

Submission

to

Senate Employment, Workplace Relations and Education
References Committee

Building and Construction Industry Inquiry

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**IEU SUBMISSION TO THE SENATE
EMPLOYMENT, WORKPLACE
RELATIONS AND EDUCATION
REFERENCES COMMITTEE**

**BUILDING AND CONSTRUCTION
INDUSTRY IMPROVEMENT BILL 2003**

INTRODUCTION

1. The Independent Education of Australia (the IEU) has prepared this submission for the Senate Employment, Workplace Relations and Education References Committee's Inquiry into the Building and Construction Industry Improvement Bill 2003 (the Bill).
2. Having had the opportunity of reading the ACTU Submission to the exposure draft of the Bill and its subsequent submission to this Inquiry, the IEU wishes to place on record its support and endorsement of the ACTU's submissions and our opposition to the Bill.
3. The ACTU submission to this Inquiry is detailed and exhaustive – it outlines a range of recommendations that would better address issues of compliance, occupational health and safety concerns, regulatory frameworks, and other recommendations from the Cole Royal Commission. This submission seeks to address the terms of inquiry most relevant to the IEU.
4. In general, the IEU condemns the attempt to create two systems of Industrial relations – one for the building and construction industry, and one for the rest of the Australian workplace. It is not just bound to lead to confusion, and an aggravation of reporting and administrative requirements, it is falsely based on the fallacy that punitive, restrictive legislation is the solution to regulatory concerns.
5. The IEU believes that the singling out of one industry in order to impose punitive and restrictive legislation is undemocratic and inappropriate. The IEU endorses the analysis of the Cole Royal Commission detailed in both the ACTU and CFMEU submissions as being fundamentally uneven in its treatment of unions and employers, and of failing to demonstrate the need for this type of restrictive industrial legislation.

6. The IEU believes that the rationale for this Bill is not justified, is politically biased in background and current context, and seeks to further reduce the rights of unions to organise and bargain effectively in workplaces on behalf of members. If enacted, the Bill will have ramifications not just for the building and construction industry, but for all workers, as many of the measures sought are part of the current government's broader industrial agenda.

7. In particular, the IEU is strongly opposed to the following key planks of the Bill:
 - (a) Further weakening of the award system in allowable matters definitions
 - (b) Prohibition of pattern bargaining
 - (c) Further restrictions on the notification and taking of protected industrial action
 - (d) Further restriction on certified agreement processes
 - (e) Further restrictions on unions' rights to enter workplaces

BACKGROUND TO THE IEU

8. The IEU is a federally registered organisation pursuant to the provisions of the *Workplace Relations Act 1996* and operates in the non government education industry which comprises Catholic and other independent schools, pre schools and kindergartens, English and Business Colleges. The union's membership of approximately 55,000 consists of teachers, principals, teacher aides, education support staff, clerical and

administrative staff and other ancillary staff such as cleaners and grounds and maintenance staff.

9. The IEU and its Associated Bodies are party to numerous awards and certified agreements. The awards and agreements applying to schools in Victoria, the ACT and the Northern Territory are federal awards. Other federal awards to which the union is a party cover English and Business Colleges across most states and the ACT.

10. The IEU is strongly committed to an orderly and fair approach to industrial regulation for all education workers. The union is also open and responsive to a flexible system of industrial relations which recognises the particular history, ethos, organisational and professional practices of the various educational institutions in our sector. This is evident in the substantial number of awards and certified agreements negotiated by the union under the present system of industrial relations.

11. The non government education sector is a significant and diverse one. In the schools area alone there are approximately 2,500 non government schools, of which approximately 1701 are Catholic Schools, employing some 67,000 staff. There are approximately 1350 system or individual employing authorities. Non government schools are often affiliated with groups which have particular educational, ethnic or religious philosophies.

12. Approximately one third of schools in the non government schools sector operate in the federal jurisdiction. Colleges which provide English Language Intensive Courses for Overseas Students (ELICOS) are respondent to federal awards. There are approximately 90 of such accredited institutions operating in the non government sector. Of the vast number of child care institutions in which the IEU has coverage approximately 65 are respondent to a federal award.

Term of reference 2(a)

Building and Construction Industry Improvement Bill 2003.

13. The following general criticisms of the Bill are made with the assumption that should the Bill succeed, the IEU is strongly concerned that it is only a matter of time before the government seeks to transpose the same regulative framework into the Workplace Relations Act. It has already tried several times in past Bills to severely reduce the strength of workers' and their unions' rights with similar failed legislation. The IEU believes that this Bill seeks to create another entry point for the government to impose its agenda, and to dilute further the safety net and "fair go" structures that underpin the existing legislative framework of the Act. The impact on our members would be significant, should this occur.

Further weakening of the award system in allowable matters definitions

14. The effect of Section 51 of the proposed Bill will be to further reduce the award safety net function, and force more time-consuming, costly award stripping applications on behalf of any award caught by the general definitions of awards that relate to building work.

15. The "simplification" of federal awards in Australia has taken years to complete – it has had considerable impact on resources, time, expertise, and not least, on the conditions of award dependent workers. The Bill proposes further reductions in employees' conditions, namely excluding from the current list of allowable matters in the Workplace Relations Act education and training, transfers of employment, recording of employees' times of work, accident make-up pay, unions' rights to be represented in

dispute settling procedures, hours of work for part-time employees, and specification of superannuation funds.

16. There is absolutely no rationale for why these matters should no longer be allowed in a building and construction industry award. Their removal would leave the most vulnerable employees – the award dependent – with little regulation of their working hours, and further marginalised in terms of being represented in a conflict arising from their employment.

17. In the IEU's experience, many workplaces have not moved from the award simplification agenda, and converted to enterprise bargaining and the achievement of certified agreements. Further, only a handful of employers in the non-government education sector have initiated a bargaining process aimed at achieving a certified agreement. In almost every case, certified agreements have only been achievable through the efforts of staff, with union support. Consequently, there is now a large group of employees in our industry who earn significantly less than their counterparts elsewhere, for the sole reason that their employers will not bargain with them. They are totally reliant on the award system for their wages and conditions.

18. In every Bill that the government has sought to introduce, and this is no exception, there has been a reliance on the myth that employers want to bargain with their employees, and that the only thing preventing them from achieving this, are outmoded and "prescriptive" award entitlements¹. This myth must be exposed – this Bill, like its predecessors, seeks only to further break down a safety net that many Australians are dependent on, and which many employers actively resist moving away from.

¹ "the arrangements will be less prescriptive, with relevant enterprise level needs being addressed in agreements.." para 61, 2003 Explanatory Memorandum, Hon Kevin Andrews)

Prohibition on pattern bargaining

19. The arguments raised by the ACTU in Paragraphs 99 – 105 of their submission in relation to the appropriate role of pattern bargaining are representative of the IEU's industry as well.
20. Employers in the non government education sector have historically engaged in 'pattern bargaining' with the union over wages and conditions and made multi employer agreements or agreed to mirror certified agreements. It is in the interests of equity and quality in educational outcomes that common bargaining outcomes across schools and non government educational institutions are achieved. For example, approximately 500 Victorian Catholic schools are covered by a multi-employer certified agreement. The Act already requires stringent tests prior to certifying such an agreement.
21. The evidence in relation to the IEU's bargaining negotiations demonstrates an understanding by the union that the nature of the sector requires an in principle commitment to the pursuit of common goals but also needs to accommodate the diversity of the sector. For example, across all sectors of the industry in Victoria, the IEU has been prepared to and in some cases has, negotiated with individual employers on particular enterprise level issues within the framework of an industry wide claim.
22. Even where employers in the non government education industry are in competition, for example, the ELICOS industry, employers seek to negotiate common outcomes in respect of wages and conditions.
23. In NSW approximately 30 ELICOS colleges negotiate with the union under the auspices of a 'federation' of employers known as the Education Providers Industrial Association (EPIA). Following the serving of an

industry wide claim, an EPIA representative negotiates with the union and coordinates consultation with individual employers. On reaching agreement individual mirror agreements are certified in the Commission. Currently there are approximately 30 federal certified agreements across the ELICOS industry in NSW providing the 'EPIA agreement' outcomes.

24. In the ACT there are six independent schools that are represented by the Association of Independent Schools. The union makes a common claim on these schools for wages and conditions and ultimately reaches common outcomes certifying identical agreements. In the Northern Territory there is one Catholic employer operating 16 schools and 15 other independent schools. The IEU makes a common claim on these schools and attempts to bargain across the industry. The wages outcomes where agreements are made are common.

25. While flexibility of arrangements to take account of particular education, ethnic, religious and financial arrangements can be accommodated in enterprise bargaining in the non government sector, it is in the public interest that there is general consistency across the nation of wages and conditions for Australia's teachers and education workers. This position is one generally supported by employers in the interests of portability of entitlements and consistency of conditions in the sector.

26. Should any union be prevented from pursuing a common claim to progress the conditions of its employees, for example, in paid maternity leave or higher wages, a fundamental right of workers is being prohibited – the right to collectively determine and bargain for appropriate goals and conditions that are of significance to the industry as a whole.

Further restrictions on the notification and taking of protected industrial action

27. The IEU is opposed to the inclusion of the following new restrictions foreshadowed by the Bill:

- (a) Prohibition of any protected action to be undertaken during the operation of a certified agreement
- (b) Arbitrary cut-off of industrial action 14 days after notification, with new applications to be made on the 35th day after industrial action has commenced
- (c) Mandatory secret ballots prior to the taking of industrial action, with a quorum of at least 40% of eligible voters required to cast a vote, and unions to be reimbursed only 80% of ballot costs

28. All of these requirements will serve only to tie organisations up in more bureaucracy and potentially lengthen industrial disputes. The requirements relating to ballots are more stringent than those required of the Australian public when it elects government.

Right of entry

29. The proposed right of entry provisions are draconian. They seem based on attempting to exclude unions from actually representing their members and visiting workplaces. The “cover the field” aspect would prevent any state industrial laws or instruments from being applied (similar to the government’s attempt to move unfair dismissal applications into the federal jurisdiction).

30. Of particular concern to the IEU is the freedom given to employers to determine where union officials shall meet employees, to the minutiae of designating the route to take to the room chosen by the employer.²
31. Recently in Western Australia the IEU (ISSOA) maintained, on appeal, the right to meet with members in staff areas³. The Union advanced this case against the Catholic employing authority because of a change in culture where union representatives found themselves restricted to remote and isolated parts of the school, without reasonable access to holding discussions with staff. The Full Bench upheld the relevant state legislation. Under the proposed Bill, such fundamental issues of fairness and reasonableness in meeting with members and eligible members would be legally able to be disregarded.

Further restriction on certified agreement processes

32. The IEU opposes the additional preconditions stipulated in the Bill in regards to the certification process, including the unnecessary administrative steps of the AIRC having a hearing prior to a hearing to certify an agreement and a ballot of employees before initiating a bargaining period. This is a waste of the Commission's and organisations' resources.
33. Of further concern to the IEU is that certified agreements will not allow for retrospective payments unless the Commission is satisfied that the employer "unreasonably delayed" the making of a new agreement. Under the Act, Australian workers are currently able to bargain only in proscribed

² ..if an affected employer or the occupier request the permit holder to hold discussions in a particular room or area, or to take a particular route to reach a particular room or area, the request is not unreasonable only because it is not the room, area or route that the permit holder would have chosen" (Section 193(4) of the Bill)

³ WAIRC 10127/2003

periods of time, and it is not uncommon for a wage offer to be contingent on settling all other components of a claim, or for an employer to satisfy the peripheral requirements of bargaining, but of not bargaining in good faith. Should negotiations for a new agreement, and subsequent applications for certification, not be made prior to the expiry date of an agreement, it is employees that experience the loss, not employers. This requirement would allow employers the opportunity to simply “wait out” negotiations – delays are in their economic interest. The test for “unreasonable delay” would be complex, and involve further litigation.

34. The Northern Territory Branch of the IEU was involved in a protracted dispute this year that resulted in certification of a new agreement some sixteen months after the expiry date of their previous agreement, with retrospective wages paid back to August 2002. The issues in dispute related to issues of equity for a small number of staff in remote schools, and codification of aspects of teachers’ work. Should this Bill’s legislation have been able to be applied in this case, it is self-evident that staff and their union would not have been able to campaign for better conditions for their colleagues in remote areas – the economic hardship of foregoing agreed payraises would have been too difficult.

Conclusion

35. The IEU strongly endorses paragraphs 186 to 220 of the ACTU’s submission that outline how current labour law in Australia does not meet the requirements of a number of ILO Conventions, in particular those pertaining to the right to organise, the right to strike, freedom of association, and the right to bargain collectively. This Bill places Australian labour law further away from the industrial law of many of its democratic counterparts. It should be rejected.

36. The IEU supports the ACTU contention that there should not be a separate set of legislation pertaining to the building and construction industry – it is neither warranted, nor is it an effective mechanism for structural change, should it be required. The IEU agrees that a tripartite process involving employers, unions, and both state and federal governments would be a more inclusive and effective process for identifying and addressing any specific issues in the building and construction industry.

37. The IEU urges the Committee to reject the Bill in its entirety, and to consider the alternative, practical suggestions for change detailed in the ACTU submission.