THE WESTERN AUSTRALIAN GOVERNMENT

SUBMISSION TO

The Senate Education, Employment and Workplace Relations Committee Inquiry on the *Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2011*

February 2012

INTRODUCTION

The Western Australian Government welcomes the opportunity to make a submission to the Senate Committee on the *Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2011* (**the Bill**).

Through its submissions to the Wilcox Review, the Senate Committee on a similar Bill in 2009 and representations at various review forums, the Western Australian Government has strongly advocated for the retention of:

a) the Australian Building and Construction Commission (**ABCC**) or, as a second preference in the alternative, for the replacement body to enjoy its structural and operational independence;
b) the ABCC's compulsive interview powers to pierce the building and construction industry's (**the industry**) prevailing climate of fear and intimidation;
c) the 'cover-the-field' industry specific *Building and Construction Industry Improvement Act 2005* (**the BCII Act**) offence provisions, particularly those pertaining to unlawful strike action;
d) the industry specific penalties that serve as a genuine deterrent to participants engaging in unlawful conduct, which has plagued the industry.

Given the similar content of the Bill before this Senate Committee, and that of the Bill before the July 2009 Senate Committee, this submission contains similar content to the Western Australian Government's submission to that committee.

The operating culture and ingrained conduct of the Construction Forestry Mining and Energy Union in Western Australia (**CFMEUWA**) should be of great interest to this Committee and should be given the utmost consideration when it ultimately makes its recommendations.

The CFMEUWA and its officials have a well documented history of consistently engaging in unlawful conduct that breaches criminal, employment and other laws. The extent of this undesirable history was clearly evident during the hearing before the Western Australian Industrial Relations Commission (**WAIRC**) of a recent application for re-issuance of a revoked State right of entry permit to the CFMEUWA's Assistant State Secretary[1].

Evidence led during the hearing was that between 1996 and 2011, the CFMEUWA's Assistant State Secretary had criminal and employment law breach findings against him for 56 different incidents involving unlawful conduct. All of this conduct is characterised by this official readily resorting to unlawful behaviour to advance his organisation's interests in circumstances where other lawful avenues were available.

Regrettably, since the WAIRC hearing the same official has had further findings against him, including criminal trespass convictions and five breaches of the BCII Act's unlawful strike provisions[2].

Given the Assistant State Secretary's position of authority within the CFMEUWA, his propensity to engage in unlawful conduct is both influential on, and representative of, the organisation's culture and operational methods. This culture and operational approach is consistent with the Cole Royal Commission's findings that the industry

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[1] *2011 WAIRC 01045*
[2] *ABCC v CFMEU (No2) [2011] FCA 1518*

operated with a disregard for the rule of law and that its participants operate in an unparalleled climate of fear and intimidation.

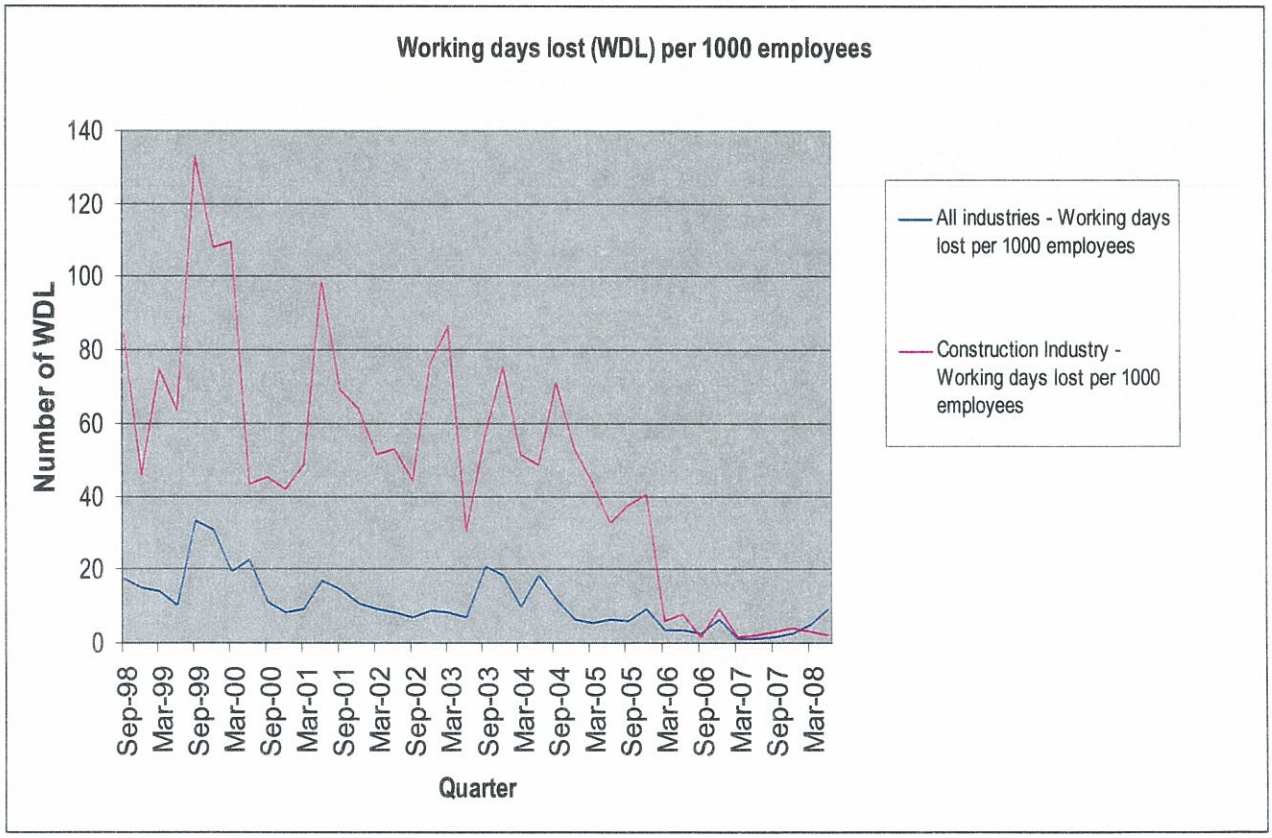
The Western Australian Government considers the CFMEUWA's culture and operational methods provide a compelling rationale for the retention of the existing federal regulatory and enforcement arrangements.

There is compelling empirical evidence that the existing arrangements have made an overwhelmingly positive impact on the culture and productivity of the industry, that make a strong argument for the retention of the existing arrangements without amendment.

A 2007 Jackson Wells Morris Pty Ltd study, commissioned by the Australian Contractors Association, of industry participants responsible for managing and supervising projects found overwhelming support for the ABCC. The study surveyed 36 such industry participants, with 97% responding that the ABCC had been a positive initiative for the industry. The study also found that 95% of the same group reported that union behaviour had improved over the last three or four years.[3]

Perhaps the most compelling evidence of all is the immediate and dramatic reduction in the occurrence of industrial action in the industry coinciding with the introduction of federal reforms in September 2005. This reduction is clearly depicted in the following graph plotting working days lost per 1000 employees.

Fig 1[4]



[3] *Jackson Wells Pty Ltd, "Four Years On", August 2007, pages 34 & 48*

[4] *Australian Bureau of Statistics, Industrial Disputes Australia Source ABS Cat no. 6321.0.55.001*

Based on the demonstrated gains, facilitated by the existing federal regulatory and enforcement arrangements, the Western Australian Government has significant concerns that the Bill in its current form will wind-back-the clock and return the industry to the restrictive work practices of the past.

As was the Western Australian experience in 2001, with the former Gallop Government's abolition of the State's Building Industry Taskforce, any winding back of effective regulatory and enforcement arrangements is an open invitation to the industry's union leaders to embark on a costly and disruptive campaign of fear and intimidation.

The Western Australian Government's primary concerns with the Bill's proposed amendments are:

a) the creation of the Advisory Board which provides the Fair Work-Building Industry Inspectorate (**FWBII**) with operational direction;
b) the limiting of the Bill's application to on-site work, effectively rendering participants working off-site to be outside FWBII's jurisdiction;
c) the introduction of overly bureaucratic processes prior to and after the FWBII exercises compulsive powers of interview;
d) the three-year sunset provision removing FWBII's access to compulsive powers of interview;
e) the introduction of a 'switch-off' mechanism to the application of the compulsive powers of interview and the introduction of a role for the Independent Assessor (**the IA**);
f) the repeal of industry specific offence provisions for conduct such as unlawful strike action;
g) the repeal of industry specific maximum penalties of $22,000 for individuals and $110,000 for corporate bodies, effectively reducing such penalties to $6,600 and $33,000 respectively; and
h) FWBII resources being dedicated to investigate alleged underpayment of award and minimum safety net standard breaches.

ADVISORY BOARD

The Western Australian Government opposes the introduction of an Advisory Board. The ABCC's effectiveness, at least in part, has been generated by its capacity to base operational imperatives on its ability to identify and respond to unlawful conduct as it arises in the industry. The Western Australian Government considers that the Advisory Board will only serve to diminish the agency's capacity to respond effectively and expediently to emerging issues in the industry.

It is questionable as to what meaningful operational direction the proposed Advisory Board may provide, given the infrequency of its mandatory meeting requirements set out in the Bill. Additionally, there appears a genuine risk that the FWBII's operational direction may be skewed to the Advisory Board members' interest areas, rather than tackling the genuine unlawful conduct that prevails in the industry.

The Western Australian Government urges the Committee to reject amendments introducing an Advisory Board and, as an alternative, ensure the Bill contains provisions that afford the FWBII with operational independence similar to that enjoyed by the ABCC.

APPLICATION TO OFF-SITE WORK

The Western Australian Government opposes provisions in the Bill that exclude its application to off-site work and prefers the broader industry definition and application of the existing BCII Act provisions.

Advances in the industry have resulted in a growing proportion of work, which was previously completed on-site, now being performed off-site. Pre-cast concrete panelling is one of many examples of work which is now performed off-site. Significantly, many employers operating such businesses employ workers in work that is completed both on-site and off-site. The proposed provisions will create confusion for these employers and their employees as to when and how the law applies to their employment relationship.

Of great concern is that the delivery and installation of the work performed off-site is critical to progression of work on-site. Consequently, there is enormous scope to cause major on-site disruption by instigating industrial action workplaces that are off-site. Given the construction of the Bill's provisions, whilst any such action will cause the type of stoppages that have previously plagued the industry, the actions will fall outside the proposed FWBII's jurisdiction.

The Western Australian Government urges the Committee to reject amendments restricting the application of the Bill to on-site work exclusively and, as an alternative, retain the existing definition and application prescribed by section 5(1)(d)(iv) of the BCII Act.

COMPULSIVE INTERVIEW POWERS

Whilst the Western Australian Government welcomes the retention of the compulsive interview powers, it has significant concerns with the proposed role of the Administrative Appeals Tribunal (**AAT**) and the three-year sunset provision.

Effective investigation is contingent on the expedient identification and collection of relevant material evidence. Any delay in the evidence gathering process increases scope for the loss of critical evidence. The loss of critical evidence adversely impacts on investigative outcomes and, in many cases, is prohibitive to instigating litigation.

The Western Australian Government has great concerns that the proposed role of the AAT will only serve to impede the FWBII's investigative response capacity. Given expediency is an investigative imperative, the proposed bureaucratic processes are likely to slow FWBII's operations and provide scope for evidence and witnesses to be lost.

Significantly, there is no evidence of the ABCC misusing the compulsive interview powers it was afforded. On this basis it would appear the ABCC's administrative procedures, which it applied to the use of compulsive interview powers, were sufficient to ensure there was no misuse.

The impact of the proposed role performed by the Commonwealth Ombudsman (**CO**) is difficult, at this stage, to determine. Whilst the Western Australian Government is not adverse to a review process after the FWBII has used its compulsive powers, it urges caution that any involvement by the CO should not be an administrative or resource intensive burden for either agency.

There appears no empirical rationale for the inclusion of a mandatory sunset provision in the Bill to remove compulsive interview powers from the FWBII after a three year period. The Wilcox review clearly identified the need for the retention of this power. Competent assessment as to merits and effectiveness of the powers as they apply to the industry in three years time may only be meaningfully made at that time.

The Western Australian Government urges the Committee to reject amendments introducing a role for the AAT prior to the FWBII using compulsive powers and ensure that any role performed by the CO does not impact on the operational efficiency of the FWBII. Additionally, The Western Australian Government urges the Committee to reject the three year sunset provision and that it be replaced with a review mechanism of the powers to be undertaken at that time.

'SWITCH-OFF' MECHANISM

The Western Australian Government opposes the introduction of the 'switch-off' mechanism for the compulsive interview powers for specific projects and subsequently the proposed role of the Independent Assessor.

It appears incongruous that the 'switch-off' provision has been included in the Bill, particularly in light of it not appearing in the Wilcox Review's recommendations. There appears neither genuine benefit nor rationale for the inclusion of this provision and it will only serve to cause confusion to the industry's participants.

The industry's sub-contractors perform work at a multitude of sites and under these provisions their employees will be working interchangeably, even on a daily basis, on sites where the provisions do apply and on others where they do not. Significantly, the provisions provide scope for such sub-contractor's work to be targeted for unlawful stoppage at sites where the provisions do not apply. As such the provisions provide scope for industry participants to engage in unlawful coercion and industrial action and avoid the prospect of being subject to the compulsive interview powers.

Given, the Western Australian Government's opposition to the 'switch-off' mechanism it opposes the proposed role of the IA. In the event the IA is introduced, it is of great concern that any appeal by the FWBII Director against a decision to apply the 'switch-off' mechanism is reviewed by the IA. This creates a circumstance where the only avenue of review is conducted by the original decision maker.

The Western Australian Government urges the Committee to reject amendments introducing a 'switch-off' mechanism and the proposed role for the IA.

INDUSTRY SPECIFIC OFFENCE PROVISIONS

The Western Australian Government opposes the repealing of industry specific offence provisions.

Enforcement of the industry specific unlawful strike action provisions has proved effective in preventing stoppages in Western Australia. The ABCC's prosecution of individual workers for engaging in unlawful strike action on the Perth to Mandurah Rail Project proved to be the catalyst that enabled the site from that time on to remain relatively stoppage free. Prior to the ABCC's action the site was plagued with repeated and ongoing strike action.

Whilst there is some symmetry between the existing provisions of the BCII Act and those prescribed by the *Fair Work Act 2009* (**the FW Act**), there are some variances. Unlike the BCII Act, the FW Act does not provide offence provision coverage for participants that are not covered by the federal jurisdiction. In the context of the industry, where for example if a crane stops work all work must cease, it provides scope for targeted stoppage of non-federal jurisdiction workers to cause a complete stoppage. In such circumstances the workers concerned may fall outside the FW Act provisions and as a consequence, the FWBII's jurisdiction.

The Western Australian Government urges the Committee to reject amendments repealing offence provisions currently prescribed by the BCII Act.

REDUCTION OF PENALTIES

The reduction in penalties arising from the repealing of offence provisions is of great concern to the Western Australian Government. As clearly identified by the Cole Royal Commission, uniquely the industry and its participants have consistently ignored the rule of law.

Clearly, as demonstrated by the reduction in industrial action that coincided with the introduction of the BCII Act's unlawful strike action provisions, the existing penalties provide a meaningful deterrent to industry participants engaging in such conduct.

The quantum of existing penalties should be of little concern to law abiding building industry participants as they will never be subject to them. It appears that support for the reduction in penalties is confined to those who have previously contravened the relevant provisions.

The industry's unique characteristics also provide a compelling rationale for the retention of the existing penalties. Industrial action has dramatic consequences for employers in the industry, rendering them liable to liquidated damages for lost time and the potential for work to be required to be redone.

When viewed in the context of many of the industry's employers operating at a number of sites, either concurrently or in succession, lost time on a particular site has significant impact on an employer's capacity to perform ongoing and future work.

The Western Australian Government urges the Committee to reject amendments reducing the penalties that are currently provided under the BCII Act.

INVESTIGATING UNDERPAYMENT OF ENTITLEMENTS

The Western Australian Government does not support the FWBII taking responsibility for the investigation and enforcement of breaches of all federal employment laws, including underpayment wages claims against employees, which occur in the industry.

The Western Australian Government notes that the ABCC has already altered its operational focus to now conduct investigations into allegations of underpayment of wages and sham contracting breaches.

The Fair Work Ombudsman (**FWO**) already provides the industry's participants with access to an agency with expertise in investigating alleged breaches of federal employment laws, awards and agreements. The FWO has the appropriate investigative and prosecutorial expertise to perform this function and transferring it to the FWBII would simply be a duplication of this existing function. The Western Australian Government is unaware of any empirical data which indicates that FWO has not adequately investigated such breaches in the industry.

A significant concern is the likely adverse impact on FWBII's resources as a consequence of these additional functions. Primarily, the additional functions are likely to divert critical FWBII resources from its pre-existing operational focus on the existing provisions of the BCII Act and potentially diminish the agency's overall effectiveness.

The Western Australian Government urges the Committee to reject amendments allocating the FWBII the function of investigating breaches of wage entitlements and ensure this function is retained by FWO.

CONCLUSION

The Western Australian Government is committed to ensuring that Western Australian workplaces are fair, flexible and productive. The capacity for workplaces in the building and construction industry to achieve these objectives was significantly enhanced by the industry reforms introduced in 2005 by the former federal Howard Government.

In the current world economic climate, where financial investment in construction projects has continued to slow, it is an imperative that additional barriers preventing a vibrant and productive building and construction industry are avoided. The Bill's proposed changes risk the introduction of such barriers.

Accordingly, the Western Australian Government strongly urges the Committee to reject the amendments in the manner which has been detailed in this submission.