SENATE EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS COMMITTEE

INQUIRY INTO THE

BUILDING AND CONSTRUCTION INDUSTRY (RESTORING WORKPLACE RIGHTS) BILL 2008

SUBMISSION BY THE
COMBINED CONSTRUCTION UNIONS

OCTOBER 2008

1 INTRODUCTION

1.1 This submission is made on behalf of the AMWU, AWU, CEPU and CFMEU, hereinafter referred to as the Combined Construction Unions. The Combined Construction Unions are of the view that there should be a single set of industrial law applying uniformly to all employers and employees in the federal jurisdiction, without artificial distinctions.

1.2 Since the enactment of the *Building and Construction Industry Improvement Act* 2005 [BCII Act] in September 2005 there has been a separate and additional set of industrial laws applying only to those working in one sector of one industry, namely the commercial, [as opposed to the domestic/housing], construction industry.

Royal Commission

1.3 The decision by the previous Federal Government to selectively legislate in this area can be traced back to the terms of reference it gave to the Cole Royal Commission into the construction industry[1]. In 2001, without any proper explanation, the Howard Government established an inquiry whose job it was to consider a strictly defined part of the Australian construction industry. As a result of the restricted terms of reference, the findings of that Commission were confined to the various manifestations of the commercial construction industry, as is the legislation which flowed from those findings.

1.4 The decision to establish the Cole Commission was itself a calculated move by the Government of the day designed to generate short term political and electoral advantage. It was also motivated by ideological opposition to the Australian construction unions and the need to provide political 'cover' or justification for the introduction of a range of harsh anti-union measures. Not surprisingly, those measures were consistent with the publicly stated policy position of the Coalition parties. Perhaps less well known is the fact that many of them[2] ultimately also found their way into the 'WorkChoices' amendments and the *Workplace Relations Act*.

1.5 The Royal Commission itself was a highly politicised process. Its focus, processes, findings and recommendations were highly contentious and ultimately, profoundly flawed. Any reasonable examination of the provenance of the BCII Act would support the view that it is steeped in the same ideology that gave rise to WorkChoices. The BCII Act is the most extreme expression of that ideology.

[1] The terms of reference defined the building and construction industry as not including the building or construction of single dwelling houses unless part of a multi-dwelling development.

[2] Mandatory secret ballots for protected industrial action, prohibitions on 'pattern bargaining' and 'right of entry' restriction to name but a few.

Two Standards

1.6 The concurrent application of different laws inevitably leads to problems in determining which laws apply to whom and in what circumstances. When this uncertainty is combined with the serious consequences attached to the application of these laws, including civil penalties and imprisonment, the case for parliamentary intervention becomes obvious and compelling.

1.7 The idea of separate industrial laws for the commercial construction industry is also inconsistent with the move towards a national industrial relations system of wide application based on available heads of constitutional power and the administrative advantage that such a system brings with it.

1.8 More fundamentally however is the fact that the laws have created two standards – one for construction workers and one for everybody else – without any sound justification. Such a situation should not be allowed to persist.

Penalties in Industrial Relations

1.9 The BCII Act also raises a basic issue about whether the penalty provisions and criminal sanctions introduced by these laws are appropriate at all in an industrial relations context. Statutory penalties for certain industrial activity were removed from the former *Conciliation and Arbitration Act* 1904 (Cth) as long ago as 1930 by agreement of all political parties. The BCII Act has outlawed virtually all forms of industrial action and re-introduced harsh penalties for such action. This has broader implications for the basic rights of citizens in a democratic state particularly since the Act gives one of the state's own agencies, the ABCC, the principal role of enforcing the laws.

1.10 The BCII Act is overly prescriptive, its penalties are disproportionate and it gives a quasi-criminal flavour to the regulation of industrial relations. It also unnecessarily impinges on basic rights of association, rights of protest and political expression, collective bargaining rights and the right to strike and other universally accepted norms including the right to silence.

1.11 There is already a range of other adequate mechanisms and remedies available to the parties under the *Workplace Relations Act* and at common law, to deal with industrial issues.

1.12 The coercive powers conferred on the ABCC and the criminal sanctions attached to those powers are unwarranted and unprecedented in Australian industrial law.

ILO and International Standards

1.13 The supervisory bodies of the International Labour Organisation, including the Committee of Experts on the Application of Conventions and Recommendations and the Committee on Freedom of Association, have, on several occasions since 2005, criticised these laws as being inconsistent with international labour Conventions to which Australia is signatory. The Australian Government should be moving immediately to bring our laws into conformity with these internationally recognised and accepted labour standards rather than simply putting the matter 'on hold' until 2010.

ABCC

1.14 There is serious doubt about the impartiality of the ABCC and concern about the extent to which its activities and powers have unnecessarily politicised industrial relations in the construction industry. These include:-

- recent reports that trade unions were the subject or one of the subjects in 73% of all ABCC investigations whereas head contractors were the subject in only 7%
- the decision of the ABCC not to prosecute employers for award/agreement breaches involving underpayments even though according to the Workplace Ombudsman, the industry ranked 4th highest in terms of compliance problems and, at the same time, regularly prosecuting unions for breaches of award/agreement terms such as dispute settlement procedures
- the number of interventions in court or tribunal proceedings in which the ABCC has supported the submissions of the employer party
- criticism by the Australian Industrial Relations Commission about the evidence-gathering processes adopted by the ABCC
- recent criticism of the ABCC by the Federal Court of Australia that its investigation processes and the decision to bring proceedings at all in a particular case, were not even-handed.

The Combined Construction Unions support the Bill before this Committee and the immediate repeal of the BCII Act.

2 STATUTORY PENALTIES FOR INDUSTRIAL ACTION – A SHORT HISTORY

2.1 When the *Conciliation and Arbitration Act* 1904 (Cth) [C & A Act] was originally enacted it contained provisions which made certain forms of industrial action unlawful and punishable by a fine. Section 6 of that Act was in the following terms:-

No person or organisation shall, on account of any industrial dispute do anything in the nature of a lockout or strike, or continue any lockout or strike.
Penalty: £1,000.[3]

2.2 Various commentators have pointed out that that the outlawing of strikes and lockouts by statute was consistent with the broad conceptual scheme of the C&A Act in which state imposed processes of conciliation and arbitration were to replace industrial force. Creighton has argued that whilst s 6 '*neatly encapsulated the underpinning logic of the 'new province'..'* it was nonetheless logic that was seriously flawed.

> *'...it is quite unrealistic in practical terms to think that in a democratic society any regulatory regime could succeed in entirely eliminating industrial disputation, even assuming that it would be desirable to do so. Secondly, it manifestly is not desirable in policy terms to attempt entirely to deny workers the right to withdraw their labour in pursuance of improved terms and conditions of employment, or in defence of existing terms and conditions.*
>
> *This reasoning finds expression in a number of developed countries, where the right to strike is accorded formal constitutional protection. It is also reflected in international standard-setting instruments such as the International Covenant on Economic Social and Cultural Rights, and in the jurisprudence of the Supervisory Bodies of the International Labour Organisation.'*[4]

2.3 In any event, the penal provisions in the C &A Act proved to be extremely unpopular even though they were not often used.[5] Ultimately section 6 was repealed with the support of all the major political parties.

2.4 The debate about the penal provisions in federal industrial laws was a focal point of the 1929 election. In fact, former conservative Attorney General and later Chief Justice of the High Court, Sir John Latham argued during the debate to repeal s 6 in 1930 that it is was largely on the basis of the false allegation that the section was introduced by the Bruce Page Government in 1928 that the Labour Party won that election.[6] In his victory speech in October 1929 Labour leader James Scullin declared that the people had '*by their votes, given*

[3] Section 6 was amended in 1928 such that the penalty was, in the case of an organisation or employer £1,000; in the case of any other person - £50.
[4] *One Hundred Years of the Conciliation and Arbitration Power: A Province Lost*? Creighton, B. [2000] MULR 33
[5] For an example of a prosecution see *Stemp v. Australian Glass Manufacturers Co Ltd* (1917) 23 CLR 226.
[6] Hansard - House of Representatives 1 July, 1930 page 3492.

a mandate to the new Ministry to amend the (C&A) Act, to remove legal technicalities and the penal clauses.'[7]

2.5 During the course of the repeal debate the then member for Macquarie, Ben Chifley, said '*I do not think that the community has the slightest desire to declare men criminals for refusing to work under certain conditions.*'[8] The member for Warringah, Mr Archdale Parkhill observed that the penalties for industrial offences had '*never had behind them the force of public opinion'.*[9]

John Latham expressed his opposition to the provisions thus:-

> *I believe that it is not sound to make either a lockout or a strike a criminal offence. I am, and have long been, of the opinion that such penalties tend to bring the law into contempt……it is rather hard to justify the imposing of a criminal offence, upon an act that does not in itself amount to violence, intimidation, or the like…….these particular penalties are ineffective, and because they are ineffective, they necessarily bring the law into disrespect. It is impossible by any form of legal process to compel large bodies of men to work on terms unacceptable to them.*[10]

2.6 From the time of the repeal of section 6 in 1930 until relatively recently, the main mechanisms by which the 'enforcement of the norms of the system'[11] were achieved was by the cancellation of the registration of organisations and bans clauses. Penal clauses of this kind did not feature in federal industrial legislation.

In more recent years however statutory penalties for defined industrial action have crept back into federal industrial law. In part this might be regarded as a function of the gradual shift away from a centralised system and compulsory arbitration, the move to collective bargaining and the introduction of the protected/ unprotected industrial action dichotomy. Perhaps the first example of the reintroduction of penalty provisions is the former s 170MN of the WRA, which penalised industrial action during the nominal term of an enterprise agreement.

2.7 But without any doubt the harshest and most comprehensive statutory treatment of industrial action is now embodied in the provisions of the BCII Act.

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[7] Sydney Morning Herald 15 October, 1929 page 11.
[8] Hansard pg 3490
[9] Ibid pg 3500
[10] Ibid pg3495.
[11] *One Hundred Years of the Conciliation and Arbitration Power: A Province Lost*? Creighton, B. [2000] MULR 33

3 INDUSTRIAL ACTION – DEFINITIONS, EXCEPTIONS AND SANCTIONS

3.1 Section 37 of the BCII Act defines unlawful industrial action. It says:-

> ***37 Definition of unlawful industrial action***
> *Building industrial action is* ***unlawful industrial action*** *if:*
> (a) *the action is industrially motivated; and*
> (b) *the action is constitutionally-connected action; and*
> (c) *the action is not excluded action*

Section 38 provides:-

> ***38 Unlawful industrial action prohibited***
> *A person must not engage in unlawful industrial action.*
> *Note: Grade A civil penalty*

There are no equivalent provisions in the *Workplace Relations Act* 1996 [WRA].

3.2 To appreciate the full effect of this prohibition it is necessary to consider each component of unlawful industrial action, including the definition of 'building industrial action'. It is also instructive to undertake a comparative analysis of these sections with the WRA.

WRA vs. BCII Act

3.3 There are a number of significant differences in the way 'industrial action' and 'building industrial action' is defined and dealt with in the WRA and the BCII Act .

Section 420 (1) of the WRA sets out the definition of industrial action under that Act:-

For the purposes of this Act, ***industrial action*** *means any action of the following kinds:*

(a) *the performance of work by an employee in a manner different from that in which it is customarily performed, or the adoption of a practice in relation to work by an employee, the result of which is a restriction or limitation on, or a delay in, the performance of the work;*
(b) *a ban, limitation or restriction on the performance of work by an employee or on the acceptance of or offering for work by an employee;*
(c) *a failure or refusal by employees to attend for work or a failure or refusal to perform any work at all by employees who attend for work;*
(d) *the lockout of employees from their employment by the employer of the employees;*

but does not include the following:

(e) *action by employees that is authorised or agreed to by the employee of the employees;*

(f) *action by an employer that is authorised or agreed to by or on behalf of employees of the employer;*

(g) *action by an employee if:*

(i) *the action was based on a reasonable concern by the employee about an imminent risk to his or her health or safety; and*

(ii) *the employee did not unreasonably fail to comply with a direction of his or her employer to perform other available work, whether at the same or another workplace, that was safe and appropriate for the employee to perform.*

Note 1: See also subsection (4), which deals with the burden of proof of the exception in subparagraph (g)(i) of this definition.

The BCII Act defines 'building industrial action' as follows: -

(a) *the performance of building work in a manner different from that in which it is customarily performed, or the adoption of a practice in relation to building work, the result of which is a restriction or limitation on, or a delay in, the performance of the work, where:*

(i) *the terms and conditions of the work are prescribed, wholly or partly, by an industrial instrument or an order of an industrial body; or*

(ii) *the work is performed, or the practice is adopted, in connection with an industrial dispute (within the meaning of subsection (4)); or*

(b) *a ban, limitation or restriction on the performance of building work, or an acceptance of or offering for building work, in accordance with the terms and conditions prescribed by an industrial instrument or by an order of an industrial body; or*

(c) *a ban, limitation or restriction on the performance of building work, or an acceptance of or offering for building work, that is adopted in connection with an industrial dispute (within the meaning of subsection (4)); or*

(d) *a failure or refusal by persons to attend for building work or a failure or refusal to perform any work at all by persons who attend for building work;*

but does not include:

(e) *action by employees that is authorised or agreed to, in advance and in writing, by the employer of the employees; or*

(f) *action by an employer that is authorised or agreed to, in advance and in writing, by or on behalf of employees of the employer; or*

(g) *action by an employee if:*

(i) *the action was based on a reasonable concern by the employee about an imminent risk to his or her health or safety; and*

(ii) *the employee did not unreasonably fail to comply with a direction of his or her employer to perform other available work, whether at the same or another workplace, that was safe for the employee to perform.*

Note: See also subsection (2), which deals with the burden of proof of the exception in paragraph (g) of this definition.

3.4 It is immediately apparent that both pieces of legislation cast a very wide net in terms of the conduct which they bring within the scope of their respective definitions of industrial action. Strikes are covered as would be work bans or limitations in their various forms. But sub-section (a) alone of both definitions (which includes the performance of (building) work in a manner different from that in which it is customarily performed) makes it clear that even minor departures from normal patterns of work can come within the definitions.

3.5 It is also clear that in the WRA definition, subparagraphs (a) to (c) are concerned with employee conduct only and subparagraph (d) covers employer conduct, namely 'lock-outs'[12]. This aspect of the WRA definition was introduced as part of the 'WorkChoices' amendments to make it clear that the only form of employer industrial action that the Act covered was the lock-out, thus dispensing with arguments that other employer conduct, such as unilateral changes to working arrangements, attracted possible sanctions under the Act. The Section 36 BCII Act definition, which was introduced prior to WorkChoices, does not draw the employer/employee conduct distinction and more closely resembles the pre-WorkChoices definition in the WRA.

Exceptions

3.6 There are also a number of exceptions as to what would otherwise constitute 'industrial action' or 'building industrial action' under the respective Acts. The exceptions under the BCII Act are narrower than those under the WRA.

Section 420(1)(e) to (g) of the WRA provides that 'industrial action' does not include:-

(e) *action by employees that is authorised or agreed to by the employee of the employees;*

(f) *action by an employer that is authorised or agreed to by or on behalf of employees of the employer;*

(g) *action by an employee if:*

(i) *the action was based on a reasonable concern by the employee about an imminent risk to his or her health or safety; and*

(ii) *the employee did not unreasonably fail to comply with a direction of his or her employer to perform other available work, whether at the same or*

[12] See also s420(3)

another workplace, that was safe and appropriate for the employee to perform.

3.7 Section 36(1)(e) to (g) of the BCII Act provides that 'building industrial action' does not include:-

(e) *action by employees that is authorised or agreed to, in advance and in writing, by the employer of the employees; or*

(f) *action by an employer that is authorised or agreed to, in advance and in writing, by or on behalf of employees of the employer; or*

(g) *action by an employee if:*

(i) *the action was based on a reasonable concern by the employee about an imminent risk to his or her health or safety; and*

(ii) *the employee did not unreasonably fail to comply with a direction of his or her employer to perform other available work, whether at the same or another workplace, that was safe for the employee to perform.*

Authorised Action

3.8 Under the WRA, action that is authorised or agreed to by the employer does not constitute industrial action. Under the BCII Act such action has to be authorised or agreed to ***in advance and in writing*** to come within the exception, thus restricting the capacity of the employer to sanction such action after the event.

Health and Safety

3.9 The 'occupational health and safety' exception to industrial action also contains some important differences. First, under s 420(4) of the WRA an employee has the burden of proving that the action was based on a reasonable concern about an imminent risk to his or her health and safety. Under s 36 (2) of the BCII Act, the employee has the burden of proving both elements of s 36 (1)(g), namely, the 'reasonable concern' element and the 'not unreasonably failing to comply with an employer direction to perform alternative work' element.

3.10 Further, the employer direction under the WRA must involve work that is both safe *and* appropriate for the employee to perform. There is no requirement under the BCII Act that the alternative work also be appropriate for the employee to perform. This raises the prospect that an employee may be directed to perform work that they are not necessarily qualified to perform or that they would not ordinarily be required to perform as part of their normal duties.

3.11 The way the Acts deal with occupational health and safety related action starkly highlights the problems associated with imposing a statutory definition on the forms of action which attract civil penalties. Prior to the WorkChoices

amendments, the differences between the two pieces of legislation in this respect were significant.

3.12 In the case of safety related action because the definitions of 'building industrial action', 'industrially motivated' and 'constitutionally connected' are so wide[13] and 'excluded action' so narrow[14] (see discussion below), effectively, unless the employees taking the action could discharge the burden of proving each of the elements of s 36(1)(g) then they would be exposed to penalties and other orders.

3.13 It is possible to highlight the inherently unsatisfactory state of this aspect of the law by considering a single example. A construction industry employee who has formed a reasonable concern about an imminent health or safety risk at his or her workplace and responds in a way that delays the performance of work may nonetheless face serious fines on the basis that the risk was to the health or safety of their workmates but not them personally.

3.14 Alternatively, an employee might reasonably identify a work practice that if continued, would pose a serious risk to health or safety but is not 'imminent' within the meaning of the BCII Act. In that case any departure from ordinary work practices as a result of such risk would expose those taking the action to a pecuniary penalty. Under the BCII Act therefore, employees are faced with the impossible dilemma of having to assess and balance an occupational health and safety issue against the prospect of large fines if they take building industrial action in response.

3.15 Under the pre-WorkChoices WRA, it was possible for employees to be immediately exposed to civil penalty proceedings for taking industrial action. Section 170MN provided that industrial action taken within the nominal term of a certified agreement (or a s170MX award) for the purpose of supporting or advancing claims against an employer[15] was prohibited. Section 170ND included s170MN as a penalty provision. Proceedings for breaches of these provisions could be pursued under Part VIB Division 10 of the WRA and, if established, penalties could follow. This section was obviously directed at prohibiting further industrial action in support of claims once an agreement had been entered into.

3.16 The reference to the purpose of the action being to support or advance claims made it less likely, though in theory not impossible, that workers covered by a current agreement would be prosecuted and penalised for taking industrial action over a health or safety concern. The more common scenario was that employees would find themselves facing an application for orders that industrial action cease, but they were not necessarily exposed to statutory penalties once the action had occurred.

[13] s36 BCII Act
[14] effectively protected action s36 BCII Act
[15] cf s 494 where no purpose is identified

'Industrially Motivated'

3.17 The BCII Act has a wider set of purposes which might render 'building industrial action' unlawful industrial action. These come under the definition of 'industrially-motivated' in s36. Under this section 'industrially-motivated' means:-

> *Motivated by one or more of the following purposes, or by purposes that include one or more of the following purposes:*
> *(a) supporting or advancing claims against an employer in respect of the employment of employees of that employer;*
> *(b) supporting or advancing claims by an employer in respect or the employment of employees of that employer;*
> *(c) advancing industrial objectives of an industrial association;*
> *(d) disrupting the performance of work.*
>
> *The employer referred to in paragraphs (a) and (b) need not be the employer whose employees do the work to which the action relates.*

3.18 The first point to note is that action can be 'industrially-motivated' and therefore potentially unlawful even where it is only partly motivated by one of the identified purposes. Second, the four identified purposes include and expand on the s170MN 'purpose' and are in combination, extraordinarily broad. In fact, there is some difficulty in conceiving of a form of industrial action that would not be motivated, at least in part, by one or more of these purposes.

3.19 It has been held that an overtime ban imposed in a dispute over whether an employer had agreed that an apprentice be employed for the duration of a project and should do so, had as at least one of its 'clear' purposes, the disruption of the performance of work.[16] This is so notwithstanding that the principle purpose of the action was to achieve the employment of an apprentice.

The 'Disruption' Purpose

3.20 On one view, the 'disruption of the performance of work' purpose appears to constitute a 'catch-all' type provision which is designed to pick up any action where there may be no specific 'claim' involved, for example, protest action. Moreover, this purpose is distinguishable from the other purposes in that disruption to work per se is rarely if ever the motivating factor for industrial action although it is almost always, if not always, the effect of such action. It might also be considered to not be a purpose at all, but the means by which other purposes or objects might be achieved.

[16] *Stuart-Moloney v CFMEU & Ors* [2008] FCA 1426 para 12 per Tracey J

3.21 The wide definition of 'industrially-motivated' action means that occupational health and safety related industrial action which does not come within the exclusion in s 36(1)(g) of the BCII Act is likely to be made unlawful by the BCII Act. This is because even if such action cannot be said to be in support of claims that an unsafe working environment be rectified by an employer, it might nonetheless be argued that it necessarily had as one of its 'purposes' disruption in order to avoid a potentially unhealthy or unsafe situation.

3.22 In the event that neither of those purposes apply, at least in part, it is likely that such action could be said to be taken to 'advance the industrial objectives of an industrial association'. This is the case because the (lawful) objectives of trade unions are ordinarily cast in such broad terms, so, for example, one of the objects of the CFMEU is to '*....improve, protect and foster the best interests of the union and its members...*'.[17] Presumably such interests would encompass the health and safety interests of its members.

3.23 The prosecution of employees over health and safety related action is no mere hypothetical concern. The ABCC has prosecuted a number of trade unions and individual workers for allegedly stopping work in October 2005, (just one month after the legislation had been enacted), because of concerns over contaminated food and unhygienic mess facilities at a construction camp at a remote site in western NSW[18]. The statement of claim in that matter alleged that the action taken was both constitutionally connected and industrially motivated and amounted to unlawful industrial action in breach of s38 of the BCII Act.

3.24 The point is however, that the scheme of the legislation means that only particular classes of occupational health and safety related industrial action will escape from the general penal provisions that apply to unlawful industrial action. And that is the point at which such a scheme breaks down because it operates not just to punish industrial action but to force people to work, upon pain of a financial penalty, in conditions that are unhealthy or unsafe.

'*Excluded Action'*

Section 37 of the BCII Act exempts 'excluded action' from the definition of 'unlawful industrial action'. Excluded action is defined, relevantly, in s 36 to mean:-

(a) building industrial action that is protected action for the purposes of the Workplace Relations Act (as affected by Part 3 of this Chapter);

3.25 The WorkChoices amendments made significant changes to the law relating to protected action. Some of the main changes included:-

[17] CFMEU Rules, Rule 4(1) Objects
[18] Alfred v Wakelin (No.1) [2008] FCA 1455

- approval by a complex mandatory secret ballot process (other than action in response to employer industrial action)
- exclusions for 'pattern bargaining' and industrial action in support of 'prohibited content'
- tightening the provisions relating to industrial action during the nominal term of an agreement (the '*Emwest'* exception); and
- reduced AIRC discretion in respect of applications to suspend or terminate bargaining periods and therefore, protected action.

3.26 These changes represent the culmination of the trend towards limiting the right to take industrial action that had been evident since the concept of 'protected action' was first introduced in 1993. With the narrowing of the scope of protected industrial action and the increasingly burdensome procedural requirements that have to be satisfied in order to gain access to protected action, the concept of the right to strike in a bargaining system is likewise diminished.

3.27 However the combined effect of these provisions and the BCII Act, which effectively ensures that virtually all forms of unprotected industrial action are unlawful and subject to harsh penalties, adds a coercive dimension to the regulation of the workplace. Almost any departure from ordinary work patterns in the construction industry which

(a) does not qualify as 'protected action' for any reason
(b) has not been authorised in advance and in writing by the employer; or
(c) does not meet the strict definition of health and safety disputes which are excluded from the definition of building industrial action

will attract a penalty.

3.28 In this case it becomes not so much a question of whether employees have a 'right to strike' within a bargaining system, but whether or not the Parliament has introduced a statutory scheme the effect of which is to have people work under compulsion.

Sanctions

3.29 Aside from the distinctions described above, there are major differences in the sanctions which the two Acts impose on industrial action. Under the BCII Act unlawful industrial action is a Grade A civil penalty provision attracting a maximum penalty of $110,000 for a body corporate, including a union, and $22,000 for individuals. Under the WRA the maximum penalty for taking industrial action in breach of s 494 is $33,000 in the case of a body corporate and $6,600 in any other case.[19]

[19] s 494(6) WRA.

3.30 The WRA has no equivalent to s52 of the BCII Act which makes it a criminal offence, punishable by up to six months imprisonment, for the failure to comply with a notice to provide documents/information to or to answer question by, the ABCC.

4 NON-COMPLIANCE WITH INTERNATIONAL LABOUR STANDARDS

4.1 In an address to the AWU on 25 November 2005 titled '*John Howard's Radical Industrial Relations Regime and its Incompatibility with ILO Standards'*, the then Shadow Foreign Affairs Minister Kevin Rudd said:-

> *'..... being elected to the ILO Governing Body brings with it additional responsibilities – particularly, the responsibility to lead by example and show genuine substantive commitment to the principles of the ILO....*
>
> *Almost all of the ILO conventions have been accepted by Australia, and ... we are under an obligation to ensure that these standards are met in domestic law and practice...*
>
> *Respect for the principle of freedom of association is regarded as so important to the operation of the ILO that the obligations to do so are regarded as inherent in the fact of membership of the Organisation*.'

4.2 Mr Rudd's speech was made within days of the ILO's first pronouncements on the construction industry legislation. In fact he specifically drew his audience's attention to what the Committee on Freedom of Association had to say:-

The ILO recommended that the Government:

- *Amend the Construction Bill to ensure that any reference to unlawful industrial action conforms with freedoms of association principles;*
- *Change the Bill to eliminate excessive impediments, penalties or sanctions against industrial action in the building and construction industry;*
- *Review the Bill to ensure the determination of the bargaining level is left to the discretion of the parties and is not imposed by law ...*

Mr Rudd concluded his speech with a call to action:-

> *'Australians cannot sit idly by while its government systematically traduces Australia's obligations under international law'.*

4.3 In a similar vein, Mr Rudd invoked the commitment to ILO principles in his contribution to the parliamentary debate over the *Workplace Relations Act Amendment (WorkChoices) Bill* 2005:-

> *'As a member of the ILO, Australia voluntarily agreed to and is bound to implement International Labour Standards in Australian Labour law, including the application of international jurisprudence protecting the right to strike from legal sanctions.'*[20]

4.4 Given statements of this kind one could be forgiven for expecting that a Rudd Labor Government would act decisively to address ILO criticism. This is not the case. The Labor Government has not acknowledged that the BCII Act is inconsistent with ILO standards. Nor has it committed to the repeal or amendment of the Act to address ILO concerns. In fact the only firm commitment it has given is to maintain those provisions of the Act which establish the ABCC and confer the coercive powers on that body, until at least 2010.

Royal Commission and the ILO

4.5 The Cole Royal Commission had no regard to Australia's international obligations including ILO Conventions to which Australia is party or the extent to which Australian laws were consistent with those Conventions. The Royal Commission expressly declined to consider whether Australia's existing laws infringed international obligations. In the final report the Commissioner said:-

> *'it is not my function to determine whether a law passed by the Parliament of the Commonwealth of Australia infringes international obligations. The Commonwealth has consistently maintained there is no infringement as alleged. The Commission can only proceed on the basis that the relevant provisions of the Workplace Relations Act 1996 (Commonwealth) are valid.'*[21]

4.6 The Cole findings were made in the context of a legislative regime that had come in for significant criticism by the ILO. For present purposes however the critical point to note is that the Cole Royal Commission made no mention of how the laws that were ultimately recommended by that body and which came to form the BCII Act, measured up against key ILO Conventions which had been signed by Australia.

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[20] Hansard Second Reading, 9/11/2005 page 7

[21] Vol 5 Pg 53 Paragraph 205

Review of ILO Consideration of BCII Act

4.7 In November 2005 the International Labour Organisation's Committee on Freedom of Association [CFA] dealt with a complaint by the ACTU relating to the construction industry legislation (Matter 2326), notwithstanding a request by the Australian Government that the CFA's consideration of the matter be put off to a later date.

4.8 The CFA's report made six key points including recommending amendments to the BCII Act 2005 to ensure, inter alia, conformity with freedom of association principles and the promotion of collective bargaining. The CFA asked the Australian Government to initiate further consultations with employers and trade unions in the construction industry to consider amendments to the BCII Act having regard to Conventions 87 and 98 (ratified by Australia) and principles of freedom of association. The CFA asked to be kept advised of developments.[22]

The conclusions of the CFA were:-

(a) The Committee requests the Government to provide specific information as to the forums for consultations and proposals tabled by the social partners with regard to the 2003 and 2005 Bills.

(b) The Committee requests the Government to take the necessary steps with a view to modifying sections 36, 37 and 38 of the Building and Construction Industry Improvement Act, 2005 (the 2005 Act), so as to ensure that any reference to "unlawful industrial action" in the building and construction industry is in conformity with freedom of association principles. It further requests the Government to take measures to adjust sections 39, 40 and 48-50 of the 2005 Act, so as to eliminate any excessive impediments, penalties and sanctions against industrial action in the building and construction industry. The Committee requests to be kept informed of measures taken or contemplated in this respect.

(c) The Committee requests the Government to take the necessary steps with a view to revising section 64 of the 2005 Act so as to ensure that the determination of the bargaining level is left to the discretion of the parties and is not imposed by law, by decision of the administrative authority or the case law of the administrative labour authority. The Committee requests to be kept informed in this respect.

(d) The Committee requests the Government to take the necessary steps with a view to promoting collective bargaining as provided in Convention No. 98, ratified by Australia. In particular, the Committee

[22] See **338th Report CFA paras 409-457**.

requests the Government to review, with the intention to amend, where necessary, the provisions of the Building Code and the Guidelines so as to ensure that they are in conformity with freedom of association principles. It further requests the Government to ensure that there are no financial penalties, or incentives linked to provisions that contain undue restrictions of freedom of association and collective bargaining. The Committee requests to be kept informed in this respect.

(e) The Committee requests the Government to introduce sufficient safeguards into the 2005 Act so as to ensure that the functioning of the ABC Commissioner and inspectors does not lead to interference in the internal affairs of trade unions and, in particular, requests the Government to introduce provisions on the possibility of lodging an appeal before the courts against the ABCC's notices prior to the handing over of documents. As for the penalty of six months' imprisonment for failure to comply with a notice by the ABCC to produce documents or give information, the Committee recalls that penalties should be proportional to the gravity of the offence and requests the Government to consider amending this provision. The Committee requests to be kept informed on all of the above.

(f) In light of the above, the Committee, recalling once again the importance that should be attached to full and frank consultations taking place on any questions or proposed legislation affecting trade union rights, requests the Government to initiate further consultations with the representative employers' and workers' organizations in the building and construction industry so as to explore the views of the social partners in considering proposed amendments to the legislation having due regard to Conventions Nos. 87 and 98, ratified by Australia, and with the principles of freedom of association set out in the conclusions above. The Committee requests to be kept informed of developments in this respect.

The CFA Report was subsequently endorsed by the Governing Body of the ILO.

4.9 On 22 November, 2005 an Australian Government spokesperson was reported as saying the ILO's decision was 'non-binding' and that the Government would not be changing the laws. On 10 February, 2006 the Australian Government provided further material to the ILO/CFA. The Government submission described the CFA Report as 'Interim Recommendations'.

4.10 The CFA issued its **342nd Report** in June 2006 in which it considered the Australian Government's additional submissions. The Report noted that *'discrepancies remain'* and *'regrets that the Government has not taken steps specifically aimed at addressing these through further consultation…'* The CFA observed that the Government's information *'largely reiterates the reasoning previously put forward by the Government.'* and *'again requests the Government*

to initiate further consultations... to ensure that the BCII Act is in full conformity with Conventions Nos 87 and 98.'

4.11 The legislative aspects of the case were then referred to the **Committee of Experts on the Application of Conventions and Recommendations** (CEACR).

On 9 October, 2006 the ACTU lodged a further complaint with the ILO in relation to the BCII Act 2005 requesting the matter be dealt with by CEACR.

At the **96th session** of the ILO's International Labour Conference (30 May – 15 June 2007), the Committee of Experts on the Application of Conventions and Recommendations reported **[Report III (Part 1A)]** as follows:-

The Committee once again requests the Government to indicate in its next report any measures taken or contemplated with a view to: (i) amending sections 36, 37 and 38 of the Building and Construction Improvement Act 2005, which refer to "unlawful industrial action" (implying not simply liability in tort vis-à-vis the employer, but a wider responsibility towards third parties and an outright prohibition of industrial action); (ii) amending sections 39, 40 and 48-50 of the Act so as to eliminate any excessive impediments, penalties and sanctions against industrial action in the building and construction industry; (iii) introducing sufficient safeguards into the Act so as to ensure that the functioning of the Australian Building and Construction (ABC) Commissioner and inspectors does not lead to interference in the internal affairs of trade unions – especially provisions on the possibility of lodging an appeal before the courts against the ABC Commissioner's notices prior to the handing over of documents (sections 52, 53, 55, 56 and 59 of the Act); and (iv) amending section 52(6) of the Act which enables the ABC Commissioner to impose a penalty of six months imprisonment for failure to comply with a notice to produce documents or give information so as to ensure that penalties are proportional to the gravity of any offence.

and

The Committee once again requests the Government to indicate in its next report the measures taken or contemplated so as to bring the Building and Construction Industry Improvement Act 2005, into conformity with the Convention, in particular with regard to the following points: (i) the revision of section 64 of the Act so as to ensure that the determination of the bargaining level is left to the discretion of the parties and is not imposed by law, by decision of the administrative authority; (ii) the promotion of collective bargaining, especially by ensuring that there are no financial penalties or incentives linked to undue restrictions of collective bargaining, especially by ensuring that there are no financial penalties or incentives linked to undue restrictions of collective bargaining (sections 27 and 28 of the Act authorise the Minister to deny Commonwealth funding to contractors bound by a collective agreement that, although lawful, does not meet the requirements of a building code; the latter:

(i) excludes a wide range of matters from the scope of collective bargaining; and (ii) contains financial incentives to ensure that AWAs may override collective agreements).

In its **348th Report** (November 2007), the CFA again criticised the Australian Government and urged further consultations *'to ensure that the BCII Act 2005 is brought into full conformity with Conventions 87 and 98…'*

The report concluded with a strong rebuke to the Australian Government:

The Committee would like to emphasise in this report that contrary to the Government's impression that the Committee's recommendations, reached at its November 2005 meeting, were interim and therefore non-binding, the Committee reached final conclusions and recommendations which are to be implemented fully and promptly following consultations with the social partners with the same due consideration the Government accords to all the obligations it has freely undertaken by virtue of its membership in the Organisation [see 346th Report, para 79].

4.12 On 3 December, 2007 the newly elected Australian Government wrote to the ILO advising of its intention to address the issues identified by the ILO, including those relating to the construction industry, through substantial amendments to the legislative framework. It suggested that the CEACR may wish to defer any further consideration of these matters until the Government responds and asks that its correspondence be brought to the attention of the CEACR and CFA.

4.13 At the **97th session** of the ILO's International Labour Conference (28 February, 2008), the Committee of Experts on the Application of Conventions and Recommendations reports **[Report III (Part 1A)]** reiterated its concerns. In respect of Convention 98 the Committee again requested the Australian Government to indicate in its next report the measures taken or contemplated to bring the *BCII Act* into conformity with the Convention.

4.14 In relation to Convention 87 the Committee noted the change of Government and the commitment of the new Government to addressing the issues identified by the Committee, including those in the building and construction industry. The Committee expressed the hope that its comments would prove useful to the Government in its deliberations on legislative revision. The Australian Government was asked by the Committee to report in detail in 2008.

Some Principles Arising From ILO Consideration of the BCII Act

4.15 In the most recent edition of the **Digest** of decisions and principles of the CFA (fifth edition 2006), which sets out the jurisprudence of the CFA which has general application, the decision in the case against the Australian

Government's construction industry laws are cited as authority for the following propositions:-

- the right to bargain freely with employers with respect to conditions of work constitutes an essential element in freedom of association and trade unions should have the right, through collective bargaining or other lawful means, to seek to improve the living and working conditions of those whom the trade unions represent. The public authorities should refrain from any interference which would restrict this right or impede the lawful exercise thereof (at para 881).

- Matters which might be subject to collective bargaining include the type of agreement to be offered to employees or the type of industrial instrument to be negotiated in the future, as well as wages, benefits and allowances, working time, annual leave, selection criteria in case of redundancy, the coverage of the collective agreement, the granting of trade union facilities, including access to the workplace beyond what is provided for in legislation etc. These matters should not be excluded from the scope of collective bargaining by law or as in this case, by financial disincentives and considerable penalties (such as provided for in the case of the National Code of Practice for the Construction Industry and the Implementation Guidelines) (at para 913).

- According to the principle of free and voluntary collective bargaining embodied in Article 4 of the Convention No 98, the determination of the bargaining level is essentially a matter to be left to the discretion of the parties and consequently, the level of negotiation should not be imposed by law, by decision of the administrative authority or by the case-law of the administrative labour authority (at para 988).

- It is essential that the introduction of draft legislation affecting collective bargaining or conditions of employment should be preceded by full and detailed consultation with the appropriate organisations of workers and employers (at para 1075).

5 THE ABCC

5.1 Against a background where almost any form of industrial dissent is punishable, the Howard Government established its preferred industry 'regulator', the ABCC. The ABCC has conducted itself not as an impartial regulator but as a blunt political instrument to undermine trade union organisation in the construction industry.

ABCC Powers

The ABCC has the **power to compel attendance to answer questions in person** (subject to giving 14 days written notice). The ABCC has issued 105 of these notices (as at 9/05/08). It can also compel the production of documents or require information to be given.

A person attending a compulsory interview has a right to have a legal representative present. However this may not necessarily be the representative of the attendee's choosing. Approximately 1/3 of those who have been questioned have had no legal representation at all.

A person can be required to give evidence on oath or affirmation.[23] They are usually questioned by experienced barristers and answers are transcribed for possible use in later prosecutions.

The ABCC can require a person to give an 'undertaking of confidentiality'. This means they are **unable to disclose or discuss what they have been questioned about with anyone other than their lawyer**.

Under the *BCII Act* it is criminal offence to:

- fail to provide required information or documents in the manner and form required by the ABCC's notice;
- fail to attend to answer questions;
- refuse to take an oath or affirmation; or
- fail to answer questions relevant to the investigation while attending the ABCC as required by the notice.

The penalty for such offences is **6 months imprisonment**.[24]

5.2 The BCII Act provides **no right to refuse to comply with these notices on the basis of self-incrimination,** however information gathered will generally not be able to be used as evidence against the person who provided it.[25] Those who are forced to answer questions are not generally those who are prosecuted or even accused of doing anything wrong.

ABCC officers are not just investigators, they are also prosecutors. They have absolute discretion over what cases they take to court and who they take them against.

These powers cannot be justified in the context of the regulation of industrial relations by the state.

[23] s 52 BCII Act
[24] Ibid
[25] s 53 BCII Act

Award/Agreement Breaches

5.3 The Australian Industrial Relations Commission has criticised the evidence-gathering processes of the ABCC

> *'One preliminary observation arises from the hearing of evidence. The evidence of the company witnesses brought by Ms Martino relied upon and adopted statements given by them to ABCC Inspectors at various times. The evidence in relation to these statements suggests, to some extent, that the statements as recorded by ABCC Inspectors reflect the particular terms of questions posed by Inspectors rather than a recording of the factual position as conveyed by the witnesses in their own words in evidence in the current matter. 48 Further, there is evidence that some information provided in interviews, which was favourable or neutral to Mr McLoughlin, was not recorded in statements prepared. ...... Mr Trantino, ... gave evidence that he did advise the ABCC Inspectors of the agreement reached in early June during the course of his interview by them.50 What is clear is that relevant evidence in relation to the exercise of right of entry by Mr McLoughlin after the time of the agreement at the Melbourne Lifestyle Centre site is not recorded in the statements of either of the managers to the ABCC. I am not persuaded to find that the ABCC has failed to make full and frank disclosure to the Commission in the sense considered in Australian Federation of Air Pilots and Transport Workers' Union of Australia v Skywest,51 as I was encouraged to do by Counsel for Mr McLoughlin. However, the manner in which the investigation and interviews appear to have been conducted and recorded by ABCC Inspectors was to cast Mr McLoughlin in the worst possible light, rather than to provide full evidence as to the manner in which Mr McLoughlin exercised his right of entry on to sites. That is a relevant consideration in assessing the evidence provided in the form of interviews undertaken and recorded by them*[26]*.*

The Federal Court of Australia has also recently cast serious doubt on the objectivity of the ABCC

> *'The promotion of industrial harmony and the ensuring of lawfulness of conduct of those engaged in the industry of building and construction is extremely important, but it is one which requires an even-handed investigation and an even-handed view as to resort to civil or criminal proceedings, and that seems very much to be missing in this case'*[27]

5.4 A single example of the way in which the ABCC conducts itself is sufficient to dispel any notion of impartiality. Although the *BCII Act* gives the ABCC responsibility for investigating breaches of awards in the construction industry,

[26] M Martino RE2007/2179 29 August 2007 para 79
[27] per Spender J QUD427 of 2007 Steven Lovewell, Bradley O'Carroll and Ors

they have made a decision not to investigate or prosecute breaches that involve underpayment of employee entitlements. However, unions have been investigated and prosecuted for allegedly breaching the dispute settlement clauses in awards/agreements.

5.4 The ABCC says that the Workplace Ombudsman is the appropriate government agency to pursue such breaches. It has referred a total of 4 such matters to the Workplace Ombudsman since September 2005. The Workplace Ombudsman has stated that, consistent with the terms of the BCII Act, the role of pursuing award/agreement breaches is properly a matter for the ABCC.[28]

Wilcox Review

5.5 In the event that the Bill presently before this Committee is not passed by the Parliament and the Wilcox Review into regulatory arrangements for the construction industry proceeds, the Combined Construction Unions will provide a comprehensive critique of the ABCC as part of that process.

6 CONCLUSION

The Combined Construction Unions support the Bill before this Committee and the immediate repeal of the Building and Construction Industry Improvement Act 2005.

[28] See attachment 1.

ATTACHMENT 1

Australian Government

Office of Workplace Services

- 4 JUN 2007

Director's Office

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Mr John Sutton
National Secretary
Construction Forestry Mining Energy Union
12th floor, 276 Pitt Street
SYDNEY NSW 2000

Dear Mr Sutton

Thank you for your letter of 14 May 2007 concerning compliance with workplace relations laws in the building and construction industry.

As you would be aware, the Australian Building and Construction Commission (ABCC) was established on 1 October 2005 and provided with the role and powers to enforce workplace laws in the building and construction industry. As such, it has primary responsibility for investigating breaches of workplace relations laws, agreements, awards, or unlawful behaviour in the building and construction industry, including underpayment of wages claims.

The Office of Workplace Services (OWS), which under the Government's recently announced policy will shortly become the Workplace Ombudsman, provides a wider enforcement role and investigates claims and suspected breaches across all industries, including some building and construction industry claims that are referred to it by the ABCC.

I welcome the opportunity to address the second issue you raised regarding the view held by some that the OWS does not investigate claims involving amounts of less than $10,000. I can categorically assure you that this is not, and has never been, OWS policy. The OWS regularly receives and acts on claims for smaller amounts. If you or your members at any time experience problems in our staff not acting on smaller claims, please do not hesitate to raise them with me.

I trust that the above information clarifies OWS' role and allays any concerns.

Yours sincerely

Nicholas Wilson
DIRECTOR
OFFICE OF WORKPLACE SERVICES

30th May 2007

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