Senate Education, Employment and Workplace Relations Committee:

Inquiry into the Building and Construction Industry (Restoring Workplace Rights) Bill 2008

Submission by the Australian Council of Trade Unions, and State Trades and Labour Councils

October 2008

Introduction

1. The ACTU and State Trades and Labour Councils (TLCs) welcome the opportunity to make a submission to Senate Employment, Workplace Relations and Education Legislation Committee considering the *Building and Construction Industry Improvement (Restoring Workplace Rights) Bill 2008.*

2. This submission draws on the submissions filed by the ACTU to the Senate Employment, Workplace Relations and Education References Committee *Inquiry into the Building and Construction Industry Improvement Bill 2005 and Building and Construction Industry Improvement (Consequential and Transitional) Bill 2005* and the *Building and Construction Industry Inquiry* in December 2003.

3. The ACTU and TLCs opposed the introduction of the BCII Bill 2005, which substantially replicated the BCII Bill 2003 that was rejected by the Senate after a substantial inquiry by this Committee.

4. It is the view of the ACTU and union peak bodies that there should be a single set of industrial laws applying uniformly to all employers and employees in the federal jurisdiction, without artificial distinctions.

5. The ACTU and TLCs agree with the conclusion of the Opposition Senators' Report into the BCII Bill 2005: that the legislation is 'obsessively punitive and opportunistic.'[1]

6. The *Building and Construction Industry Improvement Act 2005* (*BCII Act*) introduced one set of laws that apply exclusively to workers in one sector of one industry, namely the commercial (as opposed to domestic) construction industry. There is no justification for this.

[1] "Oppositional Senators' Report" *Provisions for the Building and Construction Industry Improvement Bill 2005 and the Building and Construction Industry Improvement (Consequential and Transitional) Bill 2005.* (Employment, Workplace Relations and Education Legislation Committee) May 2005. [Senate Report] p15

One standard for all workers

7. The *BCII Act*, in its application to part of one industry, is inconsistent with the principle that all citizens should be required to obey the same laws.

8. The Act is fundamentally unbalanced; the exclusion of the housing industry demonstrates that the former government was concerned with restricting the ability of unions to function, rather than dealing fairly with all parties in the industry, including employers.

9. On the introduction of the Bill to parliament it was made clear by the then Minister of Employment and Workplace Relations that the legislation specifically targeted the conduct of unions.[2]

10. Before the 2001 election, the Howard Government set up the Cole Royal Commission to investigate the construction industry this was used as the tenet to justify the Act. Commentators have noted that the Commission was purely politically motivated.[3] This Senate Committee's *Beyond Cole* report in 2004 noted that the Commission was an 'expensive waste of time'.[4] It was the view of the 2004 Committee Majority that they could have no confidence that the findings were 'necessarily fair or accurate.'[5]

11. Notwithstanding the findings of Cole, research papers provided to the Cole Commission and recorded in the Senate Committee's report showed:

> [T]hat Australia's construction industry ranked second or better in 16 of the 23 comparative international studies of the industry consulted by the researchers; that on

[2] Hon Kevin Andrews. *House of Representatives: Hansard*. 9/03/05. p6
[3] In *Beyond Cole*, the Senate Committee notes, *The Australian* labelled the Cole Royal Commission a "political stunt" and the *Australian Financial Review* editorialised that it was as much about the 'political cycle as about policy.' See Senate Employment, Workplace Relations and Education Reference Committee. *Beyond Cole: The Future of the construction industry: confrontation or cooperation?* June 2004. para 2.1
[4] Ibid para 2.54
[5] Ibid para 2.54

> productivity specifically, Australia ranked second in 5 of the 7 reports; that on completion times Australia ranked second in all studies; and finally, on cost per square metre Australia was consistently rated as second lowest in all studies.[6]

12. Research by consultancy firm Econtech is often cited as justification on economic grounds for a separate set of laws for the commercial construction industry. In addition to our concerns, builders and industry groups have both speculated the validating of the methodology Econtech applies.[7] This Committee also cites research by Dr Philip Toner that shows the method used by Econtech is inconsistent with 'authoritative productivity data produced by the ABS'; and inconsistent with international comparison research completed by a University of NSW organisation Unisearch.[8]

13. In 2004, review of Econtech led this Committee to conclude that it was 'highly selective' and produced for a Government who has a 'tendency…to purchase tailored research which is skewed in favour of the contention which the Government wishes to put forward.'[9]

14. The lack of substantial evidence for special legislation for construction industry led this Committee to comment that it was on 'shaky foundations that the Government intends to erect the equally shaky edifice of its "reform" legislation.'[10]

15. The Senate Committee also noted: 'that the practical result of the separate legislation is that it will provide reduced and inferior rights and entitlements to building workers, compared to all other workers.'[11] This has been the consequence of the introduction of the Bill and is the reality for construction workers in Australia.

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[6] *Beyond Cole* para 1.10
[7] See ibid 1.95 and 1.96
[8] Ibid para 1.91 and 1.90
[9] Ibid *para* 1.97
[10] Ibid para 2.54
[11] Ibid para 1.101

Building Industrial Action

16. The *BCII Act* seeks to make all industrial action (as defined in Chapter 5 of the Act) unlawful unless it is protected action (as defined in the Act).

17. The restrictions imposed by the Act were not based on any evidence that industrial action, or unprotected industrial action, presented a problem or a looming problem of such significance that part of the industry should be singled out for such onerous restrictions.

18. The Cole Royal Commission findings are often used to justify the existence of this Act and in particular the restrictive industrial action provisions. Yet the number of incidents of unprotected action in the building and construction industry found by the Royal Commission were small when considered in the context of the industry as a whole. Findings were made in relation to the taking of unprotected industrial action in only 24 disputes around the country since 1999: four in NSW,[12] seven in Victoria,[13] three in Queensland,[14]two in South Australia,[15] seven in Western Australia[16] and one in Tasmania.[17]

19. This is not indicative of such a problem that would require special legislation.

20. Section 36 of the Act inserts a definition of 'building industrial action' that is broader than the definition of industrial action found in the *Workplace Relations Act 1996* (the *WR Act*).

21. The purpose of the broadening of the definition of building industrial action is relevant in the consideration of sections 37 and 38 of the Act which makes certain building industrial action unlawful.

[12] Mirvac, Multiplex, Prime Constructions, Bovis Lend Lease
[13] Anzac Day 1999, Saizeria, The Age, Federation Square, Victorian State Netball and Hockey Centre, Walter Construction
[14] Barclay Mowlem, Nambour Hospital, Sun Metals
[15] Pelican Point, Alston Power
[16] Bluewater Apartments, Doric Group Holdings, Kwinana Civil Construction, 240 St George's Terrace, Universal Construction, Woodman Point Wastewater Treatment Plant, Worsley Expansion Project
[17] Royal Hobart Hospital

22. Section 36 further defines excluded action such that protected action (as further defined in Chapter 5 Part 3) will not be unlawful industrial action.

23. Section 37 specifies what building industrial action will be unlawful industrial if the action is constitutionally-connected, and industrially-motivated, and not excluded. This is the nub of the Act. The emphasis is on defining unlawful industrial action and making this definition as broad as possible.

24. Given the definitions of 'constitutionally-connected', 'industrially-motivated' and 'excluded' action it is clear that the entire intent of this section is to restrict workers and their unions of the rights and protections available to the rest of the workforce under the *WR Act* to bargain over their terms and conditions of employment.

25. The ACTU and TLCs object to the broad definition of industrial action for the purposes identified above. It is our submission that the definitions of such in the *WR Act* are more than ample and that it is appropriate that workers have access to the same rights and responsibilities regardless of the industry in which they are employed. There is no justification for singling out workers in part of the building and construction industry for this treatment.

Penalties

28. Prior to the *BCII Act*, penalty provisions and criminal sanctions were highly unusual in an industrial context and consideration should be given as to whether such sanctions are appropriate at all.

29. Penalties for industrial action were repealed by the Federal government with support of all parties in 1930. It is not until recently Australia has seen the re-emergence of any such penalties for industrial action. The *BCII Act* not only outlaws virtually all forms of industrial action, it imposes harsh penalties. For a democratic country, and one that prides itself on civil rights, this should be of grave concern.

30. Building workers under the *BCII Act* face starkly different penalties than exist for other workers under the *WR Act*. Under the *BCII Act* unlawful industrial action attracts a maximum penalty of $110,000 for a body corporate, including a union, and $22,000 for an individual. Under the *WR Act* the maximum penalty for taking industrial action in breach of s494 is $33,000 for a body corporate, and $6,600 for an individual.

31. The result is that penalties for workers in the construction industry are three times the amount that applies (with greater restrictions) to all other workers under *Work Choices* (laws that were rejected by the Australian community).

32. In 2005, this Senate Committee notes that civil penalties for construction workers has 'been considerably increased',[18] but supplies no justification for the increase or the ensuing inequality it creates.

33. Other penalties under the Act directly infringe civil liberties. Section 52 of the *BCII Act* makes it a criminal offence with penalties of up to 6 months imprisonment for failing to comply with a notice to provide documents/ information, or to answer questions by the ABCC.[19]

Enforcement

34. Sections 48-50 of the Act go to penalties to be imposed on anyone who takes unlawful industrial action as defined in the Act. This section provides for an expanded class of persons who can seek orders with respect to a contravention of a civil penalty provision, a concern raised by the ACTU in our 2005 submission to this Committee.

35. This expanded class of persons, which includes representatives from the state's own agency the ABCC and can be further expanded via the regulations, allows for persons external to the matter at hand to seek to have penalties

[18] *Senate Report 2005* para 1.10
[19] *BCII Act* s52

imposed even where the parties to the matter do not consider this a useful or beneficial course to take.

36. As the Minister of the time made clear in his second reading speech, the provisions allow for *substantial uncapped compensation* and *do not rely on an affected party to enforce the law*. [20]

37. One would have to question the motivation of a government that seeks to pursue workplace claims after they are resolved by the parties involved. The Opposition Senator's Report in 2005 concluded that the legislation was 'obsessively punitive and opportunistic.'[21] Balanced industrial relations laws should facilitate cooperative and stable relationships between employees, their unions and employers. Unrequested intervention in enforcement is indeed 'punitive and opportunistic' and works against building high trust, productive workplaces.

Australian Building and Construction Commissioner

38. The effect of introducing harsh and unjustified laws for one section of the workforce has been multiplied by the creation of a regulating body with extensive powers, the Office of the Australian Building and Construction Commissioner (ABCC). The ACTU's 2003 submission to the Senate Committee Inquiry stated that the establishment of the ABCC was both unnecessary and undesirable.[22] This objection remains.

39. There are numerous examples that suggest the ABCC is not even handed in its approach. One example is that of their investigations, 84 per cent have involved workers or their union representative, while only 6 per cent employers or subcontractors.[23] And this is in an industry that has the fourth

[20] *Hansard* 9/03/05. p7
[21] *Senate Report 2005*. p15
[22] *ACTU Submission to the Senate Employment, Workplace Relations and Education Reference Committee: Building and Construction Industry Inquiry*. December 2003.
[23] *ABCC Annual Report 2006-07*. Figure 2.1

highest underpayment of wages:[24] employers are not immune from unlawful activity.[25]

40. That said, the ACTU does not believe this Inquiry is the appropriate place to review the conduct of the ABCC. The fundamental issue is that the Act has provisions for compliance powers that are entirely unnecessary in an industrial context.

41. Under Section 52 the ABC Commissioner is given powers to compel person/s to provide documentation or answer questions before the Commissioner.

42. Section 53 (1)(b) further infringes basic civil liberties, including the right to silence. It states:

> A person is not excused from giving information, producing a document, or answering a question, under section 52 on the ground that to do so:
>
> - would contravene any other law; or
> - might tend to incriminate the person or otherwise expose the person to a penalty or other liability; or
> - would be otherwise contrary to the public interest.[26]

43. Under Section 53(2) the Act provides a small protection for Section 52 in that the document, or information obtained under Section 52 is inadmissible against the person who provides it. However, this does not protect the right to silence undermined in Section 52. The right to silence is an important right that protects against the use of oppressive methods of obtaining information. Section 53 only protects the person from their evidence being used directly against them. Which is secondary concern to ensuring information is not collected through intimidation and/or the use of oppressive methods.

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[24] 'Submission of the Office of Workplace Ombudsman' *AIRC Workplace Relation Act s576E – Award Modernisation (AM2008/1)*. June 2008 p12-13.
[25] See 'Lawless employers' *Beyond Cole* p89
[26] *BCII Act* s51(1b)

44. The effect of Section 53, as the ABCC acknowledges, is that compliance powers are most frequently used to interview people who are not suspected of any wrongdoings.[27]

45. The ABCC has used issued 105 notices for compulsory attendance to answer questions, under Section 52. The ABCC maintains these powers are essential.[28] However, the most recent report on compliance powers by the ABCC shows that out of 85 interviews conducted, only 13 were about matters that later resulted in a penalty imposed by the courts. Twenty-seven interviews, almost one third, did not result in proceedings of any kind. The remainder had not been concluded.[29]

46. Concern about this power has been raised by: the Council for Civil Liberties who said, 'Construction workers have been deprived of fundamental civil liberties that we all take for granted.'[30]

47. During the second reading parliamentary debate Federal Member Mr Emerson raised what he called the 'MacCarthyism' in this law, which required people to answer questions such as: 'are you or have you ever been a member of a trade union?'[31] The Hon Mr Crean noted concern that a person, who was not suspected of any wrongdoing can be compelled to answer questions, and then if they refuse, 'the penalty is not a fine; it is jail.'[32] Furthermore, then Shadow Minister for Industrial Relations, Mr Stephen Smith objected that these powers would be provided to the Government's chosen regulator: 'The ABCC's predecessor, the Building Industry Taskforce, has had an entirely antiunion focus since it was established in 2002…Labor does not believe that the task

[27] The ABCC reports in June 2006 that 'the compliance powers have generally not been used in respect of persons suspected to have contravened the law.' (ABCC *Report on the Exercise of Compliance Powers by the ABCC: For the period 1 October 2005 to 30 June 2006.* p8)
[28] ABCC. *Report on the Exercise of Compliance powers by the ABCC: for the period 1 October 2005 to 31 March 2008* p6.
[29] Ibid.
[30] Cameron Murphy the President of Council of Civil Liberties quoted by Ms Hoare. *Hansard* 11/08/08 p17
[31] *Hansard* 11/08/05 p54
[32] Ibid p55

force's successor, the ABCC should receive these additional coercive powers.'[33]

48. In addition to the concerns about civil liberties, Professor of Law, George Williams noted that this section, in conjunction with section 52 (7) 'has the potential to override national security laws'.[34] Such powers are excessive, particularly for dealing with what are extensively regulated contractual arrangements between employees, their representatives and employers.

49. When laws exist that infringe individual civil liberties, overseeing or supervision will not correct the injustice. Such laws should be repealed and this Bill is to be commended for that.

Scope of Building and Construction Industry

54. While on one hand the *BCII Act* seeks to treat workers in construction industry differently, on the other it tries to rope-in as many workers into its coverage as possible, significantly blurring the line as to what constitutes building work.

55. This contention is supported in the scope of the definition of 'building work' under Section 5 of the *BCII Act* 2005: which includes work seemingly removed from construction site such as prefabricated components made off-site, lighting, alteration of railways, site restoration, and landscaping.[35]

56. Both unions and employer groups raised concern to the Senate Inquiry 2005 regarding the scope of the definition for 'building work'.[36] DEWR officers sought to allay this concern by claiming: 'it is overstating it to say that, if you fall within the definition of building industry work, you are for all purposes part of the building and construction industry.'[37]

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[33] Hansard 11/08/05. p53
[34] George Williams *The Australian Building and Construction Commission: An Appropriate use of public power?* (speech to Forum of Industrial Laws Applying in the Australian Construction Industry) 25 August 2008.
[35] See *BCII Act* s 5.1 d)
[36] *Senate Report 2005*. para 1.14
[37] DEWR quoted in *Senate Report 2005*. para 1.16

57. The Opposition Senators' Report rejected the suggestion from DEWR that these were 'ambit powers.'[38] Noting the Government would use these powers to 'chase rabbits down every hole.'[39] This appears to be the case.

58. To further justify the extended definition of building work the Government's Majority Report noted in 2005:

> The Committee was also told that the bill provides a mechanism for regulating out certain classes of work that might be capture inadvertently by the legislation. If the Government believed that that was not appropriate to the objectives of the legislation it would be possible to make a regulation which excised them from the coverage of the bill.[40]

59. Despite confusion and the extended application of the Act, the Government has chosen not to use this mechanism.

60. The wide scope of the definition of 'building work' in the *BCII Act* only seeks to reaffirm that special laws for the industry are unwarranted. It also raises compliance issues and widespread confusion over which workers and employers the laws apply to.

61. Regardless of how they are defined, building workers have fewer rights than all other workers as a result of the *BCII Act*.

Occupational Health and Safety

63. This Act and its regulating body does nothing to address many of the issues in the construction industry that are of concern to workers, employers, and the government: including unpaid entitlements and superannuation, tax evasion,

[38] "Opposition Senator's Report" *Senate Report 2005*. para 2.16
[39] Ibid. para 2.15
[40] *Senate Report 2005*. para 1.17

phoenix companies, underpayment of workers' compensation, and the development of skills.[41] Also unaddressed is the most significant area of concern for one of Australia's most dangerous industries: health and safety.

64. Since the introduction of the *BCII Act* safety in the industry has not improved. Deaths have increased: from 19 in 2004/05 to 36 in 2005/06; 33 in 2006/07; and, 40 in 2007/08.[42]

65. To protect health and safety, to save lives and avoid injuries (which can result in costly workers' compensation and other flow on costs to society) workers must be able to stop work if there is a hazard at their workplace. The Act has provisions for stopping work in event of a serious health and safety risk. However, it is the view of the ACTU and TLCs that this protection is not adequate.

66. Section 36 (1) informs that building industrial action does not include:

(g). action by an employee if:

- the action was based on a reasonable concern by the employee about an imminent risk to his or her health or safety; and
- 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.[43]

67. This should be read with Subsection (2):

> Whenever a person seeks to rely on paragraph (g) of the definition of *building industrial action* in subsection (1),

[41] See Chapter 4 and 7 in *Beyond Cole*
[42] See worker fatalities by industry of employer in *ASCC Notified Fatalities Reports*: 2004/05, 2005/06, 2006/07, 2007/08
[43] *BCII Act* 36 (1)

that person has the burden of proving that paragraph (g) applies.[44]

68. Statutory changes to the burden of proof must be done with extreme caution. The consequence of the reverse burden of proof in an OHS context is concerning, particularly given that substantial penalties exist for action that is later determined to be unlawful.

69. As independent MP Mr Bob Katter noted: '…if you have a situation that is dangerous then men must be able to withdraw their labour. If they are not allowed to withdraw their labour then we have a situation which is extremely dangerous indeed.'[45]

70. In effect the Act requires a worker to weigh up a health and safety risk against a potential penalty. The reverse burden of proof asks the worker to be lawyer and assess his or her legal liability alongside their safety. To assess whether the risk is first 'imminent' and that the risk directly affects 'his or her safety'. If the risk was not imminent but posed a future risk, or if the risk was for the safety of a co-worker, it seems likely the action would be unlawful.

71. After this assessment, the worker must make sure they satisfy Section (1)(g.ii). Section (1)(g.ii) in the *BCII Act*, is a tighter restriction than that imposed by the *WR Act* where a worker should not unreasonably refuse alternative work 'that is safe and appropriate for the employee to perform'.[46] Again, this broadens the definition for unlawful action for construction workers. The removal of 'and appropriate' from the *BCII Act* means a construction worker could be required to do work they are not qualified to do. Perhaps more disturbing, it also, gives the employer punitive powers to compel a worker, who stops work over a serious safety issue, to perform work that could be inappropriate and/or degrading.

[44] *BCII Act* s36 (2)
[45] *Hansard*. 11/08/05 p10-11
[46] *WR Act* s 420(1gii)

72. Widely accepted by all parties is the critical importance of the management of occupational health and safety for the industry.[47] The failure of the *BCII Act* to make concerted progress in reducing injuries and fatalities in the industry must be of concern.

Our international obligations

73. The *BCII Act* fails to meet Australia's obligations under international law. Numerous submissions have now been put to the International Labour Organisation (ILO). Expert committees have advised the Australian Government to amend the *BCII Act* with regard to Convention 87 and 98 (both ratified by Australia) and principles of freedom of association.[48]

74. The ILO recommendations have included:

a. Amending the BCII Act to ensure that any reference to "unlawful industrial action" conforms with freedoms of association principles;
b. Revise the Act to 'ensure the determination of the bargaining level is left to the discretion of the parties and is not imposed by law';
c. Ensure there are 'no financial penalties, or incentives linked to provisions that contain undue restrictions of freedom of association and collective bargaining';
d. Amendments to the Act to ensure the fair functioning of the ABCC: including, the introduction of a provision to allow parties to appeal an ABCC notice to produce documents, and the amendment of the penalty for failure to comply to a notice so that penalty is 'proportional to the gravity of the offence'; and
e. For the Government to keep the ILO informed of relevant developments.[49]

[47] *Beyond Cole* p125
[48] See *338th Report Committee of Freedom of Association* paras 409-457
[49] Ibid. para 457

75. Encouragingly within a fortnight of being elected (3 December 2007), the new Australian government wrote to the ILO advising its intentions to address the issues identified by the ILO through substantial amendment to the legislative framework.

76. At the 97th session of the ILO's International Labour Conference (28 February, 2008), the Committee of Experts on the Application of Conventions and Recommendation reiterated its concern. It noted that the newly elected government had informed the Committee of its commitment to address issues it has raised with regard to the *BCII Act 2005*.[50]

77. The Government's recognition of the need to act on the issues identified by the ILO is commendable, and we urge the Government to act as a matter of urgency.

78. The full repeal of the *BCII Act* would enable Australia to meet its obligations under international law.

Conclusion

79. The ACTU and TLCs supports the Bill before this Committee and immediate repeal of the *BCII Act*.

[50] *CEACR: Individual Observation concerning Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) Australia (ratification: 1973).* February 2008.