AUSTRALIAN MANUFACTURING WORKERS' UNION

SUBMISSION TO THE
SENATE EMPLOYMENT, WORKPLACE RELATIONS
AND EDUCATION COMMITTEE

BUILDING AND CONSTRUCTION INDUSTRY IMPROVEMENT BILL 2005
AND BUILDING AND CONSTRUCTION INDUSTRY IMPROVEMENT BILL
(CONSEQUENTIAL AND TRANSIATION) BILL 2005

APRIL 2005

A. INTRODUCTION

1. The Australian Manufacturing Workers' Union (AMWU) welcomes the opportunity to make submissions to the inquiry of the Senate Employment, Workplace Relations and Education Committee (the Committee) into the Building and Construction Industry Improvement Bill 2005 (the Bill) and the Building and Construction Industry Improvement (Consequential and Transitional) Bill 2005 (together, the Building and Construction Bills or the Bills).

2. The full name of the AMWU is the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union. While the bulk of the AMWU's 140,000 members work in Australia's manufacturing sector, the AMWU also has a significant number of members in the building and construction industry and related industries.

3. The AMWU strongly opposes the passage of the Building and Construction Bills.

4. This submission identifies the AMWU's specific concerns with a number of aspects of the Building and Construction Bills, including:
   - the retrospective operation of the proposed legislation;
   - the extraordinarily wide definition of "building work";
   - the inclusion of "constitutionally – connected" action;
   - the inappropriate changes to the regulation of industrial action; and
   - the unnecessary and inappropriate significant increase in penalties.

5. In addition to the matters raised in this submission, the AMWU supports the submissions made to this inquiry by the Construction, Forestry, Mining and Energy Union (CFMEU) and the Australian Council of Trade Unions (ACTU).

6. The AMWU submits that the proposed amendments to the *Workplace Relations Act 1996* (the Act) are unfair, unnecessary and unjust. The AMWU urges the Committee to recommend that the Parliament should not pass the Building and Construction Bills.

B. THE RETROSPECTIVE OPERATION OF THE BILLS

7. The AMWU opposes the proposed retrospective operation of the Bills. The AMWU submits that the retrospective operation of the Bills is unfair and unnecessary.

8. The Government claims that the retrospective operation of the Bills is needed to stop unlawful industrial action taking place to support the renegotiation of certified agreements prior to the Government passing new laws with respect to industrial relations in the building and construction industry.

9. The Government however, has been unable to point to any evidence of unlawful industrial action being taken in support of the renegotiation of agreements.

10. In the absence of quite exceptional circumstances the AMWU submits that it is undesirable as a matter of public policy that legislation is given a retrospective application. The unfairness of the proposed retrospectivity must be put in the context of the present Bills that:

- contain significant changes to the rights of employees and unions in relation to the taking of industrial action;

- contain a substantial increase in the level of penalties for the taking of certain kinds of industrial action; and

- because of the wide definition of building work and the introduction of "constitutionally-connected industrial action", have a scope and application that is difficult if not impossible to determine with any degree of certainty.

11. In such circumstances retrospectivity is clearly inappropriate. The AMWU urges the Committee to recommend against the retrospective operation of the Building and Construction Bills.

C. THE DEFINITION OF BUILDING WORK

12. The AMWU submits that the definition of "building work" contained in the Building and Construction Improvement Bill 2005 is extraordinarily and inappropriately wide. Clause 5 extends the definition to include "any operation that is part of, or preparatory to" a broad range of construction, maintenance and installation work. The effect of such a wide definition is that the Bill, if it becomes law, will not only have an unfair and detrimental impact upon employees in the building and construction industry but also for a very large number of employees who are not in any ordinary sense working in the building and construction industry.

13. Clause 5 of the Bill defines building work in the following manner:

> 5 Definition of building work
>
> (1) Subject to subsections (2), (3) and (4), building work means any of the following activities:
>
> (a) the construction, alteration, extension, **restoration**, **repair**, demolition or dismantling of buildings, structures or works that

form, or are to form, part of land, whether or not the buildings, structures or works are permanent;

(b) the construction, alteration, extension, **restoration**, **repair**, demolition or dismantling of railways (not including rolling stock) or docks;

(c) **the installation** in any building, structure or works of fittings forming, or to form, part of land, including heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply, fire protection, security and communications systems;

(d) any operation that is part of, or is preparatory to, or is for rendering complete, work covered by paragraph (a), (b) or (c), for example:

(i) site clearance, earth-moving, excavation, tunnelling and boring;
(ii) the laying of foundations;
(iii) the erection, maintenance or dismantling of scaffolding;
(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;
(v) site restoration, landscaping and the provision of roadways and other access works; ...
(emphasis added)

14. The extraordinary width of the definition, particularly combined with the retrospective operation of the Bill, creates great uncertainty as to exactly which employees and employers will be subject to the new provisions. It is unreasonable and unjust that employers, employees and unions should be put in a position where they face significant (and retrospective) penalties from a piece of proposed legislation which has such an open-ended and uncertain application.

15. The Government has brought no evidence to show why the extraordinarily wide definition of building work contained in the Building and Construction Improvement Bill 2005 is necessary or desirable in the public interest.

D. "CONSTITUTIONALLY – CONNECTED" INDUSTRIAL ACTION

16. The AMWU submits that the Bill's attempted usage of the corporations power to apply the Government's proposed changes to employers and employees who would otherwise be working pursuant to state laws is unnecessary, inappropriate and likely to lead to confusion as to the application of the proposed changes.

17. By extending the definition of unlawful action to include "action … taken by a constitutional corporation, or adversely affect[ing] a constitutional corporation in its capacity as a building industry participant",[1] the Government adds another

[1] Clause 72 of the Bill – definition of "constitutionally-connected action" paragraph (b).

layer of complexity on top of the existing laws and regulations pertaining to industrial relations in the building and construction industry (and because of the definition of "building work", for an unquantifiable number of employers and employees working in businesses with a link to the building and construction industry). This complexity arises because:

- In the case of work being carried out by employees of unincorporated employers, it will often not be clear to what extent industrial action may "affect a constitutional corporation" in a manner sufficient to bring such action within the scope of the new provisions.

- A significant number of employers and employees who are currently covered by state laws, will now also be partially covered by concurrent and inconsistent federal legislation.

- Employers and employees working side by side on the one construction site will potentially be subject to a significantly different legislative regime with respect to both the taking of industrial action and the ability to stop work over genuinely held occupational health and safety concerns.

18. On any reasonable assessment this is an extraordinarily poor outcome for a piece of legislation which is purportedly being introduced at least in part to "bring greater clarity to the regulation of industrial action".[2]

E. THE INAPPROPRIATE CHANGES TO THE REGULATION OF INDUSTRIAL ACTION

19. If passed, the Bill will have the effect of outlawing all industrial action unless it falls within a handful of very limited exceptions. The AMWU submits that this approach is unnecessary and unjust.

Overturning Emwest

20. The legislative regime contained within the Bill would have the effect of overturning the Federal Court's decision in *Emwest Products Pty Ltd v. Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2002] FCA 61 (6 February 2002). This decision recognises that the *Workplace Relations Act 1996* allows that in certain specific circumstances, employers, employees and their unions may take protected industrial action over matters that are not within their certified agreement during the life of that certified agreement. This flexibility is useful in some instances where parties wish to conclude an

[2] See the Outline of the Explanatory Memorandum for the Building and Construction Industry Improvement Bill 2005.

agreement while leaving some issues for a subsequent agreement.[3] In addition, the Federal Court has recognised that such flexibility may also have a legitimate role where an employer makes significant or fundamental changes to the employer's business during the life of an agreement.[4]

21. The Australian Industry Group claimed in support of the Workplace Relations Amendment (Better Bargaining) Bill 2003, which also sought to overturn the *Emwest* decision, that in *Emwest* the Federal Court had created an "unworkable bargaining regime" and further that the decision "threatens the integrity of Australia's industrial relations system".[5] Over two years after the original decision of Justice Kenny, such predictions of industrial mayhem have proven to be entirely unfounded.

22. The Government has brought no evidence to show why it is in the public interest that the *Workplace Relations Act 1996* should be amended to reverse the decision of the Federal Court in *Emwest*.

Occupational Health and Safety

23. The legislative regime contained in the Bill also inappropriately provides that an employee may be subject to the significant penalties contained within the Bill if that employee refuses to undertake work based on occupational health and safety concerns unless that employee can show that the refusal to undertake work was based on a "reasonable concern by the employee about an imminent risk to his or her health or safety".[6] The introduction of this aspect of the Bill is inappropriate for at least two reasons:

- Firstly, it means that an employee is not allowed to refuse to undertake work that is an imminent risk to the health or safety of *others*. There can be no justification for penalising employees for refusing to undertake work that may endanger the life or health of other workers or the general public.

- Secondly, it means imposing an "objective" legal test upon workers who must make what will be at times an instantaneous decision not to undertake what is perceived to be possibly life threatening action without the benefit of the

[3] This was recognised by the Full Federal Court on appeal: *Australian Industry Group v Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union* [2003] FCAFC 183,15 August 2003– paragraph 37.

[4] See for example the Federal Court decision on claims following restructuring of Australia Post in *Clarke v Baulderstone Hornibrook Pty Ltd* [2003] FCA 1426, 5 December 2003 (noted by the Bill Digest for the Workplace Relations Amendment (Better Bargaining) Bill 2003).

[5] The Australian Industry Group's comments are extracted in the Senate Employment, Workplace Relations and Education Legislation Committee's report in the Workplace Relations Amendment (Better Bargaining) Bill 2003 at pages 6 and 7.

[6] See the definition of "building industrial action" in clause 72 of the Bill and the allocation of the burden of proof in subclause (2) of clause 72 of the Bill. It would appear by the inclusion of OH&S matters as a specific exclusion that the provision that requires that action be "industrially motivated" is not otherwise enough to remove action based on occupational health and safety concerns from the definition of unlawful industrial action.

views of a qualified occupational health and safety inspector, employee representative, or legal professional. Workers who have a *genuine* belief that the work they are being asked to undertake is a threat to the health and safety of themselves or others should not be at risk of prosecution because they are subsequently unable to prove to a court that their genuine concerns did not meet some yet to be developed objective test for reasonableness.

F. THE UNNECESSARY AND INAPPROPRIATE SIGNIFICANT INCREASE IN PENALTIES

24. The proposed civil penalty for a contravention of clause 74 of the Bill represents a 1000% increase in penalty from $10,000 for bodies corporate and $2,000 for individuals to $110,000 for bodies corporate and $22,000 for individuals.

25. The AMWU submits that the penalties proposed are excessive in all the circumstances.

26. Furthermore, the AMWU submits that it is unfair and unjust that employers, employees and unions in a particular industry (and because of the definition of "building work", in businesses partly related to a particular industry) should face not only a more restrictive legislative regime but penalties that are 1000% higher than the rest of the community.

G. CONCLUSION

27. The Howard Government's ideological obsession with unions continues to prevent it from proposing balanced and fair reforms to the industrial relations legislation. Indeed there is much truth in the recent comment from the Leader of the Opposition that the Howard Government is a Government more interested in crusades than reforms.

28. The Building and Construction Bills the subject of this inquiry are quite overtly part of the Government's ongoing crusade against unions, union members and unionism in general.

29. The AMWU submits that the amendments proposed in the Bills will not lead to more efficient outcomes in the industry but rather will lead to a significant and unnecessary injustice being perpetrated on employees and unions in the building and construction industry and large parts of industries related to the building and construction industry. Employees and unions should not be discriminated against merely on the basis of the industry in which they work.

30. The AMWU strongly urges the Committee to recommend that the Parliament should not pass the Building and Construction Bills.