THE SENATE

APPENDIX 1

STANDING COMMITTEE ON EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS

27 November 2008

Mr Brian Boyd
Secretary
Victorian Trades Hall Council
Box 93, Trades Hall, 54 Victoria Street
CARLTON SOUTH VIC 3053

info@vthc.org.au

Dear Mr Boyd,

Inquiry into the Fair Work Bill 2008

The Senate has referred the provisions of the Fair Work Bill 2008 to its Education, Employment and Workplace Relations Committee for report by 27 February 2009. I am writing to invite you to make a submission to the inquiry. Submissions for this inquiry close on 9 January 2009.

The purpose of the IR Bill is to create a new framework for workplace relations to commence on 1 July 2009. It will:

- establish a guaranteed safety net of minimum terms and conditions;
- ensure that the safety net cannot be undermined by the making of statutory individual agreements;
- provide for flexible working arrangements;
- recognise the right to freedom of association and the right to be represented in the workplace;
- provide procedures to resolve grievances and disputes;
- provide effective compliance mechanisms;
- deliver protections from unfair dismissal for all employees;
- emphasise enterprise level bargaining underpinned by good faith bargaining obligations and rules governing industrial action; and
- establish a new institutional framework to administer the new system comprising Fair Work Australia and the Fair Work Ombudsman.

You may wish to note that on 11 December 2008 the committee will hold a public hearing at Parliament House in Canberra, in committee room 2S3, to hear from the Department of Education, Employment and Workplace Relations. The committee will be briefed on each chapter of the bill and ask follow up questions. The hearing will be broadcast and a Hansard transcript of proceedings will be made available on the committee's website to assist individuals and organisations with the preparation of submissions.

Further information on the inquiry can be obtained from the committee secretary on 02 6277 3520 and from the committee's website at http://www.aph.gov.au/Senate/committee/inquiries/index.htm

I look forward to receiving your submission.

Yours sincerely

John Carter

Appendix 2
JUNE 2008

BRIEFING NOTE

BUILDING AND CONSTRUCTION INDUSTRY IMPROVEMENT ACT 2005 AND THE ABCC

INTRODUCTION

1. Since September 2005[1] Australian workers in the construction industry have had to work under what could well be the most oppressive set of industrial laws anywhere in the world. In addition to 'WorkChoices', the construction industry has had special laws that make virtually every form of industrial action unlawful *and* a politically motivated 'regulator' with extraordinary powers to interrogate workers to extract information about industrial issues.

BACKGROUND TO THE LAWS

Royal Commission

2. The first step in the former Howard Government's attack on the construction unions was the setting up of the $66 million Cole Royal Commission. The Royal Commission was an administrative body with no legal capacity to determine whether anyone had acted unlawfully, but its central findings nonetheless included the public identification of those who were said to have acted "unlawfully".

3. There was not one single criminal prosecution arising out of the matters looked into by the Commission [aside from one witness who was convicted of giving false evidence to the Commission itself]. Nor has there been a single criminal prosecution against a trade union or any official from any of the matters that were referred by the Royal Commission to the various agencies after it concluded its inquiry.

4. The Royal Commission final report became the blueprint for Liberal Party industrial relations policy which later produced *'WorkChoices'*.

Passage Through Parliament

5. Using the 'findings' of the Royal Commission as a cover, the Howard Government introduced the *Building and Construction Industry Improvement Bill 2003* (2003 Bill). The 2003 Bill proposed a separate and highly restrictive legislative regime for unions and workers in the construction industry.

6. The 2003 Bill contained impossibly tight restrictions on industrial action, limits on right of entry, the creation of a government body to investigate and prosecute breaches of the new laws and massive fines and gaol terms for workers and unionists.

7. The Howard Government was unable to convince the minor parties that its "Improvement" Bill was necessary. It was rejected by a Senate References Committee in 2004 after an extensive inquiry. After the inquiry and with the support of the Australian Democrats, wide-ranging coercive powers were given to a body called the

[1] Received Royal assent 12 September 2005

Building Industry Taskforce. These changes were pushed through Parliament in a special Saturday sitting just before the 2004 election was called.

8. Following the 2004 election, the Howard Government re-introduced a smaller version of the 2003 Bill. This Bill applied retrospectively back to 9 March, 2005, once the Government took control of the Senate in July 2005. **This was to become the *Building and Construction Industry Improvement Act 2005 (BCII Act)*.**

9. The Howard Government passed the *BCII Act* in the very first sitting of Parliament post-1 July, 2005.

10. The *BCII Act* created a new 'regulator' for the industry with sweeping coercive powers. **This body is now known as the ABCC.**

POPULAR MISCONCEPTIONS

11. The Coalition Government continually and deliberately misrepresented that the purpose of the BCII Act was to eradicate criminal conduct from the construction industry.[2] It claimed the BCII Act was designed to stamp out criminality, corruption, extortion, 'thuggery' etc and used that language to justify the existence of the ABCC. The ABCC itself repeats those claims.

12. **In fact, the *BCII Act* and the ABCC do not generally deal with criminal conduct at all. They deal with everyday industrial issues.**

13. The only criminal offence the BCII Act creates (aside from criminal sanctions for ABCC officials disclosing information), is for refusing/failing to respond to an ABCC notice to provide documents, answer questions or give information regarding industrial matters in the construction industry. In other words, **the only criminal offenders under this legislation are those that fail or refuse to give information about their workmates and everyday, non-criminal industrial issues.**

THE BCII ACT

Restrictions on Industrial Action

14. A wide range of industrial action is caught by the *BCII Act* and made unlawful. In fact, virtually any deviation from normal patterns of work – anything that involves '*the performance of work in a manner different from that in which it is customarily performed*'[3] – has the potential to infringe these laws.

15. Unlike WorkChoices where penalties ordinarily flow only after breach of a Commission order that specified that certain conduct not occur, the *BCII Act* has no 'early warning' system. There are no second chances here – if the action taken is '*unlawful industrial action*' liability will follow.

16. Not even action over health and safety concerns is immune from the reach of these extraordinary laws. This forces workers in a dangerous industry to balance a workplace health and safety risk against the prospect of being fined for not working.

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[2] eg see Senate Hansard 5 September 2005

[3] Section 36 – BCII Act

Unlawful Industrial Action

17. Unlike the *Workplace Relations Act*, the BCII Act contains a definition of unlawful industrial action. **Virtually all industrial action is unlawful.**[4] The only exceptions are:

    - **protected action** under the *Workplace Relations Act 1996*;
    - action authorised or agreed to **in advance** and **in writing** by the employer; or
    - action is based on a reasonable concern of an **imminent risk to the employee's health or safety** and the employee did not fail to comply with a reasonable direction to perform other work (**the employee bears the burden of proving the concern was reasonable etc**).[5]

Penalties

18. Unlawful industrial action constitutes an Grade A level civil penalty. The maximum penalty for a Grade A civil penalty is **$110,000** for a body corporate (union) or **$22,000** in any other case. The maximum penalty for Grade B civil penalty is $11,000 for a body corporate or $2,200 in any other case. Unlimited 'damages' and other court orders can also apply.

19. Unions can be prosecuted even when they are not directly involved in a dispute. This is because the laws 'deem' unions to be responsible for the actions of their members.

20. These provisions broaden the scope of union liability beyond what exists at common law making claims against unions an easier and more attractive proposition for employers and the ABCC than a common law claim.

THE ABCC AND ITS POWERS

21. Against this background, where almost any form of industrial dissent is punishable, the Howard Government established its preferred industry 'regulator', the ABCC.

22. The ABCC has the **power to compel attendance to answer questions in person** (subject to giving 14 days written notice). The ABCC has issued 105 of these notices (as at 9/05/08). It can also compel the production of documents or require information to be given.

23. A person attending a compulsory interview has a right to have a legal representative present. However this may not necessarily be the representative of the attendee's choosing. Approximately 1/3 of those who have been questioned have had no legal representation at all.

24. A person can be required to give evidence on oath or affirmation.[6] They are usually questioned by experienced barristers and answers are transcribed for possible use in later prosecutions.

25. The ABCC can require a person to give an 'undertaking of confidentiality'. This means they are **unable to disclose or discuss what they have been questioned about with anyone other than their lawyer.**

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[4] ss 37 & 38 BCII Act
[5] s 36 BCII Act
[6] s 52 BCII Act

26. Under the *BCII Act* it is criminal offence to:

- fail to provide required information or documents in the manner and form required by the ABCC's notice;
- fail to attend to answer questions;
- refuse to take an oath or affirmation; or
- fail to answer questions relevant to the investigation while attending the ABCC as required by the notice.

27. The penalty for such offences is **6 months imprisonment.**[7]

28. The BCII Act provides **no right to refuse to comply with these notices on the basis of self-incrimination,** however information gathered will generally not be able to be used as evidence against the person who provided it.[8] Those who are forced to answer questions are not generally those who are prosecuted or even accused of doing anything wrong.

29. ABCC officers are not just investigators, they are also prosecutors. They have absolute discretion over what cases they take to court and who they take them against.

30. Although the *BCII Act* gives the ABCC responsibility for investigating breaches of awards in the construction industry, they have made a decision not to investigate breaches that involve underpayment of employee entitlements. However, unions have been investigated and prosecuted for allegedly breaching the dispute settlement clauses in awards/agreements.

INTERNATIONAL CRITICISM

31. These laws have been extensively criticised by the International Labour Organisation's **Committee on Freedom of Association** and **Committee of Experts on the Application of Conventions and Recommendations** as being contrary to basic international labour Conventions signed by Australia.[9] Paradoxically, the *BCII Act* provides[10] that one of the ways the Act is to achieve its principle objective is by '*promoting respect for the rule of law.*' However the BCII Act plainly compounds Australia's record of non-compliance with international labour law and selectively removes workers in the construction industry from basic and universally applicable labour standards.

REPEAL – A LABOR PRIORITY

32. By retaining these laws until 2010 the Labor Government faces the real prospect of people being imprisoned over industrial relations issues. The Australian trade union movement is united in its opposition to these laws which offend fundamental labour principles. The worst excesses of Howard's industrial legacy must be remedied immediately.

12 June 2008

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[7] Ibid
[8] s 53 BCII Act
[9] Case Number 2326 ILO Committee on Freedom of Association November 2005 and see most recently, CEACR Report February 2008
[10] s 3(2)(b) BCII Act

Appendix 3

PROCEEDINGS IN THE INTERNATIONAL LABOUR ORGANISATION RELATING TO AUSTRALIAN INDUSTRIAL LEGISLATION IN THE BUILDING AND CONSTRUCTION INDUSTRY -

A SHORT CHRONOLOGY

10 March 2004	ACTU lodges a complaint against the Government of Australia in relation to proposed changes to industrial legislation applying in the building and construction industry [the *Building and Construction Industry Improvement Bill* 2003.] The matter is referred to the ILO's **Committee on Freedom of Association** [CFA] and becomes Complaint No. 2326.
15 February 2005	The Australian Government files its observations in relation to Case no. 2326 with the ILO. Citing the findings of the Cole Royal Commission, the Government submits that the proposed legislation complies with Australia's obligations under international labour law.
12 September 2005	*Building and Construction Industry Improvement Act* 2005 [BCII Act] comes into affect.
3 October 2005	Further submission and reply to Australia Government's submission is lodged with the ILO by the ACTU. The focus of the complaint is now on the BCII Act as opposed to the 2003 Bill.
November 2005	The Committee on Freedom of Association deals with Matter 2326 despite attempts by the Australian Government to have consideration of the case put off to a later date. The CFA report makes six key points including recommending amendments to the BCII Act 2005 to ensure, inter alia, conformity with freedom of association principles and the promotion of collective bargaining. The CFA asks the Australian Government to initiate further consultations with employers and trade unions in the construction industry to consider amendments to the BCII Act having regard to Conventions 87 and 98 (ratified by Australia) and principles of freedom of association. The CFA asks to be kept advised of developments (see **338th Report CFA paras 409-457**). The conclusions of the CFA are:- *(a) The Committee requests the Government to provide specific information as to the forums for consultations and proposals tabled by the social partners with*

regard to the 2003 and 2005 Bills.

(b) The Committee requests the Government to take the necessary steps with a view to modifying sections 36, 37 and 38 of the Building and Construction Industry Improvement Act, 2005 (the 2005 Act), so as to ensure that any reference to "unlawful industrial action" in the building and construction industry is in conformity with freedom of association principles. It further requests the Government to take measures to adjust sections 39, 40 and 48-50 of the 2005 Act, so as to eliminate any excessive impediments, penalties and sanctions against industrial action in the building and construction industry. The Committee requests to be kept informed of measures taken or contemplated in this respect.

(c) The Committee requests the Government to take the necessary steps with a view to revising section 64 of the 2005 Act so as to ensure that the determination of the bargaining level is left to the discretion of the parties and is not imposed by law, by decision of the administrative authority or the case law of the administrative labour authority. The Committee requests to be kept informed in this respect.

(d) The Committee requests the Government to take the necessary steps with a view to promoting collective bargaining as provided in Convention No. 98, ratified by Australia. In particular, the Committee requests the Government to review, with the intention to amend, where necessary, the provisions of the Building Code and the Guidelines so as to ensure that they are in conformity with freedom of association principles. It further requests the Government to ensure that there are no financial penalties, or incentives linked to provisions that contain undue restrictions of freedom of association and collective bargaining. The Committee requests to be kept informed in this respect.

(d) The Committee requests the Government to introduce sufficient safeguards into the 2005 Act so as to ensure that the functioning of the ABC Commissioner and inspectors does not lead to interference in the internal affairs of trade unions and, in particular, requests the Government to introduce provisions on the possibility of lodging an appeal before the courts against the ABCC's notices prior to the handing over of documents. As for the penalty of six months' imprisonment for failure to comply with a notice by the ABCC to produce documents or give information,

the Committee recalls that penalties should be proportional to the gravity of the offence and requests the Government to consider amending this provision. The Committee requests to be kept informed on all of the above.

(f) In light of the above, the Committee, recalling once again the importance that should be attached to full and frank consultations taking place on any questions or proposed legislation affecting trade union rights, requests the Government to initiate further consultations with the representative employers' and workers' organizations in the building and construction industry so as to explore the views of the social partners in considering proposed amendments to the legislation having due regard to Conventions Nos. 87 and 98, ratified by Australia, and with the principles of freedom of association set out in the conclusions above. The Committee requests to be kept informed of developments in this respect.

November 2005	The CFA Report is endorsed by the Governing Body of the ILO.
22 November 2005	Australian Government spokesperson is reported as saying the ILO's decision was 'non-binding' and that the Government would not be changing the laws.
10 February 2006	Australian Government provides further material to the ILO/CFA. The Government submission describes the CFA Report as 'Interim Recommendations'.
22 February 2006	CFMEU writes to the Australian Government referring to the ILO Report and requesting a formal Government response, including consultations as envisaged by the Report.
30 May 2006	Australian Government responds to CFMEU letter saying the Report of the CFA was based an *'incomplete information'* and advising that the Government had made a further submission to the ILO showing that *'due consideration was given to Australia's international obligations'.*
June 2006	The CFA issues its **342nd Report** in which it considers the Australian Government's additional submissions. It notes that *'discrepancies remain'* and *'regrets that the Government has not taken steps specifically aimed at addressing these through further consultation...'* The CFA observes that the Government's information *'largely reiterates the reasoning previously put forward by the Government.'* and *'again requests the Government to*

initiate further consultations... to ensure that the BCII Act is in full conformity with Conventions Nos 87 and 98.'

The legislative aspects of the case are referred to the **Committee of Experts on the Application of Conventions and Recommendations** (CEACR).

The CFA Report is adopted by the ILO's Governing Body.

9 October 2006 — ACTU lodges a further complaint with the ILO in relation to the BCII Act 2005 requesting the matter be dealt with by CEACR.

12 December 2006 — Consultations between Australian Government, employers and unions occur in Canberra.

Early 2007 — Australian Government responds to ACTU's October 2006 complaint and the CFA's observations of June 2006.

30 May – 15 June 2007 — At the **96th session** of the ILO's International Labour Conference, the Committee of Experts on the Application of Conventions and Recommendations reports **[Report III (Part 1A)]** as follows:-

The Committee once again requests the Government to indicate in its next report any measures taken or contemplated with a view to: (i) amending sections 36, 37 and 38 of the Building and Construction Improvement Act 2005, which refer to "unlawful industrial action" (implying not simply liability in tort vis-à-vis the employer, but a wider responsibility towards third parties and an outright prohibition of industrial action); (ii) amending sections 39, 40 and 48-50 of the Act so as to eliminate any excessive impediments, penalties and sanctions against industrial action in the building and construction industry; (iii) introducing sufficient safeguards into the Act so as to ensure that the functioning of the Australian Building and Construction (ABC) Commissioner and inspectors does not lead to interference in the internal affairs of trade unions – especially provisions on the possibility of lodging an appeal before the courts against the ABC Commissioner's notices prior to the handing over of documents (sections 52, 53, 55, 56 and 59 of the Act); and (iv) amending section 52(6) of the Act which enables the ABC Commissioner to impose a penalty of six months imprisonment for failure to comply with a notice to produce documents or give information so as to ensure that penalties are proportional to the gravity of any offence.

And

The Committee once again requests the Government to indicate in its next report the measures taken or contemplated so as to bring the Building and Construction Industry Improvement Act 2005, into conformity with the Convention, in particular with regard to the following points: (i) the revision of section 64 of the Act so as to ensure that the determination of the bargaining level is left to the discretion of the parties and is not imposed by law, by decision of the administrative authority; (ii) the promotion of collective bargaining, especially by ensuring that there are no financial penalties or incentives linked to undue restrictions of collective bargaining, especially by ensuring that there are no financial penalties or incentives linked to undue restrictions of collective bargaining (sections 27 and 28 of the Act authorise the Minister to deny Commonwealth funding to contractors bound by a collective agreement that, although lawful, does not meet the requirements of a building code; the latter: (i) excludes a wide range of matters from the scope of collective bargaining; and (ii) contains financial incentives to ensure that AWAs may override collective agreements).

14 September 2007 — ACTU provides a submission in reply to the Australian Government's submission to the ILO.

November 2007 — In its **348th Report**, the CFA again criticises the Australian Government and urges further consultations *'to ensure that the BCII Act 2005 is brought into full conformity with Conventions 87 and 98...'*

The report concludes with a strong rebuke to the Government:

> *'42 The Committee would like to emphasise in this report that contrary to the Government's impression that the Committee's recommendations, reached at its November 2005 meeting, were interim and therefore non-binding, the Committee reached final conclusions and recommendations which are to be implemented fully and promptly following consultations with the social partners with the same due consideration the Government accords to all the obligations it has freely undertaken by virtue of its membership in the Organisation [see 346th Report, para 79]* At para 42.

3 December, 2007 — The newly elected Australian Government writes to the ILO advising of its intention to address issues identified by the ILO through substantial amendments to the legislative framework. It suggests that the CEACR may wish to defer any further consideration of these matters until the Government responds and asks that its correspondence be brought to the attention of the CEACR and CFA.

28 February, 2008

At the **97th session** of the ILO's International Labour Conference, the Committee of Experts on the Application of Conventions and Recommendations reports **[Report III (Part 1A)]** reiterates its concerns. In respect of Convention 98 the Committee again requests the Australian Government to indicate in its next report the measures taken or contemplated to bring the *Building and Construction Industry Improvement Act* 2005 into conformity with the Convention.

In relation to Convention 87 the Committee notes the change of Government and the commitment of the new Government to addressing the issues identified by the Committee, including those in the building and construction industry. The Committee expresses the hope that its comments will prove useful to the Government in its deliberations on legislative revision. The Australian Government is asked by the Committee to report in detail in 2008.

In the most recent edition of the **Digest** of decisions and principles of the CFA (fifth edition 2006), which sets out the jurisprudence of the CFA which has general application, the decision in the case against the Australian Government's building industry laws is cited as authority for the following propositions:-

- the right to bargain freely with employers with respect to conditions of work constitutes an essential element in freedom of association and trade unions should have the right, through collective bargaining or other lawful means, to seek to improve the living and working conditions of those whom the trade unions represent. The public authorities should refrain from any interference which would restrict this right or impede the lawful exercise thereof (at para 881).

- Matters which might be subject to collective bargaining include the type of agreement to be offered to employees or the type of industrial instrument to be negotiated in the future, as well as wages, benefits and allowances, working time, annual leave, selection criteria in case of redundancy, the coverage of the collective agreement, the granting of trade union facilities, including access to the workplace beyond what is provided for in legislation etc. These matters should not be excluded from the scope of collective bargaining by law or as in this case, by financial disincentives and considerable penalties (such as provided for in the case of the National Code of Practice for the Construction Industry and the Implementation Guidelines) (at para 913).

- According to the principle of free and voluntary collective bargaining embodied in Article 4 of the Convention No 98, the determination of the bargaining level is essentially a matter to be left to the discretion of the parties and consequently, the level of negotiation should not be imposed by law, by decision of the administrative authority or by the case-law of the administrative labour authority (at para 988).

- It is essential that the introduction of draft legislation affecting collective bargaining or conditions of employment should be preceded by full and detailed

consultation with the appropriate organisations of workers and employers (at para 1075).

Prepared and produced by the National Office of the Construction, Forestry, Mining and Energy Union (CFMEU).

For further inquiries on this document contact Tom Roberts, Legal Officer, CFMEU on telephone 02 8524 5800