

Australia's 'Construction Stasi' by Humphrey McQueen

Dare Australia's Labor government goad Adelaide builders' labourer, Ark Tribe? Tribe's crime is that he refuses to attend a secret hearing of the Australian Building and Construction Commission (ABCC). His failure to appear renders him liable to six months in prison or a fine of \$22,000. Similar penalties apply if he turns up but refuses to answer, or if he answers but then tells anyone what the questions were.

The power to coerce testimony also applies to passers-by whom the ABCC felt might provide evidence of wrong-doing by unionists, as happened to a Melbourne university lecturer subpoenaed in 2007.

Many Australians, on hearing about this regime, cannot believe that its provisions apply to anyone but terrorism suspects. Overseas observers will be no less amazed that a Labor administration in a liberal democracy is relying on star chambers to deliver 'a safe, productive and harmonious construction sector'. But see the DVD 'Constructing Fear' www.constructingfear.com.au

Had Tribe submitted, he would have been cross-examined about a meeting he attended on a construction site at Flinders University to deal with safety violations, about which the official regulator later served two notices on the employer. Months afterwards, Tribe got a summons from the ABCC, which he refused to obey. While hundreds of unionists rallied outside a closed court on 8 June, a magistrate adjourned Tribe's case till 8 August.

The Construction Division of the Construction, Forestry, Mining and Energy Union (CFMEU) sent Tribe as a delegate to the biennial Congress of the Australian Council of Trade Unions where he was cheered and Labor deputy prime minister and Minister for Education, Employment and Workplace Relations, and for Social Inclusion, Julia Gillard, got heckled during her 'keep-the-cop-on-the-beat' speech.

By contrast, at the 2007 Congress, the unions and the Labor Party were combining to defeat the government headed by John Howard since 1996. Its latest round of attacks on working conditions, glossed as Work Choices, had widened and deepened his government's unpopularity. Mass rallies and millions spent on television advertising by the unions made 'Your Rights at Work' the central issue at the November 2007 elections, which Labor won and at which Howard lost his seat. The unions looked forward to the end of Work Choices, promised for no later than February 2010.

The anger at Gillard's speech to the ACTU Congress among even delegates close to the government was fed by its failure to dismantle all of Work Choices.

Instead, the Fair Work Act makes almost any industrial action illegal for workers throughout the economy.

Stoppages over political questions such as the environment, wars or domestic repression are totally banned. Pattern bargaining of the type conducted by the Hollywood script-writers will be an offence. Professor Harry J. Glasbeek has spelt out the continuity between the two Acts, Dissent no 29 Autumn/Winter 2009

<http://www.dissent.com.au/index.htm>. Several unions are taking the government to the ILO over these provisions, see Chris White <http://chriswhiteonline.org> go to Australian Building and Construction Commission ABCC 29/3/2009.

When Work Choices became law in 2005, the then secretary of the ACTU, Greg Combet, promised to go to gaol if necessary to defeat its repressiveness. Instead, he went into parliament where, as a minister, he defends a law far worse than Work Choices.

Work Choices was by no means the most savage of the attacks on workers and their organisations. In 2000, the Howard government appointed a Royal Commissioner, Terence Cole, QC, to investigate the Building and Construction Industry. Cole catalogued all the behaviours that employers deemed inappropriate and recommended that they be made offences, which the government did under the Building Industry Improvement Act (2005). See Chris White 'The Perth 107: the right to strike contest' www.aier.com.au

Cole said that he had put allegations of criminal behaviour by unionists into a secret volume to preserve their right to a fair trial. No one has ever been indicted on the basis of that information.

The previous government set up the ABCC to enforce the avalanche of unlawfulness that Cole had created. Staffed from police forces, the ABCC began its investigations with a move against workers who had stopped for twenty minutes to take up a collection for a deceased workmate.

The prime target, however, was the policy of 'deaths-in-industry' stoppages on full pay which the Victorian Branch of the CFMEU had initiated to bring instant pressure on employers to improve safety.

Under the ABCC, the union could be fined more for stopping after a fatality than the employer would be if ever convicted over the death. The unionists can be imprisoned: the employer could not. In 2008, a Victorian union official, Noel Washington, refused to attend an ABCC hearing about a union-sponsored barbeque held off-site and outside working hours. The ABCC suspended its charges against Washington after a campaign by union and community groups.

In June 2008, the Labor government appointed retired judge Murray Wilcox to report on whether there was any need to maintain special provisions for the building and construction once that industry was incorporated into the FairWork regime. Wilcox accepted that the Royal Commission and the consequent Act had been correct to criminalize all the behaviours that employers deemed inappropriate. He therefore had no difficulty in finding that significant areas of unlawfulness remained, and so recommended the retention of coercive powers.

On 17 June 2009, Gillard introduced a Bill for special provisions over the building and construction industry within the Fair Work regime. The new arrangements promise changes: off-site work will no longer be covered, and penalties will become the same for all sectors.

Nonetheless, the Bill sets up a Building Industry Inspectorate with the ‘coercive interrogation powers’ of the ABCC. However, the Inspectorate will be subject to limitations on the exercise of its powers by the Administrative Appeals Tribunal and the Ombudsman. Welcome as any oversight provisions must be, the prime beneficiaries will be lawyers.

In a surprise addition, the Minister announced that, ‘[o]n projects that commenced on or after 1 February 2010 an interested person will be able to make an application’ to the yet another tribunal - the Independent Assessor, Special Building Industry Powers – ‘to have coercive powers switched off in relation to a specific project’. This concession allows the de facto immunity for tame-cat unions to be made de jure.

The Minister’s second reading speech offered no instance of illegality by workers. Instead, she justified the coercive powers as necessary to combat ‘high levels of unlawfulness as evidenced by allegations, investigations, prosecutions, audits and the like’. This definition of ‘unlawfulness’ includes Tribe’s involvement with the on-site meeting over justified OHS concerns, and Washington’s presence at a lunch-time barbeque in a neighbourhood park.

Why does Gillard’s evidence not mention convictions? Four days after Gillard’s speech, Prime Minister Rudd attended a memorial service for a corporate thief, Richard Pratt.

A feature of the Royal Commission, the Act and the ABCC has been the almost total absence of attention paid to offences by employers. This lack of balance applies to the new legislation.

Gillard’s speech did not let employers off the hook entirely, mentioning ‘underpayment of wages or sham contracting’, but this criticism pales against her repeated references to ‘violence and intimidation’.

Much of what the employers told Cole was inappropriate had been behaviour by unionists in upholding laws that government agencies failed to enforce, whether in regard to OHS or the non-payment of wages and benefits. In 2007, the Tax Office reported that it had collected \$93m. in unpaid superannuation contributions, which the Deputy Commissioner admitted was only the tip of an iceberg.

Minister Gillard’s determination to ‘drive cultural change’ in the industry is aimed against unionists, never at corporates with their history of price-fixing.

A judicial inquiry into the Sydney casino found, in 1994, that Leighton’s CEO Wal King to be ‘not of good repute, having regard to character, honesty and integrity’, and that he did not ‘truly accept even now that the practice of the false invoices was dishonest’. Indeed, King justified their use to conceal price-fixing as ‘the culture ... and custom that had been long-standing in the industry that had been handed on for years’. Royal Commissioner Cole did not look into whether that culture persisted, a wise precaution given that a Royal Commission appointed in 1990 to nail the building unions had exposed the NSW Master Builders Association as the clearing house for collusive tendering.

Union campaigns against the ABCC and the coming Inspectorate insist on 'One law for all'. That demand will not be met under the new Bill. Unequal level of repression of building workers will continue under Fair Work.

Moreover, the coercive powers will not be applied to the employers. The ABCC has punished a few employers - for behaving decently.

Even if the coercive powers were abolished, there still would be one law for corporations and another for workers, notably in regard to OHS. Gillard's definition of violence does not extend to the tens of thousands of building and construction workers expected to die from asbestos-related diseases. No executive or director of James Hardie faces penal sanctions over that slaughter.

Gillard acknowledged that health and safety issues were 'deliberately not included in Mr Wilcox's terms of reference'. That exclusion meant that Wilcox could not investigate one of the principal realms of illegalities by employers, or use that investigation to explain the levels of unlawfulness by workers defending themselves, as in the case of Ark Tribe.

Under the review's unbalanced terms of reference, would Tribe's conscience have allowed him to accept Wilcox's fee of \$326, 974?

The government justified the omission of OHS on the grounds that its policy had always been to retain the Office of the Federal Safety Commissioner. That body is distinguished for conducting reviews into its own effectiveness at checking the paper work about OHS at worksites. Its stated objective is to provide 'an audit to improve, not inspecting to enforce'.

This application of manners gentle to violence and unlawfulness by employers is the reverse of that from the ABCC/Inspectorate towards unionists attempting to protect life and limb, with fifty fatalities a year and thousands of injuries requiring four or more days compensated leave.

Unions fear that Gillard's proposal to impose a national the OHS system in place of those in the States and Territories will deliver the lowest common denominator.

An indication of employer expectations came in the submission from the Australian Industry Group in March when it opposed the inclusion of 'welfare' in the title to the new Act since it 'may invite unnecessary angst'.

A related source of concern for building workers are amendments to the Bankruptcy Act which will make it easier for small business to get on their feet again. Building and construction is rife with Dodgy Bros declaring bankruptcy to avoid paying entitlements, only to reappear under a new company name.

Why is the Labor government taking this hard-line? The answer is as multi-faceted as the interests of the players, but include:

- to expedite its \$40 billion infrastructure spending to revive the economy during the global crisis;

- to acknowledge the tens of millions of dollars in donations from developers to Labor Party coffers;
- to advance Gillard's ambition of becoming prime minister by selling herself to the dominant Right-wing factions of the Party as no longer from the Party's disintegrating Socialist Left;
- to deal with the peculiarities of disciplining labour-time on building and construction in contrast to process lines; hence, the need for the ABCC/Inspectorate as second-line foreman to fill in the pores in the working day to ensure maximum profit;
- to break the last of the unions that see an irreconcilable conflict between capital and labour
- to build up the Australian Workers Union and its grabbing of coverage at lower wages and worse conditions, as has just tried on at Westgate Bridge in Melbourne.

Threading through these interests is the retreat from equality. The refusal to restore even the façade of equality before the Law is one more instance of the abandonment under New Labour of the principles of social equity articulated by R H Tawney.

Gillard's application of 'fair' to her watered down Work Choices is matched by her justifying grants of millions of dollars to the posh-est schools with the spin-line: 'every school can be improved'. Geelong Grammar can gold-plate its bell-tower.

The passing of the Bill into law is far from certain since the government needs cross-bench support to get legislation through the Senate. The opposition is using the proposed changes to beat its drum about the government's being in the grip of the unions, and will vote against. The Green Senators oppose both the old and new regimes as violating civil liberties. The best the government can hope from the two independents is that one will vote each way. For the moment, the Senate has referred the Bill to a committee for hearings. If the existing Act remains in force after the start of the Fair Work Act on 1 February 2010, the loss to the government will be the tactical one of having to uphold coercive powers which it has accepted are a touch excessive.

Rights on site campaigns to abolish the ABCC

Where next for the unionists? A Left remnant inside the Australian Labor Party will raise the matter at the National Conference in July, but has no chance of overturning the policy since the numbers are stitched up by right-wing factions and by the AWU. That leaves the Ark Tribe solution of making the law unworkable and using the protests around arrests and imprisonments to bring home why employers deserve to face coercive powers about their OHS violations and other criminality.

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