

Submission

to

Senate Employment, Workplace Relations and Education
Legislation Committee

Inquiry into the Building and Construction Industry Improvement Bill 2005 and Building and Construction Industry Improvement (Consequential and Transitional) Bill 2005

Submitter: The Hon John Della Bosca MLC
NSW Minister for Industrial Relations

Organisation: On behalf of the New South Wales Government

Address: Level 30, Governor Macquarie Tower,
1 Farrer Place, Sydney NSW 2000

Phone: 02 9228 4777

Fax: 02 9228 4392

Email: office@smos.nsw.gov.au

**NEW SOUTH WALES GOVERNMENT
SUBMISSION
TO THE SENATE EMPLOYMENT, WORKPLACE
RELATIONS AND EDUCATION REFERENCE
COMMITTEE INQUIRY
INTO THE
BUILDING & CONSTRUCTION INDUSTRY
IMPROVEMENT BILL 2005**

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EXECUTIVE SUMMARY

The Building & Construction Industry Improvement Bill 2005 ('the bill') and associated bill, the Building and Construction Industry Improvement (Consequential and Transitional) Bill were introduced into the Federal Parliament on 9 March 2005. The bills were referred to the Senate Employment, Workplace Relations and Education Legislation Committee, for inquiry.

The federal government has flagged subsequent amendments to the bill to be introduced later in the year, presumably once the government has secured its Senate majority on 1 July 2005. These amendments are anticipated to be based on the provisions of the Building and Construction Industry Improvement Bill 2003 ('the 2003 bill'). Based on the 2003 bill, they will contain the main operative provisions of the bill. The amendments have not yet been tabled.

The New South Wales Government considers it to be highly unusual to introduce a bill with only a small number of operative provisions whilst holding back a larger number of key provisions for amendment at some later date. It would appear that the federal government is denying stakeholders the ability to make informed comment on key aspects of the bill.

Based on the provisions of the bill, statements about the likely amendments to the bill, and the provisions of the 2003 bill, the New South Wales Government submits that the bill should be rejected, for the following reasons.

It is industry specific legislation

The bill's application of specific provisions applicable to the building and construction industry contradicts contemporary industrial relations and general regulatory practice which is to promote a framework of legislative and regulatory practice that has broad application.

It adds unnecessary complexity to the industrial relations framework in Australia

The bill's anticipated amendments will create new regulatory institutions and instruments, in the form of the Australian Building & Construction Commission (ABCC), the National Building Code and the Federal Safety Commissioner, and different provisions regarding industrial action and sanctions that are specific to the industry. This will be in addition to the provisions of the *Workplace Relations Act 1996* (WRA), which are already burdened with complexity. The proposed provisions will add even greater complexity and cost to industry participants.

Its provisions are unbalanced, punitive and heavy handed

The provisions are clearly designed to limit the capacity of employees and unions to organise collectively within the industry. The creation of a broad, new class of 'unlawful industrial action,' significant increases to penalties for breaches, reliance on heavy-handed compliance mechanisms, and reversing the onus of proof in disputes about occupational health and safety matters demonstrate the one-sided nature of the bill.

It promotes a litigious, adversarial and costly approach to industrial relations and will hinder rather than assist good faith bargaining

The bill's inherent unfairness, its reliance on tough legal sanctions, its encouragement of litigious remedies will only promote more adversarial relationships between employers and unions. Subsequently, it will hinder rather than foster constructive relationships and good faith in the industry.

It is a further incursion into the NSW industrial relations jurisdiction

The bill's provisions encompass industrial action taken by, or that will adversely affect, a constitutional corporation. This will subsequently override state regulation. There has been no consultation or demonstrated reasoning as to why this incursion is beneficial or indeed necessary. It will cause additional confusion through its complexity as small, unincorporated businesses are unlikely to be covered.

International obligations

The New South Wales Government is concerned that the legislation may be in breach of a number of Australia's international obligations, namely International Labour Organisation (ILO) Convention 87 (*Freedom of Association and Protection of the Right to Organise*) and ILO Convention 98 (*the Right to Organise and Collective Bargaining*).

Its provisions are retrospective

Governments should make retrospective legislation sparingly, judiciously and with good reason. There is no demonstrated justification for the retrospective nature of the legislation, particularly as it is creating a new form of offence for action that is currently not unlawful, and seems designed to prevent unions from achieving enterprise agreements.

STRUCTURE OF THE SUBMISSION

The Submission's background provides a brief overview of the States joint submission to the previous Senate Inquiry into the 2003 Building and Construction Industry Improvement Bill. This is followed by an overview of the New South Wales system in relation to the building and construction industry with brief commentary on the impetus driving the latest bill.

Section 2 examines the current bill in detail and highlights its intent and particular issues of concern largely in relation to Chapters 6 (unlawful industrial action) and 12 (enforcement) of the proposed bill.

Section 3 provides commentary on policy matters of particular concern to the New South Wales Government, including:

- the concept of 'unlawful' industrial action;
- occupational health and safety;
- international obligations;
- retrospective legislation;
- bargaining intervention;
- the bill's punitive nature; and
- jurisdictional encroachment.

Section 4 makes comment on the federal government's foreshadowed amendments that are likely to ensue after July 1 2005. Issues of concern include:

- the establishment of the Australian Building & Construction Commission (ABCC), a new industry 'watchdog';
- a more restrictive National Building Code;
- the implications for New South Wales in establishing a new Federal Safety Commissioner role; and
- the federal government's overt attack on collective bargaining processes, freedom of association and project agreements;

Finally, Section 5 reiterates the New South Wales Government's concerns and position on the proposed bill and its foreshadowed amendments.

Section 1 BACKGROUND

The Cole Royal Commission and the 2003 Bill

The Building and Construction Industry Improvement Bill 2005 replicates the enforcement and penalty provisions, and some provisions regarding industrial action, of the Building and Construction Industry Improvement Bill 2003 ('the 2003 bill'). The 2003 bill was passed by the House of Representatives on 4 December 2003. It was referred for inquiry 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.

The federal government has foreshadowed subsequent amendments to this bill to implement remaining elements of the 2003 bill, including amendments to establish the ABCC, a Federal Safety Commissioner and to introduce a more restrictive Building Code of Practice.

In the 2003 bill the federal government sought to implement the findings of the Cole Royal Commission into the Building and Construction Industry ('the Commission'). The Commission's key recommendations relating to workplace reform included:

- the introduction of an 'industry specific' Act;
- the establishment of a new independent monitoring and regulatory body to ensure participants comply with industrial, civil and criminal laws;
- an emphasis on bargaining at the enterprise level, with limitations on 'pattern bargaining';
- any party causing loss to other participants through unlawful industrial action to be held responsible for that loss;
- improvements to occupational health and safety, including the establishment of a Federal Safety Commissioner to oversee such issues in the construction industry;
- disputes to be resolved in accordance with dispute resolution procedures rather than by industrial and commercial pressure; and
- changes to the National Building Industry Code of Practice.

In November 2002, the federal government established the Interim Building Industry Taskforce to investigate and prosecute freedom of association breaches. In 2003, the operation of the Building Industry Taskforce was extended pending the establishment of the ABCC.

Submissions to the Senate Committee inquiring into the 2003 bill revealed that there was very little enthusiasm for the legislation, even among the employer parties considered the most likely to benefit from the proposals. The New South Wales Government, along with other state and territory governments, presented a detailed submission into what was considered to be a fundamentally unbalanced proposal.

For example, the bill failed to provide the Australian Industrial Relations Commission with the power it needs to resolve disputes that occur. It also did nothing to address other matters dealt with by the Cole Royal Commission.

Matters dealt with by Cole Royal Commission not addressed in the bill

The New South Wales Government proposes that other matters dealt with by the Cole Commission such as tax evasion and the use of 'phoenix' companies to avoid the payment of employee entitlements should be subject to federal legislative consideration.

There is concern about under-payment or non-payment of some employees in the industry. There is also evidence of tax evasion by some participants in the industry. The bill does nothing to address these issues. Nor does the bill address the phenomenon of so-called 'phoenix' companies, those companies that cease trading thus leaving sub-contractors unpaid, only to resurrect themselves under a different guise. The Cole Commission made recommendations on these issues, yet the bill is silent.

The use of sham corporate structures to avoid legal obligations

The Cole Commission examined this issue, yet there has been no attempt by the federal government to address it. The New South Wales Government again calls on the federal government to enact legislation to better protect employee entitlements. The New South Wales Government urges the federal government to work co-operatively with the states to protect 100 per cent of workers' entitlements and notes that the General Employee Entitlements and Redundancy Scheme (GEERS) is an inadequate mechanism for paying employees their proper entitlements.

The evasion or underpayment of taxation

The issue of underpayment or evasion of taxation payments is generally one that is the responsibility of the federal government. There is a significant incentive within the taxation system for workers to be engaged as independent contractors rather than employees. The building and construction industry, because of the nature of the work involved, has a much higher proportion of contract workers than other industries. There is strong evidence that many of these workers should more properly be considered to be employees. The report by the Australian Taxation Office on the cash economy¹ identifies the building and construction sector as continuing to be a focus for the ATO with respect to tax avoidance. For example, the ATO reports that investigations of phoenix company activities in the building and construction industry have raised more than \$46 million in underpayments of tax². It is noted that there is also a significant nexus between taxation issues and the avoidance or underpayment of worker entitlements including superannuation.

It is submitted by the New South Wales Government that the resolution of taxation avoidance and other issues relating to the avoidance of payments of worker entitlements is an area where additional federal government resources could be directed to the benefit of the industry.

¹ The Cash Economy under the New Tax System, Australian Taxation office, September 2003

² *ibid* p42

The underpayment or non-payment of workers' entitlements, including superannuation

The collection of superannuation payments under the federal government's superannuation guarantee levy scheme is a federal matter and one that is operated through the taxation system. However, the building and construction industry involves payments into industry schemes for workers' entitlements that are over and above the minimum statutory entitlements.

An emerging issue in relation to superannuation payments relates to the high levels of contracting in the industry. There is concern that many of these contractors are not contributing sufficient funds into superannuation schemes to provide for their future needs.

The New South Wales Government submits that this is an area where a high level of cooperation between States and the federal government could deliver better outcomes for employees.

It should be noted that after consideration of all submissions and an examination of evidence presented to the inquiry into the 2003 bill, the Senate Committee concluded that:

... by attempting to address only the issue of industrial relations, the government has failed to use the opportunity to implement root and branch reforms which would deal with problems that the industry believes are more worthy of the Government's attention.

The NSW Industrial Relations System

The New South Wales jurisdiction operates on the principle of a fair and just framework for the conduct of industrial relations, evidenced by co-operative and fair bargaining processes that are linked to real productivity and efficiency gains. In short, a well balanced system that serves both employer and employee interests.

The New South Wales Government, employers and unions seek to work together in a consultative, open and accountable environment. The *Industrial Relations Act*

1996 (NSW), provides a simple easy-to-use tribunal with conciliatory and arbitral powers to resolve disputes.

The New South Wales Act provides a broad framework for industrial relations across the entire workforce. It is flexible enough to deal with matters in all industries, whenever and however they might arise. The principles underpinning the provisions of the Act dealing with industrial disputes and industrial action are as follows:

- a simplified dispute notification and resolution process;
- an emphasis on conciliation at first instance;
- a single, cost effective process to deal with all questions of conciliation and arbitration, and enforcement, reversing the tendency towards excessive litigation;
- an effective system of sanctions for breach of agreements or awards, including the imposition of penalties as a last resort, to be entertained only after the processes of conciliation and arbitration have concluded.³

The New South Wales Government supports and promotes an approach to industrial legislation that provides for flexible bargaining arrangements adaptable to the needs of the industry. This includes enhanced roles for industrial tribunals to intervene to assist in the settlement of disputes.

The New South Wales Government experience is that punitive enforcement provisions have not proven to be effective compliance solutions in the past, nor are they appropriate. Since the inception of the Industrial Relations Act in 1996, New South Wales has enjoyed a period of industrial harmony, indicating that the only successful strategy to effectively counteract non compliance is to employ legislative enforcement provisions which place an emphasis on conciliation, and are developed in consultation with the affected industrial parties. This ensures that such provisions reflect a balanced and sensible deterrent to be applied consistently across all industries and occupations.

The *New South Wales Industrial Relations Act 1996* does not provide for notions of 'protected industrial action' as is the case in the federal jurisdiction or 'unlawful

³CCH Australia 2005, Australia Labour Law Reporter 2005.

industrial action' as is the case in this bill. The aim of the New South Wales provisions is to promote and support a process that can resolve the issues that are at the core of industrial disputes through conciliation and arbitration if necessary.

The enforcement proposals put forward by the federal government in the bill are draconian and confrontational and will only serve to entrench negative practices. The New South Wales Government strongly objects to the hostile imposition of measures such as those contained within the bill on our jurisdiction, which will clearly have a detrimental effect on New South Wales industry participants and the relatively harmonious and stable climate we currently enjoy.

The Building & Construction Industry in New South Wales

The approach of the New South Wales Government to industrial relations, particularly in respect to the building industry, contrasts sharply with the approach taken by the federal government.

The New South Wales Government is committed to reform in the building and construction industry to improve its productivity and its industrial relations and health and safety performance. The approach endorsed to achieve these outcomes is by working cooperatively with employer and employee organisations.

The New South Wales Government does not condone any unlawful behaviour in the building and construction industry. Any illegal activities or suspicion of illegal activities should be reported to, and dealt with by, the appropriate authorities. The New South Wales Government notes that the Cole Commission found that New South Wales industry was relatively free of allegations of unlawful activity in comparison to Western Australia and Victoria. The New South Wales Government submits that existing legislative frameworks provide a sufficient means of addressing any unlawful or criminal behaviour if it occurs. Therefore, further regulation is not required.

An example of a cooperative partnership model is the delivery by New South Wales of the Olympic and Paralympic Games facilities. New South Wales received global recognition for the success of its 2000 Olympic and Paralympic Games. A key factor underpinning the success of the Games was the cooperative and flexible

industrial relations system in this State. To ensure a successful Sydney Games the key players in the industrial relations arena agreed on a system to regulate the employment of workers on construction sites and at the Games. All parties worked towards an outcome of industrial harmony. In describing the success of the New South Wales system the Minister for Industrial Relations, the Honourable John Della Bosca, said

The industrial harmony and cooperative industrial relations that were evident during the Games are an excellent illustration of what can be achieved in the context of a supportive industrial relations framework.

The New South Wales industrial relations system delivered the Sydney 2000 Olympics on time and on budget.

Contrast the first class performance of the New South Wales industrial relations system when compared with the federal government's system operating in Victoria.

Australian Bureau of Statistics information records the annual dispute activity in the industry. For the year ended December 2004, New South Wales accounted for only 5 per cent of disputation across the construction industry nationwide compared to 36 per cent in Victoria.⁴

From 1996-2004, New South Wales accounted for 20 per cent of working days lost across the construction industry nationwide compared to 36 per cent in Victoria.⁵

Table 1: Working days lost in long Running Disputes as % of national 2001 – 2003

Duration	NSW	VIC
2 days & over	23.9%	44.2%
5 days & over	24%	45%
10 days & over	25.7%	51%

Source: Australian Bureau of Statistics Industrial Disputes, Australia, Cat No 6321.0, Unpublished Data, 2001 – 2003.

⁴ Australian Bureau of Statistics, 2004 Industrial Disputes, Australia, Cat No 6321.0.55, unpublished data, December Quarter 2003 to December Quarter 2004.

⁵ Australian Bureau of Statistics, 2004 Industrial Disputes, Australia, Cat No 6321.0.55.001, unpublished data.

Indeed, across the workforce more broadly, as shown in table 1, from 2001-2003 New South Wales has experienced historically low levels of disputation. Since January 2001, New South Wales' share of the national total of working days lost in long running disputes is significantly lower than Victoria's.

In terms of costs, the federal government's own submission to the Royal Commission clearly asserted that building projects are 20 to 30 per cent cheaper in Sydney than in Melbourne.⁶

The approach of the NSW Government to the building industry is governed by a number of clear principles. In summary, these are:

- employers and employees must be free to negotiate the type of agreement best suited to their industry and the particular circumstances of the workplace;
- employees and employers have the right to be represented by their appropriate union or employer association;
- any negotiations must be conducted in a climate of good faith;
- the various Industrial Relations Commissions must be empowered to play their intended role as independent umpires, and their ability to conciliate and if necessary arbitrate disputes must not be fettered; and
- the various Commissions must be appropriately resourced to enable them to undertake their proper role.

There is ample evidence available from employers and unions that the New South Wales system is a co-operative and harmonious system that is good for workers and businesses in this State.

The Current Bargaining Round

Although most certified agreements in the industry are not due to expire until October or November this year, unions have flagged an intention to bring forward the next round of enterprise bargaining. Their objective is to secure agreements

⁶ Federal Government of Australia, 2002. Federal Government Submission to the Royal Commission into the Building & Construction Industry: Phase Three, Aug 2002: 2.

under the current legislative framework regime rather than that after anticipated legislative changes following 1 July changes to the composition of the Senate .

This shortened version of the bill is the Government's legislative response, an attempt to prohibit unions from taking industrial action to achieve such agreements, even if the workers act in accordance with the current provisions of the WRA or take action which is lawful under New South Wales legislation.

The federal government has threatened employers not to sign any agreements negotiated with the union, even if they did not involve industrial action. This is an unprecedented level of government intervention in enterprise bargaining negotiations in the construction industry. The bill is indicative of the federal government's highly interventionist and one-sided approach to industrial relations.

Section 2 THE BILL IN DETAIL

Intent

The central provisions of the bill make certain forms of industrial action within the construction industry unlawful, including industrial action taken prior to the expiry of a certified agreement. These provisions are made retrospective to the 9 March 2005.

The bill also significantly increases the range of penalties for contraventions of the bill compared to contraventions of the WRA.

Chapter 6 Industrial Action

Part 1 includes definitions of various operative terms. Key terms include:

- 'building work' includes a very broad range of activities, including traditional construction, alteration, restoration, demolition work, construction or dismantling of railways, installation of works or fittings, or any operation that is part of or preparatory to or rendering complete, work covered by the previous examples. The Australian Industry Group has concerns that this section claims 'large part of the manufacturing sector, together with various services sectors, as being part of the building and construction industry.'⁷ Such a broadening of the definition of the industry will provide significantly complexity as parties may be unwittingly drawn into the bill's reach.
- 'building industrial action', which is broadly defined to include industrial action taken in the building and construction industry in relation to instruments under Commonwealth or State and Territory law;
- 'constitutionally-connected action' is very broadly defined to cover almost every form of industrial action possible, including action taken by, or that adversely affects, a constitutional corporation;
- 'industrially motivated' is a very broad and ill-defined term that purports to define the purpose and intent of industrial action; and

⁷ 'AI Group Submission to the Building & Construction Industry Improvement Bill.' At <http://www.aigroup.asn.au/scripts/cgiip.exe/ccm.r?Roxy=0x000198cl&PageID=1212>.

- 'excluded action' is defined as industrial action that is protected action under the WRA as modified by this bill (i.e. in relation to bargaining) and Australian Workplace Agreements (AWAs) industrial action.

The above definitions are unique to this bill and vary significantly from terminology set out in the WRA. They therefore add additional complexity to the terminology of the bill.

Part 2, Clause 73 defines 'unlawful' industrial action as all building industrial action that is 'industrially motivated', 'constitutionally-connected', and that is not 'excluded action'.

These provisions will apply to industrial action in the industry taken by, or that adversely affects, a constitutional corporation and will therefore override State industrial relations regulation.

Clause 74 prohibits a person from engaging in 'unlawful' industrial action. This concept of 'unlawful industrial action' is unique to the bill and has no equivalent provision within the WRA. Only protected industrial action in support of Certified Agreements and Australian Workplace Agreement claims and safety disputes will not be 'unlawful'.

The bill exempts industrial action taken by employees from being unlawful if the action is based on a reasonable concern about an imminent risk to their health and safety. However, the onus relating to action taken based on occupational health and safety concerns would be reversed. If a person seeks to argue that they have not engaged in industrial action on the grounds that the action falls within the exception for action based on an imminent risk to health and safety, the onus is on that person to prove that the action was based on a reasonable concern about an imminent risk to health and safety.

Part 3, Clause 80 provides that industrial action taken before the expiry date of a building certified agreement will not be protected. If taken, then it too will be unlawful.

This provision is designed to stop unions from taking industrial action in relation to new agreements. It is also designed to overcome the effect of the Federal Court's

Emwest decision, which held that unions could not be prevented from taking 'protected industrial action' during the life of a Certified Agreement in relation to matters not contained in such agreements.

Part 4, Clause 136 increased penalties for payment of strike pay. The maximum penalties prescribed are \$110,000 for a body corporate and \$33,000 for an individual.

Chapter 12 Enforcement

Chapter 12 comprises four distinct sections, these are:

- definitions;
- increased civil penalties and other remedies for contraventions;
- multiple proceedings for the same conduct; and
- evidence in proceedings for penalty not admissible in criminal proceedings.

The main thrust of the proposed enforcement provisions can be found within s 227 which embodies substantial civil penalties for unions and others who engage in unlawful industrial action. The bill imposes the application of financial sanctions of up to 1,000 penalty units (\$110,000) for a body corporate, or 200 penalty units (\$22,000) in the case of individuals. The bill also features increased penalties for strike pay, sequestration of union assets and the granting of injunctions restraining a person from engaging in conduct.

Contrast these with the current penalty provisions contained within the WR Act which are 25 penalty units (\$2750) for a body corporate and 5 penalty units (\$550) for an individual and it is apparent that the new penalty scale represents a dramatic increase from the status quo and characterises the distorted treatment of an industry based on its perceived reputation.

The bill seeks to impose punitive enforcement mechanisms for the building and construction industry, to enforce compliance. The federal government believes that the bill will provide a greater incentive for the building industry to obey the law.

Section 3 POLICY ISSUES

‘Unlawful’ Industrial Action

The bill creates a new statutory concept of ‘unlawful industrial action’. It prohibits any industrial action which does not fall within the exceedingly restricted criteria of ‘protected action.’ These provisions will apply broadly across the industry and extend to industrial action in relation to industrial disputes, awards, agreements, in supporting claims against an employer, or advancing the industrial objectives of an industrial association under the WRA. In particular, the bill makes industrial action taken by unions prior to the nominal expiry date of certified agreements and Australian Workplace Agreements (AWAs) unprotected and unlawful action. These measures are to apply retrospectively.

This provision is a far more onerous restriction on industrial action than those contained in the WRA. In fact the WRA contains no such concept of ‘unlawful industrial action’. Only industrial action that is ‘protected’ under the WRA, taken in the context of bargaining, or AWA industrial action is deemed ‘lawful’.

The provisions are clearly aimed at reducing a union’s ability to take industrial action to advance its claims. Such legislative prohibition on industrial action is unprecedented in recent industrial relations history. It reflects an approach that is based on eliminating the symptoms of industrial conflict rather than resolving the causes of the dispute in the first place.

This approach will do little to encourage the parties to operate in good faith. It entrenches an adversarial industrial relations culture that will potentially increase the length and intensity of ‘protected’ industrial action.

The New South Wales Government opposes the prohibition of certain forms of industrial action as ‘unlawful’.

Occupational Health & Safety

The bill exempts industrial action taken by employees from being unlawful if the action is based on a reasonable concern about an imminent risk to their health and safety. However, the onus relating to action taken based on occupational health and safety concerns would be reversed. If a person seeks to argue that they have not engaged in industrial action on the grounds that the action falls within the exception for action based on an imminent risk to health and safety, the onus is on that person to prove that the action was based on a reasonable concern about an imminent risk to health and safety.

The federal government's rationale for this measure is that it will prevent 'spurious' occupational health and safety concerns being used to justify industrial action about other issues.

However, the New South Wales Government is concerned that reversing the onus of proof to require employees to demonstrate that industrial action taken for occupational health and safety reasons was reasonable, could have the unintended effect of discouraging action in cases where a genuine risk exists.

This is of particular concern in the context of the construction industry that has been identified as having the third highest incidence of workplace injury in New South Wales. In 2002 - 2003, 20 workers died on construction sites in New South Wales.⁸ The New South Wales Government is committed to improving occupational health and safety outcomes in all workplaces.

International Obligations

The New South Wales Government is also concerned that the legislation may be in breach of a number of Australia's international obligations, namely International Labour Organisation (ILO) Convention 87 (*Freedom of Association and Protection of the Right to Organise*) and ILO Convention 98 (*the Right to Organise and Collective Bargaining*). The ILO Committee of Experts on the Application of Conventions and Recommendations has been critical of those aspects of the WRA

⁸ WorkCover New South Wales, 2003, Workers Compensation Statistics 2002 – 2003.

that give primacy to individual as opposed to collective bargaining.⁹ If, in the view of the ILO's Committee of Experts, the WRA is inconsistent with Australia's international treaty obligations, then the bill only serves to exacerbate and amplify that level of inconsistency.

New South Wales contends that legislation should comply with Australia's international obligations.

Retrospective Legislation

Although most certified agreements are not due to expire until October or November this year, unions have flagged an intention to bring forward the next round of enterprise bargaining to secure agreements prior to any anticipated legislative change after 1 July 2005. This bill is the Government's legislative response, an attempt to prohibit unions from reaching such agreements.

Indeed this factor appears to be the federal government's sole objective in bringing forward the bill in this form at this time.

The bill's proposals are aimed squarely at prohibiting unions from using industrial action to renegotiate their agreements, under the current laws, prior to the nominal expiration of existing arrangements. To this end, the bill will be applied from 9 March 2005.

Governments should make retrospective legislation sparingly, judiciously and with good reason. There is no demonstrated justification for the retrospective nature of the legislation, particularly as it is creating a new form of offence for action that is currently not unlawful.

The New South Wales Government opposes the retrospective nature of this legislation. By virtue of the fact that the federal government is yet to introduce the bulk of the operative provisions of this bill, and its inability to get the 2003 bill passed by the Senate, it does not expect its passage until after it assumes control of the Senate on 1 July. Accordingly, there ought to be no retrospectivity to the bill.

⁹ ILO Committee of Experts 1999 Observation on Convention 98 – *Right to Organise and Collective Bargaining*

Intervention in Bargaining

Through the imposition of the bill, the federal government is intervening in bargaining processes currently occurring between employees and employers to diminish the capacity of the parties to reach agreements.

The New South Wales Government is opposed to such a direct intervention in bargaining, and believes the industrial parties are best placed to determine the length, nature and operation of agreements.

Punitive Approach to Enforcement

Individuals or organisations that breach the terms of the bill face sanctions including financial penalties, injunctions and compensation orders. Furthermore, the bill exposes unions, union officials and individual workers to uncapped compensation claims from anyone who claims to have suffered damage as a result of unlawful industrial action. This extends the right to third parties who may not be directly involved in a dispute. The bill also provides for increased penalties for contravention of the strike pay provisions in Part VIIIA of the WRA.

The bill introduces a range of penalty provisions denoting a sharp rise in the scale of punishment for contraventions of the bill when compared with corresponding fines contained within the WRA applicable for identical behaviour.

The content of the bill would appear to indicate that the federal government believes it is appropriate and defensible to restrict the industrial rights of workers in the building and construction industry to an even greater extent than those of other workers.

The intent and practical effect of the bill is a heavy handed approach favoured by the federal government, which relies on weighty sanctions and a 'big stick'. The New South Wales Government rejects this approach.

Significantly, the introduction of the right to seek compensation for damages suffered as a result of a breach of the bill has been extended to third parties who may not be directly involved in the dispute leading to the alleged breach. These

provisions go even further than the enforcement provisions contained within the 2003 Bill and are a considerable departure from the provisions of the WRA which tends to limit the right to compensation to direct parties such as employers, employees and industrial associations.

These provisions mean that the federal government does not have to rely on an affected party to make an application to enforce the law. It is the intention of the federal government to permit any inspectors defined under the WRA to bring about enforcement actions as well as officers of the Government's interim investigation body, the Building Industry Taskforce and the ABCC when established.

A brief examination of the Building Industry Taskforce website reveals that they currently have 13 cases before the courts and several prosecutions imminent. The allegations range from coercion/intimidation to allegations of payments made during industrial action. The number of proceedings is only set to increase in the wake of this bill particularly as the legislation is designed to be retrospective.

The provisions will facilitate the Taskforce, and subsequently the impending industry 'watchdog' the ABCC, to pursue action against any 'unlawful' union conduct that occurs from 9 March 2005. This may include action taken which is currently 'lawful', that is protected action, under the WRA or action taken which is lawful under New South Wales legislation. As discussed earlier, the consequences include the imposition of penalties of such scale and magnitude as to threaten the financial viability of unions and their officials. The bill is clearly draconian in its impact.

In addition, a new and significant burden will be placed on those employers who are reluctantly involved in penalty proceedings initiated by third parties making application for penalty orders.

Of further concern to the New South Wales Government is the broad definition in the bill of what constitutes involvement in a contravention. The bill describes a range of conduct including that a person is 'directly or indirectly' knowingly concerned in or party to a contravention. While the contravention provisions apply equally to unions or employers, the intent of such broad definitions is clearly to intimidate union officials in undertaking activities in support of bargaining.

It is worth noting that Chapter 12 also addresses the bill's interaction with criminal law. The latter section of the enforcement proposal features what is essentially a double jeopardy provision; a court is unable to impose a contravention penalty order against a person if that person has already been convicted of an offence constituting substantially the same conduct. Civil proceedings are stayed immediately once criminal proceedings have commenced, however proceedings may be resumed if the person is not convicted of an offence. The bill allows criminal proceedings to be initiated at any time.

If a person's conduct constitutes a contravention of civil penalty provisions and the WRA, proceedings may be instituted under the umbrella of either Act, however a person cannot be liable for more than one pecuniary penalty in respect of the same conduct. Notwithstanding this, a Court is able to order compensation under the bill even if a civil penalty has been imposed for a breach of section 170MN of the WRA.

Overriding the NSW Jurisdiction

The 'unlawful industrial action' provisions of the bill will cover any unprotected industrial action as defined by the WRA taken by, or that adversely affects, a constitutional corporation. They will therefore override State industrial relations regulation in relation to constitutional corporations. The bill's use of the term *constitutionally-connected* action defines industrial action as broadly as possible to bring the maximum number of Australian workers (and employers) within the scope of the bill's 'unlawful industrial action' provisions.

While it is likely that not all workers and businesses in the building and construction industry will be covered it remains unclear, for example, whether employees of an unincorporated sub-contractor on a building site would be covered by the bill, especially if any action they take is only in relation to their own employer.

The New South Wales Government strongly rejects the federal government's attempt to encroach on the New South Wales jurisdiction. The federal government appears determined to impose its industrial regime on the states using the

corporations power, in its push for a unitary system. Yet, the 'reach' of the corporations power clearly does not extend to unincorporated entities such as sole traders and partnerships and their employees.

Consequently, there will always be limits on the capacity of the federal government to create an overriding system that provides equality of access and appropriate protection for all Australian workers and their employers without the cooperation of the states.

In fact, there is no hard evidence presented of the need to do so, or any demonstrable benefit to New South Wales.

It will create uncertainty, confusion and complexity for employers, employees and their representatives in the industry, drawing them into an adversarial industrial relations framework.

The New South Wales Government contends that the current regulatory frameworks that exist in the various State, Territory and the Commonwealth jurisdictions, are sufficiently broad, robust and attuned to the specific requirements of the industry in each jurisdiction to deal with the issues appropriately.

Conclusion

The New South Wales Government rejects placing such legislative prohibition on industrial action, and resorting to punitive enforcement provisions to police them. Such prohibitions do nothing to resolve the underlying causes of industrial disputes, or encourage the parties to resolve disputes productively. They only lead the well organised or resourced to undertake increasingly complex, costly and adversarial strategies in industrial relations.

The bill is also at odds with the practical and even-handed approach to industrial relations in Australia. The development of conciliation and arbitration processes throughout Australia has provided a practical and pragmatic way of empowering tribunals to deal with the causes of industrial disputes as well as their effects.

In contrast to the federal government the New South Wales Government supports and promotes an approach to industrial legislation that respects the right of all employers, employees and their representatives, regardless of which industry they operate in, to determine their own industrial arrangements, in a climate of trust and goodwill.

New South Wales believes the provisions in the current WRA provide the appropriate framework to deal with disputation in the industry. The federal government ought to empower and resource the Australian Industrial Relations Commission (AIRC) to resolve industrial disputes.

The New South Wales Government contends that the effect of the bill will:

- place an unreasonable restriction on the rights of employees and unions in the construction industry to act collectively;
- create a new concept of 'unlawful' industrial action that is draconian and unnecessary;
- lead to a more adversarial, litigious, complex and expensive industrial relations framework within the industry;

- diminish the goodwill of the parties and their capacity to resolve disputes at the workplace level;
- by reversing the onus of proof to require employees to demonstrate that industrial action taken for occupational health and safety reasons was reasonable, have the unintended effect of discouraging action in cases where there is a genuine risk; and
- override the New South Wales jurisdiction, which has a far superior co-operative and efficient industrial relations system.

Section 4 ANTICIPATED AMENDMENTS

The New South Wales Government notes that the federal government has flagged amendments to the Building and Construction Industry Improvement Bill 2005 which will be introduced by the federal government to occur later in the year, presumably once the government has secured its Senate majority on 1 July 2005.

While the Building and Construction Industry Improvement Bill 2005 is not a reproduction of the Building and Construction Industry Improvement Bill 2003, it generally reproduces that part of the earlier bill that dealt with enforcement and penalty provisions and industrial action. It does not contain provisions relating to the ABCC, occupational health and safety, awards, certified agreements and other provisions about employment conditions, freedom of association, union right of entry, accountability of organisations and demarcation orders that were contained in the earlier bill.

However, it is clearly intended that many of those earlier provisions will be reintroduced. In comments made in the bill's second reading speech, the federal Minister for Workplace Relations stated:

The Government will move amendments to this Bill to implement remaining elements of the Building and Construction Industry Improvement Bill 2003, including amendments to set up the Australian Building and Construction Commission.

In the Explanatory Memorandum which accompanied the bill, it is said that:

At a later date, it is intended that government amendments to the Bill will be made to introduce further amendments, based on the provisions of the Building and Construction Industry Improvement Bill 2003, to provide a comprehensive workplace relations reform package for the construction industry.

The New South Wales Government considers it to be highly unusual to introduce a bill with only a small number of operative provisions whilst holding back a larger number of key provisions for amendment at some later date. It would appear that

the federal government is denying stakeholders the ability to make informed comment on key aspects of the bill. Such an approach is not conducive to good public policy making.

The New South Wales Government outlined its opposition to the federal government's 2003 bill in a Joint State Governments' submission to the Senate Building and Construction Industry Inquiry in 2003.

The New South Wales Government continues to oppose the introduction of the remaining elements of the 2003 bill.

A number of the provisions contained in the earlier bill have subsequently been proposed by the federal government in other bills introduced in late 2004 and 2005. These include proposals on union right of entry through the Workplace Relations Amendment (Right of Entry) Bill 2004 and cooling off periods through the Workplace Relations Amendment (Better Bargaining) Bill 2005.

The New South Wales Government has made its views on those specific issues clear in submissions to the relevant Senate inquiries, and it is not proposed to cover those arguments again in this submission.

As the proposed subsequent amendments are not available for scrutiny, comments in this submission are based on anticipated amendments to the bill arising from key areas of the 2003 bill: the ABCC, the National Building Code, a Federal Safety Commissioner, Freedom of Association, Pattern Bargaining and Project Agreements.

Australian Building and Construction Commission

The 2003 bill provided for the establishment of the ABCC, a new industry 'watchdog' with powers to monitor and promote compliance in the building industry and investigate suspected contraventions by industry participants.

The federal government considers the existence of a national industry taskforce such as the proposed ABCC as a critical element in its plans to reform the building industry. The perceived importance of such a body is highlighted by the fact that the Government did not wait for the final Cole Royal Commission Report and established an Interim Building Taskforce in late 2002. The ABCC will have a stronger legislative basis and greater role and powers than the current Taskforce.

The New South Wales Government opposes the establishment of the ABCC. The New South Wales Government rejects as unnecessary and unworkable the notion that there should be a separate regulatory authority for the industry. The adoption of a system that allows for the proper exercise of the AIRC's powers to conciliate and arbitrate industrial disputes provides an appropriate model for regulating the industry and dealing with doubtful practices in the industry where they might occur.

The creation of a new regulatory body will not, in the New South Wales Government's view, provide a framework that minimises industrial disputes or encourages or accommodates speedy, genuine and reasonable outcomes. This 'big stick' approach is not the most effective way of achieving cultural change in the industry and will only frustrate the industrial parties and add another costly layer of regulation. The proposed ABCC is unnecessary, and the industry would be better served by increasing the powers and the resources of the AIRC. Integral to this is the power to conciliate and arbitrate industrial disputes.

In advocating a strengthened role for the AIRC and rejecting the notion of an industry specific tribunal, the New South Wales Government notes that opposition to the establishment of specialist tribunals was also persistently advocated by the current federal government when it was in opposition. For example, during debate on 17 November 1993 on the Commonwealth Industrial Relations Bill 1993

regarding the establishment of a 'specialist court' – the Industrial Relations Court, the Honourable John Howard MP, argued against the proposal, stating that:

One of the concepts of equality of law ought to be, as far as possible, that all Australians, irrespective of our station in life, are subject to the ordinary laws of this country, administered by the ordinary courts. The idea of establishing some kind of special court ultimately leads to the suspicion that some kind of special deal will be done.

In debate on the Commonwealth Industrial Relations Legislation Amendment Bill (No. 2) 1994 on 10 November 1994, Mr Howard strongly argued for the abolition of the Coal Industry Tribunal, recording that:

For a long time it has been commonsense industrial relations to abolish the Coal Industry Tribunal. That has been the policy of many commentators on industrial relations: it has been the policy of the Coalition... Commonsense dictates that you ought to have one single industrial tribunal dealing with all Federal areas of industrial authority.

The regulatory authority proposed in amendments to the bill will not effectively resolve the issues of the industry. Rather the proposal involves imposing a further and more complex layer of regulation.

The proposed ABCC is envisaged as a construction industry 'police force' with wide powers of investigation and prosecution. Arising from Cole recommendation 194, we understand that this will involve the direct secondment of New South Wales Police officers to the ABCC. Such action would conflict with Police operational priorities and is of enormous concern to the New South Wales Government.

A policing/prosecutorial model of workplace relations is inconsistent with the New South Wales Government's successful cooperative and consultative model of industrial relations.

In order for all parties to have confidence in the enforcement of the law, there must be a clear delineation between the role of police and the role of the industrial

inspectorate. The police already have an established role to investigate suspected criminal breaches of the law and to initiate the prosecution of any alleged offence. The New South Wales Government submits that this framework is sufficient.

The \$9.3 million that it currently costs to operate the Building Industry Taskforce would be better spent on increased funding for the AIRC and direct funding to the States to support education and compliance with industrial relations and workplace health and safety requirements.

With respect to the AIRC it is important to note that the AIRC will still be responsible for certifying agreements, hearing disputes and making orders in relation to secret ballots. The New South Wales Government is concerned that the roles of the AIRC and the ABCC may in fact conflict.

The National Building Code

The 2003 bill empowers the federal Workplace Relations Minister to issue a new Code of Practice for the Building Industry (new Building Code) with application to the industry. A building contractor that is a constitutional corporation would have to comply with such a code. The proposed ABCC would monitor compliance. The new Building Code is envisaged to empower Building Inspectors and Safety Officers to monitor compliance; enable the ABCC to request periodic reports on compliance with the code; and to require the ABCC and the Federal Safety Commissioner to report annually on compliance and to publicise non-compliance.

A new Building Code would replace the existing National Code which was developed by the Australian Procurement and Construction Ministers Council. The National Code is supported by Implementation Guidelines (the Guidelines) that were developed for application on federal government projects. New South Wales and the other States/Territories are not party to the Guidelines and were not consulted about their contents.

The Cole Royal Commission recommended that the federal government agree to deal only with those builders who comply with the National Code and Guidelines. The federal government has determined that from 1 January 2004, grant recipients are required to apply the National Code and Guidelines to building and

construction projects where the federal government contributes at least \$5 million and this represents more than 50 per cent of the project value or where the contribution is \$10 million or more. This stipulation is to apply even on state government projects that receive some federal government funding.

The New South Wales Government has developed its own Code of Practice for Procurement and Implementation Guidelines which take a more co-operative and collaborative approach to industrial relations matters, and steer away from the use of prescriptive mechanisms directed against union activity. The impact of the federal government's decision will be to override the State Code for those federally funded projects.

Furthermore, the application of the National Code and Guidelines is subject to a Code Monitoring Group consisting of only federal government departments, and the Building Industry Taskforce. The Taskforce has the principal monitoring role. The States/Territories have no role in interpretation, application or monitoring of the National Code and Guidelines on their own projects. It is anticipated that the federal government, through a new Building Code, will similarly deny any role to States/Territories, even on their own projects.

The application of the existing National Code and Guidelines on projects, both public and private, vests excessive power in the federal government. Even minor discretions by contractors and unions could lead to sanctions being imposed against them. Importantly, there is no parliamentary authority for compliance or sanctions. While the 2003 bill provides that the ABCC will be able to publish details of non-compliance, there is no evidence to suggest that alleged non-compliers will have an opportunity for review of allegations.

The introduction of a new federal Building Code on agencies and project managers would also create two competing Codes and implementation regimes. The effects on New South Wales Government construction projects include increased complexity and compliance costs, conflicting policy approaches including to occupational health and safety standards, and the loss of cooperative project management practices.

A legalistic and adversarial approach by the ABCC and the Federal Safety Commissioner will disrupt cooperative project management practices and the comparatively low levels of industrial disputation experienced on New South Wales sites.

The New South Wales Government concurs with views expressed by employer groups, the Australian Industry Group and the Australian Constructors Association, that the existing National Code or a new Building Code should remain a standard-setting instrument for projects funded by the federal government, rather than being used as a device to regulate the whole industry.¹⁰

A new Building Code provides an avenue for the federal government to introduce federal government policy without a legislative process. The application, monitoring and compliance of the new Building Code will be through the ABCC. However, there is no legislative scrutiny of the new Building Code.

It is unacceptable that the federal government impose a new Building Code on governments and industry without consultation.

Federal Safety Commissioner

The 2003 bill sets out the functions of a new Federal Safety Commissioner established to oversee occupational health and safety issues in the industry. The New South Wales Government is concerned that the Federal Safety Commissioner's role will add to the complexity of safety regulation in the industry. WorkCover NSW will be subject to additional pressure to issue prohibition notices, which are currently only issued where there is an immediate danger, or potential for serious injury.

The Federal Safety Commissioner's referral of matters to WorkCover NSW will simply add another layer of bureaucracy to the system, increase WorkCover NSW workload and cause confusion about who is responsible for the administration of occupational health and safety in the construction industry.

¹⁰ Making the Australian Economy Work Better- Workplace Relations AiG/ACA Submission, March 2005:128

Federal government inspectors will have broad powers under the bill to enforce the provisions of the proposed new Building Code, and this may cause further confusion about who is responsible for the administration of occupational health and safety in the construction industry.

The practical working relationships that are expected between State and Territory agencies and the proposed Federal Safety Commissioner need to be clarified.

The proposed occupational health and safety accreditation regime, which appears to be confined to federal government funded construction projects, may be inconsistent with State government procurement policy and increase red tape and compliance costs.

There is a need for greater clarity on the potential overlap between the proposed bill and State occupational health and safety laws on particular issues, and the applicability of two sets of laws covering the same industry sector.

Pattern Bargaining

The 2003 bill prevents the AIRC from certifying an agreement unless it is satisfied that the agreement did not result from pattern bargaining. The federal government's objections to pattern bargaining are designed merely to prevent unions from achieving consistent industrial outcomes throughout the industry.

The New South Wales Government supports processes of genuine collective bargaining. Bargaining can be genuine at an enterprise, sector, regional or industry level, and should be based on the parties being prepared to discuss and negotiate claims.

Indeed many employers prefer industry wide pay and conditions outcomes, as this provides a level playing field for industry to operate in. Even within the framework of enterprise bargaining, it is not improbable to consider that employers are disposed to reaching agreements that are consistent across industry.

The notion that industry wide arrangements for pay and conditions are somehow improper flies in the face of current general regulatory practice and common sense. Within the building and construction industry, there are a broad range of industry-wide standards in areas such as consumer protection, building standards and occupational health and safety.

The New South Wales Government believes that the degree of industry-based standards is best left to the industrial parties themselves to resolve. Given the short term nature of work within the industry, consistent industry standards may well be more appropriate.

The key principle behind enterprise bargaining, and much of the federal government's rhetoric is to allow employees and employers to make arrangements appropriate for the particular workplace. It is inconsistent for the federal government to mandate what the outcomes of such bargaining should be, or to proscribe the manner in which the parties arrive at them.

Freedom of Association

The New South Wales Government supports the right of individuals to belong or not to belong to their appropriate industrial organisation. This applies equally to unions and employer associations. New South Wales supports laws that protect the rights of individuals and impose sanctions on those who disadvantage an individual because they exercised this choice.

The 2003 bill provides extensive prescription of behavior within the industry regarding freedom of association. Whilst the clauses have provisions regarding employer behavior, they are quite clearly aimed at placing restrictions and micro-managing the workplace activity of unions. The level of detail is quite specific and prescriptive, and again demonstrates the one-sided nature of the bill.

The WRA currently contains extensive provisions protecting freedom of association. There is no evidence that the laws are lacking. Consequently, the freedom of association provisions in the bill are unnecessary.

Project Agreements

The 2003 bill placed restrictions on the use of project agreements within the industry. The New South Wales Government believes that the regulatory framework should provide scope for industrial relations arrangements that reflect the reality of an industry that is not based on the 'enterprise'. Unlike most other industries, the nature of work in the building and construction industry is project based which is generally short term or may be longer term on major capital projects. Projects draw together a range of workers at certain points in the process, with 'specialists' moving in and out of a site comparatively quickly, and then onto new sites.

The adoption of a project agreement provides a structure for the management of industrial relations on the site and affects the behaviours of the industry parties. In particular, a project agreement by imposing a single dispute resolution process across the site provides a means for rapid resolution of disputes as they arise. There is a channel for direct communication between unions and the head contractor who, through the project agreement is able to effect compliance with dispute settlement outcomes by the various employers on site.

In developing the *Industrial Relations Act 1996*, the New South Wales Government consulted widely on a range of issues including the most appropriate means of settling employment conditions. As a result of this consultative process, in the context of the building industry, project agreements were seen as a practical tool that met the needs of the industry and of the industrial parties.

Project Agreements were extensively used during the successful Olympic Construction projects. They have continued to be a feature of the industry in NSW since then. More recent examples include the King Street Wharf One Project Construction Agreement (2003), the Lane Cove Tunnel Project (2004), and the Qantas Distribution Centre Project (2005).

Indeed the NSW Industrial Relations Commission has noted in relation to project awards and agreements:

In terms of all project Awards/Agreements made by the Commission in 2004, very few have experienced disputes at a level which required the Commission's intervention. Most projects have come in, 'on time and on budget'....

In nearly all cases the objectives set out in the Awards have been advanced. The number of disputes and number of days lost to industrial action have decreased where project awards are in place.¹¹

Conclusion

- The creation of the ABCC will impose a heavy-handed compliance agency in the industry that will do little to actually resolve disputes.
- The federal government should strengthen the arbitral powers of the AIRC.
- The Building Code will be an unnecessarily prescriptive code that interferes in state jurisdictions.
- The imposition of a National Building Code throughout the industry without consultation is an imposition of federal government policy without appropriate legislative scrutiny.
- The Federal Safety Commissioner role will add another layer of bureaucracy in an already complex occupational health & Safety framework.
- The Freedom of Association provisions are prescriptive, one-sided and unnecessary.
- The bill's restrictions on pattern bargaining are ideologically-driven and unwarranted.
- The bill unnecessarily restricts the use of project agreements, which operate successfully in New South Wales, to bring in projects on time, in budget and with reduced levels of industrial disputation.

¹¹ [2005] NSWIRComm 58, Walton J, Vice-President p.4.

Section 5 CONCLUSION

This bill will provide for an extraordinarily interventionist role for government in the day to day management of industrial relations within the building and construction industry. This is a significant departure from the customary promotion of limited government interference in commercial activities. This traditional policy position was advocated by the Prime Minister, the Honourable John Howard MP during an address to the Securities Institute of Chartered Accountants of Australia, where he stated that:

The Australian public and indeed our obligations to maintaining the strength of competitive capitalism in Australia, require us to respond to this issue (ie. corporate governance) in a balanced and sensible fashion. They will expect of us a combination of improved-self regulation coupled with appropriate, but not excessive, levels of Government involvement and intervention.

It's also important that we don't impose on ethical but nonetheless robust business operators in our country, a new layer of unproductive and ultimately self-defeating regulation.¹²

Some irony is to be found in the approach of the federal government, on the one hand railing against the intervention of third parties in workplace relations, and then promoting prescriptive legislation that micro-manages day-to-day employment relationships in the industry.

The New South Wales Government opposes the enactment of industry specific legislation based on the Royal Commission findings and recommendations. Creating industry specific institutions, laws and instruments adds unnecessary complexity to industrial relations within the industry.

The bill will make it more complex for those who currently operate within both the existing state and federal industrial relations systems and it will encroach on the New South Wales industrial relations jurisdiction. The current regulatory framework existing in various States, Territory and Commonwealth jurisdictions is sufficiently broad and robust to deal with the issues that face the industry.

¹² Address to Securities Institute of Chartered Accountants of Australia, Sydney 6 August 2002.

Since 1999 the Australian building industry has been characterised by increased levels of building activity and a decreasing level of industrial disputation. While these outcomes have been pleasing more needs to be done. Successful industrial relations outcomes have been achieved where business and unions have adopted a cooperative approach to industrial relations that acknowledges the value of innovative work practices to both the business and the employee. The bill will do nothing to enhance industrial relations outcomes in Australia. It will turn back the clock and entrench a climate of hostility and disputation.

The legislation is based on the notion that the current industrial relations framework has failed to deliver positive outcomes in the building and construction industry. It is submitted that any apparent failure is a reflection of the approach taken by the federal government through the WRA. The adoption of an interventionist, highly regulated, restrictive and punitive model of oversight and enforcement under the bill is unlikely to increase productivity and efficiency in the industry. Nor is it likely to increase levels of trust and cooperation in the industry. Instead, it will drive the parties into further levels of confrontation and litigation.

The proposed bill will do nothing to improve relationships between employers and employees and as such, will not serve to attract investment or improve productivity.

The New South Wales Government rejects the notion that there needs to be significant legislated restrictions on industrial action within the industry achieved through a prescriptive regime of sanctions.

In contrast, the New South Wales Government supports and promotes an approach to industrial legislation that respects the right of the employers, employees and their representatives to determine their own industrial arrangements, in a climate of trust and goodwill.

The New South Wales Government strongly objects to the hostile imposition of measures such as those contained within the bill, which will clearly have a detrimental effect on New South Wales industry participants and the relatively harmonious and stable climate we currently enjoy.

We need less focus on strikes and lockouts and more focus on getting the parties together to achieve industrial relations outcomes benchmarked against best international practice. The bill does nothing to improve productivity. Its focus is misplaced.

The New South Wales Government opposes the proposed bill, in both its current and foreshadowed form, because:

It is industry specific legislation

The bill's application of specific provisions applicable to the building and construction industry contradicts contemporary industrial relations and general regulatory practice which is to promote broad framework legislative and regulatory practice that has broad application.

It adds unnecessary complexity to the industrial relations framework in Australia

The bill creates new regulatory institutions and instruments, in the form of the ABCC, the National Building Code and the Federal Safety Commission, and different provisions regarding industrial action and sanctions that are specific to the industry. This will be in addition to the provisions of the WRA, which are already burdened with complexity. These provisions will add even greater complexity and cost to participants in the industry.

Its provisions are unbalanced, punitive and heavy handed

The provisions are clearly designed to limit the capacity of employees and unions to organise collectively in the industry. The creation of a broad, new class of 'unlawful industrial action,' significant increases to penalties for breaches, reliance on heavy-handed compliance mechanisms, and reversing the onus in disputes about occupational health and safety matters demonstrate the one-sided nature of the bill.

It promotes a litigious, adversarial and costly approach to industrial relations and will hinder rather than assist good faith bargaining

The bill's inherent unfairness, its reliance on tough legal sanctions and its encouragement of litigious remedies will only promote more adversarial

relationships between employers and unions. Subsequently, it will hinder rather than foster constructive relationships and good faith in the industry.

It is a further incursion into the New South Wales industrial relations jurisdiction

The bill's provisions encompass industrial action taken by, or that will adversely affect, constitutional corporations. This will subsequently override state regulation. There has been no consultation or demonstrated reasoning why this is necessary or beneficial. It will cause additional confusion and complexity as small, unincorporated businesses are unlikely to be covered.

It may breach International Obligations

The New South Wales Government is concerned that the legislation may be in breach of a number of Australia's international obligations, namely International Labour Organisation (ILO) Convention 87 (*Freedom of Association and Protection of the Right to Organise*) and ILO Convention 98 (*the Right to Organise and Collective Bargaining*).

Its provisions are unnecessarily retrospective

Governments should make retrospective legislation sparingly, judiciously and with good reason. There is no demonstrated justification for the retrospective nature of the legislation, particularly as it is creating a new form of offence for action that is currently not unlawful, and seems designed to prevent unions from achieving enterprise agreements.