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8th April, 2005

The Committee Secretary
Senate Rural and Regional Affairs
and Transport Committee
Department of the Senate
Parliament House
Canberra ACT 2600.

Email: rrat.sen@aph.gov.au

Dear Sir or Madam

Auslink (National Land Transport) Bill 2004;
Auslink (National Land Transport – Consequential and Transitional Provisions) Bill 2004

I understand that the Senate has referred the provisions of the above bills to the Senate Rural and Regional Affairs and Transport Legislation Committee for inquiry and report by 12 May 2005.

I would be grateful if you would pass on to the Committee the following submission of the CFMEU Construction & General Division in relation to the Bill.

Yours faithfully,

John Sutton
NATIONAL SECRETARY

AUSLINK (NATIONAL LAND TRANSPORT) BILL 2004

and

AUSLINK (NATIONAL LAND TRANSPORT – CONSEQUENTIAL and TRANSITIONAL PROVISIONS) BILL 2004

SUBMISSION OF THE CONSTRUCTION FORESTRY MINING AND ENERGY UNION (CONSTRUCTION & GENERAL DIVISION)

to the

SENATE RURAL AND REGIONAL AFFAIRS AND TRANSPORT COMMITTEE

April 2005

Interest of the CFMEU

The Construction Forestry Mining and Energy Union ("CFMEU") is the major union in the building and construction industry. A large number of its members, and potential members, will be employed on Auslink funded projects. The union is concerned that Auslink funding is being used as a platform for the Australian Government to implement its industrial relations policies, which are overtly hostile to the union movement generally, and to the CFMEU in particular.

It is said that the purpose of the Auslink (National Land Transport) Bill 2004 is to assist national and regional economic and social development by the provision of Commonwealth funding aimed at improving the performance of land transport infrastructure.[1]

That is a commendable objective. However, it is inappropriate that the Government should seek, as by-product of Auslink funding, to force its industrial relations policies upon the States and construction industry participants who are responsible for building the infrastructure.

Auslink White Paper

In the Auslink White Paper [June 2004][2] it is stated that:

> *"It is Australian Government Policy to extend the application of the National Code of Practice for the Construction Industry (the code), and the Australian Government Implementation Guidelines for the Code (the guidelines), to all directly funded construction projects and to*

[1] Explanatory Memorandum
[2] Chapter 5 – Implementing Auslink

indirectly funded projects where it provides a substantial contribution towards the cost of the project.

"The code and the guidelines will apply to all indirectly funded construction projects where the Government's contribution to an individual project is $5 million or more and where that contribution represents at least 50 per cent of the total project value. They will also apply when the Government's contribution to an individual project is over $10 million, irrespective of the proportion that represents of the total project cost.

"The requirement to apply the code and guidelines to all projects above the thresholds is a condition of Australian Government funding. It will be included in funding agreements with the States, Territories, infrastructure managers and local government."

The Code of Practice

The National Code of Practice for the Construction Industry is a fundamentally flawed instrument.

The CFMEU has criticised the way the present Code has operated.[3] It is in fact a model not for producing value for public construction dollars but for arbitrary, highly political and virtually non-reviewable decision-making by executive government. It has its direct equivalent in the Commonwealth's recent policy of tying tertiary education funding to specific industrial relations outcomes.

[3] See *"Analysis of the Cole Royal Commission into the Building and Construction Industry"* (CFMEU June 2003) pg 36.

The Cole Royal Commission's Discussion Paper on Codes of Practice[4] stated that Codes have at least three distinct advantages for government. First, they do not require parliamentary approval. Second, it is more difficult to challenge government interpretation and implementation because Codes are not legislation. Third, enforcement can be achieved by the threat of disadvantageous commercial consequences, rather than by expensive enforcement mechanisms.

The Federal Government has exploited these advantages to further its anti-union agenda through the National Code of Practice and the Implementation Guidelines.

The Government is dictating the terms of agreements between employers and unions where, left to their own devices, unions and employers have or would have reached agreement on terms other than those required by the Government.

Further, the freedom of association provisions of the Code are being implemented in such a way as to prevent a range of conduct that promotes union membership and is not in breach of Part XA of the WRA. The freedom of association provisions of the Guidelines go well beyond the provisions of the Code and are designed to weaken unions rather than to protect freedom of association.

The present National Code applies to *"any party wishing to do business with governments or work on government construction projects".* The term "party" includes *"unions - their officials, employees and members".*[5]

[4] Discussion Paper 8 – *Codes of Practice for the Building and Construction Industry*, August 2002.
[5] Ibid p 2.

However, it is obvious that unions do not "do business" with Governments (in a commercial sense), and do not "work on" Government construction projects.

It is one thing to enter into a commercial contract to build something for a Government. It is an entirely different matter to represent the industrial interests of employees engaged on the building work.

Unions do not choose the projects where their members are employed, and do not enter into contractual arrangements with Governments in order to represent their members.

Moreover, unions have never been consulted in relation to the formulation of the National Code.

It is therefore difficult to understand how the unions can be "bound" by, or be "parties" to, the Code and the Implementation Guidelines in a formal manner. The unions can hardly have obligations under the Code if they are not true parties to the Code.

The content of the Code appears to be entirely at the discretion of the Minister[6] with the only obligations being to make the Code publicly available and table a report on its application before Parliament.

The Australian Industry Group has stated that:-

> *"…by using the Corporations Power under the Constitution, the [BCII] Bill extends the reach of the Code beyond that recommended by the Royal Commission. The Code's role extends beyond standard-setting for contractors engaged on projects funded by the Commonwealth, to the regulation of all incorporated building contractors. The Building Code would regulate*

[6] Section 26 Building & Construction Industry Improvement Bill 2003.

significant sectors of the construction industry, using an instrument that would not be subjected to Parliamentary or judicial scrutiny…..In order to protect the rights of building contractors and other building industry participants, there must be an appropriate degree of Parliamentary and judicial scrutiny of the Code and any amendments made to it."[7]

Building and Construction Industry Improvement Bill 2003

In the BCII Bill the Government attempted to give some semblance of legality to a flawed process and to extend the reach of the Code mechanism, but without addressing any of the problems inherent in the way the existing Code now operates.

Given the terms of the current Code and the Government's overt hostility to trade unions, the Code provisions of the BCII Bill have been opposed by the CFMEU. For similar reasons the Union is opposed to the provisions of the Auslink Bill which enable the Minister to make funding of projects conditional upon compliance with the Code, the implementation guidelines and the Government's IR policies generally.

Government's IR Policies

Those policies include a preference for Australian Workplace Agreements (AWAs) or s.170LK non-union agreements (as opposed to s.170LJ agreements with unions), and the encouragement of "independent contracting". There appears to be nothing to prevent the Government from converting these preferences into requirements under its Code of Practice.

One way of assessing whether the use of a "code" mechanism represents sound public policy is to ask whether the principles that it embodies are

[7] The AIG's Position on the Exposure Draft – October, 2003 pg 48-49.

uncontroversial and have widespread support throughout the community. If, for example, there is across-the-board or at least bipartisan support for those principles, then the scope for criticism of the code is greatly reduced.

That is not the case here. The Code covers matters such as union rights and freedom of association about which there are widely differing views. Although the drafters have tried to frame the Code in the language of political neutrality, its content is unambiguously political.

Transport Minister John Anderson has stated he will withhold Auslink funding "as long as it takes" to get States to conform with the Government's IR policies, on the basis that the Government requires acceptable value from its funding.[8]

As is pointed out earlier in this submission, the present Code and guidelines are not a model for producing value for dollars. Rather, they are a model for the implementation of arbitrary and politicised decisions by executive government.

Government contracting processes should be open and fair. However, in relation to Auslink contracts, the Government is effectively saying that public contracts will only go to those States that are prepared to adopt the Government's political views on the matters contained within the Code. That is not a proper basis for determining which States will obtain the benefit of essential transport infrastructure, and for the awarding of lucrative government contracts.

It is highly desirable that the Auslink bill should afford protection against the Government attaching its industrial relations "strings" to the funding of projects. In its present form, the bill provides no such protection.

[8] The Age 21 November 2004