AUSTRALIAN INDUSTRY GROUP

AUSTRALIAN CONSTRUCTORS ASSOCIATION

25 February 2005

The Hon Kevin Andrews MP
Minister for Employment and Workplace Relations
Suite MG 48, Parliament House
CANBERRA 2600

Dear Minister

Re. Workplace Relations Reform in the Building and Construction Industry

Since the Final Report of the Royal Commission into the Building and Construction Industry was released, Ai Group and the ACA have forwarded a number of comprehensive submissions to the Federal Government on the need for workplace relations reform in the building and construction industry and the approach which should be taken to reform, including:

- Ai Group's submission of July 2003 on the Final Report of the Royal Commission and its Recommendations;

- Ai Group's submission of October 2003 on the *Building and Construction Industry Improvement Bill 2003* ("the BCII Bill"); and

- A joint Ai Group / ACA submission of 18 May 2004 which arose from a meeting with you on 5 May 2004 at which you asked Ai Group and the ACA to identify the issues in the BCII Bill which are the most important if lasting reform is to be achieved.

In addition to the above submissions, during the course of the Royal Commission, Ai Group and the ACA made submissions in response to all 18 discussion papers, together with three comprehensive general submissions.

Given the Government's recent re-election and prospective changes to the balance of power in the Senate, it is timely that Ai Group and the ACA restate their views on these matters. Such views are set out below.

Key Objectives

It is vital that the reforms to be implemented in the building and construction industry achieve the following key objectives:

1. Maintenance of the rule of law in the industry;

2. Adherence by all parties to agreements which they have entered into and immediate access to effective remedies when industrial agreements are breached or unlawful industrial action is taken;

3. Ensuring that effective dispute avoidance and settlement mechanisms are in place;

4. The outlawing of industrial action in pursuit of pattern bargaining;

5. The establishment of an effective mechanism for the certification of project agreements;

6. Maintenance of high standards of occupational health and safety (OHS);

7. The outlawing of the misuse of OHS as an industrial weapon against employers;

8. Preservation of strong freedom of association principles; and

9. The outlawing of inappropriate coercion.

Approach to Reform and Important Timing Considerations

It is essential that legislative reforms to address the significant workplace relations problems which exist in the building and construction industry be enacted and operational by no later than **30 September 2005**, given that some 4000 construction and electrical contracting certified agreements expire between October and December 2005.

The BCII Bill has already been the subject of an extensive consultation process and a lengthy Senate Committee inquiry. Therefore, a further lengthy consultation process regarding this Bill is unnecessary.

In contrast, any general workplace relations reform legislation would need to be the subject of a robust consultation process to ensure that the impacts upon industry and employees are fully evaluated before the legislation comes into effect. The time required for such consultation and the Parliamentary process would appear to make it unlikely that any general workplace relations reform legislation would be operative before late 2005.

Given the vital timing issues, Ai Group and the ACA support the BCII Bill being enacted at the earliest possible time (with the amendments set out below) and prior to the enactment of the general workplace relations reform legislation which the Government has announced its intention to introduce.

In the event that there is duplication in the content of the BCII legislation and the general workplace relations reform legislation, once both pieces of legislation are in operation, consideration should be given to amending the BCII legislation at that time to remove the provisions which are duplicated in the general workplace relations reform legislation.

Amendments which need to be made to the BCII Bill

Key amendments which Ai Group and the ACA believe need to be made to the BCII Bill are set out in the sections which follow.

Chapter 1 – Preliminary

On pages 1 to 37 of Ai Group's October 2003 submission on the BCII Bill a series of changes were proposed to the definition of "building work" and some other key definitions which determine the coverage of the Bill. In response to Ai Group's submission, The Government made some amendments to the definition of "building work" before the Bill was introduced into Parliament. However, Ai Group and the ACA believe that further important amendments need to be made, as set out in **Annexure A**.

Ai Group and the ACA support industry-specific legislation being enacted to deliver a reform package for the building and construction industry, but the coverage of the legislation needs to be appropriate and limited to those activities which are typically recognised within Australia's workplace relations system as being part of the building and construction industry (eg. those activities that fall within the scope clauses of the major construction industry awards). These are the activities which were the subject of the Royal Commission's investigations.

The Bill's very broad definition of "building work" could lead to construction industry terms and conditions flowing into other industry sectors (eg. fabrication and supply of building materials and products) which, in turn, would drive up the cost of construction through higher input costs. Claims are regularly pursued by unions such as the Construction, Forestry, Mining and Energy Union (CFMEU), the Australian Manufacturing Workers Union (AMWU) and the Communications, Electrical and Plumbing Union (CEPU) to extend construction industry terms and conditions (eg. construction industry severance funds and long service leave schemes) to areas outside of the commonly accepted boundaries of the building and construction industry. The legislation, as drafted, would increase the risk of these union claims succeeding because the most important piece of legislation governing workplace relations in the industry would define the boundaries of the construction industry as extending far beyond the existing boundaries.

Chapter 2 - Australian Building and Construction Commissioner

Ai Group and the ACA support the appointment of an ABC Commissioner, as proposed in the Bill.

However, an Advisory Board should be established which includes representatives of key construction industry bodies such as Ai Group and the ACA. This is consistent with the approach taken by the Australian Taxation Office (ATO) and the Australian Competition and Consumer Commission (ACCC) which have established advisory bodies containing industry and other representatives.

Further, Ai Group and the ACA do not support the ABC Commissioner having the following functions and powers relating to the Building Code:

- The function of monitoring and ensuring compliance with the Building Code;
- The function of investigating suspected contraventions by building industry participants of the Building Code;
- The requirement to report to the Minister periodically on the extent to which the Building Code is being complied with;
- The power to publicise details of non-compliance with the Building Code;
- The power to direct persons to provide a written report detailing compliance with the Building Code, with a penalty applying for failing to provide the report.

The investigative and enforcement powers of the ABC Commissioner should apply only to the provisions of relevant legislation and regulations – not the provisions of a Code which is not subject to Parliamentary or judicial scrutiny.

Chapter 3 - The Building Code

Ai Group and the ACA support the right of the Commonwealth as a client to clearly articulate the standards expected of its service providers and to promote reform in the building and construction industry via its role as a client. To date, the centrepiece of the Federal Government's strategy in this regard has been the National Code of Practice for the Construction Industry and the supporting Implementation Guidelines.

The BCII Bill extends the role of the National Code far beyond standard-setting for contractors engaged on projects funded by the Commonwealth. By using the Corporations Power under the Constitution, the Code's role extends to the regulation of all incorporated building contractors. Under the provisions of the BCII Bill, the Code would regulate significant sections of the construction industry, using an instrument that would not be subjected to Parliamentary or judicial scrutiny. There are virtually no constraints placed upon the Minister, under the terms of the Bill, with regard to the content of the Code. Further, the exercise of Section 241 – Delegation by Minister, of the Bill allows the Minister to delegate the power to issue or amend the Building Code to the ABC Commissioner, a Deputy ABC Commissioner, the Federal Safety Commissioner and various other persons.

There are no protections within the Bill to ensure that the content of the Building Code remains appropriate over time. For example, different Governments or Ministers could have very different views about what provisions should be incorporated within the Code.

Ai Group and the ACA do not support the broad regulatory role assigned to the Code under the BCII Bill. The Code should remain a standard-setting document applicable to projects which are funded by the Commonwealth. Any necessary regulatory provisions for the whole industry should be incorporated within the BCII Bill or set out in Regulations made under the legislation.

Chapter 4 – Occupational Health and Safety

The safe performance of work should be a prerequisite to the completion of work on time and within budget. Whilst the incidence of injuries and fatalities in the construction industry remains unacceptably high, the Royal Commission acknowledged that the trend is one of improvement.

At the present time, OHS is almost entirely regulated through State and Territory laws. Employers are required to comply with onerous legislation, regulations, codes of practice and standards which differ from State to State, and very substantial penalties apply where the requirements are breached. It is essential that the Commonwealth, States and Territories continue to strive to achieve consistency amongst OHS laws. It is also vital that any reforms implemented to improve occupational health and safety in the construction industry do not simply result in the imposition of another layer of regulation which would lead to further confusion about which of the various federal and state laws, regulations, codes and standards apply. Rather than contributing to better OHS performance, the creation of further complexity and confusion could compromise the safety of employees because employers would be unlikely to understand what is required of them.

Federal Safety Commissioner

Ai Group and the ACA support the appointment of a Federal Safety Commissioner and the Commissioner having the roles of:

- Promoting OHS in the building and construction industry; and
- Managing an OHS accreditation scheme.

However, Ai Group and the ACA do not support the Federal Safety Commissioner having the following roles and powers:

- The role of monitoring and promoting compliance with the Building Code, insofar as the Code deals with OHS;
- The requirement to report to the Minister on the extent to which the Building Code is being complied with.

As set out above, with regard to Chapter 3 of the Bill, Ai Group and the ACA do not support the broad regulatory role assigned to the Code under the BCII Bill. The Code should remain a standard-setting document with application to projects which are funded by the Commonwealth. Any necessary regulatory provisions for the whole industry should be incorporated within the BCII Bill or set out in Regulations made under the legislation.

With regard to the proposed Federal OHS accreditation scheme, various State and Territory Governments already have OHS pre-qualification schemes in place and most significant employers in the building and construction industry are accredited under such schemes. It is important that the Commonwealth, States and Territories work together to ensure that a high level of uniformity and consistency occurs in the development and implementation of OHS pre-qualification schemes, and that unnecessary duplication does not occur. The Australian Procurement and

Construction Council (APCC) would be an appropriate organisation to consult in the development of a federal accreditation scheme as the APCC represents each of the State and Territory departments which are already operating OHS accreditation schemes. Significant industry representative bodies such as Ai Group and the ACA should also be involved in the development of the accreditation scheme.

Misuse of OHS as an industrial weapon

In the building and construction industry, occupational health and safety (OHS) is often misused by unions as an industrial weapon against employers. It is essential that this highly inappropriate and damaging tactic be addressed. Ai Group and the ACA strongly support the provisions of the Bill which address the misuse of occupational health and safety issues in an industrial relations context.

Chapter 5 – Awards, Certified Agreements and Other Provisions about Employment Conditions

Part 1 - Awards

With regard to the provisions of the BCII Bill relating to the further simplification of construction industry awards, the majority of these proposals were not recommended by the Cole Royal Commission. Also, the provisions of certified agreements are a much greater barrier to the implementation of flexible work practices in the construction industry than the provisions of awards. Notwithstanding this, further simplification and rationalisation of awards in all industries, including construction, is important. Ai Group and the ACA are of the view that this issue is best progressed through general workplace relations reform legislation rather than via the BCII Bill.

Part 2 - Certified Agreements

Ai Group and the ACA agree with the Royal Commission's view that pattern bargaining in the construction industry must be addressed. However, whilst supporting the thrust behind the proposed reforms set out in the Bill, Ai Group and the ACA cannot support the provisions as they are currently drafted. The Bill fails to deal with several of the most damaging aspects of union behaviour which constitute pattern bargaining, whilst outlawing many legitimate forms of bargaining and other conduct.

It is essential that industrial relations risks are able to be managed on projects. If they cannot be effectively managed, it is unlikely that investors will be prepared to commit capital to major Australian projects. Owners of major construction projects are usually multi-national organisations and the level of investment can extend to billions of dollars. In many cases, there is competition with overseas operations when investment decisions are made.

Having carefully studied the provisions of the BCII Bill relating to the outlawing of pattern bargaining, Ai Group and the ACA are of the view that the approach taken within the Bill, as currently drafted, is unworkable and would cause significant problems for industry. Ai Group and the ACA have set out below two alternative

approaches to amending the Bill to make the provisions workable and to address the problems caused by pattern bargaining in the industry:

- ***Option 1*** – Prohibiting the act of pattern bargaining, amending the Bill's provisions to overcome several definitional and other problems, and creating a genuine mechanism for the certification of project agreements on major projects; or
- ***Option 2*** – Outlawing protected industrial action in pursuit of pattern bargaining, amending the Bill's provisions to overcome several definitional and other problems, and creating a genuine mechanism for the certification of project agreements on major projects

Option 1 – Prohibiting the act of pattern bargaining, amending the Bill's provisions to overcome several definitional and other problems, and creating a genuine mechanism for the certification of project agreements on major projects

If this option is adopted, the following amendments should be made to the Bill:

(a) Definition of "pattern bargaining"

The definition of "pattern bargaining" in s.8(1) of the Bill should be amended as follows:

> *"'Pattern bargaining' means a course of conduct by a negotiating party during the negotiation of agreements under Part VIB of the Workplace Relations Act, that:*
>
> - *Involves seeking common wages or other conditions of employment; and*
> - *Extends beyond a single business."*

The Bill's definition as currently drafted, is inappropriate because it could restrain registered organisations such as Ai Group (together with a wide range of other parties) from carrying out many of their central functions. An important function of virtually all registered organisations (together with many law firms, consultants and a wide range of other parties) is to give advice to employers and/or employees regarding the content of enterprise agreements.

For example, following the Court's *Emwest*[1] decision, Ai Group procured legal advice regarding the appropriate form of wording for No Extra Claims Clauses in certified agreements that would overcome the adverse effects of the decision, and circulated this advice to its member companies. In addition, following the Full Federal Court's *Amcor*[2] decision, Ai Group sought legal advice regarding what form of wording would be appropriate for transmission of business clauses in certified agreements, and circulated this advice to members. Ai Group regularly gives advice to its member companies about union claims and provides assistance to companies to resist union claims.

[1] *Emwest , Ai Group v AFMEPKIU* [2003] FCAFC 183
[2] *CFMEU v Amcor Limited* [2002] FCA 610

The definition of "pattern bargaining" in the Bill could be interpreted as outlawing the giving of advice to more than one company in similar terms, if such advice was seen as "a course of conduct" that involves "seeking common wages or other common conditions of employment". Such a result would be inappropriate, unfair and unworkable. In addition, the definition could be interpreted as outlawing numerous publications dealing with enterprise bargaining. This would include various publications of the Office of the Employment Advocate (OEA) and a large proportion of the content of the OEA's website, which gives advice regarding the content of clauses in Australian Workplace Agreements.

The definition of "pattern bargaining" under the Bill should be limited to conduct which occurs by a negotiating party during the negotiation of certified agreements under Part VIB of the *Workplace Relations Act*. The definition should not extend to the extremely broad concepts captured by the provisions as currently drafted.

(b) The requirement to "genuinely try to reach agreement"

S.8(2) of the BCII Bill states that:

> *"Conduct by a person is not pattern bargaining to the extent to which the person is genuinely trying to reach agreement on the matters that are the subject of the conduct".*

"Genuinely trying to reach agreement" has the same meaning as in s.170MW of the *Workplace Relations Act*, as affected by s.62 of the Bill. [s.8(5)].

Ai Group and the ACA support the approach of defining "pattern bargaining" with reference to whether or not a party is "genuinely trying to reach agreement". As a set of indicators of whether an individual negotiating party is "genuinely trying to reach agreement" with another individual negotiating party, the provisions of s.62 are uncontroversial and consistent with various decisions of the AIRC and Federal Court. However, as a set of indicators of whether or not a party is "genuinely trying to reach agreement" in a pattern bargaining context, the indicators are highly inappropriate and miss the point.

As set out in a legal opinion obtained from Cutler Hughes and Harris Lawyers regarding the interrelationship between the definition of *"pattern bargaining"* in s.8 of the Bill and the indicators of *"genuinely trying to reach agreement"* in s.62 of the Bill:

> *"the Bill appears to treat the advocating of particular common standards, coupled with the refusal to engage in technical acts of bargaining at the workplace level, as being the evil of pattern bargaining. This is not a correct assumption".*

Consider the very realistic example of the CFMEU endeavouring to impose its building industry pattern agreement on an employer. The union could readily comply with all of the elements in s.62 without demonstrating any preparedness to negotiate any change in any term of the pattern agreement. Given that the union was complying with s.62, it could argue that it is not "pattern bargaining", as defined in s.8(a) of the Bill - particularly given the wording of s.8(2) of the Bill, as set out above.

It could also be argued that s.170MW(2) of the *Workplace Relations Act*, is largely overridden by s.62 of the Bill. Such an outcome would not be desirable because s.170MW(2) of the Act was varied in 2003 via the *Workplace Relations Amendment (Genuine Bargaining) Act* to give employers more protection against pattern bargaining and to achieve more clarity regarding the meaning of the term "genuinely trying to reach agreement", in a pattern bargaining context. S.170MW(2) of the Act was varied to insert a note which refers to the decision of Justice Munro in *Australian Industry Group v AFMEPKIU*[3] in which the AIRC dealt with this issue in some detail.

To better ensure that enterprise bargaining negotiations are focused on the relevant enterprise, the following indicators should be added to the list in s.62 of the Bill:

- *Negotiating in a manner consistent with wages and conditions of employment being determined as far as possible by agreement between the employer and its employees at the workplace or enterprise level;*
- *Not engaging in "pattern bargaining";*
- *Demonstrating a preparedness to negotiate an agreement which takes into account the individual circumstances of the relevant enterprise; and*
- *Demonstrating a preparedness to negotiate an agreement with an expiry date which takes into account the individual circumstances of the relevant enterprise.*

To address the widespread current problem in the construction industry of unions refusing to negotiate on any new measures to improve productivity, efficiency or flexibility, the following indicator should be added:

- *Demonstrating a preparedness to negotiate an agreement which takes into account the need for ongoing productivity and efficiency improvements at the relevant enterprise*[4]*.*

To deal with the inappropriate union behaviour referred to on page 13 of this submission, the following additional indicator should be added:

- *Disclosing to the employer and to the employees who would be bound by the proposed agreement, in writing, any direct or indirect financial benefit that the organisation may derive from any term sought in the proposed agreement.*

Finally, the following additional indicator would assist in preventing misleading and deceptive conduct being engaged in by a negotiating party during bargaining:

- *Not engaging in misleading and deceptive conduct during the negotiations.*

[3] Print T1982

[4] Note: This proposal is consistent with the approach which the Industrial Relations Commission of NSW has implemented. The Commission has issued Principles for the Approval of Enterprise Agreements which parties seeking registration of an enterprise agreement are required to demonstrate compliance with. Principle 5.2 states that *"In negotiations for a proposed enterprise agreement, the parties will consider matters such as workplace reform, productivity and efficiency".*

In addition to the above amendments to s.62 of the Bill, amendments need to be made to s.83. Section 83 of the Bill is a modified version of s.170MP of the *Workplace Relations Act*, except that the requirement in s.170MP that a party must "genuinely try to reach agreement" before taking industrial action, has been removed. S.83 specifically states that s.170MP(1) and (2) of the *Workplace Relations Act* do not apply to building industrial action. Ai Group and the ACA can see no logical reason for this approach. The requirement to *"genuinely try to reach agreement"* before industrial action is taken is an essential requirement that needs to be preserved within the BCII Bill. Further, the following provisions should be incorporated within the BCII Bill (both were proposals contained within the *Workplace Relations Amendment Bill 2000*):

- After a provision has been inserted into s.83 of the BCII Bill to require that parties "genuinely try to reach an agreement" before taking protected action (as set out above), the following further provision should be inserted into s.83:

  "An organisation of employees is taken to have not genuinely tried to reach an agreement with the employer if it was engaged in pattern bargaining in respect of the proposed agreement".

- Insert a provision in the Bill which requires that the AIRC terminate a bargaining period if an organisation of employees engages in pattern bargaining.

(c) Exclusions from the definition of "pattern bargaining"

S.8(4) of the Bill states that:

"Conduct by a person (the first person) is not "pattern bargaining" if:
- *The conduct occurs in relation to a proposed agreement between the first person and a second person under which the second person would carry out building work or arrange for building work to be carried out; and*
- *The conduct is engaged in solely for the purpose of encouraging the second person to have particular "eligible conditions" in an agreement that covers employees of the second person. [s.8(4)].*

"Eligible condition" means a condition relating to:
- *The times or days when work is to be performed;*
- *Inclement weather procedures; or*
- *Any other matter prescribed by the regulations for the purposes of this definition. [s.4]".*

This provision is unduly restrictive. The provision would severely restrict the ability of head contractors to manage projects efficiently.

Whilst Ai Group and the ACA accept that it is inappropriate (and unlawful under s.170NC of the *Workplace Relations Act)* for head contractors to coerce subcontractors to have a particular form of agreement, it is inappropriate and unworkable to prevent head contractors giving advice to subcontractors on the content of their agreements, other than advice about the inclusion of *"eligible*

conditions" as defined. The Bill, as drafted, could be interpreted as imposing such restrictions.

It is also inappropriate and unworkable to prevent head contractors and sub-contractors entering into project agreements for major projects. The definition of "pattern bargaining" in the BCII Bill and the very narrow exclusions set out above could be interpreted as even preventing head contractors and subcontractors entering into multiple-business agreements under s.170LC of the *Workplace Relations Act*, unless such agreements dealt exclusively with "eligible conditions" as defined in the Act. This is unworkable and would prevent head contractors managing industrial relations risks on projects. This in turn would act as a significant barrier to investment in Australian projects – particularly major projects.

In addition to the amendments to the definition of "pattern bargaining" as set out in paragraph (a) above, the following exclusions from the definition need to apply:

- Conduct relating to the negotiation of a multi-business agreement in accordance with s.170LC of the *Workplace Relations Act*; and
- Conduct relating to the negotiation of a "project agreement" (refer to paragraph (f) below and Annexure B).

(d) Prohibition on the certification of agreements which have resulted from "pattern bargaining"

S.56 of the Bill would prevent the AIRC from certifying agreements which resulted from "pattern bargaining". Such a provision would undoubtedly cause great difficulties for the Commission and the parties to agreements. It would be extremely difficult to identify whether agreements had resulted from "pattern bargaining", given that many agreements contain relatively similar provisions. The emphasis should be on addressing unacceptable conduct which occurs during the bargaining process, not unduly complicating the certification process once agreement has been reached.

(e) Requirement that all certified agreements in the construction industry have a three year term, or a shorter term if special circumstances exist

The apparent intent of s.55 of the Bill is to spread the expiry dates of certified agreements in the industry. However, Ai Group and the ACA are concerned that the provision will have the opposite effect and operate to ensure the ongoing close alignment of expiry dates. If s.62 of the Bill is amended in the manner proposed in section (b) above, this provision will not be necessary as the refusal by a union to enter into agreements which do not have a common expiry date would constitute "not genuinely trying to reach agreement".

The AIRC should have the discretion to certify agreements with terms of up to five years. For major projects, a four or five year construction period is not uncommon. Employers working on construction projects generally prefer that their certified agreements not expire during the life of the project.

(f) Project agreements

If pattern bargaining is to be outlawed, it is essential that the BCII Bill be amended to establish a genuine mechanism for the certification of project agreements. This is necessary to enable clients, head contractors and subcontractors to retain their ability to implement effective risk management strategies on major projects.

Major projects can be viewed as enterprises that bring together parties with the relevant skills and expertise in pursuit of a common goal.

Commissioner Cole did not recommend that project agreements be outlawed completely but expressed support for some forms of project agreement - in particular, agreements certified under s.170LC and s.170LL of the *Workplace Relations Act*). This can be contrasted with his views on industry-wide pattern bargaining which he regarded as highly inappropriate and damaging.

However, Ai Group and the ACA do not agree that either s.170LC or s.170LL provide a suitable mechanism for the certification of project agreements for major projects. S.170LC agreements are difficult to implement in the construction context because all of the organisations to be bound by the agreement need to be identified at the time when the agreement is certified. All such organisations need to sign the agreement and their employees need to vote in favour of the agreement. It is impossible to identify all employers that will work on a major project at the commencement of the project. The other mechanism - S.170LL – provides even less utility because such agreements can only apply to single businesses.

The *National Code of Practice for the Construction Industry* recognises that project agreements are often appropriate for major projects (see page 8 of the Code). The potential for project agreements to improve time and/or cost performance is recognised in the *Implementation Guidelines* (see page 11 of the Guidelines).

A proposed structure for certified project agreements is set out in **Annexure B** to this submission. The proposed mechanism contains stringent controls to avoid project agreements undermining the objects of the Bill.

The mechanism currently being used on many major construction projects to manage the significant risks associated with industrial relations is the use of common enterprise agreements. Establishing common enterprise agreements for all employers across a project is complex and far less efficient than the mechanism proposed above which would enable genuine project agreements to be reached and certified. Further, the BCII Bill, as currently drafted, would appear to outlaw the use of common enterprise agreements on projects as well as outlawing the use of project agreements – except for multiple-business agreements under s.170LC of the *Workplace Relations Act* which are limited entirely to “eligible conditions”, as defined in the BCII Bill. This is totally unworkable and would act as a significant barrier to investment in Australian projects – particularly major projects.

Option 2 – Outlawing protected industrial action in pursuit of pattern bargaining, amending the Bill's provisions to overcome several definitional and other problems, and creating a genuine mechanism for the certification of project agreements on major projects

In Volume 5 of Commissioner Cole's Final Report, the approaches to bargaining that are common in the building and construction industry were analysed. Commissioner Cole rejected the contentions of those who argue that pattern bargaining is justified in the building and construction industry:

In its submissions to the Royal Commission, Ai Group argued that the *Workplace Relations Act* should be amended to outlaw protected action in pursuit of any form of multiple employer or pattern bargaining"[5]. Such an amendment would minimise coercion of employers by unions to sign pattern agreements against their will.

In response to Ai Group's proposal, Commissioner Cole said: *"I agree that these reforms would be necessary if pattern bargaining is to continue. However, if my recommendation that engaging in pattern bargaining be prohibited in the building and construction industry is adopted, there will be no requirement for reforms as suggested above"*[6].

Prohibiting pattern bargaining which is freely entered into by parties - as the BCII Bill does - as opposed to prohibiting industrial action in pursuit of pattern bargaining, would be a very significant step because the vast majority of current enterprise agreements in the industry are pattern agreements.

Ai Group and the ACA believe that the most important issue is to outlaw industrial action in pursuit of pattern bargaining. It needs to be abundantly clear in the legislation that protected action is not available in support of any form of multiple employer or pattern bargaining. Such an approach would minimise coercion of employers by unions to sign pattern agreements against their will.

The following amendments to Part 2 of Chapter 5 of the Bill, and associated provisions, are proposed if this option is adopted:

- Amending the Bill as set out in sections (a), (b), (c), (d), (e) and (f) above regarding Option 1;

- Inserting a provision in the BCII Bill which provides that if a party takes industrial action in concert with a second party then the industrial action is unprotected – regardless of whether the second party is "protected" or "unprotected". The definition of "in concert" needs to include industrial action taken at a common time across more than one enterprise in pursuit of common claims which form part of a common union campaign. This needs to be made very clear in the drafting of the Bill and in the Explanatory Memorandum.[7]

[5] Final Report, Volume 5, p.30
[6] Final Report, Volume 5, p.73
[7] Relevant Courts could interpret the phrases "in concert" and "engaged in other than solely by", in the bill, as currently drafted, too narrowly. It may be very difficult to establish that the employees in two or

Other amendments which should be made to Chapter 5 of the Bill

The following amendments should be made to Chapter 5 of the Bill regardless of which of the above two options is adopted:

(a) Measures to address inappropriate coercion and hidden interests during bargaining

The Royal Commission into the Building and Construction Industry uncovered the fact that the Electrical Trades Union (ETU) in Victoria is receiving huge sums (understood to be approximately $1,000,000 per annum) in commission from an income protection insurance provider. This income is derived because the ETU has forced a very large number of employers in the construction and electrical contracting industries to provide income protection insurance to their employees via the provider which the union has entered into a commercial arrangement with.

As stated by Commissioner Cole, it is highly inappropriate that:

- Employers faced with claims to pay income protection insurance to employees were not aware that a large percentage of the premium paid was being redirected to the ETU through the payment of very substantial commissions; and
- The employees being urged by the ETU to pursue income protection insurance during bargaining (with threats of or actual industrial action) were unaware that a large percentage of the premium which would be paid by their employer would not be used to fund income protection insurance benefits for them, but rather would be paid to a third party.

A provision along the lines of the following should be incorporated within the Bill in respect of, firstly, a precondition for the taking of industrial action (as in s.170MP of the *Workplace Relations Act*) and, secondly, as a ground for termination of the bargaining period (as in s.170MW(2) of the *Workplace Relations Act*):

> *"An organisation of employees is taken to have not "genuinely tried to reach an agreement" with the employer unless it has disclosed to the employer and to the employees who would be bound by the proposed agreement, in writing, any direct or indirect financial benefit that the organisation may derive from any term sought in the proposed agreement.*
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> *For the purposes of this section, "disclosure" shall include details of:*
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> - *The source of all such commissions and benefits; and*
> - *The reason for receipt of all such commissions and benefits."*

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more companies have acted in concert, if it is necessary to demonstrate that communication has taken place between the employees in the different companies. For example, see *Tillman Butcheries Pty Ltd v AMIEU* (1979) 42 FLR331 per Bowen CJ at p.373, where it was held that acting "in concert" involves *"..knowing conduct, the result of communication between the parties and not simply simultaneous actions occurring spontaneously".*

The above approach is consistent with Recommendations 171 and 172 of the Royal Commission. Despite the importance of these Recommendations, the BCII Bill inexplicably fails to address them.

In addition to the above disclosure requirement, the following forms of coercion by unions should be outlawed:

- Coercion to force an employer to pay for insurance in circumstances where the insurance provider pays commission or provides other benefit/s to the union;
- Coercion to force employers to contribute to a particular employee entitlement fund in which the union has an interest or where the fund pays commission or provides other benefit/s to the union;
- Coercion to force an employer to contribute to a particular superannuation fund in which the union has an interest or where the fund pays commission or provides other benefit/s to the union.

The outlawing of the inappropriate coercion described above could be achieved via the inclusion of the following provision in the BCII Bill which is broadly based on Recommendation 175 of the Cole Royal Commission:

> *"A person shall not, by threat of industrial action, coercion or other form of intimidation, persuade or attempt to persuade an employer to:*
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> - *Pay for insurance on behalf of an employee, where that person is paid a commission or provided with a direct or indirect financial benefit relating to the provision of the insurance;*
> - *Make contributions to a particular superannuation fund or scheme on behalf of an employee, where that person has an interest in the fund or scheme or is provided with a direct or indirect financial benefit relating to contributions to the fund or scheme;*
> - *Make contributions to a particular employee entitlements fund or scheme on behalf of an employee, where that person has an interest in the fund or scheme or is provided with a direct or indirect financial benefit relating to contributions to the fund or scheme.*
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> *An "employee entitlements fund or scheme" includes but is not limited to funds relating to redundancy, long service leave, annual leave, personal leave or parental leave."*

The above provision could be incorporated within s.175 of the Bill.

There should be no exemptions for protected industrial action with regard to the above forms of coercion. However, employers should remain free to agree to pay for insurance or agree to make contributions to a particular superannuation or employee entitlement fund as part of an enterprise bargain.

(b) Penalties

Under s.71 of the Bill, the penalties for breaching awards and certified agreements would increase dramatically. Maximum penalties of $110,000 for a breach of a certified agreement and $55,000 for a breach of an award are excessive. It would be unfair for employers in the construction industry (most of which are small businesses without specialised workplace relations staff) to be exposed to such substantial penalties for what may be an inadvertent breach of an award or certified agreement provision. There are some 2200 federal awards and 2000 State awards, most of which are lengthy and complex. There are a large number of construction industry awards that are particularly complex. The penalties in the *Workplace Relations Act* for breaches of industrial instruments were recently tripled. The current level of such penalties is appropriate for all industries, including construction.

However, given the enormous costs of industrial action in the construction industry, a maximum penalty of $110,000 is appropriate for breaches of AIRC orders or directions that industrial action stop or not occur.

Chapter 6 – Industrial Action etc

Industrial action taken in the building and construction industry can be extremely costly and Ai Group and the ACA support the strong approach taken within the BCII Bill to stamp out unlawful industrial action. However, Ai Group and the ACA believe that the following amendments need to be made to the provisions of Chapter 6 of the Bill:

- With regard to s.135 of the Bill, there should only be a requirement upon employers to notify the ABCC within 72 hours in circumstances where actual industrial action occurs, not where threats of industrial action occur.

- The proposed maximum penalty of $110,000 in s.137 of the Bill for employers who fail to notify the ABCC within 72 hours of any claims made for the payment of strike pay is excessive, given the very short timeframe. The timeframe should be extended to seven days and the penalty reduced to a more reasonable level, say, $11,000 for a body corporate and $2,200 for an individual. (Consider the example of a claim made by a delegate on a remote site on a Friday night. Under the provisions of the Bill, as currently drafted, the details would need to be relayed from the remote site to the company's head office, then verified, then the relevant forms completed and delivered to the ABCC by no later than Monday. Such a timeframe is unrealistic and unreasonable).

- The proposed maximum penalty under s.121 of the Bill, of imprisonment for 12 months, for persons who disclose the identity of various persons involved in a secret ballot is excessive. Also, the penalty should only apply to Registry officials or authorised ballot agents in a consistent manner to the approach adopted in s.170WHB of the *Workplace Relations Act* regarding the disclosure of confidential information about AWAs.

Chapter 7 – Freedom of Association

Freedom of choice is a fundamental tenet of our democracy. All employers and employees should be free to decide whether or not they wish to belong to a union or employer association. Chapter 7 of the Bill reinforces these freedoms in the building and construction industry and Ai Group and the ACA support the provisions, with one exception. The "prohibited reason" in s.155(1)(i) should be deleted. A similar provision in the *Workplace Relations Act* which prohibits termination of employment on the basis that an employee "is entitled to the benefit of an industrial instrument or an order of an industrial body" is regularly being used by unions to frustrate company proposals to outsource work to reduce costs and improve efficiencies[8].

Chapter 8 – Discrimination, Coercion and Unfair Contracts

One of the most significant workplace relations problems in the construction industry relates to the coercion of employers to employ specific persons nominated by unions. The coercion typically takes the form of the relevant union refusing to sign an industrial agreement with the head contractor or major subcontractor on a project, and refusing to allow work to commence, until agreement has been reached that the employer will hire specific persons nominated by the union (and agreement reached on the assignment of key roles, such as that of OHS representatives, to such persons). Many of the individuals nominated are highly militant and have a history of contributing to poor workplace relations on previous construction projects. It is essential that employers have the ability to employ the most appropriately qualified person for each job. Employers carry the risk for OHS on a project and must be able to employ the persons who are best qualified to assist in achieving a high level of OHS performance – not the persons forced upon them by unions for industrial purposes. Section 172 of the Bill adopts proposals that Ai Group and the ACA argued strongly for in their submissions to the Royal Commission and which were recommended by Commissioner Cole in his Final Report.

However, Ai Group and the ACA are concerned about the wording of s.174 of the Bill which extends beyond the concept of "coercion". As identified by the Royal Commission, the present state of the law defines coercion as "an application of pressure which has the practical effect of negating choice, by conduct which is unlawful, illegitimate or unconscionable. Conduct which merely influences, persuades or induces, or which amounts to an incentive to do something is not coercion"[9].

It is appropriate that the Bill prohibit coercion to enter into a particular form of enterprise agreement. Such a prohibition is covered by s.173 of the Bill and s.170NC of the *Workplace Relations Act.*

Ai Group is concerned about the potential breadth of the term "discrimination" in s.174 of the Bill and the very narrow exclusions.

[8] For example, see the decision of the Full Federal Court in *Greater Dandenong City Council v ASU* [2001] FCA 349 and the recent decision of Moore J in *AFMEPKIU v Eaton Electrical Systems Pty Ltd* [2005] FCA 2 (7 January 2005)

[9] Final Report, Volume 5, p.90.

In his Final Report, Commissioner Cole endorsed the practice of head contractors discriminating against sub-contractors at the point of awarding contracts, if a sub-contractor does not have a workplace agreement with sufficiently flexible terms to enable the head contractor to efficiently manage the site.[10] For example, a head contractor may wish to give preference when awarding a contract (all others aspects being equal) to a sub-contractor whose enterprise agreement enables casuals or part-time employees to be employed to cope with work fluctuations, or permits staff to carry out a wide range of different tasks, etc. It is appropriate that head contractors retain their right to select sub-contractors with agreements that contain provisions which are suited to the needs of the project.

The prohibition in s.174 of the Bill should not extend beyond the concept of coercion.

Chapter 9 – Union Right of Entry

Unions have an important representative role to play which is recognised within the *Workplace Relations Act*. It is an object of the Act that registered employee and employer bodies be able to operate effectively (s.3(g)). Accordingly, an appropriate balance needs to be struck between protecting employers from the misuse by unions of right of entry and inspection powers (which the Royal Commission held to be highly prevalent in the industry) and retaining an entry and inspection regime which enables unions to represent their members effectively. The provisions of the Bill strike an appropriate balance.

Chapter 10 – Accountability of Organisations

Representative bodies, by definition, are established to represent their members and should be accountable to their members. Commissioner Cole found that clients and contractors often seek to secure peace by paying money to or at the direction of unions - typically after a union representative threatens to organise industrial action. Clients and head contactors cannot afford delays to their projects because liquidated damages typically apply when a project is not completed on time, of up to $250,000 per day.

The Royal Commission found that such circumstances have contributed to a culture where there is a tendency to seek “short-term, quick-fix solutions which are justified on the basis of commercial reality or pragmatism”[11]. The BCII Bill addresses these issues in an appropriate way.

Chapter 11 – Demarcation Orders

Demarcation disputes occur much less frequently these days than has historically been the case. However, some problems still arise from time to time. Ai Group and the ACA support the provisions of Chapter 11 of the Bill. The provisions are practical and balanced.

[10] Final Report, Volume 5, p.123
[11] Final Report, Volume 9, p.221.

Chapter 12 - Enforcement

Ai Group and the ACA support strong compliance and enforcement powers. The Bill provides appropriate powers and enforcement mechanisms except in the following areas. With regard to Division 2 (Powers of ABC Inspectors) and Part 3 (Powers of Federal Safety Officers) of Part 2 of Chapter 12 of the Bill, it is not appropriate that ABC Inspectors and Federal Safety Officers have a role in monitoring and promoting "compliance" with the Building Code - a document that is not subject to any Parliamentary or judicial scrutiny. These issues are covered in more detail above, in the sections of this submission which relate to Chapters 3 and 4 of the Bill.

Chapter 13 – Miscellaneous

Under s.247 of the Bill, registered organisations would be liable for the conduct of an *"officer"* of the association (defined much more broadly than under s.4 of the *Workplace Relations Act*, to include an employee of the association). As the Bill is currently drafted, such responsibility would apply even if the association has taken reasonable steps to prevent the action. Such an approach is inappropriate and unfair on registered organisations such as Ai Group. Paragraph 242(2) should be amended to include reference to the persons referred to in (1)(b) of the Bill – not just those referred to in (1)(c) and (d). This will have the effect of preventing conduct by an employee of a registered organisation being deemed to be conduct of the organisation, where the organisation has taken reasonable steps to prevent the action.

National Code of Practice and Implementation Guidelines

It is essential that employers in the construction industry understand the Government's intentions regarding the National Code of Practice for the Construction Industry and the supporting Implementation Guidelines. Companies are currently planning and pricing projects that will be constructed over the next five years. Also employers are constantly developing and negotiating workplace agreements that operate for up to three years. Given these issues, it is vital that the Government confirm its intentions regarding the following issues:

- Will the Government accept the arguments of Ai Group and the ACA that the Code should remain a standard-setting instrument for projects funded by the Commonwealth, rather than being used as a device to regulate the whole industry?
- Does the Government intend to amend the Code or Implementation Guidelines when the BCII Bill is enacted and, if so, what amendments will be made?

It is critical to the success of the building and construction industry reform program that the industry have certainty regarding these issues at the earliest possible time.

We would be happy to assist you should you require any further clarification of our position and we again stress the importance of the legislation being enacted and operational by no later than **30 September** this year.

Yours sincerely

Heather Ridout
Chief Executive
Australian Industry Group

Wal King AO
President
Australian Constructors Association

Annexure A

Proposed Amendments to Definitions in the BCII Bill

Definitions in the *Building and Construction Industry Improvement Bill*	**Comments**	**Proposed Amended Definitions**
Definition of *"building work"*: *(1) Subject to subsections (2), (3) and (4), "building work" means any of the following activities:*		**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;*	"Repair" work should not be included in the definition of *"building work",* as such work is not generally regarded as falling within the construction industry. In addition, the term *"alteration"* is too vague to be used in the definition. Forms of *"alteration"* that are appropriately covered by the Bill are covered by other terms in the definition, eg. *"construction"* , *"extension"* and *"restoration*". This part of the definition should only cover work carried out <u>on</u> a construction site.	*(a) the construction, <u>extension, restoration, demolition</u> or dismantling of buildings, structures or works that form, or are to form, part of land, <u>at the site where such buildings, structures or works are to be located</u>, whether or not the buildings, structures or works are permanent;* *(b) the construction, <u>extension, restoration, demolition</u> 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.	Only installation work carried out on a construction site should be included in the definition of *"building work".* Installation work relating to existing buildings and structures should not be included. Further, the activities in paragraph (h) below of the redrafted definition should be excluded.	*(c) <u>the installation of fittings forming part of buildings, structures or works which are being constructed, extended, restored, demolished or dismantled,</u> including heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply, fire protection, security and communications systems.*

Definitions in the *Building and Construction Industry Improvement Bill*	**Comments**	**Proposed Amended Definitions**
(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;*	Paragraph (d)(iv) of the definition is far too broad and would include a large number of companies which fabricate building materials and products (eg. manufacturers of windows and doors). Many of these companies have fought to keep construction industry terms and conditions out of their businesses. Also, many companies (eg. manufacturers of lifts and air-conditioning equipment) have structured their businesses into different divisions to stop construction industry terms and conditions flowing into their manufacturing and service operations.	*(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) <u>the prefabrication of major parts of buildings, structures and works (eg. pre-castings) carried out on-site or in a temporary facility or yard established for the purposes of carrying out such prefabrication work for the project.</u>* *(v) site restoration, landscaping and the provision of roadways and other access works;*
but does not include any of the following: *(e) the drilling for, or extraction of, oil or natural gas;* *(f) the extraction (whether by underground or surface working) of minerals, including tunnelling or boring, or constructing underground works, for that purpose;* *(g) any work that is part of a project for:* *(i) the construction, repair or restoration of a single-dwelling house; or* *(ii) the construction, repair or restoration of any building, structure or work associated with a single dwelling house; or* *(iii) the alteration or extension of a single-dwelling house, if it remains a single-dwelling house after the alteration or extension.*		*but does not include any of the following:* *(e) the drilling for, or extraction of, oil or natural gas;* *(f) the extraction (whether by underground or surface working) of minerals, including tunnelling or boring, or constructing underground works, for that purpose;* *(g) any work that is part of a project for:* *(i) the construction, repair or restoration of a single-dwelling house; or* *(ii) the construction, repair or restoration of any building, structure or work associated with a single dwelling house; or* *(iii) the alteration or extension of a single-dwelling house, if it remains a single-dwelling house after the alteration or extension.*

Definitions in the ***Building and Construction Industry Improvement Bill***	**Comments**	**Proposed Amended Definitions**
	There are a large number of companies involved in installing and repairing equipment in existing buildings (eg. lifts, air-conditioning equipment, refrigeration equipment). It is inappropriate to deem these activities to be part of the construction industry. There are also many companies which install equipment (eg. industrial machinery) in buildings but the equipment does not form part of the building. It is inappropriate to deem these activities to be part of the construction industry. The redrafted definition addresses these issue in (h)(i) and (ii).	*(h) <u>The installation and repair of equipment or machinery:</u>* *(i) <u>in existing buildings, structures or works; or</u>* *(ii) <u>which does not form part of the building, structure or works, for example, industrial machinery.</u>*
(2) Paragraph (1)(g) does not apply if the project is part of a multi-dwelling development that consists of, or includes, the construction of at least 5 single-dwelling houses. *(3) Subject to subsection (4), "building work" includes any activity that is prescribed by the regulations for the purposes of this subsection.* *(4) "Building work" does not include any activity which is prescribed by the regulations for the purposes of this subsection.* *(5) In this section:* *"land" includes land beneath water.*		*(2) Paragraph (1)(g) does not apply if the project is part of a multi-dwelling development that consists of, or includes, the construction of at least 5 single-dwelling houses.* *(3) Subject to subsection (4), "building work" includes any activity that is prescribed by the regulations for the purposes of this subsection.* *(4) "Building work" does not include any activity which is prescribed by the regulations for the purposes of this subsection.* *(5) In this section:* *"land" includes land beneath water.*

Definitions in the *Building and Construction Industry Improvement Bill*	**Comments**	**Proposed Amended Definitions**
Other Definitions: ***"building agreement"*** *means an agreement that applies to building work (whether or not it also applies to other work).* ***"building award"*** *means an award that applies to building work (whether or not it also applies to other work).* ***"building certified agreement"*** *means a certified agreement that applies to building work (whether or not it also applies to other work).*	The definitions of *"building agreement", "building award" and "building certified agreement"* incorporate agreements and awards which apply to *"building work"* even if such work is a relatively insignificant part of the overall coverage of the agreement or award. This is not appropriate. For example, Schedule A of the *Metal, Engineering and Associated Industry Award 1998* provides that the award applies to *"Making, manufacture, installation, construction, maintenance, repair and reconditioning of plant, equipment, buildings and services (including power supply) in establishments connected with industries and callings described herein and maintenance work generally".* The Metals Award is a major manufacturing industry award – not a construction industry award and it would be inappropriate to deem such award as a "building award" for the purposes of the Bill.	**Other Definitions:** ***"building agreement"*** *means an agreement that primarily applies to building work.* ***"building award"*** *means an award that primarily applies to building work.* ***"building certified agreement"*** *means a certified agreement that primarily applies to building work.*

Annexure B

Proposed Model for Project Agreements

The merits of projects agreements are analysed in Commissioner Cole's Final Report (Vol. 5, Ch. 14). Commissioner Cole accepted that head contractors need to maintain control over building sites in order to coordinate and plan work.[12]

Ai Group and the ACA submit that:

- The federal workplace relations legislation should enable genuine project agreements to be certified for "major construction projects" given the size, nature, location and complexity of such projects and the complex chain of contractual relationships involved;
- Owners, head contractors and subcontractors all support the establishment of project agreements on major projects;
- Subcontractors generally accept that project agreements provide the best environment for them but seek that project agreements be established in advance of tendering and only apply to the subcontractor's employees while they are engaged on the project;
- Project agreements have delivered many best practice outcomes for major construction projects;
- Protected action must not be available during the negotiation of project agreements because it is a fundamental tenet of the Act that protected action apply exclusively for enterprise bargaining – not bargaining involving more than one employer.

The use of project agreements on major projects is a legitimate risk-management practice adopted by stakeholders in the building and construction industry. Preventing such practices would lead to investors becoming far more reluctant to commit funds to major projects. This would not be in the public interest.

The National Code of Practice for the Construction Industry and the Implementation Guidelines recognise that project agreements are sometimes appropriate for major projects.

Commissioner Cole recommended that the forms of project agreement which should have force and effect in the building and construction industry are those made under ss.170LC or 170LL of the *Workplace Relations Act*. However, neither s.170LC nor s.170LL provide a suitable mechanism for the certification of project agreements for major projects. S.170LC agreements are difficult to implement in the construction context because all of the organisations to be bound by the agreement need to be identified at the time when the agreement is certified. All such organisations need to sign the agreement and their employees need to vote in favour of the agreement. It is impossible to identify all employers that will work on a major project at the commencement of the project. Contracts for packages of work are typically established progressively as the project progresses. The other mechanism - S.170LL

[12] Final Report, Chapter 5, p.106

– provides even less utility because such agreements can only apply to single businesses.

The BCII Bill should be amended to create a genuine mechanism for the certification of project agreements for major projects, subject to stringent controls. A project agreement should be able to be certified if it meets the following criteria:

- The agreement applies to a major project - to be defined. (Note: The definition of a "major project" needs to be carefully drafted to ensure that such agreements are only available in exceptional and appropriate circumstances. Factors which may be relevant in determining whether such exceptional circumstances exist include: the size of the project; the complexity of the project; the location of the project (eg. remote area); and whether any special demarcation problems exist.)

- It is reached between an employer or group of employers and a union or unions;

- It is certified by a Presidential Member or a Full Bench of the AIRC;

- The Presidential Member or Full Bench is satisfied that it is in the public interest to certify the agreement, having regard to:

    - Whether the matters dealt with by the agreement could be more appropriately dealt with by agreements at the enterprise level;
    - Whether the agreement contains provisions which are likely to lead to productivity and efficiency improvements on the project and a consequent reduction in the period of construction and/or a lower construction cost;
    - Whether the client supports the project agreement; and
    - Any other matters that the Commission considers relevant.

- The Presidential Member or Full Bench is satisfied that, in addition to the involvement of the specific parties to the agreement, the negotiation process has, to the extent that is practicable, taken into account the views and interests of the subcontractors who will subsequently become bound by the agreement. This could be achieved via the involvement in the negotiations of an agent (eg. an employer association or other body or person) appointed by a representative group of sub-contractors.

Upon certification, the project agreement should become binding on all Constitutional Corporations that work on the project. This could be achieved through reliance on the Corporations Power under the Australian Constitution. (Note: The overwhelming majority of employers that perform work on major projects are corporations).

Consistent with the existing multiple-business agreement provisions of the *Workplace Relations Act* (s.170LC), protected industrial action should not be available during the negotiation of project agreements. It is a fundamental tenet of the Act that protected action apply exclusively for enterprise bargaining – not

bargaining across an industry, a sector, a geographic area or more than one employer.

Further, industrial action taken by employees working on a project and covered by a certified project agreement should not be protected regardless of whether an enterprise agreement which is also applicable to such employees expires during the life of the project. This proposal is consistent with the commonly accepted interpretation of s.170MN of the Act which provides that parties covered by a certified agreement cannot take protected industrial action before the nominal expiry date of the certified agreement (regardless of whether another certified agreement which binds the parties expires).

At the present time project agreements are not producing certainty of project costs because the periodic review of enterprise agreements (which are almost invariably pattern agreements) during the life of a long term project often results in "a project becoming the front line battleground of a general campaign for the next generation of enterprise agreements, especially if it is identified by the unions as being in a vulnerable stage of its development"[13]. This proposal overcomes that problem because there would be no right to take protected action during the life of the certified project agreement even where a subcontractor's enterprise agreement expired during such period. Of course, even though the employees on the project would be unable to take protected action, the other employees of the subcontractor would retain their right to take industrial action during the renegotiation of the enterprise agreement.

[13] Final Report, Volume 5, p.109