Chapter 5

Pattern bargaining and enterprise agreements

> This leads to our final question: is pattern bargaining part of the problem or part of the solution? As an IR researcher reading the report of the Cole royal commission, I would fail it. It shows the ascendancy of ideology over any grasp of the empirical reality in this area. You see traces of that elsewhere. In other parts of the recommendations there is recognition of the benefits of coordination. That comes through in parts of the training section and in the notions of codes of practice later on. But when they deal with IR issues this ideological obsession is apparent. They show a fetish about the enterprise.[1]

5.1 This chapter deals with a core issue that arose from the committee's examination of the provisions of the Building and Construction Industry Improvement (BCII) Bill: pattern bargaining and enterprise agreements. The prohibition on pattern bargaining and on project agreements are key clauses in the bill. This raises interesting questions as to what notice the Government has taken of industry leaders and the extent of its understanding of the way in which construction businesses must operate in the marketplace. The evidence before the committee calls into question any 'reformist' claims the Government makes about this legislation.

What is at stake?

5.2 Opposition to pattern bargaining has been a defining characteristic of the Government's industrial relations policy since the coalition took office in 1996. The importance of workplace and enterprise circumstances in wage agreements was first recognised in amendments to the Industrial Relations Act made by the Keating Government. It has since been made the defining characteristic of policy implemented through the Workplace Relations Act. The insistence on the use of the term 'workplace' in all employer-employee relations contexts illustrates and reinforces the ideological focus of this policy.

5.3 The Senate has filtered the worst excesses of this policy by way of rejecting most amendments made to the WR Act. The most recent attempt was in the Workplace Relations (Genuine Bargaining) Bill 2002. Chapter 5 of the BCII Bill contains a major provision similar to previously rejected amendments to the Workplace Relations Act: a prohibition on pattern bargaining in the building and construction industry. The continuing use of pattern bargaining in defiance of the

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1 Dr John Buchanan, *Hansard,* Sydney, 2 February 2004, p.36

Government's policy of limiting wage bargaining to enterprise level negotiations has been a continued source of vexation to successive ministers for Workplace Relations.

5.4 The uncompromising thrust of the legislation before the Senate includes a ban on project agreements. This is controversial, as project agreements were used with considerable success in construction work for the Sydney Olympic Games. They are generally supported by large construction firms acting as principal contractors. The achievement of negotiating a project agreement is a managerial challenge and an indicator of high level success when the process comes to fruition, because the financial rewards to participants in the agreement are considerable. The Government's opposition to this aspect of managerial excellence is explicable only if one accepts that it violates the canon that agreements must be with individual or small groups of workplace employees on the one site. Any deviation which involves a staggered sequence of builders and contractors (as the nature of the project requires) is unacceptable, regardless of the managerial inefficiencies that result.

5.5 The point was made in chapter 1 that the Government's campaign against pattern bargaining flies in the face of common sense in reaching agreements on wages and conditions. Evidence to the committee suggests that developers, builders and contractors support pattern bargaining because of the degree of certainty it brings to cost projections. If the wages issue is settled, and wage rates are similar or identical across the industry, then a level playing field is created upon which competitive bids can be made. These can be made on the basis of savings and cost reductions in non-wage areas, not least of all through efficiencies in materials procurement and project management. Industry peak bodies claim that building corporations may find some aspects objectionable, but there is no evidence that they do not support pattern bargaining. They certainly support the continuation of other aspects of pattern bargaining that would be in breach of the proposed legislation.

5.6 Evidence to the committee supported legislation that provides options for determining wages and conditions, including the use of pattern agreements and, project agreements. While there appears to be some use of AWAs in the industry, common law agreements are also used. Bechtel, for instance, the large American constructor involved in the Darwin LNG project, prefers to use common law agreements. The diverse nature of the industry will require mechanisms for negotiating agreements on wages and conditions. There was miniscule evidence in support of the highly restrictive provisions contained in the bill. Restriction of the use of pattern bargaining was seen as increasing costs, adding to complexity and resulting in inefficiencies in doing business. The committee majority is concerned that in its desire to prevent standard agreements being established across the industry, the legislation will impose unwieldy and time consuming processes that will adversely affect the capacity of employers and employees to establish a suitable bargaining process either in the form of a pattern or a project agreement.

5.7 Unions support the use of pattern agreements because they include provisions ensuring common industry standards in relation to occupational health and safety and superannuation requirements that apply under state and Commonwealth laws, and

because they provide stable conditions and reduced transactional costs. It was also argued that it was important to establish fair tendering based on standard wages and conditions both across the industry and within a project site. Any arrangement which sees wage discrimination on a worksite is an almost certain guarantee of disruption. Stable wages and conditions are also likely to reduce the risk to businesses of an unstable workforce, with key skilled staff being vulnerable to poaching on the basis of variable wages and conditions. This increases the risks to projects being completed due to the availability of staff.

The Government's case

5.8 The explanatory memorandum describes how the bill will encourage genuine bargaining at the enterprise level and restrict pattern bargaining and provide for mandatory 'cooling off' periods during which protected industrial action is not permitted. The bill defines pattern bargaining as a course of conduct or bargaining, or the making of claims, by a person that involves seeking common wages or other common conditions of employment (other than in an award or state award); and extends beyond a single business.[2]

5.9 Having set up the Cole royal commission to unearth evidence in support of its policy of eliminating pattern bargaining, the Government, thus armed with the findings it anticipated, echoes in its submission to the committee the recommendations it received, although without some of the rhetorical flourishes. Cole had claimed that enterprise agreements were being undermined, and that one form of centralised wage-fixation was now replaced by another, the result being that initiative was stifled and creativity denied. How this manifested itself was not made clear, but the result was claimed to be detrimental to the industry and those who worked in it.[3] It is to the credit of DEWR that they have not attempted to elaborate on this argument. The DEWR submission claimed that pattern bargaining is a major cause of excessive costs and unlawful activity in the construction industry. It argues that in spurning workplace agreements, construction workers are denying themselves the flexibility that that they might otherwise have in reaching satisfactory agreements through enterprise bargaining. The submission continues:

> One-size fits all pattern agreements are routinely forced upon employers and employees by unions with no real opportunity to negotiate. Such agreements can result in increased costs and limit productivity growth.
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> Freedom of choice is a core principle underpinning the WR Act. …the Royal Commission found that this choice is often denied to construction industry participants. Pressure is applied to contractors and subcontractors to incorporate informal industry-wide or project agreements into their workplace agreements, without any regard for their specific business needs. Employers, employees and independent contractors are subject to coercion

2 Explanatory Memorandum, p.24

3 *Final Report of the Royal Commission into the Building and Construction Industry*, Volume.1, p.28

> and discrimination because of their choices about union membership and the types of workplace agreements.[4]

5.10 The Government provides figures showing that the majority of agreements made in the construction industry are pattern agreements. These figures come from the DEWR Workplace Agreements Database, which showed that at 30 June 2003:

- there were 3593 federal construction industry agreements in operation and of these agreements, non-wage (conditions only) agreements accounted for only 3 per cent (118 agreements);
- for federal agreements that were certified between 1 January 2002 and 30 June 2003 inclusive, the construction industry had the lowest number of employees per agreement with an estimated mean of 14 employees;
- 69 per cent of federal agreements in construction were certified agreements with unions under s 170LJ of the WR Act;
- 625 of the 3593 federal agreements (17.4 per cent) were made under section 170LL of the WR Act as 'greenfields' agreements (i.e. covering the terms and conditions of employment for potential employees of a new business that the employer proposed to establish);
- 82.6 per cent of construction industry agreements were made under ss 170LJ, 170LK and 170LO and 170LP of the WR Act for which protected industrial action may be taken; and
- of the federal wage and non-wage agreements certified between 1 January 2002 and 30 June 2003, 3865 (or 80 per cent) were identified as pattern agreements covering approximately 34 400 (or 66 per cent) of employees.[5]

5.11 The committee majority sees nothing alarming in these figures. They indicate what would be expected in an industry concentrated in large metropolitan centres and subject to strong competitive pressures. This works in favour of similarities in costs and wages, with some variations around the states. It is clear that the Government does not like what it reports and in this legislation is intervening in the normal dynamics of employer-employee relations. There is a degree of irony in the proactive attempts of governments, which claim to be business oriented, to erect elaborate legislative edifices to prevent the normal processes of wage negotiation between the consenting parties.

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4 Submission No.21, Australian Government Agencies, p. 34

5 ibid, pp. 62-63

The pattern bargaining debate

5.12 This section of the chapter surveys the views of witnesses and submissions on the issue of whether pattern bargaining is necessary or whether it is a practice which poisons the industrial relations culture, as the government claims. Not surprisingly, the committee received no submissions speculating on how agreements would proceed under arrangements which would be necessitated by the passage of the bill.

5.13 In general, industry groups do not appear to be opposed to the concept of establishing common wages and conditions for employees who are undertaking similar work in a common working environment. One industry group also provided evidence that, as long as the employment conditions suited the needs of their members, a common set of terms and agreements across the industry was an acceptable way to deal with industrial relations in the industry. Evidence from the Electrical and Communications Association in Queensland began with the assertion that pattern bargaining 'had reached its used-by date', for a number of reasons to do with the particular circumstances of electrical workers in the building industry. However, the committee established that this was not so much opposition to the principle of pattern bargaining as to its inflexible application to electricians.[6] The committee majority understands the problem, and suggests such issues can only be resolved through negotiation between the parties. The fact that there are impediments to negotiation confirms the view that the culture of the industry is such as to discourage lateral thinking on agreements. Legislation intended to enforce solutions will be counter productive and result in a higher level of animosity and lack of trust.

5.14 The committee majority notes the submissions which recognise the importance of maintaining pattern bargaining as the most practical way of dealing with pay and conditions, while at the same time addressing the difficulties which are evident. The committee would not condone agreement practices which disadvantage sub-contractors. It believes that the energies of DEWR would be far better employed in facilitating collaborative attempts to overcome these problems, in co-operation with state industrial agencies, unions and employer associations. The rights of subcontractors in enterprise bargaining agreements will be addressed in the section which follows on project agreements:

> Section 56 excludes pattern bargaining. All of the agreements struck in the resource expansion industry in WA are the results of pattern bargaining at the initiative of the developers and contractors. To have employees on the same site, such as the Northwest Shelf Expansion Project, performing the same work for different rates of pay, is a recipe for disaster. It would result in industrial action unable to be controlled by any trade union and would see conflict between contractors due to poaching of employees in a skilled workforce that is increasingly harder to attract. The AIG submission also

6 Mr Paul Daly, *Hansard*, Brisbane, 24 February 2004, p.130 and pp.148-50

> points to the necessity to allow some form of common agreement for major projects.[7]

5.15 Evidence from the Queensland Master Builders Association appears to the committee majority to be highly credible in relation to pattern bargaining. Its submission notes that wage justice has long been defined as circumstances where workers doing identical work in close proximity receive identical remuneration. It describes a system that encourages individual employers to pay differing wages to workers doing similar tasks on the same worksite as 'a recipe for industrial anarchy' which cannot be supported. Pattern bargaining within certain limits has been deliberately pursued by builders as a strategy to minimise industrial disputes. An additional reason to support pattern bargaining is to remove the threat of leapfrogging claims which would be the inevitable consequence of an unregulated labour market.[8]

5.16 Overall, the committee found that both employer and employee representatives believed that pattern bargaining could benefit all participants in the building and construction industry.[9] These benefits included stable employment conditions and costs,[10] improved occupational health and safety standards, and reduced transactional costs for small, medium and large businesses. The committee believes that certain provisions must be available to protect all employees in the industry and that will need to be included in all agreements. Under the proposed bill such provisions may be invalid because they arise from what may be considered a pattern agreement, even though only part of the agreement results from this process.

5.17 The CEPU believes that there are some provisions such as those related to skill based career paths and occupational health and safety that by definition must apply across an industry. It is impractical for workers sit down with each individual employer to renegotiate industry standards designed to protect employees in the industry.[11] The CEPU submission continues:

> Pattern agreements have been singularly responsible for ensuring employees have access to redundancy and income protection entitlements via the use of industry funds. Industry funds pay entitlements to employees even where employers go out of business. In the absence of the pattern agreement provision it is likely the employee would have lost all his or her entitlements. Enterprise agreements containing some pattern clauses should

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7 Submission No. 82, Mr John O'Connor, p.9

8 Submission No.90, QMBA, p.15

9 Submission No.17, ACTU, Para 102; Mr Frank D'Agostino, *Hansard*, Melbourne, 21 May 2004, p.3; Mr Charles Dixon, *Hansard*, Melbourne, 20 May 2004, p.41; Mr Mark Birkett, *Hansard,* Melbourne, 20 May 2004, pp.42-43

10 Submission No.27, CEPU, paras.7.612-7.6.18

11 ibid., paras.7.6.2-7.6.4

> not invalidated or refused certification. Pattern agreements should be certifiable as they facilitate a level playing field.[12]

5.18 The committee received evidence that pattern bargaining was fast and efficient because it is well understood by both employers and employees. The committee majority is concerned that the bill will disadvantage some small businesses which may lack the skills and resources in industrial relations to negotiate a unique EBA for every site or project. Businesses would be forced to find the resources or to develop expertise to negotiate a series of separate agreements with the same employees for different wages and conditions as they move between different sites and projects. The result would be inexpert industrial relations practices rife in industry, creating uncertainty about wages and conditions, curtailing core building activities and increasing costs, resulting in reduced productivity across the industry.[13]

5.19 Oral evidence from the CEPU set out the dilemmas facing contractors in the electrical industry. It was noted that companies with flat management structures will have problems negotiating the hurdles of implementation. Employers say they want consistency and uniformity but they do not want pattern bargaining. Many electrical contractors are quite comfortable with the provisions as they work now, because they are simple. They can sit down and negotiate flexibilities in relation to hours of work and work arrangements which are built into core EBAs. But under the new arrangement they will not know how to treat their employees who are off site.

> When there is a loss of time in relation to a health and safety issue in a residential area, are they required to report that to the federal safety commissioner? If there is an issue in relation to a stoppage, or there is a claim made by the union in relation to the maintenance service area, are they required to report that to the ABCC? These are the provisions that they are going to have to deal with. For a very small business with a very flat management, our view is that it will create the chaos which I referred to in my initial submission.[14]

5.20 The committee notes this warning about the difficulties to be faced, mostly by small business contractors, with the introduction of requirements that they make individual agreements. It is aware from other inquiries about the trauma of legislative changes to small business as a result of GST compliance. Compliance with industrial relations changes are far more onerous because it involves more than learning about a procedure. It involves higher level personnel management and negotiating skills, which many small business people do not possess. If the lack of skill forces people out of an industry already short of trade skills the result will not be a happy one for the industry.

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12 ibid., paras.7.6.29-7.6.31

13 Submission No.17, ACTU, paras.102 & 105*;* Submission No.27, CEPU, paras.7.6.9, 7.6.13, 7.6.15 & 7.6.27; Submission No.62, Queensland Council of Unions, paras 13-15

14 Mr Peter Tighe*, Hansard,* Sydney, 3 February 2004, pp.11-12

Who controls this industry?

5.21 The problems which seem to occur with pattern bargaining, and therefore the reason for prohibiting them, relate to perceptions of relative power in the negotiation process, and particularly the use of industrial action by unions to support their negotiating position.[15]

> Coercion in agreement making is at the heart of the standover tactics in the industry that gives rise to unlawful industrial action, anti competitive practices, agreements that barely reflect a mutuality of interests and militant and unlawful union power over contractors or labour supply.[16]

5.22 A belief in the unfairness of the relative balance of power in establishing agreements between employers and employees in the construction industry underpins both the Cole royal commission and the Governments' response to the commission's findings. The Government wishes to negate the relative power imbalances that it sees in the industry by providing additional power to contractors and subcontractors in the making of agreements. The Government perceived that unions have power to apply pressure to contractors and subcontractors to establish agreements that do not suit their businesses. This power is based on the risk of substantial liquidated damages for breach of contract facing employers, whereas only minor financial penalties face employees if industrial action takes place to establish an agreement.[17]

> What is proposed is a new system that empowers employers and employees to accommodate proper bargaining....It establishes clear boundaries around lawful industrial action and other processes for revising outmoded work rules....The way that pattern bargaining in the building and construction industry currently operates is one-sided, inflexible and anti-democratic.[18]

5.23 While some groups within the industry and government are concerned that the practice of pattern bargaining gives excessive negotiating power to employees, overall the practice is seen as providing benefits to all stakeholders in the industry. The committee majority is concerned that, in seeking to address the relative balance of power between the different stakeholders in the industry, the bill does not fairly balance the legitimate role of both unions and employers to reach a genuine agreement.[19]

5.24 For instance, the matters set out in section 62 do not provide the power to compel both parties to negotiate fairly, with the proposed sanctions removing the negotiating power of only one of the parties. Employees cannot use the termination of a bargaining period to promote genuine bargaining because while this supports this

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15 ibid., para.32

16 Submission No.14, ACCI, para.124

17 Submission No.21, Australian Government Agencies, paras.188-191

18 Submission No.12, MBA, p.7

19 Submission No.37, CFMEU, pp.34-35

bargaining position of the employer it negates the bargaining power of the employees.[20]

5.25 Employer organisations support the prohibition on pattern bargaining in the belief that contractors are targeted on the basis of their commercial vulnerability to unspecified threats. It is claimed that resulting peer pressure will compel other contractors to fall in line with standard agreements:

> There is a lot of authority in the hands of union officials if they know full well that there are massive commercial implications for a particular developer or contractor if projects are not constructed on time. And that conveys an enormous amount of power, as well as responsibility, to union leaders. If the findings of the royal commission that there is a failure to adhere to or respect the authority of law and the proper processes of dispute resolution and the like are then superimposed on that construct then that power is capable of being misused and is misused and damages the industry.[21]

5.26 Union leaders privately dismiss any idea that they wield power in the way that is claimed by their critics. They see themselves and their unions as just as vulnerable as proprietors. The committee believes that power is diffuse on both sides of the industrial divide, a reflection of the diversity in business and industrial activity. Industrial relations are local: they are not (except in unusual circumstances) centrally ordered. Union leadership at a state level may not be aware of many industrial disputes. As evidence to the Brisbane hearings clearly indicated, industrial harmony depends very much on the degree of trust which is developed, and the appreciation of shared interests between managers and proprietors on the one hand and local and state branch level union leaders on the other. Personal relationships play an important role in sorting out industrial relations in this industry, as in any other.

5.27 Building firms allegedly targeted by unions are indeed more likely to be the most vulnerable, as some submissions have suggested, but the nature of this vulnerability needs closer examination. It more often than not relates to their level of solvency, to the degree to which they comply with regulations, and to the general managerial competence which their proprietors demonstrate. Marginal operators in the industry are mostly responsible for underpayment of employees, tax evasion and failure to pay superannuation entitlements. They are most likely to go into liquidation, leaving their employees and sub-contractors with unpaid entitlements. The committee majority does not believe that the industry should be re-regulated by the BCII Bill for the purposes of protecting this class of business.

5.28 The committee notes also that employers are advocating that their attempts to enforce the rule against pattern bargaining be supported by the taxpayer. Presumably they would argue for this on the grounds of public benefit. It is argued that:

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20 ibid., p.34

21 Mr Peter Anderson, *Hansard,* Canberra, 11 December 2003, p.16

> The principal means of enforcing the prohibition against this illegitimate use of pattern bargaining is by way of injunction. This mechanism would be unduly expensive for a small business to instigate, both financially and in terms of the coercive force that may, as a consequence, be directed towards the particular small business. MBA believes it is essential that the ABCC stand in the shoes of the affected party. We believe that the Recommendation should be strengthened by permitting a relevant small business to make a complaint to the ABCC, which it must investigate, where an allegation of pattern bargaining arises and by providing that ABCC is able to initiate the injunctive proceedings.[22]

5.29 The committee notes that no union has put forward a similar claim to finance injunctions on the basis that disciplining the small business sector is a matter for the public good. The committee majority makes only the obvious point that parties are equal before the law in countries which are governed by the rule of law. The MBA's assumption is that ABCC will always be standing in the shoes of small business. This proposition is probably unconstitutional. Courts either determine what is in the public good, according to law, or where they cannot do so they draw this to the attention of legislators. But it is beyond the role of Parliament to make legislation on the basis that a free association of citizens will be presumed to operate on the margins of the law or beyond.

The right to negotiate

5.30 Several witnesses provided evidence that pattern bargaining is legitimate within national and international industrial relations practices in both union and non-union bargaining contexts.[23]

> The purpose of pattern bargaining may be to try and improve industrial conditions across an industry or industry sector. There is nothing fundamentally objectionable with that approach to collective bargaining. That approach is entirely in keeping with international labour standards and with what is a guaranteed international human right.[24]

5.31 The capacity of both employers and employee organisations to establish common wages and conditions for workers who are carrying out similar activities and providing reduced transactional costs for members is both legitimate and necessary for the industry. The industry has established democratic and representative processes within both employer and employee representative groups who are able to reflect the policy views of their members. Both groups are therefore able to legitimately

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22 Submission No.12a, MBA, para.7.1.1

23 Submission No.23, TWU, paras.30-32; Submission No.26, Australian States and Territories, paras.129-132

24 Submission No.77, ICTUR, p.29

represent these interests in the process of establishing industrial agreements on behalf of their members.[25]

> Unions are representative of classes of employees, and may have an interest in ensuring that employees (whether or not members of the union) in an industry or part of it provide certain minimum conditions. By seeking a certain uniformity of conditions unions are exercising a proper and long-recognised role.[26]

5.32 Government provides advice to employers by providing common or template AWAs that are developed by the Office of the Employee Advocate. A number of submissions have pointed out that this practice could be prohibited under clause 8(1) of the BCII Bill as a result of the ban on pattern bargaining. The Ai Group has recommended to the Government that the relevant clauses be amended to restrict the prohibition on pattern bargaining to conduct which might occur during the negotiation of certified agreements. [27] The committee majority speculates that this provision is an oversight, and agrees with one submission that noted that the Government is not opposed to pattern bargaining when it works to the benefit of employers, including active promotion by the Office of Employment Advocate of template style AWAs for different industries. The Government only has a problem with pattern bargaining when it is used as an effective vehicle to provide good wages and conditions to workers.[28]

5.33 This point was made strongly by the Western Australian Government:

> … the WA Government submits that, whilst the Bill seeks to outlaw pattern bargaining in the context of collective agreements, no provision is made with respect to pattern Australian Workplace Agreements (AWAs). It is common practice for AWAs to not only be made a condition of employment, but to also be made in identical terms across workplaces. It is submitted that such practices constitute the worst elements of pattern bargaining and represent an inherent contradiction in the Commonwealth's legislative approach. The failure of the Commonwealth to address such issues is further evidence of the imbalance associated with the Bill.[29]

5.34 The committee noted authoritative evidence from Dr John Buchanan of ACIRRT who observed that the proposed restrictions on pattern bargaining were not in accordance with the practice of common law or industrial relations practice and would therefore not contribute to an effective labour market for the building and construction industry:

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25 Submission No.37, CFMEU, p.32

26 Submission No.45, Society of Labor Lawyers Victoria, paras.19-20

27 Submission No.1, Ai Group, p.96

28 Submission No.16, Maritime Union of Australia, p.8

29 Submission No.26, Australian States and Territories: WA Government, paras.35-37

> … what strikes me is that, if one reflects on how labour markets function, they operate pretty much like the common law. The core of the common law is that you treat like cases alike; you follow precedent. It seems to me that, when you are dealing with the concept of wages and employment conditions... people are saying: let's treat like cases alike. There are actually deep jurisprudential grounds for pattern bargaining. It is not simply some ideological concept dreamed up by the CFMEU to stifle initiative and fairness: it has deep roots in labour market practice and in jurisprudence.[30]

Negotiating on a level playing field

5.35 A critical element to the achievement of efficiencies in the construction industry is the establishment of common employment conditions that provide predictability and stability in labour relations. This is important in reducing the risks of industrial strife and giving confidence to investors. Stakeholders in the industry are happy for this to be achieved either through pattern agreements, project agreements or an award system. The Queensland Council of Unions claims that project agreements are necessary for the industry as they provide stable employment conditions for new projects. This is supported by employer groups as well as unions.[31] The CEPU claims that pattern bargaining is not an evil to be stamped out by legislation because many employers actually prefer pattern bargaining as it creates a level playing field, and a disincentive to employers undercutting each other.[32] Confirmation of these views comes from the Queensland MBA:

> One of the strongest arguments in support of an industrial regime that supports the formation of genuine project agreements is the cost transparency for contractors who know what is required and the ability of head contractors to contractually ensure wages and conditions are honoured on the project. This form of inferred and stable contracting would go along way in securing first class industrial conditions within an environment of trust and cooperation. Building unions would be able to secure compliance through the Project agreement which would become legally enforceable and contractually obligated.[33]

5.36 Experience on large projects, such as the Sydney Olympic Games site, shows that project agreements characterised by standard pay-rates across classifications and provisions to ensure appropriate wages for sub-contactors can be highly successful business arrangements. As the committee was told:

> The simple fact is that if you have different rates of pay at a workplace for people with the same skill, it will lead to questions, unrest and, I believe, industrial anarchy. The beauty of the Olympic experience was that every electrical contractor who walked onto that site knew the rate of pay that

30 Dr John Buchanan, *Hansard*, Sydney, 2 February 2004, p.36

31 Submission No.62, Queensland Council of Unions, para.10

32 Submission No.27, CEPU, para.7.6.12

33 Submission No.90, QMBA, paras.54-61

> would apply to that class of individual. That led to industrial harmony on the site, and that is why it was so good. It was such an easy experience for the trade union movement because we did not have to be there every other day, worrying about those core industrial issues that we find on most building sites.[34]

5.37 One of the factors leading to relative stability for the industry has been the establishment of similar wages and conditions between workers who are doing similar tasks on construction sites. The committee majority is concerned that the BCII Bill will affect the availability of standardised agreements which will inevitably lead to more disputes over differences in wages and conditions. Current practice also ensures that skilled staff are not poached by competing companies, when competition for skilled labour is becoming more intense. Poaching has provided the competitive edge for contractors and subcontractors within and between project sites.[35]

5.38 An interesting perspective was given by former AIRC member Mr J J O'Connor in his submission which described the idea of having employees on the same site performing the same work for different rates of pay, as 'a recipe for disaster'. It would interest the Government to know that the reason for the former commissioner's view is that the inevitable industrial strife that would follow would result from unions being unable to be control the conflict. Another result would be conflict between contractors due to poaching of employees in a skilled workforce that is increasingly harder to attract.[36] The committee majority sees the likelihood of much more 'wildcat' action if differential rates of pay and different conditions apply across a building site, or even a number of building sites in a city. Local union organisers could not prevent this, and participants in the actions are likely to include non-unionists as well, who would be beyond the reach of any regulatory agency.

5.39 Opposition to what is proposed in the BCII Bill extends to non-union contractors and employers, as evidence from one proprietor confirms:

> Pattern Agreements provide industry with a common set of standards of employment thereby ensuring that as an employer in a very competitive industry the means of setting one of the main components of our fixed costs is the same across the industry. This ensures that we are competitive... If pattern bargaining is removed as an employer I will have to deal with employees bartering their services around the industry as they will be able to obtain a higher wage from another employer for their services. This will create instability and force the cost of employment up. I cannot see any benefit to our company in the removal of Pattern Bargaining.[37]

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34 Mr Riordan, *Hansard,* Sydney, 3 February 2004, p.15

35 Submission No.23, TWU, paras.30-32

36 Submission No.82, Mr John O'Connor, p.9

37 Submission No.4, Concept Engineering (Aust) Pty Ltd, p.1

5.40 Thus, the committee majority notes that while umbrella organisations like the MBA and ACCI may support the Government's campaign against pattern bargaining, and therefore the relevant provisions in this bill, there appears to be little rank and file support for this policy among MBA members. The Cole royal commission found that subcontractors provided between 90 per cent and 95 per cent of labour for construction work. Subcontractors have provided evidence that they are happy with pattern bargaining arrangements; that they provide a 'level playing field' to fair tendering for work on the basis of agreed costs for employees across the industry. These small business owners find pattern bargaining convenient, providing certainty in one of their cost components.[38]

5.41 The evidence provided to the committee indicates that restrictions on pattern bargaining would not achieve stable industrial relations, with each individual employer facing protected industrial action as individual agreements are established, risking disruptions throughout the life of the project.[39]

5.42 The committee is also concerned that the bill will result in increased pressure to reduce employment conditions, with employers forced to compete on the basis of lower cost structures including reductions in workers compensation and superannuation, transferring the risks and costs for support of employees to the public purse.[40]

> The other critical factor is for the employing parties to have some certainty regarding the labour cost structure prior to tendering for work. This issue is problematic as the major contractors want to engage subcontractors who are covered by the pattern bargain but are unable to insist on their subcontractors being a party to the industry pattern agreement. Less scrupulous contractors may also want to deliberately choose a subcontractor who is not covered by the pattern agreement in the hope of getting a cheaper price. With the EBA rates currently in excess of $200 per week above the award, the incentive to accept the lowest price must be high.[41]

5.43 Evidence was provided to the committee that less reputable companies were bargaining with employees for reduced awards and conditions in order bid for tenders at lower rates, in many cases successfully winning contracts unfairly in competition with companies who did pay industry standard rates and fulfil all regulatory requirements. Disreputable companies often avoided providing employees with information about the actual awards and conditions that would be paid for the work. The committee heard of a particular dispute at Nambour in Queensland referred to at the Cole royal commission. In that instance, employers defended the legitimacy of an

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38 Submission No.53, Action Construction Services, p.1

39 Submission No.30, Australian Mines and Metals Association, paras.31-36; Submission No.84, CFMEUQ, para.129; Submission No.90, QMBA, para.54

40 See, for example, Submission No.17 ACTU, paras.106-7

41 Submission No.90, QMBA, para.55

agreement which bound all of the current and future employees to non-union awards and conditions: an agreement that was signed by two senior managers and two apprentices. The unions provided evidence that this agreement was invalid, because the two managers were not employees within the incidence provisions of the EBA, and the State Contracting Award does not cover their work. The committee was advised:

> Our members, who were electricians engaged to perform the electrical work at Nambour, were unhappy because they were under the impression that [the subcontractor] had tendered on the basis of the site allowance and redundancy. Our members only discovered they were not to be paid these entitlements when they got their first pay packets. The members did not know about the changed tender arrangements whereby a non union EBA was used as the basis of the tender….The purpose of this non union certified agreement entered into by the company was to avoid paying EBA rates. Getting apprentices and managers to sign the agreement rather than real workers to be covered by the EBA is further evidence of the intention behind the agreement. It was a sham. [42]

5.44 This industrial dispute was cited during the Cole royal commission as an instance of unwarranted exercise of union power. The committee majority finds it hard to understand how this interpretation of events could be arrived at by any impartial investigator. It represents a typical example of a union protecting its members from a companies acting to take unfair advantage of them during contract negotiations.[43]

Moving between sectors

5.45 There is a perception that pattern bargaining results in increased costs for employers, with both employers and employee organisations acknowledging that union members receive higher pay and conditions then employees covered by non-union agreements. For instance, the difference in costs to employers between employing under the award and employing under the current EBA was quoted as 62.5 per cent in the electrical industry in Queensland.[44]

5.46 The Queensland Electrical Contractors Association argued that this difference in costs restricted the capacity of subcontractors to move between the housing and construction sectors because of the very large pay differences. It is claimed that having signed a pattern EBA on a major construction site, which may only happen three times each year, contractors are locked out of general electrical work because they are uncompetitive in their traditional market.[45] It was also claimed that these cost

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42 Submission No.80, CEPU Queensland, paras.4-23

43 ibid., paras.4-23

44 Submission No.15, ECA Queensland, p.9

45 ibid., pp.9-10

differentials encouraged illegal behaviour in the industry, with subcontractors avoiding rates set in legally registered EBAs to move back to the housing sector.[46]

5.47 The committee majority accepts that the costs for employees can be higher in the construction sector in comparison to the housing sector. This, however, does not mean that there are problems associated with union participation in the establishment of standard industry agreements. Instead, the committee accepts that the higher wages and conditions reflect the current process for establishing enterprise agreements. As the CEPU submission explains in response to the claim of Commissioner Cole that pattern agreements have resulted in considerable cost increases:

> Cole states: "There was evidence before me that the wage structure of a typical construction worker was about 22 per cent greater than the award." This is hardly surprising. As we argue elsewhere the industry awards have become increasingly irrelevant as EBAs are replaced and renewed. This is the aim of the bargaining system. Awards contain only outdated minimum rates as a safety net. The only way to increase those rates is via AIRC safety net increases. The amount and frequency of those increases is such that over time the difference between the safety net and the market rate is widening.[47]

5.48 The committee majority accepts this explanation. It makes the point that current arrangements have provided wage stability and high profits with very little industrial disruption in the commercial sector, in contrast with other sectors which have shown increases in labour costs. As the CFMEU Queensland submission stated:

> This can be demonstrated by contractor support for pattern bargaining in the commercial sector which has delivered to contractors their greatest boom on record and wage stability with total wage costs constrained to approximately 6 per cent per annum, whereas in the informal sector of the market (ie. housing) labour costs have increased by 87 per cent over the last 18 months, thereby compressing profits. In effect, for many builders in the housing sector, it is a green drought.[48]

Genuine bargaining

5.49 The cumbersome and prescriptive nature of industrial relations legislation introduced by the Government over past years has been much remarked on in industrial legal circles. It has the purpose of fettering the discretion, as far as possible, of the Australian Industrial Relations Commission and the Federal Court. Clause 62 of the bill sets out indicators of what is to be regarded as genuine attempts to reach agreement. Neither the AIRC nor the Federal Court can be relied on to make this judgement without assistance. The DEWR submission describes how the relevant clauses will operate:

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46 Submission No.90, QMBA, para.56

47 Submission No.27, CEPU, para.7.6.27

48 Submission No.84, CFMEUQ, paras.124-126

> The ABCC, or any person affected by pattern bargaining, will be able to seek an injunction to stop or prevent pattern bargaining conduct occurring. Injunctions will be available whether the conduct occurs under the federal or a State system or relates to bargaining for an informal agreement. The BCII Bill also makes it clear that pattern bargaining is not 'genuine bargaining' and that the AIRC can suspend or terminate a bargaining period where a party engages in pattern bargaining. The Bill contains a list of indicators of 'genuine bargaining'.[49]

5.50 The committee majority agrees with the submission from Slater and Gordon that provisions set out in clause 62 are unrealistic given the thousands of individual employers who would need to participate in the bargaining process.[50] Currently, as provided by section 67 of the WR Act, the AIRC has recognised that as long as unions have made a genuine effort to have each employer concede the benefit sought from the agreement, a legitimate agreement can be established.[51]

> The breadth of s 67 is likely to render the making common claims, of itself, a sufficient basis for attracting injunctive relief on the basis that it either constitutes or is at least indicative of a person "proposing to engage in pattern bargaining". For all practical purposes the actual manner in which such common claims might in fact be pursued by a negotiating union would be thus rendered otiose.[52]

5.51 The committee is concerned that union participation in negotiating employment conditions at an enterprise level is not seen as a legitimate indicator of a genuine attempt to reach an agreement. It notes the CFMEU view in this regard:

> The view embodied in the Bill that the individual enterprise is the only legitimate (and lawful) level at which bargaining occur, demonstrates a failure to understand or accept the representative nature of registered organisations under the Workplace Relations Act. Unions consist of members who combine to pursue their common interests. They democratically elect their leadership to pursue those interests as they determine appropriate. They should not be constrained by law to negotiations at the workplace level….[53]

5.52 The CFMEU submission surmised that seeking common wages or conditions beyond a single business is not to be regarded as 'pattern bargaining' unless the person seeking the wages and conditions is 'genuinely trying to reach agreement' on the matters in question. Genuineness is equated with bargaining at the level of the enterprise. Thus it appears that it is not so much common claims that are proscribed, but the means by which, or the level at which, such claims are advanced and pursued.

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49 Submission No.21, Australian Government Agencies, para.106

50 Submission No.69, Slater and Gordon, section 5

51 Submission No.77, ICTUR, p.30

52 ibid., p.31

53 Submission No.37, CFMEU, p.32

The CFMEU argues that there is nothing inherently more 'genuine' about claims advanced at an enterprise level.[54] The committee majority anticipates that this issue will be one for litigation in the unlikely event of the passage of the bill.

Flexibility

5.53 It can be argued that while pattern bargaining does provide for common wages and conditions, resulting in clearly defined costs for industry, flexibility can still be achieved within the agreements by defining flexibility in hours of work and other conditions to be established by individual employers and employees aiming at significant improvements in productivity. This could include skill development, client focus and innovative human resource management practices.[55]

5.54 While the Cole royal commission found pattern bargaining impeded productivity, research presented by ACIRRT contradicts this. ACIRRT has identified 23 different types of pattern bargains, and the Department of Employment and Workplace Relations has identified 45. Professor Braham Dabschek, an industrial relations specialist from UNSW, told the committee that the existence of so many pattern indicates how flexible and adaptable they are. It also demonstrates that they are not necessarily indicative of control from some centralised position of union power. Nor does the 'one size fits all' notion sit easily with the royal commission's finding that many agreements included complex sets of allowances and special rates.[56]

5.55 The issue of flexibility has been subject to some academic analysis by those who question the OECD-IMF orthodoxy, the inspiration for Government rhetoric. One research piece states:

> The international data for the end of the 1990s, as well as the data for Britain in the 1980s and 1990s, consistently demonstrate that marginal workers in the "flexible" United States and United Kingdom fare no better, and frequently far worse, than their counterparts in most of the rest of the OECD. ... At a minimum, the data suggest that "flexibility" is neither a necessary nor a sufficient condition for improving the labor-market opportunities for marginal workers, and that different economic systems as practiced in other countries seem perfectly capable of producing the same, if not better labor market outcomes.[57]

5.56 The committee majority, noting the tone of Government rhetoric over the past several years concerning industrial relations 'reform', has identified the word

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54 ibid. pp.31-32

55 Submission No.27, CEPU, paras.7.6.17 and 7.6.19

56 Submission No.110, Assoc. Professor Braham Dabschek

56 John Schmitt & Jonathan Wadsworth, 'Is the OECD Jobs Strategy Behind US and British Employment and Unemployment Success in the 1990s?' pp.170-171, in David Howell, ed. *Fighting Unemployment: The Limits of Free Market Orthodoxy,* OUP

'flexibility' as the most overused buzz-word in the Government's WR lexicon. Flexibility has come to mean the extent to which employees are either given, or take up, the 'opportunities' to meet the terms and conditions of labour which are determined by employers. A flexible employment policy is one in which employees can be persuaded to accept workshifts and routines which suit the operational needs of firms at the price employers are willing to pay. The committee majority does not believe that this attitude to the building and construction workforce is widely shared by developers and builders, which is just as well for the industry.

Project agreements

5.57 The committee heard persuasive evidence of the desirability of making project agreements standard practice across the industry. While the evidence appears to be overwhelming, it flies in the face of the Government's determination to avoid any practise which is likely to be 'contaminated' by association with pattern bargaining. Project agreements are banned to the extent that they are unenforceable under clause 68 of the bill. As the Government has stated, project agreements usually provide standard employment conditions for workers employed in a number of different businesses on a particular building site and provide a means of securing 'pattern' outcomes. This is contrary to the focus of the WR Act on enterprise or workplace bargaining.[58]

5.58 But as some influential submissions pointed out, the difficulties which commonly arise with pattern bargaining are largely eliminated by the implementation of project agreements. The committee is much more attracted to pragmatic solutions to problems than the Government appears to be, and it believes it is at one with most industry stakeholders in taking this position. Risk management strategies are regarded by investors as vitally important. The implication, as the committee sees it, is that the Government's opposition to project agreements is an impediment to investment, and therefore to growth in the industry.

5.59 The position of the Ai Group is a case in point, as was made clear in its response to the draft bill. While supporting a prohibition on industrial action taken in support of pattern bargaining – and the committee notes this careful wording of this position – the Ai Group states its belief that the prohibition would be reasonable so long as the provisions were carefully drafted, which they are not. There needs to be a mechanism to enable the certification of genuine project agreements for major projects, thereby obviating the need for the use of common enterprise agreements (which could be regarded as pattern agreements) so that the significant risks associated with major projects could be properly managed.[59] The point was re-enforced by the Ai Group in evidence to the committee at its first Canberra hearings:

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58 Explanatory Memorandum, p.49

59 Australian Industry Group, Position on the Exposure Draft of the Building and Construction Industry Improvement Bill 2003, 17 October 2003, pp.91-93

> Can I say first and foremost that we strongly believe that major projects need a project agreement to allow them to be delivered. We have argued this right from day one, because you have to get your mind around the concept that a major project is itself an enterprise—it is an enterprise that brings together a lot of different employers in different trades and sub-trade groups. Those activities are organised to produce a result.
>
> We find it a difficult concept that you can find all those activities coming together on a site with myriad different industrial arrangements and without any sort of responsibility for how that outcome would be delivered if you do not have some sort of agreement to deliver those results. Fundamentally, we think that the legislation ought to have some workable provision for project agreements. The royal commissioner, I might add, did not dismiss project agreements. I do not think his proposals were workable, but he did not dismiss them. In the national code of practice there is a recognition of the role of project agreements.
>
> The issue we try to wrestle with in pattern bargaining is that an organisation—which might be an electrical contractor, say—which already has an EBA ought to be able to enter a major project as an electrical contractor, work under the umbrella of the agreement that might be in place for that project and be able to exit that project back to his enterprise and not have the baggage of what may be involved in a project agreement following him around. One of the issues that consistently came up through the hearings was small contractors tendering for work on a major project and finding that they were not able to work on it unless they signed up to a pattern agreement. The pattern agreement might then last for three years. If you move into another market or another area of work of whatever then that pattern agreement follows you around.[60]

5.60 Reference has been made to the committee receiving evidence of the success of project agreements associated with the construction of the Sydney Olympic Games facilities. The committee heard details of the memorandum of understanding between the Olympic Coordination Authority and trade unions:

> It started off as a negotiation, with a memorandum of understanding between the Olympic Coordination Authority and the trade union movement. That set out a framework for negotiations on each of the projects. It was not binding in what would or would not be in project awards for each of the projects constructed during the Olympics construction program. Those negotiations were undertaken with each of the successful builders. … specifically dealing with things like superannuation, occupational health and safety, safety inductions, dispute settlement procedures that dealt with whole-of-project matters and dispute settlement procedures that dealt with specific subcontractor matters. So there were negotiations on two separate dispute settlement procedures.
>
> The project agreements or awards in place were not identical, and there were variations to suit the specific needs of a particular project. Many of

60 Mr James Barrett, *Hansard*, Canberra, 11 December 2003, pp.28-29

> them included a requirement to meet key milestone dates as part of the project allowances paid. So the allowances were paid in good faith on the assumption that there would be compliance and that the dates would be met. They contained procedures under which, if the dates were not met, the issue went before a committee put in place to deal with the reasons why. …
>
> I can tell you that, in one instance, milestones were not met and payments were reduced to those workers on the project. …If you look at the Olympics experience it shows that, where there is a good industrial relations environment in place and there is trust and cooperation, you can initiate some fairly innovative processes on a construction site that will deliver better outcomes for everybody. The history is that, without doubt, it was a huge success from a construction point of view. Frankly, the model has continued to be applied in New South Wales and continues to deliver.[61]

5.61 When asked how prescriptive were the dispute settlement procedures, the Trades and Labor Council explained that no industrial action could be brought while the agreement was in force. They were not so prescriptive as to undermine people's rights. They established a framework for the speedy resolution of disputes, if necessary with the assistance of external mediators.[62]

5.62 The Government concedes that there is employer pressure to institute project agreements. It argues that it would only occur in very limited circumstances where efficiencies would be gained through multi-employer or project agreements. The committee has been unable to find out the basis for the Government's reasoning in this regard and assumes this to be a rhetorical statement. The DEWR submission also points out that while multiple employer agreements are not inconsistent with the WR Act, problems occur if this constrains choice and competition.[63] There is an implication that this would more than likely be the result.

5.63 While the BCII Bill may allow project agreements to be made as part of the multiple business agreement provisions in the WR Act, the committee finds that the distinction between pattern bargaining and bargaining to establish a project agreement is not clear in the proposed legislation. Were the bill to be subject to wide-ranging amendments in a different legislative climate, the definition of 'pattern bargaining' in clause 8 and the relationship with clause 68 would be amended to enable genuine project agreements to be established in accordance with the current multiparty and 'pre-start' provisions of the WR Act.

5.64 A proposal to regularise pattern bargaining so as to meet the concerns of sub-contractors was put forward by Gadens, a Perth law firm, in its submission to the inquiry. The submission proposed that pattern bargaining provisions need to ensure that multiple-business agreements under Section 170LC of WRA (and in certain

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61 Mr John Robertson, *Hansard*, Sydney, 2 February 2004, p.32

62 ibid, p.33

63 Submission No.21, Australian Government Agencies, paras.350-351

circumstances greenfields agreements under Section 170LC of WRA) are exempt from what is proposed in the bill. The submission continues:

> The provisions for multiple-business agreements (and in certain circumstances greenfields agreements) need to be enhanced to accommodate project agreements.
>
> Subcontractors on any particular project should be able to become a party to the multiple-business project agreement.
>
> If any subcontractor chooses not to become a party to the multiple-business project agreement the subcontractor should be free to enter into a certified agreement as long as the terms and conditions of that certified agreement do not go above the terms and conditions contained in the multiple-business project agreement.
>
> In circumstances where the head builder chooses to have a section 170LK agreement or Australian Workplace Agreements with its employees as opposed to a multiple-business project agreement then the subcontractors will be free to negotiate a separate certified agreement and/or Australian Workplace Agreement with the relevant unions and/or their employees as the case may be without limitation.
>
> I believe there would then be a great incentive for head builders to look to entering into multiple-business project agreements.
>
> Such enhanced multiple-business project agreements should be capable of being registered by single Commissioners of the AIRC in the interests of speed and efficiency.[64]

5.65 The committee assumes that this advice would be unpalatable to the Government, for whom the solution to a problem through the accommodation of competing interests by way of compromise would be heresy. The value of the outcome appears to depend on the means to achieving it, and the challenge the Government has set itself is to make the practice fit the theory.

5.66 The resource sector is also concerned about negative flow-on effects of the bill for major resource projects, which rely heavily on s170LL 'pre-start' agreements.[65] Evidence from a former member of the AIRC, Mr J J O 'Connor, points out that the unenforceability of project agreements under clause 68 will have severe consequences for the future of mining projects in Western Australia. All of them employ common project agreements. The point is made that these have been very successful in minimising industrial disputes.[66]

5.67 The industry is concerned that the bill places too much emphasis on registering a project agreement as a multi-business agreement (WRA s170LC) which would

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64 Submission No.109, Gadens Lawyers, p.6

65 Submission No.30, Australian Mines and Metals Association, para.17

66 Submission No.82, Mr John O'Connor, p.10

result in delays in registering and concluding agreements before the commencement of a project. The establishment of pre-start agreements provides for certainty in industrial relations, and contains and helps to resolve industrial disputes for the life of the project.[67] This is in line with practice in the United States, which institutes project labour agreements (PLAs) for major public infrastructure works.

> A PLA is an agreement that defines wages and work rules for a project, and is approved by labor and the awarding public body before the project begins. It eliminates the need to negotiate a separate labor agreement with each contractor and each building trade, and sets up a process of conflict resolution to deal with the occasional job dispute.[68]

5.68 The committee noted on its visit to the LNG project site in Darwin the familiarity with and preference of a large American construction firm, Bechtel, for enterprise agreements based on the project model.

5.69 The QMBA also favoured the idea of registered project agreements which are commonly used on large civil and engineering projects. The strongest argument for their use is cost transparency for contractors. Both unions and employers can contractually ensure that wages and conditions agreements are honoured. Project agreements ensure industrial harmony because compliance can be legally enforced.[69] The committee majority notes that clause 67 of the BCII Bill is a specific provision that makes project agreements unenforceable. This indicates the extraordinary lengths to which the government will go to ensure the purity of its doctrine, regardless of the practical consequences. Even the bill's least critical supporter, ACCI, has raised in its submission the possibility of a 'genuine project agreement', taking the form of 170LJ, 170LK or 170 LL agreements, and has sought assurances that such agreements would be enforceable.[70]

5.70 The committee majority sees no connection between a ban on pattern bargaining and project agreements and the Government's objective of encouraging culture change in the construction industry. What is proposed will not serve that objective because it makes no business sense. It will impose considerable strain on labour-employer relations and drain reservoirs of goodwill. As stated previously it will raise questions about whose interests this legislation is intended to serve. It looks ominously as though the Government is putting its ideological concerns before the practical needs of industry. If that is the case, the legislation will fail.

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67 Submission No.30, op. cit., paras.31-36

68 Submission No.37, CFMEU, p.37

69 ibid., p.17

70 Submission No.3, Australian Chamber of Commerce and Industry (ACCI), para.71