


The Committee Secretary
Select Committee on Working Families in the ACT
ACT Legislative Assembly

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 A.C.T. LEGISLATIVE ASSEMBLY COMMITTEE OFFICE	
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Submission from UnionsACT with respect to:

- the Workplace Relations Amendment (Better Bargaining) 2005 Bill; and
- the Building and Construction Industry Improvement Act 2005

and the effects of this legislation on working families in the Australian Capital Territory.

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This submission is prepared for and on behalf of UnionsACT and its affiliates. For the purposes of this submission we have defined 'working families' to include 'traditional and single parent families', 'same sex families, with or without children' and 'extended and blended families' where one or more members is in paid employment of any description.

This submission raises concerns relating to Workplace Relations Amendment (Better Bargaining) 2005 Bill and the Building and Construction Industry Improvement Act 2005. A conclusion is provided for both the Workplace Relations Amendment (Better Bargaining) 2005 Bill and Building and Construction Industry Improvement Act 2005.

We have also provided as an attachment the ACTU WorkChoices: Family Impact Statement for reference in relation to significant changes to the

Workplace Relations Amendment (Better Bargaining) 2005 Bill

BACKGROUND:

1. The current Workplace Relations Amendment (Better Bargaining) Bill 2005 was introduced into the House of Representatives in Federal Parliament on 9 March 2005.
2. The substance of the bill was originally introduced into the House on 6 November 2003 as the Workplace Relations Amendment (Better Bargaining) Bill 2003.
3. The 2003 bill lapsed with the prorogation of the previous parliament, the 40th Parliament.
4. The current bill, is identical to the 2003 bill, other than the deletion of schedule 3 of the 2003 bill, which dealt with 'claims pertaining to the employment relationship', an issue subsequently dealt with in the Workplace Relations Amendment (Agreement Validation) Act 2004.
5. The 2003 bill was considered by the Senate Employment, Workplace Relations and Education Legislation Committee as part of an inquiry into the Workplace Relations Amendment (Award Simplification) Bill 2002, the Workplace Relations Amendment (Better Bargaining) Bill 2003, the Workplace Relations Amendment (Choice in Award Coverage) Bill 2004 and the Workplace Relations Amendment (Simplifying Agreement Making) Bill 2004. The Senate committee reported on 17 June 2004.

OVERVIEW:

6. The bill amends the Workplace Relations Act to:
7. Allow the Australian Industrial Relations Commission (AIRC) to more readily suspend a bargaining period where one or both of the parties to a collective bargaining process are taking 'protracted' industrial action.
8. Under the act, where a bargaining period is suspended and industrial action occurs or continues, injunctions and damages may be sought because, without a bargaining period in place, industrial action is unprotected.
9. Allows a third party affected by industrial action (eg. A business client) to apply to the AIRC to have a bargaining period suspended and thus terminate protected industrial action.

10. The bill denies access to protected action during the life of a certified agreement, including over matters not contemplated in the certified agreement.
11. This overrides the full bench of the Federal Court's Emwest decision¹, which found that protected action may be taken about issues not included in a current certified agreement.
12. The bill strengthens provisions outlawing pattern bargaining, contrary to the spirit of the decision by Mr Justice Munro in the so-called metals case.
13. The bill limits the capacity to take protected industrial action to single employers and not multiple employers.
14. The bill does not affect or limit all forms of industrial action in the same even-handed way. Eg. employer initiated lockouts under AWA negotiations are unaffected.
15. Generally, the bill further undermines and restricts the capacity of employees to choose to bargain collectively. A key aim of the bill is to restrict the capacity of employees to take protected industrial action.
16. NB. These further restrictions are proposed by the government in the face of repeated observations of the International Labour Organisation's committee of experts that Australian law currently does not meet the requirements of conventions 87 and 98 in respect of collective bargaining and freedom of association, particularly as they relate to the right to strike.

Schedule 1:

Industrial action and lockouts before expiry of agreements

17. This schedule has the effect of weakening the ability of employers and employees to negotiate issues that arise during the life of an agreement—usually a three-year period. This aspect of the bill is the government's legislative response to the Federal Court's Emwest decision, where the full Federal Court found that, under section 170MN, protected industrial action could be taken prior to the nominal date of expiry of a certified agreement, provided that the protected action was related to claims not already covered by the agreement.
18. The bill goes further than merely remedying the Emwest decision, as it prohibits all industrial action, irrespective of its purpose, until the nominal date of expiry of an agreement or a section 170MX award has passed.

19. The full Federal Court noted in the Emwest case that allowing for the option of negotiating any outstanding matters during the life of an agreement encouraged flexibility in the bargaining process.
20. The decision stated:
21. *In the end however, in our opinion, the preferable view is that which permits and encourages flexibility in the bargaining process. Comprehensive agreements may be desirable in some and perhaps most circumstances. But there may be cases when it will be in the interests of good workplace relations to conclude an agreement on some issues and leave less pressing issues for a subsequent agreement. If any certified agreement, however narrow its terms, has the effect that industrial action is prohibited generally in respect of the employment relationship to which it applies the result will be effectively to discourage resort to a possible option for the partial resolution of complex industrial negotiations.*
22. *It is of course possible that parties to an agreement may seek to abuse s170MN by confecting some issue not explicitly covered by a certified agreement and using that as a basis for constructing an entitlement to protected action. It may be that in such a case the court would construe the agreement as intended to cover the field of terms and conditions defining the employment relationship in question. Indeed the parties may, as Kenny J pointed out, make that intention explicit by the inclusion of a provision that the agreement is intended to be exhaustive of the terms and conditions of the relevant employment relationship.*
23. Many certified agreements are all-encompassing, and thus protected industrial action is effectively precluded for the life of the agreement. However, there are occasions where the parties find it convenient to have single-issue agreements.
24. Such occasions are not common, but have occurred to deal with such matters as arise from time to time that are not foreseen by the parties at the time of making the agreement.
25. Most industrial action could be argued to potentially impact negatively upon third parties. Section 170MW of the Workplace Relations Act 1996 allows for a bargaining period to be suspended or terminated. However, when a bargaining period is suspended, the rights of employees are protected by providing access to arbitration.
26. The effective removal of the 'right to strike' – the voluntary withdrawal of labour – is a direct attack on the bargaining power of working people; this is most easily demonstrated by using an example

Case Study 1a

27. A large business enters into an agreement for a period of 5 years from January 2006 to January 2011 (the maximum period proposed under the new legislation). In January 2007 the business undergoes a significant change in the way it delivers its product leading to major changes in work patterns (introduction of shift work) that are not currently covered in the agreement. The company imposes the changed work patterns on staff without consultation or consideration of family commitments and offers no additional remuneration. The staff asks to negotiate a single item agreement to take into consideration the changes, the company refuses.
28. Under current legislation, because shift work is not included in the current agreement, staff would be able to use industrial action to pursue their claim for fair treatment. Under the proposed legislation because an agreement is in place no industrial action of any kind or for any reason is legally possible until February 2011.
29. What this really means is that the ordinary working person is unable to address harsh or unfair treatment while ever there is an agreement in place at that workplace. This applies regardless of the scope of the agreement. Clearly the power of staff to negotiate is diminished under this legislation.
30. **The impact for working families of the reduction of bargaining power in this scenario includes a reduction of earning capacity as overtime is eliminated and shift penalties are not payable, a reduction in time spent with family members as employees are forced to work afternoon and evening shifts and a reduction in community involvement eg coaching, volunteering etc.**

3rd PARTIES – comments to Senate Inquiry (2003 Bill) reported on 17 June 2004:

Government majority report/AIG²: AIG identified three areas of risk arising from the Emwest decision, especially for industries in the manufacturing and construction sectors.

31. *First, a union might take protected action during the life of an agreement over claims which were not the subject of enterprise bargaining between the parties. Second, a union might take protected action during the life of an agreement over new claims which were not pursued during enterprise bargaining. Third, a dispute might arise in the workplace during the life of an agreement over an issue which was not dealt with during the enterprise negotiations and a union might organise protected industrial action to further its position in that dispute.*

Labor senators, minority report³:

32. *Labor senators believe that this is one of the most regressive workplace relations bills introduced in the parliament under the banner of market deregulation, since the first wave of industrial legislation in 1996. Contrary to Government rhetoric about how this bill will benefit workplaces by ensuring that enterprise bargaining processes are fair and user friendly, Labor senators maintain the bill will restrict the right of workers to take industrial action in the event of a true disagreement with their employers.*

ACTU⁴:

33. *The effect of this [bill] would be that such agreements would prevent any industrial action occurring in relation to any issue throughout the life of an agreement, even where postponement of bargaining on that issue had been contemplated by the parties prior to the making of the agreement. In this way the [bill] would act as an unnecessary fetter on the parties' freedom to bargain and to negotiate site-specific arrangements for particular types of projects.*

Schedule 2:

Suspension of bargaining periods

34. This schedule proposes to amend section 170MWB of the act to provide the commission with the discretion to suspend a bargaining period to allow for a cooling-off period on application by a negotiating party and adds a new section 170MWC to enable the suspension of a bargaining period where industrial action is causing significant harm to a third party on application by the minister or the third party.
35. The commission currently has the power to suspend the bargaining period where a party has not tried to or is not genuinely trying to reach an agreement. To provide for suspension of bargaining periods to 'cool off' in the manner that the bill suggests is simply to remove any employee's bargaining strength while leaving the employer free to continue to refuse to negotiate in good faith or negotiate at all.
36. The proposed addition of section 170MWC to enable the commission to suspend a bargaining period if industrial action is threatening to cause significant harm to a third party is very significant.
37. The effect of this proposed change to section 170MN is to prevent employees from being able to take protected action against their employer to resolve issues that arise during the life of an agreement.
38. The International Labour Organisation's Committee of Experts⁵ has repeatedly observed that Australian law does not meet the requirements of conventions 87 and 98, which among other things, deal with the rights of citizens to bargain collectively

39. This bill severely weakens access to protected industrial action and takes Australian law even further away from complying with accepted international standards.
40. **The impact for working families is to further reduce the bargaining power of employed family members to achieve fair outcomes in the workplace with relation to such matters as wages, family friendly provisions and reasonable hours of work.**

Schedule 3:

Protected action and related corporations

41. This schedule of the bill seeks to prevent two or more employer corporations who are treated as a single employer for the purposes of agreement making from being treated as a single employer for the purpose of taking protected action.
42. Again, the ILO⁶ has repeatedly criticised the inability of parties to take lawful industrial action in support of multiemployer agreements. This proposed amendment again exacerbates current limitations on the parties' ability to bargain in the manner chosen by them.

Case Study 3a

43. ACT Government employees are currently covered by a number of agreements incorporating the Core Conditions Template Agreement. A number of these agreements cover several employer corporations. The Chief Minister's Department Agreement 2004 – 2007 is a good example, this agreement covers CMD, Canberra Stadium, ACT Construction Industry Long Service Leave Board, ACT Cleaning Industry Long Service Leave Board, ACT Forests and Environment ACT.
44. Effectively under the Better Bargaining Bill each of these entities would be treated as a single employer corporation for the purpose of protected action even though they are clearly a single employer for the purpose of developing an agreement. Employees would be prevented from acting collectively to secure an outcome during the bargaining process. This could actually have a negative impact on the employer given that each entity would be forced to take separate action, presumably at different times, causing several days of disruption rather than a single isolated incident. It could also lead to confusion amongst workers leading to some people engaging in illegal industrial action believing they are legitimately protected. There is great potential for financial loss and civil penalty to workers due to complex protected action legislation.

45. **The impact for working families is to add a greater impost in understanding the complexity of industrial relations legislation, with the potential to incur severe financial and/or civil penalties, and a greater risk to fair and equitable outcomes for workers engaged in similar work who are employed by a single employer.**

Schedule 4:

Protected action and involvement of non-protected persons

46. Item 1 of this schedule repeals and replaces section 170MM. The proposed new section 170MM specifies that protected industrial action can only be taken by parties to whom the proposed agreement will apply—that is, a union, employer or employee who is a negotiating party to an agreement, or a member of a union negotiating party whose employment will be subject to the proposed agreement. Or, to put it more simply, this provision is about outlawing so-called pattern bargaining.
47. Section 170MW of the act requires that, before taking any protected industrial action, the party taking the action has genuinely tried to reach agreement before organising or taking that action. If, for example, a union was found not to have genuinely tried to reach agreement before organising or taking industrial action, an employer under the current act could apply to the commission to suspend or terminate the bargaining period. Suspension or termination of the bargaining period would make any further industrial action unprotected and subject to the penalties under the act.
48. The fact that bargaining and the taking of protected action is coordinated or organised across more than one employer does not necessarily mean that there is a lack of preparedness to genuinely negotiate different outcomes with each employer. If it were the case, the party taking such action could be taken not to have genuinely tried to reach agreement before organising or taking the industrial action, and would thus risk suspension or termination of the bargaining period.
49. The government is of the view that common claims and negotiations across a range of employers as a matter of course ignore the needs of individual enterprises and their employees. This is not necessarily correct. The issue of pattern bargaining was extensively dealt with by Justice Munro in the so-called metals case—the *Australian Industry Group v The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union*⁷ decision of October 2000.
50. In this case a number of bargaining periods were terminated on the grounds that the relevant union did not genuinely try to reach an agreement with the other negotiating parties before organising or taking

industrial action and was not genuinely trying to reach an agreement at the time of taking action.

51. In coming to its decision, the commission made a number of findings, including: (1) the commission has the authority to terminate a bargaining period, at paragraph 32 of the decision; (2) the party must be genuinely trying to reach agreement with the opposing party to whom the industrial action or bargaining period is specific, at paragraph 43; (3) a party which is trying to secure agreement with all negotiating parties in an industry — all or none—is not genuinely trying to reach agreement with any individual negotiating party, at paragraph 44; and (4) advancement of common claims in a way that does not allow individual negotiating parties the opportunity to concede or to modify by agreement does not meet the test of genuinely trying to reach agreement, at paragraph 49.
52. Justice Munro also made it clear that common claims and outcomes do have a place in the industrial relations system, are not outside the scheme of the act and may be pursued by employers as well as unions. He said:
53. *... some of the more loudly voiced and caustic criticisms of “pattern bargaining”, as practised by unions, are muted or tolerant of corporate practices intended to achieve similar uniformities of negotiating outcome across different workplaces.*
54. The clear conclusion to be drawn from this decision is that the commission has the power to exercise its discretion in relation to whether or not a particular set of facts and circumstances in a particular case meets the test of genuinely trying to reach an agreement. This bill and its provisions have the effect of fettering the use of that discretion.
55. As Justice Munro put it:
56. *The meaning of the words of paragraphs 170MW(2)(a) and (b) is clear for the reasons I have stated. It is the application of that meaning to the facts of particular cases that may be complex. For reasons that relate to the character of different sets of employer negotiating parties, it is undesirable in my view to elevate construction of these provisions into a policy dogma that compels a lopsided application of the associated powers. The overall object of the Act to providing a framework for co-operative workplace relations which supports fair and effective agreement making should not be taken out of play.*
57. That is found at paragraph 51 of the decisions.
58. Employees, who choose to organise and act collectively, usually through a union, often do so not just in relation to issues that affect their own workplace. Employees more often than not come together in unions because of concerns they have in common as employees in particular industries and as participants in the work force as a whole. It is often difficult, if not impossible, for employees to seek to improve conditions

unless that is sought to be achieved across an industry, the wider work force or even the community. This does not mean that unwanted conditions can be imposed on individual employers and their employees against their wishes or without genuine individual agreement. The act requires that, for an agreement to be made, an employer must agree and those employees covered by the proposed agreement must vote in its favour. Many of the major workplace gains in the last 20 years, for example—including maternity and parental leave, superannuation, redundancy pay, training and skill recognition and family leave—started with industry-wide campaigns which resulted in enterprise based agreements which later were adopted by the commission, in whole or in part, for the award system.

59. The current inability of employees to engage in multiemployer or industry-wide industrial action has already been found by the ILO to be unacceptable. This amendment worsens the already existing position. Campaigning around common issues is integral to union functioning.
60. To remove that ability would be to make it unacceptably difficult for unions to carry out their most basic role. Although industrial action does not invariably or even commonly accompany bargaining, without the capacity to take such reasonable action the process is unacceptably weighted towards the employer and against the employee.
61. **The impact for working families in the ACT is to ensure that different wage and conditions outcomes would be prevalent across the territory, completely negating the principle of equal work for equal pay. Traditionally women and young people have been at greater risk of securing a lesser outcome in wages negotiations and this will be exacerbated by an inability to bargain across workplaces and industries. We are already seeing these types of inequities in franchised businesses where each business is able to set their own wages and conditions – two people (same age, gender and working hours) can be employed at two separate cafes (both part of the same franchise group) and, depending on the employers good nature or otherwise, one could be employed under an agreement that provides for penalty rates, public holidays, leave loading etc and the other could be employed under an agreement that offers a single hourly rate without penalty rates, public holidays, leave loading etc.**

Schedule 5:

Relates to pattern bargaining. (added through Government amendments)

62. The key aspects of these circulated government amendments to the bill as introduced are that they define pattern bargaining, eliminate the capacity to take protected industrial action in support of claims in relation

to pattern bargaining, require bargaining periods to be suspended or terminated by the AIRC if a negotiating party is engaged in pattern bargaining in relation to the proposed agreement, and provide for injunctions to stop or prevent industrial action taken to support claims by a negotiating party that is engaging in pattern bargaining.

63. The amendments do not help the bill as introduced. For example, 'pattern bargaining' in this amendment is poorly defined and would be potentially unworkable in practice, and it provides two exception clauses that further confuse this definitional issue. Common claims and similar outcomes are normal components of bargaining engaged in by employers as well as unions. Industry-wide bargaining is not necessarily a barrier to employment or productivity. Indeed, the government actually supports pattern bargaining when effected as an Australian Workplace Agreement.
64. The amendments to the bill are aimed at eliminating the capacity for common claims and similar outcomes when pursued as part of certified agreement making. This again shows the bias of the government towards individual agreement making, because common claims and template agreements, as part of the Australian Workplace Agreement stream of agreement making, will be unaffected by these provisions.
65. The schedule seeks to further fetter the commission's discretion by requiring that the commission must suspend or terminate a bargaining period — thus making any industrial action unprotected — if a party is engaged in pattern bargaining.
66. The clause in the amendment that enables injunctions against industrial action to be sought through the courts if pattern bargaining is engaged in has the effect of bypassing the commission in these instances, thus further weakening the role the commission can play in resolving workplace disputes. The provisions would allow the court to issue injunctions before the commission had had the opportunity to determine whether pattern bargaining had taken place.
67. The enhanced provisions for suspension of bargaining periods in the bill further shift bargaining power to the employer while doing nothing to deal with the underlying issues of the dispute other than to increase pressure for a settlement on the employer's terms—and on the employer's terms alone.
68. Rather than increasing the ability of the Industrial Relations Commission to deal with those underlying issues, the stated purpose of these suspensions is to reduce the likelihood of the commission using its already very limited discretion to terminate a bargaining period and to arbitrate in defined circumstances.

69. The narrowly legalistic strategy of this bill is directed at increasing the range of industrial action which can be the subject of various penalties rather than at genuine dispute settlement and resolution.
70. The Minister Kevin Andrew's second reading speech on this bill specified health, community services and education as sectors where third parties, such as clients not directly involved in a dispute, should be able to apply to the commission for suspension of a bargaining period.
71. This suggests that nurses and others caring for vulnerable people would take irresponsible industrial action without leaving arrangements in place to ensure that the health and safety of their clients and patients were not at risk. Nurses, teachers and other similar professionals do not take industrial action lightly. On the occasions that they take action, it is invariably done in the long-term interests of their patients and students. Issues like nurse-patient and student-teacher ratios are as much about decent service standards as they are about working conditions for the employees involved. It is a historical fact that industrial action has been responsible for the establishment of some key standards in these areas, without which health, education and community services would be inferior to current operations.
72. To give exclusive rights to third parties who seek to oppose industrial action but none to those in the community who support the efforts to improve standards or services is of itself a double standard. It also ignores the fact that the minister is already free to apply to the commission to suspend or terminate a bargaining period in circumstances where health and safety is at risk.
- 73. The effect on working families in the ACT is to ensure that legitimate industrial action is rendered almost impossible, effectively removing the right to apply pressure during bargaining. In addition the AIRC will have limited power to assist in the settling of a genuine dispute potentially resulting in a more protracted bargaining process delaying workers improvements in wages and conditions.**
- 74. Further, the definition of pattern bargaining is unclear – does this mean that no two clauses can be exactly the same or does it only apply to same percentage wage claims or does it lie somewhere in-between. At this stage it would appear that working people in the ACT will be placed in a position where convoluted legal proceedings will hinder their negotiations as employers seek to prove 'pattern bargaining' claims in order to achieve lesser outcomes and make any proposed industrial action illegal.**

75. Conclusion

76. The Workplace Relations Amendment (Better Bargaining) 2005 Bill will render fair negotiations a thing of the past, with the employer holding all the cards and having all the advantage.
77. The most severe impact is likely to be experienced by women, young people and low skilled workers each of whom are represented in ACT families.
78. A major flow on effect of reduced household income is a reduction in spending on both essential and nonessential items; this will impact on the economy of the ACT and the Government's ability to manage the Budget, resulting in a reduction of services to the community.
79. The ACT Legislative Assembly has an obligation to do all it can to protect the right of the ACT community, particularly the most vulnerable members, to fair and equitable outcomes in wages and conditions. And to ensure the standard of services provided to the community are not reduced as part of the flow on effect of the changes in legislation.

¹ *Emwest Products Pty Ltd v Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union* [2002] FCA, 61.

² Steve O'Neill, *Bills Digest No. 77 2003-04* on the Workplace Relations Amendment (Better Bargaining) Bill 2003, Parliamentary Library, Department of Parliamentary Services, 2003. p. 7.

³ *ibid.*, p. 20.

⁴ *ibid.*, p. 21.

ILO *Report of the Committee of Experts on the Application of Conventions and Recommendations* Report 111 (Part 1A) ILO Geneva 1999 pp204-5

⁶ <http://www.ilo.org/dyn/declaris/DECLARATIONWEB.INDEXPAGE>

⁷ *Emwest Products Pty Ltd v Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union* [2002] FCA, 61.

BUILDING AND CONSTRUCTION INDUSTRY IMPROVEMENT BILL 2005
BUILDING AND CONSTRUCTION INDUSTRY IMPROVEMENT
(CONSEQUENTIAL AND TRANSITIONAL) BILL 2005

1. The ACT Branch of the Construction, Forestry, Mining and Energy Union (CFMEU) supports the submission of UnionsACT. However, we also wish to provide members of the Committee with some additional information regarding the *Building and Construction Industry Improvement Bill 2005* (Cth) (BCII Act) and the impact that it along with the *Workplace Relations Amendment (Work choices) Bill 2005* (Cth) will have on families.
2. The CFMEU plays an active role in the ACT Community. The CFMEU has established, amongst other initiatives:
 - ACT Building Trades Group Drug & Alcohol Program;
 - OzHelp Foundation;
 - OH&S delegates committees;
 - CFMEU Children's Charity Trust; and
 - CITEA which employs 240 apprentices and trainees.
3. All of these organisations are targeted at providing assistance to workers and their families. The restrictive nature of the right of entry provisions in the BCII Act and the proposed *Workplace Relations Amendment (Work choices) Bill 2005* (Cth) may impinge on the ability of the CFMEU to continue to provide this service. CFMEU officials will no longer be able to assist employers in meeting their OH&S requirements. Further, the CFMEU has taken a lead role in preventing youth suicide and work place accidents by establishing the BTG Drug and Alcohol Program. Clearly the BCII Act and the proposed legislation will severely affected working men and women and their families and therefore society as a whole.

BACKGROUND

4. The 2005 Bill passed through the Senate on 7 September 2005 and received royal assent on 12 September 2005.
5. The purpose of the legislation was to make certain forms of industrial action in the building and construction industry unlawful, and to provide for additional sanctions against such action in the form of injunctions, financial penalties and compensation.
6. The 2005 Bill replicated the enforcement and penalty provisions, and some of the provisions making certain forms of industrial action unlawful, in the *Building and Construction Industry Improvement Bill 2003* (Cth) (the 2003 Bill). The 2003 Bill was passed by the House of Representatives on 4 December 2003. It was also referred to the Senate Employment, Workplace Relations and Education References Committee, which provided its report on 21 June 2004. The 2003 Bill lapsed when Parliament was prorogued for the 2004 federal election.
7. The 2003 Bill was developed as the government's legislative response to the Cole Royal Commission into the Building and Construction Industry. The *Building and Construction Industry Improvement (Transitional and Consequential Provisions) 2005 Bill* provides for machinery additions related to the Building and Construction Industry Improvement Bill 2005. Nine chapters of the 2003 bill have not been re-presented.
8. The purpose of re-introducing part only of the 2003 Bill was to prohibit industrial action in the building and construction industry which may have been aimed at pressuring employers to sign new enterprise agreements before the current round of agreements expired in October 2004.
9. The Minister for Employment and Workplace Relations, the Hon. Kevin Andrews, has said that remaining elements of the 2003 Bill, including the

creation of the Australian Building and Construction Commission, would be introduced at a later date.

10. The legislation was referred to the Senate Employment, Workplace Relations and Education Legislation Committee, which reported on 10 May 2005, (some two months after retrospective introduction). The Master Builders Association and the Australian Industry Group, both made submissions supporting the 2005 Bill. The AiG, however, called for a number of amendments to narrow the definition of building work and thus the application of the 2005 Bill.
11. On the other hand, the New South Wales Government opposed the 2005 Bill on the following legitimate grounds:
 - that it is industry specific rather than having broad application;
 - it adds unnecessary complexity to the Australian industrial relations framework;
 - its provisions are punitive, heavy-handed and unbalanced;
 - it promotes a litigious, adversarial and costly approach to industrial relations which will hinder rather than assist good faith bargaining;
 - it breaches ILO conventions regarding the rights to organise, collectively bargain and freedom of association; and
 - it is retrospective with no demonstrated justification for the retrospectivity of the Bill other than an attempt to prevent further enterprise bargaining negotiations.
12. The 2005 Bill, in its application to part of one industry, is inconsistent with the principle that all citizens should be required to obey the same laws.
13. The 2005 Bill is unbalanced; the exclusion of the housing industry demonstrates that the Federal Government is solely concerned with restricting the ability of unions to function, rather than dealing fairly with all parties in the industry, including employers. The Federal Government has

either failed to take into account or completely ignored the impact that an organised workplace has upon OH&S standards and therefore the lives of working men and women.

14. The BCII Act was introduced despite the fact that there is no evidence, either from the Cole Royal Commission, or otherwise, that justifies the application of a draconian regulatory approach to the industry.
15. The BCII Act will do nothing to address the real problems of employers or workers in the industry. It is fixated on the issue of industrial action, while nothing is done to assist certainty in relation to site agreements, nor to address issues such as payment of entitlements, security of payments to contractors and the like. Essentially, the Federal Government has shown no interest in protecting the legitimate interests of small business.
16. Further, price fixing is essentially the standard for sub contractors in the industry, clearly in breach of the *Trade Practices Act 1974* (Cth) yet not one case has been investigated by the Building and Construction Industry Taskforce or the Australian Competition and Consumer Commission (ACCC). The CFMEU requests that this Committee make special note of such practices which occurs on about 50 per cent of building and construction sites in the ACT and refer this matter to the Taskforce and the ACCC with a request for investigation. The 'bullying' practice of forcing employees onto ABNs is having a major impact on the working hours of employees in the industry. These 'purported sub-contractors' are unable to access any leave entitlements what soever even though they are working side by side with employees performing the same work who are entitled to the benefit of leave provisions.
17. Conclusions, such that unions habitually ignore Australian Industrial Relations Commission and Court orders were made on the basis of remarkably little evidence. Non-compliance with an order was found in only five disputes, involving in total seven individuals and three unions.

The Cole Commission did not establish any evidence of union misconduct, whether criminal or industrial, as was claimed by the Office of the Employment Advocate and Tony Abbott, to justify a vicious attack on the unions' ability to organise and bargain. In spite of its political and biased nature, the Cole Commission has not produced any successful prosecutions to date, with many matters referred from it to authorities having been quietly dropped.

IS THE BUILDING AND CONSTRUCTION INDUSTRY UNIQUE?

18. There are features of the building and construction industry which make it different from other industries, although some of these features are found in some other industries.
19. The key differentiating features of the building and construction industry include:
 - The large number of subcontractors on every site, each with a small number of employees and little capital, totally reliant on payments from the head contractor to meet their obligations to employees and government authorities;
 - The fixed price nature of the contracting system in the industry;
 - The cyclical nature of investment and employment in the industry;
 - The short-term nature of much industry employment;
 - The physically difficult and dangerous nature of the work;
 - The largely male, blue-collar workforce with relatively low levels of formal education, characteristics shared by many of their employers.
20. A number of comments can be made about these characteristics of the industry:

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- Employers may be under a great deal of financial pressure, with consequent non-compliance with their obligations to employees;
 - Employees and unions know that if they do not pursue entitlements while the job is still going, they are likely to be irrecoverable; and
 - Strong unionism is seen as vital to protect health and safety, as well as to obtain and enforce decent wages and conditions.
21. However, not one of these features is unique to the building industry, and it is difficult to see the need for industry-specific legislation, processes and procedures. This is not to say that measures taken to address specific deficiencies in the current system of workforce regulation would not be of particular assistance in the building industry.
22. If anything, there is a need to ensure that there are greater enforcement regimes in place for non-compliance by employers and principle contractors. The issue of non compliance with industrial instruments and government legislation such as the *Occupational Health and Safety Act 1989 (ACT)*; *Workers' Compensation 1951 (ACT)*; *Long Service Leave (Building and Construction Industry) 1981 (ACT)* and *Payroll Tax 1987 (ACT)* is endemic in the building industry. Measures should also be taken to ensure that agreed payments are secured and that there is a fair contracts scheme in place. The ACT Government must introduce measures which seek to address these issues to avoid adverse impact on the quality of life of working families.
23. It is also a significant problem in those parts of the industry not the subject of the Cole Commission's investigation or the Government's response, such as the housing industry. Non-compliance is also a problem in industries such as small restaurants and cafes, which would also benefit from greater efforts to enforce the law. The meat industry is similarly dangerous and insecure, and has also developed a culture of strong unionism.

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24. It is difficult to identify any initiative which should be directed solely at the building and construction industry although, provision for site or project agreements and particular efforts in enforcement of existing law would particularly benefit this industry, amongst a number of others.

OVERVIEW:

25. There are a number of concerns with the legislation that is now in place.
26. The BCII Act significantly weakens unions' ability to bargain collectively on behalf of their members, and is designed to take control of disputes away from the parties directly involved and the Australian Industrial Relations Commission. In particular, the legislation:
- (a) prohibits pattern bargaining;
 - (b) institutes a prohibitive penalty regime on unions who take industrial action or seek to bargain vigorously;
 - (c) encourages and facilitates actions for damages against unions;
 - (d) seeks to apply the Cole Royal Commission recommendations to builders and state governments by threats of withholding Commonwealth funding from construction projects which do not adhere to a revised National Building Code; and
 - (e) establishes the Australian Building and Construction Commission (ABCC) with coercive powers and a brief to prosecute unions and their members at every opportunity, ignoring the wishes of the employer parties to disputes, and whether or not the issues have been settled, and overriding the dispute resolutions functions of the Australian Industrial Relations Commission.

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27. The new punitive regime will stifle the ability of the Unions to adequately represent union members. The BCII Act along with the proposed *Workplace Relations Amendment (Workchoices) Bill 2005* (Cth) will place a heavy compliance burden on an industry which is characterised by a large number of very small employers, while failing to assist them or their employees achieve financial security and certainty.
28. The BCII Act overrides the common law privilege against self-incrimination, an issue which was dealt with in a recent case concerning the Interim Task Force.⁷ The case also concerned the ability of the Interim Task Force, exercising the powers of the Employment Advocate, to require a CFMEU official and a delegate to produce documentation relating to their employment, their tax records and their relationship with the union.

Loss of reasonable bargaining power:

29. The legislation substantially penalises employees, unions and employers currently participating in making enterprise bargains in a free, legal and reasonable way. The legislation therefore dictates that the parties are prohibited from reaching agreement as they consider appropriate. The legislation also makes certain forms of industrial action unlawful and provides access to sanctions against unlawful industrial action in the form of injunctions, pecuniary penalties and compensation for loss.
30. The legislation makes industrial action taken by unions prior to the nominal expiry date of certified agreements unprotected and as a consequence unlawful.

Excessive penalties:

31. If a union takes industrial action in support of its negotiations, it may be exposed retrospectively to civil penalties of up to \$110,000 and uncapped damages; individuals may face fines of up to \$22,000 fine for taking illegal

action versus a \$2,200 fine (under the National Code) for safety breaches. In addition, parties who take unlawful action may be ordered by a court to pay substantial uncapped compensation to any parties affected by the unlawful industrial action. This is expressly intended to severely limit the ability to negotiate bargaining outcomes.

32. The BCII Act also provides for increased penalties for contravention of the strike pay provisions of *Part VIIIA of the Workplace Relations Act 1996* (Cth). Actions against offending parties will be able to be brought by inspectors under the *Workplace Relations Act* including officers of the Building Industry Taskforce and the Australian Building and Construction Commission, once that is operational.

OCCUPATIONAL HEALTH AND SAFETY

33. Workers would be subject to different arrangements to other workers in the same workplace. The legislation shifts the onus onto employees to prove that a reasonable concern exists where action is taken based on an imminent occupational health and safety risk.
34. This is a significant safety issue. The building and construction industry is one which is particularly hazardous. Over the last 10 years, for example, there has been an average of 50 workplace fatalities each year in the industry.
35. The BCCI Act and the proposed *Workplace Relations Amendment (Work Choices) Bill 2005* (Cth) by imposing financial penalties upon those employees who cease to work in what they regard as an unsafe environment, potentially puts the health and safety of employees at risk. The ability for workers to be adequately represented regarding their health and safety is even further impinged by the introduction of a new right of entry regime provisions contained in the *Workplace Relations Amendment (Work Choices) Bill 2005* (Cth). The proposed legislation also adds

complexity to resolving occupational health and safety issues in the industry and thus potentially endangers employees.

State Laws

36. The BCII Act does not identify the scope of OHS provisions of the Building Code, or whether OHS provisions in the Building Code would replace or supplement the state and territory OHS provisions which apply in the industry.
37. Corporations could be subject to Commonwealth OHS arrangements under the Building Code, while others working on the same site (such as subcontractors who are not incorporated) would not be subject to those Commonwealth arrangements.
38. Health and safety protection could be undermined if different employees at a worksite or related worksites in the same state or territory were to be subject to different provisions of different governments. The Royal Commission report stated: *confusion that inevitably would arise from having two systems on one site would compromise and undermine safety on that site.*⁷
39. Doubled OH&S requirements would escalate the complexity as well as undermining the effectiveness of OHS arrangements. Under doubled regimes, for example:
 - (a) Different employers interacting at the same workplace would have responsibilities under different regimes;
 - (b) Different employers would be prosecuted under different regimes for offences associated with the same OHS failure; and
 - (c) Workers would be subject to different arrangements to other workers in the same workplace.

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40. The legislation encroaches on state industrial relations jurisdiction. The unlawful industrial action provisions will apply to industrial action in the industry taken by, or that adversely affects, a constitutional corporation and will override state industrial relations regulation.
 41. The cross-jurisdictional manner of the legislation creates new complexities rather than providing simplicity. As a result there is massive uncertainty in one of Australia's largest and most important industries.
 42. According to the legislation, the provisions will apply to industrial action in the industry taken by, or that which adversely affects, a constitutional corporation and thus will override state industrial relations regulation.

Retrospectivity

43. The legislation changes the rules retrospectively and this includes the operation of retrospective penalties.

International Breach

44. The BCII Act places further restrictions upon employees and their unions in exercising their right to strike and, as a consequence, brings Australia in breach of ILO convention 87 even more so than is already the case.

Broad definition

45. The legislation has defined the construction industry so broadly that employers and employees who have never previously considered themselves as part of the industry are covered by the provisions of the BCII Act and thereby exposed to prosecution and penalties for participating in what they regard as, and what are currently, legal bargaining activities.

Selectively and unfairly targets building industry workers:

46. The legislation selectively and unfairly targets building industry workers and excludes them from basic and universally applicable labour standards. All employees should have the rights and protections afforded by international labour law, irrespective of the particular industry in which they work.
47. The building and construction industry should not be exempt from compliance with the fundamental rights to collective bargaining and freedom of association that are embodied in the relevant ILO conventions. The BCII Act breaches these fundamental rights by rendering virtually all industrial action in the building and construction industry unlawful industrial action and by further restricting what kinds of industrial action can be protected action for the purposes of the *Workplace Relations Act 1996*.
48. The Government should utilise the general jurisdiction of industrial relations law and not create industry-specific specialised jurisdiction.

Definition of unlawful industrial action

49. Chapter 6 renders certain kinds of industrial action unlawful and amends what may be protected action for the purposes of the *Workplace Relations Act 1996 (Cth)*.
50. 'Unlawful action' is defined as all constitutionally-connected, industrially-motivated building industrial action that is not 'excluded action.'
51. Only protected action under the *Workplace Relations Act 1996 (Cth)* as amended by the legislation and Australian workplace agreements industrial action will be 'excluded action'. 'Excluded action' also encompasses action by an employee based on a reasonable concern about an imminent occupational health and safety risk where the

employee does not unreasonably fail to comply with an employer's direction to perform other available work. However, the onus is on the employee to prove the action is based on a reasonable concern.

52. Industrial action is not protected where the employment of employees is subject to a certified agreement, is taken to support or advance a claim and is taken prior to the nominal expiry date of an agreement.
53. The unlawful industrial action provisions will apply broadly across the industry and extend to action in relation to industrial disputes, awards or agreements under the *Workplace Relations Act 1996* (Cth).

No cooperation:

54. The most essential element in terms of the resolution of industrial difficulties or industrial disputation is to seek to resolve these matters in a cooperative fashion, generally in a tripartite manner which comes from the cooperation between employers, employees and government. This legislation is divisive and will in turn reduce cooperation between the parties involved in agreements.

Political motivation

55. The 2005 Bill is politically motivated and has been designed to try and assist the Government in its attempts to stymie the current round of enterprise agreement negotiations within the building and construction industry.

Confusion

56. Substantial litigation will be necessary to accurately understand exactly what is encompassed by the definition. The provisions of legislation

combine to create massive uncertainty in one of the largest and most important industries in Australia.

AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSION OVERT POWER

57. The legislation invests unlimited coercive power in the commissioner:
- The requirement for Federal Court approval of subpoenas was removed;
 - the capacity for judicial review of administrative action by the commissioner was removed;
 - mandatory jail sentences are imposed on the judiciary;
 - the longstanding principle of self-incrimination was removed; and
 - the provision previously inserted that the matters above should not relate to minor or trivial offences was removed.
58. The BCII Act empowers the ABCC to demand answers to such questions as: are you or have you at any time been a member of a trade union or any political party?
59. To be subject to such questioning, a building industry employee need have done nothing wrong nor have been suspected of doing anything wrong. Further, the investigator can demand the production of phone records, bank account records and any other document. An employee who fails to co-operate fully will have committed a criminal offence and the punishment will be an automatic and mandatory prison term. Labor's amendments to the codifying contempt act had meant that there was an alternative financial penalty available to the courts rather than a mandatory prison sentence.
60. The ABCC will have much stronger powers than any police force in the country. The ABCC can use coercive powers in investigating any breach

of the Workplace Relations Act, award or agreement, including investigating ordinary industrial activities of unions such as meetings with members.

61. The ABCC's predecessor, the Building Industry Taskforce, has had an entirely anti-union focus since it was established in 2002. The task force has shown little or no interest in important issues in the industry such as the non-payment of employee entitlements, sham corporate structures and occupational health and safety concerns.

ABCC right to intervene in court and AIRC hearings:

62. The legislation provides the ABCC with the unlimited right to intervene in court and Industrial Relations Commission hearings and to seek injunctions. Proposed section 253 of the amendments to the legislation explicitly does not require the ABCC to make any undertakings as to damages, so the ABCC can seek an injunction and the parties suffering any loss as consequence of this injunction cannot seek damages. These are unusual and extraordinary powers.

THE CODE

63. The use of Commonwealth contribution to building projects as a means of forcing all other parties into industrial relations arrangements which are repressive, unnecessary and unwanted is a misuse of that funding role based on a view that the Government's preferred industrial relations model trumps any other element of public interest.
64. The Building Code has also been strongly criticised by the governments of Victoria and Western Australia, the former submitting that it will "simply impose another layer of complexity on the industry"⁷ while the latter stated that: *"Commonwealth funding of State projects is often only a small proportion of the total cost and the Commonwealth's policy represents an unjustified intrusion into an area of state responsibility."*⁷

SECURITY OF PAYMENTS

65. In 1996, the Commonwealth, State and Territory Ministers responsible for construction, endorsed a range of principles in relation to security of payment in the Building and Construction Industry. These principles formed the basis of a 'National Action on Security of Payment in the Construction Industry.'
66. The Cole Royal Commission considered this issue, and in March 2003 included in its recommendations that the Commonwealth enact a Security of Payments Act.
67. Yet since that date, the Commonwealth has dragged its feet, refusing to make a firm decision on whether it will, or won't, enact this legislation. This has left the ACT Government in a difficult position, because of the legislative restrictions placed on the ACT Legislative Assembly. If an ACT law conflicts with a Commonwealth law, the Commonwealth law prevails.
68. The CFMEU understands that the ACT Government is keen to enact its own security of payments legislation, but is concerned by the current industrial relations climate created by the Commonwealth Government. On initial reading, the *Workplace Relations Amendment (Work Choices) Bill 2005*, which attempts to 'cover the field' in industrial relations, overrules a number of pieces of ACT industrial relations legislation including the *Parental Leave Act 1994* and the proposed *Fair Works Contract Bill 2004*. The CFMEU understands this latter legislation was to work in harmony with any security of payments legislation, and the Commonwealth Government's decision to overrule it further complicates this area.
69. Given the Commonwealth Government's recent appetite for directly imposing its will on the ACT community, by overriding ACT industrial manslaughter laws, there is also a real risk the Commonwealth might elect

to enact specific legislation overriding an ACT security of payment scheme.

70. The ACT Government cannot be expected to risk expending significant taxpayer funds on setting up such a scheme, only for it to be subsequently overridden by corresponding security of payments legislation at the national level.
71. Given the significant rhetoric coming from the Commonwealth Government on issues in the Building Industry, it should spend less time passing ideologically-driven anti-union legislation, and more time putting into effect a security of payments regime agreed by all stakeholders.

INDUSTRIAL ACTION

The extent of unprotected action

72. The restrictions are not based on any evidence that industrial action, or unprotected industrial action, is a problem of such significance in the building and construction industry that it warrants restrictions on workers' rights at a level which would be found unacceptable in every developed democracy.
73. The number of incidents of unprotected action in the building and construction industry found by the Royal Commission are 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,⁷ seven in Victoria,⁷ three in Queensland,⁷ two in South Australia,⁷ seven in Western Australia⁷ and one in Tasmania.⁷
74. Many of these incidents of unprotected action were very short, involving a stoppage of no more than a few hours, and frequently involved issues to do with site working conditions.

75. A report prepared for the Royal Commission found:

In 1999 the number of working days lost per thousand employees was highest for disputes resulting from managerial policy, physical work conditions and other non-specified reasons. These include disputes over areas such as terms and conditions of employment (other than wages and hours), new awards and agreements, award restructuring and enterprise bargaining, work practices, roster complaints and retrenchments, safety issues, amenities and the condition of equipment and materials.⁷

76. Another report, also prepared for the Royal Commission, found that the construction industry's share of total working days lost from industrial disputes fell from 40 per cent in 1998 to 31 per cent in 2001.⁷ The report also found that days lost per 1000 employees in WA fell from 1,107 in 1998 to 226 in 2001, while in Victoria over the same period the fall was from 764 to 421.⁷ Most importantly however, the report concludes:

77. "Over the period 1982-3 to 2000-01 that there is a "relatively poor correlation between the number of days lost to industrial disputes and changes in the three productivity measures."⁷

Role of the ABCC

78. The BCII Act is predicated on the assumption that there is a need for an external third party to interfere in the relations between an employer and its employees, presumably on behalf of the employer, but irrespective of the wishes of the employer, and irrespective of the issues which have led to the taking of industrial action.

79. The BCII Act would involve the employer, as well as the employees and their union, in legal proceedings which would do nothing to resolve the issues in dispute, and could exacerbate them.

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80. The BCII Act imposes mandatory reporting requirements on employers in relation to industrial action, which must be in a prescribed form and within time limits to be determined by regulations. This additional regulatory burden on small business to enable the ABCC to pursue matters which may be dealt with and forgotten, is completely unjustified.
81. The ABCC is permitted to obtain an assessment of damages from an Inspector in relation to an alleged contravention of the prohibition on taking unprotected industrial action. This assessment could be made irrespective of whether an injunction had been sought to prevent the action, or whether the underlying dispute had been resolved. The assessment would then be used in a claim for damages made on behalf of the employer (although not necessarily with their consent or approval) by the ABCC.
82. The net effect of the proposed provisions governing industrial action would be that employees could stop work because their employer would not consider a concern about unilateral roster changes, for example, and could be pursued for months and years for pecuniary penalties and damages even though the stoppage led to an immediate resolution of the matter in dispute.
83. The burden of this on the employees is obvious. However, employers also would be required to give evidence and participate in legal proceedings in which they had no interest, and which would require costly absences from their business and possible damage to their relationship with their employees.

RIGHT OF ENTRY

84. The right of entry provisions seem designed to make it virtually impossible for unions to properly carry out their responsibilities to represent members, give potential members an opportunity to discuss and consider the benefits of unionism and to ensure that awards and agreements are complied with.

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85. The attempt to override state jurisdiction, resulting in state parliaments and tribunals being unable to determine the conditions under which right of entry operates in respect of its own laws and awards, is another attempt to reduce industrial law to the lowest common denominator.
86. The scheme of the BCCI Act and the *Workplace Relations Amendment (Work Choices) Bill 2005* is established to encourage third party intervention by the ABCC in applying for revocation of a permit, whether or not the employer involved is concerned about the way in which the permit holder has exercised his or her rights. This is linked to the requirement that the ABCC receives a copy of each and every notice of entry, presumably to allow for investigation during or after the entry.
87. The restriction of union officials to an area of the workplace determined by the employer, even to the extent of the route taken to get there, makes the task of effective representation virtually impossible, given that employees may find themselves in the position of being observed by the employer as they go to meet the union official in the designated place.
88. Effective recruitment is made even more difficult, given the likely reluctance of potential members to be seen by their employer as taking the initiative to see the union. However, as entry for recruitment purposes is permitted only once every six months, thus preventing any follow-up visits to answer queries or demonstrate continuing interest, the practical possibility of recruitment at the workplace is ruled out.
89. Pursuant to section 285G of the WRA, a number of disputes in relation to right of entry have come before the AIRC. In *CFMEU – and – McConnell Dowell Constructors*⁷ the AIRC ordered that the union be given access to the meal area. In *Re MEAA*⁷ the union was given access to the lunch room during the Tennis Open on condition the official remained at a table, so that employees could approach, rather than move around approaching employees. Following the Open, the AIRC determined that union

representatives could be confined to a dedicated room close to the meal area, with the right to enter the meal area to make announcements about the union's availability for discussions.⁷ In *TCFUA – and – Leading Synthetics*⁷ the AIRC determined that the TCFUA should be allowed to hold meetings in the lunch room because of the possibility of employees feeling intimidated from going to the training room to meet with the union. A similar order relating to a lunchroom on site was made in *CFMEU - and - Stockport Civil Engineering Contractors*.⁷

AUSTRALIA'S OBLIGATIONS UNDER INTERNATIONAL LABOUR LAW

90. Australian labour law does not meet the requirements of ILO Conventions 87 on Freedom of Association and Protection of the Right to Organize and 98 on The Right to Organize and to Bargain Collectively.⁷
91. The ILO's Committee of Experts on the Application of Conventions and Recommendations, consisting of 20 internationally respected and eminent jurists, has, on a number of occasions, issued "observations" about the failure of Australian law to meet these fundamental requirements.
92. Although the Committee has repeatedly called on the Australian Government to amend its legislation, the Government has consistently refused to do so. In fact, as can be seen by this Bill, the Government continues to seek to amend the law to bring it even further away from a position of conformity with those international instruments to which Australia is a signatory.

THE RIGHT TO STRIKE

93. Although not directly specified in the Conventions, the ILO has always regarded the right to strike as a fundamental right of workers and their organisations as one of the essential means through which they may promote and defend their economic and social interests.⁷

94. On a number of occasions the ILO has criticised Australian law as being inconsistent with the requirement of Convention No. 87 in relation to the right to strike. In 1999 the ILO's Committee of Experts on the Application of Conventions and Recommendations published an "observation" about Australia, noting that:

“...where a strike is 'unprotected' under the Act it can give rise to an injunction, civil liabilities and dismissal of the striking workers.....even if these consequences are not automatic, for all practical purposes, the legitimate exercise of strike action can be made the subject of sanctions.”⁷

95. The Committee then considered a number of specific limitations on strike action and concluded that Australian law restricts the right to strike, contrary to the requirements of the Convention, in the following respects:

- Protected action must be in relation to claims for a single business enterprise agreement (not multi-employer or industry wide) dealing with issues pertaining to the employer-employee relationship. This unacceptably limits the right of workers to strike in support of their economic and social interests (eg strikes about workers' compensation or industrial relations legislation, which require wider action than on a single enterprise level). The Committee also said that the prohibition on strikes about demarcation "excessively limit the subject matter of a strike".
- The prohibition on "sympathy action" through both the WRA and the *Trade Practices Act* is in breach of the Convention. The Committee says that such a general prohibition "could lead to abuse" and that sympathy strikes in support of legal (ie protected) action should also be legal.

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- Under the WRA, the AIRC can terminate a bargaining period on grounds including that the action is, or is threatening to cause significant damage to the Australian economy or an important part of it. The Committee also noted that a union's registration can be cancelled because it engaged in industrial action interfering with trade or commerce or provision of public services. This goes beyond the Convention's definition of essential services, in respect of which industrial action may be prohibited (ie where the action interrupts services which would endanger the life, personal safety or health or the whole or part of the population).
96. The Committee also notes that ss45D and DB of the *Trade Practices Act* prohibit a wide range of sympathy actions.
97. The Committee called for amendment of Australian legislation to bring it into conformity with the Convention's requirements,⁷ and has repeated this request in subsequent years, including 2003.⁷
98. The Government's position appears to be that its international legal obligations are met so long as there is some right to strike, no matter how limited. If this was a correct view, a country whose legislation permitted industrial action only, for example, with the express permission of the Government, or only in the first week of February each year, would also be meeting its obligations. This is clearly not the case.
99. The restrictions on the right to strike proposed for the building industry go well beyond those in any democratic country.

CONCLUSIONS

100. The proposed changes to the *Workplace Relations Act 1996* (Cth) will leave many in our community in an extremely vulnerable position. Those least able to negotiate for themselves namely, young people,

women and people with disabilities will be forced into unfair contracts with little bargain. Many in these groups have had little or no opportunity to gain education, skills and knowledge that the market place tags with a higher value. It is the vulnerable in our society that these legislations seek to punish.

101. In particular, families will be worse off as parents who lack skills and the ability to negotiation will be forced to trade their weekends. The vulnerable will be forced to loose penalty rates, placing an even greater burden on their ability to live above the poverty line. It is not just families who care for children who are at risk here but also those who care for the elderly and disabled relatives yet do not qualify for carer payments through the social security system.
102. Reducing the most vulnerable in society wages and conditions in particular their hours of work will also severely affect any possibility of advancement.
103. The ACT Legislative Assembly has a critical role to play in ensuring that the working men and women and their families in the ACT are protected from the damaging effects of these Bills.

Workplace Relations Amendment (WorkChoices) Bill 2005

The WorkChoices Bill will remove protections for all workers in Australia; protections which have evolved over the last 100 years. The Federal Government has publicly acknowledged the stability of the current IR climate yet seek to impose harsh and complex new legislation that will force wages and conditions to plummet, and will see a reduction in the standard of living for ACT working families.

The WorkChoices legislation will:

1. Make it easier for workers to be sacked

The Howard Government is attacking job security, leaving 3.6 million employees vulnerable to unfair dismissal. It intends to:

- Abolish unfair dismissal protection (other than the civil courts) for people working in workplaces with less than 100 staff. (Section 170CE[5E])
- Allow all employees no matter what size workplace, to be dismissed for very broad "operational reasons". (Section 170CE[5C])
- Remove award redundancy standards for employers with less than 15 employees (not including true casuals (Section 116)

2. Allow employers to put workers onto individual contracts that cut take-home pay and reduce minimum standards

The Howard Government wants us to compete with salaries and conditions in countries like India and China. To achieve this it is allowing:

- individual contracts (AWAs) and other workplace agreements to reduce existing employment conditions. Conditions such as weekend, shift and public holiday rates; overtime; redundancy pay and skill based allowances can all be removed. (Section 101B)
- employers to require employees to accept a contract under threat of gaining or keeping their job. (Section 104[6])
- employers to set up new businesses under terms and conditions they "negotiate" with themselves (Section 96D)
- employers to get employees to give up their right to access information about their workplace agreements (Section 98A)
- awards to have no effect while a workplace agreement operates. (Section 100B)
- the Act's regulations to determine industrial issues which are prohibited from being included in workplace agreements (Section 101D)

3. Change the way minimum wages are set to make them lower

The Government wants minimum wages in Australia to be lower. This will reduce the living standards for many people who are only just keeping their heads above water. To achieve this the Government intends:

- To stop the independent umpire – the Industrial Relations Commission – from setting minimum wage rates. (Section 7J)
- To have minimum wages set by a so-called “Fair Pay Commission” tasked only with ensuring the economy is competitive – not with balancing the dual needs of a strong economy and wage fairness. (Section 7J and 90)

4. Replace the award safety net with just five minimum conditions

Most of the minimum pay rates and working conditions we take for granted are guaranteed in State or Federal awards, which also underpin existing workplace agreements. The Government’s new laws will:

- strip down agreements to just five minimum conditions: a minimum hourly rate of pay and casual loadings, 10 days personal/carer’s leave, 4 weeks annual leave (2 weeks of which can be cashed out), 52 weeks unpaid parental leave and the number of weekly working hours. (Section 89)
- not only allow employees to work a maximum average of 38 hours per week over 12 months or less but also employers can require them to work any amount of “reasonable additional hours” with no mention of any extra pay for overtime, weekends, shift work or public holidays. Howard’s guarantee of a maximum 38 hour working week is simply a lie. (Section 91C)

5. Restrict Australians’ access to unions and make it harder for employees to bargain as a group with their employer

The Howard Government’s plans will affect everyone’s right to get help when they need it most. The Government wants to make it harder for unions to protect and represent employees by:

- tightening the permit processes for union officials to have right of entry to workplaces. (Sections 201-207) This includes requiring union officials to be registered under the federal law before being allowed to enter premises under the existing ACT OH&S Act provisions for right of entry. (Section 217)
- requiring between 24 hours and 14 days written notice being given to an employer before an investigation of any breach, which

includes identifying the person who has the problem. (Section 210)

- allowing general access to workplaces to discuss issues only with employees covered by awards and collective agreements, not AWAs. (Section 221)

- fining Unions up to 300 penalty points (\$33,000) for seeking to include "prohibited content" into a workplace agreement. (Section 101M)

- Removing the role of Unions from dispute resolution processes. (Sections 173-176)

- Requiring a convoluted process to gain approval from the Commission to take industrial action. This process includes: seeking approval of some employees to apply for a ballot order, then if the ballot order is granted, having a role of voters prepared which lists all union members or employees and appointing a ballot agent to conduct the ballot with the Commonwealth paying only 80 % of the cost. Any person on an AWA is prohibited from voting.(Sections 109-109ZR).

6. Reduce the powers of the independent Industrial Relations Commission

The Government wants to weaken the powers of the independent umpire in the workplace. It will do this by:

- limiting the power of the Commission to be involved in dispute resolutions to only where the parties agree and removing its powers to arbitrate any disputes (Sections 176A- 176O)

- stopping it from setting minimum wage rates and conditions. (Section 7J)

- giving the Government Minister the power to stop industrial action by terminating a bargaining period, instead of the Commission. (Section 112)

- by requiring the Commission to rationalize awards only in accordance with a written request from the Minister. (Section 118)

- by giving award review powers to a new Award Review Taskforce. (Section 90A)

- by removing the power of the Commission to arbitrate unfair dismissals for employers with 100 or less employees (not including true casual employees) (Section 170CE5E)

Recommendations to the committee

- ❖ That the committee recommends ACT Government examine all options to ensure the rights of working families are protected from the Federal Governments IR reforms
- ❖ That the committee recommends ACT Government maintain an open and constructive working relationship with UnionsACT to ensure protections for working families in the ACT
- ❖ That the committee recommends ACT Government take steps to investigate the legality and plausibility of providing a forum to regulate the fair treatment of ACT workers
- ❖ That the committee recommends ACT Government continue to monitor the specific impact of the Federal Governments IR reforms. We draw the attention of the committee to the Victorian initiative of a Workplace Advocate who will investigate and heard matters pertaining to individual complaints and suggest that ACT Government investigate the model with a view to implementing a similar system
- ❖ That the ACT Government urgently clarifies the status of an ACT security of payments system under the Workplace Relations (Workchoices) Act 2005 and proceed with all haste to establish such a scheme in the ACT.
- ❖ That the ACT Government as part of its general duty of care monitor the ongoing impact of the Federal Government's legislation in the ACT, and report annually on the trends in Occupational Health and Safety.
- ❖ That the ACT Government, as part of their general duty of care, and the general duty of care of private sector employers, preserve the unrestricted right of entry for union representatives engaged in activity relating to the maintenance and improvement of health and safety standards in the workplace.
- ❖ Include in formal OHS incident and accident reporting any relevant information regarding any changed conditions and/or circumstances that may have contributed to the incident or accident as a result of the BCII Act 2005 or the Workplace Relations (Workchoices) Act 2005.

