Submission

to

Senate Employment, Workplace Relations and Education Legislation Committee

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

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

INTRODUCTION

1. The ACTU welcomes the opportunity to make a submission to Senate Employment, Workplace Relations and Education Legislation Committee considering the *Building and Construction Industry Improvement Bill 2005* (the BCII Bill 2005) and the *Building and Construction Industry Improvement (Consequential and Transitional) Bill 2005*.

2. This ACTU submission draws on the submission filed by the ACTU to the Senate Employment, Workplace Relations and Education References Committee *Building and Construction Industry Inquiry* in December 2003.

3. In that inquiry both the report of the committee majority and the Democrat minority report recommended that the BCII Bill 2003 be opposed by the Senate[1].

4. To this extent the ACTU notes that the BCII Bill 2005 replicates provisions from the BCII Bill 2003 (and is structured such that it can be amended to insert the rest of the provisions from the BCII Bill 2003 at a time the government sees fit).

5. There is no evidence of any relevant change in the building and construction industry that would warrant any revision of the purpose, intent and effect of the BCII Bill 2003, as set out in the References Committee Report, which would warrant any different view being adopted with respect to the BCII Bill 2005.

[1] *Beyond Cole The future of the construction industry: confrontation or cooperation?* Recommendation 1 of the Committee majority report and Recommendation 5 of the Democrat minority report.

6. The ACTU sees this Bill as a continuation of the Government's concerted efforts to weaken the effectiveness of unions, and intervene on the side of employers in any disagreement or dispute

7. The Bill seeks to establish the concept of unlawful industrial action and have this imposed retrospectively. The use of retrospective legislation that seeks to impose penalties on those who transgress the legislation prior to it becoming law is not the mark of a fair society and, without strong grounds in support of doing so, should be particularly opposed.

8. The ACTU therefore recommends that the BCII Bill 2005 be rejected.

THE PROVISIONS OF THE BILL

9. The ACTU is strongly opposed to the highly ideological and unbalanced approach which the Government has taken to the building and construction industry, and which is reflected in the provisions of this BCII Bill 2005.

10. The Bill, in its application to part of one industry, is inconsistent with the principle that all citizens should be required to obey the same laws.

11. The Bill is unbalanced and shows that the Government is solely concerned with restricting the ability of unions to function and bargain on behalf of their members.

12. The Bill is unnecessary; there is no evidence, either from the Cole Royal Commission, or otherwise, that justifies the application of a draconian regulatory approach to the industry.

13. The Bill will do nothing to address the real problems of employers or workers in the industry. It is solely fixated on the issue of industrial action, while nothing is done to assist certainty in relation to site agreements, or to address issues such as payment of entitlements, security of payments to contractors and the like.

14. The Bill is designed to do no more than stop unions entering into agreements with employers that will bring stability to the industry over the coming years.

15. The Bill will create confusion for employers operating under a state system in that it now seeks to regulate industrial action that previously fell solely within the state jurisdiction within the federal system, but affects no other matter in the regulation of employment related matters.

16. The Bill is a short sighted ideological attempt to disempower workers and their unions by seeking to impose heavy penalties for any breach of the Bill.

17. The Bill is not about lifting productivity, or even about restrictive work practices. The ACTU submits that the Bill will restrict legitimate union activity to a degree unknown in the democratic world. As is well-known, the ILO has been very critical of Australian law in relation to collective bargaining and the right to strike, amongst other matters. The Bill will bring Australian law even further from conformity with fundamental international labour standards.

18. The Bill fails to recognise that Building sites are generally made up of a large number of sub-contractors, each employing a relatively small number of employees. 93.7 per cent of operating businesses in the

building and construction industry employed fewer than five employees in 1996-7, being the most recent available figures.[2]

19. These sub-contractors generally operate on tight profit margins, which can be transformed into losses very quickly should they find themselves facing any unanticipated cost increase. For this reason, certainty about their site conditions is a key element in effective quoting for work.

Building Industrial action

20. The Bill seeks to make all industrial action (as defined in Chapter 6 of the Bill) unlawful unless it is protected action (as defined in the Bill).

21. The restrictions sought to be imposed by the Bill are not based on any evidence that industrial action, or unprotected industrial action, is a problem or a looming problem of such significance that part of the industry should be singled out for such onerous restrictions.

22. The number of incidents of unprotected action in the building and construction industry found by the Royal Commission are small, when considered in the context of the industry as a whole. Findings were made in relation to the taking of unprotected industrial action in only 24 disputes around the country since 1999: four in NSW,[3] seven in Victoria,[4] three in Queensland,[5]two in South Australia,[6] seven in Western Australia[7] and one in Tasmania.[8]

[2] Report of the Royal Commission, Final report Vol 3 p60
[3] Mirvac, Multiplex, Prime Constructions, Bovis Lend Lease
[4] Anzac Day 1999, Saizeria, The Age, Federation Square, Victorian State Netball and Hockey Centre, Walter Construction
[5] Barclay Mowlem, Nambour Hospital, Sun Metals
[6] Pelican Point, Alston Power
[7] Bluewater Apartments, Doric Group Holdings, Kwinana Civil Construction, 240 St George's Terrace, Universal Construction, Woodman Point Wastewater Treatment Plant, Worsley Expansion Project
[8] Royal Hobart Hospital

23. This is not indicative of such a problem that special legislation is warranted as proposed in the Bill, nor is there evidence of any change in the incidence of unprotected action in the industry such that the Bill is warranted.

24. The proposed section 72 of the Bill inserts a definition of 'building industrial action' that is broader than the definition of industrial action found in the *Workplace Relations Act 1996* (the WR Act). The definition includes industrial action taken where the work is governed by a state or federal award or agreement (an industrial instrument is defined in section 4). In addition section 72(4) gives a broader meaning to industrial dispute than that contained in the *WR Act.*

25. The purpose of the broadening of the definition of building industrial action is relevant in the consideration of sections 73 and 74 of the Bill which make certain building industrial action unlawful.

26. Section 72(1) also introduces the concept of 'constitutionally-connected action' which is building industrial action that satisfies at least one of a number of conditions, one of which is that it adversely effect a constitutional corporation in its capacity as a building participant. Such a provision is designed to broaden the context of unlawful industrial action. The potential effect of the provision is that workers and their unions taking action against an unincorporated company within the industry may find that their action falls within the scope of unlawful action because it has some adverse effect on some constitutional corporation in the industry. The capacity for workers to seek improvements in their wages and conditions legally within a state regulated environment will be significantly and unfairly affected by this provision.

27. In addition the provision will create confusion and uncertainty for small employers who have traditionally operated within a state jurisdiction who now find themselves dragged into a much larger issue than the disagreement they have with the workforce.

28. The extent of the relationship between the building industry action being taken on the one hand and the effect felt by the constitutional corporation is an area of complexity. The inclusion of such a provision in legislation will result in employers and unions spending their time arguing over complex legal concepts instead of resolving the industrial issues in dispute between the parties.

29. Section 72 excludes from the definition of building industrial action that action taken with respect to a health and safety matter provided the employee did not unreasonably refuse to carry out alternative work 'that was safe for the employee to perform'. Again however this is a tighter restriction than that imposed by the *WR Act* where an employee should not unreasonably refuse alternative work 'that is safe and appropriate for the employee to perform'. This alteration of definition again broadens the basis for unlawful action. In addition the Bill places the onus on workers to justify access to this exclusion should they seek to use it. That is, the worker must prove that there was an imminent risk of the type provided for the exclusion to be activated. This will result in workers placing a fear of being prosecuted for taking unlawful industrial action above a concern for health and safety.

30. Section 72 further defines excluded action such that protected action (as further defined in Chapter 6 Part 3) will not be unlawful industrial action.

31. Section 73 specifies what building industrial action will be unlawful industrial if the action is constitutionally-connected, and industrially-

motivated, and not excluded. This is the nub of the Bill. The emphasis is on defining unlawful industrial action and making this definition as broad as possible.

32. Given the definitions of 'constitutionally-connected', 'industrially-motivated' and 'excluded' action it is clear that the entire intent of this section is to restrict workers and their unions of the rights and protections available to the rest of the workforce under the *WR Act* to bargain over their terms and conditions of employment.

33. The ACTU is opposed to the broadening of the definition of industrial action and industrial disputes for the purposes identified above. It is our submission that the current definitions of such in the *WR Act* are ample and that it is appropriate that workers have access to the same rights and responsibilities regardless of the industry in which they are employed. There is no justification for singling out workers in part of the building and construction industry for this treatment.

Exceptions to protected action

34. Proposed section 80 seeks to remove any possibility of taking protected action during the operation of a certified agreement which has not reached its nominal expiry date.

35. The proposal is a legislative response to a decision of the Full Court of the Federal Court, in which it dismissed an appeal against a decision of a single judge which held that section 170MN of the Act does not prevent the taking of protected action in support of a claim which was not a matter included in the agreement.[9] Section 170MN provides that

[9] Emwest Products Pty Ltd v Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union [2001] FCA 1334 (18 September 2001) per Kenny J

industrial action must not be taken during the relevant period for the purpose of supporting or advancing claims against the employer in respect of the employment of employees whose employment is subject to the agreement.

36. In determining the appeal, the Court considered alternative constructions of section 170MN, with the majority concluding:

"In the end however, in our opinion, the preferable view is that which permits and encourages flexibility in the bargaining process. Comprehensive agreements may be desirable in some and perhaps most circumstances. But there may be cases when it will be in the interests of good workplace relations to conclude an agreement on some issues and leave less pressing issues for a subsequent agreement. If any certified agreement, however narrow its terms, has the effect that industrial action is prohibited generally in respect of the employment relationship to which it applies the result will be effectively to discourage resort to a possible option for the partial resolution of complex industrial negotiations.

"It is of course possible that parties to an agreement may seek to abuse s170MN by confecting some issue not explicitly covered by a certified agreement and using that as a basis for constructing an entitlement to protected action. It may be that in such a case the court would construe the agreement as intended to cover the field of terms and conditions defining the employment relationship in question. Indeed the parties may, as Kenny J pointed out, make that intention explicit by the inclusion of a provision that the agreement is intended to be exhaustive of the terms and conditions of the relevant employment relationship."[10]

[10] *Australian Industry Group v Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union* [2003] FCAFC 183 (15 August 2003) per French & von Doussa JJ at paras 37-38

37. In most situations enterprise agreements are all-encompassing. Accordingly, protected industrial action is effectively ruled out for the life of the agreement. However, there are occasions where the parties find it convenient to have single issue enterprise agreements, or to specifically agree to leave a matter for resolution during the term of the agreement. The effect of this proposal would be that such agreements would prevent any industrial action occurring in relation to any issue throughout the life of that agreement, even where postponement of bargaining on that issue had been contemplated by the parties prior to the making of the agreement. In this way the proposal would act as an unnecessary fetter on the parties' freedom to bargain and to negotiate site-specific arrangements for particular types of projects

Penalties

38. Sections 226-229 of the Bill go to penalties to be imposed on anyone who takes unlawful industrial action as defined by the Bill. The Bill provides for an expanded class who can seek orders with respect to a contravention of a civil penalty provision. This expanded class of persons (which can be expanded via the regulations) allows for persons external to the matter at hand to seek to have penalties imposed even where the parties to the matter do not consider this a useful of beneficial course to take.

39. As the Minister made clear in his second reading speech[11], the provisions will allow for *substantial uncapped compensation* and *does not rely on an affected party to enforce the law*.

[11] Hansard, Wednesday, 9 March 2005

40. This provision is designed to give the government the capacity to enforce prosecutions in an attempt to extract maximum penalties from unions. This will occur regardless of the wishes of the parties to the matter is dispute.

41. The desire of the government to interfere so blatantly in workplace issues should be resisted. Whilst it may sound like a tough approach to alleged problems in the industry, ultimately the workers, their unions and employers need to be able to find some resolution to the issues between them such that there is no long term break down in the relationships between the parties. Ultimately the parties must work together if the construction work is to be finished. Interference such as this by the government will do nothing to resolve matters in dispute and do nothing to improve the longer term relationships in the industry.

Retrospectivity

42. The ACTU strenuously opposes the use of retrospectivity as it is proposed in the Bill. We accept that there may be times when such retrospectivity is necessary to right an accepted wrong or to overcome changes in the law that may have an unanticipated adverse effect but such events are rare. The need for retrospectivity should be limited to use for the public good – not to enable a government to continue an ideological push to drive unions out of business.

43. It is important that the industrial parties operate on sure ground when entering into the bargaining process and all that attends that process. This is as true for the building and construction industry as any other. It is inappropriate to allow this Bill to be operational retrospectively without good grounds.

44. There is no evidence of a break out of lawlessness such that an urgent remedy by virtue of retrospective legislation is required.

45. The retrospective elements of the Bill should be rejected.

AUSTRALIA'S OBLIGATIONS UNDER INTERNATIONAL LAW

46. The ACTU submits that the Bill does not meet the requirements of ILO Conventions 87 on Freedom of Association and Protection of the Right to Organize.

47. The ILO's Committee of Experts on the Application of Conventions and Recommendations, consisting of 20 internationally respected and eminent jurists, has, on a number of occasions, issued "observations" about the failure of Australian law to meet these fundamental requirements.

48. Although the Committee has repeatedly called on the Australian Government to amend its legislation, the Government has consistently refused to do so. In fact, as can be seen by this Bill, the Government continues to seek to amend the law to bring it even further away from a position of conformity with those international instruments to which Australia is a signatory.

The Right to Strike

49. Although not directly specified in the Conventions, the ILO has always regarded the right to strike as a fundamental right of workers and their

organisations as one of the essential means through which they may promote and defend their economic and social interests.[12]

50. On a number of occasions the ILO has criticised Australian law as being inconsistent with the requirement of Convention No. 87 in relation to the right to strike. In 1999 the ILO's Committee of Experts on the Application of Conventions and Recommendations published an "observation" about Australia, noting that:

"…where a strike is 'unprotected' under the Act it can give rise to an injunction, civil liabilities and dismissal of the striking workers……..even if these consequences are not automatic, for all practical purposes, the legitimate exercise of strike action can be made the subject of sanctions."[13]

51. In its report to the ILO's South East Asia and the Pacific Tripartite Forum on Decent Work, held in New Zealand on 6-8 October 2003, the Government claimed:

"Australian law does not impose an outright ban on strikes and therefore the right-to-strike is preserved."

52. While this statement and the subsequent paragraph are rather misleading in that the reader's attention is not drawn to the full scale of legal limitations on the right to strike in Australia including the common law, there would be such an outright ban should the proposed section 74 pass into law.

[12] ILO *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* 4th edition Geneva 1996 p101
[13] ILO *Report of the Committee of Experts on the Application of Conventions and Recommendations* Report 111 (Part 1A) ILO Geneva 1999 pp204-5

53. The effect of proposed section 74 is to place an outright ban on any industrial action which does not come within the very restricted criteria for protection.

54. Whilst these comments were originally directed at the BCII Bill 2003, as noted above this BCII Bill 2005 replicates parts of the 2003 Bill. Nothing in the BCII Bill 2005 indicates that the government have in nay way taken note of the submissions of unions to References Committee or the Senate majority report in formulating the 2005 Bill.

55. The complaints against the 2003 Bill therefore stand. The failure identified in the 2003 Bill to meet Australia's international obligations is not diminished in the 2005 Bill.