Submission of the

Construction, Forestry, Mining and Energy Union

(Construction and General Division)

to the

Senate Employment,

Workplace Relations and Education

Legislation Committee.

Building and Construction

Industry Improvement Bill **2005**

April, 2005.

Introduction

1. It is impossible to properly consider the terms of the *Building and Construction Industry Improvement Bill 2005* (the BCII Bill) without having regard to the political context in which it has been introduced. The BCII Bill is part of a concerted and ongoing effort by the Federal Government to undermine trade unionism in the Australian construction industry. The CFMEU opposes the BCII Bill.

2. Insofar as the Australian taxpayer is concerned, that campaign began in earnest with the Cole Royal Commission which cost in excess of $60m. It continued with the expenditure of $15.4m since 2002 for the Building Industry Taskforce [BIT] and the expansion of the Taskforce's investigative powers in 2004.[1] The 2004-05 Budget allocation for implementing the Cole Commission's findings was $136.3m including $9m for the BIT and an extraordinary $96.1m for the proposed Australian Building and Construction Commission.

3. Until the 2004 election, the most obvious political constraint on direct Government intervention in the bargaining process was the lack of Government control of the Senate. In introducing this bill, the Government has not only thrown off any such constraint but indicated through its preparedness to make the law apply retrospectively, that it will not wait until July 1 before it will intervene directly in enterprise bargaining.

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[1] See *Workplace Relations Amendment (Codifying Contempt) Offences Act* 2004.

4. Minister Andrews said in his Second Reading Speech:-

> *"This bill is a specifically targeted legislative measure to address the unlawful conduct of unions."*[2]

If the conduct referred to were unlawful there would be no need to introduce the bill in the first place unless, for example, it was simply a matter of increasing existing penalties.

5. In reality, this bill is part of a package of measures designed to impede any negotiations at all prior to the Government taking control of the Senate and substantially overhauling Australian industrial law. It is a continuation of the Government's effort to selectively implement various recommendations of the Cole Royal Commission into the construction industry. It also happens to assist those employers who do not want to re-negotiate enterprise agreements by virtually outlawing industrial action by unions in support of new agreements and rendering such action susceptible to hefty fines and orders for payment of compensation.

Current Legislation and Negotiations

5. Under existing legislation, industrial action for the purpose of supporting or advancing claims against an employer prior to the expiry

[2] Second Reading Speech 9 March 2005, Hansard pg …

of an agreement is prohibited and cannot be protected action.[3] Likewise, industrial action or other action taken or threatened with the intent to coerce another to agree to making, varying or terminating an enterprise agreement or extending the nominal expiry date of an agreement is prohibited and can attract a civil penalty for breach.[4]

6. There has been no industrial action in the construction industry in support of re-negotiated enterprise agreements either before or after the introduction of this bill.

7. However the Government is not content to allow employers armed with these remedies to seek redress where breaches occur. Through this bill it seeks to fundamentally restrict collective bargaining rights and to financially punish unions and individual workers said to have infringed these new laws through a Government-sponsored anti-union prosecution agency. One of the key features of this bill is that Government appointed officers will have standing to bring proceedings for penalties, injunctions and compensation irrespective of the position taken by the parties.

A Wider Process of Government Intervention

8. Since January 2005, the Minister has written to employers and employer groups on no fewer than 3 separate occasions urging that they not enter

[3] see s170MN Workplace Relations Act 1996
[4] see s170NC

into new enterprise agreements with unions.[5] The details of the BCII Bill have been cited as a reason to resist *"unlawful union demands"* but the Minister has also gone further by stressing that those employers who do enter into agreements run the risk of being excluded from Federal Government construction projects because those agreements may contravene the National Code of Practice for the Construction Industry. The Minister has said that even if such agreements comply with the Code now, (and only his Department can decide whether they do or not), they may not at a later point of time after the Code has been "reviewed" and altered.

7. This demonstrates that the Government's pre-eminent concern is not to "prevent lawlessness" but to impede the progress of agreement-making per se between the industry parties.

The Government Case for Change – "Lawlessness" in the Building Industry

8. The Government's case for introducing the changes recommended by the Cole Commission is based on the notion that the industry is riddled with lawlessness. In a phrase that has been repeated by the Government and employers ever since, the $60m Cole inquiry concluded that the industry was characterised by a disregard for "the rule of law".

[5] See Annexure A.

9. The Royal Commission itself was established by the Prime Minister on the basis that there was *"significant corrupt and quasi-corrupt conduct and widespread coercive and collusive practices in the industry"*[6].

10. The Minister for Workplace Relations recently said the industry *"has been and continues to be crippled by lawlessness."*[7] In the same speech he said the Cole Royal Commission had exposed an industry plagued by a range of illegal behaviour and its findings therefore presented *"a compelling and unassailable case for reform."*[8] Similar remarks were made when the BCII Bill was introduced.

11. When the final report was delivered in March 2003, Minister Abbott declared that its findings proved that this was a *"largely lawless industry"*[9], one which was *"near anarchy."*[10]

The Fate of Royal Commission "Lawlessness"

12. In the final stages of the Royal Commission 50 files were referred to the BIT to follow through. Every single case was reviewed and discontinued without any further action taken.

13. Whilst inquiring into the terms of the 2003 Improvement Bill, this present Committee heard that the confidential volume of the Royal Commission Report contained 92 separate incidents that were ultimately

[6] Media Release 26/07/01.
[7] Speech to Civil Contractors Federation Annual Conference 4/11/04.
[8] Ibid.
[9] Media Release 26/03/03.
[10] Ibid.

referred by the Attorney General to various agencies and authorities to pursue to finality.[11] Six of those incidents crossed two jurisdictions and were therefore referred to 2 separate bodies. This meant that there were a total of 98 referrals.

13. Twenty six of the 92 incidents were said to be being criminal in nature. The remaining 66 were possible breaches of civil or industrial law.

14. Thirty one of these matters were referred to the various States and Territories. As at 25/05/04 twenty of those had been finalised with a decision to take no further action. Only 9 were still under active investigation.

15. Of the 52 referred to the Government's own Building Industry Taskforce 47 were discontinued. Only 4 were active as at the same date.

16. The remaining 15 matters went to other Federal Departments/agencies. At least 4 will go no further. Most recently, the allegation surrounding the operation of the CFMEU NSW Branch's Wage Claims Department was disposed of when the Industrial Registrar advised the CFMEU that "*after considering the matter in some detail…there were not grounds ..to conduct an investigation or to commence a prosecution on the matter."*[12] That leaves a possible 11 of 15 as active matters.

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[11] Hansard - Senate Employment, Workplace Relations & Education References Committee 25/05/04 page 41.

[12] Letter from Industrial Registrar to CFMEU 11/11/04.

17. Overall then only 24 or about ¼ of what were presumably the more serious instances arising from the Royal Commission, had any life left in them as at May 2004. It is reasonable to expect that that number has been reduced even further since then, though the Government has made no effort to disclose the details.

18. In the much publicised 392 instances of "unlawful conduct" in Volumes 1 - 22 [conveniently reduced to a table form, with the name of each alleged offender in the right hand column for ease of media consumption] the Senate Employment, Workplace Relations and Education References Committee was told by a DEWR representative on 25/05/04 that *"in many of these there was insufficient evidence"* and that the Royal Commission *"did not make recommendations that they be pursued"*[13] Only one was pursued and was concluded with no further action taken.

19. In spite of this, all the adverse findings against individuals, unions, and companies remain on the Royal Commission's website for the world to see. The DEWR said on 25/05/04 they would *"have a look at"* how much longer these adverse findings would be left on the website. As at April 2005 they are still there.

20. Nor does the record of the Taskforce in the post Royal Commission period support the view that "lawlessness" is an unquestionable justification for harsh new laws. According to their website, the BIT has concluded nine cases. In over 2½ years and at a cost of more than $15m,

[13] Hansard page 81.

it has secured just over $15,000 in civil penalties against various industry parties. The website is incomplete. It makes no mention of a recent decision of the Federal Court of Australia where a BIT action against the CFMEU was dismissed with costs awarded against the BIT as the action was said by the judge to be "hopeless" and instituted "without reasonable cause."[14]

The 2005 BCII Bill

Objective

21. The objective of the bill is to make all but the most restricted possible category of industrial action unlawful and punishable at the suit of a politically motivated and directed Government agency, the Building Industry Taskforce.

Scope and Definitions

21. The scope of the Bill is generally defined by reference to *building work (s 5).* The definition is very wide-ranging. The definition of such work includes:-

> *(a) the construction, alteration, extension, restoration, repair, demolition, or dismantling of buildings, structures or works…*

Originally the Exposure draft Bill contained references to "maintenance" work in this and other parts of the definition. That was objected to by the AIG and the references to "maintenance" were removed. However

[14] *PG & LJ Smith & Ors v. Lanskey Constructions Pty Ltd & Ors* [2005] FCA 134 25 February, 2005.

the definition still includes references to "restoration" and "repair" work which can be regarded as synonymous with "maintenance".

21. The distinction between "construction" on the one hand and "maintenance" or "repair" on the other is regarded by many in the industry as difficult to draw. Often it can be difficult to determine where repair or maintenance ends and construction starts and vice versa. The history of lengthy litigation over industry definitions indicates the problems that can be associated with attempts of this kind.

22. The definition also includes: -

> *(d) any operation that is part of, or is preparatory to, or is for rendering complete, work covered by paragraphs (a),(b) or(c) for example…*
>
> *(iv) the prefabrication of made-to-order components to form part of any building, structure or works, whether carried out on-site or off-site.*

Given the width of s 5(1)(a), (b) and (c) the reach of subsection (d) is potentially very wide. Would it for example include engineering or architectural work? Would it cover the final cleaning of a building before it is handed over? These issues could not be resolved without resort to complex rules of statutory construction and undoubtedly, litigation.

23. In relation to *"the prefabrication of made-to-order components"* the Cole Commission never examined such work to any real extent. Its terms of

reference[15] did not define the industry that was to be considered, it merely excluded one sector, housing, from consideration. No justification can be drawn from Cole for the extension of the proposed laws into these areas. That much is acknowledged by the AIG response to the draft 2003 Bill.[16]

Such an extension might embrace for example off-site joinery, glazing, brick/block, tile manufacturing, pre-cast concrete products and the manufacture of other construction materials and components none of which were looked at in any detail by the Royal Commission.

24. The formulation *"prefabrication of made-to-order components to form part of any building..etc"* is imprecise and problematic. It would be susceptible to a range of interpretations by the courts. It may also include the manufacture of such components for use in the housing sector.

25. The definition of "building certified agreement" is an agreement applying to building work, *whether or not it also applies to other work*.[17]

26. Disputes, awards and agreements in respect of industries other than the construction industry, but which in any part embrace building employees [a person whose employment consists of or includes building work], or building work, could be caught by the legislation. There is any number of industries in which building work is performed to some

[15] Attachment 3 – Cole Royal Commission Terms of Reference.
[16] Australian Industry Group's Position on the Exposure Draft – October 2003 pg 25.
[17] See section 4.

degree or other by, for example, building trades-people. In that case all the provisions of the Bill where those definitions have work to do, would be imported into a range of other industries outside of the construction industry.

27. This serves to highlight the difficulty in drawing precise definitions of exactly where this new regulatory regime would start and finish. Sound law making includes the proposition that people know with some certainty what laws apply to them and in what circumstances. That is particularly the case where, as here, the laws would be very different on each side of the dividing line and where those differences included the prospect of heavy civil penalties.

28. Further, the regulations may also prescribe other work as *building work* or remove certain work from the reach of the Act. So by the mechanism of regulations that do not have to be positively approved by Parliament, any work at all may be defined as building work and thereby become subject to wide-ranging laws that are completely different to those that might otherwise apply.

29. Work that is excluded from the coverage of the Bill includes

> *g (i) The construction, repair, restoration or maintenance of a single dwelling house.*

This exclusion reflects the Government's pre-occupation with the commercial construction sector as opposed to the domestic housing sector, the latter of which was carefully excised from the Cole inquiry

without any explanation. It is also entirely arbitrary since it does not apply if *"the project is part of a multi-dwelling development…of at least five single dwelling houses."*[18]

Protected Action

30. Action is not protected action where action is taken before the nominal expiry date of an existing agreement.[19] Prohibiting action before the nominal expiry date of an agreement is overriding the decision of the Full Federal Court in *Emwest*.[20] In that case the Court pointed out that matters may arise during the nominal term of an agreement that were not contemplated by the parties at the time the agreement was struck, such as emerging social/industrial standards. It also pointed out that no doubt situations would arise where it would make good industrial sense to finalise some matters and leave other pressing issues to another time.

31. It is a relatively straightforward matter for the parties to agreements to take account of the prospect of matters arising during the currency of agreements by either including "no extra claims" type clauses or permitting different arrangements to apply on particular kinds of projects. Both situations are common at present. Unions and employers recognise the sense of permitting different arrangements to be struck for the different projects that might be undertaken during the life of an

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[18] Section 5(2).

[19] Section 80.

[20] *Australian Industry Group v Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union* [2003] FCAFC 183 (15 August 2003).

agreement. That is a practical measure to deal with the nature of the industry which, unlike so many others, involves a changing workplace.

32. That is not to say that the integrity of agreements is undermined. Such clauses have succeeded in practice over the past decade of enterprise bargaining. All of this demonstrates that the parties themselves are able to best determine their interests rather than have a blanket legislative prohibition applied to them.

Industrial Action

33. The definition of building industrial action is in similar though not identical terms, to the definition of industrial action in section 4 of the *WRA*. However the reference to work covered wholly or partly by awards, orders or agreements of the Federal Commission is replaced by references to "*industrial instruments or orders of an industrial body"* which would include state awards and agreements. To the extent such provisions remain within the reach of the Constitution this will bring a significant number of employers and employees under federal regulation for the first time. However that regulation will not be comprehensive but only in respect of industrial action. For other purposes, state regulation would continue to apply. That is confusing and will give rise to uncertainty. There is no evidence that existing state jurisdictions do not adequately deal with industrial action.

34. Industrial action that is authorised by an employer is not building industrial action. However unlike the definition in section 4 of the *WRA*, that authorisation has to be in advance and in writing.

34. Employers who do not reduce their authorisation to writing (and given the administrative capacity of many in the industry this will be a large number), would be exposed to significant penalties for example for payments for such action, because of what is in effect a technical or administrative deficiency.

35. Under the *WRA* action based on health and safety concerns is not regarded as industrial action provided an employee does not unreasonably fail to comply with a direction from the employer to perform other work where such work was *"safe and appropriate"* for the employee to perform. The reference to such work being *"appropriate"* has been deleted in the *BCII Bill*.[21] This gives much greater latitude to employers to direct an employee to perform alternative work, whether that work is appropriate for the employee or not, and employees would face the prospect of heavy fines for engaging in unlawful industrial action if they did not comply.

37. Unlawful industrial action is prohibited.[22] Maximum penalties for breach of that section are for unions, $110,000 and for individuals $22,000. [23] However "excluded action" is not unlawful industrial action.[24]

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[21] Section 72(1)(g)(ii)
[22] Section 74.
[23] Section 227(2).

Excluded action is either protected action or "AWA industrial action" as defined by Division 8 of Part VID of the WRA .[25]

38. Thus the extensive prohibitions and penalties applying to all other forms of industrial action as were included in the 2003 Improvement Bill and which the Government has indicated will likely be introduced at a later time, do not apply to AWA industrial action. It appears therefore that for those seeking an AWA as opposed to a collective bargaining agreement, all that is required to obtain immunity for action taken in support of an AWA under s 170WC of the WRA is a simple 3 working days' notice.[26] Article 4 of ILO Convention 98 relevantly provides: -

> *"Measures.. shall be taken.. to* ***encourage and promote****.. voluntary negotiation between employers.. and workers organisations, with a view to the regulation of terms and conditions of employment by means of* ***collective agreements****."(emphasis added)*

Bearing in mind that the provisions of the WRA have been found to give primacy to individual over collective agreements through the AWA procedures, there can be little doubt that the distinction drawn in the Bill between AWA industrial action [as excluded action] and other forms of action would positively undermine rather than promote, collective agreement making and is therefore in further contravention of this Convention.

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[24] Section 73.
[25] Section 72(1).
[26] Section 170WD WRA.

Costs

39. The *Building and Construction Industry Improvement (Consequential and Transitional) Bill* 2005 does not amend s 347 of the *Workplace Relations Act* 1996 [WRA] to provide that proceedings arising under either the WRA **or** the BCII Bill shall not generally attract costs orders. In that event it appears that the legislative intent is that proceedings arising under the BCII Bill would ordinarily include orders for costs to be made against the unsuccessful party. It is a retrograde step for industrial proceedings to be conducted with the spectre of legal costs hanging over the parties, particularly where as here, potential financial penalties are enormous and it is likely that a well-funded Government agency will be litigating against ordinary individual employees.

Government by Media Release - Retrospective Effect of the BCII Bill.

40. When the bill was tabled on 9th March it was announced that it would, when ultimately approved by Parliament, apply to any conduct within its terms that had occurred on or after 9th March. This runs counter to the widely accepted principle that laws not apply retroactively and should take effect after they have passed through Parliament and received Royal Assent.

41. On this basis the Minister said in his Second Reading Speech that:-

"From this day forward, industrial action taken by unions to pursue the early negotiation of agreements would not only be unprotected but unlawful."

42. Essentially the enforcement provisions, including increased penalties, will apply retrospectively to industrial action taken before the bill becomes law, including any such action that began before the commencement of the relevant sections.[27]

42. There are a range of criticisms that are commonly directed to retrospective legislation. Commentators have described the practice as arbitrary and vindictive [since it is always directed at an identifiable group] and as destructive of legal certainty. Hobbes put it as a matter of logic when he said *"..For before the law, there is no transgression of the law."* It is also said that the principle against retrospective lawmaking is grounded in a yet more fundamental notion, that is that no-one should be punished other than in accordance with law. For this reason retrospective lawmaking is said to be antithetical to, or at least to undermine, the "rule of law".

43. In opposing the retrospective application of the "bottom of the harbour" tax legislation Senator Don Chipp said:-

"Good heavens; give politicians the chance to legislate retrospectively and we will open a Pandora's Box.. I find that quite frightening. On this

[27] See s 7 *BCII (Consequential and Transitional) Bill* 2005

occasion a Pandora's Box is opened in the excuse of catching the filthy people who cheat on tax. It is done for a noble purpose, one might say, and I agree. But I have never been one to subscribe to the view that the end justifies the means…It is the track that every tyrant in history has gone down; that is, to make illegal today something that was legal last year."[28]

44. Other objections that might be taken to announcing laws through media releases before they are dealt with by the Parliament include the length of time between the announcement and the legislation and differences of substance that can arise between what was originally announced and what ultimately becomes law. In this case for example, such differences might arise through the processes of this Committee and any resulting recommendations.

Breach of International Labour Law

45. In its submission on the 2003 Improvement Bill the International Centre for Trade Union Rights [ICTUR] concluded that:-

"It is untenable for the Australian Government to profess the aim of promoting respect for the "rule of law" in the building and construction industry by the introduction of a Bill which, if enacted, will compound Australia's breach of international labour law and exacerbate an apparent lack of respect for the "rule of law" at an international

[28] Senate Debates 1982 Vol S96, pg 2594.

level."[29]

46. That submission pointed out that the Australian Government has repeatedly ignored criticisms of the ILO Committee of Experts to the effect that the 1996 WRA was in breach of a number of key international conventions to which Australia was party and that the 2003 Improvement Bill would exacerbate that problem. This was in spite of the fact that one of the stated objects of the 2003 Bill was *"promoting respect for the rule of law."*[30]

47. The ICTUR submission traces the source and scope of the obligations imposed on Australia by various international instruments. The criticisms of made by ICTUR of the 2003 bill apply with equal force to the corresponding provisions of the 2005 bill. In summary these are:-

- further restrict the capacity of employees and industrial organisations in the building industry to exercise their right to strike and would impinge on the right to strike implied in ILO Convention No 87 to a far greater extent than is already the case.

- render virtually all industrial action in the building and construction industry unlawful industrial action;

- substantially change the process by which unions can be made

[29] Submission - see Annexure B pg 3.
[30] See s 3(2)(b).

liable to pay for damages arising from the taking of industrial action.

- Is an unprecedented and unwarranted escalation of the penalties and consequences associated with the taking of industrial action in the building industry. The proposed penalties are substantial and could be imposed on individual members or officers of a union as well as the union itself. Further, the ILO Committee of Experts has addressed the imposition of penalties for taking industrial action in the following terms:

> *The Committee considers that sanctions for strike action should be possible only where the prohibitions in question are in conformity with the principles of freedom of association. Even in such cases, both excessive recourse to the courts in labour relations and the existence of heavy sanctions for strike action may well create more problems than they resolve.*[31]

- The existence of ambiguities and uncertainties together with the extended penalties and other consequences for the taking of industrial action will greatly inhibit the exercise of the right to strike implied in ILO Convention No. 87. Even the restricted right to strike left by the bill will, in practical terms, be more illusory than real.

Political Rhetoric and the "Rule of Law".

[31] The *1994 General Survey*, at para 177.

48. In an address to the NSW Law Society in October 2003 former NSW Premier Neville Wran said:-

> *"This lack of respect for the rule of law is perhaps the characteristic – not free trade agreements, not the GST, not interset rates and so on – important as all of them may be – but this lack of respect for the rule of law and due process is perhaps the characteristic that will most readily define the legacy of this Federal Government."*[32]

49. Mr. Wran was speaking of the Government's record on asylum seekers, Guantanomo Bay, the extension of ASIO powers and the gagging of HREOC. The comments can be easily transposed to apply to the Government's efforts to undermine trade unionism in the construction industry.

50. Since 2001 the Government has:-

- set up an Government-appointed administrative body [a Royal Commission] with no legal capacity to determine whether anyone has acted unlawfully, whose central findings nonetheless include the public identification of those who were said to have acted "unlawfully" and more generally, "lawlessness" and a "disregard for the rule of law"

- shown complete disdain for international labour law by refusing to amend legislation that has been consistently ruled to be contrary to

[32] Quoted in the NSW Law Society Journal December 2003 pg 58.

international conventions to which Australia is party but rather, introducing further legislation to compound the problem and deny Australian workers internationally recognised and accepted labour rights.

- introduced a Federal Government "blacklist" through its National Code of Practice for the Construction Industry whereby parties are "banned" from Government-funded projects unless they implement the Government's own ideological brand of industrial relations practices, and where entirely arbitrary and discretionary decisions about "compliance" are made by Workplace Relations Departmental officers without any public accountability, or a right to be heard or right of review for those affected by such decisions.

- extended the powers of the Government agency the Building Industry Taskforce to allow for compulsory, wide-ranging "secret" interrogation sessions involving ordinary workers over industrial issues and expressly overriding any protection against self-incrimination in the course of such interrogations.

- announced it will assist employers in the enterprise bargaining process by abandoning the general rule that legislation not have retrospective effect and directing retrospective legislation including heavy penalties at unions and employees

- conducted all of the above in the name of re-introducing adherence to the "rule of law" in the construction industry.

51. This Committee should unreservedly recommend the rejection of this bill.