Submission

to

Senate Employment, Workplace Relations and Education Legislation Committee

Inquiry into the Building and Construction Industry Improvement Bill 2005 and Building and Construction Industry Improvement (Consequential and Transitional) Bill 2005

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Australian Government

Department of Employment and Workplace Relations

SENATE EMPLOYMENT, WORKPLACE RELATIONS AND EDUCATION LEGISLATION COMMITTEE

Inquiry into the provisions of the Building and Construction Industry Improvement Bill 2005

Submission by the Department of Employment and Workplace Relations

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BUILDING AND CONSTRUCTION INDUSTRY IMPROVEMENT BILL 2005

OVERVIEW

1. The Building and Construction Industry Improvement Bill 2005 was introduced into the House of Representatives on 9 March 2005. The Bill has not been debated. It was referred to the Senate Employment, Workplace Relations and Education Legislation Committee on 16 March 2005.

2. The Bill reintroduces, with some modifications, the industrial action and ancillary provisions of the lapsed Building and Construction Industry Improvement Bill 2003.

3. In addition to the material in this submission, the Department refers the Committee to its submission to the Employment, Workplace Relations and Education References Committee Inquiry into the Building and Construction Industry Improvement Bill 2003.

POLICY OBJECTIVES OF THE BILL

Why is this Bill necessary? Why is the commencement date retrospective?

4. This Bill affirms the Government's commitment to reform of the construction industry. It was developed in response to industrial pressure by building industry unions in an attempt to force parties to terminate existing enterprise agreements prior to their expiry dates in October 2005, and enter new agreements.

5. In approaching employers, building industry unions have threatened industrial action, should parties fail to come to the bargaining table.

6. Negotiations between unions and employers have essentially been ongoing since late last year. The Government viewed these approaches as marking a critical phase in the reform of the industry. Without decisive legislative action by the Government, industry could have succumbed to union pressure and the future progress of reform would have been compromised.

7. The practice of threatening industrial action to obtain otherwise unattainable outcomes was noted by the Royal Commission. The Royal Commissioner commented that head contractors are unwilling or unable to resist such demands. To ensure continuous disruption on current and future projects does not occur, and that contractors are not disqualified from future work, it is more expedient for union demands to be accepted. The Royal Commissioner found industrial disruption

> *Places enormous power in the hands of unions. It encourages unions to use that power to obtain otherwise unattainable outcomes. The threat of the use of power is as effective as its exercise.* [Vol 3, para 19, pg 11]

8. While there are provisions of the *Workplace Relations Act 1996* (WR Act) that would apply to such action, they are unlikely to be sufficiently enforced by the affected parties or dissuade the unions from taking industrial action. This Bill will clarify that such industrial action would be unlawful and parties who suffer loss due to unlawful industrial action will have access to uncapped compensation. These provisions should minimise threats of unlawful industrial action in the future.

9. Further, the Government believes that if the unions were to be successful in reaching new agreements, these agreements may be passed on, without genuine negotiation, to parties further down the contractual chain. The imposition of these agreements would circumvent further building industry legislative measures, in particular the opportunity for employers and employees to have genuine choice about their terms and conditions of employment and flexible arrangements tailored to meet their business needs.

10. It follows that the retrospective commencement date for the provisions which render unprotected industrial action is both necessary and appropriate. Those who will be affected by the provisions of the Bill have been given repeated advance notice of what the Bill will mean for their day to day operations. The Bill will be instrumental in ensuring that the rule of law is applied equally to all industry participants. The provisions will ensure the Government's reform agenda for the building and construction industry is not circumvented or diluted, but maintains momentum and is effective in achieving cultural change.

11. Legislation that commences from the date of introduction into Parliament, or an earlier date is not uncommon. In each of the previous four Parliaments, there were over 100 Bills with retrospective effect that attracted comment from the Senate Standing Committee for the Scrutiny of Bills, with the largest number being 150 Bills in the 37th Parliament (May 1993 to March 1996).

Penalties

12. It is necessary to impose substantial penalties for unlawful industrial action in order to have an effective deterrent for parties who consider using unprotected industrial action as a negotiating tool. The penalty provisions of this Bill will provide a greater incentive for building industry participants to obey the law. The legislation will counteract the common assumption that parties can act unlawfully without consequence. The measures provided by the Bill will cause structural and cultural change which has not been achieved through existing mechanisms.

13. The existing penalties in the WR Act were shown by the Royal Commission into the Building and Construction Industry (the Royal Commission) to be ineffective in preventing unlawful conduct in the building and construction industry. Building project values are often in the vicinity of several million dollars and participants are frequently exposed to substantial liquidated damages for breach of contract. Commercial expediency means industry participants often contravene the WR Act, where the maximum penalty is 300 penalty units (currently $33 000) for a body corporate and 60 penalty units (currently $6 600) in other cases.

14. The Bill will redress this problem through appropriately measured civil penalty provisions and for unlawful industrial action and enhancing access to damages for this conduct.

15. Anyone taking unlawful industrial action will be liable to financial penalties of up to 1 000 penalty units (currently $110 000) for a body corporate or 200 penalty units (currently $22 000) in other cases. Additionally, parties who take unlawful action may be ordered by a Court to pay substantial uncapped compensation to any person affected by the unlawful industrial action. The Bill also provides for increased penalties for contravention of the strike pay provisions of the WR Act.

16. The Bill acknowledges that the same industrial action may amount to a breach of s.170MN of the WR Act and the new provisions. It therefore provides that a

person subject to a penalty under s.170MN will not be also be liable for a pecuniary penalty under the unlawful industrial action provisions of the Bill. However compensation may still be ordered under this Bill even if a civil penalty has been imposed for a breach of s.170MN of the WR Act.

17. Importantly, the Bill does not rely on an affected party to enforce the law. Inspectors under the WR Act will be able to bring actions. This includes officers of the Building Industry Taskforce and will ultimately be extended to the Australian Building and Construction Commission once it is established

18. It is intended that a comprehensive workplace relations reform package for the building industry will be introduced later in the year, in the form of amendments to the Building and Construction Industry Improvement Bill 2005.

Reforming the Building Industry – Unlawful Industrial Action

19. The measures in this Bill reflect the Government's continued commitment to workplace relations reform of the building industry.

20. In its Final Report handed down in March 2003, the Royal Commission found the building and construction industry has an entrenched culture of lawlessness. The Royal Commission found that the prevalence of industrial action in the building industry is unique. The Final Report noted

> *Underlying the attitude of participants in the industry is a disregard of the rule of law, and the adoption of a short term attitude, commercially driven, of expediency. In particular unions know that the prospect of being held civilly responsible for the losses they cause is remote.*
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> [Vol 11, p 10, para 33]

21. The level of industrial disputation in the industry is substantial. For example, in 2004 the construction industry employed 8.3 per cent of all employed persons in Australia. For the same period, employees in this sector accounted for 36.95 per cent of the total number of working days lost. This high level of industrial action supports the Royal Commissioner's conclusion that there is often a conflict between the interests of employers and unions.

22. Quick-fix commercial expediency is of utmost importance to employers, who are reluctant to enforce their legal rights for fear of project delays. These delays expose employers to contractual penalties of up to $250 000 a day, a compelling incentive for them to surrender to union demands. The reluctance of employers to take action in defence of their legal rights has placed unions in a powerful bargaining position.

23. This Bill will ensure the law applies equally to all industry participants, whether they be contractors, employers or registered organisations. The Bill establishes a statutory norm on industrial action which will clarify the law and enable it to be more effectively enforced. The Bill will make industrial action which is not protected unlawful, with industry participants able to seek damages to recover any losses they suffer due to industrial action. In this way, the Bill holds those involved in unlawful industrial action accountable for any damage they cause to others.

The Government Response

24. The Coalition's 2004 federal election workplace relations policy statement, *Flexibility and Productivity in the Workplace: The Key to Jobs*, reemphasised the

Government's policy that the building and construction industry should be free, fair and law abiding. The policy statement committed the Government to continue pursuing recommendations made by the Royal Commissioner, including the key recommendation of a stand-alone Act for the industry. The Building and Construction Industry Improvement Bill 2005 will meet that election commitment.

SUMMARY OF PROVISIONS

25. The Bill replicates, with some modifications, the industrial action and ancillary provisions previously included in the Building and Construction Industry Improvement Bill 2003. The Bill provides that all industrial action taken in the building and construction industry that is not protected under the WR Act is unlawful.

26. The provisions are intended to ensure that persons taking unlawful industrial action are liable for substantial civil penalties and can face orders to pay uncapped compensation to any party who has suffered a loss as a consequence of the action.

27. The unlawful industrial action provisions will apply broadly across the industry, reducing the concurrent regulation by State and federal systems. They will extend beyond industrial action in relation to industrial disputes, awards or agreements under the WR Act. The provisions will apply to industrial action in the building industry that is taken by a constitutional corporation, that adversely affects a constitutional corporation in its capacity as a participant in the building industry or that occurs in a Territory or a Commonwealth place.

Details of Provisions

Commencement

28. The definitions and industrial action provisions of the Bill will apply from the date of the Bill's introduction to Parliament on 9 March 2005. This means that industrial action taken by building industry unions after the date of introduction is likely to be unlawful and render unions and those taking industrial action liable to financial penalties.

29. The enforcement and miscellaneous provisions commence on the day on which this Act receives the Royal Assent.

30. This commencement date is essential to capture industry participants who take action to support negotiation of new agreement well before the agreement's nominal expiry date.

31. Industry participants have had adequate notice of the Government's agenda for reforming the unlawful practices in the industry.

32. On March 2, the Minister announced the Government would re-introduce the enforcement provisions of the Building and Construction Industry Improvement Bill into Parliament in the week beginning 7 March, with retrospective effect.

33. This announcement was designed to ameliorate the retrospective effect of these provisions. It ensured that people had advance notice so that building industry participants would not be adversely impacted by the application of a law they were unaware of.

34. Industry participants have been aware of the Government's agenda for reforming the unlawful practices in the industry for a significant period of time. For

instance, the detail of the provisions contained in the Bill has been widely communicated to the industry, dating back to September 2003.

35. The industry has also been widely consulted on the provisions of the Building and Construction Improvement Bill 2003, including the definitions and industrial action provisions.

36. Prior to the introduction of the 2003 version of the Bill, the Government consulted industry participants – unions, peak employer associations, contractors, employees and small business as well as the general public and State and Territory governments to seek their views on the proposed reforms. The industry was informed of the detail of how the Bill will operate when the Exposure Draft of the Bill was released for consultation in September 2003.

Chapter 6 – Industrial Action etc.

37. These provisions detail the policy for industrial action in the building and construction industry. The Chapter:

- renders certain kinds of industrial action unlawful, and
- modifies what may be protected action for the purposes of the WR Act.

Definitions

38. Part 1 defines building industrial action broadly to encompass any conduct by employers and employees that adversely affect the performance of building work. It also provides that protected action under the WR Act and AWA industrial action will not be unlawful under the Bill, ensuring that industrial action taken legitimately in negotiating a new agreement will remain protected.

39. Industrial action taken for occupational health and safety reasons is protected under the Bill. However, the Bill does require that the party taking this action must provide proof that there was reasonable concern of an imminent risk to health and safety on the site. It is appropriate to place the onus on the person seeking to take action as this directly addresses the observation of the Royal Commissioner that parties have made spurious OHS claims to further their industrial objectives.

40. Part 2 contains provisions to prevent the occurrence of unlawful industrial action. It defines unlawful action as all constitutionally-connected, industrially motivated building industrial action that is not excluded action.

Unlawful industrial action prohibited

41. The Bill seeks to provide a significant deterrent to building industry participants taking unprotected industrial action through the unlawful industrial action provision. Clause 74 prohibits a person from engaging in unlawful industrial action. This clause is subject to civil penalty provisions of 1 000 penalty units for a body corporate and 200 penalty units in other cases.

Action before nominal expiry date

42. Under section 170MN of the WR Act, action taken prior to the nominal expiry date of an agreement is not protected. However, in *Emwest v Automotive, Food, Metals, Engineering, Print and Kindred Industries* Union (2003) FCAFC 183, the Federal Court found an apparent anomaly in the WR Act that did not prevent employees taking protected industrial action in respect of issues not covered by a certified agreement. This is contrary to the intent of the provision, and clause 80 of

the Bill makes it clear that where the employment of employees is subject, in any respect, to a building certified agreement or agreements, building industrial action taken prior to the nominal expiry dates of any one of those agreements will not be protected action.

Payments in relation to periods of building industrial action

43. Clause 136 of the Bill deals with "strike pay". The effect of this clause is to provide that the existing provisions in the WR Act that prohibit employers from making payments, and employees from accepting payments, apply in relation to building industrial action (as defined in the Bill). In addition, the maximum penalty that may be imposed on a body corporate will be increased to 1000 penalty units.

44. Although paying, receiving or demanding strike pay contravenes the WR Act, employers face significant pressure from building industry participants to pay strike pay. The Royal Commissioner was presented with "a great deal of evidence" of occasions when, following a period of unprotected industrial action, employees demanded strike pay, unions made claims for employers to pay strike pay and employers paid strike pay [vol 1, pg 131].

45. The intention of the Government is that employees who engage in industrial action should not receive payment during this time. Through the application of civil penalties, this clause seeks to both relieve pressure on employers to make payments to employees during industrial action, and to discourage future strike payments being made.

46. This provision operates from the date of introduction of the Bill. This is to ensure that there is an effective deterrent against strike pay during any period of industrial action.

Chapter 12 – Enforcement

Part 1 – Contravention of civil penalty provisions

47. Increased penalties have been included in the Bill in order to provide a significant deterrent for parties to engage in unlawful industrial action.

48. As defined by the Bill, any eligible person may apply to an appropriate court in respect of a contravention of a civil penalty provision. These include pecuniary penalties, the payment of damages, or any other orders the court thinks appropriate.

49. Pecuniary penalties are stipulated to be 1 000 units for a body corporate, and 200 units for others. By operation of section 4A of the Crimes Act 1914, the value of a penalty unit is currently $110.

50. Parties affected by unlawful industrial action have access to uncapped compensation orders for losses they have suffered as a result.

51. The Bill also provides that where there has been unlawful action, the court can make orders that are appropriate, including granting injunctions against a person engaging in such conduct.

52. Clause 228 seeks to avoid double penalties in respect of the same conduct. This clause ensures that a person is not liable for more than one pecuniary penalty in respect of the same conduct, however criminal proceedings for this conduct may still be instituted.