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Committee Secretary
Senate Employment, Workplace Relations and Education Committee
Department of the Senate
Parliament House
Canberra ACT 2600
Australia

Dear Sir or Madam:

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

Thank you for the opportunity to make a submission to the above inquiry.

I am a Senior Lecturer in the Faculty of Law at the University of Melbourne, and have been practising, researching and teaching in the field of labour law for the last 10 years.

I am attaching a draft of a forthcoming working paper I have written, to be published by the Centre for Employment and Labour Relations Law at the University of Melbourne, for your consideration. The paper will be published later this month, and is entitled ''Deregulation of Labour Relations in Australia: Toward Command and Control'. In this covering letter, I provide an executive summary of the findings presented in this paper, which are relevant to your inquiry.

The misnomer 'labour market deregulation' continues to dominate political debates over the future of labour law in Australia. The phrase is widely used to describe the ideal of removing laws which protect labour rights and entitlements, in order to allow business more 'flexibility' in labour relations. This ideal is based on two related assumptions. First, that the Australian federal labour relations system has historically been a highly state-interventionist, centralised, and juridified model of business regulation based on a 'paternalistic' objective of protecting workers and their trade unions from the operation of market forces. Second, that Australian business will be more productive and able to compete more effectively in the global marketplace once deregulation allows labour relations to become more decentralised and de-collectivised.

In reality, there is no such thing as 'deregulation' of labour markets to the extent that this suggests the ultimate removal of all labour market regulation. Labour markets are both constituted and regulated by

the state and private actors on the basis of a number of different and contested policy priorities. The rhetoric of labour market deregulation often masks extensive legal re-regulation and juridification of social and economic systems or spheres to suit prevailing political objectives. This rhetoric is based on a rather narrow definition of 'regulation' and its purposes when it comes to the exchange of labour in the economy. The inaccuracy of the term is highlighted by the inconsistency between the Howard Coalition Government's labour market deregulation rhetoric, and its extensive use of prescriptive law to 're-regulate' labour relations to, among other things, reduce the power of the AIRC and trade unions.[1]

The Howard Coalition Government's determination to have the Parliament pass a radical piece of legislation, the *Building and Construction Industry Improvement Bill* 2003 (the BCII Bill 2003), provides a further example of this inconsistency between rhetoric and reality. The legislation under consideration by this committee, the *Building and Construction Industry Improvement Bill* 2005 (Cth) (the BCII Bill 2005) is just the first stage in the reintroduction of this the BCII Bill 2003 as the Minister for Workplace Relations has indicated that the Government intends to move amendments to the 2005 Bill to implement the remaining elements of the 2003 Bill.[2] These amendments are likely to be moved after July 2005 when the Coalition assumes its Senate majority, and is expected to pass a raft of legislative labour market 'reforms'. The discussion in my submission is based on the 2003 version of the BCII Bill.

It is my view that the BCII Bill 2003 (and the BCII Bill 2005) is particularly significant as an example of the gap between the rhetoric and reality of labour market deregulation. It provides an opportunity to examine some of the assumptions that have been made about the model of regulation represented by the Australian labour relations system, and to juxtapose this model against the BCII Bills' approach.

In order to conduct this examination and comparison, I draw upon aspects of the field of regulatory studies to develop a wider definition of 'regulation' than the one underpinning the labour market 'deregulation' perspective. By examining labour law systems using a more 'decentred' understanding of regulation developed by regulatory scholars,[3] account may be taken of the regulatory complexity of labour relations systems in a capitalist democracy.

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[1] See, for example, R Mitchell, 'Juridification and Labour Law: A Legal Response to the Flexibility Debate in Australia' (1998) 14 *International Journal of Comparative Labor Law and Industrial Relations* 113; A Forsyth, 'Outside Intervention or Necessary Evil: The Howard Government's Approach to Industrial Relations Regulation' (CCH Industrial Law News, Issue 1, 29 January 2004).

[2] See the Hon Kevin Andrews MHR, Minister for Workplace Relations, Second Reading Speech, *Building and Construction Industry Improvement Bill 2005*, House of Representatives Official Hansard, 9 March 2005, 7.

[3] For an exposition of the decentred understanding of regulation, see J Black, 'Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a Post-Regulatory World' (2001) 54 *Current Legal Problems* 103, and J Black, 'Critical Reflections on Regulation' (2002) 27 *Australian Journal of Legal Philosophy* 1.

It is my contention that the BCII Bill 2005, if passed, will be the first stage in the imposition of a highly prescriptive, legalistic model of 'command and control' regulation of industrial relations on the construction industry based on very narrow and questionable policy justifications. Such a re-regulation is, on its face, inconsistent with the Coalition's 'deregulation' policy rhetoric.[4] Further, it is inconsistent with an enormous amount of empirical research and scholarship suggesting that this approach to regulation can be problematic.

In stark contrast to the framework of the BCII Bill, the collective labour relations system in Australia has historically been a relatively 'decentred' regulatory model. Viewed in the context of the wider debate over the role of the welfare-capitalist state in the context of globalisation, the Australian labour relations system is in fact a far cry from the regulatory model normally despised by those espousing the 'deregulation' thesis on the grounds that labour markets are 'over-regulated'. Although the Australian system has been characterised as heavily centralised and legally prescriptive, in many ways it was ahead of its time as a regulatory model, given the push for less state regulation and more private ordering that has occurred over the last three decades.

Sincerely,

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[4] Others have made similar observations. See, for example, Forsyth, 'Outside Intervention or Necessary Evil? The Howard Government's Approach to Industrial Relations Regulation', above n 1.