SELECT COMMITTEE ON WORKING FAMILIES IN THE ACT

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:

- 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 no 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.

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.

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.[1] 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.

[1] *Hadgkiss v Blevin* [2003] FCA 1083 (9 October 2003)

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.*[2]

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.

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.

[2] Royal Commission into the Building and Construction Industry *Final Report* February 2002 Vol 6 p22

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"[3] 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."*[4]

[3] Victorian Government response to the BCII Bill para 16
[4] *Submission of the Government of Western Australia* p5

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,[5] seven in Victoria,[6] three in Queensland,[7]two in South Australia,[8] seven in Western Australia[9] and one in Tasmania.[10]

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

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

practices, roster complaints and retrenchments, safety issues, amenities and the condition of equipment and materials.[11]

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.[12] 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.[13] 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."[14]

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.

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.

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[11] RCBCI *Statistical Compendium for the Building and Construction Industry* Discussion Paper 2 p61
[12] Tasman Economics *Productivity and the Building and Construction Industry* November 2002 pp13-14
[13] *Ibid* p17
[14] *Ibid* p21

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.

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*[15] the AIRC ordered that the union be given access to the meal area. In *Re MEAA*[16] 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.[17] In *TCFUA – and – Leading Synthetics*[18] 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.*[19]

[15] Print P6606
[16] Print R1193
[17] Print R5524
[18] Print R5518

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.[20]

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.

[19] PR907009, upheld on appeal PR 908023

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.[21]

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."[22]

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

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[20] ILO *International Labour Conventions and Recommendations 1919-1991* Vol 1, ILO, Geneva 1992 pp435-7; 524-5

[21] ILO *Freedom of Association Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* 4th edition Geneva 1996 p101

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.

- 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,[23] and has repeated this request in subsequent years, including 2003.[24]

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

[22] ILO *Report of the Committee of Experts on the Application of Conventions and Recommendations* Report 111 (Part 1A) ILO Geneva 1999 pp204-5
[23] *Ibid* pp204-7

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.

[24] ILO *Report of the Committee of Experts on the Application of Conventions and Recommendations* Report 111 (Part 1A) Geneva 2003

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 negation 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.