national economy, with construction, supply, and project firms accounting for 14 percent of the gross domestic product…it is growing at 2.6 percent a year'.[127]

Mining also plays an important role in the building and construction industry and is a significant contributor to the economy in respect to construction. There are approximately 275 mining and energy projects under construction, committed or at a less advanced stage[128] and 'over 45 of these are advanced projects that are scheduled for completion in the second half of 2007'.[129] The total capital expenditure for these projects is between $127 and $130 billion,[130] not including

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[122] This is distinct from the housing building industry. See *Building and Construction Industry Improvement Act 2005* s 5.

[123] Hon. T Cole, Commissioner, Final Report of the Royal Commission into the Building and Construction Industry, *Summary of Findings and Recommendations*, Volume 1, February 2003, 3. www.royalcombci.gov.au site accessed 1 June 2007.

[124] Ibid.

[125] Australian Chamber of Commerce and Industry, 'ACCI Submission to the Building Industry Royal Commission', *Media Release*, 11 October 2002, 1. http://www.royalcombci.gov.au/docs/submissions/GEN_068.PDF (site accessed 1 June 2007).

[126] Australian Government, Reforming the Building and Construction Industry, Key Issues – September 2003, Department of Employment and Workplace Relations, 1. http://www.workplace.gov.au/NR/rdonlyres/DDCFD8E3-4D1B-4AA6-9932-97055A842840/0/keyissues.pdf (site accessed 1 June 2007).

[127] Cooperative Research Centre for Construction, cited in Industry Search, Australian Construction Industry Set for New Heights, 22 November 2005. http://www.industrysearch.com.au/Features/Australian_Construction_Industry_set_for_new_heights-323 (site accessed 1 June 2007).

[128] Abare Economics, *Abare Major Minerals and Energy Projects*, April 2007. http://www.abareeconomics.com/publication_html/energy/energy_07/ME_prjectionsapr07.xls (site accessed 1 June 2007).

[129] Ibid.

[130] Total calculated using the Abare Mining and Energy table. Abare Economics, *Abare Major Minerals and Energy Projects*, April 2007. http://www.abareeconomics.com/publication_html/energy/energy_07/ME_prjectionsapr07.xls (site accessed 1 June 2007).

those projects where capital expenditure figures were not available. During construction the total number of employees will be more than 21,600[131] and more than 54,000 once operations commence.[132] Some major mining construction projects include:

- Woodside's Pluto Gas field Burrup LNG Park, involving capital expenditure of $6-10 billion. Pluto is expected to boost the Western Australian economy by at least $28.6 billion over the life of the project;[133]
- Chevron Australia/ExxonMobil/Shell Gorgon Project in Western Australia with an initial investment of $11 billion;
- Xstrata/Nippon Steel's Bulga Underground Longwall black coal mine in New South Wales. This new project currently under construction has a capital expenditure of $350 million[134];
- Rio Tinto's Clermont open cut black coal mine in Queensland. This new project, committed to construction, has a capital expenditure of $950 million[135];
- Wesfarmer's Kwinana LNG plant in Western Australia with a capital expenditure of $138 million[136];
- SXR Uranimum One's Honeymoon mine with a capital expenditure of $55 million[137];
- Oxiana's Prominent Hill copper mine currently under construction with a capital expenditure of $775 million[138];
- BHP Billiton's Olympic Dam mine expansion proposal, with a capital expenditure of $6 billion[139];
- Ballarat Goldfield's Ballarat East project under construction with a capital expenditure of $120 million[140];
- Fortescue Metals Group's Pilbara Iron Ore Project currently under construction with a capital expenditure of $2.78 billion[141];
- Tarramin Australia's Angas Zinc Project, currently under construction with a capital expenditure of $64 million[142]; and

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[131] Total calculated using the Abare Mining and Energy table. Abare Economics, *Abare Major Minerals and Energy Projects*, April 2007. http://www.abareeconomics.com/publication_html/energy/energy_07/ME_prjectionsapr07.xls (site accessed 1 June 2007). The total employment figure was 21,565 – 21660 however employment figures for 151 projects were not available.
[132] Ibid..
[133] Woodside, *The Pluto Development*, 29 May 2007. http://www.woodside.com.au/Regions/Australia+and+Asia/Development+Opportunities/Pluto/Pluto+COVERPAGE.htm (site accessed 1 June 2007).
[134] above n128.
[135] Ibid.
[136] Ibid.
[137] Ibid.
[138] Ibid.
[139] Ibid.
[140] Ibid.
[141] Ibid.

- Perilya's Flinders Zinc Project under construction with a capital expenditure of $35 million[143].

These are just a sample of mining construction projects underway in Australia demonstrating investor confidence in the mining industry. According to Abare Economics,

> at the end of April 2007, the number of advanced projects was at a historically high level…as is the total value of advanced projects…new capital expenditure in the mining industry was $18.5 billion in 2005/06, 80 percent higher than 2004/05…Indications are that it will increase rapidly in 2006/07 and again in 2007/08…In the six months ended April 07, 23 major minerals and energy projects, totalling $3.36 billion were completed, resulting in increased production and export capacity for a range of commodities.[144]

Given the level of investment in the resources sector, it is not surprising that it would want to maximise productivity and keep inappropriate conduct to a minimum.

The necessity to have a separate legislative regime for the building construction industry and an industry watch dog is highlighted in the findings of the Cole Royal Commission and the final report of the Building Industry Taskforce.[145] The Cole Royal Commission made various findings in respect to conduct and practices in the building and construction industry including:

- widespread application of, and surrender to, inappropriate industrial pressure;
- unlawful strikes and threats of unlawful strikes;
- disregard of Australian Industrial Relations Commission and Court orders
- disregard by senior union officials of unlawful or inappropriate acts by inferior union officials
- reluctance of employers to use legal remedies available to them
- endeavours by unions, particularly the Construction, Forestry, Mining and Energy Union, to regulate the industry; and
- disregard of the rule of law.[146]

Some examples of this type of conduct listed by the Royal Commission in its final report include[147]

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[142] Ibid.
[143] Ibid.
[144] Above n129.
[145] Building Industry Taskforce, Upholding the Law – Findings of the Building Industry Taskforce, 2005, Commonwealth of Australia, Department of Workplace Relations. www.buildingtaskforce.gov.au (site accessed 31 May 2007).
[146] Above n123, 5-6.
[147] Ibid, 7-10.

- industrial action, or threats thereof, on a site and other related or unrelated sites, if all subcontractors did not have a union-endorsed Certified Agreement;
- stoppage of work by a union because a subcontractor would not enter into a union endorsed Certified Agreement;
- a union taking or threatening to take industrial action in its own interests;
- union members engaging in sympathy action in support of matters not related to the site on which they are working;
- unlawful industrial action by a union forcing businesses to move outside the state, or to determine not to work in that state;
- the making by unions of groundless, unspecified or disputed wage claims, and supporting such claims with threats of black bans or other industrial action; and
- contractors paying money to a union (or to an organisation nominated by the union) in an endeavour to buy industrial peace.

As a result of the findings published in the Royal Commission's final report, an interim Building Industry Taskforce was established in October 2002 to police breaches of the *Workplace Relations Act 1996*.[148] The passage of separate legislation regulating the building and construction industry and the development of a permanent national agency was also recommended by the Royal Commission.[149] This recommendation was accepted and a draft Building and Construction Industry Improvement Bill 2003[150] was circulated for consultation. This Bill provided for the appointment of a permanent Australian Building and Construction Commissioner (ABCC) with the power to investigate, enforce and prosecute in respect to conduct in the building construction industry.

In its final report before the commencement of the ABCC and *Building and Construction Industry Improvement Act 2005,* the Building Industry Taskforce made the following comment in respect to the construction building industry:

> [T]he industry remains plagued by a culture of civil disobedience, coercion, intimidation, threatening behaviour, and contempt for the law.[151]

It then detailed the nature of the behaviour in respect to the Grand Prix site in Melbourne, an event which is economically beneficial to the State of Victoria and also to various charity groups:

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[148] Australian Chamber of Commerce and Industry, *Submission of the Australian Chamber of Commerce and Industry (ACCI) on the Exposure Draft Building and Construction Industry Improvement Bill 2003*, October 2003, 2. http://www.acci.asn.au/text_files/submissions/BIRC_draft_Bill_October2003.pdf (site accessed 26 June 2007)
[149] Above n123, 28.
[150] Ibid, 3.
[151] Above n145, 5.

> In 2004, the Taskforce received reports including…union representatives shutting down the site, purportedly for safety reasons, in an effort to coerce workers to sign union agreements; and…pressure being applied to contractors with threats that work would stop because of alleged unsatisfactory amenities.[152]

The Taskforce summed up industry behaviour by stating that, 'the industry norm is to disregard the WR Act and adhere instead to, as one Taskforce complainant put it, '*the law of the jungle*'.[153] The prevalent culture in the construction industry has been one of 'lawlessness'[154] – a complete disrespect for the rule of law. For example, Craig Johnston, former Victorian State Secretary of the AMWU was sentenced to nine months imprisonment after organising raids causing over $45,000 worth of damage to two properties because of an industrial dispute – at the first property, wearing a balaclava, Johnston and others photographed employees (using force where necessary so their faces could be photographed), threatened and abused the employees, pulled out electrical wires and smashed tiles.[155] At the second property, Johnston and others upturned filing cabinets, damaged computers, upended furniture, tore a drinking fountain from the wall and set off a fire extinguisher, covering various employees including one who was pregnant.[156] 'Shortly afterwards, Johnston called the employer and questioned whether he was ready to negotiate'.[157]

This type of conduct interferes with construction projects and can drive up costs - blowing out budgets and deadlines which can result in broken contractual arrangements. The 'threat of liquidated damage provisions in commercial contracts adds considerably to the pressure that industrial action or threats of industrial action have on employers and contractors'[158] and this extends to unprotected industrial action. In addition, as identified by ACCI in its submission to the Cole Royal Commission, '[e]xcessive costs in one area of investment…decrease the capacity of enterprises to invest in other areas including employment [and] innovation'.[159]

The *Building and Construction Industry Improvement Act 2005* (BCII Act) received assent on 12 September 2005. This Act was different in comparison to the original Bill, taking into account the fact that various other complementary changes would occur as a result of the Workplace Relations Legislation Amendment (WorkChoices) Bill 2005.

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[152] Ibid, 8.
[153] Ibid, 13.
[154] Ibid.
[155] *DPP v Johnston* [2004] VSCA 150 (27 August 2004). http://www.austlii.edu.au//cgi-bin/disp.pl/au/cases/vic/VSCA/2004/150.html (site accessed 1 June 2007).
[156] Ibid.
[157] Ibid.
[158] Australian Chamber of Commerce and Industry, *Royal Commission into the Building and Construction Industry: ACCI Submission*, October 2002, ACCI, 36. http://www.royalcombci.gov.au/docs/submissions/GEN_068.PDF (site accessed 1 June 2007).
[159] Ibid, 7.

> prohibits unlawful building industrial action and enables it to be injuncted…It contains significant civil penalties for failures to comply with the requirements of the Act and significant criminal penalties for failures to comply with the requirements of the Australian Building and Construction Industry Commissioner.[160]

This Act established the office of the Australian Building and Construction Commissioner, which commenced operations on 1 October 2005. In respect to its operations, Australian Building and Construction Commissioner John Lloyd stated that 'the productivity of industry has improved; more jobs are being completed on budget, within budget and on time and the productivity benefits all Australians'.[161] This effect has been confirmed by Brian Siedler, Executive Director of Master Builders Association of NSW, who has stated that he knows 'of no project that is behind schedule due to illegal industrial action'.[162]

Mr Siedler has also made the following comparison between the way contractors had to operate prior to and after the commencement of the BCII Act:

> There were suggestions that contractors had to allow for up to 30 percent of a tender for illegal industrial activity. The industry can tender properly without worrying about grotesque industry problems.[163]

What this means is that with greater certainty offered by the operation of the ABCC and BCII Act, employers are better able to make long term plans without 'the risk of disputes vastly raising the risk and cost of new ventures'.[164] This is because uncertainty 'makes time lines and expenditure harder to predict'.[165]

The ALP in its *IR Plan: Forward with Fairness* policy document proposes to abolish the AIRC and ABCC and establish a 'one stop shop' named Fair Work

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[160] Adam Wallwork, *Summary of the Building and Construction Industry Improvement Act 2005*, Construction Update – Spring 2005, Mallesons Stephen Jacques. http://www.mallesons.com/publications/2005/Oct/8158406w.htm (site accessed 31 May 2007).
[161] Paige Taylor, 'Union Boss awaits return of ALP Glory Days', *The Australian*, 26 May 2007. http://www.theaustralian.news.com.au/story/0,20807,21795776-2702,00.html (site accessed 1 June 2007).
[162] Brian Siedler, cited in above n185, 4.
[163] AMMA, *Workplace Relations Policy Scorecard*, 24 April 2007, AMMA. www.amma.org.au/publications/ammaworkplacerleationsscorecard_24april2007.pdf (site accessed 27 June 2007).
[164] S, Singleton cited in Richard Calver, National Director Industrial Relations and Legal Counsel, Master Builders Australia, *Building and Construction Industry Workplace Reform: Current Controversies*, A Paper for the Master Builders Association of Newcastle, 22 February 2007, 3.
[165] Richard Calver, National Director Industrial Relations and Legal Counsel, Master Builders Australia, *Building and Construction Industry Workplace Reform: Current Controversies*, A Paper for the Master Builders Association of Newcastle, 22 February 2007, 3.

Australia.[166] Since the release of this document, Shadow Minister for Employment and Industrial Relations Julia Gillard has confirmed plans to abolish the Australian Building and Construction Commission (ABCC) after 2010.[167]

However this does not mean that the security offered by the ABCC and the BCII Act will remain in its current form. Greg Combet, currently head of the ACTU and preselected for the Labor seat of Charlton, has argued that the ABCC should be stripped of some of its coercive powers.[168]

This raises concerns as to how a Labor government would effectively curtail and discipline unlawful action in the construction industry without an independent and specialised body such as the ABCC or one that is limited in its powers of enforcement. This may raise a scenario similar to the one identified by ACCI in its submission to the Cole Royal Commission, where the abolition of Western Australia's own Taskforce in 2001 resulted in 'a resurgence of coercion for union membership or union agreement making on particular sites.'[169]

The aggressive attitude of some unionists is also still continuing, raising concerns that the abolition of the ABCC will bring this attitude back in practice in the form of inappropriate and unlawful behaviour identified by the Cole Royal Commission. Look no further than the abusive and intimidating behaviour of Joe McDonald (CFMEU WA Branch Assistant Secretary) at a Perth worksite run by construction company BGC. Video evidence released by the Western Australian Supreme Court on 20 June 2007 showed McDonald without a right of entry permit refusing to leave the worksite when requested and responding with 'this fucking thieving parasite dog's day's is numbered he'll be working at Hungry Jacks when I'm still a union official.'[170]

In November 2006, Dean Mighell, State Secretary of the ETU was recorded as saying that 'his "bullshit stunt" had led to…companies agreeing to a 10 percent wage rise and paying workers millions of dollars'. [171] He was also recorded as saying '[j]ust remember a little bit of bullshit every week, put it aside, have a smile

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[166] Australian Labor Party, *IR Plan: Forward with Fairness*, 2007, 18. http://www.alp.org.au/download/fwf_finala.pdf (site accessed 1 June 2007).
[167] ABC, Labor to delay scrapping construction watchdog, ABC News Online, 30 May 2007. http://www.abc.net.au/news/newsitems/200705/s1938179.htm (site accessed 1 June 2007). The ABCC will be abolished in 2010 as part of a transitional program whereby the Fair Work Australia will become the responsible body.
[168] Phillip Coorey and Deborah Snow, ACTU Chief at Odds with Labor Plan, Sydney Morning Herald, 14 June 2007. http://www.smh.com.au/news/national/actu-chief-at-odds-with-labor-plan/2007/06/13/1181414383780.html (site accessed 20 June 2007).
[169] Above n158, 36.
[170] Nadia Gilmore, *Rudd to Recommend Union Official Expulsion*, Australian Broadcasting Corporation, 20 June 2007. http://www.abc.net.au/lateline/content/2007/s1957269.htm (site accessed 25 June 2007).
[171] Workplace Express, *Mighell resigns from ALP after secret tape on pattern bargaining broadcast*, 30 May 2007, Specialist News.

when you have a beer because some dickhead's paid for that and shouldn't have'.[172]

In the Sunday Times, Kevin Reynolds, WA Branch Secretary of the CFMEU was quoted as saying:

> Some of the best trade union officials in this country have been to jail and they have to be prepared to do that…One of the major problems with the trade union movement is that there is not enough militancy.[173]

While the damage that this abusive and intimidating behaviour can cause to employers in the building and construction industry has been minimised by the BCII Act and ABCC, there remains an attitude of lawlessness within sections of the union movement. Therefore it is imperative to the continued success of the Australian economy that they do not resurface and take hold. The existence of the ABCC and BCII Act has given employers an effective avenue by which they 'can lodge complaints and achieve prompt intervention'.[174] In addition, as evidenced by historically low industrial action levels,[175] the ABCC has acted as a deterrent to unlawful behaviour - historically, the industry has accounted for a 'disproportionately high level of industrial disputes'.[176]

The Australian Bureau of Statistics data on industrial disputation shows that the level of industrial disputation in the construction industry in the September 2006[177] quarter is just 1.6 working days lost per thousand employees in the construction industry.[178] The corresponding quarter in 1996 was a high 263.9 working days lost per thousand employees.[179]

The Master Builders Association, which conducts a quarterly survey of its members, has identified that

> [o]ver three quarters of builders surveyed believe industrial relations were having only a slight or nil effect on their business activity in the December quarter 2006…From December 2003 to December 2006, members' concerns about industrial relations acting as a business constraint has more than halved.[180]

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[172] Ibid.
[173] Editorials, Rudd Puts Militants on Notice, *The Sunday Times*, 3 June 2007.
[174] Above n158, 13.
[175] While the ABCC and BCII Act themselves are not solely responsible for the low industrial disputation levels, it is argued that they have been a significant contributor as part of a total compliance package.
[176] Above n44, 12.
[177] The September 2006 quarter data is preferred over the December 2006 quarter data. The December 2006 quarter data is 9.1 days lost per thousand employees. However, this figure is significantly higher because it takes into account the ACTU National Day of Community Protest that took place on 30 November 2006. As such, the December 2006 quarter data is not an accurate reflection of the level of industrial disputes in any industry.
[178] Australian Bureau of Statistics, *Industrial Disputes*, December 2006, 6321.0.55.001.
[179] Ibid.
[180] Above n165, 5.

It is imperative that this confidence in the building and construction industry can continue. Although not the focus of discussion in this paper, confidence within the building and construction industry also extends the right of entry provisions and the role that they have had in limiting the union's ability to enter a worksite unrestricted. The need for effective right of entry provisions is demonstrated by the actions of CFMEU in 2004, including the infamous WA Branch Assistant State Secretary Joe McDonald, who tried to intimidate an occupational health and safety manager while attempting to gain access to a Perth site without the requisite permit.[181] An unrestricted ability to gain access to a worksite may open the floodgates for rogue union officials to incite unlawful and inappropriate behaviour at the workplace.

Circumventing the law – Union strategies to achieve industrial outcomes

Socialist Alliance trade union activist Tim Gooden of the Geelong Trades Hall Council has commented that 'by actually organising, solidarity community-union groups in Victoria, WA, NSW and the ACT are defeating anti-union laws when the bosses try to use them'.[182]

Gooden then went on to refer to successful community pickets at 'Alcoa (Pinjarra, WA), Thompson's Roller Shutters (Sydney) and Finlay Engineering, Toyota, Amcor, Hawker de Havilland and Tronics (Melbourne)'.[183]

In the past, unions have used members as 'human shields' to avoid the attribution of responsibility to union officials and protect union assets. This approach failed because employees as individuals were liable for their actions. Barrister Stuart Wood contends that unions are now encouraging community pickets in order to avoid this type of responsibility for industrial action.[184]

Wood describes this strategy as 'outsourcing industrial action'.[185] Wood explains that using community pickets is attractive because

> [i]t does not put the unions' assets at risk, does not place the members at risk and thus does not place the leadership of the union at risk (provided the "community protestors" obey the union – which, in most cases, they will).[186]

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[181] Tony Barrass and Paige Taylor, Union Bullying of Site Manager Taped, *The Advertiser,* 19 June 2007.
[182] Tim Gooden, 'Socialist Unionist Say: Make Howard History!' *Socialist Alliance*, 2008. http://www.socialist-alliance.org/page.php?page=605 (site accessed 20 June 2007).
[183] Ibid.
[184] Stuart Wood, *Outsourcing Industrial Action,* 2007, 7-9. http://www.stuartwood.com.au/upload_files/2007/Outsourcing%20Industral%20Action%20(Final%20Draft)%20-%20Perth%2021%20March%202007.pdf (site accessed 27 June 2007)
[185] Ibid, 1.
[186] Ibid, 10.

Community pickets work in this way:

> Essentially, a new group called "union solidarity" is taking over picket actions once the union is threatened with corporate and individual fines under the Act. The group aren't members of the actual union involved in the dispute, and it has no formal structure, nor assets. This means that it has nothing to lose in a corporate sense, and apparently also gets individuals around the Act, as well.[187]

This approach has achieved a measure of success as can be seen in the examples given by Gooden of the Geelong Trades Hall and acknowledged by Wood.[188] This has the potential to pose significant problems to employers who attempt to legitimately operate under the *Workplace Relations Act 1996* but are thwarted by seemingly untouchable community pickets – another example of unions deliberately disregarding the law.

Conclusion

The resources sector continues to make a significant contribution to Australian exports. Record worldwide demand for Australian resources is set to continue with predictions of $116.5 billion in export earnings for the forthcoming year.

In order to meet the future resource demand further investment in infrastructure is needed. Evidence of the markets confidence in the Australian resources sector can be found in the proposed investment of $130 billion[189] in 275 mining and energy projects. These investments will result in increased employment opportunities in construction (potentially as many as 21,600 jobs)[190] and ongoing operational roles (potentially as many as 54,000).[191]

The importance of having an industrial climate where investors can have confidence that infrastructure construction will proceed in an efficient and timely manner with minimal potential for surprises cannot be understated.

It is important to remind ourselves of Australia's past industrial record, when we were regarded as a country that could not deliver. Industrial disputation in the construction sector is now at an all time low (but still higher than the resource

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[187] Left Writes, cited in Ibid, 11.
[188] Above n184, 11.
[189] Total calculated using the Abare Mining and Energy table. Abare Economics, *Abare Major Minerals and Energy Projects*, April 2007. http://www.abareeconomics.com/publication_html/energy/energy_07/ME_prjectionsapr07.xls site accessed 1 June 2007.
[190] Total calculated using the Abare Mining and Energy table. Abare Economics, *Abare Major Minerals and Energy Projects*, April 2007. http://www.abareeconomics.com/publication_html/energy/energy_07/ME_prjectionsapr07.xls site accessed 1 June 2007. The total employment figure was 21,565 – 21660 however employment figures for 151 projects were not available.
[191] Ibid..

sector operational areas) and has resulted in an improvement to Australia's industrial reputation in the construction industry. This result has not occurred by accident. It is not a product of the resources boom. It is a product of longer term industrial changes which have made parties responsible for their actions.

The positive contribution of secondary boycott provisions contained in the *Trade Practises Act 1974*, which prevent industrial action being inflicted on parties unrelated, were instrumental in ensuring Australian exports were not crippled in the 1998 Waterfront Dispute.

The removal of barriers preventing rapid access to the civil courts for injunctions to prevent unlawful behaviour, and damages to compensate affected parties has resulted in a more circumspect approach by unions who used militant tactics as a tool to extract benefits from employers who by the nature of their business were acutely subject to industrial action.

The role of the Australian Industrial Relations Commission as a dispute settlement mechanism has been enhanced by a focus on the need to resolve disputes quickly and issue timely decisions.

The *Building and Construction Industry Improvement Act 2005* has focussed on the needs of the Construction sector, notorious for its 'wild west' style behaviour and lack of accountability. In the same way that the introduction of random alcohol (and now drug) testing for road users via the booze bus has changed Australian motorists' approach to drink driving, the influence of the Australian Building and Construction Commissioner is playing an important role in returning the rule of law to the construction industry. The fact that union officials and the ACTU seek the destruction of the ABCC is demonstrative of the impact the 'policeman' is having on unlawful behaviour. Law abiding employers and workers have nothing to fear from the ABCC.

Recent experience shows that parties to statutory agreements now understand that the taking of industrial action during the term of an agreement is unacceptable.

The current compliance regime has improved the international investment community's confidence in Australia as a safe place to invest from an industrial perspective. It is incomprehensible that Australia should return to the 'law of the jungle'. Opposition Leader Kevin Rudd's position that industrial action and lawless behaviour by union officials are not part of a modern industrial relations system is welcomed, but this position does not sit well with the decision to abolish the ABCC in 2010 and reduce its powers.

The Coalition Government proposes to retain the status quo. The ALP has announced that it will scrap the Australian Industrial Relations Commission and is

yet to release its position on the retention of secondary boycott provisions, rapid access to civil remedy's and union right of entry.

The resources sector is making a massive contribution to Australia's standard of living. Having made the hard decisions to reform industrial relations and attitudes to unlawful industrial action, Australia is now reaping the benefits. Now is not the time to return to a previous industrial age. The current compliance system provided by the *Trade Practices Act*, the *Workplace Relations Act*, and the *Building and Construction Industry Improvement Act* is providing demonstrable benefits to the Australian economy. The removal of the current protections would constitute an act of economic vandalism.

The resources sectors' message to Australian policy makers is that the current compliance system is working – Australian workers, employers and the general community are beneficiaries – *'If it ain't broke don't fix it.'*

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