Submission

to

Senate Employment, Workplace Relations and Education
References Committee

Building and Construction Industry Inquiry

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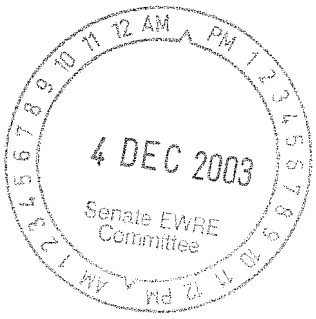

Dear Sir/Ms

Re: Exposure Draft – Building and Construction Industry Improvement Bill 2003

Please find attached the submissions of the CEPU, Electrical Division, Queensland Branch in relation to the exposure draft of the Building and Construction Industry Improvement Bill 2003.

These submissions are designed to supplement those submissions provided by the CEPU National Office.

I understand that the Senate Employment, Workplace Relations and Education References Committee intends to schedule public hearings in 2004 and I wish to advise that, at that time, the CEPU Electrical Division, Queensland Branch will be seeking to provide further oral submission/evidence to the inquiry at that time. The CEPU will provide further information to the Senate Committee in relation to the nature of those oral submissions prior to any hearing date.

Should you have any questions in relation to this submission please contact Dick Williams on (07) 3846 2477.

Yours sincerely,

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Senate Inquiry into Building and Construction Industry Improvement Bill 2003

Submissions of ETU Qld

1. The Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia, Electrical Division, Queensland Divisional Branch (CEPU Q) is an organisation registered under the *Workplace Relations Act 1996*(Cth). The Electrical Trades Union of Employees of Australia, Queensland (ETU) is an entity registered under the *Industrial Relations Act 1999* (Qld). Both organisations are referred to in these submissions as "the Union".

2. The Union has membership in a number of industries which may be broadly grouped into electrical contracting, electricity supply, generation and transmission (ESI), engineering, and state and local government. The electrical contracting industry, which is the main focus of these submissions, covers both building/construction work, and workshop and service industries.

3. The Union employs 12 full time officials, 2 part time industrial officers, and 7 office staff. Approximately one quarter of the union's membership is in the electrical contracting industry.

4. The Union is party to numerous agreements in the state of Queensland. These include a number of Greenfield construction project agreements certified under the *Workplace Relations Act 1996* (Cth), and pattern agreements in both the ESI and electrical contracting industries. The Union is also party to certified agreements covering a number of State Government entities, including TAFE, Q-Rail, Q-Health, Q-Build. Many employees of Q-Build are engaged in the construction industry.

5. Award coverage of the electrical contracting industry in Queensland is under the Electrical Contracting Industry Award – State 2002 (the award). The award applies to "employers

whose principal commercial activity is the contracting for work requiring an Electrical Contractors Licence and to the employees of such an employer."[1]

Pattern bargaining - major projects

6. Pattern agreements have evolved on major projects in response to a need. In the past, construction companies who have won major project contracts have had to deal with a range of contractors, sometimes hundreds of different contractors working on a single project, all of whom were covered by different industrial instruments. The varied rates of pay and conditions, from basic to top of the range, gave rise to frequent industrial disputation, which resulted in lost time and late completion penalties.

7. With the development of pattern bargaining in the mid 1990s, industrial conditions were able to be established uniformly on construction projects, with contractors signing onto the project agreement when, or in some cases, before they commenced work on site. This effectively eliminated the risk of projects being held up by protected industrial action on the part of employees of the contractors endeavouring to secure their own wages and conditions. Pattern bargaining also served to ensure that there would be no risk of leap-frogging claims disrupting the project.

Pattern bargaining - electrical contracting industry

8. Pattern bargaining has also been the preferred method of negotiating certified agreements in the electrical contracting industry since approximately 1996. In the commercial construction sector, electrical work is generally allocated on the basis of a tender for which contractors compete on the basis of price. This inevitably led to a situation where contracts were won on the basis of low wages rather than the superior skills or competence of the contractor. The employees of those contractors who profited on the basis of their low wages were dissatisfied and prone to industrial disputation. The contractors who paid higher wages missed out of jobs and complained about the lack of a level playing field.

9. The level playing field is assisted by pattern agreements, where employees' wages do not become the basis for competitive tendering. It is also assisted in Queensland by s129 of the *Industrial Relations Act 1999* (Qld), which enables EBA outcomes to be rolled into awards,

[1] Clause 1.2 Application of Award

in certain circumstances, thus ensuring that award wages remain a genuine safety net, and also ensuring that employers who choose to enter into any form of agreement with employees do not become increasingly disadvantaged by the widening gap between the award and agreements.

10. The present situation in Queensland is that whilst electrical contractors will be parties to a particular pattern agreement, it will be different to the one applying to plumbers or carpenters, as will the underpinning award. This in itself sometimes leads to problems, as was the case last year when improvements were made to superannuation arrangements in the state building awards, but not in the Electrical Contracting Industry Award – State.

11. The construction industry, particularly in the commercial sector, is one in which a range of different contractors are typically on site at any one time – builders, scaffolders, concreters, plumbers, electrical contractors etc. Working hours and patterns tend to be consistent not only across a particular site, but across the entire industry, with the full year's RDOs for the industry set in advance. This is an indication of a long established recognition of the benefits of maintaining a degree of consistency across the industry. Contractors move from one site to another, with some employees going with them, and others going to new employers. In recognition of this, entitlements such as long service leave and redundancy are portable from one employer to the next. In this highly mobile environment, it makes good sense for pattern agreements to be used, to ensure some consistency of wages and conditions for employees, who may have to change employers several times in a year.

12. Another benefit of pattern agreements has been to reintroduce industrial regulation into sectors of the industry that had become characterised by high levels of sham subcontracting arrangements. Employers in the industry would lure employees into operating as subcontractors with the incentive of a higher hourly rate and lower taxation. Employees would then be responsible for paying their own Workcover, superannuation, leave entitlements, and tax. Of course the higher rate was not enough to compensate for the additional contingent liabilities, and as a result many workers were not properly insured and lost significant accrual of entitlements. In addition, the Commonwealth of Australia lost untold amounts in what would have been paid as normal PAYE tax in a normal employment relationship. The only beneficiaries were the contractors at the top of the pyramid. The Union and employers in the electrical contracting industry have agreed to insert provisions into our pattern agreements, that preclude pyramid subcontracting, and require any work that

is subcontracted to be paid at rates comparable to the EBA, which makes sham subcontracting a less lucrative proposition,

13. If anything, rather than restricting or prohibiting pattern agreements as is proposed in the Bill, pattern agreements should be encouraged and fostered as a means of promoting industrial harmony, preventing tax avoidance, and encouraging employers to compete for work on the basis of superior quality and performance, instead of inferior wages and conditions.

14. Prohibition of pattern bargaining contradicts object 3(c) of the *Workplace Relations Act 1996* (Cth) which is enabling employers and employees to choose the most appropriate form of agreement for their particular circumstances, whether or not that form is provided for by the Act.

15. Prohibition of pattern bargaining in the building industry also restricts the capacity of state legislatures to regulate industrial relations within their jurisdiction as they consider appropriate. At present pattern bargaining is fully within the comprehension of the *Industrial Relations Act 1999* (Qld), with the Act making provision for multi-employer and project agreements, as well as single enterprise agreements.

Making and certifying agreements

16. Section 63[2] of the Bill applies only in respect of agreements with organisations of employees. Section 170LJ and Division 3 of Part VIB[3] of the *Workplace Relations Act 1996* are already subject to requirements that give employees opportunities to 'make representations' about a proposed agreement[4]. There is no comparable requirement in respect of s170LK agreements, and the requirement to do so for S170LJ and Division 3 agreements is in that way discriminatory.

17. The requirement that a ballot be conducted before a union initiated s170MI notice can have effect[5] is discriminatory as there is no comparable requirement in respect of any other form of s170MI notice. In effect, it denies a union the right to represent its members. A union

[2] Employee representations
[3] Sections referring to types of agreements with organisations of employees
[4] s170LJ(2) and (3) and s170LR
[5] s64

should be able to initiate a bargaining period where there is even one member or potential member. Union members are disadvantaged if there has to be a majority vote before the union is able to represent them, particularly in a workplace where they are not in the majority. There is no corresponding disadvantage to non union members whose interests in an enterprise bargaining negotiation are represented for free by a union, enabling them to reap the benefits of EBA conditions far better, in most cases, than they would have been able to negotiate for themselves.

18. The requirement that prior to certifying an agreement, the AIRC must satisfy itself that an agreement did not result from pattern bargaining, creates an additional mandatory step in the process of agreement making, which adds to the already heavy burden of paperwork. Smaller employers are frequently daunted by the existing requirements for processing of agreements, and have difficulty completing applications and statutory declarations correctly. Any additional burden of this nature is likely to increase the incidence of non certified, and non enforceable agreements.

19. The proposal to limit protected action to members of the association authorising the action is effectively requiring employees to declare their union membership in order to exercise their right to protected action. Employees are generally loath to publicise their membership of a union, especially in circumstances where not all of the workforce is unionised. This is because of a perception, often not unreasonably held, that they will be treated less favourably if the employer knows them to be union members. Freedom of association provisions offer inadequate protection, as it is generally difficult to prove that an employee was sacked or otherwise disadvantaged because of his/her union membership. Few employers are naïve enough to openly say that they are discriminating on the basis of union membership, and it is not difficult in the building industry particularly to find a 'downturn in work' or an attitude problem to justify dismissal.

20. As it presently stands, s127 of the *Workplace Relations Act* 1996 (Cth) empowers the AIRC to issue orders to stop or prevent industrial action that is happening, threatened, impending or probable. This function is duplicated in s74 of the Bill, except that s74 has the effect of causing matters that would otherwise be able to be dealt with by the Australian Industrial Relations Commission, to be dealt with in the civil courts. The AIRC is able to deal with applications under s127 expeditiously, and furthermore can use its conciliation powers to assist parties to resolve a dispute. The courts, on the other hand, generally involve greater

time delays, more expense, more lawyers, and will not do anything to assist in resolution of the dispute. In this regard, it is plainly inequitable to penalise employers and employees in the building industry by denying them access to the AIRC and forcing them into the civil courts.

Three year term and retrospectivity

21. Requiring a mandatory 3 year term for building agreements from the date of certification restricts the right of industrial parties to strike an agreement in the manner that best suits their needs. There may be any number of reasons why an operative period of less than three years may be preferred by agreement parties, only one of which relates to common expiry dates for pattern agreements. If in an industry industrial parties decide that they would prefer to have common outcomes and common expiry dates to suit the circumstances of their particular industry, it should be available to them to do so. Another example would be where a business experiencing hard times, reaches agreement for a one or two year term, with the understanding that when things improve, a more generous outcome will be able to be achieved. The mandatory 'one size fits all' approach fails to take account of the varied needs of industrial parties, and is inconsistent with *Workplace Relations Act* 1996 (Cth) object of enabling employers and employees to choose the form of agreement that best suits them.

22. Similarly the prohibition on retrospectivity fails to take account of the needs and circumstances of the parties in a particular case. There should be no restriction of parties agreeing, as part of their overall enforceable package, that a wage increase should apply from the date of expiry of the previous agreement. Often such an agreement gives the parties the freedom to fully pursue their negotiations without the artificial pressure of loss of date of operation. Commencement of negotiations may be delayed due to an unexpectedly high volume of work, or a negotiation may simply take longer sometimes. Forcing the issue of retrospectivity would be more likely to lead to increased protected industrial action being used in an effort to encourage employers to reach agreement in a hurry.

23. Refusing to allow retrospectivity is disadvantageous to employees, and the proposed s55(4) cannot adequately compensate. The scheme of the Bill is such that there can be no protected industrial action before the nominal expiry date of an agreement. Thereafter industrial action can take place only in blocks of no more than 14 days, punctuated with 21 day

cooling off periods. Scope exists for an employer to 'play the system' for several months without any clear basis for proving that they unreasonably delayed the agreement, and so enabling them to defer paying an increase.

24. The use of word 'unreasonably' means that subsection 55(3) may still apply if the employer delayed the making of the agreement, but not 'unreasonably'. Delays in certification can occur despite the best intention of parties – for example where an authorised officer/representative is temporarily unavailable; where the agreement has to be circulated to a large number of parties; or where the application or accompanying paperwork was not correctly completed and has to be reworked. The requirements of s53(2)[6] and s59[7] and 64[8] create additional opportunities for delays.

25. Furthermore, there is no equivalent mechanism available to employee/union negotiating parties, therefore this provision creates a more uneven bargaining position. The provision is based on an incorrect presumption that employees/unions are responsible for any delays in the process of making and certifying agreements.

Interaction between the Bill and other legislation

26. The electrical contracting industry is an interesting case in the context of the Bill. The industry encompasses not only a construction industry, but also service and workshop sectors. Many employers operate across all sectors, and their employees also work across all sectors. The union's agreements apply across all sectors. In terms of industrial coverage, the construction sector of the industry is not severable from other parts, and therefore the application of the Bill raises a number of complexities, particularly with regard to the laws to be applied to bargaining, where there is a conflict between the Bill and the *Workplace Relations Act 1996* (Cth) or the *Industrial Relations Act 1999* (Qld).

Award simplification

27. For an award to provide a genuine safety net, it must be more than a collection of absolute minimum conditions. The proposal to further reduce building awards can only create a

[6] At least 7 days before the hearing, the Industrial Registrar must give the ABC Commissioner a copy of each document that is lodged with the AIRC in relation to the certification.
[7] The AIRC must not certify a building agreement unless a notice has been given in respect of the agreement under section 170MI of the *Workplace Relations Act*.
[8] s64 Representation ballot for initiation of bargaining period

greater discrepancy between awards and agreements, which serves as an enormous disincentive to employers to participate in bargaining. This is inconsistent with the objects of the *Workplace Relations Act 1996*

28. The safety net award forms the basis of the no disadvantage test when the AIRC considers applications to certify agreements, and is also used in the same way for AWAs. With EBAs in the electrical contracting industry now more than 30% above the award in most cases, the no disadvantage test becomes increasingly irrelevant. This situation is exacerbated by any further reduction in the awards.

29. The yawning gulf between awards and agreements also serves to upset any notion of a level playing field in competitive tendering, and works against those employers who have chosen to enter into agreements with their workforce.

Right of Entry

30. Existing right of entry provisions under the *Workplace Relations Act* 1996 already restrict a union official's ability to respond quickly to a need in the workplace. The distinction between entering to investigate a suspected breach and entering to speak to members/employees eligible to be members is artificial because, in reality, one purpose often leads to another.

31. The requirement to give 24 hours notice is problematic because it gives an employer an opportunity to intervene and turn a situation around before employees have an opportunity to seek assistance from the union. An example is where a union official gave notice of intention to inspect time and wages records, and the employer used the 24 hours to put pressure on employees to sign letters saying that they do not wish to have their time and wages records made available to the union. Open right of entry is essential to ensure that employees genuinely have freedom of association and access to their union.

32. The proposal to further restrict right of entry by requiring that a complainant be identified, is to guarantee that it will not happen. See comments in relation to protected action. If employees are forced to identify themselves as union members in order to avail themselves of rights under legislation, then they do not have freedom of associaton.

33. Right of entry generally is an important part of the scheme of ensuring award compliance, and compliance with work related legislation such as occupational health and safety, superannuation, and privacy, and as such, should not be restricted.