SENATE INQUIRY INTO THE BUILDING AND CONSTRUCTION INDUSTRY IMPROVEMENT BILL 2005

1. The Transport Workers' Union of Australia ("the TWU") welcomes the opportunity to make submissions to the Senate regarding the Building and Construction Industry Improvement Bill 2005 ("the Bill").

2. The TWU opposes the passage of the Bill. The TWU believes that the Bill represents the use of a sledgehammer to crack a non-existent nut.

Background to the Bill

3. The TWU understands from the Minister's Second Reading Speech that the Bill has been introduced to deal with alleged pressure on "employers to renegotiate agreements well in advance of their nominal expiry dates".[1]

4. The result of this apparent activity is said to be a pressing need to introduce a "specifically targeted legislative measure to address the unlawful conduct of unions".[2]

5. For reasons that become clear in our submissions, if this is the intention of the Bill then the Bill would have to be the clearest example of a broad brush approach to the exercise of legislative power. The Bill pursues this aim in a way which extends the application well beyond the purported purpose.

Building work

6. The Explanatory Memorandum notes that the definition of building work in the Bill is broad. In our submission the definition is too broad.

7. The TWU has significant concerns with the extremely broad approach pursued by the Government with respect to the Bill. The TWU believes that the Bill might apply to a number of industries other than building and construction.

8. For example the TWU has members employed pursuant to the Transport Workers'

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1 Minister's Second Reading Speech
2 Minister's Second Reading Speech

Award 1998 and the the Transport Workers' (Ancillary Vehicles) Award. These awards are incidentally related to building and construction but should, properly considered, be seen as parts of the transport industry. While the TWU puts on the record that it does not believe that its members, who are properly considered to be part of the transport industry, will be covered by the provisions of the Bill, an unscupulous employer or public servant seeking to make mischief might attempt to bring the TWU within the reach of the Bill.

9. In this context, we feel that the definition of "building work" at Clause 5 of the Bill has the potential of applying to transport workers covered by the above Awards.

10. It appears to us that the definition of "building work" within the Act might be sought to be extended to a considerable part of the activities of the TWU. For example tipper truck drivers working for Pioneer or Boral etc could potentially be caught within the scope of section 5 of the Bill. Likewise there are a substantial number of sub-contractors who are members of the TWU who might also be affected by the Bill.

11. In circumstances where the TWU was not requested to participate in any hearings of the Royal Commission and no adverse findings were made concerning the TWU's participation in the building and construction sector (even allowing for the biased nature of the Commission's final report and hearing process as detailed in Jim Marr's *First the Verdict*) it seems extraordinary that the legislation should have such a reach.[3]

12. Given that the Minister is allegedly seeking the passage of this Bill on the apparent basis of restricting the activities of construction unions to engage in negotiations prior to the expiry of certified agreements, it seems odd that the Bill would go so far beyond its stated purpose to deal with a union which was not involved in the Royal Commission nor was involved in the alleged discussion of terms and conditions before the expiry date of their agreements.

13. Properly drafted the Bill should have no greater reach than what is absolutely necessary to meet the Minister's allegations in the Second Reading Speech and the recommendations of the Royal Commission. Any greater reach and the Bill is no longer being pursued for the purposes suggested, but instead relates to ulterior motives.

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[3] Marr J., *First the Verdict: The Real Story of the Building Industry Royal Commission*, Pluto Press 2003

14. This is made all the more perverse by the exclusion of one of the genuine building and construction sectors from the legislation. The removal of the home construction sector demonstrates that the purpose behind the legislation was not to deal with building and construction but was intended to strike only at unions.

15. This sector involves more sham contracting arrangements, a poor health and safety record, repeated use of phoenix companies and consumers suffering losses as companies become insolvent.

16. The fact that this part of the building and construction industry is not being included in the scope of the legislation, while the remainder of building and construction is defined as broadly as it is, demonstrates the Government's desire to pursue ideological objectives.

Unlawful industrial action

17. Industrial action is defined in the Bill to be unlawful in all circumstances, except in the case of protected industrial action. This is an unfortunate and retrograde step.

18. Industrial action is not and should not be considered to be unlawful merely by virtue of it taking place. There are numerous reasons for industrial action. Some reasons may be illegitimate, some reasons may be legitimate. Some may be due to managerial incompetence, some may be due to deliberately provocative behaviour and some may be due to employers deliberately pursuing breaches of Part XA circumstances.

19. Making all industrial action unlawful is to miss the point. The relevant question is whether it is appropriate, legitimate or measured.

20. The fact that section 127 orders are not granted at the mere taking of such action demonstrates that there are circumstances where industrial action might be a reasonable response to managerial actions or other circumstances.

21. Employees should have the right to take industrial action in appropriate circumstances. It is, simply put, a fundamental political freedom to associate and to withdraw labour. The Government based as it purports to be, upon the liberal tradition, should not be

seeking to restrict a person's political rights.

22. Laws which do not embody some form of discretion are generally bad laws. By making all industrial action (other than protected industrial action) unlawful the Bill becomes a bad law.

Emwest

23. The Government has introduced section 80 to deal with what it believes to be the inconsistent nature of the outcome of the Federal Court decision in *Emwest*.[4]

24. The argument by the Government that the *Emwest* decision is wrong and needs to be overridden legislatively lacks credibility. Unlike the Government's approach, the *Emwest* decision has much to commend it. If the parties, for whatever reason, are unable to agree on terms on every possible matter pertaining to the relationship of employer and employee, why shouldn't they leave certain things to be negotiated at a subsequent time. The effect of the Government's approach would be to require the parties to agree to every conceivable issue at the time of the negotiations.

25. However this is to put the Government's objectives before those of the parties. Ultimately the question is whose business is it to determine what is included in agreements that apply to a single business or part of a single business. The answer to that question based upon the structure of the Act and the Government's rhetoric is that it is for the parties to make these decisions themselves.

26. The Government has played on the rhetoric of choice for the better part of a decade. Once again, however, the Government wishes to mandate what choices persons should take. The parties to the industrial relationship are being presented with Henry Ford's choice – you can have any colour in your agreement as long as it is black.

27. For example, if the employer advises the employees that there is no prospect of redundancies and an agreement is made between the parties leaving this issue out, but allowing the parties to revisit this, including having the capacity to take protected action, in the event that circumstances change, why is the Government introducing unwanted third party intervention into the agreement reached.

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[4] *Emwest v AMWU* (2003) FCAFC 183

28. As most people involved in industrial relations are aware, the issue of redundancy entitlements is often one of the hardest to negotiate and resolve. Why shouldn't the parties be allowed to agree on the terms of their agreement free from the unhelpful intervention of Governments.

29. The result of the Government's approach to this issue will be to make enterprise negotiations more intractable by requiring parties to agree on every conceivable issue at the time of the negotiations. This may prolong disputation and lead to agreements which are not as flexible as they might otherwise be.

30. Unions and employees may require employers to agree not to make any changes which would have the result of leading to employees suffering a drop in take-home pay for the life of an agreement. However such clauses might lead to lesser productivity gains because such gains might lead to lower take-home pay.

31. Ultimately the issue is that if the Government believes in allowing the parties to choose whatever arrangement that best suits their circumstances they should be allowed to do so and not have their negotiations artificially constrained by Government.