Australian Government
Department of Employment and Workplace Relations

National Office

GPO Box 9879 CANBERRA ACT 2601

Australian Government Submission in Response to Interim Recommendations by the ILO Committee on Freedom of Association

Case No. 2326

Building and Construction Industry Legislation

1. The purpose of this submission is to:

   (a) respond to the six interim recommendations made by the ILO Committee on Freedom of Association (CFA); and

   (b) correct the errors and assumptions made in the second submission by the Australian Council of Trade Unions (ACTU) to the CFA. Where the claims made by the ACTU are not addressed in the body of the Australian Government's submission, they are explicitly addressed in the Appendix to this submission.

2. This submission demonstrates that the Australian Government gave due consideration to Australia's international obligations and its particular national conditions in developing the *Building and Construction Industry Improvement Act 2005* (BCII Act 2005).

3. The BCII Act 2005 enhances its compliance with international obligations.

4. The BCII Act 2005 addresses inappropriate industry practice and disregard for the legislative framework that governs Australian workplace relations in the building and construction industry. In making its interim recommendations on 17 November 2005, the Australian Government is of the view that the CFA considered the ACTU complaint without providing adequate opportunity for the Australian Government to respond.

5. The second submission was only provided to the Australian Government by the ILO Office on 13 October 2005. The submission raised a number of new substantive issues, contained a number of factual errors and, in the Australian Government's view, a number of highly questionable assertions. The ACTU complaint was substantially revised from its original submission of March 2004.

6. The Australian Government regrets that the CFA chose not to wait for a submission from the Australian Government on the legislative developments that occurred in September 2005 or to provide an opportunity to respond to the claims put forward in the ACTU's second submission.

7. The Australian Government welcomes any opportunity to assist the CFA to understand the conditions that have led to the enactment of the BCII Act 2005.

Australian Government Response
to the Interim Recommendations by the CFA

Recommendation 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.

8. The Australian Government has undertaken extensive consultation with industry participants and interested parties regarding the Building and Construction Industry Improvement Bill 2003 (BCII Bill 2003) and the Building and Construction Industry Improvement Bill 2005 (BCII Bill 2005). Both Bills represented the Australian Government's considered response to recommendations of the Royal Commission into the Building and Construction Industry (the Royal Commission) following extensive public consultation and scrutiny by the Australian Parliament.

Royal Commission

9. The Royal Commission into the Building and Construction Industry was established by the Australian Government in August 2001 to conduct inquiries into the unlawful and otherwise inappropriate practice and conduct in the building and construction industry. The Royal Commission was presided over by the Honourable Terence Cole, QC, a former Judge of Appeal in the New South Wales Supreme Court. A Royal Commission is the highest level of independent inquiry available to the Australian Government.

10. The Australian Government found it necessary to establish an independent Royal Commission following claims by the National Secretary of the Construction Division of the Construction, Forestry, Mining and Energy Union (CFMEU) that organised crime elements were infiltrating his union, a series of violent invasions on Perth building sites, allegations of corruption by a former New South Wales CFMEU official, and a report by the Employment Advocate[1] that the problems of the industry were beyond his Office's power and capacity to handle. The Royal Commission was also support by the peak employer industry body, the Master Builders Association (MBA) in seeking to remove unlawful practices and conduct from the building and construction industry. This demonstrates that the creation of the Royal Commission had support of Government, employer and employee stakeholders.

11. The Royal Commission provided a significant opportunity for building and construction industry participants to comment on reform in the industry. The Royal Commission was the most comprehensive independent investigation of the building and construction industry ever undertaken in Australia. The Commission:
    - conducted 171 days of public hearings;

[1] The functions of the Office of the Employment Advocate (OEA) include providing assistance and advice to employees and employers on the Workplace Relations Act, especially Australian workplace agreements (AWAs) and freedom of association.

- heard over 700 witnesses give evidence;
- received over 20 general submissions from interested parties throughout the building and construction industry; and
- issued 1,489 summonses to attend public or private hearings and 1,677 notices to produce relevant documents.

12. The Royal Commission, at the commencement of its proceedings, extended an invitation to all State Governments, organisations, companies, unions and persons with an interest in the subject matter of the Commission to provide submissions. Similarly, towards the end of the Royal Commission hearings, an advertisement was placed in the national media seeking final submissions in relation to the Commission's investigations. In response to these advertisements only two unions made submissions.

13. Volume Two of the Royal Commission's Final Report specifically notes the unions' reluctance to effectively participate in the Royal Commission process.

> *There were many occasions upon which potential witnesses who were approached by Commission investigators refused to be interviewed. Some of those people were drawn from the employer side of the industry. Most, however, were union officials or employees.*[2]

14. The Commission also expressly noted union refusal to produce documents, its general defiance and contempt of the Commission and refusal to participate cooperatively at hearings and meetings. The unions chose not to participate and held public protests and demonstrations against the Royal Commission.

15. Despite the ACTU's claims to the contrary, issues such as tax avoidance, occupational health and safety breaches, security of payments to sub-contractors, alleged use of illegal labour, were examined by the Commission and subsequently referred to the relevant Federal and State Government agencies.

16. The Final Report of the Royal Commission, comprising 23 volumes, was tabled in the Australian Parliament on 26 and 27 March 2003. The Royal Commissioner noted:

> *Underlying much of the conduct of unions, and in particular the CFMEU, is a disregard or contempt for the law and its institutions, particularly where the policy of the law is to foster individualism, freedom of choice or genuine enterprise bargaining. Overwhelmingly, industrial objectives are pursued through industrial conduct, rather than reliance on negotiation or the law and legal institutions.*[3]

---

[2] Final Report of the Royal Commission into the Building and Construction Industry, Volume 2 – Conduct of the Commission – Principles and Procedures, Paragraph 36, Page 23

[3] *ibid.*, Paragraph 22, Page 11

17. The Royal Commission, in finding that the building and construction industry was plagued by widespread intimidation, coercion and collusion, presented an overwhelming case for urgent reform.

> *[The findings of the Royal Commission] demonstrate an industry which departs from the standards of commercial and industrial conduct exhibited in the rest of the Australian economy. They mark the industry as singular. They indicate an urgent need for structural and cultural reform.*[4]

Consultation on BCII Bill 2003

18. In response to the evidence of unlawful activities and conduct in the building and construction industry by the Royal Commission, the Government was duty bound to pursue reform of this economically vital industry.

19. On 18 September 2003, an exposure draft of the BCII Bill 2003 was released and a consultation period of four weeks established. Release of legislation as an exposure draft is not standard procedure. This step was taken to ensure all parties involved with the industry were clear about the purpose and effect of the legislation. It also recognised the numerous and diverse interests that make up the industry's participants.

20. More than 60 written submissions were received from employee industrial associations, employer organisations, major contractors and subcontractors. The submissions contained comments on specific provisions and possible amendments. All submissions received were considered and, as a result, a range of amendments were made to the BCII Bill 2003.

21. Comments received from subcontractors focussed on the need for the establishment of a new regulatory body as well as the implementation of an effective enforcement and penalty regime to stamp out unlawful behaviour in the building and construction industry.

22. The ACTU and CFMEU also made lengthy submissions to the Department of Employment and Workplace Relations (the Department). Notably, several amendments suggested by the ACTU were accepted by the Australian Government in finalising the BCII Bill 2003. These amendments included provisions in the Bill relating to union right of entry, demarcation disputes and Ministerial directions to the Office of the Australian Building and Construction Commissioner (the ABCC) and the Office of the Federal Safety Commissioner (the FSC).

23. The BCII Bill 2003 was referred to the Senate Employment, Workplace Relations and Education References Committee (Senate References Committee) for review. The Senate References Committee also undertook an

---

[4] Final Report of the Royal Commission into the Building and Construction Industry, Volume 1 – Summary of Findings and Recommendations, Paragraphs 16-17, Page 6

extensive nine month consultation on the BCII Bill 2003, receiving 125 submissions from all sectors of the community, including unions, businesses, academics, associations and individual citizens. The Senate References Committee conducted 14 hearings in all major capital cities across Australia. The hearings were attended by 141 witnesses. The report of the Senate References Committee on the BCII Bill 2003 was tabled on 21 June 2004.

24. The BCII Bill 2003 lapsed when the 40th Parliament was prorogued in August 2004 prior to the October 2004 Federal Election.

Consultation on BCII Bill 2005

25. Following the 2004 Federal election, the Australian Government announced its intention to proceed with the building and construction industry legislative reforms and wrote to industry stakeholders on 12 November 2004 inviting them to provide further feedback. Submissions were received from employer organisations, industry associations and law firms. The feedback was carefully considered by the Australian Government in drafting the BCII Bill 2005.

26. The Australian Government introduced the BCII Bill 2005 on 9 March 2005. The BCII Bill 2005 was referred to the Senate Employment, Workplace Relations and Education Legislation Committee (Senate Legislation Committee) and a report was tabled on 10 May 2005. The Senate Legislation Committee received 11 written submissions including eight from unions and employer groups. Many of the union submissions called for the BCII Bill to be rejected. However, the fact that the underlying issues identified by the Royal Commission remained unchanged is the reason why building and construction industry legislative reforms were necessary.

27. In addition to the formal consultation processes, the provisions contained in the BCII Bill 2005 had been in the public domain since September 2003 and open to discussion and scrutiny by all interested parties.

28. The Bill received Royal Assent on 12 September 2005 as the *Building and Construction Industry Improvement Act 2005* (BCII Act 2005). The provisions of the BCII Act 2005 dealing with unlawful industrial action took effect from 9 March 2005, (the date on which the Bill was introduced into the Federal Parliament). All other provisions commenced on 12 September 2005.

29. The BCII Act 2005 incorporates key elements of the Government's legislative response to the Royal Commission. These include:

- the establishment of a statutory office – the ABCC to enforce Commonwealth workplace relations law in the building industry;
- setting out functions and powers of the FSC, including the establishment of an occupational health and safety accreditation scheme in relation to persons that contract with the Commonwealth; and

- provisions dealing with unlawful industrial action, coercion in relation to certified agreements and discrimination in relation to the kind of industrial instrument.

Ongoing industry consultation

30. The Department has responsibility for implementing the BCII Act 2005 and in 2004, a telephone hotline was established to seek ongoing feedback on the building industry reforms. Details of the hotline have been widely advertised within the building and construction industry.

31. The ABCC, which has offices in each of Australia's major capital cities is responsible for actively working with the industry to encourage, inform and advise industry participants on their rights and obligations under the workplace relations and building laws regardless of whether they are union officials, employers or workers.

32. Information sessions on the BCII Act 2005 and other industry initiatives are regularly conducted for industry participants by both the Department and the ABCC. Collectively, the Minister for Employment and Workplace Relations, the Department and the ABCC regularly liaise with industry participants on the ongoing operation of the building industry reforms and associated legislation.

Recommendation B The Committee requests the Government to take the necessary steps with a view to modifying sections 36, 37 and 38 of the BCII Act 2005 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 BCII Act 2005, 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.

Freedom of association

33. The Australian Government submits that sections 36, 37 and 38 of the BCII Act 2005, which specifically deal with industrial action, reflect Australia's ILO obligations, including freedom of association principles.

34. Sections 37 to 39 of the BCII Act 2005 provide that industrial action will not be unlawful if it is protected action within the meaning of the *Workplace Relations Act 1996* (WR Act 1996). In particular, the BCII Act 2005 excludes action by employees that has been authorised or agreed to in advance and in writing by the employer of those employees from being unlawful industrial action.

35. Provisions of the BCII Act 2005 must be read in conjunction with the WR Act 1996. Part XA of the WR Act 1996 sets out a range of protections which have the broad objective that individual employees, employers and independent contractors are free to join or not to join an industrial association as they may choose.

36. Suggestions by the Committee that modifications to the BCII Act 2005 may need to be made to ensure compliance with Australia's international obligations are therefore unnecessary.

37. Protected industrial action taken in accordance with the WR Act 1996 is not subject to these sections of the BCII Act 2005. Importantly, the BCII Act 2005 excludes action by an employee where that action is based on a reasonable concern by the employee about an imminent risk to his or her own health and safety and the employee did not unreasonably fail to comply with any direction of his or her employer to perform other available work that was safe for the employee to perform.

38. Further, section 45 of the BCII Act 2005 prohibits discrimination on the basis that employees are covered by, or it is proposed that they will be covered by, a particular kind of industrial instrument, or an industrial instrument made with a particular party, or in a particular jurisdiction. Examples of the types of conduct this section is intended to prohibit includes refusal to award work to an employer because:

- the employer's employees are covered by a particular type of agreement;

- an agreement has or has not been made with a particular employee organisation; or
- the agreement has been made in either State or Federal jurisdictions.

This means, for example, discrimination cannot occur on the basis of employees being covered or not covered by a union collective agreement.

Penalties and sanctions

39. Under Australia's workplace relations system employees and trade unions are able to pursue lawful industrial action in pursuit of a collective agreement. The BCII Act 2005 does not remove the right of an employee or trade union to take lawful industrial action. Reform of the building and construction industry represented a special challenge in developing solutions to combat entrenched lawlessness in the industry, which accounts for the approach taken to unlawful industrial action in the BCII Act 2005.

40. For most industries, the penalties contained in the WR Act 1996 are sufficient to deter unlawful conduct. However, the Royal Commission found an entrenched culture of lawlessness exists in the building and construction industry, and a belief among industry participants that breaking the law does not have any real consequences. The measures contained in sections 39, 40 and 48-50 of the BCII Act 2005 are a direct response to these findings.

41. Days lost due to industrial action are a significant cost to the Australian building and construction industry. Data from the Australian Bureau of Statistics indicates that, in the March 2005 quarter the Construction industry recorded 25,600 working days lost – this represents 58 per cent of all working days lost for all industries in Australia[5]. Given that building and construction employees represent only seven per cent of the total workforce, this is a disproportionate representation and, in the Australian Government's view, is unacceptable.

42. The BCII Act 2005 improves the compliance regime by providing a significant deterrent for parties engaging in unlawful industrial action. To change the culture in the industry, it is necessary to make the penalty regime appropriate to the circumstances of the industry.

43. It should be noted, the maximum penalty for unlawful industrial action is just that, a maximum penalty. The courts have the discretion to impose a minimal penalty for minor procedural infringements. Australian courts have the discretion to consider all aspects of a case when setting the level of penalty. The maximum amounts differentiate between individuals and corporate entities. The individual maxima are 20 per cent of the level of penalty that can be imposed on corporate entities. The penalties that can be imposed on an individual have no regard to their status as a union member. This is entirely consistent with freedom of association principles.

---

[5] *Industrial Relations*, ABS, CAT 6321.0.55.001, March 2005

44. The Australian Government does not believe the BCII Act 2005 requires amendment for the purposes proposed in Recommendation B.

Recommendation C The Committee requests the Government to take the necessary steps with a view to revising section 64 of the BCII Act 2005 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.

45. The Australian Government submits that section 64 of the BCII Act 2005 helps to ensure the determination of the bargaining level is left to the discretion of the parties at the enterprise level.

46. The focus of the WR Act 1996 is on bargaining at the enterprise or workplace level. The ability to negotiate agreements and workplace arrangements that are genuinely tailored to the needs of the individual workplaces produces mutual benefits for workers and employers.

47. Large building and construction projects involve work by an array of employers and employees. Project agreements, which are commonly used on building sites can be intended to deny employers and their employees the right to develop terms and conditions that suit their circumstances by trying to secure ‘pattern’ outcomes.

48. Furthermore, the nature of the work and the conditions applying to various employers in the industry may differ markedly. It is inefficient and costly to mandate a single set of terms and conditions in these circumstances. For the most part, project agreements impose inflated wages and conditions, inconsistent with existing workplace negotiated agreements and without a commensurate increase in productivity.

49. Consistent with the recommendations of the Royal Commission, the existing capacity to make project agreements under the multiple business and greenfields provisions of the WR Act 1996 are not affected by the BCII Act 2005. The Australian Government considers that the provisions for multi-business agreements are sufficient and reflect the primacy of enterprise-level agreement-making in the federal workplace relations system.

50. As noted in paragraph 32 of this submission, section 45 of the BCII Act 2005 specifically prohibits discrimination against an employer on the basis of the type of industrial instrument the employer has. Section 64 of the BCII Act ensures genuine choice in agreement-making for employers and employees in the industry and as such, the Australian Government does not believe it requires revision.

Recommendation 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 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.

51. The National Code of Practice for the Construction Industry (the National Code) and associated Implementation Guidelines (the Guidelines) are not designed to promote any type of industrial instrument above another. The Guidelines are drafted for the purpose of assisting employers and employees to practically implement the recommendations of the Royal Commission, as well as at progressing the Australian Government's commitment to establishing higher standards of workplace relations behaviour, flexibility and productivity within the building and construction industry.

52. The Committee's comments on the status of collective bargaining are based on the proposition that Article 4 of Convention 98 imposes an unqualified obligation on ratifying states to promote collective bargaining at the expense of all other forms of bargaining. The Australian Government does not agree with that view. Article 4 requires measures for the encouragement and promotion of collective bargaining to be taken 'where necessary', and that such measures are to be 'appropriate to national conditions'.

53. In this regard, collective bargaining has been the norm in Australia for more than a century, and continues to be. The Workplace Relations Act and the BCII Act do not give primacy to individual bargaining over collective bargaining. They provide machinery to facilitate and promote both collective and individual bargaining. Accordingly, employers, employees and their nominated representatives remain free to choose the type of industrial instrument most appropriate to their circumstances, including collective agreements.

Freedom of Association under the National Code

54. The Australian Government considers that the BCII Act 2005, the National Code and Guidelines are consistent with Australia's ILO obligations and freedom of association principles.

55. The National Code and Guidelines already require the strict application of freedom of association principles. Specifically, the National Code provides that:

> *All parties have the right to freedom of association. This means that parties are free to join or not join industrial associations of their choice and that they are not to be discriminated against or victimised on the grounds of membership or non membership of*

> *an industrial association. A person cannot be forced to pay a fee to an organisation if not a member.*
>
> (National Code of Practice for the Construction Industry, Industrial Relations, Freedom of Association, page 8)

Further, the Guidelines state that:

> *Among the fundamental principles underpinning the Australian Government's workplace relations policy are:*
>
> ° *Freedom of choice.*
> ° *Freedom of association – the choice to be or not to be in a union or employer associations, and the choice of which union or employer organisation.*
> ° *All Australians must be treated equally before the law.*
>
> (Australian Government Implementation Guidelines, September 2005, page 29)

56. It should be noted that paragraphs 421 and 449 of the CFA report appears to conflate the existing National Code and Guidelines with any Building Code that may be issued under section 27 of the BCII Act 2005. Further, paragraph 418 of the CFA report notes that the ACTU has complained that the Building Code would 'extend the operation' of the current National Code and Guidelines.

57. At this stage a Building Code has not be issued and therefore any comments by the ACTU about its content are premature and purely conjecture.

58. As such, the Australian Government does not consider that review of the National Code and Guidelines in relation to freedom of association is necessary.

Financial Penalties under the National Code

59. The National Code and Guidelines do not specifically provide for financial penalties or incentives. Sanctions that may be imposed under the National Code and Guidelines only apply to employers who wish to tender for Australian Government funded construction projects.

60. As stated above, the National Code and Guidelines do not place any restrictions on freedom of association. Nor do they, in any way, restrict or remove the right for parties to bargain collectively. To the contrary, the Guidelines require that no restrictions or limitations are placed on the choice of future industrial instruments in a current arrangement. Likewise, the Guidelines prohibit any requirement to negotiate future agreements with a particular party. In this way, employers and employees are afforded enhanced protection for their right to freedom of association and to collectively bargain future agreements.

61. As such the Australian Government is using its purchasing power to facilitate the implementation of the recommendations of the Royal Commission as well as to progress its commitment to establishing higher standards of workplace behaviour, flexibility and productivity in the industry.

- A copy of the National Code and September 2005 Guidelines is attached for the Committee's information.

Recommendation E   The Committee requests the Government to introduce sufficient safeguards into the BCII Act 2005 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 month's 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.

62. The main object of the BCII Act 2005 set out in subsection 3(1) is to 'provide an improved workplace relations framework for building work to ensure that building work is carried out fairly, efficiently, and productively for the benefit of all building industry participants and for the benefit of the Australian economy as a whole'.

63. Schedule 1B of the WR Act 1996 deals with the registration and accountability of organisations. The objects of Schedule 1B, as detailed at section 5, are to:
    (a) ensure that employee and employer organisations registered under this Schedule are representative of and accountable to their members, and are able to operate effectively; and
    (b) encourage members to participate in the affairs of organisations to which they belong; and
    (c) encourage the efficient management of organisations and high standards of accountability of organisations to their members; and
    (d) provide for the democratic functioning and control of organisations.

64. The powers conferred on the ABC Commissioner by the BCII Act 2005 do not compromise nor undermine the provisions of Schedule 1B that ensure trade unions and employer associations are democratically controlled, accountable to their members and efficiently managed.

Safeguards for ABC Commissioner powers

65. The potential for intimidation in the building and construction industry means that people may be reluctant to take action to address unlawful conduct or provide information about such conduct. Given the extent of unlawful and inappropriate behaviour in the industry, the powers of the ABC Commissioner to require a person to provide information are both appropriate and necessary.

66. Section 52 of the BCII Act 2005 establishes criteria which the ABCC must satisfy in order to exercise its powers to obtain information. Therefore, there currently exists important protections and safeguards in the BCII Act 2005, namely:

- the ABC Commissioner may only issue a notice where there is `reasonable grounds` to believe that a person has information or documents relevant to an investigation into a contravention of the BCII Act 2005, WR Act 1996 or a Commonwealth industrial instrument (s.52);
- a person has 14 days to comply with a notice issued by the ABC Commissioner or Deputy ABC Commissioner (s.52(2));
- a person required to attend before the ABC Commissioner or Deputy ABC Commissioner has a right to legal representation (s. 52(3));
- answers given and information or documents produced by a person are not admissible in evidence against that person in proceedings except in very limited circumstances (for instance if the person gives false or misleading evidence) (s. 53(2)); and
- a person who in good faith provides information, produces a document or answers a question has protection from liability (s. 54).

67. There are further important safeguards relating to the powers of ABC Inspectors:
   - an ABC Inspector must carry his/her identity card at all times when exercising powers or functions (s.58(6));
   - an ABC Inspector cannot compel a person to be interviewed, all such interviews must be voluntary (s.59(12)); and
   - a person has 14 days to comply with a notice issued by an ABC inspector (s.59(6)).

68. The BCII Act 2005 restricts what a person may do with protected information that has been obtained during the course of official employment. Unauthorised recording or disclosure of protected information is an offence carrying a maximum of 12 months imprisonment. The protected information provisions apply to all members of staff of the ABCC. Penalties of this nature have the effect of providing protection to individuals who seek to provide information to the ABCC.

69. The Australian Government considers the existing safeguards in the BCII Act 2005 to be comprehensive and appropriate, and as such, does not judge further protections to be necessary. The powers granted to inspectors are entirely consistent with the ILO Convention on Labour Inspection, Convention 81. The powers are similar to the powers of inspectors in many countries. In addition a number of the powers and functions of inspectors under the BCII Act 2005 are directed to securing the observance of occupational health and safety laws and standards.

Rights of appeal to the Courts

70. The CFA recommends a provision giving a person a right of appeal to the Courts before handing over documents. This right currently exists and has been exercised on several occasions. See for example *Thorson v Pine* [2004] FCA 1316, *Laing v Carroll* [2005] FCAFC 202, *Donnelly v O'Donnell* [2005] FCA 1412. In all of these cases, the person served with a notice or requirement to produce documents was afforded the opportunity to test the

validity and ambit of the notice in the Federal Court. The documents, the subject of these challenges, were not required to be handed over until after the Court had determined whether the applicant was required to do so.

71. All of the relevant operative provisions of the BCII Act 2005 contain a minimum 14 day time period to comply with the notices. This affords the person opportunity to obtain legal advice with respect to their legal options and to test the matter in the Courts if they so choose.

Penalty for failing to comply with a section 52 notice

72. The BCII Act 2005 provides for a *maximum* penalty of six months jail for failure to comply with a notice issued by the ABC Commissioner to provide information or documents. The courts retain the discretion to impose a penalty proportional to the gravity of the offence and can apply a sentence of less than 6 months imprisonment or impose a financial penalty instead of a jail term. Claims that the BCII Act 2005 provides for mandatory imprisonment are therefore unfounded and amendment of this provision is unnecessary.

Recommendation F The Committee 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 regard to Conventions No's. 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.

73. The Australian Government does not believe it is necessary to amend the legislation for the purposes proposed in the above recommendation.

74. The Australian Government considers that appropriate regard was given to Australia's obligations under ILO Convention 87 and 98 in developing the Building and Construction Industry Improvement legislation. Australian workers in the building and construction industry have the right to choose freely whether or not to join a union.

75. The Australian Government has undertaken extensive consultation with industry participants and interested parties since the Royal Commission tabled its Final Report in March 2003. Consultation was undertaken in relation to both the 2003 and 2005 versions of the BCII Bill. The Australian Government believes sufficient opportunity was given for all interested parties to provide their views on the legislation before it became law. Further information on the consultation process can be found under Recommendation A.

76. The legislation, in common with all Australian legislation, will be kept under review to ensure its objects are being met and that it is not operating in a manner contrary to the efficient conduct of the industry's activities.

77. The ABC Commissioner intends to meet on a regular basis with the industry's participants. The industry's key employer and employee associations will be invited to these meetings. The meetings will be an opportunity to canvass any issues of concern about the administration of the BCII Act 2005 by the ABC Commissioner.

78. The Australian Government also convenes a National Workplace Relations Consultative Council at least twice a year. The Council is chaired by the Minister for Employment and Workplace Relations and is attended by national union and employer representatives. Employers and unions are entitled to raise concerns about workplace relations legislation in this forum.

79. In paragraph 60 of the second ACTU submission it is claimed the Australian Government has failed to explain how Australia's compliance with Convention 87 is enhanced by provisions in the BCII Bill 2003.

80. The overall operation of the BCII Act 2005 enhances worker's right to freedom of association by making unlawful those activities that are

commonly used to directly or indirectly coerce or pressure employees and employers to become members of a particular organisation or association, to only deal with particular organisation, or to only deal with employers who have a particular kind of agreement (eg union or non-union collective agreement).

81. Convention 87 states that ‘the Preamble to the Constitution of International Labour Organisation declares “recognition of the principle of freedom of association” to be a means of improving conditions of labour and of establishing peace’.

82. The Royal Commission found evidence of behaviour in the building and construction industry where undue pressure is applied to employers and employees to become union members. These behaviours are neither conducive to establishing peace, nor primarily focused on achieving improved conditions of labour. Instead, industrial disputation over union membership and practices such as ‘no ticket, no start’ which were found to be prevalent in the industry are unnecessarily adversarial and major inhibitors to productivity. Additionally, these activities appear to be more concerned with union revenue raising than improving labour conditions.

83. The Royal Commission found that in the building and construction industry:

> *There needs to be recognition, principally by the unions but also by the major contractors and subcontractors, that in Australia there exists freedom of choice to either join or not join an association of employees. More deeply, there needs to be fostered an understanding and acceptance of the existence of that right within individuals. At present, that right is diminished, if not eliminated in the central business districts of the major cities, by doctrinal dogmatism on the part of unions, and commercial expediency on the part of head contractors and subcontractors*[6].

84. The BCII Act 2005 does not restrict freedom of association or the right of employees to organise but rather seeks to address those activities identified in the Royal Commission which impinge upon these basic rights. As such, the Australian Government considers the BCII Act 2005 reflects Australia’s international obligations with respect to freedom of association principles.

---

[6] Final Report of the Royal Commission into the Building and Construction Industry, Volume 1 – Summary of Findings and Recommendations, Paragraph 12, Page 4

Conclusion

85. In developing the BCII Act 2005, the Australian Government gave consideration to its international obligations in conjunction with the workplace relations conditions particular to the Australian building and construction industry. The Australian Government is of the view that it gave due consideration to Australia's international obligations in the development of the BCII Act 2005, and is of the view that the Act enhances Australia's obligations under ratified ILO conventions. Both the BCII Bill 2003 and the recently enacted legislation reflect the Australian Government's fundamental commitment to genuine freedom of association, choice in agreement making and ensuring the rule of law is upheld in the building and construction industry.

86. The building and construction industry is critical to Australia's economic welfare and prosperity and is an important part of the Australian economy both in its own right and in respect of its input in other industries. It is a $50 billion a year industry, comprising approximately seven per cent of Australia's gross domestic product and employing over 700,000 Australians. The industry has been the subject of ongoing attempts at industry reform to encourage improved economic and workplace relations performance over a number of years by successive Governments.

87. The benefits of a reformed building industry for the Australian economy and community are immense.

88. The Royal Commission found that lawlessness in the industry resulted in significant inefficiencies and costs. An economic analysis provided to the Royal Commission [conducted by Tasman Economics] found that if productivity in the building industry matched market sector productivity growth, the accumulated gain to real GDP for the period 2003 to 2010 would be in the order of $12 billion[7].

89. The serious nature of the industry's problems and their impact on the Australian economy should not be underestimated. An efficient industry characterised by proper commercial behaviour, sound employment practices and efficient regulation will be able to achieve a significant increase in employment, productivity and wages growth for the industry in Australia.

90. The Australian Government believes the ACTU and unions in general were given ample opportunity to provide submissions on the reform and legislation that is the subject of the CFA's recommendations. These opportunities were available both during an extensive consultation periods for both the BCII Bill 2003 and the BCII Bill 2005. The fact the unions decided not to avail themselves fully of these numerous opportunities is not, the Australian Government believes, a reflection on the level of consultation undertaken.

---

[7] *Productivity and the Building and Construction Industry – A report prepared for the Royal Commission into the Building and Construction Industry*, Tasman Economics, November 2002, page 25-26

91. The Australian Government considers that appropriate regard was given to Australia's obligations under ILO Convention 87 and 98 in developing the Building and Construction Industry Improvement legislation. The Australian Government does not propose to amend the legislation for the purposes proposed in the recommendations.

92. As noted, however, the Australian Government welcomes any opportunity to further assist the CFA to understand the national conditions which led to the enactment of the BCII Act 2005.

Appendix

Australian Government Response to the Second Submission by the ACTU

Building and Construction Industry Improvement Act 2005 - Right to Strike (Paragraphs 9-16)

<u>*Paragraphs 9 and 10 of the ACTU submission state:*</u> *the BCII Act 2005 provides for a Building Code to be issued that will not be subject to parliamentary scrutiny and that the Government will be able to alter the contents of the Code as they wish.*

1. The information provided by the ACTU in relation to any Building Code issued under section 27 of the BCII Act 2005, and the current National Code and Guidelines is inaccurate.

2. The claim that the Building Code issued under the BCII Act 2005 will not be subject to parliamentary scrutiny, and that the Australian Government will be able to alter the contents of the Building Code as they wish is incorrect.

3. Any Building Code issued under the BCII Act 2005 will be a legislative instrument under the *Legislative Instruments Act 2003*. This means that the Building Code would be subject to scrutiny and could be disallowed by the Australian Parliament. Likewise, any changes to the Building Code would be subject to Parliamentary scrutiny and could be disallowed.

4. The ACTU submission acknowledges that the contents of any future Building Code are not known to the ACTU.

5. The BCII Act 2005 establishes the ABCC and provides for the statutory position of the FSC, with associated clear lines of responsibility for enforcement of any future Building Code, if issued.

6. The ABCC has the primary responsibility for monitoring and promoting compliance with workplace relations law in the building and construction industry. The FSC has responsibility to promote occupational health and safety on Commonwealth funded sites. ABC Inspectors and Federal Safety Officers have clearly defined statutory powers appropriate to fulfil their roles in monitoring compliance with the BCII Act 2005, the WR Act 1996, the OHS accreditation scheme and Building Code, if issued.

<u>*Paragraphs 13 to 15 of the ACTU submission:*</u> *deal with industrial action in the BCII Act 2005. The ACTU submission claims the BCII Act 2005 introduces a blanket prohibition on industrial action; that unlawful industrial action includes action that may affect another industry participant even if unintended; and that any person may seek an injunction to stop industrial action, even it not affected by it.*

7. The BCII Act 2005 does not introduce a blanket prohibition on industrial action. The scope of the BCII Act 2005 reflects the need to capture the unlawful and inappropriate conduct identified by the Royal Commission. Building industrial action is defined broadly to encompass conduct by employers and employees that adversely affect the performance of building work and the BCII Act 2005 applies to employees, employers, employer organisations and unions in the commercial building and construction industry.

8. As noted at paragraph 28 in the body of this submission, sections 37 to 39 of the BCII Act 2005 provide that industrial action will not be unlawful if it is protected action or AWA industrial action within the meaning of the WR Act 1996. In particular, the BCII Act 2005 excludes action by employees that has been authorised or agreed to in advance and in writing by the employer of those employees from being unlawful industrial action.

9. Importantly, the BCII Act 2005 excludes action by an employee from being unlawful industrial action where that action is based on a reasonable concern by the employee about an imminent risk to his or her own health and safety, where the employee did not unreasonably fail to comply with any direction of his or her employer to perform other available work that was safe for the employee to perform.

10. The ACTU submission further claims the BCII Act 2005 prohibits unlawful industrial action, including action that may affect another industry participant, and that any person may seek an injunction to stop the industrial action, even it not affected by it.

11. Section 39 of the BCII Act 2005 states that the ABC Commissioner or any other person may make application to an appropriate court for an injunction to prevent *unlawful* industrial action. Protected industrial action taken in accordance with the WR Act 1996 is not subject to this section.

12. The application of the BCII Act 2005 ensures that the problems endemic in the industry through unlawful industrial action are not shifted down the contractual chain, and that all those involved in the commercial construction industry, whether on-site or supplying essential materials, are covered. This further ensures that businesses whose operations are not limited to the commercial construction sector may be covered by aspects of the BCII Act 2005.

13. ILO Convention 98 does not provide for an unlimited right to strike. The restrictions imposed on the right to take industrial action are reasonable and appropriate.

Role of the Australian Building and Construction Commissioner (Paragraphs 17-21)

Paragraphs 18 and 19 of the ACTU submission state: the ABC Commissioner has wide reaching powers and that these powers are greater than those of inspectors under the WR Act 1996. *Paragraph 21 claims that these powers are designed to intimidate workers, discourage collective bargaining and weaken trade union rights.*

14. These claims are incorrect. The powers given to the ABC Commissioner under sections 52-56 of the BCII Act 2005 substantially correspond with the powers under current Part VA of the WR Act 1996. Likewise, the powers given to the ABC Inspectors by the BCII Act 2005 (see sections 57 to 59) are equivalent to the statutory powers conferred on inspectors and authorised officers under the WR Act 1996.

15. These provisions are not designed to intimidate workers, discourage collective bargaining or weaken trade union rights. The Parliament of the Commonwealth has enshrined in statute the purpose of these provisions at Subsection 3(1) of the BCII Act 2005:

> *The main object of this Act is to provide an improved workplace relations framework for building work to ensure that building work is carried out fairly, efficiently and productively for the benefit of all building industry participants and for the benefit of the Australian economy as a whole.*

Paragraph 20 of the ACTU submission states: privilege against self incrimination is not available to individuals under the BCII Act 2005.

16. This claim is wrong. Persons who provide information to the ABC Commissioner as required under section 52 are automatically provided with a statutory immunity against any information provided being used against that person in civil or criminal proceedings. The immunity extends to:
    - proceedings for contravening any other law because of that conduct; and
    - civil proceedings for loss, damage or injury suffered by another person because of that conduct.

17. The only circumstances where the information can be used against the person providing the information is in proceedings for giving false and misleading information, or obstruction of a Commonwealth official.

18. Section 52 of the BCII Act 2005 is modelled on like provisions applying to the Australian Competition and Consumer Commission (the ACCC) and the Australian Securities and Investments Commission, (ASIC), but go further in providing protection to the witness in respect of derivative use immunity.

***Workplace Relations Amendment (Codifying Contempt Offences) Act 2004* (Paragraphs 22-28)**

Paragraphs 22 to 28 of the ACTU submission: make various statements regarding the operation of the Workplace Relations Amendment (Codifying Contempt Offences) Act 2004.

19. These provisions are no longer operative. They have been superseded by the provisions in sections 52 to 56 of the BCII Act 2005.

***Workplace Relations Act 1996* (Paragraphs 29-40)**

Paragraphs 29 and 30 of the ACTU submission state: the WR Act 1996 provisions for inspectors to require the production of documents are today being used to target individuals and unions who the inspectors believe may have breached a provision of the Workplace Relations Act.

20. The accusations of the ACTU are incorrect and unfounded. The WR Act 1996 provisions are not being used to target individuals and unions. There are a number of prosecutions brought by the ABCC (and former Building Industry Taskforce) against employers. The WR Act 1996 and BCII Act 2005 provisions are designed to bring to account any building industry participant who breaks the law. See for example:
    - *Cruse v Freshmore (Vic) Pty Ltd* [2005] FCA (11 November 2005)
    - *Pine v Multiplex Constructions (Vic) Pty Ltd* [2005] FCA 1428
    - *Pine v Austress Freyssinet (Vic) Pty Ltd* [2005] FCA 583
    - *Pine v Schiavello* [2005] FCA (11 March 2005)

Paragraphs 31 and 32 of the ACTU's second submission: outline the ACTU's interpretation of the powers afforded to an inspector under the WR Act 1996 to enter premises for the purpose of inspecting work, interview employees or to inspect or require production of documents.

21. Under the provisions of the WR Act 1996, an inspector can only interview workers with their consent. This is explained to workers at the outset of interviews. This provision is replicated under the BCII Act 2005. Under subsection 59(12) of the BCII Act 2005, a worker (or any person) is entitled to refuse to be interviewed by an ABC Inspector.

22. The powers to require documents in the WR Act 1996 and BCII Act 2005 are no different or more onerous than analogous provisions applying to the ACCC, ASIC and the Australian Taxation Office. Without these powers, it would be extremely difficult to gather any evidence of contraventions of the WR Act 1996 or BCII Act 2005.

Paragraph 33 of the ACTU submission states: the powers under the WR Act 1996 are replicated in both the Codifying Contempt Act and the BCII Act 2005 – both of which are specifically targeted at the building and construction industry.

23. The Royal Commission recommended specific legislative measures to combat the universal disregard for the rule of law it uncovered in the building and construction industry.

24. The need to compel persons to provide information has been demonstrated both by the findings of the Royal Commission and the experiences of the former Building Industry Taskforce. The Royal Commission found that many individuals in the building and construction industry were reluctant to provide information on illegal practices for the fear of reprisal and recrimination. Approximately one-third of complaints investigated by the Building Industry Taskforce where unable to proceed, as complainants' feared reprisal and recrimination.

Paragraphs 35 to 38 of the ACTU submission: state that the Courts have found that Building Industry Taskforce (now ABCC) inspectors are undertaking roving inquiries foreign to industrial relations in Australia, pursuing cases that are hopeless and prosecuting matters that are much ado about nothing.

25. The ACTU submission does not accurately reflect the activities of the Building Industry Taskforce or ABCC but instead seeks to employ poetic licence in outlining the prosecutions of building industry participants. As at 30 September 2005, there were 17 completed court actions of which 14 were successful.

Paragraphs 39 and 40 of the ACTU submission claim: notices issued by ABC Inspectors and the exercise of their powers are designed to target and intimidate individual workers. The ACTU claim the intent is to discourage workers from participating in trade union activities and thereby weakening trade unions rights and the ability of those workers to organise collectively.

26. There is no evidence to support this claim. The format and content of notices issued are prescribed under either the WR Act 1996 in relation to inspectors or the BCII Act 2005 in relation to ABC Inspectors. Notices set out the information required and are accompanied by a cover letter which outlines the workers rights and responsibilities of the recipient of the notice.

27. The ABC Commissioner and his staff are subject to stringent confidentiality provisions concerning protected information. The most serious offence contained in the BCII Act 2005, carrying 12 months imprisonment, is reserved for unauthorised disclosure of protected information by ABCC staff. The definition of protected information would capture individual details of union membership (where that information is relevant to the investigation, for

example an alleged breach of freedom of association provisions). Therefore, the claims of the ACTU regarding the possible use of ABCC information obtained by the ABC Commissioner or ABC Inspectors to target and intimidate individuals are unfounded.

28. The inclusion of a maximum 12 month imprisonment term that applies to all ABCC staff members demonstrates the Australian Governments commitment to preventing unauthorised disclosure of protected information.

29. The claims made in paragraphs 29-40 of the ACTU submission are further addressed in the body of this submission in relation to the Australian Government's response to Recommendation E.

National Code of Practice and Building Industry Guidelines (Paragraphs 41-51)

Paragraph 44 of the ACTU submission states: *the Guidelines, and particularly those which apply from 1 October 2005, will severely affect the right of workers to bargain collectively.*

30. This is incorrect. The National Code and Guidelines are silent on what type of workplace arrangement may apply. They do not prohibit collective bargaining, instead they provide protection for employers and employees, affording them the freedom to negotiate the form of their workplace arrangements themselves.

31. The National Code provides:

> *A party must not, directly or indirectly, pressure or coerce another party to enter into, or to vary or to terminate a workplace arrangement. Nor may they pressure or coerce them about the parties to, and/or the contents, or the form of their workplace arrangements*

(National Code of Practice for the Construction Industry, Industrial Relations, Workplace Arrangements, page 7).

32. The Guidelines provide:

> *It is up to each employer to negotiate with their employees (and their employees' representatives where that is the employees' wish) what form of workplace arrangement, if any, should apply. It is up to employers and their employees to decide whether to have a certified agreement (CA) (and if so what kind), Australian Workplace Agreements, a State enterprise agreement, or to work under the terms of the relevant award (supplemented possibly by over-award payments)*

An employer must not coerce or attempt to coerce an employee not to request the involvement of an industrial organisation in negotiations over a CA

(Section 8.2 Workplace arrangements, page 25).

33. Additionally, it is worth noting that the date of effect for the revised Guidelines was delayed until 1 November 2005 in response to consultation with industry participants.

<u>Paragraphs 45 and 46 of the ACTU submission:</u> lists elements of the revised Guidelines which, among other things, the ACTU claims restrict the capacity of unions and employers in the building and construction industry from bargaining collectively and determining the form of agreement and contents of agreements that best suit them.

34. Contrary to the ACTU submission, the Guidelines do not prevent collective bargaining. As stated previously, the Guidelines require that no restrictions or limitations are placed on the choice of future industrial instruments in a current arrangement, including collective agreements.

35. The Guidelines do require that an industrial instrument must not grant access to a site above that allowed by the WR Act 1996 or relevant State legislation. However, the Australian Government does not consider these legislative provisions to be a 'minimum' as claimed by the ACTU, but rather an accepted standard applicable across all industries.

36. The Guidelines do not prevent the organisation of union matters on site. Instead, the Guidelines provide that there should be no requirement to employ a non-working shop steward or job delegate, or have the effect of requiring a contractor, subcontractor or employer to hire an individual nominated by the union.

37. The Guidelines do not dictate the basis on which redundancies can be made. Instead, the provisions require that industrial instruments must not contain clauses that determine redundancy on non-operational requirements, such as seniority.

38. Nor do the Guidelines prevent an employer from applying union logos, mottos, etc to company supplied property or equipment, including clothing. Instead, the Guidelines provide that an employer cannot be required through an industrial instrument to apply union logo's etc.

<u>Paragraph 47 of the ACTU submission states:</u> the Guidelines `allow the employer to opt out of the collective agreement with an individual employee during the life of the agreement`.

39. This is incorrect. An employer cannot ‘opt out` or unilaterally move an employee from coverage by a collective agreement to coverage by an individual contract. The Guidelines simply require that industrial instruments do not contain clauses which would restrict an employee, their nominated representative and an employer from negotiating an individual arrangement during the life of a collective agreement should they wish to do so.

Paragraph 48 and 49 of the ACTU submission: makes various claims about the National Code and Guidelines and bargaining.

40. These issues are addressed in the body of this submission in relation to the Australian Government's response to the CFA's Recommendation D.

Reply to Submission of the Australian Government (Paragraphs 52-69)

<u>*Paragraphs 52 to 57 of the ACTU submission state*</u>*: there should be greater consideration of how the performance of the Australian construction industry compares internationally in relation to industrial action and the need for reform.*

41. Some opponents of reform argue that the Australian building and construction industry is performing well by international comparisons and, therefore, there is little justification for major industry reform. However, as the Royal Commission commented, international comparisons should be treated with caution because of the difficulty in obtaining comparable data.

42. Studies commissioned by the Royal Commission found that the building and construction industry has fallen behind the market average in Australian industry which indicates that significant inefficiencies remain. For example, the Royal Commission found that the residential building sector has higher rates of productivity and lower costs than the commercial construction industry in Australia.

<u>*Paragraph 59 of the ACTU submission states:*</u> *the Government has failed to address the ACTU complaint regarding the right to strike and the effect of the 2003 Bill on that right.*

43. This claim has been addressed by the Australian Government in the body of this submission in relation to Recommendation B and paragraphs 7 to 12 of this Appendix.

<u>*Paragraph 60 of the ACTU submission states:*</u> *the Government has failed to explain how restriction on the right to bargain collectively to include in agreements matters that go to encouragement of union membership, access to employer premises by unions employees and the ability for union officials to access induction courses to talk to new employees enhance Australia's compliance with Convention 87.*

44. This claim has been addressed by the Australian Government in the body of this submission in relation to Recommendation F.

<u>*Paragraph 61 of the ACTU submission states:*</u> *the Government does not dispute the effects set out in the ACTU complaint on the restrictions the BCII Bill 2003 will place on the right of unions to bargain collectively. Additionally, it states the Government does not address how the BCII Bill 2003 complies with Convention 98.*

45. The original ACTU complaint was in regard to perceived restrictions the BCII Bill 2003 would impose on the right to collectively bargain. These claims are unfounded. As discussed earlier in this submission, the Australian Government maintains that the BCII Act 2005 does not restrict the right of employees to organise and bargain collectively. In fact, the BCII Act 2005

enhances freedom of association in the Australian building and construction industry by providing greater protections against discrimination or victimisation on the basis of whether a person has chosen to join or not join an industrial association.

46. These claims by the ACTU have now been addressed by the Australian Government through this submission.

Paragraph 62 of the ACTU submission states: the Government has failed to address ACTU concerns regarding the Building Code [provided for by the Legislation] and the wide ranging powers of the ABCC to monitor and enforce the Code.

47. This claim has been addressed by the Australian Government in the body of this submission in relation to Recommendation D.

Paragraphs 63 to 69 of the ACTU submission state: the Government has failed to address the ACTU complaint and introduces irrelevant material regarding compliance with other Conventions (i.e. Conventions 81 and 155) in support of the BCII Bill 2003.

48. The Australian Government maintains it was not provided adequate opportunity to respond to the second ACTU submission. The ACTU complaint was substantially revised from its original submission of March 2004.

49. The various errors and assumptions made by the ACTU in its complaint to the CFA have been corrected by this submission.